RECENT DEVELOPMENTS

CONSTITUTIONAL LAW: FLORIDA LIMITATION ON LOCAL PROPERTY TAX RATE FOR EDUCATION VIOLATES EQUAL PROTECTION

A three-judge district court in *Hargrave v. Kirk*[1] held that a Florida statute[2] which conditions state aid to local education on the school district not assessing more than a maximum ad valorem tax for education violated the equal protection clause of the Constitution. The Florida constitution specifies that a school board may impose a county millage not to exceed ten mills without voter approval;[3] in addition, the eligible voters within a district may, by vote, authorize the school board to levy an additional district millage.[4] The Millage Rollback Act[5] provided that the aggregate of a local system's district and county ad valorem tax millage could not exceed ten mills if it were to be eligible for state Minimum Foundation Program[6] funds. The statute resulted in a decreased millage in many counties and reduced local ad valorem tax revenue for education by over fifty million dollars state-wide.[7] Following enactment, the "wealthiest" county could raise $725 per student from property taxes at the maximum ten mill rate while the "poorest" county could raise only $52 per student because of the diffcrences in tax bases.[8] Concluding that the resulting discrimination between individuals in "wealthy" and "poor" counties had no rational basis, the court held that the Act violated the equal protection clause.

A major portion of the revenue to support public schools is derived from local property taxes.[9] Florida is one of the 35 states

1. 313 F. Supp. 944 (M.D. Fla. 1970), *appeal docketed*, 39 U.S.L.W. 3084 (U.S. Aug. 21, 1970) (No. 573).

2. Millage Rollback Act, FLA. STAT. ANN. § 236.251 (Supp. 1970).

3. FLA. CONST. art. VII, § 9.

4. *Id.*

5. FLA. STAT. ANN. § 236.251 (Supp. 1970).

6. *See generally id.* § 236.07 (statutory basis of state aid to local school systems).

7. 313 F. Supp. at 950.

8. A "wealthy" county is one which, because of the combination of high property valuation and fewer school age children, will derive the highest amount of revenue per mill of ad valorem tax per student.

9. C. BENSON, THE CHEERFUL PROSPECT: A STATEMENT ON THE FUTURE OF PUBLIC EDUCATION 44 (1965).

which has a maximum millage which can be levied to fund current educational expenses;[10] however, most of these states have a provision whereby the local district can increase its levy above the maximum.[11] Seventeen states have established millage rates which vary within the state depending on school organization or population.[12] State funds provide the other major source of revenue for education.[13] Florida's Minimum Foundation Program[14] is an "equalizing" plan whereby the state fixes a minimum amount to be expended per educational unit[15] and provides the district with funds equal to the difference between the minimum and the amount derived from a hypothetical three mill ad valorem tax. The Millage Rollback Act,[16] in addition to limiting the permissible millage assessments, provided that any school district which failed to increase its revenue over the previous year by $1200 per educational unit because of the ten mill limitation would receive state funds to insure that the local budget was increased in 1968-69.[17]

10. M. REMMLEIN, TAX LIMITATION LAWS 9 (1965). For example, N.Y. CONST. art. VIII, § 10, places a limit on ad valorem taxes for all purposes including education. Within the maximum, the actual tax level is left to the appropriate local governmental unit's discretion. Separate procedures and limits are generally established for capital expenditures.

11. M. REMMLEIN, *supra* note 10, at 10. Nine states have no such provision.

12. *Id.* at 9. For example, CAL. EDUC. CODE § 20751 (West 1969), imposes a maximum millage that varies between districts depending on the school organization within a particular district.

13. The financial schemes of the states are of three categories: variable equalizing, whereby the state makes grants to equalize the revenue available in school districts; variable nonequalizing, whereby the grants vary between districts but on some basis other than local revenue; and fixed grants to each district. A. MUNSE, STATE PROGRAMS FOR PUBLIC SCHOOL SUPPORT 95 (1965). The revenue available for education is a function of local district wealth plus the amount of state aid. Local wealth may vary substantially, creating intrastate disparities in the revenue created by local taxes. Equalizing grants will tend to raise the expenditure level in the poor counties while not changing the amount of revenue in wealthy counties; fixed grants are anti-equalizing because each county receives the same amount of state aid. Variable nonequalizing grants may or may not equalize intrastate differences in available revenue. *See* A. WISE, RICH SCHOOLS POOR SCHOOLS 130 (1968); Coons, Clune, & Sngarman, *Educational Opportunity: A Workable Constitutional Test For State Financial Structures*, 57 CALIF. L. REV. 305, 312 (1969). Federal funds provide some support for public schools but, except for certain areas, do not account for a large percentage.

14. FLA. STAT. ANN. § 236.07 (Supp. 1970).

15. An edueation unit considers the type of instruction, number of students, facilities, and instructors. *Id.*

16. *Id.* § 236.251.

17. The Florida legislature deleted this provision in 1970 but at the same time added section 236.072, whieb provides that if the yield per mill per student from local property taxes is below the state average, the state will provide funds in addition to Minimum Foundation Program grants. 2 FLA. SESS. LAWS SERV. ch. 70-94 (West, 1970). This amendment was enacted after the original section 236.251 was declared unconstitutional in the instant action. The section still imposes the ten mill limitation on local millage. *Id.*

Any scheme of limitations on the taxing powers of local governmental units must be able to withstand judicial scrutiny. The role of judicial review is to guarantee that individuals share equally in the privilcges and liabilities established by a government unless a rational basis exists for different treatment.[18] The courts, by requiring that classifications resulting in unequal treatment promote a valid state interest, preserve the integrity of the political process.[19] The traditional equal protection test is satisfied if a statute's classification is reasonably related to a *permissible* state purpose.[20] A second, more stringent standard has been used to review some state statutes and requires that the state demonstrate a close connection between the classification and a *compelling* state interest[21] where the type of classification is suspect or the affcctcd interest is termed fundamental.[22] Suspect classifications include those based on race,[23] geography,[24] and wealth;[25] race is especially suspect.[26] Those interests essential to an individual's participation in self government are considered fundamental. On a scale of judicial importance, voting would be a most fundamental interest[27] while a property interest would not normally have such a fundamental quality.[28] Therefore, as the classification becomes less suspect, the interest must become more fundamental to trigger the strict standard; less suspect classifications

18. C. BAY STRUCTURE OF FREEDOM 373 (1958).

19. *See* Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

20. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076 (1969) [hereinafter cited as *Equal Protection Developments*]. *See generally* Tussman & tenBrock, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

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

22. Cox, *1965 Term Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

23. Brown v. Board of Educ., 347 U.S. 483 (1954). *See generally* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 576 (1965); Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 584 (1968); *Equal Protection Developments* 1087.

24. Reynolds v. Sims, 377 U.S. 533, 566 (1964). *See generally* McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 681-82 (1963); *Equal Protection Developments* 1181.

25. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966); Griffin v. Illinois, 351 U.S. 12, 19 (1955). *See generally* Cox, *supra* note 22, at 92; Karst & Horowitz, Reitman v. Mulkey: *A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 75.

26. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967).

27. *See* Lacas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736-37 (1964).

28. *See* Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949).

when combined with non-fundamental interests will be reviewed under the traditional equal protection test.

Intrastate educational inequalities which involve both a fundamental privilege[29] and suspect classifications based on wealth and geography arguably should be reviewed under a strict standard.[30] In *Hobson v. Hansen*[31] Judge Skelly Wright indicated that the state had the burden of explaining why the poor and the Negro were generally in the lower ranks of a "track" educational program.[32] In discussing the reduction of state aid to school districts receiving federal impact funds,[33] one court has argued that such state action denied certain individuals the same educational privileges as others in the state and resulted from a geographic classification which effected "discrimination without justification."[34] In *McInnis v. Shapiro*[35] plaintiffs argued that Illinois' public school finance statutes[36] violated the equal protection clause where the state supplemented local revenue with a fixed grant per student and a variable grant to insure a minimum expenditure per student. The relief requested was a court order requiring that each student receive the same dollar appropriation. The court determined that the Constitution did not require public school expenditures to be equalized or made only on the basis of educational need.[37] Therefore, classifications designed to facilitate decentralized administration were reasonable even though intrastate disparities in educational expenditures resulted. Alternatively, the court found that "judicially manageable standards" to determine if the Constitution were being violated were

29. The proposition that education is a fundamental privilege can be derived from Brown v. Board of Educ., 347 U.S. 483 (1954), where the Court said: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Id.* at 493.

30. *See generally* A. WISE, *supra* note 13, at 163; Coons, Clune, & Sugarman, *supra* note 13, at 382; *Equal Protection Developments* 1187.

31. 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

32. 269 F. Supp. at 513.

33. 20 U.S.C. § 236 (1964).

34. Douglas Independent School Dist. No. 3 v. Jorgenson, 293 F. Supp. 849, 854 (D.S.D. 1968).

35. 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd per curiam sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969).

36. ILL. ANN. STAT. ch. 122, §§ 18-1 to 18-16 (Smith-Hurd 1961).

37. *See* 293 F. Supp. at 334-36.

lacking because equal educational expenditures could not be equated with equal education.[38]

The plaintiffs in *Hargrave* argued that the Millage Rollback Act[39] violated the equal protection clause because the total allowable local educational tax levy was based solely on the amount of taxable property in the county and not on its educational needs.[40] Using the traditional equal protection test, the court determined that the classification inherent in the statute—a classification related to the taxable property base—had no rational connection with a legitimate state goal. Although the state has a legitimate interest in preserving the fiscal integrity of its programs, it could not further this interest by invidious discrimination between classes of its citizens. The court declined to consider the "education as a fundamental right" thesis which would have activated the concomitant requirement of a compelling state interest to justify any legislation which created unequal classifications in education. Distinguishing *Hargrave* from *McInnis v. Shapiro*,[41] the court opined that even if the state could allocate revenue on some basis other than educational need, it could not prohibit local residents from seeking to provide their children with a better education. Thus, although both Florida and Illinois had intrastate variations between districts in the money available for education, the Florida Act was unconstitutional because it did not allow local residents to determine their own tax burdens as could citizens of Illinois.

Apparently, the disability in the Millage Rollback Act[42] was its denial to local residents of the opportunity to determine educational expenditures. The equal protection clause was interpreted as requiring that local residents be given the privilege of spending more money when the state finances education in a manner which creates intrastate

38. *Id.* at 335.

39. FLA. STAT. ANN. § 236.251 (Supp. 1970).

40. 313 F. Supp. at 948. Prior to the discussion of the equal protection issue the court considered the defenses offered by the defendant. While acknowledging that equal expenditures would not necessarily result in equal education, the decision assumed that there were unequal educational opportunities in the state because of the wide financial disparities between counties. Because several counties did have a millage above ten mills prior to the Act, the court felt that if local residents could vote, equalization in the revenue available for education might result. While the counties were not absolutely prohibited from increasing their millage above ten mills since the district could do so by forfeiting state aid, a state could not be permitted to condition a benefit on a condition violative of the equal protection clause. *Id.* at 947.

41. 293 F. Supp. 327 (N.D. Ill. 1968).

42. FLA. STAT. ANN. § 236.251 (Supp. 1970). See text accompanying notes 5-8 *supra*.

educational inequalities. This implies that inequalities in education are valid if a majority of those adversely affected do not want to correct the inequality themselves.[43] The decision, evidently allowing the local governmental unit to preserve educational inequalities while denying the state the same power, implied that administrative subunits of the state have a sovereign status. Normally, such action by a local government would be imputed to the state,[44] and it is difficult to understand why the classifications which are invalid when created by the legislature are not a denial of equal protection when validated by a local government.

The court in *McInnis v. Shapiro*[45] held that any valid state interest being served by the statute would make the classification reasonable. The *Hargrave* court, however, acknowledged Florida's legitimate interest in "preserving the fiscal integrity of its programs," an interest which could be reflected in a limit on total educational expenditures. The classifications inherent in the Millage Rollback Act were the result of a state policy of decentralized administration similar to the system created by the Illinois financial scheme; however, since *Hargrave* describes the resulting discriminatory classification as invidious, there is the implication that the state would be required to show that the statute served a *compelling* interest. The court, while purporting to use the traditional equal protection test, apparently applied a stricter standard to invalidate the statute which created classifications much like those which were constitutional under the conventional standard in *McInnis*. Even if the tests applied in each case appear to differ, the actual distinction between *Hargrave* and *McInnis* should be made on the issue of justiciability. The *McInnis* position on the equal protection issue can be considered dicta since the court's alternate holding, that the case did not present a justiciable issue, made a consideration of the merits of the equal protection theory unnecessary. The court in *Hargrave* was not forced to assume that equal expenditures could produce equal education in order to find a violation of the equal protection clause. Rather, because the classifications inherent in the Millage Rollback Act[46] were clearly

43. *See* Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964) (right to vote—majority at no level can validate inequalities).

44. *Cf.* Griffin v. County School Bd., 377 U.S. 218 (1964); Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962).

45. 293 F. Supp. 327 (N.D. Ill. 1968).

46. FLA. STAT. ANN. § 236.251 (Supp. 1970).

based on geography and wealth, the court did not face the problem of attempting to evaluate a complex scheme whereby millages varied between geographical units. Also, because of the magnitude of disparities in locally raised funds available to each district under the ten-mill limit, the *Hargrave* court could assume that there were intrastate educational inequalities without being forced to articulate a standard by which to evaluate the equality of education.

One possible interpretation of *Hargrave* is that a state cannot create classifications based on geography and wealth which result in unequal educational opportunities absent a compelling state interest. This rationale can be used to attack the school finance provisions of all states except Hawaii which has a single, statewide school district.[47] All financial schemes which rely upon local taxes have created classifications based on geography and wealth. If unequal educational opportunities can be shown to result from this classification, following *Hargrave*, the classification would be a denial of equal protection. In addition, this theory could be used to attack any statute authorizing local units of government to finance and provide governmental services if the localities differed in financial means. The classifications created would still be based on geography and wealth; however, if an interest less fundamental than education would be affected, the authorization statute would be reviewed under the traditional equal protection test and upheld if the classification served a legitimate state policy—decentralized administration for example. While *Hargrave* represents a significant step toward requiring equal educational opportunity, the problem of articulating standards still remains [48] The prospective plaintiffs must present a justiciable issue to the court. *Hargrave*, by correctly assuming that unequal education is a necessary result of a great disparity in expenditures, defines the first parameter of possible standards and provides a rationale to strike down classifications made for administrative convenience that create obviously unequal educational opportunities.

47. Coons, Clune, & Sugarman, *supra* note 13, at 312.

48. For possible standards see A. WISE, *supra* note 13, at 163; Coons, Clune, & Sugarman, *supra* note 13, at 419; Kurland, *supra* note 23, at 587; *Equal Protection Developments* 1187.