# "Obtaining An Education" As A Right Of The People

By John C. Hogan*

## Constitutional Background

> Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. *San Antonio Independent School District v. Rodriquez.* (1973)[1]

The Supreme Court of the United States thus rejected the argument that there is a federal constitutional basis for the "right-to-an-education" thesis which was put forth in several recent federal court cases challenging the constitutionality of school financing systems.[2] The Court refused to agree that education is a *fundamental right* not specified in the Constitution. "It is not the province of this Court," said Mr. Justice Powell, "to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."[3] This strict construction posture of the Nixon Court would appear to affect the trend of federal court decisions concerned with the organization, administration, and programs of the public schools which has so clearly marked the period since about 1950.[4] Absent arbitrariness, capriciousness, or unreasonableness, and absent discrimination against the well-defined class which bears the "traditional indicia of suspectedness," or absent a class saddled with such disabilities, or subjected to such a history of "purposeful unequal treatment," or relegation to such a position of "political powerlessness as to command extradordinary protection against the majoritorian political process," the Supreme Court of the United States should henceforth not be expected to intervene.[5]

However, courts in California,[6] Michigan,[7] and *ab initio* New

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1. *San Antonio Independent School District v. Rodriques*, 41 LAW WEEK 4417 (March 20, 1973).

h042. See *Rodriquez v. San Antonio Independent School District*, 377 F. Supp. 280 (1971). *Van Dusartz v. Hatfield*. 344 F. Supp. 870 (1971).

3. 41 LAW WEEK 4417.

4. See John C. Hogan, *An Analysis of Selected Court Decisions Which Have Applied the Fourteenth Amendment to the Organization, Administration, and Programs of the Public Schools, 1950-1972*. U.C.L.A. Doctoral Dissertation. 1972. Chap. II.

5. Cf. 41 LAW WEEK 4415.

6. *Serrano v. Priest*. 96 Cal. Rptr. 601 (1971).

7. *Milliken v. Green*, 203 N.W. 2d 457 (1972). Michigan Supreme Court has granted a rehearing in this case. 41 LAW WEEK 2424 (February 13, 1973).

Jersey,[8] basing their decisions on *state* constitutional grounds, have said that education is a "fundamental interest" and is of such great ment by the courts. Courts in other states have refused to adopt the "fundamental interest" argument and refused to hold that education is entitled to extraordinary protection from the majoritorian political process.[9]

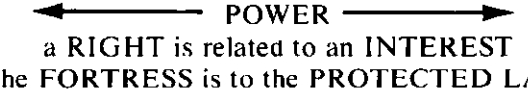
What do courts and constitutions mean when they use the words *right, fundamental interest,* or *power* with respect to education?

There is in jurisprudence a debate over whether a *right* is a "power" or an "interest." Roscoe Pound says that the ". . . word suggests both; a power to exact a certain act or forbearance . . . and a particular interest on account of which the power exists . . . But the right in itself is power."[10]

It has been customary in educational jurisprudence to look at the language of the Tenth Amendment of the Federal Constitution and to conclude therefrom that, since education is not one of the powers delegated to the United States, it is a *power* reserved to the states respectively, or to the people.

An *interest* is a "demand or desire which human beings either individually or in groups seek to satisfy . . ."[11] The law does not create interests: it classifies them, and recognizes some of them, and gives effect to those it recognizes. Roscoe Pound identified three classes of interests, which the legal order protects: (1) individual interests, (2) public interests, and (3) social interests. All three classes seem to have a place for education; and some courts have held that education is a "fundamental interest."

An analogy is helpful in understanding the positions of rights, powers, and interests in the legal order, viz.,[12]




8 *Robinson v. Cahill*, 287 A 2d 187 (1972) But see *Robinson v. Cahill*, on appeal, 41 LAW WEEK 2552-2553 (April 17, 1973) Holding with the New Jersey system on financing schools violates the state constitutional provision requiring the state to provide a "thorough and efficient" system of education for all school age children, and wherein the Supreme Court of New Jersey declared, "This court hesitates to turn this case upon the equal protection clause of the state constitution The equal protection clause may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs *The court will not pursue this equal protection issue in the limited context of public education* " Italics added

"Education " is not among the rights afforded explicit protection under our Federal Constitution Nor do we find any basis for saying it is implicitly protected " *San Antonio Independent School District v. Rodriquez* (1973)

9 *Spano v. Board of Education of Lakeland Central School District*, 328 N Y S 2d 229 (1972), *Jensen v. State Board of Tax Commissioners*, 41 LAW WEEK 2390 (January 1, 1973)

10 Pound, *Outlines of Lectures on Jurisprudence*, p 149 (1943)

11 *Ibid*, p 96

12 Cf Merkel, *Juristische Encyklopadie* (2 ed ), Sec 159, note, quoted in Pound, *op cit*, p 149

Simply put: a *right* is "... an interest protected by law."[13] Courts similarly will protect a "fundamental interest."

*Rights* retained by the people are enumerated in the Ninth Amendment:

> The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

"Obtaining an education" is not among the rights enumerated in the Constitution, hence it may be one of the *other rights* retained by the people of California under the Ninth Amendment.

The notion that "obtaining an education" is one of the fundamental rights retained by the people under the Ninth Amendment is novel;[14] there is dicta in *Palmer v. Thompson,* to-wit:

> Rights, not explicitly mentioned in the Constitution, have at times been deemed so elementary in our way of life that they have been labeled as basic rights . . . There is , of course, not a word in the Constitution . . . concerning the right of the people to education or to work or to recreation by swimming or otherwise. Those rights, like the right to pure air and pure water, may well be rights 'retained by the people' under the Ninth Amendment.[15]

Furthermore, the Ninth Amendment "... shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments, and an intent that the list of rights included there not be deemed exhaustive."[16]

13. III Jhering. *Geist des romischen Rechts*, Sec. 60. quoted in Pound. *op. cit.*, p. 149.

14. Cf. Comment. "Ninth Amendment Vindication of Unenumerated Fundamental Rights." 42 *Temple Law Quarterly* 46 (1968). Kunter. "The Neglected Ninth Amendment: The 'Other Rights' Retained by the People," 51 32Marquette Law Review 121 (1967). Redlick, "Are There 'Certain Rights . . . Retained by the People'?" 37 *New York University Law Review* 787 (1962). Bertelsman. "The Ninth Amendment and Due Process of Law—Towards a Viable Theory of Unenumerated Rights," 37 *University of Chicago Law Review* 777 (1968). Franklin, "The Relation of the Fifth, Ninth. and Fourteenth Amendments to the Third Constitution," 4 *Howard Law Journal* 170 (1958). Black, "The Unfinished Business of the Warren Court," 46 *Washington Law Review* 3 (1970). Franklin, "The Ninth Amendment as Civil Law Method and Its Implications for Republican Form of Government." 40 *Tulane Law Review* 487 (1966). B. Patterson. *The Forgotten Ninth Amendment* (1955). ". . . the ninth amendment reserves to the people the *rights* not enumerated in the Constitution. whereas the tenth amendment reserves to the people and the states the *powers* not delegated to the United States. It is unlikely that Congress intended to be redundant in these two amendments." 42 *Temple Law Quarterly* 46 (1968). "The only reported 'case' ever to discuss a claim based solely on the ninth amendment was *Ryan v. Tennessee*, 257 F. 2d 63 (6th Cir. 1958). However, the complaint failed to present a factual situation to the court or to state a controversy or issue between the parties, and contained as its only prayer for relief a request that the court make an abstract ruling concerning the construction and effect of the ninth amendment. The court therefore did not have the opportunity to explain the proper application of the amendment." *Idib.*, p. 46, n. 1. "(I)t cannot be presumed that any clause in the Constitution in intended to be without effect." In interpreting the Constitution. "real effect should be given to all the words it used." *Myers v. United States*, 272 U.S. 52, 151 (1926).

15. 403 U.S. 233-234 (1971).

16. *Griswold v. Connecticut*, 281 U.S. 492 (1965).

*Rights* which are specified in state and federal constitutions are said to be "constitutionally secured," and are given added protection by the courts; *interests* which are characterized as "fundamental" are likewise afforded this added protection. (Should not the rights retained by the people under the Ninth Amendment be entitled to the same protection?) The principal difference, therefore, between a constitutional *right* and a "fundamental interest" is that one is specified in the constitution while the other is not; the preferred treatment afforded both is essentially the same. This led Justice Harlan to protest the practice of judges who "pick out particular human activities, characterize them as 'fundamental,' and then give them added protection under an unusually stringent equal protection test" — even where such activities are not shown to be arbitrary or irrational and where they are "not *mentioned in the federal constitution.*"[17]

**Education as a "Power" of the State or the People**

Those ***powers*** not delegated to the United States by the Constitution, nor prohibited by it to the States, are ". . . reserved to the States respectively, or to the people." *(U.S. Constitution,* AmendmentX).

The power over education is not one of the powers delegated by the Constitution to the United States, or is it prohibited to the States; hence, it is one of the powers reserved to the States or to the people.

However, the *power* over education reserved to the people by the Tenth Amendment was granted, in part, by the people in California to the State to be exercised by the legislature:

> *Const. 1849, Art. IX, Sec. 3.* The legislature shall provide for a system of common schools, by which a school shall be kept up and supported in each district at least three months in every year, and any district neglecting to keep and support such a school may be deprived of its proportion of the interest of the public fund diring such neglect.[18]
>
> *Const. 1849, Art. IX, Sec. 2.* The legislature shall encourage, by all suitable means, the promotion of intellectual scientific, moral, and agricultural improvement.[19]

*Power* over education, independently of this grant by the people, may also have been reserved by the Constitution to the State. (U.S. Constitution, AmendmentX).

A *power* over education, emanating from the Tenth Amendment, explicitly retained by the people of California is that of election

17. *Shapiro v. Thompson*, 394 U.S. 662 (1969). Italics added.
18. Cf. *Const. 1879*, as last amended November 3, 1970, Art. IX, Sec. 5, which is substantially the equivalent.
19. *Ibid.*, Sec. 1, which is substantially the equivalent.

of the State Superintendent of Public Instruction:

> *Const. 1849, Art. IX, Sec. 1.* The legislature shall provide for the election by the people, of a Superintendent of Public Instruction ... [20]

In short, education in California, except for the election of the State Superintendent of Public Instruction by the people, is a state matter to be exercised by the legislature.

Constitutional language[21] such as, the "legislature shall provide for a system of common schools, by which a school shall be kept up and supported in each district at least three months in every year . . ." and the "legislature *shall encourage,* by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement," signifies the legislature's ***power*** over education; it does not establish a substantive right of the people to obtaining an education.[22]

Other rights of the people are mentioned, but nowhere in the California Constitution, is "obtaining an education" enumerated as a right of the people afforded explicit protection:

> *Const. 1849, Art. I, Sec. I:* "All people are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety, happiness, and privacy."[23]

**Education as a "Fundamental Interest"**

The conclusion reached by the Supreme Court of the Untied States in the *Rodriquez* ***case*** was not entirely unexpected;[24] as if to insure against this possibility and to foreclose federal court review,[25] the Supreme Court of California documented the 1971 *Serrano v. Priest* decision at footnote 11, thusly:

> The complaint also alleges that the financial system violates article I, sections 11 and 21 of the California Constitution . . . We have construed these provisions as 'substantially the equivalent' of the equal protection clause of the Fourteenth Amendment to the federal Constitution . . . Consequently, our analysis of plaintiff's federal

20. *Ibid.*, Sec. 2. which is substantially the equivalent.
21. *Cont. 1849.*, Art. IX, Secs. 3.2.
22. Cf. *Roberts v. City of Boston*. 59 Mass. Repts (5 Cushing) 198 (1849) construing similar language in the Massachuettes Constitution not to create any new substantive rights.
23. Cf. *Const. 1879*, as last amended November 3, 1970, Art. I, Sec. 1. which is substantially the equivalent. See discussion of education as a fundamental right, William W. Wells, "Drug Control of School Children: The Child's Right to Choose," 46 *Southern California Law Review* 602-604 (1973).
24. "The present writer reads the cases decided by the Supreme Court as in no way justifying the decisions in the *Serrano* and *Rodriquez* cases, and predicts that when the latter reaches the Court, it will be reversed." Jo Desha Lucas, "Serrano and Rodriquez—an Overextension of Equal Protection," 2 *NOLPE School Law Journal* 41 (Fall, 1972).
25. Where a judgment of a state court rests on two grounds, one involving a federal question and the other not, the Supreme Court of the United States will not take jurisdiction. Cf. *Minnesota v. National Tea Company*, 309 U.S. 554 (1940). See also *Department of Mental Hygiene v. Kirchner*, 43 Cal. Rptr. 329 (1965).

> equal protection contention is also applicable to their claim under these state constitutional provisions,[26]

This is the state constitutional grounds upon which the Court's decision rests.

Whereas the California Constitution contains no clear language concerning "obtaining an education as a right of the people," and in order to provide a further *state* basis for the *Serrano* decision's holding. Assemblyman Alex P. Garcia has introduced the following Constitutional Amendment into the California Legislature, to-wit.

> SECTION 1. All people are by nature free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining *an education,* safety, happiness, and privacy.[27]

This Amendment would establish an explicit state constitutional basis for a court decision that "obtaining an education" is a right of the people of California.

What does it mean for education and the schools now that state Supreme Courts, particularly in California but also in Michigan — basing their decisions on state constitutional laws — have characterized education as a *"fundamental interest?"*

One of the publicly stated goals of those who seek reform of the schools through the courts has been to have education characterized as a "fundamental interest."[28] That goal was realized in the case of *Serrano v. Priest,*[29] wherein the California Supreme Court held that the state's system for financing public schools, which relies heavily on local property taxes and causes substantial disparities in per pupil revenue among individual school districts, invidiously discriminates against the poor and therefore violates the equal protection provisions of the federal and state constitutions.

The most important fact about the *Serrano case,* however, is not the Supreme Court of California invalidated the state's system for financing public schools because it violates the equal protection

26. 96 Cal. Rptr. 609 (1971). California Constitution, Article 1, Section 11. "*Uniform General Laws*. All laws of a general nature shall have uniform operations." Section 21. "*Privileges and Immunities*. 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 or citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

27. Assembly Constitutional Amendment No. 37, Assemblyman Alex P. García, April 2, 1973. Italics added by the Amendment.

28. Cf. Hershel Shanks, "Equal Education and the Law," *The American Scholar*, 39 (Spring 1970), 255-269; Coons, Clune, and Sugarman, "Educational Opportunity: A Workable Constitutional Test for State Financial Structures," 57 *California Law Review* 305-421 (1969).

29. 96 California Reporter 601-626 (1971) Remanded to the trial court with directions to overrule the demurrers and to allow the defendants a reasonable time within which to answer (in other words, to proceed with a trial which is now in progress in Los Angeles). It is not yet clear just what will be the effects of SENATE BILL No. 90, approved by the Governor. December 18, 1972, on the outcome of this case.

provisions of article 1, sections 11 and 21 of the state Constitution — although that is certainly a fundamental and far-reaching conclusion — but rather that the foundation upon which the Court rested its reasoning to arrive at that conclusion was a new principle of law, namely, that *"the right to an education in the public schools is a fundamental interest . . ."*[30] In the course of its opinion, the California Court made the following solemn declaration:

> We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.'[31]

The full significance of this statement is not immediately apparent — clearly, it reaches far beyond the facts of the immediate case; it seems to encompass *all* aspects of education, not just methods for financing public schools.

One important ramification of characterizing education as a "fundamental interest" is the test or "standard" which the courts will use to measure constitutionality. We know from recent decisions in areas other than education that courts require more than the traditional test of "reasonableness" in cases where a statute or policy touching on a "Fundamental interest" is challenged. Instead, they use the *new equal protection standard* to measure constitutionality. In California, at least, the courts would now look with "active and critical analysis" at state statutes and educational policies and practices which are challenged under the above-mentioned constitutional provisions, subjecting them to *strict scrutiny,* and the schools (i.e., the state) must bear the burden of showing that continued use of such policies or parctices is *neccessary to achieve a compelling state purpose.*

There has thus been a major change in the analytical framework within which California Courts would decide cases affecting the organization, administration, and programs of the schools. The implications of this for education appear to be more far-reaching than those of the 1874 *Kalamazoo case*[32] which extended public financing to secondary education, or of the 1954 *Brown case*[33] which prohibited state-enforced separation of the races in the public schools. This new principle of the *Serrano case,* if subsequently reaffirmed by the Supreme Court of California when the case is again heard on appeal, would mark the end of judicial *laissez-faire* in California education. It would mean that hardly a thread in the educational fabric is immune to strict "judicial scrutiny."

30. *Ibid.*, p. 604. Italics added.
31. *Ibid.*, p. 618.
32. *Stuart v. School District No. 1 of Village of Kalamazoo, 30 Michigan 69 (1874).*
33. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

In order to fully appreciate the significance for education of what the Calfironia Supreme Court did in its decision in the *Serrano case,* it is necessary to understand the analytical framework within which courts in general, and the Untied States Supreme Court in particular, decide cases involving the equal protection requirement. This involves examining some of the professional apparatus which judges use to arrive at their decisions, including such technical legal terms as "rights," "power," and "interest" (see above), "classification," the "traditional standard of reasonableness," the "compelling interest doctrine," "suspect criteria," "strict scrutiny," "burden of proof," the "new equal protection standard," etc.

**The Traditional Standard of Reasonableness**

Classification, which is widely used in education, is the "jugular vein" of equal protection.[34] It involves the categorization of people into different groups or classes for purposes of *unequal* treatment. It is the *basis* on which the categorization is made (not the end result) to which courts look when deciding whether a state statue or educational practice violates the equal protection requirement. "The right to legislate implies the right to classify."[35] The *equality* required by the law does not mean that all persons must be treated alike, but only those persons under "like circumstances" or who are "similarly situated." The nub of the question, therefore, in the equal protection cases is the basis of the classification (or the *classifying factor)* which is used.[36] Courts have said that

> . . . the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.[37]

This is a concise statement of the *traditional standard of "reasonableness"* which courts still use in some cases to measure the constitutionality of state statutes and educational practices when they are challenged as a violation of equal protection of the laws. Under this standard, the person who attacks the educational practice bears the burden of proving that it is "arbitrary, capricious, or unreasonable," and courts ordinarily will not question the "wisdom

34. Forkosch, *Constitutional Law*, p. 519 (1969). Whereas *classification* is said to be the "jugular vein" of equal protection, it may also be analogized that *classification* is the "life-blood" of education. When we assign class grades, when we administer achievement tests and I.Q. tests, and when we separate pupils into special groups and classes for the express purpose of different treatment, we are classifying. Some have supposed that without classification the business of education could not proceed.

35. *Martin v. City of Struthers*, 319 U.S. 141, 154 (1943).

36. For a discussion of "reasonable," "forbidden," and "suspect" classifications, see Tussman and tenBroeck, "The Equal Protection of the Laws," 37 *California Law Review*, 341-381 (1949).

37. *F. S. Royster Co. v. Virginia*, 253 U.S. 412, 415 (1920). See note, "Developments in the Law—Equal Protection," 82 *Harvard Law Review* 1065-1192 (1969).

or expediency" that called for the practice in the first place.[38]

**The New Equal Protection Standard**

However, this long-established rule that a statute does not deny equal protection it it is rationally related to a legitimate governmental objective is subject to a significant exception, to-wit:

*The Compelling Interest Doctrine*.[39] This doctrine, which is of relatively recent vintage, has two branches, viz.,

1. The first branch which requires that classifications based on "suspect" criteria be supported by a *compelling state interest.* This branch of the doctrince apparently had its genesis in racial classifications which are regarded as inherently "suspect." (The (criterion of *wealth* has since been added to the list of suspects.)
2. The second branch of the doctrine holds that a statutory classification is subject to the *compelling state interest* test if the result of the classification touches on a "fundamental right," regardless of the basis of the classification.

Two other aspects of the compelling interest doctrine which must be noticed: *strict scrutiny* and who bears the *burden of proof.*

> ... in cases involving "suspect classifications" or touching on "fundamental interest," the court has adopted an attitude of active and critical analysis, subjecting the classification to *strict scrutiny* . . . the state bears the burden of establishing not only that it has a *compelling* interest which justified the law but that the distinctions drawn by the law are *necessary* to further its purpose.[40]

Whereas under the traditional standard, the person attacking the educational practice has the burden of proving that it is "arbitrary, capricious, or unreasonable," under the *new equal protection standard* the burden of proof is shifted to the state (i.e., the school) which must show that continued use of the practice is necessary to achieve a compelling state purpose.

The new equal protection standard has been described as the Supreme Court's "favorite and most far-reaching tool for judicial protection of 'fundamental' rights not specified in the Constitution."[41] In their book on *Private Wealth and Public Education,* Coons, Clune, and Sugarman tell how the Court has carved out from among the various equal protection (discrimination) issues seeking its attention,

> ... an *inner circle* of cases to be given special scrutiny on substantive grounds . . . race cases still stand in the bull's-eye of the inner circle as the archetype of special or "invidious" discrimination. Hovering about this racial nucleus . . . are specimens of discrimination ranging from dilution of franchise to discrimination

38. *Puglsey v. Sellmeyer*, 158 Ark. 247-255 (1923).
39. Cf. Mr. Justice Harlan dissenting in *Shapiro v. Thompson*, 394 U.S. 618, 655 (1969). For a discussion of the "rational basis" tests and of the "compelling state interest" tests, see Wells, *op. cit.*, pp. 607-611.
40. *Westbrook v. Mihaly*, 2 Cal. 3d 765, 784-785 (1970).
41. Gunther and Dowling, *Constitutional Law*, p. 983 (1970).

by wealth. The decisions are relatively few in number, and the rules they establish are fewer yet.[42]

Among the "special interests" [43] which have qualified for the ***inner circle,*** education is now an "outsider," at least so far as the Supreme Court of the United States is concerned[44] — but State courts in California and Michigan have characterized it as a "fundamental interest" and thus have admitted it to the ***circle.***

42. *Private Wealth and Public Education*, p. 339. Italics added.
43. Race, voting rights, travel, political associatinn, fair criminal procedures.
44. *San Antonio Independent School District v. Rodriquez*, 41 The United States *LAW WEEK* 4407-4450 (March 20, 1973). "... should an adverse decision come from the Supreme Court. State courts would nevertheless remain free to issue '*Serrano*-type' decisions based upon State constitutional grounds. Thus. there is little reason to believe that these cases will not leave their impact on American education." Lawyers' Committee for Civil Rights Under Law, "Intrastate School Finance Court Cases," September 11, 1972.

# Alumni News

## **Kenneth L. Birchby** (Taft '49)
## Vice President, National Assoc. of Savings Banks

Kenneth L. Birchby, graduate of St. John's School of Law, 1949, member of Phi Delta Phi, Fraternity, Taft Inn, and member of the New York Bar Association, was nominated vice president of the National Association of Mutual Savings Banks, at its 53rd Annual Conference May 6-9 in New York City. Mr. Birchby will succeed John S. Howe of Boston, Massachusetts as president of NAMSB, the national trade organization of the $100 billion mutual savings bank industry, after serving as vice president for one year.

## Recent Deaths

John Lord O'Brian (Daniels '98), distinguished constitutional lawyer who served under six United States Presidents, died April 10 in Washington, D. C. at the age of 98. Until a fall a short time before his death, he had been active and frequently went to his office in the firm of Covington and Burling.

Among his many honors were the Presidential Medal of Merit for his work with the WPB and honorary doctor of law degrees from Harvard, Syracuse, Brown and Yale.