

A First Appraisal of Serrano

John E. Coons, Wm. H. Clune, III and
Stephen D. Sugarman

A host of legal and related issues have been posed by the recent decision in *Serrano v. Priest*;¹ a selective scanning of these issues, in an attempt to ascertain their importance and likely impact, is now necessary. In *Serrano* the Supreme Court of California held that to the extent existing differences in spending among school districts are caused by differences in wealth,² the present scheme for financing public schools in California violates federal and state equal protection guarantees. The court further held that although school finance mechanisms may differ along many dimensions, they must respect one proscription: the quality of public education, at least as measured by spending per pupil, may not be a function of wealth other than the wealth of the state as a whole.³

Redundancy may be helpful here. One restatement of the court's holding is that *Serrano* requires of the state a *fiscal neutrality* among those agencies it creates and empowers to make different choices regarding educational spending. Another paraphrase would be that, to the extent the state allows quantities of public education to be bought by local units (whether counties, school districts, schools, or families), unit wealth must not be allowed to affect the quantity purchased. Since, as things stand, local taxable wealth per pupil is a major determinant of public school spending in almost all states, *Serrano* is significant; insofar as fiscal neutrality is not an elementary or unambiguous concept, the meaning of *Serrano* remains obscure. Speculation about its career is worthwhile if risky.

There are already signs of the decision's legal vitality in addition to the untutored (and undeserved) hosannas of property tax vigilantes and political opportunists. The holding has been approved and applied to the Minnesota financing system in a declaratory judgment by the Federal District Court in *Van Dusartz v. Hatfield*,⁴ and to the Texas financing system in *Rodriguez v. San Antonio Independent School District*.⁵ Many similar suits are progressing toward judgment in other states brought by lawyers acting in apparent accord on the fundamental question. Anticipatory responses are stirring in other branches of government at all levels. Given the present quantum of activity one might conclude that a series of major decision-points may be at hand regarding the

forty-five billion dollars collected and disbursed for elementary and secondary education in the United States.

Radiations of *Serrano* are likely to touch increasingly wider rings of power and interest, each likely to be affected and to respond particularistically. Three of these rings will be briefly considered here. The narrowest focus is the judicial arena: what will happen to *Serrano* and similar cases (e.g., will they be reversed?) and what is their significance to the body of Constitutional law? Next, *Serrano* holdings imply fairly prompt legislative action; how will state legislatures and the federal government respond (e.g., by a centralized or decentralized system)? Finally, there is the longer-run impact upon and reaction of the political community as a whole: what major changes are predictable over time given this major thrust toward redistribution of public resources?

The First Ring: Serrano, The Courts, and Constitutional Law The Posture of the Present Litigation

A variety of procedural and jurisdictional questions leave the eventual fate of the *Serrano* case itself *in nubibus* and will affect the rate of its progress through the system. It seems likely that the case which first

reaches the United States Supreme Court will arise in another state and through the federal courts.

There are two federal doctrines which are relevant here. The first is the "final judgment" rule which probably insulates *Serrano* itself from immediate review by the federal high court.⁶ That is, *certiorari* should properly be denied since the case arose and was decided on the pleadings and presumably will go to trial at an early date. The California Supreme Court itself has declared the decision not to be a "final judgment."⁷ Only when the trial and the available state appeals have been completed will the case be ripe for review on *certiorari*. Of course, review could occur at the present stage if for example, the United States Supreme Court concludes that the trial is but a formality.⁸ The *Serrano* opinion may be read to foreclose every factual issue except the allegations concerning tax rates, spending, and district taxable wealth which are matters of public record and apparently undisputed.⁹ So viewed the factual result is foregone. Nevertheless, the state proceeding will involve the substantial and delicate question of the appropriate order; thusfar no one has been ordered to act or refrain from acting in any way. It is unlikely at this stage that the U. S. Supreme Court would reach for the case.

The longer range question is whether *Serrano* is vulnerable at all in view of the possible presence of an "adequate and independent state ground."¹⁰ The opinion cites the state constitutional counterparts to equal protection as supporting the result and then adds artfully that the California law is "substantially the equivalent" of federal equal protection.¹¹ This represents another step in a continuing *pas de deux* between the California and United States Supreme Court.¹² The California court could have either insulated the decision from review by stressing the independence of state law¹³ or harmonized its judgment with an emergent federal rule by striking "substantially."¹⁴ What it has done instead is to leave the federal courts free to move to the merits on the federal question while leaving itself free to preserve the result in California even if a *Serrano*-type case goes down to defeat by the Burger court.

In all probability *Serrano* itself will never be decided on the merits by the U. S. Supreme Court. Some of the cases now in process in federal courts may face their own problems of delay and restraint under the abstention doctrine,¹⁵ but it is most likely that one or more of them will reach the high court in the next eighteen months, well ahead of the probable *Serrano* timetable.¹⁶

It is also possible that the *Serrano* rule could be seriously affected or even subsumed by the decision of a case or cases which barely resemble the school finance litigation. One candidate is *Johnson v. New York State Education Department*,¹⁷ decided by the United States Court of Appeals for the Second Circuit. The complaint asserts that fees for textbooks are unconstitutional, because education is a fundamental interest and fees are an invidious discrimination on

the basis of personal wealth. The court split 2-1, holding against plaintiff children. Should the Supreme Court review the substantive issue and decide it against plaintiffs, it may be hard sledding for *Serrano*-type actions, although there is an important distinction available in the purely *de facto* character of the wealth classification in *Johnson*.¹⁸ Contrariwise a substantive victory in *Johnson* would be most helpful.¹⁹

The Holding and its Rationale

Whatever the procedural odysseys of the current litigation, in the long run the substance of the problem and its solutions will determine the final outcome. *Serrano* begins with a complaint about the manner in which public schools are financed in California.²⁰ This financing system, shared in its essence by almost all other states, relies upon three sources of money: local school district taxes (on property), state aid, and miscellaneous revenues from the federal government. Federal aid tends to be directed toward specific educational purposes (e.g., disadvantaged children, school lunches) and constitutes only a small fraction of total spending for public schools. State aid is distributed in two principal ways: first, under the "Foundation Plan" the state sets some level of educational spending (say \$500 per pupil) which the state will support on a fully equalized basis. "Fully equalized" means that any incapacity of a district to raise that amount of money is compensated for by the state. For every district there is calculated the amount of money that would be raised by a levy on its property of some rate (e.g., 1%); to the extent that the amount raised from this 1% would fall short of the foundation level, state aid makes up the difference. Thus, the poorer the district, the more the state supplies in foundation aid. Second, the state dispenses "flat" grants; this is a uniform amount—\$125 per pupil in California—which is guaranteed to all districts if they do not receive this much in foundation aid; in short, it is money for the relatively rich districts.²¹ Overall, however, these state and federal subventions somewhat prefer the poorer districts.

Finally, there is the local tax levy. This last category of public school revenues, because it is so sensitive to the wealth of local districts, is the real source of the *Serrano* complaint. In 1968-69, the foundation plan in California equalized districts up to \$355 and \$488 spending per pupil respectively for elementary and high schools; yet the average respective spending per pupil in the state during 1968-69 was \$611 and \$836. This substantial difference between equalized support and actual spending is supplied mainly by local revenues, and each dollar of local revenue per child comes at a different tax price for every district in relation to the wealth of that district. Because for

the poor district each dollar above the foundation represents a much greater tax sacrifice (rate) than for the richer one, spending per pupil is highly correlated with, and obviously influenced by, local resources. If every district sacrificed equally for education, levying the same educational rate on its assessed valuation, Beverly Hills, at \$87,000 assessed valuation per elementary pupil, would raise over *ten times* as much local revenue as West Covina, at less than \$8,000. While Beverly Hills is too wealthy even to be able to spend all it would raise at a tax rate equal to the statewide average rate for schools, West Covina is too poor to run a school at that same rate. In 1968–69, with all aid included, Beverly Hills spent \$1,232 per pupil at a local tax rate of about 22 mills; West Covina, at a rate of over 44 mills, was able to spend only \$621 per pupil—half the spending for twice the tax rate. The example is not an extreme case. Analysis of the entire distribution of districts reveals a consistent pattern.²²

This nexus of wealth and spending is the target of the *Serrano* and *Van Duzart* holdings. The rationale adopted by the two courts to void that nexus invokes the converging persuasions of the “fundamental interest” and “suspect classification” test—classification by wealth of school districts is constitutionally suspect when it affects the enjoyment of a fundamental interest, which the court in each case held education to be. To justify its injury to plaintiff pupils caused by a wealth discrimination structure, the state must show a compelling interest the advancement of which requires such a system. It showed none in either of the cases.

A few words about these tools of equal protection analysis developed by the Warren court²³ are necessary but risky. The fundamental interest label obviously confers a special constitutional status. However, in itself it suggests no specific prohibitions or prescriptions of state action. For example, to declare an interest fundamental is not necessarily to prescribe an equality of its dispensation. The right to travel may be fundamental without its forbidding cheaper bus tokens for persons over 65. The presence of fundamentality by itself decides no cases. It merely triggers an expansion of the court’s ordinary view of what is relevant and of its ordinary standard for determining the validity of state action.

The Court’s standard, in most equal protection cases, is mere legislative rationality; in fundamental interest cases it is no stretch to define the standard as super-rationality—the state action must appear to the Court not merely as sane but as plausible policy. In the voting cases, for example, the United States Supreme Court has spoken of “the exacting standard of precision we require” of the state in its selection of persons appropriate to exercise the franchise.²⁴ Thus, the fixing of a very limited cadre of privileged interests permits the Court to employ a more exacting rationality standard without eroding the more tolerant standard for the general run of cases.

The notion of the “suspect classification” is no less

difficult to summarize. On its face it would seem to be a counsel of neutrality which threatens any employment of a particular category. However, if wealth is universally suspect as a classification, what are we to make of the horde of enactments specifically benefiting the poor? Is the idea of the “suspect classification” test not neutrality at all but rather its opposite—partiality to the poor? Perhaps, but if so, why does *Serrano* specifically declare personal poverty to be unnecessary to the outcome, relying instead on collective (school district) wealth alone? Is it, perhaps, because the real principle is, indeed, a super-rationality or “good sense” test and that the use of rich and poor districts to carry out a uniform educational responsibility is simply stupid policy? The *Serrano* opinion invites this analysis with its observation that:

... discrimination on the basis of district wealth is equally invalid. The commercial and industrial property which augments a district’s tax base is distributed unevenly throughout the state. To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of such property is to make the quality of a child’s education dependent upon the location of private commercial and industrial establishments. Surely, this is to rely on the most irrelevant of factors as the basis for educational financing.²⁵

In any case this conjunction of “fundamental interest” and “suspect classification” shifts the burden to the state, requiring it to demonstrate a state interest which is both compelling and which cannot be served by a system of finance less onerous to the plaintiffs. If, for example, the state had manifested a compelling interest in having local control over school spending, it would have been necessary to determine under what alternative structures, if any, such local control could be effective. Unfortunately for the state, the court found no such interest in local control manifested by a system which dispenses local privilege and burden so erratically that “fiscal freewill is a cruel illusion for the poor school districts.”²⁶ Thus, it was unnecessary for the plaintiff-children to go further and demonstrate that local control and fiscal-neutrality are in fact compatible.

The premises the court declares in *Serrano* (special interest, suspect classification, absence of advantage to state policy) do not imply or demand the court’s conclusion (the rule of fiscal neutrality in education). However, they come as close to this as we are accustomed to expect in the law. In fact, if there is deductive error, some would assign it not to the court’s boldness but to its failure to mandate statewide uniformity.²⁷ In that respect, however, the court deserves high marks precisely because it acted with restraint. If the offending classification in *Serrano* is wealth, the court’s decision is properly tailored to eliminate that influence. That the principle enunciated be limited to attacking the particular evil it sets out to abolish is a sound canon of logical as well as judicial parsimony.

Four Interesting Problems for Serranoptimists

Serrano and *Van Dusartz* have a strong appeal because of their factual soundness and moderate constitutional stance. If reversal ensues, the basic reason is likely to be a general condition of stasis in the Supreme Court; the novelty of these cases and their very importance are their primary strategic weaknesses. If the Court is intimidated by the high stakes involved, it may easily wash its hands in the warm waters of the rationality test. However, there are also a number of truly interesting sub-elements in the case that may be thought relevant and be given serious attention by judges and critics. Of these, four are relatively important and will be briefly considered here. They are:

(1) the cost-quality relation; (2) the peculiar relation of fiscal-neutrality to the injury of the individual child; (3) the rationale for treating education as a fundamental interest and its relevance to the status of other governmental services; (4) the conundrums of aggregate v. individual wealth.

First, as to cost/quality, the plaintiff-children's injury because of discrimination in the system of school finance is presumably significant, but the fact is that no one can say how significant. Social science has much to say about the cost/quality problem, but the net effect is agnosticism.²⁸ The California court comes close to saying that it will assume the presence of a positive relation of money to quality in education in the absence of proof to the contrary.²⁹ The *Van Dusartz* court says it plainly:

... [T]he Legislature would seem to have foreclosed this issue to the State by establishing a system encouraging variation in spending; it would be high irony for the State to argue that large portions of the educational budget authorized by law in effect are thrown away. . . .³⁰

Whether the respective defendants nonetheless will try to put the matter in issue at the trial is anyone's guess. Presumably it is a factual question on which expert testimony will be significant.

The second problem is the relation of the *Serrano* rule to the injury. We have said that the rule is neatly limited to the wrong, which is the use of wealth criteria for spending. This is so, but this niceness of the *Serrano* rule produces a remedy much less egalitarian than at first appears. Since local option for spending can remain the key determinant of the absolute number of dollars per child spent on education under a *Serrano*-type rationale, in theory the plaintiff-child could wind up worse off than he started. This could happen in a fiscally-neutral but de-centralized system in which his district (or family or metro-unit) chose to spend little on education.³¹ It thus is plain that *Serrano* is not concerned with level of spending for education as such. Rather it announces a limited right that, if governmental entities are empowered to decide about and administer children's education,

they must be provided an equality of economic capacity to carry out that function. In the strictest sense we are dealing not with a right to education but with a political right about education. The child is assured only that those agencies which do decide about educational spending shall be created equal by the state. Whether this result is ultimately disappointing to the plaintiffs, however, depends in large measure upon the outcome of the large-scale legislative readjustment which is required by *Serrano* and which may be the single most important effect of the decision.

Third, it is useful to ask: why education and, conversely, why not other governmental services?³² The issue of why and whether education should be treated as fundamental is rendered acute by the recent decisions in *Dandridge v. Williams*³³ and *James v. Valtierra*,³⁴ which seem to reject the fundamentality of the welfare and housing interests for purposes of equal protection. While the California court suggests several relevant qualities of education which support its fundamentality and which are not shared by welfare and housing,³⁵ the matter is not simple. The deciding factor, clearly, is not the sheer importance of the interest; it seems as important to be alive (health services, welfare) as to be educated. The salient difference lies in education's relation to other constitutional values—especially political and intellectual values.

We must be satisfied here with a mere reference to this tangled question. Presumably counsel in the school finance cases will perceive and argue the right of the child to education both in terms of its crucial relation to the viability of our political system and its inseparability from the values of liberty of thought and speech. At its core *Serrano* represents both a political and intellectual right. It is these qualities which secure its fundamentality and which simultaneously distinguish it from the creature comforts—or even necessities—represented in welfare and housing.

Fourth, the distinction between collective and individual wealth is worth considering. *Serrano* forbids discrimination in education upon either basis,³⁶ but it is likely that the proof required at trial will be confined to the wealth of school districts. At present it is very difficult to specify the degree to which personal and school district wealth coincide.³⁷ The economists seem confident that the relation is positive, but the anomalies are frequent and sometimes embarrassing. Not only do poor people inhabit rich industrial enclaves with low populations, but they also are found in large numbers in certain large cities, a few of which, for school purposes, are relatively well off (e.g., New York and San Francisco—a primary cause is significant private school enrollment). Equally troublesome, perhaps, the rich sometimes live in tax-poor areas. *Serrano*, thus, is not a one-edged blade for the war on poverty. However, this relative neutrality among economic classes may provide unexpected political support from the nonpoor who live or own property in poor districts. It also reinforces the

view that the decision has as much to do with rationality in government as with poverty.

Economic neutrality may or may not impair the analogizing of *Serrano* to the earlier wealth-discrimination cases. These decisions all dealt only with personal wealth, not with the wealth of governmental units. This distinction is not necessarily harmful to *Serrano*. What the case lacks in terms of the highly visible personal impact of discrimination upon a plaintiff-child, it retrieves in terms of the mass effect of these absurd education financing systems upon the injured class of plaintiffs³⁸ as a whole and thus upon society. Further, as the California and federal court both emphasize, the fact that the districts are creatures of the state eliminates the *de facto* debility from which all the previous decisions suffered:

... we find the case unusual in the extent to which governmental action is the cause of the wealth classifications. The school funding scheme is mandated in every detail by the California Constitution and statutes. Although private residential and commercial patterns may be partly responsible for the distribution of assessed valuation throughout the state, such patterns are shaped and hardened by zoning ordinances and other governmental land-use controls which promote economic exclusivity. . . . [citations] Governmental action drew the school district boundary lines, thus determining how much local wealth each district would contain. . . . [citations] Compared with *Griffin* and *Douglas*, for example, official activity has played a significant role in establishing the economic classifications challenged in this action.³⁹

Finally, even if discrimination based upon personal poverty were taken as a necessary criterion of judicial intervention, it is present in the facts of the school finance cases in two respects. First, the present system bears hardest upon those inhabitants of poor school districts who are themselves poor and thereby precluded from exercising their right of exit to the private school. Further, it seems appropriate for the court to view the class "children" as simply a sub-group of the class "poor". Realistically all children are poor.⁴⁰ Statistically most are protected from their poverty by the private activity of their parents, but this should not insulate the state from responsibility for their education in the public sector. The problem here is similar to that recently scrutinized by the federal court in *Chandler v. South Bend Community School Corp.*⁴¹ There public schools took punitive measures against children whose parents failed either to pay school fees or sign an "inability to pay" form:

The school fee collection procedure as applied to these minor-Plaintiffs, conditions their personal right to an education upon the vagaries of their parents' conduct, an intolerable practice . . .⁴² (ital. in original).

Such separation of the interest of child and parent could be enormously significant in future encounters among pupils, parents, and the state on issues ranging from compulsory education to school finance.

The Second Ring: Likely and Acceptable Legislative Remedies

The *Serrano* and *Van Dusartz* holdings allow for much legislative discretion as to the kind of system the state can constitutionally propose as a remedy in the litigation. Differences in spending per child are permitted, whether based on educational policy decisions by the state government (aid for the disadvantaged, gifted, handicapped) or by local governments.⁴³ Complete spending uniformity, or uniformity plus the categorical add-ons just mentioned, is also permissible. All that is forbidden is employment of units with similar tasks but differing *capacity* to spend.⁴⁴

Educational spending uniformity supported and supervised by the state government is not difficult to understand as a legislative remedy. Categorical aid (i.e., policy or "needs" aid) is similarly clear. The only elusive and somewhat controversial remedy is the one which allows spending levels for education to be fixed by the local political process. How can local spending options (unsupervised by the state as to motive and purpose) be retained under *Serrano*? The practical responses lie essentially in larger equalizing aid to districts and/or smaller differences in their taxable wealth per pupil. Under present systems, meager doses of such equalizing state aid are used to implement an implicit legislative policy that spending may not be *entirely* a function of wealth. Aid for education is dispensed inversely to wealth and (occasionally) positively to tax effort. Under *Serrano* these subventions to the poor districts could be increased to the point at which each district is in effect equally wealthy for purposes of public education; or the district tax bases could be altered to that same end;⁴⁵ or both.

Such systems are called "power equalized."⁴⁶ At present they are hypothetical. Their effect on spending is simple. Among districts with similar educational tasks spending above some legislated minimum (plus categorical aids) would depend solely upon the locally chosen education tax rate on real property (or on other local sources). To be number one in spending a district now would have to try the hardest instead of be the richest. Listening intently, one detects in power equalizing a medley of the WASP ethic and the *Marseillaise*.

Valid State Systems Exemplified

At this point illustrations of a few state systems compatible with *Serrano* may be helpful. The two broad groups of models reflect the two major approaches to legislative remedies based on *Serrano*: on the one hand, full state assumption of costs, and, on

the other, "power equalizing." The numbers within the models are arbitrary.

Three Centralized Models:

[The state provides *all* funds from centralized tax sources. These sources might include income, property, value-added, sales, and/or any other taxable values or activities.]

Model # 1—Equal Dollars Per Pupil

The state provides \$750 per child in average daily enrollment (ADE). Legislation specifies the extent to which the spending units (e.g., districts or schools) can decide their own spending priorities.

Model # 2—Equal Dollars Plus Cost Refinements

The state provides \$600 per ADE plus:
 \$100 per student whose residence is two miles or more distant from school
 \$100 per student for districts in areas in which there are high costs for goods and services
 \$100 per student in areas with high density (to account for "municipal overburden"—the presumed but difficult to document higher cost levels per capita for non-education public services in high-density areas). Again, the legislature sets the limits, if any, of the spending unit's discretion in the allocation of its budget.

Model # 3—Dollar Preferences for Specific Student Types Plus Cost Refinements

Each student in the spending unit is assigned a specific dollar value:

\$600 per average student
 \$1000 per underachieving student
 \$2000 per blind student
 \$1200 per gifted student + the categorical aids in Model # 2 for district cost differences.

Two De-Centralized Models:

[The state provides a flat grant representing a basic adequate minimum level of spending. Districts add on by a local tax which is "power equalized," so that any given rate means the same spendable dollars in every similar district.]

Model # 4—State Flat Grant Plus Local Add-On

The state supplies \$700 per ADE from central sources,

as in Model # 1. Each district may add on from \$25 to \$500 per ADE according to the rule that for each additional tax mill (\$.001) on \$100 taxable value of local property, an additional \$25 per pupil may be *spent*. If a mill raises less than \$25 per pupil (i.e., in districts with valuation below \$25,000 per pupil) the state makes up the difference; if it raises above \$25, the excess is redistributed as part of the state subvention to poorer districts. Thus, if a rich district and a poor each add 16 mills to its rate, each could spend a total of \$1100 per pupil.

Model # 5—Flat Grant, Plus Add-Ons, Plus State Categorical Aid for Costs and for Specific Student Types

The first two parts of this model are identical to Model # 4. In addition the state provides specific aids for any number of imaginable cost adjustments or policy preferences. Examples appear in Models # 2 and # 3. If desired, such adjustments can, through other adjustments in the aid formula, be included within the power equalized add-on instead of being paid in flat grants. For example, underachieving children can be counted twice.

It is also apparent that *Serrano* would permit decentralized family-based or "voucher" plans if they were fiscally neutral. The apparatus for such systems has been described elsewhere and will not be considered here.^{46a}

Objections to De-Centralized Systems

Objection to power equalized models such as #4 and #5 will come from at least three quarters: (1) large-unit egalitarians who object to giving groups of local voters any control over spending for the education of children; (2) technicians who deny the possibility of setting up a system which is truly wealth-neutral; (3) tax resisters who fear that power equalization implies grossly inflated expenditure.⁴⁷

The first group notes that tax-sensitive voters may tend to cluster (e.g. older persons with fixed incomes and no children). These critics would prefer the security of a state mandated uniformity of spending which, as they view it, would be more education-oriented and less arbitrary. The responses to this objection of those who prefer local control over state-mandated uniformity are too many to try to cover here. Generally those who prefer local control emphasize that statewide uniformity, as well as local control, is a compromise among public and private priorities. Since there is no choice but to submit children to the political process, one might as well leave that process close to home where judgments about educational needs and efficiency on the one hand and non-educational priorities on the other can be made in a context of particular children and real alternative needs of the community. This argument finds its apotheosis in family choice or "voucher" systems. Policy conflicts between the decentralizers and this first group of critics—the large-unit egalitarians—tend to focus upon conflicting philosophies of government and education, diverse views of the efficacy of money spent on schools, and disputes over what is politically possible.

The second group of critics raises a more technical objection to local choice. They doubt whether it is possible to establish fiscal neutrality or know when it exists. Realistically, there are many subtle forms of "wealth" difference in addition to differences in the value of taxable property per pupil; to equalize assessed valuation per pupil does not necessarily equalize fiscal capacity. If in a decentralized ("power equalized") district system differences in spending exist, and if, for example, spending is higher in districts with higher personal incomes, how would an objective observer determine whether taste, wealth, or some other factor is responsible?

The answers are of several kinds. The first is a simple confession and avoidance. Assessed valuation may be a defective measure of education financing capacity, but a system in which such valuation is equalized per pupil at least eliminates the *explicit* gross wealth differences that now exist. Such a change is radically superior to no change at all. Another answer would stress that the property tax can be enormously improved in its administration and is likely to be so improved under the spur of litigation.⁴⁸ If rationally and fairly administered, the property tax is tolerable and quite clearly constitutional. There is

apparently no one, however, who doubts its regressivity. A third answer simply suggests that there are other and fairer measures of wealth which may be employed to measure local tax effort. The most obvious, of course, is the income tax.

The last group of objectors to power equalizing asserts that to let poor districts spend like rich districts (as in Models #4 and #5) will drive up the cost of education enormously. The answer is that it all depends on the particular taxing/spending formula the legislature chooses. If in Model #4 the local imposition of one additional mill would by statutory formula increase spending only \$10, perhaps few would choose it; at \$50 few might refuse it. This relation of tax effort to education spending also affects the amount of the subvention required; the aid formula can reasonably control cost to the degree desired by the state.

117

The Third Ring: Politics and Long-Run System Adjustments

What kinds of education finance systems will most states choose, as *Serrano* and its progeny begin to bring about large-scale change? Despite economic and political differences, it is possible to identify certain common pressures on the various state legislatures: not to reduce spending substantially or all at once in rich districts (through cutbacks, layoffs, salary reductions); not to increase local property tax; not to grossly increase total spending for education; not to eliminate local choice; not to cut back on high priority categories (such as aid to the poor); not to make a radical change in the structure and governance of public education. Despite these pressures, under a stimulus like *Serrano*, most states probably can increase somewhat the total amount of resources allocated to education. In addition, there is an unparalleled and probably popular opportunity to begin shifting the tax burden for financing education in phases from property to income.

These pressures are neither consistent nor avoidable. It is difficult for example, to have wealth neutrality in a decentralized model without increasing spending on public schools substantially or leveling some of the highest spending schools.

Assuming these conflicting pressures, we may expect that above a basic minimum the states will adopt relatively conservative compromises between cost control on the one hand and local control on the other. If forced to predict a typical solution we would select Model #5 above. Its structure permits a fair measure of local control, and, if the local tax and spending equivalents are carefully selected, can operate without bankrupting the state. This last caveat is crucial. The first order of business in each state should be economic analysis and model building in

order to assure reasonable cost control over education.

All this assumes that most legislatures with deliberate speed will cooperate with a judicial decree. This seems a realistic prediction; for many reasons fiscal neutrality will be less painful to achieve than racial desegregation or even reapportionment. In addition to the power of voters in poor districts and that of the education establishment there will be other less obvious but substantial political support for implementing *Serrano*. A primary factor will be the self-interest of the bulk of school districts that cluster near the median in wealth. They can expect benefits from successful reform; what they can expect from unsuccessful reform is trouble. This makes them the staunch ally of the court. What school districts do not want is a prolonged period of turmoil and doubt in which aid formulas, validity of tax impositions, validity of bonds,⁴⁹ and retroactivity remain locked in a political struggle. The self-interest of these near-median-wealth districts lies in certainty, and they will be prepared to accept any reasonable legislative package that produces it.

Another important source of political support for the court may be the owners of industrial and commercial property in school districts of low wealth. For them the benefit is a reduction in property tax which can be translated into higher profit margins or at least an improvement of their market position relative to competitors now located in tax havens.⁵⁰ The combination of businessmen in poor districts and the residents of all but the wealthy districts might be a potent source of reform pressure, if organized. However, this alliance, not being traditional, concededly will be difficult to put together. Thus far there have been no businessmen friends of the court in the school finance cases; the self-interest of the businessman has not yet become sufficiently visible to him to evoke an active response in aiding these cases.⁵¹

What stance will most upper-middle income and upper income families, which can afford private education, take? Some say they will desert the public schools because the permissible spending levels in a post-*Serrano* system will be too low, and that they will then combine deliberately to shrink public education spending even further in order to convert their present public privilege into private education. These cries of alarm overlook present reality. The rich and near-rich who live in tax-wealthy districts already oppose state equalization, and, if their children attend public schools, it is only because these schools are in all essential respects private. If these families desert public education it is hard to see that much is lost. The important upper-income and upper-middle income families are those whose children are now in public school in districts of low and middling wealth. It is hard to believe that these families will desert the system they have historically chosen simply because it begins to spend more and cost them less. Rather, in those areas, it is at least as plausible that the improvements made possible by a post-*Serrano* education

finance system will draw back into the public system those who have sought advantage for their children in hitherto better financed private schools.

What is not likely to develop is bedrock legislative or executive intransigence. The blessings of *Serrano* are too obvious and the risks too remote. Indeed, among the relevant public officials in California, irrespective of party, it is difficult to discover a critic of the *Serrano* result. The more common reaction is that this is what was always hoped for and the only surprise is that it took so long in coming. Two of the more prominent defendants have publicly declared their opposition to the state attorney general's seeking review by the U.S. Supreme Court. All this is not to say that the California legislature will promptly adopt a new and valid structure, though that is possible. It will not be easy for the legislator to bite the bullet so long as he retains the notion that the court might do it for him by mandating a specific remedy. Fortunately *Serrano* offers little hope of such direct judicial intervention in the reform process.⁵²

Serrano and Other Public Services

Ultimately the idea of *Serrano* and *Van Dusartz* is intensely conservative, setting ethical limits upon the terms by which the state may dispose the fate of men. The *Serrano* principle is a fragment of the larger norm that, whatever other role government may play in society, it should never deliberately create privilege or burden without justification. This is perhaps a truism; regrettably it is also largely myth. One need only scan the spectrum of governmental activity within this country to discover its antithesis. Local government has not operated in this way since the 19th century, if ever. Some justify the result as variety, and no doubt variety can have its charms. To the poor district, however, the pattern is not the pined beauty of Joseph's coat but the ugliness of fiscal anarchy—an anarchy decreed by the state itself. The world of sub-governments—police, sewers, mosquito abatement—is a welter of privilege and impotence among governmental units responsible for the same function; the pattern is built and sustained by dependence of each unit upon collections of local property tax.

Serrano would withhold from the state this ability to create privilege and burden only as to education. However, the effect upon other governmental services cannot help but be substantial. This would be true even under a system of full state assumption of the cost of education; the burdens of providing police, parks, and libraries through the local property tax are complementary and would generally be eased in communities of low taxable property wealth.⁵³ Whether and how much the burden for those services would be increased in non-poor communities would be affected by both the level of school spending fixed

by the state and by the state's choice of tax sources to support that level. It is hard to believe that spending for local non-educational functions would not be influenced.

Adoption of a power equalized school district system would have analogous but more complex effects on other public services. For example, assuming the same relative preferences for schools and parks that existed prior to adoption of such a system—and depending on the shape of the new school formula—a community's relative investment in the two functions could obviously be shifted. Power equalizing would alter the price of education for nearly all districts, and the interdependencies of local services would assert themselves in contrasting ways. That is, this all would happen unless the state either mandated or assumed the cost of other services beside education.

In fact there are certain to be pressures toward such comprehensive fiscal neutrality. The *Serrano* idea will increase sensitivity to abuses in respect to other public services, which have been long endured because of their apparent inevitability; this dissatisfaction will be further stimulated by economists and politicians, some of whom will promote full state assumption of all services, and others of whom will argue for power-equalizing these same functions. The Constitution is unlikely ever to impose a comprehensive rule upon the state, but, given diffusion of the *Serrano* message, the eventual achievement of full neutrality through the political process is not unthinkable.

Assuming such a development with respect to all services, what would be the outlook for survival of local control over government budgets? The answers tend to be polarized. On the one hand the desire for simple solutions may drive the system relentlessly toward homogeneity of spending through full state assumption. On the other hand the enduring human instinct for the familiar local community may find in *Serrano* a key to building true local control based upon an equality of unit power. States will no doubt follow various paths, including the paths of selectivity and compromise. It would, for example, be plausible for a state to power-equalize education (allowing significant local add-ons) while centralizing the funding of every other service. Of all public functions, education in its goals and methods is least understood and most in need of local variety, experimentation, and independence.

There is plainly no answer to whether *Serrano* and its progeny will in behavioral terms produce an overall drift toward centralization. Indeed, in terms of true local autonomy it may as likely produce a renaissance of community control.⁵⁴ The principal argument against this outcome is that he who pays calls the tune. As we have seen, however, there is nothing in power-equalized systems requiring increased state subventions. Given a legislative commitment to redesign the basic system, it can be the local unit which bears the bulk of the cost, if that is desired.⁵⁵ No one can predict with confidence who will have the votes on that issue.

The Federal Role

Serrano's influence upon the federal role in education finance deserves at least brief consideration.⁵⁶ Ultimately *Serrano* should broaden federal involvement, and should bring some commitment to redressing interstate imbalance.⁵⁷ The emergence of visibly fair state financing systems can only heighten the incongruity of the present problem of interstate inequality. The policy analogies to the state/district relationship are close, and the legislative solutions are similar. Federal preemption of school spending or federal power equalizing of the states are possibilities in theory. In the latter solution states making the same proportional effort against their differing total wealths would be permitted to spend at the same level. Internally they would be free to adopt either monolithic or decentralized finance models. The imaginable ultimate would be exclusively federal funding of education through grants made directly to families and individuals, achieving simultaneously the quintessence of centralization and its opposite.⁵⁸

119

CONCLUSION

In all this, we have assumed that *Serrano* will survive as constitutional law. It does not follow that judicial *quietus* would terminate its influence. The California court has revealed the emperor's nakedness; it becomes more difficult to overlook his patent ugliness. Perhaps the old order will remain tolerable, but it is risky to underestimate the educational effect of such a decision.

With or without the *imprimatur* of the United States Supreme Court, in a decade or two the influence of *Serrano* will merge readily into the flood of economic and social change. Discomfort to the political system will be minimized by *Serrano's* essential harmony with dominant values and mythology—with mythology because most of us imagine present reality to be roughly as *Serrano* requires it;⁵⁹ with values because most of us still object to the deliberate bestowal of unmerited privilege by government.

1. 5 Cal. 3d 584, 487 P. 2d 1241 (1971).
2. For purposes of the decision the court accepted assessed property valuation per pupil as the measure of district wealth. 5 Cal. 3d at 599. This is the measure implied in the proposed California enabling legislation and was the measure suggested by the complaint. Obviously assessed valuation of property may be an imprecise index of wealth in economists' terms. See note 48, *infra*. Further, there are presumably many influences upon spending other than wealth.
3. The rule is not *in haec verba*. The Court in *Serrano* stated that the infirmity of the California system was that "it makes the quality of a child's education a function of the wealth of his parents and neighbors." 5 Cal. 3d at 587. The Court in *Van Dusartz v. Hatfield*, No. 3-71 Civ. 243 (U.S.D.C.D.Minn., decided Oct. 12, 1971), 40 U.S.L.W. 2228 (Oct. 26, 1971), refined this formulation: "the level of spending for a child's education may not be a function of wealth other than the wealth of the state as a whole."
4. *Ibid*.
5. 40 Law Week 2398 (Jan. 4, 1972). The Lawyers' Committee for Civil Rights Under Law in Washington, D.C. is now serving as a clearinghouse for *Serrano*-type litigation.
6. 28 U.S.C. ¶ 1257. See generally Stern and Gressman, *Supreme Court Practice* (4th ed.), at 93-110 (1969).
7. In its decision on the petition for rehearing (Oct. 25, 1971).
8. "... [T]he designation given the judgment by state practice is not controlling." *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 72 (1946).
9. It is, however, also possible that the trial will involve the issue of the alleged relation between spending and quality of education. 5 Cal. 3d at 599 (FN. 14), 601 (FN. 16). See text accompanying notes 28-30, *infra*.
10. This is an implied limitation of the Court's jurisdiction. "... If the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-6 (1945). See generally Stern and Gressman, *supra* note 6, at 131-142; Wright, *Federal Courts* 487-92 (1970).
11. 5 Cal. 3d at 596 (FN: 11).
12. See *Dixon v. Duffy*, 342 U.S. 33 (1951), 343 U.S. 393 (1952), 344 U.S. 143 (1952); *Dep't of Mental Hygiene v. Kirchner*, 380 U.S. 194 (1965), 62 Cal. 2d 586, 400 P. 2d 321 (1965).
13. *Cramp v. Bd of Public Instruction*, 368 U.S. 278 (1961).
14. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968). Of course the California Court would still remain free to depart from the federal result on state grounds in a subsequent proceeding.
15. See Wright, *supra* note 10, at 196-208. In *Askew v. Hargrave*, 401 U.S. 476 (1971), the District Court had held that Florida's ceiling on local educational tax rates violated the equal protection clause because the limit discriminated against poor districts. The Supreme Court remanded because the trial court should have abstained while proceedings in the state courts, already initiated, determined the validity of the limit under the Florida Constitution.
16. The most prominent candidates are two Texas cases, *Guerra v. Smith*, No. 71-2857 (U.S.C.A. 5th Cir.), on appeal from the Western District of Texas (order below granting motion to dismiss dated July 20, 1971), and *Rodriguez v. San Antonio Indep. Sch. Dist.*, *supra* note 5.
17. Decided Aug. 13, 1971, 40 U.S.L.W. 2127 (Sept. 21, 1971).
18. See text accompanying notes 36-37, *infra*.
19. A decision reversing the refusal of the court below to order the convening of a three judge panel seems the nearest thing to a victory that is likely to emerge at this point.
20. For details of the following analysis see the opinion in *Serrano*, 5 Cal. 3d at 591-5.
21. Of course, the flat grant is not earmarked for rich districts, but is subtracted from the amount of aid going to districts receiving foundation aid. Thus, the grant is "ghost money" to poorer districts and may as well be earmarked for richer ones. See *Serrano*, 5 Cal. 3d at 595. Politically, in almost every state, such aid is a concession to richer districts.
22. On motions on the pleadings, *Serrano* plaintiffs' allegations of this pattern must be taken as true. However, the court goes further, finding the pattern itself by a combination of judicial notice, structural analysis, and illustrative examples. It is questionable whether any facts not subject to judicial notice are required. From official records, a persuasive series of graphs, tables and synthetic arguments is readily constructed. See Amici Brief for Urban Coalition and National Committee for Support of Public Schools, at 4-21.
23. For a general consideration of the doctrines, see Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L.R. 7 (1969).
24. *Cipriano v. City of Houma*, 395 U.S. 701 (1969).
25. 5 Cal. 3d at 601.
26. *Id.* at 611. See *Van Dusartz*, *supra* note 3.
27. See Wise, *The California Doctrine*, *Saturday Review*, p. 78 (Nov. 20, 1971).
28. See the sources cited in *Serrano*, 5 Cal. 3d at 601 (FN. 16).
29. *Id.*
30. *Supra* note 3.
31. See text p. 117, *infra*.
32. It does seem likely that *Serrano* will extend to those educational services in which the relation of wealth to spending is most obvious. Junior colleges are the most inviting target at least when they depend upon local property tax. The rest of higher education seems protected by the obscurity of the economic relations.
33. 397 U.S. 471 (1970).
34. 402 U.S. 137 (1970).
35. 5 Cal. 3d at 604-10. The *Valtierra* opinion, stark as it is, may be helpful to the *Serrano* principle in an unexpected way. As *Van Dusartz* puts it:

Valtierra actually supports the "fundamentality" of the interest in education. The Court there emphasized the special importance of the democratic process exemplified in local plebiscites. That perspective here assists pupil plaintiffs who ask no more than equal capacity for local voters to raise school money in tax referenda, thus making the democratic process all the more effective. See *supra* note 3.
36. 5 Cal. 3d at 589.
37. Likewise the racial district wealth pattern may be other than intuition might suggest. In California over half the minority pupils reside in districts above the average in assessed valuation per pupil. Coons, Clune, and Sugarman, *Private Wealth and Public Education* 357 (1970).
38. There is no easy definition of the class. The *Serrano* complaint defines it as all pupils in all districts other than the wealthiest. Since this literally would include such districts as Beverly Hills among the injured class, there are evident

incongruities. However, there is no other completely logical line to draw.

39. 5 Cal. 3d at 603.

40. However, this involves the difficulty that there is no discrimination against the poor (children) but only *within* the class of poor.

41. F.Supp. (1971).

42. *Id.*

43. There seems no doubt that *Serrano* applies to capital costs; such expenditures have a relation to quality of education which *prima facie* is equal to that of current expenditures. Since many states have left the districts almost completely on their own to finance construction, the *Serrano* violation is *a fortiori*.

44. The *Serrano* court's brief discussion of "territorial uniformity" will doubtless cause confusion. The Court concludes that "if a voter's address may not determine the weight to which his ballot is entitled, surely it should not determine the quality of his child's education," 5 Cal. 3d at 613. Some educators have taken this to imply that mandated statewide uniformity of spending may be required. *See Wise, supra* note 27. So construed, however, this brief utterance would render superfluous that four-fifths of the opinion devoted exclusively to establishing the less restrictive principle of fiscal neutrality. It would also accord the plaintiffs relief which they specifically disavowed in the briefs and arguments before the California Supreme Court. It should be added that during oral argument in *Serrano* several of the California justices voting with the majority indicated their strong objection to mandated uniformity. No doubt what the court intended was that a voter's residence should not affect the *taxable resources available* for his child's education. The *Van Dusartz* opinion so interprets *Serrano*. *See supra* note 3.

45. Gradual equalization of tax bases could altogether solve any problems of excessive cost to the state. This is not hard to accomplish in theory. First, if industrial and commercial property were removed from the local base and taxed at a uniform rate statewide, wealth disparities among districts would shrink enormously. In California the spectrum of district wealth would probably collapse to about 1/40th of its present range. If the wealthiest residential areas were then redistricted with the aim of a rough tax-base equalization, the substance of the problem could be removed. Ironically what would emerge is a fair system of school finance in which the state's role was effectively reduced to that of the provider of categorical aids for special costs and needs. With slight exaggeration such a system might be styled "full local funding."

46. The expression is from Coons, Clune, and Sugarman, *Private Wealth and Public Education, supra* note 37, at 202.

46a. *See* J. Coons and S. Sugarman, *Family Choice in Education* (1971).

47. There are, of course, other kinds of objections. For example, some boosters of educational spending fear that power equalizing would actually reduce spending because local voters (if they get the choice) will visit their tax frustrations upon the schools. Others argue that in large districts (e.g., Los Angeles) there is no reality to "local" choice without decreasing the size of the effective school governance unit; however, such fragmentation may in turn complicate racial integration efforts.

48. A number of empirical attempts to measure local resources effectively have been attempted or are ongoing. *See* National Educational Finance Project, *Alternative Programs for Financing Education* 59-102 (1971). For a recent judicial reaction to discriminatory assessment practices *see Lee v. Boswell*, 40 Law Week 2060 (July 27, 1971).

49. *See Wall Street Journal*, p. 16 (Dec. 1, 1971).

50. One long term effect of *Serrano* could be to reduce

the powerful incentive for industry to cluster in tax havens. Removal of this artificial market incentive might help stimulate new approaches to the problem of locating industry for the general convenience of mankind.

51. The primary opposition to reform will be residents (rich and poor) of wealthy districts and the industrial and commercial interests located therein. However, even legislators who have among the districts they represent some very rich ones may find it difficult to be truly obstructive, since they ordinarily represent eight or ten districts, a majority of which are likely to be of middle or low wealth.

52. In the *very* unlikely event of outright legislative defiance, the courts are in a much stronger position to have their way with fiscal neutrality than either desegregation or reapportionment. In addition to the obvious political risks run by obstructionists, the court's possible ability to close off tax support for unconstitutional systems could bring the legislature to heel. In this respect it is interesting that *Serrano* specifically recognized the taxpayer's right to enjoin the operation of an unconstitutional system. 5 Cal. 3d at 618.

53. This is true except where low district property value coincides with high personal income under a new structure in which the taxes employed by the state to fund the system are highly progressive. Thus a tax-poor middle class suburb with no industry would trade a substantial property tax rate for a substantial income tax rate.

54. *Serrano* will provide the long sought impetus to eliminate very small districts. At the same time it closes out the long movement for district consolidation by subsuming its rationale. If tax bases in a decentralized system *must* be effectively equivalent through power equalizing, there is no point in amalgamating districts beyond the point of increasing educational efficiency. Currently district gigantism is receiving low grades in this respect. H. Levin (ed.), *Community Control of Schools* 251-256 (1970). Coincidentally ethnic movements for fragmentation of school authority are growing. If fragmentation no longer means diminution of fiscal capacity, the community control movement has become economically credible. It is now difficult to justify the independence of a middle class suburb while rejecting community demands in the inner city. The relation of this seeming benefit to the problem of racial segregation is unclear, but *prima facie* it will make metropolitan integration plans more difficult.

55. *See supra* note 45.

56. A constitutional handle upon the federal government analogous to *Serrano* is credible in theory, but presently pointless in fact. The Fifth Amendment may do equal protection service, but there are no federal programs visibly dispensing money according to wealth. The Elementary and Secondary Education Act, 20 U.S.C. §§ 241a, 241c (Supp. 1968), could be a stunning exception, but its wealth categories are presumably intended only as surrogates for true educational need. As such they are probably viable. The more obvious example of effect on a federal program involves the so-called "impacted areas" legislation. 20 U.S.C. § 241 (1969). If states may not use districts of unequal capacity, this aid loses the supporting rationale of replacing taxable local wealth lost through federal enclaves. Presumably such aid would be given now where the impact was felt—at the state level—and only if the state were relying on property tax.

57. The nature of federal participation takes on increased significance from recent suggestions that a national value-added tax be levied to raise more than ten billion dollars annually for the support of public elementary and secondary education.

58. Of course, any voucher system would require protections against reintroduction of the influence of wealth differences. *See* J. Coons and S. Sugarman, *supra* note 46a.

59. We are personally acquainted with residents of wealthy districts who express personal grievance at the local property tax! With equal reason might General Motors complain of the necessity for building automobiles.

Arthur E. Wise is Associate Dean of the Graduate School of Education at the University of Chicago, and author of *Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity*.

