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## Serrano in the Political Arena

David L. Kirp and Mark G. Yudof

Education, despite assertions of professional neutrality by teachers and administrators, is a political process. While the political implications of such policy matters as student civil liberties and racial integration are clear, even as seemingly innocuous a matter as selecting textbooks may arouse the wrath of some organized groups if the books are assertedly “soft on communism,” or “culturally biased.” The locus of the political activity—the focal point for political discussion—is essentially local: while Washington may proclaim national aims (recall the brief national “right to read” campaign), and while such state education officials as Max Rafferty may become national political spectacles, essential policy questions are largely debated and decided in the superintendent’s office and the school board meeting room.

This inverse political pyramid—the locals running the show, state education departments providing technical assistance, the Office of Education watching from the sidelines—is not fortuitous. For it is the local officials who control curriculum policies, decide whom to hire, and—most important—raise and spend the lion’s share of educational dollars.

To be sure, as reformers have been telling us for at least the past decade, the vesting of fiscal control with local school boards is not fair: it enables the rich to get richer, with less tax effort; it leaves the poor struggling to provide minimal schooling, even after levying killing taxes. Yet life is not fair, and those who would undo the inequities of prevailing political arrangements in education have learned to their peril that mere recital of the system’s shortcomings leads exactly nowhere. “The more the more,” David Riesman once said, and that principle applies perfectly to this situation. Those who have benefited from the existing system—wealthy suburbs, cities with high tax bases—have been able to fend off proposed reforms, however cogently urged. It is in their political interest to do so.

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The decision of the California Supreme Court in *Serrano v. Priest*<sup>1</sup> intrudes directly in this political arena. For *Serrano* is not a policy report, or a recommendation made by a group of outside experts; it is a

court decision, which—if ultimately upheld—constrains political behavior in notable ways. Some understanding of that decision is necessary if its implications—with respect both to “the law” and to the inevitable post-*Serrano* political jockeying—are to be comprehensible.

In *Serrano*, the California Court held that that state’s plan for financing public schools was unconstitutional under the equal protection clause of the United States Constitution. The Court also concluded that the state’s financial arrangement violated a provision in the California Constitution similar to the federal equal protection clause, a conclusion that may enable the Supreme Court to decline review of the case. The Court found that students in poor districts were systematically denied equal treatment in the allocation of public resources for education.

The decision is of national significance: California’s approach to school finance, with its attendant complexities and inequities, typifies the schemes which are in effect in most states. Most education revenue is raised by local property taxes: for that reason, a district’s capacity to support education turns directly on the size of its tax base, the assessed valuation per pupil. The state makes limited equal dollar grants to all school districts, grants which in operation maintain disparities between rich and poor districts. While California has embarked on a program of “equalizing” grants designed to close the gap between districts, in fact poor districts are

guaranteed less than half the education dollars per student spent in the median district in the state. The effect of this system is that the distribution of public dollars for public education depends directly on the wealth of each school district. Predictably, in California spending varies from about \$350 per pupil in some poor districts to more than \$3000 per pupil in some wealthy districts.

The constitutional theory of *Serrano v. Priest* finds its genesis largely in the writings of Professor John Coons and his colleagues.<sup>2</sup> They assert that it is constitutionally impermissible for the quality of education to be a function of wealth other than the wealth of the state as a whole. "Quality of education" is defined in terms of dollars per pupil, and the thrust of their constitutional standard is that a family's or a district's economic means are illegitimate criteria for the state to employ in distributing funds for education.

The Supreme Court of California substantially adopted the Coons approach. It concluded that education—like voting, the right to counsel, and the right to travel—represents a "fundamental interest." It found further that students in poor districts received fewer dollars for education than those in rich districts, and required the state to offer a "compelling justification" for the existing funding scheme. The Court found no such justification—indeed, it is impossible to imagine any state meeting that burden—and for that reason overturned California's school finance laws.

In reaching its conclusions, the Court relied heavily on the significance which American society places on education. Public schools are commonly viewed not only as inculcators of the common culture or, in Dewey's phrase, as promoters of "civic efficiency," but also as legitimate instrumentalities for resolving political conflicts and achieving socio-economic mobility. This view is hardly inevitable: indeed, schools are frequently criticized both for imposing a common ideology, and for failing to serve as agents of social mobility. While many commentators have lamented what they deem to be an over-reliance on formal schooling as an indirect method of redressing essentially extrinsic social problems, the Court held that a child's education is a major determinant of his life prospects, finding support for this view in the universality and the compulsory nature of public schooling.

The Court also held that classifications that unequally burden the poor are constitutionally suspect when an interest as vital as education is at stake. Citing cases which struck down wealth requirements with respect to the criminal process, voting, interstate travel, and divorces, the Court found that the poor were entitled to similar protection in relation to public schooling. For this purpose, the Court accepted the plaintiff's allegation that poor children tend to live in poor districts.<sup>3</sup> It further held that discrimination against children—rich or poor—living in poor districts violated their equal protection rights. In so doing, the California Supreme Court firmly

recognized the peculiarly vulnerable position of all children, tacitly viewing children as a class deserving of judicial solicitude, regardless of their race or socio-economic status.

What, in practical terms, does it all mean? While some newspaper accounts would have it otherwise, *Serrano* does not portend a revolution in the allocation of public services. Indeed, what the case does *not* do may well be as important as what it does accomplish.

First, *Serrano* is not a judicial attempt to redistribute wealth generally; it does not hold that the pricing of all goods, with the concomitant denials to those who cannot afford the price, is unconstitutional. The bounds of the holding are limited to publicly provided education, and the court went to great lengths to differentiate that public service from others—such as housing, health, and income maintenance—for which similar claims of fundamentality might be made. To be sure, that limitation is not fixed for all time; persuasive arguments can be mustered for the fundamentality of, for example, health services or equally basic human needs. *Serrano*, however, does not take us that far down the road.

Second, *Serrano* does not mark the demise of decentralized decision-making. The Supreme Court of California has not mandated equal expenditures per child for every child in the state, nor has it intervened to fix political priorities within each community, deciding whether highways or schools or hospitals or police protection should be preferred.<sup>4</sup>

*Serrano* does demand rather important political changes in the way education dollars are raised. It recognizes what has long been understood: that only some communities really "control" their education. All of the supposed virtues of such control—choice with respect to educational expenditures, the opportunity to provide diverse schooling experiences—are luxuries available only to the rich. Poor districts do not choose to spend less for education; they do not value education less; they do not prefer other municipal services. Poor districts spend less on education because they are financially incapable of doing otherwise. Those districts which have been willing to make the greatest sacrifices for the education of their children are the very ones that have been penalized under existing state policies.

*Serrano* says to the state legislature: you have to change this inequity. Its mandate is fundamentally political, not educational. Will poor children learn more if additional dollars are spent on their education? Perhaps.<sup>5</sup> Will they be happier in schools which are as amply endowed as those of richer districts? The answer is the same; and the answers to these questions are not decisive. Inequities in the provision of a service as fundamental and as universal

as education demand justification, not because they "cause" educational harm but rather because they represent a continuing political insult, a declaration that the poor are not entitled to as much of the larger community's educational resources as are the rich.

The legislature's motives in establishing a financing system are irrelevant. Did Sacramento intend injury to poor school districts? Was it merely continuing an historical practice which happened to injure some? The Court does not care. It is the effects of California's financing scheme, not its purposes, that warrant judicial scrutiny. The effect demonstrated—the nexus between wealth and educational expenditure—is sufficient showing for the Court to hold the prevailing scheme unconstitutional.

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What sorts of changes are demanded? *Serrano* is modest—unobtrusive, if you will—in prescribing a remedy. In effect, it says to the legislature, "you cannot adopt a financing system which in operation makes the dollars available for education a function of the wealth of a community; beyond that, the choices are yours." And the choices are essentially limitless. A legislature could choose to centralize or decentralize either revenue raising or school governance; it could employ a state-wide property tax, an industrial property tax, an income tax; or it could opt for diversity or uniformity of educational experience, for compensatory education programs designed to aid students with particular deficiencies or for absolute equality in dollar expenditure. A legislature may choose to allocate funds on the basis of the characteristics of the consumers of the service, the children. Particular skills and handicaps thus may warrant additional funds. Such value preferences might include the educationally disadvantaged, the artistically talented, the physically handicapped, or the emotionally disturbed child.

Another alternative for financing the public schools which could be adopted in the wake of *Serrano* is an allocation of funds based on the characteristics of each school district. Obviously, a classification which rewarded districts on the basis of wealth would be invalid, but such factors as the number of pupils, the number of schools, the willingness of a district to make a greater or lesser property tax effort to raise dollars for education, and the degree of racial integration within the district could be considered in allocating money. Extra dollars could be distributed to communities where the cost of providing educational services (most importantly, the cost of paying teachers) is appreciably higher. Older industrial communities could be compensated for what economists term municipal overburden, the readily perceived (and difficult to identify) additional costs of such necessary municipal services as welfare, street maintenance and fire and police protection.

A state legislature might decide to make education funds available on the basis of family characteristics. If the family is poor, their poverty could be treated as a shorthand for the greater educational

requirements of the children in the family. Indeed, as Professor Coons has suggested, the family could be designated as the administrative unit for purposes of determining what degree of state aid it would receive, based on the family's income and the amount it is willing to spend on education; or dollars could be allocated to school districts, employing the specific educational and financial preferences of the individual families in the district as the relevant criteria.

Thus, the funding remedies which may flow from the *Serrano* decision are compatible with any legitimate state interest in educational governance.<sup>6</sup> For example, under nearly all of the foregoing plans, the legislature could allow local school districts to make educational policy choices and to exercise broad discretion to fund and administer programs. Alternatively, the state could require or recommend that districts fund specific programs and projects such as bilingual education classes, special education classes, science laboratories, kindergarten classes, or cafeterias. The state could also compel local school districts to make direct financial payments to families, thereby enabling them to purchase educational services at both public and private schools.

What are legislatures likely to do? The short answer, and the only one which we feel confident to assert, is that they will do something. Courts in other states will inevitably be confronted with lawsuits describing similar patterns of resource inequality; indeed, more than thirty such suits have already been filed. One can only speculate whether they will reach the same result.<sup>7</sup> The threat of being required, under court order, to undo state statutes is likely to encourage some states (or at least some legislators) to begin thinking seriously about the range of alternatives sketched above. The political log-jam has been eased, if not broken, by *Serrano*. While state legislatures are unlikely to indulge long in thinking the politically unthinkable (such as centralization of school administration), they will be concerned at least with patching up the prevailing system in a fashion that would pass judicial muster. The likeliest approach, in effect a reaffirmation of existing policies, would be to maintain a mixed system both for raising and spending school revenue.<sup>8</sup>

Will any of this affect the "crisis" in urban school finance? The answer is more inconclusive than one might expect. Poor areas—those districts which, because they lack either expensive residential property or concentrations of industry, have relatively low tax bases—will assuredly benefit. Rural communities are likely to be beneficiaries; so are older urban cities whose tax base has diminished as industry moved South, or to the suburbs. But—to return to California—Los Angeles and Oakland do not fit this description; their tax bases are relatively high. Higher still is San Francisco's tax base; that city, which intervened on behalf of the *Serrano* plaintiffs, is likely to suffer under the new state formula. The causes of the urban fiscal crisis in education—higher teacher salaries; concentrations

of students whose relative educational deprivation leads them to demand more from schooling; municipal overburden—do not have to be taken into account by legislatures, in satisfying the *Serrano* requirement. That is an issue around which one presumes cities will unite, in lobbying for state legislation that meets both their needs and constitutional requirements.

The impact of *Serrano* on the dollars available for the education of black, Chicano and Indian children is unclear for much the same reason. Those who live in what might be called “tax-poor” districts will be better off; those who live in cities with heavy concentrations of tax-paying industries will not necessarily benefit. Here again, actual political strength—and, preliminarily, the awareness of an issue worth paying attention to—becomes a crucial question in defining the effect of this constitutional decree.

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In yet another way, *Serrano*'s intrusion into the political arena of educational finance is limited: it does not speak to the obligation of local school districts or the federal government in securing equitable resource allocation within school districts. There is empirical evidence that school districts allocate substantially fewer dollars to schools in poor and black neighborhoods; indeed, within-district disparities may be as significant as disparities in a given state. In the District of Columbia, where in the reopened *Hobson v. Hansen*<sup>9</sup> litigation, Judge J. Skelly Wright recently reaffirmed the unconstitutionality of such unjustified (and indeed unexplained) inequalities, the poorest school received only \$150 per student, the richest more than \$1500. For the District as a whole, the poorest section (Anacostia) received significantly less from the District school board than the bulk of the city, while the rich, white area—west of Rock Creek Park—received significantly more. The issues here, just as in *Serrano*, are fundamentally political: the relatively small number of dollars available to the poorest schools suggests the limited political strength of poor parents. *Serrano* does not reach this issue. It says nothing about the expenditure of dollars by a particular district; it only assures equitable treatment for the district as a whole. A series of *Hobson*-type decrees may well be required before within-district inequities can be redressed.<sup>10</sup>

The federal response to *Serrano* will predictably be the least significant, both in terms of actual change and the impact of that change on school finance politics. Even such a relatively modest proposal as amending the Impact Aid Law (P.L. 874), which distributes dollars to school districts on the basis of the number of residents who live or work on federal land, is likely to be rejected by Congress. It does little good to remark that the purpose of impact aid—to relieve districts of the financial hardship imposed by the presence of non-taxable federal installations—is undercut by *Serrano*, which renders local tax-raising capacity irrelevant to the receipt of education support. P. L. 874 is pure pork barrel, and is likely to remain

with us. Other less modest proposals—restoring the Elementary and Secondary Education Act requirement of comparability<sup>11</sup> to assure that within-district spending of state and local funds is equalized as a condition of receiving federal education dollars; or, more radically, redressing inequities among states, by providing additional resources to those states which (like their poor district analogues) make a substantial tax effort but have an insufficient tax base to adequately support their schools—are likely to go unmentioned.

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In sum, *Serrano* represents a notable judicial step into the arena of education finance politics. It is a well considered step; it does not, as litigants in the earlier *McInnis v. Shapiro*<sup>12</sup> suit sought to do, involve the court in the tricky and unmanageable business of determining the educational “needs” of all children. It is a political statement and a statement of constitutional principle, as were *Brown v. Board of Education*,<sup>13</sup> *Baker v. Carr*,<sup>14</sup> and other notable holdings. It represents the judiciary at its best; and in doing so, suggests the limits of what courts can do. For just as educational finance questions were political before *Serrano*, they remain so in the aftermath of that decision. The ultimate resolution of these issues—the determination of the fiscal fate of cities, and of minority group children—rests with state and local political agencies. *Serrano* has made significant reform possible; it has not rendered it inevitable.

1. 5 C. 3d 584 (1971).
2. Coons, Clune, and Sugarman, *Private Wealth and Public Education* (1970).
3. The allegation is not self-evident. The correlation between personal poverty and a district's "tax poverty" is not a perfect one; indeed, data submitted in a *Serrano*-type suit brought in Texas suggest that for the middle-income ranges there is a relatively low correlation. For that reason, *Serrano* is distinguishable from *Griffin v. Illinois*, 351 U.S. 12 (1956), *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), *Shapiro v. Thompson*, 394 U.S. 618 (1969), and the other so-called "poverty cases," where the nexus between poverty and capacity to purchase services is more direct. On at least one other ground, the cases are distinguishable: In *Serrano*, poor districts are relatively less able to purchase educational services; in the *Griffin* line of cases, the incapacity is absolute (the poor man cannot purchase a transcript, obtain counsel, pay the poll tax, etc.). Both distinctions suggest that the "no wealth discrimination" standard proposed by Coons (and affirmed in *Serrano*) differs from that adopted by the Supreme Court in its "poverty classification" decisions.
4. The *Serrano* decision does of course have an impact on the legislature's capacity to set fiscal policy. If the legislature is prodded by a *Serrano*-like suit to increase state education appropriations (a likely response), then the state will be obliged either to increase state taxing, or to cut back some other state-supported program. *Serrano*, to put the point differently, imposes constraints on the legislature's ability to trade off expenditures on public goods.
5. The answer to this question turns in part on such political issues as the capacity of teachers' unions to secure higher wages in presently poor districts, thus using up funds which could otherwise expand programs or establish new ones.
6. Compare Title I of the Elementary and Secondary Education Act, which allocates funds under a formula based on the number of poor children in a district and which, nonetheless, finances services for all educationally deprived children—poor or not—living in poverty areas.
7. In *Van Dusartz v. Hatfield*, 40 Law Week 2228 (Oct. 26, 1971), a Minnesota Federal district court concurred with *Serrano*, upholding "the principle of 'fiscal neutrality'".
8. Data recently collected in California suggest that that state may be amenable to somewhat more extensive changes in education finance. 56% of California's citizens felt that school support should come primarily from the state; only half as many felt that local property taxes should be the prime source of support. (California Poll 6902, March 1969). More surprisingly, 83% felt that poor districts should receive as much money per pupil as rich districts. (California Poll 3281, 1967). Among that state's legislators, 94% feel that local property taxes cannot be increased to provide additional school support; 68% were "very concerned" with interdistrict inequalities; a majority specifically favored overhauling the state's tax structure (67%) and increasing the state's share of education costs (54%). Meltsner, Kast, Kramer, and Nakamura, *Schools, Politics and Money: A Study of Political Feasibility* (Unpublished paper, 1971). Such data does not, of course, describe or predict political behavior; it does suggest that basic revisions of California's educational finance scheme may be politically feasible.
9. 327 F.Supp. 844 (D.D.C. 1971), enforcing *Hobson v. Hansen*, 269 F.Supp. 401 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F. 2d 175 (D.C.Cir. 1969).
10. At least two such suits have been filed, in San Francisco and Chicago.
11. See Yudof, *What Happened to Comparability? 5 Inequality in Education* 22 (June 30, 1970).
12. 293 F.Supp. 327, *aff'd mem. sub nom. McClinnis v. Ogilvie*, 394 U.S. 322 (1969).
13. 347 U.S. 483 (1954).
14. 369 U.S. 186 (1962).

