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SERRANO v. PRIEST AND ITS IMPACT ON NEW MEXICO

On August 30, 1971, the Supreme Court of California, one judge dissenting, held that the California system of financing public schools violated the equal protection clause of the Fourteenth Amendment of the United States Constitution. This case, *Serrano v. Priest*,¹ although binding only on California, may have consequences more widespread than those of *Brown v. Board of Education*² which struck down school segregation in 1953.

Robert Scott, Governor of North Carolina and Chairman of the Education Commission of the States, summarized the potential consequences of the decision as follows:

To some it may pave a way to much needed property tax relief; others may contemplate greater involvement by state leaders in local educational affairs; some will anticipate expanded sales and income taxes; hopefully many will see the opportunity to improve the quality of education for thousands of children who reside in communities with poor tax resources; others will begin to consider more seriously alternative programs that tend toward fuller state funding for schools.³

Since the *Serrano* decision, there has been much speculation and confusion as to what its impact will be in other states. This article is an attempt to review the background of the case, examine its holding and analyze its potential impact on New Mexico.

SERRANO: BACKGROUND

The current assault on school financing systems began in 1967 when the legal theories applied in *Serrano* were developed by John Coons, now professor of law at the University of California, Berkeley, who was then consultant to the Chicago Superintendent of Schools. In the summer of 1967 the theories were used by the city of Detroit which had funding problems similar to those of Chicago.⁴ Detroit brought suit against the state of Michigan in 1968 claiming that its schools were underfinanced⁵ in violation of the equal protec-

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

2. *Brown v. Board of Education*, 347 U.S. 483 (1953).

3. Legislative Review, Sept. 3, 1971, at 1 (Publication of the Educational Commission of the States).

4. Address by Stephen D. Sugarman to the Regional Interstate Project, Denver, Oct. 8, 1971.

5. *The Board of Education of the School District of the City of Detroit, et al. v. The State of Michigan and Allison Green, its Treasurer*, (County Ct. Wayne City, Michigan, complaint filed Feb. 2, 1968). The case file is available through the Clerk of the Court of Wayne Co., 201 Court Unit, City-County Building, Detroit, Michigan 48226.

tion clause of the U.S. Constitution.⁶ Although the court rejected Detroit's contention,⁷ similar suits were immediately filed in California, Illinois and Texas assailing disparities in funding plans for public education.⁸

McInnis v. Shapiro,⁹ the Illinois case, was a challenge to that state's public school funding system which in essence involved heavy reliance on local property taxes, a state-funded flat grant to school districts and state equalization funds. This was attacked as violating the due process and the equal protection clauses of the Fourteenth Amendment.

The plaintiffs argued that statutes which authorize large disparities in school funding are irrational and hence violate the due process clause.¹⁰ The court found, however, that the state legislature's choice of a funding plan was rational. It gave local governments some choice as to what their tax rate would be and also permitted them to decide how much they valued various municipal services. The court further stated:

Certainly, parents who cherish education are constitutionally allowed to spend more money on their children's schools, be it by private instruction or higher tax rates, than those who do not value education so highly.¹¹

This argument suffers from the fault that rich districts are the only ones that can choose a tax effort for support of education since, in many instances, poorer districts are taxing at a maximum rate just to keep their doors open.

The Illinois court's conclusion on the equal protection argument was that:

There is no constitutional requirement that the public school expenditures be made only on the basis of pupils' educational needs without regard to the financial strength of local school districts. Nor does the Constitution establish the rigid guideline of equal dollar expenditures for each student.¹²

It had earlier stated that school funding problems were better resolved by legislatures than in the courts.¹³

6. *Supra* note 4.

7. *Id.*

8. News from the National Urban Coalition, Aug. 31, 1971, at 2 (Newsletter of the National Urban Coalition).

9. *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969).

10. *Id.* at 331.

11. *Id.* at 331, n. 11.

12. *Id.* at 336.

13. *Id.* at 332.

In addition to holding that the Fourteenth Amendment does not require school funding based only on the child's educational needs, the court struck down plaintiff's contentions because "... there are no 'discoverable and manageable standards' by which a court can determine when the Constitution is satisfied and when it is violated."¹⁴

Civil Rights cases, as well as cases dealing directly with school funding schemes, have had a bearing on *Serrano*. In *Brown v. Board of Education* the importance of education was emphasized as follows:

[E]ducation is perhaps the most important function of state and local governments.... 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.¹⁵

Discrimination by wealth was declared unconstitutional in the voting rights cases,¹⁶ and in *Baker v. Carr*¹⁷ the court came to the aid of under-represented electoral districts. People in these electoral districts were in a predicament analogous to school children living in poor school districts.¹⁸ They could not force legislative change and hence had to turn to the courts to stop discrimination against them.

Courts have not been alone in confronting school financing problems. On July 1, 1971, the Education Commission of the States addressed this subject and adopted the following resolution:

Be it resolved that it is the position of the Education Commission of the States that states adopt a system of financial aid to local districts which in fact equalizes educational opportunities and reduces reliance upon property taxes for the support of education.¹⁹

SERRANO: ITS HOLDING

The holding of the California Supreme Court in *Serrano* is as follows:

We, therefore, arrive at these conclusions. The California public school financing system, as presented to us by plaintiffs' complaint

14. *Id.* at 335 (footnotes omitted).

15. 347 U.S. 483, 493 (1953).

16. *E.g.*, *Harper v. Virginia State Board of Education*, 383 U.S. 663 (1966).

17. *Baker v. Carr*, 369 U.S. 186 (1962).

18. Brief for Stephen D. Sugarman, John E. Coons, The Urban Coalition, and The National Committee for the Support of the Public Schools as Amicus Curiae at 26, *Serrano v. Priest* (L.A. No. 29, 820) (hereinafter cited as Urban Coalition Brief).

19. *Supra* note 3, at 2.

supplemented by matters judicially noticed, since it deals intimately with education, obviously touches upon a fundamental interest. For the reasons we have explained in detail, this system conditions the full entitlement to such interest on wealth, classifies its recipients on the basis of their collective affluence and makes the quality of a child's education depend upon the resources of his school district and ultimately upon the pocketbook of his parents. We find that such financing system as presently constituted is not necessary to the attainment of any compelling state interest. Since it does not withstand the requisite "strict scrutiny," it denies to the plaintiffs and other similarly situated the equal protection of the laws.²⁰

Stated more concisely, the *Serrano* principle is: "The quality of public education may not be a function of wealth other than the wealth of the State as a whole."²¹

In reaching this decision, the court had to decide a number of important preliminary questions.

A. *De Facto v. De Jure Discrimination*

The defendants in *Serrano* argued that the discrimination involved was *de facto* (in fact) and not *de jure* (of law). They relied on school segregation cases and argued that since the United States Supreme Court had not found *de facto* school segregation unconstitutional, *de facto* wealth discrimination was not unconstitutional.

The California court struck down this argument "... for want of a solid foundation in law and logic."²² It noted the present system involved state sanctioned discrimination resulting in discrepancies in available revenues for school purposes. The court further found the state had consciously set up districts of unequal wealth and had permitted these to tax at different rates, for its patterns of discrimination "... are shaped and hardened by zoning ordinances and other governmental land use controls which promote economic exclusivity."²³

Note was then taken of the following dicta in *Hobson v. Hansen*:

Orthodox equal protection doctrine can be encapsulated in a single rule: government action which without justification imposes unequal burdens or awards unequal benefits is unconstitutional. . . . Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of

20. 5 Cal.3d at 615, 487 P.2d at 1263, 96 Cal. Rptr. at 623 (1971) (footnotes omitted).

21. Urban Coalition Brief, *supra* note 18, at 4.

22. 5 Cal.3d at 602, 487 P.2d at 1253, 96 Cal. Rptr. at 613 (1971).

23. 5 Cal.3d at 603, 487 P.2d at 1254, 96 Cal. Rptr. at 614 (1971).

thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.²⁴

The California court expressly refused to "... attach an oversimplified label to the complex configuration of public and private decisions which has resulted in the present allocation of educational funds."²⁵ It did, however, reject defendant's contention that this was merely de facto discrimination and hence constitutional.

B. *Education: A Fundamental Interest*

Stephen D. Sugarman, an attorney who argued *amici curiae* to the California Supreme Court in *Serrano* for the Urban Coalition, says this about the decision:

In this case, ... the fundamental thing that the court said that was new, that was dramatic, was that education is a fundamental interest, like voting, like free speech, like the right to travel ... It's not a mere economic and social thing ... It involves a discrimination against the poor and therefore ... is bad unless the state can show there is a compelling interest for that system.²⁶

The Urban Coalition brief contended that education "... lies at the core of both speech and association; it is indispensable to any functional view of civic and political life; it is a major determinant of each child's future." It went on to say: "It would be hard to believe that the Court has such special concern for speech, political action, and the future of children without an equivalent concern for the intellectual preconditions of their fulfillment."²⁷

The court adopted this position. In recognizing the fundamental importance of education, the court emphasized that the state has recognized its importance by making it compulsory and assigning students to specific school districts.²⁸

Once the court found education was a fundamental right under the Constitution, the burden fell on the state to show that the present discriminatory system, if it was to be upheld as constitutional, was justified by a compelling state interest.

The state argued the system provided for local control of schools. The court dismissed this argument stating: "No matter how the state decides to finance its system of public education, it can still leave this decision-making power in the hands of local districts."²⁹

24. *Hobson v. Hansen*, 269 F. Supp. 401 (D.C. 1967) cited in 5 Cal.3d at 603, 487 P.2d at 1254, 96 Cal. Rptr. at 614, n. 18 (1971).

25. 5 Cal.3d at 603, 487 P.2d at 1255, 96 Cal. Rptr. at 615, n. 20 (1971).

26. *Supra* note 4.

27. Urban Coalition Brief, *supra* note 18, at 30.

28. 5 Cal.3d at 610, 487 P.2d at 1259, 96 Cal. Rptr. at 619 (1971).

29. 5 Cal.3d at 611, 487 P.2d at 1260, 96 Cal. Rptr. at 620 (1971).

The state then argued that the present system permitted local districts to determine how much they wanted to spend for public education. The court found "... such fiscal freewill is a cruel illusion for the poor school districts,"³⁰ and rejected the idea that this constituted a compelling state interest.

Essentially, the court found that if equal educational opportunity is not made available to all, an aristocracy, not a meritocracy, will result, for the poor won't have a chance to reach their potential through education.³¹

C. Does *McInnis* Control?

Although *McInnis* involved a similar fact situation, the California court found it not controlling in *Serrano*.

First there is a procedural argument. The United States Supreme Court has two types of jurisdiction: mandatory and permissive. In *McInnis* the jurisdiction was mandatory because the case "... reached the Supreme Court by way of appeal from a three-judge federal court..."³² Although *McInnis* got a summary affirmance from the Supreme Court, the "... decision could be considered to be simply an unwillingness to take the case and not a decision on the merits."³³

When the Supreme Court refuses to hear a case where it has mandatory jurisdiction, as in *McInnis*, this in fact results in affirming the lower court. The court's summary affirmance here amounts to the same thing.³⁴ Although this is technically an adjudication on the merits, in practice it amounts to "the substantial equivalent of a denial of certiorari."³⁵

The *Serrano* opinion notes:

Frankfurter and Landis had suggested earlier that the pressure of the court's docket and differences of opinion among the judges operate "to subject the obligatory jurisdiction of the court to discretionary considerations not unlike those governing *certiorari*." [Frankfurter & Landis, *The Business of the Supreme Court* at October Term, 1929, 44 Harv. L. Rev. 1, 14 (1930).] Between 60 and 84 percent of appeals in recent years have been summarily handled by the Supreme Court without opinion. (Stern & Gressman, *supra*, at 194)³⁶

30. 5 Cal.3d at 611, 487 P.2d at 1260, 96 Cal. Rptr. at 620 (1971).

31. *Supra* note 4.

32. 5 Cal.3d at 616, 487 P.2d at 1264, 96 Cal. Rptr. at 624 (1971).

33. *Supra* note 4.

34. *Id.*

35. D. Currie, *The Three-Judge District Court in Constitutional Litigation*, 2 U. Chi. L. Rev. 1, 74, n. 365 (1964) cited in 5 Cal.3d at 616, 487 P.2d at 1264, 96 Cal. Rptr. at 624.

36. 5 Cal. 3d at 616, 487 P.2d at 1264, 96 Cal. Rptr. at 624 (1971) (footnotes omitted).

It further notes that "[s]ummary disposition of a case by the Supreme Court need not prevent the court from later holding a full hearing on the same issue."³⁷

Even if *McInnis* is a decision on the merits, *Serrano* raises a different theory. The issue in *McInnis* was whether or not there is a constitutional right to spending for education according to the needs of children. The "educational needs" aspect of *McInnis* raised a judicially unmanageable standard and the argument for spending equal dollars on each child was found not to be a constitutional right. *Serrano*, on the other hand, challenges discrimination based on wealth.

D. Misconceptions About the *Serrano* Decision

The *Serrano* decision has been widely misunderstood and misinterpreted. *Education U.S.A.*, the National School Public Relations Association's weekly newsletter stated that in *Serrano* "... the court said equal spending for students is a basic right."³⁸ This is incorrect. The case only requires that community wealth not be the basis of discriminatory school funding systems. Under *Serrano* discrepancies in school spending are permissible as long as reasonable educational criteria justify the disparity.³⁹

Professor John E. Coons, one of the leading experts on this subject, emphasizes that:

[T]he Court's action did not:

REQUIRE UNIFORM spending statewide for public education.

SAY AN EQUAL amount of money must be spent for each student.

SAY EACH DISTRICT must have the same quality of educational program.

BAR ASSESSED VALUATION as an educational tax base.

STOP THE STATE from spending extra money for special educational needs or programs.⁴⁰

It is argued that the *Serrano* principle will apply to other local governmental services like police and fire protection.⁴¹ Mr. Sugarman refers to this argument as the "equal sewer question." The problem with the argument is that this principle could only be extended to encompass fundamental interests under the Constitution. Although policemen, fire protection and sewers are of great impor-

37. 5 Cal.3d at 616, 487 P.2d at 1264, 96 Cal. Rptr. at 624, n. 35 (1971).

38. 1971 *Education U.S.A.*, at 7 (Nat'l School Pub. Relations Ass'n, D.C., Sept. 13, 1971).

39. Urban Coalition Brief, *supra* note 18, at 37-38.

40. Sacramento Report, Sept. 15, 1971 (Cal. School Boards Ass'n. publication).

41. Wall Street Journal, Sept. 6, 1971, at 12, col. 1.

tance in our society, it is doubtful that they are fundamental interests guaranteed by the United States Constitution.⁴²

Some allege *Serrano* will bring about the end of local control of school districts.

The Urban Coalition brief says this about local choice in California's school districts:

Far from being an embodiment of local choice, it is in fact its antithesis. The primary effect of the structure is not the sharing of State power among subordinate geographical units; rather it is the creation of enclaves of widely variant power—some freakishly privileged, others grossly disadvantaged.⁴³

In fact, local interests in school funds may be better served "... by permitting local effort, but not local wealth, to determine spending."⁴⁴ Local control of schools is not expressly limited by *Serrano*. Some state controls, however, may result from state attempts to equalize educational opportunity through rational expenditure plans.

Serrano is a negative and absolute decision. It does not prescribe what must be done. The problem is left for the states to resolve for they are better equipped to deal with circumstances peculiar to their individual funding systems. Some states discriminate less than others but this will not excuse them from the effects of the *Serrano* decision. Either a state discriminates on the basis of local wealth or it does not. If it does, *Serrano* declares that practice unconstitutional.

SERRANO: WHAT HAPPENS NOW?

The California Supreme Court remanded *Serrano* to the trial court for further proceedings at that level. This means it will be some time before there is a final decision in the case and the United States Supreme Court will probably not consider it until there is a final decision.

This posed little obstacle to the future of the *Serrano* principle. In January 1972, The Lawyers' Committee for Civil Rights reported that as many as 34 suits raising the *Serrano* question had been filed in perhaps 20 states.⁴⁵ By early March, Minnesota, Texas, New Jersey, Arizona and Wyoming had joined California in adopting the *Serrano* principle.⁴⁶

42. *Supra* note 4.

43. Urban Coalition Brief, *supra* note 18, at 21.

44. *Id.* at 3.

45. Committee Report, Rep. #7, Jan. 1972 (The Lawyers' Committee for Civil Rights Under Law, Washington, D.C.).

46. Wall Street Journal, Mar. 13, 1972, at 1, col. 6.

The Texas case is *Rodriguez v. San Antonio Independent School District* and is now on appeal to the United States Supreme Court. It is expected to be heard during the 1972 fall term.⁴⁷

With the recent changes in the court's membership, one can only speculate as to what result the United States Supreme Court will reach when this case comes before it.

THE CALIFORNIA SYSTEM VERSUS THE NEW MEXICO SYSTEM

California and New Mexico have the responsibility of providing public education within their respective jurisdictions. Both rely to varying degrees on the property tax to finance education and have developed financing systems that have resulted in "an increasingly skewed system of financing . . . one in which costs for a major function of widespread benefit are largely localized."⁴⁸

As these systems are examined, it is important to remember that although increased funding does not necessarily mean better educational opportunity, there is a positive correlation between the amount of money spent in a school district and the quality of the educational program which the local district can provide.

A. California System

The California system is basically as follows:

1. a flat grant to each school district of \$125 per pupil;
2. equalization funds (the amount received depends on the local tax rate); and
3. local funding above the equalization figure.⁴⁹

Under this system the state guarantees to each school district a certain amount of money per child—an amount, however, considerably below the average per pupil expenditure. In California, the state provides about 36 percent of the funds for education (elementary and secondary) and about 55 percent is raised locally.⁵⁰

B. New Mexico System

First, a historical note and some background information on the property tax and its role in relation to school funding is in order.

In the 1930's the legislature decided that the property tax was not the best method for achieving adequate school financing. First, ad valorem taxes did not generate enough revenue to meet the state's

47. *Id.*

48. Advisory Commission on Intergovernmental Relations State and Local Finances and Suggested Legislation, 318 (1971).

49. Urban Coalition Brief, *supra* note 18, at 6.

50. *Id.* at 9.

teacher payroll. Secondly, the revenue came in in April, May and December and forced some teachers to accept as payment warrants that could not be exchanged for checks until the county treasurer received property tax revenues. These warrants were purchased from teachers at a discount by private individuals and this system resulted in teachers receiving reduced payments for their services.⁵¹

The property tax has been greatly abused since that time. Although Art. VIII, Sec. 2, of the New Mexico Constitution provides a 20 mill limit on the ad valorem tax, at the present time the state assesses in excess of this amount. Attorney General Opinion 70-34 deals with this subject:

Section 72-4-11, N.M.S.A. 1953 Compilation, enacted in 1921, sets the maximum rates of taxation for state, county, municipal and school district purposes [T]he total authorized levies for purposes within the twenty mill limitation adds up to 33.50 mills.⁵²

New Mexico derives less revenue from ad valorem taxes than most states. In the 1969-1970 fiscal year, New Mexico state and local governments raised \$81.18 per capita with the property tax compared to a national average for that year of \$167.59. This is \$28.65 per \$1,000 of personal income in New Mexico compared to \$45.74 nationally.⁵³

During the calendar year 1970 the state of New Mexico collected \$13,172,000 from the property tax and local government units collected \$62,848,000 for a total of \$76,020,000.⁵⁴ It is unlikely that the revenue derived from this tax will increase in the foreseeable future because of the constitutional limitation and the improbability that the veterans exemption will be repealed.

As New Mexico attempts to raise additional funds, there may not be public support for increasing the property tax. A study reported in the August 1971 issue of *Nation's Cities*⁵⁵ indicated the following about tax preferences in Albuquerque:

HOW WOULD CITIZENS PREFER TO RAISE MORE TAX MONEY?

	tax on property	tax on income	tax on utilities	sales tax	tax on car owners
Albuquerque	9%	20%	13%	41%	9%

51. Presentation at The University of New Mexico School of Law by Harry Wugalter, Chief of Public School Finance, Oct. 5, 1971.

52. Op. Att'y Gen. 70-34 (Apr. 1, 1970).

53. Presentation at The University of New Mexico School of Law by Franklin Jones, Commissioner of Revenue, State of New Mexico, Nov. 16, 1971.

54. *Ratios of Tax Payments to Income, by Income Class, 1970*, prepared by the Public Finance Research Program, The University of New Mexico, Apr. 1971, in Jones' presentation, *supra* note 53.

55. *Nation's Cities*, Aug. 1971.

As we turn our attention to the problems this tax creates for school financing in New Mexico, it should be remembered that it has long been suspect as a revenue source and cannot be expected to provide substantially more funds in the future.

Local school districts may levy 2.225 mills to support local schools and 4.450 mills if they also collect the assessment for a municipality. The amount of money collected and distributed is determined by the wealth of the local school district. New Mexico counties may assess 6.7 mills on the assessed valuation of the property in the county. The county funds are distributed among the districts in the county according to the average number of students in each district based on 40-day ADM (average daily membership). New Mexico has a uniform assessment ratio⁵⁶ and a uniform tax levy.⁵⁷ Only two districts tax at rates lower than the maximum allowable: Tatum, because of oil deposits in the district, taxes at 3.450 mills instead of 4.450, and Jemez Mountain, due to natural gas deposits, assesses only 2.850 mills instead of 4.450.⁵⁸

The purpose of the county assessment is to make the wealth of the county available to the children of the county.⁵⁹ California has a special area-wide foundation program similar to the New Mexico system.⁶⁰ All the *Serrano* decision requires is that the principle applied on a county-wide basis in New Mexico under the present formula be extended to the state as a whole.

New Mexico is similar to California in that it makes a basic grant of funds to all school districts and then supplies funds through an equalization distribution which is designed to provide a minimum level of funding for each school child.

Although there are differences in the systems used by these states, these differences are not important for the purposes of this article. Under both systems, all school districts receive some state funds in a basic grant. Those districts that raise more than 100 percent of need are entitled to some funds as are those districts that raise very little of their own costs. In New Mexico this results in Tatum and Mora both getting state funds.

Both states spend more money on basic support than on equalization.⁶¹ The division of public school finance of the New Mexico department of finance and administration estimated that in 1970-71

56. N.M. Stat. Ann. § 72-6-12.1 (Repl. 1970).

57. N.M. Const. art. 8, § 1.

58. Interview with Jessie Rodgers, Administrative Assistant to the Chief of Public School Finance, Nov. 9, 1971.

59. *Supra* note 51.

60. 5 Cal.3d at 593, 487 P.2d at 1247, 96 Cal. Rptr. at 607, n. 8 (1971).

61. See Urban Coalition Brief, *supra* note 18, at 8.

\$116,191,886 would be disbursed as basic support and \$3,707,301 for equalization.⁶²

New Mexico is in a better position than California in certain respects. First, New Mexico does not rely on the property tax as heavily as does California. In California 36 percent of the funds for public education come from the state while in New Mexico 77 percent of the funds are state money.⁶³ Secondly, California discriminates against the areas with lowest population,⁶⁴ but in New Mexico the opposite seems to be the case. See Table II.

In other respects, New Mexico is more likely to violate the *Serrano* principle than California. The uniform property tax assessment for school purposes is pointed to as an area in which New Mexico differs from and is in a better position than California.⁶⁵ It is true that the Supreme Court of California found the graduated tax rate violated the equal protection clause of the Federal Constitution because it enabled wealthier school districts to get higher quality education with a lower tax effort. The problem with this reasoning is that although New Mexico claims it has a uniform property tax assessment for schools, it does not, for Tatum, by not taxing the maximum allowable amount, gets more for less. This raises, on a smaller scale than in California, the exact situation struck down by *Serrano*.

Diagram I shows that in fact a uniform tax rate may be more objectionable than a graduated one. In California, wealthier districts often tax fewer mills than the poorer districts and get more for less. But with a uniform tax rate, the wealthier districts tax at as high a rate as the poorer ones. Consequently they collect more money than they would with a graduated rate and therefore have more money to spend. The result of this kind of system is that although there are not a number of districts getting more money from a lower tax rate, there is a greater discrepancy in the wealth per district from property taxes for the rich districts are collecting more money from local sources than they would with a graduated rate. In other words, the poor districts cannot raise as much money as the rich with the same tax rate, and the wealthier districts are able to take advantage of local wealth to the benefit of their children.

The effect of the New Mexico system of school financing is reflected in Tables I and II. These tables compare state and local

62. A Comparison of State Basic Program and Equalization Distribution for 1970-71 Among School Districts as of 6/16/70, at 5 (Table prepared by the Public School Finance Division of the Department of Finance and Administration).

63. *Supra* note 51.

64. Urban Coalition Brief, *supra* note 18, at 18.

65. *Supra* note 51.

DIAGRAM I

ASSESSED VALUATION PER PUPIL

- I Funds generated with a constant tax rate.
- II Funds generated with a graduated tax rate. For the purpose of this diagram, assume a basic level of support of \$300 per 180-day ADM.

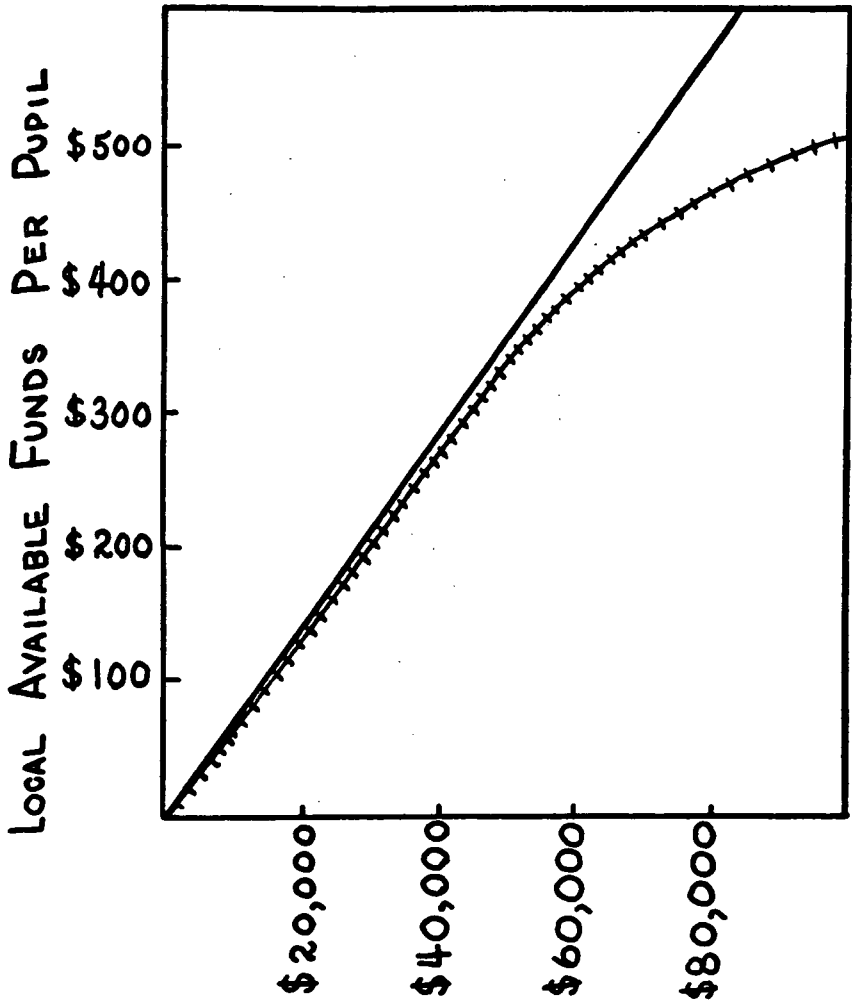


TABLE I
NEW MEXICO—TEN SELECTED POORER COUNTIES

District (County)	1970-71 ADM 180 Days*	Total Local and County Funds to District**	Local and County Money Per Pupil**	Basic State Support 1970-71*
Mora (Mora)	1,133	\$ 36,056	\$ 32	\$ 495,223
Pecos (San Miguel)	838	22,551	27	364,635
Las Vegas Town (San Miguel)	2,911	101,567	35	1,214,806
Espanola (Rio Arriba)	6,009	206,502	34	2,521,542
Las Cruces (Dona Ana)	15,787	794,764	50	6,449,686
Chama (Rio Arriba)	1,016	47,328	47	466,385
Las Vegas City (San Miguel)	2,864	118,871	42	1,195,670
Penasco (Taos)	868	58,771	68	389,874
Socorro (Socorro)	2,170	110,233	51	927,404
Clovis (Curry)	9,343	609,693	65	3,883,890

* Figure supplied by the Division of Public School Finance, Department of Finance and Administration.

** Computed from figures supplied by the Division of Public School Finance. Includes the 1970-71 district school tax levy and the general county school tax.

TABLE II
NEW MEXICO—TEN SELECTED WEALTHIER COUNTIES

District (County)	1970-71 ADM 180 Days*	Total Local and County Funds to District**	Local and County Money Per Pupil**	Basic State Support 1970-71*
Tatum (Lea)	465	\$293,802	\$632	\$ 222,918
Eunice (Lea)	898	343,097	382	401,582
Jal (Lea)	931	322,833	347	415,812
Corona (Lincoln)	174	53,353	307	133,662
Quemado (Catron)	180	42,198	234	135,216
Dora (Roosevelt)	233	74,470	320	146,667
Lovington (Lea)	3,171	879,646	277	1,364,457
Elida (Roosevelt)	142	26,222	185	117,251
House (Quay)	104	16,031	154	102,506
Animas (Hidalgo)	251	40,579	162	152,208

* Figure supplied by the Division of Public School Finance, Department of Finance and Administration.

** Computed from figures supplied by the Division of Public School Finance. Includes the 1970-71 district school tax levy and the general county school tax.

revenues available to ten of New Mexico's wealthiest counties and ten selected poor counties. They show that Mora is annually able to raise \$32 per pupil with district ad valorem taxes, where Tatum raises \$632 per pupil annually with a lower tax rate. When funds from all sources are taken into consideration, Tatum spends \$1,040 per child and Mora \$578 each school year.⁶⁶ Those who argue for the present

66. Per Capita Operational Expenditures by School Size 1970-1971, at 1, 2 (Table prepared by the Public School Finance Division of the Department of Finance and Administration).

system point out that 97 percent of the funds spent in Mora are from state sources,⁶⁷ but this does not justify the discrepancy that exists nor meet the test of *Serrano*. It further can be seen that Mora, with an average daily membership of 1,133 gets \$495,223 in basic support while Tatum, with an average daily membership of 465, gets \$222,918. In other words, Mora receives \$437 per student in basic aid and Tatum receives \$479. It should be remembered that Tatum is taxing 3.450 mills and Mora 4.450 mills.

Table III shows the annual total per pupil expenditure from all sources for the ten highest and lowest New Mexico school districts. Gadsden spends \$520 per student annually where Causey spends \$1,282. If this figure is multiplied by a 30-student classroom, the classroom in Gadsden has \$15,600 to spend annually where Causey has \$38,460. The annual difference is \$22,860 per room.

TABLE III
TEN POOREST SCHOOL DISTRICTS BY PER PUPIL EXPENDITURE 1970-1971

SCHOOL DISTRICT	ANNUAL PER PUPIL EXPENDITURE*	ADM (180 DAYS)
Gadsden (Dona Ana)	\$ 520	4,351
Las Vegas Town (San Miguel)	527	2,911
Clovis (Curry)	533	9,343
Espanola (Rio Arriba)	533	6,009
Deming (Luna)	536	3,688
Hatch (Dona Ana)	543	924
Las Vegas City (San Miguel)	543	2,864
Santa Fe (Santa Fe)	549	11,781
Albuquerque (Bernalillo)	552	83,260
Portales (Roosevelt)	553	2,927

TEN WEALTHIEST DISTRICTS BY PER PUPIL EXPENDITURE 1970-1971

Causey (Roosevelt)	\$1,282	94
House (Quay)	1,186	104
Quemado (Catron)	1,066	180
Grady (Curry)	1,047	161
Corona (Lincoln)	1,043	174
Tatum (Lea)	1,040	465
Maxwell (Colfax)	1,023	146
Elida (Roosevelt)	1,008	142
Encino (Torrance)	990	152
Mosquero (Harding)	965	141

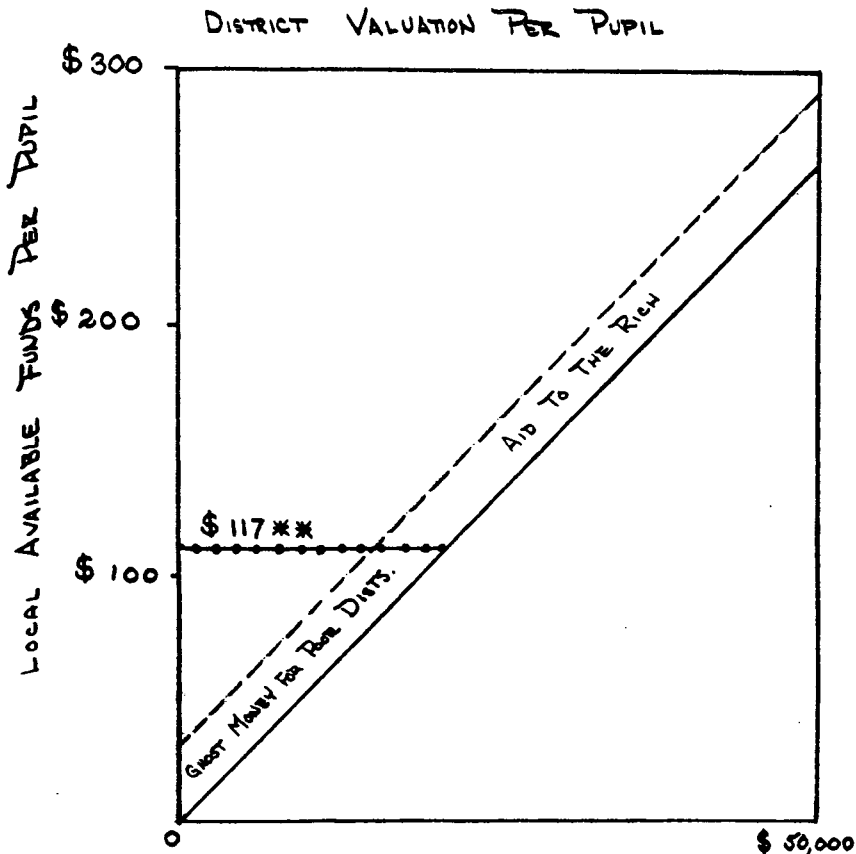
* Total per pupil expenditure—all sources 1970-71. Figures supplied by the Division of Public School Finance of the Department of Finance and Administration.

It was argued before the California Supreme Court that the flat grant or basic support was aid to the rich and was only "ghost money" for the poorer districts.⁶⁸ Diagram II shows that this

67. *Supra* note 51.

68. Urban Coalition Brief, *supra* note 18, at 7.

DIAGRAM II*



- Dollars from District and County Levies.
- - - Basic State Support.
- • • Equalization Funds.

* A similar diagram was included in the brief of the Urban Coalition.

** Figure for fiscal 1973.

argument applies equally to New Mexico. The money given to poorer districts as part of the basic support is of no real significance to them because they would have received the same total if all they received were equalization funds. Yet to the wealthier districts (those who raise more than the equalization amount from local and county sources) all money they get as basic support is money they would not otherwise receive. Stephen Sugarman has pointed out that the

problem with foundation plans is that traditionally they are inadequate and all above the basic level of expenditure is not frills, but essentials that make certain schools elite and others not.⁶⁹

Both New Mexico and California have constitutional provisions which provide for free public schools. The New Mexico provision reads:

A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained.⁷⁰

The term "uniform" in this section probably would not be interpreted as requiring relatively equal or uniform funding but would mean a single system with a uniform course of study.⁷¹ It is doubtful, therefore, that there are sufficient state grounds in either state to support the *Serrano* principle.

New Mexico has a school funding system that in many instances makes the quality of a child's education a function of the wealth of the community in which he resides. Developing a school funding formula is a complicated task and New Mexico's present formula is a complex effort to reconcile the many economic and political considerations that come to bear on this problem. But, as was stated by Chief Justice Warren in delivering the opinion of the court in *Reynolds v. Sims*: "One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.'"⁷²

SERRANO: ITS IMPACT ON NEW MEXICO

If New Mexico is to meet the test of *Serrano*, a revamping of our present system of financing public education will be required. Certain local school districts will no longer be able to benefit from property tax revenues as they have in the past, for the wealthier districts are going to be required to help the poorer ones.

One of the real strengths of *Serrano*, as noted earlier, is that it is a negative principle. Sugarman notes it is a decision "... requiring no specific legislative action, [therefore] it would not present the problems of enforcement inherent in a prescriptive standard. . . ."⁷³ This is a broad principle which leaves the ultimate determination of a financing formula in the hands of the state.

69. *Supra* note 4.

70. N.M. Const. art. 12, § 1.

71. See 5 Cal.3d at 596, 487 P.2d at 1249, 96 Cal. Rptr. at 609 (1971).

72. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) cited in 5 Cal.3d at 607, 487 P.2d at 1257, 96 Cal. Rptr. at 617, n. 24.

73. Urban Coalition Brief, *supra* note 18, at 36.

M. Carl Holman, president of the National Urban Coalition, said the following about the financing plans that will evolve in response to *Serrano*:

We anticipate, then, that the experimentation will flow from the California decision, with a variety of remedies rather than the immediate selection of a single formula to replace the present state funding systems in education.⁷⁴

Six courses of action that can be used separately or in combination with each other to meet the *Serrano* test are:

1. "power equalization",
2. increased state funding to poorer districts,
3. redrawing school boundaries,
4. voucher system,
5. total state support, and
6. state collection of property taxes.

1. "Power equalization" is an approach developed by Sugarman and Coons which would make educational offerings only a function of the effort of the school district.⁷⁵ Coons explained this principle as follows:

Under this plan, districts would decide how much they wanted to spend on schools. They then would have to levy a tax equal to a certain percentage of the assessed valuation.

The income from the percentage levied by different districts would vary according to assessed valuation. The state would then make up the difference.

Income, in effect, would be tied to a formula. The percentage that a district would have to levy would increase as the total fund it desired to spend on schools increased.⁷⁶

The formula involved in power equalization might require removing industrial and commercial property from the local tax base and having it taxed by the state. This would remove a source of extreme district wealth.⁷⁷ Other changes would have to be made depending on the particular characteristics of the district involved.

2. Increased state funding to poorer districts would eliminate the disparities between districts. This would require enormous amounts of money in New Mexico and is not a practical alternative if used alone to remedy the present disparities.

3. School boundaries could be redrawn in an effort to create dis-

74. *Supra* note 8, at 4.

75. Urban Coalition Brief, *supra* note 18, at 39.

76. Los Angeles Times, Aug. 31, 1971, at 8, col. 4.

77. Urban Coalition Brief, *supra* note 18, at 40-41.

tricts of more equal assessed valuation. In practice, this approach would have limited use in New Mexico.

4. A voucher system could be adopted whereby each parent received a voucher worth a certain amount to pay for his child's education. The voucher could be delivered to any school to pay for educational services. Private schools could accept the vouchers, but only if the vouchers were the school's only source of revenue. If not, disparities based on wealth of another kind would appear. The amount of the voucher would vary depending on the needs of the individual children.

5. The state could assume total responsibility for the support of public schools. To meet the new burden this approach would place on the state's financial resources, there would have to be either new sources of revenue (taxes) or a redistribution of government functions between the state, local and county governmental units. Since local government would have new financial resources from the property taxes they were not spending on the schools, they could be expected to provide or subsidize certain services now provided exclusively by the state.

Sugarman noted "... Any centralized system in which the state collects everything and local districts are not permitted to tax at all ... is O.K. under *Serrano*." ⁷⁸

Dr. R. L. Johns, Director of the National Educational Finance Project, commented on the effect of state assumption of the entire costs of public education:

There would be more equity for each child and for each taxpayer if the school funds were allocated to local districts from a central source. ... Allocations from the central source wouldn't just be on a flat per pupil basis. There would have to be more money per child for each one who is physically handicapped or culturally disadvantaged because it is more expensive to educate such children. ⁷⁹

6. The state could collect all property taxes and return them to the school districts on the basis of local educational needs. This would be perhaps the most practical approach for New Mexico since it would not require great amounts of additional revenue and would meet the test of *Serrano*.

Regardless of which approach would be best for New Mexico, political considerations stand in the way of change. Wealthy districts not only have more money for schools in many instances, but they also wield great political influence. Legislators from these districts

78. *Supra* note 4.

79. New York Times, Sep. 5, 1971, § E, at 7, col. 3.

can be expected to resist any change that will either increase taxes for education or decrease the funding their schools receive. Steve Browning of the Lawyers' Committee for Civil Rights Under Law characterized the situation of children in poorer school districts as "... quite similar to that which existed in malapportioned state legislatures throughout the nation before the courts intervened in the early sixties. . . ."⁸⁰ It appears, therefore, that no change can be expected until the court acts. This should not be seen, however, as an excuse for not immediately exploring alternatives to our present system of financing education.

One final point must be noted briefly. Systems that finance capital expenditures with local bonds will also be impermissible under the *Serrano* decision since they make community wealth a criteria used in determining the quality of the local school physical plant. Thus, state legislatures will also be faced with the problem of devising a new method of discharging local bond indebtedness where revenues from local property taxes are presently being used.⁸¹

CONCLUSION

It is apparent that reliance on the property tax to finance educational needs in New Mexico results in more money in some school districts than in others. Whether or not *Serrano* ultimately controls, New Mexico should recognize these inequities and act to eliminate them.

WILLIAM FRAZER CARR

80. *Supra* note 8, at 3.

81. *Supra* note 4.