

STATE CONSTITUTIONS, SCHOOL FINANCE LITIGATION, AND THE "THIRD WAVE": FROM EQUITY TO ADEQUACY

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INTRODUCTION

The distribution of educational funds among school districts by state and local governments is a frequent subject of litigation and is attracting increased scholarly attention.¹ Few dispute the importance of such issues. Indeed, as Professor Clune notes, "[s]chool finance is the vehicle through which society makes its critical decisions about investment in education."² Moreover, school finance litigation, initiated in the early 1970s, appears to be gaining momentum. During the past two decades, litigants filed more than sixty lawsuits in forty-one states.³ Since 1989, fifteen state supreme courts have considered the constitutionality of school finance systems.⁴ Unfortunately, not only have few school finance issues been resolved satisfactorily, but their number and complexity are increasing.⁵ As a result, there is little doubt that school finance litigation will continue well into the next century.

Variations in property values generate many of the disputes surrounding school finance. Most states rely primarily on local property taxes for educational funding.⁶ As property values vary, so do local property tax bases and revenues. Generally, school districts in property-rich areas benefit from high tax revenues generated by low tax rates.⁷ Conversely, school districts located

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1. For example, *The Journal of Education Finance* and the *Journal of Law & Education*, peer-reviewed and faculty-edited scholarly journals respectively, devote substantial attention to school finance and related issues. Also, special or symposium law review issues, such as 28 HARV. J. ON LEGIS. (1991) and 35 B.C. L. REV. (1994), focus on school finance or law and educational policy issues. Finally, a large number of law review articles, notes, and comments address school finance issues.

2. William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 755 (1992).

3. G. Alan Hickrod et al., *The Effect of Constitutional Litigation on Educational Finance: A Preliminary Analysis*, 18 J. EDUC. FIN. 180, 180 (1993).

4. Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 109-10 n.35 (1995).

5. For example, concerns about school finance issues are reflected in the recently enacted federal educational reform legislation, Goals 2000: Educate America Act, Pub. L. No. 103-227, § 931(g)(2)(K), 108 Stat. 125 (1994).

6. Hawaii and Michigan are two exceptions.

7. The actual tax rate imposed in a given district is somewhat arbitrary. It reflects the division of a given school district's total expenses by the total of assessed property values in the

in property-poor areas receive lower tax revenues generated by, in certain instances, comparatively higher tax rates. As a result, local and state governments distribute funds unevenly among school districts. Consequently, per-pupil spending varies among school districts within a state. Litigation and reform efforts continue to address these per-pupil spending disparities.

Although many understand why per-pupil spending disparities exist, efforts to reduce them are politically difficult and, in many instances, contentious.⁸ School finance reform efforts in this country frequently involve the courts through litigation or the threat of litigation. The scope, approach, and constitutional basis of such litigation has changed over the past two decades. School finance court decisions reflect these changes.

Commentators note three distinct "waves" of school finance court decisions.⁹ The first wave, which focused on the federal constitution's Equal Protection Clause,¹⁰ began in 1971 with *Serrano v. Priest*¹¹ and ended in 1973 with the U.S. Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*.¹² The second wave, which concentrated on equal protection and education clauses found in state constitutions, began in 1973 with *Robinson v. Cahill*¹³ and ended in 1989.¹⁴ The third and current wave of decisions, which began in 1989, focuses on education clauses in state constitutions.¹⁵

district's tax base. Thus, tax rates alone do not describe the differences in tax policies among school districts.

8. See, e.g., Mark G. Yudof, *School Finance Reform in Texas: The Edgewood Saga*, 28 HARV. J. ON LEGIS. 499, 499 (1991) (stating that inflation, expanding enrollments, new state and federal mandates, and higher expenditures by richer districts caused increased disparity between rich and poor districts).

9. See William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 598 n.4 (1994) (claiming ownership over "the idea of waves of litigation"). As Thro notes, the idea has been reiterated by others. See, e.g., Gail F. Levine, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507, 507-08 (1991) (describing three waves of school finance litigation); Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 517, 520-35 (1991) (describing three litigation approaches used in school finance equity cases).

10. The federal Equal Protection Clause provides, in pertinent part, that a state shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

11. 487 P.2d 1241 (Cal. 1971), *cert. denied*, 432 U.S. 907 (1977).

12. 411 U.S. 1 (1973).

13. 303 A.2d 273 (N.J.), *cert. denied*, 414 U.S. 976 (1973).

14. Thro, *supra* note 9, at 601.

15. Enrich, *supra* note 4, at 109-10 (finding that 7 of 15 education finance cases decided by state supreme courts since 1984 were decided solely on education clause grounds). See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 190 (Ky. 1989) (challenging constitutionality of state common school system); *Alabama Coalition for Equity, Inc. v. Hunt, Op. of the Justices*, 624 So. 2d 107, 107-10 (Ala. 1993) (advising state senate to follow trial court's order that enjoined state to establish, organize, and maintain system of public schools providing equal opportunities to all school-age children).

Besides its focus on the education clauses of state constitutions, the most recent wave of school finance court decisions is distinguished by another important factor. Specifically, the third wave illustrates the replacement of traditional "equity" court decisions with "adequacy" decisions.¹⁶ The initial two waves of equity decisions typically sought to reduce spending disparities and focused on traditional input measures such as per-pupil and overall educational spending.¹⁷ In contrast, the more recent adequacy decisions concentrate on the underlying sufficiency of school funding and argue that "all children are entitled to an education of at least a certain quality and that more money is necessary to bring the worst school districts up to the minimum level mandated by state education clauses."¹⁸ Adequacy decisions emphasize differences in the quality of educational services provided, rather than the resources provided to the school districts.¹⁹ As a result, adequacy decisions challenge school finance systems not because some districts spend more money than others, but because the quality of education in some districts (not necessarily the financially poorest ones) fails to meet a constitutionally required minimum.²⁰ The emergence of adequacy court decisions, thus, signals an important change in school finance litigation and illustrates a decidedly different approach by those using the courts to reform school finance systems.

This article is organized into five main parts. Parts I and II briefly describe the initial two waves of equity decisions. Part III examines the emergence of adequacy decisions. Part IV considers two important assumptions that equity and adequacy approaches share in invalidating state school funding systems. Possible reasons for the emergence of adequacy decisions are considered in part V.

I. THE FIRST WAVE: FEDERAL EQUAL PROTECTION

The initial wave of school finance litigation focused on the Equal Protection Clause of the United States Constitution.²¹ Two factors helped make this litigation plausible. First, the U.S. Supreme Court's interpretation of the Fourteenth Amendment changed significantly during the 1950s and 1960s.²² In the process, the Court developed the Equal Protection Clause into a tool that could significantly influence public policy. Few were surprised when this

16. See Thro, *supra* note 9, at 603 (discussing emphasis on quality as characteristic of third wave).

17. See *id.* at 600-01 (describing cases in first and second waves as equality suits claiming children entitled to equal education funding or equal educational opportunities).

18. *Id.* at 603.

19. Underwood & Sparkman, *supra* note 9, at 536-37.

20. Thro, *supra* note 9, at 603.

21. U.S. CONST. amend. XIV, § 1. See *supra* note 10 for the relevant language of the amendment.

22. Enrich, *supra* note 4, at 116; see also Frank Michaelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969) (describing "judicial equality" explosion and the Supreme Court's "egalitarian revolution").

new tool—an invigorated and expanded Equal Protection Clause—was applied to education in general and school finance in particular. Its most significant application, *Brown v. Board of Education*,²³ endures as one of the Supreme Court's most important decisions in the second half of the twentieth century.

Second, the Court recognized education's importance not only to individuals, but also to society. Although the *Brown* Court assiduously avoided defining education as a fundamental right,²⁴ the Court's description of education's importance became a "veritable rallying cry" of the school finance reform movement:²⁵

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.²⁶

Both factors, the Court's general expansion of the Fourteenth Amendment's scope along with the amenability of *Brown*'s language to school finance reform, combined to supply the foundation for the first wave of school finance litigation. Both factors have helped to define "equal educational opportunity" in terms of school finance in ways similar to their role in defining "equal educational opportunity" in terms of race.

The first significant school finance court decision addressing the struggle over educational resources, namely per-pupil spending, was *Serrano v. Priest*.²⁷ In *Serrano*, the California Supreme Court considered a challenge to that state's local property-tax-based system of funding public schools. The plaintiffs grounded their legal challenge largely in the federal Equal Protection Clause,²⁸ with a reference to the state's equal protection clause.²⁹ The litigants in *Serrano* noted that per-pupil spending disparities existed throughout the state and, in some instances, within a county.³⁰ For example, in Los Angeles County during the 1968-1969 school year, the Beverly Hills School District spent more than \$1200 on each student.³¹ In contrast, the Baldwin Park School District, also located in Los Angeles County, spent less than \$600.³²

23. 347 U.S. 483 (1954).

24. *See id.* at 493 (describing education as perhaps the most important function of state and local governments).

25. Enrich, *supra* note 4, at 117.

26. *Brown*, 347 U.S. at 493.

27. 487 P.2d 1241 (Cal. 1971), *cert. denied*, 432 U.S. 907 (1977).

28. *Id.* at 1249.

29. *Id.* at 1249 n.11. Article IV of the California Constitution provides that "all laws of a general nature shall have a uniform operation." CAL. CONST. art. IV, § 16.

30. *Serrano*, 487 P.2d at 1247-48.

31. *Id.* at 1248.

32. *Id.*

In assessing the constitutional implications raised by the state's school finance system, the California Supreme Court relied heavily on the U.S. Supreme Court's interpretation of the federal Equal Protection Clause. The California court concluded that the school finance system implicated a suspect class of individuals³³ as well as a fundamental right.³⁴ Accordingly, the court applied strict judicial scrutiny.³⁵ Under this standard the state needed to establish that a compelling interest was at stake and that the distinctions drawn by the school finance system were necessary to further that interest.³⁶

The California court acknowledged that the state's school finance system furthered legitimate governmental interests, such as traditional notions about local control of schools.³⁷ However, it declined to consider whether those interests were compelling, since local control for poor school districts was a "cruel illusion" under the existing financing system.³⁸ Far from promoting local control, the court found that California's school finance system deprived poor districts of fiscal control.³⁹ Accordingly, the court ruled California's property-tax-based school finance system unconstitutional.⁴⁰ The *Serrano* decision, reversing a lower court's dismissal, signaled the start of the modern effort to reform school finance systems judicially as well as the first wave of equity court decisions.⁴¹

Whatever momentum the *Serrano* decision provided to school finance litigants was short-lived. The first wave of school finance litigation ended three years after it began with the U.S. Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*.⁴² In *Rodriguez*, the Supreme Court first addressed the issue presented in *Serrano*, namely the constitutionality of local property-tax-based school finance systems that produced per-pupil spending disparities. Per-pupil spending varied among public school districts in Texas because property values varied throughout the state.⁴³ The litigants in *Rodriguez*, including children from low-spending and property-poor school districts, asserted that educational quality was directly linked to the amount of money spent on education.⁴⁴ Moreover, they argued that educational quality—represented by per-pupil spending—should not be a function of geography or, more specifically, the neighborhood in which a

33. *Id.* at 1250-55.

34. *Id.* at 1255-59.

35. *Id.* at 1263.

36. *Id.* at 1259-62.

37. *Id.* at 1260.

38. *Id.*

39. *Id.*

40. *Id.* at 1263.

41. Bill Swinford, *Shedding the Doctrinal Security Blanket: How State Supreme Courts Interpret Their State Constitutions in the Shadow of Rodriguez*, 67 TEMP. L. REV. 981, 989-90 (1994).

42. 411 U.S. 1 (1973).

43. *Id.* at 7-8 (citing 1 REPORT OF THE GOVERNOR'S COMMITTEE ON PUBLIC SCHOOL EDUCATION: THE CHALLENGE AND THE CHANCE 35 (1969)).

44. *Id.* at 23-24.

child happens to live.⁴⁵ This differential treatment, the litigants argued, violated the U.S. Constitution's Equal Protection Clause.⁴⁶

Noting the lack of evidence establishing that low-income families cluster in relatively low-spending school districts,⁴⁷ the Court concluded that the Texas school finance system did not work to the detriment of any suspect class, because no such suspect class existed. Moreover, although the plaintiffs in *Rodriguez* may not have received the quality of education that they wanted, they were not absolutely denied educational services.⁴⁸ Finally, the Court concluded that under the Constitution education is neither an explicitly nor implicitly protected fundamental right.⁴⁹ Applying a rational relation test, the Court concluded in a 5-4 decision that Texas's property-tax-based school finance system, although responsible for per-pupil spending differences, rationally related to a legitimate governmental interest and did not offend the Constitution.⁵⁰

The *Rodriguez* Court was concerned about the potential impact of the result urged by the plaintiffs on the nation's school systems. Twenty years earlier in *Brown*, the Court ruled school segregation unconstitutional.⁵¹ In the decades that followed *Brown*, the Supreme Court as well as many other federal courts struggled with the implementation and remedial aspects resulting from *Brown*.⁵² No doubt mindful of the judicial effort spent on school desegregation issues, the Court in *Rodriguez* noted the implications of a decision that would effectively abrogate school finance systems operating in virtually every state, thereby affecting most of the nation's public schools as well as the relation between federal and state power.⁵³ Moreover, the Court was equally disinclined to diminish local control over allocation decisions concerning local tax revenue.⁵⁴

Even though the *Rodriguez* decision essentially closed the door to school finance challenges based on the federal Equal Protection Clause, whether the U.S. Constitution ensures a minimal amount of educational services remains the subject of continued debate. Language from *Rodriguez* and other Supreme Court opinions fuels this debate. The *Rodriguez* opinion

45. See *id.* at 15 n.38 (demonstrating direct correlation between amount of district's taxable property and its level of per-pupil expenditure).

46. *Id.* at 17.

47. *Id.* at 23 (citing Note, *A Statistical Analysis of the School Finance Decision: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303, 1328-29 (1972) (empirical study of Connecticut school districts challenging assumption that only low-income people live in low-spending school districts)).

48. *Id.* at 23-24.

49. *Id.* at 36.

50. *Id.* at 54-55.

51. 347 U.S. 483, 495 (1954).

52. For evidence of the judicial effort to desegregate schools, see, e.g., MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 469-590 (3d ed. 1992) (addressing educational opportunities state must provide to students and new equal educational opportunities developed in states).

53. *Rodriguez*, 411 U.S. at 44.

54. *Id.* at 49-50.

noted, in dicta, that the Constitution might guarantee "some identifiable quantum of education" to ensure the meaningful opportunity to exercise other fundamental rights, such as free expression.⁵⁵ Also, in *Papasan v. Allain*,⁵⁶ Justice White noted that, "[a]s *Rodriguez* and *Plyler* indicate, this Court has not yet definitively decided whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review."⁵⁷

Although it is risky to read too much into such indeterminate language, a few commentators argue that the federal Constitution offers some guarantee to a basic level of educational service.⁵⁸ Despite what *Rodriguez* and other cases left unanswered, it is fairly settled that the *Rodriguez* decision transformed the school finance reform debate from a federal to a state and local issue.⁵⁹ Nevertheless, although the *Rodriguez* decision signaled the end of the first wave of school finance decisions, the next wave continued to pursue an equity theory.

II. THE SECOND WAVE: THE DISCOVERY OF STATE CONSTITUTIONS

The second wave of school finance decisions emerged soon after the Supreme Court's *Rodriguez* decision. Like its predecessor, the second wave was characterized by a commitment to equity and focused on reducing per-pupil spending disparities. However, in contrast to the first wave, the second wave of court decisions turned away from the federal Constitution's Equal Protection Clause and toward state constitutions.⁶⁰ In particular, these decisions concentrated on state constitutions' equal protection and education clauses.⁶¹

The shift away from the federal Constitution and toward state constitutions influenced two aspects of the school finance reform movement. First, the shift to state constitutions decentralized the effort to equalize educational spending and made such an effort less efficient. *Rodriguez* essentially closed the door to a federal constitutional basis for school finance litigation and, as a

55. *Id.* at 36.

56. 478 U.S. 265 (1986).

57. *Id.* at 285.

58. See, e.g., ARTHUR WISE, RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY 175-77 (1968) (arguing that Due Process Clause can resolve quality of educational opportunity); Julius Chambers, *Adequate Education for All: A Right, an Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 67-72 (1987) (discussing constitutional theories supporting federal right to education); Erica B. Grubb, *Breaking the Language Barrier: The Right to a Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 87-92 (1974) (stating that failing to train non-English-speaking children denies them due process liberties to acquire useful knowledge and liberties to be free from physical confinement); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 823-28 (1985) (discussing constitutional arguments for duty to educate effectively).

59. Betsy Levin, *Introduction to Reform Through State Courts*, 38 LAW & CONTEMP. PROBS. 309, 309-10 (1974).

60. Levine, *supra* note 9, at 507-08.

61. *Id.*

result, reformers lost a single target that could reach the nation's more than 15,000 school districts.⁶² The need to focus on state constitutions increased the number of jurisdictions in which school finance reformers had to litigate. In addition, the litigation of relatively similar legal issues in numerous state courts resulted in duplicated efforts.

Second, the shift from federal to state courts inadvertently helped many reformers discover more favorable constitutional language. Despite wide variations among them, state constitutions contain language that makes them attractive to school finance reformers seeking to reduce per-pupil spending gaps. In addition to language that essentially parallels the federal Constitution's Equal Protection Clause,⁶³ state constitutions contain education clauses⁶⁴ that obligate states to provide educational services.

School finance reformers find education clauses particularly attractive because they make it easier for some courts to reach the results reformers seek. State education clauses directly address states' educational duties. In contrast, federal constitutional language, such as that of the Fourteenth

62. NATIONAL CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 96 (1994).

63. Enrich, *supra* note 4, at 105 & n.15; see also *Serrano v. Priest*, 487 P.2d 1241, 1249 n.11 (Cal. 1971) (construing similar state constitutional provisions as substantial equivalent of the Fourteenth Amendment Equal Protection Clause), *cert. denied*, 432 U.S. 967 (1977); Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1196 (1985) (noting that most state constitutions, while not containing an equal protection clause, contain a variety of equality provisions). Compare U.S. CONST. amend. XIV ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.") with CAL. CONST. art. IV, § 16 ("All laws shall have a uniform operation.").

64. The following state constitutional provisions establish public school systems and procedures: ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1, *amended by* ARK. CONST. amend. 13; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1, para. 1; HAW. CONST. art. X, § 1, *amended by* §§ 4, 5; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2d, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. 8, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. art. LXXX-III; N.J. CONST. art. VIII, § 4; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

The existence of an education clause in the Mississippi Constitution is a matter of minor dispute. See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 n.5 (1991) (stating that some commentators assert that Mississippi's lack of education clause permits legislature to avoid establishing school system); William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661 n.102 (1989) (stating that Mississippi's constitution lacks an education clause). But such a characterization ignores the text of the Mississippi Constitution which reads, in pertinent part: "The Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe." MISS. CONST. art. 8, § 201.

Amendment, addresses educational duties only indirectly. Also, school finance decisions rooted in state education clauses pose fewer implications for other areas of the law than similar decisions involving state equal protection clauses.⁶⁵ Thus, state court judges can be relatively less concerned about the influence of their school finance decisions on areas outside the educational context.

Other aspects of state education clauses are more troublesome for school finance reformers. State education clauses vary in what they require of states. Commentators note four basic groups of these clauses.⁶⁶ While litigants in some states benefit from more generous or explicit education clause language, litigants in other states are less fortunate.⁶⁷ Indeed, between 1973 and 1989, just as many state courts invalidated state school finance systems as upheld them.⁶⁸ These mixed results reflect, in part, the range of legal rights established by state education clauses.

*Robinson v. Cahill*⁶⁹ illustrates both a successful challenge to a state school finance system and the extent to which state courts are willing to construe education clauses in favor of school finance reformers. The New Jersey Supreme Court announced its decision in *Robinson* just thirteen days after the U.S. Supreme Court decided *Rodriguez*. Oral arguments in *Robinson* occurred before the *Rodriguez* opinion was announced⁷⁰ and the New Jersey court crafted much of the *Robinson* opinion before the outcome in *Rodriguez* was known.⁷¹ Nevertheless, *Rodriguez*'s influence on the New Jersey court is clear. The New Jersey Supreme Court acknowledged that, with *Rodriguez*, the federal Constitution did not apply to challenges to state school finance systems.⁷² Moreover, the New Jersey court considered, but declined to conclude, whether per-pupil spending gaps offended the state's equal protection clause.⁷³

After disposing the federal and state equal protection claims and taking a cue from *Rodriguez* to look elsewhere, the New Jersey court considered the

65. See McUsic, *supra* note 64, at 315 (stating that because U.S. Constitution does not have education clause, state courts are not required to follow federal interpretation); William E. Thro, *The Third Wave: The Implications of the Montana, Kentucky, and Texas Decisions for the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 241-42 (1990) (recognizing that education clause in pro-finance reform issues involves only questions of legislatures' duty).

66. See, e.g., Ratner, *supra* note 58, at 814-16 (describing four education provisions classified as descriptions of general education, quality of education, specific mandates, and strongest commitment to education).

67. Thro, *supra* note 9, at 605-08 (explaining four categories of education clauses and effect of language on school districts).

68. G. Alan Hickrod et al., *The Effect of Constitutional Litigation on Educational Finance: A Preliminary Analysis*, 18 J. EDUC. FIN. 180, 208-10 (Appendix) (1993).

69. 303 A.2d 273 (N.J.), *cert. denied*, 414 U.S. 976 (1973).

70. Oral arguments in *Robinson* took place on January 9, 1973. *Id.* at 273. The U.S. Supreme Court decided *Rodriguez* on March 21, 1973. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 1 (1973).

71. *Robinson*, 303 A.2d at 279.

72. *Id.* at 281.

73. *Id.* at 282-83.

applicability of New Jersey's education clause.⁷⁴ The New Jersey Constitution guarantees school children a "thorough and efficient" school system.⁷⁵ The state school finance system's reliance on municipal and school district tax revenue magnified New Jersey's interdistrict per-pupil spending disparities—which were among the largest in the nation.⁷⁶ The court concluded that such a school finance system did not meet the state constitution's "thorough and efficient" requirement.⁷⁷

The *Robinson* decision raised many school reformers' expectations.⁷⁸ Within a period of less than two weeks, one significant litigation tool was lost and another found.⁷⁹ Despite a major defeat in the Supreme Court in *Rodriguez*, the New Jersey Supreme Court in *Robinson* demonstrated the amenability of state constitutions and that an equity approach could succeed in state court.⁸⁰ Education clauses, alone or in conjunction with claims rooted in state equal protection clauses, provided a valuable tool to invalidate school finance systems and reduce per-pupil spending disparities.

However, the high expectations raised by the *Robinson* decision waned over time due to subsequent court decisions.⁸¹ Second wave court decisions, taken as a whole, constitute a decidedly mixed record.⁸² Many courts upheld state school finance systems, despite per-pupil spending differences.⁸³ These decisions illustrate some limits to courts' acceptance of the equity theory.

74. *Id.* at 287-88. The New Jersey Constitution provides 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." N.J. CONST. art. VIII, § 4.

75. *Robinson*, 303 A.2d at 287-88.

76. Paul L. Tractenberg, *Robinson v. Cahill: The "Thorough and Efficient" Clause*, 38 LAW & CONTEMP. PROBS. 312, 315 n.29 (1974).

77. *Robinson*, 303 A.2d at 295.

78. See Thro, *supra* note 64, at 1656 (stating that successful use of state constitution as vehicle for public school finance reform in *Robinson* "revived the hopes of potential litigants frustrated by *Rodriguez* decision").

79. Tractenberg, *supra* note 76, at 314.

80. *Robinson*, 303 A.2d at 295.

81. Thro, *supra* note 9, at 603 nn.30-37 (stating that plaintiffs were victorious in Arkansas, California, Connecticut, Washington, West Virginia, and Wyoming, although courts decided majority of cases in states' favor).

82. Hickrod et al., *supra* note 3, at 208-09 (stating that there were three pre-1989 plaintiff victories at state level, four pre-1989 plaintiff victories at state supreme court level but further compliance litigation was also filed, eight pre-1989 plaintiff defeats at state level, and seven pre-1989 plaintiff defeats at state level but further complaints filed). *But cf.* Thro, *supra* note 9, at 603 n.37 (proposing that state prevailed in majority of cases).

83. See, e.g., Shoftstall v. Hollins, 515 P.2d 590, 592-93 (Ariz. 1973) (en banc) (holding that school financing system that reflected disparities in spending based on districts' wealth not prohibited by state constitution); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1011 (Colo. 1982) (en banc) (holding that limiting financing of schools based on tax base of each district constitutional); McDaniel v. Thomas, 285 S.E.2d 156, 168 (Ga. 1981) (holding constitutional school financing system based on property tax values even though system resulted in spending disparities); Thompson v. Engelking, 537 P.2d 635, 636 (Idaho 1975) (holding constitutional school financing system that relied on disparate tax bases).

Olsen v. State,⁸⁴ decided by the Oregon Supreme Court, illustrates how one court reconciled per-pupil spending disparities with state constitutional requirements concerning educational services.

Facing school finance questions similar to those in *Robinson*, the *Olsen* court reached the opposite conclusion.⁸⁵ These contrasting results were achieved despite relatively similar education clauses.⁸⁶ Whereas the New Jersey Constitution guarantees a “thorough and efficient” system of schools,⁸⁷ the Oregon Constitution provides for a “uniform and general” system of schools.⁸⁸ Although the important differences between the two constitutions should not be minimized, commentators classify New Jersey’s and Oregon’s education clauses similarly in terms of the obligations they impose.⁸⁹ That two courts assessing similar state constitutional language reached opposite results underscores the mixed judicial appeal of the equity approach.

Like the plaintiffs in New Jersey’s school finance case and others, the plaintiffs in *Olsen* argued that the state school finance system’s reliance on local property taxes contributed to per-pupil spending disparities among school districts throughout the state.⁹⁰ This absence of uniformity, they asserted, violated the Oregon constitution’s requirement for a uniform system of schools.⁹¹

The Oregon Supreme Court disagreed.⁹² In construing the Oregon Constitution and the requirements it imposed on the state’s educational system, the Oregon court adopted the approach articulated by the New Jersey court in *Robinson*.⁹³ The Oregon court adopted a balancing test that weighed the interest “impinged upon—educational opportunity,” against the state’s interest in preserving local control over schools and school finances.⁹⁴ Noting that the plaintiffs’ claim for uniformity did not extend to areas beyond school finance, the court concluded that the plaintiffs were therefore willing to tolerate a lack of uniformity in other educational areas.⁹⁵ These other areas presumably would include school facilities, programs, and curricula. The court inferred that the “plaintiffs’ regard for local control of education” explained

84. 554 P.2d 139 (Or. 1976).

85. *Id.* at 148-49.

86. *See id.* at 149 (attributing different holdings in *Olsen* and *Robinson* to New Jersey’s constitutional and legislative history and Oregon’s lack of such history).

87. N.J. CONST. art. VIII, § 4.

88. OR. CONST. art. VIII, § 3.

89. Thro, *supra* note 9, at 606 nn.56-57 (stating that education clauses in New Jersey and Oregon constitutions are categorized similarly as “Category II”-type education clauses).

90. *Olsen*, 554 P.2d at 140.

91. *Id.*

92. *Id.* at 149.

93. *Id.* at 145.

94. *Id.*

95. *Id.* at 148.

why they did not ask the court to interpret the education clause to require uniformity in areas other than per-pupil spending.⁹⁶

However, the Oregon court found no logical distinction between “uniformity in [school] finances and uniformity in other areas.”⁹⁷ As a result, the court concluded that the lack of uniformity in school finances was permissible because it rationally furthered the state’s desire to promote local control of schools, a desire the court inferred the plaintiffs shared, though to a different degree.⁹⁸

The *Olsen* decision highlights one limit to the equity theory. The argument that per-pupil spending must be equalized because state education clauses requiring uniformity cannot tolerate significant disparities (or, in the alternative, that state education clauses require greater uniformity) fails to logically distinguish school finance from the array of other important variables that also influence educational opportunity.⁹⁹ If state education clauses require more uniformity with respect to per-pupil spending, it is difficult to assert that they do not require uniformity in other aspects of education, such as school buildings, class offerings, textbooks, and curricula. The equity theory, as articulated in wave one and two litigation, does not provide helpful principles that coherently distinguish school finance from other components of education. As the school finance equity lawsuits encountered such theoretical conundrums and other more practical problems, school finance reformers began to explore alternative school finance theories. One such theory, rooted in notions about adequacy, generated the third wave of court decisions.

III. THE THIRD WAVE: THE EMERGENCE OF ADEQUACY

The third wave of school finance court decisions signals a subtle yet dramatic shift in school finance litigation theory and strategy. These decisions reflect the replacement of the traditional focus on equity—that is, per-pupil spending disparities—with a focus on adequacy, or the sufficiency of funds allocated to students and schools. Also, unlike earlier decisions, third wave decisions concentrate on state education clauses rather than state equal protection clauses or a blend of the two.¹⁰⁰

Two of the U.S. Supreme Court’s most influential education law decisions, *Brown* and *Rodriguez*, shape adequacy court decisions. In *Brown*, the Court described the importance of education with forceful elegance.¹⁰¹

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Enrich, *supra* note 4, at 106-08.

101. *Brown v. Board of Educ.*, 345 U.S. 483, 493 (1954). The 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

Nineteen years later in *Rodriguez*, the Court hinted that the Constitution might guarantee at least some “identifiable quantum” of education.¹⁰² Thus, adequacy lawsuits’ focus on establishing a state constitutional entitlement to an “adequate” level of educational services represents both a step away from and a step toward the first wave of school finance court decisions.

Although most agree that the third wave of court decisions began in 1989, its precise beginning is a matter of minor dispute. At least one commentator characterizes *Helena Elementary School District No. 1 v. State*¹⁰³ as an equity decision properly placed in the second wave.¹⁰⁴ Other commentators describe *Helena* as the first example of an adequacy court decision that ushered in the third wave.¹⁰⁵ Reasonable disagreement over the proper classification of *Helena* exists, although it probably does not justify a full-blown dispute. Confusion surrounding *Helena*’s proper classification might stem from the opinion’s confluence of equity and adequacy language. In *Helena*, the Montana Supreme Court concluded that the state’s failure to “adequately fund . . . failed to provide a system of *quality* public education granting to each student the *equality* of educational opportunity guaranteed.”¹⁰⁶

Regardless of how *Helena* is classified, the Kentucky Supreme Court’s decision in *Rose v. Council for Better Education*,¹⁰⁷ also in 1989, removes all doubt about the year in which adequacy court decisions emerged. Noting that Kentucky ranked fortieth nationally in per-pupil spending and thirty-seventh in average teacher salary,¹⁰⁸ the Kentucky court in *Rose* concluded that even the state’s more affluent school districts were inadequately funded by comparison to “acceptable national standards.”¹⁰⁹ In grappling with a workable definition of what constitutes an “adequate” education, the Ken-

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.

Id.

102. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 (1973) (“[e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right”).

103. 769 P.2d 684 (Mont. 1989).

104. See Enrich, *supra* note 4, at 138 n.192 (claiming that *Helena* rests on an equity claim rather than an adequacy claim).

105. See, e.g., James R. Hackney, *The Philosophical Underpinnings of Public School Funding Jurisprudence*, 22 J.L. & EDUC. 423, 461 n.189 (1992) (citing *Helena* as earliest of five cases listed as “new wave” cases); Thro, *supra* note 9, at 603 nn.39-41 (claiming *Helena* was first of three cases that began “third wave”).

106. *Helena*, 769 P.2d at 690 (emphasis added).

107. 790 S.W.2d 186 (Ky. 1989).

108. *Id.* at 197.

109. *Id.* at 198.

tucky court concluded that an adequate education must have the goal of developing in each child seven basic capacities.¹¹⁰

The Kentucky court analogized evidence that schools were falling short of these goals to a "tidal wave."¹¹¹ Such evidence included student achievement scores that placed Kentucky well below those of neighboring states.¹¹² Moreover, more than twenty-one percent of Kentucky's ninth graders failed to graduate from high school.¹¹³

Such evidence moved the Kentucky Supreme Court not only to invalidate the state's school finance system, but also to declare that the state's entire system of public elementary and secondary education was inadequate and unconstitutional:

Lest there be any doubt, the result of our decision is that Kentucky's entire system of common schools is unconstitutional. There is no allegation that only part of the common school system is invalid, and we find no such circumstance. This decision applies to the entire sweep of the system—all its parts and parcels.¹¹⁴

It is difficult to overstate the *Rose* decision's impact on Kentucky's public elementary and secondary schools in particular and the school finance reform movement in general. A legislative response was predictable. Having declared the existing school system constitutionally flawed and invalidating more than 153 years of legislation,¹¹⁵ the Kentucky court left state lawmakers little choice. Indeed, the court directed the General Assembly to "recreate and re-establish a system of common schools."¹¹⁶ Accordingly, the General Assembly quickly passed the Kentucky Education Reform Act,¹¹⁷ described by many as among the nation's "most far-reaching" state educational reform efforts.¹¹⁸

The *Rose* decision also influenced Kentucky financially. The court's requirement for adequate funding left the General Assembly few options but to raise the entire level of educational funding by allocating additional resources to the public schools. Accordingly, the decision resulted in new tax

110. *Id.* at 212. These capacities include (1) oral and written communication skills; (2) knowledge of social, economic, and political systems; (3) knowledge of governmental processes; (4) knowledge of mental and physical wellness; (5) grounding in the arts; (6) adequate training for life work; and (7) sufficient academic and vocational training to compete with students in surrounding states. *Id.*

111. *Id.* at 197.

112. *Id.*

113. *Id.*

114. *Id.* at 215.

115. A bill to establish a common school system was signed into law by Kentucky's governor on February 16, 1838. 1837 Ky. Acts 274. See also Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 HARV. J. ON LEGIS. 341, 342 (1991) (stating that *Rose* invalidated 153 years of legislation regarding public schools).

116. *Rose*, 790 S.W.2d at 214.

117. 1990 Ky. Acts 476 (codified at KY. REV. STAT. ANN. §§ 156.005-156.990 (1990)).

118. David S. Tatel, *Desegregation Versus School Reform: Resolving the Conflict*, 4 STAN. L. & POL'Y REV. 61, 65 (1993).

legislation that increased revenues by more than one billion dollars.¹¹⁹ Revenues for all school districts increased by at least eight percent and, in some districts, twenty-five percent.¹²⁰ According to some observers, the *Rose* decision “constitute[s] one of the most comprehensive interventions by a state judiciary into the realm of legislative policymaking for education.”¹²¹

Besides changing Kentucky’s educational and legislative landscape, the *Rose* decision influenced the school finance reform movement in two significant ways. First, and most importantly, the *Rose* decision illustrated the promise of adequacy theory. Although the Kentucky court’s decision to invalidate the entire public school system has not been followed by other courts, some accepted the adequacy theory and have reached similar, if less far-reaching, conclusions. Since 1989, supreme courts in seven states have ruled against school finance systems, largely on adequacy grounds first articulated in either *Helena* or *Rose*.¹²² Indeed, many commentators suggest that the current wave of adequacy decisions will dominate school finance litigation into the next century.¹²³

Second, subsequent adequacy decisions in other states echo the *Rose* decision’s identification of the basic academic needs that school systems must address to pass constitutional muster. In a recent Alabama Supreme Court decision, supporting a lower court decision and invalidating that state’s school finance system,¹²⁴ the court noted that the Alabama education clause required the state to provide its students with the “opportunity to attain” various skills, including oral, written, mathematic, and scientific skills commensurate with national and international standards.¹²⁵ Also, in *McDuffy v. Secretary of the Executive Office of Education*,¹²⁶ the Supreme Judicial Court of Massachusetts invalidated that state’s school finance system on adequacy

119. Alexander, *supra* note 115, at 343.

120. *Id.* at 343 n.12.

121. *Id.* at 342.

122. In addition to the Montana Supreme Court’s decision in *Helena* and the Kentucky Supreme Court’s decision in *Rose*, other state supreme courts have reached similar adequacy results. See *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 808 (Ariz. 1994) (finding that public school funding scheme causes “gross disparities and creates inadequate educational opportunities”); *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516, 552 (Mass. 1993) (finding that less affluent communities are unable to provide educational opportunities equivalent to those of wealthier communities); *Abbott v. Burke*, 575 A.2d 359, 363 (N.J. 1990) (finding that poorer school districts received less money from and provided worse education than wealthier districts); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 141 (Tenn. 1993) (finding that state educational funding scheme created disparate opportunities between wealthy and poor school districts); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 393 (Tex. 1989) (finding that school financing system violated efficiency mandate of state constitution).

123. See, e.g., Hackney, *supra* note 105, at 423 n.1, 424 (noting heated debates and “third wave” of public school funding litigation); Thro, *supra* note 9, at 604 (noting that future of school finance reform emphasizes quality of education not equality of funding).

124. *Alabama Coalition for Equity v. Hunt*, Op. of the Justices, 624 So. 2d 107 (Ala. 1993) (rendering advisory opinion directing state senate to follow trial court order).

125. *Id.* at 166.

126. 615 N.E.2d 516 (Mass. 1993).

grounds. In its opinion, the Massachusetts court identified seven core educational entitlements and noted that "[t]he guidelines set forth by the Supreme Court of Kentucky [in *Rose*] fairly reflect our view of the matter and are consistent with the judicial pronouncements found in other decisions."¹²⁷

IV. EQUITY AND ADEQUACY COURT DECISIONS' SHARED ASSUMPTIONS

Despite important differences distinguishing equity and adequacy decisions, when courts use either approach to invalidate school finance systems they typically rest their decisions on two important assumptions. First, courts often assume that increases in educational funding will increase equal educational opportunity, as expressed through student academic achievement. Second, courts implicitly assume that judicial decisions that invalidate school funding systems that result in per-pupil spending differences influence educational spending. Both assumptions rest on key empirical assertions and warrant discussion.¹²⁸

A consensus does not yet exist within the social science community about the specific relation between educational spending and equal educational opportunity. It is unclear whether additional educational resources lead to additional student achievement. The publication by Professor Coleman of the *Equality of Educational Opportunity* survey¹²⁹ (the *Coleman Report*) in 1966 provided a starting point for much of the current debate about the relation between educational spending and student achievement. Among the *Coleman Report*'s findings is that schools and their resources have a relatively negligible effect on student achievement after controlling for various student socioeconomic background variables.¹³⁰

Because the *Coleman Report*'s implications directly challenged widely and long-held assumptions about educational policy, the report attracted considerable attention and criticism.¹³¹ Much of the criticism focused on the study's methodology. Some scholars suggest that the variables Coleman selected minimized the effects of schools on student achievement, the non-response rate introduced bias, and the underlying sample of schools and school districts was biased due, in part, to the refusal of some school districts to participate.¹³² Although almost thirty years have passed since the release of

127. *Id.* at 554.

128. For a more thorough discussion of the two shared assumptions and their implications for school finance litigation, see Michael Heise, *State Constitutional Litigation, Educational Finance, and Legal Impact: An Empirical Perspective*, 63 U. CIN. L. REV. (forthcoming 1995).

129. JAMES S. COLEMAN ET AL., *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966).

130. *Id.* at 21-22.

131. For one of the earliest comprehensive collections of papers responding to the data and findings in the Coleman Report, see ON EQUALITY OF EDUCATIONAL OPPORTUNITY (Frederick Mosteller & Daniel P. Moynihan eds., 1972).

132. Samuel Bowles & Henry M. Levin, *The Determinants of Scholastic Achievement—An Appraisal of Some Recent Evidence*, 3 J. HUM. RESOURCES 3, 6-17 (1968).

the *Coleman Report*, the debate it ignited and its implications for educational policy continue to generate research and scholarship.¹³³

Even though the debate on the relation between educational resources and equal educational opportunity remains far from settled in the social science community, many courts and judges reach their own conclusions. In certain cases, courts reflect the lack of consensus on the issue. The U.S. Supreme Court described the asserted correlation between educational spending and educational opportunity as “unsettled and disputed.”¹³⁴ However, many other courts, including a majority of state courts that considered the question, concluded that educational funding correlates with equal educational opportunity.¹³⁵ In *Washakie County School District Number One v. Herschler*,¹³⁶ not only did the Wyoming Supreme Court find a relation between per-pupil spending and educational quality, but it also expressly rejected all other decisions to the contrary.¹³⁷

A second assumption common to equity and adequacy court decisions that invalidate school finance systems is that such decisions can influence educational spending. This assumption rests on empirical questions that remain largely unaddressed. Legal impact research on the relation between courts and educational policy is scant, qualitative data are thin, and helpful quantitative data are all but nonexistent.¹³⁸

The limited empirical evidence on the influence of court decisions on educational policy resolves little. In *The Hollow Hope*,¹³⁹ Professor Rosenberg notes that the *Brown* decision, standing alone, had a relatively modest effect on school integration levels in the South.¹⁴⁰ On the other hand, after studying sixty-five randomly selected federal court decisions between 1970 and 1977, Professors Rebell and Block find evidence rebutting the criticism that “[t]he judiciary lacks the resources, expertise, or comprehensive perspective needed to implement educational reforms successfully.”¹⁴¹ Viewed to-

133. See, e.g., Larry V. Hedges et al., *Does Money Matter? An Analysis of Studies of the Effects of Differential School Inputs on Student Outcomes*, 23 EDUC. RESEARCHER 5, 5-6 (1994) (stating that despite broad guidelines, consensus has not been reached on measuring or defining educational production).

134. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 23-24 (1973).

135. John Dayton, *Correlating Expenditures and Educational Opportunity in School Funding Litigation: The Judicial Perceptive[sic]*, 19 J. EDUC. FIN. 167, 178 (1993) (describing courts' response to an asserted positive correlation between funding and educational opportunities).

136. 606 P.2d 310, 334 (Wyo.), *cert. denied*, 449 U.S. 824 (1980).

137. *Id.* at 332.

138. See Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323 (1989) (discussing possible reasons why many legal scholars avoid empirically based research).

139. GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

140. *Id.* at 52 (“The statistics from the Southern states are truly amazing. For ten years, 1954-64, virtually *nothing happened*.”).

141. MICHAEL A. REBELL & ARTHUR R. BLOCK, *EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM* 210 (1982). It should be noted, however, that Rebell and Block's sample of education cases excludes school desegregation cases. *Id.*

gether, these two studies suggest that some areas of educational policy are less amenable to judicial influence than others.

Not surprisingly, answers to the more specific research question, namely whether school finance court decisions are among the type and kind likely to result in sought-after policy changes, remain elusive. Professor Hickrod's study assessing the impact of state supreme court decisions on educational spending growth rates represents an important first look at that complex question.¹⁴² However, subsequent studies examining slightly different dependent variables suggest alternative implications.¹⁴³

V. EXPLAINING THE SHIFT FROM EQUITY TO ADEQUACY

The recent shift from equity to adequacy court decisions signals a significant change in school finance litigation. A better understanding of this shift requires a better understanding of the factors contributing to the development of adequacy court decisions. Such an understanding is limited by the relatively small number of adequacy decisions and the paucity of data on their overall impact. But the limitations of equity decisions provide insight into the emergence of adequacy court decisions.

Three factors limit equity court decisions and the effort to reform school finance systems by reducing per-pupil spending gaps. First, despite proponents' claims to the contrary, such an effort is neither simple nor straightforward. Second, equity lawsuits directly confront traditional notions of local control of schools. Third, major urban school systems' enthusiasm for equity lawsuits has waned over time as they became more ambivalent about efforts to equalize per-pupil spending state-wide.

A. Equity's Complexities

Equal educational opportunity and, more specifically, school finance equity—perhaps intuitively simple—are notoriously complex and difficult to define through litigation. These definitional problems hamper efforts to make the distribution of educational resources more equitable despite the “unquestioned central place of equality in our conception of a just society.”¹⁴⁴ Aside from the struggle to define what “equality” might mean in terms of education generally¹⁴⁵ and school finance in particular,¹⁴⁶ important practical problems confront equity litigation. One problem concerns compet-

142. Hickrod et al., *supra* note 3, at 207 (finding “some evidence” that litigation results in increased funding levels for K-12 education).

143. See, e.g., Michael Heise, *The Effect of Constitutional Litigation on Education Finance: More Preliminary Analyses and Modeling*, 21 J. EDUC. FIN. 195 (1995).

144. Enrich, *supra* note 4, at 143; see also GARY WILLS, *LINCOLN AT GETTYSBURG* 37-40, 146-47 (1992) (discussing how equality became important in U.S. society).

145. See, e.g., ROSEMARY C. SALOMONE, *EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST-BROWN ERA* 17-18 (1986) (stating that equality concept “marks strongly divergent views” when applied to educational opportunities).

146. For a recent articulation of the virtues of pursuing an equity theory to reduce per-pupil spending disparities, see Enrich, *supra* note 4, at 170. Enrich notes that equity theory manifests

ing approaches to making school finance systems more equitable. A second problem relates to variations in students' educational needs.

An effort to make school finance systems more equitable can be approached from a variety of different perspectives, including that of the student or the taxpayer. These two different, though equally plausible, approaches can lead to dramatically different school finance reforms. Total¹⁴⁷ and minimum revenue equality¹⁴⁸ plans focus on the student and typically seek to ensure outright equality or a minimal level of per-pupil spending, respectively.¹⁴⁹ In contrast, fiscal neutrality plans focus on the taxpayer and seek greater school finance equity by forging a closer link between per-pupil spending and taxpayer effort.¹⁵⁰ A fiscally neutral plan awards additional resources to property-poor school districts that tax themselves at a relatively high rate.

Educational differences among students make attempts to equalize school finance systems even more complex.¹⁵¹ Most agree that the educational resources needed to meet desired educational outcomes vary from student to student.¹⁵² Students from different backgrounds and possessing varying educational needs and learning styles impose varying costs on school systems constitutionally charged with a duty to educate them.¹⁵³

Many states already acknowledge as much. States frequently weigh student funding formulas to account for compensatory, remedial, or other special educational needs.¹⁵⁴ By acknowledging the variety of student educational needs, it becomes clear that different students require different treatment and different amounts of educational resources to serve them equally. Such a recognition, however, further complicates efforts to equalize school finance systems.

B. Equity Versus Local Control

America's tradition of local control of schools and educational policymaking presents another challenge to equity litigation. Although the merits of America's locally controlled and largely decentralized educational

societal interest to educate "least advantaged," sidesteps "levelling," and avoids conflicts with other state constitutional imperatives. *Id.*

147. Levine, *supra* note 9, at 520-23.

148. *Id.* at 523-26.

149. *Id.* at 520-26.

150. *Id.* at 526-28.

151. *See id.* at 519 (noting that certain students, such as those with learning disabilities, cost more to educate).

152. *See id.* at 520 (explaining that by using a "cost of education index," many school districts adjust resources according to region, size, area, density, and educational characteristics of students).

153. *See id.* at 514 (noting that although most state constitutions grant each student equal portion of common fund for education, nothing ensures equal quality of education).

154. *See, e.g.,* IND. CODE ANN. § 21-3-1.6-3 (West 1995) (providing an "additional count for each pupil participating in program" whether pupil is disabled or requires vocational training).

system are certainly debatable,¹⁵⁵ most agree that local control is among the salient characteristics that distinguishes American school systems from other systems throughout the world.¹⁵⁶ Courts, particularly the U.S. Supreme Court, recognize the sanctity of local control and agree that it is a legitimate governmental interest.¹⁵⁷

A desire to further local control is an important factor supporting the use of local property tax revenue to fund schools.¹⁵⁸ A school finance system's reliance on local property taxes, although furthering local control, increases the likelihood of per-pupil spending disparities due to variations in property values. The tension between local control and school finance reform has proved notoriously difficult to reconcile. Many finance reform efforts attempt to reduce the influence of local property taxes on school funding systems. Such efforts threaten local control of schools and conflict with deep-seated convictions that local control of schools is sacred.¹⁵⁹

A brief review of state legal and educational systems helps illustrate the source of these convictions about local control. Constitutional responsibility for education resides with the states, which have the authority to determine the scope, organization, and shape of their educational systems. In every state but Hawaii, legislators delegated responsibility for education to local school districts,¹⁶⁰ which are governed by local school boards.¹⁶¹ In 1992, more than 15,000 local school boards operated public schools.¹⁶² These local school boards are both elective and appointive, and range in size from the

155. See generally G. Alfred Hess, Jr., *Restructuring the Chicago Public Schools*, in EDUCATION REFORM IN THE '90s 53-76 (Chester E. Finn, Jr. & Theodore Rebarber eds., 1992) (discussing restructuring of Chicago school system culminating in Chicago Reform Act); Denis P. Doyle & Chester E. Finn, Jr., *American Schools and the Future of Local Control*, 77 PUB. INTEREST 77 (1984) (discussing effects and future of local control and alternatives to decentralized education system); Christopher P. Lu, Note, *Liberator or Captor: Defining the Role of the Federal Government in School Finance Reform*, 28 HARV. J. ON LEGIS. 543, 543-44 (1991) (noting that federal role in public school finance, although previously non-existent, is being reexamined).

156. DAVID T. KEARNS & DENIS P. DOYLE, WINNING THE BRAIN RACE: A BOLD PLAN TO MAKE OUR SCHOOLS COMPETITIVE 7 (1991).

157. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973) (holding that local financing system that assured basic education for students and encouraged local control of schools did not violate Equal Protection Clause of Fourteenth Amendment); *Wright v. Council of the City of Emporia*, 407 U.S. 454, 469 (1972) (holding that although "direct control over decisions virtually affecting the education of one's children" is an important need, local plan violative of Fourteenth Amendment was not constitutional).

158. *Rodriguez*, 411 U.S. at 50.

159. Kern Alexander, *Equitable Financing, Local Control, and Self-Interest*, in THE IMPACT OF LITIGATION AND LEGISLATION ON PUBLIC SCHOOL FINANCE: ADEQUACY, EQUITY, AND EXCELLENCE 293, 299 (Julie K. Underwood & Deborah A. Verstegen eds., 1990).

160. See *Rodriguez*, 411 U.S. at 1297 (holding that education is not fundamental right under Constitution); Lewis B. Kaden, *Courts and Legislatures in a Federal System: The Case of School Finance*, 11 HOFSTRA L. REV. 1205, 1205-06 (1983) (noting that throughout two centuries of federalism debates, general consensus that elementary and secondary education are state and local government responsibility); KEARNS & DOYLE, *supra* note 154, at 112.

161. Kaden, *supra* note 160, at 1210.

162. NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 96 (1994).

minuscule district with a single school and a handful of students to the vast educational empires in New York City, Chicago, and Los Angeles.¹⁶³ Most discussions about local control focus on school policies and practices relating to the length of the school year, funding priorities, selection of teachers, administrators, and curricula.¹⁶⁴ Although many of the reform efforts spurred by the much acclaimed 1983 publication of *A Nation At Risk: The Imperative For Educational Reform*¹⁶⁵ led states to exert greater control over educational policy, these efforts did not significantly displace local control.

Many approaches considered by school finance reformers work against local control. For example, Dean Yudof notes that Texans considered three basic approaches in their struggle to enact a constitutional school finance system.¹⁶⁶ These approaches are similar to those considered by other states also attempting to reform school finance systems. First, a state might assume full responsibility for collecting and distributing the revenue necessary for financing public education.¹⁶⁷ Such a decision effectively centralizes school finance, thereby breaking sharply from current practice.¹⁶⁸ Although Texas did not adopt this approach, Michigan did in 1993.¹⁶⁹

Second, a state could consolidate or "regionalize" school districts and, more importantly, school districts' tax bases.¹⁷⁰ Such an option could reduce per-pupil spending disparities while retaining the local property tax as the primary source of revenue. Consolidating school districts may also produce certain economies of scale. Of course, school district consolidation risks exacerbating other problems associated with centralization, such as bureaucratization.¹⁷¹ Indeed, the trend in many large urban public school districts is toward decentralization.¹⁷² School districts, such as Chicago's,¹⁷³ have decentralized recently in an attempt to reduce bureaucratization, increase school autonomy, and stimulate greater parental involvement.

163. See KEARNS & DOYLE, *supra* note 156, at 117 (noting there are more than one million students enrolled in New York City's public schools, more than the statewide total in 37 states).

164. Alexander, *supra* note 159, at 299.

165. NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983).

166. See generally Yudof, *supra* note 8 (discussing Texas's attempts to reform public education finance systems).

167. *Id.* at 502.

168. *Id.*

169. In 1993 Michigan decided to replace a property tax with a sales tax as the core for school funding. See generally Michael F. Addonizio et al., *Michigan's High Wire Act*, 20 J. EDUC. FIN. 235 (1995) (discussing ramifications of Michigan legislature's decision to eliminate local property tax as source of revenue for public schools).

170. Yudof, *supra* note 8, at 503.

171. *Id.*

172. For a thorough discussion of the school decentralization literature, see generally CHOICE AND CONTROL IN AMERICAN EDUCATION (William H. Clune & John F. Witte eds., 1990) (discussing ramifications of decentralization and school restructuring).

173. See Chicago School Reform Act, 1988 Ill. Legis. Serv. 85-1418 (West) (providing that power shall rest with local school council).

Third, a state could adopt a "recapture" school finance plan.¹⁷⁴ More commonly referred to as "Robin Hood" plans, "recapture" approaches redistribute funds raised by the wealthier school districts to their less affluent counterparts. Such a plan preserves local property taxes as the primary source of revenue for schools. Unfortunately, this plan also dulls incentives for the wealthier school districts to increase their taxing efforts and thereby increase revenues.¹⁷⁵ Some state constitutions appear to prohibit this approach.¹⁷⁶ In any event, such an approach would undoubtedly generate significant political opposition.

C. *The Ambivalence of Urban School Districts*

It is generally accepted that many of the challenges confronting American education are prevalent—acutely so in some instances—in major urban public school systems. These challenges are numerous, serious, and complex, and are well-documented elsewhere.¹⁷⁷ Not surprisingly, many school reform efforts, including school finance litigation, involve urban school systems. Reasons for their involvement are obvious. Not only do many urban school systems confront important challenges producing and delivering educational services to their students, but these systems also carry important political clout. Their clout stems partly from their sheer size—the number of students, teachers, administrators, and staff they employ as well as the size of their budgets.

*Robinson v. Cahill*¹⁷⁸ is one example that illustrates the importance of urban schools to school finance reform during early equity litigation. During the 1970s in New Jersey, urban school districts were among the state's poorest. Their financial plight resulted from meager local resources, high noneducational municipal expenditures, and relatively high-education-cost students.¹⁷⁹ Each of these factors contributed to "decrepit school physical plants" and "insufficient funds" for school operations for New Jersey's urban public schools.¹⁸⁰ The urban schools were an integral party to the *Robinson* litigation because they fared so poorly under New Jersey's school finance system.

However, more recent per-pupil spending data illustrate why urban school districts might be ambivalent about participating in equity litigation

174. Yudof, *supra* note 8, at 503.

175. Levine, *supra* note 9, at 527.

176. See *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 499 (Tex. 1991) (holding that Texas Constitution forbids recapture plans).

177. For a helpful statistical summary of the conditions of the nation's largest urban public school systems, see generally COUNCIL OF THE GREAT CITY SCHOOLS, NATIONAL URBAN EDUCATION GOALS: BASELINE INDICATORS 1990-1991 (1992). For a journalistic account, see generally JONATHAN KOZOL, SAVAGE INEQUALITIES (1991) (documenting statistically and anecdotally poor conditions in urban public schools).

178. 303 A.2d 273 (N.J. 1977).

179. Tractenberg, *supra* note 76, at 316.

180. *Id.*

efforts today. These data, while far from conclusive, suggest that some urban school systems might actually lose financially in an effort to equalize per-pupil spending. Table 1 presents data on unadjusted as well as cost- and need-adjusted per-pupil spending. The multivariate estimates show the estimated impact of a school district's metropolitan status on per-pupil spending, holding constant other variables that influence educational spending differences among school districts in urban, suburban, and rural areas. These other variables include lower costs in rural areas.¹⁸¹

The results in Table 1 suggest mixed implications for urban school districts. Actual per-pupil spending (column 1) illustrates that urban school districts spend more per pupil than their counterparts located in non-urban settings. These data suggest that urban school districts would have less incentive to pursue traditional school finance equity litigation. However, adjusted per-pupil spending data (column 2) suggest that efforts to equalize per-pupil spending pose a greater threat to rural school districts.

TABLE 1¹⁸²
MULTIVARIATE ESTIMATES OF UNADJUSTED AND ADJUSTED TOTAL PER-
PUPIL EXPENDITURE BY SCHOOL DISTRICT TYPE

	Unadjusted Estimates (1)	Cost- and Need- Adjusted Estimates (2)
School District Type		
Urban	\$5241	\$4218
Suburban	5198	4189
Rural	5145	4408

The aggregate data presented in Table 1 illustrate why it can no longer be assumed that urban school districts will necessarily benefit from equity litigation designed to equalize per-pupil spending. These data illustrate that efforts to equalize statewide per-pupil spending might help some urban school districts financially, but harm others. Data from a few individual cities and states, though not representative, further illustrate some urban school districts' potential financial exposure. Per-pupil spending for the 1991-1992 school year in such urban public school districts as Newark (\$9,760),¹⁸³ Hartford (\$8,300),¹⁸⁴ and New Orleans (\$7,652)¹⁸⁵ exceeds average per-pupil spending in their respective states (New Jersey, \$9,317; Connecticut, \$8,017; and Louisiana, \$4,354).¹⁸⁶

181. NAT'L CTR. FOR EDUC. STATISTICS, DISPARITIES IN PUBLIC SCHOOL DISTRICT SPENDING, 1989-1990 A1-E7 (Appendix) (1995).

182. *Id.* at 27.

183. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 62, at 98-102.

184. *Id.*

185. *Id.*

186. *Id.* at 165 (Table 166).

Urban public school districts serve a disproportionate number of the nation's minority students.¹⁸⁷ Thus, data on per-pupil spending by percentage of minority enrollment provide further insight into the incentives of many urban school districts to pursue equity litigation. Table 2 presents unadjusted versus cost- and need-adjusted per-pupil spending data. Similar to the data presented in Table 1, data in Table 2 present multivariate estimates that hold constant other variables that influence educational spending among school districts serving varying percentages of minority students. The data illustrate that a school district's percentage of minority students increases along with per-pupil spending. Among school districts that are similar in terms of poverty, for example, more money is spent per student in high-minority districts than in low-minority districts. As a result, school districts with relatively high percentages of minority students might be less interested in legal efforts to equalize per-pupil spending.

TABLE 2¹⁸⁸
MULTIVARIATE ESTIMATES OF UNADJUSTED AND ADJUSTED TOTAL PER-
PUPIL EXPENDITURE BY MINORITY ENROLLMENT

	Unadjusted Estimates (1)	Cost- and Need- Adjusted Estimates (2)
Minority Enrollment Percentage		
Less than 5%	\$4581	\$3920
5% - 20%	4954	4140
20% - 50%	5418	4390
More than 50%	5740	4514

D. Is Adequacy Adequate?

It is easier to identify factors that worked against an equity approach to school finance litigation than assess whether an adequacy approach will fare any better over time. Initial adequacy decisions¹⁸⁹ illustrate four factors that help explain their emergence and evidence their promise as a tool for school finance reform.

First, an adequacy approach to school finance reform is comparatively less complex and exhibits greater appeal to widely accepted norms of fairness and opportunity.¹⁹⁰ Efforts to define minimum (or adequate) educational

187. For example, nationally in 1988, even though only 13.1% of the public K-12 student population was enrolled in the 47 largest public school systems, 37.1% of African American students and 31.8% of Hispanic students were enrolled in the 47 largest public school systems. COUNCIL OF THE GREAT CITY SCHOOLS, *supra* note 177, at 8-9 (Figures 7, 9).

188. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 181, at 15 (Table 1).

189. See Enrich, *supra* note 4, at 109-10 n.36 (noting number of recent decisions decided on adequacy grounds).

190. *Id.* at 167.

standards through litigation generate fewer logistical, theoretical, and political difficulties than equitable standards.¹⁹¹ Adequacy litigation seeks to assist the most troubled school systems as opposed to the decidedly more complicated and difficult task of reducing per-pupil spending differences by either increasing spending (leveling up), redistributing existing spending (leveling down), or a combination of the two. Also, adequacy decisions' attention to state education clauses that directly address schooling rather than state equal protection clauses that only indirectly speak to schooling makes it easier to locate a constitutional base. Such a constitutional base poses fewer concerns about the possibly costly implications of adequacy decisions for other public entitlements.¹⁹²

Second, adequacy decisions do not pose a direct and immediate threat to local control of schools. Adequacy decisions do not focus on reducing per-pupil spending differences—a product of local property tax revenues' influence on school finance systems—thereby side-stepping a direct confrontation with local control. Adequacy's primary concern for sufficient school funding rather than the consequences of local property tax revenue suggests that local property tax revenue is more likely to remain an important source of school funds, thus helping to preserve local control.

Third, adequacy litigation appeals to many urban school districts. Equity litigation seeking to equalize per-pupil spending state-wide might deter urban school districts that spend more than the state average. Adequacy litigation seeks additional educational resources for those school districts failing to provide a constitutionally adequate education. Struggling school districts are not necessarily the poorest districts in financial terms. Indeed, adequacy litigation might be particularly attractive to urban districts given the stresses that many confront.¹⁹³

Fourth, adequacy court decisions largely cohere with the emerging educational standards movement. The 1983 publication of the *Nation At Risk* report¹⁹⁴ prompted many states and school districts to begin identifying, developing, and implementing educational standards.¹⁹⁵ Standard-setting efforts typically include not only outcome standards (e.g., reading and math

191. McUsic, *supra* note 64, at 309.

192. Enrich, *supra* note 4, at 166 n.310 (citing Robinson v. Cahill, 303 A.2d 273, 283 (N.J. 1973); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 97 (Wash. 1978)).

193. See Abbott v. Burke, 575 A.2d 359, 408 (N.J. 1990) (holding New Jersey's 1975 Education Act unconstitutional under state's constitution and stating that primary basis for decision was institutional failure of education in poorer districts); see also COUNCIL OF THE GREAT CITY SCHOOLS, *supra* note 177, at vii (describing urban schools' problems including drug abuse, poverty, and family instability).

194. See NAT'L COMM'N ON EXCELLENCE IN EDUC., *supra* note 165, at 73-75 (recommending standards and expectations for schools, colleges, and universities).

195. For a helpful collection of articles on educational standards, see 4 STAN. L. & POL'Y REV. (1992-1993). See also Francie Alexander, *What I Saw at the California Education Revolution*, in RADICAL EDUCATION REFORMS 29-50 (Chester E. Finn, Jr. & Herbert J. Walberg eds., 1994); Albert Shanker, *National Standards*, in RADICAL EDUCATION REFORMS, *supra*, at 3-27.

proficiency), but also input or "opportunity-to-learn" standards.¹⁹⁶ Opportunity-to-learn standards are designed to ensure that school resources and conditions permit all students a meaningful opportunity to achieve.¹⁹⁷ States and school districts that develop such standards also may be constructing an educational standard of care that courts might look to when assessing the adequacy of a school finance system. Educational standards not only assist adequacy litigants, but standards also may attract such litigation.¹⁹⁸

CONCLUSION

Despite more than two decades of school finance litigation, numerous issues surrounding how state and local governments distribute educational resources endure. Although per-pupil spending disparities are likely to exist as long as local property tax revenue remains an important source of funding for schools, it is difficult to imagine any state that is not at least sensitive to and aware of the potential legal exposure such disparities create. The persistence of school finance issues and the constitutional dimensions of per-pupil spending disparities ensure that school finance litigation will continue.

School finance litigation changed significantly during the past decades. Its legal basis shifted away from the U.S. Constitution and toward state constitutions, particularly state education clauses. Another more recent change has been the replacement of traditional equity lawsuits with adequacy lawsuits. This latter change signals the beginning of the third wave of court decisions and illustrates adequacy litigation's promise as a tool to reform school finance systems. No single factor explains equity's demise and adequacy's emergence. Frustrated by the apparent stagnation of efforts to reduce spending disparities and the theoretical and practical problems associated with the equity decisions, school finance reformers now embrace adequacy arguments that demand a meaningful opportunity for all students to benefit from whatever education a state constitution promises. As a tool to reform school finance systems, adequacy arguments are comparatively less threatening and more firmly rooted in a constitutional base. Although recent court decisions illustrate adequacy's important virtues, fuel expectations, and suggest its potential, their long-term impact on school finance systems will not be known for some time. Moreover, adequacy court decisions raise important questions about judicial capacity, the separation of powers and political question doctrines, and the efficacy of litigation as a device to influence public policies. The adequacy approach represents the future of school finance litigation and underscores the need to study these questions further.

196. See Michael Heise, *Goals 2000: Educate America Act: The Federalization and Legalization of Educational Policy*, 63 *FORDHAM L. REV.* 345 (1994) (discussing recent federal legislative efforts to promote educational standards).

197. See *Goals 2000: Educate America Act*, Pub. L. No. 103-227, § 213(c), 108 Stat. 125, 143-45 (codified at 20 U.S.C.A. § 5842 (West 1995)) (establishing guidelines for setting voluntary national opportunity-to-learn standards).

198. See Heise, *supra* note 196, at 373-74 (stating that lack of consensus on determinants of student achievement will lead to debates on adequacy of learning standards and litigation).