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REFORM THROUGH THE STATE COURTS

Strategies for Reform in Selected States

Editor's Introduction to the State Studies

A substantial number of the earlier school finance lawsuits alleged, as a secondary cause of action, that the system of financing education under attack violated the state constitution as well as the Federal Constitution. Some of these suits relied upon state equal protection clauses while others resorted to more obscure and less utilized state education clauses. With the demise of the federal equal protection clause as a basis for school finance litigation, school finance reform advocates have begun to turn their attention toward the use of state constitutions for relief from the inequalities resulting from present methods of financing education.

The complaint in *Robinson v. Cahill*,¹ which was filed before *Serrano*,² had been based on both federal and state grounds. The New Jersey Supreme Court, only a few weeks after the decision in *Rodriguez*,³ clearly conveyed the message that, despite the interment of the federal equal protection ground, school finance reform litigation could be successful if the little-used state education clauses were resurrected. Thus this symposium looks first at *Robinson* to see whether the strategy relied upon there is applicable to other states.

Of the five states reviewed for this symposium, Washington and New Jersey illustrate a litigation approach which relies principally on the state education clause. In Michigan, the state equal protection clause was the primary basis for attacking the school finance system, as it was in California after the federal equal protection clause was no longer available. Finally, in Texas, where the original litigation was based solely on the federal equal protection clause,⁴ the focus turned to revision of the education clause of the state constitution. The objective of reform advocates in that state was to adopt constitutional language such that a *Robinson v. Cahill* holding would be the inevitable result of litigation.

Thus either a state's equal protection clause or its clause mandating the provision of education can be used as the basis for an attack on the

¹ 62 N.J. 473, 303 A.2d 273 (1973).

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

³ *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

⁴ Although the federal district court analyzed the case solely on federal equal protection grounds, in ordering that a new school financing system be devised, the court indicated that such a financing system must be one which would violate neither the federal equal protection clause nor the Texas equal protection clause. *Rodriguez v. San Antonio Independent School Dist.*, 337 F. Supp. 280, 286 (W.D. Tex. 1971).

The Texas constitution's equal protection clause is found in article I, section 3: "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

school finance system. Those who urge the use of the state's equal protection clause can take comfort in Justice Powell's statement in *Rodriguez* that a fundamental interest is one which is either explicitly or implicitly in the Constitution.⁵ Since almost all of the states have express constitutional provisions obligating the state to ensure that its children are educated,⁶ arguably education is a fundamental right and the strict scrutiny test can apply.

Not all of the states, however, have interpreted their equal protection clauses in accordance with the two-pronged equal protection formula which distinguishes the rational basis and compelling state interest tests. Nor do the equal protection clauses have identical language. Some states have constitutional provisions which parallel the U. S. Constitution's fourteenth amendment,⁷ others have a "privileges and immunities" provision,⁸ or a requirement that all laws have "general" applicability.⁹

As Professor Tractenberg points out, most state courts have been relatively conservative in interpreting their equal protection clause (New Jersey and California being notable exceptions), so that for those states a better strategy might be to resort to the education clause as the basis for declaring the system invalid. State education clauses are of several different types. As previously noted, almost all state constitutions contain an express provision guaranteeing a free public education. Seven states mandate a "thorough and efficient" system of free public schools¹⁰—the clause on which the successful *Robinson* litigation was based. Another nine use *either* "thorough" *or* "efficient."¹¹ Nine states mandate a "general and uniform" public school system and another ten guarantee *either* a "general" *or* a "uniform" system.¹² Thus, if the reasoning adopted in

⁵ 411 U.S. at 33-34.

⁶ See OFFICE OF EDUCATION, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, STATE CONSTITUTIONAL PROVISIONS AND SELECTED LEGAL MATERIALS RELATING TO PUBLIC SCHOOL FINANCE (DHEW Pub. No. (OE) 73-00002, 1973).

⁷ See, e.g., N.M. CONST. art. II, § 18. "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied the equal protection of the laws."

⁸ For example, California has a "privileges and immunities" clause as follows: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." CAL. CONST. art I, § 21.

⁹ California's constitution provides: "All laws of a general nature shall have a uniform operation." *Id.* art. I, § 11. The California courts have interpreted both section 21 and section 11 as being analogous to the federal equal protection clause. "We have construed these provisions as 'substantially the equivalent' of the equal protection clause of the Fourteenth Amendment to the federal Constitution." *Serrano v. Priest*, 5 Cal. 3d at 596 n.11, 487 P.2d at 1249 n.11, 96 Cal. Rptr. at 609 n.11.

In the trial court opinion, Judge Jefferson indicates that California applies the two-pronged equal protection test independent of any compulsion of the U.S. Constitution. Memorandum Opinion re Intended Decision at 30-31, *Serrano v. Priest*, Civil No. 938,254 (Cal. Super. Ct., Apr. 10, 1974).

¹⁰ OFFICE OF EDUCATION, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, *supra* note 6, at 6. Characteristics of state constitutional equal protection provisions, of due process provisions, of education provisions, and of tax uniformity provisions are given, by state, in summary tables. *Id.* at 4-7.

¹¹ *Id.* at 6.

¹² *Id.*

Robinson were followed, a constitutional challenge might succeed in thirty-four more states, the argument being that the state's school finance system does not satisfy the "thorough and efficient" or "general and uniform" clause of the state constitution.

The remaining states have education clauses more limited in nature, such as those which mandate the provision of a "system of common schools."¹³ The *Serrano* opinion suggests that such a provision may not be given as wide a scope as the "thorough and efficient" clause,¹⁴ though the interpretation of this provision by the California judiciary may not hold true for other jurisdictions since the history and prior judicial interpretation of similarly worded provisions varies from state to state.

A sample of five states can hardly yield conclusive findings; nevertheless, the thoughtful analyses which follow suggest some interesting patterns. It appears that while *Rodriguez* may have seriously hampered attempts by federal courts to restructure school finance systems, there is considerable potential for judicial reform of school financing systems through the use of a variety of state constitutional provisions.

A word of caution, however: a rush by school finance reform advocates to get courts in other states to accept the *Robinson* precedent, as was done with the *Serrano* decision, may not be the most effective strategy. While *Robinson* may indeed turn out to be an important precedent in other school finance litigation, alternative approaches should be developed. The "putting all one's eggs in one basket" theory of litigation following the *Serrano* decision did not work. No single legal theory or principle is likely to be able to deal with the many facets of school finance—problems differ from state to state as do state constitutions, statutes, and regulations. Moreover, greater emphasis on inequalities in the resources that go to children rather than differences in tax burdens which taxpayers must pay might be a more fruitful line of attack.¹⁵ Fiscal neutrality may have been seen by some of its opponents (and some courts) as a principle which merely guarantees taxpayer equality among districts within a state, rather than a constitutional standard which would ensure equality for schoolchildren within the state—presumably the primary concern of reformers.

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¹³ CAL. CONST. art. IX, § 5.

¹⁴ In *Serrano*, the plaintiffs had included among their allegations that the school financing system violated article IX, section 5 of the California constitution: "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year. . . ." The court stated that the word "system" implies a "unity of purpose as well as an entirety of operation, and the direction to the legislature to provide 'a' system of common schools means *one* system which shall be applicable to all common schools within the state." [citations omitted] However, we have never interpreted the constitutional provision to require equal school spending; we have ruled only that the educational system must be uniform in terms of the prescribed course of study and educational progression from grade to grade. [citations omitted]

5 Cal. 3d at 595-96, 487 P.2d at 1248-49, 96 Cal. Rptr. at 608-09. Thus, the court rejected "plaintiffs' argument that the provision in section 5 for a 'system of common schools' requires uniform educational expenditures." *Id.* at 596, 487 P.2d at 1249, 96 Cal. Rptr. at 609.

¹⁵ One should bear in mind, however, that a major barrier to legislative reform when attempting to address issues of educational equality is the question of who will bear the costs.