School Finance Litigation: A Strategy Session

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School Finance Litigation: A Strategy Session

Introduction to Serrano Strategy Conference

On October 15 and 16, 1971, the Lawyers' Committee for Civil Rights Under Law sponsored a School Finance Litigation Conference in Washington, D.C., to consider both the short-range and long-range goals and strategies of school finance litigation, in the wake of Serrano v. Priest. At this conference, over 100 people, mostly lawyers, discussed in plenary session the potential and problems of the emerging body of school finance litigation. Prior to the plenary session, a small group of about twenty people, many of whom had been actively involved in the conceptualization and/or institution of school finance litigation, met to discuss a number of approaches which they, as the leaders of the plenary session, would take in presenting their points of view to those attending that session.

The editors wish to express their gratitude to the Lawyers' Committee for Civil Rights Under Law, and in particular to Stephen Browning, Esq., of the Lawyers' Committee staff, without whose invaluable assistance this edited version of the small group meeting prior to the plenary session could not have been published.
John Doar is President of the Bedford-Stuyvesant Development and Systems Corporation.

James Robertson is Executive Director of the Lawyers' Committee for Civil Rights Under Law.

Sarah Carey is Assistant Director of the Lawyers' Committee for Civil Rights Under Law, and head of the Lawyers' Committee's school finance project.

Sidney Wolinsky is an attorney with Public Advocates, Inc., San Francisco, California. Mr. Wolinsky argued the Serrano case before the California Supreme Court.

Hershel Shanks is a partner in the Washington, D.C., firm of Glassie, Pewett, Beebe and Shanks, and has been an active participant in school finance litigation efforts.

John Silard is a partner in the Washington, D.C., firm of Rauh and Silard, and has been an active participant in school finance litigation efforts.

Alan Wilner is an associate with the Baltimore firm of Venable, Baetjer and Howard.

Abraham Sofaer is Assistant Professor of Law at Columbia and has been actively involved with school finance problems in the state of New York.
Frank Michelman is Professor of Law at Harvard.

Peter Rousselot is an associate with the Washington, D.C. firm of Hogan and Hartson. Mr. Rousselot has been actively involved in school finance litigation within the District of Columbia.

Paul Dimond is a staff attorney with the Harvard Center for Law and Education.

Stephen Sugarman is a member of the California Bar. Mr. Sugarman, co-author of *Private Wealth and Public Education*, submitted an amicus brief with John Coons in the *Serrano* case.

Michael Wolf is a staff attorney with Legal Assistance of Ramsey County, Minnesota.

David Kirp is Acting Associate Professor at the Graduate School of Public Policy and Lecturer at the School of Law of the University of California, Berkeley.

John Coons is Professor of Law at the University of California, Berkeley. Mr. Coons is co-author of *Private Wealth and Public Education*, and submitted an amicus brief with Stephen Sugarman in the *Serrano* case.

Joseph McDermott is Program Director for Education at the National Urban Coalition, Washington, D.C.

Allan Schwartz is Legal Advisor for the Office of the Superintendent of Public Instruction in Illinois.

Arthur 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*.

James Kelly is a Program Officer with the Ford Foundation and Associate Professor at Teachers' College, Columbia University.

David Schoenbrod is an Assistant to the President of the Bedford-Stuyvesant Development and Systems Corporation.

Stephen Browning is a staff attorney with the Lawyers' Committee for Civil Rights Under Law.

Arthur Levin is Associate Director of the Potomac Institute, Washington, D.C.
School Finance Litigation: a Strategy Session

Lawyers' Committee for Civil Rights Under Law

Washington, D.C.
October 15, 1971

Doar  I can't help but be terrifically enthusiastic and impressed by the work that many of the people at this table have done in the area of school finance. For that reason, I am delighted to welcome you all here and delighted to see the Lawyers' Committee sponsor this conference.

Robertson  The meeting tonight is I guess best described as a free-form meeting. Most of you, I am sure, have a pretty clear idea of what you'd like to talk about or where you want to go tonight, but I am going to ask Mrs. Carey, whose bailiwick within the Lawyers' Committee is school finance, to take over from here.

Carey  I would like to say that the idea we had when we pulled together this meeting was that there had been a major victory achieved, a major victory which in a real way is a tiny step, one that simply opens doors to new possibilities. That victory has certainly captured the imagination of the press and to a certain extent federal agencies and Congress. This creates a tremendous opportunity for further action, whether it be litigation or other forms of activity.

The press and other forms of attention have led to what can only be described as a rash of lawsuits around the country. It's impossible to keep up with the exact figure, because there seem to be so many new ones being filed. A number of these are very precipitous and there's some question as to whether they are very well put together. Others, I think, are very fine suits. Tomorrow, most of the lawyers who have a client who has declared an interest in bringing a suit, or who have actually filed suit, will be here. It was our hope that tonight the people who had been participating in this movement for a number of years could cover a number of the basic issues and perhaps even reach a consensus that could be projected tomorrow to the lawyers who will be coming for the workshops.

The people who will be participating in the workshops range from people who really have just gotten involved in the issue very recently to those who have given it a significant amount of thought. We would hope that among the kind of things that we could cover tonight would be suggestions for ways that this over-all effort could be guided.

Browning  I will say one thing. I think it is important that tonight we first seek to find out what things we agree on so that tomorrow we can present some kind of unified front. Once we have something we can spend the rest of the evening disagreeing.

Carey  Sid, could you start off?
Let me cover all the points that are on my mind. First, I am firmly and strongly of the opinion that we should not proceed to bring a case before a three-judge District Court; that the Federal Courts ought to be avoided like the plague and that the most likely way to win these cases is to shield any District Court decision as much as possible from the United States Supreme Court at this stage. We should push state court cases as rapidly as possible, and ultimately that will put us in the best position.

Insofar as the complaint is concerned, I think that actually all of my viewpoints are embodied in the original Serrano complaint drafted three years ago. I believe in riding a winner and am not inclined to change much that is in that original complaint. I disagree very strongly with the concept of the form complaint which has been presented here, on a number of grounds. The first is that the Serrano decision, which is going to be read by a court that is considering one of these cases, actually quotes part of the complaint in Serrano. At least that part of the complaint should be repeated in any subsequent complaint, or at least to some members of courts considering this problem in the future Serrano is not going to have much precedential value.

Secondly, these cases are likely to go on motions to dismiss or demurrers. There is likely not to be much additional evidence, and frequently no trial. For that reason I think the complaints should be not lean and clean, aesthetically pleasing as that may be, but from my viewpoint as a trial lawyer, they should be loaded up with a number of alternative theories, unless in your particular jurisdiction, alternative pleading is not permitted, which is fairly rare. The Court should be given a wide variety of options both as to causes of action as well as to remedies and loads of factual material should be thrown in on the very simple theory that on a demurrer these facts are going to have to be assumed to be true.

We treated Serrano as a very political case, which would culminate in legislation. When I say "we" I think I am including almost anybody who worked on the case. That is, the complaint was drafted, I think, in a way that looked toward the fact that a legislative response would ultimately be necessary.
amicus brief. You certainly can get the educators. If you were bringing a case in Iowa, the first thing I would do is go to the Superintendent of Public Education before I filed a lawsuit in Iowa and see if he would be willing to file an amicus brief on your behalf. There are lots of ramifications once you start thinking that way but I would like to see us think a little bit that way. All of this means that if you win the case, you can count on a more favorable legislative response.

Doar Sid, let me ask you this. I don't think anybody would argue that when you're drafting a pleading you ought to plead as many facts as you can. But when you talk about going slow and being careful and avoiding Federal Courts, I can't help but remember when I was in the Civil Rights Division back in 1961 and 1962 and we were talking about voting. We knew we were right about the constitutional issue of voting itself and yet for a variety of reasons we were saying let's go slow and let's be sure we've got all the facts and let's develop this slowly and carefully. You're going to win this case and if it takes six or eight years to win, rather than one or two, you are going to pay a price for that.

Wolinsky Well, I think you've really pinpointed the difference in our viewpoints. We knew we were going to win it before the California Supreme Court, which is a superb and brilliant court. I do not believe that it is in any sense inevitable that we are going to win before the United States Supreme Court unless we are very careful. I don't think this is an inevitable winner at all. An inexperienced lawyer could certainly botch it. Haste is likely to lose it; development of lower court cases is essential.

Shanks I would like to add something to what Sid says. I agree with everything he said. I would say that we ought to be careful that we don't go into a state where we're likely to lose, hoping that the Supreme Court is going to bail us out. I think we ought to try as much as we can to pick states where we are likely to win, to build up a reservoir of Serrano-type opinions. I think we've got to have an effort to hold off a Supreme Court decision on this issue in the hopes that perhaps if Serrano is applied in a number of states and doesn't create such terrible havoc that the people oppose this litigation, then we've got an advantage in attempting to get it adopted on a national basis.

I have felt for two years that this is a winner in the Supreme Court, which, however, does not mean that we ought to rush there. I think the Supreme Court will in the seventies look at this problem and it will agree with the Serrano court. All of which does not negate my view that we should try to win cases in the lower courts and by no means push this on the Supreme Court before there has been a gestation.
period to deal with the remedial political aspects and before we see that there's pressure around the country for taking on this problem.

Wolinsky I didn't want to be misunderstood. I didn't say it's a loser in the United States Supreme Court. I think we may be in fundamental agreement. I think it can be won in the United States Supreme Court, and should be, but there have to be a number of cases decided favorably before that.

Wilner I think you have to consider selecting a forum in the context of the best way to win your case. I know that the California Supreme Court is perhaps the most liberal in this sense in this country. The Maryland Court of Appeals is probably not as liberal. But we do have a rather liberal Fourth Circuit and there are some judges in the United States District Court who could be trailblazers in this area.

There is a possibility, not necessarily a likelihood, but a possibility if we get the right judges—and in Maryland there is more likelihood of doing that in the Federal Court— of getting a decision based on Serrano. So I think it might be a mistake either here or tomorrow to try to persuade people about to file these suits not to consider all of the alternatives and consequences of going into the state courts.

Also, I am concerned about the way the Serrano court made a certain jump in its conclusion. The inequality of wealth is documented well enough, at least for the purposes of a case on demurrer. But based on that the Court concluded that therefore there is an inequality in the quality of education. I'll take that assumption and that jump and I'll take all the quotations and citations I can to support it, but I am not terribly convinced that every court is going to make that jump.

Also, the Serrano court beat back the argument that the Supreme Court had never decided that de facto segregation was unconstitutional by saying that we in California have so decided. That's fine, but not too many other courts could probably say that.

Sofaer May I have one question: Is it realistic to think that lawyers are going to abide by anything we decide or conclude or agree on? I think we can agree on one thing—that we are stiffnecked people and that no one is going to be able to tell lawyers throughout these 50 states not to bring this kind of suit or that kind of suit, not to bring a suit in this state as opposed to that state or this court as opposed to that court. I think maybe we can hope to inform people, but let's not delude ourselves that people are going to step in line and file the right suits in the right places alleging the right things.

Michelman First, I am one of those who at the moment is pessimistic about the prospects of one of these suits in the Supreme Court, not eventually or forever, and not even necessarily for all of the seventies, but rather for the time span that's relevant to this generation of Serrano-type lawsuits.

The second point really is the one that Abe Sofaer makes. If a lawyer has a client and the client wants to file a lawsuit, I don't see how a body like this can really exercise too much control over what happens.

"I think the Supreme Court will in the seventies look at this problem and it will agree with the Serrano court."

The third point is that I don't really think we can keep the Supreme Court out of this for too long. Although in many situations they may have an instinct for ducking an issue, I am not sure they'll duck this one. I think that they may reach for it in order to hand down a decision that the people here won't like.

Rousselot That suggests that we ought to get good lawsuits, lawsuits filed under favorable circumstances and in favorable courts as rapidly as possible. And, we must find some people who are prepared to concentrate hard on how to overcome the obstacles that exist to a victory in the Supreme Court.

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There is a case that could go to the Supreme Court that does bring up the wealth classification issue—Johnson v. N.Y. State Education Dept. The facts of the case as admitted on the record are one, that there are fees charged to elementary school pupils for textbooks; two, that the named plaintiffs and the class they represent are too poor to buy textbooks; and three, there is an admission by the school district that this is in effect an exclusion from all educational opportunity, since they can't participate in the classroom. There is a petition for certiorari that's going to be filed with the Supreme Court. It seems to me that this is a far more appealing case, at least under my theory of wealth classification, than Serrano is.

The case is reported in Law Week [40 Law Week 2127] in the same issue that Serrano was reported, right in front of Serrano. It's amazing how they read together.

Someone asked if there are points on which we are in agreement which we want to stress tomorrow to those who are not in the room tonight. I would like to put down eight. They don't deal with selecting a state for a suit, because I recognize that politics and lawyers will produce lawsuits where we wish they hadn't been brought.

I do think however, that there are points one can make to those who are here tomorrow who are more or less intent on bringing a lawsuit, which will tell them things we have found which are worth doing and the things that we have found dangerous. Let me just list a number of points, although they are not all mine. Some of them have already been mentioned.

First, a careful gathering of the facts as to the operation of the state education finance system is needed. This is at least a minimum requisite for bringing a lawsuit to any stage of resolution, even on motion. Somebody who rushes in without even the facts well in mind on the operation of the state system is surely in trouble. That much caution we should exert on everyone.

Second, the choice of the forum is very important. I don't care whether it's the Federal court or the state court or a three-judge Federal court, but choosing the right forum is very important, and a lot of lawyers don't seem to realize that.

Third, there is the necessity for political work, and the value of amicus briefs from establishment-type organizations and people in the state. I think that's a very important point to make to the lawyers here tomorrow.

There are also a number of substantive points which I would like to mention to a litigator as potential problem areas in the litigation. One is the remedies problem. I think the California Supreme Court's careful avoidance of the remedy shows the desire they reflect not to be compelled at the first stage of litigation into the solution of the problem posed in the case.

Second is the problem of the non-education analogy. Again, note the care that the Supreme Court of California took to attempt to make education unique and different from roads and other services.

Third, attempting to get a Court to mandate educational expenditures in relation to educational "need" is a setup for a knockdown. It's too vague a concept for Courts to handle.

In addition to these points, there are two areas I would urge people to stress in future litigation. One is Serrano's emphasis on the direct correlation between the poverty of the child and the poverty of the education he gets. There are other inequities here, but to me that's the strongest single inequity—poor children getting poor education, that is, inexpensive education, and therefore, presumptively, less good education. I know there's a taxpayer inequity. I regard that personally as less persuasive, but not to be disregarded.

The second point to stress is the state ground availability. It's fairly clear that the California Supreme Court did Jack Coons a great favor with that
footnote resting the decision alternately on state constitutional grounds. One emphasis that is very worthwhile is to attempt to convince State Supreme Courts to rest their decisions alternately on a state constitutional ground and therefore, in my opinion, avoid Supreme Court review.

Rousselot On the last point, I didn’t understand the California Court’s treatment of the state constitutional ground. It seemed to me that it finally came around to the idea that the state constitutional provision was the same as the Federal equal protection clause and therefore, they really didn’t have to think about it. I would have hoped that they could have rested a whole separate section of the Opinion on that ground.

Sofaer And used the de facto segregation cases in that separate section.

Rousselot Perhaps what that leads to is if you are really serious about getting the court to rest the case alternatively on a state ground, there should be a separate section of your pleadings on the state ground.

Wolf If you go into Federal court, you’ve got a very limited cause of action. And, if you bring in your state claims in the Federal court, I think you are likely to run into the problem of abstention. So if we want to persuade people to stay out of Federal court we should stress that some Federal courts may in fact abstain.

Kirp Let me disagree with some of John Silard’s points. The first two points seem to be self-evident and inoperable. Nobody will say he hasn’t the facts, nobody will say he has not carefully chosen the forum.

My larger problem lies with your assertion that it is important to stress the nexus between wealth and quality of education. My problem with that is that I don’t believe it, I don’t know what it means and, in my rather peculiar view of the Serrano problem, the fundamental issue is one of a political inequity with respect to the distribution of a basic good. Does the dollar matter for education? It’s enough that people think it matters and act on the assumption in a fashion that systematically disadvantages one part of the popula-

tion, the poor and/or minority-group children.

Silard I misstated my point. I didn’t say stress the nexus between inexpensive education and poor quality education. I said stress the nexus between poor children and inexpensive education.

Coons Yes, I think that’s what you said. But I think it’s problematical, because in some states I am not sure you can prove a nexus between poor children and poverty in the district.

Dimond Is there a constitutional violation there?

Coons Yes, indeed, under Serrano there is. If I read Serrano correctly, it certainly does not depend on poverty of the plaintiffs. Although it says this issue is a matter of proof, when you turn the page, it says that in any event, collective poverty is sufficient. Now collective poverty, if it is adequate, is a much simpler thing to demonstrate. We don’t have to show what is very difficult to show under the present manner of gathering statistics—that is, the relationship between personal and collective poverty.

Silard What do you mean by collective poverty?

Coons By personal poverty I mean family wealth. By collective poverty I mean district wealth, and we don’t know except in certain specific cases that poor people live in poor districts.

Silard I assume from your complaint that this is true.

Coons In Serrano the court said, fine, go back and prove it, but by the way if you don’t prove it, it doesn’t matter and collective poverty is enough.

Kirp Do you think all courts are going to be as lenient?

Coons No, in fact that’s why in the model complaint we stress both personal and collective poverty. I think it may be that some judges will depend upon personal poverty, but if you can get the broader result, it is better.

Silard You don’t mean by collective poverty that the average income of people living
in a community is low. You mean the community has a poor tax base.

Coons: That’s right.

McDermott: There has to be some identification eventually with the fact that the lack of resources does relate to the lack of adequate accomplishments in the indigent schools or the poor district schools.

We haven’t got the data right now to prove that if you spend $2400 on a kid, he gets better education, but I do know if you spend $600 on a kid, you can’t compete with somebody in a richer district.

Coons: Why is it important to show that nexus?

McDermott: Because I think you need more teachers. I think you need lower class size. I think you need more adequate facilities. I think you have to overcome the pathologies of the environment.

Coons: How can you prove these?

McDermott: By using criteria other than Sanford-Binet scores or reading scores. I think you have to take a new look.

Kirp: The issue of whether the cost of a child’s education relates to the quality of his education is important for one reason and that is, judges believe it’s important. This argument could lead to the whole quagmire that attempting to prove educational need took us into in the first place. I would suggest either a hard-line approach—not making the connection at all—or Jack’s approach, which muddles the issue to some extent. It leaves enough of it there so that if a court wants to pick something up about equality, it can do that.

Wolinsky: I think it’s fair to say that the Serrano decision somewhat muddles the issue because we muddled it on oral argument. You can’t prove it to a certainty and I agree with you in that sense. If you put yourself in a position where you have to prove it that way, you’re in trouble, although you can decide, as a perfectly rational decision, to take on the issue, depending in part on your court, and a lot of other factors. But I think that we all could agree that it should be said tomorrow that you may have difficulty in producing over-whelming evidence that there is a positive correlation between dollars spent and quality of educational experience. That’s a factor that you have to consider.

Doar: Does anyone disagree that this can’t be proven?

Coons: I guess I would have to know what you mean by proof. I think that putting on expert witnesses who are sufficiently persuasive on the question will, in the legal sense, produce adequate proof, and the judge or jury can decide even if it is a disputed question. Of course, I would prefer to treat it formally. I would say that the state has decided that money does matter, by virtue of setting up a system in which you purchase goods and services with money, and so the state has foreclosed itself from even contesting that. But that’s a formalistic argument which may or may not work.

Rousselot: It’s not formalistic. It’s an adminis-trative law theory. This is their system. They have decided to work this way and they are allocating things unfairly.

Coons: It’s better than I thought then, but even if you have to prove it, you can prove it with expert witnesses.

Silard: We could turn it around. Instead of saying more money buys a better education, you could say almost no money cannot buy you an adequate education. A lot of people agree that the latter is true, even if they might not agree that the former is. In other words, we can ask, “can you be educated for $400 a year in California?” It’s a magic question.

Michelman: I would like to go back to the tactical question of fudging. Sid, do you mean by fudging anything other than the argument that the state, by virtue of having set up a system, is foreclosed from raising any question about whether expenditure determines quality?

Wolinsky: Correct. But the complaint should be drafted in such a way that it would also clearly allow you to introduce evidence on that question and would allow the court to make the leap if it so desires.

Sugarman: One of the things that hasn’t been said
directly is that we have an obligation to make clear to the lawyers who are going to be bringing the cases, that those of us who have written and talked about the problem have quite different legal theories, and people who have talked about the problem have different interpretations of what Serrano's legal theory was and they have different interpretations, notwithstanding what they think Serrano's theory was, of what constitutes a better theory or wiser theory or a more successful theory. We are not going to agree upon the "magic" theory and it may be that there are different theories that are going to win in different places, but I think it would be a shame for lawyers to bring cases using the Serrano complaint, because they can get a hold of it easily, without understanding, as the Serrano lawyers did understand when they drafted the complaint, that they were deliberately introducing a number of different theories in their complaint.

I don't disagree at all with Sid's notion that as a litigation strategy it's wise to have more than one theory set out in the complaint. I don't advocate the essentiality of sticking to that which has only the Coons theory in it, but I think that it's very important that people do understand what it is that others who have written in the area say they are alleging when they set out their own theory. This brings us to another problem—when lawyers say they are going to win a Serrano-type case, what is it they are going to win? People don't know what it is they want to win.

"When lawyers say they are going to win a Serrano-type suit, what is it they are going to win? People don't know what it is they want to win."

Now, if you eliminated the irrational aspects of the state aid to education formula in New York State, New York City would lose. Most everyone will agree that the minimum level of support and borough aid are irrational. How can you justify borough aid? New York City is either one district or 33, but not five boroughs. Eliminating these irrational aspects of the New York State system, New York City's aid would drop from $289 per weighted average daily attendant to at least $222 per weighted average daily attendant, or about $67, and possibly to as low as $200 per weighted average daily attending student, if the money that you take away from New York City by this calculation—which is several hundred million dollars—is not redistributed.

I have done other calculations and I figure the very least we would lose, assuming there's no absolute increase in support, will be around $35.00 per pupil. New York City can't afford it. And this reflects another problem I have with Jack Coons' approach. Eliminating the achievement issue—the relationship between quality and cost—is sound, not only because of its theoretical difficulties, but also because it's ridiculous for a state to contend on the one hand that money doesn't mean anything and on the other hand to make such a big deal about money.

But eliminating an in-depth analysis of the issue of fiscal ability is a very dangerous path to follow, especially
when you consider that on remand the people you are going to be negotiating with are the people you have just had slapped down, assuming you are successful in the Supreme Court of the state. I am very curious to know what Jack and the other litigants in Serrano are going through right now in California.

**Wolinsky** The experience in California at the moment is that it appears almost inevitable that the general level of expenditure for education, statewide, will be raised considerably. What Serrano has also generated is a search for new tax sources of all kinds, which are likely to come about. But I think you raise a question that’s much more important. Perhaps this is something that we ought to say tomorrow, because it is one of the most misunderstood things about this kind of litigation. Let me make two comments. The first is that nobody should bring one of these lawsuits without reading Private Wealth and Public Education. If nothing else, you can treat it like an encyclopedia or a dictionary and when you have a question, consult the relevant parts, and take it a bit at a time. There isn’t a question that has been raised here tonight that there isn’t some answer to in that book. The second thing is that the case should and can be presented to the court as extremely conservative. That is, all that we are asking for is that the court break the roadblock in the narrowest sense of the word. We ask that you not discriminate against poor kids, leaving open a whole range of alternatives and making acceptable almost anything that is rational and doesn’t discriminate against the poor. There’s no reason why there cannot be an urban factor written into legislation which responds to the constitutional infirmity. There’s no reason why you can’t have all manner of compensatory education. There’s no reason why you can’t take municipal overburden into account.

**Sofaer** You can’t tell your client there’s no reason that Rockefeller’s administration will refuse to consider these questions or will refuse to implement these policies. On the contrary, you have to tell your client that there’s no reason the State will have to even consider such questions. There’s very little hope, I would tell my client, having studied the complexities of proving fiscal ability, including the idea of municipal overburden, that I could prove to a court that a State should have to consider anything more than property value and the education tax rate.

**Schwartz** That cannot be stressed enough. You might go to the General Assembly only to find the level of support to a large urban area drop off dramatically. How do you have the court say yes, you can do it, but only under certain conditions?

**Wolinsky** It seems to me that’s the reason why none of these lawsuits should ever be brought in a vacuum, why ideally you should have a piece of legislation pending, which has almost made it, before you bring such a lawsuit, why you’ve got to solidify your own political resources before you bring it.

**Schwartz** What was your legislation?

**Wolinsky** Wilson Riles, Superintendent of Education in California, had a bill which almost made it. It was essentially a statewide property tax with an urban factor thrown in. The other thing is that you can sometimes say to an urban school district, you may be okay now, but if you look at the inevitable trend under the existing system, you are going to be in big trouble in a number of years as the tax base moves out to the suburbs. Now, that may not be present in some cases, but the main thing it seems to me is that the lawsuit has to be combined with something politically that’s going on, ideally a statute which responds to the problem, and which is going to be the one that rides through if you get the decision you want.

**Schwartz** If the court could fashion the statute, it may be better to deal with the court than with the state legislature.

**Kirp** That point suggests a variation of tactics. It may be that what Serrano does is make legislatures in those states where suits have not been filed begin to think about the unthinkable issue—education tax reform. In California, there’s a report that says the urban factor is unfindable, and it is not clear,
to me at least, that a state property tax in California is a very good idea. The California situation might in practical terms be a vacuum at the moment. Nobody has sat down to draft that piece of legislation which takes into account the kind of factors which will benefit the people you were concerned about in the first place. I suggest that one effort that really does need to be made is having some thought given to legislative drafting which at least sets out what the choices might be, that tries to put into English what an urban factor might be or tries to define that undefinable concept called municipal overburden, so that you don’t have a result from a Serrano-type decision in which the cities don’t benefit.

If you want to discourage people from bringing lawsuits, you might suggest to them that the modesty of the Coons approach is a modesty that can in the legislative resolution after the Court has acted work to their disadvantage. You might want to get them to concentrate on the issue of legislative drafting and lobbying, which very few legal services people worry about right now. The heart of the reform question is not the lawsuit, in California or anyplace else. That’s only the beginning of the question. That makes it possible to talk about reform. The reform or lack of reform depends on what the State Legislature is planning to do.

"The heart of the reform question is not the lawsuit, in California or anyplace else. That’s only the beginning of the question. That makes it possible to talk about reform."

Silard Having expressed one optimistic view half an hour ago about the ultimate Supreme Court outcome, I want to give another one. I think ultimately we’ve got to emerge victorious on aiding the big cities. So, while I might have to tell litigants in New York City that while we might take half a step which might even be for the moment a step backward, I am optimistic about the whole thing. I simply think equal education, not equal dollars, is what we are talking about in the Constitutional sense. We must give kids equal education, and if we can develop an economics and a statistics that shows that it costs more to educate a child in a given district than in another — because of teacher pay, physical plants, illiteracy, etc. — I am convinced in the long, long run that we could probably persuade the courts that, having taken an equalizing step to begin with, in the form of dollar equalization, that the next logical step would be education equalization. Isn’t that theory broad enough to subsume the question of overburden?

Sofaer The question is, is it broad enough to include the 20 year retirement plan for garbage men in New York City. That’s the municipal overburden question.

Wilner In light of everything that’s been thrown out, two things are evident to me. One, as has been discussed, you are not going to prevent lawyers from filing suits whether you like the way they’re filed or not. These cases are going to begin to work their way up and we are going to begin to get decisions on them. All that we really have now is Serrano, with other peripheral things. I think that rather than attempt to decide as a group how cases should go, as I think that is not in your hands to do, this committee or some agency should encourage lawyers to send their pleadings to a central place, as these cases are filed. As decisions come in, even if they are preliminary decisions on motions or whatever, these also should be sent in, and then forwarded to those people who are involved in these kinds of cases, so that we can see what other courts are doing. I think that this can be extremely helpful. Even in the course of litigation you can often change theories, pushing one and soft-pedalling another, if you see that one has gained acceptance and another has not. And I think that if there are funds and personnel available, it would be extremely helpful to get copies of what is going on in these cases so that we can guide ourselves.

Carey I do think there should be some candor about facing the range of choices that
a lawyer has in offering to his client.

Wilner I quite agree. But these cases are going to come up in a dozen different ways.

Carey I think it would be useful to discuss the sort of support you can provide and how you can orchestrate some of this political activity significantly.

Schwartz In California, are you turning to outside sources for your remedy? I want to know what you are doing. You've knocked off the mountain, now what are you doing?

Wolinsky Well, what's happening now is that there have been, up until very recently, almost daily negotiations between the Legislature and Governor Reagan's office; nobody knows what's come out of that. And we've come up with some legislation, and Wilson Riles has a bill which is being revised. There isn't any answer except that it's a dynamic process.

Schwartz Is it true that throughout the country everybody really hasn't arrived at the point of coming up with an answer?

Kelly Remember that Coons, et al. come in to court and they know the remedy that they want almost prior to working out the litigation strategy to achieve that particular remedy. I think that's probably unlike what the circumstances would be with most attorneys who bring these cases. Coons and his colleagues spent five years studying this problem. They didn't come into it two weeks ago. It seems to me that if you are going for a declaratory judgment, there are a lot of remedies that you can offer to a court; but I don't see how you could strategize that out in advance before you go in.

Schwartz Alan Wilner is talking about a central source of complaints. I also would sure as hell like a central source for some of these remedies.

Coons In some of these cases that have gotten started it does appear that delay might be useful. It would be better to put some brakes on and get a chance to orient oneself. But each lawyer has to make his own judgment about this.

Schoenbrod I have a question that I am sure is kind of unrealistic for California, but as somebody from New York City, I would like to ask it anyway. That is, I would like the Serrano people to assume that everybody in the Legislature goes out and buys the Coons book, and says that this is just a much better and simpler remedy than all these complicated bills that everybody is coming up with, and they enact Proposition One ["the quality of public education may not be a function of wealth other than the total wealth of the state"]. What do you do then? Are there any legal remedies that you could proceed in pursuing that make any sense?

What happens if a formula is adopted which provides nothing for municipal overburden, and which conforms to Proposition One, but nonetheless leaves less for your municipally overburdened districts they may now get. Do you have any legal recourse left that makes any sense whatsoever?

Coons Let me see if I understand. Suppose for example, we assume that you win and that the Legislature then abolishes public education. You may or may not be happy with this. But you've always got to ask yourself what does your theory permit. All we ask the court to do is to untie spending from local wealth. We aren't asking them to have public education. We aren't saying anything about the necessity of having or not having public education at all. Now maybe that doesn't get you very far. I mean, it doesn't if you know that you've got a Legislature that's going to abolish public education—of course, that's not the case.

You have to settle on some kind of theory or theories. In the end the court is going to say something more or less specific about the standard which it's adopting if you win. It may say you may not vary in spending from district to district with respect to kids of the same class. All blind children for example, must have the same spending in every district. You may not spend more or less on any given class—uniformity, territorial uniformity throughout. That's a very plausible and intelligible standard that Arthur Wise has been promoting and while I don't think it's going to win, certainly it's an intelligible standard.

Now, if you win that, you've got
that kind of response. But that's all you've got. It still doesn't tell you that you've got public education. It only says that if you've got public education you've got to spread it evenly across the state.

Sugarman
What should be understood is that when you concern yourself specifically with the education of individual youngsters in New York City you want the principle of the Court of Appeals of the Second Circuit or the New York Court of Appeals to be that equal educational opportunity is constitutionally required and that the State of New York must spend money according to the needs of its children.

Schoenbrod
I am not sure you do.

Sugarman
That's one thing you might want and I would say that's probably what all of us want, but whether you can get a court ever to say that is what I think many of us feel is impossible.

Wolinsky
I would like to shift the focus of this discussion in the interests of time back to procedural matters, because we can talk about the substantive matters endlessly. It seems to me there are two things that we want to do. A) We want to provide assistance on a coordinated basis, on perhaps a few key cases, in trying to evaluate which are the best cases. B) We want to provide assistance to any lawyer in any kind of case, whatever we think of it, that will help him make the best case he can make.

For example, it seems to me clear that lawyers who are busy people are going to want at minimum a checklist of problem areas to make sure at least that they have considered a whole range of questions. They are going to want a checklist of pitfalls to avoid, even though there may not be a consensus. Maybe we can just say, this is something that people are firmly opposed to, while that is something on which there is some division of opinion.

They are going to want a list, in brief and summary fashion, which they can consult and they can beef up, when they want to, of all of the potential remedies that might be available. They are going to want a documents bank that they can draw from.

A lot of questions have come up tonight. I think we ought to set up a central mechanism for answering questions. That is, ideally any lawyer any place in the country ought to be able to call up one number or drop a line to get some people to respond to a specific question; the response might be one which would go both ways.

Sugarman
Do you think there should be a model complaint? Do you think that the Serrano complaint should be annotated? That seems to be what people are asking for first, and our experience thus far with the 30 some suits which are in the process of being filed is that people are basing a lot of their stuff on the Serrano complaint. What do you think we can do to make people understand what it is that's being said?

Wolinsky
Because lawyers are going to make their own independent judgments, we ought to supply them with all that information. They certainly ought to have a copy of the original Serrano complaint. It ought to be annotated with some comments based on the experience of the people involved and anyone else who happens to have read it. They should get a form complaint with the clear understanding that this is just another alternative that they can look at. They should understand that it presents other questions and some people are unhappy with some parts of it or all of it. They ought to have all these things available to them, and they ought to have an open-ended mechanism for getting technical assistance in asking questions.

Browning
I am most gratified by what you said, Sid, because quite frankly the points that you just specified help define the role in which the Lawyers' Committee has been operating now for the last nine months. I can only say that we need more help on a number of the points.

We certainly will be able to serve as the central clearing house. We can provide the information, so that people can call us and ask us questions. I don't pretend to be an expert on school finance, but I do know who the experts are in school finance, and I invariably can point people with questions to the experts in school finance. We've started this task and we can only really do it well if people continue to support us.

I have written a letter to all the
participants in tomorrow's session who are filing or have filed school finance suits requesting, pleading, demanding from them that they send us their entire pleading file. We have the complete pleading files on about 13 school finance cases, but within a month there will be 30 school finance cases.

Silard
I am very worried about over-optimism in this whole area, in the wake of the Serrano decision. To me the most constructive comments this evening were a great variety of comments from people about problems with the remedy, problems with arguments, problems with what we are really winning, and problems with going to the Supreme Court too fast. In a way it seems to me that the cautionary note sounded here is the one that's least likely to get heard.

Levin
It seems to me that there are two things that can be done. First of all, there's the whole question of winning a case in all the various jurisdictions, to get to the point of Serrano. That's a matter of legal technicalities, and involves all of the things that have been discussed tonight.

The remedy or remedies are political. That is, they are going to vary in each jurisdiction because what the Legislature does, if a Serrano case is won, will depend on an awful lot of things—among them, where the state is, and what kind of arrangements can be made that will pass the Legislature. I think it is impossible to put down any place on paper what the possible permutations and combinations will be. Every lawyer will think that he has a case that is different in some respect and will feel that the legislative situation in his state differs.

Shanks
I am in slight disagreement with the people who say you can't really control lawyers. Of course, that's true to some extent, but it seems to be reflected in many of the remarks around the table tonight, that an organization ought to come out of this meeting. I think that it takes more than an evening to develop positions, but organizations do develop and I think they can put pressure on lawyers by, for example, telling them about the problems that inhere in the positions they are taking. I think that these lawyers can be affected.

Robertson
Just to follow right on that point, I don't think you can control lawyers. You don't control lawyers. You just persuade them that you are smarter than they are or that you know more than they do or that there are different kinds of considerations that they don't know about yet.

Coons
I do think that the model complaint is more likely to succeed than a complaint with a shotgun approach to it, simply because the other kinds of ideas in the Serrano complaint are less likely to succeed. I think historically, looking at the pattern of development, that those ideas are much less likely to succeed.

If there was anything that panicked the judges in the oral argument in Serrano, it was the notion that they...
might be centralizing and homogenizing spending around the state.

One then has to make the decision, do you want to have what you personally think is a better result, cast in terms of constitutional standards, even though it's then going to be more difficult to get that better result from a court? Of course, you have to make that latter judgment too—is it in fact going to be more difficult to get? Are all courts going to be like the Minnesota and the California courts? In my judgment, they will be, and in my judgment, it's going to be much more difficult to persuade them of the constitutional requirement of territorial uniformity than the much more modest kind of fiscal neutrality that we got in Serrano.

If I am right on that, then it seems to me that one is much safer in making a clean, simple complaint, in which you say here's what Minnesota and California have done. You buy it or you don't buy it, but at least the Judge knows what he's doing.

Wise I would like to know why, in Jack's opinion, the court chose to deal with territorial uniformity in quite the way it did, because I think it's a fairly significant point which is being overlooked here.

Coons Yes, that's good and that's something that we are going to be asked about and that we ought to come to grips with. There is a sentence which seems to me to suggest, if you just read the sentence, that indeed uniformity of spending across the whole state is the standard adopted by the court. That is not what the court intended, I am sure, as a consequence of our experience with the oral argument. Further, if this is what they intended, everything preceding that statement makes no sense. That is to say, if there is a requirement of spending uniformity statewide, then the proscription of wealth discrimination is irrelevant.

In addition, the court could not mean spending uniformity unless it wanted to proscribe preference for urban factors, municipal overburden, disadvantage—whatever you name it. Obviously the court didn't want to do that. I think that what Justice Sullivan is saying is that there must be uniform capacity, if you use a decentralized system; and that's right. On the other hand, I concede your original point that that sentence—if read literally—means territorial uniformity.

"You don't control lawyers. You just persuade them that you are smarter than they are or you know more than they do or that there are different kinds of considerations that they don't know about yet."

Wolinsky That illustrates the thrust of the criticism that I have of a model complaint. If we were sitting around discussing this as an abstract question, I agree with absolutely everything that Jack said. The only problem that I have with that is that there are a lot of courts that are just not going to buy that argument. It's just a little too abstract and a little too sophisticated and I think that therefore a complaint has to recognize that geographical argument because otherwise some judge just might pick it up and buy it.

It seems to me important that somebody goes to work and starts talking to people, because it sometimes takes a long time and it's partially a political process to collect groups and people who would be willing to go on amicus on Serrano-type cases. We can, it seems to me, talk later about which cases they are willing to help, and which they are not willing to help. But you can't expect one lawyer, one busy lawyer who is in over his head on this case to begin with, to necessarily have time to go out and get that support. Besides, if we get the support for one case, we can use it in five or six cases.

The final thing that I'd like to throw out, which we really haven't talked about, is that there is a national dimension to this—national, that is, in terms of Congress and questions of federal aid. Some bipartisan support could be generated for what's going on around the country, and I think some thought should be given to somebody at least trying to put together an effort in that direction.
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