

ARTICLE

PRIVATE WEALTH AND PUBLIC SCHOOLS

John E. Coons*

“This our life exempt from public haunt.”
—William Shakespeare, *As You Like It*

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INTRODUCTION

Recently I was asked for an account of the genesis, incubation, and promise (if any) of the constitutional rule of “fiscal neutrality” in state funding of schooling. In 1971 that concept was established as basic California law in *Serrano v. Priest* (*Serrano I*).¹ It was rejected as federal law in 1973 in *San Antonio Independent School District v. Rodriguez*,² nor has it succeeded outside California. I was there “in the beginning” of the *Serrano* affair in the 1960s, and the proposed paper was to be in part historical, hence unavoidably autobiographical. Stanford has generously encouraged me to finish and extend the story, revisiting the issues, not only as my collaborators and I then saw them, but also as I do now.

The attacks on statewide school-finance systems began in the late 1960s in federal courts as claims of unlawful discrimination among children (and taxpayers) under the Fourteenth Amendment. *Serrano* came as a departure, both in its choice to proceed in state courts in California and in its pressing a theory invoking both state and federal law. Plaintiffs prevailed in the California Supreme Court in 1971 under both constitutions. I will shortly describe the theory of that case (“fiscal neutrality”) and show its democratic implications for schools, children, and parents.

Propelled by accidents of federal appeals practice, that theory first arrived for judgment before the U.S. Supreme Court in the *Rodriguez* case. Rejected by the justices as Fourteenth Amendment law, it still prevails in California. After the *Rodriguez* and *Serrano* decisions, plaintiffs across the country turned to the state courts; the thirty-five year story of these many cases will be outlined elsewhere in this issue. I will comment only generally on these later decisions and the theories of “equity” and “adequacy” they have preferred, stressing their radical differences from the *Serrano* idea and their neglect of school choice as an educational good in itself.

Broadly speaking, what appears to me today is twofold: first, both the spirit and technical principle of *Serrano* could improve contemporary state courts’ handling of school finance litigation; at the same time the concept could help recenter the polarized debates about extending subsidized school choice to families of all social classes. I will recall the concern of the planners of *Serrano*

1. *Serrano v. Priest*, 18 Cal. 3d 728 (1976) (*Serrano II*); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (*Serrano I*). A fair history of *Serrano I* and *Serrano II* appears in the state court of appeals’ resolution of an attack on legislative responses in *Serrano v. Priest*, 226 Cal. Rptr. 584, 589-91 (Cal. Ct. App. 1986). California Courts have come to prefer the synonym “wealth-related disparities” which appears repeatedly in the 1986 appeals court’s decision. *Id.* at 590.

2. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

for the dignity of non-rich families and suggest one of the various ways in which that concern could take renewed life in constitutional argument. Fiscal neutrality invites legislative invention in forms of policy that are often forgotten or scorned by contemporary litigators; the concept is quite at home with decentralized systems, whether these are based on districts, charters, or families. It is worth understanding the principle of fiscal neutrality; if it never makes it over the California border, it will still impact more than a tenth of American children. I only warn the reader that an essay of this sort tends to become an apologia for its author and thus deserves "close scrutiny."³

Let me remember straightaway some intellectual fancies of my youth that bore upon the design of strategy. Litigation that aims to alter large human institutions commonly is affected by eccentricities of the lawyers who design it. Indeed, in cases such as these, so charged with personal values that are to be pursued by state money, this ideological sway is probably inevitable. I will confess what I remember of my motivation. As I come clean regarding these utopias of my yesterday, I warn against their easy attribution to my co-conspirators William Clune and Stephen Sugarman. Let them answer for their own sins. True, we worked together closely enough—then, and even now—to be labeled occasionally the "Sugarcloons" or "Clugaroons." I doubt that we have harbored ideological secrets from one another, and my favoring the pronoun "we" is both appropriate and unavoidable. Still, our little project never aimed to prescribe any specific public policy for education but only, by prohibiting one baneful practice, to invite legislators to rethink the whole. Minds with different or unsettled hopes can make such marriages of constitutional convenience; hence to describe the tactical consensus reached by our trio will suffice in this context. Its rationale was to gain at least grudging collaboration from diverse and conflicting sorts of lawyers. Many had their own policy goals but accepted *Serrano I* as the wedge pro tem for these urgent aspirations which otherwise lacked practical access to politics. Other critics, of course, faulted and opposed *Serrano I* precisely as legal strategy. As we proceed I'll briefly note these competing constitutional views and their tactical justifications and weaknesses as we saw them; the subjective significance to their respective champions I'll leave to others.

So I begin. My own introduction to the finance problem was dramatic. In 1961 by sheer chance,⁴ I was engaged to survey Chicago public schools for the U.S. Commission on Civil Rights. I undertook to assess both the racial patterns of enrollment and their relation to the distribution of resources among

3. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979) ("The great and modern charter for ordering the relation between judges and other agencies of government is footnote four of *Carolene Products*.").

4. My colleague, Willard Pedrick, was too busy and knew that I needed gainful avocation; he recommended me. I think the redoubtable William Taylor had some part in our various assignments. He is the Taylor of Liu and Taylor, *infra* note 80.

individual schools. While scanning the intra-district picture, I took the occasion to glance at the underlying Illinois state finance system. Its dependence upon districts of different tax capacity seemed at war with its own professed objectives, and, in the introduction to my 1962 report, I flagged it for the Commission as an institution ripe for constitutional assessment.⁵

Clune, Sugarman, and I met the following year. They were college seniors. I taught at Northwestern, which had resources (from Russell Sage) for prospective law students who showed specific interest in the relation between law and the social sciences. Some of this booty was deployed to lure the two men, and, in 1964, they came. Under whatever insidious influence, by late 1965 they were warming up to investigate and describe the several basic systems of school finance. They took charge, mastered this awful stuff, and then taught me. Only when they had mapped the technical jungle could we together identify and assess the alternative ways in which lawyers might display to a court exactly what was wrong with it all in a specifically constitutional sense. This weak spot might not be obvious. One can instinctively recoil at large differences in spending by the same state for the same function for similar children; but such a reflex does not translate directly into theory.

Or, so we then believed. What a sensitive court would prefer, we supposed, was the light fingered touch of a professional legal cracksman, who delivers the legislature from paralysis, allowing it to lurch its way politically toward some more nearly rational resolution. This act of democratic liberation a court might manage, if we could lead it to the keystone—some element critical to the offending structure but constitutionally vulnerable—whose removal would bring down the house. We would say to the Court, “Push here and the wall will crumble. Then you can exit; let the politicians do the rest.”

We settled upon what we then called “Proposition P”⁶ and, only later, “fiscal neutrality.”⁷

This idea was cast in a narrow negative form. Whatever else the state and federal constitutions might permit regarding schools, this much, we argued, was forbidden: the state cannot dispense resources for education in a manner that is irrelevant or even contrary to its own declared public purpose; and district wealth per pupil has nothing apparent to do with a state’s commitment

5. John E. Coons, *Chicago: A Report to the United States Commission on Civil Rights*, in CIVIL RIGHTS U.S.A.: PUBLIC SCHOOLS: CITIES IN THE NORTH AND WEST 175, 184 (1962) (“May a state surrender educational policy to the municipalities if the inevitable result is discrimination which is more obvious than any existing within any individual school system? The answer for the moment undoubtedly is yes, but the rationale protecting such differentials in the provision of a governmental service is by no means clear.”).

6. John E. Coons, William H. Clune III, & Stephen D. Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305 (1969). Our full argument appeared in JOHN E. COONS, WILLIAM H. CLUNE III, & STEPHEN D. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970) [hereinafter PWPE].

7. This term first appears in our amicus brief for the *Rodriguez* appeal.

to offer learning for all children in a systematic way. At bottom *Serrano*—as a legal argument—was the traditional claim about rationality but bolstered by the plausible “fundamentality” of schooling, a refinement which would allow its constitutional distinction from sewers and zoos either in federal equal protection theory or in some state constitutional equivalent.⁸

This idea was to constitute the point of the legal spear. But what underlying principles had made this tactical rationale seem the right one? As a purely moral argument rattling about in my own mind, fiscal neutrality was much less clear in its meaning. For one thing, because it was a specifically negative rule, it would conceivably allow what are very diverse mechanisms to issue from the political process. Why were we so unambitious regarding positive changes that we supposed might serve the evident needs of children and society? I will try now to clarify the relevant imperatives of justice to which I answered in those days. Some of them, I fear, were not yet past the stage of intuition; some remain so today. Here, in short form, are eight such considerations that were at least in play. All bore upon the architecture of the legal argument.

I. SCRAPS OF A CREED REMEMBERED

A. Judicial Function: Clarity and Restraint

I believed then, and do still, that courts and the lawyers who serve them are bound by high obligation, first to be clear in describing, then to be restrained in prescribing. As for the first imperative—that of clarity—the system should be as transparent in its arguments and judgments as the subject matter allows; contrary to a movie I recently enjoyed, it is not the lawyer’s job to “give ‘em the old razzle-dazzle.”⁹ Still I concede that, on occasion, nature allows little more than a rough judgment call. Issues of what we call “fact” will sometimes of necessity remain obscure; a jury’s finding regarding “negligence” for example, must often resemble a collective grunt. As Stanford’s William Koski teaches us, and as various state court opinions today exemplify, “fuzzy” norms of this sort can be applied even to institutional relationships that are ongoing and complex.¹⁰ Judges, with practical effect, do mutter judgments of “inadequacy.” In the gestation period of the *Serrano I* idea in the mid-1960s,

8. See PWPE, *supra* note 6, at 414-19. This hope was roughly vindicated as federal law in *Plyler v. Doe*, 457 U.S. 202 (1982).

9. CHICAGO (Miramax Film Corp. 2002). The song is fine; its suggestion is as old and as foul as the serpent in *Genesis*. My inchoate views on the relevance of “indeterminacy” predate *Serrano I*. See John E. Coons, *Approaches to Court Imposed Compromise: The Uses of Doubt and Reason*, 58 NW. U. L. REV. 750 (1963-64). I revisited the question in John E. Coons, *Compromise as Precise Justice*, in COMPROMISE IN ETHICS, LAW, AND POLITICS (J. Roland Pennock & John W. Chapman eds., 1979).

10. William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1185 (2003).

many norms of this vague sort were to be aired and then discarded—at least by us. We hoped the legislature could be set to its responsibility without invoking so blunt an intellectual instrument. This effort to be clear seemed a part of the respect lawyers, and the judges themselves, owed to the rationality of American citizens and to their legislative representatives in a democratic order.

In the context of school finance this imperative of clarity in turn nurtures the second virtue, that of judicial restraint. When the ultimate cure is legislative, the trick is to force the lawmaker to confront the identified problem without preempting—or even threatening—his legitimate options. Under *Serrano*, every choice would remain to the legislature except the existing policy of discrimination by wealth. In an era of sporadic judicial brutality, such diffidence may seem romantic, but I believed then, and still do, in the separation of government powers as a high value. The lawyers and the courts should be ever patrolling and mending the fences that bound the four branches of government (yes, four; I'll be adding parents).¹¹

I acknowledge, however, that this icon of judicial restraint can become idolatrous and irresponsible, as it was to do in the majority opinion in *Rodriguez*; paradoxically their misunderstanding and rejection of fiscal neutrality drove the justices to petrify what was itself a case of legislative paralysis as nearly terminal as the one they had addressed in *Baker v. Carr*.¹² *Rodriguez* worked the inadvertent frustration of its own ideal. Too bad, but to suppose that some nostrum even more intrusive than fiscal neutrality would have persuaded the justices, then or now, to pitch in and actively to redesign the offending state systems would require a stretch of the imagination.

B. Equality

Humans are “created equal” in some factual sense, elusive but crucial. Whatever their individual differences in social or cerebral condition, they are descriptively equal in respect of some defining core capacity of the human self. This is not only a claim of truth; it is urgent and necessary, at least if we are to perceive every person as having in the same degree the ineradicable dignity upon which the imperative of justice itself depends. Nobody drops out; nobody differs in importance. Elsewhere I have identified the premises I think essential to this belief plus some of their implications.¹³ Here I want only to distinguish this lone factual or descriptive equality from the numberless possible equalities among humans that I will call “prescriptive.” These latter consist in diverse and often conflicting ideals of sameness in the human condition—for example, that we should have the same chance to get rich or be drafted. Each vision of this

11. See *infra* pp. 124-27.

12. 369 U.S.186 (1962).

13. JOHN E. COONS & PATRICK M. BRENNAN, *BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT* (2000).

sort is the subjective image of some possible human good—a hope for justice lodged in an individual mind. Exactly which of these potential equalities society should recognize as law remains in permanent dispute even among “egalitarians.” Of course, some of these private perceptions of an ideal sameness do come to exist, at least temporarily, in an objective sense. For example, every citizen of the United States is today represented by two senators; and everybody gets counted for one in the census. Every society enjoys or suffers samenesses of this prescriptive sort that have become instantiated in law or custom.

I find nothing compelling in egalitarian ideals as such. I have never met a prescriptive sameness that really inspired me; they are rarely necessary to justice, and they tend toward boring convention or even oppression. This does not deny that like cases generally deserve like treatment, but that is a very different norm, not of sameness but of intellectual consistency, which itself can be unjust, as *Dred Scott* might exemplify.¹⁴

Serrano I and *II* are not egalitarian mandates. They allow any difference in government spending in California that is based on some sane educational criterion; at least above some fuzzy minimum, these differences could result from judgments of local voters or even individuals, so long as these decisions are liberated from the irrelevant influence of wealth and, emphatically, of any artificial locus of wealth—such as a school district—that has been created and empowered by the state to educate children. Without redrawing lines, all districts could be given tax bases with a wealth per pupil that is artificially equalized. The same tax rate thus would produce the same number of dollars per child (or per child of some rational classification). Two districts taxing their property owners at the same locally chosen rate would spend the same on the same sorts of children. We called this “power equalizing;”¹⁵ the variable that determines spending among the districts of such a system is the intensity of local demand by voters—or equal spending for equal local effort. Removing the irrelevant factor of district wealth imparts at least minimal rationality to an otherwise chaotic mechanism. Intensity of local preference is a plausible counter. And such systems can express every other rational educational policy, for example, special help for the needs of a particular population.

Not surprisingly, power equalizing has not proved popular among property-rich districts. But, observe that a statewide system of scholarships could be designed to empower and equalize families instead of districts, as Sugarman and I argued in technical form (including a model statute) in a 1971 book.¹⁶ We were serious about fiscal neutrality and showed how the state could “power-equalize” parents of all social classes.

14. *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393 (1856).

15. PWPE, *supra* note 6, at 200-02.

16. JOHN E. COONS & STEPHEN D. SUGARMAN, FAMILY CHOICE IN EDUCATION: A MODEL STATE SYSTEM FOR VOUCHERS (1971) [hereinafter COONS & SUGARMAN, FAMILY CHOICE]. In the summer of 1971, Professor Henry Levin and I used the page proofs of this

Now, having rejected naked prescriptions of sameness as morally empty, I confess to an historic hesitation. In the 1960s, though I preferred power equalizing either of district or family, I did tolerate the risk that *Serrano* could in the end encourage a full state takeover of the finance and control of schools. Though it seemed improbable, it was, to be sure, an option under the theory. This danger was a fair reason for the then U.S. Senator from New York, the late Daniel Patrick Moynihan, to reject *Serrano*.¹⁷ I did then and do now respect that fear, so soon to be partly realized through Proposition Thirteen, which I visit below. But, given the empowerment of individual families instead of districts, a statewide sameness could ironically be the instrument of new diversity and openness in a system grounded upon parental choice of school. By equalizing access of all families to all schools, a proper system of scholarships (with which Moynihan eventually flirted)¹⁸ could extend the range of democratic expression even into the urban core.

C. Subsidiarity and Local Control

"Subsidiarity" is a polysyllable that I learned in a Catholic high school in Minnesota circa 1945. This word, like adequacy, is a "fuzzy" concept but one whose spirit can be useful in the humane design of institutions exactly when the ideological blur gets thickest. I won't attempt a universal statement.¹⁹ Here is the notion as it might apply to schooling: in polities in which individuals and voluntary communities are diverse in their values and preferences, the wise course, in general, is to locate the power to make legitimate choices about education as close as possible to the person or persons most likely to be affected by the decision. The word "subsidiarity" has rarely made it into the argot of American political science, but it is today an explicit bedrock principle of the European Union where it applies to much more than schooling.²⁰ For Clune, Sugarman, and me it appeared to be a contribution to the new vocabulary that was needed to clarify the American school problem. It would

book as the text for a course at Stanford on school choice. See Henry M. Levin, *Studying Privatization in Education*, in *PRIVATIZING EDUCATION: CAN THE MARKETPLACE DELIVER CHOICE, EFFICIENCY, EQUITY, AND SOCIAL COHESION?* 3 (2001).

17. Daniel P. Moynihan, *Solving the Equal Educational Opportunity Dilemma: Equal Dollars Is Not Equal Opportunity*, 1972 U. ILL. L.F. 259, 259 (1972).

18. See Stephen D. Sugarman & John E. Coons, *Federal Scholarships for Private Elementary and Secondary Education*, in *PRIVATE SCHOOLS AND THE PUBLIC GOOD* 115, 115 (Edward McGlynn Gaffney, Jr., ed., 1981). Moynihan's original suggestion was to turn part of the "Title I" dollars to scholarships for the poor. Reagan was to refloat the proposition in 1981; unexpectedly the representative of the Catholic bishops declined to support the switch, and the idea languished until its hesitant embodiment in the current federal scholarship program in the District of Columbia.

19. See PWPE, *supra* note 6, at 15-35, 256-68.

20. See, e.g., *EDUCATION POLICY IN THE EUROPEAN UNION AFTER MAASTRICHT* (Miguel A.S. Rego, ed., 1997).

help to reduce issues about the location of money and power to a perspicuous form: who is the best decider for this child and for the common good?

One way to respond to that question has been, and remains, the traditional American slogan, “local control,” meaning . . . well, it’s not quite clear what that expression really intends. The reader will know a number of variations on this theme—tropes that we variously deployed and debunked in *Serrano* as advantages and criticisms of the traditional system.²¹ For example, one asks what is “local” about a place like Los Angeles? And what exactly is “control” in a district where the tax base is barely worth the cost of assessing it? Local control, nonetheless, remains a figure of speech that is passionately embraced in many high-value residential suburbs where I have heard it linked to subsidiarity—ironically by friend as well as foe of *Serrano*. Each carefully points out just who in fact is empowered by the existence of these exclusive districts, then asks whether that particular authority is the best decider on the question of where Susie goes to school. In “public” school districts like Piedmont—a rich residential enclave literally inside Oakland—one is often instructed that parental sovereignty is the primary implication of the term local control. Of course, were we to recross the Piedmont boundary into downtown Oakland and ask the same question, the term would have to mean something else, though just what is beyond my power to say.²² Such was the state of public discourse in the days of *Serrano*—and eventually that of the very confused Justice Powell in *Rodriguez*. In this condition of general incoherence in the 1960s, the three of us supposed that subsidiarity might be the vehicle for a more intelligible conversation focused upon where authority lies and where it ought to lie.

D. Freedom, Liberty et al.

This fog of language can thicken as we invoke other values, and I turn now to that all-American political champion—freedom. In the case of schools, what exactly does it mean? The late Milton Friedman and the free marketeers who want universal and unregulated school vouchers, have tended to base their whole case upon human liberty as the *summum bonum* of classical economics. If you loved freedom in communications, banks, and travel, they tell us, you’ll love it in the choice of schools.²³ This notion seems generally right regarding

21. PWPE, *supra* note 6, at 14-25.

22. At various points in this essay I risk offending well-to-do suburbanites. Let me be clear that, by any rational calculus, I am one of them in status, behavior, and—I suppose—inclination.

23. In PRIVATE WEALTH AND PUBLIC EDUCATION, we gave a dozen pages to the problems of applying market ideology to school choice. See *supra*, note 6, at 256-68. Recently I revisited the issue. *Give Us Liberty and Give Us Depth*, in LIBERTY & LEARNING: MILTON FRIEDMAN’S VOUCHER IDEA AT FIFTY 57 (Robert C. Enlow & Lenore T. Ealy eds., 2006). I admire the Friedman Institute’s nerve to include me. Friedman and I were at friendly odds, at least in Chicago days, appearing respectively on my public service radio

these other sorts of markets, but Friedman was unwary in his adoption of freedom as the signature value of the market in education. In fact the marketeers can't be right here, unless they are willing to label the legal power of one person to dominate another as a freedom or "liberty." What libertarian would do that? The hegemony of Jones over Smith is not *prima facie* a freedom for Jones, even if Jones happens to be Smith's parent.

To see this does not eliminate freedom as a value to be pursued in the reform of school finance, but requires us to apprehend meanings that are deeper than a power trip for the parent. First—and this seems agreed—education aims (*inter alia*) at the ultimate autonomy of the child; and second, where schooling is chosen by parents, it also operates as a practical system for First Amendment expression of values. It becomes, quite simply, speech by the parent both to the child and—through the child—to the world. Thus, there are crucial, if indirect, concerns about freedom that are raised by our historic decision to repress the voices of low income and worker families. Unhappily this reality has as often been neglected by the marketeers as by the ACLU. I will outline several freedom-friendly arguments as we proceed. One day they may bear upon the hope for a *Rodriguez* of a very different and more personal sort.

For the moment, what I assert is the plain fact that all children will be dominated by some older person with legal and/or financial power over them. This will be either the parent or some complete stranger who draws a line on a map. The real question will remain which of these two deciders will best realize the various interests of parents and child along with the common good (including the particular good of liberty—as one among many). In the case of wealthy families, the answer is already expressed in our constitutional law,²⁴ then implemented through the free market in suburban real estate coupled with

show and his T.V. program. From 1978, in California and elsewhere, he actively opposed various efforts by Sugarman and me to get a centrist initiative on the California ballot. With his imprimatur, nine libertarian voucher initiatives in six states were to give school choice the political mark of Cain. In the end it is hard to estimate Friedman's overall effect on choice for good or ill. *Pace* Milton.

In the last quarter century, these nine statewide libertarian initiatives have failed badly, suggesting the political futility—perhaps the fatuity—of the marketeers' lust for unregulated universal scholarships. By contrast centrist popular initiatives that are tilted toward workers and the poor remain wholly untried, though I will now recall one quixotic misfire of this sort. In October 1978, a prominent Democratic California congressman called to say he had read our new book. JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978). He suggested that we collaborate on the sort of centrist instrument we had proposed. We met and agreed. Sugarman and I were to draft the initiative; the congressman would raise the money; his political aide would organize the campaign. The kick off would come after our collaborator's reelection in November. The congressman was, indeed, reelected, then promptly murdered in Jonestown. He was, of course, Leo Ryan. Steve and I filed with the state and proceeded on the assumption that the necessary money would somehow appear. Both libertarians and teachers unions laid their curse, and the thing died. I see no negative political implication for a centrist initiative in more competent hands.

24. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

the state-created district system of what are glibly called “public” schools.²⁵ As I viewed it, this balkanized plutocracy of schools was deeply conflicted in its attitude toward the value of freedom; somehow America had decided that it is a value to be honored only for the well-off, whom we everywhere encourage to choose a style of “life exempt from public haunt.”²⁶

E. The Family

How did the institution of family affect my own thinking about *Serrano*? In those days I should have been clearer in my own mind about the importance of family integrity and the toxic effect of conscriptive school assignment. I will return to that problem later. Here I want only to be clear that the ideal of the responsible parent, so obviously compelling, could play only a back-up role in the design of the legal argument for *Serrano* itself. Our minds were necessarily confined to images of artificial, state-created collectivities which were systematically discriminatory and fitted into the jargon of equal protection. We did, now and again, mumble about the special effect of disparate tax bases upon ordinary and poor families; but the reality that the school assignment system threatens family as an institution was not to have the prominence it has always deserved.²⁷

F. Educational Outcomes

In 1966, James Coleman delivered the news that school “outcomes,” (as measured by test scores) appeared to be determined mostly by social class, a finding soon to be bolstered by Eric Hanushek.²⁸ This dictum hobbled our argument that the introduction of rationality and neutrality in spending would by itself make a significant difference in what children in poor districts learn. Except for the purchase of inputs—schools, books, teachers—maybe neutrality really wouldn’t matter much. We tended more and more to confine our arguments about this treacherous issue to the lawyer’s sarcasm that the spending behavior of the rich districts was proof enough that money matters. The New York Court of Appeals today takes this idea as seriously as did the

25. See Patrick Bayer et al., *A Unified Framework for Measuring Preferences for Schools and Neighborhoods*, 115 J. POL. ECON. 588 (2007).

26. Today that fateful decision has changed only at the margins. See THE EMANCIPATORY PROMISE OF CHARTER SCHOOLS (Eric E. Rolfes & Lisa M. Stulberg eds., 2004). The natural limits of charter schooling to democratize education are suggested by the foreword to that volume by Herbert Gintis.

27. Indeed, in PWPE we emphasized that “Children who live in poor districts—children rich and poor, white and Black [sic] alike—are being injured.” *Supra* note 6, at 2.

28. J.S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY (1966); ERIC HANUSHEK, EDUCATION AND RACE: AN ANALYSIS OF EDUCATION PRODUCTION PROCESS (1972); Eric Hanushek, *Teacher Characteristics and Gains in Student Achievement: Estimation Using Micro Data*, 60 AM. ECON. REV. 680 (1971).

California judges in *Serrano II* in 1976.²⁹ I'm still not certain what I believe; if I were back in the *Serrano* business, I suppose I would have to face up to the question about money. New Jersey and the District of Columbia are not encouraging examples of its efficacy.

G. Social Class Sympathies

For some time after my 1962 encounters with spending differences I imagined that the states maldistributed financial resources rather systematically according to social class or race; the poor, I supposed, lived in tax-poor districts that spent less. But, Jonathan Kozol to the contrary, this has never been a sustainable claim on the national scene.³⁰ I mention the matter, because, at the level of conversation, most of us express sympathy for the plight of working and low-income parents and their children—especially in the inner city. And it is they who do get rounded up for schools of whatever sort. In the 1960s, the image of such children imprisoned in what we supposed to be cheap schools strongly drove our enterprise, to a degree that verged upon our misreading the data and making a claim of formal discrimination by personal wealth. Happily we took the trouble to compare S.E.S. data for California with tax bases and spending in the state's school districts. There proved to be many poor families in odd industrial districts and wealthier cities who “benefited” from fat tax bases and potentially would be “hurt” by *Serrano*.³¹ Even Los Angeles was about to exceed the state average in taxable wealth per pupil, as it had done already in spending. We thus hesitated to play too much on the personal poverty theme, as the lawyer for *Rodriguez* would later do to the injury of his claim.³² What we could and did insist was that the child of the poor family living in the poor district was the most victimized, because he or she lacked the private and suburban options. But this fitted rather awkwardly into the Supreme Court's jurisprudence of poverty. The state of California did not stand out as systematically villainous but merely randomly stupid.

29. Campaign for Fiscal Equity v. State, 801 N.E.2d. 326 (N.Y. 2003).

30. JONATHAN KOZOL, SAVAGE INEQUALITIES (1992).

31. “[T]he class injured . . . may be defined in many ways. For example, it may be seen as the class of children resident in districts having an assessed valuation below the average . . .” PWPE, *supra* note 6, at 357. The issues of “equal” tax bases and spending are, of course complicated by perceived or real differences in “municipal overburden” *Id.* at 232-42. By the way, race did not correlate with wealth of district in California—or, rather, the correlation for minorities was inverse, if measured by residence in school districts above average in wealth per pupil. *Id.* at 357 n.47. We said “the injured class is neither black nor white.” *Id.* at 357.

32. See GARETH DAVIES, SEE GOVERNMENT GROW: EDUCATION POLITICS FROM JOHNSON TO REAGAN 212-13 (2007). A law review note had challenged the correlation between personal poverty and district per-pupil wealth; it came at an ideal time to be included in the majority opinion in *Rodriguez*. See Note, *A Statistical Analysis of the School Finance Decisions*, 81 YALE L.J. 1303 (1972).

In the end it is fair to say that concern about family poverty served well as a diet supplement to our personal commitment but added little intellectual content to the enterprise. In my own case the insight of poverty's real significance would come when, as noted, I awoke to the larger effects of conscription upon the family itself. The systemic problem of the poor and worker family is emphatically not the want of public resources that strangers decide to spend on its children; it is, rather, the imposition of the stranger's will and mind, however well funded the school might be. This deliberate moral prostration of the ordinary family is a policy both vexing and curious. Why should anyone defend it? That question did not arise in *Serrano*; fiscal neutrality did not promise a deliverance of the poor as a targeted class. But it would encourage it, if the legislature so willed. And it would, adventitiously, aid poor residents in tax-poor districts.

H. Education Fever

Most Americans attach special value to education. In the 1960s I think the school finance cadre, without exception, hoped that the proper funding of schools would help to remake the society both economically and socially. In my own eyes a fairer system could also do justice to the intellectual and spiritual nature of the child. For constitutional purposes, education is distinguishable from bread and butter issues such as roads and police protection. This was crucial; we did not want to take on what we sometimes called the "equal sewer problem."³³ Education also appeared to be the government service that was most uneven in its support by taxpayers and voters. Rational people could, and obviously did, dispute the absolute and relative social investment to be made in schooling. School districts of equal wealth and equal "municipal overburden" often made quite different tax commitments. It would have been interesting in those times to compare the range of intensity of preference among voters regarding school spending to the range of their commitments to physical public services.³⁴ If economists could construct a plausible metric for the public's taste for police, fire, and so on, one that would allow their comparison to the intensity of voter desire for schooling, what would we find? Would our chosen sacrifice for sewers emerge strikingly more uniform than that for schools? A variety in taste that was special to schools might have fortified our selection of fiscal neutrality as the best form of judicial intervention; the legislative remedy could honor this elasticity in demand. Power equalizing (above some prescribed minimum) could be preserved as an option.³⁵ Of course, to the mind of that wizard who knows the

33. See *infra* pp. 119-21.

34. See PWPE, *supra* note 6, at 414-419.

35. Sugarman, Clune, and I offered a teaser in an appendix to PWPE. See *Relation of District-Pupil Population to Offering and Effort in 119 Elementary Districts in Cook County Illinois*, in PWPE, *supra* note 6, at 479.

optimal spending level, this recognition of local voter preference might appear a cowardly concession.

I turn now from these reconstructions of my own motivation in order to examine the forms of legal argument actually proposed by the various lawyers, educators, and activists who hoped to be agents of change.

II. AN EMBARRASSMENT OF THEORIES

Around 1964 a young Ph.D. candidate at the University of Chicago, one Arthur Wise, came by to share the theme of his proposed thesis on the school finance problem and his recipe for its judicial reform. (As I recall he had read my 1962 report). Wise typified the liberal academic spirit of the 1960s and, I suppose, today. He was, and remains, an insightful, intelligent prescriptive egalitarian; he wanted the U.S. Supreme Court to equalize dollars spent per child within the respective states. A rough sameness was his moral and legal ideal. The extent to which this would be a sameness among the whole of a state's student population or, instead, a dollar equality within rational sub-categories of students was not yet clear, but he was working this out.³⁶

Wise was not a lawyer, a fact I report neither in scorn nor admiration. Many a lawyer spoke in this argot which seemed to me a light year removed from the spirit of the voting rights cases and from equal protection theory in general. Wise himself occasionally slipped into the usage "one dollar-one scholar," which was to seem comparatively graceful once transformed by others into "one kid-one buck."

My fruitful encounters with Wise were typical of countless conversations, most of them with and among civil rights enthusiasts and academics—and most with a subtext of concern about racial discrimination. One such encounter, prolonged over six weeks, was especially meaningful to me. The report of the Civil Rights Commission in 1962 had helped spawn the study of racial inequality commonly to be known as the Coleman Report (for its late great director).³⁷ We assembled at Harvard for the summer of 1965. The study was to have a separate legal component; the lawyers were to scrutinize various urban districts much as we had in 1962. My own report—an updated account of the state of affairs in Chicago—sufficiently annoyed Mayor Daley (The First)

36. See generally ARTHUR WISE, *RICH SCHOOLS POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY* (1968). One of Wise's locutions would well suit today's discussion of parental choice: "Equality of educational opportunity exists when a child's educational opportunity does not depend upon either his parents' economic circumstances or his location within the state." *Id.* at 146. I am not clear where the concept of "state action" fit into this view.

37. See COLEMAN, *supra* note 28. Coleman's data in turn became the basis for the Commission's report. See U.S. COMM'N ON CIVIL RIGHTS, *RACIAL ISOLATION IN THE PUBLIC SCHOOLS* (1967)

to get these district studies scrubbed from the final document; apparently it also helped dethrone the then U.S. Commissioner of Education, Frank Keppel.³⁸

How was all this racial stuff relevant to *Serrano*? For some observers it seemed to constitute the whole point of any probe into the disposition of dollars.³⁹ If I recall correctly, there was even a cluster of reparationists among the lawyers; they wanted new money to go to damages to be paid to blacks who had been systemically shorted in school dollars or by injustice all round. I doubt that anybody really expected such an outcome, but the feverish atmosphere of the time encouraged theories of constitutional right that were grounded in perceived educational need and in the hope for the victims to catch up. There were such theories, and they were held by serious people now forgotten by me. Perhaps these advocates had some premonition of state court bonanzas in an age yet to come. Their ideas had no purchase—at that time or now—in federal constitutional law (which was the sole target).

Apart from race, and wisely or not, the legal debate of those times focused upon three discrete criteria of spending—equality, individual need, and fiscal neutrality; however, to the advocates themselves it was constantly evident that a fourth conception was implicated either as law or policy. What is now called “adequacy” (or the like) was—under various labels—already a full-blown concern and even a political objective of all of us as early as 1965. In fact it was endlessly aired in private conversation; but for two reasons it was never paraded as a cutting edge of legal doctrine. First, the Supreme Court had shown no appetite for quantifying rights—even of the fundamental sort. Second, and especially important to the neutrality crew, it seemed unnecessary to attempt this difficult and aggressive argument. For, if the justices were to bring down the old establishment for its use of disparate district wealth, state legislators could hardly avoid diminishing the most flagrant chasms of spending between

38. A future Boalt professor, Malcolm Feeley (then a Northwestern Ph.D. candidate), was to publish shortened versions of these essays in a separate collection. See *AFFIRMATIVE SCHOOL INTEGRATION* (Roscoe Hill & Malcolm Feeley eds., 1968).

39. Of course the race cases could be wisely deployed in setting up the general arguments for the importance of education and its special place in constitutional law. See, e.g., Harold Horowitz & Diana Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place within a State*, 15 *UCLA L. REV.* 787 (1968); Harold Horowitz, *Unseparate But Unequal—The Emerging Fourteenth Amendment Issue in Public Education*, 13 *UCLA L. REV.* 1147 (1966). We argued that *Brown v. Board* was perhaps helpful, but “the language . . . remains inscrutable for our purposes.” PWPE, *supra* note 6, at 409. In those days Horowitz, Wise, Paul Diamond, David Kirp, Charles Benson, James Coleman, Steve Goldstein, Frank Michelman, John Kaplan—opponents such as Phillip Kurland and Paul Carrington—and many others published ideas that helped clear the mist for us on the issue of inter-district discrimination. I would honor them, as I do all those writers who have since the 1960s gradually recognized and then refined the then barely emergent issue of school choice discrimination. Here I risk omission by specifying Steve Arons, Joe Viteritti, Rosemary Salomone, Christopher Jencks, Stephen Gillies, Frank Kemerer, Ken Godwin, James Forman, Ted Kolderie, James Ryan, Terry Moe, Alan Bonsteel, Michael Heise, Peter Schuck, Rick and Nicole Garnett and the great Charles Glenn. May they flourish.

districts by “leveling up.” To be sure, as some of its critics correctly noted, fiscal neutrality might be satisfied literally by abolishing public education altogether. However, even we sissies in the neutralist camp, had heard about the education clauses in state constitutions; and we considered the political risk of abolition to be roughly zero. What would happen, instead, would be the adoption of a modest but higher floor by legislators who would now be required to speak and act in relevant educational terms. Leveling up was politically inevitable, and the less said of it to the Court, the better. Keep it simple.

Still, Frank Michelman of Harvard (then and now) was to convert this political prediction into an explicit constitutional probe in his review of our *Private Wealth and Public Education* in his measured Foreword to the 1969 Supreme Court issue of the *Harvard Law Review*.⁴⁰ It could be a useful exercise for the adequacy community of today to revisit Michelman’s essay. His version came informally to be called “minimum equal protection.”

III. SKETCHES OF THE *SERRANO* LAWYERING

Sugarman, my family, and I arrived in Berkeley in late summer 1967; Steve spent the fall, then headed for Europe before starting practice in Los Angeles. Bill Clune came from his Chicago practice, when he could, for short visits. Wherever we were, we all worked on the book, now encouraged by the advice and collaboration of the country’s leading school economist, Berkeley’s Charles Benson. By fall 1967, we had most of a draft, and the theme of the argument was set. Somebody, perhaps my Boalt colleague, Michael Heyman, mentioned our project to Harold Horowitz of UCLA who had bumped into a proper plaintiff and was drafting a complaint. As it happened, John Serrano (at the time) lived in a low-wealth district. The Los Angeles team planned to present ten distinct causes of action; at the last minute ours became number eleven.⁴¹

In due course, and to the surprise of all, after dismissal by the Superior Court, the California Supreme Court granted certiorari. Three of us argued the case late (I think) in 1970. Justice McComb snoozed—then took French leave. On August 31, 1971, my car radio reported the decision as the kids and I returned from backpacking. At home I heard that the court had gone six to one for theory number eleven.

That fall of 1971 is largely a blur, but I do recall with strange clarity one episode that suggests the tenor of the times—and perhaps my own naiveté. A week or two after the decision I received a call from a poverty lawyer in

40. Frank Michelman, *Foreword: On Protecting Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

41. My recollection is that these covered the waterfront of equality, racial discrimination, individual need, and a right to a minimum education.

Minneapolis. He had filed a fiscal neutrality complaint in federal court. The judge assigned to the case had gotten both sides to ask for summary judgment, then requested each to submit a proposed opinion for the court. Would I write that opinion? I consulted our Boalt Professor of Legal Ethics. He thought it weird but ok.⁴² I proceeded to write virtually all of what became the published opinion in *Van Dusartz v. Hatfield*⁴³ which, of course, went down with *Rodriguez*. I do not recommend this practice—but I enjoyed it.

Nor would I recommend the procedure awaiting *Rodriguez* which started up immediately after the victory in *Serrano I*. We had friends in Texas and hoped that some notoriously poor and heavily Hispanic Texas school district would serve as plaintiff in a federal suit. To that end I visited San Antonio. At least one promising district was interested but needed a lawyer. MALDEF refused for reasons I never could grasp. The dirt-poor San Antonio district and the individual plaintiffs settled for a volunteer—a lone practitioner, awash in nerve but green. He was intensively tutored by a young but savvy new member of the Texas law faculty—Mark Yudof, later the Chancellor of the University.⁴⁴ But the three-judge federal process of those days, with its brisk pace and lightning hand-off to the Supreme Court, would foreshorten the learning curve well below the ideal for representation in such a case. The *Serrano* idea found itself entered in this new kind of race badly handicapped. What we could or should have tried to do about this I still wonder. With coherent argument, *Rodriguez* could and should have been won.

Meanwhile, in that fall of 1971, *Serrano* had been sent back for trial. We began to round up economists, learning theorists, statisticians, and so forth. Their job was to help the trial lawyers, who were recruited from two separate poverty law offices, to prepare to prove the presence of wealth discrimination and its unlawful effects. The trial proceeded in Superior Court in Los Angeles. Judge Bernard Jefferson was up to the task and seemed to enjoy the experience. I can't say the same for defense counsel, artless and innocent—at least by contrast to the beguiling and sophisticated defense of the state yet to come in the *Rodriguez* argument before the U.S. Supreme Court.⁴⁵ In *Serrano* these were inexperienced local government lawyers strangely left by the state to save the ship mostly on their own. This shortfall in the state's defense in school finance cases has, at least until recently, been more the rule than the exception. It became the more striking as finance litigation in state courts evolved into a plaintiffs' industry featuring peripatetic teams of highly paid experts, public

42. The device seemed comparable in substance to a requested finding of law.

43. *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971). The decision appeared on October 12th, forty-two days after *Serrano*.

44. Today, President of the University of California, Yudof continued to contribute in a scholarly way to the basic literature. See MARK YUDOF, *WHEN GOVERNMENT SPEAKS* (1983).

45. I had the painful privilege of hearing this argument from the bleachers. Charles Alan Wright was in top form. The tragic-comedy is well described in DAVIES, *supra* note 32, at 210-13.

relation types, and professional organizers. Any lawyer who would undertake the defense of such a case for the state today needs help of a sort, and on a scale unfamiliar to ordinary trial practice. And the need consists as much in the ability to make media and political commotion as in the grasp of education theory and law. Still, I doubt that the most skilled defense would have saved the bizarre California school leviathan, at least from that state Supreme Court of 1971.

Our principal moments of doubt in the *Serrano* trial came in the process of proving injury. I have already confessed my own concern about showing harm. We made little headway at trial trying to link test scores, graduation, and other intellectual outputs of schooling to anything other than the social class of the family. Eric Hanushek, then of the University of Rochester, was already in the saddle on this issue and testified effectively for the defense.⁴⁶ In the end, to our relief, Judge Jefferson was satisfied to locate the unlawful effect specifically in the injury to the child's opportunity to experience whatever it is that money buys in educational goods and services; under the California Constitution as interpreted in *Serrano I*, that opportunity could not be diminished to any substantial extent by the irrelevant and fortuitous factor of district wealth.⁴⁷ This, of course, made the system unlawfully discriminatory almost by definition. The disparities in money per-child caused by variations in district wealth simply *were* the injury.

By 1976 the second appeal had become an unpredictable affair; it came after the disposition of the federal issue in *Rodriguez*. At least two of the 1971 majority had left the court, being replaced by Reagan appointees. The state curiously relied on the same counsel who had tried the case. The court affirmed 4-3 on the neutrality rationale.⁴⁸

IV. A CASE OF IDENTITY THEFT: THE MEDIA, *SERRANO*, AND PROPOSITION THIRTEEN

The media were never to grasp the meaning of fiscal neutrality. For them it has always consisted in a command to equalize and centralize. There are reasons to forgive this caricature.⁴⁹ Media voices have deadlines, and they need

46. Hanushek's testimony in *Serrano* and later cases led to his generalized treatment of the problem in Eric Hanushek, *Throwing Money at Schools*, 1 J. POL'Y ANALYSIS & MGMT. 19 (1981).

47. The *Rodriguez* reversal, of course, limited *Serrano II* to the rule of the California Constitution.

48. *Serrano v. Priest*, 18 Cal. 3d 728, 728 (1976) (*Serrano II*). In the course of argument, defense counsel cited our 1971 book (see COONS & SUGARMAN, FAMILY CHOICE, *supra* note 16) as evidence of our intent to introduce "vouchers" to California. I conceded to the justices that the judicial modesty of fiscal neutrality would indeed allow such a legislative remedy. That was the point of it all—to open legislative creativity.

49. Though its repetition in contemporary documentaries and commentaries can be tedious.

headlines; and to be sure, just as was true before *Serrano*, the ruling would indeed allow statewide uniformity of spending as well as every other sane variety of reform. What is harder to forgive is the calculated misreading by professional critics despite explicit and repeated corrections delivered to them in print and person. To this day academic careers are advanced by portraying *Serrano* as a command to tax and level, hence as the mainspring for Proposition Thirteen, which would soon loom over California and would indeed centralize. What critics might have said with probity—if not plausibility—is that this emergent and wholly mythical version of *Serrano* conceivably contributed a straw to the tax revolt. Insofar as the media (and naughty academics) gave *Serrano* a false meaning, this caricature may have increased the already brooding taxpayers' alarm of those times. For the individual landowner it would have been hard to see that any tax effect on him could be either burden or relief—and would depend in part upon the per pupil property wealth of the district of his property's location.⁵⁰ In any case, today, I try to see this identity theft of *Serrano*, not as a problem, but as a personal windfall. If there is credit to be taken for Proposition Thirteen, let's take it. I worked against the infernal thing, but it has saved me a bundle.⁵¹

V. THE STATE OF THE STATES: ADEQUACY AND ALL THAT

Rodriguez went down, and in California *Serrano* seemed to lose its immediate political relevance, as Proposition Thirteen crippled the property tax. In other states the de facto disappearance of the fiscal neutrality option from the discourse has been nearly complete and, perhaps, terminal. Recently, I attended a conference focused principally upon the perceived sins of activist state courts in school finance cases. The explicit assumption of each session was that any judge contemplating reform has only two available ideas—equity, meaning the equality of something or other; and adequacy, meaning some sort of minimum. Some critics in attendance supposed that these two conceptions come to much the same thing, and all seemed to assume that they exhaust the judicial options. The court must either vindicate the state or issue an order that tax dollars (generally more of them) go here rather than there. Apparently these critics see no third conceptual refuge for a state judiciary confronting an evidently unjust distribution of educational resources.

50. The causation of Proposition Thirteen was sufficiently complex that its reduction even to a mythical *Serrano* seems a wondrous work of the human imagination.

51. I am surprised that no enterprising academic or politician has noted that Proposition Thirteen might today allow a power-equalized local add-on to the state personal income tax. If the tax (or merely the add-on) were made progressive, I see no *Serrano*-based objection in law. Drafting the thing would be a challenging enterprise that could be simplified by using the family as the unit—instead of the district. See COONS & SUGARMAN, FAMILY CHOICE, *supra* note 16.

I am expected to comment on this scene and upon the doctrine called adequacy. I will do so briefly. I have read some of the recent state cases, and I have personal recollections of others, dating from an unsuccessful effort to steer the original New Jersey plaintiffs and their lawyer towards fiscal neutrality.⁵² From 1973 to this day, none of it is a pretty sight. No one, at least none of America's school children, seems to be the better for it. I wish I had some new analytical formula either to illuminate or to criticize this spectacle, but frankly there seems little here to analyze. These decisions are political acts, often executed with a muffled cooperation by other agencies and powers—private as well as public. The opinions exude the atmosphere of a budget office; the judges become government accountants carrying out a ministerial responsibility assigned to them by some vaguely identified constitutional source. The intended outcome is never clear, and this indeterminacy can almost become the point. The judge has scant reason to hope much from propping up the old school regime, but the Court is offered no real intellectual option.

I must, of course, concede this much: insofar as terms such as adequacy or equity can function as an incantation that makes judges jump, one has to give them the credit due any instrument that has so plainly served its operator's purposes. In that sense, it works. It works to increase the schools' money and to juggle the authority to spend it. That itself would have satisfied some of the reformers whom I knew in the 1960s. Nor do I condemn any of the particular increases or reshufflings of money and power actually wrought by these confident minds. Unlike them, I have no metric that would allow me to play critic to the addition or redeployment of a single dollar to a school or to some new programmatic emphasis. How would I be qualified to say that this or that is adequate when the educators themselves never agree? Still, who knows? Maybe all this commotion will somehow inspire these institutions to which we have exiled the poor.

Meanwhile, I take it that we are to go on trusting the rich, within their separate "public" suburban systems, to choose what is best for their own and for society as they add their private dollars to the local kitty. Their authority over their children seems secure enough in the national Constitution. Good for them. But I do worry about the rest.

VI. THE MIND OF THE CITIZEN

Should lawyers be thinking about ways that might be better? Of course, and some do. I cannot read all their essays and books but fancy that I see occasional light. Boalt's Goodwin Liu is one who has not given up, even on a

52. The New York Court of Appeals really speaks for all such efforts at justice. The majority held that "in fashioning specific remedies . . . we must avoid intrusion on the primary domain of another branch of government." *Campaign for Fiscal Equity, Inc. v. State*, 861 N.E.2d 50, 64 (N.Y. 2006). The same judges then proceed to calculate and order up the right number of dollars to do a variety of jobs that the legislature had considered done.

national version of a just solution; nor would I, though Liu is the more likely to see it. He seeks to breathe life into the corpse of *Rodriguez*, by invoking our status and rights as citizens,⁵³ even as he confronts a federal Supreme Court that surely would reach the same vote of 1973. And tomorrow's court might be—well, even more so. Is the Professor losing his grip? Not at all. Judicial rescue will not come soon, but he is patient in his exploratory invocation of the citizenship clause as an emergent instrument of intervention. Time will tell, but Liu is clearly correct to invoke the spirit of that nineteenth century flirtation, so humane in its conception, that nearly carried the day. Those old words of the Fourteenth Amendment may harbor a set of truths around which persons of goodwill can cluster, at least politically. This is important, even if politics prove to be the only course of action to be expected at the federal level.

My enthusiasm here springs from Liu's insight of untapped legal potential represented in the very identity of the citizen. I am grateful that he has unearthed the rich history of this old text for our edification. It gives hope of our reclaiming citizenship as a distinctive status in the familiar litany of protected personal values—due process, speech, religious freedom, and so on. Scholars have often arranged this duke's mixture of high principle in various sub-categories, each with a jurisprudence of its own, with some being more favored than others. Specific characteristics of citizenship suggest its association with many of these hyper-values that carry special or even fundamental weight in the calculus of rights under both state and national constitutions.

Being a rank amateur, I can put this idea only in broad terms. Citizenship is not merely a formal classification of persons. At least for adults it is a constant act of free expression. We experience this reality continually in its passive form as it signifies a free choice by a rational agent who has options. But in most lives this steady, silent message is also confirmed by empiric punctuations that are deeply expressive; one thinks of voting, military service, pledging allegiance, cooperating with agencies of government, or invoking the courts. I am no Hobbesian, but it would be difficult to deny that the adult citizen has given free intellectual and moral affirmation to an American social contract. Citizenship is more than status; it is a property of mind—potential, then actual. When actual, it is an assertion to the world. It is the stuff of speech and invites the special judicial response that speech evokes.

So, where does that get you? Who presently is interfering with the citizen's declarations of belief in, and allegiance to, this American polity of his own choice? That we'll have to consider. But simply being a citizen may, in any case, get you this far: it puts you in good company in any argument about

53. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 *YALE L.J.* 330 (2006). Liu is aiming at a national judicial and political solution. In the meantime, one remembers that the Fourteenth Amendment governs the states as well in its regard for the citizen.

justice in education. It gets you into the circle of conceptions like *Barnette* reminding us that “no official . . . can prescribe what shall be orthodox.”⁵⁴ The mind of the individual citizen, her hope for the mind of her child, is a thing of constitutional weight, whatever its particular content. Here we find ourselves warming at the flame of the First Amendment, and soon to be moving on to tales of the Amish,⁵⁵ then of *Meyer*,⁵⁶ *Pierce*,⁵⁷ *Serrano*, *Rosenberger*,⁵⁸ and even *Troxel*.⁵⁹

Liu’s invocation of citizenship promises to engage, enrich, and encourage the permanent tendency of the Court to value liberty of mind, creed, and expression with all their manifest importance to education. Turning this into legal argument and an effective remedy will be a challenge, even a vocation. Lawyers who care will remain attentive to the Court’s jurisprudence of the citizen’s mind in the hope to attach education’s wagon to something that can give school finance reform a more elevated image. The steady invocation of individual thought and expression as primary educational values could ultimately pay off with both conservative and liberal wings of any future court. The recent dissents in *Zelman*⁶⁰ may sound a bit fixated upon the coercive delivery to the poor of some ideal and universal civics curriculum. Ironically,

54. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that a school regulation requiring students to salute the flag was unconstitutional). In the case of children, the impotence of the “official” ceases when the “official” is a parent prescribing her own orthodoxy. See *infra* pp. 265-69.

55. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (compulsory secondary schooling limited by established religious practice).

56. *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that the proscription of foreign language teaching to elementary students infringed on liberty guaranteed under the Fourteenth Amendment).

57. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (holding that a state mandate requiring children to attend public schools unreasonably interfered with parental rights).

58. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (holding that state subsidy of speech cannot exclude religious speakers).

59. *Troxel v. Granville*, 530 U.S. 57 (2000) (recognizing parental authority over non-parental visits).

60. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The three dissenting opinions agree that the problem is the threat of social division created by conflicts among religious ideologies:

This diversity made it difficult . . . to devise meaningful forms of equal opportunity for all to introduce their own religious practices into the public schools. . . .

.....
[D]id not history show that efforts to obtain equivalent funding for the private education of children whose parents did not hold popular views only exacerbated religious strife.

Id. at 722 (Breyer, J., dissenting).

The shared, but silent, premise of the four dissenters (Breyer, Ginsburg, Souter, and Stevens) is that public schools avoid social conflict by some common and consensus-based curriculum of non-religious values. The empirical disproof of that premise and the demonstration of deep non-religious conflicts within the schools could move such good minds to face up to the more general problem.

however, this may be so precisely because these justices do care about freedom of the mind but need a clearer picture of where the hope for that freedom really lies in view of its frustration by the present regime. Keep the argument going, and education will be the better whenever it stands before the Court. In the end, this whole thing is less about money than whatever it is the rich seek to buy with theirs. Granted, this all assumes that the will of a particular adult—the parent—is the locus of expression to be protected for both rich and poor.

VII. HOPES FALSE AND REAL

I cannot do justice here to the rich implications of the citizenship argument or many other constitutional insights that might encourage the reform of school finance. But I will try to clear a bit of ground by discouraging two unpromising perspectives while commending a third.

The first false trail is the current suggestion of a right in non-parents, one that is to be coupled with this third party's quasi-parental authority over the child. This right is thought to be discoverable judicially in persons or groups (including "teachers")⁶¹ who plausibly can help the child. And to be sure, with constitutional protection the Boy Scouts can seek to help the child already in its care by excluding gay leadership; this outcome has been interpreted as a protected aspect of privacy—in the Scouts' case a form of group privacy. The problem with such a notion is that no individual or group—BSA, teacher, or the Lone Ranger—however effective and well intentioned, will be judicially recognized to override the will of any functioning parent who specifically rejects the proposed interference. Perhaps, over time, implied delegations of parental power will as a general matter become factually more credible; but, again, the parent who still holds office and who expressly opposes the volunteer will prevail until the day a court declares her unfit. For better or worse, the basic message of *Pierce* and its descendants is secure. Apart from emergency and abuse, parental authority trumps any non-parental effort to aid the child.

61. Laura Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833 (2007). This interesting essay invokes "the image of a triangle to describe the allocation of legal authority over child rearing." *Id.* at 833. This would be unobjectionable save for the writer's apparent assumption that the legal triangle is equilateral.

I should note here the enduring American folktale of a teacher's legal right to free classroom expression. At the level of compulsory schooling, "[a]cademic freedom remains at best a nebulous concept." FRANK KEMERER ET AL., CALIFORNIA SCHOOL LAW 228 (2005). If such a right existed, the children of the poor would be governed explicitly by the mind of our Ms. Brooks—instead of the school board, or the Department of Education, or whomever. But if the legal locus remains nebulous, the practical authority of teachers over the poor is plain enough. As I note below, the actual content of the values taught in the American urban classroom, except in rare cases, is *terra incognita*. Ms. Brooks gets her audience by conscription, and the value message is largely hers to determine. We don't know what she teaches.

The second idea is roughly as plausible but requires more attention, because it is vaguely and widely assumed, rarely challenged, and ultimately unfriendly to democratic hopes. It is the quiet supposition that, except for the specific parental powers that are judicially discoverable in the fifty-one constitutional texts, parental authority comes as a delegation from the State; apart from these texts, it consists exclusively in a bestowal from federal or state law. By this view, it would seem that these formal documents and their implementations monopolize the phenomenon we call law. When our constitutions were adopted, these texts guaranteed parents a few rights, such as due process, but secured to the State the remainder of their legal authority. Any general lawmaking power of the parent over the child was surrendered without notice either in the texts or debates. Since 1787 (and the state constitutions thereafter), the artificial State has been the residuum of legal power and it passes back to the parent such portions as it sees fitting.

The myth of the State's exhaustion of the phenomenon of law seems widely assumed by lawyers themselves. But even the most rock-ribbed positivist must see that the idea is infested with problems. One is the implausibility of the tale of the implied surrender of authority. What is the evidence for it? Another explicit countering of the myth exists in the Ninth and, more emphatically, the Tenth Amendments which, after all, are law and explicitly "reserve" and "retain" rights and powers to the "people" who—whatever else they may be—are not states. A third problem lies in the very idea of law itself, and I turn first to this jurisprudential aspect.

Americans favor the image of a "separation of powers," ordinarily denoting the three discrete sources of law that operate under each of our fifty-one constitutions. Legislatures, executives, and courts make and enforce law. They are occasions of limited but real legal power. These artificial types exist in each of our state and federal governments. Each is within these particular systems distinct from the other. Indeed, our courts make one form of law by discerning the boundaries of all the branches. The judges distinguish legislature, executive, and court within each system and also the line that separates all state from federal powers.

So far as I can see, the possibility of a universe of lawmakers that stands apart from this federal-state agglomerate is academically unattended. But the idea is not chimerical. The unwritten, non-treaty law of nations might be one example. America did not enact these rules, but it is subject to them. Another possibility is the occasional "sovereignty" of our Indian tribes over particular issues of some importance.⁶² And, as the reader anticipates, parents are quite

62. See generally FELIX COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland ed., 1982); STEPHEN PEVAR, THE RIGHTS OF INDIAN TRIBES: THE BASIC ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS (Normal Dorsen ed., 2d ed. 1992); CHARLES WILKINSON, AMERICAN INDIANS, TIME AND THE LAW (1987). The scope of autonomy appears both vague and varying among tribes and seems most evident in child custody and tribal identification cases. I claim no expertise.

transparent in the role of authentic lawmaker. Like laws made by the State, parental law is finite in scope. Unlike laws of the State, apart from abuse or emergency, parental law is virtually unlimited in its authoritative power to choose and command the picture of the good life that will be presented to the mind and the heart of the individual child. Lawyers may fail to see this quiet dominion of parents as law simply because, by comparison, the law of the State is so clamorous and the State is our constant workplace.

In any case, if we are to scrutinize this supposed monopoly of law together, we will need a common definition of law. For the monopolist's own sake, let us adopt the meaning that is favored in the narrowest forms of legal positivism. We can avoid all "contamination" with natural law, religion, and even the many sociologies of our time. To see law as the power to command and enforce habitual obedience without interference from any other sovereign is to give the theory of state monopoly its best chance.⁶³ I will simplify even further by focusing on the idea of "powers," even though that concept by definition implies correlative "rights," "duties," and so forth. With apologies to Wesley Newcomb Hohfeld,⁶⁴ let me crudely reduce the thing to its elements. A power is some recognized authority of a person or collective that I will here call Jones, either directly or indirectly to decide what someone I will call Cooper will or will not do. Powers come in three forms and from three discrete, if interactive, kinds of sources: (1) Legislative: All Coopers must stay off the land of all Joneses; (2) Executive: Cooper! Do this!; (3) Judicial: Cooper has transgressed a rule and shall pay Jones \$10 in damages.

So, very coarsely conceived, we have three forms of what is legal authority or power. In the world of Hohfeld, each is located and exercised within a separate sector of state or federal government. Acting together these domains are supposed to exhaust the concept of human or positive law. This is its universe. Outside this world which rests on texts and is embodied in the formal legislature, executive, and court, there is no instance of a rule, order, or judgment by which Jones can lawfully order Cooper about.

But of course there is. There is certainly one other domain or—possibly more—consisting of analytically clear and precise positive law, though curiously overlooked by jurisprudence. Here, in this "fourth estate," one person has the power to make important and enforceable rules, to order another to obey, then to initiate, hear, and judge cases of alleged offenses, and to enforce judgments. Nor are these orders, rules, judgments, or penalties in any respect dependent upon, or flowing from, the will of any of the three branches of the federal or state governments. None of these artificial creatures could make Susie eat her spinach, go to bed, do her homework, avoid Telegraph Avenue, or

63. Thomas Holland represents the old hard-nose school of positivists descending from Austin as he defines law as "a general rule of external human action enforced by a sovereign political authority." THOMAS HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* 37 (4th ed. 1888).

64. WESLEY HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (Walter Cook ed., 1919). Hohfeld's aim was to reduce all legal relation to dyadic forms such as right/duty.

say her prayers. So long as the “rights of the child” are not abused, the police power of the State can neither contradict nor interfere with this independent authority; in this domain, the State is simply not law. Indeed, its agencies exist to serve and conserve this prior order of human community. They have duties both to respect and preserve the parental dominion and to enforce the rights of the child when the abusive parent invades their scant limits.

Any person endowed with such nearly exclusive legislative, executive, and judicial power over another person surely is making and enforcing law—and law of a singularly broad sort in a wide domain all its own. Of course, this discrete sovereignty is both temporary and dependent upon the relation of child to parent—or, where necessary, to some substitute adult who acts in *loco parentis*. In the twentieth century, this authority of every parent to define the family’s own jurisprudence was declared to be protected by certain words in the American constitutions, but it remains something more. It was already there “at the beginning”—of the world I suppose, but in any case in 1787, 1791, and thereafter in the separate states. It was quite unnecessary to specify its office and limits in the words of our fifty-one written compacts. These functions were already manifest in the lives of the very persons who designed and drafted these artificial constitutional bulwarks of separate and limited powers. The family, as the Puritans insisted, was already a little commonwealth⁶⁵ of its own and remains so.

Nevertheless, given the impulse of the twentieth century to convert the limited sphere of State powers into the totality of all that is properly law, the Oregon initiative of 1920 was politically inevitable.⁶⁶ Only the State was to conduct school and determine its content. The new order would cancel and absorb parental authority formally to shape the intellect of school-age children. In a blunt rebuff, *Pierce v. Society of Sisters*⁶⁷ disclaimed authority of any among the various forms of government sculpted by the founders or the states—even the authority of the Oregon voters by initiative—to trump the separate law of the parent. Of course, the state may insist on the teaching of skills plus respect for law. But, within these scant (if important) limits, the rule of all the American constitutions is that the child will be formally schooled concerning the true and the good as her parents see fit. They are the locus of law for the intellect and moral culture of this family. This fourth estate, consisting of parents, rules not only the choice of spinach but of McGuffey’s Reader and the Teletubbies. Like other lawmakers, parents may fail to realize their own moral object, but, outside the narrow limits imposed by children’s rights and the common good, that object is theirs to name. Indeed, here my metaphors of “estate” and “branch” are understatements. The parent holds the

65. JOHN DEMOS, *A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY* (1970).

66. For a documentary history of this initiative and the litigation it spawned see *OREGON SCHOOL CASES: COMPLETE RECORD* (Belvedere Press 1925).

67. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

cards as legislator, executive, and judge. She is, within her realm, a government complete.

This parental hegemony is not merely settled but is probably necessary in a society such as ours. I can imagine another in which it would be plausible, even for “democratic” civil authorities to declare the dissenting family to be disenfranchised and to rule the mind of every child according to some vision of the true and good that is regnant among a consensus of the people. But, in the United States, any such Platonic educator could find no common vision to justify the usurpation—hence, usurpation it would be. We need not consider such a hypothetical.

But, how, then, should we and our judges of the future regard the present dispensation of education in which, by constitutional right, wealthy parents like me cluster in the Berkeley Hills enthusiastically exercising their broad legislative, executive, and judicial power to fuel the child’s mind? Is there anyone ready to defend this bifurcation of America’s social substance? Let us hear the argument. If the reason be that only the rich can afford to exercise this authority, what then is the implication? Unless one prefers both oligarchy and stasis, would he not either decommission the rich or strive to realize that same authority for all of us? Is this crazy, or does whimsy lie rather in our peculiar treatment of the have-not family as unfit to exercise its acknowledged authority?

VIII. CITIZENSHIP AS A STATE OF MIND

At this point I briefly rejoin Professor Liu’s insightful appreciation of Amendment XIV, Section 1 of the U.S. Constitution. What is the image of citizenship that is projected by a regime of government schools in which the form and content—plus the human provider—of the ideas that will constitute the child’s education are, in the one case, to be chosen by the citizen who is her parent and, in the other, by some stranger? Recall that being a student and being a student’s parent both constitute states of quite proper legal responsibility. Personal commitment and behavior are required of each and are enforced by the State. Getting the child schooled is not undertaken as somebody’s option; it is, rather, a bondage to two peculiar roles—one for the parent, one for the child. For a particular span of years, each is a servant to the imperative to till the soil of this young human mind. Not even the rich can purchase their freedom from this servitude. What they can do is to home-school the child or select the intellectual deputy—the school or private tutor—who will serve in their stead to deliver, or at least sustain, the unique family message. Thus, for the well-off, the only freedom actually lost as citizen is the theoretical right not to school at all. Within very wide limits they control the manner and the message.

The other half, by its financial impotence, submits to the will of the school Leviathan—a master benign, perhaps, in its intention, but still domineering

both physically and intellectually. The relation is benevolent but servile.⁶⁸ One asks, what was the Fourteenth Amendment about? When the bondsman laid down his hoe and became a citizen, did this constitute the whole of his liberation? Or had his bondage been as much of mind as body? The slave was educated to know one thing—the mind of the master. Did we end that intellectual subjection or merely extend it for all those families unable to manumit themselves with money? This may sound florid, but the images of slavery and liberation are perfectly fair here; ask any financially marginal mother who hopes somehow to move from Oakland to Baja Piedmont for the sake of her child’s “public” education.⁶⁹ I suspect that memories of the “peculiar institution” will weigh in some future battle royal before the Court over the State’s singular intellectual domination of the poor.

One “realistic,” if muted, defense of this status quo by the state will be that, for the child of many non-rich families, this conscription is actually a liberation executed precisely by subordinating the marginally competent parent; the infant citizen’s mind will be freed by exposure to the common message of proper values.⁷⁰ A second favored justification insists that democracy is enhanced when conscription of the poor secures a diversity of social class and race within the school room.⁷¹

Addressing the Court, the citizen will respond to these two claims in terms drawn from the Fourteenth Amendment’s promise to the citizen. Regarding the autonomy of the child, he will of course challenge the assumption that ordinary families lack the necessary motivation or capacity to seek the child’s self-governance; indeed, it is the poor who have the most at stake in the child’s becoming independent. But, he will go further, denying the very existence of the necessary uniform message of values supposedly professed in the public school classroom. In so pluralist a society, the state’s promise of ethical

68. And it is servile to all those adults who share in the power of the leviathan that is inner-city schooling. I concede the general good intention of these actors, but I remember Al Shanker’s favorite put down in our several debates, “I will start representing children when they start paying union dues.” The economic reality is that children of the poor do pay union dues by being drafted for the fall headcount. A recent ad for Shanker’s union seems quaintly relevant. A set of reforms proposed by the union “makes a school a place where all parents want to send their children.” Randi Weingarten, *What Matters Most*, N.Y. TIMES, Mar. 16, 2008, at A5. They will love it.

69. A friend of mine has a doctor who certifies that her child has a form of motion sickness that requires that he walk to a nearby school that the parent prefers rather than ride to his assignment. We all recognize the syndrome.

70. See generally J. DONALD MOON, *CONSTRUCTING COMMUNITY* (1993). Moon himself is a critic of various aspects of the movement to unify the curriculum in a particular form.

71. See generally RICHARD D. KAHLENBERG, *ALL TOGETHER NOW: CREATING MIDDLE CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICES* (2001). Kahlenberg would enhance racial integration through choice exclusively in the public sector—a policy now in some doubt. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Meredith v. Jefferson County Bd. of Educ.*, 127 S. Ct. 2738 (2007).

consistency is empirically improbable. In a moment I will return to the significance of this inescapable randomness among public schools in the teaching of values.

As for the state's second justification for compulsion—its interest in social and racial integration—the parent-plaintiff need only cite the mournful statistics of separation reported from every urban school district for half a century. Again, my specific point here is that these are images and arguments that emerge from the concept of citizenship; they are part of the total package of those constitutional values that rest upon the dignity of the rational individual, and which are constitutionally secure against government—state and federal.

But Liu is right in addition to recognize and emphasize the distinctly egalitarian *fiscal* implications of Section 1 of the Fourteenth Amendment which obviously merge our concerns about the teaching of values with those for equity, adequacy, and fiscal neutrality that have given life in state courts to prospective reforms of school finance. Of the two strains I find the theme of free expression and transmission of values to be more directly relevant to the hope that ordinary families may one day exercise educational rights as autonomous actors. But here I want only to stress my conviction that the aims of the two reformers appear convergent. Any serious commitment to choice for low-income families will serve not only the autonomy of the mind but also the goal of justice in the financial support of education. We could all become full citizens. Choice would maximize, equalize, and dignify as no other remedy imaginable.

IX. WHO NEEDS THE CONSTITUTION? A WILD CARD

Once we awake to the parent's unchallengeable zone of lawmaking, the landscape of law can be seen afresh. The unique power of mothers and fathers stands distinct and apart from federal and state law as either its source or limit. It was created by neither and can be withdrawn by neither so long as parental choices stay within their very broad dominion. Its zone is not boundless, but neither is formal government; and, whatever its scope, this power stands on its own. To be sure, the state and federal texts have given parental authority specifically constitutional protections, including due process and the like; all of these the State has the duty to nourish and enforce. But now we can see that these artificial protections are supplementary and do not constitute the whole of parental jurisprudence. Who could believe that the framers thought that their authority was now entrusted (and thus limited) to these vague expressions—or that recent majorities such as that in *Troxel*⁷² think so? Parents autonomously command and enforce.

72. See *supra*, note 59. The mother with custody has the right to closely limit grandparents' visits.

What follows from this multiplicity of American lawmakers (how many millions?) is still obscure, but I will risk a peek at one implication for the impending jurisprudence of parenting. Who remembers the Tenth Amendment? Here it is: “The 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.”

The specific subject here is *powers*. The language of the Ninth Amendment has already spoken for the *rights* retained by the people, and this too may be useful. But my focus here will be upon parental power and its equal protection by the state and nation.

That very rare scholar who has pondered the text of the Tenth Amendment tends to reduce it to a truism:⁷³ What powers the text has not bestowed on the nation are retained by the individual states. And that disposes of the Tenth. It would do so, that is, on the assumption that these two entities (state and nation) exhaust and monopolize the phenomenon of law. By definition, the law of the artificial State is all there is.

But that is not only untrue; it is not even what the Tenth says. To the contrary, it speaks plainly and disjunctively of “the people.” If words have meaning, this is not the boring truism that every power not federal belongs to the state. It is the assurance of something almost its opposite. Some of the preexisting powers of the people that were not delegated to the federal government do, indeed, belong to the state; but there is this disjoined remainder consisting of other unspecified authorities who also make law. There are other powers—out there. This is no truism. It is the affirmation that our courts have the responsibility constantly to define the boundary between textually-based powers of the State and other authorities unspecified. This function of discernment is being satisfied in part by Supreme Court doctrine, past and future, interpreting those particular parent powers the justices discover to be protected by specific textual references. Such back-up support from these basic texts is reassuring and might even be sufficient for every purpose, public and private.

But perhaps not. Seen as an issue about reserved powers, the jurisdictional boundary between State and parent less resembles an inquiry about “due process” than it does that cluster of enduring puzzles known as the “conflict of laws.” In the great school cases yet to come, what could emerge is a confrontation between two limited legal sovereigns—the State and Parent Sally Smith. The dignity of the parental claim will be enhanced to the degree that Sally stands, in this sense of the Tenth Amendment, *clear* of the State. In truth, this is an understatement of the assertion made. Even if there were no due

73. The nearly one thousand pages of Randy Barnett’s excellent two-volume collection includes dozens of learned essays and appendices on the Ninth Amendment but scarcely notices the Tenth. RANDY E. BARNETT, *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (1989). I have been unable to locate a serious discussion of the question of the powers of “the people” reserved in the Tenth.

process clause, the Court would still face the jurisdictional issue between state and parent. And, as in the jurisprudence of conflicts of laws, the courts would incline, by judicial instinct, toward a norm of equal treatment between and among “sovereignities.” That inclination would be strongest in the adjudication of claims to protection of “compelling” interests such as choice in schooling and the avoidance of “suspect” classifications of that interest. Can a state arrange its system of education to sustain the lawmaking power only of parents who are sufficiently rich? If choice is an educational good of such importance as the rich (and the State itself) seem to think, its judicial perception as a “conflicts” question, as well as one of traditional civil rights, intensifies the incongruity of our conscriptive assignment of the poor.⁷⁴

An extra-constitutional power of parents has more ramifications than I can manage here or even imagine. It deserves steady and extensive reflection and research of which there is a remarkable want.⁷⁵ I recommend the long haul to those scholars and litigants who would entrust non-rich parents with the means to exercise their own proper power.

X. CONCLUSION—ALMOST.

For all the civic and personal reasons that I’ve confessed, I gave *Serrano*—the real, not the mythical one—the best I had. I cherish its status as California constitutional law; and I regret that we could not avoid the tragi-comedies of *Rodriguez* and Proposition 13. Together these latter two events may have sealed any imminent legislative exit from our state’s stagnant and utterly cynical status quo. The system has the veneer of uniform funding, but the rich prudently cluster, while their private foundations provide the add-ons for the chosen district or school. The poor are clustered and pose no threat of transfer out of the “public” system. Curiously, Proposition 13’s frustration of the

74. This perspective also avoids confronting the perplexity about who actually has the right—the parent or the child. As the focus shifts from the Ninth to the Tenth Amendment, the specific issue becomes not one of right but of power and responsibility. Of course to have that power and responsibility located in the parent may also be deemed a right of the child. There should be great fun at the making of the legal architecture necessary for Tenth Amendment justice.

75. That is, so far as I can see—making no claim to have exhausted Tenth Amendment references; the mode of such writing clearly is focused on the limits to *federal* power, but I doubt that the argument in the text could be novel.

There is a related but separate stream of scholarship suggesting quasi-constitutional status for various statutes, regulations, and decisions. The currents of this literature are noted in Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007) arguing for recognition of an extra-constitutional authority parallel to the texts; the idea appears to start and end with the premise that all law is a monopoly of the State. As a good positivist Young avoids invoking “higher law” sources for constitutional norms. *Id.* at 414. However, he then fails to account for that purely positivist universe of effective command and enforcement that rules outside; but here too is law quite independent of the artificial universe of texts and formal government.

democratic renewal that was promised by fiscal neutrality has in practice been taken by American lawyers to disable the *Serrano* idea for other states as well. Its capacity one day through ordinary politics to liberate the poor has so far eluded the vision of those litigators who have championed adequacy and equity. I won't further disparage either of their chosen metaphors as politically plausible forms of distributive justice. But I am troubled by their spirit; they do not speak to the best in us. The one complains that you got more than I did; the other is the familiar demand of more for all. In both cases the specific motivation of the litigation is the capture of money to be spent on have-not children at the will of strangers.

Paradoxically, in the end, as with the path chosen by Justice Powell in *Rodriguez*, the final impulse and tendency of such strategies is to shore up our society's most tested and efficient mechanism for marginalizing and demoralizing the ordinary citizen who cares about his kids and his country. There is nothing in either legal concept—adequacy or equity—that recognizes families as independent sources of hope and energy or which invites mothers and fathers to take responsibility and to exercise an authority that is consistent with the dignity of their office as citizen-parents. I urge the high-minded and sophisticated lawyer in these cases systematically to inquire of his own clients what they truly want and not merely impose his own version of what is good for them. They might just covet a remedy of the sort that bears hope for their office as parent—the authority that we so carefully have preserved for those who can pay.

Choice could be a prime instrument for a dozen substantive goods—public and private. Properly financed and focused, parental decisions could have a benign effect upon racial and class segregation, ethnic quarrels, special education, test scores, graduation rates, crime, the professionalism and welfare of teachers, and so forth. The common good would be served in ways quite unavailable to the old regime, however well it might be financed. And parents' empowerment would maximize the best interest of the individual child by affirming the personal value of responsibility to adult and child alike. I believe this still today, as I witness these all-American values incubating against all odds in places like Milwaukee.

The alternative is the morbid continuation of the typical urban school experience of today for the family itself. Here is a very short version of that experience: the helpless parent comes to accept the role of the irrelevant and irresponsible adult. A society that treats mothers and fathers as unworthy of responsibility should not be surprised when they adopt that understanding of themselves. The effect is all the more demoralizing when the parent observes that this authority and responsibility, so cherished in Piedmont and Palo Alto, is denied her solely by reason of her personal inability to pay.

As a parallel consequence—from kindergarten on, the child also gradually comes to understand that father and mother are impotent to affect this new and engulfing totality. At age five their authority is replaced by strangers. For the

next thirteen years the student experiences the irrelevance of family to this core aspect of young life. One day he or she too might be a parent, but only with the most limited perception of the potential nobility in that responsibility. The child grasps that she will not in the end be trusted to transmit to the next generation any vision of the good life that might emerge from her own struggle and spirit. The poor of tomorrow may have ever so much tax money assigned to their children; but, if strangers still decide where and how it is spent, we will have scored a pyrrhic victory.

I should think this apprehension of deep social danger would deserve our attention. Strangely, the effect of conscription upon the family's structure and identity has not even been studied. Recently I asked a prominent social scientist why this was so even in the otherwise comprehensive work of that scholar on parents and schools. The expert wrote in reply that the question was too politically sensitive.⁷⁶ Think about that.

As you do, think also of your own parents and the effect upon them and yourself of having the option to move to Atherton or, lacking such choice, of being assigned instead by the state to P.S. 42. Did it really matter within your home whether your parents could or could not express their own version of the true and the good by their preferences of school for you? And will you in turn prefer to have your own children conscripted, or will you want to decide for yourself? Lawyers should ponder such things.

XI. *ERGO PROPTER HOC . . .*

Has this been a story, a complaint, a sermon, or an essay? I fear that these rambling pages qualify as no specific form of writing—legal or otherwise. Certainly they could use an orderly punch line to facilitate the suggested conversation. To that end I append several concluding paragraphs more or less provocative in content; they are meant for dialogue, even if the parties turn out to be no more than the left and right sides of my own brain. I will hope for more over time.

A. Choice as a Distributable Educational Good

It is the aim of school finance lawyers, through litigation, to provide all the goods of formal education to all children in fair shares. Some educational goods are for direct purchase by the state, some not: where feasible, the latter too should be guaranteed to every child. Parental responsibility to select the child's school is one such good; presently it is denied to roughly half our

76. The precise words were "This is a highly sensitive political topic. I would guess that is one reason why you do not read so much about vouchers in academic journals." (anonymity of source has been protected) (on file with author).

citizens. No technical reason prevents its provision to all.⁷⁷ Unless the finance lawyer denies the premise that parental responsibility is itself an educational good, he should seek its extension to every family. If he does deny the premise, he should say so and give better reasons than we've heard.

B. The Inference from Compulsion

Being a compulsory activity, education creates duties for student and parent respectively. The child is required to participate in the activity of schooling. The parent has the responsibility and the legal power to select the educator. This may be done by selection of residence, enrollment in private school, or surrender of the child for assignment by the state. As a matter of constitutional architecture, the incongruity of this "compulsory choice" confirms juridically the importance of the parental power itself as an educational value. Technically a burden as well as a power, this parental responsibility is prized in practice both by those who can afford to exercise it for their children and by their fellow citizens. The process of careful selection by the well-off family is socially recognized as an act of civic and personal virtue, important both for the child and the common good. Families of limited

77. Over the years Sugarman and I have drafted various practical statutory mechanisms for school choice that are intended to balance and protect private and public values. The most recent is JOHN E. COONS & STEPHEN D. SUGARMAN, *MAKING SCHOOL CHOICE WORK FOR ALL FAMILIES* (1999). The criteria for any design can be compressed to these eleven:

1. In the public sector the design must aim to encourage a gradual and prudent evolution toward a "charter" model for all government schools. Access would be governed by the criteria below and would be supported by scholarships to families.
2. Ultimately, scholarships will be available to all. For ordinary or low-income families their dollar value will approach, equal, or exceed the average total per pupil cost of public schools for the same classification of student.
3. Add-on tuition will either be forbidden or means-tested to insure equality of access.
4. Private schools may opt out of the system and refuse scholarships.
5. Participating schools—public and private—shall have the same control of curriculum that is presently guaranteed to private schools (except that government-sponsored schools may not teach religion).
6. Religion may be a mandatory subject in private schools. The school could require mastery of the content; it could not require expression of belief.
7. Private schools (hopefully public charters as well) would be as free in their hiring and personnel policies as they are today (including the use of confessional criteria in the private sector).
8. All schools could impose academic and behavioral discipline conditioned upon fair warning and reasonable process.
9. Schools would be systematically encouraged to include ordinary and low-income families. Several forms of admission policy are available. For example, the school could be required to fill twenty percent of its openings with low-income children, should so many apply. Partial lotteries would also be worth consideration. Given the control over school identity that is guaranteed by criteria #5 and #6, religion should not be a condition of admission.
10. For some sun-setting period, the government would assure a system of information for families unused to making choices among schools.
11. Reasonable transportation would be made available to the poor.

means are denied this expressive and civic opportunity except for their barren option either passively to surrender the child or to commit an unlawful act.

The honor shown to parental autonomy in cases like *Troxel* should ripen into a latter-day judicial apprehension that any State-supported invasion of this dominion by third parties needs serious justification. And if any claim by grandparents to a few domestic hours must pass maternal muster, thirteen school years of expropriation of her child by the State ought to depend upon a rather substantial showing of necessity. Over time the justices who decided *Troxel* could make that perspective conventional.

C. Separating the Branches: Our Fourth Estate

The disempowerment of the citizen to choose the educator is a practical arrogation of a reserved jurisdiction of the ordinary family. Short of actual abuse (including the complete failure to educate), the parent is the lawgiver for both the mind and body of the child. Fathers and mothers in their own persons constitute a *de jure* legislature, executive and judiciary. They are a fourth branch of government—or, more precisely—a discrete limited government comprising the conventional three branches. Their independent legal status suggests a prudent introduction of neglected concepts such as those brooding in the Ninth and, emphatically, the Tenth Amendments with their rights and powers reserved to “the people”; it certainly invites the implications from citizenship noted by Goodwin Liu.⁷⁸ The State’s intellectual appropriation of the child of the non-wealthy parent is a legal aberration; sadly this practice remains afloat on the myth of publicness to which liberals have become strangely inured. It is time to reconsider this authoritarian anomaly.

D. Free Expression and the Common Cause

This discriminatory conscription of the child based upon family wealth will over time be challenged in courts, state and federal. Parents of lower income will seek as remedy the rough equivalent of what the State presently spends; they will petition its delivery in some form that will enable them to exercise their responsibility to their child and the society. Their legal counsel will emphasize the reality that selection of a school is not only a reserved power but a speech act, hence that it carries special constitutional gravitas. The parents will combine this claim for nondiscrimination in access to all schools with those wholly consistent claims for reform that are presently represented in the school finance cases. Coalition with the fundamental values of thought and expression could only enhance and humanize the appeal of the bare claim for money.

78. See *supra* pp. 119-21, 127.

E. Compelling Interests of the State?

The lawyer who would equalize both access and money will start by scrutinizing two central ideological justifications offered for our conscription of have-not children. The first is the existence of a uniform curriculum of civics and values claimed to be necessary for molding the citizen. Whether there is such a curriculum is a yet unstudied question. Its very existence in pluralist America would be empirically surprising.⁷⁹ In any case, if proper inquiry did show it to exist, how would this justify mandatory assignment for the poor only? And, if it is not uniform, what justifies the child's assignment to School X? The reforming lawyer seems to have the State in a constitutional fork. The second justification for herding the poor is the social integration of our schools. The empirical basis for this of course, is nonexistent. Our government schools do not join; they separate.

F. Choosing the Adequate and the Integrated

The choicemaker and the adequator could jointly design attacks on the current dispensation of educational goods. The litigation would combine complaints against discrimination in the state's provision of the two basic educational goods—money and parental responsibility. Intervention might be possible in some current school finance case; combined with desegregation, it might succeed as it nearly did in Kansas City even before *Zelman*. There, a class-action lawsuit against the state and the district under a desegregation order by students in the district suggested a plan which would require the defendants to subsidize transfers to fifty waiting private schools that could realize, by parental choice, the opportunity for racial desegregation that was declined by

79. The uniform values content of the curriculum is carefully left unspecified. The apparent claim is that government schools do teach a substantially common (hence, it seems, justifying) message about civic life and the common good. But what could it be? Even those who rely on its existence complain simultaneously about the ideological chaff that gets taught. Worse, these critics are in conflict even among themselves as to what would be the right stuff. My office groans with such discord among the educators. Even the magisterial, eleven-hundred-page, classic by Phillip Jackson is essentially a report of a myriad of different messages sponsored by contending gurus. PHILIP JACKSON, *HANDBOOK OF RESEARCH ON CURRICULUM* (1992). If there were an actual uniform values curriculum, it obviously couldn't be any of theirs. Until some empirical hero shows that public teachers do in fact convey the same package of identified values, I can only take my cue from experience and the media. These report conflict deep and wide over whether public teachers should even notice sensitive value issues. Of course, many maintain silence out of mere prudence with what effect upon character I shudder to think. As for the rest, we hear of battles galore over expression of teacher (or system) opinion about sexual behavior, stem cell research, Iraq, football, animal (even vegetable) rights, assisted suicide, and gender roles. This intellectual chaos is a fact of life, but it can hardly be the justification for conscription by financial disability. We should either establish the existence of one values curriculum for all of us or scrap this canard as a defense of coercion by wealth.

suburban public districts.⁸⁰ In such a case, money, race, and parental free expression combine in an interesting menu of educational goods. Together they may hatch an equality of the sort that would neither stifle nor homogenize.

G. The Ultimate Adequator

Whether adequator, equalizer, or neutralist, the school finance lawyer should not hesitate to make common cause with those parents who might choose religious education. Their interest is ultimately the same—the fair distribution of sufficient educational goods including both dollars and parental choice.⁸¹ To continue to scorn these citizens will be to the injury of all. Advocates should be driven by the hope that in 2025 they will reach the Supreme Court in a classic merger of *Rodriguez* and *Pierce*; the cause will be undertaken jointly by the conventional school finance cadres and by citizens who suppose ordinary parents should have a choice concerning the values taught to their own children. The historic mislabeling of a left and a right on this issue can happily fade.

80. The Kansas City story is recounted in Deborah Beck, *Jenkins v. Missouri: School Choice as a Method for Desegregating an Inner-city School District*, 81 CAL. L. REV. 1029 (1993). Liu and Taylor provide a splendid analysis of the desegregating possibility of well-designed choice systems. Goodwin Liu & William Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791 (2005). They specifically note the limited desegregating capacity of any system of choice that is confined to charter schools within one district. *Id.* at 803. The freedom of individual parents to choose integrating private schools would be one important constitutional step removed from the form of state action that was disapproved of in *Cnty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738 (2007). It would consist in the state's passive approval of private choices to value racial integration.

81. Within a constitutional regime of fiscal neutrality, a universal system of parental choice would almost by definition solve the dollar "equity" problem. The aim would be that parents of children who are in the same rational educational category would have roughly the same financial opportunity. Whether the subsidy would be "adequate," however, is a separate question and not transparent in meaning. It could be restated as the clear and more provocative issue: would choice maximize public spending for education? This is another way of asking how voters would respond and especially those voters with children in private schools who presently have a strong incentive to oppose school taxes. The ideal mechanism would be one that converted those voters from hostility to enthusiasm for a greater public investment.

I can see how a system of choice could be badly designed for this objective: the wealthy family could be altogether excluded or given grants too small to induce any transfers. There are differences from state to state in the percentage of children in private schools, and this too would matter. And a decision to allow charter schools to accept scholarships and charge tuition would complicate the calculus. I won't attempt to ring the changes on all these possibilities. I do urge the apostles of adequacy and maximization to give careful thought to this ten percent of American families whose vote will be important. Treated with finesse, they might become allies.

