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.

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 pupil[2] 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-

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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.

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

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 consitutional 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).

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.

The case isn't cut and dried. Arguments on the other side seem largely based upon Supreme Court cases involving housing[8] 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

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).

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

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 adminstrative 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.

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).

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 Finance[1] 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).