THE LEGAL ASPECTS OF FUNDING PUBLIC EDUCATION THROUGH REAL PROPERTY TAXATION: 1971 SERRANO TO THE PRESENT

by

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A Dissertation Submitted to
the Faculty of the Graduate School at
The University of North Carolina at Greensboro
in Partial Fulfillment
of the Requirements for the Degree
Doctor of Education

Greensboro
1978

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APPROVAL PAGE

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March 30 1978
Date of Acceptance by Committee

March 30 1978
Date of Final Oral Examination

ABSTRACT

COULLARD, JOHN BURKE, The Legal Aspects of Funding Public Education Through Real Property Taxation: 1971 Serrano to the Present. (1978)
Directed by: Dr. Joseph E. Bryson. Pp. 114.

All states use the tax on real property to some degree in the financing of public elementary and secondary education. The problem of this usage stems largely from the local control of the collection and disbursement of the monies by the individual school districts. This method is claimed by some to create inequities whereby the quality of available educational opportunity rests on the wealth of the school district in which the student resides. Reformers have sought relief from these alleged inequities in both the United States Constitution's Fourteenth Amendment, and also in the equal protection provisions of the various state constitutions.

The data for this study are contained primarily in significant court cases from 1968 to the present. Additional data have been collected through a review of the literature, which intensified in quantity primarily during the interim between Serrano v. Priest in 1971 and Rodriguez v. San Antonio Independent School District in 1973.

An analysis shows that the Fourteenth Amendment to the United States Constitution is no longer a viable claim in a solution to the wealth versus equal educational opportunity

problem, and that available redress must be sought in the various state courts. At the present time there appears to be a decline in interest in legal prosecution, due, perhaps to the financial problem of developing a viable alternative to taxing property and the distribution of the proceeds by the collecting districts.

The Courts have avoided dictating alternatives to this historic method of funding. The courts have also disagreed with one another directly on specific interpretations, and also disagreed on the finer points of legal distinctions among the state constitutions, thus complicating the value of legal precedents.

This study presents a chronological overview of landmark decisions, with supportive cases, thus providing a cohesive, chronological treatise of the legal aspects of funding public education through the property tax. It shows what approaches have been tried, and seeks to direct future action into a middle course.

In the preparation of such a study, one of so controversial a nature as this, it is impossible to convey the real atmosphere of the subject without the occasional reflection of the passions involved. To filter out completely the emotional reactions to the problem would rather do a disservice to the reader by creating a false impression of

a problem which is apparently beyond a sterile, clinical approach to solution. The writer therefore bespeaks the tolerance of the readers, on the grounds that the presentation necessitates an element of realism, recognizing the strong disparity of opinion which exists.

ACKNOWLEDGMENTS

I wish to express my appreciation and continued indebtedness to Dr. Joseph E. Bryson, my dissertation adviser, for his guidance, encouragement, and forebearance, not only in the preparation of this work, but throughout my entire program at the University of North Carolina at Greensboro.

The Committee, Dr. Dale L. Brubaker, Dr. James W. Crews, Dr. J. Gary Hoover, and Dr. Donald W. Russell, are also extended my most fervent sense of obligation for their expressed and apparent understanding and assistance. Their individual and collective contributions to my progress are sincerely acknowledged.

A special expression of thankfulness is rendered to Kenneth A. Zick, Assistant Professor in the School of Law at Wake Forest University for the generous use of his time and efforts to assist and guide me in the legal research for this work.

Certainly not in the order of importance, my humble, complete, and inadequate gratitude to my wife, Elizabeth, who subjugated her claims on my attentiveness, endured loneliness, and still extended the encouragement so essential to the entire program of doctoral studies.

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CHAPTER I

INTRODUCTION

Statement of the Problem

This is an historical study of recent legal developments in the area of funding public education in the United States through the taxation of real property. The research is concerned with the establishment of the early methods of tax funding; the extent to which these practices have been and are being challenged and litigated; the reasons for the challenges; the results of selected major cases in this field; and the possible consequences these decisions will have upon the methods of funding public school education.

Procedures Used

The basic research technique of this historical study will be to examine and apply the available primary and secondary references. Applicable federal and state court records contained in the National Reporter System, the American Digest System, and United States Reports will be the major primary sources. Secondary references include books related to the principles of school finance sources, and journal articles reflecting the legal and social aspects of public school financing in the United States.

Delimitations

The questions of sources of tax monies, the effect of increased expenditures on the quality of education, and the social justification of public education continues to be widely debated among educators, legislators, jurists, and the general public. Discussion of the subject is usually liberally laced with biased rhetoric including attempts to relate, and in many cases to equate, the property tax method of funding with undemocratic oppression of the poor through willfully contrived inequality in educational opportunity, racism, and capitalistic class establishment.

This study will be concerned with the legal questions involved. The goal will be objectivity and exposition. No effort will be made to select a method or combination of methods as an alternative to the presently employed procedures.

Significance of the Study

For nearly the entire first two-hundred years of the history of the United States, education was considered to be largely a local issue. The subject of funding sources and funds disbursement was questioned very little. Schools were community affairs, and the school district was the governmental unit which dealt with education. Some states did set up boards of education, with varying degrees of authority, but the subject of taxation for the support of

schools was hardly ever very far from the direct control of the local populace.

The Judicial Branch of our government considered taxation and spending as the restricted domain of political matters into which it would not enter.[1] Up until the mid-1960s plaintiffs brought to court cases against the uneven distribution of public services, particularly those of educational expenditures, only to find little interest in the Courts.[2] This history is similar to others in the area of Supreme Court activity--no decisions until a topic becomes fashionable, until social pressures bring the subject into the political consciousness of the country.

The social pressure in this case, as pointed out by Chalecki, was the spectacular growth of the suburbs,[3] coupled with the racially-inspired phrase "flight from the cities" which became popular as an epithet in the desegregation struggles of the 1960s. By the end of the decade, the Warren Court, with little or no inhibitions about whether or not taxing and spending constitute solely political

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[1]For a statement of the traditional doctrine of non-intervention, cf., Eugene McQuillan, Law of Municipal Corporations, 3rd ed., (Mundeline, Illinois: Callaghan Publishing, 1966), sec. 10.33, pp. 823-828.

[2]cf. as typical, Hawkins v. Town of Shaw, 437 F.2d 1286 (1971), in which the court intervened to redress racial rather than economic discrimination.

[3]Richard B. Chalecki, "Is There a Solution? Problems in School Finance," NASSP Bulletin, 60 (January, 1976), p. 81.

matters, almost eagerly provided, as Professor Philip Kurland noted, an "activist" base of decisions which lead to "the easy case for equal educational opportunity."[4] The scene was painted thus: those previously espousing the cause of desegregation and still committed but now bored with it (The movement was even then succumbing to self-doubt among its leaders and to growing opposition in the north.[5]); urban education in a state of near collapse; parochial schools closing; and central city public schools seemingly the next to go.[6] Expenditures for elementary and secondary education were increasing at a more rapid rate than was the market value of real property. This either brought about or accompanied the so-called "taxpayers' revolt"--the beginning of the rejection at the polls of an unprecedented number of millage rate increases and bond issues.[7]

In such an atmosphere, economic reforms often multiply

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[4]Philip Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined," University of Chicago Law Review, 35 (1968), p. 584.

[5]Judith Areen and Leonard Ross, "The Rodriguez Case: Judicial Oversight of School Finance," Supreme Court Review, 33 (1973), p. 44.

[6]A classis example of the literature of gloom of those days is: Charles E. Silberman, Crisis in the Classroom (New York: Vintage Books, 1970).

[7]Betsy Levin, "School Finance Reform in a Post-Rodriguez World," Contemporary Legal Problems in Education (Topeka, Kansas: The National Organization on Legal Problems of Education, 1974), pp. 156-173.

rapidly, and where the emotional mixture of education and children were involved, the activity was remarkable. Scholars expounded, developed and defined the thesis that the method of financing education through the local property tax was not only inequitable but unconstitutional. In 1968, Wise[8] had written a major position supporting the issue of equal educational opportunity. Wise maintained that the equal protection clause of the Fourteenth Amendment requires that the quality of education within a state may not vary with geography or wealth. He based this upon three major premises supported by court decisions:

1 - "The opportunity of an education, . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[9]

2 - ". . . a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States."[10]

3 - ". . . there is no indication in the Constitution, that homesite . . . affords a permissible basis for distinguishing between qualified voters within the State."[11]

Of even greater impact, certainly receiving greater publicity because of its deep involvement in the Serrano[12] proceedings,

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[8]Arthur E. Wise, Rich Schools, Poor Schools (Chicago: University of Chicago Press, 1968).

[9]Brown v. Board of Education, 347 U.S. 483 (1954) at 493.

[10]Edwards v. California, 314 U.S. 160 (1941) at 184.

[11]Gray v. Sanders, 372 U.S. 368 (1963) at 380.

[12]Serrano v. Priest, 96 Cal.Rptr. 601 (1971).

was the powerful simplification of the concept stated by Coons, Clune, and Sugarman: ". . . the quality of public education may not be a function of wealth other than the total wealth of the state."[13]

It is interesting to consider that at this time the publicly accepted point of view began to lose patience with the time-honored and formerly much-praised principle of local control of schools. People began to lose fear of central control and it became the vogue to accept as a fact the "need for broad based funding." More money for the loosely defined "disadvantaged" was a Good Thing, and the reformers were ready to sacrifice old-fashioned principles about local control. Broad implications were ignored, as they so often are, in enthusiasm for an ideal. As Areen and Ross warn"

> . . . such modifications involve value judgments of a kind which a simple judicial formula must seek to avoid. For a court to determine that each handicapped child is worth 2.3 times the allotment of the normal child demands the same cabalistic insight as giving rural Tennessee 2.3 times the voting power of urban Tennessee.[14]

When the Serrano[15] case reached the courts it was

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[13]John E. Coons, William H. Clune III and Stephen D. Sugarman, Private Wealth and Public Education (Cambridge: Harvard University Press, 1970), p. 304.

[14]Areen and Ross, op. cit., p. 44.

[15]Serrano v. Priest, 96 Cal.Rptr. 601 (1971).

decided, after exhaustive studies, in favor of the principle advanced by Coons, Clune, and Sugarman.[16]

Two years after Serrano, the Rodriguez[17] decision in the United States Supreme Court threw reformers into further confusion by rejecting a constitutional challenge to the property tax method of school finance. Confused but not denied, the cause against property tax funding continued to seek in the states what it could not muster within the federal constitution. The most significant, to date, of these cases was that of Robinson v. Cahill[18] where the New Jersey Supreme Court ordered the State Legislature to provide funds for a "thorough and efficient system of free public schools," as provided in that state's constitution.[19]

In this atmosphere, school finance has become the subject of an extraordinary and topically instructional chapter in the history of judicial reform. "It is a history that must still be written on loose-leaf pages, like the Great Soviet Encyclopedia, allowing for short-notice reversals between dogma and heresy."[20]

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[16] op. cit., p. 304.

[17] Rodriguez v. San Antonio, 411 U.S. 1 (1973).

[18] 303 A.2d 273 (1973).

[19] Article VIII, sec. 4, para. 1.

[20] Areen and Ross, op. cit., p. 33.

Thus this study is significant in that it will present an analysis of the three most influential court cases, providing for educational advisers and decision makers a concise, complete reference to the legality of property tax funding of education, and guidelines to observe when making decisions regarding the complexities of financing public education. This is of particular significance after the Rodriguez case has established an interpretation of the Constitution at such fundamental variance with the popularly held opinions of the alleged rights involved. It is essential that decision makers deal in the facts as established by each of these landmark cases, and in the interrelationships belonging to these cases. This study will provide such a vehicle of appropriate fundamentals.

Organization of the Remainder of the Study

The balance of this study will be divided into four major parts. Chapter II will contain an historical introduction and review of educational funding before Serrano, highlighting the colonial practices and their European foundations, and the nineteenth and twentieth century methods and problems. This will provide a brief history of the development of the property tax method of funding, leading to the social entanglements which resulted in Serrano.

Chapter III will enlarge upon the legal aspects of the

immediate forces which led to the inevitable Serrano decision and its effects, and will also discuss the other two landmark cases--Rodriguez and Robinson.

Chapter IV will present an analysis of other pertinent litigation recently decided in the field of public school funding through property taxes.

Chapter V will present, briefly, a summary and conclusions drawn from the information advanced in the preceeding chapters. An effort will be made to establish some beacons to guide constructive thinking in this very controversial area.

CHAPTER II

REVIEW OF EDUCATIONAL FINANCE BEFORE SERRANO

European Origins

It is difficult for the modern American to understand the attitudes toward education which existed in Europe prior to and even as the American colonies were being founded. Our schools teach us of the great revival of art, literature, and learning which began in Europe in the fourteenth century--the Renaissance. Starting in Italy, it spread gradually for three hundred years to other countries, marking the transition from the medieval world to the modern era. The Renaissance is depicted as a vibrant time--a time in which man developed and expanded the knowledge rediscovered during the Crusades, a time which produced the Reformation, a time of exploration, a quickening of trade, and a period of evolution of the early universities.

For many, the Renaissance is imagined as a popularization of education. Stories abound about poor youths who were taken into the monastery school, there to learn and ultimately to rise above the station in life which birth had given. There may even have been a certain amount of this sort of thing, but it was far from common. That class to which we now refer as the common man was overwhelmingly

left out of the educational process. The schools still largely followed the model established by Charlemagne and Alcuin to educate the royal family, the nobility, and the clergy.[1]

The class system prevailed throughout the years of the Renaissance, and England, the country which influenced the development of the United States more than any other, was no exception. The dominating influence in England before and during the American colonial period was aristocratic. The social position of the commoner was fixed by the accepted belief that the masses were born to obey, not to govern, and that education of the lower classes was both unnecessary and dangerous. This belief was so strong that the simple people looked upon the priviliged aristocrats as superior beings.[2] It was a principle of governance for those in authority to keep the poor in ignorance. It was believed that learning among the masses would threaten the established order and lead not only to disobedience but to revolution.

> This was probably the view of most of the American colonists, if they had views on the matter at all.

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[1] cf. the brief description by Paul Monroe, History of Education (New York: Macmillan, 1917), pp. 274-278.

[2] Edgar W. Knight, Education in the United States (Boston: Ginn and Company, 1929), p. 64.

> Governor Berkeley of Virginia, in his remarkable reply to the authorities in England in 1671, thanked God that there were no free schools and no printing presses in that province, and hoped that there would be none for a hundred years. "Learning," he said, "has brought disobedience, and heresy, and sects into the world, and printing has divulged them, and libels against the best government. God Keep us from both!"[3]

It was this theory, not the modern dream of improvement toward equality, which governed, retarding the growth of public education in England and even acting to delay the development of public education in the early United States.

During the sixteenth, seventeenth, and eighteenth centuries, education was held to be a responsibility of the family and the Church. The State was not involved in the process except for a minor regulatory role. The Church had a monopoly on education in the middle ages, and even after the establishment of the Church of England in the sixteenth century, the practice continued. The crown, which was also the head of the Church, required school teachers to hold licenses issued by the Church, and dissenters from the Church of England were not allowed licenses. It was not until the last quarter of the eighteenth century that the Church began

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[3] *ibid*. *cf*. also, Paul Monroe, *Founding of the American Public School System* (New York: Hafner Publishing, 1971, facsimile of 1940 ed.) where this quotation is listed in v. I, p. 53, but with exceptions taken. Monroe believes that there were "free schools" in Virginia at the time and states that Berkeley had even contributed funds to the program. Monroe does not, however, explain the economic class which attanded this school.

to establish the Sunday school for instruction, not only in religion, but also in the elements of reading and writing.

Thus, even though some writers[4] like to infer that popular education had its origin in the Reformation, it is a rather long stretch to imply that the culmination of the Renaissance was realized in the mid-nineteenth century! If it be true that

> Under the new theory of individual responsibility promulgated by the Protestants the education of all classes became a vital necessity.[5]

then it appears that the Reformation was quite sluggish in causing the realization of this "vital necessity."

Our European origins may have provided some of the elements of modern education, but not the foundation of organization or of equality of educational opportunity. It was not until after the Colonial period in America that England began to be interested in the education of the poor.[6] Public funding of education was understandably not a part of an educational system which provided only for the wealthy, the privileged, the aristocratic.

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[4]Ellwood P. Cubberley, Public Education in the United States (Boston: Houghton Mifflin, 1934), pp. 6-10.

[5]ibid., p. 9.

[6]The principles of public support and public control of schools in England were not established until 1870. cf. Knight, op. cit., p. 67. This law (Elementary Education Act; 33 and 34 Victoria, chap. 75) is listed in the essential parts by Ellwood P. Cubberley, Readings in the History of Education (Boston: Houghton Mifflin, 1920), p. 534.

Some attempt has been made to infer that because the English Poor Laws of 1597 and 1601 had provisions for apprentice fees, these laws became a scheme of taxation to secure the education of the poor.[7] Whether or not this can be accepted depends largely on one's definition of the word "education." Certainly the apprentice programs of the sixteenth century cannot be equated to the educational process of even the seventeenth-century schools of Massachusetts.

Colonial America

It is human nature that Englishmen would tend to do similar things in their new land, and, in general, the customs of England were adapted to the situations found on the new frontiers.[8] Just as their settlements differed according to geographical, climatic, and topographical conditions, so did these factors influence and modify the cultural heritage which the colonists brought from Europe.

In New England, the Puritans (Calvinists) established and maintained an educational orientation of lasting influence. They brought with them from England the strong Calvinist theory that piety was based on intelligence.[9] To

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[7]Paul Monroe, Founding of the American Public School System (New York: Hafner Publishing, 1971, facsimile of 1940 ed.), v. I, p. 11.

[8]Gerald Lee Gutek, An Historical Introduction to American Education (New York: Thos. Y. Crowell, 1970), pp. 9-10.

[9]Monroe, op. cit., v. I, pp. 31-33.

them, education was an instrument of religious salvation, providing the means by which a person might study the Bible, Calvinist doctrine, and also the general laws of the Commonwealth. It was a rigid system based on their concept of the need for the training of the young, who were believed to be savage creatures, conceived in sin and treated as miniature adults.[10] A law was enacted in 1642 which required parents and guardians (including apprentices' masters) to attend to their children's ability to read and understand the principles of religion and the laws of the Commonwealth.[11] This law closely followed the English Poor Law of 1601 which required apprenticeship of pauper children.[12] In 1647, the General Court enacted the famous "Ould deluder, Satan Law" which required every town of 50 or more families to "appoint one within their towne to teach all such children as shall resort to him to write and reade," and the law further provided that the teacher's "wages shall be paid either by ye parents or masters of such children, or by ye inhabitants

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[10]Stanford Fleming, Children and Puritanism: The Place of Children in the Life and Thought of the New England Churches, 1620-1847 (New Haven: Yale University Press, 1933). This book is a remarkable treatise of life of the New England child.

[11]Ellwood P. Cubberley, Readings in the History of Education (Boston: Houghton Mifflin, 1920), p. 298.

[12]Edgar W. Knight, Education in the United States (Boston: Ginn and Company, 1929), p. 100.

in general . . ."[13]

Two other laws previously passed by the General Court in 1634 and 1638 which established the principle of common taxation of all property for town and colony benefits.[14] It is easy at this point to jump to a conclusion that these laws anticipated and actually are the foundation of the publicly-supported, state-controlled schools which we now enjoy. This is an oversimplification as an analysis will show.

The four laws in question did establish certain significant points, however. First, the state could compel education. The Law of 1642 provided this precedent, but it did not establish complusory attendance at a school. Second, the state could require civil units to maintain teachers. This was done in the Law of 1647, but again there was no forced attendance, just "such children as shall resort to him." Third, both of these laws provided for the supervision and control of education by civil authorities. Fourth, permission was granted, but no order given, to use public funds to support education. Fifth, those public funds, if used, could be raised by common taxation of all property.

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[13]Cubberley, op. cit., p. 299.

[14]Ellwood P. Cubberley, Public Education in the United States (Boston: Houghton Mifflin, 1934), p. 14.

It must be constantly kept in mind that these schools were created primarily for religious reasons, especially for the ability to read and understand the principles of religion and the capital laws of this country. These schools were indeed a beginning, but were severely restricted in matters of curriculum. They were supported in a variety of ways, not all by property taxation. One quaint system of revenue was provided for by the Plymouth Colony in 1673.

> It is ordered by the Court that the charge of the free Scoole, which is three and thirty pounds a yeare shalbe defrayed by the Treasurer out of the proffitts ariseing by the ffishing att the Cape vntil such Time as that the minds of the ffreemen be knowne concerning it which wilbe returned to the next Court of election.[15]

Worth mentioning to strengthen the understanding of the elitism prevalent in early education is the New England Latin Grammar School. This was a program for the sons of New England's social, political, and religious elite. Children destined for this special education did not enter the school directly from the town schools, but learned first to read and write either in the household dame schools or other forms of private tutorage. The Latin Grammar School taught Latin and Greek as the languages of the educated class. Entering at the age of eight, the boys studied

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[15] Ellwood P. Cubberley, Readings in the History of Education (Boston: Houghton Mifflin, 1920), p. 302.

Cicero, Terence, Caesar, Livy, Virgil, Horace, Isocrates, Hesiod, and Homer for another eight years. Utilitarian subjects such as mathematics, science, history, and modern languages were ignored.

The history of public education in colonial Massachusetts is essentially the history of education in colonial New England. That Commonwealth originally embraced what is now Maine and New Hampshire too, so their systems and practices were used throughout the major part of the section. Vermont was not settled until 1724 and schools developed slowly there.

In southern New England the colonies of Connecticut and New Haven (joined together in 1665) were under laws very similar to those of Massachusetts. Rhode Island had no school system until 1790.[16]

In the South and in the middle Atlantic states, the matter of education was almost strictly private. There was no school system in any colony south of Connecticut before the Revolution.[17] There were various local schools established by the religious sects, each having its own notion of culture and how to transmit it. None of them had a lasting impact of any significance, and the American colonial

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[16]Richard G. Boone, Education in the United States (New York: D. Appleton and Company, 1890), pp. 47-53.

[17]ibid., p. 58. cf. also, Gutek, op. cit., pp. 15-20.

educational experience remains basically a reconstruction of English institutions imported into New England and modified to suit the social and religious environment of a Calvinist society.

Nineteenth Century Upheaval

There is little to discuss about American education in the period of the War of Independence. The effect of the war on all types of schools was disastrous. Some schools closed, others continued to operate intermittently. Some schools in the cities managed to operate, but even there the so-called charity schools suffered or closed, leaving the private pay schools to keep open longest.[18]

The end of the war saw a bankrupt government whose major concern was survival. The period from the surrender of Cornwallis at Yorktown in 1781 to the adoption of the Constitution in 1789 was critical. The government and the country paid little attention to education. In the Constitution itself there is no use of the word "education" nor is there any reference to the subject. It is interesting to note that so far as there is any record of the subject in the discussions at the constitutional convention, it was a single question relating to the power under the new

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[18] Ellwood P. Cubberley, Public Education in the United States (Boston: Houghton Mifflin, 1934), p. 82.

Constitution to establish a national university. There was no question or discussion about public education.[19]

Considering the times, this should not be surprising. The modern belief in education for all, and education's paramount importance is simply not applicable to the period of the American Revolution. The founders of the Republic were educated men, not ignorant bigots, but they held the subject of education to be still a private matter, generally under the control of the Church.[20] The New England attitude was a singular exception, both in this country and even abroad. Education was still generally considered to be a luxury, not a necessity. To be illiterate was no reproach, and it was possible to follow many pursuits successfully with no more education than that of daily work and experience.[21]

There were some exceptions among the founders of the nation, but their success in promoting general education for the public was less than astounding. In the writings of Jefferson, Washington, General Francis Marion, John Jay,

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[19] ibid., p. 84. cf. also, Ellwood P. Cubberley, Changing Conceptions of Education (Boston: Houghton Mifflin, 1909), p. 29.

[20] Edgar W. Knight, Education in the United States (Boston: Ginn and Company, 1929), p. 144.

[21] Ellwood P. Cubberley, Public Education in the United States (Boston: Houghton Mifflin, 1934), pp. 110-111.

John Hancock, John Adams and James Madison, to name but a few, there appears strong advocacy for the promotion of science literature, and general education.[22] Although some writers have attached specific meanings to these declarations, seemingly to ascribe additional halos of wisdom to these men, it is considerably doubtful that those living in the first decade of the nineteenth century had prescience of the circumstances and problems of the twentieth century. Rather they were defending the concept of education because of the severe curtailment of schools in their period, but little was said about system, curriculum or funding.

The general population of the country was also not clamoring for public education. A large proportion of them felt that those desirous of an education should pay for it. A Rhode Island farmer stated that it would be as sensible to propose taking his plough away from him to plough his neighbor's field as taking his money away from him to educate his neighbor's child. Some felt that free education should be in the form of pauper schools limited to children of the poor, and only for the rudiments of learning. Others felt

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[22] cf. Cubberley, op. cit., pp. 88-91, and also Knight, op. cit., pp. 146-156.

that all forms of education should remain with the churches and educational societies.[23]

An eminent educator states:

> No other single problem connected with education presented greater difficulties to our forefathers than that of its support. To begin with, most of them agreed with Jefferson than that government is best which governs least. Certainly they believed that government to be best which taxes least. But they quite generally disagreed with Jefferson when he held that the support of education is one of the undoubted responsibilities of government.[24]

Of the twenty-three states in the Union by 1820, only thirteen had made any mention of education in their state constitutions. Of these, seven--Connecticut, Maine, Massachusetts, New Hampshire, New York, Ohio, and Vermont--had laws to provide for the implementation of acceptable systems. These were the five Calvinist New England states, plus those two most influenced by settlers from New England.[25] The schools were financed either through property taxes and/or funds. Taxes were generally "local, optional, and permissive" and the "rate bill"--a fee, or tuition, controlled by

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[23]Ellwood P. Cubberley, Changing Conceptions of Education (Boston: Houghton Mifflin, 1909), p. 28. cf. also Knight, op. cit., pp. 153-156, and also P. A. Siljeström, The Educational Institutions of the United States, tr. F. Rowan (London: John Chapman, 1853), p. 16.

[24]Paul Monroe, Founding of the American Public School System (New York: Hafner Publishing, 1971, facsimile of 1940 ed.), v. I, p. 295.

[25]Ellwood P. Cubberley, Public Education in the United States (Boston: Houghton Mifflin, 1934), p. 97.

the number of children the family had in school--continued to operate in some places well into the nineteenth century.[26] But these were not the only methods used to provide income to schools. In addition to fishing revenues cited above, there were salt workings, lotteries, funds from congressional and state land grants, and even the distribution of a federal treasury surplus (!) in 1836.[27] Also used were occupational taxes, insurance premium taxes, bank taxes, liquor license fees, theater fees--but the population was increasing too rapidly for these indeterminate and uncontrollable revenue systems to cover the growing expenses. This is quite an indictment because the fact is that as much as education needs were outrunning the inadequate funding in some locations, it can hardly be said that an educational consciousness had developed before c. 1820 (except in New England and New York). Even in New England there was a steady decline in education during the first fifty years of the nation.[28]

The vitality of the new nation eventually changed the popular attitude toward education. The rise of a new national government based on principles of legal and political equality and also upon religious freedom helped to effect

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[26]Knight, op. cit., p. 155.

[27]Boone, op. cit., pp. 85-92.

[28]Cubberley, op. cit., p. 110.

these changes. New economic conditions began slowly to create the realization that education was necessary for economic as well as political (and religious) ends. This pressure gradually became too much for the churches to handle, especially so since most of them still were interested only in education for salvation of the soul, and this patent inadequacy opened the path for secular schools, with more dependence upon government taxation for finance.

The path was not smooth. Much of the original work was done by several semi-private philanthropic agencies, each introducing different factors influencing both curriculum and funding. The infant schools, the Lancastrian and the Bell monitorial schools, the secular Sunday schools[29] all operated to create and nurture the concept of education for all. Indeed, education as a need in a republic began to be recognized. Thomas Jefferson had said that if a nation expects to be ignorant and free in a state of civilization it expects what never was and never will be.[30] State governors, legislators, political leaders at all levels, and workingmen began to be heard calling for more and better

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[29] cf. Knight, op. cit., pp. 160-170, and also Cubberley, op. cit., p. 120-143, for specific details on the effects these schools had upon the development of common schools.

[30] A letter written in 1816 to a Colonel Yancey, quoted in Cubberley, op. cit., p. 89.

education in free state schools. The response was still far from unanimous.

> The second quarter of the nineteenth century may be said to have witnessed the battle for tax-supported, publically controlled and directed, and non-sectarian common schools. In 1825 such schools were the distant hope of statesmen and reformers; in 1850 they were becoming an actuality in almost every Northern State. The twenty-five years intervening marked a period of public agitation and educational propaganda; of many hard legislative fights; . . . Excepting the battle for the abolition of slavery, perhaps no question has ever . . . caused so much feeling or aroused such bitter antagonisms. Old friends and business associates parted company . . ., lodges were forced to taboo the subject to avoid disruption, ministers and their congregations often quarreled over the question of free schools . . .[31]

There were even serious questions over the fundamental issue of whether or not a state had the right to educate. This was more than a local issue raised by ultra-conservatives. The question was of prime importance even in England where debates were held in Parliament over the matter. In one of these Macaulay is reported to have said that if a state has a right to hang people, it must certainly have the right to educate them.[32]

In such an atmosphere, the subject of funding was one of the major battles to be fought. As the argument against the theory of the common school declined, it was replaced

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[31]Cubberley, op. cit., p. 164.

[32]Siljeström, op. cit., p. 18.

by the problems of finance. Earlier ideas, which for a time seem to have been generally held, that the income from land grants, fees and endowment funds would eventually stabilize and provide complete support for the necessary schools, were abandoned as it was discovered how little these incomes kept up with growing needs.

It is to be expected that a nation which had fought a Revolution against "taxation without representation" would find all forms of taxation to some degree abhorrent. And yet, to provide the free common school there was no alternative. Progress was slow. At first, permission was granted by the legislative bodies to communities to tax themselves, usually in the form of property taxes, for school support. This began in the towns and cities and usually preceeded action by the state as a whole. In Rhode Island, Providence began schools in 1800, Newport in 1825 whereas the first general law came in 1828. New York City in 1805 predated the state school law by seven years. In Pennsylvania, it was Philadelphia in 1812, Harrisburg and Pittsburg in 1821, and Lancaster in 1822, while the state school law passed in 1834. Baltimore in 1825 was a year ahead of the state. In the south, Charleston's schools (started in 1811) were made free in 1856 whereas no South Carolina state school system was established until after the War Between the States, and Alabama's state school law of 1854 was 28 years behind

Mobile's schools. There are other examples of early permissive state legislation in New Jersey (1820), Missouri (1824), Illinois (1825), Virginia (1829), Kentucky (1830), North Carolina (1839), Iowa (1840), Mississippi (1846), Indiana (1848), and Tennessee (1854).[33]

The movement from the permissive taxation by the cities or counties was no more uniform than that of the beginnings of the permissive taxation. If any pattern could be identified it would be only one of a general geographic progression with New England and the Midwest being the first to follow the model established by Massachusetts, then a more gradual change to the Middle Atalntic States. The movement did not permeate the South until after 1865.[34]

A general outline of the course which resulted in compulsory, free school education and therefore compulsory taxation can be divided into four phases. First came the permissive legislation which recognized the school district as an administrative unit with taxing powers. In the second phase the state encouraged the formation of school districts by providing financial aid from permanent school funds which existed from the various funding plans mentioned above--

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[33] cf. Cubberley, op. cit., pp. 180-181, and Knight, op. cit., pp. 261-262.

[34] Gutek, op. cit., p. 53.

monies from the sale of land, lotteries, federal allotment, and state taxes. This phase was still not compulsory, but the financial incentive provided did weaken opposition. The third phase introduced the factor of compulsion, but was not the last step toward free education. The formation of school districts was required, but the state and district financial support remained inadequate, forcing many to charge a tuition, called a "rate bill," for each student attending. Thus everyone paid a tax base, but those using the schools were required to pay an additional assessment. The final phase was the passage of legislation providing for the establishment of compulsory and completely tax supported public education.[35]

The movement, once begun, was inexorable. With the beginning of state financial aid, also began state control, and the greater the aid, the greater the control. The State became a power and could enforce compliance with their general regulations. School districts which refused received no state funds, and as expenditures continued to increase, the burden of independence became more than they could bear. The payment of state taxes without receiving a portion of the revenue in return actually amounted to double taxation for the service. District pride succumbed to economic pressure.

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[35] *ibid*.

In the course of establishing the compulsory common school, one of the battles fought was that of eliminating the pauper-school idea--either a separate school for the poor or special treatment for those children whose parents could not pay a full rate-bill assessment. It was an important battle, but one whose outcome could have been foretold as the conception of egalitarianism grew. The struggle viewed in the light of twentieth century sophistication appears primitive and quaint, but it is still worthy of comment if for no other reason than the soaring rhetoric involved. And it seems to remind one of the modern hyperbole on the subject of equality and discrimination.

In Pennsylvania, the Free-School Law of 1834 was defended by Thaddeus Stevens.

> This law is often objected to, because its benefits are shared by the children of the profligate spendthrift equally with those of the most industrious and economical habits. It ought to be remembered that the benefit is bestowed, not upon the erring parents, but the innocent children. Carry out this objection and you punish children for the crimes or misfortunes of their parents. You virtually establish cases and grades founded on no merit of the particular generation, but on the demerits of their ancestors; an aristocracy of the most odious and insolent kind--the aristocracy of wealth and pride.[36]

In Virginia, a report of a state educational convention (c. 1850) raised a moral objection to the pauper schools in that it was wrong to spend public funds, which belonged to

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[36]Quoted in Knight, op. cit., p. 270.

all, for the benefit only of the poor?

> Is it right to take the property of the many and bestow it exclusively on the few? . . . They are the privileged class, the aristocracy of poverty. Now is it right to exclude from all the benefits of the literary fund all the children of this glorious old commonwealth, except those who put in the plea of rags and dirt? . . . Can this injustice and partiality benefit the poor children? Is it a law of humanity, that to lift up, you must first degrade, that to elevate the soul and spirit of a child, you must first make him a public pauper? . . . Has the pauper system of education diminished the number of your intellectual paupers? Or is it, like every other system of legally supported pauperism, a fire that feeds itself?[37]

A convention in New Jersey in 1838 also rejected the concept of the pauper schools in language so soaring that even the logic of Virginia pales.

> We utterly repudiate as unworthy, not of freemen only, but of men, the narrow notion that there is to be an education for the poor as such. Has God provided for the poor a coarser earth, a thinner air, a paler sky? Does not the glorious sun pour down his golden flood as cheerily on the poor man's hovel as upon the rich man's palace? Have not the cotter's children as keen a sense of all the freshness, verdure, fragrance, melody, and beauty of luxuriant nature as the pale sons of kings? Or is it on the mind that God has stamped the imprint of a baser birth, so that the poor man's child knows with an inborn certainty that his lot is to crawl, not climb? It is not so. God has not done it. Man cannot do it. Mind is immortal. Mind is imperial. It bears no mark of high or low, of rich or poor. It asks but freedom. It requires but lights.[38]

The more things change, the more they are the same!

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[37]Quoted in Knight, op. cit., p. 267.

[38]Quoted in Cubberley, op. cit., p. 197.

The battle continued on a local basis well into the second half of the century as the population grew westward and as the South recovered from the devastation of the war and Reconstruction. By 1874, the precedent had been established and tested[39] that high schools are a legitimate extension of the common school and a proper use of tax funds.

The nineteenth century upheaval in the funding of education was largely over by 1871 when New Jersey, the last state in the Union to do so, abolished the rate bill.[40] The problems continued, however, switching the emphasis from largely those of method to those of size. The period was one of great industrial growth and national development. The schools saw a tremendous change in emphasis. The old reason for education (to provide the basis for religious development) was reversed and the school was asked to direct its efforts to a more utilitarian purpose--a preparation for participation in the political and economic growth of the nation. By 1900, the schools had undergone a transformation from mere disciplinary training in the rudiments of learning and were aspiring to a broader enterprise. Increased

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[39] Stuart v. Kalamazoo, 30 Mich. 69 (1874).

[40] Ernest Carroll Moore, Fifty Years of American Education (Boston: Ginn and Company, 1917), p. 43.

expenditures were viewed as a necessity as practical men took the old systems of education to task, demanding that the shortcomings be corrected.[41] Schools gained significantly in dignity, power, influence--and cost.

Between 1870 and 1900, the United States Census shows an increase in population from 34,905,000 to 76,094,000--almost a doubling in thirty years. The number of student days of attendance increased by a factor of 2.4.[42] The rise in the value of school property in the same period was from $130,383,008 to $550,069,217--an increase of over 4 times. The total expenditures for education increased from $63,000,000 to $215,000,000--a growth of nearly 3.4 times--but the per capita expenditure increase was only 1.7 times higher at the end of the period than at the beginning.[43]

It is necessary to look at the combination of these statistics to form an opinion, but the conclusion must be that size and growth were major problems. Indeed, the character of education was foreshadowed in the observations of a professor of education at the then Leland Stanford

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[41] cf. Ellwood P. Cubberley, Changing Conceptions of Education (Boston: Houghton Mifflin, 1909), pp. 41-45.

[42] Moore, op. cit., pp. 60-61.

[43] ibid., pp. 62-63.

Junior University.

> The new period of advance which we now seem to be entering also bids fair to be very paternalistic, perhaps even socialistic, in the matter of education. The old principle, fought for so vigorously fifty or sixty years ago, that the wealth of the state must educate the children of the state, bids fair to be even further extended with a view to a greater equalization of both the burdens and the advantages of education. Poor and overburdened towns and districts will be supplied with sufficient means to enable them to provide a good school for their children, and the present great difference in tax rates, to provide practically the same educational advantages, will be in large part equalized by the state.[44]

The Stability before Serrano

In the first half of the twentieth century the most salient characteristic of education in this country was the growth in size. With a population only doubling in that period, public school expenditures rose by 2,615 per cent. From 1950 to 1970 the disparity is just as phenomenal, considering the larger base from which it started. Population grew approximately 36 per cent while school expenditures rose by 597 per cent.[45]

Nearly all of this growth was financed by state and local taxes. In 1970, Federal expenditures for public school education amounted to only 8 per cent,[46] the remainder being

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[44]Cubberley, op. cit., p. 62.

[45]Bureau of the Census, United States Department of Commerce, Historical Statistics of the United States (Washington: Government Printing Office, 1975), I, 8, 373-374.

[46]ibid.

collected almost exclusively from state and local property taxes.[47] The property tax has never been popular. It is a regressive tax as enforced by the states and has been a constant target of the taxpayers and egalitarians alike. Wishful thinking has produced constant predictions that the property tax is doomed. In 1924 one educator wrote that:

> Although there is a strong tendency to depend less than formerly upon the general property tax, due to a growing recognition within the past decade of the unsoundness of this tax, it still remains the most universally employed of all taxes.[48]

And again:

> It is a realization of the unfairness of existing systems of local support and local control and the disastrous and incurable evils produced by such systems that has led many scientific students of education and several of our states to give serious consideration to the possibilities of deriving a much larger proportion of school revenues from units more capable than school districts of equalizing school revenues, burdens, and opportunities.[49]

It is difficult to determine just how prevalent this attitude was. It did persist, however, as it still does

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[47] At one time a number of states raised a portion of the revenues for school expenditures by a poll tax, either on a state-wide basis or levied by local option in counties or towns. Since the Voting Rights Act of 1965, 42 U.S.C. sec. 1973H (1970), this practice is no longer valid.

[48] Fletcher Harper Swift, "Public School Finance," Twenty-Five Years of American Education, ed., I. L. Kandel (New York: Macmillan, 1924), p. 211.

[49] ibid., p. 215. cf. also Edgar W. Knight, Fifty Years of American Education, 1900-1950 (New York: Ronald Press, 1952), pp. 319-321.

today. Attempts were made up through the mid-1960s, as previously stated, to obtain judicial relief from a system believed to be unfair, and therefore probably unconstitutional. The courts, however, abstained, demurred, and otherwise avoided entering the arena of taxing and spending--the domain of politics--and thus created the legal stability before Serrano.

Many writers, therefore, advance the idea that the change began when the social pressures of the 1960s began to meld the concepts of social justice, equality, poverty and race into an indefinable potpourri of guilt complexes and emotional reactions. Actually a good case can be made for attributing the beginnings of the legal foundations to the Zeitgeist of that period to the strength of a United States Supreme Court decision in 1941.[50] This case introduced the modern attitude toward wealth into the courts, and the concepts of wealth and poverty became an increasing factor in influencing attitudes in a number of fields--education included.

It can be debated whether or not it was the Great Depression which caused an intensification of the attitude against wealth in general, but it cannot be denied that the

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[50] Edwards v. California, 314 U.S. 160 (1941).

peril of those times contributed to the suspicion, mistrust and overt resentment of the power which wealth commands. World War II interrupted the development of the consequences of such an emotion by substituting the need for patriotism, and the energy of the country and its populace was directed towards a pride in overcoming an enemy. Following 1945, however, and coexistent with the greatest power the United States has ever held, both economically and militarily, there arose a growing embarrassment among the opinion makers which grew into what was described as a "guilt complex" associated with that power. It was a compulsion to distribute the wealth, thus to eradicate some imagined evil, a negative greed which was not really generosity but which did drive people to the greatest acts of national charity the world has ever seen. This was a new phenomenon and not, as some like to believe, an unqualified characteristic of the American people.

It would no doubt shock most Americans to read of the earlier intolerance of the United States Supreme Court towards the concepts of poverty and paupers. In 1839 it was held that it was

> . . . as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence, which

> may arise from unsound and infectious articles imported.[51]

This principle was largely governing until Edwards v. California, wherein proceedings were held to test a California law prohibiting the transportation of "indigent" persons into the state. The Court held the law to be an unconstitutional burden on interstate commerce. Justice J. Byrnes, writing the Opinion of the Court, went on specifically to reject New York v. Miln, stating that

> Whatever may have been the notion then prevailing we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a "moral pestilence."[52]

Following the war, the courts again began to be buffeted with cases appealed in forma pauperis--where the appellant seeks redress at public expense on the plea of poverty. Here the subject of wealth--or lack of it--became a prime attack on laws which provided procedures to reduce what were considered useless expenses. As an illustration, California provided that upon filing of an application for the appointment of counsel, the District Court of Appeals would make

> . . . an independent investigation of the record and determine whether it would be of advantage to the

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[51] New York v. Miln, 36 U.S. 84 (1837), at 117.

[52] 314 U.S. 160 (1941) at 176.

> defendant or helpful to the appellate court to have counsel appointed.[53]

Even though the intent of such procedures was to protect the government, and hence the public, from what was considered as a frivolous waste, most cases against laws or procedures of this kind were successful on the grounds that the rights of the poor were being infringed and that the equal protection provisions of the Fourteenth Amendment were being denied.[54]

It can be argued that the success of the weapon of poverty in legal matters helped intensify the attack on the property tax as a means of financing education. Various approaches were used to claim that the equal protection guaranteed under the Fourteenth Amendment was being denied. Two representative cases came from Chicago, and Bath County, Virginia.

In Illinois, the state imposed limitations on local taxes in such a way that poorer school districts were effectively prohibited from spending as much as the wealthier ones. Further, there were vast disparities among districts

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[53] cf. People v. Hyde, 331 P.2d 42 (1958), at 43.

[54] Representative of such cases are: Griffin v. Illinois, 351 U.S. 12 (1956); Burns v. Ohio, 360 U.S. 252 (1959); Smith v. Bennett, 365 U.S. 708 (1961); Douglas v. California, 372 U.S. 353 (1963); Lane v. Brown, 372 U.S. 477 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Draper v. Washington, 372 U.S. 487 (1963); and Reynolds v. Sims, 377 U.S. 533 (1964).

in assessed valuation per pupil. As a consequence, some school districts with high tax rates actually spent less on education than other districts with lower tax rates. In objection to this situation, a suit was brought in Federal Court,[55] the plaintiffs claiming that their rights under the Fourteenth Amendment were violated, and specifically asking the court to direct school spending based on a standard of pupil need under the concept of equal educational opportunity. The court refused, basing its decision on (1) the opinion that the Fourteenth Amendment does not require that public school expenditures be based only on pupil needs, and (2) the opinion that equal educational opportunity is an imprecise concept and untenable as a legal standard.

The plaintiffs had based their case upon precedents invalidating racial discrimination in education,[56] geographical discrimination in voting,[57] and wealth discrimination in criminal cases.[58] They maintained that these precedents

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

[56] Brown v. Board of Education, 347 U.S. 483 (1954); Griffin v. County School Board, 377 U.S. 218 (1964).

[57] Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964).

[58] Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Miranda v. Arizona, 384 U.S. 436 (1966).

had, in effect, established that the present funding system constituted discrimination in education, based on account of geography and wealth. The court found the argument novel but not persuasive.[59]

In the Virginia case,[60] certain residents of Bath County alleged that the state system of funding education invidiously discriminated against them because the county is poor. Again, similar to the conditions in the Illinois case, the state had limitations on the maximum allowable property tax rates. Bath County rates were set at the maximum, but due to the county poverty and low tax base, their expenditures were restricted. The plaintiffs sought a remedy whereby the state would be compelled to assure expenditures on the basis of "educational need," and not on local wealth.

The Court found that the law applied equally to all districts, that funds were disbursed by the state under a uniform and consistent plan, and that equal protection under law was provided. Of perhaps more significance, however, was the position taken by the Court on the impreciseness

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[59]The similarity of the arguments by the plaintiffs in the McInnis case to those used by Arthur E. Wise in Rich Schools, Poor Schools (Chicago: University of Chicago Press, 1968) are remarkable.

[60]Burruss v. Wilkerson, 310 F.Supp. 572 (1969), aff'd 397 U.S. 44 (1970).

of the term "educational need."

> Actually, the plaintiffs seek to obtain allocations of State funds among the cities and counties so that the pupils in each of them will enjoy the same educational opportunities. This is certainly a worthy aim, commendable beyond measure. However, the courts have neither the knowledge, nor the means, nor the power to tailor the public monies to fit the varying needs of these students throughout the state. We can only see to it that (state) outlays on one group are not invidiously greater or less than on another. No such arbitrariness is manifest here.[61]

In these cases the courts were still maintaining an air of reluctance to interfere with the political domain of taxation and disbursement of public funds. The plaintiffs also contributed to the judgments against them by approaching the problems with an excess of enthusiasm and too little analysis of possible problems.[62] The nebulous definition of educational needs was a major determinant as courts turned back their worthy aims, however commendable.

Opponents of property tax funding methods learned from these defeats, and the next round was theirs.

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[61] Burruss v. Wilkerson, 310 F.Supp. 572 (1969), at 574.

[62] For an interesting commentary on this very human propensity, see Seymour B. Sarason, The Creation of Settings and Future Societies (San Francisco: Jossey-Bass, 1976), chapter 1.

CHAPTER III

LEGAL ASPECTS OF PUBLIC SCHOOL FINANCING

The Instability before Serrano

1968 was a good year for the cause against property tax funding. Brown[1] was twelve years old and had assumed the strength of an amendment to the Constitution. The Coleman report[2] was two years old and was being used to support all sorts of action, legal and social, against real and merely emotional inequalities, de jure and de facto, found in our educational systems across the land. Wise had published the first of the major tenets[3] of the growing creed which demanded change from the claimed injustices resulting from property tax funding of education. McInnis[4] had been decided unfavorably, true, but it was under appeal. Confidence reigned that the wisdom of the United States Supreme Court would correct this temporary aberration and the natural order would be once more resumed. Substantive

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[1] Brown v. Board of Education, 347 U.S. 483 (1954).

[2] James S. Coleman, and others, Equality of Educational Opportunity (Washington: Government Printing Office, 1966).

[3] Arthur E. Wise, Rich Schools, Poor Schools (Chicago: University of Chicago Press, 1968).

[4] McInnis v. Shapiro, 293 F.Supp. 327 (1968).

litigation was filed in Texas,[5] California,[6] and Michigan,[7] and more was under way.

There was confidence among the revisionists as the mood of the country seemed to favor change. The student revolt had caused a great deal of uncertainty among the electorate and the legislators, especially in view of the increasing role assumed by the judiciary in matters so broad that the United States Supreme Court was accused on more than a few occasions of stretching the Constitution far beyond the intent of the writers of body and amendments alike.[8] The inevitability of change was certainly not a novel social phenomena of the year, but it was just as certainly a prominent factor--as prominent as it had ever been before in history.

The taxpayer was in a mood for a change, but his ideas did not always coincide with the revisionists who,

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[5]Rodriguez v. San Antonio Independent School District, Civil No. 68-175-SA.

[6]Serrano v. Priest, Civil No. 35017, Los Angeles County Superior Court.

[7]Board of Education of the School District of the City of Detroit v. Michigan, Civil No. 103342, Wayne County Circuit Court (Subsequently dismissed for lack of prosecution).

[8]cf. Raoul Berger, Government by Judiciary (Cambridge: Harvard University Press, 1977) for one example of scholarly concern in this area.

while they fought for a cause they believed would correct a situation they held to be unfair, were at the same time advocating (as a consequence of their anticipated success) an increase in taxes. Most Americans could know instinctively that improving education in poor school districts meant higher taxes for all. There certainly was never any talk of lowering the quality (and cost) in the better schools. No alternatives at all were mentioned--only the improvement of the underpriviliged. Taxes were the principal cause of the reaction to the continual increase in educational programs. No one knew how to curtail the expenditures, but the property owners thought they knew how to cut the growth rate, and approvals on school bond issues began to be considerably less than enthusiastic. Some failed referendum.

When the Supreme Court affirmed McInnis[9] and Burruss[10] the cause was in no way defeated. Advocates realized that a better job would have to be done in the preparation of cases and more precision achieved in claims, supportive statements and proofs, but success was never doubted.

Serrano was just the proof needed. The fundamental

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[9]Aff'd sub nom. McInnis v. Ogilvie, 394 U.S. 322 (1969).

[10]Burruss v. Wilkerson, 397 U.S. 44 (1970).

issue in Serrano was a determination of whether or not the California system of public school financing, with its heavy dependence upon local property taxes and resultant disparities in revenues available in individual school districts, violated the equal protection provisions of the Fourteenth Amendment.

The plaintiffs, a group of Los Angeles County public school children and their parents, brought a class action against the treasurer, the superintendent of public instruction, and the controller of the state of California; and the tax collector and treasurer, and superintendent of schools of the county of Los Angeles. The plaintiffs sought (1) a declaration of the unconstitutionality of the existing financing system; (2) an order directing the reallocation of school funds in order to remedy the claimed invalidity; and (3) an adjudication that the trial court retain jurisdiction to act itself to restructure the system if the defendents and the legislature fail to act within a reasonable time.

At the trial court, all of the defendants filed general demurrers to the claims, asserting that none of the three stated facts were sufficient to constitute a cause of action. The trial court sustained the demurrers, giving plaintiffs leave to amend. Upon plaintiffs' failure to

amend, the defendants moved for a dismissal and the court granted the motion.[11] A Court of Appeals decision affirmed the dismissal[12] and the action was taken to the California Supreme Court.

By this time the attack on the property tax system was well organized. The writings of the triumvirate Coons, Clune, and Sugarman, for example, were powerful and had a strong influence on the California court.[13] They are frequently cited in Serrano, from their devastating critique of the McInnis decision[14] to what became their famous

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[11]The foregoing facts are from Serrano v. Priest, 96 Cal.Rptr. 601, 5 Cal.3d 584, 487 P.2d 1241 (1971).

[12]89 CalRptr. 345 (1970), at 351.

[13]Anthony M. Cresswell, "Reforming Public School Finance: Proposals and Pitfalls," Teachers College Record, 73 (May, 1972), 478.

[14]"The meaning of McInnis v. Shapiro is ambiguous; but the case hardly seems another Plessy v. Ferguson, 163 U.S. 537 (1896). Probably but a temporary setback, it was the predictable consequence of an effort to force the court to precipitous and decisive action upon a novel and complex issue for which neither it nor the parties were ready. . . . (T)he plaintiffs' virtual absence of intelligible theory left the district court bewildered. Given the pace and character of the litigation, confusion of the court and parties may have been inevitable, foreordaining the summary disposition of the appeal. The Supreme Court could not have been eager to consider an issue of this magnitude on such a record. Concededly its per curiam affirmance is formally a decision on the merits, but it need not imply the Court's permanent withdrawal from the field. It is probably most significant as an admonition to the protagonists to clarify the options before again invoking the Court's aid." John E. Coons, Wm. H. Clune III and S. D. Sugarman, "Educational Opportunity: A Workable Constitutional Test for State Financial Structures," California Law Review 57 (1969), 308-309.

Proposition I in their book.[15] The strength of the book is undeniable, even if one disagrees with their logic and their conclusions. The concept of the relationship of public wealth and education was not originated by them[16] but their book reemphasized the thought of the time when Cubberley's earlier statements had been all but forgotten.

The Serrano plaintiffs had advanced sufficient "intelligible theory" to satisfy the California court. Justice Sullivan wrote the Opinion.

> We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing. We have concluded therefore, that such a system cannot withstand constitutional challenge and must fail before the equal protection clause.[17]

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[15]John E. Coons, William H. Clune III and Stephen D. Sugarman, Private Wealth and Public Education (Cambridge: Harvard University Press, 1970).

[16]Cubberley's conclusion that: " . . . the wealth of the state must educate the children of the state," written in 1909 (see p. 62, Changing Conceptions of Education, cit. supra), substantially equates with Coons, and others' Proposition I: ". . . The quality of public education may not be a function of wealth other than the total wealth of the state." op. cit., p. 304. Wise had been less specific about quality when he advocated: "What is clear is that the amount of money spent on a child (for education) should not depend upon his parents' economic circumstances or his location within the state." Arthur E. Wise, "The Constitutional Challenge to Inequalities in School Finance," Phi Delta Kappan, LI (November, 1969), 145-148.

[17]96 Cal.Rptr. 601 (1971), at 604.

Justice Sullivan concluded:

> The judgment is reversed and the cause remanded to the trial court with directions to overrule the demurrers and to allow defendants a reasonable time within which to answer.[18]

It was a 6 - 1 decision with only Justice McComb dissenting. Justice McComb agreed with the 3 - 0 decision of the Court of Appeals, which leaned heavily upon the precedent established in McInnis.

Upon remand, the procedures at the trial court, after more than 60 days of trial procedings, resulted in a judgment for the plaintiffs and an appeal to the California Supreme Court by the defendants. Again Justice Sullivan wrote the opinion of the majority (this time 4 - 3), affirming the judgment of the Los Angeles Superior Court. The opinion declared that the state's public school financing laws violated the equal protection clause of the California Constitution by conditioning the availability of school revenues upon the wealth of the school district and by making the quality of education dependent upon the level of expenditure in the district.[19] Serrano II required 29 pages to establish the Opinion, and 12 additional pages of dissent.

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[18] ibid., at 626.

[19] Serrano v. Priest, 135 Cal.Rptr. 345 (1977), at 346.

The majority of the court were hampered in their Serrano I position which stated:

> Public school financing system which relies heavily on local property taxes and causes substantial disparities among individual school districts in amount of revenue available per pupil for the districts' educational grants invidiously discriminates against the poor and violates the equal protection clause of the Fourteenth Amendment.[20]

In the interim between Serrano I and Serrano II, however, The United States Supreme Court had established that education is not a fundamental right within the United States Constitution and that the Fourteenth Amendment, at least where wealth is involved, does not require absolute equality or precisely equal advantages.[21] This blow to Serrano I required that Serrano II be decided solely upon the California State Constitution, no problem to four of the seven Justices. The influence of Coons is found in such statements as:

> Substantial disparities in expenditures per pupil among school districts cause and perpetuate substantial disparities in the quality and extent of availability of educational opportunities.[22]

and also in the equivocal admission that:

> Although an equal expenditure level per pupil in every district is not educationally sound or

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[20] 96 Cal.Rptr. 601 (1971), at 602.

[21] Rodriguez v. San Antonio, 411 U.S. 1 (1973), at 35 and 24, respectively.

[22] 135 Cal.Rptr. 345 (1977), at 355.

> desirable because of differing educational needs, equality of educational opportunity requires that all school districts possess an equal ability in terms of revenue to provide students with substantially equal opportunities for learning.
>
> . . .
>
> There is a distinct relationship between cost and the quality of educational opportunities afforded. Quality cannot be defined wholly in terms of performance on state-wide achievement tests because such tests do not measure all the benefits and detriments that a child may receive from his educational experience. However, even using pupil output as a measure of the quality of a district's educational program, differences in dollars do produce differences in pupil achievement.[23]

Rhetoric of this sort is perhaps allowable in scientific journals and books, but to use such unprovable statements as foundation material in a judicial matter of such importance is questionable indeed. Many writers agree with Creswell, who puts his objections in these words:

> A definition of educational opportunity in terms of dollars must be based on a solid relationship between cost and quality. I find, however, no such relationship established in Private Wealth and Public Education.
>
> In fact, evidence to support such an assumption is not easy to come by. Some work, including reanalyses of the Coleman data, has shown weak relationships between categories of school expenditures and achievement scores, but the findings are far from conclusive. On the other hand, evidence abounds that simply increasing expenditures for educational programs is ineffective. New York City schools, for example, have nearly doubled their per pupil expenditures in the past ten years while reading scores have continued to plummet. Evaluations of Head

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[23] ibid.

> Start and Title I (ESEA) programs come up with the same discouraging results. Not only are positive results hard to find, there is increasing evidence of mismanagement of funds and malfeasance at the local level. In short, dollars alone do not create educational opportunity.[24]

The foundation material in Serrano was lengthy. The trial produced a 6000 page record and trial briefs hundreds of pages in length,[25] a full-scale judicial exploration of the cost-quality issue. The subject occupied a major portion of the Superior Court's opinion. This was expected because both sides had argued against the social science tests, in essence. The plaintiffs argued against output measuring--achievement tests--as being an inappropriate measure of educational opportunity. The defendants took the position that since achievement testing is the best method presently available in measuring educational quality, and since the

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[24]Creswell, op. cit., p. 479. cf. also Michael J. Churgin, Peter H. Ehrenberg, and Peter T. Grossi, Jr., "A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars," The Yale Law Journal, 81 (June, 1972), pp. 1303-1341. In addition, the Coleman Report emphasized the point that purchasable educational resources produce little impact upon the academic achievement of students. James S. Coleman, and others, Equality of Educational Opportunity (Washington: Government Printing Office, 1966). cf. S. Francis Overlan, "An Equal Chance to Learn," New Republic, 166 (May 13, 1972), 19-21, for an excellent evaluation of the main Coleman points.

[25]Kenneth L. Karst, "Serrano v. Priest's Inputs and Outputs," Law and Contemporary Problems, 38 (Winter-Spring, 1974), 337.

plaintiffs avoided presenting any correlation between unequal spending and test scores, the case fails. After reviewing the voluminous social science and behaviorist testimony, the court said:

> This court is convinced, from the evidence introduced in this case, that the statistical correlation reasearch methods employed in social science or educational research have not reached that degree of reliability that it can be said with any degree of certainty as to the precise part which the various factors of home, school or genetics play separately upon pupil achievement in the standardized reading, mathematics, language, or other achievement-measurement tests.[26]

In spite of its own admission that no proof was possible, the court was

> . . . convinced that a school district's per-pupil expenditure level does play a significant role in determining whether pupils are receiving a low-quality or a high-quality educational program as measured by pupil test-score results on the standard achievement tests.[27]

As one analyst expressed it:

> There is room in the Serrano opinions . . . for all sorts of differential spending justified by programs of compensatory education, experimental programs, increased appropriation to districts with a problem of "municipal overburden"--indeed, any inequalities that serve compelling state interests, including "local control."[28]

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[26] Serrano v. Priest, Civil No. 938,254 (Cal.Super.Ct., April 10, 1974), at 89.

[27] ibid.

[28] Karst, op. cit., p. 349.

The Aftermath of Serrano

The Serrano decision brought joy to those who were opponents of local funding of school districts. They were not concerned with what the decision did not do. They listened only to the negative standard produced by the court: the quality of a child's education may not be a "function of wealth of . . . (a pupil's) parents and neighbors."[29] They gave this principle the name of "fiscal neutrality," and it was a standard of measurement which could be applied anywhere. Here was no vague statement about "educational needs,"[30] or "educational opportunities."[31] Wealth was easy to measure and to compare.

There was fear in many, however, that full state funding would destroy even the little local autonomy which the community schools had remaining.[32] Undaunted by this, however, the reform advocates seized the standard of "fiscal neutrality" provided by Serrano and headed for trial courts

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[29] Serrano v. Priest, 96 Cal.Rptr. 601 (1971), at 604.

[30] McInnis v. Shapiro, 293 F.Supp. 327 (1968), at 331, 335.

[31] Burruss v. Wilkerson, 310 F.Supp. 572 (1969), at 574.

[32] B. Levin, "School Finance Reform in a Post-Rodriguez World," Contemporary Legal Problems in Education (Topeka, Kansas: The National Organization on Legal Problems of Education, 1974), p. 158.

all over the land. Between Serrano[33] and the Rodriquez[34] decisions, there were filed in 31 states no less than 52 actions.[35] In that period, and of the fifty-two cases, nine decisions were given, seven favorable to the Serrano position, and two opposing it.

But a jarring note of reality crept through the emotion of fiscal neutrality. In collecting and preparing data to defend their court actions, reformers came across some startling data which ran counter to their beliefs. Districts with the highest tax bases per pupil were found not to be the wealthy, affluent, conservative suburbs, but rather were the big inner-city systems with industrial and commercial bases.[36] Researchers found per pupil wealth to be $48,837 in the central cities, exceeding the suburban average by about 35 per cent and rural averages by 77 per cent.[37] The Urban

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[33] Serrano v. Priest, 96 Cal.Rptr. 601 (1971).

[34] Rodriguez v. San Antonio, 411 U.S. 1 (1973).

[35] Lawyers' Committee for Civil Rights Under Law, "Intra-state School Finance Court Cases," (Washington: Lawyers' Committee for Civil Rights Under Law, 1972). This report was subsequently revised in 1976 as "Update on Statewide School Finance Cases. School Finance Project." ED 119 299, January, 1976.

[36] B. Levin, Thomas Muller, William J. Scanlon, and others, Public School Finance: Present Disparities and Fiscal Alternatives, (Report prepared by the Urban Institute for the President's Commission on School Finance, 1972).

[37] ibid., p. 53.

Coalition found that a shift to a uniform state-wide tax would disadvantage schools in 25 out of 34 major cities. Calculations showed that even the district power equalizing plan advocated by Coons would hurt most city schools just as much.[38] Very quickly the enthusiasm for property tax reform began to wane.

The Nixon Administration had proposed a national Value Added Tax, a sort of national hidden sales tax, which would effect a very quiet devaluation of the dollar. Congress was understandably at this time cold to the idea, and the proposal was abandoned, as well as federal proposals for property tax relief which were to be financed by the Value Added Tax. Voters in both California and Oregon voted down proposals for abandoning the local property tax. Even Orange County in California (the locale for Serrano) preferred the trouble it had to that of an untested alternative.[39] As Areen and Ross commented:

> . . . one could argue, if the property tax were so unpopular it wouldn't have survived so long. Its very inelasticity--its built-in resistance to rapid expansion--may have endeared it to a tax-weary electorate.[40]

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[38] Judith Areen and Leonard Ross, "The Rodriguez Case: Judicial Oversight of School Finance," The Supreme Court Review 33 (1973), p. 35.

[39] ibid.

[40] ibid., p. 50.

Rodriquez and the United States Constitution

In the summer of 1968 a group of Mexican-American parents filed a class action suit against the Texas system of financing public education. In that state the so-called state-aid program--funds from general revenues--financed approximately one-half of all public expenditures. These state-aid funds were distributed according to a fairly complicated formula, but one which was designed to have an equalizing influence on expenditures among the school districts. Approximately forty per cent of education expenditures were raised by local property taxation and the balance was provided from federal funds.

As in Serrano, the plaintiffs held that the system favored the more affluent and violated the equal protection requirements of the United States Constitution. The trial was delayed for two years,

> . . . to permit extensive pretrial discovery and to allow completion of a pending Texas legislative investigation concerning the need for reform of its public school finance system.[41]

In December, 1971, the three-judge court rendered its decision in a per curiam decision holding the Texas school finance system to be unconstitutional under the Equal

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[41] 411 U.S. 1 (1973), at 6, n. 4.

Protection Clause of the Fourteenth Amendment.[42] The state appealed, and on 21 March 1973 Justice Powell delivered the Opinion of the Supreme Court.[43]

The decision reflected the diversity of opinion rampant among the political and educational leaders in the country. In a five-to-four decision, the Court rejected a constitutional challenge to the property tax method of school finance. In finding the Texas system of public school finance to be not unconstitutional, the court considered three major aspects of the "equal protection" challenge.

(1) Was the relationship between district wealth and school expenditures tantamount to a "suspect classification" whereby an identifiable body of students was subject to discrimination? The Court first disposed of the question of the "identifiable body." Citing Churgin, Ehrenberg and Grossi,[44] the Court pointed out that there is a reason to believe that the poorest families are not necessarily clustered in the poorest property districts and that they frequently are found clustered around commercial and industrial areas--those same areas that provide the most

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[42] Rodriquez v. San Antonio School District, 337 F.Supp. 280 (1971).

[43] 411 U.S. 1 (1973).

[44] op. cit.

attractive sources of property tax income for school districts.[45] The Opinion went on to state that:

> Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.[46]

After a brief reanalysis of the Texas "Minimum Foundation Program of Education,"[47] the Court reemphasized that in

> . . . the absence of any evidence that the financing system discriminates against any definable category of "poor" people or that it results in the absolute deprivation of education--the disadvantaged class is not susceptible of identification in traditional terms.[48]

(2) In the second phase of the plaintiffs' challenge, the Court examined whether the system of Texas school finance was compatible with a "legitimate state purpose." Here the Court found that the usage of local property taxation was rationally related to the state's avowed desire to encourage local interest and participation in the concerns of the school district. Justice Powell wrote that:

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[45] 411 U.S. 1 (1973), at 23.

[46] ibid., at 23-24.

[47] Which program had been considered in detail, ibid., at 6 through 17.

[48] ibid., at 25.

> . . . if local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds.[49]

And further:

> The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class. On the contrary, it is rooted in decades of experience in Texas and elsewhere, and in major part is the product of responsible studies by qualified people.
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> . . .
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> In its essential characteristics, the Texas plan for financing public education reflects what many educators for a half a century have thought was an enlightened approach to a problem for which there is no perfect solution.
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> . . .
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> The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. We hold that the Texas plan abundantly satisfies this standard.[50]

(3) The third question, possibly the most far-reaching, was whether ot not education is a "fundamental interest" in the eyes of the Constitution. The Court reaffirmed its "historic dedication to public education," but refused to find, either explicitly or implicitly, that education is among the fundamental rights protected by the Constitution.

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[49] ibid., at 54.

[50] ibid., at 55.

> We are in complete agreement with the conclusion of the Three-panel below that "the grave significance of education both to the individual and to our society" cannot be doubted. But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.[51]
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> . . .
>
> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. . . . Rather the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.
>
> Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.[52]

As stated by Areen and Ross:

> Although the Court conceded some plausibility to the argument that education was fundamental because it was related to the right to vote, the argument was rejected on the ground that it proved too much.[53]

It was this proof, rejected in the Opinion of the Court, which constituted the bulk of the 67-page dissent by Justice Thurgood Marshall, who was absent during the oral argument of the case.[54] It was stated early in this dissent that it

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[51] ibid., at 30.

[52] ibid., at 33, 35.

[53] Judith Areen and Leonard Ross, "The Rodriguez Case: Judicial Oversight of School Finance," The Supreme Court Review, 33 (1973), p. 37.

[54] Mark G. Yudof and Daniel C. Morgan, "Rodriguez v. San Antonio Independent School District: Gathering the Ayes of Texas--The Politics of School Finance Reform," Law and Contemporary Problems, LXXXVIII (Winter-Spring, 1974), p. 401.

is his opinion that

> . . . the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is . . . vital . .[55]

While it is difficult to disagree with such a statement, it is even more difficult to arrive at a viable procedure which will provide this "right" if it exists. For a state to provide an equal start in life to each individual, the education would have to be individually (and therefore unequally) provided in order to overcome the variances in need provided by "home, school, or genetics," which the Serrano trial court had specified in its rejection of the absolute in educational research.[56] The inherent monumental difficulty, if not impossibility, in providing such equality makes the naming of it as a "right" extremely tenuous.

Robinson and State Constitutions

From Rodriguez to Robinson took less than two weeks. Where Rodriguez seemed to restrict the way to school finance reform, Robinson[57] opened new doors. The suit was filed in the Superior Court, Hudson County, New Jersey, early in 1970. The plaintiffs charged that the New Jersey system

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[55] 411 U.S. 1 (1973), at 71.

[56] Serrano v. Priest, Civil No. 938,254 (Cal. Super. Ct., April 10, 1974), at 89.

[57] Robinson v. Cahill, 303 A.2d 273 (1973).

of financing public schools was unconstitutional under both the New Jersey and United States Constitutions for reasons that it made the quality of education dependent upon the wealth of each respective district, that the schools were not being maintained thoroughly and efficiently as required by the State Constitution, and that the system provided racial discrimination. They asked the court to declare the system unconstitutional, to order the restructuring of the system to change district boundary lines to equalize the tax base per student ratios.[58]

Trial was not held until late 1971, and on 19 January 1972 the court decided that the school finance system in New Jersey did violate the education clause of the State Constitution and the provision requiring uniformity of taxation, and also denied the plaintiffs equal protection of the laws under both the State and Federal Constitutions.[59] The education clause in question was a provision in an 1875 amendment to the New Jersey Constitution which commands the Legislature to provide a "thorough and efficient system of free public schools."[60]

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[58] cf., Lawyers' Committee for Civil Rights Under Law, Update on State-wide School Finance Cases, (Washington: Lawyers' Committee for Civil Rights Under Law, January, 1976), p. 7.

[59] Robinson v. Cahill, 287 A.2d 187 (1972).

[60] Constitution of the State of New Jersey, Article VIII, sec. 4, para. 1.

On appeal to the New Jersey Supreme Court, the decision invalidating the state's school finance system was affirmed unanimously on the basis of the "thorough and efficient" clause, finding discrepancies in dollar input per pupil.[61] Disagreeing with the trial court, the supreme court found the case to be inappropriate for decision on federal and state equal protection grounds.[62]

The court found that, unlike the Texas system, the New Jersey State aid did not operate substantially to equalize the sum available per pupil,[63] and stated in rather conclusive terms (but with no supportive citations) that although the court recognized that equality of dollar input would not assure equality of results, "the quality of educational opportunity does depend in substantial measure upon the number of dollars invested."[64]

The court, while basing its affirmation on the basis of the "thorough and efficient" clause, left to others the task of giving detailed content to these words. The court recognized the temporal nature of the meaning, contrasting the 1970s against the 1890s when only elementary school education

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[61] Robinson v. Cahill, 303 A.2d 273 (1973), at 295.

[62] ibid., at 283-287.

[63] ibid., at 277.

[64] ibid.

was provided. "Today, a system of public education which did not offer high school education would hardly be thorough and efficient."[65] The court further buttressed this position by advancing the opinion that:

> The Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market.[66]

This matter of the meaning of "thorough and efficient" requires some analysis in order to define the depth of the Robinson decision. After the decision and in a hearing the court set 31 December 1974 as a deadline by which the legislature was to act in an appropriate manner to remedy the unconstitutional aspects of the school financing system.

On 23 January 1975, the court recognized that no such legislation had been enacted and said that: "The matter now returns to the court for the ordering of the appropriate remedies to effectuate the court's original decision."[67] The court scheduled a hearing for 18 March 1975. The first question to be considered was that of a definition of a "thorough and efficient system of free public schools."

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[65] ibid., at 295

[66] ibid.

[67] Robinson v. Cahill, 335 A.2d 6 (1975), at 6.

The second question was to be the translation of the definition into fiscal terms. The responses of all concerned, plaintiffs, defendants, and amici curiae illustrate the complexity and difficulty of the problem.

(1) The New Jersey Attorney General proposed "process standards," a system whereby the local districts, using some formula to be established by the State Department of Education, would translate its needs into educational objectives or standards. This was criticized on the grounds that (a) it did not provide state-wide standards of educational quality, and (b) "process standards" did not meet the court's requirement of the application of equal educational opportunity to the entire state.

(2) The Governor endorsed the "process standards," suggesting that all funds from the six areas of existing state aid be distributed through a district power equalization formula--named the Bateman formula. This was criticized because low wealth districts would receive substantial financial "windfalls" and other districts suffer considerable losses.

(3) The plaintiffs agreed with the Governor, but concentrated their comments on the "thorough and efficient" problem. They claimed that "thorough and efficient" was a very fluid concept, definable only in the context of a given

situation at a given time.[68] They advocated a "controlled experimentation with process standards."

(4) The American Civil Liberties Union and the National Association for the Advancement of Colored People proposed that both the equal educational opportunity could be defined and the "thorough and efficient" requirement satisfied by using a state-wide assessment program coupled with the use of a competency based education program.

(5) The New Jersey Education Reform Project proposed that the concept of "thorough and efficient" would be satisfied in terms of the basic skills of reading, writing and mathematics.

As Salmon and Alexander sum it:

> After hearing arguments it would appear that the Supreme Court of New Jersey had made very little progress on its journey down the misty judicial road of school finance to a poorly delineated destination of defining "thorough and efficient." In addition to the court's rather vague interpretation of "thorough and efficient" it had the equally vague and conflicting opinions of the plaintiff, defendants, and amici curiae.[69]

A danger here would be in assuming that this problem of vagueness of two words completely debilitates the

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[68] For a very good analysis of this and other aspects of this hearing, see R. G. Salmon and M. D. Alexander, "The Concept of 'Thorough and Efficient': A Problem of Definition." ED 123 734, 1976.

[69] ibid., p. 19.

strength of the Robinson case so as to make it useless. Robinson is an extremely complex case from the legal standpoint. If it did nothing else, Robinson illustrates the difficulty which arises from legislation which is either imprecisely stated, or stated in general terms which can be interpreted in various ways. The intent of legislators fades with time unless it is precisely expressed. An example of this, related to the specific issue of "thorough and efficient" in the New Jersey Constitution, is cited by Tractenberg:

> A participant in the 1947 Constitutional Convention, which carried forward the 1875 education clause, informally expressed the view that the intent of the Convention was not to create a justiciable issue whenever a student alleged that he or she had been denied a "thorough and efficient" education. Rather, the clause was intended as a mandate to the legislature to take necessary action. The implication, presumably, was that the legislature, and not the courts, should determine finally whether the mandate had been met. Some states have constructed their education clauses in this manner. Others, including New Jersey, have ultimate power in the judiciary to determine the sufficiency of legislative action.[70]

The Robinson court went to great lengths to investigate the problem of "thorough and efficient" and, failing to find anything but conflict, took some courageous steps to fill the need. It established that: "Thorough and efficient means

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[70]Paul L. Tractenberg, "Robinson v. Cahill: The 'Thorough and Efficient' Clause," Law and Contemporary Problems, 38 (Winter-Spring, 1974), p. 325, n. 82.

more than adequate or minimal."[71] It then declared an extremely controversial tenet that "there is a significant connection between the sums expended and the quality of educational opportunity."[72]

Having gone this far, the court also rejected the extremists in the reform movement by allowing for differences by local option: "Nor do we say that if the State assumes the cost of providing the constitutionally mandated education, it may not authorize local government to go further."[73] It was thus the position of the court that even if "thorough" was not the most complete education possible, the standard established by the word was, of necessity, high, and also sufficient to the needs of the times. The court cited Landis v. Ashworth with approval.

> Nor can I think that the constitution requires the legislature to provide the same means of instruction for every child in the state. A scheme to accomplish that result would compel either the abandonment of all public schools designed for the higher education of youth or the establishment of such schools in every section of the state within reach of daily attendance by all children there residing. Neither of these consequences was contemplated by the amendment of 1875. Its purpose was to impose on the legislature a duty of providing for a thorough and efficient system of free schools, capable of affording to every child such

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[71] Robinson v. Cahill, 287 A.2d 187 (1972), at 187,

[72] 303 A.2d 273 (1973), at 277.

[73] ibid., at 298.

> instruction as is necessary to fit it for the ordinary duties of citizenship; and such provision our school laws would make, if properly executed, with the view of securing the common rights of all before tendering peculiar advantages to any. But, beyond this constitutional obligation, there still exists the power of the legislature to provide, either directly or indirectly, in its discretion, for the further instruction of youth in such branches of learning as, though not essential, are yet conducive to the public service. On this power, I think, rest the laws under which special opportunities for education at public expense are enjoyed.[74]

The court also found itself in a controversial ambiguity when it declared:

> . . . it cannot be said the 1875 amendments were intended to insure statewide equality among taxpayers. But we do not doubt that an equal educational opportunity for children was precisely in mind. The mandate that there be maintained and supported "a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of five and eighteen years" can have no other import.[75]

The term "equal educational opportunity" is as difficult to define as "thorough and efficient."[76] The approach used by the court may have been a deliberate attempt to avoid a rigidly based standard of specified input, output, process, or method. The proof of the educational system must be whether the constitutionally mandated basic, but high level, education available to students throughout the state was likely to produce the desired outcome--to permit students

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[74] 31 A. 1017 (1895), at 1018.

[75] Robinson v. Cahill, 303 A.2d 273 (1973), at 294.

[76] A good analysis is in Arthur E. Wise, "Legal Challenges to Public School Finance," School Review, LXXXII (November, 1973), pp. 19-20.

to achieve the capacity to function as productive citizens.

The Robinson decision provides no handbook solution to school finance problems, not even yet in the state of New Jersey. The alternative forms of taxation and distribution of funds will be tested for many years. But the decision is a powerful one, both in its strengths and its weaknesses. As summed by Tractenberg:

> The New Jersey Supreme Court's decision in Robinson should provide the impetus for long-overdue reform of educational finance, education itself, and perhaps ultimately, of the way in which the entire range of governmental services are provided. At least, by its willingness to begin entertaining issues of fundamental importance to the structure of the state and local government, the court has created a powerful inducement for responsible legislative and executive action. One can only hope that legislators in New Jersey and other states will seize the initiative from the courts and develop the lasting and comprehensive reform which they are best constituted to provide.[77]

On 23 May 1975, the court gave its opinion[78] based on the 18 March hearing and the previous rulings.[79] Here the court proposed a provisional solution, warning that the provisional plan should not be misconstructed as a permanent, satisfactory mandate. The problem for solution still rested with the state legislature. In September 1975, the

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[77] op. cit., p. 332

[78] Robinson v. Cahill, 339 A.2d 193 (1975).

[79] Including: 287 A.2d 187 (1972); supplemented in 289 A.2d (1972); aff'd as modified 303 A.2d 273 (1973); supplemented in 306 A.2d 65 (1973); supplemented in 335 A.2d 6 (1975); supplemented 67 N.J. 333 (1975).

legislature passed and the governor signed S. 1516 into law, The Public School Education Act of 1975.

The Robinson plaintiffs, not satisfied with this act, claimed that it did not comply with the instructions of the court. The plaintiffs filed suit on the grounds that (1) the Act did not define the term "thorough and efficient," (2) the Act was not funded by the legislature, and (3) the Act, if funded, would operate to continue the inequities between the suburban school districts and the urban districts.

On 30 January 1976, the court held the Act constitutional on its face, provided it be funded.[80] The court withheld final approval, however, until the Act had been tested in practice. After the 30 January opinion, Governor Bateman suggested to the court that the legislature may not provide the necessary funds, and the court responded with an order to show cause why certain remedies should not be ordered by the court if the funds were not provided by the legislature.

On 13 May 1976, after another hearing, the supreme court enjoined all state and local officials from spending any funds for the support of the public schools, effective 1 July, unless the legislature should act to find the Act fully for the coming school year.[81] The schools were closed

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[80] Robinson v. Cahill, 355 A.2d 129 (1976).

[81] Robinson v. Cahill, 358 A.2d 457 (1976).

for two weeks following 1 July after which the legislature passed a state income tax bill for the purpose of fully funding the Act. The injunction was lifted.

CHAPTER IV

ANALYSIS OF MAJOR COURT DECISIONS IN THE AREA OF PUBLIC SCHOOL FINANCE

In a surge of Serrano-generated enthusiasm, the reform advocates instituted a surfeit of anti-property-tax cases throughout the nation. Many of these cases were abandoned, simply not prosecuted, for various reasons. Others were decided in state courts and considered to be of such little general influence in the scheme of the property-tax battle that they are not even given space in the usual Reporter System.

The cases selected here for analysis are the major decisions in both state and federal courts. Their influence is felt in the three "landmark" cases discussed in Chapter III--Serrano, Rodriguez and Robinson. They are illustrative of the fine constitutional lines drawn by the different courts, emphasizing the substance of both rights and responsibilities, and of ideals and practical limitations. Collectively, the effect is that of a very fine tapestry.

Arizona

Hollins v. Shofstall, 515 P.2d 590 (1973).

On 12 October 1971, a group of public school students from Maricopa County, Arizona, and their parents filed a suit

claiming (1) that the Arizona state system of public school financing was unconstitutional in that it discriminated against the taxpaying parents, violating the state and federal constitution equal protection clauses, and (2) that the system also provided for unconstitutional injury and inequality in the right of the students to an education. The Arizona Superior Court for Maricopa County granted a summary judgment for the taxpayer plaintiffs but denied the motion of the students.[1] In an attempt to allow the state legislature time to remedy the situation, the court ordered that its declaratory judgment for the taxpayers would not take effect until after the close of the 1974 session of the legislature.

On 2 November 1973, the Arizona Supreme Court, on appeal, reversed the lower court and remanded the case for further proceedings. The Supreme Court of Arizona held that the state "Constitution does establish education as a fundamental right of pupils between the ages 6 and 21 years,"[2] but maintained that the applicable standard to judge the constitutionality of the Arizona system of school finance was whether it has a "rational and reasonable basis . . .

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[1] Hollins v. Shofstall, Civ. No. C-253652 (Ariz. Super. ct., June 1, 1972).

[2] Hollins v. Shofstall, 515 P.2d 590 (1973) at 592.

which meets the educational mandates of the . . . constitution."[3] The Court further maintained that the Arizona school finance system did meet that standard, despite the fact that some districts had a greater tax burden than others, stating that it found "no magic in the fact that the school district taxes herein complained of are greater in some districts than others."[4]

On 1 July 1974, an entirely new school financing statutory framework became effective as a result of legislative action in the 1973 session.[5]

Connecticut

Horton v. Meskill, 332 A.2d 813 (1974), 376 A.2d 359 (1977).

In the town of Canton a group of school children sought a declaratory judgment to determine whether the Connecticut system of financing public schools was in violation of either the United States Constitution or the Connecticut Constitution. They claimed that the state had been derelict in its duty, specified in Article 8, section 1, of the State Constitution, which states: "There shall always be free elementary and secondary schools in the State. The general assembly

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[3] ibid., at 592, and 593.

[4] ibid., at 593.

[5] Arizona laws 1973, Chapter 182, section 13.

shall implement this principle by appropriate legislation."

The Connecticut system, in total, was financed by local taxes for approximately three-quarters of the educational expenditures and the rest by state and federal aid, the latter being about three per cent. The state aid was distributed as a flat grant per pupil, but because of wide ranges of property valuations among the school districts, educational expenditures were largely a function of geography and local wealth.

On 26 December 1974, the Superior Court of Hartford County issued a memorandum decision holding that the Connecticut system violated the equal protection clause of the State but not the Federal Constitution. The court maintained that

> although the duty of educating children has been delegated by statute to municipalities, both the common law of this state and the Connecticut Constitution provide that the duty of educating Connecticut children is upon the state, as a whole and not upon its municipalities.[6]

Further, the court maintained that legislation for financing education which depended on local property wealth was not "appropriate" as stipulated in Article 8, section 1. The court denied any justification of the system on the grounds that it served the objective of local control.[7]

The court also held education to be a "fundamental

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[6] Horton v. Meskill, 332 A.2d 133 (1974) at 116.

[7] ibid., at 119.

interest" in the State even though admitting that "the Connecticut constitution does not declare in haec verba that education is a fundamental right."[8]

Another admission of consequence is that:

> The court is not unmindful of the testimony that there is no conclusive evidence that there is a correlation between education input . . . and education output. . . . On the other hand, the evidence in this case is highly persuasive that, all other variables being constant, there is a high correlation between education input and education opportunity (the range and quality of educational services offered to pupils). In other words, disparities in expenditure per pupil tend to result in disparities in education opportunity.[9]

The court granted no injunctive relief, but retained jurisdiction over the case. On 19 April 1977, the Supreme Court of Connecticut upheld the decision.

Florida

Hargrave v. Kirk, 413 F.2d 320 (1969), 313 F.Supp. 944 (1970), vacated sub nom. Askew v. Hargrave, 401 U.S. 476 (1971).

The plaintiffs were a group of resident parents and students from sixteen counties in Florida. They brought the suit (in the U.S. District Court for the Middle District of Florida) challenging a 1968 law in Florida, the Millage Roll-back Law, as violative of the Equal Protection Clause of the

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[8] ibid.

[9] ibid.

Fourteenth Amendment on the ground that the law invidiously discriminated in effect in its distribution of taxing authority for educational purposes by a standard related solely to a county's wealth. The District Court dismissed the case and the Court of Appeals remanded with directions to convene a three-judge court.[10]

The law involved was enacted by the legislature to provide for the financing of public schools through state appropriations and local ad valorem taxes assessed by each school district. One section of the law provided that, to be eligible to receive state aid under this law, a school district must limit ad valorem taxes for school purposes to not more than ten mills of assessed valuation.

The three-judge court, on cross motions for summary judgment, held that the law was a violation of the equal protection clause.[11]

In a broader view, the United States Supreme Court vacated the judgment of the district court, citing that the plea was inadequate as a basis for deciding the equal protection claim in that it ignored the fact that the Millage Rollback law was

> . . . only one aspect of a comprehensive legislative

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[10] Sub nom. Hargrave v. McKinney, 413 F.2d 320 (1969).

[11] Hargrave v. Kirk, 313 F.Supp. 944 (1970).

> program for reorganizing educational financing throughout the State to more nearly equalize educational opportunities for all the school children of the State.[12]

The Court went on to quote, with favor, from the defendants' position:

> The net effect of the 1968 educational financing enactments was not only to make up for the loss of funds suffered by the counties required to reduce local millage but to greatly increase the moneys available to the counties on a per pupil basis.[13]

This decision was not enthusiastically supported by everyone. As Salmon and Alexander somewhat wryly noted, the Court authorized a program which provided that equality can be attained by permitting local school districts to tax themselves at levels sufficiently high to offset any existing wealth differences.[14]

Idaho

Thompson v. Engelking, 537 P.2d 635 (1975).

Article 9, Section 1 of the Idaho Constitution states:

> The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho to establish and maintain a general, uniform and thorough system of public, free common schools.

A group of school children and their parents residing

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[12] Askew v. Hargrave, 401 U.S. 476 (1971) at 479.

[13] ibid.

[14] R. G. Salmon and M. D. Alexander, "The Concept of 'Thorough and Efficient': A Problem of Definition," ED 123 734, 1976.

in Pocatello School District No. 25 brought suit against the school system in Idaho based upon the equal protection provisions of the Idaho Constitution, and upon the education provisions of Article 9, section 1. On 16 November 1973, a trial court issued a written opinion declaring the state's school financing system to be unconstitutional and ordering a restructuring of the system so as to provide equal expenditures per pupil.

On appeal, the Idaho Supreme Court reversed the trial court,

> . . . after a careful analysis of our Constitution, the circumstances surrounding its adoption, and the long line of cases in which this Court has adjudicated questions relating to our system of public schools and to its financing.[15]

The Court refused to recognize education as a fundamental interest,[16] and dismissed the equal protection clause claims of the plaintiffs as well.[17] One of the arguments used by the court in support of the Opinion regarding equal protection was taken from a 1952 case in the same court.[18]

> Traditionally, not only in Idaho but throughout most of the states of the Union, the legislature has left the establishment, control and management of the school to the parents and taxpayers in the community which it serves. The local residents organized the

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[15] Thompson v. Engelking, 537 P.2d 635 (1975) at 641.

[16] ibid., at 647.

[17] ibid., at 640-645.

[18] Andrus v. Hill, 249 P.2d 205 (1952).

> school district pursuant to enabling legislation, imposed taxes upon themselves, built their own school house, elected their own trustees and through them managed their own school. It was under these circumstances that the "Little Red School House" became an American institution, the center of community life, and a pillar in the American conception of freedom in education, and in local control of institutions of local concern. In the American concept, there is no greater right to the supervision of the education of the child than that of the parent. In no other hands could it be safer.
>
> The American people made a wise choice early in their history by not only creating forty-eight state system(s) of education but also by retaining within the community, close to parental observation, the actual direction and control of the educational program. This tradition of community administration is a firmly accepted and deeply rooted policy.[19]

Illinois

People of the State of Illinois ex. rel. Jones v. Adams, 350 N.E.2d 767 (1976).

A group of landowners and parents of school children in Franklin County, Illinois, paid their property taxes in 1971 and 1972 under protest. They claimed that farmers, under the Illinois school financing system

> . . . are denied equal protection of the laws by the levying of burdensome real estate taxes upon their farms, and that the parents of school-aged children who reside in poor school districts are denied equal protection of the laws . . . in violation of the fourteenth amendment to the United States Constitution and Article I, sec. 2 of the 1970 Illinois Constitution.[20]

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[19] ibid., at 207.

[20] People of the State of Illinois ex. rel. Jones v. Adams, 350 N.E.2d 767 (1976) at 768.

The Circuit Court of Franklin County overruled the landowners' objections and on 9 July 1976, the Appellate Court of Illinois, Fifth District, affirmed the decision.

The Court disposed of the arguments respecting the method of taxing and the property tax multipliers in question and then proceeded to a novel interpretation of the Rodriguez decision.[21]

> Although the United States Supreme Court purported to apply, in Rodriguez, the standard of review ordinarily used in equal protection cases, it actually fashioned another standard which is more restrictive than the ordinary standard, but less restrictive than the standard of strict judicial scrutiny.[22]

Under this intermediate standard, the court concluded that

> . . . a state's method of financing public schools might deny children in expecially poor school districts the equal protection of the laws, and yet might be constitutional with respect to children in other school districts.[23]

Nevertheless, the court found that

> The burden of demonstrating, by evidence and reasoned argument, that the discrimination against parents and school children residing in a poor school district is invidious, must fall upon the parties who attack the discrimination. In the present case, the defendants have failed to carry this burden.[24]

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[21] Rodriguez v. San Antonio, 411 U.S. 1 (1973).

[22] People of the State of Illinois ex. rel. Jones v. Adams, 350 N.E.2d 767 (1976) at 776.

[23] ibid.

[24] ibid.

Indiana

Jenson v. Board of Tax Commissioners, 41 U.S.L.W. 2390 (Indiana Circuit Court, 15 January 1973).

The plaintiffs in this case alleged that the Indiana system of public school financing, relying upon local property taxes, results in disparities which constitute a violation of the equal protection provisions.

The court found for the defendants, raising the question whether the plaintiffs had adequately discharged their burden of proof that the disparities result in differences in "educational opportunities," and that some children have "substantially inferior" educational opportunities as compared with others.

The court cited the differences among educators regarding a definition of equal educational opportunity, citing, in addition, that there is, however, general agreement that equal educational opportunity would require an unequal expenditure of dollars.

Going further, the court found that the system in Indiana is a "reasonable and rational system, not designed to, nor invidiously discriminating against, plaintiffs or others.[25]

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[25] Jenson v. Board of Tax Commissioners, 41 U.S.L.W. 2390 (Indiana Circuit Court, 15 January 1973).

Michigan

Milliken v. Green, 203 N.W.2d 457 (1972), vacated 212 N.W.2d 711 (1973).

This highly politically controversial case began on 15 October 1971 when Governor Milliken and the Attorney General sought a declaratory judgment in the Ingham County Circuit Court to test the constitutionality of the Michigan public school financing system on the grounds of violation of the equal protection clauses of the State and United States Constitutions.

On 8 May 1972, the Circuit Court certified the question and on 29 December 1972 the Michigan Supreme Court held that the state school financing system

> . . . consisting of local, general ad valorem property taxes, and school aid appropriations, by relying on the wealth of local school districts as measured by the state equalized valuation of taxable property per student . . . [26]

resulted in substantial inequality and denied equal protection of the laws guaranteed by the Michigan constitution.

To this decision Justice Brennan fixed a most unusual Addendum[27] wherein he questioned the propriety of the methods used by Justice G. Mennen Williams to certify his opinion as

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[26] Milliken v. Green, 203 N.W.2d 457 (1972) at 457.

[27] ibid., at 474-476.

that of the majority, concluding:

> When, in the name of all that is sacred in the administration of justice, will the members of this court turn a deaf ear to the siren call of executive and legislative politics, and come home to the dignity of judicial scholarships, judicial decisions, and judicial restraints?[28]

His dissent[29] follows, and was, no doubt, contributory to the certification of a rehearing a year later, when on 14 December 1973 Chief Justice T. M. Kavanagh vacated the prior opinion and dismissed the cause.[30] Substantively, the court answered negatively the question raising a Federal Fourteenth Amendment claim, found no discrimination violative of Michigan's Equal Protection Clause, and stipulated that the Michigan Constitution allows a school district to tax itself for the education of students which may exceed the level in other districts.[31]

Significantly, the court pointed out that:

> Instead of substantiating with evidence their claim of educational inequities and demonstrating that a decree of this Court would overcome those inequities, all have concentrated exclusively on the disparities in taxable resources among local school districts.[32]

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[28] ibid., at 476.

[29] ibid., at 476-488.

[30] Milliken v. Green, 212 N.W.2d 711 (1973).

[31] ibid., at 721.

[32] ibid., at 719.

Later the court stated that:

> Even if it were made to appear that more money would eliminate constitutionally significant disparities between districts in the quantity or quality of educational services or opportunity, the remedy need not be to discard altogether the present tax machinery.[33]
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> . . . .
>
> Because of definitional difficulties and differences in educational philosophy and student ability, motivation, background, etc., no system of public schools can provide equality of educational opportunity in all its diverse dimensions.[34]

Minnesota

Van Dusartz v. Hatfield, 334 F.Supp. 870 (1971).

The plaintiffs were pupils who charged that the Minnesota school financing system resulted in making the quality of education a function of the wealth of the parents and district in which the pupil resides, thus violating the equal protection clause of the Fourteenth Amendment of the United States Constitution.

On 12 October 1971, the United States District Court for the Third Division of the District of Minnesota supported the plaintiffs, concluding that the complaint stated a cause of action and declaring that

> . . . . a system of public school financing which makes spending per pupil a function of the school district's wealth violates the equal protection guarantee of the 14th Amendment. . .[35]

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[33] ibid.

[34] ibid., at 720.

[35] Van Dusartz v. Hatfield, 344 F.Supp. 870 (1971) at 877.

The significance of this case hardly exceeds its existence because the finding was largely vacated by the subsequent Rodriguez[36] decision by the United States Supreme Court. It is interesting to note that the Van Dusartz court depended heavily on the Serrano I[37] findings and upon the thesis of Coons, Clune and Sugarman.[38]

Montana

State ex. rel. Woodahl v. Straub, 520 P.2d 776 (1974).

The state of Montana brought this suit against certain county officials who maintained that a 1973 tax discriminated against the taxpayers of their county by requiring them to pay more than is required for the support of its local schools, thus violating both the Montana and United States Constitutions. The law in question required counties raising more than the amount reeded to fund a "foundation program" with a 40-mil property tax to pay any excess to the state for redistribution to other counties which may have raised less than the foundation amount. This is a "negative aid" to the wealthier counties.

The court found for the state, denying that there

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[36]Rodriguez v. San Antonio, 411 U.S. 1 (1973).

[37]Serrano v. Priest, 96 Cal.Rptr. 601 (1971).

[38]John E. Coons, William H. Clune III and Stephen D. Sugarman, Private Wealth and Public Education (Cambridge: Harvard University Press, 1970).

was any unconstitutionality.[39] The court held the tax to be a state rather than a local tax, and supported its findings by precedent.

> However, it is almost unanimously held that it is no defense to the collection of a tax for a special purpose that a person liable for the tax is not benefitted by the expenditure of the proceeds of the tax or not as much benefitted as others.[40]

This case is included here to illustrate that the property tax question is buffeted by both sides, those who pay and those who receive.

New York

Spano v. Board of Education of Lakeland Central School District No. 1, 68 Misc.2d 804, 328 N.Y.S.2d 229 (1972).

The plaintiff asked for a judgment declaring unconstitutional New York's existing legislative and constitutional provisions for levying and distributing school taxes.

The Supreme Court, Westchester County, on 17 January 1972, granted a motion to dismiss on the grounds that the complaint failed to state a cause of action. The court dismissed the Serrano[41] decision, stating that until otherwise vacated by the United States Supreme Court, "The applicable

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[39] State ex rel. Woodahl v. Straub, 520 P.2d 776 (1974) at 783.

[40] ibid., at 781.

[41] Serrano v. Priest, 96 Cal.Rptr. 601 (1971).

law is contained in McInnis[42] and Burruss."[43] Justice Hawkins wrote that

> "One scholar, one dollar"--a suggested variant of the "one man--one vote" doctrine proclaimed in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663--may well become the law of the land. I submit, however, that to do so is the prerogative and within the "territorial imperative" of the Legislature, or, under certain circumstances, of the United States Supreme Court.[44]

Oregon

Olsen v. State of Oregon, 554 P.2d 139 (1976).

This was a class action brought in early 1972 on behalf of public school students in the state. The plaintiffs also included taxpayers and parents residing in districts with low-wealth property bases. The plaintiffs contended that the Oregon system of financing public education is contrary to Article I, section 20, of the State Constitution,[45] and Article VIII, section 3, of the State Constitution.[46]

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[42]Sub nom. McInnis v. Ogilvie, 394 U.S. 322 (1969).

[43]Burruss v. Wilkerson, 397 U.S. 44 (1970).

[44]Spano v. Board of Education, 328 N.Y.S.2d 229 (1972) at 235.

[45]Oregon's Equal Protection Clause: "No law shall be passed granting to any citizen or class of citizens, or immunities, which, upon the same terms, shall not equally belong to all citizens."

[46]"The Legislative Assembly shall provide by law for the extablishment of a uniform, and general system of Common schools."

The suit was tried in September, 1973, but it was not until 25 February 1975 that the trial court ruled against the plaintiffs. On 3 September 1976, the Supreme Court of Oregon affirmed the judgment.

The court maintained that while it could interpret the equal protection clause of the Oregon constitution more broadly than that of the federal constitution, it found no legal basis for such a construction in this case.[47]

The court denied the allegation that the language of Article III, section 3, establishes education as a "fundamental interest." The court explained that in Oregon many laws which are usually considered legislation are inserted in the state constitution, and dismissed the idea that this raises everything so done to the category of a "fundamental interest."[48] Cited as an example:

> Article I, section 39, of the Oregon Constitution, Oregon's Bill of R ghts, provides that it is a guaranteed constitutional right to sell and serve intoxicating liquor by the drink. According to the analysis of Rodriguez, this would make that right a "fundamental interest.[49]

In refusing to find that explicit mention in the constitution was controlling, the court adopted a "balancing test,"

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[47] Olsen v. State of Oregon, 554 P.2d 139 (1976) at 143.

[48] ibid., at 144-145.

[49] ibid.

an approach in which the court

> . . . weights the detriment to the education of the children of certain districts against the ostensible justification for the scheme of school financing.[50]

The court found that the interest impinged upon--educational opportunity--was outweighed by the state's concern in maintaining local control.

> In Oregon this emphasis on local control is constitutionally accepted. Art. XI, section 2 and Art. VI, section 10, of the Oregon Constitution provide for home rule by cities and counties; that is, the voters of the cities and counties can enact their own charters which shall govern on matters of city or county concern.[51]

The Court was also not convinced by the plaintiffs that there was a violation of Article VIII, section 3. The Opinion stated that the provision is met

> . . . if the state requires and provides for a minimum of educational opportunities in the district and permits the districts to exercise local control over what they desire, and can furnish, over the minimum.[52]

Washington

Northshore School District No. 417 v. Kinnear, 530 P.2d 178 (1974).

The plaintiffs were 25 (out of 320) school districts of the state of Washington, their directors, resident parents, taxpayers and children. They brought an original petition

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[50] ibid., at 145.

[51] ibid., at 147.

[52] ibid., at 148.

to the Supreme Court of Washington in April, 1972, for a writ of prohibition and mandamus to declare the state's system of funding its public schools unconstitutional and to prohibit state officers from collecting and disbursing public funds to support it. They alleged that the system makes the quality of education a function of taxable district wealth, resulting in substantial disparity in taxation and expenditures and in quality and extent of available educational opportunities. They alleged also that the state was therefore in violation of its duty to provide for the ample provision of education,[53] and of its duty to provide a general and uniform system of public schools.[54] The plaintiffs asked the court to declare the financing system void as repugnant to the equal protection clauses of the state constitution,[55] and the Fourteenth Amendment to the United States Constitution.

On 16 December 1974, the Supreme Court of Washington upheld the state's educational finance statutory structure. The decision was a bitter 6 - 3 split. Five separate opinions were filed. Three judges concurred in the Opinion without reservation, three concurred in the result, and

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[53]Washington Constitution, Article 9, section 1.

[54]ibid., Article 9, section 2.

[55]Article 1, section 12.

three dissented.

The court found that a

> . . . general and uniform system . . . is . . . one in which every child in the state has free access to certain minimum and reasonably standardized educational facilities.[56]

The Opinion held that

> . . . assessed valuation per pupil not only had little to do with the quality of education in the ennumerated districts, but that no decision as to the equal protection of the laws nor the paramount duty to provide uniform education can be based upon it. The significance of assessed valuation per pupil is thus inconstant, tenuous, superficial and coincidental only.[57]

Three justices joined in an at least equally strongly worded dissent which characterized the plurality opinion as a "legal pygmy of doubtful origin . . . (that) may be short lived," and done in a "cavalier manner."[58] They accused the majority of ignoring facts which, in their opinion, did show a direct relationship between assessed valuation per pupil and expenditures per pupil, but the dissent did avoid claiming a direct relationship between expenditures and quality of education.[59]

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[56] Northshore School District No. 417 v. Kinnear, 530 P.2d 148 (1974), at 202.

[57] ibid., at 191.

[58] ibid., at 204.

[59] ibid., at 204-224. cf. at 220 re quality of education.

Wisconsin

Buse v. Smith, 247 N.W.2d 141 (1976).

The plaintiffs in this case were certain school districts, residents, taxpayers, school board members, and parents of school children who brought action for declaratory judgment that the negative-aid provisions of the school district financing system, by which certain school districts would be required to pay a portion of their property tax revenues into a general state fund for redistribution to other school districts, were unconstitutional. The Wisconsin legislature had enacted this system in an attempt to remove property wealth as a factor in determining the amount of educational expenditures per pupil.

On 30 November 1976, the Wisconsin Supreme Court struck down the negative aid provisions of the school finance law. They found that the negative aid provisions did not violate due process or equal protection rights of taxpayers in negative-aid districts,[60] but concluded that under Article VIII, section 1 of the Wisconsin Constitution,

> . . . the state cannot compel one school district to levy and collect a tax for the direct benefit of other school districts, or for the sole benefit of the state.[61]

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[60] Buse v. Smith, 247 N.W.2d 141 (1976), at 155.

[61] ibid.

The three dissenting justices held that the purpose of school districts is not merely to educate their own children, but to share in the state system costs.[62]

Wyoming

Sweetwater County Planning Committee v. Hinkle, 491 P.2d 1234 (1971), juris. rel. 493 P.2d 1050 (1972).

The appellants (at the district court level) were a group of school administrators, citizens, and taxpayers who sought relief from a plan of organizing school districts by the Sweetwater County Planning Commission for the Organization of School Districts. The goal of the Commission was to join an affluent school district with a poorer district so as to provide equivalent educational opportunities for all students concerned.

The district court found for the appellants, basing the decision primarily upon the practicable near impossibility of a satisfactory working agreement between the districts involved.[63] The case was remanded to a state committee with instructions to reject the plan of organization which the county planning committee had proposed. The county committee was permitted to intervene in the

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[62] ibid., at 156-168.

[63] Explained by the Supreme Court of Wyoming in its introduction to 491 P.2d 1234. See also at 1235.

procedure, and appealed the matter to the Wyoming Supreme Court. That court held on 14 December 1971 that the proposed plan was not a satisfactory solution to the problem, and directed the matter, with suggestions, to the state legislature.

The court was in favor of a state-wide, uniform tax, stating that Article 1, section 28 of the Wyoming Constitution provides that all taxation shall be equal and uniform.

> We see no manner in which ad valorem taxes for school purposes can be made equal and uniform unless it is done on a state-wide basis. In other words, all property owners within the state should be required to pay the same total mill levy for school purposes.[64]

But the court recognized that the Wyoming Constitution makes the operation of such an idea impracticable without explicit legislation.

> Art. 15, sec. 17, Wyoming Constitution, provides there shall be levied each year in each county a tax of 12 mills on the dollar for the support and maintenance of public schools. This tax is collected by the county treasurer and disbursed among the school districts "within the county." In as much as this levy is mandatory and a constitutional requirement, it will necessarily continue.
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> Art. 15, sec. 15, Wyoming Constitution, authorizes a state tax not exceeding six mills on the dollar to be levied each year for support of public schools in the state. There is no need for any change in what is

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[64] Sweetwater County Planning Committee v. Hinkle, 491 P.2d 1234 (1971), at 1237.

> being done with respect to the levy of this tax and the distribution of funds derived from such levy.[65]

What the court wanted, was an additional state tax, the proceeds of which would be distributed by the state treasurer by a formula which would provide each district with the same

> . . . share per classroom unit, when its allotment from the countywide 12-mill school levy and its additional allotment from the state treasurer are added together.[66]

The court also recognized that the joining of districts caused the possibility (and an actual case was cited) of a situation where residents of one district would have to assume responsibility for the bonded indebtedness of another. The original appellants claimed this to be a violation of Article 16, section 4, of the Wyoming Constitution, which specifies:

> No debt in excess of the taxes for the current year shall, in any manner, be created by any county or sub-division thereof . . . unless the proposition to create such debt shall have been submitted to a vote of the people thereof and by them approved.

The court retained jurisdiction in the matter until after the state legislature adjourned in 1973. The court expected the legislature "to equalize ad valorem taxes for

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[65] ibid., at 1237.

[66] ibid., at 1238.

school purposes on a statewide basis, . . ."[67]

On 15 February 1972, the Wyoming Supreme Court relinquished that jurisdiction which it had retained.[68] It found that:

> The varying petitions and requests presented to the court since our original opinion make it clear the court is being called upon to perform a function which does not properly belong to our court, i.e., that of completing the reorganization of school districts in Sweetwater County. Such petitions and requests have also made it clear that our retaining of jurisdiction is hampering and interfering with the proper performance of duties by duly constituted school administration officials.[69]

The court further declared that:

> The state committee therefore has jurisdiction and the right to reorganize any of the Sweetwater County territories into a unified school district or districts. We cannot anticipate what problems may or may not arise if and when this is done.[70]

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[67] ibid., at 1239.

[68] Sweetwater County Planning Committee v. Hinkle, 493 P.2d 1050.

[69] ibid., at 1051.

[70] ibid., at 1052.

TABLE I

SUMMARY OF SELECTED COURT DECISIONS
ON PROPERTY TAX FUNDING OF PUBLIC EDUCATION

Year of Final Decision	State of Origin	Name	Highest Judicial Level Attained: Circuit & Other Courts	State Supreme Court	U. S. District Court	U. S. Supreme Court	Local Property Tax Method Sustained
1969	IL	McInnis				x	yes
1970	VA	Burruss				x	yes
1971	FL	Hargrave				x	yes
	MN	Van Dusartz			x		no
1972	CA	Serrano		x			no
	WY	Sweetwater		x			no
	NY	Spano	x				yes
1973	AZ	Hollins		x			yes
	IN	Jenson	x				yes
	MI	Milliken		x			yes
	TX	Rodriguez				x	yes
1974	MT	Woodahl		x			yes
	WA	Northshore		x			yes
1975	ID	Thompson		x			yes
	NJ	Robinson		x			no
1976	IL	Jones	x				yes
	OR	Olsen		x			yes
	WI	Buse		x			yes
1977	CT	Horton		x			no

Source: Federal Court Reporter System

CHAPTER V

SUMMARY AND CONCLUSION

Summary

All states use the tax on real property to some degree in the financing of public elementary and secondary education. The problem of this usage stems largely from the local control of the collection and disbursement of the monies by the individual school districts. This method is claimed by some to create inequities whereby the quality of available educational opportunity rests on the wealth of the school district in which the student resides. Reformers have sought relief from these alleged inequities in both the United States Constitution's Fourteenth Amendment, and also in the equal protection provisions of the various state constitutions.

The data for this study are contained primarily in significant court cases from 1968 to the present. Additional data have been collected through a review of the literature, which intensified in quantity primarily during the interim between Serrano v. Priest in 1971 and Rodriguez v. San Antonio Independent School District in 1973.

An analysis shows that the Fourteenth Amendment to the United States Constitution is no longer a viable claim in a solution to the wealth versus equal educational opportunity

problem, and that available redress must be sought in the various state courts. At the present time there appears to be a decline in interest in legal prosecution, due, perhaps, to the financial problem of developing a viable alternative to taxing property and the distribution of the proceeds by the collecting districts.

The Courts have avoided dictating alternatives to this historic method of funding. The courts have also disagreed with one another directly on specific interpretations, and disagreed on the finer points of legal distinctions among the state constitutions, thus complicating the value of legal precedents.

This study presents a chronological overview of landmark decisions, with supportive cases, thus providing a cohesive, chronological treatise of the legal aspects of funding public education through the property tax. It shows what approaches have been tried, and seeks to direct future action into a middle course.

In the preparation of such a study as this, one of so controversial a nature, it is impossible to convey the real atmosphere of the subject without the occasional reflection of the passions involved. To filter out completely the emotional reactions to the problem would rather do a disservice to the reader by creating a false impression of

a problem which is apparently beyond a sterile, clinical approach to solution. The writer therefore bespeaks the tolerance of the readers, on the grounds that the presentation necessitates an element of realism, recognizing the strong disparity of opinion which exists.

Conclusions

With the existing conflicts in the positions courts have taken, it is difficult to arrive at definite conclusions in the concepts framing this study. However, the courts have established certain factors which may be identified as conclusive. These are offered in the nature of guidelines to those who must live with this problem and continue to effect a solution.

1 - Education is not a fundamental right within the explicit or implicit provisions of the United States Constitution.

2 - The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution has not yet been a ground upon which to base successful claims of rights to equal educational opportunity.

3 - Education may be established as a fundamental right within a given state provided that the individual state constitution affords either explicit or implicit provisions to that effect.

4 - It is extremely difficult to analyze state school funding equalization decisions, or legislative actions, and predict with any accuracy how another state court will rule in a seemingly similar situation, primarily because state courts have established no pattern of acceptance of precedents.

5 - Alternatives to property tax funding are not universally popular. There appears to be a reluctance to change on the part of the general public.

6 - It has been virtually impossible to obtain acceptable definitions of such important concepts as "equal educational opportunity" and "thorough and efficient" education in spite of the paramount need by the courts for the standardization of such fundamentals.

7 - The attempt to relate the wealth of a district to the quality of educational opportunity will continue to be a major factor in the struggle for the reform of funding public education.

8 - The courts will continue to exert a strong influence in the areas of public school funding and in the reformation of such programs.

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