

I'd just like to close by saying that what we ought to be doing here is finding answers to the educational financing problems of all our children attending private and parochial as well as public schools. They've been short-changed long enough.

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1. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
2. *Id.* at 593, 487 P.2d at 1246, 96 Cal. Rptr. at 606.
3. *Id.* at 594, 487 P.2d at 1248, 96 Cal. Rptr. at 608.

Steven Sugarman:* I have entitled my comments "The End of Public Education as We Know It," because this cry is coming from some quarters regarding the California Supreme Court's decision in *Serrano v. Priest*.¹ Interestingly, it is coming from both sides. Some people who think the public schools today are fine fear that *Serrano* will mark their downfall. Others who feel there is a lot lacking in the public schools hope that with *Serrano*, and other cases like it, we can get public education to address itself to the long advocated goal of equal educational opportunity. Hence, the "end" if it comes, will be greeted with mixed cheers.

I will talk briefly about how we finance schools in this country. In practically all of our states, state government says to school districts, "We will guarantee some minimum level of education for each of you. By that, we mean we will guarantee you some minimum amount of spending. After that, it is up to you to raise through local property taxes any additional money that you want for your schools." In California, for example, the minimum that the state guarantees is approximately \$400 a pupil² and that number is fairly typical for the country as a whole.

What do you suppose happens? In rich places like Beverly Hills, the district adds on perhaps \$800 or \$1000 extra, so that they spend maybe \$1400 a pupil.³ In poor districts like Baldwin Park, although the tax rate is more than double that of Beverly Hills since they don't have much property wealth, they are barely able to raise \$200 or \$250 more; they wind up with some-

4. In a footnote to the *Serrano* opinion the court concluded "[O]ur analysis of plaintiffs' federal equal protection contention is also applicable to their claim under these state constitutional provisions" referring to the sections in the California constitution which together have been interpreted to constitute a California equal protection clause. *Id.* at 596 n. 11, 487 P.2d at 1249 n. 11, 96 Cal. Rptr. at 609 n. 11.

5. *Griffin v. Illinois*, 351 U.S. 12 (1956).

6. *Harper v. Virginia*, 383 U.S. 663 (1966).

7. *Bullock v. Carter*, 405 U.S. 134 (1972).

thing less than \$700 a pupil to spend. This dramatic difference is the way of life for hundreds of thousands of children in California and elsewhere.

No one has challenged the right of parents to add on out of their own pockets for the education of their children. No one is suggesting that it is unconstitutional for parents to send their children to summer camp, to give them music lessons, to have them go to tutors or to have anything like that. In this country that aspect of free enterprise democracy clearly exists; private benefit to your children is one of those things you have a right to bestow.

What's being objected to, however, is a state-created school finance system, whereby the state sets up districts, gives them the power to tax, and then lets them have different amounts of resources per pupil to tax. This state action is the kind of discrimination which, it is alleged, violates the Equal Protection Clause of the Fourteenth Amendment. This is what *Serrano* held; it also held that the system violates the California constitution.⁴

Analogies relied upon stem from U.S. Supreme Court cases in other fields that hold it's not fair for wealth to be a hurdle when something very important is at stake. For example, there is the case which holds that a state may not require an indigent to pay for the transcript of his criminal trial because this too endangers his opportunity for a fair appeal.⁵ Similarly, the Court has said a state may not condition the right to vote on the payment of a poll tax;⁶ nor may a state condition the right of a person to run for office upon the payment of filing fees because the rights of the indigent who wants to run for office and of poor people who want one of their own to appear on the ballot are effectively infringed.⁷

Just as these fundamental rights cannot be conditioned on money, proponents seek to have

public education viewed by the Court as so fundamental that it, too, may not be conditioned on wealth. That is, the vast differences in local property wealth which the state allows to dominate the financing of public education should no longer serve to provide better public education to some children and worse to other children.

8. *James v. Valtierra*, 402 U.S. 137 (1971).

9. *Dandridge v. Williams*, 397 U.S. 471 (1970).

10. 337 F. Supp. 280 (W.D. Tex. 1971), rev'd, 406 U.S. 965 (1973).

The case isn't cut and dried. Arguments on the other side seem largely based upon Supreme Court cases involving housing⁸ and welfare,⁹ which the Court has characterized as important but not fundamental. The Court seems to differentiate between economic and social interests on the one hand, which the state may deal with in a merely rational way, and more fundamental rights on the other. In cases involving the latter, the state is held to a very strict standard and may not condition them upon wealth. Hence, the main issue is whether education is close enough to voting, to contesting for office, to free speech, or to other essential First Amendment and Bill of Rights interests. The other side says education is no more fundamental than housing.

The debate can be reduced to the issue of whether education is seen as good for your head or merely good for your stomach. I suggest, that while it may be good for your stomach because it will help you get a better job, what makes it crucial is that it's also good for your head because it helps make you the kind of citizen that we need in this country.

In 1973 the Supreme Court will decide the question. Shortly following *Serrano*, a three-judge federal district court in *Rodriguez v. San Antonio Independent School District*¹⁰ announced that the Texas school finance system is unconstitutional on the theory that I've described. The district court has given the Texas legislature two years to come up with a new plan which is not wealth-discriminatory. This decision was rendered after a full trial on the merits and is in

11. *Serrano* was an appeal from defendants' successful motion to dismiss.

12. On March 21, 1973, the U.S. Supreme Court, in a 5-4 decision, reversed *Rodriguez*.

13. See 1 FLEISCHMANN REPORT ON THE QUALITY, COST, AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION IN NEW YORK STATE ch. 2 (1973).

14. See 1 FINAL REPORT TO THE SENATE SELECT COMMITTEE ON SCHOOL DISTRICT FINANCE (1972).

15. This is a label which my colleagues, Prof. John Coons and Prof. William H. Clune, and I gave to plans earlier initiated by Prof. Charles S. Benson; see J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970).

contrast with the California decision which was merely a preliminary announcement of a legal principle.¹¹ The Supreme Court will hear *Rodriguez*.

Various interests are already lining up through amicus briefs. I am filing an amicus brief on behalf of the Serranos. California's Superintendent of Public Instruction, Dr. Wilson Riles, is filing a brief on our side as are others, including a number of governors. On the other side, amicus briefs are being filed by wealthy suburban school districts, a group of state attorneys generals and others who think that the present system is constitutional.¹²

Alongside of this litigation have come substantial efforts at the state and national levels to reform school finance regardless of court orders. In New York, the State Commission on Cost, Quality and Financing of Elementary and Secondary Education, the so-called Fleischmann Commission, has come out for full state financing of elementary and high schools.¹³ Local administrative control of schools would continue, but there would be no additional local school taxation.

In California, a recent report to the California Senate Select Committee on School District Finance suggests that we do not go directly to full state assumption of school costs but rather adopt a system that allows local add-ons in a manner which is not biased in favor of the rich school districts.¹⁴ That is, through additional "state aid," poor districts are enabled to raise extra school dollars as easily as rich districts can. The system is called district power equalizing.¹⁵

Please note that the continued use of property taxes, at least in some form, is not at stake in these cases. We can still have local property taxes under a district power equalizing plan; and we certainly can have state property taxes. They may be unwise as a matter of tax policy, but they're not being challenged by these cases.

Finally, I'd like to comment on the possible application of the *Serrano* principle—that a fundamental interest such as education cannot be parceled out on a wealth discriminatory basis—to other municipal services. There already has been a suit filed in the San Francisco area suggesting that rich communities can afford better police protection than poor communities and, therefore, under the *Serrano* doctrine this is unconstitutional. Poor communities, it is said, ought to be aided by the state so that they, too, can afford quality police protection. It's a very interesting proposition. The first issue, as I see it, will be to decide whether police protection should be considered a fundamental interest.

These are very difficult cases to decide. Although Mr. Justice Rehnquist, in one of his first opinions on the bench, bemoaned the fact that in these kinds of cases judges are making value judgments, it seems to me that there is no way getting around having courts make them.¹⁶ Constitutional decision-making under the equal protection clause has necessarily become too complex and important a process for courts to try to fashion easy black and white decision rules. If this makes judges more active policy makers, I think there is nothing we, as lawyers, can do about it, except to argue the issues creatively here as we would on any other question.

Norman Karsh:* I'm very proud of the final report of the President's Commission on School Finance¹ for at least two reasons. First, I'm willing to bet that it's the smallest report ever put out by a presidential commission. It's less than 150 pages, and it should take about one hour to read. I would recommend that anyone interested in education obtain a copy of the report. It is available from the Government Printing Office and it's called "Schools, People and Money." The second reason for feeling proud is that the Commission reported on time—there was no extension of the life of the Commission.

16. *Weber v. Aetna Cas. Ins. Co.*, 406 U.S. 164, at 179 (1972) (dissenting opinion).

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1. THE PRESIDENT'S COMM'N. ON SCHOOL FINANCE, SCHOOLS, PEOPLE, AND MONEY (1972).

“School finance” is a most misleading title. It’s everything that’s been said by the previous speakers, but it includes much more. Let me mention some of the things the Commission felt had to be considered before any recommendations for national direction in school finance could be made.

A major consideration is what is commonly called the governance of education. This involves such questions as: Who is responsible for determining the level or allocation of resources for schools? Where does that power reside? Does any level of government decide what should be spent for education?

Quite frankly, there is no single source or authority that makes such decisions. Funds spent for education come from a variety of sources and each source renders its decision within its own sphere of control. If it were desired that resources for education should be doubled, tripled, cut in half, or allocated in any different manner than is now the case, it would be virtually impossible to do so. Further, there is no single authority to hold responsible for decisions made which affect the total level to be spent for education.

What does exist, is a shared-cost arrangement between state and local governments, with the federal government providing a small part of the resources that go to schools. What does not exist is a single public body or official that can be held responsible for financing elementary and secondary education in each state. Education has often been cited as functioning as a fourth level of government, highly political but, never-the-less, removed from the normal political decision-making process. That situation creates one critical issue that must be dealt with in any review of school finance.

A second consideration, and an area that’s been mentioned by Superintendent Riles, is that school finance is just one part of public finance.

In its larger perspective, it involves an entire revenue system, a choice of tax sources and a choice of levels of government to utilize various tax sources.

2. OFFICE OF EDUCATIONAL RESEARCH, UNIVERSITY OF NOTRE DAME, ECONOMIC PROBLEMS OF NON-PUBLIC SCHOOLS (1972).

There are three major revenue sources— income, sales and property taxes—and there are a host of public functions in addition to education, that compete for the resources from these taxes. While Mr. Sugarman made the point that education is a “compelling interest” of the state, it is only one area of public activity which is in competition for public money.

We have a federal system of taxation, a state system of taxation and a local system of taxation. While each has its own characteristics, they all operate in relationship to each other, and a significant change in one invariably affects the other. Much of the recent discussion on tax reform has included the local property tax. This tax currently serves as the major source of funds for schools, and any change in the financing of schools which lessens the dependence on local property taxes could be the catalyst for much of the reform that may take place over the next ten years in terms of who taxes what and for what purpose.

Still another consideration of school finance is the matter of the relative costs of providing an education to students. It's obvious that educational services cost more to provide a comparable education for a person with a learning handicap than for a person whom we consider “normal.” And who would deny that it costs more to provide an education for a physically handicapped child than it does for someone who has not been afflicted? These also are things that have to be examined if we are to know what school finance is all about.

The subject of school finance cannot ignore the issues raised by the existence of non-public schools. Ten percent of the children in this country attend these schools.² That is a healthy

3. THE RAND CORPORATION, HOW EFFECTIVE IS SCHOOLING? (1972).

segment of American education which must be considered not only in terms of the finances that may be allocated from public revenues, but also in recognition of the fact that education affects everybody. We are a highly interdependent nation with great population mobility. Children educated in one state may eventually live and work in another, and whether they attend public or non-public schools, the impact of what they learn and how they apply it, is felt throughout the country. On this issue, constitutional considerations must play the deciding role.

Then there is the issue of what we are getting for our money. We're spending one heck of a lot of money in education, and the amount is sky-rocketing. Are we getting services rendered commensurate with the dollars paid? That is a big, open question.

It has been generally believed that fewer children in a classroom result in improved education. Well, that's not necessarily true. As a matter of fact, in one particular study³ done for the Commission, every piece of research and every study in this field was reviewed in terms of varying class size and of varying all resource in-puts into a classroom. They were examined to see if there's any evidence that, in fact, additional resources per child provide better quality education. Ignoring the extreme cases of, say one child per teacher as compared to 100 children per teacher, but within the range of 18 to one and 35 to one, the conclusion reached by the study was that no single element or item led to a difference in the achievement level of children—a startling conclusion.

The Commission was very concerned about equal educational opportunity and quality education. The Fourteenth Amendment to the U. S. Constitution, and the basis for the *Serrano* decision, pin-points this issue. What do we owe our children, all of them, in terms of equal opportunity and in terms of a quality education?

The Commission first tried to define what it meant by equal educational opportunity and quality education. Without a definition and without some means of quantifying it, we felt we would be dealing with extremely subjective and nebulous concepts. For its own purposes and, hopefully, for the assistance of others who may wish to do the same thing, the Commission did define the concepts. I won't go through it all, but again, it is to be found within the relatively few pages of the report.

4. *Serrano v. Priest*, 5 Cal. 3d 534, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

What I have told you so far should provide you with the background of how the Commission approached its assignment. Now, let me tell you about our findings and recommendations.

The Commission concluded that it is the state level of government that must bring about the reforms that are most necessary, not only for school financing, but in the delivery of education equally throughout the state. The state government, pre-eminent in the field of education, has to be the agent of change if there is going to be any change at all.

Quite naturally, the most important recommendation of the Commission concerned the method of financing schools in the states. I believe that it is important to note that while the *Serrano* decision⁴ was announced in the middle of our deliberations, it did not change the direction of our thinking. Its main effect was to reinforce our views.

The context in which the financing recommendation was made should first be explained. There are essentially two possibilities. One is a continuation of the shared-cost arrangement whereby local school districts raise what they can and the state adds to it, hopefully, in a manner that minimizes extreme disparities in local wealth. The other possibility is to have the state provide all, or predominantly all, funds required for the schools.

5. J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970).

Under a shared-cost arrangement, there are two alternatives. One would be to reorganize the school districts so that local taxes, equally applied, would generate approximately equal resources around the state. If tax bases were approximately equal, it would minimize wealth disparities amongst the school districts. It didn't take much time to see that this approach would involve the most horrendous gerrymandering that ever could take place and the Commission discarded that alternative out of hand.

The other alternative under a shared-cost arrangement is the one developed in the book that Steve Sugarman co-authored, *Private Wealth and Public Education*.⁵ This is the "power equalizing" concept which would equalize financing of schools amongst school districts. In its simplest form, this means that given levels of local tax effort would guarantee a given level of return. What would be generated locally, if below the guaranteed level, would be augmented by the state. We did not choose this method as our preference because we felt that it did not speak to some of the other Commission considerations I have mentioned. Nevertheless, power equalizing could be a viable approach, if states were to select this approach.

Under a full-state funding concept, there are also some variations. One possibility is equal dollars for all—a kind of "one dollar—one pupil plan." But I think that it is obvious from what I have already said that this was discarded as impractical, as equal treatment of inequals certainly does not bring about equality of opportunity. We adjusted this concept, however, to take into account the varying costs of education around the state. If equal dollars were adjusted to provide for the actual cost of buying equal educational services, it would overcome the major objection to the concept and provide a favorable alternative. But this still left unspoken the problem of relative needs of differing children such as the physically handicapped, learning difficulties amongst children, and other special educational problems.

Another alternative considered was the voucher plan. The Commission agreed with the view of Superintendent Riles that this would not be a viable way of financing public schools.

Our recommendation then, was a predominantly state-financed system of education that would have the state responsible for raising virtually all the revenue and distributing it on a basis that incorporated the cost of education and relative educational needs.

Let me mention at this point that "educational need," though generally accepted by most people as a reasonable consideration in financing education, has not been accepted by the courts. The difficulty of quantifying a subjective concept such as this and then obtaining general acceptance of the measures or factors reflecting such quantification has impeded its application. But this may be more a shortcoming in our knowledge than in the concept itself.

Now more about our recommendation. We have all heard of a cost-of-living index. There are numerous economic studies that deal with its development and its application. We have labor unions that bargain to have their salaries adjusted in accordance with changes in it. Why not a cost-of-education index? With the knowledge that is currently available, I believe that it would not be a difficult undertaking to develop one, and we recommended strongly that every state develop one and that the federal government assist them in doing so.

Regarding a relative educational need index, some work recently done by the National Educational Finance Project—an Office of Education funded research project with the University of Florida in Gainesville—provides an excellent base for states to work with. Their work involved the development of such an index and it could be adapted to each individual state's need.

To implement our recommendation, we sug-

gested that local school taxes be phased out and that state revenues be used to replace these funds, in at least an equal amount. We felt strongly that the states should choose their own tax systems. In spite of the fact that we felt uncomfortable with the local property tax for schools, we did not recommend that all states move away from property taxes. As a matter of fact, there was a significant body of opinion that wanted the Commission to come out strongly for a state property tax. Personally, I favored that, for several reasons, and in at least an amount that would replace fifty percent of current local school revenues. But, we didn't go that far. There are states which do not have an income tax and to move from the property tax to an income tax—or a sales tax—would have been to mandate their tax policy. In the federal system of government, this was felt to be inappropriate. Instead, we recommended that each state decide what system of taxation would best serve their need as they move from local funding to state funding for schools.

We recommended that no school district receive less resources than it had before the transition began. In other words, we felt it wrong to take away from an educational offering something that's already satisfactory and to require any school system to arbitrarily cut back its program.

We recommended that the federal government provide financial incentives for states to move from local to state financing by providing approximately 25 percent of all local resources now being devoted to education. That's roughly \$5 billion, which would be over and above the existing level of state and local money now devoted for this purpose.

To provide for some degree of local enrichment, we also recommended that local school districts be able to augment the state's allocation by a maximum of ten percent of what the state provides. This should not be required or neces-

sary for an adequate and proper education, but permissible if the local district desired it. In light of the legal considerations now existing, we were not sure that such a local add-on would be appropriate, but we did not feel that a school district should be absolutely precluded from doing so. Our reasoning was based on the feeling that two very basic philosophies were at work in this situation; liberty and equality. When carried to their extreme, they become contradictory. There must be room for the exercise of individual freedom to operate within our system of government, and by the same token, we must recognize the equal rights guaranteed by our Constitution. Somehow, there has to be a balance, and the ten percent local option was an attempt to bridge both concerns.

Another major recommendation of the Commission was the initiation of a special urban education assistance program that would help both public and non-public schools in the inner-cities of the country. Roughly 20 percent of the school population in the urban centers of this country come from non-public schools.⁶ There are enough problems in the cities of this country without aggravating them. The cities are facing critical situations and education is but one of them. Non-public school children and their families are an integral part of urban life. Some have said that the existence of the non-public schools is a major reason for families whose children attend them to remain in the city. We recommended a federal program at a level of at least one billion dollars annually for at least five years to help in this area. Recognizing the constitutional issues pertaining to the non-public schools, we recommended that the funds and services flow through the public school system as they currently do under Title I of the Elementary and Secondary Education Act of 1965.⁷

I would like to make one last point. We all have read in the newspapers about the financial problems of the schools, particularly in the

6. ECONOMIC PROBLEMS OF NON-PUBLIC SCHOOLS, *supra* note 2.

7. 20 U.S.C. §§ 821 note, 241a note (1965).

large cities. Schools in New York, Chicago, San Francisco, Detroit, Los Angeles, to mention just a few, have had to close down before the full term expired, or are threatening to do so. I submit that the primary cause of these problems results from the shared-cost arrangement in those states for supporting elementary and secondary education. Contracts for instructional salaries, negotiated locally, are being entered into without the money to honor them. Local school districts have not had the money available to them to support their part of the agreement. But they conduct the negotiations, complete them, and then run to the state capital for help to bail them out. That help does not always come.

In my judgment, that best describes the major problem of financing schools throughout the country. As long as we continue to finance schools under the shared-cost arrangement, with local school districts paying the major share, we can expect our financial problems to remain with us.