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Equal Protection - An End to Wealth Discrimination in Public Education

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EQUAL PROTECTION—AN END TO WEALTH DISCRIMINATION IN PUBLIC EDUCATION

"[T]here is no justification—constitutional or otherwise—for permitting the circumstances of parental wealth and geography to determine the quality of a child's education in the public schools of a state."[1]

Action was brought by public school pupils challenging the California public school financing scheme. Petitioners contended that they were denied equal protection of the law as guaranteed by the United States Constitution and the California Constitution due to the allocation of educational resources in direct proportion to the wealth of the residents of individual school districts. This method of allocation resulted in disparities in the amount of funds available for education in wealthy districts and poor districts causing residents of poorer districts to pay a higher tax rate on their property for the education of their children, than do the parents of children in the wealthier districts. As a result, a child in a poorer district is likely to receive an education inferior to that received by a child residing in a more wealthy district.

The Superior Court, Los Angeles County, Robert W. Kenny, J., granted defendants' motion for dismissal because after the defendants' demurrer was sustained, the plaintiffs failed to amend their complaints. The court of appeals held that the complaint did not state a cause of action under the equal protection clause of the fourteenth amendment.[2] The Supreme Court of California reversed the judgment with directions to the lower court to overrule the demurrers. It held that the public school financing system in California does cause substantial disparities in the amount of revenue available per student among school districts. The resulting inequality of educational facilities available to its students constitutes discrimination by wealth in violation of the equal protection clause of the fourteenth amendment. *John Serrano, Jr., et al, Plaintiffs and Appellants, v. Ivy Baker Priest, as State Treasurer, etc., et al, Defendants* and *Respondents Sup. Calif. Rptr. 601 (1971).*

Examined here is the evolution of the equal protection formula for determining the constitutionality of classifications of persons via a statute

1. WISE, RICH SCHOOLS, POOR SCHOOLS, THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY at xi (1968).

2. 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (1970).

affecting some fundamental interest for which no over-riding state interest justifies such classifications. The application of such a formula and the recognition of education as a fundamental interest complete the scope of this note.

The complaint in *Serrano v. Priest*[3] essentially took the form of three causes of action. The first cause of action alleges that the plaintiffs are students attending schools in Los Angeles County under a financing scheme that relies heavily on taxation of real property within each school district for its revenue; that this method of financing causes substantial disparities among individual school districts in the amount of revenue available per pupil in the district; and that as a result of this method of financing, districts with smaller tax bases (based upon assessed valuation of real property, including industrial property contained within the district) cannot spend as much money per child for education as districts with larger tax bases. This financing scheme violates the equal protection clause of the Constitution by creating substantial disparities in the quality of educational opportunities available to school children in the various school districts of the state. As a result, plaintiff school children claim they are afforded substantially inferior educational opportunities than are made available to school children in many other districts of the state. Also enumerated in the complaint are specific allegations of denials of equal protection.[4] In their second cause of ac-

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

4. The complaint alleges that the financing scheme:

"A. Makes the quality of education for school age children in California, including Plaintiff Children, a function of the wealth of the children's parents and neighbors, as measured by the tax base of the school district in which said children reside, and

"B. Makes the quality of education for school age children in California, including Plaintiff Children, a function of the geographical accident of the school district in which said children reside, and

"C. Fails to take account of any of the variety of educational needs of the several school districts (and of the children therein) of the State of California, and

"D. Provides students living in some school districts of the State with material advantages over students in other school districts in selecting and pursuing their educational goals, and

"E. Fails to provide children of substantially equal age, aptitude, motivation, and ability with substantially equal educational resources, and

"F. Perpetuates marked differences in the quality of educational services, equipment and other facilities which exist among the public school districts of the State as a result of the inequitable apportionment of State resources in past years.

"G. The use of the 'school district' as a unit for the differential allocation of educational funds bears no reasonable relation to the California legislative purpose of providing equal educational opportunity for all school children within the State.

"H. The part of the State financing scheme which permits each school district to retain and expend within that district all of the property tax collected within that

tion plaintiffs alleged that they, as parents, are required to pay a higher tax rate than taxpayers in many other school districts in order to obtain for their children the same or lesser educational opportunities afforded children in other districts. Thirdly, they alleged that an actual controversy exists between the parties as to the validity and constitutionality of the financing scheme. The complaint prayed for a declaration that the present financing system is unconstitutional.

Defendants' contention was that through a system of basic aid and equalization aid the government distributes funds in a manner beneficial to the poorer districts; that this system tends to equalize disparities caused by the differing tax bases of the various school districts; and that in spite of any inequality which may result, such a plan is necessary to promote the *compelling state interest* of allowing local control of schools by district and allowing each community to decide for itself how much it will spend for the education of its children.

The court, in finding for the plaintiff, took this opportunity to seize upon the constitutional issues of the case and examine the application of equal protection to wealth discrimination as applied to school finance. The importance of the *Serrano* decision becomes clear in light of the fact that most states finance their schools in much the same way that California's statute provides.[5] Speaking directly to the defense's arguments, the court stated, "assuming *arguendo* that local administrative control may be a compelling state interest, the present financial system cannot be considered necessary to further this interest,"[6] and

> such fiscal freewill is a cruel illusion for the poor school districts. We cannot agree that Baldwin Park residents care less about education than those in Beverly Hills solely because Baldwin Park spends less than $600 per child while Beverly Hills spends over $1200. As defendants themselves recognize, perhaps the most accurate reflection of a community's commitment to education is the rate at which its citizens are willing to tax themselves to support their schools. Yet by that standard, Baldwin Park should be deemed far more devoted to learning than Beverly Hills, for Baldwin Park citizens levied a school tax of well over $5 per $100 of assessed valuation, while residents of Beverly Hills paid only slightly more than $2.[7]

The court applied the traditional formula for the examination of state

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district bears no reasonable relation to any educational objective or need.

"I. A disproportionate number of school children who are black children, children with Spanish surnames, children belonging to other minority groups reside in school districts in which a relatively inferior educational opportunity is provided." *Id.* at 589-90, 96 Cal. Rptr. at 604-05, 487 P.2d at 1244-45.

5. WISE, *supra* note 1, at 3, fn. 3.

6. Serrano v. Priest, *supra* note 3, at 610, 96 Cal. Rptr. at 620, 487 P.2d at 1261.

7. *Id.* at 611, 96 Cal. Rptr. at 620, 487 P.2d at 1261.

laws when equal protection is in issue. Where the classifying fact is inherently suspect by race or wealth, or the interest is characterized as fundamental, the standard of review is whether the distinctions drawn are necessary to further a compelling state interest.[8]

Perhaps the most ambiguous factor in this equal protection formula is the determination of what is a fundamental interest. *Serrano* broke new ground in holding that education is the most recent addition to a growing list of fundamental interests which will allow courts to apply constitutional sanctions.[9]

To determine the inherent inequity (if not the scope)[10] of such a financing scheme, this note will examine some statistical material concerning educational expenditure. The existence of wealth discrimination and its potential to do harm through its effect upon educational opportunity should become clear in light of the figures given below. Under a system in which the quality of schools reflects assessed valuation of the real property in the district, the quality of public education depends upon the wealth of a child's parents. To exemplify the substantial variation in tax bases throughout the state of California the court noted that "the assessed valuation per unit of average daily attendance of elementary school children ranged from a low of $103 to a peak of $952,156—a ratio of nearly 1 to 10,000."[11] This figure alone shows the basic inequity to children of a state which bases financing on property values. Also to be considered is the injustice of such a system with respect to parents who must adjust the rate of taxation of their own property (especially in districts with a low industrial tax base) to maintain a competitive school system for their children. Between districts with small or even moderate disparity in their tax bases, the residents retain some control over the relative quality of education for their children by their ability to tax themselves accordingly—to work a little harder for the sake of good schools. But what choice do the residents

8. For example, *see* Kramer v. Union Free School District, 395 U.S. 621, 630 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969).

9. On the factual issue the court held, "Although equalization aid and supplemental aid temper the disparities which result from the vast variations in real property assessed valuation, wide differentials remain in the revenue available to individual districts and, consequently, in the level of educational expenditures." *Serrano, supra* note 3, at 594, 96 Cal. Rptr. at 607, 487 P.2d at 1247.

10. According to Mr. Wise, *supra* note 1, nearly all of the states provide for financing of their local school districts essentially through local taxation of real property within the school district. California's and Illinois' statistics are presumably representative of the situation in most states.

11. Serrano v. Priest, *supra* note 3, at 592, 96 Cal. Rptr. at 606, 487 P.2d at 1246.

of a poor school district have when faced with such large variances as between Baldwin Park where the assessed valuation per child is $3,706 and Beverly Hills where the figure runs to over $50,000?[12] No matter how hard the people of the poor districts tax themselves, there is no hope that their children will enjoy a school nearly as well equipped as one in a wealthier district.

Mr. Wise points out evidence of similar disparity. In high school districts in Illinois, having an average daily attendance of less than four hundred pupils, there were variances in assessed valuation of real property ranging from a high of $322,179 to a low of $14,414, a ratio of over 22 to 1; and, in elementary districts, there were found to be variances in a ratio of over 50 to 1.[13]

One writer comments on the potential danger inherent in this system in the possibility of gerrymandering:

> The local share of the education bill is paid primarily from taxation of the real property located in the district. Hence, the power of some districts to include estates of large industrial holdings within their boundaries but to exclude high-density residential areas allows those districts to provide expensive educational programs at extremely low tax rates. The other result, of course, is that the poorer districts (in terms of local real property tax base) must levy taxes at high rates in order to finance even a minimum program. The gerrymandering of the real property base excludes a substantial portion of local wealth from the support of schools.[14]

Such a temptation could well prove overpowering to those influential residents of suburban school districts which border high density urban areas.

Mr. Wise reported two gerrymandered districts he labeled X and Y. District X had 411 pupils with an assessed property valuation per pupil of $226,505 and an expenditure per pupil of $1,168 while district Y which contained 4,279 pupils, had an assessed valuation per pupil of $16,985 and was able to spend only $479.52 per pupil.[15]

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12. *See* CAL. DEPT. ED. CAL. PUBLIC SCHOOLS, SELECTED STATISTICS, 1968-1969 (1970) Table IV-II at 90-91.

13. Wise, *supra* note 1, at 128; *see generally* COVANT, SLUMS AND SUBURBS 2-3 (1961); COONS, CLUNE, and SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970); REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 434-36 (Bantam Ed. 1968); Horowitz and Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State*, 15 U.C.L.A. L. REV. 787 (1968); Horowitz, *Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A. L. REV. 1147 (1966).

14. BENSON, THE CHEERFUL PROSPECT: A STATEMENT ON THE FUTURE OF PUBLIC EDUCATION at 44-45 (1965).

15. Wise, *supra* note 1, at 128.

Statistics such as these go to prove that under such a system only a district with a large tax base will be able to decide how much it would like to spend to educate its children. The poorer districts are limited in their decision by how far they are able to tax themselves. The question may arise as to whether this is inherently bad or merely a necessary evil. True, under the free enterprise economic system, some people are going to have to work harder (or spend a greater portion of their income) for a given commodity than others. Arguments have been made in other contexts attempting to justify such inequality. But, here we are dealing not with ordinary goods and services but with a *fundamental interest*—education. The following is a discussion of the history of equal protection and the evolution of the doctrine of strict scrutiny of discriminatory classifications.

The fourteenth amendment with its equal protection and due process clauses has long been the authority by which the courts have been able to examine the actions of state legislatures. This authority was recognized by Mr. Justice Bradley in the *Civil Rights Cases* in 1883.[16]

> Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws.[17]

The old equal protection refers to that relatively narrow application of the clause during a time of reluctance by the courts to step into the legislative domain. There was a presumption that state laws which classified persons did so out of necessity and in good faith. The *rational relationship* rule was used whereby the state, when defending a classifying statute, needed to prove only some rational relationship between the interest of the state and the purpose of the statute to be held within the limits of the fourteenth amendment. There has always been a heavy burden of proving lack of reasonable relationship between state interest and statutory purpose on the part of a class which seeks relief from any burdens which may be imposed on it by such a statute.[18]

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16. 109 U.S. 3 (1883).

17. *Id.* at 11; *see also* Hill v. Texas, 316 U.S. 400 (1942); Evans v. Newton, 382 U.S. 296 (1966); Cooper v. Aaron, 358 U.S. 1 (1958); Robinson v. Florida, 378 U.S. 153 (1964); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

18. *See* Asbury Hospital v. Cass County, 326 U.S. 207 (1945); Snowden v. Hughs, 321 U.S. 1 (1944); New York Rapid Transit Corp. v. New York, 303 U.S. 573 (1938); State Board of Tax Commissioners v. Jackson, 283 U.S. 527 (1931);

Discriminating statutes were therefore presumed justified and, except for statutes which classify people for the sole purpose of discrimination against one class, were held constitutional.

As exemplified in the *Civil Rights Cases* and others, the equal protection clause was applied in the early cases to statutes involving racial discrimination. The racial cases were, by their facts, easily applicable to the sanctions of the fourteenth amendment. Also, the reconstruction origins of the amendment created the impression in some courts that the equal protection clause was limited in its application to the race cases.[19] The obvious application of the clause became its limitation. Even restrictions of such basic interests as the right to bear children were not considered sufficient to apply the sanctions of the fourteenth amendment in *Buck v. Bell.*[20] Classifications of persons for any plausible end were considered to be justified. It was only in cases involving clear violations of equal protection via discriminatory state laws that the Court would use the constitutional sanctions of the equal protection clause.[21] Indeed, the Court held the fourteenth amendment was meant to refer *exclusively* to issues involving racial discrimination.

Concern with non-racial classifications of persons grew but did not merit the sympathy of the courts until much later. Cases questioning such classifications continued to be met with the old equal protection rule of rationality of relationship to state objectives. The missing element in these cases was the special need for a strict scrutiny by the courts as provided by the inherently suspect classification of race. This acceptance of non-racial classification was voiced by the Court in following the narrow rule preventing judicial intervention in state statutes in the more recent case, *Salsburg v. Maryland.*[22] Here the classification

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McGowan v. Maryland, 366 U.S. 420 (1961); Allied Stores of Ohio Inc. v. Bowers, 358 U.S. 522 (1959).

19. *See* State v. Weber, 96 Minn. 422, 105 N.W. 490 (1905), (limiting right of suffrage of naturalized citizens); Pope v. Williams, 98 Md. 59, 56 A. 543 (1903), (voting restrictions denying registration of citizens with a residency of less than one year in state upheld); Logan v. United States, 144 U.S. 263 (1892), (holding the amendment confers no new rights on citizens generally); McKinney v. State, 3 Wyo. 719, 30 P. 293 (1892), (holding exclusion of women from jury is not prohibited by the amendment); Allen v. Wyckoff, 48 N.J.L. 90, 2 A. 659 (1886), (holding discrimination against nonresidents in game laws does not violate the amendment).

20. 274 U.S. 200 (1927); *see also* Pearson v. Probate Court, 309 U.S. 270 (1940), (sterilization); Baxtrom v. Herold, 383 U.S. 107 (1966), (involuntary commitment to mental institution); *but see* Skinner v. Oklahoma, 316 U.S. 535 (1942).

21. *See* for example, Strauder v. West Virginia, 100 U.S. 303 (1880).

22. 346 U.S. 545 (1954); *see also* McGowan v. Maryland, *supra* note 18 and Williamson v. Lee Optical, 348 U.S. 483 (1955).

was one based upon counties with respect to the admissability of evidence, concerning certain gambling misdemeanors, inadmissible in other counties, in Anne Arundel County, Maryland. The Court held that such classifications were presumed to be reasonable and were not subject to strict examination for violation of equal protection. The constitutional safeguard was held to apply only in cases involving classifications that were wholly irrelevant to the state's objectives.[23] So at this point, we have the recognized authority of the Court to strike down state laws which are violative of equal protection. We also have seen the recognition that classifications of people by statutes (though presumed to be reasonable and not subject to any special suspicion) calls to the attention of the court that these people, so classified, have some tendency to fear for their own constitutional safety, if only by reason of the fact of the classification itself. Still needed, however, is an *inherently* suspect classification beyond that of race, which will call for strict scrutiny of the courts even where the interest involved is not of a fundamental nature.

The new equal protection refers to those decisions which have expanded the application of equal protection by recognizing the existence of certain *suspect* classifications which, when recognized by the court, require a strict scrutiny of the statute creating the classification. The purpose of such an examination is to determine whether that statute is necessary to further some *compelling state interest*—a much higher standard of scrutiny than the old rule of mere rational relationship and presumed reasonableness.[24] Whether a classification should be characterized as suspect has been the subject of both old and new equal protection arguments. The earlier cases held, in effect, that race classifications were inherently suspect; but, for any other classification to be treated with suspicion, the presumption of reasonableness had to be overcome.[25] This was a formidable problem to the courts who had

23. Reasonable classifications have been defined as those which are incidental to necessary legislation. Carrington v. Rash, 380 U.S. 89 (1965); Kotch v. River Port Pilots Commissioners, 330 U.S. 552 (1947); Great Atlantic and Pacific Tea Co. v. Grosjean, 301 U.S. 412 (1937); Continental Baking Co. v. Woodring, 286 U.S. 352 (1932).

24. *See* Kramer v. Union Free School District, *supra* note 8, at 627-28 "and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable. [*See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966).] The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality."

25. *Id.*

traditionally been reluctant to interfere with state law. The new equal protection cases recognize classification as suspect if some *fundamental interest* has been affected by such a statute.

The foundation cases of *Serrano v. Priest* apply the strict scrutiny of the new equal protection to statutes creating classifications along lines of wealth.[26] The constitutional guarantee of equal protection of the law has been especially vulnerable where statutes create classifications which result in harsh treatment of the poor. Poverty is a condition frought with denials of fundamental rights and has become an inherently suspicious topic. Wealth classification has become sufficient to cause independently a strict scrutiny by the courts. Indeed, whether an interest is fundamental appears to hinge on whether the court finds the existence of a classification along lines of wealth.

In 1956, the era of new equal protection began with the decision of *Griffin v. Illinois*.[27] The Court held that the Illinois criminal appellate procedure was violative of the equal protection clause because indigent defendants were required to provide their own transcript of the court proceedings for appeal; except where an indigent defendant was sentenced to death, in which case he would be afforded a free transcript. Petitioners, having been convicted of armed robbery, moved that a certified copy of the entire record be provided them without cost, on the ground of their indigency. The motion was denied and the Illinois Supreme Court affirmed. The United States Supreme Court vacated the judgment of the Illinois Supreme Court and remanded the case. Mr. Justice Black, citing both the due process and equal protection clauses, wrote in his opinion:

> In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial.[28]

Here the class was one of indigent defendants as opposed to defendants with funds to buy a transcript, clearly a classification along lines of wealth. The fundamental interest is that of a fair trial. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[29] More significantly, the Court implied the existence of, at least in this area of criminal appeals, "an affirmative duty to lift the handicaps flowing from differences in economic circum-

26. *See* note 24; *infra*, notes 28, 33, 38.
27. 351 U.S. 12 (1956).
28. *Id.* at 17-18.
29. *Id.* at 19.

stances."[30] This case contains the first reference in the law of an affirmative duty imposed on the state to relieve the burdens of poverty. The effect of *Griffin* was to define wealth as a suspect classification.

The next step in this new area of equal protection for the poor was taken in 1963 in the case of *Douglas v. California.*[31] Here the Court took the step of applying the law developed in *Griffin* and reinforced the commitment to equal protection for the poor. The defendants were convicted of thirteen felonies including robbery and assault. Both indigent defendants appealed as of right to the California District Court of Appeal which affirmed the convictions. Defendants' petition for review to the Supreme Court of California was denied. The United States Supreme Court granted certiorari to litigate the question in the petition as to the right of counsel on appeal. The Court, relying primarily on *Griffin*, agreed with the dissenting justice of the California Supreme Court, who compared the effects of a denial of counsel with that of a denial of a transcript to an indigent when the same reason, lack of funds, causes both.[32]

Mr. Justice Douglas spoke directly to the issue of wealth discrimination in his opinion.

> There is lacking that equality demanded by the fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.[33]

Mr. Justice Clark in his dissent recognizes the trend of the Court toward a duty to indigent defendants and displays his disgust when he referred to "this new fetish for indigency"[34] arguing that this trend in the area of the criminal process creates too heavy a burden on the State's judicial machinery. Justice Harlan again dissented saying this case, like *Grif-*

30. *Id.* at 34, Mr. Justice Harlan's dissent arguing that this decision *causes* discrimination by imposing a duty to aid some and not others. His thesis seems to be that non-action cannot be discriminatory, while affirmatively aiding some, discriminates against others. He does concede however, that there may be a due process issue in the case.

31. 372 U.S. 353 (1963).

32. *Id.* at 355, The "[d]enial of counsel on appeal (to an indigent) would seem to be a discrimination at least as invidious as that condemned in Griffin v. Illinois."

33. *Id.* at 357-58.

34. *Id.* at 359, a dissent grounded in the practicality of operating within the criminal process as compared with Justice Harlan's consistent objection on grounds of construction.

fin, speaks of due process, not equal protection. He recognized the illegality of a law which discriminates between rich and poor, but rigorously dissented from the suggestion of illegality of any law that may "affect the poor more harshly than it does the rich . . . ."[35] Again, in *Douglas,* appear the elements of the equal protection formula. *Douglas* dealt with indigent defendants as a class and involved the fundamental interest of representation by counsel on appeal. As the application of the new equal protection grows out of the area of criminal indigency and into other areas, the Court will be required to define more specific rights as fundamental interests.

In 1966, the new equal protection emerged from the area of criminal process. *Harper v. Virginia Board of Elections*[36] dealt with de facto discrimination through wealth, in the form of a statute providing for a state poll tax. Here the Court in its decision striking down the poll tax broke new ground by invalidating a statute as violative of due process even without a classification dividing rich and poor. Section 1973 of Virginia's Constitution directed the General Assembly to levy an annual poll tax not exceeding $1.50 on every resident of the state twenty-one years of age or over. Section 18 provided for payment of the tax as a precondition to voting, and Section 20 provided that all state poll tax shall be paid for three years preceding the year in which one applies for registration. The Court held that the poll tax was a fee chargable to everyone who would vote, rich and poor alike, and therefore did not create a classification along wealth lines. The decision of the Court centered on the limited power of the state in the regulation of voting.[37] The opinion goes on to speak of wealth discrimination as outside the scope of the state's authority in fixing voting qualifications. "Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax."[38] The opinion does, however, contain important language about poverty and wealth discrimination as perhaps an independent ground for the unconstitutionality of this law. Such language contains the real significance of *Harper.* "Lines drawn on the basis of

35. *Id.* at 361. It is to be noted that in both *Griffin* and *Douglas* Mr. Justice Harlan spoke separately to the issues of equal protection and due process.

36. 383 U.S. 663 (1966).

37. *Id.* at 668. The Court held that the state was limited in its power to the fixing of voter qualifications and that the ability to pay the poll tax had no relation to a person's qualifications to vote.

38. *Id.* at 666. The Court did mention that some restrictions, such as literacy tests, could be valid. *But see* Louisiana v. United States, 380 U.S. 145 (1965), where the test was designed specifically to keep black people from voting.

wealth or property, like those of race, are traditionally disfavored."[39] The Court recognized the discrimination but said that the degree of discrimination is irrelevant.[40] However, the degree of discrimination may have been very relevant, if the more positive means of relief via constitutional authority of state regulation of voting had not been available. Voting here was called a fundamental interest, even though voter qualification are normally left up to the states. In the absence of a true classification by wealth, this measure served to grant relief from a statute which effectively denied the right of voting to those people inclined to save the tax money rather than vote. The final effect of *Harper* is to signal a step forward by the Court in holding that even without a classification per se, de facto discriminations are suspect and will be examined carefully in cases involving fundamental interests—in this case, voting.

The significance of *McDonald v. Board of Elections*[41] is in its exemplification of the completed equal protection-wealth classification formula. Petitioners, county jail inmates awaiting trial (most were without funds to make bail), sought to receive absentee ballots for voting. They claimed a strict scrutiny by the court was justified here because voting rights were involved. In dealing with the right to receive absentee ballots, the Court was compelled to consider the degree of scrutiny to be applied to the case. Recognizing wealth as an independent ground for the application of strict scrutiny, the facts of the case were considered in the special light of dealing with poor people, stating:

> And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race . . . two factors which would render a classification highly suspect and thereby demand a more exacting judicial scrutiny.[42]

Here was one more voting case in which the Court was very careful to consider the possible issue of wealth discrimination. Not all voting cases require strict scrutiny, only those involving wealth or race classifications. Here, the Court found that no such classification existed and the old rationality test was sufficient to settle the equal protection issue of the case.

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39. *Id.* at 668 referring to Edwards v. California, 314 U.S. 160, 184-85 (1941), as well as *Griffin* and *Douglas. See also* McLaughlin v. Florida, 379 U.S. 184 (1964).

40. *Id.*

41. 394 U.S. 802 (1969).

42. *Id.* at 807; *see generally*, Michelman, *Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). An interesting idea is put forth by Professor Michleman as to the significance of the court's mention of *Harper*, a non-classification case, in the dictum. This is taken as a sign that the

The effect of *McDonald* is to underscore the importance of wealth and race as highly suspect classifications. In his opinion, Mr. Chief Justice Warren said in effect that without the existence of the wealth issue in *Harper*, it too would have been decided without the strict scrutiny test as was *McDonald*. Classification by wealth alone has become a criterion for strict scrutiny by courts.

It would appear that the completed formula was now ripe for application to the school tax issue and its special fundamental interest, education. The *Serrano* case, however, faced one obstacle which may signal a limit in the federal jurisdiction of the application of the new equal protection in the area of school finance. That obstacle was an Illinois Supreme Court case.

The facts of *McInnis v. Shapiro*[43] are essentially the same as those of *Serrano*. Plaintiffs challenged the constitutionality of the Illinois school financing system as a violation of equal protection because of the wide variations among districts in school expenditures per pupil. These facts were held by a three-judge Federal District Court not to constitute a situation calling for strict scrutiny of the Illinois statute and held that, under the old standard of rationality rather than a justifiable compelling state interest, the statute allowed localities to "determine their own tax burden according to the importance which they place upon public schools."[44] Why didn't the facts here fit into the formula of strict scrutiny? It is to be noticed that plaintiffs in *McInnis* significantly narrowed the field of alternatives to the present system in arguing that only a financing system which apportions public funds according to educational needs complies with the fourteenth amendment. This approach held, in effect, that only the *proposed* system is constitutional. It now appears that the better argument, at least from the standpoint of offering the court a less rigid alternative, would be to declare that only the *existing* system is unconstitutional. It may well have been this rigid approach that caused the court to fall back on the old equal protection standard of rationality of classification. The court concluded that the complaint states no cause of action because, "the Fourteenth Amendment does not require that public school expenditures be made only on the basis of pupils' educational needs, and (2) the lack of judicially manageable

court is now willing to consider the payment of a fee as a classification along wealth lines.

43. 293 F. Supp. 327 (1968) *affd. mem. sub. nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969).

44. *Id.* at 333. This argument is answered at length by the court in Serrano, *supra* note 3, 5 Cal. 3d at 611, 96 Cal. Rptr. at 620, 487 P.2d at 1260 (1971).

standard makes this controversy nonjusticiable."[45] The United States Supreme Court affirmed per curiam.[46] No cases were cited and there was no oral argument. Such an affirmance is formally a decision on the merits, however, so the actual significance of this case is not clear.[47] Whether the Federal District Court would have been more receptive to an argument stressing wealth discrimination is unknown. However, it appears that such an argument would have offered the judges a less burdensome decision both in terms of not requiring them to legislate by holding that only one type of system is constitutional and in being able to fit the argument and facts into the guidelines of wealth discrimination as developed by the Supreme Court.[48]

When the school children of Los Angeles County brought suit to have the California school financing scheme declared unconstitutional, they were confronted with the past decisions of the United States Supreme Court with its guidelines and the obstacle of the adverse decision in *McInnis*. The *Serrano* case will probably gain prominence as the first case which added education to the list of fundamental interests protected by the fourteenth amendment, and which strictly scrutinized the law creating classifications of children by school districts. The thrust of plaintiffs' argument was based squarely on a discriminatory classification which was based on wealth. Plaintiffs claimed to represent all public school pupils in California except children in that school district which affords the greatest educational opportunity of all school districts within California.[49] And plaintiff parents purported to represent the class of parents who have children in the school system and who pay real property taxes in the county of their residence.[50]

45. *Id.* at 329.

46. *Id.*

47. STERN AND GROSSMAN, SUPREME COURT PRACTICE, (4th Ed. 1969) at 233. It has been observed that the dismissal of an appeal, technically an adjudication on the merits, is in practice often the substantial equivalent of a denial of certiorari. House v. Mayo, 324 U.S. 42, 48 (1945), "But we have often said, a denial of certiorari by this court imports no expression of opinion upon the merits of a case." For an extended discussion of the rationale of this principle, see Brown v. Allen, 344 U.S. 443, 488-497 (1953). (Frankfurter, J., concurring but speaking for the majority on this point). *See also* Frankfurter and Landis, *The Business of the Supreme Court at October Term* 1929, 44 Harv. L. Rev. 1, 12-14 (1930).

48. The Petitioner's argument in *McInnis* has been compared to "free floating logis pulled together from scattered wisps of Supreme Court dicta showing little organic connection to the facts." Coons, Clune, and Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. at 352.

49. Serrano v. Priest, *supra* note 3, 5 Cal. 3d at 589, 96 Cal. Rptr. at 604, 487 P.2d at 1244.

50. *Id.*

The court agreed that the alleged classification did indeed classify along lines of wealth, citing *Harper* and *McDonald*, and that education was a fundamental interest (acknowledging lack of direct authority for this holding).[51] The court found that the statute was not necessary to accomplish any compelling state interest and[52] did deny plaintiff school children and their parents equal protection of the laws "because it produces substantial disparities among school districts in the amount of revenue available for education."[53] This is a decision which, except for the new finding that education is a fundamental interest, appears to be completely in line with the Supreme Court's past decisions on wealth discrimination and equal protection.

Must the rule of law, that relative wealth may not determine the quality of public education, be applied to all tax-supported public services? Definitely not. The court seemed to sense this possible danger and was careful to define, in each case involving the new equal protection, the specific fundamental interest involved. *Serrano* stressed the importance of education in its opinion. The Supreme Court imposed limits on the idea in *McDonald*[54] by holding that even though voting is a fundamental right, the right to receive an absentee ballot is not. Post *Griffin* and *Douglas* cases do show a limited expansion in the fundamental interest in a free transcript and counsel on appeal for indigents. Filing fees,[55] right on collateral proceedings,[56] transcripts for habeas corpus

51. The Court cited as authority for finding that education was a fundamental interest the memorable quote in Brown v. Board of Education, 347 U.S. 483, 493 (1954). "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."; *see also* Hargrave v. McKinney, 413 F.2d 320 (5th Cir. 1969).

52. The interest set forth by defendant was the strengthening and encouragement of local responsibility for control of public education.

53. Serrano v. Priest, *supra* note 3, 5 Cal. 3d at 618, 96 Cal. Rptr. at 625, 487 P.2d at 1265 (1971).

54. *McDonald, supra* note 41.

55. Burns v. Ohio, 360 U.S. 252 (1959); *see also* Douglas v. Green, 363 U.S. 192 (1960).

56. Smith v. Bennett, 365 U.S. 708 (1961).

proceedings,[57] and the determination of the necessity of free transcript[58] have all been found to be within the scope of *Griffin*. These cases are notable in their obvious similarity to *Griffin*. More notable are some new cases which seem to restrict the application of equal protection.[59]

So, in light of a possible trend to limit an easy application of equal protection, the possibility of *Serrano's* rule being applied to all the states via a United States Supreme Court affirmation of its rule is highly uncertain. The rule will ultimately be decided by the new Court with its yet untested members. The real issue must be whether the legal flexibility necessary to cause a radicial alteration of the school finance systems of all the states can be achieved within the limits of "strict constructionism." If the United States Supreme Court does not see fit to so rule in the near future, the individual states will be put under great pressure toward change.

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57. Long v. District Court of Iowa, 385 U.S. 192 (1966).

58. Lane v. Brown, 372 U.S. 477 (1963).

59. Labine v. Vincent, 401 U.S. 532 (1971); Palmer v. Thompson, 403 U.S. 217 (1971).