Rodriguez Redivivus

John E. Coons

[Documentation will be enriched in the final draft.]

Professor Liu has generously invited me to recall what I can of the conception and incubation of what I will call the *Serrano*[1] idea, then to comment on its fate in *Rodriguez*[2] and its current significance, if any. I am instructed to be personal, informal and brief; of these I promise at least two. I see no harm in recalling youthful intellectual fancies and their bearing on specific choices of strategy; litigation that aims to alter large institutions commonly is affected by eccentricities of the lawyers who design it. I will confess what I remember of my sins.

As I come clean regarding these utopias of my yesterday, I warn against their easy attribution to Clune and Sugarman. They have sins enough of their own to answer for. True, we worked together closely enough to be labeled occasionally as Sugarcloons or Clugaroons. I doubt that we harbored ideological secrets from one another, and my own use here of the pronoun "we" is appropriate as well as unavoidable. Still, our little project never aimed to prescribe any specific public policy for education, but only, by prohibiting one baneful practice, to invite legislators to rethink the whole. Minds with very different or yet unformed hopes can make such marriages of constitutional convenience; and describing that tactical side of our triad will suffice for our purpose here. Note that the *Serrano* approach gained at least grudging collaboration from very diverse and conflicting sorts of lawyers. Most, I suppose, had their own policy goals but accepted *Serrano* pro tem as the wedge for these remote aspirations which otherwise lacked access to politics. Others, of course, faulted *Serrano* precisely as legal strategy.

[1] Serrano v. Priest, 487 P.2d 1241 (1971)

[2] San Antonio Independent School District v. Rodriguez, 411 U.S. J (1973)

I'll note these competing constitutional views and their justifications in Part II; the subjective appeal these represented to their respective champions I'll leave to others.

So I begin. My own introduction to the finance problem was dramatic. In 1961-62, by sheer chance, I was engaged to survey Chicago public schools for the U.S. Commission on Civil Rights. I undertook to assess both the racial patterns of enrollment and their relation to the distribution of resources. While scanning the intra-district picture, I took the occasion to glance at the underlying state finance system. In its dependence upon districts of different capacity it seemed at war with its own professed objectives, and, in my 1962 report, I flagged it as an institution ripe for constitutional assessment.

I met Clune and Sugarman the following year. They were college seniors. In those days I dispensed scholarship resources at Northwestern for prospective law students who were specifically interested in the relation between law and the social sciences. Some of this welfare I deployed to lure the two men, and, in 1964, they came. Under whatever insidious influence, by late 1965 they were warming up to investigate and describe the several basic finance systems. They took charge, mastered this awful stuff, then taught me. Only when they had mapped the technical jungle could we together identify and assess the alternative ways in which lawyers might display to a court exactly what was wrong with it all in a specifically constitutional sense. This weak spot might not be obvious. An instinctive revulsion to differences in spending for the same function does not translate directly into theory.

Or, so we then believed. What a sensitive court would prefer, we supposed, was the light-fingered touch of a professional cracksman, one who deftly unshackles a paralyzed legislature, allowing it to lurch its way toward some more nearly rational resolution. This a court might manage, if we could lead it to that one keystone – that element critical to the whole structure but

constitutionally pregnable – whose removal would bring down the house. We would say to the Court, push here and the wall will crumble. Then you can exit; let the politicians do the rest.

We settled upon what we then called "Proposition I" and, later, "fiscal neutrality". Whatever else the state and federal constitutions might require or forbid regarding schools, this much, we argued, was foreclosed: The state cannot dispense resources for education in a manner that is irrelevant to its own declared public purpose; district wealth per pupil has nothing to do with the uniform public enterprise of education. At bottom *Serrano* – as a legal argument – was the traditional claim about rationality bolstered by the plausible fundamentality of schooling, a refinement which would allow its constitutional distinction from sewers and zoos in Federal equal protection theory or in some state constitutional equivalent.

This idea was to constitute the point of the legal spear. But, what deeper principles had made this strategy seem the right one? Taken as the product of some moral argument rattling about in my own mind, *Serrano* was much less clear in its meaning. For one thing it would allow what are nearly contradictory outcomes to issue from the political process. I will try now to clarify the underlying imperatives of justice to which I answered in those days; some of them, I fear, were not yet past the stage of intuition – and may remain so today. Here in short form are eight such considerations that were at least in play in those days.

I. Scraps of a Creed Remembered

1. *Judicial Function*: *Clarity and Restraint*

I believed then and still do that judges and the lawyers who serve the court are bound by high obligation, first, to be clear in describing, then to be restrained in prescribing. As for the first imperative – that of clarity – the system should be as transparent in its judgments as the subject matter allows; contrary to a movie I recently enjoyed, it is not the lawyer's job to "give

'em the old razzle-dazzle". Still I concede that, on occasion, nature allows little more than a rough judgment call. Issues of what we call fact will sometimes of necessity remain obscure; a jury's finding regarding "negligence" for example, must often resemble a collective grunt. And Bill Koski and various state court opinions have well shown that "fuzzy" norms of this sort can be applied even to institutional relationships that are ongoing and complex. Judges can and do mutter judgments of "inadequacy". In the gestation period of the *Serrano* idea in the mid 60's many norms of this vague sort were to be aired and discarded – at least by us - . The legislature could be set to its responsibility without invoking so blunt an intellectual instrument. The effort to be clear seemed to me a part of the respect lawyers and judges owed to the rationality of citizens and to their elected representatives in a democratic order.

This imperative of clarity in turn nurtures the second virtue of judicial restraint. When the cure is legislative, the trick is to force the lawmakers to confront the identified problem without preempting – or even threatening – its legitimate options. Under *Serrano,* of course, every choice would remain to the legislature except discrimination by wealth. In this current era of judicial brutalism, such thoughts may seem romantic, but I believed then, and still do, in the separation of powers as a high value. The lawyers and the courts should be ever patrolling and mending the fences that bound the four branches of government (yes, four; I'll return to this).

I concede, however, that this icon of judicial restraint can become idolatrous and irresponsible. It was to do so for the majority in *Rodriguez*; paradoxically their rejection of fiscal neutrality drove them to petrify what was already a case of legislative paralysis as nearly terminal as the one addressed in *Baker v. Carr*. The justices worked the inadvertent frustration of their own ideal. Too bad, but to suppose today that some remedy more intrusive than fiscal

neutrality would have persuaded the justices to pitch in and redesign the offending state systems would require a stretch of the imagination.

2. *Equality*

Humans are "created equal" in some crucial factual sense; whatever our social condition, we are descriptively equal. This is not only true; it is urgent and necessary, at least if we are to perceive every person as having in the same degree the ineradicable dignity upon which every imperative of justice depends. Nobody drops out; nobody is more important – or less so - than anybody else. Elsewhere I have identified the premises that I think necessary to this belief. Here I want to distinguish this lone factual equality from the numberless equalities that I will call prescriptive. These consist in diverse and often conflicting ideals of sameness in the human condition. They are the subjective images of possible human goods – images lodged in individual minds; which of these potential equalities would be desirable as law remains in permanent dispute even among the "egalitarians". Of course, some of these private perceptions of an ideal sameness do come to exist in an objective sense, at least temporarily. For example, everybody in the USA is today represented by two senators; and everybody gets counted in the census. Other societies around the world either enjoy or suffer from their own special samenesses that have become instantiated in law or custom.

I find nothing compelling in egalitarian ideals as such. I have never met a prescriptive sameness that really inspired me; they are rarely necessary to justice, and they tend toward boring convention. This does not deny that like cases generally deserve like treatment, but that is a matter, not of sameness but intellectual consistency.

Serrano I and II are not egalitarian mandates. They allow differences in spending in California that are based on sane educational criteria; at least above some minimum, these differences could consist in the judgments of local voters or even individuals, so long as these decisions are liberated from the irrelevant influence of wealth and, emphatically, of any artificial locus of wealth – such as a district - that has been created and empowered by the state Without redrawing lines all districts can be given tax bases with a wealth per pupil that is artificially equalized throughout the state. The same tax rate thus produces the same number of dollars per child. Two districts taxing their property owners at the same locally chosen rate will spend the same. We called this "power equalizing"; the variable that determines spending in such a system is the intensity of local demand by voters – or equal spending for equal local effort. Note that such systems can be adjusted to express any other rational policy such as special help for the needs of a particular population. Not surprisingly, power equalizing has not proved popular among rich districts. Observe that a statewide system of scholarships could be designed to power equalize families instead of districts, as Sugarman and I demonstrated in a lengthy article in the California Law Review republished as a book in 1971.[3]

Now, having rejected naked prescriptions of sameness as morally empty, I confess nonetheless, to an historic and perhaps lingering hesitation on this score. Indeed, I can scarcely deny it. In the 1960's, though I preferred power equalizing, I tolerated the risk that *Serrano* could

[3] Coons, J. and Sugarman, S., Family Choice in Education: A Model State System for Vouchers (Berkeley, Institute of Government Studies, 1971). The three of us had suggested this possibility in an amicus brief to the U. S. Supreme Court in *McInnis v. Shapiro:*

> Family Power Equalizing. A state which wishes to emphasize individual choice could apply the power equalizing principle to a different unit. The family instead of the school district could be given the power to decide its own desired level of sacrifice or effort for education. The wealth against which the tax effort would be made would be the family income per child. For each level of self-chosen tax effort permitted by the system, a specific level of spending would be allowed the family for all its children. Each child would be given scrip in the amount fixed by the statutory formula with which to purchase education. Given appropriate adjustment for marginal utility, cost of living, etc., equal tax efforts would give families of varying wealth access to schools of equal offering. 1969 Westlaw 120023. For opinion see 89 S. Ct.. 1197.

in the end encourage a mindless full state takeover imposing a really big time sameness -- making California's plight even worse. It was for this reason that the then U. S Senator from New York, the late Daniel Patrick Moynihan, in the end rejected *Serrano*. I respect that fear. But, note that, given the empowerment of families, such a statewide equality could itself be a mechanism of new life and openness. Paradoxically, statewide systems of scholarships for children with which Moynihan flirted would strongly tend toward universal sameness in the amount of the subsidy; but, by respecting subsidiarity they would encourage real intellectual freedom.

3. *Subsidiarity and Local Control*

"Subsidiarity" is a polysyllab that I learned in a Catholic high school about 1945 in a religion class of a sort that, under current rules, might jeopardize my grandchildren's qualifications for admission to Berkeley. This word, like adequacy, is a "fuzzy" concept but one that can be very useful in the humane design of institutions exactly when the ideological fuzz gets the thickest. I won't attempt a universal statement of this idea. Here is the notion as it might apply to schooling: In polities in which individuals and sub-communities are diverse in their values and preferences, the wise course, in general, is to locate the power to make legitimate choices about education as close as possible to the person or persons most likely to be affected by the decision. The word subsidiarity has never made it into the argot of American political science, but it is an explicit bedrock principle of the European Union where, of course, it applies to much more than schooling. For Clune, Sugarman and me it was a contribution to the new vocabulary that would be necessary to identify the American school problem. It helps to reduce issues about the location of money and power to the perspicuous form: Who is the best decider – for the child and for the common good?

One way to respond to that question had been, and remains, the traditional American slogan: local control, meaning . . . . well, it's not quite clear what that expression really intends. The reader will know a number of variations on this theme – tropes that we variously deployed and debunked in *Serrano* as advantages and criticisms of the traditional system. For example, one asks what is "local" about a place like Los Angeles? And what exactly is "control" in a district where the tax base is barely worth the trouble it takes to assess it? Local control, nonetheless, remains a figure of speech that is passionately embraced in many high-value residential suburbs where I have heard it linked to subsidiarity – ironically by friends and foes of *Serrano* alike. Each carefully notes who in fact is empowered by the existence of these exclusive districts, then asks whether that particular authority is the best decider on the question of where Susie goes to school. In "public" districts like Piedmont – a rich enclave literally inside Oakland, where the affluent parent clearly rules - often one is instructed that parental sovereignty is yet another important meaning for local control. Of course, were we to recross the Piedmont boundary into downtown Oakland and ask our question, the term local control would have to mean something else again, though just what this meaning could be is beyond my power to say. Such is the state of our discourse – and that of the very confused Justice Powell in *Rodriguez.* In this condition of general incoherence subsidiarity may provide the form for a more coherent conversation focussed upon where authority lies and where it ought to lie.

4. *Freedom, Liberty et al.*

The fog of language can get even worse as we invoke other values, and I turn now to that all-American political champion – freedom. In the case of schools, what exactly is it? The Milton Friedman Foundation, and the free marketeers who want naked school vouchers, tend to base their whole case upon it as the summum bonum of classical economics. If you loved

freedom in communications, banks and travel, they tell us, you'll love it in the choice of schools. They may have been generally right about these other sorts of markets, but they are deeply confused in their easy adoption of freedom as the signature value of the market in education. In fact they can't be right, unless they are willing to label the legal power of one person to dominate another as a freedom or "liberty". What libertarian would do that? The hegemony of Jones over Smith is not prima facie a freedom for Jones, even if Jones happens to be Smith's parent.

This insight does not, however, eliminate freedom as a value to be pursued in the reform of school finance. Education aims at the ultimate autonomy of the child; and, where it is controlled by the parents, it also operates as a system of free expression for the parents' own values. It is, simply, family speech. Thus, there are important arguments about freedom that are raised by the possibility of school choice for low income and worker families; but these seem to be as neglected by the marketeers as by the egalitarians. I will outline several such arguments toward the end. One day these may bear upon the hope for a *Rodriguez* of a very different and more personal sort.

For the moment, what I assert is the plain fact that children will be dominated by some older person with legal and financial power over them. This may be either the parent or the bureaucrat. Thus, the real question will remain exactly which of these two shall society empower to serve both the various interests of the child and the common good (including the particular good of liberty – as one among many). In the case of wealthy families, that decision about the best decider has already been made by our society and implemented through the free market in suburban real estate coupled with the state-created district system for what are glibly called "public" schools. This selective encouragement of family choice may be ambiguous in its

respect for the value of freedom; but it is perfectly clear as a decision that subsidiarity will be honored – for the well-off.

5. *The Family*

How did the institution of family affect my own thinking about *Serrano*? In those days I should have been clearer in my own mind about the ultimate importance of family integrity and the toxic effect of conscriptive school assignment upon that value. I will advert to that problem later. At the moment, I want only to be clear that the ideal of the responsible family that now seems clearer to me, played – and probably could play – only a minor role in the design of *Serrano* itself. Our minds were necessarily confined to images of artificial, state-created collectivities which fitted more easily into the jargon of equal protection and yielded more readily to a common sense sort of financial scrutiny. We did now and again mumble about the special effect of disparate tax bases upon the poor; but the important reality that – in the context of schooling – personal poverty exists exactly as a family affair, was not to be a prominent theme.

6. *Outcomes*

In 1967, James Coleman delivered the news that school outcomes, measured by test scores and the like, were determined mostly by social class, a finding soon to be bolstered by Eric Hanushek. This dictum hobbled the argument that the introduction of rationality and equity in spending would by itself make a significant difference in what children in poor districts learn. Except for the purchase of inputs, maybe neutrality really wouldn't make any difference. We tended more and more to confine our arguments about this treacherous issue to the observation that the spending behavior of the rich districts was proof enough that money matters. The New York Court of Appeals now takes this idea as seriously as the California judges did in *Serrano* II

in 1976. I'm still not certain what I believe; if I were back in the *Serrano* business, I suppose I would have to face up to the question.

7. *Social Class Sympathies*

For some time after my original disenchantment of 1962 I imagined that the states distributed financial resources rather systematically by social class; the poor, I supposed lived in poor districts that spent less. Jonathan Kozol to the contrary, this has never been a sustainable claim on the national scene. I mention the matter, because of sympathies that most of us share for the plight of those working and low-income parents and their children who are rounded up for schools that are in fact unjustly supported. In the 60's, the image of those children in cheap schools strongly drove our enterprise, to a degree that verged on our misreading the data and making a claim of formal discrimination by personal wealth. Happily we took the trouble to compare S.E.S. data for California with tax bases and spending in the state's school districts. There proved to be many poor families in odd industrial districts and wealthier cities who "benefited" from fat tax bases and potentially would be "hurt" by *Serrano*. Even Los Angeles was about to exceed the state average in wealth per pupil, as it already did in spending. We thus hesitated to play too much on the personal poverty theme, as later the lawyer for *Rodriguez* would do to the injury of his claim. What we did insist was that the child of the poor family living in the poor district was the most victimized, because he or she lacked the private option. But this fitted rather awkwardly into the Supreme Court's jurisprudence of poverty. The state of California here had not been systematically villainous but merely randomly stupid.

In the end it is fair to say that concern about family poverty served well as a diet supplement to our own personal commitment but added little intellectual content to the enterprise. In my own case the insight of poverty's real significance would come when,

belatedly, I awoke to the effect of conscription upon the family itself. The systemic problem of the poor and worker family is emphatically not the want of public resources that strangers decide to spend on its children; it is, rather, the imposition of the stranger's will and mind, however well funded the school might be. This deliberate moral prostration of the ordinary family is a policy both vexing and curious. Why should anyone defend it? That question did not arise in *Serrano*; fiscal neutrality did not promise a specific deliverance of the poor. But it would, at last, allow it, if the legislature so willed.

Comment [GL1]: Do you mean "at last" or "at least" here?

8. Education Fever

Most Americans attach special value to education. In the 1960's I think the school finance cadre, without exception, had hope that the proper funding of schools would help to remake the society both economically and socially. In my own eyes it would also do justice to the intellectual and spiritual nature of the child. Thus, for constitutional purposes, education was to be distinguishable from bread and butter issues such as roads and police protection. This was crucial. We did not want to take on what we sometimes called the "equal sewer problem".

At the same time, however, education appeared to be the government service most uneven in its support by taxpayers and voters. Rational people could, and obviously did, dispute the absolute and relative investment to be made in schooling. School districts of equal wealth and equal overburden often make quite different tax commitments. It would have been interesting in those times to compare the range of voter intensity regarding school spending to the range of their commitments to non-ideational local public services. If economists could construct a plausible metric for the public's taste for physical services that would allow their comparison to the intensity of voter desire for intellectual services, what would we find? Would our chosen sacrifice for sewers emerge strikingly more uniform than that for schools? A variety in taste that

was special to schools might have fortified the selection of fiscal neutrality as the form of judicial intervention; the remedy would fit the elasticity in demand. Power equalizing (above some prescribed minimum) should be preserved as an option. Of course, to any wizard who thinks he knows the optimal spending level this indifference to difference might appear a cowardly concession.

I turn now from these reveries of my own motivation to examine the forms of legal argument actually proposed by the lawyers and others who then hoped to be agents of change.

II. An Embarrassment of Theories

Sometime around 1964 a young Ph.D. candidate at the University of Chicago, one Arthur Wise, came by to share the theme of his proposed thesis on the school finance problem and his recipe for its judicial reform. (As I recall he had read my 1962 report). Arthur Wise typified the liberal academic spirit of the 60's as it then appeared to be spilling over into the law. He was a solid, intelligent man of the species I have referred to as the prescriptive egalitarian; and he wanted the U.S. Supreme Court to equalize dollars spent per child within the respective states. A rough sameness was his moral and legal ideal; the extent to which he conceived this as a sameness among the whole of the student population or, instead, as a dollar equality within certain sub-categories of students was not entirely clear, but he was working this out.

Wise was not a lawyer, a fact I report neither in scorn nor admiration. Many a lawyer was to talk in this same argot which seemed to me a light year removed from the spirit of the voting rights cases and from equal protection theory in general. Wise himself occasionally slipped into the quaint usage "one dollar – one scholar" which grated on my ear until it was made to seem comparatively graceful by its transformation by others into "one kid – one buck".

Those years were to be filled with similar conversations about schools, most of them among civil rights enthusiasts and academics – and most with a sub-text of concern about racial discrimination. One such encounter, prolonged over six weeks was most meaningful to me. The Report of the Civil Rights Commission in 1962 had helped spawn its huge 1967 study of racial inequality to be known commonly as the Coleman Report.[4] We assembled at Harvard for the summer of 1965. The study was to have a legal component; the lawyers were to scrutinize various urban districts much as we had in 1962. Boalt Professors Michael Heyman and Preble Stolz participated. My own report – my second account of the state of affairs in Chicago - was destined to annoy Mayor Daley (the 1st) sufficiently to get all these district studies scrubbed from the final Coleman Report and, in 1967, to dethrone the then U.S. Commissioner of Education, Frank Keppel. Ultimately, a future Boalt Professor (then a Northwestern Ph.D. candidate), Malcolm Feeley, was to publish shortened versions of these essays in a separate collection.

How was all this racial stuff relevant? For some it seemed to constitute the whole point of any school finance probe. If I recall correctly, there was even a cluster of reparationists among the school finance cadre; the reparations would go in damages to be paid to Blacks who had been systemically shorted in school dollar resources or some other metric. I doubt that anybody really expected this, but the feverish atmosphere of the time encouraged theories of constitutional right that were grounded in educational need and in the hope for the victims to catch up. There were such theories, and they were held by serious people. Perhaps these advocates had some premonition of the 90's. Their ideas had no purchase – at that time or now – in federal

[4] Racial Isolation In the Public Schools, A Report of the U.S. Commission on Civil Rights (Washington, D.C., Government Printing Office, 1967).

constitutional law (which was the only subject then at hand). But there were state court judges, then still in high school, who would one day resonate to similar pleas.

So, one could say that the legal debate involved theories of equality, theories of individual need and theories of fiscal neutrality; however, to the advocates themselves it was also evident that a fourth conception was implicated either as law or policy. I hope I will offend no one by suggesting that what is now called adequacy (or the like) was –under various labels – already a full-blown concern and political objective as early as 1965. In fact it was endlessly aired in conversation; but for two reasons it was not paraded as a cutting edge of legal doctrine. First, the Supreme Court had shown little appetite for putting specific dollar signs next to any rights – even of the fundamental sort. Second, and more important, it seemed to us unnecessary to attempt this difficult argument. For, if the justices were to bring down the old establishment for its use of disparate district wealth, state legislators could hardly fail – in one way or another – to fill the chasms then represented in the spending of the poorest districts. To be sure, some of its critics noted correctly that fiscal neutrality might be satisfied literally by abolishing public education altogether. However, even we sissies in the neutralist camp, had heard about state constitutions; and we considered the risk of abolition to be roughly zero. What would happen, instead, would be the adoption of a modest but higher floor by legislators who would now be required to speak in relevant educational terms. Leveling up was politically inevitable, and the less said of it to the Court, the better. Keep it simple.

Still, Frank Michelman of Harvard (then and now) was to convert this political prediction into an explicit constitutional probe in his review of our *Private Wealth and Public Education*[5] in his *Foreword* to the 1969 Supreme Court issue of the *Harvard Law Review*[6]. It might be a

[5] Cambridge, Harvard University Press (1970).
[6] Michelman, Foreward: "On Protecting the Poor Through the Fourteenth Amendment," 83 Harv. L. Rev. 7 (1969)

useful exercise for the adequacy community to revisit Michelman's essay. I think he called his version "minimum equal protection"; if that label seems oddly self-conflicted, make the most of it.

III. Scraps of the *Serrano* Lawyering

Sugarman and I arrived in Berkeley in late summer, 1967; he spent the fall, then headed for Europe before starting practice in Los Angeles. Clune came from Chicago when he could for short visits. Wherever we were we all worked on the book. By fall, 1967, we had most of a draft, and the theme was set. Somebody, perhaps Heyman, mentioned our project to Hal Horowitz of UCLA who had found a proper plaintiff and was drafting a complaint. As it happened, John Serrano lived in a low-wealth district. Horowitz planned to present ten distinct causes of action; at the last minute ours became number eleven.

In due course, and to the surprise of all, after dismissal by the Superior Court, the California Supreme Court granted certiorari. We argued the case late (I think) in 1970. Justice McComb slept – then disappeared. On August 31, 1971, I learned of the decision on my car radio on the way home from backpacking. At home I heard that the court had gone for theory #11.

That fall of 1971 is largely a blur, but I do recall with strange clarity one episode that suggests the tenor of the times – and, perhaps, my own naivete. A week or two after the decision I received a call from a poverty lawyer in Minneapolis. He had filed a fiscal-neutrality complaint in federal court. The judge assigned to the case had gotten both sides to ask for summary judgment, then requested each to submit a proposed opinion for the court. Would I write that opinion? I consulted our Boalt Professor of Legal Ethics. He thought it weird but ok.

I proceeded to write virtually all the published opinion in *Van DuZarts v. Hatfield* which, of course, went down with *Rodriguez*. I do not recommend this practice – but I enjoyed it.

Nor would I recommend the genesis reserved for *Rodriguez* which started up about that same time. We had earlier hoped the notoriously poor Edgewood district would serve as a plaintiff in a federal suit. I had visited San Antonio. The district was interested but needed a lawyer. MALDEF refused for reasons I never could grasp. The district and the individual plaintiffs settled for a volunteer – a lone practitioner, awash in nerve but short on knowledge and experience. He was intensively tutored by a young but very savvy new member of the Texas law Faculty – Mark Yudof, today the President of the University. But the three-judge federal process with its brisk pace and lightening hand-off to the Supreme Court would foreshorten the learning curve well below the minimum required by the case. The *Serrano* idea found itself entered in a new kind of race badly wanting for the proper jockey. What we could or should have done about this I still wonder. *Rodriguez* could easily have been won.

Meanwhile, in that fall of 1971, *Serrano* had been sent back for trial, and we began to round up economists, learning theorists, statisticians and so forth; they were to help the trial lawyers, drawn from two separate poverty offices, preparing them to prove the presence of wealth discrimination and its unlawful effects. The trial proceeded in Superior Court in Los Angeles. Judge Bernard Jefferson was up to the task, and seemed to enjoy the experience. I can't say the same for defense counsel, who provided an ironic contrast to the mismatch we were about to witness in the *Rodriguez* appeal. These were inexperienced local government lawyers strangely left by the state to save the ship mostly on their own. Apart from the one instance of artful representation of the state in *Rodriguez* by Charles Wright of Texas, this neglect in the defense of important school finance cases has, until recently, been more the rule than the

exception. It became the more striking as litigation in state courts soon evolved into a plaintiff's industry featuring peripatetic teams of highly paid experts, public relation types and professional organizers. Any lawyer who would undertake the defense of such a case for the state today needs help of a sort and on a scale unfamiliar to ordinary trial practice. The need consists as much in the ability to make media and political commotion as in the grasp of education theory and law. Still, I doubt that the most skilled defense would have saved the bizarre California school leviathan from fiscal neutrality.

Comment [GL2]: See my comment regarding recent cottage industry of defense lawyers, led by Alfred Lindseth.

Our principal moments of doubt in the *Serrano* trial came in the process of proving injury. I have already confessed to my own concern about showing harm. We made little headway in the trial trying to link test scores, graduation, and other intellectual outputs of schooling to anything other than the social class of the family. As I recall, Eric Hanushek, then of the University of Rochester, was already in the saddle on this issue and testified for the defense. In the end, to our relief, Judge Jefferson was satisfied to locate the unlawful effect specifically in the injury to the child's opportunity to experience whatever it is that money buys in educational goods and services; that opportunity cannot be diminished to any substantial extent by the irrelevant and fortuitous factor of district wealth. This, of course, made the system unlawfully discriminatory almost by definition. The disparities in money caused by variations in district wealth simply *were* the injury.

The appeal was an unpredictable affair. At least two of the 1971 majority had left the court, being replaced by Republicans. The state curiously relied on the same counsel who had tried the case. The court affirmed 4 – 3 on the neutrality rationale.

IV. A Case of Identify Theft: The Media, *Serrano* and Prop. 13

The media was never to grasp the meaning of fiscal neutrality. For them it has always consisted in a command to equalize spending and to tax the rich. There are reasons to forgive this caricature. Media voices have deadlines, and they need headlines; and to be sure, just as was true before *Serrano*, the ruling would, indeed, *allow* uniformity of spending as well as every sane variety of tax reform. What is harder to forgive is the calculated and deliberate misreading by professional critics despite explicit and repeated corrections delivered to them in print and person. At least one ivy-league economist has made a career of sorts portraying *Serrano* as a command to tax and level, hence (for him) the mainspring for Prop. 13.

Such a person might, instead, have said the following with personal probity and, possibly, with conviction: Insofar as the media (and careless fellow academics) had given *Serrano* a false meaning, their caricature may have contributed very marginally to the already brooding taxpayers' alarm of those times. In any case today I should probably see this identity switch not as a problem but as an opportunity, and simply get on the bandwagon. If there is credit to be taken, let's take it. And, forget that I worked against Prop. 13; after all, it has saved me a bundle. Thanks.

The State of the States: Adequacy and All That*Rodriguez* went down, and, in California, *Serrano* was to lose most of its relevance in Prop 13. Elsewhere the disappearance of the fiscal neutrality option has been nearly complete and, perhaps, terminal. Recently I attended a conference focussed principally upon the perceived sins of activist state courts in school finance cases. The explicit assumption of each session was that any judge who might be pondering reform has only two available ideas – equity, meaning the equality of something or other; and adequacy, meaning some sort of minimum. Some critics in attendance supposed that these two conceptions in the end came to much the same thing; in effect they reduced the courts' options

in these cases to either a clear vindication of the state or a broad reproof with an order that tax dollars – and perhaps more of them – must go here rather than there. No third course was even suggested by these critics as a conceptual refuge for a state judiciary confronting an unjust distribution of educational resources.

I think that I am expected to comment on this scene and upon the doctrine called adequacy. I have read some of the recent state cases, and I have personal recollections of others, starting with the ever - rejuvenating New Jersey imbroglio in 1973.[7] From that day to this it is not a pretty sight. No one – at least none of the school children – seems the better for it. I wish I had some analytical device by which either to illuminate or to criticize this spectacle, but frankly there seems little here to analyze. These decisions are political acts, often executed with a muffled cooperation by other agencies, public as well as private. The opinions exude the atmosphere of a budget office; the judges become government accountants carrying out a ministerial responsibility assigned to them by some vaguely identified constitutional source. The intended outcome is never clear, and this indeterminacy can itself become the point.
The judge has scant reason to hope much from propping up the present regime, but is offered no real option.

Comment [GL3]: This paragraph and the one that follows contain some language that might be unnecessarily off-putting to folks who have worked hard on the state cases. Perhaps reconsider the underlined phrases?

I will, however, concede this. Insofar as a term such as adequacy or equity can function as an incantation that makes judges jump, one has to give it the credit due any instrument that has served its operator's purpose. It works. It works to increase the schools' money and to redirect the authority to spend it. That by itself would have satisfied some of the reformers I knew in the 60's. Nor do I condemn any specific particular increase or reshuffling of money and power wrought by these confident minds. I have no metric that would allow me to play critic to the redeployment of a single dollar to another agency or to some new programmatic emphasis.

[7] Robinson v. Cahill, 303 A. 2d 273 (1973) et Sequellae

How am I qualified to say that this or that is adequate? Where is the lawyer who claims such insight? And, who knows? Maybe all this commotion will somehow inspire these institutions to which we have exiled the poor, as, meanwhile, we go on trusting the rich to choose what is best for their own and for society.

VI. The Mind of the Citizen

So, what should lawyers be thinking about and doing (or avoiding) that might be any better? Goodwin Liu has not given up on a national version of a just solution; nor would I, though he is the more likely to see it. He would breathe life into the corpse of *Rodriguez*, even as he confronts a court that surely would reach the same headcount for the conclusion of 1973. And tomorrows' court might be even – well, more so. Is Goodwin losing his grip?

Not at all. Whether he is precisely on target in his exploratory invocation of the citizenship clause as an instrument of judicial intervention, time will tell. In any case he is correct to invoke the spirit of that 19th Century flirtation, so humane in its conception, that nearly carried the day; these old words of Amendment XIV may harbor a set of truths around which persons of good will can cluster politically, even if politics will be the only federal course of action for some time to come.

But, I am willing to follow Professor Liu even farther, as he plays the somewhat tentative role of citizen's lawyer; and my enthusiasm here springs, at least in part, from his notion of an untapped legal potential represented in the very status of citizen. I am grateful that he has unearthed this rich history for our edification. It gives hope to our reclaiming for citizenship its distinctive place in the familiar litany of protected personal values. Scholars have often arranged

this duke's mixture of high principle in various sub-categories, each with a jurisprudence of its own – and some more favored than others. Specific characteristics of citizenship suggest its association with many of these hyper-values that carry special or even fundamental weight in the calculus of rights.

Being a rank amateur, the only way I can put this idea is very simply. Citizenship is not merely a status created by law; at least for adults it is an act of free expression. We experience it generally in its passive form, but even here it is the choice of a rational agent who has options. Often the reality of that act of free expression can be detected in unmistakable empirical events – voting, military service, pledging allegiance, cooperating with agencies of government, invoking the courts. I am no Hobbesian, but it would be difficult, even for me, to deny that the adult citizen has given a free intellectual and moral embrace to a certain social contract – ours. Citizenship is more than status; it is a property of mind – at first potential, then actual. When actual, it is an assertion to the world. It is the stuff of speech and invites the special judicial response that speech evokes.

So, where does that get you? Who presently is interfering with the citizen's silent declaration of belief in, and allegiance to, this American polity of his own choice? That we'll have to consider. But simply being a citizen may in any case get you this far: It gets you into good company in any argument about education. It gets you, maybe, into the circle of conceptions like *Barnette* reminding that "no official … can prescribe what shall be orthodox." The mind of the citizen, and of the citizen's child, is a thing of constitutional weight, whatever its particular content. We may here find ourselves warming at the flame of the 1st Amendment, and

soon to be moving on to tales of the Amish, then of *Meyer*, *Pierce*, *Rosenberger* and even *Troxel*.[8]

Liu's invocation of citizenship promises to engage, enrich and encourage the permanent tendency of the court to value liberty of mind, creed and expression – with all its manifest importance to education. How to turn this into legal argument – and for just what remedy – is hard to say, but I urge that we remain attentive to the Courts' jurisprudence of the free mind in the hope to attach education's wagon to something that can give school finance reform a more elevated image.

Please note: These suggestions assume nothing special about either wing of the Court. My hunch is simply that the steady invocation of free thought and expression as a primary educational value will ultimately pay off with both conservative and liberal. The recent dissents in *Zelman* may sound a bit fixated upon the coercive delivery to the poor of some ideal and universal civics curriculum; ironically, however, this may be so precisely because these justices do care about freedom of the mind but at the same time doubt that ordinary parents are the agency that best assures it. Keep that specific argument going, and education will be the better for it whenever it stands before the Court. In the end, this whole thing is really not about money.

VII. The Fourth Branch and the Separation of its Powers

Let me encourage our courtship with the concept of citizenship from another perspective. Here, again, I will suggest that we play upon the expressive freedom that is a defining element of the role of citizen and which invokes those parallel constitutional values of the intellect to which regimes of education presumably are dedicated. But to play this specific game I ask that, for a

[8] Perhaps the reader will forgive – or even possibly welcome – reference to the six cases referred to in this paragraph. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Meyer v. Nebraska, 262 US 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972) (the "Amish" case); Rosenberger v. University of Virginia, 515 U.S. 819 (1995); Troxel v. Granville, 530 U.S. 57 (2000)

moment, you exit the universe of law, the better to view it as a whole. Ponder it from outside, surveying its division into three estates or branches of legal authority – its separation into what we call "powers".

What exactly is the aspect of a "power" that turns blind force into what we call law? Meaning no offense to Wesley Newcombe Hohfeld, Yale's great taxonomist of the law, let me crudely simplify what I think we mean. A power is some recognized authority of a person or collective that I will here call Jones, either directly or indirectly to decide what someone I will call Cooper will or will or will not do. Powers come in three forms and from three discrete sources: (1) Legislative: All Coopers must stay off the land of all Joneses; (2) Executive: Cooper! Do this!; (3) Judicial: Cooper has transgressed a rule and shall pay Jones $10 in damages.

So, coarsely conceived, we have three forms of what is legal authority or power. Each is supposed to issue from, or be exercised within, a separate sector of state or federal government. Together these domains exhaust the concept of human or positive law. This is our constitutional universe. Outside the world composed of and by the legislature, the executive and the court there is no instance of a rule, order or judgment by which Jones can lawfully order Cooper about.

But there is. There is another domain – and only one – consisting of analytically clean and precise positive law, though curiously overlooked a century ago by Hohfeld and still largely ignored. Here, in this 4th estate, one person has the power to order another about, to make important and enforceable rules and to hear and judge cases of persons accused of offenses. Nor are these orders, rules, or judgments in any respect dependent upon, or flowing from, the will of the other three branches. None of these could make Susie eat her spinach, go to bed, do her homework, avoid Telegraph Avenue or say her prayers. Nor could they contradict or interfere

with this independent authority; in this domain they are simply not law. Indeed, these agencies of the state exist to serve and conserve this prior order of human community.

Any person endowed with such exclusive legislative, executive and judicial power over another surely is making and enforcing law – and law of a singularly broad sort in a wide domain all its own. Of course, this unique sovereignty is both temporary and dependent upon the relation of child to parent– or, where necessary, to some substitute adult who acts *in loco parentis*. This authority of every family to define and enact its own jurisprudence is constitutional, but it is something more. It was there, shall we say, "at the beginning" – of the world I suppose, but in any case in 1787. It was quite unnecessary to specify its office and its limits in the words of the Constitution. These functions were already manifest in the lives of the very persons who designed and drafted this written triocracy of separate and limited powers. The family, as the Puritans insisted, was already "a little commonwealth".

Nevertheless, given the impulse of the 20th Century to convert the limited sphere of positive law into the totality of all legitimate power, the Oregon initiative of 1920 was politically inevitable. Only the state was to school the child. The new order would cancel the old and subsume its intimate authority over the intellect of children. Henceforth, if parents were to rule, it was to be by the sufferance of the State. In a blunt rebuff in Pierce the justices disclaimed such authority of any of the three branches sculpted by the founders – or even that of the Oregon citizenry by initiative – to trump the separate law of the parent. With few limits the following is, then, the rule of the American constitution: Susie will hear of the true and the good in the form and content her parents choose. They are the law for the intellect of the Smith family. The fourth estate, consisting of the parents, rules not only spinach but McGuffey's reader and Sesame Street.

This broad hegemony of the fourth branch is not merely settled but is probably necessary in a society such as ours. I can imagine another in which it would be plausible for the civil authorities to declare the dissenting family disenfranchised and to rule the mind of the child according to some vision of the true and good that is regnant among a consensus of the people. But, in the United States, this Platonic educator could find no such common vision to justify the usurpation – hence, usurpation it would be.

What, then, should we and our judges of the future think of the present dispensation of education in which, by constitutional right, the wealthy cluster in the Berkeley Hills exercising their exclusive legislative, executive and judicial power over the child's mind? Is there anyone ready to argue that this separate jurisdiction of the fourth estate betrays the interest either of the child or the common good? Give us your reasons. But, if the reason you give is that only the rich can afford to exercise this authority, what then is the remedy? Unless you prefer stasis, we must either decommission the rich or strive to subsidize that same authority for all of us. Is this crazy, or does the whimsy lie rather in our peculiar treatment of the ordinary family as unfit for the civic dialogue?

VIII. Citizenship as a State of Mind

At this point I rejoin Professor Liu's insightful appreciation of Amendment XIV, Section 1. What is the image of citizenship that is projected by a regime of government schools in which the form, content, method and human provider of the ideas that will constitute the child's education are, in the one case, to be chosen by the citizen who is her parent and, in the other, by some stranger? Recall that being a student and being a student's parent both constitute states of quite proper legal compulsion. Personal commitment and behavior are required of each and are enforced. Getting the child schooled is not undertaken as somebody's option; it is, rather, a

bondage to two peculiar roles – one for the parent, one for the child. For a particular span of years, each is a servant to the imperative to till the soil of this young human mind. Not even the rich can purchase their freedom from this servitude. What they can do is select the intellectual deputy – the school or private tutor – who will serve in their stead and deliver the unique family message. Thus, for them the only freedom actually lost as citizen is the theoretical right not to school at all. They completely control the manner and the message.

The other half, by its financial impotence, submits to the will of the school Leviathan – a master benign, perhaps, in its intention, but still domineering both physically and intellectually. The relation is, let us say, benevolent but servile. One asks, what was the 14th Amendment about? When the bondsman laid down his hoe, and we hailed him as citizen and gave him a mule, did this constitute the whole of his liberation? Or had his bondage been as much of mind as body? The slave was educated to know one thing – the mind of the master. Have we ended that intellectual subjection or merely extended it to those families who are unable to manumit themselves with money? Such language is perhaps florid and ad hominem, but I think that the images of slavery and liberation are perfectly fair here; ask any financially marginal mother who hopes somehow to move to Baja Piedmont for the sake of her child's "public" education. I suspect that memories of the "peculiar institution" will weigh in some future battle royal before the Court over the state's intellectual domination of the poor.

One principal defense of the status quo in that litigation will be that, for the child of the ordinary family, this conscription by the state is actually a liberation that is executed precisely by subordinating the parent; the infant mind is freed by getting the right sort of civics curriculum that is taught to everybody. Another will be that democracy is enhanced by securing a diversity of social class within the school room. Addressing the Court, the citizen will respond to these

claims in terms drawn from the 14th Amendment's promise to the citizen. He will challenge the state's assumption that ordinary families lack the taste and capacity for self-governance and autonomy that is assumed to be common among the rich. He will contest the assumption that there is, or even could be, a uniform curriculum of values in the schools of this country. And the state's claims of social integration he will dispose of with the mournful statistics of separation reported from every urban school district. Again, my specific point here is that these are images and arguments that emerge from citizenship; they are part of the total package of those constitutional values that rest upon the dignity of the rational individual. But Liu is right to recognize and emphasize the distinctly egalitarian implications of Section 1 which obviously merge these concerns for freedom with those for equity and adequacy that have given life in state courts to the reform of school finance. Of the two strains I find the theme of free expression to be the more directly relevant to educational rights and to the hope that ordinary families may one day exercise them as autonomous actors. But here I want only to stress my conviction that the aims of all the reformers are in fact convergent. Any serious commitment to choice for low-income families will serve not only the autonomy of the mind but also the goals of adequacy and equity. Choice will maximize and equalize.

IX. Choice and the Max-Eq Ideal

A universal system of parental choice would almost by definition solve the "equity" problem. All families in the same educational category would have the same financial opportunity. Whether the subsidy would be "adequate", however, is a separate question and not transparent in meaning. It poses this provocative issue: Would choice maximize public spending for education? This is another way of asking how voters would respond, and especially those voters with children in private schools who presently have a strong incentive to oppose

school taxes. The ideal mechanism, I suppose, would be one that converted those voters from hostility to enthusiasm for a greater public investment.

I can see how a system of choice could be badly designed for this objective; the wealthy family could be permanently excluded or given grants too small to induce any transfer. There would be differences from state to state in the percentage of children in private schools, and this too would matter. And a decision to allow charter schools to accept scholarships and charge tuition would complicate the calculus. I won't attempt to ring the changes on all these possibilities but only refer you to Professor Sugarman who understands these things. Still, I do urge the apostles of adequacy and maximization to give careful thought to this 10% of American families whose vote you should covet. They are against you; they might be converted.

X Conclusion – almost.

For all the civic and personal reasons that I've confessed, I gave *Serrano* the best I had. I approve its outcome; and I regret that we could not avoid *Rodriguez* and Prop 13. Together, in the State of California, these latter two events have sealed any practical legislative exit from our stagnant and utterly cynical status quo. Curiously, this frustration of the intended effects of fiscal neutrality has in practice been taken by lawyers to disable the idea for other states as well. Its capacity one day to liberate the poor has eluded the vision of litigators who champion adequacy and equity. I won't disparage either of these latter legal metaphors as politically plausible forms of distributive justice. But I am troubled by their spirit; they do not speak to the best in us. The one complains that you got more than I did; the other is the familiar demand of more for all. In both cases the specific motivation of the litigation is money to be spent on children at the will of strangers.

Paradoxically, in the end, as with the path chosen by Justice Powell, the final impulse and tendency of such strategies is to shore up our society's most tested and efficient mechanism for marginalizing and demoralizing the ordinary citizen who cares about his kids and his country. There is nothing in either legal concept – adequacy or equity - that recognizes families as independent sources of hope and energy or which invites mothers and fathers to take responsibility and to exercise an authority that is consistent with the dignity of their office as citizen-parents. I urge the high-minded and sophisticated lawyer in these cases to take more care to give his own clients what they truly want and not merely his own version of what is good for them. He or she would do well to ask their preference. For they might just covet a remedy of the sort that bears hope for the office of parent – the authority that we have enshrined for the rich.

I have come only gradually to this conviction of the baneful tendencies of this systematic division of education by social class. I approached *Serrano* in the 60's as an equal protection advocate sniffing out unjust discrimination. My finger sought the technical trigger best suited to encourage such a legislative end. If we won, and if politics were to extend greater respect for the dignity of the poor, that would have been a bonus. The story we presented to the court included this possibility of parental choice, but this was largely to show how really unintrusive fiscal neutrality would be.

By 1970, however, we had begun to see a second sort of reality; choice could be a prime utilitarian instrument for a dozen substantive goods – public and private. Properly financed, informed and focussed, parental decisions would have a benign effect upon racial and class segregation, ethnic quarrels, special education, test scores, graduation rates, crime, the welfare of teachers and so forth. The common good would be served in ways quite unavailable to the old regime, however well it was financed. And, of course, the parents' empowerment would

maximize the best interest of the individual child. I believe all this still today, as I witness these all-American values actually incubating in places like Milwaukee.

My focus thus gradually expanded from a technical-legal insight to a set of utilitarian policies. Both choice and equity would have specific benign effects. However, I had yet fully to grasp the third reality – the mournful implications of the typical urban school experience of today for the family itself. This wholly unnecessary American tragedy has at last gotten its grip on my conscience, and I can only implore the lawyers and policy makers of tomorrow to witness this social wickedness and to address the school's part in this degradation of the ordinary family. Here is a very short version of that effect as I see it: The helpless parent soon comes to accept the role of the irrelevant and irresponsible adult. A society that treats mothers and fathers as unworthy of responsibility should not be surprised when they adopt that understanding of themselves. The effect is all the more demoralizing when the parent observes that this authority and responsibility so cherished in Piedmont, is denied her solely by reason of her personal inability to pay.

As a consequence – from kindergarten on, the child also gradually comes to understand that father and mother are impotent to affect this new and engulfing totality. Their authority has been replaced by strangers. For the next thirteen years the student experiences the irrelevance of family to this core aspect of young life. One day he or she too will be a parent, but now with what perception of the responsibility, much less the hope, to express one's own values and expectations for this new child through choice of school? The poor of tomorrow may have ever so much tax money assigned to their child; but, if strangers still decide where and how it is spent, we will have scored a pyrrhic victory.

I should think this common sense apprehension of deep social danger deserves our attention. Strangely, the effect of withholding choice from the family upon its own structure and identity has not even been studied. Recently I asked a prominent social scientist why this is so. He wrote in reply that the question was too politically sensitive. Think about that.

As you do, think also of your own parents and try to assess the effect upon your whole family of having had the choice to move to Piedmont or, to the contrary, of having you yourself taken from them by the state for P. S. 42. Did it really matter within your home whether your parents could or could not express their own version of the true and the good by their choices for you? Will you in turn prefer to have your own children conscripted, or will you want to decide for yourself? Lawyers should talk about such things.

XI Ergo Propter Hoc . . . .

Has this been a story, a complaint, a brief, a prayer, an essay? I fear that these pages qualify as no specific form of writing – legal or otherwise. Certainly they could use some more orderly punchline to facilitate the suggested conversation. To that end I append seven bonus paragraphs more or less provocative in content and roughly bitesize; they are meant for dialogue. The parties to this proposed seminar may turn out to be no more than the left and right sides of my own brain, but I will hope for more.

1. Choice as a Specific Educational Good

It is the aim of school finance lawyers, through litigation to provide all the goods of formal education to all children in fair shares. Some educational goods are for direct purchase by the state, some not: where feasible, the latter too should be guaranteed to every child. Parental responsibility to select the child's school is one such good; presently it is denied to roughly half the children. No technical reason prevents its provision to all. Unless the finance lawyer denies

the premise that parental responsibility is an educational good, he should seek its extension to every family. If he does deny the premise, he should say so and give reasons.

2. The Inference from Compulsion

Being a compulsory activity, education creates duties for student and parent respectively. The former is required to participate in the activity of schooling. The latter has the responsibility to select the child's educator. This required choice may be made by selection of residence, enrollment in private school or surrender of the child for assignment by the state. This constitutional architecture of a compulsory choice confirms juridically its importance as an educational value. Technically a burden, this parental responsibility is prized in practice both by those who can afford to exercise it for their children and by their fellow citizens. The process of careful selection by the family is recognized as an act of civic and personal virtue, important both for the good of the child and the common good. Families of limited means are denied this expressive educational opportunity except for the barren option between passively surrendering the child to the state and committing an unlawful act.

3. Separating the Branches: Our Fourth Estate

The disempowerment of any citizen to choose the educator represents a unique departure from the constitutional jurisdiction of the family. Short of actual abuse (including the complete failure to educate), the parent is the sole recognized lawgiver for both the mind and body of the child. Fathers and mothers in their own persons constitute a de jure legislature, executive and judiciary. They are quite literally the fourth branch of government. Their independent legal status suggests a prudent introduction of neglected concepts such as these brooding in the 9th Amendment with its "rights….retained by the people"; it certainly invites the implications from citizenship noted by Goodwin Liu. What needs rescue from the mythology of publicness is the

reality that the state's intellectual appropriation of the child of the non-wealthy parent is a legal aberration; sadly it is one to which civil libertarians have become strangely inured. It is time to reconsider this authoritarian anomaly.

4. Free Expression and the Common Cause

This discriminatory conscription of the child based upon family wealth will over time be challenged in courts, state and federal. Parents of lower income will seek as remedy the rough equivalent of what the state presently spends; they will petition its delivery in some form that will enable them to exercise their responsibility to their child. Their legal counsel will emphasize that selection of a school is a speech act, hence it has special constitutional gravitas. The parents will combine this claim for non-discrimination in access to all schools with the wholly consistent claims for reform that are presently represented in the school finance cases. A coalition with the fundamental values of thought and expression can only enhance the appeal of any bare claim for money.

5. Compelling Interests of the State?

The lawyer who would equalize both access and money will start by scrutinizing the two central ideological justifications offered for conscription of have-not children. The *first* is the uniform curriculum of civics and values said to be necessary for molding the citizen. Whether there is such a curriculum is an unstudied empirical question; and, if it does exist, why is it imposed only upon the poor? In any case the very existence of a uniform values curriculum in a pluralist America would be constitutionally problematic. On the other hand, if it is not uniform, what justifies the child's assignment to School X? The reforming lawyer seems to have the state in a constitutional fork. The *second* justification for herding the poor is the social integration of our schools. The empirical basis for this is non-existent. Our schools do not join; they separate.

6. Choosing the Adequate

The choicenik and the adequator could jointly design attacks on the current dispensation of educational goods. The litigation would combine complaints against discrimination in the state's provision of the two educational goods – money and free parental expression. Intervention might be possible in some current school finance case; and it might succeed as it nearly did in Kansas City even before *Zelman*. There a district under a desegregation order would have been required to subsidize transfers to fifty waiting private schools that could realize by choice the opportunity for desegregation that was declined by suburban districts. In such a case money, race and parental free expression combine in an interesting menu of educational goods. What fun it would be to hatch an equality that does not stifle the human mind!

7. God the Adequator

Liberals! Do not hesitate to make common cause with parents who would choose religious education. Their interest and yours is ultimately the same – the fair distribution of educational goods including dollars and choice. If you should scorn the believers either formally or informally, it will be to the injury of your own cause. You should be driven by the hope that, in 2026 you will reach the Supreme Court in an action undertaken jointly by levelers and by every citizen who longs to have her own values taught to her own child.

Finally, I predict that there will soon arise a strong, new centralist movement for equality (and adequacy?) in school choice. It will feature a substantial cadre of elected Democrats, nationally and locally. The historic labeling of left and right in education will at last be exposed as artificial.

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