7-1-2006

# The Spirit of Serrano: Past, Present and Future

Anne Dupre
*University of Georgia School of Law*, adupre@uga.edu

John Dayton
*University of Georgia*

# The Spirit of *Serrano* Past, Present, and Future

*John Dayton and Anne Proffitt Dupre*

A decades-long school funding revolution continues in the United States. The litigation sparked by the Supreme Court of California's 1971 decision in *Serrano v. Priest*[1] continues to reshape the legal, political, and educational landscape in the United States, affecting the lives of children, parents, educators, and taxpayers throughout the nation.[2] *Serrano*-inspired lawsuits have transformed school funding policies nationwide, resulting in billions of dollars in new funding and a notable redistribution of resources among school districts. *Serrano*-inspired litigation has changed public schools in many states to a degree second only to the transformation that followed *Brown v. Board of Education*.[3] To understand school funding litigation in the present and to better anticipate future developments, a review of the past, present, and likely future of school funding litigation is invaluable. This article briefly reviews and dis
school funding litigati

## BRIEF HISTORY

The initial catalyst in t
*of Education*, in which

> Today, education is p
> ernments. Compulsc
> education both dem
> our democratic socie
> lic responsibilities, e
> good citizenship. To
> cultural values, in pr
> him to adjust normal
> child may reasonably
> nity of an education.
> provide it, is a right v

Advocates for childr
statement in *Brown* as
equal educational opp
press for judicial mand
left unaddressed in *Br*
was unsuccessful. Cou
because courts lacked
funding inequities.[7]

John Dayton is a professor of law at the University of Georgia and co-director of the Education Law Consortium. Anne Proffitt Dupre is the Alton Hosch Professor of Law at the University of Georgia and co-director of the Education Law Consortium.

1. *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

2. See J. Dayton, "Serrano and Its Progeny: An Analysis of 30 Years of School Funding Litigation," *Education Law Reporter* 157 (2001): 447. School funding litigation has received little attention in proportion to the repercussions it has had in the states. Some of these decisions have had a significant impact on state government, with sweeping consequences for children, parents, schools, and taxpayers. In *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989), the Supreme Court of Kentucky declared that "the result of our decision is that Kentucky's *entire system* of common schools is unconstitutional" (p. 215). 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" (p. 215). Because the *Rose* decision also addressed taxpayer equity, it affected not only students and parents but every citizen and taxpayer in the state. The court ordered that all property must be assessed at 100% of its fair market value and required the legislature to establish a uniform tax rate throughout the state (p. 216). Thus, the *Rose* decision has affected everyone in Kentucky.

3. *Brown v. Board of Education*, 347 U.S. 483 (1954).

4. Ibid., 483, 493. The Court
school funding equity movem
nearly two centuries. In 1819, i
ing to provide an adequate ed
schools required by the statute
policy of the law to give all the i
lic schools. Nor is it in the pow
146 (1819).

5. Ibid., 483. Also see J. T. He
*Law Review* 21 (1986):1, 5 ("The
expenditures on children's edu

6. See S. D. Cashin, "America
ity," *Howard Law Journal* 47 (2c
a later generation of civil rights
tions").

7. See *McInnis v. Ogilvie*, 293

briefly reviews and discusses the past, present, and likely future of *Serrano*-inspired school funding litigation.

## BRIEF HISTORY OF SCHOOL FUNDING LITIGATION

The initial catalyst in the modern school funding revolution was *Brown v. Board of Education*, in which the U.S. Supreme Court 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 undertaken to provide it, is a right which must be made available to all on equal terms.[4]

Advocates for children in economically disadvantaged schools read the Court's statement in *Brown* as broad enough to include the rights of all children to an equal educational opportunity.[5] By the late 1960s 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.[6] Early litigation was unsuccessful. Courts found that school funding issues were nonjusticiable because courts lacked judicially manageable standards to address the alleged funding inequities.[7]

4. Ibid., 483, 493. The Court's decision in *Brown* served as the ideological foundation for the modern school funding equity movement, but 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." 16 Mass. 141, 146 (1819).

5. Ibid., 483. Also see J. T. Henke, "Financing Public Schools in California," *University of San Francisco Law Review* 21 (1986):1, 5 ("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").

6. See S. D. Cashin, "American Public Schools Fifty Years After Brown: A Separate and Unequal Reality," *Howard Law Journal* 47 (2004): 341, 347 ("The battle for equal or adequate funding would be left to a later generation of civil rights lawyers and it would be fought in state courts based upon state constitutions").

7. See *McInnis v. Ogilvie*, 293 F. Supp. 327 (Ill. 1968); *Burruss v. Wilkerson*, 310 F. Supp. 572 (Va. 1969).

In 1971 the Supreme Court of California issued its decision in the landmark case *Serrano v. Priest.*[8] *Serrano* was the first successful challenge to a state system of public school finance, establishing a judicially manageable standard for courts to use when addressing inequities in school funding.[9] The *Serrano* principle[10] mandated that the quality of a child's education must not be a function of the wealth of the local community. Instead, under the *Serrano* principle, public school funding throughout the state must be a function of the wealth of the state as a whole.[11] Citing *Brown,*[12] the *Serrano* court stated,

> We have determined that [the state's school funding] scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors. Recognizing, as we must, that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing. We have concluded, therefore, that such a system cannot withstand constitutional challenge and must fall before the equal protection clause.[13]

Following *Serrano,* other state high courts struck down school finance laws on similar grounds.[14] Events suggested that the decision in *Serrano* might be the catalyst for a new *Brown*-type mandate for school funding reform. Advocates for economically disadvantaged school children set their sights on a victory at the national level.

In 1973 the U.S. Supreme Court was presented with an opportunity to establish a national mandate for school funding equity when it decided *San Antonio v. Rodriguez.* In *Rodriguez,* however, the Court concluded that education was not a fundamental right under the U.S. Constitution, and disparities in school funding between school districts do not violate the U.S. Constitution.[15] The Court's decision

8. *Serrano v. Priest,* 487 P.2d 1241 (Cal. 1971). See also Note, "The *Serrano* Documents," *Yale Review of Law and Social Action* 2 (1971): 77.

9. M. La Morte, *School Law,* 8th ed. (Boston: Allyn & Bacon, 2005): 368.

10. The *Serrano* principle is one of fiscal neutrality. See National Education Association, *Understanding State School Finance Formulas* (Washington, DC: Author, 1987): 5.

11. *Serrano v. Priest,* 487 P.2d 1241, 1244 (Cal. 1971).

12. Ibid., 1256.

13. Ibid., 1244.

14. See *Van Dusartz v. Hatfield,* 334 F. Supp. 870 (D.C. Minn. 1971) (U.S. District Court held that 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 (N.J. 1972) (New Jersey Superior Court judge held that funding system that 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 (Mich. 1972) (Supreme Court of Michigan held that 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).

15. *San Antonio v. Rodriguez,* 411 U.S. 1 (1973).

in *Rodriguez* effectively
courts as a vehicle for a
Marshall noted in his di
sion today should inhibi
state constitutional pro
to state courts and state

Shortly after the Supr
trial court in *Robinson*
lated equal protection g
Constitution as well as t
appealed to the Suprem
waited to release its deci
in *Rodriguez* in 1973. Aft
tection claims in *Rodrig*
set off in a new direction
funding was unconstitu
state's education article
The *Robinson* decision es
their state courts to overt

Based on legal theori
reform advocates had tw
funding schools: funding
and funding suits based

16. *San Antonio v. Rodriguez,* 4
17. *Robinson v. Cahill,* 287 A.2
18. *Robinson v. Cahill,* 303 A.2
19. In reviewing the plaintiffs
explicit–implicit test for fundam
(1973). Instead, the court adopte
apparent public justification. *R*
declined to find that education w
holding on the New Jersey Const
tem of free public schools" (Ibid.
20. See J. Dayton and A. Dupre
*Review* 57 (2004): 2351, 2381. *Serra*
ing cases based on equal protecti
would apply strict scrutiny, and
cient justification for the challen
21. Ibid., 2386. To resolve educa
tion article to determine the mag
measure the state's current fundi
tive duty are more likely to find t
constitution prohibits significant
erally determine that the constitu
parities in funding are constitutic

in *Rodriguez* effectively closed the door on plaintiffs who wanted to use the federal courts as a vehicle for achieving greater equity in school funding. However, 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."[16] Following Justice Marshall's cue, plaintiffs turned to state courts and state constitutions seeking school funding remedies.

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 article.[17] 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* in 1973. After the U.S. Supreme Court's rejection of federal equal protection claims in *Rodriguez*, in an unanimous opinion, the New Jersey high court set off in a new direction.[18] The court agreed that the New Jersey system of school funding was unconstitutional, but its holding was based on the mandates of the state's education article rather than state or federal equal protection provisions.[19] The *Robinson* decision established a new model for future plaintiffs as they pressed their state courts to overturn entrenched school funding systems.

Based on legal theories successfully tested in *Serrano* and *Robinson*, funding reform advocates had two primary causes of action in challenging state systems of funding schools: funding suits based on state equal protection clauses as in *Serrano*[20] and funding suits based on state education articles as in *Robinson*.[21] Plaintiffs

16. *San Antonio v. Rodriguez*, 411 U.S. 1, 138 n. 109 (J. Marshall, dissenting).

17. *Robinson v. Cahill*, 287 A.2d 187 (N.J. Sup. Ct. Law Div. 1972).

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

19. In reviewing the plaintiffs' equal protection claim, the court rejected the U.S. Supreme Court's explicit-implicit test for fundamentality as too mechanical; see *San Antonio v. Rodriguez*, 411 U.S. 1, 33 (1973). Instead, the court adopted an approach that weighed the value of the reviewed interest against the apparent public justification. *Robinson v. Cahill*, 303 A.2d 273, 282 (N.J. 1973). Nonetheless, the court declined to find that education was a fundamental right in New Jersey (Ibid., 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" (Ibid., 294).

20. See J. Dayton and A. Dupre, "School Funding Litigation: Who's Winning the War?" *Vanderbilt Law Review* 57 (2004): 2351, 2381. *Serrano* framed the issues that became prominent in subsequent school funding cases based on equal protection claims: whether education is a fundamental right, whether the court would apply strict scrutiny, and 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.

21. Ibid., 2356. To resolve education article challenges, courts first interpret the meaning of the education article to determine the magnitude of the state's constitutional duty to support education and then measure the state's current funding system against this standard. Courts that find high levels of legislative duty are more likely to find that school funding systems fail to meet this high standard and that the constitution prohibits significant funding disparities. Courts that find low levels of legislative duty generally determine that the constitution allows broad legislative discretion in school funding and that disparities in funding are constitutionally permissible.

pressed suits based on these theories throughout the nation, with mixed results.[22] After wins in the early 1970s in *Serrano* and *Robinson*, plaintiffs suffered losses in the high courts in Michigan[23] and Pennsylvania[24] but had a string of victories in the latter part of that decade in Connecticut,[25] Washington,[26] and West Virginia.[27] The 1980s opened with a string of plaintiff losses in Georgia,[28] Colorado,[29] New York,[30] and Maryland[31] but a victory in Arkansas in 1983.[32] This was followed by another plaintiff loss in Oklahoma in 1987.[33] However, the plaintiffs scored another string of major victories in 1989 in Kentucky,[34] Montana,[35] and Texas.[36]

In the midst of this seesawing battle over school funding, the Supreme Court of Kentucky's decision in *Rose v. Council for Better Education* stands out as a landmark decision.[37] In *Rose*, the plaintiffs were mostly residents of poorer rural areas. Determining that the state had failed to provide these children with the efficient system of common schools required by the state constitution's education clause, the Kentucky high court quoted a state constitutional delegate's declaration that "common schools make patriots and men who are willing to stand upon a common land. The boys of the humble mountain home stand equally high with those from the mansions of the city. There are no distinctions in the common schools, but all stand upon one level."[38] The court also 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. . . . Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[39]

The court ruled that the state must create an efficient system of schools throughout the state and declared, "The result of our decision is that Kentucky's

22. See Dayton and Dupre, "School Funding Litigation," 2351.
23. *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973).
24. *Danson v. Casey*, 399 A.2d 360 (Pa. 1979).
25. *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977).
26. *Seattle v. State*, 585 P.2d 71 (Wash. 1978).
27. *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979).
28. *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981).
29. *Lujan v. Colorado*, 649 P.2d 1005 (Colo. 1982).
30. *Levittown v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982).
31. *Hornbeck v. Somerset*, 458 A.2d 758 (Md. 1983).
32. *Dupree v. Alma School Dist.*, 651 S.W.2d 90 (Ark. 1983).
33. *Fair School Finance Council v. State*, 746 P.2d 1135 (Okla. 1987).
34. *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989).
35. *Helena v. State*, 769 P.2d 694 (Mont. 1989).
36. *Edgewood v. Kirby*, 777 S.W.2d 391 (Tex. 1989).
37. *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989).
38. Ibid., 206.
39. Ibid., 215, citing *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

*entire* system of comm
sion and the resulting r
litigation was initiated i

As in *Rose*, *Serrano*-i
rural or urban school
between their schools a
urban areas.[43] The pote
is often strained, howev
create an opportunity f
drive a strategic wedge b
to go it alone or even fin

Although the litigatio
advocates, in 1990 advoc
in *Abbott v. Burke*. Plain
was unconstitutional in i
tailoring the allegations
group of schools.[45] The
declared the state's syster
these particular urban a
school funding system m

40. Ibid.
41. Ibid. ("This decision appli
applies to the statutes creating,
taining thereto. This decision c
Department of Education to th
covers school construction and
school system in Kentucky").
42. See D. Dawahare, "Public S
*Law Review* 27 (2004): 27.
43. See J. Dayton, "Rural Chil
lem in Search of a Real Solution
44. See *Leandro v. State*, 488 S
selves in opposition. Poorer rura
vene alleging that the state's syst
burdens faced by urban school d
nary educational needs, and furt
materials are particularly signific
dent population is taking place i
high levels of poverty, homelessn
their fiscal resources, they canno
tion as can the more rural poor c
of certain poor rural districts to
if not greater needs in the urban s
olina Constitution and state law"
45. *Abbott v. Burke*, 575 A.2d 35
46. Ibid., 363.

*entire* system of common schools is unconstitutional."[40] The scope of the decision and the resulting remedial actions were unprecedented.[41] After *Rose*, similar litigation was initiated in more than 30 states.[42]

As in *Rose*, *Serrano*-inspired litigation commonly includes claims by poorer rural or urban school plaintiffs contesting inequities in educational resources between their schools and the wealthier schools in the state's more affluent suburban areas.[43] The potential political alliance between rural and urban plaintiffs is often strained, however, and differences in interests between these groups can create an opportunity for state defendants and their wealthier suburban allies to drive a strategic wedge between them. In some cases rural or urban plaintiffs decide to go it alone or even find themselves on opposite sides in funding disputes.[44]

Although the litigation in *Rose* represented a major step forward for rural school advocates, in 1990 advocates for inner city school children scored a major victory in *Abbott v. Burke*. Plaintiffs asserted that the New Jersey school funding system was unconstitutional in its application to poorer urban school districts in the state, tailoring the allegations and the proposed remedy to a more narrowly defined group of schools.[45] The tactic succeeded, and the Supreme Court of New Jersey declared the state's system of public school funding unconstitutional as applied to these particular urban area school districts.[46] The court held that the New Jersey school funding system must be amended to ensure funding of education in poorer

40. Ibid.

41. Ibid. ("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").

42. See D. Dawahare, "Public School Reform: Kentucky's Solution," *University of Arkansas at Little Rock Law Review* 27 (2004): 27.

43. See J. Dayton, "Rural Children, Rural Schools, and Public School Funding Litigation: A Real Problem in Search of a Real Solution," *Nebraska Law Review* 82 (2003): 99.

44. See *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997). In *Leandro* rural and urban schools found themselves in opposition. Poorer rural schools filed the original suit, but urban schools filed a motion to intervene alleging that the state's system of funding did not sufficiently take into consideration the additional burdens faced by urban school districts, which must educate a large number of students with extraordinary educational needs, and further complained that "deficiencies in physical facilities and educational materials are particularly significant in their systems because most of the growth in North Carolina's student population is taking place in urban areas" (p. 253). They alleged that "because urban counties have high levels of poverty, homelessness, crime, unmet health care needs, and unemployment which drain their fiscal resources, they cannot allocate as large a portion of their local tax revenues to public education as can the more rural poor districts." They urged the court to conclude that "the state's singling out of certain poor rural districts to receive supplemental state funds, while failing to recognize comparable if not greater needs in the urban school districts, is arbitrary and capricious in violation of the North Carolina Constitution and state law" (p. 253).

45. *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990).

46. Ibid., 363.

urban districts at the same level as that of property-rich districts in the more affluent suburban areas of the state. Echoing *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 special disadvantages.[47]

After the 1990 decision in *Abbott*, litigation continued unabated through the 1990s with mixed results. Defendants prevailed from 1999 through 2002, in South Carolina,[48] Wisconsin,[49] and Alabama.[50] In the last few years, however, plaintiffs have been on a winning streak, including wins in North Carolina,[51] Kansas,[52] and Montana.[53]

The litigation that followed the Supreme Court of California's landmark school funding decision in *Serrano v. Priest* has touched every state to some degree, with most states experiencing full-scale legal challenges to the systems of funding public schools. The highest courts in 36 states have issued opinions on the merits of funding litigation suits, with 19 courts upholding state funding systems and 17 declaring the system unconstitutional.[54] Litigation has been filed and is still pending in many more states.[55] All 50 states have experienced school funding reform efforts, ranging from grass roots reform to intense litigation, and some states have experienced protracted serial litigation extending over decades.[56]

## CURRENT STATUS OF SCHOOL FUNDING LITIGATION

In recent years plaintiffs have experienced much success in litigation.[57] In part, this success may be related to a new approach in litigating these cases. Since *Robinson*, in litigation based
challenge in successful
substantive level of dut
cation, and plaintiffs n
constitutional duty. Pla
difficulty of persuasive
clear, tangible level of
and because of the evi
meet the established co

The passage of the fe
"accountability" legisla
challenge.[58] This "acco
quate public school perf
quate educational achie
help plaintiffs to prove
failing to achieve at state
dardized tests.[59] When t
and then the state's ow
schools are failing, it is t

States are facing a diffi
Act and similar state legi
student achievement an
that achievement, states l
in challenging school fu
the proper remedy for p
then continued poor pe
resources are needed. Sta
liability in these cases.[60]

47. Ibid.

48. *Abbeville County School Dist. v. State*, 515 S.E.2d 535 (S.C. 1999).

49. *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000).

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

51. *Hoke County Board of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004).

52. *Montoy v. State*, 120 P.3d 306 (Kans. 2005).

53. *Columbia Falls v. State*, 109 P.3d 257 (Mont. 2005). But see *Hancock v. Commissioner of Educ.*, 822 N.E.2d 1134 (Mass. 2005), ruling for the state and holding that the state is currently meeting its constitutional duty in funding education.

54. See J. Dayton, A. Dupre, and C. Kiracofe, "Education Finance Litigation: A Review of Recent State High Court Decisions and Their Likely Impact on Future Litigation," *Education Law Reporter* 186 (2004): 1.

55. See Advocacy Center for Children's Educational Success with Standards (ACCESS) (www.accessednetwork.org/litigation) (tracking current school funding litigation in all states).

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

57. D. Hoff, "States on Ropes in Finance Lawsuits," *Education Week* 24 (Dec. 8, 2004): 1.

58. 20 U.S.C. §6301 (2001).

59. School funding reform ad
ing successful. This is not a con
*Governor*. See *Claremont*, 794 A.
New Jersey, and Tennessee had d
*Claremont III* was decided, listin
to the State's duty to provide a co
went further in 2002, making acc
that same tone, the Supreme Co
same theory in *Lake View v. Hu*
*Campaign for Fiscal Equity v. Sta*

60. See M. Heise, "Educational
school regulation away from the t
ing, number of certified teachers

*son*, in litigation based on state education articles plaintiffs have faced a two-part challenge in successfully pleading their cases: Plaintiffs must clearly establish a substantive level of duty for the state in providing a constitutionally adequate education, and plaintiffs must prove that the state has failed to meet the established constitutional duty. Plaintiffs have had mixed success in litigation because of the difficulty of persuasively translating the text of the state's education article into a clear, tangible level of substantive state duty to provide an adequate education and because of the evidentiary challenge of proving that the state has failed to meet the established constitutional duty.

The passage of the federal No Child Left Behind (NCLB) Act and similar state "accountability" legislation is proving very useful to plaintiffs in meeting this challenge.[58] This "accountability" legislation in many cases clearly defines adequate public school performance in producing what the state itself considers adequate educational achievement. Furthermore, the state's own student testing data help plaintiffs to prove that students in many of the state's poorest schools are failing to achieve at state-established levels of competence on state-adopted standardized tests.[59] When the state itself defines adequate educational achievement, and then the state's own test data confirm that the children in the plaintiffs' schools are failing, it is then advantageous for the plaintiffs.

States are facing a difficult situation. By accepting the premise under the NCLB Act and similar state legislation that the state and state schools are responsible for student achievement and that standardized test scores are the proper measure of that achievement, states have made it much easier for plaintiffs to prove their cases in challenging school funding systems. If plaintiffs can convince the court that the proper remedy for poor performance on standardized tests is more funding, then continued poor performance is further evidence that still more remedial resources are needed. States may be exposed to potentially open-ended financial liability in these cases.[60]

58. 20 U.S.C. §6301 (2001).

59. School funding reform advocates have increasingly found that "accountability" litigation is proving successful. This is not a completely new approach, but it increased in prominence in *Claremont v. Governor*. See *Claremont*, 794 A.2d 744, 751–752 (N.H. 2002) (the highest courts in Massachusetts, Ohio, New Jersey, and Tennessee had discussed accountability legislation as setting the level of state duty before *Claremont III* was decided, listing other states that have recognized "accountability as a logical corollary to the State's duty to provide a constitutionally adequate education"). But the New Hampshire high court went further in 2002, making accountability a central issue in the case (*Claremont*, 745). In keeping with that same tone, the Supreme Court of Arkansas also recognized a state duty of accountability under this same theory in *Lake View v. Huckabee*, 91 S.W.3d 472 (Ark. 2002), as did the high court in New York in *Campaign for Fiscal Equity v. State*, 801 N.E.2d 326 (N.Y. 2003).

60. See M. Heise, "Educational Jujitsu," *Education Next* (Fall 2002): 3 ("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

A serious underlying problem for the state is that the NCLB Act is premised on some unrealistic assumptions,[61] including a flawed supposition that children in a school system are like raw materials in a manufacturing process, and as with the processing of other fungible commodities, the final result can be controlled as a function of the process. On the contrary, every child is unique and brings to the educational experience unique strengths and weaknesses. Largely independent of the quality of instruction, academically gifted children usually achieve higher scores on state standardized tests than academically challenged children. The state does not have complete control over student achievement. Many of the factors that affect student achievement are controlled by the child, the parent, and other nonschool factors.[62]

In contrast to plaintiffs' more recent claims based on accountability legislation and test data, claims based on equity and adequacy were tied to measures of inputs and had clearer limits on state financial liability. The ceiling for state financial liability in equity suits generally is limited by the level of equality in per-pupil expenditures. Similarly, adequacy suits are limited by a demonstration that the state support for all schools was at least minimally adequate. But the model of state accountability embedded in the NCLB Act and similar state legislation presents no definite upper limit on state financial responsibility when groups of students consistently fail to meet state established standards. This scenario presents tremendous potential advantages to school funding reform advocates and some serious problems for state defendants.

Despite their current successes in the courthouse, plaintiffs still face another serious problem: Victory in the courthouse does not guarantee victory in the statehouse, as evidenced by decades of serial litigation in some states.[63] Many of the recent and pending school funding cases involve compliance litigation, with

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").

61. See J. Ryan, "The Perverse Incentives of the No Child Left Behind Act," *New York University Law Review* 79 (2004): 932, 934.

62. See E. Hanushek, "When School Finance 'Reform' May Not Be Good Policy," *Harvard Journal on Legislation* 28 (1991): 423, 431–432 (citing the "Coleman Report" as finding "that schools are not very important in determining student achievement. Families, and to a lesser extent peers, were the primary determinants of variations in performance.... Policymakers directly control some [educational inputs] such as the characteristics of the schools, teachers, and curricula. Other inputs such as those of family and friends, plus innate endowments of the students, generally cannot be affected by public policy").

63. See NCLB Act.

previously successful plai
quate reforms in school f

Even when courts ord
authority. Constitutiona
authority over the legisl
responsive to political co
from a court intended to f
state legislators may inste
with tax increases or an u

Legislators have becon
perceive as judicial intrusi
to a 2005 court order in K
additional $143 million fo
constitutional amendmer
ing cases.[67] Similarly, whi
bill was introduced in the
grant full authority over
hibit any future judicial ir

Despite the persistence
that litigation has not yet
nomically advantaged sch
taged status, whereas dis
legislative support to ove
districts.[70] Notwithstandi
by the Education Trust sh
levels were lower in distric
the lowest quartile of pov
students also had lower pe
centage of minority stude

64. See *Montoy v. State*, 120 P.3d
ing Levels Ordered by the Courts,
65. See R. C. Wood, "Constitut
Moving from Equity to Adequacy
66. See M. Heise, "Litigated Lea
67. D. Hoff, "Kansas Lawmaker
68. R. Johnston, "Bar on Financ
69. See M. Heise, "Litigated Learn
70. See T. Bevelock, "Public Sch
the Statehouse Follow Suit?" *St. Jo*
71. Dayton and Dupre, "School

previously successful plaintiffs claiming that legislators have failed to make adequate reforms in school funding systems as ordered in prior court decisions.[64]

Even when courts order school funding reforms, there are limits to judicial authority. Constitutional mandates for separation of powers limit judicial authority over the legislative branch.[65] Furthermore, legislators may be more responsive to political consequences than judicial threats.[66] Despite ultimatums from a court intended to force legislators to enact specific school funding reforms, state legislators may instead choose to avoid the political consequences associated with tax increases or an unpopular reallocation of resources.

Legislators have become increasingly aggressive in responding to what they perceive as judicial intrusions on the legislative domain. For example, in response to a 2005 court order in Kansas requiring the General Assembly to appropriate an additional $143 million for school funding reform, legislators instead proposed constitutional amendments limiting the authority of the courts in school funding cases.[67] Similarly, while a funding challenge was still pending in Missouri, a bill was introduced in the state senate that would amend the state constitution to grant full authority over school funding expressly to the legislature and to prohibit any future judicial intervention in school funding disputes.[68]

Despite the persistence of school funding reformers, there is much evidence that litigation has not yet produced the desired reforms.[69] In many states economically advantaged school districts have retained or even increased this advantaged status, whereas disadvantaged districts have failed to generate sufficient legislative support to overcome the political influence of the more advantaged districts.[70] Notwithstanding more than three decades of litigation, a recent study by the Education Trust showed that in 30 of 47 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. 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 31 of 47 states studied.[71]

64. See *Montoy v. State*, 120 P.3d 306 (Kans. 2005). See also D. Hoff, "States Resist Meeting K–12 Spending Levels Ordered by the Courts," *Education Week* 24 (April 6, 2005): 1.

65. See R. C. Wood, "Constitutional Challenges to State Education Finance Distribution Formulas: Moving from Equity to Adequacy," *St. Louis University Public Law Review* 23 (2004): 531, 562.

66. See M. Heise, "Litigated Learning," 2417, 2440.

67. D. Hoff, "Kansas Lawmakers Agree on Spending Plan," *Education Week* 24 (July 13, 2005): 23.

68. R. Johnston, "Bar on Finance Cases Sought," *Education Week* 24 (March 2, 2005): 17.

69. See M. Heise, "Litigated Learning and the Limits of Law," *Vanderbilt Law Review* 57 (2004): 2417, 2438.

70. See T. Bevelock, "Public School Financing Reform: Renewed Interest in the Courthouse, but Will the Statehouse Follow Suit?" *St. John's Law Review* 65 (1991): 467, 489.

71. Dayton and Dupre, "School Funding Litigation" 2351, 2408.

## LIKELY FUTURE OF SCHOOL FUNDING LITIGATION

A great deal can be learned from a study of the history and current circumstances defining school funding litigation.[72] Nonetheless, as one education law and finance scholar noted,

> The net sum of over a quarter century of intense education finance litigation proves that the outcome of future lawsuits cannot be known. Too many variables impact an ever-changing social milieu, and the courts themselves are never certain of whether to lead or to reflect society's thinking. Courts seem to be at times ahead of the political readiness, while in other obvious ways they lag behind. The political climate of legislatures adds to this uncertainty, as states themselves shape the frequency and intensity of litigation by the legislatures' relative vigilance to equity concerns.[73]

School funding litigation is a complex process that can be significantly affected by changes in the volatile areas of fiscal and political circumstances, making its future impossible to predict with certainty. Nonetheless, some useful insights can be gained by connecting the history of school funding litigation with what is currently occurring to logically extrapolate the likely future of school funding litigation.[74]

This much seems certain: The line of litigation begun in *Serrano* is now in its fourth decade, with no end in sight. Nationwide, the courtroom has become the arena of choice for an ongoing dialog over equal access to educational opportunities and the fair allocation of tax burdens. Furthermore, decades of litigation since *Serrano* confirm that additional funding for schools cannot be allocated if the money is not available, and lasting reforms cannot be achieved without adequate and sustained political support for these reforms.[75] Accordingly, economic and political circumstances will continue to have a significant effect on the direction of school funding litigation.

Many states have been struggling economically for decades, and all states face an uncertain economic future with growing global competition for jobs and resources. Increasing federal deficits are further compounding state fiscal problems, and the political future is uncertain in many states.[76] All of these factors

72. Ibid.

73. R. C. Wood, "Constitutional Challenges," 531, 563.

74. See Ibid., 559 (listing eight likely future directions in school funding litigation based on a logical extrapolation from historical and current events).

75. See J. Dayton, "When All Else Has Failed: Resolving the School Funding Problem," *Brigham Young University Education and Law Journal* 1995 (1995): 1, 20.

76. See I. Lav and A. Brecher, *Passing Down the Deficit: Federal Policies Contribute to the Severity of the State Fiscal Crisis* (Washington, DC: Center on Budget and Policy Priorities, www.cbpp.org/5-12-04sfp.htm), August 18, 2004.

probably will make it r
additional new funds
times of budget surpl
funding inadequacies
trast, school funding
additional resources w
cult economic circum

In the current econ
movement by school v
on the present momen
suit in Georgia, the firs
their case consolidate
brought by advocates f
many children are recei
to meet its constitutio
should order a proper
proper remedy.

The new "voucher re
quate education belon
also belongs to the chil
argue, would be a schoo
selected by the child's pa
method of assigning stu
school in the state for th

Although the first of
plaintiffs have a much l
for the Alliance for Scho
edy in about a half-doze
funding equity suits mo

77. D. Hoff, "Movement Afc
2005): 25.

78. See *Williams v. State*, 200
see also Consortium for Adequa
ton Co., Ga. Oct. 28, 2005) (rulin
system of school funding may
tution's education clause but th
156 (Ga. 1981)).

79. C. Hendrie, "Georgia Laws
24 (Oct. 26, 2005): 17.

80. *Williams v. State*, No. 1:05-

81. Ibid. (quoting Clint Bolick

probably will make it more difficult for school funding reform advocates to obtain additional new funds and long-term political support for funding reforms. In times of budget surpluses and political stability, it is fairly easy to address school funding inadequacies by simply making the fiscal pie bigger for everyone. In contrast, school funding reform advocates will have greater difficulties obtaining additional resources when funds are limited and demands are escalating. Difficult economic circumstances also tend to fuel political instability.

In the current economic and political climate there appears to be an emerging movement by school voucher advocates to advance their cause by piggybacking on the present momentum of school funding adequacy suits.[77] In a pending lawsuit in Georgia, the first of its kind in the nation, voucher advocates seek to have their case consolidated with another, more traditional school funding suit brought by advocates for poorer rural schools.[78] Plaintiffs in both suits agree that many children are receiving an inadequate education and that when the state fails to meet its constitutional obligation to provide an adequate education, courts should order a proper remedy. However, they disagree about what constitutes a proper remedy.

The new "voucher remedy" plaintiffs assert that because the right to an adequate education belongs to the child and not to the school district, the remedy also belongs to the child and not to the school district.[79] A proper remedy, they argue, would be a school voucher that could be used at any public or private school selected by the child's parents. Furthermore, they seek to have the residence-based method of assigning students abolished, giving parents the ability to choose any school in the state for their children.[80]

Although the first of these suits was filed in Georgia, these "voucher remedy" plaintiffs have a much larger national agenda. According to the general counsel for the Alliance for School Choice, "There is active discussion of the voucher remedy in about a half-dozen states right now."[81] They seek two goals: to make "the funding equity suits more child-centered, with more realistic remedies" and "to

77. D. Hoff, "Movement Afoot to Reframe Finance-Adequacy Suits," *Education Week* 25 (Oct. 26, 2005): 25.

78. See *Williams v. State*, 2005 WL 2156135 (N.D. Ga. Aug. 11, 2005) (defendant's motion to dismiss); see also Consortium for Adequate School Funding in *Georgia v. State*, No. 2004CV91004 (Super. Ct. Fulton Co., Ga. Oct. 28, 2005) (ruling that plaintiffs representing poorer rural schools challenging the state's system of school funding may proceed on claims that the system is inadequate under the state constitution's education clause but that equal protection claims are barred by *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981)).

79. C. Hendrie, "Georgia Lawsuit Seeks Vouchers as Remedy to School Aid Disparities," *Education Week* 25 (Oct. 26, 2005): 17.

80. *Williams v. State*, No. 1:05-CV-0427 at 9–10 (N.D. Ga. Apr. 27, 2005).

81. Ibid. (quoting Clint Bolick, president and general counsel for the Alliance for School Choice).

provide an opportunity for school choice supporters in states where legislative prospects are not bright."[82] Currently in their sights is the state of New Jersey, where the state's highest court has recognized a fundamental right to a high-quality education and experienced decades of frustration in attempting to obtain a satisfactory remedy from the legislature.

Because of the constitutional separation of powers, however, it is doubtful that courts could legitimately order a remedy as specific as vouchers. A court may order school funding reforms if the school funding system fails to pass constitutional muster, but the specific means of reform is a decision for legislators, not the judiciary. Nonetheless, in filing these "voucher remedy" lawsuits, advocates for vouchers are gaining significant national attention, and the remedy they propose may appeal to some legislators as a legitimate alternative to simply allocating more money to some schools or, more ominously, as a means of putting plaintiffs on notice that they should be careful what they ask for because the remedy the legislature provides could be vouchers instead of additional funding. If the voucher movement gains a firm footing, it would give parents another way to educate their children outside of public schools and would be yet another disincentive to pay higher taxes for public schools. "Affluent parents may even opt to minimize taxes in order to free up income for tuition expenses at private schools."[83]

## CONCLUSION

The spirit of *Serrano* remains strong well into the fourth decade of litigation inspired by the Supreme Court of California's 1971 decision in *Serrano v. Priest.*[84] School funding litigation will continue for the foreseeable future, with advocates for poorer rural and urban children continuing to push for greater educational funding. As long as plaintiffs do not believe they can achieve a just resolution of their disputes in the political arena, they are likely to continue to turn to litigation, seeking victory in the courthouse when it cannot be achieved in the statehouse.

However, winning in court does not guarantee that reform advocates will realize their objectives. A court order for school funding reform does not guarantee the passage of a statute providing for adequate funding reform. Furthermore, the passage of a statute does not guarantee that adequate funding will be appropriated to fully fund the reform legislation. Under favorable circumstances, a court order for funding reform may serve as a powerful catalyst for change or at least strengthen the hand of reform advocates in the legislative process. Regardless of

82. Ibid.

83. M. Yudof, "School Finance Reform: Don't Worry, Be Happy," *NOLPE Notes* May 1992: 3.

84. *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

where the school fundi
because school fundin
which can come only fr

Depending on the ci
essary to produce great
improvement in fundin
ical coalition for fundir
reform. Funding reform
officials if those elected
port the necessary scho
to school funding probl
support public school fi

Ultimately all signific
people, and the battle o
changes in school fundi
nize the need for chan
Through their votes the
cation policy changes. D
cation, what degree of
burden of adequately fu
vouchers, school accoun
to influence the outcom
*rano* extends into its fou

85. Authentic and lasting chai
funding legislation, and sufficie
funding systems. Judicial involve
more broadly to encompass the
lems lies in persuading the elec
clearly in everyone's long-term i
to be more productive, pay more
crimes, and need fewer social se
New Jersey, and Kentucky," *Har*
ated with incarceration, welfare c
cates must persuade the electora
only because they are unconstit
*Act: Hearing on H.R. 3850 Before t*
*Comm. on Educ. and Labor*, 101st

where the school funding reform journey starts, it always ends at the statehouse, because school funding reforms require new legislation and appropriations, which can come only from the legislature.

Depending on the circumstances, judicial action may be helpful or even necessary to produce greater equity, but it is never sufficient. If the goal is long-term improvement in funding for schools, not just victory in litigation, building a political coalition for funding reform is essential to achieving meaningful and lasting reform. Funding reformers are most likely to obtain the full cooperation of elected officials if those elected officials know that their constituents understand and support the necessary school funding reforms. Judicial decisions may call attention to school funding problems, but the electorate must be persuaded to accept and support public school funding changes.[85]

Ultimately all significant battles are about winning the hearts and minds of the people, and the battle over school funding is no exception. Adequate and lasting changes in school funding can be achieved only if the people of the state recognize the need for change as legitimate and worthy of their ongoing support. Through their votes the people of the state can promote, prevent, or reverse education policy changes. Disputes continue over what constitutes an adequate education, what degree of equity in resources is needed, and who should bear the burden of adequately funding public schools. Hot-button political issues such as vouchers, school accountability, and the fair allocation of resources will continue to influence the outcome of these disputes as the line of litigation begun in *Serrano* extends into its fourth decade and beyond.

---

85. Authentic and lasting change in school funding requires adequate fiscal resources, effective school funding legislation, and sufficient long-term political will to enact and sustain positive changes in school funding systems. Judicial involvement may serve as a catalyst for change, but reform advocacy must extend more broadly to encompass the political realm. The only enduring resolution to school funding problems lies in persuading the electorate that making a high-quality education available to every child is clearly in everyone's long-term interest. When adequately educated children become adults they are likely to be more productive, pay more taxes, enhance the nation's international competitiveness, commit fewer crimes, and need fewer social services. See C. Benson, "Definitions of Equity in School Finance in Texas, New Jersey, and Kentucky," *Harvard Journal on Legislation* 28 (1991): 401, 403 ("School failure is associated with incarceration, welfare dependency, and bad health, all of which drain the public coffers"). Advocates must persuade the electorate and lawmakers that educational inequities should be eliminated not only because they are unconstitutional but because they are unwise public policy. See *The Fair Chance Act: Hearing on H.R. 3850 Before the Subcomm. on Elementary, Secondary, and Vocational Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 2d Sess. (1990).