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School Funding Litigation: Who's Winning the War?

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I. INTRODUCTION

Much is being made this year in education law circles and elsewhere about the fiftieth anniversary of *Brown v. Board of Education*.[1] The *Brown* decision has certainly left an indelible mark on schools and other institutions in the United States. But last year the thirtieth anniversary of another major Supreme Court opinion passed largely without comment, despite the fact that it may be the most significant decision regarding public schools since *Brown*. In 1973, the U.S. Supreme Court, in *San Antonio Independent School District v. Rodriguez*, concluded that education was not a fundamental right and that disparities in school funding among school districts do not violate the federal constitution.[2] The Court's decision in *Rodriguez* effectively closed the door on plaintiffs who wished to use the federal Constitution and the federal courts as a vehicle for achieving greater equity in school funding. Yet Justice Marshall, in his dissenting opinion in *Rodriguez*, noted that "nothing in the Court's decision today should inhibit further review of state educational funding schemes under state constitutional provisions."[3]

Battles over school funding have been waged on many fronts nationwide including efforts to influence public opinion[4] and attempts

1. 347 U.S. 483 (1954).
2. 411 U.S. 1 (1973).
3. *Id.* at 138 n.100 (Marshall, J., dissenting).
4. *See generally* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991) (presenting a shocking description of the harmful effects of poverty and inadequate education on poorer children that received extensive media attention).

to pass federal[5] and state[6] legislation. When these efforts fail to provide adequate remedies, funding equity advocates turn to litigation. Following Justice Marshall's cue, plaintiffs looked to state courts and state constitutions for school funding remedies.

The litigation that followed the Supreme Court of California's landmark school funding equity decision in *Serrano v. Priest*[7] has touched every state to some degree, with most states experiencing full scale legal challenges to their systems of funding public schools. To date, the highest courts in thirty-six states have issued opinions on the merits of funding litigation suits, with nineteen courts upholding state funding systems and seventeen declaring the systems unconstitutional.[8] Some states have experienced protracted serial

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5. *An Examination of the Federal Role in School Finance: Hearing Before the Subcomm. on Educ., AAS, and Humanities of the House Comm. of Labor and Human Res.*, 103rd Cong. 230-37 (1993) (statement of Kern Alexander, University Distinguished Professor, Virginia Tech); *see also* WALTER L. GARMS ET AL., SCHOOL FINANCE: THE ECONOMICS AND POLITICS OF PUBLIC EDUCATION 216 (1978):

> The courts were not the only arena for action. The Johnson Administration's War on Poverty produced many federal pressures for reform of the schools. It also produced the massive Elementary and Secondary Education Act of 1965 (ESEA). Title I of that act provides over $2 billion yearly for the education of the disadvantaged. The money is distributed to school districts based on the number of pupils from low-income households and is thus an important equalizing force. The civil rights movement produced advocates who fought for equal rights not only in the courts but also in the legislatures and in the bureaucracies of executive departments.

6. Funding equity advocates generally attempt to obtain legislative changes prior to litigation, because litigation is neither a certain nor fast way to achieve reform. Nonetheless, these political efforts often fail, because sufficient political will to make changes in the political status quo is lacking. *See* John Dayton, *When All Else Has Failed: Resolving the School Funding Problem,* 1995 BYU EDUC. & L.J. 1, 20 ("To achieve lasting reform, the electorate and lawmakers must be persuaded that school funding reform is in the best interests of all children and the general public").

7. 487 P.2d 1241 (Cal. 1971).

8. *See* John Dayton, Anne Dupre, & Christine Kiracofe, *Education Finance Litigation: A Review of Recent State High Court Decisions and Their Likely Impact on Future Litigation,* 186 EDUC. L. REP. 1, 1 (2004) (listing state high court opinions on the merits of school funding challenges since *Serrano*).

litigation that has extended for decades.[9] Litigation has been filed and is still pending in many more states.[10]

This Article examines how the landscape of school funding litigation has changed over the three decades since *Serrano* and *Rodriguez*. The first part of the Article sets forth the history of school funding litigation since *Serrano* and *Rodriguez* and unravels the legal theories that have driven the school financing cases, explaining past dispositions and pointing out likely future trends. At first blush it would appear that the attorneys seeking social change through greater equity in school funding are litigating similar issues in each state. Yet judges have approached these matters from different directions with results that vary significantly from state to state and from case to case. Plaintiffs have unveiled a number of legal theories based on a state constitution's equal protection clause or education clause. As the litigation has evolved over time, issues of equity in funding have given way to increased attention to funding adequacy and, more recently, accountability.

The second part of this Article examines the role of the courts in school funding litigation and analyzes the extent to which judges in these cases have become involved in matters that are traditionally left to the legislature and local control. School funding litigation raises some knotty issues when a court mandates specific remedies for funding inequities and expressly outlines what will constitute an adequate education under the relevant state's constitution. Some state courts have also been willing to "set the table" for funding plaintiffs, while other state courts have been more hesitant, deferring to the political process to resolve the funding inequities. This section will also explore the political issues that arise in school funding cases in which state judges, in contrast to federal judges, are subject to direct public opinion and majoritarian pressures — including popular elections, review by the electorate, and recall votes.

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9. *E.g.*, Abbott v. Burke, 575 A.2d 359 (*Abbott II*) (N.J. 1990); Abbott v. Burke, 495 A.2d 376 (*Abbott I*) (N.J. 1985); Robinson v. Cahill (*Robinson VII*), 360 A.2d 400 (N.J. 1976); Robinson v. Cahill (*Robinson VI*), 358 A.2d 457 (N.J. 1976); Robinson v. Cahill (*Robinson V*), 355 A.2d 129 (N.J. 1976); Robinson v. Cahill (*Robinson IV*), 351 A.2d 713 (N.J. 1975); Robinson v. Cahill (*Robinson III*), 335 A.2d 6 (N.J. 1975); Robinson v. Cahill (*Robinson II*), 306 A.2d 65 (N.J. 1973); Robinson v. Cahill (*Robinson I*), 303 A.2d 273 (N.J. 1973); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Carrollton-Farmers Branch v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489 (Tex. 1992); Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

10. *See* Advocacy Center for Children's Educational Success with Standards (ACCESS), Litigation: Recent Developments, (tracking current school funding litigation in all fifty states), *at* www.accessednetwork.org/litigation (last visited Jan. 6, 2005).

The last part of this Article scrutinizes the efficacy of school funding litigation and considers whether even the most so-called "activist" courts have actually helped plaintiffs achieve their desired reforms. With large revenue shortfalls in most states, even the plaintiffs who believed that they had won the school funding litigation battle are still not sure of the outcome of the war.

II. HOW IT ALL STARTED

A. The Basis for School Funding Disputes

Disagreements over school funding are as old as schools themselves, and disputes over how best to fund schools have deep roots.[11] Public schools were historically supported by local funding, which meant that wealthier communities could afford to fund good schools, while poorer communities could afford only poor schools or no schools. Concerns over these inequities in funding led to the adoption of some visionary and idealistic state constitutional mandates for state-level support of education for all children. But when states began to adopt language in state constitutions that made support of public education a state-level responsibility, a collision between the constitutional ideal and political reality was inevitable. Many states adopted language that required the legislature to support a high quality education for all children.[12] The more powerful the constitutional command to support a high quality education for all children, though, the greater the contrast between the constitutional ideal and the political reality. Egalitarian support for providing high quality education for all children is attractive, but it becomes

11. *See* LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE COLONIAL EXPERIENCE, 1607-1783 193-94 (1970) (describing alternative methods of local school funding in the Colonial Era, including funding by private businesses, private endowments, tuition, and local taxation). *See generally* John G. Augenblick et al., *Equity and Adequacy in School Funding*, *in* 7 FINANCING SCHOOLS 63 (1997) (describing the historical evolution of school funding in the U.S.).

12. CAL. CONST. art. IX, § 1 ("[T]he Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."); ILL. CONST. art X, § 1 ("A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities."). In addition to these more lofty statements, language requiring a "thorough and efficient" or "adequate" education are often found in state constitutions. *See, e.g.*, GA. CONST. art. VIII, § 1 ("The provision of an adequate education for the citizens shall be a primary obligation of the State of Georgia . . . the expense of which shall be provided for by taxation"); MINN. CONST. art. XIII, § 1 ("The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state."). *See generally* DAVID C. THOMPSON ET AL., FISCAL LEADERSHIP FOR SCHOOLS: CONCEPTS AND PRACTICES 282-86 (1994) (cataloguing the education articles found in the constitutions of all fifty states).

problematic when it requires higher taxes or the transfer of funds from wealthier districts to poorer districts. This clash between the altruistic and egalitarian language in state constitutions and the hard truth of local self-interest created a fertile ground for funding disputes.

State constitutions in all fifty states recognize a state-level responsibility for funding public schools.[13] Nevertheless, local taxpayers, especially in wealthier school districts, grew accustomed to exercising proprietary control over their locally generated public school funds. Although state constitutions assigned the responsibility for funding public schools to the state, most states' legislation delegated a large portion of this responsibility to local governments, who then used property and sales taxes to supplement any funding they received from the state. This delegation is at the root of the disparity, as local resources for school funding vary widely from district to district. Property-wealthy districts can raise large amounts of money, while property-poor districts may fail to generate adequate funding for their schools even when levying the maximum legal tax rate.[14] This disparity in taxable wealth can create a dual inequity in which relatively wealthy school districts enjoy both generous funding for their schools and lower tax rates, while poorer school districts lack adequate funding despite their relatively high property tax rates.

The use of local sales taxes to supplement local school funding only aggravates these inequities. The most active areas of commerce tend to be in the more property-wealthy suburban school districts. Not only does this leave many poorer rural and inner-city urban residents without adequate funding for their schools, but also because there are fewer places to shop for needed goods in their home districts, such residents are forced to supplement the funding of wealthier

13. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 112 n.69 (Marshall, J., dissenting) ("[E]very state had a constitutional provision directing the establishment of a system of public schools. But after *Brown v. Board of Education*, 347 U.S. 483 (1954), South Carolina repealed its constitutional provision, and Mississippi made its constitutional provision discretionary with the state legislature."). However, subsequent amendments to the South Carolina and Mississippi constitutions provided that: MISS. CONST. art. VIII, § 201 ("The Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe."); S.C. CONST. art. XI, § 3 ("The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children of the state.").

14. *See, e.g.*, GA. CONST. art. VIII, § 6 ("The board of education of each school system shall annually certify to its fiscal authority or authorities a school tax not greater than 20 mills per dollar for the support and maintenance of education."). Any exception to this constitutional limit can only be granted based on the approval of a majority of the school district's voters.

neighboring school districts through sales taxes because there are few places to shop for needed goods in their home districts.[15]

Advocates for children in property-poor districts began questioning state systems of funding that based school funding on local property wealth. Under these funding systems, wealthy areas had as much as 700 times the wealth of poorer areas, and the children in wealthier areas received nearly 10 times the amount of money available to children in the state's poorer school districts.[16] These advocates viewed limited access to educational funding as the equivalent of a denial of equal educational opportunity.

B. The Fight for Equity

From the Nation's first official statement in the Declaration of Independence proclaiming that "all men are created equal," to the adoption of the Fourteenth Amendment, and through the school finance war today, the struggle for equality has engendered long and difficult battles in American courtrooms.[17] Thomas Jefferson, who drafted that first official statement, recognized that an educated citizenry was necessary to effectuate the principles of the Declaration of Independence,[18] and the *Brown* Court elaborated on that theme when it declared:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has

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15. *See* Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 144 (Tenn. 1993):

> Purchases previously made by residents of rural school districts locally, are now made in the more urban counties, and the sales tax on those purchases is collected in the wealthier counties . . . [b]ecause all revenues from the property tax and the local option sales tax are received by the county or city where collected, the result is the progressive exacerbation of the inequity inherent in a funding scheme based on place of collection rather than need.

16. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 392 (Tex. 1989).

17. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("We hold these truths to be self-evident: that all men are created equal . . . ."); *see also* THOMPSON ET AL., supra note 12, at 275 (recognizing the deep historical roots of the struggle for equity in educational opportunity and reviewing funding equity litigation).

18. G.C. Lee, *Learning and Liberty: The Jeffersonian Tradition in Education, in* CRUSADE AGAINST IGNORANCE: THOMAS JEFFERSON ON EDUCATION 1, 1 (G.C. Lee ed., 1961) (Thomas Jefferson recognized education "as the *sine qua non* of a truly viable democracy").

> undertaken to provide it, is a right which must be made available to all on equal terms.[19]

There is little doubt that the modern revolution in school funding equity was sparked by *Brown*. "The language of the *Brown* case sounded broad enough to apply to unequal expenditures on children's education even when racial discrimination was not involved, [and] [t]he constitutional theory that evolved in the Supreme Court civil rights decisions that followed *Brown* also seemed to apply to the school finance situation."[20] As a result, civil rights advocates began to press for judicial mandates for school funding equity, focusing on the critical issue left unaddressed in *Brown*: inequities in public school funding.[21]

Although the Court's decision in *Brown* served as the ideological foundation for the modern school funding equity movement, school funding litigation in the United States can be traced back nearly two centuries. In 1819, in *Commonwealth v. Dedham*, the town of Dedham was charged with failing to provide an adequate education, and the Supreme Judicial Court of Massachusetts stated:

> The schools required by the statute are to be maintained for the benefit of the whole town, as it is the wise policy of the law to give all the inhabitants equal privileges, for the education of their children in the public schools. Nor is it in the power of the majority to deprive the minority of this privilege.[22]

The litigation in *Dedham* was based on a statute unique to Massachusetts, but after states adopted constitutional language creating a state-level right to education, disputes over school funding moved from local school board meetings to state and federal courts. Early litigation was unsuccessful, as the courts held that school funding issues were nonjusticiable because courts lacked judicially manageable standards to address the alleged inequities.[23]

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19. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

20. Joseph T. Henke, *Financing Public Schools in California: The Aftermath of* Serrano v. Priest *and Proposition 13*, 21 U.S.F. L. REV. 1, 5 (1986).

21. *See* Sheryll D. Cashin, *American Public Schools Fifty Years After* Brown*: A Separate and Unequal Reality*, 47 HOW. L.J. 341, 347 (2004) ("The battle for equal or adequate funding in public education would be left to a later generation of civil rights lawyers and it would be fought in state courts based upon state constitutions."). David Long is the most prominent of this next generation of civil rights attorneys focused on funding equity, regularly representing plaintiffs since his seminal work in the 1970s with the Washington, D.C., Lawyers Committee for Civil Rights under Law. *See* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 252 n.9 (1999) (noting David Long's extensive work in school funding equity litigation).

22. 16 Mass. (1 Tyng) 141, 146 (1819).

23. *E.g.* McInnis v. Shapiro, 293 F. Supp. 327, 329 (N.D. Ill. 1968); Burruss v. Wilkerson, 310 F. Supp. 572, 574 (W.D. Va. 1969).

C. Equal Protection Clause Litigation: The Beginning of the Modern Era in Funding Litigation

In 1971, the Supreme Court of California issued its decision in the landmark case *Serrano v. Priest*.[24] *Serrano* was the first successful challenge to a state system of public school finance. In addition, *Serrano* was the first case to establish a judicially manageable standard for courts to use when addressing inequities in school funding.[25] The "*Serrano* principle"[26] required that the quality of a child's education must not be a function of the wealth of the local community. Instead, public school funding must be a function of the wealth of the state as a whole.[27] *Serrano* framed the issues that would become prominent in subsequent school funding cases based on equal protection claims: (1) whether education is a fundamental right; (2) whether the court would apply strict scrutiny; and (3) whether the state's goal of promoting local control constituted a sufficient justification for the challenged funding system under the court's standard of review.

Before *Serrano*, wide fiscal disparities existed in California's system of public school funding. Assessed valuation per average daily attendance "ranged from a low of $103 to a peak of $952,156 — a ratio of nearly 1 to 10,000."[28] Within Los Angeles County, per pupil expenditures ranged from $577.49 to $1,231.72.[29] Taxpayer equity was at the root of the problem because "as a practical matter districts with small tax bases simply cannot levy taxes at a rate sufficient to produce the revenue that more affluent districts reap with minimal tax efforts."[30] As the Supreme Court of California noted in *Serrano*, "affluent districts can have their cake and eat it too: they can provide

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24. 487 P.2d 1241 (Cal. 1971); *see also* John E. Coons & Stephen D. Sugarman, *The Serrano Documents*, 2 YALE REV. L. & SOC. ACTION 77, 78 (1971) (discussing the legal significance of the *Serrano* decision including excerpts from the author's Amici Curiae brief and the Supreme Court's decision).

25. MICHAEL LA MORTE, SCHOOL LAW 368 (7th ed. 2001).

26. The *Serrano* principle is one of fiscal neutrality. *See* NATIONAL EDUCATION ASSOCIATION, UNDERSTANDING STATE SCHOOL FINANCE FORMULAS 5 (1987) (Under the principle of fiscal neutrality, "tax burdens and tax efforts should be equalized among all districts" and "equal tax effort should result in equal expenditures per pupil throughout the state, all other factors being equal.").

27. *Serrano*, 487 P.2d at 1244.

28. *Id.* at 1246.

29. *Id.* at 1248.

30. *Id.* at 1250.

a high quality education for their children while paying lower taxes. Poor districts, by contrast, have no cake at all."[31]

Noting the importance of education, as recognized in *Brown,* the *Serrano* court held that education was a fundamental right in California.[32] The court applied strict scrutiny to the California system of public school funding and determined that California's funding system discriminated against the poor in violation of the federal Constitution's equal protection clause. Weighing the importance of education in comparison with both the right to vote and the rights of defendants in criminal cases (two fundamental interests that the U.S. Supreme Court had already protected against discrimination based upon wealth),[33] the court concluded that "the distinctive and priceless function of education . . . compel[led], . . . treating it as a 'fundamental interest.' "[34]

The court rejected the state's argument that promoting local control constituted a compelling state interest, noting that the state's system, rather than being necessary to promote local fiscal choice, "actually deprives the less wealthy districts of that option."[35] The state argued that if the court were to find that wealth discrimination in public education violated the equal protection clause, the court must then "direct the same command to all governmental entities in respect to all tax-supported public services" and that "such a principle would spell the destruction of local government."[36] The court rejected that argument, declaring that "[a]lthough we intimate no views on other governmental services, we are satisfied that, as we have explained, its uniqueness among public activities clearly demonstrates that education must respond to the command of the equal protection clause."[37]

D. School Funding Equity Litigation Reaches the U.S. Supreme Court

After *Serrano,* several other state high courts struck down school finance laws on similar grounds.[38] Considerable attention was

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31. *Id.* at 1251-52.
32. *Id.* at 1244.
33. *Id.* at 1257.
34. *Id.* at 1258.
35. *Id.* at 1260.
36. *Id.* at 1262.
37. *Id.* 1262-63.
38. *See* Van Dusartz v. Hatfield, 334 F. Supp. 870, 874 (D. Minn. 1971) (A U.S. District Court held that the state system of funding that made spending per pupil a function of local wealth violated the equal protection clause of the U.S. Constitution.); Robinson v. Cahill, 287 A.2d 187, 217 (N.J. 1972) (A New Jersey Superior Court Judge held that the funding system that

focused on these cases, and many commentators predicted "an unprecedented upheaval in public education"[39] similar to the events following *Brown*.[40]

In 1973, the U.S. Supreme Court was presented with the opportunity to establish a national mandate for school funding equity when it decided *San Antonio Independent School District v. Rodriguez*.[41] Instead of using the *Rodriguez* case to promote school funding equity, the Court, in a 5-4 decision, delivered a significant defeat to advocates of school funding reform. The Court held that education was not a fundamental right protected under the U.S. Constitution[42] and that the Texas system of school finance did not disadvantage any suspect class.[43]

The *Rodriguez* plaintiffs were Mexican-American parents who sued on behalf of schoolchildren throughout the State that were members of minority groups or poor and resided in school districts having a low property tax base.[44] In the Edgewood District, 90 percent of the student population was Mexican-American and over 6 percent was African-American.[45] The Court noted that the average assessed property value per pupil in the Edgewood District was $5,960, and the median family income was $4,686.[46] In contrast, the nearby Alamo Heights District was predominately Anglo with only 18 percent Mexican-American children and less than 1 percent African-American children.[47] The average assessed property value per pupil in the Alamo Heights District was over $49,000, and the median income was $8,001.[48]

The state conceded that its system of funding public schools could not withstand the level of scrutiny the Court uses in reviewing legislation that interferes with fundamental rights, and the Court

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created disparities in local districts' abilities to fund an adequate education denies equal protection guaranteed by the New Jersey and federal Constitutions.); Milliken v. Green, 203 N.W.2d 457, 471 (Mich. 1972) (The Supreme Court of Michigan held that the funding system relying on local wealth and resulting in substantial inequality in educational support denies equal protection of the laws guaranteed by the Michigan Constitution whether measured by the "compelling state interest" test or the "rational" basis test.).

39. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 56 (1973).

40. 347 U.S. 483 (1954); *see* Henke, *supra* note 20, at 5 (noting the similarities between the race-based inequities in *Brown* and the resource-based inequities in *Serrano* and its progeny).

41. 411 U.S. 1 (1973).

42. *Id.* at 37.

43. *Id.* at 28.

44. *Id.* at 4-5.

45. *Id.* at 12.

46. *Id.*

47. *Id.* at 12-13.

48. *Id.* at 13.

agreed that "the Texas financing system and its counterpart in virtually every other State w[ould] not pass muster"[49] under strict scrutiny. The Court then considered whether strict scrutiny was the appropriate standard of review.[50]

First, the Court considered whether the Texas system disadvantaged any suspect class. Specifically, the Court considered the plaintiffs' allegations that poverty constituted a suspect classification. Concluding that it did not, the Court found no identifiable disfavored class in *Rodriguez*.[51] The Court distinguished *Rodriguez* from prior cases protecting indigents by noting that the plaintiffs had alleged only a relative, rather than an absolute, deprivation of education.[52] Based on a study published in the *Yale Law Journal*, the Court criticized "the major factual assumption of *Serrano*—that the educational financing system discriminates against the 'poor'. . . ."[53] "[T]here is no basis on the record in this case for assuming that the poorest people . . . are concentrated in the poorest districts."[54] The Court was skeptical of the assumption that the amount of money available for education affects the quality of the education, stating "this is a matter of considerable dispute among educators and commentators."[55] Since the Court refused to recognize any suspect class, the Court could not apply strict scrutiny unless it classified education as a fundamental right.

Justice Powell's majority opinion refused to hold that education was a fundamental right, observing that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."[56] The Court criticized the *Serrano* court's method for determining whether education is a fundamental right (weighing the importance of education in comparison to other fundamental rights recognized by the Court), noting that instead "the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[57] Finding no explicit or implicit guarantee regarding

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49. *Id.* at 16-17.

50. *Id.* at 17.

51. *Id.* at 16-17.

52. *Id.* at 28.

53. *Id.* at 23 (citing Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303, 1328-29 (1972)).

54. *Id.* at 23.

55. *Id.* at 23 n.56.

56. *Id.* at 33.

57. *Id.* at 33-34. Justice Brennan, dissenting, disagreed with the majority's test of fundamentality stating "as my Brother Marshall convincingly demonstrates, our prior cases stand for the proposition that 'fundamentality' is, in large measure, a function of the right's

education, the Court merely needed to determine if the Texas system had some rational relationship to any legitimate state interest. The Court determined that the interest in promoting local control of public schools was sufficient to meet this lower standard of review.[58] In conclusion, the majority recited a litany of concerns that virtually every opinion upholding an existing school funding system has echoed: (1) criticism of the plaintiffs' statistical data and conclusions;[59] (2) fear of engaging in judicial activism;[60] (3) fear of opening the floodgates of litigation in other areas of social services;[61] (4) concerns related to judicial competence in an area where courts generally have limited expertise;[62] (5) the importance of judicial deference to the legislature in this area;[63] and (6) the need for the plaintiffs to address their grievances to the legislature instead of the courts.[64]

Justice Marshall, in a dissent joined by Justice Douglas, asserted that the majority's opinion was "a retreat from our historical commitment to equality of educational opportunity" and an "unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as

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importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed," *id.* at 62 (Brennan, J., dissenting), essentially the test used by the Supreme Court of California in *Serrano*. Justice Brennan further commented that "there can be no doubt that education is inextricably linked to the right to participate in the electoral process and the rights of free speech and association guaranteed by the First Amendment," and therefore any classification effecting the right to education should be subjected to strict scrutiny. *Id.* at 63 (Brennan, J., dissenting).

58. Justice White also filed a dissenting opinion, joined by Justice Douglas and Justice Brennan. Justice White stated: "Alamo Heights had total revenues of $594 per pupil, while the Edgewood District had only $356 per pupil. The majority and the State concede, as they must, the existence of major disparities in spendable funds." *Id.* at 63-64 (White, J., dissenting). In contrast to the majority opinion, Justice White would have found that the Texas system of school funding failed even the rational basis test. Justice White noted that "[i]t is not enough that the Texas system seeks to achieve the valid, rational purpose of maximizing local initiative; the means chosen by the State must also be rationally related to the end sought to be achieved." *Id.* at 67 (White, J., dissenting). According to Justice White, if the state seeks to justify its system as promoting local control, its method of pursuing this goal must be more than a mere "scheme with 'different treatment being accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.' " *Id.* at 69 (White, J., dissenting) (citing Reed v. Reed, 404 U.S. 71, 75-76 (1971)).

59. *Id.* at 27, n.61.

60. *See id.* at 31 ("In [Justice Harlan's] view, if the degree of judicial scrutiny of state legislation fluctuated depending on a majority's view of the importance of the interest affected, [the Supreme Court] would have gone 'far toward making this Court a "super-legislature." ' We would, indeed, then be assuming a legislative role and one for which the Court lacks both authority and competence.") (citation omitted).

61. *Id.* at 37.

62. *Id.* at 41.

63. *Id.* at 40.

64. *Id.* at 59.

citizens."[65] He pointed out that the majority's solution—submitting the issue to the political process—was no solution at all, as the district court had delayed its decision in the case for two years hoping that the legislature would remedy the gross disparities in the Texas system. Asserting the futility of depending on the Texas legislature, Justice Marshall stated, "The strong vested interest of property-rich districts in the existing property tax scheme poses a substantial barrier to self-initiated legislative reform in educational financing."[66] He further explained, "I, for one, am unsatisfied with the hope of an ultimate 'political' solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that 'may affect their hearts and minds in a way unlikely to be undone.' "[67]

If money is unrelated to educational quality, as the majority seemed to believe, Justice Marshall wondered why "a number of our country's wealthiest school districts, which have no legal obligation to argue in support of the constitutionality of the Texas legislation, have nevertheless zealously pursued its cause before this Court."[68]

III. STATE COURT SIEGE: LANDMARK CASES

Once the U.S. Supreme Court determined that the federal Constitution would not aid the equity plaintiffs, the battle shifted to the state courts and the state constitutions. The litigation since *Serrano* and *Rodriguez* has resulted in the reallocation of billions of tax dollars to poorer school districts and has transformed the public schools in some states to a degree second only to the transformation that followed *Brown*. Although the case law in this area is extensive, the decisions discussed below signify important themes that developed as school finance litigation evolved.

A. Attack on a New Front

In 1972, shortly after the Supreme Court of California's decision in *Serrano*, a New Jersey trial court, in *Robinson v. Cahill*, held that the state's system of school funding violated equal protection guarantees of both the U.S. Constitution and the New Jersey Constitution, as well as the New Jersey Constitution's education

65. San Antonio v. Rodriguez, 411 U.S. 1, 71 (1973) (Marshall, J., dissenting).

66. *Id.* at 71 n.2.

67. *Id.* at 71-72. (citing Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

68. *Id.* at 85.

article.[69] The state appealed to the Supreme Court of New Jersey. The Supreme Court of New Jersey waited to release its decision until after the U.S. Supreme Court issued its opinion in *Rodriguez*, and in a unanimous opinion, the New Jersey court set off in a new direction.[70] The court agreed that the New Jersey system of school funding was unconstitutional, but its holding was based on the mandate of the state's education article, rather than either state or federal equal protection provisions.[71] The *Robinson* decision established a new model for plaintiffs throughout the country as they pressed their state courts to overturn entrenched school funding systems.

B. Expanding Judicial Intervention

In 1979, in *Pauley v. Kelly*, West Virginia's highest court reversed a trial court's dismissal of an action challenging the constitutionality of the state's school funding system.[72] The court remanded the case for a trial and proposed specific guidelines for the trial court on remand.[73] Although the court recognized that children seeking educational equality could not seek the protection of the federal Constitution,[74] it criticized the *Rodriguez* majority, stating "our examination of *Rodriguez* and our research in this case indicates an embarrassing abundance of authority and reason by which the majority might have decided that education is a fundamental right of every American."[75] Even the General Assembly of the United Nations "appears to proclaim education to be a fundamental right of everyone, at least on this planet."[76]

The court declared that education was a fundamental right in West Virginia, and it reviewed the state funding system under a strict

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69. 287 A.2d 187, 217 (N.J. Super. Ct. Law Div. 1972).

70. *See* Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973) (describing the difficulties in determining whether a right is fundamental and whether a state interest is compelling).

71. In reviewing the plaintiffs' equal protection claim, the court rejected the U.S. Supreme Court's explicit-implicit test for fundamentality, *see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973), as too mechanical. Instead, the court adopted an approach that weighed the value of the reviewed interest against the apparent public justification. *Robinson*, 303 A.2d at 282. Nonetheless, the court further declined to find that education was a fundamental right in New Jersey, *id.* at 284, preferring to base its holding on the New Jersey Constitution's education clause, which requires "a thorough and efficient system of free public schools." *Id.* at 294.

72. 255 S.E.2d 859, 884 (W. Va. 1979).

73. *See infra* notes 79-81 and accompanying text.

74. *Pauley*, 255 S.E.2d at 863.

75. *Id.* at 863-64 n.5 (citing Martha McCarthy, *Is the Equal Protection Clause Still a Viable Tool for Effecting Education Reform?*, 6 J.L. & EDUC. 159, 168 n.53 (1977)).

76. *Id.* at 864 n.5.

scrutiny standard.[77] The court analyzed constitutions of other states in which the education clauses – like that in West Virginia's – required that the state provide a "thorough and efficient" education.[78] Based on this analysis, the court defined a thorough and efficient system of schools as one that "develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically."[79] The court set out a thorough list of elements related to this definition.[80]

> Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work — to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.
>
> Implicit are supportive services: (1) good physical facilities, instructional materials and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency.
>
> ... [T]here are undeniable legal basis for all our conclusions, including the elements specifically distilled from the debates and cases that are the specifications of what a thorough and efficient school system should have, and should do.[81]

The articulation of such detailed and specific requirements presented a new development in school funding litigation. Although the court provided the legislature with clearer guidance for legislative reforms, the court also left itself open to accusations that it had exceeded its competence and intruded on legislative functions.

C. Elevating Scrutiny and Elevated Hopes

In 1982, in *Plyler v. Doe,* the U.S. Supreme Court was again asked to rule on a case concerning children's access to educational opportunity.[82] Instead of merely asserting a disparity in educational

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77. *Id.* at 878.

78. *Id.* at 866.

79. *Id.* at 877.

80. *Id.*

81. *Id.* at 877-78.

82. 457 U.S. 202 (1982). The Court's decision in *Plyler* concerned children of undocumented alien residents being denied admission to Texas public schools, but it was relevant to school

opportunity, the plaintiffs in *Plyler* – children of Mexican descent who could not establish that they had been legally admitted to the United States – claimed that they had been denied all educational opportunity because they had been completely excluded from public schools.[83] The Court rejected the state's argument that aliens were not persons within the jurisdiction of the United States and held that the state statute that denied these children access violated the equal protection clause of the U.S. Constitution.[84]

In doing so, the Court reaffirmed the *Rodriguez* holding that education was not a fundamental right, but added "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[85] In distinguishing education from other social welfare legislation, the Court noted "both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child."[86] Applying the intermediate standard of review—whether the classification in the statute has a substantial relationship to an important government interest—the Court stated that denying children educational benefits imposes a lifetime hardship based on circumstances that the children can not control.[87] Although statements like this were made in the context of a total deprivation of educational services, funding plaintiffs started to use similar arguments against state school funding systems that caused relative deprivation of educational services.[88]

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funding litigation because: (1) *Plyler* reaffirmed that education was not a fundamental right under the U.S. Constitution, *id.* at 221, citing *Rodriguez*; (2) many of the arguments of educational access used by the *Plyler* majority have been applied to school funding litigation as well; and (3) the Court in *Plyler* extended intermediate scrutiny to a denial of access to educational opportunity, *id.* at 217-18.

83. *Id.* at 206.

84. *Id.* at 224-25.

85. *Id.* at 221.

86. *Id.*

87. *Id.* at 223.

88. The following statements in *Plyler* could be adapted for school funding litigation: (1) "[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation," *id.* at 213; and "[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish," *id.* at 216 n.14; (2) legislation that denies educational benefits imposes a lifetime hardship on children who are not responsible for their status, *id.* at 223, and since children are not responsible for the circumstances of their birth, imposing disabilities on children because of accidents of birth is contrary to the basic concept of our system that burdens should bear some relationship to individual responsibility, *see id.* at 220 (explaining that the children of illegal immigrants can affect neither their parents' choice to "enter our territory by stealth and in violation of our law" nor their resulting status); (3) denial of educational benefits results in "significant social costs" that must later be borne by society, *id.* at 221, including "unemployment, welfare, and crime," making it likely that whatever savings are achieved through denial of educational opportunity

D. Lowered Scrutiny and Lowered Hopes

Shortly after the Court's decision in *Plyler,* New York's highest court rejected a trial court's ruling that the state's public school funding system was unconstitutional. [89] In *Board of Education v. Nyquist,* the court held that New York's system of funding "does not violate the equal protection clause of either the Federal or State Constitution nor is it unconstitutional under the education article of our State Constitution."[90]

The *Nyquist* plaintiffs had argued that the New York system of public school funding violated both the federal and state constitutions because of disparities in financial support, disparities in educational opportunity, and the negative effects of municipal overburden on city schools.[91] The court acknowledged the validity of the plaintiffs' arguments[92] and stated, "We are assuming that there is a significant correlation between amounts of money expended and the quality and quantity of educational opportunity provided."[93]

Although agreeing with the plaintiffs' arguments concerning funding disparities, the court ruled that the lower court had improperly applied the *Plyler* intermediate scrutiny standard to the plaintiff's equal protection claim.[94] Instead, the court applied the rational basis standard and determined that the state's interest in promoting local control was an interest sufficient to satisfy that test.[95] With regard to the plaintiffs' education clause challenge, the court analyzed documents related to New York's 1894 constitutional convention, decided that the constitution required only a "sound basic education," and ruled that this requirement had been met by the state.[96] In dissent, Justice Fuchsberg argued that nothing was more vital, and therefore fundamental, to the future of our nation than education. "[W]ithout education there is no exit from the ghetto, no

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are outweighed by the long term social costs, *id.* at 230; and (4) denial of educational benefits presents an affront to advancement on the basis of merit, and thereby forecloses the means by which disadvantaged individuals can escape their disadvantaged status, *id.* at 222.

89. 439 N.E.2d 359 (N.Y. 1982).
90. *Id.* at 361.
91. *Id.* at 361-62.
92. *Id.* at 363.
93. *Id.* at 363 n.3.
94. *Id.* at 365-66.
95. *Id.* at 366.
96. *Id.* at 369.

solution to unemployment, no cutting down on crime."[97] Education is " 'the great equalizer of men' " and "by alleviating poverty and its societal costs, more than pays for itself."[98] After the *Nyquist* decision, courts in other states followed its reasoning, resulting in numerous losses for funding plaintiffs.[99]

E. Closing the Crack in the Federal Door

The climate in federal courts also became increasingly inhospitable to funding equity plaintiffs. In *Kadrmas v. Dickinson Public Schools*,[100] the U.S. Supreme Court ruled that denying school bus transportation to an indigent student for failure to pay school bus fees did not violate the child's equal protection rights.[101] Affirming once again that education is not a fundamental right subject to strict scrutiny,[102] the court ruled that the North Dakota statute authorizing school bus user fees for unreorganized school districts satisfied the rational basis test.[103]

Justice Marshall argued that the majority opinion undercut the principles that had been set forth in both *Brown* and *Plyler*:

> Today, the Court continues the retreat from the promise of equal educational opportunity by holding that a school district's refusal to allow an indigent child who lives 16 miles from the nearest school to use a school-bus service without paying a fee does not violate the Fourteenth Amendment's Equal Protection Clause. Because I do not believe that this Court should sanction discrimination against the poor with respect to "perhaps the most important function of state and local governments," Brown v. Board of Education, 347 U.S. 483, 493 (1954), I dissent.[104]

Joined by Justice Brennan, the Marshall dissent echoed some of the concerns that had been expressed by the *Plyler* majority by stating that "a child must reach the schoolhouse door as a prerequisite to receiving the educational opportunity offered therein."[105] "By denying equal opportunity to exactly those who need it most, the law not only militates against the ability of each poor child to advance

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97. *Id.* at 371 (Fuchsberg, J., dissenting).

98. *Id.*

99. *E.g.*, Hornbeck County Bd. of Educ. v. Somerset, 458 A.2d 758, 790 (Md. 1983); Fair Sch. Fin. Council of Okla., Inc. v. State, 746 P.2d 1135, 1151 (Okla. 1987); Richland County v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988); Kukor v. Grover, 436 N.W.2d 568, 585 (Wis. 1989).

100. 487 U.S. 450 (1988).

101. *Id.* at 461-62.

102. *Id.* at 458.

103. *Id.* at 465.

104. *Id.* at 466 (Marshall, J., dissenting) (citing Kadrmas v. Dickinson Pub. Sch., 402 N.W.2d 897, 900 (N.D. 1987)).

105. *Id.* at 467.

herself or himself, but also increases the likelihood of the creation of a discrete and permanent underclass."[106] Justice Marshall concluded:

> The Court's decision . . . "demonstrates once again a 'callous indifference to the realities of life for the poor.' " . . . For the poor, education is often the only route by which to become full participants in our society. In allowing a State to burden the access of poor persons to an education, the Court denies equal opportunity and discourages hope. I do not believe the Equal Protection Clause countenances such a result.[107]

F. Renewed Hope for Plaintiffs (and a Resurgence of Judicial Activism?)

In *Rose v. Council for Better Education*, the Supreme Court of Kentucky affirmed a lower court ruling that the Kentucky system of public school funding was unconstitutional.[108] In the opening section of the Kentucky opinion, the court acknowledged its reliance on the precepts that had been set forth in *Brown*:

> The goal of the framers of our constitution, and the polestar of this opinion, is eloquently and movingly stated in the landmark case of *Brown v. Board of Education*:
>
> "*[E]ducation is perhaps the most important function of state and local governments* . . . it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonable be expected to succeed in life if he is denied the opportunity of an education. *Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*"[109]

The court held that education was a fundamental right under the Kentucky Constitution[110] and that the funding system failed to meet the constitutional mandate that the state must create an "efficient" system of schools throughout the state.[111]

The evidence presented to the court contained "numerous depositions, volumes of oral evidence . . . and a seemingly endless amount of statistical data, reports, etc."[112] According to the court, the overall effect of the evidence was "a virtual concession that Kentucky's

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106. *Id.* at 470.

107. *Id.* at 471 (citations omitted).

108. 790 S.W.2d 186, 215 (Ky. 1989); *see also* Woody Barwick, *A Chronology of the Kentucky Case*, 15 J. EDUC. FIN. 136, 138-41 (1989) (listing the chronology of important events leading to Governor Wallace Wilkinson's signing of a Kentucky education reform package).

109. *Rose*, 790 S.W.2d at 190 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (emphasis added by the Kentucky court)).

110. *Id.* at 206.

111. *Id.* at 213.

112. *Id.* at 190.

system of common schools is underfunded and inadequate" and "fraught with inequalities and inequities" among the districts.[113] The court noted:

> Without exception, [witnesses] testified that there is great disparity in the poor and the more affluent school districts with regard to classroom teachers' pay; provision of basic educational materials; student-teacher ratio; curriculum; quality of basic management; size, adequacy and condition of school physical plants; and per year expenditure per student. . . . . The quality of education in the poorer school districts is substantially less in most, if not all, of the above categories.[114]

Accepting the plaintiffs' assertion that there was a correlation between per pupil expenditures and educational quality,[115] the court pointed out that the "disparity in per pupil expenditure by the local school boards runs in the thousands of dollars per year."[116] Put simply, "the total local and state effort in education in Kentucky's primary and secondary education is inadequate and is lacking in uniformity,"[117] as "[c]hildren in 80% of local school districts . . .are not as well-educated as those in the other 20%."[118]

Section 183 of the Kentucky Constitution states that the "General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State."[119] After reviewing the constitutional debates and noting how the Supreme Court of Appeals of West Virginia interpreted similar language in *Pauley*,[120] the court decided to set forth its view of the characteristics of an efficient school system:

> The essential, and minimal, characteristics of an "efficient" system of common schools, may be summarized as follows:
>
> 1) The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly.
>
> 2) Common schools shall be free to all.
>
> 3) Common schools shall be available to all Kentucky children.

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113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 199.
117. *Id.* at 198.
118. *Id.*
119. *Id.* at 205.
120. *Id.* at 210 n.19 ("We recommend a study of this opinion for those who are interested in the historical background of similar constitutional provisions. We are persuaded that the history and reasoning expressed in the *Pauley* case is applicable and persuasive in the decision of the case before us.").

4) Common schools shall be substantially uniform throughout the state.

5) Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances.

6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.

7) The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education.

8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.

9) An adequate education is one which has as its goal the development of the seven capacities recited previously.[121]

Regarding these seven capacities, the court stated:

[A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities:

i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;

ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;

iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;

iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;

v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;

vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[122]

Addressing the taxpayer equity issue, the court ordered that all property must be assessed at 100 percent of its fair market value and

121. *Id.* at 212-13.

122. *Id.* at 212.

that the legislature must establish a uniform tax rate throughout the state.[123] The court was clear in its mandate:

> This decision applies to the entire sweep of the system—all its parts and parcels. This decision applies to the statutes creating, implementing and financing the *system* and to all regulations, etc., pertaining thereto. This decision covers the creation of local districts, school boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. It covers school construction and maintenance, teacher certification—the whole gamut of the common school system in Kentucky.[124]

In conclusion, the court underscored that it had decided only one legal issue – "that the General Assembly of the Commonwealth has failed to establish an efficient system of common schools throughout the Commonwealth"[125]—a conclusion based solely on the requirements of the Kentucky Constitution.[126] In the starkest terms possible, the court emphasized, "[T]he result of our decision is that Kentucky's *entire system* of common schools is unconstitutional."[127]

Although it provided clear direction for the legislature, the court never explained where it had "found" these guidelines in the state's constitution. When subsequent cases followed the path set by *Rose*, critics of judicial command-and-control methods in school financing and other public law litigation claimed that broad and deep intervention of this nature was illegitimate.[128]

G. Funding for Urban Schools

School funding cases commonly include claims by both rural and urban area plaintiffs contesting the availability of superior educational resources in the more affluent suburban areas. The plaintiffs in *Abbott v. Burke* tried a different tactic by focusing only on poorer urban school districts.[129] The tactic succeeded, as the Supreme Court of New Jersey declared the state's system of public school funding unconstitutional as applied to poorer urban districts.[130] The court held that the New Jersey school funding system must be amended to assure funding of education in poorer urban districts at substantially the same level as that of property rich districts. Echoing

123. *Id.* at 216.

124. *Id.* at 215.

125. *Id.*

126. *Id.*

127. *Id.*

128. Charles F. Sabel & William H. Simon, *Destabilization Rights; How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1017 (2004).

129. 575 A.2d 359, 359 (N.J. 1990).

130. *Id.* at 363.

Serrano, the court determined that funding cannot depend on local wealth and stated that the level of funding must be adequate to provide for the special needs of urban districts so as to address their special disadvantages.[131] "The inadequacy of poorer urban students' present education measured against their needs is glaring. Whatever the cause, these school districts are failing abysmally, dramatically, and tragically."[132] The court found that poorer urban students with the greatest needs "are getting the least education . . . . The implications of that fact on their future and on the state's future is the central theme of plaintiffs' case."[133]

Despite the large disparities in programs and facilities found between wealthy suburban and poorer urban schools,[134] the state argued that socioeconomic status was the most important factor in explaining the failure of poor urban children.[135] The court rejected the state's argument that students in poor urban areas could not benefit from enhanced opportunities:

> The State contends that the education currently offered in these poorer urban districts is tailored to the students' present need, that these students simply cannot now benefit from the kind of vastly superior course offerings found in the richer districts . . . . The State's conclusion is that basic skills are what they need first, intensive training in basic skills. We note, however, that these poorer districts offer curricula denuded not only of advanced academic courses but of virtually every subject that ties a child, particularly a child with academic problems, to school—of art, music, drama, athletics, even, to a very substantial degree, of science and social studies . . . .

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131. *Id.*

132. *Id.* at 366.

133. *Id.* at 366-67.

134. *Id.* at 395-97. The court found disparities between these schools in: 1) computer science courses (Princeton has one computer per eight children, while Camden has one computer per 58 children and Jersey City computer classes are taught in storage closets), *id.* at 395; 2) science education (poorer urban districts have labs built in the 1920's, no sinks or microscopes, and insufficient supplies), *id.*; 3) foreign language (Montclair students begin foreign language instruction at the preschool level, while foreign language is not available at Paterson until tenth grade), *id.* at 396; 4) music (Montclair begins music instruction during pre-school, while Paterson offers an introductory level music class in high school), *id.*; 5) art, vocational programs, and physical education, *id.* The court also noted extreme disparities in facilities. *Id.* at 397. In contrast to the "newer, cleaner, and safer" facilities in richer suburban districts: 1) elementary children at Paterson eat lunch in a small area of the boiler room; 2) Paterson children hold remedial classes in a converted bathroom; 3) Irvington children hold classes in converted closets and a converted coal bin; 4) East Orange students take turns eating in the first floor hallway; 5) the Jersey City library is a converted cloakroom, the nurse's office has no bathroom or waiting room, and student bathrooms have no hot water; 6) buildings are crumbling from age and lack of maintenance, need roof repair, heating, electrical work, ventilation, plumbing, painting, and asbestos removal or containment; the court further noted that "in another school the entire building was sinking." *Id.*

135. *Id.* at 385.

> . . . However desperately a child may need remediation in basic skills, he or she also needs at least a modicum of variety and a chance to excel.
>
> . . . Equally, if not more important, the State's argument ignores the substantial number of children in these districts, from the average to the gifted, who can benefit from more advanced academic offerings. Since little else is available in these districts, they too are limited to basic skills.[136]

Finding that a determination that the state's system violated the education article was sufficient, the court declined to review the plaintiffs' equal protection challenge.[137] It ordered legislative reform that would ensure funding for poorer urban schools that was substantially equal to the funding given to wealthy suburban districts and stated that this funding must be adequate to provide for the special needs of poorer urban schools, addressing their disadvantages.[138] Reminiscent of some of the statements made by the *Plyler* majority, the court pointed out that children in poorer urban schools "face, through no fault of their own, a life of poverty and isolation that most of us cannot begin to understand or appreciate." [139] The court concluded, "After all the analyses are completed, we are still left with these students and their lives. They are not being educated. Our Constitution says they must be."[140]

H. Funding for Rural Schools

In *Tennessee Small School Systems v. McWherter*,[141] the plaintiffs used the same tactic as that used in *Abbott*, but they focused instead on rural schools. A coalition of small and mostly rural school districts, superintendents, school board members, parents, and students alleged that Tennessee's system of school funding violated the state's education article and equal protection provisions of the state's constitution.[142] Nine urban and suburban school districts joined the state as defendants[143] because "the larger, more affluent systems [did] not want the funding scheme which favors their systems disturbed . . . [and] [t]hey express[ed] grave concern that the result

136. *Id.* at 398-99.
137. *Id.* at 411.
138. *Id.* at 409.
139. *Id.* at 412.
140. *Id.*
141. 851 S.W.2d 139 (Tenn. 1993).
142. *Id.* at 139.
143. *Id.* at 141.

[would] be 'a redistribution of education funds away from the central cities and the growing suburbs.' "[144]

The *McWherter* court recognized a "direct correlation between dollars expended and the quality of education a student receives" and found tangible disparities among schools in facilities, curricula, libraries, and accreditation rates, with corresponding educational harm to students in economically disadvantaged districts.[145] Moreover, disparities in funding were not the result of lack of effort by economically disadvantaged districts, as "most school districts in the state—especially non urban districts—cannot reasonably raise sufficient revenues from local sources to provide even the average amount of total funds for education per pupil statewide."[146] The continued movement of economic resources from small local communities toward larger urban areas, and the spiral of poverty resulting from inadequate schools in disadvantaged poorer districts exacerbated the problem:

> The record . . . shows that over the years, the distribution of sales tax and property tax revenues has become more concentrated as economic activity has moved from small local communities to larger regional retail centers. Purchases previously made by residents of rural school districts locally, are now made in the more urban counties, and the sales tax on those purchases is collected in the wealthier counties. With the construction of large retail centers in the urban counties, property tax revenues, though much less significant than sales tax revenues, also are concentrated in those same communities rather than distributed more evenly throughout the entire state. Because all revenues from the property tax and the local option sales tax are received by the county or city where collected, the result is the progressive exacerbation of the inequity inherent in a funding scheme based on place of collection rather than need.[147]

Rejecting the state's argument that local control justified the funding disparities, the court determined that "**even without deciding whether the right to a public education is fundamental**, we can find no constitutional basis for the present system, as it has no rational bearing on the educational needs of the districts."[148] Having declared the system of funding violated the state's equal protection clause, the court declined to rule on the education clause challenge and affirmed the trial court's order to the General Assembly to fashion an appropriate remedy.[149]

144. *Id.* at 141-42.
145. *Id.* at 144.
146. *Id.* at 145.
147. *Id.* at 144.
148. *Id.* at 155 (citation omitted).
149. *Id.* at 152.

IV. THE STRUGGLE CONTINUES

Funding disputes have arisen in all fifty states, ranging from grassroots reform efforts to intense litigation. The highest courts of most states have issued opinions on at least one school funding challenge, and many states have experienced decades of serial litigation in protracted efforts to obtain satisfactory remedies for funding inequities. Because the constitutional provisions, statutes, regulations, legal precedents, and even the relevant facts vary significantly from state to state, school funding litigation has been both extensive and diverse. Despite these contextual differences, some common elements have emerged.

A. Jurisdictional and Factual Establishments in Funding Litigation

It goes without saying that plaintiffs must first establish a valid cause of action and proper jurisdiction before a court will hear evidence and render a decision on the merits of a case. These issues generally have not presented a bar to a decision on the merits in school funding litigation cases.[150] In 1981, in *McDaniel v. Thomas*, the Supreme Court of Georgia commented, "We know of no sister State which has refused merits treatment to such issues, and we would regard our own refusal to adjudicate plaintiffs' claim of constitutional infringement an abdication of our constitutional duties."[151] Undaunted, defendants continue to hold plaintiffs to their burden of establishing the existence of a valid cause of action, standing, justiciability, and other preliminary matters.[152] More recently, some courts have refused to retain jurisdiction, holding that school funding challenges constitute nonjusticiable political questions. For example, in 2002 the Supreme Court of Alabama held that school funding equity challenges were "non-justiciable" and that "the time has come to return the Funding Equity Case *in toto* to its proper forum," the legislative domain.[153]

150. *But see* Gould v. Orr, 506 N.W.2d 349, 353 (Neb. 1993) (finding that the plaintiffs' petition failed to state a valid cause of action and dismissing without leave to amend).

151. 285 S.E.2d 156, 157 (Ga. 1981) (citing Bd. of Educ. v. Nyquist, 443 N.Y.S.2d 843, 854 (N.Y. App. Div. 1981)).

152. For a more thorough treatment of these issues, see John Dayton, *An Anatomy of School Funding Litigation*, 77 EDUC. L. REP. 627, 628 (1992).

153. *Ex parte* James, 836 So.2d 813, 819 (Ala. 2002).

B. Linking Expenditures to Educational Quality and Establishing Educational Harm

One common element in post-*Serrano* school funding litigation is the allegation that funding inequities among school districts result from a state's overreliance on local taxes to fund local education. Plaintiffs routinely introduce evidence of disparities in the assessed valuation of property among local school districts and then argue that these disparities result in inadequacies in local financial resources for education. Both plaintiffs and defendants expend significant efforts in gathering and presenting numerical data regarding the extent and causes of funding inequities.[154] But even if plaintiffs can establish the existence of significant disparities in financial resources, these factual establishments are of limited value without persuasive evidence that the quantity of expenditures can be linked to measures of educational quality and adequacy and that children in fiscally disadvantaged schools suffer real educational harm.

Constitutional guarantees of public education are guarantees of educational opportunity and not guarantees of equal dollar amounts per pupil;[155] therefore, plaintiffs must link expenditures to educational opportunity.[156] Since *Serrano v. Priest*,[157] no plaintiff has ultimately prevailed without convincing the court of the existence of a positive correlation between expenditures and educational opportunity.[158] The

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154. *See* DuPree v. Alma School Dist. No. 30, 651 S.W.2d 90, 95 (Ark. 1983) (39 witnesses and 287 exhibits reviewed); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 196 (Ky. 1989) ("numerous depositions," "volumes of oral evidence," and "a seemingly endless amount of statistical data, reports, etc."); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 766 (Md. 1983) (four month trial and many thousands of pages record); Abbott v. Burke, 575 A.2d 359, 373 (N.J. 1990) (recognizing the complexity of the factual contentions and the production of a record of enormous length); Bd. of Educ. v. Walter, 390 N.E.2d 813, 815 (Ohio 1979) (78 days of testimony, 77 witnesses, 2,400 exhibits, and a 7,530-page long transcript).

155. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973); Serrano v. Priest, 557 P.2d 929, 939 (Cal. 1976); Lujan v. Colo. St. Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982); Thompson v. Engelking, 537 P.2d 635, 641-642 (Idaho 1975); Helena v. State, 769 P.2d 684, 691 (Mont. 1989); Abbott v. Burke, 575 A.2d 359, 369 (N.J. 1990); Robinson v. Cahill, 303 A.2d 272, 297-98 (N.J. 1973); Fair Sch. Fin. Council v. State, 746 P.2d 1135, 1149 (Okla. 1987); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 398 (Tex. 1989); Pauley v. Kelly, 255 S.E.2d 859, 865 n.7 (W. Va. 1979); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 336 (Wyo. 1980).

156. Julie Underwood, *Changing Equal Protection Analyses in Finance Equity Litigation*, 14 J. EDUC. FIN. 413, 414-15 (1989) ("All plaintiffs in school finance equity litigation rely on the common assumption that the level of funding of a school district has a direct effect on the quality of the program provided and the education that children receive").

157. 487 P.2d 1241 (Cal. 1971).

158. For cases where plaintiffs have prevailed and a correlation between expenditures and educational opportunities was recognized, see Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 809 (Ariz. 1994); DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 92 (Ark. 1983); Serrano v. Priest (*Serrano II*), 557 P.2d 929, 939 (Cal. 1976); Serrano v. Priest (*Serrano I*), 487

obvious explanation for this is that if expenditures do not affect the quality of educational opportunity, any increase in funding sought by plaintiffs would not rationally promote the constitutional interest in educational opportunity that the court is charged with protecting.

Because of its crucial importance to the case and the unsettled academic debate regarding this issue, considerable judicial attention has been devoted to examining the alleged correlation between expenditures and educational opportunity.[159] Although the Coleman Report and studies by other researchers have been critical of this asserted correlation,[160] the decisions of the highest courts in at least seventeen states attest to the fact that some credible support exists for the claim that there is a positive correlation between expenditures and

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P.2d 1241, 1253 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 368 (Conn. 1977); Rose v. Council for Better Educ., Inc. 790 S.W.2d 186, 198 (Ky. 1989); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 552 (Mass. 1993); Helena v. State, 769 P.2d 684, 687 (Mont. 1989); Abbott v. Burke, 575 A.2d 359, 377 (N.J. 1990); Robinson v. Cahill, 303 A.2d 273, 277 (N.J. 1973); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 144 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 97 (Wash. 1978); Pauley v. Bailey, 324 S.E.2d 128, 131 (W. Va. 1984); Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1276-77 (Wyo. 1995); Washakie Co. Sch. Dist. v. Herschler, 606 P.2d 310, 332 (Wyo. 1980); *see also, e.g.,* McDaniel v. Thomas, 285 S.E.2d 156, 160 (Ga. 1981) (finding a correlation between expenditures and educational opportunities, but finding that the state constitution did not require equalized educational opportunities between the districts); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 261-62 (N.D. 1994) (affirming a district court judgment that "the overall impact of the entire statutory method for distributing funding for education in North Dakota is unconstitutional" but lacking the supermajority required by the North Dakota Constitution to declare statutes unconstitutional); Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 363 n.3 (N.Y. 1982) (recognizing this correlation but ruling in favor of the state).

159. There is considerable disagreement among scholars regarding the alleged correlation between expenditures and educational opportunity and an abundance of expert testimony and research supporting both sides of the debate. For articles generally supporting the correlation between expenditures and educational opportunity, see Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465, 465 (1991); Christopher F. Edley, Jr., *Lawyers and Education Reform*, 28 HARV. J. ON LEGIS. 293, 296 (1991); Richard J. Murnane, *Interpreting the Evidence on "Does Money Matter?,"* 28 HARV. J. ON LEGIS. 457, 461 (1991); HOUSE COMM. ON EDUC. AND LABOR, 101ST CONG., 2D SESS., REPORT ON SHORTCHANGING CHILDREN: THE IMPACT ON FISCAL INEQUITY ON THE EDUCATION OF STUDENTS AT RISK 25 (Comm. Print 1990). Those supporting the correlation between expenditures and educational opportunity have had to contend with contrary findings in the well known *Coleman Report*. *See* JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY 21-22 (1966) (presenting studies that indicate that "socioeconomic factors bear a strong relation to academic achievement" and contending that when these factors are controlled for, differences between schools "account for only a small fraction of differences in pupil achievement"). For articles generally refuting the alleged correlation between expenditures and educational opportunity, see Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 425 (1991); *The Economist: A Survey of Education*, THE ECONOMIST, Nov. 21, 1992, at 6.

160. COLEMAN, *supra* note 159.

educational opportunity.[161] The majority of courts ruling on the issue have held that although money is a significant factor in providing educational opportunities, exact equality in per pupil expenditures is not constitutionally required.[162] Most courts recognizing the correlation between expenditures and educational opportunity have focused on assuring that all of the state's children have access to the degree of educational opportunity guaranteed by the state's constitution.[163]

Interestingly, the U.S. Supreme Court, in *San Antonio v. Rodriguez,* found the alleged correlation between expenditures and educational opportunity unproved,[164] and the correlation has been found unproved by the highest court in at least four states.[165] All of these courts ultimately ruled in favor of the state defendants.[166] Most, but not all, of the seventeen courts that recognized the correlation ruled in favor of the plaintiffs. In four instances courts recognized the correlation but ruled in favor of the state.[167]

Presenting evidence of educational harm to children in property poor districts is an extension of the expenditure-educational quality correlation argument. Evidence that inadequate funding has a harmful impact on an identifiable group of children provides a court with a concrete example of the negative effects of inequities produced by the state's funding system. For example, in *Roosevelt Elementary*

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161. For cases recognizing a correlation between expenditures and educational opportunity, see *supra* note 158. *But see* Lujan v. Colo. St. Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982) (refusing to accept, "amidst a raging controversy, that there is a direct correlation between school financing and educational opportunity"); Thompson v. Engelking, 537 P.2d 635, 641-42 (Idaho 1975) (stating that the correlation between per-pupil expenditures and educational opportunities is only based on "documentary evidence" that "need not conclusively bind [the] Court"); Milliken v. Green, 212 N.W.2d 711, 719 (Mich. 1973) (stating that elimination of disparities in per-pupil expenditures has not been shown to eliminate disparities in educational opportunities); Danson v. Casey, 399 A.2d 360, 366 (Pa. 1979) (finding this correlation unproven).

162. John Dayton, *Correlating Expenditures and Educational Opportunities in School Funding Litigation: The Judicial Perspective,* 19 J. EDUC. FIN. 167, 178 (1993).

163. *See* DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983); Serrano v. Priest (*Serrano II*), 557 P.2d 929, 939 (Cal. 1976); Horton v. Meskill, 376 A.2d 359, 376 (Conn. 1977); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 780 (Md. 1983); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 522 (Mass. 1993); Helena v. State, 769 P.2d 684, 691 (Mont. 1989); Robinson v. Cahill, 303 A.2d 273, 297-98 (N.J. 1973); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989); Pauley v. Kelly, 255 S.E.2d 859, 865 n.7 (W. Va. 1979); Washakie County Sch. Dist. v. Herschler, 606 P.2d 310, 336 (Wyo. 1980).

164. 411 U.S. 1, 23-24 (1973).

165. *See supra* note 161.

166. *Id.*

167. McDaniel v. Thomas, 285 S.E.2d 156, 160 (Ga. 1981); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 764 (Md. 1983); Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 363 n.3 (N.Y. 1982); Coalition for Equitable Sch. Funding, Inc. v. State, 811 P.2d 116, 117 (Or. 1991).

School District No. 66 v. Bishop[168] the Supreme Court of Arizona recognized tangible harm resulting to children in poorer school districts because of inadequate funding for facilities:

> There are disparities in the number of schools, their condition, their age, and the quality of classrooms and equipment. Some districts have schoolhouses that are unsafe, unhealthy, and in violation of building, fire, and safety codes. Some districts use dirt lots for playgrounds. There are schools without libraries, science laboratories, computer rooms, art programs, gymnasiums, and auditoriums. But in other districts, there are schools with indoor swimming pools, a domed stadium, science laboratories, television studios, well stocked libraries, satellite dishes, and extensive computer systems.[169]

Courts in more recent school funding opinions have increasingly focused on the tangible harm to students resulting from inadequate funding.[170] Rather than limiting their consideration to the statistical data discussed in many of the prior cases, these courts have more thoroughly examined the daily realities of children attending poorer schools in comparison to the circumstances of children in wealthier schools in the state. This examination may include a review of the quality of curriculum, teaching staff, facilities, extracurricular offerings and other academic inputs.[171] Nonetheless, despite allegations of educational harm to children, many courts have denied relief to plaintiffs who allege only a relative, rather than an absolute, deprivation of education opportunity.[172]

C. Challenges Based on Equal Protection Guarantees

After a 1965 article by Dr. Arthur Wise suggested that school funding challenges might be based on equal protection guarantees,[173]

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168. 877 P.2d 806 (Ariz. 1994).

169. *Id.* at 808.

170. Cases demonstrating this focus include Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 489-90 (Ark. 2002); *Roosevelt*, 877 P.2d at 808; Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 197 (Ky. 1989); Helena v. State, 769 P.2d 684, 687 (Mont. 1989), *opinion amended by* Helena Elementary Sch. Dist. v. State, 784 P.2d 412 (Mont. 1990); Bismarck Pub. Sch. Dist. v. State, 511 N.W.2d 247, 261 (N.D. 1994); Abbott v. Burke, 575 A.2d 359, 395 (N.J. 1990); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 144 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989).

171. For example, Abbott v. Burke, 575 A.2d 359, 394 (N.J. 1990), contains an extensive account of the disparities in New Jersey schools.

172. *See* Milliken v. Green, 212 N.W.2d 711, 716 (Mich. 1973) (no total exclusion of plaintiffs from benefits); Bd. of Educ., v. Nyquist, 439 N.E.2d 359, 363 (N.Y. 1982) (plaintiffs do not allege denial of a minimum standard of education); Fair School Fin. Council v. State, 746 P.2d 1135, 1144 (Okla. 1987) (plaintiffs do not allege an absolute denial of education); Danson v. Casey, 399 A.2d 360, 365 (Pa. 1979) (plaintiffs do not allege denial of a minimal education). Olsen v. State, 554 P.2d 139, 145 (Or. 1976) (no total deprivation of educational opportunity found).

173. Robert E. Lindquist, Busé *v. School Finance Reform: A Case Study of the Doctrinal, Social, and Ideological Determinants of Judicial Decisionmaking*, 1978 WIS. L. REV. 1071, 1075,

school funding equity advocates initiated litigation based on this theory[174] and, in 1971, the *Serrano* Court held that inequities in the state's system of public school funding violated the equal protection clause of the U.S. Constitution.[175] After the U.S. Supreme Court's decision in *Rodriguez* put an end to claims based on the federal constitution, the Supreme Court of California, in 1976, revived equal protection claims in *Serrano II*, holding that continuing inequities in the funding system violated equal protection provisions of the state constitution.[176] Despite many declarations that equal protection challenges have been entirely displaced by subsequent "adequacy" litigation, equal protection claims continue to be an important part of the school funding litigation landscape.[177]

Most state constitutions contain express guarantees of equality,[178] but the equality provisions contained in the states' bills of rights "are among the most diverse guarantees found in American constitutions."[179] Despite wide variations in specific constitutional language and history, the analyses of equal protection challenges in school funding cases have been largely uniform because of the

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n.8 (1978) (citing Arthur Wise, *Is Denial of Equal Educational Opportunity Constitutional?* 13 ADMIN. NOTEBOOK 1 (1965)).

174. Equal protection challenges have been based on both the federal and state constitutional provisions guaranteeing equal protection of the laws. Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1216-21 (1985).

175. 487 P.2d 1241, 1244 (Cal. 1971).

176. Serrano v. Priest (*Serrano II*), 557 P.2d 929, 957-58 (Cal. 1976).

177. Funding cases continue to include allegations based on state and federal equal protection provisions. *See* Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 477 (Ark. 2002) (alleging violations of equality provisions in the Arkansas state constitution); Campaign for Fiscal Equity v. State, 801 N.E.2d 326, 328 (N.Y. 2003) (plaintiffs contested school funding as constitutionally inadequate and court reiterated its rejection of an equal protection argument); Tenn. Small Sch. v. McWherter, 851 S.W.2d 139, 140 (Tenn. 1993) (alleging violations of equality provisions in the Tennessee state constitution). State constitutional challenges based on equal protection provisions have enjoyed significant success. Since 1970, more than 250 published opinions have held that federal constitutional minimums were insufficient to satisfy the requirements of their states" constitutions. 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.L. & EDUC. 219, 227 (1990). If state constitutions were interpreted as guaranteeing no greater rights than the federal Constitution, these guarantees would be largely superfluous since states are prohibited from falling below federal Constitutional minimums. *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (discussing state constitutions that have extended to their citizens greater protections than the federal constitution).

178. THE AMERICAN BENCH—1985/86 2491 (1986) ("[S]even states have no express equality guarantee in their individual rights provisions: Del., Minn., Miss., Neb., Okla., R.I. (cf. Art. I, § 2), and Tenn.").

179. *Id.* at 2492 (providing a table categorizing the provisions of state equal treatment guarantees).

pervasive influence of the federal model.[180] The issues generally considered are: (1) whether education is a fundamental right; (2) whether the plaintiffs constitute a suspect class; (3) what level of judicial scrutiny is appropriate in reviewing the state's system of funding; and (4) whether the state has an appropriate justification for inequities in the public school funding system.

A state court's decision about whether education is a fundamental right is significant because it means that the court will likely apply strict scrutiny to state action impinging on that right.[181] In *San Antonio v. Rodriguez,* the U.S. Supreme Court applied an explicit-implicit test of fundamentality that assessed "whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[182] Since there is no mention of education in the U.S. Constitution, the Court in *Rodriguez* concluded that education was not a fundamental right.[183]

Because state constitutions expressly provide for state support of education,[184] the *Rodriguez* explicit-implicit test suggests that education is a fundamental right in all states. Most state courts have rejected the *Rodriguez* test of fundamentality in school funding cases, however.[185] The Supreme Court of California, for example, views as

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180. For cases following the federal model of equal protection analysis, see Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973); Serrano v. Priest (*Serrano* I), 487 P.2d 1241, 1244 (Cal. 1971); Lujan v. Colo. St. Bd. of Educ., 649 P.2d 1005, 1014 (Colo. 1982); Horton v. Meskill, 376 A.2d 359, 371-73 (Conn. 1977); McDaniel v. Thomas, 285 S.E.2d 156, 167 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635, 641 (Idaho 1975); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 781 (Md. 1983); Bd. of Educ. v. Walter, 390 N.E.2d 813, 816-22 (Ohio 1979); Fair Sch. Fin. Council v. State, 746 P.2d 1135, 1143-47 (Okla. 1987); Pauley v. Kelly, 255 S.E.2d 859, 863-78 (W. Va. 1979); Kukor v. Grover, 436 N.W.2d 568, 579-83 (Wis. 1989); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 332-35 (Wyo. 1980). For cases rejecting this approach, see Robinson v. Cahill, 303 A.2d 273, 277-78 (N.J. 1973); Olsen v. State, 554 P.2d 139, 142-48 (Or. 1976).

181. *But see* Shofstall v. Hollins, 515 P.2d 590, 592-93 (Ariz. 1973) (holding that education is a fundamental right but applying a rational basis test); Kukor v. Grover, 436 N.W.2d 568, 579 (Wis. 1989) (same). The method used by the Supreme Court of Arizona in *Shofstall* was later criticized by the Supreme Court of Arizona. Roosevelt Elementary Sch. District No. 66 v. Bishop, 877 P.2d 806, 811 (Ariz. 1994) ("We do not understand how the rational basis test can be used when a fundamental right has been implicated. They seem to be mutually exclusive. If education is a fundamental right, the compelling state interest test (strict scrutiny) ought to apply." (citing Kenyon v. Hammer, 688 P.2d 961, 975 (Ariz. 1984))).

182. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

183. *Id.* at 37.

184. William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation,* 75 VA. L. REV. 1639, 1661 (1989).

185. For cases expressly rejecting the *Rodriguez* explicit-implicit test of fundamentality, see Serrano v. Priest (*Serrano II*), 557 P.2d 929, 952 (Cal. 1976); Lujan v. Colo. St. Bd. of Educ., 649 P.2d 1005, 1017 (Colo. 1982); Thompson v. Engelking, 537 P.2d 635, 644 (Idaho 1975); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 784-85 (Md. 1983); Robinson v. Cahill, 303 A.2d 273, 283 (N.J. 1973); Bd. of Educ. v. Walter, 390 N.E.2d 813, 818 (Ohio 1979); Fair Sch. Fin.

fundamental those interests that "because of their impact on those individual rights and liberties which lie at the core of our free and representative form of government, are properly considered 'fundamental.' "[186]

Even if a court determines that education is not a fundamental right, plaintiffs may nonetheless obtain strict scrutiny review if they constitute a suspect class.[187] Suspect classes are traditionally "those based on race, alienage, and national origin."[188] Though at least two courts in the school funding context[189] have accepted Justice Marshall's argument that "[p]ersonal poverty may entail much the same social stigma as historically attached to certain racial or ethnic groups,"[190] it is likely that the majority of courts will continue to reject it.[191] Recognizing poverty as a suspect classification may implicate other areas of social welfare legislation, with the possibility of opening the floodgates of litigation in these politically volatile areas. In equal protection analysis, the level of scrutiny applied to state action is generally determinative of the outcome.[192] Therefore, deciding whether education is a fundamental right or whether the plaintiffs

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Council v. State, 746 P.2d 1135, 1149 (Okla. 1987); Olsen v. State, 554 P.2d 139, 145 (Or. 1976) (application of the *Rodriguez* test in Oregon would make "liquor by the drink" a fundamental right). Note also that the Supreme Court of New Jersey in *Robinson* rejected the entire framework of federal equal protection analysis, making a decision on fundamentality unnecessary. Instead, the court adopted a balancing test for analyzing equal protection claims. Under the *Robinson* test, "the court weighs the detriment to the education of the children of certain districts against the ostensible justification for the scheme of school financing. If the court determines the detriment is much greater than the justification, the financing scheme violates the guarantee of equal protection." Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973); *see also* Olsen v. State, 554 P.2d 139, 145 (Or. 1976) (adopting the *Robinson* test).

186. *Serrano II*, 557 P.2d at 952.

187. *See* Julius Menacker, *Poverty as a Suspect Class in Public Education Equal Protection Suits*, 54 EDUC. L. REP. 1085, 1094-95 (1989) (suggesting that poverty may be a class entitled to strict scrutiny review).

188. BLACK'S LAW DICTIONARY 1297 (5th ed. 1979).

189. *See Serrano II*, 557 P.2d at 951 (recognizing discrimination on the basis of wealth involved a suspect classification and that education was a fundamental interest); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 334 (Wyo. 1980) (noting that classification on the basis of wealth is suspect, "especially when applied to fundamental interests").

190. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 121 (1974) (Marshall, J., dissenting).

191. *E.g.*, Lujan v. Colo. St. Bd. of Educ., 649 P.2d 1005, 1021 (Colo. 1982); Thompson v. Engelking, 537 P.2d 635, 645-46 (Idaho 1975); Hornbeck v. Somerset Bd. of Educ., 458 A.2d 758, 787 (Md. 1983).

192. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring, suggesting that strict scrutiny may be "strict in theory, but fatal in fact"). *But see* Adarand v. Pena, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory but fatal in fact.' ").

constitute a suspect class is a critical issue,[193] at least where the court follows the federal model of equal protection analysis.[194]

States attempt to justify their current funding systems by arguing that it is necessary to preserve local control over education.[195] If a court is applying strict scrutiny, then the state will need to demonstrate that this interest is compelling, and the state will generally fail to meet this heavy burden.[196] Even in the cases in which courts have applied intermediate scrutiny, states have had difficulty passing muster.[197] When courts have applied a rational basis test, not all courts have accepted the defense of preserving local control as sufficient justification for funding inequities. [198]

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193. For a case expressly ruling that education is a fundamental right, see Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973). *But see* Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 811 (Ariz. 1994) (declining to decide whether education is a fundamental right under the state's constitution)); Serrano v. Priest (*Serrano II*), 557 P.2d 929, 951 (Cal. 1976); Serrano v. Priest (*Serrano I*), 487 P.2d 1241, 1244 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977); Rose v. Council for Better Educ., Inc. 790 S.W.2d 186, 192 (Ky. 1989); Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993); Bismarck Pub. Sch. Dist. v. State, 511 N.W.2d 247, 256 (N.D. 1994); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979); Kukor v. Grover, 436 N.W.2d 568, 579 (Wis. 1989); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 333 (Wyo. 1980). For cases expressly rejecting education as a fundamental right, see Lujan v. Colo. St. Bd. of Educ., 649 P.2d 1005, 1017 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156, 167 (Ga. 1981); Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 733 (Idaho 1993); Thompson v. Engelking, 537 P.2d 635, 647 (Idaho 1975); Gould v. Orr, 506 N.W.2d 349, 350 (Neb. 1993); Fair Sch. Fin. Council, Inc. v. State, 746 P.2d 1135, 1149 (Okla. 1987).

194. A determination of fundamentality is unnecessary under the *Robinson* balancing test. Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973). For cases adopting the *Robinson* test, see Bd. of Educ. v. Walter, 390 N.E.2d 813, 818 (Ohio 1979); Olsen v. State, 554 P.2d 139, 145 (Or. 1976).

195. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 51-53 (1973).

196. *See* Serrano v. Priest (*Serrano I*), 487 P.2d 1241, 1260 (Cal. 1971) (rejecting decentralization rationales to justify state's funding system); Horton v. Meskill, 376 A.2d 359, 374 (Conn. 1977) (applying a test of "strict judicial scrutiny" to the state's educational framework). *But see* Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994) (finding that the state's system of funding withstood strict scrutiny review).

197. *E.g.*, Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 259 (N.D. 1994). *But see* Hornbeck v. Somerset, 458 A.2d 758, 788 (Md. 1983) (noting that Maryland's system of public school funding would withstand intermediate scrutiny of meeting legislative goals, but rejecting intermediate scrutiny in favor of a rational basis test).

198. *Compare* DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983) (rejecting the rationale of local control as justification for funding disparities and holding that the Arkansas system of school funding failed even a rational basis test), Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 156 (Tenn. 1993) (holding that public school funding systems failed even a rational basis test), *and* Bismarck v. State, 511 N.W.2d 247, 260-61 (N.D. 1994) (applying intermediate scrutiny and rejecting the state's rationale of local control, holding that local control in North Dakota "is undercut and limited by the legislature's enactment of requirements for statewide uniformity of education"), *with* Lujan v. Colo. St. Bd. of Educ., 649 P.2d 1005, 1023 (Colo. 1982) (finding the funding system to be constitutional as rationally related to a legitimate state purpose), McDaniel v. Thomas, 285 S.E.2d 156, 167-68 (Ga. 1981) (applying a rational basis test and upholding the state's educational funding system), Hornbeck v. Somerset, 458 A.2d 758, 789 (Md. 1983) (holding that Maryland's school finance system satisfied the rational basis test),

Most courts that have overturned a state's system of school funding have been highly critical of the position that local control justifies educational funding inequities. The Supreme Court of California in *Serrano II* described this rationale as a "cruel illusion" which, far from being necessary to promote local control, "actually deprives the less wealthy districts of the option."[199] The Supreme Court of Arkansas agreed, adding that "to alter the state financing system to provide greater equalization among districts does not in any way dictate that local control must be reduced."[200] The Supreme Court of Texas likewise stated that improved equity "will actually allow for more local control, not less. It will provide property-poor districts with economic alternatives that are not now available to them. Only if alternatives are indeed available can a community exercise the control of making choices."[201] Not surprisingly, courts upholding a funding system are less critical of the state's position, pointing out that statutes reviewed under the rational basis standard are presumed valid and agreeing that local control is a legitimate state purpose that the school funding system furthers.[202]

D. Education Article Challenges

As explained above, the Supreme Court of New Jersey gave new hope to funding plaintiffs stung by the *Rodriguez* decision in ruling that the state's funding system was unconstitutional.[203] All states have constitutional provisions describing the state's role in supporting public education, and state education articles continue to

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Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 366 (N.Y. 1982) (holding that New York's system met the rational basis test), Bd. of Educ. v. Walter, 390 N.E.2d 813, 821 (Ohio 1979) (concluding that Ohio had a rational basis for its funding plan), Olsen v. State, 554 P.2d 139, 146-47 (Or. 1976) (noting the legislature's desire not to centralize educational funding issues under state control), Danson v. Casey, 399 A.2d 360, 367 (Pa. 1979) (holding that Pennsylvania's system had a "reasonable relation" to "its constitutional duty to the public school students of Philadelphia"), *and* Kukor v. Grover, 436 N.W.2d 568, 580-81 (Wis. 1989) (applying the rational basis test in finding that Wisconsin's approach was constitutional).

199. Serrano v. Priest (*Serrano II*), 557 P.2d 929, 948 (Cal. 1976) (quoting *Serrano I*, 487 P.2d at 1260.

200. DuPree Sch. Dist. No. 30 v. Alma School Dist., 651 S.W.2d 90, 93 (Ark. 1983).

201. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 398 (Tex. 1989)*; see also* Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 690 (Mont. 1989) (noting that the current system restricted options); Tenn. Small Sch. Sys. v. WcWherter, 851 S.W.2d 139, 154 (Tenn. 1993) (rejecting the benefits of local control as providing a rational basis for funding discrepancies); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 260-61 (N.D. 1994) (noting that North Dakota's "present method of distributing funding for education fails to offer any realistic local control to many school districts . . .").

202. *See, e.g.*, Lujan v. Colo. St. Bd. of Educ., 649 P. 2d 1005, 1022-25 (Colo. 1982).

203. Robinson v. Cahill, 303 A.2d 273 (N.J. 1973).

provide a successful tool for constitutional challenges to school funding inequities.[204]

Legal scholars have suggested that education articles can be divided into a four-part framework based on the apparent strength of the constitutional language.[205] Under this framework, Category I clauses impose only a minimal educational obligation on the state,[206] Category II clauses impose a slightly higher duty requiring a certain minimum standard of quality,[207] Category III clauses contain stronger and more specific mandates,[208] and Category IV clauses impose the highest level of state obligation.[209] In theory, the likelihood that a state's system of funding will be overturned is the lowest in Category I and the highest in Category IV; yet a review of the decisions reveals no such consistent pattern.[210]

To resolve education article challenges, courts first interpret the meaning of the education article, next determine the magnitude of the state's constitutional duty to support education, and finally decide whether the state has met that obligation. Although there are wide variations in judicial interpretations of constitutional language, there is some measure of consistency regarding the methodology of interpretation. Courts typically attack the problem by considering the plain meaning of the constitutional language,[211] analyzing

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204. For a listing of the specific language found in the education clauses of all states, see Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 134-40 (1989).

205. Thro, *supra* note 184, at 1661.

206. State constitutions with Category I clauses are: ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; CONN. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; KAN. CONST. art. VI, § 1; LA. CONST. art. VIII, § 1; MISS. CONST. art. VIII, § 201; NEB. CONST. art. VII, § 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; OKLA. CONST. art. XIII, § 1; S.C. CONST. art. XI, § 3, UTAH CONST. art. X, § 1; VT. CONST. ch. 2. § 68.

207. State constitutions with Category II clauses are: ARK. CONST. art. XIV, § 1; COLO. CONST. art. IX, § 2; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; KY. CONST. § 183; MD. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; MONT. CONST. art. X, § 1; N.J. CONST. art. VIII, § 4; N.D. CONST. art VIII, § 1; OHIO CONST. art. VI, § 3; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; VA. CONST. art. VIII, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3.

208. State constitutions with Category III clauses are: CAL. CONST. art. IX, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2d, § 3; MASS. CONST. pt. 2, ch. 5, § 2; NEV. CONST. art. XI, § 2; R.I. CONST. art. XII, § 1; S.D. CONST. art. VIII, § 1; WYO. CONST. art. VII, § 1.

209. State constitutions with Category IV clauses are: GA. CONST. art. VIII, § 1; ILL. CONST. art. X, § 1; ME. CONST. art. VIII, pt. 1, § 1; MICH. CONST. art. VIII, § 2; MO. CONST. art. IX, § 1(a); N.H. CONST. pt. 2, art. LXXXIII; WASH. CONST. art. IX, § 1.

210. *See* John Dayton, Serrano *and Its Progeny: An Analysis of 30 Years of School Funding Litigation,* 157 EDUC. L. REP. 447, 456-57 (2001) (comparing the predicted theoretical outcomes of cases with actual outcomes and finding no consistent pattern).

211. For cases using the plain meaning mode of analysis, see Hornbeck v. Somerset, 458 A.2d 758, 776 (Md. 1983); Helena Elementary Sch. Dist. v. State, 769 P.2d 684, 689 (Mont. 1989),

constitutional debates and early legislative construction,[212] and reviewing how other courts have interpreted similar language.[213] Most courts seem to favor the historical approach,[214] but some courts use a combination of these methods.[215]

Once a court decides what the constitutional language means, it must determine the extent of the legislature's duty to support education. The court's decision regarding the extent of the legislative duty is often the key to the outcome. Determining whether the state has met its constitutional duty involves measuring the factual findings regarding the state's funding system against the constitutional duty as interpreted by the court. Courts that find high levels of legislative duty are more likely to find that the constitution prohibits significant funding disparities,[216] and courts that find

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amended by 784 P.2d 412 (Mont. 1990); Fair Sch. Fin. Council v. State, 746 P.2d 1135, 1149 (Okla. 1987); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989); Scott v. Commonwealth, 443 S.E.2d 138, 141 (Va. 1994); Kukor v. Grover, 436 N.W.2d 568, 574 (Wis. 1989).

212. For cases using the historical mode of analysis, see Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 812 (Ariz. 1994); Lujan v. Colo. St. Bd. of Educ., 649 P.2d 1005, 1011 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156, 163 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635, 641 (Idaho 1975); Rose v. Council for Better Educ., Inc. 790 S.W.2d 186, 205 (Ky. 1989); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 523 (Mass. 1993); Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1377 (N.H. 1993); Robinson v. Cahill, 303 A.2d 273, 287 (N.J. 1973); Board of Educ., v. Nyquist, 439 N.E.2d 359, 368 (N.Y. 1982); Bd. of Educ. v. Walter, 390 N.E.2d 813, 820 (Ohio 1979); Danson v. Casey, 399 A.2d 360, 367 (Pa. 1979); Richland Co. v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988); Seattle School Dist. No. 1 v. State, 585 P.2d 71, 85 (Wash. 1978); Pauley v. Kelly, 255 S.E.2d 859, 866 (W. Va. 1979).

213. *See, e.g.*, DuPree v. Alma Sch. Dist., 651 S.W.2d 90, 92-93 (Ark. 1983); *Rose*, 790 S.W.2d at 210; Hornbeck v. Somerset, 458 A.2d 758, 777 (Md. 1983); Pauley v. Kelly, 255 S.E.2d 859, 866 (W. Va. 1979).

214. Some courts have included an extensive historical analysis in their opinions. *See McDuffy*, 615 N.E.2d at 523-47; *Claremont Sch. Dist.*, 635 A.2d at 1377.

215. For courts using multiple modes of analysis, see *Rose*, 790 S.W.2d at 205, 210; Hornbeck v. Somerset Bd. of Educ., 458 A.2d 758, 776-80 (Md. 1983); Skeen v. State, 505 N.W.2d 299, 308-19 (Minn. 1993); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 150-51 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 394-98 (Tex. 1989); Pauley v. Kelly, 255 S.E.2d 859, 866-78 (W. Va. 1979); Kukor v. Grover, 436 N.W.2d 568, 574-86 (Wis. 1989).

216. *See Robinson*, 303 A.2d at 295, 297 (finding that a disparity in expenditures violated the constitutional mandate and that education funding was a state legislative responsibility, not a local responsibility); *Seattle Sch. Dist. No. 1*, 585 P.2d at 92 (holding that the legislature has a paramount duty to support education and that children have a right to be amply provided with an education); *Rose*, 790 S.W.2d at 205 (holding that the legislature has the sole obligation to provide for education throughout the state by appropriate legislation and that the system must be an efficient one); *Edgewood Indep. Sch. Dist.*, 777 S.W.2d at 396-97 (holding that large disparities in funding are prohibited by the constitution and that the legislature must devise a system which correlates tax efforts and educational resources).

relatively low levels of legislative duty generally determine that the constitution allows broad legislative discretion in school funding.[217]

E. A Bold Enfilade? Discrimination, Adequacy, and Accountability

Scholars who describe the evolution of school funding litigation have provided some useful models for understanding its complexities, including innovative attempts to fit this diverse collection of state constitutional provisions and judicial decisions into orderly categories.[218] But to classify these in this manner, it becomes necessary to "round the corners" so the data will fit the theoretical framework.[219] The problem with this method is that the more the corners are rounded, the less the end result will resemble the more complex reality it attempts to describe. Nonetheless, it is possible to accurately identify some general trends. Although school funding litigation continues to focus on state equal protection and education provisions, other theories have emerged, including claims based on racial discrimination under a federal statute and claims that focus on educational adequacy and accountability.

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217. *See McDaniel*, 285 S.E.2d at 165 (the constitution requires only an adequate education and basic educational opportunity); *Hornbeck*, 458 A.2d at 780 (rejecting mathematical equality in school funding); *Nyquist*, 439 N.E.2d at 369 (requiring only a sound basic education); *Walter*, 390 N.E.2d at 824-825 (granting the legislature wide discretion in school funding, limited only where a student is effectively deprived of educational opportunity); *Fair Sch. Fin. Council*, 746 P.2d at 1149 (the constitution requires only a basic, adequate education); *Campbell*, 364 S.E.2d at 472 (the legislature is free to choose the method of school funding).

218. Thro, *supra* note 184, at 1661.

219. To bring theoretical order to the complexity of reality, it often becomes necessary to impose some artificial constructs and compromises on the subject of study. But there is always a danger that the attempt to explain reality may be confused with the infinitely more complex reality itself. Theories are meant to explain reality, but reality rarely fits perfectly with the theory. For example, in 1989, a year recognized by many scholars as marking the shift from "equity" cases to the new "adequacy" cases, plaintiffs did not suddenly stop making equity arguments and focus exclusively on adequacy in their pleadings. To the contrary, plaintiffs in this area of litigation commonly continued to make both equity and adequacy arguments in their pleadings. Further, despite the U.S. Supreme Court's decision in *Rodriguez*, plaintiffs continued to include arguments based on the equal protection clause of the Fourteenth Amendment in school funding cases. Nor was the "adequacy" movement a new idea, but was instead a revival of arguments made by legal aid lawyers in the 1960s. *See* Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future, in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUE AND PERSPECTIVES 34, 47 (Helen F. Ladd et al. eds., 1999) ("Quite plainly, the new 'adequacy' approach is an important revival, in state court, of the legal aid lawyers' 'needs-based' claims of the late 1960s."). The reality is always infinitely more complex than the theories in this area of litigation. Accordingly, care should be taken to not give the impression that more than three decades of intense litigation can be easily explained by helpfully clear, but deceptively too simple, theories explaining this litigation.

1. Title VI and Discriminatory Effect

Funding plaintiffs in New York advanced a theory based on Title VI of the Civil Rights Act of 1964 with some initial success. Title VI Section 601 provides: "No person . . . shall, on the ground of race, color, or national origin, be excluded from preparation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[220] In 1995, in *Campaign for Fiscal Equity v. State (CFE I)*, New York's highest court ruled that under Title VI regulations, proof of discriminatory effect sufficed to establish liability and that the funding plaintiffs had established a cause of action under the regulations for Title VI.[221] In a subsequent trial, the judge ruled in favor of the plaintiffs,[222] but in 2001, in *Campaign for Fiscal Equity v. State (CFE II)*, a New York appellate court overturned *CFE I*.[223] The *CFE II* court explained why the funding plaintiffs no longer had a cause of action based on the Title VI regulations:

> Section 602 of Title VI . . . authorizes Federal agencies to "effectuate the provisions of [this Title] by issuing rules, regulations, or orders of general applicability." Pursuant to that authority [the U.S. Department of Education] has promulgated a regulation prohibiting a recipient of Federal financial assistance from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." (34 C.F.R. 100.3(b)(2))
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> [T]itle VI itself only prohibits intentional discrimination (of which there is no allegation in this case), and plaintiffs concede that, under the recent U.S. Supreme Court decision in *Alexander v. Sandoval* (532 U.S. 275) there is no private right of action under the implementing regulations, since the empowering statute reveals no Congressional intent to create one. Nevertheless, plaintiffs argue that they may still enforce the regulations through 42 U.S.C. § 1983, which provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by anyone acting "under the color of any statute, ordinance, regulation, custom, or usage, of any State."[224]

The court pointed out that the "law" that gives rise to a Section 1983 claim generally means a statute. "[R]egulations, standing alone, are not 'laws' within the meaning of § 1983."[225] The U.S. Supreme Court has determined that a regulation may have the force of law under certain conditions:

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220. 744 N.Y.S.2d 130, 146 (N.Y. App. Div. 2002) (citing 42 U.S.C. § 2000d (2002)).
221. 655 N.E.2d 661, 669-70 (N.Y. 1995).
222. 719 N.Y.S.2d 475, 541 (N.Y. Sup. Ct. 2001).
223. 744 N.Y.S.2d 130, 148 (N.Y. App. Div. 2002).
224. *Id.*
225. *Id.*

> [A] regulation may have the "force and effect of law" if: (1) it is substantive (a legislative-type rule that affects individual rights and obligations, rather than interpretive, a general statement of policy or a procedural agency rule); (2) it is promulgated by an agency pursuant to a Congressional grant of quasi-legislative authority; and (3) the promulgation of the regulation conforms with any procedural requirements imposed by Congress.[226]

The only other court to rule on this specific issue had determined that there was no cause of action for a violation of the Title VI implementing regulations because "they do not merely define a right Congress already conferred by statute, but rather 'give the statute a scope beyond that Congress contemplated.' "[227] The New York court agreed with that analysis and dismissed the Section 1983 claim. Although New York's highest court reversed the appellate court's decision on other grounds, it affirmed the decision to dismiss the plaintiffs Title VI claim.[228] What began as a promising theory for funding plaintiffs no longer looks very promising.

2. Adequacy Standards

Law and finance scholars have documented a trend in school funding cases that has moved from a focus on equity to an increased focus on adequacy in funding litigation.[229] Although the U.S. Supreme Court's decisions in school funding have generally disappointed plaintiffs, a seed that was planted in the opinions has produced some fruit. In 1986, in *Papasan v. Allain*,[230] school officials and children in twenty-three Mississippi school districts claimed that they were being denied the economic benefit of public school land grants and that this violated the federal Constitution's equal protection clause.[231] The trial court granted the defendants' motion to dismiss based on *Rodriguez*, and the Fifth Circuit affirmed.[232] The Supreme Court vacated the dismissal and remanded the case.[233]

The Court noted that although the *Rodriguez* Court had decided that education was not a fundamental right, it had not foreclosed "the possibility that some identifiable quantum of education

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226. *Id.* at 147.

227. *Id.* at 148 (citing S. Camden Citizens in Action v. N.J. Dept. of Envtl. Prot., 274 F.3d 771, 788-90 (3d Cir. 2001)).

228. Campaign for Fiscal Equity v. State, 801 N.E.2d 326, 369 (2003).

229. *See, e.g.*, Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 175, 175 (Helen F. Ladd et al. eds., 1999).

230. 478 U.S. 265, 267-68 (1986).

231. *Id.* at 267.

232. *Id.* at 275.

233. *Id.* at 276.

is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote]."[234] The Court also cited *Plyler*, stating that while "the Court did not . . . measurably change the approach articulated in *Rodriguez* . . . it [nevertheless] concluded that the justifications for the discrimination offered by the State were wholly insubstantial in light of the costs involved to these children, the State, and the Nation."[235] Moreover, "*Rodriguez* did not . . . purport to validate all funding variations that might result from a State's public school funding decisions. It merely held that the variations that resulted from allowing local control over local property tax funding of the public schools were constitutionally permissible in that case."[236]

The Court also pointed out that it had "not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review."[237] Because the plaintiffs in *Papasan* were not alleging a denial of a minimally adequate education, the Court remanded the case for a determination whether the Mississippi system was rationally related to a legitimate governmental interest—a relatively easy burden of proof for the state to meet.[238]

Although the *Papasan* plaintiffs did not prevail on their claim, the *Papasan* Court signaled that obtaining a minimally adequate education mattered for the purposes of the federal Constitution, and subsequently, adequacy litigation in state courts has taken on a life of its own. Indeed, the increased focus on adequacy in providing public education is one of the more significant developments in funding litigation in recent years.[239] Unlike *Serrano*-model equity plaintiffs, who focus on equity in expenditures, adequacy plaintiffs focus more on meeting state standards and whether the state provides an "adequate education."[240]

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234. *Id.* at 284 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 (1973)).

235. *Id.* at 285 (citing Plyler v. Doe, 457 U.S. 202, 230 (1982)).

236. *Id.* at 287.

237. *Id.* at 285; *see also* Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 466 n.1 (1988) (Marshall, J., dissenting) (noting that the question of whether denial of access to a minimally adequate education violates the protections of the U.S. Constitution remains open).

238. *Id.* at 289.

239. *See* Minorini & Sugarman, *supra* note 229, at 175 (describing the spread of the adequacy movement).

240. *See* James W. Guthrie & Richard Rothstein, *Enabling "Adequacy" to Achieve Reality: Translating Adequacy into State School Finance Distribution Arrangements*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 209, 209 (Helen F. Ladd et al.

Every new innovation brings with it both advantages and disadvantages. One advantage of the adequacy-based claim is that, if successful, it can promote access to the educational resources that are necessary to provide an adequate education for every child regardless of per-pupil expenditures, while still permitting local discretion to exceed the minimums of educational adequacy. One disadvantage is that cases that focus on adequacy lack the judicially manageable standard of fiscal equity, and judges in these cases find themselves in murky waters when they try to define what constitutes an "adequate" education.

Some judges have set forth detailed conditions that are required for an adequate education under their state's constitution.[241] Others have declined to issue explicit substantive mandates but have instead ordered the general assembly to (1) consider what constitutes an adequate education under their state's constitution; and (2) design a funding system to assure that sufficient resources are available to fund this adequate education for all children. For example, the Supreme Court of Wyoming declared the state funding system unconstitutional and ordered the legislature to "first design the best educational system by identifying the 'proper' educational package each Wyoming student is entitled to have" and then, after the cost of that educational package is determined, "take the necessary action to fund that package."[242] Although the latter approach has the virtue of avoiding direct substantive mandates to the legislature concerning education policy, there is little guidance for the legislature concerning what the court would deem a constitutionally adequate education. Further, the legislature may simply determine that the status quo is "adequate," thereby forcing the court to either defer completely to the legislature concerning what constitutes an "adequate" education or to retroactively establish a new judicially approved substantive standard, likely prompting charges of judicial activism and interference.

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eds., 1999) (describing state court decisions that suggest that adequacy is the proper standard for school funding cases).

241. *See* Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979) (In defining a thorough and efficient education, the court included in its "legally recognized elements of this definition" the development of every child's capacity related to: (1) literacy; (2) mathematics; (3) government; (4) environmental and self-knowledge; (5) academic and work-training; (6) recreation; (7) creative arts; and (8) socialization skills.); *see also supra* text accompanying note 122 (describing Kentucky's requirements for an adequate education).

242. Campbell Co. Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995).

Courts in all fifty states recognize the importance of respecting the limits of judicial competence and authority.[243] Judges that issue "command-and-control" orders from the bench provoke critical questions related to their judicial competence and authority to make such detailed education policy and administration decisions. Dissenting opinions in these cases often express serious concerns about whether judges are qualified to make these kinds of education policy decisions and whether these judges have the authority to foist their own policy preferences on the legislative and administrative branches. Indeed, most judges have no special expertise in education, and they were not elected to make education policy decisions. But it can also be argued that inadequate judicial guidance may unnecessarily prolong a state's efforts to comply with constitutional mandates, as members of the legislative and administrative branches must guess at what the court will deem a constitutionally adequate education. Heated debate continues concerning whether judicial declarations expressly outlining an adequate education exceed judicial authority or whether failure to set clear judicial standards when ordering a remedy constitutes an abdication of judicial duty.

3. Accountability Standards

The Supreme Court of New Hampshire clearly set out in a new direction when it focused directly on accountability as a constitutional requirement of an adequate education.[244] New Hampshire had been dealing with serial litigation regarding school funding, and two other cases led up to the sea change that occurred in *Claremont III*. In *Claremont I*, the Supreme Court of New Hampshire held that the state constitution "imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire and to guarantee adequate funding."[245] In *Claremont II*, the court held that a state-funded constitutionally adequate education was a fundamental right, any property tax levied to fund education was a state tax, the taxing district was the entire state, and disproportionate local school taxes

243. *See, e.g., Ex parte* James, 836 So. 2d 813, 815 (Ala. 2002) ("This Court 'shall *never* exercise the legislative and executive powers, or either of them.' ALA. CONST. 1901, Art. 3, § 43."); *see also* Dayton, *supra* note 152, at 631, 644 (reviewing judicial opinions concerning separation of powers issues, judicial authority, and judicial competence in school funding cases).

244. Claremont Sch. Dist. v. Governor (*Claremont III*), 794 A.2d 744, 751 (N.H. 2002).

245. 635 A.2d 1375, 1376 (N.H. 1993).

were an unreasonable and unconstitutional means of funding schools.[246]

In *Claremont III,* the court declared that "accountability is an essential component of the State's [constitutional] duty and . . . the existing statutory scheme has deficiencies that are inconsistent with the State's duty to provide a constitutionally adequate education."[247] Accountability means that the State must provide a definition of a constitutionally adequate education, the definition must have standards, and the standards must be subject to meaningful application so that it is possible to determine whether, in delegating its obligation to provide a constitutionally adequate education, the State has fulfilled its duty.[248]

The court emphasized that it was the state's duty, not the duty of local government, to ensure that adequate funding was available to provide a constitutionally adequate education for every student in New Hampshire. The heart of the opinion, however, was the court's statement – in no uncertain terms – that lack of money in a particular school district did not excuse the state from its duty:

> The State's duty cannot be relieved by the constraints of a school district's tax base or other financial condition . . . . [T]he State may not take the position that the minimum standards form an essential component of the delivery of a constitutionally adequate education and yet allow for the financial constraints of a school or school district to excuse compliance with those very standards.[249]

The court held that the state had not met its obligation to develop a system that would make certain that school districts could deliver a constitutionally adequate education.[250] "The purpose of meaningful accountability is to ensure that those entrusted with the duty of delivering a constitutionally adequate education are fulfilling that

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246. 703 A.2d 1353, 1354 (N.H. 1997).

247. 794 A.2d at 745.

248. *Id.* at 751-752, the court explained:

> This view is shared by other jurisdictions. In Massachusetts, for example, in response to *McDuffy* . . . the legislature promulgated a system of accountability whereby the state board of education was given authority to establish specific performance standards and a program of remediation when students' test scores fall below a certain level . . . In Ohio [*DeRolph*, 728 N.E.2d at 1018] the state supreme court stated that "accountability is an important component of the educational system". . . In Tennessee [*Tenn. Small Sch. Sys. McWhether*, 894 S.W.2d 734, 739 (Tenn. 1995)] the state supreme court said that "the essentials of the governance provisions of the [Basic Education Program] are mandatory performance standards; local management within established principles; performance audits that objectively measure results; . . . and final responsibility upon the State officials for an effective educational system throughout the State". . . It is thus widely accepted that establishing standards of accountability is part of the State's duty to provide a constitutionally adequate education.

249. *Id.* at 755.

250. *Id.*

duty."[251] The court concluded, "[T]he State has not provided a sufficient mechanism to require that school districts actually achieve this goal."[252]

The dissenting justices in *Claremont III* stressed the separation of powers theme that appears in many of the school finance cases:

> If individuals believe that the legislative or executive branches are unresponsive to their concerns, they may seek change through the elective or legislative process. It is up to the citizens of New Hampshire to express their views concerning educational policy and funding by electing officials who support those views, and by seeking legislation and administrative rules which implement them . . . The majority speaks in terms of "standards of accountability," reasoning that they are required, in part, because the duty to provide an adequate education is imposed by the constitution. But the constitution imposes many duties upon the State, and the court has never before interpreted it to require the State to adopt specific "standards of accountability" as a prerequisite to fulfilling these duties. We see no reason to require this of the State today with respect to its duty to provide an adequate education . . . The time has come for the supreme court to conclude its jurisdiction over this appeal.[253]

The highest courts in Massachusetts, Ohio, New Jersey, and Tennessee had discussed accountability before *Claremont III* was decided,[254] but the New Hampshire opinion went further, making accountability a central issue.[255] In keeping with the same tone, the Supreme Court of Arkansas also recently recognized a state duty of accountability, as has the New York Court of Appeals.[256]

"Accountability" litigation may be a promising new direction for plaintiffs. From the federal No Child Left Behind Act[257] to similar state legislation, accountability is increasingly a "front-burner" issue, and states may soon be facing a difficult scenario in future school funding cases. If some of the state's school districts consistently score below the state's established achievement standards, plaintiffs will demand more state funding for these schools. If these schools continue to be unable to meet state standards, it will be further evidence that still more resources are required. By accepting, either voluntarily or through judicial order, the premise that the state is accountable for student achievement and that the results of standardized tests are the proper measure of achievement, states may

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251. *Id.* at 758.

252. *Id.*

253. *Id.* at 761-63.

254. *See id.* at 751-52 (listing other states that have recognized "accountability as a logical corollary to the State's duty to provide a constitutionally adequate education").

255. *Id.* at 745.

256. Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 511 (Ark. 2002); Campaign for Fiscal Equity v. State, 801 N.E.2d 326, 345 (N.Y. 2003).

257. P.L. 107-110, 115 Stat. 1425 (2001).

be exposed to potentially open-ended financial liability. As Professor Michael Heise has stated:

> Such policy changes seek to shift school regulation away from the traditional focus on inputs—teacher-to-student ratios, per-pupil spending, number of certified teachers — and toward a focus on performance as the basic metric of education quality. However, in an ironic twist, this output-driven movement has made it easier for activists to appeal to the courts for more inputs. The standards movement enables activists to define adequacy as that level of funding necessary for a school district and its students to meet state education standards. Thus a new wave of litigation may be upon us, one that turns the states' efforts to improve achievement through standards against the state and enables school districts to gain financially from their inability to perform at desired levels. These failures are used in court to bolster legal claims that such schools underachieve because their resources are inadequate and, therefore, unconstitutional.[258]

The problem for the state is that it simply may not have the means to control student achievement to the necessary degree, as many of the factors that affect student achievement are controlled by the child, the parents, and other environmental factors. In contrast to accountability claims, claims based on equity and adequacy had clearer limits on state financial liability. The ceiling for state financial liability in equity suits is generally limited by the level of equality in per-pupil expenditures. Similarly, adequacy suits are limited by a demonstration that the state funding for all schools was at least adequate. But the model embedded in the No Child Left Behind Act and similar state accountability legislation presents no definite upper limit on state financial responsibility when some schools consistently fail to meet state standards. The output-based standards in the new accountability suits may give future school funding plaintiffs the "Midas touch" as they attempt to turn student performance failure into gold.

V. WHO'S WINNING THE WAR?

School funding litigation has received relatively little attention in proportion to the repercussions it has set off in the states. Some of these decisions have had a significant impact on state government, with sweeping consequences for children, parents, schools and taxpayers. For example, in *Rose v. Council for Better Education*,[259] the Supreme Court of Kentucky declared that "the result of our decision is

258. Michael Heise, *Educational Jujitsu*, EDUCATION NEXT, Fall 2002, at 31, 32.

259. 790 S.W.2d 186 (Ky. 1989).

that Kentucky's *entire system* of common schools is unconstitutional."[260] More specifically the court stated:

> This decision applies to the entire sweep of the system — all parts and parcels. This decision applies to the statutes creating, implementing and financing the *system* and to all regulations, etc., pertaining thereto. This decision covers the creation of local districts, school boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. It covers school construction and maintenance, teacher certification — the whole gamut of the common school system in Kentucky.[261]

Because the *Rose* decision addressed taxpayer equity, it has affected students, parents, and every citizen and taxpayer in the state. The court ordered that all property must be assessed at 100 percent of its fair market value and required the legislature to establish a uniform tax rate throughout the state.[262] Thus, the *Rose* decision has affected everyone in Kentucky, from wealthy landowners to less affluent renters.

School funding litigation has prompted major education funding changes, including tax increases and the redirection of billions of dollars in high stakes battles that have extended over decades of serial litigation. Understanding the relevant history and theories underlying school funding cases is necessary to a thorough comprehension of school funding litigation. But a relatively unexplored and revealing window to understanding these cases may be examining judges' views concerning judicial activism and restraint, and whether they believe they should actively enforce the constitution through direct judicial involvement, or instead broadly defer to the legislative branches on politically volatile subjects such as education policy and taxation.

A review of the school funding cases reveals the deep divide between the "activist" judges who push for more direct judicial involvement in education funding and the "deferential" judges who generally reject judicial involvement in school funding disputes. Judicial views between these groups vary dramatically, resulting in heated exchanges.[263] The following section examines some of the

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260. *Id.* at 215.

261. *Id.*

262. *Id.* at 216.

263. *See, e.g.*, DeRolph v. State, 754 N.E.2d 1184, 1188 (Ohio 2001), *rev'd* 758 N.E.2d 1113 (Ohio 2001).

> Since it was first docketed in this court in 1995, this dispute has produced from this court no fewer than three signed majority opinions, a per curiam opinion, eleven separate concurrences and dissents, and a number of rulings on motions filed by plaintiffs and defendants. Every justice of the court has expressed her and his views regarding the constitutional issue that once again is presented for our disposition nearly six years after the court exercised its discretionary jurisdiction to review the

factors that may influence judicial decisions in school funding cases, including an analysis of judicial roles in school funding litigation, the status of federal and state judges, the effects of contemporary economic circumstances, and the political affiliations of judges.

A. The Role of the Judge in School Funding Litigation

Recognizing the limited ability of a court to reform state funding systems, the U.S. Supreme Court in *San Antonio v. Rodriguez* stated,

> At a time when nearly every State and locality is suffering from fiscal undernourishment, and with demands for services of all kinds burgeoning and with weary taxpayers already resisting tax increases, there is considerable reason to question whether a decision of this Court nullifying present state taxing systems would result in a marked increase in the financial commitment to education.[264]

The Court acknowledged that "[t]he need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax . . . But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them."[265] Some state courts have agreed, holding that "such demands cannot be remedied by claims of constitutional discrepancies, but rather must be made to the legislature and, perhaps, also to the community."[266]

Despite the Supreme Court's admonition, the role for the judge in school funding cases is not always clear.[267] Courts commonly

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merits. The written opinions of the justices reflect deeply held beliefs regarding the responsibility of the court as an institution and the principles that define the framework by which each justice decides issues brought to the court. The informal and formal discussions among the justices regarding the jurisdictional and merit issues have been of an intensity and duration unmatched by any other case.

264. 411 U.S. 1, 56 n.111 (1973). The Court qualified this statement by explaining: "These practical considerations, of course, play no role in the adjudication of the constitutional issues presented here. But they serve to highlight the wisdom of the traditional limitations on this Court's function." *Id.* at 58.

265. *Id.* at 58-59.

266. Kukor v. Grover, 436 N.W.2d 568, 585 (Wis. 1989); *see also* McDaniel v. Thomas, 285 S.E.2d 156, 168 (Ga. 1981) (holding that solutions to disparities in education funding are best left to lawmakers); Bd. of Educ., v. Nyquist, 439 N.E.2d 359, 369 n.9 (N.Y. 1982) (responsibility for "fair and equitable educational opportunity" belongs in the state legislative branch).

267. For decisions upholding state funding systems and addressing the need for judicial deference, see Lujan v. Colo. St. Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982); *McDaniel*, 285 S.E.2d at 165; *Nyquist*, 439 N.E.2d at 363; Bd. of Educ. v. Walter, 390 N.E.2d 813, 824 (Ohio 1979); Richland Co. v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988); Kukor v. Grover, 436 N.W.2d 568, 582 (Wis. 1989). *But see* Washakie County School Dist. v. Herschler, 606 P.2d 310, 319 (Wyo. 1980) (recognizing a limitation to judicial deference and overturning the state's school finance system). La Morte and Williams noted that "although most courts have commented on their need to defer to these [other] branches (including courts which held plans unconstitutional),

acknowledge separation of powers limitations on judicial authority,[268] but courts have also recognized a judicial duty to interpret provisions in their state constitutions, and it is here where courts may encroach on the powers of the legislature. Most courts have found that the constitutionality of a state's school funding system presents a justiciable issue[269] and that courts have a duty to adjudicate these constitutional questions.[270] Courts often grant broad deference to legislative decisions on taxation and public school funding,[271] and even most of the courts that have declared funding systems unconstitutional—sometimes harshly condemning inequities created by the legislature—rarely go beyond judicial declarations of unconstitutionality and a call for legislative reform.[272] Other courts seemingly have no qualms about whether other branches of government are able or willing to follow their directives.[273]

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decisions upholding finance methods were more inclined to argue that any order changing the system would act as an unwarranted intrusion into the powers of other governmental units." Michael W. La Morte & Jeffrey D. Williams, *Court Decisions and School Finance Reform*, 21 EDUC. ADMIN. Q. 59, 79 (1985).

268. Dayton, *supra* note 152, at 631.

269. *See Washakie Co. Sch. Dist.*, 606 P.2d at 317-18 (discussing the elements of a justiciable controversy); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 147 (Tenn. 1993) (citing courts that have held that a challenge to the constitutionality of the state's public school funding system presents a justiciable dispute).

270. *See supra* note 151 and accompanying text. For other cases recognizing a judicial duty to adjudicate constitutional disputes over school funding, see Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 734 (Idaho 1993); Rose v. Council for Better Educ., Inc. 790 S.W.2d 186, 209 (Ky. 1989); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 550 (Mass. 1993); Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 363 (N.Y. 1982); Bd. of Educ. v. Walter, 390 N.E.2d 813, 823 (Ohio 1979); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 83-84 (Wash. 1978); *Washakie Co. Sch. Dist.*, 606 P.2d at 319.

271. *See McDaniel*, 285 S.E.2d at 165 (noting that whether students receive adequate education is a question best left to legislatures); Thompson v. Engelking, 537 P.2d 635, 640 (Idaho 1975) (cautioning against an "unwarranted entry into the controversial area of public school financing, whereby this Court would convene as a 'super-legislature' legislating in a turbulent field of social, economic and political policy"). *But see Rose*, 790 S.W.2d at 211 ("[W]e do not engage in judicial legislating. We do not make policy. We do not substitute our judgment for that of the General Assembly. We simply take the plain directive of the Constitution, and armed with its purpose, we decide what our General Assembly must achieve in complying with its solemn constitutional duty.").

272. *But see* William E. Camp & David C. Thompson, *School Finance Litigation: Legal Issues and Politics of Reform*, 14 J. EDUC. FIN. 221, 237 (1988) (describing an instance in which the Supreme Court of New Jersey "forced the State Department of New Jersey to withhold state aid from all districts after the legislature failed to provide sufficient money for the new finance plan. The court closed the schools until funding was assured and forced immediate action by the legislature to allow the schools to open").

273. *See Seattle Sch. Dist. No. 1*, 585 P.2d at 88-89 ("We cannot abdicate our judicial duty to interpret and construe [the constitution] merely because, as appellants seem to suggest, we lack apparent available physical power. We do not see the threat of confrontation visualized by appellants. To the contrary, we are firmly convinced the other branches of government also will

Before ordering a remedy in a case, the court must necessarily consider issues of both judicial competence and deference. Many courts making this analysis simply back off, avoiding any direct involvement in structuring specific remedies for school funding inequities.[274] One of the ironies in this judicial deference may be that "efforts by courts to avoid direct involvement in formulating change may have had the effect of extending the duration of their involvement and thereby arousing the very charges of meddling that they were attempting to prevent."[275] But, as noted above, some courts have refused to back off and have even mandated specific and detailed remedies for funding inequities,[276] raising some serious questions about this level of intervention.[277] The position that judges take on these issues may be influenced by many factors, including notions of federalism, economic concerns, and perhaps even political viewpoints.

B. Federal and State Judges

There is no education clause in the federal Constitution,[278] so federal court involvement in education matters must be based on a claim that some other clause (or a federal statute) has been violated. Federal courts generally grant considerable deference to the states in matters that are traditionally seen as issues of local control. This deference was ultimately fatal to the plaintiffs' case in *Rodriguez.* When federal judges do become involved in matters involving public education, such as in *Brown v. Board of Education* and the subsequent desegregation cases,[279] they are largely insulated from direct

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carry out their defined constitutional duties in good faith and in a completely responsible manner."); *see also Idaho Sch. for Equal Educ. Opportunity*, 850 P.2d at 734 (citing *Seattle Sch. Dist. No. 1*, 585 P.2d. at 89).

274. La Morte & Williams, *supra* note 267, at 71.

275. *Id.* at 72.

276. *See, e.g.*, Pauley v. Bailey, 324 S.E.2d 128, 136-37 (W. Va. 1984) (finding that the school board's policies did not meet the requirements of the master plan required by the lower court).

277. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 31 (1973) (cautioning against assuming a legislative role for which the Court lacks both authority and competence); Thompson v. Engelking, 537 P.2d 635, 640 (Idaho 1975) (cautioning against "an unwise and unwarranted entry into the controversial area of public school financing, whereby this Court would convene as a 'super-legislature.' ").

278. *Rodriguez*, 411 U.S. at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

279. *See generally* John Dayton, *Desegregation: Is the Court Preparing to Say It is Finished?*, 84 EDUC. L. REP. 897 (1993) (analyzing Supreme Court school desegregation cases).

majoritarian pressures.[280] Even so, federal judges must still deal with federalism concerns—whether federal judges are competent to become involved in complex local education matters or whether they should defer to state officials in this arena.[281]

State court judges may sometimes hesitate to become involved in unpopular school funding decisions for other reasons. State judges are significantly more vulnerable than their federal counterparts to the political influence of the majority.[282] State court judges are often subject to direct public pressures, including popular elections, periodic review by the electorate, recall votes, and limited terms.[283]

In addition, "[s]tate constitutions are often much easier to amend than the federal Constitution.[284] Thus, even if members of the state court risk the political wrath of the electorate by interpreting a state's constitution to produce a politically unpopular result, unpopular state constitutional provisions may suffer the same fate as unpopular state judges.[285] Put simply, "if judicial protection of the rights of politically less-powerful groups proves sufficiently unpopular, the politically mobilized can overrule the court by amending the constitution."[286]

C. Economic Conditions

One of the more intriguing questions in school funding litigation is whether judges are influenced in their decisions by the contemporary economic conditions in their state. From a common sense perspective, it might be more surprising if they were not. Even if judges can distance themselves from contemporary economic realities, judges realize that the legislators responsible for

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280. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office").

281. *See Rodriguez*, 411 U.S. at 41 ("Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues").

282. *See* Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1084 (1991) ("Many state constitutions provide for an elected judiciary or periodic review of appointed judges. Seven states subject sitting judges to the possibility of popular recall. Rather than enjoy the life tenure afforded federal judges, most judges on state high courts serve limited terms ranging from six to fourteen years.") (citation omitted).

283. *Id.*

284. *Id.* (citation omitted)

285. *Id.*

286. *Id; see* Coalition for Equitable Sch. Funding, Inc. v. State, 811 P.2d 116, 119 (Or. 1991) (declining to rely on a former decision by the Supreme Court of Oregon on school funding because "[t]he people have added a new provision to the Oregon Constitution that addresses specifically how public schools are to be funded").

implementing judicial orders for funding reform are on the front lines. Politically astute judges who do not wish to instigate a judicial-legislative showdown are unlikely to order an expensive remedy in the face of looming budget shortfalls and a state constitutional requirement for a balanced budget.[287]

Nonetheless, several courts have held that state fiscal difficulties do not excuse failure to comply with constitutional mandates to support education. One court boldly stated that financial difficulties "do not trump the Constitution . . . We realize that the General Assembly cannot spend money it does not have. Nevertheless, we reiterate that the constitutional mandate must be met. The Constitution protects us whether the state is flush or destitute."[288] In declaring the entire public education system of Kentucky unconstitutional, the Supreme Court of Kentucky stated, "The taxpayers of this state must pay for the system, no matter how large, even to the point of being 'unexpectedly large or even onerous.' "[289] The Supreme Court of Texas made similar remarks, stating, "[T]he legislature must establish priorities according to constitutional mandate; equalizing educational opportunity cannot be relegated to an 'if funds are left over' basis,"[290] and in Montana, the Supreme Court emphasized that "fiscal difficulties could not justify perpetuating inequities."[291] Although no court has explicitly stated that state fiscal difficulties affected its ruling, the status of the economy in the state may have some effect on how the court views the evidence that is presented in the case.

Seemingly unrelated events, such as economic recessions, can act to thwart plaintiffs' hopes since the unavailability of revenue makes change more difficult and bolsters defendants' contentions that workable solutions do not exist. When the fiscal condition of state governments is relatively healthy, equity may well enjoy greater popularity: state revenue is available for a "leveling up" process, which is clearly a more palatable task for both courts and legislatures than requiring a "leveling down."[292]

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287. John Dayton, Anne Dupre, & Christine Kiracofe, An Analysis of School Funding Litigation and the Influence of Economic Circumstances (2004) (unpublished manuscript, on file with the authors) [hereinafter *Analysis of School Funding*]; *see also* Dayton, Dupre, & Kiracofe, *supra* note 8, at 12-13.

288. DeRolph v. State, 780 N.E.2d 529, 530-32 (Ohio 2002).

289. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 208 (Ky. 1989).

290. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397-398 (Tex. 1989).

291. Helena Elem. Sch. Dist. v. State, 769 P.2d 684, 690 (Mont. 1989).

292. La Morte & Williams, *supra* note 267, at 81.

Although "[s]peculation is difficult . . .as to whether economic conditions would lead to different judicial treatment of the issues presented,"[293] it is hard to imagine that elected state court judges are not somehow influenced by the financial and political realities in their state, or that they are unaware if funding remedial legislation will be politically difficult or impossible. State court judges are likely aware that if the General Assembly cannot, or will not, comply with a judicial mandate for greater equity in funding, this noncompliance will constitute an open threat to the continuing authority of the court.

There is some evidence to support the notion that judicial decisions concerning school funding litigation may be influenced by perceptions of the status of the economy. A recent study by Professors Dayton, Dupre, and Kiracofe compared outcomes of state high court decisions on school funding disputes to: (1) the level of the Consumer Sentiment Index ("CSI") at the time of the decisions (between 1971 and 2002); and (2) the directional trend of the CSI immediately proceeding the time of the decision.[294] The study's hypothesis was that state high court judges would be more inclined to declare a state funding system unconstitutional when there was a positive trend and sentiment about the national economy, and less likely when there was a negative trend and sentiment about the economy.[295]

The study found that (a) ten of seventeen decisions declaring state funding systems unconstitutional (59 percent) followed an upward trend in the CSI; and (b) thirteen of seventeen (76 percent) occurred when the CSI was above the average for the time period. Further, (a) eleven of nineteen decisions declaring funding systems constitutional (58 percent) followed a downward trend in CSI; and (b) seven of nineteen (37 percent) occurred when the CSI was below the average for the time period." Although this study merely establishes a correlation between the level and trend of the CSI and judicial decisions in school funding cases, not causation,[296] the results of this study are generally consistent with the hypothesis that contemporary economic conditions may influence judges' decisions in school funding cases to some degree.

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293. *Id.*

294. Dayton, Dupre, & Kiracofe, *Analysis of School Funding*, supra note 287.

295. *Id.*

296. A classic logical error is *cum hoc ergo propter hoc* ("with this, therefore because of this"). Correlation does not prove causation, and a correlation study cannot establish causation.

D. Political Affiliations

Election to a position on the bench does not immunize judges from the human condition. Either consciously or unconsciously, judges may be influenced in their decisions by their political affiliations and the orthodoxies of their political views. Although most judges are unlikely to confess to this influence, it is likely assumed by most voters that judges with a conservative political philosophy may behave differently on the bench than judges with a more liberal political philosophy. Indeed, some scholars of constitutional theory posit that every "constitutional opinion is sensitive [to the judge's] political conviction."[297] Thus, judges—be they liberal or conservative—"who draw inspiration from different legal and political philosophers will read the same cases, even pivotal cases, quite differently."[298] The Supreme Court of Ohio's eleventh hour decision terminating school funding litigation during a December 2002 session—just weeks before two Republicans were to be seated on the court—is a more egregious example that seems to support the view that political affiliation may influence decision making in school finance litigation.[299]

E. The Efficacy of School Funding Litigation

What is the result of three decades of school funding litigation? Has it translated into better education for students? The scoreboard at this point is essentially a tie, as roughly as many decisions have upheld challenged funding systems as have declared them unconstitutional.[300] But the wins and losses in state supreme court opinions do not tell the entire story. A loss for plaintiffs often has

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297. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2-3, 36-37 (1996).

298. DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 31 (2004) (citation omitted).

299. Although the Ohio Supreme Court presumably ended *DeRolph* litigation with its December 2002 decision, DeRolph v. State, 780 N.E.2d. 529, 542 (2002), plaintiffs continued to petition the courts for remedy. On March 4, 2003 *DeRolph* plaintiffs petitioned the trial court "to schedule and conduct a conference to address the defendants' compliance with the orders of the common pleas court and this [supreme] court." State *ex rel.* State v. Lewis, 789 N.E.2d 195, 199 (Ohio 2003). After a series of state and plaintiff actions (including an attempt by the Ohio Coalition for Equity & Adequacy of School Funding to "intervene as additional respondents"), the Supreme Court reaffirmed its December 2002 decision by issuing a writ of prohibition preventing Perry County Common Pleas Court Judge Linton D. Lewis Jr. from exercising further jurisdiction in *DeRolph*. *Id.* at 202-203.

300. *See* Dayton, Dupre, & Kiracofe, *supra* note 8, at 1 ("[T]he highest courts in 36 states have issued opinions on the merits of funding litigation suits, with 19 upholding state funding systems and 17 declaring state funding systems unconstitutional.").

consequences that reach beyond the facts of a particular case. Legislators often perceive a decision upholding a funding system as explicit judicial approval of the existing system, rather than merely the failure of the plaintiffs to prove their case on the facts presented. A funding litigation loss may thus make it more difficult to persuade reluctant legislators of the need for reform.

Even in those cases declaring funding systems unconstitutional, adequate reform is not guaranteed merely by "success" in litigation. Court decisions may gain wide media attention initially, but after several years of serial litigation and little progress, these cases sometimes represent little more than a confirmation of the futility of reform where political will is lacking. Indeed, it is interesting that many states are closer to equity—at least in the fiscal sense—without litigation than are other states with long histories of serial litigation.[301]

There are many other factors that have stymied efforts to achieve the plaintiffs' equity goals. In many instances, the goals mandated by court orders were not the goals pursued through legislative reform.[302] Further, even if courts are able to influence legislation, they are not able to control private choices in education, as "[a]ffluent parents may even opt to minimize taxes in order to free up income for tuition expenses at private schools."[303] If the voucher movement gains a firm footing, it will give parents another way to educate their children outside of public schools and will be yet another disincentive to pay higher taxes for public schools.

Over three decades after *Serrano,* inequities in educational opportunity persist, raising concerns about the efficacy of this litigation. As we celebrate the anniversary of *Brown* this year, the efficacy of that decision, too, is being questioned. Despite the massive changes sparked by the decision, few would argue that the egalitarian dreams of racial desegregation associated with *Brown* were ever fully realized. Recent studies show that even the gains achieved through *Brown* and the cases that came after it are rapidly eroding. The *Harvard Civil Rights Project* has documented an unmistakable demographic trend toward resegregation[304] that has gained ground

301. For cases detailing long histories of serial litigation regarding educational funding, see *supra* note 9.

302. G. Alan Hickrod et al., *The Effect of Constitutional Litigation on Education Finance: A Preliminary Analysis*, 18 J. EDUC. FIN. 180, 207-08 (1992).

303. Mark G. Yudof, *School Finance Reform: Don't Worry, Be Happy*, NOLPE NOTES, May 1992, at 3.

304. GARY ORFIELD & CHUNGMEI LEE, HARVARD UNIVERSITY CIVIL RIGHTS PROJECT, BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE? 2-3 (2004), *available at* www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf.

since the U.S. Supreme Court's 1991 decision in *Board of Education v. Dowell*.[305]

The *Brown* desegregation legacy and the *Rodriguez* funding legacy are, of course, inextricably linked. In addition to concerns about public school resegregation, commentators continue to note that individuals with low family incomes, African-Americans, and Hispanics are underrepresented both in university enrollment and among graduates of institutions of higher education.[306] It appears, not surprisingly, that poorer racial minority children often find themselves in inadequately funded schools, where academic preparation and achievement are neither supported nor vigorously encouraged. For some students, lack of rigorous academic preparation—an important predictor of college enrollment and success—has made it much less likely that they will be able to enroll in an institution of higher learning or succeed if they do enroll.[307]

Researchers even claim that students with rigorous academic preparation are more likely to enroll in college, regardless of racial or ethnic group, and despite low socioeconomic status.[308] Indeed, in one cohort studied, half the students in the lowest quartile of socioeconomic status but the highest quartile of "academic resources"[309] enrolled in a four-year institution, while less than 14 percent of students in the lowest socioeconomic quartile and the lowest resources quartile did so.[310] Reform advocates who can show that schools that enroll a large proportion of African-American or Hispanic students consistently fail to offer the advanced math and science classes that are available in "whiter" districts, or advocates who can show that teacher quality is significantly lower in schools with higher percentages of minority students may be able to prevail in the issue that was left open in *Brown*: what if resegregated, "separate" schools are not equal to other schools with smaller proportions of students in a suspect class?

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305. 498 U.S. 237 (1991) (noting that "[f]rom the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination").

306. Lani Guinen, *Admission Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals*, 117 HARV. L. REV. 113, 116 (noting that college admissions "correlate with class, geography, and race. As a result, the few who enjoy access to higher education tend to be already quite privileged, although more low-income students now seek college degrees than ever before. In short, higher education has become a 'gift from the poor to the rich.' ")

307. Laura W. Perna, Inequitable and Inadequate School Resources: A Critical Barrier to Obtaining the Academic Preparation that is Required to Enroll in College 1 (2003) (unpublished manuscript, on file with authors).

308. *Id.* at 8.

309. The term "academic resources" is defined as a "composite measure of student's abilities, high school class rank and the quality and intensity of high school curriculum." *Id.* at 9.

310. *Id.* at 8-9.

Brown may have broken down many legal and social barriers for minority race children, but *Brown* was no panacea for the educational needs of these children. W.E.B. DuBois said in 1935:

> [T]he Negro needs neither segregated schools nor mixed schools. What he needs is Education. What he must remember is that there is no magic, either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad.[311]

In several recent cases, advocates representing economically disadvantaged racial minority children have presented some shocking examples of inadequate schools and have won judicial support in the form of orders for remedial action.[312] This vein of litigation may continue to bear fruit in the future, and the recent "accountability" cases may also be promising for advocates representing poorer minority race children.[313] If it is correct that low-income African-American and Hispanic students lack proper academic preparation because of inadequate resources and the high-level of student needs at the schools that they are likely to attend, school funding litigants may have one more weapon to deploy in yet another assault on the entrenched school funding system in some states.[314]

F. Will it Ever End?

Despite over three decades of litigation, a recent study by The Education Trust shows that in thirty of the forty-seven states studied, per-pupil funding levels were lower in districts in the highest quartile of poverty than in districts in the lowest quartile of poverty.[315] Districts with the highest percentage of minority students also had lower per-pupil funding levels than districts with the lowest percentage of minority students in thirty-one of forty-seven states studied.[316]

Although federal programs like Title I and some state programs that add financial support to poorer districts attempt to

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311. W.E.B. DuBois, *Does the Negro Need Separate Schools?*, 4 J. OF NEGRO EDUC. 328, 335 (1935).

312. *See, e.g.*, Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 477 (Ark. 2002) (affirming trial court's finding that the state's school funding system was unconstitutional).

313. *See, e.g.*, Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 327 (N.Y. 2003) (finding that education "scheme should ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education").

314. *See* Perna, *supra* note 307, at 13-16 (explaining research that reaches these conclusions and noting that teaching quality is a high predictor of student achievement).

315. *See* Perna, *supra* note 307.

316. *Id.* at 17.

compensate for the increased costs in educating students with greater needs, there is no clear indication that the low academic performance of disadvantaged students is changing. The arguments rage on as to whether school funding is related to school achievement at all,[317] but funding litigation continues unabated. While the winners press judges and legislatures for remedies that they assert will solve the conundrum, no court, no legislature, and no litigant can claim complete victory in this war.

Many courts have simply turned the problem back to the state legislature.[318] For example, the Supreme Court of Georgia stated, "It is clear that a great deal more can be done and needs to be done to equalize educational opportunities in this state. For the present, however, the solution must come from our lawmakers."[319] There are undoubtedly limitations to the usefulness of the political model as a remedy for school funding inequities. Justice Marshall stated that he could not accept "the notion that it is sufficient to remit [funding plaintiffs] to the vagaries of the political process which . . . has proved singularly unsuited to the task of providing a remedy for this discrimination."[320]

> Districts that have political clout within a legislature continue to influence the design of school finance formulas, and less powerful districts are forced to use the courts to alter and shape the finance systems. . . .
>
> . . . .[T]here is often great [political] resistance to changing a state's school finance formula because [politically powerful groups] fear the loss of a favorable status under the present formula.[321]

Although it may be tempting to embrace judicial action as a panacea for school funding inequities, the *Rodriguez* majority seemed in tune with political reality when it stated that "the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them."[322] Despite the persistence of school funding reformers, there is considerable evidence that the courts have not produced the desired reforms.[323] In many states,

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317. *See supra* note 159.

318. McDaniel v. Thomas, 285 S.E.2d 156, 160 n.8, 167 (Ga. 1981); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 764, 786 (Md. 1983); Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 363 (N.Y. 1982); Kukor v. Grover, 436 N.W.2d 568, 573, 582 (Wis. 1989).

319. *McDaniel*, 285 S.E.2d at 168.

320. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 71 (1973) (Marshall, J., dissenting).

321. Camp & Thompson, *supra* note 272, at 223-24.

322. 411 U.S. at 59.

323. Even if the state's highest court declares the state's funding system unconstitutional, the electorate could choose to rescind or amend the relevant constitutional provision. *See* Coalition for Equitable Sch. Funding v. State, 811 P.2d 116, 119 (Or. 1991) (declining to rely on a

economically advantaged districts have retained or even increased their advantaged status, while disadvantaged districts have failed to generate sufficient legislative support to overcome the political influence of advantaged districts.[324] Perhaps the only lasting resolution to the school funding problem will be found in popular political support for funding reform, if the electorate somehow can be convinced that making egalitarian education ideals a reality is consistent with their own self-interest.[325] Advocates for school funding reform might consider focusing more resources on persuading the electorate and lawmakers that educational inequities should be eliminated, not only because they are unconstitutional, but because they are unwise public policy.[326]

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former decision by the Supreme Court of Oregon on school funding because "[t]he people have added a new provision [to the Oregon Constitution] that addresses specifically how public schools are to be funded"). In comparison to the U.S. Constitution, state constitutions are relatively easy to amend. *See* Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability*, 64 WASH. L. REV. 19, 34 (1989) ("The current state constitutions have been amended more than 5,300 times. Most may be amended by a majority of the popular vote ratifying a proposal which has passed the legislature.") (citations omitted). But where public opinion remains flexible, court decisions for equity may act as a catalyst for improvements in equity. Courts can help to educate both the legislature and the public about the requirements of the state's constitution and the wisdom and necessity of complying with the educational mandates of the constitution. Many courts have written about the critical importance of public education in our democratic system of governance. *See* McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 524, 554-55 (Mass. 1993) ("[A]n educated people is viewed as essential to the preservation of the entire constitutional plan: a free, sovereign, constitutional democratic State."). In addition to this educative function, courts may also provide the needed political cover if the state's legislature and governor have the will to change public school funding systems, but not the political courage. *See* Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 HARV. J. LEGIS. 341, 343 (1991) ("The court provided the legislature with both the nerve and the rationale to raise taxes, equalize school funding, and make other necessary changes."). Members of the political branches can deflect political fallout towards the court's decision. A judicial-political coalition supporting reform may significantly aid reform efforts. John Dayton, *The Judicial-Political Dialogue*, 22 J.L. & EDUC. 323, 332 (1993).

324. *See* Tricia E. Bevelock, Note, *Public School Financing Reform: Renewed Interest in the Courthouse, but Will the Statehouse Follow Suit?*, 65 ST. JOHN'S L. REV. 467, 489 (1991) ("[T]he [school funding] system, which was enacted in response to *Robinson I*, actually resulted in increased disparities.").

325. When adequately educated children become adults they are likely to be more productive, pay more taxes, enhance the nation's international competitiveness, commit less crimes, and require less social services. *See* Charles S. Benson, *Definitions of Equity in School Finance in Texas, New Jersey, and Kentucky*, 28 HARV. J. ON LEGIS. 401, 403 (1991) ("School failure is associated with incarceration, welfare dependency, and bad health, all of which drain the public coffers.").

326. *See generally Hearing on H.R. 3850, The Fair Chance Act: Hearing Before the Subcomm. on Elementary, Secondary, and Vocational Educ. of the House Comm. on Educ. and Labor*, 101st Cong. (1990).

The pursuit of popular political support in resolving the school funding problem has been advocated by both judges and scholars,[327] and courts can play an important role in educating the public and lawmakers about the harm caused to children by inequities and inadequacies in public school funding.[328] At some point the answer to the school funding dilemma must be consistent with the will of the people, but as explained above, other education reform movements, such as school choice and vouchers, may subvert the goals of the school funding reformers if such reforms reduce taxpayer incentive to improve public school funding.[329]

It is doubtful whether either side will be able to claim victory any time soon, as the funding litigation war has become the arena for an ongoing dialogue over the critical issue of access to educational opportunity. As in all wars, the ultimate battle is for the hearts and minds of the people. But when this battle includes litigation, the initial war is for the hearts and minds of judges. Litigants find themselves in a complex adversarial dance in which advocates for the state express the will of those with political and economic power and advocates for reform express the needs of those without financial means or political clout. Each side attempts to get the court to join their side in the dance and to share their vision in this protracted

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327. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 59 (1973) ("[T]he ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them."); THOMPSON ET AL., *supra* note 12, at 290 ("[R]apid change is often available only at the polls").

328. Four recent opinions overturning school funding systems discussed educational harm to children because of funding inequities and inadequacies: Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 197 (Ky. 1989); Helena v. State, 769 P.2d 684, 687 (Mont. 1989); Abbott v. Burke, 575 A.2d 359, 395 (N.J. 1990); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989). At least one court has recognized the potential public relations impact of school funding litigation. *See* Kukor v. Grover, 436 N.W.2d 568, 587 (Wis. 1989) ("This case has been a public cry to the legislature, disguised as a constitutional attack, that additional funds are necessary to improve education in some districts.").

329. A judicial order could serve as a catalyst for change, but without popular support it is unlikely that the legislature will produce an adequate solution for school funding inequities. Note, *Unfulfilled Promises*, *supra* note 282, at 1073. ("[P]opular support for educational equity in the remedial phase can help courts mitigate legislative inertia and the potential for unwarranted judicial acquiescence in order to effectuate state constitutional rights regarding public education."). The existing funding system and the resulting inequities are a product of political compromise, reflecting the distribution of political power within the state. Reform efforts that attempt to allocate resources in a manner inconsistent with the state's balance of political power are unlikely to succeed. Further, even a forced judicial resolution based on the state's constitution is not immune from popular political will. *See* Thro, *supra* note 184, at 1657 ("State constitutions [compared to the federal constitution] are . . . much more 'political' in that they can be easily amended to reflect the current values of a state's citizenry"). When a judicial declaration of unconstitutionality fails to alter the political dynamics that perpetuate school funding inequities, the result is often serial litigation. For cases demonstrating this result, see *supra* note 9.

contest of competing ideals about education, taxation, and social justice.

VI. CONCLUSION: THE FUTURE OF SCHOOL FUNDING LITIGATION

Despite the many problems associated with school funding litigation, there are many instances in which litigation has been and will likely continue to be a useful tool in the struggle for greater funding equity. Depending on the circumstances, judicial action may be helpful or even necessary to produce greater equity, but it is not sufficient. If the goal is long-term improvement in funding for public schools, and not just victory in litigation, building a political coalition for funding reform is essential to achieving meaningful and lasting reform. Judicial decisions may call attention to school funding problems, but the electorate must be persuaded to accept public school funding changes. Through their votes, the people of the state can promote, prevent, or reverse policy changes.

State courts may be less likely than federal courts to contravene popular opinion in protecting constitutional rights because of the enhanced vulnerability of state judges and constitutions to majoritarian politics, but state courts opinions on funding issues often can play a role in educating the people about the importance of supporting public education that is adequately funded for all students. A judicial decision calling for equity reform may also encourage legislators to initiate funding reforms previously stalled because of lack of interest or political courage.

Thomas Jefferson recognized that education is essential to the continued vitality of a democratic nation.[330] Many of the nation' s courts have also recognized that adequate funding is essential to adequate education,[331] and few citizens would argue that obtaining an

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330. *See* John Dayton & Carl Glickman, *American Constitutional Democracy: Implications for Public School Curriculum Development*, 69 PEABODY J. EDUC., Summer 1994, at 63 n.3 (citation omitted).

331. For cases holding that adequate funding is a prerequisite for adequate education, see Roosevelt Elementary Sch. Dist. v. Bishop, 877 P.2d 806, 809 (Ariz. 1994); DuPree v. Alma Sch. Dist., 651 S.W.2d 90, 92 (Ark. 1983); Serrano v. Priest (*Serrano* II), 557 P.2d 929, 939 (Cal. 1976); Serrano v. Priest (*Serrano* I), 487 P.2d 1241, 1253 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 368 (Conn. 1977); McDaniel v. Thomas, 285 S.E.2d 156, 160 (Ga. 1981); Rose v. Council for Better Educ., Inc. 790 S.W.2d 186, 190 (Ky. 1989); Hornbeck v. Somerset, 458 A.2d 758, 764 (Md. 1983); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 552 (Mass. 1993); Helena v. State, 769 P.2d 684, 687 (Mont. 1989); Bismarck v. State, 511 N.W.2d 247, 261-62 (N.D. 1994); Abbott v. Burke, 575 A.2d 359, 377 (N.J. 1990); Robinson v. Cahill, 303 A.2d 273, 277 (N.J. 1973); Board of Educ. v. Nyquist, 439 N.E.2d 359, 363 n.3 (N.Y. 1982); Coalition for Equitable Sch. Funding v. State, 811 P.2d 116, 117 (Or. 1991); Tenn. Small Sch. Systems v.

adequate education is unimportant. Disputes continue over what constitutes an adequate education, what degree of equity in resources is required, and who should bear the burden of adequately funding public schools. Hot-button political issues like vouchers, school accountability and fiscal budgets will continue to influence the outcome of these disputes as the school funding war extends through its fourth decade.

McWherter, 851 S.W.2d 139, 141 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989); Pauley v. Bailey, 324 S.E.2d 128, 131 (W. Va. 1984); Washakie County School Dist. v. Herschler, 606 P.2d 310, 332 (Wyo. 1980).

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