

April 1983

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Recommended Citation

Fred R. Green, *Board of Education v. Nyquist: A Keen Eye Views the Problems in New York's Educational Financing System*, 3 Pace L. Rev. 621 (1983)

DOI: <https://doi.org/10.58948/2331-3528.1657>

Available at: <https://digitalcommons.pace.edu/plr/vol3/iss3/13>

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Board of Education v. Nyquist: A Keen Eye Views the Problems in New York's Educational Financing System

I. Introduction

New York State has long been recognized as a leader in public education.¹ In 1894, New York saw fit to provide a constitutional guarantee of public education.² Recently, however, the substance of that guarantee has been questioned because of the disparities in fiscal resources among New York's school districts.³ Like many other states,⁴ New York's system of public school financing has been challenged on constitutional grounds. The New York Court of Appeals, in *Board of Education v. Nyquist*,⁵ after adopting a rational relation test in analyzing the

1. See L. CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783-1876*, at 148-52 (1980); III C. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* 500-04 (1906).

2. See LINCOLN, *supra* note 1, at 475.

3. The fiscal disparities have triggered equal protection challenges to school financing systems. See generally Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 1977 DUKE L.J. 1099 (traces the evolution of equal protection claims based on wealth discrimination).

4. See *Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973); *Serrano v. Priest*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977); *Lujan v. Colorado State Bd. of Educ.*, ___ Colo. ___, 649 P.2d 1005 (1982); *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977); *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981); *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975); *State ex rel. Woodahl v. Straub*, 164 Mont. 141, 520 P.2d 776 (1974); *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973); *Board of Educ. v. Walter*, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979), *cert. denied*, 444 U.S. 1015 (1980); *Olsen v. State*, 276 Or. 9, 554 P.2d 139 (1976); *Northshore School Dist. No. 417 v. Kinnear*, 84 Wash. 2d 685, 530 P.2d 178 (1974); *Washakie County School Dist. No. One v. Herschler*, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980); *cf. Milliken v. Green*, 389 Mich. 1, 203 N.W.2d 457 (1972), *vacated*, 390 Mich. 389, 212 N.W.2d 711 (1973) (decided prior to *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973)).

5. 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), *appeal dismissed*, 51 U.S.L.W. 3532 (U.S. Jan. 18, 1983) (Nos. 82-639 and 82-655). This case is commonly referred to as "Levittown," which was one of the school districts to originally bring this action.

equal protection challenges, concluded that the state's system of financing public education was rationally related to the objective of maintaining local control over public schools.⁶ Thus, the court of appeals held, as Justice Hopkins had found in his appellate division opinion,⁷ that New York's reliance on local property taxes to finance public education does not violate the equal protection clauses of either the federal⁸ or state⁹ constitutions. The court of appeals also held that the state's system did not violate the education clause of the New York Constitution.¹⁰

Because of the size of New York's education system, *Board of Education v. Nyquist*¹¹ bears substantial significance upon the cases involving equal protection claims against public school financing schemes.¹² Furthermore, the claim of "metropolitan overburden"¹³ advanced by the cities of New York, Buffalo, Rochester, and Syracuse¹⁴ represents the first time that a city, rather than a mere property-poor school district, has presented an equal protection claim against a state's public school financing scheme.¹⁵

Section II of this Note discusses New York's system of

6. *Id.* at 44, 439 N.E.2d at 366, 453 N.Y.S.2d at 651, *modifying* 83 A.D.2d 217, 443 N.Y.S.2d 843 (2d Dep't 1981).

7. *Board of Educ. v. Nyquist*, 83 A.D.2d at 258, 443 N.Y.S.2d at 869 (Hopkins, J., concurring in part and dissenting in part).

8. U.S. CONST. amend. XIV, § 1 provides in relevant part: "[N]or deny to any person within its jurisdiction the equal protection of the laws."

9. N.Y. CONST. art. I, § 11 provides in relevant part: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof."

10. N.Y. CONST. art. XI, § 1 provides: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."

11. 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), *appeal dismissed*, 51 U.S.L.W. 3532 (U.S. Jan. 18, 1983) (Nos. 82-639 and 82-655).

12. *See supra* note 4.

13. Metropolitan overburden is a combination of municipal and educational overburden. *See infra* text accompanying notes 43-46.

14. These cities comprise the group known as the plaintiffs-intervenors. *See infra* text accompanying note 39.

15. *See Thomas, Equalizing Educational Opportunity Through School Finance Reform: A Review Assessment*, 48 U. CIN. L. REV. 255, 294 (1979). Cities normally have substantial property wealth from which to finance education. *Board of Educ. v. Nyquist*, 94 Misc. 2d 466, 494, 408 N.Y.S.2d 606, 619-20 (Sup. Ct. Nassau County 1978). Thus, it can be inferred that they have not been disadvantaged by virtue of the state's reliance on local property taxes.

school financing as it relates to *Board of Education v. Nyquist*.¹⁶ Section III discusses the constitutionality of school finance systems with particular emphasis on the United States Supreme Court decision in *San Antonio Independent School District v. Rodriguez*.¹⁷ Section IV outlines the decisions of the New York courts. Section V reasons that the court of appeals correctly adopted the dissenting portion of Justice Hopkins' appellate division opinion. This Note concludes that the rational relation test is the appropriate test for considering equal protection challenges to public school financing schemes.

II. Facts

A. New York's School Financing System¹⁸

The financial support of New York's more than 700 school districts¹⁹ is obtained primarily from *ad valorem*²⁰ taxes on real property within each district.²¹ The distribution of real property wealth is unequal among districts, and results in disparate available revenues for the districts.²² Under this system, the amount of revenues raised locally depends on each district's self-imposed tax rate,²³ but is also a function of the assessed value of real

16. 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. Nassau County 1978), *modified*, 83 A.D.2d 217, 443 N.Y.S.2d 843 (2d Dep't 1981), *modified*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), *appeal dismissed*, 51 U.S.L.W. 3532 (U.S. Jan. 18, 1983) (Nos. 82-639 and 82-655).

17. 411 U.S. 1 (1973) (5-4 decision).

18. For the purposes of this Note, unless otherwise indicated, all facts are drawn from the appellate division opinion. Statutory amendments to the state aid formula were enacted subsequent to the trial court decision and were considered by the appellate division, pursuant to the appellate division's obligation to decide the appeal based on the law at the time the case is presented to the appellate division. *Fruhling v. Amalgamated Hous. Corp.*, 9 N.Y.2d 541, 545-46, 175 N.E.2d 156, 157, 215 N.Y.S.2d 493, 495, *appeal dismissed*, 368 U.S. 70 (1961); *accord* *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

19. These school districts include over 4000 schools, wherein 200,000 professionals educate approximately 3,000,000 children. *Board of Educ. v. Nyquist*, 83 A.D.2d at 219, 443 N.Y.S.2d at 845.

20. *Ad valorem* taxation is "[a]ccording to value" of the property taxed. BLACK'S LAW DICTIONARY 48 (rev. 5th ed. 1979).

21. Local school districts supply 55% of total educational funds in New York. The state contributes 40% and the balance is obtained from federal sources. *Board of Educ. v. Nyquist*, 83 A.D.2d at 224, 443 N.Y.S.2d at 848.

22. *See id.* at 226-27, 443 N.Y.S.2d at 849-50.

23. *See, e.g.*, N.Y. EDUC. LAW § 2021(8)-(21) (McKinney 1969) (empowering districts

property within the district.²⁴ Consequently, poor school districts are unable to generate the revenue obtained by affluent school districts.²⁵

State aid²⁶ is intended to equalize the disparities and insure a minimum level of support for each district.²⁷ Under the current formula for computing the district allotment, each district is guaranteed a minimum support level of \$1,650 per pupil.²⁸ To be eligible under the state system, each district is required to impose an 11.57 mill tax on its full tax base.²⁹ The state aid then compensates any district that is unable to generate \$1,650 per pupil by its own efforts.³⁰ In addition, every district is entitled to a flat grant of \$360 per pupil, regardless of wealth.³¹

The state aid formula also permits districts to compute their allotments under "total save harmless" or "special aid" provisions.³² These provisions allow districts with diminishing pupil counts or increased property wealth to avoid decreases in

to vote a tax for school financing).

24. *Board of Educ. v. Nyquist*, 94 Misc. 2d at 486, 408 N.Y.S.2d at 614.

25. *See id.* at 488, 408 N.Y.S.2d at 616 (quoting 1 GOVERNOR'S TASK FORCE ON AID TO EDUCATION (1975)).

26. *See generally* N.Y. EDUC. LAW §§ 3601-3609 (McKinney 1981 & Supp. 1982) (providing for the apportionment of money to the school districts).

27. *See Dugan, The Constitutionality of School Finance Systems Under State Law: New York's Turn*, 27 SYRACUSE L. REV. 573, 590 (1976).

28. In a footnote, the appellate division stated:

The current formula for computing first tier operating aid is:

$$OA_1 = \$1,650 (1 - .51 \frac{\text{district valuation/total wealth pupil units}}{\$72,700})$$

Thus, for the district of average wealth as of 1981 (that is, one in which district valuation/total wealth pupil units equals \$72,700) State aid under the first tier is \$1,650 (1 - [.51 x 1]) = \$808.50. . . .

The current formula for computing second tier operating aid is:

$$OA_2 = \$235 (1 - .80 \frac{\text{district adjusted gross income}}{\$29,700})$$

Thus, the district which has an adjusted gross income equal to the State average as of 1981 (i.e., \$29,700) received \$47 per pupil unit (\$235 [1 - .80 x 1] = \$47 . . .). *Board of Educ. v. Nyquist*, 83 A.D.2d at 225 n.10, 443 N.Y.S.2d at 848 n.10 (citations omitted). The second tier was considered to be insignificant because of the limited sums involved at that tier. *Id.* at 225, 443 N.Y.S.2d at 849.

29. *Id.* at 224-25, 443 N.Y.S.2d at 848.

30. *Id.* at 225, 443 N.Y.S.2d at 848.

31. *Id.* at 225, 443 N.Y.S.2d at 849.

32. *Id.* at 225-26, 443 N.Y.S.2d at 849.

their allotments by allowing them to receive the same total state aid as in the previous year.³³ Thus, a district may maintain a level of state assistance "without accounting for [its] currently lessened needs."³⁴

The disparities resulting from the current system are illustrated by the statistics admitted at trial. "[T]he range in real property wealth among school districts extended from \$8,884 in the poorest district to \$412,370 behind each pupil in the wealthiest district. . . ."³⁵ Similarly, individual district spending varied greatly, ranging from \$936 in the poorest district to \$4,215 in the wealthiest.³⁶

B. *Plaintiffs' Allegations*

The "original plaintiffs," consisting of the boards of education of twenty-seven school districts located throughout the state and twelve school children from some of those districts,³⁷ instituted this suit in 1974.³⁸ The "plaintiffs-intervenors," consisting of the boards of education of New York City, Rochester, Buffalo, and Syracuse, the United Parents Associations of New York, Inc., and twelve school children from the city school districts, subsequently intervened and served a separate complaint.³⁹ The defendants were the University of the State of New York, the Comptroller of the State of New York, and the Commissioners of Education and Taxation and Finance of the State of New York.⁴⁰

The original plaintiffs alleged that, by virtue of their districts having less valuable real property, they could not match the ability of more affluent districts to generate tax revenue, thus precluding equal educational advantages across the state.⁴¹ Furthermore, the state system was structurally unable to eliminate the gross disparities that arise from the uneven distribution

33. *Id.* at 226, 443 N.Y.S.2d at 849.

34. *Id.*

35. *Board of Educ. v. Nyquist*, 94 Misc. 2d at 486, 408 N.Y.S.2d at 615.

36. *Id.* at 489, 408 N.Y.S.2d at 616.

37. *Id.* at 475, 408 N.Y.S.2d at 608-09.

38. *Board of Educ. v. Nyquist*, 83 A.D.2d at 221, 443 N.Y.S.2d at 846.

39. *Board of Educ. v. Nyquist*, 94 Misc. 2d at 475-76, 408 N.Y.S.2d at 608-09.

40. *Id.* at 476, 408 N.Y.S.2d at 609.

41. *Id.* at 477, 408 N.Y.S.2d at 609.

of real property values among the school districts.⁴² Thus, the unequal financial resources available to the plaintiff districts compelled plaintiffs to offer an inferior education because they were unable to provide "educational advantages such as: small class size; experienced and effective teachers; low pupil-teacher ratios; curricular breadth; extensive extracurricular programs; modern equipment; and special programs for the disadvantaged or the specially gifted."⁴³ Therefore, the original plaintiffs contended that the state's public school financing system constituted a violation of the equal protection clauses of the federal⁴⁴ and state⁴⁵ constitutions.

An additional ground was asserted by the original plaintiffs, directed solely at New York's educational scheme. By allowing the gross disparities to exist, the state system was claimed to be in violation of the New York constitutional mandate requiring a "system of free common schools, wherein all the children of this state may be educated."⁴⁶

The plaintiffs-intervenors asserted similar claims based, however, on the theories of "municipal overburden" and "educational overburden."⁴⁷ Under the theory of municipal overburden, it was claimed that while urban school districts have adequate real property wealth, the tax revenues must finance a "variety of municipal services of which education is but one."⁴⁸ Consequently, the noneducational services, such as police,⁴⁹ fire,⁵⁰ welfare,⁵¹ and transportation,⁵² reduce the amount of funds availa-

42. *Id.*

43. *Id.*

44. *Id.* at 479, 408 N.Y.S.2d at 610.

45. *Id.* at 476, 408 N.Y.S.2d at 609.

46. N.Y. CONST. art. XI, § 1; see *Board of Educ. v. Nyquist*, 94 Misc. 2d at 478, 408 N.Y.S.2d at 610.

47. See *Board of Educ. v. Nyquist*, 94 Misc. 2d at 479-80, 408 N.Y.S.2d at 611.

48. *Id.* at 494, 408 N.Y.S.2d at 620.

49. The trial court noted that higher levels of population density, poverty, and unemployment exist in urban rather than in suburban areas. These factors contributed to higher crime rates which necessitated "police expenditures that ran from two to six times greater than was the case in . . . suburban areas." *Id.* at 498, 408 N.Y.S.2d at 622.

50. The population and building densities of cities were found to contribute to the higher costs of urban fire protection. *Id.*

51. The trial court stated that "[t]he evidence showed that although only 43% of the State's population resides in New York City, 70% of the State-wide recipients of public assistance were living in that city." *Id.* at 499, 408 N.Y.S.2d at 622.

52. The evidence admitted at trial showed that "transit operating expenses were

ble to finance education.⁵³ The theory of educational overburden was founded on three factors. First, it was claimed that the plaintiffs-intervenors' education dollar had less purchasing power compared with rural districts' educational dollar.⁵⁴ Thus, the higher costs faced by city school districts required them to pay more than rural school districts to avail themselves of comparable benefits.⁵⁵ Second, the use of average daily attendance to determine the number of students within a district overstated the fiscal capacity of the city school districts because of the high rate of absenteeism within the city districts.⁵⁶ Finally, it was contended that the city school districts contain high concentrations of pupils with special educational needs.⁵⁷ As a result of the state's failure to account for the factors constituting municipal and educational overburden, the plaintiffs-intervenors claimed that the financing system violated the state and federal equal protection clauses, as well as the education clause of the New York Constitution.⁵⁸

\$33.39 per capita in [New York City] as compared to a level of only \$6.64 in the rest of the State." *Id.* at 508, 408 N.Y.S.2d at 623. Other noneducational services cited by the court were health care, corrections systems, court systems, parks and recreational facilities, and public housing. *Id.* at 499-500, 408 N.Y.S.2d at 622-23.

53. *Id.* at 496, 408 N.Y.S.2d at 621.

54. *Id.* at 501, 408 N.Y.S.2d at 624.

55. *Id.* at 502, 408 N.Y.S.2d at 624. For example, in 1974-75, the average teacher salary in upstate New York was \$12,737 whereas in New York City the average was \$16,498. *Id.*

56. *Id.* at 495, 408 N.Y.S.2d at 620. The five largest cities in New York had an average attendance rate of 84% compared with a rate of 93.83% in the balance of the state. *Id.* at 503, 408 N.Y.S.2d at 625. The appellate division noted:

With planning based on total enrollment and the concomitant need to render additional assistance to pupils who have fallen behind due to absence, the high number of absentees increases education costs in the cities while at the same time depriving them of needed succor. Because the high absentee rate is a direct consequence of poverty and underlying social conditions, its effects are inexorable and its financial effects cannot be alleviated by employment of additional attendance officers.

Board of Educ. v. Nyquist, 83 A.D.2d at 231, 443 N.Y.S.2d at 852.

57. Board of Educ. v. Nyquist, 94 Misc. 2d at 495, 408 N.Y.S.2d at 620. The special educational needs of the children in the city school districts are caused by, *inter alia*, physical and economic disadvantages, impaired learning abilities, and illiteracy in English. *See id.* at 505-11, 408 N.Y.S.2d at 626-33.

58. *Id.* at 479, 408 N.Y.S.2d at 611.

III. Background

The equal protection clause of the fourteenth amendment of the United States Constitution⁵⁹ guarantees that individuals will be treated by the state in a similar manner.⁶⁰ The clause is implicated when state law classifies individuals;⁶¹ the concept of classification inherently implies unequal treatment of individuals. Despite this inevitable unequal treatment, courts will only invalidate those classifications that are based upon impermissible criteria or used to burden a specific group of individuals.⁶²

In determining the validity of a classification, the judiciary has established varying standards of review. The standards of review for the equal protection clause has traditionally been considered "two-tiered."⁶³ The first tier is the rational relation test, which merely requires that the classification bear a rational relationship to a legitimate state purpose.⁶⁴ The second tier, known as strict scrutiny, removes the presumption of validity that attaches to the state classification and requires the state to show: (1) a compelling state interest, (2) the classification is necessary to promote that interest, and (3) no less drastic alternative exists.⁶⁵

Under this two-tiered approach, the threshold determination is what level of review is to be applied. The general rule for this determination is that unless a fundamental right⁶⁶ is in-

59. U.S. CONST. amend. XIV, § 1. See *supra* note 8 for the relevant text of the fourteenth amendment.

60. See J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 517 (1978) [hereinafter cited as NOWAK, *CONSTITUTIONAL LAW*].

61. See *id.* at 518.

62. See *id.* at 519; Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 343 (1949); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-1 (1978); *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969).

63. See Fox, *Equal Protection Analysis: Laurence Tribe, The Middle Tier, and the Role of the Court*, 14 U.S.F.L. REV. 525, 525 (1980); see also Gunther, *The Supreme Court 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

64. *E.g.*, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973); see also NOWAK, *CONSTITUTIONAL LAW*, *supra* note 60, at 524.

65. *E.g.*, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); see also NOWAK, *CONSTITUTIONAL LAW*, *supra* note 60, at 524.

66. Fundamental rights include the right to vote, *e.g.*, *Dunn v. Blumstein*, 405 U.S. 330 (1972); right to travel, *e.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969); right to procreate, *e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and the specific guarantees enu-

fringed or a suspect class⁶⁷ is burdened, then the rational relation test is appropriate.⁶⁸ The two-tiered approach, however, has come under severe criticism because of the lack of an intermediate level of review, and the outcome determinative characteristics of both tiers.⁶⁹ Consequently, courts have slowly departed from the rigid two-tiered approach, adopting an intermediate level of review.⁷⁰ This intermediate level, known as heightened scrutiny or the "sliding scale" test, requires that the classification bear a substantial relationship to an important governmental interest.⁷¹

A. San Antonio Independent School District v. Rodriguez

The landmark case on equal protection challenges to school financing systems is *San Antonio Independent School District v. Rodriguez*,⁷² where the United States Supreme Court held that the Texas system did not violate the fourteenth amendment of the United States Constitution.⁷³ *Rodriguez* involved a class action suit on behalf of children of poor families residing in districts having a low property tax base.⁷⁴ The Texas school financing system,⁷⁵ which was substantially similar to other state

merated in the Bill of Rights, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (freedom of religion).

67. State classifications are considered suspect if they are based upon race, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); alienage, e.g., *Nyquist v. Mauclet*, 432 U.S. 1 (1977); or national origin, e.g., *Castaneda v. Partida*, 430 U.S. 482 (1977).

68. See NOWAK, CONSTITUTIONAL LAW, *supra* note 60, at 524.

69. See, e.g., Fox, *Equal Protection Analysis: Laurence Tribe, The Middle Tier, and the Role of the Court*, 14 U.S.F.L. REV. 525, 526 (1980); see also L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-30 (1978); Gunther, *The Supreme Court 1971 Term — Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

70. See, e.g., *Craig v. Boren*, 429 U.S. 190, 198 (1976) (gender).

71. *Id.*; see NOWAK, CONSTITUTIONAL LAW, *supra* note 60, at 525.

72. 411 U.S. 1 (1973).

73. *Id.* at 6.

74. *Id.* at 5.

75. The financing of public schools in Texas was centered around a Minimum Foundation Program, which was designed to supplement the funds raised by an *ad valorem* property tax imposed by local school districts. The Program provided funds to cover the costs of teacher salaries, school maintenance and transportation. The general revenues of the state provided 80% of the funds with the remaining 20% provided by local school districts. Each local school district received a share of the funds raised by the Program according to an economic index which unintentionally rewarded the payment of high

systems in its reliance on local property taxes,⁷⁶ was challenged for its failure to relieve the interdistrict disparities in per pupil expenditures.⁷⁷ The plaintiffs argued that strict scrutiny was mandated not only because education was a fundamental right, but also because the system discriminated on the basis of wealth, the poor being a suspect class.⁷⁸

The threshold issue in *Rodriguez* was the choice of the standard of review for the equal protection analysis. Justice Powell, writing for the majority, refused to find that education was a fundamental right, and thus strict scrutiny was not invoked on that basis.⁷⁹ The majority did, however, recognize the "vital role of education in a free society."⁸⁰ But, since the right to education was not explicitly or implicitly guaranteed by the United States Constitution,⁸¹ Justice Powell refused to equate education to a substantive constitutional right.⁸²

In attempting to characterize the plaintiffs' class, the Court considered three possibilities:

- (1). . . 'poor' persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally 'indigent,' or
- (2). . . those who are relatively poorer than others, or
- (3). . . all those who, irrespective of their personal incomes, hap-

teacher salaries paid by affluent districts. *Id.* at 9-10.

76. *Id.* at 47-48.

77. *Id.* at 15.

78. Brief for Appellees at 3, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), reprinted in 76 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 173, 175 (P. Kurland & G. Casper eds. 1975).

79. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 17-18 (1973).

80. *Id.* at 30.

81. *Id.* at 33-37.

82. *Id.* at 37. Justice Marshall's dissent, however, argued that education was a fundamental right because of the close relationship between education and other constitutionally protected rights, such as freedom of speech and the right to vote. *Id.* at 112-14 (Marshall, J., dissenting). According to Justice Marshall, this relationship existed because education affects an individual's ability to enjoy his protected rights and furthermore, "[e]ducation may instill the interest and provide the tools necessary for political discourse and debate." *Id.* at 113.

In response to Justice Marshall's dissent, Justice Powell argued that it would be impossible to determine what quantum of education is required for the enjoyment of these constitutionally protected rights. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 36-37 (1973). Furthermore, Justice Powell recognized that these constitutionally protected rights could only be affected by an absolute denial of educational opportunity and thus, the Texas system could not be challenged for failing to provide basic minimal educational skills. *Id.* at 36-37.

pen to reside in relatively poorer school districts.⁸³

The Court, however, found that each of these categories was incongruous with classes traditionally defined as being discriminated against.⁸⁴ The Court noted that such classes "shared two distinguishing characteristics: because of their impecuniness they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."⁸⁵ According to the majority, since the alleged classes did not contain either of these characteristics,⁸⁶ the plaintiffs' class was not subject to discrimination in traditional terms.⁸⁷ Furthermore, the Court noted that had the class been discriminated against, it would still not qualify as a suspect class because it lacked the traditional indicia of suspectness.⁸⁸ Absent traditional criteria of discrimination and the requisite indicia of suspectness in the plaintiffs' class, the Court was precluded from applying strict scrutiny on the basis of a suspect class.⁸⁹

The majority further reasoned that strict scrutiny was inappropriate because of the principles of federalism.⁹⁰ Since the case involved the local concerns of fiscal and educational policy, the "Court's lack of specialized knowledge and experience" counseled "against premature interference with the informed judgments made at the state and local levels."⁹¹

After refusing to apply strict scrutiny, the Court analyzed the Texas school financing system under the rational relation

83. *Id.* at 19-20 (footnote omitted). Justice Marshall suggested, however, that "the schoolchildren of property poor districts constitute a sufficient class." *Id.* at 91 (Marshall, J., dissenting).

84. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973).

85. *Id.*

86. The majority reasoned that the plaintiffs' class was not discriminated against because there was no definable category of "poor" people and no absolute deprivation of education. *Id.* at 25.

87. *Id.*

88. *Id.* at 28. The traditional indicia of suspectness require that the class be "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.*

89. *Id.* at 27, 28.

90. *Id.* at 44.

91. *Id.* at 42.

test.⁹² With the preservation of local control identified as a legitimate state interest,⁹³ the Texas school financing system was held to be rationally related to that interest.⁹⁴ The impact of *Rodriguez* was to preclude the use of strict scrutiny for federal equal protection challenges to school financing systems.⁹⁵ In light of the rubber stamp qualities of the rational relation test,⁹⁶ the likelihood of success for future equal protection challenges to state school financing schemes was bleak.

B. *State Decisions Post-Rodriguez*

Encouragement for future school finance reform through the courts came only thirteen days after *Rodriguez*. In *Robinson v. Cahill*,⁹⁷ the New Jersey Supreme Court invalidated the New Jersey system of financing public schools.⁹⁸ The *Robinson* court did not rely on equal protection analysis to strike down the state system.⁹⁹ The New Jersey public school financing system was found to have violated the education clause of the New Jersey Constitution.¹⁰⁰

92. In 1973, the Supreme Court was still adhering to a two-tiered approach to equal protection analysis. *But see id.* at 98-99 (Marshall, J., dissenting) (advocating the application of a "spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause").

93. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 49 (1973). In recognizing the legitimacy of local control, the *Rodriguez* Court relied on *Wright v. Council of the City of Emporia*, 407 U.S. 451, 469 (1972) ("[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society").

94. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973). The Court recognized, however, that had strict scrutiny been applied, the Texas school financing system would have clearly violated the fourteenth amendment. *Id.* at 17.

95. *See Thomas, Equalizing Educational Opportunity Through School Finance Reform: A Review Assessment*, 48 U. CIN. L. REV. 255, 288 (1979).

96. *See supra* text accompanying note 69.

97. 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).

98. *Id.* at 520, 303 A.2d at 298.

99. *See id.* at 492, 303 A.2d at 283. *Rodriguez*, however, was interpreted as not precluding the court from finding a potential state equal protection violation. *Id.* at 490-91, 303 A.2d at 282.

100. *Id.* at 519, 303 A.2d at 297; N.J. CONST. art. VIII, § 4, ¶ 1 provides: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." The *Robinson* court interpreted this clause as requiring "that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market." *Robinson v. Cahill*, 62 N.J. at 515, 303 A.2d at 295.

In a similar challenge, the California Supreme Court invalidated its state's school financing system by divorcing the state's equal protection provisions¹⁰¹ from their federal counterpart.¹⁰² In *Serrano v. Priest*,¹⁰³ the court applied the strict scrutiny test under the California Constitution and noted the "independent vitality [of the state equal protection provisions] which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable."¹⁰⁴ Moreover, the concerns of federalism, which guided the Supreme Court in *Rodriguez*,¹⁰⁵ were not applicable to the California Supreme Court.¹⁰⁶ Thus, the California Supreme Court applied strict scrutiny because "(1) discrimination in educational opportunity on the basis of district wealth involves a suspect classification, and (2) education is a fundamental interest."¹⁰⁷

C. New York's Approach

In New York, the right to a free public education is guaranteed by the state constitution.¹⁰⁸ The right to education, however, is not absolute.¹⁰⁹ Although the state must provide "for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated,"¹¹⁰ the state is not compelled to enact a comprehensive program that fully provides for each pupil's individual needs.¹¹¹ For example,

101. CAL. CONST. art. I, § 11 provides: "All laws of a general nature shall have a uniform operation." CAL. CONST. art. I, § 21 provides: "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." These provisions have been construed to constitute California's equal protection provisions, which are substantially equivalent to their federal counterpart. See, e.g., *Department of Mental Hygiene v. Kirchner*, 62 Cal. 2d 586, 588, 400 P.2d 321, 322, 43 Cal. Rptr. 329, 330 (1965).

102. *Serrano v. Priest*, 18 Cal. 3d 728, 765-66, 557 P.2d 929, 951, 135 Cal. Rptr. 345, 367 (1977). See *supra* note 8 for the text of the federal equal protection clause.

103. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977).

104. *Id.* at 764, 557 P.2d at 950, 135 Cal. Rptr. at 366.

105. See *supra* notes 90-91 and accompanying text.

106. *Serrano v. Priest*, 18 Cal. 3d at 766-67, 557 P.2d at 952, 135 Cal. Rptr. at 368.

107. *Id.* at 765-66, 557 P.2d at 951, 135 Cal. Rptr. at 367.

108. N.Y. CONST. art. XI, § 1. See *supra* note 10 for the text of the provision.

109. See IV C. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* 707 (1906).

110. N.Y. CONST. art. XI, § 1.

111. See *In re Levy*, 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13, *appeal dismissed*, 429 U.S. 805 (1976). In *Levy*, the court of appeals stated:

the New York Court of Appeals, in *In re Levy*,¹¹² acknowledged that it was not a violation of the equal protection clause for the state to provide free education to children who were deaf or blind, yet require parents of children with other handicaps, such as mental retardation, to bear the maintenance portion of the special educational services required for such children.¹¹³ In *Levy*, the court of appeals concluded that education was not "a 'fundamental constitutional right' as to be entitled to special constitutional protection Accordingly, the appropriate standard is not the so-called strict scrutiny test or anything approaching it, but rather the traditional rational basis test."¹¹⁴

IV. *Board of Education v. Nyquist*

A. *The Trial Court*

After dismissing the original plaintiffs' claim on federal equal protection grounds because of the *stare decisis* effect of *Rodriguez*,¹¹⁵ Justice Smith¹¹⁶ addressed the question of what standard of review is required under the equal protection clause of New York's Constitution.¹¹⁷

It would be unthinkable . . . to suggest that confronted with economic strictures State government is powerless to move forward in the fields of education and social welfare with anything less than totally comprehensive programs. Such a contention would suggest that the only alternative open to the Legislature in the exercise of its policy-making responsibility, if it were to conclude that wholly free education could not be provided for all handicapped children, would be to withdraw the benefits now conferred on blind and deaf children — thus to fall back to an undifferentiated and senseless but categorically neat policy that since all could not be benefitted, none would be.

Id. at 660, 345 N.E.2d at 560, 382 N.Y.S.2d at 17.

112. 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13, *appeal dismissed*, 429 U.S. 805 (1976) (construing N.Y. FAM. CT. ACT § 234 (McKinney 1975) (amended 1976)).

113. *In re Levy*, 38 N.Y.2d at 661, 345 N.E.2d at 560, 382 N.Y.S.2d at 17.

114. *Id.* at 658, 345 N.E.2d at 558, 382 N.Y.S.2d at 15 (citing as controlling *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973)). The *Levy* court also refused to find that handicapped children constituted a suspect class. *In re Levy*, 38 N.Y.2d at 658, 345 N.E.2d at 558, 382 N.Y.S.2d at 15.

115. *Board of Educ. v. Nyquist*, 94 Misc. 2d at 519, 408 N.Y.S.2d at 634. For a discussion of *Rodriguez*, see *supra* text accompanying notes 72-94.

116. Justice L. Kingsley Smith delivered the opinion for the New York Supreme Court in *Nassau County. Board of Educ. v. Nyquist*, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. Nassau County 1978).

117. *Id.* at 519-20, 408 N.Y.S.2d at 634-35. See *supra* note 9, for the relevant text of N.Y. CONST. art. I, § 11.

Justice Smith began his analysis by attempting to identify either a suspect class or fundamental interest which would justify the use of strict scrutiny. Regarding the suspect class issue, Justice Smith stated that "the division of the State into school districts possessing varying amounts of property wealth"¹¹⁸ is insufficient to justify the existence of a suspect class according to wealth.¹¹⁹ Since there was no discriminatory purpose, it was legitimate for the legislature to create school districts to aid in the discharge of its education obligation.¹²⁰

In considering whether education qualified as a fundamental interest, the trial court determined that *Rodriguez* was not controlling because of the explicit guarantee of education in the New York Constitution, not found in the federal constitution.¹²¹ Justice Smith did, however, conclude that *In re Levy*¹²² precluded the use of strict scrutiny based on the right to education.¹²³

The trial court nonetheless reasoned that the unavailability of strict scrutiny did not compel the use of the lenient rational relation test. Justice Smith selected the intermediate level of review, called the "sliding scale" test,¹²⁴ which had been recognized by the New York Court of Appeals in *Alevy v. Downstate Medical Center*.¹²⁵ The sliding scale test requires that the challenged discrimination satisfy a substantial state interest, and

118. Board of Educ. v. Nyquist, 94 Misc. 2d at 520, 408 N.Y.S.2d at 635.

119. *Id.*

120. *Id.*

121. *Id.* at 521, 408 N.Y.S.2d at 635. See *supra* text accompanying notes 80-82.

122. 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13, *appeal dismissed*, 429 U.S. 805 (1976). For a discussion of *Levy*, see *supra* notes 112-14 and accompanying text.

123. Board of Educ. v. Nyquist, 94 Misc. 2d at 522, 408 N.Y.S.2d at 636.

124. *Id.* at 522-23, 408 N.Y.S.2d at 636.

125. 39 N.Y.2d 326, 334, 348 N.E.2d 537, 544, 384 N.Y.S.2d 82, 89 (1976). *Alevy* involved a reverse discrimination claim wherein the petitioner was denied admission to medical school even though minority students with inferior credentials were accepted. The *Alevy* court rejected the use of strict scrutiny for reverse discrimination, stating that it "would cut against the very grain of the [fourteenth] amendment, were the equal protection clause used to strike down measures designed to achieve real equality for persons whom it was intended to aid." *Id.* at 335, 348 N.E.2d at 545, 384 N.Y.S.2d at 89. Similarly, the *Alevy* court rejected the use of the rational relation test because "preferential treatment programs involve perpetuating undesirable perceptions of race as criteria affecting State action . . . and, therefore, should be subjected to more careful scrutiny than traditional standards of rationality ordinarily invoked." *Id.* at 335-36, 348 N.E.2d at 545, 384 N.Y.S.2d at 90 (citation omitted).

that it be the least objectionable alternative.¹²⁶ Applying the sliding scale test, Justice Smith identified the state interest as the "obligation to 'provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.'"¹²⁷ In interpreting the education clause as requiring equal educational opportunity,¹²⁸ the court noted that the uncontroverted evidence showed the unequal distribution of property wealth and the corresponding variation in operating expenditures among the state's school districts.¹²⁹ Evaluation of this evidence led to the trial court's conclusion that the system of relying primarily on local property taxes to finance public education operated in a discriminatory manner.¹³⁰ This discrimination, coupled with the existence of less objectionable alternatives,¹³¹ resulted in the trial court's holding that New York's school financing system violated the state equal protection clause as to the original plaintiffs, measured under the sliding scale test.¹³²

The trial court also found a violation of the education clause as to the original plaintiffs because of the state's failure to correct the disparities arising from the use of local real property taxes.¹³³ Justice Smith reasoned that the constitutional violation arose from the operation of the school financing scheme and not

126. See *id.* at 336-37, 348 N.E.2d at 545-46, 384 N.Y.S.2d at 90. In order to satisfy the substantial interest requirement, it must be shown that the "gain to be derived from the preferential policy outweighs its possible detrimental effects." *Id.* at 336, 348 N.E.2d at 545, 384 N.Y.S.2d at 90 (footnote omitted). Cf. *Dandridge v. Williams*, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting) (the equal protection analysis should focus on the character of the classification, the value of the government benefits denied the class, and the asserted interest in support of the classification).

127. *Board of Educ. v. Nyquist*, 94 Misc. 2d at 523, 408 N.Y.S.2d at 636 (quoting N.Y. CONST. art. XI, § 1). See *supra* note 10 for the text of New York's education clause.

128. *Board of Educ. v. Nyquist*, 94 Misc. 2d at 523, 408 N.Y.S.2d at 636. The trial court recognized that the purpose of state aid should be to remedy the inter-district disparities that would exist absent such aid. *Id.*

129. *Id.* at 523, 408 N.Y.S.2d at 637.

130. *Id.* at 524, 408 N.Y.S.2d at 637.

131. The trial court did not describe any specific alternatives, but merely indicated their existence. *Id.* at 524-25, 408 N.Y.S.2d at 637-38. See generally Grubb, *The First Round of Legislative Reforms in the Post-Serrano World*, 38 LAW & CONTEMP. PROBS. 459 (1974) (discussion of alternative school finance systems).

132. *Board of Educ. v. Nyquist*, 94 Misc. 2d at 525, 408 N.Y.S.2d at 638.

133. *Id.* at 528, 408 N.Y.S.2d at 640.

its basic structure.¹³⁴

In addressing the plaintiffs-intervenors' equal protection claims, Justice Smith concluded that the state school financing system created classifications between urban and nonurban school districts by failing to account for the "overburdening conditions that affect the large cities and the schools located within their boundaries."¹³⁵ Accordingly, "[s]uch a classification bears no reasonable relation to the statute's purpose of providing State aid to districts in proportion to their need."¹³⁶ Thus, since the classification could not withstand scrutiny under the rational relation test, New York's financing scheme was found to constitute a denial of state equal protection as to the plaintiffs-intervenors.¹³⁷

Regarding the plaintiffs-intervenors' federal equal protection claim, Justice Smith interpreted *Rodriguez* as merely prohibiting the use of strict scrutiny during a court's evaluation of such claims.¹³⁸ Justice Smith stated that "*Rodriguez* does not mean that an educational statute's compliance with the federal equal protection standards cannot be tested by a less rigorous standard of review."¹³⁹ Thus, by applying the rational relation test to the plaintiffs-intervenors' federal equal protection claim, Justice Smith concluded that a violation existed for the same reasons that justified his conclusion regarding the state equal protection issue.¹⁴⁰

134. *Id.* at 528-29, 408 N.Y.S.2d at 640. Justice Smith stressed that the state's use of local school districts and locally imposed real property taxes was constitutionally permissible. *Id.*

135. *Id.* at 529, 408 N.Y.S.2d at 641. For a discussion of the overburdening conditions affecting the plaintiffs-intervenors, see *supra* notes 47-57 and accompanying text.

136. *Id.* at 530, 408 N.Y.S.2d at 641. The statutes providing state aid to New York's public schools appear at N.Y. EDUC. LAW §§ 3601-3609 (McKinney 1981 & Supp. 1982).

137. *Board of Educ. v. Nyquist*, 94 Misc. 2d at 530, 408 N.Y.S.2d at 641. It was unnecessary for the trial court to subject the classification to more careful scrutiny because it could not survive the most lenient standard of review.

138. *Id.* at 532, 408 N.Y.S.2d at 642.

139. *Id.* at 531, 408 N.Y.S.2d at 642. The trial court noted that *In re Levy*, 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13, *appeal dismissed*, 429 U.S. 805 (1976), was an instance where the court of appeals applied a less rigorous standard of scrutiny in the equal protection analysis of an education statute. *Board of Educ. v. Nyquist*, 94 Misc. 2d at 531, 408 N.Y.S.2d at 642. See *supra* notes 111-14 and accompanying text for a discussion of *In re Levy*.

140. *Board of Educ. v. Nyquist*, 94 Misc. 2d at 532, 408 N.Y.S.2d at 642. See *supra* notes 135-37 and accompanying text.

In addressing the education clause issue, Justice Smith stated that "the education article must be regarded as . . . guaranteeing to all the children of the State an equal opportunity to acquire basic minimal educational skills."¹⁴¹ Consequently, the existence of a substantial number of pupils in the large urban school districts who failed to acquire basic minimal educational skills coupled with the state's failure to remedy this condition resulted in Justice Smith's finding a violation of the education clause as to the plaintiffs-intervenors.¹⁴²

After finding the respective constitutional violations, the trial court retained jurisdiction until the legislature had the opportunity to remedy the public school financing scheme.¹⁴³

B. *The Appellate Division*

1. *Majority opinion*

After reiterating the trial court's findings of fact regarding the gross disparities in fiscal capacity among the school districts, Justice Lazer, writing for the majority,¹⁴⁴ addressed the question of what standard of review is applicable in determining the equal protection claims. Justice Lazer reasoned that *Rodriguez, Alevy, and Levy* were controlling, thus precluding application of the strict scrutiny standard.¹⁴⁵ The appellate division acknowledged the existence of the intermediate standard of review (sliding scale), thereby refusing to limit its analysis to the traditional two-tiered approach.¹⁴⁶

141. *Id.* at 533, 408 N.Y.S.2d at 643. The trial court considered New Jersey's education clause to be substantially similar to New York's. Thus, the interpretation given New Jersey's education clause in *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973), was cited approvingly by Justice Smith. *Board of Educ. v. Nyquist*, 94 Misc. 2d at 532-33, 408 N.Y.S.2d at 642-43. For a discussion of *Robinson*, see *supra* notes 97-100 and accompanying text.

142. *Board of Educ. v. Nyquist*, 94 Misc. 2d at 534, 408 N.Y.S.2d at 643.

143. *Id.* at 537, 408 N.Y.S.2d at 645.

144. Justice Lazer delivered the majority opinion, and was joined by Justice Gibbons. Justice Weinstein filed a separate concurring opinion. Justice Hopkins delivered a separate opinion wherein he concurred in part and dissented in part. *Board of Educ. v. Nyquist*, 83 A.D.2d 217, 443 N.Y.S.2d 843 (2d Dep't 1981).

145. *Id.* at 239, 443 N.Y.S.2d at 857.

146. *Id.* at 238-39, 443 N.Y.S.2d at 857. See *supra* notes 60-71 and accompanying text.

Because of the important function of education,¹⁴⁷ Justice Lazer applied the intermediate, or heightened scrutiny, level of review for the equal protection analysis. In applying this sliding scale test, the appellate division identified preservation of local control as the state interest,¹⁴⁸ whereas the lower court had identified equality of educational opportunity as the state interest.¹⁴⁹

After balancing the fiscal disparities in the education system against the state's justification of local control, the appellate division majority concluded that the statutory scheme could not survive heightened scrutiny.¹⁵⁰ Therefore, the financing scheme was held to violate the state equal protection clause as to both the original plaintiffs and the plaintiffs-intervenors.¹⁵¹

In considering the federal equal protection claims, the appellate division noted that the United States Supreme Court in *Rodriguez* had failed to delineate that minimum quantum of education which must be transgressed prior to finding a fourteenth amendment violation.¹⁵² Because of the lack of specific guidelines, the appellate division reasoned that there was not foundation from which the court could find a federal equal protection violation as to either the original plaintiffs or the plaintiffs-intervenors.¹⁵³

In upholding the finding of an education clause violation, the majority considered the purpose of the education clause as mandating "the maintenance of a system of schools in which all

147. *Id.* at 240, 443 N.Y.S.2d at 857-58. *Accord* *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (a state's most important function is education).

148. *Board of Educ. v. Nyquist*, 83 A.D.2d at 242, 443 N.Y.S.2d at 859. *Accord* *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 49 (1973) (recognizing the importance of local control over education).

149. *See supra* notes 127-28. In identifying the state interest, Justice Lazer noted that courts are limited to consideration of those interests proffered by the state, and should not articulate conjectural interests to defend a classification. *Board of Educ. v. Nyquist*, 83 A.D.2d at 242, 443 N.Y.S.2d at 859. *Accord* *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 336, 348 N.E.2d 537, 545, 384 N.Y.S.2d 82, 90 (1976).

150. *Board of Educ. v. Nyquist*, 83 A.D.2d at 242, 443 N.Y.S.2d at 859. Justice Lazer stated that "[f]or the property poor, local control of education is more illusory than real, for it cannot be utilized to produce the educational output local authorities perceive [sic] as appropriate, but only what a limited tax base will permit." *Id.* at 243, 443 N.Y.S.2d at 859.

151. *Id.* at 245, 443 N.Y.S.2d at 861.

152. *Id.* at 245, 443 N.Y.S.2d at 860. *See supra* note 82.

153. *Id.* at 245, 443 N.Y.S.2d at 861.

the children of the State could be equipped with certain basic educational skills necessary to function effectively in society.”¹⁵⁴ Thus, since the evidence demonstrated that many children emerge from the school system lacking these skills,¹⁵⁵ the appellate division concluded that the education clause was violated.¹⁵⁶

2. *Justice Hopkins’ opinion*

While Justice Hopkins agreed that *Rodriguez* controlled the federal equal protection issue and was not binding authority on the state equal protection issue, he noted that the reasoning of the United States Supreme Court should be given substantial deference in guiding the interpretation of New York’s equal protection clause.¹⁵⁷ Thus, using the analysis approved by the Supreme Court in *Rodriguez*,¹⁵⁸ Justice Hopkins concluded that proof of an absolute deprivation of educational opportunity was needed in order to succeed on an equal protection claim.¹⁵⁹ According to Justice Hopkins,

What the plaintiffs’ proof suggests circumstantially is that the complaining school districts employ a lower ratio of teaching staff to students, that their teaching staff may not possess as extensive experience or training, that they do not have as many guidance counselors, psychologists and ancillary staff, and that their curricula are more limited in subject matter than those that exist in wealthier districts.¹⁶⁰

154. *Id.* at 248, 443 N.Y.S.2d at 863.

155. The court relied on:

[T]he findings that thousands of children fail to acquire even minimal skills in reading, vocabulary and mathematics in lower grades and later underachieve or fail because they lack those skills; that thousands who pass through the school system can only decode words without comprehending them, cannot use graphs, maps or indexes, and cannot apply acquired knowledge . . . to solve problems; that thousands who attend high school read at a fifth grade level or below and some of these read at a third or even second grade level; and that some students leave the system wholly illiterate.

Id. at 250, 443 N.Y.S.2d at 864.

156. *Id.* at 251, 443 N.Y.S.2d at 864.

157. *Id.* at 259, 443 N.Y.S.2d at 869 (Hopkins, J., concurring in part and dissenting in part).

158. See *supra* notes 80-88 and accompanying text.

159. Board of Educ. v. Nyquist, 83 A.D.2d at 259, 443 N.Y.S.2d at 869 (Hopkins, J., concurring in part and dissenting in part).

160. Board of Educ. v. Nyquist, 83 A.D.2d at 259, 443 N.Y.S.2d at 869-70 (Hopkins,

These circumstantial findings were deemed insufficient by Justice Hopkins to show an absolute deprivation of educational opportunity, and thus the plaintiffs' claims should fail regardless of the level of review used.¹⁶¹

Additionally, Justice Hopkins was concerned with the impact this case would have on other New York constitutional mandates if the equal protection claim prevailed. The constitutional mandates of support for the needy,¹⁶² public health,¹⁶³ the care of persons suffering from natural disorders,¹⁶⁴ and public housing¹⁶⁵ were noted as requiring treatment similar to education.¹⁶⁶ Consequently, "the argument of the plaintiffs underpinning their claim of constitutional discrimination on the ground of disparity of wealth prove[d] too much and would, if accepted, effectively destroy the long-established governmental principle that the municipality can be expected to deal competently with State functions delegated to it."¹⁶⁷

Although Justice Hopkins relegated the equal protection claims to mere disparities inherent in the use of any geographical unit,¹⁶⁸ the determination of the appropriate standard of review was still considered.¹⁶⁹ While agreeing that strict scrutiny

J., concurring in part and dissenting in part).

161. *Id.* at 263, 443 N.Y.S.2d at 871 (Hopkins, J., concurring in part and dissenting in part). In illustrating that these circumstantial findings did not necessarily imply an inferior education by the poorer school districts, Justice Hopkins stated:

(1) the one-room school house in a school district may or may not provide as good instruction as another school district containing many school houses having a grade to a room, depending on the skills and dedication of the teacher and the interest of the students; (2) the access to the great museums within the City of New York enjoyed by the students in its schools may or may not be an advantage over school districts so distant from the city that their students are foreclosed from using such facilities, depending again, on the bent of the teachers and the curiosity of the students.

Id. at 260 n.2, 443 N.Y.S.2d at 870 n.2.

162. N.Y. CONST. art. XVII, § 1.

163. *Id.* § 3.

164. *Id.* § 4.

165. *Id.* art. XVIII, § 1.

166. *Board of Educ. v. Nyquist*, 83 A.D.2d at 261, 443 N.Y.S.2d at 871 (Hopkins, J., concurring in part and dissenting in part).

167. *Id.* (Hopkins, J., concurring in part and dissenting in part) (citation omitted).

168. *Id.* at 260, 443 N.Y.S.2d at 870 (Hopkins, J., concurring in part and dissenting in part).

169. *Id.* at 263, 443 N.Y.S.2d at 871 (Hopkins, J., concurring in part and dissenting in part).

was inappropriate,¹⁷⁰ Justice Hopkins suggested that heightened scrutiny could only be used in cases of reverse discrimination, and therefore only the rational relation test remained.¹⁷¹ In applying the rational relation test, Justice Hopkins stated that, "the Legislature could legitimately find that school districts are proper means by which the operation and financing of schools within the State shall be accomplished."¹⁷² Furthermore, because the rational relation test was used by Justice Hopkins instead of the heightened scrutiny test, he opined that there was no need to consider the availability of a less objectionable alternative.¹⁷³

In interpreting the education clause, Justice Hopkins examined the wording of the provision to derive its meaning.¹⁷⁴ Justice Hopkins separated the provision into three elements: "First, the constitutional duty is cast on the legislature; second, that duty includes both maintenance and support of a system of common schools; third, the system shall be free to all children of the State."¹⁷⁵ In focusing on the particular language of the education clause, Justice Hopkins explained that "[t]he word 'support' clearly indicates financial backing," and that a "system is a whole composed of parts in orderly arrangement according to

170. *Id.* at 264, 443 N.Y.S.2d at 872 (Hopkins, J., concurring in part and dissenting in part). See *supra* note 145 and accompanying text.

171. *Id.* See *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 336, 348 N.E.2d 537, 545, 384 N.Y.S.2d 82, 90 (1976) (intermediate level of review is appropriate in resolving reverse discrimination claims).

Justice Hopkins noted in his opinion that, "the Court of Appeals has not demonstrated any disposition to enlarge the 'heightened scrutiny' test where educational legislation was the point of attack." *Board of Educ. v. Nyquist*, 83 A.D.2d at 264, 443 N.Y.S.2d at 872 (Hopkins, J., concurring in part and dissenting in part). In support of that statement, he pointed out that in *Lombardi v. Nyquist*, 63 A.D.2d 1058, 406 N.Y.S.2d 148 (3d Dep't 1978), the appellate division "held that the 'rationality' test should be applied to article 89 of the Education Law, and leave to appeal was denied by the Court of Appeals" *Board of Educ. v. Nyquist*, 83 A.D.2d at 264 n.5, 443 N.Y.S.2d at 872 n.5 (Hopkins, J., concurring in part and dissenting in part) (citation omitted).

172. *Board of Educ. v. Nyquist*, 83 A.D.2d at 265, 443 N.Y.S.2d at 873 (Hopkins, J., concurring in part and dissenting in part) (citation omitted).

173. *Id.* at 265-66, 443 N.Y.S.2d at 873 (Hopkins, J., concurring in part and dissenting in part).

174. See *supra* note 10 for the full text of the education clause.

175. *Board of Educ. v. Nyquist*, 83 A.D.2d at 267, 443 N.Y.S.2d at 873 (Hopkins, J., concurring in part and dissenting in part).

some scheme or plan; an organized scheme or plan of action; an orderly or regular method of procedure.”¹⁷⁶ In applying those terms to the context of the provision, Justice Hopkins noted that:

State aid [from 1795 to the adoption of the Education Clause in the State Constitution in 1894] had been furnished to the school districts through the common school fund and direct grants . . . , so that the language of the education article must have been selected with full knowledge and approval that State support was to be continued by the Legislature according to a *system*.¹⁷⁷

Concluding that the legislature was given the duty to provide a system for support for the common schools, Justice Hopkins then examined the current status of support for the New York State system.

Tracing the developments of various ways to provide support for the system of common schools, Justice Hopkins pointed out various schemes adopted by the legislature to ensure satisfactory offerings of educational services among the districts.¹⁷⁸ Such schemes included the “foundation grant” with accompanying “equalization grants” which were designed to yield a uniform system.¹⁷⁹ In 1962, however, the foundation grant plan was re-

176. *Id.* (citing OXFORD ENGLISH DICTIONARY (1971 ed.)). In a footnote, Justice Hopkins further explained the meaning of the word “system,” stating:

More specialized definitions correspond. “A system is a group of components integrated to accomplish a purpose” (5 Encyclopedia of Education, The MacMillan Co. and the Free Press, 1971, p 583). In the same digest it is remarked that an educational system is composed of several subsidiary systems, such as the fundamental instructional system, and supportive systems, one of which is the financial system, and that a supportive system should not impose unreasonable constraints on the instructional system (*id.*, pp 583-587).

Board of Educ. v. Nyquist, 83 A.D.2d at 267 n.7, 443 N.Y.S.2d at 874 n.7 (Hopkins, J., concurring in part and dissenting in part).

177. Board of Educ. v. Nyquist, 83 A.D.2d at 267, 443 N.Y.S.2d at 874 (Hopkins, J., concurring in part and dissenting in part) (emphasis in original).

178. *Id.*

179. The foundation grant program was developed by George D. Strayer and Robert M. Haig in 1923. The program was designed to equalize educational facilities and maintain a uniform burden of taxation throughout the state. The foundation grant program required the state to guarantee a “foundation” dollar level of spending per pupil for each district. Each district must then tax at a certain minimum property tax rate to qualify for the program. Equalization grants by the state would then supplement the amounts raised locally to the extent necessary for each district to meet the foundation level. Under the program, individual districts could still raise additional revenues by taxing at

placed by a "shared-cost" program,¹⁸⁰ which has been the subject of numerous amendments and "piecemeal modifications," and which, by 1974, "reach[ed] a level of complexity so as to negate the existence of a basic State-wide fiscal system for education"¹⁸¹ Noting that further modifications to the educational support system had been added by the legislature since 1974, Justice Hopkins concluded:

[W]hat needs to be stressed is that the 1974 complexities have been converted into a veritable jungle of labyrinthine incongruity. . . . What began as a simple exercise of arithmetical proportions in the distribution of State Aid has been distended in the last 30 years into a prodigious task. Moreover, the conception of a system geared to the foundation grant, or aid based on the fiscal needs of the school districts in terms of their respective wealth, has disappeared under the enveloping layers of contingencies and obscurity introduced by the contradictory effect of the flat grant and save-harmless provisions. The statutes now resemble a patchwork mounted on patchwork, an Ossa of confusion piled on a Pelion of disorder. Thus, the design of a uniform and harmonious system conceived by its nineteenth century authors had been frustrated and distorted by the twentieth century attempts of legislators to satisfy the conflicting demands of their constituents.¹⁸²

Thus, Justice Hopkins found a violation of the education clause of the New York Constitution.

more than the minimum rate. J. COONS, W. CLUNE III & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* 63-64 (1970).

180. The "shared-cost" program allows each district to design its own educational program. The cost of the program is then shared on an equalized basis between the district and the state. The shared-cost program was considered preferable to the foundation grant program. Under the foundation grant program, the state only contributed to an acceptable *minimum* educational program, whereas the shared-cost program provides state aid for any educational program developed by the local school districts. *Id.* at 183 (quoting UNIVERSITY OF STATE OF NEW YORK, STATE EDUCATION DEPARTMENT, BUREAU OF EDUCATIONAL FINANCE RESEARCH, *STUDIES OF PUBLIC SCHOOL SUPPORT 1966 SERIES: VITAL ISSUES IN PUBLIC SCHOOL FINANCE* 10 (1967)).

181. Board of Educ. v. Nyquist, 83 A.D.2d at 267-68, 443 N.Y.S.2d at 874 (Hopkins, J., concurring in part and dissenting in part) (citing Mort, *Unification of Fiscal Policy in New York State*, in C. BENSON, *PERSPECTIVES ON THE ECONOMICS OF EDUCATION* 341 (1963) (emphasis in original)).

182. *Id.* at 269, 443 N.Y.S.2d at 875 (Hopkins, J., concurring in part and dissenting in part).

C. *The Court of Appeals*

1. *The majority decision*¹⁸³

The court of appeals, addressing the original plaintiffs' federal equal protection claim first, stated that the essence of their claim was that the disparities in per pupil expenditure among districts and the failure of the state to remedy such disparities resulted in an "impermissible discrimination against pupils in the less property-wealthy districts in violation of the Fourteenth Amendment"¹⁸⁴ The court of appeals concluded, however, that the original plaintiffs' claim was considered and rejected by the United States Supreme Court in *Rodriguez*.¹⁸⁵ Thus, the court of appeals rejected the original plaintiffs' federal equal protection claim, affirming the appellate division and the trial court rulings, relying on *Rodriguez*.

Considering the plaintiffs-intervenors' federal equal protection claim next, the majority reiterated Justice Hopkins' observation that the "inequalities existing in cities are the product of demographic, economic, and political factors intrinsic to the cities themselves, and cannot be attributed to legislative action or inaction."¹⁸⁶ Furthermore, with regard to metropolitan overburden,¹⁸⁷ the majority quoted Justice Hopkins' opinion, stating:

It is beyond the power of this court in this litigation to determine whether the appropriations of the intervenor-plaintiffs have been wisely directed or reasonably applied, or whether their budgets are fairly divided in terms of priority of need between the competing services, such as police, fire, health, housing and transportation, and it is, equally, beyond the power of the court to determine whether the resources of the intervenor-plaintiffs can otherwise be employed so that their educational needs can be met.¹⁸⁸

183. Judge Jones delivered the majority opinion of the court of appeals and was joined by Chief Judge Cooke and Judges Jasen, Gabrielli, Wachtler, and Meyer. Judge Fuchsberg dissented in a separate opinion. *Board of Educ. v. Nyquist*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982).

184. *Id.* at 40, 439 N.E.2d at 364, 453 N.Y.S.2d at 649.

185. *Id.*

186. *Id.* at 41, 439 N.E.2d at 365, 453 N.Y.S.2d at 649.

187. *See supra* note 12.

188. *Board of Educ. v. Nyquist*, 57 N.Y.2d at 42, 439 N.E.2d at 365, 453 N.Y.S.2d at 649-50 (quoting Justice Hopkins, *Board of Educ. v. Nyquist*, 83 A.D.2d at 262, 443

Thus, by applying the rational relation test, the court of appeals concluded that there was no federal equal protection violation as to the plaintiffs-intervenors.¹⁸⁹

In addressing the state equal protection claims, the majority expressly stated that *In re Levy*¹⁹⁰ requires that the rational relation test be used whenever “challenged state action implicate[s] the right to free, public education.”¹⁹¹ The majority reasoned that rational relation scrutiny is appropriate when the discrimination is between units of local government (property-poor and property-wealthy school districts).¹⁹² Thus, the court of appeals concluded “that the justification offered by the State — the preservation and promotion of local control of education — is both a legitimate State interest and one to which the present financing system is reasonably related.”¹⁹³

N.Y.S.2d at 871).

189. *Id.* at 42, 439 N.E.2d at 365, 453 N.Y.S.2d at 650.

190. 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13, *appeal dismissed*, 429 U.S. 805 (1976). For a discussion of *Levy*, see *supra* notes 111-14 and accompanying text.

191. *Board of Educ. v. Nyquist*, 57 N.Y.2d at 43, 439 N.E.2d at 365, 453 N.Y.S.2d at 650. The court of appeals rejected the intermediate (heightened scrutiny) level of review by relying on *Rodriguez* and *Levy*. *Id.*

192. *Id.* at 44, 439 N.E.2d at 366, 453 N.Y.S.2d at 651. The majority determined that a classification of persons, not of governmental units, is necessary to invoke a higher level of review. *Id.* In refusing to define education as a fundamental right, which would have required the application of strict scrutiny, the court stated:

The inclusion in our State Constitution of a declaration of the Legislature's obligation to maintain and support an educational system is not to be accorded the same significance for purposes of equal protection analysis as would a counterpart reference to education in the Federal Constitution. The two documents are drafted from discretely different constitutional perspectives. The Federal Constitution is one of delegated powers and specified authority; all powers not delegated to the United States or prohibited to the States are reserved to the States or to the people (US Const, 10th Amdt). Great significance accordingly is properly attached to rights guaranteed and interests protected by express provision of the Federal Constitution. By contrast, because it is not required that our State Constitution contain a complete declaration of all powers and authority of the State, the references which do appear touch on subjects and concerns with less attention to any hierarchy of values, and the document concededly contains references to matters which could as well have been left to statutory articulation (e.g., provision for superintendence and repair of canals, art. XV, § 3, scarcely to be classified a fundamental constitutional right on any view).

Id. at 43 n.5, 439 N.E.2d at 366 n.5, 453 N.Y.S.2d. at 650 n.5.

193. *Id.* at 44, 439 N.E.2d at 366, 453 N.Y.S.2d at 651. In recognizing the legitimacy of local control of education, the court of appeals noted that historically, “the people of [New York] State have remained true to the concept that the maximum support of the public schools and the most informed, intelligent and responsive decision-making as to

With respect to the education clause, where a violation had been found by the lower courts, the majority noted that the language of the constitutional provision did not specifically require equal education among the districts.¹⁸⁴ According to the majority, "[w]hat appears to have been contemplated when the education article was adopted at the 1894 Constitutional Convention was a State-wide system assuring minimal acceptable facilities and services in contrast to the unsystemized delivery of instruction then in existence within the State."¹⁸⁵ The majority reasoned that the legislature assures minimal acceptable facilities by providing a system which prescribes "the minimum number of days of school attendance, required courses, textbooks, qualifications of teachers and of certain nonteaching personnel, pupil transportation, and other matters."¹⁸⁶ In response to Justice Hopkins' analysis regarding the system of financial support,¹⁸⁷ the majority stated that the word "system," as used in the education clause, modifies "free common schools" instead of "maintenance and support" and, therefore, "it is immaterial that the Legislature in its wisdom has seen fit to provide financial support under complex formulas with a variety of components."¹⁸⁸ Thus, after noting that the average per pupil expenditure in New York exceeds all other states except two, the majority was satisfied that the constitutional requirement was met.¹⁸⁹

2. Judge Fuchsberg's dissent

In finding the equal protection violations, Judge Fuchsberg, the lone dissenter, concurred with the appellate division's determination that the intermediate level of scrutiny was appropri-

the financing and operation of those schools is legislated by giving citizens direct and meaningful control over the schools that their children attend." *Id.* at 46, 439 N.E.2d at 367, 453 N.Y.S.2d at 652 (quoting amicus brief filed on behalf of the 85 school districts).

The court of appeals also determined that the differences in services and facilities among the districts arise from the willingness of the taxpayers to finance an enriched education. *Id.* at 45, 439 N.E.2d at 367, 453 N.Y.S.2d at 651.

194. *Id.* at 47, 439 N.E.2d at 368, 453 N.Y.S.2d at 652.

195. *Id.* at 47, 439 N.E.2d at 368, 453 N.Y.S.2d at 653.

196. *Id.* at 48, 439 N.E.2d at 368-69, 453 N.Y.S.2d at 653.

197. See *supra* notes 174-82 and accompanying text.

198. Board of Educ. v. Nyquist, 57 N.Y.2d at 48 n.7, 439 N.E.2d at 368 n.7, 453 N.Y.S.2d at 653 n.7.

199. *Id.* at 48-49, 439 N.E.2d at 369, 453 N.Y.S.2d at 653.

ate.²⁰⁰ Judge Fuchsberg relied substantially on the statistics admitted at trial that evidenced the gross disparities among the school districts.²⁰¹ Consequently, Judge Fuchsberg concluded that, " 'the failure to provide State aid on an equitable basis deprived the children in the large city districts of an equal protection opportunity.' " ²⁰² Judge Fuchsberg also noted that the burdens faced by the original plaintiffs were effectively identical to those borne by the city school districts.²⁰³

Regarding the education clause, Judge Fuchsberg reiterated Justice Hopkins' remark, "that 'the design of a uniform and harmonious system conceived by its nineteenth century authors had been frustrated and distorted' into 'a veritable jungle of labyrinthine incongruity', 'an Ossa of confusion piled on a Pelion of disorder.' " ²⁰⁴ Therefore, Judge Fuchsberg determined that the New York school financing scheme violated the state education clause.²⁰⁵

V. Analysis

A. *The Federal Equal Protection Claims*

The New York courts, in *Board of Education v. Nyquist*,²⁰⁶ recognized the substantial similarity between the New York

200. *Id.* at 58, 439 N.E.2d at 374, 453 N.Y.S.2d at 659 (Fuchsberg, J., dissenting). Judge Fuchsberg suggested the use of strict scrutiny despite the mandate of *Rodriguez*. He reasoned that the basis for strict scrutiny is discrimination with respect to race and alienage, and because minorities are a disproportionate population of the city school districts, the inadequate aid to those districts discriminates against the state's minority students. *Id.* at 59-60, 439 N.E.2d at 375-76, 453 N.Y.S.2d at 659-60. *See also* *Board of Educ. v. Nyquist*, 83 A.D.2d at 254-55, 443 N.Y.S.2d at 866-67 (Weinstein, J., concurring).

201. *Board of Educ. v. Nyquist*, 57 N.Y.2d at 50, 439 N.E.2d at 370, 453 N.Y.S.2d at 654 (Fuchsberg, J., dissenting).

202. *Id.* at 55, 439 N.E.2d at 373, 453 N.Y.S.2d at 657 (quoting Justice Smith, *Board of Educ. v. Nyquist*, 94 Misc. 2d at 519, 408 N.Y.S.2d at 634).

203. *Board of Educ. v. Nyquist*, 57 N.Y.2d at 55, 439 N.E.2d at 373, 453 N.Y.S.2d at 657 (Fuchsberg, J., dissenting).

204. *Id.* (quoting Justice Hopkins, *Board of Educ. v. Nyquist*, 83 A.D.2d at 269, 443 N.Y.S.2d at 875) (emphasis added).

205. *Board of Educ. v. Nyquist*, 57 N.Y.2d at 50, 439 N.E.2d at 370, 453 N.Y.S.2d at 654 (Fuchsberg, J., dissenting).

206. 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. Nassau County 1978), *modified*, 83 A.D.2d 217, 443 N.Y.S.2d 843 (2d Dep't 1981), *modified*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), *appeal dismissed*, 51 U.S.L.W. 3532 (U.S. Jan. 18, 1983) (Nos. 82-639 and 82-655).

school financing system and the Texas system which was considered by the United States Supreme Court in *San Antonio Independent School District v. Rodriguez*.²⁰⁷ The presence of the plaintiffs-intervenors' federal equal protection claim, based on metropolitan overburden, did not sufficiently distinguish *Nyquist* from *Rodriguez*.²⁰⁸ Consequently, the doctrine of *stare decisis* justified the dismissal of the plaintiffs' federal equal protection claims. Indeed, the United States Supreme Court's approval of this result can be inferred from its dismissal of the *Nyquist* appeal.²⁰⁹

B. *The State Equal Protection Claims*

As stated by Justice Hopkins in his appellate division opinion, "the interpretation made by the Supreme Court of the United States concerning the meaning and effect of the Fourteenth Amendment must be granted great respect by the State courts when they are called on to construe the equal protection clause of the State Constitution."²¹⁰ Support for this proposition can be found in New York case law, which has held that New York's equal protection clause is equal in breadth to its federal counterpart.²¹¹ The plaintiffs in *Nyquist* failed to persuade Justice Hopkins, and later, the court of appeals, that a sufficient justification existed for departing from this interpretation of New York's equal protection clause.

Education was not deemed a fundamental interest by the court of appeals, and accordingly the strict scrutiny test was not applied to the equal protection challenges to the New York school financing system.²¹² The United States Supreme Court in *Rodriguez* had held that education was not a fundamental inter-

207. 411 U.S. 1 (1973).

208. See *Board of Educ. v. Nyquist*, 57 N.Y.2d at 41, 439 N.E.2d at 365, 453 N.Y.S.2d at 649.

209. See *Board of Educ. v. Nyquist*, 51 U.S.L.W. 3532 (U.S. Jan. 18, 1983) (Nos. 82-639 and 82-655) (appeal dismissed for want of a substantial federal question).

210. *Board of Educ. v. Nyquist*, 83 A.D.2d at 258-59, 443 N.Y.S.2d at 869 (Hopkins, J., concurring in part and dissenting in part).

211. See, e.g., *Seaman v. Fedourich*, 16 N.Y.2d 94, 209 N.E.2d 778, 262 N.Y.S.2d 444 (1965); *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), cert. denied, 339 U.S. 981 (1950).

212. *Board of Educ. v. Nyquist*, 57 N.Y.2d at 43-44, 439 N.E.2d at 366, 453 N.Y.S.2d at 650-51.

est, relying, however, on the absence of an explicit reference in the United States Constitution to the right to education.²¹³ The New York State Constitution, unlike its federal counterpart, explicitly refers to education as a right inuring to the people of the state.²¹⁴ Since education is constitutionally mandated under the state constitution, the New York courts were forced to go beyond the reasoning of *Rodriguez* to decide what that right involved.

The court of appeals, in determining the extent of the right to education under the state constitution, rejected the argument that since education was explicitly referred to in the constitution, it was a fundamental state interest.²¹⁵ In so holding, the court noted that many powers were enumerated in the state constitution that did not encompass fundamental interests, such as a provision for the superintendence and repair of canals,²¹⁶ and therefore such matters were not to be given greater importance merely because of their inclusion in the state constitution.²¹⁷ To reinforce this interpretation, Justice Hopkins' equal protection analysis added additional concerns that could have resulted had the court of appeals not properly rejected the elevation of education to a fundamental interest, requiring strict scrutiny. Justice Hopkins noted that many powers and rights, including education, were explicitly included in the state constitution.²¹⁸ If the education clause was held to violate the state equal protection clause due to the demonstrated fiscal disparities in this case, future cases would undoubtedly follow where other enumerated rights, such as public health,²¹⁹ would be challenged for containing fiscal disparities in the manner in which the funds were distributed among the state.²²⁰ The state could, if required under

213. See *supra* notes 79-82 and accompanying text.

214. See *supra* note 10.

215. Board of Educ. v. Nyquist, 57 N.Y.2d at 43-44, 439 N.E.2d at 366, 453 N.Y.S.2d at 650.

216. See N.Y. CONST. art. XV, § 3.

217. Board of Educ. v. Nyquist, 57 N.Y.2d at 43 n.5, 439 N.E.2d at 366 n.5, 453 N.Y.S.2d at 650 n.5. See *supra* note 192.

218. Board of Educ. v. Nyquist, 83 A.D.2d at 261, 443 N.Y.S.2d at 871 (Hopkins, J., concurring in part and dissenting in part). See *supra* notes 162-67 and accompanying text.

219. N.Y. CONST. art. XVII, § 3.

220. Board of Educ. v. Nyquist, 83 A.D.2d at 261, 443 N.Y.S.2d at 871 (Hopkins, J.,

this reasoning to provide only comprehensive, exactly tailored services for such interests, choose to deny all services, as the court of appeals warned in *Levy*, thus providing equal treatment to all people of the state under the "categorically neat policy that since all could not be benefitted, none would be."²²¹ Rather than compel the legislature and the courts to hammer out precise, exact solutions in a complex and imprecise world, the court of appeals correctly opted for the present system of school financing, satisfied that it provided at least a basic education for all children of the state, which exceeded the quality offered by most other states.²²²

State funding of public education in New York has been provided by statute since 1795, over 100 years before the education clause was added to the state constitution.²²³ With this in mind, Justice Hopkins, in his appellate division opinion, examined the history of public education funding in New York in assessing the state equal protection claims. The delegation of the financing of public schools to the local municipalities by the state was, according to Justice Hopkins, "part of the fundamental pattern of our government."²²⁴ Despite acknowledging that the resources of the local municipalities vastly differed, Justice Hopkins explained that an equal protection claim based on such delegation of duties had to fail unless one was willing to hold that the state could not constitutionally delegate any functions that created some inequality due to the local control.²²⁵ According to the court of appeals, the inequities that were demonstrated were the result of demographic, economic, and political factors, rather than any state action.²²⁶ Thus, without a direct showing of purposeful discrimination by the state creating these inequities, the courts had to defer to the legislature to remedy

concurring in part and dissenting in part).

221. *In re Levy*, 38 N.Y.2d 653, 660, 345 N.E.2d 556, 560, 382 N.Y.S.2d 13, 17, *appeal dismissed*, 429 U.S. 805 (1976). See *supra* note 111.

222. *Board of Educ. v. Nyquist*, 57 N.Y.2d at 48-49, 439 N.E.2d at 369, 453 N.Y.S.2d at 653. See *supra* text accompanying note 199.

223. See *Board of Educ. v. Nyquist*, 83 A.D.2d at 261, 443 N.Y.S.2d at 870 (Hopkins, J., concurring in part and dissenting in part).

224. *Id.*

225. *Id.* at 260-61, 443 N.Y.S.2d at 870.

226. *Board of Educ. v. Nyquist*, 57 N.Y.2d at 41, 439 N.E.2d at 365, 453 N.Y.S.2d at 649.

the present inequities found in the New York State educational financing system. Given the structure of the state government, the history of local control, and the regional interests of the residents of the state, this approach was the strongest justification for denying the state equal protection claims.

In cases challenging state financing of public schools such as *Rodriguez* and *Nyquist*, the plaintiffs have always asserted that unequal wealth among the school districts resulted in disparities in the quality of education among the local school districts.²²⁷ Although the plaintiffs and the plaintiffs-intervenors in *Nyquist* were able to show disparities in wealth among various local school districts in New York State, no conclusive showing of unequal educational services was ever established.²²⁸ Justice Hopkins, in his appellate division opinion, squarely addressed the claims of varying degrees of state supplied education among the districts. He first attacked the notion that expenditures alone were decisive of the quality of education. Noting that commentators were critical of the lack of proof of this correlation, he refused to strike down the present system on such unproven theories.²²⁹ In addressing the claim that wealthier districts could afford more expansive buildings and maintain larger staffs, thus reducing the teacher-pupil ratio, Justice Hopkins suggested that these factors, in and of themselves, did not insure a higher quality of education over the poorer districts. Drawing perhaps on his own educational background and interests, he suggested that a one-room school house, with a capable teacher and attentive pupils, might yield a better education than a large suburban school with small class sizes, or alternatively, that cultural and artistic resources available in New York City such as museums might provide experiences that students outside of New York

227. See, e.g., *id.* at 35-36, 439 N.E.2d at 361-62, 453 N.Y.S.2d at 646; accord Brief for Appellees at 3, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), reprinted in 76 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 173, 175 (P. Kurland & G. Casper eds. 1975).

228. See *Board of Educ. v. Nyquist*, 83 A.D.2d at 259-60, 443 N.Y.S.2d at 869-70 (Hopkins, J., concurring in part and dissenting in part).

229. *Id.* at 259, 443 N.Y.S.2d at 870 (citing J. COONS, W. CLUNE III & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 30 (1970); Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303 (1972)).

City could not enjoy.²³⁰ Despite all of the impressive figures on the disparities in wealth among the local school districts, Justice Hopkins' analysis places these statistics in their proper perspective, and accordingly, without further proof of their correlation to educational opportunities, the equal protection arguments were properly denied.

C. *The Education Clause Claims*

The court of appeals, although agreeing with Justice Hopkins' appellate division opinion in finding no violation of the federal or state equal protection clauses, rejected Justice Hopkins' finding that there was a violation of the education clause.²³¹ Both the majority and Justice Hopkins examined the wording of the education clause to come to their respective results. According to Justice Hopkins, the word "system" encompasses more than just the fundamental instructional system, and includes the maintenance and support of that system.²³² In tracing the historical context of the education clause, he found further justification for his interpretation, in that state funding had been supplied to the public schools through a common school fund for 100 years before the education clause was included in the state constitution, inferring that the education clause was selected with the approval that state support was to be continued through a system.²³³ Concluding that the education clause required a system of maintenance and support, Justice Hopkins found no such system to exist given the complex and patchwork formulas for computing and assessing state aid to local school districts currently in use.²³⁴ The court of appeals, in interpreting the education clause, consulted the relevant legislative history of the provision.²³⁵ Although it indicated that such history was "in-

230. Board of Educ. v. Nyquist, 83 A.D.2d at 260 n.2, 443 N.Y.S.2d at 870 n.2. See *supra* note 161. Justice Hopkins' grade school education was in a one-room schoolhouse in Armonk. See *A Tribute to Justice James D. Hopkins*, *supra* at 442, 448, 453.

231. See Board of Educ. v. Nyquist, 57 N.Y.2d at 48 n.7, 439 N.E.2d at 368 n.7, 453 N.Y.S.2d at 653 n.7.

232. Board of Educ. v. Nyquist, 83 A.D.2d at 266-67, 443 N.Y.S.2d at 873-74 (Hopkins, J., concurring in part and dissenting in part).

233. *Id.* at 267, 443 N.Y.S.2d at 874.

234. *Id.* at 269, 443 N.Y.S.2d at 875. See *supra* text accompanying note 182.

235. Board of Educ. v. Nyquist, 57 N.Y.2d at 47-48 & n.6, 439 N.E.2d at 368 & n.6,

formative," the majority deemed it irrelevant to an interpretation of the provision, stating that what had been suggested as "sound educational policy" in interpreting the system to include maintenance and support had to be "clearly distinguished from the command laid on the Legislature by the Constitution."²³⁶ Thus, the court of appeals, based on what the legislative history did not explicitly state, rejected Justice Hopkins' analysis of a system, stating that "system" merely modified "free common schools."²³⁷ Under this interpretation, the court of appeals required that a "system of free common schools" include only a "sound basic education."²³⁸

When conflicting interpretations by various courts arise in cases such as this one, both interpretations are usually plausible and have support in the law. In the instant case, concededly both interpretations are faithful to the legislative history and the law. The court of appeals rejected Justice Hopkins' interpretation, upholding the financing system as constitutional upon the justification that New York State was "a leader in free public education" and that its "per pupil expenditure exceed[ed] that in all other States but two."²³⁹ In so concluding, the court of appeals implicitly adopted the argument that per pupil expenditure was directly correlated to educational quality, a notion never proven and openly criticized by Justice Hopkins.²⁴⁰ Without further explanation of the relationship of district expenditure and educational quality, the court of appeals adopted a pragmatic approach, refusing to strike the financing system despite the acknowledged amalgam of the current system.

Although the majority was careful to indicate "the very great, and perhaps understandable, temptation to yield a result-oriented resolution of this litigation" as it so chastised the dissent,²⁴¹ it was not completely immune from this evil itself. Without a comprehensive plan to replace the current system, it can

453 N.Y.S.2d at 652-53 & n.6.

236. *Id.* at 48 n.6, 439 N.E.2d at 368 n.6, 453 N.Y.S.2d at 653 n.6.

237. *Id.* at 48 n.7, 439 N.E.2d at 368 n.7, 453 N.Y.S.2d at 653 n.7.

238. *Id.* at 47-48, 439 N.E.2d at 368-69, 453 N.Y.S.2d at 652-53.

239. *Id.* at 48, 439 N.E.2d at 369, 453 N.Y.S.2d at 653.

240. *See supra* text accompanying notes 229-30.

241. *Board of Educ. v. Nyquist*, 57 N.Y.2d at 49 n.9, 439 N.E.2d at 369 n.9, 453 N.Y.S.2d at 654 n.9.

be inferred that the court of appeals was loathe to reject a flawed, but working, system in favor of leaving the issue to the legislature to resolve. Given the political interests involved, pitting small districts against large, poor against wealthy, rural against urban, town against city, the legislature would be hard pressed to produce a solution better than that which currently exists. This approach, however, validates and perpetuates the legislature's failure to improve the educational system. The court of appeals' decision is not a resounding vote in favor of New York's current financing system; there is much need for the legislature to devise a better solution to this important state function.

VI. Conclusion

The New York Court of Appeals decision in *Board of Education v. Nyquist* represents a pragmatic conclusion to a controversial issue. The court correctly applied the rational relation test in determining the validity of the equal protection challenge to New York's public school financing system. Additionally, New York's education clause is not a basis for finding a fundamental right to education. Indeed, had the equal protection claims been sustained, a floodgate of litigation challenging the financial support of other constitutional mandates may have opened. Finally, this case presents issues which are particularly suited for resolution in the legislature without judicial intervention.

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