1-1-2003

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OF FUZZY STANDARDS AND INSTITUTIONAL CONSTRAINTS: A RE-EXAMINATION OF THE JURISPRUDENTIAL HISTORY OF EDUCATIONAL FINANCE REFORM LITIGATION

William S. Koski*

The standards problem is essentially one of achieving intelligibility. If the present state financing systems are condemned, it is not enough simply to declare them invalid. If the court hopes to generate the consensus necessary to meaningful change it must identify with reasonable clarity the locus and nature of the constitutional defect. Society cannot or will not respond to canons incapable of communication . . . . Where substantive rights depend upon Delphic distinctions the court stands endlessly on flypaper, unable to clear more than one foot at a time. Unless the court can find an effable essence, its judgments tend to be ad hoc and unpredictable, qualities which in the school finance case will evoke nothing but criticism of the court and evasion by the legislatures.

—John Coons, William Clune, and Stephen Sugarman¹

We . . . hold that Wisconsin students have a fundamental right to an equal opportunity for a sound basic education. An equal opportunity for a sound basic education is one that will equip students for their roles as citizens and enable them to succeed economically and personally.

—Justice N. Patrick Crooks, Wisconsin Supreme Court²

I. INTRODUCTION

Although obviously intended as advice to advocates and

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judges alike to ensure clarity and intelligibility in framing legal issues and designing standards for what is a constitutional educational finance system, the words of John Coons, William Clune, and Stephen Sugarman appear three decades later to have been largely disregarded by the courts. In their influential book, *Private Wealth and Public Education*, Coons, Clune, and Sugarman argued for a constitutional standard for educational finance systems that is clear and easy to apply. Otherwise, they argue, the political system will not respond to the judicial decree and the courts will lose legitimacy. With this argument, Coons, Clune, and Sugarman recognized early the institutional constraints facing courts that embark upon educational finance reform. Their prescription: clarity. Despite this warning, however, state supreme courts, if they choose to intervene at all, have done little more than declare funding systems unconstitutional. The locus and nature of the constitutional defect is often unclear and the judicial standard, to the extent one is articulated at all, is bereft of definitive guidance for a legislature prone to evasion. For example, the Wisconsin Supreme Court articulated a right to an education that "will equip students for their roles as citizens and enable them to succeed economically and personally" 3—hardly a model of clarity. The court left many questions unanswered: What are the roles of citizens? What does it mean to succeed economically and personally? And, more vexing, what kind of schooling does it take to achieve those goals? Yet Coons, Clune, and Sugarman’s fear of widespread criticism and the risk of legislative evasion have been in large part unrealized. On the contrary, judicial use of fuzzy and flexible standards may have resulted in a species of jurisprudence of the least intrusive variety—a jurisprudence that recognizes courts’ institutional constraints, while at the same time understanding the courts’ obligation to ensure a “just” educational finance system.

This article examines the jurisprudential history of educational finance reform litigation, focusing on the role of legal doctrine and theory in state supreme court decision-making in this arena and the courts’ awareness of their own institutional capacities. To be precise, this article may better be described as a “re-examination” of the judicial history of educational finance reform as this history has already been extensively addressed by

3. Id.
other commentators.\textsuperscript{4} Section II of the article provides a background and framework for discussing the problem of educational finance reform. Section III briefly examines the very minimal role of the federal courts in school finance reform and argues that the primary contribution of the federal courts has been the sounding of a note of caution regarding the institutional limitations on courts when intervening in such a complex social policy area.

Section IV then extensively reconsiders the last three decades of educational finance reform litigation in the state supreme courts. That section first argues that the so-called "second wave" of school finance litigation that arguably focused on theories of fiscal and educational equity was, in fact, equally concerned with the provision of a basic, "adequate" education to children. That the courts often intertwined the language of equity and adequacy demonstrates both their inability to articulate a clear standard for constitutional compliance and their desire to

maintain flexibility in school finance jurisprudence. Second, the section argues that, from the beginning, state supreme courts have recognized their institutional limitations and paid significant deference to the legislative and executive branches in educational finance reform. Third, the section argues that courts in some cases have deployed adequacy arguments to repel plaintiffs’ equity claims, while in other cases they have used evidence of inequity to support claims of inadequacy. That courts have fused their equity and adequacy analyses suggests not only that the supposed demarcation between “second wave” equity cases and “third wave” adequacy cases is not so distinct, but also that courts instrumentally adopt either equity or adequacy analyses to meet their own policy objectives and maintain their institutional legitimacy and role in state governance. The article finally concludes with some thoughts on the evolving—and fuzzy—jurisprudence in school finance litigation and the role of courts in school finance policy.

II. BACKGROUND AND FRAMING THE PROBLEM

A. A Brief Overview of School Finance Reform Litigation: Three Waves of Reform

Ever since Coons, Clune, and Sugarman struggled to articulate a workable standard for what constitutes a constitutional education, the evolution of school finance litigation has become the sine qua non of the development of students’ rights to some identifiable level or quality of education.5 Launched in the late 1960’s, school finance litigation initially focused on the federal Constitution’s Equal Protection Clause and was fueled by the argument that per-student funding should be substantially equal or at least not dependent upon the wealth of the school district in which the student resided.6 In 1973, however, the United States Supreme Court in *San Antonio Independent School District v. Rodriguez*7 slammed the door on fiscal equity claims under the Equal Protection Clause and thereby terminated school finance reform litigation in the federal courts. Undaunted, school finance reformers turned to state constitutions as sources of educational rights. Only thirteen days after the Supreme Court

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5. See Coons, Clune & Sugarman, supra note 1, at 290-91.
6. See infra Part II.B.3.
handed down Rodriguez, the New Jersey Supreme Court in Robinson v. Cahill\(^8\) paved the way for school finance litigation based solely upon state constitutions. Between 1973 and 1989, state supreme courts issued twenty-two significant opinions in school finance cases.\(^9\) These cases all focused on interpretations of the state constitutional equality provisions and/or the state education article, but continued to assert the right to an equitable allocation of educational resources. This round of state court “equity” litigation proved mostly unsuccessful for plaintiffs, although the reformers did prevail in seven of those twenty-two cases.\(^10\)

These early cases demonstrate that the hallmark of judicial decision-making was an unwillingness to interfere with school finance policy on the grounds that judges are ill-equipped to make such decisions and that no judicially manageable standards for what is a fair and equitable finance system exist. Two early federal district court cases in which the plaintiffs alleged that children were being denied the educational resources they “needed” provide examples of judicial reasoning in these cases. In McInnis v. Shapiro,\(^11\) the court rejected plaintiffs’ claim because it could not discern any “judicially manageable” standards for defining what are children’s educational needs and in Burrus v.

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Wilkerson\textsuperscript{12} the court dismissed plaintiffs' claim and stated that "courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the State." With that line of reasoning, courts recognized early on that there may be limits to their ability to reform educational finance schemes.

Specifically, courts seemed to be using "judicial manageability" as code for their own constraints to effectuate school finance reform. Courts are not well-equipped to design educational finance policy and do not have the latitude to make the necessary tradeoffs among competing interests and obligations of state government and its limited budget. Moreover, courts possess neither the power of the sword nor the power of the purse and cannot implement their educational finance reform decrees. Indeed, even when courts do strike down educational finance schemes, they often order declaratory relief (as opposed to injunctive, prospective, or coercive relief) and admonish the state legislature to develop and implement a new school finance policy within the broad and often vague constitutional guidelines set forth by the court.

In a judicially ideal world, the translation of court order to public policy would be seamless and precise. In reality, however, because courts rely on the political branches to design and implement educational finance reform, they must persuade the legislature to adopt and implement a funding scheme that is consistent with the rights declaration. Getting the legislature to act constitutes no easy feat, as a court cannot provide incentives to or coerce the legislature and governor to act, save the largely symbolic threat of civil contempt. This enforcement problem is further exacerbated by subtle forms of noncompliance. Although outright defiance of educational finance decisions is not unheard of,\textsuperscript{13} legislatures almost always "comply" to some degree with the order by crafting a remedial educational finance scheme. The question is whether this "compliance" is so watered-down by the political process that it fails to bring about


\textsuperscript{13} Take, for example, the New Jersey legislature's 1976 refusal to fund the remedial school finance plan and the subsequent order of the state supreme court shutting down the schools. See RICHARD LEHNE, THE QUEST FOR JUSTICE (1978), or Alabama Governor Fob James's public refusal to allow some state court judge to tell him what to do. See D. Frank Vinik, The Contrasting Politics of Remedy: The Alabama and Kentucky School Equity Funding Lawsuits, 22 J. EDUC. FIN. 60, 63-64 (1996).
meaningful change in school funding. Many political interests, including wealthy school districts and other groups with a legitimate claim to the public treasury, will oppose shifts of funds to poor districts. Constituency and reelection pressures will weaken the resolve of even compliance-minded legislators. And what looked like a clear legal right and standard stated by the court will become fuzzy and unworkable on the floor of the state assembly. In short, law in the judicial opinion will not look exactly like law as passed by the legislature. Aware of this constraint, courts preserve their own institutional legitimacy, this article argues, by only cautiously entering the school finance fracas.

Despite the limited success of the early litigation, however, reformers continued to press their cases in court until 1989 when the tide turned. In that year, state high courts in Kentucky, Montana, and Texas overturned their states' school finance systems. With that change in momentum, state high courts in the years from 1989 to 2000 issued another twenty-four significant decisions in educational finance reform cases and ruled in favor of the plaintiffs in twelve of those opinions. Significantly, many of those decisions turned almost exclusively on an interpretation of the state's education article and, perhaps more important, arguably focused on the substantive adequacy of the education provided to the children of those states. Courts have also become increasingly unafraid - at least in the abstract - to


15. See infra Section IV.F.
make forays into educational policy-making and articulating the rights of children to an education. Symbolic of this recent judicial activity is the Kentucky high court's pronouncement in *Rose v. Council for Better Education*.[16] There the Kentucky Supreme Court held that the state legislature must provide its students with an adequate education, which includes the opportunity to develop seven capabilities, including, for example, sufficient oral and written communication skills to enable them to function in a complex and rapidly changing society and sufficient levels of academic or vocational skills to enable them to compete favorably with their counterparts in surrounding states.[17] In short, courts in the last decade and a half seem more willing to intervene in educational finance policy and to define what are children's educational rights.

Consequently, scholars and commentators have argued that the 1989 cases ushered in a new “third wave” of school finance litigation. In this wave, courts ostensibly have turned away from equality provisions and towards education articles;[18] away from arguments based on “equity” and towards those based on “adequacy,”[19] and away from traditional legal standards of educational “inputs” to those that measure educational “outputs.”[20] As one observer noted, this new wave of school finance reform reflects a sea change that “challenge[s] school finance systems not because some districts spend more money than others, but because the quality of education in some districts . . . fails to meet a constitutionally required minimum.”[21] Indeed, some have proclaimed this shift is “being driven by an emerging consensus that high minimum outcomes should be the orienting goal of both policy and finance.”[22]

Despite this momentous shift in the legal and substantive

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16. 790 S.W.2d 186 (Ky. 1989).
17. See id. at 76-77.
22. Clune, *The Shift from Equity to Adequacy,* *supra* note 4, at 376.
educational underpinnings of school finance litigation and despite the modestly visible shift toward a more reform-oriented state judiciary in school finance cases, a review of the judicial opinions in the "third wave" cases suggests that educational reform litigation in the 1990's was hardly monolithic. First, in those judicial opinions, one sees as much talk of "equity" as "adequacy." Even as early as 1994, Julie Underwood recognized that some courts in the third wave continued to rely on second-wave equity arguments in rendering their state school finance schemes unconstitutional.23 In Ohio, for instance, the primary evidence supporting the plaintiffs' successful claim was testimony of breathtaking disparities between the state's richest and poorest school districts.24 Second, while some courts appeared interested in student outcomes, others looked to educational inputs as the test for what is a lawful opportunity to learn. Hence, the Wyoming Supreme Court directed its legislature to produce a basket of educational resources that would provide an adequate opportunity for all children to learn.25 Third, despite some wins in the early part of the decade, plaintiffs have more recently lost cases. From 1989 through 1993, plaintiffs won six of their nine cases that reached a final supreme court decision (66%), but since then they have won only six of their last fifteen bouts (40%).26 For instance, the Wisconsin Supreme Court in the spring of 2000 rejected without trial a finance equity claim on behalf of 101 property-poor school districts, despite demonstrated gaps in spending between plaintiffs and the state's property wealthy districts.27 Given the recent stumbles of the adequacy theory, school finance scholars must question the util-

27. See Vincent v. Voight, 614 N.W.2d 388 (Wis. 2000).
ity of equity and adequacy as explanations for judicial behavior and re-examine the foundation upon which courts choose to intervene in educational finance policy.

The argument in this article is simple: jurisprudence in school finance cases is not so much concerned with defining a clear, enforceable right to some quality of education. Rather, it is concerned with carving out the proper role for a judiciary wary of its ability to craft policy in such a complex area, while mindful of its obligation to check the political branches and maintain its own institutional presence in governance of the state. Rather than dictate case outcomes, legal-policy concepts such as "equity" or "adequacy" are shaped by courts to provide them with flexibility and authority. None of this is to say that legal theory and doctrine do not matter. On the contrary, even if theory and doctrine are not determinative of case outcomes, the development of legal doctrine provides the flexibility necessary for courts to reach outcomes that are nominally grounded in the law, responsive to the facts, but ultimately shaped by institutional concerns, among other considerations.

28. This article uses the term "jurisprudence" in a manner akin to Karl Llewellyn's method of judicial decision-making he termed the "Grand Style." See Karl Llewellyn, On the Current Recapture of the Grand Tradition, in JURISPRUDENCE: REALISM IN THEORY ANY PRACTICE 217 (Karl Llewellyn ed., 1962) "The essence" of the Grand Style, Llewellyn wrote, is "that every current decision is to be tested against life-wisdom, and that the phrasing of the authorities which build our guiding structure of rules is to be tested and is at need to be vigorously recast in the new light of what each new case may suggest either about life-wisdom, or about a cleaner and more usable structure of doctrine." Id.

29. This article was prepared as part of a larger study of the politics of judicial decision-making in educational finance reform litigation. William S. Koski, Fuzzy Standards, Institutional Constraints, and Judicial Attitudes: The Politics of State Supreme Court Decision-Making in Educational Finance Reform Litigation (2003) (unpublished Ph.D. dissertation, Stanford University School of Education) (on file with author). That study presented comparative case study data from two educational finance reform litigations and argued that judicial decision-making in educational finance reform cases is influenced by judges' own policy preferences and the courts' institutional limitations.
B. The Legal and Scholarly Roots of School Finance Reform Litigation

1. The Issue

Local control is a central tenet of American public education. From the selection of teachers to the design of curriculum, the primary locus of decision-making on educational issues has been the local school board and its administrators. Prior to the very recent decades, state involvement in educational issues was limited and federal involvement was virtually nonexistent.

By constitutional or legislative edict, all states (except Hawaii) had, until the 1970's, relied primarily on local property taxes to finance local public schools. Although the details of any local tax system are complex, a commonality among such systems was that the local voting public, either directly or through elected officials, levied upon themselves a property tax intended to pay for basic municipal services, including educational facilities and the operation of schools. As property values varied, so did local property tax bases and revenues earmarked for school purposes. Consequently, property-rich school districts typically enjoyed lower tax rates and high tax revenues, while property-poor districts generated lower tax revenues even though they taxed themselves at rates equal to or greater than their wealthy counterparts. Not only did this result in unequal tax burden among districts within a given state, it also resulted in unequal per-pupil spending among districts.

Recognizing the potential unfairness such a system worked on people in low property wealth areas, particularly rural areas, states in the first half of the twentieth century began to provide a fixed amount per-pupil to its school districts to ensure that stu-
ents received at least the necessary, basic resources of education. These "foundation plans," however, were often modestly funded – if funded at all – and failed to keep pace with the rising costs of educating children, particularly children in urban communities.

For its part, the federal government continues to do very little by way of funding local public schools. That which the federal government does provide is in the form of categorical grants that earmark the monies for specific purposes such as compensatory education services for "educationally disadvantaged" youth under Title I, special education services for children with disabilities under the Individuals with Disabilities Education Act, or vocational education services and equipment under the Perkins Vocational-Technical Education Act. The result of modest state and federal contribution to funding of local schools has been an often vast differential between property-wealthy communities that can generate sufficient revenues from local property tax and property-poor communities that cannot generate the same level of revenues even with equal tax effort. The now-infamous comparison between the San Antonio school districts of Alamo Heights and Edgewood Independent demonstrates the disparities that existed by the end of the 1960's. Alamo Heights enjoyed an assessed per-pupil property value of $49,000 and spent $594 per pupil in 1970, while the predominantly Mexican-American Edgewood Independent School District had a property tax base of $5,960 per pupil and spent only $356 on each student. To further dramatize the difference, Edgewood taxed itself at a rate of $1.05 per $100 of assessed property value, while Alamo Heights levied only a rate of 85 cents.

Although the extent of the intrastate inequality in educational funding had long been recognized by educational finance

33. See, e.g., Koski, supra note 29 (describing Wisconsin's early foundation plan).
34. See, e.g., id. (describing Wisconsin's efforts in the 1960's to study and address the underfunding of property-poor school districts).
39. See id. at 11-14.
40. See id.
experts, it received little outside attention until the late 1960's. Perhaps emboldened by the victories of the Civil Rights movement or disappointed with the pace of change in educational equality in the wake of early desegregation efforts, social activists and scholars began to notice the differences in educational resources available to students in different districts. Buoyed by the victories in front of the Warren Court, these reform-minded scholars and activists began to look to federal law and litigation as a potential remedy for what they viewed as an unfair distribution of educational opportunities.

2. The Legal Environment

In the United States, public education has been intertwined with law since its inception. As David Tyack, Thomas James, and Aaron Benavot have made abundantly clear, the law influenced and shaped education long before the Supreme Court handed down the *Brown v. Board of Education* decision in 1954.41 Beginning even before the Civil War and accelerating during Reconstruction, policy-makers and educational evangelists used law—particularly state constitutions—to mandate that the state provide a system of common schools, specify how funds should be raised for those schools, require that teachers be certified, and even prescribe that certain subjects be taught.42 Guided by a nearly religious belief in "a strong ideological connection between an educated citizenry and the success of a republic form of government,"43 these elites used constitutional and, later, statutory law to compel the development of a common school system.

Notably, however, this institution-building occurred largely outside of the courtrooms. In examining educational cases and litigation rates in state appellate and federal courts during the late nineteenth and early twentieth centuries, Tyack, James, and Benavot concluded that education cases formed a "very small" proportion of all reported litigation and that judges, who were "in general highly deferential to the professional prerogatives of educators," were "bulwarks of the system" rather than the architects of the system.44 Courts seldom addressed educational is-

42. Id. at 62-63.
43. Id. at 55.
44. Id. at 66-67.
sues that were even tangentially related to actual teaching and learning – the province of local school boards and principals – but rather adjudicated cases dealing with educational governance (e.g., creation and alteration of school districts, district meetings, and claims against districts) and finance (e.g., district property, contracts, and liabilities, and district debt, securities, and taxation). Indeed, even when they tackled nominally “education cases,” courts most often relied on traditional common law contract and tort principles and statutory interpretation.

In the early twentieth century, however, courts paid somewhat more attention to the rights of parents to direct their children’s education and the rights of ethnic and religious minority groups to be free from government educational oversight. However, the judiciary paid relatively little attention to the substantive educational opportunities to which children were entitled, save the odd case dealing with school busing or fees for tuition or instructional materials, both of which potentially

45. See id. at 67-69.
46. See id. at 74-76.
47. The standard citation here is to Pierce v. Society of Sisters, 268 U.S. 510 (1925), in which the Court crafted the delicate “Pierce Compromise,” allowing parents to send their children to private schools, while at the same time recognizing the state’s right to compel school attendance and modestly regulate private school education. As with almost any compromise, the terms of Pierce were sufficiently vague to engender decades of litigation regarding parents’ rights to direct their children’s education and the rights of religious/ethnic groups to tailor their children’s education to meet their religious and cultural needs. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (excepting a group of Old Order Amish students from the state’s compulsory school attendance laws after eighth grade because “secondary schooling, by exposing Amish children to worldly influences . . . and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child”).
48. By the 1930s, children in many states enjoyed statutory rights to free transportation to and from public schools. See, e.g., Lyle v. State, 88 N.E. 850 (Ind. 1909); Lanphier v. Tracy Consol. Sch. Dist., 277 N.W. 740 (Iowa 1938); State ex rel. Brand v. Mostad, 148 N.W. 831 (N.D. 1914). This right was typically not embodied in state constitutions, however, and was ultimately found not to be a federal constitutional right even though the failure to provide free transportation resulted in great hardship to the student’s family in the case. See Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450 (1988).
49. See, e.g., Morris v. Vandiver, 145 So. 228 (Miss. 1933) (holding that the board of trustees had no power to make payment of athletic, literary, and library fees a condition precedent to the right of the student to enter school); State ex rel. Roberts v. Wilson, 297 S.W. 419, 420 (Mo. App. 1927) (noting that “[t]he right of children . . . to attend the public school established in their district for them is not a privilege
could work to deprive students of an education. From the student's perspective, the only significant constitutionally or statutorily guaranteed right was the right to attend a common school for free. 50 Therefore, judicial policy-making regarding students' educational rights was virtually non-existent and is often seen as a post-Brown phenomenon.

Yet all of this apparent judicial complacency cloaks one significant area in which courts, almost by neglect, defined the educational rights of children: race and equality of educational opportunity. Equal treatment under the law is a fundamental canon of American constitutional law. In a putative effort to honor this principle, enfranchise the newly-freed slaves, and to ensure that the political rights of African Americans are on par with those of their white counterparts, states added the Fourteenth Amendment to the U.S. Constitution in 1868. The Amendment provides, in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. 51

Although this fundamental precept is known to any American high school student as a straightforward requirement that everyone is to be treated the same by the law, most high school students also understand that African Americans and other minority groups have not enjoyed such equality in actuality. The provision "equal protection of the laws" proved to be language malleable as clay in the hands of lawyers and jurists. So flexible was this language that, under Plessy v. Ferguson 52 and its progeny, it countenanced the now-reviled practice of segregating schoolchildren on the basis of race.

dependent upon the discretion of any one, but is a fundamental right which cannot be denied except for the general welfare" and holding that the district could not withhold the student's certificate of attainment merely because she did not pay a $20 tuition fee).

50. See, e.g., Bryant v. Whisenant, 52 So. 2d 525 (Ala. 1910) (reading a state statute to require that tuition shall be absolutely free, but permitting the school district to collect a reasonable fee for heating and lighting); Maxcy v. Oshkosh, 128 N.W. 899 (Wis. 1910) (finding that Wisconsin's constitution requires the legislature to provide for the establishment of district schools and that such schools shall be free and without charge to children of specified ages).


52. 163 U.S. 537 (1896).
Yet in 1954, the Supreme Court wielded the Equal Protection Clause to invalidate Plessy's "separate but equal" doctrine and abolish the practice of state-enforced racial segregation of schoolchildren. In language quoted by courts to this day, Justice Earl Warren, writing for a unanimous court, stated:

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. 53

Although segregation was a ubiquitous practice in the Jim Crow south affecting public accommodations, transportation, and education alike, it is no accident that the Court chose to address the "separate but equal" doctrine in the context of education. As Richard Kluger explained in his landmark history of the Brown litigation, the NAACP Legal Defense Fund orchestrated a systematic attack on segregation by demonstrating that separate educational facilities could never be equal. 54 In Brown, not only did the Court recognize the evils of enforced segregation and hold that the Equal Protection Clause prevents the state from passing legislation that discriminates among certain classes of persons, but it also identified the importance of providing equal educational opportunities to all children, irrespective of their race, and as some would later argue, irrespective of zip code, wealth, or community standing.

By the time scholars and advocates began to turn their attention to the issue of unequal school funding, the United States Supreme Court had significantly refined its Fourteenth

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Amendment analysis, employing two distinct approaches to claims asserted under the Equal Protection Clause for discrimination among persons in different legislative classifications. Acknowledging the role of the Court in policy-making, the separate approaches differed in the level of deference paid to the policy choice made by political branches, depending on the policy’s subject matter and character. The first and more relaxed standard of review under the Equal Protection Clause, known as the “rational review” test, upholds a state’s policy decision so long as it reflects some rational relation between the state policy objective and the means the regulation used to achieve that objective. Most legislation falls under this category.

The second approach, which requires closer scrutiny of the state law by the Court, is triggered when either a “fundamental interest” is at stake or the state employs a “suspect classification.” In finding the state legislation subject to strict scrutiny, the Court requires the state to provide a compelling interest to which the challenged legislation is narrowly tailored, and a showing that the interest cannot be satisfied by any other means. For example, in Shapiro v. Thompson, the Court struck down a state residency statute denying welfare benefits to persons who had not resided in the state for more than a year. In that case, the Court held that while a state had an interest in preventing fraud in applications and in reducing costs of welfare programs, the classification imposed was an impermissible intrusion on the constitutional right to travel from one state to another where less drastic measures were available to protect a state’s interest. What would constitute “fundamental interest,” however, was not at all clear. And whether education—which Brown had deemed a “most important” function—was a “fundamental interest,” was a question that had not been considered by the Court.

In addition to finding a fundamental interest, the Court had begun to invoke more intense scrutiny for legislation adversely affecting a “suspect class” of persons. Clearly, race was recog-

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58. See id.
nized as a suspect class. But by the late 1960's, the Court had begun to show a marked antipathy toward legislative classifications that discriminated on the basis of wealth. "Lines drawn on the basis of wealth or property, like those of race . . . , are traditionally disfavored."59 In the Harper case, the Court struck down a Virginia poll tax on the grounds that it discriminated against voters on the basis of wealth: "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor."60 The Court further stated that "a careful examination on our part is especially warranted where lines are drawn on the basis of wealth . . . [a] factor which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."61 For those seeking to challenge educational finance schemes on the ground that they discriminate against children in property poor school districts, it may have seemed logical that such schemes discriminated against those children on the basis of wealth.

The legal groundwork had been laid. Beginning with Brown, the Supreme Court increasingly involved itself in complex issues of social policy, particularly when those policies discriminated against persons who were categorized by suspect classifications or when the policies infringed upon one's exercise of a fundamental right. To scholars and advocates alike, school finance systems that provided fewer educational opportunities to children solely because they lived in property-poor communities appeared to be easy targets for this new jurisprudence. However, unlike a poll tax or a policy requiring one year of state residency before receiving public assistance, the courts could not simply strike down the school finance scheme without providing guidance toward what would be a constitutional replacement. At least, this was the early conventional wisdom on the subject.

3. The Strategies and Proposed Standards

Writing and plotting independently and simultaneously in the second half of the 1960's, several legal scholars and advocates were preparing the assault on school finance systems that provided vastly different educational opportunities to children.

60. Id.
61. Id.
Although differing slightly on the details, all seemed to agree that the legal basis for the attack was the Equal Protection Clause of the Fourteenth Amendment, and that the proper forum would be the federal courts, as those courts seemed to be more willing to step in to protect the rights and liberties of persons than their relatively complacent state counterparts. Where these scholars and advocates disagreed, however, was in their interpretation of what was the specific constitutional wrong in the system and what should be the judicial standards for constitutional compliance. From this early thinking, four contenders emerged: per-pupil spending equality or “horizontal equity;” needs-based funding equality or “vertical equity;” equal opportunity for an equal outcome or “effective equality,” and the “fiscal neutrality” principle.

i. One Scholar, One Dollar

As a doctoral student in education at the University of Chicago, Arthur Wise became one of the early architects of the assault on the inequality produced by educational finance systems. Wise’s dissertation work, which was published in 1967 under the title Rich Schools, Poor Schools, set forth not only the factual basis and legal strategy for challenging school funding schemes, it also developed a standard that courts—specifically, federal courts—could employ in urging the development of a constitutional educational finance system. To Wise, the central evil of educational finance schemes was their classification of students based upon the accident of geography. Because such schemes classify students in the state on the basis of the school district in which they reside, and because such classification largely determines the quality of the educational opportunity the students receive, educational finance schemes that rely on local property tax bases unlawfully discriminate against children in low property wealth districts.

Wise’s legal strategy wove together three independent areas of Supreme Court equal protection jurisprudence: racial equality in education, equality of treatment of the indigent criminal and indigent voter, and equality among voters who reside in different geographic areas. Relying on Brown and its progeny, Wise first argued that education was a central function of state gov-

ernment and must be provided to all on equal terms.\textsuperscript{63} In exam-
in ing criminal justice, Wise traced a trend in Supreme Court ju-
risprudence that seemed to require equality among rich and 
poor in the administration of a state’s criminal justice system. 
For instance, the Court had held that states must provide indi-
gent criminal defendants a free copy of their respective trial 
transcripts if they wished to appeal their convictions. Similarly, 
analogizing from the poll tax cases, Wise argued that the right to 
vote could not be conditioned upon one’s wealth. Wise reasoned 
that this principle of non-discrimination of the poor in criminal 
justice and voting may suggest that such equal treatment among 
rich and poor should be required in education just as equal 
treatment among black and white in education is required. Fi-
ally, Wise analyzed the legislative reapportionment cases and 
culled the principle that the state cannot discriminate against 
voters on account of their geographic residence – the Court 
rulled that “one man, one vote” was the proper way to draw dis-
trict voting lines. If discrimination in education on account of 
race was unconstitutional and discrimination in voting on ac-
count of geography was unconstitutional, Wise reasoned that 
discrimination in education on account of geography also 
should be unconstitutional.\textsuperscript{64}

Even if legal precedent supported judicial intervention in 
educational finance schemes, Wise cautioned, the courts would 
have to fashion a definition of equal educational opportunity to 
guide legislative remedies. Wise exhaustively reviewed nine 
separate potential definitions of equal educational opportunity, 
and ultimately concluded that the courts would most likely se-
lect a “negative definition” of equality of educational opportu-
nity. This definition would require that a child’s educational 
opportunity should depend upon neither his or her parents’ 
economic circumstances nor his or her location within the state. 
Wise believed that such a negative anti-discrimination principle 
would be adopted because it is consistent with the anti-
discrimination principles in the jurisprudential areas from which 
his precedent was drawn and because of the simplicity of its ap-
lication to the facts. The difficulty with this definition, how-
ever, is that it provides little guidance to states for what would 
be a constitutional educational finance system. Thus, Wise ar-

\textsuperscript{63} See generally id.
\textsuperscript{64} See generally id.
In their seminal work on the measurement of equality in educational finance, Robert Berne and Leanna Stiefel later called this standard “horizontal equity.”

Simplicity of application aside, the “one scholar, one dollar” standard appeared to many, including Wise, to be unsatisfying in that it would not take into account the differential costs of doing business among districts, the differing needs of students, or the differing pressures on the municipal budget for social services. As Wise himself suggested, courts might stray from this absolute equality standard to allow deviations in spending for different classifications of students.

ii. Student Needs

Writing at about the same time as Wise, Professor Harold Horowitz of the University of California, Los Angeles Law School was crafting a slightly different legal theory to attack educational finance schemes and an arguably more ambitious standard for equality of educational opportunity under the Fourteenth Amendment. To Horowitz, the constitutional infirmity of educational finance schemes was that they treated students differently on the sole basis of geography. Horowitz argued that a state could not discriminate among individuals in different areas when providing public administration and services such as criminal justice, economic regulation, and legislative apportionment, unless the state could demonstrate that the classification was “reasonable” and that there were no less onerous alternatives that the state could employ. Similarly, the state could not provide unequal educational opportunities among territories, particularly where there are reasonable alternatives to district-based educational financing, such as redistrict-

65. See id. at 159.
68. See Horowitz & Neitring, supra note 67, at 803-04.
ing on a more functional basis or changing financing formulae to equalize revenue among districts.

At first blush, Horowitz appeared to be calling for a horizontal equality standard for remedial financing schemes. But Horowitz's original writing suggested a radically different approach. There, Horowitz argued that equal protection jurisprudence could support a claim to strike down the state's educational finance scheme where "a school board, though providing substantially the same educational programs and services in all schools, fails to provide programs and services which adequately compensate for the inadequate educational preparation of culturally deprived children." Relying on empirical evidence that children in schools in "disadvantaged" neighborhoods perform poorly on academic achievement tests and receive fewer educational resources, Horowitz maintained that such children could only enjoy "equality" if they received "special programs, adapted to the specific needs of these children." In Berne and Stiefel's terminology, this type of equality of educational opportunity is deemed "vertical equity."

As a judicial standard, however, vertical equity would pose a serious problem for manageability on a case-by-case basis. Is each child to receive a program that meets his or her needs? Horowitz dismissed this concern:

The principle contended for... is that a school board denies disadvantaged children the equal protection of the laws if, having a "rational basis" to do so, it fails to provide them with an educational program as well designed to permit achievement to the full extent of their capacities as it provides to other children. There would be no unique problem for a court in applying such a principle: the question would be whether there were any rationally-based alternatives which the school board had not utilized, and, if there were, the issuance of a decree requiring the board... to develop a plan for utilization of such alternatives.

This dismissal may have been too cavalier, however. Will the school board know what programs, if any, will permit its students to achieve to the full extent of their capacities? For that

69. See Horowitz, Unseparate, But Unequal, supra note 67.
70. Id. at 1148.
71. Id. at 1166-67.
72. See BERNE & STIEFEL, supra note 66.
73. Id. at 1171.
matter, how do we know what are their respective capacities? And who will pay for these programs? Any court employing a needs-based standard would have to address these questions when passing on the constitutionality of a school funding scheme.

iii. Equal Opportunity for an Equal Outcome

Perhaps the most aggressive standard for equality of educational opportunity to arise from the early equal protection scholarship is David Kirp’s call for effective equality. Kirp argued that

[a] reconsideration of effective equality in the light of recent and extensive educational research studies . . . suggests that the state’s obligation to provide an equal educational opportunity is satisfied only if each child, no matter what his social background, has an equal chance for an equal educational outcome, regardless of disparities in cost or effort that the state is obliged to make in order to overcome such differences.74

Drawing from the Supreme Court’s equal protection jurisprudence in the criminal procedure and voting rights domains, Kirp opined that “[t]he right to an equal educational opportunity merits special judicial solicitude because education shares with criminal process and suffrage the attributes of a fundamental right.”75 Therefore, any legislative classification schemes that impact this fundamental right - including those that treat students differently depending upon the school district in which they reside - are subject to searching judicial review.

But Kirp was far less concerned with what it takes to establish legal liability than he was with what it would take to ensure equality of educational opportunity. For such a standard, Kirp relied on the findings of educational research - particularly the Coleman Report, an extensive study that sought to identify the factors affecting educational achievement - and argued that any remedy must help poor and minority youth to overcome the conditions of their educational background.76 Two remedial schemes appeared most promising: integration and resource re-

74. David L. Kirp, The Poor, the Schools, and Equal Protection, 38 HARV. EDUC. REV. 635, 636 (1968).
75. Id. at 642.
allocation aimed at effective equalization. Kirp argued that redistricting local school districts such that poor and minority youth would be integrated among their wealthier and whiter peers would "do most to better the chances of the poor, presently locked into predominantly lower class schools." But what about those districts, such as Washington D.C., for which such redistricting would be politically or geographically unfeasible due to the sheer density of concentrated poverty among minority children and the resistance of wealthy suburbs? Kirp's response was reallocation of resources pursuant to the principle of effective equalization - an equal chance for equal achievement.

Theoretically, a meaningful distinction exists between the needs-based standard proposed by Horowitz and the outcomes-oriented standard proposed by Kirp. Horowitz would have the state compensate for educational deprivation and needs without regard to outcome, whereas Kirp's model would focus on outcomes and what it would take to get each student to the same high outcome. In practice, however, the technology of education was not then so developed that it could reliably ensure educational outcomes, and even the language the scholars used to talk about inputs and outputs standards tended to blur. Thus, Kirp argued for a state aid formula that would "compensate as fully as possible for inequalities of prior training and background." To that end, Kirp cited with apparent approval a then-pending lawsuit that sought a school funding formula that would consider differences in the quality of facilities presently available, differences in the cost of providing the same facilities in different parts of the state, and the added costs of adequately educating disadvantaged children. Similarly, to begin to provide programs that would help children achieve to their full capacity under the Horowitz model, one would inevitably need to work backwards from potential outcomes to the necessary programmatic interventions. This blurring of the lines among standards was and is inevitable where theory vastly outpaces empirical knowledge of what it takes to provide equal chances for equal outcomes or an adequate education. But ambiguity is not a principle upon which courts can act and act effectively, some would argue. The constitutional standard must be clear.

77. Kirp, supra note 74, at 661.
78. Id. at 665.
iv. Fiscal Neutrality

Coons, Clune, and Sugarman believed fiscal neutrality was the answer. Less than two pages into Private Wealth and Public Education, Coons, Clune, and Sugarman set forth their modest and clear standard for what would be a constitutional provision of educational opportunities within a state: "The quality of public education may not be a function of wealth other than the wealth of the state as a whole." What they then called Proposition One, and what would later be dubbed the "fiscal neutrality" principle, is a simple negative statement of what the state could not do—discriminate against students on the basis of the wealth of the community in which they live. Mindful of the complexity and inherent contradictions in defining equality of educational opportunity, Coons, Clune, and Sugarman designed a simple and elegant principle that courts could apply, in which educational opportunity was boiled down to one simple measure: dollars. And the availability of those dollars could not depend upon the wealth of one's neighbors. Moreover, from a separation of powers perspective, the fiscal neutrality principle allowed the courts to spark a major reform in educational finance policy while permitting the legislature to tackle the intricate difficulties of designing a fair and efficient system. A court could at once be activist and restrained. Finally, the negative statement of fiscal neutrality largely sidestepped the complex and ever-controversial issue of whether and how money matters in education, then known as the cost-quality debate. Under Coons', Clune's and Sugarman's formula, there was no need to demonstrate the link between educational resources and educational outcomes. Even today's most sophisticated educational production functions have only begun to give us reliable data on this issue. At the time Coons, Clune, and Sugarman were writing their book, the question was wide open.

Coons, Clune, and Sugarman were also mindful, however, that their principle would continue to permit vast disparities

79. See COONS, CLUNE, & SUGARMAN, supra note 1, at 2.
80. The basic lesson to be drawn from the experts at this point is that the current inadequacy of social science to delineate with any clarity the relation between cost and quality. We are unwilling to postpone reform while we await the hoped-for refinements in methodology which will settle the issue. We regard the fierce resistance by rich districts to reform as adequate testimonial to the relevance of money.

Id. at 30.
among educational opportunities and student outcomes. Their principle did not dictate that the state must compensate for prior inadequate schooling, "cultural disadvantage," or natural (in)abilities. Nor did their principle prevent some localities from choosing to spend more on their children's education than others, so long as that choice was not dependent upon the wealth of a municipality. Indeed, Coons, Clune, and Sugarman saw the fact that some communities could tax themselves at higher rates to provide more educational resources to their children as a strength of their proposal. This system would encourage educational experimentation, enhance local control, and recognize the independence and liberty interests that communities and parents should enjoy. Coons, Clune, and Sugarman went so far as to refuse to recommend a specific remedial finance scheme that would jibe with Proposition One, though they clearly preferred a form of "power equalizing" in which the state would ensure an equal tax base among all school districts by providing aid to those districts with low property wealth. Stated differently, equal tax rates should provide equal spendable dollars.

Yet the fiscal neutrality principle and power equalizing could do very little for those districts that needed the most. By the late sixties, educational failure had become synonymous with large, urban, minority districts. Children in such districts often faced multiple handicapping conditions, ranging from deep and persistent poverty to racial and cultural isolation to greater rates of physical, emotional, and mental disabilities. Under a needs-based standard, such children required more assistance and resources. Paradoxically, however, those districts often enjoyed greater than average commercial or industrial property wealth. The obstacle was not the tax base, but the tax rate. Urban residents already taxed themselves to the limit to pay for municipal services that included amplified law enforcement, social services programs, or even waste disposal. Suffering from such "municipal overburden" and already enjoying tax-base equalization, urban communities simply could not afford to tax themselves any more. Yet fiscal neutrality as a principle was unconcerned with this problem.

Coons, Clune, and Sugarman also parted ways with Wise, Horowitz, and Kirp on the question of whom the attack on educational finance reform schemes was intended to benefit. Under the horizontal, vertical, and outcome equity principles, the assumption was that children, specifically poor children, were to
benefit from school finance reform. Under the fiscal neutrality principle, the target of equity reform is as much the taxpayer in low property wealth districts as it is the student in such districts. But one could argue that this proposition would be true of any other reform standard. Any scheme that would shift state monies or reallocate local monies to low property wealth areas would, at least indirectly, benefit taxpayers in those property poor communities. More nettlesome, however, is whether fiscal neutrality would benefit poor children. It takes a modestly heroic leap of faith to suggest that poor children can be found in property-poor school districts. Indeed, given the relative property wealth of urban school districts with high concentrations of children in poverty, this leap is likely unwarranted. Under the fiscal neutrality principle it is entirely possible that suburban school districts and rural districts with little residential property value with low concentrations of poverty, but little commercial or industrial property wealth, would benefit most.

Judicial modesty and manageability were the touchstones for judicial intervention and the guiding principles behind Proposition One. Courts should only apply a negative test for constitutionality of an educational finance system and refuse to prescribe specific components of equality of educational opportunity. This decision was best left to the legislature, Coons, Clune, and Sugarman argued. Yet this modesty put Coons, Clune, and Sugarman directly at odds with the more ambitious proposals to equalize opportunities of rich and poor children. From the work of Wise, Horowitz, Kirp, and Coons, Clune, and Sugarman, four theoretically distinct principles for judicial intervention in educational financing emerged. Wise, Horowitz, and Kirp argued that courts should pay attention to the educational opportunities children received and equalize those opportunities on a dollar-for-dollar basis or compensate children for the educational and social deprivation they suffered. How the courts grappled and continue to grapple with these standards demonstrates that all of the early thinking was right and all was wrong.

III. THE EARLY FEDERAL EQUAL PROTECTION CLAUSE CASES

Presented with an issue ripe for reform and armed with coherent and potentially winning legal strategies, educational finance reform advocates were prepared to take their cases to court. From our twenty-first century vantage point, it may be
worth asking why the reformers chose the judicial route, rather than the traditional avenue for policy reform: the legislature. Perhaps this choice was due to the perception that the legislatures had proven unresponsive to claims of fiscal inequality among school districts or that entrenched suburban interests would be unwilling to equalize school funding absent external pressure. Or perhaps it was because reform was being driven by legal scholars and advocates who were comfortable with legal forums and tools and had crafted elegant and persuasive legal theories for why reform should occur. In any event, this institutional choice made by the advocates has left an indelible mark on educational finance in the United States. No state legislature undertakes finance reform without an eye toward the bench. Many state legislatures have in fact undertaken reform because of the bench. In the realm of school finance, unlike most other areas of social policy, the courts have consistently played an integral role, a role that began in 1968 when the first of a tidal wave of litigation reached the courts’ dockets.

A. The Federal Courts’ Early Refusals

In February 1968, the school board of the city of Detroit and certain individual school children in the District filed the first of the modern school finance cases in a Wayne County, Michigan state Circuit Court. The suit alleged that the state’s school aid formula resulted in substantial disparities in the financing of public education, and, therefore in the quality and extent of availability of educational services and facilities. According to David Kirp, the theory of the case was that “even equal expenditures in all districts would not be sufficient; that equally effective education should be the end sought.” Because Detroit enjoyed a relatively strong tax base, fiscal neutrality would not be enough: a needs-based or outcome-oriented remedy was required.

At about the same time that the Detroit case was being pressed, legal aid attorneys representing individual students in Chicago were bringing a similar suit before a federal three-judge panel in the Northern District of Illinois. Like the Detroit case,

81. See Kirp, supra note 74, at 665-66 (describing the litigation).
82. See id.
83. Id. at 666.
the lawyers in the Chicago case, *McInnis v. Shapiro*, argued that any school finance system that did not account for differences in student needs was violative of the federal Equal Protection Clause. Unlike the Detroit case, which languished in a Michigan appellate court, the *McInnis* case was quickly heard by a three judge panel.

The result of *McInnis* seemed to vindicate the Coons, Clune, and Sugarman stance that courts should not act in the realm of school finance unless they could articulate a clear standard for constitutionality. The "student needs" standard was anything but clear. The court rejected the student lawyers' claim on two separate grounds. First, although acknowledging the breathtaking disparities that result from the property-tax-based finance scheme, the court refused to adopt the then-novel concept of heightened scrutiny of the educational finance scheme, instead applying the rational review test. Finding that the school funding scheme was rationally related to the state's interest in providing local control over educational decision-making, the court ruled that the finance scheme passed constitutional muster. As a second, independent ground, the court held that the lack of judicially manageable standards prevented it from venturing into the thicket of student needs. Fresh in the court's memory was the recent perceived failure of the judiciary to bring about meaningful desegregation in the aftermath of *Brown*. In a footnote, the *McInnis* court noted that the recent bussing-related upheavals were accomplished legislatively, not judicially; at another point, the court warned of wealthy flight from public schools should their local taxes be recaptured and reallocated to property poor school districts. Institutional limitations sufficed for the court to uphold the state's funding scheme. Shortly after the *McInnis* decision, a federal district court in Virginia cited *McInnis* and adopted its reasoning. In *Burruss v. Wilkerson*, the court, with scant analysis, flatly stated that "the courts have

85. See id.
86. See id. at 328-29.
87. See id. at 335.
88. See id. at 331-32.
89. See id. at 332.
91. See id. at 332 n.14.
93. Id. at 572.
 scant analysis, flatly stated that "the courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the state." 94

The *McInnis* plaintiffs appealed the adverse ruling and, per federal appellate procedure, the case went directly to the U.S. Supreme Court. 95 In a per curiam memorandum decision—without a written opinion—the high court affirmed the trial court's ruling. 96 Technically, this disposition was a decision on the merits, binding on all lower federal courts - and state courts - seeking to interpret the Fourteenth Amendment in educational finance cases. But, as argued by Coons, Clune, and Sugarman, the high court's ruling need not have been taken as the final word on school finance litigation under the federal theory. 97 Due to the hurried nature of the litigation and the perfunctory development of the underlying facts and legal theories throughout several jurisdictions, the Supreme Court may have been waiting for a better moment to express its thoughts on the issue. That moment would inevitably come.

B. *The Bellwhether Case? Serrano v. Priest* 98

1. *The Setting*

All the necessary people were in California in 1968. Derrick Bell, Jr. had recently taken the helm at the Western Center on Law and Poverty in Los Angeles, a federally-funded public interest law office whose mission was to provide litigation support for legal services agencies in the region and taking on cases having a widespread impact for poor people. 99 Although the Western Center had little experience with educational issues, Bell was impressed with the idea of tackling what seemed to be an obvious roadblock to success for poor children. 100 Professor Harold Horowitz at the University of California, Los Angeles was eager to put to the test the theories he developed in the legal jour-

94. *Id.* at 574.
96. *Id.*
97. See COONS, CLUNE & SUGARMAN, supra note 1, at 311-15.
99. See *id.* at 21-22.
100. See *id.* at 22.
nals. Later, David Kirp would join the faculty at the School of Public Policy at the University of California, Berkeley and John Coons would visit at the Boalt School of Law in Berkeley, inviting his student, Stephen Sugarman, to join him for the year. The lawyers would find the ideal plaintiff in John Serrano, Jr., a social worker and father of children who attended a poorly funded school in East Los Angeles.

That the Western Center was involved in the issue of school finance litigation in California was in itself noteworthy. In later years, educational finance reform cases were often spearheaded by school district administrators, school board members, and their lawyers. They sought a greater share of the state’s education budget. But in the early days of school finance reform litigation, the civil rights attorneys like those at the Western Center and a network of school finance reform advocates were the ones pushing the agenda. The American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People’s Legal Defense Fund (NAACP) routinely co-counseled the cases on behalf of plaintiffs or filed amicus curiae briefs in support of the plaintiffs.

This attention of civil rights activists reflected a shift in the focus of educational rights advocacy away from desegregation to a direct assault on the provision of equal resources to students. The NAACP’s ultimate strategy was not to enforce Plessy v. Ferguson’s “separate but equal” doctrine and seek equalization of educational resources in black in white schools, but rather, to attack the very existence of segregated schools. As Richard Kluger noted, state-sponsored segregation itself was the evil to be attacked. Others may have believed that integration, effectively “tying” the fortunes of black children to those of white children, was the only way that equal resources would ever be provided in a racist society.

Whatever the motivation for the desegregation strategy, the focus of advocacy began to shift by the late 1960’s and early 1970’s as disappointment grew over the inefficacy of the desegregation strategy and disillusionment grew over the ideal of in-

101. See id. at 26-27.
102. See id. at 29.
104. See Kluger, supra note 54, at 718-19.
Although aided by the carrot of Title I monies and the stick of the Civil Rights Act of 1964, the pace of integration had been agonizingly slow since the 1954 Brown decision, due to southern massive resistance and the difficulty of demonstrating unlawful segregation in northern and western states. Although the Supreme Court did not definitively address the issue until 1973, it was becoming evident due to the appointment of conservatives to the high court in the late 1960s and early 1970s, that the Court would require evidence of intentional (de jure) segregation to prove a violation of the Fourteenth Amendment, rather than mere de facto segregation. Because legally enforced segregation in the northern and western states was seldom clearly evidenced, proof of such de jure segregation was more difficult. This difficulty was coupled with the increasing inefficacy of the desegregation remedy in the face of "white flight" from the urban centers. Desegregation litigation was becoming more difficult and providing less fruitful remedies. Additionally, a rift was growing within the African American community over the desirability of integration as a remedy, as opposed to neighborhood or separate schools. Harkening back to W.E.B. Dubois's suggestion that blacks might be better off with truly equal and separate schools, some (including Derek Bell) began to question whether the African American community uniformly supported integration. Given desegregation's growing difficulty, inefficacy, and undesirability (for some), turning toward resource equalization made sense for civil rights litigators.

All the facts were present in California in 1968. The state school funding system relied heavily upon local property taxes. About 55% of local revenues came from local property taxes, while 35% of those revenues came from state sources, mostly through a traditional foundation plan. More significant, there was considerable disparity in property wealth, tax rates, and local revenues among districts in the state. Per pupil assessed valuation varied by a ratio of 1 to 10,000 from the poorest to the

105. See Minorini & Sugarman, Educational Adequacy, supra note 30, at 187-188.
110. See ELMORE & MCLAUGHLIN, supra note 30, at 3.
Plaintiffs would contrast the fortunes of Baldwin Park with those of nearby Beverly Hills. In 1968-69, Beverly Hills enjoyed a per-pupil assessed valuation of $50,885, while the largely minority Baldwin Park suffered a $3,706 valuation. These disparities were naturally reflected in per-pupil expenditures, where Beverly Hills lavished $1,231.72 on each of its students, whereas Baldwin Park could afford to spend only $577.49 per student. This difference prevailed in spite of the fact that Baldwin Park taxed itself more aggressively than Beverly Hills.

Finally, the California Supreme Court seemed like the right court. Under the direction of the legendary Chief Justice Roger Traynor, the court enjoyed a national reputation for tackling complex legal issues that would ultimately shape the social and policy landscape in the state and nation. The court had developed novel theories of liability against manufacturers and retailers of products that injured the public, even where the injured persons could not prove that the product actually caused the injury. The court also was where other state courts looked for developments in criminal law, including the rule excluding from trial all evidence seized illegally by police. Further, the court had applied its intellectual prowess to reshape the arcane and technical choice-of-law doctrine so that it maintained its theoretical consistency and rigor. Traynor and the California Supreme Court enjoyed the respect of jurists and courts throughout the country. Although Chief Justice Traynor would

111. See id. at 3.
113. See id. at 1248
114. See id. at 1252, 1260.
115. See Benjamin Thomas Field, Justice Roger Traynor and His Case for Judicial Activism vi-vii (2000) (unpublished Ph.D. dissertation, University of California, Berkeley) ("Traynor and his brethren gained the reputation as the leading state court in the nation.").
116. See Escola v. Coca-Cola Bottling Co., 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring) (setting forth Traynor's theory that manufacturers should be held strictly liable for consumer injuries caused by design or manufacturing defects); Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963) (becoming the first court in the nation to adopt the rule of strict products liability); see also Field, supra note 115, at 150-89.
117. See People v. Cahan, 282 P.2d 905 (Cal. 1955); see also Field, supra note 115, at 110-49.
118. See Grant v. McAulliffe, 264 P.2d 944 (Cal. 1953)(holding that the choice of law question is procedural in nature).
retire by the time the Serrano case reached the high court, all the ingredients seemed present for a revolution in educational finance led by well-crafted legal theory and a court unafraid to adopt that theory.

2. The Decision

On August 30, 1971, the California high court concluded that a line of U.S. Supreme Court cases established the two-tiered test for constitutionality under the Equal Protection Clause of the Fourteenth Amendment.\(^{119}\) For most public policies and legislation, a presumption of constitutionality existed and the mere rationality test would apply. For those legislative decisions that drew lines on the basis of a suspect class or those that infringed upon a fundamental interest, heightened scrutiny applied—the state would be required to justify its policy or legislation by demonstrating that the law served a compelling state interest and that the distinctions drawn by the law were necessary for fulfilling that interest.

The Serrano I court found both a fundamental interest in education and a suspect class in those who suffered from poverty.\(^{120}\) Although there was no direct authority for this position, the court relied on language from Brown regarding the indispensable role of education in the modern industrial state and the influence of education in the development of citizens for participation in community life to proclaim that education was a fundamental right.\(^{121}\) Focusing on criminal procedure and voting rights decisions of the U.S. Supreme Court, the California court concluded that the Supreme Court had established that classifications based on an individual’s wealth required exacting scrutiny.\(^{122}\) The court made this finding even though it was not at all clear that poor people necessarily lived in property poor districts. The constitutional evil here, the California court clarified, was not only that poor people may live in low property wealth school districts, but also that any funding scheme that makes the child’s educational funding dependant upon the wealth of the district—that is, the wealth of her neighbors—must be subjected to strict judicial scrutiny.\(^{123}\) The Serrano court

\(^{120}\) See id. at 1254-55.
\(^{121}\) See id. at 1256-57.
\(^{122}\) See id. at 1257-58.
\(^{123}\) See id. at 1260.
thereby adopted the fiscal neutrality principle.

In defending its school finance scheme, the state first argued that the scheme was narrowly tailored to meet the compelling state interest of maintaining local control over educational decision-making.\textsuperscript{124} The \textit{Serrano} court rejected this argument for two reasons. First, even if rejection of the current school funding scheme resulted in a greater role for the state in the way that schools are financed, there was no reason local school districts should lose any control over decision-making in administrative matters.\textsuperscript{125} Second, if the state were truly interested in local control to encourage experimentation and account for differences in regional educational needs, the state should be willing to amplify funding for those poor school districts that could not afford such experimentation.\textsuperscript{126} Indeed, local control was little more than a "cruel illusion" for poor school districts.

Second, the state employed the classic "slippery slope" argument, contending that if the court invalidated the educational finance scheme as discrimination on the basis of the wealth of the political district in which the plaintiffs resided, the next logical conclusion would require the invalidation of statutes providing for numerous government activities supported by local taxes, ranging from waste disposal to fire protection and the concomitant destruction of local government.\textsuperscript{127} The court summarily dismissed this argument, citing the "uniqueness" of education among government services.\textsuperscript{128} The court concluded that education is unique because of its centrality in the state constitutional scheme, the role it plays in developing the ability of citizens to participate in the political process, and the importance it has in ensuring that citizens may compete in the modern economy.\textsuperscript{129} In sum, the court held that the plaintiffs had adequately plead their complaint and that a trial should be held to determine whether the plaintiffs could present evidence to sustain the allegation that the system was unconstitutional.\textsuperscript{130}

The California Supreme Court would not issue a decision on the merits in the \textit{Serrano} case until December 30, 1976, some

\textsuperscript{124} See id.
\textsuperscript{125} See \textit{Serrano}, 487 P.2d. at 1260 (\textit{Serrano I}).
\textsuperscript{126} See id.
\textsuperscript{127} See id. at 1262-63.
\textsuperscript{128} See id. at 1263.
\textsuperscript{129} See id.
\textsuperscript{130} See id. at 1266.
five years and four months after the Serrano I decision. Much happened in the interim. As discussed below, the United States Supreme Court weighed in on the educational finance issue and held that the federal Equal Protection Clause did not prohibit disparities in educational funding among districts and did not require state systems to be fiscally neutral. The state-level policy actors and some of the legal players changed, and the California State Assembly enacted SB 90 in an effort to preempt a finding that the state's educational finance system was unconstitutional. Senate Bill 90, by all accounts, "did not radically alter the existing school finance system." The legislation maintained the state's foundation plan but increased the flat grants provided to all school districts, thus potentially exacerbating inequality, rather than closing the gap. The state did attempt to equalize the funding formula by including a "revenue limit" that capped spending in high wealth districts and narrowed the spending gap over time, but even this modest equalizer was rendered meaningless by another provision that allowed local districts to override the spending cap. Naturally unsatisfied with SB 90, the Serrano lawyers argued in the trial court that the legislative attempt at equalization fell short of the constitutional mark.

After a sixty-day trial, a Los Angeles Superior Court Judge agreed with the plaintiffs and struck down the state's educational finance system, including SB 90, under the principles set forth in Serrano I. Plaintiffs' lawyers had demonstrated to the satisfaction of the court that SB 90 would result in much the same inequality as the previous system. The trial court, unsurprisingly, ordered that the legislature pass a new school funding system that meets the dictates of Serrano I. But it also ordered that the new system should produce per-pupil expenditure differences among districts of no more than $100. This

133. See ELMORE & MCLAUGHLIN, supra note 30, at 51, 106-11.
134. Id.
135. Id.
136. Id. at 51
137. Id. at 52.
138. Id.
139. See ELMORE & MCLAUGHLIN, supra note 30, at 65.
140. Id. at 65-66.
141. Id. at 66.
142. Id.
order was puzzling in light of the fact that Serrano I purportedly focused on fiscal neutrality, not equality of educational opportunity in terms of dollars spent. The decision was appealed directly to the California Supreme Court.143

The California Supreme Court's Serrano II decision largely reiterated the applicable legal test, with one small modification.144 In light of the U.S. Supreme Court's Rodriguez decision,145 the California court applied the California constitution's equal protection provision, rather than the federal Constitution's Equal Protection Clause.146 The decision upheld the trial court's conclusion, holding that California's funding system, including SB 90, was unconstitutional.147 But the Serrano II court did little to clarify whether the constitutional concern was fiscal neutrality or equality of educational opportunity.148 Nor did it do much to reconcile the concept of fiscal neutrality with concerns about revenue-raising ability in those districts plagued by municipal and educational overburden. The court cryptically stated:

Substantial disparities in expenditures per pupil among school districts cause and perpetuate substantial disparities in the quality and extent of availability of educational opportunities. For this reason the school financing system before the court fails to provide equality of treatment to all the pupils in the state. Although an equal expenditure level per pupil in every district is not educationally sound or desirable because of differing educational needs, equality of educational opportunity requires that all school districts possess an equal ability in terms of revenue to provide students with substantially equal opportunities for learning. The system before the court fails in this respect, for it gives high-wealth districts a substantial advantage in obtaining higher quality staff, program expansion and variety, beneficial teacher-pupil ratios and class sizes, modern equipment and materials, and high-quality buildings.149

The first two sentences and the first clause of the third sentence seem to point to an equality of educational opportunity standard, one that takes into account educational needs. But the re-

143. Id.
146. See Serrano, 557 P.2d at 949-51 (Serrano II).
147. Id. at 940.
148. Id. at 939-47.
149. Id. at 939.
mainder of the paragraph retreats to the language of fiscal neutrality. Clearly the court found something wrong with the educational finance system, but it did not articulate the precise locus and nature of the constitutional defect. The court's choice of remedy also provided little guidance. Rather than setting forth the outlines of a constitutional system, the court simply repeated that there are "several" systems of educational financing that would not violate the wealth-neutrality principle and sent the matter back to the legislature with the following entreaty:

We are confident that the Legislature, aided by what we have said today and the body of scholarship which has grown up about this subject, will be able to devise a public school financing system which achieves constitutional conformity from the standpoint of educational opportunity through an equitable structure of taxation.

Nothing was said about the trial court's $100 band of constitutionality.

The Serrano litigation's political aftermath was as tumultuous as the case itself. The legislature eventually passed a funding scheme that did much to equalize expenditures, but the public revolted against local property taxes and passed Proposition 13—a property tax limitation measure which has had a stifling effect on public school expenditures in the state. The California Supreme Court, however, has not directly ruled on the constitutionality of the system since Serrano II.

The impact of Serrano I cannot be understated. In the immediate aftermath, a United States District Court in Minnesota adopted the fiscal neutrality standard, and struck down Minnesota's educational finance scheme. Litigation quickly was

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150. It is worth noting that in a 1992 case, Butt v. California, 842 P.2d 1240, 1251 (Cal. 1992), the California Supreme Court had the opportunity to interpret the Serrano I & II decisions and found that those decisions and the California Constitution embraced the equality of educational opportunity principle:

It therefore appears well settled that the California Constitution makes public education uniquely a fundamental concern of the State and prohibits maintenance and operation of the common public school system in a way which denies basic educational equality to the students of particular districts. The State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity.

Id.

151. Serrano, 557 P.2d at 957 n.54 (Serrano II).
152. CAL. CONST. art. XIII A.
filed in dozens of other state courts. State legislatures convened task forces to study the extent to which their funding schemes were susceptible to a Serrano-style attack.\textsuperscript{154} And, in what would be the federal courts' controlling case, a federal three-judge panel in Texas adopted the fiscal neutrality principle and Serrano's reasoning to invalidate Texas' school finance system.\textsuperscript{155} Once again, the bellwether state with the bellwether court appeared to be setting the tone for reform across the nation.

C. Rodriguez and the End of Federal Equal Protection Clause Litigation

Under Chief Justice Earl Warren, the U.S. Supreme Court launched the Equal Protection Revolution that provided greater protections for the rights of the criminally accused, voters, people of color, and the poor.\textsuperscript{156} Writing at the crest of this Revolution, school finance scholars believed it almost inevitable that the Court would wield the Equal Protection Clause to strike down unequal educational finance schemes.\textsuperscript{157} Even University of Chicago Professor Phillip Kurland, who was critical of Wise's work, conceded that the Supreme Court would recognize some kind of equal protection right to equality of educational opportunity.\textsuperscript{158} By 1973, when the Rodriguez case reached the high court, however, the Court's composition had changed. Gone was Justice Earl Warren and the more liberal bench. In his stead sat three conservative Nixon appointees - Chief Justice Warren Burger and Associate Justices Harry Blackmun and William Rehnquist. William Brennan and Thurgood Marshall still anchored the left-leaning side of the Court. Justices Byron White and William Douglas often cast votes similar to those of Brennan and Marshall, but Justices Potter Stewart and Lewis Powell were wildcards. The optimism of the early school finance thinkers may have been premature.

At the time, many school finance reform advocates were critical of the stubborn lawyer from San Antonio who doggedly

\textsuperscript{154} See KOSKI, supra note 29 (describing the response of the Wisconsin legislature to the Serrano decision).
\textsuperscript{156} See supra Part II.B.3.i.
\textsuperscript{157} See supra Part II.B.3.
pressed his case and intentionally chose a three-judge district court panel so that his cases would be on the fast-track to the U.S. Supreme Court. Lacking the appellate experience and perhaps the theoretical sophistication to master the intricacies of school finance reform, attorney Arthur Gochman may not have been the ideal candidate to bring the school finance issue before the Supreme Court. Critics felt that he was being too hasty in taking the issue to the Court, allowing insufficient time for theory and practice to develop among the states. Yet the facts of Gochman's Rodriguez case could hardly be more compelling. Poor Latino families were taxing themselves at a higher rate in their Edgewood Independent School District than their wealthier peers in Alamo Heights, but Edgewood's children were enjoying much narrower educational opportunities than Alamo Heights children. If fiscal neutrality was the test -- as the district court held -- then the basic facts were there for a plaintiff victory.

In the end, the plaintiffs and the school-finance reform movement lost by the narrowest five-to-four margin, --with Powell and Stewart joining the Nixon appointees in the majority. Gochman argued that under an equal protection analysis wealth was a suspect class, and that education was a fundamental right that triggered strict scrutiny. The majority was not persuaded and refused to apply any form of heightened scrutiny.

1. No Suspect Classification

A subtle elegance--some might say sleight of hand--of the fiscal neutrality principle was that the actual flesh-and-blood plaintiffs need not necessarily be identified. These plaintiffs could be the taxpayers who labored under a burdensome tax rate, reaping little revenue. They could be children whose parents and neighbors owned property that had a relatively low assessed value. The only certainty was that the current funding

159. See ELMORE & MCLAUGHLIN, supra note 30, at 53.
160. See id.
161. Id.
163. Admittedly, this oversimplifies the complexity of the factual determinations to be made, but the fundamental factual findings could have been made on Gochman's record.
165. Id. at 17-18.
166. Id. at 18.
system in Texas, like that in California, made a link—unlawful under the fiscal neutrality principle—between assessed property values and educational expenditures.

But it was precisely this ambiguity upon which the Court seized. The majority specifically charged that "there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts." For this proposition, the Court cited a student note from the Yale Law Journal that published data from a study of Connecticut's financing system and was not a part of the record in the case. Plaintiffs never had a chance to subject the study and its author to cross-examination. To the Court, however, the failure to identify a "suspect class" of poor people was fatal. Noting that the plaintiffs identified only a "large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth," the Court concluded that:

[the system of alleged discrimination at the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.]

The Court also distinguished this case from the indigent criminal and poll tax cases by arguing that in those cases, the plaintiffs suffered an absolute deprivation of the desired benefit. On the contrary, Edgewood children still attended school, even though the quality of education they received was allegedly lower than their Alamo Heights peers. Although the Equal Protection Clause could not countenance the absolute deprivation of education to a suspect class of children—a principle the Court later applied to strike down a state statute that denied public education to undocumented children—no such deprivation had been demonstrated in the Rodriguez case. The Court thus had found the Achille's Heel of the fiscal neutrality

167. Id. at 23.
168. Id. at 23 n.53 (citing Michael J. Churgin et al., A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars, 81 YALE L.J. 1303, 1328-29 (1972)).
169. Id. at 28-29.
170. Id. at 28.
171. See id. at 21.
172. See id.
principle. Despite its apparent clarity, it was not at all clear whose rights would be vindicated by enforcement of the principle.

2. No Fundamental Interest

Although the Brown Court proclaimed that education was "perhaps the most important function of state and local governments," the Rodriguez Court did not find it so important as to earn "fundamental interest" status.\textsuperscript{174} The Rodriguez Court recognized that education may affect other fundamental interests such as the right to vote and participate in First Amendment freedoms, but it felt that this mere relationship was not enough, given that there had been no demonstration that the Texas educational system failed to provide each child with the basic minimal skills necessary for the enjoyment of the rights of free speech and participation in the political process.\textsuperscript{175} Instead, the Court looked to the text of the federal Constitution to determine whether education was among the rights afforded explicit protection.\textsuperscript{176} The word "education" does not even appear in the Constitution. Nor could the Court find education in the "penumbra" of the explicit rights within the constitution.\textsuperscript{177} Thus, education was not among those rights, which when infringed, would merit strict scrutiny.

3. Local Control

Finding no suspect class to protect and no fundamental interest to police, the Court analyzed the state's school finance scheme under the traditional rational relation test that applied to most reviews of social and economic legislation.\textsuperscript{178} The Court easily found a legitimate state interest in the form of local control over education.\textsuperscript{179} Noting first that it was ill-suited to make complex decisions regarding state and local taxation, the Court also found that judicial intrusion was ill-advised in cases in which it was not at all clear whether educational expenditures correlated with the quality of education delivered.\textsuperscript{180} The Court

\textsuperscript{175} Id. at 62.
\textsuperscript{176} Id. at 35-36.
\textsuperscript{177} Id. at 35.
\textsuperscript{178} Id. at 40-41.
\textsuperscript{179} Id. at 44.
supported this proposition by citing the progeny of the Coleman Report, which indicated that the cost-quality debate was far from settled.\textsuperscript{181} Better to leave such decisions to local educational agencies, the Court reasoned.\textsuperscript{182} The Texas school funding scheme furthered the legitimate goal of local control.

Writing for three of the dissenters, Justice Marshall attempted to systematically take apart the majority opinion.\textsuperscript{183} Granted, there is a good deal to complain about in the logic of the majority. However, there is also much to complain about in the logic of the dissent. Singling education out for fundamental status may not be completely arbitrary, but it borders on such when compared with other needs such as housing and police protection. Equating the poor with those who live in property-poor school districts is a leap of faith. While there is much that is irrational about a system that ties educational expenditures to property wealth of a district, similar difficulties would inhere in a one-scholar, one-dollar system, or in the potential impracticalities of a needs-based system. Attitudes toward the poor aside, the Court may well have felt that the policy implications were too far reaching for the Justices to resolve. Thus school finance litigation came to an end in the federal court system.

\textbf{IV. JUDICIAL FEDERALISM: SCHOOL FINANCE LITIGATION IN STATE COURTS AFTER RODRIGUEZ}

Recognizing the conservative tendency of his brethren on civil rights and civil liberties issues, U.S. Supreme Court Justice William Brennan, in an article in the Harvard Law Review, called for a re-awakening of state constitutional law:

\begin{quote}
[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law – for without it, the full realization of our liberties
\end{quote}


\textsuperscript{182} See id. at 49-52.

\textsuperscript{183} See id. at 70-133 (Marshall, J., dissenting).
cannot be guaranteed.184

Brennan’s admonition highlights a peculiarity in our federal system of government. Not only do state legislatures develop significant law and policy wholly apart from Washington, D.C., but so too do state supreme courts. One caveat applies, however, state supreme courts can always interpret their own constitutions to provide greater protections for individual rights and liberties than the U.S. Constitution, but they can never interpret those documents as providing less protection. In other words, state constitutional interpretation of civil rights and liberties is a one-way ratchet that can move up from the Bill of Rights, but not down.

Even before Justice Brennan’s article, several state supreme courts had begun to exercise this “new judicial federalism” to provide greater protections for individuals in areas in which the federal courts had demonstrated reluctance. For instance, California had expanded the Miranda protections to preclude the introduction into evidence of statements taken from criminal suspects prior to receiving their Miranda warnings, even if the statements were to be used for impeachment purposes.185 Likewise, contrary to U.S. Supreme Court precedent, the Michigan Supreme Court held that criminal suspects were entitled to assistance of counsel at any pretrial lineup or photographic identification procedure.186 More germane in this context, just thirteen days after the U.S. Supreme Court handed down Rodriguez, the New Jersey Supreme Court looked to its own constitution to accomplish what the Nixon appointees would not.187

A. Robinson v. Cahill Sets the (Flexible) Standard

1. The Setting

In Chief Justice Joseph Weintraub, the New Jersey Supreme Court had its own Roger Traynor. In 1973, when Robinson v. Cahill188 reached the New Jersey high court, Weintraub was in his final year of a fifteen-year stint as Chief Justice.189 The Wein-

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189. See LEHNE, supra note 13, at 44-46.
traub court’s actions supported Weintraub’s belief that the court had a creative responsibility to make the law, as the court revamped the law of product liability to provide greater protections for consumers, intervened in legislative reapportionment policy, and openly criticized the U.S. Supreme Court’s constitutionalization of criminal procedure because it lacked the sensitivity to current conditions that the common law possessed.\footnote{190} This court was not one to back down from a policy fight.

In its school finance system, New Jersey also had the functional equivalent of California. According to the \textit{Robinson} court’s opinion, local property taxes provided 67\% of the statewide total of school operating expenses, state aid provided 28\%, and federal aid provided the 5\% balance.\footnote{191} There was no disagreement among the parties that there was a disparity among districts in the dollars spent per pupil and that such a disparity was due to differential property tax bases. The state aid formula, in short, did little to equalize these disparities. There was disagreement, however, on whether these financial differences led to a disparity in the quality of education. Both sides provided expert witness testimony on the cost-quality issue, but in the end the court relied primarily on logic rather than social science for its answer.

\begin{quote}
[I]t is . . . clear that there is a significant connection between the sums expended and the quality of the educational opportunity. And of course the Legislature has acted upon that premise in providing State aid on formulas designed to ameliorate in part the dollar disparities generated by a system of local taxation. Hence we accept the proposition that the quality of educational opportunity does depend in substantial measure upon the number of dollars invested, notwithstanding that the impact upon students may be unequal because of other factors, natural or environmental.\footnote{192}
\end{quote}

Accordingly, all the necessary factual findings for a traditional equal protection analysis were present. Weintraub, writing for a unanimous court, however, had a different view of the law.

\footnotesize\begin{tabular}{ll}
190. & \textit{See} \textit{id}.
192. & \textit{Id.} at 277.
\end{tabular}
2. A New Legal Hook and a Fuzzy Standard

i. Equal Protection

The U.S. Supreme Court’s decision in Rodriguez made it easy for Weintraub to dispose of plaintiffs’ federal Equal Protection Clause claim. But plaintiffs’ lawyers were prepared for just such a circumstance and had preserved for appeal their argument that the funding scheme violated the equal protection provision implicit in the New Jersey state constitution.\(^{193}\) Although the New Jersey constitution does not have an equal protection clause \textit{per se}, like most other states’ constitutions, New Jersey’s constitution has an equality provision that state courts had interpreted much like the federal Equal Protection Clause. Weintraub quickly pointed out that there was no reason why the state supreme court could not interpret the state equality provision differently from the Fourteenth Amendment to provide greater protections to the citizens of New Jersey.\(^{194}\) Weintraub specifically noted that principles of federalism, which caution the federal courts about intervening in matters that are of a strictly state or local nature, are not present when state courts are interpreting their own constitutions.\(^{195}\)

However, the New Jersey court was unwilling to use the state’s equal protection provision to strike down the school finance scheme.\(^{196}\) First, the court was highly critical of the concepts of “fundamental rights” and “compelling state interests” because they were too vague to be meaningfully applied.\(^{197}\) Granted, if the discrimination perpetrated by the state was invidious, the court would hold the state action to a higher level of scrutiny. But the mechanical invocation of “fundamental rights” does not advance the inquiry, Weintraub wrote.\(^{198}\) Nor did Weintraub find the Supreme Court’s “textual basis” analysis helpful.\(^{199}\) After all, he wrote, both the federal and state constitutions provide that citizens have the right to acquire and hold property, but surely this interest could not be singled out for

\(^{193}\) See id. at 276.
\(^{194}\) See id. at 286.
\(^{195}\) See id. at 282.
\(^{196}\) See id. at 286-87.
\(^{197}\) See Robinson, 303 A.2d at 282.
\(^{198}\) See id. at 282.
\(^{199}\) See id.
heightened protection.\textsuperscript{200} Finally, the concept of a "compelling state interest" shed little light. Rather, Weintraub wrote that under the equal protection provision of the New Jersey constitution, the proper test was a flexible balancing calculus that weighed the "nature of the restraint or the denial against the apparent public justification, and decide[d] whether the State action [was] arbitrary."\textsuperscript{201} If bright-line clarity and predictability are supposed to be the hallmarks of a judicial standard, this ad hoc balancing test misses the mark. But if flexibility and responsiveness to current conditions are the goals, as Weintraub believed, the fuzzy balancing test hits its mark.

Applying the balancing test to the educational finance system, the court was quick to point out that education "is handled no differently than sundry other essential services" and therefore should receive no heightened protection.\textsuperscript{202} Other services, such as police, fire protection, and public assistance were equally essential to people who received them. To ensure equality among local governments in the provision of one such service would require equality in the provision of all such services. Merely because a state provided a service, Weintraub wrote, does not mean that the service must be provided on an equal basis.\textsuperscript{203} To equate differentials in spending on government services among local governments with discrimination on the basis of wealth would result in the fundamental alteration of the political structure. Thus, in sharp contrast to the California Supreme Court, the New Jersey Supreme Court employed the slippery slope argument to buttress its rejection of the fiscal neutrality principle.

\section*{ii. The Education Article and the "Adequacy" Standard}

Virtually every state constitution addresses the issue of providing a public education. The specific language of these constitutional provisions differs, sometimes dramatically, from state to state, depending upon the historical conditions under which the language was adopted. In the New England states, whose provincial charters and constitutions often predated the Common School movement, the language is aspirational in calling upon the legislatures to "cherish" or "encourage" literature,

\begin{itemize}
\item\textsuperscript{200} See id.
\item\textsuperscript{201} See id.
\item\textsuperscript{202} See id. at 283.
\item\textsuperscript{203} See Robinson, 303 A.2d at 285-86.
\end{itemize}
the arts and sciences, and the establishment of grammar schools.204 In the western states, whose admission to the union was routinely conditioned upon the establishment of common schools, the education provision frequently makes it the duty of the legislature to provide a "uniform," "thorough," "common," or "general" system of schools.205 Finally, the state constitutions of the former Confederacy often bear the marks of the radical Reconstructionists who sought to ensure that public education was available to all children in the state – black and white – and that such education be provided "uniformly."206

In the New Jersey case, the Robinson attorneys argued that New Jersey's constitutional education article placed an independent duty upon the state to provide to students some minimally adequate quantum of education.207 One clause of New Jersey's education article required that "[t]he legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."208 Plaintiffs' argument based on this "thorough and efficient" clause, which had not been forcefully advanced prior to the Robinson case, was championed in an amicus brief filed on behalf of the NAACP and the ACLU by Professor Paul Tractenberg of Rutgers Law School.209 Tractenberg was concerned primarily with the state's failure to ensure that the inner city school districts had the ability to raise sufficient money to finance an adequate education, a requirement, he argued, of constitutional proportions.210 The state's obligation went further than simple fiscal neutrality. Rather, the state was constitutionally required to ensure that each child received an education of a specific quality under the education article. This strategy - requiring that the state provide some minimally adequate level of education to a student, rather than ensuring that equal educational opportunities be provided or fiscal neutrality be observed - was novel. Though the term "adequacy" would not be en vogue until after the 1989 Kentucky decision, the basic theory had been put for-

204. See generally TYACK, JAMES AND BENAVOT, supra note 41.
205. See id.
206. See id.
207. See N.J. CONST. art. VIII, § 4, para. 1.
208. Id.
209. See LEHNE, supra, note 13, at 34-35.
210. See id.
ward in Robinson.

This strategy possessed many advantages – and at least one significant disadvantage – that the fiscal neutrality principle did not possess. First, by relying upon the education provision of the state constitution, judges would be less likely to create spill-over effects in other areas of public policy. Changing the black-letter law of equal protection might apply not only to education, but also to other government policies and legislation. This possibility was a risk that not even Weintraub would take.

Second, adequacy arguments seem to flow naturally from the language of the education articles, which generally require that the legislature provide a “thorough,” “efficient,” or even “quality” education to its children. The court need not bend the language of these provisions beyond recognition to reach the adequacy standard or search for elusive “fundamental rights” and “suspect classes.”

Third, a standard that relied on absolute levels of educational opportunity rather than relative levels of educational opportunity would, at least in theory, avoid the ire of the political and economic elite in the state. For instance, a constitutional floor of adequacy would permit some local districts to provide their children more than what the court would deem “adequate.” Thus, less political resistance to those schemes that would potentially “level down” the wealthier districts could be anticipated with an adequacy remedy. More cynically stated, the political and economic elite would not have to fear that their privileged status would be challenged. Similarly, an adequacy standard seems to intrude less upon that hallowed value of local control. The decision-making authority of well-to-do districts need not be curtailed simply because of a court order to the state that a failing school district be fixed. Indeed, giving that failing school district the financial wherewithal to improve itself enhances local control. Thus, the symbolic value of the adequacy standard was great and school finance reformers today recognize its political potency.

Fourth, an adequacy standard may simply be more appeal-

211. Note that, even under an adequacy standard, there would be no guarantee that Robin Hood financing schemes that took from wealthier persons or districts and gave to poorer persons or districts could be avoided.

212. For example, the fledgling group of school finance reformers in Ohio, decided early on to dub their group the Coalition for Equity and Adequacy to capture the broader political base. See Koski, supra, note 29.
ing to accepted norms of fairness and opportunity. In modern American society, we view education as among those keys to economic success and social mobility. In fact, it is not much of a stretch to say that social and economic inequality are better tolerated in this country because Americans believe that the necessary tools for success are provided through public education. When one learns that some children are not receiving even the minimally adequate education that will help them better their lot, one feels that an injustice has been perpetrated. Images of children in crumbling schools with no textbooks and incompetent teachers outrage onlookers. But Americans do not seem to feel this way if one child—most often our own—receives a better education than another child, so long as that “other child” is getting an “adequate” education.

Finally, at least upon initial examination, the adequacy standard appears to enjoy a clarity that equality of educational opportunity lacks. Nettlesome concerns for taxpayer versus student equity, input versus outcome equity, and vertical versus horizontal equity are avoided. All the legislature is required to do is define what is a minimally adequate education and provide schools the resources and conditions necessary to deliver that education.

The hidden pitfall, however, is that legislatures, and ultimately courts, are given absolutely no guidance as to what is an adequate education. There is no standard for the skills, competencies, and knowledge necessary for an adequate education. Moreover, the level of competency is, after all, a matter of degree. A legislature could adopt various standards for competency in math, depending on the lawmakers’ tastes for rigor and the chosen purposes of mathematics competency. For instance, a student may be deemed competent in math so long as she can divide fractions, solve simple algebraic equations, or comprehend matrix algebra; it all depends on the policy-makers’ desired goals. Once settled upon, this definition cannot remain static, in any event. “Adequacy” must change with the times. It is unlikely that the Robinson plaintiffs would have demanded computer literacy as part of a basic education, but they would likely do so now.213

Even if the legislature and courts were to craft those standards from whole cloth, there is no magic formula that equates educational resources and conditions with the provision of those standards. Indeed, it is not at all clear whether a student’s failure to achieve those standards demonstrates that an adequate education was not provided or whether provision of resources that would permit the “average” child to reach those standards is sufficient. Inputs and outcomes become hopelessly blurred. Moreover, if legislatures or courts talk about adequacy for a particular student or narrowly defined class of students, are they not talking about what the student needs in order for the education to be adequate for their needs. Or as Professor Underwood put it, perhaps adequacy is merely a case of vertical equity.214

Whether Chief Justice Weintraub and his colleagues debated these technical points is unknown, but unlikely. If anything, the portion of the Robinson opinion in which the court struck down New Jersey’s educational finance system under the education provision reflects a tension between the equity standards and an adequacy standard.215 After reviewing the history of public education in New Jersey, the court first concluded that the education article did not prevent the use of local taxes to fund education. Rather, the court held “[t]he Constitution’s guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market.”216

This seems to be a clear, albeit broad, minimum adequacy standard. But only a paragraph later, the standard became murkier:

The trial court found the constitutional demand had not been met and did so on the basis of discrepancies in dollar input per pupil. We agree. We deal with the problem in those terms because dollar input is plainly relevant and because we have been shown no other viable criterion for measuring compliance with the constitutional mandate. The constitutional mandate could not be said to be satisfied unless we were to suppose the unlikely proposition that the lowest level of dollar performance happens to coincide with the constitutional mandate and that all efforts beyond the lowest

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214. See Underwood, School Finance Adequacy as Vertical Equity, supra note 4.
216. Id.
level are attributable to local decisions to do more than the State was obliged to do.\textsuperscript{217}

Rather than holding up the yardstick of what is an adequate education, the court relied on evidence of financial discrepancies—namely, inequity—to support its adequacy claim. The clever rhetorical device of refusing to equate the lowest spending district with constitutional adequacy is by no means a logical conclusion. As will be noted below, other courts have found to the contrary. In what may have been an effort to relieve the apparent tension between adequacy and equity, the court identified the specific failure of the legislature:

Indeed the State has never spelled out the content of the educational opportunity the Constitution requires. Without some such prescription, it is even more difficult to understand how the tax burden can be left to local initiative with any hope that statewide equality of educational opportunity will emerge.\textsuperscript{218}

Perhaps it was nothing more than the vernacular of the times, perhaps the court felt boxed in by the evidentiary record which provided clear evidence of inequity without a clear demonstration of educational inadequacy, or perhaps the court did not want to define what it meant by adequacy at all, but even when the court was spelling out the constitutional duty to provide some minimum standard of adequacy, it could not help itself but retreat to the language of equality of educational opportunity. If the court merely was saying that the state had to provide the minimally adequate education equally, that is no different from saying that the state's duty was to provide a minimally adequate education. On the other hand, if the court was saying the state constitution's "thorough and efficient" clause embraced both an equality and adequacy principle, then the court could have been more explicit about the clause's meaning. Unfortunately, the imprecise language would plague the court throughout the 1970s as it attempted to implement \textit{Robinson}\textsuperscript{219} and into the 1990s when the court revisited educational fi-

\textsuperscript{217} Id.

\textsuperscript{218} Id.

Finding a violation of the state constitution’s education article, the court appeared uncertain as to how best to remedy the wrong. Plaintiffs had requested retrospective relief in the form of damages and a prospective relief in the form of declaratory and injunctive relief, ordering the state to fulfill its constitutional obligations. The court denied the retrospective relief because of the complexity of unraveling the “fiscal skein” and scheduled further hearings to determine the form of the prospective relief.

iii. The Judicial-Legislative Showdown

Upon further hearing, the Robinson court order did not set forth any more specific principles for what is an adequate education. Nor did it craft a remedy to bring the system into compliance with the state constitution. Rather, the court left the remedy to the legislature, ordering it to enact new legislation in compliance with its Robinson I decision by December 31, 1974. Declaring the school finance system unconstitutional and ordering the legislature to come up with a new plan would eventually become the exclusive “remedy” that plaintiffs would receive after successfully prosecuting an educational finance case in states throughout the country. Although the legislature set about to craft a compliant funding system for New Jersey, the various proposals received substantial opposition in the legislature. When the compliance deadline passed, the court extended the time for the legislature to act until October 1, 1975 before the court would step in and disturb the existing statutory scheme.

Four months later, with no legislation pending, the court held a hearing to determine whether it should authorize a provisional remedy to effectuate the constitutional entitlement to a thorough and efficient education. In deference to the separation of powers doctrine, the court remained reluctant to intervene. “[T]he Court’s function is to appraise compliance with the

221. See Robinson v. Cahill, 303 A.2d at 298.
222. See id. at 298.
223. See Robinson, 306 A.2d at 65 (Robinson II)
224. See id.
225. See LEHNE, supra, note 13, at 90-123 (describing the legislative aftermath of the Robinson decision).
226. See Robinson, 335 A.2d at 6 (Robinson III).
227. See Robinson, 351 A.2d at 717-18 (Robinson IV).
Constitution, not to legislate an educational system, at least if that can in any way be avoided." But the court could not stand by idly this time, and thus developed a provisional remedy to be implemented for the 1976-77 school year. The extraordinary action was grounded in the principle that when legislative inaction threatens to abridge a central right such as education, the judiciary must afford an appropriate remedy: "To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper."

Before the provisional remedy became effective, however, the legislature acted. The goals of the legislature's plan - the Wiley-Burstein education bill, also known as the 1975 Act - fit well with the court's directive to define what is a "thorough and efficient" education. The legislation aimed to provide, among other things, the following: establishment of educational goals at both the State and local levels; instruction intended to produce the attainment of reasonable levels of proficiency in the basic communications and computational skills; adequately equipped, sanitary and secure physical facilities and adequate materials and supplies; and evaluation and monitoring programs at both state and local levels. Mirroring the tension in the court's marriage of adequacy and equity, however, the primary fiscal mechanism the Wiley-Burstein bill proposed was a form of power equalizing. The bill permitted districts to levy the tax rate of their choice, but ensured that all districts would be equalized to 135% of the average per-student assessed value.

The court was divided in its determination whether this legislation complied with the mandate of Robinson I. A majority of the court focused on the adequacy considerations. It found that the legislature had sufficiently defined a "thorough and efficient" educational system, had chosen to share power with local districts in implementing that system, had provided for the ongoing monitoring and evaluation of the system by the commissioner of education, and perhaps most important, provided

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228. Id. at 719.
229. See id. at 718.
230. Id. at 720 (quoting Cooper v. Nutley Sun Printing Co., 175 A.2d 189, 197 (1961)).
231. See Lehne, supra note 13, at 21, 91-123.
232. See id.
233. See id.
what appeared to be adequate resources to fund the system.\textsuperscript{235} Emphasizing that the case was a challenge to the statute on its face (rather than as applied), the court held that the legislation was in compliance with Robinson I.\textsuperscript{236} The concurring and dissenting opinions, however, focused on the equalizing aspects of the legislation and found them wanting.\textsuperscript{237} The dissent, in particular, argued that the power equalizing plan may not provide adequate funds for a thorough and efficient education and, more telling, that the plan would not equalize expenditures, but rather would only equalize tax rates up to a certain point.\textsuperscript{238} Notwithstanding these criticisms, however, the court approved the funding scheme on its face.\textsuperscript{239}

\textit{Serrano} and \textit{Robinson} are landmark decisions not only because they were the first of their kind for state supreme courts, but also because they shed light on how judges might make decisions in this brave new world of educational finance litigation. First, it cannot be seen as a coincidence that the first two state supreme courts to tackle this issue and invalidate their states' educational finance schemes were the venerable California and New Jersey courts. Both courts possessed reputations for activism and policy-making and both upheld those reputations when confronting head-on their sister branches over what is likely the most expensive line item in the state budget—education finance. At least where courts are presented with a legal \textit{tabula rasa}, judicial attitudes toward their roles would seem to influence their decisions.

Second, both courts strayed from the judicial penchant to craft bright line rules that can be easily understood and translated into action. Rather both established constitutional standards, although very different from each other, that were ambiguous in their target and vague in their command. Although the \textit{Serrano I} decision appeared initially to embrace

\begin{itemize}
\item \textsuperscript{235} \textit{Id.} at 717 n.2.
\item \textsuperscript{236} See \textit{id.} at 723-24.
\item \textsuperscript{237} See \textit{id.} at 731-35.
\item \textsuperscript{238} \textit{Id.} at 733-34.
\item \textsuperscript{239} Unfortunately, this did not end the judicial-legislative standoff. After \textit{Abbot V}, the legislature failed to enact a tax package that would fully fund the 1975 Act, prompting the court to issue an order on May 13, 1976, forcing state officials to stop expending funds on elementary and secondary education on July 1, unless the legislature acted. On July 1, the legislature had not acted and the schools closed. On July 9, the legislature passed the tax package and the schools re-opened. For the moment, a truce was called in the school finance wars in New Jersey. See \textit{LEHNE}, \textit{supra} note 13, at 156-63.
\end{itemize}
wholeheartedly the clear fiscal neutrality standard, the legislature's inability to determine the beneficiary of the court's edict - Are poor children to receive equal educational opportunities or is the elimination of property wealth as a factor in educational financing the goal? - and the Serrano II decision made clear that the court was equally concerned with equality of educational opportunity in terms of educational expenditures. Elimination of a finance system wedded to local property wealth was only part of the legislative solution. The court also wanted the gap in spending to be closed. Robinson I was even more puzzling. The constitutional standard set forth by the court clearly lent itself to an adequacy remedy, but the evidence upon which the court relied and the rhetoric it employed seemed to call for equality of educational opportunity. Critics may argue that this type of judicial lawmaking is inappropriate because it fails to provide guidance to persons seeking to order their behavior in compliance with the law and because it makes the law unpredictable. A more generous interpretation of the courts' use of fuzzy standards in this case is that they were actually exercising restraint in a new policy arena and permitting the political bodies to help them define the contours of their state constitutions through the remedial phase.

But perhaps the most telling and pragmatic justification for such judicial ambiguity is the desire to preserve flexibility. The courts' decisions provided the legislature with sufficient flexibility to get a proposal through the political mill that met the ambiguous decree and garnered a sufficient coalition of support. It is likely, in addition, that the courts wanted to preserve their own flexibility. Should conditions change and an unforeseen legislative finance scheme reach their dockets again, the New Jersey and California courts may need broad and ambiguous precedent to either uphold or strike down the system, depending upon each court's respective attitude and the political dynamics in the state at the time. The use of fuzzy standards promotes adherence to precedent and adaptation to current conditions - the ideal combination of restraint and activism.

Finally, despite the activist rulings in the liability phase of these litigations, both the Serrano and Robinson courts stood down when it came to the remedial phase of the litigation and allowed their respective legislatures to craft suitable remedies. Indeed, the Robinson court paid substantial deference to the first legislative remedy proposed and approved it on its face, in spite
of vociferous objections to how the new funding schemes would play out in practice. After *Serrano* II's rejection of SB 90 – a school finance scheme patently out of line with either a fiscal neutrality principle or any equal educational opportunity principle – the California Supreme Court never again reviewed the constitutionality of the legislative remedy – AB 65 – which was severely criticized by the *Serrano* lawyers, but included at least the basic ingredients of power equalizing and modest guarantees of more equalized expenditures. This pattern of judicial veto followed by a legislative remedy would become the routine in school finance litigation. Including *Serrano* and *Robinson*, in all nineteen final state supreme court educational finance decisions that favored plaintiffs, the courts issued declaratory relief and ordered the legislature to develop a remedial finance scheme. On the one hand, hawkish educational finance reform advocates may criticize this judicial behavior as being nothing more than an issuance of an improper advisory opinion, insufficient to remedy the constitutional wrongs perpetrated by the state legislatures. Of what consequence is a constitutional right if there is no judicial remedy? On the other hand, opponents of judicial intervention in educational finance policy may characterize this same behavior as mere “Monday morning quarter-backing” by exercising the constitutional veto power without specifically delineating what is a constitutional educational finance scheme. Without sufficient guidance, how can the legislature develop a constitutionally sound plan?

Both positions have merit, but both also may miss the mark. The California and New Jersey supreme courts may have been seeking a compromise between their activist tendencies and their respect for separation of powers. Not wanting to ignore a harm being perpetrated against a political minority – in this case, children not receiving an equitable or adequate education – but also recognizing the futility of unilaterally forcing a specific remedy upon the political branches, the courts may have been carving out a new role in state policy-making—that of a catalyst for legislative action. When legislative policy produces results that fall below some constitutional expectation, the court need not stand on the sidelines, no matter how complex the policy arena. On the contrary, the court may act as the backstop against legislative failings.
B. The Classic Equity Cases: Inequality By Design

The period between Robinson and the watershed Kentucky decision of 1989 was not fruitful for school finance reform litigators. After Robinson, twenty school finance cases reached final state supreme court decisions prior to 1989. Plaintiffs won only five of those cases. Those five cases, however, demonstrate the remarkable diversity in judicial analysis during this early unsettled phase of educational finance litigation, as courts looked to both equal protection provisions and state education articles, and put forth tentative theories of fiscal neutrality, equality of educational opportunity, and adequacy. This section briefly considers three of those five state supreme courts that championed the fiscal neutrality and equity theories – Connecticut, Wyoming, and Arkansas.

Six years after the 1971 Serrano I decision, educational funding in Connecticut remained in the Strayer-Haig “foundation plan” era. The state contributed 20-25% of local operating expenditures compared to the 41% nationwide average. Of the state’s 20-25% contribution, 80.1% was a flat grant given to all districts on the basis of average daily student attendance, 12.6% was reimbursement for special educational services, and the remaining 7.3% was from miscellaneous categorical grants. None of these revenue streams was equalized or tied to the local district’s ability to pay. Seventy percent of school expenditures were raised through local property taxes that were, not surprisingly, drawn from highly unequal property tax bases. In turn, these unequal tax bases generated greatly different revenues, even for school districts that taxed themselves aggressively. The statistics were dramatic. Those districts in the highest decile property wealth enjoyed an average $102,901 per-pupil assessed value, taxed themselves at an 11.1 millage rate, and generated $1245 dollars per student in operating expenditures. By contrast, the districts in the lowest decile, had an average assessed value of $25,474, an average millage rate of 26.3, and an average per-pupil expenditure of $813. These expenditure differentials translated into significant differences in average teacher salaries, curricular offerings, student-teacher ratios, and library re-

241. See id.
242. See id.
243. See id. at 367.
244. See id.
EDUCATION SYMPOSIUM

From an equity perspective, this was an easy case.

In a 5-1 decision, the Connecticut Supreme Court agreed. Its analysis in Horton v. Meskill, which sprung almost naturally from the facts, was based on the state’s equal protection provision. In applying that provision, the court adopted the two-tiered equal protection analysis of the federal Constitution for the most part, but rejected the Rodriguez test for what was a “fundamental” interest. Rather than calling every right or interest identified in the state constitution a “fundamental” interest, the court weighed the importance of the provision of education among other services that the state provides and concluded that education was indeed a fundamental interest. Finding a fundamental interest, the court applied strict scrutiny to the state’s foundation aid educational finance scheme and easily found it unconstitutional. The court held that students in the state are entitled to equal enjoyment of the fundamental right to an education. Although clearly requiring the state to ensure that students receive equal educational opportunities, the court left unclear what such equality meant. This definition, the court stated, was a matter for the legislature to determine with its remedial scheme.

Interestingly, the Horton court’s decision may have been facilitated by the legislature itself. In 1973, Connecticut’s General Assembly had established the Commission to Study School Finance and Equal Educational Opportunity, which issued a report concluding that the current system of financing education in Connecticut was “inherently unequal” and was not affording the children of Connecticut an equal educational opportunity. No charge could then be made against the Connecticut Supreme Court that it had made an incorrect finding of fact or was incapable of understanding a complex area such as public education. With the report as support and confirmation of the court’s findings, the Horton justices were left to what they do best – interpret

245. See id. at 368.
246. See Horton, 376 A.2d at 376.
247. See id. at 374-75.
248. See id. at 373-74.
249. See id.
250. See id. at 375.
251. See id. at 374.
252. See Horton, 376 A.2d at 374-76.
253. See id. at 375.
254. See id. at 376.
and apply legal standards.

In Washakie County School District No. 1 v. Herschler, the Wyoming Supreme Court similarly relied on the state’s equal protection provision to strike down the state’s educational finance system that produced large spending disparities among property poor and property rich districts. The Washakie court, however, focused on wealth discrimination as being the trigger for the equal protection analysis and concluded that the Wyoming educational finance system, which relied on local property taxes, discriminated against students on the basis of the school districts’ property wealth. Relying heavily on the California Supreme Court’s Serrano I analysis the Wyoming court then adopted a fiscal neutrality standard to declare the state’s system unconstitutional:

[T]he quality of a child’s education in Wyoming, measured in terms of dollars available for that purpose, is dependent upon the property tax resources of his school district. The right to an education cannot constitutionally be conditioned on wealth in that such a measure does not afford equal protection.

But, again, what seemed like a clear constitutional test became muddy when the court sent the remedy back to the legislature with instructions to craft a new educational finance scheme that would not discriminate on the basis of wealth, but instead would take into account cost differentials among the districts.

Three years after the Washakie decision, equal protection analysis in educational finance cases remained unsettled, as the Arkansas Supreme Court overturned its school finance system under a mere “rationality” test. In DuPree v. Alabama School District No. 30, the court held that it could find no legitimate interest in the state’s school finance system and that system “bears no rational relationship to the educational needs of the individual districts, rather it is determined primarily by the tax base of each district.” Moreover, the Arkansas court was unwilling to pin itself down to any single constitutional standard and stated that the state’s school finance system suffered from two defects:

255. 606 P.2d 310 (Wyo. 1980).
256. See id. at 334-35.
257. Id. at 332.
258. See id. at 336.
260. Id. at 93.
(1) that property wealth was the primary dictator of educational opportunities to students, and (2) that the state distributed educational resources on an irrational basis. Thus, the court allowed for the possibility to challenge the educational finance system as to both how the money is raised and whether the funds are distributed on a rational basis among districts in the state.

For those states that pursued the fiscal neutrality or equality of educational opportunity standard prior to 1989, diversity was the norm. In interpreting their state equal protection provisions, the Connecticut Supreme Court diverged from the "fundamentality" test of Rodriguez, whereas the Wyoming Supreme Court looked to wealth as the trigger for heightened scrutiny, and the Arkansas Supreme Court found the system unconstitutional under a mere rationality test. Perhaps even more frustrating from the legislative perspective was that none of these courts was willing to specify whether the constitutional infirmity was basing the system on local property wealth or failing to provide equal educational opportunities to children in the state. Each court seemed to "fuzz up" this distinction so that it would not have to analyze itself into a corner.

C. Washington, West Virginia, and the Further Development of the Adequacy Standard

The constitution of the State of Washington proclaims that it is "the paramount duty of the state to make ample provision for the education of all children" and that the legislature shall establish a "general and uniform system of public schools." On its face, this provision of the education article seems to suggest (1) that an adequate (indeed ample) education must be provided to all children, (2) that it is the state's duty to provide that education, (3) that this duty cannot be subordinated to other state obligations or preferences, and (4) that the education provided must be uniform (some might argue equal) in all districts throughout the state. To educational finance reformers in the early 1970's, this language must have seemed like a silver bullet.

When the Washington Supreme Court first interpreted this language in the context of a school finance case, however, the school finance reform plaintiffs found out just how malleable

261. See id. at 95.
262. WASH. CONST., art. IX, § 1.
By a 6-3 vote, the court in *Northshore School District No. 417 v. Kinnear* upheld the state's educational finance system in the face of a challenge to the adequacy and equity of the entire educational system (not merely the financial aspects of the system). Despite the clear majority, however, no single opinion spoke for a majority of the court. Rather, a plurality of four became the lead opinion with two justices joining in a concurring opinion upholding the system based on the plaintiffs' failure to present sufficient evidence of inadequacy alone. This evidentiary finding was harshly attacked by the dissent, which noted that, at the extremes, assessed property valuations in districts ranged from a low of $1,925 per pupil to a high of $776,567 per pupil. Moreover, among the state's 320 school districts, per-pupil expenditures ranged from $4,517 per pupil to $470, the mean basic expenditure being $819 and the standard deviation between the basic expenditures per pupil being $392. The trial court found that these discrepancies were directly a function of property wealth. Moreover, the system itself perpetuated inequality by paying sums to those districts that are better able to recruit, train, and retain qualified staff (read: wealthy districts). Finally, the dissenters pointed out, the trial court had specifically found that the educational finance system did not provide sufficient funds to operate and maintain schools (particularly without the infusion of cash from special property tax levies).

Although none of the opinions issued in the *Kinnear* case speaks for a majority of the court, the four-justice plurality opinion is instructive in its treatment of the facts and the law. The plurality argued, and the concurring justices agreed, that there was insufficient evidence presented by the plaintiffs to establish

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264. See id. at 203.
265. See id. at 179, 203.
266. See id. at 210-11 (Stafford, J., dissenting).
267. See id. at 211.
268. See id. at 211-12.
270. See id. at 212-13.
271. Technically speaking, none of the opinions issued by the court would be binding authority on other courts or have precedential value in later supreme court decisions. That said, those areas in which the plurality and concurrences converged arguably bind later judicial decision-makers and all opinions may be cited for their persuasive value.
a claim that an "ample" provision for education was not being provided to any student.\footnote{272} Specifically, the plurality noted that there was no evidence of the specific failure to provide ample education to any child, nor evidence that any child had been denied promotion or admission to other schools based on a the prior school’s failings.\footnote{273} Moreover, there was no evidence that the district failed to provide classes in accordance with the state’s required curriculum; and no suggestion as to the curriculum or content standards that should have been provided.\footnote{274} In terms of equity, the plurality recognized the existence of financial disparities, but relied upon a dubious statistical analysis to deny the inequality claim. The plurality found that the financial disparities were not caused by differences in local taxable wealth, but rather by differences in pay for teachers and the differences in by the certificated staff-student ratio among districts.\footnote{275} (Naturally, those districts with higher pay for teachers had higher teacher:student ratios and cost more to run on a per-pupil basis.) Finally, the plurality found that there was no correlation between parental wealth and property wealth among districts, a finding that the fiscal neutrality principle would not have required.\footnote{276}

In applying the law to these facts, the \textit{Kinnear} plurality first rejected the equal protection claim by adopting \textit{in toto} the \textit{Rodriguez} reasoning and the fact that the alleged discrepancies in property values were not correlated with spending differences or differences in educational quality.\footnote{277} In responding to the claim that the state failed in its "paramount" duty to make "ample" provision for the education of all children, the plurality first denuded this clause by deferring its interpretation and application to the political branches: "the nature and extent of that duty and the means of carrying it out rest upon the legislature and the state superintendent."\footnote{278} Moreover, there was no evidentiary showing that that duty had not been met. Finally, the plurality rejected the claim that the state had failed to provide a "general and uniform system of public schools."\footnote{279} Focusing on the word
"system," the court reasoned that, despite variation in size, taxable property wealth, and expenditures, the state had provided a uniform system of public schools with

certain minimum and reasonably standardized educational and instructional facilities and opportunities to at least the 12th grade—a system administered with that degree of uniformity which enables a child to transfer from one district to another within the same grade without substantial loss of credit or standing and with access by each student of whatever grade to acquire those skills and training that are reasonably understood to be fundamental and basic to a sound education.280

Looking only at the structure, not the actual delivery of education, the plurality then upheld the system under the "general and uniform" clause.281

Although seemingly a crushing defeat for the plaintiffs, the Kinnear plurality and concurring opinions provided clues to plaintiffs as to how they might prove that the state had failed in its paramount obligation to provide an ample education to all children. The task is to demonstrate that specific children in certain districts are not receiving an ample education according the state's own standards, to the extent that such standards exist. This was precisely the strategy taken by Seattle School District No. 1 in its 1978 attack on the state's funding system under the "ample provision" and "general and uniform" clauses of the education article.282 Due to budget shortfalls in the mid-1970's, Seattle (and other Washington school districts) were forced to rely on "special excess levy funding" which required local voter approval. The difficulty was that the Seattle voters had rejected such levies in the prior two local elections and the district was forced to make budget cuts.283 These budget cuts, in turn, deprived children of certain educational opportunities required by state statutes and regulations of the state board of education.284

This time, in a 6-3 vote with three justices in the majority who did not participate in the Kinnear case, the Washington Supreme Court agreed.285 From the outset, the court's tone was

280. Id. at 202.
281. See id. at 203.
283. See id. at 78, 81.
284. See id.
285. See id. at 98-99.
less deferential to the legislature, as it argued that the “paramount” duty of the education clause was placed on the “state,” including the judiciary; that the obligation of the court was to interpret this clause; and that there might even be a conflict or confrontation with the legislature over this interpretation.\textsuperscript{286} Then the court set about to define what is an “ample” education. Recognizing that changing times and conditions may dictate changing definitions of what is an “ample” education, the court held that it is for the legislature to specifically define what the “basic” education required by the clause is and the level of funding and deployment of resources necessary to provide that basic education.\textsuperscript{287} The court noted that discretion to the legislature lies within the broad parameters set by the constitution and the court’s interpretation of the constitution.\textsuperscript{288} Citing New Jersey’s Robinson, decision, the court then said that

the State’s constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today’s market as well as in the marketplace of ideas... Education plays a critical role in a free society. It must prepare our children to participate intelligently and effectively in our open political system to ensure that system’s survival... It must prepare them to exercise their First Amendment freedoms both as sources and receivers of information; and, it must prepare them to be able to inquire, to study, to evaluate and to gain maturity and understanding.\textsuperscript{289}

Thus, the Washington Supreme Court developed an adequacy standard that went much further than the Robinson court’s standard, but left much room for legislative interpretation. Indeed, the court required that the legislature identify the specific educational components that would meet that standard and provide the funding necessary for those components to be achieved.

The adequacy standard was further refined by the West Virginia Supreme Court in Pauley v. Kelly.\textsuperscript{290} On appeal from a trial court’s dismissal of the plaintiffs’ complaint, the court faced

\textsuperscript{286} See id. at 93-94
\textsuperscript{287} See id. at 95.
\textsuperscript{288} See Seattle Sch. Dist. No. 1, 585 P.2d at 95.
\textsuperscript{289} Id. at 94 (citations omitted).
\textsuperscript{290} 255 S.E.2d 859 (W.Va. 1979).
the question of whether the state constitution's "thorough and efficient" clause had been violated by the legislature. After an exhaustive review of the educational finance cases that had been litigated to date, the interpretations of other states' "thorough and efficient" clauses, and the constitutional history of West Virginia's clause, the court - mirroring the New Jersey and Washington standards - concluded that a "thorough and efficient" education in West Virginia embraces a specific quality of education. "It develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically." The court did not stop there. Rather, it went on to define more specifically the components of a minimally adequate education in West Virginia:

Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.

Quite apparently, these components of a thorough and efficient education go far beyond the financial aspects of the educational system to policies, service delivery structures, curricula, and the like. The court recognized this fact and held that, implicit in this definition of "thorough and efficient" are supportive services, including "good physical facilities, instructional materials, and personnel; [and] careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency." Because there had been no evidentiary record devel-

291. See id. at 861.
292. See id. at 877-78.
293. Id. at 877.
294. Id.
295. Id. at 877.
oped in the case, the court remanded the case back to the trial court for further hearings.

Current commentators often point to 1989's Rose v. Council for Better Educ., Inc. decision by the Kentucky Supreme Court as the case that ushered in the adequacy standard.296 Prior to 1989, these commentators argue, educational finance reform litigation focused on an equity standard, whether it was the fiscal neutrality or equality of educational opportunity standard.297 Yet this assertion is puzzling in light of the New Jersey Supreme Court's articulation of the standard in Robinson and the further refinement of the standard by the Washington and West Virginia Supreme Courts. Granted, courts and commentators prior to 1990's may not have been as self-conscious about the novelty of the standard or they may not have dubbed it "adequacy," but judicial decision-making nonetheless reflected the central tenet of adequacy: the entitlement to an absolute level of education.

The pre-1989 cases also were not concerned merely with the fiscal aspects of the educational system. The remedial plan in New Jersey set forth the specific components of a "thorough and efficient" educational system. The Washington Supreme Court noted that the plaintiffs' attack was on the entire system and that the appropriate remedy should start with a definition of a "basic" education in the state. The West Virginia Supreme Court specifically identified the importance of goals, educational resources, and assessment and monitoring to a constitutional educational system (what educational policy-makers might now loosely refer to as "standards-based" or "systemic" reform).

After remand to the trial court in the Pauley case and the trial court's finding that the education provided in the plaintiff districts was "woefully inadequate," the state legislature and department of education, aided by expert assistance, developed the "Master Plan for Education."298 That Master Plan was intended to revamp educational service delivery in West Virginia beginning with education standards and curricula tied to those standards, moving to programmatic reforms, and then to adequate and equalized funding.299 As discussed below, this reform package went as far as that adopted in Kentucky after the Rose decision. Finally, as was the case in New Jersey, the remedial

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296. See supra note 16 and accompanying text.
297. See supra note 16 and accompanying text.
299. See Minorini & Sugarman, Educational Equity, supra note 30, at 52.
plan promulgated by the West Virginia legislature eventually found its way back before the state supreme court, which approved the plan on its face and ordered its implementation.\(^{300}\)

That the conceptual and potential strategic distinctions between equity and adequacy did not capture the attention of commentators prior to the *Rose* case is perhaps the most meaningful difference between litigation in the second and third waves. However, this difference and the potential to use these flexible constitutional standards strategically was not lost on the courts in the 1970's and 1980's—especially those that wielded the adequacy standard to defeat equity claims.

\[ \text{D. The Era of State Wins: 1973-1988} \]

Although commentary and research often focus on the handful of cases that school finance reformers won in the first and second waves of educational finance reform litigation, this obscures the fact that the state defendants won fifteen of the twenty-two cases that reached the state's highest court after *Robinson*.\(^{301}\) Although each of the decisions reflects the idiosyncrasies of the procedural posture of the case, the school finance formula in question, and the law applied by the court, four unified themes arise from the analyses in these decisions to uphold the educational finance system. First, in a number of cases, the courts relied upon the state's interest in preserving local control to justify any inequity in expenditures or educational opportunity, irrespective of the type of equal protection analysis adopted.\(^{302}\) At the same time, these courts downplayed the alleged harm of spending less on education by arguing that more money may not matter anyway. Second, despite plaintiffs' reliance in some cases on *Robinson* or the language of "uniformity" in the state constitution's education provision, several courts rejected the notion that the education provision embraces any equality standard.\(^{303}\) Third, courts in a number of cases disposed of plaintiffs' claims by citing the separation of powers doctrine and noting that the political branches enjoy near plenary power in the field of public education.\(^{304}\) Others used the doctrine to buttress the denial of plaintiffs' claims. Finally, in re-

\[ \text{300. See Pauley v. Bailey, 324 S.E.2d 128 (W.Va. 1984) (Pauley III).} \]
\[ \text{301. See supra note 10 and accompanying text.} \]
\[ \text{302. See infra Part IV.D.1.} \]
\[ \text{303. See infra Part IV.D.2.} \]
\[ \text{304. See infra Part IV.D.3.} \]
jecting both equity and adequacy claims, many courts found that the state had provided to plaintiffs a minimally adequate education and that nothing more was required by the equal protection provision or education article of the relevant state constitution. This final judicial strategy highlights the dual-edged nature of adequacy as a standard. Whether an adequate education is being delivered all depends upon where the bar is set.

1. The Hallowed Status of Local Control and the Harmlessness of Underfunding Education

Scholars and jurists alike have attempted to discredit the myth of local control in public education as a justification for the state to offer unequal educational opportunities to its children. Calling local control a "cruel illusion" or a "hoax" for those districts that cannot raise enough money to effectively exercise it, some judges have dismissed local control as a justification for inequality. Others have noted that there is no necessary connection between local funding of public schools and local decision-making in public schools. More recently, some have pointed out that states have so pervasively regulated public education that there is little left of local control. Yet local control is uniformly cited by state supreme courts as a reason for upholding educational finance systems in the face of equal protection challenges. Local control is often the cited "legitimate" or "compelling" state interest used to defeat an equal protection claim.

Examples of courts' reliance on local control abound. Having found no fundamental interest in education and upholding

305. See infra Part IV.D.4.


307. See Serrano v. Priest, 487 P.2d 1241, 1260 (Cal. 1971) ("under the present financing system, such fiscal freewill is a cruel illusion for the poor school districts"); Milliken v. Green 203 N.W.2d 457, 471 (Mich. 1972) ("For poorer school districts it is a hoax that they can follow the richer school districts into the green pastures"), vacated by 212 N.W.2d 711 (1973).

308. See Serrano, 487 P.2d at 1260 ("even assuming arguendo that local administrative control may be a compelling state interest, the present financial system cannot be considered necessary to further this interest. No matter how the state decides to finance its system of public education, it can still leave this decision-making power in the hands of local districts").

309. See Rebell, supra note 306.
the educational finance system under a rationality review, the
New York Supreme Court found that "[a]ny legislative attempt
to make uniform and undeviating the educational opportunities
offered by the several hundred local school districts... would
inevitably work the demise of the local control of education
available to students in individual districts."\(^{310}\) This conclusion,
of course, ignores the fact that poor districts may already not en-
joy local fiscal control. Similarly, the Ohio Supreme Court
stated: "local control allows for local participation in the deci-
sion-making process that determines how these local tax dollars
will be spent. Each school district can develop programs to meet
perceived local needs."\(^{311}\) It is difficult to understand how poor
districts can develop programs to meet their needs when they do
not have the money to do so. The Maryland Supreme Court
noted:

> [I]t is readily apparent that a primary objective [of the fund-
ing system] is to establish and maintain a substantial meas-
ure of local control over the local public school systems—
control exercised at the local level through influencing the
determination of how much money should be raised for the
local schools and how that money should be spent.\(^{312}\)

These decisions speak for themselves. In \textit{Olsen v. State},
however, the Oregon Supreme Court, confronted head-on the
argument that poorer school districts do not enjoy the fiscal
flexibility to exercise meaningful local control.\(^{313}\) The court was
unpersuaded by this argument:

The local control argument is generally based upon the po-
etical principle that the governmental body supplying the
funds, despite initial protestations to the contrary, ultimately
directs how the funds shall be spent. ... While it is no doubt
true that reliance on local property taxation for school reve-
 nues provides less freedom of choice with respect to expen-
ditures for some districts than for others, the existence of
'some inequality' in the manner in which the State's rationale
is achieved is not alone a sufficient basis for striking down
the entire system.\(^{314}\)

\(^{310}\) Levittown Union Free School District v. Nyquist, 439 N.E.2d 359, 367 (N.Y.
1982).
\(^{311}\) Bd. of Educ. v. Walter, 390 N.E.2d 813, 821 (Ohio 1979).
\(^{312}\) Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 788 (Md. 1983).
\(^{313}\) 554 P.2d 139 (Or. 1976).
\(^{314}\) Olsen, 554 P.2d at 146-47.
At least the court was honest. According to the court, local control over educational expenditures is necessarily diminished under a local property-tax funded educational system, but not to the point that it raises constitutional concerns.\footnote{See id.} Eschewing the \textit{Rodriguez} test for fundamentality and the two-tiered equal protection analysis altogether, the court then balanced the state’s interest in preserving local control against the detriment to the education of children in lower expenditure districts, concluding that local control outweighed that detriment.\footnote{See id. at 147.}

On the local control issue, courts could go either way. On the one hand, courts could summarily reject the local control justification as a hoax for poor districts or they could point out that state control over funding does not require state control over administration. Of course these approaches ignore the old adage about the piper, who pays him, and who calls the tune. On the other hand, rhetoric and convenient disregard of financing realities allow many courts to justify an unequally funded educational system on the grounds of local control. These courts argue that fiscal control cannot be separated from administrative control and blithely forget that those districts with less money are less able to make decisions in the best interests of their children. However, such legal gymnastics need only be performed because traditional equal protection analysis - under either a multiple-tiered analysis or a balancing test - required that the alleged harm of unequal funding be balanced against \textit{some} state interest. Apparently finding no other candidates, states were compelled to rely on local control as the justification for the system. The weight of such a nebulous concept as local control leaves much room for judges to manipulate the scale.

Some courts that sought to uphold educational finance schemes not only put a finger on top of the balance on the local control side, but also placed a finger underneath the alleged harm side. To the extent that the target of equity in these cases were students (as opposed to taxpayers), plaintiffs inevitably had to argue that students in property-poor school districts or districts that faced municipal and educational overburden suffered from the harm of inadequate or inequitable educational opportunities. To make this argument work, plaintiffs were sometimes compelled to logically and empirically demonstrate
that harm by showing that money matters in terms of educational opportunities. From the outset, courts bickered over whether “educational opportunity” should mean resource inputs or student performance and outcomes. If it means the former, then plaintiffs would have a much easier time demonstrating that unequal funding results in unequal opportunities. If the meaning of educational opportunity is the latter, the parties and the courts are swept into an empirical maelstrom. Beginning with the Coleman Report\(^{317}\) and continuing today, a debate has raged as to whether and how much money matters in terms of educational opportunities, student performance and student outcomes. This debate, and evidence on the matter will not be discussed in detail here. However, suffice it to say that sufficient social science data had been generated by expert witnesses in these cases to allow for a factual finding in either direction or no direction. Therefore, what the courts were left with was logic and argument to support their factual findings on the cost/quality debate.

Some courts, such as the New Jersey Supreme Court, found that as a matter of intuition, money matters.\(^{318}\) Less money results in fewer educational resources and diminished educational outcomes. That money matters is further demonstrated by the fact that wealthier school districts spend more on their children and fight to maintain those funding levels.\(^{319}\) Why would people in those districts and their school boards be squandering money? Further, reform advocates argue legislatures themselves must recognize the importance of money to educational outcomes, otherwise they would not provide what foundation aid they do provide. Finally, some may argue that the very importance of education to the future of the children and the state suggests that money does matter, because the education of children cannot be put at risk merely because a definitive link between cost and quality cannot be demonstrated.

Other courts, however, have pointed to the ambiguity in the research and opined that such ambiguity counsels in favor of a finding that money does not matter, because it would be unwise to intervene in legislative decision-making by ordering the spending of good money when the value of such expenditures is

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317. See Coleman, supra note 76.
uncertain. Strictly speaking, the burden of demonstrating proof by some evidentiary standard (a preponderance of the evidence or clear and convincing evidence) nearly always rests with the plaintiffs in civil litigation. Thus, in the face of ambiguous evidence, a finding for the defendants seems procedurally justified. Yet evidentiary burdens are as unsteady as other legal standards and reasonable judges could differ on the cost/quality question.

Emblematic of this shifting evidentiary standard is the Colorado case of *Lujan v. Colorado State Board of Education*. In that case, the trial court struck down the educational finance system and specifically found that the level of educational expenditures affected the quality of education offered to Colorado's children. On review, a majority of the Colorado Supreme Court disagreed, stating that "a review of the record and case-law shows that courts are ill-suited to determine what equal educational opportunity is, especially since fundamental disagreement exists concerning the extent to which there is a demonstrable correlation between educational expenditures and the quality of education." In other words, when in doubt, err on the side of non-intervention. One dissenting justice, however, applied another legally justified standard and took the majority to task. Reciting the trial court's findings as to the how the differences in educational expenditures create differences in educational opportunities, the dissenting justice accused the majority of ignoring the factual record and applying a de novo review of the facts rather than the presumption of correctness usually applied by appellate courts to lower court factual findings. In other words, when in doubt, the burden rests on the appellate court to overturn a trial court's facts. Similarly, when in doubt, the burden rests on those who would risk children's education: "[E]ven the strongest advocates of Coleman's position have not declared that expenditures have no effect on a child's education. Moreover, it is yet to be expressed by anyone that increased expenditures are deleterious to a child's education."
At the end of the day, judges and advocates are left without a firm grasp on the facts. Under traditional equal protection balancing tests, either side of the scale can be manipulated by argument and rhetoric. Local control can be either severely jeopardized by state intervention in educational funding, or it can be enhanced in those districts that do not have the financial wherewithal. Children may be harmed by lower educational opportunities or they may suffer de minimis or educationally irrelevant disadvantages, depending on what “educational opportunity” means and who bears the burden of demonstrating that unequal expenditures affect such opportunities.

2. The Constitutional Framers Did Not Require an Equitable Education

If equality of educational opportunity or fiscal neutrality could not be achieved through the equal protection provision of the state, reform advocates—taking their cues from the Robinson plaintiffs—argued that the state’s education article required such equality. Based on the texts of state education articles, for example, the requirement that the state provide a “uniform” or “general” or “thorough and efficient” system of education, advocates argued that such education clauses embrace an equality standard. Although this argument enjoyed a modicum of success in the Robinson case, it was by and large rejected by the courts in the “second-wave” litigation.

Judicial reasoning in these cases was straightforward. Some courts, such as the Washington Supreme Court, noted that the constitution provided only that the “system” be general or uniform. This requirement was met by provision of state-mandated courses, a specified number of days of school per year, and other state regulations such as teacher credentialing. Other courts relied on the traditional tools of constitutional and statutory interpretation and found that the plain meaning of terms such as “general,” “thorough,” and “efficient” did not imply “equality” or that the constitutional framers had never intended that the terms would embrace equality of educational opportunity, especially when the educational systems in place at

sentencing).

326. See infra notes 509-14 and accompanying text.
328. See id.
the time of the constitutional ratification were so unequal or when terms such as "equitable" and "equal" were proposed and rejected for inclusion in the education clause. Although Robinson and some later courts would recognize an equality standard in their states' education articles, this claim carried little weight during the 1970's and 1980's.

3. *Deference to the Political Branches*

Separation of powers manifested itself explicitly in the school finance opinions of state supreme courts in three distinct ways. First, every court that has ever held its state educational finance system unconstitutional has affirmed its role as the "interpreter" of the constitution, yet acknowledged that the appropriate institution to craft the remedial scheme is the legislature. Most courts support this deference to the legislature by vague references to the proper role of the judiciary in state governance and/or the constitutional mandate that it is for the legislature to provide a constitutional educational system to the children of the state.

While "[it is emphatically the province and duty of the judicial department to say what the law is," the fashioning of a constitutional system for financing elementary and secondary education in the state is not only the proper function of the legislative department but its expressly mandated duty under the provisions of the constitution of Connecticut, article eighth, § 1. The judicial department properly stays its hand to give the legislative department an opportunity to act.

This apparent deference to the political branches, however, masks the courts' own institutional concerns. Although the separation of powers doctrine has proven flexible in describing the role of the court at the liability stage of the litigation, all courts that have overturned their educational finance scheme invoke the doctrine at the remedial phase. This cannot be due to respect for such a flexible doctrine. Rather, it is likely due to the courts own unwillingness to specify a detailed standard, whether it be an equity or adequacy standard, for what is a constitutional school finance system. Moreover, the same courts that have little difficulty vetoing the work of the legislature on

constitutional grounds recognize their inability to craft a technically and politically workable finance system.\textsuperscript{331} If a court were to craft the remedial plan, that same court would be hard-pressed to later find its own standards and system unconstitutional. A court might reason that it would be better to maintain the constitutional trump card. This idea is noteworthy in light of the judiciary's willingness to become involved with crafting a remedy in other types of complex institutional reform litigation such as prison reform, desegregation, and antitrust. Because school finance reform litigation is \textit{sui generis} in that it places the state judiciary against the state legislature on an issue of statewide policy, the different remedial approach may well be warranted.

The second manner in which the separation of powers doctrine manifests itself in judicial opinions in educational finance cases is when courts invoke the doctrine to support their decision on the merits to uphold an educational finance scheme. Virtually every court that denies the plaintiffs' claim pursuant to an analysis of the law and the facts presented bolsters its analysis with a statement of judicial deference. This could be based on a constitutional textual commitment of the duty to the state legislature:

[The Washington constitution] reserved to the proper state officers the general supervision of the system and entrusted to its various political subdivisions certain functions and details in which they were particularly interested and concerned... Thus, it is the legislature and the State superintendent upon whom the constitution and statutes impose the responsibility of discharging the paramount duty of the State... to make ample provision for the education of all children.\textsuperscript{332}

Or it could be based on general notions of deference to the legislature in areas of fiscal and educational policy:

"[O]ur approach to the case at bar has been with a 'disciplined perception of the proper role of the courts in the resolution of our State's educational problems, and to that end, more specifically, judicial discernment of the reach of the mandates of our State Constitution in this regard...'. "To do

\textsuperscript{331} See, e.g., DeRolph v. State, 677 N.E.2d 733 (Ohio 1997) (striking down the state's school finance system and asking the state to systematically overhaul the financing scheme).

\textsuperscript{332} Kinneir, 530 P.2d at 197.
otherwise would be an unwise and unwarranted entry into the controversial area of public school financing, whereby this Court would convene as a 'super-legislature,' legislating in a turbulent field of social, economic and political policy."\textsuperscript{333}

In either event, separation of powers was not the sole articulated reason for the court's refusal to intervene; rather, it supported the court's analysis of the cases on its legal and factual merits.

Finally, although courts would not explicitly and solely rely on theories of "justiciability" or the "political question" doctrine to reject the claims of reformers until the third wave, several courts in the second wave emphasized the fact that the legislature enjoyed near plenary power in the fields of public education and tax policy. Any analysis of the legal and factual grounds for the plaintiffs' claim took a backseat to this concern. Courts in Maryland,\textsuperscript{334} North Carolina,\textsuperscript{335} and South Carolina\textsuperscript{336} all held that their constitutions placed primary responsibility for determining what is a constitutional education with the legislative branch. South Carolina's supreme court recognized the constitutional delegation of authority to the legislature:

\begin{quote}
[T]he Constitution... places very few restrictions on the powers of the General Assembly in the general field of public education. It is required to 'provide for a liberal system of free public schools,' but the details are left to its discretion.... The development of our school system in South Carolina has demonstrated the wisdom of the framers of the Constitution in leaving the General Assembly free to meet changing conditions.\textsuperscript{337}
\end{quote}

While it is true that the functional difference between those courts that use the separation of powers doctrine to support their holdings on the merits of the case and those that use the doctrine as the primary justification for their holding is one of degree, this latter group of cases was a definite precursor to the even more deferential rulings issued by a number of courts in the third wave.

\textsuperscript{333} Kukor, 436 N.W.2d at 583 (citations omitted).
\textsuperscript{334} See Hornbeck, 458 A.2d at 758.
\textsuperscript{336} See Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988).
\textsuperscript{337} Id. at 472.
4. Adequacy to Justify Inequity

In the 1990's, educational "adequacy" became the rallying cry for reformers seeking to shift the paradigm for judging the constitutionality of educational finance system. Yet, as has already been discussed, adequacy is hardly a 90's phenomenon. Of the seven plaintiff wins in the second wave of educational finance litigation, at least two can fairly be described as adequacy decisions. Perhaps more revealing, however, is not the number of plaintiff wins under an adequacy theory, but rather the number of state wins under a theory of educational adequacy. What constitutes an adequate education, after all, is in the eye of the beholder. In the eyes of a handful of state high courts, all that the state was required to provide was an adequate education to all students, not one that provides equality of educational opportunity to those students. Therefore, what has been brandished as a weapon by plaintiffs has just as frequently been used as a shield by defendants in educational finance cases. The issue is where the constitutional adequacy line is drawn.

One convenient method to dispose of plaintiffs' equality of educational opportunity claims during the second wave was pointing out that the constitution only requires that children be provided some minimally adequate or basic education or that children enjoy a fundamental right to an education, but that the fundamental right is to only a minimally adequate or basic level of education. The court would then note that the plaintiffs had either presented no evidence of educational failure or deprivation of an adequate education or find that the state had demonstrated that such a minimally adequate education had been provided to its children. Indeed, second-wave cases in Arizona, Michigan, Washington, Idaho, Oregon, Ohio, Pennsylvania, Georgia, New York, Maryland, and

341. Kinnear, 530 P.2d at 178.
347. Levittown, 439 N.E.2d at 359.
348. See Hornbeck, 458 A.2d at 758.
Wisconsin relied at least in part on this rationale. An example of judicial reasoning along these lines is the New York case of Board of Education, Levittown Union Free School District v. Nyquist. In Nyquist, plaintiffs alleged that, due to the property tax-based financing system in the state, children in property-poor districts did not receive the same educational opportunities as children in wealthier districts. Plaintiffs also argued that children in urban districts could not raise sufficient revenue to meet the needs of their special needs population, even though they could raise as much as the average district in the state. In response, the court made several stunning findings. First, it acknowledged that differences in property wealth led to differences in revenue, which in turn led to differences in educational opportunity. It also found that the plaintiff districts suffered from fewer educational resources, older and more deteriorated educational facilities, and more limited educational programs than the wealthier districts. Finally, the court recognized that these same children had, on average, lower levels of academic achievement.

Yet none of this mattered to the Nyquist court. The state constitution, which mandated the “maintenance and support of a system of free common schools,” required that the state provide a “sound basic education,” not equality of educational opportunity. In response, the plaintiffs contended that the fact that few children in the plaintiff districts passed the state’s own minimum competency exams demonstrated the failure to provide such a sound, basic education. However, the court replied by noting that the State of New York spent more money per pupil than all states but two and, perhaps more important, the court stressed that the plaintiffs presented no evidence that “educational facilities or services provided in the school districts . . . [fell] below the State-wide minimum standard of educational quality and quantity fixed by the Board of Regents.” Thus, the court concluded, there was insufficient evidence that

349. Kukor, 436 N.W.2d at 568.
350. 439 N.E.2d at 359.
351. Id. at 361-62.
352. Id. at 362.
353. Id. at 363.
354. Id.
355. Id.
356. Levittown, 439 N.E.2d at 368.
357. Id. at 363.
children were not receiving the constitutionally mandated sound, basic education. With that, the court placed front-and-center the debate that continues today over what evidence demonstrates the failure to provide an adequate education. Is it the evidence of failure of students to achieve competency on state exams? Or could it be evidence of the failure of schools to provide the requisite courses, curricula, or programs? Or, finally, could it be the failure of the state to spend sufficient funds on education? Any of these forms of evidence could be relevant, and any and all could serve as the standard. Yet a definitive standard remains largely unarticulated. Thus, the fuzzy standard of adequacy will continue to serve as both an offensive weapon and a defensive shield.

By the end of the so-called second wave, the primary legal theories for educational finance reform litigation had been developed. Plaintiffs had employed Equal Protection Clause theories, either alone or bolstered by the state’s education article, and theories based solely on the state’s educational article. The relevant standards had been fleshed out and their shortcomings identified. Fiscal neutrality, after an initial burst of victories, diminished in importance as the main battle was waged between an adequacy standard and an equality of educational opportunity standard. Perhaps most important, the courts confronted their institutional boundaries and began to move and shape those boundaries. From the vantage point of more than a decade after commentators identified a “third wave” of educational finance reform causes, one must then ask, what was so different about the third wave?

E. The Kentucky Case and the Would-Be Revolution

Beginning in 1989, the tide seemed to turn, at least initially, for educational finance reform advocates. From 1989 through 1993, plaintiffs won six of nine cases (66%) that reached a final state supreme court decision. As a result, scholars sought to characterize this new winning streak for school finance reformers and explain why plaintiffs were winning. The common account, that this was the “third wave” of educational finance reform litigation in which the courts were focusing on educational adequacy and turning away from theories of equity, has

358. See supra note 4.
359. See supra note 26 and accompanying text.
become dogma in the literature. But adequacy was nothing new in the courts. A number of the plaintiff wins prior to 1989 were based on an adequacy theory, even if the courts did not use the term. Perhaps more perplexing, the effectiveness of the adequacy theory as a reform tool seemed to have been belied by the track record of plaintiffs after 1993. From 1994 to 2000, plaintiffs had prevailed in only six of fifteen cases (40%) that reached a final state supreme court decision on the merits. Nonetheless, if one includes those opinions that were final decisions, as well as those that permitted plaintiffs to go forward on their claims after an initial dismissal by the trial court, plaintiffs have enjoyed much more success since 1989, as they won sixteen out of twenty-eight (57%) of those cases (compared to seven of twenty-two (32%) in the second wave), six of which were reversals of the courts' second-wave positions. Something may be different between the eras, but it cannot be explained by the "discovery" of adequacy.

1. The "At-Risk" Nation and a Call to Arms

"Our Nation is at risk," wrote the National Commission on Excellence in Education in April 1983, "[o]ur once unchallenged preeminence in commerce, industry, science, and technological innovation is being overtaken by competitors throughout the world." The report continued, "the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people." In response to a request by then Secretary of Education T.H. Bell in the Reagan Administration, the Commission evaluated the quality of education in the United States as of the early 1980's. The Commission, which was made up of educators, researchers, administrators, and policy-makers, conducted a broad-based inquiry into the state of primary, secondary, and post-secondary education in the United States and its conclusion

360. See supra note 4.
361. See supra note 26 and accompanying text.
362. See id.
364. Id.
was resoundingly clear: society had lost sight of the basic purposes of schooling and of the high expectations and disciplined effort needed to attain those purposes.\textsuperscript{366} The Commission’s prescription was equally clear: American education must be “directed toward reform and excellence throughout education.”\textsuperscript{367}

Officially born in the \textit{Nation at Risk} report, the excellence movement would become the focal point for educational reform in the 1980’s. This reform movement manifested itself in development of competency exams for high school students, expansion of the movement to require that all teachers pass basic skills tests before being placed in the classroom, and a renewed attention to the math and science curriculum that had purportedly been disregarded during the building of “shopping mall” high schools during the 1970’s.\textsuperscript{368} So widely accepted was the belief that America’s schools were in crisis and that the solution lie in raising expectations for all students that by the close of the decade at a conference convened by President George Bush, with all fifty of the nation’s governors present, the group resolved to adopt nationwide education goals that focused on achieving academic excellence for all students.\textsuperscript{369} One year later, in 1990, President Bush announced the education goals that had been adopted by the governors.\textsuperscript{370} Among those goals were that students would demonstrate competence in challenging subject matter and that American students would be first in the world in math and science achievement.\textsuperscript{371} During the Clinton administration, these goals were embraced by virtually all interests, as the goals became the centerpiece of the standards-based reform movement that sought to set high academic standards for all children, building a coherent system of curriculum, assessment, and accountability.\textsuperscript{372} This push for standards-based reform was enshrined in the \textit{Goals 2000 Educate America Act} of 1994, which provided incentives for states to develop academic standards and assessments tied to those standards.\textsuperscript{373} In addition, the push was bolstered by the 1994 passage of the \textit{Improving America’s
Schools Act, which urged states receiving Title 1 funds to set educational proficiency standards and required those states to make "adequate progress" toward bringing all students to the level of those standards.\textsuperscript{374}

In less than a decade, the rallying cry of scholars and reformers - that American students should enjoy equality of educational opportunity - had been transformed into the belief that all students can and should achieve at high levels and that the focal point of educational reform should be excellence for all. But even the language of the Nation at Risk report argued that excellence should not come at the cost of equality:

We do not believe that a public commitment to excellence and educational reform must be made at the expense of a strong public commitment to the equitable treatment of our diverse population. The twin goals of equity and high-quality schooling have profound and practical meaning for our economy and society, and we cannot permit one to yield to the other either in principle or in practice.\textsuperscript{375}

Under President Reagan, however, the legal infrastructure that had been instrumental in the push for educational equity was dismantled. No longer would the Justice Department affirmatively pursue school districts to abolish segregation practices.\textsuperscript{376} On the legislative and budgetary front, Congress virtually banned support for school districts that sought to integrate their student bodies in any other way than voluntary "magnet" programs.\textsuperscript{377} Congress also nearly de-funded the federal legal aid program that had spearheaded much of the educational equity litigation movement in the 1960's and 1970's, including litigation in Illinois, California, and Arizona.\textsuperscript{378} Couple these legislative and executive actions with the continued rightward shift of the U.S. Supreme Court and the climate had become decidedly chilly for equity-minded reformers. Indeed,


\textsuperscript{375} A Nation at Risk, supra note 363.

\textsuperscript{376} GARY ORFIELD & SUSAN EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 17 (1996).

\textsuperscript{377} Id. at 16-17.

by the early 1990's the Court had signaled its retreat from the equity-minded integration ideal, in the trilogy of Dowell,\textsuperscript{379} Freeman,\textsuperscript{380} and Jenkins,\textsuperscript{381} regardless of whether African-American children had caught up with their white peers in the classroom. In short, those cases significantly relaxed the standard for when a school district could be deemed "unitary" and relieved of its desegregation obligations. Even in those jurisdictions, such as Kansas City, where creating racial balance among students was numerically impossible because of the paucity of white students and where the courts had ordered improvements in educational facilities and services, the U.S. Supreme Court allowed districts to liquidate consent decrees and court orders that required financial support for those services.\textsuperscript{382} If educational reform had any prayer in this environment, it would have to be in the name of "excellence" and "adequacy," not "equity."

Fortunately for school finance reform advocates, there existed a ready legal hook for the argument that all children are entitled to an adequate education—the state's education article—and a developing adequacy standard that could be culled from the New Jersey, Washington, and West Virginia cases. The question was whether the advocates could convince the courts to take advantage of the available constitutional text and precedent.

2. \textit{The Rose v. Council for Better Education Decision}

In educational finance reform circles, the \textit{Rose v. Council for Better Education, Inc.}\textsuperscript{383} decision is the stuff of legend.\textsuperscript{384} By almost any measure, the school system in Kentucky was both highly inequitable \textit{and} inadequate. As the court put it, the Ken-

\textsuperscript{380} Freeman v. Pitts, 503 U.S. 467 (1992).
\textsuperscript{382} See id.
\textsuperscript{383} 790 S.W.2d 186 (Ky. 1989).
Kentucky educational system was "ranked nationally in the lower 20-25% in virtually every category that is used to evaluate educational performance."\textsuperscript{385} In comparison to their peers in the wealthiest school districts, children in property-poor school districts suffered from a more limited curriculum, insufficient facilities, lower standardized test scores, and less qualified teachers.\textsuperscript{386} Perhaps most troubling to the court, only 68.2\% of Kentucky's ninth graders were remaining in school long enough to earn a diploma.\textsuperscript{387} The Rose case has attained legendary status not because of these grim facts, however, but rather because of the court's dramatic response to those facts and the unusual level of constitutional "creativity" in that response.

Latching on to the Kentucky Constitution's requirement that the state provide an "efficient system of common schools," the court held the entire statutory system of common schools to be unconstitutional, stating that it is "up to the General Assembly to re-create and re-establish a system of common schools."\textsuperscript{388} But the court did not stop there. It also provided the legislature with specific guidance on what would constitute an "efficient" system of common schools:

\begin{quote}
[An efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics.
\end{quote}

\textsuperscript{385} Rose, 790 S.W.2d at 197.
\textsuperscript{386} See id.
\textsuperscript{387} See id.
\textsuperscript{388} Id. at 214.
The Court did not stop there, noting:

The essential, and minimal, characteristics of an "efficient" system of common schools, may be summarized as follows:

1) The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly.

2) Common schools shall be free to all.

3) Common schools shall be available to all Kentucky children.

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

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

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

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

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

9) An adequate education is one which has as its goal the development of the seven capacities recited previously. 390

Contrary to commentators' discussion of the case, what is striking about the decision is not that it invalidated the entire educational system in Kentucky, nor that it identified the competencies that students should receive from a constitutional system, nor that it identified the minimum characteristics of a constitutional system. Rather, what is striking about the decision cannot be found in the opinion as written in the legal reporters. The Kentucky Supreme Court's sweeping rejection of the state's
educational system was facilitated by an unprecedented agreement among policy elites, the press, and the state courts that the system needed to be scrapped.

The fact that the legislature, without additional cajoling from the court, crafted and began to implement the landmark Kentucky Educational Reform Act less than one year after the court handed down its opinion is perhaps the most persuasive piece of evidence that the court was merely providing the nudge to get the legislature to act. As Kern Alexander, who was instrumental in developing the trial court's definition of what is an "efficient" education, put it:

A most striking aspect of the Kentucky case was the breadth of the court's ruling and the promptness of the legislative response. The court's decision led directly to a complete revision of the scheme of school finance and substantial modification in the organization and administration of the public schools. The court provided the legislature with both the nerve and the rationale to raise taxes, equalize school funding, and make other necessary changes.

Unlike New Jersey, there were no judicial threats of shutting down the Kentucky system. Unlike California, passage of a presumptively constitutional educational finance plan in Kentucky did not take six years from the time of the initial decision. All of this came from a court that was not held in any particular high regard by its peers and was not known for a tradition of activism.

In the flurry of commentary and analysis following the Rose decision, most seemed to believe that the reasons for the rapid legislative response was likely the unusual degree of agreement among leaders in the state that the school system needed to change. Bert T. Combs, the lead counsel for the plaintiffs and a former governor of Kentucky, called the Rose court's transcendence of its institutional concerns "creative constitutional law." Mr. Combs noted that after the dust settled on the court's decision, the General Assembly "announced that it agreed with the supreme court decision and that it would comply with the court's mandate." Combs concluded that "[I]egal

391. See Alexander, supra note 384, at 343.
392. Id.
393. Combs, supra note 384.
394. Id. at 375. The governor, superintendent of public instruction, state board of education, and state treasurer all apparently agreed, for they did not appeal the
historians will note that Kentucky's School Reform Law is a classic example of how this democracy of ours can work for progress when the heads of the three coordinate branches of government lay aside their egos and pride of turf and work together." This is not to say that the legislative and executive branches supported the litigation from the time of its inception or even that most legislators supported the litigation. If that were true, there might be no need for judicial pressure. As Kern Alexander argued, the Kentucky case demonstrates that "judicial intervention and interpretation of state constitutional provisions is necessary to provide initiative and guidance for the legislature if it is to abide by its constitutional obligations." Yet this observation ignores the reality that the legislature could well have ignored the court's decree, dragged its feet, or "complied" in only a superficial manner. That the legislature acted so quickly and decisively suggests that leadership within the legislature desired change as much as the leadership in the judiciary.

Both Ronald Dove and Frank Vinik argue that the Rose decision was at least in part motivated by the unusual consensus among state leaders in favor of school reform and the mobilization of the media to support that cause. Seeking to understand the mechanism for the high degree of consensus among the judiciary and the policy elites in the state, Victor Kuo went further to demonstrate that the plaintiffs in the case had tighter associational networks with the judges in the matter. Using social network analysis, Kuo provided evidence that the "friendship" and "advice" networks were stronger among the plaintiffs and the judges than they were among the defendants and the judges.

3. What was so Different about the Rose Case?

One could argue that Kentucky's Rose decision differed little from previous school finance litigations. There, the court struck down the entire system of schooling in the state on the grounds that it was inadequate and set forth broad parameters for what is an adequate education. But that had been done before. Yet the
scholarly deluge after the Kentucky case would suggest that something had changed.

Perhaps what is significant about the Kentucky decision is nothing more than its timing. This case focusing on educational quality arrived at a time when the policy climate favored such quality-minded reform. Even if the legal and educational standards had been developed in earlier cases, the policy and scholarly environments were not yet prepared to embrace the adequacy theory. With the confluence of the governor's summit and the *Rose* case in 1989, the path was paved for educational adequacy as a theory of school finance reform. Perhaps what is equally significant about the Kentucky case is how effective the court was in sparking educational reform. The court, in overturning the system and leaving its overhaul to the legislature, read the tea leaves correctly. A significant constituency favoring school reform had coalesced in the state and all that was needed was the court order for the legislature to act. The Kentucky Supreme Court, not known for its leadership among supreme courts, had carved out a new and potentially effective role for the judiciary in state governance.

F. The Judicial Aftermath of the Kentucky Decision

1. New Hope for Reformers

Much like the Serrano decision, the *Rose* decision immediately affected opinions in other state supreme courts. Courts in Alabama, Massachusetts, and New Hampshire addressed the constitutionality of their educational finance systems for the first time and, citing the *Rose* decision, declared them unconstitutional under an adequacy theory. Each of those courts specifically relied on the Kentucky court's definition of "adequacy" and sent the matter back to their legislatures to craft a remedial

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400. In Alabama, the trial court in *Alabama Coalition for Equity v. Hunt* (Ala. Circ. Ct., 1993) (published as an appendix to *Opinion of the Justices No. 338*, 624 So. 2d 107 (Ala. 1993), found that the state's entire educational system violated the state constitution's equality provision, due process clause, and education article. Although the case was not appealed to the Alabama Supreme Court because it was not yet an appealable order, the court issued an advisory opinion that the legislature was bound by the trial court's decision).


402. *See* Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997) (*Claremont II*).
null
ready knew, thereby facilitating passage of reform. The legislature's 1993 Education Reform Act had not been challenged in the state's supreme court as of this writing.

In a 1997 decision in Claremont School District v. Governor (Claremont II), the New Hampshire Supreme Court similarly ruled that its constitution, which also required the legislature to "cherish" its public schools, required the state to "prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas." In its prior 1994 decision, the court had sent the case back to the trial court for a full evidentiary hearing on whether the state had met that broad standard. On remand, the trial court ruled that the state had met that standard. But on appeal, the supreme court reversed the trial court and, noting that the state ranked dead last among states in support for local schools, held that the legislature was required to develop specific standards for an adequate education and revamp its taxation and funding system to ensure that taxpayers in property poor districts did not suffer from inequitable tax efforts. In so doing, the court specified that the Kentucky standards were guidelines that the legislature should follow in crafting a new educational finance system.

Finally, an exhaustive review of the dismal conditions of Alabama's schools, the poor performance of its students, and the failure of all of the state's school districts to meet the department of education's accreditation standards, a trial court judge had little difficulty finding that the state's educational system was not providing a "liberal system of public schools throughout the state for the benefit of the children." That trial court went a step further and found that the failure to provide an adequate education to its children denied those children their liberty and property interests in their education without due process of law. But the trial court's findings were aided by testimony from personnel in the department of education and statements

410. Claremont, 703 A.2d at 1353, 1356, 1359 (quoting Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1381 (N.H. 1993)) (Claremont II).
412. See Claremont, 703 A.2d at 1354 (Claremont II).
413. See id. at 1354-55.
414. See id. at 1359-60.
415. Opinion of the Justices No. 338, 624 So.2d at 146 (quoting ALA. CONST. art. XIV, § 256).
416. See id. at 161-62.
by then-Governor Guy Hunt that the schools were inadequate and needed more money.\textsuperscript{417} Following Kentucky's lead, the trial court judge articulated the specific features of an equitable and adequate education. Not only did the court benefit from the Kentucky court's standard, it also benefited from the same climate of reform the Kentucky court enjoyed. But the Alabama circuit court went a step further by ordering, not merely declaratory relief, but rather, an injunction directing the state to come into compliance while the court retained jurisdiction.\textsuperscript{418} By retaining jurisdiction, the trial court made its decision unappealable as it was not yet a final order. Under Governor Hunt, compliance with the order appeared to be attainable. But the remedial actions unraveled when Hunt was convicted on felony charges and a non-sympathetic Governor, Fob James, refused to comply with the trial judge's order.\textsuperscript{419} Governor asked the supreme court to set aside the ruling several years later on the theory that attorneys for the state had offered no vigorous defense, and that the decision was merely a "sweetheart deal" between the plaintiffs and Governor Hunt.\textsuperscript{420} James's appeal to the supreme court was rejected as being untimely, but meaningful reform had not taken hold as of 2001 in Alabama.\textsuperscript{421}

2. The "Reversals"

Apart from the reformers' victories in those states in which the school finance issue was one of first impression, plaintiffs in the 1990's have been successful in convincing state supreme courts to switch positions from those that they took during second-wave cases. High courts in Ohio\textsuperscript{422} and Arizona\textsuperscript{423} both had upheld their educational finance systems in the face of 1970's challenges, but overturned those same systems in the 1990's. In Idaho,\textsuperscript{424} New York,\textsuperscript{425} North Carolina,\textsuperscript{426} and South Carolina,\textsuperscript{427}

\begin{itemize}
\item \textsuperscript{417} See id. at 111, 115-16.
\item \textsuperscript{418} See id. at 166.
\item \textsuperscript{419} See Vinik, supra note 13, at 75, 82-85. Lieutenant Governor Jim Folsom served out the remained of Hunt's term and lost the governorship to Fob James in the next election. Id. at 82-83.
\item \textsuperscript{420} See id. at 85.
\item \textsuperscript{421} See id.
\item \textsuperscript{422} Compare Bd. of Educ. v. Walter, 390 N.E.2d 813 (Ohio 1979), with DeRolph v. State, 677 N.E.2d 733 (Ohio 1997).
\item \textsuperscript{424} Compare Thompson v. Engelking, 537 P.2d 635 (Idaho 1975), with Idaho Schools for Equal Educational Opportunity v. Evans, 850 P.2d 724 (Idaho 1993), later
supreme courts all had ruled in favor of the state in the second wave of litigation, but each of those courts allowed plaintiffs to go forward against the state on different legal theories in the third wave. These "reversals" are instructive because they may provide insight into differences between second and third-wave cases and may suggest factors that may have influenced judicial decision-making in the two waves. Unfortunately, however, a careful analysis of the judicial opinions in the two matters in each state clarifies little. There is one distinct difference between the second-wave cases and five of the six third-wave cases. The second wave decisions were all based on theories of equal educational opportunity, while five of the six third wave reversals were all based on adequacy theories. But, as discussed below, this trend tells us little about whether the adequacy theory caused the courts' change of heart or whether the theory provided the desired flexibility for the courts to seek desired reform of the system in the face of unfavorable precedent.

The New York and Idaho cases are typical of the legal reasoning used in these reversals, while the final decisions in Arizona and Ohio provide some clues as to judicial thinking in the cases. As discussed above, the New York Court of Appeals in the Board of Education, Levittown v. Nyquist case accepted many of the plaintiffs' allegations that children in poor rural districts receive fewer resources than those in wealthier districts and children in urban districts may not receive the same educational opportunity as suburban districts due to their greater educational needs. Plaintiffs argued that these disparities amounted to a denial of equal educational opportunities and therefore a violation of the state's equal protection provision and education article. The court disagreed and justified the disparities under proceeding 912 P.2d 644 (Idaho 1996).


428. It should be noted that in none of the cases did the court technically "reverse" prior precedent. Rather, the courts, using fuzzy standards, simply distinguished that prior precedent.

429. See supra notes 349-56 and accompanying text.

430. See Levittown, 439 N.E.2d at 361-62.
the state's education article and a rational relation test by reasoning that all the provisions required was a "sound basic education" and that the plaintiffs had not demonstrated that they were denied such an education.431

Just over two decades later, plaintiffs in Campaign for Fiscal Equity v. New York used the Levittown decision as a roadmap for their legal and factual allegations.432 Initially, the trial court dismissed the plaintiffs' complaint, finding it barred by the Levittown decision.433 But on appeal, the New York Court of Appeals reinstated the complaint by relying on Levittown for the proposition that a "sound, basic education" must be provided to New York's children, and that plaintiffs were entitled to a trial to determine whether that quality of education had been provided.434 Normally, courts are supposed to be reactive institutions that only rule on issues and facts presented to them. But in a somewhat unorthodox judicial maneuver, the court of appeals went further and provided guidance to the trial court and plaintiffs in defining the minimum content of a sound, basic education. "Such an education should consist of 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."435 What type of evidence would suggest that such an education was not being provided? The court provided suggestions on that point.

The State must assure that some essentials are provided. Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.436

Thus, where the Levittown court used adequacy to justify inequity, the Campaign for Fiscal Equity court held, consistent with its

431. Id. at 369.
432. See Campaign for Fiscal Equity, 655 N.E.2d at 664.
433. See id. at 664.
434. See id. at 669.
435. Id. at 666.
436. Id.
predecessor court, that plaintiffs could make a viable constitutional claim based on a failure to provide the minimally adequate education.\textsuperscript{437}

The Idaho Supreme Court's educational finance decisions further demonstrate the legal gymnastics that courts may perform in the face of adverse precedent. In the 1975 case, \textit{Thompson v. Engelking}, the Idaho high court interpreted the legislature's duty to establish and maintain a "general, uniform and thorough system of public free common schools," as one that does not require that all services and facilities be equalized.\textsuperscript{438} Specifically, the court found that the "uniformity" provision required only uniformity among school districts in the system's essentials, including its curriculum, not equality in funding.\textsuperscript{439} Two decades later, the court again interpreted the education article in the face of allegations of inequity and inadequacy. The second time around, apparently bound by \textit{Thompson}, the court rejected the equality allegations under the equal protection and "uniformity" provisions.\textsuperscript{440} Notwithstanding the rejection of the equity claims, the court then focused on the "thoroughness" provision of the education article and held that it embodied a minimum quality of educational services.\textsuperscript{441} On that ground and consistent with the \textit{Thompson v. Engelking} decision, the court remanded the case back to the trial court to determine whether a thorough education was being provided.\textsuperscript{442} Like the New York Court of Appeals, the Idaho Supreme Court provided some guidance to the trial court, but its guidance evinced deference to the political branches. The court stated that its "duty to define the meaning of the thoroughness require-

\textsuperscript{437} The \textit{Campaign for Fiscal Equity} court also held that plaintiffs could go forward on their claim under the Title VI implementing regulations that the state's educational finance system provided unequal opportunities to children in high minority population school districts compared to children in low minority population school districts. Plaintiffs properly alleged, the court held, that the system disproportionately and negatively impacted minority youth. Since that ruling, however, the Title VI theory has been largely denuded by the U.S. Supreme Court. \textit{See Alexander v. Sandoval}, 532 U.S. 275 (2001) (eliminating the longstanding private right of action under Title VI). Thus, a trial was necessary to determine whether a violation of the Title VI regulations could be demonstrated.

\textsuperscript{438} \textit{Thompson}, 537 P.2d at 648.

\textsuperscript{439} See id. at 652.


\textsuperscript{441} See id. at 734-35.

\textsuperscript{442} See id. at 735.
ment... has been made simpler... because the executive branch of the government has already promulgated educational standards pursuant to the legislature's directive." The court then adopted the State Board of Education's rules and regulations dealing with "school facilities, instructional programs and textbooks, and transportation systems" and held that the " thoroughness" clause required those standards to be met.

What changed the minds of the New York and Idaho courts between the second and third waves? Wave theorists might argue that the emergence of the adequacy theory provided a persuasive basis for courts to overturn their educational finance systems. But one could equally argue that it was all just a change in attitudes among the justices on the court. Either due to a change in personnel or some environmental influence, the judges now possessed a favorable attitude toward educational finance reform and were simply using the adequacy theory to circumvent adverse prior precedent and maintain the integrity of their legal reasoning. Or perhaps it was neither the adequacy theory nor a change in judicial attitudes, but rather a recognition by the courts that policy elites in the state supported educational finance reform but needed the catalyst of the judicial branch to instigate reform. On the face of the opinions, it is difficult to determine which of these (or any other) explanations fits best. But the opinions in the Ohio and Arizona reversals provide some insight.

In perhaps the most thinly reasoned educational finance reform decision of the past three decades, the Arizona Supreme Court upheld the state's school finance scheme in the face of an equity challenge in 1973 in Shofstall v. Hollins. Applying the Rodriguez test for fundamentality, the court found that education was a fundamental interest under the Arizona Constitution. But the court also found that the education article's requirement that a "general and uniform" system of public schools had been met, because the state had set the minimal systemic requirements regarding the length of the school year, required courses,

443. Id. at 734.
444. Id.
446. See 515 P.2d at 590.
447. Id. at 592.
qualifications of teachers, and selection of textbooks. Because the system was general and uniform and despite the alleged inequity in funding, the court found no infringement of the fundamental right to an education and applied the rational relation test to uphold the state's system.

Twenty-one years later in Roosevelt Elementary School District No. 66 v. Bishop, the court was faced with the question of whether "gross disparities" in school facilities, e.g., classroom size and condition, and minimal or no library, laboratory, technology, and athletic facilities, constituted a violation of the state's equal protection or "general and uniform" provision. In a 3-2 decision, the Arizona supreme court held that such inequity violated the "general and uniform" requirement. While the sole concurring justice felt that the state's facilities were both inadequate and inequitable, the two justices in the plurality opinion and the concurring justice all agreed that the provision of facilities was unconstitutionally inequitable. Because this decision was grounded in an equity theory, it cannot be argued that the adequacy "movement" influenced the court. On the contrary, the court specifically stated that "[e]ven if every student in every district were getting an adequate education, gross facility disparities caused by the state's chosen financing scheme would violate the uniformity clause."

What then may have made the difference between Shofstall and Roosevelt? One commentator has suggested that the "judges' attitudes toward education had evolved" in the time between the two cases. The evidence that the commentator pointed to was the court's observation that education was the "key to America's success" and its argument that "financing a general and uniform public school system is in our collective self-interest." While the change-of-attitude theory may be correct, a better understanding of judicial attitudes on the Arizona Supreme Court is necessary before that conclusion can be reached. More telling, the court provided some other clues as to its motivation. First, the State Superintendent of Public Instruc-

448. Id. at 592.
449. Id. at 592-93.
450. 877 P.2d at 808-09, 814.
451. See id. at 823 (Feldman, J., concurring)
452. See id. at 815-16.
453. Id. at 815 n.7.
454. See Patt, supra note 445, at 572.
455. Id.
tion and named defendant, Diane Bishop, testified that the educational infrastructure was lacking and that "education is a state responsibility and that all children of the state have the same rights to education." In addition, the Court explicitly noted that "there is significant public support for reform and that the Governor, the Superintendent of Public Instruction, and some legislators have attempted to take up the challenge." Thus, similar to Kentucky’s Rose court, the Roosevelt court was likely acting in concert with what it thought was the elite and/or public opinion in the state to bring about educational reform.

Suffice it to say that, superficially, the educational conditions in Ohio were little different between the 1979 Board of Education v. Walter case, in which the Ohio Supreme Court upheld the state’s educational finance system on an equity theory, and the 1997 DeRolph v. Ohio decision, in which the court struck the system down on an adequacy theory. The state’s educational funding mechanism remained largely the same over the entire period. Glaring disparities in educational opportunities could be demonstrated over the entire period. And the political branches in both cases vehemently opposed court-induced school reform. A liberal “working majority” on the court in the 1990’s was simply unwilling to permit the educational inequity and inadequacy that its predecessors permitted in the 1970’s.

Although available in the second wave, adequacy as a legal strategy emerged as a factor in judicial decision-making in the 1990’s. This emergence is perhaps most evident in those states in which the supreme courts “reversed” earlier decisions. There, the adequacy theory provided judges with the flexibility to distinguish the prior, adverse precedent. Whether adequacy “caused” the reversals is a more difficult proposition to demonstrate. Clearly, adequacy is not a necessary causal factor in third-wave decision-making, as is demonstrated by the Arizona Supreme Court’s decision to reverse itself on equality grounds.

457. Id.
458. See supra notes 383-99 and accompanying text.
460. 677 N.E.2d 733 (Ohio 1997).
461. Id. at 777-78 (Moyer, J., dissenting); see Koski, supra note 29 (discussing the state’s school finance formula that was adopted shortly after the Walter decision).
463. See Koski, supra note 29.
464. See supra notes 446-49 and accompanying text.
Moreover, other factors may be influencing judicial decision-making in recent educational finance reform cases. Evidence from the judicial opinions themselves suggests that courts may be facilitating educational reform in those states in which reform is already on the agenda for certain policy elites. And finally, it is entirely possible that judicial attitudes have evolved over time such that educational finance reform is supported by a judiciary that has crafted a role for itself in state educational finance policy. Of course this proposition cannot be gleaned from the judicial opinions alone. What is clear is that the fuzzy standards of adequacy and equity at least provide the court flexibility to intervene as conditions warrant.

G. The Tenacity of Equity

As alluded to above, the so-called “third wave” of educational finance reform litigation has hardly been the demise of “equality of educational opportunity” as a theory of educational reform. Although such equity theories may have seemed foreclosed in those jurisdictions with adverse second-wave decisions, advocates have continued to press such claims even in the face of adverse precedent and even in the midst of the “quality” and “adequacy” movement. The Arizona Supreme Court’s Roosevelt decision is typical of the tenacity of equity.465 Even in a jurisdiction that had initially rejected an equity claim in the 1970’s, a different court, focusing on different facts, was able to find that “gross disparities” in the provision of educational facilities offended the state constitution.466

Perhaps more striking, however, are decisions in those states in which a fiscal equity theory still held sway because extreme fiscal inequity endured. Even though the second wave was not particularly successful in terms of legal victories, reformers nonetheless enjoyed a great deal of success after Serrano in persuading their legislatures to provide greater equalization in funding among districts in their states.467 But not all states heeded Serrano’s warning. As a result, relatively small and rural states - whose funding formulas were still largely driven by foundation grants and local taxes - continued to suffer great fis-

465. See 877 P.2d at 806.
466. See id.
467. The State of Wisconsin, for instance, adopted a tiered tax-base equalization system in the wake of Serrano that provided much greater revenue equity among districts. See Koski, supra note 29, at Ch.4.
Irrespective of student need or municipal overburden, some districts still could not raise enough money to provide the same type of resources as their wealthier peers. Tennessee was one state suffering such disparities. There, a coalition of small, rural school districts challenged the state’s educational funding system on the grounds that the dramatic disparities in revenues generated from local sales taxes (a primary source of school funding in the state) among the rural districts and metropolitan districts with their stronger commercial base created unconstitutionally large disparities in educational resources. The rural districts provided evidence of spending variations, resource inequalities (including facilities, qualified teachers, curricula), and performance gaps between the poor rural districts and the wealthier metropolitan districts. Significantly, a group of nine urban and suburban districts intervened on behalf of the defendants in an effort to preserve the status quo. It was thus clear that this case was factually premised on fiscal equality, not vertical equity or concerns about municipal and educational overburden. Equally significant, the State Department of Education and the State Comptroller had each issued reports, detailing the level of financial disparity among districts, and the Department and Board of Education both were calling for reform.

The rural schools hung their claims on both the state’s education article and the state’s equal protection provision. After a trial court victory and an appellate court reversal, the plaintiffs appealed to the Tennessee Supreme Court. Although the supreme court found that the state’s education article provided some right to an “education,” it explicitly refused to define the substantive educational right that Tennessee’s children enjoyed. The court would not even go so far as to rely on the Rose court’s broad parameters for an adequate education.

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469. See id.
470. See Tennessee Small Sch. Sys., 851 S.W.2d at 139.
471. See id. at 144.
472. See id. at 141-42.
473. See id. at 144-45.
474. See id. at 141.
475. See id. at 142.
477. See id. at 149.
instead, the court looked to the equal protection provision and found that it required the state to provide substantially equal educational opportunities to its children.\(^{478}\) Even under a rational basis test, the court found that local control could not justify the current funding formula, for it bore no rational relationship to the needs of the districts. The court sent the matter back to the legislature to achieve equity in educational funding in the state.\(^{479}\)

Similar conclusions were reached in Vermont\(^{480}\) and New Hampshire,\(^{481}\) two states that have strong traditions of local control and distastes for taxes and state intervention. Although the New Hampshire Supreme Court in \textit{Claremont I} did find a "right to an adequate education mandated by the [state] constitution," it offered little by way of a definition of adequacy, stating only that such an education must "prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas" and must reflect consideration of the Kentucky principles.\(^{482}\) In \textit{Claremont II}, the court was clearer about the state's violation of the constitutional mandate that state taxes must be "proportionate and reasonable," that is, "equal in valuation and uniform in rate."\(^{483}\) Finding that the "local" property tax is a "state" tax for school funding purposes, the court directed the legislature to achieve fiscal neutrality.\(^{484}\)

The Vermont Supreme Court's reliance on equity was even more clear. There the court found that a "minimally adequate" education was provided to children in the state, but such a "minimal" or even "adequate" education could not justify the property-tax generated inequality.\(^{485}\) The court held that educational opportunities had to be made available on substantially equal terms.\(^{486}\) This equity-minded thinking was commonplace, as courts in Montana, Texas, New Jersey, Tennessee, Arizona, and Vermont (\textit{i.e.}, six of the twelve plaintiff wins in final decisions) all relied significantly on equity theories in the third

\(^{478}\) See id. at 153-54.

\(^{479}\) See id. at 156-57.

\(^{480}\) See Brigham v. State, 692 A.2d 384 (Vt. 1997).

\(^{481}\) See \textit{Claremont}, 635 A.2d at 1375 (\textit{Claremont I}).

\(^{482}\) \textit{Id.} at 1381.

\(^{483}\) \textit{Claremont}, 703 A.2d at 1355-56 (\textit{Claremont II}).

\(^{484}\) See id. at 1356-1358.

\(^{485}\) See \textit{Claremont}, 692 A.2d at 1396-97 (\textit{Claremont I}).

\(^{486}\) See id. at 1397.
wave.\textsuperscript{487}

Courts in the 1990's have thus enjoyed the doctrinal developments of the early thinkers on educational finance reform and the few rulings striking down educational finance schemes during the second wave. Nothing is particularly new in terms of educational reform theories in the 1990's (save the novel racial equality theory developed by Connecticut's \textit{Sheff v. O'Neill} court),\textsuperscript{488} but courts have creatively used fiscal neutrality, adequacy, and equality of opportunity to reach desired outcomes in the face of current facts and "controlling" law. But the earlier victories for plaintiffs in the 1990's often prompt commentators and advocates to overlook the subtle shift in plaintiffs' fortunes in the latter half of the decade.

H. The Euphoria Subsides

From the perspective of school finance reform advocates, the 1990's held an early promise of significant reform through the courts, but ultimately closed with only modest success. Familiar second wave themes have begun to re-assert themselves into judicial opinions as the third wave matures. Some courts have rejected equity and adequacy claims on the grounds that the state has provided its children a constitutionally adequate education.\textsuperscript{489} Others that have been asked to revisit their second wave decisions to uphold the state educational finance system have stayed the course.\textsuperscript{490} Finally, the institutional concerns of the courts have begun to take an even more central role in judicial analysis as some courts have explicitly refused to enter the school finance debate, citing the separation of powers and political question doctrine as legal justification for remaining on the sidelines.\textsuperscript{491} Even those who dared enter the debate are seeing themselves in protracted "conversations" with their sister


\textsuperscript{488.} 678 A.2d 359 (Conn. 1996) (holding that racial minority children in Connecticut's schools had been denied their right to equal access to a non-segregated education).

\textsuperscript{489.} See, e.g., infra notes 515-35 and accompanying text.

\textsuperscript{490.} See, e.g., Vincent v. Voight, 614 N.W.2d 388 (Wis. 2000); Marrero v. Penn., 739 A.2d 110 (Penn. 1999).

\textsuperscript{491.} See, e.g., infra notes 536-42 and accompanying text.
branches about what makes a constitutional educational system.492

1. Judicial Setbacks for Reformers

Amidst the legal and educational journal articles and all the press over the revolution that started in Kentucky, the fact can be lost that plaintiffs in school finance cases still lost about as many of the state supreme court decisions as they won during the 1990’s. Courts in Oregon,493 Minnesota,494 Nebraska,495 North Dakota,496 Virginia,497 Maine,498 Rhode Island,499 Florida,500 Illinois,501 Pennsylvania,502 and Wisconsin503 all upheld their educational finance systems in the face of adequacy and/or equity challenges. Like their companion courts that used the doctrinal flexibility developed in the second wave to overturn their states’ educational finance systems, these courts that capitalized on that flexibility to uphold their systems.

Compared to the national average and their sister states, the states of the Upper Midwest perform relatively well on standardized tests such as the National Assessment for Educational Progress.504 Perhaps this success is why a trio of school cases from Minnesota, Nebraska, and North Dakota were rejected by their state supreme courts in part because children in the state were already receiving an adequate education or the plaintiffs had failed to allege that their children were not receiving an adequate education. Minnesota’s Skeen v. State505 was a lawsuit

492. See, e.g., infra notes 544-45 and accompanying text.
494. See Skeen v. State, 505 N.W.2d 299 (Minn. 1993).
500. See Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So.2d 400 (Fla. 1996).
503. See Vincent v. Voight, 614 N.W.2d 388 (Wis. 2000).
504. Wendy S. Grigg, Mary C. Daane, Ying Jin, & Jay R. Campbell, National Center for Education Statistics, The Nation’s Report Card: Reading 2002, Figure 2.4 (June 2003) (indicating that the states of Minnesota, Iowa, Missouri, North Dakota, Nebraska, Kansas, Montana, Wyoming, and Idaho all earned higher than average scale scores than the national average in fourth grade reading on the National Assessment of Educational Progress).
505. 505 N.W.2d at 302 (the districts satisfied with the school finance formula
brought by "outer ring," semi-rural areas that have a stable or growing student population rather than by the metropolitan districts of Minneapolis, St. Paul, or Duluth, or the "inner ring" suburbs around Minneapolis-St. Paul or the rural "Iron Range" districts. Although home values in these communities are not low, these districts alleged that they suffered from fiscal inequity due to a provision in the state funding scheme that required districts to provide a small portion of their financing through an unequalized referendum levy. But these plaintiff districts and their children conceded that they were receiving an "adequate" education and were compelled to complain only about the "relative harm" they suffered as a result of the per-pupil revenue inequalities due to the referendum levy.

The Minnesota Supreme Court agreed that the children in the state were receiving an adequate education. "It is important to note," the court stated, "that 'adequacy' as used here refers not to some minimal floor but to the measure of the need that must be met." The court then denied plaintiffs relief under both the education article theory and the equal protection theory. Minnesota's education article mandated both a "general and uniform" and "thorough and efficient" educational system. But relying on the educational finance cases from Wisconsin, Oregon, and Idaho that mandated only a general and uniform "system," as opposed to uniformity in educational services, the court found that such a general and uniform system had been provided. Then, surveying the cases that dealt with the meaning of "thorough and efficient" such as West Virginia's Pauley v. Kelly, the court found that these cases focused on only the "broad purposes of an education system and emphasize[d] that such a standardized system be established throughout the state." Stated differently, all that the state must do to ensure a thorough and efficient educational system is provide a standardized system aimed at achieving the broad educational

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506. See id. at 302.
507. See id. at 302-03.
508. See id. at 318.
509. Id. at 318.
510. See id. at 320.
511. See Skeen, 505 N.W.2d at 315.
512. See id. at 310, 316-17.
514. Skeen, 505 N.W.2d at 311.
goals be promulgated by the state. Finally, although the court agreed that children in Minnesota had a fundamental right to an education, it specified that this right was to enjoy an *adequate* education.\(^5\) Because such a right had been honored by the state, strict scrutiny was not the proper standard for the equal protection analysis.\(^6\) Despite the alleged and demonstrable inequity in Minnesota's system, it passed constitutional muster because it was adequate.

From a technical legal perspective, the Nebraska Supreme Court's decision in *Gould v. Orr*\(^7\) went even farther than the Minnesota Supreme Court. In *Gould*, plaintiffs alleged that there were severe disparities in spending and educational resources among the districts in the state.\(^8\) The Nebraska Supreme Court, on appeal from the trial court's dismissal of the case, acknowledged the discrepancies, but argued that such disparities in themselves were not unconstitutional.\(^9\) According to the court, the constitution only required that the quality of the education that students received be adequate.\(^10\) Because the plaintiffs did not allege inadequacy and did not allege how those inequalities affected the quality of their education, the supreme court dismissed the plaintiffs' complaint.\(^11\) What was striking from a technical sense, however, was that courts typically give plaintiffs the opportunity to amend their complaints to allege facts that would give rise to a legal claim. However, the *Gould* court refused to allow the plaintiffs to amend their complaint and stated that "no reasonable possibility" existed that plaintiffs could cure their complaint by amendment.\(^12\) Thus, the court effectively ruled that no Nebraskan child in the plaintiff school districts could allege that she was receiving an inadequate education because the state was, as a matter of law, providing an adequate education. This ruling was judicial policy-making of an entirely different variety.

In North Dakota, the state constitution requires that in order for the supreme court to overturn state legislation, a supermajority of four of the five justices on the court must support the deci-

\(^{515}\) See id. at 318.
\(^{516}\) See id. at 317-18.
\(^{517}\) See id. at 351.
\(^{518}\) See id. at 353.
\(^{519}\) Id.
sion to strike down the state law. In Bismarck Public School District No. 1 v. State, three of the five justices thought that the glaring disparities in revenues, facilities, resources, and curricula amounted to a violation of the state’s equal protection provision. Because two justices dissented from this opinion, however, the court could not constitutionally strike down the state’s school funding scheme. Of course, the two justices whose opinion carried the weight of a majority, believed that there was no equal protection violation. Especially noteworthy is that the dissent, which actually was a three-person majority, and the plaintiffs agreed that, at a minimum, the education North Dakota’s children received was not “totally inadequate.” Consequently, the state funding scheme was properly reviewed under an equity theory. Although the three-judge opinion found that the inequalities could not be justified under mid-level scrutiny, the two-judge opinion found that constitutional inequalities did not exist because students received education that met or exceeded the requirements of the legislature, because North Dakotans performed at or near the top of the nation on the NAEP and Comprehensive Test of Basic Skills, and because the legislature had met its responsibility of providing a “basic education” to the state’s children. These facts were enough adequacy to defeat the equity theory.

The Skeen, Gould, and Bismarck School District No. 1 cases all recalled the fuzzy and dual-edge of adequacy that was wielded by both sides during the second wave. But reliance on adequacy to defeat equity was not the only remnant of the second wave. Witnessing the pitched and protracted battles between the New Jersey Supreme Court and the state legislature, and recalling the political question concerns of the federal district court’s McInnis and Burrus decisions, some third-wave courts simply opted out of the school finance conflict by making the entire issue off limits to the judiciary.

Most striking of these cases is the refusal of the Illinois Supreme Court to enforce the apparently demanding education ar-

524. See 511 N.W.2d at 249, 261-62.
525. See id. at 262-63.
526. See id. at 270-72 (Sandstrom, J., dissenting).
527. Id. at 255.
528. See id. at 256-58.
529. See id. at 270-71.
ticle of the Illinois Constitution. That article provides:

A fundamental goal of the People of the State is the educa-
tional development of all persons to the limits of their capaci-
ties. The State shall provide for an efficient system of high
quality public educational institutions and services. Educa-
tion in public schools through the secondary level shall be
free. There may be such other free education as the General
Assembly provides by law. The State has the primary re-
ponsibility for financing the system of public education.530

Notwithstanding that provision and the concrete allegations
made by the plaintiffs in The Committee for Educational Rights v.
Edgar531 that their children suffered from unequal and inadequate funding, facilities, and curricula, the court specifically re-
lied on the U.S. Supreme Court’s Baker v. Carr test for political
questions to hold both that issues relating to the quality of a
child’s education have been designated solely to the legislature
under the state’s constitution and that such issues defy judicially
manageable standards.532 The court stated that:

What constitutes a “high quality” education, and how it may
best be provided, cannot be ascertained by any judicially dis-
coverable or manageable standards. The constitution pro-
vides no principled basis for a judicial definition of high
quality. It would be a transparent conceit to suggest that
whatever standards of quality courts might develop would
actually be derived from the constitution in any meaningful
sense. Nor is education a subject within the judiciary’s field
of expertise, such that a judicial role in giving content to the
education guarantee might be warranted. Rather, the ques-
tion of educational quality is inherently one of policy invol-
ving philosophical and practical considerations that call for
the exercise of legislative and administrative discretion.533

In Coalition for Adequacy and Fairness in School Funding v.
Chiles, the plaintiffs sought a declaration that an adequate edu-
cation is a fundamental right under the Florida Constitution and
that the state had failed to provide its students that fundamental
right by “failing to allocate adequate resources for a uniform
system of free public schools as provided in the Florida Consti-
tution.”534 In reviewing a trial court dismissal of the plaintiffs’

530. ILL. CONST., art. X, § 1 (emphasis added).
531. 672 N.E.2d 1178 (ill. 1996).
532. See id. at 1191-92.
533. Id. at 1191.
534. Coalition for Adequacy and Fairness in Sch. Funding, 680 So. 2d at 402.
complaint, the Florida Supreme Court made the somewhat rhetorical point that the "constitutional mandate is not that every school district in the state must receive equal funding or that each educational program must be equivalent."\textsuperscript{535} But the court also refused to analyze whether the state had provided the adequate education that plaintiffs alleged was obligatory.\textsuperscript{536} Rather, the court raised the separation of powers doctrine as a bar to plaintiffs' entire claim.\textsuperscript{537} Florida, like many states, has a "separation of powers" provision in its constitution: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."\textsuperscript{538} Pursuant to that provision and the political question doctrine, the court found that judicial intervention would usurp the legislative power to appropriate funds, that striking down the funding scheme would infringe on the legislative power to provide by law for an adequate and uniform system, and that there are no appropriately manageable judicial standards to determine whether the alleged fundamental right to an adequate education had been provided.\textsuperscript{539}

Similarly, the Rhode Island Supreme Court in \textit{City of Pawtucket v. Sundlun} recognized the broad plenary power of the legislature in education matters and a strong presumption of constitutionality for legislative enactments in the field.\textsuperscript{540} Thus, the court held that "the analysis of the complex and elusive relationship between funding and 'learner outcomes,' when all other variables are held constant, is the responsibility of the Legislature, which has been delegated the constitutional authority to assign resources to education and to competing state needs."\textsuperscript{541} Coming full circle to \textit{McInnis} and \textit{Burrus} and invoking the specter of conflict with the legislature, the Rhode Island court concluded that:

We point out one additional caveat: the absence of justiciable standards could engage the court in a morass comparable to the decades-long struggle of the Supreme Court of New Jer-

\textsuperscript{535} \textit{Id.} at 406.
\textsuperscript{536} \textit{See id.} at 406-07.
\textsuperscript{537} \textit{See id.} at 407.
\textsuperscript{538} \textit{Fla. Const.}, art. II, § 3.
\textsuperscript{539} \textit{See Coalition for Adequacy and Fairness in Sch. Funding}, 680 So. 2d at 407.
\textsuperscript{540} \textit{See City of Pawtucket}, 662 A.2d at 44.
\textsuperscript{541} \textit{Id.} at 57.
sey that has attempted to define what constitutes the "thor-
ough and efficient" education specified in that state's consti-
tution . . . . the New Jersey Supreme Court has struggled in
its self-appointed role as overseer of education for more than
twenty-one years, consuming significant funds, fees, time, ef-
fort, and court attention. The volume of litigation and the ex-
tent of judicial oversight provide a chilling example of the
thickets that can entrap a court that takes on the duties of a
Legislature. 542

2. Institutional Wrangling

The New Jersey Supreme Court's struggle as monitor of
education in the state is, at this point in educational finance re-
form history, an epic tale. 543 Beyond the 1970's standoff between
the supreme court and legislature in the Robinson v. Cahill 544 li-
tigation, the New Jersey high court has engaged in a dialogue
with its legislature throughout the 1990's in its Abbott v. Burke
litigation. 545 In Abbott, twenty-nine of the state's poorest urban
districts filed a lawsuit claiming that the state still failed to
equalize funding among those districts and the richest districts
and had failed to provide for the educational needs of children
in those districts as was required by Robinson. 546 In response to
that lawsuit, the court ordered the legislature to raise substan-
tially spending in those poor districts to the level of the wealthy
districts and required the state to provide additional supplemental
services and resources to meet the educational needs of urban
children from disadvantaged backgrounds. 547

The legislative response to this judicial mandate was to in-
crease significantly the aid to the twenty-nine "Abbott Districts,”
such that average per pupil expenditures in those districts rose
to 84% that of the richer districts whereas it was only 70-75%
that of the richer districts prior to Abbott II. 548 But that was not
enough for the New Jersey Supreme Court, which ordered in
1994 that spending in Abbott District should be substantially

542. Id. at 59.
543. The discussion of the New Jersey school finance saga relies heavily on the
work of Minorini and Sugarman. See Minorini & Sugarman, Educational Adequacy,
supra note 30, at 202-04.
544. 303 A.2d 273 (1973); see also, LEHNE, supra note 13.
545. See Minori & Sugarman, Educational Adequacy, supra note 30, at 202-04.
546. See Abbott, 575 A.2d at 359(Abbott II).
547. See id. at 363.
548. See Minorini & Sugarman, Educational Adequacy, supra note 30, at 202-04.
equivalent to spending in the richer school districts by the 1997-98 school year. In addition, the court ordered that provision should be made for the special educational needs of students in those districts. In reiterating its order that children from disadvantaged backgrounds in the Abbott Districts should receive additional funding to meet their educational needs and responding to the state's claim that additional money would not help these districts, the court quoted directly from Robinson v. Cahill: "Obviously, equality of dollar input will not assure equality in educational results... but it is nonetheless clear that there is a significant connection between the sums expended and the quality of the educational opportunity." The court went on to state that such extra funding for the Abbott Districts was necessary so that all students will be given a chance, treated equally, and "begin at the same starting line."

Notwithstanding the grand rhetoric, the Abbott case would end up in court again. The legislative response to the Abbott III decision was a fairly thorough overhaul of the state's school finance and accountability system - the Comprehensive Educational Improvement and Financing Act of 1996. The anchor of this new system was the state's education content standards. The notion was that each of the schools in the state should be funded to the level that would allow the schools and the students to meet the new standards. From an adequacy and standards-based reform perspective, this system theoretically might ensure that all children learn and are prepared to be competitors in the marketplace of ideas. The state accordingly set specific per-pupil funding levels for elementary, middle, and high schools, and provided supplemental aid to the state's poorest districts to help them meet the needs of their disadvantaged students.

But this legislation was soon challenged by the Abbott Districts as being in violation of the court's mandate to substantially equalize funding and failing to provide for the needs of at-risk

550. See id. at 577.
551. Id. at 580 (quoting Robinson v. Cahill, 303 A.2d 273 (N.J. 1973)).
552. Id.
553. See Abbott IV, 693 A.2d at 425-26; Minorini & Sugarman, Educational Adequacy, supra note 30, at 202.
554. See id.
555. See id.
Although the court approved of the state’s new content standards and said that they appropriately defined a “thorough and efficient” education in the state, the court took issue with the financing mechanisms that were purportedly tied to the standards. In fact, they were not so tied. The court specifically found that the theoretical formula that was supposed to determine the necessary amount of funding to permit all children to achieve the new content standards failed to adequately consider the needs of the Abbott Districts. Specifically, the court faulted the state for failing to conduct a study of the needs of children in the Abbott Districts and the costs of meeting those needs. While frustrated with the legislature’s lack of compliance with Abbott III and critical of the legislature’s failure to develop a financing scheme that would provide all children the opportunity to achieve the content standards, the court did nothing to remedy that deficiency directly. Rather, the court’s interim remedial order, though unusually clear, specific, and arguably intrusive, was a classic equity solution: By the 1997-98 school year, the legislature must equalize spending in the poor urban districts and the wealthy suburban districts and ensure that the Commissioner of Education spend such monies in furtherance of the state’s educational content standards. Finally, the court remanded the case to the trial court for further factual findings regarding the needs of at-risk youth and remedies that would meet those needs.

The case returned to the supreme court one year later for the court’s consideration of a remedial scheme for disadvantaged children in the Abbott Districts. The remedial scheme presented by the trial court was largely shaped by Dr. Allan Odden, a nationally renowned education expert. Dr. Odden’s recommendations and the trial court’s remedial scheme were adopted almost entirely by the supreme court. Tellingly, in the court that has had the most experience with educational finance litigation over the last thirty years, the remedy ordered by the

557. See id. at 427.
558. See id. at 434.
559. See id.
560. Critics might argue that the simplicity of the court’s interim remedy exposes the difficulty of designing a remedial scheme that meets the court’s own needs-based standard.
562. See id. at 456.
court was unusually detailed and prescriptive.\textsuperscript{563}

Perhaps heartened by the state's fundamental agreement with the need for sweeping reform and seeming rather weary of school finance battles, the court may have felt that its future involvement would be limited, stating, "this decision should be the last major judicial involvement in the long and tortuous history of the State's extraordinary effort to bring a thorough and efficient education to the children in its poorest school districts."\textsuperscript{564}

The court was wrong. Two years later, the court was compelled to issue another order to enforce its prior order regarding services for preschool students\textsuperscript{565} and, in a separate opinion, clarified the state's responsibility to pay for the capital construction costs of the Abbott Districts.\textsuperscript{566}

V. CONCLUDING THOUGHTS:
FUZZY STANDARDS AND POLITICAL-INSTITUTIONAL REALITY

The Dickensian school finance reform litigation in New Jersey is the stuff of judicial lore as described by the Rhode Island Supreme Court, but it is hardly atypical. Supreme courts in Wyoming, Ohio, and Arizona have been compelled to issue multiple rulings to urge their sister branches to comply with the constitutional mandate of an equitable and/or adequate education. In Alabama, the trial court faced outright defiance from the

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\textsuperscript{563} The court ordered as follows:

[T]hat the Commissioner implement whole-school reform; implement full-day kindergarten and a half-day pre-school program for three- and four-year olds as expeditiously as possible; implement the technology, alternative school, accountability, and school-to-work and college-transition programs; prescribe procedures and standards to enable individual schools to adopt additional or extended supplemental programs and to seek and obtain the funds necessary to implement those programs for which they have demonstrated a particularized need; implement the facilities plan and timetable he proposed; secure funds to cover the complete cost of remediating identified life-cycle and infrastructure deficiencies in Abbott school buildings as well as the cost of providing the space necessary to house Abbott students adequately; and promptly initiate effective managerial responsibility over school construction, including necessary funding measures and fiscal reforms, such as may be achieved through amendment of the Educational Facilities Act.

Abbott, 710 A.2d at 468-69 (Abbott V).

\textsuperscript{564} Id. at 455.


Experiences like these seem to have made judges quite aware of their institutional limitations and their ability to craft and implement equity or adequacy-minded reform schemes. While courts could undoubtedly employ education and educational finance experts to help them develop remedial schemes that could theoretically pass constitutional muster, the courts seem also to recognize that the implementation process could strip these schemes of their effectiveness. In school finance litigation, it seems, the power of the court is by and large the power to say "no." Sure, shutting down the system is a theoretical option, but such an enforcement mechanism has the perverse effect of harming those whom the court aims to help, and it does not ensure long-term fidelity to the court’s order as political tradeoffs inevitably erode the work of even the most compliance-minded legislatures over time.

Couple this legislative erosion and evasion with the fact that standards for compliance are malleable and subject to differing interpretations and, as Coons, Clune, and Sugarman argued three decades ago, one has a recipe for very little reform. Indeed, courts have alternately used the adequacy theory, even when they strike down those systems on the grounds of adequacy, to uphold school finance systems in the face of equity challenges and have largely refused to detail the components of an adequate school system in any workable way. But a more generous take on the fuzzy judicial standards for equality of educational opportunity and adequacy, and the propensity of courts to defer to the legislature for a remedy is that a workable compromise between the judiciary and political branches can be achieved with these methods. A fuzzy standard allows plaintiffs to bring novel actions and permits the judiciary to invalidate what it views as an unjust educational finance scheme, while those same fuzzy standards permit legislatures to respond to the law in the face of competing political demands. Law, under this analysis, does little to shape legislative or executive behavior on the books. It is not self-executing. Litigation and judicial intervention, however, can influence legislative behavior, but only to a certain extent. Litigation and a court’s decision to strike down an educational finance system can serve as the catalyst for legislative reform, as they can provide the political cover for reform.

567. See Vinik, supra note 13, at 84-85.
568. See Coons, Clune & Sugarman, supra note 1.
minded policy-makers to act. And if the political branches do not respond appropriately, the judicial "veto power" can again be invoked.\footnote{Almost a decade after he called for a legal standard of "effective equality" in the pages of the Harvard Educational Review, David Kirp wrote prophetically about the role of the courts in educational policy-making after ten years of observing education reform litigation: Subtle questions of distributive justice persist, but these cannot be decided solely by reference to the Constitution. Because they typically involve allocative choices among claimants who are nominally equally deserving, such issues may be better fit for political than judicial resolution. They seem best fit for joint resolution, the courts initially defining minimal constitutional guarantees, the legislative enactments giving substance to these definitions, and the judiciary subsequently clarifying statutory ambiguities.}{David L. Kirp, Law, Politics, and Equal Educational Opportunity: The Limits of Judicial Involvement, 47 HARV. EDUC. REV. 117, 137 (1977). Though a far cry from the clarity in judicial standards called for by Coons, Clune, and Sugarman, Kirp's limited role for the courts, as this article argues, seems to have been our experience.} Thus, the jurisprudence of educational finance permits judicial intervention through its malleable standards, when conditions warrant, but law and standards of adequacy and equity do not, in themselves, seem to dictate judicial behavior.