of expenditure per pupil. Vocational education programs and classes for the mentally retarded or physically handicapped, could reasonably be shown to cost more than other kinds of educational offerings. It is suggested that there may be variations in level of expenditures per pupil, within a school district, or between school districts, just so long as these variations are not grounded on the wealth of the particular school district. Weighting of a state aid formula, therefore, would not be unconstitutional, if the weighting is used in such a manner that it is nondiscriminatory in its application to individual school districts on the sole criterion or principal criterion of wealth.

The legislative remedy advocated by Coons, Clune and Sugarman is called "power equalizing" and is grounded on the theory of providing equal power to make equal expenditures with all other school districts by making equal effort. A bill based upon the power equalizing principle was introduced in the Kansas legislature this year, and although it did not pass, there was broad support for this approach. Indeed, the failure of the bill was not based upon any lack of political support for the distribution formula, but rather upon the unwillingness of the legislature to consider the tax measures necessary to finance the formula. But since power equalizing has not yet been enacted by any state it would be unwise to suggest that it is the only way in which state legislatures can meet the test of Serrano, or even that it is the best way. It is entirely possible that there are several other approaches which may be equally acceptable to the courts.

Who is to take the leadership in fashioning the elements of a state aid formula to meet the tests of equity and fairness demanded by Serrano? In the past, leadership in the development of the separate elements of state aid distribution formulas has come most frequently from state education associations, from state departments of education, and from university professors who teach school finance. In most instances, leadership on the part of state education associations, and to some degree from state departments and the universities,

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ABSTRACT

This paper outlines the historical background leading to the California Serrano vs Priest decision, discusses the implications of that decision, and suggests what might be done to fashion the elements of a State aid formula to meet the tests of equity and fairness demanded by Serrano. The author presents the various equalizing formulas and discusses who should assume the leadership in State aid distribution. (JF)

The Assault Upon State School Finance Systems*

by

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"Education is a state function." "The power of the legislature is plenary." "School districts are creatures of the state." "School board members are state officers, whose powers are derived solely from the state constitution and state statutes." We who are in education have recited these magic sentences like a catechism. But when the California Supreme Court, in late 1971, in the case of Serrano v. Priest, applied to a specific set of facts these principles which we all have agreed upon in the past, it has created a judicial, legislative, and indeed a political revolution, rivalling in intensity and potential impact the decisions in Brown v. Board of Education relative to racial segregation, and Baker v. Carr relative to legislative reapportionment. And strangely enough, both of these cases are involved in developing the principle enunciated by the California Supreme Court in Serrano.

And this is in reality all that Serrano says. The court took Proposition I of Coons, Clune and Sugarman which said that "the quality of public education may not be a function of wealth other than the wealth of the state as a whole" and applied that principle to the state school finance system in the state of California and found that, indeed, the State of California had deprived its citizens of the equal protection of the laws of the State as guaranteed by the 14th amendment to the Constitution of the United States.

But we need to go back a few years and pick up the thread of the story which lays the basis for Serrano.

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In early school financing many states had a state financed school system, although at a very low level, for a short school term, and involving only a small percentage of the children of school age. As the system expanded, state resources proved inadequate and the states turned to local financing, until by the first decade of the 20th century, public schools in most states were financed almost entirely at the local level, and almost entirely by the local ad valorem property tax.

By the 1920's the political battle began for equalization of educational opportunity through the medium of the foundation plan. Under the leadership of Paul Mort and George Strayer at Teachers College, Columbia University, and expanded and diversified by other colleges of education throughout the country, the states, one by one began to increase the amount of school revenue which came from state sources (which for the most part were from nonproperty taxes). But despite the foundation plans, the degree of equalization provided was far from perfect. In many states, there was blatant discrimination against the largest school districts, and relative indifference to the very poor school districts. To some degree, at least in many states, this discrimination against the large school districts was closely related to the malapportionment of state legislatures, hence the earlier reference to the significance of Baker v. Carr.

During the 1950's and 1960's there was an increasing number of lawsuits initiated under the equal protection clause of the 14th amendment to the United States Constitution, as exemplified by the segregation and apportionment cases. In 1968 the board of education of Detroit, Michigan, smarting under the injustice of the state aid formula as it applied to the Detroit district, challenged the constitutionality of the state aid system in that state. Their case was based upon this theory: "Every child has the right to spending according to his need." Unfortunately the Detroit case never came to trial, so we shall never know what might have happened to that case.

However, other cases were initiated under the same theoretical approach in Chicago, Bath County, Virginia, in Oklahoma and in Los Angeles. The Chicago case was decided against the board of education, largely on the basis that the definition of educational need was justiciably unmanageable. That is to say, there are no tools available through which the court can determine just what the need of a particular child is in order to afford him the equal protection guaranteed under the United States Constitution.

The decision in the Chicago case, McInnis v. Ogilvie, was upheld in a summary decision by the United States Supreme Court, and when the Serrano case was heard by a trial court in the state court system, the trial court followed McInnis and dismissed the case. Now Serrano, because it was filed in a state court system, proceeded at a rather leisurely pace, and after the unfavorable decision in the Chicago case, the plaintiffs in Serrano completely changed their theory. That is, they gave up the "educational needs" goal as first pressed by the Detroit Board of Education, and later by the Chicago case, and said in effect that "all we are asking the court to do is strike down the relationship between spending and wealth." From a legal theory which asked the court in effect to measure the educational outcomes of a state school finance system, the plaintiffs changed to one which merely asked the court to guarantee equal input in terms of nondiscriminatory expenditure per pupil. There are some four stages involved in the revised argument of the plaintiffs in Serrano:

First, there isn't likely to be any change in state school finance systems unless the judiciary intervenes. This is the same argument advanced in support of Baker v. Carr, in an area (legislative reapportionment) which the courts had carefully avoided for a number of years as a "political thicket" to quote one justice of the United States Supreme Court.

Second, we are dealing here with a "fundamental interest" which is a magical term invoked to create a greater degree of inspection on the part of the federal courts, when there is an equal protection issue involved. In this respect, the court in Serrano relied to a great deal upon the reasoning of Brown v. Board of Education, the 1954 segregation case, also decided upon equal protection clause of the 14th amendment. In Brown, the court cited the importance of education in our society and the likely effect upon the individual denied an opportunity to achieve an education.

Third, the classification of schools by wealth is a suspect classification, constituting the type of invidious discrimination which invokes the close scrutiny required for an equal protection situation. Among others cited, the court referred to the case of Tate v. Short, 401 U.S. 395 which was concerned with the rights of the indigent accused to legal counsel at state expense.

Fourth, the present school finance system in California is not essential to the pursuit of a legitimate state interest, which interest may not as well be served by a different system which does not possess the qualities of discrimination found in the present system.

Now we should make a diversionary point here at this step in the discussion. Serrano was not decided upon the merits of the case but rather upon a procedural question. When the case was filed, the defendant, the State of California, moved to dismiss the case, upon the argument that the facts as stated did not state a cause of action. That is to say, even if the facts alleged by the plaintiff are true, they do not amount to a legal theory through which the court may provide relief. As pointed out earlier, the trial court dismissed the case, in effect stating the plaintiff did not have a cause of action. Upon appeal, the California Supreme Court reversed, with only one judge dissenting, and found that the plaintiff did have a sufficient cause of action.

In doing so, the court examined three facts about the financial system in California:

First, what is the variation in expenditure per pupil? The court found variations in elementary school expenditures to range from a low of $407 per pupil to a high of $2,586 per pupil.

Second, the court looked at the range of local wealth, after establishing that the appropriate measure was the assessed valuation per pupil of the school district. In California the range was from $103 per pupil to $952,156 per pupil for elementary schools.

Third, the court inquired as to the variation in local tax effort and noted that Baldwin Park levied $5.48 per $100 of assessed valuation, only to be able to spend less than half of the amount spent by Beverly Hills residents, who were taxed only $2,38 per $100 of assessed valuation.

The court then turned its attention to the state aid system to see if adequate compensation had been made for the variations in local wealth. In this examination the court discovered that each school district received $125 per pupil from the state, regardless of its local resources. Clearly the basic aid, which constituted about one-half of the state's school finance effort, did not compensate at all, and the equalization aid distributed over and above the basic aid failed to make adequate adjustment for widely varying local tax wealth.

The court held that the failure of the legislature to equalize the educational benefits and burdens was a violation of the equal protection clause of the 14th amendment to the United States Constitution. The court summarized its conclusions in the following language:

> We, therefore, arrive at these conclusions. The California public school financing system, as presented to us by plaintiffs' complaint supplemented by matters judically noticed, since it

deals intimately with education, obviously touches upon a fundamental interest. For the reasons we have explained in detail, this system conditions the full entitlement to such interest on wealth, classified its recipients on the basis of their collective affluence and makes the quality of a child's education depend upon the resources of his school district and ultimately upon the pocketbook of his parents. We find that such financing system as presently constituted is not necessary to the attainment of any compelling state interest. Since it does not withstand the requisite "strict scrutiny," it denies to the plaintiffs and others similarly situated the equal protection of the laws. If the allegations of the complaint are sustained, the financial system must fall and the statutes comprising it must be found unconstitutional."

The essence of this decision then, is "that the quality of public education, measured in dollars spent per child, may not be a function of wealth--of a child's family or of his school district--but only of the state's wealth, taken as a whole."

At this point it would be well to repeat that Serrano was not decided upon the merits of the issue, but upon the procedural question of whether the plaintiff's allegations, if sustained by adequate evidence, constituted a valid cause of action. The California Supreme Court said that the allegations did represent a valid cause of action. Since the state Attorney General has declined to appeal this procedural question to the U. S. Supreme Court this case will go back to the trial court for further proceedings.

Now, let me summarize what Serrano does not say or does not do:

1. It does not strike down the property tax--this was not an issue and Serrano does not deal with this question one way or another. The property tax is likely to be here for some time in the future in most states. Indeed it is more than likely that a state property tax for education will play a prominent role in the financing scheme employed to meet the test of Serrano.

2. Serrano does not have anything to say about the need for compensatory education between different kinds of children. Thus special education and vocational education for example, may be accorded a higher rate of expenditure than that provided for the usual school child without violating the theory of Serrano.

3. It does not prevent the state legislature from employing all kinds of preferences in implementing a state finance plan.

4. There is nothing which suggests an urban bias in the Serrano opinion, since in many states the urban districts are wealthy.

5. There is nothing in the Serrano principle which has anything to do with interstate differences. The 14th amendment applies only to the states, and not to the Congress. There may be a hint of equal protection in the fifth amendment which does apply to the federal government but this has not yet been established. Then, too, the Congress might be persuaded to apply the Serrano argument through appropriate legislation.

6. There is nothing in all of this which is relevant to the problem of racial or minority disadvantage.

7. There is nothing in the case to deal with the appropriations choices of the federal government, which may continue to promote specific goals which produce unequal effects through categorical aids, for example.

8. Serrano has nothing to say about the level of educational expenditure of a state or the adequacy of the education offered.

And this is where we leave Serrano, to trace its aftermath.

On October 12, 1971, Judge Miles W. Lord, of the U.S. District Court for the Third Division of the District of Minnesota, handed down a very similar decision, Van Dusartz v. Hatfield, 40 U.S.L.W. 2228 (Oct. 26, 1971), upon a similar procedural question, and with a similar factual base. Judge Lord adopted with approval the "fiscal neutrality" doctrine announced in Serrano, and clarified somewhat the fundamental interest question. "Education," said Judge Lord, "... is to be sharply distinguished from most other benefits and services provided by government. . . .Education has a unique impact on the mind, personality, and future role of the individual child. It is basic to the functioning of a free society and thereby evokes special judicial solicitude."

On Christmas eve, 1971, a three judge federal court in San Antonio, Texas, handed down its decision in Rodriguez v. San Antonio, 40 U.S.L.W. 2398 (Jan. 4, 1972), similar in factual situation to Serrano and Van Dusartz. Rodriguez is unique, however, in two important respects. First, since it is a three judge federal court, the decision may be appealed directly to the United States Supreme Court. Indeed, it is likely to be the vehicle for appeal to the U. S. Supreme Court rather than Serrano. Second, Rodriguez was not decided upon a procedural point, but on the merits of the situation.

Most authorities now agree that Rodriguez is the case most likely to go all the way.

The reasoning of Serrano has also been accepted and applied by the Wyoming Supreme Court in Sweetwater County Planning Committee v. Hinkle, Supreme Court of Wyoming, No. 3988 (Oct. Term 1971), in a most interesting and innovative manner, involving a school district reorganization case. It may be observed that Rodriguez also started as a school district reorganization case.

A superior court in Phoenix, Arizona has also adopted the Serrano theory in Hollins v. Shofstall, Supreme Court of Arizona, in and for the County of Maricopa, Memorandum and Opinion No. C-253652 (Jan. 13, 1972), as has a superior court in

New Jersey in Robinson v. Cahill, Supreme Court of New Jersey, Hudson County Docket L-18704-69 (Jan. 1972). There is little additional law in the Wyoming, Arizona and New Jersey decisions.

A state trial court in Westchester County, New York, Spano v. Board of Education, Laklin Central School District No. 1, Supreme Court, State of New York, County of Westchester, No. 1051-1971, however, has reached an opposite conclusion, citing the U. S. Supreme Court's decision in upholding the decision in the Chicago case referred to in the beginning of our discussion. It should be noted that Serrano and the cases which follow have not found it difficult to distinguish the principle involved in Serrano relating to the equalized expenditures test from that involved in the earlier Chicago case in terms of the educational needs test.

A federal district court in Missouri has also considered the Serrano issue, but declined to apply it in the case at trial, under the abstention doctrine, which holds that the federal courts should abstain from deciding a case of this sort unless it has been first submitted through the state court system.

And this is where the judicial battle stands at the present time. There are cases pending in several states, both in the state courts and in the federal courts. Probably some of these cases will be decided during the next few months, but many of them will be delayed pending review of Rodriguez by the United States Supreme Court. It would probably be of greater political advantage to delay Rodriguez for awhile to allow the political processes to operate during this year of elections, because the eventual solution to the problem must come through the political processes, rather than through the judicial process. That is to say that state legislatures will have to fashion legislative formulas for distributing state funds and that the courts are unlikely to impose judicial formulas for distributing state funds for public education without giving every opportunity for the normal political processes to operate. It is certainly not beyond

the limits of the authority of the courts to impose such formulas, but the experience with legislative reapportionment and desegregation suggests that such judicial action has been taken only after repeated failures at the political level.

In designing a distribution formula to meet the test of Serrano, it must be recalled that the Serrano test is a negative test. The court has not laid down any guidelines as to what is permissible. At this stage, the court has only said that the present system is not permissible under the Federal Constitution, or under the State Constitution as in the New Jersey decision. Moreover, the courts are not likely to set forth any guidelines for the development of constitutionally permissible state aid formulas. As in the case of racial desegregation and legislative reapportionment, the United States Supreme Court may lay down broad general principles, perhaps of an essentially negative nature, and remand to the federal district courts all questions of applying these principles to specific legislative solutions.

It should be made clear that Serrano does not specifically require that the number of dollars spent per pupil shall be exactly the same in each and every school district in a particular state. Indeed if this were true, we should all be opposed to the Serrano principle because it would produce eventual disaster in practical educational terms. Serrano speaks only to the variations in expenditures per pupil which are a function of the wealth of the school district, or of the residents thereof, and not to other kinds of variations in expenditures, which may be grounded upon considerations other than wealth. For example, it would be relatively simple to establish that the cost of education is greater, in terms of dollars per pupil, in a secondary school than it is or needs to be in an elementary school or junior high school. Accordingly, some weighting of a state aid formula to produce a larger number of dollars per pupil for secondary pupils would not automatically be in contradiction of Serrano. It might be shown that sparsity of population, or density of population require greater amounts

has tended to be self-serving. Formulas have been consciously designed to exert pressure upon local boards of education with respect to employment practices, the production of a ready-made market for education courses in the colleges and universities, or the addition of specific educational services or programs. Indeed, state aid formulas have been rarely used for the sole and simple purpose of distributing state funds to local school districts. To illustrate, many states have distributed state aid funds based upon a minimum salary schedule constructed in terms of education and experience. Such formulas tend to influence the development of local salary schedules, produce a market for education courses, and foster the idea that the quality of education is somehow related to the level of teacher's salaries. The minimum salary approach has been dropped in most states because the political battle for state funds has been reduced to a question of how much teachers' salaries should be increased in a particular year. But alternative proposals have frequently carried along the same use of "incentives" designed to influence, if not demand, a certain change in the decisions of local boards of education. I would want to hasten to add that the foregoing statements are meant to be descriptive, and not specifically to be critical in nature. It may be entirely justifiable for the state legislature to use the distribution of state aid funds as a means of achieving results which are politically difficult through direct legislative intervention. The entire idea of the appropriateness of incentive aids is certainly open to public discussion. The sole purpose of introducing the idea is to demonstrate the point that the leadership in the past has not been entirely altruistic in terms of serving the broad public interest.

Now we must be honest with ourselves in facing up to the question as to whether or not school boards associations, or school administrators associations, can take an active role of leadership in the precise elements of the distribution formula, or whether we must content ourselves with speaking in broader policy terms about the needs of the schools. The voting bodies of school boards associations are not, in most states at least, weighted to reflect the number of constituents

served by the board which is casting its vote for association policies. This is also true in state administrator associations in which each superintendent is given one vote, without regard to the number of constituents which he represents. In any issue which naturally divides itself along large school/small school lines, the small schools are likely to win, because of their superior numbers. Since justice and equity are hard terms upon which to reach agreement, being impossible of precise, mathematical exactness, considerable frustration may be experienced by school boards association and administrators' associations in dealing with the problems of leadership in school finance at the formula level. I certainly have no magic wand to wave to resolve these internal political problems or to make them simply go away. I would offer the hope that we might achieve a greater level of statesmanship in both organizations in trying to achieve legislative solutions to real problems of educational discrimination in this country.

Let us now turn to the inevitable question of what type of audience the Serrano type case might have with the United States Supreme Court. It is certainly common knowledge that recent appointments to the court were made with the express goal of achieving a more conservative approach to the judicial resolution of essentially political problems. Many observers feel that the present court will take a much more conservative approach to any extensions of the equal protection clause in the field of education and elsewhere. The action of the United States Supreme Court, in refusing to interfere with state laws which require more than a simple majority on bond elections or on operating levy elections, illustrates the conservative bent of the present members of the court. The recent case in which the United States Supreme Court upheld the loyalty oath in Massachusetts certainly should be described as a more conservative approach then the earlier loyalty oath decisions. Suffice it to say that I do not believe that we should rely upon the courts for the eventual solution to the political problems involved in either the determination of the level of our investment in public education, in the type of tax structure employed to produce the necessary funds, or in the

distribution formulas of state aid. Organizations of administrators, and organizations of school board members should continue to invest a substantial degree of their energy and resources in attempting to produce a climate favorable for the continued and expanded support of public education.

There is no better way to conclude this discussion than to quote the final words of the California Supreme Court in Serrano:

> "By our holding today we further the cherished idea of American education that in a democratic society free public schools shall make available to all children equally the abundant gifts of learning. This was the credo of Horace Mann, which has been the heritage and the inspiration of this country. 'I believe,' he wrote, 'in the existence of a great, immortal immutable principle of natural law, or natural ethics, a principle antecedent fo all human institutions, and incapable of being abrogated by any ordinance of man...which proves the absolute right to an education of every human being that comes into the world, and which, of course, proves the correlative duty of every government to see that the means of that education are provided for all...'"

I have every confidence that organizations such as the American Association of School Administrators, and its several state affiliated associations, will continue to provide the major source of leadership for the implementation of the ideals expressed by Horace Mann, as you have so many times in the past.