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Wyoming's Equal Protection Clause Mandates Fiscal Neutrality in School Funding

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COMMENTS

WYOMING'S EQUAL PROTECTION CLAUSE MANDATES FISCAL NEUTRALITY IN SCHOOL FUNDING

The financing of public schools in Wyoming is based primarily on district and county property taxes.[1] The revenue derived from these taxes is utilized by each school district solely within its respective county. Since assessed property valuations vary extremely throughout the state, a substantial disparity in the amount of money available for public education exists among the state's forty-nine districts.[2] The property poor districts consistently have less total revenue than the property rich districts based on assessed valuation per student.[3] On June 28, 1978, three Wyoming school districts and affected citizens residing therein[4] brought an action under the Wyoming Declaratory Judgments Act[5] asking that the system of financing public schools be declared violative of the Wyoming Constitution.[6] The Wyoming Supreme Court held that under the present system "the quality of a child's education in Wyoming . . . is dependent upon the property tax resources of his school district," and therefore the system does not afford equal protection as guaranteed by the Wyoming Constitution.[7]

The court gave the legislature until July 1, 1983, to implement a school funding plan which will pass constitutional muster.[8] This comment will: 1) explain the property tax sources of school funding in Wyoming, 2) discuss the court's analysis in *Washakie County School District Number*

1. Washakie County School District Number One v. Herschler, 606 P.2d 310, 323, 324 (Wyo. 1980).
2. *Id.* at 329-32.
3. *Id.* at 330.
4. *Id.* at 314.
5. WYO. STAT. §§ 1-37-101 through 1-37-115 (1977).
6. Washakie County School District Number One v. Herschler, *supra* note 1, at 314.
7. *Id.* at 332; WYO. CONST. art. I, § 34. "All laws of a general nature shall have a uniform operation."
8. *Id.* at 340.

One v. Herschler, 3) compare the Wyoming Supreme Court's equal protection analysis to that employed by the U.S. Supreme Court when deciding Fourteenth Amendment-equal protection questions, 4) survey the school financing cases, both in Wyoming and other states, 5) examine various reform methods of school financing, and finally, 6) preview the proposed new method of school funding in Wyoming.

I. DISTRICT WEALTH BASED FINANCING—UNCONSTITUTIONAL

Pre-Washakie Sources of Funding—The Current System

The state legislature has the dual responsibility of: 1) providing a school system as a whole and 2) financing it.[9] To accomplish the task of financing, the legislature may draw from a broad spectrum of resources.[10] However, the mill levy property tax [also called the ad valorem tax] makes up approximately 66% of the total revenue used for public education.[11] This is where most of the disparity of resources available to school districts originates.[12] Consequently, the court in *Washakie* focused mainly on the property tax sources of revenue for schools.[13]

The state constitution has several provisions for levying property taxes for school purposes:

> 1. A state tax of six mills may be levied each year for the support of public education.[14]
>
> 2. A mandatory county tax of twelve mills is collected annually, and the proceeds are distributed among the school districts within the county as the legislature provides.[15]

9. WYO. CONST. art. VIII, § 1.
10. Washakie County School District Number One v. Herschler, *supra* note 1, at 320, 323.
11. *Id.* at 322.
12. *Id.* at 324.
13. *Id.*
14. WYO. CONST. art. XV, § 15.
15. WYO. CONST. art. XV, § 17.
16. WYO. CONST. art. XV, § 5.

> 3. A part of the revenue derived from a county tax not to exceed twelve mills on the dollar for *all* county purposes may be collected annually.[16]
>
> 4. The legislature has the power to make such further provision "by taxation or otherwise" as necessary to create a thorough and efficient system of public education.[17]

These constitutional taxing provisions are implemented by various statutes. The six mills state school tax levy is effectuated by Section 21-13-303 of the Wyoming Statutes.[18] The revenue derived from this tax is transferred into the Wyoming School Foundation Program.[19] The purpose of the foundation program is to guarantee a *minimum* education for every child by providing financial assistance to those local school districts with relatively fewer resources available to them.[20] The twelve mills *mandatory* county tax for support of public schools is implemented by Section 21-13-201 of the Wyoming Statutes.[21] This tax is collected by the county treasurer and distributed as directed by the state superintendent of schools to the school districts in that county. Of the twelve mills *general* county tax, a maximum of three mills may be used for school purposes.[22]

Each of the three property tax sources of school funding discussed above are expressly authorized by the state constitution.[23] One additional property tax source of school funding, a special school district tax, has statutory authorization.[24] Section 21-13-101 of the Wyoming Statutes[25] allows a tax of up to ". . . twenty-eight mills for combined

17. WYO. CONST. art. VII, § 9.
18. WYO. STAT. § 21-13-303 (1977).
19. WYO. STAT. §§ 21-13-305 to 21-13-314 (1977), as amended.
20. Washakie County School District Number One v. Herschler, *supra* note 1, at 322. The foundation program has other sources aside from the six mills levy. All state money for elementary and secondary education is placed in this fund. WYO. STAT. § 21-13-306 (1977).
21. WYO. STAT. § 21-13-201 (1977).
22. WYO. STAT. § 21-13-205 (1977).
23. The six mills state tax by article XV, section 15 of the Wyoming Constitution; the twelve mills mandatory county tax for support of public school by article XV, section 17 of the Wyoming Constitution; the twelve mills general county tax for all county purposes by article XV, section 5 of the Wyoming Constitution.
24. WYO. STAT. § 21-13-101 (1977).
25. *Id.*

elementary and high school purposes, three mills of which shall not be levied except with the approval of the majority of voters voting on the proposition," to be levied for all school purposes.[26] However, this tax finds *no explicit textual support* in the state constitution.[27] The *Washakie* court stated that the special district tax might be allowable under the general terms of article VII, section 9 of the Wyoming Constitution.[28] However, the special district levy raises more revenue than the combined sum of all other ad valorem levies for school purposes,[29] and the court concluded that this tax was the principal cause of the substantial interdistrict disparity of school funding.[30]

The Court's Analysis in Washakie

The *Washakie* court engaged in strict judicial scrutiny of the Wyoming system of financing public education.[31] Under the Wyoming Supreme Court's analysis, if a fundamental interest is *affected* or if a classification is inherently suspect, then strict judicial scrutiny shall be invoked in order to determine whether the classification is necessary to achieve a compelling state interest.[32] If strict judicial scrutiny is applied, then those defending the classification have the burden of proving it fulfills a compelling state interest and that no less onerous alternative classifications are available.[33]

Both a fundamental right and an inherently suspect classification were found to be present in *Washakie*.[34] The court relied on article I, section 23, and article XXI, section

26. *Id.*
27. Washakie County School District Number One v. Herschler, *supra* note 1, at 335.
28. *Id.* at 321. Article VII, Section 9 of the Wyoming Constitution provides: "The legislature shall make such further provision by taxation or otherwise, as with the income arising from the general school fund will create and maintain a thorough and efficient system of public schools, . . ."
29. *Id.* at 335.
30. *Id.* at 324.
31. Washakie County School District Number One v. Herschler, *supra* note 1, at 333.
32. *Id.*
33. *Id.* at 333-34.
34. *Id.*

28 of the Wyoming constitution[35] to support its conclusion that education of the children of Wyoming is of fundamental importance under the state constitution.[36] The court also emphasized the *Brown v. Board of Education of Topeka* proposition[37] that education may be the most important function that state and local governments perform, and the right to education should be available to all on equal terms.[38]

The Wyoming program of funding public schools was found to be a function of local wealth, since it was based primarily on local ad valorem taxes.[39] Citing *Harper v. Virginia Board of Elections*,[40] the *Washakie* court held that, "A classification on the basis of wealth is considered suspect especially when applied to fundamental interests."[41] Even though funds in the foundation program were distributed to the school districts in accordance with need, there was not enough revenue in the foundation to raise the poor counties to the level of the rich counties.[42] The substantial difference in total revenue among districts is illustrated by Appendix A to the *Washakie* opinion.[43] The Campbell County and Hot Springs County School Districts had total revenue per average daily membership of $3299 and $3033, respectively. The Niobrara County and Park County School Districts had total revenue per average daily membership of $2124 and $1759, respectively.[44] Without the aid of a prior trial on the merits and a full and complete record,[45] the Wyoming Su-

35. WYO. CONST. art. I, § 23, reads: "The right of citizens to opportunities for education should have practical recognition. The legislature shall suitably encourage means and agencies calculated to advance the sciences and liberal arts." WYO. CONST. art. XXI, § 28, reads: "The legislature shall make laws for the establishment and maintenance of systems of public schools which shall be open to all the children of the state and free from sectarian control."
36. Washakie County School District Number One v. Herschler, *supra* note 1, at 333.
37. Brown v. Board of Education of Topeka, 347 U.S. 483, 493 (1954).
38. Washakie County School District Number One v. Herschler, *supra* note 1, at 333-34.
39. *Id.* at 335.
40. Harper v. Virginia Board of Elections, 383 U.S. 663, 668, 670 (1968).
41. Washakie County School District Number One v. Herschler, *supra* note 1, at 334.
42. *Id.*
43. *Id.* at 338-39.
44. *Id.*
45. The District Court, Hot Springs County, granted the state's motion to dismiss. *Id.* at 311.

preme Court concluded *a priori* that without equality of financing, equality of educational opportunity in Wyoming cannot be achieved, and therefore equal protection is being denied.[46] The court did not specifically say who was denied equal protection. While it is arguable that all school children in the state of Wyoming except those in the wealthiest school districts are the victims, the language in the *Washakie* opinion seems to indicate that the relatively poorer counties are the ones being denied this constitutional guarantee.[47] The state did not adequately show that a less burdensome alternative method of financing public schools was available, and therefore the court declared the entire system unconstitutional.[48]

The court pointed out that no single element of the system standing alone violates the constitution, but gave several hints as to "highly suspect" statutes and potential solutions.[49] After *Washakie*, the special district tax,[50] which authorizes a twenty-five mills levy with a three mills override if approved by the voters, is probably unconstitutional under the present system.[51] This tax is greater than the sum of the six mills state tax, the twelve mills mandatory county tax for support of public schools, and the three mills from the general county tax which may be used for school purposes.[52] Further, it is the only one of these taxes which does not have express constitutional authorization.[53] The assessed property valuations vary substantially among school districts,[54] and the vast majority of school districts are levying the maximum tax allowed by statute without a voter override.[55] Therefore, the special school district tax levied and utilized solely by

46. *Id.* at 334.
47. *Id.* "It would be unacceptable logic to deduce that the wealthy counties are squandering their money merely from the fact that the poor counties are getting along just fine and providing an adequate education on the lesser amounts per child they have."
48. *Id.*
49. *Id.* at 335-37.
50. WYO. STAT. § 21-13-101 (1977).
51. Washakie County School District Number One v. Herschler, *supra* note 1, at 335.
52. *Id.*
53. *Id.* at 332, 335.
54. *Id.* at 328.
55. WYO. STAT. § 21-13-101 (1977); Washakie County School District Number One v. Herschler, *supra* note 1, at 326-27.

each school district within its respective county is the single greatest factor causing the significant disparity in financial resources among the school districts. In *Washakie*, the court suggested an investigation be conducted on the feasibility of levying the special school district tax on a statewide basis and then paying the revenue therefrom into the foundation fund or other state fund.[56] The revenue from this state fund would then be paid out to the school districts in accordance with "a legislative formula on an equitable basis throughout the state."[57]

The distributive scheme of income derived from school lands was also singled out by the *Washakie* court as constitutionally suspect.[58] Whereas the court condemned other statutes under an equal protection analysis, it earmarked the School Land Income distribution scheme a likely violator of article VII, section 8, of the Wyoming Constitution, as amended.[59] This provision requires that school funds be *equitably* allocated among all school districts in the state.[60] Before 1979, Section 21-13-301, of the Wyoming Statutes[61] provided for distribution "pro rata among the several counties of the state according to the number of children of school age in each as determined by reference to the last preceding annual school enumeration." Amended in 1979, this Section now provides for distribution "pro rata among the several counties of the state according to the number of children of school age in each as determined by the average daily membership[62] of the school districts within each county for the preceding school year."[63] Distribution pursuant to this statute on the basis of average daily membership of the

56. *Id.*
57. *Id.*
58. *Id.* at 336.
59. Washakie County School District Number One v. Herschler, *supra* note 1, at 336. Article VII, section 8 of the Wyoming Constitution (Cum. Supp. 1980) provides: "The legislature shall make such further provision by taxation or otherwise, as with the income arising from the general school fund will create and maintain a thorough and efficient system of public schools, . . ."
60. WYO. CONST. art. VII, § 8 (Cum. Supp. 1980).
61. WYO. STAT. § 21-13-301 (1977).
62. Average daily membership is approximately equal to number of pupils. Washakie County School District Number One v. Herschler, *supra* note 1, at 322 n. 14.
63. WYO. STAT. § 21-13-301 (Cum. Supp. 1980).

school districts is not likely to pass constitutional muster after *Washakie*. To satisfy the constitutional criterion of "equitable allocation",[64] the court suggested that this revenue be placed in the foundation fund.[65]

Further, the *Washakie* court noted that the present method of financing capital projects with which to carry on the process of education was "tarred with the same brush of disparate tax resources" as the other aspects of the financing system.[66] To be constitutional, the new funding program will have to provide for statewide availability of state resources for the financing of physical facilities on an equal basis for all school districts.[67]

Clearly the method of providing public education must not be based on the wealth of the school district in order to comply with the state equal protection guarantee. In addition, there is a restraint imposed by article VII, section 8 of the Wyoming Constitution which requires the "equitable allocation" of school income funds.[68] Precise dollar for dollar input per student is not mandated, and allowances for such things as local impact and rural factors must be made.[69] All of this places a heavy burden upon the legislature to devise a new financing system which can withstand the Wyoming Supreme Court's rigorous constitutional analysis.

II. COMPARISON OF WYOMING AND FEDERAL EQUAL PROTECTION ANALYSIS

The equal protection analysis engaged in by the Wyoming Supreme Court in *Washakie* differs in several material respects from that employed by the United States Supreme Court when deciding questions under the equal protection clause of the Fourteenth Amendment of the United States Constitution. It is important to understand the distinctions

64. WYO. CONST. art. VII, § 8 (Cum. Supp. 1980).
65. Washakie County School District Number One v. Herschler, *supra* note 1, at 322 n. 14.
66. *Id.* at 337.
67. *Id.*
68. WYO. CONST. art. VII, § 8 (Cum. Supp. 1980).
69. Washakie County School District Number One v. Herschler, *supra* note 1, at 336.

between the two types of analysis, because the result in an equal protection case may hinge solely upon whether the state or the federal equal protection provision is appiled.[70]

The system of financing public education in Texas and Wyoming are comparable: both rely heavily on the local ad valorem property tax to raise revenues to be used in local schools.[71] In addition, both states have substantial inter-district disparities in school expenditures.[72] The *Washakie* court found both a fundamental interest and a suspect classification and applied strict scrutiny to Wyoming's financing system,[73] whereas the U.S. Supreme Court in *San Antonio Independent School District v. Rodriguez* found neither a fundamental right nor a suspect classification,[74] and applied the rational relationship test to the method of financing education in Texas.[75] When the rationality test is applied, as opposed to strict judicial scrutiny, the court will presume a legislative classification is valid.[76] The party attacking the classification can prevail only by showing that it is inherently arbitrary.[77] This is a heavy burden, because the classification will be upheld if any set of facts can reasonably be conceived that would sustain it.[78] Thus, it is difficult to invalidate legislation in an equal protection attack unless

70. *See*, Serrano v. Priest, 487 P.2d 1241, and Serrano v. Priest, 557 P.2d 929. In *Serrano I* the California Supreme Court declared the California system of financing public education unconstitutional because it violated the equal protection clause of the Fourteenth Amendment of the U.S. Constitution. *Id.* at 1251-52. In a footnote to the Serrano I opinion, the court indicated that the *state* equal protection provision also was applicable because it was "substantially the equivalent" of the federal equal protection guarantee. *Id.* at 1249 n. 11. Nevertheless, the *Serrano* I decision rested squarely on the federal constitution. *Id.* at 1249-63. The U.S. Supreme Court in *Rodriguez* upheld the ad valorem based system of financing public education in Texas, finding no denial of equal protection. San Antonio Independent School District v. Rodriguez, 611 U.S. 1, 2 (1972). The California court in *Serrano* II, modified its *Serrano* I opinion, without changing the result, by grounding the holding of unconstitutionality solely in the state constitution's equal protection clause. Serrano v. Priest, 557 P.2d 929, 952-55 (1977).
71. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 6-15 (1972). Washakie County School District Number One v. Herschler, *supra* note 1, at 324.
72. Washakie County School District Number One v. Herschler, *supra* note 1, at 324.
73. *Id.* at 333-34.
74. San Antonio Independent School District v. Rodriguez, *supra* note 71, at 18.
75. *Id.* at 2.
76. Lindsey v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).
77. *Id.*
78. *Id.*

heightened scrutiny is invoked. Since either the requisite interference with a fundamental right or the disproportionate impact upon a suspect classification will trigger strict judicial scrutiny,[79] the criteria a court uses to define a right that is fundamental or a classification that is suspect becomes critical.

Assessing a Fundamental Right

The *Washakie* court held that education for Wyoming children is a fundamental right because of its importance.[80] Two provisions of the Wyoming Constitution emphasize the importance of education and direct the legislature to establish and maintain free public schools open to all children of the state.[81] The *Washakie* court cited *Brown v. Board of Education of Topeka*[82] to support its proposition that education is essential and might be the most important function that state and local governments perform.[83] However, the U.S. Supreme Court in *Rodriguez* rejected the idea that a right was fundamental simply because of its importance; holding instead that a right in order to be fundamental must either be explicitly or implicity guaranteed by the constitution.[84] The Wyoming Supreme Court could have applied the *Rodriguez* analysis and still reached the *Washakie* result by interpreting article XXI, section 28, of the Wyoming Constitution as either explicitly or implicitly guaranteeing a right to education.[85] While Wyoming is not the only state to dismiss the *Rodriguez* approach to assessing fundamental rights,[86] the practice of subjecting a classification to strict judicial scrutiny merely because the right affected is important sets a precedent with uncertain ramifi-

79. Washakie County School District Number One v. Herschler, *supra* note 1, at 333.
80. *Id.* at 333-34.
81. WYO. CONST. art. I, § 23, WYO. CONST. art. XXI, § 28.
82. Brown v. Board of Education of Topeka, *supra* note 37.
83. Washakie County School District Number One v. Herschler, *supra* note 1, at 333-34.
84. San Antonio Independent School District v. Rodriguez, *supra* note 71, at 33.
85. WYO. CONST. art. XXI, § 28 reads: "The legislature shall make laws for the establishment and maintenance of systems of public schools which shall be open to all the children of the state and free from sectarian control."
86. *See* Serrano v. Priest, *supra* note 70, at 952; Horton v. Meskill, 376 A.2d 359, 373-74 (Conn. 1977).

cations. Under the U.S. Supreme Court's approach, heightened scrutiny under the equal protection clause is carefully circumscribed. Only certain established constitutional rights are characterized as fundamental and thereby subjected to strict scrutiny.[87] The rationale seems to be that since these rights are constitutional guarantees, they warrant the Court's utmost protection.[88] Such rights include the right to travel,[89] to vote,[90] and to marry.[91] The *Washakie* court's approach of deeming a right to be fundamental if it is important enough could expand this list to such things as the right to police and fire protection. While these are both very important functions of state and local government, the practice of subjecting a legislative plan for dealing with these rights to strict scrutiny tends to place the court in a legislative role.[92]

The Requisite Level of Interference

In order for strict scrutiny to be applied, a higher level of interference with a fundamental right is required under the equal protection clause of the U.S. Constitution than under the substantially equivalent clause of the Wyoming Constitution.[93] In *Washakie*, all that was required for the heightened level of judicial review to be invoked was for the fundamental right of education to be affected.[94] Since all legislation concerning education will "affect" education, the court opened the door for the application of strict scrutiny to all such classifications. The U.S. Supreme Court, on the other hand, usually looks for a *penalty* on the exercise

87. Shapiro v. Thompson, 394 U.S. 618, 642-44 (1969) (concurring opinion).
88. *Id.*
89. *Id.* at 638.
90. Harper v. Virginia Board of Elections, *supra* note 40.
91. Zablocki v. Redhail, 434 U.S. 374 (1978).
92. *See*, San Antonio Independent School District v. Rodriguez, *supra* note 71, at 31. The opinion of the Court notes that if fundamentality were determined by the importance of a right, the Court would be going far towards being a "super-legislature".
93. WYO. CONST. art. I, § 34.
94. Washakie County School District Number One v. Herschler, *supra* note 1, at 333.

of a fundamental right.[95] An interference which does not rise to the level of a penalty or serve as an absolute bar to the exercise of a fundamental right triggers the rationality test, not heightened scrutiny. In *Sosna v. Iowa*, where a state statute imposed a one year durational residency requirement upon those seeking a divorce in the Iowa courts, the Supreme Court upheld the statute even though it adversely affected the fundamental right to travel from state to state, because it did not completely bar the plaintiff from obtaining some part of what she sought.[96] The *Sosna* Court distinguished *Shapiro v. Thompson*[97] on the basis that in *Shapiro*, the plaintiff was "irretrievably foreclosed" from securing a portion of what she was seeking.[98] The *Shapiro* Court applied strict scrutiny to a state statute which imposed a one year durational residency requirement on those seeking welfare.[99]

By applying the rationality test to classifications which do not rise to the level of a penalty or serve as an absolute bar upon the exercise of a fundamental right, the U.S. Supreme Court has deferred to the legislature the power to implement classifications which merely affect fundamental rights as long as they have a conceivably rational relationship to a legitimate state end. However, in *Washakie*, only a showing of an effect upon a fundamental right was required.[100] This indicates a willingness by the court to tread upon what would otherwise be the legislature's territory.

95. *See*, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), where the Court held that a state statute requiring a year's residence in a county as a condition upon an indigent's obtaining nonemergency hospitalization or medicare *penalized* the constitutional right of interstate migration. *Also see*, Shapiro v. Thompson, *supra* note 87, where a statute which conditioned the right to receive welfare upon a one year's prior residence in the state was struck down as a *penalty* upon the exercise of a fundamental right. *But see*, Zablocki v. Redhail, 434 U.S. 374 (1978), where the Court merely required the classification to *significantly interfere* with the fundamental right to marry before invoking strict scrutiny.

96. Sosna v. Iowa, 419 U.S. 393, 406 (1975).

97. Shapiro v. Thompson, *supra* note 87.

98. Sosna v. Iowa, *supra* note 96.

99. Shapiro v. Thompson, *supra* note 87.

100. Washakie County School District Number One v. Herschler, *supra* note 1, at 833.

Wealth as a Suspect Classification

The wealth discrimination ascertained in *Washakie* to create a suspect classification is substantially different from any type of wealth discrimination reviewed by the U.S. Supreme Court.[101] The salient distinction is that the U.S. Supreme Court will not deem a classification to be suspect unless it discriminates against a class that is saddled with disabilities or has historically been subjected to purposeful discrimination.[102] Wealth discrimination was at least one basis for the U.S. Supreme Court invoking strict scrutiny in *Harper v. Virginia Board of Elections.*[103] However, the statute being attacked in *Harper*, conditioning the right to vote upon the payment of a poll tax, discriminated against poor people as a class.[104] Poor people clearly satisfy the Supreme Court's prerequisite of having suffered through a history of disabilities. In *Rodriguez*, the Supreme Court faced a classification that burdened poor *school districts*,[105] which is precisely what the Wyoming Supreme Court confronted in *Washakie.*[106] The *Rodriguez* Court held that discrimination on the basis of district wealth did not create a suspect classification, because a *district* does not have any of the "traditional indicia of suspectness."[107] Not requiring a past history of discrimination and disability, the *Washakie* court found that a district wealth based classification is suspect.[108]

Even when the U.S. Supreme Court finds that a classification burdens the poor, wealth discrimination *alone*, with

101. San Antonio Independent School District v. Rodriguez, *supra* note 71, at 18-19.

102. *Id.* at 28.

103. Harper v. Virginia Board of Elections, *supra* note 40. In *Harper*, a statute conditioning the right to vote upon the payment of a poll tax was struck down under the equal protection clause. *Id.* at 666. Both a suspect classification on the basis of wealth and the infringement of the fundamental right to vote triggered strict scrutiny. *Id.* at 667-69.

104. *Id.* at 668-69.

105. San Antonio Independent School District v. Rodriguez, *supra* note 71, at 28.

106. Washakie County School District Number One v. Herschler, *supra* note 1, at 334.

107. San Antonio Independent School District v. Rodriguez, *supra* note 71, at 28.

108. Washakie County School District Number One v. Herschler, *supra* note 1,

two narrow exceptions,[109] is not sufficient to trigger strict scrutiny.[110] In addition to finding wealth discrimination in *Harper*,[111] the Court held that conditioning the right to vote upon the payment of a poll tax infringed upon the fundamental right to vote.[112] Since the *Washakie* court found both a suspect classification based on wealth and the requisite interference with a fundamental right,[113] the case is probably not precedent for the proposition of triggering strict scrutiny when only wealth discrimination is found. Our state has many instances of the government charging everyone the same price for its services regardless of ability to pay. For example, university tuition, hunting licenses, and automobile licensing fees are the same for rich and poor. Clearly, the indigent may be unable to pay for one or all of these. However, this does not mean these classifications will be subjected to strict judicial scrutiny. It is simply the way our society functions. If in the future the Wyoming Supreme Court strictly scrutinizes classifications which only defacto discriminate on the basis of wealth, then the state's political structure stands to be drastically changed.

III. THE FLOOD OF SCHOOL FINANCE LITIGATION

Previous Wyoming Decisions

The legislature addressed the problem of unequal resources available for school funding among school districts

109. *See*, Boddie v. Connecticut, 401 U.S. 371 (1971), where the Court applied due process strict scrutiny to strike down a state statute which imposed filing fees upon all persons seeking a divorce, because it restricted poor people from bringing such an action. *Id.* at 372. The Court held that since the state had *monopolized* the means for legally dissolving a marriage, due process prohibited denial of access to the courts for those seeking a divorce solely because of inability to pay. *Id.* at 374. *See also*, United States v. Kras, 409 U.S. 434 (1973), and Maher v. Roe, 432 U.S. 464 (1977), where the Court refused to extend the *Boddie* Court's application of strict scrutiny of wealth based classification to cases where the state did not monopolize the means for obtaining an adjudication of bankruptcy and an abortion, respectively.

In cases dealing with the *criminal* justice system, certain rights can not be denied the indigent defendant. *See*, Griffin v. Illinois, 351 U.S. 12 (1956), where the Court held indigent defendants had a right to be provided with trial transcripts. *See also*, Douglas v. California, 372 U.S. 353 (1963) where indigent defendant was found to have the right to be provided with counsel for the first appeal.

110. San Antonio Independent School District v. Rodriguez, *supra* note 71, at 29.

111. Harper v. Virginia Board of Elections, *supra note* 40, at 668.

112. *Id.* at 667.

113. Washakie County School District Number One v. Herschler, *supra* note 1, at 333-34.

when it passed the Wyoming School District Organization Law of 1969.[114] The purpose of this chapter was to provide an improved and more equalized education opportunity for all pupils in Wyoming and to reduce the disparity of resources available for education among school districts.[115] The flaw in the Wyoming School Districts Organization Law of 1969 is that it only reduces the disparity of available resources per classroom unit among the school districts in their respective counties and not among all the school districts in the state.[116]

In *Sweetwater County Planning Committee for the Organization of School Districts v. Hinkle*,[117] the controversy centered on the property rich Bairoil school system and which unified school district would merge with it. The Wyoming Supreme Court recognized that the Wyoming School District Organization Law of 1969 did not sufficiently reduce the disparity in the amount of resources available per classroom unit to school districts and stated:

> We see no manner in which ad valorem taxes for school purposes can be made equal and uniform unless it is done on a statewide basis. In other words, all property owners within the state should be required to pay the same total mill levy for school purposes.[118]

The court then proposed that the legislature provide a system for a uniform property tax to be levied throughout the state for purposes of school financing.[119] Funds derived from this levy [excluding the constitutionally mandated twelve mills county levy for school purposes] would be transmitted to the state treasurer.[120] The state superintendent of education would then direct the state treasurer to proportionally distribute these funds so that each district would receive "the same share per classroom unit, when the allotment from the

114. WYO. STAT. § 21-5-102 (1977).
115. *Id.*
116. Sweetwater County Planning Committee for the Organization of School Districts v. Hinkle, 491 P.2d 1234, 1236-37 (Wyo. 1971).
117. *Id.*
118. *Id.* at 1237.
119. *Id.* at 1237-38.
120. *Id.*

countywide twelve mills school levy and the additional allotment from the state treasurer are added together."[121] Two months after retaining jurisdiction until the close of the next legislative session, the court relinquished its jurisdiction in *Hinkle*.[122] However, the court reaffirmed its position that the legislature should take the necessary steps to equalize revenue derived from ad valorem taxes for school purposes on a statewide basis instead of the countywide basis provided for in the Wyoming School District Organization Law of 1969.[123]

The Wyoming court again enunciated the principle of reducing the disparity of per pupil valuation among school districts on the basis of statewide action in *Johnson v. Schrader*.[124] The court rejected Goshen County's school district reorganization plan because of the substantial disparity of funding per pupil among the four proposed districts in the county.[125] In dictum, the *Johnson* court correctly foresaw that the issue of equalization of school funding might necessarily expand into statewide action because of possible equal protection violations.[126]

Decisions Outside Wyoming

Other state courts have dealt with the question of unequal funding of education among school districts. In *Serrano v. Priest*, the California Supreme Court held that the state school financing system based heavily on local property taxes, with concomitant disparity among school districts in the amount of resources available per pupil for education, violated the equal protection clause of the Fourteenth Amendment of the U.S. Constitution.[127] The *Serrano* court

121. *Id.* at 1238.
122. Sweetwater County Planning Committee for the Organization of School Districts v. Hinkle, 493 P.2d 1050, 1052 (Wyo. 1972).
123. *Id.* at 1051.
124. Johnson v. Schrader, 507 P.2d 814 (Wyo. 1973). *Johnson*, along with *Hinkle*, was brought pursuant to the Wyoming school District Organization Law of 1969. In *Johnson*, the County Committee of Goshen County formulated a reorganization plan which the committee admitted did not comply with the Wyoming School District Reorganization Law of 1969.
125. *Id.* at 816.
126. *Id.*
127. Serrano v. Priest, *supra* note 70.

applied a two-tier test for evaluating the allegedly unconstitutional funding method.[128] The court applied strict judicial scrutiny, because education was deemed to be of fundamental importance[129] and concluded the property tax funding system created a suspect classification, because it invidiously discriminated against the poor.[130] Since the state did not show any compelling interest which necessitated that particular system of financing, the court found that the California scheme of funding public schools violated the equal protection clause of the Fourteenth Amendment.[131] In a footnote to the opinion, the court indicated that the system also ran afoul of the equivalent provision of the state constitution.[132]

In *San Antonio Independent School District v. Rodriguez*, the United States Supreme Court, in a 5-4 decision, invalidated the *Serrano* decision insofar as it held the California system contravened the federal constitution.[133] The Supreme Court in applying the traditional two-tier equal protection test, stated that education was not a fundamental right under the U.S. Constitution.[134] Since the Texas system did not disadvantage a suspect classification or interfere with a fundamental right, strict judicial scrutiny was not triggered.[135] The Court merely required that the method of school funding be rationally related to a legitimate state end.[136] In a strong dissent, Marshall sharply criticized the majority opinion as a retreat from the Court's "historic commitment to equality of educational opportunity."[137] Marshall accepted the proposition that education is a fundamental right and therefore would have applied heightened scrutiny, because he felt education was "intimately related" to basic first amendment and political freedoms.[138]

128. *Id.* at 1249.
129. *Id.* at 1255-59.
130. *Id.* at 1250-55.
131. *Id.* at 1260.
132. *Id.* at 1249 n. 11.
133. San Antonio Independent School District v. Rodriguez, *supra* note 71, at 2.
134. *Id.* at 35.
135. *Id.* at 40.
136. *Id.* at 55.
137. *Id.* at 71 (dissenting opinion).
138. *Id.* at 110-17.

In deference to the *Rodriguez* decision, the California Supreme Court issued a modified opinion on *Serrano v. Priest.*[139] The *Serrano* II court held that even though the school financing system was valid under the U.S. Constitution, it violated the equal protection provision of the state constitution.[140] Adhering to its findings in *Serrano* I, education was deemed a fundamental right guaranteed by the state constitution, and the financing program was held to discriminate against a suspect classification.[141] Strict scrutiny was therefore invoked and the school funding scheme was struck down.[142]

The states that have litigated the issue of unequal financing among school districts have resolved it in a variety of ways. New Jersey's method of funding schools was struck down because it did not provide a "thorough and efficient" education for all students as guaranteed by the state constitution.[143] The Wyoming constitution contains a similar "thorough and efficient" provision;[144] however, the *Washakie* court's decision was based instead on the state equal protection provision.[145] The Washington Supreme Court held that state's funding system unconstitutional,[146] and mandated a system which provided for a "basic education" for all children.[147] In the wake of *Rodriguez*, some states have rejected challenges to their school funding systems. In *Shofstall v. Hollins*,[148] the Arizona Supreme Court held that state's financing program provided a "general and uniform" system of education as required under the Arizona constitution and found no equal protection violations. Similarly, the Idaho Supreme Court, in upholding the state's financing program, held the differences in the amounts available for education among the state's school districts did not deny

139. Serrano v. Priest, *supra* note 70.
140. *Id.* at 953.
141. *Id.* at 951.
142. *Id.*
143. Robinson v. Cahill, 303 A.2d 273 (N.J. 1973).
144. WYO. CONST. art. VII, § 9.
145. Washakie County School District Number One v. Herschler, *supra*, note 1, at 332.
146. Seattle School District Number One of King City v. State, 585 P.2d 71, 104 (Wash. 1978).
147. *Id.* at 98.
148. Shofstall v. Hollins, 515 P.2d 590 (1973).

equal protection under the state constitution,[149] nor was it violative of the constitutional mandate of a uniform system of public schools.[150]

IV. SCHOOL FINANCE REFORM: DEFINITION-METHODS-LITIGATION

Equal Educational Opportunity—Inputs v. Outputs

Not all courts are in accord in the definition of equal educational opportunity [EEdO]. Some states, including Wyoming, define EEdO in terms of equalizing *inputs*. This standard focuses on the equalization of: (1) resources expended, (2) tax effort per educational expenditure, and (3) program options.[151] Several deviations from an absolute equal inputs standard are necessary because of the varying educational needs of children.[152] For instance, urban school districts, because of higher price and wage rates, spend more per pupil for educational programs than do rural districts,[153] but rural districts generally have higher transportation costs per pupil than do their urban counterparts. The difficulties of providing a truly equal educational opportunity become evident upon the realization that one district may utilize its revenue more efficiently than another. This presents the question of whether the wasteful district should be awarded more revenue than its more efficient neighbor in order to equalize the actual inputs utilized by each student.

Advocating an education funding system which equalizes inputs, the *Washakie* court stated, "Equality of dollar input is manageable. . . It is nothing more than an illusion to believe that extensive disparity in financial resources does not relate directly to quality of education."[154] However, absolute dollar for dollar equality per student was not recom-

149. Thompson v. Engelking, 537 P.2d 635 (Idaho 1975).
150. *Id.*
151. COHN, ECONOMICS OF STATE AID TO EDUCATION 28 (1974).
152. Washakie County School District Number One v. Herschler, *supra* note 1, at 336.
153. Comment, *Current Trends in School Finance Reform Litigation*, 1977 DUKE L. J. 1115 (1977).
154. Washakie County School District Number One v. Herschler, *supra* note 1, at 334.

mended,[155] and the court warned that a flat rate per student distribution scheme would probably be unconstitutional.[156] Instead, the court proposed a state formula be devised which accounts for "balancing factors" so that special needs can be compensated for.[157]

The major shortcoming of the inputs standard is that it does not guarantee statewide equalization of achievement test scores and college entrance exams, even though adjustment in the standard is made for such cost differentials as rural and impact factors.[158] The Wyoming Supreme Court recognized this proposition when it acknowledged that there are other factors besides money which affect the quality of education.[159] However, because the effect of these other factors can not be accurately measured or compared, the court concluded that equality of dollar input is the only viable criterion that exists.[160]

A further standard which may have been employed by at least one court is the outputs measure.[161] To equalize outputs, the focus is upon the end product, such as student achievement and societal benefits.[162] The obvious difficulty with this standard is in determining what inputs are necessary in order to equalize outputs.[163]

The court in *McInnis v. Shapiro*[164] rejected the outputs standard because there were no manageable standards which

155. *Id.* at 336.
156. *Id.* The court said a flat rate per student distribution scheme would likely be violative of: 1) article XV, section 17 of the Wyoming Constitution, which mandates a twelve mill county levy, and 2) article VII, section 5 of the Wyoming Constitution, which fines and penalties to be paid to the counties.
157. *Id.*
158. Presentation given by Representative Jack Sidi, Chairman, of Select Committee to Study School Finance. Representative Sidi explained the mechanics of the Select Committee's proposed new system of financing public education in Wyoming. The notes are on file in the Land and Water Law Review office. (January 18, 1981).
159. Washakie County School District Number One v. Herschler, *supra* note 1, at 334.
160. *Id.*
161. Robinson v. Cahill, *supra* note 143, at 295. *See also,* Comment, *Current Trends in School Finance Reform Litigation,* 1977 DUKE L. J. 1109-10 (1977).
162. COHN, ECONOMICS OF STATE AID TO EDUCATION 28 (1974).
163. Comment, *Current Trends in School Finance Reform Litigation,* 1977 DUKE L. J. 1110 (1977).
164. McInnis v. Shapiro, 293 F. Supp. 327, 355 (N.D. Ill. 1968), *aff'd sub nom* Mclnnis v. Ogilvie, 394 U.S. 322 (1969).

a court could apply to determine whether the system was constitutional.[165] Empirical research is not yet able to predict what inputs are necessary in order to produce an equalized output for students, especially since their backgrounds and capabilities are quite often extremely varied.[166]

Alternative Designs for School Financing

Wealth based financing systems have been replaced in numerous states by an assortment of methods designed to provide equal educational opportunity. These reform plans all have two common characteristics: 1) increased role of the state in the financing scheme, and 2) rejection of the principle that the quality of education in terms of dollars expended can be primarily dependent on district wealth. This section will discuss four basic systems which many states have relied on in enacting reform legislation. However, this is by no means an exclusive list of school finance reform methods.[167]

1. *District Power Equalization:* At least nine states have adopted a power equalization format.[168] Basically, this program allows school districts to *choose* how much they wish to spend per pupil for education without making education a function of local wealth.[169] In other words, an ad valorem tax effort of ten mills in the poorest district will return the same amount of revenue per weighted pupil as the equivalent tax effort in the richest district.[170] The state determines by formula the average amount of revenue raised per weighted pupil [or classroom unit or some other distribution unit] by a given mill levy.[171] If the district levy raises actual funds in excess of the stipulated amount [or average]

165. *Id.*
166. Comment, *Current Trends in School Finance Reform Litigation*, 1977 DUKE L. J. 1110 (1977).
167. For an excellent review of alternative financing systems, *See*, COHN, ECONOMICS OF STATE AIDE TO EDUCATION (1974).
168. Thomas, *Equalizing Educational Opportunity Through School Finance Reform: A Review Assessment*, 48 UNIV. OF CINCINNATI L. REV. 225, 307 (1979).
169. COONS, CLUNE AND SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION, 201 (1970).
170. COHN, ECONOMICS OF STATE AID TO EDUCATION, 35 (1974).
171. COONS, CLUNE, AND SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCTATION, 204-209 (1970).

set by the state, then the excess must be transferred to the state.[172] Conversely, the state will pay the difference to a district in the event the stipulated amount exceeds the actual revenues raised.[173] District power equalizing proposals often place a "ceiling" above which the districts are not allowed to spend.[174] The two reasons generally given for this feature are: 1) spending above a certain maximum level yields "only the slimmest marginal returns and may be frivolous," and 2) DPE plans contain a degree of budgetary uncertainty; therefore a ceiling will protect the state treasury.[175] A "floor" or minimum spending level is often set by the state which designates the least amount a district is permitted to spend.[176] This allows the state to avoid the possibility that a district would allow the quality of the school systems to deteriorate in order to avoid taxes.[177] Substantial underfunding of education could lead to increased crime, unemployment, and welfare.[178]

The principle advantage of power equalization is that it allows each school district to select the level of spending for education it desires without making the choice a function of local wealth.[179] Each district has the power to increase or decrease the amount of revenue available for education.[180] One possible disadvantage of a DPE plan is that while it does not make the quality of a child's education dependent upon district wealth, it still conditions it upon the willingness of a district to tax at a given level. On the other hand, allowing each district to choose how much revenue it wishes to raise is arguably beneficial, because it encourages the efficient use of school revenue and enables the school districts to have more control over education.

172. COHN, ECONOMICS OF STATE AID TO EDUCATION, 35 (1974).
173. *Id.*
174. GUTHRIE, EQUITY IN SCHOOL FINANCING: DISTRICT POWER EQUALIZING 10 (1975).
175. *Id.* at 9-10.
176. *Id.*
177. *Id.*
178. *Id.*
179. COONS, CLUNE, AND SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 202 (1970).
180. *Id.*

2. *Foundation Program:* The traditional foundation system is based on the premise that no child's education will be allowed to fall below a certain expenditure level.[181] Although the *Rodriguez* Court indicated that school systems should provide an opportunity for each child to obtain "basic minimal skills" requisite for the full enjoyment of speech and political rights,[182] most state courts see foundation programs as providing a minimum level of *spending*.[183] Since the courts in Wyoming and various other states have mandated that education provide for an *equal* educational opportunity, the *traditional* foundation program by itself cannot convert a financing system which depends heavily on local property taxes into one which is not a function of local wealth.[184] Even if some wealthy districts receive no state aid, they may still be able to raise more revenue than those districts receiving foundation funds.[185] Thus, the quality of a child's education remains dependent upon the property wealth of his school district.

If the mechanics of the foundation program were changed so that it provided an *equal* education as opposed to a *minimum* education, then it would appear this program alone could enable the financing system to meet the *Washakie* court's mandate of not making the quality of a child's education a function of district wealth.[186] The plan would require state taxes to be increased [and local taxes to be correspondingly decreased] to a level which would yield enough revenue to bring all school districts up to an even keel with the wealthiest school district. A ceiling on local taxes would have to be set in order to prevent wealthy districts from raising more revenue than those districts receiving foundation funds. Theoretically, all but the wealthiest school district would be receiving state aid. An alterna-

181. THE PHI DELTA KAPPA COMMISSION ON ALTERNATIVE DESIGNS FOR FUNDING PUBLIC EDUCATION, FINANCING THE PUBLIC SCHOOLS 45 (1973).
182. San Antonio Independent School District v. Rodriguez, *supra* note 71, at 37.
183. THE PHI DELTA KAPPA COMMISSION ON ALTERNATIVE DESIGNS FOR FUNDING PUBLIC EDUCATION, FINANCING THE PUBLIC SCHOOLS 45 (1973).
184. COHN, ECONOMICS OF STATE AID TO EDUCATION 35, 36 (1974).
185. *Id.* at 35.
186. Washakie County School District Number One v. Herschler, *supra* note 1 at 236.

tive to increasing state taxes and decreasing local taxes would be for the state to *recapture* local property tax revenue for placement in the foundation program. However, as will be discussed below, the state recapture of all or a portion of locally levied taxes faces the possibility of being unconstitutional.[187]

3. *Foundation Program Supplemented by DPE:* At least three states have adopted education funding systems which combine both the foundation program and DPE.[188] This technique provides for a DPE program to be used "over the top" of a state's minimum foundation level formula, and thereby allows the benefits of both programs to be enjoyed.[189] A district is guaranteed a minimum education for each student by the foundation program.[190] In addition, each district has the option of raising incremental revenue in a manner which is not dependent upon local wealth.[191] The Phi Delta Kappa Commission on Alternative Designs for Funding Public Education recommends a foundation program supplemented by DPE as a viable system of school funding.[192] The commission further suggests the foundation level be kept relatively high and the DPE schedule be correspondingly low.[193]

4. *Full [or Nearly Full] State Funding:* Full state assumption (FSA) is a school funding plan where the state, pays for virtually all education and determines on an equitable basis, how much each school district receives.[194] School districts would at best be allowed to contribute minimally from their own resources for the purpose of enrichment of their local schools.[195]

187. *See*, Buse v. Smith, 247 N.W.2d 141 (Wis. 1976).
188. THE PHI DELTA KAPPA COMMISSION ON ALTERNATIVE DESIGNS FOR FUNDING PUBLIC EDUCATION, FINANCING THE PUBLIC SCHOOLS 50 (1973). Utah, Kansas, and Florida have enacted programs which combine both the foundation program and DPE.
189. *Id.* at 49.
190. *Id.*
191. *Id.*
192. *Id.* at 49-50.
193. *Id.* at 50.
194. ODDEN, AUGENBLOCK, AND VINCENT, SCHOOL FINANCE REFORM IN THE STATES 48 (1976).
195. THE PHI DELTA KAPPA COMMISSION ON ALTERNATIVE DESIGNS FOR FUNDING PUBLIC EDUCATION, FINANCING THE PUBLIC SCHOOLS 42 (1973).

Opponents of full state funding argue that it would decrease local participation by parents in public education matters.[196] They contend parent involvement in the past has been concerned with how much revenue to raise by an appeal to local resources.[197] With the conversion to full state funding, their decisions would be reduced to dividing the "given pie" as specified by the state.[198] On the other hand, those advocating total funding by the state assert there is no reason why the level of government which raises and appropriates the revenue must decide how it will be used, and support the proposition that decisions concerning education rest with the lowest level of government that can efficiently make that decision.[199]

Full state funding in Wyoming would require extensive statutory and constitutional change. The twenty-five mills special district tax[200] and the twelve mills mandatory county tax would have to be levied by the state. Both would require statutory adjustment. Further, since the Wyoming Constitution specifically mandates the twelve mills county levy,[201] a constitutional amendment would be necessary. Significant changes in the structure of Wyoming's education funding system are inevitable. However, the three financing methods previously discussed allow for greater local contribution and would require less change to the existing system than would full state funding.

Reform Financing Litigation

The Wisconsin Supreme Court found that a *statute* which required school districts to remit to the state a portion of local property tax revenue violated the state constitutional rule of uniform taxation.[202] The financing scheme contained a district power equalization factor.[203]

196. *Id.* at 44.
197. *Id.*
198. *Id.*
199. JOHNS, FULL STATE FUNDING OF EDUCATION 49 (1972).
200. WYO. STAT. § 21-12-101 (1977). This statute also authorizes an additional three mills levy with voter approval.
201. WYO. CONST. art. XV, § 17.
202. Buse v. Smith, *supra* note 187, at 150-55.
203. *Id.* at 144.

Wealthy school districts would not receive any state aid, and were instead required to pay a portion of their tax revenue into the state fund for redistribution to other school districts in the state.[204] Even though education in Wisconsin is a matter of statewide concern, and the purpose of state recapture of local revenue was to equalize the burden upon the property taxpayers in Wisconsin, the court concluded that the purpose of the tax must pertain to the public purpose of the district which levies it.[205] Classifying the tax as local, the court stated:

> But to determine whether a tax is to be classified as a state or local tax, one must look to the entity which directly levies the tax, and which in turn directly provides governmental benefits therefor. If that entity is the state it is a state tax. If that entity is a political subdivision of the state, it is a local tax. The question is who *directly* (and not indirectly) levies the tax.[206]

Montana's district power equalization system withstood a constitutional attack in *State ex rel. Woodahl v. Straub*.[207] The tax system required each county to levy a forty mills property tax.[208] Negative aid districts were required to deposit revenue in excess of a stipulated amount in a state account for use in positive aid districts.[209] Plaintiffs argued that the forty mills tax levied by the county was a *local* property tax, and that to tax one district for the benefit of another constituted a taking of property without due process.[210] Further, plaintiffs alleged the financing statutes violated the state's constitutional obligation to fully fund the basic educational system.[211] The court rejected these arguments.[212] Crucial to the holding was the determination that the forty mills tax levied by the county was in fact a

204. *Id.*
205. *Id.* at 152-53.
206. *Id.* at 152.
207. State *ex rel.* Woodahl v. Straub, 530 P.2d 776 (Mont. 1974).
208. *Id.* at 777.
209. *Id.* at 777-78.
210. *Id.* at 780-81.
211. *Id.* at 780.
212. *Id.* at 780-83.

state tax, because all property in the state was subject to this levy.[213]

In *Tennant v. Sinclair Oil and Gas Company*, the Wyoming Supreme Court struck down a county five mills property tax which was levied in only *specified* school districts.[214] The tax violated article I, section 28 of the Wyoming Constitution,[215] which provides that all taxation shall be equal and uniform.[216] The Montana court distinguished *Sinclair* on the ground that in *Woodahl* the tax in issue was a uniform levy imposed on all taxable property throughout the state,[217] whereas, in *Sinclair*, the court dealt with a tax which was only levied in certain school districts.[218] Those in favor of achieving equalization by having the state recapture local tax revenue for statewide distribution in Wyoming are divided on the question of whether a constitutional amendment is necessary. Advocates of the constitutional amendment argue that there is no compelling reason why mere statutes enacting such a scheme would not be struck down under the *Buse v. Smith* court's rationale.[219] On the other hand, those opposing a constitutional amendment argue that statutory adjustment would be sufficient since the Wyoming Supreme Court in both *Hinkle* and *Washakie* favorably discussed in dictum the feasibility of enacting a statutory plan which involved recapture.[220] They therefore contend that it is unlikely the court would change direction and declare such a plan violative of the uniform taxation provision of the Wyoming Constitution. As will be discussed below, the 1981 legislature chose the route of amending the constitution.

213. *Id.* at 779, 781.
214. Tennant v. Sinclair Oil and Gas Co., 355 P.2d 887-88 (Wyo. 1960). A Wyoming Act provided for an annual tax of five mills on taxable property within each school district which did not operate a high school. The revenue derived therefrom was to be used for certain expenses of local students attending high school outside the school district. The Act also provided that any surplus remaining be distributed among districts in the county which operated high schools. WYO SESS. LAWS Ch. 158 (1959).
215. WYO. CONST. art. I, § 28.
216. Tennant v. Sinclair Oil and Gas Co., *supra* note 214, at 890-91.
217. State *ex rel.* Woodahl v. Straub, *supra* note 207, at 782.
218. *Id.*
219. Buse v. Smith, *supra* note 187, at 152.
220. Sweetwater County Planning Committee for the Organization of School Districts v. Hinkle, *supra* note 116, at 1237-38; Washakie County School District Number One v. Herschler, *supra* note 1, at 335.

V. WYOMING'S PROPOSED NEW SYSTEM OF SCHOOL FUNDING

The 1981 Wyoming Legislature responded to the Wyoming Supreme Court's mandate of fiscal neutrality in the funding of public education in Wyoming by enacting numerous statutory changes and proposing two constitutional amendments. Further school financing legislation is expected to be passed during the 1982 session. The supreme court directed the district court to retain jurisdiction over the *Washakie* case,[221] and once the entire funding scheme is devised it will be submitted to the court for a determination of its constitutionality.

Constitutional Amendments:

The cornerstone of the new funding plan is a proposed amendment to article 15, sections 15 and 17 of the Wyoming Constitution.[222] The effect of these amendments is threefold: 1) The six mills state levy will be increased to a maximum twelve mills, and the twelve mills county level will be decreased to a maximum six mills.[223] Obviously this will decrease the amount of local effort and allow more funds to be distributed from the state level, thus enabling the state to bring poor districts up towards the level of the rich districts. 2) The legislature will have specific constitutional authorization to permit districts to levy a special school district tax.[224] 3) The amendment adopts principles of district power equalization by permitting the state to recapture up to seventy-five percent of the revenue from the special district levy in excess of a state average yield.[225] In relatively wealthy districts a specified mill levy would raise more revenue than what that levy would raise on the average across the state. Up to seventy-five percent of that excess revenue would be subject to state recapture for distri-

221. Washakie County School District Number One v. Herschler, *supra* note 1, at 337.
222. WYO. CONST. art. XV, § 15; WYO. CONST. art XV, § 17; H.R.J. Res. No. 3, 46th Gen. Sess. (Wyo. 1981)
223. H.R.J. Res. No. 3, 46th Gen. Sess. (Wyo. 1981).
224. *Id.*
225. *Id.*
226. WYO. STAT. § 21-13-101 (1977).

bution in relatively poor districts. Individual districts can choose to levy a special district tax at any level up to a maximum of twenty-five mills [with a three mills voter override.][226] The constitutional amendment will provide incentive for wealthy districts to keep local effort high because it allows them to retain at least twenty-five per cent of the excess revenue over the state average yield for that given levy. Incentive for relatively poor districts to maximize local effort is provided by Section 21-13-214 of the Wyoming Statutes,[227] which conditions state aid upon the levy of not less than one mill below the maximum allowed special district levy without a vote of the people.[228]

The proposed amendment might appear to give the legislature free rein to recapture whatever percentage it desires (up to seventy-five per cent) of the excess revenue over the average yield from the special district levy; however, the *Washakie* court would probably circumscribe the legislature's discretion under the amendment to the extent necessary to adequately equalize the funding of education statewide. For example, if only twenty per cent of eligible special district tax revenue was being recaptured and substantial interdistrict disparity in school funding remained, then on the basis of the state equal protection clause[229] the court would probably mandate a higher percentage of recapture so that more funds could be allocated to the poor school districts.

Capital Construction Funding:

The financing of physical school facilities was one of the areas of school funding which the *Washakie* court singled out as being highly suspect;[230] however, the opinion was vague with regard to what should be done. School construction projects are funded primarily from capital construction

227. WYO. STAT. § 21-13-314 (Cum. Supp. 1981).
228. WYO. STAT. § 21-12-314(c) (Cum. Supp. 1981).
229. WYO. CONST. art. I, § 34.
230. Washakie County School District Number One v. Herschler, *supra* note 1, at 337.
231. WYO. STAT. §§ 21-15-101 through 21-15-104 (Cum. Supp. 1980).

entitlements from the state,[231] federal royalty revenue,[232] school district bond issues,[233] and occasionally from operating revenue.

The procedures for disbursing federal royalties and state funds for school construction were modified somewhat by the 1981 legislature.[234] These changes do not appear to make significantly more school construction funds available to poor school districts. However, the method of disbursing both royalty money and capital entitlements appears to be fiscally neutral even without these changes because neither distribution scheme favors wealthy counties.

The *Washakie* court was probably thinking of the inter-district disparity of available bond indebtedness, and possibly even the disparity of available operating funds for capital construction when it flagged the method of funding school construction as a likely violator of the equal protection provision.[235] If the above constitutional amendments are adopted and if the other changes made in the funding system sufficiently equalize the availability of operating revenues among school districts, then it necessarily follows that the disparity in *operating* revenues available for school construction will also be adequately equalized.

There still remains a disparity among school districts in the amount that each can borrow. Ironically, the Wyoming Constitution itself is the culprit. Article XVI, section 5 of the Wyoming Constitution provides, "No school district shall in any manner create any indebtedness exceeding ten per cent (10%) on the assessed value of taxable property therein for the purpose of acquiring land, erection, enlarging, and equipping of school buildings."[236] Consequently, property rich school districts can borrow more money for capital projects than property poor school districts. Appar-

232. WYO. STAT. § 9-7-901 through 9-7-904 (Cum. Supp. 1980).
233. WYO. STAT. § 21-13-701 (Cum. Supp. 1980); WYO. STAT. §§ 21-13-702 through 21-13-709 (1977); WYO. STAT. § 21-13-710 (Cum. Supp. 1980); WYO. STAT. §§ 21-13-711 through 21-13-721 (1977).
234. H.R. 222, 46th Gen. Sess., (Wyo. 1981); H.R. 224, 46th Gen. Sess., (Wyo. 1981).
235. Washakie County School District Number One v. Herschler, *supra* note 1, at 337.
236. WYO. CONST. art. XVI, § 5.

ently the *Washakie* court requires even this disparity be alleviated, as the opinion states:

> There is no constitutional requirement that school buildings must be built by the creation of debt. There are other areas of consideration, for example, a statewide reserve fund for building construction. The point is that statewide availability from total state resources for building construction or contribution to school buildings on a parity for all school districts is required just as for other elements of the educational process.[237]

Between the 1981 and 1982 sessions, the interim legislative committee on school financing plans to examine the present system of funding school construction.[238] It is possible that a study will be conducted by the Department of Education in order to determine what the actual needs and disparities are among school districts.[239]

Other Legislation — 1981 and Proposals for 1982:

The 1981 legislature made several other changes in the existing school funding system. The statutes authorizing the use of up to three mills of the general county tax for school purposes were repealed.[240] An Act creating a state reserve account to guarantee payment of school district bonds was passed.[241] Finally, Section 21-13-309(a) of the Wyoming Statutes was amended to provide for an increase in the classroom unit value for the fiscal year beginning July 1, 1981.[242]

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237. Washakie County School District Number One v. Herschler, *supra* note 1, at 337.
238. Telephone communication with Patti MacMillan, (March 2, 1981). Albany County Legislator and member of Select Committee to Study School Finance.
239. Telephone communication with Joe Meyer of the Legislative Service Office, on March 4, 1981. Notes on file in the Land and Water Law Review Office.
240. WYO. STAT. §§ 21-13-202 through 21-13-205 (Cum. Supp. 1981).
241. WYO. STAT. §§ 21-13-801 through 21-13-802 (Cum. Supp. 1981).
242. WYO. STAT. § 21-13-309(a) (Cum. Supp. 1981). The classroom unit is "A measure of financial need expressed in terms of numbers of classes. It is weighted by a system of divisors that allows a smaller number of students per CRU in small schools." STATE DEPARTMENT OF EDUCATION, THE WYOMING SCHOOL FOUNDATION PROGRAM v (1976). Thus a rural factor is figured into the calculation of the classroom unit, and is reflected in the amount of state aid a district receives.

The interim committee will study and propose to the 1982 legislature further changes to be made in the school funding system. The foundation program[243] is targeted for extensive review and readjustment.[244] The program is designed to consider the local wealth of each school district and to give financial aid to the poor school districts thereby guaranteeing each child a basic minimum education. Currently, however, not all sources of local wealth are weighed in the foundation formula which determines what each district's entitlement from the program is.[245] For example, of the twenty-five mills Special District Levy, only ten mills is considered a local resource.[246] Therefore, since the vast majority of school districts are levying the maximum tax allowed without a vote of the people,[247] the wealthy districts gain an advantage by not having to count revenue from up to fifteen mills of the special district tax as a local resource.

An impact factor will also be considered for introduction into the foundation formula. The cost of education is often higher in impacted districts.[248] Additional aid to these districts will spread the cost of providing an equal education in high cost districts among all districts and not place it solely on the impacted districts themselves.

The *Washakie* court singled out the distribution method of school lands income as likely to contribute to the unconstitutionality of the entire system;[249] therefore, this topic warrants serious consideration by the legislature. Currently this revenue is distributed among all districts on the basis of average daily membership. The court felt this did not meet the requirements of article VII, section 8 of the Wyo-

243. The foundation program is "A state fund held by the State Treasurer, to which certain receipts earmarked for schools are paid. It is supplemented by appropriations from the legislature, and is paid to schools according to formula." STATE DEPARTMENT OF EDUCATION, THE WYOMING SCHOOL FOUNDATION PROGRAM vi (1976).
244. Telephone communication with Joe Meyer, *supra* note 239.
245. *See*, WYO. STAT. § 21-13-310 (1977), for a list of local resources currently computed in the foundation formula in order to determine a district's entitlement.
246. WYO. STAT. § 21-13-310 (1977).
247. Washakie County School District Number One v. Herschler, *supra* note 1, at 325-27.
248. Telephone communication with Joe Meyer, *supra* note 239.
249. Washakie County School District Number One v. Herschler, *supra* note 1, at 336.

ming Constitution which states, "Provision shall be made by general law for the equitable allocation of such income among all school districts in the state."[250] If distribution of school lands income on the basis of average daily membership among the several counties of the state[251] does not, in the court's eyes, meet the constitutional mandate of equitable allocation,[252] then it would seem this income might best be placed in the foundation fund in order to be distributed on the basis of need. Indeed in a footnote to the *Washakie* opinion, the court indicated that school lands income could be included in the foundation program.[253]

On the other hand, the court emphasized it was judging the system as a whole and not condemning any particular statute as unconstitutional.[254] Instead it was only pointing up statutes which had a bearing upon the disparity *caused by the present system.* Without drastic changes in the funding system, an enormous disparity in available resources for school funding exists among school districts. Therefore, under the *existing* system the disparity could be reduced if school lands income were distributed to school districts on the basis of need, rather than on the basis of average daily membership. However, distribution of school lands income on the basis of average daily membership does not *by itself* favor wealthy districts. It merely does not respond to the necessity of reducing the disparity of school funding among school districts *which is caused by other financing techniques presently employed in the funding system.* Consequently, if these disparities are sufficiently equalized by other remedial adjustments in the system, arguably the present method of disbursing school lands income could be left unscathed.

Court and Electorate Approval:

The destiny of Wyoming's education funding system can not be predicted with certainty, except to say that the

250. WYO. CONST. art. VII, § 8 (Cum. Supp. 1980).
251. WYO. STAT. § 21-13-101 (Cum. Supp. 1980).
252. Washakie County School District Number One v. Herschler, *supra* note 1, at 335-36; WYO. CONST. art VII, § 8 (Cum. Supp. 1980).
253. Washakie County School District Number One v. Herschler, *supra* note 1, at 322 n. 14.
254. *Id.* at 335.

system finally adopted must not substantially be a function of local wealth. The plan proposed by the legislature faces two critical tests. First, it must be suitable to the court.[255] Second, the constitutional amendments, which are the major components of the proposal, must be approved by the voters of the state.[256]

How much deviation from absolute fiscal neutrality the court will tolerate is not known. The *Washakie* court stated that absolute dollar for dollar input per pupil was not required, and that adjustments should be made for certain cost differentials.[257] However, allowance for cost differentials is consistent with fiscal neutrality, because it allows for an equal educational opportunity to be provided for all students regardless of wealth or special needs. Therefore, the *Washakie* opinion did not indicate that any significant deviation from fiscal neutrality would be permissible. On the other hand, the *Hinkle* court noted in dictum that at least some variance from strict fiscal neutrality would be allowed.[258] The court in *Hinkle* stated:

> . . . we will not consider any invidious discrimination involved if the legislature sees fit to permit local initiative within any district, for expenditures other than for capital improvements, to the extent of 10 per cent or 15 per cent of the level of income guaranteed for the district by the state in any year.[259]

The question of whether the court would reaffirm this dictum is one of the many problems the legislature will have to grapple with.

Perhaps the greatest test of the proposed new financing system will be the vote of the electorate on the amendments to article 15, sections 15 and 17 of the Wyoming Constitution.[260] For the amendments to pass, a majority of the quali-

255. *Id.* at 337.
256. If the proposed constitutional amendments are adopted, then they will not be subject to judicial attack.
257. Washakie County School District Number One v. Herschler, *supra* note 1, at 336.
258. Sweetwater County Planning Committee for the Organization of School Districts v. Hinkle, *supra* note 116, at 1238.
259. *Id.*
260. WYO. CONST. art. XV, § 15; WYO. CONST. art. XV, § 17.

fied voters in the state must approve (not just a majority of those voting). If the amendments are rejected in the 1982 general election, then the 1983 legislature will face the formidable task of devising new proposals. Otherwise the *Washakie* court itself will probably remedy the existing disparity after the July 1, 1983 deadline passes.[261]

CONCLUSION

The *Washakie* court held that Wyoming's local wealth based method of financing public education denies equal protection.[262] The equal protection analysis used by the Wyoming Supreme Court in *Washakie* differs from that used by the U.S. Supreme Court when deciding equal protection questions under the U.S. Constitution. If the analysis used in *Washakie* is applied in future cases, then the court will be assuming what would otherwise be a legislative function.

There are many funding techniques which can be adopted in order to achieve fiscal neutrality. The 1981 legislature proposed the first phase of a system which incorporates principles of district power equalization.[263] The heart of the plan is an amendment to two sections of the Wyoming Constitution. These proposed amendments would restructure the method of disbursing revenue raised from property taxes which are the primary source of school funding. They will be voted on by the people of Wyoming at the 1982 general election. Further changes are expected to be made by the legislature in 1982.[264] Once the entire plan is devised, it will probably be submitted to the Wyoming court system for a determination of its constitutionality.[265] Whether or not the plan presently under consideration is accepted by the court

261. Washakie County School District Number One v. Herschler *supra* note 1, at 340. Presentation given by Jack Sidi, *supra* note 158.

262. Washakie County School District Number One v. Herschler, *supra* note 1, at 332-36.

263. H.R.J. Res. No. 3, 46th Gen. Sess. (Wyo. 1981).

264. Telephone communication with Joe Meyer, *supra* note 239.

265. *Id.*

and the voters of Wyoming, fiscal neutrality in the funding of public education for the children of Wyoming is mandatory. If the legislature does not devise an acceptable plan, the Wyoming Supreme Court probably will.

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