# High Tide of Equal Protection: Justice Raymond L. Sullivan's Opinions in *Serrano* and *Westbrook*

Paul Sabin

During the early 1970s, Justice Raymond L. Sullivan authored some of the California Supreme Court's most significant equal protection decisions, cases that addressed central questions about the political and economic rights of individuals and groups under the California and U.S. constitutions. In *Castro v. State* (1970),[1] Sullivan's opinion helped open the electoral process to non-English speakers by overturning a state constitutional provision that conditioned the right to vote on the ability to pass an English literacy test.[2] In *Thompson v. Mellon* (1973),[3] Sullivan and the court similarly found to be unconstitutional a requirement that candidates in city elections have resided in the city for a minimum period of time. *Calderon v. City of Los Angeles* (1971)[4] re-adjusted the balance of local political power by declaring that political apportionment had to reflect population figures rather than the number of registered voters. Sullivan declared in *Calderon* that apportioning Los Angeles city council districts based on the number of voters unconstitutionally reduced the political power of groups with low voter participation. In a major decision concerning the rights of indigent criminal defendants, Sullivan wrote in *In re Antazo* (1970)[5] that equal protection guarantees protected such a defendant from serving time in jail for not paying a fine if a solvent defendant similarly situated could have escaped with payment.

In all these cases, Sullivan marched in step with the national Supreme Court, whose rulings on literacy tests,[6] the rights of indigent defendants,[7] and reapportionment[8] were similarly expanding the scope of equal protection. Yet two of Sullivan's more innovative rulings, *Serrano v. Priest* (1971)[9] and *Westbrook v. Mihaly* (1970),[10] led the California court to farther reaches of equal protection jurisprudence, where the national court did not follow. Both *Serrano* and *Westbrook* implied significant changes in the structure of government finance in California, most

importantly in the area of public education. Justice Sullivan's opinion in *Serrano* declared unconstitutional the way that California financed its public schools through the use of local property taxes. Because property holdings and values varied so greatly among school districts, he held in a 6-1 decision, California's financing system effectively discriminated against the residents of low-wealth school districts. *Serrano* provided school-finance reformers with a major legal victory and also spurred school finance cases in state courts nationwide. Although the U.S. Supreme Court effectively overruled Sullivan's opinion in *San Antonio Independent School District v. Rodriguez* (1973),[11] Sullivan subsequently broke with the federal court's interpretation. His opinion in *Serrano II* (1976)[12] led California and other state supreme courts in deciding the school finance cases on the basis of "independent state grounds," i.e., the provisions of state constitutions as an adequate, independent basis of judgment.[13] Because legislative policies were directly responsible for establishing the financial system and the inequalities it produced, the school financing scheme could be judged on the basis of the state constitution's equal protection clauses.[14] California's school system underwent major financial restructuring as a result of *Serrano II*—significantly affected later, however, by the passage of Proposition 13 in 1978.[15]

In *Westbrook*, the court overturned a two-thirds "supermajority" requirement, specified in the state constitution, for the passage of local bond issues. Sullivan, writing for a unanimous court, found that the two-thirds requirement halved the value of the votes of "yes" voters and thus infringed on their federally guaranteed equal protection rights. If upheld by the U. S. Supreme Court, Sullivan's opinion potentially would have affected hundreds of millions of dollars in bond financing for schools, parks, and other public facilities in California. The U.S. Supreme Court, however, overturned the *Westbrook* ruling in the case *Gordon v. Lance* (1971).[16] Unlike *Serrano*, the California court found, a voting rights decision such as *Westbrook* had no vitality under "independent state grounds." The California court's decision had relied solely on the Fourteenth Amendment. The California constitution itself stipulated the "supermajority" requirement; and thus, the California Supreme Court decided the rule could not be invalidated by the state constitution's equal protection provisions. In light of the ways that Proposition 13 expanded the two-thirds bulwark against local taxation, *Westbrook's* demise looms large over the recent history of California's public sector.

Both *Serrano* and *Westbrook* suggested the reformative social and economic policy implications of the Fourteenth Amendment. Sullivan's spirited attacks on wealth discrimination and on barriers to majoritarian democracy showed how equal protection jurisprudence could redistribute educational opportunity and facilitate public investment. A history of the cases and the fate of the decisions also shows how the U.S. Supreme Court, under the leadership of Chief Justice Warren Burger, rejected these further extensions of equal protection guarantees in national constitutional law.

## Serrano v. Priest

*Serrano* arose from a growing national awareness of inequalities in the financing of public school districts in the late 1960s. With schools financed primarily through local property taxes, varying tax bases meant that school districts achieved starkly different revenues, even with the same tax rate. While wealthy Beverly Hills in 1969-70 could tax real property at a rate of 3.2 percent to raise $1,354 per student, Milpitas could only manage $724 per student at a tax rate of 7.7 percent.[17] Through such a system, Sullivan observed in *Serrano*, "affluent districts can have their cake and eat it too: they can provide a high quality education for their children while paying lower taxes. Poor districts, by contrast, have no cake at all."[18]

As educational analysts and legal scholars came to recognize these inequalities in school financing, they realized that they might challenge the system through the equal protection clause of the Fourteenth Amendment. The authors of *Private Wealth and Public Education* (1970), John Coons, William Clune III, and Stephen Sugarman, offered the clearest articulation of this equal protection argument.[19] Justice Sullivan would rely heavily on their writings in his opinions. Yet initial efforts to overturn the property tax financing system were frustrated. Prior to *Serrano*, the leading federal equal protection case in this area was *McInnis v. Shapiro* (1968),[20] in which a three-judge district court panel dismissed a constitutional challenge to Illinois' school finance system. The U.S. Supreme Court affirmed without opinion.

The plaintiffs in *Serrano* sought to distinguish their case from *McInnis* by arguing that the latter case had been based on a needs theory, whereby the school finance system had to take into account the varying needs of the different children. In contrast, the *Serrano* plaintiffs—and later Justice

Sullivan in his opinion—contended that the problem lay in wealth discrimination between school districts. The taxpayer of a poor district suffered as much as the student in this financing system. The plaintiffs called on the government to practice fiscal neutrality.[21] Fiscal neutrality did not require egalitarianism; rather, neutrality meant only that the link between district wealth and educational quality had to be broken.[22]

Although the *Serrano* case did not run its full course until *Serrano III* was decided in 1977, Sullivan's 1971 opinion in *Serrano I* resolved the case's most important equal protection issues. The California Supreme Court reversed a trial court judgment sustaining a demurrer and ruled that the plaintiffs would prevail if they could prove their factual allegations at trial.[23] Sullivan's opinion declared the stark financial inequalities alleged by the plaintiffs unconstitutional under the Fourteenth Amendment as well as the state constitution's equal protection clauses. If correctly characterized, he argued, the existing funding scheme "invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors."[24]

The *Serrano* decision stepped beyond the traditional domain of equal protection jurisprudence—which included property rights, voting rights, and the criminal process—to identify wealth discrimination as a suspect category in the area of public educational policy.[25] Affirming the "suspect" nature of wealth discrimination in education required another innovation from the California court—education had to be declared a "fundamental interest."

In *Serrano I*, Sullivan forcefully argued for the "distinctive and priceless function of education." To advance the view that education constituted a fundamental interest, Sullivan pursued the "functionalist" analysis often characteristic of the California Supreme Court under Chief Justices Roger Traynor and Donald Wright.[26] Rather than consider education in the abstract, Sullivan examined how education functioned in a "modern industrial society" as a "lifeline of both the individual and society."[27] He argued that education significantly determined "an individual's chances for economic and social success in our competitive society," and that education has a "unique influence on a child's development as a citizen and his participation in political and community life."[28] Comparing education to the other "fundamental interests" that the Supreme Court had already protected against wealth discrimination, Sullivan found education to be of comparable importance. "Although an individual's

interest in his freedom is unique," he wrote, referring to earlier decisions in the area of criminal process, "we think that from a larger perspective, education may have far greater social significance than a free transcript or a court-appointed lawyer." Furthermore, he noted, "the analogy between education and voting is much more direct: both are crucial to participation in, and the functioning of, a democracy."[29] In a forceful affirmation of the role of free public schools in a democracy, Sullivan concluded his opinion with a quotation from the educator Horace Mann:

> "I believe," [Mann] wrote, "in the existence of a great, immortal immutable principle of natural law, or natural ethics,—a principle antecedent to all human institutions, and incapable of being abrogated by any ordinance of man . . . which proves the *absolute right* to an education of every human being that comes into the world, and which, of course, proves the correlative duty of every government to see that the means of that education are provided for all. . . . "[30]

The impact of Sullivan's *Serrano I* opinion was felt throughout the nation, and not only in California, prompting many other state courts and legislatures to restructure the financial mechanisms supporting the public schools. *Time Magazine* declared that the decision might be "the most far-reaching court ruling on schooling since *Brown v. Board of Education* in 1954. . . ."[31]

In the wake of the ruling, California adjusted its financing system to try to make it constitutional, while still retaining primarily local control over school funding and property tax revenues. The state legislature raised the guaranteed minimum (per average daily attendance) from $355 to $765 for elementary schools and from $488 to $950 for high schools. The legislature also established revenue limits that allowed districts to levy taxes "at a rate no higher than would increase its expenditures per pupil over 1972-73 base revenues by a permitted yearly inflation factor. A district having a school tax rate which produced revenues in excess of foundation levels would receive inflation adjustments which decreased in magnitude as those revenues rose above foundation levels."[32] According to this theory of "convergence," the limitation on expenditures would bring districts closer to parity. Districts could easily override these revenue limitations, however, with a simple majority vote on a popular ballot.

Legal commentators typically supported the *Serrano* opinion for its political and moral position, as much as for its narrower constitutional reasoning. Some, however, acknowledged the "national disgrace" of public school financing, and yet still questioned many aspects of the decision,[33] for example pointing out the discrepancy between district wealth and individual wealth, arguing that there was no clear correlation between poor school districts and poor people. They contended that the *Serrano* ruling could badly undermine the interests of poor residents living in city districts with considerable commercial or industrial property, whether in California or in other states. San Francisco, New York, and Philadelphia, for example, had relatively high tax bases and spent more per pupil as compared to their state averages.[34] Income-rich individuals living in property-poor districts, on the other hand—such as residential suburbs that had excluded industrial and commercial development—might benefit from equalization.

*Serrano's* focus on poor school districts, some commentators noted, had the similarly ambiguous implication that the declared "constitutional right to an education" might remain subject to the whims of a school district's electorate. Unless the state assumed the bulk of the financial responsibility, as it ultimately did in California following Proposition 13 in 1978, local expenditures per child would still depend on the child's residence. Living in a district that undervalued education would thus produce the same effect as residence in a poor district before the ruling. Focusing on poor districts rather than children's needs meant that many children might not benefit from a ruling about taxpayers and school districts.[35]

Other scholars asked whether education was truly a "fundamental" interest, and, if so, how it differed from other governmental services, like police and fire protection, that are also often inequitably provided to poor people. Sullivan's opinion called education unique, and contended that the unique conjuncture of wealth discrimination and education made the system unconstitutional. While he would "intimate no views on other governmental services," Sullivan suggested through a reference to *Hawkins v. Town of Shaw* (1971)[36] that wealth discrimination might be unconstitutional in other instances as well.[37] Some commentators viewed this ambiguity as a potential opportunity for further extension of the equal protection doctrine; perhaps equality could be mandated in other areas of governmental activity as well as in education.[38] Others viewed with

disapproval the prospect that equal protection guarantees might be applied to other areas of governance. Where would it stop? Had the court declared that taxation must be proportional or progressive in order to be constitutional? Was the court correct in calling for equal, rather than minimum, protection in education?[39]

Although *Serrano I* had been based primarily on federal equal protection guarantees, by the time the case came before the California Supreme Court again (following the trial court's ruling) cut some of those federal guarantees had been stripped away: In April 1974, the U.S. Supreme Court had ruled against the school finance reformers in *San Antonio Independent School District v. Rodriguez.*[40] The *Rodriguez* case involved similar arguments to *Serrano* and a comparably structured school finance system. The federal court opinion, written by Justice Powell, declared that classifications on the basis of wealth were not inherently suspect and that education was not a fundamental interest. Therefore the San Antonio school finance system should be reviewed under the lenient basis of "rationality" rather than "strict scrutiny." The national court declared the system acceptable because it met a rational goal of increasing local control.

Because of the U.S. court's ruling in *Rodriguez*, Justice Sullivan's opinion in *Serrano II* (1976)[41] based the California court's decision on the California state constitution. A footnoted reference in *Serrano I* to the California court's landmark *Kirchner* decision (1965)[42] had laid the groundwork for a ruling independent of *Rodriguez*. Sullivan announced in *Serrano II* that "our state equal protection provisions, while 'substantially the equivalent of' the guarantees contained in the Fourteenth Amendment to the United States Constitution, are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable."[43] This decision to part ways with *Rodriguez* proved more controversial than Sullivan's opinion in *Serrano I.* In *Serrano II* the California court affirmed the trial court's ruling with a mere 4-3 majority. With *Serrano III* (1977),[44] Sullivan's final opinion for the court, Sullivan concluded the California Supreme Court's involvement with the case and his own distinguished judicial career. *Serrano III* affirmed the trial court's award of $800,000 in fees under the private attorney general theory, whereby plaintiffs acting as private attorneys general could recover attorneys' fees for vindicating important constitutional rights. *Serrano III* declined to follow the U.S.

Supreme Court, which had denied fees in *Alyeska Pipeline Co. v. Wilderness Society* (1975),[45] though that decision had dealt with federal rather than state courts.[46]

Sullivan's *Serrano II* opinion affirmed the ruling of the trial court judge, Bernard Jefferson. Despite legislative changes made to California's school financing system, including an increase in the money distributed by the state, the court found that the financing methods remained unconstitutional. The system, Sullivan wrote, would "continue to generate school revenue in proportion to the wealth of the individual district."[47] While strict equality in per pupil expenditures was not mandated, equal educational opportunity,

> requires that all school districts possess an equal ability in terms of revenue to provide students with substantially equal opportunities for learning. The system before the court fails in this respect, for it gives high-wealth districts a substantial advantage in obtaining higher quality staff, program expansion and variety, beneficial teacher-pupil ratios and class sizes, modern equipment and materials, and high-quality buildings.[48]

The inequality between basic-aid and equalization-aid districts, and the continuing ability of districts to raise additional money through voted overrides, meant that this equal educational opportunity did not exist. Sullivan upheld Jefferson's guideline of a $100 band (adjusted for inflation) that would serve as the measure for whether educational opportunity differed significantly between school districts. The court gave the state a six-year period to bring the school system into compliance with the state constitution's equal protection guarantees. While the court did not specify what funding system the state should implement, it suggested a number of possible strategies for achieving compliance, including full state funding, the redesign of the school districts around equal property bases, and what was called "district power equalizing" whereby local taxes would be redistributed by the state among the different school districts, depending on their tax rate.[49]

**Westbrook v. Mihaly**

The California court's decision in *Serrano II* applied the equal protection provisions of the California constitution to the state's school system. With *Rodriguez* and the defeat of school finance litigation in the federal courts, state courts around the country were forced to rely on the state constitutions for judicial support. They could do so partly because all 50 state constitutions had specific provisions regarding education, something that the federal Constitution lacked.[50] Rulings on other governmental services did not follow partly because they lacked the moral imperative that education claimed as well as this state constitutional support. Sullivan's opinion had drawn a thick line around education as a unique interest, thus creating barriers to other wealth discrimination arguments.

Sullivan had clearly stated that the constitution's education clauses were not the basis for the court's decision in *Serrano II*.[51] The ruling on independent state grounds had been triggered instead by the state legislature's statutory intervention in the educational finance system. Other constitutional issues lacking such statutory involvement were covered solely by federal equal protection guarantees and could not be protected by the state constitution. Voting rights, for example, in the case of *Westbrook v. Mihaly*, could not be protected by the California constitution when the infringement on those rights also lay within the state constitution.

The story of *Westbrook v. Mihaly,* another Sullivan equal protection ruling from the early 1970s, illustrates how the Burger Court rapidly blocked the progressive expansion of the equal protection doctrine to other matters of government finance. In *Westbrook*, a unanimous California Supreme Court held that bond votes that required two-thirds majorities, as mandated by the state constitution, violated federal equal protection guarantees. *Westbrook* revealed the limitations of state judicial innovation in an area of law that depended on federally guaranteed rights. The federal court summarily dismissed Sullivan's *Westbrook* decision, based on the court's recent opinion in *Gordon v. Lance*.

W*estbrook v. Mihaly*, and its companion case *Adams v. Mihaly*, challenged a California constitutional provision, contained in Article XI, section 18, that mandated supermajorities for the passage of municipal bond measures. The specific cases resulted from the defeat of two San Francisco bond proposals for schools, parks and recreational facilities in

November 1969. The bond measures had fallen short of the two-thirds requirement though the majority of the electorate had approved the measures with votes of 52.3 and 56.8 percent. Sullivan's opinion declared that the two-thirds requirement violated the federal equal protection clause of the Fourteenth Amendment by giving negative voters twice the voting power of those people voting in the affirmative. For future bond votes, a simple majority of the voters would suffice, the court ruled.

Sullivan authored an eloquent attack on the supermajority requirement, denying that it was necessary for sound policymaking:

> Respondents imply that the two-thirds vote requirement is all that stands between the state and either immediate financial catastrophe or ultimate collapse of its political subdivisions under crushing burdens of debt foolishly incurred by reckless or malevolent popular majorities. There is no support for respondents' position.[52]

Rather, Sullivan found more persuasive the petitioners' arguments that times had changed, and, with them, so had the state's compelling interest. Approaching the case through the California court's functionalist analysis, Sullivan suggested that the respondents confused the "general principle of debt control and the particular technique of an extraordinary majority vote requirement."[53] A supermajority requirement may have been justified by the economic conditions of the 1870s, when a nationwide economic depression sparked the wave of municipal bankruptcies that led to the insertion of the two-thirds requirement into the state constitution of 1879. Yet since that "chaotic period," Sullivan argued, "virtually every factor which may have been relevant . . . has since been altered dramatically."[54] The quality and integrity of governmental and financial administration had improved tremendously, and the institutions of the bond market discouraged unsound bond sales. Full and accurate financial and legal information on the bond sales was readily available to prospective buyers. In short, Sullivan declared, remarkable progress in municipal governance made the safeguard no longer necessary:

> We consider it fanciful to argue, in the absence of any evidence, that a majority of this electorate, better educated and with access to far more sources of information than its counterpart of a century

> ago, is so incapable of mature judgment that it will bankrupt itself through indiscriminate borrowing.

Holding the two-thirds vote requirement to this compelling interest measurement, Sullivan noted that he had seen no evidence that it produced greater fiscal security. Despite the fact that most states did not require a two-thirds vote, the respondents had shown "no data indicating more frequent bond defaults, lower credit ratings, or extravagant public projects in those states."[55]

Sullivan's engagement with the problems of municipal governance in the late twentieth century led him to a passionate defense of the equal importance of government action as opposed to stasis:

> This justification for the extraordinary majority requirement rests on the premise that a decision to undertake a project such as the construction of schools and playgrounds is qualitatively different from a decision not to do so. This, in turn, is based on the assumption that spending money is a more serious matter than not spending it and, consequently, must be justified whereas frugality is self-justifying. A predisposition to thrift may serve a man well. It does not, however, justify governmental inertia, especially when government is faced with critical social problems demanding urgent and sometimes costly remedies. There is no presumption in favor of inaction.[56]

Property owners did not need the supermajority requirement to protect them, he argued, because they were not " a beleaguered minority" bearing the burden of bonds for the rest of the population. Rather, a "substantial majority of the registered voters in California own their own homes" and those who do not pay property taxes directly do so through their rent. Thus, the "probability of a property-owning minority being subjected to confiscatory taxation by the unbridled appetites of the propertyless masses is no more than 'theoretically imaginable.'"[57]

Sullivan criticized the attempt to make analogies between the California provision and other American institutional arrangements that eschew majoritarianism, such as unanimous jury verdicts or the two-thirds requirements for impeachment. State-imposed inequalities in voting power could not be justified through reference to other distinct institutions. Nor

was it relevant to point to the internal procedures of legislative bodies, for they "involve no dilution of the individual exercise of the franchise which is at issue here."[58]

Finally, Sullivan pointed out that his opinion did not uniformly invalidate all extraordinary vote requirements outside the legislative process. Rather, it was necessary to demonstrate only that they promote a compelling state interest. A supermajority requirement to alter the constitution, he argued, could meet such a standard of compelling interest.

Editorial response from California's major newspapers generally supported *Westbrook*, seeing it as part of the progressive evolution of equal protection jurisprudence. "The State Supreme Court recognized 20th century economic conditions" enthused the *Sacramento Bee*. "Its decision will be a boon for hard-pressed local governments—particularly school districts—which have been struggling to keep up with the needs of modern society." The supermajority requirement, the *Bee* wrote, "was inconsistent with the spirit of a democratic society which places each citizen's vote on an equal pedestal."[59] The *San Francisco Chronicle* observed that the court "was clearly on sound grounds" in finding the rule unconstitutional. "The taxpayer," the *Chronicle* noted, "will pray that the court is no less sound in attributing fiscal wisdom and prudence to the modern electorate."[60] The *Los Angeles Times* accepted the decision as a logical outcome of "the trend of recent constitutional rulings" while warning that it not be used as an excuse to delay statewide property tax relief.[61]

As with *Serrano*, legal commentators divided over how they viewed Sullivan's opinion. Some saw the *Westbrook* ruling as a simple extension of the reapportionment cases of the U.S. Supreme Court. "The function of this decision" declared one author, "should be to better protect the individual voter from encroachment of his vote by any method. The burden has merely shifted to the state, when challenged on a particular extraordinary majority provision, to justify and bear the burden of proof of any deviations from the rule of equal voting power for individual citizens."[62] Supporters agreed with Sullivan that the voters could be clearly classified by the manner in which they voted. Since only school districts were typically restricted to the general obligation bonds that required two-thirds approval, the class discriminated against could be even more narrowly defined as "that portion of the electorate which favors increased budgetary expenditures *for educational facilities*." Local governments could finance other activities through mechanisms such as multi-year

contracts, special districts, joint authority financing, or lease financing, but these methods were not legally available to school districts.[63]

Critics thought that *Westbrook* rested "on dubious constitutional reasoning." The court should not have applied the strict scrutiny of an exacting equal protection test, according to this analysis. The extraordinary majority requirement did not deny individual voters equal influence over the election's outcome and did not abridge any group's separate constitutional rights to equal treatment. Interestingly, even some critics of the court's reasoning thought that "*Westbrook's* practical consequences may prove sound and salutary," aiding local government's ability to meet its financial needs.[64]

The *Westbrook* decision would have had substantial implications for public expenditures in the early 1970s as well as today. According to the *Los Angeles Times*, there were 175 school bond issues on the ballot in California in 1967-68. Ninety-two percent of these bond measures won a majority, yet only 45 percent received the necessary two-thirds vote legally required for passage. If the supermajority rule had been eliminated, the school districts that relied most heavily on this financing method could have raised money to meet their needs more easily.[65]

Within a year, however, *Westbrook* had been reversed by the U.S. Supreme Court. Chief Justice Warren Burger wrote the Court's opinion in the West Virginia case *Gordon v. Lance* that upheld the supermajority requirement.[66] Burger argued that the supermajority requirement did not discriminate against any "discrete and insular minority" as in earlier Supreme Court voting rights cases (*Gray v. Sanders*[67] and *Cipriano v. City of Houma*[68]). He argued that nothing required that a majority always prevail on every issue and that United States institutions had many examples of nonmajoritarian provisions. Burger cited many of the rules, including impeachment and ratification of treaties, that Sullivan had dismissed in his opinion for being irrelevant to the case of a general election. Unlike Sullivan, who contended that government stasis should not be privileged over action, Burger maintained that fiscal frugality deserved special protection. By voting to issue bonds, he argued, "voters are committing, in part, the credit of infants and of generations yet unborn, and some restriction on such commitment is not an unreasonable demand."[69]

## *Serrano*, *Westbrook*, and California History

Coming as the United States Supreme Court pulled back on the equal protection front, Sullivan's opinions in *Serrano* and *Westbrook* marked the outermost boundaries of a national equal protection revolution. *Gordon v. Lance* and *San Antonio Independent School District v. Rodriguez* revealed the hostility of the Burger Court to further expanding federal equal protection rights under the Fourteenth Amendment, particularly when such an extension might result in a redistribution of wealth and public services within American society. Through the federalism of the United States court system, the Burger Court's chilly attitude toward equal protection, expressed in these and other cases, sent shock waves back through the state courts.

As a California court dominated by liberals increasingly diverged from the more conservative national Supreme Court during the 1970s, the struggle over the relative independence or deference appropriate to state constitutional interpretation sparked a contentious debate within the state court and among members of the public. To what extent could the California court continue to expand the rights of individuals solely on the basis of the California constitution? Sullivan's *Serrano II* opinion asserted the "independent vitality" of state constitutional provisions.[70] The more conservative members of the state court in the mid-to-late 1970s, Justices Clark, Richardson, and McComb, pointed to the national court's restrictive decisions and argued for the uniform interpretation of similar state and federal constitutional provisions. Thus, in his *Serrano II* dissent, Richardson referred to his previous repudiation of the "independent state grounds" doctrine in *People v. Disbrow* (1976, dissenting opinion) and suggested that "we might defer to the *Rodriguez* equal protection analysis rather than create our own different interpretation of substantially identical constitutional language."[71]

While the fiercest controversy raged over the California court's independent decisions on the death penalty and the rights of criminal defendants, the different fates of Sullivan's *Serrano* and *Westbrook* opinions revealed some of the opportunities and the limitations of jurisprudence based on independent state grounds. Protected by state constitutional doctrine, *Serrano* survived to bring about the restructuring of California's school finance system. In contrast, the ghost of *Westbrook*

haunted California's struggling public sector, particularly in the area of public education.

In addition to demarcating some of the farthest reaches of equal protection jurisprudence into the areas of wealth discrimination and voting rights, the paths from *Serrano* and *Westbrook* also led directly forward to Proposition 13 in 1978 and the ensuing struggle to sustain the financing of local government in California. *Serrano's* equalization requirements for the schools combined with Proposition 13's property tax limitation to provoke a switch from local to primarily state financing for public education. With *Westbrook* overturned, the authors of Proposition 13 expanded the use of the two-thirds vote requirement in what Justice Stanley Mosk would call a "fundamentally undemocratic" curtailment of revenue-raising by local governmental entities.[72]

Some have argued that by inciting a political reaction among California taxpayers the *Serrano* decision was partially responsible for the passage of Proposition 13. Thus in a provocative essay entitled "Did *Serrano* Cause Proposition 13?" the economist William Fischel claims that *Serrano* broke the positive relationship between the property tax and local economic benefits, leading many voters to support Proposition 13 when they had rejected tax-limiting initiatives in 1968 and 1972 by 2-1 margins. While Fischel does not prove that a sufficient number of voters consciously associated *Serrano* with the antitax initiative, he points to the general absence of resistance to the proposition from high-wealth districts that might have rejected the proposed constraints on their financial autonomy. So long as local property taxes poured into the local schools, the property tax initiative did not have a critical mass of supporters. With *Serrano*, Fischel argues, "households in wealthy communities . . . would find that the property tax was a deadweight loss to them" rather than "a virtual fee for public school services."[73] According to such reasoning, with Proposition 13 California voters implicitly repudiated Justice Sullivan's normative assumption that the schools should be financed by taxation based on "ability to pay." By limiting the government's ability to redistribute educational resources and thus successfully implement *Serrano*, the California electorate instead asserted a "benefit" rationale for property taxation, i.e., that people should pay only for the public educational services that they receive.[74]

While the causal connection between *Serrano* and Proposition 13 remains only hypothetical, there has been an unmistakable decline in

spending on California's public school system following *Serrano* and Proposition 13. An evaluation of Sullivan's opinion in *Serrano* must also consider the subsequent history of school financing in California. In answering the court's call for greater equality in the financing of the schools, would California raise the lowest spending levels, lower the highest, or both?

According to a 1994-95 report, California had plunged from fifth in 1965 to a rank of fortieth among the states in current per pupil expenditures for public elementary and secondary schools.[75] In the current financing system, the state's public schools rely on the state for 88 percent of their revenue. This centralized structure limits local control over finances and leaves the schools vulnerable to a downturn in the state economy. Sharp limitations on local taxing discretion, including the mandated two-thirds requirement for bond measures, partially constrain localities from raising additional funds for the schools. Revenue limits help narrow discrepancies between the amounts school districts spend per pupil.

Commentators generally agree that official expenditures became more equal in the decade following *Serrano II*. With the centralization of funding at the state-level, over 90 percent of California students are reported to be within the inflation-adjusted band set by *Serrano II*. The remaining students typically receive expenditures above the band.[76] Yet the connection between more equal funding levels and educational achievement remains less clear. Some studies of the California schools have noted that interdistrict achievement levels did not change measurably, even though state financing did. This continuing disparity in achievement can be partially blamed on the ability of wealthier districts to evade revenue limits through unofficial supplements. Additional local taxes, approved by two-thirds of the voters, can help finance specific projects like construction, smaller student-teacher ratios, or the rewiring of classes. Localities can also raise millions of dollars through local education foundations, collect fees and gate receipts for athletics, or draw on computer donations and charitable golf tournaments. The changing composition of students in poorer districts is another factor: In the districts that were poorer before *Serrano II*, the mean percentage of AFDC recipients rose from 13.75 to 15.23 percent and the percentage of non-native English speakers also rose significantly.[77]

Sullivan's *Westbrook* opinion figured prominently in California school financing following the passage of Proposition 13 in 1978. Proposition

13's two-thirds voting requirements restricted the ability of local governments to raise taxes for school construction and maintenance, as well as for other public services. When the California court was asked to interpret the legality of Proposition 13 and its supermajority voting requirements for taxation, the court's liberal wing salvaged what it could from *Westbrook*, but was ultimately constrained by the Supreme Court's decision of *Gordon v. Lance*, which reversed the *Westbrook* doctrine. In several cases, the court upheld two-thirds requirements while seeking to limit their application. Thus in *Los Angeles County Transportation Commission v. George U. Richmond* (1982)[78] the court construed narrowly the definition of "special districts" to which the two-thirds requirement applied. Writing for the court, Justice Stanley Mosk argued that while *Gordon v. Lance* made clear that the supermajority stipulation did not offend federal equal protection requirements, *Westbrook* had established the principle that the supermajority requirement should be avoided whenever possible. Consequently, Mosk declared, any infringement on majoritarian democracy should be "strictly construed and ambiguities resolved in favor of permitting voters of cities, counties and 'special districts' to enact 'special taxes' by a majority rather than a two-thirds vote."[79] *Richmond* upheld the passage of a sales tax by the Los Angeles County Transportation Commission, arguing that since the commission lacked the ability to levy a property tax, it did not constitute a special district. Shortly after *Richmond*, the court similarly contended in *City and County of San Francisco v. Farrell* (1982),[80] also written by Justice Mosk, that the term "special taxes" similarly needed to be defined narrowly so as to limit Proposition 13's impingement on majoritarian democracy.[81] (With *Rider v. County of San Diego* [1991],[82] the Lucas Court would later substitute broad acceptance of the two-thirds voting requirement for Justice Sullivan and Justice Mosk's restrictive interpretations of when the rule could impinge on majoritarian democracy.)

*Serrano* and *Westbrook* reflected a judicial approach that interpreted the law in the context of a larger social vision. The decisions illustrated the potential for significant judicially mandated redistribution of wealth and opportunity through the equal protection doctrine. In *Serrano*, the court squarely took on an example of stark educational inequality, while cautiously clothing the decision in restrained constitutional garb. Justice Sullivan's opinion helped raise searching questions about the potential for equal protection litigation to challenge wealth discrimination both in and

out of the schools. Could equal protection guarantees be extended from education to apply to wealth discrimination in other areas of government action? Was education so much more fundamental than other governmental services, such as police and fire protection, that notoriously are often inadequately provided to poorer areas? Was there a basis for challenging other forms of taxation that fall more heavily upon the poor than upon others in society, such as a regressive sales tax?

*Westbrook* posed less complicated constitutional questions than *Serrano*, but the ruling's financial implications were no less sweeping. In June 1986, with the passage of Proposition 46, California's school districts regained the authority to issue general obligation bonds that they had initially lost with the passage of Proposition 13.[83] According to a tally made by the Association of California School Administrators, between 1986 and June 1995, California voters gave two-thirds approval to 170 of the 371 school-bond measures that came before them, a 45.8 percent rate of success. If the simple majority that *Westbrook* required had been sufficient, the approval rate would have doubled to 90.6 percent; a total of 336 of the bond measures would have passed, and many millions of additional dollars would have flowed into the California schools.[84]

In their day, the *Serrano* and *Westbrook* decisions logically extended contemporary jurisprudence and received solid 6-1 and 7-0 support from the California Supreme Court. Yet the past 25 years of popular politics and equal protection jurisprudence have turned sharply away from the principles embodied in Justice Sullivan's eloquent opinions.[85] *Serrano* and *Westbrook* remain behind like the sculpted seashells left by a receding tide.

## NOTES

*Acknowledgment*: The author gratefully acknowledges the financial support of the Center for the Study of Law and Society at the University of California, Berkeley, and the valuable editorial guidance of Professor Harry N. Scheiber.

[1]2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970).

[2]Sullivan wrote for the court that a provision of the California constitution that conditioned the right to vote on the passage of an English literacy test violated equal protection rights, as applied to citizens capable of passing an equivalent test administered in Spanish. The U.S. Supreme Court made the *Castro* ruling somewhat irrelevant in *U.S. v. Arizona,* when it sustained the nationwide ban on literacy tests imposed by the 1970 amendments to the Voting Rights Act.

[3]9 Cal. 3d 96, 507 P.2d 628, 107 Cal. Rptr. 20 (1973).

[4]4 Cal. 3d 251, 481 P.2d 489, 93 Cal. Rptr. 361 (1971).

[5]3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

[6]*U.S. v. Arizona* 400 U.S. 112 (1970).

[7]*Griffin v. Illinois* 351 U.S. 12 (1956); *Williams v. Illinois* 399 U.S. 235 (1970).

[8]*Burns v. Richardson* 384 U.S. 73 (1966) and *Avery v. Midland County* 390 U.S. 474 (1968), among others.

[9]5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

[10]2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970) (Sullivan J) (5-2 dec.) petitions for cert. denied, 39 USLW 3096 (US Sept. 2, 1970) ( No. 641), 39 USLW 3115 (US Sept. 2, 1970) (No. 730). Justices Mosk and Peters supported the decision but argued that it should apply to the bond issues in question, not only to future bond elections.

[11]411 U.S. 1 (1973).

[12]18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

[13]Jerome Falk, "The Supreme Court of California 1971-1972, Foreword: The State Constitution: A More than 'Adequate' Nonfederal Ground," *California Law Review*, 61: 273 (1973); William J. Brennan, Jr., "State Constitutions and the Protection of Individual Rights," *Harvard Law Review,* 90: 489 (1977); David R. Lipson, "*Serrano v. Priest*, I and II: The Continuing Role of the California Supreme Court in Deciding Questions Arising under the California Constitution," *University of San Francisco Law Review*, 10: 697 (1976); Robert J. Frank, "Camping on Independent State Grounds: California Ensures the Reality of Constitutional Ideals," *Southwestern University Law Review*, 9: 1157 (1977); James G. Roberts, "Note: *People v. Pettingill*: The Independent State Ground Debate in California," *California Law Review*, 67: 768 (1979).

[14]Sullivan observed in the footnote in *Serrano I* that would become the basis for the decision of *Serrano II* on the basis of independent state grounds: "The

complaint also alleges that the financing system violates Article I, sections 11 and 21, of the California Constitution. Section 11 provides: "All laws of a general nature shall have a uniform operation." Section 21 states: "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." We have construed these provisions as "substantially the equivalent" of the equal protection clause of the Fourteenth Amendment to the federal Constitution. (*Dept. of Mental Hygiene v. Kirchner* (1965) 62 Cal. 2d 586, 588 [43 Cal. Rptr. 329, 400 P.2d 321].) Consequently, our analysis of plaintiffs' federal equal protection contention is also applicable to their claim under these state constitutional provisions." [5 Cal. 3d 584, 595-6, n.11] By *Serrano II*, these constitutional sections had become, in substance, Article IV, section 16 and Article I, section 7(b).

[15]See text below.

[16]403 U.S. 1 (1971).

[17]California Teachers Association, *Research Bulletin No. 253: California School District Financial Analyses 1969-70*, at 4, 8, 12, 197, 202, 207 (1970) as cited in Paul A. Brest, "Book Review: Interdistrict Disparities in Educational Resources," *Stanford Law Review,* 23: 591 (1971) at 591.

[18]5 Cal. 3d 584, 599.

[19]John E. Coons, William H. Clune III, and Stephen D. Sugarman, *Private Wealth and Public Education* (Cambridge, Mass.: The Belknap Press of the Harvard University Press, 1970).

[20]293 F. Supp. 327 (N. D. Ill. 1968).

[21]Kenneth L. Karst, "*Serrano v. Priest*: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law," *California Law Review,* 60: 720 (1972) at 737, 742.

[22]John E. Coons, "Fiscal Neutrality after *Rodriguez*," *Law and Contemporary Problems,* 38: 299 (Winter-Spring 1974).

[23]"In sum, we find the allegations of plaintiffs' complaint legally sufficient and we return the cause to the trial court for further proceedings. We emphasize that our decision is not a final judgment on the merits." 5 Cal. 3d 584, 617.

[24]5 Cal. 3d 584, 589.

[25]5 Cal. 3d 584, 603.

[26]Justice Mathew Tobriner offered a useful reflection on this approach in "Retrospect: Ten Years on the California Supreme Court," *UCLA Law Review,* 20: 5 (1972). See also former Chief Justice Donald R. Wright's "The Role of the Judiciary: From *Marbury* to *Anderson*," *California Law Review,* 60: 1262 (1972).

[27]5 Cal. 3d 584, 604, 608.

[28]5 Cal. 3d 584, 605.

[29]5 Cal. 3d 584, 607.

[30]5 Cal. 3d 584, 618, quoting *Old South Leaflets* V, No. 109 (1846) pp. 177-180 (Tenth Annual Report to Mass. State Bd. of Ed.), quoted in *Readings in American Education,* 336 (1963). In their comments on *National League of Cities v. Usery* (426 U.S. 833 [1976]) Lawrence Tribe and Frank Michelman would later emphasize similarly the affirmative obligations of government to provide essential services: Lawrence Tribe, "Unraveling *National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services," *Harvard Law Review,* 90: 1065 (1977); Frank Michelman, "States' Rights and States' Roles: Permutations of Sovereignty in *National League of Cities v. Usery*," *Yale Law Journal*, 86: 1165 (1977).

[31]*Time Magazine*, Sept. 13, 1971, at 43, as quoted in Karst, "*Serrano v. Priest*," 720. Karst noted in his 1972 article that an estimated 30 *Serrano*-style lawsuits had been undertaken in 20 states. (Karst, "*Serrano v. Priest*," 721, n.5.)

[32]18 Cal. 3d 728, 742.

[33]Karst, "*Serrano v. Priest*," 720.

[34]Stephen R. Goldstein, "Interdistrict Inequalities in School Financing: A Critical Analysis of *Serrano v. Priest* and Its Progeny," *University of Pennsylvania Law Review*, 120: 504 (1972) at 526; Note "A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars," *Yale Law Journal*, 81: 1303 (1972). Powell cited the *Yale Law Journal* article extensively in his *Rodriguez* opinion. An attack on the Yale article is W. Norton Grubb and Stephan Michelson, "Public School Finance in a Post-*Serrano* World," *Harvard Civil Rights-Civil Liberties Law Review*, 8: 550 (1973). Justice Clark argued in his dissent in *Serrano II* that the decision would mean a transfer of wealth from the poor to the wealthy: "In our urban-suburban complexes where most students live, a rich district does not mean a district of rich people but is ordinarily one of poor residents, while a poor district is ordinarily one of more fortunate people. The impact of today's opinion appears to be a transfer of resources from poor people to those more fortunate." (18 Cal. 3d 728, 793).

[35]Goldstein, "Interdistrict Inequalities in School Financing," 543. Goldstein referred to what was called "district power equalizing."

[36]*Hawkins v. Town of Shaw*, Mississippi (5th Cir. 1971) 437 F. 2d 1286.

[37]5 Cal. 3d 584, 613-614.

[38]Karst, "*Serrano v. Priest*," 725-729. Mary Bowen Little, "Potholes, Lampposts and Policemen: Equal protection and the financing of basic municipal services in the wake of *Hawkins* and *Serrano*," *Villanova Law Review*, 17: 655 (1972); Robert L. Graham and Jason H. Kravitt, "The Evolution of Equal Protection–Education, Municipal Services, and Wealth," *Harvard Civil Rights-Civil Liberties Law Review*, 7: 103 (1972); Daniel Wm. Fessler and Charles M. Haar, "Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure" *Harvard Civil Rights-Civil Liberties Law Review*, 6: 441 (1971).

[39]Goldstein, "Interdistrict Inequalities in School Financing," 529, 531. Frank Michelman differentiated generally between "equality" and "minimum welfare" in "The Supreme Court—Foreword: On Protecting the Poor through the Fourteenth Amendment," *Harvard Law Review*, 83: 7 (1969).

[40]411 U.S. 1 (1973).

[41]18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976). Opinion by Sullivan, J., with Wright, C. J., Tobriner and Mosk, JJ., concurring. Separate dissenting opinion by Richardson, J. Separate dissenting opinion by Clark, J., with McComb, J., concurring.

[42]*Dept. of Mental Hygiene v. Kirchner* (1965) 62 Cal. 2d 586, 588 [43 Cal. Rptr. 329, 400 P.2d 321]. Sullivan wrote, "the footnote's citation of our second *Kirchner* opinion forecloses any argument that a classification which satisfies federal equal protection standards by the same token satisfies our own constitutional provisions." 18 Cal. 3d 728, 763.

[43]18 Cal. 3d 728, 764.

[44]20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977).

[45]421 U.S. 240 [44 L.Ed.2d 141, 95 S.Ct. 1612].

[46]John E. McDermott and Richard Rothschild "The Supreme Court of California 1976-77. Foreword: The Private Attorney General Rule and Public Interest Litigation in California," *California Law Review*, 66: 138 (March 1978).

[47]18 Cal. 3d 728, 745.

[48]18 Cal. 3d 728, 748.

[49]Quoting Jefferson's opinion, Sullivan wrote: "These alternative methods, which are 'workable, practical and feasible,' include: '(1) full state funding, with the imposition of a statewide property tax; (2) consolidation of the present 1,067 school districts into about five hundred districts, with boundary realignments to equalize assessed valuations of real property among all school districts; (3) retention of the present school district boundaries but the removal of commercial and industrial property from local taxation for school purposes and taxation of such property at the state level; (4) school district power equalizing[,] which has as its essential ingredient the concept that school districts could choose to spend at different levels but for each level of expenditure chosen the tax effort would be the same for each school district choosing such level whether it be a high-wealth or a low-wealth district; (5) vouchers; and (6) some combination of two or more of the above.'" 18 Cal. 3d 728, 747.

[50]For a summary of education clauses in state constitutions, see Frank, "Camping on Independent State Grounds," *supra* n. 13, at 1176.

[51]18 Cal. 3d 728, 763.

[52]2 Cal. 3d 765, 788.

[53]2 Cal. 3d 765, 788.

[54]2 Cal. 3d 765, 789.

[55]2 Cal. 3d 765, 790.

[56]2 Cal. 3d 765, 793.

[57]2 Cal. 3d 765, 795, quoting *Mine Workers v. Illinois Bar Assn.* (1967) 389 U.S. 217, 224 [19 L.Ed.2d 426, 432, 88 S.Ct. 353].

[58]2 Cal. 3d 765, 798.

[59]Editorial, "State Supreme Court Makes Correct Decision in Local Bond Issue Vote," *Sacramento Bee,* July 2, 1970, A20: 1.

[60]Editorial, "Court Outlaws Two-thirds Rule," *San Francisco Chronicle*, July 2, 1970, 38:1.

[61]Editorial, "Bond Ruling and the Taxpayer," *Los Angeles Times,* July 2, 1970, Part II, 6:1.

[62]Michael V. Vollmer, "Note: The Extraordinary Majority Rule in Municipal Bonding: *Westbrook v. Mihaly,*" *Loyola University Law Review,* 4: 423 (1971) at 437.

[63]Comment, "California's Debt Restriction: An Unconstitutional Super-majority Voting Requirement?" *Southern California Law Review*, 43: 455 (1970) at 475, 486.

[64]"California Supreme Court: 1969-70," *California Law Review*, 59: 58 (1971) at 157, 158.

[65]"Boost for Bond Issues," *Los Angeles Times,* July 5, Section G, 5:4.

[66]403 U.S. 1 [153 W. Va. 559, 170 S. E. 2d 783, reversed.] Brennan and Marshall dissented.

[67]372 U.S. 368.

[68]395 U.S. 701.

[69]403 U.S. 1, 6.

[70]*Serrano II*, 18 Cal. 3d 728, 764, as cited in *Hawkins v. Superior Court of San Francisco*, 22 Cal. 3d. 584, 600 (586 P.2d. 916; 150 Cal. Rptr. 435 [concurring opinion]). Other significant independent state grounds decisions include: *Dept. of Mental Hygiene v. Kirchner* (1965) 62 Cal. 2d 586, 43 Cal. Rptr. 329, 400 P.2d 321; *People v. Anderson* (1972) 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152; *People v. Pettingill* (1978) 21 Cal. 3d 231, 578 P.2d 108, 145 Cal. Rptr. 861; *People v. Hannon* (1977) 19 Cal. 3d 588, 564 P.2d 1203, 138 Cal. Rptr. 885; *People v. Longwill* (1975) 14 Cal. 3d 943, 538 P.2d 753, 123 Cal. Rptr. 297; *People v. Disbrow* (1976) 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360; *People v. Brisendine* (1975) 13 Cal. 3d. 528, 531 P.2d. 1099, 119 Cal. Rptr. 315; *People v. Norman* (1975) 14 Cal. 3d. 929, 939, 538 P.2d 237, 123 Cal. Rptr. 109. See footnote 14 above for article references. The tendency to leave ambiguous whether state courts were ruling on the basis of "independent state grounds" led to the Supreme Court decision of *Michigan v. Long* (463 U. S. 1032 [1983]). *Long* declared that the Supreme Court would make a presumption that the state courts were depending on federal law unless the state court's opinion or judgement stated clearly that the decision rested on state grounds.

[71]18 Cal. 3d 728, 778, diss. op. See *People v. Disbrow* (1976) 16 Cal. 3d 101, 119, diss. op. While Richardson, Clark, and McComb dissented in *Serrano II* because of their fundamental disagreement with the majority's understanding of the potential for equality in school finance, *Serrano* was part of this controversy over the relationship between the federal and state supreme courts.

[72]For his use of the phrase "fundamentally undemocratic," see Justice Mosk's opinion, relying on *Westbrook* in *Los Angeles County Transportation Commission v. George U. Richmond* (1982) 31 Cal. 3d 197, 205.

[73]William A. Fischel, "Did *Serrano* Cause Proposition 13?" *National Tax Journal,* 42:4, (1989) at 465-73. Donald R. Winkler also associates Proposition 13 with tax and expenditure limitations imposed on public education in the 1970s: Winkler, "Fiscal Limitations in the Provision of Local Public Services: The Case of Education," *National Tax Journal,* 32:2 Supplement (June 1979) at 329-41. For a recent review of post-Proposition 13 school finance issues, see Daniel L. Rubinfeld's "California Fiscal Federalism: A School Finance Perspective," in Bruce E. Cain and Roger G. Noll, eds., *Constitutional Reform in California: Making State Government More Effective and Responsive (*Berkeley: Institute of Governmental Studies Press, University of California, Berkeley, 1995), 431-53. Rubinfeld underscores the tensions between equalization through state financing and the willingness of local parents and taxpayers to raise taxes for the schools and participate in school administration.

[74]The idea of ability to pay runs through both *Serrano* and *Westbrook.* Justice Sullivan made his ideological position on taxation clear in the latter case. Claiming that American taxation was based on ability to pay, Sullivan declared that even the danger of confiscatory taxation by the masses did not justify the two-thirds vote requirement: "It is by no means obvious that a two-thirds vote requirement would be constitutionally permissible even were this [i.e., confiscation] a more realistic possibility. Underlying respondents' argument is a normative assumption that, for each individual, the benefits derived from governmental action should correspond to the burdens imposed by the taxing system; i.e., that those who use public facilities should pay for them. This assumption has never been thought to describe our actual tax structure which is based, instead, on an 'ability to pay' theory." [2 Cal. 3d 765, 795, n.60.] I am grateful to Robin Einhorn for her insights on this point. For classic explications of "ability to pay" and "benefit" theories of taxation, from an earlier era of American history, *see* Edwin R. A. Seligman. "Progressive Taxation in Theory and Practice. Second Edition," *American Economic Association Quarterly,* IX, no. 4 (1908); Seligman, *Essays in Taxation,* Tenth Edition (Boston: Macmillan and Co., 1928).

[75]From "Ranking of the States, 1994" National Education Association, West Haven, Conn., as cited in Michael W. Kirst, Gerald C. Hayward, Julia E. Koppich, et al., *Conditions of Education in California, 1994-95 (*Berkeley: Policy Analysis

for California Education, April 1995), 49.

[76]Danielle Starkey, "*Serrano* 20 Years Later" *California Journal*, 24: n6 (June, 1993) at 19; Kirst, Hayward, Koppich, et al., *Conditions of Education in California*, 55.

[77]Thomas A. Downes, "Evaluating the Impact of School Finance Reform on the Provision of Public Education: The California Case," *National Tax Journal*, 45: 4 (1992) at 405-419.

[78]31 Cal. 3d 197; 643 P.2d 941; 182 Cal. Rptr. 324.

[79]31 Cal. 3d 197, 205.

[80]32 Cal. 3d 47.

[81]The sales tax in *Richmond* and the payroll taxes in *Farrell* did not commit the credit of future generations, as Burger had characterized the bonds in *Gordon v. Lance*. The sales tax was "a broad-based tax on consumers; it has no relation to property ownership; it does not increase the indebtedness of the [Los Angeles County Transportation Commission] and it may be repealed by the voters of the local entity by a majority vote." 31 Cal. 3d 197, 205.

[82]1 Cal. 4th 1; 820 P.2d 1000; 2 Cal. Rptr. 2d 490 (1991).

[83]Bond Buyer Western Bureau, "Voters Pass $1.6 Billion of State GO [general obligation] Bonds and Allow Localities to Issue GOs," *The Bond-Buyer*, June 5, 1986, 4.

[84]Personal communication with Dennis Meyers, Legislative Advocate, Association of California School Administrators, Sacramento, California, November 14, 1995.

[85]For the change from broad public support for affirmative governmental action to the antigovernmentalism of Proposition 13, see Harry N. Scheiber, "Innovation, Resistance, and Change: A History of Judicial Reform and the California Courts, 1960-1990," *Southern California Law Review* 66:2049 (July 1993) at 2059-60.

# II. Oral History