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Part I

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Serrano Symposium– The Death Knell to Ad Valorem School Financing*

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RICH SCHOOL districts have tended historically to dominate educational politics. Thus it has been extremely difficult for poor districts, even with astute and vigorous political representation to put together a package of votes which really count in any legislature. The reason, I believe, is not merely the money and power of the rich districts. The middle-income districts are the key districts that have repeatedly held fast to the idea that they have little to gain from reform and something to lose. They feel, since they had heard most of the reformers talk in terms of centralization, that reform would mean a diminution of local control over their school districts. They have not been eager to link their common cause with the poorer districts and, consequently, legislative action has been unlikely.

Perceiving the structural immobility of the legislatures, courts have found justification for intervention on the basis of the "suspect classification" and "fundamental interest" involved in these cases. There is of course some precedent for this. The suspect nature of wealth can be seen in a number of criminal cases involving the right to counsel and trial transcripts and the poll tax cases. School finance cases provide a similar example. In the end it is clear that the plaintiffs in the school cases have operating for them the vast disparity in economic power from district to district.

One of the responses by defendants to this disparity in wealth is "yes, districts are radically different in their economic power, but

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the cases on which you rely are cases involving personal poverty not collective power." Now concededly that is a difference. However in *Bullock v. Carter*,[1] a recent Texas case involving the payment of primary fees, the force of the argument is reduced. *Bullock* talks in terms of the poverty of *groups* of voters that are injured by the Texas requirement of large fees in order to enter the primary. Furthermore, it is not clear that the difference here is harmful to plaintiffs.

Plaintiff's lawyers in *Serrano*[2] claim that collective wealth is actually an advantage to the plaintiff, since it is a wealth that is state defined. The state has drawn the boundaries, it has created the agencies, the school districts, which are rich and poor. This is perhaps a slight exaggeration. Nevertheless, in an important sense, it is a state created wealth and poverty. Courts that have spoken to this issue have emphasized that the state is more deeply involved in this matter of wealth than it was in the poverty found in *Griffin v. Illinois*[3] or the pool taxpayers in *Harper v. Virginia*.[4]

The next step is very important. The nature of the interest involved often triggers a special kind of judicial solitude for the plaintiffs. This notion of fundamental interests triggering special judicial solicitude is not a clear one to me. I do not entirely understand it, but it is certainly one which is with us and is going to be with us. The court has talked repeatedly about the special character of voting, about the special character of the criminal process, as well as other kinds of special interests. It has talked about their fundamentality and how careful it will be to see that there is fairness in the dispensation of burdens and benefits respecting those kinds of interests. We do not know whether or not education will qualify as "fundamental," though we do know that it qualifies with the California Supreme Court and the other courts who have spoken thus far. The United States Supreme Court has a history of interest in education and it has occasionally spoken as if education was fundamental in a special Fourteenth Amendment sense. The *Brown*[5] case is, of course, the most famous example. The fact is however, the court has never clearly stated that education alone is a fundamental right. It de-

[1]405 U.S. 134 (1972).
[2]Serrano v. Priest, 5 Cal. 3d. 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971).
[3]351 U.S. 12 (1956).
[4]383 U.S. 663 (1966).
[5]Brown v. Board of Education, 347 U.S. 483 (1954).

pended upon race in the *Brown* case and its sequels. What we can say is that education invokes some very special kinds of ideas and concepts that are not associated with other kinds of municipal activities. This is important in two ways. First, it reinforces the fundamental aspect of education and secondly, it makes it possible to distinguish education from other municipal services. Education, unlike sewers I hope, is a right or an interest of the intellect; we are talking about the human mind and the human spirit. The state deliberately undertakes to educate and to shape the personality of the child. Once one notices that this is what the state is doing, it must be recognized that the state is in First Amendment territory. We are talking about speech, politics and freedom of the mind. There are many cases which provide at least plausible analogies to the kinds of intellectual impositions and opportunities that one can identify in public education. Now it may be said that this is different from the free speech cases in many respects; the state is actually trying to educate the child. It is not as if the state were withholding education and totally frustrating a child's right to knowledge. And it is not as in *Tinker*,[6] an arm band case, in which the state is trying to prevent the child from speaking. The child here is not the speaker, the child is the audience. But even given the fact that it is an audience case, even given the fact that it is a case in which the state is actually trying to carry out an educational function to some extent with respect to this audience, the First Amendment issue remains, because there is still the element of discrimination.

It is entirely possible, at least to scholars like the late Mr. Justice Black with his concentration on discrimination in access to speech, that the state has a special responsibility to see that all children have an opportunity to learn and that such opportunities are fairly distributed. Even if all this is true, what about the competing state interests? Given the fact that education may be fundamental, and that you would expect children to have equality of opportunity in this very special kind of right, the states do have some interests which are involved. The interest which the state has asserted most vigorously thus far, is local control. The difficulty with the state's position has been that the state really is not, under the present system, offering local control as a systematic part of public education. It is wrong to suppose that districts which are so poor that they cannot raise

[6]Tinker v. School District, 393 U.S. 503 (1969).

money above the foundation level, and whose programs are largely mandated by the state, have local control. Perhaps it could be said that there are really two systems, one in which rich districts do have local control because they can decide what kinds of different programs are desirable and one where poor districts can only decide to meet the state-mandated minimum. But whether the present system represents a state interest in local control or not, the state can still enjoy that interest without dispensing education according to the wealth of the district.

There are many systems in which local control may be preserved, and which do not dispense money according to the wealth of the school district. We like to call the decentralized systems which operate this way "power equalized." Power equalizing works essentially in the following manner. The state says to the districts "we will no longer have you spend according to your wealth but only according to your effort." It is arguably, a translation of the protestant ethic into public school finance. Effort rewarded is the principle; if you like education enough to work hard for it by taxing yourselves you shall have more to spend. The less you tax, the less you spend.

In practice, this works in many different ways. Imagine a system in which the state simply redesigns the districts geographically through gerrymandering, or shall we say, fiscal reapportionment. The state draws the boundaries of the districts to make them as nearly as possible equal in their capacity to raise money. Now that is a difficult thing to do, but it is not so difficult if you combine redistricting with a local tax base which no longer includes industrial and commercial property. If you split the tax role and eliminate all the industrial and commercial property from the local tax base, taxing it state-wide at a uniform rate, you would have squeezed the spectrum of local district wealth to about one twentieth of it previous size in many states. Given that kind of relatively narrow spectrum of local wealth, it is not difficult to design a new system in which the same tax rate will produce the same spending in every district in the state.

Where does it all stand now? The Supreme Court of the United States holds the answer. *San Antonio v. Rodriguez*,[7] was argued in October. It is anybody's guess as to who will win. There is a chance that the decision of the three-judge court of Texas will be affirmed.

[7] *Appealed from* Rodriguez v. San Antonio Independent School District, 337 F. Supp. 280 (W.D. Tex. 1972).

However, if *Rodriquez* is lost in the Supreme Court, there is every reason to expect two surviving effects of the litigation. One will be an occasional victory judicially in state supreme courts. It is my personal conviction that the California Supreme Court will protect *Serrano* from extinction under the California constitution. I cannot believe that the strong majority that was produced there and their powerful commitment to this principle is going to evaporate simply because the Supreme Court of the United States disagrees. There are other state courts which show a similar inclination. Wyoming, without being asked, adopted the *Serrano* principle; Michigan is pondering it, New Jersey, likewise.

In addition, it appears that something has touched the interests of a larger community in these cases. There is a sense of outrage which hitherto was nonexistent. The reason perhaps is that the present system, having survived untouched over the last hunderd years, was so incredibly complicated and was so much the domain of the experts, that people heretofore could not or did not bother themselves to understand what was going on. This has changed somewhat. The new concern is not going to mean full-blown reform, it is not going to mean fiscal neutrality in the sense that *Serrano* and *Rodriguez* imply. But, it will mean that people like you will legislatively design newer and fairer systems irrespective of what happens in the courts.

PART II

James W. Beebe*

THE TITLE given to our panel discussion—"*Serrano v. Priest*: The Death Knell to Ad Valorem School Financing?"—reminds one of a cable Mark Twain sent from London to the Associated Press after learning that his death had been announced in the newspapers. The message said that "the reports of my death are greatly exaggerated."[1] As many have observed, the decision in *Serrano v. Priest*[2] did not hold the property tax as such to be unconstitutional. What *Serrano*

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[1]Cable from Mark Twain to the Associated Press, 1897.

[2]5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971), *modified*, 5 Cal. 3d 884a (November 9, 1971).