

**THE REFUSAL TO “FEDERALIZE” THE QUEST FOR EQUAL
EDUCATIONAL OPPORTUNITY, THE ROLE OF STATE COURTS AND THE
IMPACT OF DIFFERENT STATE CONSTITUTIONAL THEORIES:
A TALE OF TWO STATES**

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Introduction

This paper was born during a 1996 sabbatical year I spent in San Francisco. One of my projects as the Public Policy Institute of California’s first Visiting Fellow was to prepare a long manuscript comparing California’s and New Jersey’s then 25-year school funding and education reform wars.

The manuscript had a straightforward three-part hypothesis:

- In 1970, California and New Jersey both had above-average state systems of public education by virtually any measure;
- Beginning in the mid-1970s the two state education systems began to diverge—with California beginning to sink and New Jersey to rise--and that divergence accelerated over the next 20 years; and
- The divergence was traceable to the different legal theories adopted by the California and New Jersey Supreme Courts in *Serrano v. Priest* and *Robinson v. Cahill*.

The hypothesis’s first two parts are easily established; the third is more complicated for a number of reasons. *Serrano*’s dominant legal theory shifted from fiscal neutrality to equalized spending part-way through the litigation. Proposition 13’s adoption by California voters in 1978 changed the fundamental ground rules for raising revenues for education and other state and local services. California experienced huge demographic changes, partly in the form of a growing influx of limited-English proficient immigrants.

When I learned of the Warren Institute’s Rethinking Rodriguez project, I immediately thought of it as a vehicle for revisiting my old manuscript. My proposal was to do that, but to frame the California-New Jersey comparison between the U.S. Supreme Court’s 1973 decision in *San Antonio Independent School District v. Rodriguez*, which in the area of school funding refused to federalize education, and the No Child Left Behind Act of 2001, which, in its own dramatic way, did move in the direction of federalizing education.

Researching and writing this paper have led me to think more deeply about many aspects of the long effort to equalize school funding and educational opportunities: the interplay between federal and state courts, and between federal and state governments more broadly; the roles of courts and of other governmental branches; the relationship between efforts to use funding reform and desegregation to enhance or equalize education opportunities; the impact of different legal theories on remedies ordered and reforms

achieved; the relationship between equality claims brought on behalf of students and taxpayers.

This paper can hardly be the vehicle for fully exploring all these matters, but it provides an opportunity to raise the issues and begin to frame some answers. I use four main devices for that purpose:

- a re-imagining of the U.S. Supreme Court's decision in *Rodriguez* that assumes a 5-4 decision striking down, rather than sustaining, Texas' school funding system and the effect it would have had on the ensuing 33 years;
- an analysis of the relationship among the real *Rodriguez*, *Serrano* and *Robinson*;
- an abridged version of a "Tale of Two States," comparing California's and New Jersey's state court lawsuits and their educational effects; and
- an assessment of the No Child Left Behind Act's federalizing impact.

Re-Imagining *Rodriguez*: Entering an Alternate Universe

For virtually the entire period between the U.S. Supreme Court's 1973 *Rodriguez* decision and the present, I considered the 5-4 decision to have both paved the way for and necessitated the 33 years of state court litigation that has ensued in almost every state. With federal equal protection out of play, legal advocates of school finance reform were left with state constitutional equal protection and education clauses.

The first state courts to address the issue of unequal education funding were California's and New Jersey's in *Serrano* and *Robinson*, respectively. For that reason and because they adopted different state constitutional clauses as the basis of their decisions, a comparison of those two states seemed likely to shed important light on the entire school finance reform effort. Of course, the first decision by the California Supreme Court in *Serrano* preceded *Rodriguez* and the first decision by the New Jersey Supreme Court in *Robinson* followed *Rodriguez* by less than two weeks. That timing is important to our story about the interaction among the three cases.

Until very recently, when I thought about *Rodriguez* in this connection, like many I bemoaned the failure of the plaintiffs to have won over a single additional justice. In the best tradition of Monday morning quarterbacking, I rued that the stronger facts of New Jersey or another state had not reached the Supreme Court first, that Arthur Gochman, the plaintiffs' lawyer, had not welcomed more outside assistance, that a brilliant oral advocate had not been pressed into service for the Supreme Court argument.

The conventional wisdom all this time has been that, if *Rodriguez* had been differently decided, the 33 years that followed would have been not only much different, but also much better for the advocates of poor children and for their clients. If the Supreme Court had announced a constitutional equality standard applicable throughout the nation, we would have been spared the need to commit as many resources, and as much intellectual and professional energy and time as we have, on a state-by-state basis. We could have focused on ensuring that the federal standard was fully and effectively implemented in each state rather than having to first devise state constitutional theories in each state for striking down school funding laws and only thereafter turning our attention to the remedial stage.

Put that way, it sounds as if we were wishing for a counterpart to *Brown v. Board of Education*, a stirring Supreme Court pronouncement that state education funding laws substantially dependent upon disparate local property wealth were contrary to the law of the land. One of the problems with such wishful thinking is that *Brown*'s aftermath has demonstrated how difficult it can be to convert ringing pronouncements into meaningful changes on the ground. Perhaps we would have needed a *Rodriguez II* demanding that constitutional compliance be achieved "with all deliberate speed," and then decades of enforcement litigation.¹

Another problem with this wishful thinking, also analogous to *Brown*, relates to the federal standard that might have been established. In *Brown*, the Court's failure to extend its desegregation ruling to de facto, as well as de jure, segregation and its subsequent unwillingness to extend its remedial reach to multi-district, metropolitan areas in the north, substantially limited desegregation to southern states.

Might the Court's re-imagined *Rodriguez* doctrine and remedial approach also have been sufficiently narrow to prevent it from correcting much of the unconstitutional defect it sought to address?

Both the majority opinion and Justice Marshall's dissenting opinion in the actual *Rodriguez* decision give some clear indications of what the Court might have done if it had ruled differently in the case and how the states might have responded. The majority first states that it was being urged "to direct the States either to alter drastically the present [school financing] system or to throw out the property tax altogether in favor of some other form of taxation."²

Shortly thereafter, the majority says that, "The most likely result of rejection of the existing system would be state-wide financing of all public education with funds derived from taxation of property or from the adoption or expansion of sales and income taxes."³ The only alternative it mentions is "district power equalizing," a system under which "the State would guarantee that at any particular rate of property taxation the district would receive a stated number of dollars regardless of the district's tax base."⁴

The majority does not go so far as to indicate that, if it were to rule differently in the case, it would order states to adopt a particular new school financing system, either one based on full-state funding or district power equalizing. Rather, the majority seems to be suggesting that these are alternative ways in which states might respond to an order invalidating their current systems. Nor does the majority indicate why it believes that full-state funding is the most likely state response. At the time of the decision, Hawaii was the only state with a full-state funded system.⁵ As to district power equalizing, the majority does volunteer a comment and it is negative—"that commentators are in disagreement as to whether it is feasible, how it would work, and indeed whether it would violate the equal protection theory underlying appellees' case."⁶

The majority also weighs in with a "cautionary postscript"⁷ about what would follow from a decision striking down Texas' school financing system. It would be nothing short of "an unprecedented upheaval in public education," one that would be unpredictable.⁸ It could result in: reduced educational spending in general; reduced spending on poor or minority students residing in property wealthy districts; or, if states were compelled to level up their spending, in "severe financial stringency."⁹

Justice Marshall's dissenting opinion is more explicit than the majority opinion on both points. First, he makes clear that a decision invalidating the Texas school financing

statute would strike down “nothing more than the continued interdistrict wealth discrimination inherent in the present property tax,”¹⁰ and not the use of property taxation to fund education. It would leave intact most of local control over education and, in fact, would “make true local control over educational decision-making a reality for all Texas school districts.”¹¹ Even as to a new school financing system, the choice “would remain with the State, not with the federal courts.”¹²

As to the second point—the State’s alternatives regarding a new financing system, Justice Marshall lists four. In addition to the majority’s two alternatives--full-state, or centralized, funding and district power equalizing, Justice Marshall adds district wealth reapportionment, and removal of commercial, industrial and mineral property from local tax rolls.¹³ He concludes his discussion of these alternatives by underscoring his view that the choice is for the State:

None of these particular alternatives are necessarily constitutionally compelled; rather, they indicate the breadth of choice which would remain to the State if the present interdistrict disparities were eliminated.¹⁴

In light of these different, but overlapping, opinions, what kind of decision might have emerged if the dissenters had been able to win over one more justice? Clearly, it would have invalidated the Texas school funding system, and sent a strong message to other states whose systems discriminated against students living in low property wealth school districts, but it would not have imposed a particular alternative school financing system. The constitutional violation could be cured in a variety of ways, perhaps so long as it was eliminated “root and branch.”

More specifically, the dissenting justices, and I presume their re-imagined fifth colleague, would have affirmed the district court decision.¹⁵ That decision, after concluding that plaintiffs had proven a denial of equal protection, instructed the State of Texas to cure the defect by selecting “from a wide variety of financing plans so long as the program adopted does not make the quality of public education a function of wealth other than the wealth of the state as a whole.”¹⁶ As the district court acknowledged, this is the quintessential statement of fiscal neutrality, the theory Coons, Clune and Sugarman advanced in *Serrano* and in a number of federal district courts. Ironically, given *Serrano*’s later shift of theory from fiscal neutrality to equalized spending, the *Rodriguez* district court stressed that plaintiffs had “not advocated that educational expenditures be equal for each child.”¹⁷ Affirmance by the Supreme Court in our alternate universe, therefore, would have federalized the fiscal neutrality theory, with its strengths and limitations.

The district court arrived at its constitutional conclusion by finding that education was a fundamental interest and the Texas classification of school districts was wealth-based; consequently, the proper standard of review was strict scrutiny and defendants had failed to demonstrate a compelling state interest. Indeed, the district court found that defendants had failed to establish even a reasonable basis.

All four dissenting justices (White, Douglas, Brennan and Marshall) appeared to agree that the Texas school funding system, with its stated emphasis on local control, failed to meet even the rational basis test. Not all the dissenters offered guidance about whether they would have been willing to impose stricter scrutiny. Three (Brennan,

Douglas and Marshall) would have ruled that education was a fundamental interest and at least two (Marshall and Douglas) would have found a suspect classification.

That may suggest a re-imagined majority would have struck down the Texas system on the ground that it did not satisfy the rational basis test. In one sense, that seems surprising, since a common rule of thumb is that equal protection challenges to which that test is applied usually fail. In another sense, though, it is plausible. Courts, federal and state, regularly have expressed concern about establishing a constitutional principle with far-reaching, even unknowable, implications.¹⁸ To characterize education as a fundamental interest, or relative school district “poverty” (lower property wealth) as a suspect classification, might conjure up precisely those slippery-slope fears. By contrast, using the rational basis test to strike down Texas’ statute, because its claim of local educational control was in Justice Marshall’s terminology a “mere sham,”¹⁹ might tend to limit the ruling to the facts before the Court.

With a U.S. Supreme Court pronouncement of fiscal neutrality as the governing theory and a finding that Texas’ school funding system failed to meet the rational basis test in our alternate universe, what would have been the likely nationwide impact?

Perhaps some states could have established that their school funding systems, unlike Texas’ system, were rationally related to promoting local control or another legitimate state interest. That would have put their systems beyond the reach of a re-imagined *Rodriguez* standard.

For those states that could not establish a rational basis for their school funding systems, they would have had to confront remedying the unconstitutionality. As indicated, the actual *Rodriguez* opinions mentioned four remedies that might be consistent with fiscal neutrality—full-state funding, district power equalizing, district wealth reapportionment (probably by reorganizing districts to equalize their local property wealth) and removal of commercial, industrial and mining property from local tax rolls.²⁰

Of these remedial alternatives, district power equalizing (“DPE”) would seem the most likely. It is the least intrusive, requiring no fundamental departure from a shared state-local funding system and no alteration of existing school district boundaries or the composition of the local property tax base. States could simply establish an equalization ratio to ensure that that every district whose taxpayers taxed themselves at a particular rate would have the same amount available to spend on education. In low property-wealth districts, where that tax rate would not produce the guaranteed amount, the state would make up the difference. In high property-wealth districts, where that tax rate would produce more than the guaranteed amount, under pure fiscal neutrality theory those wealthy districts should not be permitted to spend above the guaranteed amount. They might even be required to “contribute” excess amounts to the state to offset some of the state’s equalizing obligations for lower-wealth districts.²¹

This simple form of DPE would permit the taxpayers of each district to determine how much should be spent on the district’s schools, unconstrained by the actual level of local property wealth or poverty. It would inevitably result in spending differentials from district to district across the state, an issue to be discussed again soon.

States could choose, though, and many would, to add to their DPE systems a spending floor or foundation, perhaps pegged to a certain educational level or to historical spending levels, such as the state average spending. In some states, an

educational foundation might even be required by the education clause of the state constitution or by a statute committing the state to provide a certain quantum of education.

Under such a foundation system, no district would be permitted to spend less, but what if a district wanted to spend more? If local add-ons were permitted, they would re-introduce wealth-based inequalities unless they also were power equalized. In turn, equalized local add-ons would increase the state's fiscal burdens, especially if redirecting local revenues from wealthier to poorer districts were not part of the system. Consequently, states which incorporated the local add-on feature would be likely to limit it to a relatively modest percentage above the foundation level.

Would an alternate universe, in which states running afoul of the re-imagined *Rodriguez* equal protection standard might wind up with some form of DPE as outlined above, be preferable to the real world we inhabit now?

To be honest, it's not clear exactly what impact a re-imagined *Rodriguez* might have had on the school finance reform movement;²² nor is it clear that the impact would have been positive. Perhaps the concerns expressed by the real *Rodriguez* majority—reduced educational spending in general, inequalities in educational spending from district to district, or reduced spending on poor or minority students especially those residing in property wealthy districts, which led them to sustain the Texas statute, might have materialized. Although a full analysis is beyond the scope of this paper, some preliminary thoughts are in order.

The impact of a re-imagined *Rodriguez* could have differed on the basis both of the details of the ruling and the responses of the states. If the Court in the re-imagined decision simply had embraced the theory of fiscal neutrality to strike down the Texas statute and had left the remedy to the state without significant judicial guidance, all three of the remedial problems adverted to above could have surfaced.

Reduced educational spending in general. Since Professor Michelman's theory of "minimum entitlement" has never really been accepted in federal equal protection jurisprudence,²³ a re-imagined *Rodriguez* decision would be unlikely to have imposed any particular funding level on Texas. As a consequence, Texas and other states could have responded by adopting a district power equalizing system that leveled down, rather than up, to equalization. That could happen directly if a state added a low foundation level to a DPE system, or indirectly if the state established no foundation level and local taxpayers simply chose to tax themselves at relatively low levels.

This is more than a theoretical concern. As indicated, almost 30 states had joined in an amici brief to the Supreme Court in *Rodriguez* complaining of the "fiscal stringency" that would be caused by a ruling that required them to level up school spending. If left to their own devices under a federal equalization mandate, such states might have found leveling **down** more appealing, or at least more viable.

We know that, in the real, as opposed to alternate, world, California has leveled down its spending sharply under an equalized expenditure mandate from the state courts (and might well have done so under *Serrano*'s original fiscal neutrality theory). If California were implementing a fiscal neutrality mandate from the U.S. Supreme Court instead, it certainly could have responded by leveling down as well.

Of course, DPE remedies don't necessarily result in leveling down of educational spending. The key is the foundation level (or, absent one, the educational

commitment of local taxpayers). Some states, especially in the earlier “equity” stage of school finance reform litigation, did adopt DPE remedies. However, these, unlike our re-imagined *Rodriguez*, resulted from state-specific cases in which education clauses, or at least educational quality considerations, often were invoked. This tended to create, de jure or de facto, an educational quality floor for the state’s district power equalizing scheme. In some cases, such as New Jersey’s *Abbott v. Burke*, the equalization level set was an extraordinarily high one.

Inequalities in educational spending from district to district. As has been mentioned, with fiscal neutrality as the dominant theory underlying a re-imagined *Rodriguez*, some states could have emphasized taxpayer equity over educational equity by choosing not to establish an educational foundation level or by establishing a low one with expansive local add-on authority. This could have resulted in sharply different spending levels from district to district based on local choices about desirable rates of taxation—what Professor Michelman called “place-based” inequalities among students. From a student equity perspective, as Professor Michelman and others have stressed,²⁴ students are no better off educationally if their levels of school funding result from taxpayer choices to tax themselves at low rates rather than from disparately low property wealth in their school districts. Such an approach also could have resulted in an overall reduction of educational spending in some states. What an irony that would have been—a decision in a case brought to vindicate student equal protection rights that wound up helping taxpayers but not students.

Reduced educational spending on poor or minority students. It also is possible that under a re-imagined *Rodriguez* this additional concern of the real majority might have materialized in some states. For example, under the type of fiscal neutrality remedy discussed above where local taxpayers have discretion about how much effort to make on behalf of education, taxpayers in an urban district, even if it had substantial property wealth, as many of California’s cities did, might choose to tax themselves at a relatively low level for education. They might do so because municipal overburden imposed on them relatively high taxes for services other than education. Or they might do so because they had no children in the city’s public schools. In either event, it would be scant comfort for poor and minority students attending schools in that property-wealthy urban district.

Poor or minority students also could have wound up with disproportionately low educational funding in our alternate universe because of a real-world California problem. In wealthier districts or schools, private education foundations have raised substantial sums of money to supplement available public funding.²⁵ Under either an equalized spending or a fiscal neutrality regimen, that would produce wealth-based inequalities, which might fall outside a court-ordained equalization regime.

There is yet another hard-to-quantify, but global, impact question about a re-imagined *Rodriguez* decision—would it have sapped the energy, vitality, creativity and funding from the school finance reform movement or, less apocalyptically, would it have focused the movement on implementation of the *Rodriguez* equal protection remedy?

As a legal matter, notwithstanding such a federal remedy, advocates could have proceeded in state courts arguing that state equal protection clauses should be interpreted more expansively or that state education clauses should be invoked to achieve broader reforms.²⁶ As a practical matter, is that likely to have happened often? Isn’t it more

likely that years would have been spent in the federal courts trying to enforce a re-imagined *Rodriguez* remedy, perhaps by seeking to expand the remedy's scope?

Is there an upside to the alternate universe? Presumably it could have been more cost-effective. Enforcement actions might not have been necessary in all or even most states. Even where they might have been required, they are unlikely to have been as complex and time- and resource-draining as litigation designed to establish violation of a constitutional right to education. Perhaps states with unsuccessful state court litigation would have been better off with an enforceable federal legal right. Perhaps federal courts would have been more effective at enforcing remedies because they are not encumbered with the separation of powers concerns that limit many state courts (although federalism is a constraint).²⁷

How one weighs the possible plusses and minuses of the re-imagined version of *Rodriguez*, and what scenarios one believes are most likely to have occurred, will go a long way toward determining which version, actual or re-imagined, one prefers. Since we can't actually recreate 33 years of history, the utility of this exercise in imagination is mainly to provide an alternate perspective from which to evaluate the litigation that has occurred entirely in the state courts as a result of *Rodriguez*.

The Intricate Interplay among *Rodriguez*, *Serrano* and *Robinson*

It should be clear already that *Rodriguez*, *Serrano* and *Robinson* are connected to one another in important and complicated ways. They also are part of a broader story covering almost 40 years. In this section of the paper, I'll first sketch the big picture and then zoom in, albeit briefly, on the three cases.

The big picture. Very broadly speaking, there have been four separate, but overlapping chronological chapters in the modern school finance story:²⁸

1. *The big flop.* The first chapter occupied the period between 1966 and 1970, and primarily involved an unsuccessful effort to have the federal courts invalidate state school funding systems under the federal equal protection clause because they failed to provide adequate funding to meet student educational needs;²⁹
2. *The big breakthrough.* The second chapter occupied the period between 1971 and March 1973, and was dominated by the first California Supreme Court decision in *Serrano*.³⁰ Rendered on August 31, 1971, it was the first decision in the country to articulate a legal theory, primarily under the federal equal protection clause, through which school funding systems based upon unequal local property wealth could be ruled unconstitutional.³¹ In October and December 1971 and January 1972, respectively, federal district courts in Minnesota³² and Texas,³³ and a state trial court in New Jersey³⁴ climbed aboard the *Serrano* bandwagon. Thus was the relationship among *Serrano*, *Rodriguez* and *Robinson* formed.
3. *The big let-down.* The third chapter was notable for its brevity—it began and ended on March 21, 1973, when the U.S. Supreme Court decided the *Rodriguez* case, ruling 5-4 in favor of the constitutionality of Texas' school funding system.³⁵ *Rodriguez* effectively barred the federal courthouse doors

against school funding challenges. Since then, school finance challenges overwhelmingly have been in the state courts.

4. *The big, extended bang.* The last chapter, still being written, started on April 3, 1973, with the New Jersey Supreme Court's strong statement in *Robinson* that it was picking up the school funding reform gauntlet thrown down by the U.S. Supreme Court.³⁶ Rejecting state tax uniformity and choosing not to rely on state equal protection, the New Jersey court decided the case solely on the state education clause. Ever since then, school funding litigation has been brought exclusively in state courts on a mix of state constitutional theories, with many commentators describing a shift in the dominant thrust from equity to adequacy. These lawsuits have been based either on state equal protection, state education clauses, or a combination of those doctrines. Some theorists have argued that school finance reform litigation has proceeded through three waves, with federal equal protection being the first (1968-73), state equal protection the second (1973-89), and state education clauses the third (1989 to the present).³⁷ Although the "waves" are hardly as neat and tidy as the commentators suggest, there certainly has been a shift in constitutional doctrine during the life cycle of the school finance reform movement. Undeniably, state education clauses currently are in the ascendancy.³⁸ By now, all but five states have had such litigation, a number more times than once, and the trend has been decidedly in favor of plaintiffs for some years.³⁹

Serrano, Rodriguez and Robinson. The district court decision in *Rodriguez*, striking down Texas' school funding system, was issued less than four months after the first California Supreme Court decision in *Serrano*, and relied heavily on *Serrano*,⁴⁰ embracing fiscal neutrality as a central element of its remedial order.⁴¹ Not quite four weeks later, the trial court in *Robinson* struck down New Jersey's school funding system on federal and state equal protection grounds, among others, and at the start of its opinion referred to *Robinson's* similarity to *Serrano*, *Van Dusartz* and *Rodriguez*.⁴²

For a time thereafter, *Serrano* dropped out of the picture as it proceeded to trial,⁴³ but the interaction between *Rodriguez* and *Robinson* intensified. On March 21, 1973, the U.S. Supreme Court issued its 5-4 decision in *Rodriguez*, reversing the district court and sustaining the constitutionality of Texas' school funding system.⁴⁴ On April 3, 1973, the New Jersey Supreme Court unanimously affirmed, as modified, the trial court's decision in *Robinson*.⁴⁵

Justice Powell's opinion for the majority in *Rodriguez* dealt much more with *Serrano* and its constitutional theory than with *Robinson*,⁴⁶ and it rejected virtually all aspects of it. Without opining on the issue, the majority seemed to give some credence to the argument that a district power equalizing remedy might even "violate the equal protection theory underlying appellees' case."⁴⁷

Indeed, in a "cautionary postscript," the majority directly addressed the "considerable attention that has focused on the District Court opinion in this case and on its California predecessor, *Serrano v. Priest*, [citation omitted]."⁴⁸ The majority's cautionary message was that affirming the district court decision could cause "an unprecedented upheaval in public education," one that might worsen rather than improve the situation.⁴⁹

The majority concluded its opinion by emphasizing that its action “should not be viewed as placing its judicial imprimatur on the status quo,” which clearly called out for reform.⁵⁰ What was required was continued scholarly attention, and the “consideration and initiation of fundamental reforms with respect to state taxation and education” by the “legislative processes of the various States.”⁵¹

Less than two weeks later, the New Jersey Supreme Court responded to the U.S. Supreme Court’s exhortation for state-level reform in its first *Robinson* decision. The court relied exclusively on the state’s education clause to strike down New Jersey’s school funding system. True it was a state court not a state legislature providing the reform impetus, but the opinion recognized the judiciary’s limitations in fashioning a remedy.

The New Jersey Supreme Court characterized *Serrano* as the “lead case finding that the federal equal protection clause requires statewide equality of expenditure per pupil,”⁵² but the court clearly had to accept that *Rodriguez* was the law of the land regarding that federal clause. Despite the fact that New Jersey’s facts were stronger than Texas’s, the court concluded that the *Rodriguez* majority would not “find a federal constitutional violation” in the case before it.⁵³ Thus, the court was thrown back on state constitutional law. It reversed the lower court’s ruling that New Jersey’s school funding system violated the tax uniformity clause,⁵⁴ chose not to turn the case on state equal protection,⁵⁵ raised sua sponte but did not decide whether the system ran afoul of “an implicit premise in the concept of local government that the State may not distribute its fiscal responsibility through that vehicle if substantial inequality will result,”⁵⁶ and eventually affirmed the lower court’s decision on a ground not used below—the education clause.⁵⁷

Robinson thus provided school funding reform advocates with a clear indication that *Rodriguez* had not ended the litigation effort; the state courts still beckoned. *Serrano* had blazed the original trail to state court 18 months earlier, but it was a different kind of decision in a different context.

Serrano was an equal protection case, with primary focus initially on the federal clause, which happened to be filed in state court. Without doubt it could have been filed in federal court. By contrast, from the start *Robinson* was primarily a state constitutional case relying on a number of different clauses and theories. It could only have been filed in state court.

The California Supreme Court’s first decision in *Serrano* was rendered substantially before the U.S. Supreme Court decision in *Rodriguez*, at a time when the application of federal equal protection to school funding systems was uncharted territory. The New Jersey Supreme Court’s first decision in *Robinson* was rendered under *Rodriguez*’s overwhelming shadow.

After *Rodriguez*, *Serrano*’s focus shifted from federal to state equal protection, but neither before nor after *Rodriguez* did *Serrano* give significant attention to California’s state education clause. By contrast, *Robinson* had always given prominence to the education clause, and, through the circuitous route described above, it came to be based solely on that clause.

These are among the many intriguing elements of the California-New Jersey/*Serrano-Robinson/Abbott* comparison to which I now turn.

A Tale of Two States

The California-New Jersey comparative story has many dimensions, factual and legal. In this paper, the legal will be featured, with special emphasis on three important distinctions:

- The predominant state constitutional provision—equal protection in California as compared to education in New Jersey
- The doctrinal and remedial focus—initially tax equity/fiscal neutrality and then equalized educational spending in California as compared to student needs and outcomes in New Jersey
- The judicial approach—systemic in California as compared to increasingly targeted in New Jersey.

The factual context. The long, detailed story of how California's and New Jersey's above-average education systems have diverged sharply since the early 1970s is important to a full understanding of the legal comparison, but it can be presented in a dramatically abridged version here. The precipitous decline of California's public education system from the halcyon days of the 1950s and 1960s to rock bottom in the mid-1990s is effectively captured by the title and substance of John Merrow's 2004 PBS project, *First to Worst*. Although some education experts claim that California has started the long climb out of the depths, the Rand Corporation's 2005 report, *California's K-12 Public Schools: How Are They Doing?*, presents a less upbeat picture:

As recently as the 1970s, California's public schools were reputed to be excellent. Today, that reputation no longer stands. Instead, there is widespread concern that California's schools have slipped in quality over the years and that they are no longer performing as well as they did previously or as well as schools in other states.⁵⁸

Meanwhile, New Jersey has held its own in some respects and dramatically improved in others, especially those relating to educational resources and programs for poor urban districts. Today, by most measures, California ranks among the nation's weakest public education systems and New Jersey among the nation's strongest, especially when one compares them with relatively comparable states.

Only a few factual comparisons are necessary to document the extent of the divergence.

- Per-pupil spending. In 1959-60, both New Jersey and California spent above the U.S. average, but California was spending almost 10 percent more than New Jersey. By 1969-70, both remained above the U.S. average, but New Jersey had reversed positions with California, spending about 17 percent higher. The gap widened in almost every year shown by NAEP between 1969-70 and 2001-02, sometimes approaching a two-to-one differential. For the most recent year shown, New Jersey was spending \$12,197 in constant dollars and California \$7,439 against a U.S. average of \$8,259.⁵⁹ For a number of years, New Jersey has been among the nation's highest-spending states. Moreover, under the judicial

mandates of *Abbott v. Burke*, students in New Jersey's poor urban districts receive funding beyond the levels of all but a few very wealthy suburban districts,⁶⁰ as compared to students in some of California's urban districts who suffer from "third-world" quality conditions.⁶¹

- *Student-teacher ratios*. In 1999-2000, California had "the second highest ratio of students per teacher of any state," about 20.9 against a U.S. average of 16.1 (and this was an improvement over the 1990's numbers).⁶² In 2001, New Jersey's pupil-teacher ratio of 12.9 was significantly below the U.S. average of 15.9, and dramatically below California's 20.5. Only three small, rural states—Maine, Vermont and Wyoming—had lower ratios than New Jersey.
- *School facilities*. Although California has made some recent progress in school facilities, it "still lags the nation and other large industrial states in terms of the adequacy of the school buildings' environmental and other features, and per-pupil construction expenditures." Tragically, as with teacher credentials, "[t]hese inadequacies are concentrated in central cities serving high minority and low-income populations, as well as in rural areas."⁶³ By comparison, as a result of a judicial mandate in *Abbott v. Burke*, New Jersey has launched a huge school facilities effort, the largest capital campaign in the state's history. The plan was for the so-called "Abbott districts"—31 poor urban districts educating about 20 percent of New Jersey's public school students—to receive full state facilities funding sufficient to replace or renovate every deficient school building.⁶⁴
- *Student achievement and progress*. California's student academic achievement lags far behind almost every other state. According to the Rand report, "[t]he only assessment that allows for reliable comparative analyses...among states is the National Assessment of Educational Progress (NAEP)..."⁶⁵ "The data show that California performs at the bottom end of the distribution of states, just above Louisiana and Mississippi," and far below all comparable, populous states.⁶⁶ California does not fare much better on other indicators of student progress. It "lags other states in terms of high school graduation rates but is catching up."⁶⁷ It "generally lags other states in college continuation and is falling further behind." (*Id.*) Despite recent improvement, it still has the highest teenage pregnancy rate of any state. By comparison, from the earliest NAEP tests in 1990 through the most recent results, New Jersey has consistently surpassed the U.S. average, typically ranking among the top 25 percent of states and at or near the top of diverse, urbanized states. For example, based on NAEP's Common Core of Data for 2003-4 and 2002-3, New Jersey's scale scores for every mathematics and reading test in which its students participated were significantly above the U.S. averages, and the percentage of students ranked at or above proficient improved.⁶⁸ According to NCES data, New Jersey's total high school dropout rate of 2.8 percent is among the lowest in the nation.⁶⁹

The causal link. What explains this remarkable educational divergence between California and New Jersey? As with the factual comparison, the causal link must be dealt with in relatively summary fashion here. In short, many attribute California's decline to *Serrano* and the processes it set in motion. Because New Jersey's overall situation has not changed so dramatically, and the full impact of *Robinson* and *Abbott* on the state's urban districts is still a work in progress, there is less discussion there of a causal link.

According to the Rand report, "California's relative standing in the nation has declined over the last three decades, and especially since the school finance reform legislation in the 1970's" (which, of course, was a response to *Serrano*).⁷⁰ Clearly, the adoption of Proposition 13 in 1978 played a major role by reining in local property taxation. But some believe that *Serrano* paved the way to Proposition 13 by largely severing the linkage between education funding and local property taxes. Peter Schrag, for one, thinks *Serrano* was "a significant factor in the passage of [Proposition] 13."⁷¹ John Mockler, a former high-ranking California state education official, agrees. On PBS' *First to Worst* program he explains the linkage in the following folksy terms:

[T]he public just said, 'Well, gee, it doesn't matter if we raise more money in property taxes because it won't go to our local schools, so what do we care? After all, the logic goes, if increased property taxes don't help our schools, why should we be for increasing property taxes?'"⁷²

Professor Michael Kirst of Stanford University saw the *Serrano* remedy, equalizing per pupil spending within a narrow band without an underlying educational rationale, as writing off educational adequacy and "end[ing] up with equalized mediocrity."⁷³ He had even harsher words for the education finance system that emerged:

It has no underlying rationale, is incredibly complex, fails to deliver an equal or adequate education to all children and is a nonsensical historical accretion. It is more centralized than almost any state system in the nation.⁷⁴

Serrano and *Robinson* made us do it. We now turn somewhat more intensively to the story of how and why *Serrano* and *Robinson* had such profound, and profoundly different, effects on California and New Jersey.

To fully understand and appreciate this tale of two states requires an explanation of how California and New Jersey wound up taking such different legal roads. That involves learning something about how the litigation in each state began, what the goals were, and why and how the differing legal theories and strategies were chosen to advance the goals.

The Germination of Different Legal Theories and Strategies. To a substantial degree, the legal divergence between California and New Jersey began by 1970 when school finance reform theorists and litigators reacted to federal district court decisions in *McInnis v. Shapiro* and *Burruss v. Wilkerson*. They were not significantly discouraged by these initial defeats, but for quite different reasons.

In California, Coons, Clune and Sugarman characterized the more prominent of the two decisions, *McInnis*, as a "temporary setback," and a "predictable consequence of an effort to force the Court to precipitous and decisive action upon a novel and complex issue for which neither it nor the parties were ready."⁷⁵ As this statement suggests, one way around the *McInnis* obstacle was to present the courts with a legal theory that was, or

at least appeared to be, less novel and complex, and did not press the judiciary to take precipitous action, “fiscal neutrality” for example.

Another approach, embraced by some reform advocates in New Jersey, was to pursue the “novel and complex issue” in a different judicial forum—a state rather than federal court—and based on a different constitutional principle—a state constitution’s education clause rather than the federal constitution’s equal protection clause. *Serrano* in California and *Robinson* in New Jersey exemplify these different responses.

In *Serrano*, federal equal protection doctrine was selected as the centerpiece, but “fiscal neutrality,” rather than funding commensurate with student needs, became the preferred constitutional test. In *Robinson*, reform advocates focused on the state constitution’s education clause instead because they had decided that a neutrally interpreted equal protection clause could not assure educationally disadvantaged students the resources they needed.

The Soil in which the Legal Seeds Were Planted. Context is important to the story of why California and New Jersey wound up going in such different directions, first legally and then educationally, but it is not necessarily dispositive. There were, after all, a number of important similarities between the two. As indicated, California and New Jersey were considered to have relatively high quality public education, but they also were afflicted by similar problems--gross disparities in revenue-raising capacity,⁷⁶ school spending⁷⁷ and educational achievement from district to district.⁷⁸ Both states had large numbers of school districts to compound their problems. Both had substantial and growing minority populations; in California, these were predominately Hispanics and Asians, and, in New Jersey, predominately blacks. Both had troubled urban areas; in California, more frequently sections of cities and, in New Jersey, entire cities.

There were important differences, though. California was and is a West Coast colossus—huge and sprawling, almost a country by itself. New Jersey was and is a small, dense East Coast state, squeezed between and historically overshadowed by New York and Pennsylvania. California’s population was more than three times as great as New Jersey’s and is now about four times as great. California’s public education focus was broader than New Jersey’s, with free or low-tuition higher education widely available.

Of greater import for this paper, New Jersey’s minority populations were more dramatically and visibly clustered in the state’s cities. Those cities had relatively small populations--between 100,000 and 400,000—increasingly dominated by lower income minority residents. By the late 1960s and early 1970s, the cities and most of their residents were poor by every measure. In many of those cities, public school enrollments already consisted of a large majority of lower-income minority students with greater educational needs than their suburban counterparts. Children in New Jersey’s cities were doubly disadvantaged—by the pathology of crumbling center cities and by the manifest failure of their schools to be able to help them overcome their circumstances.

By contrast, California’s large cities were substantially bigger than New Jersey’s, and their populations tended to be far more diverse in racial, ethnic and socioeconomic terms. Most of them also tended to be at or above the state average in property wealth and to have relatively high per pupil expenditures, although not necessarily sufficient to fully meet the educational needs of their least advantaged students. A good number of the affluent residents of California’s large cities had no school age children or their

children attended private schools. As a result, poor, minority students began to disproportionately populate the public schools, and these students tended to be heavily concentrated in certain sections of the cities. California certainly had its privileged, high wealth residential and educational enclaves, but, unlike New Jersey, some of them were sections of cities.

California's property-poor districts tended to be in small cities and rural areas. New Jersey had some of those, but, in the early years of the school finance reform effort, they were much less visible than the urban poor.⁷⁹

Competing Goals. At a deeper level, the explanation for why school funding litigation was filed in California and New Jersey, and how the lawsuits differed in conception, becomes substantially more complicated. In both states, reformers were determined to redress disparities in educational resources and opportunities, and in tax burdens. To do that required some form of equalization. But, in each state a tension emerged between competing equalization approaches.⁸⁰ One focused on particular educational needs and the other on more general systemic deficiencies.

The first approach—driven by concern for unmet student needs--gave primacy to improving the educational lot, and even more ambitiously the life prospects, of poor, educationally disadvantaged minority children. The problems those children experienced seemed to be exacerbated by their concentration in school districts, especially if the districts were property poor or otherwise unable to provide the necessary educational support. Therefore, this approach tended to emphasize the plight of students in such districts.

For at least some of its proponents, this first approach also had to seek to equalize educational outcomes or performance rather than inputs. Given the dramatically different circumstances of advantaged and disadvantaged students, the only meaningful way to seek equalized outcomes was by providing disadvantaged students with educational opportunities and resources fully responsive to their educational needs and disadvantages, even if those exceeded the opportunities and resources being provided to advantaged students.

This was an heretical notion. Since most American school finance systems relied substantially on local property tax revenues, students in property-wealthy districts generally received greater fiscal support than students in property-poor districts, even if the former were more educationally advantaged. In many states, this situation was so well established that superior resources had come to be considered an entitlement of students in wealthy districts.⁸¹

The second approach—driven by systemic concerns--focused on increasing fairness and enhancing meaningful local control by equalizing tax capacity across school district lines. The systemic problem was perceived to be that access to a state service—public education—was dependent on local tax capacity, rather than on statewide resources. Some saw this as an affront to “the educational aspirations of a free society.”⁸² They also found it inconsistent with a system of meaningful local control under which educational spending could vary with local tax effort but not the extent of local resources. Consequently, they proposed to use neutral constitutional principles, befitting the judiciary, to force restructuring of the errant state school finance system.

Equalizing local tax capacity certainly would cure discrimination against taxpayers in poorer districts, who were under pressure to tax themselves at higher rates to

compensate for their smaller local tax bases. Whether such a change also would benefit students would depend upon how taxpayers responded to their newly equalized tax capacity. If they maintained their pre-existing tax effort, greater revenue would be generated for school spending. On the other hand, if they maintained pre-existing school spending levels by reducing their tax effort, students would be no better off. In effect, equalizing local tax capacity, without imposing educational spending requirements, would give taxpayers a choice between using increased state aid to augment school spending or to offset local property taxes.

New Jersey's demographics clearly made it a more likely candidate than California for using the first school finance equalization approach to improve the circumstances of educationally disadvantaged minority children. Pursuing such an objective in California would have been much more difficult in the context of a statewide school finance equalization challenge. Instead, reformers might have had to adopt a different legal strategy. Among the possible challenges were: one emphasizing intra-district disparities in a city such as Los Angeles;⁸³ one focusing on a single predominately poor and minority district with serious educational deficiencies;⁸⁴ or one claiming that poor, minority students, wherever they lived and attended school throughout the state, were receiving a constitutionally inadequate education.

Choices Made: A Half or Full Loaf. Nonetheless, initially both types of equalization visions were present in California, as well as in New Jersey. The complex story of how the California scenario began with the first—the plight of disadvantaged students—and wound up with the second—fiscal neutrality—is skillfully recounted in the most detailed work about the evolution of the *Serrano* case—*Reform and Retrenchment: The Politics of School Finance Reform in California*.⁸⁵ How New Jersey's school finance litigation came to be dominated by the first vision is described in an equally detailed book, *The Quest for Justice: The Politics of School Finance Reform*.⁸⁶

In trying to understand why the states chose different visions, even the titles of these books are revealing. Although the subtitles of both include the phrase “the politics of school finance reform,” the California book emphasizes “reform” and the New Jersey book “justice.” As it turned out, the *Serrano* case did focus on reforming an inequitable system, as a matter of principle, but without the same sense of client-driven immediacy as the *Robinson* case's “quest for justice.” In a sense, the *Serrano* advocates wound up proceeding more pragmatically or strategically, with judgments about the most effective or appropriate legal theory and strategy seeming to overwhelm other considerations. In *Robinson*, a higher risk/higher gain approach prevailed.

Little about the *Serrano* plaintiffs or their attorneys⁸⁷ hinted at this distinction. What may have explained it, however, was the involvement in the case of many of the major legal theoreticians who had written about school finance reform in the 1960s. Most of them either were in California then or wound up there in short order. They became involved in various capacities, as members of an informal plaintiffs' brain trust, as lawyers for amici, or as amici themselves. Their involvement didn't focus the California quest on something other than justice, but it did make the plights and rights of real people seem more remote, and theoretical purity more proximate. John Coons, probably the premiere theoretician, put it very concisely: “We may have given the impression in some of our rhetoric that we were helping poor children, but our main objective was always to demonstrate the irrationality of wealth-based systems.”⁸⁸

By contrast, in New Jersey the *Robinson* case was inspired and partly funded by the City of Jersey City as a means of generating more state funding for its school district,⁸⁹ but lawyers representing amici curiae, the American Civil Liberties Union of New Jersey and the Newark chapter of the NAACP, (the “Newark lawyers”) joined the litigation early and played an unusually active role.⁹⁰

Although the Newark lawyers briefed and argued equal protection and state tax uniformity claims, their main focus throughout was on the state education clause claim. A choice between advocating for taxpayers (let alone for systemic purity), or for poor minority children in the state’s cities, was really no choice for them. As it turned out, the New Jersey Supreme Court was of the same mind.

By eventually choosing these different visions, *Serrano* and *Robinson* were propelled in fundamentally different directions, despite their having had significant common roots. The *Serrano* case was dominated by “fiscal neutrality”⁹¹ in its early stages and by expenditure equality in its later stages, both in the name of equal protection. The *Robinson* and *Abbott* cases,⁹² from the initial New Jersey Supreme Court decision in 1973, proceeded solely on the basis of the state constitution’s “thorough and efficient” education clause.

In theory, the choice between federal and state constitutions and between equal protection and education clauses might have been dictated by the particular state constitutions of California and New Jersey, or the judicial constructions of them. In fact, however, that did not seem to be the case. California’s constitution actually contains an education clause that some commentators have construed to be stronger than New Jersey’s.⁹³ Both states had supreme courts that tended to give their state constitutions quite expansive readings.

Instead, the choice of a fiscal neutrality construction of federal equal protection in California and of the state education clause in New Jersey seems to reflect the triumph of the theoreticians in *Serrano* and of the civil libertarians and community activists in *Robinson*.⁹⁴

In conversations with Professor Coons about 30 years ago, I argued that, notwithstanding its undeniable benefits, fiscal neutrality ultimately couldn’t guarantee even “half a loaf” to students. He, in turn, argued that seeking a “full loaf” for students would assure a *McInnis* result—dismissal by a court unable or unwilling to identify judicially manageable standards.⁹⁵ Certainly, the full-loaf argument was reminiscent of the *McInnis* plaintiffs’ argument (or at least how the court construed them).⁹⁶ Emphasizing student educational needs or outcomes, or even educational expenditures, as the constitutional standard for measuring a school funding system’s adequacy,⁹⁷ might have raised judicial manageability concerns, but it also provided important, countervailing benefits in the form of a “full loaf.”

Implications of the Path Chosen. The decision to seek an educational “full loaf” for urban students strongly argued for basing the legal claim on the state education clause rather than the federal or state equal protection clause. There are three major advantages to doing so. First, many such clauses⁹⁸ contain express, if not very explicit and detailed, qualitative standards. New Jersey’s “thorough and efficient” education system language is a relatively common formulation. For a court willing to engage the issue of urban education, this may provide a more appropriate and even politically acceptable vehicle than the completely open-ended language of equal protection clauses. It more readily

permits the court to address educational quality issues that go beyond school finance mechanisms.⁹⁹ As an aid to construing education clauses, there are some credible plain meaning arguments, often some useful if not definitive constitutional history, occasionally some helpful prior interpretations by courts, the legislature or the state education authorities, and even the possibility of expert opinion about current educational thinking and experience.

A second and related benefit of relying on an education clause is that it permits the court to limit the reach of its ruling to public education. A major reason given by some courts for rejecting equal protection challenges to state school finance systems was the potentially unlimited impact of a finding of unconstitutionality. For example, the New Jersey Supreme Court reversed the trial court's equal protection ruling on the ground that it could be extended to many other governmental and public services and, ultimately, might even call into question the use of local governmental entities to provide such services.¹⁰⁰

The final benefit¹⁰¹ of relying on an education clause is that it provides the court with a remedial structure, as well as a liability standard. A violation is found when a state's educational system is not providing the requisite program quality, whether because of inadequate resources or otherwise. The remedy for such a violation is a corrective plan reasonably designed to meet the constitution's educational quality standard, by adjusting the resource supply or otherwise. The court can define the violation narrowly or comprehensively,¹⁰² and the scope of the remedy typically will follow suit.¹⁰³

The decision to rely on a fiscal neutrality construction of equal protection, by contrast, was designed to spare litigants and courts from having to deal with virtually all these matters. In its purest form, fiscal neutrality would require plaintiffs only to demonstrate that the state's school finance system made funding for a student's education dependent on local, rather than state, wealth. Still, there remained two questions for the *Serrano* advocates—which equal protection clause, federal or state, should be their focus, and in which court, federal or state, should they pursue their claim? They decided to mix-and-match—to focus on the federal clause but in the state courts.

The decision to use federal rather than state equal protection doctrine as the basis for the fiscal neutrality claim undoubtedly was influenced by a number of factors. The *Serrano* lawyers certainly were more familiar with federal than state constitutional law.¹⁰⁴ The federal courts already had shown their receptivity to some fiscally-based equality claims.¹⁰⁵ Early school finance theorists had focused on that legal doctrine.

Nonetheless, the *Serrano* lawyers chose to file their suit in state court. Coming before the decisions in *McInnis* and *Burruss*, this might have seemed surprising, even counter-intuitive. As recounted in *Reform and Retrenchment*, Harold Horowitz gave one reason for favoring the state court: “This was exactly the sort of issue to argue before the California Supreme Court, because of the Court's eminence and its willingness to consider questions of this magnitude.”¹⁰⁶

Because the plaintiffs' lawyers came to embrace different equalization visions and adopted different legal theories to advance their goals, *Serrano* and *Robinson* were propelled in fundamentally different directions. By their responses to the plaintiffs' legal claims, the supreme courts of California and New Jersey strongly supported and even extended the diverging paths of the two cases.

How the Courts Responded and What Constitutional Standards Were Established. Describing and analyzing the judicial responses to California's and New Jersey's school finance challenges are complicated by the length, complexity and changing character of those cases.¹⁰⁷ A detailed analysis, therefore, is well beyond the scope of this paper.¹⁰⁸ Instead, I will provide a relatively brief overview.

- *Serrano and the California Courts.* Because the California Supreme Court had already rendered a decision in *Serrano* based almost exclusively on the federal equal protection clause, the U.S. Supreme Court's decision in *Rodriguez* had a more profound effect on *Serrano* than on *Robinson*, in which a trial court decision had relied on multiple legal theories, including federal equal protection.

There is little doubt that, when the case returned to the California Supreme Court later in 1974, the court could have injected an education clause dimension, either *sua sponte*¹⁰⁹ or by reference to the original complaint. Why it did not do so, especially in light of the New Jersey Supreme Court's post-*Rodriguez* focus on the education clause, is unclear. Perhaps the court was persuaded by the view, most strongly expressed by Coons and Sugarman, that the issues raised by an education clause argument would lead the judiciary far afield into problematic areas. Perhaps it was because the court was so "totally enthralled with Warren Court jurisprudence" that, even when the United States Supreme Court's interpretation of federal doctrine turned out to be unhelpful in a particular case, the California court was more inclined to adapt its state constitutional counterpart to fill the gap than to embrace an alternative constitutional doctrine.¹¹⁰ Whatever the explanation, however, neither the plaintiffs' lawyers nor the court exhibited any inclination to seriously raise an education clause argument.

With the benefit of hindsight, it is fascinating how little attention the California courts gave the education clause throughout a lengthy litigation dealing with school funding. Other than the California Supreme Court's reference to, and possibly tacit acceptance of, several trial court findings of fact regarding "a distinct relationship between cost and the quality of the educational opportunity afforded,"¹¹¹ the only reference to educational quality or adequacy was a particularly curious, but revealing, one. In *Serrano II*, the supreme court quoted the following passage from the trial court's memorandum opinion, foreshadowing later school funding developments in California:

What the *Serrano* court imposed as a California constitutional requirement is that there must be uniformity of treatment between the children of the various school districts in the State....**If such uniformity of treatment were to result in all children being provided a low-quality educational program, or even a clearly inadequate educational program, the California Constitution would be satisfied.** This court does not read the *Serrano* opinion as requiring that there is any constitutional mandate for the State to provide funds for each child in the State at some magic level to produce either an adequate-quality educational program or a high-quality educational program.¹¹²

Instead, the court focused almost entirely on equal protection doctrine, initially on the federal clause,¹¹³ and, after the U.S. Supreme Court's decision in *Rodriguez*, on the state clauses.¹¹⁴ The California Supreme Court made the transition seamlessly, finding that the state clauses had "an independent vitality" and, "[i]n the area of

fundamental civil liberties,” guaranteed “the full panoply of rights Californians have come to expect as their due.”¹¹⁵

With that point established, the court went on to find under state equal protection provisions, as it previously had in *Serrano I* under the federal provision, that district wealth was a suspect classification and education a fundamental interest. Consequently, “strict and searching scrutiny”¹¹⁶ was the proper constitutional standard, a standard the state defendants could not meet.¹¹⁷

For about the next six years, the action shifted from the California courts to the legislature and the electorate. Two new school finance statutes were adopted in 1977¹¹⁸ and in 1979,¹¹⁹ and two public initiatives were adopted by the electorate in 1978¹²⁰ and 1979.¹²¹

The judicial respite ended in mid-1980 when the *Serrano* plaintiffs petitioned for enforcement of the judgment in *Serrano II*.¹²² In a proceeding characterized as a compliance hearing, the *Serrano* plaintiffs sought to prove that the state had failed to satisfy, within the stipulated six-year period, the remedial mandate of *Serrano II*--that “[w]ealth-related disparities between school districts in per-pupil expenditures, apart from categorical aids special needs programs, [be reduce] to insignificant differences, which mean amounts considerably less than \$100.00 per pupil....”¹²³

After a 27-day trial, the trial court ruled that California’s school finance system satisfied the constitutional standard,¹²⁴ and the court of appeals agreed.¹²⁵ Under either a legislative “best efforts” approach¹²⁶ or a flexible “\$100” approach,¹²⁷ the court found that the California school finance system passed constitutional muster. The court undoubtedly was influenced by the fact that, at the time of the compliance hearing, 93% of California students were in districts within the permissible spending band. This had been accomplished by modest leveling up in low revenue districts and severe leveling down in high revenue districts. The educational result was “a school system in which educational offerings are roughly uniform, if not uniformly excellent.”¹²⁸

To press for even greater equalization, however, by further leveling down of spending in high wealth, high revenue districts,¹²⁹ would have especially pernicious consequences because, according to the court, its “harm would fall most heavily on urban districts with large numbers of minority and disadvantaged children.”¹³⁰

Thus, the trial court and the intermediate appeals court in May 1986 validated the state’s new school finance system. Although there were a few further flurries of litigation activity,¹³¹ for all intents and purposes those decisions completed the judicial response to *Serrano v. Priest*.

Robinson and the New Jersey Courts. The New Jersey Supreme Court responded totally differently to the educational quality issues presented to it. At no point did it shy away from considering them, or basing its decisions on them. Even in its earliest decisions, which dealt in great detail with school finance formula nuances, the court always expressed its solicitude for the plight of urban students. It defined the constitutional right, embodied in the education clause, as a right to an educational opportunity reasonably designed to enable urban students to compete in the job market and to function as citizens.¹³² Not only was its standard educationally related, but it also was outcome oriented. The court used equality of school funding as the criterion of constitutionality because no other had been provided it.

Although the New Jersey courts never specifically stated that the defendants had the burden of proving that money did **not** make an educational difference, they did the functional equivalent. They accepted the proposition that money makes a difference, not because plaintiffs had proven it empirically, but rather because it was a premise of the state's school funding system, and because it explained why high-spending districts were so adamant about being able to continue to spend as much as they chose. Moreover, in a refrain that became very familiar over the life of New Jersey's school funding litigation, the court said that the state's failure to provide an educational definition of "thorough and efficient" education left it with no alternative to a fiscal definition.

In its *Robinson I* decision, the court concluded that the state's school funding system was unconstitutional. The problems were manifold. At the threshold, the state had not "spelled out the content of the educational opportunity the Constitution requires."¹³³ Consequently, the court could not conceive of how leaving a major part of the tax burden to local initiative could possibly lead to statewide equality of educational opportunity. This was especially true since local tax resources differed so greatly, and there were such "discordant correlations between the educational needs of the school districts and their tax bases."¹³⁴ The court even pondered whether the constitutional requirements realistically could be met by relying on local taxation.¹³⁵

The charge the court gave the other branches in *Robinson I* was to define the educational opportunity the state constitution contemplated, require local districts to raise the necessary funds to provide that opportunity, design state aid to compensate for local failures to reach that level, and stand ready to assume ultimate responsibility for the fulfillment of the constitutional command. The court also stated, without elaborating on the point, that "The State's obligation includes as well the capital expenditures without which the required educational opportunity could not be provided."¹³⁶

The failure of the other branches to respond effectively to *Robinson I* forced the New Jersey Supreme Court into an extended remedial effort. Finally, in 1975, the legislature adopted a new school funding law—the Public School Education Act of 1975 ("1975 Act").¹³⁷ A sharply-divided court found it facially constitutional.¹³⁸ However, the legislature's failure to appropriate funding for the 1975 Act led the state to the brink of a constitutional crisis,¹³⁹ averted only when the legislature blinked first and adopted New Jersey's first state income tax. Meanwhile, the successors to the *Robinson* plaintiffs¹⁴⁰ were busy collecting data to demonstrate that the 1975 Act's finance system was unconstitutional as applied.

Abbott and the New Jersey Courts. In February 1981, New Jersey returned to the school finance litigation wars with the filing of a new case, but one obviously closely related to *Robinson*—*Abbott v. Burke*.¹⁴¹ By every measure, *Abbott* has been a massive case from its inception. Although it was an expected follow-up to *Robinson*, procedural wrangling consumed more than five and one-half years until an evidentiary hearing began before an administrative law judge.¹⁴² The hearing involved 95 days, 99 witnesses and 745 exhibits. The parties also submitted approximately 1,500 pages of proposed factual findings, hundreds of pages of replies to the other's proposals, and 400 pages of legal briefs. On August 24, 1988, almost 15 months after the hearing ended, the administrative law judge rendered a 607-page "Initial Decision," concluding that the 1975 Act, as applied, violated both the education and equal protection clauses of the New Jersey

Constitution.¹⁴³ After the commissioner and state board of education rejected this decision and found the 1975 Act constitutional,¹⁴⁴ the case returned to the supreme court about four years after its prior visit, more than eight years after *Abbott* had been filed, and about 13 years after the last *Robinson* decision.

Although there were obvious and important connections between *Robinson* and *Abbott*, there also were important distinctions. First, in *Robinson*, there had been only a brief evidentiary hearing, and a record “primarily limited to the funding scheme, its impact and demographic data [lacking] significant evidence of substantive educational content.”¹⁴⁵ In *Abbott*, the lengthy hearing produced compelling evidence about the increasingly desperate educational straits of New Jersey’s overwhelmingly poor and minority students in urban school districts. The comparisons with high wealth and high spending, largely white suburban districts could not have been starker.

Second, at the start of the *Robinson* litigation, the court had been confronted with a school funding statute that failed to define the educational content of the “thorough and efficient” clause, on which an equitable financing system could be based. In *Abbott*, the 1975 Act contained an educational definition that the plaintiffs did not challenge and that the court endorsed.

Third, in *Robinson*, the supreme court had quickly rejected the plaintiffs’ equal protection challenge because, on the limited record before it, the court was not prepared to entertain a theory that might implicate the whole institution of local government. In *Abbott*, the court initially was willing to treat equal protection as a potentially viable alternative or supplemental theory.

Ultimately, the first distinction was the most significant.¹⁴⁶ Writing for a unanimous court, Chief Justice Robert Wilentz produced an opinion of passionate rhetoric and broad sweep, ruling that students in 28 poor urban districts had been denied their constitutional rights under the state education clause.¹⁴⁷ They were entitled to an educational opportunity that would enable them to compete with their more advantaged suburban peers in the job market and in society. For there to be any realistic prospect of such outcome equality, the court recognized that poor urban districts would have to spend **more** on their students than wealthy suburban districts did. Consequently, the court’s constitutional benchmarks included three fiscal aspects and one educational aspect.

- i) the poor urban districts, designated as “special needs districts” (SNDs) by the court, must spend an amount per pupil on “regular education”¹⁴⁸ equal to the average of what the highest wealth districts spent;
- ii) the SNDs must provide students with supplemental programs designed to meet their special educational needs;¹⁴⁹
- iii) the state must guarantee and mandate the necessary funding, and “such funding cannot be allowed to depend on the ability of local school districts to tax;”¹⁵⁰ and
- iv) substantial, far-reaching educational reform must be implemented in SNDs to ensure that adequate funding is translated into improved education.¹⁵¹

In important ways, *Abbott II* also is unique among school finance reform decisions nationally.

First, in one respect *Abbott II* is narrower than any other school finance decision in the country. It found a challenged statute unconstitutional only in part. In *Robinson*, and in every other decision invalidating a state funding system, the entire system was

struck down. Indeed, Kentucky's supreme court used a school finance challenge to strike down the legal structure of the whole public education system.¹⁵² Despite the *Abbott* record's extraordinary scope and size, the New Jersey supreme court concluded that it provided an insufficient basis for invalidating the school funding system as it affected all those districts falling between the wealthiest and the poorest urban districts.¹⁵³

Second, the comprehensiveness of *Abbott's* record about poor urban districts convinced the court not only to find the system unconstitutional as to those districts, but also led to the articulation of an elevated standard of educational and fiscal equality. Most state court decisions either have required equality of resources or spending without reference to any educational quality standard, or have required equality only to a level of educational adequacy, or even minimum adequacy, and then permitted school districts to enhance their educational offerings out of local resources. *Abbott II*, instead, mandates that "poorer disadvantaged students...be given a chance to be able to compete with relatively advantaged students."¹⁵⁴ By contrast, the *Robinson* standard, an "educational opportunity...needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market,"¹⁵⁵ stopped well short of explicitly adopting, as an outcome goal, that the state's most educationally disadvantaged students should be enabled to compete with its most advantaged students.

Third, *Abbott II* stands alone among school finance decisions in acknowledging and building into its remedy that disadvantaged students are constitutionally entitled to more educational resources than advantaged students. This conclusion follows inexorably from the outcome standard described immediately above. In the court's words:

It is clear to us that in order to achieve the constitutional standard for the students from these poorer urban districts—the ability to function in that society entered by their relatively advantaged peers—the totality of the districts' educational offering must contain elements over and above those found in the affluent suburban district. If the educational fare of the seriously disadvantaged student is the same as the "regular education" given to the advantaged student, those serious disadvantages will not be addressed, and students in the poorer urban districts will simply not be able to compete.¹⁵⁶

Fourth, the court made explicit that it had decided the case "on the premise that the children of poorer urban districts are as capable as all others; that their deficiencies stem from their socioeconomic status; and that through effective education and changes in that socioeconomic status, they can perform as well as all others. Our constitutional mandate does not allow us to consign poorer children permanently to an inferior education on the theory that they cannot afford a better one or that they would not benefit from it."¹⁵⁷

Fifth, the court rejected the state's argument that an educational reform technique—"effective schools,"¹⁵⁸ by itself, could improve education in poor urban districts to the constitutionally required thorough and efficient level. The court's position was that educational reform and fiscal equalization are each necessary but not sufficient to assure constitutional compliance. They had to be implemented in tandem.¹⁵⁹

Finally, in *Abbott II* the court expressly rejected the state's argument that, because New Jersey's average per pupil spending was at or near the top nationally, all districts

had sufficient funding and any educational inadequacies must result from “incompetence, politics, and worse in the operation of some urban districts.”¹⁶⁰ The court found that any conceivable mismanagement “has not been a significant factor in the general failure to achieve a thorough and efficient education in poorer urban districts....[S]tudents in all of the poorer urban districts simply do not receive the quality of education they need to equip them as citizens and competitors in the market, especially when compared to the education given in the affluent suburbs. No amount of administrative skill will redress this deficiency and disparity—and its cause is not mismanagement.”¹⁶¹

The distinctive approach taken by the New Jersey Supreme Court in *Abbott II* led directly to its remedy. Put succinctly:

The Act must be amended, or new legislation passed, so as to assure that poor urban districts’ educational funding is substantially equal to that of property-rich districts. “Assure” means that such funding cannot depend on the budgeting and taxing decisions of local school boards. Funding must be certain, every year. The level of funding must also be adequate to provide for the special educational needs of these poorer districts and address their extreme disadvantages.¹⁶²

The court gave the legislature slightly more than a year to put a new school funding system into effect. Because of the magnitude of the increased funding, however, the legislature could choose to phase in the new system rather than fully implement it immediately. The court expressly left to legislative determination a variety of other important remedial matters.¹⁶³

The court concluded its remedial discussion by indicating a number of things things it would **not** do, including ordering a capital improvement timetable for all school facilities throughout the state because “the record was insufficient to fashion a remedy concerning capital construction.”¹⁶⁴

With the remedial details out of the way, Chief Justice Wilentz, writing for a unanimous court, concluded the *Abbott II* opinion with a sweeping and heartfelt description of the societal and personal implications of school funding inequalities.

This record proves what all suspect: that if the children of poorer districts went to school today in richer ones, educationally they would be a lot better off. Everything in this record confirms what we know: they need that advantage much more than the other children. And what everyone knows is that—as children—the only reason they do not get that advantage is that they were born in a poor district. For while we have underlined the impact of the constitutional deficiency on our state, its impact on these children is far more important. They face, through no fault of their own, a life of poverty and isolation that most of us cannot begin to understand or appreciate.¹⁶⁵

In the years following this resounding 1990 judicial ruling, recalcitrance and resistance increased in the other branches of state government and the plaintiffs repeatedly found their way back to the courts. For the most part, the courts’ resolve has remained remarkably strong. Indeed, subsequent *Abbott* decisions have not only reaffirmed, but also extended *Abbott*’s reach. In particular, the New Jersey Supreme

Court added specific, detailed mandates regarding “well-planned, high-quality” early childhood education for all three- and four-year old children in the Abbott districts, and an ambitious school facilities program.¹⁶⁶

The court also gave high priority to the “dire need for specific programs and funding addressed to the educational needs of these disadvantaged students.”¹⁶⁷ According to the court:

The primary concern, the goal, of the [State Education] Department, the Legislature and indeed the public, is the actual achievement of educational success in the special needs districts. The record before us makes it clear that that success cannot be expected to be realized unless the Department and the Commissioner identify and implement the special supplemental programs and services that the children in these districts require. Without them, they will not have a fair chance to achieve that success. The money mandated by Abbott cannot bridge the gap without significant intervention in the form of special programs and services targeted to the needs of disadvantaged students.¹⁶⁸

This episode in the *Abbott* saga captures the thrust of the plot line beginning with the court’s *Abbott II* decision in 1990—doctrinal tenacity in the face of recalcitrance, but an understandable reluctance to go to the constitutional mat with the other branches of state government.¹⁶⁹ In some ways, *Robinson* and *Abbott* were mirror images of one another. *Robinson* was characterized by doctrinal moderation (at least in relative terms), but remedial assertiveness; *Abbott* by doctrinal boldness, but remedial moderation.¹⁷⁰

As a result, it was not until 1998 that parity funding was put into place, and compliance with that mandate has continued. With some serious fits and starts, several years ago, the state began to largely honor its commitment to provide full-day,¹⁷¹ high-quality early childhood education to all three- and four-year olds in the Abbott districts, and there are more than 40,000 enrolled. The supplemental programs mandate continues to be problematic,¹⁷² and serious problems have beset the school facilities program.¹⁷³

Comparing the Judicial Responses in Serrano and Robinson/Abbott. Obviously, the New Jersey Supreme Court used the state constitution’s education clause to reach a fundamentally different result than the California Supreme Court reached under its state equal protection clause. Although the decisions in both states incorporated a substantial measure of spending equalization, there were two distinctions of enormous importance.

First, since its 1990 *Abbott II* decision, the New Jersey Supreme Court’s constitutional benchmark for regular education spending equalization has been the average of what the state’s highest wealth districts spend on their own students. In effect, the court was defining a “thorough and efficient” education by reference to what elite suburban districts provide. By selecting this benchmark, the Court clearly contemplated that equalization would be achieved by leveling up expenditures in the poor urban districts. Although, in theory, the state, or the high wealth districts themselves, could have chosen to level down their expenditures to meet those in the poor urban districts, that has never been politically feasible in New Jersey. Nor is it necessarily clear that

leveling down beyond a certain point might not have violated the educational rights of all students.

In California, by contrast, the neutral equal protection approach, with no constitutionally-based educational input or outcome standard available, left entirely to state and local education authorities, and to the state's voters, the decision of how to achieve equalization. Relative to the nation, as well as to New Jersey, California's spending equalization approach clearly has been to level down.¹⁷⁴

The second major distinction between the approaches of the New Jersey and California courts is that the New Jersey Supreme Court directly addressed the issue of funding in relation to students' educational needs. Although its *Abbott* opinions are suffused with that approach, the most dramatic example is the court's repeated requirement that the state identify, cost out and provide supplemental educational programs to meet the special educational needs of disadvantaged students in poor urban districts. This followed from the court's conclusion that the education clause could be satisfied only if the state provided such programs, and that the state has not done so. Of course, the court stopped short of specifying what programs were required, and of identifying students who were entitled to them. But, the court ventured well beyond a fiscally neutral approach without apparent concern about the absence of traditional judicial standards.

Another basis for comparing the judicial responses is by considering the extent to which they satisfied the plaintiffs' goals. In a sense, this is an easier judgment to make for New Jersey than for California. In New Jersey, almost 35 years of litigation has proceeded in a straighter line from plaintiffs' original goals to the current situation than has been true of California. Although that is surely not the same thing as saying those goals have been fully satisfied, in fact New Jersey may be poised at the brink of that accomplishment.

Plaintiffs and amici in *Robinson* unabashedly were seeking to advance the educational interests of poor minority students in poor urban school districts.¹⁷⁵ In that case, and even more so in *Abbott*, the New Jersey Supreme Court focused on those students and districts, ruling the state's school finance law unconstitutional only as to them. In a series of strong opinions, the court spoke to the plight of urban students in unusually emotional and powerful prose, endorsing virtually all of plaintiffs' main arguments about the constitutional and even moral rights of those students.¹⁷⁶ The court also has articulated with increasing specificity what the state must do to satisfy those constitutional rights. At their core is leveling up of urban district spending to the point where it is sufficient to meet all the educational needs of their students. The result is spending by New Jersey's poor urban districts substantially greater than all but the very highest spending California districts, and dramatically more than California's poorer districts.

Not just New Jersey's urban education advocates but others as well have recognized that *Robinson/Abbott* can be the springboard to a unique breakthrough. Robert Slavin, a Johns Hopkins University professor and creator of Success for All, a widely-touted whole-school reform program,¹⁷⁷ has said that New Jersey has an historic opportunity. Says Slavin, New Jersey "is a very good place to test the proposition that if we decide as a society that we won't tolerate such low achievement [by urban students],

this problem can be solved.” Unlike many other states, “New Jersey can afford to solve this problem.”¹⁷⁸

In California, a threshold problem with determining whether the plaintiffs’ goals have been met is identifying who the plaintiffs were and what goals they had. In common with many law reform or public law cases, including *Robinson* and *Abbott*, the *Serrano* plaintiffs were more nominal than real.¹⁷⁹ In the words of the lead plaintiff, John Serrano, this was a “lawyers’ case.”¹⁸⁰

Despite some rhetoric that suggested helping poor, disadvantaged students was a significant goal of the case, that claim was inconsistent both with the fiscal neutrality theory and with California demographics. Fiscal neutrality definitely could help taxpayers in low property wealth districts; it might help students in low property wealth districts whose taxpayers chose to tax themselves at higher rates because the state would equalize their tax capacity. It was not at all clear, though, to what extent poor, disadvantaged students lived in low property wealth districts. In fact, the evidence seemed to be to the contrary.¹⁸¹

One of the reasons Coons, Clune and Sugarman had been captivated by fiscal neutrality was because it paid homage to local choice—the choice by taxpayers of the effort they would make to support their local public schools.¹⁸² As *Serrano* was litigated through the California courts, however, that goal became obscured and, ultimately, lost in the courts’ embrace of equalized spending on basic education.¹⁸³ Rather than honoring local control, as fiscal neutrality would have done, an equal spending requirement effectively eliminates local control. The situation was compounded by the adoption of Proposition 13,¹⁸⁴ which capped local property taxes and converted not only school funding, but also the whole of local finance to a centralized system.¹⁸⁵ Whatever one’s opinion about the goal of fiscal neutrality,¹⁸⁶ it is clear that the combination of the later *Serrano* opinions and Proposition 13 rendered it unattainable so far as the funding of basic education is concerned.¹⁸⁷ It also is clear that an early effect of *Serrano* and Proposition 13 was to cause a substantial leveling down of educational spending in California’s largest cities where many of the state’s minority residents lived.

Thus, *Serrano* has failed to meet the goals implicit in either the early rhetoric about advancing the interests of poor minority students, or the initial legal theory of fiscal neutrality. Indeed, as indicated previously, the current situation falls well short of any meaningful notion of equalized spending on regular education, and raises serious questions about the adequacy of the educational opportunities available to many California students.¹⁸⁸

A final lens through which we can compare and assess the impact of the judicial responses in *Serrano* and *Robinson/Abbott* is public finance and public policy. Looked at broadly, the impact has been enormous. In California, *Serrano* and the school finance reform effort have contributed to, if they have not caused, a series of constitutional initiatives starting with Proposition 13.¹⁸⁹ These, in turn, have largely brought about the centralization of school funding and of local finance generally. According to many commentators, this has led to reduced levels of funding for education and perhaps other locally delivered services as well.¹⁹⁰ By reducing the property tax burden, this also has led to a reduced overall tax load.¹⁹¹ Reduced educational spending has contributed to

special problems for California's cities, with their increasingly diverse and expensive to educate student populations.

In New Jersey, *Robinson, Abbott* and the school finance reform effort have had equally weighty but quite different effects on the state's public finance and public policy. Among the most prominent were: the adoption of the state's first income tax in 1976 under the court's prodding in *Robinson*;¹⁹² the huge 1990 state tax increase orchestrated by Governor James Florio in response to *Abbott II*;¹⁹³ and the public response to both. The Florio tax increase, in particular, spawned grass roots anti-tax organizations with formidable political influence, and broad citizen opposition. Many pundits believe the tax increase led inexorably to Florio's electoral loss in 1993.¹⁹⁴ Certainly, a centerpiece of Christine Todd Whitman's campaign was her promised 30% reduction in the state income tax. Her ability to make good on the promise, even earlier than specified, vaulted her from obscurity to national political stardom. She came, for a time at least,¹⁹⁵ to symbolize the politician of the future—generous of spirit but ruthless in slashing big government and big taxes. The Whitman reduction, incidentally, for several years made it substantially more difficult for the state to meet the equalization mandate of the New Jersey Supreme Court.¹⁹⁶ At the same time, it did not dramatically improve the lot of the state's average taxpayer.¹⁹⁷ For a few years, a combination of substantial state borrowing and higher than anticipated state tax revenues improved the short-term fiscal picture,¹⁹⁸ and enabled the state to meet the court's regular education parity mandate. Since 2000, though, the state has lurched from one huge projected state budget deficit to the next, putting at least some of the *Abbott* funding categories at risk every year.¹⁹⁹

Litigation Reacting to, or Building upon, Serrano and Robinson/Abbott. Litigation in California and New Jersey since *Serrano's* and *Robinson/Abbott's* doctrinal frameworks were completed provides a distinctive perspective on those cases. In each state, two cases deserve special attention—the *ABC School District* and *Williams* cases in California, and the *Bacon* and *Stubaus* cases in New Jersey. What they demonstrate with power and clarity is the failure of *Serrano* to achieve meaningful educational equalization in California, and the success of *Robinson/Abbott* in accomplishing exactly that in New Jersey.

Serrano's narrow equalization focus—revenue limit spending—led in 1992 to the filing of the *ABC School District* case by low-wealth school districts and the statewide Association of Low Wealth Schools. Their complaint was that:

The California school finance system is in a shambles. Massive budget cutbacks, legislative loopholes, unfunded but state mandated special education costs that must be paid from general fund revenues, and the lack of any local taxing authority have resulted in a school finance system that is irrational, unequal and, for some districts and children, inadequate to prepare students for their responsibilities as citizens, and for work and for life.²⁰⁰

That litany could be extended to include inequitable use of categorical funds,²⁰¹ differential ability of districts to tap public and private grant sources²⁰² and extensive use of private educational foundations primarily by high wealth school districts.²⁰³

The *ABC School District* case was voluntarily dismissed by the plaintiffs because they could not raise the \$1 million in legal costs their attorney, John McDermott, had

advised them would be required to go forward in light of the state's commitment of \$1.8 million to fight the lawsuit.²⁰⁴ As a result of an arduous negotiation process between plaintiffs and the state as defendant, the plaintiffs' complaint was dismissed without prejudice, as was a cross-complaint filed by the state.²⁰⁵ The plaintiff school districts and the Association of Low Wealth Schools have not re-filed their complaint even though they had stressed that the dismissal was caused solely by funding problems, and not because of doubts about their legal position or the importance of further equalization.²⁰⁶

The *Williams* case is an even more dramatic and devastating indictment of what *Serrano* hath wrought for California. The case was filed on May 17, 2000, the 46th anniversary of *Brown v. Board of Education*. The plaintiffs were public school students who claimed that the State of California was denying them their state constitutional right to an education because it had failed to provide them with the "basic tools necessary for that education."²⁰⁷ Among the "basic tools" plaintiffs argued were lacking were textbooks, chairs, and open and functional lavatories.²⁰⁸ The case was characterized as one complaining of less than "third-world" educational facilities and programs in many California school districts.

After four years of litigation, the plaintiffs and the State of California entered into a settlement agreement under which the state committed itself to provide students with the fundamental requisites for education, especially relating to textbooks, facilities and teachers. To implement the agreement, the state enacted five statutes and provided more than \$188 million of additional state funding in the 2004-5 State Budget. In addition, a total of \$800 million would be allocated in upcoming years to a new School Facilities Emergency Repair Account, at a minimum of \$100 million per year starting with 2005-6.²⁰⁹

The New Jersey cases are from a different universe, not just a different state. The *Bacon* case was brought by 17 poor, rural school districts who sought designation as Abbott districts and access to the Abbott mandates and funding. Their claim was that, although they were rural not urban districts, their needs and circumstances were comparable and that they could not provide their students with the constitutionally-required "thorough and efficient" education without the Abbott remedies. The State Board of Education and its Legal Committee announced their agreement with the petitioners in ringing terms, reversing a very limited Commissioner's decision.²¹⁰ Not only were the 17 poor, rural districts right in seeking appropriate remedies to meet their particular needs (although not necessarily the full panoply of Abbott remedies), but they highlighted the need for New Jersey to adopt a new school funding law that would assure all districts and their students with the necessary resources and support to implement the state constitutional mandates.

The other New Jersey case is different from *Bacon* in a number of particulars, but like it in one important respect. Ironically, in a sense, *Stubaus*²¹¹ was more like *Serrano* than like *Robinson* or *Abbott*. It was brought on behalf of taxpayers in mid-wealth school districts who sought equalized tax burdens. Their claim was **not** that students in their districts were receiving less than a thorough and efficient education. Rather, they claimed that such an education was being provided only because local taxpayers were willing to tax themselves at an unequally and unfairly high rate as compared to taxpayers in more affluent districts. Their legal claim was doomed by the very first *Robinson* supreme court

decision in 1973, where the court refused to find a state constitutional basis for taxpayer equity across district lines.

Stubaus is similar to *Bacon*, however, in the sense that it, too, accepts *Robinson/Abbott* as an appropriate constitutional judgment about the primacy of a high-quality education for all of New Jersey's students. The plaintiffs in *Stubaus* and *Bacon* both want *Abbott* (or, in the case of the *Stubaus* plaintiffs, what they wish *Abbott* stood for) extended to their particular situations. In effect, their position is that *Abbott* correctly addresses the needs of students in poor, urban districts; it should be a model for their districts as well. Similar positions have been staked out for charter schools serving students who live in *Abbott* districts and for poor, educationally-disadvantaged students no matter where they live in the state.

The bottom line as to our California-New Jersey comparison, thus, seems to be that in California students are running away from (or at least beyond) *Serrano* and in New Jersey students and taxpayers are running toward *Robinson/Abbott*.

Revisiting the Federalization of Education

The “Tale of Two States” (at least these two states) recounted in this paper might suggest that three decades of state court litigation, since *Rodriguez* barred the federal courthouse doors, has not panned out very well. Perhaps we should reconsider whether a different *Rodriguez* decision and federalization of school finance reform might have been better after all.

Before we romanticize that alternative, though, let's think it through. First, suppose the federal standard had been *Serrano*'s original incarnation—fiscal neutrality.²¹² As a practical matter, would that have resulted in a leveling up or down of educational aspirations and educational equality throughout the country? Would it have improved the lot of students or just taxpayers? Would it have discouraged the kind of heretical full-loaf efforts that advocates in New Jersey (or Kentucky²¹³) have successfully made?

Second, neither *Serrano* nor *Robinson/Abbott* is fully representative of the mainstream of school finance litigation that has emerged especially during the past 15 years. Neither is an “education adequacy” lawsuit, but for quite different reasons. *Serrano* has been oblivious to adequacy or any other education standard. *Abbott* has insisted upon a level of educational quality far beyond any normal definition of adequacy. Indeed, *Abbott* has come very close to, if has not completely accepted, a definitional argument that I, and some colleagues and students of mine, made in a 1972 brief to the New Jersey Supreme Court in *Robinson*—that a “through and efficient” education was the best possible education.²¹⁴

Education adequacy lawsuits, which have come to dominate school finance litigation, aim for an intermediate point between *Serrano* and *Abbott*—an educational level that will equip students to function in the economy and as citizens, but stops well short of the best possible education. In an important sense, though, these lawsuits focus on a notion more consistent with *Abbott* than *Serrano*—that a constitutional school financing law should start with student needs and educational programs suited to meet them, and then determine how much that should cost. In many cases, advocates have not left the costing out to either state defendants or courts, but have themselves commissioned studies.²¹⁵

In an exquisite touch of irony, that seems quite like the legal theory advanced in *McInnis* and *Burruss*, which prompted both courts to dismiss the cases because they could find no judicially-appropriate standards to apply. It also prompted Coons, Clune and Sugarman to devise their fiscal neutrality theory so that courts could be spared having to address educational needs and the costs of meeting them.

It's tempting to interpret this as an ultimate repudiation of *McInnis* and *Burruss*, and of fiscal neutrality, but that's not fair. After all, the more recent decisions are by state courts under state constitutions. Consequently, they are being asked to make law only for their own states based on particular circumstances with which they are likely to be familiar. Additionally, the standards movement has swept the nation in the interim, leaving in its wake detailed educational standards developed by state legislatures, and by state and local education officials. These have provided important starting points for legal advocates constructing cases to challenge the constitutionality of school finance systems.²¹⁶ Detailed state standards also have tended to reassure judges that they were not being expected to become instant educational experts. Rather, the courts simply could determine whether the funding laws provided students with sufficient resources to give them a reasonable opportunity to satisfy the state's own standards.

The standards movement has not only buttressed education adequacy litigation in the state courts, but also has contributed to a new manifestation of federalization. At the urging of the Bush administration, but with bipartisan support, Congress enacted the No Child Left Behind Act of 2001.²¹⁷ In one sense, it imposed a federal educational mandate of breathtaking scope—that by the 2013-4 school year every student in U.S. public schools, no matter their educational circumstances, should be able to demonstrate 100 percent proficiency.

Congress' authority to impose this requirement flows from its spending power, exercised through Title I of the Elementary and Secondary Education Act, first enacted in 1965 as part of President Lyndon B. Johnson's Great Society" legislative program. The mechanism it has chosen to implement this bold mandate is a standardized testing regimen far beyond anything previously seen by U.S. public schools.²¹⁸

Between now and 2013-4, schools and districts must determine by these state tests whether their students are achieving "adequate yearly progress" ("AYP") toward the goal of 100 percent proficiency. For those schools and districts whose students are not, a sequence of consequences is specified, ratcheting up year-by-year. For example, schools and districts not achieving AYP for five consecutive years must undertake a major reorganization or "restructuring." This can include reconstituting an offending school as a public charter school, replacing all or most of the school staff, state takeover of the school or district, or contracting with an entity such as a private management company to operate the school.²¹⁹ Nothing in the Act, regulations or policy statements seems to address, however, what happens if 2013-4 arrives and NCLB's proficiency goals have not been achieved.

Nonetheless, NCLB is one of the federal government's deepest penetrations into state and local educational operations. Yet, any claim that it constitutes true "federalization" of education is limited by the fact that it is the states, not the federal government, that determine what constitutes proficiency and adequate yearly progress toward it. In effect, the federal mandate is dependent upon 50 state determinations of proficiency standards. Clearly, this is leading to significant variations from state-to-state.

In fact, state pressure has led the U.S. Department of Education to introduce increasing “flexibility” into the implementation of NCLB.²²⁰

Another limitation on the impact of this federalization is that states can avoid the NCLB mandates entirely by refusing federal Title I funding. Since the costs of complying with NCLB apparently exceed Title I funding, this may not be such a far-fetched option.²²¹ Some states have threatened to do so; others have filed or joined in lawsuits challenging NCLB as an unfunded mandate.²²²

Despite these limitations, NCLB already has had an enormous impact on public education throughout the United States. The unresolved questions are whether that impact has been a positive one and what the longer-term effects of NCLB will be.

Both liberals and conservatives can find something to like here. Disaggregating students by race, ethnicity and socioeconomic status, and focusing attention on the academic performance of each sub-group, respond to deeply-held liberal concerns for poor and minority students. Requiring that all students meet proficiency standards, and that schools and districts are held accountable for that, respond to equally deeply-held conservative concerns.

Some have speculated that a possible outcome, if not the real goal, of NCLB is a move toward privatization of public education, an even more deeply-held preference of some conservatives. This could take the form of private-school vouchers or more thoroughgoing privatization.

Early versions of the bill that led to NCLB did include provisions for private school vouchers, and that possibility has been floated regularly ever since. In fact, USDOE’s FY2007 budget includes \$100 million for tutoring and “school choice,” including vouchers. Pro-voucher advocates, taking a page from the book used by pro-public school advocates over the past 35 years, have turned to the legal process as well.

Complaints have been filed with two Southern California urban school districts—Los Angeles Unified and Compton Unified—arguing that they have failed to comply with NCLB’s requirements regarding publicly-financed tutoring services and transfers to better-performing public schools. The complaints demand compliance. Until the districts do so, the complainants are asking Secretary Spelling to withhold certain federal funds and to afford students in those districts the opportunity to receive private school vouchers or to transfer to public schools in other districts, options not authorized by NCLB.²²³

Conclusion

This paper starts and ends by considering federal actions that sought to federalize important aspects of public education. At the front end is the United State Supreme Court’s 5-4 decision in *Rodriguez*, which refused to impose a national standard on the financing of public education. At the back end is the action of Congress in adopting, and the executive branch in implementing, the No Child Left Behind Act, which has imposed a national requirement of educational proficiency.

In between, the paper speculates about what might have happened if *Rodriguez* had been differently decided and then considers how the state courts of two states—California and New Jersey—accepted the challenge of applying their state constitutions to their respective school financing inequalities in light of the *Rodriguez* Court’s

unwillingness to assume the responsibility. That “Tale of Two States” highlights the impact that different legal theories can have on the quality of education afforded students.

The California-New Jersey comparison is rich and provocative. Two states, distant from one another geographically and different from one another demographically, have been linked by their common engagement in state court-spawned fiscal and educational reforms. Decisions by two of the nation’s premier high courts have led to more than 35 years of legislative, executive and public activity. In New Jersey, the court’s involvement in *Abbott* continues, although at a lower level of intensity; in California, *Serrano* is long over, but students have returned to the state courts periodically to complain about its failure to assure them an adequate education.

Over the years, *Serrano*’s original “half a loaf” litigation strategy—fiscal neutrality--has been relegated to the proverbial dustbin of school finance history and its equalized spending approach has proven wholly inadequate to meet the educational needs of California’s students.²²⁴ The *Robinson/Abbott* focus on a constitutionally-mandated level of education and on student outcomes, with all its attendant complexities and controversy, even constitutional crises, has proven far more responsive to the needs of students, especially those trapped in decaying center cities. Most commentators and most litigants now seem to agree that school finance litigation must emphasize some variation on the theme of educational adequacy to be meaningful.²²⁵ Of course, what happens with New Jersey’s ongoing remedial process in *Abbott* may influence the future of school finance reform litigation, as *Robinson* and the earlier stages of *Abbott* have influenced the present status of such litigation.

The half-loaf vs. full-loaf issue leads to a broader question--what do we believe should be the role of courts in shaping public and social policy? A central rationale for fiscal neutrality was that it would not impose judicially inappropriate burdens on the courts. Rather, courts could apply neutral principles to school funding laws and, if they failed to pass muster, the solution would be left to the other branches. Clearly, the full-loaf approach of *Robinson* and *Abbott* saw the courts playing a far different and more active role. The debate over judicial activism continues to percolate. It has historical, theoretical and pragmatic dimensions. One of its many manifestations occurs regularly in United States Supreme Court arguments about whether or not an originalist interpretation of the Constitution is required.²²⁶

Although judicial activism seems to be in the ascendancy in state court school finance and educational adequacy litigation, there have been notable backlashes. The result is a body of decisions that is decidedly bipolar. Some courts, such as New Jersey’s, have been willing to assume at least oversight responsibility for major fiscal and educational reforms. Other courts have been unwilling even to find justiciable issues in an educational adequacy challenge. The likelihood is that this bipolarity will continue, but it is conceivable that a single major event could alter the situation in one direction or another. For example, were the New Jersey courts to retreat in a highly visible manner from their strong and longstanding commitment to full equality of educational opportunity between poor urban and wealthy suburban students, that might transmit a strong and influential message to other state courts.

This paper also speculates about how the national educational scene might have been different if a single additional justice had joined the four dissenting justices in *Rodriguez* to strike down Texas’ school finance statute. The likeliest result would have

been a decision adopting an equal protection standard of “fiscal neutrality”—that only the wealth of the entire state could have an impact on the funding of education. It is inconceivable that our hypothetical *Rodriguez* majority would have adopted either an “equal-dollars-for-scholars” approach (essentially what *Serrano* put in place in California) or funding based on student needs (essentially what *Abbott* put in place in New Jersey).

Under pure fiscal neutrality, taxpayer burdens would have been equalized, but educational spending levels could have varied from district to district based on local taxpayer choices about the level of tax effort they were willing to make. Presumably, this could have been unaffected by the level of educational need in a school district. The actual majority in *Rodriguez* had commented on this sort of result possibly violating the plaintiffs’ equal protection theories regarding student rights, but Professor Coons and his colleagues clearly contemplated this as a possible, and constitutionally acceptable, outcome of their fiscal neutrality theory.

Thus, a U.S. Supreme Court equal protection edict of this sort could have resulted in district-by-district spending disparities unrelated to educational needs.²²⁷ Indeed, since urban districts tend to be more subject to municipal overburden—higher than normal non-education service costs--than other districts, it is quite possible that in a fiscally-neutral world urban taxpayers might have opted for lower school tax rates, and, therefore, lower educational spending levels, than other school districts. Of course, states could have chosen to establish minimum educational spending levels or, if they had not, students harmed by such taxpayer choices might have pursued remedies in state courts under state education clauses along the lines of *Abbott* and the latter-day education adequacy cases. Whether those cases would have had the same chance of success in our hypothetical world is uncertain. State courts reluctant to involve themselves in these complex and controversial issues would have had an easier out—the U.S. Supreme Court has already established a national norm.

Finally, let’s suppose that, under the scenario of *Rodriguez* re-imagined, California and New Jersey had wound up with the school funding systems they have—would their systems have been constitutional under a U.S. Supreme Court-imposed standard of fiscal neutrality?

Serrano’s “equal spending” approach, with a good deal of the funding coming from the state and much of the rest from state-limited local property taxes, might well have passed federal constitutional muster. By contrast, *Robinson/Abbott*’s educationally-driven, and heavily locally-raised, school funding almost certainly would not satisfy a *Rodriguez* re-imagined fiscal-neutrality mandate. Under New Jersey’s current system, disparities of tax burden, independent of tax effort, are rampant.

If I am correct about how California’s and New Jersey’s current school funding and educational systems would fare under *Rodriguez* re-imagined, there is a resounding answer to the question of whether we would have been better off during these 33 years with a different *Rodriguez* decision. We would not have been. If later cases had built upon a federalized version of *Serrano* rather than on *Abbott*, our nation’s public education system and its students would have been the worse for it. So, too, would our nation.

Might we fruitfully “Rethink *Rodriguez*” in a different sense, though? Instead of expressing sour grapes about how we could have won in *Rodriguez* if only..., or instead

of speculating about how the world would have been different if the Court's 5-4 split had been in the opposite direction, or even instead of proposing doctrinal refinements in the original approach that might produce a different result if *Rodriguez* were re-litigated today, perhaps we should rethink *Rodriguez* in a more profound way.

Is there a way, however dramatic a departure it might be from *Rodriguez*, to fashion a single federal approach, judicial or legislative, that could successfully address the national problem of educational inequalities? Personally, I remain ready to be persuaded, but dubious.

Tempting as it might be to hope that a single solution could be found to complex nationwide education problems, especially in an increasingly global world, our experience over the decades with school desegregation should have warned us of the disappointments and dangers lurking there. The *Rodriguez* decision might have been a blessing in disguise by forcing state courts into the breach. NCLB's effort to federalize the elimination of the achievement gap might lure us away from, not toward, real and abiding solutions. Like *Brown v. Board of Education*, NCLB might play a more positive role in highlighting a profound national educational failing than in directly curing it. Perhaps the framers had it right when they left the primary responsibility for education to the states.

¹ I am the last to claim that enforcement of state court rulings in this area is simple or quick. In New Jersey, we have been at it for 33 years, and we are not alone among states trying to achieve fundamental reform. Texas and California are probably entitled to membership in the club, and New York may soon be applying.

² 411 U.S. at 41, 93 S.Ct. at 1301.

³ 411 U.S. at 41, n. 85, 93 S.Ct. at 1301.

⁴ *Id.*

⁵ Actually, Hawaii's system was not entirely funded by the state then and it is somewhat less so now.

⁶ 411 U.S. at 41, n. 85, 93 S.Ct. at 1301.

⁷ 411 U.S. at 56, 93 S.Ct. at 1308.

⁸ *Id.*

⁹ 411 U.S. at 58, n. 111, 93 S.Ct. at 1309 (quoting from an amici curiae brief filed on behalf of almost 30 states).

¹⁰ 411 U.S. at 130, 93 S.Ct. at 1346.

¹¹ *Id.*

¹² 411 U.S. at 131, 93 S.Ct. at 1347.

¹³ *Id.* at n. 98. Justice Marshall is not explicit about district wealth reapportionment, but presumably it would involve the reallocation of property wealth, perhaps by re-drawing district lines, to equalize actual tax capacity.

¹⁴ *Id.*

¹⁵ See 411 U.S. at 69, 93 S.Ct. at 1315 (J. White dissenting, joined by J. Douglas and J. Brennan); 411 U.S. at 133, 93 S.Ct. at 1348 (J. Marshall dissenting, joined by J. Douglas).

¹⁶ *Rodriguez v. San Antonio Independent School District et al.*, 337 F.Supp. 280, 285 (W.D.Tex. 1971). The district court retained jurisdiction and gave the defendants two years to bring their system into compliance with applicable law.

¹⁷ *Id.* at 283-4.

¹⁸ The actual *Rodriguez* majority certainly did. So, too, did the New Jersey Supreme Court when it chose not to decide *Robinson* on state equal protection grounds. See 62 N.J. at 492, 303 A.2d at 283. Ironically, the California Supreme Court expressed no such concerns in *Serrano*. See 5 Cal. 3d at 613-4, 487 P.2d at 1262 (“unhesitatingly” rejecting the state defendants’ “unreasoned apprehensions”).

¹⁹ 411 U.S. at 130, 93 S.Ct. at 1346.

²⁰ The *Serrano II* opinion, 18 Cal. 3d 728, 747, 557 P.2d 929, ___ (1976), added two more possible remedies—vouchers and some combination of two or more of the other five.

²¹ A few states sought to recapture those excess funds and redirect them to lower-wealth districts—an approach labeled the “Robin Hood” strategy. In at least one state, Wisconsin, the approach was struck down as violative of state tax uniformity requirements. See *Buse v. Smith*, 74 Wis.2d 550, 247 N.W.2d 141 (1976). For a discussion of legal challenges to recapture efforts, see Levin, *Equal Educational Opportunity in School Finance Reform: What Went Wrong? Can (Should) It Be Fixed?* in *QUALITY EDUCATION FOR ALL IN THE 21ST CENTURY: CAN WE GET THERE FROM HERE?* 129, 156 (Lovell, ed., 1994).

²² The long effort deserves the appellation “movement,” largely because of the extraordinary work of The Ford Foundation and its education program officer James Kelly. Ford and Kelly orchestrated the movement over a period of at least 10 years, funding research and advocacy projects and regular conferences, as well as promising young researchers and scholars (many of whom are among the leading lights in school funding and education reform today). We came to know one another well, to debate our views, and even to collaborate in research and advocacy. There’s a long-overdue book to be written about this history.

²³ See Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

²⁴ See *id.* at ___.

²⁵ See Eric Brunner & Jon Sonstelie, *Coping with Serrano: Voluntary Contributions to California's Local Public Schools* 18 (1996); see generally Schomberg, *Equity v. Autonomy: The Problems of Private Donations to Public Schools*, 1998 ANN. SURV. AM. L. 143.

²⁶ The California and New Jersey Supreme Courts, especially, have made it a practice to construe equal protection and other state constitutional counterparts to U.S. constitutional provisions more broadly. In New Jersey, the best example may be school desegregation. The state courts have gone far beyond the federal courts in construing the state constitution's equal protection and anti-segregation clauses to bar de facto segregation and to require racial balance wherever feasible, even if school district lines must be crossed. See, e.g., *Jenkins v. Morris Twp. School Dist.*, 58 N.J. 483, 279 A.2d 619 (1971).

²⁷ See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 115 S.Ct. 2038 (1995) (on federalism grounds, Supreme Court limits federal district court remedial action, which included ordering the state to fund remedial education programs, in desegregation litigation).

²⁸ Various commentators have sought to categorize school funding litigation, with William E. Thro and his "three-wave" approach being the most widely embraced. See, e.g., William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J. LEGAL EDUC. 219 (1990).

²⁹ The most prominent decisions were in federal district courts, see *McInnis v. Shapiro*, 293 F.Supp. 327 (N.D.Ill. 1969) and *Burruss v. Wilkerson*, 310 F.Supp. 572 (W.D.Va. 1969), but there also were two negative decisions by lower state courts in *Serrano* during 1969 and 1970.

³⁰ 5 Cal.3d 584, 96 Cal.Rptr. 601, 487 P.2d 1241 (1971).

³¹ Since *Serrano* was on appeal from the lower court's dismissal, plaintiffs' allegations were assumed to be true. The California Supreme Court articulated a legal standard under which plaintiffs would prevail if they could prove the facts alleged.

³² See *Van Dusartz v. Hatfield*, 334 F.Supp. 870 (D.Minn. 1971)..

³³ See *Rodriguez v. San Antonio Indep. School Dist.*, 337 F.Supp. 280 (W.D.Tex. 1971).

³⁴ See *Robinson v. Cahill*, 118 N.J.Super. 223, 287 A.2d 187 (Law Div. 1972).

³⁵ 411 U.S. 1, 93 S.Ct. 1278 (1973)

³⁶ See *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973).

³⁷ See, e.g., William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J. LEGAL EDUC. 219 (1990).

³⁸ See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV.J. ON LEGIS. 307, 311 n. 8 (1991) (indicating that state courts have relied heavily on education clauses).

³⁹ For a complete, current summary of school funding litigation, see ACCESS website, <http://accessednetwork.org>.

⁴⁰ 337 F.Supp. at 281, n. 1 ("Serrano convincingly analyzes discussions regarding the suspect nature of classifications based on wealth...");. The court also relied on *Van Dusartz v. Hatfield*, 334 F.Supp. 870 (D.Minn. 1971), which struck down Minnesota's school funding system six weeks after *Serrano* and 10 weeks before *Rodriguez*. *Van Dusartz*, in turn, relied almost entirely on *Serrano*. See, e.g., 334 F.Supp. at 871-2 ("[T]his Court chooses to analyze the narrow claims presented here in light of the recent California Supreme Court decision in *Serrano v. Priest* [citation omitted]").

⁴¹ 337 F.Supp. at 286.

⁴² 118 N.J.Super. at 227, n. 1, 287 A.2d at 189. The court returns to *Serrano*, *Van Dusartz* and *Rodriguez*, and especially to the concept of fiscal neutrality, in its equal protection discussion. See 118 N.J.Super. at 274, 287 A.2d at 213-4.

⁴³ The trial began December 26, 1972 and resulted in an unpublished trial court judgment on September 3, 1974 invalidating California's school funding system. More than two years later, on December 30, 1976, the California Supreme Court affirmed. 18 Cal.3d 725, 557 P.2d 929 (1976).

⁴⁴ 411 U.S., 93 S.Ct. 1278.

⁴⁵ 62 N.J. 473, 303 A.2d 273.

⁴⁶ At the start of its wealth discrimination discussion, the opinion referred to *Serrano*, *Van Dusartz* and *Robinson*, 411 U.S. at 18, n. 48, 93 S.Ct. at 1289, but thereafter it shifted its main attention to *Serrano*, see, e.g., 411 U.S. at 27-8, n. 65, 93 S.Ct. at 1293-4.

⁴⁷ See 411 U.S. at 41, n. 85, 93 S.Ct. at 1301. In the State of Texas' Reply Brief to the Court, it took dead aim at the constitutionality of district power equalizing, arguing that such a remedy would not satisfy the equal protection claims made on behalf of students because it left the level of their education funding to

local taxpayers. Argued the State, "...Professor Coons and his associates seem to have persuaded no one except themselves that 'district power equalizing' is constitutional." Appellants' Reply Brief at 12.

⁴⁸ 411 U.S. at 56, 93 S.Ct. at 1308.

⁴⁹ 411 U.S. at 56-8, 93 S.Ct. at 1308-9.

⁵⁰ 411 U.S. at 58, 93 S.Ct. at 1309-10.

⁵¹ 411 U.S. at 58-9, 93 S.Ct. at 1309-10.

⁵² 62 N.J. at 484, 303 A.2d at 278. The equality of expenditure standard ordered in *Serrano* is a departure from the district power equalization standard recommended by Professor Coons and his associates William Clune and Stephen Sugarman. In their amici curiae brief to the U.S. Supreme Court in *McInnis v. Shapiro*, they referred to equal funding as "utterly rigid and totally preemptive of state discretion." Brief of Amici Curiae Re Jurisdictional Statement of Appellants at 12. It seems safe to assume that Coons, Clune and Sugarman were not enamored of the *Serrano* remedy.

⁵³ 62 N.J. at 489, 303 A.2d at 282.

⁵⁴ 62 N.J. at 502-5, N.J., 303 A.2d at 288-90. This ruling, together with the court's equal protection rulings, meant taxpayers had no constitutional right to equality of treatment beyond their local borders.

⁵⁵ 62 N.J. at 490-501, 303 A.2d at 282-7. Regarding state equal protection, the court simply wasn't prepared to trigger the "convulsive implications" of making home rule vulnerable, at least not based on the limited record of this case.

⁵⁶ 62 N.J. at 500-1, 303 A.2d at 287.

⁵⁷ 62 N.J. at 505-20, 303 A.2d at 290-8. The court effectively construed the education clause to be a limited-purpose equal protection clause, affording students a right to equal educational opportunity. See Paul L. Tractenberg, *Reforming School Finance Through State Constitutions: Robinson v. Cahill Points the Way*, 27 RUTGERS L. REV. 365 (1974); and Paul L. Tractenberg, *Robinson v. Cahill: The "Thorough and Efficient" Clause*, 38 LAW & CONTEMP. PROBS. 312 (1974).

⁵⁸ [cite to report at xxiii in Summary]

⁵⁹ [cite to NAEP].

⁶⁰ As indicated, California has very high percentages of poor and limited-English proficient students compared to the U.S. average. The percentages also are significantly higher than New Jersey (percent in Title I schools: CA-60.5%, NJ-53.3%; percent eligible for free/reduced lunch: CA-48.7%, NJ-26.9%; percent in limited-English proficient programs: CA-25.4%, NJ-4.0%). By contrast, New Jersey has a significantly larger percentage of students with Individualized Education Programs than California (NJ-15.4%, CA-10.8%).

⁶¹ [cite to Williams case].

⁶² [cite to Rand, p. xxx & 81]. More recent NCEs data are consistent. In the fall of 2001, California's pupil-teacher ratio was 20.5 compared to a U.S. average of 15.9. California's very high pupil-teacher ratio is an inevitable result of low spending and high average teacher salaries. At an estimated \$55,545 in 2001-2, California's average teacher salary was the highest of any state, more than 21% higher than the U.S. average and somewhat higher than New Jersey's average of \$54,364. California's numbers for other school staff were as bad. It "ranked 50th in total school staff to students, 48th in number of district officials/administers to students, 50th in number of school principals and assistant principals to students, and 51st in number of guidance counselors and librarians to students." [cite to Rand, p. 81, n. 18]. Compounding the problem of the high teacher-student ratio is the fact that "Teacher qualification requirements are generally lower in California than in other states," with only 46 percent of California school districts requiring full standard state certification as compared to 82 percent nationally. Worse still, "[t]eachers in California who have not completed all requirements for a credential are concentrated in urban schools, the lowest performing schools, and schools with high percentages of low-income and minority students." [p. xxx].

⁶³ [cite to Rand, p. xxxiii].

⁶⁴ Other districts throughout the state were eligible for substantial state matching funds for their capital projects. Unfortunately, the program has been mired in controversy around charges of inefficiency and corruption; available funds have been expended with many projects incomplete or never started; and, in the midst of a serious fiscal crisis, the state is debating how to proceed. [cite?].

⁶⁵ [p. xxxiii].

⁶⁶[p. xxxiv)]. California has high percentages of poor, limited-English proficient and minority students,⁶⁶ but “California’s low NAEP scores cannot be accounted for by the state’s high percentage of minority students. When students’ family backgrounds are controlled for, California’s scores are the lowest in the nation....” *id.*

⁶⁷ *Id.* at xxxvii.

⁶⁸ On 4th grade mathematics, the percentage of students at or above proficient rose from 27% in 1992 to 53% in 2005; on 8th grade mathematics, the increase was from 24% in 1990 to 45% in 2005. On 4th and 8th grade reading, the increases were, respectively, from 43% in 1992 to 47% in 2005, and from 40% in 2003 to 42% in 2005. By way of comparison, California’s percentage of students at or above proficiency on the same NAEP tests ranged from a low of 13% to a high of 32%, only slightly better than half of New Jersey’s percentage.

⁶⁹ California was not included in the ranking. Many experts in the field question the accuracy or reliability of student dropout data, and, as if often the case, averages mask great disparities. Reports of dropout rates in some New Jersey urban high schools suggest that they are astronomically high. [cite]

⁸⁴ [cite to Rand at p. xxxvi]

⁷¹ [cite to Paradise Lost].

⁷² [cite to The Merrow Report-First to Worst (Serrano v. Priest)].

⁷³ [cite to First to Worst transcript at 7].

⁷⁴ [cite to Stanford Report Jan. 21, 2004, Lisa Trei, “Documentary examines how California public schools fell ‘from first to worst’”(quoting Dr. Kirst)].

⁷⁵ See John E. Coons et al., *supra* note __, at 308.

⁷⁶ See *Serrano v. Priest*, 5 Cal. 3d 584, 592 (1971); *Robinson v. Cahill*, 118 N.J. Super. 223, 242 (Law. Div. 1972).

⁷⁷ See *Serrano v. Priest*, 5 Cal. 3d 584, 594 (1971); *Robinson v. Cahill*, 118 N.J. Super. 223, 282 app. A, 288 (Law Div. 1972).

⁷⁸ See *Serrano v. Priest*, 5 Cal. 3d 584, 600-01 (1971); *Robinson v. Cahill*, 118 N.J. Super. 223, 251-56 (Law Div. 1972).

⁷⁹ [cite to Bacon case before State Board and its 17 poor rural districts].

⁸⁰ In the early years of school finance reform litigation, theorists identified a wide array of equalization approaches or definitions. [cite to Robert Beirne’s and Lenore (?) Stieffel’s work on defining equalization]

⁸¹ The New Jersey Supreme Court’s 1990 decision in *Abbott v. Burke*, 119 N.J. 287 (1990) (*Abbott II*), was the first in the country to establish a state constitutional right of disadvantaged students to have more spent on their education than advantaged students. The Court has twice reaffirmed and extended that right. See *Abbott v. Burke*, 136 N.J. 444 (1994) (*Abbott III*); *Abbott v. Burke*, 149 N.J. 145 (1997) (*Abbott IV*).

⁸² See Amici Curiae Brief of Stephen D. Sugarman et al. at 3, *Serrano v. Priest*, 96 Cal. Rptr. 601 (1971) (No. 29820).

⁸³ [cite to *Hobson v. Hansen*; did we ever find a CA intra-district case?]

⁸⁴ [cite to and describe the recent ACLU case filed in CA re: the Compton district; cross-reference to discussion *infra* re: Newark lawyers’ intention to file suit on behalf of students in the Newark district]

⁸⁵ REFORM AND RETRENCHMENT at 26-51.

⁸⁶ QUEST FOR JUSTICE.

⁸⁷ The *Serrano* plaintiffs included Los Angeles county public school children and their parents. See *Serrano*, at 589, 487 P.2d at 1244. Plaintiff children claimed to represent “a class consisting of all public school pupils in California except children in that school district, the identity of which is presently unknown, which school district affords the greatest educational opportunity of all school districts within California.” *Id.* Their lawyers were brought together under the auspices of the Western Center on Law and Poverty (“WCLP”). They included Harold Horowitz from UCLA, Derrick Bell from WCLP, and two young attorneys, Sidney Wolinsky and Michael Shapiro, from private law firms in Los Angeles. See RICHARD F. ELMORE & MILBREY WALLIN MCLAUGHLIN, REFORM AND RETRENCHMENT: THE POLITICS OF CALIFORNIA SCHOOL FINANCE REFORM 35 (1982). The plaintiffs’ complaint alleged that California’s school financing system made “the quality of education a function of wealth, a function of geographical accident, and that it fails to take account of educational needs, fails to provide children of equal age, aptitude . . . and ability

with equal resources, and that it perpetuates marked differences in the quality of educational services.” See *id.* at 36 (quoting *Serrano v. Priest*, 557 P.2d 929 (1976)).

⁸⁸ REFORM AND RETRENCHMENT at 43 (quoting an August 3, 1980 personal communication from John Coons).

⁸⁹ The mayor of Jersey City contacted a young, but politically connected, lawyer, Harold Ruvoldt, who had floated a school finance reform litigation idea in the state’s weekly newspaper for lawyers, the *New Jersey Law Journal*. See QUEST FOR JUSTICE at 26-28.

⁹⁰ Lawyers for amici, of whom I was one, were all affiliated with Rutgers Law School in Newark, several with the Constitutional Litigation Clinic and I with my clinically-oriented Public Education Law Seminar. Both enterprises were relatively new to the scene. The Clinic was created as part of the response to Newark’s riots, which led law students and faculty to convene a special tripartite committee dealing with law school reforms that would make it more responsive to the Newark community. I had joined the law faculty in July 1970, committed to teaching and working in public education law. While working previously as an associate with a major Manhattan law firm, I served as special counsel to the New York City Board of Education in connection with school decentralization.

⁹¹ The term was first used in the amicus brief filed in *Serrano* by Sugarman and Coons. See Sugarman and Coons, *supra* note 65, at 35. According to John Coons, it was the name that best captured their equal protection concept, and one that eluded them when they wrote the book, *Private Wealth and Public Education* [cite?]. See REFORM AND RETRENCHMENT at 32 (quoting from John Coons’ August 3, 1980 personal communication).

⁹² In a real sense, the two cases are part of one litigation effort. *Robinson V* held, in a set of opinions reflecting great ambivalence among the justices, that the Public School Education Act of 1975 was facially constitutional. See *Robinson v. Cahill*, 69 N.J. 449, 355 A.2d 129 (1976) (*Robinson V*)[?]. The court indicated, however, that, if plaintiffs’ strong criticism of the statute was borne out by subsequent events, the plaintiffs should return to the court. See *id.* Five years later, the plaintiffs accepted the court’s invitation by filing *Abbott*.

⁹³ See, e.g., William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J. LEGAL EDUC. 219, 244-45 (1990) (citing California constitution as example of “both the purposive preamble and the stronger and more specific educational mandate”). But cf. Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307 (1991) (proposing a new categorization of education clauses based on whether they support equity or minimum standards claims).

⁹⁴ Ironically, New Jersey may have presented a stronger equal protection case than California. New Jersey’s poor school districts were more substantially populated by poor and minority residents than California’s, enhancing the poverty-as-suspect-classification argument. Despite the contrary views of some commentators, the language of New Jersey’s state education clause—“a thorough and efficient system of free public schools”—also seemed more explicit and prescriptive than California’s, enhancing the education-as-fundamental-interest argument. In addition, when considered on a district-by-district basis, New Jersey’s educational outcomes seemed more consistently strong or weak than California’s, and more strongly correlated with property wealth and educational spending.

⁹⁵ Professor Coons also may have said, or I may have intuited he was thinking, that, even if I were able to find a court so misguided as to buy a full loaf argument, such a decision could only lead to constitutional disaster. I address that possibility later in the paper.

⁹⁶ Some believe that the plaintiffs’ lawyers’ problems were more uncertainty, than wrong-headedness, about legal theory and remedy. In their complaint and district court brief, they advanced a number of theories. By the time the case reached the U.S. Supreme Court, their argument sounded much more of fiscal neutrality than educational needs. [cite]

⁹⁷ For a succinct statement of the difference between a half and a full loaf, see Paul L. Tractenberg, *Robinson v. Cahill: The “Thorough and Efficient” Clause*, 38 L. & CONTEMP. PROBS. 312, 317 n.38 (1974) (stating that “[a] major reason for this [state education clause] focus was concern about the limitations inherent in the fiscal neutrality approach to school finance reform. That theory simply asserts that the state may not use the wealth of individual school districts in developing a school finance scheme. Thus it assures neither minimum levels of educational funding nor funding commensurate with educational needs.”).

⁹⁸ Every state constitution contains an education clause at least committing the state to have public schools (although there has been a long-running controversy over whether Alabama has ever effectively repealed its segregatory state education clause; see Paul L. Tractenberg [cite to chapter on state education clauses in new Rutgers-Camden Center for State Constitutional Studies book at n. 39]. Various commentators have sought to categorize the clauses in terms of their linguistic “strength,” and to predict from that categorization their school finance and education reform potential. See, e.g., McUsic, *supra* note __, at 309 n.4 (1991) (citing earlier sources).

⁹⁹ During the past half dozen years, a number of commentators have embraced William Thro’s three-wave theory of school finance litigation. See generally William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Litigation*, 19 J. LEGAL EDUC. 219 (1990). Under that theory, the first wave (1968-73) focused on federal equal protection claims, the second wave (1973-89) primarily on state equal protection claims, and the third wave (1989 to the present) on state education clause claims. See *id.* The approach is far too simplistic and mechanistic for my taste, and it leaves Thro and his supporters with some difficult challenges, such as where to place the 1973 and 1978 education clause decisions in New Jersey and Washington, respectively. Nevertheless, Thro and others do usefully point out that since 1989 most of the school finance litigation has been based on state education clauses. This has been seen as part and parcel of an increasing shift away from the equity/equal protection focus of most earlier cases to the educational adequacy/education clause thrust of most later cases.

¹⁰⁰ See *Robinson v. Cahill*, 62 N.J. 473, 499-501, 303 A.2d 273, 298-300 (1973). The court suggested that, based on equal protection doctrine or “an implicit premise in the concept of local government,” the plaintiffs’ arguments about the mismatch between local needs and resources might raise questions even about the legality of local government itself. See *id.* See also *San Antonio v. Rodriguez*, 411 U.S. 1, __ (1973) (expressing concern about the broad scope of a federal equal protection ruling of unconstitutionality).

¹⁰¹ Professor Coons probably would see this as the crowning **failure** of an education clause-based claim for school funding, and related improvements, sufficient to assure students an “adequate,” or “thorough and efficient,” education. The fiscal neutrality theory, by contrast, was carefully crafted to keep courts away from any affirmative specification of remedy. The court merely would rule out a school funding system based on wealth, other than the wealth of the entire state, and defer to the legislature.

¹⁰² For example, in New Jersey the court’s *Abbott* rulings have held the school funding system unconstitutional only insofar as it failed to meet the educational entitlements of students in poor urban districts. See *Abbott v. Burke*, 119 N.J. 287, 575 A.2d 359 (1990), *aff’d*, 136 N.J. 444, 643 A.2d 575 (1994). In a number of states, the entire school finance system was struck down. See, e.g., *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). In Kentucky, the court ruled that the state’s entire public education system was unconstitutional. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

¹⁰³ In New Jersey, a remedy limited to poor urban districts was not politically viable. The legislature instead adopted a new school finance system applicable to all districts. See *Quality Education Act of 1990*, N.J. STAT. ANN. 18A:7D (West 1989).

¹⁰⁴ It was not until the 1970s that state constitutional law began to receive serious attention from lawyers, jurists and legal academics. See William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 541 (1986) (noting that between 1962 and 1969, the Supreme Court extended nine provisions of the Bill of Rights to the states); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 708 (1983) (recognizing that after the 1960s, there was a “renaissance” of state constitutional law); Robert F. Williams, *Equity Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985) (describing state constitution equality provisions).

¹⁰⁵ See *U. S. v. Jefferson Co. Bd. Of Ed.*, 372 F.2d 836, 900 (5th Cir. 1966) (remedial education required to overcome deficits of segregation); *Hobson v. Hansen*, 269 F.Supp. 401, 405 (D.D.C. 1967) (unconstitutional resource disparities between white and black schools had to be remedied by integration and resource equalization or by compensatory education “sufficient to overcome the detriment of segregation” where integration was not possible). The *Hobson* alternatives of integration or compensatory funding were adopted in the New Jersey case of *Spencer v. Kugler*, 326 F. Supp. 1235 (D.N.J. 1971), a

companion case to *Robinson* filed by the same lawyer. See discussion *infra* at notes [?] 416-420 and accompanying text.

¹⁰⁶ REFORM AND RETRENCHMENT at 37-38 (quoting a July 9, 1979 personal communication from Harold Horowitz).

¹⁰⁷ *Serrano*'s life cycle extended from 1968 to 1989; that of *Robinson* and *Abbott* from 1970 to the present. The California courts issued five major rulings during the case, three by lower courts and two by the state Supreme Court. The New Jersey courts far eclipsed that record during their 35-year involvement in school finance reform litigation. There have been five decisions or orders of lower courts (two in *Robinson* and three in *Abbott*), and 19 by the state supreme court (eight in *Robinson* and 11 in *Abbott*), about a dozen of them worthy of being given a number by the court.

¹⁰⁸ My 1996 manuscript contains such an analysis, and I anticipate producing an updated version for a book-length treatment of the "Tale of Two States."

¹⁰⁹ In common with its sister court in New Jersey, the California Supreme Court's activist tradition extended to raising issues *sua sponte*. **Contact retired Justice in California concerning this—only found one example.**

¹¹⁰ This idea was advanced in a memorandum, dated December 10, 1996, to the author from Professor Joseph Grodin, a retired California Supreme Court justice (on file with the author).

¹¹¹ *Id.* at 748.

¹¹² *Id.* at 754 n.28 (Emphasis added.). Ironically, defendants rather than the plaintiffs attacked this passage when *Serrano* returned to the California Supreme Court in 1974. Presumably, the plaintiffs were so committed to a fiscal neutrality approach, and so certain that an educational needs or adequacy argument would lead to disaster, that they were willing to accept the trial court's reading of the first supreme court opinion. Perhaps to remind the court about the *McInnis* decision, the defendants challenged the trial court interpretation. They argued that the trial court, "by confining its inquiry to the matter of wealth-related disparities among the several school districts, improperly ignored certain other factors—for example, the 'adequacy' and 'equality' of educational programs [footnote omitted]—and thus oversimplified the problem before it." *Id.* at 753-54. The California Supreme Court rejected the state's argument, however, adhering to fiscal neutrality and staying away from educational standards.

¹¹³ In *Serrano I*, the court characterized as plaintiffs' "chief contention... that the California public school financing scheme violates the equal protection clause of the Fourteenth Amendment to the United States Constitution." 5 Cal.3d at 596.

¹¹⁴ Although plaintiffs' complaint had referred to state, as well as federal, equal protection, there was evidence that plaintiffs' attorneys considered the state equal protection clause to be functionally equivalent to the federal clause. It was only after *Rodriguez* that they had to mount an argument about how the state clause should be construed differently.

¹¹⁵ *Serrano II*, 18 Cal.3d at 764.

¹¹⁶ *Id.* at 766.

¹¹⁷ The Court rejected the state's argument that changes in the school funding system effected by S.B. 90 and A.B. 1267 had satisfied constitutional requirements. *Id.* at 769.

¹¹⁸ [cite to AB 65]

¹¹⁹ [cite to AB 8, to be read in conjunction with yearly budget acts and with refinements adopted in 1981 in the form of AB 777 and AB 61]

¹²⁰ [cite to the (in)famous Proposition 13]. A one-year "bail-out" statute was enacted shortly thereafter. [cite to SB 154, as amended by SB 2212].

¹²¹ [cite to Proposition 4 (the Gann Initiative)]. A statute was enacted in 1980 to exempt school districts from Gann limits. [cite to SB 1352].

¹²² Challenges to California's school finance system also were brought by the Placentia and Lucia Mar Unified School Districts. During the closing phase of trial preparation for the compliance hearing, an additional action was filed, at the suggestion of the court, to assure that all relevant issues and evidence bearing on the constitutionality of that system were before the court. *Gonzalez v. Riles*, Los Angeles Superior Court No. CA 000745. The *Gonzalez* case was consolidated and tried with *Serrano*, as were the other proceedings. See *Serrano III*, 200 Cal. App. 3d at ___, 226 Cal. Rptr. at 590.

¹²³ See *Serrano II*, 135 Cal. Rptr. at 356 n.21, 18 Cal.3d at 749 (California Supreme Court quoting from trial court's Sept. 3, 1974 judgment). The court also disposed of the *Gonzalez* plaintiffs' broader claims.

Serrano III, 200 Cal. App. 3d at ___, 226 Cal. Rptr. at 590. The full story of how *Serrano*'s mandate migrated from fiscal neutrality to spending equality is beyond the scope of this paper. It is a story well worth telling, however, and will be recounted in my upcoming book.

¹²⁴ Subsequent to the trial, the trial court rejected both the defendants' effort to have it rely on projections of the current system's future effect and the plaintiffs' effort to reopen the trial to introduce evidence on the effect of new legislation enacted after the trial closed. Serrano III, 200 Cal. App. 3d at ___, 226 Cal. Rptr. at 591.

¹²⁵ In fact, after a brief introductory statement, the appeals court adopted virtually the entire trial court opinion as its own, since it could not "improve on or add to that statement of decision." Serrano III, 200 Cal. App. 3d at ___, 226 Cal. Rptr. at 589.

¹²⁶ The court stated that "the proper standard for testing compliance with the judgment is whether the Legislature has done all that is reasonably feasible to reduce disparities in per-pupil expenditures to insignificant differences." 226 Cal. Rptr. at 604.

¹²⁷ The court resisted placing "[u]ndue emphasis on the \$100 figure." *Id.* at 603. Actually, the language of the *Serrano II* standard was "considerably less than \$100.00," Serrano II, 135 Cal. Rptr. at 356 n.21, 18 Cal. 3d at 749 (California Supreme Court quoting from trial court's Sept. 3, 1974 judgment). Nonetheless, the court adjusted the dollar amount to reflect inflation and arrived at a permissible disparity band of \$198.

¹²⁸ *Id.* at 619.

¹²⁹ Although there was some leveling up of low revenue districts, this was dwarfed by the leveling down of high revenue districts. According to the court, "Although the present Serrano equalization formula is generally described as one of 'leveling up' low spending districts, the reverse is actually true due to the hidden cost of inflation." *Id.* at 617.

¹³⁰ *Id.* at 620. The San Francisco, Oakland and Berkeley school districts, with minority student populations of 80.3%, 85.4%, and 53.9%, respectively, had already suffered large losses in purchasing power and in teaching positions. For example, in a single year, Oakland had to lay off 205 regular teachers and 142 special needs teachers. *Id.* at 617.

¹³¹ In August 1986, the California Supreme Court granted review; in August 1988, it transferred the matter to the court of appeals on a narrow issue; and in October 1989, it dismissed the case pursuant to a settlement agreement.

¹³² [cite to *Robinson I* decision]

¹³³ *Robinson I*, 62 N.J. at 516, 303 A.2d at 295.

¹³⁴ *Robinson I*, 62 N.J. at 520, 303 A.2d at 297.

¹³⁵ *Id.*

¹³⁶ *Robinson I*, 62 N.J. at ___, 303 A.2d at ___.

¹³⁷ [cite]

¹³⁸ [cite to *Robinson V*]

¹³⁹ [cite to *Robinson VI* and *VII*]

¹⁴⁰ The Education Law Center, a public interest law project that I established in 1973 with Ford Foundation funding and directed for its first three years, had housed an increasing amount of the legal work for amici in the *Robinson* case. Beginning in 1978, its new director, Marilyn Morheuser, a former research assistant of mine and a committed public interest lawyer, assumed responsibility for ongoing school funding litigation. Marilyn surely was a larger than life player in New Jersey's and the country's school finance reform litigation efforts. As a former nun in the Sisters of Loretto, she brought an unrivalled passion and fervor to the cause until her death in 1995.

¹⁴¹ [cite]

¹⁴² The complaint was filed in the state superior court on February 5, 1981. More than two and one-half years later, after extensive pre-trial discovery and shortly before trial, the state defendants moved to dismiss the complaint on the ground that the plaintiffs had failed to exhaust their administrative remedies. Those remedies consisted of a petition to the commissioner of education for a hearing and decision, and an appeal to the state board of education. Since the case's core issue was a matter of constitutional interpretation relating to the courts' *Robinson* decisions, and since the commissioner and state board were defendants in *Abbott*, the usefulness of administrative determinations was unclear at best. Nonetheless, after the trial court granted the state's motion and the appellate division reversed, 195 N.J. Super. 59, ___ A.2d ___ (1984), the supreme court agreed to hear the matter. 97 N.J. 669, ___ A.2d ___ (1984). In a decision unprecedented among school finance cases, the court ordered the case to be remanded and transferred to the

commissioner of education for a hearing by an administrative law judge. 100 N.J. 269, 301-02, 495 A.2d 376, 393 (1985). The court did stress that all administrative proceedings “can and will be expedited.” 100 N.J. at 302, 495 A.2d at 394. Moreover, it provided an overview of the state constitutional framework and the issues raised by the parties to guide the administrative law judge’s fact-finding. 100 N.J. at 280-96, 495 A.2d at 381-90.

¹⁴³ OAL Dkt. No. EDU 5581-85 (Aug. 24, 1988).

¹⁴⁴ For a description of the administrative decisions, *see Abbott II*, 119 N.J. at 297-300, 575 A.2d at 364-65. The commissioner rejected the administrative law judge’s recommended decision. He concluded that, if there were any failures to meet the constitutional standard, they were “district specific and remediable under the existing educational funding system.” *Abbott II*, 119 N.J. at 300, 575 A.2d at 365. On appeal, the state board adopted the commissioner’s decision in almost all respects.

¹⁴⁵ *Id.*, 119 N.J. at 347, 575 A.2d at 389.

¹⁴⁶ As to the second distinction, the court found that an acceptable educational definition, by itself, was insufficient to save the statute because the definition had not been adequately implemented either fiscally or programmatically. *See id.*, 119 N.J. at 348-53, 575 A.2d at 390-92. As to the third distinction, the court wound up declining to rule on the plaintiffs’ equal protection claim because the education clause remedy ordered substantially satisfied that claim. *See id.*, 119 N.J. at 389-90, 575 A.2d at 410.

¹⁴⁷ *Abbott v. Burke*, 119 N.J. 287, 575 A.2d 359 (1990) (*Abbott II*).

¹⁴⁸ The Court defined “regular education” as that “education offered in the district except those programs supported by categorical and federal aid.” *Id.* at 333.

¹⁴⁹ *Id.* at _____. [briefly characterize the court’s approach re: supplemental programs—how it defined them, the state’s responsibility to identify and cost them out, etc.]

¹⁵⁰ *Id.* at 295. The court stated that one basis for its conclusion that the 1975 Act’s funding mechanism could “never achieve a thorough and efficient education [was] because it relies so heavily on a local property tax base already over-taxed to exhaustion.” *Id.* at 357. The over-taxation phenomenon is referred to in the court’s opinion and elsewhere as municipal overburden.

¹⁵¹ *Id.*

¹⁵² [cite to *Rose* case]

¹⁵³ The *Abbott II* decision, therefore, left the 1975 Act in effect for about three-fourths of the state’s school districts, arrayed between the 120 [?] wealthy districts and the 28 poor urban districts. For a discussion of possible legal challenges by some of those districts, *see infra* at _____. Ironically, although the scanty record in *Robinson* gave the court pause about whether the case was an appropriate vehicle for deciding about the funding system’s constitutionality, the court’s decision was to strike down the entire system.

¹⁵⁴ 119 N.J. at 287, 575 A.2d at 372.

¹⁵⁵ *Robinson I*, 62 N.J. at 515, 303 A.2d at 273.

¹⁵⁶ *Abbott II*, 119 N.J. at 374, 575 A.2d at 402-03.

¹⁵⁷ *Id.*, 119 N.J. at 340, 575 A.2d at 385-86. The court’s statement almost seems a throwback to the beliefs and rhetoric of the 1960s. *But compare* [cite to Jensen, Shockley and other genetic inferiority sources].

¹⁵⁸ For a discussion of “effective schools,” *see Abbott II*, 119 N.J. at 377-80, 575 A.2d at 404-06. *See also* Ronald Edmonds, [cite to illustrative article from 1970s].

¹⁵⁹ Notwithstanding the court’s rejection of the argument that educational reform alone would suffice, the state reasserted the contention in connection with *Abbott IV*. *See infra* at _____.

¹⁶⁰ *Abbott II*, 119 N.J. at 381, 575 A.2d at 406.

¹⁶¹ *Id.*, 119 N.J. at 381, 575 A.2d at 406.

¹⁶² *Id.*, 119 N.J. at 385, 575 A.2d at 408. The court also stated its assumption that any new funding plan would address the problem of municipal overburden in poorer urban districts. 119 N.J. at 388, 575 A.2d at 409.

¹⁶³ These matters included: which districts should be classified as “poorer urban districts;” how to make provision for meeting the special educational needs of students in those districts; what funding mechanism to use (so long as it was not dependent upon how much poorer urban districts were willing to tax); whether to extend the “*Abbott* remedy” to districts other than the poorer urban districts; and how to determine the division between state aid and local funding, including how much local leeway is permissible.

¹⁶⁴ *Abbott II*, 119 N.J. at 391, 575 A.2d at 411. The court’s statement about the insufficiency of the record concerning capital construction is especially interesting in light of *Abbott IV*’s inclusion of a capital construction remedy. *See* [cite *Abbott IV*]. The court also rejected the plaintiffs’ requests by: declining to

rule on the plaintiffs' equal protection claim; and dismissing without prejudice the plaintiffs' claim that the education funding system violated the state's Law Against Discrimination because the issue had not been fully litigated. Had plaintiffs proved such a violation, they would have been able to claim attorneys' fees from the defendants. [cite to LAD section]

¹⁶⁵ Abbott, 119 N.J. at 394, 575 A.2d at 412. The societal implications and personal tragedies resulting from racial isolation and poverty were central concerns of Chief Justice Wilentz for much of his judicial tenure. See, e.g., Paul L. Tractenberg, *A Clear and Powerful Voice for Urban Students: Chief Justice Robert Wilentz's Role in Abbott v. Burke*, 49 RUTGERS L. REV. 719, 720, 731-33, 749 (1997), John M. Payne, *Politics, Exclusionary Zoning and Robert Wilentz*, 49 RUTGERS L. REV. 689, 704, 712 (1997)(special commemorative issue).

¹⁶⁶ [cite to Abbott IV, V and perhaps later decisions]

¹⁶⁷ Abbott III, 136 N.J. 444, 453, 643 A.2d 575, 579 (1994). The court's concern about supplemental programs and services was heightened by the fact that legislation had been enacted in 1991, three years earlier, requiring the Commissioner of Education to conduct a study of the added costs associated with such special programs, but the study had never been completed.

¹⁶⁸ *Id.* at 454, 643 A.2d at 580.

¹⁶⁹ Despite a ringing endorsement, even extension, of *Abbott II*'s constitutional standards, the court in *Abbott III* did not order a remedy, let alone one that would compel immediate compliance with fundamental constitutional rights of children who, in 1990, the court said had "already waited too long for a remedy." *Abbott II*, 119 N.J. at 380, 575 A.2d at 405.

¹⁷⁰ *Abbott IV*, [cite], might be considered an exception. The court seemed to have lost its collective patience with the state defendants. For example, in castigating them for failing to implement the court's supplemental program mandate despite the court's repeated urging, the court chided the state for not conducting "any actual study of the needs of the students in the SNDs or the costs of supplying the necessary programs," 149 N.J. at 180, 693 A.2d at 435, and for "shirk[ing] its constitutional obligation under the guise of local autonomy," by offering a "menu" of eligible programs to the districts, 149 N.J. at 182, 693 A.2d at 435. In its sharpest criticism, the court railed against the state's reliance on "experts:"

The State contends that experts were involved in formulating the amounts of DEPA and ECPA [categorical state aid] and that the Court should defer to their determinations. Children in the special needs districts have been waiting more than two decades for a constitutionally sufficient educational opportunity. We are unwilling, therefore, to accede to putative expert opinion that does not disclose the reasons or bases for its conclusions. We have ordered the State to study the special educational needs of students in the SNDs. That has not been done. We also have ordered the State to determine the costs associated with implementing the needed programs. Those studies have not occurred. Without studies of actual needs, it is unclear how a sound program providing for those needs has been accomplished. 149 N.J. at 185, 693 A.2d at 437.

¹⁷¹ The court ordered half-day programs, but, based on research evidence, the state education department opted for full-day programs.

¹⁷² [brief explanation]

¹⁷³ [brief explanation of SCC difficulties, recommendation of a new agency]

¹⁷⁴ See discussion *supra* at _____. Even measuring *Serrano* by its own terms—spending equalization, serious questions have been raised about its success. Assuming the court to have been correct about the degree of equalization achieved in spending and educational offerings in 1982-83, the year of the compliance hearing, and about the negative consequences of continuing to pursue the greater equalization plaintiffs sought, today's picture is much less encouraging. During the period since 1982-3, or even since 1986, a number of developments have conspired to raise serious questions about whether current educational spending in California satisfies a meaningful equalization standard let alone is sufficient to provide students with an adequate education. In part, these developments highlight limitations of the original *Serrano* equalization concept; in part, they reflect efforts, largely by higher wealth school districts, to find and exploit loopholes; and, in part, they result from extensions of the revenue straitjacket produced by Proposition 13. To mention just a few of many reasons why *Serrano* equalization has fallen short: some

substantial revenue sources, such as parcel taxes, are not ad valorem taxes falling within Proposition 13; state categorical and capital aid fall outside *Serrano*'s equalization requirements; and private foundations, mainly in wealthy school districts, raise large amounts of money to augment school spending.

¹⁷⁵ The only quibble with that statement might be based on the City of Jersey City's sponsorship of the litigation, and whether Jersey City's interests might have been taxpayer-oriented as well. See RICHARD LEHNE, *THE QUEST FOR JUSTICE, THE POLITICS OF SCHOOL FINANCE REFORM 26-30* (1978).

¹⁷⁶ See *Abbott v. Burke*, 136 N.J. 444, 454, 643 A.2d 575, 580 (1994) (Abbott III); *Abbott v. Burke*, 119 N.J. 287, 357-72, 585 A.2d 359, 394-401 (1990) (Abbott II) (describing the lack of quality of education in the poorer urban school districts).

¹⁷⁷ Slavin's program, Success for All, is the default reform program for all of New Jersey's special needs district elementary and middle schools. Districts may opt for another program, but they have the heavy burden of demonstrating convincingly that it "will be equally effective and efficient, or that it is already in place and operating effectively." SDE SUPPLEMENTAL PROGRAM REPORT 26.

¹⁷⁸ See Nick Chiles, *School Reformer Sees Jersey as Test Case*, STAR-LEDGER, Nov. 12, 1997, at 29.

¹⁷⁹ See Abram Chayes, *The Supreme Court, 1981 Term Foreword, Public Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982) (describing extent to which litigation involves grievances about public policy and impact of this on "standing" requirement). [cite and describe some additional literature about law reform/public law litigation—Handler book?]

¹⁸⁰ See REFORM & RETRENCHMENT at 43; For a detailed discussion of the origins of *Serrano*, see *id.* at 21-32.

¹⁸¹ See *Serrano v. Priest*, 226 Cal. Rptr. 584, 619 (1986) (finding that some high-wealth urban school districts had very high concentrations of poor and minority children) [check Elmore & McLaughlin and other sources]

¹⁸² JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE, THE CASE FOR FAMILY CONTROL* (1978). This work, advocating family choice and education vouchers, was a natural extension of the authors' pursuit of fiscal neutrality in *Serrano*. Both have remained involved in the continuing effort to promote education vouchers in California, but Professor Coons has been more prominently identified with the cause. For a discussion about vouchers, see *infra* at ____.

¹⁸³ The shift was a relatively subtle one. The central constitutional standard adopted in *Serrano II* and applied in *Serrano III* was stated in terms of "[w]ealth-related disparities between school districts in per-pupil expenditures." This formulation is certainly consistent with fiscal neutrality; indeed, it is probably more supportive of that theory than of an equal spending approach. Yet, in *Serrano III*, the court's focus seemed to have shifted to equalized spending. Its main focus became the \$100 band of per-pupil spending, adjusted for inflation, and the conclusion that the state had "reduced per-pupil expenditures, **wealth-related or not**, to insignificant differences." *Serrano III*, 200 Cal. App. 3d at ____, 226 Cal. Rptr. at 620. See also discussion *infra* at ____.

¹⁸⁴ See CAL. CONST. art. XIII A., §1(a).

¹⁸⁵ See RAQUEL FERNANDEZ & RICHARD ROGERSON, *EDUCATION FINANCE REFORM & INVESTMENT IN HUMAN CAPITAL: LESSONS FROM CALIFORNIA 7* (National Bureau of Econ. Research Working Paper No. 5369 (1995); William A. Fischel, *How Serrano Caused Proposition 13*, 11 (1996); see also Thomas B. Timar, *Politics, Policy, and Categorical Aid: New Inequities in California School Finance*, 16 EDUC'L EVALUATION & POLICY ANALYSIS 143 (1994) (describing California's school finance system after Proposition 13).

¹⁸⁶ See generally William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721 (1992) [cite to Benson, etc., proponents of fiscal neutrality who've recanted]

¹⁸⁷ Some of the funding that supplements basic education, or revenue limit, funding, however, is a function of local choice. Certainly, that is true of excess revenue in high property wealth districts generated by the application of the Proposition 13 1% limit. It also is true of special taxes, such as parcel taxes and special assessments, that districts choose to impose. Finally, the creation and funding of private educational foundations in some districts reflect local choice. Of course, none of these exercises of local discretion is power equalized, so they are available primarily to wealthier districts. Consequently, they would not be consistent with the Coons, Clune and Sugarman view that unequalized local spending is not a meaningful expression of choice. See JOHN E. COONS ET AL., *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970).

¹⁸⁸ See discussion *supra* at _____. As to whether the Serrano result might satisfy other worthy goals, see discussion *infra* at _____.

¹⁸⁹ Under Proposition 13, the state of California imposed a maximum property tax rate of 1%, which is to be shared by all local governments including school agencies. See CAL. CONST. art. XIII A, § 1(a). Consequently, school districts could not increase their property tax rates and had to rely on state aid to operate. See PAUL M. GOLDFINGER, REVENUES AND LIMITS: A GUIDE TO SCHOOL FINANCE IN CALIFORNIA 5 (1996). Proposition 13 therefore could affect K-12 education in many ways including inflation increases, instability due to changes in the state's economy, uncertainty over deficits, mandated cost reimbursement (if the state does not approve additional funding for court and Federal mandates, the costs of the mandates must be taken from reductions in educational programs), and limiting local revenue options. See *id.* at 6-7. In 1979, as a response to *Serrano* and Proposition 13, the voters approved Proposition 4, known as the Gann Initiative. Proposition 4 established constitutional limits on the growth of local and state government spending. See *id.* at 12. These limits prohibited government spending from growing at a rate faster than inflation and the change in population. See *id.* In 1986-87, high state income tax revenues caused the state to have \$1.1 billion in excess of its Gann limit. See *id.* The state rebated the entire amount to the taxpayers instead of raising the Gann limit and allowing the state to spend part of the \$1.1 billion on education. See *id.* at 12. As a result, many angry supporters of education took the initiative and placed Proposition 98 on the ballot. See *id.* at 12-13. Proposition 98 gave K-14 education a constitutionally protected portion of the budget. See CAL. EDUC. CODE § 41200 (1993). Proposition 98 provides that K-14 education would receive additional funding from any future state Gann limit excess revenues instead of the revenues being rebated to taxpayers. See *id.* at 13. Proposition 98 impacted education by "nullifying constraints that Gann limits placed on state spending." See *id.* For a further detailed discussion on how Proposition 98 is implemented, see *infra* note 323. Proposition 218 establishes that the public must vote on general taxes and any property-related assessments that local governments could previously have raised. See CAL. CONST. art. XIII C. Because many local governments raised fees and assessments to raise property taxes without the public's vote, they were able to circumvent Proposition 13, which put a limit on property taxes. See Ed Mendel, *Proposition 218 Mayor Says Tax Measure to have Little Impact Here*, SAN DIEGO UNION-TRIB., Nov. 9, 1996, at _____.

¹⁹⁰ **Prior to the *Serrano* decision and Proposition 13, local governments and citizens in California tacitly followed the tenets of the Tiebout model. See Fabio Silva & Jon Sonstelie, *Did Serrano Cause a Decline in School Spending?*, 48 Nat'l Tax J. 199, 199-200 (1995). Under the Tiebout model, local governments sold goods and services which people could purchase by moving into a particular community or reject by moving away. See Charles Tiebout, *A Pure Theory of Local Expenditures*, 65 J. POL. ECON. 415 (1956). Consequently, families grouped themselves in communities with those who had the same demands for public goods given that price. See Silva & Sonstelie, 48 Nat'l Tax J. 199, 199-200 (1995). Because one of the public goods was education; the high income families tended to live in communities with high spending per pupil. See *id.* The Tiebout model's predominance ended with the *Serrano* decision and later Proposition 13, which centralized state funding. See *id.*; see also Caroline M. Hoxby, *Is There an Equity-Efficiency Trade-Off in School Finance? Tiebout and A Theory of the Local Goods Producer*, NBER Working Paper No. 5265) Issue 09/01/95.**

¹⁹¹ For example, in 1992-93, California residents paid an average of 14.2 percent of income to their state and local governments and an average of 35.5 percent in support of local, state and federal governments. See Stephen Krouse, *Californians Take a Heavy Hit in Wallet*, L.A. DAILY NEWS, June 9, 1996, at V1. California was ranked 23d of states' taxes and fees as a percent of income. See *id.*

¹⁹² See Robinson VI, 70 N.J. at 160, 358 A.2d at 459 (enjoining public officers from expending any funds on public education after July 1, 1976, if legislature failed to appropriate necessary funds by that date).

¹⁹³ 119 N.J. 287, 575 A.2d 359 (1990).

¹⁹⁴ See David Lauter, *Votes' Mood Puts Democrats at Risk*, CHI. SUN-TIMES, Nov. 4, 1993 (noting that President Clinton's greatest disappointment in the 1993 elections was Florio's loss resulting from Florio's tax increases); Richard Reeves, *Clinton May Face Same Florio Dilemma*, THE REC., Nov. 9, 1993 (recognizing that Florio lost the 1993 election because his 1990 tax increase went directly to the Legislature before the people could understand the tax); Jonathan Schell, *A Political Volcano Stirs Across the Hudson River*, NEWSDAY, Nov. 4, 1993 (noting that all of the 1993 exit polls agreed that Florio's defeat was a result of his \$2.8 billion tax increase in 1990).

¹⁹⁵ [cite to articles documenting her close electoral victory in this year's election, and attributing it, in part, to growing public skepticism about her fiscal policies (a "borrow and spend" conservative?)]

¹⁹⁶ Governor Whitman's imposition of three tax cuts since 1994 has cost the state treasury about \$1.2 billion in annual revenue. See Joe Donohue, *Jersey Taxes Higher than Average, Unfairly Burden Poor, Study Says*, THE STAR-LEDGER, June 27, 1996, at 27. A shortfall of this magnitude, given the state's balanced budget requirement, clearly has been seen as an impediment to full compliance with court mandates to equalize public school funding. See Ron Marsico, *Schools Top Whitman's '96 Curriculum Address asks Jersey to 'Create Scholars,'* THE STAR-LEDGER, Jan. 12, 1996, at __; Steve Adubato, Jr., *No More Room To Fudge Equitable School Funding*, THE REC., May 18, 1997, at 004 (Northern N.J. Ed.).

¹⁹⁷ The second of Governor Whitman's tax cuts, effective January 1, 1995, was estimated to save the average taxpayer about \$100 per year. See Dunstan McNichol, *Senate Passes Income Tax Cuts Average Taxpayer to Save \$100 a Year*, THE REC., July 1, 1994, at A1 (Northern N.J. Ed.).

¹⁹⁸ The most notable state borrowing was a \$2.8 billion bond offering in 1997, necessitated by some earlier fiscal wizardry that borrowed "excess" funds from the state's pension accounts to balance the budget. Reportedly, this is the single largest state bond issue in United States history. Governor Whitman's refusal to submit the matter to the electorate for a vote led to litigation and severe public criticism. See [cite to selected articles, including Star-Ledger, Nov. 25, 1997, about huge fees generated for financial people].

¹⁹⁹ Currently, with a projected deficit of \$4 billion and a governor stating unequivocally that New Jersey will not continue with its tradition of one-shot budget fixes, the state is almost certain to return to the state supreme court requesting a freeze on Abbott funding. [cite to a source re: this?]

²⁰⁰ Pls. Compl. ¶ 1 at 4-5.

²⁰¹ See Timar, *supra* note 133 [update], at 143, 251.

²⁰² See Curry, *supra* note 145 [update], at 61-96.

²⁰³ See Eric Brunner & Jon Sonsteli, *Coping with Serrano: Voluntary Contributions to California's Local Public Schools* 18 (1996) (finding that 79% of districts with family incomes averaging \$70,000 or more had non-profit organizations that raised over \$25,000; the organizations revenue averaged over \$240 per student) (publication forthcoming).

²⁰⁴ McDermott had been lead counsel in *Serrano* for a number of years when he was employed by the Western Center on Law and Poverty. In 1992, when the *ABC School District* case was filed, he was affiliated with the major national law firm of Cadwalader, Wickersham & Taft. Undoubtedly, that affiliation had something to do with McDermott's estimate of the cost of litigating the case. By way of comparison, in New Jersey plaintiffs in the *Abbott* case (and amici in *Robinson*) have been represented throughout the lengthy litigation history by the Education Law Center, the small nonprofit public interest law center established in 1973 under a Ford Foundation grant. The Center's annual New Jersey budget has seldom exceeded \$350,000, yet it has successfully challenged a succession of school finance statutes, despite major defense efforts. The State of New Jersey has never disclosed how much it has spent on its consistently unsuccessful litigation efforts, but several key legislators have publicly attacked the Center for accepting funding from urban school districts. See Robert J. Braun, *Klagholz, Legislator Assail Districts Using State Aid to Fund Legal Fight*, THE STAR LEDGER, May 3, 1994 at 1; Matthew Reilly, *Newark Isn't Alone in Lobbying with School Funds, Wealthier Districts Join in Practice, Senator Sees Misuse of Aid to Cities*, THE STAR LEDGER, May 4, 1994 at 28; Caryl R. Lucas, *Law Center Trustees Deny Misusing School Funds*, THE STAR LEDGER, May 5, 1994 at 30. The apparent inability of low wealth districts to identify free or low cost legal assistance to support their litigation efforts in California is an interesting commentary on another California-New Jersey difference.

²⁰⁵ In its cross-complaint, the state contended that the 1983 judgment in *Serrano*, upholding the constitutionality of the school funding system, despite differences in funding of \$100 or more per pupil, was binding on the low-wealth schools. See State's Cross-Cl. ¶ 8 at 8-9. The state also contended that the funding of public education in California was constitutionally adequate. See *id.* ¶ 10 at 9. Subsequent to the dismissals of the complaint and cross-complaint, the state filed for sanctions in the amount of \$105,336.50 against plaintiffs for failure to comply with and for abuse of the discovery process. See Motion for Monetary Sanctions at 2.

²⁰⁶ In a memorandum to an ALWS representative, dated September 16, 1993, John McDermott stated, "We are not dismissing because we lost or changed our minds about the fairness or legality of the system. We are dismissing because school districts don't have enough money to litigate the case effectively . . ." In a letter from the Association to superintendents of the 130 plaintiff districts, the Association expressed its

disappointment about having to dismiss the law suit, but added, “. . . equalization is still a viable issue, and we will intensify our lobbying efforts.”

²⁰⁷ *The Williams v. California Settlement: The First Year of Implementation* 9 (Report by Counsel for the Williams Plaintiffs Nov. 2005).

²⁰⁸ [cite to ACLU lawyer’s statements on the Merrow Report, *First to Worst*]. Plaintiffs also sought clean and safe classrooms, and qualified teachers. *Id.*

²⁰⁹ *Id.* at 9-10. Although the *Williams* settlement agreement may be a good start in addressing California’s profound educational failures, it stops well short of the kind of adequacy litigation being pursued in many states, let alone *Abbott*.

²¹⁰ [cite and describe briefly].

²¹¹ [cite].

²¹² There seems little basis for believing that any of the justices involved in *Rodriguez* would have been willing to order the actual *Serrano* remedy of equalized spending.

²¹³ [distinguish KY and *Rose* from NJ and *Abbott*].

²¹⁴ [cite to amici curiae brief]

²¹⁵ The best example of this may be the efforts of the Campaign for Fiscal Equity in New York not only to commission expert “costing-out” studies, but also to involve the public through a process of civic engagement. [cite to website]

²¹⁶ Piling irony upon irony, California’s academic standards have been ranked the most demanding of any state. See Fordham Foundation, *The State of State Standards 2000*. See also American Federation of Teachers, *Making Standards Matter 2001*.

²¹⁷ [cite].

²¹⁸ See Michael Winerip, *Standardized Tests Face a Crisis over Standards*, N.Y. TIMES (Mar. 22, 2006).

Starting this year, NCLB requires that every student be tested annually between third and eighth grade and in one high school grade.

²¹⁹ 34 CFR 200.34.

²²⁰ See USDOE, Flexibility in NCLB (Answer ID 138, Nov. 28, 2005), describing Secretary Margaret Spellings’ April 2005 “new approach” under which states and districts that demonstrate a commitment to certain “bright line” principles will be given “increasing flexibility in meeting the requirements of NCLB.”

²²¹ [compare to state actions under IDEA or its predecessor statute; NM’s brief refusal of federal special ed funding; ultimate unwillingness or political inability of state to resist or reject federal funding, however inadequate it may be].

²²² [cite to CN and NEA litigation]

²²³ [cite to complaints]. These complaints are hardly the first legal forays by the pro-voucher organization Alliance for School Choice and its president Clint Bolick. They have pursued voucher remedies for school finance inequities in Atlanta, Georgia and New York City. [cites] The California complaints were filed with the school districts because NCLB “does not provide a private right of action.” [cite to 3/23/06 press release on Alliance for School Choice website].

²²⁴ Interestingly, Professor Coons may agree with both, or at least the second, of my views. In a 1971 letter, he challenged Arthur Wise’ equalized spending interpretation of the first *Serrano* decision by the California Supreme Court. According to Coons, the dispute about whether *Serrano* stood for fiscal neutrality or equalized spending was “of central substantive importance. If Wise were right, the case would be reversed on appeal, and perhaps properly so. What makes *Serrano* viable is its very refusal to bully the legislature into homogenizing spending.” See SATURDAY REVIEW 70 (Dec. 18, 1971) (letter to education editor responding to Arthur E. Wise, *The California Doctrine*, SATURDAY REVIEW 78 (November 20, 1971)).

²²⁵ See discussion *supra* at _____. Not all judges agree that such a litigation approach is consistent with the proper judicial role, however. See discussion *supra* at _____.

²²⁶ [cite to illustrative articles, opinions]

²²⁷ Large disparities in average education spending among states, of the kind we currently have, would have been acceptable under our hypothetical *Rodriguez* decision. Although it would have established a national standard of sorts, fiscal neutrality, by definition, is accepting of state-by-state spending variations. After all, it focuses on the “wealth of **the state**.” Indeed, that sort of “national standard” for school taxation is analogous to NCLB’s “national standard” for student proficiency. In both cases, the ultimate judgments as to what the standard is and whether it’s been met are left in the hands of the states. In both, federal funding

would fall far short of what it would cost to attempt to satisfy the national standards. Perhaps, most ironically, NCLB does not recognize, or meaningfully assist with, the order of fiscal resources necessary to enable states, school districts and schools to re-orient and re-fashion themselves in the fundamental ways necessary to bring all students to proficiency by 2013-4.