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CONSTITUTIONAL LAW—SCHOOL FINANCING SYSTEM BASED ON LOCAL PROPERTY TAXES VIOLATIVE OF EQUAL PROTECTION CLAUSE OF STATE CONSTITUTION

*Horton v. Meskill*¹

Barnaby Horton and Peter Grace, pupils in the Connecticut public school system, brought an action in Connecticut superior court challenging that state's system of financing elementary and secondary education as violative of state and federal equal protection. The court found that the Connecticut system of financing schools produced significant interdistrict disparities in per pupil educational expenditures and that these disparities, although not violative of federal equal protection, did violate state constitutional guarantees of equal protection.²

The Connecticut Supreme Court affirmed, holding that the education article of the Connecticut Constitution establishes free public education as a fundamental right in that state; that any action by the state denying equal protection of that right is subject to strict judicial scrutiny; and that the interdistrict disparities found by the trial court denied the plaintiffs equal protection of that right.³

Equal protection challenges to school financing systems are premised upon the notion that the state can promote equal educational opportunity only by guaranteeing equal per pupil educational expenditure in every school district in the state.⁴ Monies allocated in this manner are said to be "equalized." Unfortunately, few school financing systems meet this ideal. Typically, school districts are financed from three revenue sources: state and federal grants, and local property tax receipts. State and federal grants, which in most states are distributed according to each district's need, do tend to equalize the amount of money available to each school district. Local property tax receipts, on the other hand, are "unequalized" because they are generated, not according to the district's need, but in direct proportion to the amount of taxable wealth located within the district's boundaries. This local contribution often produces interdistrict disparities of such a magnitude as to over-

1. 172 Conn. 615, 376 A.2d 359 (1977).

2. *Horton v. Meskill*, 31 Conn. Supp. 377, 332 A.2d 113 (Super. Ct. 1974).

3. 376 A.2d at 374-75.

4. See generally A. WISE, *RICH SCHOOLS, POOR SCHOOLS—THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY* (1968); J. COONS, W. CLUNE & S. SUGERMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970).

come the equalizing influence of state aid. Thus it is actually the constitutionality of local property taxes which is at issue in the school financing cases.

The first challenges to local property tax financing of public education were brought under the equal protection clause of the fourteenth amendment to the United States Constitution.⁵ Although the United States Supreme Court affirmed per curiam two early district court decisions sustaining "unequalized" school financing systems,⁶ this authority was sufficiently ambiguous to allow a succession of state and lower federal courts to distinguish it and overturn school financing systems in a number of states.⁷

In 1973 the Supreme Court ended this trend with its landmark decision in *San Antonio Independent School District v. Rodriguez*,⁸ which reversed a federal district court's order overturning the Texas school financing system. The Court held that education is not a "fundamental right" under the fourteenth amendment.⁹ This finding led the Court to apply the "rational basis" test of equal protection and to find local fiscal control of schools to be an adequate justification for sustaining interdistrict disparities in per pupil expenditure.¹⁰

5. The Supreme Court applies a two-tiered standard of review in deciding whether a discriminatory classification violates federal equal protection. In cases involving social or economic regulation, a state-created classification will be upheld if it has any rational basis whatsoever. However, a classification which affects "fundamental rights" or which is "inherently suspect" will be struck down unless the state can show that the classification is necessary to achieve a compelling state interest. See generally Comment, *The Evolution of Equal Protection—Education, Municipal Services and Wealth*, 7 HARV. C.R.C.L.L. REV. 105 (1972); Comment, *Educational Financing, Equal Protection of the Laws, and the Supreme Court*, 70 MICH. L. REV. 1324 (1972); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

6. *Burruss v. Wilkerson*, 397 U.S. 44 (1970), *aff'g per curiam* 310 F. Supp. 572 (W.D. Va. 1969); *McInnis v. Ogilvie*, 394 U.S. 322 (1969), *aff'g per curiam* *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968).

7. *Rodriguez v. San Antonio Indep. School Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973); *Van DUSART v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *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); *Serrano v. Priest* (Serrano I), 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601; *Sweetwater County Planning Comm'n v. Hinkle*, 491 P.2d 1234 (Wyo. 1971), *juris. relinquished*, 493 P.2d 1050 (Wyo. 1972). *Contra*, *Parker v. Mandel*, 344 F. Supp. 1068 (D. Md. 1972); *Spano v. Board of Educ.*, 68 Misc. 2d 804, 328 N.Y.S.2d 229 (Sup. Ct. 1972).

8. 411 U.S. 1 (1973). See Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 500-04 (1973). Only one case has been decided exclusively on federal equal protection grounds since *Rodriguez* was handed down. *Lafayette Steel Co. v. Dearborn*, 360 F. Supp. 1127 (E.D. Mich. 1973).

9. 411 U.S. at 30-35.

10. *Id.* at 49-55.

Although the Supreme Court has chosen a narrow application of federal equal protection with respect to public school financing, the state courts are free to apply a stricter standard of review in interpreting the equal protection provisions of their respective state constitutions.¹¹ Until *Horton v. Meskill*, however, there was no reliable authority to challenge a school financing system on state equal protection grounds.¹²

The point of greatest contention in the school financing cases has been whether education should be considered a fundamental right.

11. *Serrano v. Priest* (Serrano II), 18 Cal. 3d 728, 764-65, 557 P.2d 929, 950, 135 Cal. Rptr. 345, 364; *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635, 645 (1975); *Robinson v. Cahill*, 62 N.J. 473, 490, 303 A.2d 273, 282, *cert. denied*, 414 U.S. 976 (1973). See also *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.C.L.L. REV. 271 (1973); *Lipson, Serrano v. Priest, I and II: The Continuing Role of the California Supreme Court in Deciding Questions Arising Under the California Constitution*, 10 U.S.F.L. REV. 697, 707 (1976).

12. Cases finding no equal protection violation: *Hootch v. Alaska*, 536 P.2d 793 (Alaska 1975); *Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973); *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975); *Governor v. State Treasurer*, 390 Mich. 389, 212 N.W.2d 711 (1973); *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, *cert. denied* 414 U.S. 976 (1973); *Olsen v. State*, 276 Or. 9, 554 P.2d 139 (1976); *Northshore School Dist. v. Kinneary*, 530 P.2d 178 (Wash. 1974). *Contra*, *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976) (dictum).

Serrano v. Priest (Serrano II), 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), used the strict scrutiny standard of equal protection to overturn California's system of financing schools. However, this decision has been questioned on two grounds.

First, when the California court originally decided the case it did not consider the state equal protection claim which was raised on appeal, noting that the California equal protection clause had been construed as: "substantially the equivalent" of the equal protection clause of the Fourteenth Amendment . . . such that our analysis of plaintiffs' federal equal protection contention is also applicable to their claim under these state constitutional provisions." *Serrano v. Priest* (Serrano I), 5 Cal. 3d 584, 596 n. 11, 487 P.2d 1241, 1249 n.11, 96 Cal. Rptr. 601, 609 n.11. After the Supreme Court decided *Rodriguez*, the California court reheard the *Serrano* case, but managed to affirm its earlier decision on state grounds. To do this the court was required to hold, its earlier decision to the contrary notwithstanding, that the California equal protection clause was possessed of "independent vitality." *Serrano v. Priest* (Serrano II), 18 Cal. 3d 728, 762-65, 557 P.2d 929, 950, 135 Cal. Rptr. 345, 365-67 (1976). See *Horton v. Meskill*, 376 A.2d at 379 (Loiselle, J. dissenting); *Karst, Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CAL. L. REV. 720, 743-48 (1972) (questioning whether an independent state ground was raised in *Serrano I*). Second, it is not clear from *Serrano II* whether a classification not involving both a "fundamental right" and an "inherently suspect" classification would invoke strict judicial scrutiny. 18 Cal. 3d at 766, n.45, 557 P.2d at 951 n.45, 135 Cal. Rptr. at 367 n.45. This uncertainty is particularly troublesome in view of the persuasiveness of Justice Powell's argument in *Rodriguez* that wealth is not a suspect classification, 411 U.S. at 19-28, and the California court's failure to answer its dissenting member's observation that there is no positive correlation between individual wealth and district wealth. *Serrano v. Priest* (Serrano II), 18 Cal. 3d at 793, 557 P.2d at 969-70, 135 Cal. Rptr. at 385-86 (Clark, J., dissenting).

Under the two-tiered standard of equal protection, if education were deemed a fundamental right, any denial of that right would be subject to strict judicial scrutiny.¹³ For several years the United States Supreme Court applied an ad hoc test in deciding whether a certain right was fundamental without ever having precisely defined the test.¹⁴ The result was an open-ended definition which has been criticized for enabling the Court to "[circumscribe] legislative choices in the name of newly articulated values that lacked clear support in constitutional text and history."¹⁵ Most of the pre-*Rodriguez* school financing decisions adopted this analysis.¹⁶

In *Rodriguez* the Supreme Court declared school financing cases to be sui generis and applied a special "explicit-implicit" test for deciding whether education is a fundamental right. The test looked to whether "there is a right to education explicitly or implicitly guaranteed by the Constitution."¹⁷ The state courts, however, have not been inclined to apply this highly mechanical test to their "compendious, comprehensive, and distinctly mutable" constitutions.¹⁸

An alternative test was offered by Justice Brennan in his dissent to *Rodriguez*. It is a "nexus" test which assumes that "'fundamentality' is, in large measure, a function of the right's importance in terms of effectuation of those rights which are in fact constitutionally guaranteed."¹⁹ Under this test education is a fundamental right because of its impact on the individual's ability to exercise *other* indisputably fundamental rights,

13. See note 5 *supra*.

14. See *Parker v. Mandel*, 344 F. Supp. 1068, 1076 (D. Md. 1972); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1127 (1969); Comment, *The Evolution of Equal Protection: Education, Municipal Services, and Wealth*, 7 HARV. C.R.C.L.L. REV. 103 (1972); Comment, *Educational Financing, Equal Protection of the Laws, and the Supreme Court*, 70 MICH. L. REV. 1324, 1330-31 (1972).

15. Gunther, *The Supreme Court 1971 Term: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). See also Vieira, *Unequal Educational Expenditures: Some Minority Views on Serrano v. Priest*, 37 MO. L. REV. 617, 621 (1972).

16. See cases cited notes 6 & 7 *supra*.

17. 411 U.S. at 33-34. For an earlier articulation of this test by a federal circuit court, see *Flemming v. Adams*, 377 F.2d 975, 977 (10th Cir.), cert. denied, 389 U.S. 898 (1967). See also *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977); noted in Newan, *Equal Protection—A Judicial Cease Fire in the War on Poverty?*, 36 MO. L. REV. 117 (1971), which suggests that the right must be one guaranteed by the Bill of Rights.

18. *Serrano v. Priest* (Serrano II), 18 Cal. 3d 728, 767, 557 P.2d 929, 952, 135 Cal. Rptr. 345, 368 (1976). *Accord*, *Olsen v. State*, 276 Or. 9, 554 P.2d 139, 144 (1976). See also *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977); *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975); *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973). Two state courts have applied the *Rodriguez* test, but neither decision is authoritative. *Governor v. State Treasurer*, 389 Mich. 1, 203 N.W.2d 457 (1972), vacated, 390 Mich. 389, 212 N.W.2d 711 (1973); *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976) (dictum).

19. 411 U.S. at 62-63 (Brennan, J., dissenting).

such as the right to vote and the right of free speech. This test was alluded to in *Serrano v. Priest*²⁰ which established education as a fundamental right under the California Constitution. This nexus test would be particularly effective in a school financing case brought under the Missouri equal protection clause because the preamble of the Missouri education article expressly recognizes a nexus between education and other clearly fundamental rights: "A general diffusion of knowledge [is] essential to the preservation of the rights and liberties of the people. . . ." ²¹

A few courts have abandoned the mechanical two-tiered approach to equal protection in school financing cases in favor of a balancing test which "weigh[s] the nature of the restraint or denial against the apparent public justification."²² This is a more subjective test than the others and essentially consists of weighing competing policy considerations.

Faced with this multiplicity of equal protection tests, the Connecticut Supreme Court gave consideration to each and concluded that education is a fundamental right in Connecticut regardless of which test is applied. Therefore, any infringement of that right warrants strict judicial scrutiny.²³ In support of its conclusion, the court cited Connecticut cases defining education as a right and duty of the state, statutes making school attendance compulsory, the prominence of public education throughout the history of the state, and language in the Connecticut Constitution and statutes referring to equal educational opportunity.²⁴

Under any of the tests discussed above there should be little doubt that the Missouri Constitution makes education a fundamental right. In *State ex rel. Roberts v. Wilson*²⁵ the Missouri Supreme Court held that the right of children to attend public school is "not a privilege dependent upon the discretion of any one, but is a *fundamental* right, which cannot be denied except for the general welfare."²⁶

Furthermore, the preamble of the Missouri education article is considerably more explicit than most other state constitutions in declaring the importance of education to preserving the "rights and liberties of the people."²⁷ This forceful language has been preserved as a part of the

20. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

21. MO. CONST. art. 9, § 1(a).

22. *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, 282, *cert. denied*, 414 U.S. 976 (1973). *Accord*, *Olsen v. State*, 276 Or. 9, 554 P.2d 139 (1976).

23. 376 A.2d at 373.

24. *Id.* at 373-74.

25. 297 S.W. 419 (Spr. Mo. App. 1927).

26. *Id.* at 420. *Accord*, *Lehew v. Brummel*, 103 Mo. 546, 15 S.W. 765, 766 (1890). *But cf.* *State ex inf. Wright v. Morgan*, 268 Mo. 265, 187 S.W. 54, 57 (1916) (statutes relating to schools are presumed valid); *Viriden v. Schaffner*, 496 S.W.2d 846, 850 (Mo.), *appeal dismissed*, 414 U.S. 1105 (1973) (quoting *Rodriguez* with approval to the effect that taxation schemes are presumed to be valid).

27. *Compare, e.g.*, MO. CONST. art. 9, § 1(a) with CONN. CONST. art. 8, § 1; CALIF. CONST. art. 9, §§ 1, 5; N.J. CONST. art. 4, § 6.

Missouri Constitution since 1865 despite attempts in 1875 and 1945 to have it excised.²⁸ The report of the 1875 convention's Education Committee makes it clear that the preamble was intended to establish education as a fundamental right in Missouri: "The education of the people is to be interwoven with the very framework of the commonwealth. It is not to be left to the ever changing whim and indefinable caprice of the Legislature, but is to be made organic and fundamental."²⁹

However, even if the Missouri Supreme Court found education to be a fundamental right under the state constitution, it is not certain whether the court would apply strict judicial scrutiny. The Missouri Constitution has an express equal protection clause,³⁰ as well as a section prohibiting special and local laws which has been treated as substantially equivalent to the equal protection clause of the fourteenth amendment of the federal constitution.³¹ Despite these independent state provisions, whenever suit has been brought on both state and federal equal protection grounds, the Missouri Supreme Court consistently has refused to consider the scope of state equal protection apart from the requirements of the fourteenth amendment.³² Consequently there is a dearth of authority construing the Missouri equal protection clause. Indeed, there is one Missouri case which appears to accept decisions of the United States Supreme Court as controlling the scope of state equal protection.³³

28. 9 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875 at 87-92 (I. Loeb & F. Shoemaker eds. 1920) [hereinafter cited as DEBATES 1875]. Transcript of the Debates of the 1945 Missouri Constitutional Convention, April 28, 1944, at 1800-03. (Transcripts of the debates are available on microfilm at the State Historical Society in Columbia, the St. Louis Public Library, and the law school libraries of Washington University and St. Louis University) [hereinafter cited as Transcripts 1945].

29. 9 DEBATES 1875, *supra* note 28, at 27.

30. MO. CONST. art. 1, § 2.

31. MO. CONST. art. 3, § 40(30). See *State ex rel. Toedebusch v. Public Service Comm'n*, 520 S.W.2d 38 (Mo. En Banc 1975); *St. Louis Union Trust v. State*, 348 Mo. 725, 155 S.W.2d 107 (1941), *cert. denied*, 314 U.S. 700 (1942).

32. See, e.g., *In re Interest of J.D.G.*, 498 S.W.2d 786 (Mo. 1973) (upholding statutory rape statute which discriminated against males); *State v. Stock*, 463 S.W.2d 889 (Mo. 1971) (upholding classification of marijuana as a narcotic); *A.B.C. Liquidators, Inc. v. Kansas City*, 322 S.W.2d 876 (Mo. 1959) (upholding ban on Sunday auctions).

33. *Gem Stores, Inc. v. O'Brien*, 374 S.W.2d 109 (Mo. En Banc 1964). The case was brought on both federal and state equal protection grounds:

The constitutional requirements of due process and equal protection of the laws as interpreted by the Supreme Court of the United States are *binding* on this court. Nevertheless, decisions of this state are in harmony with the federal cases Adjudged by these standards [citing a U.S. Supreme Court decision], the [statute] does not violate the due process and equal protection provisions of the state or federal constitutions'

Id. at 117 (emphasis added). *But see* authorities cited note 11 *supra*.

Two cases have been brought exclusively under the Missouri equal protection clause, *Bopp v. Spainhower*³⁴ and *State ex rel. Dreer v. Public School Retirement System*.³⁵ Neither opinion distinguished state from federal equal protection. In *Bopp* the Missouri Supreme Court depreciated state equal protection to the extent of holding that the rational basis test was the appropriate standard of review when "no specific federal right, apart from equal protection, is imperiled."³⁶ Neither of these state equal protection decisions applied strict scrutiny. There has been only one Missouri case applying strict scrutiny to federal equal protection,³⁷ although the Missouri Supreme Court has taken notice of this higher standard of review on several occasions.³⁸ Otherwise, the Missouri court has consistently applied the rational basis test,³⁹ even in cases involving "fundamental rights"⁴⁰ or "inherently suspect classifications."⁴¹ Thus it appears unlikely that the Missouri Supreme Court would extend the scope of state equal protection beyond the holding of *Rodriguez*.

Even if the Missouri court would apply strict scrutiny to public school financing, the Missouri school financing system has several "equalizing" features which might remove it beyond the scope of *Horton v. Meskill*. In Missouri the relative contributions of the three sources of school revenues in 1976-77 were 6.4% federal, 41.8% state, and 51.8%

34. 519 S.W.2d 281 (Mo. En Banc 1975).

35. 519 S.W.2d 290 (Mo. 1975).

36. 519 S.W.2d at 289 (emphasis added).

37. *State v. Ewing*, 518 S.W.2d 643, 649 (Mo. 1975) (strict scrutiny applied to classification affecting the freedom from restraint and compulsion).

38. *Bopp v. Spainhower*, 519 S.W.2d 281 (Mo. En Banc 1975); *In re Interest of J.D.G.*, 498 S.W.2d 786 (Mo. 1973); *State ex rel. Gralike v. Walsh*, 483 S.W.2d 70 (Mo. En Banc 1972).

39. As articulated by the Missouri Supreme Court, the rational basis test requires that the classification be "reasonable and [bear] a fair and substantial relationship to the object of [the statute] and that all persons similarly classified [be] treated alike under that statute." *In re Interest of J.D.G.*, 498 S.W.2d 786, 793 (Mo. 1973). Another line of authority requiring only that "all persons in the same class [be] treated with equality," *King v. Swenson*, 423 S.W.2d 699, 705 (Mo. En Banc 1968), apparently has been overruled by *State v. Baker*, 524 S.W.2d 122 (Mo. En Banc 1975), for failing to require some relevance to the purpose of the statute. *See also Brawner v. Brawner*, 327 S.W.2d 808, 815 (Mo. En Banc 1959).

40. *Bopp v. Spainhower*, 519 S.W.2d 281 (Mo. En Banc 1975) (right to vote on imposition of local sales tax); *Kansas City v. Webb*, 484 S.W.2d 817 (Mo. En Banc), *cert. denied*, 409 U.S. 851 (1972) (right to common law jury in condemnation suit). *But see Rodgers v. Danforth*, 486 S.W.2d 258 (Mo. En Banc 1972) (Seiler, J. dissenting) (applying strict scrutiny to a classification affecting right of procreation); *State ex rel. Gralike v. Walsh*, 483 S.W.2d 70 (Mo. En Banc 1972) (Seiler, J. dissenting) (applying strict scrutiny to classification affecting freedom of association and right to cast an effective ballot).

41. *In re Interest of J.D.G.*, 498 S.W.2d 786 (Mo. 1973) (sex as a suspect classification). *But see State v. Duren*, 556 S.W.2d 11, 25 (Mo. 1977) (Seiler, J. dissenting) (applying a higher standard of review to classifications based on sex).

local.⁴² In other words, equalized and unequalized revenues were contributed in roughly equal proportions. In Connecticut, where the relative contributions of these three sources were 5% federal, 25% state, and 70% local, unequalized revenues outweighed equalized revenues more than two to one.⁴³ Another equalizing feature of Missouri's school financing system is its foundation program for allocating state aid to local school districts. In Connecticut each school district received a flat per pupil grant from the state regardless of how much the district raised from local property tax receipts.⁴⁴ In Missouri the recently amended foundation program guarantees every district a minimum per pupil foundation level of funding and provides districts having low per pupil assessed valuation an additional grant designed to overcome disparities created by the presence or absence of taxable wealth within their boundaries.⁴⁵

Nonetheless, Missouri still suffers substantial interdistrict disparities in per pupil expenditure. Projected per pupil expenditure in Missouri for the 1977-78 school year, even under the new state aid distribution formula, ranges from an average \$1,045 per pupil for schools in the bottom five percentile to an average \$1,674 per pupil for schools in the top five percentile.⁴⁶

More dramatic are comparisons between individual school districts. In 1977-78 the Leopold R-III school district in Bollinger County is projected to spend only \$921 per pupil in average daily attendance; the Clayton school district in St. Louis County is projected to spend \$2,996 per pupil in average daily attendance.⁴⁷ These disparities are due primarily to differences in the amount of taxable wealth per pupil found in each district. It is not merely coincidental that assessed valuation per pupil in average daily attendance is only \$4,155 per pupil in the Leopold

42. MISSOURI BOARD OF EDUCATION, STATE BOARD OF EDUCATION'S REPORT ON MISSOURI PUBLIC SCHOOLS FOR THE YEAR ENDING JUNE 30, 1977, Table 1(a).

43. *Horton v. Meskill*, 376 A.2d at 366.

44. *Id.*

45. Ch. 160, RSMo 1969, as amended by H.B. 131, 79th Gen. Assembly, 1st Reg. Sess. (1977).

46. Missouri State School Funding Simulation, May 4, 1977 (computer print-out made available to the author through the courtesy of the Missouri State Teachers' Association).

47. These figures were obtained by adding projected increases in state aid for 1977-78 under the new foundation program to documented per pupil expenditures for 1976-77. Projected increases in state aid for 1977-78 were taken from Missouri State School Funding Simulation, *supra* note 45. Figures for 1976-77 were taken from Missouri Department of Elementary and Secondary Education, Statistical Report #3 Distributed By School Data Section for Internal Use (to be published in MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, SUMMARY OF DATA OF SCHOOL DISTRICTS IN ALL COUNTIES FOR THE 1976-77 SCHOOL YEAR).

R-III district compared with \$73,242 per pupil in the Clayton district.⁴⁸ This disparity in assessed valuation means that a given tax levy would generate eighteen times more revenue per pupil in Clayton than in Leopold R-III.

Given these figures it is apparent that, regardless of an individual district's tax effort, wealthy districts in Missouri have significantly more money per pupil to spend on education than do poorer districts, and that therefore the Missouri system remains susceptible to an equal protection challenge. Indeed, it is difficult to see how any school financing system relying on local property tax revenues can overcome financing disparities to satisfy the equal protection test applied by the Connecticut court.⁴⁹

If an equal protection challenge under the state constitution should prove untenable, there are other constitutional provisions which might be used to challenge existing school financing systems. In *Robinson v. Cahill*⁵⁰ the New Jersey Supreme Court held that the state's school financing system failed to provide the "thorough and efficient system of schools" mandated in the New Jersey Constitution.⁵¹ Courts of other states have dealt with the question whether their respective constitutions establish a *qualitative standard* for public education, but none have followed *Robinson*.⁵² Some of these courts have based their decisions on the absence of constitutional language capable of construction as a qualitative standard;⁵³ others have refused to recognize such a standard even in language more explicit than that in the New Jersey Constitution.⁵⁴

48. Statistical Report #3 Distributed By School Data Section for Internal Use, *supra* note 46.

49. *Serrano v. Priest* (Serrano II), 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), invalidated the California school financing system under the strict scrutiny standard of equal protection even though only 10% of the system's revenues were unequalized.

50. 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).

51. N.J. CONST. art. 8, § 4, para. 1 provides: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools"

52. *Hootch v. Alaska*, 536 P.2d 793 (Alaska 1975); *Shoftstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973); *Serrano v. Priest* (Serrano I), 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977); *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975); *Blase v. State*, 55 Ill. 2d 94, 302 N.E.2d 46 (1973); *Governor v. State Treasurer*, 389 Mich. 1, 203 N.W.2d 457 (1972), *vacated on other grounds*, 390 Mich. 389, 212 N.W.2d 711 (1973); *Olsen v. State*, 276 Or. 9, 554 P.2d 139 (1976); *Northshore School Dist. v. Kinnear*, 530 P.2d 178 (Wash. 1974); *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976) (dictum).

53. *See, e.g.*, *Hootch v. Alaska*, 536 P.2d 793, 804 (Alaska 1975).

54. *See, e.g.*, *Blase v. State*, 55 Ill. 2d 94, 302 N.E.2d 46 (1973) (the court held that the constitutional language: "The State shall provide for an efficient system of high quality educational institutions and services . . ." was merely precatory).

It is not likely that the Missouri Constitution is susceptible to the New Jersey court's analysis. The section of the Missouri Constitution establishing free public schools makes no reference to the quality or kind of education to be provided.⁵⁵ However, Missouri does have a somewhat obscure constitutional provision which arguably mandates a minimal level of state support for public schools. Section 3 (b) of the education article⁵⁶ [hereinafter referred to as the "deficiency clause"] provides:

In event the public school fund provided and set apart by law for the support of free public schools shall be insufficient to sustain free schools at least eight months in every school year in each district of the State, the general assembly may provide for such deficiency

Although the deficiency clause never has been used to challenge the adequacy of state support for public education, such a use would not be inconsistent with the history and purpose of the section.

The deficiency clause first became a part of the Missouri Constitution in 1865.⁵⁷ It simply authorized the general assembly to provide by statute for the levying of a local property tax if contributions from the state and county school funds⁵⁸ proved insufficient to keep schools open at least four months out of the year.⁵⁹ In *State ex rel. Sharp v. Miller*⁶⁰ the Missouri Supreme Court interpreted words contained in the deficiency clause, "the general assembly may provide," to be an absolute mandate to the legislature and not simply an acknowledgement of legislative discretion.⁶¹ The 1865 version of the deficiency clause did not require the general assembly to provide direct financial support to local school districts.

The deficiency clause acquired a new dimension in the Constitutional Convention of 1875 when the convention, although committed to state support of public education, failed in its initial attempt to provide

55. MO. CONST. art. 9, § 1(a). The Education Committee of the 1875 Missouri Constitutional Conventional Convention declined to adopt a resolution calling for the addition of the words "thorough and efficient" to the language of this section. 1 JOURNAL OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875 at 187 (I. Loeb & F. Shoemaker eds. 1920).

56. MO. CONST. art. 9, § 3(b).

57. MO. CONST. of 1865, art. 9, § 8.

58. The county school fund consisted of the income and proceeds from land designated by the federal government to be used for school purposes. The state school fund was established out of the proceeds from escheats, penalties, fines, forfeitures, the sale of public lands and estrays, and "so much of the ordinary revenue of the State as may be necessary." MO. CONST. of 1865, art. 9, § 5.

59. *State ex rel. Sharp v. Miller*, 65 Mo. 50, 54 (1877).

60. *Id.*

61. *Id.*

for minimum legislative appropriations to the public school fund.⁶² To prevent state aid to local school districts from remaining a matter of legislative discretion, the chairman of the Education Committee introduced a modified deficiency clause as a guarantee that enough money would be appropriated to the public school fund every year to insure the operation of a school in every district in the state.⁶³ It was adopted only after considerable debate.⁶⁴

The Constitutional Convention of 1945 was more concerned with school segregation than with school financing and retained the deficiency clause without debate.⁶⁵ Two minor changes made by the convention's Education Committee did not alter the basic purpose of the deficiency clause.⁶⁶ Thus, it appears that the 1875 constitutional debate on the deficiency clause remains authoritative as to its proper interpretation—the general assembly is under a duty to remedy the operating deficit in any school district unable to “sustain” its schools at least eight months every year.⁶⁷

Whether the deficiency clause can be made a tool to challenge the existing school financing system depends upon the meaning given the word “sustain” as used in the deficiency clause. A court might find that the word “sustain” implies a subjective qualitative standard as was done

62. 11 DEBATES 1875, *supra* note 28, at 39. Ironically the education article eventually was amended to require at least 25% of the State's revenue be appropriated annually for the support of free public schools. *Id.* at 282-88.

63. *See* 11 DEBATES 1875, *supra* note 28, at 243-89.

64. *Id.* at 289.

65. 1 OFFICIAL JOURNAL OF THE 1945 CONSTITUTIONAL CONVENTION, March 10, 1944, at 2-6. *See also* Transcripts 1945, *supra* note 28, May 2, 1944, at 1852.

66. *Id.* One change was to raise the minimum school term from four months to eight months. The second change was to eliminate the 1875 reference to “section eleven of the Article on Revenue and Taxation.” *See* MO. CONST. of 1875, art. 10, § 11. This requirement was intended by the 1875 convention to prevent the legislature from remedying deficiencies by imposing a direct tax on districts unable to maintain four-month schools. *See* 11 DEBATES 1875, *supra* note 28 at 248-80. However, § 11 defined the taxing authority of political subdivisions of the state and was not an appropriate limitation on the power of the general assembly to tax. The Education Committee of the 1945 convention recognized this fact and eliminated the deficiency clause's reference to § 11. Transcripts 1945, *supra* note 28, May 2, 1944, at 1852.

67. Although there are no cases interpreting the modern deficiency clause, the 1875 convention clearly recognized it as a mandate to the legislature to take direct action to remedy deficiencies in districts unable to operate a school at least four months out of the school year. *See* 11 DEBATES 1875, *supra* note 28, at 243-89. The 1945 convention did not debate the purpose of the deficiency clause, however, the chairman of the Education Committee did observe at one point that: “[T]his is not a school system of isolated districts. It's a state school system and it's the state's obligation to see that we have a school system, and if the money doesn't come from other sources, why, I never could see anything wrong with the state supplying the money.” Transcripts 1945, *supra* note 28, at 1796.

with the words "thorough and efficient" in *Robinson v. Cahill*.⁶⁸ The word might be construed to imply a constitutional requirement of equal per pupil expenditure in all school districts in the state. A few courts have considered the possibility that equal per pupil expenditure is implicit in the legislature's duty to establish free public schools, but none have given any support to the proposition.⁶⁹

In *Concerned Parents v. Caruthersville School District*⁷⁰ the Missouri Supreme Court was presented with a similar question when it was asked to decide whether the state constitution's guarantee of free public schools prohibited a school district from requiring pupils to furnish their own "materials and equipment." The court noted that some states have held that "books and school supplies are as much a part of providing schools as teachers and buildings."⁷¹ Accordingly, the case was remanded for a determination whether books and school supplies are "an integral part of free public schools."⁷²

The principle difficulty with this approach is that the courts would be asked to make decisions they are not equipped to handle—decisions that ordinarily have been reserved to the legislature and the elected school boards. For example, faced with a deficiency arising from a district's inability to meet teachers' salaries, the court would have to decide whether a financially compelled cut-back in the number and quality of teachers in the district meant that the district was unable to "sustain" its schools. Like early federal equal protection cases framed in terms of a denial of "educational needs," a suit alleging a school system's inability to "sustain" its schools confronts the courts with a controversy lacking judicially manageable standards.⁷³ Given these problems of justiciability, it

68. 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).

69. *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635, 647 (1975); *Northshore School Dist. v. Kinnear*, 530 P.2d 178, 217 (Wash. 1974) (Stafford, J., dissenting); *Robinson v. Cahill*, 62 N.J. 473, 500, 303 A.2d 273, 287, *cert. denied*, 414 U.S. 976 (1973) (question not raised by the parties).

70. 548 S.W.2d 554 (Mo. En Banc 1977).

71. *Id.* at 563.

72. The court instructed the trial court to consider "such proof as may be available as to whether at the time the constitutional requirement was adopted, the people drafting and adopting the provision understood the language to encompass such things as materials and equipment." *Id.*

73. *McInnis v. Shapiro*, 293 F. Supp. 327, 336 (N.D. Ill. 1968), *aff'd per curiam sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969); *Wilkerson v. Burruss*, 310 F. Supp. 572, 574 (W.D. Va. 1969), *aff'd per curiam*, 397 U.S. 44 (1970). The problem of non-justiciability raised in these two cases was subsequently obviated by characterizing the alleged violation as a denial of "equal educational opportunity." See, e.g., *Parker v. Mandel*, 344 F. Supp. 1068, 1075 (D. Md. 1972); *Van DUSARTZ v. Hatfield*, 334 F. Supp. 870, 877 (D. Minn. 1971); *Serrano v. Priest* (Serrano I), 5 Cal. 3d 584, 615-17, 487 P.2d 1241, 1264-65, 96 Cal. Rptr. 601, 623-25 (1971).