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Serrano v. Priest: The End of an Era in Public School Financing

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NOTES

SERRANO V. PRIEST: THE END OF AN ERA IN PUBLIC SCHOOL FINANCING

The system of free public schools which Californians enjoy is provided for in article IX, sections 5 and 6 of the state constitution.¹ These sections provide for: (1) the establishment of a uniform system of “common schools,” (2) a minimum contribution per pupil in average daily attendance (with an absolute minimum contribution of $2,400 per school district regardless of its size) made by the state government to the local school districts, and (3) the levying of taxes by local governing bodies at a rate necessary to meet their annual education budget.

In order to implement the constitutional provisions, the state legislature has established what is known in school financing parlance as a “combination plan.”² This plan utilizes revenue from both the local districts and the state.

1. In pertinent part these constitutional sections provide:

“Sec. 5. The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district. . . .

“Sec. 6. . . . .

“The Legislature shall add to the State School Fund such other means from the revenues of the State as shall provide in said fund for apportionment in each fiscal year, an amount not less than one hundred and eighty dollars ($180) per pupil in average daily attendance in the kindergarten schools, elementary schools, secondary schools, and technical schools in the Public School System during the next preceding fiscal year.

“The entire State School Fund shall be apportioned in each fiscal year in such manner as the Legislature may provide, through the school districts and other agencies maintaining such schools, for the support of, and aid to, [the aforementioned schools] except that there shall be apportioned to each school district in each fiscal year not less than one hundred and twenty dollars ($120) per pupil in average daily attendance in the district during the next preceding fiscal year and except that the amount apportioned to each school district in each fiscal year shall be not less than twenty-four hundred dollars ($2,400).

. . . . .

“The Legislature shall provide for the levying annually by the governing body of each county, and city and county, of such school district taxes, at rates not in excess of the maximum rates of school district tax fixed or authorized by the Legislature, as will produce in each fiscal year such revenue for each school district as the governing board thereof shall determine is required in such fiscal year for the support of all schools and functions of said district. . . .”

2. See notes 11-13 & accompanying text infra.
The legislature, pursuant to article IX, section 6 of the state constitution, requires local governing bodies to levy taxes on the real property within a school district at a rate which will discharge the requirements of the district's annual education budget. The legislature has established maximum allowable district tax rates; however, these rate ceilings may be exceeded if a majority of the voters in a given district indorses the higher rate.

In addition to these local property taxes, the California public school system is funded by state sources of revenue supplied under the so-called "foundation program." Under this program the state guarantees that each school district will receive, from either state or local funds, at least $355 annually for each elementary school student and $488 for each high school pupil. The state's contributions under the

3. Cal. Educ. Code §§ 20701-06 (West 1969). Section 20701 provides as follows: "After approving the budget of a school district, the county superintendent of schools shall determine the amount of money which must be provided by a school district tax." The method of determining the school district tax is spelled out in section 20702. "He [the county superintendent of schools] shall determine this amount by deducting from the total estimated needs of the school district as shown by its budget the total estimated income of the school district (from all sources other than a school district) tax for the current school year as estimated in the budget. The remainder, if any, shall be the minimum amount of the school district tax to be levied by the board of supervisors for the particular school district."

4. Id. §§ 20751-52 (West Supp. 1971). Section 20751 provides in pertinent part: "[T]he maximum rate of school district tax which may be levied for all school purposes . . . for any school district in any school year on each one hundred dollars ($100) of assessed valuation within the district shall be as follows:

. . . . .

"[T]he maximum rate of school district tax which may be levied for all school purposes . . . . ."

Section 20751 also allows for elementary and secondary school maxima of $1.25 and $0.85 respectively if the district's expenses of education in prior years were below certain statutory minima.

5. Id. §§ 20803-04 (West 1969), as amended, (Supp. 1971).

6. Id. § 17300 (West 1969). The statement of legislative intent in section 17300 indicates the lawmakers' belief that "the system of public school support should assure that state, local, and other funds are adequate for the support of a realistic foundation program." Thus, section 17300 provides as follows in its last paragraph: "The broader based taxing power of the State should be utilized to raise the level of financial support in the properly organized but financially weak districts of the State. . . . It should also be used to provide a minimum amount of guaranteed support to all districts. . . ."

7. Id. §§ 17656, 17660 (West Supp. 1971). These sections also indicate that the figure is $345 annually for each elementary school student in school districts which have an average daily attendance of less than 901 during the fiscal year.

8. Id. § 17665. This section provides that the state superintendent of public instruction in computing the foundation program for high school districts "shall mul-
foundation program are classified as either "basic state aid" or "equalization aid." The *basic* state aid is nothing more than a flat grant to each district of $125 per pupil per year which is given to all districts regardless of their individual financial status. The *equalization* aid for a given school district, on the other hand, is computed by the state superintendent of public instruction. First, the amount of local property taxes which would be generated if the district were to assess a theoretical tax of one dollar on each $100 of assessed property valuation in elementary school districts and eighty cents per $100 in high school districts is computed. To this computed district aid figure is added the $125 per pupil basic state aid amount. The total of these two sums is then compared with the foundation program figure for that district. If the total is less than the minimum amount required under the foundation program, the state provides the "equalization aid" necessary to raise the district to the minimum level established under the foundation program. The equalization aid monies are thus to insure that the less fortunate districts will not be forced to operate below the basic financial level set by the foundation program.

1. Id. 

2. Id. 

9. Id. § 17751 (West 1969) which provides that the superintendent of public instruction must "allow one hundred twenty-five dollars ($125) to each elementary school district for each unit of average daily attendance therein during the fiscal year... but not less than two thousand four hundred dollars ($2,400) shall be allowed to any elementary school district, to be known as basic state aid." Section 17801 of the Education Code contains similar provisions as to basic aid for high school districts.

10. Id. § 17702. The specific language of the section is as follows: "The Superintendent of Public Instruction shall compute for each district... the amount to be known as district aid, which a tax levied on each one hundred dollars ($100) of 100 percent of the assessed valuation in such district... would produce if levied, if such tax was:

"(a) One dollar ($1) in an elementary school district.

"(b) Eighty cents ($0.80) in a high school district."

11. Id. §§ 17901-02. Section 17901 states that: "The Superintendent of Public Instruction shall compare the total of the amounts allowed to, and computed for, each elementary district [under basic state aid and district aid]... with the amount of the foundation program of school support...

"If the total amount allowed to, and computed for, any elementary school district [under basic state aid and district aid], is less than the amount of the foundation program... computed for such district... he shall add to the amount [of the basic state aid and district aid] such additional amount, to be known as state equalization aid, as may be necessary to equal that computed for such district [under the foundation program]."

12. "Supplemental aid" is also available to especially poor districts which make
This combination plan, which forms the basis for the California public school financing scheme, may be summarized by the following formula:

\[
\text{state aid} = [\text{guaranteed amount under the foundation program} - (\text{local district aid} + \text{basic state aid flat grant})] + \text{basic state aid flat grant}.
\]

This illustration of the California system as a whole brings into focus one of the inequities inherent in the program. The basic state aid is of no value to the poorer districts because they would receive the same amount of state funds through equalization aid even if there were no basic aid program. The districts which are too wealthy to qualify for equalization aid, however, still receive the basic aid. Thus, the basic aid has the perverse effect of benefiting the richer districts and being of little or no significance to the poorer districts.

This illogical result under the foundation program is not the only problem inherent in the current California financing system; the reliance on local property taxes for 55.7 percent of the revenues for the California public school system produces even greater inequities. This inequality results because there are wide variations among the school districts in assessed property valuations. The value of taxable real estate ranges from $103 per school child in the poorest district to $952,156 per child in the wealthiest—a ratio of almost 1 to 10,000! Consequently, there are significant differences in the amount of money available per pupil in the different school districts despite state contributions under the foundation program.

Recently, the local property tax financing of California public schools was declared unconstitutional by the California Supreme Court an extra effort by taxing at a high rate. An elementary school district with an assessed valuation of $12,500 or less per pupil may receive as much as $125 additional revenue per pupil if the local tax rate is above a minimum statutory level. In the case of a high school district with an assessed valuation which does not exceed $24,500 per pupil, the supplemental aid may reach $72 per child if the local tax is high enough. \textit{Id.} §§ 17920-26 (West Supp. 1971) for the details of the supplemental aid program.

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\textit{Id.}, pt. V, at 8.
in Serrano v. Priest. The court held that the property tax system of financing makes "the quality of a child's education a function of the wealth of his parents and neighbors," and that this violated the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

Although similar financing systems in other states have been challenged on the same constitutional grounds, Serrano is the first appellate court decision to strike down the property tax financing of public schools. The ruling, if left undisturbed in subsequent proceedings, could lead to an unprecedented overhaul of state and local taxing and spending methods throughout the country. This note will assess the content of the decision, its value as a precedent, and its implications for the future.

19. Id. at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604.
21. 22. In Hargrave v. Kirk, 313 F. Supp. 944 (M.D. Fla. 1970), vacated on other grounds sub nom. Askew v. Hargrave, 401 U.S. 476 (1971), a statute roughly similar to those involved in Serrano was held unconstitutional on equal protection grounds. However, on appeal, the Supreme Court indicated that the pleadings and affidavit offered by plaintiffs were inadequate as a basis for deciding the equal protection claim.
22. See text accompanying notes 119-22 infra.
23. The wide spread reliance on local revenue for public schools is indicated in DEP'T OF HEALTH, EDUCATION & WELFARE, DIGEST OF EDUCATIONAL STATISTICS 54 (1970). That report notes that 52.3% of the total revenue receipts of public elementary and secondary schools in 1967-1968 came from local sources. It also indicates that the school systems of all states rely on local revenue sources, ranging from a high of 85% of total revenues in Nebraska to a low of 4.9% in Hawaii. In thirty of the states the figure is over 50%.
24. The nationwide impact of Serrano is further illustrated by the fact that it has already been followed in the recent federal district court cases of Van Dusartz v. Hatfield, 40 U.S.L.W. 2228 (D. Minn., Oct. 12, 1971), and Rodríguez v. San Antonio Independent School District, 40 U.S.L.W. 476 (W.D. Tex., Dec. 23, 1971). Both cases held that a property tax system of public school financing which made per pupil spending a function of the school districts wealth violated the equal protection clause of the Fourteenth Amendment. However, in Spano v. Board of Education, 40 U.S.L.W. 2475 (N.Y. Sup. Ct., Jan. 21, 1972), the court explicitly rejected a similar attack against the New York public school financing system.
25. The court in Van Dusartz cited Serrano and relied upon the reasoning of the California court to a large extent.
Setting the Stage For Serrano—
Action of the Lower Court

On August 23, 1968, a number of elementary and high school children attending public schools in Los Angeles County commenced a class action seeking ultimately to revamp the state school financing scheme so as to secure equality of educational opportunity. In a second cause of action, a number of parents brought a similar suit as taxpayers. Named as defendants were the state and local officials who were assigned the responsibility for supplying the revenue for the support of public schools.

The plaintiffs alleged that the existing California system of financing public schools violated both the equal protection clause of the Fourteenth Amendment, and certain provisions of the California Constitution. Plaintiffs asserted that there were wide differences among the school districts in the amount of money spent per pupil under the existing system, which resulted in disparate educational opportunities for the children. The specific relief sought by the plaintiffs was threefold: (1) a declaration that the financing system for California public schools violated the equal protection clause of the Fourteenth Amendment and the "fundamental law and Constitution of California"; (2) an order directing the defendants to reorganize the financing plan so as not to violate the constitutions of California and the United States; and (3) a ruling that the court would retain jurisdiction of the case in order to revise the system should the defendants and the legislature fail to do so within a reasonable time.

The defendants filed general demurrers which were sustained. After plaintiffs failed to amend their complaint within the time permitted, defendants moved for dismissal. The court granted the motion and dismissed the action.

In the subsequent appeal to the California court of appeal, the

26. Id. at 15-18.
27. Id. at 8-9. The parties named were: Ivy Baker Priest, state treasurer; Max Rafferty, state superintendent of public instruction; Houston I. Flournoy, state controller; Harold J. Ostly, tax collector and treasurer of the County of Los Angeles; and Richard M. Clowes, superintendent of schools of the County of Los Angeles.
28. See notes 1-13 & accompanying text supra.
29. Cal. Const. art. 1, §§ 11, 12; art. 9, § 5.
30. Brief for Plaintiff, supra note 25, at 11.
31. Id. at 16-17.
33. Id.
plaintiffs contended that the complaint stated a cause of action under the equal protection clause of the Fourteenth Amendment. The court of appeal disagreed, however, and affirmed the order of dismissal.

In upholding dismissal by the lower court, the court of appeal relied heavily upon *McInnis v. Shapiro*, a case decided by a federal district court in Illinois and affirmed in a memorandum opinion by the United States Supreme Court. The court of appeal held that, as a summary affirmance by the Court, *McInnis* had precedential value and was possibly binding on the California courts, and at a minimum was persuasive and entitled to great weight.

*McInnis* involved a complaint by high school and elementary school students in which it was alleged that certain Illinois statutes violated Fourteenth Amendment rights to equal protection because of wide variations in expenditures per student by the various school districts. These wide variations resulted primarily from a school financing system (which was comparable to the one used in California) whereby three fourths of the revenue for the Illinois public schools was generated by local property taxes. In the opinion of the plaintiffs the Fourteenth Amendment required a financing system which apportioned public funds according to the educational needs of the students and not according to the wealth of the district as a whole. The court held, however, that public school spending based upon pupils' educational needs is not a constitutionally created requirement. In addition, the court was of the opinion that the constitution did not "establish the rigid guideline of equal dollar expenditures for each student."

It is important to note that the district court in *McInnis* reviewed the Illinois statutes by a standard which presumed the validity of actions by the state legislature. The standard employed was similar to that which the United States Supreme Court has used to test legislative classifications in the area of economic regulation. This approach is typified by such inquiries as: "What constitutionally permissible objective might this statute and other relevant materials plausibly be construed to reflect?" In other words, a court using this test would in-

35. 89 Cal. Rptr. at 350.
36. 293 F. Supp. at 328-29.
37. Id. at 330.
38. Id. at 331.
39. Id. at 336.
40. Id.
validate a statute only if the legislative classification failed to bear a reasonable relationship to a legitimate state purpose. This "reasonable relationship" test is in stark contrast to a more rigorous standard of review—the "strict scrutiny" test. Under this test, if the court finds that "suspect classifications" or "fundamental interests" are involved, there is no longer a presumption in favor of validity and the legislation in question is subjected to active and critical review. In order to uphold the validity of a statute under this test, the state must demonstrate that there is a compelling state interest in retaining such legislation.

With these standards in mind, the Serrano plaintiffs argued in the California Court of Appeal that McInnis was not persuasive, because the district court erroneously used the "reasonable relationship" test in upholding the constitutionality of the Illinois public school financing scheme. The plaintiffs contended that the court of appeal should apply the more exacting "active review" or "strict scrutiny" test. This was necessary, the plaintiffs argued, because a "fundamental right" was at issue—namely, the right to an education. The court was not convinced, however, and refused to apply the "strict scrutiny" test urged by the plaintiffs.

The plaintiffs also contended, at this stage of the litigation, that the McInnis holding was not binding precedent on the California court because a summary affirmance by the United States Supreme Court is not a decision on the merits. This was a vital argument by the plaintiffs because of the well established California rule that a decision by the United States Supreme Court on a federal constitutional question is binding upon state courts. The court of appeal disagreed with plaintiffs' contentions as to the effect of a summary affirmance by the Supreme Court and ruled that such an affirmance "is a decision on the merits which has precedential value." Furthermore, the court of appeal found the substantive arguments in McInnis convincing irrespective of the procedural effect of the holding on California courts.

The plaintiffs also argued that their complaint stated a cause of action under article IX, section 5, of the California Constitution which requires that:

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43. Id. at 1087-1132.
46. 89 Cal. Rptr. at 349.
47. Id. at 349-50.
49. 89 Cal. Rptr. at 349-50.
The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.

The plaintiffs contended that the California public school financing methods violated this provision for a common school system because it created "separate and distinct school systems, each providing an educational program whose quality depends upon the relative wealth of the residents of the district." The court of appeal, notwithstanding plaintiffs' ingenious argument, viewed the constitutional provision as requiring only uniformity of curriculum and "educational progression" not uniformity of expenditure per pupil.

The court of appeal held that the numerous factual allegations of the complaint did not state a cause of action under either the federal or California constitutions. Thus, the judgment of dismissal was affirmed, and the stage was set for plaintiffs' subsequent appeal to the California Supreme Court.

Decision of the California Supreme Court

On appeal to the California Supreme Court, the plaintiffs found an audience much more receptive to their equal protection arguments. Justice Sullivan, writing for the majority, clearly and forcefully stated that if plaintiffs' factual allegations were true, the California public school financing system violated the equal protection clause of the Fourteenth Amendment.

In a prefatory discussion, the court set out in detail the statutory foundation of the state public school financing plan and compared the plan with statistical data which showed substantial disparities in per pupil expenditures by the various school districts. Within this framework, the court considered the plaintiffs' claim that the system violated

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article IX, section 5, of the California Constitution. The court held that a cause of action had not been stated under article IX, section 5, and agreed with the court of appeal that section 5 could not reasonably be interpreted to apply to school financing.57

Having disposed of these preliminary matters, Justice Sullivan focused his main effort on the plaintiffs' equal protection arguments. The different standards of review employed by the United States Supreme Court in equal protection cases were summarized.8 There was no discussion as to whether or not the statutory system being challenged was a denial of equal protection under the "rational relationship" test. Instead, the "strict scrutiny" test was almost perfunctorily applied to the statutory financing system for the California public schools.59

**Wealth as a Suspect Classification**

The plaintiffs' allegations that the school financing system established classifications on the basis of wealth were found by the court to be "irrefutable."60 The court's conclusion was based upon the fact that, aside from the monies provided by the state to raise all districts to a minimum financial level,61 the underlying property wealth of a school district largely determined the amount of money spent on education.62 Although the court acknowledged that the amount of money available for education was partially a function of the rate at which residents were willing to be taxed, the fact remained that a rich district could tax itself at a lower rate and produce substantially more revenue than a poorer district which taxed itself at a much higher rate.63

The defendants argued that the California school financing system did not discriminate on the basis of wealth since basic aid was distributed to pupils in all districts and equalization aid was aimed at elimi-

57. 5 Cal. 3d at 595-96, 487 P.2d at 1248-49, 96 Cal. Rptr. at 608-609.
58. Id. at 597, 487 P.2d at 1249-50, 96 Cal. Rptr. at 609-10.
59. Id. at 597-615, 487 P.2d at 610-23, 96 Cal. Rptr. at 1250-63.
60. Id. at 598, 487 P.2d at 1250, 96 Cal. Rptr. at 610.
61. This program is provided for in CAL. EDUC. CODE §§ 17702, 17751, 17801, 17901-07, 17920-26 (West Supp. 1971).
62. 5 Cal. 3d at 598, 487 P.2d at 1250, 96 Cal. Rptr. at 610. See text accompanying note 1 supra.
63. Id. at 597-98, 487 P.2d at 1251-52, 96 Cal. Rptr. at 611-12. The court illustrated its point with some examples taken from the LEGISLATIVE ANALYST. It was noted that the Beverly Hills Unified School District, with an assessed valuation of $50,885 per average daily attendance, need only tax itself at a rate of $2.38 per $100 of assessed valuation in order to produce an expenditure of $1,232 per average daily attendance; while another Los Angeles County school district, Baldwin Park Unified, with an assessed valuation of $3,706 per average daily attendance, must tax itself at a $5.48 rate in order to produce an educational outlay of $577 per average daily attendance. Id. at 600 n.15, 487 P.2d at 1252 n.15, 96 Cal. Rptr. at 611 n.15.
nating the financial disparities among the districts. The court's reply to this contention was simply that state funds only provide a portion of school revenues and that "the system as a whole generates school revenue in proportion to the wealth of the individual district."6

Justice Sullivan was equally unimpressed with defendants' contention that assessed valuation per pupil was not an accurate measure of the wealth of a district, inasmuch as a district which had a low total assessed valuation but also a small number of students would have a high per pupil tax base. Justice Sullivan stated that defendants' argument was without merit:

The only meaningful measure of a district's wealth in the present context is not the absolute value of its property, but the ratio of its resources to pupils, because it is the latter figure which determines how much the district can devote to educating each of its students.

The court also rejected the suggestion by the defendants that the wealth of a school district does not necessarily reflect the wealth of the families who live there. Justice Sullivan pointed out that plaintiffs' factual allegations that there was "a correlation between a district's per pupil assessed valuation and the wealth of its residents" must be admitted as true on demurrer.

More fundamentally, Justice Sullivan attacked the notion that wealth was not a "suspect classification" when the classification was between districts rather than individuals:

We think that discrimination on the basis of district wealth is equally invalid. The commercial and industrial property which augments a district's tax base is distributed unevenly throughout the state. To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of such property is to make the quality of a child's education dependent upon the location of private commercial and industrial establishments.

The court also rejected defendants' argument that plaintiffs had not alleged any purposeful or intentional discrimination, and that therefore the complaint did not state a cause of action on constitutional grounds. The defendants contended that without purposeful discrimination, any inequities in the school system would only be de facto, not

64. Id. at 598, 487 P.2d at 1250, 96 Cal. Rptr. at 610.
65. See notes 13-17 & accompanying text supra.
66. 5 Cal. 3d at 598, 487 P.2d at 1250-51, 96 Cal. Rptr. at 610-11.
67. Id. at 599, 487 P.2d at 1251, 96 Cal. Rptr. at 611.
68. Id.
69. Id. at 600-601, 487 P.2d at 1252, 96 Cal. Rptr. at 613.
70. Id. at 601, 487 P.2d at 1252-53, 96 Cal. Rptr. at 612-13.
71. Id.
de jure. Since the United States Supreme Court had not held de facto racial discrimination unconstitutional, the defendants argued any de facto discrimination on the basis of wealth should likewise be accorded a presumption of validity.

To counter this argument, Justice Sullivan first reviewed a number of United States Supreme Court decisions which invalidated wealth classifications that were “unintentional classifications [but] whose impact simply fell more heavily on the poor.”\(^{72}\) Secondly, he pointed out that, far from being an example of de facto discrimination, the *Serrano* situation was noteworthy because of the extent to which state action was the cause of the wealth classifications.\(^{73}\) Finally, he observed that the school financing system could hardly be justified by an analogy to de facto racial segregation, in view of the fact that the California Supreme Court had struck down such de facto segregation several years before.\(^{74}\) The court firmly concluded that “the school financing system discriminates on the basis of the wealth of a district and its residents,”\(^{75}\) and that this “suspect” legislative classification required “strict scrutiny” by the court.\(^{76}\)

**Education as a Fundamental Interest**

Reinforcing its “suspect criteria” attack on the school financing system, the court further concluded that the right to an education is a “fundamental interest.”\(^{77}\) In equal protection terms, the court was indicating that a further justification for an active and critical review of the financing system lay in the fact that it had a strong impact on a right deserving of special judicial consideration.\(^{78}\)

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73. 5 Cal. 3d at 603, 487 P.2d at 1254, 96 Cal. Rptr. at 614. The opinion cited the effect of zoning ordinances on the distribution of assessed valuation around the state and the fact that “[g]overnmental action drew school district boundary lines, thus determining how much local wealth each district would contain.”


75. 5 Cal. 3d at 604, 487 P.2d at 1255, 96 Cal. Rptr. at 615.

76. See note 72 *supra*.

77. 5 Cal. 3d at 604-10, 487 P.2d at 1255-59, 96 Cal. Rptr. at 615-19.

78. The effect of the combination of the “suspect criteria” and “fundamental interest” factors in an equal protection context has been summarized as follows: “The interaction of these two factors can be visualized by imagining two gradients. Along the first of these gradients is a hierarchy of classifications, with those which are most invidious—suspect classifications based on traits such as race—at the top. Along the second, arranged in ascending order of importance, are interests such as employment, education, and voting. When the classification drawn lies at the top of the first
The court acknowledged that it was taking an innovative turn in that no direct authority supported its claim that education was a fundamental right.\(^7\) The court also candidly noted that earlier wealth classifications had been struck down only when coupled with a select few fundamental interests, such as rights of defendants in criminal\(^8\) cases and voting rights.\(^9\) However, the court was apparently of the view that the question of whether an interest is "fundamental" is essentially a matter to be determined by the court.\(^8\) Consequently, the court went to considerable lengths to demonstrate "the indispensable role which education plays in the modern industrial state."\(^8\)

Justice Sullivan's opinion emphasized the unique role of education in molding a child's development as a citizen.\(^8\) Also noted was the view that education in a modern society is a vital factor in determining a child's future chances for economic success. This latter point is particularly interesting because it dovetailed nicely with the court's holding that the public school financing system classified on the basis of wealth. Thus, the wealth classification was especially invidious because it deprived the poor child of the very means he must employ in order to break the vicious cycle of poverty.

The Serrano opinion also referred to prior judicial expressions of the importance of education in our society's scale of values.\(^8\) Brown v. Board of Education,\(^8\) the case which found de jure racial segregation in public schools unconstitutional, was cited by the court as "the classic expression" of the need for education. The court also highlighted some of its own decisions which underlined the importance of education.\(^8\)

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79. 5 Cal. 3d at 604, 487 P.2d at 1255, 96 Cal. Rptr. at 615.
82. Archibald Cox has expressed the view that "the relative importance of the subject with respect to which equality is sought" is at least one "subjective" factor which has motivated the Supreme Court in its modern equal protection decisions. Cox, The Supreme Court 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 HARV. L. REV. 91, 95 (1966).
83. 5 Cal. 3d at 605-607, 487 P.2d at 1255-57, 96 Cal. Rptr. at 615-17.
84. Id. at 605, 487 P.2d at 1256, 96 Cal. Rptr. at 616.
85. Id. at 606-07, 487 P.2d at 1256-57, 96 Cal. Rptr. at 616-17.
87. The following cases were discussed by the court: San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 479 P.2d 669, 92 Cal. Rptr. 309 (1971); Manjares v. Newton, 64 Cal. 2d 365, 411 P.2d 901, 49 Cal. Rptr. 805 (1966); Jackson
These cases were not cited as legally binding precedents by the court, but rather as examples of judicial writing which were "persuasive in their accurate factual description of the significance of learning."\(^8\)

The *Serrano* court also sought to compare the right to an education, in terms of its importance, with the rights of defendants in criminal cases and the right to vote,\(^8\) since these rights have already been recognized by the Supreme Court as "fundamental interests" which, when threatened by a statutory Court as a "suspect criterion," have been deemed worthy of special consideration.\(^9\) Finally, in terms of the overall impact on the quality and direction of the lives of Americans, the court found education to be at least as significant as the other established "fundamental interests."\(^9\)

**The Absence of a Compelling State Interest**

The defendants' principal contention was that the existing statutory school financing system served to "strengthen and encourage local responsibility for control of public education."\(^9\) In the defendants' view, the goal of the statutes was to give local districts a voice in the operation of their schools and a right to allocate local funds according to the importance placed upon education by the voters.\(^9\) These arguments were deemed not persuasive by the court, however, and the court noted that the state could easily reform the financial system and still allow the districts decision making power on such essential items as personnel and curriculum.\(^9\) Moreover, the court stated that financial control by local residents "is a cruel illusion for poor school districts" in view of the fact that "the poor district cannot freely choose to tax itself into an [educational] excellence which its tax rolls cannot provide."\(^9\)

In a broader context, the court's line of reasoning at this point represented the "strict scrutiny" approach which requires a high degree of relevance to purpose before upholding the validity of a statute.\(^9\) Under this method of statutory interpretation, the normal presumption of constitutional validity\(^9\) is eliminated and the burden of justifying

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88. 5 Cal. 3d at 605, 487 P.2d at 1256, 96 Cal. Rptr. at 616.
89. *Id.* at 607-608, 487 P.2d at 1257-58, 96 Cal. Rptr. at 617-18.
90. See notes 80 & 81 supra.
91. 5 Cal. 3d at 609-10, 487 P.2d at 1258-59, 96 Cal. Rptr. at 618-19.
92. *Id.* at 610, 487 P.2d at 1260, 96 Cal. Rptr. at 620.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 611, 487 P.2d at 1260, 96 Cal. Rptr. at 620.
the statute falls on the state. In Serrano, therefore, because the defendants failed to establish that there were no “financially and administratively feasible” alternatives to the old form of “local control,” the court could perceive no reason for perpetuating the old financial system in the name of grass-roots democracy.

Territorial Uniformity as a Constitutional Requirement

Defendants’ contention that territorial uniformity is not a constitutional requirement with respect to the school financing system was also rejected by Justice Sullivan. Such an argument, he said, overlooked recent United States Supreme Court decisions which enunciated the following constitutional precepts:

Where fundamental rights or suspect classifications are at stake, a state’s general freedom to discriminate on a geographical basis will be significantly curtailed by the equal protection clause.

To buttress his point Justice Sullivan referred to cases in which the Supreme Court had struck down attempts to shut down schools in one part of a state while schools in other districts remained open. Additionally, he noted the line of Supreme Court decisions concerned with legislative apportionment to achieve equal representation of voters. This latter group of cases was offered as further proof that, as the court

100. 5 Cal. 3d at 612, 487 P.2d at 1261, 96 Cal. Rptr. at 621.
101. Id. Justice Sullivan mentioned Griffin v. School Bd., 377 U.S. 218 (1964). In that case the Supreme Court declared: “A state, of course, has a wide discretion in deciding whether laws shall operate statewide or shall operate only in certain counties. . . . But the record in the present case could not be clearer that Prince Edward's public schools were closed . . . for one reason . . . only: to ensure . . . that white and colored children in Prince Edward County would not, under any circumstances, go to the same school.” Id. at 231. In addition, Justice Sullivan noted Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), aff'd mem., 368 U.S. 515 (1962) which held that a statute allowing a district to close its schools in order to avoid integration was unconstitutional, not only because it furthered racial discrimination: “More generally, the Act is assailable because its application to one parish, while the state provides public schools elsewhere, would unfairly discriminate against the residents of that parish, irrespective of race. . . .” Id. at 651.
102. 5 Cal. 3d at 613, 487 P.2d at 1261-62, 96 Cal. Rptr. at 621-22. Justice Sullivan quoted the following excerpt from Reynolds v. Sims, 377 U.S. 533, 566 (1964) in which the Court rejected efforts to explain unequal representation on the basis of geographic factors: “Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race. . . .” 5 Cal. 3d at 613, 487 P.2d at 1262, 96 Cal. Rptr. at 622. From the Reynolds holding Justice Sullivan concluded that “[i]f a voter's address may not determine the weight to which his ballot is entitled, surely it should not determine the quality of his child’s education.” Id,
put it, "[A]ccidents of geography and arbitrary lines of local government can afford no grounds for discrimination among a state's citizens."\textsuperscript{103}

Differentiating Education from Other Essential Municipal Services

A more significant argument advanced by the defendants was that the inclusion of education in the "fundamental interest" category meant that the same approach might have to be taken with respect to all property tax supported municipal services.\textsuperscript{104} In other words, the equal protection clause could also be construed as forbidding statutory schemes which conditioned the quality or quantity of such vital services as police and fire protection on the assessed valuation of local real property. The court did not clearly express an opinion on this point. Instead, Justice Sullivan indicated that the court was satisfied that the unique importance of education has been "clearly demonstrated," notwithstanding the possibility that the right to other municipal services might also be considered "fundamental interests."\textsuperscript{105}

Thus, the court concluded that the "strict scrutiny" test was applicable to the school financing system and that the system as it was currently organized was not necessary to the realization of any compelling state interest. Consequently, the inescapable conclusion was that California's statutory school financing system denied the plaintiffs equal protection of the laws and thus violated the Fourteenth Amendment.\textsuperscript{106}

The Effect of McInnis v. Shapiro

The California Supreme Court took a decidedly different view of the precedential effect of the \textit{McInnis} decision than had the court of appeal. The high court of California felt strongly that \textit{McInnis} was not controlling upon the issues.\textsuperscript{107}

The \textit{Serrano} court pointed out that \textit{McInnis} reached the Supreme Court on appeal from a three judge federal court, a situation in which the high court's jurisdiction was not discretionary.\textsuperscript{108} In addition, the \textit{Serrano} court noted that the Supreme Court had only summarily affirmed the trial court's decision in \textit{McInnis}, and this clouded the precedential authority of the case because "the significance of such summary dispositions is often unclear, especially where, as in \textit{McInnis}, the court

\textsuperscript{103} 5 Cal. 3d at 613, 487 P.2d at 1261, 96 Cal. Rptr. at 621.
\textsuperscript{104} Id. at 613-14, 487 P.2d at 1262-63, 96 Cal. Rptr. at 622-23.
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 614-15, 487 P.2d at 1263, 96 Cal. Rptr. at 623.
\textsuperscript{107} Id. at 616, 487 P.2d at 1264, 96 Cal. Rptr. at 624.
cites no cases as authority and guidance."109 Although the Supreme Court's decision in McInnis was formally a decision on the merits,110 the court noted that some scholars were inclined to equate such summary decisions with denials of certiorari.111

In any event, the majority in Serrano concluded that there were also important substantive differences between McInnis and the California litigation. The court emphasized that the plaintiffs in McInnis had argued that the Fourteenth Amendment required that public school expenditures be made on the basis of pupils' "educational needs."112 The district court in McInnis held that the "educational needs" concept was too nebulous, and that there were "no 'discoverable and manageable standards' by which a court can determine when the Constitution is satisfied and when it is violated."113 The Serrano situation was "significantly different," in the opinion of the California Supreme Court, because the plaintiffs had avoided the vague "educational needs" argument and had limited their complaint to "a familiar standard"—namely, that "discrimination on the basis of wealth is an inherently suspect classification which may be justified only on the basis of a compelling state interest."114 Furthermore, the Serrano court felt that the nonjusticiability of the "educational needs" standard was the fundamental reason for the McInnis holding. Thus, the court reasoned, the district court's treatment of the substantive constitutional issues was dictum.115

The Court's Conclusions

The court applied the customary rule and treated the demurrer as admitting all material facts properly pleaded.116 The facts pleaded by the plaintiffs, together with the official statistical reports which had been judicially noticed, convinced the court that a cause of action had been stated by the plaintiffs:

[P]laintiff children have alleged facts showing that the public school financing system denies them equal protection of the laws because it produces substantial disparities among school districts in the amount of revenue available for education.117

109. 5 Cal. 3d at 616, 487 P.2d at 1264, 96 Cal. Rptr. at 624.
110. Id. The court conceded that "a summary affirmance is formally a decision on the merits."
111. The court relied upon the following authorities: Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 74 n.365 (1964); Frankfurter & Landis, The Business of the Supreme Court at October Term, 1929, 44 Harv. L. Rev. 1, 14 (1930).
112. 5 Cal. 3d at 617, 487 P.2d at 1265, 96 Cal. Rptr. at 625.
113. 293 F. Supp. at 335.
114. 5 Cal. 3d at 617, 487 P.2d at 1264-65, 96 Cal. Rptr. at 624-25.
115. Id.
116. Id. at 617-18, 487 P.2d at 1265, 96 Cal. Rptr. at 625.
117. Id. at 618, 487 P.2d at 1265, 96 Cal. Rptr. at 625.
The same was true, said the court, with respect to the second cause of action of the plaintiff parents.\textsuperscript{118} Consequently, the court reversed the judgment of the court of appeal, remanded the case to the trial court, and ordered that the demurrers be overruled.

The ultimate outcome of the \textit{Serrano} case is still somewhat problematical. Although the defendants' petition for rehearing has been denied,\textsuperscript{119} they still have the option of filing a petition for a writ of certiorari to the Supreme Court.\textsuperscript{120} Should certiorari be denied, or should the court grant certiorari and affirm the decision of the California Supreme Court, the plaintiffs might still conceivably fail to sustain their burden of proof in a trial on the merits.

Meanwhile, the State of California appears to have been left with an unconstitutional method of financing its public school system. In order to forestall any possible confusion during the period before the constitutional issue is ultimately resolved, the California Supreme Court has recently filed a modification order to its original decision in \textit{Serrano}.\textsuperscript{121}

In its modification order the court made it clear that the existing system of public school financing is still valid, and it was emphasized that the original holding was not a final judgment on the merits inasmuch as the case had been remanded to the trial court for further proceedings. Furthermore, in the modification order the court stated that if the trial court subsequently found the present system to be unconstitutional, an orderly transition to a constitutional system was to be insured by keeping the old system operable until a new system could be put into effect.

In the following paragraphs, a critical look will be taken beyond this uncertain state of affairs to see how well the decision in \textit{Serrano} will withstand the test of subsequent judicial scrutiny, whether by the Supreme Court if the case is appealed, or in separate litigation wherein the case may be relied upon as a precedent.\textsuperscript{122}

**Problems and Uncertainties in the Court's Decision**

The constitutional issue dealt with in \textit{Serrano} has been litigated previously.\textsuperscript{123} In addition, there has been a significant amount of

\textsuperscript{118} \textit{Id.}

\textsuperscript{119} See note 18 \textit{supra}.

\textsuperscript{120} 28 U.S.C. § 1257(3) (1971).


\textsuperscript{122} See cases cited in note 24 \textit{supra}.

\textsuperscript{123} See note 21 & accompanying text \textit{supra}.
scholarly writing about the constitutionality of school financing systems like the one challenged in Serrano.\textsuperscript{124} Therefore, in gauging the effectiveness of the Serrano decision, it is helpful to see how well the court has responded to the earlier criticisms that have been directed against this particular point of view. In order to gain a proper perspective, it will be necessary to backtrack somewhat and juxtapose some of the points made in the Serrano opinion with the criticisms that have been raised against them.

Is McInnis Controlling?

\textit{The Matter of Summary Affirmance}

The disagreement between the court of appeal and the California Supreme Court as to the precedential effect of McInnis on the Serrano case has already been noted.\textsuperscript{125} Although this is admittedly a technical and procedural problem, the correct categorization of the effect of the McInnis decision is an issue which could obviously have a very practical effect on any subsequent litigation in the Supreme Court.

The California Supreme Court in Serrano did not dispute the general proposition that a decision by the United States Supreme Court on a federal constitutional question is binding upon the state courts;\textsuperscript{126} nor did the Serrano court deny that a summary affirmance by the Supreme Court is a decision on the merits.\textsuperscript{127} However, the California Supreme Court did not agree with the court of appeal that this necessarily leads to the direct and simple conclusion that McInnis is binding. Instead, the court noted that "the significance of such summary dispositions is often unclear."\textsuperscript{128} The court also indicated that some writers have characterized a summary affirmance as being the rough equivalent of a denial of certiorari, due to the court's heavy case load and differences of opinion among the judges.\textsuperscript{129}

The Serrano opinion appears to be purposely vague at this point. No case, statute, or court rule is cited which suggests that a summary affirmance should be treated as anything but what it is: a decision on the merits. In short, the court is using a makeweight argument that obscures more than it clarifies.


\textsuperscript{125} See text accompanying notes 107-15 supra.


\textsuperscript{128} 5 Cal. 3d at 616, 487 P.2d at 1264, 96 Cal. Rptr. at 624.

\textsuperscript{129} Id. See note 111 supra.
A subsidiary problem with the court's analysis at this point is that no method is suggested whereby a lower court can look behind a summary affirmance by the Supreme Court and confidently determine what really motivated the ruling. The suggestion has been made that a summary affirmance sometimes means the court believes that the issue raised "is palpably frivolous or one lacking in substantiality because controlled on the merits by settled doctrine." This explanation would, of course, not support the Serrano court's categorization of McInnis, or the conclusion that the summary affirmance was to be treated as a species of denial of certiorari. If cases that have been summarily decided by the Supreme Court are subject to intuitive guesses as to what the Court really meant, there is a likelihood that the lower courts' interpretation will tend to be result oriented.

Although it is interesting to speculate as to the factors motivating the court's decision, the procedural effect of a summary affirmance has never been doubted. In Barton v. Sentner, where the Supreme Court summarily affirmed an appeal on the authority of United States v. Witkovich, two dissenting justices stated: "The court, by summary affirmance on this appeal, without argument, enlarges its holding in Witkovich..." Thus, the Barton dissenters took cognizance of the fact that "affirmance of an appeal is a decision by the Supreme Court having precedential value, not a mere refusal to review that allows the lower court's decision to stand."

The meaning of both a summary affirmance and a summary dismissal on the merits before argument has been characterized by legal writers as follows:

When the Court feels that the decision below is correct and that no substantial question on the merits has been raised, it will affirm an appeal from a federal court, but will dismiss an appeal from a state court "for want of a substantial federal question." Only history would seem to justify this distinction; it would appear more sensible to affirm appeals from both state and federal courts when the reason for the summary disposition is that the decision below is correct.

Clearly, then, the basic reason behind a summary affirmance is no more mysterious than the procedural effect to be accorded the affirmance. That is, a summary affirmance is the antithesis of uncertainty; the Court is simply saying that argument on the matter is unnecessary because the lower court's decision is not open to serious dispute.

130. Frankfurter & Landis, supra note 111, at 8.
133. 353 U.S. 963 (1957).
135. Id. at 233.
Distinguishing McInnis

Perhaps sensing some of the ambiguities inherent in its argument against the court of appeal's view of McInnis, the California Supreme Court hastened to add that it believed McInnis could be distinguished, and discussed what it considered to be the substantive reasons why McInnis need not be followed. The Serrano court's contention that the plaintiffs in McInnis were seeking "significantly different" relief, and that the nonjusticiability of the "educational needs" concept was seen as the controlling ground for the holding in McInnis has previously been noted. One troublesome aspect of the Serrano opinion is that so little space was devoted by the court in explaining how the substantive constitutional issues decided by the McInnis court could be distinguished from the issues raised in Serrano. Analysis of precisely what the McInnis court held raises certain unanswered questions about the Serrano court's version of the case.

At the outset in McInnis the district court held:

[N]o cause of action is stated for two principal reasons: (1) the Fourteenth Amendment does not require that public school expenditures be made only on the basis of pupil's educational needs, and (2) the lack of judicially manageable standards makes this controversy nonjusticiiable. After explaining the structure of the existing Illinois legislation, this opinion will discuss these two conclusions in detail.

The underlying basis for the district court's holding is not included in the Serrano court's abbreviated discussion of the case.

The district court held that the "educational needs" standard was nonjusticiiable; however, the court also based its holding on a determination of the constitutional issues before it. Thus, the court interpreted the vague demand that public school funds be expended according to the educational needs of the students and stated:

1972), the court emphatically rejected the Serrano court's characterization of the effect of McInnis. With reference to the view expressed in Serrano that a per curiam opinion is akin to granting or denying certiorari, the Spano court stated that "to accept such a view is to demean the U.S. Supreme Court." The court disapproved of the effort in Serrano "to extract revelatory arcane insights from the bare bones of [summary] affirmances." Furthermore, the Spano opinion emphasized that it was not within the competence of a state court to guess at the content of the Supreme Court's unexpressed views: "[T]he U.S. Supreme Court is quite capable of expounding its views when so inclined; also, that learned court does not require pronouncements from intermediary surrogates."

136. 5 Cal. 3d at 617, 487 P.2d at 1264-65, 96 Cal. Rptr. at 624-25.
137. See text accompanying note 114 supra.
138. The California court's efforts in this area consisted of two sentences in which it stressed the "significantly different" relief that the Serrano plaintiffs sought. 5 Cal. 3d at 617, 487 P.2d at 1264-65, 96 Cal. Rptr. at 624-25.
139. 293 F. Supp. at 329 (emphasis added).
[The students' goal is presumably a judicial pronouncement that each pupil is entitled to a minimum level of educational expenditures, which would be significantly higher than the existing [state supported minimum expenditures].\(^{140}\)

The district court fully considered the question of the constitutionality of the existing Illinois system of public school financing,\(^{141}\) and concluded:

The present Illinois scheme for financing public education reflects a rational policy . . . . Unequal educational expenditures per student, based upon the variable property values and tax rates of local school districts, do not amount to an invidious discrimination. Moreover, the statutes which permit these unequal expenditures on a district to district basis are neither arbitrary nor unreasonable.

There is no Constitutional requirement that public school expenditures be made only on the basis of pupils' educational needs without regard to the financial strength of local school districts.\(^{142}\)

This statement seems to clearly outline the basic syllogism behind the court's holding: (1) the Illinois system of public school financing is "neither arbitrary nor unreasonable"; (2) the disparities in per pupil expenditures resulting from the system "do not amount to an invidious discrimination"; therefore the court felt justified in concluding that (3) there was no constitutional requirement that public school expenditures be made only on the basis of pupils' educational needs.

If the foregoing analysis of the court's reasoning in *McInnis* is correct, it would appear that the district court ruled on the same fundamental issues faced by the *Serrano* court, i.e., the constitutionality of the legislative financing plan, and the ruling was then applied to the specific contention of the plaintiffs that the system should be changed so as to meet pupils' "educational needs." Thus, the summary statement that plaintiffs in *Serrano* were seeking "significantly different" relief does not adequately distinguish the two cases. In substance, the Illinois court held that the legislative financing scheme (which was acknowledged by the *Serrano* court to be substantially the same as the California system) did not contravene the mandate of the equal protection clause. The *Serrano* opinion did not adequately resolve this issue by pointing out that the plaintiffs in the two cases differed on the relief to be granted if the respective financing system were held unconstitutional. The *Serrano* court's version of *McInnis* would have been more persuasive if the California court had explained how the district court's

\(^{140}\) Id. at 331 n.11.

\(^{141}\) Id. at 332-35. It is important to note in this regard that the financing scheme that the *McInnis* court reviewed was essentially the same type of combination plan as that used by the State of California. *Compare* note 13 & accompanying text supra, with 293 F. Supp. at 330.

\(^{142}\) 293 F. Supp. at 336.
ruling on the constitutionality of the statutory system in question could be reconciled with, or differentiated from, the basic constitutional issues raised by the plaintiffs in *Serrano*.143

Another problem with the *Serrano* court's interpretation of *McInnis* is the failure to explain more fully the reasons for characterizing the *McInnis* court's ruling on the constitutional issue as dictum.144 The two grounds given by the district court in *McInnis* for its holding have already been mentioned.145 It is difficult to label either of the two grounds as dictum in view of the settled California rule that:

[W]here two independent reasons are given for a decision, neither one is to be considered mere dictum, since there is no more reason for calling one ground the real basis of the decision than the other. The ruling on both grounds is the judgment of the court and each is [of] equal validity.146 The *Serrano* court apparently disagreed with this principle when it read *McInnis*. There is no statement in the *McInnis* decision to indicate that the district court regarded "nonjusticiability" as the major reason for its holding, and that the constitutional issue was deemed minor.147 The *Serrano* court's characterization of the constitutional issues discussed in *McInnis* as "dictum" should have been fully explained by the court.

The California Supreme Court's view as to the precedential effect of *McInnis* on the *Serrano* case is clouded by ambiguities and uncertainties. The *Serrano* court cited some secondary authority to the effect that a summary affirmation by the United States Supreme Court is not necessarily a decision on the merits.148 But the California court did not indicate the guidelines to be used by a lower court in deter-

143. The possibility remains that the case might reach the California Supreme Court again after a trial on the merits. In that event, the court might choose to elaborate on its position with regard to the *McInnis* case.

144. See text accompanying note 115 supra.

145. See note 139 & accompanying text supra.


The rule laid down in the *Bank of Italy* case appears to be clearly violated by the *Serrano* decision. Despite the unequivocal statement by the district court in *McInnis* that it was basing its decision on two separate grounds, the *Serrano* court determined to label one ground the "true" basis for the *McInnis* decision and the other as "pure dictum." This type of selective approach was thoroughly criticized by the court in the *Bank of Italy* case, yet the court apparently overrode its own criticism and utilized this approach in the *Serrano* case without even a passing reference to the prior case.

147. Actually, more emphasis in the *McInnis* decision was placed on the equal protection issue, see 293 F. Supp. at 331-35, than on the lack of judicially manageable standards, see id. at 335-36.

148. See notes 128-29 & accompanying text supra.
mining when a summary affirmance was to be treated as a decision on the merits and when it was to be viewed as something else. The court in Serrano also left some unanswered questions when it argued that, in any event, McInnis could be distinguished from the litigation before the California court on the grounds that the Illinois plaintiffs were seeking significantly different relief. Assuming that this contention was correct, the Serrano court still did not explain away the fact that the Illinois court held that a legislative financing scheme, substantially the same as the California system, did not violate the equal protection clause.149 Furthermore, the Serrano opinion's characterization of the McInnis court's ruling on the constitutional issue as dictum did not clarify matters, since this argument flatly contradicted previous decisions of the California Supreme Court without attempting to refute the logic of those earlier cases.150 In short, the Serrano court did not clearly and effectively refute the California Court of Appeal's conclusion that the McInnis holding was a binding precedent in the Serrano litigation.

Is the "Strict Scrutiny" Test Applicable?

The district court in McInnis was confronted with an equal protection attack upon a school financing system that was comparable to California's,151 and the court explained the proper equal protection standard to be used in testing the constitutionality of the statutory system as follows:

The Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective.152 The district court concluded that the existing Illinois legislation met the constitutional test because it was "neither arbitrary nor [did] it constitute an invidious discrimination."153 Rather, the court felt that the legislature had made a reasonable decision to allow local school districts to determine their own tax burden for educational purposes.154

The Serrano court, on the other hand, chose not to apply this same "rational relationship" test to the similar California legislation. In-

149. See note 142 & accompanying text supra.
150. See notes 144-46 & accompanying text supra.
151. In Serrano v. Priest, 5 Cal. 3d at 615, 487 P.2d at 1263, 96 Cal. Rptr. at 623, the court conceded the similarity between the Illinois and California systems.
153. Id.
154. Id. at 333. As the court put it, "[t]he state legislature's decision to allow local choice and experimentation is reasonable. . . ."
stead, as has been previously pointed out, the court applied the “strict scrutiny” equal protection test.\textsuperscript{155} Why the court chose not to apply the “rational relationship” test is not explained. One is tempted to speculate that the court was tacitly indicating that the California legislation would have been constitutional had the less stringent test used in \textit{McInnis} been employed. In any event, the \textit{Serrano} opinion relied exclusively upon the applicability of the “strict scrutiny” test to the legislation in question. Therefore, the decision must stand or fall on the persuasiveness of the court’s argument that the “strict scrutiny” test is the proper one.

\textit{Wealth as a Suspect Classification}

The court in \textit{Serrano} took care to indicate that legislation which classifies on the basis of wealth has often been critically scrutinized by the Supreme Court.\textsuperscript{156} In addition, the court stressed that, in its opinion, the California public school financing system discriminated on the basis of the wealth of a school district and its residents.\textsuperscript{157} Without questioning the validity of these assertions by the court, it should be pointed out that the \textit{Serrano} court completely failed to take into account the impact of the Supreme Court’s decision in \textit{Dandridge v. Williams}.\textsuperscript{158} The decision in \textit{Dandridge} has been noted as a significant departure from the earlier approach taken by the Supreme Court with regard to the equal protection clause of the Fourteenth Amendment.\textsuperscript{159}

In \textit{Dandridge} the court was confronted with a challenge to the constitutionality of an administrative regulation which the State of Maryland promulgated in connection with its participation in the federal aid to families with dependent children program.\textsuperscript{160} The Maryland regulation imposed a maximum limit on the total amount of aid which any one family could receive. The appellants in \textit{Dandridge}, who had large families with standards of need that exceeded the maximum of aid which they received under the regulation, brought suit in the United States District Court for Maryland alleging that the regulation violated the equal protection clause of the Fourteenth Amendment.\textsuperscript{161}

Although the trial court in \textit{Dandridge} found the maximum aid regulation unconstitutional,\textsuperscript{162} the Supreme Court reversed the lower

\begin{footnotes}
\item[155] See text accompanying notes 58 & 59 supra.
\item[156] See note 72 & accompanying text supra.
\item[157] See notes 60-76 & accompanying text supra.
\item[159] 36 Mo. L. Rev. 117, 124 (1971); see 9 Duquesne L. Rev. 271, 279 (1971); \textit{The Supreme Court, 1969 Term}, 84 Harv. L. Rev. 1, 62, 64 (1970).
\item[162] \textit{Id.} at 458-59.
\end{footnotes}
The court's ruling on a direct appeal. The opinion by Justice Stewart concluded that because the regulation was of a "social and economic nature" it could be reviewed only under the rational relationship equal protection test.\(^{163}\) Quoting from *McGowan v. Maryland*,\(^ {164}\) the court indicated that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."\(^ {165}\) Thus, Justice Stewart indicated that the Maryland regulation was constitutional in view of the fact that there were legitimate state interests which it might conceivably further.\(^ {166}\)

The opinion in *Dandridge* expressed the view that the strict scrutiny equal protection test should only be applied when classifications are "infected with a racially discriminatory purpose or effect,"\(^ {167}\) or they impinge upon a "constitutionally protected freedom."\(^ {168}\) The *Dandridge* court simply did not view the case before it as involving what it considered to be a "constitutionally protected freedom," because, as the court put it: "[H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights . . ."\(^ {169}\) The equal protection standard that emerges from this line of reasoning has been summarized as follows:

[T]he court [in *Dandridge*] indicates that all classifications, unless racial or involving freedoms guaranteed by the Bill of Rights, will not be set aside if any state of facts reasonably may be conceived to justify it.\(^ {170}\)

The standard of review set forth in *Dandridge* certainly does not appear to support the view expressed in *Serrano* that the strict scrutiny test was applicable to the California school financing system. The *Serrano* opinion did not predicate its constitutional holding on the ground that the financing system was racially discriminatory, but rather, the court held that the system was unconstitutional because it resulted in a classification based on wealth.\(^ {171}\) Furthermore, there was no indication in the *Serrano* holding that the case involved "freedoms guaranteed by the Bill of Rights." In light of these apparent contradictions, the *Serrano* court's constitutional holding is weakened by its failure to even discuss the *Dandridge* decision.

Even if one ignores the *Dandridge* case the question naturally arises as to what compulsory connection the court saw between the

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163. 397 U.S. at 485.
165. 397 U.S. at 485.
166. Id. at 486.
167. Id. at 485 n.17.
168. Id. at 484 n.16.
169. Id. at 484 (emphasis added).
170. 36 Mo. L. Rev. 117, 125 (1971).
171. See notes 75-76 & accompanying text supra.
prior factual contexts in which the strict scrutiny approach had been
used and the fact situation under consideration in Serrano. The court
cited Griffin v. Illinois\(^ {172}\) and noted that the Supreme Court held in that
case that Illinois was obligated to provide a free transcript on appeal to
a poor defendant.\(^ {173}\) Also mentioned by the court was Harper v. Vir-
ginia Board of Elections\(^ {174}\) which involved invalidation of a poll tax on
the basis that it would deter indigents from voting.\(^ {175}\) Other similar
cases were also mentioned by the court.\(^ {176}\) Of course, whether these
cases lent credence to the position taken by the court—that wealth was
a suspect classification—is open to question, and scholars have dis-
puted whether the decisions of the Supreme Court in these cases were
precised on the wealth classifications or only on the basis that the fund-
damental interests in fair criminal procedure and voting were in-
volved.\(^ {177}\) Furthermore, even if one assumes Harper and Griffin were
decided on wealth classification grounds, this would not necessarily
mean that they supported the court's equal protection argument in Ser-
rano. At least one commentator, in analyzing these particular cases,
stated, "Griffin, Harper, and similar cases do not seem to hold that all
classifications . . . that have a differential impact on persons of dif-
ferent wealth are suspect per se absent an adverse effect on 'fundamental
interests'."\(^ {178}\) In other words, if this analysis may be accepted, cases
such as Griffin and Harper would be relevant in the context of Ser-
rano only insofar as the court has succeeded in establishing that educa-
tion is a fundamental interest.

Education as a Fundamental Interest

The court's attempt to establish education among those interests
deemed to be fundamental by the Supreme Court has already been out-
lined.\(^ {179}\) The court's efforts in this area consisted mainly of: (1) cit-
ing cases that were admittedly not directly in point in order to estab-

\(^{172}\) 351 U.S. 12 (1956).
\(^{173}\) 5 Cal. 3d at 602, 487 P.2d at 1253, 96 Cal. Rptr. at 613.
\(^{175}\) 5 Cal. 3d at 602, 487 P.2d at 1254, 96 Cal. Rptr. at 614.
\(^{176}\) E.g., Tate v. Short, 401 U.S. 395 (1971); Boddie v. Connecticut, 401 U.S.
\(^{177}\) Michelman, Forward to The Supreme Court, 1968 Term, 83 Harv. L.
Professor Brest, a member of the Stanford Law School faculty, was reviewing J.
His criticisms are of particular interest because the book he was reviewing made essen-
tially the same equal protection argument that one finds in the Serrano opinion.
\(^{178}\) Brest, supra note 177, at 604.
\(^{179}\) See text accompanying notes 77-91 supra.
lish the importance of education in our society; (2) attempting to develop analogies between education and other interests already established as fundamental by prior decisions; and (3) attempting to differentiate education from other interests, less deserving of judicial protection. The first line of argument need not be discussed in detail for no one would seriously dispute the idea that education is vital to society. The second and third contentions, however, merit attention.

A careful analysis of the court's holding that education is a fundamental interest reveals that it relied on a number of undocumented assertions. These same assertions had been promulgated in support of the constitutional argument that education is a fundamental interest in a recent law review article,180 and in a subsequent book by the same authors, Private Wealth and Public Education.181

The Serrano court relied heavily on the above mentioned law review article as authority for some of its assertions; however, the specific manner in which the authority was utilized by the court can be faulted because: (1) in at least one instance the court selectively quoted from the article so as to sacrifice some of the objectivity of the original work;182 and (2) the court indulged in an apparent "bootstrap" operation when it supported some of its points by citing to the article which in turn contained basic factual assumptions which were unsubstantiated by any empirical data.183

The Serrano opinion also contained justifications for labeling education as a fundamental interest which parallel those employed in Private Wealth and Public Education although they were not directly attributable to that work.184 In this regard, the review of the book by Professor Brest of the Stanford Law School faculty in which the lack of empirical data to support the authors' conclusions is criticized, is of particular interest. Many of the criticisms raised by Brest as to the validity of the conclusions reached by the book's authors might also be leveled against parts of the holding in Serrano.185

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182. See notes 193-95 & accompanying text infra.
183. See notes 196-98 & accompanying text infra.
185. See notes 188-92 & accompanying text infra for the use of such an approach in this Note's analysis. Some of Brest's criticisms focus on the author's argument that education should be admitted "to the equal protection clause's 'inner circle' of fundamental interests." Brest, supra note 177, at 604. The review points out weaknesses in the following areas: (1) the authors' conclusion that the right to education is comparable in importance to society's interest in fair criminal law procedures, (2) the contention that education is at least as important as voting rights
A critical review of the apparent weaknesses in the court's effort to establish education as a fundamental interest necessitates consideration of certain of the analogies used to support its own position. The *Serrano* court compared the right to an education with the rights of defendants in criminal cases, an interest which has already been recognized as fundamental.\(^{186}\) In comparison to the rights of defendants in criminal cases, education has, said the court, "far greater social significance than a free transcript or a court-appointed lawyer."\(^{187}\) Furthermore, the court indicated that education affects more people in more ways than the criminal law.\(^{188}\) However, the court failed to take note of certain crucial aspects of criminal procedure cases which would not appear to be present in cases alleging a fundamental right to education.

As Professor Brest has stated:

> [In compulsory education] the critical aspects of the criminal process are absent: the child has committed no offense, no child is singled out or stigmatized, and there is no purpose to subject the pupil to unpleasant treatment. . . . There is simply no element of the adverseness that calls forth the special duty of 'fair play.'\(^{189}\)

These inherent differences from a criminal law situation are obviously differences in kind rather than degree and could be said to dictate greater judicial scrutiny than could be warranted in an attack upon statutes dealing with education.

The court also drew an analogy between education and voting, explaining that both rights are essential to an effective democracy.\(^{190}\) "At a minimum," said the court, "education makes more meaningful the casting of a ballot [and] it is likely to provide the understanding of, and the interest in, public issues . . . ."\(^{191}\) The court did not elaborate further on the subject, evidently considering its assumptions to be self-evident. Professor Brest criticizes the assumption that there is a necessary correlation between effective voting and education:

> [I]t is not unreasonable (or at least not unusual) to assume some sort of positive relationship between the money spent on a person's education and his political involvement, political influence, and perhaps even the quality of his political judgments. But it is not self-evident that increased expenditures above a certain, possibly

since the quality of the electorate's decisions are determined by the educational system, and (3) the limiting argument that education is sufficiently unique so that cases involving other public services need not be given the same special treatment. *Id.* at 605-09.

186. See note 80 & accompanying text *supra*.
187. 5 Cal. 3d at 607, 487 P.2d at 1258, 96 Cal. Rptr. at 618.
188. *Id*.
189. Brest, *supra* note 177, at 605-06.
190. 5 Cal. 3d at 607, 487 P.2d at 1258, 96 Cal. Rptr. at 618.
191. *Id.* at 608, 487 P.2d at 1258, 96 Cal. Rptr. at 618.
quite modest, level will result in an increase of whatever educa-
tional output . . . deem[ed] relevant to participation in the
political process.192

In the absence of empirical data, it would seem that the court's asser-
tion that there is an interrelationship between the amount of money
spent for education and the quality of the electorate's judgments is
purely speculative.

Certain difficulties also arise in connection with the court's efforts
to establish the pre-eminent position of education in our society on com-
parative grounds. Initially, the court quoted the following statement
from a law review article:193 "Not every person finds it necessary to
call upon the fire department or even the police in an entire lifetime.
. . . Every person, however, benefits from education
. . . "194 The
opinion neglected, however, to include the caveat by the author of the
article, in which it was conceded that certain public services, such as
police protection, can be of great importance merely because they are
available, even if they are never utilized.195 In other words, police
protection fulfills the important public function of crime deterrence
simply by being visible and available. More fundamentally the court's
effort to distinguish the beneficial effect of education from that of po-
lice and fire protection proves little with regard to the relative impor-
tance of education. The educational process obviously benefits so-
ciety in a different way than other municipal services, but that fact does
not establish that its fundamental importance to the general populace is
any greater than that of the other services. If a community were forced
to hold a plebiscite in which the voters had to choose between the
elimination of their schools, fire department, or police protection, would
the knowledge that more people have occasion to come in contact with
the schools assist them in making a confident decision?

The court also offered the following contrast between education
and other public services: "While police and fire protection, garbage
collection and street lights are essentially neutral in their effect on the
individual psyche, public education actively attempts to shape a child's
personal development . . . ."196 The court's authority for this state-
ment was the same law review article, in which the authors did not
refer to any independent empirical studies in support of their original
assertions.197 This basic lack of authority naturally raises the ques-
tion of whether or not the propositions the court sets forth at this point

192. Brest, supra note 177, at 606.
193. Coons, Clune & Sugarman, supra note 180, at 388.
194. 5 Cal. 3d at 609, 487 P.2d at 1259, 96 Cal. Rptr. at 619.
195. Coons, Clune & Sugarman, supra note 180, at 388 n.231.
196. 5 Cal. 3d at 610, 487 P.2d at 1259, 96 Cal. Rptr. at 619.
197. Coons, Clune & Sugarman, supra note 180, at 389.
are really as self-evident as asserted by the court. Can it be assumed without further investigation that poor police protection and inadequate garbage collection have no effect on the "child's personal development"?

In summary, the decision in *Serrano* which establishes a pre-eminent position of the right to education is not convincing. The effort to differentiate public education from other vital public services was based on presumptions, not factual studies.\(^{198}\) The attempt to analogize education and the procedural rights of criminal defendants ignored important qualitative differences between the two.\(^{199}\) Also, the analogy drawn between education and voting rights appears to have rested upon an unfounded assumption.\(^{200}\) The court does not appear to have clearly and unequivocally established education as one of the interests which should be considered fundamental for equal protection purposes.

In view of the apparent weaknesses in the distinctions drawn by the court, one is left to speculate as to why the court attempted to differentiate education from other essential government services in the first place. Some writers have suggested that *all* essential public services which are primarily funded by local property taxes should be re-examined in the light of the "strict scrutiny" approach to the equal protection clause.\(^{201}\) None of these writers makes any effort to differentiate education from other governmental services. Evidently these authors did not consider that the more pedestrian services were any less essential, in the practical sense of the term, than education. A better approach, both from the point of view of consistency and social policy, is to say that the equal protection clause demands a rough parity in the distribution of all vital public services.

The defendants in *Serrano* conceded that if the financing system for the public schools was constitutionally unsound, the same could also be said of other governmental services which are financed in much the same way.\(^{202}\) The court did not respond to this particular contention by the defendants, but chose instead to leave the question unanswered. The court indicated that irrespective of any arguments about other services, it was satisfied that the right to education was a fundamental interest.\(^{203}\) This stance appears to be a bit inconsistent

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198. See notes 193-97 & accompanying text supra.
199. See notes 186-89 & accompanying text supra.
200. See notes 190-92 & accompanying text supra.
202. 5 Cal. 3d at 613-14, 487 P.2d at 1262, 96 Cal. Rptr. at 622.
203. Id. at 614, 487 P.2d at 1262-63, 96 Cal. Rptr. at 622-23.
with the court's earlier effort to demonstrate what it considered to be clear-cut differences between education and other public services.\textsuperscript{204}

Perhaps the \textit{Serrano} court felt constrained to emphasize the unique qualities of education because it thought that an effort to elevate all municipal services to the status of "fundamental interest" would leave its decision more vulnerable to attack. The difficulties faced by the court inherent in its effort to justify active and critical review of a statute affecting the right to education may have been great enough without going further out on a limb. One writer characterized the problem thusly:

\begin{quote}
Education, [in contrast to interests already recognized as fundamental] presents a more difficult task for justification of active review. . . . Unlike voting and fair criminal procedure, education is not an interest which has long been recognized to be of preeminent importance.\textsuperscript{205}
\end{quote}

Whatever the motivation for the \textit{Serrano} court's attempt to distinguish education from other vital public services, the opinion is not persuasive on this matter from the point of view of both logic and public policy. Thus, the court appears to have caught itself in its own trap by failing to establish education as deserving of greater judicial consideration than other public services, yet at the same time refusing to extend that special consideration to the other services.\textsuperscript{206}

\textbf{Is Judicial Action the Appropriate Solution?}  

\textit{Propriety of Judicial Activism}  

The district court in \textit{McInnis} made it clear that it did not think the solution to the problem of providing equal educational opportunity should be achieved through litigation. No attempt to minimize the inequalities of the existing public school financing system was made; however, the court indicated that the problem of how best to allocate the state's financial resources was more a legislative than a judicial problem.\textsuperscript{207} Furthermore, the court felt that the problems involved were beyond judicial cognizance because "the courts simply cannot provide the empirical research and consultation necessary for intelligent educational planning."\textsuperscript{208} Therefore, the court concluded, "If the legislatures cannot solve these problems surely the deep cutting edge of constitutional precepts is not the answer."\textsuperscript{209}

\begin{footnotes}
\footnotetext{204. See text accompanying notes 193-97 supra.}
\footnotetext{205. Developments—Equal Protection, supra note 42, at 1129 (1969); accord, Brest, supra note 177, at 606.}
\footnotetext{206. See text accompanying notes 201-204 supra.}
\footnotetext{207. 293 F. Supp. at 331-32.}
\footnotetext{208. \textit{Id.} at 336.}
\footnotetext{209. \textit{Id.}, n.38; see Developments—Equal Protection, supra note 42, at 1129.}
\end{footnotes}
Obviously the Serrano court felt that constitutional precepts did provide a proper basis for deciding the same issue that confronted the district court in Mclnnis. Which court was right? Perhaps the answer can be found by examining some of the underlying problems involved in the school financing controversy to determine if the Serrano decision effectively dealt with them.

Initially, it is worth noting that educators are still embroiled in a controversy as to whether or not a given amount of money spent in a ghetto school will do as much good as the same amount expended in a suburban school. The central finding of a leading study, the Coleman Report,\(^\text{210}\) indicates that it will not.

It appears that variations in the facilities and curriculums of the schools account for relatively little variation in pupil achievement insofar as this is measured by standard tests . . . . [A] pupil's achievement is strongly related to the educational backgrounds and aspirations of the other students in the school.\(^\text{211}\)

The Serrano opinion acknowledged this "controversy among educators" in a footnote;\(^\text{212}\) however, the court found it unnecessary to consider any factual controversy in view of the fact that plaintiffs' complaint had alleged that the amount of educational expenditure affected the quality of education, and "for purposes of testing the sufficiency of a complaint against a general demurrer, we must take its allegations to be true."\(^\text{213}\) As the Serrano court indicated, the procedural treatment to be accorded plaintiffs' allegations on demurrer was cut and dried; however, the procedural situation in Serrano does not change the existing fact that there is active disagreement as to whether there is any relationship between educational achievement and the amount of money spent per pupil. In future litigation, this substantive argument could be decided adversely by a court less inclined to believe that judicial activism is the proper means of affecting reforms in school financing.

Another problem inherent in the concept of equal expenditures for education is that too much emphasis might be placed on educational equality at the expense of educational quality. Some writers have suggested that a demand for equal expenditures may result in an "adverse leveling effect"\(^\text{214}\) in that a state would simply reduce all the school systems within the state to the lowest common denominator.\(^\text{215}\) This de-

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211. COLEMAN, supra note 210, at 22.
212. 5 Cal. 3d at 601 n.16, 487 P.2d at 1253 n.16, 96 Cal. Rptr. at 613 n.16.
213. Id.
velopment would in turn damage the rich school districts that attempted to stimulate excellence in their school systems. The Serrano court did not deal with this "reverse discrimination" contention, but the possibility that it might be raised in future litigation should not be ignored. If found persuasive, such an argument could make a court lean in the direction of those who feel that judicial action is not the appropriate means of dealing with such problems.

The pessimistic view that requiring equal expenditures for education may have an adverse impact on the quality of education overall has been countered by at least one knowledgeable observer with the assertion that such dire results are unlikely in the Serrano situation in view of California's long-standing commitment to education. In addition, it has been argued that rich "public" schools are in effect private schools for the chosen few that live in the right districts, and that nothing would really be lost if these "rich" individuals avoided the use of "public" schools and sent their children to private schools.

The Problem of Implementation

The practical problem of implementing the decision in Serrano is another point which should not be overlooked when discussing the appropriateness of judicial action in this area. If the case is remanded and the defendants lose, they will be ordered, as the Serrano opinion indicated, "to reallocate school funds in order to remedy [the] invalidity" of the present financing system. Should the state authorities fail to respond within a reasonable time, the trial court would retain jurisdiction of the action in order to rebuild the system. The court did not, however, attempt to dictate precisely how these goals are to be accomplished. Presumably the court was relying on the state legislature to take its cue and restructure the statutory framework of the system.

Will the California legislature respond to the court's ruling, and if so, will the legislative response satisfy the court's requirements? Assuming the legislature fails to take the necessary steps, will the trial court be able to effectively supervise a restructuring of the system? These questions go to the ultimate success or failure of the Serrano decision. More fundamentally, they raise doubts as to the practicability of achieving the kind of equitable relief that the plaintiffs sought in

216. Id.
218. Coons, Clune & Sugarman, supra note 180, at 419.
219. 5 Cal. 3d at 591, 487 P.2d at 1245, 96 Cal. Rptr. at 605.
220. Id.
Serrano.\textsuperscript{221} The propriety of the court’s attempt to exercise its equity powers is open to question, and the basic inquiry remains as to whether the issues presented in Serrano are beyond judicial cognizance.

Professor Kurland has stated that judicial action is inappropriate in this area and that a court attempting to effectuate a decision based on the equal protection argument used in Serrano would be unsuccessful.\textsuperscript{222} He contends that such a decision would lack certain elements that are necessary to any important equal protection case which has an effective impact on society as a whole. These “ingredients for success,” gleaned from an analysis of earlier decisions by Professor Kurland, follow:

The first requirement is that the constitutional standard be a simple one. The second is that the judiciary have adequate control over the means of effectuating enforcement. The third is that the public acquiesce. . . .\textsuperscript{223}

Kurland feels that the first requirement would be met in a school financing case if a guide of equal expenditures per pupil were employed.\textsuperscript{224} However, he also indicates that such a simple standard would be undesirable because it would only reduce, rather than eliminate, existing inequities.\textsuperscript{225} Any standard formulated should, he says, “afford a basis for the inundation of the worst schools with the best resources that society can marshal.”\textsuperscript{226}

The Serrano decision did not impose the rigid standard of equality which Kurland’s article criticizes, and instead sought the more amorphous goal of eliminating “substantial disparities” in the revenue available to different school districts.\textsuperscript{227} Thus the court did not preclude the expenditure of greater sums of money where it is rationally justified. On the other hand, the court abandoned whatever advantage there may have been in having a simple constitutional formula such as the “one man, one vote” formula used in Baker v. Carr.\textsuperscript{228}

The second requirement discussed by Kurland, that the judiciary have adequate control over the means of effectuating enforcement, also presents problems in the Serrano holding. Professor Kurland summarizes the difficulty of a court trying to reform a school financing system as follows:

The judiciary is extremely efficient at wiping a statute off the books. It is quite good at rewriting an existing statute so as to

\begin{itemize}
\item \textsuperscript{221} See text accompanying note 31 supra.
\item \textsuperscript{222} Kurland, supra note 215, at 592-98.
\item \textsuperscript{223} Id. at 592.
\item \textsuperscript{224} Id. at 596.
\item \textsuperscript{225} Id. at 597.
\item \textsuperscript{226} Id.
\item \textsuperscript{227} 5 Cal. 3d at 618, 487 P.2d at 1265, 96 Cal. Rptr. at 625.
\item \textsuperscript{228} 369 U.S. 186 (1962).
\end{itemize}
frame a rule that it would have legislated had it been a legisla-
ture. But it is not very strong on creating legislation *ab initio*.

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Hopefully, the *Serrano* court has avoided this dilemma by jolting the California legislature into action. Of course, the success of *Serrano* under this view depends entirely upon whether or not the legislators accept the role the court has fashioned for itself as a spokesman for change.

If the legislature fails to act, and a subsequent trial on the merits results in a holding that the present system is unconstitutional, the California Supreme Court's efforts may have produced nothing more than an impasse between an unconstitutional school financing system and an unenforceable court order. Such an eventuality conjures up visions of a paralyzed state school system; however, the court has wisely avoided this potential embarrassment by filing its modification order which allows the present system to operate until it is replaced.230

With reference to the third "ingredient for success," public acquiescence, Kurland is also pessimistic. He notes that the school desegregation ideal enunciated by the Supreme Court in *Brown v. Board of Education*231 has yet to become a reality because of public hostility; and he sees no reason to believe that the American public will behave in a more enlightened manner if inequality in school financing is the issue.232 Whether Professor Kurland's assessment of court imposed school financing schemes is correct or not will have to await the final outcome in *Serrano*.

The "Natural Law" Dilemma

One additional factor which might prompt inquiry as to the pro-
priety of judicial action in this area, is the fear that the courts will usurp a disproportionate amount of political power. Chief Justice Warren E. Burger expressed this concern as follows:

Those who would look to judges . . . to innovate and reshape our society will do well to ponder what remedy is available if the world shaped by the judicial process is not to their liking.

I suggest that this approach be considered against the background of our traditions and history which began with a revolution instituted to overthrow a government that was beyond recall by the votes of the people.233

230. See note 121 & accompanying text *supra*.
Of course these remarks by the chief justice were not directed at any particular court or decision; however, they were no doubt aimed at what he considered to be an unfortunate judicial trend. Interestingly enough, his warning seems to echo the following excerpt from Justice Black's dissent in *Adamson v. California*:\(^{234}\)

This decision reasserts a constitutional theory spelled out in *Twinning v. New Jersey*, 211 U.S. 78, that this Court is endowed by the Constitution with boundless power under "natural law" periods to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes "civilized decency" and "fundamental liberty and justice."\(^{235}\)

Although Justice Black's statement was made with reference to a due process issue,\(^{236}\) his remarks regarding imaginative judicial interpretation closely parallel those made by Chief Justice Burger. If the Supreme Court were to view *Serrano* in the same light as Burger and Black viewed the concept they were criticizing in the preceding statements, the ruling on the issues presented in *Serrano* would probably be contrary to the California court's decision.

Although it would be idle to speculate as to exactly how the judicial philosophy of the Supreme Court might affect the outcome of an appeal from the *Serrano* decision, one can safely say that the justices' attitude toward the role of the judicial system in our society would be an important factor in deciding the case. The ruling in *Serrano* is clearly a bold and aggressive move by the California Supreme Court into an area not previously considered by an appellate court to be appropriate for judicial action.\(^{237}\) If the United States Supreme Court frowns on this instance of judicial activism, it would no doubt be hesitant to adopt the California Supreme Court's view of the *Serrano* case.

**Conclusions**

The basic importance of *Serrano v. Priest* is clear. It is the first appellate court decision to hold that a widely used method of financing public schools violates the equal protection mandate of the Fourteenth Amendment; this assumes, of course, that plaintiffs can prove their allegations. The future impact of the decision is not so clear. A number of imponderables are encountered when one attempts to assess how the *Serrano* decision might fare on appeal to the Supreme Court, or how far it may be relied upon as precedent by other courts.

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\(^{234}\) 332 U.S. 46 (1947).

\(^{235}\) *Id.* at 69.

\(^{236}\) Justice Black was disturbed by the majority opinion which upheld the constitutionality of a California law which permitted court and counsel to comment on the failure of a defendant to testify, because "[i]t [did] not seem unfair...." 332 U.S. at 57.

\(^{237}\) See notes 21-22 & accompanying text *supra.*
The court's characterization of the precedential effect of *McInnis* is debatable. This is a point of no small importance since, if the *Serrano* court's version of *McInnis* is found to be wrong, the California court would have had no discretion to decide the Fourteenth Amendment issue in the first place.\(^{238}\)

The *Serrano* court's argument for the application of the "strict scrutiny" equal protection test to school financing statutes may be questioned.\(^{239}\) The right to education may be different than the right to police and fire protection as noted by the court, but it is not so certain that it is any more important a right. If the importance of education is conceded, can one say that its importance is as clearly and unequivocally established as that of the interests already considered fundamental for equal protection purposes? Again it must be noted that this is a potentially vulnerable point because the court based its entire constitutional argument on the applicability of the "strict scrutiny" test.

Finally, it should be noted that distinguished writers have advanced several arguments to the effect that judicial action is neither an appropriate nor an effective means of accomplishing educational reforms.\(^{240}\) Of course, if a state such as California succeeds in effectuating these reforms via the courts, the force of most of the arguments will be gone.

To say that the *Serrano* decision is assailable in certain respects is perhaps to say nothing more than that it is imperfect, as all human endeavors must be. However, the imperfections in *Serrano* appear to be substantial and may not be readily disregarded. Consequently, we must await the final outcome of *Serrano* to determine whether the egalitarian principles embodied in the opinion by the court will ultimately triumph.

*Jack E. Perkins*\(^*\)

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238. See text accompanying notes 125-49 *supra*.
239. See text accompanying notes 151-205 *supra*.
240. See text accompanying notes 207-36 *supra*.

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