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Serrano: A Victory of Sorts for Ethics, Not Necessarily for Education

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Coons, Clune and Sugarman uncovered Proposition I—"the quality of public education may not be a function of wealth other than the wealth of the state as a whole"[1]—and artfully spread the word, much like any suitor who had experienced paradise and wanted all to share in the bounty.[2] With the help of numerous commentators, various political allies, and capable trial attorneys—midwives all[3]—the California Supreme Court despite a few ramblings overcame earlier miscarriages elsewhere[4] and gave judicial birth to Proposition I in *Serrano* v. *Priest*.[5] *Serrano's* first step-child, *Van Dusartz* v. *Hatfield*,[6] even improved on the original proposition:

> 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.[7]

In practical terms, *Serrano* and *Van Dusartz* stand for a principle of "fiscal neutrality": state systems of school finance in which per pupil expenditures vary directly with the relative wealth of local school districts cannot meet the Constitutional test of Equal Protection. The *minimum* remedy which flows from such a conclusion is that the same tax effort by local school districts must result in the same level of expenditures per pupil. That would require a revolution of sorts: no longer could districts with high tax bases per pupil spend more money per pupil with less tax effort than districts with low tax bases per pupil. Instead, at a minimum, the *capacity* of each school district to raise revenues per pupil would have to be *equalized*.[8]

As there are now several tens of cases vying for the role of next child, this article will attempt (1) to critically examine the judicial, constitutional, and practical underpinnings of Proposition I and (2) to speculate about its possible effects on American education.

I. The Assumptions of Proposition I, Judicial, Constitutional, and Practical: A Well-Constructed House of Straw

A. The Political Judgment: What Theory has the Best Chance of Winning, or at least not losing, for Awhile

At the very heart of Proposition I is an odd respect for judicial restraint: declare what now exists in financing public education unconstitutional so that legislatures may be freed from the present yoke of the dominant special interest groups to finance education in a basically more ethical and—hope springs eternal for all constitutional law reformers[9]—more innovative and effective way. At the outset it must be understood that Proposition I knows its place: in an attack on a politically universal system of financing education, Proposition I seeks to influence courts to free others to do the initiating but carefully avoids requiring the courts to bludgeon the states into submission. That is not just because the constitutional underpinnings for Proposition I are unfirm; it is because Proposition I is being pressed by able advocates who have artfully attempted to carve a place for judicial action where none existed before and actually get jurists to assume it.

The answers to everything about Proposition I are not yet at hand. If all the answers were clear, an activist court might impose a remedy on the state rather than await a political response to a judicial declaration; and that, know the discoverers of the delights of Proposition I, probably is too much for the Supreme Court.[10] Yet unless some answers about

Proposition I are apparent, only judges who wish to act in the absence of outside data and support will accept it; that would be too little for the Supreme Court. Proposition I succeeds (and only in the sense of getting a judicial declaration of present wrong) therefore, only if some, but not too many, answers are apparent.[11] Thus Proposition I is a carefully calculated political strategy designed to persuade courts to intervene where they have not before. The measure of its success, however, is not just the obvious, *Serrano* and *Van Dusartz;* its success will also be gauged by how long it can convince courts *and* legislators generally that it is so right that action is required "consistent" with it.[12] The answer to the question "how long" remains unclear; and as long as that uncertainty remains, Proposition I can continue to engender "consistent" action in a variety of states —in courts, legislatures, executive offices, and lobbyists' headquarters alike.[13]

B. The Constitutional Argument: Education as a "Fundamental Interest" and Wealth as a "Suspect Classification"

In a series of cases[14] in the fifties and sixties, the Supreme Court departed in some areas from its traditional mode of testing the validity of statutes challenged under the Equal Protection clause of the 14th Amendment and adopted a more rigorous test.[15] This test simply stated is that when a "fundamental interest" is affected by a state classification, or if that classification is "suspect"—i.e., one of a few classifications that the Court feels are generally unjustified—or if there is any combination of "suspect" classification and "fundamental" interest extensive enough to produce a proper "prejudice variable," then the Court will examine the classification with "strict scrutiny." The initial rub, of course, is defining what are "fundamental interests" and "suspect classifications."

Proposition I tackles this area head-on by arguing that education is "fundamental"[16] and classification on the basis of wealth is "suspect."[17] Neither of these designations, apparently, has been accepted by the Court.[18] Yet there are some Supreme Court decisions which suggest that the argument has merit and several lower court cases in addition to *Serrano* and *Van Dusartz* which have adopted one or the other of the arguments.[19] If these two designations are accepted by the Court, then, in theory, the equal protection clause will trigger closer judicial scrutiny of the challenged finance scheme, and require that it be justified by a showing that it is necessary—i.e., no less onerous alternative exists—to promote a compelling state interest.[20] Unfortunately, the Court has not shown any consistent willingness to package its decisions in the neat labels suggested by this approach.[21]

It would serve no purpose to discuss at length here why challenged actions which involve education should be considered "fundamental" or should stir the Court to closer scrutiny than merely a search for bare rationality. Suffice it to note that education is important and distinguishable in several respects from many other public "goods" and that the Court has not yet squarely held that education is fundamental.[22] Beyond that, advocates on all sides can only await further action by the Court.

The second Constitutional leg on which Proposition I stands—that wealth is a suspect classification—deserves more discussion. For it is in the nature of how the school finance schemes are viewed as wealth classifications that the ethical claims of the proponents of Proposition I can best be understood and ruled upon. The theory's proponents place much reliance on cases like *Griffin* v. *Illinois, Douglas* v. *California,* and *Harper* v. *Virginia Bd. of Elections,*[23] which suggest that in some instances poor *persons* should not be disadvantaged simply because they do not have the money to purchase certain public goods, "just wants" under our present system of government and state of society.[24] Yet the disproportionate impact of present school finance schemes on poor persons is merely window dressing to Proposition I.[25] It may be invoked to tug the heartstrings of a few judges, but it is basically irrelevant.[26] Rather, the main thrust of Proposition I is that the entire scheme of school finance—with its reliance on differences in the taxable wealth between local school *districts* to generate systematic disadvantage in terms of dollar expenditures per pupil for poor *districts* as compared with rich *districts*—is in all respects an "unfair," state-created wealth classification. The very foundation of the inequities perceived by Proposition I is the state's creation of school districts with boundaries around areas with different wealth concentrations, and its investing these areas with the power to reap only their own education dollar abundance or poverty. The very classifying fact of such school finance schemes is wealth.[27] The issue is whether the Court will ultimately view that classifying fact as an illegitimate means[28] of distributing dollars for public schooling.

Unless *James* v. *Valtierra*[29] is merely an aberration resulting from Justice Black's love of the referendum as a democratic institution, it is probably lucky that Proposition I is not concerned primarily with protecting poor persons. For, in conjunction with *Dandridge* v. *Williams,*[30] *Valtierra* suggests the end of the Court's apparent general concern for protecting the poor from serious disadvantage under equal protection analysis.[31] The fate of Proposition I rests on whether it can compel the Court to share the view that there is something undeniably and ultimately "unfair" about a financing scheme for public education which is a state-created wealth classification and which rewards rich districts for being rich and punishes poor districts for being poor.

If *Valtierra* turns out to be an accurate indicator, I suspect that the Court will not be won over. One

notion expressed in *Valtierra* in particular leads me to be skeptical:

> this procedure [the referendum to determine whether low-income housing can be built in a municipality] insures that all the people of a community will have a voice in a decision which may lead to larger expenditures of local governmental funds for increased public services and to lower tax revenues.[32]

This statement is premised on the fact that "all the people" necessarily excludes the poor who have not yet gotten into that community. The "referendum" in education finance cases that is equivalent to the public housing referendum in *Valtierra* is the local millage election. And, as in *Valtierra,* only those persons already "in" the community reap the benefits or bear the burdens of that election, while those who are seeking to enter the community (and who may be an additional financial burden on the community) have no voice whatsoever.[33]

The basic ethical assumption in *Valtierra* is that in America there is a strong interest in allowing people to live in local governmental sanctuaries in which tax burdens can be avoided. A corollary interest is that persons should be permitted to live in local governmental sanctuaries which spend a greater share of their tax revenues on schools as compared with welfare.[34] Stated simply, the ethic is this: an individual should be able to move from a city where only 30% of his tax dollar is spent on his children's education to a suburb where 50% is spent if, of course, he does not unfavorably affect the relationship between municipal costs and tax revenue; the individual should be able to move from a rich industrial town to a poor rural environment if he is willing to take on either a greater tax burden or accept a lower cost education.

This ethic of the "market model" of individual residence applies with equal vigor to the location of commercial and industrial property: let each locality fight with relative tax breaks and municipal bond incentives for getting new business and retaining old.[35] It is beside the point that such an ethical view ignores the fact that the poor (and more particularly the black) cannot participate fully in competition for residences, that the market is structured by state actions which reward and protect some persons for simply being rich, that local governmental entities assume life independent of the hand of the state which in theory created them, and that in many other respects it is fiction. The almost incredible rejoinder of the market model approach to Proposition I is that the ethical view of *Valtierra* may be acceptable in America in 1971 to a majority of the final interpreters of the Fourteenth Amendment.[36]

The hope of Coons, *et al.* is that the Court will adopt a different view of ethics in deciding the final fate of Proposition I than it did in deciding *Valtierra.* The advocates of Proposition I must, therefore, convince the Court that "education" is somehow fundamentally different from "housing"; despite all the persuasive arguments and skills that Coons and company can muster on behalf of Proposition I, their constitutional argument may well be less than convincing when it finally encounters the Supreme Court.

C. The Practical Problems: "Wealth", "Tax Effort", "Equal Capacity", and a "System of School Finance" Undefined

For Proposition I to succeed in the Supreme Court, a necessary precondition is that it must define with precision what its declaration means and isolate education finance from the rest of the system of financing public services in the states.[37] Proposition I does not attempt to attack the unequal financing of all major public services, such as garbage collection, sewer systems, police protection, and transportation facilities. It attempts by definition to isolate the system of public school finance from other revenue raising systems of the state: by definition it declares that the "wealth" of a school district is defined by the taxable assessed valuation of property per pupil; "effort" is defined as the rate of mill levy for financing schools; and "equal capacity" is defined, therefore, as raising equal dollars per pupil from the same tax rate. Unfortunately, as simple as this definitional approach may sound, there are competing definitions for "wealth," "effort" and "equal capacity" which tend to diminish the distinctions between a state's and a municipality's system of financing public education and its methods of financing other public services. These competing definitions take into account the importance of other revenue needs of a community, differential costs of school and other public services, and possible sources of taxing power other than taxable assessed valuation on property.

As an example, consider the claim of an urban area that it has a tremendous tax burden from non-educational expenditures, such as police, fire, sanitation, welfare, and hospitals, a burden which is much greater than in many suburban and rural areas. Many citizens who live in communities with such a greater tax burden will argue that "equal effort" is not measured by the mill rate adopted for school property taxes; the entire tax effort must be considered. The response of a cynic, who is imbued with the full spirit of *Valtierra,* to this situation is to suggest that school finance cannot be so isolated from the rest of the local government's fiscal package for special treatment: why should a suburban area pay New York City for its inability to negotiate as toughly with its public employees or keep as many of the supposedly burdensome poor people from living in the City as the suburb? There is no one who can yet precisely define the urban factor or municipal overburden, but somehow the cynic's response seems inaccurate.[38]

As another example, consider the definition of the "wealth," or fiscal capacity, of the school district to support educational expenditures. As all taxes must

be paid from income, it is not clear why assessed, or even real market, value of property per pupil is a correct measure of wealth. Retail sales per capita or household and effective buying income per capita or household are competing definitions with as much claim to accuracy.[39] Moreover, in districts where the property tax is not the sole source of education finance, or there is no separate education tax at all, the application of the particular definitions in Proposition I become nonsensical and their replacement by more enlightening definitions improbable. Thus it is uncertain what the correct definitions of "tax effort," "district wealth," and "equal capacity" are and what they mean.

An additional difficulty is that any decision requiring "fiscal neutrality" in public school finance alone in practice may well affect the entire fiscal and tax package of states and localities. If education expenditures constitute between 30 and 50% of all state and local tax dollars, tinkering with the education finance structure cannot help but affect what occurs in the financing of all other public services. What the effect will be is not entirely clear: what will happen to the overall tax structure and level of funding for other public services in districts with high tax bases but heavy competing demands for tax dollars from other municipal services or in poor districts with no such competing "needs," or in all variety of urban, suburban, and rural districts with any mix of these? Is it fair to say that the education priorities of a community, as established relative to all other public *and* private spending, can be accurately judged in such circumstances by the mill rate it chooses to impose for school taxes? I cannot claim to know; in fact I have not the vaguest notion of what the effect of "fiscal neutrality" in school finance alone will be on other public taxing and spending and private consumption and saving. I only know that Coons, *et al.*, bear a high burden of proof that it is possible to tinker with "just" the public school finance scheme.[40] I suspect that requiring reform of public school finance systems will have a considerable impact on the patterns of all other public and private systems of raising and spending money. Those disinclined by philosophy to judicial intervention will be immensely troubled by that spectre, and especially by its unknown contours.

In summary, Proposition I may be an artfully constructed house. In many particulars it is entirely appealing. But there has been no showing that it yet has enough power to hang together in the face of a conservative court bent on judicial restraint. Some of the weaknesses no doubt are remediable; they can be buttressed by new arguments and statements of fact. But, I fear, not enough are. It would be an appropriate irony if in the end the house fell before the very concern for judicial restraint on which it is built.

That in no way suggests, however, that Proposition I cannot in the meantime "succeed." Proposition I does present a *very* close question to the Court and the outcome will remain in doubt until the final decision. Therefore, even if the basic concern with fiscal neutrality is not ultimately compelling to the United States Supreme Court, it still may persuade many courts, legislatures, and executives to act affirmatively until the final day of reckoning arrives.

II. The Possible Effects on American Education of Implementation of Proposition I: A Clouded Horizon.

Just as the effect of Proposition I on present patterns of American economic life and location of people and property is unclear, so is its effect on American education.

First, and most obvious, it is simply unclear which of the many permissible responses to Proposition I any state legislature will choose. Among the types of permissible alternatives are: funding on the basis of school district characteristics, such as, tax effort or number of children; funding on the basis of family characteristics, such as tax effort or level of parent education; funding on the basis of child characteristics, such as "childness"[41] or the age, need or giftedness of the child; funding with or without state assumption of the entire school tax burden; funding by distribution of moneys to districts or directly to the family in the form of a voucher;[42] funding accompanied by centralized administration of schools or any degree or form of decentralized administration of, or choice among, schools; and any and all combinations and variations on these themes. In large part, therefore, any discussion of the ultimate effects on education must await particular states' implementation of particular remedies.

Yet, just the fact that this variety of remedies exists suggests that any state which is placed under the *Serrano* mandate to revise its school finance system will be free to examine the variety of permissible remedies carefully and tailor a response to the political will of the powers that be. As Coons, *et al.*, would have it,

> the range and variety of legislative response in fifty states to the judicial establishment of Proposition I is radically unpredictable. . . . Considering the multitude of potential compromises . . . it is clear that the Supreme Court has the capacity to touch off an explosion of creativity in the structure of education. It is an opportunity that in importance can be compared only to the first flowering of public education in the 19th century.[43]

Such optimism, as pleasing in appearance as it may be, is difficult to share. Something will happen if Proposition I is accepted; but whether flowers, brickbats, false hopes, or more tawdry political ineffectiveness will bloom is not clear. One might even wish that Proposition I would spur all fifty states to act, for a change, as the laboratories of democracy; more likely the states' drive for uniformity will as usual triumph, and all the states with no good reason will jump for the same remedy.

Second, and almost as obvious, there probably will be some reshuffling of who gets how many education tax dollars. *Districts* which are currently poor are likely to get more tax dollars relative to the rich, whatever the remedy.[44] It is not likely, however, that poor *children* will share proportionately in this gain. Aside from the fact that many poor children may reside in districts richer than the average, the present practice of most local school authorities in no way suggests that wealth privilege exists only between school districts. Rather, within school districts, poor children are often systematically disadvantaged relative to rich in the share of the state and local education dollars spent on them.[45]

Third, and to many not obvious at all, any reshuffling of dollars—if spent within the present range of variability on more highly paid teachers, reductions in class size, and buildings—is not likely to have much effect on the tested cognitive skills, on the credentials necessary for entrance into honors programs, jobs, or college or on the values of the children.[46] What the reshuffling of dollars will *do* is reshuffle teacher salaries in rough proportion. That such a result will not materially alter the outcome of schooling for the child should not be all that surprising. Teachers, like the rest of us, are not paid for how well they perform (even if we could define what performance means).[47]

Stated simply, no one knows how to use money to buy "quality" schooling, both because we are unsure how to define "quality" and how to "purchase" it. After all, the notion that money buys quality is often just the shared myth of conservatives and liberals, labor and business; for that very reason money, of course, does count in some very important ways, but not necessarily to buy better educational outcomes for the children.[48] That in no way suggests that dollar expenditures per pupil should not be reshuffled; indeed, any time the society invests systematically fewer dollars in the education of the poor children than the rich, it says all too much about our lack of willingness even to try to make schooling a path to mobility and success for all children.[49]

Poor persons deserve the same opportunity as the rich to try to make schooling have an effect independent of family background.[50] Moreover, the poor also deserve the same opportunity as the rich to define what should be viewed as the "effect" of education—for example, whether values or credentials are more important than cognitive skills as presently measured. It is not at all clear that merely reshuffling dollars between *districts* guarantees either opportunity. Guaranteeing these opportunities probably requires transferring power over schools in which the poor are presently isolated from central bureaucracies to each school community, transferring children—both rich and poor—instead of just dollars, or transferring choice over schools from the financial ability to purchase a home or a private education to equal, and completely publicly supported, choice for all families among diverse educational institutions.

The ultimate tragedy will be if courts and legislatures begin to think fuzzily about "equal educational opportunity" instead of these other issues. Proposition I, at least, makes courts view wrongs not in terms of educational "quality" but in terms of measurable resources like dollars, and *admittedly* unmeasurable ethics.[51] Proposition I states only that especially in the schools we should have some ethical distribution of dollars. Whether Proposition I is also powerful

enough to make courts and legislatures—the people—begin to think about other issues of ethics involving poverty of children (and not poverty of districts), race, control, diversity, and choice may be more important than whether courts and legislatures respond to its narrow focus. I fear that Proposition I from the beginning has lacked that power; it was carefully designed as a politically acceptable revolution.[52] Its judicial liberation of the political decision-making process for new thought, therefore, is limited to the thinkable. But that may be a start.

Yet the fundamental wrong in our present system of education remains as always racial segregation. We need to admit that wrong and act to eradicate it. Indeed the saddest commentary on our present situation is that control, choice, diversity *and* resource allocation all become immediately thinkable and politically feasible only when present patterns of state-imposed segregation—North as well as South—are threatened by local initiative or judicial action.[53] It is for this very reason that the Constitution should make maximum feasible desegregation the paramount priority; only then can we be sure that any new reforms are not just subterfuges to perpetuate the cancer of segregation in our society, especially in the schools.[54]

1. Coons, Clune and Sugarman, *Private Wealth and Public Education* 304 (1970) [hereafter, Sugarman].

2. *See, e.g.*, Sugarman and Coons, Clune, and Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 Cal. L. Rev. 305 (1969) [hereafter, Coons].

3. These helpers were not always in complete agreement, but their message was always the same: there is *something unfair* (exactly what has always been at issue) about the present methods of financing elementary and secondary education in almost every state. *See, e.g.*, Horowitz and Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place within a State*, 15 U.C.L.A.L. Rev. 787 (1968); A. Wise, *Rich Schools, Poor Schools* (1968); Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969) [Hereafter, Michelman]; Kirp, *The Poor, The Schools and Equal Protection*, 38 Harv. Ed. Rev. 635 (1968); Kirp and Yudof, *Whose Priorities for Educational Reform*, 6 Harv. Civ. Rts. Civ. Lib. L. Rev. 619 (1971). The political allies included state officials of all stripes who for a variety of reasons felt some need to push for reform of the financing of public education.

4. Most notably, *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom. McInnis* v. *Ogilvie*, 394 U.S. 322 (1969).

5. 5C. 3d 584 (1971). Whether this declaration is now reviewable is a matter for experts in Supreme Court practice.

6. 40 U.S.L.W. 2228 (Oct. 26, 1971). I shall also leave to the arcane experts on procedure and federal jurisdiction exactly how a single judge can declare an act of state-wide application unconstitutional, what the effect of such declaration is, where and at what stage in the proceedings any appeal can be lodged, etc. Of course, the point of *Serrano* and *Van Dusartz* is exactly that nothing is made clear except a general judicial declaration that what now exists eventually is not likely to pass constitutional muster upon whatever trial on the merits there likely never will be. *See, e.g.*, Coons at 409–410 and discussion accompanying notes 10–13, *infra*.

7. *Van Dusartz, supra* note 6. As Coons, *et al.*, defined quality in terms of dollars spent per pupil, it is heartening to see the subterfuge about quality dropped in the statement of the standard. *See* Sugarman at 25.

8. Thus it should be manifest that Proposition I does not require the end of existing local school districts nor strike down the property tax as a means of raising revenues. But many attorneys, politicians, and newspapers have not yet grasped this.

9. *Cf.* Kurland, *Equal Education Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. Chi. L. Rev. 583 (1968).

10. But one thing the advocates of Proposition I want to make very clear about its limitations: judicial adoption of the principle of "fiscal neutrality" extends only to education. Sugarman at 414–419. But see discussion accompanying notes 37–40, *infra*.

11. As Coons, *et al.*, would have it, Proposition I presents a winning case only to the extent that it is at the same time modest, clear, flexible, and relatively simple. See Coons at 340–345. That it may be none of these things says more about the quality of its advocates than the relative power of Proposition I: in the face of several alternative propositions, they have merely taken the best now available for all situations and supported it by persuasive arguments. [Where race can be systematically tied to the disparities in per pupil expenditures, there may be a more powerful alternative. *See Hobson* v. *Hansen*, 327 F. Supp. 844 (D.D.C. May 25, 1971); and *compare Hunter* v. *Erickson*, 393 U.S. 385 (1968) with *James* v. *Valtierra*, 402 U.S. 137 (1971)].

12. The ultimate success, of course, is for Supreme Court acceptance of the proposition. But even if that is not to happen, much success can be gained by getting other courts and legislators to act on the principle before it is reviewed by the Court.

13. Beware the three-judge court decision that permits direct appeal to the Supreme Court for an immediate end to this particularly useful uncertainty.

14. *E.g., Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963); *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); and *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

15. Conceptualizing what exactly is involved in this new test has been the subject of much scholastic effort. *See, e.g.*, Cox, *Foreword—Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91,95 (1966); *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1120 (1969); Michelman, 83 Harv. L. Rev. at 34; Karst, *Invidious Discrimination: Justice Douglas and the Return of the 'Natural-Law-Due-Process' Formula*, 16 UCLA L. Rev. 716, 739 (1969).

16. *See* Sugarman at 397–409.

17. *See* Sugarman at 359–387.

18. For a few years, at least until *James* v. *Valtierra*, 402 U.S. 137 (1971), we had good reason to believe that wealth classifications were suspect. *See, e.g., Harper, supra* note 14.

19. *See, e.g.*, Supreme Court decisions cited in Sugarman at 359–409, *passim*, and *Hoosier* v. *Evans*, 314 F. Supp. 316 (D.St. Croix 1970); *Ordway* v. *Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971).

20. *See Shapiro* v. *Thompson, supra* note 14.

21. *See, e.g., Boddie* v. *Connecticut*, 401 U.S. 371 (1970) ("wealth"); *Palmer* v. *Thompson*, 403 U.S. 217 (race). *Compare Graham* v. *Richardson*, 403 U.S. 365 (1971) (travel and resident aliens). *See also*, Michelman; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205 (1971); Dimond, *School Segregation in the North: There is But One Constitution*, 7 Harv. Civ. Rts.-Civ. Lib. L. Rev. 1 (1972). Given these ambiguities, it would seem wise for the advocates of Proposition I to couch an alternative set of arguments based on education and some notion of ordered liberty, rationality, or fundamental fairness under the Due Process rubric. *See, e.g., Bolling* v. *Sharp*, 347 U.S. 497 (1954); *Meyer* v. *Nebraska*, 262 U.S. 391 (1922).

22. But *compare, Griffin* v. *Prince Edward County*, 337 U.S. 218 (1964) with *Palmer* v. *Thompson, supra* note 21; and *Evans* v. *Abney*, 396 U.S. 435 (1969). *Cf. Developments in the Law of Equal Protection, supra* note 15, at 1127–1129.

23. *See supra* note 14, for citations.

24. *Cf.* Michelman and *United States* v. *Carolene Products*, 304 U.S. 143, 152–153 n. 4 (1938).

25. *Compare* Kirp, *The Poor, the Schools, and Equal Protection*, 38 Harv. Ed. Rev. 635 (1968).

26. Indeed it is not clear in many states that children of "poor" families are singled out for disadvantage: many poor children reside in school districts—like San Francisco and New York City—which are considerably above the statewide average in tax base per pupil. The *Serrano* complaint, insofar as it relies on disadvantage to individuals, merely suggests that plaintiffs represent the class of all persons but those in the wealthiest school district. And that is a far cry from the particularized disadvantage to a relatively small number of people in cases like *Griffin, Douglas*, and *Harper*. (I should note that my heartstrings, judicial and otherwise, are motivated primarily by this windowdressing: if I had the power to declare a different Proposition I—perhaps, Coons, et al., will make it Proposition II—it would be that children of poor families should not have fewer dollars spent on their education per child than those of the rich. *See* Brief, *Amicus Curiae*, of the Center for Law and Education filed in *Serrano*. That means that any final value judgment I might make about the present Proposition I must await a *factual* examination,

state by state, of the coincidence of family poverty and district wealth, school tax rates and school expenditures.)

27. *Cf. Loving* v. *Virginia,* 388 U.S. 1 (1967) and *McLaughlin* v. *Florida,* 379 U.S. 184 (1964). I suppose Professor Michelman would even be tempted to agree that this constitutes a *de jure* wealth classification.

28. Some may question whether district effort is any more legitimate a criterion than district wealth for the allocation of educational resources: neither bear much relationship to the independent interest of children (and society) in their learning. *See* Kirp and Yudof, *supra* note 3, at 625–6; Dimond, *Toward a Children's Defense Fund,* 41 Harv. Ed. Rev. 346, 394 (1971).

29. *Supra* note 18. In an opinion by Justice Black, the Court upheld a California Constitutional Amendment that required community referenda on all decisions of public authorities to initiate low-income public housing developments in that community. The Court in *Hunter* v. *Erickson, supra* note 11, had held that a similar referendum procedure dealing with a race (rather than wealth) classification violated the Equal Protection clause.

30. 397 U.S. 471 (1970). In *Dandridge,* the Court upheld a Maryland-HEW regulation that placed a per month ceiling on the amount a single family could receive in welfare benefits.

31. This term the Supreme Court has the opportunity to prevent a gross abuse of particular poor children's independent interest in their education. In *Johnson* v. *New York State Education Dept.* plaintiff elementary children were deprived of all textbooks simply because they were too poor to pay the lending fee required by operation of state law. The district court refused even to convene a three-judge court, finding the claim insubstantial or foreclosed by prior decisions of the Supreme Court and dismissed the complaint. 319 F. Supp. 271 (1971). The Court of Appeals affirmed, Judge Kaufmann, dissenting. 449 F. 2d 871 (2nd Cir. 1971).
No more palpably imaginable deprivation of educational opportunity by reason of poverty exists except exclusion altogether from school. Perhaps, however, the situation is even worse: poor children sit bookless next to their wealthier classmates, directly stigmatized thereby as poor. I refuse to believe that *Valtierra* and *Dandridge* represent the total lack of concern of the Court under the Fourteenth Amendment for the poor necessary to uphold, or to refuse review of, this error. *Cf. Boddie, supra* note 21.

32. 402 U.S. at 142–3.

33. There is, of course, another possible reading of *Valtierra.* It could be maintained that the Court, in upholding the referendum in *Valtierra,* did so on the grounds that admitting low and moderate income housing would have had a deleterious effect on the tax situation in that community. However, that very deleterious effect is caused in part by the operation of present financing systems which Proposition I attacks. Therefore it is possible to allow for the decision in *Valtierra* and still conclude that the system of education finance must be changed; but to that extent, the underlying premise of *Valtierra* would no longer be operable. That is, it might be argued that within the present system the Court will uphold the referendum in *Valtierra,* because of its necessary consequences. That does not mean, however, that the causes of those consequences may not themselves be unconstitutional. Then *Valtierra* could be read as an urging by the Court to undo the underlying cause of the tax difficulty which would have resulted from the introduction of low and moderate income housing in the *Valtierra* situation.
Of course, while this reading may be logically consistent, it is mere wishful thinking, given the political composition of the *Valtierra* court, to believe that the Court went through such a reasoning process.

34. In 1957 a study of 36 standard metropolitan statistical areas suggested that central cities spent 31.3% of their total fiscal package on education as compared with 53% in the suburbs. A. Campbell and Sacks, *Metropolitan America* 118 (1967).

35. The counter of Coons, *et al.,* may be that such competition is great; Proposition I merely insures that, at least for financing education, it should be done so that all start with the same set of advantages. A more forthright response is that a child's education dollars should not be made to depend on whether his family is willing to have a factory as a neighbor or on the inability to move into a rich district because the family is black or poor and the rich district effectively excludes the family.

36. This interest in a state-created, and biased, market "free-for-all" is quite different from the state's interest in "subsidiarity," *i.e.,* allowing small local decision-making units to control the raising and expenditure of funds. The interest in subsidiarity obviously can be easily served by any variety of alternative "fiscally neutral" methods of financing education. Rather the interest in the market model meets the ethics of Proposition I head on. It represents an affirmative interest in what would be called—I believe properly—"naked privilege" by Coons, *et al.* My skepticism about the ultimate fate of Proposition I is merely that education probably will not be viewed by the Court as so fundamental as to require removing such a massive and firmly entrenched, sometimes judicially favored, wealth classification from the American landscape.

37. The California Supreme Court in *Serrano* went to great lengths to distinguish education from other services, and therefore to attempt to limit its declaration of unconstitutionality to the area of education alone. *See Serrano, supra* note 5, at 609–10.

38. In a forthcoming book Michelson and Grubb conclude that in Massachusetts the non-educational tax rate is a good measure of municipal overburden. They argue in support of the city taxpayer's claim: the non-education tax rate is non-discretionary, no matter how wealthy the district. *The Political Economy of School Resource Inequalities.* The National Educational Finance Project reached a different conclusion after analysis of a sample of school districts from eight states: "no persuasive evidence of the existence of 'municipal overburden' was uncovered." Johns, *et al., Alternative Programs of Financing Education* 98 (1971). *See* also, Dimond, *Reform of the Government of Education,* Wayne L. Rev. 1005, 1007 n.9, 1025–26 n. 69(1970).

39. *See* Johns, *Ibid.,* 83–99 (1971).

40. Michelson and Grubb have begun to undertake this task by examining the interrelationship among many variables including school tax rates, non-education tax rates, local school revenue per pupil, local revenue for non-education purposes, property valuation, state school aid, federal school aid, mean family income, average daily attendance, children from low income families, and population. Their work suggests many interesting interrelationships, causes, and effects. One of their most interesting conclusions is that "non-educational spending is, by and large, determined by factors beyond the control of communities, and tends not to be subject to discretion. Educational spending, on the other hand, is more constrained by the availability of fiscal resources. The school tax-rate will be lowered if non-educational requirements are high in burdened communities, while the non-education rate is not similarly affected by a high school tax rate." An implication may be that district power-equalizing for school finance might enable some rich "unburdened" districts to join the others in not being able to tax for schools in accord with their "real" preferences and free some poor districts to express a preference in the rate of their school tax.
Ironically, in a sample of 223 school districts in eight states, the National Education Finance Project found that major urban core cities in 1967 had higher market value of property per pupil than *any* other type school districts, including the suburbs. Johns, *et al., supra* note 38, at 91. Thus it is far from clear which types of school districts will be helped or hurt, and in what way, by the acceptance of Proposition I. *Cf.* notes 38 and 39 *supra.*

41. The one thing all children share in common is that each is a child. Ergo—it's so simple and fair—equal dollars per child, unless some *other* system of expenditure is necessary to promote a compelling state interest. Examples might

be compensatory education for the disadvantaged or special education for the mentally or physically handicapped. *Cf.* note 26 *supra.*

42. If permitted, the voucher, of course, might be spent at other than the present public school buildings. *See, e.g.,* Arons, *Equity, Option, and Vouchers,* 72 Teacher's College Record 3371 (1971).

43. Coons at 19–20.

44. How much more is not clear. Consider, for example, the following unanswered questions. Will poor districts make more effort? Or will rich districts treble their own efforts to maintain an expenditure advantage? If tax rates are raised, will property values go down and business leave, thus realtering the "wealth" of the district? Or will rich districts simply go out of business, thus insuring that poor districts will get relatively more tax dollars than the non-existent districts but perhaps no more dollars than before? Will the total dollars for public schooling per pupil go up or down? What would be the effect, and constitutionality, of a remedy in which dollars were distributed in proportion to the giftedness of the child? If family tax effort is chosen, who will try "harder" and under what rate of return? *See* Coons at 413–420; Sugarman at 452–462.

45. *See, e.g.,* Kirp and Yudof, *supra* note 3, at 629. *Cf. Hobson* v. *Hansen, supra* note 11; *Hawkins* v. *Town of Shaw,* 437 F. 2d 1286 (5th Cir. 1971).

46. *See* Center for Educational Policy Research, *Education and Inequality: A Preliminary Report* (1971) at 47–64. But *see,* Guthrie, *et al., Schools and Inequality* (1971); Michelson, *Principal Power, 5 Inequality in Education* 7 (1970).

47. Given the present ignorance about what systematically works to improve schooling outcome for the child, we probably cannot make any but arbitrary definitions about the "quality" of schooling and the "performance" of teachers.

48. Arguing for the irrelevance of money to the quality of education can, of course, be carried too far. There is, no doubt, a threshold level of expenditures that is essential to even begin decent education. *See* note 31 *supra.* There may be school districts today that cannot provide books, facilities, or teachers of any kind to all their children; to them the argument that quality and money have no relation must sound very hollow indeed. To the extent that re-shuffling of dollars within a state can help some school districts provide the threshold level of education expenditures, such re-shuffling will not be totally irrelevant to the quality of education those children will receive. But beyond this goal of guaranteeing all schools a minimum level of expenditures, I have some difficulty tracing the effect of mere re-allocation of funds in the larger battle of significantly reforming the present system of education in order to make it work better, especially for the poor and racial minorities.

49. That, of course, is *not* the primary ethic of Proposition I. *See* note 26 *supra,* for the corresponding definition of an alternative Proposition I. *See also,* Dimond, *Toward a Children's Defense Fund, supra* note 28, at 394. *Cf. Hobson* v. *Hansen, supra* note 11.

50. *Cf.* J. Coleman, *et al., Equality of Educational Opportunity* (1965).

51. *See* Cahn, *Jurisprudence,* 30 N.Y.U. L. Rev. 150 (1955).

52. *Cf.* Coons at 415–417, 419–420.

53. *See, e.g.,* Altshuler, *Community Control* 198 (1970); *Poindexter* v. *Louisiana Financial Assistance Comm's,* 296 F.Supp. 833 (E.D.L.A. 1967), *aff'd* 393 U.S. 17(1968); *Bradley* v. *Milliken,* 433 F. 2d 897 (6th Cir. 1970), 438 F. 2d 945 (6th Cir. 1971).

54. *See* Dimond, *School Segregation: There is but one Constitution, supra* note 21.

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