ON EGALITARIAN OVERZEAL:
A POLEMIC AGAINST THE LOCAL
SCHOOL PROPERTY TAX CASES†

Paul D. Carrington *

THE CELEBRATED DECISION in the Supreme Court of California in Serrano v. Priest,¹ and the decisions of other courts which adhere to that precedent,² are wrongly decided and should be reversed for the following reasons:

† This article is adapted from a speech delivered at the conference entitled "Equal Protection Against Unequal Schools?" held at the University of Illinois College of Law, February 23, 1972, discussing the decision in Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

* Professor of Law, University of Michigan. Member, Ann Arbor Board of Education. B.A. 1952, University of Texas; LL.B. 1955, Harvard University.

In 1971, the Ann Arbor School District enjoyed a state equalized valuation per student of $31,451; local property was taxed at a rate of 36,434 mils, resulting in expenditures in excess of $1,250 per student. These data demonstrate that Ann Arbor is in the upper middle-class of local school districts and perhaps on the high side of that class. The author participated in the conference as a friendly adversary of Professor John E. Coons of the University of California, Berkeley, the chief advocate for the local school property tax cases. This article consciously reflects the bias of that role and is presented as a work of advocacy. The author is indebted to his colleague, Professor Terrance Sandalow, and to Professor Paul A. Brest of Stanford University, Paul R. Dimond of the Harvard Center on Law and Education, Professor Stephen Goldstein of the University of Pennsylvania, Lecturer David Kirp of the University of California, Lawrence D. Owens, Esq., of Lansing, Michigan, and Professor Abraham D. Sofaer of Columbia University, and Roger Tilles of the Michigan Department of Education, for helpful criticisms of the earlier draft which was presented at the University of Illinois on February 23, 1972. Although this article bears a close kinship to the speech delivered, it has unquestionably benefited from their assistance to the extent that it is really a different work. Of course, they bear no responsibility for any errors which abide despite their helpful efforts.

1. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
1. Although the present method of financing public schools in California and other states is not as equitable as it should be, and the subject merits the attention of state legislatures, the method is not so irrational and unjust as the Serrano analysis assumes.

2. Alternative methods of school finance, which are assumed by the Serrano analysis to be available, are of uncertain merit and may be worse than the existing system; these methods should not be forced on the state legislatures.

3. The constitutional principle expressed by the decision in Serrano is unsound; it is too broad in some respects and too narrow in others.

4. In its present form, the Serrano principle would create a risk of constitutional crisis because the remedies available to the courts are not adequate to assure effective enforcement.

5. If judicial intervention is appropriate at all, a better approach is available; this approach would limit intervention to matters pertaining to the process by which public resources are allocated, would extend beyond the sphere of education, and would respect the limits of judicial remedies.

THE EQUITY OF LOCAL SCHOOL TAXES  
Equity Among Taxpayers: Regressivity

The local school property tax cases are primarily concerned with the apparent inequity to disadvantaged children resulting from disparate educational expenditures. But they also rest in part on the alleged unfairness of the local property tax to those local taxpayers who pay more, but receive less service, than some comparable local taxpayers in other taxing districts. As much of the popular reaction to the decision has been based on supposition that the courts are striking a blow for tax equity, it seems useful to give this brief preliminary consideration.

Attacks on the equity of the property tax have been heard for at least a century. But the system has survived many devastating critics, among them, Henry George. The reason for its survival is that it


3. The advocates of Serrano explain: "Ours is a concern for children, not for taxpayers, even though a 'fair' taxing system is in some respects important to the achievement of our purpose." J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 242 (1970) [hereafter cited as PRIVATE WEALTH AND PUBLIC EDUCATION].

remains a useful means of raising public revenue which is not demonstrably more objectionable in its consequences than other sources of the public fisc.\(^5\)

It is widely assumed that the property tax is very regressive, that it tends to benefit the rich at the expense of the poor. This assumption is reinforced by reference to the obvious fact that the rich invest relatively less of their resources in land, and thus tend to pay a much smaller fraction of their income to the property tax collector. Very low income taxpayers unquestionably do pay a higher portion of their income to satisfy the tax, and by a significant margin.\(^6\) On the other hand, there are a number of reasons, supported by significant data, to suppose that this first impression of inequity is much exaggerated.

First, the local property tax resembles, in some respects, a user charge.\(^7\) Because the expenditures which are customarily financed by the local property tax are distributed in a manner which bears an inverse relationship to ability to pay, the property tax may even serve as a significant instrument of redistribution of income from rich to poor.\(^8\) Second, the apparent regressivity of the tax is much diminished if ability to pay is measured over a longer time span;\(^9\) many of the high tax, low income landowners are enjoying expensive property purchased during periods of affluence. Third, the ultimate incidence of the tax is quite uncertain.\(^10\) Much of the tax is actually borne by landlords, merchants, industry, investors, and consumers. To this extent, the burden falls on those who are able to pay. Fourth, any inequities in the property tax are correctable, either by special exemptions in that tax, or by appropriate provisions in the federal internal revenue code,\(^11\) or federal benefit programs.\(^12\) Indeed, some of the evil consequences


\(^6\) R. Netzer, Economics of the Property Tax 40-56 (1966); W. Morton, Housing Taxation 144-76 (1955).

\(^7\) R. Netzer, supra note 6, at 59-60; Spengler, The Property Tax as a Benefit Tax, in Property Taxes 165 (L. Woodworth ed. 1940).

\(^8\) R. Netzer, supra note 6, at 60-62. This analysis ignores the fact that property taxes, like most public funds, are paid to middle class employees. See Mosteller & Moynihan, A Pathbreaking Report, in On Equality of Educational Opportunity (Mosteller & Moynihan eds. 1972).

\(^9\) Id. at 62-66.

\(^10\) Id. at 32-40.

\(^11\) At present, the deduction for state and local property taxes has the effect of magnifying the regressive effect. There is no reason, however, why this has to be so.

\(^12\) See Goldstein, Book Review, 59 Calif. L. Rev. 302, 303-04 (1971). Professor Goldstein points out the weakness of the Serrano analysis in failing to take account of federal programs in measuring the resources available to poor districts. Although it has been held that state benefit programs should not be interpreted to nullify the intended effect of federal aid (see generally Carlsbad Union School Dist. v. Rafferty, 429 F.2d 337 (9th Cir. 1970) ) it would seem that the existing finance scheme could
of property taxation may already be neutralized when the tax is viewed as a part of the overall scheme of the nation's system of public revenue.\textsuperscript{13}

Even if it be conceded that the property tax is, in some respects, regressive, the inequity should be appraised with the realization that the burden of the property tax is substantially capitalized, that the tax is reflected in the value of land and improvements.\textsuperscript{14} For this reason, it can be said that the tax is fair because it is old. To the extent that \textit{Serrano} will produce substantial changes in the rate of taxation, capital will change hands.\textsuperscript{15} If we were to abolish the property tax altogether, we would produce a class of instant millionaires; the recipients of the windfall would be those who have invested heavily in land. It is true, the poor in poor districts, of course, would be blessed with a lesser windfall in increased values, but to some extent, this would make their land less available to other poor families who now have limited access to low-priced land in poor districts.

Also to be taken into account is a related phenomenon first observed by Charles Tiebout.\textsuperscript{16} Because it is localized and capitalized, to some extent the local property tax offers the advantage of increased family choice in the allocation of resources. Within a metropolitan area, a family may choose to invest in a home which is accompanied with first-class public services, or in one which offers a lesser package of services. To some extent, the occupier of land is able to control the amount of money he retains for other uses by living in a low public expenditure district. Although the analogy is somewhat crude, one can see in the local property tax the likeness of the family voucher plan advocated by some \textit{avant garde} thinkers about school finance.\textsuperscript{17} Elimination of the differences in treatment between taxpayers would eliminate an option now enjoyed by many citizens who exercise some control over the use of their taxes by selecting their homes. Perhaps for this reason citizen complaints about interdistrict disparity in expenditures are rare; the victim of the alleged inequity can, in many urban areas correct it himself by moving to a "rich district." In addition, it is possible that this competition between competing land markets may provide marginal stimulation to the efficiency and quality of public services.


13. \textit{See generally R. NETZER, supra note 6, at 55-56.}

14. J. JENSEN, \textit{supra note 4, at 63-75}; W. MORTON, \textit{supra note 6, at 103-09}; R. NETZER, \textit{supra note 6, at 33-36.}


There may be other benign consequences of local property taxation. Some tendency for localized revenues to correspond to local needs may result because intensity of land use (and thus value) tends to correlate with the cost of public services. Thus, we may speculate that the local property tax tends, imperfectly but inexorably, to put public resources where they are most needed. \(^{18}\) Local property taxation may also serve to encourage productive land use by rewarding productive areas with public services at a lower rate of tax than would be available for areas in which land is less productively used. \(^{19}\) The local property tax may be a source of quality in educational services, although this possibility may be more properly considered in appraising the plight of the disadvantaged children attending schools in poor districts.

Enough has been said to demonstrate that the localized property tax is not grossly unfair to taxpayers, despite the superficial appearance to the contrary. Almost surely it is not the best form of taxation; \(^{20}\) but the case for its abolition is not compelling; and that case gains very little strength from the alleged inequity to taxpayers of interdistrict disparities in tax rates.

\textit{Equity Among Children: Localization of Revenue}

Turning to the unfairness of current methods of school finance to children attending underfinanced schools, it must be conceded that there are some dramatic contrasts in school expenditures which require correction. In general, the situations requiring correction occur within metropolitan areas where well-endowed suburbs often abut older districts which must finance their public services from a very meager tax base. \(^{21}\) While the great contrasts in these situations may

\(^{18}\) In Michigan, for example, this allocation is fairly dramatic. With few exceptions, the very poor districts are northern and rural, while the wealthy districts are southern and urban. See Mich. Ass'n of School Boards, Summary of Estimated Enrollment and Selected Financial Data (1972). These tendencies correspond in a very rough fashion to the needs demonstrated by student achievements. Mich. Dep't of Education, Distribution of Educational Performance in Michigan (1971); Mich. Dep't of Education, Levels of Educational Performance in Michigan (1970).

\(^{19}\) In its present form, the tax tends to inhibit land improvement. W. Morton, supra note 6; Delogu, The Taxing Power as a Land Use Control Device, 45 Denver L.J. 279 (1968); Gillespie, Urban Affairs: The Property Tax and Urbanization, 21 Admin. L. Rev. 319 (1969); Comment, Toward Optimal Land Use: Property Tax Policy and Land Use Planning, 55 Calif. L. Rev. 856 (1967).

\(^{20}\) See sources cited in notes 3, 4 & 15 supra. Netzer's generally negative appraisal of the tax appears in R. Netzer, supra note 6, at 164-90. Widespread preference for more progressive taxation may be well-founded, and is shared by the author. But it should not be assumed that local millage failures bespeak such a preference and/or a willingness on the part of voters to submit to some progressive taxes.

\(^{21}\) The situation in Serrano was, not surprisingly, a most appealing example of
be intolerable, the situation should be viewed in light of some of the advantageous features of the existing system, which, in some respects, serve the needs of poor youth, if not the needs of poor districts.

Thus, we should not underestimate the importance of localized finance to the preservation of localized control over public institutions. Experiences in Scandanavia and Germany demonstrate that finance and control can be severed; but there can be no question that the two are related, that as long as local institutions have at hand their own source of revenue, they are far less vulnerable to centralized regulation. It is no accident that many state education officials have rushed to approve Serrano, because its impact will surely be to make

the tax base contrast, with poor industrial Baldwin Park compared to elegant Beverly Hills. The plaintiffs alleged that there is a correlation in California between individual poverty and residence in poor districts; it is very doubtful that this allegation could be proved. Proof was achieved through an uncontested affidavit in Rodriguez. The wealthiest districts in Michigan on the other hand, are River Rouge and Ecorse, which serve citizens who are among the most disadvantaged in the state. See data cited in note 18 supra.

22. R. Netzer, supra note 6, at 171.


IT IS HEREBY ORDERED THAT:

1. The Superintendent of Public Instruction shall by May, 1973, develop a school district reorganization plan that will provide for the organization of Illinois school districts in accordance with a criteria for an efficient and adequate educational organization consistent with the State's financial system.

2. The Superintendent of Public Instruction by June of 1973 shall develop a school aid formula that will:
   (a) eliminate or supplement the Illinois School's district reliance upon the local property tax;
   (b) transfer the primary responsibility for financing the system of public education to the State of Illinois;
   (c) not permit the education of students to be dependent upon the wealth of the individual district but upon the wealth of the State as a whole.

3. The State school formula shall provide for unequal educational spending through:
   (a) a cost equalizing provision to compensate for variances in educational costs in the State;
   (b) a cost equalizing formula that compensates for the variances in the cost of an educational program for varying groups of students including, but not limited to socio-economic disabilities.

4. The state school formula shall provide full State funding of the capital improvement needs of all school districts.

5. The declaration of this Court in reference to the Illinois financing system and school reorganization shall operate prospectively only.

6. This order shall not:
   (a) prevent the continued operation of the present school system and existing tax laws, or any actions taken thereunder;
   (b) invalidate future obligations incurred under the provision of existing laws such as school bonds, tax anticipation warrants, etc.

7. All such laws and obligations arising under the present system of school finance shall continue in effect until and if the court specifically enjoins the same.

8. This order does not affect or change any system of financing local governmental units except school districts.

9. To implement this order the Office of the Superintendent of Public In-
all of their work much easier to accomplish, at least over the longer term. But their very enthusiasm should call into question the assertion, made on behalf of the advocates of *Serrano*, that relief from local taxes will be accompanied by preservation of the instruments of local control.

There may be reason to doubt the wisdom of much contemporary rhetoric about the importance of local control.24 Little would be gained, and much lost, if we were to become so infatuated with participatory democracy that each classroom were turned into a separate political constituency to be organized and controlled by those parents and students having the most time and energy to devote to such matters. On the other hand, there is good reason to believe in civilian control of experts, whether the experts are operating in a military or an educational arena; this control is most effective where the size of the expert operation is not so large that it dwarfs the skill and energy of the amateur overseers. Moreover, there are some differences in the needs of youth in different areas, and some differences in the community resources available to be exploited for educational use; local control is probably important in preserving the ability of the system to recognize those differences. In addition, as we give increasing recognition to the problems of self-identity, local control may be a significant instrument for enabling more youth to gain a sense of participation and control over their own destinies. However one may assess the real importance of local control, the conventional wisdom asserts its value; indeed, the advocates of *Serrano* are at considerable pains to demonstrate that local control can survive their advocacy,25 although they cannot deny that they would make local control less likely.

A secondary consequence of local control may be fiscal. It is at least possible that localized taxation is a means of making more funds available for public use. By giving the assurance that local resources will be locally spent, support is obtained for revenue measures which would otherwise fail of support. Perhaps more importantly, if the cost of public education is not to be borne by localized measures, it

24. See generally *Community Control of Schools* (H. Levin ed. 1968).
will have to compete more vigorously for funds in state or federal budgets. It is by no means clear that the children of the poor, or even the children of poor districts, would be well-served by a diversion of more state and federal funds to elementary and secondary education. This diversion would almost surely mean less welfare, less early childhood development resources, less public transportation, less police protection, less housing, or even less food for the poor.\(^{26}\) Some trade-off of this sort would be almost inevitable.\(^{27}\) And this trade-off might, at the same time, result in considerable waste of these badly needed resources; it is not at all unlikely that a program of strict equalization would result in what may be described as a cultural suburbanization of all schools, with much consumption of educational services which bear little relation to the real needs of most youth.

This last observation leads to another inquiry, of central importance in evaluating the impact of the inequity on the disadvantaged youth of poor districts. What in fact are the disadvantaged deprived of? The Serrano analysis presumes that the quality of an education is the product of the dollars invested in it, and that quality education, so measured, is advantageous in the competition among graduates in the academic or economic marketplace.\(^{28}\) Contrary to that premise, the Coleman Report\(^{29}\) in 1966 revealed a large mass of data which tended to establish that there is little or no relationship between dollars spent in a school and the measurable, cognitive skills of its graduates. More recent data and analysis has tended to confirm the Coleman conclusion.\(^{30}\) Indeed, the Michigan Assessment data suggests an inverse correlation between cognitive achievement and expenditure.\(^{31}\) Little data has been provided, so far, which would demonstrate the validity of the Serrano premise.\(^{32}\)

---

26. T. Ribich, Education and Poverty 128 (1968). Indeed, it has been observed that the one sure consequence of Serrano is that more money will be paid to middle class teachers in poor districts. See Moynihan, Solving the Equal Educational Opportunity Dilemma: Equal Dollars Is Not Equal Protection, p. 259 infra.


31. See note 18 supra.

The data does not necessarily mean that money spent on primary and secondary education is wasted. On closer analysis of the nature of expenditures in deluxe districts, it is apparent that much of the extra expense is associated with higher teacher salaries or smaller classes. These expenditures probably do affect interpersonal relationships to a significant, if unmeasurable, degree. Surely these expenditures are more constructive uses of money than such other consumption items as automobiles, liquor, and cosmetics which would be consumed if those dollars were not invested in the educational programs. But these expenditures are, for the most part, consumer items, not investments in human resources. Children who are taught in large classes by less rewarded teachers are, for the most part, disadvantaged in the same way as those who have less housing or smaller cash allowances than their neighbors. These disadvantages have only marginal impact on the long term capacities of the students.

Of course, not all the deluxe educational expenditures are invested in reducing class size and in increasing teachers’ salaries. The bulk of the remainder is likely to be invested in auxiliary services and personnel. The primary beneficiaries of these expenditures are likely to be poor children living in rich districts. Thus, the school social worker, the school psychologist, the school nurse, the school counsellor, and, indeed, the assistant football coach, are providing services which are more essential or beneficial to the offspring of the poor than to the offspring of the rich because the latter have other access to such services. To the extent that lower class size or higher teacher salaries for poor districts would be attained by lower expenditures for these services in the rich districts, it is the poor who would bear the burden.

One affirmative instruction that may be derived from the Coleman Report data is that cognitive achievement is maximized in situations in which there is socioeconomic integration.\textsuperscript{33} To the extent that this is true, the Serrano decision may actually be antiegalitarian in its effect. The existence of rich and high-spending districts may be a critical keystone in the American success in holding the public school patronage of some segments of the upper middle class. So far, we have succeeded in minimizing the development of elite private education at the primary and secondary levels. In many parts of the world, and perhaps all which feature wealth disparities as great as those found in this country, it is private schools which serve most of the clientele seriously interested in the educational achievements of children, leaving the public schools to serve the children of the poor or the indiferent crudely, cheaply, and ineffectively.\textsuperscript{34} Certainly it is possible

\textsuperscript{33} Coleman Report 302-18.
\textsuperscript{34} Of course, it must be conceded that little integration occurs in the more ele-
that the existing method of school finance has facilitated the melting pot function of the public schools. Although our schools may have been inadequate in the achievement of that function, it would be a loss if we disabled them from further effective effort by hardening the class lines between public and private school youth.

The existing scheme of local school property taxation finances our public schools by exploiting the desires of parents to do the best they can for their own children. Although not denouncing that parental instinct as antisocial, the Serrano analysis would limit the ability of the state to facilitate its expression. The Serrano analysis assumes that parents who indulge that instinct are giving their children an effective competitive advantage over others, whereas the evidence indicates that they are gaining very little, if any competitive advantage. If we are to correct for that advantage, it will almost surely have to be by investing public funds which could be better spent elsewhere.

Taking all these considerations into account, we cannot assert that the youth in the very poor district would not be justified in some resentment when he looks upon the deluxe establishment serving his neighbors in a rich adjoining district. But the disparity he views is not unique, or wholly irrational; it reflects some realities and results from a fiscal policy which serves a number of goals, some of which may benefit him.\(^{35}\) While a wise legislature should seek means to alleviate the disparity, the injustice is not so grave that drastic, urgent, and heroic measures are in order.

**Some Alternatives to the Local Property Tax**

*Modified Local Taxation: “Power Sharing”*

This counsel of caution gains strength and importance as we consider the revenue sources available as alternatives to the existing local property tax. The defects of that tax become more tolerable as we consider the defects of the means of finance which might displace it. The alternatives proposed are of two types: a new local tax featuring improved methods of statewide equalization, and full state funding.

The chief advocates of the Serrano analysis have urged that the
giant middle class schools such as Great Neck or New Trier. These institutions are in large measure elite private schools with public subsidies. Dimond adds the argument that Serrano may discourage integration by inviting the middle class to integrate its dollars in lieu of its children. *See Serrano: A Victory of Sorts for Ethics, Not Necessarily for Education, 2 Yale Rev. of Law & Social Action 133 (1971).*

35. It is perhaps conceivable, depending on the many value judgments to be made, that the inequities in school finance are of the type which the hypothetical rational person, ignorant of his own place in society, would accept. If so, the inequities could be said to be just, according to modish standards. *See Rawls, A Theory of Justice (1971).*
principal virtue of the local property tax—its amenability to local control—can be retained, and its defects avoided, by means of a device described as "district power sharing." This ingenious scheme would make the level of local school finance dependent entirely on the level of local tax effort. The availability of property to be taxed would be neutralized as a factor controlling revenue by means of a state guarantee that each district would obtain a like return in dollars per student for each increment in local taxation. The local tax effort might be made either in the form of a property tax, or some variation on the income tax. This proposal merits serious consideration as a means of reducing the amount of inequity to local taxpayers. One may hope that some legislature will soon be wise enough to enact some variation on this theme. But it is not now the law in any state and there are reasons for caution in assuming that it is the answer to inequity.

First, from the viewpoint of the disadvantaged youth, district power sharing appears but little different from the existing means of school finance. District power sharing contemplates substantial disparities in school expenditures in different districts; its achievement is that it makes the disparity more purely a reflection of a political value judgment made by the local community. If the constitutional basis for judicial intervention is found to lie in a concern for children rather than parents, it is not clear that district power sharing would meet whatever constitutional test may be imposed.

A second problem with district power sharing is that it may have unfortunate secondary consequences derived from its conflict with a political reality. Legislators appropriating money for a power equalized scheme of local school finance would face difficulty in explaining their positions to selfish constituents in wealthier districts. The representatives from wealthy districts would return home not only without any state assistance for their schools, but with a negative dowry, an obligation to the equalizing fund which would have to be satisfied out of local revenue. In contrast, the existing custom of allocating modest grants on a per capita statewide basis, in addition to the foundation program appropriations which provide a modicum of equalization between districts, does provide every legislator with the assurance that his constituents will get some benefit from the state investment in education. Without that assurance, it may be

36. Private Wealth and Public Education 201-42. For additional negative comment on the power-sharing plan see Cresswell, Reforming Public School Finance: Proposals and Pitfalls, 73 Teachers College Record 477 (Colum. Univ. 1972).
38. For a full description see Private Wealth and Public Education 39-137.
more difficult to find the votes for education appropriations. Thus, district power sharing may be more of an academic theoretician’s ideal than a realistic political alternative.

A third concern about district power sharing is that it may not work. Many rich districts would be prone to reduce their tax efforts, motivated by the knowledge that a significant portion of the revenue produced will leave the district for use in a poor district. At the same time, it is at least possible, if less likely, that some poor districts will choose to increase their tax efforts, motivated by the knowledge that their efforts will be matched by state funds. If there is less income from rich districts and more expense in poor districts, the state fund may become insolvent, with chaotic results. Although this risk may seem remote, it is a risk which influences those who are responsible for maintaining a balance between state revenues and expenses. For all of these reasons, it would be wise to observe district power sharing in operation in some state for a few years before regarding it as a superior alternative to the existing method of school finance.

**Full State Funding**

The most available alternative to the local property tax is full state funding, with appropriations for local districts on a per capita basis, although perhaps with some adjustments for cost differentials.\(^{40}\) The state funds might be derived from a statewide property tax, or from a progressive or flat rate income tax, or perhaps from other revenue sources. State funding in any form would seem to require the collection of new money. This necessity raises the question identified earlier of whether new money is needed more in education than in other fields of public endeavor.\(^{41}\)

State funding also necessarily implies a strong tendency to equalize expenditures per capita statewide. As the principal advocates of the *Serrano* analysis have conceded, per capita equalization “might be a catchy device for terminating the existing injustices; it might also be an effective way to terminate public education.”\(^{42}\) One reason for this concern is that the resulting reallocation of resources will tend to run contrary to the public need for improvement in educational services. In almost every state the tendency will be to spend relatively more on education in rural areas, and relatively less in urban areas.\(^{43}\)

---

\(^{40}\) The effort to define resource needs proved to be too difficult for the court. McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff’d sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969). But doubtless the legislature could devise some formulae to reflect different costs, and needs for compensatory funding.

\(^{41}\) See text accompanying notes 26-27 *supra*.

\(^{42}\) *PRIVATE WEALTH AND PUBLIC EDUCATION* 293.

\(^{43}\) See note 18 *supra*. 
This point merits emphasis because it is contrary to the common expectation of citizens who have come to suppose that those with the greatest need for equalization are inner city residents. Thus, it is usually assumed that statewide equalization will benefit inner city schools. More often than not, the opposite is the case. To the extent that full state funding would produce literal equality in financing for school children, it is not a development favorable to the aspirations of the urban poor. Equalization would, to be sure, favor some urban areas, chiefly those served by districts which are located in pockets lacking profitable industry. But the biggest increases in expenditures would tend to benefit the rural schools which manifest the least need or demand for additional funding.

A fleeting comfort might be extended to urban schools. The burdens of equalization would fall even more heavily on some wealthy suburban districts which have long boasted about “lighthouse” service to those who want the best in education for their youth. One cannot be sure how beneficial the demise of these districts will be to urban children. As noted earlier, it is at least possible that this demise would serve as a stimulus to the development of elite private education and to the abandonment of the public schools by substantial segments of the middle class. This development would be a substantial price to pay for the pursuit of an ethical ideal of uncertain practical value.

Neither district power sharing nor full state funding may afford a clear answer to the problem of equitable funding of public education. Either approach might be expected to produce some benign effects, but there are risks inherent in both. We are not justified in assuming that either would ultimately serve the cause of a more open, egalitarian society.

THE PRINCIPLE OF EQUAL PROTECTION

For the reasons stated, judicial intervention designed to move the states away from the existing local property tax toward other means of school finance should be undertaken only on the basis of a fairly solid legal principle. But the Serrano decision cannot be explained as an application of any existing constitutional principle.

Serrano is said to rest on the equal protection clause of the federal constitution, but it is a substantial extension of existing doctrine and requires some retreat from judicial proclamations of equal

44. 5 Cal. 3d at 596, 487 P.2d at 1249, 96 Cal. Rptr. at 609. At the same time, the court seems to be relying on the state constitution, insulating itself from Supreme Court review.
protection law which have been repeated as recently as 1970. The principle which Serrano seems to invoke is that expenditure on public education cannot be a function of local wealth. That principle is unreasonably broad in the extent to which it involves the courts in making public revenue policy, and it is unreasonably narrow in its limitation to the field of education.

The New Equal Protection Doctrine

Traditional equal protection law has limited the function of the courts to a narrow inquiry. The question asked by the court reviewing legislation has been whether the distinctions drawn by the challenged statute bear a rational relation to a legitimate state purpose. If so, it has been asserted traditionally, there is no violation of the requirement that the states afford all citizens equal protection of the laws.

The Serrano opinion acknowledges rationality as the usual test applicable in the area of economic regulation. This test has not always been so limited in its application. For all of the reasons stated, the local property tax must be regarded as reasonably related to legitimate goals. One may question some of the goals, perhaps, and suggest other ways of pursuing them; and one may argue that the values attained are outweighed by the costs to the students of poor districts, but it is untenable to assert that the present method of school finance is without reason. The Supreme Court of California relied on no such assertion but on the development of what others have described as the new equal protection.


46. Dandridge v. Williams, 397 U.S. 471 (1970), re-establishes the traditional principles of equal protection law in rejecting a challenge to a Maryland welfare law which was said to discriminate unlawfully against welfare clients with large families.

47. 5 Cal. 3d at 614, 487 P.2d at 1263, 96 Cal. Rptr. at 623. The principle is much more fully articulated in Private Wealth and Public Education 394-432. The court’s failure to embrace the principle is a source of some uncertainty as to the rationale of decisions.

48. Brest, supra note 39, at 599-600, 601, 607-08; Goldstein, supra note 45, at 538, 540-41, 544; Schoettle, supra note 27, at 1411.


50. 5 Cal. 3d at 597, 487 P.2d at 1249, 96 Cal. Rptr. at 609.

51. See sources cited in note 49 supra.


53. See Brest, supra note 39, at 597-602.

54. E.g., id. at 602; Michelman, supra note 45, at 33. The development was forecast by Tussman & tenBroek, supra note 49, at 361-65; its history is traced in Developments in the Law, supra note 45.
which is invoked has emerged in the recent decades of litigation in the field of race relations. As stated in the Serrano opinion, it is that

in cases involving "suspect classifications" or touching on fundamental interests, . . . the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. . . . Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law, but that the distinctions drawn by the law are necessary to further its purpose. 65

Although we may be confident that local property taxation is a rational means of pursuing legitimate goals, we must concede that the goals of local school property taxation are not compelling, nor is the present method of finance the only means of pursuing them. The question, therefore, is whether the situation is one which calls for the application of this compelling interest test required by the new equal protection law. The answer would seem to be negative because the local property tax involves neither a suspect classification nor a fundamental interest.

Suspect Classification

Serrano begins with the assertion that wealth is a suspect classification. 66 Unquestionably, a statute explicitly requiring wealth qualifications of citizens seeking to enjoy a public benefit would be subject to a searching inquiry under the new equal protection formula. But the point is that the local property tax is not such a statute. No absolute wealth qualification exists for educational services. 67 Indeed, no showing has been made of the inability of any district to obtain the most elite educational services, only that it is more inconvenient for some to do so. 68 Moreover, although it may be possible, as was alleged and assumed in Serrano, that the current disadvantage tends to befall poor children, 69 it is the poor district, not the child, which is the object of the discrimination; 70 any harm to individuals is at least one link removed from the immediate impact of the law.

56. 5 Cal. 3d at 597-604, 487 P.2d at 1250-55, 96 Cal. Rptr. at 610-15.
57. The Serrano opinion slides rather glily past this distinction by equating de jure discrimination with state action. 5 Cal. 3d at 603-04, 497 P.2d at 1254-55, 96 Cal. Rptr. at 614-15.
58. For further development see Brest, supra note 39, at 603-04. A district which is disabled by state limitations on ability to raise revenue has successfully challenged such a limitation. See Askew v. Hargrave, 401 U.S. 476 (1971), rev'g Hargrave v. Kirk, 313 F. Supp. 944 (M.D. Fla. 1970).
59. See note 21 supra.
60. Compare the conventional dogma that "school districts are quasi-municipal corporations and the creations of statute, having only the rights expressly conferred
A searching inquiry for the compelling state interest behind every statute which may visit indirect disadvantages on the poor more often than the rich would be a very broad undertaking indeed. The economic status of an individual is, by definition, ubiquitous and persistent in its significance. One recalls the familiar Anatole France epigram about the bogus egalitarianism of laws forbidding both rich and poor to sleep under bridges; the point of his epigram extends far beyond the law of vagrancy to include most principles of criminal, property, or contract law. To undertake a constitutional challenge to all these indirect wealth classifications would be to commence a fool's errand. However committed we may be to the ultimate attainment of social and economic equality, it is an ideal which offers little basis for immediate, practical judgments of the type involved here. Justice Harlan was resistant to denouncing wealth a suspect classification largely for this reason. 61 Adhering closely to the views of Harlan, Professor Michelman has suggested a reanalysis of the handful of wealth classification cases to identify them as problems of substantive due process of law. 62 Accordingly, Michelman would have us speak not at all of equal protection, but of minimal protection, which is the obligation of the state to provide for basic wants.

Fundamental Interests

In any event, no one has yet rested the case against local school taxes wholly on the principle that all legislation which indirectly disadvantages the poor is subject to the compelling interest test. Rather, the Serrano opinion is disposed to move on to the additional assertion that education is a fundamental interest; 63 therefore the need for the searching inquiry and the compelling state interest is doubly assured, or at least assured by the concurrence of the two conditions needed to set the inquiry in motion.

In this fundamental interest phase of the analysis, reference is made to the many encomia to education, especially those contained in the opinion of the United States Supreme Court in Brown v. Board of Education. 64 But the problem is somewhat more difficult than in-

---

63. 5 Cal. 3d at 605-10, 487 P.2d at 1255-59, 96 Cal. Rptr. at 615-19.
64. 347 U.S. 483 (1954).

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public
voking words of praise for schools; the Serrano advocates clearly acknowledged this in citing\textsuperscript{65} the 1964 dictum of the Supreme Court\textsuperscript{66} which implied that the states have the power to abandon public education altogether, if they do not discriminate invidiously in doing so. Similar dictum was repeated by Justice Marshall and Douglas in 1971.\textsuperscript{67}

The Supreme Court decisions identifying fundamental interests to determine the necessity of searching judicial inquiry into legislative policy begin, and almost end, in the field of criminal procedure. Beginning with Griffin v. Illinois,\textsuperscript{68} the Court has repeatedly invoked the equal protection clause to invalidate state procedural practices which tended to impair effective defenses by indigent defendants.\textsuperscript{69} In Harper v. Virginia State Board of Elections,\textsuperscript{70} the Court extended the range of fundamental interests which cannot be wealth-classified without a compelling interest to include the right to vote, thus invalidating a poll tax. A theme which might be identified as common to these cases is that all directly involve the citizen's participation in public decisionmaking. This theme could easily have been extended to include some interests arising in civil litigation; it is perhaps a suggestion of retrenchment that the Court did not choose to do so in deciding the recent case of Boddie v. Connecticut.\textsuperscript{71} In the latter case, a decision invalidating a requirement that an indigent pay fees in order to obtain a divorce did not rest on equal protection grounds, but on the requirement of procedural due process. A similar explanation could, and perhaps should, have been offered for Harper, and Griffin and its progeny.\textsuperscript{72}

If, indeed, the inner circle of fundamental interests includes only political and procedural interests, it is nevertheless held in Serrano that education is essential to political activity and to participation in responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

\textit{Id.} at 493.

\textsuperscript{65} Private Wealth and Public Education 407-09.
\textsuperscript{66} Griffin v. County School Bd., 377 U.S. 218, 231 (1964).
\textsuperscript{67} Palmer v. Thompson, 403 U.S. 217, 233 (1971) (Douglas, J., dissenting);
\textit{id.} at 273 (Marshall, J., dissenting). For fuller discussion see Goldstein, \textit{supra} note 45, at 541 n.118.
\textsuperscript{68} 351 U.S. 12 (1956).
\textsuperscript{69} \textit{See Developments in the Law, supra} note 45, at 1177-80.
\textsuperscript{70} 383 U.S. 663 (1966).
\textsuperscript{71} 401 U.S. 371 (1971).
\textsuperscript{72} On the other hand, it should be noted that the opinion in Boddie manifests a tendency to rationalize the result in terms that suggest egalitarian concerns. \textit{See} 1971 U. Ill. L.F. 524, 526 n.21.
most governmental proceedings and affairs. The court notes that education is an activity constitutionally protected by the first amendment. The flaw in this assertion is that it fails to distinguish among the many kinds of expenses associated with the operation of schools. There is no reason to believe that high teachers’ salaries and low class size, much less instruction in art and golf, are related in any causal way to effective political activity. Those who would invalidate the school tax structure on this premise should at least bear the burden of demonstrating that the acquisition of basic literacy and other political skills are related to the level of financial support for education.

Actually there is no reason to require equalization of school golf programs unless we are also to require equalization of public golf programs conducted outside the schools. But the Serrano advocates assure us that they do not propose to require compelling justification for state discriminations in financing other public services. An effort is made in Serrano to distinguish other public services, such as police protection, on the ground that they are less essential to economic competition, less “universally relevant,” less continuous in nature, less important in their impact on the personality, and less compulsory than education. None of these distinctions is persuasive. As Professor Brest has observed, the reason that there are so many encomia to education, as compared to subsistence or other services, is that there may be more doubt about its importance and more need for assurance of its value to the consumer. No one doubts the fundamentality of police protection; no one needs to be compelled to take advantage of a public sewer or fire department; even more basically, no one can be expected to compete effectively if he lacks subsistence.

As we recognize that the Serrano court has embarked on an effort which will require it to equalize expenditures on public services other than education, it becomes even clearer that the court has moved into the center of the arena in which public revenue policy is made. A decision to level expenditures on public education is a decision affecting the availability of public resources and thus the level of ex-

73. 5 Cal. 3d at 607-08, 487 P.2d at 1258, 96 Cal. Rptr. at 618.
74. Id. at 608 n.25, 487 P.2d at 1258 n.25, 96 Cal. Rptr. at 618 n.25.
75. PRIVATE WEALTH AND PUBLIC EDUCATION 414-19.
76. 5 Cal. 3d at 609-10, 487 P.2d at 1258-59, 96 Cal. Rptr. at 618-19.
77. Brest, supra note 39, at 607. See also Goldstein, supra note 45, at 537-41.
78. The court in Serrano manifests a startling insensitivity to this obvious fact at 5 Cal. 3d at 599-600 n.13, 487 P.2d at 1251 n.13, 96 Cal. Rptr. at 611 n.13. The court there distinguished Briggs v. Kerrigan, 431 F.2d 967 (1st Cir. 1970), which held that the Boston schools did not violate the equal protection requirement by serving lunch to some children, but not to others, including many who were most in need. A good lunch may be far more important to the educational achievements of the poor than are additional expenditures on teachers’ salaries and class size. But see Jencks, supra note 30, at 94.
penditures on other services. The Serrano court must ultimately face the need to dictate the state budget. But courts are not equipped with any rational means for deciding how large an expenditure on education is appropriate in relation to the expenditure on police protection or sewers. These policy decisions can be made wisely only through a process of compromise among competing interests, with all interests participating in the decision—a process eminently legislative and executive. Judicial institutions are disabled from providing that process for compromise, both by their obligation for principled rationality and by the adversary tradition which limits the scope of judicial vision. These considerations prompted the United States Supreme Court recently to hold that citizens are not entitled to equalized subsistence payments under the fourteenth amendment: “the intractable, economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.” 79 As Professor Brest has observed, “it is not obvious that educational finance systems embody economic judgments that are any less complex, intuitive, and ultimately nonjusticiable than those inherent in welfare legislation.” 80

Given these immense difficulties, it seems that the Serrano court was unwise in its effort to extend equal protection doctrine to establish the no-wealth principle in the field of public education. Wisdom dictates that courts recognize that education is not more fundamental than other public services and that differences in the quality of services resulting indirectly from wealth are inevitable. Contrary holdings would leave the responsibility for the public fisc with those members of the government who are least equipped to bear it.

JUDICIAL REMEDIES FOR UNEQUAL FINANCE

Doubts about wisdom of the Serrano principle are deepened by consideration of the difficulty which any court might face in trying to impose it. Effective enforcement of the principle could produce a painful crisis.

Unfortunately, the Serrano case itself was decided on the pleadings, so that the court did not reach the question of a remedy. If it had considered the problem whole, on the basis of a complete record, it might have perceived some additional difficulty which must arise in the framing of the decree. So far as appears, only the court in Rodriguez v. San Antonio Independent School District has thus far attended to this aspect of the problem. 81

80. Brest, supra note 39, at 615.
Of course, a federal court can issue a declaratory judgment pontificating on its constitutional commitment to egalitarianism. One would hope that legislatures confronted with such declarations would respond by revising their systems of school finance to comply with the declared doctrine. On the other hand, clearly many legislatures may prove unable to do so. Most have been aware of the inequity of school finance for some time, but have been politically immobilized

3576 (U.S. June 7, 1972) (No. 71-1332). The court ordered that:

(1) The defendants and each of them be preliminarily and permanently restrained and enjoined from giving any force and effect to the operation of said Article 7, § 3 of the Texas Constitution, and the sections of the Texas Education Code relating to the financing of education, including the Minimum Foundation School Program Act, insofar as they discriminate against plaintiffs and others on the basis of wealth other than the wealth of the State as a whole, and that defendants, the Commissioner of Education and the members of the State Board of Education, and each of them, be ordered to reallocate the funds available for financial support of the school system, including, without limitation, funds derived from taxation of real property by school districts, and to otherwise restructure the financial system in such a manner as not to violate the equal protection provisions of both the United States and Texas Constitutions;

(2) The mandate in this cause shall be stayed for a period of two years in order to afford the defendants and the Legislature an opportunity to take all steps reasonably feasible to make the school system comply with the applicable law; and without limiting the generality of the foregoing, to reallocate the school funds, and to otherwise restructure the taxing and financing system so that the educational opportunities afforded the children attending Edgewood Independent School District, and the other children of the State of Texas, are not made a function of wealth other than the wealth of the State as a whole, as required by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

(3) Our holding that the plaintiffs have been denied equal protection of the laws under the Fourteenth Amendment to the United States Constitution by the operation of Article 7, § 3 of the Texas Constitution, and the sections of the Texas Education Code relating to the financing of education, including the Minimum Foundation Program, shall have prospective application only, and shall not become effective until after the expiration of two years from December 23, 1971. This order shall in no way affect the validity, incontestibility, obligation to pay, source of payment or enforceability of any presently outstanding bond, note or other security issued, or contractual obligation incurred by a school district in Texas for public school purposes, nor the validity or enforceability of any tax or other source of payment of any such bond, note, security or obligation; nor shall this judgment in any way affect the validity, incontestibility, obligation of payment, source of payment or enforceability of any bond, note or other security to be issued and delivered, or contractual obligation incurred by Texas school districts, for authorized purposes, during the period of two years from December 23, 1971, nor shall the validity or enforceability of any tax or other source of payment for any such bond, note or other security issued and delivered, or any contractual obligation incurred during such two year period be affected hereby; it being the intention of this Court that this judgment should be construed in such a way as to permit an orderly transition during said two year period from an unconstitutional to a constitutional system of school financing.

(4) The Court retains jurisdiction of this action to take such further steps as may be necessary to implement both the purpose and spirit of this order, in the event that the same is not complied within the time stated, but, as we understand the law, this constitutes no impediment with respect to the finality of this judgment for the purpose of appeal, and none is intended. . . . Needless to say, we hope that no further action by this Court will be necessary.

337 F. Supp. at 285-86 (citations omitted).

The problem is considered, of course, in Private Wealth and Public Education 437-45; and see Kirp & Yudof, Serrano in the Political Arena, 2 Yale Rev. of Law & Social Action 142 (1971).

to correct it. Unless a consensus can be achieved among dissident interests as to the best alternative method of finance, no action can be forthcoming. If nothing happens, then what?

Judicial Revision of the Public Fisc

Presumably, the court could devise its own scheme of school finance which it would seek to implement pending effective legislative action. It could direct the distribution of the available funds in accordance with its plan. If the court wished to avoid the unseemly politics of drawing the plan, it could appoint the state board of education,83 or some other body, to devise the scheme.

The trouble with this technique is likely to be encountered when the available funds are counted. Perhaps it would be proper to follow the lead of the Rodriguez court, and direct the redistribution of all available state aid funds.84 But it is very questionable whether the court can redistribute funds which are raised from locally imposed taxes. It would be a breach of faith with the local voters to withdraw funds from the district in which the taxes were voted by an electorate that thought the funds would be spent locally. The quick repeal of most local school tax measures would hardly be surprising. Thus, the total fund available for redistribution would almost surely be less than is now spent. At the same time, many property owners would experience windfall profits derived from the reduction of the tax liability which had been capitalized into the value of their land.

The complexities of distributing this reduced supply of funds are substantial. Presumably, any judicially devised scheme would have to be simplistically egalitarian in its basic approach: one pupil, one dollar. Although values other than money can be considered consistently with the no-wealth principle of Serrano, it would be very hard to resist the argument that these considerations should be presented to the legislature, not the courts. The court holds no commission to invent a system of compensatory education, for example.85 On the other hand, special needs will arise as a result of the court's own action. For instance, in the short term, many of the elite districts would be saddled with relatively high expectations for teachers' salaries, sometimes embodied in existing contracts. If these districts are required to operate at a level of support below the present state-

83. This practice, of course, is common in school desegregation cases. The Illinois Superintendent of Public Instruction apparently is a volunteer for such a role in the finance field. See note 23 supra.
84. See the court's order quoted in note 81 supra.
85. Cf. Private Wealth and Public Education 398-99: "It is always arguable that the state should do more for the physically handicapped. It is not an argument properly addressed to the judiciary."
wide average, they will have to function with enormous class size. It would be particularly poignant if this crunch were imposed on allegedly rich urban districts at the same time that poor rural districts suddenly were enriched with new funds which those communities never knew they needed.

Conceivably a court might attempt to enlarge the pool of available funds by inducing some local tax effort through a judicially created system of power equalization. This program would be fraught with the same risks as a legislatively created power equalization scheme, in that poor districts would be far more likely to respond, with the prospect of a resulting insolvency in the fund used for the purpose.

In short, judicial reallocation of education funds is likely to be disastrous. Even if implementation is feathered over time in order to accommodate change only with "deliberate speed," almost certainly a significant and widespread impairment of the public educational system would occur.

**Challenging the Legislature**

Indeed, the suggestion has been boldly made that impairment is the way in which the court should compel the legislature to do the right thing and raise new funds to develop a fiscally sound system of equalization: If the legislature won't play, the courts can close the schools altogether by enjoining their operation. This might be described as playing chicken with the legislature. The court would put itself in the position of using the children of the state as hostages to coerce legislative action. In other words, the schools would be destroyed in order to save them; so would the public fisc. One cannot be optimistic about the ultimate consequences of that kind of judicial statesmanship.

The school finance problem is, in some respects, far more difficult to remedy than either school desegregation or legislative reapportionment. School desegregation can be achieved by local school officials who are subject to the contempt power. Although it may be necessary for the enforcing court to draw new district lines, reapportionment also can be achieved by administrative officials. The critical shortcoming of the judicial system in dealing with the school finance problem is its inability to raise a new tax. Federal and state constitutions are explicit about the process by which financial measures are to be enacted, and the courts have no part to play. How-

---
86. Griffin v. County School Bd., 377 U.S. 218 (1964), is a case in which a local board was ordered to levy and collect a tax in conformity with a legislative authorization. Although itself questionable as an exercise of the contempt power, that decision is far less dramatic than the imposition of a judicial scheme of taxation on a statewide basis in violation of legislative provisions.
ever flexible the power of the chancellor to correct inequity, it is not adequate to that challenge. The result is that *Serrano* must stand as a dare to the legislature. Although it is not unreasonable to hope that the legislative reaction to the dare will be constructive, a significant chance exists that the result will be a constitutional crisis potentially more harmful to all than a century of gross disparity in school finance.  

AN OBLIQUE APPROACH

The need for the *Serrano* decision is further weakened in that any constructive effects it might achieve could perhaps be attained obliquely, by invoking a principle which would not be limited to the field of education, and which would avoid some of the problems raised by the *Serrano* approach.

*Equal Protection for Voters*

One feature of a less hazardous technique has been suggested by Professor Ferdinand Schoettle of the University of Minnesota.  

Professor Schoettle suggests that the courts might more usefully attend to the problem, not of the children or taxpayers of the poor district, but of the voters. In doing so, the courts may find the ground to be trod somewhat firmer. Thus, he would emphasize that the voter in the poor district must bear a heavier burden in order to achieve a policy or resource allocation than that borne by the voter in the rich district to achieve the same result. The harm thus suffered is similar to the harm which was corrected in the reapportionment and poll tax cases. Perhaps a modest extension of the principle of equal protection invoked in those cases could produce useful results in correcting the most objectionable features of the present scheme of local government finance.

The potential advantages of this approach are several. First, it avoids the problem of direct judicial involvement in the allocation of public resources. The courts’ attention is focused not on the problem of how public money should be spent, but on the process and institutions used for making spending decisions. The latter concerns are

87. The most powerful expression of this concern is still R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941). It should be noted that the *Serrano* advocates do suggest other less hazardous remedies, the most effective being the admission of poor district students into rich district schools. PRIVATE WEALTH AND PUBLIC EDUCATION 437-45. This remedy would, of course, be effective only in metropolitan areas.


91. But see PRIVATE WEALTH AND PUBLIC EDUCATION 369-76; Goldstein, *supra* note 45, at 542 n.119.
more traditional, and more appropriate, objects of judicial attention.\footnote{See Schoettle, supra note 88, at 1408-09.} Second, this approach is not embarrassed by the need to make unrealistic distinctions between education and other public services. A less dramatic enlargement of the new equal protection is required. While "one vote, one dollar" is too slick a phrase to be useful, some attention to the financial aspect is almost required by the reapportionment cases.\footnote{But cf. James v. Valtierra, 402 U.S. 137 (1971).}

\textit{A Suggested Limitation: The Concept of the Economic Community}

A second feature of a more conservative judicial approach would be to localize the concern for equalization, requiring equal treatment of local government taxpayers only insofar as discrepancies and inequities occur within a metropolitan area. Such a limitation assures that the court administering the equalizing principle will not be drawn into a statewide confrontation with legislative authority. It also would avoid the very unfortunate waste of resources resulting from statewide equalization. It assures at least some of the advantages of local control, including local spending of locally raised funds. Finally, the resulting principle would be more narrowly directed at the kind of caste distinctions which it is the function of the equal protection clause to prevent, because the beneficiaries would be more frequently found to be the urban poor. To be sure, these advantages are somewhat counterbalanced by the difficulty of administering such a concept.

Before enlarging on the advantages and disadvantages of the concept, it may be helpful to attempt a statement of the principle which emerges when the suggested limitation is combined with the Schoettle suggestion that the taxpayers become the center of attention. The concept of equal protection that then emerges might be stated, thus:

\begin{quote}
VOTERS EXERCISING LOCAL CONTROL OVER THE ALLOCATION OF PUBLIC RESOURCES WITHIN AN ECONOMICALLY INTEGRATED COMMUNITY ARE ENTITLED TO PARTICIPATE IN THE CONTROL OF RESOURCES WHICH ARE SUBSTANTIALLY EQUAL TO THOSE CONTROLLED BY OTHER VOTERS WITHIN THE SAME COMMUNITY.
\end{quote}

Or, perhaps, thus:

\begin{quote}
POLITICAL BOUNDARIES WHICH DIVIDE AN ECONOMICALLY INTEGRATED COMMUNITY WITHIN A STATE MAY NOT BE MAINTAINED IN A MANNER WHICH PERMITS ANY GROUP WITHIN THE COMMUNITY TO BE SUBSTANTIALLY FAVORED OR DISFAVORED WITH RESPECT TO POLITICAL POWER OVER THE ALLOCATION OF PUBLIC RESOURCES WITHIN THE COMMUNITY.
\end{quote}
Doubtless, the foregoing statements are not deathlessly phrased. Further exploration of the approach suggested would surely lead to a more carefully refined statement of the principle to be invoked. But the statements rendered are sufficient to suggest the contours of the idea, and to permit further exploration of its advantages over the Serrano approach.

Comparison with Serrano

First it may be noted that such a principle lends itself more readily and more fully to judicial remediation. A complete remedy might be fashioned by means of judicial mandates altering district boundary lines, or perhaps deleting these lines, at least for fiscal purposes. Thus, on the facts of Serrano, a complete remedy for the voters of poor Baldwin Park might be district consolidation, or fiscal federation, with rich, adjoining Beverly Hills. Most states have established procedures for accomplishing consolidations of school districts. The principle stated could be invoked in these proceedings, with appropriate judicial review to assure that the right is properly vindicated in the prescribed forums. No new taxing powers would be required to give full effect to the principle, and hence no confrontation with the legislature would be risked. Although some variation on this remedy might be prescribed as a means of enforcing the Serrano principle, it is not logically responsive to the dictates of the no-wealth principle. Moreover, it would be incomplete relief, unless the court were to compel the consolidation of all school districts into one.

Secondly, the practical importance of limiting the equalizing principle to intracommunity equalization ought not be underestimated. One of the worst results of Serrano is the gross misallocation of resources into rural schools which need them least. Any principle which advances statewide equalization of resources is destined to promote much waste. A variation on the Serrano principle could be fashioned which would be similarly restricted, but these restrictions do not associate so comfortably with a concern for educational equalization of children or economic equalization of taxpayers.

Thirdly, the principle stated is more congenial to the retention of


96. It might be possible to rephrase Proposition I thus: "The quality of public education may not be a function of wealth, except for the wealth of the whole economically integrated community in which the patron resides."
local control than is Serrano. Thus, we may speculate that its operation in a state like Michigan would produce only a modicum of change in the degree of local control. Within the Detroit area, predictably a few rich districts, such as Dearborn, might be consolidated or fiscally federated with adjoining poor districts, such as Dearborn Heights or Inkster, to produce a situation in which the resources available to all would approximate the metropolitan mean or average. Some very rich or very poor districts might be consolidated or federated with the metropolitan district. Similar consolidations or federations might occur with respect to rich and poor local governments other than school districts.

Fourthly, it can be observed that intradistrict disparities which are the result of urban-rural difference, or the differences between distant cities, are not likely to have the effect of creating or reinforcing caste or color lines. To the extent that Serrano eliminates such disparities, it overreaches the real problem which the fourteenth amendment should be used to solve. But intrametropolitan disparities may very well tend to have such a caste-reinforcing effect. The suggested limitation may thus perform the function of a rifle bore, directing the missile to the real target.

To be sure, intrametropolitan consolidations or fiscal federations would have significant impact on land values; owners in poor districts would be enriched by a windfall, while owners in rich districts would experience a loss in values. Some loss of freedom of choice would result with respect to the amount of public service a citizen may choose to buy. To some extent it would imperil middle class support for the public schools and stimulate the growth of elite private education for the children of parents now satisfied with the public service available in rich districts. But because the remedy is less drastic, these impacts would be diminished. The risks are less grave.

The administrative difficulties created by the proposed limitation are real and obvious, but probably not insurmountable. The concept can almost surely be given substance by reference to decennial census data gathered in any urban community. It would be necessary to vest some discretion in a trier of fact. But it would not be hard, as a matter of law, to identify most populous suburban areas as parts of a larger urban community which can be viewed as an economic entity.

Also, in the same vein, it should be noted that the suggested principle is cast in less concrete terms than the no-wealth proposition urged by the Serrano advocates. Only substantial intrametropolitan differentials are proscribed. 97 Although this flexibility may create an admin-

istrate problem, it further moderates the impact of the decision.\textsuperscript{68}

Finally, the suggested principle would give less satisfaction to the appetite for rhetorical flourish. It is far more appealing to compassionate people to speak of the right to equal educational opportunity and the needs of children. But it may be a greater favor to all the children, including those who reside in poor districts, to use the courts, not to attempt the vindication of the claim of children to a different allocation of educational resources, but to establish more fully the power of their parents to participate on roughly even terms in the process by which these allocations are made.

CONCLUSION

In short, \textit{Serrano v. Priest} is a quixotic decision. The enemy that it attacks turns out to be the still serviceable, if imperfect, mill of public finance. The steed which it rides turns out to be a somewhat misshapen principle of equal protection law. The well-intentioned assailants may well find that the results of their engagement with the enemy are more harmful than helpful to the causes they intend to serve. The chivalry of \textit{Serrano} is admirable, but constructive achievements are more likely to result from ventures which are less grand or more tedious in the use of the political process.

\textsuperscript{68} It should be kept in mind that earlier efforts to challenge interdistrict inequities failed for want of a viable principle which could be fairly administered by the trial courts. McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), \textit{aff'd sub nom.} McInnis v. Ogilvie, 394 U.S. 322 (1969). The kind of "needs test" advocated by counsel in that case left a whole universe of value judgments to be made at the point of application. The range of discretion permitted by the suggested principle is probably less than is customary for most constitutional principles, even in such rigorous areas as criminal procedure.