INTRODUCTION: "FISCAL NEUTRALITY" AFTER *RODRIGUEZ*

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It was sporting of the editor to entrust this informal introduction to a frustrated assassin of the present school finance system. Such *beau geste* merits a special effort at objectivity. Regrettably, the present performance does not discharge that obligation, but at least the sin is quickly concluded. May it find expiation in the merits of the authentic scholarship that follows in this distinguished collection.

I

A BRIEF CANDLE

Rodriguez[1] came and went like a Texas twister. It was all too quick, even for those who claimed paternity, to perform the patient scholarship befitting constitutional litigation of such magnitude. Adjudication by the Court had to be swift; the tottering state systems, the bond market, and the legislatures all demanded it. It was too much too soon for the Court to manage with ripe understanding; but decide it must, and, to its credit, the opinions are as skillful a handling of the discordant information as could be expected. Only the result is offensive.

This symposium reassembles the pieces scattered by *Rodriguez*, adds new information, and wonders what policy and legal issues survive concerning the structure and finance of public education. There are suggestions here for litigation and legislation that will offend some and delight others. The partisan of reform is cheered by the general agreement that the problem which *Serrano*[2] first addressed is a problem indeed. Furthermore, scattered reforms excepted, the basic facts remain unaltered since the California Supreme Court's decision in 1971.

I shall assume that the reader is generally familiar with the opinions in *Serrano* and *Rodriguez*. Thanks to both, the basic problem is now widely understood. The typical state has established school districts, rich and poor. Like an eccentric father, it has divided the family patrimony of taxable property among its districts in grossly unequal shares and with no concern for varying educational needs or objectives. Through the local property tax each of these districts must raise dollars to educate its children. What it can raise and the rates its taxpayers must bear are to a great extent a function of the wealth the parent state has arbitrarily bestowed. Perhaps the social and political reality of it all is best characterized by Justice Stewart: the system for distribution of public education approved by the Court is,

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[1] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[2] Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

simply—chaos. Behavior of this sort by the patriarch of a human family would be deplored as eccentric and wicked, then tolerated as a private aberration. *Rodriguez* legitimates such caprice by the state itself.

To this chaos *Serrano* would offer a normative response called "fiscal neutrality"—the rule that spending for a child's publicly financed education should not be a function of wealth.[3] This concept, which was rejected as fourteenth amendment doctrine in *Rodriguez*, needs the re-evaluation offered in this symposium. It may even need alteration or abandonment, but what it needs most, is to be understood. And it has not always been understood. Indeed, *Serrano* lost many a liberal friend who belatedly discovered that the ox he gored might be his very own. Taking the long view, one can say today that the defection of such allies confirmed *Serrano's* impartiality. It is the lot of neutral principles to be opposed by those who enjoy fortuitous advantages.

II

ALL THE THINGS YOU ARE NOT

To understand *Serrano* is to discover what it is not. And principally it is not. Like most workable judicial principles, fiscal neutrality is content to condemn particular and manifest injustice, leaving definition of the good society to the political process. It merely says no to a particular order of things—wealth discrimination in education; to every other order it offers a presumptive yes.

This conservative core has been obscured by the common misconception that *Serrano* implies fiscal egalitarianism. Critics (and friends) of varying sophistication saw fiscal neutrality as a way of leveling spending within a state. Some even imagined it to require interstate leveling. In fact, of course, the principle itself implies nothing one way or another on this important question. For example, a state that wished to spend more upon children learning English as a second language or children with special physical difficulties would be free to do so. If a state wished to test the relation of cost to quality it might even mandate very large differences among similar children as part of the experimental control mechanism. Such a distribution for this purpose might be wise or foolish, but it would be "fiscally neutral." If the spending pattern were not a function of wealth, *Serrano* would not forbid it. One can imagine similar examples of spending variation based upon plausible considerations such as educational needs, objectives, cost, local tax rates, and so on; none of these would raise *Serrano* issues. The state could have these variations as wide or narrow as it chose, so long as they were not in any degree the consequence of the educationally irrelevant factor of district wealth.

The more sophisticated critics understood this, but argued that under fiscal neutrality political reality would force statewide uniform spending norms.[4]

[3] *See generally* J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 346 (1970).

[4] *See, e.g.*, Berke & Callahan, Serrano v. Priest: *Milestone or Millstone for School Finance*, 21 J. PUB. L. 23 (1972); Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis*

It was a curious position to take. If correct, it would be so precisely because *Serrano* was conceded to be a necessary precondition of the ordinary political processes; only judicial liberation would permit the legislature to operate upon the substantive issues of education. Conversely, the unspoken premise of these critics was that spending variety could be protected solely by maintaining the power of rich districts to keep the existing system insulated from basic legislative review.

Even if this were true, a permanent preference for property-rich districts would seem a high price to pay for spending variety. My own view is that predictions of mandated uniform spending are quite eccentric. Indeed, they are already seriously discredited by the systems created by the legislatures of Florida, Kansas, Maine, and Michigan.[5] In the course of the commotion over *Rodriguez*, each of these states adopted basic reforms but carefully left significant scope for local spending differences.

Of course, the critics were not necessarily wrong in thinking fiscal neutrality more egalitarian in probable outcome than the present system. It is likely that present interdistrict spending differences of more than four or five-to-one would disappear, not because they would be forbidden, but simply because there is no argument, educational or otherwise, to support them. But "leveling" to that extent does not seem a serious practical constriction of spending variety; and even if it proved to be so, the legislature would be free to expand the spending options.

Rodriguez converted the misunderstandings about spending equality into the issue of local control. Having rejected application of the strict scrutiny test, Justice Powell still had to find some basis on which the Texas system could be deemed rational. In the least satisfactory part of his opinion, Justice Powell concludes that reasonable men might believe local control is enhanced by the existing system. The irony here is that the plaintiffs in *Serrano* and *Rodriguez* had themselves claimed the role of champion for local control. Perhaps some of their supporters took this line for purely tactical purposes; plainly no court would order a statewide leveling of spending. Many Serraniks, however, placed a high value upon "subsidiarity" in decision making. They opposed a status quo which seemed to value neither equality on the one hand nor local control on the other. They argued that the present system bestows control upon rich districts only and thus does not deserve to be considered a "system" of local control but only a system of pointless local privilege for the rich districts and of local misery for the poor. They described to the Court a hypothetical apparatus of the decentralized type Florida has since adopted. Texas, they said, could adopt such a system if it were sincere about desiring local control for all its citizens.

Justice Powell shrugged this off, saying no such system then existed, and that, under the rationality test, Texas was entitled to be skeptical as to whether they would work. Today such systems are in operation, and the pub-

of Serrano v. Priest *and Its Progeny*, 120 U. PA. L. REV. 504 (1972); Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 YALE L.J. 409 (1973).

[5] *See* Grubb, *The First Round of Legislative Reforms in the Post-*Serrano *World*, 38 LAW & CONTEMP. PROB. 459 (1974).

lic is invited to be the skeptic. And whatever is concluded about the constitutional issue, two policy questions should be kept in mind: first, to what extent and in what sense does the state achieve local control within the present system; and second, is local control diminished or enhanced by systems such as that adopted in Florida?

III

THE POOR AND THE EDUCATION-POOR

Fiscal neutrality may not be particularly egalitarian, but it was easy for it to seem so, if only because of its source. *Serrano* itself was filed in 1968 as part of the rash of ill-conceived litigation that sought a radical judicial mandate for compensatory education for minorities and the poor. Even today it is difficult for many to forget that the plaintiffs were chosen for their indigence and that the lawyers were from the poverty bar. *Serrano* was undoubtedly intended as a stroke on behalf of poor persons generally. For some supporters it was only the exigencies of battle that justified the less intrusive alternative emphasized before the California Supreme Court and later in *Rodriguez.* To this day not every partisan has been reconciled to that expedient.

This ambivalence may have contributed to the confusion about the intended clientele for fiscal neutrality—a confusion which finally manifested itself in *Rodriguez.* The majority of the Court there claimed to be perplexed about the meaning of classification by wealth, a confusion easily forgiven considering the discord among plaintiffs' own supporters. The problem arose because of the natural assumption that all wealth discrimination works injury to poor people generally. This is a misconception wherever the mechanism of discrimination is—as in school finance—the collective wealth of political entities, such as school districts. Many poor families in fact reside in districts of high property wealth per pupil.

Serrano supporters were divided from the beginning over whether the favored definition of the injured class of pupils should be expressed in terms of poor people, poor districts, or poor people living in poor districts. In *Rodriguez,* the plaintiffs attempted to show a correlation between district and personal poverty, thereby inviting opponents to locate poor families living in rich school districts around the country, an invitation they accepted.[6] Eventually the *Serrano* forces may win the poor-spotting contest; by and large, nationally, they do seem to live in poor districts. This news, if true, came too late to offset the innocent mischief committed by scholars and law review editors in their anxiety to be helpful to the Court. In any case, however, it would be a flaccid rationale which rested solely upon such a hit or miss disadvantage of the injured class.

[6] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. at 23. In the majority opinion, Justice Powell relied upon a student Note, which concluded that in Connecticut poor people do not necessarily live in poor school districts, to refute appellees' argument. *See* Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars,* 81 YALE L.J. 1303, 1328-29 (1972).

The *Serrano* purists approached the classification issue in a simpler way; the injured class is that of pupils resident in relatively poor school districts. It is their collective poverty, not their personal poverty, that causes the problem. Family poverty, of course, increases the individual injury; poor families cannot escape to private schools and usually stand in greater need of educational services. Their clustering in poor districts thus would be relevant to the practical effect of this chaotic system of distribution. But this additional injury to the poor is less directly attributable to the state and seems less invidious when it is remembered that many others of the poor are simultaneously benefited by living in rich districts. The discriminatory state action is basically against collectivities, and everyone within them suffers.

Justice Powell dismissed this definition of the injured class almost without discussion on the ground that precedents involving wealth discrimination had been largely confined to personal wealth, and he had no mind to extend them. One, however, may wish to probe further, asking what it is about poverty that would ever induce the Court to give it special constitutional treatment and whether "district" poverty is different from personal poverty in this regard. District wealth is the only wealth with which public education can be purchased. Even rich men cannot obtain high priced public schools. All residents of poor districts are hurt by the absence of the one form of wealth which can purchase the educational services available to all students in richer districts. Everyone, rich or poor, living in Baldwin Park is public-education-poor.

Rich families, however, can escape poorly financed public schools by buying the private alternative. And seeing this may illuminate a view of the injured class not suggested by plaintiffs, Justice Powell, or the critics. In *Rodriguez* the protagonists were excessively concerned to discover the "poor" in the sense of the official poor as defined by legal standards for welfare, bail, and so forth. These are persons lacking the economic capacity to purchase a sufficiency of particular goods—food, clothing, shelter. Personal poverty is sensibly defined as the family's inability to buy something in the market. But the inability to buy potatoes was not the deprivation in *Rodriguez*; the problem was the inability of a family to purchase education. For such families—those that cannot afford private schooling—government has properly provided a form of educational welfare; it is called the public school. And, wherever the public schools are underfinanced and inferior, these families are the most poignant victims of the public fiscal system. They are the education-poor in both the public and private senses of the term. They are stuck with whatever the state chooses to force upon them.

The number of such families greatly exceeds that of the food and clothing-poor—the official poor. Indeed, the education-poor may represent half the population. And it is plain even from the statistics of the critics themselves that a strong correlation exists between district poverty and the lower half of the personal income scale. Once again it may be the blue collar worker who is the most consistent victim of governmental policy.

The concept of such a class of education-poor is crude and would need considerable attention from economists and demographers as well as lawyers.

Properly developed, it might represent a superior approach to defining the injured class in terms of personal as well as collective wealth. It would not supplant, but would rather refine, the district wealth test. The injured, that is, would be those children living in poor districts who are required by their family incomes and the truancy laws to accept education welfare. Among those who fall within this class but are relatively higher in the income scale, the injury would be partially offset by their greater ability to provide educational services outside school. This qualification seems of secondary importance, however; the state has preempted the prime hours of the child's day with its compulsory experience.

Finally, note that Justice Powell's distinction in *Rodriguez* between relative and absolute injury to the child's educational interest tends to generate additional confusion about the poverty issue. He suggests that the judicial precedents forbidding wealth discrimination involve only absolute deprivations; these cases would support plaintiffs only if it were proved that the child is denied a basic education, whatever that may be. One might ask first whether this represents a fair view of the precedents. What, for example, was the absolute deprivation in the criminal appeal cases?[7] Could Mr. Griffin not have taken an appeal without a transcript; and could Mr. Douglas not have represented himself? Each was already possessed of the minimum; there had been no divestment of their interest in an appeal. Of course, the transcript and the lawyer rendered their appeals plausibly more effective, but this is only to say that they were addressed to a relative deprivation. A free accountant in a tax case would serve the same function. The educational parallel to Griffin's trial transcript is the language lab and the library of the well-financed school district; and Douglas' lawyer is its orchestra or counseling service. In each instance the improvement over the basic provision is "merely" marginal.

Of course, showing a relative deprivation is only the beginning of the argument. One must go on from there to consider the substantive significance of such deprivations; and the comparison just made between Mr. Griffin and little Demetrio Rodriguez risks an hysterical response. It will be said that the child's superadded educational opportunity cannot compare in importance to the prisoner's freedom. I agree, but the proper comparison is not between Demetrio's language lab and Griffin's freedom. Rather, the factors to be contrasted are, on the one hand, the value of all improvements like language labs to all the children who would use them, and on the other, the value of the more elaborate criminal appeal to all convicted indigents. One can admit there is more at stake in each criminal case without conceding that constitutionally it is more important for society to provide a free transcript.

Suppose in a given state we knew that the incidence of reversal on appeal was three per cent before *Griffin* and could reasonably attribute an additional two per cent thereafter to the availability of transcripts for indigents. Suppose further that this two per cent represents one hundred prisoners while the *Serrano* benefits would represent a million children formerly com-

[7] Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

pelled by law to attend underfinanced public schools. Even reasonable doubts about the cost/quality relation in education cannot make this one easy. For that matter, the marginal effectiveness of the money spent for transcripts may be no easier to quantify than gains in output from extra school dollars. Perhaps the Court showed wisdom in the transcript cases when it refused to consider how much, or even whether, these prisoners' chances on appeal would in fact be improved.

The distinction between relative and absolute deprivation seems wrong as a matter of precedent and dubious as a picture of reality. Whatever its descriptive power in other fields, it does not nicely divide the significant from the trivial in education. If Demetrio Rodriguez is denied the opportunity to learn German because the Edgewood District cannot afford it, what kind of deprivation is that? Are not most such deprivations both absolute and relative? Is not the distinction itself pointless and misleading?

IV

OF REVOLUTION AND RATIONALITY

Despite its origins, fiscal neutrality should not be understood as somebody's second-best weapon in fomenting egalitarian revolution. There could be a revolution in which it might have a role to play, and that transformation of society might help the poor, but it would be essentially a revolt of rationalism. At ground level, fiscal neutrality is not class warfare but merely a challenge to the pathetic American system of local non-government. One wonders at the state's justification for creating both weak and strong local authorities to perform identical tasks. If the state has the option of creating authorities with similar capacity why has it not done so? Government seems satisfied to delegate power according to chance or the cunning of residents in creating tax havens. But why is it satisfied?

That is a question which Justice Powell understands. It is a question about rationality. Its very relevance may help to explain why Justice Powell, otherwise so eager to explain, neglected discussion of the principal classification argument of the plaintiffs—that collective wealth of the state-created districts was the key discrimination and that it defined the injured class. To create rich and poor enclaves of governmental responsibility may or may not be invidious treatment of poor people. It may or may not be a suspect classification like race. It is, however, an eccentric way to organize a polity. It may be defensible in historic terms, and no doubt the transaction costs of changing the established rules today would count for something. From that point, however, excuses in the defense of the system come hard—unless one really believes that public wealth discrimination is good for local control. And the capacity to believe that will be sorely tested by the neutral and decentralized systems now operating.

Emphasis upon the rationality aspects of discrimination may gain favor in the Court as it has recently in the journals. That is probably all to the good if it manages to keep the Court alive to its responsibility to encourage the states

to behave like governments. One should not be deceived, however, into supposing that rationality is either neutral or predictable as a judicial standard. One observer's rationality is another's delirium. And if implied legislative purpose is relevant in determining rationality, one could defend almost anything. The rationality of the Texas system could be established by inferring a legislative policy to encourage industry to form tax havens. In the end, if it is to enjoy credibility and respect, the test must candidly include considerations of substantive effect as well as fitness for the legislative purpose. It is impossible to avoid the question of the *relative* "fundamentality" of interests like education. It is only possible to pretend to do so and thus risk incoherency. If the Court comes again to decide *Rodriguez,* it should draw no more artificial boundaries between the "close scrutiny" formula and "rationality." Both are important and should interpenetrate.

Tactically, consideration of both the substance and the rationality of the discrimination will be important in the state court litigation now in process and projected. In such contests, even without showing constitutional singularity in the subject matter, one could still make a powerful argument that the existing school fiscal systems are irrational; yet in doing so one might fail by proving too much. Education is no more bizarre in its finance than is mosquito abatement or sewerage service; but no court will wish to be euchered into declaring a rationalist revolution against all governmental wealth variation. Thus, to prevail at all it will have to be shown that education is different from, and constitutionally more significant than, mosquito abatement. Perhaps education need not be "fundamental" with the talismanic consequences that label has latterly involved, but the court ought to be able to articulate its substantial singularity and assign education a place in the constitutional hierarchy of the particular state's jurisprudence. In many states this process of selection will be assisted by explicit treatment of education in the state constitution or, contrariwise, will be altogether pretermitted by explicit state constitutional foundations for the present system. Of course, in some states—New Jersey, for example—constitutional language will permit plaintiffs to forego reliance upon either the rationality or close scrutiny arguments.

Whatever the form taken by the legal argument, those seeking to end the discrimination must offer a standard by which a court may judge legislative response. And the legal argument for the standard is distinct from the standard itself. The *Rodriguez* plaintiffs argued *on grounds of* fundamental interest and close scrutiny; they argued *for* a standard of fiscal neutrality. It would be quite possible, however, to argue for that standard (or some other standard) on the basis of rationality. That is, rationality itself may be said to demand fiscal neutrality as a minimum, unless the state can discover better reasons for wealth discrimination than it has so far advanced. Some governmental discriminations are prima facie pointless, and this is one of them. That conclusion would be assisted, of course, to the extent that education succeeded in establishing its constitutional singularity.

Whatever the standard proferred the court, it must avoid the public relations problem that dogged fiscal neutrality. The standard must not only be intelligible and restrained, but it must be seen to be so. Perhaps this point

seems too dogmatic; after all the New Jersey case[8] was won despite that court's inability to articulate any standard whatsoever. However, if the legislature balks, the New Jersey court will ultimately have to face the necessity of establishing a workable norm. It is still open to that court to set some clear minimum criterion for legislation which will satisfy the state constitution. That criterion could be fiscal neutrality or another intelligible standard yet to be discovered. One possibility adumbrated by the opinion itself is simple dollar equality—statewide uniformity for children in similar circumstances. Such a standard would be intelligible if not in every respect intelligent.

V

A LOOK AT THE FUTURE

The editor has requested a comment on the future, a subject on which, by temperament, the author is highly qualified to expatiate. Sparing details, the career of the school finance issue will unfold as follows: first, there will be a good deal of important empirical and modeling work accomplished by social scientists and economists. One kind of inquiry will probe the historic inability of well-meaning legislatures to effect fiscal neutrality. The hypothesis that the balance of power lies with middle-wealth districts indifferent to change will be tested by analysis of voting records, wealth statistics, and so forth. Another set of studies will follow the behavior of power equalized districts in Maine and Florida to determine how much, if anything, family income has to do with setting the local expenditure level. Demographers using the 1970 census will finally chart the coincidence of district and personal wealth. Psychologists will continue to struggle manfully, and probably fruitlessly, to measure the relation between spending and quality; by chance we may learn something about the relation of the value of such research to its cost.

Meanwhile economists will model power equalizing apparatuses designed to adjust for the many differences in the objective influences upon spending, such as higher local costs of living and "municipal overburden."[9] Others will design models for compensatory education, full state assumption, community control with power equalization, voucher-style systems for family choice, the use of local income tax as the measure of effort, the hypothetical effect of power equalizing more than one public service, and a multitude of related devices. In short, there will be a serious invasion of the social, political, and economic foundations of public education finance by researchers and policy analysts who come from outside the system itself.

This research will be effective in holding society's nose to the malodorous reality. It will also ultimately demonstrate what Justice Powell found prob-

[8] Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (1972), *aff'd and modified*, 62 N.J. 473, 303 A.2d 273 (1973).

[9] The term "municipal overburden" refers to the differential burden of nonschool municipal services. This is relevant to the extent that nonschool taxes paid by individuals in a particular district affect the ability to pay school taxes. *See* J. COONS, W. CLUNE & S. SUGARMAN, *supra* note 3, at 232-42.

lematic—the compatibility of local choice with equality. Not that this will be enough to generate basic legislative reform in most states. There will be occasional breakthroughs where unusual combinations of forces congeal, as in Maine.[10] In most states, however, the potent self-interest of wealthier districts will recruit the apathy of the average districts for the protection of the status quo. In these majority states public education regrettably will fall into increasing disfavor to the extent that it becomes understood by its victims in poor districts.

Happily, a handful of legislatures in important states such as California,[11] Washington,[12] and New Jersey[13] will receive the enlightened judicial assistance they seek and need. The state supreme courts, applying their own constitutions, will invalidate wealth discrimination in education. This will permit the adoption of rational fiscal systems by legislators who can at the same time deflect the political wrath of the rich districts by resting upon the constitutional imperative. The transformation will not only be relatively painless, but will prove a substantial boon to local control. Over time it will generate additional structural reform, thereby helping to restore that respect for state and local government upon which federalism must ultimately rest. In time such legislative demonstrations will convince a Federal Supreme Court that to speak here in a well-considered mandate is to loose and not to bind. Out of its very regard for federalism will emerge a judicial insistence that the states of that union maintain sufficient self-respect to behave like governments.

[10] *See* Grubb, *supra* note 5, at 481-83.

[11] *See* Karst, Serrano v. Priest's *Inputs and Outputs*, 38 LAW & CONTEMP. PROB. 333 (1974).

[12] *See* Andersen, Northshore School District v. Kinnear: *The "General and Uniform" and "Ample Provision" Clauses*, 38 LAW & CONTEMP. PROB. 366 (1974).

[13] *See* Tractenberg, Robinson v. Cahill: *The "Thorough and Efficient" Clause*, 38 LAW & CONTEMP. PROB. 312 (1974).