Cornell Law Review

Volume 86
Issue 3 *March 2001*

Article 4

A for Effort: Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy

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NOTE

"A" FOR EFFORT: EVALUATING RECENT STATE EDUCATION REFORM IN RESPONSE TO JUDICIAL DEMANDS FOR EQUITY AND ADEQUACY

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In this Note, the author examines measures recently enacted by New Hampshire and Vermont in response to judicial mandates for education reform. By implementing district reform measures in demographically similar environments, the reform efforts of these two states provide a valuable perspective from which to examine the debate surrounding education finance reform. Evaluating the experiences of these two New England states, as well as those of other states committed to education finance reform, the author contends that successful reform measures must incorporate elements of both equity and adequacy. Specifically, the author proposes that both states' implementation of a statewide property tax is a progressive step toward equality in education and fairness in taxation. The author concludes that a state committed to school finance reforms that are both fair and effective should expand revenue sources in order to arrive at per-pupil expenditures that will ensure equity and adequacy.

INTRODUCTION

In *Brown v. Board of Education*,[1] Chief Justice Warren declared, "[i]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[2] While the immediate response to *Brown* was the racial desegregation of American public schools, the spirit of *Brown* manifests itself today in the effort to effectuate economic desegregation.[3] For the last thirty years, state supreme courts have interpreted state constitutions to require state education systems to meet basic requirements of adequacy, equity, or both.[4] Thus, "where the state has undertaken to provide it," education "is a right which must be made available on equal terms."[5] Consequently, it is unconstitutional for a state to delegate its responsibility to local districts when those districts vary greatly in their ability to finance adequate public education.[6] Because every state except Ha-

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1 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

2 *Id.* at 493.

3 *See* Elinor Burkett, *Don't Tread on My Tax Rate*, N.Y. TIMES, Apr. 26, 1996, § 6 (Magazine), at 42.

4 Nearly every state has faced a challenge to the constitutionality of its education finance system in the last thirty years. *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976) ("Serrano II") (analyzing the school finance system under strict scrutiny because "education is a fundamental interest"); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977) ("Horton I") ("[I]n light of the Connecticut constitutional recognition of the right to education it is, in Connecticut, a 'fundamental' right." (internal citation omitted)); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1359 (N.H. 1997) ("Claremont II") ("We hold that in this State a constitutionally adequate public education is a fundamental right."); Brigham v. State, 692 A.2d 384, 394 (Vt. 1997) ("The courts of this state have been no less forthright in declaring education to be a fundamental obligation of the state."); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994) ("In sum, we agree with the trial court that education is a fundamental right under the [state] Constitution."); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979) (noting that language in the state constitution "demonstrates that education is a fundamental constitutional right in this State"); Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310, 333 (Wyo. 1980) ("In light of the emphasis which the Wyoming Constitution places on education, there is no room for any conclusion but that education for the children of Wyoming is a matter of fundamental interest.").

5 *Brown*, 347 U.S. at 493; *see also* Mildred Wigfall Robinson, *Financing Adequate Educational Opportunity*, 14 J.L. & POL. 483, 484-85 (1998) ("The *Brown* opinion is both an eloquent expression of the importance of education and an unreserved reaffirmation of the state's commitment to providing all children equal educational opportunity.").

6 Since 1976, courts in twenty states have held state education systems to be unconstitutional under state constitution equal protection clauses or education clauses or both, with some state supreme courts ruling on the validity of the education system multiple times. *See, e.g.*, Opinion of the Justices, No. 338, 624 So. 2d 107 (Ala. 1993); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994); DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); Serrano v. Priest, 557 P.2d 929 (Cal. 1976) ("Serrano II"); Horton v. Meskill, 376 A.2d 359 (Conn. 1977) ("Horton I"); Idaho Schs. for Equal Educ. Opportunity v. Evans, 850 P.2d 724 (Idaho 1993), Exira Cmty. Sch. Dist. v. State, 512 N.W.2d 787 (Iowa 1994); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989), *amended by* Helena Elementary Sch. Dist. No. 1 v. State, 784 P.2d 412 (Mont. 1990); Claremont Sch. Dist. v.

waii relies on local school districts to some extent,[7] judicial declarations of the state's ultimate responsibility for education have catalyzed dramatic changes in how states ensure their citizens' fundamental right to education. Indeed, reform inspired by state supreme court demands for economic equality in education have been as controversial[8]—and as essential to the American ideals of democracy and equality—as the reform the *Brown* Court mandated.

New Hampshire and Vermont, two states that have recently responded to judicial mandates for educational reform,[9] are fascinating case studies of the controversies surrounding education finance reform, particularly when compared to one another. Looking at policy and results in these two states in tandem is productive for three reasons. First, both states implemented reform during approximately the same time frame (1997 to 1999) and with the same information available to each in terms of the experiences of and lessons to be learned from other states. Second, because both states are overwhelmingly white and therefore racially homogenous, the aspect of race-based inequality is largely eliminated from the equation, allowing for the isolation of economic inequality.[10] Third, because both states are comparable in their population profiles—largely rural with smaller, metropolitan centers[11]—aspects of inequality associated with popula-

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Governor, 635 A.2d 1375 (N.H. 1993); Abbott *ex rel.* Abbott v. Burke, 575 A.2d 359 (N.J. 1990) ("Abbott I"); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247 (N.D. 1994); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Brigham v. State, 692 A.2d 384 (Vt. 1997); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310 (Wyo. 1980).

7 *See* Robinson, *supra* note 5, at 483 n.4.

8 *E.g.*, Editorial, *The Fight for a Sound Education*, N.Y. TIMES, Sept. 11, 2000, at A24 (arguing that state court rulings demanding education reform have "revealed a disturbing hypocrisy among state officials, who trumpet the need for high standards but have tended to defend mediocrity and inequality in court when their systems are challenged").

9 *See* Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997) ("Claremont II"); Brigham v. State, 692 A.2d 384 (Vt. 1997).

10 In 1995, both New Hampshire and Vermont, along with Maine, had nonwhite, non-Hispanic populations of 2%, the lowest among all states, and Hispanic populations of 1%, as low as any state. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., STATE INDICATORS IN EDUCATION 1997, at 35 (1997).

11 The United States Census Bureau lists greater Burlington, Vermont as a New England County Metropolitan Area with a 1998 population of 154,442. U.S. CENSUS BUREAU, NEW ENGLAND COUNTY METROPOLITAN AREA AND CENTRAL CITY POPULATION ESTIMATES (1999), *at* http://www.census.gov/population/estimates/metro-city/ma98-09.txt (revised May 15, 2000) [hereinafter NEW ENGLAND COUNTY METROPOLITAN AREA POPULATION ESTIMATES]. This accounts for 26% of Vermont's total population in 1998. U.S. CENSUS BUREAU, STATE POPULATION ESTIMATES AND DEMOGRAPHIC COMPONENTS OF POPULATION CHANGE (1999), *at* http://www.census.gov/population/estimates/state/st-99-1.txt (released Dec. 29, 1999) [hereinafter STATE POPULATION ESTIMATES] (reporting Vermont's population in 1998 as 590,579). The Census Bureau lists four cities in New Hampshire—Manchester, Nashua, Portsmouth, and Rochester—as part of the greater Boston, New En-

tion distribution also do not distort the picture. In sum, these states provide a unique and valuable controlled "laboratory" environment in which to examine education finance reform.

In response to the mandates of their respective state supreme courts, these tiny New England states are now attempting to dismantle their own version of segregation—of the "haves" from the "have-nots"[12]—by undertaking bold reform. Although both states undertook this reform by converting some local property tax to statewide property tax and equally distributing the revenue to pupils statewide, the states' approaches differ in significant respects.[13] It is because of these differences that comparison of these otherwise nearly mirror-image states is fruitful. The major point of contrast is in the states' prioritization of equity among pupils in terms of spending, versus adequacy of education in terms of quality. Vermont's approach is equity-driven,[14] with financial penalties, called recapture, imposed on any school district that raises money in order to allot funds to education beyond the statewide per-pupil amount.[15] Significant protest has resulted. Declaring the "Robin Hood" tactics of diverting revenues from wealthy districts to poorer districts to be unconstitutional in and of themselves, many Vermonters found the scheme to be offensive to traditional Yankee values of individualism and local control.[16] By contrast, New Hampshire's approach is adequacy-driven. New Hampshire calculates a minimum state subsidy deemed "adequate" but does not obstruct the efforts of local districts to raise funds in excess of that amount.[17]

This Note proposes that implementation of a statewide property tax in Vermont and New Hampshire is a progressive step toward equality in education and fairness in taxation. This Note further argues that limiting the spending in wealthier districts, as Vermont has done, is a necessary component of equity-driven reform. However, this Note cautions that the increased per-pupil expenditure generated by Vermont's equity-conscious system does not ensure that the system will provide adequacy. Ultimately, this Note concludes that any state

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gland County Metropolitan Area. Their respective 1998 populations of 102,524, 82,169, 25,388, and 27,869, NEW ENGLAND COUNTY METROPOLITAN AREA POPULATION ESTIMATES, *supra*, account for 20% of New Hampshire's 1998 population, STATE POPULATION ESTIMATES, *supra* (reporting New Hampshire's population in 1998 as 1,185,823).

12 Carey Goldberg, *School Tax Law Splits 'Haves' and 'Have Nots,'* N.Y. TIMES, Dec. 19, 1997, at A34.

13 *See infra* Part III.

14 *See infra* Part III.B.1.

15 *See infra* Part III.B.1(b).

16 *See* Burkett, *supra* note 3, at 43; Tamala M. Edwards, *Revolt of the Gentry: In Vermont a New Law Meant to Equalize Public School Funding Has Set Off a Ferocious Class War*, TIME, June 15, 1998, at 34; Goldberg, *supra* note 12, at A34.

17 *See infra* Part III.A.

looking to reform education finance in the name of fairness, including New Hampshire and Vermont, should look to expand revenue sources in order to arrive at per-pupil expenditures that will ensure equity and adequacy.

This Note also examines how New Hampshire and Vermont could benefit from education finance legislation undertaken in sister states, which serve as models to states undertaking education reform legislation.[18] This Note further explores how examination of the experiences of other states' reform efforts helps to build on and contextualize the experiences of Vermont and New Hampshire. For example, Texas has experimented with more publicly acceptable alternatives to recapture[19] that generate the same financial effects sought by reform in New Hampshire and Vermont. Accountability and assessment measures such as those in Kentucky[20] and Massachusetts[21] also provide valuable lessons for New Hampshire and Vermont.

Part I of this Note describes how school districts with low property tax bases, which consequently must tax at higher rates to generate as much revenue as districts with more property wealth, have brought equal protection or education clause claims in state courts. This section also describes the history of education litigation in New Hampshire and Vermont, as well as the New Hampshire Supreme Court's decision to overturn the state's education finance system on the basis

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18 Education finance reform is a topic visited and continuously revisited in all states. Many state legislatures have pending or recently enacted legislation affecting the generation and distribution of education funds. *See, e.g.*, Act of Apr. 10, 2000, 2000 Colo. Legis. Serv. ch. 107 (West 2000) (providing for new assessment plan under which the state reviews schools failing to meet state standards and may recommend district reorganization, curriculum reform, and reallocation of funds); A Plus Education Reform Act, 2000 Ga. Laws 685 (proposing, among comprehensive reform, adjustment to the equalized yield formula); Act of May 25, 2000, 2000 Mont. Laws 1st Spec. Sess. ch. 11 (proposing to reduce local property taxes by increasing state funding for education); H.B. 1, 1999 Leg., 140th Gen. Assem. 1st Reg. Sess. (Del. 1999) (proposing to distribute $17.5 million dollars to enable school districts to reduce property taxes).

Furthermore, education finance continues to be a political issue in many states. *E.g.*, Randy Ludlow, *Teachers Union: Revamp Property Tax Ensure Quality, Mooney Says*, CINCINNATI POST, Aug. 30, 2000, *available at* 2000 WL 23839257 (reporting teachers union president's call for the Ohio state legislature to enact a statewide property tax); Stephen Ohlemacher, *Governor Doubts Schools Can Share Taxes on Business*, CLEVELAND PLAIN DEALER, Aug. 26, 2000, *available at* 2000 WL 5162367 (reporting Ohio governor's disfavor of a statewide property tax). Even in states that have enacted a statewide property tax to support education to some degree, debate continues over its magnitude and implementation. *E.g.*, Editorial, *Daley Talks Property Tax Reform*, CHI. TRIB., July 24, 2000, at 14, *available at* 2000 WL 3688641 (noting Chicago mayor's attempt at statewide property tax reform); Jim Sullinger, *Musil Ad Steps Up Attack on Kline Radio Spot Deals with School Funding*, KAN. CITY STAR, July 15, 2000, at B1, *available at* 2000 WL 7738054 (reporting on the race between Kansas Republican congressional candidates and their disagreement over statewide property tax rate).

19 *See infra* Part II.A.4.

20 *See infra* Part II.B.1.

21 *See infra* Part II.B.2.

of the New Hampshire Constitution's education clause[22] and the Vermont Supreme Court's invalidation of that state's system on the basis of the Vermont Constitution's equal protection clause.[23] Part II describes and evaluates various components of legislative remedies implemented in other states, including the equity-based remedies in states like Texas and California and adequacy-based remedies in states like Kentucky and Massachusetts. Part III describes and compares reform efforts in New Hampshire and Vermont. Part IV makes suggestions for further reform based on the experiences of Vermont, New Hampshire, and other states.

I
EDUCATION FINANCE LITIGATION

To understand the national trends in education finance reform, one must examine the litigation that has driven it. This Part examines the origins of education finance litigation, first in federal courts and then in state courts. Next, it considers state court claims brought under the equal protection clauses of state constitutions. Then, it contrasts these claims with state court claims brought under education clauses of state constitutions. Finally, it provides background on education reform litigation in New Hampshire and Vermont specifically.

A. Early Federal and State Court Litigation

Litigation surrounding the adequacy and equality of education and education finance began with the stirring words of Chief Justice Warren in *Brown v. Board of Education*:

> Today, education is perhaps the most important function of state and local governments.... It is the very foundation of good citizenship.... [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[24]

With this statement, the Court seemingly opened the door for plaintiffs to challenge the constitutionality of their state education finance systems by objecting to disparities in educational opportunity.[25] However, in *San Antonio Independent School District v. Rodriguez*,[26] the first

22 *See* Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997) ("Claremont II").

23 *See* Brigham v. State, 692 A.2d 384 (Vt. 1997).

24 347 U.S. 483, 493 (1954).

25 *See* Jay P. Heubert, *Six Law-Driven School Reforms: Developments, Lessons, and Prospects*, *in* LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUALITY 1, 2 (Jay P. Heubert ed., 1999).

26 411 U.S. 1 (1973). The plaintiff school district challenged Texas's adequacy-based system of funding education, which consisted of a guaranteed minimum amount of resources according to the numher of students in the district. *See id.* at 45. The state contrib-

challenge to a state's education finance system to reach the U.S. Supreme Court, a five-to-four majority closed the doors of federal courthouses to plaintiffs seeking to reform state education finance systems. After deciding that education is not a fundamental right[27] and that the petitioner school district with a low property-tax base was not a suspect class based on the factor of "wealth,"[28] the Court denied that the plaintiff's claim warranted strict scrutiny under the Fourteenth Amendment of the U.S. Constitution.[29]

Following *Rodriguez*, plaintiffs in education finance reform litigation had no choice but to assert their claims under state constitutions. Two early cases, *Serrano v. Priest*[30] and *Robinson v. Cahill*,[31] led the second wave of education finance litigation.[32] In both cases, state supreme courts overturned state education finance plans that relied heavily on property taxes, but did so on very different grounds from each other. The California Supreme Court in *Serrano II* struck down the system based on the equal protection clause of the California Constitution,[33] holding both that education is a fundamental right and that poor school districts are a suspect classification.[34] In contrast, the

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uted 80% of this amount and required districts to raise property taxes to supply the remainder, while allowing districts to supplement this amount with additional property tax revenue. *Id.* at 9-10, 46. Typical of most plaintiffs in school finance litigation, the Edgewood school district had a low property base, so that even when applying high tax rates, it could only generate a fraction of the funds that wealthier districts could supply using lower tax rates. *Cf. id.* at 46 (noting that, under the then-current Texas system, "[t]he greatest interdistrict disparities . . . are attributable to differences in the amount of assessable property available within any district" and that "[t]hose districts that have more property, or more valuable property, have a greater capability for supplementing state funds").

27 *Id.* at 35-37. The Court rejected the petitioner's claim that education is a fundamental right because it effectuates the First Amendment right to free speech and the right to make an informed vote. *Id.* The Court explained that: "we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice." *Id.* at 36.

28 *See id.* at 28 (characterizing the plaintiffs as a "large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts"). The Court denied that such a class met requirements for strict scrutiny:

> The system of alleged discrimination and the class it defines have none of the indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Id.

29 *Id.* at 37-39.

30 487 P.2d 1241 (Cal. 1971) ("Serrano I"). This case, decided prior to *Rodriguez*, was reaffirmed in *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) ("Serrano II").

31 303 A.2d 273 (N.J. 1973).

32 Deborah A. Verstegen, *The New Wave of School Finance Litigation*, PHI DELTA KAPPAN, Nov. 1994, at 243, 244.

33 CAL. CONST. art. I, § 7.

34 *Serrano II*, 557 P.2d at 951.

New Jersey Supreme Court in *Robinson* based its holding on the state constitution's education clause, which requires a "thorough and efficient system of free public schools."[35] On this basis, the court held that the state failed to satisfy its constitutional duty of providing an adequate public education system.[36] Taken together, *Serrano II* and *Robinson* demonstrate (1) that education finance litigation can succeed in state courts; and (2) that courts may evaluate education funding systems on two different grounds—adequacy and equity.

B. Litigation Based on Equal Protection Claims

Most post-*Serrano II* state equal protection litigation focused on correcting inequality in education resulting from the combination of state and local tax systems funding state public education systems.[37] Whereas California continued to strictly scrutinize its funding system in *Serrano III*,[38] courts in Wyoming,[39] Connecticut,[40] Arkansas,[41] Alabama,[42] North Dakota,[43] and Vermont[44] have used varying levels of

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35 N.J. CONST. art. VIII, § 4, cl. 1.

36 *Robinson*, 303 A.3d at 295. Specifically, the court applied a balancing test to the state school finance system. *See id.* at 282. The benefits of local control the state achieved by relying heavily on the local property tax system weighed heavily in favor of its position. *See id.* at 286. But on the plaintiff's side, the court interpreted the constitutional mandate for a "thorough and efficient system of free public schools" as the functional equivalent of equal educational opportunity. The court declared the current property tax system unconstitutional because it contained "no apparent relation to the mandate for equal educational opportunity." *Id.* at 296.

37 *See* Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REFORM 493, 498-500 (1995).

38 *See* Serrano v. Priest, 226 Cal. Rptr. 584, 615 (Ct. App. 1986) ("Serrano III") (upholding California's revised system under equal protection strict scrutiny and calling existing disparities in per-pupil spending "both insignificant and justified by legitimate state interests").

39 *See, e.g.*, Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310, 340 (Wyo. 1980) (invalidating Wyoming's education finance system as violative of both the equal protection clause and the education clause of the Wyoming Constitution).

40 *See, e.g.*, Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977) ("Horton I") ("[I]n Connecticut the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized.").

41 *See, e.g.*, DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983) (determining that the right to equal educational opportunity is "basic to our society" and that the tax system bore "no rational relationship to the educational needs of the individual districts, [but rather that the system] is determined primarily by the tax base of each district").

42 *See, e.g.*, Opinion of the Justices, No. 338, 624 So. 2d 107, 156 (Ala. 1993) (holding that "the Alabama system of public schools fails to provide plaintiffs the equal protection of the laws under *any* standard of equal protection review").

43 *See, e.g.*, Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 259 (N.D. 1994) (finding that the property tax-based system did not deprive plaintiffs of their fundamental right to education and using intermediate scrutiny to find the system "not necessarily related to any aspect of educational needs" and that it "fails to bear a close correspondence either to the constitutional mandate to provide an equal educational opportunity, or to the legislative goal of 'support[ing] elementary and secondary education in this state from

scrutiny to overturn education finance system on equal protection grounds.

Courts examining education finance systems on equal protection grounds must determine what component of the system to equalize. Commonly, equal protection plaintiffs seek to equalize a system's "inputs," or general per-pupil spending, regardless of special needs.[45] Thus, plaintiffs bringing equal protection claims urge courts to require districts to tax property at similar rates and to generate similar amounts of per-student revenue.

A majority of courts, however, have been reluctant to strike down entire education funding systems on the basis of inequity alone and have used both equal protection and education clauses of state constitutions to invalidate education finance systems.[46] Additionally, some courts have upheld education finance systems by rejecting interpretations of equal protection clauses that mandate absolute equality in education.[47] Other courts have determined that equal protection

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state funds based on the educational cost per [pupil]." (quoting N.D. CENT. CODE § 15-40.1-06(1) (1993))).

44 *See* Brigham v. State, 692 A.2d 384, 396 (Vt. 1997) (finding the state education finance system capricious even under the rational basis test).

45 *See, e.g.*, Serrano v. Priest, 226 Cal. Rptr. 584, 608 (Ct. App. 1986) ("Serrano III").

46 *See, e.g.*, Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 814 (Ariz. 1994) (noting that "[f]unding mechanisms that provide sufficient funds to educate children substantially on equal terms tend to satisfy the general and uniform requirement" and holding that Arizona's then-current education finance system did "not satisfy the constitutional mandate of a general and uniform school system"); Abbott *ex rel* Abbott v. Burke, 643 A.2d 575, 580-81 (N.J. 1994) (invalidating education finance system that failed to provide additional funding to special-needs districts on the grounds that it failed to meet the state education clause mandate for a thorough and efficient education); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979) (using both the equal protection clause and the education clause of the West Virginia Constitution to overturn state education finance system largely relying on local property tax revenues); *see also* Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, BYU EDUC. & L.J., Spring 1997, at 1, 12-14 (noting the difficulties confronting plaintiffs challenging systems on equality grounds alone).

47 *See, e.g.*, Lujan v. State Bd. of Educ., 649 P.2d 1005, 1022 (Colo. 1982) ("The Colorado Constitution does not forbid disparities in wealth, nor does it forbid persons residing in one district from taxing themselves at a rate higher than persons in another district."); Thompson v. Engelking, 537 P.2d 635, 653 (Idaho 1975) ("Neither equal protection, nor [the state constitution education clause], require that the public schools be financed so that equal amounts are expended per pupil . . . ."); Gould v. Orr, 506 N.W.2d 349, 353 (Neb. 1993) (upholding summary judgment against equal protection plaintiffs that alleged disparity in funding but not inadequacy in education); Britt v. State Bd. of Educ., 357 S.E.2d 432, 436 (N.C. 1987) (refusing to interpret the state constitutional mandate that "equal opportunities shall be provided for all students" as providing a fundamental right to substantially equal funding (quoting N.C. CONST. art. IX, § 2, cl. 1)); Danson v. Casey, 399 A.2d 360, 366-67 (Pa. 1979) (finding no requirement in the Pennsylvania Constitution's equal protection clause that educational offerings be uniform).

clauses of state constitutions do not require equality in educational opportunities.[48]

C. Litigation Based on Education Clauses in State Constitutions

Unlike the federal Constitution, every state constitution contains an education clause. However, these clauses vary in language from state to state.[49] Over half of the education clauses in state constitutions mandate a threshold level of educational quality.[50] Several of these clauses use more expansive qualitative language to prioritize education[51] or to further specify the standard the state must meet. Some clauses specifically identify subjects on which the state education system should focus.[52] Fifteen state constitutions contain clauses emphasizing the purpose and importance of education.[53] Some constitutions also include specific provisions for nondiscrimination, accessibility, and uniformity.[54]

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48 McDaniel v. Thomas, 285 S.E.2d 156, 168 (Ga. 1981) (recognizing that "[i]n terms of equalization the system is a poor one" but upholding it against equal protection challenge); Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 363 (N.Y. 1982) (upholding the school finance system even after admitting it had "significant inequalities"); Reform Educ. Fin. Inequities Today v. Cuomo, 578 N.Y.S.2d 969, 973-76 (Sup. Ct. 1991) (recognizing that the plaintiffs had "vividly demonstrated the disparities in expenditures per pupil between property-wealthy and property-poor districts" but rejecting their claim for failure to show "gross and glaring inadequacy" in the quality of education provided), *aff'd as modified*, 655 N.E. 2d 647 (N.Y. 1995); Coalition for Equitable Sch. Funding v. State, 811 P.2d 116, 117 n.2, 121-22 (Or. 1991) (holding that clause of the state constitution requiring "uniform" public schools countenances disparities between districts with respect to financial benefits and tax burdens).

49 *See* Daniel D. McClain, *Education, Developments in State Constitutional Law: 1994*, 26 RUTGERS L.J. 1064, 1064 n.2 (1995).

50 *See* Jensen, *supra* note 46, at 4. Examples of state constitution education clauses with quality-defining language include "'efficient system of high quality,' 'efficient,' 'general and efficient,' 'thorough and efficient,' 'general and uniform,' 'thorough and uniform,' 'general, uniform, and thorough,' 'complete and uniform,' 'liberal,' 'basic,' 'competent,' and 'suitable.'" *Id.* at 4-5 (footnotes omitted). "Fifteen states have no quality statement at all, establishing a commitment only in terms of the existence of a system without any given standard." *Id.* at 5.

51 *See id.* at 5. The Washington Constitution places the education duty above all other duties. *Id.* The Illinois, Georgia, Louisiana, and Montana Constitutions define the education duty as a fundamental goal to provide citizens with education development to the limits of their capacities. *Id.* at 5-6.

52 *Id.* at 6. Some states focus on intellectual, vocational, and scientific improvement, while others focus on "cultural education," and still others on "moral or religious education." *Id.* at 6-7.

53 *See id.* at 7. For example, North Dakota's education clause counsels that, "'[a] high degree of intelligence, patriotism, integrity, and morality on the part of every voter in a government by the people'" is necessary "'to insure the continuance of that government and the prosperity and happiness of the people,'" and mandates that "'the legislative assembly shall make provision for the establishment and maintenance of a system of public schools.'" *Id.* (quoting N.D. CONST. art. VIII, § 1).

54 *See id.* at 8 & n.42.

1. *Education Clauses as a Basis for Inadequacy Claims*

As an alternative to, or, more commonly, in addition to equal protection-based claims, challengers to state education finance systems use education clauses to assert that the state education system is inadequate.[55]

Following *Robinson*, in cases based on state education clauses, courts have expounded on the characteristics of adequacy necessary to satisfy their state constitutional requirements. In the landmark 1989 case *Rose v. Council for Better Education, Inc.*,[56] the Kentucky Supreme Court delineated seven factors governing educational adequacy:

> [A]n 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 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 enable the student 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 fa-

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55 *See supra* note 46 and accompanying text. Adequacy arguments have been successful as the sole basis for challenges in seven cases in which state supreme courts found the state education funding system to be inadequate under education clause standards. *See* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989) (declaring that "Kentucky's *entire system* of common schools is unconstitutional" because "the General Assembly of the Commonwealth has failed to establish an efficient system of common schools"); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 527-28, 555-56 (Mass. 1993) (holding that the state government had failed to fulfill its state constitutional duty to "cherish" the state public schools); Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1378-81 (N.H. 1993) ("Claremont I") (interpreting the New Hampshire Constitution's education clause to impose a duty on the legislature to "cherish" public schools); DeRolph v. State, 677 N.E.2d 733, 747 (Ohio 1997) (invalidating the state system of education finance under the Ohio Constitution's education clause, which mandates a "thorough and efficient system of common schools throughout the state"), *clarified by* DeRolph v. State, 699 N.E.2d 518 (Ohio 1998); Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999) ("We hold today that the South Carolina Constitution's education clause requires the General Assembly to provide the opportunity for each child to receive a minimally adequate education."); Seattle Sch. Dist. No. 1. v. State, 585 P.2d 71, 92 (Wash. 1978) (holding that "all children residing within the State's borders have a 'right' to be amply provided with an education," that this right is "constitutionally paramount," and "must be achieved through a 'general and uniform system of public schools'" (quoting WASH. CONST. art. IX, § 2)).

56 790 S.W.2d 186 (Ky. 1989).

> vorably with their counterparts in surrounding states, in academics or in the job market.[57]

Though state constitutions differ significantly in their education standard-setting language, courts' adequacy-based decisions have found the *Rose* adequacy factors relevant to their determinations, regardless of the exact langnage of the education clause in question.[58]

2. *Education Clauses as a Basis for Claims of Inequity*

State constitution education clauses also provide the basis for claims of inequity within education finance systems.[59] In some cases, the langnage in the state constitution's education clause also served as the basis for claims identical to those brought under state equal protection clauses. For example, the Montana constitution's education clause, which specifically states that "[e]quality of educational opportunity is gnaranteed to every person of the state,"[60] provided the basis for the state supreme court to hold that "spending disparities among the State's school districts translate into a denial of equality of educational opportunity."[61] On the other hand, when language in the education clause fails to allude specifically to an equality mandate, courts have been reluctant to imply this langnage.[62]

The largest group of successful education finance reform plaintiffs are those who brought "hybrid" claims under both an equal protection clause (demanding horizontal equity) and an education clause (demanding adequacy).[63] In contrast, the least successful plaintiffs are those who attempted to substitute an education clause's demand for "uniformity" for the mandate of an equal protection clause. Hy-

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57 *Id.* at 212.

58 *See, e.g., McDuffy*, 615 N.E.2d at 554; Claremont Sch. Dist. v. Governor 703 A.2d 1353, 1359 (N.H. 1997) ("Claremont II").

59 For example, the Texas Supreme Court initially interpreted its constitution's requirement that the state produce an "efficient" system of education as a demand for equity. *See* Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989) ("Edgewood I"). Later, the court decided that efficiency mandated minimum adequacy. Edgewood Indep. Sch. Dist. v. Meno, 893 S.W.2d 450, 470 (Tex. 1995) ("Edgewood IV").

60 MONT. CONST. art X, § 1.

61 Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 690 (Mont. 1989).

62 *E.g.*, Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994) (concluding that "nowhere does the [Virginia] Constitution require equal, or substantially equal, funding or programs among and within the Commonwealth's school divisions," after noting the state constitution admonishes government to avail itself of its peoples' talents "'by assuring opportunity for [the peoples'] fullest development by an effective system of education throughout the Commonwealth.'" (quoting VA. CONST. art. I, § 15 (alterations in the original))).

63 Jensen, *supra* note 46, at 27; *see also* cases cited *supra* note 48 (invalidating education finance systems on equal protection grounds). *But see* Jenkins v. Leininger, 659 N.E.2d 1366 (Ill. App. Ct. 1995) (rejecting plaintiffs' challenge to Illinois's education system based on the education and equal protection clauses of the state constitution and the parental right to oversee a child's welfare).

brid claims seek to establish equality as "just one measure of adequacy to advance the quality of education."[64] Hybrid claims are successful due to the synergistic effect of equity and adequacy arguments in one suit. Allegations of an education system's inadequacy bolster a plaintiff's demands for equity in taxing and spending.[65] Furthermore, alleging inequality enables a plaintiff to present evidence of disparate funding in support of inadequacy claims.[66]

D. Education Finance Reform Litigation in New Hampshire and Vermont

1. *New Hampshire's* Claremont *Litigation*

New Hampshire school districts had been aware of the education funding disparities since the 1970s, but attempts to initiate litigation were unsuccessful until the 1990s.[67] Catalyzed by the loss of accreditation at Stevens High School in Claremont, New Hampshire,[68] and the state's apparent failure to distribute state aid in the manner to which it had committed,[69] a coalition of plaintiffs—including five property-poor school districts[70]—filed a petition for declaratory and injunctive relief in Merrimack County Superior Court on June 12, 1991.[71] The plaintiffs alleged that (1) the inequitable and inadequate distribution of state education funds violated the education clause of the New

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64 Jensen, *supra* note 46, at 27 (internal quotation marks omitted).

65 *Id.*

66 *Id.*

67 Interview with Andru Volinsky, Partner, Stein, Volinsky, and Callahan, Concord, NH, lead counsel for *Claremont* plaintiffs, in Concord, N.H. (August 12, 1999). In one early case, *Jesseman v. State*, No. 83-371 (N.H. 1982), plaintiff school districts alleged that the state education finance system violated the education clause of the New Hampshire Constitution by failing to equitably distribute education resources. *Procedural History of the Claremont Lawsuit*, *in* WISS INST. FOR PUB. POLICY, THE CLAREMONT EDUCATION LAWSUIT: BRIDGING THE EDUCATION DIVIDE (1998), at http://www.wissinst.org (last visited Aug. 31, 2000) (on file with author) [hereinafter, *Procedural History*]. The plaintiffs ultimately dropped the suit when the 1985 Augenblick Bill in the New Hampshire legislature amended the manner in which the state distributed education resources. *See id.*

68 Interview with Andru Volinsky, *supra* note 67; *see also* Royal Ford, *5 Districts Sue N.H., Say Students Are Short-Changed*, BOSTON GLOBE, June 14, 1991, at 1 (describing the beginning of the Claremont litigation).

69 In 1983, education finance expert John Augenblick reported to the New Hampshire House and Senate education committees on the funding disparities in New Hampshire and made recommendations for change. *See Procedural History*, *supra* note 67. This report resulted in the 1985 passage of the Augenblick Bill, *see id.*, which is now codified as N.H. REV. STAT. ANN. 198:29 (1989) (amended 1999). The codification of the "Augenblick Formula" for distribution of "Foundation Aid" to school districts included an equalization factor based on districts' property wealth, income wealth, and tax effort. *See Procedural History*, *supra* note 67. However, the state never fully funded districts under the Augenblick Formula, which, among other things, prompted the *Claremont* litigation. *Id.*

70 *See* Ford, *supra* note 68, at 14 ("Named as petitioners in the New Hampshire suit are school districts in Claremont, Franklin, Lisbon, Pittsfield and Allentown . . . .").

71 *Procedural History*, *supra* note 67.

Hampshire Constitution;[72] and (2) the current system's reliance on property taxes to finance public schools exceeded the state's constitutional tax powers.[73] Specifically, the plaintiffs argued that taxpayers in property-poor districts paid a significantly higher property tax rate, yet their tax efforts raised less money per pupil than those in property-rich districts.[74] The plaintiffs argued that "[t]he amount of state funding—less than eight percent of the total spent on public education—[was] insufficient to allow property poor districts to provide an adequate education to their children or to allow the districts to make up for the deficiencies in their property values."[75] Finding that the language of the education clause of the New Hampshire Constitution, which requires the legislature to "cherish public schools," imposed no duty on the state to support public schools, Judge Manias of the Superior Court granted the state's motion to dismiss on August 13, 1992.[76] The school districts subsequently appealed to the New Hampshire Supreme Court.[77]

Relying on dictionaries in existence at the time of the New Hampshire Constitution's inception,[78] the supreme court determined that the duty to cherish education is not "merely a statement of aspiration" and that "[t]he language commands, in no uncertain terms, that

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72 Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1377 (N.H. 1993) ("Claremont I"). The education clause reads:

> Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country, to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people.

N.H. CONST. pt. II, art. 83.

73 *Claremont I*, 635 A.2d at 1377. The state constitution lists among the duties of the legislature the power to "impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state." N.H. CONST. pt. II, art. 5. Plaintiffs argued that when provision of education is the duty of the state, taxes used to fund education must be proportional and reasonable. When taxpayers in property-poor districts pay a significantly higher property tax rate than taxpayers in property-rich districts, yet by these tax efforts raise less money per pupil, the system depends on disproportional and unreasonable assessment. *See Procedural History, supra* note 67.

74 *See Procedural History, supra* note 67.

75 *Id.*

76 *Id.*

77 *Id.*

78 *Claremont I*, 635 A.2d at 1378 (relying on a 1780 dictionary defining "duty" as "[t]hat to which a man is by any natural or legal obligation bound" and "cherish" as "[t]o support, to shelter, to nurse up" (internal quotation marks omitted)).

the State provide an education to all its citizens and that it support all public schools."[79] The court also looked to the decision of the Massachusetts Supreme Judicial Court in *McDuffy v. Secretary of the Executive Office of Education*,[80] which construed the similarly worded education clause of the Massachusetts Constitution as providing such an affirmative duty.[81] Concluding that the right to a free public education is "at the very least an important, substantive right,"[82] the supreme court remanded the case to the superior court for a determination of whether New Hampshire's education finance system adequately discharged this duty.[83]

On remand, Judge Manias again ruled in favor of the state.[84] In a three-part analysis, the lower court adopted the state's restrictive definition of educational adequacy,[85] determined that the current education finance system met that definition of adequacy,[86] and concluded that the state constitution did not mandate equitability and adequacy of education.[87] As for the claim that the school property tax system

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79 *Id.*

80 615 N.E.2d 516 (Mass. 1993). The New Hampshire Supreme Court was also comfortable looking to Massachusetts for precedent because of the states' shared colonial history and the similarities in language in their education clauses. *See Claremont I*, 635 A.2d at 1378.

81 *See Claremont I*, 635 A.2d at 1378, 1381.

82 *Id.* at 1381.

83 *Id.* at 1382.

84 *Procedural History*, *supra* note 67.

85 Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1357 (N.H. 1997) ("Claremont II"). The State Board of Education developed this definition, which provided that "[a]n adequate public elementary and secondary education in New Hampshire is one which provides each educable child with an opportunity to acquire the knowledge and learning necessary to participate intelligently in the American political, economic, and social system of free government." *Id.* By contrast, the plaintiff's proposed definition of educational adequacy, prepared by an education expert, required the state to take responsibility for providing sufficient resources to recognize the special needs of gifted and at-risk students, to manage schools efficiently, and to enable students to achieve reasonable educational goals. *Procedural History*, *supra* note 67.

86 *Procedural History*, *supra* note 67. Evidence presented to the court matched the five plaintiff districts to "comparison districts" of equal population. *Id.* In the district of Franklin, the equalized property valuation per student in 1993 was $183,626, compared to the district of Gilford, with a property valuation per student of $536,761. *Id.* Even though Franklin's 1993-94 tax rate was higher than Gilford's by $3.93 per $1000 of property value, Gilford was able to raise $2901 more per student than Franklin. *Id.* Even more dramatic is the discrepancy between plaintiff district of Pittsfield and its comparison district of Moultonborough. *See id.* In 1993, Moultonborough, on Lake Winnepesaukee, had an equalized property value per student of $1,319,221, compared to Pittsfield's $120,792. *Id.* Despite Pittsfield's property tax rate of $25.32 per $1000 of property, it was able to raise only $4493 per student, while Moultonborough could tax at a rate of $5.48 per $1000 of property value and raise $6426 per student. The trial court acknowledged the discrepancy, but discredited it by stating that "tax rate, standing alone, is not an accurate measure of tax burden; other factors such as income level partially determine the 'burden' the tax actually imposes." *Id.*

87 *Id.* Judge Manias pointed out that the New Hampshire Supreme Court in *Claremont I* made no specific reference to adequacy or equality required under the state constitution.

violated the "proportional and reasonable" requirement of the taxation clause, the court determined that local property taxes are municipal taxes, not state taxes, and thus immune from the requirement.[88]

On second appeal, the New Hampshire Supreme Court again overturned the lower court.[89] First, the court invalidated the tax system, reasoning that because education is a nondelegable state duty, taxes raised in support of education are state taxes, not municipal taxes, and therefore must be "'equal in valuation and uniform in rate'" to comply with the taxation clause.[90] Second, the court declared that students have a fundamental right to a constitutionally adequate education[91] and consequently employed strict judicial scrutiny.[92] In concluding that the current education finance system did not meet adequacy standards, the supreme court rejected the trial court's definition of adequacy, adopting instead the seven *Rose* factors for determining adequacy.[93] While acknowledging some value in local control over education, the court asserted that "the State cannot use local control as a justification for allowing the existence of educational services below the level of constitutional adequacy."[94] The court gave the state legislature a deadline of April 1, 1999, to develop a tax scheme for funding education that would equalize property valuation and tax rates statewide.[95]

Id. The district court rejected equal protection claims, citing lack of a fundamental right and suspect classification. *Id.* It thus applied "middle tier" scrutiny to the education finance system, and found it to be "a reasonable, not arbitrary classification" with a "fair and substantial relationship to the object of the legislation." *Id.* The district court maintained that the petitioners did not demonstrate that the current funding system of local property tax plus foundation aid resulted in inadequate educational opportunity. *See id.*

88 *Id.*

89 Claremont Sch. Dist v. Governor, 703 A.2d 1353 (N.H. 1997) ("Claremont II").

90 *Id.* at 1355 (quoting Opinion of the Justices, 379 A.2d 782, 786 (N.H. 1977)). New Hampshire became the first state to hold an education system unconstitutional based on unequal taxation. DAVID LONG, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., INTRODUCTION TO SCHOOL FINANCE LITIGATION (1999), *at* http://www.nces.ed.gov/edfin/litigation/Introduction.asp [hereinafter LONG, INTRODUCTION].

91 *Claremont II*, 703 A.2d at 1358-59. The court pointed out that the education clause is one of only two places in the entire New Hampshire Constitution where the framers placed an affirmative duty on the legislature. *Id.* at 1358.

92 *Id.* at 1359.

93 *Id.* at 1359 (defining an adequate education as one that extends beyond "[m]ere competence" in "reading, writing, and arithmetic" to the "broad exposure to the social, economic, scientific, technological, and political realities of today's society [which] is essential for our students to compete, contribute, and flourish in the twenty-first century"); *see also* text accompanying *supra* notes 56-57 (discussing the *Rose* factors).

94 *Claremont II*, 703 A.2d at 1360.

95 Geeta O'Donnell Anand, *Who Wins and Who Loses Under N.H. Tax Proposals*, WALL ST. J.-NEW ENG., Mar. 17, 1999, *available at* WL-WSJ 5444725.

In May of 1998, the court denied the state's motion to vacate its ruling in *Claremont II*.[96] Later that year, the court expressed its opinion that the legislature's proposed remedy, known as the ABC plan,[97] was unconstitutional.[98] Meanwhile, conservative legislators unsuccessfully attempted to introduce a referendum for a constitutional amendment that would have nullified the court's decision in *Claremont II*.[99] In November of 1998, the court denied the state's request for a two-year period in which to comply with *Claremont II*.[100] In May of 1999, the court ruled that the state's proposed use of a referendum vote to enact a tax plan was an unconstitutional delegation of power.[101]

2. *Vermont's* Brigham *Litigation*

In Vermont, disparities in tax effort and education opportunities among communities, similar to those in its neighboring communities across the Connecticut River,[102] as well as failed legislative efforts to reform the education funding system, inspired the American Civil Liberties Union of Vermont (ACLU) to seek judicial action.[103] Vermont's education finance system was similar to New Hampshire's prior to *Claremont*: it consisted of a codified foundation formula, in

96 *See* Claremont Sch. Dist. v. Governor, 712 A.2d 612 (N.H. 1998) ("Claremont III") (denying the state's argument that a state statute disqualified the retired judge in the case because he was over age seventy).

97 The ABC (Advancing Better Classrooms) plan HB 1280-Local, was a proposal to tax property at a uniform rate, but allowed property-wealthy districts to set their rates lower than the uniform rate. Opinion of the Justices (School Financing), 712 A.2d 1080, 1085 (N.H. 1998).

98 *Id.* at 1087.

99 *See* Claremont Sch. Dist. v. Governor, 725 A.2d 648, 650 (N.H. 1998) ("Claremont IV"). In October 1999, the New Hampshire Senate passed a proposal to amend the New Hampshire Constitution that would validate the taxation system found unconstitutional in *Claremont II*. Constitutional Amendment Con. Res. 26, 156th Leg. (N.H. 1999). However, as predicted, the proposal died in the state House of Representatives. *See, e.g., Lawmakers May Team Up to Get Courts Out of Loop*, FOSTER'S DAILY DEMOCRAT, Dec. 11, 1999, at 1, 8; Norma Love, *Republican Leaders' Best Shot at Constitutional Amendment Falls Short*, ASSOCIATED PRESS, Jan. 14, 2000, *available at* WL APWIRES 02:16:00.

100 *See Claremont IV*, 725 A.2d at 649 ("Absent extraordinary circumstances, delay in achieving a constitutional system is inexcusable.").

101 *See* Opinion of the Justices (Tax Plan Referendum), 725 A.2d 1082 (N.H. 1999).

102 *See* Robert Gensburg, *The Road to Equal Educational Opportunity for Vermont School Children*, 22 VT. L. REV. 1, 1 (1997). For example, in 1995, the property taxes on an $85,000 home in the ski resort town of Stratton were $17, while the taxes on a house of the same value in the town of Stannard were $2640. *Id.* at 7. Property values were even disparate as between towns within the same union school district. *See id.* Gensburg provides an additional anecdotal example of how tax base disparities lead to disparities in fundamental education resources: In 1994 the property-poor, high-tax school district of Hardwick had to eliminate a first grade remedial reading program because it could not afford to pay its share of the cost of the largely federally-funded program, while the nearby, property-rich, ski-resort town of Stowe contemplated an appropriation of $84,000 to repair the tennis courts at Stowe High School. *Id.* at 2.

103 *See id.* at 2.

which state aid supplemented local effort in order to meet a legislatively determined, minimum per-pupil expenditure in each district.[104]

In March of 1995, a group of students, taxpayers, and two school districts filed suit against the state,[105] alleging violations of the education[106] and equal protection[107] clauses of Vermont's constitution. Judge Meaker of the Lamoille County Superior Court granted the State's motion for summary judgment, reasoning that education is not a fundamental right under the Vermont Constitution and that the provision the plaintiffs relied upon does not confer a private right of action.[108] On joint appeal, the Vermont Supreme Court recognized that its duty was "solely to define the impact of the State Constitution on educational funding."[109] At the outset, the court determined that the education funding system in place did not eliminate wealth disparities, but only equalized funding "to a level of a minimally adequate education program."[110] Assessing the education clause of the Vermont Constitution in its historical context,[111] the court concluded that education is a fundamental obligation of the state, a responsibility the state may not delegate to municipalities.[112] In the equal protection analysis that followed, the court held that the state's argument that "local control" justified such a shift of responsibility did not constitute a legitimate government purpose underlying the education finance system.[113]

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104 *See* VT. STAT. ANN. tit. 16, §§ 3492-3499 (1989) (repealed 1997, effective 1998).

105 Brigham v. State, 692 A.2d 384 (Vt. 1997). The principal plaintiff was Amanda Brigham, an elementary school student in the district of Whiting, Vermont. In Whiting, the property tax base was less than 70% of the state average. *See* Gensburg, *supra* note 102, at 8.

106 VT. CONST. ch. II, § 68 ("[A] competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth.").

107 VT. CONST. ch. 1, art. 7 ("[G]overnment is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community . . . ."); VT. CONST. ch. I, art. 9 ("[E]very member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute the member's proportion towards the expence of that protection . . . .").

108 Brigham v. State, No. 53-3-95, slip op. at 9-10 (Lamoille County Super. Ct. Oct. 2, 1996).

109 *Brigham*, 692 A.2d at 386.

110 *Id.* at 388.

111 *Id.* at 392-93. The court considered the importance of fostering republican values, or "public virtue," that the framers of the Vermont Constitution considered "a matter literally affecting the survival of the new Republic" and "'necessary to preserve the blessings of liberty.'" *Id.* at 392 (quoting VT. CONST. of 1777, ch. I, art. 16). That the framers subsequently combined the virtue and education clauses into a single section suggests their equally strong conception of the importance of education. *See id.* at 393.

112 *Id.* at 395.

113 The court rejected the state's local control argument, reasoning that "poorer districts cannot realistically choose to spend more for educational excellence than their property wealth will allow, no matter how much sacrifice their voters are willing to make. The

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LEGISLATIVE RESPONSES TO EDUCATION REFORM DECISIONS

Professor Molly S. McUsic reminds us that "winning in the courtroom is not the same as winning in the classroom,"[114] suggesting that litigation victories are only half the battle for proponents of education reform. After a court invalidates a state's methods for funding education, the legislature then must enact a remedy responsive to both judicial and public concerns.[115]

Litigation prompts most modern legislative reform,[116] but whether plaintiffs base their claims on an education clause or an equal protection clause does not necessarily dictate the components of the resulting legislative reform. As mentioned in Part I, claims based on either or both of these sources can place equity in the reform spotlight.[117]

This Part first considers equity-based elements of reform, including minimum expenditures, spending caps and recapture, consolidation of districts and tax bases, and giving districts a choice among various remedies. The reforms adopted in Connecticut, Arkansas, California, Wyoming, and Texas exemplify how these elements come into play. Next, this Part describes adequacy-based elements of reform, such as those adopted by Kentucky and Massachusetts. Lastly, this Part presents arguments favoring and opposing equity- and adequacy-based elements of reform.

A. Equity Elements of Reform

Legislatures responding to courts' equity concerns generally focus on the equalization of funding.[118] Reformers define equity in three ways. The first, most common type is "horizontal equity," the

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current system plainly does not enhance fiscal choice for poorer school districts." *Id.* at 396.

114 Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, *in* LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 88, 107 (Jay P. Heubert ed., 1999).

115 *E.g.*, Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1381 (N.H. 1993) ("Claremont I") ("We are confident that the legislature and the Governor will fulfill their responsibility with respect to defining the specifics of, and the appropriate means to provide through public education, the knowledge and learning essential to the preservation of a free government."); *Brigham*, 692 A.2d at 398 ("Although the [Vermont] Legislature should act under the Vermont Constitution to make educational opportunity available on substantially equal terms, the specific means of discharging this broadly defined duty is properly left to its discretion.").

116 For an example of litigation-free education reform, see generally Charles Berger, *Equity Without Adjudication: Kansas School Finance Reform and the 1992 School District Finance and Quality Performance Act*, 27 J.L. & EDUC. 1 (1998) (evaluating education finance reform initiated by the Kansas state legislature which had not been catalyzed by a court mandate).

117 *See supra* Part I.C.1-2.

118 *See* McUsic, *supra* note 114, at 104.

theory that per-pupil expenditures should not materially differ between rich districts and poor districts.[119] The second type is "vertical equity," which evaluates a system's ability to account for differing needs of school districts with varying populations of special education students, bilingual students, and gifted and talented students.[120] Closely related to the other types of equity is "fiscal neutrality," which "requires similar tax efforts and burdens among districts."[121] Thus, invalidation of an education funding system for lack of equity, under either an equal protection or education clause, may inspire any of a number of legislative remedies, including: (1) modification or implementation of a foundation program to ensure minimum per-student spending; (2) spending caps and "recapture" provisions that limit the education spending of property-rich districts; (3) consolidation of tax bases or school districts; and (4) others means of equalizing tax bases.[122]

1. *"Leveling Up": Minimum Expenditure Requirements*

A state that adopts a "leveling up" approach will increase the revenue in districts where education spending is below the state mean. For example, in Connecticut, the General Assembly responded to *Horton v. Meskill*[123] by enacting a leveling up approach that contained two components: a guaranteed tax base grant and a minimum expenditure requirement.[124] Under this approach, districts that demonstrate an inability to meet minimum expenditure requirements per pupil qualify for the guaranteed tax base (GTB) grant.[125] The state distributes the grant under the GTB formula, which takes into account the district's wealth (measuring real and personal property), the district's need (measuring the relationship between the district's educational expenditures and per capita income), and the district's population (measuring the number of students in the district).[126] Because the formula generates a figure for state aid designed to put the district in the financial position it would be in if it had the tax base of a desig-

119 *See* Erin E. Kelly, Note, *All Students Are Not Created Equal: The Inequitable Combination of Property-Tax-Based School Finance Systems and Local Control*, 45 DUKE L.J. 397, 402 (1995).

120 *Id.*

121 *Id.*

122 *See* discussion *infra* Part II.A.1-4.

123 376 A.2d 359 (Conn. 1977) ("Horton I") (invalidating education finance system under the strict scrutiny afforded to fundamental rights under the state equal protection clause).

124 Horton v. Meskill, 486 A.2d 1099, 1101 (Conn. 1985) ("Horton II").

125 *See id.*

126 *Id.* at 1101 n.2.

nated target district, the formula ensures horizontal equity among taxpayers of different districts.[127]

Education finance reform litigation in Arkansas elicited a similar legislative response. The School Finance Act of 1984[128] contained a guarantee that state aid per student will supplement a school district's local expenditures to meet a minimum amount per student.[129] The Act also required reassessment and equalization of property values within the state.[130]

2. *"Leveling Down": Spending Caps and Recapture*

In a "leveling down" approach, the state ensures horizontal equity among taxpayers of different districts by "recapturing" local money raised in wealthier school districts and distributing it to poorer districts.[131] For example, the California state legislature attempted to adhere to the state supreme court's equal protection mandate in *Serrano II* by enacting a plan to redistribute property tax revenues collected in property-rich districts to property-poor ones.[132] This leveling down equality-based remedy so incensed the majority of California voters that they preempted the measure by passing a ballot initiative called Proposition 13.[133] This constitutional amendment capped property taxes at 1% of the assessed property value and prohibited implementation of a statewide property tax.[134] The amendment forced any district wishing to raise funds though additional nonproperty taxes to obtain voters' consent by a two-thirds majority.[135]

The result of this measure was to transfer the bulk of education financing from the local district level to the state level.[136] Critics charged that although the state's plan distributed funds on a relatively

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127 *See id.* at 1101-02 & 1101 n.2. The *Horton II* court found the distribution of categorical grants for transportation, construction, and special education under the system enacted in response to *Horton I* to be constitutional under a modified equal protection analysis. *Id.* at 1105, 1108. The court required the plaintiff to make a prima facie showing of a greater-than-de-minimis disparity in expenditure and then shifted the burden onto the state to show that the disparities are the result of a legitimate government purpose and that the disparities are not so great as to render the scheme unconstitutional. *Id.* at 1106.

128 ARK. CODE ANN. § 6-20-301 to § 6-20-319 (Michie 1987 & Supp. 1991).

129 *See* Fayetteville Sch. Dist. No. 1 v. Ark. State Bd. of Educ., 852 S.W.2d 122, 123 (Ark. 1993) (upholding changes to the state finance system using equal protection analysis).

130 *Id.*

131 Verstegen, *supra* note 32, at 249.

132 *See* Hanif S. P. Hirji, Note, *Inequalities in California's Public School System: The Undermining of* Serrano v. Priest *and the Need for a Minimum Standards System of Education*, 32 LOY. L.A. L. REV. 583, 599-600 (1999).

133 *Id.* at 600.

134 *Id.*

135 *Id.*

136 *See id.* at 600-01.

equal basis,[137] it reduced local control over education and increased the likelihood that other state finance obligations would take priority over the security of funds needed to sustain education quality.[138]

At the time of *Serrano II*, California ranked eighteenth in the nation for expenditures per average daily attendance (ADA).[139] It subsequently dropped to forty-sixth,[140] and to forty-ninth in reading proficiency.[141]

Wyoming's initial legislative response to its state supreme court's holding in *Washakie County School District Number One v. Herschler*[142] also exemplifies a leveling down approach:

> In response to *Washakie*'s holding that school funding must depend upon state wealth and not local wealth, the select committee proposed solutions to redistribute some local wealth to other districts. Those solutions culminated in an amendment to the state constitution authorizing the legislature to "recapture" revenues generated by the [mandatory local tax of one dollar of tax per $1000 of property value] which exceeded an amount determined by formula. Local wealth remained a factor in the system, however, when the optional mill levy was made available to the school districts according them the option of levying another six mills for their own use.[143]

The legislature then allocated recaptured funds to school districts on the basis of district "classroom units."[144] These classroom units derived from each district's average daily membership, adjusted to include transportation and special education expenditures.[145] The legislature then multiplied the total number of classroom units in a district by a legislatively-determined classroom value for the state guarantee amount.[146]

The Wyoming Supreme Court struck down this system in *Campbell County School District v. State*,[147] citing both equal protection and adequacy grounds.[148] Wyoming voters amended the state constitution to allow the recapture of funds from wealthy districts for distribution to

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137 A California appellate court upheld the education finance system developed by the legislature after Proposition 13 took effect. Serrano v. Priest, 226 Cal. Rptr. 584 (Ct. App. 1986) ("Serrano III").

138 *See* Hirji, *supra* note 132, at 601.

139 *Id.* at 596.

140 *See* McUsic, *supra* note 114, at 112 (using 1994 statistics).

141 *See id.*

142 606 P.2d 310 (Wyo. 1980).

143 *See* Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1247 (Wyo. 1995).

144 *Id.* at 1248.

145 *Id.*

146 *Id.* at 1249.

147 907 P.2d 1238 (Wyo. 1995).

148 *See id.* at 1266, 1279-80.

property-poor districts,[149] and the legislature enacted recapture provisions in 1997.[150]

3. *Consolidating Tax Bases and School Districts*

The Texas state legislature responded to the state supreme court's invalidation of the state education finance system[151] with a plan to consolidate school districts.[152] Senate Bill 351, passed on April 12, 1991, consolidated Texas's 254 counties into 188 County Education Districts (CEDs).[153] Each multicounty CED was the taxing authority for the school districts it contained.[154] The legislature spread tax revenues from wealthy districts among their property-poor neighbors by requiring that no CED exceed $280,000 in taxable property value per ADA.[155] In addition, the legislature turned the existing two-tiered formula for determining state aid into a three-tiered formula.[156] First, CEDs that taxed at a rate of $0.72 per $100 in property value received the basic allotment of $2200 per student.[157] Second, CEDs could tax up to an additional $0.45 per $100 to raise funds for instruction and facilities.[158] Third, local districts could raise funds beyond the authority of the CED.[159]

Wealthy districts challenged this reform, and on January 30, 1992, the Texas Supreme Court invalidated it under Texas's constitutional prohibition against a statewide property tax.[160] The legislature's new plan, ultimately upheld,[161] retained both the two-tiered formula for determining a district's state aid and the consolidation of tax bases,

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149 *See* WYO. CONST. art. 15, § 17.

150 *See* Lincoln County Sch. Dist. No. 1 v. State, 985 P.2d 964, 966 (Wyo. 1999) (describing the recapture provisions found in 1997 Wyo. Sess. Laws ch. 3, §§ 101-701).

151 *See* Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991) ("Edgewood II"); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989) ("Edgewood I"). In both cases, the overturned system consisted of some variation on a minimum expenditure ("Foundation") system that used a two-tiered formula to calculate need. *See Edgewood II*, 804 S.W.2d at 495. In a notable display of judicial activism, the *Edgewood II* court specifically recommended tax-base consolidation as a remedy. *Id.* at 497; *see* J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 653 (1999).

152 *See* Farr & Trachtenberg, *supra* note 151, at 660.

153 An Act Relating to Public Schools, 1991 Tex. Sess. Law. Serv. ch. 20 (Vernon).

154 *See* Farr & Trachtenberg, *supra* note 151, at 661.

155 *Id.*

156 *See id.*

157 *Id.*

158 *Id.*

159 *Id.*

160 Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 493 (Tex. 1992) ("Edgewood III"). The court also held the plan levied an *ad valorem* tax without a referendum in violation of TEX. CONST. art. VII § 3. *Edgewood III*, 826 S.W.2d at 493.

161 *See* Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717 (Tex. 1995) ("Edgewood IV").

school districts, or both, as an option for districts with a tax base greater than $280,000 per ADA.[162]

4. *Giving Districts a Choice Among Various Equity Remedies*

The current Texas plan contains other equity remedies that this Note has not heretofore addressed. As mentioned above, the current system in Texas determines state aid using a two-tiered formula.[163] Tier one, the Foundation program, consists of block grants of $2300 per pupil in districts that tax $0.86 per $100 property value.[164] Tier two is a guaranteed yield program, whereby districts with property value of less than $205,000 per pupil in ADA can tax at a rate between $0.86 and $1.50 per $100 property value.[165] For each penny above $0.86 that the district taxes, the state contributes an additional $20.55 per weighted ADA.[166] Furthermore, any district with property wealth greater than the threshold amount of $280,000 per ADA must take steps to reduce its tax base in one of five ways: (1) consolidating with a property-poor district; (2) detaching commercial property and allowing it to be annexed to a property-poor district, thereby increasing the poor district's tax base; (3) purchasing "attendance credits" from the state (essentially a form of recapture resulting in funds sent to the state); (4) contracting for the education of nonresident students; or (5) consolidating tax districts by setting up a mini-CED.[167]

Although the Texas Supreme Court conceded that this system fails to provide absolute equity,[168] the court also found that this system meets the requirements of the state constitution.[169] Giving wealthy

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162 *See id.* at 727.

163 *See supra* note 162 and accompanying text.

164 *See* Farr & Trachtenberg, *supra* note 151, at 630-81.

165 *See id.* at 681.

166 *Id.* Texas also has an Available School Fund (ASF) (consisting of fund interest and gas tax revenue) that is dispersed among districts on the basis of ADA. *Id.* at 682. ASF funds are distributed in lieu of, not in addition to, foundation aid and guaranteed yield. *Id.* Therefore, the state aid that a district is entitled to consists of: tier one allotment plus guaranteed yield from tier two minus per capita allotment from ASF, minus the district's local share of tier one and two property tax revenue raised. *See id.*

167 *Id.* at 683.

168 *See* Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 729-30 (Tex. 1995) ("Edgewood IV"). Plaintiffs challenged the system based on the $600 per-pupil gap in revenue between property-rich and -poor districts taxing at the maximum of $1.50 per $100 in property value. *See id.* at 731. Property-poor districts taxing at the maximum received state funding of $2300 per pupil plus the additional $20.55 for every cent between $0.86 and $1.50, or $1315, for a total of $3615 per pupil. Farr & Trachtenberg, *supra* note 151, at 687. At the same time, districts with the maximum property value of $280,000 taxing at $1.50 per $100 in property value could raise $4200 per pupil. *Id.*

169 *Edgewood IV*, 917 S.W.2d at 737. The trial court had previously held that an "efficient" system required by the Texas Constitution demanded absolute equity. *Id.* at 730. The supreme court adopted a different approach, interpreting "efficient" as demanding a level of adequacy achieved by the current system's substantial equity. *Id.* at 730.

districts options regarding reduction of their tax yield made Texas's unique approach of coupling a guaranteed yield formula with the equivalent of a spending cap (in the form of a maximum property tax base) more palatable.[170] Indeed, the system has already achieved some measures of success, including increases in the percentage of equalized revenue, in revenue available per pupil in poor districts, in the overall amount of education funding, and in student performance on statewide testing.[171]

B. Adequacy Elements of Reform

In general, adequacy-based remedies differ from equity-based remedies in many ways. First, if a state supreme court deems all schools in a state inadequate, then an adequacy-based reform will have the effect of elevating all schools to a state-prescribed minimum adequacy level.[172] Second, if certain groups of students have special needs, an adequacy-based reform will ensure that those groups receive the additional funding they require to meet state-determined standards for academic achievement.[173] Third, by taking into account both a district's outputs and inputs, adequacy remedies seek to maximize the outcome-to-input ratio (*i.e.*, "efficiency") and thus contain assessment and accountability components.[174]

From a education policy standpoint, adequacy-based remedies are more complex than equity-based remedies, which seek to equalize

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170 In 1993-94, ninety-eight of Texas's 281 districts exceeded the $280,000 property value threshold. Farr & Trachtenberg, *supra* note 151, at 684. Sixty-four optioned to purchase attendance credit, thirty opted to contract to educate students from other districts, while four opted for a combination of attendance credits and contracting for students. *Id.* No district opted for consolidation or detachment. *Id.*

171 *See id.* at 706; *see also* Craig D. Jerald, *The State of the States*, EDUC. WEEK (QUALITY COUNTS 2000), Jan. 13, 2000, at 62, 62 (noting that "Texas'[s] African-American and Hispanic students performed as well as or better than the average 8th grader in the other populous, ethnically diverse states of California, Florida, and New York"). In 1997-98, Texas school districts with the lowest effective tax rates (including Edgewood) and districts with the highest total effective tax rates (including Alamo Heights) had total per-pupil expenditures of $5245 and $4984 respectively: a difference of 4.9%. *See* TEX. DEP'T EDUC. SNAPSHOT '98: TAX EFFORT: SUMMARY TABLES (1999), *at* http://www.tea.state.tx.us/perfreport/snapshot/98/taxeffort.html.

172 *See generally* Martha I. Morgan et al., *Establishing Education Program Inadequacy: The Alabama Example*, 28 U. MICH. J.L. REFORM 559 (1995) (lauding legislative reform that implemented adequacy standards in Alabama using a combination of state and national standards for inputs and outcomes).

173 *See, e.g.*, Abbott v. Burke, 575 A.2d 359, 408-10 (N.J. 1990) (ordering high per-student spending for pupils' "special educational needs"); *see also, e.g.*, Sheff v. O'Neill, 609 A.2d 1072, 1074-76 (Conn. Super. Ct. 1992) (considering racial and economic segregation as factors in the deprivation of a "minimally adequate education"); William H. Clune, *Educational Adequacy: A Theory and Its Remedies*, 28 U. MICH. J.L. REFORM 481, 487 n.22 (1995) (discussing *Sheff* and *Abbott*).

174 *See* Clune *supra* note 173, at 481.

economic inputs.[175] Courts mandating adequacy-based remedies may require legislatures to define adequacy standards (if the court has not already done so), implement or modify mechanisms by which to evaluate school districts' achievement of those standards, or implement or modify the state's financial structure to afford districts the means to perform self-evaluation.[176]

Courts differ in their approaches to defining adequacy standards. Some are reluctant to perform a policymaking role and leave it up to the state legislatures to define adequacy.[177] Lack of guidance from the court, however, can be problematic during the remedy phase.[178] Conversely, courts that define adequacy too extensively run the risk of constraining the legislature.[179] Either way, guidance from the courts largely influences states' education reform efforts.

1. *Kentucky's Model Adequacy Reform*

In response to the Kentucky Supreme Court's invalidation of the state's system for funding education after finding the "entire system of common schools" to be unconstitutional,[180] the Kentucky General Assembly enacted one of the most comprehensive legislative reform plans to date.[181] The Kentucky Education Reform Act of 1990 (KERA)[182] was a direct response to the seven factors of adequacy the supreme court defined earlier in *Rose*.[183] In order to assure that edu-

175 *See id.* at 485. *But see* Robinson, *supra* note 5, at 494-95 (arguing from a taxation standpoint that adequacy remedies are less complex because they are concerned with quality of service rather than differences in resources).

176 *See* Clune, *supra* note 173, at 487-90.

177 *See, e.g.*, City of Pawtucket v. Sundlun, 662 A.2d 40, 56 (R.I. 1995) (deferring to the legislature to define adequacy); *cf.* Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 152 (Tenn. 1993) (declining to address the issue of adequacy in light of plaintiffs' strong equal protection claim); William F. Dietz, Note, *Manageable Adequacy Standards in Education Reform Litigation*, 74 WASH. U. L.Q. 1193, 1205-06 (1996) (suggesting that the Tennessee Supreme Court's use of equal protection analysis was an attempt to avoid defining adequacy).

178 *See* Dietz, *supra* note 177, at 1206-07. For example, after the Texas Supreme Court struck down the state education finance system on adequacy grounds without defining adequacy standards in *Edgewood I*, it found the legislative responses inappropriate remedies in two subsequent cases, *Edgewood II* and *Edgewood III*, before it finally found the legislative response to be constitutional. *See supra* Part II.A.3.

179 In New Jersey, for example, the supreme court imposed specific mandates and enjoined particular expenditures. *See* Dietz *supra* note 177, at 1207-08 (describing the "political struggle among all three branches of government in New Jersey" that erupted when the court sought to specifically mandate education reform measures).

180 Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989).

181 *See* Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485, 499 (1999); C. Scott Trimble & Andrew C. Forsaith, *Achieving Equity and Excellence in Kentucky Education*, 28 U. MICH. J.L. REFORM 599, 609 (1995).

182 *See* Kentucky Education Reform Act, ch. 456, 1990 Ky. Acts 1208 (codified as amended in scattered sections of KY. REV. STAT. ANN., chs. 156-165 and other scattered chapters).

183 *See supra* notes 56-57 and accompanying text.

cation outcomes met minimum standards of student achievement, such as standardized test scores and dropout rates,[184] KERA's drafters aimed their reform efforts at the areas of curriculum, governance, and finance.[185]

KERA's financial reform consists of a leveling up equity approach: a foundation program that guarantees a minimum per-pupil expenditure statewide.[186] Districts must tax property at the equalized rate of $0.30 per $100 of assessed value (called the Equivalent Tax Rate, or ETR) to qualify for a base level of adjusted per-pupil funding from the state.[187] Districts are allowed to supplement state aid according to a two-tiered formula.[188] A tier I district may levy additional property taxes to yield revenue of no more than 15% of the minimum guaranteed base.[189] Districts electing to participate in tier I that have property wealth 150% below the statewide average per-pupil assessment also receive equalization funds.[190] A tier II district may generate additional funds up to 30% of the minimum, guaranteed base, but is not entitled to equalization funds.[191] Tier II, essentially a revenue cap, is credited with lowering expenditure disparities between property-rich and property-poor districts.[192] But because the tier II cap exempts the wealthiest districts, critics argue that the plan fails to narrow the expenditure gap between the extreme ends of the property wealth spectrum.[193] However, KERA's finance reform increased local and state spending on education in the year following its enactment by $700 million over the previous year.[194] This additional funding allowed for an overall increase in per-pupil funding and teacher salaries and for reduction of class sizes.[195] KERA also implemented the Facilities Support Program, which equalizes local funds for construction and renovation.[196]

KERA's curriculum-based provisions first establish goals and standards designed to be more challenging than previous minimum academic standards.[197] KERA requires schools to assess student

184 *See* Clune, *supra* note 173, at 485.
185 Trimble & Forsaith, *supra* note 181, at 610.
186 KY. REV. STAT. ANN. § 157.360 (Banks-Baldwin 1999).
187 *Id.* § 160.470(12)(a).
188 *Id.* § 157.440.
189 *Id.* § 157.440(1)(a).
190 *Id.* § 157.440(1)(b).
191 *Id.* § 157.440(2)(a).
192 Prior to KERA's implementation, the Kentucky school districts saw a 35.87% disparity in wealth. Following KERA's implementation, the disparity fell to 16.72%. *See* Kelly, *supra* note 119, at 406.
193 *E.g., id.*
194 Trimble & Forsaith, *supra* note 181, at 599-600.
195 Hunter, *supra* note 181, at 502.
196 *Id.* at 503.
197 *See id.* at 501.

performance in grades four, eight, and twelve with comprehensive testing.[198] It also fosters school accountability by rewarding or sanctioning schools based on assessment results.[199] KERA's governance reform consists of restructuring provisions designed to reduce political impact on education policy.[200] Specifically, it transferred governing authority to local schools while reducing the size of the state Department of Education.[201]

Although it has only been five years since KERA's implementation, Kentucky schools are showing signs of improvement.[202] The National Assessment of Educational Programs has documented consistent improvement of Kentucky students in writing since the state's reform efforts began.[203] Statewide assessment in 1998 revealed top-twenty performances by several high-poverty elementary schools.[204] The General Assembly continues to modify its assessment and accountability efforts.[205]

2. *Following Kentucky's Lead: Education Reform in Massachusetts*

Following the decision of the Massachusetts Supreme Judicial Court ruling that the state's education system violated the mandate of the state constitution's education clause to "cherish" the state's public schools,[206] the Massachusetts legislature responded with comprehensive reform. Like KERA, the Massachusetts Education Reform Act of 1993 (MERA)[207] consists of measures to equalize inputs, perform assessment, and foster district accountability.[208] MERA's finance reform

198 KY. REV. STAT. ANN. § 158.6453. Kentucky's performance-based assessment is designed to evaluate how a student organizes, communicates, and applies knowledge. *See* Trimble & Forsaith, *supra* note 181, at 614-15. In addition to traditional multiple choice questions, the assessment program includes performing arts assessment and writing portfolios. *See id.* at 617. In 1998, the General Assembly modified the assessment component of the original KERA by creating the Commonwealth Accountability Testing System, which retains the comprehensive means of testing, but reduces the potential sanctions for districts that do not meet testing standards. Hunter, *supra* note 181, at 515.

199 *See* KY. REV. STAT. ANN. § 158.6455.

200 *See* Trimble & Forsaith, *supra* note 181, at 611-12.

201 *Id.* at 611. Every school has a management council on which the principal, three teachers, and two parents sit. Hunter, *supra* note 181, at 500. The councils make decisions regarding curriculum, textbooks, staffing, discipline, and the budget. *Id.*

202 *See* Hunter, *supra* note 181, at 514-15.

203 NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T EDUC., THE NAEP 1998 READING REPORT CARD NATIONAL & STATE HIGHLIGHTS 14, *available at* http://nces.ed.gov/nationsreportcard/pubs/main1998/1999479.shtml (reporting Kentucky as one of only five states in which average reading scores among fourth graders in 1998 were significantly higher than in 1992).

204 Hunter, *supra* note 181, at 515.

205 *See id.*

206 McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 553-54 (Mass. 1993).

207 MASS. ANN. LAWS ch. 71 (Law. Co-op. 1996 & Supp. 2000).

208 *See* Kelly, *supra* note 119, at 410-14.

is a leveling up approach, but with no ceiling on the amount of revenue wealthy districts can raise.[209] MERA created curriculum framework committees, assessment programs, and a governance structure that shifts control and responsibility to local schools.[210] Threat of sanction encourages schools to strive to meet state testing standards.[211]

Indicators show early signs of success for Massachusetts's reform efforts. In 1999, the Iowa Test of Basic Skills showed 31% of Massachusetts third-graders in the "advanced reader" category, up ten percentage points from the 1998 results.[212]

C. Common Critiques of Equity and Adequacy Reform

Both those who favor education reform generally as well as those who oppose it have criticized equity-based reform. Some education reformers point out that the drawback to equity reform is that strict per-student spending threatens funding that enables districts to address special needs. For instance, urban schools with security needs, schools with high numbers of special education students, and schools with high numbers of non-English-speaking students simply have higher per-pupil costs than other districts that do not get factored into the state allocation formula.[213] On the other side of the debate, some critics of equity-based reform use it as a reason to oppose progressive reform generally. They argue that equity-based remedies waste money in low-income districts in which, according to the argument, students do not benefit from expensive amenities and college preparatory programs.[214] Furthermore, opponents of general reform note that supporters of equity-based reform are unable to find evidence that equalization of funding equalizes education, but argue instead that factors such as levels of parent education, wealth, and involvement in

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209 *Id.* at 412.

210 *See id.* at 412-13.

211 *See id.* at 413. Massachusetts also implemented a new statewide testing program implementing a requirement that tenth graders must meet testing requirements in order to graduate. *See* Memorandum from David P. Driscoll, Commissioner, to Members of the Board of Education (Nov. 16, 1999), *available at* http://www.doe.mass.edu/mcas/112399memo.html. The graduation requirement of the Massachusetts Comprehensive Assessment System (MCAS) has proved to be controversial. *See* Coco McCabe, *Schools Debating Impact of MCAS*, BOSTON GLOBE, Dec. 10, 2000, at 1. After 45% of tenth graders failed English and 34% failed math on the 2000 test, the state board of education approved a plan that would allow students at least five more chances to pass and to take retests that do not include the hardest questions. Scott S. Greenberger & Corey Dulling, *MCAS Retest Plan Approved*, BOSTON GLOBE, Jan. 24, 2001, at B4.

212 *See* Press Release, Mass. Dep't of Educ., Grade Three Iowa Reading Test Results are Released (July 20, 1999), *available at* http://www.doe.mass.edu/news/archives99/072099g3r.html.

213 *See* McUsic, *supra* note 114, at 106.

214 *See id.*

schools are more likely to have an impact than dollar figures on a balance sheet.[215] Finally, it is difficult for equity-based reform to escape the criticism that it will bring about the "dumbing-down" of public schools.[216]

In contrast, adequacy reform is often heralded as a more thoughtful approach to education reform because it addresses not only a system's inputs, but also uses assessment and accountability measures to monitor a system's outputs.[217] Furthermore, adequacy reform is often less controversial because it poses a "less immediate" threat to local control.[218] However, not all reform proponents share in the praise of adequacy reform. Adequacy reform is less likely to result in absolute horizontal or vertical equity, as evidenced by the experience of Texas, Kentucky, and Massachusetts.[219] Given the seemingly arbitrary determinations of what constitutes "adequate," some critics advocate more objective measures of equality.[220] In the words of Justice Marshall, "the question of discrimination in educational quality must be deemed to be an objective one that looks to what the State provides its children, not to what the children are able to do with what they receive."[221]

III
NEW HAMPSHIRE AND VERMONT'S EDUCATION FINANCE REFORM EFFORTS

A. New Hampshire's Legislative Response to *Claremont*

As *Claremont II*'s April 1, 1999, deadline approached, the New Hampshire legislature considered alternative tax reform plans: one raising revenue for education through a statewide property tax and another generating the funds through a 4% income tax.[222] Both plans proved controversial in the "Live Free or Die" state, which to

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215 *See id.* at 107.

216 *See id.*

217 *See, e.g.*, Robinson, *supra* note 5, at 497.

218 *Id.* at 495. Robinson means "less immediate" in the sense that adequacy reform does not displace local control over finances, although it may result in state-mandated school district performance standards.

219 *See supra* Part II.A.4, B.1-2.

220 One critic cites the variety of adequacy definitions in court opinions as evidence of the true arbitrariness of the concept: "To me, it is not at all self-evident why certain aspects of an adequate education—such as sufficient knowledge of one's 'mental health'—are included within the courts' definitions, and others—such as sufficient exposure to those of different backgrounds and cultures—are excluded." James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 549 (1999).

221 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 84 (1973) (Marshall, J., dissenting).

222 Anand, *supra* note 95.

date had no income, sales, or statewide property tax.[223] Finally, on April 29, 1999, almost a month past the deadline, the legislature enacted House Bill 117,[224] an $825 million education spending plan, most of which was to come from a statewide property tax of $6.60 per $1000 equalized property value on both residential and utility property.[225] The plan required the state treasurer to deposit all revenue collected in an education trust fund.[226] From this fund, the state would pay "adequate education grants"[227] to districts with property tax revenue below the "per pupil adequate education cost,"[228] an amount equal to the adequate education cost multiplied by the ADA in that district.[229] Under the plan, districts that raised education property tax revenue in excess of the adequate education grant for which they were eligible under the formula would be liable to the state for that amount.[230] The legislature intended to phase in this liability over five years.[231] Furthermore, the legislature authorized districts to "develop educational programs beyond those required for an adequate education and to raise and appropriate amounts necessary for such programs."[232]

The New Hampshire Supreme Court weighed in on the constitutionality of the education finance plan in October of 1999.[233] The court declared unconstitutional the provisions creating the five-year phase-in of statewide property tax liability for districts whose statewide property tax revenue exceeded their adequate education grant allocation.[234] Property-wealthy districts continue to challenge the constitu-

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223 *Id.*

224 *See* Act of April 29, 1999, 1999 N.H. Laws ch. 17.

225 N.H. REV. STAT. ANN. § 76:3 (Supp. 2000). The tax reform measure also consisted of a business enterprise tax, Act of April 29, 1999, ch. 17, §21 (to be codified at N.H. REV. STAT. ANN. § 77-E:2), and a cigarette tax increase, *id.* ch. 17, § 23 (to be codified at N.H. REV. STAT. ANN. § 78:32).

226 *Id.* § 198:39 ("Moneys in such fund shall not be used for any purpose other than to distribute adequate education grants to municipalities' school districts pursuant to RSA 198:42.").

227 *Id.*

228 *Id.* § 198:40. The formula determined per-pupil adequate education cost by multiplying the lowest per-pupil expenditure in districts where 40% to 60% of the elementary school students enrolled achieved a score on statewide education assessment tests of basic or above. *Id.* § 198:40(I)(b)(1).

229 *Id.* § 198:41(I)(a). The formula also takes into account transportation costs and education property tax warrants. *Id.* § 198:41(I)(b)-(c). The average daily attendance is a weighted figure which takes into account disabled students and students eligible for free or reduced-price meals. *Id.* § 198:40(II).

230 *Id.* § 198:46, *amended by* Act of June 6, 2000, 2000 N.H. Laws ch. 239, § 8 (to be codified at N.H. REV. STAT. ANN. § 198:46).

231 *Id.* § 198:46(IV).

232 *Id.* § 198.43.

233 Claremont Sch. Dist. v. Governor, 744 A.2d 1107 (N.H. 1999) ("Claremont V").

234 *Claremont V*, 744 A.2d at 1108. The court points out that, under the plan, in 1999 property-poor towns (for example, Claremont and Allenstown) had to pay the $6.60 per

tionality of the statewide property tax and some are withholding their property tax liability to the state.[235]

B. Vermont's Legislative Response to *Brigham*

1. *The Equal Education Opportunity Act of 1997 ("Act 60")*

In June of 1997, the Vermont legislature responded to the *Brigham* decision by enacting the Equal Education Opportunity Act of 1997, colloquially known as "Act 60."[236] The Act adopted as its underlying policy the notion that "all Vermont children will be afforded educational opportunities which are substantially equal although educational programs may vary from district to district."[237] This section will address Act 60's main components, which consist of: (a) block grants from the state supported by a statewide property tax; (b) measures to equalize local spending; and (c) provisions regarding assessment and accountability.

a. *Block Grants and Equalized Local Spending*

Act 60 requires the state to allocate block grants of $5000 per "equalized" pupil in each school district.[238] A variety of revenues support the block grant allocation, including revenue from a statewide education property tax and local property tax revenues from school

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$1000 property rate, while their property-rich counterparts (for example, Rye and Moultonborough) had to pay less ($3.79 per $1000 and $3.18 per $1000, respectively). *Id.* at 1109. The court denied that the phase-in constituted a legitimate partial abatement because it did not limit tax relief to persons aggrieved by assessment of the tax. *Id.* Instead, the court found the plan was overinclusive in its favorable tax treatment to those not in jeopardy of suffering economic hardship as a result of the new rate scheme. *See id.* at 1111.

The New Hampshire Supreme Court then rendered an advisory opinion calling a revised plan unconstitutional. Opinion of the Justices (Reformed Public School Financing System), No. 00-179, 2000 WL 1800528 (N.H. Dec. 7, 2000). The court emphasized that any funding mechanism that relied on local funding to support the cost of an adequate education—up to the baseline adequacy amount—would violate the state constitution's education clause. *Id.* at *2.

235 *See Alton Voters Give Blessing to Tax Revolt*, ASSOCIATED PRESS, Jan. 17, 2000, *available at* WL APWIRES 02:18:00; Carey Goldberg, *A Tax Revolt Grows in New Hampshire: 'Donor Towns' that Pay More Will Challenge New System in Court*, N.Y. TIMES, Nov. 27, 1999, at A9; Ann E. Marimow, *Donor Towns Sue State: They Argue Taxation Method is Still Unfair*, CONCORD MONITOR, Dec. 23, 1999, at A1, A8.

236 Equal Education Opportunity Act of 1997, 1997 Vt. Acts & Resolves No. 60 (codified as amended in scattered sections of titles 16 and 32 of VT. STAT. ANN.).

237 VT. STAT. ANN. tit. 16, § 1 (Supp. 2000).

238 *See* Equal Education Opportunity Act of 1997 § 24(a). $5000 is adjusted upward from the fiscal year 1997 level based on an annual state index. In 1999 the block grant per equalized pupil is $5377. *See* VT. STAT. ANN. tit. 16, § 4011. Use of "equalized pupil" results in a weighted average daily membership, which takes into account economically deprived pupils and pupils for whom English is a second language. *Id.* § 4010(c), (d).

districts with budgeted spending in excess of the amount receivable under the state block grant calculation.[239]

b. *Equalization Measures*

Under Act 60, the education property tax is itself equalized, in that it applies a rate of $1.10 per $100 of nonresidential property, but makes certain sensitivity adjustments that take into consideration the taxpayer's household income and the amount of the taxpayer's local district property tax.[240]

Act 60 also enacted equalization of local education spending "so that each school district will have substantially equal capacity to raise and provide the same amount per pupil on the local tax base" by implementing a local share state education property tax.[241] Under the statutory tax formula, a district is liable to the state for a percentage of the funds it raises in local property taxes in excess of its state block grant entitlement.[242] The Commissioner of Education sets this "equalized yield amount" each year.[243] For example, in fiscal year 1997, for every $42 above the $5000 block grant amount that a district desired to spend per pupil, it was liable to the state for 1% of the funds raised towards that amount.[244] Property-poor districts are eligible for the revenue collected in this way.[245]

In summary, Act 60's effect on each district is determined by a comparison of the amount receivable by the district from the state to the amount the district must pay to the state in education property taxes and local share state education property taxes. Amounts receivable from the state include the block grant allocation, other state allocations in nonblock form (such as for special education), property tax reduction payments to qualified low income taxpayers, and funds from the sharing pool for qualified property-poor towns.[246] Qualified

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239 VT. STAT. ANN. tit. 16, § 4025(a)(1)-(2). The education fund also includes revenue from the state lottery, a portion of revenue from a meals, room, and alcohol tax, and a portion of corporate income tax, among other sources. *Id.* § 4025(a)(4)-(6).

240 VT. STAT. ANN. tit. 32, § 5402(a) (Supp. 2000); *id.* § 6066.

241 VT. STAT. ANN. tit. 16, § 4000(b); *id.* § 4011, *amended by* 2000 Vt. Acts & Resolves No. 108.

242 *Id.* § 4025(a)(2).

243 *Id.* § 4027(a).

244 *See* VERMONT LEAGUE OF CITIES & TOWNS, EDUCATION FINANCE FEATURES OF ACT 60, *as amended* (1998), *at* http://www.act60.org/vlct_doc.htm. [hereinafter EDUCATION FINANCE FEATURES].

245 *See* VT. STAT. ANN. tit. 16, § 4011(b), *amended by* 2000 Vt. Acts & Resolves No. 108.

246 The activist group Concerned Vermonters for Equal Educational Opportunity provides an example of how Act 60 results in net gains for towns that must contribute to the sharing fund. *See* VERMONTERS FOR EQUAL EDUC. OPPORTUNITY, ACT 60: CALCULATING ITS EFFECT ON YOUR TOWN(2000), at http://www.act60works.org/calc.html. The town of Norwich, in fiscal year 1999, is eligible for: $4 million in block grants, $600,000 in nonblock grant funds, $600,000 in property tax reduction payments, and $0 from the sharing pool,

property-poor local districts may offset property tax liability by raising revenues through a sales tax.[247]

c. *Allocation of Responsibility for Assessment Between the Local Districts and the State Board of Education*

Act 60 reflects the mandate of the *Brigham* decision[248] in that it attempts to establish both equal access to quality education and local district control over education programs.[249] Act 60's allocation of responsibilities between the State Board of Education and the local school districts incorporates both of these goals. Under Act 60, the State Board of Education has the power to set standards, develop assessments, and issue statewide reports on school and student progress, while the local school districts maintain responsibility for local action plans, assessments, and accountability systems.[250]

2. *Challenging Act 60*

In 1999, the Vermont Supreme Court upheld Act 60 against a challenge brought by citizens from the property-rich, ski-resort town of Stowe, who had created a plaintiff corporation.[251] After the expiration of Act 60's transition provisions in 2002, the town of Stowe, in order to maintain its level of funding, stands to be liable to the state for nearly 70% of its local property tax revenue in local state share property taxes.[252] The plaintiff corporation argued that the Act's reliance on the discretion of voters in property-wealthy towns to supplement state funding for education is an unconstitutional delegation of the state's legislative authority.[253] The court rejected the plaintiff's delegation doctrine claim[254] and further held that the plaintiff was precluded from suing based on "predictions" about how the Act might violate the constitution when and if the citizens of Stowe voted to provide additional funds beyond the block grant amount.[255]

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for a total of $5.2 million. Norwich is liable for $3,700,000 in statewide education property tax and a $500,000 contribution to the sharing pool, for a total of $4.2 million. The town's net gain is $1 million, $600,000 more than the $400,000 in nonblock aid it would have been eligible for without Act 60. *Id.*

247 *See* VT. STAT. ANN. tit. 24, §138(b)(1) (Supp. 2000). These districts may also raise revenues through a 1% meals, alcoholic beverages, and rooms tax. *See id.* § 138(b)(2)-(3).

248 VT. STAT. ANN. tit. 16, § 4000(a).

249 *Id.* § 1.

250 *See* EDUCATION FINANCE FEATURES, *supra* note 244.

251 *See* Stowe Citizens for Responsible Gov't v. State, 730 A.2d 573, 574 (Vt. 1999).

252 *Id.* at 575.

253 *Id.* at 574.

254 *Id.* at 576 ("[A] statutory provision that does not take effect unless assented to by the voters of a municipality 'is not invalid as a delegation of legislative power, provided the statute is complete in itself.'" (quoting 2 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 4.10, at 30 (3d ed. 1994))).

255 *Stowe Citizens*, 730 A.2d at 576.

3. *Public Opinion and Proposed Legislative Changes*

Act 60 has provoked outrage and concern among parents of Vermont schoolchildren residing in property-rich communities.[256] Even some communities that stand to benefit from the local share property fund are concerned about the tax impact on businesses such as ski resorts and factories that employ local citizens.[257] Citizen groups on both sides of this divisive issue have published detailed web sites.[258] Some towns have retaliated against Act 60 by refusing to pay the state its local share liability.[259]

As an alternative to Act 60, citizens and conservative lawmakers have proposed the Education Revenue Sharing (ERS) plan, which they contend meets *Brigham*'s mandate for equalized educational opportunity without relying on either a statewide property tax or recapture provisions.[260] ERS would replace the Act 60 equalized yield/block grant system with a "local property tax for funding of education and a new formula for distribution of state aid which is based on the income level of the school district residents."[261] Specifically, the state would limit property tax liability and provide supplemental appropriations from the general fund to property-poor districts.[262] This system, however, would not address the discrepancies among districts' property tax bases. Property-poor districts would still be taxed at a disproportionately higher rate as compared to property-rich districts, which could continue to raise more revenue with lower tax rates.

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256 The most famous parent to criticize Act 60 is novelist John Irving of *The World According to Garp* fame. Irving called the legislature "Marxist[ ]" and predicted that "now we will see those schools [in his property-rich district of Dorset] decimated." Amity Shlaes, *Vermont Levels Its Schools*, WALL ST. J., Apr. 22, 1998, at A22.

257 *See* Shlaes, *supra* note 256, at A22.

258 For examples, see the pro-Act 60 Concerned Vermonters for Equal Education Opportunity website at http://www.act60works.org. and the anti-Act 60 Vermont League of Cities and Towns website at http://www.act60.org.

259 The towns of Whitingham, Searsburg, and Dover were the initial holdout communities that refused to pay their shares of Act 60 liability to the state. *Last Three Towns Rebelling Against Act 60 Settle Up with State*, Apr. 10, 2000, *available at* WL 4/10/00 APWIRES 15:24:00. Dover eventually paid voluntarily, but the attorney general had to sue Whitingham and Searsburg—and a superior court judge had to freeze the two towns' bank accounts—to elicit their shares of statewide property taxes. *Id.* One Vermont newspaper reports yet another holdout—the state's smallest town of Victory. John Dillon, *Victory Fights Vermont on School Tax Sharing*, RUTLAND HERALD, Nov. 5, 2000, http://rutlandherald.nybor.com/Archive/Articles/Article/15058.

260 *See* THE ALTERNATIVES GROUP, EDUCATION REVENUE SHARING: A SENSIBLE ALTERNATIVE TO ACT 60 (1999), *at* http//www.act60.org/sharing.htm [hereinafter EDUCATION REVENUE SHARING].

261 H.B. 444, 65th Leg., Biennial Sess. (Vt. 1999).

262 The Bill was not carried over to the current legislative session. *See* EDUCATION REVENUE SHARING, *supra* note 260.

IV
EVALUATION OF THE LEGISLATIVE REMEDIES OF NEW HAMPSHIRE AND VERMONT

Foregoing attempts at guaranteed yield and equalization of districts' tax bases,[263] New Hampshire and Vermont legislators have equalized property tax rates by imposing statewide property taxes.[264] New Hampshire's choice of this remedy is not surprising, given the New Hampshire Supreme Court's holding in *Claremont I* that the legislature has a nondelegable duty to provide students with an adequate education.[265] This stance led to the court's conclusion in *Claremont II* that "'the taxes imposed by the legislature for support of schools . . . are, in their nature, state taxes'"[266] and that therefore "the taxing district is the State."[267] However, New Hampshire does not attempt to recapture districts' local property tax revenue raised with the intent of supplementing adequacy education grants, while Vermont has chosen to make districts liable for a percentage of supplemental funds raised.[268]

A question faces legislators and voters in each state: Which system will ensure educational adequacy for public school students while providing an equitable system of taxation? This section addresses the equity and adequacy of both states' remedies.

A. Equitability of the Remedies of New Hampshire and Vermont

Horizontal equity (equity in per-pupil expenditure among districts), vertical equity (sensitivity to districts with special needs), fiscal neutrality (equity of yield for tax effort among districts), income sensitivity (sensitivity to taxpayers with low income levels), and extent of equalization (equalization of nonprogrammatic expenditures such as

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263 *See* discussion *supra* Part II.A.1. The Vermont Supreme Court specifically commented on its then-existing "foundation formula" for distribution which was essentially a guaranteed tax base:

> From an equity standpoint, the major weakness of a foundation formula distribution system is that it equalizes capacity only to a level of a minimally adequate education program. . . . School districts with greater property wealth, however, can more easily spend above foundation costs to improve education, and the record before us shows that they usually make these expenditures. Thus, a foundation-formula, state aid program can boost the capacity of the poorest districts, but still leave substantial deficiencies in overall equity.

Brigham v. State, 692 A.2d 384, 388 (Vt. 1997) (citations omitted).

264 *See supra* Part III.

265 *See* Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1381 (N.H. 1993) ("Claremont I").

266 Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1356 (Vt. 1997) ("Claremont II") (quoting Opinion of the Court, 4 N.H. 565, 571 (1829) (alterations in the original).

267 *Id.*

268 *See supra* Part III.

plant and transportation costs) contribute to the overall equity of an education reform system. The chart below summarizes the comparison of the reform efforts of New Hampshire and Vermont on these factors.

TABLE 1

Indicator	New Hampshire Reform (HB 117)	Vermont Reform (Act 60)
Horizontal Equity (equity in per pupil expenditure among districts)	Lack of substantial equity as districts are free to generate revenue from local property taxes without liability to the state.	Substantial equity achieved by imposing liability on wealthy districts for spending above the block grant amount.
Vertical Equity (ensuring that districts with special needs have access to additional funds)	Adequacy grant calculated based on a weighted average daily attendance figure that takes into account the number of students who are disabled and economically disadvantaged (measured by eligibility for free or reduced lunch) in each district.	Block grant is multiplied by a weighted averaged daily membership in a district, which takes into account economically disadvantaged students (measured by eligibility for food stamps) and English-as-a-second-language students.
Fiscal Neutrality (equity in yield from tax effort among districts)	Uniform statewide property tax rate of $6.60 per $1000 property value. However, additional local property taxes have no uniformity rate.	Uniform statewide property tax rate of $1.10 per $100 property value. Additional local property taxes may be levied at nonuniform rate.
Income Sensitivity	None[269]	Taxpayers with household incomes less than $75,000 may pay the lesser of (a) 2% of their income or (b) the tax the municipality would have assessed on property if the value were reduced by $15,000.[270] Additional relief is provided for taxpayers with household income of less than $47,000.[271]
Equalization of non-programmatic costs	Cost of construction, transportation, and special education are not included in the state's base expenditure per pupil; therefore, these costs are not equalized.	Special education funds are distributed at the state level separate from block grants.[272]

269 In fact, New Hampshire's constitution prohibits progressivity within any single tax. *See* N.H. CONST. pt. 2, art. 5.

270 VT. STAT. ANN. tit. 32, § 6066(a)(1)(B) (Supp. 2000).

271 *See id.* § 6066(a)(3). Taxpayers with annual household income between $25,000 and $47,000 are eligible for a property tax credit of 5%. *Id.* Taxpayers with annual household income between $10,000 and $24,999 are eligible for a property tax credit of 4.5%. *Id.* Taxpayers with annual household income between $5000 and $9999 are eligible for a property tax credit of 4%. *Id.* Taxpayers with annual household income less than $5000 are eligible for a property tax credit of 3.5%. *Id.*

272 The state makes total expenditures in each fiscal year equal to 60% of the total statewide special education expenditures not derived from federal sources. VT. STAT. ANN. tit. 16, § 2967(b) (Supp. 2000).

1. *New Hampshire and Vermont Attain Fiscal Neutrality*

As the chart illustrates, the uniform property tax rate ensures the fiscal neutrality of both states' tax systems. As a result, residents' property taxes are proportional to property value. Both states have required reassessment of property values according to statewide criteria to ensure that the uniform rate is applied fairly to all property.[273] If property values are assessed too infrequently, the effects of the competing forces of appreciation and depreciation go undetected, resulting in distorted relative property values.[274]

2. *Vermont Surpasses New Hampshire in Horizontal Equity and Income Sensitivity*

Both states' implementation of a statewide property tax creates a distinction between "donor" towns and "receiver" towns.[275] Donor districts have high property tax bases and therefore raise more than their state entitlements by taxing at the uniform rate.[276] Receiver towns have smaller property tax bases, so their property tax revenue is less than their state entitlements; the state supplements the difference between the state entitlement and the property taxes raised.[277] Payment from donor towns to receiver towns is a step toward horizontal equity that narrows the gap between what property-rich and property-poor districts can afford to spend on education.

Vermont's system of taxation, with its limited recapture,[278] provides more horizontal equity than New Hampshire's system, which does not limit districts in the amount of revenue they may raise to

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273 *See* N.H. REV. STAT. ANN. 21-J:3 (XIII) (Supp. 1999) (imposing on the Commissioner of the Department of Revenue Administration the duty to "[e]qualize annually by March 31 the valuation of the property in the several towns, cities, and unincorporated places in the state"); VT. STAT. ANN. tit. 32, § 5405(a) (imposing on the commissioner of taxes the duty to "determine the equalized education property tax grand list and coefficient of dispersion for each municipality in the state").

274 *See* Marcia A. Brown Thunberg, *Raising Revenue for an Adequate Education in New Hampshire*, 20 VT. L. REV. 1001, 1037-39 (1996). Thunberg explains that when "one home is assessed at fair market value during a town's assessment and a second home, built a few years later, is assessed at a value comparable to the first," relative property values are distorted because "[a]lthough the two homes have the same assessed value, the possible increase or decrease in value of the first home is not recognized." *Id.* at 1307. Evidence of Thunberg's characterization of the problems caused by infrequent assessment has been uncovered as New Hampshire now attempts to correct for years of disparate assessment. For instance, one report indicates that the city of Keene consistently undervalued its property by 16% due to twenty-eight years of failing to conduct door-to-door property inspections. *See* Geeta O'Donnell Anand, *Way of Valuing Property in N.H. is Under Attack*, WALL ST. J.–NEW ENG., July 14, 1999, *available at* 1999 WL-WSJ 5460195.

275 Lisa Shapiro et al., *The Economic and Fiscal Impact of a Statewide Property Tax in New Hampshire*, STATE TAX TODAY, Jun. 14, 1999, at ¶2, *available at* WL 1999 STT 113-16.

276 *See id.*

277 *See id.*

278 *See supra* Part III.B.1(b).

supplement their adequacy grant.[279] Also, Vermont's income-sensitivity provisions increase the equitability of its tax system.[280] Furthermore, Vermont includes more local costs in its equalization formula, thereby ensuring that a district's designated financial needs include such expenses as special education costs.[281]

3. *Both Vermont and New Hampshire Strive for Vertical Equity*

Both states strive for vertical equity by accommodating expenses for students with special needs when calculating the ADA for the purpose of determining each district's block grants.[282] It is difficult, however, to predict whether merely factoring special-needs students into the ADA accurately reflects the additional funding needed to finance the particularized programs that special-needs students require.

B. Adequacy of the Legislative Remedies of New Hampshire and Vermont

New Hampshire relies on the New Hampshire Educational Improvement and Assessment Program (NHEIAP) tests as a measure of "adequate" student performance when it calculates the cost of adequate education.[283] However, it does not provide incentives for districts to increase performance on assessment indicators. In order to establish the cost of an adequate education in the state, it merely looks at how much "adequately" performing schools are spending.[284] Some critics assert that, because New Hampshire's per-pupil adequate education cost worked out to only $4220, the plan does not raise enough revenue to provide for adequate education in property-poor districts.[285]

In contrast, Vermont's local districts remain responsible for curriculum development, and its districts face penalties for failure to meet state-determined adequacy standards.[286] In addition, the state

279 *See supra* Part III.A.

280 *See supra* notes 270-71 and accompanying text.

281 *See supra* Part III.B.1(b).

282 *See supra* Part III.A; Part III.B.1(b).

283 H.B. 117, 1999 Gen. Ct., 156th Sess. (N.H. 1999). The legislature acknowledges that "[t]here is no single, empirically correct method of establishing the cost of an adequate education," but finds that "school districts that have 40 to 60 percent of students scoring at or above the basic level on the NHEIAP tests are those districts that are meeting the relevant outcome expectations and are providing an adequate education." *Id.* ch. 17, § 1(V).

284 *See supra* note 283.

285 *E.g., Question: Is New Hampshire Raising Enough for School Spending?*, WALL. ST. J.-NEW ENG., Aug. 11, 1999, *available at* 1999 WL-WSJ 5464092.

286 For example, if a district fails to meet "quality standards" set forth by Act 60 (included measures of things such as reading proficiency, access to current technology, community support and early care) for two consecutive two-year assessment periods, the Commissioner of Education may recommend technical assistance from the state, adjust-

encourages local districts to be innovative and self-promoting.[287] Vermont's per-pupil state spending is $5282,[288] unsurprisingly higher than New Hampshire's because Vermont equalizes more of the costs of education.

C. Suggestions for Further Reform

1. *Generating Additional Funds*

Successful education finance reform in New Hampshire and Vermont requires the generation of additional funds.[289] Prior to New Hampshire's reform litigation, critics cited the underfunding of the then-current program[290] as a primary cause of education inadequacy.[291] Therefore, it is unlikely that New Hampshire and Vermont will improve the adequacy of the education they offer their students unless they increase the amount of money dedicated to financing education.

One indicator of adequacy is spending per pupil.[292] A national comparison of per-pupil education spending (from both state and local sources) ranked New Hampshire thirty-third and Vermont forty-fifth for per-pupil expenditures.[293] Data from another source reflect

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ment of the superintendent's responsibilities, state assumption of administrative control of the district, or closing the school and requiring the district to pay tuition to another district. VT. STAT. ANN. tit. 16, § 165(a)-(b) (Supp. 2000).

287 Districts may apply for up to $50,000 in "Challenge to Excellence" grants, awarded for the financing of proposals to "promote quality education for all students within the school" or "create educational opportunities for students" through "special classes and activities; mentorship; summer institutes on math, science, reading and language arts, social studies, service, the arts or technology; partnerships for learning with businesses, post-secondary institutions and community organizations; tutorials; programs for at-risk or gifted students; guidance, peer counseling, and career planning activities." *Id.* § 215(b)(2)-(3).

288 Act 60's transitional provisions set the block grant amount at $5000 per pupil, adjusted upward based on the "appropriate annual index for state and local government purchased of goods and services." *Id.* § 4011 (transitional provision). In fiscal yeaer 1999, the adjusted amount was $5282. VERMONT LEAGUE OF CITIES AND TOWNS, EDUCATION FINANCE FEATURES OF ACT 60, AS AMENDED (July 15, 1998), *available at* http://www/act60.org/vlct_doc.htm.

289 *See* John Augenblick, *The Role of State Legislatures in School Finance Reform: Looking Backward and Looking Ahead, in* STRATEGIES FOR SCHOOL EQUITY: CREATING PRODUCTIVE SCHOOLS IN A JUST SOCIETY 89, 95 (Marilyn J. Gittell ed., 1998). Augenblick lists several factors as crucial to successful legislative remedies, including the stimulus of litigation, availability of new funds, legislative leadership, efforts to inform the public, and reliance on technical expertise. *Id.* at 94-97; *see also* Thunberg, *supra* note 274, at 1006-09 (describing recent studies finding correlation between economic resources and academic performance). *But see* Ryan, *supra* note 220, at 538-41 (downplaying the importance of monetary remedies).

290 New Hampshire distributed Foundation Aid based on calculations using the Augenblick formula. *See supra* note 69.

291 *See* Thunberg, *supra* note 274, at 1017; Interview with Andru Volinsky, *supra* note 67.

292 *See* Jerald, *supra* note 171, at 65.

293 *Id.* at 82 tbl.

New Hampshire's willingness to increase total spending on education at a faster rate than Vermont.[294] However, these increases take into account both state and local district education expenditures. Consider the comparison between total per-pupil education expenditures and each state's share of that amount. New Hampshire's adequacy grant formula worked out to a guaranteed $4220 per pupil in 1999,[295] while the per-pupil expenditures including local districts' expenditures is estimated at $7046 per pupil.[296] Thus, the state of New Hampshire contributes only 60% of the cost of an adequate education, which finds the state ranked only thirty-third nationally.[297] Vermont's block grant per pupil in 1999 worked out to be $5282,[298] compared to its total per-pupil expenditure of $6680,[299] making the state responsi-

294 *See* LENA M. MCDOWELL, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., EARLY ESTIMATES OF PUBLIC ELEMENTARY AND SECONDARY EDUCATION STATISTICS: SCHOOL YEAR 1998-99, at 3 tbl.1, 4 tbl.2, 5 tbl.3, 6 tbl.4, 7 tbl.5 (1999). McDowell reported the fifty states' total education expenditures and total student memberships for the fiscal years 1995 to 1999. *Id.* From this data, I calculated the total per-pupil expenditures and the rate of increase from year to year. As the following chart illustrates, New Hampshire's percentage increase in total per-pupil education funding increased in the fiscal years following *Claremont II*; while Vermont shows no such trend following *Brigham*:

TABLE 2

	Fiscal Year	Total Expenditures (McDowell, table 5)	Total Membership (McDowell, table 1)	Total Per-Pupil Expenditure (Expenditure/ Membership)	% Increase
New Hampshire	1995	$1,053,966,000	189,319	$5567	—
	1996	$1,114,540,000	194,171	$5740	3%
	1997*	$1,173,958,000	198,308	$5919	3%
	1998	$1,309,171,000	201,629	$6493	8.8%
	1999	$1,370,542,000	194,512	$7046	7.8%
Vermont	1995	$ 665,559,000	104,553	$6366	—
	1996	$ 684,864,000	105,565	$6487	1.9%
	1997**	$ 718,092,000	106,341	$6753	3.9%
	1998	$ 707,083,000	105,984	$6672	-1.2%
	1999	$ 704,331,000	105,442	$6680	0.1%

* *Claremont II* decided.

** *Brigham* decided.

295 *See supra* note 228 (discussing New Hampshire's formula for determining adequacy grant amounts); Geeta O'Donnell Anand, *Claremont's Victory in School Suit Has Come with a Very High Price*, WALL ST. J.-NEW ENG., Dec. 1, 1999, *available at* 1999 WL-WSJ 24923978 (reporting that the adequacy grant amount in fiscal year 1999 was $4220, "37% below the average cost of educating a child in the state").

296 *See supra* note 294 tbl.2.

297 *See supra* note 293 and accompanying text.

298 *See supra* note 288.

299 *See supra* note 294 tbl.2.

ble for 79% of the total per pupil expenditures—a total that is forty-fifth among all fifty states.[300]

For the states to guarantee higher spending per pupil, they must expand their revenue sources. One study predicts that for the state to fund the entire cost of adequate education in New Hampshire solely through the statewide property tax, it would have to increase the rate from $6.60 per $1000 to $15 per $1000.[301] Economists believe that increased reliance on statewide property taxes may have the unintended effect of deterring economic growth in both the business and real estate sectors.[302] Therefore, increasing or implementing other broad-based taxes, such as an income tax or sales tax, politically unpopular as they may be, are preferable methods of generating additional revenue.

2. *Improving Equity*

Equity is not only a judicial mandate arising from the *Claremont* and *Brigham* decisions, it is also a necessary public policy. Excessive reliance on local school districts to fund education appears increasingly misplaced given trends in American demographics. An increasing proportion of the population is elderly[303] and the number of families with school-age children is declining.[304] These trends translate into fewer numbers of citizens willing to vote for education spending at a local level,[305] which threatens to increase education funding

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300 *See supra* note 293 and accompanying text.

301 *See* Shapiro et al., *supra* note 275, ¶ 15.

302 *See id.* Donor towns that raise local property taxes in an effort to compensate for their statewide property tax liability will deter economic growth of their local businesses. *See id.* A statewide property tax disrupts the real estate market through capitalization, which is "the general phenomenon whereby a stream of services or costs affects the value of an asset." *Id.* ¶ 72. For example, higher taxes reduce property values, while proximity to better schools increases property values. Shapiro and her coauthors predict that the market disruptions caused by capitalization will make it difficult for homeowners to access the capital they need to purchase homes. *Id.* ¶ 117. This in turn will have a negative impact on the real estate market and in turn may reduce the state's overall property tax base. *Id.* ¶ 118.

303 *See* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1997, at 48 tbl.47 (117th ed. 1997) (reporting that the number of persons aged sixty-five or older was 25.5 million in 1980, but is projected to increase to 34.7 million in 2000).

304 *See* NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 1996, at 25 tbl.17 (1997) (reporting that married-couple families with their own children under 18 represented 41.9% of all families in 1980, 37.5% of all families in 1990, and 36.6% of all families in 1994).

305 Robinson, *supra* note 5, at 509 ("An aging population is likely to be less concerned about schools and more concerned about public goods that are important to them.") Robinson points out that both public choice theory and empirical data support the disinclination of the elderly and families without school-age children to support public schools. *See id.*

disparities among communities. Thus, it is increasingly important to equalize education funding at the state level.

Given the Vermont Supreme Court's explicit recognition of the importance of equity in its education finance system,[306] it is not surprising that the Vermont state legislature incorporated elements of fiscal neutrality, horizontal equity, and vertical equity into its tax structure.[307] New Hampshire has only begun to foster tax equity by reducing reliance on local property taxes to fund education.[308] Research indicates that both states have much to strive for in terms of equity.[309] A national comparison of states' education spending patterns found a 17.5% differentiation in per-pupil expenditures among districts in New Hampshire, the third highest percentage of all the states.[310] Vermont fared slightly better; its 16.2% differentiation placed it sixth highest nationwide.[311] While this study used pre-1998 data[312] and therefore does not reflect both states' most recent efforts to improve equity among districts, it should signal to both states how far there still is to go. Moreover, both states can increase horizontal equity by equalizing more of the costs of education and limiting the extent to which districts can raise additional funds.

3. *Texas-style Alternatives to Recapture*

Though recapture has allowed Vermont to attain substantial equity, it is a politically unpopular device because school districts view recapture of revenue as state encroachment on local control of public schools.[313] In Texas, the legislature made the bitter pill of recapture easier to swallow by giving districts the power to choose the means by which they would support education statewide.[314] The Vermont legislature ought to consider alternative methods of inducing districts to contribute a portion of the revenue raised above the block grant entitlement. Districts given the option to purchase attendance credits, contract with students from other districts, submit commercial real estate for attachment, or consolidate districts and/or property tax ba-

306 *See* Brigham v. State, 692 A.2d 384, 390 (Vt. 1997) ("While we recognize that equal dollar resources do not necessarily translate equally in effect, there is no reasonable doubt that substantial funding differences significantly affect opportunities to learn.... Money is clearly not the only variable affecting educational opportunity, but it is one that government can effectively equalize.").

307 *See supra* Part III.B.

308 *See supra* Part III.A.

309 *See supra* Part IV.A.

310 *See* Jerald, *supra* note 171, at 67 tbl.

311 *See id.*

312 *See id.*

313 *See* Edwards, *supra* note 16, at 34.

314 *See* Farr & Trachtenberg, *supra* note 151, at 679.

ses might more readily accept their obligation to contribute to statewide education.[315]

4. *Increasing Reliance on Performance Indicators*

Had New Hampshire's legislative reform paralleled the reform acts of Kentucky and Massachusetts in the same way that *Claremont* paralleled *Rose* and *McDuffy*,[316] New Hampshire also would have implemented the strong accountability measures now considered a key to successful education reform.[317] As noted above, assessment indicators demonstrate improvement in Kentucky and Massachusetts school systems.[318] Other states, like Texas, have also implemented strong accountability measures, and these states document improving scores on national indicators.[319] *Education Week* magazine, in its yearly "Quality Counts" issue, reports that Kentucky and Texas are among the "handful" of states whose students have consistently improved their reading and mathematics scores on the National Assessment of Educational Progress, due in large part to their comprehensive legislative reform, including accountability measures.[320] It is thus imperative that New Hampshire follow the lead of Kentucky, Massachusetts, and Texas, as well as its neighbor Vermont, by holding school districts accountable for the success of their students on performance indicators, either through systems of rewards or sanctions.

5. *Earmarking State Funds for Education*

The potential downside of shifting education funding from local to state sources is a diminished incentive for local taxpayers to invest in education.[321] Taxpayers with school-aged children have obvious incentives to vote for higher property tax rates under uncapped, unequalized property-tax-based education finance systems.[322] Taxpayers

315 *See id.*

316 *See* Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1359 (N.H. 1997) ("Claremont II").

317 *See, e.g.*, Kelly, *supra* note 119, at 408 ("KERA appropriately includes two accountability mechanisms that encourage substantive change."); *id.* at 412-13 (heralding MERA's assessment programs and school accountability for students' performance as "capable of improving the quality of education in poor districts").

318 *See supra* Part II.B.1-2.

319 *See supra* note 171 and accompanying text.

320 *See* Jerald, *supra* note 171, at 62. Jerald includes Kentucky and Texas in a small list of states that he considers to be "pace-setters in education policy," and notes that they "consequently also score near the top on the *Quality Counts* indicators." *Id.* Attributing one measure of success to specific accountability measures, Jerald goes on to discuss Texas's minority student success in testing: "That kind of progress [does not] happen by accident. Texas remains the only state to hold schools accountable for helping poor and minority students meet the same achievement benchmarks as their peers." *Id.*

321 *See* McUsic, *supra* note 114, at 112.

322 *See id.* at 113.

without school-aged children also have similar incentives because their property value increases with the quality of the local schools.[323] At the state level, the education lobby depends on these kinds of incentives for its strength and its ability to defeat competing special interest groups.[324] This problem is particularly threatening in New Hampshire and Vermont for two reasons. First, both states have historically been unresponsive to the education lobby regarding state appropriations for the state university systems.[325] Another is the strong "anti-tax sentiments" in both states, especially New Hampshire,[326] which compel state legislators to sacrifice education funds for tax cuts.[327]

To compensate for this potential problem, New Hampshire and Vermont should ensure that revenue generated in pursuit of equalizing education is earmarked for education. Both states should propose and ratify constitutional amendments to that effect. The New Hampshire state legislature has considered, but not yet adopted, a constitutional amendment that would invest the revenue generated from its statewide property tax in an education trust fund and restrict its use to the financing of public education.[328] Provisions of this kind would serve to protect education revenue from competing special interests and ensure the long-term success of education reform.

CONCLUSION

State legislatures attempting to comply with state supreme court mandates to reform their education finance systems should strive to meet the demands of both adequacy and equity. Reform efforts in New Hampshire and Vermont demonstrate the potential for a dual response: while *Claremont* relied on the state education clause and *Brigham* relied on the state equal protection clause, both state legislatures have incorporated elements of adequacy *and* equity into their systems. The experiences of these two states suggest that regardless of the catalyst for reform, education reform can and should include elements of both equity and adequacy.

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323 *See id.*

324 *See id.*

325 New Hampshire ranks forty-ninth and Vermont fiftieth in the nation for higher education funding. Peter Schmidt, *As Economy Chugs Along, States Pour Money into Higher Education*, CHRON. OF HIGHER EDUC., Dec. 17, 1999, *at* http://chronicle.com/government.

326 New Hampshire has neither an income tax, nor a sales tax and instead relies on "sin" taxes on liquor and cigarettes, room and meals taxes, gasoline taxes, and business profits taxes. *See* Thunberg, *supra* note 274, at 1013. Only one other state, Alaska, has neither a sales tax nor an income tax. *See* Norma Love, *Legislature Approves School Financing Compromise*, ASSOCIATED PRESS, Apr. 29, 1999, *available at* WL APWIRES 16:09:00.

327 *See* McUsic, *supra* note 114, at 113.

328 *See* Constitutional Amendment Con. Res. 10, 156th Leg. (N.H. 1999).

States like New Hampshire and Vermont, which meet their respective supreme court mandates by implementing an equalized statewide property tax rate, impose a measure worthy of replication because statewide property taxes ensure the fiscal neutrality, or proportional effort, of state taxpayers. However, from a policy standpoint, New Hampshire and Vermont demonstrate that states implementing such measures must strive to ensure horizontal equity and reduce the discrepancies between total per-pupil expenditures among districts. It is no longer constitutionally or politically acceptable for a state to delegate the lion's share of its responsibility to provide education to local districts that vary in ability and willingness to finance education.

Whether a state is in the initial stages of implementing court-mandated reform, or whether it has been in the process for decades, modern reform should incorporate the lessons of the last thirty years of reform efforts in sister states. For instance, as Texas's reform demonstrates, recapture is not the only way to ensure horizontal equity and reduce funding disparities among school districts. States like New Hampshire and Vermont, or those looking to their experiences for guidance, should experiment with district consolidation, attachment, attendance credits, and contracting with students from other districts. They should also take steps to alleviate "local control" issues by allowing districts to choose the method by which they will contribute to equalized state education funds.

As for adequacy, increasing state-guaranteed per-pupil expenditures is one way to ensure that schools have access to the funds they need to retain quality teachers, implement curriculum reform and accountability measures like those of Kentucky and Massachusetts, construct and maintain schools, and meet the expenses of students with special needs. Generating additional funds in the form of new or increased taxes, as well as earmarking those funds raised for education, are also necessary reform measures. Furthermore, to ensure efficient use of funds, states with systems like New Hampshire's should hold districts accountable for the success of their students.

States have always regarded education as an essential component of a successful democratic system of government.[329] However, in most states, it took judicial efforts to catalyze legislative reform efforts and encourage legislators to reiterate their states' commitment to education. Though most states required judicial efforts to catalyze legislative reform and encourage legislators to reiterate their states' commitment to education, successful reform requires state legislatures' continued dedication. If New Hampshire and Vermont are, in

329 State constitutions' education clauses demonstrate the importance of education. *See supra* notes 49-54.

Governor Shaheen's words, "guided by common sense and dedication to our children's futures,"[330] they can ensure that their initial measures of reform are not the final steps towards serving quality education for all students of both states, and that over time New Hampshire and Vermont will emerge as models for education reform in other states.

330 New Hampshire Governor Jeanne Shaheen, State of the State Address (Jan. 7, 1998).