CALIFORNIA

SERRANO v. PRIEST'S INPUTS AND OUTPUTS

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The opinion of the California Supreme Court in *Serrano v. Priest*[1] had at least three institutional addressees: the trial court, the United States Supreme Court, and the California legislature. The case was remanded to the superior court for trial of a single issue: whether substantial inequality in school district capacities to tax and spend means inequality of educational opportunity. While the case was before the trial court, the legislature made some important changes in California's system of school finance, and a closely-divided United States Supreme Court responded negatively to *Serrano's* appreciation of federal constitutional law. In addition to the cost-quality issue, then, the trial required the parties to confront the questions raised by the new legislation and by the Supreme Court's decision.

Judge Bernard Jefferson, the trial judge, has now issued a 106-page opinion, ruling in favor of the plaintiffs on virtually every issue that matters. This article reports on the litigation strategies in the *Serrano* trial, and on the trial court's decision. Before turning to the cost-quality issue, I shall take a few pages to discuss the relevance of the Supreme Court's decision and to sketch the new legislation.

I

THE RELEVANCE OF RODRIGUEZ

In *San Antonio Independent School District v. Rodriguez*,[2] the United States

*Professor of Law, University of California, Los Angeles. Author's note: I am well acquainted with some of the counsel for the *Serrano* plaintiffs, and have watched the case from their side from the beginning. The resulting spiritual kinship may not constitute an "interest" in the litigation, but it should be disclosed.

[1] 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). Much has been written about this decision. Given the subject of this symposium, I shall assume that the reader is generally familiar with this literature. For those who need background reading, I suggest beginning with these articles: Carrington, *Financing the American Dream: Equality and School Taxes*, 73 COLUM. L. REV. 1227 (1973); Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of* Serrano v. Priest *and Its Progeny*, 120 U. PA. L. REV. 504 (1972); Schoettle, *The Equal Protection Clause in Public Education*, 71 COLUM. L. REV. 1355 (1971). The Carrington article contains an excellent review of the most recent literature, and the Schoettle article discusses the social science literature at some length. All three of the cited discussions are critical of the *Serrano* opinion. For a warmer reception of the decision, see Karst, *Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CALIF. L. REV. 720 (1972). The main line of argument in the *Serrano* opinion is adopted from J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970), which is doctrinally summarized in Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305 (1969). An analogous theory was explored at an earlier date in Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State*, 15 U.C.L.A.L. REV. 787 (1968). In addition, Frank Michelman rightly included the school finance problem in his pre-*Serrano* articulation of a "minimum protection" theory. Michelman, *Foreword: Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

[2] 411 U.S. 1 (1973).

Supreme Court held that the Texas school finance system, which was similar to California's, did not violate the United States Constitution's guarantee of the equal protection of the laws. Finding neither a "suspect classification" nor a "fundamental interest" to be involved, the Court held that the appropriate standard of judicial review was not "strict scrutiny," but rather the easily satisfied "rational basis" standard. The *Serrano* defendants naturally made use of the *Rodriguez* decision, arguing that the decision not only placed the California school finance system beyond federal constitutional attack, but also furnished a standard of review for testing the plaintiffs' state constitutional arguments.

The *Serrano* decision of the California Supreme Court rested on both federal and state constitutional grounds; as the court noted, two provisions of the California constitution are "substantially equivalent" to the federal equal protection clause.[3] The defendants argued that the *Serrano* opinion's conclusions (a) that education is a "fundamental interest" and (b) that wealth discrimination is a "suspect classification" should be read as predictions of the course of future Supreme Court decisions, predictions which were shown by *Rodriguez* to be mistaken.[4] Defendants thus asked the trial court to make its own prediction as to the California Supreme Court's interpretation of the state constitution in the light of *Rodriguez.*

Interestingly, the *Serrano* plaintiffs were also able to find two causes for comfort in the *Rodriguez* opinion:

(1) The *Rodriguez* opinion agrees with the California Supreme Court's conclusion in *Serrano* that a school finance system such as those of Texas and California "will not pass muster" under a "strict scrutiny" standard of review.[5] Since this proposition of law now has the blessing of both the state and federal supreme courts, defendants' suggestion[6] that "local control" over educational spending constitutes a justifying "compelling state interest" seems futile indeed. The relevance of *Rodriguez* for the future disposition of the *Serrano* litigation is therefore limited to the possibility that the California Supreme Court will abandon its state-law determinations that the interest in education is fundamental and that wealth discrimination implies a suspect classification. Since this is the season for predictions, it seems a safe bet that the California Supreme Court will not relinquish its position of doctrinal leadership in the area of the "new equal protection,"[7] and that the "strict scrutiny" standard of review will be retained for state constitutional litigation in California involving either the fundamental interest in education or wealth discrimination. The trial court, sharing this view, adopted the plaintiffs' argument.[8]

[3] 5 Cal. 3d at 596 n.11, 487 P.2d at 1249 n.11, 96 Cal. Rptr. at 609 n.11. The adequate state ground issue is discussed in some detail in Karst, *supra* note 1, at 743-48.

[4] Defendants' Trial Brief at 70-84, Serrano v. Priest, Civil No. 938,254 (Cal. Super. Ct., Apr. 10, 1974) [hereinafter cited as Defendants' Brief]. The two trial briefs filed by the *Serrano* plaintiffs are hereinafter cited as Plaintiffs' Brief and Plaintiffs' Reply Brief.

[5] 411 U.S. at 16-17. *See* Plaintiffs' Brief at 156, 167-69.

[6] Defendants' Brief at 84-87.

[7] *See* Karst, *supra* note 1, at 721-40.

[8] Memorandum Opinion re Intended Decision at 15-33, Serrano v. Priest, Civil No. 938,254 (Cal. Super. Ct., Apr. 10, 1974) [hereinafter cited as Super. Ct. Opinion]. Findings of fact and

(2) Plaintiffs also argued that *Rodriguez* had specified the kinds of considerations that should control the decision as to what constitutes a fundamental interest, and that the interest of the *Serrano* plaintiffs met that test. Plaintiffs principally relied on the California constitution's statement in article IV, section 1 that education is "essential to the preservation of the rights and liberties of the people." The argument is that this language creates a constitutional right to education, which satisfies the *Rodriguez* standard for determining which interests are fundamental.[9] The trial court agreed.[10]

II

THE LEGISLATURE'S RESPONSE

As had been predicted,[11] the *Serrano* decision freed the legislative process rather than confining it. Those seeking to equalize school financing found allies among those who sought to shift the whole revenue system toward lesser reliance on local property taxes and greater reliance on other taxes. As a result, the system of school finance was altered in the direction of heavier contributions from state funds, in an act cheerfully entitled the "Property Tax Relief Act of 1972."[12]

The 1972 Act retains the basic structure of the pre-*Serrano* scheme for financing schools: local taxes on real property are supplemented by state aid through a "foundation program" aimed at providing a minimum level of support. The new legislation is complex, but two of its features are the most significant for our present purposes: (1) the foundation levels are (roughly) doubled,[13] with provision for their gradual increase,[14] and (2) a gradually decreasing limit is placed on the revenue which can be raised by a school district through local property taxation, in the absence of approval of increased rates by the district's voters (a "voted override").[15] In combination, these two features will cause school spending by wealthy and poor districts to converge, *provided* that the voters of wealthier districts approve no overrides.

Probably no serious observer would have predicted that the legislature would, as a first response to *Serrano,* move directly to a system of fully

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conclusions of law are to be issued later.

[9] Plaintiffs' Brief at 161-67.

[10] Super. Ct. Opinion at 33-34.

[11] J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 454 (1970).

[12] S.B. 90, ch. 1406, [1972] Cal. Stats. 2931, *as amended,* A.B. 1267, ch. 208, [1973] Cal. Stats. ___. These bills' provisions are hereinafter cited by their section numbers in the California Education Code.

[13] CAL. EDUC. CODE §§ 17655.5-17665.5 (West Supp. 1974). Thus the foundation level in 1973-1974 for elementary school districts is raised from $355 per pupil (per "average daily attendance") to $765; in high school districts, the level is increased from $488 to $950 per pupil in ADA. The foundation level is a guaranteed minimum; if a school district levies school taxes at or above a specified rate, the state will contribute whatever may be needed to bring school funds up to the foundation level. It is worth noting that this system does *not* provide equality of school spending capacity; above the guaranteed minimum level of expenditure a poor district may be raising revenues that are less than half the revenues which a wealthy district could raise by taxing at the same rate as the poor district.

[14] *Id.* § 17301(e).

[15] *Id.* §§ 20902-20909.1.

equalized school spending capacity. Certainly it has not done so. It remains to be determined, however, whether the new finance system is sufficiently equalizing to pass the constitutional test announced in *Serrano*. A considerable part of the trial was devoted to that issue. In fact, the trial scarcely resembled an ordinary trial. The issues of fact were issues of "legislative fact"—the facts relevant to deciding the constitutionality of the legislative scheme. Some of the testimony was predictive, exploring the probable future levels of local taxation and spending under the new law, and particularly the pace and ultimate timing of the "convergence" envisioned by the law.

The space limitations for this article make it inappropriate to analyze the details of the "convergence" debate here. Suffice it to say that the estimates of witnesses[16] varied between nineteen years and nearly thirty years for the length of time before ultimate convergence of the state's foundation-level contributions and the limits on revenue produced by local tax rates in the wealthiest districts (always assuming no voted overrides). One question which the trial court was called upon to answer, then, is whether such a period is too lengthy, or whether the rights in question are to be treated as "personal and present."[17] Plaintiffs in *Serrano* called the trial court's attention to the depressing analogy of "all deliberate speed" in school desegregation,[18] and defendants countered by arguing that (1) the state's good faith is illustrated by the speed with which the new legislation was passed, and (2) equalization of school finance capacity cannot be accomplished immediately without creating "chaos in the schools," in contrast with school desegregation, which "theoretically" could be readily accomplished.[19]

The trial court was able to avoid deciding the issue of the timing of "convergence" by recognizing the obvious fact that the things which are to converge under the new law are *not* the capacities for school spending in rich and in poor districts; what will converge are: (1) the state's foundation-level contribution and (2) the amount that a district will be permitted to raise by property taxation for schools *in the absence of a voted override*. Since the wealth disparities among school districts are not affected by the new law, wealthy districts will still be able to vote to raise school revenues beyond the foundation levels more easily than can poor districts.[20] If the state's foundation levels were set very high, of course, it would be arguable that school spending above those levels was inconsequential—or, in doctrinal terms, that such additional amounts were being spent on something other than those aspects of education that were "fundamental" in the constitutional sense.[21] But the fact is that even the newly increased foundation levels are

[16] This evidence is summarized and analyzed in Plaintiffs' Brief at 38-52; Defendants' Brief at 138-45; and Plaintiffs' Reply Brief at 68-73.

[17] The phrase comes from Sweatt v. Painter, 339 U.S. 629, 635 (1950).

[18] Brown v. Board of Educ., 349 U.S. 294, 301 (1955). *See* Plaintiffs' Brief at 51.

[19] Defendants' Brief at 145. This assessment of the simplicity of school desegregation bears little resemblance to the experiences of southern school boards in the two decades following *Brown*. When desegregation litigation comes to some of the California school districts which are defendants in *Serrano*, we can hope that they will remember what they have said here.

[20] Super. Ct. Opinion at 71-74.

[21] In its *Serrano* opinion, the California Supreme Court left open the question of the boundaries of the fundamental interest in education. See the discussion in Karst, *supra* note 1, at 724-25,

below the present level of per pupil expenditure in the median school district in California.[22] In other words, more than half the districts in the state will have to continue to use local school taxes in order to keep total per pupil expenditures at current levels. The districts' capacities to raise these local revenues continue to be determined by district wealth, with the same discriminatory effects that the California Supreme Court held unconstitutional in *Serrano*.

III

LITIGATING THE COST-QUALITY ISSUE

A. Lawyers' Perspectives

Since the question before the California Supreme Court in *Serrano* was the sufficiency of the complaint to state a cause of action, the court assumed the correctness of the plaintiffs' allegation that substantial disparities in school spending capacity meant inequality of educational opportunity. The *Serrano* trial thus promised to be a milestone—a full-scale judicial exploration of the cost-quality issue. The trial produced a 6000-page record and trial briefs hundreds of pages long.

The *Serrano* plaintiffs made a deliberate choice not to present social science testimony on the cost-quality issue in their case in chief, but held their evidence of this type for rebuttal of defendants' evidence. This tactical choice must have been designed at least in part to emphasize three arguments aimed at shaping the way the cost-quality issue should be addressed: (1) the legislature itself had determined the issue in their favor;[23] (2) the defendants had admitted the correctness of plaintiffs' proposition as to the relation of cost to quality;[24] and (3) in any case defendants should have the burden of proving that significant spending-capacity differentials did *not* imply differentials in educational quality.[25] These arguments, which are potentially dispositive of the cost-quality issue, are obviously variants of familiar forms of lawyers' argumentation. Precisely for that reason, they may be attractive to judges who may want to avoid setting sail on the treacherous waters of social science. Judge Jefferson did not allude to these arguments at the outset of his long discussion of the cost-quality issue, but instead plunged directly into the social science testimony. Perhaps the judge was of the view that his chief task, as outlined by the state supreme court, was to make findings of fact on the cost-quality issue, and not to make further law on the subject. Nonetheless, since similar "lawyers' arguments" may be made in school finance litigation in other states,

733-36. *See also* text at pp. 338-39 *infra*.

[22] Some 69 per cent of the school districts, serving 85 per cent of the public school children in California, are currently spending at levels above the 1973-1974 foundation levels. See the summary in Plaintiffs' Reply Brief at 61-62. Although the new legislation provides for annual increases in the foundation levels at around 7 per cent per year, much of that increase will be eaten away by inflation, even if inflation can be contained at pre-1973 rates.

[23] Plaintiffs' Brief at 64-70; Plaintiffs' Reply Brief at 91-93.

[24] Plaintiffs' Brief at 71-76; Plaintiffs' Reply Brief at 98-99.

[25] Plaintiffs' Brief at 76-77.

they deserve our attention before we, too, embark on those seas.

(1) California's legislature has repeatedly asserted, both directly and by clear implication, that the amounts of money spent on education bear importantly on educational quality. Both in its general declaration of principles of the school finance system[26] and in its specific structuring of the details of that system,[27] the legislature leaves no room for doubting its acceptance of the general proposition that the quality of education may depend on the amount of money spent on it. What the *Serrano* defendants argued was that these legislative declarations are valid only up to the levels of spending provided by the state's foundation program. Those levels, the defendants argued, define the cost of an "adequate" education, and variations in spending above those levels do not represent significant variations in educational quality.[28] The *Serrano* plaintiffs replied that their complaint alleged inequality of educational opportunity, not total denial of an adequate education, and they pointed out that the California Supreme Court had held that such an allegation states a cause of action.[29]

There would be more than a little unreality in an assertion by the plaintiffs that the legislature had concluded that its own scheme of school finance, so recently adopted, was invalid. But plaintiffs made a more limited argument: that the legislature has recognized the relation between cost and quality, not only up to the state's foundation levels of support, but also above those levels. Since the California school finance system is designed specifically to permit spending above those levels, both by the state and by local districts,[30] presumably the legislature assumes that something will be achieved by this additional spending. Indeed, it is hard to see any purpose to be achieved by this spending other than increased educational quality.

At some high level of state support, of course, the argument of the *Serrano* defendants must become valid. If the state should decide to support all school districts at the level at which the wealthiest district is now spending, and to provide for regular future increases in state support commensurate with past increases in wealthy district spending, then surely variations in spending above the state support level would not be unconstitutional under the California Supreme Court's *Serrano* opinion. The reason, however, would not be that such spending variations did not produce inequality of educational opportunity; it would be, instead, that the remaining inequalities either were de minimis or related to aspects of education that lie outside the "fundamental" interest in education.[31] Perhaps the defendants should be understood to make the latter argument in the

[26] CAL. EDUC. CODE § 17300 (West 1969).

[27] Examples of such structuring include the foundation program itself, which is protected against inflation, the limitations of class size, and various programs of special and compensatory education. *See* Plaintiffs' Brief at 66-69.

[28] Defendants' Brief at 172-75.

[29] Plaintiffs' Brief at 93-94.

[30] California school districts are authorized to vote overrides to provide support for schools above the foundation levels. CAL. EDUC. CODE § 20906 (West Supp. 1974).

[31] *See* text at p. 344 *infra*.

context of the present foundation levels. If so, they were betrayed by the testimony of their own witnesses, those representatives of wealthy districts who asserted with great vigor that they could not cut back their spending to present foundation levels without suffering educational disaster.[32]

(2) Since many of these witnesses are either defendants or representatives of defendants in the *Serrano* litigation itself, their enthusiastic affirmance of the relationship between cost and quality—the very proposition plaintiffs sought to establish—may seem curious. In fact, however, this irony is built into school finance litigation wherever it may arise. The "haves"—those who are favored by the state's system for collecting taxes and distributing public funds—must argue that they will suffer harm if they are deprived of their preferred status, and at the same time argue that those who are not so favored have suffered no relative disadvantage. The *Serrano* plaintiffs quite naturally have spotlighted this built-in inconsistency, and the defendants have been embarrassed by it.

(3) The plaintiffs' burden-of-proof argument may seem on first glance to be a bit of lawyers' maneuvering. Defendants merely dismissed this argument as a curiosity, having misunderstood it as no more than a repetition of argument (1) above.[33] What plaintiffs argued in addition was that the legislature's declarations as to the relation of cost to quality should at least be taken as establishing a prima facie case for the validity of plaintiffs' assertions of that relation.

The same conclusion—that defendants have the burden of proving that substantial cost inequalities do not produce inequalities of educational quality—can rest on another basis, which relies not on legislative determinations but on the common understanding of participants in a market economy.[34] Insofar as the defendants' "local control" argument has relevance to levels of school spending, it is control over the allocation of money that matters. Even a state which financed schools entirely out of state funds might reasonably choose to make allocations to its school districts in money rather than goods and services in kind. The natural assumption in such a system, by both state officials and district officials, would be that since it is the availability of money that provides choice in a market system, increases in the money so dispensed would provide more choice (more "local control") to school districts—and thus more opportunity to provide high-quality ed-

[32] Defendants persuasively argued that there is a great difference between the serious and perhaps irremediable effects of cutting back a going program in a wealthy district (which involves disruption of existing educational operations and the breaking of commitments to teachers, suppliers, and so forth) and adding to a poor district's program (which offers only a chance to achieve certain educational effects). Since all the *Serrano* plaintiffs seek is an equalization of the *capacity* to spend for the purpose of trying to achieve educational effects, it is hard to see how this argument of defendants does more than reinforce plaintiffs' position. Wealthy school districts (defendants here) argue: don't take away the educational benefits we have achieved with money merely on the speculation that poorer districts will also be able to achieve the same kinds of educational benefits with money. It is always painful for the "haves" to be required to share with the "have-nots." While that is a political argument that has prevailed throughout the pre-*Serrano* era, it is scarcely an argument addressed to the cost-quality issue.

[33] Defendants' Brief at 173-74.

[34] *See* Karst, *supra*, note 1, at 749-52.

ucation. The idea that money equals capacity in a market is not an exceptionally subtle idea; it is grasped readily by budget-makers and wage-earners the world over. True, some budget-makers spend their allocated funds unwisely, just as some wage-earners consume too much poker and gin. But the *Serrano* plaintiffs have sought only to equalize the *capacities* of school districts to offer high educational quality.[35] If "local control" means giving a district a real choice of tools for achieving such an offering—as distinguished from a mask for privilege—then it is this capacity which is the critical factor. It is not strange, then, that courts have regularly assumed that inequality as to allocations of resources to schools implies inequality of educational opportunity, and requires justification.[36] This shifting of the burden of proof is not a lawyer's trick, but a sensible recognition of the role of money in the market of educational goods and services.

B. The Limitations of Social Science

The *Serrano* trial produced volumes of expert social science testimony about the cost-quality issue. The result should be heartening to those who have feared the imminent take-over of society by practitioners of the behavioral sciences. The *Serrano* trial illustrates one great strength and one weakness of those social science professionals who dwell in the world of models and statistical analysis. The strength lies in the sophistication of techniques for analyzing "the data." The weakness lies in the very process of model-building. In order to be reduced to statistical analysis, facts must be refined and abstracted, with the danger that our perceptions of reality will be seriously distorted by this inevitable selection process. The word "data" is Latin for "given"; we must always remember that "the data" represent someone's assumption of what is given, someone's choice of what should be measured.

When plaintiffs say that inequality of "inputs"—the things money can buy—means inequality of educational opportunity, it is fair for defendants to accuse them of being "simplistic."[37] And when defendants say that inequality of educational opportunity is to be measured by "outputs"— achievement scores on standardized tests in a few subject areas—it is fair for plaintiffs to criticize this measure as "limited" and "inadequate."[38] Both accu-

[35] Defendants' characterization of plaintiffs' argument as one calling for uniform spending, Defendants' Brief at 177, is simply mistaken. Plaintiffs content that *wealth-based* inequality of school-spending capacity is unconstitutional, since it is not needed to serve a compelling state interest. Other kinds of differential spending would raise different issues. If all districts had the same fiscal capacity, and some chose to tax less and spend less on schools, then the courts might have to face the question whether the *children* in those lower-spending districts were being denied a constitutional right to equal spending. That is not this case. Furthermore, differential spending may be justified—may serve a compelling state interest—if it is aimed at compensatory education or other special educational needs. That also is not this case.

[36] *See, e.g.*, Hobson v. Hansen, 327 F. Supp. 844 (D.D.C. 1971) (Wright, J., sitting as District Court Judge).

[37] Defendants' Brief at 177. The accusation is not so fair if we perceive the cost-quality issue to be a question of law rather than a question of legislative fact. Plaintiffs' argument that the legislature has determined the cost-quality issue is a legal argument, not a factual assertion.

[38] Plaintiffs' Brief at 115, 117.

sations are fair, for any statement about so vast and complex a phenomenon as education must necessarily be oversimplified. Any analysis requires abstraction and selection. Because we have nothing like an adequate model of the educational process, either we cannot now measure educational opportunity at all, or we must measure it with crude instruments. Since abdication was ruled out by the California Supreme Court's opinion in *Serrano*, the trial court had to decide whether "inputs" or "outputs" was the more appropriate measure.

Plaintiffs' effort to summarize their position by saying that "outputs are an inappropriate measure of educational opportunity"[39] is too broadly phrased. If we really could accurately measure the output of a school, it would be silly to look anywhere else to determine the quality of the education offered by that school. In the sense in which I am now using the term, "output" and education are the same thing. What plaintiffs argued was a far narrower proposition: that achievement on standardized tests is an inaccurate measure of educational output, both because these tests measure performance in only a small portion of a student's education and because the tests are inadequate to measure students' educational attainments in the areas which they do cover.[40]

In reply, defendants made an argument that is a once-removed cousin of the plaintiffs' burden-of-proof argument:[41] (1) The "fundamental" interest which triggers strict judicial scrutiny, defendants say, is the interest in education. (2) Therefore, if plaintiffs cannot demonstrate that unequal spending produces unequal education, they are not entitled to a strict scrutiny standard of review, for they are arguing only about money and not about education. (3) "Education" means educational output. (4) The only output measure we have consists of achievement scores on standardized tests, and these scores show only an insignificant positive correlation with school spending.[42] (5) If these tests are inadequate to measure educational output (and defendants conceded that they were), then there is no way to prove that unequal spending produces inequality of educational opportunity, and plaintiffs must wait until social science comes up with better ways to measure output before asking for strict judicial scrutiny of unequal spending. In the meantime, all the state need show is a rational basis for the current school spending pattern.

Perhaps the most significant part of this line of argument is the *Serrano* defendants' admission that achievement tests

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[39] Plaintiffs' Reply Brief at 106.

[40] Plaintiffs' Brief at 109-36. That truncated statement in the text is wholly inadequate to convey the richness of this long and careful portion of the plaintiffs' brief, which is a model of lawyers' analysis of social science. *See also* McDermott & Klein, *Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference?*, 38 LAW & CONTEMP. PROB. 415 (1974).

[41] Defendants' Brief at 172-204.

[42] There was a lot of testimony on this question. Plaintiffs dispute the defendants' conclusion that achievement scores do not support plaintiffs' position on the cost-quality issue. In particular, plaintiffs offered testimony concerning two longitudinal studies of the cost-quality relationship, made in certain California public schools. These studies dispute the now-conventional social science wisdom, as represented by J. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966). *See* Plaintiffs' Brief at 137-49.

> do not measure all the goals of education nor do they measure all the benefits or detriments a child may receive from his educational experiences. Also, defendants agree that the state of the art of measuring educational effectiveness is in its infancy and provides at this time and on this record, an inadequate basis for judicial determination of the effect of varying expenditure levels and assessed valuations on the quality of education as measured by the only common statewide method available—pupil achievement scores.[43]

Defendants thus relied primarily on their own version of a burden-of-proof argument: since achievement testing is the best anyone can presently do in measuring educational quality, and since plaintiffs have not demonstrated that unequal spending produces unequal test scores, plaintiffs' case fails.

The irony of this state of the case is worthy of the great ironic traditions of constitutional law. The *Serrano* trial had been nationally billed as a judicial proving ground for social science arguments about the cost-quality issue. Yet the parties on both sides ultimately urged the court to discount the social science evidence, and to fall back on such familiar lawyers' devices as admissions and the burden of proof. Such an approach to decision, far from being surprising, is invited by modern equal protection doctrine, where the law's predispositions are enshrined in competing standards of review: "rational basis" and "strict scrutiny."

The trial court's discussion of the cost-quality issue occupied a major portion of the opinion.[44] After reviewing much of the social science testimony, the court agreed with the parties' assessment of the state of the art:

> This court is convinced, from the evidence introduced in this case, that the statistical correlational research methods employed in social science or educational research have not reached that degree of reliability that it can be said with any degree of certainty as to the precise part which the various factors of home, school or genetics play separately upon pupil achievement in the standardized reading, mathematics, language, or other achievement-measurement tests.[45]

Despite this lack of confidence, the court was

> convinced from the evidence that a school district's per-pupil expenditure level does play a significant role in determining whether pupils are receiving a low-quality or a high-quality educational program as measured by pupil test-score results on the standardized achievement tests.[46]

This conclusion was taken partly from a statement by the Office of Program Evaluation of the California State Department of Education that high achievement-test scores were associated with high expenditures per pupil, and partly from the testimony of school district officials (including representatives of the defendant high-wealth districts) as to the importance of school spending in providing high quality education.[47]

Even more significant was the court's refusal "to accept a definition of the quality of an educational program that is made to depend solely upon

[43] Defendants' Brief at 184.
[44] Super. Ct. Opinion at 74-101.
[45] *Id.* at 89.
[46] *Id.*
[47] *Id.* at 89-90.

pupil performance on these standardized achievement tests . . . ."[48] School district offerings—the inputs that money can buy—were found to be a more appropriate measure of educational quality. In particular, the court emphasized those inputs which affect

> (1) varying class size; (2) teacher quality; (3) curricular offerings; (4) length of school day; (5) adequacy of materials and equipment; and (6) variations in supportive services such as the number of counselors, the training of counselors, the number of teacher aides and the type of maintenance of buildings and equipment.[49]

In reaching this conclusion, too, the court relied heavily on the testimony of public education officials, including the superintendents of both low-wealth and high-wealth districts.

Both of the trial court's major findings as to the cost-quality issue thus rested not so much on the testimony of social scientists as on the testimony of school district superintendents—and especially those who represented the defendant high-wealth districts. Without speaking directly to the plaintiffs' argument that defendants had admitted that educational quality depended on school spending, the court accepted that argument in substance. Since school district offerings would continue to be a function of district wealth even under the new legislation, the court was able to find that "plaintiffs have established the truth of the allegations of their complaint. . . ."[50]

Even assuming that plaintiffs have carried their burden of proof on the cost-quality issue, a major question remains. Defendants contended that the inequalities, if any, caused by differential school spending did not affect the fundamental interest in education. To hold for the plaintiffs, it was necessary for the trial court to respond to this contention. We thus turn to the question: what aspects of educational spending can be called fundamental?

IV

THE FUNDAMENTAL INTEREST IN EDUCATION

One of the bases for the California Supreme Court's *Serrano* opinion was its conclusion that education is a fundamental interest. What the court left unresolved was the content of the fundamental interest in education. The *Serrano* defendants argued that once the state is providing an "adequate" level of financial support for schools, any additional inequalities in local school spending capacity relate to something other than the fundamental interest in education. They further argued that the newly increased state support levels under the foundation program are sufficient to provide an "adequate" education.[51]

The defendants' approach to defining what is fundamental about education, it will be seen, does not involve the court in sorting through the

[48] *Id.* at 94.
[49] *Id.* at 95.
[50] *Id.* at 101.
[51] Defendants' Brief at 172-76, 182-83. As the trial court noted, Super. Ct. Opinion at 57, defendants' argument is supported as to the *federal* equal protection clause by San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

myriad features of the educational process in order to pick out the fundamental ones. That is a task that would horrify any judge—well, almost any judge. Even selecting a level of school financing that is "adequate" is a troublesome task for a court. A judge's natural inclination would be to defer to the legislature's determination as to the adequacy of support—and this despite the admitted fact that in 1972 the California legislature made no such determination at all. It first set a total amount of money that was "available" for the state's contribution to education, and then worked backward from that gross figure to the foundation levels ultimately adopted.[52]

The *Serrano* plaintiffs agreed that the court should not try to pick out fragmentary inputs into the educational process and label them "fundamental," but should instead concern itself with dollars as the key input. However, they argued, the constitutional issue does not turn on the "adequacy" of state support for education, in some absolute sense, but on "whether the foundation program is so high that districts will not choose to exceed it, so that wealth-related expenditure differences will not occur."[53] The only truly adequate foundation program, in this view, would be one in which the state supported what the plaintiffs called "quality" educational programs. By this they meant the sort of education that is now being provided in the high-spending districts, and their best support in the record came from the testimony of defendants' own witnesses from wealthy districts testifying as to the minimum levels they would find adequate.[54]

The issue as defined by the California Supreme Court's opinion in *Serrano* is, of course, neither "adequacy" nor "quality"; it is inequality. The trial court readily agreed with this characterization of the issue.[55] Plaintiffs' "quality" argument was in fact a restatement of the inequality point quoted above, with perhaps a recognition that beyond some high level of equalized spending capacity, wealth-related inequalities in spending can be treated as de minimis. To put this issue once again in doctrinal terms, the question is whether those inequalities in spending capacity which persist between the minimum presently assured by the state and the levels at which "quality" education is being financed in the wealthier districts are inequalities as to a "fundamental" aspect of education. The answer to this question, it seems to me, has to be affirmative. To say otherwise would be to say that the wealthy districts, which spend nearly twice as much per pupil as the amounts of the new foundation levels, are spending nearly half their budgets on goods and services that are educationally insignificant.

A respectable argument has been made to the effect that the judiciary should approach the problem of wealth discrimination not so much with the idea of ending relative deprivations as with the idea of assuring the satisfaction of everyone's essential needs.[56] But the author of this "minimum

[52] *See* Plaintiffs' Brief at 66-67.

[53] *Id.* at 61.

[54] The cost range suggested by these witnesses for "adequate" educational quality was in the area of $1400-1600 per pupil per year. *See id.* at 32-34. The new foundation levels are in the area of $765 per pupil for elementary districts and $950 per pupil for high school districts.

[55] Super. Ct. Opinion at 58-60.

[56] Michelman, *supra* note 1.

protection" theory has noted that in education, "the minimum is significantly a function of the maximum."[57] In other words, as the California Supreme Court said in *Serrano,* education is fundamental largely because of its importance for achievement in a competitive society. For this reason, in education it is precisely relative deprivation that matters, and not merely a minimal "adequacy." The voters and school officials in both wealthy and poor school districts understand this point very well, the trial court accepted it, and it will not be surprising if the California appellate courts continue to accept it.

Certainly it is true that our notions of what is "fundamental" in education will change as times change. A growth in the general level of affluence will be reflected in an expanded definition of what is a part of "quality" education. Correspondingly, any constitutional obligation on the part of the state to support education must surely be limited by what the state can afford. The *Serrano* defendants so argued, and the argument is undeniably sound. But the defendants seem to be assuming that the constitutional right asserted by the plaintiffs is a right to some (rather high) minimum level of state support for the schools. The plaintiffs' argument was, however, very different; it was an argument based on *inequalities* of school spending capacity. The California constitution need not be interpreted to require any particular level of state spending on schools.[58] But if the legislature chooses to organize its taxing and spending system to produce substantial wealth-based inequalities of school spending capacity, then those inequalities will be constitutional only to the extent that they can be confined to spending beyond the aspects of education that are fundamental. It seems inconceivable that the California Supreme Court would abandon this carefully articulated position.

V

THE PROBLEM OF REMEDY

In their complaint, the *Serrano* plaintiffs had asked not merely for a declaratory judgment that the California school finance system is unconstitutional, but also for an order that the defendants (including state school officials) reallocate school funds in order to bring the system within constitutional bounds. Furthermore, if the defendants and the legislature did not so restructure the system, the plaintiffs asked the court to formulate its own plan for collecting and allocating school funds. The plaintiffs no doubt wanted to suggest that the judiciary had a number of instruments at hand, of varying degrees of delicacy, to be applied as might prove necessary. The more draconian forms of possible relief will almost certainly never be

[57] *Id.* at 58.

[58] Super. Ct. Opinion at 60. We might expect the courts to adopt a position such as this in the unlikely event that the state should drastically reduce its support for public education (including those forms of state support that are channeled through local governments' power to tax and spend). If the state were to go out of the education business altogether, for example, the resulting de facto wealth discrimination in education might well be unconstitutional. *See* Karst, *supra* note 1, at 733-36; Michelman, *supra* note 1, at 47-59. No such heroic issue faces the courts in *Serrano.*

appropriate, but plaintiffs cannot be faulted for keeping them in reserve.

Compared with their complaint, plaintiffs' prayer for relief at the conclusion of the *Serrano* trial was modest.[59] They asked primarily for a declaratory judgment that the school finance system continues to violate the California constitution. More specifically, they sought a declaration that one unconstitutional feature of the system is its continued authorization of voted overrides by wealthier districts.[60] Secondly, they asked for an injunction forbidding such voted overrides in defendant districts.[61] Such a declaration or injunction would limit school spending inequalities to the gradually diminishing differences between the state foundation levels and district revenue limits during the period of "convergence." Plaintiffs, however, added this conciliatory remark:

> Plaintiffs do not wish to overemphasize the prayer for injunctive relief, however. Defendants are governmental entities and public officials, and there is no reason to conclude that they will not conform their conduct to the terms of a declaratory judgment issued by this Court.[62]

Even the requested limited injunctive relief, it seems, was to be kept as a reserve weapon to be used only if the legislature does not properly respond to a declaratory judgment of unconstitutionality. What the plaintiffs chiefly wanted at this stage was a declaration that wealthy district voted overrides are unconstitutional.

Plaintiffs got their wish, and more. The trial court declared the following provisions of the California school finance system unconstitutional:

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[59] Plaintiffs' Brief at 170-75.

[60] Plaintiffs' suggested two alternative formulas, both using existing statutory language, for identifying these wealthier districts. One related to the entitlement to an inflation adjustment allowed for revenue limits, and the other related to a district's qualification for "equalization aid"—the aid that guarantees funds at the foundation levels. Either formula would be arbitrary, denying substantial sums of money to a district just above the chosen line. However, the injunctive remedy would surely be of short duration, given the near-certainty of a quick response by the legislature. The legislature might even be given a set period of time between a declaration that wealthy district voted overrides are unconstitutional and the effective date of an order enjoining such overrides.

[61] Plaintiffs also suggested another possible limited form of injunctive relief, restraining the payment by the state of "basic aid"—$125 per pupil paid annually to all districts, but applied against the foundation levels. "Basic aid" is essentially a subsidy to the wealthier districts. *See* Plaintiffs' Brief at 173-74; Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 315 (1969). The trial court, responding to this argument of the plaintiffs, held that "basic aid" to high-wealth districts was unconstitutional. Super. Ct. Opinion at 102. However, no injunctive relief was ordered at this time.

In an amicus brief for the Childhood and Government Project of the Earl Warren Legal Institute at the University of California at Berkeley, the National Congress of Parents and Teachers, and the California Congress of Parents and Teachers, Inc., John E. Coons, Robert H. Mnookin, and Stephen D. Sugarman suggest that the court might also specify that two sections of the Education Code are invalid, in the event that the legislature should fail to adopt a constitutional finance system within a reasonable time. The sections (20905 and 20906) allow some districts to have "revenue limits" above the foundation levels, and to vote overrides above their revenue limits. The result of this relief would be to cut school spending in California back to the foundation levels, permitting the legislature to authorize school spending above these levels only if wealth-based inequalities of spending capacity were eliminated. As the text at note 63 *infra* indicates, the trial court did hold that voted overrides are unconstitutional. Super. Ct. Opinion at 102.

[62] Plaintiffs' Reply Brief at 117.

> (1) the basic aid payments of $125 per pupil to the high-wealth school district; (2) the right of voters of each school district to vote tax overrides and raise unlimited revenues at their discretion; (3) disparities between school districts in per-pupil expenditures, apart from the categorical aids special-needs programs, that do not reduce to insignificant differences, which means amounts considerably less than $100 per pupil, within a maximum period of six years; and (4) variations in tax rates between school districts that are *not* reduced to nonsubstantial variations within [six years].[63]

In choosing the six-year period, the court noted that equalization of per pupil expenditures ought to be "achieved at a pace faster than that of all due deliberate speed."[64]

Part (3) of the court's declaration seems on its face to bar the legislature from using any system of school finance that results in differential school spending from district to district, even differences that are *not* based on district wealth. Taken literally, this portion of the opinion would hold "district power equalizing"[65] unconstitutional. Elsewhere, however, the court suggests this very scheme as one possible legislative response that would be upheld.[66] The *Serrano* opinion of the California Supreme Court made clear that it is *wealth-based* inequality that is at the heart of the school finance system's constitutional defect; perhaps there will be a modification of the trial court's opinion to clarify this point.

The court issued no injunctive order, but retained jurisdiction to permit the parties to apply for "appropriate relief" in the event that the legislature or other governmental bodies do not create a constitutional school finance system "within a reasonable time."[67] The court did not specify what length of time might be reasonable. In the *Rodriguez* case the lower court had declared the Texas school finance system unconstitutional, and had stayed its mandate for two years to permit the legislature to enact a valid system. It has been argued that the lower court's order in the *Rodriguez* case created a risk that the Texas legislature might not respond favorably within the period set by the court, thus setting the stage for a confrontation between court and legislature.[68] In *Rodriguez*, the order provided that, in such event, the state school officials should reallocate school funds in conformity with constitutional demands. The reserve weapon thus laid on the table was indeed a bludgeon, and perhaps an ineffective one at

[63] Super. Ct. Opinion at 102-03.

[64] *Id.* at 103.

[65] This proposal would permit a school district to spend at any desired level, by adopting a school tax rate pegged to the spending level selected. The higher the tax rate, in other words, the higher would be the permitted school spending. However, spending would not be tied to the amount of revenues collected, but to an amount determined by the tax rate selected. The state would "recapture" the revenues raised in excess of those necessary for the predetermined spending level and distribute them (along with state funds, if necessary) to poorer districts whose tax rates did not raise sufficient revenue to meet the predetermined spending levels corresponding to the rates selected by those districts. *See* J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 201-42 (1970).

[66] Super. Ct. Opinion at 102.

[67] *Id.* at 106.

[68] Carrington, *supra* note 1, at 1253.

that, given the limited authority of state officials over school funds raised locally.[69]

In the context of *Serrano*, however, it might be argued that the California legislature already has shown itself to be responsive; the 1972 Act was adopted in a bipartisan atmosphere,[70] before any judicial order had been entered against any defendant. The trouble with such an argument is that much of the political momentum of 1972 was spent in the 1972 Act itself. Despite the *Serrano* plaintiffs' expression of optimism, there is no reason to assume that the California legislature will do anything whatever in response to a declaratory judgment, even one that has been affirmed by the state supreme court. Is the California prospect then one of stalemate?

The main justification for a more optimistic prediction lies in the 1972 legislation itself, which gave the California courts a convenient handle on the school finance system. Under the new law, the state's foundation program contributions to poor districts will be regularly increasing, and the levels of permissible wealthy district school taxation will be steadily decreasing. The law thus contemplates the ultimate "convergence" of school spending by wealthy and poor districts—assuming no voted overrides in wealthy districts. The courts can, by the simple expedient of enjoining voted overrides, assure the eventual (although delayed) equalization of school spending.

By specifying the unconstitutionality of such features of the California system as basic aid and voted overrides, the *Serrano* trial court has narrowed the focus of its decision. If the court should find it necessary to grant injunctive relief against the payment of basic aid and the voting of tax overrides by high-wealth districts, such an order will be more limited (and more "judicial"-seeming) than was the order of the lower court in *Rodriguez*. Such injunctive relief would not involve the court in the constitutionally dubious process of drawing up its own system of taxation and school spending. Nor would such an order require anything of the defendant state officials that was beyond their control. It would, however, virtually assure a prompt response by the legislature, since the representatives of wealthier districts would have a pressing reason to join with those of poorer districts in fashioning a school finance system to meet constitutional requirements.

Short of moving to a system of exclusively state-level financing of public education, the legislature can eliminate wealth-based inequality in the system in one of two ways. (1) State foundation levels can be radically increased, to the point that any additional school spending could properly be called de minimis or said to be unrelated to the "fundamental" interest in education. It bears emphasis that the new foundation levels, to pass this constitutional test, would have to be roughly equal to present spending by the wealthiest districts, with provision for their increase at rates commensurate with past rates of increase in such districts. (2) The legislature can maintain the same foundation levels, but move to a wealth-free system of local taxation and spending above those levels. "District power equalizing" is only one possible formula for such

[69] *Id.*

[70] The bill came to be known as the "Reagan-Moretti Bill," after the state's Republican Governor and the Democratic Speaker of the Assembly.

a legislative response, and not the most likely one at that.[71]

Neither the *Serrano* plaintiffs, the trial court, nor others (so far as I know) suggest that the state must move to a rigid system in which exactly the same amount is spent on each school child. There is room in the *Serrano* opinions of both the California Supreme Court and the trial court for all sorts of differential spending justified by programs of compensatory education, experimental programs, increased appropriation to districts with a problem of "municipal overburden"—indeed, *any* inequalities that serve compelling state interests, including "local control."[72] What is constitutionally forbidden in California—*Rodriguez* notwithstanding—is the substantial wealth-based inequality in school spending capacity that persists even under the 1972 Act.

[71] Another response, one variant of which has been articulated by the authors of district power equalizing, would be a voucher system. *See, e.g.*, Coons & Sugarman, *Family Choice in Education: A Model State System for Vouchers*, 59 CALIF. L. REV. 321 (1971). The chief practical objection to the adoption of district power equalizing is the difficulty of predicting the state's annual obligation to support education. Despite this difficulty, Edmund G. Brown, Jr., the Democratic candidate for Governor in the November 1974 election, has spoken approvingly of district power equalizing as a means of complying with Judge Jefferson's *Serrano* decision. Brown's Republican opponent, Houston I. Flournoy, proposes compliance with the decision by combining a statewide property tax with other financing from the state's general fund. It is noteworthy that both candidates anticipate not defiance of the courts, but a good-faith effort at legislative compliance with the decision. *See* Los Angeles Times, June 2, 1974, § IX, at 3, col. 1.

[72] Thus it would be permissible, within the constitutional limits set by *Serrano*, for the state to permit local districts to choose to tax at lower rates, thereby supporting their schools at lower levels, provided that the districts had equal capacity to make such choices. Despite the *Serrano* trial court's language in part (3) of its declaration of unconstitutionality, see notes 65-66 *supra*, it seems unlikely that the court wished to invalidate inequalities in school spending that were not the result of wealth-based inequalities in spending *capacity*.