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Constitutional Law - State Financing of Public Schools - Violation of Equal Protection Clause. Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971)

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CURRENT DECISIONS

Constitutional Law—State Financing of Public Schools—Violation of Equal Protection Clause. *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Reptr. 601 (1971)

The California Court of Appeals upheld a demurrer to the plaintiff's allegation that the California system of school financing, based on property tax revenues, was unconstitutional.[1] The Supreme Court of California reversed, holding that plaintiff school children had "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."[2] The California decision is the first judicial recognition of a duty to finance schools in such a manner so as not to create wide disparities in funds available to individual districts.[3]

A constitutional provision placing a duty on the state legislature to provide essentially free public education[4] is found in every state but

1. Serrano v. Priest, 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (2d Dist. 1971).

2. Serrano v. Priest, 5 Cal. 3d 584, 618, 487 P.2d 1241, 1265, 96 Cal. Rptr. 601, 625 (1971).

3. The original equal protection attack came in Board of Educ. v. Michigan, General Civil No. 103342 (filed Feb. 2, 1968). *See also* Burruss v. Wilkerson, 310 F Supp. 572 (W.D. Va. 1969), *aff'd*, 397 U.S. 44 (1970); McInnis v. Shapiro, 293 F Supp. 327 (N.D. Ill. 1968), *aff'd. mem. sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969). In *McInnis* the court held that "individual needs" was such a "nebulous concept" that the issue was nonjusticiable for lack of a manageable standard. *Id.* at 335. For an article arguing that school districts have a constitutional duty to participate in national compensatory programs when "reasonably feasible" see Comment, *Equality of Educational Opportunity: Are "Compensatory Programs" Constitutionally Required?*, 42 S. Cal. L. Rev. 146 (1968).

4. The following are state constitutional provisions calling for establishment of public schools: Ala. Const. art. 14, § 256; Alaska Const. art. 7, § 1; Ariz. Const. art. 11, § 1; Ark. Const. art. 14, § 1; Cal. Const. art. 9, § 5; Colo. Const. art. 9, § 2; Conn. Const. art. 8, § 1; Del. Const. art. 10, § 1; Fla. Const. art 11, § 1; Ga. Const. art. 8, § 1; Hawaii Const. art. 9, § 1; Ida. Const. art. 9, § 1; Ill. Const. art. 8; § 1; Ind. Const. art. 8, § 1; Iowa Const. art. 9, § 12; Kan. Const. art. 6, § 1; Ky. Const. § 183; La. Const. art. 12, § 1; Me. Const. art. 8, § 1; Md. Const. art. 8, § 1; Mass. Const. pt. 2, ch. 5, § 2; Mich. Const. art. 8, § 2; Minn. Const. art. 8, § 1; Miss. Const. art. 8, § 201; Mo. Const. art. 9, § 1a; Mont. Const. art. 11, § 1; Neb. Const. art. 7, § 6; Nev. Const. art. 11, § 1; N.H. Const. pt. 11, § 83; N.J. Const. art. 8, § 4; N.M. Const. art. 12, § 1; N.Y. Const. art. 11, § 1; N.C. Const. art. 9, § 2(F); N.D. Const. art. 8, § 148; Ohio Const. art. 6, § 2; Okla. Const. art. 13, § 1; Ore. Const. art. 8, § 3; Pa. Const. art. 3, § 14; R.I. Const. art. 12, § 1; S.D. Const. art. 8, § 1; Tenn. Const. art. 11, § 12;

one.[5] The role of free public education as an essential element of a democratic society has been recognized by legal scholars,[6] public commissions,[7] economists,[8] and occasionally in judicial opinions.[9]

Intuitively, the concept that educational results are a function of financial input has been accepted.[10] The one empirical study[11] on the relationship tended to show that education was less a function of wealth and more a function of social background. Assuming that some direct correlation exists between wealth and educational achievement, there can be mounted an "equal protection" attack because of the wide[12] spending disparities.

TEX. CONST. art. 7, § 1; UTAH CONST. art. 10, § 1; VT. CONST. ch. 2, § 64; VA. CONST. art. 9, § 129; WASH. CONST. art. 9, § 2; W VA. CONST. art. 12, § 1; WIS. CONST. art. 10, § 3; WYO. CONST. art. 7, § 1.

5. South Carolina's public education provision S.C. CONST. art. 11, § 5 (1895) was repealed by No. 902 [1952] S.C. Laws 2223 and No. 653 [1954] S.C. Laws 1695.

6. *Preface* to J. COONS, W CLUNE, & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION at XX (1970) [hereinafter cited as PRIVATE WEALTH]. The authors note that "[t]he goal of equal education may justify heroic judicial measures. " *Id.* at XX.

7. The United States Riot Commission's second recommendation was that communities "meet the urgent need to provide full equality of educational opportunity" 1968 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 438 (New York Times edition).

8. Even those economists who favor the workings of the free market mechanisms agree on "the proposition that a necessary step in breaking the chain of successive generations of poverty and lack of motivation is satisfactory elementary and secondary education for children." J. BURKHEAD, PUBLIC FINANCE 15 (1964).

9. Free education has been termed "the most powerful agency for promoting cohesion among a heterogeneous democratic people at once the symbol of our democracy and the most pervasive means of promoting our common destiny" Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 216, 231 (1948). No comment would be complete without the often quoted dictum in Brown v. Board of Educ., 347 U.S. 483 (1954). "[E]ducation is perhaps the most important function of the state and local governments. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Id.* at 493.

10. In Van Dusartz v. Hatfield, 334 F Supp. 870 (D. Minn. 1971), the court stated that it must assume the existence of a direct correlation because "[t]o do otherwise would be to hold that in those wealthy districts where the per pupil expenditure is higher than some real or imaginary norm, the school boards are merely wasting the taxpayers' money." *Id.* at 874.

11. U. S. DEP'T. OF HEALTH, EDUCATION AND WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966).

12. *See, e.g.*, data in CALIFORNIA STATE DEP'T. OF EDUCATION, AVERAGE DAILY ATTENDANCE AND SELECTED FINANCIAL STATISTICS OF CALIFORNIA SCHOOL DISTRICTS 1965-66, 7-8, 27-28, 47-48, 65, 77-78, 97-98, 117-18, 135, 144, 155, 165, 175, 185, 207-08, 225, 237-38 (1967). *See also* R. JOHNS & E. MORPHET, FINANCING THE PUBLIC SCHOOLS 143, 248-51 (1960).

Writers[13] have suggested that this equal protection attack can take either of two approaches. The first is generally termed the traditional or economic approach. The essence of this test is rationality—is the means chosen by the legislature reasonably related to the evil sought to be eliminated.[14] The second line of attack occurs when "fundamental interests" [15] or "suspect" classifications[16] cause the court to apply a more stringent standard, requiring a showing of compelling[17] state interest in the status quo. Either of the above elements is sufficient to trigger the more stringent standard when present in a sufficient degree. Therefore, as one element increases in offensiveness the other can decrease and still trigger the standard. In *Serrano* the court concluded that education was a fundamental interest and determined that classifications were being made under a suspect criterion—wealth.[18] Armed with those findings, the court had no problem holding that if plaintiff proved the facts alleged, the California school system would be held to violate the equal protection clause.

Assuming[19] that the California school system is held unconstitutional, what are the major legislative and judicial remedies? The initial prob-

13. PRIVATE WEALTH, *supra* note 6, at 290.

14. Coons, Clune, and Sugarman, *Educational Opportunity: A Workable Constitutional Test For State Financial Structures*, 57 CALIF. L. REV. 305, 326 (1969) [hereinafter cited as Coons, Clune, and Sugarman]. For cases following this form of analysis see Ferguson v. Skruda, 372 U.S. 726 (1963); Morey v. Doud, 354 U.S. 457 (1957); Williamson v. Lee Optical, 348 U.S. 485 (1955); Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949); Railway Express Agency v. New York, 336 U.S. 106 (1949).

15. Heretofore "fundamental interests" have been limited to dilution of franchise and race cases. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969); Reynolds v. Sims, 377 U.S. 533 (1964); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Strauder v. West Virginia, 100 U.S. 303 (1880).

16. Wealth has been viewed as suspect classification when it is concerned with criminal process or voting rights. *See, e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); *In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

17. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963).

18. 5 Cal. 3d at 614, 487 P.2d at 1263, 96 Cal. Rptr. at 623.

19. As early as 1968 Philip Kurland made the following reluctant prophecy: "I should tell you with some assurance, that sooner or later the Supreme Court will affirm the proposition that a state is obligated by the equal protection clause to afford equal educational opportunity to all of its public school students. But I would also tell you that such a decision, if it comes sooner rather than later, will probably only be the creation of a problem and not a solution to this one." Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583 (1968).

lem is the proper role of the judiciary itself. Until *Serrano*, the courts[20] had consistently held that there was no justiciable standard. It had been the consensus of the legal writers that the body best suited to handle any change in the school financing system is the state legislature.[21] The disagreement centered on the means to stimulate the legislature into action.

The first line of reasoning is built on the premise that the legislature is locked into its present position. The injured parties have no access to the democratic process since by definition they are incapable of voting.[22] More importantly, the people in control, the wealthy, have a vested interest in seeing that the status quo does not change.[23] The writers conclude that only the courts can liberate the legislature from this political log jam.[24] Even these writers agree that whatever the remedy, it should provide flexibility[25] to the state in answering the problem.

The second line of reasoning suggests that the change should be strictly a function of the legislature. One writer[26] argues that the court

20. *E.g.*, McInnis v. Shapiro, 293 F Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969). This change in judicial attitude is not without precedent. It was as late as 1946 that the Court refused to apply the equal protection clause to legislative reapportionment. Colegrove v. Green, 328 U.S. 549, 553 (1946) (alternative holding). *See also* MacDougall v. Green, 335 U.S. 281, 285-86 (1948) (Rutledge, J., concurring); Baker v. Carr, 179 F Supp. 827 (M.D. Tenn. 1959), *rev'd*, 369 U.S. 186 (1962).

21. *See generally* Kurland, *supra* note 19; Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1154 (1969).

22. PRIVATE WEALTH, *supra* note 6, at 292.

23. *Id.*

24. *Id.* at 293.

25. *Id. Cf.* 181.1-.76, 31 FED. REG. 5623-34 (1966); 181.54(f), 31 FED. REG. 5629 (1966); 12(a), 33 FED. REG. 4956 (1968), where the original order from the Department of Health Education and Welfare established categorical definitions of desegregation in percentage figures. The free choice plans were to be evaluated by these definitions. The Department had to abandon these categorical definitions for quantifiable formulas.

26. Kurland explores the impotence at length as he states:

> [The Court] is not very strong on creating legislation *ab initio*, except where it falls within its province of administering criminal justice. Given even the least complex measure of the proper standard of equality, dollar equivalence, how can it bring about the necessary change? For the principle calls for a fundamental revision of the state governmental structure.
>
> The Court, therefore, cannot leave with the local unit the discretion as to how much it is to tax its constituents and what portion of that amount is to be devoted to educational purposes. Will it then command that all educational expenditures shall be made by the state and no local government unit shall supplement the grant? Will it then tell the state how it shall raise the necessary revenues.

is impotent to act in necessary areas to fulfill its decree. Others[27] have concentrated on the legislative function, exhorting their legislature to act.

The foregoing argument is now largely academic as the courts in *Serrano* and *Van Dusartz v. Hatfield*,[28] have come to grips with the problem and have held that the issue is justiciable. The defendants in each of the above cases argued that *McInnis v. Shapiro*[29] had authoritatively decided the issue. Both cases noted, however, that an affirmance without a decision, although technically a judgment on the merits,[30] is practically the equivalent of a denial of certiorari.[31]

For purposes of this comment it will be necessary to assume that the issue is properly before the court and that the plaintiff has sustained his burden of proof, thereby obtaining a decision that the state financing system is unconstitutional. The traditional remedy[32] for a statute that is found to violate the equal protection clause was either to abolish the unconstitutional classification or to make the statute operate on everyone equally The reapportionment[33] and integration[34] cases showed the need for a third alternative. That alternative must be one which allows an orderly transition from the unconstitutional system to a constitutional one.

On October 21, 1971, the California Supreme Court entered an order modifying the original *Serrano* opinion. In the modification order, the court emphasized that the decision was not a judgment on the merits and that if the existing system is found to be unconstitutional the judg-

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Kurland, *supra* note 19, at 597 *See also* Kurland, *Equal Educational Opportunity*, in THE QUALITY OF INEQUALITY: URBAN AND SUBURBAN PUBLIC SCHOOLS 67 (C. Daly ed. 1968).

27. OHIO LEGISLATIVE SERVICE COMM'N, STAFF RESEARCH REP'T No. 38, SCHOOL FINANCE EQUALIZATION IN OHIO 54 (1959).

28. 334 F Supp. 870 (D. Minn. 1971).

29. 293 F Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom.* McInnis v. Ogilvie, 394. U.S. 322 (1969). The *McInnis* case was brought before a three-judge court as required by 28 U.S.C. § 2281 (1970), when a suit is brought to restrain enforcement of a state statute on the ground of unconstitutionality The Supreme Court's jurisdiction in appeal from these three-judge courts is not discretionary. 28 U.S.C. § 1253 (1970).

30. *See generally* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE: JURISDICTION, PROCEDURE, ARGUING AND BRIEFING TECHNIQUES, FORMS, STATUTES, RULES FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES 195-96 (3d ed. 1962).

31. *See* D. Currie, *The Three-Judge District Court in Constitutional Litigation*, 31 U. CHI. L. REV. 1, 14 n.74 (1964).

32. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

33. *See* Silver v. Brown, 63 Cal. 2d 270, 405 P.2d 132, 46 Cal. Rptr. 308 (1965).

34. *See* Brown v. Board of Educ., 349 U.S. 294 (1955).

ment should be one that would allow an orderly transition to a constitutional system.[35]

Thus, California is following the third alternative, declaring the present system unconstitutional and allowing the legislature to make the necessary changes.[36] Writers[37] have argued that this flexibility is of great importance.

The final question deals with the power of the judiciary actively to remake the system in case the legislature[38] fails to act. The court may issue a mandatory injunction[39] ordering the state officials to implement the desired remedy where the public interest is sufficient. This mandatory injunction is enforceable by the court's contempt power.[40] There is some authority that the court could appoint a receiver[41] to manage property under its direction.

It is clear that the court can implement a system of education that will comply with the mandates of the fourteenth amendment, either by allowing the state legislature to respond or by judicial decree and supervision. The remainder of this comment will explore the viable alternatives to the present system without regard to the method of implementation.

Initially it must be recognized that school financing has two component parts: (1) fund raising and (2) the administration of those funds to the consumption unit, the student. These two elements are usually in a dynamic relation to each other but for the sake of analysis here it must be assumed that they are separable.

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35. Serrano v. Priest, 41 A.L.R. 3d 1187, 1218 (1972).

36. The Supreme Court has recognized that education presents a unique situation where this type of relief is particularly appropriate. Watson v. City of Memphis, 373 U.S. 526, 532 (1963).

37 Coons, Clune, and Sugarman, *supra* note 14, at 305.

38. "[I]t is now settled that responsibility for formulating and implementing a plan falls initially upon the defendant. Responsibility shifts to the trial court or ultimately the appellate court only if the defendant fails to meet his duty" Note, *supra* note 21, at 1141. *See also* Hall v. West, 335 F.2d 481, 484 (5th Cir. 1957).

39. *E.g.*, Edison Illuminating Co. v. E. Pennsylvania Power Co., 253 Pa. 457, 98 A. 652 (1916); *cf.* Virginia Ry v. Ry Employees System Fed'n No. 40, 300 U.S. 515, 552 (1937).

40. *See generally* Comment, *Legal Sanction to Enforce Desegregation In Public Schools: The Contempt Power and the Civil Rights Acts*, 65 YALE L.J. 630, 638-48 (1956).

41. H. MCCLINTOCK, EQUITY 211-12 (2d ed. 1948); Note, *supra* note 21, at 1146; FED. R. CIV. P 66. *Cf.* Burnite Coal Briquette Co. v. Riggs, 274 U.S. 208, 212 (1927).

FUND RAISING

First, the alternative methods of financing will be examined. It should be noted that educational costs could be paid out of a general fund, but the following analysis is based on the premise that the best alternative is to tie educational costs to a specific revenue source.

Value Added Tax

The President brought national attention to the value added tax as a proposal for an alternative to the property tax in the 1972 State of the Union address.[42] The essence of the system is that a company would pay a tax on value increase attributable to its handling of an item.[43] This amounts to a sales tax and as such becomes a tax on consumption.[44] Consumption taxes are by their nature regressive in character.[45] If reform of state school financing is the goal, a regressive tax is hardly the proper vehicle.

Progressive Property Tax

Henry Howell, Jr., Lieutenant Governor of Virginia, has suggested[46] a progressive property tax as an alternative. Under this plan the rate would be determined by absolute value and productivity of the land. Implicit in this system is the proposition that corporations, especially large corporations, will be taxed at a higher rate. At first such a tax objective appears fair, but on closer scrutiny it will be found that the incident,[47] the real tax burden, is either shifted forward to the consumer[48] or to a lesser degree backward on the labor. Little, if any, is shifted to the investor[49] in terms of decreased return on his capital investment.

Functional Income Tax

This type of tax is novel and was first conceived and structured by

42. Address by President Nixon, as recorded in 118 CONG. REC. 158 (daily ed. Jan. 20, 1972).

43. A thorough explanation of how this system operates can be found in THE MORGAN GUARANTY SURVEY 3 (Jan. 1972).

44. R. MUSGRAVE, THE THEORY OF PUBLIC FINANCE 249 (1959).

45. *Id.* at 379-82.

46. Address by Lieutenant Governor of Virginia Henry Howell, Week-End Institute of Virginia State AFL-CIO, Feb. 5, 1972.

47. R. MUSGRAVE, *supra* note 44, at 205-31.

48. R. MUSGRAVE, *supra* note 44, at 325. Once the shift to the consumer has been made the analysis is the same as notes 44 and 45 *supra* and accompanying text.

49. *Cf.* M. KRZYZANIAK & R. MUSGRAVE, THE SHIFTING OF THE CORPORATION INCOME TAX 63-67 (1963).

John Coons and Stephen Sugarman.[50] The goal of this taxing system is to eliminate as far as possible wealth as a determining factor in educational opportunity Essentially the system works simply; a family unit determines what level of spending per child they want (effort) They then compare the desired effort with the family income level to determine the amount of the tax.[51] This system is very progressive and allows the family unit to decide the level of educational expenditure without regard to wealth.

Fund Administration

The second part of the problem is the determination of how to distribute the funds collected. This involves a very fundamental and emotional question. Can the local school district maintain control over its function?[52] One writer has expressed the opinion that by the very nature of equalization plans, the local unit must lose some of its independence.[53] It will be shown later[54] how equalization and local control can work in complete accord.

Under the present systems of financing there are statutes that are blatantly anti-equalizing[55] as well as statutes that appear to be equalizing[56] but, due to complicated procedures, are in fact anti-equalizing Very generally an anti-equalizing statute redistributes the wealth upward, that is, it increases the benefits to the rich and burdens to the poor. What are the alternatives?

Equal Dollar Expenditure

The most basic remedy would be an order of equal expenditure per pupil. Such a remedy would satisfy the equal protection clause. One

50. Coons and Sugarman, *Family Choice in Education: A Model State System for Vouchers*, 59 Calif. L. Rev. 321, 330-34 (1971) [hereinafter cited as *Family Choice*].

51. *Id.* Coons and Sugarman postulate the following example: A family with a $4000 income wants to spend $600 per child on education, therefore, it pays $16.50; if the family decides to spend $1500 per child the tax would be $54.50. A family with a $20,000 income would pay $440 and $1,218 respectively *Id.* at 331.

52. This was evident in the emphasis given by the President in the 1972 State of the Union Address. Address by President Nixon, as recorded in 118 Cong. Rec. 158 (daily ed. Jan. 20, 1972).

53. A. Wise, Rich Schools Poor Schools 206 (1968).

54. *See* notes 73-88 *infra* and accompanying text.

55. Cal. Educ. Code § 17091 (West 1969); 122 Ill. Rev. Stat. Ann. § 18-8(2) (Smith-Hurd Supp. 1967).

56. N.Y. Educ. Law §§ 3602-09 (McKinney Supp. 1969); R.I. Gen. Laws, tit. 16 ch. 7, § 20 (Supp. 1967). *See generally* Public Wealth, *supra* note 6, at 164-200.

writer[57] has suggested that this "simplistic criterion" would be very inadequate. Such a system would not recognize unusual circumstances which require compensatory education.[58] Furthermore, it would not allow the local unit to decide what level of expenditures it could make.[59] This would be the very essence of central control.

Consolidation

Consolidation is a very basic remedy It would continue the traditional financing system but would merely redraw the district boundaries. The question remains: Can the boundaries be redrawn so as to create substantially similar per pupil tax base? This question has to be answered in the affirmative in order to pass an equal protection analysis. The California experience is illustrative. Under the present system,[60] the per pupil tax base ranges from a high of $952,156 to a low of $103—a ratio of 10,000 to 1. One writer[61] suggests that under a realistic consolidation plan the ratio could be reduced to 22 to 1. Needless to say, this would be an improvement but it is not certain that a 22 to 1 ratio would survive an equal protection attack.

Individual Responsibility

Under this system the state would pay for the initial cost of education. The student in return pledges a certain percentage of his future income. The percentage would be determined by the number of years of education and the relative expense.[62] The main advantage in such a system is that it allows the value of the benefit (future income) to determine the individual's liability One who did not succeed financially would pay little or nothing for his education while the very successful would pay several times the actual cost. The practical disadvantages are obvious: (1) the administration of a collection system and (2) the lag in return to the state.

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57. *Preface* to A. WISE, RICH SCHOOLS POOR SCHOOLS at xii-xiii (1968).

58. *See* note 3 *supra.*

59. *See generally,* PRIVATE WEALTH, *supra* note 6; A. WISE, *supra* note 53; Kurland, *supra* note 19.

60. Serrano v. Priest, 5 Cal. 3d 584, 592, 487 P.2d 1241, 1246, 96 Cal. Rptr. 601, 606 (1971).

61. J. BURKHEAD, STATE AND LOCAL TAXES FOR PUBLIC EDUCATION 45 (1963).

62. Friedman has outlined the mechanics of such a system for vocational training in M. FRIEDMAN, CAPITALISM AND FREEDOM 100-07 (1962).

The Ohio Plan[63]

Basically this is a compromise plan designed to make the foundation guarantee at a level that corresponds to the wealth of the average district. Here the state guarantees that a district will be no lower in resources than the previously average district.[64] This plan corresponds to the basic minimum principle structured in *Douglas v. California*.[65] The basic fallacies in the application of such a computation have been pointed out in one commentary.[66] Additionally, there is no guarantee that this plan will meet the requirement of equal protection.[67]

Percentage Equalizing

The idea of percentage equalizing was popularized by Charles S. Benson.[68] In its pure form the system equalizes the wealth differentials, but as has been shown[69] the political process of compromise has frustrated its application. Under this plan the state simply pays a percentage share of the local budget. The percentage share is inversely related to the wealth of the district. To determine this share the local wealth, determined on a per pupil basis, is divided by the wealth in the key district, ideally the richest district. This ratio is then subtracted from 1 to determine the percentage the state will pay of the local budget.

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63. S. Bailey, Achieving Equality of Educational Opportunity Report, prepared for Ohio Foundations (1966).

64. An explanation of the mechanics and critical analysis of the system can be found in A. Wise, *supra* note 53, at 204-07

65. 372 U.S. 353 (1963).

66. *See* Coons, Clune, and Sugarman, *supra* note 14.

> We have suggested that the analogy to *Douglas* is hurtful, because of its guarantee of representation, not equality of representation, appears to correspond to the wide spread "foundation" programs in public education and thus tends to validate existing discriminations. the analogy is treacherous to begin with, for we are comparing things that are quite unalike. The hypothetical right to counsel case just posed would compare the quality of state-supplied counsel with privately employed counsel. But proposition I involves only a comparison of state-supplied education with state-supplied education not with private or the 'best' education (whatever that is).

Id. at 365.

67. *See* notes 13-18 *supra* and accompanying text.

68. C. Benson, The Economics of Public Education 242-46 (1961); C. Benson, The Cheerful Prospect: A Statement on the Future of Public Education 90-94 (1965); C. Benson, State Aid Patterns in Public School Finance 214-32 (J. Burkhead ed. 1964).

69. *See* note 56 *supra* and accompanying text.

This system achieves one primary goal, that of local control.[70] The local unit determines the rate of taxation in its district and the amount and categories of distribution. In addition, this system raises the power of the poorest districts to levels comparable to relatively rich districts.

Some writers[71] have attacked the Benson formulation, charging that it is merely a compromise. The compromise elevates the poor districts but allows the rich to maintain their preferred position.[72]

Power Equalizing

Power equalizing is a concept of financing and distribution that has been structured by Messrs. John Coons,[73] William Clune,[74] and Stephen Sugarman,[75] acting in various capacities.[76] It is convenient to define three basic terms at this time. *Offering* is the average number of dollars spent in current operating expenses per public school pupil. *Wealth* is the dollar value of a given tax source per public school pupil. *Effort* describes the tax rate levied against a given resource.[77] In the traditional state financing system the amount of the offering is a function of both effort and wealth of the local district, "supplemented" by state aid. Under a power equalizing system the amount of the offering becomes solely a function of the effort.[78] The local school district determines at what rate it wishes to tax itself.[79] This effort automatically sets the

70. *See* notes 52-53 *supra* and accompanying text.

71. *See* PRIVATE WEALTH, *supra* note 6, at 174-80.

72. The results here are very similar to the Ohio Plan. Notes 63-67 *supra* and accompanying text.

73. Professor of Law, University of California, Berkeley

74. Member of the Illinois Bar.

75. Member of the California Bar.

76. The following works present an example of their numerous writings: J. COONS, W CLUNE, & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970); Coons, Clune, and Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures* (1969); Coons and Sugarman, *Family Choice in Education: A Model State System for Vouchers* (1971); Coons, *Recreating the Family's Role in Education*, in 3 INEQUALITY IN EDUCATION 1 (Harvard Center for Law and Educ. ed. 1970); Coons, Clune, and Sugarman, *Recreating the Family's Role in Education*, in NEW MODELS FOR AMERICAN EDUCATION 216 (J. Guthrie ed. 1970). John Coons acted as attorney of plaintiff school children in Van Dusartz v. Hatfield, 334 F Supp. 870 (D. Minn. 1971). John Coons and Stephen Sugarman filed an amicus curiae brief in Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

77. Coons, Clune and Sugarman, *supra* note 14, at 310.

78. *Id.* at 319.

79. Note that the tax base need not be property *See* notes 50-51 *supra* and accompanying text.

offering per pupil to be paid out of the state funds (from whatever source derived) [80] A chart will clarify this system.[81]

A	B	C
Percentage rate of property tax	*Primary offering*	*Secondary offering*
.5%	300	500
1.0%	400	600
1.5%	500	700

The district selects a tax rate from column A, say 1.0%, this would provide $400 per primary pupil and $600 per secondary pupil from the state no matter how much revenue is actually raised. The revenue that is raised would go to the state. This is necessary because if local districts were allowed to supplement the state grants the current disparities would again arise.[82]

A variation on the above is family power equalizing. The concept is the same but with the sole difference being a change in the decisional unit from the district to the family [83] Thus, a family decides what level of offering it wants for its children[84] and then compares that to its income to determine the tax owed.[85] The state would then issue script to the family, which could be used in either private or public schools. The participating school would have to accept the script as the sole measure of tuition.[86] The local control problem has been improved upon despite fears to the contrary [87] The decision making unit has been atomized to the greatest possible extent and the schools would be competing for the students' dollars—a healthy state of competition.

The main criticism of the system is that it has a built in penalty for those districts wishing to tax at a lower rate. Coons, Clune and Sugarman explain the penalty this way·

80. *See* notes 42-51 *supra* and accompanying text.

81. Coons, Clune, and Sugarman, *supra* note 14, at 320.

82. *Family Choice*, *supra* note 50, at 331-34.

83. Coons, Clune and Sugarman, *supra* note 14, at 321.

84. The fact that the family has more than one child will not affect the offering or tax bill. To allow different amounts of offering or tax to be a function of the number of children would exaggerate the wealth discriminations beyond that of the present system. PRIVATE WEALTH, *supra* note 6, at 265.

85. *See* notes 50-51 *supra* and accompanying text.

86. PRIVATE WEALTH, *supra* note 6, at 321. If individual foundations or any other source was allowed to supplement the tuition, education would again become a function of wealth.

87. *See* note 52 *supra*.

> As one district cannot control the actions of another, its high effort must be paid for in part by state taxes collected to some extent from districts of lower effort. If two similar districts seek subsidization from without, each must keep up in the effort race. This "penalty" of course, occurs in any system of subsidy based upon matching grants affected by local decision making. This factor also may tend to increase expenditures generally [88]

Legislative Response

During the 1971 regular session an Education Voucher bill[89] was introduced before the California Assembly The system would allow the state to issue a voucher in specific amounts to each school child.[90] The voucher must be accepted by participating schools as the sole payment for tuition.[91] This system varies from the "power equalizing" system in one important particular, the offering is invariably fixed. No amount of local choice would be able to change it. The taxing system was considered in separate bills.[92]

The foregoing illustrates the principle that Coons, Clune, and Sugarman were advancing.[93] Courts, applying the stimulus by declaring the present system unconstitutional, would be followed by a legislative response establishing a constitutional system. For seventy years legislative reform had been frustrated.[94] As in the reapportionment cases, those in power have a vested interest in maintaining the status quo. In 1968 an educator[95] conceived of a judicial attack on the system. The legal writers adopted his theory and formulated a plausible argument. The stimulus was provided and the legal log jam was broken. The fears of some,[96] that hearing of these cases by courts would be a case of judicial overreaching that would stultify the system appear to be unfounded. Slowly the American system is moving toward a more just method of financing education.

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88. PRIVATE WEALTH, *supra* note 6, at 208.
89. A.B. 150, 1971 Regular Session.
90. Proposed CAL. EDUC. CODE § 31184(a).
91. Proposed CAL. EDUC. CODE § 31158. This system raises some question about first amendment violation as aid to parochial schools. *See generally*, Note, *New Trends in Education and the Future of Parochial Schools*, 57 CORNELL L. REV. 256 (1972).
92. A.B. 1406, 1971 Regular Session; S.B. 801, 1971 Regular Session.
93. Coons, Clune and Sugarman, *supra* note 14, at 413-15.
94. PRIVATE WEALTH, *supra* note 6, at 293.
95. A. WISE, *supra* note 53.
96. Kurland, *supra* note 19.