

THE JUDICIAL IMPACT

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I am here today to speak about the judicial impact of *Serrano v. Priest*.¹ I am not going to tell you what the fate of *Serrano* will be in your state, or in the U.S. Supreme Court, other than to tell you it is a very close question. One thing, however, is clear about the *Serrano* opinion: if its reasoning is adopted in each New England state, then each of the New England states is in violation of the U.S. Constitution. Your present mechanisms of financing public education are illegitimate. In order to understand that, I recommend that each of you look at Steven Weiss' statistics on assessed valuation per pupil, property tax rates, and expenditures per pupil for each of the New England states as compared with California,² and you will see that you are no better off here than in California.

The second point I would like to make, in legal terms, is that I really do not believe *Serrano* has much to do with the concept of equality of educational opportunity, as Mr. Wise described it.³ Nor do I accept the notion, at least with any precision, that spending more dollars on children's education will necessarily lead to better educational outcome. In fact, I think that question is probably irrelevant to the constitutional inquiry as it is framed in *Serrano*. I think that it was also irrelevant to the decision in *Brown v. Board of*

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¹*Serrano v. Priest*, 5 Cal. 3d 584 (1971).

²Steven J. Weiss, "The Need for Change in State Public School Finance Systems," *New England Economic Review*, January/February 1970. See also the paper by Steven J. Weiss and Deborah Driscoll in this volume.

³See the paper by Arthur E. Wise in this volume.

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Education;⁴ and as my primary field is desegregation, I feel more confident about that statement.

The principle of the *Serrano* case deals, quite simply, with dollars alone. Dr. Robert S. Ireland, in his discussion at the beginning of this conference, considered total resource allocation for education, how to raise and distribute that education dollar. The standard adopted in *Serrano*, as refined in later decisions in Minnesota and Texas, is this: 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.⁵ That means, in the context of American public education which is supported substantially by local property taxes, that if two school *districts* have the same tax levy, they should be able to raise and spend the same number of dollars per pupil.⁶ If you will look at Weiss' statistics on New England⁷, you will see that this clearly is not now true. Rather, the pattern is that poor *districts*, as measured by assessed valuation per pupil, tax themselves harder to raise and spend fewer dollars per pupil than rich *districts*. That is precisely the pattern which was condemned in *Serrano* and each of its judicial progeny.

My problem with this principle is one that Mr. Wise has already indirectly mentioned: the equal protection clause speaks to the rights of *individuals*, not *districts*. That is why, on behalf of the Center for Law and Education at Harvard, representing legal services and poor people, we attempted to set forth a standard which would look at the rights of poor children. Our standard was rather simple: count the dollars spent on every child in the state, both within and between districts; take any cut-off point you want to measure poor and rich children; and then make sure that poor children are not getting fewer dollars spent on them, on the average, than the rest of the children in the state, or the rich children in the state, or whatever breakdown you would like to have.

⁴347 U.S. 483 (1954). See, generally, Kahn, "Jurisprudence," 30 N.Y.U. L. Rev. 150 (1955); Dimond, "School Segregation in the North: There is but One Constitution," 7 Harv. Civ. Rts. Lib. L. Rev. 1 (1972).

⁵*Van Duzart v. Hatfield*, 40 U.S. L.W. 2228 (October 26, 1971). This principle has been variously called "Proposition 1" or "fiscal neutrality." Professor Coons and the California Supreme Court substituted "quality" for "level of spending" in their propositions; but as both defined quality in terms of dollars spent, the *Van Duzart* phrasing is to be commended for dropping any possible implication of subterfuge.

⁶This minimum remedy is called "power-equalization."

⁷See Footnote 2, above.

The California Supreme Court did not adopt our standard, and for that reason, I am not going to try to mention it again except as a basis for policy. I think our main interest here should be in preventing discrimination against poor children, as a policy matter, and I think that is a question that applies both within districts and between districts. Most of you probably have very little to do with how much money you can raise in your district, relative to another district. That is an issue for the courts and the state legislatures. But you do have a great deal to do with how you distribute resources within your district. And on that issue several courts have found that you are discriminating against poor children.⁸

With that introduction I would like to tell you what *Serrano* does not do and tell you what options are available if the principle of that court decision is adopted in your state. The decision does not do away with the property tax as a source of school funds. You can still use the property tax as much as you want; but if you are going to use it at the local level, the same tax effort must result in the same number of dollars per pupil raised and expended. The court decision does not consider cost differentials, or the other tax problems which often fall under the rubric of "municipal overburden." The cost differential idea arises from two notions: first, that it costs more to educate the urban child, which I do not believe; and second, that it costs more to provide an input in an urban area — in other words, teachers' salaries, the cost of land, construction costs, etc. I do not know whether municipal overburden exists or not. Norton Grubb and Stefan Michelson, economists at the Kennedy School of Government and the Harvard Graduate School of Education, suggest in a forthcoming book that municipal overburden can be measured simply by the amount of non-education taxes in your community — the non-education tax rate.⁹ The *Serrano* opinion does not deal with either of these "urban factors." The issue of municipal overburden is complex, but I wish the court had dealt with it because I think that it does have something to do with even the court's own notion about "fiscal neutrality." After all if an urban community's non-education tax rate is 10 times that of a rural neighbor, it is simply unrealistic to think that the education tax rate of each will accurately quantify

⁸Cf. *Hobson v. Hanson*, 269 F. Supp. 401 (D.D.C. 1967); 327 F. Supp. 844 (D.D.C. 1971).

⁹Stefan Michelson and Norton Grubb, *The Political Economy of School Resource Inequalities* (forthcoming).

either their relative interest or effort in supporting education. The cost differential problem, especially as it relates to teachers' salaries, has very little to do with the equity issue at stake except insofar as cost differentials may reflect regional variations in the cost of living.

Serrano does not set education priorities or suggest whether the state, local school districts, schools, or even individual families under tuition voucher schemes should be permitted to determine educational priorities. In other words, the whole theory of the *Serrano* decision is to free up the legislatures, the educators, and the families so that they may vigorously debate, for the first time, the appropriate method of financing American education and distributing educational resources.

Serrano does not speak to questions of race. It does not speak to questions of quality and performance. It does not speak directly to per pupil cost, simply because the minimum remedy that flows from *Serrano* is that equal tax effort must lead to the same number of dollars per pupil. It does not speak to the children of the rich or of the poor; and I would caution you not to take at face value Mr. Wise's statement that socioeconomic status is related directly to the poverty of school districts. In fact, a factual analysis of that question has to be made in each state to know whether or not it is true. To give you the most obvious example, in New York State clearly New York City is one of the richest school districts, yet it has by far the largest percentage and number of poor children. So that for New York State it simply is not true that poverty of children is related directly to poverty of districts, for the poorest children are in one of the richest districts.

Serrano does not decide that there is a right to an education. Instead, it calls education fundamental. The court has never held that just because there is a fundamental good it has to be provided. So if your state wanted to eliminate all support for public education nothing in *Serrano* would prevent it. *Serrano* simply says that if you are going to support public education there is a notion of "fiscal neutrality" in the operation of the financing scheme which should govern the school finance system. It does not say in any way how money should be spent. It does not say, for example, that money raised must be spent on poor children in poor districts or on poor children in rich districts. To return again to my initial remarks, if a "power-equalizing" scheme were instituted, which is the minimum remedy that flows from *Serrano*, you would still be free to discriminate against poor children in the distribution of educational dollars within districts.

Furthermore, *Serrano* does not speak to interstate disparities or to the role of the Federal government. As we all know, there are extensive differences in wealth among states. The problem is that the 14th amendment says "No state shall. . ."; thus it is difficult to apply the 14th amendment to discrimination between states.

Yet there is a role for the Federal government in school finance. But I do not think that *Serrano* is a call for the Federal government to intervene to bail out the individual states. Rather, *Serrano* is a demand upon state legislators to put their own houses in order first. The role of the Federal government would be: first, to go *beyond Serrano*, to try to take care of interstate and regional disparities; and second, to enforce *Serrano*, to attach strings to Federal dollars to try to make state legislators comply with the *Serrano* opinion.

What does *Serrano* leave open for you, then? If it does not do any of the things I have just described, what kinds of options are available to you? You can fund on the basis of school district characteristics. For example, I have already mentioned a minimum remedy, tax effort. You could fund on the basis of the number of students in each district which would, in essence, give you equal dollars per pupil. You could fund on the basis of family characteristics: once again on tax effort, or inversely to the level of the parents' education, or directly in relation to the level of the parents' education. You could fund on the basis of child characteristics. I think this is part of the formula that Mr. Wise has suggested. The most important characteristic of all children is simply that each one is a child. The state, therefore, should now be required as a policy matter to give compelling justifications for spending different dollar amounts for different children. For example, I think a compelling justification can be found for the special education of children who are handicapped if, in fact, there is a fair procedure to determine how those children are handicapped and a required review to make sure that these children are going to be given a benefit as well as the stigma of being labeled handicapped.

You can fund on the basis of other child characteristics. You could fund on the basis of the age of the children. I suppose an argument could be made that it costs more to educate children at the high school level than at the elementary level, or vice versa if you were going to put your priorities on learning how to read. You could fund on the basis of the talents of the children instead of on their disadvantages, if that is the priority you chose. I share some of Mr. Wise's prejudices and believe that, in fact, the reverse should be true. We should be most concerned about children in our society who are

children of poor parents, in order to avoid the cycle of having the same families poor in each succeeding generation.

You can fund with or without state assumption of the entire tax burden for education. In other words you can maintain the local revenue-raising structure, be it a property tax or any other kind of local tax, be it a lottery or any other method. Or, you could have a state education tax and prohibit any added local taxation. You could fund by distribution of money to existing or new school districts, to school units, or directly to families on a tuition voucher plan, regardless of how you raise the money. You could fund using any kind of state administration of schools, even a state takeover of all schools, maintain local control as you presently have it, or put in any other governmental mechanisms you wish.

Any of these schemes and all variations on each of them are permissible under *Serrano*. Jack Coons, and I take by implication those courts that have ruled on the issue, think that this may lead to a revolution in American education. I am less sanguine about the prospects, simply because, as I suggested earlier, I disagree with at least some parts of the principle of fiscal neutrality. I think it goes only halfway. To go the rest of the way it would be necessary to make sure that poor children are not discriminated against in the provision of dollars.

In conclusion, let me suggest a few things that you might consider as policy matters in terms of all these options available to you, not suggesting which alternatives are appropriate, but some I think you should consider. First, proposition 1, the *Serrano* theory, fiscal neutrality, whatever you would like to call it, has not been imposed on any of your states yet. You can wait around for law suits to be filed, as I know they are going to be in several of your states, or you can begin to act now and recognize that it is a policy issue as well as a constitutional issue.

Second, I think the real financial issue in American education has to do with poor children, not poor districts — in other words, the standard I proposed to you at the beginning of the talk. And I would like to see any response to *Serrano* take that into account. That means not only putting your own state houses in order but your own local school districts; out of state and local funds, poor children should receive at least the same share of dollars as do the rich and other children within your districts. On that point I think it is worthwhile to note that the National Education Finance Project (which as far as I know is the first to try to take a broader look rather than just picking out states one at a time and filing law suits) took a sample of

school districts within eight states across the country and found the urban school districts were the wealthiest in these eight states. So do not think for a minute that *Serrano* is going to save urban education. That is not its point; that is not its principle. The only thing that *Serrano* might do to help urban education is simply this: surrounding our urban areas today are some of our wealthiest school districts, and if the minimum remedy flows from *Serrano*, there may be a smaller economic incentive to move from a rich urban school district to an even richer suburban school district.

Third, I think that the amount of money spent once you get beyond a certain minimum has almost nothing to do with the quality of a child's education. It is simply too personal a matter, too important a matter to measure by dollars. We live in a capitalist society and we think dollars are important, and indeed they are. It is the shared myth of liberals, conservatives, businessmen, and labor that dollars are important — and they are. They buy us the comforts that we enjoy and many of the social goods that we are all able to share. But basically dollars, in terms of education, relate to a principle of labor equity — a fair working wage for the teacher. But money has very little to do with the quality of a child's education. It has very little to do with the child's educational outcome in terms of tested achievement or the credentials he is going to receive, whether he is going to be labeled smart or dumb, rich or poor; whether he is going to be tracked into a college preparatory program, a general program, or a vocational education program which holds out the hope of giving him a useful job when, in fact, it trains him for next to nothing. After all, if dollars have not purchased a better president or war or peace, there is no reason that dollars alone should buy a better education.

Fourth, the wealth of school districts may more properly be a function of factors other than the property tax valuation and the school tax. Once again I return you to the Michelson and Grubb book. If you are going to devise a remedy to *Serrano*, I think you should analyze whether or not there is a municipal overburden factor. In other words, are there services within cities which are mandatory and must be financed which are not provided in rural and suburban areas, such as fire protection, welfare, police and traffic control, and other things? The conclusion of the Michelson and Grubb book goes something like this: the problem with our present education financing scheme in Massachusetts is that only a few of the very wealthy and suburban school districts have any discretion over what they are going to spend on education, because they are the only

ones that have any discretion in setting their school tax rate. In most other school districts in the state there simply is no discretion available because non-education costs come before school taxes. By the time these communities have paid for all their non-education costs the capacity to raise taxes has already been exhausted.

Fifth, the method of raising revenues for education is vital. I do not think it does much good to respond to *Serrano* by implementing a regressive tax. I do not think it does much good to continue to rely on the property tax, which is relatively inelastic and regressive; and you should not listen to the remarks that the Federal government has usurped the progressive personal and corporate income tax, because it has not. That progressive and elastic tax is available to every state that wants to institute it, and it is a matter of state choice that this has not been done. If you are interested in financing education and some other services as well in a fair and efficient way, you might look to that same personal and corporate income tax.

Sixth, I do not believe the priority should be for the Federal government to raise the percentage of Federal funds for education. Instead, the primary role of the Federal government should be to overcome interstate disparities and, where possible, to identify specific educational problems. The Federal government also should be much more conscientious in its contracting mechanisms. For example, Title I, which is supposed to be a compensatory aid program, is now used as a discretionary aid program in most school districts. Such failure by the Federal government to enforce its own policies is an open invitation to wasting Federal dollars.

Seventh, I would like to suggest that the real issues in education are not financial. And I think you have already seen my point on this by my suggestion that the number of dollars you spend on a child is not the vital issue. Financing schools is a matter of equity, and I see no reason why poor children should have fewer dollars spent on their education than rich children. On the other hand, I think the real issues relate to control, to diversity, to choice, and, most important of all, to the issue of race. The paramount issue facing each of you who lives in a multi-racial state is simply whether you are going to have integration or continued segregation; or whether, if you are not going to integrate the schools, you are going to provide the same power over ghetto schools to black people that white suburbanites now have.

In conclusion, I have presented a mixed picture and I think I disagree with most of the constitutional analyses that are now floating around. I would like to see some very hard thought on policy

issues, and to see the term “equality of educational opportunity” dropped for the moment — it is old and tired, and we do not know what it means any more. Instead, I would like you to think about the issues that we do face in the 1970s, regardless of labels, which I think are vital for all our children, rich and poor, black and white.