The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts' Lingering Institutional Concerns

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School finance reform litigation has challenged state school financing systems utilizing both equality and adequacy theories. The litigation can best be analyzed as proceeding in waves, each with its own characteristics. The first wave consisted of equality claims based upon the Equal Protection Clause of the Fourteenth Amendment, the second of equality claims based upon state equal protection clauses, and the third of adequacy claims based upon state constitutional clauses. Courts facing each wave struggled to address the issue of whether the judiciary had the legitimacy and competency to address complex financial and educational questions. The author examines the most recent struggle and asks whether a new fourth wave of litigation is being created with claims based upon both education and desegregation clauses in state constitutions, and questions the viability of such a fourth wave.

I. INTRODUCTION

In the era of institutional reform litigation,[1] school finance reform litigation in particular has posed difficult questions for federal and state courts alike, and overall has remained elusive and unpredictable for both litigators and observers. In school finance reform litigation, claimants challenge the state financing system for public education as either violating equal protection of the laws as a result of inter-district disparities in education caused by the system, or as violating their right to a certain qualitative level of education as a result of insufficient funding provided to their school district by the system. These two claims will generally be referred to as equality claims or adequacy claims. Numerous commentators have noted the transformation of litigation in this area

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[1] Institutional reform litigation involves the systematic denial of rights, usually of a plaintiff class, due to the formal organization or ongoing pattern of activity in a governmental institution. Institutional reform litigation also encompasses prison reform, housing, state mental hospitals, and school desegregation suits. *See* Susan Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1360 (1991). For a general discussion of the rise of institutional reform suits, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1, 281–316 (1976); Archibald Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791, 821–29 (1976); and Owen Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 1–88 (1978).

and have analyzed the same by utilizing a theory of waves.[2] This Note examines school finance reform litigation from a national perspective and within the context of wave analysis.[3]

This Note explains, both descriptively and normatively, that a rash of recent cases makes the continued viability of the third and most recent wave doubtful. Consequently, this Note goes on to discuss the development of a fourth wave of school finance litigation. This most recent shift will then be explained through the lenses of legitimacy[4] and competency[5]—two significant concerns for courts undertaking institutional reform cases. In support of this proposition, Part II of this Note explains the tumultuous background of school finance litigation by following the three waves of litigation and recognizing the reasons and points involved in each shift. Part III describes the thrust of recent decisions going against plaintiffs embroiled in the third wave approach to litigation. Part IV evaluates the third wave, concludes that it is unstable at best for the future prospects of both claimants and the courts alike, and attempts to analyze this reversal of plaintiffs' fortune. Finally, Part V posits a fourth wave and examines whether it is consistent with the judiciary's legitimacy and competency concerns.

II. A BRIEF HISTORY OF THE FIRST THREE WAVES

The history of school finance litigation generally can be traced in a series of distinct waves, each with "its own identifiable set of characteristics with respect

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[2] William E. Thro began the idea of waves of litigation in the school finance area with *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). For further discussion of wave theory see William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994) [hereinafter Thro, *Judicial Analysis*]; Gail F. Levine, Note, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507, 542 (1991); and Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 517, 544 (1991).

[3] Admittedly, a national perspective across fifty jurisdictions may appear to trivialize the focused doctrine of each individual state. However, a number of commentators have used this approach to analyze this important issue. The following analysis, which notes interwoven approaches, is both substantial and useful in the area of school finance reform litigation.

[4] Legitimacy includes concerns of the separation of powers, federalism, and process. *See infra* note 106 and accompanying text.

[5] Competency concerns include the raw ability to make decisions in the context of the social issue, to develop and enforce a remedy, and to withstand the political exigencies. *See infra* note 107 and accompanying text.

to legal theory, methods of judicial analysis, and plaintiffs' success rate."[6] The shifts between one wave and another have occurred for reasons closely tied to these three unique characteristics of the individual waves. More favorable political palpability of a certain legal theory, seemingly increased legitimacy and competency of judicial decisionmaking, and shifts in the plaintiffs' likelihood of success propel these shifts from one wave to the next. When courts decide cases affecting large social institutions,

> [t]heir success . . . depend[s] upon their competence, *i.e.*, upon whether the problems will yield to the judicial method, and upon their "legitimacy," *i.e.*, upon the sense of the political branches, of the rest of the legal profession, and of enough of the public that what the courts are doing is "legitimate," and therefore deserves an uncoerced consent.[7]

Therefore, as courts struggled with defining and limiting their institutional role in school finance reform, waves of complex institutional litigation resulted.

The following section is an excursion into the first three waves and the points involved in each wave's respective shifts. It includes an explanation of how institutional concerns have affected the first two waves, and it foreshadows the collapse of the most recent waves. Those already familiar with the first three waves of school finance litigation may move ahead to Part II.C.2 without losing the impact of this Note.

A. *The First Wave: Federal Equal Protection Challenges*

The first wave consisted of equality claims[8] based primarily upon the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[9] This wave lasted from the late 1960s to 1973.[10] The foremost example, and ironically the case which marked the end of the first wave, is the United States Supreme Court case *San Antonio Independent School District v. Rodriguez*.[11]

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[6] Thro, *Judicial Analysis*, *supra* note 2, at 598.

[7] Cox, *supra* note 1, at 822.

[8] The first two waves are based on the theory of equality, whereas the third wave marked a shift from equality to the legal theory of adequacy.

[9] U.S. CONST. amend. XIV, § 3 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[10] *See* Thro, *Judicial Analysis*, *supra* note 2, at 600 (listing the first wave of school finance reform cases).

[11] 411 U.S. 1 (1973). The Court held that education was not a fundamental right and that property wealth did not constitute a suspect classification. *See id.* at 28, 35. Therefore, the appropriate standard of review, rational basis, was satisfied because maintaining local

The plaintiffs in *Rodriguez* claimed that all children have the right to have either an equal amount of money spent on their education or equal educational opportunities.[12] The school finance plan challenged in this case supported education with local property taxes, consequently creating wide disparities in funding between property-poor and property-rich districts.[13] On considering the equal protection claim, the Supreme Court determined that education did not constitute a fundamental right,[14] and that the challenged financing system did not operate to the "peculiar disadvantage of any suspect class[ification]."[15] Accordingly, the Court applied a mere rational basis standard of review[16] because greater "judicial scrutiny [is] reserved for laws that create suspect

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control of school financing was a legitimate reason for the finance scheme. *See id.* at 41–42, 55. Prior to *Rodriguez*, successful claims were brought in both federal and state courts. *See* Serrano v. Priest, 487 P.2d 1241, 1265–66 (Cal. 1971) [*Serrano I*] (finding education to be a fundamental right and property wealth a suspect classification, and therefore holding that the distribution of state funds for education could not be based on district wealth); *see also* Van Dusartz v. Hatfield, 334 F. Supp. 870, 877 (D. Minn. 1971) (following *Serrano I* in concluding that education was a fundamental right and that property wealth constituted a suspect classification, and therefore applying strict scrutiny review to invalidate the Minnesota finance scheme). *But see* Parker v. Mandel, 344 F. Supp. 1068, 1079–81 (D. Md. 1972) (upholding the Maryland funding system after deciding that education was not a fundamental right and that the lack of equal educational opportunities was not a suspect classification); McInnis v. Shapiro, 293 F. Supp. 327, 336–37 (N.D. Ill. 1968) (upholding the Illinois finance scheme because unequal educational expenditures due solely to varied property values was not invidious discrimination).

[12] *See Rodriguez*, 411 U.S. at 4–6.

[13] *See id.* at 12–13 (explaining that state and local allotments varied from $248 per pupil in the Edgewood district to $558 per pupil in Alamo Heights, the most affluent school district).

[14] *See id.* at 30. In finding that education was not a fundamental right the Court looked solely to the federal Constitution:

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor, is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Id. at 33–34.

[15] *Id.* at 28.

[16] The rational basis standard of review "requires only that the State's system be shown to bear some rational relationship to legitimate state purposes." *Id.* at 40.

classifications or impinge upon constitutionally protected rights."[17] The Court was satisfied that state and local control of school finance was a legitimate state purpose, and it therefore provided a rational basis for the Texas legislature to finance schools with local property taxes.[18]

In *Rodriguez*, questions of the Court's legitimacy and competency in the school finance context heavily persuaded the majority. These concerns included federalism concerns[19] and educational policy concerns.[20] These concerns led the Court to apply mere rational basis review of the educational funding scheme and marked the death knell for plaintiffs' federal equal protection claims. The Supreme Court, having squarely addressed the issue of public educational finance and the federal Constitution, concluded that education was not a fundamental right and that property wealth did not constitute a suspect classification. Thus, the Supreme Court negated future hopes for plaintiffs seeking federal equal protection relief. Therefore, school finance reform litigants had to turn to other theories of recovery.

B. *The Second Wave: State Equal Protection Challenges*

The second wave, primarily covering the years 1973–1989,[21] was also based upon the theory of equality, but because the use of the federal Constitution and the federal courts was foreclosed, school finance litigation focused on state equal protection claims brought in state courts.[22] In fact, the

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[17] *See id.*

[18] *See id.* at 42–43.

[19] *See id.* at 44. The Court showed great deference to the state legislature because they were particularly concerned with interfering in the areas of education, fiscal control, and tax policy. The Court stated, "[I]t would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State." *Id.*

[20] *See id.* at 42. The Court conceded:

> In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps more than welfare assistance, presents a myriad of "intractable economic, social, and even philosophical problems."

Id. (quoting Dandridge v. Williams, 397 U.S. 471, 487 (1970)).

[21] *See* Thro, *Judicial Analysis*, *supra* note 2, at 600–03 (discussing the second wave of school finance litigation).

[22] Second wave claims often were bolstered by the state education clauses that helped the courts to recognize education as a fundamental right. *See, e.g.*, Horton v. Meskill, 376 A.2d

plaintiffs' claims generally arose from identical circumstances of disparity and were argued in the same manner as the claims in the first wave.

The emergence of the second wave was marked by the New Jersey case *Robinson v. Cahill*.[23] In *Robinson*, the New Jersey Supreme Court recognized the federal courts' closure on the issue of school finance equal protection challenges, yet maintained the continued viability of the state constitutional issue.[24] Thus, the court in *Robinson* applied equal protection analysis.[25] However, it failed to find an equal protection violation. In a decision out of character with the second wave, the court ruled that the New Jersey financing scheme was unconstitutional based solely on the education clause and not the equal protection clause.[26]

359, 373–74 (Conn. 1977) (holding that education is a fundamental right and is codified as such in the state constitution). State education clauses provide for the creation and maintenance of the public school system in the state. *See infra* note 33 for a discussion of state education clauses.

[23] 303 A.2d 273 (N.J. 1973).

[24] The New Jersey Supreme Court stated:

> The question whether the equal protection demand of our State Constitution is offended remains for us to decide. Conceivably a State Constitution could be more demanding. For one thing, there is absent the principle of federalism which cautions against too expansive a view of a federal constitutional limitation upon the power and opportunity of the several States to cope with their own problems in the light of their own circumstances.

Id. at 282.

[25] The *Robinson* court applied an equal protection analysis quite distinct from the traditional three-tiered analysis (i.e., rational basis review, intermediate scrutiny, or strict scrutiny) that the Supreme Court utilized in *Rodriguez*. The New Jersey Supreme Court stated that "[u]ltimately, a court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is *arbitrary*." *Id.* (emphasis added).

[26] While *Robinson* marks the beginning of state equal protection challenges, it is odd that the court's decision for the plaintiffs relied entirely upon the state education clause as is typical for the third wave, not the second wave. Nonetheless, *Robinson* is fundamental to the transformation from the first to the second wave. *See* Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 & n.7 (1991) (explaining that *Robinson* and *Seattle School District No. 1 v. State*, 585 P.2d 71 (Wash. 1978), represent the only two cases within the temporal period of the second wave to base decisions solely upon the education clause); *cf.* Thro, *Judicial Analysis*, *supra* note 2 at 601–03 (claiming *Robinson* as marking the beginning of and as a primary example of the second wave).

During the second wave, varied equal protection analysis lead to divergent results. While plaintiffs in a few states were able to prevail,[27] the majority of the second wave cases resulted in state victories.[28] A number of factors contributed to the end of the second wave. The multitude of plaintiffs' defeats, or the ensuing uncertainty of the result, caused school finance reform claimants to look elsewhere for relief. For the state courts, the remaining concern of institutional legitimacy, such as the federalism-like issue of local control and the separation of powers, played a large role in upholding state finance schemes. In addition, the concern over the courts' institutional competency played a large part in the downfall of the second wave. By the end of the second wave, equality as a theory of school finance reform litigation was deemed inadequate because it lacked the "simplicity and unquestioned normativity that gave it its initial appeal."[29] Furthermore, the political realities of equality mandates caused

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[27] Plaintiffs prevailed in the following second wave cases as the state courts moved beyond the analysis of the *Rodriguez* court: *DuPree v. Alma School District No. 30*, 651 S.W.2d 90, 92–93 (Ark. 1983) (holding that local control did not constitute a legitimate state purpose); *Serrano v. Priest*, 557 P.2d 929, 951–52 (Cal. 1976) [*Serrano II*] (holding that the discrimination in educational opportunity based upon district wealth constituted a suspect classification and that education was a fundamental right); *Horton v. Meskill*, 376 A.2d 359, 373–74 (Conn. 1977) (holding that discrimination in educational opportunities based upon district wealth constituted a suspect classification and that education was a fundamental right); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (holding that education was a fundamental right under the state constitution and that the legislature had to develop high quality educational standards for all school districts); and *Washakie County School District No. 1 v. Herschler*, 606 P.2d 310, 334–35 (Wyo. 1980) (holding wealth-based classifications as suspect). For further discussion see Thro, *Judicial Analysis*, *supra* note 2, at 602–03.

[28] Plaintiffs in the following second wave cases failed to win in almost identical fashion as courts applied rational basis review and found that the finance schemes were rationally related to the legislature's objectives: *Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1022–24 (Colo. 1982) (en banc); *McDaniel v. Thomas*, 285 S.E.2d 156, 165–68 (Ga. 1982); *Thompson v. Engelking*, 537 P.2d 635, 644 (Idaho 1975); *Hornbeck v. Somerset County Board of Education*, 458 A.2d 758, 788–90 (Md. 1983); *Britt v. North Carolina State Board of Education*, 357 S.E.2d 432, 436 (N.C. App. 1987), *aff'd mem.*, 361 S.E.2d 71 (N.C. 1987); *Board of Education of City School District of Cincinnati v. Walter*, 390 N.E.2d 813, 819 (Ohio 1979); *Fair School Finance Council of Oklahoma, Inc. v. State*, 746 P.2d 1135, 1143–47 (Okla. 1987); *Olsen v. State*, 554 P.2d 139, 144–49 (Or. 1976); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979); *Richland County v. Campbell*, 364 S.E.2d 470, 472 (S.C. 1988); and *Kukor v. Grover*, 436 N.W.2d 568, 578–85 (Wis. 1989). For future discussion see Thro, *Judicial Analysis*, *supra* note 2, at 601.

[29] Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 145 (1995). Primarily, reasons for the end of the second wave are couched in the court's questionable legitimacy and competency in determining and mandating the concept of equality. As Enrich suggests, equality is not a simple concept because there are four quantities that could be equalized: capacity, actual funding, caliber of services, and

great strain upon the second wave courts.[30]

Another fundamental difficulty with equality mandates was that the mandates are difficult for the courts to tailor narrowly, and therefore, equality decisions necessarily affect the expanse of other areas of social litigation.[31] The court in *Robinson* raised this concern when it failed to uphold the plaintiffs' equal protection claim, reasoning that "the equal protection clause may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs, choosing those which must be met and a single basis upon which the state must act."[32] Once again, this time because of the collapse of the second wave, school finance reform plaintiffs needed to look elsewhere for relief.

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outcomes. Therefore, the question arises whether the court is the legitimate institution to choose from these measures. Conceivably, the legislature, with its ability to hold hearings, and education experts, with their experience and knowledge, would be more appropriate institutions to choose the correct measure of educational equality. *See id.* at 143–55.

In addition, Enrich stated that "[w]hile the demand for equal treatment by government has a powerful initial allure, the concrete application of that demand to education has proven deeply threatening to other powerful societal values." *Id.* at 155. For example, demanding equalization of school funds would necessarily bring about (1) restrictions to the capacity, spending, or services in the wealthier districts, (2) limits on the ability of parents in the wealthy districts to provide the best educational services for their children, and consequently, (3) limits on parents' ability to provide the best post-school opportunities for their children. In addition, a court mandate for strict equality would create the "Robin Hood" effect of the wealthier districts providing funds for the poorer districts because redistribution necessarily accrues with any equality mandate. *See id.* at 155–62.

[30] For example, in New Jersey, opposition from the populace, the legislature, and education experts has caused tremendous backlash for courts' equalization efforts. *See* Russell S. Harrison & G. Alan Tarr, *School Finance and Inequality in New Jersey*, *in* CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 178, 181–97 (G. Alan Tarr ed. 1996) (discussing the political aspects of the school finance reform litigation in the New Jersey line of cases including *Robinson*); Douglas S. Reed, *The People v. The Court: School Finance Reform and the New Jersey Supreme Court*, 4 CORNELL J.L. & PUB. POL'Y 137 (1994) (examining the New Jersey situation with the school finance cases, the subsequent legislative responses, including disapproval ratings of the public, and concluding that the plan resulting from litigation was not making the districts equal).

[31] *See Robinson v. Cahill*, 303 A.2d 273, 283 (N.J. 1973).

[32] *Id.*

C. *The Third Wave: Adequacy Challenges Based on State Education Clauses*

1. *A Description*

With the commencement of the third wave, litigators, courts, and commentators were confronted with a major shift in the theory of school finance system challenges. The third wave of school finance cases is based upon the theory of adequacy rather than equality, demanding that all children be guaranteed a certain qualitative level of education. The cases constituting this wave are characterized by claims based solely upon the state education clause. These claims suggest that school finance systems must provide a certain minimum level of education for all children in the state as mandated by the particular state education clause. [33]

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[33] The state education clauses, because there are fifty states, vary widely in language. Certain commentators have created a typology for simple reference. The most prominent categorizations are those posited by Professors Grubb and Ratner. *See* Erica B. Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 66–71 (1974); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814–18 (1985).

William Thro modified Grubb and Ratner's initial categories in propounding his analytical scheme for third wave cases. *See* William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 ED. L. REP. 19 (1993) [hereinafter Thro, *Role*]. For Thro, Category I clauses merely mandate a system of free public schools without mention of a standard of quality. *See id.* at 23, 23 n.24. The following is a list of Category I clauses based on Thro's standards: ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; HAW. CONST. art. X, § 1; KAN. CONST. art. VI, § 1; LA. CONST. art. VIII, § 1; MASS. CONST. pt. II ch. 5, § 2; MICH. CONST. art. VIII, §§ 1–2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(A); NEB. CONST. art. VII, § 1; N.H. CONST. pt. 2, art. 83; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; OKLA. CONST. art. XIII, § 1; S.C. CONST. art. XI, § 5; TENN. CONST. art. XI, § 12; and VT. CONST. ch. 2, § 68.

Thro contends that Category II clauses impose some minimum standard of quality. *See* Thro, *Role*, *supra*, at 23–24. For example: ARK. CONST. art. XIV, § 1; COLO. CONST. art. IX, § 2; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; IDAHO CONST. art. X, § 1; KY. CONST. § 183; MD. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; MONT. CONST. art. X, § 1; N.M. CONST. art. XXI, § 4; N.C. CONST. art. IX, § 2(1); N.D. CONST. art. VIII, §§ 1–2; OHIO CONST. art. VI, § 3; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; TEX. CONST. art. VII, § 1; UTAH CONST. art X, § 1; VA. CONST. art. VIII, §§ 1, 3; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; and WYO. CONST. art. VII, § 1.

Next, Category III clauses go beyond the simple mandate with a "stronger and more specific educational mandate." Thro, *Role*, *supra*, at 24. For example: CAL. CONST. art. IX, § 5; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, §§ 2–3; NEV. CONST. art. XI, § 2; R.I. CONST. art. XII, § 2; and S.D. CONST. art. VIII, § 1.

For example, in the first third wave case, *Rose v. Council for Better Education, Inc.*,[34] the Kentucky Supreme Court found that the state education clause,[35] calling for an efficient system of public schools, required the General Assembly not only to establish a system of common schools, but to establish one that "provides an equal opportunity to have an *adequate* education."[36] Based upon the gross inadequacies in the plaintiffs' school districts, the court declared the finance system to be constitutionally deficient and directed the legislature to "recreate and redesign" a new system that would comply with adequacy standards that the court itself rather stringently and explicitly declared.[37] However, adequacy determinations did not have to be specific. For

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Finally, Category IV clauses are those that "make education an important, if not the most important, duty of the state." Thro, *Role*, *supra*, at 24. For example: GA. CONST. art. VIII, § 1, para. 1; ILL. CONST. art. X, § 1; ME. CONST. art. 8, § 1; and WASH. CONST. art. IX, § 1.

[34] 790 S.W.2d 186 (Ky. 1989).

[35] KY. CONST. § 183 ("The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.").

[36] *Rose*, 790 S.W.2d at 211 (emphasis added). Interestingly, the reasoning behind this determination is shrouded by a number of difficult-to-grasp terms that haunt courts in this area. However, the Kentucky court had no problem stringing them together. The slippery slope is obvious. The court reasoned:

> The system of common schools must be *adequately* funded to achieve its goals. The system of common schools must be substantially *uniform* throughout the state. Each child, every child, in this Commonwealth must be provided with an *equal opportunity* to have an *adequate* education. *Equality* is the key word here. The children of the poor and the children of the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an *adequate* education.

Id. (emphasis changed).

[37] *Id.* at 212. To date, this has been the strongest state supreme court adequacy determination. In *Rose*, in strict opposition to what has been decided recently, the Kentucky court not only declared inadequacy, it adopted an adequacy standard. This Note will establish in Parts III and IV that in a recent rash of cases adequacy claims are beginning to fail. The entire movement of the third wave adequacy claims can be regarded as a diminution of this first aspirational case.

In effect, the Kentucky Supreme Court adopted the trial court's list of seven goals or capacities while also listing its own characteristics of an adequate school system. Also, once again, it must be noted that the court switches terminology (getting back to the term "efficiency" as explicitly provided for in the education clause) in introducing this list:

> We concur with the trial court that an *efficient* system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and

example, in *Abbott v. Burke*[38] the New Jersey Supreme Court found that a sufficient education was one that "will equip all of the students of [the] state to perform their roles as citizens and competitors in the same society."[39]

The Kentucky case, *Rose*, represents one extreme on the spectrum of third wave legal theory cases, and has stood as aspirational for adequacy theory proponents. The Kentucky state education clause does not even mention adequacy but only "efficiency." Therefore, the Kentucky Supreme Court's adequacy determination was derived from the mere existence of the clause.[40] In effect, the court held that because education is mandated by the education

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rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to understand the issues that affect his or her community, state and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

Id. (emphasis added). In addition, the court listed the baseline minimum characteristics of an efficient, common schools system:

(1) The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly.

(2) Common schools shall be free to all.

(3) Common schools shall be available to all Kentucky children.

(4) Common schools should be substantially uniform throughout the state.

(5) Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances.

(6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.

(7) The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education.

(8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.

(9) An adequate education is one which has as its goal the development of the seven capacities recited previously.

Id. at 212–13.

[38] 575 A.2d 359, 410 (N.J. 1990).

[39] *Id.*

[40] KY. CONST. § 183.

clause, a certain qualitative level is mandated, and the court can determine what qualitative level is required.[41]

2. *The Initial Allure of the Third Wave*

The move from equality challenges to adequacy challenges was met by an often optimistic if not exuberant welcome from a number of school finance legal commentators.[42] From 1989–1993, plaintiffs, in a number of states, were successful in challenging school finance schemes.[43] The initial allure of the

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[41] In stark opposition, and as will be discussed in Part IV, the Supreme Court of Illinois refused to enter the realm of adequacy determinations even though the Illinois education clause calls for "high quality."

[42] *See* William H. Clune, *Educational Adequacy: A Theory and Its Remedies*, 28 U. MICH. J.L. REF. 481 (1995) (explaining the third wave's promise for school finance reform litigation); Enrich, *supra* note 29, at 184 (declaring that it may be better to leave equality behind and use adequacy arguments which "provide tools which are more firmly grounded on the constitutional base, more closely matched to the task at hand, and less threatening in their reach and power"); Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 MICH. J.L. REF. 493 (1995) (explaining the virtue of adequacy claims as necessary in promulgating vertical equity—that differences in resource allocation should be based on legitimate differences between individuals in an effort to mitigate innate and environmental inequalities); Phil Weiser, *What's Quality Got to Do with It?: Constitutional Theory, Politics, and Education Reform*, 21 N.Y.U. REV. L. & SOC. CHANGE 745, 766–89 (1994–1995) (arguing that adequacy claims are favorable because they are grounded in the state constitutions that reflect the people's fundamental public commitment to education). *But see* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMPLE L. REV. 1151, 1172–76 (1995). Heise conceded that adequacy arguments are less threatening and more firmly rooted in the constitutional base, but cautioned that:

> [a]lthough recent court decisions illustrate adequacy's important virtues, fuel expectations, and suggest its potential, their long term impact on school finance systems will not be known for some time. Moreover, adequacy court decisions raise important questions about judicial capacity, the separation of powers and political question doctrines, and the efficacy of litigation as a device to influence public policies.

See id. at 1176. Professor Heise's concerns are borne out in the cases explained by this Note as the collapse of the third wave.

[43] By 1993, claimants were 7-3-1 in William Thro's estimation. Thro, *Judicial Analysis*, *supra* note 2, at 599 n.6. In chronological order, the victories for the plaintiffs were: *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 215–16 (Ky. 1989); *Helena Elementary School District No. 1 v. State*, 769 P.2d 684, 690–91 (Mont. 1989); *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391, 398–99 (Tex. 1989); *Abbott v. Burke*, 575 A.2d 359, 408 (N.J. 1990); *Tennessee Small School System v. McWherter*, 851 S.W.2d 139, 154–57 (Tenn. 1993); *Opinion of the Justices*, 624 So. 2d 107 (Ala. 1993); *McDuffy v. Secretary*

third wave and its theory of adequacy, beyond the number of plaintiff victories, was the increased legitimacy that the subsequent court decisions and the greater political palpability of adequacy over equality that the courts would have.[44] Some commentators believed that the third wave's method of judicial decisionmaking would finally bring coherence to this area of litigation.[45]

Initially for the courts and commentators, adequacy was favored over equality because the courts' decisions would be based solely upon the state education clause. On the surface, this would take care of two of the main problems of institutional reform litigation that were evident in the first and second waves: (1) whether the court has institutional legitimacy and competency, and (2) whether the decision can be narrowly tailored.[46]

As already noted, these two problems adversely affected the promise of the first and second waves. For example, the *Rodriguez* court acquiesced to the state legislature, citing its refusal to enunciate a fundamental right of education because of the concern that plaintiffs from all fifty states would take advantage of a broad statement in attacking every piece of state legislation that created a disparate impact. Furthermore, the Supreme Court was concerned with its place as a federal institution in relation to the state and local governments and as a judicial institution in relation to the legislature. Likewise, in the second wave, the state courts were hesitant to rely on their state constitutions' equal protection clauses for fear that the decision would open the door to massive amounts of

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of the Executive Office of Education, 615 N.E.2d 516, 553–55 (Mass. 1993). Of the three "loser" cases, two are post-1993 decisions, which clearly fit within the movement marking the end of the third wave, and one is a 1991 case following the same line. *See infra* note 54.

[44] *See* Enrich, *supra* note 29, at 183–84.

[45] *See* Thro, *Judicial Analysis*, *supra* note 2, at 617 ("If other states follow the lead of Massachusetts . . . perhaps, some coherence will emerge in this area of the law."). For the most part, Thro's method of judicial analysis has proven consistent with the litigation. However, the method allows much room for judicial discretion. In particular, Thro focused on the language of the state education clauses. *See* Thro, *Judicial Analysis*, *supra* note 2, at 600 n.19 (positing a five-step method of judicial analysis for third wave cases where state education clause interpretation is vital); *see also* Thro, *Role*, *supra* note 33, at 28–31 (explaining how subtle differences in the languages of the education clauses have become extremely important in the third wave cases). The fact that the education clauses in these cases must first be interpreted then specified as garnering a particular measure of adequacy leaves open a great number of questions. The areas most apt to discretion are where incoherence exists, and where the most recent cases seem to be marking the end of the third wave. *See id.* Likewise, Molly McUsic levied a method of analysis for cases based solely upon the education clauses. *See* McUsic, *supra* note 26, at 308. Her method also focused on the state education clause language as vital to the courts' decisionmaking process. *See id.* However, neither of these accounts considered the court's concerns of legitimacy and competency.

[46] *See* Chayes, *supra* note 1, at 1298–1313 (recognizing these two limiting elements as applicable in all institutional reform litigation).

equal protection litigation from the broad spectrum of social institutions. Moreover, the second wave courts were faced with separation of powers concerns and federalism-like local control concerns. Demanding equalization meant the certain reallocation of finances, and an intrusion upon what have traditionally been the jobs of the legislature and the local school districts.

However, the third wave, based solely on the education clauses of the states, was at first thought to alleviate these problems. The education clause was a direct mandate from the state constitution, and a decision based in its terms would be legitimized.[47] As a result, the institutional concern was avoided because the state judiciary's recognized function is to interpret the state constitution.[48] Also, because of the direct mandates in the state constitutions, the courts did not need to make the difficult connection between the challenged finance system and a broadly drafted equal protection clause. Furthermore, the courts' third wave decisions were narrowly tailored to the social institution of education. The education clause was just that—an education clause—and the courts would not have to worry about the creation of a standard applicable across the broad spectrum of social institutions.[49]

In addition, many observers initially believed that relying upon adequacy is more politically palpable than relying on equality. Many courts and commentators held that the third wave appealed to accepted norms of adequacy and fairness.[50] This was important to judges at the state level because they are elected officials. After all, it seemed much easier for an individual to say that a child has a right to at least some level of education as compared to saying that children must receive equal amounts of or equal funding for education.[51] Moreover, at first glance, the concept of adequacy—at least on the surface—seemed less threatening than the concept of equality.[52] Finally, some commentators believed that because adequacy is necessarily derived from the state constitution's education clause, it reflects the political will of the people of the state.[53]

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[47] *See* Enrich, *supra* note 29, at 166.

[48] For a discussion of judicial interpretivism in institutional reform cases, see Fiss, *supra* note 1, at 9–17.

[49] *See* Enrich, *supra* note 29, at 166–78.

[50] *See id.*

[51] *See id.*

[52] *See id.*

[53] *See* Weiser, *supra* note 42, at 754–57 (arguing that the adequacy decisions of the third wave are legitimized by the will of the people as expressed in the state education clause).

III. THE COLLAPSE OF THE THIRD WAVE: A DESCRIPTION

The third wave, as exemplified in the Kentucky *Rose* case, meant success for plaintiffs as courts declared finance systems inadequate and posited what an adequate system would constitute. Despite the exuberant clamoring of third wave proponents, the third wave does not mark the end of the tumultuous history of school finance waves. Third wave cases since 1993 indicate a tendency for the state courts to refuse either of these findings. A number of state courts have turned away the plaintiff's adequacy claims in the following ways: acquiescing to the state legislature's efforts, refraining from specifying a particular level of adequacy, exceedingly finding plaintiffs' allegations insufficient to support a claim, and refusing to recognize adequate education as a constitutional right. [54]

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[54] The latter part of the third wave is marked by anti-plaintiff holdings. *See* Sheff v. O'Neill, 678 A.2d 1267, 1286–90 (Conn. 1996) (holding that plaintiffs' adequacy claim is insufficient to implicate a constitutional right, but that the disparity between the school districts as a function of race is unconstitutional); Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996) (per curiam) (holding that plaintiffs failed to allege a standard of adequacy which would enable the courts to decide the case so as not to violate the separation of powers); Idaho Schs. for Equal Educ. Opportunity v. Idaho State Bd. of Educ., 850 P.2d 724, 736 (Idaho 1993) (rejecting challenge based on "uniformity" provision of state education clause and remanding "thoroughness" claim while declaring the state board of education standard the constitutional standard); Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1196 (Ill. 1996); Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1197 (Kan. 1994) (finding the school finance system constitutional because the system meets the standards created by the legislature and the state board of education); School Admin. Dist. No. 1 v. Commissioner, Dep't of Educ., 659 A.2d 854, 857–58 (Me. 1995) (recognizing that no education clause claim was raised by plaintiffs); Skeen v. State, 505 N.W.2d 299, 319–20 (Minn. 1993) (holding plaintiffs unable to show that the basic system is inadequate or that the "general and uniform" language requires full equalization); Gould v. Orr, 506 N.W.2d 349, 353 (Neb. 1993) (holding disparity does not mean inadequacy, and therefore that the education clause claim must fail); Reform Educ. Fin. Inequities Today v. Cuomo, 631 N.Y.S.2d 551, 553 (1995) (holding that disparity does not equal inadequacy); Coalition for Equitable Sch. Funding v. State, 811 P.2d 116, 122 (Or. 1991) (holding that plaintiffs were unable to show inadequacy of educational opportunities); City of Pawtucket v. Sundlun, 662 A.2d 40, 62–63 (R.I. 1995) (upholding the school finance system and refusing to declare an adequacy standard); Edgewood Ind. Sch. Dist. v. Meno, 893 S.W.2d 450, 452–53 (Tex. 1995) (holding disparity does not equal inadequacy). *But see* Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 815–16 (Ariz. 1994) (finding state education provision calling for a "general and uniform" system was violated where gross disparities of facilities resulted therefrom); Abbott v. Burke, 693 A.2d 417, 445 (N.J. 1997) (revisiting the drawn-out school finance battle, this time declaring the legislature's remedial attempt unconstitutional in its creation of disparity in educational opportunity); Campaign for Fiscal Equity, Inc. v. State, 631 N.Y.S.2d 565, 574–75 (1995) (finding a sustainable claim under the state education clause); Leandro v. North Carolina, 488 S.E.2d

School finance reform cases are taking a new direction at the behest of the courts. Perhaps, as these cases seem to prove, the optimism of the third wave commentators was premature, overlooking the eventual questions of judicial legitimacy and competency which have surfaced in each of the previous waves of school finance cases. The third wave is not immune from judicial scrutiny. Problems with the elusive concept of adequacy and the separation of powers have caused a collapse of the third wave.

A clear example of one response to separation of powers concerns is the Florida Supreme Court case, *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*.[55] In this case, appellants sought a declaration that an adequate education is a fundamental right under the Florida Constitution, and that the state had violated students' fundamental right to an adequate education by failing to allocate adequate resources for a uniform system of free public schools as provided for in the state constitution.[56] Florida state constitutional education articles contain both an adequacy and a uniformity provision.[57] The majority held that "[w]hile we stop short of saying 'never,' appellants have failed to demonstrate in their allegations, or in their arguments on appeal, an appropriate standard for determining 'adequacy' that would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature."[58]Likewise, in the Rhode Island case *City of Pawtucket v.*

249, 254 (N.C. 1997) (holding that the right to education provided in the state constitution was qualitative and encompassed a right to sound basic education); DeRolph v. State, 677 N.E.2d 733, 747 (Ohio 1997) (holding 4-3, on adequacy grounds, that the finance system violates the state constitutional provision mandating the state to provide a "thorough and efficient" system of public schools); Brigham v. Vermont, 692 A.2d 384, 397–98 (Vt. 1997) (holding, in second wave fashion, that the finance system is unconstitutional in that it deprives children of an equal educational opportunity, but leaving the specific means of achieving substantial equality to the legislature); Campbell County Sch. Dist. v. Wyoming, 907 P.2d 1238, 1264–80 (Wyo. 1995) (maintaining a long line of extremely pro-plaintiff Wyoming precedent in declaring certain aspects of state funding system violative of state education clause, and declaring that no separation of powers violation results from determining the "nature and extent of the constitutional right").

[55] 680 So. 2d. 400 (Fla. 1996).

[56] *See id.* at 402.

[57] FLA. CONST. art. IX, § 1 ("*Adequate* provision shall be made by law for a *uniform* system of free public schools . . . ." (emphasis added)).

[58] *Chiles*, 680 So. 2d at 408. In fact, in response to the *Chiles* decision, an initiative petition for amendment to the state constitution sought to add a clearer adequacy provision. *See* Advisory Opinion to the Attorney General Re: Requirement for Adequate Public Education Funding, No. 89962, 1997 WL 719476 (Fla. Nov. 20, 1997) (per curium). The Florida Supreme Court found the amendment to affect substantially "more than one function of the government and multiple provisions of the Constitution." *Id.* at *4. Therefore, the court struck it from the ballot for failing to comply with the single subject requirement. *See id.*

Sundlun,[59] the state supreme court recognized the legislature's authority to provide for education as a plenary power and as unreviewable in the courts.[60] Thus, the court acquiesced to the legislature in determining the elusive relationship between funding and outcomes that is so crucial to the construct of educational finance schemes.[61] Furthermore, the Rhode Island Supreme Court—based on the record before them, and even though the trial court found that the level of state funding failed to ensure both "substantial equality" and "adequacy" of resources for children in all communities[62]—refused to conclude that the legislature violated the constitutional mandate[63] so as to warrant a judicial response.[64] In addition, the court recognized the difficulty in quality mandates, declining to speculate as to the "omens that would presage a constitutional violation."[65]

Similar in conclusion to the Florida and Rhode Island decisions—but coupled with the uniquely strong demand of the Illinois State Constitution which calls for "high quality"—the Illinois Supreme Court took the Florida and Rhode Island courts' holdings in *Chiles* and *Sundlun* one step further.[66] In *Committee for Educational Rights v. Edgar*, the plaintiffs challenged the school finance system as violative of the very demanding state education provision.[67] While the court considered this challenge to the state constitutional education provision, it still declared that the question of whether the system offended the

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[59] 662 A.2d 40 (R.I. 1995).

[60] *Id.* at 57 ("Because the Legislature is endowed with virtually unreviewable discretion in this area [education], plaintiffs should seek their remedy in that forum rather than in the courts.").

[61] *See id.* at 62.

[62] *Id.* at 54.

[63] "[I]t shall be the duty of the general assembly to promote public schools, . . . and to adopt all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education . . . ." R.I. CONST. art. XII, § 1.

[64] *See Sundlun*, 662 A.2d at 63.

[65] *See id.* at 57. Also, in this case, the court refused to declare the system "inadequate," which would have created a judicial standard in terms of a floor represented by the existing level provided by the current system. *See id.*

[66] The Illinois education clause is one of only four of the highest demanding Category IV clauses that make education an important duty of the state—if not the most important duty, while the Florida education clause is Category II which merely imposes some minimum quality. The Rhode Island education clause provides for Category III or "a stronger mandate" of public education. In addition, it is important to note that the Kentucky education clause is also a Category II clause. *See supra* note 33.

[67] 672 N.E.2d 1178, 1180–81 (Ill. 1996).

prescribed requirement of "high quality"[68] was outside of the "sphere of judicial function."[69]

In addition to merely refusing to declare an adequacy standard as exemplified in the cases above, a second response to a separation of powers predicament is to adopt a standard already accepted by what the court may deem a more "legitimate" institution. However, not so coincidentally, the institution is usually the very defendant in the case. This method is exemplified in the Kansas case, *Unified School District No. 229 v. State*,[70] and the Idaho case, *Idaho Schools for Equal Educational Opportunity (ISEEO) v. Idaho State Board of Education*.[71]

The Kansas Supreme Court, in determining the Kansas education clause standard,[72] found that the requirement of "suitable" funding most closely resembled the adequacy requirement found in several other state constitutions.[73] While recognizing the efforts of the courts that addressed the early third wave cases in *Rose v. Council for Better Education*,[74] *Abbott v. Burke*,[75] and *Alabama Coalition for Equity v. Hunt*,[76] the court decided not to substitute its judgment of what is "suitable," but rather, used the standards of the legislature and the state board of education.[77] Not surprisingly, using the base standards prescribed by the challenged institutions themselves, the court ultimately held that the school finance plan did not contravene the state constitution's education provision.[78] Therefore, using these already specified adequacy standards, the

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[68] The Illinois Constitution mandates:

> A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an *efficient* system of *high quality* public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law. The State has the primary responsibility for financing the system of public education.

ILL. CONST. art. X, § 1 (emphasis added).

[69] *Committee for Educ. Rights*, 672 N.E.2d at 1193.

[70] 885 P.2d 1170 (Kan. 1994).

[71] 850 P.2d 724 (Idaho 1993).

[72] "The legislature shall make *suitable* provision for finance of the educational interests of the state." KAN. CONST. art. VI, § 6(b) (emphasis added).

[73] *See Unified Sch. Dist. No. 229*, 885 P.2d at 1185.

[74] 790 S.W. 2d 186 (Ky. 1989).

[75] 575 A.2d 359 (N.J. 1990).

[76] Nos. CV-90-883R, CV-91-0117-R, 1993 WL 204083 (Ala. Cir. Ct., Apr. 1, 1993).

[77] *See Unified Sch. Dist. No. 229*, 885 P.2d at 1186.

[78] *See id.* at 1187.

Kansas Supreme Court merely made the appearance of examining the adequacy question, succumbing to a circularity in which the legislative plan would never be struck down.

In a similar case, the Idaho Supreme Court faced a challenge to the school finance system based on the "uniform and thorough" language of the state constitution's education clause.[79] The court held that the "uniformity" requirement of the state education clause was not violated.[80] However, the court held that the plaintiff's suit was not foreclosed because the "thoroughness" requirement had not yet been determined by precedent.[81] The court remanded the case to the trial court for a determination of the thoroughness issue, holding that the judicial branch has the responsibility to determine whether the school finance system meets the thoroughness requirements.[82] Nonetheless, the Idaho Supreme Court noted its institutional concerns by conditioning its remand, stating that the politically difficult task of determining thoroughness was simplified because the state board of education already promulgated educational standards and that these standards were consistent with the constitutional requirement.[83] Therefore, to win on remand the plaintiffs would have to prove that the school district failed to achieve the level of funding necessary to meet the state board of education standards. Again, just as in the Kansas case, the court here acquiesced to another branch of the state government—in this case the defendant state board of education.[84]

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[79] "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho to establish and maintain a general, uniform, and thorough system of public, free common schools." IDAHO CONST. art. IX, § 1.

[80] *See Idaho Sch. for Equal Educ. Opportunity v. Idaho St. Bd. of Educ.*, 850 P.2d 724, 730 (Idaho 1993).

[81] *See id.* at 734–35.

[82] *See id.*

[83] *See id.*

[84] The dissent in this case was particularly concerned with the court's acquiescence, stating:

> For the reasons which the majority opinion itself describes, I have a great deal of difficulty allowing other branches of government to set the standard for determining the meaning of a provision of the Idaho Constitution. However, I have even more difficulty with the Court's conclusion that the word "thorough" in Article 9, § 1, constitutionalizes the State Board of Education's regulation requirements for "school facilities, instructional programs and textbooks, and transportation systems. . . ."

Id. at 741 (Bakes, J., concurring in part and dissenting in part) (citation omitted).

Another reason adequacy claims failed was that, because of the particular factual circumstances surrounding school finance reform, the primary challenge arises not from squalid and poor conditions, but from the existence of disparity between the rich and poor school districts. Therefore, whether a school district achieves a certain level of adequacy is often not the appropriate question, as both the courts and plaintiffs have recognized.[85] For example, the New York Court of Appeals case, *Reform Educational Financing Inequities Today (R.E.F.I.T.) v. Cuomo*,[86] and the Nebraska Supreme Court case, *Gould v. Orr*,[87] both hold that disparity does not equal inadequacy and that therefore, without a sufficient allegation of inadequacy, the claim must fail. In the Nebraska case, the court sustained a demurrer and refused leave to amend the complaint stating that it appeared "clear that no reasonable possibility exist[ed] that plaintiff [would], by amendment, be able to state a cause of action."[88]

Nonetheless, and not surprisingly considering the depth and complexity of the issue, the collapse of the third wave has not been entirely sweeping. In marked contrast to the rash of cases failing to support adequacy claims, the Ohio Supreme Court, in *DeRolph v. State*,[89] declared the Ohio school finance system unconstitutional solely on adequacy grounds.[90] The court found, in a close four-to-three decision, that the school finance system violated the state constitutional education clause that provides for a "thorough and efficient"[91] system of common schools.

However, the Ohio decision and its aftermath actually help illuminate the institutional issues and problems with court involvement in adequacy decisions. The issue of judicial involvement in a complex social institution was pushed to the forefront in the discussion between the majority and the dissent. As the dissent acknowledged: "Only infrequently are the members of this court required to balance our appreciation for the principle of separation of powers among the three branches of government against our desire to use the

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[85] Due to similar difficulties in matching reality with an adequacy claim, the Maine case, *School Administrative District No. 1 v. Commissioner, Department of Education*, 659 A.2d 854 (Me. 1995), took the form of a second wave case: the plaintiffs failed to raise an education clause claim, and the court rejected their equal protection claim in like manner.

[86] 631 N.Y.S.2d 551 (N.Y. 1995).

[87] 506 N.W.2d 349 (Neb. 1993).

[88] *Id.* at 353.

[89] 677 N.E.2d 733 (Ohio 1997).

[90] The majority stated: "We recognize that disparities between school districts will always exist. By our decision today, we are not stating that a new financing system must provide equal educational opportunities for all. In a Utopian society, this lofty goal would be realized." *Id.* at 746.

[91] OHIO CONST. art. VI, § 2.

considerable powers of this court to mandate action to improve the imperfect."[92] The dissent argued that school finance was a non-justiciable political question that should remain in the hands of the legislature.[93] The majority, on the other hand, focused upon the poor conditions of the plaintiff school districts[94] and determined that the funding system failed to provide the adequate level of education demanded by the state education clause.[95]

Unlike in the aspirational third wave Kentucky case, the Ohio Supreme Court refrained from instructing the legislature as to the specifics of a remedial scheme,[96] but rather sent the issue back to the legislative branch to fix the system within one year.[97] Ohio Republican leaders, who constitute the majority in the legislature and include the Governor, reacted vehemently against the state high court's decision to enter the fray. Believing that the Ohio Supreme Court improperly undertook a legislative function, and desiring to reverse this institutional imposition, Republican leaders proposed and supported placing any remedial plan, whether it entail a constitutional amendment or not, on a popular ballot.[98] This, they hoped, would place the ultimate determination of adequacy in the hands of the people, thereby taking the power away from the court and legitimizing the process.

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[92] *DeRolph*, 677 N.E.2d at 782 (Moyer, C.J., dissenting).

[93] *See id.* at 783–87 (Moyer, C.J., dissenting).

[94] *See id.* at 742–44 (outlining testimony and evidence of severely deprived conditions in the plaintiff school districts). Justice Douglas's concurrence provides an elaborate laundry list of the poor conditions evident in the plaintiff school districts. *See id.* at 757–68 (Douglas, J., concurring).

[95] The majority declared:

> We recognize that money alone is not the panacea that will transform Ohio's school system into a model of excellence. Although a student's success depends upon numerous factors besides money, we must ensure that there is enough money that students have the chance to succeed because of the educational opportunity provided, not in spite of it. Such an opportunity requires, at the very least, that all of Ohio's children attend schools which are safe and conducive to learning. At the present, Ohio does not provide many of its students with even the most basic of educational needs.

Id. at 746.

[96] The court did declare that "[a] thorough and efficient system of common schools includes facilities in good repair and the supplies, materials, and funds necessary to maintain these facilities in a safe manner, in compliance with all local, state, and federal mandates." *Id.* at 747.

[97] *See id.*

[98] *See* Lee Leonard, *School Issue Could Go to State Ballot*, COLUMBUS DISPATCH, June 7, 1997, at 1B; Lee Leonard, *GOP Calls for School-Funding Ballot Issue*, COLUMBUS DISPATCH, June 4, 1997, at 1A.

Despite the turning tide of school finance reform litigation, the recent rash of cases does not itself constitute the fourth wave because the plaintiffs' primary legal theory, and the courts' recognition of that theory and method of decisionmaking, remain consistent with the third wave. Rather, the cases mark a change in the character of the third wave, as state courts begin to concede that the concept of adequacy is elusive and succumb to questions of their institutional legitimacy and competency in the school finance arena.[99] Hence, the finance reform plaintiffs' failure to succeed in the third wave foreshadows the fourth wave.

IV. UNDERSTANDING THE COLLAPSE OF THE THIRD WAVE

The beginning of the third wave carried great promise for court determinations of adequacy and seemed to appeal to a certain common sense of justice. In his discussion of the transformation of constitutional adjudication towards greater involvement in institutional reform, Professor Archibald Cox declared that "law . . . is a human instrument designed to meet human needs; the only question is how the needs can best be met as nearly as may be, not only for ourselves but for our children and their children."[100] The third wave decisions, based on the idea that deprived children should be granted at least some minimum level of adequate education, appealed to this humanitarian notion.[101]

However, a reversal of fortune has struck school finance reform plaintiffs. Professor Cox also recognized that the judiciary's function must be exercised so

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[99] Although this Note argues that adequacy decisions are problematic for state courts, it does not claim the same is true for federal courts. State constitutions provide explicit educational mandates directly to the legislature whereas the federal Constitution does not. This creates separation of power difficulties unique to state courts, and provides greater judicial incentive to acquiesce to the legislative body. Furthermore, the separation of powers is explicitly delineated in most state constitutions. Therefore, the unique premises involved in a constitutional adequacy determination leaves the federal courts with an air of legitimacy not applicable to the state courts. For example, see Edward B. Foley, Rodriguez *Revisited: Constitutional Theory and School Finance*, 32 GA. L. REV. (forthcoming 1998) for a thorough argument for and detailed explanation of what a federal court adequacy determination in the area of school finance would constitute.

[100] Cox, *supra* note 1, at 821. The article deals primarily with the federal courts; however, its applicability to state courts is clear.

[101] In an oft-cited piece, that for many marked the beginning of institutional reform litigation commentary, Abram Chayes was generally supportive of court involvement in what he called public law litigation. Even so, he recognized the problematic institutional overlap and stated that his willingness to accept such overlap was simply "actuated by the outcome oriented motives." *See* Chayes, *supra* note 1, at 1313.

as to preserve it as a consistent, vital, reliable institution of society.[102] He noted that while the courts' own interpretations of their power determines what they *will* do in the short run, in the long run, legal professionals (including the judiciary), political branches, media, and others must determine what they *can* do or what is legitimate.[103] As evidenced by the anti-plaintiff third wave cases, and from a national perspective, the short-term promise of the third wave is settling into the long-term reality.

Institutional reform litigation as a whole, more than any other area of the law, raises concerns of judicial "activism," and the anti-plaintiff decisions of the third wave cases indicate that adequacy suits do not satisfy the all-important questions of judicial legitimacy and competency which are so vital to court decisions hoping to contravene the "activist" impression. School finance reform litigation raises the concern about judicial "activism" to an even greater level by dealing with complex institutions and involving a myriad of issues, including educational policy and theory, appropriations, and fiscal and local control issues.[104]

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[102] *See* Cox, *supra* note 1, at 821–22. Cox explains:

> We *may* pay too high a price for some short range results that are good in terms of their substantive public policy if the cost is the destruction—or even the impairment—of the long-run usefulness of the Court as an instrument for achieving other important objectives. If destroyed or impaired, the instrument will not be available—or if available, will not be as effective—for doing the good it can do, without consuming itself, in the longer future. In quite utilitarian terms, therefore, there *may* be a tension between short-run, beneficial social and political results and longer-range institutional considerations—between today's good and tomorrow's.

Id.

[103] *See id.* at 823.

[104] Federal District Judge William Wayne Justice has delineated activism in the institutional reform area into two distinct categories: jurisprudential activism and remedial activism. *See* William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1, 2 (1992). Judges practice jurisprudential activism in the creation of constitutional meaning when their vision does not coalesce with precedents, majoritarian preference, or subsequent social or doctrinal developments. *See id.* Judges exercise remedial activism when they order broad mandates deemed as an usurpation of the power of the legislature, a declaration beyond the expertise of the court, or an imposition of the judges' philosophical and sociological conclusions. *See id.* at 7.

The third wave school finance reform cases include concerns in both categories of activism. Conceivably, the adherence of a constitutional standard of adequacy necessarily touches upon the former, while the involvement in cases directly connected to complex social institutions of schools and school finance systems touches upon the latter.

Since 1993, as the late third wave decisions illustrate,[105] the state supreme courts' major concerns are their legitimacy and their competency in dealing with the legal theory of adequacy. Legitimacy concerns include "(1) adherence to some charter delimiting however vaguely the proper scope of the judicial function and the proper manner of performing it, [and] (2) the power to command compliance, and acceptance, which are forms of consent."[106] Legitimacy focuses on the separation of powers, political question, and federalism concerns. On the other hand, the courts' competency concerns ask whether the problem will actually yield to the judicial method.[107] Hence, competency deals with the raw ability of the courts to comprehend the problem and come up with a considerable solution and remedy outside their area of expertise, the courts' subsequent power to enforce that remedy, and the effect of political influences.

A. *Legitimacy: The Separation of Powers and the Political Question Doctrine*

The separation of powers concern is one of the foremost questions of legitimacy in institutional reform cases[108] because of the legislative and administrative nature of court mandates reforming a complex social institution. Under the separation of powers doctrine one branch is not permitted to encroach on the domain of or exercise the powers of another branch. This doctrine was found by the federal judiciary to be implicit in the U.S. Constitution. However, most state constitutions contain an explicit mandate providing for the separation of powers. For example, the Florida constitution states that "[t]he powers of the state government shall be divided into

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[105] *See supra* note 54 and Part III.

[106] Cox, *supra* note 1, at 823.

[107] *See id.*

[108] *See* William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982). Professor Fletcher argued that federal court remedial discretion in institutional reform is presumptively illegitimate and that these questions are solely for the legislature. By clear analogy, the same holds true for the state courts. Fletcher explained that the trial court's remedial discretion in institutional reform must supplant a politically based governmental body, and the competing factors involved are more complicated and more intangible than those involved in private injunctive suits. Institutional cases, such as school finance cases, are what Fletcher called "polycentric" in a "non-legal" fashion. "Polycentric" means that there exists a complex problem with a number of subsidiary problem centers related to each other such that the solution to one depends on the others. *See id.* at 645. "Non-legal" means that the problems are not all based on a protected legal claim. *See id.* at 646. Therefore, as in school finance litigation, judges are not bound by legal norms when choosing one remedy over another.

legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."[109]

Violations of the separation of powers doctrine in school finance cases can occur both generally and specifically.[110] In the general sense, courts are hesitant to usurp the legislature's power in exercising normal legislative functions such as appropriations, while in the specific sense, the courts are hesitant to usurp the legislature's duties as explicitly mandated by the specific education clause.[111] The Rhode Island Supreme Court, in *City of Pawtucket v. Sundlun*,[112] cited Justice Powell who delineated these two ways that the separation of powers could be violated: "'One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Alternatively, . . . [one branch may] assume[ ] a function that more properly is entrusted to another.'"[113] The Rhode Island Supreme Court held that the third wave plaintiffs had urged the court to do both by asking the court to interfere with the constitutional mandate to the legislature in education, and by asking the court to order equity in funding sufficient to achieve a certain level of outcomes.[114]

General separation of powers concerns are not unique to the school finance institutional reform cases. Any decision that affects a state institution requires that money be appropriated in some varied manner to cure the constitutional defect. In the school finance reform context, whether the court determines a specified level of adequacy or merely declares inadequacy, some appropriations issue would be raised, even if the court did not specifically mandate a finance order.[115]

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[109] FLA. CONST. art. II, § 3.

[110] *See, e.g., Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 407 (Fla. 1996) (acquiescing to the legislature's authority in both the general and the specific sense).

[111] *See id.*

[112] 662 A.2d 40 (R.I. 1995).

[113] *Id.* at 58 (quoting I.N.S. v. Chadha, 462 U.S. 919, 963 (1983)).

[114] *See id.* at 62–63.

[115] *See Chiles*, 680 So. 2d at 406–07. The Florida Supreme Court explained its concern over its involvement in appropriations decisions:

> To decide such an abstract question of "adequate" funding, the courts would necessarily be required to subjectively evaluate the Legislature's value judgments as to the spending priorities to be assigned to the state's many needs, education being one among them. In short, the Court would have to usurp and oversee the appropriations power, either directly or indirectly, in order to grant the relief sought by Plaintiffs. While Plaintiffs assert that they do not ask the Court to compel the Legislature to appropriate any specific

In the specific sense, state education clauses mandate the state legislatures both to create and maintain a system of public education. Where adequacy provisions exist,[116] that mandate may rise to the level of both determining and providing for adequacy in the public education system. Therefore, the constitutions speak directly to the court that educational financing is in the realm of plenary power of the legislature. The Illinois Supreme Court in *Committee for Educational Rights v. Edgar*,[117] stated that, regardless of the state education clause language, "[c]ourts may not legislate in the field of public education any more than they may legislate in any other area."[118]

In conjunction with, and closely tied to both the general and specific separation of powers concerns, lies the concern that adequacy claims raise a political question outside the scope of the judiciary's jurisdiction. Two of the six criteria for a political question seem overwhelmingly satisfied: (1) there exists a textually demonstrable constitutional commitment of the issue to a coordinate political department, and (2) a lack of judicially discoverable and manageable standards exist for resolving it.[119] Therefore, for example, in respect to

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> sum, but merely to declare that the present funding level is constitutionally inadequate, what they seek would nevertheless require the Court to pass upon those legislative value judgments which translate into appropriations decisions. And, if the Court were to declare present funding levels "inadequate," presumably the Plaintiffs would expect the Court to evaluate, and either affirm or set aside, future appropriations decisions . . . .

Id. (quoting the trial court's order).

The court mentions the problem of continuous involvement in institutional reform. If the court were merely to find the finance system inadequate, and the legislature were to react to the decision, the court would have to evaluate the reaction. If the court is successfully persuasive, this tit-for-tat approach, while not direct, nonetheless allows the court to shape appropriations decisions. However, if not successfully persuasive, the court and the legislature may enter into an endless imbroglio where the legislature merely refuses to abide with a non-specific mandate. Therefore, in either case, the costs may outweigh the benefits of entering the realm of educational financing.

[116] Although state constitutions provide for public education in their education provisions, not all education clauses call for adequacy. *See supra* note 33.

[117] 672 N.E.2d 1178, 1189 (Ill. 1996).

[118] *Id.* at 1190. Not only does the Illinois Supreme Court believe that the education clause does not give them authority to determine an adequacy standard and therefore impede on the legislative function, they also believe that dealing with the institution of public education presents even greater difficulties of competency. *See infra* Part IV.B.

[119] *See* Baker v. Carr, 369 U.S. 186, 217 (1962). Consider the others: "[(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [(4)] the impossibility of an court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; [(5)] an unusual need for unquestioning adherence to a political decision already made; [and (6)] the potentiality of embarrassment from multifarious pronouncements by various departments or

determining adequacy, the Florida court held that there was a lack of judicially discoverable and manageable standards to apply to the question of adequacy as mandated to the legislature in the state education clause.[120] Thus, the court refused the complainants because they did not allege an appropriate standard of adequacy.[121]

The early third wave majorities and the later third wave dissents argued that state courts abrogate their duty and responsibility to ensure that state constitutional mandates have been met when they refuse inquiry into questions of adequacy, particularly with the existence of specific mandates.[122] Even if this were true, the court must take into account the possible damage to the state court as an institution. Furthermore, the court must consider its ultimate effectiveness upon the issue of school financing, which leads to the question of judicial competency. What evolves in the long term, for each of these waves, is a cost-benefit analysis that weighs public policy and institutional responsibility against institutional legitimacy and institutional competency.[123]

B. *Competency: Court Adequacy Determinations and the Transparent Conceit*

Closely related to legitimacy is the concept of competency. However, competency questions ask whether the judicial response is appropriate for the desired results. Because education is governed by a plethora of complex issues, the judiciary has been deemed the least capable institution to determine policy

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one question." *Id.* While the first two criteria are more directly satisfied, one certainly can make a strong case that these are satisfied as well.

[120] *See Chiles*, 680 So. 2d at 408; *see also* DeRolph v. State, 677 N.E.2d 733, 782–95 (Ohio 1997) (Moyer, C.J., dissenting). In the *DeRolph* dissent, Chief Justice Moyer acknowledged the aspirations of the majority, but levied strong opposition on the grounds that the issue was non-justiciable because of the fundamental separation of powers doctrine and limitations upon judicial review including the political question doctrine.

[121] *See Chiles*, 680 So. 2d at 408. Exactly what must this allegation include? Does it exist? Is it an achievable task for the plaintiff to allege a standard of adequacy? This created great difficulty for future school finance reform plaintiffs. *See infra* Part IV.C.

[122] *See Chiles*, 680 So. 2d at 410 (Anstead, J., dissenting) ("While the legislature may be vested with considerable leeway in carrying out this mandate, we cannot determine in a factual vacuum, without abrogating our own responsibility, that the mandate has been met.").

[123] Certain commentators have recognized the complete futility of court involvement in the normal mode of public law decisionmaking in school finance cases. These commentators propose a dialogic solution, where the court's role is relegated to that of an arbiter or discussion leader amongst the political players involved in the quagmire of a school finance suit. *See, e.g.*, Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL'Y REV. 99 (1996).

within this social institution. The judiciary lacks the ability to hold legislative hearings and is constrained to a particular set of facts presented at trial. It was felt that adequacy in education, as a constitutional standard, overcame these obstacles because the adequacy issue was grounded in an explicit mandate of the state constitution; hence, the court had the standard it needed to make a valid determination.[124] However, the recent state supreme court decisions explain that this is not the case. For example, the Illinois Supreme Court in *Committee for Educational Rights v. Edgar*[125] explained:

> The constitution provides no principled basis for a judicial definition of high quality. It would be a *transparent conceit* to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense. Nor is education a subject within the judiciary's field of expertise, such that a judicial role in giving content to the education guarantee might be warranted.[126]

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[124] As explained in Part II.C.2, adequacy was thought to be an easier concept than equality for the courts to handle competently. However, there are many arguments that this is not the case and that courts more appropriately enter the realm of equality than adequacy. In our society, there are education experts who administer, teach, and theorize about what level of education a child requires. There are no equality experts other than perhaps our courts who have protected equality through the years. We can assume that the judiciary has a general understanding of the concept of equality, even though it may be difficult to apply this concept in the expanse of school finance systems. There are numerous examples in the institutional litigation area where the courts have properly decided cases based on the concept of equality. Therefore, the third wave, with its focus on adequacy, does not constitute an opening for the courts to become the saviors of education.

[125] 672 N.E.2d 1178 (Ill. 1996).

[126] *Id.* at 1191 (emphasis added). The education clause involved here contains the strongest "quality" language of all the states—"high quality." ILL. CONST. art. X, § 1. Nonetheless, the court refuses to engage in the creation of a constitutional standard based on the elusive terms quality or adequacy. In support of the decision the court cites to the framers' discussion:

> MR. GARRISON:
>
> It is my understanding that the word "quality" is—in relation to education—is a much debated concept and that there have been commissions which have given a great deal of study to it.
>
> MR. FOGAL:
>
> [T]he word "quality" . . . means different things to different people. We had in mind the highest, the most excellent educational system possible; leave this up to the determination of the legislature and your local districts, and let the citizens keep pushing for higher-quality education.

Therefore, the elusive concept of adequacy has made the welcomed emergence of the third wave short-lived.

Competency concerns also take into account the role of democracy in our nation's politics. Although some argue that the will of the people is necessarily reflected in state constitution education clauses, these clauses give a tremendous amount of discretion to the courts. The Illinois Supreme Court expressed concern about this:

> To hold that the question of educational quality is subject to judicial determination would largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals in Illinois. Judicial determination of the type of education children should receive and how it can best be provided would depend on the opinions of whatever expert witnesses the litigants might call to testify and whatever other evidence they might choose to present. . . . [N]onexperts—students, parents, employers and others—also have important views and experiences to contribute which are not easily reckoned through formal judicial factfinding. In contrast, an open and robust public debate is the lifeblood of the political process in our system of representative democracy. Solutions to problems of educational quality should emerge from a spirited dialogue between the people of the State and their elected representatives.[127]

Hence, the state supreme courts have begun to find that the judiciary is ultimately the least effective political body to resolve school finance concerns.

C. *Plaintiffs' Future Prospects*

The later third wave decisions affect the prospects of future claimants in school finance actions. In general, the cases demand that the plaintiffs meet a very high standard to sustain a claim. This standard may be impossible to meet.[128] Moreover, the school finance cases, in general, have shown that the courts will look to decisions in other states in determining how to ultimately

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Committee for Educ. Rights, 672 N.E.2d at 1190–91 (quoting 2 Proceedings 767). Here, Mr. Fogal explains that the adequacy determination should be left to (1) the legislature—appealing to separation of powers, (2) the local districts—appealing to decentralization or local control, and (3) the citizenry—appealing to the democratic strain of competency or politics.

[127] *Committee for Educ. Rights*, 672 N.E.2d at 1191.

[128] While the Florida court in *Coalition for Adequacy and Fairness in School Funding v. Chiles*, 680 So. 2d 400 (Fla. 1996), did not foreclose the possibility of sustaining an adequacy claim in the future, it is difficult to imagine exactly what a plaintiff would need to allege. Arguably, this determination may be similar to the definition propounded for pornography—"you know it when you see it." Clearly, showing inequality seems an easier route for plaintiffs.

decide the issue. Once a number of precedents exist across numerous jurisdictions, more and more courts will likely begin to similarly reject adequacy claims. Remember that the early third wave cases, *Rose v. Council for Better Education, Inc.*,[129] *Abbott v. Burke*,[130] and *Tennessee School System v. McWherter*,[131] were followed initially as a number of plaintiffs succeeded. It follows that the onslaught of these latter third wave cases foreshadows a number of state triumphs. Additionally, many state education clauses do not provide a minimum adequacy standard whatsoever, focusing instead on uniformity or efficiency in education. Therefore, the courts will be even less likely to strain to find a quality standard.

V. THE FOURTH WAVE OF SCHOOL FINANCE REFORM LITIGATION

The fourth wave is inherent in the cases that mark the end of the third wave of school finance litigation as viable for courts and claimants. Looking ahead, the fourth wave should be applicable regardless of state education clause language. Furthermore, the fourth wave should examine the school finance issue in light of other institutional reform cases and properly place it within this context. Because of the nature of school finance reformers, and most plaintiffs generally, a move towards a fourth wave is inevitable—undoubtedly towards a victorious litigation strategy.

As the first three waves of the school finance reform cases exemplify, the determination of the plaintiffs to find a cure for disparities in education caused by the state finance systems propels litigation in this area despite numerous defeats. Furthermore, at the inception of these waves, courts are often easily persuaded by the niceties of curing the problems of school finance. However, in the long-term, courts are eventually forced to protect the viability of their institution as consistent and undaunted. Therefore, with these factors in mind, it is clear that school finance reform plaintiffs and the courts will continue to engage in this back-and-forth until a theory arises that satisfies both public policy and institutional concerns.

The Connecticut case, *Sheff v. O'Neill*,[132] may provide insight into the fourth wave of school finance litigation. In *Sheff*, the plaintiffs were able to succeed despite the Connecticut Supreme Court's holding that the plaintiffs' third wave claim—that the state failed to provide them with the educational resources necessary to obtain a minimally adequate education—did not

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[129] 790 S.W.2d 186 (Ky. 1989).

[130] 575 A.2d 359 (N.J. 1990).

[131] 851 S.W.2d 139 (Tenn. 1993).

[132] 678 A.2d 1267 (Conn. 1996).

implicate a constitutional right mandated by the state education clause.[133] In this regard, the court's decision remained consistent with those of the later third wave cases that rejected plaintiffs' adequacy claims. Furthermore, there was no true second wave equality claim. Although the plaintiffs claimed that the finance system failed to provide them with the resources for an adequate education, they did not include a claim that the finance system violated equal protection.[134] In fact, both parties stipulated that the state formula for distributing state aid to local school districts provided the most aid to the neediest school districts.[135] Hence, the court was not required to determine the elusive concept of adequacy, nor to determine inequities across a general class defined by property wealth disparity. Therefore, *Sheff* stands apart from the first three waves of school finance reform litigation.

In addition, *Sheff* stands apart from the first three waves because its allegations go much deeper. The plaintiffs in *Sheff*, children residing in the Hartford public school district,[136] alleged that they were "burdened by severe educational disadvantages arising out of their racial and ethnic isolation and their socioeconomic deprivation."[137] The factual circumstance and allegation necessary for this case to transcend the third wave was that the disparity in education broke down along racial and ethnic lines, evincing that the districting provided by the state's public education system furthered socioeconomic division, and consequently, caused the disparity in education.[138]

In Connecticut, minorities constituted 25.7% of the public school population.[139] In the urban Hartford public school district, 92.4% of the

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

[134] *See Sheff*, 678 A.2d at 1286.

[135] *See id.* at 1286 n.41.

[136] The eighteen children were of varied racial make-up, including African-American, Latino, and white. *See id.* at 1271.

[137] *Id.* at 1271 n.3. The dissent in *Sheff* argued that the majority's characterization of the plaintiffs' claim was unfounded. The dissent contends that the record reflects that the plaintiffs claimed that they had been "denied their constitutional right to an equal educational opportunity by virtue of their racial and ethnic concentration, and by the concentration of poverty in the Hartford school district, coupled with certain disparities in educational resources and outcomes as compared to the suburban school districts," that the racial and ethnic concentration in the school districts was violative of the state equal protection provision, and that they were denied a constitutionally required minimally adequate education. *Id.* at 1300 (Borden, J., dissenting) (emphasis omitted).

[138] *See id.* at 1280.

[139] *See id.* at 1272.

students were members of minority groups.[140] In the twenty-one surrounding suburban school districts, only seven had a minority student enrollment of over 10%.[141] Furthermore, the majority of children in Hartford schools came from economically disadvantaged households, headed by a single parent, where a language other than English was spoken.[142] While these differences in socioeconomic status grew, the performance of Hartford students on standardized tests fell significantly below that of students from the surrounding suburbs.[143]

The issue was not, however, that the state had intentionally segregated racial and ethnic minorities in the public school system.[144] In fact, the court stated that it was economic poverty, not minority status, which indicated the disparity.[145] Therefore, the plaintiffs claimed, under both the state education clause and the state desegregation clause,[146] that the state defendants had a constitutional obligation to remedy the alleged educational inequities in the Hartford public schools.[147] Although the third wave claims were based solely on the education clause, the fourth wave claims were bolstered by the addition of the desegregation clause of the state constitution. The fourth wave cases added the desegregation clause because the disparities between districts also broke down along racial lines.

The crucial component of the *Sheff* decision was the court's decision to read the education and desegregation clauses conjointly. In so doing, the court found that the state constitution demonstrated a "deep and abiding constitutional commitment to a public school system that, in fact and in law, provides Connecticut schoolchildren with a substantially equal educational opportunity."[148] The Connecticut Supreme Court, in its protracted school finance litigation, previously held that the state constitution, as exhibited in the education clause, provided a "fundamental right to education and a corresponding affirmative state obligation to implement and maintain that

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[140] *See id.*

[141] *See id.* at 1273.

[142] *See id.*

[143] *See id.*

[144] *See id.* at 1274.

[145] *See id.*

[146] CONN. CONST. art. I, § 20 ("No person shall be denied the equal protection of the law nor subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."). See *supra* note 133 for the state education clause.

[147] *See Sheff*, 678 A.2d at 1271.

[148] *Id.* at 1280.

right."[149] The second wave finance case *Horton v. Meskill*[150] played a role in persuading the Connecticut court to read the provisions together. The *Horton* court applied strict scrutiny to the finance scheme finding that "in Connecticut, elementary and secondary education is a fundamental right, . . . [and] the state system of financing public elementary and secondary education as it exists and operates cannot pass the test of 'strict judicial scrutiny' as to its constitutionality."[151] Therefore, the *Sheff* court was, in particular, persuaded that the education clause embodied the "special nature of the affirmative constitutional right."[152] The *Sheff* court explained this "special nature" that the *Horton* court first expressed:

> [E]ducational equalization cases are "in significant aspects sui generis" and not subject to analysis by accepted conventional tests or the application of mechanical standards. The wealth discrimination found among school districts differs materially from the usual equal protection case where a fairly defined indigent class suffers discrimination to its peculiar disadvantage. The discrimination is relative rather than absolute.[153]

Hence, the court found that the education clause's explicit requirement must be acknowledged as fundamental because of the distinct nature of educational disparity cases. In addition, the court was also persuaded that the state's obligation to provide a substantially equal educational opportunity was "informed and amplified" by its unique constitutional provision which explicitly —by express use of the term "segregation"—directly prohibited segregation.[154]

Reading the two provisions together, the court recognized that the question they addressed in *Sheff* was distinct from the questions involved in the disparity cases of the first three waves:

> We need not decide, in this case, the extent to which substantial socioeconomic disparities or disparities in educational resources would themselves be sufficient to require the state to intervene in order to equalize educational opportunities. For the purposes of the present litigation, we decide only that the scope of the constitutional obligation expressly imposed on the state by article eighth, §1, is

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[149] *Id.* at 1279.

[150] 376 A.2d 359 (Conn. 1977).

[151] *Id.* at 374.

[152] *Sheff*, 678 A.2d at 1281.

[153] *Id.* (quoting *Horton*, 376 A.2d at 373).

[154] *Id.* at 1281–82.

> informed by the constitutional prohibition against segregation contained in article first, § 20.[155]

The court's complex reasoning and resolute conclusion—that the existence of the extreme racial and ethnic disparity deprived school children of a substantially equal educational opportunity as mandated by the state education clause and as further informed by the desegregation clause—mirrors the ambition of the other break-out cases that have come to define each particular wave.

The Connecticut Supreme Court, as judicial protectors of the state constitution, seemed reassured in its decision despite its interference with a complex institution—the school system. Perhaps, the majority derived additional institutional legitimacy from its utilization of two separate provisions of the state constitution—both directed at protecting distinct rights threatened by the circumstances of the case. Perhaps also, because of the disparity along the racial and ethnic divide, the court was comforted that it was able to avoid the difficult adequacy determination which challenged the court's legitimacy—as evident in the third wave cases or the troublesome equality determination of the first and second waves.

In this sense, *Sheff* may initiate a fourth wave characterized by the inclusion of the racial and ethnic divide in plaintiffs' claims or the use of two distinct state constitutional provisions that coalesce to create a more viable cause of action for the plaintiffs. Even if the characteristics inherent in *Sheff* encompass what will be the fourth wave, the legitimacy and competency concerns already apparent foreshadow its collapse. The *Sheff* majority itself noted separation of powers concerns. Although the court required the state to take further remedial measures, it did not include a remedial determination of its own. Rather, citing "the constitutional imperative of the separation of powers" the court gave the legislature and the executive the opportunity to "fashion the remedy that will most appropriately respond to the constitutional violation . . . identified."[156]

Connecticut Chief Justice Ellen A. Peters, author of the *Sheff* majority, stated in a law review article published subsequent to *Sheff* that the question of judicial legitimacy boils down to "political digestibility."[157] Ironically, Chief Justice Peters, former President of the Conference of Chief Justices and author

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[155] *Id.* at 1281.

[156] *Id.* at 1271.

[157] *See* The Honorable Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1563 (1997) (citing and quoting HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION 19 (1990) (stating that "law made by judges must in the end be politically digestible")).

of the next emerging activist wave of school finance reform cases, questioned the state judiciary's institutional role balanced against the other branches of state government[158] and concluded, "[i]f there were easy answers, someone would have already found them."[159]

Furthermore, the hostile dissent argument in *Sheff* was directly aimed at the majority's institutional leap. The dissent argued that the majority exercised its decisionmaking power extremely illegitimately. The dissent conceded the importance of "finding a way to cross the racial divide,"[160] but explained that the majority:

> In its zeal to reach a result that, it envisions, will eliminate racial and ethnic concentration in the public school districts of this state,. . . has "[renounced] this Court's historical commitment to a conception of the judiciary as a source of impersonal and reasoned judgments. . . ." In essence, "[p]ower not reason, is the new currency of this Court's [state constitutional] decisionmaking."[161]

In addition, the dissent acknowledged that the legislature was left with the "extraordinarily difficult or perhaps even impossible" task of remedying de facto racial and ethnic concentration in the public schools because the majority

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[158] *See id.* Chief Justice Peters, vividly expressing the institutional concern, asks:

> Is this functional blurring of the lines of executive, legislative, and judicial power a matter for applause or for concern? Are we moving back toward the parliamentary practices of colonial Connecticut? Should we do so? Separation of powers is rooted in very important democratic values. If the judiciary is even indirectly involved in the drafting of legislation, will it retain its independence to resolve constitutional challenges to the validity of such legislation? Perhaps more importantly, does such a role risk undermining the appearance of judicial impartiality and independence? If a judge embraces the role of a participant in the provision of social services, will the judge continue vigilantly to protect the individual rights of the litigants and to act conscientiously on their claims of innocence in the face of their need for therapy? Again, even more importantly, will the judge risk being perceived as having a personal stake or psychological investment in the outcome, so as to cause litigants or the general public to doubt the judge's impartiality? Finally, in a judicial world in which accommodation with political actors has many visible rewards for the judiciary, do we risk creating a judicial climate, or risk being perceived as having created a judicial climate, in which the voices of politically unrepresented minorities do not get a fair hearing?

Id.

[159] *Id.* at 1564.

[160] *Sheff*, 678 A.2d at 1296 (Borden, J., dissenting).

[161] *Id.* at 1295 (Borden, J., dissenting) (quoting Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall and Blackmun, JJ., dissenting) (internal citation omitted)).

failed to articulate a "principle upon which to structure such a remedy."[162] As evident in the previous three waves, articulating principles affecting a large social institution raises difficult questions of both judicial legitimacy and judicial competency. Therefore, as already evident in the dissent, legitimacy and competency concerns may preclude the question of whether or not *Sheff* foreshadows a fourth wave.

Furthermore, beyond the courts' institutional and legitimacy concerns, *Sheff* has inherent limitations as a wave of school finance litigation. First, the explicit desegregation clause of the state constitution is unique to Connecticut and only two other states.[163] Therefore, other courts would need to implicate equal protection analysis if faced with a claim that included segregation. As a result, the plaintiffs' claims may not be very persuasive without the explicit education and explicit desegregation clause connection. Second, the *Sheff* decision, in the same way that it is separate from the other three waves, is loosely tied to the finance issue. Although the restructuring of the finance system may be one solution to end educational disparity, it is evident that a change in the make-up of the districts or where district lines are drawn could also be remedial outlets.[164] This is especially true where the level of resources favors the disparate district or where it is believed that the problems transcend money. Third, it is not always the case that the disparities will break down the racial divide. In fact, a number of the school finance cases are brought by white rural school districts claiming that white suburban districts attain greater resources due to property wealth divergence. Therefore, invoking racial disparity may not be a viable alternative for a number of plaintiffs.

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[162] *Id.* at 1295–96.

[163] The two other states are Hawaii and New Jersey. *See id.* at 1281 n.29.

[164] The Connecticut legislature's initial response to the decision called for $90 million to be spent. Furthermore, the education department was given the responsibility of coming up with a five-year plan that is likely to raise this figure dramatically. In addition, the legislature approved a very small and limited school choice program. *See* Rick Green, *Mixed Reviews for Legislature's Response to* Sheff *Decision*, HARTFORD COURANT, June 5, 1997, at A10.

In addition, despite the rejection of school choice as the ultimate remedial plan in Connecticut, *see* Maxine Bernstein & Robert Frahm, *Legislative Panel Rejects Proposal on School Choice*, HARTFORD COURANT, Apr. 25, 1997, at A1, at least one law review commentator extols the virtues of this long heralded—but rarely applied—school finance reform proposal as the solution to the particularly complex situation evidenced in Connecticut. *See* Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375 (1997).

VI. CONCLUSION

After a thorough examination of the waves of school finance reform litigation, it is clear that school finance reformers have had everything but smooth sailing. The tumultuous history of challenges to school finance systems reflect the depth, uncertainty, and complexity of this most expansive area of institutional reform. The most recent tide of decisions sheds substantial doubt upon the continued viability of the most recent third wave of school finance challenges. Yet, despite the collapse of the third wave, the plaintiffs' noble voyages and the courts' noble quests to cure the disparities in education sustain continued litigation in this area. In fact, an emerging fourth wave of school finance litigation may be rolling in as exemplified by *Sheff*. Nonetheless, the history of this litigation foretells that, in the long run, even this fourth wave is likely to dissipate as courts once again become concerned with the preservation of the judicial institution.