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Symposium on The New Judicial Federalism: A New Generation

Disorder in the Courts: The Aftermath of San Antonio Independent School District v. Rodriguez in the State Courts

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DISORDER IN THE COURTS: THE AFTERMATH OF *SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ* IN THE STATE COURTS

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> In recent years, however, a new role for the judicial branch of the government has been introduced [regarding the issue of financing for public schools]. The question of funding has taken on a new dimension which threatens to change the entire set of arrangements that has traditionally governed the allocation of local and state fiscal responsibilities for public school education. The problem is based on court challenges to the current system of financing elementary and secondary school education on the grounds that current financing methods do not provide equality of educational opportunity for public school students in each school district within a state.[1]

I. OVERVIEW

This Article examines the changes in judicial strategy by education advocates for disadvantaged children and school districts. Additionally, this Article traces the development of school finance strategy, from issues of equity of funding arrangements among districts within the states to issues of the overall adequacy of funding arrangements in certain districts within the states. As education standards have deteriorated generally, the focus of education has become less on what other favored districts receive by way of competitive advantage in funding and more on how basic public school education is not being provided in many, largely urban, school districts. Through it all, there remains significant dissatisfaction with public schooling and with the action of state and local authorities to meet the educational needs of children.

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1. Frank J. Macchiarola, *Constitutional and Legal Dimensions of Public School Financing, in* THE MUNICIPAL YEAR BOOK 17 (1974).

This examination centers around reported cases which have followed *San Antonio Independent School District v. Rodriguez*, where the United States Supreme Court refused to apply federal constitutional remedies to the underfunding of certain Texas school districts.[2] This Article deals with various state cases prior to *Rodriguez* and with the flood of cases coming under state constitutional law that followed *Rodriguez*. This Article concludes by suggesting that judicial remedies have been ineffective and consequently inadequate to meet the schooling needs of our youth.

In *The 1974 Municipal Year Book*, one of us wrote an article entitled, "*Constitutional and Legal Dimensions of Public School Financing.*"[3] In that article, a number of decisions reached by both the Supreme Court and the courts of several states regarding the constitutionality of variations in per-pupil school spending based on local taxing schemes and state aid were discussed.[4] Besides providing the reader with an overview of the law in that particular area, the question implicitly raised was whether the Supreme Court had failed in its handling of *Rodriguez*.[5] While the issue of public school finance was a constitutional "hot" topic of the day, the direction and focus of lawsuits concerning the issues of financing education have changed significantly. Instead of finding fault with local and state tax revenue schemes arguing that children are being educated in violation of their equal rights, more recent actions challenge the adequacy of public education itself. These claimants argue that children are being denied the right to a quality education regardless of the issue of fiscal equity among districts.

Since the Burger Court decided *Rodriguez* and took away the federal issue, state courts have come down squarely on both sides of the funding issue in their application of state constitutional law. Several state courts have concluded that education is an important right and that the various funding schemes used in the states are required to comply with state constitutional requirements. In those states, school funding has been subject to constitutional standards generally developed by state-wide governmental bodies created by the legislatures or by the legislature itself. Other states have declined to include education in the breadth of fundamental rights and have thus avoided applying an analysis that would adjust the system of school finance used within the state. Those courts have concluded that variations in school-district funding based on local taxing schemes and on state aid formulas are rationally related to the goal of local political control and therefore satisfy legal requirements. These decisions have allowed courts to stay clear of issues of equity that are more customary in the

2. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
3. Macchiarola, *supra* note 1, at 17.
4. *Id.* at 17-22.
5. *Id.* at 17.

political process.

This Article will look at three distinct questions regarding *Rodriguez* and its progeny. First, it will examine what the courts have said about public school finance and government spending in light of *Rodriguez*. Second, this Article will discuss the merits and consequences of state courts' involvement in the equity issues pertaining to public school finance. And third, this Article will discuss what state courts have said about the effectiveness of governmental spending as it concerns the quality of public education.

The authors conclude that although litigation in public educational finance has been considerable, results have not been significant in addressing youngsters' needs in public schools. History has shown that even when fairness issues are resolved, the problems remain with the effectiveness of that funding. Schools do not pass the benefits of increased funding on to youngsters. We contend that any solution through the judicial process will be inadequate. We believe that seeking a solution to a matter of fundamental fairness through the adversarial process can give us, at best, limited results. We suggest that while the courts can identify the wrong, they are incapable of providing effective remedies by adjusting formulas or mandating expenditures. Remedies are more appropriately found in the political process, by exhorting a fairness standard for the legislature to adopt, or by providing citizens with the opportunity to opt out of traditional and inadequate public school structures.

II. INTRODUCTION

Education rights proponents have utilized the courts to challenge states' discretion with regard to its public school financing and spending policies and practices since the late 1960s. The first cases challenged funding discrepancies between various local school districts. Plaintiffs argued that the funding discrepancies between the affluent suburban school districts and the poorer urban school districts on a per-pupil basis were violative of the federal and state constitutional guarantees of equal protection, as well as a denial of the fundamental, i.e., constitutionally guaranteed, right to a public education.[6] While the Supreme Court declined to agree that the right to an education is fundamental or that funding disparities of local school districts are violative of

6. Some commentators have distinguished between the cases brought along federal equal protection theories and those brought under theories of state constitutionality, whether it be under state equal protection guarantees, state constitutional guaranty clauses, or under the education clauses of the particular state constitutions. *See, e.g.*, William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990).

equal protection under the federal Constitution,[7] several states have ruled that such funding discrepancies are violative of their own state constitutions.

Generally, these state court actions have been brought under theories of what has been termed "fiscal equity" or "fiscal neutrality" litigation. Statewide school funding schemes are usually based on revenue from federal, state, and local funding. While federal and sometimes state funding can be tied to a fixed or equal per-student amount, the portion of school income based on local taxes can vary greatly depending largely upon the strength or weakness of the property tax base as these taxes are generally raised through a property levy. Plaintiffs in these actions have posited that simply because a particular school district's tax base is weaker or smaller and thus draws in less revenue than a school district with a more affluent or stronger tax base, it is inequitable to "penalize" the school districts with the weaker tax bases by tying a significant portion of the district's funding to local taxes, hence the terms "fiscal equity" and "fiscal neutrality." Proponents of the variations in funding to school districts maintain that local taxes are a reasonable decision of local government policy and urge that the affluent or suburban districts' decision to spend greater amounts on per-pupil expenditures because their relatively stronger tax bases should not be impinged upon by state government.

Among the states where the courts have found public school funding schemes unconstitutional on the issue of "fiscal equity" or "fiscal neutrality" are California,[8] New Jersey,[9] Connecticut,[10] Washington,[11] West Virginia,[12] Wyoming,[13] Arkansas,[14] Texas,[15] Kentucky,[16] Montana,[17] and Tennessee.[18] Similar actions, however, have been unsuccessful in at least fifteen states, including Arizona,[19] Idaho,[20] Oregon,[21] Ohio,[22]

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7. The United States Supreme Court, in *San Antonio Independent School District v. Rodriguez*, considered and rejected both arguments that (1) education is a fundamental right either explicitly or implicitly guaranteed in the Constitution, and (2) wealth is a protected group such that any differences in educational spending is subject to strict scrutiny analysis. For a further discussion of the Court's holding in *Rodriguez*, see *infra* notes 54-73 and accompanying text.

8. Serrano v. Priest, 487 P.2d 1241 (Cal. 1971).

9. Robinson v. Cahill, 339 A.2d 193 (N.J. 1975).

10. Horton v. Meskill, 376 A.2d 359 (Conn. 1977).

11. Seattle Sch. Dist., No.1 v. Washington, 585 P.2d 71 (Wash. 1978).

12. Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979).

13. Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980).

14. DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983).

15. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

16. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989).

17. Helena Elementary Sch. Dist. No. 1 v. Montana, 769 P.2d 684 (Mont. 1989).

18. Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993).

19. Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973).

Pennsylvania,[23] Georgia,[24] Colorado,[25] New York,[26] Maryland,[27] Oklahoma,[28] South Carolina,[29] Wisconsin,[30] Kansas,[31] and Minnesota.[32]

More recently, the focus of challenges to statewide funding mechanisms has switched from equity in per-pupil spending to the actual "adequacy" of the education provided. In these suits, the aim of the litigation is essentially to adjudicate whether the qualitative nature of particular states' public education systems provides students with an adequate education. While a court rarely evaluates the overall uniformity of education across school districts, it is usually asked to determine that the children in disadvantaged districts are not obtaining an adequate education. This litigation strategy, with some variation, has succeeded in New Jersey,[33] Connecticut,[34] Alabama,[35] Massachusetts,[36] and Pennsylvania.[37] The courts of Kansas[38] and Illinois[39] have rejected such claims, reserving issues of educational adequacy and uniformity for the state legislature. Most recently, this strategy also appears to be working in the New York Court of Appeals.[40] This recent decision, which was remanded for fact

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20. Thompson v. Engelking, 537 P.2d 635 (Idaho 1975).

21. Olsen v. Oregon, 554 P.2d 139 (Or. 1976).

22. Board of Educ. v. Walter, 390 N.E.2d 813 (Ohio 1979), *cert. denied*, 444 U.S. 1015 (1980).

23. Danson v. Casey, 399 A.2d 360 (Pa. 1979). *But see* Pennsylvania Human Relations Comm'n v. School Dist. of Philadelphia, 638 A.2d 304 (Pa. Commw. Ct. 1994).

24. McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981).

25. Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982).

26. Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1138 (1983).

27. Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983).

28. Fair Sch. Fin. Council of Okla., Inc. v. Oklahoma, 746 P.2d 1135 (Okla. 1985).

29. Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988).

30. Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989).

31. Unified Sch. Dist. v. Kansas, 885 P.2d 1170 (Kan. 1994).

32. Skeen v. Minnesota, 505 N.W.2d 299 (Minn. 1993).

33. Abbott v. Burke, 575 A.2d 359 (N.J. 1990) (holding that the Public School Education Act violated the "thorough and efficient" clause of the New Jersey Constitution by failing to provide that poorer urban districts provided a thorough and efficient education to their students, thus preventing them from full participation as citizens).

34. Sheff v. O'Neill, 609 A.2d 1072 (Conn. Super. Ct. 1992).

35. Opinion of the Justices No. 338, 624 So. 2d 107 (Ala. 1993) (advising that the state legislature was obliged to comply with an order of the Circuit Court of Montgomery County, in *Alabama Coalition for Equity, Inc. v. Hunt*, stating that an equitable education must be provided for all school children).

36. McDuffy v. Secretary of the Executive Office, 615 N.E.2d 516 (Mass. 1993).

37. Pennsylvania Human Relations Comm'n v. School Dist. of Philadelphia, 638 A.2d 304 (Pa. Commw. Ct. 1994).

38. Unified Sch. Dist. No. 229 v. Kansas, 885 P.2d 1170 (Kan. 1994).

39. Committee for Educ. Rights v. Edgar, 641 N.E.2d 602 (Ill. App. Ct. 1994).

40. Campaign for Fiscal Equity, Inc. v. New York, 655 N.E.2d 661 (N.Y. 1995).

finding at the trial level, is significant because of that court's historically strong stand against "fiscal equity" as a means of eliminating discrepancies in the funding of school districts throughout the state.[41]

In light of this ongoing expansion of educational litigation, the issue arises about the impact of the Supreme Court's failure to include education among the fundamental and thus guaranteed rights of its citizenry when it had the opportunity to do so. There is no doubt that advocates of education rights in state courts have created and influenced educational policy and spending in many states that would have been very difficult to accomplish through the more direct legislative process. Indeed, the issue of whether a federal entitlement might be created if the Supreme Court were to reconsider the question remains to be pondered.

The authors contend that without the guidance of the Supreme Court, the states have reached different results regarding significant policy decisions of national importance in an area of fundamental significance to our citizenry: i.e., the right to public and free education. These policy decisions include: education as a fundamental right; the appropriateness of variations in local school district spending on a per-pupil basis; and, more recently, the right to some "adequate" level of education over and above some minimum right to be present in the classroom. Indeed, notwithstanding the *Rodriguez* decision, the judicial struggles remain important and serious as these education rights groups continue to utilize the judicial process to secure rights and form policy by prodding legislatures to improve the quality of public education. While there is no consensus among the states as to the fundamental nature of public education, the authors will address the issue of whether it is wise to allow individual states to determine the right to acquire an education. Moreover, the reliance on the courts to create educational policy also raises serious questions as to both federalism and the separation of powers.

Did the Supreme Court act correctly in deciding *Rodriguez*? Some commentators have concluded that by utilizing theories of justice and equality external to the Constitution,[42] the Court could have reached a different decision, akin to what occurred in *Brown v. Board of Education*.[43] In hindsight, while a decision in favor of the plaintiffs may have avoided much

41. *Id.* at 667-68.

42. *See, e.g.*, David A.J. Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32 (1973); James R. Hackney, Jr., *The Philosophical Underpinnings of Public School Funding Jurisprudence*, 22 J.L. & Educ. 423 (1993).

43. 347 U.S. 483 (1954). This decision invalidated the doctrine of separate but equal, the law of the land since Plessy v. Ferguson, 163 U.S. 537 (1896), and in particular as it applied to educational facilities. *Brown*, 347 U.S. at 495.

funding disparity litigation at the state level, there is no assurance that, given the complexity of state formulas, federal litigation could have disposed of basic questions. In addition, while an apparatus for overseeing state formulas might possibly have been developed, there is no sense that a beneficial result for students would have emerged. Indeed, even if "fair formulas" could have been found, a process about which we are not sanguine, it does not appear that the Court would have given direction and instruction to states as to what that fundamental right to an education would require.

We also believe that while it is possible that lawsuits brought in the state courts based on state constitutions might have had a positive impact on the issue of fairness of funding, a crisis in education remains.[44] That crisis in public education, as the new direction of education litigation indicates, is about the *effectiveness* of the education itself. It is the authors' belief that our society can no longer use state or federal courts to provide citizens an appropriately fundamental education and the opportunity to build on that education. The remedy needed goes beyond judicial remedy. A popular sense of common urgency must occur and grip the political branches of our government.[45] Inadequate school districts will not become adequate by the infusion of funds. Even direct intervention by state offices within local districts is not enough. Furthermore, granting parents the opportunity to have satisfactory alternatives outside the typical form of public schooling remains the most easily enforceable. Charter schools, public school choice, and voucher plans are attractive alternatives to investing in failing government schools. Those options are more appropriate than judicial damages since they come closer to granting immediate relief to aggrieved parties.

After a review of the leading decision regarding the fundamental right to education by the Supreme Court, we then discuss how the state courts have responded to that decision in their own jurisprudence, thus providing the reader with an overview of the case law in this area. We then consider the issue of whether the Supreme Court in *Rodriguez* took the most appropriate stand, given the state of public education today. Did the position the Court took in *Rodriguez* leave the state courts with sufficient guidance to rule on similar issues raised in the state high courts? Additionally, this Article addresses the issue of whether

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44. In an analysis of spending trends generated by these cases, one commentator suggests that the real increase in funding has not occurred because of equity-based challenges. *See* Michael Heise, *State Constitutional Litigation, Educational Finance, and Legal Impact: An Empirical Analysis*, 63 U. CIN. L. REV. 1735 (1995). He sees real increases in funding to be possible under "adequacy" litigation. *Id.* at 1736-38.

45. With the passage of Goals 2000, the national act aimed at community-based school reform to achieve higher standards, that sense of urgency does appear to be gaining some political momentum, at least to a limited extent at the federal level.

the state courts have done any better than the Supreme Court in responding to the needs of public education through "adequacy" litigation, and whether in fact the issues raised by public education are amenable to constitutional adjudication. Underlying these issues is the greater issue of judicial restraint and activism based on the assumption that the judiciary takes power away from the legislative and executive branches of the government and can give rise to a conflict among the branches.

III. *RODRIGUEZ* AND ITS PROGENY

A. Passing the Burden to State Governments: A Review of Several State Decisions Considering Funding Discrepancies Based on Local Taxation

Most discussions of educational finance reform litigation begin with an overview of *Serrano v. Priest (Serrano I)*,[46] which predated the Supreme Court's *Rodriguez* decision by two years. In 1971, California's Supreme Court became the first state high court to declare that a system of finance for public education, based in part on local taxing practices which permitted a large disparity in per-pupil funding among the various districts, was unconstitutional under both the federal and state Constitutions.[47]

In *Serrano I*, the California Supreme Court was asked to decide the constitutionality of the school funding system. The plaintiffs in the lower court urged that a system that resulted in different per-pupil spending violated the equal protection laws of the federal as well as the California Constitution.[48] The high court agreed, holding that once the state chooses to provide education to its citizens, it must do so in a generally fair manner, and not based on district wealth even if only partially based on district wealth.[49] Finding that "rich" districts did spend more per-pupil than "poor" districts, the court ruled that the state public school financing scheme was unconstitutional.[50]

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46. 487 P.2d 1241 (Cal. 1971) (*Serrano I*).

47. *Id.* at 1266. *See also* Van Dusartz v. Hatfield, 334 F. Supp. 870 (D.C. Minn. 1971) (holding, prior to the Supreme Court's opinion in *Rodriguez*, that a state wide funding scheme was unconstitutional).

48. *Serrano I*, 487 P.2d at 1266. This decision was the first to address the issues of the constitutionality of California's state-wide school district funding scheme. The court held that if the allegations in the complaint were found to be true by the trial court, then the system would have been in violation of the state and federal equal protection provisions. *Id.* at 1266. The legislature did not actually await such a finding because of the high likelihood that the lower court would so find and thus addressed the problems with the finance scheme immediately upon the court's decision. This matter needs to be distinguished from Serrano v. Priest, 557 P.2d 929 (Cal. 1976) (*Serrano II*). In *Serrano II*, the California Supreme Court addressed the legislative response to its earlier decision in *Serrano I*. *Id.* at 930.

49. *Serrano I*, 487 P.2d at 1264-66.

50. Serrano v. Priest, 487 P.2d 1241, 1264-66 (Cal. 1971).

The decision in *Serrano I* was based on federal and state equal protection provisions.[51] The court reasoned that because the system failed to provide its students with some equality of resources and thereby discriminated on the basis of wealth, it violated the state constitution as well as the federal Constitution.[52] In doing so, the court rejected the government's argument that each school district was free to raise as much revenue as its taxpayers wanted.[53] Besides being the first state supreme court decision to address the issue of disparity in a school system's funding practices and decide in favor of the plaintiffs, the *Serrano I* decision is also significant in that it agreed with the plaintiffs that education was among those basic rights guaranteed citizens.

After the *Serrano I* decision, the United States Supreme Court considered similar issues concerning education rights. The Court's seminal decision regarding an individual's right to education is *Rodriguez*.[54] In *Rodriguez*, a class action was brought in federal court on behalf of children living in school districts with low property tax bases.[55] Because the Texas school financing system relied partially on local property taxes, the class argued that such a system was violative of the federal Equal Protection Clause in that it discriminated against a definable class of "poor" persons, which the class urged the Court to consider a suspect class worthy of strict scrutiny protections.[56]

It is important to note that prior to *Rodriguez*, state governments had generally generated a significant portion of educational funding for local school districts by using local tax levies in their funding schemes, which in turn had a great impact on per-pupil spending and the variations thereof among districts.[57] This practice and policy of permitting localities discretion as to the use of their locally tied and raised tax dollars is the norm in many local funding schemes, including police, housing, sanitation, health care, transportation and other public benefit services. In *Rodriguez*, the Court was asked to address the key states' rights issue of state versus local government control of locally raised revenues and resources.[58] Put another way, the difficulty for the Court, and for many state legislatures, was in simultaneously requiring localities to raise funds and then limiting that spending. Under more conservative viewpoints, this manner of achieving "equity" would seem anathema to our system of democracy and

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51. *Id.* at 1249.
52. *Id.* at 1254-55.
53. *Id.* at 1251.
54. 411 U.S. 1 (1973).
55. *Id.* at 5.
56. *Id.* at 19-20.
57. Hawaii, for example, has a unique system of school district funding that has no local government component but instead requires of the state a duty to provide wholly for a system of public education. HAW. CONST. art X-1.
58. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50-51 (1973).

federalism. Compounding this concern is the issue of the redistribution of locally raised monies, which strikes similarly hard at the principles underlying usual state practices encouraging local control over public schools. *Rodriguez*, then, was about more than the right to education or even the fundamental nature of education; it challenged an entrenched method of local finance and control whose outcome stood to have substantial impact on the issue of state's rights.

The plaintiffs in *Rodriguez*, the parents of Mexican-American children attending elementary schools in the Edgewood School District in urban San Antonio, originally brought their action in federal district court where it was tried before a three-judge panel.[59] They alleged that the Texas system of school finance violated the Equal Protection Clause in several ways, including differences in the quality of education, by making it a function of the wealth of the local school district.[60] As a result, differences in the material resources between those districts with higher tax bases and the "poorer" districts occurred, and they charged that it perpetuated marked differences in the quality of educational services available to the youngsters.[61] The plaintiff urged the district court to adopt a strict scrutiny analysis.[62] This argument rests upon the plaintiffs' claimed status as a suspect class, based on their income relative to the median statewide income and the incomes of families in affluent districts, as well as the funding scheme's interference with the fundamental right of education, through unequal distribution of financial resources.[63]

The district court substantially agreed with the plaintiffs, ruling that the Texas system of school finance did promote substantial disparities among the school districts in terms of per-pupil spending and thereby resulted in invidious discrimination against the poor.[64] Accordingly, the court found this system to be in violation of the Equal Protection Clause. On appeal, the defendants, which included the Edgewood School District, the State Board of Education, the

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59. *Id.* at 4-5.

60. *Id.* at 28.

61. *Id.* at 25-26.

62. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973).

63. The Court explained that it applies a strict scrutiny analysis in reviewing legislative judgments that interfere with either a fundamental constitutional right or where a suspect classification or "protected class" is involved. *Id.* at 16-17. Where strict scrutiny is found to apply, the state law or system is not entitled to a usual presumption of validity. *Id.* at 16. The challenged legislative act or system must demonstrate that the challenged law or system has been structured with "precision" and is "tailored" narrowly to serve a legitimate objective and that the legislative body has selected the least drastic method for obtaining its objectives. *Id.* The challenged legislative judgment carries a heavy burden of justification. *Id.* at 16-17. Because the Court found that neither a suspect class nor a fundamental right was involved, the Court applied the much less stringent "rational relationship to a legitimate state interest" analysis, wherein there is a presumption of validity as to the statute or other governmental interest being attacked. *Id.* at 18.

64. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

Commissioner of Education, and the Texas State Attorney General, essentially conceded that Texas permitted a dual system of financing which could not pass muster under strict scrutiny analysis.[65] They argued instead, that the matter before the court involved neither a fundamental right nor a suspect classification and that a legitimate state interest was served by maintaining the statewide educational finance system.[66]

The Supreme Court agreed with the defendants and reversed as to the fundamental nature of education and the application of the Equal Protection Clause.[67] The Court determined that the state government could enact legislation that affects its citizens differently concerning how monies for education were raised and expended.[68] Delving into a long history of the Texas Constitution and the state's development from an evenly distributed rural population to extremely diverse urban and suburban populations,[69] the Court nonetheless criticized the district court's reliance on the cases dealing with the rights of indigents to equal treatment in criminal proceedings and on cases disapproving of wealth restrictions in the right to vote.[70] The Court called the district court's analysis "simplistic," and ruled that wealth was not a traditionally suspect class under strict scrutiny analysis.[71] In a narrow five to four ruling, the Court held, inter alia, that education is not among those rights afforded explicit or implicit protection under the federal Constitution, and that one's financial status cannot give rise to a protected status which would invoke strict scrutiny analysis under the Constitution.[72]

1. State Courts' Holding That Funding Disparities Are Unconstitutional.

Handed this powerful defeat, proponents of education rights sought to undo the impact of *Rodriguez* by following the lead of *Serrano I* in California, by bringing actions on a state-by-state basis. Indeed, after the Court decided *Rodriguez*, many state courts were asked to address the issue of the legality of disparity in public school funding between "affluent" and "poorer" school districts. Public school finance challenges have been consistently based on state constitutional claims, alleging violations of both the fundamental right to an education and the respective states' equal protection, guaranty or education

65. *Id.* at 16.
66. *Id.* at 16-17.
67. *Id.* at 3.
68. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 3 (1973).
69. *Id.* at 9.
70. *Id.* at 18.
71. *Id.* at 19.
72. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 3 (1973).

clauses.[73] Moreover, the decisions of state courts discussing public education availability and funding uniformly expand on the view of education as a basic individual right under their constitutions.

One of the first state courts to address this issue, in an opinion released only nineteen days after the *Rodriguez* decision, was New Jersey.[74] In *Robinson v. Cahill*,[75] New Jersey's high court, like California's in *Serrano I*, also struck down a statewide financing system as unconstitutional because of its partial reliance on a system of local taxation which resulted in the continuous under-funding of "poor" districts relative to "rich" districts.[76] Significantly, the high court did not rely on a federal equal protection or due process analysis in reaching this conclusion, but instead relied on New Jersey's "education clause," in holding that the current system of school finance failed to provide the students in New Jersey's less affluent districts with a "thorough and efficient" education, as required by that clause.[77]

While the court in *Robinson* expressed doubt about whether any system of finance and funding based on local taxation could resolve the constitutional violations the court found to have existed, it permitted the legislature an opportunity to "redistribute" the local aid in such a way as to correct the constitutional defects of the existing funding system.[78] The court stopped short of ordering a distribution of the appropriated tax monies in a constitutional manner and left the legislature with this responsibility.[79] The court was reluctant to broaden its rulings to include a specific remedy less it become entangled in either the executive or legislative duties.[80]

Several years later, the New Jersey Supreme Court in *Robinson II* determined that the legislature had failed to heed its warning.[81] The court ordered a provisional remedy for the 1976-1977 school year by adopting the state governor's plan for the redistribution of the appropriated taxes, and enjoined a distribution under the legislature's plan because the governor's plan

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73. Many of these challengers to public school finance systems also argued that funding discrepancies were violative of the federal Constitution's equal protection guarantees. This argument has met with mixed success, but has been rejected as a basis for the federal courts by the United States Supreme Court in *Rodriguez*. *Id.* at 3.

74. Tricia E. Bevelock, *Public School Financing Reform: Renewed Interest in the Courthouse, But Will the Statehouse Follow Suit?*, 65 ST. JOHN'S L. REV. 467, 473 (1991).

75. 303 A.2d 273 (N.J. 1973).

76. *Id.* at 297.

77. *Id.*

78. *Id.* at 298.

79. Robinson v. Cahill, 303 A.2d 273, 298 (N.J. 1973) (*Robinson I*).

80. *Id.*

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

for school funding fit "more conformably to the constitutional norm . . . ."[82]

Of import, and indicative of the problem of seeking judicial remedies to issues that may be better addressed by the legislative branch, is that the *Robinson* decision continued to require judicial oversight and involvement several years after the original action was filed. In a variety of forms and addressing several related issues, *Robinson* itself was in the courts of New Jersey until 1976, when *Robinson VI* was decided.[83] Litigation and controversy between the courts and legislature in New Jersey, in fact, has continued for over more than two decades, as will be discussed later in this Article.

In *Gwinn Area Community Schools v. Michigan*,[84] the United States Sixth Circuit Court of Appeals addressed the issue of whether the Michigan State School Aid Act was unconstitutional under both the state constitution and the federal Constitution.[85] Although the matter was removed to federal court, the court utilized state law. In *Gwinn*, the plaintiffs were a school district, a student, and a taxpayer who were challenging the validity of a state school funding formula as applied because it provided for a reduction in state funding to schools which received federal impact aid.[86]

The plaintiffs argued that the matter should be compared to *Plyler v. Doe*,[87] where the Court found that the challenged state aid program had the effect of totally denying children of illegal aliens a public school education.[88] However, the court of appeals relied instead on *Rodriguez*, and reasoned that the Equal Protection Clause required only a rational relationship between a legislative classification and a legitimate state interest.[89] Finding that the state had met its burden, the court ruled against the plaintiff-appellants.[90] As to their due process claim, the court dismissed it with little discussion.

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82. *Id.* at 200.

83. Robinson v. Cahill, 358 A.2d 457 (N.J. 1976) (*Robinson VI*). The permeations of *Robinson VI* include: *Robinson V*, 355 A.2d 129 (N.J. 1976); *Robinson IV*, 351 A.2d 713 (N.J. 1975); *Robinson III*, 335 A.2d 6 (N.J. 1975); *Robinson II*, 306 A.2d 65 (N.J. 1973); *Robinson I*, 303 A.2d 273 (N.J. 1973).

84. 741 F.2d 840 (6th Cir. 1984).

85. *Id.* at 841-42.

86. *Id.* at 841.

87. 457 U.S. 202 (1982).

88. *Id.* at 215-19. The Court in *Plyler* has been criticized for applying a "heightened" level of "rational relationship" to avoid the result of having the immigrant school children deprived of the right to an education, and thus it has been said to "not fit neatly into previous structures of equal protection analysis." Gwinn Area Community Sch. v. Michigan, 741 F.2d 840, 845 (6th Cir. 1984).

89. *Id.* at 844.

90. *Id.* at 844-45.

In 1979, in *Pauley v. Kelly*,[91] the Supreme Court of West Virginia decided the issue of the constitutionality of a school funding system based on local taxes as the high courts of California and New Jersey had, ruling that per student spending discrepancies permitted by the existing funding scheme might be an unconstitutional denial of one's equal protection and equal opportunity to education.[92] The plaintiffs in this action claimed that the state's existing funding mechanism was discriminatory and denied them equal protection as well as access to a state constitutionally mandated "thorough and efficient system of schooling."[93] Besides agreeing with the plaintiffs that the discrepancies did in fact rise to constitutionally unacceptable levels, the court remanded with instructions that the state construct a "master plan" of how it would meet the constitutional mandates for equal educational opportunity, including specific areas of curriculum, personnel, facilities, materials and equipment.[94]

More recently, the Supreme Court of Texas undid the impact of the *Rodriguez* decision in *Edgewood Independent School District v. Kirby*.[95] In *Edgewood*, the court addressed the issue of whether certain undisputed facts describing a public school financing system met the state constitutional requirements of an "efficient" system of public schools.[96] The undisputed facts indicated that disparities in district property wealth resulted in district per-pupil spending varying from $2112 per student in the poorest district to $19,333 per student in the districts with the strongest tax bases.[97]

The court based its decision on the Texas Constitution and rejected the court of appeals conclusion that the question of whether the school system was "efficient" was a "political question" appropriately within the realm of the legislature.[98] However, the court did state that the remedy for an "efficient" public system of education lies within the legislature's responsibility under the constitution.[99] In essence, it was a right without a judicial remedy.

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91. 255 S.E.2d 859 (W. Va. 1979).
92. *Id.* at 878.
93. *Id.* at 861.
94. *Id.* at 877.
95. 777 S.W.2d 391 (Tex. 1989).
96. *Id.* at 392.
97. *Id.*
98. *Id.* at 393-94.
99. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397-98 (Tex. 1989). The legislature's response to the mandates given to it by the court has not yet remedied the existing constitutional flaws in the public school system of finance. *See* Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489 (Tex. 1992) (holding that public school finance system enacted after the first *Edgewood* decision was in violation of state constitution).

In the same year, the Supreme Court of Kentucky examined similar issues in *Rose v. Council for Better Education, Inc.*[100] In *Rose*, the question presented was whether a "common school" finance system was unconstitutional as well as discriminatory because of the lack of parity in funding to all districts.[101] The court responded affirmatively, declaring education a fundamental right, and ruled that Kentucky's system of public education could not continue to spend more in the affluent districts and less in others.[102] The court specifically rejected the argument that it was entering the legislative function of government because its ruling meant the government would have to spend more to comply.[103] Accordingly, it held that the public school system based on its lack of uniformity and the disparity in district funding, was a breach of the constitutional mandate that the state produce an efficient system of common schools.[104] The court also concluded that the state was spending insufficient funds to accomplish this aim and noted additional spending would have to occur to correct the insufficiency.[105] The court specifically rejected the argument that its ruling violated the separation of powers.[106] It could be said that *Rose* shows how far judicial remedies can go toward forcing the hands of legislators without the judges actually "disrobing" and taking up legislative garb.[107]

In *Tennessee Small School Systems v. McWherter*,[108] the Tennessee Supreme Court, striking down that state's funding mechanism, held that the legislature had an obligation to maintain and support a system of free public schools that "affords substantially equal educational opportunities to all students."[109] Relying on the state constitution's equal protection clause, the court ruled that the school funding system, forty-five percent of which came from local funding, permitted too much of a discrepancy in per-pupil allocation.[110] In the state's system, however, the discrepancy varied less than in the earlier and more egregious circumstances of California, New Jersey and Texas: total funds available per-pupil for the 1987 school year averaged $2337 and varied from $1823 to $3669.[111]

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100. 790 S.W.2d 186 (Ky. 1989).
101. *Id.* at 189, 196-98, 209.
102. *Id.* at 213, 215-16.
103. *Id.* at 213-14.
104. Rose v. Council For Better Educ., Inc., 790 S.W.2d 186, 213 (Ky. 1989).
105. *Id.* at 214.
106. *Id.* at 213-14.
107. *See* Michael A. Rebell, *Fiscal Equity in Education: Deconstructing the Reigning Myths and Facing Reality*, 21 N.Y.U. REV. L. & SOC. CHANGE 691, 704 (1995).
108. 851 S.W.2d 139 (Tenn. 1993).
109. *Id.* at 140-41.
110. *Id.* at 143, 156.
111. *Id.* at 145.

McWherter is also significant because the Tennessee Supreme Court chose to invalidate the state's public school finance mechanism not by applying the intermediate level of analysis normally used by courts when concluding that such systems are invalid, but by relying instead on a stricter test to reach the same result. At least one commentator has noted that the stricter analysis adopted by the *McWherter* court is "a harbinger of future analyses."[112] However, the problem of an adequate remedy would still exist.

This development of a state-by-state approach to the adoption of education as a fundamental or basic right is unsettling in terms of fairness on a national basis. Additionally, it has not come about without a substantial price, both in terms of the use of judicial as well as political resources. Judicially, the evolution of an educational litigation strategy has meant that those seeking "fairness" have had to rely on an adversarial process to achieve that end, and to do so in repeated state forums that may or may not adopt the view that education is a basic right and should be provided in a somewhat equal manner. In terms of political costs, this process casts the quest for education in terms of "liberal" and "conservative" paradigms that may not best serve the interests of school children.

While the approach of pitting one group's interests against those of another can be very effective for resolving disputes in the private sector, where personal and basic political rights are involved, it is cumbersome and narrow. The adversarial system fails to consider the common and long term good that a broader approach of finding common entitlements would yield. Moreover, when a particular state's judiciary adopts the view that significant financial discrepancies in per-pupil spending among school districts within that state are a breach of either state or federal constitutional law, the result is just as frustrating. Even with a funding inequality, there remains the disturbing fact that there is no valid measure of equality that can satisfactorily indicate what an appropriate standard of education funding should be. The present wave of adequacy litigation is strong evidence of that.

In each of these cases where the public school system of finance was found unconstitutional, the remedies have ultimately been left to the state legislatures, although some state courts appear to be more heavy-handed than others in permitting legislatures to respond to their rulings. Thus far, these courts are in agreement that while great disparity among school districts in terms of per-pupil spending is unconstitutional, they have refrained from creating or implementing plans of their own. New Jersey's high court seems to have gone further than most by imposing on the legislature a plan drawn up by the executive branch.

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112. *See* Rebell, *supra* note 107, at 701.

More recently and with the emergence of "adequacy" litigation, however, courts are being asked to evaluate a much more subjective quality of local elementary and secondary public schools based on the efficacy of the education.[113]

2. Courts supporting their states' funding schemes.

As the states of California, New Jersey, West Virginia, and Texas were invalidating public school funding schemes based on their per-pupil spending variations, other states were upholding similar schemes as constitutionally proper. Some states made such rulings while upholding the constitutionally guaranteed right to an education, finding it to be among the fundamental rights of the state. In New York, for example, in *Board of Education, Levittown v. Nyquist*,[114] the New York Court of Appeals addressed the issue of whether the state constitution required a "minimal acceptable facilities and services" in public education in a challenge to that state's funding scheme which was based partly on local taxes and resulted in per-pupil spending discrepancies among the school districts.[115]

In *Levittown*, the plaintiffs, public school children and district school boards, brought a suit for a declaratory judgment challenging the state provisions for school financing pursuant to the federal and state Constitutions, as well as the state constitution education article, which required that the state provide for the maintenance and support of a system of free common schools.[116] The significance of this challenge was not lost on the court of appeals:

> At the outset it is appropriate to comment briefly on the context in which the legal issues before us arise. Although New York State has long been acknowledged to be a leader in its provision of public elementary and secondary educational facilities and services, and notwithstanding that its per pupil expenditures for such purposes each year are very nearly the highest in the Nation, it must be recognized that there are nonetheless significant inequalities in the availability of financial support for local school districts, ranging from minor discrepancies to major differences, resulting in significant unevenness in the educational opportunities offered.[117]

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113. *See* Helena Elementary Sch. Dist. No. 1. v. Montana, 769 P.2d 684 (Mont. 1989). The court held that as a result of the state's failure to adequately fund a foundation program, forcing excessive reliance by local districts on permissive and voted levies, the state had failed to provide an adequate system of quality public education as guaranteed under the Montana Constitution. *Id.* at 690.

114. 439 N.E.2d 359 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1138 (1983).

115. *Id.* at 368.

116. *Id.* at 362.

117. *Id.* at 363.

The court discussed the interplay between the three branches of government:

> The determination of the amounts, sources, and objectives of expenditures of public moneys for educational purposes, especially at the State level, presents issues of enormous practical and political complexity, and resolution appropriately is largely left to the interplay of interests and forces directly involved and indirectly affected, in the arenas of legislative and executive activity.[118]

The court, consistent with these comments, held that it was within the purview of the state legislature to decide funding allocation issues.[119] The court also found that there was no constitutional requirement that public education be made available on an equal or substantially equivalent basis.[120]

Almost a decade after the New York Court of Appeals decision in *Levittown*, a trial court for Nassau County, New York had the opportunity to revisit the constitutionality of "extreme" funding disparities in that state's public school funding system. The court begrudgingly followed the court of appeals *Levittown* decision in *Reform Education Financing Inequities Today v. Cuomo*.[121] In the *REFIT* decision, the plaintiffs complained of the inadequacy and unfairness of the agglomeration of fifty-one different legislatively derived formulas by which eight billion dollars was distributed among the state's more than 700 school districts, resulting in "huge" disparities between "low-wealth" and "high-wealth" districts.[122] The plaintiffs argued, however, that they were not asking the court to overrule *Levittown*, but to consider the increasing gap in per-pupil spending that had continued to grow since the court's earlier decision: "Plaintiffs' theory on the case rests primarily on their belief that they come within the narrow opening articulated in *Levittown*. More specifically, the plaintiffs asserted that the 'gross and glaring' inadequacy the majority found absent a decade ago, now exists."[123] At the time the *Levittown* case was decided, the most extreme per-pupil expenditure disparities were four to one.[124] At the time of the *REFIT* decision, the disparity had grown to six to one in some districts.[125] The court based its decision upon the same grounds that the court of appeals had used in *Levittown*, but made several references to

118. Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 363 (N.Y. 1982).
119. *Id.* at 365.
120. *Id.* at 366.
121. 578 N.Y.S.2d 969 (N.Y. Sup. Ct. 1991) (*REFIT*).
122. *Id.*
123. *Id.*
124. *Id.* at 972.
125. Reform Educ. Fin. Inequities Today v. Cuomo, 578 N.Y.S.2d 969, 972 (N.Y. Sup. Ct. 1991).

the possibility that it would entertain an adequacy action:

> Apparently, the high state courts in New Jersey, Texas, Montana and Kentucky linked the concepts of "efficient," "thorough," and "uniform" to educational equality. Still, citizens may have difficulty understanding why one state's "uniform" mandate means equal educational opportunity, while another state's "common" mandate demands only a minimum skills education. . . . Until such time as we address the issues of maximizing facilities, curriculum, school terms and motivation of teachers and students together with a reasonable formula for financing the public school system, can we hope for meaningful improvement in the education of our children.[126]

On appeal, the New York Court of Appeals rejected the plaintiffs' claims essentially ruling that the issues presented had been disposed of in the *Levittown* decision approximately thirteen years earlier.[127] However, apparently taking note of the lower court's reference to the adequacy issue in its opinion, the case was remanded back to trial for a resolution of that issue.[128]

The Wisconsin Supreme Court upheld the equal opportunity for education as fundamental under its constitution while simultaneously upholding a system of public school funding that admittedly resulted in certain school districts having inadequate funds to provide special programs for impoverished students. In *Kukor v. Grover*,[129] the court found no violation of a uniformity requirement in the state constitution, nor did it find that funding discrepancies based on the financial strength of a school district's tax base violated the equal protection clause of the state constitution.[130] In a strongly worded opinion, the court made clear that equal *opportunity* for an education is protected as fundamental and that opportunity was not the same as equality in per-pupil spending.[131] In permitting the localities to control spending as "rationally based upon preservation of local control over education," that court appeared to rule that, absent a complete denial of education to students in the poorer districts, the matter was one for the legislature to resolve.[132]

It is hard to avoid the conclusion that among the states the issue of what the constitution says about education rights for its citizen is quite different, with

126. *Id.* at 975-76.
127. Campaign for Fiscal Equity, Inc. v. New York, 631 N.Y.S.2d 565 (1995).
128. *Id.* at 567.
129. 436 N.W.2d 568 (Wis. 1989), *reh'g denied*, 443 N.W.2d 314 (Wis. 1989).
130. *Id.* at 570.
131. *Id.*
132. *Id.*

legislatively derived formulas being held to very different standards under state constitutional law. Moreover, any discussions of the trends in courts may be premature. Recently, the Minnesota Supreme Court declined to strike its funding scheme as unconstitutional despite substantial variations in per-pupil spending derived from its funding formulas.[133]

A review of these decisions indicates that without the guidance of the United States Supreme Court, there has been no consensus among the state courts as to what constitutes an acceptable non-discriminatory system of public school finance. In addition, the courts have also demonstrated difficulty in determining what constitutes an "adequate" education. There have been several recent cases in this area that have demonstrated the difficulties for the courts. An analysis of these cases follows.

B. Fairness in Spending versus Local Control: No Easy Solution

A review of the financial equity cases indicates that the solution to dealing with the problem for urban and poor school districts does not lie simply in the reallocation of tax dollars in search of a "fairer" method of distribution. The courts of several states have sought generally equal per-pupil spending while other state courts have considered school funding issues to be issues of local legislative concern. School districts may fail to educate adequately whether they adhere to judicially imposed financial equity plans or not. For while individual schools may excel, few if any school districts, particularly within the large urban cities, function to the satisfaction of teachers, education advocates, or students.

The judicial decisions that support the "fiscal equity" philosophy attempt to deal with the politically disadvantaged issue of the desperate state of urban and poor school districts through a proactive and unaccustomed role for courts. It is a role, moreover, that has not yielded gains in pupil performance.

As a result, educational advocates have increasingly attempted to address some of the deficiencies of funding equity litigation by requesting that the courts require educational "adequacy" as opposed to financial fairness in the distribution of educational resources. In the next Section, the authors review some of these cases which constitute the trend in education rights litigation.

C. Adequacy Litigation: Widening the Gap Between the States

Many reviewers have labelled the more recent strategy in education litigation as "adequacy" litigation. This litigation challenges the qualitative

133. Skeen v. Minnesota, 505 N.W.2d 299 (Minn. 1993).

nature of the right to an education, and promises to both secure new rights for students as well as put a new layer of obligations on state legislatures, and subsequently, state education departments.[134]

Eighteen years after the New Jersey Supreme Court first reviewed the aid formula and found it unconstitutional, that court was presented with a related but distinct issue in *Abbott v. Burke*.[135] The court addressed the issue of whether the constitutional right to a "thorough and efficient" education in New Jersey required funding to the various school districts at the same level, regardless of whether those districts were "property rich."[136] The court also addressed the issue of whether the level of funding had to be adequate to provide for the special educational needs of the poor urban districts in order to address their extreme disadvantages.[137]

The court answered these issues in the affirmative, holding that the finance provisions of the Public School Education Act, passed after the court had originally struck down the prior school funding act, did violate the constitutional right to a thorough and efficient education.[138] The court found this violation prevented students from poorer districts from full participation as citizens and from an ability to compete in the work place.[139] The court's remedy was to order that the state education funding law be amended, or new legislation passed, to assure that the "poorer urban districts' educational funding is substantially equal to that of property rich districts."[140]

This was the first time that a state's highest court informed its legislature that an adequate education is one that offers more than some minimal generalized standard of education and that the constitutional requirement to a thorough and efficient education would not be met by some minimum, basic instruction:[141]

> It is clear to us that in order to achieve the constitutional standard for the student from these poorer urban districts—the ability to function in that society entered by their relatively advantaged peers—the totality of the districts' educational offering must contain elements over and

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134. *See* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995).

135. 575 A.2d 359 (N.J. 1990).

136. *Id.* at 363.

137. *Id.*

138. *Id.* at 389.

139. Abbott v. Burke, 575 A.2d 359, 389 (N.J. 1990).

140. *Id.* at 408.

141. *See* Patricia F. First & Louis F. Miron, *The Social Construction of Adequacy*, J.L. & EDUC. 421 (1991).

> above those found in the affluent suburban district. If the educational fare of the seriously disadvantaged student is the same as the "regular education" given to the advantaged student, those serious disadvantages will not be addressed, and students in the poorer urban districts will simply not be able to compete. A thorough and efficient education requires such level of education as will enable all students to function as citizens and workers in the same society, and that necessarily means that in poorer urban districts something more must be added to the regular education in order to achieve the command of the Constitution.[142]

In short, the court was directing the legislature to shift resources and fund poor districts in a way that the legislature had clearly not intended nor desired to do. This decision caused a political struggle in New Jersey between the court and the legislature.

Other courts have expanded upon the direction of the New Jersey Supreme Court, thereby building their own constitutional requirements for education. For example, the Superior Court of Connecticut, relying heavily on the New Jersey Supreme Court's opinion in *Abbott v. Burke*, held that the allegation by plaintiffs that they had been deprived of minimally adequate education as a result of the conditions of racial and economic segregation required a judicial determination as to whether the state constitution required a particular substantive level of education.[143] Although the court did not address the actual issue, its finding the issue as a justiciable one was significant because, like *Abbott*, it discussed the appropriateness of a court's examination into areas of the quality of education.

Three more recent opinions, in Alabama, Massachusetts, and Pennsylvania, all indicate that plaintiffs will continue to urge state courts to consider issues of adequacy in education in a way that was, prior to *Abbott*, unattempted or unsuccessful. In Alabama, for example, the state's senate requested an advisory opinion from the justices of the Alabama Supreme Court because of a state circuit court opinion in *Alabama Coalition for Equity, Inc. v. Hunt*.[144] In *Hunt*, the plaintiffs sought a declaratory judgment that the Alabama system of public schools violated the state constitution because the public schools failed to provide equitable and adequate opportunities to all school children.[145] Significantly, in that action, the plaintiffs used qualitative measures of educational adequacy, while the state maintained that the equity or adequacy of

142. *Abbott*, 575 A.2d at 402-03.
143. Sheff v. O'Neill, 609 A.2d 1072, 1076 (Conn. Super. Ct. 1992).
144. 624 So. 2d 107 (Ala. 1993).
145. *Id.* at 107.

Alabama's public schools was entirely a matter of legislative discretion.[146] The measures included minimum standards promulgated by the Alabama Department of Education as well as the Southern Association of Colleges and Schools.[147]

The court agreed with the plaintiffs noting that the Alabama Education Improvement Act included a revised method for state accreditation and additional sources of "qualitative state standards for Alabama."[148] It concluded therefrom that:

> Each of these state documents represents an acknowledgement of the present inadequacy of Alabama Schools by the state and speaks of the need for major, structural change according to the standards and requirements outlined therein . . . . The Court finds, based on this evidence and that set out below, that Alabama schools today fall far short of the very educational standards that the State of Alabama has determined are basic to providing its schoolchildren with minimally adequate educational opportunities.[149]

Accordingly, the court required that the legislature comply with the circuit court order to provide its school children with substantially equitable and adequate educational opportunities.[150]

This decision has a clear and direct impact upon the legislature's taxing authority and budgetary process. Nonetheless, the fact that the decision blurs the differences in the functions of the legislative and judiciary branches does not appear to have dissuaded the justices from reaching this decision.

The Massachusetts high court reached substantially the same conclusion in *McDuffy v. Secretary of the Executive Office.*[151] In *McDuffy*, sixteen students from sixteen different school districts sued the state Office of Education for failure to comply with the constitutional obligation to provide an "adequate" education.[152] The court found in favor of the students, finding that the state was in violation of its duty to provide all public school students with such an education where the evidence supported the conclusions that students in the less affluent school districts were offered significantly fewer educational

146. *Id.* at 107-08.
147. *Id.*
148. Opinion of the Justices, 624 So. 2d 107, 108 (Ala. 1993).
149. *Id.*
150. *Id.* at 109.
151. 615 N.E.2d 516 (Mass. 1993).
152. *Id.* at 517-18.

opportunities and lower educational quality than students in districts with the highest per-pupil spending.[153] The court concluded by listing factors which determined what qualified as an adequate education, including oral and written skills, knowledge of economic, social, and political systems, understanding of governmental processes, grounding in the arts, occupational training or preparation for advanced training in academic or vocational fields to enable students to compete favorably with counterparts in surrounding states.[154]

Pennsylvania's Supreme Court, in a case dealing with desegregation, mandated that a court must look to student achievement results, among other things, to determine whether equal educational opportunity had been made available to all students within Philadelphia's public schools.[155] The court concluded that:

> The record amply demonstrates that the School District has not provided to Black and Hispanic students equal access to, among other things, the best qualified and most experienced teachers, equal physical facilities, and plants, equal access to advanced or special admissions academic course offerings, equal allocation of resources, or a commitment to eliminating racial imbalances in the schools to the extent feasible.[156]

Even in New York, where the court of appeals has consistently rejected claims that funding disparities between urban and affluent districts deprive students of their equal rights under the state's constitution, the court now appears willing to at least consider an adequacy claim. In *Campaign for Fiscal Equality, Inc. v. New York*,[157] the issue before the New York Court of Appeals was not whether the funding disparity between affluent and less affluent districts was unconstitutional, but whether adequacy could be litigated.[158] The court in *Campaign* allowed the plaintiffs to challenge whether the state had violated its constitution on the grounds that the resources of a given district could fall to such a level that the district could not guarantee the right to a sound public education.[159] While not reaching the merits of the argument, it agreed with the plaintiffs that, at least as a matter of pleading, a breach of the state's education article with respect to New York schools was shown.[160]

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153. *Id.* at 552-53.
154. *Id.* at 554.
155. Pennsylvania Relations Comm'n v. School Dist. of Philadelphia, 638 A.2d 304 (Pa. Commw. Ct. 1994).
156. *Id.* at 328.
157. 655 N.E.2d 661 (N.Y. 1995).
158. *Id.* at 663.
159. *Id.* at 664.
160. *Id.* at 667-68.

Accordingly, the court remanded the matter to the trial court to make a determination as to the merits of the matter.[161] Interestingly, both Judge Levine, in concurrence, and Judge Simons, in a partial dissent, agreed that it was not the duty of the judiciary to participate in educational policy.[162] Hence, although the adequacy issue remains unresolved in New York State, it appears to be an issue ripe for some kind of adjudication.

Other courts that have considered the adequacy issue have chosen to leave this area to the discretion of their state legislatures. Those courts ground their decisions on the rational relationship of local school district control to the legitimate state purpose of preservation and promotion of local control of education.

In 1994, the Kansas Supreme Court considered adequacy arguments in *Unified School District No. 229 v. Kansas*.[163] The plaintiffs argued that the School District Quality and Funding Act was unconstitutional because the application of its uniform formulae and provisions to particular school districts resulted in different funding allocations.[164] In upholding the statute, the court held that the right to education was not a fundamental one for the equal protection challenge.[165] Furthermore, the high court also specifically rejected the plaintiff's arguments that the constitutional provision requiring the legislature to make "suitable" provisions for school funding required the school district to provide a quantifiable measure of education: "[the provision] does not mandate excellence or quality . . . . In fact [the provision] . . . does not imply any objective, quantifiable . . . standard against which schools can be measured by a court."[166] A determination of suitability was to be made according to standards enunciated by the legislature and by the state department of education.[167]

In the same year that the Kansas Supreme Court handed advocates of adequacy litigation its unequivocal defeat, an Illinois appellate court addressed

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161. Campaign for Fiscal Equality, Inc. v. New York, 655 N.E.2d 661, 668, 671 (N.Y. 1995). The court also remanded the matter on an issue apart from the state's education clause in the constitution. *Id.* at 671. The court also supported the plaintiffs' claim on federal Title VI grounds, ruling that Title VI, which bars discrimination under any program that receives federal financial assistance, may in fact have been violated because the city received only 34% of state education aid although the city has 37% of its students, with 81% of those being minorities, composing 78% of the state's total minority student population. *Id.* at 670.

162. *Id.* at 671, 675.

163. 885 P.2d 1170 (Kan. 1994).

164. *Id.* at 1173.

165. *Id.* at 1188.

166. *Id.* at 1185.

167. Unified Sch. Dist. No. 229 v. Kansas, 885 P.2d 1170, 1188 (Kan. 1994).

a similar issue. The court addressed the issue of whether the Illinois statutory scheme for financing public education violated the state education article of the Illinois Constitution based on the discrepancy in educational resources between wealthier and poorer school districts.[168] In that matter, the challenged system allowed for differences in school district funding based on differences in local property taxes.[169] Plaintiffs pointed to differences in resources among some school districts as evidence of the state's failure to provide students in poorer districts with an "adequate education."[170] The plaintiffs argued that because Illinois' system was not "fiscally neutral," it violated both the equal protection clause and the education article of the Illinois Constitution.[171]

Noting that the alleged constitutional violation did not rest on the adequacy of the quality of education in a given district, but on the differences in benefits and opportunities offered from district to district, the court held that the elimination of economic disparity among school districts was a goal but not a requirement of the Illinois Constitution.[172] The court stated that:

> The education article does not mandate equal educational benefits and opportunities among the State's school districts as the constitutionally required means of establishing and maintaining an "efficient" system of free public schools. It does not make value judgments that foreign languages are subordinated to computer science or music to home economics. It does not require the same instruction in all schools. To allege that certain educational resources are unavailable in poorer school districts, or inferior to those in wealthier districts, does not compel the conclusion that the funding provided by the State's financing system is insufficient to provide an adequate education.[173]

The Illinois court utilized the rational relationship test and held that as long as the classification in the statute bears a reasonable relationship to a legitimate legislative purpose, the court's function is not to substitute its own judgment.[174]

One problem with adequacy litigation is inherent in the term "adequate," because of a possible legislative and judicial disagreement regarding what constitutes an adequate education. Moreover, adequacy also carries the risk of

168. Committee for Educ. Rights v. Edgar, 641 N.E.2d 602 (Ill. App. Ct. 1994).
169. *Id.* at 605.
170. *Id.*
171. *Id.*
172. Committee for Educ. Rights v. Edgar, 641 N.E.2d 602, 605 (Ill. App. Ct. 1994).
173. *Id.*
174. *Id.* at 608.

adhering to stagnant or fixed standards which may not best serve the needs of students. "The concept of a minimum adequate education is subject to constant change in our fast-moving society. A remedy based solely on adequacy standards runs the risk of emphasizing adherence to outdated precepts or involving courts in continuing modifications of remedial decrees to respond to changing educational realities."[175]

IV. NON-JUDICIAL REMEDIES

Fortunately, there is growing support for and a trend toward seeking non-judicial remedies that hold hope for both the systems of public education as well as the quality of public education overall. These alternatives give the remedies to those who have the most at stake in public education, the children and their parents. Moreover, not only do these extra-judicial remedies give children and their parents choice and empowerment, but they also address issues of educational inequities within the legislative process.

The three most commonly discussed alternatives to litigating the adequacy of public schools are the creation of charter-schools, developing "schools of choice," and installing voucher plans that allow parents options to deteriorating inner-city school systems.[176] Essentially, charter-schools are freed from many of the bureaucratic rules and regulations of normal public school systems in return for a commitment to meet explicit performance goals. They are contractually established, wherein a managing authority, such as a large corporation, civic group, labor union, or scientific or medical foundation, manages a school with the sponsoring authority overseeing it, such as a state education department, local school board, or other government agency. The schools are given a charter wherein their goals and commitments are specified. It is important to note that these schools are public schools and are funded publicly. Since 1991, nineteen states have enacted laws enabling charter-schools.[177]

A second alternative to the present method of public education also being tried throughout the country is "schools of choice" programs. This alternative also works within the public schools system, and creates open-enrollment and open-district systems wherein students are permitted to enroll in schools other than their "automatic" geographic school and even outside of their districts. This system has several limiting factors, including space in the schools and

175. Rebell, *supra* note 107, at 705.

176. For a more thorough overview of each of these alternatives, see Diane Ravitch & Joseph Viteritti, *A New Vision for Public Schools*, 122 PUB. INTEREST 3 (1996) (criticizing the current "factory model" of public schools systems and urging parent involvement methods of education).

177. *Id.* at 6.

transportation in larger cities, but it is an alternative that can work in certain areas and should be considered.

Third, the idea of vouchers has been around for some time, but is now being tried in certain states with positive results. A voucher program allows parents of school age children to receive a state voucher for value that they can use at participating private schools. The fact that this method takes students out of the public school system may make it the most controversial one, especially where religious schools are permitted to participate in the voucher program. In Wisconsin and Ohio, the voucher programs, passed "at the urging of minority parents dissatisfied with the quality of education in inner-city public schools,"[178] appear to have had a positive impact upon the quality of the education the students are receiving.

In each of the three alternatives briefly discussed, a key element is parents' and children's right to choose either how they will be educated or how the money for education will be spent. All three alternatives thus create a stake in the quality of the education not normally associated with the parents of school children in the inner-city school district, where many of the most severe problems with adequacy exist. In addition, these remedies are better at addressing the problems of students and parents.

Remedies that direct additional funding to public school systems are not efficient or effective ones. They, more often than not, punish the claimants who brought the action when they are successful. Parents and children rely on funds to actually produce a result which often does not occur. A remedy that puts funding or resources directly at the disposal of the parent and student is much more compatible with the legal tradition of rectifying the wrong done to the aggrieved. A school district without adequate funding is only aggrieved because children within the district are being denied an entitlement.

V. CONCLUSION: WHERE THE COURTS LEAD, THE LEGISLATURE WILL FOLLOW

Some observers note that there appears to be a trend in state courts to find disparities in per-pupil funding based on local taxing formulas unconstitutional on whatever grounds. However, we are left with the problems of enforcement and oversight. This was exemplified in the case of New Jersey, where eighteen years after the initial action was presented to the state supreme court in *Robinson I*, the court was asked to revisit many of the same issues in *Abbott v. Burke*.

178. *Id.* at 10.

That the courts are in for the long haul seems an undeniable, if lamentable, state of affairs. Courts are involved with one major problem. Even if courts decide that these issues are appropriately within their scope of review, much of the remedial nature of these cases must be performed by state legislatures which are hesitant to go as far and or as fast as the courts appear to be urging.[179] Courts simply lack an effective enforcement capacity. While the courts can point in a policy direction and exhort the political arm to perform its functions with certain standards of equity or adequacy in mind, there really is no role for the court. These are, after all, political choices.[180]

The problem is compounded by the fact that allowing state legislatures to do their jobs and to provide for an adequate education as a fundamental right of all students within its borders appears to be lagging far behind the need. Some evidence that the federal government, at least the legislative branch, may be willing to rethink the Supreme Court's conclusions in the *Rodriguez* decision may be gleaned from passage of the Goals 2000 Act.[181]

The Goals 2000 Act was devised to foster "coherent, nationwide, [and] systemic education reform" while balancing the principles of federalism in education.[182] Its purposes are threefold: first, to promote the achievement of important national education goals by the year 2000; second, to raise student, teacher, and parent expectations through high academic standards for all students and in all schools; and third, to assist state and local education reform with grants and greater flexibility to help more students meet higher standards.[183] While these are lofty and admirable goals, one has to wonder whether any serious efforts at educational reform can be made within the few years prior to the year 2000. So far, the impact of the legislation appears uncertain at best, as our national test scores remain dismally below the average among industrialized nations.[184]

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179. *See generally* Harry J. Walberg & Harry J. Walberg, III, *Losing Local Control*, 23 EDUC. RES. 5 (1994).

180. We should not forget the lessons of a related area of litigation, that of busing actions brought to enforce integration. This method tied courts up in the unintended role of overseer and required the use of "consent decrees" as a remedy with its attendant problems of enforcement. This remedy failed to provide for a foreseeable end to the oversight by the courts instead demanding action by the executive branch. *See* Frank J. Macchiarola, *The Courts in the Political Process: Judicial Activism or Timid Local Government?*, 9 ST. JOHN'S J. LEGAL COMMENT. 703 (1994).

181. Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994) (codified at 20 U.S.C. § 5801 (1991)).

182. 20 U.S.C. § 5801.2(1) (1995).

183. *Id.*

184. For a further discusion, see Frank J. Macchiarola et al., *The Judicial System and Equality in Schooling*, 23 FORDHAM URB. L.J. (forthcoming Spring 1996).

One can only speculate as to the continuing impact that the Goals 2000 legislation may have upon current litigation strategies. Whether plaintiffs will seize this law to urge that state courts adopt unintended remedies in the form of further obligations upon already weary state legislatures remains to be seen. Either way, the crisis in our states' public school systems as well as the political crisis to which the state legislatures seem incapable of responding continue in dire need of resolution.[185]

Several commentators have urged that the Supreme Court's decision in *Rodriguez* was wrong,[186] and that we would have been better served as a society had the Court held that the right to an education was indeed within the unspoken rights of the Constitution. However, it is a credit to our system of federalism that the various judiciaries of the states, even without the moral compass of the Court, have tried to advance the cause of children. The results speak for themselves. State funding remains an important determinative factor in how well that child may or may not be educated. The critical issue, however, has more to do with the commitment to education rather than the tax dollars expended in the effort.

Is the effectiveness of funding an appropriate issue to be addressed by the judiciary? These authors think not, preferring to have some faith in the legislative process that would presumably have a sincere and long-term interest in the effective deliverance of education outside of the adversarial judicial system. A return to local control and a greater freedom to experiment with alternative forms of schooling appear to be working. With the changing mores and political climate of present society, locally based remedies hold out the promise of empowerment to the people most in need of sound public education and educational alternatives.

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185. The argument has been made that Goals 2000 will in fact "serve as a catalyst for the next generation of educational litigation . . . . By converging with emerging legal doctrines forged by school-finance litigants at the state level, educational standards, even voluntary ones, will attract litigation designed to turn standards into legal entitlements." Michael Heise, *The Courts vs. Educational Standards*, 120 PUB. INTEREST 55, 55 (1995); *see also* Michael Heise, *Goals 2000: Educate America Act: The Federalization and Legalization of Educational Policy*, 63 FORDHAM L. REV. 345 (1994).

186. *See, e.g.*, Richards, *supra* note 42; First & Miron, *supra* note 141; Hackney, Jr., *supra* note 42.