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## Educational Opportunity: A Workable Constitutional Test For State Financial Structures†

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#### INTRODUCTION

Nineteen Sixty-eight brought the opening skirmishes in a constitutional struggle potentially involving much of the financial structure of public elementary and secondary education. Thus far the battle has been more ardent than intelligible. The unprecedented attacks on the state systems have featured a simplistic, if healthy, revulsion for gross variations in per pupil expenditure from school district to school district within the states; often this objection to inter-district disparities in spending is bolstered by the plausible and complicating assertion that the children needing the most dollars for education receive the least and vice versa.

This combination of deprivations inspired the original complaint attacking the Michigan system;<sup>1</sup> that action was filed in the state court in February, 1968, by the school board of the city of Detroit and by individual public school children of the district. Following the Detroit complaint similar litigation was begun in other states.<sup>2</sup> In mid-

† This Article is part of a longer work to be published in 1969 by the Harvard University Press entitled PRIVATE WEALTH AND PUBLIC EDUCATION.

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1. Board of Educ. v. Michigan, General Civil No. 103342 (Cir. Ct. Mich., Wayne County, filed Feb. 2, 1968).

2. *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom. McInnis v. Ogilvie*, \_\_\_ U.S. \_\_\_ (1969); *Guerra v. Smith*, Civil No. A-69-CA-9 (W.D. Tex., filed Jan. 28, 1969); *Rodriguez v. San Antonio Independent School Dist.*, Civil No. 68-175-SA (W.D.

April poverty lawyers representing individual clients in Chicago and suburban districts launched *McInnis v. Shapiro*<sup>3</sup> before a three-judge federal court in the Northern District of Illinois. While the other cases languished, *McInnis* rose and fell like a flare. Before the year was out the complaint had been dismissed on the merits at the district level;<sup>4</sup> propelled by the eccentricities of federal appellate practice, a direct appeal was before the Supreme Court by the following February;<sup>5</sup> in March, 1969, the decision was affirmed per curiam without opinion.<sup>6</sup> In eleven months *McInnis* had blazed, sputtered, and died. With it perished the naive hope for an instant revolution in education by the invocation of the federal judiciary.

The meaning of *McInnis v. Shapiro* is ambiguous; but the case hardly seems another *Plessy v. Ferguson*.<sup>7</sup> Probably but a temporary setback, it was the predictable consequence of an effort to force the Court to precipitous and decisive action upon a novel and complex issue for which neither it nor the parties were ready. As we shall elaborate, the plaintiffs' virtual absence of intelligible theory left the district court bewildered.<sup>8</sup> Given the pace and character of the litigation, confusion of court and parties may have been inevitable, foreordaining the summary disposition of the appeal. The Supreme Court could not have been eager to consider an issue of this magnitude on such a record. Concededly its per curiam affirmance is

Tex., filed July 30, 1968); *Burrus v. Wilkerson*, Civil No. 68-C-13-H (W.D. Va., filed July 2, 1968); *Serrano v. Priest*, Civil No. 938254 (Cal. Sup. Ct., dismissed, Jan. 8, 1969); *Silva v. Atascadero Unified School Dist.*, Civil No. 595954 (Cal. Sup. Ct., filed Sept. 26, 1968).

The Detroit litigation also inspired an academic conference, the proceedings and papers of which are now in soft cover. *THE QUALITY OF INEQUALITY: SUBURBAN AND URBAN PUBLIC SCHOOLS* (C. Daly ed. 1968). In fact the literature is spawning. See, e.g. Horowitz & Neiring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within A State*, 15 U.C.L.A.L. REV. 787 (1968); Kirp, *The Constitutional Dimensions of Equal Educational Opportunity*, 38 HARV. EDUC. REV. 635 (1968); Comment, *Equality of Educational Opportunity: Are "Compensatory Programs" Constitutionally Required?* 42 S. CAL. L. REV. 146 (1969). A book also has appeared on the subject. A. WISE, *RICH SCHOOLS. POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY* (1969).

3. *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968).

4. It is possible to construe the holding narrowly. See note 95 *infra* and accompanying text. However, it is reasonably clear that the district court intended completely to insulate the existing Illinois financing scheme from fourteenth amendment attack, for it observed: "[T]he existing school legislation is neither arbitrary nor does it constitute an invidious discrimination. It therefore complies with the Fourteenth Amendment." 293 F. Supp. at 332.

5. In suits to restrain the enforcement of state statutes on grounds of unconstitutionality a three-judge court is required. 28 U.S.C. § 2281 (1964). From the decision of such a tribunal direct appeal lies as of right to the Supreme Court. 28 U.S.C. § 1253 (1964).

6. *McInnis v. Ogilvie*, \_\_\_ U.S. \_\_\_ (1969). Mr. Justice Douglas dissenting.

7. 163 U.S. 537 (1896).

8. So bewildered the court held the issue as presented nonjusticiable. 293 F. Supp. at 335. See text accompanying notes 94-95, *infra*. The case is discussed at many points in the Article.

formally a decision on the merits,<sup>9</sup> but it need not imply the Court's permanent withdrawal from the field. It is probably most significant as an admonition to the protagonists to clarify the options before again invoking the Court's aid.

The Court does well to wait for clarification. Thus far the debate, even outside the courts, has featured utopian reforms on the one hand pitted against utter immobility on the other. The latter school represented by Professor Phillip Kurland, has seen clearly what are the considerable risks represented in the school finance issue; the former has seen the substantial opportunity.<sup>10</sup> Neither has yet perceived a moderate course for court and legislature. It shall be our primary purpose here to suggest such a resolution.

Any hope for a reasonable approach to the school finance question requires an understanding, first, of the very complex existing structure of public education finance and, second, of the protean distributional structures that might replace it in the future. To that end we have analyzed elsewhere in detail the existing statutory paradigms, their history and their empirical consequences;<sup>11</sup> further, we have suggested a multitude of alternative systems. Here we will content ourselves with the barest outline of this complex material. To succeed even at this, however, we first must ascribe meanings to a few

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9. The Supreme Court's jurisdiction is not discretionary in appeal cases. 28 U.S.C. 1253 (1964). Technically any affirmation of a decision which was rendered below on the merits is itself a decision on the merits. R. L. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE 195-96* (1962). However, where the disposition is summary and without opinion, the practical meaning of such action by the Court is inscrutable. "It has often been observed that the dismissal of an appeal, technically an adjudication on the merits, is in practice often the substantial equivalent of a denial of certiorari." D. Currie, *The Three-Judge District Court in Constitutional Litigation*. 32 U. CHI. L. REV. 1, 74 n.365 (1964). The *McInnis* decision was affirmed, not dismissed, but there is probably no significance in this distinction. It is the historic practice of the Court in direct appeals from federal courts to affirm rather than to dismiss the appeal—an order reserved for appeals from state courts. Stern and Gressman observe that "Only history would seem to justify this distinction." STERN & GRESSMAN, *supra* at 200.

10. See Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583 (1968). This is a reprint of the talk by Professor Kurland delivered at the conference referred to in note 2, *supra*, and contained in the book cited therein. The *McInnis* opinion cites the article favorably in two places. 293 F. Supp. at 334, 336. Kurland finds much of the Supreme Court's recent work "awful" and anticipates more of the same in the finance cases. See generally *THE QUALITY OF INEQUALITY: SUBURBAN AND URBAN PUBLIC SCHOOLS*, *supra* note 2. The reform-bent conferees recorded in this book seemed preoccupied exclusively with urban eschatology in various forms. Both sides conceived the problem to be essentially a city-suburban struggle, as the title of the book from the conference suggests. In fact this misstates the issue badly, as the problem is endemic. The title of the book by Arthur Wise, cited in note 2 *supra*, is also misleading (*RICH SCHOOLS. POOR SCHOOLS*); the relevant collectivities here are school districts, not schools.

11. J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* (forthcoming, 1969, Harvard U. Press). [hereinafter cited as COONS, CLUNE & SUGARMAN.]

concepts that will inform the discussion, commencing with three factors which are central to existing systems of school finance—offering, wealth, and effort.

*Offering* shall mean the average number of dollars spent in current operating expenses per public school pupil;<sup>12</sup> unless otherwise indicated this will refer to the average for a school district.

*Wealth* shall mean the dollar value of a given tax source per public school pupil (e.g., the assessed valuation per pupil of real estate in a school district—hereafter AVPP).<sup>13</sup>

*Effort* shall mean the tax rate levied against a given resource (e.g., the mill rate on real property or on income).

We shall assume throughout that, as offering varies, quality of education varies; that is, we accept as a fact the positive relation between the cost and quality of education. For our limited purposes this assumption is less risky than might at first appear. The state will be in no position to deny its validity;<sup>14</sup> that relation is itself the justification for the existing financing systems, nearly all of which permit districts to apply varying tax rates and to spend varying amounts per pupil in order to implement local aspirations and meet local needs.<sup>15</sup> It would be endlessly complicating and tactically fatuous for plaintiffs to attempt to compare from district to district the quality of the educational system actually purchased. However, unsatisfactory it may be as a measure for individual cases, given the present primitive state of social science on this question, money is the only feasible criterion.<sup>16</sup>

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12. Current operating expenses ordinarily account for the bulk of the cost of education. See, e.g., J. THOMAS, *SCHOOL FINANCE AND EQUAL OPPORTUNITY IN MICHIGAN* 154 (1968). However, the elimination of capital expenditures from our analysis is not intended as a slight to their importance. In fact the grossest instances of discrimination involve the financing of physical plant, since the state "equalization" programs, described in text accompanying notes 20-32, *infra*, rarely provide assistance to the districts for their capital needs. If we are successful in demonstrating the invalidity of the present systems for financing current operating expenditures, the argument is *a fortiori* for plant. Our sole purpose in eliminating capital costs, therefore, is to simplify the discussion. For fuller consideration of the problem see COONS, CLUNE & SUGARMAN, *supra* note 11.

13. When greater precision is required, adjustments may be necessary for such objective differences among districts as costs of transportation, differences in cost of purchasing services, municipal overburden, etc. See text accompanying notes 88-91 *infra*. For the purpose of introducing the basic systems the simpler definition will suffice.

14. In *Serrano v. Priest*, Civil No. 938254 (Sup. Ct. Cal., *dismissed*, Jan. 8, 1969), the state accepted the plaintiffs' contention on this point "arguendo" in its answer and motion to dismiss.

15. See *McInnis v. Shapiro*, 293 F. Supp. 327, 333 (N.D. Ill. 1968).

16. Thus far no one has come near demonstrating the actual cost-benefit relation of educational expenditures. The significance of differences in per pupil costs sometimes is questioned on the basis of inferences drawn by the Coleman Report. OFFICE OF EDUCATION, *EQUALITY OF EDUCATIONAL OPPORTUNITY* 316 (1966). However, these conclusions have been

These definitions and assumptions lack economic and pedagogical sophistication in some respects, but they aid in pruning away side issues and permit a sharper focus upon what we consider the crucial policy and legal problem. Presently we shall analyze existing state structures with the object of exposing systematic state-created discrimination by wealth. Such discrimination is the principal vice of present legislative systems and will be the target of the constitutional position here advanced. That position will be stated at this early point, since everything that follows is in some sense a comment upon it:

*The quality of public education may not be a function of wealth other than the wealth of the state as a whole.*

This principle generally will be styled "Proposition I" both for convenience and as a concession to the possibility that other forms of discrimination in public education will arise once the existing wealth determinants of quality are eliminated under this standard. Occasionally it will be referred to as the "no-wealth" principle, and finance systems that satisfy the principle sometimes will be called "wealth-free." No properly elegant labels seemed sufficiently precise.

A convincing case for the adoption of this standard will involve several distinct analyses of fact and principle. At the outset must be shown the connection between wealth and offering (quality) under existing systems. Next, hypothetical "wealth-free" state systems must be examined, and the inquiry made whether any cherished value must be sacrificed to make such systems constitutionally prescribed. We shall demonstrate that local choice is not jeopardized under the above

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scouted effectively by Bowles and Levin who insist that the Coleman data, if anything at all, suggest that dollar inputs are important. Bowles & Levin, *The Determinants of Scholastic Achievement—An Appraisal of Some Recent Evidence*, 3 J. HUMAN RESOURCES 1 (1968). This latter conclusion is supported by the studies of H. JAMES, J. THOMAS & H. DYCK, WEALTH EXPENDITURES AND DECISION MAKING FOR EDUCATION (1961). Other such work is, like Coleman, less sanguine. A preliminary evaluation of Head Start programs has reported only modest positive results as measured by standard criteria; like the Coleman Report, however, its methodology has been severely criticized. *The Impact of Head Start* (preliminary draft). Westinghouse Learning Corporation (1969). For a summary of a number of studies see Dyer, *School Factors and Equal Educational Opportunity*, 38 HARV. EDUC. REV. 38 (1968). The most recent general study is T. RIBICH, EDUCATION AND POVERTY (1968). Ribich's careful assessment (slightly oversimplified here) concludes that the available data are too fragmentary for any solid conclusions, and if anything, show that there is a variety of conflicting effects from extra dollar inputs—effects which depend upon a great many abstruse factors. Further, all efforts at measuring educational efficiency risk the objection that there is no universal agreement on just what effects education is intended to have. See generally, A. Jensen, *How Much Can We Boost I.Q. and Scholastic Achievement?*, 39 HARV. EDUC. REV. 1 (1969). We prescind from the issue altogether, since we speak not of student performance (output) but of dollars available (input). Ultimately, the research of social scientists on the cost-benefit relation may deserve a significant role in the shaping of judicial and legislative attitudes toward the educational finance issue. In our judgment that day has not yet arrived.



standard. Nor does the principle either require flat equality or have anything to say upon the issue of compensatory education.<sup>17</sup> We shall show Proposition I, by virtue of its modesty, flexibility, and relative simplicity, to be superior to the other constitutional standards that have been proposed. We then shall suggest the general approach to the Supreme Court most likely to produce that standard as a fourteenth amendment guarantee.

## I

### A LAWYER'S BAEDEKER TO SCHOOL FINANCE

#### *A. The Relation of Wealth and Offering Under Existing Systems*

Except for Hawaii all state systems of education depend in one degree or another for fiscal support upon taxes which are approved, levied, and collected within the several school districts.<sup>18</sup> For our limited purposes we may suppose that the tax source is local real estate, as is most often the case. It is obvious that, if such local collections were the only support for public education, the offering per pupil would be a simple function of local wealth and effort:  $O = (W)(E)$ . Local (district) wealth varies radically, and—given equal effort—quality would vary with it. Fortunately, no such pure local system exists, though it is approached in several states.<sup>19</sup>

What exists in all states but Hawaii is a system of local collections with a second system of state "subventions" superimposed. Therefore, instead of offering being determined simply by local wealth and effort, it is also a function of the form and amount of state contribution:  $O = (W)(E) + \text{State Aid}$ . The gross proportion of state aid to local collections varies wildly from state to state.<sup>20</sup> The forms of state aid, however, are subject to intelligible generalization, and it will be important now briefly to analyze these forms and a few of the variety of effects they produce under varying circumstances. It is, of course, their effects upon the relation between wealth and offering that is our principal interest.

#### *1. Effects of State/Local Financing Plans*

State aids may be of three kinds in their effects upon the relation of wealth and offering. They may be equalizing, non-equalizing, or

17. See discussion of compensatory education accompanying notes 98-99 *infra*.

18. Hawaii's system of finance is completely centralized. See 6 HAWAII REV. LAWS (Supp. 1965).

19. The U.S. Office of Education puts Iowa, Nebraska, New Hampshire, and South Dakota in this group. A. MURSE, STATE PROGRAMS FOR PUBLIC SCHOOL SUPPORT (U.S. Office of Education, 1965).

20. From about 10% state aid (New Hampshire) to more than 80% (Delaware and North Carolina). *Id.*

anti-equalizing. The definitions of these three terms is to some extent arbitrary; they are intended as clarifying mechanisms as well as normative judgments. *Equalizing* effects shall mean those by which the state dollars (or equivalent resources) reduce the impact of local wealth differentials upon education and, thus, are an aid to the poor districts. *Non-equalizing* effects shall mean those by which state dollars have no impact on wealth differentials. *Anti-equalizing* effects shall mean those by which state dollars exacerbate wealth differentials and, thus, constitute a bonus for being wealthy.

## 2. Typical Plans Analyzed

These three characteristics can be observed<sup>21</sup> in each of the historic systems of state aids which have arisen in this century in apparent response to the inequities of the purely local systems which characterized the 19th Century. There are basically three forms of state aid; flat grants, foundation plans, and percentage equalizing plans.

The *flat grant* is the earliest and simplest system of state aids, amounting to an absolute number of state dollars paid to each district per pupil or other unit.<sup>22</sup> It survives in some form in most states and may involve a substantial share of the total state aid program.<sup>23</sup>

The probable effect of most flat grants is a non-equalizing one. Rich districts and poor districts alike receive per pupil grants. The consequence is to raise the average district offering but to leave unaltered the preexisting gaps in offering between rich and poor districts. However, observe that some equalizing effect could take place indirectly in either or both of two ways. First, if the source of the state aid is a strongly progressive tax, such as a graduated personal income tax, there will be a mild equalizing effect to the extent, if any, that individuals with higher incomes tend to live in wealthier districts. Of course, a regressive tax would have the opposite (anti-equalizing) effect. Second, if the flat grant becomes very large in amount—say \$1000 per pupil—it may subsume local aspirations for education and result in near uniformity statewide. This would

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21. Here we will observe them only analytically; the empirical relation is examined at length in COONS, CLUNE & SUGARMAN, *supra* note 11.

22. The widespread adoption of flat grants can be traced to the early work of Ellwood P. Cubberly. See E.P. CUBBERLY, *SCHOOL FUNDS AND THEIR APPORTIONMENT* (1905). See generally S. NOBLE, *A HISTORY OF AMERICAN EDUCATION* (1954).

23. In North Carolina, for example, the state provides in flat grants over 80% of all money spent. See N.C. GEN. STAT., ch. 115 (Supp. 1967). For an analysis see N.C. SUPERINTENDENT OF PUBLIC INSTRUCTION, *CURRENT EXPENDITURES BY SOURCE OF FUNDS 1965-66*, on file with the authors.

approximate the effects of a centralized system of finance and would to that extent be equalizing. However, nothing of the sort exists.

On the other hand the flat grant is anti-equalizing in its effects when it is given on the basis of a *revenue-unit* formula such as "per teachers hired" or any similar standard which employs objects of purchase in the educational market as the measure of aid. Since the rich district can afford in the first place to hire more teachers, any grant keyed to such a factor is a reward for opulence. Shortly we shall see that flat grants can also be anti-equalizing when joined in a particular combination with "foundation" grants.

The *foundation plan* is essentially a guaranty to the district by the state that, if it will tax itself at a specified minimum level, the district will have a specified number of dollars available per pupil (or other unit such as a "classroom").<sup>24</sup> For example, suppose the state guarantees \$500 per pupil for a 1 percent district effort. Suppose further that the poorest district (A) has an assessed valuation per pupil of \$10,000 and that the richest district (B) has an AVPP of \$100,000. Each taxes at a specified minimum qualifying level of 1 percent. District A thus raises \$100 per pupil locally and is "subvented" \$400 per pupil by the state to produce the guaranteed minimum. District B raises \$1000 locally with the same 1 percent effort and receives no state aid.

Under these factual assumptions the \$400 paid to District A is all equalizing in its effect; it reduces—though by no means does it eliminate—the effect of wealth disparity. Suppose next that the same foundation plan exists except that the qualifying effort is reduced to 4 mills (0.4 percent). At that rate District A raises \$40 locally and receives \$460 from the state. District B raises \$400 locally and the state adds \$100. In such a case how should the effect of the state aid be described? Clearly the first \$360 received by District A is equalizing, for it is awarded precisely because of A's relative poverty and is not awarded to B. However, beyond \$400 even District B receives aid; the system at that point becomes indifferent to wealth variations, and the \$100 given each district is non-equalizing. It is worth observing that the effect here is precisely that of a \$400 foundation plan with an added \$100 flat grant. The official labels are meaningless until the equalizing effects are analyzed.

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24. The "foundation" plan was originally proposed by Strayer and Haig in 1923 and later refined and modified by Paul Mort. See G. STRAYER & R. HAIG, FINANCING OF EDUCATION IN THE STATE OF NEW YORK (1923); P. MORT, STATE SUPPORT FOR PUBLIC SCHOOLS (1926).

It is also crucial to realize that, even where *all* the state aid is equalizing in its effect, foundation plans are incapable of achieving full equalization; above the guaranteed "foundation" level identical local efforts produce increments of offering directly determined by the relative wealth of the district. Suppose, for example, that our rich District B decided to offer a \$2000 public education in a system with a \$500 foundation guarantee and a 1 percent required effort. Such an offering would require a 2 percent effort by B; but a 2 percent effort by District A produces only \$600 even with the \$400 state aid. An offering of \$2000 by District A would require an effort of 16 percent—an absurdity even if it were permitted by the statutes, which ordinarily is not the case.

*Combination plans* exist in many states where flat and foundation aid plans are employed, in either of two relations. In one type of relation the flat grant is simply added on top of whatever foundation money is due:

$$\text{State Aid} = (\text{guaranteed amount} - \text{local collection}) + \text{flat grant}.$$

In the second formula the flat grant is included with the local collection in determining the amount due under the other (foundation) plan:<sup>25</sup>

$$\text{State aid} = [\text{guaranteed amount} - (\text{local collection} + \text{flat grant})] + \text{flat grant}.$$

The effect of this latter approach is subtle and very interesting; the districts that would be poor enough under the first formula to receive (in foundation money) an amount equal to the flat grant in effect receive no flat grant. Put another way, under the second formula they would receive the same amount of state aid through the foundation plan if no flat grant existed. However, the districts rich enough to receive no foundation aid yet receive the full amount of the flat grant. The grant thus is a subsidy for the wealthy only and is grossly anti-equalizing. California<sup>26</sup> and Illinois<sup>27</sup> are prominent examples of this grotesque policy.

25. See, e.g., 122 ILL. STAT. ANN. § 18-8(2) (Smith-Hurd Supp. 1967):

[A] school district . . . shall be entitled . . . to such equalization quota as is necessary to supplement the amount of such [local] levy and the above general [flat] grant . . . by an amount that will produce the sum of \$400 . . . .

In our previous example of the \$500 foundation at a 1% tax, the poor district (\$10,000 AVPP) would still receive only \$400 in state aid, but the rich district (\$100,000 AVPP) would now receive \$100 per pupil.

26. CAL. EDUC. CODE § 17901 (West 1969).

27. 122 ILL. REV. STAT. ANN. § 18-8(2) (Smith-Hurd Supp. 1967), quoted *supra* note 25.

*Percentage equalizing* is the exotic label for plans adopted in several states and hailed as fully equalizing—that is, as eliminating the effect of wealth differentials among districts. The theory has been sound; this plan empowers the district to set its own budget and to have that budget supported by the state in inverse proportion to the relative wealth of the district.<sup>28</sup> If, as in our previous example, the poorest district had 1/10 the wealth of the richest, the state would undertake to support 90 percent of A's chosen budget and none of B's budget. If A's chosen budget were \$1000 per pupil, A would be required to make a local effort of 1 percent to raise the \$100 to match the \$900 contributed by the state. Such a system would be fully equalizing.

Of course, no system in existence resembles the theory. New York, which purported to adopt the theory, has adorned its percentage equalizing with devastating refinements.<sup>29</sup> First, it has placed upon state aid to the districts an absolute dollar limit which, for poor districts, renders it little better than a foundation plan in its equalizing effect. Second, and more importantly, it has guaranteed to all districts a state contribution of \$238 per pupil. This amounts to an enormous flat grant of the anti-equalizing type described above. There are other subtler anti-equalizing features which it would be tiresome to elaborate. Suffice it to say that the New York structure is a labyrinth of false promises. Its deceptive character is matched only by Rhode Island which has guaranteed under its "percentage equalizing" system that each district will receive at least 30 percent of its budget from the state.<sup>30</sup> This not only emasculates most of the potential equalizing effects otherwise created, but may be termed doubly anti-equalizing since the rich districts can afford in the first place to spend more local dollars to which the 30 percent guaranteed subvention can be applied.

### *3. Empirical Summary: More Effort and Less Education for Poor Districts*

Elsewhere we have traced the practical effects of these systems in several states.<sup>31</sup> We will not repeat our findings here except in their

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28. The theory has been the work principally of the late Paul Mort and of Professor Charles Benson. C. BENSON, *THE ECONOMICS OF PUBLIC EDUCATION* 242-246 (1961); C. BENSON, *THE CHEERFUL PROSPECT* 90-94 (1965); Mort, *Unification of Fiscal Policy in New York*, in *PERSPECTIVES ON THE ECONOMICS OF EDUCATION* 341 (C. Benson ed. 1963).

29. See generally N.Y. EDUC. LAW §§ 3602-09 (McKinney Supp. 1969).

30. R.I. GEN. LAWS, tit. 16, ch. 7, § 20 (Supp. 1967). See RHODE ISLAND SPECIAL COMM'N TO STUDY THE ENTIRE FIELD OF EDUCATION: *THE RHODE ISLAND STATE SCHOOL AID PROGRAM, A REPORT TO THE LEGISLATURE* (1967).

31. In COONS, CLUNE & SUGARMAN, *supra* note 11, the systems of Ohio, Nevada,

conclusions. The empirical consequences of these systems are precisely what their structure implies:

(1) Poorer districts in general tend to make a greater tax effort for education than do wealthier districts.

(2) Poorer districts in general have significantly lower educational offerings than do wealthier districts.

The difficulty of making the nature of the financing structure and its consequences plain to the court should not be underestimated. The effect of failing in that effort is illustrated by the opinion of the three-judge court in *McInnis v. Shapiro*. The court described the Illinois system as one

. . . designed to allow individual localities to determine their own tax burden according to the importance which they place upon public schools.<sup>32</sup>

This is a gross misstatement. In order to enjoy the same quality of education, districts in Illinois of varying wealth in fact must have widely differing tax burdens; that is the poorer district must care *more* than the rich. To say that the tax burden is determined "according to the importance which they place upon public schools" is eerily reminiscent of another view of equality from an earlier century on the different issue of racial discrimination:

[I]f the enforced separation of the two races stamps the colored race with a badge of inferiority . . . it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.<sup>33</sup>

The importance of educating the court to the realities of financial discrimination and the mechanisms which create it cannot be overemphasized.

### *B. The Value System: The Alleged Conflict between Subsidiarity and Equal Opportunity*

The inequities outlined above are frequently blamed upon the American fondness for local government in education. It is quite true

Arizona, Illinois, Utah, Nevada, New York, and Rhode Island are considered in varying detail. For the first six states taxing and spending data are employed to check empirically the correlations that the systems seem logically to demand.

32. *McInnis v. Shapiro*, 293 F. Supp. 327, 333 (N.D. Ill. 1968). Elsewhere the court remarks that "the equalization grant effectively tempers variations in assessed value." *Id.* at 330. The fact is that, at the same tax rate, Illinois districts vary several hundred per cent in offering. See COONS, CLUNE & SUGARMAN, *supra* note 11.

33. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896). As we will demonstrate, the interdistrict finance issue does not involve race. See text accompanying notes 149-150 *infra*.

that the states have shown a policy preference for decisionmaking by the smallest unit of society competent to do so. In this attitude there is obviously a strong strain of individualist philosophy, but there are other roots as well. Some of them tap ancient philosophies. As a label for this value emphasizing low level decisionmaking we employ the scholastic term "subsidiarity."<sup>34</sup> It is a more general concept than "federalism" or "localism," being applicable to intermediate groups of all descriptions including families, local governments, private associations, etc. The merits and political strength of a policy of subsidiarity are subjects of some complexity. We will not argue them in detail here but merely assert that systems informed by subsidiarity tend to produce variety, competition, experimentation, and citizen participation in greater degree than systems which emphasize centralization. The latter tend to be characterized by the kind of equality guaranteed by any system of uniformity.

Equality in fact is the other major, and seemingly competing, value that dominates the rhetoric of public education. In the United States equality is rarely (though sometimes)<sup>35</sup> taken to suggest uniformity of achievement; for the most part, it is expressed as the equivalence of opportunity.<sup>36</sup> Indeed, "equality of educational opportunity" is accepted as widely as perhaps any value in our national portfolio. This does not mean there is agreement upon its definition, however; the idea is nearly as various and self-contradictory as the men who promote it. It would be tiresome to enumerate here the gallery of competing meanings. We pause only to examine the common belief that, whatever its meaning, equality of opportunity and subsidiarity cannot be accommodated in a single system. Kurland, for example, supposes that ". . . the argument [for equal educational opportunity] demands the elimination of local government authority to choose the ways in which it will assess, collect, and expend its tax funds."<sup>37</sup> It is perhaps natural to draw such a simplistic inference in the light of our national experience. The

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34. This term is common coin for Thomistic philosophers. See, e.g., POPE JOHN XXIII, *PACEM IN TERRIS* Part IV (1963); J. MESSNER, *DAS NATURRECHT* 294-304 (1966).

35. See note 83 *infra* and accompanying text.

36. For consideration of the general theory of equality and equality of opportunity, see S. LAKOFF, *EQUALITY IN POLITICAL PHILOSOPHY* (1964); *EQUALITY, NOMOS IX* (J. Pennock & J. Chapman, eds. 1967); 56 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* (1955-56). Our own philosophical kinship seems closest to that expressed in J. Rawls' beautiful piece, *Distributive Justice: Some Addenda*, 13 *NATURAL LAW FORUM* 51 (1968).

37. Kurland, *supra* note 10, at 589. The three-judge court in *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), cited Kurland and uttered similar warnings. *Id.* at 333. James Allen and (according to Allen's report of a recent address by Dr. Conant) James Conant seem to

states have emphasized local government and the outcome has been gross inequalities of expenditure. The conclusion that equality of opportunity will require centralization and uniformity may not follow logically, but one can be forgiven for drawing that practical lesson.

If Kurland were correct about this, the consequence would not be trivial. Subsidiarity is not something lightly to be cast aside as an historic anomaly. It is an important element in the mix of institutions that promote an open society. In fact, however, there is no need even to consider its demise, because the scandalous discriminations now tolerated in public education in our society are a consequence not of too much but of too little local control. The existing financing mechanisms are not truly systems of local control; rather they are a system of naked privilege for those localities which are created by the state with superior power. Local control in the sense of entities with parity of power to perform their assigned task of education has never existed. Whether such a system could exist is a more meaningful question. We will show that the choice between the existing caricature of subsidiarity on the one hand and centralization on the other is unnecessary; the dilemma posed by the Kurland school is a work of the imagination.

### *C. Alternative De-centralized Systems: Power Equalizing to Achieve both Subsidiarity and Equal Opportunity*

In fact at least two styles of de-centralized systems are possible, both of which eliminate the effects of variations in wealth while retaining (more accurately, creating) true local fiscal control. Each has been developed by us in great detail elsewhere,<sup>38</sup> and the barest outline will be offered here. Each depends upon the principle of equalizing—for purposes of public education—the economic power of collectivities intermediate to the individual and the state. The principle of “power equalizing” differs from the “percentage equalizing” concept noted above principally in its greater generality and flexibility.

#### *1. District Power Equalizing*

The essence of district power equalizing is the simple elimination of wealth from the formula determining a school district's offering. Instead of offering being a function of both wealth and effort, it becomes a function of effort alone. The easiest way to perceive this is

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agree with Kurland on this point. Allen, *The State, Educational Priorities, and Local Financing*, INTEGRATED EDUCATION, Sept.-Oct. 1968, at 55-61. Their difference from Kurland is simply their eagerness and his reluctance to emasculate local government.

38. See COONS, CLUNE & SUGARMAN, *supra* note 11.



to suppose that the legislature has developed a table which specifies how much per pupil each district will be permitted to spend for each level of (locally chosen) tax effort against local wealth (preferably income, but, more realistically, property). Such a table might look like this:

<i>Local Tax Rate</i>	<i>Permissible Per Pupil Expenditure</i>
10 mills (minimum rate permitted)	\$ 500
11 mills	550
12 mills	600
13 mills	650
14 mills	700
.....	.....
.....	.....
29 mills	1450
30 mills (maximum rate permitted)	1500

Irrespective of the amount of the local collections the district would be permitted to spend that amount—and only that amount—per pupil fixed by law for the tax rate chosen. Rich districts and poor districts taxing at 12 mills would provide a \$600 education. Poor districts and rich districts taxing at 30 mills would provide a \$1500 education. Obviously this might require the redistribution of excess local collections from rich districts and the subvention of insufficient collections in poor districts. The magnitude of such effects would depend on the degree to which the state wishes to pay for the total cost of education; this in turn is related to the extent to which the state wishes to stimulate district effort. The formulas for controlling total cost and the respective state and local shares are infinitely variable and can incorporate many refinements. One that deserves mention would be an adjustment for municipal overburden in the case of large cities. Such fine tuning is easily handled under a power equalized system and could be employed to eliminate vestiges of wealth discrimination associated with certain economic and social differences among the districts other than differences in assessed wealth. Other examples of such differences are transportation costs and variations from area to area in cost of services such as salaries.

The effect, then, is to make all districts equal in their *power* to raise dollars for education. The variations from district to district in

dollars per pupil spent upon education would thus be a function simply of local interest in public education. Power equalizing would not guarantee equal dollars per pupil—a goal we consider fatuous and counter-productive; it would merely make the money raising game a fair one and maximize the incentive for political effort at the local level.<sup>39</sup> Its potential relevance to the movement for “community control” is obvious.

## 2. Family Power Equalizing

This is simply an application of the power equalizing principle to a different unit. The family instead of the school district would be given the power to decide its level of sacrifice or effort for education. The wealth against which the tax effort would be made is the family income per child. For each level of effort a specific level of spending would be permitted the family, which would be given some form of scrip for each child with which to purchase education. Given appropriate adjustment for marginal utility, cost of living, etc., equal tax efforts would give families of varying wealth access to schools of equal offering. The state would decide how the necessary schools would be provided. Perhaps both public and private schools would be permitted to respond to the variety of choices made by families; the resulting system would be essentially a market in which educators would match demand for schools charging \$400, \$800, etc. All participating schools including private schools would have to accept the scrip as the sole measure of tuition. Otherwise wealth determinants of quality could be reintroduced by wealthy parents who wished to supplement the state stipend. On the other hand, private schools not accepting the scrip could charge what they pleased.

This system superficially resembles that proposed by Milton Friedman but is fundamentally different. Professor Friedman has suggested that existing systems be supplanted by one in which the state pays a flat and equal amount to each child whose parents will then choose the school in which to spend<sup>40</sup> the stipend and would be

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39. The advisory Commission on Intergovernmental Relations has produced a model statute which flirts with full district power equalizing but, in the end, is little more than a fancy foundation plan. It is contained in FISCAL MEASURES FOR EQUALIZING EDUCATIONAL OPPORTUNITIES FOR ECONOMICALLY AND SOCIALLY DEPRIVED CHILDREN, a pamphlet available from the Commission. The statute features a mandated and fully equalized minimum plus an “Educational Improvement Program” under which: “[T]he state will assist local school districts to finance a level of per pupil expenditures above the mandated minimum program level provided in section 3 up to 2.00 times that level . . . .” *Id.* at sec. 7. A moment’s reflection will reveal how much depends upon the level of the mandated minimum. If it were set at \$250, the statute has about the effect of a \$500 foundation program, for the statute does not continue to equalize the districts above the level of twice the mandated minimum. To be truly equalizing the system must provide for equal spending power at all permitted levels of local effort.

40. M. FRIEDMAN, CAPITALISM AND FREEDOM 85-107 (1963); Friedman, *The Role of*

free to supplement it as they saw fit and were able. Such a proposal would obviously magnify the present advantage of the wealthy over the poor. The poor could not afford to supplement the stipend and would wind up in schools charging only that amount; the rich could create "lighthouse" schools upon the foundation supplied by the state. Family power equalizing is a way of turning such an oppressive system into one which maximizes freedom of choice, not merely for large collectivities but for families. There are many refinements and complexities which are neglected here. We do not necessarily recommend family power equalizing, but it should be seen as another alternative to the existing schemes—an alternative which does not diminish but rather enhances subsidiarity.

Thus far, then, we have shown that existing systems of educational finance reward persons living in rich districts and punish those living in poor districts. We have shown also that these systems can be altered legislatively to maintain local choice while removing wealth determinants of quality. Given this view of the options—one hitherto neglected by the protagonists—what constitutional posture is appropriate? We turn now to that question.

## II

### CONSIDERATIONS OF JUDICIAL ROLE

The attacks on the existing structures come by way of the equal protection clause.<sup>41</sup> Equal protection approaches of two general sorts are available. First, the Court can be asked simply to declare the existing legislation invalid as an irrational classification;<sup>42</sup> second, the Court may be urged to elevate the conflict to the level of one involving a "fundamental" interest or "invidious discrimination" thereby requiring the development of a separate and additional standard by which to test the validity of the state action.<sup>43</sup> The adoption of a standard barring wealth as a determinant of quality would be an approach of this second type. We shall indicate later<sup>44</sup> why we prefer it to the "rationality" approach. However, before we reach that point, it would be well to ask in a rather general way what qualities should inform whatever judicial strategy is adopted for resolving the issue either for or against the state. To say that the

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*Government in Education* in PERSPECTIVES ON THE ECONOMICS OF EDUCATION 132-142 (C. Benson ed. 1963).

41. For an excellent general analysis of modern equal protection trends see Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

42. See text accompanying notes 57-81 *infra*.

43. See text accompanying notes 100-34 *infra*.

44. See text accompanying notes 66-81 *infra*.

United States Supreme Court again will have the opportunity to face the school finance issue<sup>45</sup> is not to demonstrate that it should do so or that it can effectively dispose of it. Much of the lengthy discussion that follows will be predicated upon the assumption that judicial review of the school finance question can take many forms, some of them clearly more destructive than beneficial. Whether the Court should act<sup>46</sup> and how depends largely upon three fundamental and interrelated aspects of judicial review—standards, preemption and enforceability.

### A. Standards

The standards problem is essentially one of achieving intelligibility. If the present state financing systems are condemned, it is not enough simply to declare them invalid. If the Court hopes to generate the consensus necessary to meaningful change, it must identify with reasonable clarity the locus and nature of the constitutional defect. Society cannot or will not respond to canons incapable of communication. An example of a problem of standards which has been solved by the Court is provided by the reapportionment field. Here the need for an intelligible measure of equal protection drove the Court to a one-man, one-vote principle which—whatever its other defects—has qualities of intelligibility unmatched by any of the tests competing for adoption.<sup>47</sup> In other areas, the Court has been less successful in articulating standards. The “state action” and “obscenity” concepts have plagued the Court because of their inherent inscrutability.<sup>48</sup> Where substantive rights depend upon delphic distinctions, the Court stands endlessly on flypaper, unable to clear more than one foot at a time. Unless the Court can find an effable essence, its judgments tend to be ad hoc and unpredictable, qualities which in the school finance case will evoke nothing but criticism of the Court and evasion by the legislatures. As we shall see, the inability of the plaintiffs in *McInnis v. Shapiro* to suggest an intelligible standard was sufficient to dissuade the three-judge court from interfering with the existing system and probably

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45. There is no question that the Court has jurisdiction of the subject matter. *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968).

46. As we have suggested, note 9 *supra*, the Court has no choice if the suit arises under its appellate jurisdiction. However, even in that case, the Court, by disposing of the appeal summarily, may diminish or at least becloud its practical significance while giving a technical disposition on the merits. See C. WRIGHT, *FEDERAL COURTS* 430-31 (1963).

47. See *Gray v. Sanders*, 372 U.S. 368 (1963).

48. For copious illustration of these two troublemakers at work and for references to scholarly comment thereon see W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW. CASES COMMENTS QUESTIONS* 1276-1325, 1047-116 (1967).

contributed to the decision of the Supreme Court to dispose of the appeal summarily.<sup>49</sup> Whether Proposition I best satisfies the need for intelligibility will be considered at several points below.

### B. Preemption

Within the term preemption we include two consequences of judicial invalidation of state legislation which are distinct but related and which pose questions about the prudence of judicial intervention in this instance. One is the anti-democratic effects of the Court's sapping of the legislative power of the states. The other is the Court's excessive narrowing of alternatives available to the state legislature.<sup>50</sup>

The anti-majoritarian criticism, whatever its merits, is an objection that tends to dissipate to the extent that the individual seeking protection is of a class effectively unrepresented in the political process;<sup>51</sup> but if cases of de facto disenfranchisement escape the objection that judicial review is anti-democratic, the school finance problem appears to be a classic instance. What better example of political impotence than a class of persons by definition unqualified to vote? Of course, one might take the view that, functionally, parents qualify as political surrogates for their children. Even if this is accepted, however, the political debility of the parents is equally certain for another reason. We have shown that the injury under existing systems is visited principally upon those living in districts whose wealth is below the average of the state. It is improbable that parents in these districts ever could rally sufficient political muscle in other districts to overthrow a system which is perceived as advantageous to all the richer districts and which is effectively indifferent to the interests of districts near the average in wealth—districts whose political support would be required for change.<sup>52</sup> Further, the testimony of seventy years of frustration of

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49. See text accompanying notes 82-95 *infra*.

50. See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

51. An example is the class of the criminally accused, one notably deficient in political potency. We are not likely soon to see the formation of a powerful National Criminal Defendant's League. See the remarks of former Senator Kenneth Keating reprinted in *Harvard Legal Aid Bureau* 18-20 (Feb. 18, 1965). See generally Choper, *On the Warren Court and Judicial Review*, 17 *CATL. U.L. REV.* 20 (1967). The special role of the Supreme Court as rescuer of unrepresented victims of state action probably is traceable to the insight and influence of Chief Justice Harlan Fiske Stone. Dowling, *The Methods of Mr. Justice Stone in Constitutional Cases*, 41 *COLUM. L. REV.* 1160, 1171-1181 (1941). The first beneficiaries of the approach ironically were interstate businesses which were the objects of xenophobic state action. *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938). And see the recent decision in *Whyy Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968). The first appearance of this rationale as a source of protection for civil liberties was in Stone's dissent in the first flag salute case. *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 601 (1940).

52. The situation resembles that described by Chief Justice Stone in *United States v.*

legislative reform strongly suggests the futility of political commotion at the state level where to invoke the democratic process is to ask privileged society to surrender the advantage that as much as any other is the keystone of its privilege.<sup>53</sup> Change, if it is to come—an event by no means fated—is not likely to commence with political puissance. Before the democratic process can assemble a new consensus for the compromise we will propose, or for any other solution, the principle of Rich District-Poor District must perish. Only the Court can liberate the legislature for the consideration of alternatives.

The second problem of preemption, as we noted, is that of excessive limitation by the Court of legislative alternatives. The question may be put this way: How far should the Court specify the forms of legislation that do satisfy the Constitution? Some partisans in the school finance cases urge the Court to prescribe in detail the very form and structure of school finance for the states.<sup>54</sup> That hope is probably vain. If not, it is merely horrifying. Perhaps the worst service the Court could render would be the enunciation of a principle which would leave the state no flexibility in its choice of financial structure for education. For example, requiring equality of expenditures per pupil statewide might be a catchy device for terminating the existing injustices; it might also be an effective way to terminate public education. There is certainly no question that such a solution could pretermit forever the possibility of legislative reexamination of a host of alternatives to the rejected order of things. There is great virtue in the Court's confining itself whenever possible to minimal proscriptions in the interest of legislative flexibility. We shall hope to demonstrate that Proposition I satisfies this criterion.

### C. *Enforceability*

Ultimately the Court must rely upon other branches of government for the enforcement of its orders. The last fifteen years

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Carlene Prods., 304 U.S. 144, 153 n.4 (1938)—one of “. . . discrete and insular minorities [whose] special condition . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry . . . .” Since the Colorado reapportionment case, the importance of showing a practical disenfranchisement is unclear. *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964). However, we doubt that we have overemphasized its persuasive value.

53. There is one limitation upon our confidence about the relative lack of representation for the poor school district. The same state legislator occasionally represents a balance of rich and poor school districts. He may enjoy, as a consequence, a larger degree of independence than we have suggested. Arguably, if large numbers of legislators represented such balanced constituencies the problem would diminish.

54. See notes 82-83 and accompanying text *infra*.

have demonstrated how difficult it can be to realize in practice the implications of a judicial ruling on a fundamental social question which is not supported by reasonable consensus in the state. If there is doubt of this, the current statistics on school desegregation in the South should quickly dispel it.<sup>55</sup> The Supreme Court will be sensitive to the enforceability question, both when it decides whether or not to condemn the existing finance system and when it chooses the form that condemnation is to take. This latter is a matter intimately related to the search for an intelligible standard, the absence of which has done much to frustrate successful desegregation.

To sum up this section, the best service the Court can perform is fourfold: (1) to break the logjam of the status quo and thus free the state from a politically immovable system; (2) to give the state wide latitude in its reexamination of the finance problem; (3) to speak with clarity in a standard capable of intelligent interpretation; (4) to remain keenly sensitive to the likely legislative and popular responses to the various forms its decisions and orders might take. We happily endorse the monition of Professor Kurland:

Let's place the responsibility where it belongs. Let's permit the state an opportunity to experiment with different answers to these difficult problems and free them to undertake the experiment.<sup>56</sup>

### III

#### A CLASSICAL APPROACH TO THE SCHOOL FINANCE CASE

In the great bulk of the Court's equal protection opinions involving economic regulation and, occasionally, in a "basic rights" case<sup>57</sup> the analysis is cast in terms of the rationality of the relation of the legislative purpose to the means chosen by the legislature for the realization of that purpose. The thought is variously expressed, but we may put it first that the means chosen must bear a reasonable relation to the evil that the state seeks to eliminate or diminish (or the good that it seeks to achieve). We shall style this approach variously as "ends/means," "purpose/means," or merely "classical."

The approach is congenial to lawyers. It has a veneer of judicial restraint, conceding the legislature apparent freedom to select any purpose whatsoever; and the professed standard for judgment is disinterested rationality in the highest traditions of the neutralist style.

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55. U.S. COMM'N ON CIVIL RIGHTS. II. RACIAL ISOLATION IN THE PUBLIC SCHOOLS APPENDICES 2-7 (1967).

56. Kurland, *supra* note 10, at 600.

57. See, e.g., *Railway Express Agency v. New York*, 336 U.S. 106 (1949) (regulation of advertising on commercial vehicles); *Baxstrom v. Herold*, 383 U.S. 107 (1966) (procedure for involuntary hospitalization of the criminally insane).

Further, the lawyer's role in the process of judgment is one of exposing inconsistencies between purposes and means, a task for which he regards himself as exquisitely equipped, especially when called to the repair of concepts drafted by laymen.

Before we proceed, we should clarify the somewhat specialized sense in which we use the term "means." The reference is not to concrete machinery of enforcement such as policemen, silver nitrate, or school buildings. A legislative (or administrative) "means" is a *classification of persons* upon whom the law will operate. It is the legislative use of selected facts as a way of distinguishing one group of humans from another for an end the legislature has in mind. The chosen fact may be the ownership of something such as cows, pistols, or houses; it may be a personal quality such as race, age, or acuity of vision; it may be an act such as the possession of burglar tools; it may be location, profession, wealth, sex, size, intelligence or police record. Each of these chosen factual attributes separates its human referents as a group from everyone else, an effect which serves some legislative purpose—or must if it is to survive scrutiny.

#### A. *The Classical Analysis and Some Unclassic Cases*

Tussman and tenBroek pointed out in 1949 that the application of the classical approach involves comparisons of what are in fact two classifications:

[We] are really dealing with the relation of two classes to each other. The first class consists of all individuals possessing the defining Trait; the second class consists of all individuals possessing, or rather, tainted by, the Mischief at which the law aims. The former is the legislative classification; the latter is the class of those similarly situated with respect to the purposes of the law.<sup>58</sup>

Note that Trait corresponds to legislative "means" and Mischief to legislative "end."

The question of equal protection becomes one of the reasonableness of the relation to each other of these two classes—of the trait to the mischief, the means to the end.

There are five possible logical relations of these two classes—(Traits (T) and Mischief (M)).<sup>59</sup>

1. All T's are M's and all M's are T's
2. No T's are M's
3. All T's are M's, but some M's are not T's
4. All M's are T's, but some T's are not M's

58. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 347 (1949).

59. *Id.* This scheme is drawn nearly verbatim from Tussman and tenBroek.



5. Some T's are M's, some T's are not M's, and some M's are not T's.

Case #2 would of course be pure unreason and invalid—that is, the occurrence of the trait is *never* an occasion of the mischief. Case #1 represents perfect congruence and validity—that is, the occurrence of the trait is *always* an occasion of the mischief and *exhausts* all occasions of mischief. The others present problems of under-inclusion (Case #3), of over-inclusion (Case #4), and of both (Case #5). Under-inclusion might be exemplified by the regulation of milk farmers in counties over 50,000 in population in order to reduce tuberculosis. Over-inclusion might be seen in a regulation forbidding the keeping of any pet in order to reduce psittacosis. Both might be involved in a regulation of the sales of all implements with longer than six-inch blades in order to reduce crimes of violence. Some such implements are never so used; some implements so used are not included in the regulation.

In none of these problem cases does invalidity follow automatically. Rather, other considerations such as the difficulty or ease of administering a broader or narrower regulation would be taken into account. In the milk regulation example the fact that tuberculosis is spread by other media and that it thrives and wanes irrespective of county size may be relevant but hardly decisive. The creation of unintended side effects may also become crucial. Indeed, if the use of "T" and "M" and other abstractions suggest a picture of legal geometry, a look at a few cases will dispel the illusion that the "classical" approach can be captured in a formula.

A favorite example of the classical style is *Railway Express Agency v. New York*.<sup>60</sup> Here the city of New York by a traffic regulation had barred from its streets all vehicles carrying advertising on their sides, except those used to advertise the business of their owner. Railway Express, like many another transportation company, commonly rented advertising space on the exterior of its trucks to other businesses. This now was forbidden with very substantial economic effect. The apparent purpose of the regulation was to reduce dangerous distractions to pedestrians and to other drivers. REA protested that the exemption for self-advertising was a denial of equal protection to REA; considering the purpose of the regulation, there could be no rational justification for picking on one and not the other. Thus, said REA, the regulation had no reasonable relation to the traffic problem.

The Supreme Court made short work of the case in a unanimous judgment upholding the regulation. The Court's opinion accorded

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60. 336 U.S. 106 (1949).

enormous deference to the city authorities on the question of whether there was any difference between the two kinds of advertising in their relation to the danger:

The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that this is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants.<sup>61</sup>

Note that the Court would be content with the ordinance even if merely the *extent* of the forbidden advertising differed; the limit, if any, of that justifiable difference in extent is unexplored. Would a bare majority of the forbidden type be sufficient? If the balance altered, would the ordinance then lose its validity? Note also that the Court manifests little or no interest concerning the actual differences between the two types of advertising, in either their nature or extent, but is concerned only with what the local authorities might have concluded about such matters. The language leaves room for empirical demonstrations of the lack of relation of means to purpose, but not much.

The opinion in *Railway Express* further discouraged equal protection attacks with the following observation:

. . . the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eliminated or none at all.<sup>62</sup>

If this passage is intelligible, this is only because one is willing to assume that the Court perceived a standard for determining which differences amount to differences of "kind", "category" and "genus"—a standard which it failed to disclose. One can guess that the Court means no more than that the state may attack particular evils one step at a time—but what is a step?

In 1957 the Court used the classical approach to strike down an economic regulation—a rare application of the clause in recent times and one accomplished in a manner contrasting strongly with the *Railway Express* case. *Morey v. Doud*<sup>63</sup> involved an Illinois statute regulating currency exchanges but excepting by name from such regulation the American Express Company. The purpose of the

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61. *Id.* at 110.

62. *Id.*

63. 354 U.S. 457 (1957).

statute was "to protect the public when dealing with currency exchanges." The Court gave its standard endorsement to the ends/means formula saying that ". . . a statutory discrimination must be based on differences that are reasonably related to the purpose of the Act in which it is found." In this instance it viewed this relationship as "remote" (whatever that means) despite a demonstration by the State that American Express was a unique "world-wide enterprise of unquestioned solvency and high financial standing" and despite the Court's concession that exception by name is not by itself forbidden. It was somehow the conjunction of the two—*i.e.* (1) the alleged remoteness of the discrimination to the purpose and (2) the "creation of a closed class" by naming its object—that apparently was too much for the Court to abide.<sup>64</sup>

An example of ends/means analysis in the setting of a civil rights case is *Harper v. Virginia State Board of Elections*,<sup>65</sup> the 1966 poll tax case. Here the class of special legislative "trait" which disqualified an otherwise eligible voter was nonpayment of the tax. At least that was the superficial trait. The majority of the Court through Justice Douglas saw it as the subtle *de facto* classification of the voters by affluence. How the legislative "purpose" was perceived is not entirely clear, but the Court did refer to the widespread failure "to participate intelligently in the electoral process;" this was probably intended as a description of the evil aimed at by the legislature. Although the Court's approach was a medley of ideas—some inconsistent with the ends/means approach—it stated decisively that "voter qualifications have no relation to wealth nor to paying or not paying this or any other tax."

There are many other examples of the classical approach to be found in every corner and context of equal protection.<sup>66</sup> We are interested only in providing enough examples to permit us to demonstrate some genuine difficulties in this approach generally as well as in its specific application to the school finance issue.

### *B. The Trouble with the Classical Approach*

Of our objections to the classical approach the first concerns its incapacity either to explain or predict judicial actions. The three cases described above present a curious pattern in this respect. Of the three legislative "traits" involved, those that seem most intimately connected with legislative purpose are the ones found invalid. To suppose, as does the *Harper* opinion, that affluence has nothing to do with "intelligent participation in the electoral process" cannot be

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64. *Id.* at 469.

65. 383 U.S. 663 (1966).

66. See generally R. HARRIS, *THE QUEST FOR EQUALITY* (1960).

taken seriously. The problem is clearly the opposite—that affluence has far too much to do with intelligent participation. It is not treasonous to observe that those who pay taxes in general, and rich men in particular, form a class of better educated, better equipped political animals. That is precisely the trouble—it is not the lack of relation, but rather the super-relation between politics and wealth that offends democratic values.

The same is true of the Illinois currency exchange case, but there in a milder degree. That American Express was “in a class by itself” among the private entrepreneurs in this business is a simple fact. This logically should have supported the state; the relation of statutory class to the danger is patent. Perhaps what aroused the Court’s antipathy was not that there was no reason for the exception, but that the state was simply too blatant in naming it. Distinctions based upon total assets or some other sterile criterion which de facto would have included only American Express might have succeeded. Such a device at least would have palliated that vague sense of outrage humans experience when famous and mighty are selected for preference without at least a perfunctory test of their qualifications. There is something offensive about bestowing explicit privilege, even on the deserving, and it is especially irksome to those who would like to compete on equal terms for the perquisites of privilege. But, if this sense of injustice was decisive in *Morey v. Doud*, it surely was not a part of an intelligible ends/means approach, nor was it even consistent with such a rationale.

The New York traffic regulation falls the other way. Any suggestion of a relation between the class of self-advertisers and the class of traffic dangers from advertising on vehicles is nearly, if not actually, ludicrous. There may be other bases for the classification of course. It might be, as Bickel has suggested, simply a policy to favor owner-operated vehicles.<sup>67</sup> As such, is not the classification defensible as a means reasonably related to that purpose of discrimination in favor of such owners? Clearly yes, and if the congruence of ends and means is the only criterion of equal protection, that should be an end of the matter. This is true also of racial classifications, many of which represent a closer connection of means and purpose than did the New York regulations. If the legislative aim is white supremacy, segregation is a means well designed to effect it. The answer may be that certain purposes are simply not permitted the legislature, and that is quite so; our immediate question, however, is not how to slay each injustice but how to make sense out of equal protection. The classical approach to equal protection does not well explain the cases we have examined,

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67. A. BICKEL, THE LEAST DANGEROUS BRANCH 225 (1962).

primarily because we have the impression that the Court changes the rules without notice and smuggles in values other than those permitted by the theory. Although the rationale is cloaked in apparent disinterest, its neutrality barely survives the first step of its application. When the going is rough on an issue of classification upon which a majority of the Court has strong feelings, its tolerance for disparity between means and ends is necessarily a product of a rather personal judgment. How will that judgment be rendered except by individual estimates of the importance of the interests at stake, the state's administrative convenience, and perhaps other values to which each Justice must assign relative importance in an arbitrary and personal manner? Perhaps the classical approach acts as a governor upon the degree of over and under-inclusion, but its power to explain judicial behavior is extremely low, and, as a predictor, it is extremely unreliable. As a vehicle of communication to the state legislator who must respond, it utterly fails.

The second objection to the classical theory is its dependence upon a legislative purpose that is seldom plain. Now and then a clear statutory preamble is available to the Court, but where it is not, the search for purpose can become mere ascription by the Court of those legislative objectives which seem to assist a judgment already reached upon other grounds. We shortly shall illustrate how this approach might be employed quite easily to upset the legislative classifications in school finance structures. Conversely, such an approach can be used to validate the same legislation. Any ambiguous purpose can be construed by the Court so as to conform to the adopted means classifications. It was no trick for the Court in the *Railway Express* case to view the city's purpose to be limited to the supposed special hazards posed only by vehicles advertising for hire.<sup>68</sup>

Third, the classical approach loses all meaning as a coherent system for analysis of legislation in those instances where the legislature is clearly aware of the effects of legislation but leaves it unchanged. The most obvious cases of this kind involve four characteristics: (1) legislation of long standing, (2) which is not in

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68. The three-judge court in *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968) was less nimble. It actually described the Illinois system as ". . . designed to allow individual localities to determine their own tax burden according to the importance which they place upon public schools . . ." *Id.* at 333. If this description of purpose were accurate, then surely the chosen statutory mechanism would be invalid, for its true effect is nearly the opposite of that described by the court. Where wealth of districts varies, the tax burden is—almost by definition—unrelated to the importance accorded public schools, unless what the court had in mind was an inverse relation. The poorer must try harder to achieve equivalent results.

desuetude, (3) which is frequently reexamined (especially where appropriations are necessary), and (4) which produces a constant effect. Where such a constellation exists there obtains almost perfect congruity between purpose and classification, for the legislature constantly views and approves the effects of its work. Put another way, in the case of long-standing legislation, the only sensible test of legislative purpose is the empirical one; what the statute does in fact it is intended to do. Thus any application of the classical approach to such legislation seems either hopeless or disingenuous; the antagonist of the statute must depend rather upon some variation of the "fundamental rights" approach.<sup>69</sup> The legislation must be attacked in terms of the validity of the purpose itself or in terms of its effects and not upon the fit of the means to the purpose.

The financial structures of public education represent the classic example of a mature legislative system, long endured and thus obviously approved. The legislature clearly is getting what it wants. Thus to seek out a legislative purpose such as "providing equality of opportunity" or "maximizing potential" or "rationalizing expenditures" is fruitless.<sup>70</sup> The legislature intends the three effects it is getting:

1. A minimum education for all;
2. Better education for the children living in rich districts;
3. Higher sacrifice for poor districts, limited only to the extent equalization is provided.

It is possible to eschew this empirical view of purpose in long-standing legislation, but only at a cost. One can select among the various effects of any statute and argue that this or that effect is the *only* purpose the legislature has had over the years—that the other effects were merely uninvited consequences. For example, in the school problem, we might say that the legislature's sole purpose is a basic minimum of education for all. The legislation is achieving this (we would say); ergo the system is valid. Never mind the other hurtful consequences of the system; these are merely the inscrutable product of blind economic forces for which the state cannot be held responsible. Aside from its adoption of a purely subjective view of legislative intent, such a rationale has the weakness of excusing the legislature even in cases where the very "unintended" effects that the state concededly deplores could be avoided at the same time the

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69. See text accompanying notes 100-34 *infra*.

70. Obviously this objection diminishes where major structural revisions (however wrongheaded) have recently been effected, as in New York. See Part I *supra*.

legislature is achieving completely its claimed purpose.<sup>71</sup> At that point the judicial method becomes itself sufficiently arbitrary that the court forfeits all justification for judging the rationality of any system whatever.

Fourth, the invalidation of legislation merely as irrational can constitute the most trivial of judicial outcomes. Absent the silent insinuation of a substantive standard into its deliberations, the Court must view the evil as purely formal in character. In theory it would even permit legislative repair by a mere restatement of purpose to fit the observable effects.<sup>72</sup> While we have urged the wisdom of preserving wide legislative discretion, it is not inconsistent to hope that the Court at least would require the legislature to come to grips with the problem of educational finance on the substantive level.

Of course, no legislature is politically free to be candid about such a purpose. No state will reenact its system with an avowal of preference for rich districts. What is more likely is the obfuscation of the problem by the creation of a new structure for public education replete with new offices, new labels, and a complicated new formula destined to produce the old discriminations, and all this without any statement of legislative purpose whatsoever. For example, if the Illinois system<sup>73</sup> falls as an unconstitutional mismatch of means and ends, the legislature could well adopt the New York or Rhode Island<sup>74</sup> scheme without risk of injury to the rich districts; and there would be little point in the legislature stating its purpose for this new scheme. The total effect of such a reprise would be to present the Court with a new system to analyze in its purposes and its mechanisms. Observe—as the years between such decisions pass by—that the plaintiffs in these cases will not be prisoners who will have been freed when the old statute falls; they will be children who will continue to be cheated until the old statute is replaced with a fair system.

Further, so long as the Court does not deal with the substance—so long as it avoids stating a rule—it must stand ready to deal with the individual structures of each of the fifty states; there will be no generality in the decision that a particular state financing program is an irrational classification. There are significant formal,

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71. This weakness is not without constitutional relevance, as we shall note in our discussion of the cases involving "less onerous alternatives." See text accompanying notes 245-60 *infra*.

72. See Comment, *Rational Classification Problems in Financing State and Local Government*, 76 YALE L.J. 1206, 1212 (1968).

73. See text accompanying note 27, *supra*, and notes 94-95, *infra*.

74. See text accompanying notes 29-30 *supra*.

and even practical, differences between state systems. The mere demise of the Illinois statutes will not reform Rhode Island.

Fifth, it is not even clear why legislative purpose matters at all under the equal protection clause. What is it in the notion of "equal protection" that calls purpose into question in this fashion? Perhaps the answer is that some meaning must be given to the clause, that no other interpretation of the formula makes any better sense of the words than this, and that the end/means test is in itself a desirable limitation upon legislative power. So viewed, the classical approach is no less a tour de force than the forbidding of "invidious" classifications under the same clause. Neither approach is more than dimly implied (if at all) in the words "equal protection." But (we may say) the words must mean something, and perhaps the rationality test is as good as any. This is a hard saying to those made uneasy by open ended invitations to judicial review. We may point to similar invitations to judicial activism such as "due process," but this is little comfort if we seek intelligibility and (hence) limits. It is here that the "conservative" critics owe the Court some credit in terms of their own proclaimed standards of judicial behavior. Once they concede the radical unintelligibility of "equal protection," they should be grateful for any judicial limitations however factitious. It is mere irony that such limits can be forged only in those very acts of power for which the Court is upbraided. The only real benchmarks in equal protection theory are the "invidious" or "basic right" cases for which the Court is most criticized. It is the candid intrusion by the Court into specialized substantive areas which permits the articulation of such intelligible boundaries as one can discover. Outside of such demarcations all is darkness. To say that enforced separation by race is impermissible may be a bold thing. It is also a very limited—indeed almost precious—act considering the bullying and erratic judicial interference one can imagine under an activist Court addicted to an inscrutable ends/means rationale. Camus was correct—"The only real formalism is silence."<sup>75</sup>

A sixth and final objection to the classical approach lies in the special awkwardness of its application to state spending programs such as education, health, or public aid. Prior cases have asked why it is that X is regulated and Y is not; the *Railway Express* case and *Morey v. Doud* are examples. In the spending cases the question will not be one merely of inclusion but the harder question of more or less. *All* children receive a free public education; they *all* are

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75. A. CAMUS, *THE REBEL* 269 (Vintage Paperbound 1956).



compelled to attend. On that formal level of mere inclusion no equal protection problem is evident. The mirror begins to darken only when we commence to weigh the state's differential treatment of individuals realistically in a quantified comparison. This limitation of the means/ends approach is closely related to what may be a general, if vague, distinction between the examples, on the one hand, of programs of spending designed primarily to provide goods and services to persons in need of them and, on the other, of criminal or regulatory statutes imposing undesired restrictions. This distinction may be simplified as one between benefits bestowed upon and burdens imposed upon classes of persons. Regulatory and punitive (burden) classifications more readily can be specific in their purposes whether these be the eradication of tuberculosis, the prevention of theft, or the raising of a billion dollars. Contrast these with the purposes of education which are constantly debated by philosophers. The problem for which education is the corrective is the very humanity of the beneficiaries of the legislation. The evil is unfulfilled potential; in a sense the evil is evil. Thus, such a benefit classification in relation to its purposes may be seen as under-inclusive insofar as *all* men, simply as men, need done for them what education is supposed to do; on the other hand it may be viewed as over-inclusive insofar as some of the beneficiaries (the rich) don't need the state's aid to accomplish the end. But even more fundamentally, since the central issue is one of more or less, the very notion of inclusion may be largely irrelevant.

Considering these objections we may delude ourselves by undertaking seriously a classic purpose/means approach to the school finance problem. Nevertheless, we shall now outline briefly such an argument.

### *C. How the Classical Argument Might be Made*

Although there is a multitude of forms the classical approach could take in this case, the structure of the argument could be simple indeed once the Court characterizes the legislative purpose. Counsel for the child might describe that purpose as the provision of equal opportunity in public education for the development of the potential of every child who comes to the state to be formally educated. While such a purpose is nonexistent, it is the kind of fantasy which is difficult for the state to repudiate explicitly without thereby admitting the gross reality of the system. Instead, the state may concede the beneficent purpose but concentrate upon the identification of competing values and "practicalities" which frustrate full achievement of this central purpose. Presently we will enumerate a few of these.

Let us assume that the purpose of "equality of educational opportunity" is agreed to inform the system or that the court so holds. One crucial "trait" or class chosen as the legislative means to that objective is the school district. These creatures of the state are the delegates of the power and duty to provide the educational opportunity.<sup>76</sup> In their power to educate they are formally equal. In practical fact, however, they are grossly unequal in that power. Thus, it could be said, a uniform purpose has been rendered incapable of achievement by its delegation to a class of agents which is in reality no class at all in relation to the function assigned to it. The means are radically inappropriate to the legislative purpose, with the inevitable consequence of significant injury to those in whom resides the right to a rational relation of means and ends, namely the children who are its intended beneficiaries.

At that point a prima facie case of invalidity would be established. The state's response would be cast in terms of judicial tolerance for legislative imperfection; "some play must be allowed for the joints of the machine," and "the law does all that is needed when it does all that it can." Further, as the *Railway Express* case put it, "it is no requirement of equal protection that all evils of the same genus be eradicated or none at all."<sup>77</sup> We would expect the state to emphasize the administrative conveniences of the existing system, and its historical acceptance. The state's hope to experiment with "lighthouse" schools is a plausible makeweight; no doubt the existing system can be viewed as a grand experiment involving a variety of quality levels. The political impossibility of equality may also be trotted out, though its invocation by the state may backfire, since it bolsters the case for judicial intervention.<sup>78</sup>

The principal response to this otherwise plausible display is simply that all the same educational and administrative considerations

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76. We have not thought it necessary to elaborate the state action concept. The issue is trivial in this case, as the structure attacked is avowedly public. Of course one can identify important elements in the context which are non-public. The disparity in district wealth is the most obvious; this, it would be said by the state, is the "cause" of the problem, the state system being perfectly uniform and egalitarian—and quite irrelevant. The Court has shown no disposition to take such argument seriously. Its bent has been rather to expand than contract the concept. See *Reitman v. Mulkey*, 387 U.S. 369 (1967). The wisdom of this erosion of the non-public sanctuary is not our question of course; we merely observe that the school finance case requires no extensions of doctrine.

77. 336 U.S. at 110.

78. See text accompanying notes 51-53 *supra*. See also Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 349-50 (1949). Most of these considerations were offered as justification by the court in *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968) under the mistaken assumption that any relief to the plaintiffs would jeopardize local control and experimentation.

offered as justification for the inequalities could be satisfied under a number of alternative systems which would not frustrate the general purpose to provide equal opportunity. In other words the state has neglected "less onerous alternatives"<sup>79</sup> which would permit lighthouse and experimental education and a wide variety of financing mechanisms based upon local or even individual choice. We have already suggested some of them. There is no predicting how the Court would come out under such an argument from the classical rationale. Bickel has called the approach a "mirage,"<sup>80</sup> and such it is. Nevertheless, it is a mirage that occasionally produces springs of pure water. The problem is not that mirages are not effective, but that they are not to be trusted, nor even to be understood. Candor and predictability are not the only constitutional values, but they are values, and they are peculiarly weighty in those cases where the Court can expect sophisticated legislative responses to its mandate. The purpose/means approach is available to the Court, but is unlikely to be used unless a majority wishes to finesse the real problem which is that of discrimination by wealth.<sup>81</sup> The invalidation of state systems by a rationale of this purely formal character would invite legislative hypocrisy; it would not necessarily evoke (since it would not seek) legislative reform on the level of substance. Ultimately the Court would have to deal with the substance. There may be reasons for waiting, but there are millions of reasons for not waiting—and they are children.

The rest of this Article is given over to consideration of the alternative judicial method and its relevance for the establishment of the specific principle that wealth shall not determine quality in public education—the principle we have styled "Proposition I."

#### IV

##### PROPOSITION I AS A CONSTITUTIONAL STANDARD

So far the litigation and literature on the school finance issue have produced a number of proposed formulations for a fourteenth

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79. For a fuller exposition of this concept see text accompany notes 245-60 *infra*.

80. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 221 (1962).

81. However, if the sympathies of Justices Harlan, Stewart, and Black are to be aroused, this is likely to be the only rationale for invalidation which is consistent with their approaches to equal protection. See their dissents in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670, 680 (1966). *But cf.* the majority opinion of Justice Black in *Williams v. Rhodes*, 393 U.S. 23 (1968), and that of Justice Stewart in *Carrington v. Rash*, 380 U.S. 89 (1965). Even if the Court voids the existing systems, it will not be surprising if no majority opinion is possible, at least in the first cases.

amendment duty of the state to treat education as a "fundamental right." To call these proposals exotic is scarcely to do justice to the uninhibited imagination of their authors. The proffered formulas range in their ambitions from a humdrum "one kid-one buck" levelism<sup>82</sup> to the vaulting ecstasies of a duty to spend for each child what is needed to equalize everyone's achievement.<sup>83</sup> Consider, for example, the complaint before the Supreme Court in *McInnis v. Ogilvie* which argued denial of equal protection in the following respects:

a. . . . classifications upon which students will receive the benefits of a certain level of per pupil educational expenditures are not related to the educational needs of these students and are therefore arbitrary, capricious and unreasonable;

b. . . . the method of financing public education fails to consider . . . (ii) the added costs necessary to educate those children from

82. This expression does not appear in the literature; it is contemporary argot for the kind of minimal outcome tolerable to some reformers.

83. Complaint in *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968). Among the other tests which have been suggested so far are the following:

1. "[T]he pertinent question for the court is whether everyone has an equal share of the goods, measured according to need." Kirp, *The Constitutional Dimensions of Equal Educational Opportunity*, 38 HARV. EDUC. REV. 635, 642 (1968).

2. "The Act . . . is . . . repugnant to the equal protection clause . . . in the following respects:

14.4 The Act . . . fails to take into account . . . the added costs incurred in providing substantially equal educational opportunity to those children . . . who lack the preschool background and extracurricular educational experiences enjoyed by most of the children . . ." Complaint in *Board of Educ. v. Michigan*, General Civil Action No. 103342 (Cir. Ct. Mich., Wayne County, filed Feb. 2, 1968).

3. "Equality of educational opportunity exists when a child's educational opportunity does not depend upon either his parents' economic circumstances or his location within the state." A. WISE, *RICH SCHOOLS, POOR SCHOOLS—THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY* 146 (1969). (Wise offers and analyzes ten possible definitions of the concept; unfortunately, he neglects Proposition I. See Wise, *supra*, at 148-68).

4. "The absence of equal educational opportunity within a state, as evidenced by unequal per pupil expenditures, may constitute a denial . . . of the equal protection, etc. . . ." A. WISE, *THE CONSTITUTION AND EQUALITY: WEALTH, GEOGRAPHY, AND EDUCATIONAL OPPORTUNITY* (doctoral thesis, University of Chicago Library 1967).

5. "[G]eographical considerations should be eliminated as a basis for pupil assignment where the result is loss of equality measured either in terms of money or total educational program." McKay, *Defining the Limits*, in *THE QUALITY OF INEQUALITY: SUBURBAN AND URBAN PUBLIC SCHOOLS*, *supra* note 2, at 72, 80.

6. "[A] school district is constitutionally required to provide the best possible equality of opportunity. . . ." Comment, *Equality of Educational Opportunity: Are "Compensatory" Programs Constitutionally Required?*, 42 S. CAL. L. REV. 146, 150 (1969).

culturally and economically deprived areas (iii) the variety of educational needs of the several public school districts of the State of Illinois . . .

c. . . . the method of financing public education fails to provide to each child an equal opportunity for an education . . . .

In this baroque company Proposition I is clearly a country cousin; nevertheless it may have its charms for a court with a lingering fondness for judicial restraint and a hope to be understood by its clientele. Here we will examine some of its advantages and weaknesses.

For clarity's sake it may be well to repeat the formula:

*PROPOSITION I*

*The quality of public education may not be a function of wealth other than the wealth of the state as a whole.*

*A. Modesty, Clarity, Flexibility and Relative Simplicity*

This principle embodies the indispensable political quality of flexibility. Within its expansive boundaries there is ample room for the harmonization of equality and subsidiarity through a power equalizing system—that is, if the legislature prefers it that way. In fact, adoption of this standard would validate most of the existing structure, including the use of school districts as a locus of decision concerning the quality of education. If, on the other hand, the legislature wishes to emphasize equality in the sense of uniformity, that choice may be given expression in a wholly centralized system, and subsidiarity may be permitted to disappear. In either case, majoritarian politics—far from being stultified by the Court—necessarily would be invoked. The political processes of each state would give expression to the interests at stake disposing them over a broad spectrum of alternatives.

Nothing, indeed, is foreclosed except the linking of quality and wealth. The state, if it wishes, may opt for centralization; it may experiment boldly with family equalizing; it may leave the districts intact, or it may abolish public education altogether. Some states may wish to rationalize spending according to need and/or promise. Others may employ one system at one level, another at others. We can imagine full equality of spending or a power equalized model from kindergarten to third grade with expenditure according to need or promise thereafter (or vice versa).<sup>84</sup> The one predictable feature of the future structure under this proposal is its unpredictability. Freed

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84. See text accompanying notes 38-40 *supra*.

of the historic domination by haphazard affluence, each of the fifty state systems would be at liberty to adjust itself to a new equilibrium determined by its own unique conditions and interests. Proposition I is a liberating, not a restrictive, political principle.

Proposition I also satisfies the criterion of simplicity, at least in its application to existing systems. A mere examination of public records regarding assessed valuation, tax rates, and sources and amounts of district revenue—indeed an examination of the face of the statutes—ordinarily is sufficient to reveal whether the state permits offering to vary by assessed wealth of its districts; if it does, the principle is clearly offended.

Suppose, however, that the present system is replaced by one which either totally centralizes the funding of schools or one in which school district tax-raising power per pupil is equalized in the sense that a given local school rate results everywhere in the same number of spendable dollars per pupil. Questions of two kinds might yet arise as to whether the state has produced a wealth-free system. The first relates to differentials in the cost of buying education. Must the state adjust for those objective economic variations among districts which render the same dollars inadequate to purchase the same offering; in short, what of differences in the cost of the same educational services from district to district? Consider, for example, the added costs of student transportation in certain areas or the common variations in price for the same services or goods. Perhaps an adjustment for such objective cost differences should be required by the principle that wealth shall not determine quality, necessitating minor refinement of our original definitions to account for them.<sup>85</sup> Such factors represent extra costs of furnishing to the child of that district the same objective school experience available for less elsewhere. They increase in a quantifiable way the task assigned to the district and are closely analogous to an increase in student population which would entitle the district to increased funds. Because such adjustments are relatively easy to make, they probably should be required by the court where their magnitude has been shown with precision. We resist any temptation, however, to push this analogy to the point of requiring an additional dollar adjustment for the cultural disadvantage of

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85. The same is true of claims of overassessment of the property of one's own district and underassessment of others. For a good general appraisal of the social and economic effects of the administration of the property tax see D. NETZER, *ECONOMICS OF THE PROPERTY TAX* (1966). See also *Joint Economic Committee Congress of the United States, Impact of the Property Tax: Its Economic Implication for Urban Problems*, H.R. No. 91-142, 90th Cong., 2d Sess. (1968).

students.<sup>86</sup> We are concerned to reach through the constitution only those measurable economic disadvantages *the state itself has created* in its employment of particular administrative and financing mechanisms.<sup>87</sup> The line between the two can be and is kept reasonably clear by Proposition I.

The second potential complexity would appear in the event the state adopts a power equalized district system. This is the problem of "municipal overburden." We speak here of the effect of claims upon the city-dwelling taxpayer for the support of police, fire protection, welfare programs, etc., the magnitude of which are thought by some to be unique to the city. If unaccounted for, these extra competing needs may reduce the ability of the city resident and of his district to make the effort they otherwise would for education.<sup>88</sup>

Whether the effect of municipal overburden on educational spending should be considered by a court or a legislature is an issue with possible vitality, but whether it should be considered a constitutional problem under Proposition I is by definition not an issue at all.<sup>89</sup> When Proposition I refers to "wealth," it refers to assessed valuation per pupil, because it is by deliberate and specific employment of variations in this kind of wealth that the state has decreed unequal schools for the poor districts. An area may be "city poor" (either because of high costs, low wealth, or both in combination), and this condition may affect school spending, but the *cause* is by definition outside the system of public school finance. The objection to the present dispensation expressed in Proposition I is that the very system for raising money for public education is itself designed to create differences in school quality; it need not, and does not, follow that there is a constitutional objection to every human condition, or even every act of the state, which has a similar effect.

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86. The state would be *permitted* to adjust for cultural disadvantages as a matter of legislative judgment. See text accompanying notes 98-99 *infra*.

87. Perhaps one can imagine a duty to compensate for the state-inflicted injuries of children who have been the *past* victims of the systematic violation of Proposition I. The problem is specifying the victim and the quantum of injury. Is he every child in every district below the richest? Are dollars the measure? Is the tax rate in the child's district relevant? Retroactive application of the principle is not likely, nor does it seem wise.

88. See J. BURKHEAD, STATE AND LOCAL TAXES FOR EDUCATION (1963); Lindman, *School Support and Municipal Government Costs*, in LONG RANGE PLANNING IN SCHOOL FINANCE (Committee on Education Finance, Nat'l Educ. Assoc., 1962); Mort, *Unique Problems of Financing Education in Big Cities*, in FINANCING THE CHANGING SCHOOL PROGRAM (Committee on Educational Finance, Nat'l Educ. Assoc., 1962); J. POLLEY, VARIATIONS IN IMPACT OF MUNICIPAL GOVERNMENT ON ABILITY TO SUPPORT SCHOOLS (New York State Educ. Conference Board, Staff Study #3; Albany 1961).

89. The issue is discussed in great detail in COONS, CLUNE & SUGARMAN, *supra* note 11.

This is much more than a matter of arbitrary definition of "wealth." Municipal overburden is merely a special case of the general problem of marginal utilities—the effect of spending fixed amounts from varying incomes.<sup>90</sup> Any expenditure—public or private, whether for Chevrolets or police, if made against varying incomes may selectively reduce capacity and willingness to spend elsewhere, *e.g.*, on schools. In order to eliminate completely the *source* of all marginal utility effects on educational spending, one would have to redistribute all costs and equalize all wealth. This could be done selectively, of course; for example, wealth variations of municipal governments could be eliminated by full power equalization or centralization of municipal services. But, the result would be merely to remove one more source of "outside" pressure on school spending; to remove all such influences it would be necessary to redistribute wealth completely. Proposition I seeks the redistribution of economic power only for the support of public education.

But, if the *source* of the problem is out of reach, pragmatically much less may be required, at least if our aim is merely to eliminate the *effect* of that source upon the taxing behavior of school districts. Given that limited purpose, the ideal system would display a distribution of taxing choices which is random with respect to wealth (in its broader sense). A very minor adjustment in the formula well may stimulate such a result, causing the districts bearing marginal burdens to behave as if they had none.<sup>91</sup> The judgment which must calculate the amount of such aid is prime material for the legislature—pragmatic, experimental, policy-oriented.<sup>92</sup> This is not the game for judges.

To sum up, Proposition I is tempered to the needs of the situation and to the demands of the judicial role.<sup>93</sup> It does not grandly insist that children be treated differently because of their biological, cultural, or intellectual differences. It does not require that they be

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90. *Id.* at Chapter 6.

91. New York employs a device which is crude but could be effective for this purpose. It involves a formula for "size corrections of additional costs arising either from sparsity or density of population . . ." N.Y. CONSOL. LAWS ANN. § 3602(8) (McKinney's Supp. 1968). See Mort, *Unification of Fiscal Policy in New York State*, in PERSPECTIVES ON THE ECONOMICS OF EDUCATION (C. Benson ed. 1963).

92. See the federal legislation contained in 20 U.S.C. §§ 236-244 (Supp. 1967) providing financial relief to school districts for such sophisticated impacts from federal activity as (1) the loss of local tax revenue from federal land acquisitions, (2) increased attendance attributable to families living and working on federal property, (3) increased attendance from the families of persons employed by federal contractors.

93. See text accompanying notes 42-56 *supra*.



treated uniformly because of their sameness. It insists only that they be treated fairly in the choice of economic mechanisms by which their public education is supported. We are well content with a constitutional meaning for "equality of opportunity" that can be understood and then can be applied to the grosser objective aberrations of the existing systems—those springing from that measure of wealth chosen by the state itself to determine educational quality. The Supreme Court seems likely to share this modesty and to prefer to leave the proper distinctions between children to be drawn by legislatures and administrators. Nothing disturbed the district judges in *McInnis v. Shapiro*,<sup>94</sup> so much as the employment by the plaintiff of a "needs" standard. The three-judge Court went so far as to hold that:

Even if the Fourteenth Amendment required that expenditures be made only on the basis of pupils' educational needs, this controversy would be nonjusticiable . . . [T]here are no 'discoverable and manageable standards' by which a court can determine when the Constitution is satisfied and when it is violated.

The only possible standard is the rigid assumption that each pupil must receive the same dollar expenditure . . .<sup>95</sup>

The error represented by the last sentence is probably traceable to the plaintiff's emphasis upon a "needs" criterion. The Court simply never grasped the opportunity for simplicity, clarity and flexibility represented by the no-wealth principle. Whether on plenary consideration the Supreme Court could have penetrated the confusion is anyone's guess, but it is not difficult to appreciate its refusal to try.

All our claims of minimalism and simplicity, however, are not intended to conceal the fact that the standard offered here is relatively ambitious when compared, for example, with a mere declaration of

94. 293 F. Supp. 327 (N.D. Ill. 1968).

95. 293 F. Supp. at 335. The quote within the quote is from *Reynolds v. Sims*, 377 U.S. 533, 557 (1964). The emphasis that the district court put upon the imagined dilemma between the needs standard asserted by plaintiffs and an equal dollars standard provides a ground for limiting even the technical meaning of the affirmance by the Supreme Court. *McInnis v. Ogilvie*, \_\_\_ U.S. \_\_\_ (1969). The holding of the district court can be limited to an absence of a fourteenth amendment right *of the character asserted by the plaintiffs*. The district court opinion lends plausibility to this by the summation it gives of its own holding. After concluding that it had jurisdiction the court stated: "[W]e further concluded that no 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 pupils' educational needs, and (2) the lack of judicially manageable standards . . . ." 293 F. Supp. 329.

The court thereafter repeatedly referred to the right to spending according to needs as the only claim asserted by plaintiffs. 293 F. Supp. at 329, 331, 335, 336. It concludes with the language quoted in the text.

invalidity such as would come from an approach testing only the "rationality" of a state program. Proposition I may be restrained, but it does have a quality of definiteness of form that would eliminate certain kinds of state response.<sup>96</sup> Its very explicitness will require more art in its pursuit through litigation than would the simple invalidating of the present systems under an "irrational classification" approach.<sup>97</sup> Invalidity is not enough; absolute equality or the duty to compensate would be too much—each is too vague. What is needed is a strategy which will produce a judicial adoption of Proposition I at the end of the litigation. We will turn to this after a brief note on the relation of the proffered standard to the need for compensatory education.

*B. A Note on the Relation of Proposition I to Compensatory Education and the Federal Role.*

The constitutional standard supported in this essay neither commands nor forbids compensatory spending either in the sense of restitution for past discrimination by the state or in the sense of preferential treatment to overcome cultural disadvantage. Assuming the adoption of the no-wealth standard, the extent to which the states and the federal government will augment existing "compensatory" programs is unpredictable; our own preference is strongly for a powerful legislative program of compensation and experimentation from both levels of government. This is not the place to argue such policy questions in detail; but the reader's perspective may be assisted by a few bare assertions of fact and opinion that will be defended elsewhere.<sup>98</sup> First, it is absurd to speak of "compensatory" education so long as the alleged beneficiaries of that compensation lack even equality (in any sense of that term). Second, the current federal and state programs are a hodge-podge and will remain so until there exists in each state an underlying system based upon fiscal equity (in any sense of that term). Third, the existing federal programs are probably worse than nothing; at best they merely reduce the pressure upon the states to put their own houses in order, and, at worst, actually increase the disparities arising from variation in wealth.<sup>99</sup> Fourth, the proper federal role is an ancillary one designed to encourage experimentation and to help where educational need (and local effort)

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96. See text accompanying notes 72-74 *supra*.

97. See text accompanying notes 57-81 *supra*.

98. See COONS, CLUNE & SUGARMAN, note 11 *supra*.

99. This is confirmed by A. THOMAS, SCHOOL FINANCE AND EDUCATIONAL OPPORTUNITY IN MICHIGAN 204 (1968).

are greatest; this includes the reduction of disparities among states of varying wealth as well as compensatory spending according to the needs of individual children.

V

VIEWING THE SUBSTANCE: THE INNER CIRCLE OF EQUAL PROTECTION

*A. Judicial Scrutiny of Legislative Purpose in Special Circumstances*

The best hope for Proposition 1 lies in the demonstrated willingness of the Supreme Court to carve out from among the populous herd of equal protection issues seeking its attention an inner circle of cases singled out upon substantive grounds for special scrutiny. Such a process of differentiation and ordering among equalities is at least as old as *Strauder v. West Virginia*,<sup>100</sup> and the race cases still stand in the bullseye of the inner circle as the archetype of the special or "invidious discrimination."<sup>101</sup> Hovering about this racial nucleus, like electrons in an atomic model, are specimens of discrimination ranging from dilution of the franchise,<sup>102</sup> to discrimination by wealth.<sup>103</sup> The decisions are relatively few in number, and the rules they establish are fewer yet. Within this area the Court has not been content merely to review the fit of the legislature's purpose to the means chosen for its effectuation.<sup>104</sup> Instead it has sat in candid judgment upon the very purpose and, even more often, upon the objective effects of legislation.<sup>105</sup> Here, in the inner sanctum of equal protection, we see how the fourteenth amendment "may embody a particular value in addition to rationality."<sup>106</sup> The sculptor of transcendent values, of course, is the Court.

If the present population of the inner circle is small, there will be other candidates for admission. Discrimination in prosecution,<sup>107</sup>

100. 100 U.S. 303 (1880) (statutory exclusion of Negroes from juries).

101. The term was first used in *Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886).

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

103. *Griffin v. Illinois*, 351 U.S. 12 (1956).

104. See *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949).

105. See, e.g., *Douglas v. California*, 372 U.S. 353, 357 (1963): "The present case . . . shows that the discrimination is not between 'possibly good and obviously bad cases,' but between cases where the rich man can require the court to listen to argument of counsel . . . but a poor man cannot."

106. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 682 n.3 (1966) (dissenting opinion of Harlan, J.).

107. See Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103 (1961).

bail,<sup>108</sup> sentencing,<sup>109</sup> and public aid<sup>110</sup> are the current possibilities. They may well mark the outermost perimeter, at least for our generation; however, no obvious theoretical limits to the elasticity of the circle have yet developed. One of the challenges to the Court and its acolytes is the fashioning of criteria for selection of the insiders and outsiders. That task is too formidable for us here and exceeds our purpose. In the following pages we will be content to show that financial discrimination in education is easily digestible within the more obvious lines already drawn by the Court. Of course, in doing so we cannot help but suggest some perspective of our own on the problem of the boundaries, if any, of the concept of special cases—on the problem, that is, of what makes them special. We will also express our relative confidence that the development of this approach to equal protection poses no unmanageable hazard to proper judicial administration.

One might at first suppose that the sole common characteristic of these special cases is their substantive importance and that sheer magnitude explains their power to evoke reactions of anguish from critics.<sup>111</sup> The Supreme Court has used the equal protection clause to undergird several of the most significant judgments in its history. This very determination to engage significant issues is itself one of the reasons to expect the Court's serious attention to educational finance.

Yet magnitude of outcome is scarcely the sole criterion for the Court's special handling of a case, nor is it even a necessary one. The provision of a transcript to an indigent appellant in *Griffin v. Illinois*<sup>112</sup> did not amount to a procedural earthquake, and one may even view *Harper v. Virginia*<sup>113</sup> as relatively trivial. Snuffing the life of the moribund poll tax was little more than euthansia. Something in

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108. See Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 1125, 1151-64 (1965).

109. Here there are two general questions; the first is the validity of the alternative sentence—fine or jail—as imposed upon the indigent. As to this, see Note, *The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines*, 64 MICH. L. REV. 938 (1966). The second issue is that of simple disparity in severity in indistinguishable cases. This question seems considerably more difficult to handle because of the need for wide discretion. It has received widespread attention as a policy matter, but little or none as an equal protection problem. See Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453 (1960).

110. Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84 (1967).

111. Kurland, *Equal in Origin and Equal in Title to the Legislative and Executive Branches of Government*, 78 HARV. L. REV. 143 (1964).

112. 351 U.S. 12 (1956).

113. 383 U.S. 663 (1966).

addition to the proportions of the discrimination must be operating. Mr. Justice Black worries that the fundamental criterion of judicial action here is the personal dislike of five judges for the state policy at issue. He sees and fears a return to "the 'natural law due process formula' under which courts make the Constitution mean what they think it should at a given time . . ." <sup>114</sup>—a form of activism once indulged with unhappy consequence under the due process clause. Justice Black does not cry in the wilderness; the chorus of dissent is formidable, and is closely identified with the "neutrality" school of constitutional jurisprudence.<sup>115</sup> A persistent theme of these critics is the alleged particularism of the Court's approach in these special cases in the equal protection field.

### B. *Qualifying for the Inner Circle: Fact and Interest Considerations*

To show what the Court is doing and to view this criticism in perspective a simple classification of the factors operative in these cases will be helpful. These factors fall into two distinct types. First, as in any equal protection case, the Court is concerned with the *classifying fact*.<sup>116</sup> This is inevitably a fact attributable in one way or another to an individual—some personal characteristic. It need not be a fact that the legislature intended as the defining characteristic of the class; it may be merely a *de facto* classification, as was the fact of relative wealth in the criminal procedure and poll tax cases.<sup>117</sup> The facts which have played a role in these special cases so far are race,<sup>118</sup> relative wealth,<sup>119</sup> and—arguably—residence.<sup>120</sup>

Second, unlike the classical approach which focuses upon legislative purpose, the cases in the inner circle tend to fasten upon certain *interests* to whose enjoyment the factual classification is relevant. The special interests so far identifiable in the decisions are voting, (or, more broadly, political activity), and fair criminal procedure.<sup>121</sup>

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114. *Id.* at 667 (dissenting opinion). *But cf.* Black's own opinion in *Williams v. Rhodes*, 393 U.S. 23 (1968).

115. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Kurland, *supra* note 111.

116. See text accompanying notes 57-59 *supra*.

117. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Griffin v. Illinois*, 351 U.S. 12 (1956).

118. See text accompanying notes 146-55 *infra*.

119. See text accompanying notes 156-83 *infra*.

120. See text accompanying notes 135-45 *infra*. Membership in a political organization is a plausible addition, though the Court's special attention there seems more attributable to the interest at stake. See *Williams v. Rhodes*, 393 U.S. 23 (1968).

121. See text accompanying notes 159-83 *infra*.

While the Court accords special attention to the classifying facts of race and wealth, observe that "special attention" is not equivalent to either favor or disfavor. That a fact is disfavored as a basis for one legislative classification does not mean necessarily that it will be disfavored as the basis for another. Whether it will be favored, disfavored, or ignored depends in varying degrees upon the interest which the classification affects. To classify by wealth for voting purposes is now forbidden;<sup>122</sup> to classify by wealth for progressive taxation is—to say the least—approved. To classify by race with respect to the marriage interest is forbidden;<sup>123</sup> to do so to promote school integration may well be valid.<sup>124</sup> Thus the relative potency of the fact/interest combination in its effect upon legislation may be rather different depending upon which fact is used and which interest is at stake.

But to say this is not to say that the process is utterly amorphous. In fact most lines of decision are rather clear. For example, racial classifications are clearly disapproved where used to segregate, no matter how trivial the interest at stake.<sup>125</sup> This, by the way, is important for present purposes, for it means that the race cases can be largely ignored in evaluating which interests will be preferred. The presence of a racial classification overwhelms whatever influence otherwise might have been manifested by the particular interest at stake. Thus, as we shall develop, the race cases have little to say about a special constitutional status for the interest in education.<sup>126</sup>

Conversely, the Court's quite different handling of the classifying fact of relative wealth clearly implies the importance of the two interests that so far have received special protection. In those decisions involving relative wealth as the classifying fact, except where that fact has been combined with either the voting interest or the interest in fair criminal process,<sup>127</sup> it has shown no capacity to move the Court. This limitation recently was challenged without success in

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122. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

123. *Loving v. Virginia*, 388 U.S. 1 (1967).

124. See Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 *Nw. U.L. Rev.* 363 (1966).

125. Perhaps this should be qualified where the competing interest is prison security. See *Lee v. Washington*, 390 U.S. 333 (1968). For a catalog of such specialized cases see W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW, CASES—COMMENTS—QUESTIONS*, 1239-40 (1967).

126. See text accompanying notes 204-24 *infra*.

127. *E.g.*, *Griffin v. Illinois*, 351 U.S. 12 (1956).

*Williams v. Shaffer*.<sup>128</sup> There a Georgia tenant put at issue the right of the landlord to use a summary eviction statute which, in order to leave the tenant in possession and obtain a trial, required the tenant to "tender a bond with good security." The security required was double the rent for six months, and the tenant was indigent. As a consequence the tenant received no hearing and was summarily evicted. Over the dissents of three justices the United States Supreme Court denied certiorari. Justice Douglas' dissent complained specifically of the limitation of the line of "poverty" cases to the criminal process.<sup>129</sup> Conceding the hazardous nature of all inferences drawn from denials of certiorari, the message of *Williams* may be the reaffirmation by the Court of the special status of the interest in fair criminal procedure.<sup>130</sup>

The same is true of the voting interest which, when combined with the fact of relative wealth, voided the poll tax. In fact the special character of the voting interest seems quite independent of any combination of that interest with wealth classifications. In the *Reapportionment* cases and in *Carrington v. Rash*<sup>131</sup> the Court demonstrated a capacity to invalidate even commonly used and seemingly inoffensive classifying facts such as military status and residence.

Summarizing, it is plain that the interest in fair criminal procedure and the voting interest are objects of special favor under the equal protection clause and are the only interests so treated thus far. When either of such interests is combined with and affected by a classification based upon the fact of wealth, the insecurity of the state action is magnified. Of course any classification—by wealth or otherwise—that results in the differential weighting of votes is forbidden. Finally, classification by race for segregation is almost universally forbidden irrespective of the interest at stake. This package of propositions is fairly modest and is reasonably clear in meaning and scope.

We concede, of course, that the number of classifying facts other than race and wealth that could be accorded special status is potentially infinite. Classification by redheadedness, Irishness, party and accent each would be just as suspect, just as invidious, as race or

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128. 385 U.S. 1037 (1967).

129. *Id.* at 1039-40.

130. The outrageous character of the Georgia procedure reinforces this view. See Note, *Poverty and Equal Access to the Courts: The Constitutionality of Summary Dispossession in Georgia*, 20 STAN. L. REV. 766 (1968).

131. 380 U.S. 89 (1965). In addition, see text accompanying notes 137, 144, 168-71 *infra*.

wealth, if but one assumption is permitted. Merely let them become a common basis for classification for purposes of bestowing benefits or imposing burdens and the Court will begin, bit by bit, to draw the victims into the warmth of the inner circle. In first amendment cases a similar process is sometimes described as the creation of "preferred freedoms."<sup>132</sup> In equal protection cases it would be more accurate to label it the identification of preferred persons—"preferred" in the inverted sense of receiving special attention from the Court in order to maintain their very equality. For equal protection purposes the characterization of the person affected often may prove more important than the specification of the right.

This potential for growth in the ranks of the special facts is true also of the special interests. Indeed our next step shall be to examine the credentials of the interest in public education as a candidate for such treatment, at least when that interest is conjoined with the two classifying facts of relative wealth of the district and the tender age of the victims. Perhaps it is obvious by now that all governmental services are potential aspirants for "special" protection. This risk of overkill we style "The Equal Sewer Problem" and deal with somewhat later.<sup>133</sup> Not surprisingly we find it possible to distinguish sewers from education for purposes of equal protection. Other public services present somewhat greater difficulty.

In justifying this special status for the educational interest, arguments of the most simplistic order, but with a superficial appeal, can be assembled from the race, voting, and wealth cases.<sup>134</sup> In the next two sections we shall indicate how such arguments might be cast; it shall be demonstrated that the cases, while suggestive, are an inadequate base for invalidating school finance structures.

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132. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182 (1959).

133. See text accompanying notes 228-32 *infra*.

134. See, e.g., A. WISE, *supra* note 2, at 167, which contains the following "three tentative arguments:"

1. Discrimination in education on account of race is unconstitutional. Discrimination in criminal proceedings on account of poverty is unconstitutional. Therefore, discrimination in education on account of poverty is unconstitutional.

2. Discrimination in education on account of race is unconstitutional. Discrimination in legislative apportionment on account of geography is unconstitutional. Therefore, discrimination in education on account of geography is unconstitutional.

3. Discrimination in education on account of race is unconstitutional. Discrimination in voting on account of poverty is unconstitutional. Therefore, discrimination in education on account of poverty is unconstitutional.

For a similar "simple" argument see Kurland, *supra* note 10, at 583, 584-89. Kurland's argument is (we think) intended as a *reductio ad absurdum*. At least, as he has stated it (citing



## VI

## PROPOSITION I AND THE CONSTITUTION: THE PLACE AND RACE CASES

*A. Place: The Reapportionment Decisions and Other Encounters with Pied Public Policy*

The problem of education finance may be viewed from what might be styled a horizontal perspective. The inequalities may be seen as inhabiting a flat geographic world, with a map of the state's districts in various shades of green representing levels of assessed valuation per pupil. This two-dimensional image possesses the advantage of simplicity in demonstrating the effects of a pied public policy on whatever subject.

The *Reapportionment* cases established the invalidity of such a policy when it results in weighing votes by residence; they are an arsenal of dicta suggesting vaguely that discrimination by geography is constitutionally suspect.<sup>135</sup> Consider their easy application to discrimination in school finance. If a man's address ought not determine the weight of his vote, should it not also be impermissible that his address dilute the quality of public education available to him? Indeed the case is a fortiori; no one is compelled to vote, but the child is subject to compulsion in education. Further, in a free society education is intrinsically as important as voting (we would say—later we shall say it seriously),<sup>136</sup> and the geographical discrimination is, thus, on all grounds, at least as invidious as malapportionment of the franchise. As arguments go, this one is hard to outimplify. However, despite this important virtue, it is pretty clearly wrong.

First, of all, the *Reapportionment* cases held nothing which is inconsistent with the use of geographical classification by the state either for administration of elections or anything else. Indeed, the whole point of the cases is that such devices be used but used properly. Elections at large were not a policy goal of the Supreme Court. They were merely consistent with the one point the Court had in mind, a point which turned out to be utterly simple—one-man, one-

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Wise), the rationale—if not absurd—is grossly unbalanced. This is partly because it fails to perceive the possibility of a feasible standard, but even more because it is not anchored in an understanding of the nature of school financing. It is, like the Wise rationale, a form of free floating logic pulled together from scattered wisps of Supreme Court dicta and showing little organic connection to the facts. Unfortunately, this form of argumentation seems to have been offered to the three-judge court in *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968).

135. See, e.g., *W.M.C.A., Inc. v. Lomenzo*, 377 U.S. 633, 653 (1964); *Reynolds v. Sims*, 377 U.S. 533, 567, 580 (1964).

136. See text accompanying notes 177-82 *infra*.

vote. But there were and are a multitude of geographical districting techniques consistent with that holding. Indeed, as a curative the old districts could have been retained and the representation adjusted to equalize the weighting. It was not geography that bothered the Court; it was the fact of differential weighting, a state of affairs which would have been no less invidious if the voters were grouped not by geography but alphabetically or according to their height. No matter what the classifying fact, if the votes are weighted, the system is void. Thus, the cases do not suggest that the use of geography as a factual classification in itself gives any cause whatsoever for unusual judicial scrutiny, although the mere presence of the voting interest does.<sup>137</sup>

Geography is ordinarily a perfectly rational basis upon which to administer the provision of state benefits or the imposition of state burdens—indeed it is sometimes the only way. Examples are legion. The location of the state capital must be relatively inconvenient to the political representatives of large numbers of state citizens, just as a single state university must be relatively inconvenient to a majority of students. But even burdens and benefits which could be geographically uniform, but are not, ordinarily are subject to no special scrutiny simply because of that territorial difference. What judicial disfavor does appear in the cases involving territoriality is related rather to the interest at stake and the classifying fact, and not to the territoriality. This is confirmed by Horowitz and Neitring who recently surveyed the decisions:

The relevant cases have involved: (a) the administration of justice; (b) the enforcement of various types of criminal standards; (c) the regulation of economic activities; (d) the demarcation of boundaries of local governmental entities; (e) the closing of public schools; and (f) the apportionment of state legislatures. Considered in that order, the cases move from those in which it has been said that there is practically no conceivable constitutional violation in intrastate territorial differences in law to those in which it has been held that practically any territorial difference constitutes a constitutional violation.<sup>138</sup>

The decisive factor in the cases cited by Horowitz in his (d) and (f) categories was the voting interest; in (e) it was the classifying fact of race. This merely supports our general view that race and

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137. See *Carrington v. Rash*, 380 U.S. 89 (1965). The classification was military status. The case is discussed more fully at text accompanying notes 177-82 *infra*.

138. Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State*, 15 U.C.L.A.L. REV. 787, 788-89 (1968).

voting are a fact and an interest "in the inner circle." Nor is the low position of the criminal justice decisions in the list (categories a and b) inconsistent with our position. None of the cases cited in these categories involved an issue of discrimination by wealth of the defendant.<sup>139</sup>

These authors demonstrate that while state and federal courts have generally upheld legislation providing for local option—for example, regarding the sale of alcoholic beverages<sup>140</sup>—few of these local option cases seem to have involved the inner circle of interests or classifying facts. When they did, as in *Brown v. Board of Education*,<sup>141</sup> in which the state provided to its school boards the option of racial segregation, the local option fell along with the power of the state to impose the discrimination upon the whole of its territory.

Perhaps the clearest manifestation of the Supreme Court's emphasis upon the character of the classifying fact (other than geography) and upon the interest affected by the law rather than the mere territoriality of its application comes from the opinion in *McGowan v. Maryland*.<sup>142</sup> The Sunday closing laws there held valid were imposed upon dealers in some counties and not in others:

[W]e have held that the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite. With particular reference to the State of Maryland, we have noted that the prescription of different substantive offenses in different counties is generally a matter for legislative discretion. We find no invidious discrimination here.<sup>143</sup>

Summarizing, we might suggest that geography is not very different from any other non-invidious classifying fact—adulthood, blindness, or the state of being an optometrist, housewife, or professor. As such it is colorless—or at least deserves the standard deference accorded any classification. It is not a suspected fact like race. There is no special branch of constitutional law waiting to be developed for geographical discriminations.

Two final points relating to territoriality: Even if we were willing to focus upon place as the operative discrimination and were to

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139. See cases cited and discussed *id.* at 789-97.

140. *Id.* at 795-97.

141. 347 U.S. 483 (1954).

142. 366 U.S. 420 (1961). See our discussion of *Griffin v. School Board*, 377 U.S. 218 (1964), text accompanying notes 219-24 *infra*.

143. 366 U.S. at 427.

assume that the *Reapportionment* or other cases treated geographical dispensations as suspect, the use of geography for education is functionally a thing apart from its use for regulating the franchise. The difference lies in the fact that the voting interest, unlike the interest in education, is easily regarded as a fungible commodity. Whatever the wisdom of doing so, to equate one man's vote with another's is a very natural and easy thing to do; to equate one man's education with another's requires elaborate rationalizations—witness this Article. Any distribution of education requires an offering diversified according to differences of age, grade, and a dozen other factors. Despite this variety it may be possible to establish the basis for an "equality" of education, but its informing principle can scarcely be the absence of geographical distinctions. The misuse of geographical districting is best viewed as merely a medium of discrimination by wealth.

In addition to its invalidity, the argument from geography is risky. It tends to become an argument for a standard of undifferentiated sameness such as is represented in the *Reapportionment* cases.<sup>144</sup> We believe this to be undesirable as a policy result in education, and its imposition by constitutional fiat would be even more pernicious. Thus, Proposition I is structured so as to leave plenty of room for variety from district to district if the state chooses, so long as the criterion of difference is other than wealth.<sup>145</sup>

The residual relevance of the *Reapportionment* cases for our purpose lies principally in two other directions. First, these cases confirm the reality of special categories of equal protection based upon the interest at stake. In this they give reason to hope that factors in the school finance cases will equal the power of the voting interest to move the Court to bestow special protection upon the victimized children. Second, and related, these cases, in their elevation of the voting interest, offer a standard of importance against which to measure the significance of the interest in education.

### B. Race: The Irrelevance of *Brown* and its Progeny

There is an understandable tendency to treat the school finance issue as an outlier of the racial problems of public education. The

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144. Which is precisely the pit into which Dr. Wise falls with the "definition" attempted in A. WISE, *supra* note 2, at 146: "Equality of educational opportunity exists when a child's educational opportunity does not depend upon either his parents' economic circumstances or his location within the state."

145. See text accompanying note 84 *supra*.

reasons are not far to seek. The money discriminations have become visible largely as a by-product of the prodigious effort to expose and eliminate racial discrimination in the schools. Since the 1930's the strategy of civil rights counsel has combined attacks upon segregation with those upon discriminations in quality, including differentials in expenditure.<sup>146</sup> These latter attacks rarely have been successful in any meaningful way<sup>147</sup> and, until 1968, had not been directed to differences between school districts. Until the first two of the suits now in process were filed—by school board lawyers in Detroit and by poverty lawyers in Chicago<sup>148</sup>—all attacks upon financial discrimination had been based upon an alleged relation between race and underfinancing. Finally, an easy association of poverty with black people is the incessant theme of public utterance. It is not surprising that even the present litigation is understood, by many of its close supporters, as a racial struggle.

The fact is otherwise. There is no reason to suppose that the system of district-based school finance embodies a racial bias. The districts which contain the great masses of black children ordinarily also contain great masses of white children.<sup>149</sup> There well may be very significant racial/dollar discrimination *within* districts but that is

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146. See the "law and graduate" school cases discussed in text accompanying notes 207-16 *infra*.

147. Part of the problem is the enormous expense of establishing the fact of intra-district differentials, and especially in their relation, if any, to race. This burden has bogged down such litigation as that directed against the board of education in Chicago since 1961. A suit known as *Webb v. Board* has been on and off the docket in the United States District Court for the Northern District of Illinois for over eight years without trial, and principally for this reason. *Webb I* (Civil No. 61 C 1569) filed September 18, 1961, was dismissed without prejudice on August 29, 1963, by Judge Hoffman. Plaintiff's motion to reinstate was denied on October 21, 1963. *Webb II* (Civil No. 63 C 1895) (a virtually identical complaint) was filed on October 23, 1963. It was dismissed without prejudice on January 4, 1965, by Judge Marovitz. *Webb III* (Civil No. 65 C 51) (again, practically the same suit) was filed on January 14, 1965. The NAACP Legal Defense Fund Inc. is of counsel. The defendant school board filed an answer on April 5, 1965. On March 5, 1965, defendants served plaintiffs with voluminous interrogatories, which, so far as the record shows, have never been answered. The case still lies dormant in early 1969.

Recently, another action has been filed in the same court against the Chicago School Board by new plaintiffs objecting to similar and related forms of intra-district discrimination. *Brinkman v. Board*, Civil No. 69C246, filed Feb. 6, 1969. Some of the many difficulties are aired in Ratner, *Inter-Neighborhood Denials of Equal Protection in the Provision of Municipal Services*, 4 HARVARD CIVIL RIGHTS—CIVIL LIBERTIES L. REV. 1 (1968). The kind of factual difficulty characteristic of such litigation will not attend the inter-district school finance discrimination cases.

148. See notes 1 and 2 *supra*. Even these complaints have not made a sharp break with race and seem to vaguely assume its relevance.

149. Of the 119 school districts in the sample of Southern, border, and Northern states described by the United States Commission on Civil Rights in 1967 only four districts

another problem;<sup>150</sup> to lump it with inter-district discrimination is totally misleading. No doubt there are poor districts which are basically Negro, but it is clear—almost by definition—that there is a vast preponderance of such districts which are white. Of course the class injured by the present school financing discrimination may be defined in many ways. For example, it may be seen as the class of children resident in districts having an assessed valuation below the average in the state or even those in all districts below the richest. But, however it may be defined, the injured class is not racial—either black or white. If there were no black people in America the inequity in the system in no way would be diminished.

This simple fact suggests the political unwisdom of turning this into a racial issue. There will surely be enough upset over this question on social and economic grounds without evoking all the furies of racism. It could well be that some of the very forces which would give the necessary political support to institute a positive legislative response to the Court's decree would be paralyzed or even set in opposition to reform if the affair were falsely cast in racial terms.

The non-racial character of the problem also suggests the limited relevance of the long line of equal protection cases stretching from *Strauder v. West Virginia*<sup>151</sup> in 1880 to the recent decision in *Loving v. Virginia*<sup>152</sup> that has forbidden discrimination by race. For our purpose the only significance of these decisions—as with the *Reapportionment* cases—lies in their affirmation of the Court's separate and special approach to certain combinations of factual classification and interest. Even this element of analogy is attenuated, however, by the fourteenth amendment's genetic connections with the racial issue.

There is yet another misuse of the racial cases that is likely to be promoted in the school finance cases. It is true that many of the important racial discrimination decisions dealt with the interest in public education, and the decision in *Brown v. Board* included an

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(including the District of Columbia) had a public school population less than one-third white. U.S. COMM'N ON CIVIL RIGHTS, II, RACIAL ISOLATION IN THE PUBLIC SCHOOLS—APPENDICES 1-7 (1967) [hereinafter RACIAL ISOLATION IN THE PUBLIC SCHOOLS]. A private study of California data conducted for the authors by Mr. Roger Haines demonstrates that a majority of Negroes in that state live in districts above the state median in AVPP. Where the opposite condition prevails, however, its relevance is problematic.

150. See Horowitz, *Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A.L. REV. 1147 (1966).

151. 100 U.S. 308 (1880).

152. 388 U.S. 1 (1967).

encomium upon education.<sup>153</sup> This dictum will be cited as the basis for an argument that education is to be included with voting and fair criminal procedure as a specially protected interest or even a "right" in itself. Horowitz and Neitring, Wise, and Kurland have already suggested that possibility.<sup>154</sup> Later we shall indicate the form such an argument is likely to take before the Supreme Court. It will then be suggested why the reliance upon the race/education cases for the canonization of education is risky at best.<sup>155</sup> For the moment it is adequate to observe that, while racial discrimination is a clear constitutional benchmark, discrimination against the children of poor districts is not the same thing.

## VII

### PROPOSITION I AND THE CONSTITUTION—THE RELATIVE WEALTH CASES

#### *A. The "New Fetish for Indigency": Fair Criminal Process and Voting Rights*

The empirical relationship between wealth of the school district and the quality of each child's education is clear and close. Perhaps the best hope in the quest for judicial analogies to our problem is in the line of equal protection cases that considers the relevance of wealth—relative wealth—to the scope of the state's power to treat citizens differently. These cases which appear to thrust the classifying fact of wealth into the inner circle of equal protection may be the key to the establishment of Proposition I.

Unlike racial discrimination relative wealth has begun only recently to play a role in decisionmaking, and the decisions emphasizing it are few. It is nevertheless widely viewed by the commentators as potentially either a cornucopia or a Pandora's box, depending on the observer. Justice Clark spoke fearfully of the "new fetish for indigency,"<sup>156</sup> and his colleague, Justice Harlan, has repeatedly warned that, when the Court comes to defining the limits of that fetish it may find itself negotiating a slippery slope.<sup>157</sup>

Let us briefly outline the developments so far. Aside from a lonely concurring opinion of the late Justice Jackson,<sup>158</sup> indigence had

153. 347 U.S. at 493. Quoted in text accompanying note 206 *infra*.

154. Horowitz & Neitring, *supra* note 138, at 808; Kurland, *supra* note 10, at 584; A. WISE, *supra* note 2, at 21-24.

155. See text accompanying notes 215-24 *infra*.

156. Douglas v. California, 372 U.S. 353, 359 (1963) (dissenting opinion of Clark, J.).

157. See, e.g., the Harlan dissent in each of the major cases to be discussed in this chapter.

158. Edwards v. California, 314 U.S. 160, 181 (1941).

gained no purchase whatsoever on the problems of equal protection until 1956. In that year the Court decided *Griffin v. Illinois*.<sup>159</sup> The facts, as the Court saw them, were simple. For full, direct, appellate review of his conviction Illinois required a criminal defendant to furnish a certified bill of exceptions. Practically speaking, this often required him to purchase a transcript of the record. Only in capital cases did the state purchase it for him. All other impoverished defendants thus were denied effective appellate review. Griffin based his claim upon invalid wealth discrimination, and he won. The Court split 5-4 on the decision and the majority split 4-1 on the reasons. Black spoke for the majority four in a brief and delphic opinion apparently resting on both due process and equal protection. Frankfurter, by himself, relied plainly upon equal protection.<sup>160</sup> Neither said the state must in all cases supply transcripts to indigents. Both affirmed the absence of any duty to permit appeals at all. However, the discrimination between rich and poor on the facts before the Court was, for Black's part, "invidious," and for Frankfurter's, "squalid" in its application to the petitioner's interest in fair criminal proceeding.

Justice Harlan in dissent was careful to observe—as he has done repeatedly in the succeeding wealth cases—that the majority was not merely interested in Griffin's plight as a problem of misclassification. A necessary aspect of their concern about his poverty was the character of the interest Griffin had at stake. In this view, said the Harlan opinion, the question was less one of classification than one of fundamental fairness, and, arguably, was more nearly a due process case than one of equal protection.<sup>161</sup> His dissent embodies a clear recognition and a condemnation of the bifurcation of method in equal protection cases that we have already described.<sup>162</sup> There is in fact an inner circle, and *Griffin* clearly is in it. Just why the Court preferred this method to the exclusive invocation of the due process clause need not concern us here. That it did so and has reaffirmed that preference in similar cases is enough to justify our tracing the subsequent history of the developing line of crime/poverty cases.

In 1958 the Court made the result in *Griffin* retroactive, and reaffirmed its intention to employ an equal protection approach to discrimination against "those who cannot afford to pay for the

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159. 351 U.S. 12 (1956).

160. *Id.* at 20.

161. See Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. CHI. L. REV. 151 (1957).

162. See text accompanying notes 100-34 *supra*.



records of their trials."<sup>163</sup> The following year the rule was extended to invalidate the imposition upon indigents of a \$20 filing fee as a condition precedent to all criminal appeals to the Ohio Supreme Court.<sup>164</sup> In 1961 a similar result was reached with respect to a \$4 fee for the filing of a state habeas corpus and a \$3 fee for the appeal in such a case.<sup>165</sup>

As the vestigial fee and transcript problems petered out<sup>166</sup> the Court extended the wealth principle to a new area of criminal appellate procedure. In *Douglas v. California*<sup>167</sup> in 1963 it required the appointment of counsel for indigents by the state for the one appeal guaranteed by California law. Indigence did not reappear thereafter as a special ground of equal protection until the 1966 interment of the poll tax in *Harper v. Virginia*.<sup>168</sup> The state had imposed a poll tax of \$1.50 as a condition of the suffrage. In a windmilling opinion employing both an ends/means and an "invidious discrimination" approach Justice Douglas discovered a de facto discrimination by wealth. Wealth was not only declared constitutionally irrelevant for the purpose of qualifying voters, but—irrespective of its rationality—its use for such classification was invidious, because it unfairly burdened an interest which is "a fundamental matter in a free and democratic society."

Strong dissents were delivered by Justice Black<sup>169</sup> and also Justice Harlan<sup>170</sup> whose opinion was joined by Justice Stewart. The objections

163. *Eskridge v. Washington State Board of Prison Terms & Paroles*, 357 U.S. 214, 216 (1958).

164. *Burns v. Ohio*, 360 U.S. 252 (1959).

165. *Smith v. Bennett*, 365 U.S. 708 (1961). This decision also gave evidence of the Court's sensitivity to the potential constitutional fecundity of the emerging poverty "rule." The issue arose in *Smith* because of the accepted and historic identification of habeas corpus as a civil proceeding. Was the Court now extending the influence of the wealth factor beyond the criminal process? The Court denied any advance in that respect: "We shall not quibble as to whether in this context it be called a civil or criminal action . . . . The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels . . . ."

"To require the State to docket applications for the post-conviction remedy of habeas corpus by indigent prisoners without the fee payment does not necessarily mean that all habeas corpus or other actions involving civil rights must be on the same footing. Only those involving indigent convicted prisoners are involved here and we pass only upon them." 365 U.S. at 712-13.

The *Griffin* rule was applied to habeas corpus in *Long v. District Court*, 385 U.S. 192 (1966).

166. *Long v. District Court*, 385 U.S. 192 (1966); *Draper v. Washington*, 372 U.S. 487 (1963); *Lane v. Brown*, 372 U.S. 477 (1963).

167. 372 U.S. 353 (1963). For a later modest extension of the *Douglas* rationale see *Anders v. California*, 386 U.S. 738 (1967).

168. 383 U.S. 663 (1966).

169. *Id.* at 670.

170. *Id.* at 680.

went both to substance and method. Justice Harlan argued that wealth discrimination, unlike race, had never become a ground for special scrutiny, and he deplored the demotion of the traditional ends/means analysis of equal protection issues.<sup>171</sup>

The *Harper* decision is important if only because it represents the debouchment of the wealth factor from its former cloister within the criminal law. If the classifying fact of wealth can be significant for the voting interest, it may demonstrate further expansibility and become significant for the interest in public education. This potential for diffusion is, of course, precisely the complaint of the critics. We concede (indeed we insist) that the end of the poverty game is not in sight, but we doubt the boundless elasticity of the concept. Its thirteen-year career since *Griffin* has yielded extremely modest results. Granting that the mountain still is heaving there is no reason to expect a judicial monster; but perhaps this depends on how one feels about Proposition I.

On the surface, Proposition I nicely fits the philosophy of *Harper v. Virginia* and the criminal appeals decisions. If the principle is that wealth classifications—explicit or de facto—may not determine the state's disposition of fundamental personal interests, and if the ledger of such interests is even slightly pregnant, the argument for Proposition I is nearly implicit. The interest in education is important and personal; the present system is grossly discriminatory and victimizes children. Perhaps best of all—and unlike the interest of the criminal accused—once the Court liberates the legislative energy through Proposition I, education may well find itself propelled into basic structural reforms by a new political consensus in the states. The barriers, however, are significant, and the easy transition from *Griffin*, *Douglas*, and *Harper* to Proposition I is an illusion. Whatever the rhetoric in these cases there are arguably differences in both the importance of the interest at stake and in the practical prospects for a remedy.

#### *B. Evaluation of the Wealth/Crime Analogy to the School Case*

There are at least six plausible differences between the wealth/crime cases and the school finance cases that can be briefly stated: (1) In the *Griffin* line of cases (and in *Douglas*) the Court dealt with the sensitive interest in freedom from personal confinement and from all the stigmata of the convicted criminal. This interest is unique in character, and, arguably, in importance; (2) The focusing of the state's power specifically upon one man makes the interest of the

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171. *Id.* at 683-85.

criminal defendant appear intensely individualized and personal, giving this interest greater clarity and poignancy than any other interest that can be imagined, including education; (3) The remedy for the discrimination is simple, clear, and effective—*i.e.*, give the appellant a transcript (and a lawyer) or else let him go; (4) The remedy is relatively cheap; (5) The judicial nose under the state's tent is petite and the alarms of federalism correspondingly muted; (6) The *Douglas* line of cases involves a right (representation) which is in no way *egalitarian* in nature but which merely establishes a *minimum*. That is, there is no suggestion that appellate representation has to meet the standard of hired counsel or any definable standard above the base line of "competence." From *Douglas*, therefore, the easiest analogy is to a minimal or "foundation" education, which, of course, is precisely what as a practical matter now obtains.<sup>172</sup> A brief evaluation of these six plausible distinctions between the *Griffin-Douglas* lines of decision and the school finance problem is necessary, even though some of this ground will be reexplored in Part VIII.

### 1. *The Difference in the Interests at Stake*

The first two points both deal with differences in the nature of the interests at stake and can be considered together. This aspect is important if we hope to show that the interest in education should be given the special status of the "inner circle" of equal protection. In speaking of the relative importance of the affected interests in these two kinds of cases it is useful first to inquire—important to whom? The individual or the state? To what extent is this problem to be viewed as one of doing justice to an individual and to what extent as a question of general policy? The relative emphasis upon one or the other may influence any judgment about whether education can compete successfully for the Court's attention, even though it should be conceded that, in its criminal/wealth opinions, the Court itself has not yet clearly distinguished between the interests of the individual and of the public.

With respect to the public or policy aspect of the interest in education we note first that education not only affects directly a vastly greater number of persons than the criminal law, but it affects them in ways which—to the state—have an enormous and much more varied significance. Aside from reducing the crime rate (the inverse relation is strong),<sup>173</sup> education also supports each and every other value of a democratic society—participation, communication, and

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172. See text accompanying notes 24-27 *supra*.

173. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE; TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 77-80. (1967).

social mobility, to name but a few. Secondly, and still from a policy perspective, the comparison is one of cause on the one hand and effects on the other. In the criminal law the state deals principally with particular social effects; in and through education it influences (indeed, in some measure determines) the incidence and distribution of all social effects, of which crime is but one example. Third, in education the state deals with a classification of citizens which, on the whole or statistically (our present focus) appears more deserving than the class of criminal defendants. By definition the class "Children" is incapable of deserving less than the full solicitude of *parens patriae*; they are innocent even without benefit of presumption. We do not denigrate the policy significance of fair criminal procedure by calling attention to the conviction rate that obtains even under the fairest of systems.<sup>174</sup>

With respect to the relative importance of the individual interests in the two cases, that of the criminal defendant appears relatively more significant. The threatened deprivation is immediate, personal, and decisive. In education the state is not focusing simply upon an individual child but upon a collectivity. The fact of the relative poverty of that collectivity may or may not work an injury to the child; his district may try harder, or the child may be rich and go to a private school. What the injury in the individual case may be is much less certain and less easily identified than the sudden loss of freedom by imprisonment. On the other hand—in the criminal appeals cases—it was by no means certain that the provision of a transcript to Mr. Griffin and a lawyer to Mr. Douglas would effect any difference in the outcome of their appeals; if certainty is relevant, it may be that in properly planned school finance litigation it will be possible to pinpoint plaintiffs whose academic profile strongly suggests a causal nexus with the poverty of his school. These latter considerations are only slightly off the point. They do not go to the importance of the interest but to the likelihood of injury to that interest. Nevertheless, the two are sometimes nearly inseparable, and the Court is by no means uninterested in the practical question of who is being hurt how much, and how its intervention will affect the practical outcome of education.

In one sense, whatever diffuseness characterizes the injury to the child's interest in education makes the school cases more persuasive, for it emphasizes the class character of that interest and, thus, the

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174. Or, we might add, the number of guilty pleas. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE; TASK FORCE REPORT: THE COURTS 9-13 (1967).

equal protection aspects of the case. The *Griffin* opinions do not focus upon the class aspect of the petitioner's interest. Indeed, the petitioner is so immediately and personally threatened in the criminal cases that the lawyer's instinct is for due process, and not equal protection, as the essential problem. In that light the Court's use of equal protection in *Griffin* not only demonstrates the uncommon vitality of equal protection, even for cases of individual discrimination, but renders the equal protection rationale in the school case all the stronger because of the more obviously class interest at stake.

## 2. *The Difference in Remedy and the Interference with State Government*

The remedy and federalism questions are closely related; what the Court orders it always must order against the existing dispensation of the state.

The judicial strictures in the wealth/crime cases and the school finance case vary widely from each other in their implications both for the Court and for the state. As we noted, the *Griffin* remedy is utterly simple, clear, and effective.<sup>175</sup> Compared to such judicial child's play a decree invalidating an entire system of educational finance for failure to comply with Proposition I may seem to critics an act of quixoterie. That there is some difference between the cases in this respect we concede. We think its importance exaggerated, however, and note that the most significant distinction between the cases may actually cut in favor of Proposition I; for that difference is not the threatening complications of judicial remedy but the promising complications of state response. In other words, the disadvantages of the more difficult remedy are offset by the greater flexibility in the response permitted the state. Indeed that very flexibility will enormously ease the problems of enforceability by encouraging the state to respond.

Available remedies will be elaborated in Part VIII, but we note here that their essence is the ultimate power of the Court to shut down a system of public education that does not comply with Proposition I or such other standard as the Court chooses to apply. That the Court would need to provoke such an Armageddon is unlikely in the extreme, and we shall explore some sub-ultimate and much more likely approaches. Again, their feasibility is supported by the promise of significant political support for quality public education—support which will be liberated from its present state of paralysis by Proposition I. This potential political puissance for

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175. See text accompanying note 172 *supra*.

educational equality is in marked contrast to the political impotence of the values in fair criminal procedure. That difference will not be overlooked by the Court in assessing probable responses to its decree. Moreover, the ultimate power to close offending school programs becomes rather less a nightmare when set alongside its counterpart in criminal procedure—the power to free all similarly situated convicts.

In any event these genuine difficulties about what the Court effectively can do, should not be merged with the separate problem of what the state can do. The state's option after *Griffin* and *Douglas* is really no option at all. The Court there has very nearly specified the state's response in criminal appeals: give the transcript; provide the lawyer. In the school cases there is no need for such imposition; the state can remain free to invent, as we have repeatedly indicated. It is this very freedom and the rich variety of appropriate responses to the essentially simple Proposition I that produces complexity exactly where complexity is desirable.

Sheer cost is a related and distinguishing feature of these two kinds of cases. The wealth/crime cases were relatively inexpensive for the state to set right. Transcripts and lawyers are not cheap, but, compared, for example, to the cost of raising all school districts to the spending level of the highest district, their costs seems trivial. Of course the Court will not prescribe any level of spending, and a diminution of educational expenditure is conceivable. Practically, however, the legislative responses are very likely to raise the educational ante in substantial amounts, and, whether this happens or not, the Court is certain to be accused of meddling indirectly with the level of state spending for education. Our view is that, although this is a plausible distinction from *Griffin-Douglas*, it is not clear that the distinction makes Proposition I less attractive, for it helps to drive home the enormous magnitude of the existing discriminations. No doubt the Court will consider the potential economic fallout from such a decision with extreme care, but, if our general thesis is sound, such extra effort to understand the implications will be all to the good.

### 3. *The Douglas Case and the Basic Minimum Analogy*

We have suggested that the analogy to *Douglas* is hurtful, because its guarantee of representation, not equality of representation, appears to correspond to the widespread "foundation" programs in public education and thus tends to validate existing discriminations.<sup>176</sup> The easiest answer to this is that the question of

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176. See text accompanying notes 24-27 *supra*.

equality in quality of representation was not raised by the petitioner in *Douglas*. However, let us assume for the moment that such a right were claimed and denied (as it would surely be). The denial would prove nothing; the analogy is treacherous to begin with, for we are comparing things which are quite unlike. The hypothetical right to counsel case just posed would compare the quality of state-supplied counsel with privately employed counsel. But Proposition 1 involves only a comparison of state-supplied education with state-supplied education not with private or the "best" education (whatever that is). Proposition 1 is not a demand that the state supply everyone with the highest quality education available anywhere in the state. It is in fact not in strict terms a demand for equality at all, for it only insists negatively that quality not be made a product of wealth differentials, thus leaving room for inequalities that do not offend any other constitutional principle. If there is a right to counsel case which is analogous it would be a demand that the quality of appointed counsel from district to district not be a function of local wealth. Such a claim, so far as we know, has not been made, though it is conceivable as one branch of the "equal sewer" argument to be considered in Part VIII.

### C. Evaluation of the Wealth/Voting Analogy

*Harper v. Virginia*<sup>177</sup> (the "Poll Tax" case) is bound to play a prominent role in the argument on school finance before the Supreme Court. If a \$1.50 poll tax is an invidious discrimination how can a \$150 per pupil differential in education be tolerated? Yet the case is arguably too remote an analogy for Proposition 1. As with the wealth/crime cases, the important plausible distinctions principally involve the nature of the two interests at stake—voting and education—and the feasibility of remedy. Among them are the following: (1) *Harper* involves the unique activity in a democratic society; voting is arguably more basic even than the interest in fair criminal procedure; (2) The definition of the evil (injury) is simple compared to that in the education cases; the economic imposition upon the franchise is avowed and direct; (3) The remedy is clear, simple, and effective; (4) The remedy is cheap.

In part these objections (especially #2) can be seen as straw men in their relation to Proposition 1, for they are, in some respects, primarily objections to notions of equality of education we have already rejected. We concede that the notion of a fourteenth amendment duty to educate according to individual needs is

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177. See text accompanying notes 168-71 *supra*.

intolerably vague in comparison to the *Harper* standard. Our sole purpose however, is to compare *Harper* to Proposition I.

### 1. *A Comparison of the Interests at Stake*

The voting interest can be analyzed functionally as either of modest importance or as crucial. One's view of its significance is largely a product of the level of analysis chosen. On the level of the individual the voting interest is principally symbolic. Many find it quite unnecessary to vote, even in important elections. The practical effects of casting a ballot upon the objective quality of a voter's life is largely limited to cases where his vote makes or breaks a tie. Of course his self-image and reputation arguably may be involved, but these are not the stuff of which important constitutional rights are made. Learned Hand made the point even more strongly: "My vote is one of the most unimportant acts of my life."<sup>178</sup>

There is a related distinction that is important. Whatever the individual's interest in the weight of his vote, that need is never demonstrably greater for any one individual than for another. Poor voters need the vote to gain power; the rich need it to keep power. As voters we are fungible. However, individuals have differing needs for the state's aid in supplying education, and, as an observation of fact, where the need for education is likely to be greatest today, it is the least available. The poor district is most likely to have the academically necessitous student. In the *Reapportionment* cases there was a uniform need and a skewed distribution of the resource; in the school finance case there is a skewed distribution of need with an inversely skewed distribution of the resource.

The Court, however, has not viewed the voting interest solely from the perspective of injury to the individual voter, nor should it. Realistically, the *Harper* decision, and the *Reapportionment* cases have as their concern the injury to the interest of collectivities.<sup>178-1</sup>

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178. Hand, *Democracy: Its Presumptions and Realities*, in *THE SPIRIT OF LIBERTY* 90, 93 (J. Dilliard ed. 1953). On (shall we say) the other Hand we have the following grace note whose harmonization with this view requires a certain breadth of perspective: "When I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture. If you retort that a sheep in the flock may feel something like it, I reply, following St. Francis, 'My brother, the Sheep.'" L. HAND, *THE BILL OF RIGHTS* 74 (1958).

Of course one may view the interest at stake as other than "my vote." That is, it may be defined as the individual's interest in not having the total influence of his district diluted. How much this adds, of course, is problematical. A voter in the minority in his district is sometimes better off for the dilution.

178.1. 393 U.S. 23 (1968). The "right of political association" is not separately compared to education here because of its affinity to the voting interest and also because of the absence of any wealth classification in the *Williams* case.



Individual plaintiffs in these cases could show injury only to the extent of injury to the collectivity of which they were a part. The point here is this: In comparing the voting and education interests we are comparing (on the voting side) an interest which is essentially a group and societal interest with one (on the education side) of vital concern to the individual, to society as a whole, and to all intermediate collectivities (including, but hardly exhausted by, voting groups). In judging the relative importance of voting and education, therefore, we need not be diffident about the comparative scope of the educational interest, whatever its comparative weight.

From the aspect of a group interest alone, however, education seems the equal of voting in sheer importance to a democratic society. It underlies the whole substance of the political process and is antecedent to voting in the orders of both time and cause. All political behavior inevitably must reflect the presence or absence and the quality of education. A man's understanding of public issues is a function of those communications which are intelligible to him. The broadening of the franchise which currently is taking place in this country in no way neutralizes this point. The potential entry of millions of Southern Black and Spanish-speaking people into the franchise<sup>179</sup> represents no national policy to cheapen the qualifications to vote. Any movement in the direction of universal suffrage is in spite of, not because of, the desirability of education for political participation. Such expansion merely renders fair treatment in education all the more crucial.

If society's stake in the preservation of the "voting interest" really is broader than protecting the mechanical act of pulling a lever—and surely the Court perceives it so—education must be viewed as a crucial interest. The model of the voting citizen, we trust, is not one of passive absorption and pavlovian reaction; it is the model of *response* and *participation*, a role for which education is the fundamental preparation. But this is only the beginning, for participation in elections is only one of the many roles society expects of the citizen *qua* citizen. Perhaps not all these roles require education, but the exceptions are few.

There is another point of difference between the voting and education interests which may have great significance in the legal argument and which cuts in education's favor. This is the compulsory character of education. To put it argumentatively, voting may be an interest that, because of its importance, approaches the level of a

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179. See Cox, *Constitutional Adjudication and the Promotion of Human Rights* (Foreword to *The Supreme Court 1965 Term*), 80 HARV. L. REV. 91, 99-108 (1966).

right, but education is considered so significant that the State has bypassed the establishment of the right and rendered education a duty. It is a duty imposed in the name of preparing citizens for full participation in modern society. We are tempted to say that, unlike voting, it is such an important right it must be exercised. In any event its compulsory character will not be ignored by the Court, as we shall have occasion to remark below.

Finally, the prospects for an intelligible standard for defining the constitutional injury in the school case are admittedly less promising than the one-man, one-vote rule or than the *Harper* "no tax on voting" rule.<sup>180</sup> Proposition I is not so easy of application as these. Perhaps, however, the proper comparison is not with one-man, one-vote or with "no tax no voting" but rather with the other and vaguer standard of injury to the voting interest also employed in the *Harper* decision, the violation of which obtains ". . . whenever [the State] makes the affluence of the voter . . . an electoral standard."<sup>181</sup> The wealth/voting rule, as it may properly be called, is not only no more definite than Proposition I but bears a striking resemblance to it. Paraphrased in school terms the *Harper* language could read ". . . whenever it makes the affluence of the family or school district an educational standard." Nevertheless the practical difference in the two tests is considerable, simply because the apparatus of the poll tax to which it was applied was so simple compared to the school finance jungle.

## 2. Comparing the Remedies

The remedy for the poll tax was no poll tax—a simple result that the Court could easily guarantee through its equity power, if the state chose to balk. Implementing Proposition I concededly will be more challenging to the Court, as we have suggested already in this section and will elaborate later.<sup>182</sup>

With respect to preemption of legislative alternatives, what is true of the wealth/crime cases is true here. The *Harper* decision effectively leaves the state even less choice than *Griffin* or *Douglas*; the state's program is simply annihilated and cannot be saved by broadening the class. Proposition I on the other hand leaves the state all the many choices it had before minus only one.

### D. Whose Poverty?

There is an additional question about the analogy to the indigence cases which we would prefer to treat briefly and separately.

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180. See text accompanying notes 168-71 *supra*.

181. 383 U.S. at 666.

182. See text accompanying notes 262-308 *infra*.

We have noted at several points that, in the school finance issue, the poverty involved is always that of the district and only sometimes (if normally) that of the individual. What difference, if any, should this make in our evaluation of precedent involving individuals asserting personal poverty as a relevant constitutional fact? A short answer is that the school finance cases are not necessarily different in this respect. After all, the coincidence of personal and district poverty is probably fairly high; secondly, it would be easy to select an indigent plaintiff; and, third, in any event all children should be regarded as poor. These points should be useful and perhaps are true, but it will probably be observed that, while they are helpful to show that poor people are being injured, that injury is not an effect of their own poverty but of the poverty of their district. The poor who live in rich districts are simultaneously preferred.

Another kind of response is more convincing; properly viewed the discrimination by district wealth actually is worse than that in the personal poverty cases. At least in those latter cases one could suppose that the individual was in some sense responsible for his condition. His own qualities, however completely determined by events beyond his control, were the cause of his poverty—and (who knows?) perhaps he could have prevented all this, if only he had tried. There is at least a whisper of personal responsibility. But consider the school finance case. Here, not only is the victim not responsible for the relevant poverty—it is the state itself which has created it (and, worse, has done so deliberately) in the very creation of the district. Indeed, then, there is a difference between the cases, but that very difference reinforces every argument based upon the poverty rationale in *Griffin*, *Douglas* and *Harper*.

#### *E. Does Poverty Even Count?*

One can argue that no “poverty” line of cases exists—that *Griffin* and *Douglas*, at least, do not ultimately depend upon poverty at all. In the poverty/crime cases we may say the essence is not poverty but merely the inability of the accused person—for whatever reason—to provide those necessities for a fairly considered appeal that are normally left to his initiative. For example, how different from *Griffin* would it be if the convicted person were rich but had become incompetent and thus was unable to contract for the purchase of a transcript? Could the state deny him the appeal, or would it be constrained constitutionally to provide a guardian to secure his rights? That the answer is easy and the process so familiar should not blind us to the principles at work. It is not the appellant’s indigence as such

which counts; indigence is but the most common subspecies of all those personal disabilities which might prevent the fair consideration of the appeal. This line of thought confirms the Harlan position that the *Griffin* problem is one of due process to which the element of poverty is merely incidental. Similarly the *Poll Tax* case can be said to be concerned with poverty only as one of a great many imaginable burdens upon the voting interest—certain literacy tests, for example<sup>183</sup>—that might be intolerable, and, if intolerable, would be so because of the unique character of the interest, not of the burden.

This argument seems unconvincing. There is pretty clearly a special—if narrow—niche for judicial scrutiny of discrimination against the poor. Yet however they may be interpreted, the poverty cases by themselves are insufficient as a basis for our position. Much still depends upon one's evaluation of the character and importance of the educational interest at stake and of the ethical claims of the victimized class, as both are weighed against those interests of the state served by the present systems.

## VIII

### THE FORM AND LIMITS OF THE ARGUMENT FOR PROPOSITION I

In this section we hope to gather some threads and sketch an equal protection argument for Proposition I. It is a sketch only and not a complete brief. By no means does it exhaust the possibilities of argument,<sup>184</sup> and it scarcely touches upon the specific weaknesses of particular state systems.<sup>185</sup>

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183. See *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959).

184. For example, the district court in *McInnis v. Shapiro* cited as relevant those cases brought by taxpayers to protest the manner of levy and distribution of state tax funds. 293 F. Supp. at 335. These cases are principally concerned with state requirements of "uniformity" of taxation. They certainly do not involve the question of a fourteenth amendment right of the school child to equality of treatment. Presumably, none of the plaintiffs in these cases would have had standing to raise such a question. See *Sawyer v. Gilmore*, 109 Me. 169, 82 A. 673 (1912); *Miller v. Korns*, 107 Ohio St. 287, 140 N.E. 773 (1923); *Dean v. Coddington*, 81 S.D. 140, 131 N.W.2d 700 (1964). See also *Hess v. Mullaney*, 213 F.2d 635 (9th Cir. 1954). For a penetrating equal protection analysis of this area, see Comment, *Rational Classification Problems in Financing State and Local Government*, 76 YALE L.J. 1206 (1968).

The plaintiffs in both the Illinois and Detroit suits also have stressed what seems a pointless argument so far as the fourteenth amendment is concerned. Each is at pains to show that a "responsibility for education rests with the state" under state law. The assumption seems to be that state constitutions create federally enforceable rights. *But see Baker v. Carr*, 369 U.S. 186 (1962); *Calder v. Bull*, 3 Dall. 386 (1798). *Wise* makes the same error. A. WISE, *supra* note 2, at 93-104.

185. Such vagaries as special limitations on the taxing power of specific districts may require separate analysis. This was a part of the complaint in *McInnis v. Shapiro*. One especially interesting device is the automatic diminution of state equalizing money to the extent

As shown in Part III,<sup>186</sup> with some strain the classical or ends/means rationale is adequate, if we are content simply to void existing systems state by state. However, if the Court wants to encourage the states to embark upon planned reform rather than planned evasion, it may wish to be more explicit in its identification of the evil to be avoided, an evil broader than mere formal misclassification. For this purpose the approach that accords special weight to selected classifying facts and "fundamental" interests is more promising. Of course the two approaches are not mutually exclusive and we may wish to combine elements of both.<sup>187</sup>

#### A. *The Argument in Outline*

Concededly, Proposition I is no logical extension of any existing doctrine, and the argument for it will be dictated more by purely policy considerations than by syllogisms. That argument is essentially an accumulation of separate and converging policy persuasions involving education, federalism, and judicial role. Because the approach is cumulative, it is difficult to suggest the specific point at which the demonstration is sufficient. The package of persuasions constituting the argument includes at least the following:

1. The factual showing of gross discrimination by wealth.
2. The practical unavailability of legislative relief.
3. The fundamental significance of the interest at stake.
4. Precedent rendering wealth at least suspect as a classifying fact when used to affect "fundamental interests."
5. A class of defenseless victims similar in interest and suffering serious injury.
6. Available practical alternatives which satisfy legitimate state goals without continuing the existing discrimination.
7. An intelligible and limited standard leaving legislative discretion.

Most of these points have been adequately covered already. The factual relation of wealth and public education (point #1)<sup>188</sup> and the dismal prospects for legislative relief (point #2)<sup>189</sup> have been shown.

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of federal aid. It seems clear that the state responsibility will be assessed separately and not diminished by aid from extrinsic sources which reduces the discrimination. See *Shepherd v. Godwin*, 280 F. Supp. 869 (E.D. Va. 1968).

186. See text accompanying notes 76-81 *supra*.

187. The Court used both the "invidious" and "classical" approaches in its recent decision striking down discrimination against illegitimate children under the wrongful death statute of Louisiana. *Levy v. Louisiana*, 391 U.S. 68 (1968).

188. See text accompanying notes 19-33 *supra*.

189. See text accompanying notes 50-53 *supra*.

Our chosen standard (point #7) has been discussed at length.<sup>190</sup> We have examined the cases making relative wealth a classifying fact subject to special scrutiny (point #4).<sup>191</sup> These cases are suggestive for our purpose but not compelling, since they involved only the interests in voting and personal freedom.

We showed that in several respects education compares favorably in importance with those interests that the Court already has chosen for special protection. Nevertheless, we will wish to inquire somewhat further whether the Court either already has selected or, at least, ought to select education for admission to the inner circle of interests (point #3) and, if it does so, whether this implies that over governmental services must be subjected to the same constitutional limitation. That is our next step. It will be followed by the suggestion (respecting point #5) that this favored interest is held by persons who constitute, in effect, a favored object of judicial protection. Finally, in this part (respecting point #6) we will briefly review available alternative financing systems that are practical, and that, without discriminating against the poor, serve all legitimate interests of the state now being served. We will argue that the existence of such alternatives is constitutionally relevant.

## *B. Education as a Favored Interest: Legal Posture and Precedent*

### *1. Education as a Right*

Education could constitute a favored interest in at least two senses quite distinct from each other. It could, first, be elevated to the status of a "right." The state would be compelled to tax in its support; the state would no more be free to close its public schools than to close its courts. The thought is both obvious and preposterous. It is obvious insofar as universal public education in our culture is taken as a datum. Its abolition is unthinkable (or nearly so). The transition from the familiar to the necessary is painless; there is even a dictum here and there in judicial opinions plus a flood of popular literature to support the notion. It is, however, fundamentally preposterous. Being radically unintelligible it is incapable of forming the subject matter of that complex relation to the state we denote when we use the term "right." To give content to such a relation the Court would have to determine what minimum expenditure, for what minimum number of years, learning what substance, in which time and place would constitute "education." The thought is a judicial nightmare, but

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190. See text accompanying notes 82-97 *supra*.

191. See text accompanying notes 156-83 *supra*.

worse, it is an educational nightmare. Since it would have to be couched in terms of minimums, there is no reason to suppose that it would not support all existing or even inferior systems. In any event, since it deals in absolutes, the minimum would have to be set low enough to permit its effectuation in poor as well as rich states, thus leaving the richer states unaffected.

Now, as some would prefer,<sup>192</sup> the right may be defined instead by reference to the characteristics of the individual child and not by the characteristics of the state system. We might, for example, say that every child has a right to an education suitable to his need or to his potential or something of that sort. This, of course, is saying nothing intelligible until someone has judged for each child, and according to a reasonable standard, his need or potential or whatever (which characteristic is chosen makes another enormous difference). Note also that if this individualized "right" is to become a right in fact, it must be a subject of judicial protection. It is beyond imagining either that the Court would accept such a responsibility itself or that it would supinely relegate judgment on such a question to bureaucrats whose radical inability to judge need or potential has been itself a ground for judicial interference.<sup>193</sup> We say this even though we recognize that certain children have special needs objectively manifested such as blindness. While judicial intervention in such cases is quite imaginable, it is least necessary, for these are seldom the cases of relative legislative neglect. It is always arguable that the state should do more for the physically handicapped. It is not an argument properly addressed to the judiciary.

Much more could be said, but our purpose is simply to distinguish education as a right from education as a favored interest. By the latter we mean merely that the Court ought candidly to give closer scrutiny to legislative classifications affecting education than it does to those involving the run of other interests. This does not mean that the Court would be readier to substitute its judgment for the legislature's in the education cases as it did in the *Reapportionment* cases with the one-man, one-vote straitjacket. It need imply nothing further than its willingness to say "No" when education is distributed by wealth. The Court should limit its strictures to those cases in which the already suspect fact of wealth and the now favored interest in education are linked in a manner which systematically discriminates among children.

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192. See, e.g., *Complaint in Board of Education v. Michigan*, General Civil No. 103342 (Cir. Ct. Mich., Wayne County, filed Feb. 2, 1968).

193. *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967).

## 2. *Intimations from the Non-Racial School Cases*

The next question, then, is whether the Court, as a historical fact, has treated education as a fundamental value. The answer is not very clear. An early suggestion in that direction comes from the Holmes opinion in *Interstate Railway Company v. Massachusetts*.<sup>194</sup> Here a statute compelled a street railway corporation to transport school children at half fare. Holmes found that the statute went "to the verge of constitutional power" of the state. It was spared, however, by the peculiar weight of the subject matter:

Education is one of the purposes for which what is called the police power may be exercised . . . Massachusetts always has recognized it as one of the first objects of public care. It does not follow that it would be equally in accord with the conceptions at the base of our constitutional law to confer equal favors upon doctors, or workingmen, or people who could afford to buy 1000-mile tickets. Structural habits count for as much as logic in drawing the line. And, to return to the taking of property, the aspect in which I am considering the case, general taxation to maintain public schools is an appropriation of property to a use in which the taxpayer may have no private interest, and, it may be, against his will. It has been condemned by some theorists on that ground. Yet no one denies its constitutionality. People are accustomed to it and accept it without doubt.<sup>195</sup>

Did Holmes' reference to "first objects," "structural habits," and public acceptance mean that education was different simply because the state had regulated it generally for a long time? How much longer than "doctors or workingmen"? The statute at issue had been passed in 1900. It is risky to make too much of this cryptic passage, particularly when the next decision upholding the educational interest finds Holmes dissenting. This was *Meyer v. Nebraska*<sup>196</sup> which considered a state statute forbidding the teaching of German in public and private schools to children below the 9th grade. Meyer was convicted of violating this prohibition. The Supreme Court held his conviction a violation of due process. The theory seems to waver among the teacher's right to teach, the parent's right to educate his child, and the child's right to learn, although only the first was at issue. In any event all three constitute educational interests and inspired the Court to the following description:

The American people have always regarded education and

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194. 207 U.S. 79 (1907).

195. *Id.* at 87.

196. 262 U.S. 390 (1923).



acquisition of knowledge as matters of supreme importance which should be diligently promoted . . . . Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.<sup>197</sup>

Within a few years the *Meyer* case was cited as controlling in a decision which today plays a prominent role in the debate over aid to private schools. *Pierce v. Society of Sisters*<sup>198</sup> settled the question of the fourteenth amendment right to satisfy the statutory duty of compulsory education by attendance at a private school—secular or religious—meeting appropriate state standards. The *Pierce* opinion is lacklustre and terse with little language helpful here. It is the *Meyer*-based result that is significant for our purpose. Without the reference to *Meyer*, the *Pierce* case could be contained within routine substantive due process analysis—education, like property, may not be monopolized by the state. Apart from the state's legitimate interest in standards, and its power to provide schools as a public service, education is simply private. But *Meyer* has no place in this syllogism; and its presence alters the whole approach. Education is not simply private; it is *education*, and the state may not lightly make it in its own image. The individual's interest in education is personal and important, important enough to subdue the arguably rational purpose of the state to democratize its children and thus to avoid the divisions of sect and creed.

These cases are old, if vigorous. Except for its summary action in *McInnis v. Shapiro* (and, arguably, in the racial segregation field),<sup>199</sup> the Court has not dealt with the educational interest directly recently, but it is worth noting a few passages from the opinions of Justices Frankfurter and Brennan in establishment of religion cases involving released time and Bible reading. Concurring in *McCullum v. Board of Education*,<sup>200</sup> Frankfurter described the public school as

. . . the most powerful agency for promoting cohesion among a heterogenous democratic people . . . .

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197. *Id.* at 400.

198. 268 U.S. 510 (1925).

199. And most recently in *Epperson v. Arkansas*, 393 U.S. 97 (1968) where the Court in dictum described the *Meyer* decision as follows: "The state's purpose in enacting the law was to promote civic cohesiveness by encouraging the learning of English and to combat the 'baneful effect' of permitting foreigners to rear and educate their children in the language of the parents' native land. The Court recognized these purposes, and it acknowledged the State's power to prescribe the school curriculum, but it held that these were not adequate to support the restriction upon the liberty of teacher and pupil."

200. 333 U.S. 203 (1948).

. . . The public school is at once the symbol of our democracy and the most persuasive means for promoting our common destiny.<sup>201</sup>

In *Abington School District v. Schempp*, Mr. Justice Brennan (concurring) noted:

. . . Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. It is therefore understandable that the constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom.<sup>202</sup>

In contrast to the *Meyer* and *Pierce* cases, these last two sources emphasize the *public v. sectarian* aspect of the educational interest in public schools. Justice Brennan called specific attention to this:

It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function . . . .<sup>203</sup>

Whether this emphasis on the “common” or “public” character of public education indicates an egalitarian spirit with dimensions broader than the “religion” cases is unfortunately imponderable.

The Court, then, has not been indifferent to the special qualities—private and public—of the educational interest. However, it is clearly too much to say on this evidence that education is within the “inner circle” of equal protection. The references are oblique and the issues were not approached as equal protection problems.

### 3. *Intimations from the Race/Education cases*

This brings us to the segregated education cases.<sup>204</sup> Horowitz argues that “Analysis . . . of interdistrict inequalities in educational opportunity must begin with the Supreme Court’s statement in *Brown v. Board of Education* . . . .”<sup>205</sup> This is the oft-repeated dictum that:

education is perhaps the most important function of 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

201. *Id.* at 216, 231.

202. 374 U.S. 203, 230 (1963). In the recent “evolution” decision, *Epperson v. Arkansas*, 393 U.S. 104 (1968), the Court added, (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)); “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”

203. 374 U.S. at 241-42.

204. See text accompanying notes 146-55 *supra*.

205. Horowitz & Neitring, *supra* note 138, at 808 (1968).

undertaken to provide it, is a right which must be made available to all on equal terms.<sup>206</sup>

To make full use of this language, we would inquire whether the analysis should not begin even earlier with those cases which culminated in the *Brown* decision. The argument in that historical form is attractive, and, even if dubious, will surely be made at some point in the litigation ahead. We shall set it out in some detail for examination.

The argument for education as an historically favored interest rests on the line of "separate but equal" cases beginning with *Plessy v. Ferguson*<sup>207</sup> and terminating in *Brown*. It is necessary in making the argument to extricate education from race, the presence of which has a tendency to obfuscate all other considerations. The issue of financial discrimination between districts, as we have shown, has literally nothing to do with race.<sup>208</sup>

The holding in *Brown* may be viewed as a decision upon equality of education, not upon racial discrimination as such. The question was simply whether the plaintiffs were being treated equally. In short, the cause of the inequality was a race-connected cause, but the object of judicial concern was the plaintiff's interest in education. Hence the encomium upon education quoted above. As Judge Wright explained the matter in *Hobson v. Hansen*:

The crime which *Plessy* committed was that in applying its standard it concluded that *de jure* segregated facilities were or could be equal. The Court, ruling in *Brown* that deliberately segregated schools were *inherently* unequal, implicitly accepted the separate but equal frame of reference, exploding it from the inside so far as its application to *de jure* schools was concerned.<sup>209</sup>

In "exploding" *de jure* segregated education "from the inside" the Court is seen to have accepted racial segregation as such; what it could not accept was inequality in education. Actually, this concern for equality of education can then be viewed as one of sixteen years standing which *Brown* merely affirmed. It began in 1938 with *Missouri ex rel. Gaines v. Canada*<sup>210</sup> involving the exclusion of Negroes from the University of Missouri.

The Court defined the issue as follows:

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206. 347 U.S. 483, 493 (1954).

207. 163 U.S. 537 (1896).

208. See text accompanying notes 149-50 *supra*.

209. 269 F. Supp. 401, 497 n.165 (1967).

210. 305 U.S. 337 (1938).

The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right.<sup>211</sup>

Gaines' exclusion was struck down, and his victory began the series of cases leading up to *Brown*.<sup>212</sup> These decisions involved admission to formerly white segregated law and graduate schools which were superior in quality to the Negro schools available within the state.

The real question for us in these cases is how much did race count toward the result which was uniformly favorable to the petitioning student? Another way to put the question would be: If the plaintiffs had been white would the results have differed? It is not quite enough to respond that, if the plaintiffs were white, the discrimination would not have occurred in the first place. The discrimination might not have sprung from the same cause, but our factual analysis has made it clear that discrimination in education against members of all races is, and has been, an inherent part of the state systems, North and South, since public education began.<sup>213</sup>

Why then have the injured whites failed to raise the question until 1968? The answer is partly the low visibility of the discrimination. The statutes make no explicit requirement of inequality; the system is characterized by formal equality with even an element of compassion for the poor district expressed in the local foundation plan. It takes sophistication to understand that the poor pay more for less, in education as elsewhere. Nor was financial discrimination like segregation made obvious by skin color. To the extent that it was perceived as a problem it may also have been accepted as part of the general debility of local financing of services. Further, it is possible that white mobility rendered the system tolerable; the imposition was seen as temporary by those who expected to move up and out. And those whites who would be of the class most likely to appreciate the uses of litigation had the least need for it, since they were the most upwardly mobile. It is relevant to observe that those cases that did come up to the Court were planned and executed by middle class Negroes for middle class Negroes and at the college level where either literally no alternative Negro segregated facility existed or what existed was absurdly inferior.<sup>214</sup>

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211. *Id.* at 349.

212. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents of the U. of Oklahoma*, 332 U.S. 631 (1948).

213. See COONS, CLUNE & SUGARMAN, *supra* note 11.

214. The private sources for this were themselves participants in these cases. See also C.

The argument for the educational interest climaxes, of course, with the *Brown* decision and its special kudos for education. In *Brown* we see the educational interest joined with the invidious classifying fact of race to compass in one opinion the demise of segregation and the emergence of equality of education.

The argument—though not strictly illogical<sup>215</sup>—is unconvincing. The separate but equal cases preceding *Brown* had nothing to do with education as such. It may be that the Negro plaintiffs wisely chose to attack the system of segregation at the point most important to them. It may be that their judgment of the relative importance of interests and the Court's choice of school segregation as the most promising point to initiate the prohibition of race as a classifying fact are fair indications of the intrinsic significance of education. Nevertheless, nothing that the Court said or did prior to the *Brown* opinion suggested that education was special; much that it did suggested the opposite. *Plessy v. Ferguson*, which was the basis of these cases, forbade discrimination in more than schools. If these cases elevated education, they also elevated the interest in sleeping cars;<sup>216</sup> and a court which elevates every interest elevates none. The Court's attention was upon race, not upon the substance of the particular discriminations.

It is true that the quotation from the *Brown* opinion seems stunningly relevant. Taken literally it would be decisive in some sense upon the question of this Article. Education "must be made available to all on equal terms." From the vantage point of 1968, however, it is no longer clear that *Brown* was specially concerned about the interest in education. The decision had scarcely appeared before the "fundamental" character of education become the fundamental character of golf and swimming rights,<sup>217</sup> and all the cases since *Brown*, even the cases involving education, have shown complete preoccupation with the racial factor.<sup>218</sup> Meanwhile the Court has done

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VOSE, CAUCASIANS ONLY, (1959) detailing the similar background for litigation involving restrictive covenants.

215. The *Brown* case could be viewed as divorced in its rationale from all that preceded and succeeded it. It departed from the prior cases in rejecting the possibility of equality in education without desegregation; it is inconsistent with the succeeding cases insofar as it permits racial segregation wherever this does not result in discrimination. Thus it is a nearly pure expression of the Court's special interest in education emerging like a Century Flower for its one appearance in our time.

216. *McCabe v. Atchison, Topeka & Santa Fe Ry.*, 235 U.S. 151 (1914).

217. The cases involve many other equally trivial interests. See catalogue of cases in W. LOCKHART, Y. KAMISAR, & J. CHOPER, *CONSTITUTIONAL LAW, CASES—COMMENTS—QUESTIONS* 1228 (1967).

218. *Id.* at 1230-35.

nothing further to suggest that education enjoys a constitutional life of its own. In practical effect the hope for an emerging and independent educational interest based upon the words of *Brown* has been a casualty of the all-consuming racial crisis. Except for those few words there is nothing in the line of racial cases since *Plessy v. Ferguson* to suggest a constitutional difference between sleeping cars, toilets, golf, swimming, and education.

Indeed, in *Griffin v. Prince Edward County School Board*<sup>219</sup> the Court came perilously close in dictum to rejecting the *Brown* language about education. It refused to allow a county to close its schools rather than desegregate, but the rationale was race discrimination and the Court suggested vaguely that a variety of policies by school districts was not necessarily bad where not based upon race—*i.e.*, the state could provide educational opportunity on unequal terms, as long as it was not unequal for racial reasons.<sup>220</sup> Within the racial line of cases the only arguable exception to the Court's indifference to education as such appears in its affirmance, without opinion, of the judgment in *St. Helena Parish School Board v. Hall*.<sup>221</sup> That case involved one segment of Louisiana's rear guard actions against school desegregation. School districts were given the option to close and the defendant did so. The plaintiff sought and obtained an injunction. Judge Skelly Wright's opinion for the three-judge court divided the issues into racial discrimination on the one hand, and, on the other, discrimination "geographically against all students, white and colored." His rationale for forbidding the "geographic" discrimination was summarized as follows:

[A]bsent a reasonable basis for so classifying, a state cannot close the public schools in one area while, at the same time, it maintains schools elsewhere with public funds. And, since Louisiana here offers no justification for closure in St. Helena Parish alone, and no 'state of facts reasonably may be conceived to justify it,' except only the unlawful purpose to avoid the effect of an outstanding judgment of the court requiring desegregation of the public schools there, it seems obvious that the present classification is invidious, and therefore

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219. 377 U.S. 218 (1964).

220. "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 and private schools operated in their place with state and county assistance, for one reason, and one reason only . . . . *Id.* at 231.

221. 368 U.S. 515 (1962). The case below was cited as *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961).

unconstitutional, even under the generous test of the economic discrimination cases.<sup>222</sup>

The opinion in *Hall* is scarcely clear on the issue of a special status for education. At one point Judge Wright attempts a distinction between "private activities" and "governmental benefits," education being among the latter but, apparently, not among the former. "When the state provides a benefit, it must do so evenhandedly."<sup>223</sup> This would apparently lump education with every other benefit and apply to all of these benefits some yet to be explained notion of equality. Other parts of the opinion, however, cast doubt on this homogeneity of interests and use the term "invidious" which is typical of the special interest cases but here may connote only the racial aspect of the case. In any event the whole opinion is so concerned with race, it is risky to make too much of it as either a prop for or threat to the special educational interest. It is even unclear as to the "geographical" discrimination point; if the discrimination was against all children in the parish, it may not have been *by* race, but it was clearly *because of* race. Geography was purely and simply a mechanism. Finally, the silent affirmance by the Supreme Court is at best neutral on these points, since it had at least one strong orthodox ground upon which to rely. Later, in the *Prince Edward County*<sup>224</sup> case, the Supreme Court relied upon *Hall* as a racial precedent.

Thus, in candor, it seems that in this line of cases the language of *Brown* in praise of education stands alone; until the Court speaks again, its role as authority remains inscrutable for our purposes. Nevertheless, Professor Horowitz is right; this is a good place to start, not because those words from *Brown* establish any judicial doctrine about education, but because they are a good description of objective truth. It is not crucial whether the Court already has put education on the pedestal it deserves. It is only crucial that education deserve it.

### C. Education as a Favored Interest: Policy Justifications

Already we have said a good deal about the virtues of education in a comparative way in our discussion of the voting and poverty

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222. 197 F. Supp. 649, 656 (E.D. La. 1961). The "economic discrimination cases" referred to by Judge Wright are not the "wealth" cases, but are decisions dealing with differential regulation of business. *E.g.*, *McGowan v. Maryland*, 366 U.S. 420, 425-28 (1961) and cases cited therein.

223. 197 F. Supp. at 659.

224. 377 U.S. 218 (1964).

cases. Now it is appropriate to consider education on its own. The principal embarrassment in showing education's title to special treatment is one of riches heaped upon riches. There is no point more frequently made in the public forum or in our folklore than the universal virtues of school. We have already compared education favorably to the interests in voting and in fair criminal procedure. It would be ludicrous to add to the libraries of educational encomia yet another glowing assurance to Everychild that the shortest way to the White House is through the schoolhouse. In the interest of economy we incorporate by implied reference all the paeans from Plato to Dr. Conant, our own included. We will be content here to consider a few qualities of the state's educational activities (1) which affect in a unique way the tension between the values of freedom and equality, and (2) which distinguish education in character and in significance from other services expected of the state.

### *1. Public Education and the Freedom/Equality Dilemma*

An abiding dilemma for our society, as for most, has been the frequent incompatibility of freedom and equality. We have trimmed here and patched there in a living compromise, but always with more or less discomfort. Redefine and obfuscate as we will, we cannot at the same moment recognize an employer's right to choose his workers and the applicants' right to receive equivalent treatment. So we constrain the employer and declare that the quantum of freedom overall is increased when we really mean that equality seemed the more important value in that particular contest. Fair housing presents the same antinomy of values; in fact much of the field of civil liberties may be analyzed in these terms. The problem is endemic.

Public education may be viewed as an important exception to this dilemma, for here the values of equality and liberty can merge without subordination—or even diminution—of either. By “liberty” we shall mean the right and power of the individual to make decisions with significant economic, political, or social effects. If we start with the reasonable assumption that education has a “liberating” effect (*i.e.*, increases the practical choices available to the individual), and assume further that this effect is random with respect to populations of the size with which the financing of public education deals (districts), it follows that we do not increase that liberating effect by systematically preferring some such groups over others in the distribution of available educational resources; nor do we decrease that liberating effect by eliminating existing preferences. The total quantum of freedom is logically independent of the distribution of the available education among such groups.



If we make the further assumption that the liberating effect of public education for any such population of students also is a relative one which depends upon the state's having done nothing to prevent that group's education being at least equal to the education available to those with whom it must compete (*i.e.*, if we adopt a market model of liberty), a somewhat different consequence follows. In a system marked by preference, only those groups which are preferred by the state will enjoy this liberating effect; and their gain is offset by the relative unfreedom of the disfavored. Only when equality of opportunity for public education exists can freedom for every group be increased through education.

No doubt other more complex assumptions about the relation of freedom and education may set the values in apparent conflict. For example, if we assume that children of the poor districts cannot benefit from education as much as those of the rich (and assuming we are agreed what "poor," "rich," and "benefit" mean) we may infer a negative correlation between the values of freedom and equality. Such a result, however, seems to require assumptions about masses of persons that—even if they were empirically demonstrable—would be at least constitutionally questionable as a criterion for the dispensation of state benefits. The most sensible assumption for the present context is the market model relationship in which public education has its liberating effect for all groups only if it is dispensed without state engineered inequality. In this competitive model the state can prefer no entity without destroying the liberty of another. Free competition cannot endure the state's thumb on the scale.

Now it is certainly proper to wonder whether all of this airy conceptualizing means anything at all. It treats freedom as a term subject to quantification, which is questionable, and it is a far cry from the kind of practical analysis of discrimination we have attempted above. We see its limited role in the argument for Proposition I as essentially syncretic. The semi-Darwinian market analogy is addressed to the natural fears of the conservative that the levelers are at work here, sapping the foundations of free enterprise. We would like him to see that there is in fact no graver threat to the capitalist system than the present cyclical replacement of the "fittest" of one generation by their artificially advantaged offspring. Further, where that advantage is proffered to the children of the successful *by the state*, we may be sure that free enterprise has sold its birthright.<sup>225</sup>

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225. Note the comment of one observer rarely suspected of Fabian tendencies: "The difference of natural talents in different men is, in reality, much less than we are aware of; and the very different genius which appears to distinguish men of different professions, when grown

Even if that special advantage were not awarded by the state systematically to the successful but were utterly random in its dispensation, the same would follow. The state has no business giving differential pushes upon an arbitrary basis. Thus, to defend the present public school finance system on a platform of economic or political freedom is no less absurd than to describe it as egalitarian. In the name of all the values of free enterprise the existing system of public school finance is a gross scandal. Properly articulated this can be convincing to the classical liberal and may have something to do with his reaction to the Court's decision.

But cooptation of the free enterpriser is only half the battle. His support is dearly bought if the Court must forfeit the natural support for Proposition 1 that exists among (contemporary) liberals. There is, however, little risk of this, for, although their preference (like our own) will run strongly for *compensatory* education, they will support *equality* as a half-loaf of significant dimensions; and recall that we deal here only with constitutionality and only with the judiciary. Compensation is a question we would leave to legislation, and the gulf between liberal and conservative should become apparent only at that point. Thus the emphasis upon the harmony of freedom and equality may be useful in pulling together normally polarized ideologies; there is no reason that the Court cannot succeed in that aim, so long as it does not concern itself with compensatory education.

Our own point of view may appear incongruous to the extent that we have indicated our support for compensatory education by legislation. Does not such preference by the state for the disadvantaged disturb the proper relation between freedom and equality in education as much as the preference of the rich? The state's thumb is merely on the other side of the scale. Those who argue for compensation as a constitutional duty of the state may answer no, that true equality must imply compensation in our society. We already have rejected this constitutional position;<sup>226</sup> indeed we

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up to maturity, is not upon many occasions so much the cause, as the effect of the division of labour. The difference between the most dissimilar characters, between a philosopher and a common street porter, for example, seems to arise not so much from nature, as from habit, custom, and education. When they came into the world, and for the first six or eight years of their existence, they were, perhaps, very much alike, and neither their parents nor playfellows could perceive any remarkable difference. About that age, or soon after, they come to be employed in very different occupations. The difference of talents comes then to be taken notice of, and widens by degrees, till at last the vanity of the philosopher is willing to acknowledge scarce any resemblance." A. SMITH, WEALTH OF NATIONS 20-21 (Eliot ed. 1937). And see F. HAYEK, THE CONSTITUTION OF LIBERTY 91-93 (Univ. of Chi. Press 1960).

226. See text accompanying notes 72-97 *supra*.

would think that the propriety even of legislatively determined compensatory programs may depend upon how that compensation is dispensed. If the criterion for compensation is under-achievement (or over-achievement or other relevant distinguishing characteristic of the child or his district other than poverty) we see no more difficulty in extra state assistance than in the case of the preference for the blind child. Perhaps there is some loss of freedom in the Darwinian or market sense; if so we regret it, but do not see this as more than a makeweight. To argue that the provision of educational equality is compatible with classical freedom is not to reject every act of the state which is not.

However, if the criterion of preference is poverty, we face potential embarrassment. Can we hold that wealth ought not determine quality of education and then permit it to do so when it works to the advantage of the poor? The answer is we do not so hold. Later we will indicate why we would apply the standard "neutrally."<sup>227</sup>

## 2. *The Equal Sewer Problem*

The argument that the interest in education is crucial and distinctive had a twofold purpose. It seeks first, of course, to justify the giving to education of special judicial treatment of the kind now accorded voting. At the same time, and for many of the same reasons, it seeks to remove education from the herd of interests that may not deserve entry to the inner circle. If the Court is to "prefer" all interests it prefers none; but why stop with education? If the equal protection clause eliminates relative wealth as a determinant of the quality of public education, by what warrant will wealth continue to determine the quality of other public services? If the distinction between education and all other services is merely that of the sheer importance of the service at stake, shall we prefer being educated to being alive? Police, firemen, and sewers protect our most precious possessions, yet the quality of their service, like that of education, is tied securely to the standard of community affluence. In the years ahead the Court will be asked repeatedly to remove wealth determinants (and probably other non-egalitarian influences) from all public services. It is possible to imagine such a result.

There is a certain ethical appeal to the broad notion that, at least for government, it is *prima facie* improper either to assign the same social task to unequal units or to assign tasks of varying difficulty to

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227. See text accompanying notes 242-44 *infra*.

equal units. As a legislative principle the idea of universal power equalizing or even universal equality of services is well within the range of reason; as a judicially generated inference from the fourteenth amendment it is almost, but not quite, inconceivable. It is barely possible that the Court could move that far by constant incremental expansion of the "egalitarian revolution." The reason for our opposition to such a cosmic extension of equal protection may be inferred from our previous discussions of judicial restraint which we will not further elaborate.<sup>228</sup> What is important here is the question whether the extension represented in Proposition I is subject to prudent containment.

The principal safeguard lies in special qualities of the educational interest—qualities that justify, if they do not dictate, unique judicial response. In several respects public education differs from all other services or benefits of the state, and differs not only in importance but in ways that arguably make it distinctly and uniquely appropriate for fourteenth amendment protection. We do not intend to repeat everything we have said already about education's unique significance to the individual and to the political process, though it is all relevant. Here we will be concerned only with factors which distinguish education from other state benefits not yet in the inner circle but no doubt hovering in the wings.

The first is public education's role in maintaining "free enterprise democracy" and the economically open society that the phrase implies.<sup>229</sup> No other governmental service can claim such a seminal role in preserving entry to and competition within the market. Man as competitor is first and foremost educated man; we do not expect him—indeed we do not permit him—to compete until he has been educated. The demands of *laissez faire* must be postponed; but once the age of basic education is passed, competition and its fruits make a great deal more sense, at least if free enterprise makes sense. If we encourage people to become rich, we should be slow to prohibit their living together and taking advantage of their wealth by putting together a desired package of municipal services; nor should we confuse the issue by conjuring up visions of rat bitten slum children suffocating in garbage and adapting to life on inadequately protected streets. We can and perhaps will solve these problems of physical living standards with a *minimum* level of public services, whether or not the Court can intelligibly match the moral imperative for that minimum with a constitutional standard.

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228. See text accompanying notes 42-56 *supra*.

229. See J. DEWEY, DEMOCRACY AND EDUCATION 101-02 (1923).

The next and most obvious distinguishing quality of education is its compulsory character—a quality it shares with the criminal process. It is, of course, not on this ground to be compared to the criminal process which, unlike education, few seek voluntarily. Nevertheless, the element of compulsion has its uses in the argument when, to the compulsion of attendance, is added the compulsion of assignment—first to a particular district and then to a particular school. For the poor this combination of compulsions is confining indeed, at least when compared to the freedom of the more affluent to select among private educations. Nor is it insignificant in this context that the freedom of the affluent is one firmly grounded upon the fourteenth amendment itself. *Pierce v. Society of Sisters*<sup>230</sup> represents the prime (perhaps the only) example of a constitutional right to substitute private action for a state imposed duty; but, more than this, the Court's special concern for educational freedom in the *Pierce* case easily implies a corresponding concern for the child whose family condition makes the exercise of that freedom impossible. In the ambience of *Pierce* a child of the poor assigned willy-nilly to an inferior state school takes on the complexion of a prisoner, complete with a minimum sentence of 12 years. It is hard to find an analogy among the competing public "benefits," and one remains tempted to draw the parallel of the criminal law.

A third feature of education distinguishing it from all other benefits is the universality of its relevance. Not every person finds it necessary to call upon the fire department or even the police in an entire lifetime. Relatively few are on welfare. Every person, however, benefits from education;<sup>231</sup> if formal education were not compulsory, most would seek it anyway. Those who did not would substitute something in its place. The only service approaching it in universality is medical aid, and even medicine gets avoided by some of our most successful citizens on the grounds of religious conviction.

Further, to an extent surpassing other benefits, education is also a continuing process, not an episode. In this it can be contrasted with welfare which is never continuing by intention of the state, and, probably, rarely so by intention of the receiver. Education is the only planned, continuing, and universal relation with the state. Of all the state's benefits, therefore, it represents both the largest opportunity for and the most significant danger to the individual caught in its maternal embrace.

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230. 268 U.S. 510 (1925).

231. Perhaps the point is somewhat overdrawn. Even those who do not "call upon" the police benefit from them.

Finally, education is that service through which the state deals with every man *as man*. In this relation the state has made the fateful choice to reach out to touch the self and personality of its children. Here we have more than the warming, feeding, preserving, and healing of bodies—services appropriate to the lower orders of life. Such actions, laudable as they are, at most are neutral with respect to the human personality. They provide a context of security in which man, without undue interference from the elements and hostile humans, may develop in the directions and to the extent that he wishes and is able. But it is public education that enters actively to shape that development in a manner chosen not by the child or his parents, but by the state. When the state educates, it stamps its mold on the personality of the child. Often it does so explicitly; the preambles of legislation are rich with expressions of intention to shape young minds. Always it does so implicitly by determining which part of the deposit of learning shall be transmitted to the next generation.

We need not fear this aspect of public education in order to appreciate its unique role, but there are thoughtful men who do fear it.<sup>232</sup> For some of them education's inevitable impact on human personality is the basis of an argument not for equality in, but for abolition of, the public school. They would deny the state's right to maintain a *system* of education in the sense of comprehensive state norms for educational content. There is, of course, a dilemma here and one which is uneasily resolved by the *Pierce* decision, protecting freedom for those who can afford it. For those who cannot, the state's influence upon personality is inescapable. It is this that, as much as any other factor, makes discrimination in public education distasteful and which distinguishes education from all other public services.

These are distinctions the Court cannot fail to see. On the other hand, their persuasive effect is imponderable. The Court is not bound by our notions of where to stop expanding the inner circle of equal protection. It is enough for us that the distinctions are there, and that the end of wealth discrimination in education does not imply its necessary demise for all public services.

#### *D. The Role of the Victimized Class: Children as Preferred People*

It is likely that the argument for Proposition I, or for equality in any form, will be assisted by the characteristics of the class of

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232. M. FRIEDMAN, *CAPITALISM AND FREEDOM* 85-107 (1963); F. HAYEK, *THE CONSTITUTION OF LIBERTY* 376-95 (1959); Jencks, *Is the Public School Obsolete?* 1 *THE PUBLIC INTEREST* (1966); West, *The Uneasy Case for State Education*, 4 *NEW INDIVIDUALIST REV.* 38 (1966).

persons—children—whose interest in education is the subject matter of the litigation. Children we define operationally by reference to the age at which persons may leave school under state law. The claims of children for, in some sense, an equality of treatment with other children seem ethically sound. This conclusion is obvious, but the reasons may not be. Aside from age there is little about children which suggests sameness or uniformity for educational purposes with two exceptions. First, in the case of most children, it is very difficult to predict the upper limits of an individual child's development, at least during his first years of school. Testing is notoriously fallible, culturally biased, and inclined strongly to measure achievement rather than pure potential.<sup>233</sup> Further, by the time testing becomes plausibly reliable for that purpose, school itself may have had a major impact upon potential. Thus there is a sameness among children in the sense of a general substantial uncertainty about their potential role as adults. Being yet indeterminate, children are classless—or their class is classlessness.

Secondly, and vaguely, there is an equality of deserts; no child of tender years is capable of meriting more or less than another, or at least our ethic forbids the recognition of that possibility. This outlook finds a negative form of expression in the common law and in statute in the blanket toleration for crimes and certain torts by persons under 7 years and the de facto immunity of children for such acts up to the age of 10 or 12.<sup>234</sup> This might be put positively as an equality of innocence. In this respect the equality of adults is always problematical; even social and economic differences among them are plausibly ascribed to their own deserts. Our socioreligious history is full of explanations for this attitude<sup>235</sup> but, in any event, adults as a class enjoy no presumption of homogeneous virtue, and their ethical demand for equality of treatment is accordingly attenuated. The differences among children on the other hand cannot be ascribed even

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233. See Judge Wright's assault on the system in *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967). For the very interesting sequellae to this case see *Smuck v. Hobson*, No. 21,167 and *Hansen v. Hobson*, No. 21,168, both decided January 21, 1969, by the United States Court of Appeals for the District of Columbia.

234. The immunity was based upon the inability to achieve the mental state necessary for the wrong. The common law of crimes exempted those under seven years absolutely and presumed that children from 7-14 did not possess "the degree of knowledge essential to criminality." 2 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 98 (1883). The tort immunity has been narrower since "the state of mind of the actor is an important element" in only a limited number of torts. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 1025 (3d ed. 1964).

235. The classic study is M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (C. Scribner's Son 1956).

vaguely to fault without indulging an attain of blood uncongenial to our time.

If children are similar in their deserts, they are not similar in their needs. However, for purposes of achieving legal equality of opportunity this very dissimilarity, ironically, is helpful. There is widespread agreement that the current dispensation of resources is generally in inverse proportion to that need. The ethical claims of the disadvantaged children thus even exceed the requirements of our rationale. As we have explained, this does not tempt us to satisfy those ethical demands for preference through the medium of the Constitution, but it may help toward convincing the Court to move as far as equality in the sense of Proposition 1.

### *1. Protection of Children's "Welfare" Rights*

A special status for children under the Constitution is a question that has not reached the Supreme Court in anything approaching pure form. However there are some hints here and there that we can briefly explore without any effort to be exhaustive. A number of Supreme Court cases deal with state regulations intended to benefit children by limiting their exercise of those freedoms recognized for adults. However, the issue has not been cast in terms of the discriminatory effects of regulation among subclasses of children. (*Brown* is a possible exception, but, as we have seen, subsequent cases make it appear much broader in scope).<sup>236</sup> By and large the point of these cases is the special breadth of the state's power to legislate for the benefit of children because of their unique needs. Thus in *Prince v. Massachusetts*<sup>237</sup> a statute limiting the freedom of children to sell magazines was applied to a 9-year-old Jehovah's Witness who sold religious tracts on the street in violation of the act. The defense was put solely on grounds of the free exercise of religion clause. The Court split 5-4. The majority appeared to be tortured by the choice between private rights and the state's *parens patriae* role, but held for the state:

Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved. The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded

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236. See text accompanying notes 217-18 *supra*.

237. 321 U.S. 158 (1944).



from abuses and given opportunities for growth into free and independent well-developed men and citizens.<sup>238</sup>

This same tone is evident in the recent decision upholding limitations upon distribution of literature to minors that were more restrictive than the rules developed for adults in the obscenity cases. In *Ginzburg v. New York*<sup>239</sup> the Court approved the *Prince* decision and specifically confirmed the broader power of the state to regulate the conduct of children.

The apparent difficulty with these cases and others of this genre is not that they fail to distinguish children, but that they seem to distinguish them for purposes of limiting rather than increasing their rights under the Constitution. The recent decision in *In re Gault*,<sup>240</sup> sprucing up the procedures of the juvenile court, seems rather to affirm than deny this apparent second-class citizenship by making exceptions to it.

Fortunately this gloomy perspective leaves out of account a crucial distinction. In *Prince*, in *Ginzburg*, and in the *Gault* case, there was a sharp conflict between two interests held by the same child. The child's "welfare" interest promoted by the curfew, obscenity, or juvenile delinquency laws clashed directly with either the child's interest in freedom of religion (*Prince*), freedom of communication (*Ginzburg*), or personal liberty (*Gault*). The Court in every case was forced willy-nilly to reject one or the other of the interests—either the one claimed *by* the child or the one claimed *for* the child failed to dominate in *Gault*, but it is worth noting that the conclusion, it might be the ironic one that the cases in which the child's "civil liberty" interest was subordinated to his welfare interest are the ones which most clearly suggest a preferred status for children. It was the welfare interest which truly belonged to the child *qua* child. His civil liberty interest was no different from that of any adult; it was asserted not as a class interest but as the interest of an individual who happened to be a child. And observe that the interests which failed in *Ginzburg* and *Prince* were the most jealously protected liberties—the interests in speech and religion. The welfare interest of the child failed to dominate in *Gault*, but it is worth noting that the Court emphasized its grave doubt whether the juvenile's surrender of procedural protection under existing systems was in fact compensated by any substantial benefits from coming into the state's custody. As Mr. Justice Fortas put it:

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238. *Id.* at 165.

239. 390 U.S. 629 (1968).

240. 387 U.S. 1 (1967).

It is claimed that juveniles obtain benefits from the special procedures applicable to them which more than offset the disadvantages of denial of the substance of normal due process. As we shall discuss, the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process. But it is important, we think, that the claimed benefits of the juvenile process should be candidly appraised. Neither sentiment nor folklore should cause us to shut our eyes . . . .<sup>241</sup>

Now comes the point: If the child's interest in the benefits of state policy is so potent against fourteenth amendment rights, as *Prince*, *Ginzburg*, and even *Gault* suggest, how stands his claim when that welfare interest is itself asserted—not to offset—but as an additional foundation for such a right? The school finance case is not one where the child asserts the liberty of playing truant against the weight of the state educational policy designed to benefit children as a class. It is a case where he asserts a fourteenth amendment right to equality with respect to the very benefit (education) the state will force upon him even if he does not wish to enjoy it. He draws strength both from the class welfare interest *and* the civil liberties interest. Being in the peculiar position of withholding from the child what it acknowledges to be for the child's benefit, the state not only cannot rely upon but must counter whatever strength it would ordinarily have drawn from the child's minority status. The child's claim thus embodies all the relevant interests except those of the state's administrative convenience.

If there exists here a special role for childhood it is tempting to compare it to the role of race under the fourteenth amendment. One can imagine the category "child" and the category "Negro" together forming a broader class of "precious people" for equal protection purposes. The comparison, however, is false, at least for our problem. The discrimination in school finance is not against the class "children"; it is within that class. The advantaged children are equally "precious." It is no help to our argument to distinguish children from all other classes, as the equal protection cases occasionally seem to do with the class "Negro." This, however, does not mean that the Court's special concern for children will not be helpful. There may be a difference between using that concern to distinguish children from adults and using it as we suggest, but that difference is hardly crucial. If the Court is as solicitous of children as

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241. *Id.* at 21.

we believe it to be, this concern is likely to be expressed inside as well as outside the class.

However, the comparison to the special use of equal protection on behalf of the Negro is questionable for a second reason. It may carry the implication that children should be viewed as another pressure group in a social revolution. That is, in the context of equal protection cases dealing with race, the poor, urban voters, and the like, it is easy to misconstrue reform in school finance simply as a weapon in a class struggle, with loyalties to be recruited according to the lines of cleavage between the jarring sects and segments of society. The divisive social consequences of such a view could be a net loss, even if the Court ultimately sees it our way. Success for the constitutional proposal here advanced would surely cost the rich in the short run, but this does not make it essentially a program for redistribution of wealth. It is merely a long overdue effort at redistribution of public education; its objects and beneficiaries are neither poor children nor rich children, Negro children nor white children, urban children nor farm children. They are children.

## *2. Children and the Neutrality of Proposition I*

We are now in a position to answer the question whether the application of Proposition I should be "neutral." That is, would it be improper for the state to prefer the children of the poor as such? Suppose, for example, a statute which directs per pupil expenditure by district in inverse proportion to the relative wealth of the district. Clearly such a statute offends Proposition I as we have cast it, for quality is made a function of wealth. Should an exception be made where the poor are advantaged? How concerned should we be about symmetry in this respect when a number of other governmental programs of incontestable validity prefer the poor quite explicitly?

The answer is that Proposition I probably should operate with neutrality; the hypothetical statute just posed should be subject to the same constitutional restrictions as a preference in public education for the rich. The central reason lies in what we have just said about the class of victims. The state ought not discriminate among children upon the basis of a characteristic of any persons other than the children themselves. The wealth of his parents (or of some artificial collectivity such as a district) seems to us a questionable basis for denying a child equal access to public education. Perhaps one could argue that the wealth of the child himself would be a proper criterion; but since children are notoriously impecunious, any concession on this ground would be largely theoretical. Further their very poverty and

dependence is an additional index of that universal democracy of children which we have invoked. We see little reason to punish the penniless children of the rich.

The issue is not one of extreme importance, if only because it is easily avoided.<sup>242</sup> In this country we have found it possible to legislate preference for Negroes by legislating about poverty; if poverty were our immediate target we would, no doubt, find it possible to legislate about that subject by legislating about achievement scores, IQ's, reading levels, and the like. Poverty, however, should not be conceived as the direct object of legislation designed to improve our schools. Its object rather is the individual educational needs of children who are not properly distinguishable from each other as either rich or poor. It will not overtax our imagination to find ways of meeting those needs without applying an irrelevant means test to the parents or districts.

Our posture here may suggest that the federal legislation in aid of education in defined areas of poverty should be held invalid under the unwritten equal protection clause of the fifth amendment.<sup>243</sup> The point is arguable. It could be escaped by suggesting that the use of the poverty test in those statutes was simply a legislative shorthand for all those other characteristics of children about which Congress would be free to legislate; indeed this is probably the fact.<sup>244</sup> Nevertheless, although it is not the present subject, the superficial inconsistency with Proposition 1 is somewhat unsettling. We would at least prefer that Congress more explicitly invoke the relevant criteria in establishing such programs. On the other hand there is little doubt that Congress (or the state) could give unrestricted grants to the poor which the recipients could spend for education if they chose. At some point our neutrality may verge upon fatuous formalism.

#### *E. Reasonable Alternatives and Their Relevance*

There is a principle of constitutional law which runs something like this: In assessing the validity of state action which significantly injures an individual, it is relevant to inquire whether the state's legitimate purposes could have been achieved by an alternative form

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242. For the converse problem of "compensatory" education of the gifted rich, see text accompanying notes 299-306 *infra*.

243. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

244. We do not wish to become too pure about this. It is clear enough that Congress was in fact interested in "the special educational needs of educationally deprived children," 20 U.S.C. § 241a (Supp. III 1968), and that the use of the poverty standard could realistically be regarded as merely an instrument to define what are purely educational needs. Actually the federal standards are sufficiently complex to support any argument. See 20 U.S.C. §§ 241a, 241c (Supp. III 1968); cf. NEW YORK EDUC. LAW 3602(12)(b) (McKinney Supp. 1967).

of action which would avoid the injury. This would appear to be an elementary principle of personal ethics. Its spirit is indwelling in a number of basic principles of the common law, and it played a prominent role in the now moribund field of economic due process. It has recently insinuated itself into the civil liberties field and seems now to bear a name which arose out of its application in antitrust cases. It is known as the doctrine of "less onerous" or "less restrictive alternative."<sup>245</sup> It has appeared in at least two equal protection cases in the last few years.<sup>246</sup>

Its application may be illustrated by the problem of the criminal accused who seeks release on bail. The state has a strong interest in assuring his presence for trial. Hence, a substantial bail requirement is sensible. However, such a system harshly discriminates against the man who cannot make the amount of the bail. He remains in prison until trial despite all presumptions of innocence.<sup>247</sup> If we assume that other adequate incentives for his appearance are available, the state may have the duty to use one of them in place of bail. Some such general rule is a valuable item of judicial hardware. It permits the Court to protect the interest of the individual without frustrating the state's purpose, if the state is merely willing to adopt the ameliorating alternative.

The Supreme Court has been escalating its use of this concept in the area of fundamental rights. Its description in *Shelton v. Tucker*<sup>248</sup> is often cited now as the classic form. There the Court struck down a statute requiring school teachers to make broad disclosures of their private associations. The Court's opinion said:

[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

. . . Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.<sup>249</sup>

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245. See Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967); Horowitz, *Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A.L. REV. 1147, 1161 (1966).

246. See *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965).

247. See Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 446-47 (1967).

248. 364 U.S. 479 (1960).

249. *Id.* at 488-89.

Note that the degree of the Court's willingness to reject the state's interests served by the statute is a function of the fundamental character of the personal right. It is therefore likely that, if the concept of less onerous alternative is relevant to equal protection problems, it will be limited to the protection of those interests in the "inner circle." One of the few equal protection decisions in which it has been given clear expression is *Carrington v. Rash*<sup>250</sup> involving the voting interest. There a Texas statute had excluded military personnel stationed in Texas from the franchise. The state feared "infiltration by transients" whose concern for state affairs was often not substantial. The Court found such state interest valid but the statute invalid, because the state with relative ease could have made the distinction between those servicemen who intended in good faith to stay in Texas and those who didn't.

In another equal protection decision, *Rinaldi v. Yeager*,<sup>251</sup> the Court invalidated a classification affecting criminal appellants, because there were alternatives available to the state which made the classification unnecessary.

There is little doubt that this concept will be used with increasing effect in equal protection cases, but our brief encounter here should not leave the impression that the concept is altogether clear or predictable. Later in the very term of Court in which the *Shelton* case was decided the Court upheld Sunday closing laws imposing significant restrictions upon Saturday sabbatarians, even though the state could have altered the prohibition so as to leave the choice of the day of rest up to the individual. Many other states had made an alternative day available to such minorities. In *Braunfeld v. Brown*<sup>252</sup> the Court admitted that "this may well be the wiser solution" but it allowed the state interests to prevail. Among these interests the Court noted the problems of more complicated enforcement and of potential injury to other state policies.

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250. 380 U.S. 89 (1965).

251. 384 U.S. 305 (1966). New Jersey required indigent appellants who asked for and received free transcripts to pay for them out of prison wages if (1) the appeal was unsuccessful and (2) the sentence involved imprisonment. The court found irrational and "invidious" the financial amnesty for those who were not imprisoned and struck down the reimbursement obligation for those imprisoned. The Court added, "[Any] supposed administrative inconvenience would be minimal, since repayment could easily be made a condition of probation or parole, and those punished only by fines could be reached through the ordinary processes of garnishment in the event of default." *Id.* at 310. *Rinaldi* can be viewed as the one criminal case of the "inner circle" in which the discrimination is not by wealth. That is, the discrimination is between subclasses of indigents. One might even stretch a point and call the interest at stake a purely financial one, thus viewing *Rinaldi* as the first purely civil, non-racial, non-voting case in the inner circle. The Court, however, clearly viewed it as part of the *Griffin* line.

252. 366 U.S. 599 (1961).

A point worth noting is the distinction between "less" and "least." The doctrine has been described as that of the "least onerous alternative";<sup>253</sup> however, the use of "least" is misleading, for it suggests too much. The Court is not engaged in a detailed examination of alternatives in an effort to tell the state how to rewrite the statute. The ameliorating alternatives are merely one of the factors of judgment. The imposition on the person "must be viewed in the light of less drastic means for achieving the same basis purpose."<sup>254</sup> As we see from *Braunfeld* there is no "rule" here other than the soft rule of balancing the interests of person against those of the state. We might add that it is also unclear just how completely the interests of the state must be served by the available alternative. One commentator suggests that, in the field of economic due process, the alternative must be rather precisely applicable.<sup>255</sup> It seems certain that no such niceness will be required in the area of fundamental rights, but the fit of the alternative to the problem clearly cannot be too wide of the mark. It is in this perspective that we can apply the general concept of less onerous alternative to the school finance issue.

*F. Alternatives for Financing Public Education:  
Preserving State Interests*

In a general way the important state interests served by the existing decentralization of the responsibility for education are (1) subsidiarity in administration of the school system and (2) subsidiarity in decisionmaking about the level of sacrifice that is appropriate for education in the light of other local needs.<sup>256</sup> Let us outline the ways in which such interests can be served while avoiding the existing inequities.

*1. The Interest in Decentralized Administration*

It is abundantly clear that the states' interest in decentralized administration can be served under a wide range of financing systems some of which we have already identified.<sup>257</sup> The following breakdown includes but twelve examples of financing systems that do not discriminate by wealth and which are compatible with local *administration* of varying kinds and degrees.

A. Centralized (Total State) Financing:

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253. Horowitz, *supra* note 245, at 1161.

254. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

255. See Struve, *supra* note 245, at 1175.

256. See text accompanying note 34 *supra*.

257. See text accompanying notes 38-40 *supra*.

*Equality of Allocation to Districts on a Per Pupil Basis:*

- #1. District free to allocate to all reasonable uses.
- #2. District compelled to spend on an equality per pupil basis.
- #3. District compelled to allocate to various categorical uses.  
(Compensatory, experimental, etc.)

*Allocation to District on Reasonable Basis Other than Per Pupil:*

- #4. Categorical special aid for the blind, gifted, and disadvantaged.
- #5. Categorical special aid for curricular specializations (science, art, experimentation, etc.) to be chosen by the district.

*Direct Aid to Students:*

- #6. (Either all or some of the state budget for education—  
Implies freedom to spend in private schools)

## B. Local Financing (Partial)—#7-12.

[All the administrative systems possible under #1-6 are possible under local financing. They would, however, require "power equalizing" to be constitutionally valid if Proposition 1 is accepted.]

All of these systems—#1 through #12—would be less onerous alternatives insofar as they would remove the effect of poverty upon quality without sacrificing subsidiarity in administration. Indeed, as we have demonstrated, subsidiarity would be augmented by any form of power equalizing.<sup>258</sup>

2. *The Interest in Local Fiscal Control*

The state's other principal interest—the interest in retaining a substantial *local fiscal control*—could be satisfied by a slightly smaller number of alternative programs having the same ameliorating effect upon the interest of the child. All of them would involve some aspect of power equalizing<sup>259</sup>—either through the district, the family, or both.<sup>260</sup> Where the district is used they would probably not be more difficult to administer and enforce than the existing foundation and flat grant programs which they would replace. The use of the family as the equalized unit would involve some additional complications, but it would at the same time diminish those burdens—including financial responsibilities—connected with the administration of districts.

All of these options, of course, frustrate any interest the state might assert in imposing either a heavier load or inferior education,

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258. See *id.*

259. The only exception is a program of constant redistricting in order to keep district tax bases equal. This seems sufficiently cumbersome as to exceed the definition of an "alternative."

260. See text accompanying notes 38-40 *supra*.



or both, upon poorer districts. The history of educational finance would suggest the pursuit of such an interest by the states. To say that this interest is illegitimate and does not deserve recognition begs the question asked by this Article. Whether the rationale offered here will carry the Court is of course unpredictable, but it is difficult to imagine the Court tolerating the existing scandal in education if it can be provided an approach that assures change without preordaining the form that change will take. Proposition 1, we suggest, will serve these ends.

## IX

### TACTICS AND POLITICS

Legal and political strategies must be developed to give practical meaning to the theories offered here. Many approaches are possible, and we do not intend to be exhaustive; prediction is difficult and tactics are peculiarly a matter of time and place. Nevertheless, some things are reasonably clear.

#### *A. Who Sues Whom for What?*

Since our purpose is broadly to challenge the entire structure of education finance, the most promising defendant is clearly a state manifesting in significant degree all the inequalities analyzed in Part I. States such as Illinois<sup>261</sup> and California<sup>262</sup> seem ideal, since they have coupled the foundation plan with flat grants in a relation which makes the flat grants often anti-equalizing. In our discussion we will assume that we are planning litigation in such a state.

A plaintiff must be chosen who is being injured by the wealth discrimination built into the system. There will be two types to choose from: children and school boards. The child plaintiff (represented by his parent, and himself representative of a class in most cases) should be a public school pupil who (1) resides in a "poor" district which is (2) taxing above the minimum participation rate of the foundation plan. This child's district can be compared in wealth, effort, and offering to specific districts above the state median in wealth in what is the only factual showing essential to the theory. It would be preferable, however, if the following additional characteristics of the district were present: (1) extreme poverty and (2) a tax rate at or near the permitted maximum.

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261. 122 ILL. ANN. STAT. ch. 122, § 18-8(2) (Smith-Hurd Supp. 1968). For a general discussion of anti-equalizing effects of flat grants see text accompanying notes 21, 23-25 *supra*.

262. CAL. EDUC. CODE § 17901 (West 1969).

For obvious reasons the plaintiff child might best be from a poor family, even if this is unnecessary under the theory. If the parent's employment requires his residence in the district this is also a makeweight, emphasizing the "captive" aspects of the situation. As we have indicated before, the child's race is legally quite irrelevant,<sup>263</sup> but, for later political purposes, in order to stress this irrelevance a white plaintiff (or a preponderance of whites in a class action) is probably desirable.<sup>264</sup> In most cases it also will be desirable to have the school board of the plaintiff children's district join as plaintiff at least where the board is not subordinated to political influence and frequent shifts of view (an important consideration). There also may be some difficulty concerning the district's standing to attack the legislation under which it is created,<sup>265</sup> but the original presence of the district in the litigation would lend importance to the matter, even if it were to be dismissed because of lack of standing. However, its involvement would render it doubly important that the tax rate for that district reflect a level of sacrifice well above the state median.

The complex legislation under attack can be put in two categories. First, there are laws creating districts with power to perform the educational task. Second, there are laws tying students to such districts. The objection to the first, the district mechanism, can be phrased in two ways: (1) By empowering rich districts to tax "local" wealth at a rate above the foundation level, the state has unfairly preferred these districts and permitted them to spend more than their share of the state's educational resource; or (2) By limiting the power of districts to the taxation of "local" wealth the state has unfairly injured them unless there is an adequate subvention, which there is not.

The second general category of laws—the assignment rules—fits the inequality to the child. These rules create three kinds of potentially

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263. See text accompanying notes 145-55 *supra*.

264. If the reaction of those practicing attorneys who have heard us speak on this subject over the last years is typical, we can expect a rather general rejection of this advice. That sampling of the fraternity by and large has stressed to us what it considers the strategic value in litigation of "riding the race horse." As developed later in this section, we fear the dampening effect of race upon the development of a consensus to support meaningful legislative change. The racial emphasis would be designed to convince nine men its de-emphasis to convince all men. See notes 146-55 *supra*.

265. *Cf. Columbus & Greenville Ry. Co. v. Miller*, 283 U.S. 96 (1931); *Braxton County Court v. West Virginia ex rel. State Tax Comm'rs*, 208 U.S. 192 (1908). *But see Board of Educ. v. Allen*, 392 U.S. 236, 241 n.5 (1968). The two older tax cases involved state officials asserting the invalidity of a state action injurious to a unit of government or to the state itself. Would the official's standing be improved or weakened if he purported to act on behalf of persons for whose welfare in part he was responsible under state legislation? Is a school board responsible for the representation of those interests of its students arising outside the statutes?

objectionable restraints which we will label 3, 4 and 5 to add to the two objections arising from the laws creating districts. They are: (3) Children are required to attend school; or (4) their attendance is in general limited to the district of their residence; or (5) if they wish to attend elsewhere (private schools or other districts) they must pay out of their own pockets.

It is the combination and interaction of these five factors that create the total problem, but we shall see that the system as a whole may be brought under fire by an attack from any one of the five points, each attack stressing a slightly different kind of injury and remedy. These five strategies, stated first in legal and then in simple normative terms, would seek the following ends:

(1) To prevent the richer districts from receiving an unfair percentage of the general resource for education. (Jones, in the richer district, deserves no more than I am getting for the same tax).

(2) To obtain a fair amount of money for the plaintiff's education in his own district. (I deserve to get in my district at least what Jones gets for the same tax).

(3) To gain admission for the plaintiff to a district with a fair budget per child. (If I cannot get in my district what I deserve, considering our tax rate, I should be permitted to attend Jones' school.)

(4) To excuse the child from attendance so long as less than a fair sum is available in his own district. (If I am unable to get what I deserve in my district considering our tax rate, I should not have to go to school).

(5) To obtain a fair sum for the plaintiff to purchase education elsewhere. (If I cannot get what I deserve in my district considering our tax rate, then I should get as much money as is spent on Jones to spend on my education elsewhere).

As we evaluate these five kinds of confrontations it is crucial to recall the purpose of it all. We do not aim to end or injure public education, compulsory attendance, districts, or even the variations in the number of dollars spent per pupil. We hope simply to free the state from the existing straitjacket of wealth-determined quality and thus force a basic legislative reexamination of the system to the probable benefit of all education. We bank on the commitment of the state to education and thus do not shrink from creating through the courts a choice for the legislature between two systems of equality—one viable, the other intolerable. As in the *Reapportionment* cases, the plaintiffs did not seek to end elections, hold them at large, or declare state legislation unconstitutional. Of course, the trick is to avoid such ultimate confrontations wherever possible.

We will reorder the five strategies for purposes of evaluating potential lawsuits and consider first the assignment-type restraints upon the child. After we have viewed all five separately, as a sixth alternative we will consider their use in combination.

*I. If I am Unable to Get What I Deserve in My District, I Should Not Have to Go to School*

Here the constitutional question arises by way of defense to the application of the compulsory attendance law to the child or his parents. The child merely stays away from school and lets the state come after him. The parallel intradistrict case, except for its racial overtones, is presented in *In re Skipwith*,<sup>266</sup> a 1958 decision in the trial court of New York. In a child neglect action, parents successfully defended with a showing of teaching and other services in the child's school inferior to the other schools of New York City.

The simplicity of the strategy is attractive. There are, however, risks that the state will not prosecute or will moot the matter after the defense is offered. To force the state to meet the issue might require an escalation to the level of boycott, possibly jeopardizing the constitutional defense for the organizers and risking political support for the reforms that are the real issue. Nobody, after all, really wants the children out of school.

On the other hand, as a test case, this device may produce an alliance of the truant and the authorities rather than a clash. The school board, after all, would also like to increase the district school budget. A single chosen child, absent for one day, could provide the basis for the test in a manner reminiscent of the litigation testing the Connecticut birth control statutes.<sup>267</sup> The court might be concerned about the adequacy of representation for the state's interest,<sup>268</sup> but there is nothing to bar the entry of the state as a proper party.

The approach has substantive weaknesses. The court may well regard the relationships between truancy and equality to be too attenuated to establish a constitutional defense. There is an incongruity in seeking equality of education by claiming a right to none at all—a weakness that could be expressed judicially in terms of an estoppel or a lack of standing, at least when other remedies are available.

The legislature's probable response is also a matter of concern

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266. 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct., Child Div. 1958).

267. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

268. *United States v. Johnson*, 319 U.S. 302 (1943), expresses the general rule against collusive litigation.

for both the children and the court. The legislature in theory could moot the specific case by abolishing compulsory education though this is almost inconceivable before judgment and only slightly less so after; in any case it would merely postpone more basic legislative consideration. The constitutional argument does not depend on compulsion, and another lawsuit should produce the desired result. However, the possibility of such temporary legislative frustration shows how the truancy approach is directed at a target which is not the crux of the discrimination. It thus may cloud the issue and sap whatever appeal the case otherwise might have had for the court. The judges will be keenly aware of what a short handle they have on the legislative process in this case in which the only order can be to let the defendant go.

*2. If I am Unable to Get What I Deserve in My District, I Should be Able to Go to Another District*

Here the child is plaintiff. He seeks free admission to a public school in a neighboring richer district, is refused, and seeks a judicial order requiring admission. By way of answer the defendant school and district set up the present attendance rules. The plaintiff raises the constitutional question in reply.<sup>269</sup> An exhaustion of remedies might be an intervening requirement where relief of the sort requested could be sought administratively.<sup>270</sup>

There are obvious pitfalls. If plaintiff attends in his own district in the meantime, does he lose standing? If he doesn't, is he truant? Will the rich district moot the case by admitting him, thus ending the case and forcing plaintiff to travel long distances to a school which he really didn't want to attend? Does this mean that large numbers of plaintiffs will be necessary to discourage mooting?

Unlike the truancy test case, this one will not elicit cooperation from the defendant district, whose present and ultimate interests both are adverse. Further there is doubt whether this confrontation involves the proper defendants for the broad purpose of the plaintiff. The rich district may admit the plaintiff under court order, but it has no power to change the whole system by itself. Very likely the district would implead the state and its appropriate officers, but, as we shall see, there may be problems here too about the power of such individuals to effect the necessary change.

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269. A similar approach was taken in many of the historic racial segregation cases. *Sweatt v. Painter*, 339 U.S. 629 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

270. Few state systems, however, provide a realistic avenue of relief. *See, e.g., McNeese v. Board of Educ.*, 373 U.S. 668 (1963).

Would the legislature respond to an adverse judgment by abolishing district attendance lines but retaining the fiscal discrimination? This is unlikely, as no coherent result could be obtained from this except under a statewide plan. Such a plan, of course, in itself would end the discrimination unless the state chose to discriminate directly and explicitly by spending more state resources in rich areas of the state, an unlikely and, in any event, short-lived expedient.

If the legislature does not respond at all, the result could be a ponderous drift toward equality. If numbers of children transferred from poor to rich districts, the districts would tend to draw together in educational wealth. At some point the formerly rich districts would become "sending" schools; worse, since districts are "rich" or "poor" only in relation to each other, a district would be a "sending" district as to some districts and a "receiving" district as to others. The administration of all this would be unimaginably confusing and involve a multiplicity of litigation. Again, concentration on one element—here geographical assignment—gives the remedy a skewed and absurd appearance, and makes it one that a judge would hesitate to use unless he had some confidence in a quick and healthy legislative reprise.

*3. If I am Unable to Get What I Deserve In My District, I Should Get as Much Money to Spend on Education Elsewhere as is Spent Per Pupil in District Q*

Here the plaintiff child is suing for what might be thought of loosely as damages or compensation for the taking of property without due process. He says my district is spending X dollars on me when, in a fair system, I would deserve Y dollars (determining "Y" is difficult and very important; the easiest method is the comparison to some richer district, "Q"). The Y dollars awarded by the court would be spent by plaintiff on education in either public or private school.

This has attractions; it does not depend on any false assertion about not wanting to attend school, and, if the "damages" can be fixed, it is simple. Yet, its allure fades when we think of the effect of large numbers of children using it. First, when sufficient numbers of children have left a poor district, that district becomes "rich"—indeed, each departure reduces the measure of injury to those remaining. Second, unlike the previous remedy, there is no problem of making the receiving district poor (since it would receive the child's judicially determined stipend). One wonders where all the schools

would come from to serve those who leave one district's schools for another's or for private schools? And, third, would not such a system of relief cause private school children in poor districts to enroll in public school simply for the purpose of qualifying for their stipend and then transferring back to private school? Finally, could the parent supplement the stipend? If so, would the court not be supporting the very wealth discrimination it hoped to end, because it would be preferring the richer parents in the poor district? Could the court forbid the parent's adding on?

There is also a problem about the defendant. It is not the child's district, but who is it—the tax collector for a rich district? He may be collecting too much, but whence arises his duty to pay it to this particular child?<sup>271</sup> Clearly the defendant—or one of them—must be a statewide body or official. Could he be reached under a state claims act, or is there some hope under the Civil Rights Act of 1871?<sup>272</sup> In what sense is this "damage" if the child is asserting a right to *future* behavior by the state?<sup>273</sup> And even if it can be treated as such, wouldn't its measure be  $Y-X$ , not simply  $Y$ ? But what good will the mere difference do the child? Does he go to school in his own district and hire  $Y$  dollars worth of tutoring?

Victory in such a suit would have the advantage of driving the legislature into an immediate panic, but it is doubtful that such relief could be won and seems a questionable incentive to sensible and measured reform.

#### 4. *I Deserve to Get in My District at Least What Jones Gets in His*

Now we focus upon the powers and limitations of the districts. The plaintiff (child and/or his district) asserts directly a right to a share in the total public educational spending in the state unaffected by wealth differences in the districts. In short the plaintiff's demand is for more money for his district. In making it, of course, he compares the district's wealth and effort with that of richer districts.

This approach has the advantage of direct and complete relevance to the central problem. It keeps the child going to school and going to his own school. Its spirit is one of raising the level of education, and

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271. If the action were a class action, the measure and distribution of the damages would be a forbidding task.

272. 42 U.S.C. § 1983 (1964), which, however, is confined in its reach to offending individuals. *Monroe v. Pape*, 365 U.S. 167 (1961). Thus any hope to use state tax funds for damages might depend upon a theory of "taking" under the fourteenth amendment.

273. Perhaps any child above the first grade could allege the wrong with respect to the preceding year.

it is not immediately and necessarily disruptive of rich districts, though its success will probably affect most districts eventually.

Suppose the legislature does nothing to arrest the discrimination; how will the court go about effecting the necessary changes? Can it raise money? The *Prince Edward County* decision recognized the judicial power to “. . . require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain . . . a public school system . . . like that operated in other counties in Virginia.”<sup>274</sup> The state capitulated, and it proved unnecessary to attempt that judicial rope trick. We are left with a precedent that has never been applied. It is not easy to imagine just how it could be applied in our case. What level of tax in what form upon whom for which purpose shall the court decree? If the court were to permit the richest district to continue to spend at current levels, all the districts taxing at the rate levied in that district would have to be elevated to match it. The economic consequences of such a change in some states would be very significant.<sup>275</sup> If the decree were pegged to any other district but the richest, the court would have to restrain the spending in all districts richer than the level chosen, and to that extent it would depress the quality of education. The judge-levied tax is not a promising prospect for these and many other reasons.

Note that the existence of an equalization fund is no answer. By definition a “foundation” plan fund is inadequate to equalize, and its present allocation is often as near to a fair distribution of that exiguous sum as any court could manage. The court might make some headway with the impounding and reallocation of the flat grant fund, but this is no final solution, and what if the legislature abolishes both funds in favor of purely local financing?

In this form of litigation the proper defendant is difficult to identify. All the relief sought is beyond the power of any agent of the state operating under the existing state law. The real target is the legislature in all these cases, but even more directly here. Perhaps the legislature should be named defendant as it was in the *Colorado General Assembly* case.<sup>276</sup> The problem is that in reapportionment there was, at least in theory, a *duty* of the legislature to act; here there seems no duty since public education is concededly not a right. Yet there is at least this right: that public education be either validly

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274. *Griffin v. County School Board*, 377 U.S. 218, 233 (1964).

275. Elsewhere we have estimated the total effect of such a change to be in range of \$15-20 billion per year. See COONS, CLUNE & SUGARMAN, *supra* note 11.

276. *Lucas v. Forty-fourth General Assembly*, 377 U.S. 713 (1964).



structured or abolished.<sup>277</sup> Arguably the state legislature has a duty to do one or the other which would render it the proper defendant. Even if such a duty exists, however, the inclusion of the legislature as a party is awkward and undesirable unless it is clearly necessary.

5. *District Q Students Deserve No More Than I Get*

Instead of using the court to permit the poor district to catch up to the rich districts, the plaintiff may pull the whole system around his ears by blocking access of the rich to their super-adequate tax base. The court would be asked to enjoin the operation of any part of the state system exploiting a wealth advantage over the plaintiff's district. State officials would be enjoined from the distribution of flat grants and equalization for relatively rich districts, and the richer districts would be prevented from spending any more per child than their tax rate would raise in the plaintiff's district. There are clear emotional objections to this dog-in-the-manger approach, but it is vastly more manageable from the judge's point of view. For one thing, it need raise no money. In fact surpluses would accumulate from unspent state and local funds which might be impounded by the court. These might actually be distributed to poorer districts in a judicially-created power-equalizing scheme using the average district as key in a purely redistributive manner.<sup>278</sup> However, if this worked at all, it would soon cease to do so if the state and local units stopped collecting the taxes.

Another advantage is its point blank aim at the rich districts—those politically least sympathetic to equality; at the same time it would leave schools in poorer districts unaffected except as beneficiaries. Self-interest would require the rich districts to cast about for those judicially-acceptable solutions that involve the least surrender of local control. What they probably could not tolerate is inadequate or closed public schools.

There is a possible question of standing. The dog-in-the-manger plaintiff gets no direct immediate advantage from victory. What he gets is fair competition. The suit resembles that of the businessman who asks that a subsidy be denied his competitors. There is some precedent that the plaintiff in such a case lacks standing.<sup>279</sup>

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277. The thought is reminiscent of the prescription of *Brown v. Board of Educ.*, 347 U.S. 483 (1954), which passed no judgment upon the right to an education but only upon the right to its dispensation without racial segregation.

278. This would seem to offer a more feasible field of operation for the judicial tax-raising suggestion of *Griffin v. County School Board*. See note 274 *supra*.

279. See *Tennessee Elec. Power Co. v. T.V.A.*, 306 U.S. 118 (1939). The cases are collected and considered in *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920, 935-36 (1968).

### 6. *An Eclectic Approach*

The disadvantages of these action-oriented tactics may be diminished without losing any advantages. What the child really seeks is a fair hearing on the merits of the constitutional issue, plus a declaration of principle, and the broadest possible freedom for the judge to coax and impel the legislature to a relevant response. On the whole the approach that will most often serve these needs best is an action for a declaratory judgment naming as defendants state and county officials—and arguably district superintendents—who have the duty and power to collect the tax or spend for public education. Such a forum can produce an expression of the constitutionality or no of the whole package of laws.<sup>280</sup> Having declared the system invalid, no immediate action would be required of the court. It could, as in *Brown v. Board*,<sup>281</sup> wait a period to consider the remedy or await legislative reprise; this would be especially appropriate in a case where an intervening legislative session could address the question of the proper state response. All the political forces could participate in the remodeling of the state scheme while the court retained jurisdiction and awaited local developments. If the state did not respond in an acceptable fashion, the court could proceed by stages on motion of individual plaintiffs to excuse students from the duty of attendance, order admission in other districts, possibly award money compensation, begin to impound and then to redistribute equalization and flat funds, and then tie up the money of the richer districts. Before the court would shut down the entire system, use its contempt power, or raise taxes, it could even take a leaf from the book of reapportionment by hiring the computer expert who would assist the

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280. 28 U.S.C. § 2201 (1964) provides: "In a case of actual controversy . . . any court of the United States . . . may declare the rights . . . of any interested party seeking such declaration, whether or not further relief is or could be sought."

281. 347 U.S. 483 (1954). The Court concluded: "Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument." *Id.* at 495.

The Court then specified the questions concerning the appropriate relief that it wished to have argued. The outcome is reported in the second *Brown* case, 349 U.S. 294, 301 (1955) which adopted the gradualism of "all deliberate speed." For criticism of that approach see Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163 (1963).

court in redrafting school districts to produce a uniform wealth base for each.<sup>282</sup>

### B. Existing Litigation and *McInnis v. Shapiro*

The original action filed in the state courts of Michigan by individual children who are residents of Detroit and by the Detroit school board<sup>283</sup> involves questionable strategy. The first difficulty is in the choice of plaintiff. Not only is Detroit's tax effort mediocre, but also, the district is not poor by the test of per pupil assessed valuation.<sup>284</sup> The plaintiffs have adopted a standard of state responsibility keyed to characteristics of children rather than of the system. That is, the plaintiffs assert that they need more expensive education than the average child and that such need is the constitutional criterion of equality.<sup>285</sup> Our objections to this already have been specified.<sup>286</sup>

The Detroit suit also seeks a somewhat peculiar remedy. It first asks that the legislation establishing the state equalization fund be declared void and its administration be enjoined; it suggests the legislature be given time thereafter to reapportion the state contribution, and, if it fails to do so or do so properly, that the court do the apportioning itself. Presumably, if the legislature no longer appropriates the state contribution, the plaintiffs will be satisfied with nothing but local taxation as the support of public education. This strategy may involve a prediction that such a result is impossible because intolerable. The prospect for the suit in its original form is not promising; at least we hope not.

282. Cf. Weaver & Hess, *A Procedure for Nonpartisan Districting: Development of Computer Techniques*, 73 YALE L.J. 288 (1963).

Even if the Court did nothing but pronounce principle, the consequences ultimately would be significant. One need not be a Jules Verne to imagine a future Congress addressing itself to the protection of such rights under section 5 of the fourteenth amendment. Concerning this "vast untapped reservoir" see Cox, *Constitutional Adjudication and the Promotion of Human Rights*, (Foreword to *The Supreme Court 1965 Term*) 80 HARV. L. REV. 91, 99 (1966). Cf. the use of the analogous Congressional powers to enforce the thirteenth amendment. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

283. *Board of Educ. v. Michigan*, Civil No. 103342. (Cir. Ct. Mich. filed Feb. 2, 1968).

284. Its 1967 State Equalized Valuation divided by "resident" membership (\$16,244) slightly exceeds the median for Wayne County (\$14,622) and for the whole state (\$14,526). Neighboring districts in Wayne County range from \$5,252 to \$383,940. The poorest district levies an education tax rate nearly the highest in the state and nearly half again the Detroit rate. J. Anderson, *Poverty Stalks A Neighborhood*, *The Washington Post*, Dec. 24, 1967, at p. 81, col. 6. Of course one can emphasize that poverty is relative and that the proper comparison is with the richest district.

285. *Board of Educ. v. Michigan*, General Civil No. 103342 (Cir. Ct. Mich., Wayne County, filed Feb. 2, 1968).

286. See text accompanying notes 82-97 *supra*.

In the stampede to the courts in 1968, the Detroit complaint was taken as the original model for most of the other suits including the ill-fated *McInnis v. Shapiro* which involved plaintiffs from Chicago and several Cook County suburbs.<sup>287</sup> The choice of Chicago residents as plaintiff was unfortunate, again because the district is about average in assessed valuation per pupil.<sup>288</sup> Other plaintiffs from poorer districts were included, but the litigation had from the beginning the aura of an effort to achieve compensatory education for the inner city through litigation. This impression was amplified by the emphasis upon "needs" in the complaint and by the failure to articulate any clear standard.<sup>289</sup>

The defendants included the governor, the state auditor, state treasurer, and state superintendent of public instruction. The complaint challenged the whole structure of Illinois school finance, not just the equalization fund, and sought a declaratory judgment finding the package as a whole invalid. As remedy it prayed an injunction against the enforcement of the financing statutes and the submission of a plan by the defendants which will conform to the Constitution. The use of a plan has played an important role in the desegregation of Southern schools.<sup>290</sup> The court retains jurisdiction but puts the burden of selecting alternatives upon the state authorities. The parallel, however, is imperfect. School boards have the general power to adopt plans for assignment of their students. In desegregation cases the court had merely to free that power from unconstitutional fetters in order to let it operate. In the school finance case none of the Illinois officers named had power in any sense to redesign the distribution of state money—either the level of spending or the recipients. Only the legislature can give a "plan" which is

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287. *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom. McInnis v. Ogilvie*, \_\_\_ U.S. \_\_\_ (1969). *Rodriguez v. San Antonio Independent School Dist.*, Civil No. 68-175-SA (W.D. Tex., filed July 30, 1968); *Burrus v. Wilkerson*, Civil No. 68-C-13-H (W.D. Va., filed July 2, 1968).

288. 1965 ASSESSED VALUATIONS AND 1966 TAX RATES IN DESCENDING ORDER ILLINOIS PUBLIC SCHOOLS. (Office of the Superintendent of Public Instruction 1967).

289. The argument for "compensatory education for disadvantaged children" was dropped in the jurisdictional statement before the Supreme Court. (Jurisdictional Statement, p. 9-10). As a standard for judgment, however, the appellants offered nothing more specific than the following language from *Williams v. Rhodes*, 393 U.S. 23, 30 (1968): "[I]n determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and interests of those who are disadvantaged by the classification."

290. The use of plans is rooted in the holding in *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955) that the local authority has primary responsibility for solving the problem. See Dunn, *Title VI. The Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42 (1967).

anything like a guarantee. It is true that, in reapportionment cases, commissions which included state legislators from the two dominant parties were permitted to work out plans more or less under the court's eye, even though it always lay with the legislature as a whole to reject it.<sup>291</sup> However, in that situation the constitutional principle to be satisfied by the plan—one-man, one-vote—was very narrow, and only two fundamentally partisan interests were at stake; any plan coming from a committee fairly representative of both parties would generally be acceptable to the legislature. In school finance cases no plan from a few bureaucrats however highly placed could in any sense substitute for the judgment of the legislature. What is necessary is not a plan but a statute. It is also unclear what the Illinois plaintiffs expected to happen in the interim before the plan. Taken literally their prayer to the court required that the schools be closed.<sup>292</sup> It could safely be predicted that they would not be closed, even if on appeal the Supreme Court had agreed with one of plaintiffs' meanings of the substance of the right.

The two California suits<sup>293</sup> depart basically from the Detroit model. Each complaint makes plain the central objection to the determination of quality by wealth, and each involves plaintiffs from districts with high tax rates and low wealth. The complaint in *Serrano v. Priest* in particular details the contrast between the wealth and the tax rates of the plaintiffs' districts and those of the wealthier districts of the state. Each, however, from the point of view taken here, suffers from the invocation of a constitutional standard of individual need.

The future of these cases in the light of the *McInnis* decision is not easy to predict. Unless amended, those complaints which, like *McInnis*, fail to pull the issue of wealth discrimination into clarity can expect short shrift. In any event they are unlikely to be given much attention by any court below the Supreme Court of the United States. We have struggled here to suggest a proper approach to that Court. If we are correct, this much at least seems clear: the Court will insist upon a detailed understanding of how the system of any state discriminates against poor districts, and it will not be interested in

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291. See, e.g., *In re Apportionment of State Legislature*, 373 Mich. 247, 128 N.W.2d 721 (1964). See generally, Comment, *Reapportionment and the Problem of Remedy*, 12 U.C.L.A.L. REV. 1345 (1966).

292. Amended complaint at 2-3, 13-14, *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968).

293. *Serrano v. Priest*, No. 93854 (Super. Ct., Cal., Los Angeles County, dismissed Jan. 8, 1969); *Silva v. Atascadero Unified School Dist.*, No. 595954, (Super. Ct., Cal., San Francisco County, filed Sept. 26, 1968). The same approach is adopted in *Guerra v. Smith* Civil No. A-69-CA-9 (W.D. Tex., filed Jan. 28, 1969).

vague exhortations to reform education. This may well suggest the abandonment of the existing litigation and a fresh start featuring plaintiffs from districts with the lowest wealth and the highest tax rates, asserting the single simple principle that wealth shall not determine quality.

### C. *Judicial Stimulus and State Response*

Even assuming eventual success with the Court, however, the variety of judicial prods, clubs, and carrots does not guarantee success. They have in fact failed in the fourteen years since *Brown* significantly to ameliorate the effects of de jure segregation.<sup>294</sup> On the other hand, they have succeeded with incredible ease and dispatch in reapportioning legislatures.<sup>295</sup> The full explanation of the different results exceeds our grasp, but three points of comparison and difference between these two cases, and between each of them and the school finance case are relevant for predicting response to a judicial holding along the lines of Proposition I.

The difference in intelligibility of standards is surely one factor. Once the superstructure of explicit official segregation is removed, de jure racial segregation becomes so immanent and elusive that its existence for purposes of judicial action is problematical. The description of the beast may be possible but requires the most extraordinary elaborations of legal and social "science." The reapportionment standard requires little more than a judge who can do his sums. Proposition I lies somewhere between. Except for the relatively minor complications of wealth measurement<sup>296</sup> the standard approaches in simplicity that employed in reapportionment. Even taking these complications into account, the problem is of a different order of magnitude from racial conundrums such as the injury to children from segregation. Legislative evasions would be relatively transparent (the "rational category" ruse is a possible exception we will discuss below)<sup>297</sup> and can be described in financial terms which do not rely upon occult and popularly suspect disciplines. Having less wealth devoted to one's education is a considerably more concrete thing than having one's self image eroded by segregation.

A second general point of comparison is community consensus or acquiescence. *Brown* evoked none in most states, and the federal

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294. RACIAL ISOLATION IN THE PUBLIC SCHOOLS, *supra* note 149, at 84-89; see *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967).

295. See *Kurland*, *supra* note 10, at 585-86.

296. See text accompanying notes 85-93 *supra*.

297. See text accompanying notes 295-306 *infra*.

courts were left to stand for years, largely without the aid of the political arms, struggling to wrest insignificant victories from local guerillas. The *Reapportionment* cases on the other hand liberated political forces whose self-interest was represented in the full implementation of the Court's order. The groups whose self-interest will promote Proposition 1 are at least a substantial minority.<sup>298</sup> The political alignment for reform will be no worse than rich district v. poor district with the middle disinterested. The poor districts will have in their corner the full weight of the Court and of every educational pressure group not representing the interests of particular districts. Evasions designed to continue the preference for rich districts can only mean prolonged judicial disruption of the entire system to the injury of all. In this context it is reasonable to suppose that the disinterested middle also will be coopted for the cause of reform. In short a consensus for the Court's mandate is very likely to materialize once the system is freed from its present political paralysis. In this context the resort to baroque legislative artifice to escape change is also unlikely. What resistance from the rich districts is encountered may be tempered by a careful selection of judicial remedies. Where an injunction against the rich districts would seem inflammatory, the court may employ the more indirect sanctions, outlined above.

A third factor for comparison we might call the humiliation quotient. It is closely connected to consensus but should be thought of more in purely social than in political terms. We refer to the very visible and inflammatory characteristics of integration when compared, for example, with reapportionment. The Negro child who appears at the all-white school—even in the North—has shown a capacity to focus satanic energies. His very visible presence unleashes all the aggressions of the insecure white whose self-respect is somehow put at issue. The fact may resist rational analysis, but, like Everest, it is there. No commitment to compensatory education, however great, could ever evoke the mad reactions attributable to a black face in the wrong place. Compared to this cauldron of emotions reapportionment was a polite shuffling of impersonal counters in a parlor game of the politicians. This radical difference of reapportionment from racial integration did not spring from a difference in the significance of the stakes but from the remoteness of this game from the interests, fears, and expectations of most men. It is doubtful whether most men today are aware that reapportionment has occurred. Those who are seem indifferent, at least if we judge them by their behavior.

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298. See text accompanying note 52 *supra*.

Fiscal equity, like reapportionment, will produce emotional ripples of little consequence. No children will be bussed by it; no bodies will be juxtaposed; no targets will be put into cross hairs. The movement of dollars is nearly invisible and quite incapable of stimulating anything worse than the passing malaise associated with military reverses and tax increases. It will be denounced by the residents of rich school districts and in ten years accepted as a natural phenomenon. Here and there in those days rich men will refer to it with pride as an example of how the states meet their social responsibilities.

#### *D. Retaliation and the Rich*

Let us assume, however, that the poor districts, the professionals, and their new allies from the middle districts somehow are dominated in the legislature by the minority rich. The principle effort by the rich in that event will be the design of a fiscal facade seemingly neutral with respect to wealth and also of sufficient rationality to pass the "classical" test of equal protection.<sup>299</sup> The only promising chicane for this purpose is the employment for preference of seeming nonwealth criteria which in fact define the children of the rich.

Now the rich can be defined in three ways—by their money, their location, and their culture. The use of the first as a classifying criterion to benefit the children of the rich would be invalid under any rationale of equal protection. The use of the second we have already disposed of with much labor. But suppose the state decided that all educational spending upon each individual child will be according to that child's "academic achievement" or "promise," and suppose that the criteria of selection of those with and without promise were standardized tests of intelligence and achievement. It is a cultural fact that there is a strong positive relation between the socio-economic characteristics—hence wealth—of the family and the child's performance on such tests.<sup>300</sup>

As we state the scheme it may seem a transparent dodge, but its vulnerability is by no means clear. Its rationality seems superficially unassailable no matter how pernicious it may be. Unlike the case of specific geographical boundaries there is here a positive justification to be offered for the preference accorded to members of this classification. It is a clear value choice of the legislature, and how can the reward and nurture of excellence be invidious?

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299. See Part III *supra*.

300. See generally RACIAL ISOLATION IN THE PUBLIC SCHOOLS, *supra* note 154. See also Jensen, *supra* note 16.



Such a system, especially if the magnitude of the dollar differences between "gifted" and "non-gifted" were significant, could present an extreme temptation to the Court to abandon general standards in order to void the gross inequities. One such easy but unpredictable judicial route would be the ascription to the legislature of an invidious purpose—to prefer the rich; or the Court may begin the seductive slide down the slope to a constitutional right either to uniformity in education—or worse—to expenditure according to need as the Court defines that need. At that point the Court would have preempted effectively the educational policy of the state.

The Court no doubt could argue that Proposition 1 applies to this kind of de facto relation between wealth and quality. After all, the constitutional proscription is not confined to an explicit statutory connection; in none of the "poverty" cases already decided have the rich been explicitly favored.<sup>301</sup> This would not be an argument which would forbid altogether a preference for gifted students. It would do so only where the de facto preference for wealth was not softened by other preferences; one, for example, for under-achievers, blind, retarded, etc. As part of a *system* of preferences, a program of special aid to the gifted could well survive. In any event, the argument against such preferences is not particularly convincing, since the state has such a strong, manifest, and essentially innocent interest in fostering excellence. There also is some question whether the relation between wealth and "gifts" is sufficiently close that the de facto preference could be regarded as state action.

There would be other exits from the traps, such as Judge Wright's virtual annihilation of the existing testing devices as a basis for rational categories.<sup>302</sup> In support of this tour de force in *Hobson v. Hansen* we could offer what has already been said above about the fungibility of children, especially in the primary grades.<sup>303</sup> The whole line of argument about the essential democracy of children seems particularly persuasive during what appears to be an anti-technological interlude in our history; indeed, these arguments may even be intrinsically correct. Nevertheless, one can be uneasy over sweeping results which depend for their rationale upon the superiority of the Court's judgment not only over the legislature but also over

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301. See Part VII *supra*.

302. *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967). See generally Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691, 734-43 (1968). See also R. ROSENTHAL & L. JACOBSON, *PYGMALION IN THE CLASSROOM: TEACHER EXPECTATION AND PUPILS' INTELLECTUAL DEVELOPMENT* (1968).

303. See text accompanying notes 228-39, *supra*.

most of the teaching and testing profession as well. And new tests will be devised.

We concede that all such attacks upon the rational category ruse have weaknesses, and there is little point in adding others of even greater dubiety. While the most respectable argument is that regarding the inadequacy of tests, it is not one the Supreme Court will be anxious to adopt. A specific determination of the validity of each test would approach in magnitude the problem of judgment the Court faces in the obscenity cases<sup>304</sup> without providing even the redeeming qualities of diversion that obscenity surely possesses.

Nevertheless, we have elaborated unduly what is in reality a minimal threat. Note first that we had assumed for purposes of argument that the political support for such an evasion was the "rich," but it is questionable whether even their enthusiasm could be predicted. The rich may produce more "gifted" children, but the mass of their children are not gifted, unless the standards for that category are set so low as to incorporate great numbers of the children of the poor. Setting the "gifted" standards low would have enormous negative consequences for the rich, probably including either vastly increased expenditures or such an unconscionable difference in expenditure between gifted and nongifted that it would surely be held constitutionally invalid (hang the rationale). In either case large numbers of children of the rich would still be left out of the benefits of high expenditure and would suffer the burdens of low expenditure. It is utterly unrealistic to think that enclaves of wealth like those created by the district system as it now operates can be reproduced in effect on a nongeographical basis. The rich clearly live together more as rich than as smart. The higher incidence of "intelligence" among their children is radically insufficient to serve as an organizing political principle capable of asserting its interest against opposition.<sup>305</sup> And observe that the opposition to such a systematic discrimination would include not only the groups hitherto noted but also significant numbers of those rich who suspect that their children—or some, or even one of them—will not be among the favored. The rich may or may not believe in democracy for the mass of mankind; as among their own children it could be quite another

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304. See note 48 *supra*.

305. Data collected in Evanston and Skokie, Illinois, in Elementary District 65 strongly confirm this. Testing differences appeared from neighborhood to neighborhood and are related to average income in the neighborhood, but substantial numbers of children appeared in all ranges of "IQ" in every neighborhood. J. Coons, Report to the United States Office of Education on Ill. Elementary School Dist. 65 Evanston-Skokie, June 15, 1965 (unpublished, on file with the authors).

matter. These unfavored rich should qualify as the strong opponents of special educational advantages for those children who would be in fact the most threatening social and economic competitors of their own. In short even the rich would not stand for preference of the rich.

Now in all this we assumed that the preference was offered to the *individual* "gifted" child. If instead, the preference—the extra dollars—were awarded without strings to the district upon the basis of its average performance on tests or upon the number of "gifted" students it produced, matters would stand somewhat differently. The residents of rich districts might support such legislation. Of course, there would be grave doubt of its validity; such a collective preference surrenders the close link to the individual gifted student that provides the chief source of its rationality, and the system might on that ground fail the "classical" test. Furthermore, if the aim is to increase the incentive for academic achievement, the wrong means has been chosen—at least if it is the sole criterion of preference—for it would encourage the further withdrawal of teaching talent from the districts that need it most; also it would create the strongest temptation toward academic corruption in testing and/or test reporting.

The risk that such a device would be adopted seems minimal. Quite aside from the fact that personal wealth and district wealth often fail to correspond, its implications would be politically intolerable. In effect the children of every district would be publicly lined up by the state on its official merit scale to accept their portion of praise or humiliation in the form of dollars. It is not hard to imagine the reaction of the citizens of Chicago, New York, Detroit, or Los Angeles to such gross discrimination; to speak of political suicide would be unduly metaphorical. For states with large urban districts, the price of attempting such a system of preferences would be Armageddon. In more rural states, and especially the South, the system would seem politically unattractive for the additional reason that wealth is more evenly distributed. The "rich" districts would have less advantage to gain, even if it were adopted.<sup>306</sup>

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306. Here, as elsewhere, the available statistics are of limited assistance. National data is often reported only for governmental units (e.g., counties) which may or may not coincide with school districts. This is true of the U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* (1968). However, the extent to which school districts differ in the expenditures under existing systems is probably a fair predictor of the political strength for continuing discrimination. In this respect the Southern States show a rather consistent pattern of smaller differentials than the rest of the country. "Many of these [Southern] States are typical of the States in which the amount expended by the low-expenditure classroom units is not significantly lower than would be required to support the lower half of the classrooms at the State median expenditure level." F. HARRISON & E. MCLOONE, *PROFILES IN SCHOOL SUPPORT* 95 (U.S. Office of Education 1965).

One should not conclude from all this that a preference for the gifted—the individually gifted—is not viable politically or judicially. The only point here is that such a policy is most easily defended as part of a balanced system of preferences. It may be ironic to prefer both superiority and inferiority, but the very sanity of the system lies in that incongruous balance in which society stimulates the excellent, cradles the unfortunate, and somehow in the process humanizes itself. There is room in a wealth-free system for as much “preference” as a state could wish, including special concern for blind, deaf, retarded, disadvantaged, plus all the categories of gifted from the eclectic genius to the one talent specialist. Nor does anything in the Constitution bar experimentation, even where it means extra money for the students involved and less for others. It is hard, indeed, to think of any program or structure freely chosen by a disinterested educational planner that would offend the minimal standard we have proposed, because there is simply no sound educational reason for favoring the child according to the wealth of his parents or neighbors.

Now if the system is truly wealth-free, will the rich choose to retaliate by defecting to private education? Elsewhere we have argued at length that the answer to this depends a good deal upon the character of the system that emerges from the state legislative process, and that, if they do leave, it will be principally because the legislature has decided to have inferior public education.<sup>307</sup> Such a decision should be well within the power of the nonrich majority and the professionals to prevent. Further, it is possible to conclude that the response of the rich is irrelevant—that they already have defected. The residential clustering of the rich and the existing financing structure give to the suburban school system many of the qualities of a private school. If the rich should abandon such “public” schools in favor of private education, perhaps nothing will have been lost. Little political support for a high level subvention will have been jeopardized in such areas, because little ever existed.

#### CONCLUSION

The range and variety of legislative response in fifty states to the judicial establishment of Proposition I is radically unpredictable. That it is so is one of the chief strengths of the constitutional system proposed; the very unpredictability demonstrates that the invalidation of wealth as a determinant of quality should operate not to bind the states but to liberate them from the iron law of privilege.

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307. See COONS, CLUNE & SUGARMAN, *supra* note 11.

What can be foreseen is that battle lines in each state will be drawn sharply between local and central control of the levels of spending. This division, however, should no longer follow lines of self-interest but should represent differences in philosophy of government. And such differences between these two camps will be trivial in comparison to the difference of both from the private school enthusiasts who may seek forms of family power equalizing.<sup>308</sup>

Considering the multitude of potential compromises among these three basic styles it is clear that the Supreme Court has the capacity to touch off an explosion of creativity in the structure of education. It is an opportunity that in importance can be compared only to the first flowering of public education in the 19th Century. As in those exciting days our society is faced with a crisis of division. The potential factions are many and the lines of cleavage complex; in the decent education of children may lie the common adhesive.

#### *Postscript—Recent Developments*

The *Review* has permitted the appending of a hasty impression of the Supreme Court's orders of April 21, 1969, employing the equal protection clause to strike down the period of residence required for eligibility under state and federal welfare programs.<sup>309</sup> The 6-3 decision in the consolidated appeals strongly confirms the analysis offered above. The majority opinion by Justice Brennan adds to the "inner circle" of equal protection the right to travel, casting the rationale in the now-familiar terms of a "fundamental" interest in freedom of interstate movement and an "invidious" discrimination against recent residents. The Brennan opinion accords unusual attention to the details of competing state interests, asking whether these interests are "compelling" and whether they can be satisfied without burdening unduly the citizen's interest in interstate movement: "[A]ny classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."<sup>310</sup> The Court adds:

"[The states] in these cases do not use and have no need to use the one-year requirement for the governmental purposes suggested. Thus, even under traditional equal protection tests a classification of

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308. See text accompanying note 40 *supra*.

309. *Shapiro v. Thompson*, No. 9, *Washington v. Legrant*, No. 33, *Reynolds v. Smith*, No. 34, 37 U.S.L.W. 4333 (U.S. April 21, 1969). Chief Justice Warren and Justices Black and Harlan dissented.

310. *Id.* at 4338 (emphasis in original). This deliberate emphasis of "compelling" and its repetition at several points in the majority opinion may argue a refinement of the "inner circle" approach to equal protection. In his dissent Justice Harlan labels the entire method the

welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional. But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest."<sup>311</sup>

For those concerned with generality of principle and with predictable boundaries there are obvious grounds for concern. The logic of the Court's use of equal protection to shelter the interest in freedom of movement from the chilling effect of waiting periods plausibly could be applied to a number of important benefits hitherto reserved by the states for their tenured residents. It is difficult to anticipate whether compelling state interests will preponderate over the citizen's interest in unfettered interstate travel when the new resident of a state must wait a year to vote, to receive free higher education, or to practice law. The opinion will not rate high marks from the neutralists.

We share this concern, and it is not the only troublesome aspect of the opinion,<sup>312</sup> as will be elaborated in the larger work of which this Article is but a part.<sup>313</sup> Of course, these new cases are most encouraging to all who seek judicial aid for public education; they make clearer the continued expansibility of the inner circle upon which the constitutional standard we have proposed must depend. At the same time they illustrate the need for confining an intelligible principle if the legislative and judicial development of these new rights is to proceed in an orderly fashion.

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"'compelling interest' doctrine." *Id.* at 4345. He traces its history and once more rejects the rationale in toto. Justice Stewart, concurring, suggested that Harlan's objection "misapprehended" the significance of the majority opinion, since, in protecting the right to travel "the Court simply recognizes . . . an established constitutional right." *Id.* at 4340. Precisely how this distinguishes right to travel cases from "inner circle" cases applying equal protection to the right to vote or the right to fair criminal process is not suggested.

311. *Id.* at 4339 (emphasis in original) (footnote omitted).

312. For example, the Court emphasizes the element of *purpose*—the fact that the states designed the programs specifically to inhibit exercise of the freedom to travel by withholding benefits. *Id.* at 4336, 4337, 4339. However, waiting periods which were not intended to discourage residence but which in fact do so are easily imagined. A state might wish to welcome and encourage attorneys as residents, so long as they did not compete with the local bar. What is the role of an unintended burden upon travel, and, if that burden is relevant, how is it to be measured? The Court cannot escape the empirical difficulties unless it wishes to cling to legislative purpose as a necessary and sufficient test; nor is purpose likely to prove easier of divination than is effect.

313. COONS, CLUNE & SUGARMAN, *supra* note 11.