The Past, Present, and Possible Futures of Educational Finance Reform Litigation

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For more than thirty years, the judiciary has been shaping the educational finance terrain and debate. Seizing upon arcane and often indeterminate state constitutional language, state supreme courts have invalidated the educational finance schemes of state legislatures and ordered those systems reformed in accordance with constitutional strictures. Through 2005, school finance lawsuits have been filed in 45 of the 50 states, with challengers prevailing in 24 of 43 cases that resulted in a judicial decision (National Access Network, 2005a, 2005b). Although early litigation focused on the development of the right to equal per pupil funding, or at least a school finance scheme not dependent upon local property wealth, more recent litigation has sought to define qualitatively the substantive education to which children are constitutionally entitled.

This chapter explores the intellectual and legal foundations of the school finance reform litigation of recent decades, the legal and reform theories that have evolved in those litigations, and the potential directions that this litigation might move in the future. Though the future of school finance reform through the courts remains uncertain, there can be no doubt that this experiment in judicial federalism has generated heated debate and affected education finance policy making in those states in which courts have intervened.

THE PAST (PART I): THE INTELLECTUAL AND LEGAL ROOTS OF SCHOOL FINANCE LITIGATION

Rooted in the hallowed principle of local control, public schools have traditionally relied on local property taxes as their primary funding source. Naturally, as property tax bases vary among districts, so do the property tax revenues available to schools. Although the extent of the inter-district inequality in educational funding resulting from this property-tax-based system had long been recognized by educational finance experts, it received little outside attention until the late 1960s, when social activists and scholars began to notice the differences in educational resources available to students in different districts. Buoyed by recent victories in the Warren Supreme Court, these reform-minded scholars and activists began to look to federal law and litigation as a potential tool to remedy the unfair distribution of school funding.
The Legal Environment

Prior to the landmark *Brown v. Board of Education* decision in 1954, courts rarely intervened in educational policy making and practice. With that decision, the U.S. Supreme Court ushered in the Equal Protection Revolution that quickly spread from the unlawful segregation of children based on race to the differential treatment of other “suspect classes,” such as women and religious minorities, and the state’s denial of other “fundamental rights,” such as the right to vote, to an attorney in criminal cases, and, perhaps, to equal educational opportunity.

By the time scholars and advocates began turning their attention to the issue of unequal school funding, the U.S. Supreme Court had begun employing two distinct approaches to claims asserted under the Equal Protection Clause. The first and more relaxed standard of review under the Equal Protection Clause, known as the “rational review” test, upholds legislation so long as it reflects some rational relation between the state’s policy objective and the means the regulation uses to achieve that objective. Most legislation falls under this category. The second approach, requiring closer scrutiny of the law by the Court, is triggered when either a “fundamental right” is at stake or the state employs a “suspect classification.” Legislation subject to strict scrutiny is unconstitutional unless the state provides a compelling interest to which the challenged legislation is narrowly tailored as well as showing that the interest cannot be satisfied by any other means.

Whether education was a “fundamental right” was a question that had not been considered by the Court, but *Brown* had deemed it “perhaps the most important function of state and local government.” And while race was clearly recognized as a suspect class, by the late 1960’s the Court had also begun to show a marked antipathy toward legislative classifications that discriminated on the basis of wealth. The legal groundwork had been laid. To scholars and advocates alike, school finance systems that provided fewer educational opportunities to children solely because they lived in property-poor communities appeared easy targets for this new jurisprudence. However, unlike a poll tax, the courts could not simply strike down the school finance scheme without providing guidance towards a constitutional replacement. At least, this was the conventional wisdom on the subject.

Strategies and Proposed Standards

In the late 1960s, several legal scholars and advocates began preparing the assault on school finance systems that provided vastly different educational opportunities to children. Although differing slightly on the details, all agreed that the legal basis for the attack was the Equal Protection Clause of the Fourteenth Amendment, while the proper forum would be the federal courts, as those courts seemed more willing to protect rights and liberties than their relatively complacent state counterparts. Where these scholars and advocates disagreed was in their interpretation of the specific constitutional wrong in the system and the judicial standards for constitutional compliance; i.e., the meaning of “equality of educational opportunity.” From this early thinking, four contenders emerged: per-pupil spending equality or “horizontal equity;” needs-based funding equality or “vertical equity;” equal opportunity for an equal outcome or “effective equality;” and the “fiscal neutrality” principle. This intellectual history is reviewed here because the questions raised by these early thinkers are still debated today.

**One Scholar, One Dollar—Horizontal Equity.** As a doctoral student, Arthur Wise became one of the early architects of the assault on the inequality produced by educational finance systems (Wise, 1967). To Wise, the central evil of educational finance schemes was their classification of students based upon the accident of geography and socio-economic status. He
reasoned that because education finance schemes classify students on the basis of the school district in which they reside, and because such classification largely determines the quality of the educational opportunity students receive, educational finance schemes that rely on local property tax bases unlawfully discriminate against children in low property wealth districts.

Mindful that courts would have to fashion a definition of equal educational opportunity to guide legislative remedies, he reasoned that they would most likely select a “negative definition” of equality of educational opportunity. Such a negative definition would require that a child’s educational opportunity should depend upon neither her parents’ economic circumstances nor her location within the state. The difficulty with this definition, Wise noted, is that it provides legislatures little guidance as to what constitutes a constitutional educational finance system. To be safe, Wise concluded, courts would likely adopt the “basic standard of equal dollars per pupil” (p. 159). Simplicity of application aside, however, the “one scholar, one dollar” standard appeared to many, including Wise, unsatisfying. It failed to account for the differential costs of doing business among districts, the differing needs of students, and the differing pressures on municipal budgets for social services. To rectify this deficiency, Wise suggested that courts might stray from this absolute equality standard to allow deviations in spending for different classifications of students.

Student Needs—Vertical Equity. Writing at about the same time as Wise, Harold Horowitz of the University of California, Los Angeles Law School was crafting a slightly different legal theory to attack educational finance schemes and preparing an arguably more ambitious standard for equality of educational opportunity under the Fourteenth Amendment (Horowitz, 1966; Horowitz & Neitring, 1968). Horowitz argued that equal protection jurisprudence could support a claim to strike down the state’s educational finance scheme where “a school board, though providing substantially the same educational programs and services in all schools, fails to provide programs and services which adequately compensate for the inadequate educational preparation of culturally deprived children” (Horowitz, 1966, p. 1148). Relying on empirical evidence that children in schools in “disadvantaged” neighborhoods perform poorly on academic achievement tests and receive fewer educational resources, Horowitz maintained that such children could only enjoy “equality” if they received “special programs, adapted to the specific needs of these children” (pp. 1166–1167). As a judicial standard, however, vertical equity was thought to be unmanageable, as it seems to require a student-by-student analysis and remedy.

Equal Opportunity for an Equal Outcome—Effective Equity. Perhaps the most aggressive standard for equality of educational opportunity to arise from the early Equal Protection scholarship is David Kirp’s (1968) call for effective equality. Kirp argued that “[a] reconsideration of effective equality in the light of recent and extensive educational research studies … suggests that the state’s obligation to provide an equal educational opportunity is satisfied only if each child, no matter what his social background, has an equal chance for an equal educational outcome, regardless of disparities of cost or effort that the state is obliged to make in order to overcome such differences” (p. 636). To achieve this goal, two remedial schemes appeared to Kirp most promising: integration and resource reallocation aimed at effective equalization. Kirp argued that redistricting local school districts such that poor and minority youth would be integrated among their wealthier and whiter peers would “do most to better the chances of the poor, presently locked into predominantly lower class schools” (p. 661). But what about those districts for which such redistricting would be politically or geographically infeasible due to the sheer density of concentrated poverty among minority children and the resistance of wealthy suburbs? Kirp’s response was reallocation of resources pursuant to the
principle of effective equalization—resources should be allocated to ensure children of different social backgrounds have the same academic success.

Theoretically, a meaningful distinction exists between the needs-based standard proposed by Horowitz and the outcomes-oriented standard proposed by Kirp. Horowitz would have the state compensate for educational deprivation and needs without regard to outcome, whereas Kirp’s model—much like modern adequacy “costing-out” models discussed below—would focus on outcomes and the resources necessary for each student to reach the same high outcome. In practice, however, the connection between specific educational inputs and outcomes was unknown, creating a great deal of ambiguity in judicial standards. This ambiguity of standards was and is inevitable where theory outpaces empirical knowledge of what it takes to provide equal chances for equal outcomes or an adequate education.

Fiscal Neutrality. Jack Coons, William Clune, and Stephen Sugarman saw fiscal neutrality as the remedy for ambiguity. Less than two pages into their seminal work, *Private Wealth and Public Education* (1970), Coons, Clune, and Sugarman set forth their modest and clear standard for what would constitute a constitutional provision of educational opportunities within a state: “The quality of public education may not be a function of wealth other than the wealth of the state as a whole” (p. 2). What they then called Proposition One, and what would later be dubbed the “fiscal neutrality” principle, is a simple negative statement of what the state could not do—discriminate against students on the basis of the wealth of the community in which they live. Mindful of the complexity and contradictions inherent in defining equality of educational opportunity, Coons, Clune, and Sugarman designed this principle in a way that boils down to one simple measure: dollars. The availability of those dollars could not depend upon the wealth of one’s neighbors. Because the fiscal neutrality principle prohibited, rather than demanded, certain forms of state action, it allowed the courts to spark a major reform in educational finance policy while permitting the legislature to tackle the intricate difficulties of designing a fair and efficient system. A court could at once be activist and restrained. Finally, the negative statement of fiscal neutrality largely sidestepped the complex and ever-controversial issue of whether and how money matters in education, then known as the cost-quality debate. Under the Coons, Clune, and Sugarman formula, there was no need to demonstrate the link between educational resources and educational outcomes.

The fiscal neutrality principle did not mandate compensation for prior inadequate schooling, “cultural disadvantage,” or natural (in)abilities. Nor did it prevent some localities from choosing to spend more on their children’s education than others, so long as that choice was not dependent upon the wealth of a municipality. Indeed, Coons, Clune, and Sugarman saw the fact that some communities could tax themselves at higher rates to provide more educational resources to their children as a strength of their proposal. It would encourage educational experimentation, enhance local control, and recognize the independence and liberty interests that communities and parents should enjoy.

Unfortunately, the fiscal neutrality principle could do very little for those districts that needed the most help. By the late 1960s, educational failure had become synonymous with large, urban, minority districts. Children in such districts often faced multiple handicapping conditions, ranging from deep and persistent poverty to racial and cultural isolation to greater rates of physical, emotional, and mental disabilities. Paradoxically, those districts often enjoyed greater than average commercial or industrial property wealth; the problem was not the tax base, but the tax rate. Urban residents already taxed themselves to the limit to pay for municipal services that included amplified law enforcement, social services programs, and waste disposal. Suffering from such “municipal overburden,” urban communities simply could not afford to increase their taxes.
Yet fiscal neutrality as a principle was unconcerned with this problem. Judicial modesty and manageability were the touchstones for judicial intervention and the guiding principles behind Proposition One. The courts should only apply a negative test for constitutionality of an educational finance system, and they should refuse to prescribe specific components of equality of educational opportunity. This decision was best left to the legislature, Coons, Clune, and Sugarman argued.

This modesty put Coons, Clune, and Sugarman directly at odds with the more ambitious proposals to equalize opportunities of rich and poor children. From the work of Wise, Horowitz, Kirp, and Coons, Clune, and Sugarman, four theoretically distinct principles for judicial intervention in educational financing emerged. This chapter now considers how the courts grappled, and continue to grapple, with these standards.

THE PAST (PART II): THE EVOLUTION OF EDUCATIONAL FINANCE REFORM LITIGATION

Presented with an issue ripe for reform and armed with coherent and potentially winning legal strategies, educational finance reform advocates took their cases to court. Since 1968, according to the standard narrative, school finance litigation has developed in three waves (Heise, 1995b; Thro, 1989). Though the three waves are hardly monolithic and may be criticized for their descriptive accuracy (Koski, 2003; Ryan & Saunders, 2004), this standard narrative provides a common language to consider the shifting legal underpinnings of school finance litigation. In addition to the shift in legal doctrine, the wave narrative traces a shift from equity to adequacy in the distributional paradigm underlying school finance reform. This section describes the evolution of educational finance reform litigation in three waves.


Launched in the late 1960s, successful school finance litigation initially adopted the strategies developed by Wise and Coons, Clune, and Sugarman by focusing on the federal constitution’s Equal Protection Clause and the theory that per-student funding should be substantially equal, or at least not dependent upon the wealth of the school district in which the student resided. After enjoying initial success in at least two federal district courts and the California Supreme Court in Serrano v. Priest (Serrano I), the federal equal protection theory was quashed by the U.S. Supreme Court in San Antonio Independent School District v. Rodriguez.

At issue in Rodriguez was Texas’s system of educational finance, which relied almost exclusively on local property tax wealth and resulted in local school districts receiving radically unequal levels of educational funding. The questions before the Court were whether such a system violated the federal Equal Protection Clause and, more specifically, whether poor children in poor school districts formed a suspect classification, or whether education was a fundamental interest under the federal Constitution. Finding neither a suspect classification in poverty nor a fundamental interest in education, a 5–4 majority of the Court applied the “rational relationship” test to Texas’s school finance plan and held that the state’s interest in local control over education easily supported the school funding scheme, unequal as it was. Though the Court left open the door to a federal constitutional claim against a state policy that deprived children of some basic floor of educational opportunity, Rodriguez effectively shut the door on federal school finance litigation under the U.S. Constitution to date.
The Second Wave: State “Equity” Litigation (1973–89)

Undaunted and capitalizing on the federalist structure of the judicial system, school finance reformers turned to state constitutions as sources of educational rights and school finance reform. Only thirteen days after the Supreme Court handed down *Rodriguez*, the New Jersey Supreme Court ushered in the second wave of school finance cases with its discovery of educational rights in state constitutions. Although the *Robinson v. Cahill* court based its decision solely on the state’s education article, which imposed on the state legislature a duty to provide a “thorough and efficient” education to the state’s children, the critical aspect of the case was the newfound reliance on state constitutional arguments. Thereafter, most state high courts relied heavily on their state education article, at times employing it in conjunction with the state’s constitutional equality provision, when finding the state’s school spending scheme unconstitutional.

The essence of the claim in second-wave cases was the equity of school funding schemes. Specifically, the courts primarily sought to achieve either horizontal equity among school districts, such that per-pupil revenues were roughly equalized by the state, or at least fiscal neutrality, such that the revenues available to a school district would not depend solely on the property wealth of the school district. Unfortunately for plaintiffs in second-wave cases, the courts were mostly unreceptive to their claims: plaintiffs prevailed in only 7 of the 22 final decisions in second-wave cases.

Beyond the win–loss record, several modest conclusions can be made as to the impact of second-wave, equity-minded educational finance litigations. First, in those states in which the state’s high court overturned the educational finance system, per-student spending across districts has become more equal (Evans, et al., 1997, 1999; Murray, et al., 1998). Second, this greater equity has in part been realized by greater funds being targeted to less wealthy school districts (Evans, et al., 1997, 1999; Murray, et al., 1998). Third, while some have argued that this increased equity has come at the expense of limiting overall growth in educational spending or reducing the state’s educational spending compared to other states, others have concluded that educational spending in the wake of a successful challenge to the school finance scheme increased school funding. Finally, a declaration that the educational finance system is unconstitutional typically leads to greater centralization in educational spending.

The Third Wave: State “Adequacy” Litigation (1989–Present)

The third wave was launched by the Kentucky Supreme Court in 1989 when it found in the education article of its state constitution not an entitlement to educational equity, but rather an entitlement to a substantive level of educational quality. Interpreting its thorough and efficient clause, the court held that the state legislature must provide its students with an adequate education, defined as one that instills in its beneficiaries seven capabilities, including, for example, sufficient oral and written communication skills to enable them to function in a complex and rapidly changing society. Though equity litigation has not been abandoned, *Rose* is considered the bellwether for the legal and rhetorical shift from equity to adequacy (Thro, 1989).

“Adequacy” as a distributional principle differs from any of those proffered by the early school finance scholars seeking to define “equality of educational opportunity.” An adequate education is understood to mean a specific qualitative level of educational resources or, focusing on the outcomes object, a specific level of resources required to achieve certain educational outcomes based on external and fixed standards. It is a measure that does not compare the educational resources or outcomes of students with each other; rather, it looks only to some minimally
required level of resources for all students. Notably, in the context of adequacy lawsuits, the very same education articles that supported equity claims in the second wave would now be deployed for adequacy claims in the third wave.

One might argue that the move from equity to adequacy was a strategic necessity. Rather, the adequacy principle based on state education articles possesses many advantages over the equity principle based either on state equality provisions or education articles. First, by relying upon the education provision of the state constitution, judges would be less likely to create spillover effects in other areas of public policy. Changing the black-letter law of equal protection might invalidate not only locally financed education, but all other locally funded government services—a decision the scope of which courts were unprepared to order.

Second, adequacy arguments seem to flow naturally from the language of education articles, which generally require that the legislature provide a “thorough and efficient,”18 “uniform,”19 or even “high quality”20 education to its children. The court need not bend the language of these provisions beyond recognition to reach the adequacy standard or search for elusive “fundamental rights” and “suspect classes.”

Third, a standard that relies on absolute rather than relative levels of educational opportunity would, at least in theory, avoid the ire of the state’s political and economic elite. A constitutional floor of adequacy permits local districts to provide their children more than what the court deems an “adequate” education. Similarly, an adequacy standard seems to intrude less upon the value of local control. The decision-making authority of well-to-do districts need not be curtailed simply because of a court order to the state that a poor school district be provided resources. Indeed, giving that school district the financial wherewithal to improve itself enhances local control.

Fourth, an adequacy standard may, at first blush, simply be more appealing to certain norms of fairness and opportunity. Modern American society views education as a key to economic success and social mobility. It is not much of a stretch to say that social and economic inequality are better tolerated in this country because Americans believe that the necessary tools for success are provided through public education. When one learns that some children are not receiving even the minimally adequate education that will help them better their lot, one feels that an injustice has been perpetrated. But Americans do not seem to feel this way if one child—most often their own—receives a better education than another child, so long as that “other child” is getting an “adequate” education.

Finally, at least upon initial examination, the adequacy standard appears to enjoy a clarity that equality of educational opportunity lacks. Nettlesome concerns about input versus outcome equity and vertical versus horizontal equity are avoided. All the legislature needs to do is define what constitutes an adequate education and provide districts with the resources and conditions necessary to deliver that level of education.

Normatively, however, the shift from adequacy to equity might be seen as troubling. Education as a private good possesses strong positional aspects, with one’s employment opportunities and socio-economic status depending (in large part) not on one’s absolute level of academic achievement but on one’s place in the educational distribution. Policies and constitutional holdings that mandate higher achievement but tolerate or even exacerbate already existing educational disparities only serve to further disadvantage the educationally underserved (Koski & Reich, 2006).

More pragmatically, the adequacy standard may provide no more clarity than ineffable equity standards. State constitutions provide legislatures, and ultimately courts, virtually no guidance as to what constitutes an adequate education. There is no agreed-upon list of public education goals (is it producing civic-minded democratic citizens, or productive contributors to the economy?)
There is no standard for the skills, competencies, and knowledge necessary to serve those goals of an adequate education. Finally, even if the legislature and courts were to craft those standards from whole cloth, how do we determine what resources will produce the desired outcomes? And what background characteristics of students ought to be considered in distributing those resources (e.g., linguistic, economic, and/or genetic disadvantages)? This chapter next considers how courts have addressed these issues in modern adequacy litigation.

THE PRESENT: ISSUES IN MODERN EDUCATIONAL FINANCE REFORM LITIGATION

This section explores modern “adequacy” school finance litigation with a focus on how that litigation has developed in conjunction with the standards-based reform movement. Concurrently, it examines the difficult question of how courts have approached the challenge of crafting a remedy for the constitutional deprivation of an adequate or equal education.

Adequacy Litigations, Standards-Based Reform, and the “New Accountability”

Parallel to recent adequacy litigation, state legislatures have embraced the now-inseparable policies of standards-based reform and accountability for student outcomes. Put simply, the standards-based reform movement has sought, among other things, to combat low educational expectations for poor and minority children. By establishing challenging educational content standards that define what all children should know and be able to do, standards-based reform aims to raise the level of all children’s achievement to what the state determines is “proficient” (read: “adequate”).

Beginning a decade or so ago, standards-based reform or the push for accountability has been supplemented by an additional policy lever—accountability of schools and students for performance on standards-referenced achievement tests. This “new accountability” in public education provides for rewards or sanctions to schools, administrators, teachers, and students according to their success in meeting achievement goals. At one end of the spectrum, successful schools are provided with commendations and, sometimes, monetary rewards. At the other end, failing schools may be offered technical assistance and temporary improvement grants, while persistently failing schools may be subject to state takeover or reconstitution. At a minimum, school and district performances on standards-based assessments are published and subjected to public scrutiny.

Standards-based accountability programs, like the federal No Child Left Behind Act, though promising to raise the performance of poor and minority children and close the achievement gap, are frequently criticized for failing to provide the necessary educational resources and conditions for all children to achieve at world-class levels (Elmore, 2003). This is where the new adequacy litigation and new accountability movements are beginning to embrace each other in courtrooms. Scholars and advocates have argued that it is institutionally appropriate for courts to hold states accountable under state constitutional education articles for providing the resources necessary for children to learn at the levels authorized by legislatures and often established by executive branches.

Although no state court has gone so far as to constitutionalize state educational standards, many judges are citing as evidence of educational inadequacy the failure of students to reach proficiency on state-mandated tests. Whether at the point of identifying the substantive entitlement to an education (the skills and capacities all children should receive) or designing the appropriate
remedy (costing-out an adequate education based on student need or providing specific interventions and programs geared toward achieving the standards-based outcomes), courts are beginning to compel policy makers to flesh-out the substantive entitlement to an education, sometimes based on states’ own expected educational outcomes.

**System-Wide Reform: What Is the Remedy for an Unconstitutional Funding Scheme?**

Although some courts have held the issue of educational adequacy to be non-justiciable, a matter best left to the legislative branch, these decisions are in the minority. As explored above, courts are increasingly finding it within their power, indeed their duty, to rule on the constitutionality of their state’s method of financing education. But often that is all they do. Having found the funding system in violation of their state’s constitution, separation of powers concerns have led most courts to simply instruct the legislature to fix the problem.

In some states, this inter-branch dialogue has led to meaningful education reform. But where legislatures appear politically unmotivated or unable to enact a constitutional funding scheme, some courts have taken a more active role. Unwilling to be complicit in their state’s failure to provide a constitutionally adequate education, they have ordered a range of remedies, from simply imposing deadlines upon the legislature to ordering specific, comprehensive, system-wide reform. Some of these more expansive, and often controversial, remedies and their legal underpinnings are explored below.

**Costing-Out.** State funding for education has historically been a product of political deal making, economic pressures, and the struggle among competing interests for limited state resources. Costing-out is an attempt to tie educational funding to the actual amount needed to provide every child a constitutionally adequate education. Many legislatures have conducted costing-out studies independent of judicial intervention, but others have done so only in response to threats of litigation, settlements, judicial orders to enact a new and constitutional system of educational funding, or occasionally, specific orders to conduct such studies.

Costing-out remedies are a logical extension of adequacy claims. If the court finds the state to be violating its constitutional obligation to fund an adequate educational system, it must know how much more before it can order more funding. A costing-out study can inform that question. The pathbreaking case in this respect is *Campbell v. State*, in which the Wyoming Supreme Court directed the legislature to define the “basket” of education every Wyoming child should receive, to undertake a “cost of education” study to determine the actual cost of providing such a basket, and to fund such an educational system. Other state courts have followed, with New York, Arkansas, and Ohio all ordering the legislature to conduct costing-out studies as a prerequisite to funding an adequate educational system.

Although adequacy claims naturally lead to costing-out remedies, costing out sometimes results from equity claims. In Arizona, a federal court twice ordered costing-out studies performed in response to Equal Education Opportunities Act (EEOA) claims, though these costing-out studies were done only for English Language Learners. Costing-out studies have also resulted from state equal protection claims, as legislatures act to provide a “rational basis” for their funding decisions.

As prevalent as costing-out studies have become, they are not without their critics, who focus not on the need for such studies but rather on the feasibility of obtaining accurate and reliable results. Nonetheless, recognizing the imperfections in the studies but also the need for a rational method of determining necessary educational resources, courts and legislatures continue ordering and implementing costing-out studies.
Programmatic Mandates. While many courts have hesitated to intrude on the legislative domain by directing them to fund education on the basis of a costing-out study, a few courts have gone further and directed their legislature to fund and implement specific educational programs found necessary under the state constitution. The leading cases in this vein are New Jersey’s *Abbott* decisions where, after a period of “inter-branch dialogue” spanning over twelve years, the court finally made clear (i.e. ordered) what was required. Among the most expansive of the programmatic mandates ordered by the court was implementation of Success for All, a whole-school reform program for elementary schools. Other mandated programs include interventions aimed at reducing dropout rates; school-to-work and college-transition programs; summer-school, after-school, and school nutrition programs for which there is demonstrated need; and art, music, and special education programs beyond those required as part of the reform plan. More recently, courts are going beyond K–12 education and mandating early enrollment kindergarten and preschool. This is hardly surprising: evidence suggests that remedial programs are more effective and less costly when intervention occurs at a young age (Barnett, & Jung, & Lamy, 2005).

Remedies Focusing on Subclasses of Children. Just as some courts have ordered remedies focused on subsets of the educational offerings (programmatic remedies), others have ordered remedies focused on subsets of students. This most often takes the form of courts focusing adequacy opinions on the plight of at-risk children, with remedies tailored to “ensuring that ‘at-risk’ students are afforded a chance to take advantage of their constitutionally-guaranteed opportunity to obtain a sound basic [adequate] education.” In some instances, a case has been brought by students protected by specific legislative mandates. For instance, English Language Learners have prevailed under the EEOA and children with disabilities have prevailed under the Individuals with Disabilities Education Act (IDEA). The underlying claim—inadequate or unequal educational opportunities—remains the same, but the remedy—extra programs or funding—is directed toward a subclass of students.

Race is a subclass to which courts pay especially close attention, and when issues of educational equity and racial segregation mix the resulting remedy might be neither programmatic nor financial in nature. In a particularly innovative suit, plaintiff schoolchildren in Hartford, Connecticut claimed that the racial isolation of the Hartford public schools prevented them from receiving substantially equal educational opportunity as guaranteed by the state’s education and equal protection clauses. Reading these two clauses together, the Connecticut Supreme Court agreed. It held the state’s creation of school boundaries to be the most important factor contributing to the racial disparity between Hartford and the surrounding suburbs and ruled that “the existence of extreme racial and ethnic isolation in the public school system deprives schoolchildren of a substantially equal educational opportunity and requires the state to take further remedial measures.” Underlying this ruling was an understanding that a child’s educational experience is defined by more than just the programs provided by the state, it includes, perhaps most importantly, the child’s interaction with his peers.

But the Connecticut case is an outlier, and even it did not force the state to redraw or redefine district boundaries. The parties agreed to a settlement requiring the state to create eight new inter-district magnet schools in Hartford, provide additional seats in suburban schools for minority public school students from Hartford, and provide increased funding for inter-district cooperative programs, a far cry from a truly inter-district, regional solution. Moreover, in a similar suit, the New York Court of Appeals recently held the state not “responsible for the demographic makeup of every school district… [as this] would… subvert the important role of local control and participation in education.” It concluded that “if the State truly puts adequate resources into the classroom, it satisfies its constitutional promise under the Education Article, even though student
performance remains substandard.”41 This opinion envisions a very different future for judicial involvement in educational finance litigation, one in which the state is found to be supplying a constitutional educational system despite perpetual substandard performance—low performance being a product of socio-economic factors for which children, not the state, are responsible.

Whether it be costing out, specific programmatic remedies, or a focus on subclasses of children, courts and advocates appear to appreciate that increased funding for schools is insufficient. Inequities persist, and disadvantaged children remain without their constitutionally guaranteed adequate education. The following section explores the possible futures of educational finance litigation by considering suits brought on behalf of educational units other than the district; i.e., suits brought by individual schools, students, and states. The section concludes with thoughts on the continuing role, if any, of courts in educational finance reform.

THE POSSIBLE FUTURES OF EDUCATIONAL FINANCE REFORM LITIGATION

To this point in the chapter, all plaintiffs (with the exception of those filing under federal statutes) have claimed that their state’s method of distributing funds to local school districts violates the state or federal constitution. But state financing of education is only part of the problem. As education litigation matures, its scope is expanding. Gone are the days when the only legal relationship in question is that between the state and its districts. This section examines current and possible educational finance litigation involving the legal relationships between students, schools, districts, states, and finally, the nation.

The School as the Focal Point for Litigation and Remedial Efforts

If a state has a constitutional obligation to provide every child an adequate education, why should an individual school not bring a suit claiming inadequate resources and funding? Manageability concerns have led some courts to reject this legal approach on the basis that, given absent evidence that the state is under-funding the district as a whole, the school has no claim against the state.42 But what if the state is not underfunding the district? What if the district is misallocating its resources and underfunding the school? Is it possible for a school to bring suit against its district? Is such district misallocation even a problem?

Recent research suggests that “variations of per pupil funding within districts are often greater than the within-state variations that have been found unconstitutional” (Roza & Hill, 2004). A primary reason for such intra-district inequality is the use of Teacher Salary Cost Averaging (TSCA), a practice by which teachers are paid “directly” by the district, with each school given the authority to hire a number of teachers proportionate to the school’s enrollment, independent of salary constraints. Because teacher’s salaries are usually independent of the difficulty of their teaching assignment, there is an incentive among teachers to teach in easier, more affluent schools. Moreover, the more “affluent” schools are often staffed with more experienced, more expensive teachers. Thus, schools serving low-income, minority students frequently receive substantially less funds than schools serving more affluent, Anglo students, even after Title I and other categorical funds are taken into account.43 While suits challenging the constitutionality of TSCA are rare,44 more might be forthcoming.

Charter Schools. In the last decade, charter schools have grown from an oddity to an established feature of the educational landscape; as of September 2006 there were over 4,000 charter schools serving over a million students (The Center for Education Reform, 2006). A
number of common finance issues impact both charter and non-charter schools: because charter schools are usually funded by the state according to the state’s education finance formula—which itself may produce inequitable or inadequate funding— intra-state inequalities affect charter schools, as does inadequate funding. On the other hand, some finance problems are unique to charter schools. While charter schools are not subject to TSCA, they are usually responsible for their facility costs. Because they often receive little or no extra money to pay for their building, many spend close to 20% of their core funding securing a facility (Sugerman, 2002; Premack, 2001). This leaves them with less to spend on individual students, perhaps leading to future claims of inadequate funding or funding incapable of financing educational opportunities equal to those in the district’s non-charter schools. Such adequacy or equity claims by charter schools could usher in the next wave of educational finance litigation.

The Student as the Focal Point for Litigation and Remedial Efforts

While schools seek funding appropriate to their student population, another class of plaintiffs—individual students in failing and/or underfunded schools—has emerged as potential claimants, with the result being a remedy individualized to the aggrieved student. Voucher advocates argue that since the constitutional right to an adequate education is that of the child rather than the district or the school, the funding (based on a weighted student formula) should flow to the child, not the district or the school. Possessing the funding necessary to secure a constitutionally adequate education, the student would be free to seek it at the school of her choice.

This is not a hypothetical case; it is already in the courts. In New Jersey, a class action was recently filed on behalf of children in high-poverty, low-performing school districts seeking vouchers for each family worth the weighted student formula value of their children, “so they may attend a functioning public or private school” (Alliance for School Choice, 2006). A similar lawsuit has been filed in Georgia, where three parents have sought to join Georgia’s adequacy suit, but seek a voucher remedy similar to the one above (Donsky, 2005). Interestingly, in both cases, the plaintiffs seek another remedy in the alternative: the elimination of compulsory attendance zones forcing students to attend a school in the district of their residence (Alliance for School Choice, 2006; Donsky, 2005).

The liability arguments in these two voucher cases are identical to the adequacy arguments discussed throughout this chapter. All are brought under state constitutional provisions; the difference is the remedy sought. But school choice claims are increasingly being brought under federal statutory law as well. The No Child Left Behind Act (NCLBA) requires “program improvement schools” to offer their students the option of transferring to a non-improvement school. NCLB’s implementing regulations require the district to provide a choice of more than one such school. An administrative complaint was recently brought against the Los Angeles Unified School District alleging failure to inform parents of their right to transfer their child under NCLB’s school choice provision and illegally discouraging and denying transfers. As more schools fall into “improvement” status, this provision of NCLB will undoubtedly be used more often to leverage school choice.

Inter-State Inequality as the Focal Point for Litigation and Remediation

Even when adjusted for cost-of-living differences, per-pupil spending varies dramatically between states, with states containing more economically disadvantaged, minority, and English language learner students likely to spend less (Liu, 2006). In fact, “disparities between states accounts for more of the variation in district per-pupil spending nationally than disparities within
states” (Liu, 2006). While this could reflect a preference for less educational spending, data indicate that it is more a function of ability than willingness to pay (Liu, 2006). Absent substantial federal aid aimed at equalizing educational opportunities, children in wealthier states will continue receiving educational opportunities superior to those in poorer states.

The difficulty is that the likeliest source of legal rights to remedy inter-state inequality, the U.S. Constitution, appears to most advocates to have been foreclosed by the Rodriguez decision. Recently, however, Goodwin Liu has suggested a legal argument for establishing a Congressional “duty”—though not an actionable “right”—to ameliorate such inter-state inequalities. Arguing the Citizenship Clause of the 14th Amendment constitutes a “font of substantive rights,” with the affirmative nature of the Clause acting to expand Congress’s enforcement power beyond protecting national citizenship from state invasion, he concludes that “the constitutional grant of congressional power to enforce the national citizenship guarantee implies a constitutional duty of enforcement” (Liu, 2006). While Liu uses legislative history from the period directly subsequent to enactment of the 14th Amendment to buttress the validity of this interpretation (Liu, 2006), recent increased involvement of the federal government (through legislation such as the NCLB, IDEA, and EEOA) in the traditionally local matter of public schooling makes claims of adequate educational opportunities being a component of citizenship all the more reasonable. While not providing a source of action to aggrieved individuals, the paper serves to remind national legislators of their moral and constitutional responsibility to abet inter-state educational equity.

From refocusing litigation and remedial reform from school districts to schools and individual students, to seeking to combat the large inequalities in educational spending among states, the future of educational finance litigation may look very different from its past. It is not clear whether the recent upsurge in judicial activity will continue, or whether courts are showing signs of fatigue.

The Continuing Role of the Judiciary in Educational Finance Policy Making

Though advocating a litigation strategy to attack the manifest unfairness of property-tax-based educational finance schemes, Coons, Clune, and Sugarman (1970) were equally wary of the courts intervening in the complex social policy arena of educational finance without clear standards. As the previous section demonstrates, courts have frequently failed to heed that advice and have become entangled in frequently lengthy and often contentious policy-making “dialogues” with state legislatures. The inevitable question is whether, and if so how, courts will help shape the future of educational finance and policy.

There is no doubt that the role of the judiciary in what Abram Chayes (1976) famously called “public law litigation” differs dramatically from traditional litigation among private parties. Ever since at least Brown v. Board, courts, under the authority of state and federal constitutional and sometimes statutory mandates, have been called upon to reform and superintend complex institutions such as schools and prisons in equally complex social policy arenas such as child welfare and police practices. In educational finance reform cases, state supreme courts have become deeply enmeshed in the policy-making process. Whether it is exercising the judicial “veto” over a school finance scheme, directing that a legislature “cost-out” an adequate education, or even prescribing specific educational reforms such as preschool for all, courts are making forays into policy making that was traditionally left to legislatures.

For some, this dialogue between the judiciary and the political branches is a logical, if not healthy, role for the branch charged with protecting constitutional values (Jaffe, 1991). James Liebman and Charles Sabel (2003) have recently argued that in these school reform cases the judiciary is beginning to create public forums in which the political branches, educational in-
siders, and “new publics” (coalitions of civic-minded outside reformers) can “discuss comprehensive reforms of American education that draw on linked innovations in school governance, performance measurement, and the reconceptualization of the teaching profession and pedagogy” (p. 280). In this model, courts assume a coordinating and oversight role, enabling the new publics to reform educational finance policy once powerful interests have been “disentrenched” by judicial decisions. Whether this will become the norm in educational finance litigation is, however, unknown, as some are much less sanguine about this new role for the judiciary.

Indeed, the courts have come under increasing scrutiny and even attack for intervening in and invalidating educational finance policy (Starr, 2005). Courts have been criticized for crafting unmanageable constitutional standards, straying beyond their expertise, ignoring the separation of powers, and calling into question the very legitimacy of the judicial institution. Faced with such challenges, courts may choose a very different future from that lauded by Liebman and Sabel. Since the inception of educational finance reform litigation, many courts have avoided the complex waters of school finance policy by invoking the “political question doctrine” or citing to concerns about the separation of powers.48 Perhaps a more chilling example for would-be judicial reformers, however, is the risk of being ineffectual in the reform process. Some argue that the Ohio educational finance reform litigation provides a cautionary tale, a tale in which, after repeatedly striking down the state’s educational finance reform system and being rebuffed by the legislature (and potentially facing a constitutional crisis), the Ohio Supreme Court relinquished jurisdiction over the matter.49

Whether the judiciary will ambitiously pursue the role of participant in a school reform dialogue with policy makers and other “new publics” or whether courts, feeling fatigued from 30 years of litigation and not infrequent legislative recalcitrance, will withdraw from the school finance debate remains to be seen. What is known, however, is that the last few decades of educational finance reform litigation have permanently injected the “constitutional” values of equality and adequacy into that debate.

NOTES

5. Harper, 383 U.S. at 668 (“Lines drawn on the basis of wealth or property, like those of race . . . , are traditionally disfavored.”).
6. In their seminal work on the measurement of equality in educational finance, Robert Berne and Leanna Stiefel later called this standard “horizontal equity” (Berne & Stiefel, 1984).
7. In Berne and Stiefel’s (1984) terminology, this is deemed “vertical equity.”
9. 487 P.2d 1241 (Cal. 1971), aff’d after remand, 557 P.2d 929 (Cal. 1976). Serrano I is widely recognized as the case all equity litigations sought to emulate. There, the California Supreme Court considered the now-infamous discrepancy in funding between the Baldwin Park and Beverly Hills school districts. In 1968–69, Beverly Hills enjoyed a per-pupil assessed valuation of $50,885, while the largely minority Baldwin Park suffered a $3,706 valuation. These disparities were naturally reflected in per-pupil expenditures: where Beverly Hills lavished $1,231.72 on each of its students, whereas Baldwin Park could afford to spend only $577.49 per student. This difference prevailed in spite of the fact that
Baldwin Park taxed itself more aggressively than Beverly Hills. Based on the federal Equal Protection Clause, the California Supreme Court found that education was a “fundamental right” and poverty a “suspect classification.” Therefore, judicial “strict scrutiny” should apply. California could provide no compelling state interest for the local property-tax-based finance system nor demonstrate that the system was narrowly tailored to achieve the state’s interests. Although the court found the funding system unconstitutional under the federal Constitution, the court would later reconsider the matter and again find the state’s funding scheme unconstitutional under the state constitution. *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) (*Serrano II*).


11. See, e.g., *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (1978) (finding the state’s school finance system unconstitutional under the state’s education article); *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310 (Wyo. 1980) (bolstering the state’s equality provision with the state’s education article to find the funding system unconstitutional); *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983) (finding that an analysis of the education article reinforces the holding that the funding system was unconstitutional under the equality provision).

12. This usually meant greater state-level involvement in educational funding through state-guaranteed tax base plans or, on rare occasion, state-backed equal yield plans, a.k.a. district power equalization, that sought to recapture “excess” revenues from wealthy districts.

13. See Evans, et al. 1999, pp. 74–75 (noting that California has achieved finance equity through leveling down high revenue districts); Joondeph, 1995 (concluding that California’s *Serrano* decision depressed educational spending in the state); Heise, 1995a (finding a negative relationship between judicial intervention in Connecticut’s school finance policy and overall state educational spending); Sonstelie, et al. 2000 (“[S]pending per pupil in California between 1969 and 1998 fell about 15% relative to the average for the other states.”). It should be noted, however, that some of the evidence for this proposition comes from California; a state in which school funding has been further stymied by the property-tax-capping effects of Proposition 13. See Silva & Sonstelie, 1995.


17. *Rose*, 790 S.W.2d at 212.

18. See, e.g., N.J. Const. art. VIII, § 4, cl. 1 (“The Legislature shall provide for maintenance and support of a thorough and efficient system of free public schools . . . .”).

19. See, e.g., Wis. Const. art. X, § 3 (“The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable.”).

20. See e.g., Ill. Const. art. X, § 1 (“The State shall provide for an efficient system of high quality public educational institutions and services.”).


23. Florida and Rhode Island are typical of states holding any judicial ruling on educational adequacy to constitute an impermissible foray into the legislative realm. See, e.g., Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So.2d 400 (Fla. 1996); *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995).


25. *Campbell I*, 907 P.2d at 1279 (indicating that the opportunity for a quality education should include small class sizes, ample, appropriate provisions for at-risk students, and meaningful standards and assessments).

27. Indeed, both Campbell I and Lake View IV can be viewed as hybrid adequacy-equity cases, with both courts using strong equity language. See Campbell I, 907 P.2d at 1278 (holding that under Wyoming’s equal protection clause “an equal opportunity for a proper education necessarily contemplates the playing field will be leveled so each child has an equal chance for educational success.”); Lake View IV, 91 S.W.3d at 499 (holding it to be the General Assembly’s constitutional duty to “provide equal educational opportunity to every child in this state.”).

28. See Flores v. Arizona, 160 F.Supp.2d 1043, 1047 (Ariz. 2000) (Flores III); Flores v. Arizona, 2002 U.S. Dist. LEXIS 23178, 8 (Ariz. 2002) (Flores V). Plaintiffs in these cases claimed the state was denying English Language Learners (ELL) equal educational opportunities and was failing to take appropriate action to overcome language barriers that impeded equal participation by ELL students in the state’s educational programs. The federal court agreed and ordered the state implement a costing-out study to determine the cost of an appropriate ELL program, and then to supply the funding.

29. See Tennessee Small School Systems v. McWhorter, 851 S.W.2d 139 (Tenn. 1993) (Small Schools I) (enacting the Educational Improvement Act based on a court-ordered costing-out study in an equity litigation).

30. While most scholars view costing out as an inexact and evolving methodology, some argue that it’s so susceptible, and subject to, manipulation, that it ought not be used by judicial decision makers (Hanushek, 2006). For example, the Professional Judgment Model produces different results depending on the professionals chosen, the Similar Schools approach is susceptible to data based manipulation, and the Cost Function Model is highly sensitive to technical assumptions. Competing studies using similar methodologies produce radically different results (Guthrie & Springer, 2007).


32. See Abbot V, 710 A.2d at 457 (explaining that this was an effort to change the way educational decisions are made, rather than add reform piecemeal).

33. Id. at 473–474.

34. See Id. (ordering the state to provide full-day kindergarten for five year olds and a half day preschool program for three and four year olds); Abbot v. Burke, 748 A.2d 82 (N.J. 2000) (Abbot VI) (further detailing the type of preschool to be provided); see also Circuit Court Decision 93–CP–31–0169, 162 (S.C. 2005) (holding that “students in the Plaintiff Districts are denied the opportunity to receive a minimally adequate education because of the lack of effective and adequately funded early childhood intervention programs designed to address the impact of poverty on their educational abilities and achievements.”); but see Lake View IV, 91 S.W.3d at 501 (holding “implementation of pre-school programs… [to be] a public-policy issue for the General Assembly to explore and resolve.”); Hoke County v. State, 599 S.E.2d 365, 391–95 (N.C. 2004) (holding “specific court-imposed remedies… [to be] inappropriate at this juncture…”).

35. Hoke County, 599 S.E.2d at 390.


39. Id. at 1281.


42. NYCLU v. State, 791 N.Y.S.2d 507, 511 (2005) (rejecting the claims of a group of 27 schools outside New York City by holding that “in identifying specific schools that do not meet minimum standards, plaintiffs do not allege any district wide failure . . . in seeking to require the State to assess and rectify the failings of individual schools, plaintiffs’ theory would subvert the important role of local control and participation in education”).

43. In a study of Baltimore, Cincinnati, and Seattle, high-poverty, low-performing schools employed
teachers whose salaries were lower than average (Roza & Hill, 2004). In Houston, high-poverty, low-performing schools were found to be receiving significantly less funding than low-poverty, high-performing schools (Roza & Miles, 2002).

44. To the authors’ knowledge only one such claim has been litigated: *Rodriguez v. Los Angeles Unified School District*, No. C 611–358, Superior Court of the State of California for the County of Los Angeles, with a consent decree entered August 25th, 1992.


48. See, e.g., *Hornbeck v. Somerset County Bd. Of Educ.*, 458 A.2d 758, 790 (M.D. 1983) (“[I]t is not within the power or province of members of the Judiciary to advance their own personal wishes or to implement their own personal notions of fairness under the guise of constitutional interpretation. The quantity and quality of educational opportunities to be made available to the State’s public school children is a determination committed to the legislature . . . .”); *Britt v. North Carolina Bd. of Educ.*, 357 S.E.2d 432, 437 (Ct. App.), appeal dismissed 361 S.E.2d 71 (N.C. 1987) (holding that good law or bad law, wise or unwise, the question of what type of education to provide to North Carolinians is for the legislature, not the courts); *Committee for Educ. Rights v. Edgar*, 174 Ill. 3d 1, 28 (1996) (“What constitutes a “high quality” education, and how it may best be provided, cannot be ascertained by any judicially discoverable or manageable standards”); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 59 (R.I. 1995) (“The volume of litigation and the extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on the duties of a Legislature.”).


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3. EDUCATIONAL FINANCE REFORM LITIGATION


