1-1-2004

Education Finance Litigation: A Review of Recent High Court Decisions and their Likely Impact on Future Litigation

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COMMENTARY

EDUCATION FINANCE LITIGATION: A REVIEW OF RECENT STATE HIGH COURT DECISIONS AND THEIR LIKELY IMPACT ON FUTURE LITIGATION*

by

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Most citizens know very little about how their schools are funded, and even less about the school funding litigation that has shaped public school funding systems since *Serrano v. Priest*.[1] Nonetheless, funding litigation has had a tremendous impact on public schools in the United States, second only to the impact of the litigation associated with *Brown v. Board of Education*.[2] Since *Serrano*, the highest courts in 36 states have issued opinions on the merits of funding litigation suits, with 19 upholding state funding systems[3] and 17 declaring state funding systems unconstitutional.[4] A 2001 article titled

* The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 186 Ed.Law Rep. [1] (May 20, 2004).

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1. 96 Cal.Rptr. 601, 487 P.2d 1241 (Cal. 1971).

2. 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). *See also*, John Dayton, *Desegregation: Is the Court Preparing to Say it is Finished?*, 84 Ed.Law Rep. [897] (2003).

3. The public school funding systems of Alabama, Alaska, Colorado, Georgia, Idaho, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Virginia, and Wisconsin, have been upheld by their states' highest courts. *See* 2002 Ala. LEXIS 166 (Ala. 2002); *Matanuska-Susitna v. State*, 931 P.2d 391 [116 Ed.Law Rep. [401]] (Alaska 1997); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 [6 Ed.Law Rep. [191]] (Colo. 1982); *McDaniel v. Thomas*, 285 S.E.2d 156 [1 Ed. Law Rep. [982]] (Ga. 1981); *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724 [82 Ed.Law Rep. [660]] (Idaho 1993); *Committee v. Edgar*, 220 Ill.Dec. 166, 672 N.E.2d 1178 [114 Ed.Law Rep. [576]] (Ill. 1996); *Unified Sch. Dist. v. State*, 885 P.2d 1170 [96 Ed.Law Rep. [258]] (Kan. 1994); *Sch. Administrative Dist. v. Commissioner*, 659 A.2d 854 [101 Ed.Law Rep. [289]] (Me. 1995); *Hornbeck v. Somerset*, 458 A.2d 758 [10 Ed.Law Rep. [592]] (Md. 1983); *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973); *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993); *Bd. of Educ., Levittown v. Nyquist*, 453 N.Y.S.2d 643, 439 N.E.2d 359 [6 Ed. Law Rep. [147]] (N.Y. 1982); *Fair Sch. Fin. Council v. State*, 746 P.2d 1135 [43 Ed.Law Rep. [805]] (Okla. 1987); *Coalition for Equitable Sch. Funding v. State*, 811 P.2d 116 [67 Ed.Law Rep. [1311]] (Or. 1991); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979); *City of Pawtucket v. Sundlun*, 662 A.2d 40 [102 Ed.Law Rep. [235]] (R.I. 1995); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535 [135 Ed.Law Rep. [833]] (S.C. 1999); *Scott v. Commonwealth*, 443 S.E.2d 138 [91 Ed. Law Rep. [396]] (Va. 1994); *Vincent v. Voight*, 614 N.W.2d 388 [146 Ed.Law Rep. [422]] (Wis. 2000).

4. The public school funding systems of Arizona, Arkansas, California, Connecticut, Kentucky, Massachusetts, Montana, North Dakota, New Hampshire, New Jersey, Ohio, Tennessee, Texas, Vermont, Washington, West Virginia, and Wyoming have been declared unconstitutional by the state's highest court. *See Roosevelt v. Bishop*, 877 P.2d 806 [93 Ed.Law Rep. [330]] (Ariz. 1994); *Dupree*

Serrano and It's Progeny: An Analysis of 30 years of School Funding Litigation reviewed school funding litigation since the *Serrano* decision.[5]

This article updates this research by providing brief reviews of the most recent and significant school funding litigation decisions, including the most recent decisions in *Claremont v. Governor*, *James v. Alabama Coalition for Equity*, *Tennessee Small School Systems v. McWherter*, *Lake View v. Huckabee*, *DeRolph v. State*, and *Campaign for Fiscal Equity (CFE) v. State.*[6] This article also discusses possible future directions in this litigation, based on an analysis of these recent state high court cases and the litigation since *Serrano v. Priest*.[7]

Claremont v. Governor (Claremont III)
Supreme Court of New Hampshire
Decided April 11, 2002

Accountability has become a leading issue in education reform at both the state and national levels. In *Claremont v. Governor III*,[8] the Supreme Court of New Hampshire elevated state standards of accountability to a new level in funding litigation, holding that an effective accountability system was an essential element of the state's duty to provide an adequate education. In a 3–2 decision, the court held that "accountability is an essential component

v. Alma Sch. Dist., 651 S.W.2d 90 [11 Ed. Law Rep. [1091]] (Ark. 1983); *Serrano v. Priest*, 96 Cal.Rptr. 601, 487 P.2d 1241 (Cal. 1971); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 [60 Ed.Law Rep. [1289]] (Ky. 1989); *McDuffy v. Secretary of the Executive Office of Educ.*, 615 N.E.2d 516 [83 Ed.Law Rep. [657]] (Mass. 1993); *Helena v. State*, 769 P.2d 684 [52 Ed.Law Rep. [342]] (Mont. 1989); *Bismarck Public Sch. Dist. v. State*, 511 N.W.2d 247 [88 Ed. Law Rep. [1184]] (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 super-majority required by the N.D. Constitution to declare statutes unconstitutional); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375 [88 Ed.Law Rep. [1102]] (N.H. 1993); *Abbott v. Burke*, 575 A.2d 359 [60 Ed.Law Rep. [1175]] (N.J. 1990); *Tennessee Small Sch. Systems v. McWherter*, 851 S.W.2d 139 [82 Ed.Law Rep. [991]] (Tenn. 1993); *DeRolph v. State*, 677 N.E.2d 733 [116 Ed.Law Rep. [1140]] (Ohio 1997); *Edgewood v. Kirby*, 777 S.W.2d 391 [56 Ed.Law Rep. [663]] (Tex. 1989); *Brigham v. State*, 692 A.2d 384 [117 Ed.Law Rep. [667]] (Vt. 1997); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238 [105 Ed.Law Rep. [771]] (Wyo. 1995).

5. John Dayton, *Serrano and its Progeny: An Analysis of 30 Years of School Funding Litigation*, 157 Ed.Law Rep. [447] (2001). *See also* William Thro, *School Finance Reform: A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J. L. & POLITICS 525 (1998). For a discussion of the shift from equity to adequacy-based cases, see Michael Heise, *Equal Educational Opportunity Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA.L.REV. 543 (1998).

6. *See James v. Alabama*, 836 So.2d 813 [174 Ed.Law Rep. [487]] (Ala. 2002); *Lake View v. Huckabee*, 91 S.W.3d 472 [173 Ed.Law Rep. [248]] (Ark. 2002); *Claremont Sch. Dist. v. Governor*, 794 A.2d 744 [163 Ed.Law Rep. [882]] (N.H. 2002); *Campaign for Fiscal Equity v. State*, 769 N.Y.S.2d 106, 801 N.E.2d 326, 2003 WL 21468502 [183 Ed. Law Rep. [970]] (N.Y. 2003); *DeRolph v. State*, 780 N.E.2d 529 [172 Ed.Law Rep. [428]] (Ohio 2002); *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232 [172 Ed.Law Rep. [1044]] (Tenn. 2002).

7. 96 Cal.Rptr. 601, 487 P.2d 1241 (Cal. 1971).

8. 794 A.2d 744 [163 Ed.Law Rep. [882]] (N.H. 2002).

of the State's duty and that the existing statutory scheme has deficiencies that are inconsistent with the State's duty to provide a constitutionally adequate education."[9] Concerning accountability, the court stated:

> Accountability is more than merely creating a system to deliver an adequate education ... 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.[10]

The court stated: "The system the State currently has in place appears to use both standards based on what school districts provide (input-based standards) and results that school districts achieve (output-based standards)."[11] But the court noted that: "The plaintiffs argue that despite these programs, 'the State has failed to meet its obligation to promulgate standards because the standards in place are voluntary, unconstitutional, and do not set any specific levels of performance that schools or school districts must meet.' "[12] In holding these statutes unconstitutional, the court stated:

> On their face [the statute and regulation] permit a school district to provide less than an adequate education as measured by these minimum standards when the local tax base cannot supply sufficient funds to meet the standards. The statute and the rule also permit noncompliance with the standards under emergency conditions, such as a fire or natural disaster. While it may be permissible to excuse noncompliance under emergency conditions, the statute permits the board of education to also approve a school that does not meet the minimum standards based solely on the "financial condition of the school district" ... Excused noncompliance with the minimum standards for financial reasons alone directly conflicts with the constitutional command that the State must guarantee sufficient funding to ensure that school districts can provide a constitutionally adequate education. As we have repeatedly held, it is the State's duty to guarantee the funding necessary to provide a constitutionally adequate education to every educable child in the public schools in the State ... The responsibility for ensuring the provision of an adequate public education and an adequate level of resources for all students in New Hampshire lies with the State.

The Court underscored its position that it is the duty of the State–and not the local districts–to meet the constitutional mandate, stating:

> While local governments may be required, in part, to support public schools, it is the responsibility of the State to take such steps as may be required in each instance effectively to devise a plan and sources of funds sufficient to meet the constitutional mandate ... There is no accountability when the rules on their face tolerate noncompliance with the duty to provide a constitutionally adequate education. While the

9. *Id.* at 745.
10. *Id.* at 751–752.
11. *Id.* at 753.
12. *Id.*

> State may delegate this duty . . . it must do so in a manner that does not abdicate the constitutional duty it owes to the people.[13]

James v. Alabama Coalition for Equity
Supreme Court of Alabama
Decided May 31, 2002

In an acrimonious 6–1 opinion rendered in *James v. Alabama Coalition for Equity* (2002),[14] the Supreme Court of Alabama vacated the trial court's remedial order requiring the legislature to formulate a constitutional system of school funding. Alabama's high court held that the issue was actually a political question, and that the state's separation of powers doctrine prohibited the court from resolving this dispute. Accordingly, any further grievances concerning school funding inequities must be addressed through the state's political process.

This case had a most unusual history, which was captured by Chief Justice Moore in a concurring opinion that stated:

> This Court has never had to deal with a case as unusual at this one, and it is unusual in several ways . . . While this case was pending in the trial court, the then governor was convicted of a felony, that, in turn, produced the unusual occurrence that several of the plaintiffs realigned themselves as defendants, so that there appeared to be adverse parties and a case and controversy . . . In reality there was no case or controversy and there were no adverse parties . . . Nor did the trial court allow any other interested parties to intervene in the case. While the case was pending before the trial court, the trial judge campaigned for a position on the Alabama Supreme Court as "The Judge for Education Reform." In his campaign literature he stated that he was a "tough judge" because he had ruled "Alabama's education system unconstitutional," "order[ed] the Legislature back to work," and told "a governor and the Legislature to fix the problem." Those public statements ultimately forced his removal from the case while it remained pending. However, before his removal, the trial judge declared his orders final and then continued to order hearings and different forms of relief, in contradiction to the supposed finality of his own order. Using racism as a basis, the trial court declared all of the education portion of Amendment 111 . . . unconstitutional, but preserved a portion of the original [§ 256] . . . Then, using one word found in § 256—"liberal"—the trial judge renovated and reformed the entire education system to the tune of an estimated $1 billion and instituted a scheme of continuing supervision by his court of every aspect and agency of the entire Alabama education system, including the Alabama Legislature, the Governor, and the State Board of Education.[15]

Concerning the trial court's order, Chief Justice Moore's concurring opinion stated:

13. *Id.* at 744–755.

14. 836 So.2d 813 [174 Ed.Law Rep. [487]] (Ala. 2002).

15. *Id.* at 842–844 (Moore, J., concurring in the result and dissenting in part).

> The orders issued to promulgate this plan would necessarily require an increase in taxation, amounting to taxation without representation, and would create a "right" to public education which was expressly prohibited by Amendment 111. The trial judge proceeded to set up this program even though the Legislature was not properly a party to the action. He went to great lengths to micro manage the State's school system, to the point of requiring that adequate toilet paper be provided to each student. A trial court in a proper case may hold an act of the Alabama Legislature unconstitutional, but to enter an order that would require the Legislature to pass legislation and spend money on an education project of the trial judge's own making is unprecedented in the history of this State.[16]

As Chief Justice Moore's opinion indicated, the trial court judge was also a political competitor for a position on Alabama's Supreme Court, possibly explaining some of the venomous language in this case. But there were also questions concerning why the Justices of the Supreme Court of Alabama were even reviewing this case. In a dissenting opinion, Justice Johnstone objected to the court's current review of the "equity funding cases" and stated:

> We lack appellate jurisdiction to review these cases ... Both deadlines for our appellate jurisdiction expired without any application in any form for further appellate review. Indeed, even after the expiration of these deadlines, no party has sought appellate review in any form ... The entirely unsolicited nature of the instant purported review of these "equity funding cases" exacerbates our lack of appellate jurisdiction. We do not want to become like the Iranian judges who roam the streets of Tehran ordering a whipping here and a jailing there. On the other hand, if this tardy and unsolicited purported review does prevail, I suppose the consolation will be that some old cases which I think or shall think grossly unfair will once again be subject to review.[17]

Tennessee Small School Systems v. McWherter (Small Schools III)
Supreme Court of Tennessee
Decided October 8, 2002

In 1993 in *Tennessee Small Schools v. McWherter* (*Small Schools I*)[18] and in 1995 in *Small Schools II* in 1995,[19] the Supreme Court of Tennessee declared a school funding system that disadvantaged smaller rural area schools unconstitutional.[20] The Court ordered the State to provide greater equity in funding educational opportunities throughout the state. In 2002, in *Tennessee Small School Systems v. McWherter* (*Small Schools III*), the court was asked to determine "whether the State's current method of funding salaries for teachers ... equalizes teachers' salaries .. or whether it fails to

16. *Id.* at 844–845.
17. *Id.* at 877–878 (Johnstone, J. dissenting).
18. 851 S.W.2d 139 [82 Ed.Law Rep. [991]] (Tenn. 1993).
19. 894 S.W.2d 734 [98 Ed.Law Rep. [1102]] (Tenn. 1995).
20. 91 S.W.3d 232 [172 Ed.Law Rep. [1044]] (Tenn. 2002).

do so and violates equal protection by denying students substantially equal educational opportunities."[21] The court held that:

> [W]e find that the salary equity plan ... does not equalize teachers' salaries ... no rational basis exists for structuring a basic education program consisting entirely of cost-driven components while omitting the cost of hiring teachers, the most important component of any education plan and a major part of every education budget.[22]

The court concluded that:

> [T]he record supports the plaintiffs' argument that for the most part, the same disparities in teachers' salaries that existed when *Small Schools II* was decided still exist today. For example, in 1995, the City of Alcoa paid teachers an average of $40,672, while Jackson County paid teachers an average of $23,934, a difference of $16,738. In 1997, Oak Ridge paid its teachers an average of $42,268, while in Monroe County the figure was $28,025, a disparity of $14,243. In 1998–1999, the disparity between Oak Ridge and Monroe County grew to $14,554. Thus, wide disparities still exist, and it takes little imagination to see how such disparities can lead to experienced and more educated teachers leaving the poorer school districts to teach in wealthier ones where they receive higher salaries ... The interveners [urban and suburban school districts] cite a survey of teachers suggesting that [only] 21% of teachers moving to another district to teach did so primarily because of salary considerations. However, the same study reveals that 61.7% of those surveyed cited salary as the reason they preferred working in their current school system over their former one, and 53.3% said that salary influenced their decision to migrate from one system to another ... In the end, the rural districts continue to suffer the same type of constitutional inequities that were present fourteen years ago when this litigation began.[23]

Lake View v. Huckabee
Supreme Court of Arkansas
Decided November 21, 2002

In *Lake View v. Huckabee*, the Supreme Court of Arkansas held that the state system of public school funding was unconstitutional (2002).[24] The Lake View School District is a poorer, rural district, serving mostly African-American children, with 94% of their students on free or reduced school lunches. Concerning the school district's circumstances, the court noted that the Lake View School District:

> [H]as one uncertified mathematics teacher who teaches all high school mathematics courses. He is paid $10,000 a year as a substitute teacher and works a second job as a school bus driver where he earns $5,000 a year. He has an insufficient number of calculators for his trigonometry class, too few electrical outlets, no compasses and one chalkboard, a computer lacking software and a printer that does not work, an inade-

21. *Id.* at 233.
22. *Id.* at 233–234.
23. *Id.* at 242.
24. 91 S.W.3d 472 [173 Ed.Law Rep. [248]] (Ark. 2002).

> quate supply of paper, and a duplicating machine that is overworked. Lake View's basketball team does not have a complete set of uniforms, while its band has no uniforms at all. The college remediation rate for Lake View students is 100 percent.[25]

Concerning the plaintiffs' equal protection challenge, the court concluded that:

> [T]he current school-funding system violates the equal-protection sections of the Arkansas Constitution in that equal educational opportunity is not being afforded to the school children of this state and that there is no legitimate government purpose warranting the discrepancies in curriculum, facilities, equipment, and teacher pay among the school districts. It is clear to this court that, as we indicated in *DuPree* [declaring the funding system unconstitutional in 1983] whether a school child has equal educational opportunities is largely an accident of residence.[26]

Further, the court recognized a duty of accountability by the state, and noted that:

> It is the State's responsibility, first and foremost, to develop forthwith what constitutes an adequate education in Arkansas. It is, next, the State's responsibility to assess, evaluate, and monitor, not only the lower elementary grades for English and math proficiency, but the entire spectrum of public education across the state to determine whether equal educational opportunity for an adequate education is being substantially afforded to Arkansas' school children. It is, finally, the State's responsibility to know how state revenues are being spent and whether true equality in opportunity is being achieved. Equality of educational opportunity must include as basic components substantially equal curricula, substantially equal facilities, and substantially equal equipment for obtaining an adequate education. The key to all this, to repeat, is to determine what comprises an adequate education in Arkansas. The State has failed in each of these responsibilities.[27]

The court concluded that:

> We emphasize, once more, the dire need for changing the school-funding system forthwith to bring it into constitutional compliance. No longer can the State operate on a "hands off" basis regarding how state money is spent in local school districts and what the effect of that spending is. Nor can the State continue to leave adequacy and equality considerations regarding school expenditures solely to local decision-making. This court admits to considerable frustration on this score, since we had made our position about the State's role in education perfectly clear in the *DuPree* case. It is not this court's intention to monitor or superintend the public schools of this state. Nevertheless, should constitutional dictates not be followed, as interpreted by this court, we will have no hesitancy in reviewing the constitutionality of the state's school-funding system once again in an appropriate case.[28]

25. *Id.* at 490.
26. *Id.* at 500.
27. *Id.*
28. *Id.* at 510–511.

DeRolph v. State (IV)
Supreme Court of Ohio
Decided December 11, 2002

On November 5, 2002, Ohio voters elected two new Justices to the Supreme Court of Ohio. Clearly, a judge's political affiliation should not prejudice their views on cases before the court. Further, judicial elections in Ohio are non-partisan. Nonetheless, the political affiliations of judicial candidates are widely reported and commonly known among voters. Many voters and political commentators believe that party affiliation may be a good predictor of judges' future decisions. In the November 2002 elections, Ohio voters elected two Republicans to the Ohio Supreme Court, leading many commentators to believe that these new Republican members of the court may tip the balance away from judicial activism, and make it less likely that the court would mandate significant new funding increases in the pending public school finance cases. However, in a December 11, 2002 decision, prior to seating the newly elected Republican Justices in January 2003, the Supreme Court of Ohio issued a 4–3 opinion in *DeRolph v. State* (*DeRolph IV*), finding that the Ohio funding system remained unconstitutional, calling for a complete systematic overhaul of the state's school funding system, and terminating jurisdiction over the case, effectively ending the *DeRolph* litigation.[29]

Nonetheless, in a dissenting opinion, Chief Justice Moyer responded that:

> [I]t is virtually inconceivable that today's judgment will, in fact, end litigation relative to the constitutionality of Ohio's current school-funding system. The issues will almost certainly again come before this, or another, Ohio court. I write today in anticipation of that unfortunate eventuality ... the majority offers the observation that the General Assembly has done no more than merely "nibbl[e] at the edges" of the current system. The infusion of billions of additional dollars into the public school system of this state in the last ten years, as demonstrated in the record before us, constitutes significantly more than "nibbling" at the edges or elsewhere ... Despite today's decision, I fear that the weight of *DeRolph v. State* will continue to burden not only each of the three branches of state government, but also the school districts and school children the majority decision purports to be helping, as well as other recipients of state tax dollars, e.g., Ohio's public institutions of higher education.[30]

Campaign for Fiscal Equity (CFE) v. State
Court of Appeals of New York
Decided June 26, 2003

In *Campaign for Fiscal Equity (CFE) v. State*,[31] New York's highest court was asked to decide whether the state's method of funding schools in New

29. 780 N.E.2d 529 [172 Ed.Law Rep. [428]] (Ohio 2002). *See also* Molly Townes O'Brien, *At the Intersection of Public Policy and Private Process: Court-Ordered Mediation and the Remedial Process in School Funding Litigation*, 18 OHIO ST. J. ON DISP. RESOL. 391 (2003).

30. *Id.* at 536–538 (Moyer, J., dissenting).

31. 801 N.E.2d 326, 769 N.Y.S.2d 106, 100 N.Y.2d 893 [183 Ed.Law Rep. [970]], 2003 WL 21468502 (N.Y. 2003).

York City violated the New York Constitution's education article,[32] or Title VI of the Civil Rights Act of 1964.[33] The court dismissed the Title VI claim, based on the U.S. Supreme Court's decisions in *Alexander v. Sandoval*,[34] and *Gonzaga University v. Doe*,[35] but ruled in favor of the plaintiffs on their claim under the New York Constitution's education article.[36]

In reviewing this case, the court noted that the State of New York was required to provide a "sound basic education."[37] The court defined a "sound basic education" as "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury ... meaningful participation in a contemporary society."[38] In weighing the evidence to determine whether the State had met this standard, the court concluded that:

> [T]he educational inputs in New York City schools are inadequate ... But tens of thousands of students are placed in overcrowded classrooms, taught by unqualified teachers, and provided with inadequate facilities and equipment. The number of children in these straits is large enough to represent a systemic failure. A showing of good test results and graduation rates among these students—the "outputs"—might indicate that they somehow still receive the opportunity for a sound basic education. The showing, however, is otherwise[39] ... Here the case presented to us, and consequently the remedy, is limited to the adequacy of education financing for the New York City public schools, though the State may of course address Statewide issues if it chooses.[40]

In a dissenting opinion, Justice Read stated:

> [T]his case is about whether the courts or the legislature and the executive should set education policy for our public schools. Because the constitutional standard crafted by the majority to define a "sound basic education" is illusory, because the causal connection between the level of State aid and any deficiencies in New York City's public schools is not proven, and because the majority's proposed remedy exceeds the prudential bounds of the judicial function, I respectfully dissent[41] ... The majority's dilemma is easy to appreciate. Recognizing the judiciary's limitations as an education policymaker, my colleagues are reluctant to create a detailed quality standard by which to define the State's obligation under the Education Article. But they are also unwilling to cede

32. N.Y. Const., Art. XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated").

33. 42 U.S.C. § 2000d; 34 C.F.R. § 100.3(b)(2).

34. 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) (holding that there is no private right to enforce disparate-impact regulations promulgated under Title VI of Civil Rights Act of 1964).

35. 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 [165 Ed.Law Rep. [458]] (2002) (holding that unless a federal statute clearly and unambiguously created an implied cause of action, it also does not create any right that is enforceable under 42 U.S.C. § 1983).

36. *Campaign for Fiscal Equity v. State*, 801 N.E.2d 326, 769 N.Y.S.2d 106, 100 N.Y.2d 893 [183 Ed.Law Rep. [970]], 2003 WL 21468502 (N.Y. 2003). *See also* Bruce Baker and Preston Green, *Can Minority Plaintiffs use the Department of Education Regulations to Challenge School Finance Disparities?*, 173 Ed.Law Rep. [679] (2003).

37. *Id.* at 328, 2003 WL 21468502 at *2.

38. *Id.* at 330, 2003 WL 21468502 at *4.

39. *Id.* at 336, 2003 WL 21468502 at *8.

40. *Id.* at 347, 2003 WL 21468502 at *16.

41. *Id.* at 361, 2003 WL 21468502 at *27 (Read, J. dissenting).

to the Board of Regents and the State Education Department the power to define (and, in the future, redefine) what is claimed to be a constitutional principle (albeit a dynamic one), not an education policy decision. As a result, the standard that the majority has created—a "meaningful high school education" that prepares students "to function productively as civic participants"—is illusory[42] . . . This lawsuit should be at an end. Instead, the majority, observing that "the political process allocates to City schools a share of State aid that does not bear a perceptible relation to the needs of City students" casts the courts in the role of judicial overseer of the Legislature. This disregards the prudential bounds of the judicial function, if not the separation of powers. Moreover, as soon as the trial court is called upon to evaluate the cost and educational effectiveness of whatever new programs are devised and funded to meet the needs of New York City's school children, the education policy debate will begin anew in another long trial followed by lengthy appeals. The success of the new funding mechanism will then be tested by outputs (proficiency levels). This dispute, like its counterparts elsewhere, is destined to last for decades, and . . . is virtually guaranteed to spawn similar lawsuits throughout the State.[43]

DISCUSSION

A review of these most recent opinions, in the perspective of the three decades of litigation since *Serrano*, suggests some interesting possible directions in future funding litigation. From the No Child Left Behind (NCLB) Act to similar state level efforts, accountability is increasingly a central issue in matters concerning public schools. This movement also appears to be influencing funding litigation. Previously, the issue of accountability had been discussed by the highest courts in Massachusetts, Ohio, and Tennessee.[44] However, the Supreme Court of New Hampshire's 2002 opinion in *Claremont III* went further, making accountability a central issue in its opinion, holding that "accountability is an essential component of the State's duty" to provide a constitutionally adequate education.[45] The court quoted President George W. Bush advocating for the NCLB Act, and stating that "without consequences for failure, there is no pressure to succeed."[46] In its 2002 opinion in *Lake View*, the Supreme Court of Arkansas also recognized a state duty of accountability, and the New York High Court's 2003 opinion in *Campaign for Fiscal Equity (CFE) v. State* noted a duty of accountability required by federal, state, and local education reform plans.[47] This issue appears to be rapidly gaining prominence in school funding cases. Given the recent success of plaintiffs arguing this issue, it is likely that future school funding plaintiffs will also assert that the state has a constitutional duty of accountability, as defined in accountability legislation, in assuring the provision of an adequate

42. *Id.* at 365, 2003 WL 21468502 at *30 (Read, J. dissenting).

43. *Id.* at 369, 2003 WL 21468502 at *33 (Read, J. dissenting).

44. *See* 615 N.E.2d 516 at 525 [83 Ed.Law Rep. [657]] (Mass. 1993); 677 N.E.2d 733 [116 Ed.Law Rep. [1140]] (Ohio 1997) (Douglas, J. concurring); 894 S.W.2d 734 at 736 [98 Ed.Law Rep. [1102]] (Tenn. 1993)

45. 794 A.2d at 745.

46. *Id.* at 750.

47. *See* 91 S.W.3d 472 [173 Ed.Law Rep. [248]] (Ark. 2002), and 801 N.E.2d 326, 769 N.Y.S.2d 106, 100 N.Y.2d 893 [183 Ed.Law

education for all students in the state. Accountability legislation, from the NCLB Act to similar state legislation could become fertile new grounds for funding litigation. As Professor Michael Heise 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.[48]

The educational status of rural schools, and of minority race children, were also prominent issues in recent funding litigation. Advocates representing rural area schools played a major role in recent cases, as plaintiffs in five of the six most recent school funding decisions issued by state high courts.[49] In addition to this increased focus on rural schools, the status of minority race students has also received increased attention in recent litigation in Alabama, Arkansas, and New York.[50] The combination of these issues produced some compelling arguments for more equitable funding in Alabama and Arkansas.[51] Both the Supreme Court of Alabama's decision in *James*, and the Supreme Court of Arkansas' decision in *Lake View* involved schools that primarily served poorer, rural, southern, minority-race students.[52] Some of the poorest communities and schools in the nation are found in the South, and the combined disadvantages of persistent poverty, rural isolation, and minority race compound the educational disadvantages faced by some of the Nation's most needy children.[53] Given the desperate social and education-

Rep. [970]], 2003 WL 21468502 (N.Y. 2003).

48. Michael Heise, *Educational Jujitsu*, EDUCATION NEXT, Fall 2002, p. 3.

49. *See James v. Alabama*, 836 So.2d 813 [174 Ed.Law Rep. [487]] (Ala. 2002); *Lake View v. Huckabee*, 91 S.W.3d 472 [173 Ed.Law Rep. [248]] (Ark. 2002); *Claremont Sch. Dist. v. Governor*, 794 A.2d 744 [163 Ed.Law Rep. [882]] (N.H. 2002); *DeRolph v. State*, 780 N.E.2d 529 [172 Ed.Law Rep. [428]] (Ohio 2002); *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232 [172 Ed.Law Rep. [1044]] (Tenn. 2002).

50. *See James v. Alabama*, 836 So.2d 813 [174 Ed.Law Rep. [487]] (Ala. 2002); *Lake View v. Huckabee*, 91 S.W.3d 472 [173 Ed.Law Rep. [248]] (Ark. 2002); *Campaign for Fiscal Equity v. State*, 801 N.E.2d 326, 769 N.Y.S.2d 106, 100 N.Y.2d 893 [183 Ed.Law Rep. [970]], 2003 WL 21468502 (N.Y. 2003).

51. *See James v. Alabama*, 836 So.2d 813 [174 Ed.Law Rep. [487]] (Ala. 2002); *Lake View v. Huckabee*, 91 S.W.3d 472 [173 Ed.Law Rep. [248]] (Ark. 2002).

52. *Id.*

53. An October 2002 report from the U.S. Census Bureau confirmed that rural areas continue to be among the poorest in the nation. *See Highest Poverty Rates in Border Counties, Rural Areas*, Associated Press, Oct. 30, 2002. Although rural poverty is a national problem, it continues to be most extreme in the South, with rural minorities, women, and children being the most disadvantaged. *See id. See also*, Doug Bowers & Peggy Cook, *Rural Conditions and Trends: Socio-economic Conditions Issue*, Economic Research Service, U.S. Dept. of Agriculture, *at*

al situation of these children, and the inequities in the educational opportunities they receive, it is likely that advocates for poorer rural and minority schools will continue to press for greater equity in educational funding.[54]

Urban school advocates also scored a major win in *Campaign for Fiscal Equity (CFE) v. State*.[55] Not only did the New York City public school advocates win an order for funding reform, they won an order for a remedy that only applied to New York City, obviously giving New York City public schools a significant advantage in competing for future education funds in the state. The majority in *CFE* dismissed the suggestion that its decision would likely foster additional future litigation,[56] but it is difficult to imagine the rest of the state acquiescing in silence to this favored status for New York City schools, as the money to fund this remedy has to come from either increased taxes or a redistribution of resources statewide. It is likely that other school districts in New York will resist this shift in resources in both the legislature and the courts of New York.

For decades, law, education, and finance scholars have been searching for a principled way to explain and predict the outcomes of judicial decisions concerning public school funding litigation. In a perfect world, judicial decisions would be based strictly on a dispassionate analysis of the applicable law. A review of the three decades of litigation since *Serrano* does reveal some clear patterns concerning the methods of litigation and the legal tests used by the courts, but to date, fails to explain the outcomes of these cases based on any coherent legal theory.[57] In the absence of a principled means of explaining and predicting the outcomes of school funding litigation cases based on the law, it is possible that other factors may be influencing judges decisions in these cases. For example, the economic situation of the state, or the political ideology of the judges, may be consciously or unconsciously influencing judges' decisions in the difficult funding cases they decide.

Courts have made bold statements about how 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."[58] Nonetheless, it is difficult to imagine that elected state court judges are not influenced by the financial and political realities in their

http://www.ers.usda.gov/publications/rcat73 (Feb. 1997) ("The poverty rate for rural children was 23.0 percent. For rural Black children, who face the combined economic disadvantages of rurality, minority status, and childhood, the poverty rate was 48.2 percent").

54. Pending litigation challenging Iowa's use of the Local Option Sales Tax, in *Coalition for a Common Cents Solution v. State*, addresses the disparate impact the funding scheme has on rural, retail-poor school districts. *See* Rural schools are also at issue in a pending Montana constitutional challenge. Also, in March 2003, the Montana Rural Education Association joined the Montana Quality Education Commission in challenging the constitutionality of Montana's state education funding scheme in a case scheduled for trial on January 20, 2004. *See* Montana Quality Education Commission: Constitutional Challenge at http://www.mqec.org/prong2.htm.

55. 801 N.E.2d 326, 769 N.Y.S.2d 106, 100 N.Y.2d 893 [183 Ed.Law Rep. [970]], 2003 WL 21468502 (N.Y. 2003).

56. *Id.* at 349, 2003 WL 21468502 at *18.

57. See John Dayton, *Serrano and its Progeny: An Analysis of 30 years of School Funding Litigation*, 157 Ed.Law Rep. [447] (2003).

58. *DeRolph v. State*, 780 N.E.2d 529, 530–532 [172 Ed.Law Rep. [428]] (Ohio 2002).

state, and are not fully aware that if the funds for leveling up in funding reform are not available to the General Assembly, funding remedial legislation ordered by the court is going to be politically difficult or impossible. If the General Assembly cannot, or will not, comply with a judicial mandate for greater equity in funding, their non-compliance will constitute an open threat to the continuing authority of the court. Given this reality, one could argue that some judges may be more hesitant to find a public school funding system unconstitutional if they believe it is likely that the General Assembly will not, or can not, comply with a remedial order from the court.

Justices' political affiliations should not prejudice their views on cases before the court. Nonetheless, the Supreme Court of Ohio's eleventh hour decision terminating the *DeRolph* litigation in December, just weeks before two Republicans were to be seated on the court, raised suspicions among many observers.[59] No doubt most judges make a sincere effort to rule on the cases before them based on a dispassionate assessment of the laws governing the case. However, where uncertainty concerning the law creates room for judicial discretion, it is possible that the same political ideologies that caused judicial candidates to gravitate towards one political affiliation over another, might also predispose these individuals toward favoring one case outcome over another. This may be especially true with litigation concerning politically volatile and polarizing issues such as equal opportunity in education and matters of taxation.[60]

CONCLUSION

It has been 30 years since the U.S. Supreme Court's decision in *San Antonio v. Rodriguez* declared that education was not a fundamental right under the U.S. Constitution, effectively ending federal litigation of school funding disputes.[61] But as Justice Marshall noted in his dissenting opinion in *Rodriguez* "nothing in the Court's decision today should inhibit further review of state educational funding schemes under state constitutional provisions."[62] The state court litigation begun in *Serrano v. Priest* continues to thrive with

59. Although the Ohio Supreme Court presumably ended *DeRolph* litigation with its December 2002 decision, plaintiffs continued to petition the courts for a 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." *See State ex rel. State v. Lewis*, 99 Ohio St.3d 97, ¶ 13, 789 N.E.2d 195 [176 Ed.Law Rep. [841]] (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 of Ohio reaffirmed its December 2002 decision by issuing a *writ of prohibition* "prohibiting Perry County Common Pleas Court Judge Linton D. Lewis Jr. from exercising further jurisdiction in *DeRolph v. State*" *State ex rel. State v. Lewis*, 99 Ohio St.3d 97, 789 N.E.2d 195 [176 Ed.Law Rep. [841]] (2003).

60. On May 29, 2003, the Texas Supreme Court in an 8–1 decision reversed both the trial court and the court of appeals' dismissal of the West Orange–Cove case. *See West Orange–Cove v. Alanis*, 107 S.W.3d 558 [178 Ed.Law Rep. [576]] (Tex. 2003). The *West Orange Cove* case challenges Texas' use of a "Robin–Hood" tax collection mechanism, where money generated by property wealthy districts are transferred to lower property wealth districts. The case has been sent back to the trial court for further consideration.

61. 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

62. *Id.* at 133 n.100, 93 S.Ct. 1278 (Marshall, J., dissenting).

cases in progress, pending, and planned nationwide.[63] Although largely overlooked by many educators and scholars, funding litigation has had a tremendous impact on public schools. This litigation has resulted in billions of dollars in additional allocations to schools, and has transformed some states' school systems to a degree second only to the transformation that followed *Brown v. Board of Education*.[64]

There is no end in sight for this type of funding litigation, because at the core of this litigation is the perpetual tension between citizens' altruistic ideals and the realities of political self-interests. Many state constitutions espouse lofty ideals of equity and opportunity for all children, yet few citizens actually want to pay additional taxes or want to share their local educational resources with poorer regions of the state. While egalitarian ideals of educational equity are attractive, the realities of paying for it are not. To those interested in funding litigation, recent school funding decisions have provided some very interesting reading. And given the new directions indicated by these recent cases, there will undoubtedly be many more interesting funding cases in the near future.

63. *See* the ACCESS (Advocacy Center for Children's Educational Success with Standards) website at http://www.accessednetwork.org.

64. 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).