

## AD VALOREM PROPERTY TAXATION AND PUBLIC SCHOOL FINANCING

In recent years, courts<sup>1</sup> and commentators<sup>2</sup> have questioned the constitutionality of public elementary and secondary school financing through ad valorem property taxation.<sup>3</sup> Opponents challenge the fairness of state finance plans which permit districts with high tax bases to raise more money, more easily than property-poor districts.<sup>4</sup> Since fourteenth amendment equal protection claims have not suc-

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1. *E.g.*, Board of Educ. v. Walter, 58 Ohio St. 2d 368, 393 N.E.2d 613 (1979) (upholding state plan using traditional scrutiny test); Danson v. Casey, 484 Pa. 415, 399 A.2d 360 (1979) (upholding state plan as consistent with education mandate in state constitution); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979) (invalidating state plan using strict scrutiny test). For a listing and discussion of early public school finance litigation, see Lindquist & Wise, *Developments in Education Litigation: Equal Protection*, 5 J. L. & EDUC. 1, 3 n.11 (1976). See also Horton v. Meskill, 172 Conn. 615, 644 n.13, 376 A.2d 359, 372-73 n.13 (1977) (updating Lindquist & Wise to 1977).

2. See Gammon, *Equal Protection of the Law and San Antonio Independent School District v. Rodriguez*, 11 VAL. U. L. REV. 435, 443 (1977); McCarthy, *Is the Equal Protection Clause Still a Viable Tool for Effecting Education Reform?*, 6 J. L. & ED. 159, 168 n.53 (1977).

See generally Pauley v. Kelly, 255 S.E.2d 859, 893-94 (W. Va. 1979), for an excellent biography of books, articles and student works on the subject of school finance.

3. "Ad valorem," which means "in proportion to value," is most often used in regard to property taxes, although it may also be associated with personalty. BLACK'S LAW DICTIONARY 58 (rev. 4th ed. 1968). With the exception of Hawaii, all state education finance systems rely in part on local property taxation. Comment, *An Analysis and Review of School Financing Reform*, 44 FORDHAM L. REV. 773, 779-80 (1976).

In the 1971-72 school year, local revenues contributed an average of 54% of total revenues used for public elementary and secondary education nationwide. See C. BENSON, P. GOLDFINGER, E. HOACHLANDER, & J. PERS, *PLANNING FOR EDUCATIONAL REFORM, FINANCIAL AND SOCIAL ALTERNATIVES* 4 (1974) [hereinafter cited as BENSON]. This percentage is by no means typical of state ratios; local revenues accounted for more than 60% of total school funds in 19 states, and less than 35% in 12 others. New Hampshire led the nation with 85% of total receipts coming from local governments. *Id.*

4. Districts with valuable commercial, industrial or mineral assets, or expensive residential areas have high tax bases which yield more revenue than "property-poor" districts for a given tax rate. Thus, some districts must tax themselves at considerably higher rates than others to produce comparable revenue. See generally W. GARMS, J. GUTHRIE, & L. PIERCE, *SCHOOL FINANCE, THE ECONOMICS AND POLITICS OF PUBLIC EDUCATION* 22-24 (1978) [hereinafter cited as GARMS].

ceeded in invalidating state programs,<sup>5</sup> advocates of educational financing reform have turned their attention to state constitutions.<sup>6</sup> In *Washakie County School District Number One v. Herschler*,<sup>7</sup> the Wyoming Supreme Court struck down the state's school finance program as violative of the equal protection provision in Wyoming's constitution.<sup>8</sup>

In the Wyoming tax system, an optional district ad valorem property tax permitted local governments to dramatically increase their educational tax levy and receipts.<sup>9</sup> Plaintiffs in *Washakie County*<sup>10</sup> sought relief from alleged inequalities and revenue disparities inherent in the plan.<sup>11</sup> A unanimous supreme court reversed the trial

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5. The Supreme Court upheld the Texas school finance plan against equal protection challenges in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). See notes 28-41 and accompanying text *infra*.

6. State courts are the final interpreters of state law, and may use this authority to grant individuals more rights than those guaranteed by the Constitution. *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967). See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 20-21 (1978) [hereinafter cited as NOWAK].

For an examination of the current use of this authority, see Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976). See also Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (advocating wider use of state authority).

7. 606 P.2d 310 (Wyo. 1980), *cert. denied*, 101 S. Ct. 86 (1980).

8. WYO. CONST. art. 1, § 34: "All laws of a general nature shall have a uniform operation." The Supreme Court of Wyoming has held this provision to be equivalent to the equal protection clause of the fourteenth amendment to the United States Constitution. *Nehring v. Russell*, 582 P.2d 67 (Wyo. 1978).

9. The Wyoming school finance program derived revenue from three primary sources. A state tax of six mills (thousandths of a dollar) and a county tax of twelve mills on every dollar of assessed property value were mandated by the Wyoming Constitution. In addition, the Wyoming legislature allowed school districts to levy a 28 mill tax on assessed property value to be used for educational purposes. 606 P.2d at 321. Since assessed valuation per student in Wyoming's school districts varied from \$209,543 to \$10,899, a ratio of over 21 to 1, equivalent tax levies would earn vastly different sums. *Id.* at 329. Of the fifty school districts existing in Wyoming at the institution of this suit, residents of one of the Washakie County districts paid the fourth highest combined tax levy, yet received the sixth lowest total revenue per student average daily membership. *Id.* at 325-31.

10. Plaintiffs in this suit were three school districts, the school board members of those districts (in their official capacities, as taxpayers, and as parents of children attending schools within the districts), and several students who attended Washakie County School District Number One. *Id.* at 317.

11. The Wyoming plan, like that in most states, included a foundation program designed to equalize school district revenues. Under the program, a portion of the six mill state school property tax was distributed in inverse proportion to each district's

court, holding the finance plan unconstitutional as denying equal educational opportunities to students in property-poor districts.<sup>12</sup> The court ordered the state legislature to revise the plan.<sup>13</sup>

In equal protection cases,<sup>14</sup> the United States Supreme Court generally applies one of two standards of judicial review.<sup>15</sup> For matters of general economic consequence, the Court utilizes the "traditional scrutiny" test, which requires the state to show only that the challenged legislation is rationally related to a legitimate state objective.<sup>16</sup> If, however, the legislation in question jeopardizes a "fundamental right," one which is so important as to warrant special protection under the Constitution, the Court will employ a "strict scrutiny" standard of review.<sup>17</sup> The Court has applied the term "fundamental" to the rights of election participation,<sup>18</sup> free association,<sup>19</sup> interstate

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tax paying ability. Since the disparities were produced in part by a 28 mill local district tax, significant steps toward revenue equality were impossible. *Id.* at 321-22.

Plaintiffs argued that disparities would increase astronomically within the coming years due to new mineral finds in certain districts and rapidly increasing oil and gas prices. Reply Brief for Appellants at 10, *Washakie County School Dist. Number One v. Herschler*, 606 P.2d 310 (Wyo. 1980).

12. *Washakie County* is the third case to come before the Wyoming Supreme Court on school funding. Both *Johnson v. Schrader*, 507 P.2d 814 (Wyo. 1973), and *Sweetwater County Planning Comm. v. Hinkle*, 491 P.2d 1234 (Wyo. 1971), dealt with disparities in per pupil valuation among school districts within individual counties. Although the court noted in each case that students were denied equal protection when the disparity became too great, and even suggested legislative guidelines for reform, the legislature made no significant changes through the time *Washakie County* came to trial.

13. 606 P.2d at 337. The date for compliance, as extended per state request, is July 1, 1983. *Id.* at 340.

14. The federal equal protection clause provides, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1, cl. 2.

15. See NOWAK, *supra* note 6, at 524-25. For an examination of recent indications that the Court is using a multi-tier or sliding-scale approach to equal protection, see G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 674-75 (1975).

16. *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

17. Fundamental rights flow from two sources of constitutional concern: first, recognized liberty, property, or due process of law interests such as the right of interstate travel; second, rights given special protection because their equal distribution is important in and of itself, e.g., the right to election participation. When availability of these rights is determined by criteria recognized as inherently inequitable, such as an immutable characteristic or historical disadvantage, the classification is labeled "suspect" and stricken as a denial of equal protection. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1000-10 (1978).

18. *Reynolds v. Sims*, 377 U.S. 533 (1964).

19. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

travel,<sup>20</sup> and certain forms of privacy.<sup>21</sup>

Similarly, if legislation discriminates against a "suspect class," one based on immutable characteristics, the Court will again apply strict scrutiny to avoid denial of equal protection.<sup>22</sup> Suspect classifications have included race,<sup>23</sup> national origin,<sup>24</sup> and, to a lesser degree, alienage<sup>25</sup> and gender.<sup>26</sup> Application of strict scrutiny demands that the state justify its actions by showing that the legislation is the only means available for achieving a compelling state objective.<sup>27</sup>

In 1971, a federal district court reviewing Texas' school finance system held, in *San Antonio Independent School District v. Rodriguez*,<sup>28</sup> that the significance of education in American society justifies declaring it a fundamental right.<sup>29</sup> The court also declared wealth a

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

21. *E.g.*, *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977) (privacy right in purchase of contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (right to obtain an abortion); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (marital decisions); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right to private education).

22. *See* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 1010-11 (1978).

23. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

24. *Korematsu v. United States*, 323 U.S. 214 (1944).

25. *Graham v. Richardson*, 403 U.S. 365 (1971). *See* NOWAK, *supra* note 6, at 525-26 (suggesting that "compelling state interest" requirement is more lax in alienage cases).

26. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (Justices Brennan, Douglas, White, and Marshall found gender to be a suspect classification; Justice Stewart concurred in the result).

27. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

28. 337 F. Supp. 280 (W.D. Tex. 1971). *Rodriguez* was the third case to arise in federal district courts testing the constitutionality of state public school finance plans. In *Burruss v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970), and *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969), the Supreme Court affirmed without opinion rejection of equal protection challenges to the Illinois and Virginia systems. The district court in *Rodriguez* denied that it was bound by these decisions. 337 F. Supp. at 283.

In both *Burruss* and *McInnis*, plaintiff asked the courts to define "school needs" and require statewide fulfillment of this standard. 310 F. Supp. at 574; 293 F. Supp. at 329. The *Rodriguez* court felt this type of remedy was ill-suited to the abilities of the judiciary, and thus refused to grant relief on this ground. 337 F. Supp. at 284. Plaintiffs in *Rodriguez* instead asked merely for "fiscal neutrality," i.e., that quality of education not be a function of district wealth, a judicially manageable remedy. *Id.*

29. 337 F. Supp. at 283. The court cited the often repeated declaration of *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954), that "education is perhaps the most important function of state and local governments. Compulsory school attendance laws

suspect classification, relying upon prior Supreme Court decisions.<sup>30</sup> The court determined that the Texas system created revenue disparities among school districts which infringed upon students' rights to education in property-poor areas.<sup>31</sup> Since the state advanced no compelling interest underlying the particular finance scheme, the court ruled it unconstitutional.<sup>32</sup>

On appeal, the Supreme Court reversed, declaring application of the strict scrutiny test inappropriate in the area of school finance.<sup>33</sup> The Court found education is not a fundamental right because it is neither "explicitly nor implicitly" mentioned in the Constitution.<sup>34</sup> Although it recognized the societal importance of education<sup>35</sup> and the close relationship it bears to other fundamental rights,<sup>36</sup> the

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and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society."

30. 337 F. Supp. at 282-83. The court cited *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1965) (striking down a poll tax voting requirement); *Douglas v. California*, 372 U.S. 353 (1963) (upholding indigent criminal defendant's right to counsel on appeal); *Griffin v. Illinois*, 351 U.S. 12 (1956) (criminal defendants improperly denied appeal for inability to buy official copy of trial transcript). 337 F. Supp. at 282-83.

31. 337 F. Supp. at 282. The Texas school finance system consisted basically of two sources: a Minimum Foundation Program, which provided a minimum revenue for each child in the state, and a district tax. The proceeds from the latter fund remained within the school district which generated the tax. Plaintiffs contended this tax structure discriminated against students in property-poor districts by denying them an equal opportunity for public education. *Id.* at 281. The court agreed, ruling that the system subsidized the rich at the expense of the poor. *Id.* at 282.

32. *Id.* at 286. The court held that the state failed to establish even a reasonable basis for its program. *Id.* at 284. The state's expressed objective, leaving decision-making powers to the local districts, was not advanced by the plan, which tended to limit many districts' options. *Id.*

33. 411 U.S. 1, 39 (1973).

34. *Id.* at 33-34.

35. *Id.* at 29-30. Despite this recognition, the Court rejected plaintiffs' argument that it create a substantive constitutional right to education by weighing the right to learn against the right to travel. *Id.* at 33. The Court cited examples of other essential human interests that are denied fundamental right status for lacking constitutional support: *Lindsey v. Normet*, 405 U.S. 56 (1972) ('need for decent shelter' and 'right to retain peaceful possession of one's home'); *Dandridge v. Williams*, 397 U.S. 471 (1970) (administration of welfare assistance providing most basic economic needs to the impoverished). 411 U.S. at 37.

36. 411 U.S. at 35-36. Plaintiffs argued that the right to free speech and the corollary right to receive information are empty privileges to one who has not been taught how to read and use available knowledge. *Id.* Similarly, the right to vote is meaningless without an informed electorate. *Id.* The Court stated that these arguments were

Court held a specific constitutional mandate is necessary to accord an interest special constitutional protection.<sup>37</sup>

The *Rodriguez* Court also rejected any inference from past decisions that wealth is a suspect classification. It claimed its earlier decisions were consistent in giving special consideration to wealth classifications only where the disadvantaged class was definably and uniformly poor,<sup>38</sup> and had sustained complete deprivation of a desired benefit.<sup>39</sup> Since all students in Texas were provided some level

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inapplicable to the present case, since some level of education was being provided to all students. *Id.* at 36-37. The Court had not and could not guarantee "the most effective speech or the most informed electoral choice." *Id.* at 36.

37. *Id.* at 33-34. Mr. Justice Marshall, dissenting, objected to the Court's use of a two-tiered analysis. He argued that "[A]s the nexus between the specific constitutional guarantee and the nonconstitutional interests draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied . . . must be adjusted accordingly." *Id.* at 102-03. See generally Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

38. 411 U.S. at 20. The Court hypothesized three possible classes of "poor" the district court may have considered in its analysis. First, the Texas system could have discriminated against poor persons who fell below an identifiable poverty level. If true, this classification would satisfy the Court's definable and uniform indigency test and perhaps warrant closer scrutiny. The Court found no evidence, however, that all families in any property-poor district were of low income. Thus, there was no uniformity of poverty among this class. *Id.* at 22.

Second, the district court may have implicitly adopted a theory of comparative discrimination. This theory provides that along a continuum, the lower the family income the lower the dollar amount of education provided. The Court did not consider the merits of this argument because it found no proof of a significant correlation between family income and district property value. *Id.* at 25-27.

Third, the Texas financing plan may have discriminated against all who lived in property-poor districts, regardless of personal wealth. In rejecting this district poverty rationale, the Court refused to extend strict scrutiny to a "large, diverse, and amorphous class" that lacks all of the "traditional indicia of suspectness." *Id.* at 28. Thus, since the Court found no definably and uniformly poor class, it rejected the district court's finding that discrimination was present in the Texas school plan. *Id.*

39. *Id.* at 20. The Court reconciled several of its past decisions with the absolute deprivation requirement: *Douglas v. California*, 372 U.S. 353 (1963) (no relief for those on whom the burden of paying for defense counsel was great but not insurmountable); *Griffin v. Illinois*, 351 U.S. 12 (1956) (no constitutional violation would have been shown had the state provided an adequate substitute for a full stenographic transcript). 411 U.S. at 20-21.

Conspicuously absent from the majority's list is *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966). Justice Marshall, in dissent, cited this case as inconsistent with an absolute deprivation standard. In *Harper*, the Court had struck down a \$1.50 poll tax, in part because classifications based on wealth were "traditionally disfavored." *Id.* at 668. In Marshall's view, the degree of discrimination was irrelevant

of public education under the state's school finance system, the Court upheld the plan using the traditional scrutiny test.<sup>40</sup> The Court found that allowing districts to individually raise school revenue promoted the valid state goal of local control over public schools.<sup>41</sup>

The first state challenge to property-based school financing arose in California. In *Serrano v. Priest*<sup>42</sup> (*Serrano I*), the California Supreme Court declared education a fundamental interest<sup>43</sup> and wealth a suspect classification<sup>44</sup> under the federal and California constitutions.<sup>45</sup> Although the California court reached its decision prior

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since the statute was invalidated in toto instead of merely exempting the poor from payment. 411 U.S. at 118.

40. 411 U.S. at 36-37. Mr. Justice Powell, speaking for the Court, stated that "relative" differences in spending did not require judicial intervention, as long as each child was accorded the opportunity to acquire basic minimal skills. *Id.* at 37. Justice Marshall objected to the Court's premise that any level of educational quality would pass scrutiny. "The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action. It mandates nothing less than that 'all persons similarly circumstanced shall be treated alike.'" *Id.* at 89, citing *R.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920). See Note, *Strict Scrutiny and Rodriguez—Relative Versus Absolute Deprivation*, 9 Sw. U.L. REV. 217 (1977).

The Court's holding was not based on factual peculiarities in the Texas plan. The majority stated that all states had similar plans. 411 U.S. at 55-56. Commentators popularly see *Rodriguez* as ending the possibility of federal judicial action in school finance reform. See Comment, *Buse v. School Finance Reform: A Case Study of the Doctrinal, Social and Ideological Determinants of Judicial Decisionmaking*, 1978 WIS. L. REV. 1071, 1077. But see Lindquist & Wise, *Developments in Education Litigation: Equal Protection*, 5 J. L. & EDUC. 1 (1976) (discounting the long-run impact of *Rodriguez*).

41. 411 U.S. at 55.

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

43. Citing *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and other cases to establish education's importance in American society, the court discussed the close relationship between education and other fundamental rights in reaching its holding. 5 Cal. 3d at 616-18, 487 P.2d at 1264-66, 96 Cal. Rptr. at 624-26.

44. 5 Cal. 3d at 598, 487 P.2d at 1250, 96 Cal. Rptr. at 610. The court cited several Supreme Court cases, including *Harper*, *Griffin* and *Douglas*, which the *Rodriguez* district court also relied on. See note 30 *supra*. The only state case cited was *In re Antazo*, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970) (fourteenth amendment rights of criminal defendants). See generally Note, *Strict Scrutiny and Rodriguez—Relative Versus Absolute Deprivation*, 9 Sw. U. L. REV. 217, 219-20 (1977) (examining the basis for speculation that wealth had in fact been labeled a suspect classification by the Supreme Court).

45. CAL. CONST. art. 1, § 11 states: "All laws of a general nature shall have a uniform operation." The court ruled that since it had previously held this clause to be "substantially the equivalent" of the fourteenth amendment equal protection clause,

to *Rodriguez*, it later reiterated the appropriateness of the strict scrutiny test under the California Constitution in the second *Serrano v. Priest*<sup>46</sup> (*Serrano II*) decision. In that case, the court struck down the state legislature's revised finance plan which perpetuated the revenue disparities found in *Serrano I*.<sup>47</sup>

Since *Rodriguez*, several state supreme courts have considered the constitutionality of their state's school finance system.<sup>48</sup> Many have rejected the challenges, either citing the Supreme Court's interpretation of equal protection<sup>49</sup> or developing their own.<sup>50</sup> In *Horton v. Meskill*,<sup>51</sup> however, the Connecticut Supreme Court invalidated the state's finance plan as impinging upon students' rights to equal education, without addressing the validity of wealth-based classifications.<sup>52</sup> The Supreme Court of New Jersey rejected equal protection claims in *Robinson v. Cahill*,<sup>53</sup> but reached the same result as the *Meskill* court under an education provision in the New Jersey Constitution.<sup>54</sup> A few courts, like the Wyoming court in *Washakie*

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its analysis of plaintiffs' federal claim was also applicable to any state claims. 5 Cal. 3d at 597 n.11, 487 P.2d at 1249 n.11, 96 Cal. Rptr. at 609 n.11.

46. *Serrano v. Priest*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

47. *Id.* at 776-77, 557 P.2d at 958, 135 Cal. Rptr. at 374. The revised plan froze the amount of revenue wealthier districts could provide per pupil (exclusive of an annual inflation allowance). Poorer districts were allowed to increase revenues at a rate estimated to bring all districts to parity in 15-20 years. The plan did not, however, take notice of the districts' ability to raise these revenues. *See* GARMS, *supra* note 4, at 217-18.

48. *See* note 1 *supra*.

49. *E.g.*, *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975) (education not a fundamental right under Supreme Court authority); *Northshore School Dist. No. 417 v. Kinnear*, 84 Wash. 2d 685, 530 P.2d 178 (1974) (Supreme Court's analysis used for both federal and state claims).

50. *See* *Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973) (although education found to be a state fundamental right, finance plan upheld under rational relation test); *Olsen v. State*, 276 Or. 9, 554 P.2d 139 (1976) (though scope of federal and state equal protection provisions is the same, separate analysis is still in order).

51. 172 Conn. 615, 376 A.2d 359 (1977).

52. *Id.* at 648-49, 376 A.2d at 374-75. Although equal protection analysis did not require fiscal neutrality in school financing, the Connecticut legislature enacted such a plan. *See* CONN. GEN. STAT. §§ 10-261 to 10-266d (1979).

53. 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, 411 U.S. 976 (1973).

54. *Id.* at 519-20, 303 A.2d at 297. N.J. CONST. art. 8, § 4, ¶ 1 provides in part: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools. . . ." The court apparently equated "through



County, have adopted the *Serrano* approach.<sup>55</sup>

The *Washakie County* court summarily dismissed the *Rodriguez* construction of equal protection limitations, calling federal standards a minimum upon which state constitutions may expand.<sup>56</sup> It found education to be a fundamental right by considering both its societal importance<sup>57</sup> and the numerous education provisions in the Wyoming Constitution.<sup>58</sup> The court considered *Serrano I* persuasive authority<sup>59</sup> since the equal protection provisions in the California and Wyoming Constitutions are identical.<sup>60</sup> In its declaration of wealth

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and efficient" with a required minimum standard for all students. *See* 62 N.J. at 514, 303 A.2d at 295.

Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979), is based on a "thorough and efficient" provision in West Virginia's constitution. *Id.* at 878. One commentator suggests that since many states are conservative in their equal protection interpretations, a better strategy might be to seek invalidation through constitutional education clauses. Seven states have a "thorough and efficient" clause; nine have either "thorough" or "efficient" mandates. Another nine states' constitutions provide for a "general and uniform" public education system; ten more guarantee either a "general" or "uniform" system. Thus, if the *Robinson* reasoning were adopted, constitutional challenges might succeed in 34 more states. Introduction, *Reform Through the State Courts: Strategies for Selected States*, 38 LAW. & CONTEMP. PROB. 293, 310-11 (1974).

55. *E.g.*, Knowles v. State Bd. of Educ., 219 Kan. 271, 547 P.2d 699 (1976); Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972).

56. 606 P.2d 310, 332 (Wyo. 1980). The court admitted that it had previously held Wyoming's "uniform operation" provision to be "equivalent" to the equal protection clause of the fourteenth amendment, but maintained that conflicting interpretations were valid. *Id.* It cited *Nehring v. Russell*, 582 P.2d 67 (Wyo. 1978) which struck down Wyoming's guest statute despite a previous ruling by the 10th Circuit Court of Appeals upholding the law under the fourteenth amendment. The *Nehring* court drew a distinction between the "uniform operation" and "equal protection" phraseologies, implying that the Wyoming provision should be given a more liberal interpretation. *Id.* at 79-80. *See generally* authorities cited in note 6 *supra*, for the proposition that state courts are the final interpreters of state law.

57. 606 P.2d at 333-34. This court, like both the *Serrano I* and *Rodriguez* courts, cited passages from *Brown v. Board of Educ.*, 347 U.S. 483 (1954). *See* notes 29 & 43 *supra*.

58. The Wyoming Constitution contains an unusual number of provisions relating to education. These provisions require both a "thorough and efficient system," WYO. CONST. art. 7, § 9, and "a complete and uniform system" of public instruction, WYO. CONST. art. 7, § 1. In addition, the Wyoming Constitution contains an unusual guarantee that "the right of the citizens to opportunities for education should have practical recognition." WYO. CONST. art. 1, § 23. For a general discussion of state education provisions, *see* note 54 *supra*.

59. 606 P.2d at 332.

60. *See* notes 8 & 45 *supra*.

as a suspect classification, in fact, the court stated no justification except *Serrano I*.<sup>61</sup>

The Wyoming Supreme Court's criteria for determining the fundamental importance of education conjoined the United States Supreme Court's requirement of explicit or implicit constitutional mention<sup>62</sup> with the societal importance standard from the *Rodriguez* district court.<sup>63</sup> Other state courts have rejected the Supreme Court's test outright for its excessive rigidity,<sup>64</sup> arguing that literal interpretation of ever changing state constitutions would not be wise.<sup>65</sup> The *Washakie County* court's use of the Supreme Court test in conjunction with an intuitive standard of education's individual and societal importance provides a flexible, workable standard for state use.

The court's holding that wealth classifications are suspect, however, has no basis in the Wyoming Constitution. For authority, the court cites *Serrano I* and a United States Supreme Court case,<sup>66</sup> both of which interpret only the federal equal protection clause.<sup>67</sup> Thus, not only did *Washakie County*'s wealth holding have no textual or judicial state support, but the federal interpretations it relied upon were expressly repudiated in *Rodriguez*.<sup>68</sup> Constitutional challenges to other locally funded public services in Wyoming will be necessary to determine the court's commitment to wealth neutrality.<sup>69</sup>

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61. The court also cited *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (invalidation of poll tax under fourteenth amendment), but offered no explanation for its relevance to the case at hand. 606 P.2d at 334.

62. See notes 34-37 and accompanying text *supra*.

63. See note 29 and accompanying text *supra*.

64. *E.g.*, *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973) (rejecting entire concept of fundamental rights as unhelpful); *Olsen v. State*, 276 Or. 9, 554 P.2d 139 (1976) (using a balancing test to determine education's importance).

65. *Olsen v. State*, 276 Or. 9, 14, 554 P.2d 139, 144 (1976) ("This is particularly true in Oregon where many laws which are usually considered legislation are inserted in the constitution.").

66. See note 61 *supra*.

67. See notes 44 & 61 *supra*.

68. See notes 39-40 *supra*.

69. The possibility of other publicly funded services being challenged was of concern to the majority in *Rodriguez*, which feared the overthrow of traditional local provision of police, fire, health, and utility services. 411 U.S. 1, 54 (1973). The California Supreme Court, in *Serrano I*, limited its wealth holding to classifications that infringed the right to education, citing education's "uniqueness among public activities." 5 Cal. 3d 584, 613-14, 487 P.2d 1241, 1262-63, 96 Cal. Rptr. 601, 622-23 (1971). The *Washakie County* opinion contained no such limitation.

*Washakie County* also fails to clarify what methods of school finance reform the state legislature may adopt.<sup>70</sup> National commentators have proposed several definitions for "equal education"<sup>71</sup> and "wealth neutrality,"<sup>72</sup> the controversy generally centering around the importance of local control over schools. Advocates of local control suggest a program to supplement the tax bases of property-poor districts with state funds, giving all districts an equal ability to raise school revenue.<sup>73</sup> Each district would then have an equal opportunity to provide its students with the quality of education it desires.<sup>74</sup>

Critics of local control point out that it would encourage disparities between school districts.<sup>75</sup> They argue educational quality ought not be left in the generous or miserly hands of local taxpayers.<sup>76</sup> Full

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70. *Serrano II*, by contrast, listed several acceptable alternatives, including state-wide property tax funding for schools rather than local funding, redrawing district boundary lines to equalize assessed property valuations, district power equalizing, and vouchers. 18 Cal. 3d 728, 747, 557 P.2d 929, 938-39, 135 Cal. Rptr. 345, 354-55 (1976).

71. Two of the most basic definitions are "equal inputs," requiring that the same amount of economic resources be applied to each child's education, and "equal outputs," meaning the manipulation of resources such that all students of equal ability achieve the same results on standardized achievement exams. See BENSON, *supra* note 3, at 7.

Another study suggests eight different standards: "(1) equal dollars per pupil; (2) dollars adjusted according to pupil needs; (3) lack of judicially manageable standards; (4) maximum variable ratio; (5) negative standard; (6) inputs; (7) outputs; and (8) minimum adequacy." McDermott & Klein, *The Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference?* 38 LAW. & CONTEMP. PROB. 415, 416 (1974).

72. See generally Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305, 310-12 (1969); Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 1977 DUKE L.J. 1099, 1122-26.

73. This plan, called district power equalizing (DPE), was first proposed in J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* 200-243 (1970). For an examination of the pricing effects of DPE, see W. GRUBB & S. MICHELSON, *STATES AND SCHOOLS* 141-52 (1974).

74. Some authorities speculate that the "wealth neutral" standard would be breached under district power equalizing if wealthy districts continue to spend more on education than poorer districts. They conclude, however, that since education in poorer districts will be subsidized by state funds, the districts will demand higher quality schools than they otherwise would have. See GARMS, *supra* note 4, at 218-19 (1978).

75. See generally Silard & Goldstein, *Toward Abolition of Local Funding in Public Education*, 3 J. L. & EDUC. 307 (1974) (criticizing district power equalizing on equity and efficiency grounds).

76. See BENSON, *supra* note 3, at 54.

state funding is the alternative most widely proposed. Under this plan, the state levies a uniform school tax and redistributes the money on the basis of school need.<sup>77</sup>

The Wyoming court left the method of compliance with its order to the legislature, expressly refusing to give advance approval to any program.<sup>78</sup> Nevertheless, several passages in the opinion imply endorsement of a full state funding plan.<sup>79</sup> The decision is ambiguous regarding other school finance alternatives.<sup>80</sup>

*Washakie County* represents the beginning of a new philosophy of equal and equitable public education in Wyoming. Its national influence in school finance reform may be small, however, since many aspects of the opinion lack clarity and persuasive reasoning. Legislative compliance with these vague judicial standards may be turbulent,<sup>81</sup> as other cases arise to test the scope of *Washakie County's* holding.

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77. See GARMS, *supra* note 4, at 54.

78. 606 P.2d 310, 336 (Wyo. 1980).

79. The court suggests that a school district tax be levied throughout the state and paid into a foundation fund for distribution on an equitable basis. *Id.* at 335. The court also affirms the proposition that all funds derived from ad valorem tax levies be divided equally among the state's school districts. *Id.* at 319. These two statements describe exactly the full state funding system.

80. The court's basic assertion is a negative one: that school funding shall not be a function of wealth. See *id.* at 334, 336. Many wealth neutral proposals might qualify under this directive. See, for example, the alternatives cited by the *Serrano II* court, set out in note 70 *supra*. The *Washakie County* court specifically states, however, that "[e]quality of dollar input is manageable. There is no other viable criterion." 606 P.2d at 334. Only full state funding approaches this standard.

81. An example of problems in legislative compliance is *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973). The *Robinson* controversy lasted for three years and resulted in six decisions, culminating in 1976 when the court approved N.J. STAT. ANN. § 18A:7A-5 (West Supp. 1979-80). *Robinson v. Cahill*, 69 N.J. 449, 355 A.2d 129 (1976). See generally Martell, *School Finance Reform: Robinson v. Cahill*, 13 URBAN L. ANN. 139, 154-56 (1977).