2004

Constitutional Challenges to State Education Finance Distribution Formulas: Moving From Equity to Adequacy

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CONSTITUTIONAL CHALLENGES TO STATE EDUCATION
FINANCE DISTRIBUTION FORMULAS:
MOVING FROM EQUITY TO ADEQUACY

R. CRAIG WOOD*

I. INTRODUCTION

There has been an intense struggle concerning fiscal resources involving public elementary and secondary education for many years. There are at least six concepts that render powerless any hesitancy concerning the importance of financial resources and public elementary and secondary education.1 The first concept is that public elementary and secondary schools indeed distribute economic and social opportunities in a nation fueled by competitiveness. The second concept is that these opportunities depend in large measure on the quality of the public elementary and secondary schools these children attend. The third concept is that despite a lack of strong productivity equations, school quality is heavily conditioned by fiscal resources that are purchased with money. The fourth concept is that absent ability to purchase these inputs, public elementary and secondary education must fail because altruism is not a sufficient offsetting condition within our society. The fifth concept is that people who argue for the irrelevance of money still prefer a larger share. The sixth concept is that until money is irrefutably shown to make no difference, its effect must be presumed from the behavior of wealthy individuals who choose wealthy communities with high expenditure school districts for their children.

While education finance as a discipline has only emerged since the early 1900s, issues of taxation have been at the forefront of thought since the early days of the nation, and it is only a small step to move the financing of public education into that stream of political and legal activity.2 This is especially true when the wider implications of education finance are considered, such as equality of educational opportunity as it relates to matters of discrimination.

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1. This following portion borrows extensively from R.C. WOOD & D.C. THOMPSON, FINANCING PUBLIC AND PRIVATE EDUCATION (forthcoming 2004).
and opportunity. The study of education finance litigation is actually the study of the litigation of state aid distribution formulas and the results of those formulas in terms of the expenditure and revenue patterns to school districts.3

At the federal level, litigation has focused on the Federal Constitution in the context of interpreting the limits of federal responsibility to embrace education and on any guarantees construed in the Constitution. At the state level, litigation has been focused on the constitutional, as well as statutory, provisions of the individual states. At both levels, these questions have been complex and difficult. Within this legal environment is the constant issue of whether the parties have been able to prove their arguments and statements via sound methodological research and data in terms of acceptable education finance statistics and research design. In these instances litigants have sought to determine the meaning and extent of equal opportunity and to test the strength and limits of constitutional and statutory language. The challenges to education finance distribution formulas have traditionally centered on three strategies: education as a fundamental right, the equal protection of the laws, and the education articles of the individual state constitutions. Historically, education finance litigation has focused its efforts on issues of equality and opportunity. Recently, more cases have addressed the adequacy of education finance distribution formulas in terms of meeting state constitutional and statutory guidelines.

II. FEDERAL ROOTS

Legal struggles concerning the financing of public education are longstanding. Litigation has raised both federal and state questions based on particular strategies aimed at various features of federal and state laws as well as the applicable state constitutional clauses.4

While no federal school finance lawsuits existed before the mid-twentieth century,5 the foundations were laid by American preoccupation with equality and supported by a series of broader issues with education finance overtones that would only later become apparent. The Fourteenth Amendment’s equality provisions led to three litigation strands that were to have a powerful impact concerning education finance.6 The first strand was a series of lawsuits under the concept of desegregation, in which enforcement of equality before the law for all persons was sought.7 The second strand was a series of cases known as

3. For a thorough discussion of education finance litigation, see id.
4. See id.
5. For the earliest known federal school finance lawsuit, see Pitts v. Bd. of Trustees, 84 F. Supp. 975 (E.D. Ark 1949).
7. The history of racial equality is too complex to fully describe herein. In an educational context, it is obvious that Brown v. Bd. of Educ., 374 U.S. 483 (1954), was the most critical.
the reapportionment decisions, establishing the principle of “one man, one vote.” The third strand emerged from lawsuits that became known as the indigent defendants and administration of criminal justice cases. These cases established that defendants may not be denied the right of appeal simply because of inability to pay for a transcript of trial proceedings as such denial is tantamount to wealth discrimination. Although seemingly unrelated to education finance, these strands were to lay a framework for equal protection in resource distribution.

Desegregation cases were obvious for the eventual impact on public schools. Desegregation cases were fervently contested for many years, with great overtones for the costs and structure of public elementary and secondary education. The question of whether differential wealth, under certain circumstances, could be a barrier to equality under the law began to emerge over time. If this were true, an entirely new meaning of equality would be formed.

These strands were actually the expression and extension of judicial sympathy to a fairly liberal construction of the meaning of equality that had already resulted in the establishment of certain fundamental rights under the law. In addition to the rights and liberties specifically guaranteed by the Federal Constitution, the U.S. Supreme Court had at various times enumerated several other rights which it found to be so fundamental that these rights could not be abridged or denied except by the most exacting due process of law. Several of these rights were established in the cases that formed the three


8. These cases are also multiple and meaningful. See Baker v. Carr, 369 U.S. 186 (1962) (holding that accidents of geography and arbitrary boundaries of governments may not be a basis for discrimination among otherwise equal citizens, in this instance forbidding the requirement that one must pay property taxes in order to vote). See also Davis v. Mann, 377 U.S. 678 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 276 U.S. 1 (1964); Gray v. Sanders, 372 U.S. 368 (1963).


10. These cases are also multiple and far ranging. See, e.g., Lubin v. Panish, 415 U.S. 709 (1974) (a filing fee as prerequisite to the right to vote is wealth discrimination); Shapiro v. Thompson, 394 U.S. 618 (1969) (a law against bringing indigents into a state violated the right to interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (a state poll tax was wealth discrimination); Griffin v. Illinois, 351 U.S. 12 (1956) (denying an indigent defendant a transcript of trial for appeal was wealth discrimination).


12. See WOOD & THOMPSON, supra note 2, at 58.
strands of litigation; the Court had found fundamental rights to interstate travel, procreation, voting, and the right to criminal appeal. The essence of fundamental rights, however many or few, is to assure the equality of each citizen so that arbitrary abridgment of certain freedoms could never be countenanced in a democratic nation.

The effect of the Fourteenth Amendment’s nondiscrimination clause was to entrust two distinct lines of litigation. The first line resulted from unequal treatment of a suspect class. As defined by the courts, various conditions might lead to the establishment of a suspect class where “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” Subsequent litigation created suspect classes for race, national origin, and alienage, with special empathy for other sensitive constitutional concerns. This first line of litigation drew its basis from illegitimate differential treatment on the basis of immutability whereby people were discriminated against for characteristics they could not change. The second line of litigation resulted from abridgment of some fundamental right. This second line drew justification from constitutional provisions or, alternatively, whether the Supreme Court would construe a new fundamental right for reasons of its own.

The concepts of suspect class and fundamental rights were vitally important to equal protection litigation because if courts were persuaded that a fundamental right was violated or a suspect class was discriminated against, courts would evaluate an act or a law with searching scrutiny. Race was clearly immutable, and an alleged violation of the rights of a member of this suspect class would trigger an exacting analysis under anti-discrimination equal protection laws; similarly, abridgment of a fundamental right would trigger the same sharp scrutiny. Under these conditions, establishing the characteristics of suspect classes and increasing the number of suspect classes became paramount to successful Equal Protection Clause challenges. The second line of litigation was equally critical, in that any right declared to be fundamental would demand strict scrutiny under the law. These key concepts were thus the first strategy of Equal Protection Clause analysis,

because if a violation of a fundamental right was shown or if a suspect class was established, then the burden of proof would shift to the defendant, i.e., the state, to show a compelling interest in the law. This test of strict scrutiny became the sought-after judicial standard, as the only other standard, rational basis, would require only some sensible reason to allow a law to stand.

As Phillip Kurland has noted, the concepts derived from these three broader strands were quickly applied to education, wherein litigants launched concerted efforts to establish suspect classes and fundamentality in education. Although the origins of equality in American law are more complex than briefly stated within this article, these strands illustrate why it was ultimately sensible in a historical context to first bring lawsuits involving public elementary and secondary education at the federal level. Regardless of whether the topic was race discrimination or fiscal resources, the goal of any such lawsuit would be to seek federal protection, wherein inequality would be alleged and from which it would be claimed that equal educational opportunity was denied. Thus, from a simple hierarchical perspective, if education was found in some way to merit the protections of the Fourteenth Amendment, especially in areas where abridgment would be severely proscribed, new federal law would be written which would also be controlling on the states. The first alternative required a ruling that education was a fundamental right. Failing this, the only other alternative was to establish a protected class against whom illegitimate discrimination in education could be shown.

Winning a federal lawsuit was thus critical. If the broader cases could be analogized to education, their successful application meant the establishment of constitutional protections in a totally new arena. If neither a fundamental right nor a suspect class was established, failure was assured because the doctrine of limited federal powers given the Tenth Amendment’s silence regarding education would release the coveted claims of federal protection; failure of a federal case meant that equality of educational opportunity would either be lost or turned to the states without the power of the Federal Constitution. Thus, from a historical perspective, the thinking of the early education finance scholars was clear, if not flawed in the reality of the overwhelming complexity of the question.


19. See, e.g., Hodel v. Indiana, 452 U.S. 314, 331 (1981) (reasoning that social legislation that does not impinge upon fundamental rights must be upheld against an equal protection challenge when the legislative means are rationally related to a legitimate governmental purpose).

20. Kurland, supra note 6, at 584-87.

21. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.
III. THE FEDERAL RESPONSE

Although federal litigation regarding racial equality spanned many decades,\(^\text{22}\) it was in the 1954 *Brown v. Board of Education*\(^\text{23}\) decision when equality of educational opportunity under the law received its greatest impetus. In an often-quoted passage the Court proclaimed:

\[
\ldots \text{E}ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms.\(^\text{24}\)
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Invoking the Equal Protection Clause of the Fourteenth Amendment, *Brown* spoke strongly to the value of education, calling it one of the most important functions of government and noting its central role to preservation of literate and free people.\(^\text{25}\) The Supreme Court in *Brown* declared that education was a right that must be made available on equal terms.\(^\text{26}\) Thus, *Brown* opened a new era of justice from which a whole field of civil and educational rights litigation would occupy the nation’s court system for several decades.

It could be argued that if the Court’s apparent mandate in *Brown* were to be satisfied fully, educational opportunity would have strong application to fiscal resources as uneven revenues are at the root of most other forms of inequality. Although it had not been a simple matter to force condemnation of racial inequality, at least there had been a long record of discrimination lawsuits against which concepts and theories could be empirically tested. In education finance inequality there was no rich history on which to rely. The question first became one of a conceptual nature, rather than a formal legal standard, from which litigants would be forced to argue. The only other alternative was to analogize to the strands cited earlier, supported by the strong

\(^\text{22}\) Litigation regarding this issue is longstanding; e.g., a Massachusetts court in 1850 addressed school segregation under Massachusetts’s 1780 equality statute. Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1850).


\(^\text{24}\) *Id.* at 493.

\(^\text{25}\) *Id.*

\(^\text{26}\) *Id.*
language of Brown. By the 1960s, plaintiffs had formulated arguments and were ready to file actions before the federal courts.

The first strand of unequal treatment under the law seemed well established in Brown because schoolchildren must be provided equal opportunity. The second strand also seemed viable because it was reasonable to draw an equal protection analogy to geographic discrimination, as it was widely known that educational opportunity varied greatly based on residence. The third strand also seemed applicable, as there was sufficient case law to argue that wealth may not serve to bar equality under the law. Of particular support to the latter theory was the belief that school district wealth could be the basis of wealth discrimination, i.e., leading to establishment of a new suspect class. In plaintiffs’ minds, wealth suspectness was grounded in case law, and it was simply a matter of transferring the Brown logic condemning racial inequality to fiscal inequality. Plaintiffs relied on the fact that the Supreme Court had long ago stated in United States v. Carolene Products that “[p]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily . . . relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”27 In addition, there were the voting rights and criminal appeals cases, cited earlier, in which the Court had held that classifications based on wealth were to be strictly scrutinized.28

These conditions seemed ripe for a federal decision extending equality of educational opportunity to include fiscal equality. The first suit to be filed was Burruss v. Wilkerson, brought in Virginia in 1968.29 The plaintiffs in Burruss based their claims on the Fourteenth Amendment, arguing that inequality in the school division’s (district’s) physical and instructional facilities resulted in a lack of equal protection of the law because the quality varied among school divisions.30 The three-judge United States District Court panel which heard oral arguments rendered a decision in May 1969, stating that while

The existence of such deficiencies and differences is forcefully put by plaintiffs’ counsel . . . we do not believe they are creatures of discrimination by the State . . . our reexamination of the Act confirms that the cities and counties receive State funds under a uniform and consistent plan . . . we can only see to it that the outlays on one group are not invidiously greater or less than that of another . . . no such arbitrariness is manifest here.31

28. See, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). This logic was especially supported as the Court had stated in Harper, in ruling against a poll tax, that “[l]ines drawn on the basis of wealth or property, like those of race, are disfavored.” Harper, 383 U.S. at 668.
30. Id. at 573.
31. Id. at 574.
The court added that although

plaintiffs seek to obtain allocations of State funds among the cities and

counties so that the pupil in each of them will enjoy the same educational

opportunities . . . , the courts have neither the knowledge, nor means, nor the

power to tailor the public monies to fit the varying needs of these students

throughout the state.32

A second federal case, McInnis v. Shapiro, was decided in Illinois in the

same year.33 Heard in United States District Court and affirmed by the U.S.

Supreme Court under the name McInnis v. Ogilvie,34 McInnis was also a

Fourteenth Amendment equal protection suit seeking to overturn the state

education funding formula on the grounds that unequal educational

expenditures based on variable property values as tax rates of local districts

were arbitrary and an unreasonable denial of equal protection of the law.35 The

Court ruled for the defendant state.36 The Court noted several features that

were to become summative of the federal position in school finance litigation.

While the Court acknowledged wide variations in expenditures per pupil based

on wealth, the Court stated its vulnerability before the question in three

respects.37 First, variations in revenue were not on the face invidious and

arbitrary.38 Second, the legislature’s decision to allow local choice and

experimentation was reasonable, particularly because the common school fund

placed, at that time, a $400 minimum base under each student.39 Third, the

Court ruled that there was no constitutional requirement establishing rigid

guidelines for equal dollar expenditures under the Fourteenth Amendment’s

Equal Protection Clause provisions.40 And fourth, the Court was clear in

stating that allocation of revenue was a policy decision better suited to

legislatures.41

In both instances federal courts had uniformly refused to intervene on three

importantly consistent grounds. The first rationale was a plain reading of the

Fourteenth Amendment, noting no equal protection mandate for unequal

revenues.42 The second rationale was equally important, as the court deferred

to the legislative branch by relying on the separation of powers doctrine in the

32. Id.
35. Id. at 328-29.
36. Id. at 336-37.
37. Id. at 331.
38. Id. at 332.
40. Id. at 335-36.
41. Id. at 336-37.
42. Burruss, 310 F. Supp. at 574; McInnis, 293 F. Supp. at 336.
The absence of blatant invidious discrimination. The third rationale applied to the court’s bewilderment as it noted its lack of judicially manageable standards, even if it were to rule for plaintiffs. Equality, then, to the federal court was a negative standard, in that no affirmative duty was owed by the state to each child for resource equality; rather, the absence of something was not the same as invidious denial of that object.

The final federal issues were determined by the U.S. Supreme Court in *San Antonio Independent School District v. Rodriguez*. The case had actually been filed in 1968, and a three-judge panel had rendered a decision in 1971 holding the Texas system of school finance unconstitutional under the Fourteenth Amendment. The case was then accepted on appeal by the United States Supreme Court. The plaintiffs argued key points taken from earlier successful, but broader litigation. The plaintiffs contended that the Texas funding system violated the federal Equal Protection Clause by discriminating against a class of poor and that students were denied their right to an education. Plaintiffs were actually arguing for wealth as a suspect class and for fundamentality at the highest level in an all-out effort to force strict judicial scrutiny.

The Supreme Court, however, refused to accept plaintiffs’ arguments as it found no class of persons who were identifiably suspect. The plaintiffs argued that that the injured class should be comprised of all students living in poor school districts, rather than poor students themselves. Justice Powell, writing for the majority, noted that wealth discrimination in prior cases had historically been confined by the Court to personal wealth and that the class in *Rodriguez* was not one for which special protection is usually provided; i.e., it was neither politically powerless, discrete, or an insular minority. The Court further noted that individual income did not necessarily correlate with district wealth and that even if the correlation were strong, the Court’s historic application of wealth discrimination under strict scrutiny had been limited to absolute deprivation rather than relative differences. Under these conditions,
the Court found no distinct suspect class and held that because no student was absolutely deprived of an education, fiscal inequalities were of only relative difference and not entitled to wealth suspectness.  

The Court in *Rodriguez* then turned to plaintiffs’ claims for fundamentality, again refusing to accept their arguments.  

Plaintiffs had recognized the difficulty of this argument and had based their claims on the relationship of education to other extant fundamental rights in an effort to establish a clear nexus. In this concept, public education was inextricably tied to other existing fundamental rights wherein the intelligent exercise of the right to vote and the right to free speech were said to depend on education. The Supreme Court refused these arguments, however, stating that it saw no more connection between public education and these rights than it could find between housing, food, or other subsistence and the right to vote. The Supreme Court especially noted a difference between hindering a child from a public education and the state education finance distribution formula that, in its view, instead sought to improve available offerings. Although the Supreme Court noted wide disparities among Texas school districts, it rejected the standard of strict scrutiny, stating that a rational relationship was all that was required to defend a state distribution formula where no invidious discrimination could be found. In *Rodriguez*, a rational basis could be found in the state’s goal of promoting local control of schools — a view supported by the Supreme Court’s own words:

> Education, perhaps even more than welfare, presents a myriad of intractable economic, social, and even philosophical problems. The very complexity of the problems of financing and managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them, and that, within the limits of rationality, the legislature’s efforts to tackle the problems should be entitled to respect.

The concept, as expressed in *Rodriguez*, was rejected by the U.S. Supreme Court. Contrary to *Brown*, there was apparently no fundamental right, no
suspect class, and no equal protection for education except in cases of total educational deprivation or in the established instances of invidious discrimination such as race. It appeared from Rodriguez that little equality of educational opportunity could be gained apart from race, as the Supreme Court had sanctioned legislative prerogative and declared judicially unmanageable standards, while unwilling to go beyond the historically narrow application of the race relations.

The Supreme Court ruling in Rodriguez had one primary effect concerning education finance litigation. The effect was to turn litigants’ attention to the state courts.

IV. THE POST-RODRIGUEZ AFTERMATH

Although Rodriguez dictated that legal challenges to education finance distribution formulas would have to originate in the states, there were three other federal cases coming after Rodriguez. In Papasan v. Allain, plaintiff school districts in Mississippi argued for a violation of the federal Equal Protection Clause in revenue differences based on Section 16 land income lost during the War Between the States. Although the state of Mississippi had provided aid to help offset those losses, by 1981 state funds were only $0.63 per pupil compared to $75.34 per pupil in districts whose lands had not been lost. Originally dismissed in federal district court, the Fifth Circuit Court of Appeals held that equal protection would not be barred by the Eleventh Amendment but also held that Rodriguez was the controlling standard on disparate funding. The U.S. Supreme Court upheld the immunity decision but reversed on the equal protection issue, and it remanded the case for development because the countenance of discrimination absent a legitimate state interest was sufficient to state a cause of action.

Papasan is thus important for what it stated and for what it failed to state. The complaint did not raise the issue of fundamentality, so that the federal court dealt only with a narrow legal question. In addition,

63. Papasan v. Allain, 478 U.S. 265, 274 (1986). “Section Sixteen” lands were first introduced by the Land Ordinance of 1785. The ordinance provided for the survey and sale of the Northwest Territory and “reserved the lot No. 16, of every township, for the maintenance of public schools within the said township . . .” Id. at 268 (citing 1 Laws of the United States (1815)). In Mississippi, these lands “constitute property held in trust for the benefit of the public schools and must be treated as such.” MISS. CODE. ANN. § 29-3-1.

64. Papasan, 478 U.S. at 273.

65. Amendment XI to the United States Constitution reads “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.” U.S. CONST. amend. XI.

66. Papasan, 478 U.S. at 281-82.

67. Id. at 282.
a glimmer of federal interest in education finance was seen on remand, as the court noted that unreasonable government action would be scrutinized.68

The second important federal case after Rodriguez was also from Texas, as the Supreme Court ruled in Plyler v. Doe that refusal by a state to educate undocumented school-aged children involved an area of special sensitivity that would merit constitutional pleas of equal protection.69 While the Court in Plyler stopped short of declaring education a fundamental right, it stated a higher level of scrutiny and interest in cases of educational deprivation, utilizing language that seemed less closed to fundamentality under such conditions. The Plyler majority stated that while its ruling in Rodriguez remained intact, it was deeply concerned that education was more than a mere service and convenience to citizens.70 The Supreme Court stated:

Education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills on which our social order rests.71

The third and final important federal case occurred in 1988 in Kadrmas v. Dickinson Public Schools.72 In Kadrmas, the plaintiffs had argued that charging for school bus service was, in fact, denial of equal protection because the plaintiff child was wealth-disadvantaged.73 Although the Court found for the defendant state, its five to four vote was sharply divided and indicative of the constantly unsettled nature of a federal claim involving education and further noted in strong language that there are variances and exceptions that preclude absolutism in interpreting Rodriguez.74 Kadrmas stands as the most recent proof of this indeterminateness, as the dissenting opinion sharply stated:

The Court therefore does not address the question whether a state constitutionally could deny a child access to a minimally adequate education. In prior cases this court explicitly has left open the question whether such a

68. Although only four federal cases are discussed herein, there were actually five such cases, as in 1987 plaintiffs in Livingston v. Louisiana State Bd. of Elementary and Secondary Educ. claimed equal protection, arguing that the state aid plan was arbitrary and discriminated against school districts with large homestead exemptions. Livingston v. Louisiana State Bd. of Elem. and Secondary Educ., 830 F.2d 563, 568 (5th Cir. 1987). This case is only included as a note because like Papasan, it was narrowly drawn and did not claim inadequate education or a fundamental right.


70. See id. at 221.

71. Id.


74. See generally id.
deprivation of access would violate a fundamental constitutional right. That question remains open today.75

From these challenges, several observations may be stated. First, it can be gathered that the Supreme Court is sympathetic to the problems of judicially manageable standards. Second, the Supreme Court is quick to uphold legislative prerogative. Third, the Supreme Court is reluctant to declare education a fundamental right, and any reversal is not likely to occur lightly. Fourth, the Supreme Court is not yet willing to create new suspect classifications. Fifth, in the case of education, the Supreme Court has narrowly interpreted equal protection to mean racial equality or, alternatively, to mean absolute deprivation which has fiscal overtones. Sixth, Rodriguez has been the controlling precedent in subsequent litigation, and the Supreme Court itself has utilized Rodriguez to reject further assaults on a federal educational right. But seventh, all assaults following Rodriguez have been narrowly drawn, and it is clear the Supreme Court holds an undefined interest in education that may eventually emerge. Future federal cases will depend on changes in the Supreme Court’s make-up. But it is finally clear that no firm federal case yet exists — a reality that has in fact effectively turned most traditionally pure education finance litigation to the state courts for adjudication.

A. State Court Tests

Legal struggles concerning the financing of public schools have occurred for more than 100 years. The perception of recency concerning education finance litigation is particularly misguided. Federal claims beginning in 1968 lend the appearance that education finance litigation is only a modern phenomenon. The intensive state-level reform following the failed federal test in Rodriguez has confirmed the impression of recency. But while a lengthy history of education finance litigation could be drawn,76 it is more instructive in the modern context to examine the state court test in the post-Rodriguez light because these events have had the greatest impact in shaping current education finance constitutional challenges.

75. Id. at 466 n.1 (Marshall, J., dissenting) (internal citations omitted).
76. School finance litigation could be readily traced into the Nineteenth Century, where complex roots of other issues impacting education finance can be understood; e.g., school finance-related litigation can be seen in Stuart v. Sch. Dist. of the Vill. of Kalamazoo, 30 Mich. 69, 70 (1874), where a court determined the power to lay and collect taxes for the support of secondary schools. See also Morton Salt Co. v. City of South Hutchinson, 177 F.2d 889, 892 (10th Cir. 1949) (court noted that no direct benefit need accrue to taxpayers if the taxes were uniform and for public purposes benefiting the entire public); Lewis v. Mosley, 204 So. 2d 197, 201 (Fla. 1967) (court ruled that laws providing for taxation must be construed in favor of the taxpayer when questions of court discretion arise); Sawyer v. Gilmore, 83 A. 673 (Me. 1912) (court enunciated the Rodriguez-like principle of legislative discretion in the manner and amount of tax distributions to schools).
B. The State Response

There has been considerable overlap in the chronology of federal and state lawsuits, as well as the issues framing the various challenges to unequal fiscal resources. Chronological overlap occurred as lawsuits were brought in both federal and state courts in the early days of reform. *Burruss*, *McInnis*, and *Rodriguez* were brought in federal court under Fourteenth Amendment claims in the 1960s, but *Serrano* had previously been decided at the California State Supreme Court level before the United States Supreme Court finally reached its ruling in *Rodriguez* in 1973. Overlap of issues occurred in like form, as the federal cases obviously addressed federal equal protection and as state cases such as *Serrano* also commonly brought both federal and state constitutional claims. There are no lines of demarcation as might be implied from the earlier federal discussion; however, state litigation has become the standard fare in the post-*Rodriguez* era.

The state test is usually marked with the historic ruling of the California Supreme Court in *Serrano v. Priest*. Destined to become the classic model for state education finance litigation, the plaintiffs charged that the state financial aid distribution formula for public school districts violated the federal and state constitutions’ guarantees of equal protection. Inherent within these allegations were concepts of fundamentality, wealth suspectness, and equal protection under the state constitution to which reformers had earlier pinned their hopes in the failed federal test. The complaint thus set three causes of action. First, the plaintiffs alleged that as a direct result of the state distribution formula for schools, substantial disparities existed in the quality and extent of educational opportunities. Second, the plaintiffs alleged that as a result of such an education finance distribution formula, they were likewise required to pay higher tax rates in order to obtain the same or lesser educational opportunity. Third, the plaintiffs alleged that these realities worked jointly to deny children the equal protection of the laws, to deny them their fundamental rights to education, and to make the quality of education a function of residence such that quality varied in response to local district wealth. Given


79. *Id.* at 1244, 1249.

80. *Id.* at 1249-50, 1255.

81. *Id.* at 1244.

82. *Id.* at 1245.

83. *Serrano*, 487 P.2d at 1245.
these causes, the plaintiffs in *Serrano* sought to invalidate the state aid distribution formula under the federal and state constitutions. The California Supreme Court found for the plaintiffs on every cause. The court provided numerous condemning statements concerning unequal educational opportunity. In establishing the facts, the state supreme court first noted that the root of the disparity was unmistakable, in that aid was insufficient to offset the widely disparate assessed valuation per pupil in Baldwin Park of $3,706, as compared to Beverly Hills’ valuation of $50,885 per pupil, a ratio of 1:13. Second, the state supreme court noted that state aid actually widened the gap between rich and poor school districts, as aid was distributed irrespective of wealth so that rich and poor districts alike were aided by the state. Third, the court noted that such aid was effectively meaningless to poor districts. In its ruling regarding wealth suspectness, the state supreme court rejected the state’s traditional claim that suspectness lay only with individual wealth, stating that:

To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of such property is to make the quality of a child’s education dependent upon the location of private commercial and industrial establishments, surely, this is to rely on the most irrelevant of factors as the basis for educational financing.

The court further stated, “we reject defendants’ underlying thesis that classification by wealth is constitutional so long as the wealth is that of the district, not the individual. We think that discrimination on the basis of district wealth is equally invalid.”

Similarly, in ruling for fundamentality, the California Supreme Court turned to both law and logic to justify its position. The court stated that education in a modern industrial state was indispensable and noted that education had two major distinguishing attributes that qualified it as a fundamental right. First, the court stated that education was a “major determinant of an individual’s chances for economic and social success in our competitive society.” Second, the court noted that education was a unique influence on the development of citizens and their place in political and

84. *Id.*
85. *Id.* at 1244.
86. *Id.* at 1244, 1255-59.
87. *Id.* at 1248.
89. *Id.*
90. *Id.* at 1252-53.
91. *Id.* at 1252.
92. *Id.* at 1255.
community life.94 The court then turned to its own thinking and the California State Constitution in declaring fundamentality. In comparing education to other fundamental rights, the Justices stated “[w]e think that from a larger perspective, education may have far greater social significance than a free transcript or a court-appointed lawyer.”95 The court then considered the education article of the California State Constitution,96 declaring fundamentality on five bases. First, education was essential to free enterprise democracy.97 Second, education was universally relevant.98 Third, unlike other government services, public education continued for a lengthy period of time.99 Fourth, education was unmatched in molding youth and society.100 And fifth, education was so important that the state had made it compulsory.101 The state supreme court then ruled that the plaintiffs were entitled to strict scrutiny review of equal protection and that the federal and state equal protection clauses were both impermissibly violated.102

Although Rodriguez would later invalidate the federal claims in Serrano, the case was powerful and decisive for education finance reform across the nation. First, Serrano proved that the meaning of equal educational opportunity could be so broadly sweeping as to include education finance. Second, Serrano proved that states could be vulnerable to constitutional attack, even though the federal courts had been unassailable. Third, under state provisions Serrano successfully established all three claims of fundamentality, wealth suspectness, and equal protection. Fourth, Serrano had an immediate and profound effect, sparking dramatic reform of state aid distribution formulas in many states. Finally, Serrano compelled the flurry of reform both through legal standards and by the court’s view on how inequity might be redressed. Serrano proposed several alternatives, including full state funding and statewide taxation.

The impact of Serrano was accelerated by the New Jersey Superior Court’s 1972 decision of Robinson v. Cahill.103 The plaintiffs had alleged that the state education finance distribution formula violated federal and state equal

94. Id. at 1256.
95. Id. at 1258.
96. Article IX of the California Constitution states: “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.
98. Id. at 1259.
99. Id.
100. Id.
101. Id.
102. Serrano, 487 P.2d at 1259, 1263.
protection laws and the fundamental right to an education, in that tax revenues varied greatly by school district wealth and were inadequately unequalized by the state of New Jersey.\(^\text{104}\) According to the plaintiffs, there existed a state denial of equal educational opportunity and equal protection by making the quality of education dependent on the wealth of each local school district.\(^\text{105}\) The plaintiffs argued that New Jersey had abrogated its responsibility to public elementary and secondary education because the state statutes were not equal in effect on all citizens, as equal tax effort did not produce equal tax yield, despite the fact that state aid provided approximately 28 percent of all school district revenues.\(^\text{106}\) The trial court agreed in principle, and the case was taken on appeal by the state supreme court.\(^\text{107}\)

The 1973 New Jersey Supreme Court ruling, which came after \textit{Rodriguez}, was notable for many important reasons. First, the New Jersey Supreme Court refused to rule for fundamentality, perceptively noting a profound hesitancy in \textit{Rodriguez} that had been overlooked by plaintiffs.\(^\text{108}\) The United States Supreme Court had said that:

\begin{quote}
Every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system . . . [i]t would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.\(^\text{109}\)
\end{quote}

Second, the New Jersey Supreme Court noted that the United States Supreme Court had never cited \textit{Brown} as a case involving the fundamental right concept, stating that \textit{Brown} would point the opposite direction because it declared education to be a most important function of state and local governments.\(^\text{110}\) Third, the New Jersey Supreme Court refused to find wealth to be a suspect class, noting that “if this is held to constitute classification according to ‘wealth’, and therefore ‘suspect’, our political structure will be fundamentally changed.”\(^\text{111}\) Under these conditions, the court could find no basis for fundamentality or federal Equal Protection Clause violations.\(^\text{112}\) But critical to reform, the New Jersey Supreme Court nonetheless ruled the state system unconstitutional by invoking the education article of the state

\begin{itemize}
  \item \textit{Id.} at 214.
  \item \textit{Id.} at 213-14.
  \item \textit{Robinson}, 303 A.2d at 276-77, 279, 296.
  \item \textit{Id.} at 276.
  \item \textit{Id.} at 281-82.
  \item \textit{Robinson}, 303 A.2d at 284.
  \item \textit{Id.} at 283.
  \item \textit{Id.} at 279-80.
\end{itemize}
constitution that demanded a “thorough and efficient” system of education.113 A requirement that was not met due to a lack of equalization in revenues and thus a violation of the state’s equal protection clause.114

Robinson was of equal or greater significance than either Serrano or Rodriguez. As the first test to follow the federal debacle in Rodriguez, Robinson was proof that plaintiffs could potentially prevail at the state level. While a ruling for fundamentality and suspectness would have strengthened reform, critics were overlooking an enormous legal lever, in that Robinson showed that education finance litigation did not necessarily have to turn on fundamentality. Robinson found no need to rely on tenuous Brown analogies. The genuine effect of Robinson was not in its failure to establish coveted claims, but rather in prevailing solely on the education article of the state constitution. Robinson thereby opened the possibility of technical examination of state aid distribution formulas with analysis centered on whether they worked sufficiently well so as to not deny equal protection of state laws. In sum, Robinson greatly aided reform by helping to move from high-risk litigation strategies that depended too heavily on ephemeral constitutional analysis.

The ruling of the Robinson Court revealed the third approach of an emerging school finance litigation strategy.115 Although the federal case had failed, Serrano and Robinson taken together indicated that plaintiffs could still bring claims for equal protection and fundamentality wherein an adverse federal ruling on the fundamentality would not negatively affect equal protection claims under interpretation of the education clause of individual state constitutions. Since the Tenth Amendment had cast educational responsibility to the states, this strategy would apply universally, because all states had included some statement in their respective constitutions concerning education. The fundamentality claim, while not equally universal, should always be made, as it might succeed in some states. The strategy thus shifted to multiple prongs with sub-parts. The first prong of any challenge to a state aid distribution formula would direct the assault toward state courts. The second prong would seek relief under both federal and state provisions for equal protection. The third prong would seek a ruling for fundamentality in hopes of securing strict scrutiny review. The fourth prong would challenge the education finance distribution formula under analysis of the education articles, wherein chances for success could depend upon the courts’ analysis of the state

113. Id. at 294-95, 297.
114. Id. at 276-77, 295, 297.
constitutional framers’ intent, the inclinations of each state court, persuasive litigation from other states, and the strength of the language of the state education article itself. In this manner, a rational basis test might also be sufficient to win.

The decisions and strategies derived from Rodriguez, Serrano, and Robinson have provided a legacy of intense litigation in most of the states. Since 1971, state aid plans have been held unconstitutional at the state supreme court level in a number of states. These states have spurred the hopes of reformers, as each instance has provided another opportunity for determining the elements of successful state constitutional analysis. However, these strategies have not always rendered plaintiffs victorious, as state courts have reached different conclusions when confronted with the unique provisions of each state’s statutes. It has been suggested that in order for either the plaintiffs or the state to win, a party must have an overall strategy of an outstanding legal team, an outstanding team of education finance experts, and a thorough understanding of the education finance research.

While litigation has succeeded in many states, education finance distribution formulas have also been upheld in other states where courts have found for the defendant state. State education finance distribution formulas have been challenged at various times and with various results.


Several states have ruled that portions of the state education finance distribution formula were unconstitutional, i.e., the distribution of capital outlay financial assistance in Idaho119 and the methodology of funding classes for English language learners in Arizona.120 Several state supreme courts have issued rulings which have overruled a previous state supreme court decision and thereby changed the state education finance distribution formula. These include Arizona, North Carolina, South Carolina, Ohio, and Texas.121

From this overall litigation, significant features have emerged. First, the supreme courts in a number of states have declared that education is a fundamental right based on the state constitution.122 Second, based on the state constitution, there are many states in which the highest court has declared that education is not a fundamental right.123 Third, due to strict scrutiny sometimes being applicable, there has been no perfect pattern in which establishing fundamentality has automatically invalidated a state finance distribution formula by virtue of invoking coveted strict scrutiny. For example, the Arizona Supreme Court found that education was a fundamental right but nonetheless ruled for the state in Shofstall v. Hollins in 1973.124 Similarly, the Wisconsin court declared in Buse v. Smith that education was a fundamental right125 but later noted in Kukor that a rational basis was all that was required to uphold the state aid distribution formula when absolute denial of education

122. Scott, 443 S.E.2d at 142; Buse v. Smith, 247 N.W.2d 141, 155 (Wis. 1976); Shofstall, 515 P.2d at 592.
123. McDaniel, 285 S.E.2d at 167; Thompson, 537 P.2d at 647; Lujan, 649 P.2d at 1018.
125. Buse, 247 N.W.2d at 149.
Fourth, the harshness of this reality has been somewhat softened by the logic of *Robinson*, as several state supreme courts have ruled for plaintiffs by finding equality a requirement, even absent the one feature of fundamentality that would invoke strict scrutiny analysis. Only one state other than California has declared wealth a suspect class, when the Wyoming Supreme Court in *Washakie* invalidated its education finance distribution formula, establishing that no equality could exist until funding was also equal.

V. RECENT ADEQUACY LAWSUITS

In recent years an additional movement has emerged in challenging the state finance distribution formulas. That is, the plaintiffs argue that the state aid distribution formula is fiscally inadequate. Thus, it is argued that the state aid distribution formula fails the state constitutional mandate and the applicable statutory mandates for an education that meets minimal standards. A few of these suits have emerged after the applicable state supreme court has ruled that equity was either already met or only the legislature could define such a concept. In a few instances, these suits essentially questioned the concept of “the equality of poverty.” That is to say, if a state aid distribution formula allocates funds in an equitable manner, but such funds were by definition unable to meet various educational and academic standards, such a distribution formula would be inadequate by definition. The question then becomes whether the distribution formula then violates the applicable constitutional and statutory obligations of the state.

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126. *Kukor*, 436 N.W.2d at 580, 582.
127. See, e.g., *Roosevelt*, 877 P.2d at 811, 814-16 (declining to reach the issue of a “fundamental right”).
132. See, e.g., *Leandro*, 468 S.E.2d at 547. See also Deborah A. Verstegen, *The New Finance: Today’s High Standards Call for a New Way of Funding Education, AM. SCH. BD. J.* (2002), available at http://www.asbj.com/schoolspending/resources1002verstegen.html (Equity targets alone cannot determine whether there is an “equality of poverty” – that is, whether all students are receiving fewer dollars than necessary to implement state standards).
Various states have unwittingly established a standard by which many plaintiff groups are able to question and quantitatively establish noncompliance via the state distribution formula. That is to say, in the movement toward greater educational accountability and raising academic standards for the public schools of a given state, the legislature has, unsuspectingly, defined by statute what makes an adequate education. Thus, when school districts are not able to meet those stated standards, due to fiscal constraints placed upon them by various statutes and economic realities, the plaintiffs argue for relief. The relief sought is a declaration that the state aid distribution formula is unconstitutional.

In recent years, state legislatures have faced an increasing number of challenges to the state financial distribution formula based on the concept of adequacy. Generally, plaintiffs are not challenging the equity of the distribution formula.133 Instead, the plaintiffs are challenging the fact that the distribution formula either does not allow for adjustments for certain classification of students, i.e., at-risk students; or the plaintiffs utilize the fact that certain groups of children are not achieving certain levels on state imposed standardized tests.134 The plaintiffs argue that by virtue of the fact that certain groups of children are underachieving on these state imposed sanctions, the distribution formula is, by definition, inadequate, at least for these groups of children.135

Also, it has become increasingly common for states to attempt to determine the adequacy of public education. In September 2003, North Dakota released a cost study that estimated that a thirty-one percent increase was necessary to fund public elementary and secondary education adequately.136 In 1998, the South Carolina School Boards Association commissioned an adequacy study, which determined that funding would have to increase by fifty percent in 1998 dollars to meet the state imposed standards by 2010.137 At the time of this writing, several states are exploring the measurement of adequacy. One example is California, which has established the California Quality Education Commission, charged with the responsibility of determining the educational components, fiscal resources, and corresponding costs necessary so that students can meet academic performance standards.138

134. Id.
135. Id.
Oregon established the Quality Education Commission, which published the Quality Education Model utilizing three broad based panels to determine the costs of an adequate education in the state of Oregon.\textsuperscript{139}

Determining the adequacy of public elementary and secondary education is, at best, a difficult task. In attempting to determine adequacy there are two basic models currently in practice. These models attempt to estimate a base cost figure by which to establish state aid.\textsuperscript{140} These two models consist of what is referred to as the Successful Schools/Districts Model and the Professional Judgment Model.\textsuperscript{141} Each has virtues and vices. Presently, the state of education finance reveals that the determination of adequacy tends to center around the Successful Schools/Districts Model. It is important to note that in the Successful Schools/Districts Model, the approach attempts to determine the foundational level, which would then become the model by which school districts are funded.\textsuperscript{142}

In the Successful Schools/Districts Model, one can articulate that subjectivity is limited by simply determining the successful schools/districts based on achievement in relationship to expenditures. Success can be defined in a number of ways as determined by the state. Generally, a number of school districts are selected to represent a cross section so as to reflect wealthy, as well as poor, districts.\textsuperscript{143} The Professional Judgment Model calls for a panel of practicing educators, as well as state and local policymakers, to determine what constitutes an adequate education.\textsuperscript{144} Once this adequate education is determined, then the task is to determine the actual costs of such a program.\textsuperscript{145} It is important to note within this model that the task is to determine an adequate education, not an excellent education.

Additionally, there are variations of the two models. Some additional models include examining the costs of successful schools regardless of whether they are in the public or private sector.\textsuperscript{146} Thus, this model would utilize data for the basis of developing a foundational level. It is also possible to utilize statistical analysis that would account for numerous variables to determine the foundational level.\textsuperscript{147}

\textsuperscript{139} QUALITY EDUCATION COMMISSION, OREGON’S QUALITY EDUCATION MODEL 2002 30 (2002).
\textsuperscript{140} See Guthrie & Rothstein, supra note 130, at 228.
\textsuperscript{142} See id.
\textsuperscript{143} See id.
\textsuperscript{144} See Guthrie & Rothstein, supra note 130, at 228.
\textsuperscript{145} Id. at 228-29.
\textsuperscript{146} See MORGAN, supra note 142, at iii.
\textsuperscript{147} This following portion borrows extensively from R. C. WOOD AND D. C. THOMPSON, FINANCING PUBLIC AND PRIVATE EDUCATION (publication forthcoming 2004).
Two major fundamental issues have emerged in recent years that are beginning to exert major influence in the arena of education finance litigation. The first concept is that states have begun to develop values and goals for public schools in terms of student achievement and standards. Unwittingly, these have led to a quantitative standard of the success or failure of school districts. As discussed previously, this has led to the argument that, by definition, these schools have failed and thus are deemed to be inadequate. A second, and larger, thrust has emerged as perhaps an unintended consequence of the federal No Child Left Behind Act (NCLB) passed by Congress in December 2001. This federal law, based on the concept of standards based reform, requires each state to develop its own standards and to identify those schools that fail those standards as well as those schools that do not make Adequate Yearly Progress (AYP) toward meeting those standards. Thus, in virtually every state, the plaintiffs will be able to access, examine, and analyze fully each school district’s data, school by school, in order to determine which schools are not making AYP. Then, by extension, the state has demonstrated, on its own terms and via federal statute, which schools are failing to meet AYP and, regardless of the state aid distribution formula, are deemed to be “inadequate” by such a definition. In fact, one could speculate that this strategy will be piloted in a handful of states and, if successful, will lead to the next major wave of public education finance distribution challenges.

Specifically, the NCLB calls for the identification of schools that are in “need of improvement” or are “subject to corrective action.” These standards of identification also call for schools to be identified that are “unsafe.” The standards call for all schools to have one hundred percent of students achieve proficiency on a state standardized test by the year 2014. Schools in many states are projected to improve to meet the NCLB standards in the future. Under NCLB, each state sets its own standards. While this is certainly subject to criticism from a variety of sources, it is interesting to note that it will, in the long run, assist plaintiffs in education finance distribution challenges in that because the state set the standard, issues of reliability and validity are not germane to the state’s defense.

Increasingly, more states are attempting to determine the true costs of providing an adequate public elementary and secondary education. In some

### Footnotes

148. See Guthrie & Rothstein, supra note 130, at 214.
150. Id. § 6311(b)(2)(B).
151. Id. § 6316(a)(1)(B).
152. Id. § 7912(a).
instances, this is the result of a suit in which the court directs the legislature to determine such an attempt. In this manner, funding formula distribution patterns and amounts can be obtained for the state. Specifically, this was the result of a long history of litigation concerning the funding distribution patterns in the state of Arkansas.\textsuperscript{155} The Arkansas Supreme Court directed the state to conduct an adequacy study.\textsuperscript{156} The court placed a January 2004 deadline for the legislature to remedy the state aid distribution formula that it found to violate the state constitution.\textsuperscript{157} As a result, in September 2003, the Arkansas Joint Committee on Educational Adequacy released a report entitled, \textit{An Evidence-Based Approach to School Finance Adequacy in Arkansas}.\textsuperscript{158} This report determined that the overall spending for public elementary and secondary education would have to increase by thirty-three percent to become adequate and to achieve the state’s standards.\textsuperscript{159}

The state of Ohio has adopted a convoluted method of judging the adequacy of the education finance distribution formula.\textsuperscript{160} In 1997, the state supreme court in \textit{DeRolph v. State} ruled that the state education finance distribution formula was unconstitutional and remanded the case to the common pleas court.\textsuperscript{161} The state supreme court directed the legislature to change the distributional formula.\textsuperscript{162} Despite efforts by the governor and the legislature to fund public elementary and secondary education, the plaintiffs again brought suit as to compliance, and the order was clarified.\textsuperscript{163} The state appealed, and the Ohio Supreme Court allowed additional time for compliance.\textsuperscript{164} The state supreme court then ruled that the funding system was still unconstitutional.\textsuperscript{165} After this decision, the legislature, again, increased

\begin{enumerate}
\item \textsuperscript{156} \textit{See Huckabee}, 10 S.W.3d at 894.
\item \textsuperscript{157} Lake View Sch. Dist. No. 25 of Phillips County v. Huckabee, 91 S.W.3d 472, 511 (Ark. 2002).
\item \textsuperscript{158} Molly A. Hunter, Advocacy Center for Children’s Educational Success with Standards, \textit{Arkansas “Adequacy Study” Calls for Increased Funding and Recommends Major Restructuring}, (2003), \textit{available at} \url{http://www.accessednetwork.org/states/ar/Costing-OutStudy9-4-03.htm} (for more information see the full study at \url{http://www.sedl.org/rel/policydocs/forum2003/AR_AdequacyExecSumm.pdf}).
\item \textsuperscript{159} \textit{Id}.
\item \textsuperscript{160} See Miller v. Korns, 140 N.E. 773 (1923). \textit{See also} Bd. of Educ. of Cincinatti v. Walter, 390 N.E.2d 813 (Ohio 1979).
\item \textsuperscript{161} \textit{See DeRolph v. State}, 677 N.E.2d 733, 747 (Ohio 1997) [hereinafter \textit{DeRolph I}].
\item \textsuperscript{162} \textit{Id}.
\item \textsuperscript{163} \textit{DeRolph v. State}, 699 N.E.2d 518, 519 (Ohio 1998); \textit{DeRolph v. State}, 678 N.E.2d 886, 887 (Ohio 1997).
\item \textsuperscript{164} \textit{DeRolph v. State}, 728 N.E.2d 993, 1022 (Ohio 2000) [hereinafter \textit{DeRolph II}].
\item \textsuperscript{165} \textit{DeRolph v. State}, 780 N.E.2d 529, 532 (Ohio 2002).
\end{enumerate}
funding for public education by well over one billion dollars.\textsuperscript{166} In September 2001, the court issued \textit{DeRolph III}, directing remedial measures for the legislature.\textsuperscript{167} In December of 2001, the court appointed a mediator to work with the parties.\textsuperscript{168} In March of 2002, the mediator stated that he had failed to produce an agreement between the parties.\textsuperscript{169}

The court vacated \textit{DeRolph III} and held that \textit{DeRolph I} and \textit{DeRolph II} were the law of the state and that the school funding system was unconstitutional.\textsuperscript{170} In March of 2003, the state filed a writ of prohibition seeking to prevent the court of common pleas from exercising any further jurisdiction.\textsuperscript{171} On May 16, 2003, the Ohio State Supreme Court issued its opinion in \textit{State v. Lewis}, in which it ended further litigation by declaring the education finance distribution formula was unconstitutional and directed the legislature to remedy the situation.\textsuperscript{172} The court did not retain jurisdiction in this case.\textsuperscript{173}

In August of 2003, the plaintiffs filed a Petition for \textit{Writ of Certiorari} before the U.S. Supreme Court, contending that the state supreme court violated the U.S. Constitution’s Due Process Clause by preventing the enforcement of a court ordered remedy and denying the plaintiffs equal protection because Ohio schoolchildren were treated differently than other successful litigants before the Ohio courts.\textsuperscript{174} In October of 2003 the Court denied certiorari.\textsuperscript{175}

Several states have current adequacy suits in various stages. North Carolina is a prime example of a state still within the restrictions of an adequacy suit. In \textit{Leandro v. State}, beginning in 1995, the courts linked the failures of the plaintiff school districts to the state learning standards.\textsuperscript{176} After years of hearings and opinions, the court, in 2000, found that the failure of at-
risk students was a function of insufficient state funding and lack of implementation of successful programs.\textsuperscript{177} In \textit{Campbell County School District v. State}, the Wyoming Supreme Court ruled the state distributional formula unconstitutional.\textsuperscript{178} In doing so, the court ordered a detailed cost analysis.\textsuperscript{179} The legislature had passed and identified the core knowledge and skills of students so as to constitute a “proper” education.\textsuperscript{180} On February 23, 2001, the Wyoming Supreme Court in \textit{Campbell County} upheld the new cost based distributional formula and stated that it was capable of fulfilling the constitutional guarantees.\textsuperscript{181} The court did note that a variety of factors should be analyzed every five years and adjustments due to inflation made at least every other year.\textsuperscript{182}

The Massachusetts Supreme Court overturned the education finance distribution formula in 1993.\textsuperscript{183} However, \textit{Hancock v. Driscoll}, which opened in Superior Court on June 12, 2003, will have a potential major impact on the future of all public schools in the state of Massachusetts.\textsuperscript{184} The case has roots tracing back to \textit{McDuffy v. Secretary of Education}, in which the court originally declared the duty of the state.\textsuperscript{185} \textit{Hancock} now begins its likely sixty to ninety day run when children from nineteen plaintiff school districts argue that, even “ten years after the landmark \textit{McDuffy} decision, there still aren’t enough state and local resources to adequately educate the students to the standards set forth by the state’s [c]onstitution.”\textsuperscript{186}

The state of New York has presented a lengthy and far reaching adequacy issue. In \textit{Campaign for Fiscal Equity v. State}, the New York Supreme Court ruled that the New York City schools were inadequately funded, and therefore the state distributional formula was held to be unconstitutional.\textsuperscript{187} On appeal, the appellate court ruled on behalf of the state in requiring that the state’s obligation was only for certain grade level proficiencies.\textsuperscript{188} New York’s highest court, the Court of Appeals, on June 26, 2003, upheld the trial court, stating that the public schools of New York City were inadequately funded and

\begin{footnotes}
\textsuperscript{178} Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1244 (Wyo. 1995).
\textsuperscript{179} See id. at 1279.
\textsuperscript{180} Campbell County Sch. Dist. v. State, 19 P.3d 518, 528-530 (Wyo. 2001).
\textsuperscript{181} Id. at 526. \textit{See also} State v. Campbell County Sch. Dist. 32 P. 2d 325 (Wyo. 2001).
\textsuperscript{182} \textit{Campbell County}, 19 P.3d at 526.
\textsuperscript{183} \textit{McDuffy} v Sec’y of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993).
\textsuperscript{185} \textit{McDuffy}, 615 N.E.2d at 621.
\textsuperscript{186} Hancock v. Discoll, at www.goodschoolsformass.org/ (as of Mar. 15, 2004).
\end{footnotes}
thus unconstitutional. The ruling also directed the state to determine the cost of a “sound, basic education” within the public schools of New York City.

In dissent, Justice Reed noted the following:

The majority first directs the State to determine the actual cost of a “sound basic education” and to ensure that every school in New York City has the necessary funding to meet the standard, and sets a deadline. The funding level must reflect the cost of a “sound basic education” that is not tied to anything other than a “meaningful high school education.” The majority also remands the case to the trial court to review the Legislature’s efforts to determine if under the new funding scheme “inputs and outputs improve to a constitutionally acceptable level.”

... This remedy is extraordinary, if not unprecedented. Having determined that the State is not satisfying its constitutional obligations with respect to the education of New York City’s public school children, we should - as the State requests - simply specify the constitutional deficiencies. It is up to the Legislature, as the entity charged with primary responsibility under the Education Article for maintaining the State’s system of public education, and the Executive, who shares responsibility with the Legislature, to implement a remedy. This lawsuit should be at an end. Instead, the majority, observing that “the political process allocates to City schools a share of state aid that does not bear a perceptible relation to the needs of City students,”... casts the courts in the role of judicial overseer of the Legislature. This disregards the prudential bounds of the judicial function, if not the separation of powers.

Moreover, as soon as the trial court is called upon to evaluate the cost and educational effectiveness of whatever new programs are devised and funded to meet the needs of New York City’s school children, the education policy debate will begin anew in another long trial followed by lengthy appeals. The success of the new funding mechanism will then be tested by outputs (proficiency levels). This dispute, like its counterparts elsewhere, is destined to last for decades, and, as previously noted, is virtually guaranteed to spawn similar lawsuits throughout the state.

The overview of this arena indicates an uncertain patchwork of decisions. Yet, despite the uneven record, there are indicators of which claims have consistently received the most court sympathy or rejection. First, it is extraordinarily rare to reach wealth as a suspect class. As stated very early in Robinson, the unintended implications for society are too broad in that all other government services could be immediately be subject to the same claim. Second, fundamentality is only slightly less rare, as courts are slow to construe new rights from state constitutions and for which federal precedent is adverse.

190. Id.
191. Id. at *36 (Read, J., dissenting) (internal citations omitted).
Third, federal equal protection is *de rigueur* in claim, but state equal protection is a key to overturning state aid distribution formulas. This is a strategy that does not usually work well unless the education article can also be invoked in a plain reading that requires the state to accomplish what it set out to do. For example, the Supreme Court of Texas in *Edgewood* in 1989 stated “[w]hether the legislature acts directly or enlists local government to help meet its obligation, the end product must still be what the constitution demands.”192 Taken collectively, this suggests that favorable rulings depend at least in part on specific language in state constitutions. Again, as Wood has stated, the successful party must have an outstanding legal team, an outstanding education finance research team, and a well-grounded knowledge of education finance research.193 While the relationship may not be perfectly incremental as language increases, in most instances the opportunity for success does diminish rapidly as language becomes more vague.

VI. PRINCIPLES AND NEW DIRECTIONS IN LITIGATION

First, it may be safely stated that litigation will not achieve great success in federal courts. The only exceptions to this principle rest in events that might cause the Supreme Court to abandon its traditional position on fundamentality, wealth suspectness, or broadened interpretation of the Fourteenth Amendment Equal Protection Clause. Given the present composition of the Supreme Court and its historic reluctance to create new fundamental rights, the federal path will likely disappoint reformers unless a nexus to other fundamental rights can be better established. Despite *Plyler*, the Supreme Court has stood firm in determining that education is a most important responsibility of state and local governments.194 Similarly, wealth as a suspect class is a fruitless attack, unless the Supreme Court unexpectedly reverses itself or unless plaintiffs can show overwhelming and consistent evidence of wealth-based discrimination against individuals. Likewise, federal equal protection will remain largely unavailable except where established suspect classes can be linked to education finance. The only other alternative is through changes in the Supreme Court itself. Under these conditions, a federal plea will receive sympathy only by dramatic breakthroughs or by new political appointments.195

195. This discussion is confined to changes brought about by the legal system itself. It does not consider other strategies such as Congressional action or constitutional amendment to achieve the same ends.
Second, it may be confidently stated that litigation will continue in state courts into the foreseeable future. Although the record in state courts has been mixed, plaintiffs have achieved their only successes at this level. Within state courts, it is equally evident that the plea for fundamentality will experience very limited success, as these courts will frequently apply the federal test in the absence of strong state constitutional provisions. It must, of course, be noted that few state constitutions have the language needed unquestioningly to require strict scrutiny.\footnote{See generally Brent E. Troyan, Comment, The Silent Treatment: Perpetual In-School Suspension and the Education Rights of Students, 81 Tex. L. Rev. 1637 (2003) (discussing state jurisprudence on the right to education).} Even when such language is present, many courts will hesitate at fundamentality because of the powerful analysis found long ago in Robinson. In that case, the court perceptively recognized that society itself could be unintentionally transformed, as even noble goals could be twisted by hastily turning mere social conveniences into fundamental rights. As such, litigation in state courts will continue to turn on issues other than fundamentality or wealth suspectness.

Third, it is likely that Serrano logic will have only limited utility, as courts have generally moved beyond striking down education finance distribution formulas that are unequal without evidence that inequality results in an inadequate education. While this may appear regressive, there is an attractive logic that underlies it. The court in Serrano presumably did not care that the system could be adequate without being equal. In contrast, most subsequent decisions have attempted to determine if inequality was in fact followed by inadequacy. While the standard appears to be lowered, it may be ultimately beneficial in that plaintiffs will be required to demonstrate the link between resources and equal opportunity. Although this has been a difficult hurdle for plaintiffs in the past, the NCLB Act and the various state standards make such hurdles achievable in a relatively gentle fashion.

Fourth, the potential demise of Serrano logic also speaks to the dubious survival of strategies based only in noble theories and moral outrage. The failure of these strategies is evident in the shambles of federal hopes after Brown, leading to the conclusion that though there is high regard for conscience in the context of the law, lawsuits are generally won by constitutional obligations. Instances of “soft” litigation are rare, and the outrage in Pauley v. Kelly is generally nonreplicable at the state level, as is its level of judicial prescription.\footnote{Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979). Pauley stands almost alone in the court’s willingness to engage in judicial remedy for fiscal inequities. The court ordered creation of a Master Plan addressing in minute detail each deficiency of educational program and its support mechanism, which today has resulted in millions of new dollars to education and massive restructuring of education on a statewide basis that is linked to student outcomes. For a similar}
expenditures is not likely to recur elsewhere. This view is especially reinforced in compliance litigation, as even in Serrano II the court was satisfied when most fiscal variations were erased. This logic was also echoed in Horton v. Meskill, as that court, under constitutional fundamentality, required only that disparities not be so great as to be unconstitutional. This was also the overwhelming view of the Virginia Supreme Court in Scott v. Commonwealth, in which the court stated that disparities were acceptable as long as all school districts were minimally adequate as defined by the state constitution.

Fifth, it is likely that the Robinson strategy of scrutinizing the education clause of individual state constitutions will continue to be the most promising strategy. This certainly applies in the latest adequacy suits. It is also consistent with the foregoing, in that the greatest scrutiny will likely rest in how closely the state achieves its adequacy aims when measured against its constitutional requirements and state imposed academic accountability requirements. Robinson demonstrated that fundamentality and suspectness are not absolute prerequisites to success, and most subsequent winning litigation stands as further proof to this truth. The ephemeral and intangible nature of fundamental rights and wealth suspectness is frustrating to courts, in contrast to the more tangible concepts of equal protection and adequacy, which courts can usually apply to the plain reading of state education articles. Given that courts typically have no dispositive proof to presume the linkage between wealth and opportunity, tying specific language to factual analysis in the context of equal protection likely explains the success of the Robinson strategy.

Sixth, it is likely that different decisions will continue to be handed down by state courts using the Robinson strategy for several reasons. One reason is simply that different constitutions state significantly different things. A second reason is that courts themselves cannot examine language so dispassionately as to read nothing into the language except the words; i.e., words are subject to perceptual political/social filters. Still, a third reason is that the language in many state education articles is nearly empty. In these cases, courts are

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198. See Serrano v. Priest, 557 P.2d 929, 957 (Cal. 1976) (note that the court required some equality but did not mandate that exactly the same amount of money goes to each student).
exhibiting an interest in constitutional debate analysis wherein the court examines the framing of the constitution to determine the intent in the education article. Although it has been suggested that many legislatures had no motive deeper than copying other states’ education articles, the more recent decisions in Kentucky and Texas seriously examined the framers’ intent in order to determine the meaning of “thorough and/or efficient” phrases. An increasingly common strategy combines the framers’ intent, litigation from similar states, measures of adequacy, or lack thereof, as well as jurisdictional precedent to cast a ‘plain’ reading of the education article. Thus decisions will be different among the states, with some influence by other reform, aided or deterred by the inclinations of the court itself.

Seventh, it is likely that courts will always be reluctant to engage in specific judicial prescription as a remedy to education finance distribution problems because courts are bound to respect the separation of powers. For decades, courts have hesitated to intervene in legislative affairs, noting that they have neither the power nor the expertise to prescribe solutions to political questions. Courts generally rule only on questions of law brought before them and direct the issues to the legislatures for remedy. As such, in one sense, courts are poor tools to force school finance reform, as they will almost always stop short of providing an actual remedy. In addition, the courts can actually frustrate reform as a favorable decision for plaintiffs by no means guarantees an immediate or receptive legislative response. For example, the response to 

Edgewood in Texas was a call for a constitutional amendment that would nullify the court’s decision. Ohio, as discussed herein, appears to be no closer to an acceptable remedy that will satisfy the plaintiffs than it was before 

DeRolph. Nevertheless, some progress has been wrought by litigation. As a consequence, a natural tension will continue to slow reform, as courts will not readily pursue direct intervention strategies.

Eighth, it is likely that reform will be slow and will remain incomplete for many years. In one sense, the legal and policy issues were identified so many years ago in Sawyer in 1912 when the court stated, “[t]he method of

204. Even where courts have become enthusiastic in judicial prescription, they have usually later modified their zeal. See generally, e.g., Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979).
206. The question whether litigation actually leads to significant financial reform, that is greater equity as well as adequacy, has yet to be clearly defined. See, e.g., M. Petko, A Statistical Analysis of the Effect that Education Finance Litigation Has on per Student Revenues in the United States (unpublished Ph.D. dissertation, Univ. of Florida) (on file with Univ. of Florida Library).
distributing the proceeds of a tax rests in the wise discretion and sound judgment of the Legislature. If this discretion is unwisely exercised, the remedy is with the people, and not with the court— a view consistently upheld and confirmed by Rodriguez. Thus, it should be noted that legislatures may engage in policies that are perhaps unwise as long as these policies are not unconstitutional. Under these conditions, it would seem that reform has gained little ground. Yet, it is encouraging to note that standards do change with the times, as contemporary views regarding inequality have led to significant judicial intervention by state courts. Indeed, Sawyer may have been right for the wrong reasons; i.e., justice makes few errors of haste, and rapid change is often available only at the voting polls. Thus litigants expecting dramatic results may be disappointed. But it still should be stated that deliberateness can be beneficial, as dizzying change may be unwise public policy.

VIII. CONCLUSION

The net sum of over a quarter century of intense education finance litigation proves that the outcome of future lawsuits cannot be known. Too many variables impact an ever-changing social milieu, and the courts themselves are never certain of whether to lead or to reflect society’s thinking. Courts seem to be at times ahead of the political readiness, while in other obvious ways they lag behind. The political climate of legislatures adds to this uncertainty, as states themselves shape the frequency and intensity of litigation by the legislatures’ relative vigilance to equity concerns. While no amount of money can ever satisfy litigants, they are better satisfied when the distribution is fair and minimally adequate. Legislatures, however, are generally faced with competing demands from all corners of society for which sufficient funding is beyond the means of the state. Yet there has been great change as a result of litigation, as states have assumed greater shares, taxes have been better equalized, and expenditures have increased. In addition, reform has become a political agenda seized upon by presidents, governors, and legislators. Thus, while equity has far to go, the power of a court should never be underestimated; if it were not for litigation, it is absolutely certain that less progress toward fundamental fairness in the financing of public elementary and secondary education would exist today.

Although these conditions indicate that only uncertainty itself is certain, the long-range view still demands optimism. The political pendulum swings, and equity and adequacy will continue to rise and fade in cycles. It cannot be otherwise because people will protect their resources, giving rise to disputes. Public elementary and secondary education remain great and noble causes because life’s opportunities are in large measure a product of the education

received in childhood. If educational funding is inadequate to these ends, then children in all social and economic circumstances should experience the inadequacy on equal terms.