Serrano II—A Case of Missed Opportunities?

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Introduction

Two opportunities were presented to the California Supreme Court when *Serrano v. Priest*[1] (*Serrano II*) came before it for the second time. These were: (1) an opportunity to establish sound criteria for determining whether a school financing system satisfies state equal protection requirements, and (2) an opportunity to establish an appropriate standard of judicial review to be applied in equal protection cases. This commentary will explore the manner in which the court lost these opportunities by failing to solve the school financing dilemma. Part I reviews the challenged finance system. Part II analyzes the constitutional test developed by the California Supreme Court in the two *Serrano v. Priest* opinions.[2] Parts III and IV discuss the first and second opportunities, respectively, and the problems that remain because those opportunities were avoided by the court.

I. The Challenged School Financing System

Full appreciation of the constitutional issues involved in the *Serrano* opinions requires an understanding of the basic framework of the challenged school financing system. Although *Serrano II* describes the system with a fair degree of accuracy, it does so in a way that obscures important features that must be understood in order fully to comprehend the defendants' proposed alternative test for constitutionality.[3] California, like most

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1. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 45 U.S.L.W. 3822 (U.S. June 15, 1977).

2. Serrano I, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Serrano II, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

3. For the sake of brevity and clarity, some of the more important abbreviations and terms that will be used in describing California's school financing system are defined as

states, utilizes a "foundation program" system of financing its public schools.[4] Under California's system, the sources of current operating revenue for each district are of three types: foundation program revenue, categorical aids funds, and local supplements.

A. Foundation Program Revenue

Foundation program revenue consists of three types of funds. Basic aid is an allocation made by the state to each school district in the amount of $125 per ADA,[5] $120 of which is required by the California Constitution.[6] These allocations are made to each district, regardless of its wealth. District aid (D. Aid) represents the expected contribution of a district toward the achievement of its foundation program.[7] District aid is in direct proportion to the district's wealth. It is computed by determining the amount of tax revenue that would be generated by applying a hypothetical tax rate (known as the computational tax rate) to the modified assessed valuation (MAV) of taxable property in the district. Commencing with the 1973-74 school year, the computational tax rates have been $2.23 per $100 of assessed valuation for elementary districts and $1.64 per $100 for high school districts.[8] Since each unified school district is treated for school finance purposes as a combined elementary and high school district, the computational tax rate for a unified school district has accordingly been $3.87 for each $100 of assessed valuation. If a particular district is suffi-

follows: (1) ADA means units of average daily attendance in one or more school districts. This figure is computed by adding together the number of students counted present on each school day and dividing that sum by the number of days school was taught. In practice, ADA approximates 98% of pupil enrollment. Because of this rough equivalence, the reference herein to figures on a per-pupil basis means per unit of ADA. (2) AV means assessed valuation of taxable property in a school district. The legislature has directed every assessor to assess all property subject to general property taxation at 25% of its full value. CAL. REV. & TAX CODE § 401 (West Supp. 1977). (3) MAV means assessed valuation modified by the so-called Collier Factor (an averaging mechanism used to equalize statewide property assessments), adopted by the State Board of Equalization each year to conform the varying practices of the county assessors to the statewide average assessment level. *See* CAL. EDUC. CODE §§ 41200-41206 (West Spec. Pamph. 1976) (formerly *id.* §§ 17261-17265 (West Supp. 1977)). (4) "School district wealth" means a district's modified assessed valuation per unit of average daily attendance (MAV/ADA).

4. Through this foundation program, the state supplements local taxes in order to provide "for essential educational opportunities for all those who attend public schools." CAL. EDUC. CODE § 14000 (West Spec. Pamph. 1976) (formerly *id.* § 17300 (West Supp. 1977)).

5. CAL. EDUC. CODE §§ 41790, 41800 (West Spec. Pamph. 1976) (formerly *id.* §§ 17751, 17801 (West Supp. 1977).

6. CAL. CONST. art. IX, § 6, para. 4.

7. *See* CAL. EDUC. CODE §§ 41761, 41810-11 (West Spec. Pamph. 1976) (formerly *id.* §§ 17702, 17901-02 (West Supp. 1977).

8. CAL. EDUC. CODE § 41761 (West Spec. Pamph. 1976) (formerly *id.* § 17702 (West Supp. 1977)).

ciently wealthy such that its district aid, when added to its basic aid of $125 per pupil, exceeds the district's per-pupil foundation program amount, the excess is treated as unused district aid.[9] Equalization aid (E. Aid) consists of funds allocated by the state to each district in which the sum of its basic aid and district aid is insufficient to meet that district's foundation program amount.[10] The state is able, by means of equalization aid, to guarantee each district a specified foundation program amount per ADA on the assumption that each district makes a tax effort equal to the specified computational tax rate.

Using the foundation program formulas made applicable for the school year 1973-74 by Senate Bill 90[11] and Assembly Bill 1267,[12] the foundation program amount for unified school districts was approximately $843 per ADA.[13] These formulas thus ensured that no unified district, no matter how "poor" in per-pupil taxable wealth, would have less than $843 per pupil to spend if its tax rate were at least $3.87 per $100 of modified assessed valuation. Calfornia's foundation program makes use of the following formula:

$$\frac{\text{F.P.}}{\text{ADA}} = \frac{\text{Basic Aid} + \text{D. Aid} + \text{E. Aid}}{\text{ADA}}.$$

Using the 1973-74 figures mentioned previously,

$$\$843 = \$125 + .0387\frac{\text{MAV}}{\text{ADA}} + \frac{\text{E. Aid}}{\text{ADA}}$$

Solving this equation for the equalization aid per pupil to which a unified school district of given wealth (MAV/ADA) is entitled,

$$\frac{\text{E. Aid}}{\text{ADA}} = \$718 - .0387\frac{\text{MAV}}{\text{ADA}}.$$

9. See figure 1, page 457.

10. CAL. EDUC. CODE § 41761 (West Spec. Pamph. 1976) (formerly *id.* § 17702 (West Supp. 1977)).

11. 1972 Cal. Stats., ch. 1406, at 2931.

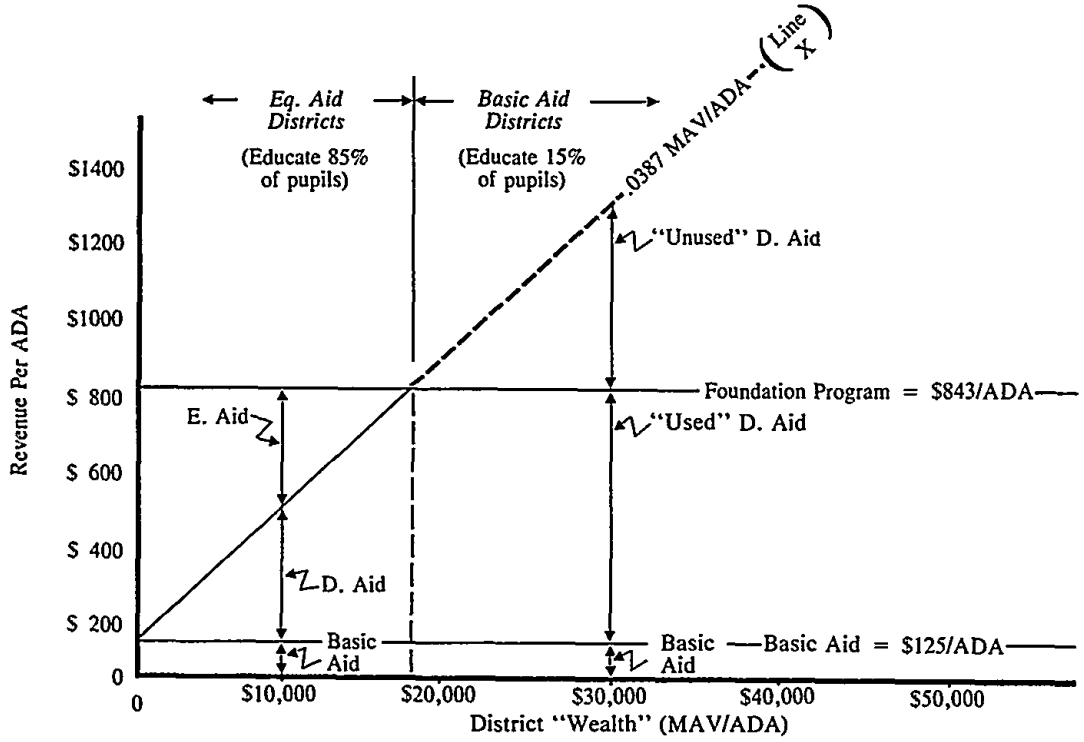
12. 1973 Cal. Stats., ch. 208, at 528. Senate Bill 90 was the legislative response to *Serrano I*. Assembly Bill 1267 was enacted primarily to "clean up" technical errors present in Senate Bill 90.

13. This figure is based on an average "mix" of elementary and high school students of two elementary students for each high school pupil, where the foundation program amounts were $765 per elementary pupil and $950 per high school pupil and the ADA exceeds 900 elementary and 300 high school students (CAL. EDUC. CODE §§ 41704, 41712 [West Spec. Pamph. 1976] [formerly *id.* §§ 17656, 17665 (West Supp. 1977)]), with a $20 per-pupil bonus for the more highly-favored unified school districts (CAL. EDUC. CODE §§ 41730-31 [West Spec. Pamph. 1976] [formerly *id.* §§ 17671-17672 (West Supp. 1977)]). As a result of automatic inflation adjustments and special increases, the foundation program amounts in 1976-77 were $1012 per elementary pupil and $1198 per high school pupil, with a $20 per-pupil bonus for unified districts. Assuming a "mix" of two elementary students for each high school pupil, this creates a foundation program amount for unified districts of $1094 per ADA, compared to the 1973-74 figure of $843 per ADA.

Figure 1 indicates how unified districts of differing wealth are affected by this illustrative foundation program. The graph therein indicates several things: First, each district, regardless of its wealth (MAV/ADA), is entitled to basic aid in the amount of $125 per pupil. Second, the expected amount of district aid is proportional to the wealth of the district. One can determine from Figure 1 the district aid expected of a district of given wealth (*e.g.*, a MAV/ADA of $10,000) by selecting that MAV/ADA on the horizontal axis and measuring the vertical distance at that location from the horizontal basic aid line up to the sloping line (Line X). This vertical distance, at a taxable wealth of $10,000 per ADA, numerically translates to $387 of district aid. This amount, when added to $125 of basic aid, brings that district's expected revenues up to $512 per ADA. That figure is $331 per ADA short of the $843 per ADA foundation program in 1973-74. Third, the figure shows that equalization aid is inversely proportional to district wealth. To the extent that a district's basic aid and computed district aid do not bring the district's per-pupil revenues up to the foundation program of $843 per ADA, equalization aid is apportioned, making up the difference. Thus, for a district of $10,000 MAV/ADA wealth, equalization aid in the amount of $331 per ADA will be allocated to bring the district's anticipated revenues up to the foundation program amount. At a district MAV/ADA wealth of $10,000 per ADA, $331 is graphically represented by the vertical distance from that point in Line X to the horizontal line representing the foundation program of $843 per ADA. Fourth, it will be seen that all equalization aid districts will have $843 to spend for educating each pupil if they all have the same tax rate of $3.87 per $100 of modified assessed valuation. No district need have less than $843 to spend for each pupil if it will shoulder that minimum tax rate. Fifth, Figure 1 shows that equalization aid becomes zero at that MAV/ADA at which Line X intersects the horizontal foundation program line. This point on the district wealth axis is sometimes known as the break point, which signifies the dividing line between equalization aid districts and basic aid districts. Of the state's 251 unified school districts in 1973-74, equalization aid districts educated eighty-five percent of the pupils and basic aid districts educated the remaining fifteen percent. Only five percent of all unified school district pupils were taught in districts of wealth greater than $30,000 MAV/ADA; almost half of these pupils were educated in the San Francisco Unified School District, which had a wealth of $38,551 MAV/ADA.[14] Sixth, Figure 1 also illustrates that the district aid computed for a basic aid district, when added to its allocation of $125 per ADA, would bring its revenues above the foundation program level of $843. This means that any district aid in excess of $718 (foundation program of $843 minus basic aid of $125) is unused.

14. CALIF. STATE DEP'T OF EDUC., 1973-74 CALIFORNIA PUBLIC SCHOOL SELECTED STATISTICS 27-28, 112 (1975).

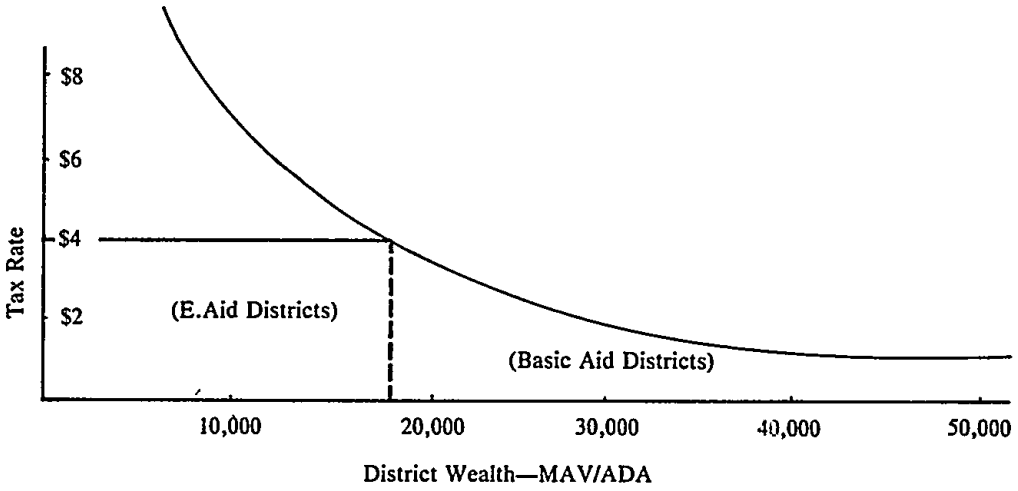
Figure 1
Sources of Revenues of Unified Districts
of Different "Wealth" (MAV/ADA) Within Structure
of Foundation Program in 1973-74



Thus, in the illustrated case of a basic aid district of $30,000 MAV/ADA with the same $3.87 tax rate, its revenue would be comprised of basic aid of $125 per ADA, utilized district aid of $718 per ADA, and unutilized district aid of $443 per ADA, for a total of $1286 per ADA. This district could achieve its foundation program level of $843 per ADA by using a tax rate of $2.39 per $100 of MAV (718 ÷ $30,000/100), which is $1.48 less than the computational rate of $3.87 required of all equalization aid districts to achieve their foundation programs.

From the foregoing, it is apparent that the essence of the foundation program concept is that the state guarantees each district a certain number of dollars per pupil to spend, using a local tax rate that is not excessive, and which is the same for all similar equalization aid districts. This way of viewing the foundation program concept, that is, from the perspective of limiting the tax rate required by any district to achieve a specified spending level, regardless of its wealth, is illustrated by Figure 2.

Figure 2



The curved line shows what the tax rate of a district would be were it compelled to raise the entire $718 per pupil required without any state assistance in the form of equalization aid. The curve is generated by application of the following formula:

$$\frac{\text{Revenues}}{\text{ADA}} = \text{Tax Rate} \times \frac{\text{MAV}}{\text{ADA}}$$

Thus,

$$\text{Tax Rate} = \$718 \div \frac{\text{MAV}}{\text{ADA}}$$

The horizontal line, at a tax rate of $3.87 per $100 of modified assessed valuation, demonstrates that the foundation program is a means of precluding excessive tax rates in low-wealth districts in order to achieve a certain spending level for each pupil. Since eighty-five percent of all pupils are educated in equalization aid districts that need not exceed the specified computational tax rate to achieve their respective foundation program spending levels, it is clear that no district need have fewer dollars to spend than its specified foundation program amount.

It is true, as noted in *Serrano II*,[15] that basic aid districts can achieve their foundation program amounts with tax rates lower than their computational rates, as illustrated in Figure 2. But it is also true that each district can achieve the foundation program level without imposing an excessive local tax rate, and in that sense the foundation program is equally available to every district. Dollars in the foundation program are made available to the district in order that it may provide educational opportunities for its pupils;

15. 18 Cal. 3d at 744, 746, 757, 557 P.2d at 937-38, 945, 135 Cal. Rptr. at 353-54, 361.

to the extent that the foundation programs are equal, foundation program dollars will provide equal educational opportunities.[16]

B. Categorical Aid

The foundation program funds in California are designed to assure a basic educational program for children with typical educational needs. The designers of the California system have long recognized, however, that it costs more to educate certain types of students, such as the physically, mentally, or culturally handicapped, and that it costs more to provide certain types of services, such as pupil transportation in sparsely-settled communities. Acknowledging that these higher-cost burdens are not equally distributed among the districts, the state and federal governments have provided categorical aids to help shoulder the costs inherent in assuming the atypical burdens of operating such specialized programs.

In some states, these atypical burdens are taken into account by utilizing a "weighted-pupil" approach. For example, according a typical elementary pupil a weight of one, the educational authorities might give a high school pupil a weight of 1.2, and an educable mentally retarded pupil a weight of two. In other states a "staffing ratio" might be utilized in which a standard ratio of students to certificated staff personnel is determined for each of the various types of designated institutions, including, *inter alia*, elementary, handicapped, vocational, and high schools. By this method, educational authorities would first determine the number of staff members

16. There are three exceptions to the general rule that the per-pupil foundation program amounts are equal for districts of the same type. First, the designers of California's foundation program system, recognizing that a low population density and other factors sometimes make it necessary to maintain inefficient schools, have adjusted foundation program guarantees to account for the diseconomies of scale involved in operating such schools. Thus, for a "necessary small school," CAL. EDUC. CODE § 41702 (West Spec. Pamph. 1976) (formerly *id.* § 17655 (West Supp. 1977)), with an ADA of less than 26 and employing at least one full-time teacher, the basic foundation program amount in 1973-74 was $18,875. CAL. EDUC. CODE § 41703(a)(1) (West Spec. Pamph. 1976) (formerly *id.* § 17655.5(a)(1) (West Supp. 1977)). If a school has an ADA of 25, this would result in a guaranteed $755 per pupil; but if the ADA is only five, there would be a foundation program guarantee of $3775 per pupil. Second, to discourage maintenance of unnecessary small schools, the foundation programs for such institutions are reduced in all but the smaller districts from the basic amount by $10 per pupil. CAL. EDUC. CODE §§ 41703(b), 41704, 41771(b)(1) (West Spec. Pamph. 1976) (formerly *id.* §§ 17655.5(b), 17656, 17709 (b)(1) (West Supp. 1977)). Third, to encourage efficient school district organization, the foundation programs for unified school districts are increased by $20 per pupil. CAL. EDUC. CODE §§ 41730, 41731, 41735 (West Spec. Pamph. 1976) (formerly *id.* §§ 17671, 17672, 17676 (West Supp. 1977)). Thus, despite the fact that the per-pupil foundation program guarantees are not equal for all districts of the same type, they may be treated as though they were equal for purposes of constitutional review because per-pupil disparities exceeding $20 are the result of attempts to adjust for diseconomies of scale, and disparities of only $20 are caused by attempts to encourage more efficient school district organization.

needed and then proceed to fix the level of support to be guaranteed by the state.

In California, however, the lawmakers have chosen to meet special needs through grants of categorical aids funds. Virtually all categorical aids are distributed to school districts without regard to their per-pupil taxable wealth.[17] The most notable exception is federal "Public Law 81-874 money," or funds provided for educational agencies in areas affected by federal activity.[18] A substantial part of those funds goes to districts losing taxable wealth because of large tax-exempt federal facilities located therein, such as the Wheatland and Travis Air Force bases. The plaintiffs in *Serrano II* essentially agreed that categorical aids are not sources of unequal spending in relation to districts' educational task loads; thus, they did not allege that this component of the school financing system led to unequal educational opportunities. The trial court acknowledged as much by specifically excepting "categorical aids special needs programs" from the features of the school financing system found to be unconstitutional.[19]

C. Local Supplements

Before discussing local supplements, it should be observed that if the foundation and categorical aids programs were the only sources of school district revenues, the system would essentially provide equal educational opportunities to the extent that financial resources are a measure of the quality of education offered by a district. Each district would be entitled to its foundation program funds, which provide essentially equal educational opportunities, and to categorical aids, which adjust the system to provide for atypical needs as perceived by the federal and state lawmakers.

In addition to foundation program funds and categorical aids, each school district is empowered to adopt a budget that provides for supplemental revenues obtained by local property taxation. In this regard, California's Constitution directs the county governing body having jurisdiction over each district to levy annual school district taxes sufficient to bring each district's revenue up to its budgeted amount,[20] subject to such maximum tax

17. Some categorical aids, however, do draw distinctions based on *family* wealth or poverty, by providing additional funds for districts in which there is a high incidence of family poverty. *See, e.g.*, Elementary and Secondary Education Act of 1965, Pub. L. 89-10, 79 Stat. 27 (1965); Elementary and Secondary Education Amendments of 1967, Pub. L. No. 90-247, Title VII, 81 Stat. 783, 816 (1968); California's Educationally Disadvantaged Youth Programs, CAL. EDUC. CODE §§ 54000-07 (West Spec. Pamph. 1976) (formerly *id.* §§ 6499.230-.238 (West Supp. 1977)).

18. *See* Act of Sept. 30, 1950, Pub. L. No. 81-874, 64 Stat. 1100 (codified at 20 U.S.C.A. §§ 237 to 241—1 (West Supp. 1977)).

19. Serrano II, 18 Cal. 3d at 749 n.21, 557 P.2d at 940 n.21, 135 Cal. Rptr. at 356 n.21.

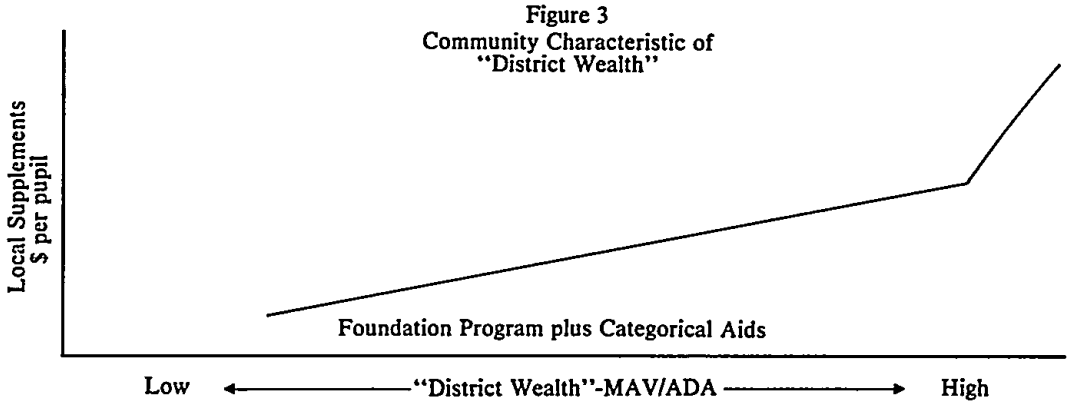
20. CAL. CONST. art. XIII, § 21.

rates as the legislature may provide.[21] In addition, the legislature has authorized the voters of each district to vote "overrides" of the maximum tax rates established by law.[22] Revenues in excess of foundation program funds and categorical aids will be referred to as "local supplements"; the power to provide such local supplements will be denominated "local fiscal control."

Since unequal education, as measured by per-pupil spending levels adjusted for atypical educational task loads, results solely from unequal local supplements, *Serrano II* was primarily concerned with those funds. A school financing system that allows a substantial degree of local fiscal control inevitably results in substantial differences in educational offerings unless *all* community characteristics that materially affect the ability and willingness of local taxpayers to provide tax monies for local supplements are substantially equalized.

The power to provide local supplements in a given district depends upon the interaction of several community characteristics associated with that district. This is most dramatically illustrated by Figures 3, 4, and 5.

Figure 3
Community Characteristic of
"District Wealth"



21. *Id.* at § 20.

22. CAL. EDUC. CODE § 42202 (West Spec. Pamph. 1976). Prior to enactment of S.B. 90, maximum tax rates were established in terms of specified dollar-amount rates per $100 of assessed valuation. Law of July 18, 1968, ch. 664, § 1, 1968 Cal. Stats. 1343-45 (repealed 1974). Senate Bill 90 changed this, so that a district's maximum tax rate is derived by a complicated formula from a per-pupil "revenue limit" calculated for that particular district. CAL. EDUC. CODE § 42238 (West Spec. Pamph. 1976) (formerly *id.* § 20905 (West Supp. 1977)). Under the new system, the electorate has the power to vote to increase each district's per-pupil revenue limit, CAL. EDUC. CODE § 42202 (West Spec. Pamph. 1976) (formerly *id.* § 20803.2 (West Supp. 1977)).

Figure 4
Community Characteristic of
Family Wealth

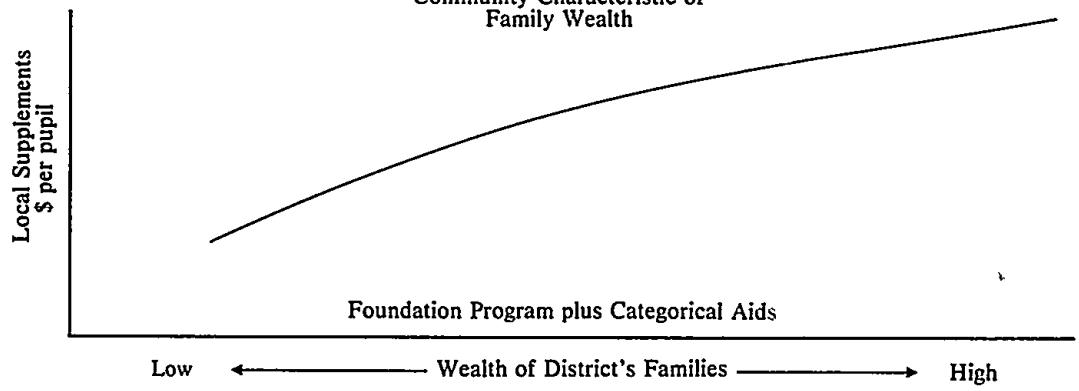
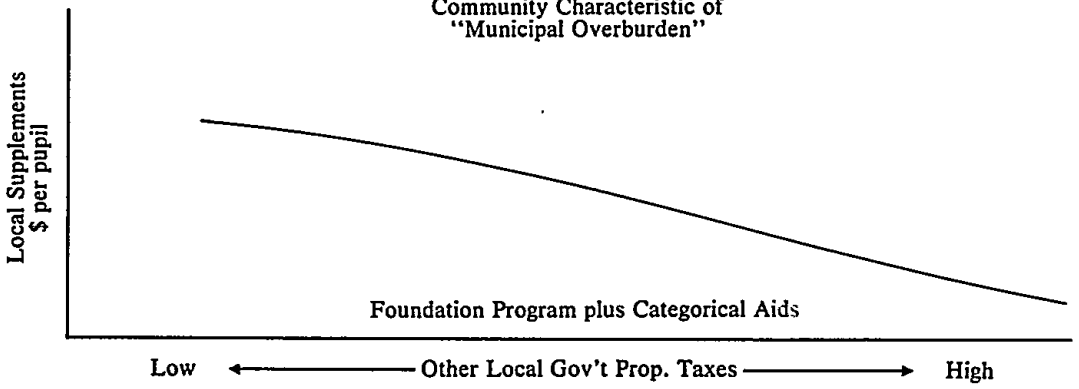


Figure 5
Community Characteristic of
"Municipal Overburden"



Each of these figures shows the expected per-pupil local supplements in districts in which all community characteristics affecting the ability and willingness of the taxpayers to provide local supplements are precisely the same, with the exception of the designated community characteristic. Thus Figure 3 shows how per-pupil local supplements can be expected to vary among districts of different wealth (MAV/ADA) where relevant community characteristics of the districts are otherwise the same. Under these circumstances, the taxpayers of each district would be willing and able to sustain essentially the same school tax rate above the computational rate, but for the law of diminishing returns. Since the per-pupil yield of a given tax rate is directly proportional to per-pupil assessed valuation, the local supplements increase in direct proportion to district wealth. In the case of basic aid districts, however, there is a sharper rise in local supplements because of the unused district aid,[23] assuming the same total school tax rate for all of the districts. This increase, which would be depicted by a straight line if all school tax rates were equal, becomes less steep in the case of wealthier basic aid districts because of the law of diminishing returns. Thus, even though all other relevant community characteristics are considered to be the same,

23. See Figure 1, page 457.

taxpayers in an extremely wealthy district would not be willing to sustain the same tax rate as that imposed by other districts in the belief that they would not be getting a full dollar's worth of educational benefits for each additional tax dollar.

Figure 4 shows how local supplements can be expected to vary among districts in which all relevant community characteristics, including district wealth, are the same except for the average wealth or income of the district's families. Since wealthier families can afford to pay higher property taxes, the local supplements derived from such taxes are expected to increase with the wealth of the families. Again, the law of diminishing returns dictates a lesser rate of increase in local supplements congruent with the increase in family wealth in the community.

Figure 5 illustrates how local supplements may be expected to vary among districts that are identical in all relevant aspects except for their "municipal overburden"—the property tax rates required to support all local governmental services other than the public schools in question. These include property tax rates for counties and cities, which vary from a low of about two dollars per hundred dollars of assessed valuation to a high of almost nine dollars, and special districts such as fire protection, flood control, lighting and sewer maintenance, sanitation, and water, and even community college districts, which were excluded from consideration in the *Serrano* trial proceedings. Since school districts compete with these other government agencies for the local property tax dollar, those school districts situated in communities with high "municipal overburden" are less able to provide local supplements, as indicated by Figure 5.

Other isolated community characteristics also determine the production of local supplements. These include the relative costs of providing the same quality of educational services; the ratio of children attending public schools to total population; the ratio of assessed valuations to fair market values; and various indicators of the educational aspirations of the citizens in the community, such as the incidence of professional persons, the number of parents who are college graduates, and so forth. Each district will have its own unique cluster of community characteristics that determine the extent to which that district can and will exact tax revenue to enrich the school program; no single community characteristic is controlling with respect to the power of a district to raise disequalizing local supplements.

As previously noted, any system that allows a substantial degree of local fiscal control will inevitably result in unequal education on a statewide basis, to the extent that local money makes a difference in the quality of educational opportunities offered. This unequal education can find no rational justification in any selected community characteristic, or even in any

cluster of community characteristics, because *none* of them have any relevance to the quality of education to which a child is constitutionally entitled subsequent to the denomination of education as a fundamental right in *Serrano I*.[24] The only rational justification for unequal schooling, when challenged on equal protection grounds, must be found in the *concept* of local fiscal control.[25]

Without such local control, fiscal planners in the state capitol would be required to make all decisions concerning how much money each district would have to spend each school year. Neither the plaintiffs, the defendants, the trial court, nor the California Supreme Court[26] deemed that requirement to be a desirable or a required solution. The problem that the state supreme court had to confront was how to balance the goal of local fiscal control with the goal of equal educational opportunity for all California school children.

II. The Constitutional Test of *Serrano II*

A. Background: Origins of District Power Equalizing

In an influential book published in 1970,[27] John Coons, William Clune, and Stephen Sugarman examined the foundation program model for school financing and concluded that this model causes a district's per-pupil revenue to depend upon that district's per-pupil taxable wealth. They eloquently argued that this interdependence was improper; accordingly they asserted, "*[t]he quality of public education may not be a function of wealth other than the wealth of the state as a whole.*"[28] Coons, Clune, and Sugarman treated public education as a matter of statewide concern. They acknowledged nevertheless that local fiscal control is a legitimate value to be preserved in a state school financing system; by use of the term "subsidiarity," they acknowledged the general principle that governmental decisions should be made at the lowest level of the state bureaucracy at which

24. Serrano I, 5 Cal. 3d at 608-09, 487 P.2d at 1258-59, 96 Cal. Rptr. at 618-19.

25. The trial court found that: "[l]ocal fiscal control, valued by all school officials, assumes the existence of a relationship between cost and quality [of educational programs]." Findings of Fact and Conclusions of Law at 40, Serrano v. Priest, No. 938,254, Super. Ct. of the County of Los Angeles (Aug. 30, 1974).

26. In the words of the court in *Serrano II*, "The constitutional provision [CAL. CONST. art. XIII, § 21 (formerly art. IX, § 6, para. 6)], as we shall point out more fully below, 'mandated' only that there be a system allowing for local decision as to the level of school expenditures and that the mechanism to be utilized in providing revenues to permit such expenditures be a county levy of school district taxes." 18 Cal. 3d at 771, 557 P.2d at 955, 135 Cal. Rptr. at 371. *Serrano I* also recognized the importance of the "local fiscal control" provision in the state constitution. *See* Serrano I, 5 Cal. 3d at 592-96, 487 P.2d at 1246-49, 96 Cal. Rptr. at 606-09.

27. J. COONS, W. CLUNE, & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970) [hereinafter cited as COONS, CLUNE, & SUGARMAN].

28. *Id.* at 2.

such decisions can efficiently be made, that is, at that level closest to the people affected.[29] The authors accordingly did not propose to eliminate local fiscal control, but rather proposed simply to equalize the power of districts to raise local supplements. To effect this proposal, Coons, Clune, and Sugarman advocated a system of "district power equalizing" (DPE), which would treat all districts as though they had the same per-pupil assessed valuation for the purpose of determining the number of dollars per pupil available to spend.

The essential ingredient of DPE is that all districts having the same school tax rate would be entitled to receive the same per-pupil revenues, excluding categorical aids. This was to be accomplished by a system of state-imposed rewards for the tax efforts of low-wealth districts and penalties for the tax efforts of high-wealth districts.[30]

Since unequal district tax efforts necessarily produce unequal net revenue, the DPE system does not purport to result in equal educational opportunities; its purpose is simply to neutralize the influence of district wealth on district spending levels. Because of the inherent limits of DPE—in particular, its indifference to all other community characteristics that influence district per-pupil revenues—the mere establishment of such a system might well have little or no calculable effect in terms of equalizing per-pupil revenue or expenditures. In other words, DPE provides no assurance whatsoever that the cause of equal education will be advanced.

How is it that Coons, Clune, and Sugarman selected the single community characteristic of district wealth as the villain in the school finance drama? One reason, of course, is that high district wealth is a community characteristic that, taken alone, is indicative of ability to provide local supplements. Another reason is that the authors observed that the United States Supreme Court had established two distinct standards of judicial review—one, the "rational basis" test, which almost any legislation could pass; the other, the "strict scrutiny" test, which most legislation could not pass.[31] Strict scrutiny would be triggered if a court characterized the adversely-affected interest as "fundamental" or if a court characterized the legislative classification as "suspect." Deeming a child's interest in education to be "fundamental," Coons, Clune, and Sugarman also concluded that, by analogy to certain decisions by the United States Supreme Court involving wealth-based discriminations against individuals,[32] classifications

29. *Id.* at 14-20.

30. *Id.* at 163-68.

31. See text accompanying notes 47-52 and 92-98 *infra*.

32. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (invalidating poll tax as a de facto discrimination against the poor); Douglas v. California, 372 U.S. 353 (1963) (free counsel must be provided to an indigent criminal defendant where he has only one appeal as of right);

based on district wealth should be treated as suspect.[33]

The "reward-for-effort" (or upward-power-equalizing) component of DPE was not a new idea. It was first proposed by Harland Updegraff in 1922.[34] Dr. Erick L. Lindman, called by the defendants as an expert witness on the subject of school finance in the *Serrano* trial, testified that in the early 1940's he developed such a reward-for-effort system with respect to school building aid for the state of Washington. He pointed out, however, that such a system has two important drawbacks: its stimulation of unequal incentives for a local tax effort creates new sets of advantaged and disadvantaged districts, and its failure to place a ceiling on the local tax effort that would be rewarded generates an unpredictable annual withdrawal from the state treasury that hampers responsible state fiscal planning. In Washington, the state thus found it necessary to approve the cost of the proposed school facility before it made its equalizing grants for school construction costs. Yet, as Dr. Lindman pointed out, if the state places a ceiling on the local tax effort to be rewarded, the result is essentially a foundation program system under another name.[35] These drawbacks to the open-ended, reward-for-effort system probably explain the failure of such a system to gain any foothold in the school financing systems of the fifty states.[36]

Although the reward-for-effort component of the Coons, Clune, and Sugarman DPE proposal was not new to school fiscal designers, the penalty-for-effort component was novel. Such novelty arises from this component's inherent inutility; fiscal designers would be likely to find that this component only exacerbates the unequal incentive effects already discovered in the reward-for-effort system. Planners are more interested in searching for acceptable ways to increase the ability of poorer districts to obtain needed funds than ways to decrease the similar ability of a few wealthier districts to some common denominator.[37]

Griffin v. Illinois, 351 U.S. 12 (1956) (free transcripts must be provided to indigents in criminal appeals).

33. COONS, CLUNE, & SUGARMAN, *supra* note 27, at 374.

34. *See* K. ALEXANDER & K. JONES, CONSTITUTIONAL REFORM OF SCHOOL FINANCE 33, 41 (1973).

35. Record at 4055-68, Serrano II, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

36. For example, even though New Jersey lawmakers acted under compulsion of a judicial decree requiring equalization of educational opportunities, they chose to place a limit upon annual budget increases in establishing a reward-for-effort system, although the state Commissioner was empowered to approve requests for larger increases. Thus, the lawmakers declined to issue blank checks to the districts to be rewarded for their tax efforts; the New Jersey Supreme Court upheld the validity of the legislation, assuming that the equalizing program would be fully funded by the state. Robinson v. Cahill, 69 N.J. 449, 355 A.2d 129 (1976).

37. The philosophy that invokes the penalty-for-effort component of DPE would seem to require any district to reject an exceptionally qualified applicant for a teaching position because children in other classes would thereby be denied equal educational opportunities.

B. The Holding in *Serrano I*

With this background, it is time to consider the *Serrano* litigation itself, which originated with a complaint filed in late August, 1968. The plaintiffs' allegations bore a remarkable resemblance to the arguments set forth in *Private Wealth and Public Education*.[38] The complaint alleged that California's system of school financing made the quality of education "a function of the wealth of the children's parents and neighbors, as measured by the tax base of the school district in which said children reside . . . ."[39] Claiming that education is a fundamental interest and that wealth is a suspect classification, the plaintiffs then alleged that California's foundation program system denied equal protection because it made the quality of a child's education depend upon the wealth of the school district in which that child resided. Both plaintiffs' challenge and Coons, Clune, and Sugarman's thesis are grounded on the assertion that the quality of education may not be a function of district wealth.

The complaint failed to survive in the trial court, which sustained the defendants' general demurrers and entered a judgment of dismissal after the plaintiffs' failure to amend.[40] On appeal, however, the California Supreme Court held that the complaint did indeed state a cause of action.[41] In the course of its *Serrano I* decision, the court determined that district wealth is a suspect classification,[42] that education is a fundamental interest,[43] that these determinations triggered the strict scrutiny test,[44] and that the system as described in the complaint could not pass muster under the strict scrutiny test.[45] The equal protection analysis utilized in *Serrano I* is worth focusing on both because it established the ultimate criterion for constitutionality developed by the court in *Serrano II*, namely, that district spending cannot be a function of district wealth, and because the reasoning by which the criterion was established was inherently fallacious.

The faulty analysis is contained in the second of the following paragraphs of the *Serrano I* opinion:

> Finally, defendants suggest that the wealth of a school district does not necessarily reflect the wealth of the families who live there. The simple answer to this argument is that plaintiffs have alleged that there is a correlation between a district's per pupil assessed valuation and the wealth of its residents and we treat these material facts as admitted by the demurrers.

38. COONS, CLUNE, & SUGARMAN, *supra* note 27.
39. Serrano I, 5 Cal. 3d at 590 n.1, 487 P.2d at 1244 n.1, 96 Cal. Rptr. at 604 n.1.
40. *Id.* at 591, 487 P.2d at 1245, 96 Cal. Rptr. at 605.
41. *Id.* at 617-18, 487 P.2d at 1264-66, 96 Cal. Rptr. at 624-26.
42. *Id.* at 597-604, 487 P.2d at 1250-55, 96 Cal. Rptr. at 610-15.
43. *Id.* at 604-10, 487 P.2d at 1255-59, 96 Cal. Rptr. at 615-19.
44. *Id.* at 596-97, 487 P.2d at 1249-50, 96 Cal. Rptr. at 609-10.
45. *Id.* at 610-17, 487 P.2d at 1259-65, 96 Cal. Rptr. at 619-25.

> More basically, however, we reject defendants' underlying thesis that classification by wealth is constitutional so long as the wealth is that of the district, not the individual. We think that discrimination on the basis of district wealth is equally invalid. The commercial and industrial property which augments a district's tax base is distributed unevenly throughout the state. To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of such property is to make the quality of a child's education dependent upon the location of private commercial and industrial establishments. Surely, this is to rely on the most irrelevant of factors as the basis for educational financing.[46]

There are three fallacies in the second paragraph above. First, the paragraph poses the wrong question. Traditionally, of course, the threshold problem in equal protection cases is whether the particular state action triggers the rational basis or the strict scrutiny standard of judicial review.[47] Once that standard has been determined, the state, in cases applying strict scrutiny, must bring forth a compelling interest to justify its mode of classification.[48] The paragraphs quoted appear in a section of the opinion entitled "Wealth as a Suspect Classification"; this topic is relevant *only* to the selection of which equal protection standard ought to be applied. But in *Serrano I*, the court never properly found a suspect classification. After three pages of discussion in which the court found the school financing system to be based on wealth,[49] it continued with the two paragraphs quoted above. The court there attempted to bridge the gap between personal wealth, a suspect classification, and district wealth, but did not state why the latter was similarly suspect. This error occurred because of the court's misunderstanding of the defendants' "underlying thesis," that is, the question of whether *district wealth* is in fact a suspect classification. Defendants' underlying thesis was that classification by *wealth* is not *suspect* so long as the wealth is that of the district, not that of the individual. The court, however, struck down a "straw man" by assuming that the defendants' underlying thesis was "that classification by wealth is *constitutional* so long as the wealth is that of the district, not the individual."[50] The court thus prematurely inquired into the ultimate question of whether or not a classification based on district wealth, as distinguished from personal wealth, is constitutional, when it should have determined the preliminary issue of whether such a classification is suspect. Had the California Supreme Court

46. *Id.* at 600-01, 487 P.2d at 1252-53, 96 Cal. Rptr. at 612-13.

47. Bullock v. Carter, 405 U.S. 134, 142 (1972).

48. *See* Westbrook v. Mihaly, 2 Cal. 3d 765, 784-85, 471 P.2d 487, 500-01, 87 Cal. Rptr. 839, 852-53 (1970), *cited in* Serrano I, 5 Cal. 3d at 597, 487 P.2d at 1249-50, 69 Cal. Rptr. at 609-10.

49. Serrano I, 5 Cal. 3d at 597-600, 487 P.2d at 1250-52, 96 Cal. Rptr. at 610-12.

50. *Id.* at 601, 487 P.2d at 1252, 96 Cal. Rptr. at 612 (emphasis added).

adopted a logical methodology for analyzing equal protection claims, it might have arrived at a conclusion on the issue of district wealth as a suspect classification similar to that of Justice Powell in *San Antonio Independent School District v. Rodriguez*.[51] Justice Powell found that strict scrutiny was unwarranted; he concluded that the Texas school financing scheme passed the rational basis test.[52]

Second, the analysis used in answering the wrong question, whether district wealth is a constitutional basis for educational financing, was also faulty. The court thought the defendants were arguing that the distribution of commercial and industrial property among districts is somehow relevant to the quality of a child's education.[53] But the defendants' actual argument was that the values inherent in permitting local fiscal control are relevant to the quality of education children will receive throughout the state. As already noted, no community characteristic can be offered as a legitimate basis for allocating educational dollars. Only the values inherent in permitting local fiscal decision-making can legitimately be advanced as a justification for a differential allocation. These are the very same values on which the *Serrano* plaintiffs relied to support their "district power equalizing" alternative.[54] They are also the same values protected by article thirteen of the California Constitution.[55] Thus, because the state supreme court misconstrued the contentions of the defendants, the wrong question was answered by the use of fallacious reasoning.

Third, the *Serrano I* equal protection analysis proves to be untenable.[56] The major premise of this analysis is that a community characteristic that allots more educational dollars to the children of one district than it does to those of another is an invalid, unconstitutional classification if that community characteristic is irrelevant to the quality of a child's education. The court reasoned that the fortuitous presence of commercial and industrial

51. 411 U.S. 1, 33-34 (1973).

52. *Id.* at 18-29.

53. The location of commercial and industrial property in a school district is obviously a prime factor differentiating district wealth from the personal wealth of a child's parents and neighbors. It will be recalled that the complaint ambiguously alleged that the financing scheme made "the quality of education for school age children . . . a function of the wealth of the childrens' parents and neighbors, *as measured by* the tax base of the school district in which said children reside . . . ." Serrano I, 5 Cal. 3d at 590 n.1, 487 P.2d at 1244 n.1, 96 Cal. Rptr. at 604 n.1 (emphasis added).

54. Plaintiffs claimed to be "the real champions of local fiscal control." Brief for Respondents at 217, Serrano II, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

55. CAL. CONST. art. XIII, §§ 20, 21.

56. For an example of a legitimate resolution of the problem, *see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), in which the United States Supreme Court set forth sound reasons for its determination that district wealth should not be treated as a suspect classification for the purpose of triggering the "strict scrutiny" standard of judicial review.

property within a school district will result in differential allocations of educational dollars, that this fortuity is surely irrelevant to the quality of a child's education, and that therefore classification by district wealth is unconstitutional. But any financing system, including DPE, that permits a substantial measure of local fiscal control will inevitably result in an unequal allotment of educational dollars on the basis of many community characteristics, each of which is irrelevant to the quality of education a child has the right to expect. If the court's major premise is true, all community characteristics that affect the allocation of educational dollars are rendered unconstitutional to the extent that they are utilized as bases for classification. To adopt such a draconian position is tantamount to requiring that the school financing system produce substantially equal per pupil revenues in order to comport with the mandate of the California Constitution.[57]

C. The Holding in *Serrano II*

Following remand by the supreme court, a trial on the merits commenced on December 26, 1972, the same day that Senate Bill 90,[58] the legislature's response to *Serrano I*, became effective. S.B. 90 greatly increased state support of the public schools by expanding both the foundation programs and the categorical aids. It also established a new method of fixing a district's maximum tax rate, using a new per-pupil "revenue limit" concept. It was this new financing system that went on trial.

In the course of that trial, the plaintiffs made no attempt to prove that there was a correlation between a district's per-pupil assessed valuation and the wealth of its residents, despite the understanding of the court in *Serrano I* that the plaintiffs would do so.[59] In short, plaintiffs failed to show that poor people tend to live in poor school districts.[60] With respect to the wealth discrimination issue,[61] plaintiffs, relying on *Serrano I*'s characterization of district wealth as the villain, simply offered data showing both wide dis-

57. CAL. CONST. art. XIII, § 21.

58. 1972 Cal. Stats., ch. 1406, at 2931.

59. *See* Serrano I, 5 Cal. 3d at 600-01, 487 P.2d at 1252-53, 96 Cal. Rptr. at 612-13.

60. Evidence offered by the defendants indicated a lack of any significant correlation between the Index of Family Poverty and district expenditures per pupil. CALIF. STATE DEP'T OF EDUC., CALIFORNIA STATE TESTING PROGRAM, 1969-70, 571, 574, 577 (1972). A 1974 study, too late for use in the trial proceedings, concluded that "[t]here appears to be no significant relationship between the AV/ADA of school districts and the presence in them of children 6-17 years old from families earning less than poverty level." SENATE OFFICE OF RESEARCH, THE INCIDENCE IN SCHOOL DISTRICTS OF CHILDREN 6-17 YEARS OLD FROM FAMILIES EARNING LESS THAN POVERTY LEVEL BY ASSESSED VALUATION PER CHILD OF THE SCHOOL DISTRICT 10 (Calif. 1974).

61. The only other issue of fact was whether district spending levels significantly affect quality of education; the trial court resolved this issue in favor of the plaintiffs. Serrano II, 18 Cal. 3d at 748-50 & nn.19-21, 557 P.2d at 939-40 & nn.19-21, 135 Cal. Rptr. at 355-56 & nn.19-21.

parities in district wealth and the expected influence of such disparities on district spending levels under the new financing system.[62]

On March 21, 1973, while the trial was in progress, the United States Supreme Court handed down its decision in *San Antonio Independent School District v. Rodriguez*.[63] The Court held that the foundation program system of financing public schools in Texas did not violate the equal protection clause of the Fourteenth Amendment of the United States Constitution. The majority opinion by Justice Powell specifically rejected the notion that district wealth, as opposed to individual wealth, should be considered suspect for purposes of equal protection analysis.[64] Nevertheless, the trial court, adhering to *Serrano I*'s determination that district wealth is suspect, held that S.B. 90 violated the California Constitution's equal protection provisions because impermissible wealth-related disparities in per-pupil expenditures and tax rates would continue under the new financing program for an unreasonable period of time.[65] In *Serrano II*, the state supreme court affirmed the trial court judgment without modification.[66]

What then is the meaning of the trial court decision, affirmed by *Serrano II*? It means that local supplements cannot materially depend on district wealth (MAV/ADA), but it indicates in addition that local supplements must be a function of the tax rates chosen by the districts. In a system in which property taxes are the only source of per-pupil local supplements, such supplements will be determined by application of equation (1):

$$\frac{\text{Local Supps.}}{\text{ADA}} = \text{Tax Rate} \times \frac{\text{AV}}{\text{ADA}}$$

where "Tax Rate" is that rate chosen in the district to provide for local supplements and "AV/ADA" is the total assessed valuation of taxable property in the district divided by the district's average daily attendance. But since *Serrano II* specifies that a district's per-pupil local supplements may not materially depend on its per-pupil taxable wealth, the last term of equation (1) must be effectively neutralized and replaced with a constant (K), which yields equation (2):

62. *See id.* at 745 n.17, 747 n.18, 557 P.2d at 937 n.17, 938 n.18, 135 Cal. Rptr. at 353 n.17, 354 n.18.

63. 411 U.S. 1 (1973).

64. *Id.* at 33-34.

65. The essence of the trial court judgment is set forth in Serrano II, 18 Cal. 3d at 749 n.21, 557 P.2d at 940 n.21, 135 Cal. Rptr. at 356 n.21.

66. 18 Cal. 3d at 775-77, 557 P.2d at 957-58, 135 Cal. Rptr. at 373-74. In so doing, the California Supreme Court failed to reconsider the fallacious reasoning process by which *Serrano I* concluded that district wealth is "suspect," despite the intervening decision of the United States Supreme Court in *Rodriguez*; it appeared instead to rely on the doctrine of the law of the case. Serrano II, 18 Cal. 3d at 756, 765-66, 776, 557 P.2d at 944, 951-52, 958, 135 Cal. Rptr. at 360, 367-68, 374.

$$\frac{\text{Local Supps.}}{\text{ADA}} = \text{Tax Rate} \times \text{K.}$$

Serrano II's requirement that equation (2) be substituted for equation (1) necessitates either an actual or an artificial equalization of the wealth of all similar districts, or elimination of local property taxes as a source of local supplements. Actual equalization of such wealth (MAV/ADA) can theoretically be accomplished by gerrymandering district boundary lines so that all districts of the same type (elementary, high school, or unified) would have the same MAV/ADA, or so that there would be only a single, state-wide school district of any type. The former reorganization could be facilitated by transferring all commercial and industrial property from the local tax rolls to a state property tax roll, since these types of property account for most of the disparities in per-pupil taxable wealth among the districts. The artificial method of equalizing district wealth has previously been described—it is the district power equalizing (DPE) system.[67] Under DPE, the state would treat each district of the same type as though it were a district of given wealth when it establishes a tax rate for local supplements. The state would do this by rewarding the tax effort of districts below the specified wealth and by penalizing the tax effort of districts above the specified wealth. The net result would be that, for a given tax rate, all districts of the same type would be entitled to the same number of supplementary dollars per-pupil as would be generated by that tax rate in a district of specified wealth (MAV/ADA). Considered mathematically in connection with equation (2), the DPE system establishes a value for the constant "K" of a specified MAV/ADA. The formula for a DPE system could accordingly be written as follows in equation (3):

$$\frac{\text{Local Supps.}}{\text{ADA}} = \text{Tax Rate} \times \left(\text{Specified } \frac{\text{MAV}}{\text{ADA}}\right).$$

Since under a DPE system the lawmakers would establish the value of the term "Specified MAV/ADA," the mandate of *Serrano II* would be satisfied by a DPE system that artificially equalizes the wealth of all districts of the same type at a specified wealth level.[68]

The only other feasible way to satisfy equation (2) is by the elimination of local property taxes as a source of local supplements.[69] Expressing this method mathematically within the framework of equation (2), one would merely set the value of the term "Tax Rate" at zero. This would express the concept that school districts are not permitted to use local property taxes as a source of local supplements. Two of the potential alternative systems of

67. See text accompanying notes 27-37 *supra*.

68. *Accord*, Serrano II, 18 Cal. 3d at 747, 557 P.2d at 939, 135 Cal. Rptr. at 355.

69. This does not mean that a state-wide property tax would be in violation of *Serrano II*.

school financing found by the trial court to be feasible would utilize this method of satisfying equation (2):[70] full state funding, with the imposition of a statewide property tax, and vouchers.[71] Full state funding, by definition, negates the possibility of any local supplementation. As for the other alternative, there is nothing inherent in the structure of a voucher plan that would enable it to satisfy equation (2) if local supplementation from local property taxes is permitted. Accordingly, the voucher plan must be considered an alternative which does not permit such local supplementation unless the wealth of the districts is actually or artificially equalized, as previously described.

The ultimate meaning of *Serrano II* is that it requires a redistribution of inequalities in educational offerings and a reshuffling of advantaged and disadvantaged districts in accordance with those community characteristics, other than district wealth, that favor or disfavor the raising of local supplements. In light of the discussion above, there are several meanings that cannot be imputed to the *Serrano II* decision. First, it does not mean that local property taxation for schools is unconstitutional.[72] Second, it does not mean that equal expenditure levels, or equal educational opportunities, are constitutionally required. Third, it does not mean that adequate expenditure levels are necessitated by law.[73] Fourth, it does not signal a victory for poor children, since poor children are just as likely to be found in the newly-disadvantaged wealthy districts as in the newly-advantaged poor districts.

III. The First Opportunity Missed

Establishing criteria by which to test a school financing system's validity under California's equal protection provisions was one of the vital problems presented by the *Serrano* case. Development of such criteria requires an examination of the various interests at stake in the search for equal educational opportunities. In this regard, it is important to recall that although equal education is an ideal that should be zealously pursued, it can never be fully attained. Not all teachers in the same school district, or even in the same school building, are equally effective. The same teacher

70. All of the potential alternative systems described by the trial court are set forth in Serrano II, 18 Cal. 3d at 747, 557 P.2d at 938-39, 135 Cal. Rptr. at 354-55.

71. *Id.*

72. In fact, *Serrano II* recognized that the authority to raise local supplements (local fiscal control) is found in article thirteen, section twenty-one of the California Constitution. *Id.* at 770, 557 P.2d at 954, 135 Cal. Rptr. at 370.

73. The trial court's memorandum opinion recognized this in stating "If such uniformity of treatment were to result in all children being provided a low-quality educational program, or even a clearly *inadequate* educational program, the California Constitution would be satisfied." Serrano II, 18 Cal. 3d at 754 n.28, 557 P.2d at 943 n.28, 135 Cal. Rptr. at 359 n.28 (emphasis in original).

may be more effective with one student than with another. Moreover, it is readily apparent that even uniform methods of selection and compensation of teachers do not necessarily provide a satisfactory guarantee of equal educational opportunities.

It is understandable then that efforts to provide equal education are concentrated on the more manageable goal of equalizing resources available to the public schools. Two ways to achieve this goal are (1) imposition of state-established minimum educational standards, and (2) utilization of fixed formulas for allotting educational dollars to school districts. Both approaches are part of the majority of existing financing systems.

The first approach is illustrated by state requirements for the licensing of teachers. This involves the promulgation of distinctly *minimum* standards; teachers with superior training and ability are permitted to teach even though their presence in the classroom creates unequal opportunities.

Foundation programs such as California's[74] are an example of the second, "formula" approach. In the allotment of educational dollars under the foundation program, a similar philosophy of state-established guidelines prevails: the state assures a basic amount of income per pupil to every school district within its boundaries, the state and federal governments give additional amounts in the form of categorical aid to eligible districts, and the state permits local districts to supplement these amounts from local tax sources. The state generally allows local electorates to raise additional supplements by means of taxes that exceed maximum tax rates; thus, the ability of a community to meet locally-perceived needs is not stifled.

Three effects of the foundation program system, or any other school finance system, of concern to the children, parents, educators, taxpayers, and the courts, are: (1) the effect upon the equalization of available resources; (2) the effect upon community capability to meet locally-perceived needs; and (3) the effect upon property tax rates.

A. The Optimum Balance Test

One approach to the evaluation of a school finance system is to determine whether or not there are adequate revenues for all necessary school services. This would require, however, a detailed analysis of the complex formulas used to allocate foundation program funds and categorical aids. While this approach may be appropriate for skilled school finance system designers and the legislatures they advise, it is clearly an impractical test for determining the *constitutionality* of a given financing system.[75]

74. See notes 5-10 and accompanying text *supra*.

75. A "judicially unmanageable controversy" would be presented. McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969);

Fortunately, there is another way. Of the three types of revenues available to school districts, the foundation program, categorical aids, and local supplements, the first two are equally available to all school districts according to need as determined by the lawmakers. Only the third type, local supplements, is not equally available to all districts. The relative amount of school revenue of this unequal type, expressed as a percent of the state's total school revenue, thus provides an index of the extent to which public school revenue is equalized in the state. Assuming that the quality of education is a function of fiscal considerations, such an index provides an objective measure of the relative weights given by the state school financing system to equal educational opportunities and to local participation in school fiscal affairs. This approach also directly confronts the problem of making an appropriate accommodation of the competing interests of furnishing equal educational opportunities and of maximizing local fiscal control. The technique provides a useful monitoring device by which optimum balance can be preserved between these values.[76]

This criterion[77] for an "optimum balance" of equalized and unequalized revenues responds directly and fully to the issues of the equaliza-

Burruss v. Wilkerson, 310 F.Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970). The *Serrano I* court disagreed with the *McInnis* and *Burruss* opinions on this point. 5 Cal. 3d at 615, 616 & n.33, 617-18, 487 P.2d at 1263, 1264 & n.33, 1265, 96 Cal. Rptr. at 623, 624 & n.33, 625.

76. For example, assume that the judicial branch determines that a 90%/10% ratio (90% equalized funds, 10% unequalized funds) is the optimum balance. Assume further that for several years the lawmakers set the foundation programs sufficiently high and provided sufficient categorical aid funds so that the exercise of local fiscal control in meeting locally-perceived additional needs did not cause the unequalized local supplements to exceed the 10% limit. Assume, however, that after a few years the lawmakers fail to appropriate sufficient state funds for the foundation programs and categorical aids to keep pace with rising educational costs, with the result that locally-perceived needs for more educational dollars cause the unequalized local supplements to reach 12% of the total funds. Under these circumstances, the courts could either redirect apportionments of state funds from advantaged wealthy districts to disadvantaged poor districts, or could enjoin the expenditure of funds so as to require closing the schools until the lawmakers corrected the situation. In New Jersey, both of these forms of judicial relief were afforded when the lawmakers, who were parties to the suit, failed to respond appropriately to the state supreme court's decision as to what were the necessary provisions for a "thorough and efficient" system as specified in the state constitution. Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), *modified*, 63 N.J. 196, 306 A.2d 65 (1973), *aff'd*, 67 N.J. 35, 335 A.2d 6 (1975) (in the last two decisions, the court declined to act until the legislature first enacted a financing statute); Robinson v. Cahill, 69 N.J. 133, 351 A.2d 713 (1975) (ruled legislative enactment unconstitutional), *modified*, 69 N.J. 449, 355 A.2d 129 (1976) (issued injunction pending full state funding of 1975 act), *aff'd per curiam*, 70 N.J. 155, 358 A.2d 457 (1976), *amended*, 70 N.J. 464, 360 A.2d 400 (1976) (injunction dissolved).

77. Credit for development of this criterion must be accorded Dr. Erick L. Lindman, a nationally-recognized expert in public school financing, then professor at the Graduate School of Education, University of California at Los Angeles. *See* E. LINDMAN, DILEMMAS OF SCHOOL FINANCE (1975). Dr. Lindman testified for the defense at the *Serrano* trial. See text accompanying note 35 *supra*.

tion of available resources and of the capability of communities to meet local needs. This test does not concern itself with the devices or formulas used for resource allocation among the districts. It can apply to any resource allocation system, so long as the various types of revenues received under that system can be identified as being either "equalized" (*i.e.*, funds available to each and every district, without excessive taxation, regardless of a district's community characteristics), or "unequalized" funds (*i.e.*, supplementing funds raised by local taxation which are not equally available to districts, depending upon their specific community characteristics). Thus the "optimum balance" test measures a school financing system by its results in terms of its effect on the equalization of available resources and on local fiscal control.

To illustrate, assume that the legislature or the courts determined that the optimum balance for total school revenues was not less than ninety percent "equalized" funds and, accordingly, not more than ten percent "unequalized" funds. Would California's foundation program system meet this constitutional test?[78] In the course of the trial proceedings in *Serrano*, it was shown that the California foundation program operating in 1970-71, just prior to the *Serrano I* decision, resulted in a balance of 76.4 percent equalized and 23.6 percent unequalized revenues.[79] The reasons for this

78. The majority opinion in *Serrano II* asserts that the foundation program "revenues can by no means be considered 'equalized' under defendants' own definition of that term." 18 Cal. 3d at 757, 557 P.2d at 945, 135 Cal. Rptr. at 361. This assertion is based on the fact that basic aid districts are able to achieve their respective foundation program levels with a tax rate lower than the computational tax rate (see Figure 3, page 461). Perhaps there is a semantic problem here. As previously noted (see note 16 and accompanying text *supra*), each and every district can achieve its foundation program without imposing an excessive tax rate; the foundation program dollars are hard educational dollars, available to each and every district, and thus serve the cause of equal education. Perhaps the term "universally available" funds would have expressed these concepts more clearly. The court's conversion of foundation program "universally available" funds into "unequalized" funds is anomalous in view of its lack of concern about disparities in property tax rates for the support of non-school governmental services (*i.e.*, municipal overburden). Municipal overburden disparities far exceed the tax rate advantages that are enjoyed by only a few of the California's most wealthy basic aid districts. For example, in the 1973-74 school year, San Francisco could achieve its foundation program with a tax rate of about $1.86, giving it a two dollar advantage over equalization aid districts. In that same year, municipal overburden tax rates (considering only cities and counties) ran from a low of $1.68 in unincorporated territory of Orange County to a high of $8.41 in the city of Isleton in Sacramento County. Thus municipal overburden varied by as much as $6.73; San Francisco's two dollar advantage in achieving its foundation program was in turn offset by its high municipal overburden tax rate of $6.95. Since it is possible to view municipal overburden as a sharing of a school district's taxable wealth, it is obvious that disparities in municipal overburden are an important cause of "district wealth-related" disparities in per-pupil expenditures; yet *Serrano II* relegated the search for tax equity with respect to municipal overburden to the legislature. 18 Cal. 3d at 759 n.38, 557 P.2d at 946 n.38, 135 Cal. Rptr. at 362 n.38.

79. *See id.* at 755 n.31, 557 P.2d at 944 n.31, 135 Cal. Rptr. at 360 n.31.

imbalance are clear: the combined foundation program amounts and categorical aids were too low to satisfy the perceived needs of the various districts' constituents, who in turn provided large supplementation that they considered necessary for proper education.

As a result of the passage of Senate Bill 90 and Assembly Bill 1267, the foundation program amounts and categorical aids were dramatically increased for the school year 1973-74 and for subsequent years. As a result of these increases, the operation of the system in 1973-74 resulted in approximately 89.6 percent equalized and 10.4 percent unequalized revenues.[80] This change in the ratio between equalized and unequalized revenues, brought about by increases in the foundation and categorical aids programs, highlights the importance of the numbers used in the various program formulas. The structure of the formulas will not determine the balance achieved; rather, the numbers used in the formulas will determine the balance.

Similarly, the numbers used in a district power equalizing (DPE) system would decide whether the system could pass the optimum balance test. It is impossible to test the efficacy of a DPE system in equalizing school resources and in accommodating the values inherent in local fiscal control, however, until numbers have been inserted into its formulas and the system has been in actual operation. In a simple DPE system, the state would finance fully a basic level of support so that all districts would have the same property tax rate in return for the same level of support. The system would also provide for categorical aids to meet special needs perceived by the state and federal governments. Beyond these subsidies, each district could provide local supplements depending upon the financial capacity of its constituents. If basic support and categorical aids are low and if district power to raise local supplements is average, then the predictable statewide response of each district's constituents will be to provide large amounts of local supplements. These supplements would not, however, be equally available to the districts, since they are dependent on community characteristics other than district wealth[81] affecting the ability and willingness of a district's taxpayers to provide additional funds.

80. *Id.*

81. The assumption that, under a DPE system, local supplements would be independent of district wealth may in fact not be well-founded. As stated in the appellants' reply brief, "district power equalizing, through the unequal incentives it would induce by its fiscal rewards and penalties for local tax effort, would result in State-induced and supported inequalities in educational programs. Thus, if the fulcrum of the 'power equalizing' is at the average district taxable wealth, a 'poor' district of one-third the average per-pupil wealth could obtain $300,000 for a locally perceived program by raising only $100,000 by local taxation, whereas a 'wealthy' district (or pupil-poor district, *e.g.*, Alpine County and San Francisco) of three times the average per-pupil wealth would have to raise $900,000 by local taxation in order to retain

B. Optimum Balance v. Fiscal Neutrality

In contrast to the optimum balance test, *Serrano II*'s criterion for constitutionality in terms of equal educational opportunities and local participation in school fiscal affairs is that a district's wealth may not influence its spending. This test concentrates on the required *structure* of a constitutional system rather than on the *results* to be achieved. The *structure* of a district power equalizing system or any other allegedly fiscally neutral system provides no assurance of either equality or adequacy of educational opportunities, nor any guarantee of an *appropriate* regard for the value of local fiscal control. The optimum balance criterion, on the other hand, because it does concentrate on results rather than on structure, can provide assurances of continued equality and adequacy of educational opportunities, while simultaneously providing proper respect for the value of local fiscal control. Should state levels of support fall too low, local electorates predictably would provide larger local supplements causing a perceptible imbalance that the court could then correct under this test.

In promulgating its declaratory relief criteria,[82] the *Serrano* trial court failed to address itself to two of the three key concerns: equalizing resources and local fiscal control. This omission was caused by the trial court's focus on the structure rather than on the operation and effects of the critical numbers used in the financing formulas and in its exclusive focus on the third concern, the financing system's effect on the ability of taxpayers to pay taxes. The optimum balance criterion, on the other hand, addresses itself directly to the two concerns ignored at the trial in *Serrano*; in fact, it is these two vital interests of the people of California that the optimum balance

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$300,000 for a similar locally perceived program. It is clear that the 'poor' district (especially if it were a high-income suburban district) would be much more likely to obtain voter approval to support the proposed program than would the 'wealthy' district. Under power equalizing, then, we would still have 'wealth-related expenditures', but the expenditures would be inversely related to district wealth (MAV/ADA). Instead of finding positive coefficients of correlation between expenditures and district wealth, we would find negative coefficients, *i.e.*, the higher the 'wealth' of the district the less it would tend to spend for education. *Would such 'inversely-wealth-related' disparities in per-pupil expenditures be less offensive to California's equal-protection-of-the-laws provisions than S.B. 90's 'wealth-related' disparities in per-pupil expenditures*?" Reply Brief for Appellants at 29, Serrano II, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (emphasis added). In *Serrano II*, plaintiffs declined to defend DPE or any of the other suggested district wealth-equalizing alternatives, claiming that "[s]o long as wealth is removed as an influence on spending, the Legislature [will be] left free [by the trial court] to design any system of its choosing." Brief for Respondents at 158, Serrano II, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976). The *Serrano II* court also declined to consider the constitutional merits of DPE or any other alternative system. 18 Cal. 3d at 775 n.54, 557 P.2d at 957 n.54, 135 Cal. Rptr. at 373 n.54. Since a DPE system, with its unequal incentive effects, does not remove the influence of wealth on spending, it ironically fails to satisfy the very "fiscal neutrality" test that gave birth to DPE. See note 28 and accompanying text *supra*.

82. *See* Serrano II, 18 Cal. 3d at 749 n.21, 557 P.2d at 940, 135 Cal. Rptr. at 356.

test seeks to protect. The third concern of school financing vis-à-vis taxes is also satisfied, both in the requirement that in order for school revenue to qualify as "equalized," they must be available to each and every district without excessive tax rates, and in the requirement that supplements from local taxes must be relatively small.[83]

Thus, not only is the optimum balance test more logical and easier to administer than the *Serrano* fiscal neutrality test,[84] but it is also a test that can be applied to any state school finance system, so long as "equalized" and "unequalized" revenues can be identified. Therefore the federal government could use it to encourage equalization of educational opportunity within each of the states by requiring a specified optimum balance in order to qualify for federal categorical aids.[85]

Why then did the California Supreme Court fail to adopt this preferable test? The answer to this question may perhaps be gleaned from portions of

83. "It may be noted that one of the beauties of the 'optimum balance' test is that it may readily be applied to various classifications of districts in the system as well as to all the districts in the system. Thus all urban districts, and all 'pupil-poor' rural districts could be examined as groups to determine if their respective balances between equalized and unequalized revenues were approximately the same as the statewide balance. The results of such studies could be used to determine any need to make corrections in either the categorical aid programs for such districts (*e.g.*, urban districts) or the foundation programs for 'necessary small schools' with their higher per-pupil costs. Thus the 'optimum balance' method can be used to continually refine the process by which foundation program levels and categorical aid programs are determined." Reply Brief for Appellants at 50 n.25, Serrano II, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

84. This is not to say that additional tests are precluded, such as one that determines the percentage of average local supplements that the state's "key" low-wealth district would raise with the statewide average tax rate for local supplementation (*i.e.*, statewide total of local supplements divided by statewide total of assessed valuation, for districts of the same type). For example, the "key" low-wealth unified district in California is probably Baldwin Park, which has about a third of the wealth of an average district. If equalized revenues for unified districts comprise 90% of the total revenues, and unequalized local supplements comprise the remaining 10%, Baldwin Park's per-pupil revenues would be 93 1/3% of the state average, assuming an average local supplementation tax effort. (The "key" low-wealth district is the state's lowest wealth district, excluding districts in which lower wealth is accounted for by tax-exempt federal facilities for which Public Law 81-874 compensates the districts.) See text accompanying notes 18-19 *supra*.

85. The federal government is moving in the direction of requiring equal educational opportunity in the states. Thus, section 801 of the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974), provides: "Recognizing that the Nation's economic, political, and social security require a well-educated citizenry, the Congress (1) reaffirms, as a matter of high priority, the Nation's goal of equal educational opportunity, and (2) declares it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential without financial barriers." Section 842 of the same act provides for federal assistance to states for development of school finance plans designed to achieve equality of educational opportunity. It also directs the Commissioner to develop guidelines defining the achievement of equal educational opportunity. *See also* 20 U.S.C.A. § 238(d)(2)(B)(West Supp. 1977) ("equal educational opportunity" requirements affecting allotment of Public Law 81-874 funds).

the *Serrano II* opinion that exhibit certain judicial intuitions concerning the rival tests for constitutionality. The court opined that the optimum balance test "is less an alternative to the 'fiscal neutrality' approach of the trial court than what turns out to be defendants' description of the system at issue from the standpoint of its overall effect."[86] Perhaps this indicates a sentiment on the part of the court that the optimum balance test was offered more as an excuse for the existing system than as a sincere proposal for an alternative criterion of constitutionality.[87] If so, this is a misapprehension on the part of the court; the defendants proposed the optimum balance test as a test that *must* be applied to any system in order to assure equalization of school resources while appropriately accommodating local fiscal control.

But a more crucial reason for the court's persistence in adhering to the fiscal neutrality test may be inferred from the following excerpt from the *Serrano II* opinion:

> Under the system we here examine, however, the ability of a school district to meet those problems peculiar to it depends in large part upon the taxable wealth of that district per ADA. A fiscally neutral system, if tailored in a responsive and responsible way, would in no way resemble the specter which defendants raise. Rather, it would make the individual district's ability to meet its own particular problems connected with providing educational opportunity depend upon factors other than the wealth of the district, *and thus dissipate the discrimination which characterizes the system before us*.[88]

This clearly indicates a judicial belief that a properly designed, fiscally neutral system will in fact reduce inequalities of educational opportunity from district to district. Is there a sound basis for this belief? There probably is some basis for this belief in the short term, particularly if the standard of measurement of unequal education is based upon comparing a few of the highest-spending districts against a few of the lowest-spending districts. In the first few years of its operation, the legislative desire to do as little damage as possible to the programs of some of the high-wealth and high-spending districts[89] will cause the legislature to infuse large sums of equalizing state money into the school system. But after the system has been in operation for a few years, the foundation for the court's intuition crumbles. When the competition between public education and other state governmental services for state tax dollars becomes normalized and state surpluses are exhausted, the public schools can expect no greater share of the state

86. Serrano II, 18 Cal. 3d at 754, 557 P.2d at 943, 135 Cal. Rptr. at 359.

87. This apparent suspicion of the California Supreme Court brings to mind Justice Marshall's remark in the Texas school financing case "that the State's purported concern with local control is offered primarily as an excuse rather than as a justification for interdistrict inequality." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 126 (1973) (Marshall, J., dissenting).

88. Serrano II, 18 Cal. 3d at 760, 557 P.2d at 947, 135 Cal. Rptr. at 363 (emphasis added).

89. *E.g.*, the San Francisco, Oakland, and Long Beach unified school districts.

treasury than they could expect under the present foundation program system. Without the coercive effect of an optimum balance test, the lawmakers could readily neglect public schools in favor of other public institutions, the consequence of which would be an increase in local supplements, which will in turn lead to unequal education. The only predictable long-range outcome of a "fiscally neutral" system is that there will be a new list of high-spending and low-spending districts. The new list of high-spending districts will be comprised of those districts with community characteristics other than district wealth that favor the raising of local supplements.

It is, indeed, anomalous that the lawmakers are struggling to restructure California's vast school financing system to comply with *Serrano* at a time when that system achieves a good balance between equal opportunity and local fiscal control. The balance presently achieved by the California system is probably one of the best in the nation; yet it alone, with one exception, is deemed to deny equal protection of the laws.[90] When *Serrano* came before the California Supreme Court for the second time, the court had a golden opportunity to establish a viable test for determining the constitutionality of a state school financing system. In electing to adopt a standard of so-called fiscal neutrality, the court allowed that opportunity to slip through its fingers.

IV. The Second Opportunity Missed

The *Serrano II* court was also presented with an opportunity to establish criteria for the judicial scrutiny to be applied in state equal protection cases. In this regard, it is clear that at least two highly valued but incompatible interests were at stake, equal educational opportunity and local fiscal control. It is also clear that each of these interests is afforded protection by the California Constitution.[91] Both the trial court and the parties agreed that neither of these important interests was to be treated as an absolute; rather, the consensus was that the more vital of these interests, equal educational opportunity, must to some extent defer to the less vital interest in local fiscal control. The complexity[92] and importance of the issues at stake called for

90. On April 19, 1977, the Connecticut Supreme Court held that the state's school-financing system violated equal protection guarantees of the state constitution. Meskill v. Horton, *summarized*, 45 U.S.L.W. 2509 (April 19, 1977). The New Jersey system was held invalid in Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), *modified*, 63 N.J. 196, 306 A.2d 65 (1973), *aff'd*, 67 N.J. 35, 335 A.2d 6 (1975), because the legislature failed to "provid[e] for the maintenance and support of a thorough and efficient system" as required by the state constitution. 62 N.J. at 514, 303 A.2d at 294-95. The court rejected the suggestion that it apply that state's equal protection clause to strike down the system. *Id.* at 492-501, 303 A.2d at 283-87.

91. Equal educational opportunity finds protection in the equal protection provisions of CAL. CONST. art. I § 7, art. IV § 16. Local decision-making in fiscal matters finds protection in CAL. CONST. art. XIII, § 21.

92. The complexity of the system is not the result of a legislative attempt to obscure any existing deficiencies. Rather, it results from the state's efforts to assure appropriate financial

more subtle judicial tools than those provided by the either-or equal protection approach used with contrary results in both *Serrano I* and *Rodriguez*.[93] Despite the opinion expressed in *Serrano II*,[94] application of the traditional rational basis test under federal standards would affirm even the pre-Senate Bill 90 school financing system.[95] Is this proper? Surely a child's interest in equal education is entitled to greater protection than this test affords.

If the traditional rational basis test is inappropriate, is the traditional strict scrutiny test the *only* remaining judicial tool? This test shifts the burden to the state, requiring it to demonstrate that the challenged legislation is "necessary to achieve a compelling state interest."[96] In this respect, Chief Justice Burger's dissent in *Dunn v. Blumstein*[97] is pertinent:

> In both cases some informed and responsible persons are denied the vote, while others less informed and less responsible are permitted to vote. Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.[98]

Legislatures that represent communities with widely-varying and often incompatible interests cannot realistically be expected to design perfect products. In politics, the rule of compromise prevails. The judicial tool of strict scrutiny is thus inappropriate in this area of complex and important systems.

A. A Proposed Alternative

If the rational basis and strict scrutiny tests are both inappropriate tools for analyzing school financing systems, what other methods are available? Several judicial opinions prior to the *Serrano II* decision advocated a single, flexible technique that could replace the two outmoded analytical devices described. This technique may be labelled a "variable standard of review," or a "balancing test." It is a method that can be adjusted to account for all

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resources to school districts with widely-varying community characteristics and, in turn, to provide a similar quality of education to *all* children despite individual differences in educational need.

93. This very complexity was given by the United States Supreme Court in *Rodriguez* as a reason to avoid utilization of the strict scrutiny test. 411 U.S. at 40-44. *Accord*, Robinson v. Cahill, 62 N.J. 473, 492-501, 303 A.2d 273, 283-87 (1975).

94. 18 Cal. 3d at 749 n.20, 769 n.49, 557 P.2d at 939 n.20, 953 n.49, 135 Cal. Rptr. at 355 n.20, 369 n.49.

95. "A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the state's system bear some rational relationship to legitimate state purposes." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 41 (1973).

96. Serrano II, 18 Cal. 3d at 768, 557 P.2d at 952, 135 Cal. Rptr. at 368.

97. 405 U.S. 330 (1972).

98. *Id.* at 365 (Burger, C.J., dissenting).

relevant factors in the case. Justice Marshall, in his dissenting opinion in *Rodriguez*, described this technique as follows:

> The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in thefield of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. I find in fact that many of the Court's recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued—that is, an approach in which "concentration [is] placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."[99]

The supreme courts of New Jersey and Oregon have both found the traditional approach to equal protection review inadequate in the school financing area. The Oregon Supreme Court has stated:

> We prefer the approach made by the New Jersey court in *Robinson v. Cahill*.[100] Its approach could be termed a balancing test. Under this approach the court weights the detriment to the education of the children of certain districts against the ostensible justification for the scheme of school financing. If the court determines the detriment is much greater than the justification, the financing scheme violates the guarantee of equal protection . . . . Ultimately, a court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial . . . . This is a combination of the two-step analysis used by the [United States] Supreme Court. How important is the interest impinged upon,—educational opportunity, as balanced against the state objective in maintaining the present system of school financing,—local control?[101]

99. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (citing Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting)).

100. 62 N.J. 473, 303 A.2d 273 (1975).

101. Olsen v. State of Oregon, 276 Ore. 9, 20, 554 P.2d 139, 145 (1976). The California Supreme Court recently observed that "the standard [of judicial review] applicable under the Fourteenth Amendment as it has evolved in the federal courts, appears as a curious hybrid, variously characterized as 'strict rationality' (*Berkelman v. San Francisco Unified School Dist.*, 501 F.2d 1264, 1269 (9th Cir. 1974)), or 'rational scrutiny' (Gunther, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 21 [1972]). The most recent pronouncement on the applicable

In the wake of *Serrano I*, Professor Goldstein advocated a refined version of this same approach.[102] He contended that each *basis* of the legislative classification should be examined regarding its relationship to each *reason* for denominating an affected interest "fundamental."[103] For example, the courts would not only inquire into the relationship between school district per-pupil expenditures and the quality of education, but would also examine the influence of "district wealth-related" expenditures, where the legislative classification being examined is grounded on district wealth, on the additional educational benefits purchased.

B. Application of the Alternative Test

The "balancing test" is a tool that could have been effectively applied to the issues raised in *Serrano II*. By adopting this test, the court would not have been faced with the necessity of validating the school financing system if the legislative classification of districts by wealth were found to have only *some* rational relationship to the state's legitimate interest in local fiscal control. Instead of labeling classifications as suspect or interests as fundamental, the court could have weighed the detriment to the education of a child living in a district that is unable or unwilling to provide for sufficient local supplements against the ostensible justification for the state's scheme of school financing. If the court had determined that the detriment is greater than the justification, only then would the financing system have been found to violate the guarantee of equal protection.

Under this balancing test, the pre-Senate Bill 90 system should have failed because the educational detriment to children in the most disadvantaged districts was too great when weighed against the ostensible justification of local fiscal control; the most disadvantaged districts had equal access to only 76.4 percent of average per-pupil revenues. On the other hand, the post-Senate Bill 90 system should have passed constitutional muster, because all districts had access to 89.6 percent of average per-pupil revenues. In spite of these differences between the pre-Senate Bill 90 and post-Senate Bill 90 systems, the court in *Serrano II* treated them as the same. That is, since both systems involved a suspect classification that affected a funda-

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federal standard is contained in *Craig v. Boren, supra*, [429 U.S. 190, 197], in which the high court announced that statutory sex classifications are acceptable only when they further 'important governmental objectives' and are 'substantially related to the achievement of those objectives.' " Arp. v. Worker's Comp. Appeals Bd., 19 Cal. 3d 395, 400, 563 P.2d 849, 851, 138 Cal. Rptr. 293, 295 (1977). The six opinions in Craig v. Boren, 429 U.S. 190 (1976), indicate the unsettled views of the Supreme Court as to the standard or standards of judicial review to be applied in equal protection cases.

102. Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny*, 120 U. PA. L. REV. 504 (1972).

103. *Id.* at 519.

mental interest, the court concluded that both systems triggered strict judicial scrutiny. Under this approach, a newly-improved foundation program system would probably receive strict scrutiny even if its equalized revenue constituted ninety-five percent of the total revenue. On the other hand, the traditional rational basis/strict scrutiny technique would validate any school financing system in which the structure is such that the judiciary cannot label it "suspect," regardless of the extent to which it may actually deny equal education.

Conclusion

The court in *Serrano II* was faced with complementary opportunities, but let both slip away without clear resolution of the problems. The equal protection balancing test would have weighed educational detriments against the justification of local fiscal control by examining the operational results of the system. This is also what the optimum balance test would have done. This latter test would have weighed the educational detriment against the values inherent in local fiscal control and required that an optimum balance be achieved. One can only hope that the next time the California Supreme Court has the opportunity to determine the validity of a state school financing program, it will have the courage to turn its back on the outmoded and inadministrable techniques it relied on in *Serrano II* and will instead utilize the optimum balancing test and the variable balancing standard in its equal protection analysis.