

SCHOOL FINANCE REFORM: *ROBINSON V. CAHILL*

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America has traditionally emphasized local responsibility for the financing and administration of its public school systems.¹ Financing public schools through property taxes at the local level, however, creates serious inequality among districts in the educational resources they are able to raise and distribute.² State school financing systems have thus come under strong attack in the past decade, either because they fail to provide an adequate level of educational resources to all districts or because they make the quality of a child's education a function of the property wealth of his school district.³ Several school

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1. *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 126 (1973) (Marshall, J., dissenting); see R. JOHNS & E. MORPHET, *THE ECONOMICS & FINANCING OF EDUCATION* 200, 277 (3d ed. 1975); Andersen, *School Finance in Washington—The Northshore Litigation and Beyond*, 50 WASH. L. REV. 853, 896-97 (1975).

2. See J. BERKE, A. CAMPBELL & R. GOETTEL, *FINANCING EQUAL EDUCATIONAL OPPORTUNITY* 5-16 (1972) [hereinafter cited as BERKE]. In New Jersey, property tax resources vary from \$1 million per pupil in the wealthiest district to \$5,000 in the poorest. The range is \$100,000 to \$30,000 when the 60 wealthiest and 60 poorest districts are eliminated. Report of the Joint Education Committee to the New Jersey Legislature 19 (1974). See Berke & Sinkin, *Developing a "Thorough and Efficient" School Finance System: Alternatives for Implementing Robinson v. Cahill*, 3 J.L. & EDUC. 337, 343 Table I (1974) (expenditure levels vary in New Jersey from a high of \$1647 per pupil to a low of \$717 per pupil); Silard & Goldstein, *Toward Abolition of Local Funding in Public Education*, 3 J.L. & EDUC. 307, 311 & n.22 (1974); Tractenberg, *Robinson v. Cahill: The Thorough and Efficient Clause*, 38 LAW & CONTEMP. PROB. 312, 315 n.29 (1974).

3. See, e.g., J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970); R. REISCHAUER & R. HARTMAN, *REFORMING SCHOOL FINANCE* (1973); S. SACKS, *CITY SCHOOLS/SUBURBAN SCHOOLS* (1972); A. WISE, *RICH SCHOOLS POOR SCHOOLS* (1968); Ruvoildt, *Educational Financing in New Jersey: Robinson v. Cahill and Beyond*, 5 SETON HALL L. REV. 1 (1973); Tractenberg, *Reforming School Finance Through State Constitutions: Robinson v. Cahill Points the Way*, 27 RUTGERS L. REV. 365, 370-71 (1973). This Note will not consider whether school financing should in fact be reformed. It has been argued that "equalizing" money could be better spent in other areas like housing and employment. That argument is based on the premise that equalizing educational finances is an inefficient means of helping the powerless poor. Carrington, *Financing The American Dream: Equality and School Taxes*, 73 COLUM. L. REV. 1227, 1250 (1973).

finance systems have been challenged in the courts.⁴ Other methods of school finance have been proposed to meet such challenges and to achieve equality of educational resources.⁵ State legislatures, however, have been reluctant to adopt such proposals without modifications substantially reducing their equalizing effect.⁶

Both the New Jersey and California courts have been deeply involved in the school finance controversy for several years.⁷ In Sep-

4. See, e.g., *Serrano v. Priest* (Serrano I), 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); *Horton v. Meskill*, 31 Conn. Supp. 377, 332 A.2d 113 (Super. Ct. 1974); *Caldwell v. Kansas*, No. 59616 (D. Kan. Aug. 30, 1973); *Robinson v. Cahill* (Robinson I), 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973); *Sweetwater County Planning Comm. v. Hinkle*, 491 P.2d 1234 (Wyo. 1971).

5. See, e.g., COONS, CLUNE & SUGARMAN, *supra* note 3, at 201-42 (district power equalizing; discussed *infra* at notes 153-59); NEW YORK STATE COMM'N ON THE QUALITY, COST AND FINANCING OF ELEMENTARY AND SECONDARY EDUC., 1 THE FLEISHMANN REPORT 60-87 (1973) (full state funding; discussed *infra* at notes 173-88) [hereinafter cited as FLEISHMANN REPORT].

Family power equalizing (FPE) is a third alternative. See Coons & Sugarman, *Family Choice in Education: A Model State System for Vouchers*, 59 CALIF. L. REV. 321 (1971). FPE is an application of district power equalizing principles to educational vouchers. Under the FPE proposal each family would be given a voucher based on the rate at which the family chose to tax itself for education. The family could spend the voucher at any school within the price range of its voucher. *Id.* at 334-335. The voucher system promises maximum accountability and flexibility in the style and content of education but may present problems of integration and state support for religious institutions. *Id.* at 338-40.

Federal aid has also been suggested through an historical analysis of school financing. Initially, the superiority of city schools led to state aid for rural systems. As suburban school systems developed, the rural policies were extended to the suburbs. The city school systems appeared deceptively stable during the period of suburban growth but in fact were in a state of transition as poor minority children replaced the children of ethnic groups who were transferring to parochial schools. Sacks argues that aid to rural and suburban school systems should not be reduced to aid the inner cities. A pinpoint federal program would provide aid to inner cities without affecting the present suburban-oriented state programs. SACKS, *supra* note 3.

6. See Grubb, *The First Round of Legislative Reforms in the Post-Serrano World*, 38 LAW & CONTEMP. PROB. 459 (1974).

7. The New Jersey school finance litigation began with *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (L. Div. 1972), in which the trial court held the state school finance system to be unconstitutional and ordered that a nondiscriminatory school finance system be enacted by January 1, 1973. The trial court refused to stay its order, 119 N.J. Super. 40, 289 A.2d 569 (L. Div. 1972). The New Jersey Supreme Court affirmed the trial court's holding in *Robinson v. Cahill* (Robinson I), 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973). Subsequent litigation has involved implementation of *Robinson I*. In *Robinson II* the supreme court set December 31, 1974 as the deadline for legislative action and retained jurisdiction for the 1975-76 school year. 63 N.J. 196, 306 A.2d 65 (1973). The court later extended the deadline in *Robinson III*, 67 N.J. 35, 335 A.2d 6 (1975), to the 1976-1977 school year. In *Robinson IV* the court ordered the distribution of minimum support and save-harmless aid according to the equalization scheme for the 1976-1977 school year. 69 N.J. 133, 351 A.2d 713 (1975). *Robinson V* held the 1975 Act constitutional if fully funded. 69 N.J. 449, 355 A.2d 129

tember, 1975, the New Jersey Legislature enacted a new school finance program⁸ which was approved by the New Jersey Supreme Court,⁹ though it does not appear to achieve the equality hoped for by many advocates of reform. California's school finance system is similar to that approved by the New Jersey court, but in December, 1976, the California Supreme Court held that state's finance system unconstitutional.¹⁰ This Note will focus on the New Jersey litigation, which may foreshadow some of the problems and pitfalls to be faced by California courts and legislators in implementing a new school finance system.

I. SCHOOL FINANCE UNDER ATTACK

States traditionally have financed their public school systems through foundation programs and flat grants.¹¹ Under a foundation program, the state establishes a minimum grant per pupil and a minimum tax rate at which districts must tax to obtain the foundation aid.¹² Flat grants are a variation of foundation plans.¹³ The state pro-

(1976). The state legislature had not enacted legislation to fund the 1975 Act by the spring of 1976. In an attempt to implement the principles of *Robinson I*, the court in *Robinson VI* enjoined the state from spending funds on the public schools unless the 1975 Act was fully funded. 70 N.J. 155, 358 A.2d 457 (1976). The injunction in effect closed the public school system in the state and prompted the state legislature to enact New Jersey's first state income tax to fund the 1975 Act. New Jersey Gross Income Tax Act, ch. 47, 1976 N.J. Sess. Law Serv. 103 (West) (to be codified as N.J. STAT. ANN. §§ 54A: 1-1 to 9-27). The court dissolved the injunction in view of this legislation in *Robinson VII*. 70 N.J. 464, 360 A.2d 400 (1976).

The California school finance system was challenged in *Serrano v. Priest* (*Serrano I*), 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). The supreme court remanded the case for trial. The trial court held the state school finance system unconstitutional, *Serrano v. Priest*, No. 938,254 (Cal. Super. Ct. Apr. 10, 1974). The supreme court affirmed in *Serrano v. Priest* (*Serrano II*), — Cal. 3d —, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

The Connecticut Supreme Court recently declared that state's school finance system to be unconstitutional. The court did not suggest what type of finance system might withstand constitutional attack and decided not to interfere with legislative attempts to develop an equitable system. The court's hands-off approach may be an attempt to avoid the judicial-legislative conflicts of the *Robinson* litigation. See Fellows, *Connecticut High Court Invalidates Property Tax For School Financing*, N.Y. Times, Apr. 19, 1977, at 1, col. 1.

8. N.J. REV. STAT. § 18A: 7A-1 to 7A-33 (West. Supp. 1976).

9. *Robinson v. Cahill* (*Robinson V*), 69 N.J. 449, 355 A.2d 129 (1976).

10. *Serrano v. Priest* (*Serrano II*), — Cal. 3d —, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

11. Barro, *Alternative Post-Serrano Systems and Their Expenditure Implications*, in *SCHOOL FINANCE IN TRANSITION* 36-42 (J. Pincus ed. 1974).

12. *Id.* at 36; see COONS, CLUNE & SUGARMAN, *supra* note 3, at 64.

13. Barro, *supra* note 11, at 36.

vides a fixed grant without requiring a minimum tax rate.¹⁴ Foundation programs and flat grants provide some equalizing of educational resources since property-poor districts may contribute less to the state education fund than they receive as a flat grant or under the foundation plan.¹⁵ The equalizing effect of foundation plans, however, is minimized by providing aid to all districts regardless of wealth,¹⁶ by allowing property-wealthy districts to augment their foundation aid,¹⁷ and by providing state aid at a level that is significantly lower than that of the local districts.¹⁸ The California school finance system is an example of a flat grant-foundation aid system.¹⁹

Foundation programs are designed to achieve some equalization of educational resources while leaving local districts free to determine tax rates and spending levels.²⁰ Despite the equalizing effects of foundation programs, district resource disparities persist as a result of the unequal distribution of taxable wealth rather than the tax rates selected.²¹

A. *Federal Court Involvement in the School Finance Controversy*

The attack on school finance systems began with *McInnis v. Shapiro*.²² Plaintiffs challenged the Illinois foundation plan²³ arguing that

14. *Id.* at 36-37.

15. JOHNS & MORPHET, *supra* note 1, at 268; Note, *Public Schools: Serrano v. Priest—A Challenge to Kentucky*, 60 Ky. L.J. 156, 164 (1971).

16. JOHNS & MORPHET, *supra* note 1, at 268.

17. *Id.* at 253; Barro, *supra* note 11, at 37.

18. Barro, *supra* note 11, at 37.

19. CAL. EDUC. CODE §§ 17300-18480 (Deering Supp. 1976). See *Serrano v. Priest* (Serrano I), 5 Cal. 3d 584, 591-95, 487 P.2d 1241, 1245-48, 96 Cal. Rptr. 601, 605-08 (1971). See also Shanks, *Educational Financing and Equal Protection: Will the California Supreme Court's Breakthrough Become the Law of the Land?*, 1 J.L. & EDUC. 73, 73-75 (1972). California provides \$125 per unit of average daily attendance as basic aid. See CAL. EDUC. CODE §§ 17601.1, 17616 (Deering Supp. 1976). A district's foundation aid is determined by adding the basic aid and the estimated revenue a district could generate by taxing at a set rate of assessed valuation. See *id.* § 17702. The state then provides the difference between that sum and the statutory foundation level. See *id.* §§ 17655, 17656. Wealthy school districts are able to generate substantially more than the foundation level by taxing at or below the set rate, but there is no provision for the recapture of funds above the foundation level.

20. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 48-49 (1973).

21. *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (L. Div. 1972), *aff'd*, 62 N.J. 473, 303 A.2d 273 (Robinson I), *cert. denied*, 414 U.S. 976 (1973). See BERKE, *supra* note 2, at 6-7, Table II, 10.

22. 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969).

23. *Id.* at 330.

“only a financing system which apportions public funds according to the educational needs of the students satisfies the Fourteenth Amendment.”²⁴ The district court, however, found the case nonjusticiable for lack of a manageable standard.²⁵ The court refused to involve itself in a determination of equal educational opportunity, finding educational need to be a “nebulous concept”²⁶ more appropriately left to the legislature.²⁷

To avoid the *McInnis* “educational needs” problem,²⁸ other challenges to school financing plans have been based on the principle of fiscal neutrality: “the quality of public education may not be a function of wealth other than the wealth of the state as a whole.”²⁹ In *San Antonio Independent School District v. Rodriguez*,³⁰ plaintiffs argued that the Texas school finance system resulted in a child’s education being a function of the wealth of the school district in which the child lived and thus violated the equal protection clause of the fourteenth

24. *Id.* at 331 (emphasis in original).

25. *Id.* at 335-36.

26. 293 F. Supp. at 335. One of the major issues of school finance reform is to give content to the phrase “equal educational opportunity.” Equal educational output as determined by scores on standardized tests has been suggested as an appropriate standard, see R. JOHNS, K. ALEXANDER, & F. JORDON, *FINANCING EDUCATION* 436-38 (1972), but the output standard raises the problem of establishing a positive correlation between money spent and the education purchased, see note 61 *infra*. Equality of input has also been suggested, see *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 84 (1973) (Marshall, J., dissenting). But see *Thompson v. Engelking*, 96 Idaho 793, 799-800, 537 P.2d 635, 641-42 (1975). See generally Note, *Equal Educational Opportunity: A Case for the Children*, 46 ST. JOHN’S L. REV. 280, 296-97 (1971) (discussing nine possible definitions for “equal opportunity”). For a discussion of “equal educational opportunity” in the school desegregation context see Feiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965).

The relationship between educational resources and educational quality was the only issue for trial on remand in *Serrano I*. See Karst, *Serrano v. Priest’s Inputs and Outputs*, 38 LAW & CONTEMP. PROB. 333 (1974). The trial court held that such a correlation did exist, and based its decision on an input standard. *Id.* at 343. The court relied on the testimony of school officials, primarily from property-wealthy districts, who claimed that their programs would be harmed if funds were reduced. Defendants thus admitted the cost-quality correlation plaintiffs were to have proven. *Serrano v. Priest*, No. 938, 254 at 89 (Cal. Super. Ct. Apr. 10, 1974).

27. 293 F. Supp. at 332. *McInnis* was relied on in *Burruss v. Wilkerson*, 310 F. Supp. 572, 574 (W.D. Va. 1969), *aff’d mem.*, 397 U.S. 44 (1970), to dismiss a challenge to the Virginia school finance system.

28. Tractenberg, *supra* note 3, at 369.

29. COONS, CLUNE & SUGARMAN, *supra* note 3, at 2. See Andersen, *supra* note 1, at 862 (the principle of fiscal neutrality requires that educational resources be distributed fairly but not necessarily equally; it prohibits distributing educational resources on the basis of taxable wealth but does not require any specific spending level).

30. 411 U.S. 1 (1973).

amendment.³¹ A three-judge court agreed,³² but the United States Supreme Court reversed.³³ The Court admitted that education was of "grave significance," but refused to find education to be a fundamental right guaranteed under the federal equal protection clause.³⁴ The Court further found no suspect classification based on wealth since plaintiffs had failed to demonstrate that the Texas school finance system worked to the disadvantage of an identifiable indigent class.³⁵ The Court applied the rational relationship test³⁶ and upheld the Texas plan, finding the plan to be a reasonable attempt to further the legitimate state interest of maintaining local control over school financing.³⁷

The opinion recognized that had education been explicitly guaranteed by the federal constitution and thus a fundamental right, the Texas plan could not have withstood the strict scrutiny test which would necessarily have been applied.³⁸ Nearly every state constitution

31. *Id.*

32. 337 F. Supp. 280 (N.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973).

33. 411 U.S. at 1.

34. *Id.* at 30. Plaintiffs in *Rodriguez* argued that education was a fundamental right because of its close relationship ("nexus") to other guaranteed rights, specifically the right to vote and freedom of speech. *Id.* at 35. The Court recognized such a nexus but found that it was not the function of the courts "to guarantee to the citizenry the most effective speech or the most informed electoral choice." *Id.* at 36 (emphasis in original). The Court left open the possibility that the Texas school finance system might infringe a fundamental right if it "occasioned an absolute denial of educational opportunities to any of its children." *Id.* at 37. The Court emphasized that rather than depriving Texas children of a fundamental right, the Texas system was an affirmative attempt to extend a quality education to all Texas students. *Id.* at 38-39.

35. *Id.* at 23. Plaintiffs' difficulty was defining their class to fit the Court's analysis of suspect classifications based on wealth. The Court found that defining the class as those relatively poorer than others or those who happen to live in poor districts would not meet its test for suspectness: the class must be completely unable to pay for some desired benefit and as a result suffer an absolute deprivation of a meaningful opportunity to enjoy that benefit. The Court then rejected the possibility that the finance system discriminated against poor people. *Id.* at 18-26. Compare *Serrano v. Priest* (*Serrano I*), 5 Cal. 3d 584, 601, 487 P.2d 1241, 1252, 96 Cal. Rptr. 601, 612 (1971) (decided before *Rodriguez*) (plaintiffs defined their class as those living in all but the wealthiest districts and the court found discrimination based on district wealth), with *Northshore School Dist. No. 417 v. Kinnear*, 84 Wash. 2d 685, 530 P.2d 178 (1974) (no correlation between district wealth and individual wealth could be established but plaintiffs did establish that a significant number of poor people do live in poor districts). See generally Andersen, *supra* note 1, at 884-85.

36. For a discussion of the strict scrutiny and rational relationship tests used by the Supreme Court in analyzing equal protection problems, see Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). See also *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

37. 411 U.S. at 55.

38. *Id.* at 16-17.

does explicitly require provision for education.³⁹ Consequently a basis is provided for state courts to hold education to be a fundamental right within the *Rodriguez* analysis. Challenges to school financing plans, though effectively closed to federal courts by *Rodriguez*,⁴⁰ can be raised under the education clause or the equal protection clause of state constitutions.⁴¹

B. State Court Challenges to School Finance Plans

*Serrano v. Priest (Serrano I)*⁴² was decided by the California Supreme Court before *Rodriguez*. Plaintiffs challenged the California school finance system arguing that they were denied equal protection under both the federal and state constitutions because the quality of their education was a function of the wealth of the school district in which they lived rather than the wealth of the state as a whole.⁴³ The trial court dismissed for failure to state a claim upon which relief could be granted.⁴⁴ On appeal, the Supreme Court of California remanded for trial,⁴⁵ finding that under plaintiffs' allegations, the California system denied their fundamental right to an education⁴⁶ and discriminated on

39. All state constitutions except South Carolina have an education clause. See generally Moore, *In Aid of Public Education: An Analysis of the Education Article of the Virginia Constitution of 1971*, 5 U. RICH. L. REV. 263, 271 n.40 (1971); Ruvoldt, *supra* note 3, at 15-16 n.90; Tractenberg, *supra* note 3, at 408 n.224.

40. But see Tractenberg, *supra* note 3, at 367-77 (arguing that future challenges in federal court can overcome the suspect classification problem of *Rodriguez* by demonstrating that: "(1) present inequities are not the result of happenstance, as the majority suggested, but of a history of deliberate economic segregation or other purposeful discrimination; (2) poor districts are politically impotent; (3) there is a stigma attached to living in education-poor, property-poor districts; and (4) geographical mobility is not a reality for many residents in those districts.").

41. See, e.g., *Horton v. Meskill*, 31 Conn. Supp. 377, 332 A.2d 113 (Super. Ct. 1974). Compare *Milliken v. Green*, 390 Mich. 389, 212 N.W.2d 711 (1973) (court relied on the *Rodriguez* interpretation of the Federal Constitution despite the MICH. CONST. art. 8, § 2, requiring that the state "maintain and support" the Michigan public school system), with *Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973) (ARIZ. CONST. art. XI, § 1 and art. XI, § 6 establish education as a fundamental right under the Arizona equal protection clause, but the school finance system is not unconstitutional if "rational, reasonable and neither discriminatory nor capricious." *Id.* at 90-91, 515 F.2d at 592.).

42. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

43. *Id.* at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

44. *Id.* at 591, 487 P.2d at 1245, 96 Cal. Rptr. at 605.

45. *Id.* at 619, 487 P.2d at 1266, 96 Cal. Rptr. at 626.

46. *Id.* at 608-10, 487 P.2d at 1258-59, 96 Cal. Rptr. at 618-19. The court based its holding on the belief that "education is a major determinant of an individual's chances for economic and social success in our competitive society [and] education is a unique influence on a child's development as a citizen and his participation in political and community life." *Id.* at 605, 487 P.2d at 1255-56, 96 Cal. Rptr. at 615-16.

the basis of wealth, a suspect classification.⁴⁷

The California Supreme Court reaffirmed its position in *Serrano II*.⁴⁸ Significantly, contrary to the suggestion of *Rodriguez*, the court in *Serrano II* found it unnecessary to establish the fundamentality of education by any explicit constitutional guarantee.⁴⁹ The supreme

47. *Id.* at 598-604, 487 P.2d at 1250-55, 96 Cal. Rptr. at 610-15. Plaintiffs' class consisted of all children attending public schools in California except those children in the school district affording the greatest educational opportunities. *Id.* at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

The *Serrano I* court implied that district wealth should be considered a suspect classification: "More basically, . . . we reject defendants underlying thesis that classification by wealth is constitutional so long as the wealth is that of the district, not the individual. We think that discrimination on the basis of district wealth is equally invalid." *Id.* at 601, 487 P.2d at 1252, 96 Cal. Rptr. at 612. *But see* Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and its Progeny*, 120 U. PA. L. REV. 504, 527-34 (1972) (basing the wealth classification on a district's tax base raises the problem of "voluntary" poverty since local governments can choose to exclude industrial or commercial development). *See also* Coons *Introduction: Fiscal Neutrality After Rodriguez*, 38 LAW & CONTEMP. PROB. 299, 303 (1974) (arguing for establishing a class of education-poor: those who are unable to purchase private alternatives to the public school system).

48. *Serrano v. Priest* (*Serrano II*), — Cal. 3d —, —, 557 P.2d 929, 951, 135 Cal. Rptr. 345, 367 (1976). The *Serrano I* holding based on the federal equal protection clause was overruled by *Rodriguez*. *Id.* at —, 557 P.2d at 945, 135 Cal. Rptr. at 361. Other courts have interpreted their state equal protection clauses in accordance with the *Rodriguez* interpretation of the federal clause. *See* Thompson v. Engelking, 96 Idaho 793, 800, 537 P.2d 635, 642 (1975); Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 725, 530 P.2d 178, 200 (1974) (*Rodriguez* controlling on interpretation of state constitution); Robinson v. Cahill (Robinson I), 62 N.J. 473, 492-99, 303 A.2d 273, 283-86, *cert. denied*, 414 U.S. 976 (1973) (*Rodriguez* controlling on interpretation of state equal protection clause). *But see* Horton v. Meskill, 31 Conn. Supp. 377, 332 A.2d 113 (Super. Ct. 1974) (*Rodriguez* is controlling on the interpretation of the federal equal protection clause and would be controlling on interpretation of the state equal protection clause if not for an education clause in the state constitution).

49. — Cal. 3d at —, 557 P.2d at 949-50, 135 Cal. Rptr. at 365-66. *See* Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973) (ARIZ. CONST. art. XI, § 1 and art. XI, § 6 requires the legislature to provide a general and uniform system of free schools and establish education as a fundamental right under the state equal protection clause but the school finance system is no different than other governmental services and is not unconstitutional if rational and non-discriminatory); Thompson v. Engelking, 96 Idaho 793, 804-05, 537 P.2d 635, 646-47 (1975) (despite art. 9, § 1 of the Idaho Constitution, which requires the state to "establish and maintain a general, uniform and thorough system of public, free common schools," the Supreme Court of Idaho refused to find that education was a fundamental right); Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 720, 530 P.2d 178, 198 (the State's obligation to provide for the education of all students under WASH. CONST. Art. 9 "is the same as any other major duty or function of state government" and does not create a fundamental right under the Washington privileges and immunities clause). *But see* Horton v. Meskill, 31 Conn. Supp. 377, 332 A.2d 113 (Super. Ct. 1974) (the education clause of the Connecticut Constitution establishes a fundamental right under the Connecticut equal protection clause).

court held that education is a fundamental interest covered by the state's equal protection clause and school financing based on district wealth discriminates against a suspect class.⁵⁰ The court thus applied the strict scrutiny test and determined that the state had not established that the California school finance system served a compelling state interest.⁵¹ The court found the state's asserted interest in local control to be "chimerical."⁵²

*Robinson v. Cahill*⁵³ was decided by the New Jersey Supreme Court shortly after *Rodriguez*. The New Jersey Constitution states that "the legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools."⁵⁴ In *Robinson*, plaintiffs⁵⁵ challenged the New Jersey school finance system under the state equal protection clause,⁵⁶ arguing that the "thorough and efficient" clause made education a fundamental interest,⁵⁷ and directly under the education clause,⁵⁸ arguing that the guarantee of a thorough and efficient education was not being met in property-poor districts.⁵⁹ The trial court found the New Jersey system unconstitutional under both the education⁶⁰ and equal protection⁶¹ clauses of the state constitution.

50. — Cal. 3d at —, 557 P.2d at 951, 135 Cal. Rptr. at 367.

51. *Id.* at —, 557 P.2d at 952, 135 Cal. Rptr. at 368.

52. *Id.* at —, 557 P.2d at 953, 135 Cal. Rptr. at 369.

53. 62 N.J. 473, 303 A.2d 273 (Robinson I), *cert. denied*, 414 U.S. 976 (1973).

54. N.J. CONST. art. 8, § 4, ¶ 1.

55. Plaintiffs represented public school students deprived of an equal educational opportunity, property owners bearing an unequal tax burden, and all public officials charged with providing an equal educational opportunity but unable to do so because of the New Jersey finance system. Tractenberg, *supra* note 3, at 385; *see* Ruvoldt, *supra* note 3, at 5-6.

56. N.J. CONST. art. I, ¶ 1.

57. 62 N.J. at 496, 303 A.2d at 285.

58. *See* text at note 54 *supra*; Tractenberg, *supra* note 3, at 386.

59. 62 N.J. at 501, 303 A.2d at 287-88. Plaintiffs also challenged the New Jersey school finance system under a property taxation provision of the New Jersey Constitution: "Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts should be assessed according to the same standard of value. . . ." N.J. CONST. art. VIII, § 1, ¶ 1. The New Jersey Supreme Court rejected the taxation challenge by holding that the clause does not prohibit delegating state functions to local governments, but only requires that if the state provides a service and funds it through the property tax, the tax must be uniform. 62 N.J. at 502-03, 303 A.2d at 288. *See* Tractenberg, *supra* note 3, at 414-15.

60. 118 N.J. Super. 223, 270, 287 A.2d 187, 211 (L. Div. 1972). *aff'd*, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973). The trial court relied on *Landis v. School Dist. No. 44*, 57 N.J.L. 509, 31 A. 1017 (1895), to hold that "thorough and efficient" means just that and not simply adequate or minimal. *But see* *Shofstall v. Hollins*, 110

In a unanimous decision,⁶² the Supreme Court of New Jersey (*Robinson I*) found that plaintiffs had been denied a thorough and efficient education,⁶³ but refused to find a denial of equal protection.⁶⁴

Ariz. 88, 515 P.2d 590 (1973) (Arizona school finance system does not violate education clause); Thomson v. Engelking, 96 Idaho 793, 805, 537 P.2d 635, 647 (1975) (the state education clause "does not guarantee to the children of this state a right to be educated in such a manner that all services and facilities are equal throughout the state." (emphasis in original)); Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974) (Washington state school finance system does not violate education clause).

61. 118 N.J. Super. at 279-90, 287 A.2d at 216. New Jersey does not have an explicit equal protection clause. N.J. CONST. art. I, ¶ 1 provides for "certain natural and unalienable rights" and has been interpreted to provide for equal protection by implication. 118 N.J. Super. at 271, 287 A.2d at 212.

To establish their equal protection claim, plaintiffs in *Robinson* had to prove a positive correlation between the money spent on education and the quality of the education provided. Plaintiffs were able to demonstrate disparities in input based on the quality of teaching personnel: wealthy districts had a lighter percentage of teachers with master's degrees and more special education personnel; and the quality of the physical facilities: buildings, textbooks, equipment, libraries. 118 N.J. Super. at 249-51, 287 A.2d at 200-01. Plaintiffs demonstrated disparities in output based on an analysis of the number of college-bound graduates and students' scores on standard educational performance tests. *Id.* at 255, 287 A.2d at 204. See Ruvoldt, *supra* note 3, at 6-8. *But see* Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974) (finding a .85 correlation between taxable wealth and educational spending but concluding that educational resources are not related to the quality of education provided).

Establishing a cost/quality correlation has been one of the major problems of school finance reform. See J. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY 325 (1966) (concluding that inequalities of the child's home and background are more influential than inequalities in education); C JENCKS, INEQUALITY 8 (1972) (concluding that educational resources do not have an effect on standardized test scores). *But see* J. GUTHRIE, SCHOOLS AND INEQUALITY 60-62 (1971) (criticizing the methodology of the Coleman Report); Billings & Legler, *Factors Affecting Educational Opportunity and Their Implications for School Finance Reform: An Empirical Study*, 4 J.L. & EDUC. 633 (1975) (finding that together educational expenditures and the percentage of non-white students in a school have a significant effect on educational achievement); Richards, *Equal Opportunity and School Finance: Toward a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32, 54 (1973) (suggesting that the Coleman study and other similar studies are based on a very narrow concept of education—verbal skills).

Richards suggests that educational spending should be equalized regardless of its effect on the quality of education because of its symbolic importance and its effect on students' perceptions of the equality of all people. Richards, *supra* at 57. See also Tractenberg, *Robinson v. Cahill: The Thorough and Efficient Clause, supra* note 2, at 332.

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

63. *Id.* at 505-21, 303 A.2d 290-98.

64. *Id.* at 482-501, 303 A.2d at 277-87. The New Jersey court was bound by the *Rodriguez* decision in its interpretation of the fourteenth amendment. *Id.* at 486-89, 303 A.2d at 279-81. As to the New Jersey equal protection clause, the court found neither a suspect classification based on wealth, *id.* at 492-94, 303 A.2d at 283, nor a fundamental right to an education, *id.* at 495, 303 A.2d at 284, despite the fact that the New Jersey

The court was concerned that basing its decision on the equal protection clause might implicate all municipal services. Unequal tax bases also result in some municipalities being able to provide better police and fire protection. If variations in local expenditures for education deny equal protection, then variations in local expenditures for other essential services may also deny equal protection to those living in poor municipalities. The court was unwilling to consider whether "local government as a political institution denies equal protection."⁶⁵ The United States Supreme Court had voiced similar concerns in *Rodriguez*.⁶⁶

The New Jersey Supreme Court's holding that the New Jersey school finance system was unconstitutional under the state's education clause was only the beginning of the *Robinson* litigation. The courts and the state legislature wrestled with the implementation of a new financing system for the next three years. Though founded on a different constitutional principle than *Serrano II*, the difficulties suffered by New Jersey may prove instructive to the courts and legislators of California in their attempts to implement a new financing system harmonious with *Serrano II*.

II. THE NEW JERSEY EXPERIENCE: BEYOND *ROBINSON I*

A. *The Bateman Act*

In *Robinson I*, the New Jersey court placed the responsibility for correcting the fiscal disparities created by the New Jersey school finance system squarely on the state legislature: "Whatever the reason for the violation, the obligation is the State's to rectify it. If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the State must itself meet its continuing obligation."⁶⁷

Prior to 1970 New Jersey financed its school systems through a foundation program under which the state contributed twenty-eight percent of the statewide operating costs.⁶⁸ In 1970 New Jersey enacted

constitution explicitly guarantees a right to an education. The court found other rights were also explicitly guaranteed but not "fundamental." *Id.* at 491, 303 A.2d at 282.

65. *Id.* at 500, 303 A.2d at 287.

66. 411 U.S. at 40.

67. 62 N.J. at 513, 303 A.2d at 294.

68. *Id.* at 516, 303 A.2d at 296. The pre-1970 Act provided for a statewide minimum guarantee of \$100 per pupil and foundation program of \$400 per pupil. Each district was to receive the minimum aid plus the difference between the "local fair share" raised by taxing at 10.5 mills and the \$400 foundation. *Id.* at 516-17, 303 A.2d at 296. See Tractenberg, *supra* note 3, at 387.

the State School Incentive Equalization Aid Law (The Bateman Act)⁶⁹ which provided for minimum support aid to all districts,⁷⁰ equalization aid based on a guaranteed assessed valuation,⁷¹ and categorical aid for special programs.⁷² The Bateman Act did little to improve the original foundation plan.⁷³ It was to have been phased in with full funding for the 1974-75 school year.⁷⁴ Had the Act been fully funded it would have provided equalization aid for only twenty-seven percent of the school districts of New Jersey.⁷⁵

In *Robinson I* the New Jersey Supreme Court explicitly rejected the Bateman Act:

[The Bateman Act] is not demonstrably designed to guarantee that local effort plus the State aid will yield to all the pupils in the State that level of educational opportunity which the [New Jersey Constitution] mandates. We see no basis for a finding that the [Bateman] Act, even if fully funded, would satisfy the constitutional obligation of the State.⁷⁶

Robinson I was decided in April, 1973. In June, 1973, the New Jersey

69. State School Incentive Equalization Aid Law (Bateman Act), ch. 234, [1970] N.J. Laws 823. The Bateman Act was repealed by the Public School Education Act of 1975, § 54, N.J. STAT. ANN. § 18A: 7A-33 (West Supp. 1976). See generally Berke & Sinkin, *supra* note 2, at 346-50; Tractenberg, *supra* note 3, at 385 n.109.

70. State School Incentive Equalization Aid Law (Bateman Act), ch. 234, § 5, [1970] N.J. Laws 823. The Bateman Act classified school districts as nonoperating, basic, limited, intermediate, precomprehensive and comprehensive with minimum support aid varying from \$100 per weighted pupil in nonoperating districts to \$160 per weighted pupil in comprehensive districts. *Id.* § 2. No criteria were specified for classifying districts. All districts would thus have received the basic rate of \$110 per weighted pupil under the Bateman Act.

71. *Id.* § 5. The guaranteed assessed property valuation was \$30,000 per weighted pupil in basic districts. *Id.* § 2.

72. The Bateman Act provided state aid for transportation (75% of transportation costs paid by the state) and increased aid for vocational education from \$100 to \$320 per pupil. *Id.* § 7.

73. *Robinson v. Cahill (Robinson I)*, 62 N.J. 473, 518, 303 A.2d 273, 296, *cert. denied*, 414 U.S. 976 (1973). The Bateman Act would have increased the state's contribution to education from 28% to 40%. *Id.* Equalization aid under the Bateman Act would have benefited only 27% of New Jersey's school districts, those with average assessed property valuation of less than \$38,000 per pupil. More than half of the state aid under the Bateman Act was distributed to all districts as minimum support. Berke & Sinkin, *supra* note 2, at 348.

74. *Robinson v. Cahill (Robinson V)*, 69 N.J. 449, 479-80, 355 A.2d 129, 145 (1976) (Conford, J., concurring and dissenting).

75. *Id.* at 486, 355 A.2d at 148.

76. 62 N.J. at 519, 303 A.2d at 297. *But see* Tractenberg, *supra* note 3, at 441 (*Robinson I* rejection of Bateman Act was focused primarily on its revenue-raising dimension and its failure to give content to the education clause rather than its revenue distribution).

Supreme Court ordered the state legislature to enact a nondiscriminatory finance system to become effective for the 1975-76 school year (*Robinson II*).⁷⁷ That deadline was later extended another year (*Robinson III*).⁷⁸

In *Robinson IV*⁷⁹ the court reluctantly ordered the distribution of nearly \$300 million of minimum support⁸⁰ and save-harmless aid⁸¹ according to the equalization scheme of the previously rejected Bateman Act.⁸² The New Jersey legislature contended that the supreme court did not have the authority to so redistribute state funds. The Legislature argued that the education clause specifies that the state legislature alone has the power to provide for a public school system. The court rejected the argument, asserting that it had taken affirmative steps to redress violations of constitutional rights in other instances.⁸³ The legislature also argued that the New Jersey Constitution specifically prohibits court redistribution of state funds: "No money shall be drawn from the state treasury but for appropriations made by law."⁸⁴ The court responded that a redistribution of state funds already ap-

77. 63 N.J. 196, 198, 306 A.2d 65, 66 (1973).

78. 67 N.J. 35, 335 A.2d 6 (1975).

79. 69 N.J. 133, 351 A.2d 713 (1975).

80. Minimum support is that aid provided to all districts under a foundation program regardless of the district's taxable wealth. *E.g.*, State School Incentive Equalization Aid Law (Bateman Act), ch. 234, § 7, [1970] N.J. Laws 823. Minimum support amounted to \$234 million in New Jersey during the 1974-75 school year. 69 N.J. at 148, 351 A.2d at 720.

81. The save-harmless provision allows wealthy districts to continue spending at their present level though it may well be above the state equalization level. *E.g.*, State School Incentive Equalization Aid Law (Bateman Act), ch. 234, § 15, [1970] N.J. Laws 823. Save-harmless aid amounted to \$7.6 million in New Jersey during the 1974-75 school year. 69 N.J. at 148, 351 A.2d at 720.

82. 69 N.J. at 150, 351 A.2d at 722. The court limited its redistribution to the 1976-77 school year since "the Courts function is to appraise compliance with the Constitution, not to legislate an educational system . . ." *Id.* at 145, 351 A.2d at 719. Redistributing minimum support and save-harmless aid would have resulted in raising the guaranteed assessed property valuation level from \$43,000 to \$67,000 per pupil for the 1976-77 school year. *Id.* at 150, 351 A.2d at 722.

Justice Pashman concurred in the court's decision to redistribute minimum support and save-harmless aid but felt the court should have gone even further. *Id.* at 155-74, 351 A.2d at 724-35. He relied on language in *Robinson I* requiring the state to either compel local districts to raise support funds to provide a thorough and efficient education or provide those funds from state resources. *Id.* at 158, 351 A.2d at 726.

83. *Id.* at 152-55, 351 A.2d at 722-24. An analogy can be drawn to affirmative court intervention in other areas such as school desegregation and reapportionment. *See* Tractenberg, *supra* note 3, at 453-54.

84. N.J. CONST. art. VIII, § II.

propriated by law did not violate the state constitution.⁸⁵ In the event of an actual conflict, the court held that the education clause would control over the appropriation clause, implying that it was not precluded from ordering the state legislature to appropriate sufficient funds to finance the public school system.⁸⁶ As the dissent pointed out, such an order would conflict with the separation of powers doctrine. Judicial "legislation" can generally be checked by legislative action overruling the court decision, but judicial allocation of state funds cannot be checked by the legislature.⁸⁷

B. *The 1975 Act*

In September, 1975, more than two years after the state supreme court declared New Jersey's school finance system to be unconstitutional, the state legislature enacted the Public School Education Act of 1975.⁸⁸ The 1975 Act is patterned after the Bateman Act.⁸⁹ It provides for minimum aid to all districts,⁹⁰ equalization aid⁹¹ based on guaranteed assessed valuation⁹² and categorical aid for special programs.⁹³ If fully funded, the 1975 Act will provide equalization aid for sixty-four percent of the school districts of New Jersey,⁹⁴ a substantial improvement over the Bateman Act.⁹⁵

85. 69 N.J. at 152-54, 351 A.2d at 722-24.

86. *Id.*

87. *Id.* at 179-80, 351 A.2d at 737-38 (Mountain & Clifford, JJ., dissenting). See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 58 (1973).

88. N.J. STAT. ANN. § 18A: 7A-1 to 7A-33 (West Supp. 1976).

89. *Robinson v. Cahill (Robinson V)*, 69 N.J. 449, 478-79, 355 A.2d 129, 144 (1976) (Conford, J., concurring and dissenting).

90. N.J. STAT. ANN. § 18A: 7A-18(c) (West Supp. 1976).

91. *Id.* § 7A-18(a) to 18(b). Both current expenses and capital and debt service costs are to be computed under the equalization scheme. *Id.* § 18A: 7A-19. See *Robinson v. Cahill (Robinson V)*, 69 N.J. 449, 539-40, 355 A.2d 129, 177 (1976) (Pashman, J., dissenting).

92. N.J. STAT. ANN. § 18A: 7A-3 (West Supp. 1976); see *Robinson v. Cahill (Robinson V)*, 69 N.J. 449, 464-65, 355 A.2d 129, 137 (1976). The 1975 Act establishes a guaranteed assessed valuation per pupil of 1.3 times the state average for the 1976-77 school year and 1.35 times the state average thereafter. N.J. STAT. ANN. § 18A: 7A-3 (West Supp. 1976).

93. N.J. STAT. ANN. § 18A: 7A-20 (West Supp. 1976) (categorical aid is to be provided for special education classes).

94. *Robinson v. Cahill (Robinson V)*, 69 N.J. 449, 485-86, 355 A.2d 129, 148 (Conford, J., concurring and dissenting). At a guaranteed valuation level of 1.35 times the state average, 368 of the 578 New Jersey school districts would be below the guaranteed level and thus would receive equalization aid (64% of all New Jersey districts). These 368 districts included 73.5% of New Jersey public school students. *Id.*

95. *Id.* Under the Bateman Act, 157 districts (27.2%) would have received equaliza-

In addition to providing financial support for New Jersey's public schools, the 1975 Act also attempts to define a "thorough and efficient" education as "the educational opportunity which will prepare [all children in New Jersey] to function politically, economically and socially in a democratic society."⁹⁶ The Act provides for comprehensive review of the state educational system by the Commissioner of Education, considering each district and school individually.⁹⁷ The Commissioner and State Board of Education are empowered to order changes necessary to assure a thorough and efficient education in all schools, including "necessary budget changes within the school district."⁹⁸

C. *Robinson V*

In January, 1976, the New Jersey Supreme Court approved the 1975 Act (*Robinson V*)⁹⁹ conditioned upon the legislature fully funding the

tion aid for the 1976-77 school year and would have included 38.5% of all New Jersey public school students. *Id.*

96. N.J. STAT. ANN. § 18A: 7A (West Supp. 1976). See Brief for Defendant-Attorney General at 24, *Robinson v. Cahill (Robinson V)*, 69 N.J. 449, 355 A.2d 129 (1976) (of the 43 states that responded to a Department of Education survey, 13 had "thorough and efficient" clauses but none could provide a concise definition). The State Attorney General argued that the Act need only provide a framework within which the state Department of Education and local districts could define a "thorough and efficient" education for their students. *Id.* at 27-28. See also Report of the Joint Education Committee to the New Jersey Legislature 4 (1974) ("the local school district must have considerable freedom and encouragement to innovate and experiment . . . otherwise, educational practice will stagnate and rigidify").

The 1975 Act enumerates several elements of a "thorough and efficient" education. The list includes: establishing educational goals with local participation in that process; providing instruction in the basic skills sufficient to attain a reasonable level of proficiency; offering a broad program with supportive services for educationally handicapped students; adequately equipping physical facilities; establishing an efficient administrative system and an adequate research program; hiring qualified personnel; and evaluating and monitoring all programs. N.J. STAT. ANN. § 18A: 7A-5 (West Supp. 1976).

97. N.J. STAT. ANN. § 18A: 7A-14 to 7A-16 (West Supp. 1976). The Commissioner is to revise the criteria for a "thorough and efficient" education as necessary, relative to societal changes, and is to evaluate district performance against those criteria. *Id.* See Brief for Defendant-Attorney General at 7, *Robinson v. Cahill (Robinson V)*, 69 N.J. 449, 355 A.2d 129 (1976) (suggesting that each district evaluation might be based on "the employability of its graduates or their ability to gain entrance to institutions of higher education").

98. N.J. STAT. ANN. § 18A: 7A-15 (West Supp. 1976). The dissent in *Robinson V* urged that the legislature did not intend to grant the Commissioner and State Board such broad power, arguing that "budget changes" did not refer to budgetary increases since the Act fails to provide a source of revenue for such increases. 69 N.J. at 512-62, 355 A.2d at 163-89 (Pashman, J., dissenting).

99. *Robinson v. Cahill (Robinson V)*, 69 N.J. 449, 355 A.2d 129 (1976).

Act for the 1976-77 school year.¹⁰⁰ The court considered the 1975 Act as a "full and complete plan designed to provide a thorough and efficient education,"¹⁰¹ emphasizing that the fiscal provisions should be evaluated in light of the legislature's attempt to deal comprehensively with public education in New Jersey.¹⁰² The court considered whether the fiscal provisions provided *sufficient* financial support for New Jersey's educational system.¹⁰³ By considering the 1975 Act as a whole rather than in two parts (one defining a thorough and efficient education and the other establishing a system of financing) and by evaluating the 1975 Act against a standard of sufficiency, rather than equality, the court was able to approve a financing plan that falls far short of equality of financial resources among all school districts.¹⁰⁴

The 1975 Act is weak in several specific areas.¹⁰⁵ The Act's equalization plan fails to provide equalizing aid for over one-third of New Jersey's school districts,¹⁰⁶ and the aid is based on equalized property valuation, not equalized dollar input per pupil.¹⁰⁷ There is provision for minimum support to all districts regardless of wealth¹⁰⁸ and a save-

100. *Id.* at 468-69, 355 A.2d at 139.

101. *Id.* at 463-64, 355 A.2d at 136.

102. *Id.*

103. *Id.* See *Robinson v. Cahill* (Robinson I), 62 N.J. 473, 514-15, 303 A.2d 273, 294-95, *cert. denied*, 414 U.S. 976 (1973), quoting *Landis v. School Dist. No. 44*, 57 N.J.L. 509, 512, 31A.1017, 1018 (1895). *But see* Tractenberg, *supra* note 3, at 418 ("thorough" literally means "complete with attention to detail, not basic or adequate").

104. 69 N.J. at 490-93, 355 A.2d at 150-51 (Conford, J., concurring and dissenting). The 1975 Act provides little more equalization than the court-ordered redistribution of *Robinson IV* which "was only a step in the direction of achievement of full equalization of educational resources." *Id.* See Brief by the New Jersey Education Reform Project as amici curiae at 17, *Robinson v. Cahill* (Robinson VI), 70 N.J. 155, 358 A.2d 457 (1976) (Districts in the poorest class, having an average property wealth of \$22,625, would receive \$1253 per pupil under the 1975 Act fully funded and \$1184 per pupil under the *Robinson IV* court-ordered distribution. Districts having an average property wealth of \$32,569 would receive \$962 under the 1975 Act and \$874 under *Robinson IV*. Districts in the three wealthiest classes having over \$80,000 average assessed valuation per pupil would receive \$275 under the 1975 Act but nothing under *Robinson IV*).

105. See *Robinson v. Cahill* (Robinson V), 69 N.J. 449, 512-62, 355 A.2d 129, 163-89 (1976) (Pashman, J., dissenting).

106. *Id.* at 541, 355 A.2d at 178.

107. Justice Pashman relied on the trial court's conclusion that there is a positive correlation between "dollar input per pupil" and the quality of education. *Id.* at 543-44, 355 A.2d at 179, citing 118 N.J. Super. 223, 237-38, 249, 287 A.2d 187, 194, 200 (L. Div. 1972), *aff'd*, 62 N.J. 473, 303 A.2d 273 (Robinson I), *cert. denied*, 414 U.S. 976 (1973).

108. N.J. STAT. ANN. § 18A: 7A-18(c) (West Supp. 1976) (all districts are to receive at least 19% of the state support limit). See *Robinson v. Cahill* (Robinson V), 69 N.J. 449, 492-93, 355 A.2d 129, 152 (Conford, J., concurring and dissenting).

harmless provision¹⁰⁹ to protect wealthy districts. These funds were redistributed in *Robinson IV* upon finding that they were inconsistent with achieving the goal of equality of educational resources.¹¹⁰ The Act also provides for categorical aid which is distributed according to the types of programs a district provides rather than financial need.¹¹¹ Under the Act the state will not provide more than sixty-five percent of a district's total budget regardless of need.¹¹² The purpose of such a limit is to prevent school districts from unreasonably inflating their budgets to obtain increased state aid.¹¹³ But, if property-poor districts are unable to provide a "thorough and efficient" education on a sixty-fifth percentile budget, then that limit may operate to prevent the state from meeting its obligation in those districts.¹¹⁴ Finally, the Act fails to take municipal overburden into account.¹¹⁵ The Act does not compensate for the increasing costs of providing municipal services other than education in large metropolitan areas.¹¹⁶ In both *Robinson*

109. Public School Education Act of 1975, ch. 212, §§ 55-56, 1976 N.J. Sess. Law Serv. 519 (West).

110. *Robinson v. Cahill (Robinson IV)*, 69 N.J. 133, 149-51, 351 A.2d 713, 721-22 (1975). "In a world of limited resources and serious disparities in the wealth and expenditure levels of local districts, minimum support and save-harmless aid tend to exacerbate rather than alleviate current inequities." *Robinson v. Cahill (Robinson V)*, 69 N.J. 449, 546-47, 355 A.2d 129, 181 (1976) (Pashman, J., dissenting). Justice Conford argued that the minimum aid provision of the 1975 Act is more invidious than that held unconstitutional in the Bateman Act since the aid will be distributed only to districts above the equalization level rather than all districts. *Id.* at 492-93, 355 A.2d at 152 (Conford, J., concurring and dissenting).

111. N.J. STAT. ANN. § 18A-7A-20 (West Supp. 1976); see *Robinson v. Cahill (Robinson V)*, 69 N.J. 449, 548-49, 355 A.2d 129, 182 (1976) (Pashman, J., dissenting). The categorical aid is constitutionally suspect under the court's "sufficiency" approach in that it may draw funds from the state's educational appropriation which might otherwise be used to provide a minimum level of educational opportunity to poor districts.

112. N.J. STAT. ANN. § 18A: 7A-3 (West Supp. 1976).

113. *Robinson v. Cahill (Robinson V)*, 69 N.J. 449, 553, 355 A.2d 129, 182 (Pashman, J., dissenting).

114. *Id.*

115. *Id.* at 553-57, 355 A.2d at 184-86.

116. Municipal overburden is a term used to describe the problem of providing educational programs in communities where tax resources are limited because of competition for the local tax dollar from other essential services, such as public safety, public welfare and the administration of justice. So long as the schools must turn to local tax resources for a portion of their revenue, the potential for a municipal overburden problem will exist.

Report of the Joint Education Committee to the New Jersey Legislature 37 (1974). See Berke, *supra* note 2, at 31, 78, 134; Berke & Sinkin, *supra* note 2, at 342, 344 Table II (five out of six metropolitan school districts in New Jersey are below the median in property valuation but above the median in tax rate); Tractenberg, *supra* note 3, at 391 n.137 (In New Jersey, 58% of the total tax rate is spent on education, but in the six metropolitan school districts—Camden, Newark, Jersey City, Trenton, Paterson, and Elizabeth—only 47% of the total tax rate is spent on education.).

*I*¹¹⁷ and *Robinson IV*¹¹⁸ the court acknowledged the problem of municipal overburden. Other states have also recognized the problem and attempted to compensate for it.¹¹⁹

D. *The Revenue Dimension of the New Jersey Plan*

The conflict between the need for legislative reform and the legislature's reluctance to act is illustrated by the New Jersey litigation and the state legislature's attempts to implement the *Robinson* decision. The supreme court's approval of the 1975 Public School Education Act was made specifically conditional upon full funding of the state contribution.¹²⁰ By May, 1976, nine months after the 1975 Act was enacted, the legislature had not funded the state contribution. The New Jersey supreme court enjoined the State's operation of an unconstitutional school system (*Robinson VI*).¹²¹ The court acknowledged that an injunction may not be the most effective remedy for legislative inaction, but noted that in the *Robinson* litigation the court had played an active role and was not abdicating its responsibility to protect the constitutional rights of New Jersey public school students.¹²² The court in *Robinson VI* had considered redistributing all funds actually appropriated by the legislature according to the equalization scheme of the 1975 Act, a remedy similar to the redistribution plan of *Robinson IV*,¹²³ but rejected that alternative in part because it would have

117. 62 N.J. at 519, 303 A.2d at 297; see *Robinson v. Cahill* (*Robinson V*), 69 N.J. 449, 553-56, 355 A.2d 129, 184-85 (1976) (Pashman, J., dissenting).

118. 69 N.J. at 151-52, 351 A.2d at 722; see *Robinson v. Cahill* (*Robinson V*), 69 N.J. 449, 554-55, 355 A.2d 129, 185 (1976) (Pashman, J., dissenting).

119. Grubb, *supra* note 6, at 469. See, e.g., COLO. REV. STAT. ANN. § 22-50-105 (1973) (school districts of more than 300,000 residents receive 1.5 times the state support level).

120. *Robinson v. Cahill* (*Robinson V*), 69 N.J. at 475, 355 A.2d at 139. The *Robinson I* decision required that the state provide a "thorough and efficient" education. It did not require a uniform statewide tax to raise the education revenues. 62 N.J. at 502-03, 303 A.2d at 288. See Brief for Defendant—Attorney General at 36, *Robinson v. Cahill* (*Robinson V*), 69 N.J. 449, 355 A.2d 129 (1976) (arguing that the revenue dimension of the 1975 Act was not relevant to the constitutionality of the Act under the state's education clause); Tractenberg, *supra* note 3, at 429-30 ("The court could have restricted itself to the revenue dimension side of school funding and left the revenue-raising side solely to legislative discretion. Arguably that would have been more consistent with its emphasis on the constitutional rights of children and its rejection of the constitutional rights of taxpayers."). But see *Robinson v. Cahill*, (*Robinson I*) 62 N.J. 473, 520, 303 A.2d 273, 297, *cert. denied*, 414 U.S. 976 (1973) ("it may be doubted that a thorough and efficient system of schools . . . can realistically be met by reliance upon local taxation.").

121. *Robinson v. Cahill* (*Robinson VI*), 70 N.J. 155, 358 A.2d 457 (1976).

122. *Id.* at 160 n.1, 358 A.2d at 459 n.1.

123. 69 N.J. at 475, 355 A.2d at 139.

benefited wealthier school districts.¹²⁴

Much of the political attractiveness of school finance reform stems from its promise of tax reform necessary to generate the increased state revenues needed to finance the plans.¹²⁵ The particular dilemma for any legislature is the property tax: it produces substantial revenue¹²⁶ but is a regressive tax.¹²⁷ It may be necessary to retain some form of property tax as part of any reform plan to avoid significant appreciation in property values and to assure fiscal stability.¹²⁸ Thus

124. Brief for the New Jersey Education Reform Project at 22-23, *Robinson v. Cahill* (Robinson VI), 70 N.J. 155, 358 A.2d 457 (1976). See note 104 *supra*. The court could have considered other non-affirmative forms of relief to pressure a legislative solution such as enjoining districts above the statewide average from raising additional funds locally. Tractenberg, *supra* note 3, at 455.

125. Meltsner & Nakamura, *Political Implications of Serrano*, in *SCHOOL FINANCE IN TRANSITION* 273 (J. Pincus ed. 1974).

126. In 1972, 54.4% of all state and local revenues in New Jersey were raised through the property tax. The national average was 38.7%. Report of the Joint Education Committee to the New Jersey Legislature at 21 (1974), *citing* Summary Report of the New Jersey Tax Policy Committee at 3 (1973). The percentage of state revenues raised through the property tax varies from a high of 14.3% in Arizona to a low of .1% in Illinois, Vermont and West Virginia. Hartman & Reischhauer, *The Effect of Reform in School Finance on the Level and Distribution of Tax Burdens*, in *SCHOOL FINANCE IN TRANSITION* 116-18, Tables 4 & 5 (J. Pincus ed. 1974).

The local share of the cost of education is raised primarily through the property tax. *Id.* at 119. Local districts might shift to sales or income taxes but consumer expenditures and personal income are more mobile tax bases than real property. Differences in local sales or income tax rates might thus have a substantial effect on residential and shopping locations. *Id.* at 145.

127. See BERKE, *supra* note 2, at 32; Ruvoldt, *supra* note 3, at 28. The property tax is considered regressive since it consumes a higher portion of the current incomes of poor families. When measured against long-term income, however, the property tax may in fact be a progressive tax. The progressive tax argument is based on data indicating that low-income homeowners are often young, old, or temporarily unemployed, having purchased their home based on their long-term income rather than their temporarily low current income, and that high-income families often own homes that are more valuable relative to their income than do low-income families. Hartman & Reischauer, *supra* note 126, at 120. Property taxes on apartments are often passed on in rent, though not specified as such; thus in the case of low-income families who live in rented apartments, the property tax may be less regressive than their rent/income ratio indicates since properties normally rented by lower-income families tend to be more costly to maintain making rent less representative of actual value. High-income families who live in rented apartments generally rent properties with high value/rent ratios making the rent/tax ratio more proportional as well. *Id.* at 121.

The regressive effect of the property tax may be due in part to its administration: low-income housing is often assessed at a higher fraction of its true market value than is high-income housing. *Id.* at 122. Several states have reformed the administration of the property tax system by centralizing assessments as part of school finance reform legislation. Grubb, *supra* note 6, at 466.

128. Generally, real property is owned by higher-income groups. Removing a 2% property tax could cause an appreciation in property values of 20%. Hartman & Reischauer, *supra* note 126, at 120.

circuit-breakers¹²⁹ or split assessment¹³⁰ provisions have been proposed to alleviate the regressive effect of the property tax. The decision as to the particular tax scheme to be adopted, however, must be based on the unique characteristics of each state.¹³¹

In response to the court's injunction, the General Assembly enacted a two percent gross income tax to fund the 1975 Act.¹³² The tax is expected to yield one billion dollars in 1977.¹³³ Three hundred seventy-four million dollars of that one billion will be used to fund the 1975 Act.¹³⁴ The scheme also includes provisions to lower property taxes by exempting part of the assessed value of personal residences,¹³⁵ limiting

chauer, *supra* note 126, at 146. Shifting to a statewide property tax would also have a significant effect on property values, but the effect would be to raise the value of property in less wealthy districts and decrease the value in more wealthy districts because property-wealthy districts would have to pay the same tax as property-poor districts. *Id.* See Ruvoldt, *supra* note 3, at 24.

129. A "circuit-breaker" cuts in when the tax reaches a specified percentage of the family's income. See Odden, *Circuit Breaker Techniques for the Property Tax*, in *NEW DIRECTIONS FOR EDUCATION* (Kelly ed. 1973). The FLEISHMANN COMMISSION recommended that "any family paying more than 10 per cent of state taxable income in property taxes for schools to credit the excess against their state income tax bill." FLEISHMANN REPORT, *supra* note 5, at 81. The state would reimburse those who pay no income tax. *Id.*

130. Split assessments tax business but not residential property, or taxes them at different rates. Assessing residential and commercial property at differing rates avoids the problem of increasing homeowner taxes and places the tax burden on property that generates income. Meltsner & Nakamara, *supra* note 125, at 274. Agricultural and commercial interests might, however, present serious political opposition to split assessment. *Id.* at 275.

131. Hartman & Reischauer, *supra* note 126, at 141. The decision should be based primarily on the effect various taxes have on the distribution of taxes among individuals. For example, increasing sales or income taxes and decreasing property taxes would benefit industrial, commercial and nonresident property owners. The opposite effect would be achieved by raising corporate income taxes and lowering residential property taxes; corporate income taxes may not, however, be capable of producing the revenue needed to finance a state's public school system. *Id.* at 141-42.

132. New Jersey Gross Income Tax Act, ch. 47, 1976 N.J. Sess. Law Serv. 103 (West) (to be codified as N.J. STAT. ANN. §§ 54A: 1-1 to 9-27).

133. SENATE REVENUE, FINANCE AND APPROPRIATIONS COMM., 197TH N.J. LEGIS., 1ST SESS., STATEMENT TO ASSEMBLY COMM., SUBSTITUTE FOR A. 1513, at 1 (1976).

134. Act of July 1, 1976, ch. 42, 1976 N.J. Sess. Law Serv. 90 (West).

135. Homestead Exemptions, ch. 72, 1976 N.J. Sess. Law Serv. 234 (West) (to be codified as N.J. STAT. ANN. § 54A: 4-3.80 to 4-3.94). For property valued at less than \$15,000 the exemption is computed by adding 2% times two-thirds the equalized valuation and 25% of the local effective tax rate times two-thirds the equalized valuation. For property valued at more than \$15,000 the exemption is \$10,000. The cost of such exemptions was estimated to be \$360 million per year. SENATE REVENUE, FINANCE AND APPROPRIATIONS COMM., 197TH N.J. LEGIS., 1ST SESS., STATEMENT TO ASSEMBLY COMM., SUBSTITUTE FOR A. 1330, at 2 (1976).

To assure that the property tax credit would benefit those renting homes and apart-

growth in public expenditures,¹³⁶ and repealing specific business taxes.¹³⁷

III. ROBINSON V AND SERRANO II

The decision in *Robinson I* was based entirely on the education clause of the state constitution.¹³⁸ The *Robinson V* court thus considered the equalizing provisions of the 1975 Act within the context of a comprehensive education statute.¹³⁹ In approving the fiscal provisions of the Act, the court conditioned approval on the implementation of expanded powers in the office of the State Commissioner of Education.¹⁴⁰ The Commissioner is to be authorized to order increases in local school budgets when deemed necessary.¹⁴¹ The court assumed the 1975 Act would not be static, as the foundation program had been,

ments, the Tenants' Property Tax Rebate Act provides that landlords must pass 50% of the benefit they receive from the property tax exemptions on to their tenants. Tenants' Property Tax Rebate Act, ch. 63, 1976 N.J. Sess. Law Serv. 222 (West) (to be codified as N.J. STAT. ANN. § 54: 4-6.2 to 4-6.13).

136. State Expenditures Limitation Act, ch. 67, 1976 N.J. Sess. Law Serv. 226 (West) (to be codified as N.J. STAT. ANN. § 52: 9H-5 to 9H-11). The expenditure limit is computed by multiplying the appropriation of the state in the base year (1976-77 fiscal year) by the state per capita personal income in the base year. The limit applies to all appropriations except state aid anticipated in local budgets, federal funds, and payments of interest or principal on general obligation bonds. Another provision limits increases in spending by municipalities and counties to 5%. Local Governments—Limitations on Expenditures, ch. 68, 1976 N.J. Sess. Law Serv. 229 (West) (to be codified as N.J. STAT. ANN. § 40A: 4-45.1 to 4-45.6).

137. As part of the tax scheme the Unincorporated Business Tax (Unincorporated Business Tax Act—Repeal, ch. 80, 1976 N.J. Sess. Law Serv. 252 (West) (repealing N.J. STAT. ANN. § 54: 11B-1 to 11B-23)) and the Retail Gross Receipts Tax (Retail Gross Receipts Tax Act—Repeal, ch. 81, 1976 N.J. Sess. Law Serv. 253 (West) (repealing N.J. STAT. ANN. § 54: 11C-1 to 11C-14)) were repealed.

138. Even though the *Robinson I* decision was based on the state's education clause, the court requested all parties to brief the equal protection question in *Robinson V*. Notice to Parties and Amici, Supreme Court of New Jersey, Oct. 21, 1975. The Attorney General argued that the 1975 Act was

consistent with the equal protection guarantees of the New Jersey Constitution, because there is a rational basis for the legislative determination to delegate primary responsibility for public education. . . to local school districts, and the legislature properly may provide a formula of state aid . . . which does not simply seek to equalize the local fiscal burden.

Brief for Defendant—Attorney General at 40, *Robinson v. Cahill* (*Robinson V*), 69 N.J. 449, 355 A.2d 129 (1976).

139. "It is, initially, of vital importance to note that this is the first time in the course of this litigation that we have had an opportunity to consider a plan intended to meet all aspects of a thorough and efficient education." 69 N.J. at 455-57, 355 A.2d at 132.

140. *Id.* at 458-62, 355 A.2d at 134-35.

141. *Id.* at 463-64, 355 A.2d at 136.

but would be a dynamic plan for the improvement of New Jersey's public school system.¹⁴²

The actual reform approved in *Robinson V* fails to provide the equality mandated by *Robinson I*.¹⁴³ The *Robinson I* court had found the Bateman Act unconstitutional because it failed to provide sufficient financing for a "thorough and efficient" education (education clause) rather than because it failed to provide equal financial resources to all districts (equal protection clause).¹⁴⁴ The *Robinson* litigation can thus be distinguished from *Serrano*.

The Supreme Court of California, in *Serrano II*, held that the California school finance system violated the state's equal protection clause rather than its education clause.¹⁴⁵ The court found that only a fiscally neutral system could meet the requirements of the state's equal protection clause.¹⁴⁶ Defendants in *Serrano II* suggested an optimum balance criteria rather than fiscal neutrality.¹⁴⁷ Defendants' optimum balancing approach is much closer to the *Robinson* approach and illustrates a distinction between *Robinson* and *Serrano*. Defendants in *Serrano II* were proposing that the court accept a high base program with minimum local augmentation. The New Jersey court approved the 1975 Act because it provided a thorough and efficient education for New Jersey students by raising the minimum state support level. The New Jersey system is thus also a high base program with local augmentation. The California court rejected the optimum balance criteria, professing to accept only pure equality measured against fiscal neutrality.¹⁴⁸

Under California's equal protection approach in *Serrano II* it is possible that a school finance system could be approved even though it

142. *Id.* at 464-65, 355 A.2d at 137.

143. 62 N.J. at 513-14, 303 A.2d at 294. See Tractenberg, *Robinson v. Cahill: The Thorough and Efficient Clause*, *supra* note 2, at 522.

144. 69 N.J. at 464, 355 A.2d at 136: "The fiscal provisions of the Act are to be judged as adequate or inadequate depending upon whether they do or do not afford sufficient financial support for the system of public education that will emerge from the implementation of the plan set forth in the statute."

145. — Cal. 3d at —, 557 P.2d at 951, 135 Cal. Rptr. at 367.

146. *Id.* at —, 557 P.2d at 953, 135 Cal. Rptr. at 369.

147. Under the balancing approach, some variation in resources among districts would be tolerated to accommodate the need for local control of fiscal and educational matters. Defendants suggested that so long as the state school finance system allowed no more than 10% of the total state revenues to be "unequalized" (dependent on district wealth) it met the requirements of equality. *Id.* at —, 557 P.2d at 944, 135 Cal. Rptr. at 360.

148. *Id.* at —, 557 P.2d at 944-45, 135 Cal. Rptr. at 360-61.

does not provide a "thorough and efficient" education.¹⁴⁹ From a practical standpoint, however, it may be easier to persuade the California legislature to increase state aid to a level of minimum sufficiency when all districts, rich and poor, are spending at the same rate and thus united in their demands. Under the *Robinson V* education clause approach, persuading the legislature to include aid to property-poor districts to achieve equality of educational resources may be more difficult since such districts are providing a "sufficient" education and are alone in their demand for increased resources.

The equal protection approach also raises the problem of implicating other municipal services.¹⁵⁰ The New Jersey supreme court avoided such a problem by basing its decision on the education clause. The *Serrano I* court found education to be unique among public services and expressly refused to consider the problem of extending its equal protection holding beyond education.¹⁵¹ The *Serrano II* court did not reconsider the problem.

IV. IMPLIMENTATION OF ALTERNATIVE FINANCE SYSTEMS

It is obvious that a declaration of unconstitutionality is only the first step toward meaningful school finance reform. Alternative school finance systems must be implemented. The *Serrano* trial court suggested that a district power equalizing formula (DPE) would satisfy the equal protection requirements.¹⁵² Under a pure DPE plan,¹⁵³ each school district chooses its own tax rate. The financial resources the

149. *Id.* at — n.28, 557 P.2d at 943 n.28, 135 Cal. rptr. at 359 n.28, quoting the trial court's memorandum opinion:

What the *Serrano* court imposed as a California constitutional requirement is that there must be uniformity of treatment between the children of the various school districts in the State because all the children of the State in public schools are persons similarly circumscribed. The equal-protection-of-the-laws provisions of the California Constitution mandate nothing less than that all such persons shall be treated alike. If such uniformity of treatment were to result in all children being provided a low-quality educational program, even a clearly inadequate educational program, the California Constitution would be satisfied. The court does not read the *Serrano* funds for each child in the State at some magic level to produce either an adequate-quality educational program or a high-quality educational program. It is only a disparity in treatment between equals which runs afoul of the California constitutional mandate of equal protection of the laws.

150. Karst, *Serrano v. Priest: A State Court's Responsibilities, and Opportunities in the Development of Federal Constitutional Law*, 60 CALIF. L. REV. 720, 726-28 (1972). See notes 64-66 and accompanying text *supra*.

151. 5 Cal. 3d at 614, 487 P.2d at 1262, 96 Cal. Rptr. at 622.

152. — Cal. 3d at —, 557 P.2d at 938, 939, 135 Cal. Rptr. at 354, 355.

153. District power equalization was first proposed by COONS, CLUNE & SUGARMAN, *supra* note 3, at 201-42.

district is entitled to are established by a support/effort schedule.¹⁵⁴ The quality of education provided by the district is thus determined by its chosen tax rate rather than its property wealth.¹⁵⁵ The plan is designed to achieve fiscal neutrality¹⁵⁶ while maintaining some local control over the administration and financing of public schools.¹⁵⁷ Recapture is an essential element to equalization under DPE programs.¹⁵⁸

The many policy considerations involved in selecting a DPE plan,¹⁵⁹

154. Barro, *supra* note 11, at 54-59. The following table illustrates a hypothetical DPE plan.

Tax Rate	Support per pupil	\$6000	State aid per pupil when district assessed value per pupil is:			
			\$12,000	\$18,000	\$24,000	\$30,000
2.0% (min)	\$ 600	\$480	\$360	\$240	\$ 120	\$ 0
2.5	700	550	400	250	100	-50
3.0	800	620	440	260	80	-100
3.5	900	690	480	270	60	-150
4.0	1000	760	520	280	40	-200
4.5	1075	805	535	265	-5	-275
5.0	1150	850	550	250	-50	-350
5.5	1225	895	565	235	-95	-425
6.0 (max)	1300	940	580	220	-140	-500

Id. at 57.

155. Theoretically, the choice a local district makes under a DPE plan will be a function of both the increase in the base level of state aid over the existing system and the slope of the support-versus-effort schedule. *Id.* at 68-74. A district will probably not lower its tax rate even though it can receive the same resources at a lower rate; if the slope is attractive enough, the district may in fact increase its tax rate to purchase additional educational resources at the bargain rate. *Id.* Thus, DPE may not only maintain local control over the choice of a tax rate but may also destroy the "cruel illusion" of local control in property-poor districts by selling educational resources at a lower price. *But see* Citizens Union Comm. on Educ. Finance, *Financing Public Education in New York State: An Analysis of the Fleishmann Commission Report*, 48 N.Y.U.L. REV. 6, 14 (1973) (DPE will result in greater disparities in educational resources since poorer districts will find it more difficult to tax at a high rate and since the system will still be based on the regressive property tax).

District power equalization has been attacked because it *does* make educational spending dependent on the voters' chosen tax rate. Educational spending should be based on educational considerations rather than tax considerations. Silard & Goldstein, *supra* note 2, at 321-22.

156. *See* Carrington, *supra* note 3: "The great charm of the 'no wealth' principle is evident. It can be simply stated. It is easy to apply. It does not require the courts to appraise the sufficiency of any funding levels. It seems to leave much freedom to design new systems of school finance. And it is faithful to the rhetoric of equal educational opportunity." *Id.* at 1231.

157. Barro, *supra* note 11, at 49. *See* Silard & Goldstein, *supra* note 2, at 377.

158. Barro, *supra* note 11, at 49.

159. Policy decisions must be made regarding the base level program, the funding

however, may allow state legislatures to make political compromises diluting the equalizing effect of the plan.¹⁶⁰ The New Jersey plan approved in *Robinson V*, while not a pure power equalizing system,¹⁶¹ exemplifies the tendency to dilute equalization aid. In providing minimum¹⁶² and categorical aid¹⁶³ to all districts, including a save-harmless clause¹⁶⁴ to protect wealth districts, and allowing local augmentation,¹⁶⁵ the New Jersey legislature eliminated much of the equalizing effect promised by its guaranteed assessed valuation program.

Serrano II may encourage the state legislature to adopt a district power equalization plan, though the trial court suggested other alternatives.¹⁶⁶ The California Constitution allows for variation in school district expenditures.¹⁶⁷ Responding to the argument that the California Constitution specifically authorizes those elements of the California school finance system that create the inequalities among districts, the

needed to support a minimum adequate education, including adjustments for need and cost differences among districts, and the slope of the supplementation line. Barro, *supra* note 11, at 58. The New Jersey program is not a pure incentive equalization plan. It establishes a base level of aid through a guaranteed property valuation scheme and allows each district to augment that aid as it wishes. The plan does not provide any incentive to local districts since it does not match their augmentation with state funds. Under a pure incentive equalization plan, the state can make supplementation more attractive by reducing the effective price of education with a high support/effort ratio. *Id.* at 59. In the alternative, a state can place an upper limit on taxing or spending or establish a high base program with limited supplementation to reduce the disparities in actual expenditures which are possible under DPE plans. *Id.* at 55.

160. Silard & Goldstein, *supra* note 2, at 317, 319. See Tractenberg, *supra* note 3, at 428 n.302 ("Legislative unwillingness to appropriate sufficient funds, political deference to educational home rule, and the need to pacify suburban interests by increasing state aid to their districts, have diminished the actual impact of the most progressive-sounding programs.") See also Grubb, *supra* note 6, at 465.

161. The New Jersey school finance system remains a foundation program. Power equalizing requires that the state aid for each district be based upon the district's chosen tax rate. The New Jersey plan provides equalization aid based on a guaranteed assessed valuation scheme rather than the districts' chosen tax rate. The New Jersey system, however, does illustrate the problem of legislative compromise when numerous policy parameters are involved.

162. N.J. STAT. ANN. § 18A: 7A-18(c) (West Supp. 1976).

163. *Id.* § 18A: 7A-20, 7A-34, 7A-35.

164. *Id.* § 18A: 7A-49, 7A-50.

165. *Id.* § 18A-7A-18.

166. — Cal. 3d at —, 557 P.2d at 938-39, 135 Cal. Rptr. at 354-55. The trial court suggested that full state funding, consolidation of the 1,067 school districts into about 500 districts with boundary realignments to equalize property values, statewide taxation of commercial and industrial property, district power equalizing, and vouchers might all be "workable, practical and feasible" alternative methods of school financing. *Id.*

167. *Id.* at —, 557 P.2d at 954, 135 Cal. Rptr. at 370.

Serrano II court decided that the constitution does not authorize inequalities based on district wealth but did not contest the fact that the constitution does allow for local variations.¹⁶⁸ If the state constitution authorizes local variation among districts, it will be difficult to persuade the legislature to adopt any plan other than one which allows for local variation. DPE is the only proposal that promises both fiscal neutrality and local variation.

Other states that have reformed their school finance systems by enacting power equalizing plans have diluted much of the promised neutrality, and thus the possibility of equality, through manipulation of the various policy judgments involved.¹⁶⁹ As the New Jersey experience indicates, it may be difficult for the California court to avoid approving such a compromise plan. *Robinson I* declared that the New Jersey school finance system violated the state education clause, but provided the court with an opportunity to interpret that clause to require equality.¹⁷⁰ The New Jersey court first redistributed state appropriated funds¹⁷¹ and later closed the New Jersey public schools¹⁷² in an attempt to enforce its *Robinson I* decision. The financing system approved in *Robinson V* suggests that the New Jersey court itself became involved in the compromise process.

Full state funding offers an alternative that would avoid many of the problems associated with implementing DPE plans. It would meet the New Jersey court's sufficiency test,¹⁷³ the California court's fiscal

168. *Id.* The court was considering CAL. CONST. art. XIII, § 21 which provides that "the legislature shall provide for an annual levy by county governing bodies of school district taxes sufficient to produce annual revenues for each district that the district's board determines are required for its schools and district functions."

169. See Grubb, *supra* note 6, at 490-91.

170. See 62 N.J. at 513-14, 303 A.2d at 294.

171. *Robinson v. Cahill (Robinson IV)*, 69 N.J. 133, 351 A.2d 713 (1975).

172. *Robinson v. Cahill (Robinson VI)*, 70 N.J. 155, 358 A.2d 457 (1976). The court later dissolved the injunction after the enactment of a state income tax which permitted full funding of the Public School Education Act of 1975. *Robinson v. Cahill (Robinson VII)* 70 N.J. 464, 360 A.2d 400 (1976).

173. Tractenberg, *supra* note 3, at 437. The original 1871 Sta School Tax Act, the Free School Law, ch. 527, §§ 1, 4, 5, [1871] N.J. Laws 94, provided essentially for full state funding based on a statewide property tax with local augmentation. Tractenberg, *supra* note 3, at 438-39.

The Fleishmann Commission recommended that New York adopt a full state funding plan to be implemented at the 65th percentile level. FLEISCHMANN REPORT *supra* note 5, at 65. A firmly established spending level similar to the Fleischmann recommendation would have provided the New Jersey Supreme Court with a concrete basis for deciding whether the state legislature had met its obligation to provide a "thorough and efficient" education. The finance program actually adopted by the New Jersey legislature leaves the determination of which districts are providing a thorough and efficient education to

neutrality test,¹⁷⁴ and at the same time achieve the absolute equality of resources originally sought. In 1970 the Governor of New Jersey established a committee (The Sears Commission) to examine the tax policies of New Jersey including those policies relevant to the financing of New Jersey's public school systems.¹⁷⁵ The Sears Commission recommended that the State assume the primary responsibility for financing public school systems.¹⁷⁶ The funds were to be raised from a mix of statewide property taxes, income taxes, and an increase in the sales tax,¹⁷⁷ and were to be distributed equally to all districts based on the educational costs per pupil in each district as determined by the Commissioner of Education.¹⁷⁸

Full state funding has also been recommended as the most appropriate solution to New York's school finance problems.¹⁷⁹ The Fleishmann Commission recommended that educational resources be raised through a statewide property tax¹⁸⁰ and distributed to all districts equally¹⁸¹ but also recommended that all educational spending be equalized at the sixty-fifth percentile¹⁸² with a save-harmless provision to protect wealthy districts spending above that level.¹⁸³

The primary advantage of power equalization is that it retains local control over the administration and financing of public schools.¹⁸⁴ The Sears Commission suggested several advantages to full state funding to

the Commissioner of Education since educational resources will vary among districts depending upon the district's taxable property. *See* *Robinson v. Cahill (Robinson V)*, 69 N.J. 449, 458, 355 A.2d 129, 134 (1976).

174. *See* Michelson, *What is a Just System for Financing Schools? An Evaluation of Alternative Reforms*, 38 *LAW & CONTEMP. PROB.* 436, 458 (1974) ("a shift to state funding and equal allocation automatically generates compliance with court orders to disassociate school spending from district wealth.").

175. *Ruvoldt*, *supra* note 3, at 23.

176. *Id.*

177. *Id.* at 24.

178. *Id.* at 23-24. The Commission's plan allowed some leeway in local district spending to be funded through local property taxes based on a type of incentive equalization plan under which the state would contribute a portion of the leeway based on the district's wealth. *Id.* at 24.

179. *FLEISCHMANN REPORT*, *supra* note 5, at 55.

180. *Id.* at 74.

181. *Id.* at 63-73.

182. *Id.* at 63-64. *But see* *Citizens Union Comm. on Educ. Finance*, *supra* note 154 (arguing that the most significant disparities occur above the 65th percentile and that those districts needing more educational money, the big cities, will not benefit from the 65th percentile level).

183. *FLEISCHMANN REPORT*, *supra* note 5, at 65.

184. *Barro*, *supra* note 11, at 49.

counter the local control argument,¹⁸⁵ while the Fleishmann Commission argued that local control over school administration can be separated from local control over school finance.¹⁸⁶ A full state funding system may sacrifice local control over the financing of public schools, but the inequality in educational resources caused by traditional school finance systems is too high a price to pay for that control.¹⁸⁷ Full state funding leaves less room for legislative manipulation¹⁸⁸ and thus has the potential for providing greater equality in school finance.

185. The Sears Commission argued that full state funding would eliminate competition among districts, reduce ratables zoning, support state housing policies, balance the use of property and non-property taxes, eliminate tax shelters, assure adequate resources in all districts, encourage a balance of population between urban areas and their suburbs, and equalize educational opportunity among all districts. Ruvoldt, *supra* note 3, at 25.

186. FLEISCHMANN REPORT, *supra* note 5, at 86. The Commission suggested that administrative control should be at the school rather than district level. *Id.* But see *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 52-53 (1973) (“[the people of Texas] may believe that along with increased control of the purse strings at the state level will go increased control over local policies.”). See also Silard & Goldstein, *supra* note 2, at 332-33 (analogizing to Great Britain and New Brunswick, Canada, where such a separation between control over financing and administration is maintained).

187. In addition to inequality in educational resources, financing systems based on local funding may have other social and economic consequences including racial isolation. Silard & Goldstein, *supra* note 2, at 309-10. School finance inequalities may have contributed to “white-flight” to suburban school districts and (in the pattern of a vicious circle) increased the financial disparities between cities and suburbs by drawing valuable industry to the suburbs. The problem perpetuates itself as urban school systems become more segregated and financially burdened. *Id.* 322-26.

188. There are two policy parameters involved in implementing a full state funding proposal. First, the level of the base program must be set. Second, adjustments must be made in the funding level for differing needs and costs among districts. Barro, *supra* note 11, at 51-54.

COMMENTS

