

THE EMERGING RIGHT TO EDUCATION UNDER STATE CONSTITUTIONAL LAW

*Allen W. Hubsch**

In the past two decades, many state supreme courts have addressed for the first time the import and meaning of the education articles of their state constitutions. As a result, a new body of state constitutional law regarding the right to education has emerged. Many of the cases reaching state supreme courts have been school financing cases, brought under the equal protection or due process clauses. The plaintiffs in these cases have focused the attention of the state judiciaries on the resources, or "input," provided by the states to educate their youngest citizens. Principally, plaintiffs have argued that money provided for education has been spent in an unequal and discriminatory manner.

More recently, plaintiffs in education rights litigation have placed greater emphasis on whether the money provided for education by the states is minimally adequate to provide the level of educational attainment required by the education articles of state constitutions. Most of these cases have not been grounded in funding disparities, but rather upon the notion that whatever the monetary distribution, the state has a constitutional obligation to provide a minimal quality of educational opportunity to its citizens.

About twenty-five state supreme courts have considered the meaning of state constitutional requirements for education.¹ With regard to equal protec-

* Attorney, Latham & Watkins, Los Angeles. A.B. 1985, Duke University/Oxford University; J.D. 1988, Harvard Law School. The author thanks Lisa Karsai for her assistance in the preparation of this Article.

1. *E.g.*, *Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973); *Dupree v. Alma Sch. Dist.*, 651 S.W.2d 90 (Ark. 1983); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973); *Helena Elementary Sch. Dist. v. State*, 769 P.2d 684 (Mont. 1989), *opinion amended by* 784 P.2d 412 (Mont. 1990); *Robinson v. Cahill*, 303 A.2d 273 (N.J.), *cert. denied*, 414 U.S. 976 (1973); *Board of Educ. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1138 (1983); *In re G.H.*, 218 N.W.2d 441 (N.D. 1974); *Board of Educ. v. Walter*, 390 N.E.2d 813 (Ohio 1979), *cert. denied*, 444 U.S. 1015 (1980); *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135 (Okla. 1987); *Olsen v. State*, 554 P.2d 139 (Or. 1976); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Seattle Sch. Dist. v. State*, 585 P.2d 71 (Wash. 1978); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Buse v. Smith*, 247 N.W.2d 141 (Wis. 1976); *Washakie County Sch. Dist. v. Herschler*, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980); *see also* Opinion of the Justices, 387 A.2d 333, 335-36 (N.H. 1978) (no rational basis for excluding minors living on military bases from public schools); *Britt v. North Carolina State Bd. of Educ.*, 357 S.E.2d 432, 435-36 (N.C. Ct. App.) (disparity in local tax bases do not render state school funding system per se unconstitutional), *cert. denied*, 361 S.E.2d 71 (N.C. 1987); *Tennessee Small Sch. Sys. v. McWherter*, No. 01-A-019111CH00433, 1992 WL 119824, at *4 (Tenn. Ct. App. June 5, 1992) (legislature's statutory scheme upheld where no plaintiff before court has sustained actual injury).

tion and due process claims, many state courts have, when interpreting their respective state constitutions, applied the United States Supreme Court's reasoning in *San Antonio School District v. Rodriguez*,² which was a challenge to the Texas school financing system brought under the Federal Equal Protection Clause. The United States Supreme Court determined in *Rodriguez* that education was not a "fundamental right" because education was neither an explicit nor implicit right under the Federal Constitution.³ Likewise, many state courts have been reluctant to find that education is an explicit or implicit "fundamental right," for equal protection or due process purposes, under state constitutions.⁴

Recently, several state courts have, with varying degrees of enthusiasm, begun to determine whether education articles in state constitutions contain a legally enforceable constitutional guarantee.⁵ In some respects these litigations are "output" oriented, reflecting a determination by the state supreme courts that children are or are not receiving an "adequate," "fair," or "efficient" education, depending upon the qualitative buzzword contained in the state constitution. Plaintiffs in these litigations have relied upon "inputs," such as money (or lack thereof) as evidence of educational deficiencies.⁶ As a result, these cases have articulated — in varying degrees of detail — a standard of minimally adequate educational opportunity. Thus, through school finance litigation, the state courts have injected new meaning into the education articles of the state constitutions and also provided a new role for the state judiciary.

A. *The Role of State Courts*

The single most difficult issue facing advocates of educational entitlement is state judicial deference to the state legislatures' efforts to establish and maintain a state-wide system of education.⁷ State courts defer to legislatures for a number of reasons, including the difficulty and complexity of education issues and the controversial nature of judicial involvement in public education. In addition, some state supreme courts have cited explicit constitutional language, which they interpret as favoring exclusive legislative responsibility for education, as justification for deferring to such legislatures.⁸ Each of the state supreme courts that has addressed educational entitlement litigation has taken the view that full implementation of the state constitutional principles should be left to the state legislatures.⁹ In fact, in some state education entitlement cases, the courts have

2. 411 U.S. 1 (1972).

3. *Id.* at 17, 33-34 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 447 n.7 (1972)).

4. See *infra* notes 71-75 and accompanying text for a discussion of cases holding that education is not a fundamental state constitutional right.

5. See Robert E. Lindquist & Arthur E. Wise, *Developments in Education Litigation: Equal Protection*, 5 J. L. & EDUC. 1, 23-46 (1976) (there is evolving right to educational equal opportunity in states); see also generally *Symposium: Future Directions for School Finance Reform*, 38 LAW & CONTEMP. PROBS. 309 (1974).

6. See *infra* notes 102-43 for a discussion of some of these types of claims.

7. See *infra* notes 71-75 and accompanying text for a discussion of judicial deference.

8. See *infra* notes 71-75 for a discussion of these decisions.

9. See, e.g., *infra* notes 81-143 and accompanying text for a discussion of education articles in state constitutions.

specifically denied equal protection by reasoning that the state legislature has plenary authority to develop state education policy.¹⁰

The Georgia Supreme Court, for example, refused to adopt a constitutional requirement of educational quality or equality because of the "inherent difficulty" in establishing a judicially manageable definition of "adequate education."¹¹ The court cited disagreement among educators about the most effective inputs and the most appropriate outputs of an educational system.¹² Accordingly, the court decided to defer to the legislature because of its greater fact-finding and policy-making capacity.¹³

State supreme courts are especially likely to defer where the issue is one of controversial public policy.¹⁴ In these cases, the justices have generally considered themselves ill-suited to interfere. Judicial deference represents a judgment by state courts that their expertise and judgment does not contribute positively. However, withholding of judicial expertise and independent judgment may inhibit the proper resolution of an important policy debate.¹⁵

On the other hand, some state supreme courts have sustained equal protection or education claims by relying on general constitutional principles and leaving to the legislatures a fuller implementation of the judicially announced principles. For example, the Connecticut Supreme Court declared unconstitutional a state school financing plan, but left to the legislature the responsibility for devising a new scheme.¹⁶ The court's only direction to the legislature was that the new system should consist of schools that are substantially equal, while allowing individual towns their own choices in educational programs.¹⁷ In formulating its mandate to the legislature, the court relied upon a study commissioned by the General Assembly, which found the state's system of school financing unconstitutional and suggested a specific plan to rectify the problem.¹⁸

In contrast, the Washington Supreme Court adopted a more aggressive role in adjudication of education issues arising under the state constitution. In *Seat-*

10. See, e.g., *Thompson v. Engelking*, 537 P.2d 635, 648 (Idaho 1975) (constitution gives legislature plenary responsibility and duty to establish and maintain uniform education system).

11. See *McDaniel v. Thomas*, 285 S.E.2d 156, 165 (Ga. 1981) (courts ill-equipped to define "adequate education" beyond system designed to produce individuals who can function in society) (citing *Deviso v. Cooper*, 272 S.E.2d 274, 277 (Ga. 1980)).

12. *Id.* at 167 (quoting *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1972)).

13. *Id.* at 164-65; accord *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1018 (Colo. 1982) (courts can neither wisely nor efficiently decide questions of education policy because relationship between dollar amounts and educational outputs is so uncertain) (citations omitted).

14. See *Lujan*, 649 P.2d at 1018 (judiciary must avoid deciding questions of public policy) (citations omitted); *Thompson*, 537 P.2d at 640 (court would become "super legislature" if it were to decide such political questions); *Board of Educ. v. Nyquist*, 439 N.E.2d 359, 363 (N.Y. 1982) (complexity of managing statewide education system makes it more appropriately handled by legislature and executive), *appeal dismissed*, 459 U.S. 1138 (1983).

15. See *Dupree v. Alma Sch. Dist.*, 651 S.W.2d 90, 96 (Ark. 1983) (Hickman, J., concurring) (while judiciary has legitimate power to act, education, if in trouble, is too vital to be ignored).

16. *Horton v. Meskill*, 376 A.2d 359, 375-76 (Conn. 1976).

17. *Id.*

18. *Id.* at 376.

tle School District v. State,¹⁹ the court recognized its possession of the "ultimate power and the duty to interpret, construe and give meaning to words, sections and articles of the state's constitution."²⁰ The court reasoned therefore that it had "ample power" to enforce education rights.²¹ The majority stated, "[o]nce it has been determined that the court has the power or the duty to construe or interpret words or phrases in the constitution and to give them meaning and effect by construction, it becomes a judicial issue rather than a matter left to legislative discretion."²²

The response of the Washington Supreme Court differs substantially from the deferential attitude of the Georgia Supreme Court in the face of similar constitutional phraseology.²³ The Washington Supreme Court determined that it had the power to construe the education article of its state constitution, and then found the legislature in violation of constitutional requirements.²⁴ The Georgia Supreme Court, on the other hand, adopted a deferential attitude, which strongly influenced its decision to uphold the statutory scheme. The Georgia court cited the controversial nature of the complex issues pending before it and determined that the legislature had greater institutional competence.²⁵

The Washington Supreme Court both avoided obtrusive interference and exercised its authority to criticize unconstitutional legislative action. The court accomplished these twin goals by broadly construing the constitutional mandate and then deferring to the legislature for a practical elaboration of the constitutional duty that would harmonize with the judicially announced principles. The court stated that although the judiciary must decide the constitutional definition of "education" as used in the Washington Constitution, the legislature must enact specific programs to comply with the constitutional requirements.²⁶ Thus, by providing only broad guidelines, the court did not unnecessarily intrude into the legislative domain except to the extent necessary to compel the legislature to comply with its constitutional duty.²⁷

Another impediment to enforcement by state courts of education rights has been the language in some state constitutions that specifically directs the legisla-

19. 585 P.2d 71 (Wash. 1978).

20. *Id.* at 87.

21. *Id.* at 86 (quoting *Gottstein v. Lister*, 153 P. 595, 606 (Wash. 1915)); *accord* *Board of Educ. v. Walter*, 390 N.E.2d 813, 823 (Ohio 1979) ("We wish to state clearly at the outset that this court has the authority, and indeed the duty, to review legislation to determine its constitutionality under the Constitution of Ohio and to declare statutes inoperative."), *cert. denied*, 444 U.S. 1015 (1980) (judicial review of statutes for constitutionality firmly established) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-80 (1803)).

22. *Seattle*, 585 P.2d at 87; *accord* *Walter*, 390 N.E.2d at 823 (judiciary is final arbiter of constitutionality, even where rulings contradict views of other branches) (citing *Powell v. McCormack*, 395 U.S. 486, 549 (1969); *In re Juvenile Director*, 555 P.2d 163, 169 (Wash. 1976)).

23. See Appendix *infra*, Ga. & Wash., for language of constitutional provisions.

24. *Seattle*, 585 P.2d at 97-104.

25. *McDaniel v. Thomas*, 285 S.E.2d 156, 165 (Ga. 1981).

26. *Seattle*, 585 P.2d at 95.

27. See *id.* at 96 ("While the Legislature must *act* pursuant to the constitutional mandate to discharge its duty, the general authority to select the *means* of discharging that duty should be left to the Legislature.") (emphasis in original).

ture to establish and maintain a system of education.²⁸ The legislature's authority under a plenary grant of power could be construed so broadly by a court as to preclude the judicial branch from intervening to decide basic education rights. For example, the Alabama Constitution states that "[t]he legislature *shall* establish, organize and maintain a liberal system of public schools."²⁹ All but eight state constitutions appear to grant the legislature this plenary authority over education.³⁰ Six states place the duty to educate upon the state in general, presumably through all of its officers.³¹ Two states give its "magistrates" concurrent authority over education, presumably welcoming judicial intervention.³²

The direction that state legislatures "shall" provide for a minimally adequate education is probably best explained as merely descriptive. That the legislature "shall" pass laws simply reflects the nature of a representative democracy — that legislatures were created for the purpose of passing laws. The mere fact that legislatures have the exclusive authority to enact legislation, however, should not prevent the courts from interpreting the state constitution or applying the constitution to laws enacted by the legislatures.³³ The Washington Supreme Court resisted the argument that its constitution specifically and exclusively vested the legislature with authority over education.³⁴ The court reasoned that "[r]egardless of its [lack of] physical power to enforce them, the Court has a duty to issue appropriate orders."³⁵

In contrast, the United States Supreme Court virtually abdicated any role for the federal courts in guaranteeing education rights under the Federal Constitution.³⁶ According to *Rodriguez*, the states have primary responsibility for establishing and maintaining appropriate school systems.³⁷ This result is reasonable given that state governments, including state judges, presumably have greater ability to apply laws enacted by the states to the problems of the state's communities than federal courts.³⁸ As discussed above, state courts are beginning to assume the responsibility for education rights litigation that the United States Supreme Court deferred to them in *Rodriguez*.

28. *E.g.*, *Lujan v. Colorado*, 649 P.2d 1005, 1017 (Colo. 1982).

29. ALA. CONST. art. XIV, § 256 (emphasis added).

30. See Appendix *infra*, for a list of constitutional provisions.

31. See Appendix *infra*, Ark., Fla., Ga., Haw., Ill., & N.M.

32. See Appendix *infra*, Mass. & R.I.

33. See, *e.g.*, *Board of Educ. v. Nyquist*, 439 N.E.2d 359, 363 (N.Y. 1982) (notwithstanding distribution of powers in education matters among legislative, executive, and judicial branches, it is court's responsibility to determine constitutionality of any educational programs), *appeal dismissed*, 459 U.S. 1138 (1983); *Washakie County Sch. Dist. v. Herschler*, 606 P.2d 310, 318 (Wyo.) (constitutionality of statutes not political question but integral part of Washington and Federal Constitutions) (citations omitted), *cert. denied*, 449 U.S. 824 (1980).

34. *Seattle Sch. Dist. v. State*, 585 P.2d 71, 86-90 (Wash. 1978).

35. *Id.* at 89 (quoting *In re Grand Jury Subpoena*, 360 F. Supp. 1, 9 (D.D.C. 1973)).

36. See *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43, 38-59 (1972) (courts should refrain from imposing inflexible constitutional restraints on states in area of education policy).

37. *Id.* at 58.

38. See generally William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) (as Supreme Court limits its protections of individual rights, state courts must fill void).

B. State Equal Protection

1. Suspect Classification Analysis

States generally fund education through local property taxes. This funding mechanism results in greater expenditures on education in those areas where property values are highest. Yet, most state courts have held that poverty is not a "suspect classification" and disparate expenditures based upon disparate wealth characteristics do not mandate "strict scrutiny" analysis.³⁹ This result is consistent with the United States Supreme Court's interpretation of the Federal Constitution.⁴⁰ For example, the New Jersey Supreme Court determined that the state school financing scheme — financed through property taxes — did not impinge upon a suspect wealth classification.⁴¹ The court reasoned that "[t]he Legislature of course has not conditioned attendance at elementary and secondary schools upon the net worth of the pupil or his parents or even the payment of a fee."⁴² According to this court, education differed in no material way from other important government services — like police and fire protection — which were similarly funded through disparate local taxation and were clearly inappropriate for constitutional equal protection.⁴³ The supreme courts of California and Wyoming are two notable exceptions to the rejection of suspect classification of wealth in school finance litigation.⁴⁴ In *Serrano v. Priest*,⁴⁵ for example, the court reasoned that education was a "fundamental" right.⁴⁶ Thus, the court held that strict scrutiny analysis was appropriate.⁴⁷ Accordingly, the court found wealth to be a suspect classification and rejected the state's non-uniform system of educational funding.⁴⁸

2. Fundamental Right Analysis

According to *Rodriguez*, education is not a fundamental right because the Federal Constitution does not make implicit or explicit mention of a right to education. Of course, education is not mentioned in the Federal Constitution. The state constitutions, on the other hand, provide for the establishment of

39. See, e.g., *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1019-22 (Colo. 1982) (wealth rejected as suspect classification); *Thompson v. Engelking*, 537 P.2d 635, 645-46 (Idaho 1975) (same).

40. See *Rodriguez*, 411 U.S. at 28-29 (wealth is not suspect classification).

41. *Robinson v. Cahill*, 303 A.2d 273, 283 (N.J.), cert. denied, 414 U.S. 976 (1973).

42. *Id.*

43. *Id.* at 283-86.

44. See *Serrano v. Priest*, 487 P.2d 1241, 1250-55 (Cal. 1971) (school financing system based on district tax collection created suspect classifications where wealth differed between districts); *Washakie County Sch. Dist. v. Herschler*, 606 P.2d 310, 334 (Wyo.) (unequal distribution of state funds to school districts on basis of wealth created unconstitutional suspect classification) (citing *Serrano*, 487 P.2d at 1250), cert. denied, 449 U.S. 824 (1980)). The California court found the proposition that the state classified according to wealth "irrefutable," and that such classification was invalid under the state's equal protection clause. *Serrano*, 487 P.2d at 1250-52.

45. 487 P.2d 1241 (Cal. 1971).

46. *Id.* at 1258-59.

47. *Id.* at 1263.

48. *Id.* at 1254-55, 1263.

state-wide schools systems. Thus, the *Rodriguez* test would have great potential strength if applied to state constitutions because courts could more easily recognize an implied or explicit right to education in the state constitutions' lengthy discussion about school systems. Under this test, the state constitutions' education clause could provide the foundation for the strict scrutiny analysis that *Rodriguez* contemplated.⁴⁹ Each state supreme court that has considered the issue, however, has rejected the *Rodriguez* test as inapplicable to equal protection under its state constitution.⁵⁰ Two state supreme courts — California and West Virginia — have rejected the *Rodriguez* test but applied other standards of fundamentality to strike down the state education scheme under strict scrutiny analysis.⁵¹

In contrast, the Colorado Supreme Court based its rejection of the *Rodriguez* "explicit or implicit" test upon its view of the differing natures of state and federal constitutions.⁵² One commentator has explained this point by pointing out that the United States Constitution consists of restricted authority and dele-

49. See *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30-31 (1972) (rights not deemed fundamental under U.S. Constitution may deserve fundamental status under state law); see also *In re G.H.*, 218 N.W.2d 441, 447 (N.D. 1974) (court determined that state constitution's education clause created constitutional right to education requiring protection under its equal protection, due process, and privileges and immunities clauses). The court considered G.H., a handicapped student, to be entitled to an educational opportunity equal to that of other children and required the local school district to finance fully her education, even though that education would require greater expenditures. *Id.* at 447-48. *G.H.* is notable for mandating equal educational opportunity under state constitutional law, even to the extent of requiring disparate educational expenditures to achieve equality. *G.H.* may be limited, however, by the fact that the plaintiff alleged a total deprivation of education rather than a denial of equal educational opportunities. *Id.*; see generally Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 845-51 (1985) (equal protection provisions of state constitutions examined in connection with education claims).

50. See, e.g., *Hornbeck v. Somerset County Sch. Dist.*, 458 A.2d 758, 784 (Md. 1983) (*Rodriguez* test inappropriate in state constitutional context); *Robinson v. Cahill*, 303 A.2d 273, 282-83 (N.J.) (not all rights in state constitution deserve fundamental status), *cert. denied*, 414 U.S. 976 (1973); see also Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 354-55 (1984) (state court rejection of Supreme Court analysis appropriate within context of state constitution's broader scope); *Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1355 (1982) (different standards of review proper at state level because state constitutions typically cover wider range of issues). But see *Shofstall v. Hollins*, 515 P.2d 590, 592 (Ariz. 1973) (court decided education is fundamental right under Arizona constitution, suggesting, though not expressing, adoption of *Rodriguez* test); *Horton v. Meskill*, 376 A.2d 359, 372-73 (Conn. 1977) (regardless of *Rodriguez* test, Connecticut constitution provides fundamental right of education to citizens).

51. See *Serrano v. Priest*, 487 P.2d 1241, 1255-59 (Cal. 1971) (importance of education in society relied upon by court in fundamental rights analysis); *Pauley v. Kelly*, 255 S.E.2d 859, 863-64 (W. Va. 1979) (court relied on analysis of state constitutional language to find fundamental right to education).

52. See *Lujan v. Colorado*, 649 P.2d 1005, 1017 (Colo. 1982) (state powers not limited to "four corners" of constitution); accord *Board of Educ. v. Nyquist*, 439 N.E.2d 359, 366 n.5 (N.Y. 1982) (United States Constitution more specifically delegates powers to branches than does state constitution), *appeal dismissed*, 444 U.S. 1015 (1983); *Hornbeck*, 458 A.2d at 784, 785 (state constitutions concern broader issues than fundamental rights); *Board of Educ. v. Walter*, 390 N.E.2d 813, 818-19 (Ohio 1979) (unlike federal system, state powers not limited to text of state constitution), *cert. de-*

gated powers.⁵³ State constitutions, on the other hand, consist of both provisions detailing fundamental interests and provisions otherwise suitable for statutory enactment.⁵⁴ Therefore, the often mundane nature of state constitutions precludes the automatic attribution of strict scrutiny to interests merely mentioned in the state constitution. The Oregon Supreme Court, for example, pointed out that the Oregon Bill of Rights guarantees "the right to sell and serve intoxicating liquor by the drink."⁵⁵ Given the mundane nature of this language, the court stated that according equal protection to such a right would be incongruous.⁵⁶

The Georgia Supreme Court also rejected a plaintiff's equal protection claim but adopted a different rationale for refusing to adopt *Rodriguez's* explicit mention test.⁵⁷ To give content to the state's adequate education⁵⁸ and equal protection⁵⁹ clauses, the court reviewed the status of education in Georgia when the state constitution was adopted.⁶⁰ The court found that, at the time of adoption, significant inequalities existed between school districts, and that the framers of the state constitution did not intend to alter the existing system.⁶¹ Therefore, the implication could be drawn that the original intent of the framers was not violated by the existing system of financing public education, which in fact contained greater equality than at the time of the state constitution's adoption.⁶² The court stated, moreover, that the education provisions of the Georgia

nied, 444 U.S. 1015 (1980); *Olsen v. State*, 554 P.2d 139, 144 (Or. 1976) (mixture of rights and legislation in state constitution makes "explicit or implicit" analysis impractical).

53. *See Developments in the Law*, *supra* note 50, at 1355 (state constitutions resemble codes in their comprehensiveness).

54. *Id.*

55. *Olsen*, 554 P.2d at 144 (citing OR. CONST. art. I, § 39). The court evidently felt that according equal protection to such a right would be incongruous. *Id.*

56. *Id.*

57. *McDaniel v. Thomas*, 285 S.E.2d 156, 166 (Ga. 1981) (rather than providing rights to citizens, state equal protection clause imposes duty on state).

58. GA. CONST. art. VIII, § 8, ¶ 1 ("the Georgia Assembly shall by taxation provide funds for an adequate education for the citizens of Georgia.").

59. *See Appendix infra*, GA. CONST. art. 1, § 1, ¶ 1 ("Protection to person and property is the paramount duty of government, and shall be impartial and complete.").

60. *McDaniel*, 285 S.E.2d at 163-64.

61. *Id.*

62. *See id.* (framers of Georgia Constitution understood that disparities in wealth between districts existed but declined to constitutionalize equality of resources; present school financing system contains same funding structure as existed at time of adoption of constitution); *accord* *Britt v. North Carolina State Bd. of Educ.*, 357 S.E.2d 432, 436 (N.C. Ct. App. 1987) (state's equal protection clause provides only access to education required by *Brown v. Board of Educ.*, 402 U.S. 1 (1971)); *Thompson v. Engelking*, 537 P.2d 635, 648-50 (Idaho 1975) (legislative history indicates that framers knew that financing system would produce disparities in education); *Milliken v. Green*, 212 N.W.2d 711, 717 (Mich. 1973) (disparate expenditures "a predominant phenomena" when state constitution adopted).

The Washington Supreme Court, faced with a similar argument, responded in a manner allowing judicial re-interpretation of the original intent of the framers of the state constitution. Quoting the words of Justice Holmes, the court stated:

When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of

Constitution were long and comprehensive, and if the framers of the state constitution had really intended that education be provided equally, they would have stated that explicitly in the education provisions.⁶³

Of the three state supreme courts that have applied the fundamental interest, strict scrutiny test to strike down a statutory education scheme, none has used the *Rodriguez* test. The California Supreme Court considered the issue prior to the *Rodriguez* decision, thus the test was unavailable to the court; it, however, adopted a more flexible standard of fundamentality than the United States Supreme Court. The California court did not examine the issue of whether education was explicitly mentioned in the state constitution. Rather, the court rested its decision on the nexus between education and citizenship.⁶⁴ The court reasoned that education is a unique influence on a child's development as a citizen and the child's later participation in political and community life. The California court concluded that "the distinctive and priceless function of education in our society warrants, indeed compels, our treatment of it as a 'fundamental interest.'" ⁶⁵

The West Virginia Supreme Court did not mention the *Rodriguez* test in deciding whether education was a fundamental right.⁶⁶ Instead the court stated that "both our equal protection and thorough and efficient constitutional principles can be applied harmoniously to the State school financing system."⁶⁷ The court relied upon the "thorough and efficient" clause to conclude that education was a fundamental right in West Virginia.⁶⁸ The Connecticut Supreme Court likewise chose not to indicate what test of fundamentality it adopted, but indicated only that whatever test it might apply, education clearly constituted a fundamental right.⁶⁹ The Connecticut court then struck down the state's education scheme as being in violation of state equal protection.⁷⁰

which could not have been foreseen completely by the most gifted of its begetters. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

Seattle Sch. Dist. v. State, 585 P.2d 71, 94 (Wash. 1978) (quoting Missouri v. Holland, 252 U.S. 416, 433 (1920)). The court concluded that "the constitution was not intended to be a static document incapable of coping with changing times. It was meant to be, and is, a living document with current effectiveness." *Id.*; cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) ([Federal] Constitution is "intended to endure for the ages to come, and consequently, to be adapted to the various crises of human affairs") (emphasis in original).

63. *McDaniel*, 285 S.E.2d at 166.

64. *Serrano v. Priest*, 487 P.2d 1241, 1255, 1256 (Cal. 1971).

65. *Id.* at 1258.

66. See *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (court failed to cite *Rodriguez* as basis for decision).

67. *Id.*; see also *Buse v. Smith*, 247 N.W.2d 141, 149 (Wis. 1976) (citing *Pacyna v. Board of Educ.*, 204 N.W.2d 671, 672-73 (Wis. 1973)) (Wisconsin Supreme Court simply determined, without stating rationale, that "equal opportunity for education" is fundamental right).

68. *Pauley*, 255 S.E.2d at 878.

69. See *Horton v. Meskill*, 376 A.2d 359, 372-73 (Conn. 1977) (decisions in other jurisdictions and in *Rodriguez* unhelpful in determining whether education is fundamental right under state constitution).

70. See *id.* at 374-75 (financing system unconstitutional because it resulted in disparate funding).

3. Rational Basis Review

Other state supreme courts reject fundamental right and suspect classification arguments and address the state school financing systems under a rational basis standard of review. Under this test, the courts determine whether the school financing system rationally furthers a legitimate state purpose.⁷¹ Accordingly, the presumption of constitutional validity,⁷² and the deference shown to state legislatures under this standard of review⁷³ have more often than not resulted in upholding the state's school financing scheme.⁷⁴ The "legitimate state purpose" most frequently articulated by the state supreme courts in upholding the state scheme has been the state's interest in furthering some degree of local control over education.⁷⁵

Only the Arkansas Supreme Court has applied rational basis review to strike down its state's education financing system.⁷⁶ The state's school financing system, like those in most states, made educational opportunity a function of residence.⁷⁷ The court determined that residency-based disparities in educational opportunity bore no rational relationship to the educational needs of the individual districts.⁷⁸ According to the court, local control, the compelling state interest accepted by some state courts, constituted "a 'cruel illusion' for the poor districts due to limitations placed upon them by the system itself. . . . Far from

71. See, e.g., *Lujan v. Colorado*, 649 P.2d 1005, 1022 (Colo. 1982) (court adopted rational basis test to review state public school financing system); cf. *Danson v. Casey*, 399 A.2d 360, 363, 367 (Pa. 1979) (Pennsylvania Supreme Court applied rational basis review because plaintiff school district's allegations were too vague to provoke strict scrutiny). The plaintiff in *Danson* did not allege that he had been harmed by the legislature's financing scheme, that the legislature had failed to fulfill any duty to him, or even that the financing scheme resulted in disparate financial resources between districts. *Id.* at 365. Thus, the court analyzed the plaintiff's claim under the rational basis standard and held the financing system constitutional. *Id.* at 367.

72. See *Lujan*, 649 P.2d at 1022 (rational basis standard entitles financing system to presumption of validity).

73. See *id.* (if facts "can reasonably be conceived as supporting action," classification upheld under rational basis standard).

74. See *infra* note 75 for a list of these decisions.

75. See, e.g., *Lujan*, 649 P.2d at 1022-23 (constitution and interpretive case law support implicit objective of local control of school financing system); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 788 (Md. 1983) (historical financing of public schools evidenced purpose of establishing local control over such schools); *Board of Educ. v. Nyquist*, 439 N.E. 2d 359, 367 (N.Y. 1982) (state public school financing system ensured local control over educational expenditures and services in community), *appeal dismissed*, 459 U.S. 1138 (1983); *Board of Educ. v. Walter*, 390 N.E.2d 813, 820-22 (Ohio 1979) (applying local taxes to school financing system satisfies purpose of local control of education) (quoting *Wright v. Council of Emporia*, 407 U.S. 451, 478 (1972) (Berger, J., dissenting), *cert. denied*, 444 U.S. 1015 (1980)); *Olsen v. State*, 554 P.2d 139, 146-48 (Or. 1976) (objective of school financing system is to ensure control by local voters); *Buse v. Smith*, 247 N.W.2d 141, 150-55 (Wis. 1976) (constitutional provision that town and city taxes will be applied to local district education system is proof of objective of local control over school system).

76. See *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983) (poorer districts lack control under public school financing system because, with less money to spend, they have fewer spending options).

77. See *id.* at 91-92 (state aid to local school districts based on individual district's tax base).

78. *Id.* at 93.

being necessary to promote local fiscal choice, the present system actually deprives the less wealthy districts of the option."⁷⁹

In sum, state supreme courts have, with the exception of California and Wyoming, agreed with the United States Supreme Court's rejection of plaintiffs' applications for suspect classification strict scrutiny. State supreme courts have, on the other hand, generally disagreed with the United States Supreme Court's formulation of the test of fundamental interest strict scrutiny. Three state supreme courts — California, Connecticut, and West Virginia — have applied fundamental interest strict scrutiny to overturn the legislature's education scheme, though each applied fundamental interest analysis in an ambiguous fashion.⁸⁰ Unfortunately, these courts did not clearly state why education constituted a fundamental right. Perhaps, like the United States Supreme Court, they could divine no way of making education a fundamental right without also making other important governmental services fundamental.

C. The Education Articles

The state constitutions' education articles have provided the most fruitful source of independent state jurisprudence concerning education.⁸¹ The education clauses of the fifty states vary in their formulations of the state's duty to establish and maintain publicly funded schools. Some of the clauses establish various qualitative standards such as "general and uniform";⁸² "general, suitable, and efficient";⁸³ "thorough and uniform";⁸⁴ "general and efficient";⁸⁵ "uniform" and "adequate";⁸⁶ "adequate";⁸⁷ "general, uniform, and thorough";⁸⁸ "efficient" and "high quality";⁸⁹ "general and uniform";⁹⁰ "efficient";⁹¹ "thor-

79. *Id.* (quoting *Serrano v. Priest*, 557 P.2d 929, 948 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977)); *accord* *Helena Elementary Sch. Dist. v. State*, 769 P.2d 684, 690 (Mont. 1989) (financing system denied poorer school districts local control because with less money available to spend, their choices on how to spend it were limited).

80. *See supra* notes 64-70 for a discussion of decisions in these states.

81. *See generally* Julius Chambers, *Adequate Education for All: A Right, An Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 65 (1987); Patrick R. Hugg & Louis F. Miron, *A Hybrid Theory for Education Reform*, 36 LOYOLA L. REV. 937, 955 (1991); William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J. L. & EDUC. 219, 250 (1990); William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661 (1989); John C. Walden & Renee D. Culverhouse, *School Finance Litigation in Alabama*, 72 EDUC. L. REP. 691, 698 (1992).

82. *See* Appendix *infra*, ARIZ. CONST. art. XI, § 1, for text of state constitutional provision.

83. *See id.*, ARK. CONST. art. XIV, § 1, for text of state constitutional provision.

84. *See id.*, COLO. CONST. art. IX, § 2, for text of state constitutional provision.

85. *See id.*, DEL. CONST. art. X, § 1, for text of state constitutional provision.

86. *See id.*, FLA. CONST. art. IX, § 1, for text of state constitutional provision.

87. *See id.*, GA. CONST. art. VIII, § 1, ¶ 1, for text of state constitutional provision.

88. *See id.*, IDAHO CONST. art. IX, § 1, for text of state constitutional provision.

89. *See id.*, ILL. CONST. art. X, § 1, for text of state constitutional provision.

90. *See id.*, IND. CONST. art. VIII, § 1, MINN. CONST. art. XIII, § 1, N.C. CONST. art. IX, § 2, OR. CONST. art. VIII, § 2, S.D. CONST. art. VIII, § 1 & WASH. CONST. art. IX, § 2, for text of state constitutional amendments.

ough and efficient";⁹² "quality";⁹³ "uniform";⁹⁴ "uniform" and "sufficient";⁹⁵ "high quality";⁹⁶ and "complete and uniform."⁹⁷ Accordingly, the outcome of an education rights case may depend heavily on the language of the state constitution's education article.

Plaintiffs have had less success making claims under the education articles of the state constitution where they have used the education article as a surrogate for, or reiteration of, an equal protection claim.⁹⁸ For example, a requirement of uniformity in the education articles⁹⁹ has sometimes been the source of an equality claim.¹⁰⁰ State courts that have found the state constitution's equal protection clause inapplicable to education have not been inclined to sustain a nearly identical claim of entitlement to equality based upon the words of the education article. In fact, some state supreme courts have expressed surprise that the plaintiffs pursued equality rather than quality claims under the education articles.¹⁰¹ On the other hand, plaintiffs have been more successful in school finance cases where they have distinguished their education article claims from equal protection claims. Cases decided in West Virginia, Washington, New Jersey, Texas, and Kentucky are illustrative of this trend.

91. *See id.*, KY. CONST. § 183 & TEX. CONST. art. VIII, § 1, for text of state constitutional amendments.

92. *See id.*, MD. CONST. art. VIII, § 1, N.J. CONST. art. VIII, § 4, ¶1, OHIO CONST. art. VI, § 2, PA. CONST. art. III, § 14, W. VA. CONST. art. XII, § 1, for text of state constitutional amendments.

93. *See id.*, MONT. CONST. art. X, § 1, for text of state constitutional amendment.

94. *See id.*, NEV. CONST. art. XI, § 2, WIS. CONST. art. X, § 3, for text of state constitutional amendments.

95. *See id.*, N.M. CONST. art. III, § 1, for text of state constitutional amendment.

96. *See id.*, VA. CONST. art. VIII, § 1, for text of state constitutional amendment.

97. *See id.*, WYO. CONST. art. VIII, § 1, for text of state constitutional amendment.

98. *See Lujan v. Colorado Bd. of Educ.*, 649 P.2d 1005, 1024 (Colo. 1982) (Colorado provision mandating "thorough and uniform . . . free public school" does not require absolute equality in funding; only requires opportunity for public education); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 776-80 (Md. 1983) (Maryland constitution requiring "thorough and efficient" public school system does not compel General Assembly to enact legislation guaranteeing quality per pupil funding in school district); *Milliken v. Green*, 212 N.W.2d 711, 719 (Mich. 1973) (Michigan system of financing schools not unconstitutional); *Olsen v. State*, 554 P.2d 139, 148 (Or. 1976) (federal equal protection and state constitutional arguments denied).

99. *See Appendix infra*, Ariz., Colo., Fla., Idaho, Ind., Minn., Nev., N.C., N.M., Or., S.D., Wash., Wis. & Wyo., for the text of these provisions, which all require uniformity in education.

100. *See supra* note 98 for cases alleging equality claims.

101. *See, e.g., Hornbeck*, 458 A.2d at 780 (court noted that no allegation was advanced that qualitative standards were not met in school districts, that education was inadequate, or that school financing scheme did not provide all districts with funds necessary to provide basic education contemplated by state constitution); *Milliken*, 212 N.W.2d at 719 (court surprised that plaintiffs concentrated exclusively on disparities in taxable resources of local school districts, rather than substantiate claims of educational inequities and demonstrate that judicial decree would overcome those inequities).

In fact, the California Supreme Court went out of its way, at the same time it accepted plaintiff's equal protection claim, to reject the education article claim, which mirrored the equal protection claim. *See Serrano v. Priest*, 487 P.2d 1241, 1248-49 (Cal. 1971) (court rejected claim that article IX, § 5 of state constitution mandated equality in school spending).

1. West Virginia

In *Pauley v. Kelly*,¹⁰² the Supreme Court of West Virginia interpreted the "thorough and efficient" clause of its constitution¹⁰³ to provide state guarantees independent of the state equal protection clause.¹⁰⁴ The court first defined the words of the education article by reference to the constitutional debate in Ohio,¹⁰⁵ the first state to adopt a "thorough and efficient" clause,¹⁰⁶ and whose constitution served as a model for West Virginia's clause.¹⁰⁷ The West Virginia Court concluded that the intent of the Ohio framers in adopting the "thorough and efficient" standard of education was to achieve excellence and to make education of the public a fundamental function of state government and a fundamental right of Ohio citizens.¹⁰⁸

In addition to legislative history, the West Virginia court reviewed the case law of fifteen states where the constitutions contained a "thorough and efficient" standard in their education articles.¹⁰⁹ According to the court, of the fifteen states that had a "thorough and efficient" clause, all fifteen had declared them to be "absolutely mandatory upon legislatures."¹¹⁰ Thus, the West Virginia court determined that its education article was indeed mandatory, and therefore enforceable.¹¹¹

The court concluded that the constitutional debates and relevant case law revealed a discernible standard of education quality embodied in the words "thorough and efficient."¹¹² The court defined a "thorough and efficient" system of schools as one that "develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship."¹¹³ Further, the court listed the "legally recognized elements" of the definition of a "thorough and efficient" education.¹¹⁴ Included among the eight elements were literacy, social ethics ("to facilitate compatibility with others in this society"),¹¹⁵ and 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

102. 255 S.E.2d 859 (W. Va. 1979).

103. W. VA. CONST. art. XII, § 11.

104. See *Pauley*, 255 S.E.2d at 882 ("thorough and efficient" clause requires more than just equality of educational funding).

105. *Id.* at 866.

106. *Id.*; see generally OHIO CONST. art VI, § 2 (state shall provide "thorough and efficient system of education").

107. *Pauley*, 255 S.E.2d at 866 (court examined constitutional debates in Ohio).

108. *Id.* at 867. But see *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 770-78 (Md. 1983) (Maryland Supreme Court performed similar analysis of state constitutional debates and determined there was no equalizing intention in Maryland's proscription for "thorough and efficient" schools).

109. *Pauley*, 255 S.E.2d at 869-74.

110. *Id.* at 869.

111. *Id.* at 874.

112. *Id.*

113. *Id.* at 877.

114. *Id.* at 877-78.

115. *Id.* at 877.

governance").¹¹⁶ In sum, the West Virginia Supreme Court broadly outlined the constitutional mandate, giving substantive content to the education article and leaving the legislature to further elaborate and implement the standards of education quality.¹¹⁷

2. Washington

The Washington Supreme Court adopted a different interpretation than the West Virginia Supreme Court by giving substantive content to the state constitutional duty to educate. The Washington court relied on the uniquely strong language of the Washington Constitution's education article, which makes the duty of the state to provide for education "paramount" above all other responsibilities.¹¹⁸ The court stated:

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. The constitutional right to have the State "make ample provision for the education of all [resident] children" would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the market place of ideas.¹¹⁹

Thus, the court did not attempt to define the quality standards, "general and uniform," which appear in the Washington Constitution. Instead, the court simply adopted the trial court's definition of "education" by noting:

"[E]ducation" . . . comprehends all that series of instruction and discipline which is intended to enlighten the understanding, correct the temper, and form the manners and habits of youth, and fit them for usefulness in the future. In its most extended signification it may be defined, in reference to man, to be the act of developing and cultivating the various physical, intellectual, aesthetic and moral faculties.¹²⁰

The court then distinguished between what it termed "total education" and "basic education," stating that the Washington legislature need provide only the latter to comply with the constitutional command.¹²¹

Like the West Virginia Supreme Court, the Washington Supreme Court

116. *Id.* The other elements were math skills, self-knowledge and the knowledge of the total environment (to enable a child to choose life work), work training, recreational pursuits, and creative arts. *Id.*

117. *Accord* Washakie County Sch. Dist. v. Herschler, 606 P.2d 310, 336 (Wyo.) (Wyoming Supreme Court similarly overturned state's public school financing system, but limited its action by only proscribing programs making quality of education a function of district wealth), *cert. denied*, 449 U.S. 824 (1980).

118. *Seattle Sch. Dist. v. State*, 585 P.2d 71, 91 (Wash. 1978) (court supported decision by relying on constitutional provision making education paramount duty of state).

119. *Id.* at 94 (citations omitted).

120. *Id.*

121. *Id.* at 95. The court distinguished "total education" from "basic education" in that "total education" offers programs in all subjects. *Id.*

viewed its duty as providing broad constitutional guidelines, while obligating the legislature to give specific content to the constitution's education clause by developing a comprehensive system of education consistent with the Constitution's mandate.¹²² By providing only broad guidelines, the court avoided treading further upon the powers of the state legislature.

3. New Jersey

The New Jersey Supreme Court also granted relief to a plaintiff based upon the education articles of the state constitution, while rejecting the plaintiff's equal protection claim.¹²³ In *Robinson v. Cahill*,¹²⁴ the New Jersey court analyzed the history of the education article of the state constitution and subsequent legislative action to confirm that the framers' intent was to make education a fundamental right.¹²⁵ The court then gave substantive content to the "thorough and efficient" clause of the education article of the New Jersey Constitution by stating that "[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."¹²⁶ Furthermore, on rehearing, the New Jersey Supreme Court left the state legislature "broad options" to discharge the constitutional requirements, stating:

[T]here is no responsible dissent from the view that implementation of the constitutional command is peculiarly a matter for the judgment of the Legislature and the expertise of the Executive Department. In other words, the Court's function is to appraise compliance with the Constitution, not to legislate an educational system.¹²⁷

Thus, the New Jersey court saw its role as a definer of broad constitutional principles; it was for the legislators, however, to determine how to give effect to those principles.

4. Texas

The Texas Supreme Court also invalidated the school finance system established by that state's legislature on the basis of the Texas Constitution's education article.¹²⁸ In *Edgewood Independent School District v. Kirby*,¹²⁹ The Texas court interpreted the term "efficient" as used in the state constitution to mean

122. *Id.*; see *supra* notes 103-17 and accompanying text for a discussion of the West Virginia Supreme Court's actions.

123. See *Robinson v. Cahill*, 303 A.2d 273, 277-87 (N.J.) (equal protection clause should not be used to grant relief because it is too difficult to find objective basis to require statewide uniformity in education expenditures), *cert. denied*, 414 U.S. 976 (1973).

124. 303 A.2d 273 (N.J.), *cert. denied*, 414 U.S. 976 (1973).

125. *Id.* at 290-92.

126. *Id.* at 295.

127. *Robinson v. Cahill*, 339 A.2d 193, 199 (N.J. 1975).

128. *Edgewood Ind. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 395 (Tex. 1989) (education financing not "efficient" where spending per pupil varied greatly); see generally Allen E. Park & Michael D. Weiss, *Litigating Edgewood: Constitutional Standards and Application to Educational Choice*, 10 REV. LITIG. 599 (1991) (discusses *Edgewood* and its implications for Texas school system).

129. 777 S.W.2d 391 (Tex. 1989).

"effective or productive of results."¹³⁰ Because the Texas Constitution contained a standard of educational entitlement, however, implementation of a school system was not left entirely to legislative discretion. The court stated that although the constitution's terms are not precise, they provide a standard to measure the constitutionality of the legislature's actions.¹³¹ Thus, the court determined that the Texas school system was not efficient because of the "glaring disparities" in funding among school districts.¹³² The court concluded that poorer school districts were unable to raise enough revenue to meet even "minimum standards."¹³³ The court rejected local control as a basis for existing disparities, stating that an efficient system "will provide property-poor districts with economic alternatives that are not now available to them."¹³⁴ The court further stated that a community can exercise local control only if alternatives are available.¹³⁵

The Texas court also expressly declared its role to be interpretive, rather than remedial, stating:

[W]e do not now instruct the legislature as to the specifics of the legislation it should enact; nor do we order it to raise taxes. The legislature has primary responsibility to decide how best to achieve an efficient system. We decide only the nature of the constitutional mandate and whether that mandate has been met.¹³⁶

Thus, through limited direction, the Texas Supreme Court avoided infringing upon the legislative domain.

5. Kentucky

The Kentucky Supreme Court construed the term "efficient" in the Kentucky Constitution in a consistent but more detailed manner than the Texas Supreme Court.¹³⁷ In *Rose v. Council for Better Education, Inc.*,¹³⁸ the Kentucky court concluded that it had the power and the duty to construe all words in the Kentucky Constitution and that to leave such matters to the legislature's discretion was "literally unthinkable."¹³⁹ The *Rose* court determined that the provision for "efficient education" in the Kentucky Constitution established, among other things, a constitutional right to an adequate education and an obli-

130. *Id.* at 395.

131. *Id.* at 394.

132. *Id.* at 392.

133. *Id.* at 397.

134. *Id.* at 396.

135. *Id.* The court also noted that "[g]enerally, the property-rich districts can tax low and spend high while the property-poor districts must tax high merely to spend low." *Id.* at 393.

136. *Id.* at 399.

137. See *Rose v. Council for Better Educ. Inc.*, 790 S.W.2d 186, 205-06 (Ky. 1989) ("efficient" defined by reference to history of framing of constitution and original purposes behind constitution); see generally Troy Reynolds, *Education Finance Reform Litigation and Separation of Powers: Kentucky Makes Its Contribution*, 80 KY. L.J. 309 (1992).

138. 790 S.W.2d 186 (Ky. 1989).

139. *Id.* at 209.

gation by the state to provide sufficient funding for an adequate education.¹⁴⁰

Moreover, the court determined that an adequate or "efficient" education required provision of seven enumerated "capacities," similar to the eight "legally recognized elements" mandated by the West Virginia Supreme Court.¹⁴¹ These capacities included reading and writing skills, knowledge of economic, social and political systems, and knowledge of governmental processes.¹⁴² The court further mandated an education sufficient to prepare students for higher education or vocational training to enable them "to compete favorably with their counterparts in surrounding states, in academics or in the job market."¹⁴³

CONCLUSION

The foregoing state cases indicate that successful claims based on the education articles must address the quality level of education assured to citizens by the state constitution. In each instance, the West Virginia, New Jersey, Washington, Texas and Kentucky Supreme Courts did not fault their respective state funding schemes because they resulted in inequality among school districts. Rather, the courts found that the plaintiffs' constitutional rights were violated because funding schools through property taxes caused school districts to fall below the minimum in the education article of their respective state constitution.¹⁴⁴ Thus, to maintain a successful education rights challenge under a state constitution, a plaintiff should allege a quality argument under the constitution's education article.

The issue then becomes how to define education in the context of a particular education article. The West Virginia, New Jersey, Washington, Texas, and Kentucky Supreme Court opinions demonstrate the facility of interpretation of the education articles of state constitutions. Each court took a slightly different approach, providing future litigants with abundant constitutional and jurisprudential materials with which to define the terms contained in an education article. Further, these decision provide meaningful standards of education quality that can be used in future cases.

The West Virginia, New Jersey, Washington, Texas and Kentucky Supreme Courts constitute a solid core of state cases establishing a constitutional right to education wholly independent of federal law. The holdings in these cases are

140. *Id.* at 205.

141. *See supra* notes 114-17 for a discussion of these elements.

142. *Rose*, 790 S.W.2d at 213.

143. *Id.* at 212.

144. *See Dupree v. Alma Sch. Dist.*, 651 S.W.2d 90, 93 (Ark. 1983) (Arkansas statute that financed public school system through property taxes unconstitutional because it "bears no national relationship to the education needs of the individual districts. . ."); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (West Virginia constitution, which insures "thorough and efficient" public school education, requires development of certain high quality standards against which system should be tested). *But see Helena Elementary Sch. Dist. v. State*, 769 P.2d 684, 689-91 (Mont. 1989) (according to Montana's constitution, each Montana citizen is guaranteed right of "equality of education opportunity," and financing through property tax system does not result in "quality public education . . . guaranteed under . . . Montana constitution."), *opinion amended on other grounds by* 784 P.2d 412 (Mont. 1990).

based entirely upon state constitutional law. They address issues of education quality rather than equality and therefore constitute a viable and distinctive doctrine of educational entitlement. They answer the call of the United States Supreme Court in *Rodriguez* for the states to take responsibility for what is essentially a state function. They also satisfy the principle that judges must assume a role in enforcing the duties imposed by law.

APPENDIX

*Education Provisions of State Constitutions**Alabama*

"The legislature shall establish, organize and maintain a liberal system of public schools." ALA. CONST. art. XIV, § 256.

Alaska

"The legislature shall by general law establish and maintain a system of public schools open to all children." ALASKA CONST. art. VII, § 1.

Arizona

"The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system." ARIZ. CONST. art. XI, § 1.

Arkansas

"Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education." ARK. CONST. art. XIV, § 1.

California

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." CAL. CONST. art. IX, § 1.

Colorado

"The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools." COLO. CONST. art. IX, § 2.

Connecticut

"There shall always be free public elementary and secondary schools in this state. The general assembly shall implement this principle by appropriate legislation." CONN. CONST. art. VIII, § 1.

Delaware

"The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools." DEL. CONST. art. X, § 1.

Florida

"Adequate provision shall be made by law for a uniform system of free public schools." FLA. CONST. art. IX, § 1.

Georgia

"The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia." GA. CONST. art. VIII, § 1.

Hawaii

"The state shall provide for the establishment, support and control of a statewide system of public schools." HAW. CONST. art. X, § 1.

Idaho

"The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to

establish and maintain a general, uniform and thorough system of public, free common schools." IDAHO CONST. art. IX, § 1.

Illinois

"A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services." ILL. CONST. art. X, § 1.

Indiana

"Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools." IND. CONST. art. VIII, § 1.

Iowa

"The General Assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement." IOWA CONST. art. IX, § 3.

Kansas

"The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools . . . which may be organized and changed in such manner as may be provided by law." KAN. CONST. art. VI, § 1.

Kentucky

"The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools." KY. CONST. § 183.

Louisiana

"The goal of the public educational system is to provide learning environments and experiences, at all stages of human development, that are humane, just, and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop to his full potential." LA. CONST. art. VIII, pmbl.
"The legislature shall provide for the education of the people of the state and shall establish and maintain a public educational system." LA. CONST. art. VIII, § 1.

Maine

"A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to promote this important object, the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools." ME. CONST. art. VIII, § 1.

Maryland

"The General Assembly, at its First Session after the adoption of this Constitution, shall by law establish throughout the state a thorough and efficient System of Free Public Schools." MD. CONST. art. VIII, § 1.

Massachusetts

"Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and

as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of the Legislators and Magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns." MASS. CONST. Ch. V, § 2

Michigan

"Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." MICH. CONST. art. VIII, § 1.

"The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law." MICH. CONST. art. VIII, § 2.

Minnesota

"The stability of a republican form of government depending upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools." MINN. CONST. art. VIII, § 2.

Mississippi

"It shall be the duty of the legislature to encourage by all suitable means, the promotion of intellectual, scientific, moral and agricultural improvement, by establishing a uniform system of free public schools." MISS. CONST. art. VIII, § 201.

"The legislature may, in its discretion, provide for the maintenance and establishment of free public schools." MISS. CONST. art. VIII, § 201.

Missouri

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools." MO. CONST. art. IX, § 1(a).

Montana

"It is the goal of the people to establish a system of education which will develop the full educational potential of each person." MONT. CONST. art. X, § 1(1).

"The legislature shall provide a basic system of free quality public elementary and secondary schools." MONT. CONST. art. X, § 1(3).

Nebraska

"The legislature shall provide for the free instruction in the common schools of this state." NEB. CONST. art. VII, § 1.

Nevada

"The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements." NEV. CONST. art. XI, § 1.

"The legislature shall provide for a uniform system of common schools." NEV. CONST. art. XI, § 2.

New Hampshire

"Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and

magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools." N.H. CONST. art. LXXXIII.

New Jersey

"The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools." N.J. CONST. art. VIII, § 4(1).

New Mexico

"A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained." N.M. CONST. art. XII, § 1.

New York

"The legislature shall provide for the maintenance and support of a system of free common schools." N.Y. CONST. art. XI, § 1.

North Carolina

"Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means or education shall forever be encouraged." N.C. CONST. art. IX, § 1.

"The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools." N.C. CONST. art. IX, § 2.

North Dakota

"A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools." N.D. CONST. art. VIII, § 1.

Ohio

"The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state." OHIO CONST. art. VI, § 2.

Oklahoma

"The Legislature shall establish and maintain a system of free public schools." OKLA. CONST. art. XIII, § 1.

Oregon

"The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools." OR. CONST. art. VIII, § 3.

Pennsylvania

"The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education." PA. CONST. art. III, § 14.

Rhode Island

"The diffusion of knowledge, as well as of virtue, among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools, and to adopt all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education." R.I. CONST. art. XII, § 1.

South Carolina

"The General Assembly shall provide for the maintenance and support of a system of free public schools." S.C. CONST. art. XI, § 3.

South Dakota

"The stability of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools . . . and to adopt all suitable means to secure to the people the advantages and opportunities of education." S.D. CONST. art. VIII, § 1.

Tennessee

"The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools." TENN. CONST. art. XI, § 12.

Texas

"A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." TEX. CONST. art. VII, § 1.

Utah

"The Legislature shall provide for the establishment and maintenance of a uniform system of public schools." UTAH CONST. art. X, § 1.

Vermont

"Laws for the encouragement of virtue and prevention of vice and immorality, ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the General Assembly permits other provisions for the convenient instruction of youth." VT. CONST. § 68.

Virginia

"The General Assembly shall provide for a system of free public elementary and secondary schools . . . and shall seek to ensure that an educational program of high quality is established and continually maintained." VA. CONST. art. VIII, § 1.

Washington

"It is the paramount duty of the state to make ample provision for the education of the children residing within its borders without distinction or preference on account of race, color, caste, or sex." WASH. CONST. art. IX, § 1.

"The legislature shall provide for a general and uniform system of public schools." WASH. CONST. art. IX, § 2.

West Virginia

"The Legislature shall provide, by general law, for a thorough and efficient system of free schools." W. VA. CONST. art. XII, § 1.

Wisconsin

"The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable." WIS. CONST. art. X, § 3.

Wyoming

"The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction." WYO. CONST. art. VII, § 1.