Principled *Serrano* Reform

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Introduction

The decision of *Serrano v. Priest*[1] (*Serrano II*) rests on the principle that spending on public education shall not be a function of wealth other than that of the state as a whole. As a result, the California state government is now free from the constraint of an educational financing scheme built on local property wealth differentials; it can at last concentrate on determining which system best serves the basic educational needs of its school children. *Serrano II* thus represents not only an obligation, but an opportunity. Now that the California Supreme Court has intervened, the political energy previously dissipated on promoting and opposing aid formulas may be addressed to the substance of education financing. To be sure, during the transition the school finance system may be quite complicated; but it is only reasonable that the new regime be phased in over time to insure a coherent financial policy for education. Perhaps some logrolling is inevitable as conflicting objectives (including the non-educational) are compromised to enable the lawmaking machinery to move forward. If so, one might hope that the advocates themselves would start from principled positions.

Yet, because of proposals from the Governor and his backers,[2] it is unclear whether California's legislative battle will be fought in terms of basic educational objectives. The specter of financial and computer technicians wielding barely comprehensible state aid formulas looms. Perhaps this is the inevitable price of utilizing the tools of modern policy analysis; indeed, some may consider it a benefit. But hopefully there are legislators who are concerned not only about the dollars their constituents receive, but also about the underlying principles of that system.

1. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 45 U.S.L.W. 3822 (U.S. June 15, 1977).

2. State Assemblyman Leroy Greene is sponsoring A.B. 65, 1977-78 Reg. Sess. (introduced Dec. 15, 1976), the Governor's proposal, in the legislature.

To broaden the debate, this commentary explores elementary and contrasting precepts upon which a *Serrano* solution might be based. Three means of financing education are discussed in Parts I, II, and III: scholarships or vouchers, full and uniform state funding, and district power equalizing.[3] Part IV reviews various aid adjustments that have been proposed and which reflect state policy choices in favor of certain pupils and educational programs. Each of these proposals is analyzed in terms of the underlying values it represents.

I. Scholarships and Vouchers: Optimizing Freedom of Choice

The state could simply provide each school age child with a scholarship or voucher to be used at the school his family chooses.[4] This proposal emphasizes the liberty principle. As scholarships became their basic source of revenue, public schools would in effect begin to charge tuition and each school would have to attract students in order to survive financially. The students, in turn, would be able to attend public schools located outside their "districts"; indeed, the concept of districts might disappear. Students would also be permitted to apply their scholarships to private school tuition. Because of tradition, inertia, and familiarty, most families would probably continue to patronize public schools, at least at the outset. Over time, however, private school enrollment might rise substantially.[5] For example, there might be a sizeable market for schools that offered more to those poor and minority families who are ill-served by public schools today, but who cannot afford to escape their school districts. The scholarship proposal for education is, in this regard, conceptually similar to the Medicare program for the elderly. In effect, the federal government provides Medicare recipients with health care charge cards (vouchers) that may be used at the public or private health care office of their choice. Adopted in 1965, this precedent from the medical field suggests that the state voucher route would be a viable solution to the financial problem in public education.

In order to ensure free choice, however, the historical trappings of the existing district system must be shed. Public financing of education had its origins in nineteenth century America when population sparsity and transportation problems in many communities mandated that children attend a

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3. See notes 41-49 and accompanying text *infra*.

4. The voucher plan was mentioned with approval by the California Supreme Court in *Serrano II* as one possible solution to the school financing problem. 18 Cal. 3d at 747, 557 P.2d at 939, 135 Cal. Rptr. at 355.

5. Approximately 10% of the state's elementary and secondary school children currently attend private schools, primarily schools associated with religious organizations.

single school in the general vicinity. At that time, local government was the basic financing unit for all social welfare measures throughout America *e.g.*, local communities drew on local wealth to take care of the poor. Funding education from local property tax revenue was in a similar vein. The situation has of course changed today. Indeed, what *Serrano II* condemns is the legacy of this first, but presently insufficient, step in the collective financing of education. The natural monopoly problem in education is now confined to a modest number of rural children; the states and the nation have assumed primary financial responsibility for most domestic programs. Thus, the historical reasons for requiring children to attend the local public school no longer exist.

The Medicaid program (in California, "Medical") provides a different analogy from that of Medicare since its health care credit card plan is limited to the poor. The state's major educational role could similarly be limited to providing scholarships to needy children. The state's concern for the education of all children could be accomplished by enforcement of compulsory attendance and general neglect laws. Nevertheless, vouchers for the poor only is an unlikely solution in the elementary and secondary education field, if nothing else, because of the tradition of universal "free" schooling. Moreover, the universal scholarship plan would allow all families to pay for the schooling of their children over time rather than being forced to pay large sums in the relatively few years when children are in school and when basic family expenses, compared with income, are also typically high. In this way the government acts like a lender in a world in which commercial lenders are reluctant—children are obviously not suitable collateral. In short, the "temporarily" needy are alleviated of a cash flow problem. But a careful analysis of the universal voucher plan would reveal that repayments would probably not be tailored to borrowing as in a commercial setting. Rather, there would be winners and losers and the poor, in general, would probably gain at the expense of the rich.

A. Policy Considerations

The scholarship proposal thus raises the broad policy question: who pays and who benefits under alternative educational financing systems? For present purposes, three comments can be made in response. First, apart from their effect on the rich and the poor, both the existing finance scheme and the proposal that would provide scholarships for all appear to benefit the large family at the expense of the small family and the childless.[6] Whether

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6. An alternative would be to view the scholarship as a mechanism by which children themselves pay for their own education. The payment is on an income-contingent basis through the taxes they pay as adults. This model assumes that the child support laws with respect to education would be repealed.

that situation is desirable is an issue worthy of legislative consideration. Second, in analyzing who pays, it is not enough to note that the burden of today's school finance plan is carried, at least in part, by non-users, such as the childless and the private school family. Any such analysis also requires comparison with a competing financing package. For example, were the scholarship plan supported by a combination of general state taxes, including a state property tax, one major beneficiary of the change would probably be those who now use private schools.[7]

Finally, although the costs of the proposed scholarship program are not predictable, it is possible that the plan would cost less than the present system. Since private schools that receive no state aid now attract ten percent of the state's children, it might appear that state educational costs would rise at least by that amount. It is by no means clear, however, that the scholarships would have to be equal to the weighted mean expenditure in California public schools today. *Serrano II* plainly does not mandate such a result; there, the court's concern was with guaranteeing equality of educational opportunity, not with equal expenditure levels.[8] Moreover, in the competitive market resulting from the scholarship plan, levels of service equal to those provided by today's monopoly might well be offered for less.

The legislature must resolve four additional policy issues raised by the voucher program. First, a uniform scholarship plan for all school age children would constitute a commitment to equal funding of high school and elementary school children and, necessarily, a rejection of the existing spending pattern that typically favors high school pupils. If it is true that the younger years are the most important for development, perhaps the existing pattern should be neutralized, if not reversed. Similarly, as applied to the present system, the scholarship proposal would begin funding the education of a child when he becomes five or six years old. The legislature should consider, however, whether the state's children should start their formal education (and perhaps end it) at an earlier age in order to reap the most benefit from any scholarship plan.[9]

Second, the legislature must decide whether participating schools are to be allowed to charge tuition in excess of the scholarship amount. Such charges are contemplated in the voucher plan favored by economist Milton Friedman.[10] Such a plan, however, violates an important aspect of equal

7. *See* J. Coons & S. Sugarman, Family Choice in Education: A Model State System for Vouchers 85-118 (1971) [hereinafter cited as Coons & Sugarman].

8. 18 Cal. 3d at 747-48, 557 P.2d at 939, 135 Cal. Rptr. at 335.

9. Wilson Riles, California's Superintendent of Public Instruction, once proposed that the twelfth grade be dropped in favor of beginning public school one year earlier, arguing that the money could be more effectively employed in pre-kindergarten classes. Address by Wilson Riles, School of Education Commencement, the University of California at Berkeley (June 8, 1971).

10. M. Friedman, Capitalism and Freedom 85-107 (1962).

educational opportunity: the freedom of the poor to choose to go to school with the rich. Hence, participating schools should be required to accept the scholarship as the full cost of education.[11] The rich could supplement their children's education with private out-of-school instruction but they would have to forego their scholarships and attend non-participating schools if they wanted to buy their freedom from the poor.

Third, the legislature must adopt rules governing admission to participating schools. Under a freedom of contract model, schools could turn away anyone they wished. In actual practice, however, the Civil Rights Acts[12] and the Constitution[13] would serve as limitations on such refusals. It might be wise to impose further limits favoring consumer sovereignty and the right to be admitted. Schools, like public utilities, would have to take all applicants limited only by their pre-announced capacity.[14]

Fourth, the legislature must establish the qualifying criteria under which an educational institution would be entitled to receive scholarship students. Assuming input requirements were adopted, the only other requirements that seem necessary would be that the school meet regularly, offer substantial training in reading and arithmetic to children age fourteen and younger, and disclose details of the school's program and personnel to participating families and potential applicants.[15]

Constitutional questions are raised, however, by a state scholarship program available to private schools. Not only is the establishment clause[16] of the First Amendment of the federal Constitution implicated if religious schools are included,[17] but three similar California constitutional provisions are also pertinent.[18] A fourth provision of the California Constitution is not limited to religious schools; it provides that "no public money shall ever be appropriated for the support of . . . any school not under the exclusive

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11. For further discussion see Sugarman, *Family Choice: The Next Step in the Quest for Equal Educational Opportunity?* 38 LAW & CONTEMP. PROB. 513, 550-51 (1974) [hereinafter cited as *Family Choice*].

12. *See* 42 U.S.C. § 1981 (1970) and 42 U.S.C. 2000(d) (1970).

13. *See* U.S. CONST. amend. XIV.

14. *See generally Family Choice, supra* note 11, at 536-44.

15. *Id.* at 534-36.

16. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

17. See notes 21-23 and accompanying text *infra*.

18. Those provisions are: (1) "The Legislature shall make no law respecting an establishment of religion." CAL. CONST. art. I, § 4 (1879) (amended 1974); (2) "No public money shall ever be appropriated for the support of any sectarian or denominational school . . . ." CAL. CONST. art. IX, § 8; and (3) "[The Legislature shall never] make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school . . . controlled by any religious creed, church, or sectarian denomination . . . ." CAL. CONST. art. XVI, § 5 (1879) (amended 1974).

control of the officers of the public schools."[19] While an extended analysis of the issue is beyond the scope of this commentary, this latter provision may not be a serious obstacle. Students who attend private colleges such as Stanford University and the University of Southern California presently receive state scholarships, and those schools are not under the exclusive control of state officials. Similarly, California has an educational voucher plan for handicapped children of public school age which allows them to attend private schools under certain circumstances;[20] no constitutional attack has been made on that program, despite the lack of exclusive public control over the private schools involved. To be sure, these are limited programs that have not in fact been validated through court challenge, but they suggest that programs adopted for the primary purpose of providing children with increased educational opportunities will be valid even if they incidentally benefit the schools the students attend.

Plainly, every state spending decision that benefits private schools does not necessarily amount to an unconstitutional appropriation for the support of such schools. In those cases in which the United States Supreme Court has voided similar state plans for aid to private schools, the programs at issue included predominantly religious schools.[21] A general scholarship program in which religious schools are not the predominant members would probably survive both state and federal constitutional challenge, even if the religious schools are fully included as educators of scholarship students.[22] In sum, the argument is that as long as (a) the state is getting the full worth if its investment in public benefits (here, educated children), (b) the legislative motive is not to enrich the parents whose children attend private schools, and (c) the scholarship recipients are free to choose between public and private schools, then such a program should not be deemed unconstitutional.[23]

B. Existing Precedents

Although the voucher plan represents a novel approach to elementary and secondary education, it is not a radical departure from the system of higher education in California today. For students who graduate in the top half of their high school class, the state college and university system functions somewhat like the scholarship plan proposed here. These students are entitled to attend a school in the state college system and may be

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19. CAL. CONST. art. IX, § 8.

20. See CAL. EDUC. CODE § 6871 (West Supp. 1977) (current version at § 56031 (West Spec. Pamph. 1976)).

21. See, e.g., Committee for Pub. Educ. and Rel. Liberty v. Nyquist, 413 U.S. 756 (1973).

22. For a more detailed analysis, see Sugarman, New Perspectives on 'Aid' to Private School Users, in NONPUBLIC SCHOOL AID (E. West ed. 1976).

23. See Family Choice, supra note 11, at 559-63.

admitted to any campus they choose, not just to the one closest to their home. They are, in effect, "on scholarship" as they pay virtually no tuition; at the same time, the colleges they choose receive a significant portion of their budget from the state based upon how many students they attract. For students in the top eighth of their high school class, the University of California system functions similarly, although the scholarship is only partial. And although the community college system is formally financed in a manner similar to the elementary and secondary schools, it offers similar advantages to the student. If a student is eighteen and willing to reside in California, he is entitled to attend junior college without cost in the community college district of his choice. Finally, in the area of higher education, there is precedent for expanding publicly funded choice to include private colleges. California now awards about $50 million annually in scholarships to able and needy high school graduates, most of whom attend private colleges and universities.[24]

Though not without precedent, the proposed scholarship program for elementary and high school pupils has far reaching implications. As a solution to the school financing problem in California, the alternative of vouchers may very well not be adopted by the legislature. But because *Serrano II* offers a unique opportunity to reexamine education in California, the proposal might stimulate increased experimentation with free choice in education in limited geographical areas or for specific groups of children.[25]

II. Full State Funding: Simple Equality

Full and uniform state funding of public education is an equally principled response to *Serrano II*.[26] Under this plan, the state would raise all educational funds through general taxes and would distribute the revenues to public schools on a uniform basis. This proposal emphasizes basic equality; in fact, it goes beyond the mandate of *Serrano II* by eliminating all spending differences, not simply those that are wealth-related.[27] Yet by virtue of its

24. California Educational Opportunity Grant Program, CAL. EDUC. CODE §§ 40400-15 (West Supp. 1977) (current version at §§ 69530-47 (West Spec. Pamph. 1976)) (replacing in fiscal year 1977-78 the Competitive Scholarship Program, CAL. EDUC. CODE §§ 41000-14 (West Supp. 1977) (current version at §§ 69560-73 (West Spec. Pamph. 1976)).

25. There are, on the other hand, some principled objections to the voucher proposal. Some argue that public education assures the common socialization of children. The validity of this argument is doubtful in view of the race and class isolation presently experienced in our public schools. Moreover, the pluralism that could result from a family choice scheme might ultimately result in a true national consensus. In addition, while school districts may foster a sense of community, a more realistic "community of interest" would be created among parents who willingly sent their children to the same school.

26. Full state funding, with the imposition of a statewide property tax, was discussed with approval by the California Supreme Court as another possible solution to the school financing problem. 18 Cal. 3d at 747, 557 P.2d at 938, 135 Cal. Rptr. at 354.

27. *Id.* at 738, 557 P.2d at 939, 135 Cal. Rptr. at 355.

simplicity, full state funding has considerable legislative appeal.[28]

Objections may be raised to this elegant solution, however. It may first be argued that to have to select one uniform expenditure level per pupil for all schools presents the legislature with a dilemma. The state must either raise average expenditures to the level of the current high spending districts, thereby incurring huge cost increases, or lower the amounts expended by those districts, thereby reducing the quality of their educational programs.[29] But this dilemma may be less intractable than it appears. Many high-spending school districts probably include in their educational budgets items that are only loosely tied to the traditional core functions of schools; were full state funding enacted, these could be dropped and farmed out to other branches of local government.[30] In addition, as a result of the reforms made in response to the first *Serrano* decision, *Serrano v. Priest*[31] (*Serrano I*) in 1971,[32] spending variations are far less today for most students than they were when the *Serrano I* complaint was filed. Moreover, since collective bargaining has recently been adopted in California public education, the costs incurred in the form of wages and working conditions might well become more uniform statewide, regardless of the school finance plan adopted. Finally, the reform plan can be transitional; indeed, it can follow the general pattern of the post-*Serrano I* reforms. High-spending districts

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28. For a discussion of the view that children have different needs and hence "equality" requires non-uniform spending, see text accompanying notes 50-64 *infra*.

29. This same objection can, of course, be made to the uniform scholarship proposal. In response to that concern, Professors Coons, Clune, and I have proposed a kind of variable scholarship scheme in which the scholarship amount would be a function of a family's wealth and its willingness to pay for education; we called that proposal "family power equalizing." J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 256-68 (1970) [hereinafter cited as COONS, CLUNE & SUGARMAN].

An analogous problem is now faced by federal welfare reformers. Benefit payments in the Aid to Families With Dependent Children (AFDC) program vary dramatically throughout the nation. In some places, these variations both exceed and are inconsistent with differences in cost of living. They persist despite the fact that the federal government now pays, on an open-ended basis, a higher share of these costs in poorer states. If the federal government were to take over AFDC in order to deal with these inequalities it would have to decide how high to set the benefit level. To many it seems just as inappropriate for southern poor people to receive double their former grants as it would be for California poor to receive less than they now do. Thus, in 1972, when the federal government effectively took over welfare for the aged, blind, or disabled, it still allowed states to add on supplementary payments, which about three-quarters of the states have done. SOC. SEC. ADMIN., STATE SUPPLEMENTARY PAYMENT PROVISIONS UNDER SSI, January 1, 1975 at 1 (Research and Statistics Note No. 2, March 1, 1977).

30. There is a danger in this idea, however. Wealthy districts may seek to shift the core of their educational program to other local government entities, in order to fund education through agencies that may still exploit their wealth advantage. While a prediction is difficult, excessive use of this technique would probably meet with the courts' disfavor as inconsistent with the mandate of *Serrano II*.

31. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 60 (1971).

32. 1973 Cal. Stats., ch. 208; 1972 Cal. Stats., ch. 1406.

could be held to budget increases that are less than the rate of inflation, while the expenditures of low-spending districts could outpace inflation.[33] This approach applies a "squeeze factor," and were the squeeze applied even more tightly in the future, districts would eventually converge at a point where the influence of wealth on spending is de minimis. While the *Serrano II* opinion is notably silent regarding tolerable imperfections in the remedy to be applied, it would seem that a de minimis rule would suffice.[34]

Another objection to full state funding is the political interest in avoiding higher state taxes and in excluding major educational costs from the state budget. California officials have often expressed the fear that once a statewide property tax for education is adopted, it may encourage a further extension of this taxing mechanism. But even now, the state can easily manipulate what amounts to an imposed local property tax simply by changing the terms of the state-local school financing partnership. This is true because although property taxes for education are formally levied by local governments,[35] a significant portion of these taxes do not offer local options. For example, under the present foundation aid program a computational local property tax rate ($3.87 per $100 of assessed valuation in unified school districts) is established.[36] Officially, the computational rate is hypothetical; state aid to the district is equal to the difference between what that rate would raise per pupil in the district and the foundation amount per pupil.[37] However, since all districts feel obliged to spend at least at the

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33. *See, e.g.*, CAL. EDUC. CODE § 20905 (West Supp. 1977) (current version at § 42238 (West Spec. Pamph. 1976)).

34. A transitional system should be judged by "(1) whether in the shortest practicable time the impact of differences in district taxable wealth upon spending will have been substantially eliminated for all but an insignificant number of children; and (2) whether, ultimately, the impact of such wealth differences will have been eliminated for all children." Brief for the Childhood and Government Project as Amicus Curiae at 3, Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976). A transition to full state funding could surely be designed to meet this test.

On the other hand, existing spending variations at the county level probably serve as rough estimates of county differences in the cost of providing similar educational services. Bringing the rural and metropolitan county averages into line would frustrate the very equality principle that simple full state funding is designed to serve. In theory this problem could be solved by a cost of education index, but no satisfactory index is presently available. Moreover, it will always be easier for state legislators to allow costs to rise in deference to local spending preferences than to establish central priorities and face up to the inevitable allocation problems.

35. CAL. CONST. art. IX, § 6 (1879) (amended 1974); CAL. EDUC. CODE, §§ 20701-06 (West Supp. 1977) (current version at §§ 14200-05 (West Spec. Pamph. 1976)).

36. CAL. EDUC. CODE §§ 17702 (West Supp. 1977) (current version at §§ 41761, 87431 (West Spec. Pamph. 1976)).

37. Under present law, even if there is no difference between the amount that would be raised by the computational rate and the foundation level, a district is guaranteed a flat grant of $125 per pupil in average daily attendance. CAL. EDUC. CODE §§ 17751, 17801 (West. Supp. 1977) (current version at §§ 41790, 41800 (West Spec. Pamph. 1976)). *Cf.* CAL. CONST. art. IX, § 6, para. 4 (1879) (amended 1974) (120 per pupil). This money, known as "basic state aid," was held by the trial judge to have an "anti-equalizing" effect on school districts, of varying wealth;

foundation level,[38] as a practical matter the computational rate is levied in most districts. In fact, most wealthy districts have tax rates equal to or in excess of the $3.87 computation rate, thus using their wealth advantage to achieve high spending status rather than to maintain a minimum taxing level. In short, the $3.87 property tax rate might as well be an imposed tax, because anytime the state wishes to affect property taxes, it simply alters the computational rate.

A related ground for opposition to a state property tax lies in elected officials' fear of voter backlash in response to higher state taxes and a corresponding increase in the state budget. This fear is also unfounded. Suppose that under a full state funding system the state levies a state property tax equal to the $3.87 computational tax rate. Although there would in fact be a new "state" tax and a large increase in the state budget, local taxpayers (except perhaps in the rich districts) would be relieved of the local property tax and face no tax increase. Moreover, when trade-offs must be made among the major fields of health, education, and welfare, funding school costs through state taxes allows the responsible state officials to use the state budget as the basis for policy choices. In addition, property tax reform could be carried out more efficiently. For example, in order to shift property taxes from residents to commercial and industrial users, the state could raise the overall state property tax rate and, at the same time, increase the homeowner's property tax exemption and the renter tax credit in the state income tax system.[39] The fear of voter backlash is in essence simply an excessive concern with form.

A third objection to full state funding attacks the central hypothesis of the proposal. The empirical assertion is first made that taste for educational spending varies among local school districts. It is then argued that even though *Serrano II* prohibited expenditures based on district wealth, it did not and should not bar variety in the level of local expenditures.[40] In practice

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in the context of the current school finance scheme, it was therefore unconstitutional. Serrano v. Priest, No. 938, 254, conclusion of law no. 102, (Los Angeles Co. Super. Ct., Aug. 30, 1974). On the other hand, $120 of the $125 per pupil guarantee would seem valid since that amount is specified by the state constitution. CAL. CONST., art. IX, § 6, para. 4 (1879) (amended 1974). Therefore the proposal of Governor Brown and his backers (A.B. 65) to phase out the flat grant would appear impermissible.

38. The current foundation level for high school students is $1198 as compared to $1012 for elementary school students. Analysis of A.B. 65 at 3, A. Post, Legislative Analyst, April 8, 1977.

39. Of course, these state policy decisions could be made and the reforms carried out even if the property tax remains "local". But the trade-offs would be more difficult to perceive and implementing legislation would perhaps be more complicated. In any event, these points do not argue against substituting the state for the local property tax.

40. *See* 18 Cal. 3d at 746-48, 557 P.2d at 938-39, 135 Cal. Rptr. at 354-55. Moreover, the argument could be made that full state funding is itself unconstitutional. The California Constitution can be interpreted to require a grant to districts, on a wealth-free basis, of the power to vary local spending. *See* CAL. CONST. art. IX, § 5.

this would mean that once the state guarantees some minimum level of local spending, taste-related local add-ons would be allowed, thereby permitting those districts who wish to spend more for education to do so. A system allowing for wealth-neutral local district add-ons is said to stimulate experimentation with new programs, preserve local control, and create competition between school districts to achieve high levels of spending and efficiency simultaneously. Nevertheless, the manner in which the state can comply with *Serrano II* while allowing local districts with different spending preferences to exercise their discretion is not self-evident; this will be the topic of the next section.

III. District Power Equalizing: Fiscal Neutrality

Under a system founded on fiscal neutrality, educational spending may vary as long as it is not based on wealth differences among districts. It is based upon the principle of equal educational opportunity. Implementation of the fiscal neutrality concept, however, is not an easy matter. Assuming some definition of wealth is agreed upon, one possibility would be to redraw district boundaries so that all districts possess equal wealth. Each district would then be allowed to finance from local wealth either the total cost of education or a supplementary amount above a minimum state-provided base. But this solution is implausible because it would require either very large districts that would destroy the sense of community that such "add-ons" are designed to further, or create districts with non-contiguous boundaries, again with a resulting loss of identity. Thus, advocates of fiscal neutrality have sought to create state aid or matching grant formulas that would subsidize education in such a way that all districts would become equally wealthy for educational purposes. These proposals are generally known as district power equalizing (DPE), wealth equalizing, or wealth pooling plans.[41]

A. *Ex Ante* Versus *Ex Post* Fiscal Neutrality

As initially proposed, the DPE plan sought to achieve what Professor Friedman has aptly termed *"ex ante* fiscal neutrality."[42] In order to compensate for differences in district wealth, the legislature initially adopts a state aid formula whereby districts levying the same tax rate would have the same expenditure level per pupil.[43] Under this scheme, the cost of education to each district would be equal to a given proportion of its wealth. A district

41. The *Serrano* court recognized district power equalizing as another possible solution to the school financing problem. 18 Cal. 3d at 747, 557 P.2d at 939, 135 Cal. Rptr. at 355.

42. L. Friedman, Implementing the *Serrano* Decision: Constraints, Alternatives, and Avoiding Unintended Consequences, A Summary Report of the California School Finance Task Force of the Graduate School of Public Policy, University of California, Berkeley at l,1 (August, 1976) [hereinafter cited as Friedman].

43. COONS, CLUNE & SUGARMAN, *supra* note 29, at 200-42.

could choose to spend a greater amount on education than another, but it would have to tax a larger portion of its wealth.

Under the plan proposed, however, districts might array themselves in such a manner that spending patterns would still be correlated with existing differences in wealth. For example, in order to maintain their traditional commitment to greater spending, voters in high property wealth districts could continue to raise relatively larger amounts. Alternatively, because education would become less expensive to the low property wealth districts, they could conceivably spend more than high wealth districts. Indeed, there is some evidence that were district power equalizing actually tried in this simple *ex ante* form, it would overcompensate for wealth differences with the effect that low wealth would become associated with high spending.[44] To rectify this *ex post* problem, the state could observe district behavior and then continuously adjust the state aid formula until spending and wealth were no longer correlated.[45] It is doubtful whether an approach that simply abandons *ex ante* fiscal neutrality is wise, however. The *ex post* test is not concerned with a principled state aid formula; rather, it focuses entirely on results. This means that it would be permissable to structure a price schedule that would create inequities among individual districts (indeed identical districts could all be treated differently) as long as a statistical analysis of resulting behavior showed that wealth differences accounted for no significant part of the spending variation.

Therefore the *ex post* and *ex ante* definitions of fiscal neutrality should be combined into a single approach.[46] This approach is based on the assumption that there is in fact no correlation between district wealth and district spending preferences. Any *ex post* correlation of spending with *ex ante* district wealth would be indicative of an improper definition of wealth. Hence, this approach would not require the state to alter the aid formula directly as the *ex post* test implies; rather, a search would be made for a new or modified definition of district wealth. Indeed, some commentators have already suggested that were a district power equalizing plan enacted, it might not be proper to use property value per pupil as the measure of wealth.[47] A DPE plan in which the definition was based on district income

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44. *See* Feldstein, *Wealth Neutrality and Local Choice in Public Education*, 65 AM. ECON. REV. 75 (1975). *Contra*, D. Stern, The Effects of Alternative State Aid Formulas on the Distribution of Public School Expenditures in Massachusetts (1972) (unpublished Ph.D. dissertation at M.I.T.).

45. As Professor Friedman has pointed out, neither the California Supreme Court nor the legal commentators have made clear whether *Serrano II* demands an *ex post* or an *ex ante* definition of fiscal neutrality. See Friedman, *supra* note 42, at 12-18.

46. Professor Coons and I have outlined a similar approach for family involvement in education. *See* COONS & SUGARMAN, *supra* note 7, at 102.

47. *See generally*, FINAL REPORT TO THE SENATE SELECT COMMITTEE ON SCHOOL DISTRICT FINANCE, Vol. I (June 12, 1976).

rather than property wealth, for example, is certainly a technically feasible arrangement.[48] Of course, by adjusting the wealth definition of each district, the state would be assigning a new price schedule to that district, and the fairness of this new definition and schedule would be judged by the *ex post* test. The important point, however, is that the commitment to *ex ante* fiscal neutrality would be maintained by adherence to the wealth adjustment route. Adjustments in the price schedule would be based upon a conceptual framework that treats individual districts in a manner intended to preserve individual fairness.[49]

B. An Attempted Application of DPE

Assembly Bill 65, the initial proposal advanced by Governor Brown and State Assemblyman Leroy Greene in response to *Serrano II*, generally adopts a DPE concept, although in detail it fails to meet any definition of fiscal neutrality. A.B. 65 would phase in a DPE scheme whereby all districts that desire to increase spending on education would, for the tax increase they chose, receive the same additional revenue per pupil as a district with average wealth. Those generating too much locally would contribute the excess to a special state fund, while those producing too little would draw from this fund. Unfortunately, the bill places a dollar ceiling on the state's obligation to this special fund; thus, if many of the poorer districts took advantage of the opportunity provided, there would not be enough money available. Moreover, current wealth-related spending patterns were developed at a time when local boards had more taxing authority and when communities were more willing to vote for new school taxes. It is unlikely that today's voters would as readily approve increases to augment spending levels. Besides, it will take five years before the plan applies to the large number of districts now spending at the foundation level. Furthermore, A.B. 65 both maintains the lighter taxing burden now enjoyed by property-rich districts and provides immediate tax relief for districts with above average spending and wealth. Thus, even after five years, were a poor district to vote a spending increase twenty per cent greater than the foundation level, it would nonetheless experience a greater tax burden than richer districts that have always spent at 120 percent of the foundation amount. In sum, A.B. 65 in its initial form does not provide for *ex ante* fiscal neutrality. Nor will *ex post* fiscal neutrality be achieved, because Governor Brown's proposal perpetuates existing spending patterns, at least for the foreseeable future.

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48. *Id.* at 63-89.

49. For further discussion of this concept, see Friedman, *The Ambiguity of Serrano: Two Concepts of Wealth Neutrality*, 4 HASTINGS CONST. L.Q. 487 (1977).

IV.   Adjustments Reflecting State Policies

Each of the broad proposals discussed has implicitly treated all students alike; despite differences in pupil conditions, no difference in spending among pupils, i.e., categorical aid, is mandated or implied. *Serrano II* recognizes that aid adjustments reflecting state policy judgments about such differences are proper.[50] For example, the state could adopt a policy favoring greater spending for high school pupils, for students living in high cost of living areas, for children pursuing vocational education, or for the education of the blind. Three such policy adjustments considered here are conditional categorical aid, aid to the educationally disadvantaged, and aid to further racial integration.

A.   Categorical Aid or Revenue Sharing

The California trend in recent years has been to assign more discretion in educational matters to the districts themselves. Until 1968, state curriculum requirements were extremely detailed and inflexible, including rules about minutes of instruction per week in specified fields;[51] since then program requirements have been relaxed considerably.[52] Until 1974, the Education Code, in general, was restrictive. For example, a local school had no power to make decisions not expressly permitted or clearly implied from existing grants of authority. Now the Code is more liberal; districts may act at their discretion except where their action would be prohibited by, in conflict with, or pre-empted by state laws.[53] In addition, although the state still certifies public school teachers, districts may now establish independent study programs under which students are taught by persons who are not certified teachers.[54] Given this tendency toward increased decentralization of public education, the problem facing the state legislature is to decide whether and how to place conditions on the use of its financial aid.

School districts receive unconditional general aid under the present foundation plan. Since both full state funding and district power equalizing are essentially revenue sharing proposals, there is no reason to expect that the state will place conditions on general funds provided under either of those plans. The issue of conditional aid arises, however, when the state

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50. 18 Cal. 3d at 770-76, 557 P.2d at 954-57, 135 Cal. Rptr. at 370-73.

51. *See* Griffin, Principles of Construction for a Permissive Education Code (1976) (unpublished Ph.D. dissertation at the University of California, Berkeley).

52. CAL. EDUC. CODE §§ 8551, 8571 (West Supp. 1977) (current version at §§ 51210, 51220 (West Spec. Pamph. 1976) (enacted in the George Miller, Jr. Education Act, 1968 Cal. Stats., ch. 182)).

53. CAL. EDUC. CODE § 7503.5 (West Supp. 1977) (current version at §§ 35160, 72233 (West Spec. Pamph. 1976)).

54. CAL. EDUC. CODE § 11251(a) (West Supp. 1977) (current version at § 46308 (West Spec. Pamph. 1976)).

decides to make an adjustment in aid to account for differences in pupil needs. Should the state insist that such funds be used only for the reasons for which the aid adjustment was made?

In general, the state should impose no conditions on districts, except perhaps reporting, because the local political process will usually force conformity with the state's broad policy objective. There is no point, for instance, in trying to force unified districts to spend an amount on high school pupils which is greater than that currently spent on elementary pupils. Nor is there any point in insisting that high cost of living districts spend all extra funds given for that purpose on certain items, such as wages and land, that actually cost them more. On the other hand, when the state program is designed to benefit a "discrete and insular minority,"[55] for example those pupils who do not speak English, state controls may be necessary. This could also be true if a certain group constitutes a politically powerless minority within a district. Yet, neither imposing a state-designed program nor requiring state approval of the local program seems appropriate. Substantive controls are likely to be ineffective unless the state is willing to invest time and money in constant monitoring of local administration and to risk significant involvement in local affairs. A more promising technique would be to give the families of the beneficiary children procedural authority to participate in the spending of the funds. Parent councils (similar to those established under federal Title I programs) could be effective, particularly if given independent staff support and a voice in the decision-making process.[56]

B. Educationally Disadvantaged Youths

California's post-*Serrano I* school finance reform included a substantial allocation for a new program of special aid to districts with concentrations of "educationally disadvantaged youths" (EDY).[57] An understanding of this program is useful since the *Serrano II* decision did not preclude its continuance. Examining the distributional criteria actually used, poverty, transiency, and a bilingual/bicultural factor, is a helpful starting point. These factors would seem to indicate a legislative desire to compensate students who live in culturally disadvantaged homes and/or attend schools with inadequate educational resources. But in fact it appears that the drafters had something slightly different in mind. By studying statewide variations in reading achievement, state officials concluded that these three factors predicted achievement differences more accurately than did any other vari-

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55. United States v. Carolene Products, 304 U.S. 144, 155 n.4 (1938).

56. *See generally* D. KIRP & M. YUDOF, EDUCATIONAL POLICY AND THE LAW 553-67 (1974).

57. CAL. EDUC. CODE §§ 6499.230-.238 (West Supp. 1977) (current version at §§ 54000-07 (West Spec. Pamph. 1976)).

able tested.[58] Thus, EDY funds are being distributed to school districts in the hope that extra money will improve student achievement. It might be asked why the legislature did not simply distribute funds to each district based upon the number of poor achievers. The answer is that such a direct route might have created negative incentives, e.g., as the number of successful student achievers increased, the amount of EDY aid received would decrease. Use of demographic indices that do not change with success or failure as proxies for poor achievement might be an effective response to this problem. While such a solution would eliminate the possibility of rewarding success, at least it would not reward failure.[59]

The rationality of the EDY program becomes clouded, however, when the details of the distributional criteria are examined. First, a district's Spanish-surnamed and Asian-American student population is compared, on a percentage basis, with the state average; this, in essence, becomes the district's bilingual/bicultural index. Second, a count is made of the number of students who have transferred into or out of the district's schools during the year; comparing this on a percentage basis with the state average produces the district's transience index. Finally, a district's per pupil entitlement to federal Title I dollars is compared with the state average, and this becomes its poverty index; a district's Title I allotment is based on its AFDC welfare population.[60] The three indices are then average.[61] The net index

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58. Interview with Gerald C. Hayward, Senior Consultant to the Senate Finance Com-. mittee, California State Senate (April 8, 1977) [hereinafter cited as Interview with Gerald C. Hayward].

59. Perhaps this is the best we can do where the cause of achievement level is so difficult to assess; yet I have some difficulty accepting this explanation for the use of indirect criteria to distribute EDY funds because of the state imposed criteria chosen for the distribution of EDY funds to schools *within* a district. Those funds are first distributed to schools with the worst reading achievement record, then to better achieving schools until all the district's EDY funds are exhausted. Thus, within-the-district success can cost the *school* money and perverse incentives are introduced at that level.

60. CAL. EDUC. CODE § 6499.231 (West Supp. 1977) (current version at § 54001 (West Spec. Pamph. 1976)).

61. A district must have a net index of at least 1.0 to be eligible for any EDY funds. On the other hand, if its net index is greater than 2.0, it is reduced to 2.0. CAL. EDUC. CODE § 6499.231 (West Supp. 1977) (current version at § 54001 (West Spec. Pamph. 1976)). The former rule (the minimum index) is designed to concentrate the funds in areas with an above average proportion of deserving students. Although this sentiment is understandable it creates a serious "notch" effect: districts with similar populations and with net indices on either side of 1.0 are treated very differently. Thus, the cost to a district of losing a few EDY students could be large indeed. This "notch" problem could be solved by phasing out the EDY benefits more slowly; but, of course, the price would be either increased state costs or a decrease in the EDY funds provided in the higher index districts. Nontheless, on balance, a smoother benefit phase-out would seem desirable. It should also be noted that under the present rules, a poor performing school in a low index district is not entitled to EDY benefits; that is an unfortunate result. The 2.0 ceiling on the index can be justified, if at all, by the imprecision of the individual indices themselves. A scaling of the individual indices themselves, to de-emphasize extreme variations from the average, would be a more refined solution.

produced from this averaging process is not multiplied by a district's average daily attendance (ADA) and then by a certain dollar amount; rather, it is multiplied by the district's AFDC welfare count, and then by a certain dollar amount. The result is that poverty, and especially this particular measure of poverty, is counted twice. As a consequence, AFDC dominates the EDY formula; indeed, multiplying the net index by the AFDC count gives a greater weight to the poverty factor than would averaging the four factors together, including the two AFDC poverty indices.

AFDC favors districts with poor children who have absent fathers, the basic make-up of the AFDC population. Although this is by no means irrational, it does not seem justified by the concept underlying the program itself. Instead, the explanation for this imbalance lies in the effective lobbying of legislators from districts with a relatively large AFDC constituency. Research has indicated that the primary EDY beneficiaries are large urban districts with substantial Black populations.[62] Consequently, the bilingual/bicultural factor, which is aimed at such minority groups as Chicanos, may be carrying too little weight; for although Spanish-surnamed pupils outnumber black pupils, districts with heavy concentrations of Blacks receive more funds. The formula could, of course, be amended to favor Chicanos simply by reversing the AFDC count and the bilingual/bicultural factor; that is, after the transiency, poverty, and AFDC indices are averaged, the state would multiply the result by a district's Spanish-surnamed and Asian-American count. But such a change would produce complaints from blacks and many urban districts. Moreover, because the present EDY program appears to be the product of raw political power, it would be difficult to evaluate the Chicano complaint.[63]

C. Integration Incentives

Many of California's minority pupils attend schools in which their own racial or ethnic group predominates. To date, local school authorities, the state, and the courts have provided little opportunity for integrated education to the families of these children. There are, of course, exceptions: Berkeley

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62. California School Finance Reform Project, A Study of the Educationally Disadvantaged Youth (EDY) State Fund in the California Public Schools (February 24, 1977) (San Diego State University).

63. Furthermore, there are a number of bilingual programs in California that are funded separately from EDY. In 1977-78 there will be $12 million in state funds provided for such programs. Interview with Gerald C. Hayward, supra note 58. It would seem appropriate to consider these categorical schemes also when evaluating the Chicano concern about EDY.

The Governor's proposal (A.B. 65) promises to change the EDY formula. It is significant, however, that on April 26, 1977, the bill was passed by the Assembly without the new EDY sections. It was announced that a new formula had been worked out and that it would be amended into the bill when it reached the Senate. *Id.*

has voluntarily desegregated its schools and San Francisco, Pasadena, and a few other districts have desegregated their schools in response to judicial pressure. *Serrano II* presents a unique opportunity for the state to do something new about racial isolation. In this regard, rewarding districts that provide an integrated education with financial bonuses is one possibility.

To that end, a model statute has been drafted, the Integration Incentive Act,[64] that provides school districts with $500 a year for each "minority" pupil residing in the district and attending an integrated school. The statute defines "minority" in terms of the district's school population. Hence, Caucasians are minorities in some places and the bonus would also apply to their integration. Permissible methods for earning the bonuses would include majority to minority voluntary transfer plans and compulsory racial balance assignments among district schools. A student would not have to attend school in the district in which he resides, however, in order for his district to receive a bonus. The act provides that a district can choose to transfer its students to any public school outside its boundaries or to any private school they would like to attend, so long as they are in the minority in the receiving school. Under this provision, students of any racial or ethnic group could generate the $500 bonus.

These bonuses are designed to provide each district with more than the net financial cost of either intra-district transfers (transportation) or extra-district contracts (tuition less expenses saved). It is thus politically difficult for local officials to resist making voluntary integration-enhancing options available to their constituents. In the case of extra-district contracts, the financial attraction of the plan for the recipient school lies in the fact that the marginal costs of a full-tuition-paid pupil are presumably less than the tuition amount charged. Where intra-district transfers are employed, the bonus funds must be spent in the integrated school.

In a number of California's large districts, Caucasians are now in the minority. Oakland, for example, is more than two-thirds black, and Compton, a large district adjoining Los Angeles, is nearly 100 per cent black. Few large California districts have the single minority group domination that is characteristic of Detroit, Michigan and Washington, D.C., however. In both Los Angeles and San Francisco, for example, Blacks, Chicanos/Latinos, and Asians are significantly represented and collectively outnumber Caucasians. This is probably little consolation to Los Angeles Black and Spanish-surnamed families, in view of their extreme group isolation in the schools of that city. The incentive plan proposed here would stimulate these large urban districts to transfer willing students to the suburbs and to private

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64. A California version of the statute, S.B. 1064, was introduced in the California State Legislature on April 18, 1977, by State Senator Bill Greene.

schools, and to spread their local minorities among their own schools. Local conditions and politics will determine the approach taken. San Francisco and Berkeley, as noted, are already substantially integrated and would receive large bonuses just for maintaining their existing racial balance. In Oakland the district might agree to transfer Blacks, but not its few remaining whites, to other districts. In Los Angeles and San Diego, both intra- and extra-district integration tactics might be employed.

The model act contains a further provision which modifies the concept already described. Under this provision, a family that did not receive an integrated educational opportunity from its school system could demand that opportunity, thereby forcing the district to take advantage of the. state's bonus plan. To the extent that children would then be placed in the public or private school of their choice, the Integration Incentive Act would operate in much the same way as the scholarship proposal discussed in Section I of this commentary, the only difference being that the present scholarships would be provided solely to those children who are minorities in the school they attend.

Conclusion

The purpose of this commentary was to discuss four proposals for a school financing package which would comply with the *Serrano II* mandate: vouchers, state funding, fiscal neutrality, and policy adjustments. The attention that each or a combination of these proposals receives from the California legislature should reveal a great deal about the future direction of public education in California. It is the reformer's hope that in arriving at a politically feasible arrangement the legislature will rest its decision on coherent educational principles.