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Spring 2010

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Recommended Citation
41 U. Tol. L. Rev. 545 (2010)

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# WHEN ENOUGH ISN'T ENOUGH: QUALITATIVE AND QUANTITATIVE ASSESSMENTS OF ADEQUATE EDUCATION IN STATE CONSTITUTIONS BY STATE SUPREME COURTS

*Amy L. Moore*[*]

## I. INTRODUCTION

> [E]ducation is the silver bullet. Education is everything. We don't need little changes, we need gigantic, monumental changes. Schools should be palaces ... [S]chools should be incredibly expensive for government and absolutely free of charge to its citizens, just like national defense. That's my position. I just haven't figured out how to do it yet.[1]

THE one truth about domestic educational policy that almost every American can agree on is that education in the United States is not where it should be.[2] Statistics come in on all sides exposing how poorly American children perform compared to children in the rest of the world.[3] The

[*] Assistant Professor of Law, Thomas Goode Jones School of Law, Faulkner University. Thanks to Professor Lisa Bernstein and Professor Gerald Rosenberg for allowing me the proper forum to create this article. Special thanks to Leigh Moffett for always being my inspiration in the area of education (and everything else) and to Stephanie Stephens for all of her hard work as my research assistant through the editing phase.

1. *The West Wing*: *Six Meetings Before Lunch* (NBC television broadcast, Apr. 5, 2000).

2. As recently as August of 2009, 89% of Americans polled were less than completely satisfied about the quality of education students receive in kindergarten through grade twelve in the United States today. Gallup, Aug. 2009, *available at* http://www.gallup.com/poll/1612/Education.aspx (last visited Apr. 23, 2010).

3. *See, e.g.*, MICHAEL O'MARTIN ET AL., TRENDS IN INTERNATIONAL MATHEMATICS AND SCIENCE: TIMSS 2007 STUDY INTERNATIONAL SCIENCE REPORT: FINDINGS FROM IEA'S TRENDS IN INTERNATIONAL MATHEMATICS AND SCIENCE STUDY AT THE FOURTH AND EIGHTH GRADES 34-35 (2008) (placing the United States eighth in science performance in the fourth grade behind Singapore, Chinese Taipei, Hong Kong, Japan, Russia, Latvia, and England and as ranking eleventh in science performance for the eighth grade behind Singapore, Chinese Taipei, Japan, Korea, England, Hungary, the Czech Republic, Slovenia, Hong Kong, and Russia); MICHAEL O. MARTIN ET AL., TRENDS IN INTERNATIONAL MATHEMATICS AND SCIENCE STUDY: TIMSS 2007 INTERNATIONAL MATHEMATICS REPORT: FINDINGS FROM IEA'S TRENDS IN INTERNATIONAL MATHEMATICS AND SCIENCE STUDY AT THE FOURTH AND EIGHTH GRADES 34-35 (2008) (placing the United States eleventh in math performance in the fourth grade behind Hong Kong, Singapore, Chinese Taipei, Japan, Kazakhstan, Russia, England, Latvia, the Netherlands, and Lithuania and as ranking ninth in math performance in the eighth grade behind Chinese Taipei, Korea, Singapore,

major piece of education legislation from the last administration, the No Child Left Behind Act, however, has faced mostly scathing criticism and has shown little in the way of results.[4] Thus, it is no wonder that the above quotation is so resonant, in spite of the fact that it comes from a fictional politician working in an imaginary White House.

What does it take to educate a child in America today? How many dollars are necessary to produce a citizen who can participate in domestic and world affairs with an easy knowledge of the world? How many light bulbs are necessary for such an education? How many roof tiles? How many pencils or pieces of loose-leaf paper?

Additionally, what kind of curriculum is necessary to complete a child's education? Can a child be educated without ever tackling trigonometry problems, memorizing lines from Shakespeare, attempting to test a hypothesis in a chemistry experiment, or playing a musical instrument? How do we measure education? Is it all about the end result or is it how the system is created from the beginning?

These are the very questions state supreme courts and legislatures are struggling with across the country. People may ask, "if education is so vital and its failure is such an epidemic, where is the national solution?" The trouble with such a question is that education problems should not necessarily be addressed by a national solution.[5] When it comes to controlling issues like funding and curriculum, state and local school districts have most of the power over education, and these districts cannot and should not use a one-size-fits-all solution.[6] In the process of creating and maintaining an education system, states have dealt with a myriad of different educational issues, ranging from funding to accreditation standards to compulsory attendance.[7] Recently, there has been an emerging wave of litigation forcing states, and their supreme courts, to deal with

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Hong Kong, Japan, Hungary, England, and Russia); PROGRESS IN INTERNATIONAL READING LITERACY STUDY: PIRLS 2006 TECHNICAL REPORT 187 (Michael O. Martin et al. eds., 2007) (placing the United States fourteenth in reading achievement in the fourth grade behind Russia, Hong Kong, Singapore, Luxembourg, Italy, Hungary, Sweden, Germany, the Netherlands, Belgium, Bulgaria, Denmark, and Latvia).

4. *See generally, e.g.*, Adam Lichtenheld, Opinion, *Bush Education Policy Leaving Many Behind*, BADGER HERALD (Wis.), Apr. 26, 2006 (discussing the inadequacies of the No Child Left Behind Act); 'NO CHILD LEFT BEHIND' CRITICISM WIDESPREAD (NPR radio broadcast, Apr. 19 2004), *available at* http://www.npr.org/templates/story/story.php?storyId=1842214 (last visited Mar. 22, 2010); Claudia Wallis & Sonja Steptoe, *How to Fix No Child Left Behind*, TIME, June 4, 2007, http://www.time.com/time/magazine/article/0,9171,1625192,00.html (last visited Mar. 22, 2010).

5. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (observing that "education is perhaps the most important function of state and local governments").

6. *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities.").

7. *See* Avidan Y. Cover, Note, *Is "Adequacy" a More "Political Question" than "Equality?" The Effect of Standards-Based Education on Judicial Standards for Education Finance*, 11 CORNELL J.L. & PUB. POL'Y 403, 405 (2002); Howard O. Hunter, *"Curriculum, Pedagogy, and the Constitutional Rights of Teachers in Secondary Schools,"* 25 WM. & MARY L. REV. 1, 13 (1983) (noting that the Supreme Court "acknowledged the power of states to enact compulsory attendance laws, set accreditation standards, and establish the general curriculum").

the idea of adequate education, or rather, of how much education states are constitutionally required to provide to their citizens.[8]

Education literature suggests three waves of education litigation, which are separated into time periods and different focuses.[9] This article delves into the third, most recent, wave of education litigation and all that this wave has unearthed. State supreme courts analyze the adequacy clauses in state constitutions under both quantitative and qualitative rubrics, but they mainly focus on approving or disapproving the work of the state legislatures.[10] In other words, while the legislatures draw the lines in the sand, the courts merely tell them when they have gone too far or not far enough. Currently, courts are working at the limit of their judicial power and state legislatures must take up the burden to correctly execute the demands of their constitutions.[11]

In order to understand this assertion, this article first presents the idea of adequacy as an abstract concept: what does an "adequate education" mean theoretically and practically? Next, this article recounts the history of the U.S. Supreme Court and state supreme courts taking action in this area of education and summarizes their conclusions. Finally, this article concludes that while most state supreme courts focus heavily on quantitative numbers and formulas for funding—a rubric that may frustrate rather than embolden state legislatures—courts are helping to alleviate the education crisis to the full extent of their power. Simply put, courts can do no more.

This issue is so important because the citizens who are hungry for change in the educational system may be asking the wrong questions. History shows us that advocates for change focus primarily on issues of equality and money, never stopping to ask what will be done with the equal money once received.[12] The issues in education require solutions far more complex than giving any particular school a few more dollars.[13] America needs to concern itself with things like the

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8. *See infra* Appendix A for a list of such cases between 1989 and 2009.

9. *See* Anna Williams Shavers, *Rethinking the Equity vs. Adequacy Debate: Implications for Rural School Finance Reform Litigation*, 82 NEB. L. REV. 133, 137 (2003).

> The waves are typically described as a first wave consisting of equality claims including reliance upon the Federal Equal Protection Clause of the Fourteenth Amendment, a second of equality claims based upon the state equal protection clauses, and the third and present wave of adequacy claims based upon state education constitutional claims.

*Id.*

10. *See* Roosevelt Elementary Sch. Dist. v. Bishop, 877 P.2d 806, 815 (Ariz. 1994).

11. *See, e.g.* Cover, *supra* note 7, at 412, with a parallel to finance issues ("Judicial action in education finance elicits questions of legitimacy because decisions of education financing are viewed as the province of the legislature.").

12. *See generally* Dan Lips et al., *Does Spending More on Education Improve Academic Achievement?*, BACKGROUNDER (The Heritage Found., Wash. D.C.), Sept. 8, 2008, http://www.heritage.org/Research/Reports/2008/09/Does-Spending-More-on-Education-Improve-Academic-Achievement.

13. *Id.*

> Simply increasing government spending on education may no longer be a viable option for federal and state policymakers. Furthermore, as this paper demonstrates, simply increasing education spending does not appear to improve American students' academic achievement.

qualifications of our teachers, getting parents involved, and the opportunities offered to our children.[14] Money may help make many of these things possible.[15] Yet, by focusing on squeezing each dollar out of our governments, rather than focusing on the best use of those dollars and the need for additional policy, it is no wonder that citizens can spend many decades in these cases spinning their wheels.[16] This article exposes that fact: courts are working at their maximum capacity to approve and disapprove funding plans and education reform needs a new focus and a new shape.[17] Citizens need to understand what "adequate education" means, and they must know what to ask for and who to ask for that ever elusive answer.

## II. LOGICAL UNDERSTANDINGS OF ADEQUACY

### *A. Adequacy in Definitional Tangles*

What does an "adequate education" comprise? Since its inception as a legal tool, this concept has baffled not only courts, but also educational professionals and legislatures alike.[18] While this article makes no attempt to pin down a neat and tidy definition of adequacy, it does seek to discover the possible facets such a definition might entail. Grasping the abstract concept of adequacy is an analytical prerequisite to understanding the legal battles that have been taking place in America's schools.

From a purely academic definitional standpoint, the dictionary defines adequate as "lawfully or reasonably sufficient ... for a specific requirement ... or

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To improve learning opportunities for American children, policymakers should refocus on allocating resources more efficiently and effectively.

*Id.*

14. *Id.* at 8 ("State policymakers should implement systemic education reforms that improve resource allocation and encourage effective school leadership, such as expanding school choice options for families and attracting and retaining effective schoolteachers.").

15. *See id.*

16. *Id.*

17. *See generally* Eric A. Hanushek, *The Alchemy of "Costing Out" an Adequate Education* (paper prepared for Adequacy Lawsuits: Their Growing Impact on American Education (Kennedy Sch. of Gov't, Harvard Univ., held Oct. 13-14, 2005)), http://www.hks.harvard.edu/pepg/PDF/events/Adequacy/PEPG-05-28hanushek.pdf.

> This backdrop has led courts and legislatures to look for a scientific determination of the amount of spending by schools that would be adequate to achieve the state standards. Indeed there has been no shortage of consultants who are prepared to provide an analytical answer to what level of spending is required. This activity, dubbed costing out studies, has been conducted in over 33 states, and the demand for such analyses has only increased. Courts are willing to write the specific numbers of costing out studies into judgments, and legislatures come back repeatedly to these studies to guide their appropriations.

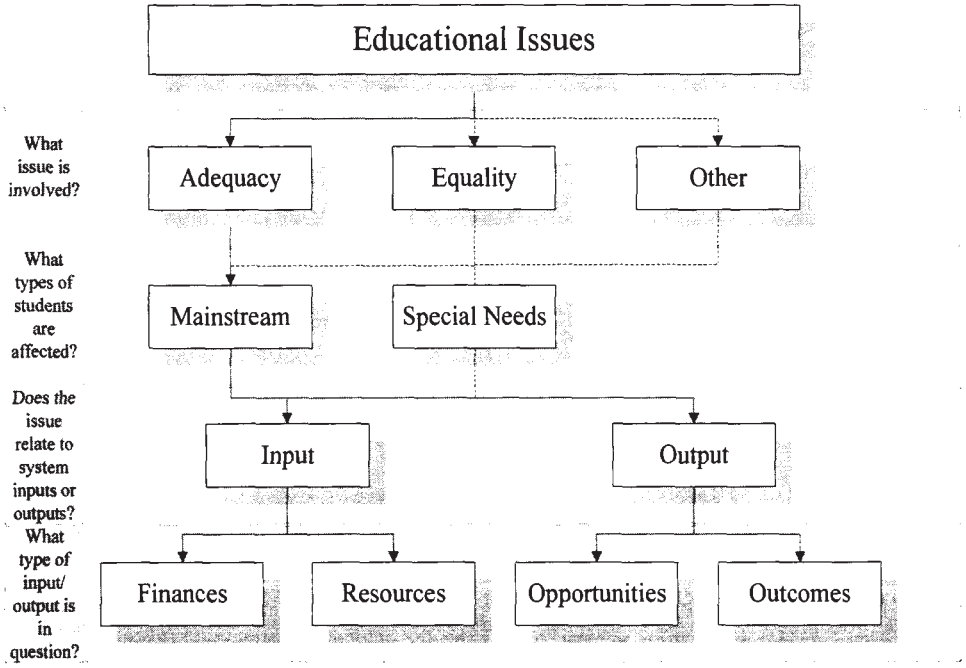
*Id.* at 4-5.

18. Esther Tron, *Adequate Education: Issues in Its Definition and Implementation* 12 (Office of Educ. Research & Improvement, Working Paper No. ED226489, 1982).

satisfactory."[19] This definition of the term grapples with the simpler understanding of being "enough."[20] An adequate education should be one that is enough for the children of America. But enough of what? Or more accurately, sufficient to what requirements?

Adequacy can be defined in four different arenas: finances, resources, opportunities, and outcomes. In an effort to organize the discussion on adequacy, Chart 1 provides a rubric to conceptualize how adequacy and equality can be broken down into these four categories. The solid lines direct the discussion of this article towards adequacy and the dotted lines indicate that other issues exist.

**Chart 1**




Educational issues, especially in the legal realm, center mainly around two ideas: equality and adequacy.[21] A third category has been added to this visual representation to symbolize issues outside of these two main concerns, which most assuredly do exist.[22] The "other" category encompasses things like parental

19. WEBSTER'S NEW COLLEGIATE DICTIONARY 150TH ANNIVERSARY EDITION 14 (1981).

20. Courts have similarly grappled with the bare concept of "enough." *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 89 (1972) (Marshall, J., dissenting) ("Neither the majority nor appellants inform us how judicially manageable standards are to be derived for determining how much education is "enough" to excuse Constitutional discrimination.").

21. *See* Cover, *supra* note 7, at 404-05 (discussing this concept in educational funding).

22. *See, e.g.*, Daria E. Neal, *Healthy Schools: A Major Front in the Fight for Environmental Justice*, 38 ENVTL. L. 473, 474 (2008) (discussing educational environment issues).

involvement or compulsory attendance laws; anything that does not directly relate to equality or adequacy, but is still an educational issue, would fit in this category.[23]

From that point, equality and adequacy alike can be broken apart to address their impact on two different groups of children: mainstream students and special-needs students.[24] The literature diverges in its treatment of these groups of children.[25] Special-needs children, whether their needs center around a mental, physical, or linguistic handicap, usually require a measure that is "appropriate" to their handicap.[26] Alternatively, mainstream children are generally fighting for a more generalized "adequate" or "equal" education.[27] This article makes no attempt to deal with the often divergent and sensitive issues of special-needs children and instead focuses on the definitions of adequacy for entire educational systems, which will benefit children in both groups. While the needs of these two groups are considered separately, they do have the same set of concerns at heart and it is possible to fold the chart back together and conceptualize the concerns as being split from a single branch into two areas: input and output.[28]

Input can be loosely defined as what is going into an educational institution and is usually represented by financial markers such as dollars per student or the amount of money going into a school in sum.[29] However, input can also encompass other resources such as teacher competency levels or the state of facilities.[30] Adequacy in the input arena can usually be conceptualized in terms

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23. *See, e.g., id.* (discussing the government's obligation to provide a healthy school environment).

24. *See* Mary C. Stablein, Note, *An IDEA Gone Out of Control:* Covington v. Knox County School Board, 45 HOW. L.J. 643, 643 n.1 (2002) (discussing the Individuals with Disabilities in Education Act). Special-needs students generally encompass both gifted children as well as those with learning, physical, or emotional disabilities. Allison M. Dussias, *Let No Native American Child Be Left Behind: Re-Envisioning Native American Education for the Twenty-First Century*, 43 ARIZ. L. REV. 819, 867 (2001) (explaining that tribal schools are more likely to serve students with special needs, a group including disabled and gifted students).

25. *Compare* Cover, *supra* note 7, at 403-04 (discussing "adequacy" of education within the context of educational finance), *with* MICHAEL IMBER & TYLL VAN GEEL, EDUCATION LAW 295-356 (1993) (discussing the history and law surrounding special education).

26. *See generally* IMBER & VAN GEEL, *supra* note 25, at 295-356 (explaining the history and basic legal principles behind appropriate education for special needs children in a variety of settings).

27. *See generally* Brian J. Nickerson & Gerard M. Deenihan, *From Equity to Adequacy: The Legal Battle for Increased State Funding of Poor School Districts in New York*, 30 FORDHAM URB. L.J. 1341 (2003) (discussing the shift in educational legal challenges from equity to adequacy); Anthony J. Christmas, Note, *Educated Fools from Uneducated Schools: Whether the No Child Left Behind Act Will Be an Effective Remedy to the Inadequate Funding of Inner City Urban Schools and Ultimately Improve the Education of Low-Income Blacks*, 6 RUTGERS RACE & L. REV. 177 (2004) (describing issues of educational inadequacy in inner city urban schools).

28. *See supra* Chart 1.

29. *See* Deborah A. Verstegen & Robert C. Knoeppel, *Equal Education Under the Law: School Finance Reform and the Courts*, 14 J.L. & POL. 555, 580 (1998) (citing Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989)).

30. *Id.*

of money—how much funding is adequate to satisfy the designated objectives of a constitution or a legislature?[31] Adequacy can also be measured as how much is enough in terms of resources.[32] A discussion of this nature focuses on the types of facilities and the number of teachers necessary to provide a substantively adequate education.[33] There is a logical difference then between adequate *funding* and a substantively adequate education requiring enough *resources* to sometimes defy the classification of mere input versus output. A court or legislature may adjust the funding scheme alone or may adjust the output required from a system and then be forced also to adjust the funding scheme to meet that goal.[34] The action taken to fix the problem depends on which piece of the system is being evaluated.[35]

Alternatively, equality comes into play for input when there is a vast disparity in the amount of money received by different districts due to property taxes or another funding scheme.[36] Most litigation has arisen over this issue: over money and its intersection with equity.[37] State supreme courts have primarily tasked funding schemes for not doing enough or not doing it fairly enough.[38]

Output, on the other hand, can be analyzed via an evaluation of educational access or opportunities available to students through different venues, such as programs, services, or facilities.[39] This concept is closely correlated to input because input is directly linked to available opportunities.[40] For example, a great curriculum set up by the state is an input into the system, but it also allows and directs students to learn, which is an educational opportunity, or output, for them.[41] The difference evolves when discussing funding for such initiatives, or rather, a child's access to these opportunities. In a very different sense, output can also be analyzed through educational outcomes by a standard created by the

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31. *See, e.g.*, Robinson v. Cahill, 303 A.2d 273, 277 (N.J. 1973); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d. 391, 397 (Tex. 1989).

32. *See, e.g.*, Judith A. Winston, *Achieving Excellence and Equal Opportunity in Education: No Conflict of Laws*, 53 ADMIN. L. REV. 997, 1010 (2001).

33. *See id.* at 1011.

34. Joy Chia & Sarah A. Seo, *Battle of the Branches: The Separation of Powers Doctrine in State Education Funding Suits*, 41 COLUM. J.L. & SOC. PROBS. 125, 141-42 (2007).

35. *See id.* at 130-36.

36. Laurie Reynolds, *Full State Funding of Education as a State Constitutional Imperative*, 60 HASTINGS L.J. 749, 749-50 (2009).

37. *See id.*

38. *See infra* Section IV-B.

39. *See, e.g.*, R. Craig Wood & George Lange, *Selected State Education Finance Constitutional Litigation in the Context of Judicial Review*, 207 EDUC. L. REP. 1, 7 (2006).

40. *See, e.g.*, Osamudia R. James, *Business as Usual: The Roberts Court's Continued Neglect of Adequacy and Equity Concerns in American Education*, 59 S.C. L. REV. 793, 795-96 (2008) ("[A]dequacy contemplates the relationship between educational inputs and educational outputs, and how the former affects academic achievement.").

41. *See* Preston C. Green, III, Bruce D. Baker, & Joseph O. Oluwole, *Achieving Racial Equal Educational Opportunity Through School Finance Litigation*, 4 STAN. J. C.R. & C.L. 283, 294-95 (2008).

legislature or court.[42] This could involve standardized testing or accreditation results, or even state board reviews; countless possibilities exist to measure how a school is doing.[43] The challenge for the legislature is to set up such standards and continue to monitor and enforce them according to its own guidelines. In any of these cases, whether a governmental body is examining adequacy or equity from an output or input standard or some combination thereof, there is another distinction to consider. Are they looking at opportunity or funding from the viewpoint of an individual child or from the viewpoint of a group of children? And if it is from the viewpoint of a group of children, is the group a school, school district, or some other class of children?

Because of this myriad of assaulting questions, adequacy of input or opportunity is often easier to quantify in terms of dollars or curriculum. These ideas depend more upon what the state designates as the overarching program. Even if the execution is extremely poor, the standards of "enough money" or "enough opportunity" may be met even if a particular student or group of students is disadvantaged in some other way. However, this is much harder to defend when an individual student or a group of students continue to fail basic outcome requirements. Failing outcomes are a clear sign that the system itself is deteriorating, whereas it is up to students or their parents to challenge opportunity denials or poor funding where issues may not be as readily apparent or as easy to prove. Nearly every available system for measuring educational output, whether it be standardized tests or accreditation standards, can be attacked as being inaccurate or faulty to an unacceptable degree.[44]

While it may be clear upon reflection that equity and adequacy are very distinct concepts, they sometimes overlap and are certainly linked. Many lines of argumentation assert that equality is a prerequisite for adequacy with regard to funding, as if the courts are saying, "let us make everyone equal before we decide what the minimum acceptable amount is supposed to be." A better approach would be adequacy first, or rather, "let us figure out what enough is supposed to be and then make sure that everyone has at least that much." Ensuring that everyone has a basic level of education ensures equity at a basic level and allows for an outgrowth of funding, support, or opportunity from a cognitive understanding in which every child is being educated.[45] It should be clear,

42. *See* Regina R. Umpstead, *Determining Adequacy: How Courts Are Redefining State Responsibility for Educational Finance, Goals, and Accountability*, 2007 BYU EDUC. & L.J. 281, 282.

43. *See id.*

44. *See* David W. Murray, *The War Against Testing*, 106 COMMENTARY MAG. 34 (1998); Semin Ngai, *Painting over the Arts: How the No Child Left Behind Act Fails to Provide Children with High-Quality Education*, 4 SEATTLE J. FOR SOC. JUST. 657 (2006); Andrea Rodriguez, *Revealing the Impurities of Ivory Soap: A Legal Analysis of the Validity of the Implementation of the No Child Left Behind Act*, 10 SCHOLAR 75 (2007).

45. *See* Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 175, 188 (Helen F. Ladd et al. eds., 1999).

however, that neither adequacy nor equality can be addressed independently of one another.[46]

Adequacy of education in a compact definitional form should ideally draw from all of these areas so that legislatures make programs or funding schemes that are *adequately* funded with *adequate* resources and provide *adequate* opportunities and a substantively *adequate* education to the children of their states.[47] Once legislatures and courts realize and internalize education as more than mere money going into the system, they will be saddled with the next part of the problem; they must determine exactly what adequacy means. How much is enough?

### *B. Literature Struggles with Adequacy*

With the meaning of adequacy already in so many knots and tangles from all of its logistically applicable areas, literature has attempted to provide order with different scholarly approaches and definitions. Educational professionals McDonald, Hughes, and Ritter, in an article titled "School Finance Litigation and Adequacy Studies," describe four different approaches to defining adequacy in terms of estimating the cost of an adequate education: "historical spending, econometric[s], professional judgment, and successful schools."[48] The "historical spending approach" simply uses the amount of money spent in previous years and adjusts this amount for inflation, which does not help if the past spending was inadequate in any way.[49] The econometrics approach "compares data on student performance with data on spending for a variety of factors" by utilizing complex statistical models and theories.[50] The professional judgment approach relies on a group of experts or educational professionals, such as teachers, administrators, and local finance personnel, to accurately deduce the needs of a model school district and how best to meet those needs.[51] The last approach, the successful schools approach, also referred to as the empirical method, is the most popular and looks to school districts that are "already achieving state standards to establish the cost of an adequate education."[52]

Such approaches hinge upon different understandings of what adequacy means. The econometrics and successful-schools approaches are tied mainly to outputs of educational outcomes, while historical spending focuses on just financial input.[53] The professional judgment approach can involve a combination

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46. *See* EQUITY AND ADEQUACY IN EDUCATION FINANCE, *supra* note 45, at 2.

47. Minorini & Sugarman, *supra* note 45, at 188.

48. Janet D. McDonald, Mary F. Hughes, & Gary W. Ritter, *School Finance Litigation and Adequacy Studies*, 27 U. ARK. LITTLE ROCK L. REV. 69, 89-92 (2004).

49. *Id.* at 89.

50. *Id.* at 89-90.

51. *Id.* at 90.

52. *Id.* at 91.

53. *See id.* at 89-90.

of inputs and outputs if the professionals deem it necessary and there is no telling where professionals get their standards.[54]

In an article about manageable adequacy standards, William Dietz proposes that courts define adequacy via "existing standards."[55] He proposes using statutory expressions of aspirational goals or state school accreditation standards as a vehicle for broadly defining what adequacy means so that the legislature can use this meaning when creating more exact standards for meeting adequacy.[56] This approach differs from an approach in which the court defers entirely to the legislature or defines the standards for adequacy itself.[57] However, Dietz provides no rubric for courts to adjust these standards or reject them as insufficient.[58] In effect, he assumes that existing standards, having been decided, are already in place and legislatures must simply fulfill them.[59]

Josh Kagan offers a list of similar approaches that a court could take to measure adequacy: use existing standards, defer to the legislature entirely, make a court-approved list of required outputs, or make a court-approved list of required inputs.[60] Kagan's existing-standards approach is not much different from Dietz's use of the term, except that Kagan broadens it to use standardized tests or other measurements that a state currently has in play, adopting them as adequacy standards.[61] Instead of saying that education minimally requires that a school meet the standard for accreditation as Dietz would say, Kagan suggests that a state should use a state-wide exam already in use and assign it as a new measurement of adequacy based on educational outcome.[62] Alternatively, the court could avoid the question entirely, or make up its own list of what adequacy requires and submit the list to the legislature for execution.[63] Unlike Dietz, Kagan provides examples of what the court-defined standards might look like, as a laundry list of either outputs or inputs that the legislature must meet.[64]

These articles share a common theme, which also represents the feeling of the entire literature on adequacy standards. Courts and legislatures are generally confused over what adequacy should logically mean and even more confused about their exact obligations as a state government to provide such adequacy.[65] Tension also exists as to who has the authority to decide what adequacy means

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54. *See id.* at 90.

55. William F. Dietz, Note, *Manageable Adequacy Standards in Education Reform Litigation*, 74 WASH. U. L.Q. 1193, 1212-23 (1996).

56. *Id.* at 1212.

57. *Id.* at 1213.

58. *See id.* at 1215-19 (describing the range in which courts should operate without giving any specific guidance).

59. *Id.* at 1221.

60. Josh Kagan, Note, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2249-57 (2003).

61. *Id.* at 2249, 2251.

62. *Id.* at 2249.

63. *Id.* at 2248, 2251, 2254.

64. *Id.* at 2254-56.

65. *See generally, e.g.*, Dietz, *supra* note 55; Kagan, *supra* note 60.

when it is vaguely put in constitutional terms: the court or the legislature?[66] Authors want to give these governmental bodies a vehicle for definition, whether that vehicle is a broad goal-oriented definition, a funding formula, or something else entirely.[67] Logically, however, all of these definitions pull from input or output standards in some cross-combination or single-minded focus.[68]

With the stage set for the definitions of adequacy currently in existence and the confusion surrounding the meaning of this basic requirement, the next question must be how legal claims of inadequate education have fared and the possible legal reasoning that exists for asserting such claims. This article is primarily concerned with identifying the tangles and observing what state supreme courts have done to try and smooth their way into a legal solution.

## III. LEGAL BASES FOR ASSERTING ADEQUACY

Merely defining adequacy is insufficient, although doing so is far from a simple task. Citizens who want to claim inadequate education must assert that claim on a legally recognizable basis.[69] This section presents a chronology of asserted legal claims and a breakdown of federal and state claims.

Adequacy claims are new to the game of education litigation, at least nominally.[70] It is traditionally accepted that there are three "waves" of education litigation.[71] Equity claims dominated the first two waves of litigation, first in federal courts and then in state courts.[72] Only in the most recent (the third) wave of litigation has the focus begun to shift away from equality and more towards adequacy as the forerunner of educational concerns.[73] In the first wave of education litigation, claimants relied on the equal protection provisions of the Federal Constitution and crashed into the shore upon pronouncement of *San Antonio v. Rodriguez*.[74] The second wave re-shifted focus to the equal protection provisions of state constitutions and state education clauses.[75] As plaintiffs

66. *See id.* at 2241 ("Nearly every state constitution requires the state to provide its children with an education. Vaguely worded clauses require that this education be 'adequate.'").

67. *See generally* Dietz, *supra* note 55; Kagan, *supra* note 60.

68. *See, e.g.*, Dietz, *supra* note 55, at 1215 (output measures); Kagan, *supra* note 60, at 2255 (input measures).

69. William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 604 n.47 (1994) (noting that most contemporary cases involve questions of standing and adequacy of pleading).

70. *Id.* at 598-99.

71. *Id. See also* Shavers, *supra* note 9, at 137 (discussing the three waves of education litigation).

72. Thro, *supra* note 69, at 600-02.

73. *Id.* at 603 ("In ... the third wave ... instead of emphasizing equality of expenditures ... plaintiffs have argued that all children are entitled to an education of at least a certain quality ....").

74. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973) (noting that alleged discriminatory education financing at issue was "*sui generis* [and could not] be so neatly fitted into the conventional mosaic of constitutional analysis under the Equal Protection Clause").

75. *See, e.g.*, Robinson v. Cahill, 303 A.2d 273, 276 (N.J. 1973) (holding the discrimination at issue were "held to violate the equal protection mandates of the Federal and State Constitutions ...

experienced more success with state education clauses, the third wave has relied primarily on these clauses and the concept of adequacy.[76] Despite these advances, education decisions have never completely abandoned the idea of equity.

### *A. The First Wave: Federal Claims*

In *Brown v. Board of Education*, the Supreme Court declared that a sound education "is the very foundation of good citizenship ... [and i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[77] In 1973, the Court had the opportunity to consider the particular importance of education from a federal perspective.[78] The justices analyzed the solvency and legitimacy of Texas' educational funding scheme in *San Antonio v. Rodriguez*, concluding that the statute survived the rational basis analysis.[79]

The plaintiffs in *Rodriguez* asserted a federal equal protection claim against the Texas government, claiming that the children in question were not receiving equal educational opportunities simply because of class status.[80] This claim was grounded in the language of the Fourteenth Amendment, as well as other cases that had established what equal protection meant to the Court.[81] When an equal protection claim is asserted, the court must engage in a two-part analysis: first, what level of analysis or test does the case call for and, second, what results from the subsequent application of that test?[82] The levels of analysis available to the court range from "rational basis" review, where a state decision must only be rationally related to a legitimate state interest to satisfy the Court,[83] to "strict scrutiny," where a state decision must involve a compelling state interest that is narrowly tailored and necessary to achieve state objectives.[84] Strict scrutiny is considered a more stringent test—it is harder for the state to prove its case.[85] In deciding whether to apply strict scrutiny, the Court historically required plaintiffs to show that they were either representing members of a suspect class and/or that a fundamental right had been abridged by the state action in question.[86]

In *Rodriguez*, the district court found for the plaintiffs, agreeing that wealth was a suspect class and that education was a fundamental right.[87] This meant that

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[and] held also to violate ... provisions of the State Constitution relating to public education and to the assessment of real property for taxation ....").

76. *See* Thro, *supra* note 69, at 603.
77. 347 U.S. 483, 493 (1954).
78. *See generally Rodriguez*, 411 U.S. 1.
79. *Id.* at 54-55.
80. *Id.* at 4-6.
81. *Id.* at 6.
82. *Id.* at 16-17.
83. *Id.* at 17.
84. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973).
85. *Id.*
86. *Id.*
87. *Id.* at 18.

strict scrutiny applied and the Texas funding scheme could not continue.[88] The district court went even further than that, however, claiming that Texas would not only fail the strict scrutiny analysis, but also the rational basis test because of its actions.[89] Unfortunately for the district court, and for the plaintiffs, the Supreme Court disagreed with them on every count.[90] The Court found that wealth was not a suspect class, education was not a federal fundamental right, and that Texas would not fail rational basis analysis.[91] In other words, the funding scheme was rationally related to the legitimate state interest of education.[92] A review of these significant conclusions aids in understanding why education litigation has begun to reform itself in the context of adequacy.

Initially, the Court rejected wealth as a suspect class because such a designation ignored key threshold questions about vague definitions of "poor" and the absolute versus relative deprivation of education.[93] Previously, because of "impecunity," other suspect classes "were *completely* unable to pay for [a] desired benefit" and then sustained an "*absolute* deprivation of a meaningful opportunity to enjoy that benefit."[94] In *Rodriguez*, the Court concluded that these conditions had not been met.[95] Studies before the Court failed to prove that the poorest kids were *always* in the poorest districts, which meant that the poorest kids were not always part of the class in question.[96] Additionally, these children were not being *absolutely* deprived of education, but rather, only receiving less educational opportunity than their more affluent counterparts.[97] To the Court, equal protection did not require absolute equality or precisely equal advantages.[98]

In Texas' favor, it had established a "Minimum Foundation Program of Education" and provided twelve years of free education with books, teachers, transportation, and money to these kids.[99] Texas claimed that *every* child was receiving an adequate education.[100] As the plaintiffs provided no rebuttal to this argument, the Court believed the state on this point.[101] Additionally, finding no "traditional indicia of suspectness"[102] the Court proceeded to the next major argument.

According to the Court, education is not a fundamental right, but the Court took great pains to explain that this conclusion does not mean education is

88. *Id.* at 17-18.
89. *Id.* at 17.
90. *Id.* at 18, 55.
91. *Id.*
92. *Id.* at 44, 55.
93. *Id.* at 18-29.
94. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20 (1973) (emphasis added).
95. *Id.* at 22-25.
96. *Id.* at 23.
97. *Id.* at 25.
98. *See id.*
99. *Id.* at 6-8.
100. *Id.* at 87 (Marshall, J., dissenting).
101. *Id.*
102. *Id.* at 28.

unimportant.[103] Importance has no impact on the fundamental nature of a right.[104] Instead, such a designation is grounded in whether the right is explicitly or implicitly recognized in the Constitution and education is not.[105] The plaintiffs argued that education was a prerequisite to other fundamental rights, such as free speech or voting, but the Court rebuffed this argument.[106] The Court said that even if a prerequisite claim could be proven, Texas was meeting its obligation towards its children.

Once the Court decided that no suspect class existed and no fundamental right was in peril, the Court easily settled on the rational basis test as the appropriate tool for review.[107] The Court admitted it was not comprised of education experts, so deference was the theme of the day.[108] If Texas was providing a basic and adequate education to its children and disparities were not the product of a system so irrational as to be invidiously discriminatory, then there was nothing the Court could do in terms of relief.[109]

The most vigorous objections to the majority's conclusions came from the Marshall and Douglas dissent, which summarized the majority's decision as one allowing a state to "constitutionally vary the quality of education which it offers its children [with] the amount of taxable wealth ... in the school districts within which [the children] reside."[110] Marshall and Douglas derailed this as a retreat from the Court's "historic commitment to equality of educational opportunity" and offered up a manageable standard to measure equality, which looks at discrimination in the opportunity to learn that is afforded to a child.[111] Marshall and Douglas preferred such a standard because the equal protection standard is more suited to an analysis of equality as opposed to minimal sufficiency and no one had offered the Court a standard of how much education would be "enough" to excuse constitutional discrimination.[112] This is precisely the problem that occurs when equity is conflated with adequacy and the two are not regarded as distinct concepts. If everyone equally has nothing, this still may not be enough.

*Rodriguez* was a crushing blow to those marshalling equal protection claims on a federal level.[113] The Supreme Court admitted that it was unlikely that any state could pass strict scrutiny review, but the Court would not agree to apply such a review to matters of state educational funding schemes.[114]

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103. *Id.* at 29-40.

104. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973).

105. *Id.*

106. *Id.* at 35.

107. *Id.* at 104.

108. *Id.* at 42.

109. *Id.* at 54-55.

110. *Id.* at 70 (Marshall, J., dissenting).

111. *Id.* at 70-71, 84.

112. *Id.* at 88-89.

113. Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1, 9-10.

114. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17, 55 (1973).

Since *Rodriguez*, the Court has not reversed its stance, but it has, in the approximation of some critics, given credence to the possibility of change.[115] Almost ten years after *Rodriguez*, in *Plyler v. Doe*, the Court again dealt with Texas and claims that the state was not educating children that were illegal aliens.[116] Applying a familiar analysis, the Court considered whether the claim involved a suspect class or fundamental right.[117] The Court held that illegal alien children were not a suspect class and education continued to be a non-fundamental right, but Texas was still doing something wrong.[118] The Court commented that Texas' actions were "imposing a lifetime of hardship on a discrete class of children."[119] These children were not accountable for their disabling status and deprivation of education differed from deprivation of other governmental benefits.[120] As a result of this analysis, the court decided to impose a heightened level of scrutiny, more stringent than rational basis, but less than strict scrutiny.[121]

Just four years after *Plyler*, the court addressed similar funding claims made by Mississippi plaintiffs as to the inadequacy of the state's funding system and additional claims of inadequate education.[122] The court tossed out the adequacy claim as a legal conclusion, as opposed to a factual allegation that must be accepted as true.[123] For the equal protection claim, the court relied on *Rodriguez* and applied the rational basis test once again, remanding to the lower court.[124] However, the court noted a difference in this case: the court noted that Mississippi's funding decisions were attributable to a state decision to divide state resources unequally among school districts.[125] Two years after *Papasan*, the Court upheld a North Dakota statute creating disparities between school districts through a classification of reorganized and non-reorganized districts and refused to use either strict scrutiny or *Plyler*'s heightened scrutiny for special circumstances.[126] However, in *Kadrmas* the Court said that it was leaving open the question of whether deprivation of access to a minimally adequate education would violate a fundamental constitutional right.[127]

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115. *See* Greg Rubio, *Surviving* Rodriguez: *The Viability of Federal Equal Protection Claims by Underfunded Charter Schools*, 2008 U. ILL. L. REV. 1643, 1654.

116. 457 U.S. 202, 206 (1982).

117. *Id.* at 216-17.

118. *Id.* at 223.

119. *Id.*

120. *Id.* at 202-03.

121. *Id.* at 216-17.

122. Papasan v. Allain, 478 U.S. 265 (1986).

123. *Id.* at 286.

124. *Id.* at 283-92.

125. *Id.* at 288.

126. Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 451 (1988).

127. *Id.* at 466 n.1 (Marshall, J., dissenting) ("In prior cases, this Court explicitly has left open the question whether such a deprivation of access would violate a fundamental constitutional right .... That question remains open today.").

### B. *The Second and Third Waves: State Claims*

While the Supreme Court was and is still struggling with the questions posed in *Rodriguez*, the message is clear that it is extremely difficult for anyone to advance such a claim.[128] After the first wave of litigation abruptly crested with *Rodriguez*, and despite the subtle federal residual surges, a second and then a third wave of litigation grew in a rising tide of education litigation.[129] The second wave shifted focus from *federal* equal protection to *state* equal protection claims and the third wave added another layer of adequacy claims.[130]

The second wave saw its first real success in California in 1971 with *Serrano v. Priest*, which found relief for the plaintiffs not only under California's equal protection clause, but also under its education article.[131] The funding scheme was deemed inadequate because it relied on property taxes which discriminated unfairly against the poor.[132] However, most state equal protection claims failed for the same reason that federal equal protection relief had failed: the level of scrutiny applied for state action was low because education was not a fundamental right and the poor were not a suspect class.[133] The third wave began in 1989 and 1990 in states like Kentucky and New Jersey where it was claimed not only that funding was generally unequal, but also that the disparities in financial support resulted in children receiving inadequate educational opportunities.[134]

## IV. STATE CONSTITUTIONS AND STATE SUPREME COURTS ON THE ISSUE OF ADEQUACY

### A. *State Constitutions*

All fifty state constitutions include a provision relating to education and the role of the state in providing education.[135] Although every state constitution demands that the state make education available to its children, not every state elaborates on what type of education ought to be supplied.[136] In 1982, Martha McCarthy and Paul Deignan conducted a survey of constitutional language in an attempt to divine what would legally constitute an adequate public education.[137]

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128. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). *See also Kadrmas*, 487 U.S. at 450.

129. *See* Jeffrey S. Sutton, San Antonio Independent School District v. Rodriguez *and Its Aftermath*, 94 VA. L. REV. 1963, 1973 (2008). *See also generally* Thro, *supra* note 69.

130. *See generally* Thro, *supra* note 69.

131. 487 P.2d 1241 (Cal. 1971).

132. *Id.* at 1265.

133. *Id.* at 1250, 1255.

134. Thro, *supra* note 69, at 603.

135. *See* MARTHA M. MCCARTHY & PAUL T. DEIGNAN, WHAT LEGALLY CONSTITUTES AN ADEQUATE PUBLIC EDUCATION?: A REVIEW OF CONSTITUTIONAL, LEGISLATIVE, AND JUDICIAL MANDATES 120-26 (1982).

136. *See id.* (listing various state constitutional provisions).

137. *Id.* at 1.

McCarthy and Deignan found that in the early 1980s there was much rhetoric about adequacy, but little had been done in the way of tailoring programs or funding formulas towards that goal.[138] Their inquiry into the constitutional basis for adequacy is, however, helpful as a starting point.

Adequacy is a buzz word that includes many different constitutional phrases. Though states may define education as needing to be "thorough and efficient" or "sound [and] basic," educators and government officials discuss these ideas in the larger framework of adequacy.[139] In effect, an education must be adequate to meet specified constitutional goals.[140]

Looking purely at state constitutional text, three states require that education be "[h]igh [q]uality," four states require that it be "[a]dequate" or "[s]ufficient," and nine states require that it be "[s]uitable."[141] Fifteen states require the overall system to be "[u]niform," twelve states require that it be "[e]fficient," nine states require that it be "[t]horough," and ten states require that it be "[g]eneral."[142] There is disagreement as to whether the constitutional text discusses the system itself or the education inside that system, and obviously some of these requirements overlap.[143]

When the states that demand basic minimum educational requirements are compiled, those requiring an adequate, sufficient, suitable, or high quality education constitute only 30% of the states.[144] States that set some parameters for their educational system raise the number to over 50%.[145] Either compilation would be insufficient to institute some bold constitutional amendment adding education to the federal constitution even if all of those states could agree on one term or set of terms to describe their goals.[146]

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138. *See id.* at 94.

139. *See id.* at 120-26.

140. From now on in the article, when there is mention of adequacy, it is meant to include all such parallel terms.

141. MCCARTHY & DEIGNAN, *supra* note 135, at 120-26 (noting states requiring "high quality" include Illinois, Montana, and Virginia; states requiring "adequate" or "sufficient" include Florida, Georgia, New Mexico, and Wyoming; and states requiring "suitable" include Arkansas, California, Indiana, Iowa, Maine, Nevada, South Dakota, Texas, and Wyoming).

142. *Id.* at 120-27 (noting states requiring "uniform" include Arizona, Colorado, Florida, Idaho, Indiana, Minnesota, New Mexico, North Carolina, North Dakota, Oregon, South Dakota, Utah, Washington, Wisconsin, and Wyoming; states requiring "efficient" include Arkansas, Delaware, Illinois, Kentucky, Maryland, Minnesota, New Jersey, Ohio, Pennsylvania, Texas, West Virginia, and Wyoming; states requiring "thorough" include Colorado, Idaho, Maryland, Minnesota, New Jersey, Ohio, Pennsylvania, West Virginia, and Wyoming; and states requiring "general" include Arizona, Arkansas, Delaware, Idaho, Indiana, Minnesota, North Carolina, Oregon, South Dakota, and Washington).

143. *Id.* at 95.

144. *Id.* at 127 (Wyoming overlaps with suitable and adequate/sufficient, but is only counted once).

145. *See id.*

146. *See* U.S. CONST. art. V. Article V requires three-fourths of states to ratify a constitutional amendment. Thirty percent of states requiring adequate, sufficient, suitable, or high quality education, or fifty percent of states setting some parameters for educations system would not meet the three-fourths minimum of states required to ratify constitutional amendment.

### B. State Supreme Courts

Ambiguous constitutional language is nothing new, so an analysis must not only review constitutional text, but must consider constitutional interpretation as well.[147] The only viable method of gathering information from across all relevant states during this time period[148] is to search for all relevant state supreme court cases and subsequently review them.[149] Once this initial survey is completed to hone in on applicable entries, some core inquiries face each case.[150] For each case, the nature of the claim is categorized as an equal protection and/or an education clause claim and the court must identify the framework used to review each allegation.[151] The court's view of itself in relation to the legislature and its mandate to the state government is noted as well.[152] This mandate can range from a mere definition of an ambiguous constitutional term to a list of required inputs or outputs the legislature must incorporate into a new educational plan.[153]

This categorization and analysis presents problems because comparing court language, even language in different cases from the same court, can be difficult.[154] Additionally, courts may only make the minimum arguments necessary to render a decision and leave out logic that would be more helpful for direct comparisons to other cases or other courts.[155] While there is admittedly some room for error in this analysis, the results seem to overwhelmingly confirm that courts are dealing with this issue in vast numbers.[156] Moreover, there are strongly identifiable compare and contrast points that converge to show that states are on very different tracks when it comes to education.[157] In a final

147. *See* JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 3 (Greenwood Press 2001). *See also generally* Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255 (2002).

148. "This time period" refers to the third wave of litigation, from 1989 until at least 2009. *See* Thro, *supra* note 69, at 603.

149. The search was conducted through Westlaw, and key words were searched for in the cases. Adequate or adequacy had to appear in the same sentence as education in an opinion from a state's highest court within the specified dates (1/1/1989 through 12/31/2009). The resulting 638 cases were reviewed by overview to find cases that involved state constitutions and educational claims from state supreme courts. Eight-five cases were located in this search. These cases were then classified by state and reviewed in full. Appendix A contains a list of case names separated by state. Appendix B is attached with a core set of questions asked about each case. Appendix C is a example of the data collected. Only state supreme courts were included to ensure the finality and the highest possible level of review.

150. *See infra* Apps. B-C.

151. It is important to note here that while the search did fairly well to isolate cases for adequacy, there was a large overlap to cases that also dealt with equal protection claims. The analysis on the equal protection front is less complete, only because the search was not intended to capture all equal protection education cases.

152. *See infra* Apps. B-C.

153. *See id.*

154. *See infra* App. C at 49-53.

155. *Id.*

156. *See, e.g., id.* (listing cases discussing the adequacy of education, from select states).

157. *See, e.g.*, Mildred Wigfall Robinson, *Financing Adequate Educational Opportunity*, 14 J.L. & POL. 483, 489-90 (1998).

analysis, it is unclear if states would be able to agree on a single cohesive definition for adequacy, or even a correct standard of review for equality, on a national level.[158]

Three themes emerge from the review of these cases. The first theme is a dichotomy of judicial restraint contrasted with judicial interference.[159] While all of the courts willing to intervene still give much deference to the state legislature, the form of the intervention differs widely; courts will do everything from recommending specified outputs required by the new system to merely presenting self-divined definitions of adequacy.[160] This pivotal point of judicial action limits the court system as a whole.[161] Even a court that wants to be an activist in terms of this dichotomy will still *at the most* only lay out specified outputs and allow the legislature to formulate a plan to reach those outputs.[162] The court acts like a Roman emperor, giving the up or down sign to the tireless legislative gladiators trying to comport with constitutional mandates. While this kind of action is extremely frustrating for legislatures, courts have reached the limit of their action.[163] The second theme revolves around the sheer number of states that invoke funding as part of their analysis.[164] Courts focus on funding issues because that is the issue before them—the parents, students, and educators bemoaning educational systems are still caught up in the false idea that more funding will solve all of their educational woes.[165] The third theme involves how to deal with equal protection claims that come intertwined with adequacy arguments: what tests to use, what factors to consider, and whether education is a fundamental or even an important right.[166]

To provide some context as to how these themes play out in the data, it is important to look at the chronology of the litigation reviewed. Since 1989—the start of the third wave of education litigation—twenty-five different states have struggled with constitutional challenges to their education system.[167] Chart 2 shows that the litigation wave started slowly in the early 1990s, but by 1997,

158. *See, e.g.*, Lobato v. Colorado, 218 P.3d 358, 366 (Colo. 2009) (applying rational basis review to school funding scheme); Roosevelt Elementary Sch. Dist. v. Bishop, 877 P.2d 806, 811 (Ariz. 1994) (discussing, but not deciding, whether rational basis was the proper standard of review, since education was included in the state constitution, and was thus a fundamental right).

159. *Compare Ex parte* James, 836 So. 2d 813, 815-16 (Ala. 2002), *with* Rose Council for Better Educ., 790 S.W.2d 186, 212 (Ky. 1989).

160. Kagan, *supra* note 60, at 2243.

161. Thro, *supra* note 69, at 615.

162. *See, e.g.*, Patricia F. First & Barbara M. De Luca, *The Meaning of Educational Adequacy: The Confusion of* DeRolph, 32 J.L. & EDUC. 185, 202 (2003).

163. *Id.* at 185 (commenting on the "the Ohio Supreme Court['s] retreat[] from its long battle with the Ohio legislature" over the adequacy of school funding).

164. *See, e.g. Ex parte James*, 836 So. 2d at 815-16; Opinion of the Justices, 624 So. 2d 107, 112-14 (Ala. 1993).

165. First & De Luca, *supra* note 162, at 185-86.

166. *See* Elizabeth Reilly, *Education and the Constitution: Shaping Each Other & the Next Century*, 34 AKRON L. REV. 1, 14 (2000).

167. That is obviously 50% of the states, and this number does not include states that may have dealt only with equity educational issues via state constitutions. *See* Chart 2 *infra*.

lawsuits reached a record high.[168] Since then, litigation has been going strong.[169] Many states are listed in multiple years.[170] Either disgruntled plaintiffs have tried another angle[171] or the legislature is back in court reviewing its new or modified system to see if it can finally be deemed acceptable.[172]

**Chart 2**

| Educational Litigation Timeline | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| **1989** | KY | WI | | | | | | | **2** |
| **1990** | NJ | | | | | | | | **1** |
| **1991** | OR | | | | | | | | **1** |
| **1992** | | | | | | | | | **0** |
| **1993** | AL | ID | MA | MN | NE | NH | TN | | **7** |
| **1994** | AZ | CT | KS | ND | | | | | **4** |
| **1995** | ME | NY | RI | TN | WY | | | | **5** |
| **1996** | CT | FL | ID | IL | | | | | **4** |
| **1997** | AL | AK | AZ | NH | NJ | NC | OH | VT | **8** |
| **1998** | ID | NH | NJ | | | | | | **3** |
| **1999** | IL | PA | SC | | | | | | **3** |
| **2000** | AR | NH | NJ | OH | WI | | | | **5** |
| **2001** | OH | WY | | | | | | | **2** |
| **2002** | AL | AR | NH | NJ | OH | TN | | | **6** |
| **2003** | NY | | | | | | | | **1** |
| **2004** | AR | NC | | | | | | | **2** |
| **2005** | AR | ID | KS | MD | MA | NY | TX | VT | **8** |
| **2006** | KS | NH | NY | | | | | | **3** |
| **2007** | AR | NE | OK | | | | | | **3** |
| **2008** | NH | NJ | WY | | | | | | **3** |
| **2009** | CO | IN | MO | NJ | OR | | | | **5** |

With this chronology in mind, the first issue presenting itself is the confusion among state courts as to whether or not to intervene into education policy in the first place. Eight states declined to enter the debate either in whole or in part, claiming that setting educational policy, and even deciding if educational policy is constitutional, is a purely legislative decision.[173] These

168. *Id.*

169. *See id.*

170. *See id.*

171. *See* Claremont Sch. Dist. v. Governor (*Claremont III*), 725 A.2d 648, 649 (N.H. 1998).

172. *See* Lake View Sch. Dist. v. Huckabee (*Huckabee VII*), 257 S.W.3d 879, 883 (Ark. 2007) (concluding that "our system of public-school finance is not in constitutional compliance").

173. Alabama, Florida, Illinois, Indiana, Nebraska, Oklahoma, Pennsylvania, and Rhode Island. This equals 32% of the sample. *See Ex parte* James, 836 So. 2d 813, 818 (Ala. 2002); Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996); Bonner v. Daniels, 907 N.E.2d 516, 522 (Ind. 2009); Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 181 (Neb.

states made cases against intrusion largely because of stated beliefs that courts should not be defining adequacy.[174] The Illinois Supreme Court went so far as to say that "[t]o hold that the question of educational quality is subject to judicial determination would largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals in Illinois."[175] Florida declined to impose any definition of adequacy as well because no definition was given to them that was not too judicially intrusive.[176] Oklahoma acknowledged how vital education is to a society, claiming "[w]e ... are aware of the importance of an educated society to our system .... However, the important role of education in our society does not allow us to override the constitutional restrictions placed on our judicial authority."[177] If given a legislative definition of adequacy or constitutionally-required education, it is unclear whether these states would still be unwilling to determine whether a state met its own definition.[178]

Nebraska also declined to deal with the definition of adequacy question, noting that this is a political question best left to the legislature, and says that a "justiciable issue must be susceptible to immediate resolution and capable of present judicial enforcement. But courts have been unable to immediately resolve school funding disputes."[179] While these courts correctly state that setting educational policy is the job of the legislature, and subsequently a more local authority, they misstep in not telling the legislature whether or not it is comporting with the constitution. Such a determination requires no outright activism, but only requires a review of what the legislature has done in light of the constitution—the very nature of judicial review.[180]

The data is overwhelmingly clear that most state high courts have no problem intervening to tell the state legislatures whether or not constitutional requirements are being met.[181] These courts, the other 76% of the sample,[182]

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2007); Okla. Educ. Ass'n v. Oklahoma, 2007 OK 30, ¶ 24, 158 P.3d 1058, 1066; Marrero v. Commonwealth, 739 A.2d 110, 113 (Pa. 1999); City of Pawtucket v. Sundlun, 662 A.2d 40, 57 (R.I. 1995).

174. *See generally* cases cited *supra* note 173.

175. *Edgar*, 672 N.E.2d at 1191.

176. *Chiles*, 680 So. 2d at 408.

177. *Okla. Educ. Ass'n*, 2007 OK 30, ¶ 27, 158 P.3d at 1066.

178. *See, e.g.*, Unified Sch. Dist. v. Kansas, 885 P.2d 1170, 1186 (Kan. 1994).

179. *Heineman*, 731 N.W.2d at 182. An interesting note about Nebraska is that the citizenry rejected constitutional amendments to force the state to provide for a thorough and efficient or uniform or even high quality education. *See* George A. Clowes, Nebraska Rejects Funding Initiatives, SCH. REFORM NEWS, Jan. 1, 1997, www.heartland.org/schoolreform-news.org/Article/14179/Nebraska_Rejects_Funding_Initiatives.html ("Nebraska voters on November 5 defeated [an] initiative[] that promised ... more equitable funding of public schools .... [that would have made] a 'quality education a fundamental right of each individual.'").

180. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

181. *See* App. A.

182. *Id.* This number gives a total that is greater than one hundred percent because Alabama and Florida were only partially in the camp of complete restraint and were counted twice. What this means is that every single state court expressed, at the very least, deference to their legislature if not absolute restraint.

express some sort of deference to the legislature.[183] This deference involves everything from letting the legislature define adequacy[184] to using an existing definition of adequacy given by the legislature that the court may find undesirable.[185] At no point during the review of cases does a court seem to strike out against a legislature in a way that violates the separation of powers laid out in each state.[186] The courts that have intervened have done so largely to provide guidelines or constitutional boundaries to their legislatures, hoping and entrusting the furtherance of these goals to future legislative work.[187] Of course, as the long chronology of some state education court cases bears out, this faith in the legislature is not always well-founded.[188] This is not the fault of the courts themselves, who, at their outer limits, can only give approval or disapproval (and at the very outer limits, boundaries and guidance) to legislatures.[189] The problem is that the legislatures are not effectively dealing with this call to action.[190]

Twelve state high courts decided to provide at least some definition of adequacy or a parallel term in broad strokes.[191] These courts have given their respective legislatures a strong form of guidance in deepening the vague constitutional terms available.[192] Some of these definitions are negative in that they declare that the current argument at issue was enough to say that the state

183. *Id.*

184. *See* Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 816 (Ariz. 1994).

185. *See Unified Sch. Dist.*, 885 P.2d at 1173 ("The wisdom or desirability of the legislation is not before us. The constitutional challenge goes only to testing the legislature's power to enact the legislation.").

186. *See* App. A.

187. *See, e.g.*, Oklahoma Educ. Ass'n v. Oklahoma, 158 P.3d 1058 (2007).

> Questions of fiscal and educational policy are vested in the legislature, and its wisdom in these areas is not within the scope of this Court's review .... We are ... aware of the importance of an educated society to our system of government. However, the important role of education in our society does not allow us to override the constitutional restrictions placed on our judicial authority.

*Id.* at 1066.

188. *See, e.g.*, *Ex parte* James, 836 So. 2d 813, 815 n.1 (Ala. 2002) (observing that a case filed in May of 1990 was "still pending before the Montgomery Circuit Court" in 2002).

189. Dietz, *supra* note 55, at 1204-11 (observing that separation of powers concerns have sometimes led courts to "refrain[] from giving the coordinate branches specific directions on how to fix the state school systems [which has often resulted in] either a right with no remedy ... or a mandate with insufficient guidance for legislatures").

190. *See* Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2447-49 (2004) (discussing whether judicial processes may influence social change).

191. Arizona, Connecticut, Idaho, Kentucky, New Jersey, New York, North Carolina, South Carolina, Tennessee, Texas, Wisconsin, and Wyoming. *See* App. A. As 48% of the sample, this is a little under half of the states under consideration that gave some parameters for their idea of adequacy. *See id.*

192. *See, e.g.*, Abbeville County Sch. Dist. v. South Carolina, 515 S.E.2d 535, 540 (S.C. 1999) (defining the constitutional requirement of minimally adequate education).

was not providing an adequate education.[193] Connecticut, for example, said that even if the court could not pin down an exact definition for adequacy, the definition was at least not segregation.[194] Arizona declared that there was not enough money in the system to provide an adequate education, which made the system inadequate itself.[195] At one point, New Jersey decided that the law only entitled the children of the state to "more."[196]

Alternatively, sometimes courts tried to define adequacy without the help of the legislature, stopping short of setting a full list of requirements.[197] The New Jersey Supreme Court later declared:

> At its core, a constitutionally adequate education has been defined as an education that will prepare public school children for a meaningful role in society, one that will prepare public school children for a meaningful role in society, one that will enable them to compete effectively in the economy and to contribute and to participate as citizens and members of their communities.[198]

While such a definition is eloquent, it is hardly useful as a practical, constitutional mandate, although certainly more practical than an incomplete statement of "more."[199] If education is supposed to merely prepare children for the world, what should this mean to school districts and state budget committees? Is it a vote for equality of opportunity, as many states seems to think, or is it a vote against equality because the real world is less than equal? Of course, these types of questions are better answered by state legislatures, who may not be able to glean much from the definitions provided by these courts.[200] But the legislatures *cannot* ask the courts to do the job of legislatures.[201] States have struggled not only with their right to define adequacy but also with the definition itself.[202] State courts seem to want a definition that stops short of legislating for their governments, but that gives some guidance those same governmental systems. However, it is unclear how the courts could provide more guidance without overstepping their bounds.

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193. *See, e.g.*, Idaho Schs. for Equal Educ. Opportunity v. Idaho, 129 P.3d 1199, 1208 (Idaho 2005) (affirming the district court ruling that the current educational funding system is not sufficient).

194. Sheff v. O'Neill, 678 A.2d 1267, 1278 (Conn. 1996).

195. Roosevelt Elementary Sch. Dist. v. Bishop, 877 P.2d 806, 815-16 (Ariz. 1994).

196. Abbott v. Burke (*Abbott I*), 575 A.2d 359, 402 (N.J. 1990).

197. *See, e.g.*, Neeley v. West Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 753 (Tex. 2005) (defining adequacy as "[a] general diffusion of knowledge") (quoting TEX. CONST. art. vii, § 11).

198. Abbott v. Burke (*Abbott II*), 693 A.2d 417, 428 (N.J. 1997).

199. *Compare id.* (an adequate education is "one that will prepare [children] for a meaningful role is society [and] ... compete effectively in the economy ..."), *with Abbott I*, 575 A.2d at 402 ("more").

200. *See* Bess J. DuRant, *The Political Question Doctrine: A Doctrine for Long-Term Change in our Public Schools*, 59 S.C. L. REV. 531, 536 (2007).

201. *See id.* at 544.

202. *See* William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 561-62 (2006).

Six states avoided broad generalizations and instead went so far as to give specific lists of what should be achieved by an adequate education.[203] The earliest and most popular list came from Kentucky in 1989.[204] The Kentucky Court laid out seven components to an adequate education:

(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 favorably with their counterparts in surrounding states, in academics or in the job market.[205]

These guidelines were later employed and reified in the state courts of New Jersey and New Hampshire and were used for inspiration in North and South Carolina.[206] During this time period, New York referred to an older case, which laid out definitions of what an adequate education means in terms of facilities and eventual output: classrooms with "enough light, space, heat, and air" and enough desks, chairs, pencils, and textbooks accompanied by adequate teaching so that children can function in society and be able to vote and serve on a jury.[207] Both lists seem to attempt to clarify and define what the New Jersey court conceptualized in *Abbott v. Burke*.[208] The consensus these courts have arrived at

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203. *See* Rose v. Council for Better Educ., 790 S.W.2d 186, 212 (Ky. 1989) (laying out seven "capacities" necessary for an adequate education); Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353 (N.H. 1997); Hoke County Bd. of Educ. v. North Carolina, 599 S.E.2d 365 (N.C. 2004); Abbeville County Sch. Dist. v. South Carolina, 515 S.E.2d 535 (S.C. 1999); Campaign for Fiscal Equity, Inc. v. New York (*Campaign for Fiscal Equity III*), 801 N.E.2d 326 (N.Y. 2003); *Abbott II*, 693 A.2d at 417. The six states are Kentucky, New Hampshire, North Carolina, South Carolina, New York and New Jersey. This accounts for 24% of the sample. *See generally id.*

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

205. *Id.*

206. *Claremont II*, 703 A.2d at 1353 (New Hampshire); *Abbott II*, 693 A.2d at 442 (New Jersey); *Hoke County Bd. of Educ.*, 599 S.E.2d at 365 (North Carolina), *Abbeville County Sch. Dist.*, 515 S.E.2d at 535 (South Carolina).

207. Campaign for Fiscal Equity v. New York (*Campaign for Fiscal Equity III*), 801 N.E.2d 326, 331-32 (N.Y. 2003).

208. 693 A.2d 417 (N.J. 1997).

is that children must learn enough in our schools to function properly in our society.[209] American society is largely based on being able to exercise freedoms and involve oneself in the economy and culture.[210] Such a definition of adequacy is reminiscent of the rejected argument in *Rodriguez* that education should be a fundamental right because it is so necessary to the exercise of other rights resolutely claimed as fundamental.[211] More abstractly, such a definition merely says that education should be enough for such preparation, resulting in able members of society.[212] This seems like a workable place for legislatures to start as they as they must co-opt this definition into funding formulas and curriculum plans, among other things.[213]

However, state legislatures do not always comply with these guidelines and may use an abstract catalog to form specific, coherent lists of what is necessary for an adequate education.[214] The court in New Hampshire experienced some frustration because it provided the legislature with guidelines and "made clear that the legislature was expected to develop and adopt *specific criteria* for implementing the guidelines ... [because] [t]he right to a constitutionally adequate education is meaningless without standards that are enforceable and reviewable."[215] In that case, the legislature took the general and aspirational guidelines from the court and simply adopted those guidelines as the "Criteria for an Equitable Education" to satisfy the constitutional mandate that the legislature define a constitutionally adequate education.[216] In the eyes of the court, the legislature failed by not translating vague principles into concrete definitions.[217]

The second theme that surfaces in the course of the study is the issue of funding. Perhaps this is largely because funding levels seem to be much more quantifiable than substantive education.[218] Every *single* state grappled with the

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> At its core, a constitutionally adequate education has been defined as an education that will prepare public school children for a meaningful role in society, one that will enable them to compete effectively in the economy and to contribute and to participate as citizens and members of their communities.

*Id.*

209. *See Rose*, 790 S.W.2d at 212. *See also Campaign for Fiscal Equity III*, 801 N.E. 2d at 331-32.

210. *See* Kenneth L. Karst, *The Bonds of American Nationhood*, 21 CARDOZO L. REV. 1141, 1171-72 (2000) (discussing bilingual education); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 333-34 (1986) (discussing factors leading to assimilation).

211. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35-39 (1973).

212. *Id.* at 37.

213. *See* William S. Koski, *Achieving "Adequacy" in the Classroom*, 27 B.C. THIRD WORLD L.J. 13, 26 (2007) (discussing how courts and legislatures are beginning to recognize that the state constitutional right to education includes providing resources and conditions necessary for all children to obtain certain capacities and reach proficiency).

214. *See id.* at 27.

215. Londonderry Sch. Dist. v. New Hampshire, 907 A.2d 988, 994 (N.H. 2006).

216. *Id.* at 991.

217. *Id.* at 989, 994.

218. *See* Koski, *supra* note 213, at 14.

issue of funding during its third wave of litigation and over half of these states fretted over whether the funding system provided adequate or sufficient means.[219] A state supreme court seemingly cannot broach the idea of adequacy without considering whether there is enough money going into the system to fund the illusory ideal of a "minimally adequate education."[220]

Even though the Supreme Court correctly found in *Rodriguez* that the correlation between money and better education was, at best, contentious according to education experts,[221] funding issues in state supreme courts did not dissipate with this conclusion. These state governments do not seem to understand that funding is not the sole source of educational failings.[222] Instead of focusing on what children need in terms of curriculum or resources, state governments plunge headlong into getting more money, hoping that it will be enough to quell the question of adequacy.[223] The first step is to ask what is required in school and of schools and then money or funding should be used in a responsible way to ensure that those needs are met.

Four states specifically said that while funding is a paramount issue, a system can be generously funded and still not meet constitutional minimums.[224] The North Dakota Supreme Court said simply "[g]reater funding means that schools do more things educationally, and do them better."[225] States like Arkansas, Ohio, and New Jersey chimed in with similar statements, all admitting that funding is not magic for an ailing system, but is necessary and perhaps should be accompanied by accountability for districts.[226] More funding, however, *must* be accompanied by more accountability and monitoring for districts—it is not an option if state governments want these programs and mandates to succeed.[227] This article does not evaluate each state-funding system, nor does it compare the origins and effects of differing funding schemes, but rather it simply notes that states are deeply concerned about sufficient funds and

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219. This just includes the states in the sample, but all states have struggled with school finance issues. *See, e.g., id.* at 13-14 ("[S]chool finance lawsuits have been filed in forty-five of the fifty states with challengers prevailing in twenty-six of the forty-five cases that resulted in a judicial decision.").

220. *See Londonderry Sch. Dist.*, 907 A.2d at 996 (Duggan, J., concurring in part and dissenting in part).

221. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42-43 (1972).

222. *See* Lips et al., *supra* note 12.

223. *See id.*

224. *See generally* Montoy v. Kansas (*Montoy II*), 112 P.3d 923 (Kan. 2005); DeRolph v. Ohio (*DeRolph II*), 728 N.E.2d 993 (Ohio 2000); Bismarck Pub. Sch. Dist. v. North Dakota, 511 N.W.2d 247 (N.D. 1994); Abbott v. Burke (*Abbott III*), 710 A.2d 450 (N.J. 1998).

225. *Bismarck Pub. Sch. Dist.*, 511 N.W.2d at 262.

226. Lake View Sch. Dist. v. Huckabee (*Huckabee II*), 91 S.W.3d 472, 497 (Ark. 2002) (discussing monitoring); *DeRolph II*, 728 N.E.2d at 1001; *Abbott III*, 710 A.2d at 469.

227. Lakeview Sch. Dist. v. Huckabee (*Huckabee VII*), 257 S.W.3d 879, 883 (Ark. 2007) (holding that the General Assembly was finally in constitutional compliance and reporting, "[w]hat is especially meaningful to this court is the ... finding that the General Assembly has expressly shown that constitutional compliance in the field of education is an ongoing task requiring constant study, review, and adjustment").

easily incorporate this idea into their thoughts on adequacy. Sometimes states obfuscate the idea of adequacy and instead concentrate solely on funding.

More than half of the states have turned these thoughts of funding towards the similar idea of facilities.[228] The study considers facilities to be anything that constitutionally must be supplied that is not money such as: equipment, curricula, teachers, and buildings.[229] A court could use facilities as a benchmark for what is necessary to provide an adequate education, alongside or instead of sheer dollars and cents.[230]

In 2002, the Arkansas Supreme Court noted "[t]here is no doubt in our minds that there is a considerable overlap between the issue of whether a school-funding system is inadequate and whether it is inequitable."[231] Although the third wave of litigation primarily focuses on adequacy claims, claims of inequity never really went away.[232] In many instances, equality claims could be tangled up with adequacy (inequity making the system of education functionally inadequate), or they could be part of a double-barrel approach to litigation via equal protection claims.[233]

The impetus for funding claims comes from the fact that most state funding systems cause great disparities among districts by appropriating funding based on property taxes.[234] The large inequality between rich and poor areas in terms of property is reflected in educational systems.[235] The California Supreme Court has admonished that "'[i]f a voter's address may not determine the weight to which his ballot is entitled, surely it should not determine the quality of his child's education.'"[236] Yet in cases across the country, that is exactly what has happened.[237] This disparity in funding, for which plaintiffs sought relief, bundled claims of adequacy with claims of equality.[238]

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228. *See* App. A (17 states, or 68% of the sample: Alabama, Arizona, Arkansas, Connecticut, Idaho, Kentucky, Maine, New Hampshire, New Jersey, New York, North Dakota, Ohio, South Carolina, Tennessee, Texas, Wisconsin, and Wyoming).

229. *See* Jensen, *supra* note 113, at 22.

230. Edward B. Foley, Rodriguez *Revisited: Constitutional Theory and School Finance*, 32 GA. L. REV. 475, 528 (1998).

231. *Huckabee II*, 91 S.W.3d at 497.

232. *See generally* Cover, *supra* note 7.

233. *See generally* Ferdinand P. Schoettle, *The Equal Protection Clause in Public Education*, 71 COLUM. L. REV. 1355 (1971).

234. Cover, *supra* note 7, at 404.

235. *See Huckabee II*, 91 S.W.3d at 499 (holding "that a classification between poor and rich school districts does exist and that the State, with its school-funding formula, has fostered this discrimination based on wealth").

236. Butt v. California, 842 P.2d 1240, 1249 (Cal. 1992) (quoting Serrano v. Priest, 487 P.2d 1241, 1262 (Cal. 1971)).

237. *See, e.g.*, McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 552 (Mass. 1993) ("[T]he reality is that children in the less affluent communities ... are not received their constitutional entitlement of education as intended and mandated by the framers of the Constitution."); DeRolph v. Ohio (*DeRolph I*), 677 N.E.2d 733, 737 (Ohio 1997) ("[S]chool funding factors have caused ... vast wealth-based disparities among Ohio's schools.").

238. *See Butt*, 842 P.2d at 1252-53.

All but two of the states studied have invoked a claim based on the state's "education clause" in its constitution and two-thirds of states have also had equal protection claims come to light in the same cases.[239] Every state used *Rodriguez* to at least stand for the proposition that federal equal protection claims have been foreclosed.[240] Ten states used *Rodriguez* as a foundation for their use of the rational basis test for equal protection,[241] though use of such a minimal level of scrutiny is not always fatal to a claim.[242] No state elected to use the strict scrutiny test and only five states relayed a new analysis of either an intermediate or heightened test or no need for any particular standard.[243]

The use of standards may initially be thought to bear a strong correlative relationship to whether education is considered by the state to be a fundamental right.[244] Almost one quarter of the relevant states consider education itself to be

239. Alaska referenced the education clause, but the primary claims brought were about equal protection and religious issues. *See* Matanuska-Susitna Borough Sch. Dist. v. Alaska, 931 P.2d 391, 397 (Alaska 1997). Maine had no claim on the education clause itself, centering only around the adequacy of funding. School Admin. Dist. v. Comm'r, Dep't of Educ., 659 A.2d 854, 856 (Me. 1995). Twenty states had equal protection claims, or 80%: Alabama, Alaska, Arizona, Arkansas, Connecticut, Idaho, Illinois, Kansas, Maine, Maryland, Minnesota, Missouri, New York, North Dakota, Rhode Island, South Carolina, Tennessee, Vermont, Wisconsin, and Wyoming. *See, e.g.*, *Ex parte* James, 713 So. 2d 869, 901 (Ala. 1997); *Matanuska-Susitna Borough Sch. Dist.*, 931 P.2d at 394; Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 811 (Ariz. 1994); Lake View Sch. Dist. v. Huckabee (*Huckabee I*), 10 S.W.3d 892, 895 (Ark. 2000); Sheff v. O'Neill, 678 A.2d 1267, 1278-79 (Conn. 1996); Idaho Schs. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 729 (Idaho 1993); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1182 (Ill. 1996); Unified Sch. Dist. v. Kansas, 885 P.2d 1170, 1187 (Kan. 1994); *Sch. Admin. Dist.*, 659 A.2d at 855; Maryland State Bd. of Educ. v. Bradford, 875 A.2d 703, 706 (Md. 2005); Skeen v. Minnesota, 505 N.W.2d 299, 308 (Minn. 1993); Comm. for Educ. Equality v. Missouri, 294 S.W.3d 477, 489 (Mo. 2009); Paynter v. New York, 797 N.E.2d 1225, 1227 (N.Y. 2003); Bismark Pub. Sch. Dist. v. North Dakota, 511 N.W.2d 247, 251 (N.D. 1994); City of Pawtucket v. Sundlun, 662 A.2d 40, 42 (R.I. 1995); Abbeville County Sch. Dist. v. South Carolina, 515 S.E.2d 535, 538 (S.C. 1999); Tennessee Small Sch. Sys. v. McWherter, 91 S.W.3d 232, 233 (Tenn. 2002) (citing Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993)); Brigham v. Vermont, 692 A.2d 384, 386-87 (Vt. 1997); Kukor v. Grover, 436 N.W.2d 568, 570 (Wis. 1989); Campbell County Sch. Dist. v. Wyoming, 907 P.2d 1238, 1243-44 (Wyo. 1995).

240. *See, e.g.*, *Brigham*, 692 A.2d at 386; *Abbeville County Sch. Dist.*, 515 S.E.2d at 538.

241. Forty percent of the sample used the rational basis test for equal protection: Arkansas, Idaho, Illinois, Kansas, Maine, Maryland, New York, Rhode Island, Tennessee, and Wisconsin. *See Huckabee II*, 91 S.W.3d at 499; *Evans*, 850 P.2d at 728; *Edgar*, 672 N.E.2d at 1195; *Unified Sch. Dist.*, 885 P.2d at 1190; *Sch. Admin. Dist.*, 659 A.2d at 857; *Bradford*, 875 A.2d at 707; Reform Educ. Fin. Inequities Today v. Cuomo, 655 N.E.2d 647, 649 (N.Y. 1995); *Sundlun*, 662 A.2d at 55; *McWherter*, 851 S.W.2d at 153; *Kukor*, 436 N.W.2d at 580.

242. *See, e.g.*, *McWherter*, 851 S.W.2d at 153.

243. Arizona and Vermont declined to use a standard, and Alaska, North Dakota and Wyoming used an intermediate or heightened standard. *See* Hull v. Albrecht, 950 P.2d 1141, 1145-46 (Ariz. 1997); *Brigham*, 692 A.2d at 390; Opinion of the Justices No. 338, 624 So. 2d 107, 156 (Ala. 1993); *Bismarck Pub. Sch. Dist.*, 511 N.W.2d at 259; Campbell County Sch. Dist. v. Wyoming, 181 P.3d 43, 56 (Wyo. 2008).

244. Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 438 (2000) ("The rational relation test most likely would be applied in states that have recognized a constitutional, but not fundamental, right to an adequate education.").

a fundamental right, in stark contrast to the lack of any state to use strict scrutiny to review a violation of this alleged right.[245] Seven states declared that education is not a fundamental right, with three states explicitly stating that they would not reach the question and two deciding that although education is normally a fundamental right, educational funding is something less and deserves a lower level of review.[246] There is clear dissension among the states as to the nature of education as a right, largely stemming from an uncomfortable tension with the holding in *Rodriguez*.[247] State courts quickly noted that they did not have to abide by the Court's analysis in state constitutional settings and, as such, have struggled with their new, or rehashed, analysis of the subject.[248]

Even when equal protection itself is not vying with adequacy for judicial attention, equality itself is still embedded in the debate. Over half of the states, when trying to pin down what adequacy is supposed to mean, have settled on a factor of equality of opportunity.[249] Usually these courts mention equality of educational opportunity as a right or require that such access be substantially

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245. Six states considered education a fundamental right or 24% of the sample: Connecticut, Kentucky, New Hampshire, North Carolina, Wisconsin, and Wyoming. *See Sheff*, 678 A.2d at 1279; Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 206 (Ky. 1989); Claremont Sch. Dist. v. Governor (*Claremont III*), 725 A.2d 648, 649 (N.H. 1998); Leandro v. North Carolina, 488 S.E.2d 249, 254-55 (1997); *Kukor*, 436 N.W.2d at 579; *Campbell County Sch. Dist.*, 907 P.2d at 1245.

246. Seven states said education was not a fundamental right: Idaho, Illinois, Indiana, Kansas, Maryland, Missouri, and New York. *See Idaho Schs. for Equal Educ. Opportunity*, 850 P.2d 724; *Comm. for Educ. Rights*, 672 N.E.2d at 1194-95; *Bonner*, 907 N.E.2d at 522; *Unified Sch. Dist.*, 885 P.2d at 1188-89; *Bradford*, 875 A.2d at 707; Campaign for Fiscal Equity v. New York (*Campaign for Fiscal Equity I*), 655 N.E.2d 661, 668 (N.Y. 1995). Three states explicitly did not reach the question: Arkansas, Maine, and Rhode Island. Lake View Sch. Dist. v. Huckabee (*Huckabee II*), 91 S.W.3d 472, 495 (Ark. 2002); *Sch. Admin. Dist.*, 659 A.2d at 857; *Sundlun*, 662 A.2d at 60. Two states said funding gets less: Minnesota and North Dakota. *Skeen*, 505 N.W.2d at 315; *Bismarck Pub. Sch. Dist.*, 511 N.W.2d at 250.

247. *See* Cochran, *supra* note 244, at 406-07 (discussing California's pre-*Rodriguez* classification of education as a fundamental right and how that "victory" was struck down by *Rodriguez*).

248. *Id.* at 408.

249. There are generally considered to be three types of equality: equality of condition, opportunity, and result. States discussed only the latter two types and only invoked equality of result very sparingly. (Wyoming referred to educational success. Campbell County Sch. Dist. v. Wyoming, 907 P.2d 1238, 1278 (Wyo. 1995)). Sixteen states or 64% of the sample discussed equality of opportunity: Alabama, Alaska, Arkansas, Connecticut, Florida, Kentucky, Maryland, Massachusetts, New Jersey, North Carolina, North Dakota, Ohio, Tennessee, Vermont, Wisconsin, and Wyoming. *Opinion of the Justices*, 624 So. 2d at 114-15; Mantanuska-Susitna Borough Sch. Dist. v. Alaska, 931 P.2d 391, 399 (Alaska 1997); Lake View Sch. Dist. v. Huckabee (*Huckabee V*), 220 S.W.3d 645, 657 (2005); Sheff v. O'Neill, 768 A.2d 1267, 1280-81 (Conn. 1996); Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 406 (Fla. 1996); *Rose*, 790 S.W.2d at 211; Maryland State Bd. of Educ. v. Bradford, 875 A.2d 703, 708 (Md. 2005); McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 552 (Mass. 1993); Abbott v. Burke (*Abbott II*), 693 A.2d 417, 431 (N.J. 1997); Leandro v. North Carolina, 488 S.E.2d 249, 259 (N.D. 1994); Bismarck Pub. Sch. Dist. v. North Dakota, 511 N.W.2d 247, 263 (N.D. 1994); DeRolph v. Ohio (*DeRolph II*), 728 N.E.2d 993, 1033 (Ohio 2000); Tennessee Small Sch. Sys. v. McWherter, 91 S.W.3d 232, 234 (Tenn. 2002); Brigham v. Vermont, 692 A.2d 394, 395-96 (Vt. 1997); Vincent v. Voight, 614 N.W.2d 388, 396-97 (Wis. 2000); *Campbell County Sch. Dist.*, 907 P.2d at 1278.

equal to be in accordance with the constitution.[250] It would be difficult for a court to say what an adequate education is without simultaneously saying that every child must have access to such an education, which brings in the notion of equality of opportunity. As it would be hard for courts to delineate what educational opportunities mean or are comprised of, this is something to be satisfied and defined by state legislatures.[251] Whatever the state government decides to provide as part of its educational plan, it must comport with the state constitution, both for adequacy and equity.[252]

The inequalities in provisions and access are clear to many state courts. The Arizona Supreme Court noted:

> Some districts have schoolhouses that are unsafe, unhealthy, and in violation of building, fire, and safety codes .... There are schools without libraries, science laboratories, computer rooms, art programs, gymnasiums, and auditoriums. But in other districts, there are schools with indoor swimming pools, a domed stadium, science laboratories, television studios, well stocked libraries, satellite dishes, and extensive computer systems.[253]

Inequalities such as these are frequently what provide impetus for litigation to begin.[254] When equal protection arguments began to chronologically break down after *Rodriguez*, the argument shifted.[255] Not only are these children being denied equity with their peers, and mostly because of property value disparity, but they are functionally being denied an adequate education.[256] Without enough, plaintiffs have sought the court's relief. However, while a court can note a problem such as facility disparity and encourage the legislature to change policy (via funding or some other means), a court cannot mandate that every school maintain a "well-stocked library."[257] Doing so would overstep the court's bounds and violate the separation of powers doctrine. The ability of the courts to change the system and improve education comes through approval or disapproval of the acts of its state legislature.[258]

Even equality, whether in terms of money or access, can be hard to quantify. A little more than 35% of the states went out of their way to mention that although equality is important, it does not mean districts or budgets must be

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250. *See, e.g.*, *Campbell County Sch. Dist.*, 907 P.2d at 1263 (classifying equal opportunity as a "fundamental right").

251. *Id.* at 1262 (discussing district and school performance standards).

252. *Id.* at 1264.

253. Roosevelt Elementary Sch. Dist. v. Bishop, 877 P.2d 806, 808 (Ariz. 1994).

254. *See, e.g.*, Campaign for Fiscal Equity v. New York (*Campaign for Fiscal Equity II*), 719 N.Y.S.2d 475, 506 (2001) (dealing with a public school system where plaintiffs argued poor school facilities).

255. *See, e.g.*, *Campbell County Sch. Dist.*, 907 P.2d at 1264.

256. *Bishop*, 877 P.2d at 809.

257. *Id.* at 818.

258. *See Campbell County Sch. Dist.*, 907 P.2d at 1264.

exactly the same.[259] State equal protection itself was the focus of the second wave of litigation, but the Wisconsin Supreme Court noted that "[c]ourts have turned toward adequacy as an alternative way to analyze school ... systems because previous decisions centered on equality have not lessened the disparity between school districts."[260] This statement should lend even more credence to the concept that more funding does not equate to automatic educational success.[261] The ideas of adequacy and equality are meshed together and are sometimes impossible for courts or legislatures to untangle.[262] Throughout the latest barrage of litigation, state supreme courts have differed on how much to intervene, focused on funding and resources, and made several decisions involving equality as part of the adequacy equation. Yet the only real point of resonance across time and space for these courts is that providing for children, providing for education, is incredibly important.

## V. CONCLUSION

Education is indeed the silver bullet; it is everything. The Supreme Court recognized this in *Brown v. Board of Education*,[263] and state court after state court have echoed this sentiment.[264] Education is important and states are meant to provide it in some form or fashion. But what is enough? American state supreme courts have not yet come to a consensus in answering this question. Most state supreme courts focus on overarching qualitative aspects of education—that the education offered be enough for a child to act and compete in the world. At the same time, these courts frustrate the quantitative efforts of legislatures to reduce education to funding formulas and dollars per student. These methods of analysis are not yet converging in a comprehensive or understandable way. Courts in each state may merely approve or disapprove of legislative action. Cases, dragging over multiple years or even multiple decades, make clear that legislatures are not doing enough to solve this problem. But courts can only validate or invalidate what a state legislature does in terms of constitutional quality. Some courts are reaching out to provide definitions and guidance, even a seven principle list, in an effort to clarify what state

259. Arizona, Arkansas, Florida, Idaho, Maryland, Minnesota, North Carolina, Texas, and Vermont. *Bishop*, 877 P.2d at 816; Lake View Sch. Dist. v. Huckabee (*Huckabee IV*), 189 S.W.3d 1, 13 (Ark. 2004); *Coal. for Adequacy & Fairness*, 680 So. 2d at 406; *Idaho Schs. for Equal Educ. Opportunity*, 850 P.2d at 728; Montoy v. Kansas (*Montoy IV*), 138 P.2d 755, 763 (Kan. 2006); *Bradford*, 875 A.2d at 707; *Skeen*, 505 N.W.2d at 311; *Leandro*, 488 S.E.2d at 259; *Neeley*, 176 S.W.3d at 790; *Brigham*, 692 A.2d at 397-98.

260. Vincent v. Voight, 614 N.W.2d 388, 406-07 (Wis. 2000). *See also* App. A.

261. Jensen, *supra* note 113, at 28.

262. *See id.* at 27.

263. 347 U.S. 483, 493 (1954) ("[Education] [i]s required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.").

264. *See, e.g.*, Jackson v. Pasadena City Sch. Dist., 382 P.2d 878, 880-81 (Cal. 1963) ("In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis.").

constitutions, and children, demand. Judicial experts might say those courts are acting at the limit of their power. It would be unreasonable, almost unthinkable, for a court to mandate that every school teach British literature or geometry. Similarly, it would be absurd for a court to mandate the specific dollar amount needed per student or per district. These decisions are for legislatures, which must comport to the constitutional divining of adequacy that comes from their high courts.

If and when a consensus on adequacy is reached, the impact on educational reform will be powerful and swift. Education as a federal right via a constitutional amendment would allow it to be a fundamental right according to *Rodriguez* as well as enjoy protection and funding from the federal government. This would require an amendment to the federal Constitution. Educational adequacy defined by consensus by our federal legislature would be helpful, because programs and resources would be more uniform and geared towards a singular, more clearly defined goal.

People say that the only way to solve the problem of education in America is for citizens to rally behind the cause and push politicians to get things done. State legislatures are, in most cases, fighting with state supreme courts for control of the education issue—struggling against seemingly conflicting or vague ideas of equality and adequacy and always over money. Even though the Supreme Court pointed out in *Rodriguez* that educational scholars have yet to prove that money has a direct effect on educational quality and are confused, at best, over this issue, many critics still think more money will solve everyone's problems.

This article is not meant to dispute the claim that more money would aid many failing schools, improve facilities, or allow for the hiring of better teachers. The point of this study is to show that states are thrashing about in all directions looking for something to improve the system. In a world in which there is a choice between equality and adequacy, it would be helpful for state legislatures to be able to latch on to a cohesive definition of adequacy and provide an adequate education for every child. Only when every child has at least "enough" will it possibly be easier to play out battles over educational equality and rewrite state constitutions so that they demand and mandate high quality educations for American children. However, as long as children are attending schools that allow them to remain functionally uneducated, unprepared to be citizens of our society, our weary legislatures, courts, and schools will be fighting both the disease and the overwhelming symptoms of a failing educational system.

**Appendix A: Case List**

**Alabama:**
*Ex parte* James, 836 So. 2d 813 (Ala. 2002)
*Ex parte* James, 713 So. 2d 869 (Ala. 1997)
Opinion of the Justices, 624 So. 2d 107 (Ala. 1993)

**Alaska:**
Matanuska-Sustina Borough Sch. Dist. v. Alaska, 931 P.2d 391 (Alaska 1997)

**Arizona:**
Hull v. Albrecht, 950 P.2d 1141 (Ariz. 1997)
Roosevelt Elementary Sch. Dist. v. Bishop, 877 P.2d 806 (Ariz. 1994)

**Arkansas:**
Lake View Sch. Dist. v. Huckabee, 257 S.W.3d 879 (Ark. 2007)
Lake View Sch. Dist. v. Huckabee, 220 S.W.3d 645 (Ark. 2005)
Lake View Sch. Dist. v. Huckabee, 222 S.W.3d 187 (Ark. 2005)
Lake View Sch. Dist. v. Huckabee, 189 S.W.3d 1 (Ark. 2004)
Lake View Sch. Dist. v. Huckabee, 144 S.W.3d 741 (Ark. 2004)
Lake View Sch. Dist. v. Huckabee, 91 S.W.3d 472 (Ark. 2002)
Lake View Sch. Dist. v. Huckabee, 10 S.W.3d 892 (Ark. 2000)

**Colorado:**
Lobato v. Colorado, 218 P.3d 238 (Col. 2009)

**Connecticut:**
Sheff v. O'Neil, 678 A.2d 1267 (Conn. 1996)
New Haven v. State Bd. of Educ., 638 A.2d 589 (Conn. 1994)

**Florida:**
Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996)

**Idaho:**
Idaho Schs. for Equal Educ. Opportunity v. Idaho, 129 P.3d 1199 (Idaho 2005)
Idaho Schs. for Equal Educ. Opportunity v. Idaho, 976 P.2d 913 (Idaho 1998)
Idaho Schs. for Equal Educ. Opportunity v. Idaho State Bd. of Educ., 912 P.2d 644 (Idaho 1996)
Idaho Schs. for Equal Educ. Opportunity v. Evans, 850 P.2d 724 (Idaho 1993)

**Illinois:**
Lewis v. Spagnolo, 710 N.E.2d 798 (Ill. 1999)
Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996)

**Indiana:**
Bonner v. Daniels, 907 N.E.2d 516 (Ind. 2009)

**Kansas:**
Montoy v. Kansas, 138 P.3d 755 (Kan. 2006)
Montoy v. Kansas, 112 P.3d 923 (Kan. 2005)
Montoy v. Kansas, 120 P.3d 306 (Kan. 2005)
Unified Sch. Dist. v. Kansas, 885 P.2d 1170 (Kan. 1994)

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

**Maine:**
Sch. Admin. Dist. v. Comm'r of the Dep't of Educ., 659 A.2d 854 (Me. 1995)

**Maryland:**
Maryland State Bd. of Educ. v. Bradford, 875 A.2d 703 (Md. 2005)

**Massachusetts:**
Hancock v. Comm'r of Educ., 822 N.E.2d 1134 (Mass. 2005)
McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993)

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

**Missouri:**
Comm. for Educ. Equality v. Missouri, 294 S.W.3d 477 (Mo. 2009)

**Nebraska:**
Nebraska Coal. for Educ. Equity & Adequacy v. Heineman, 711 N.W.2d 164 (Neb. 2007)
Gould v. Orr, 506 N.W.2d 349 (Neb. 1993)

**New Hampshire:**
Londonderry Sch. Dist. v. New Hampshire, 958 A.2d 930 (N.H. 2008)
Londonderry Sch. Dist. v. New Hampshire, 907 A.2d 988 (N.H. 2006)
Claremont Sch. Dist. v. Governor, 794 A.2d 744 (N.H. 2002)
Opinion of the Justices, 765 A.2d 673 (N.H. 2000)
Claremont Sch. Dist. v. Governor, 725 A.2d 648 (N.H. 1998)
Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997)
Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993)

**New Jersey:**
Abbott v. Burke, 971 A.2d 989 (N.J. 2009)
Abbott v. Burke, 960 A.2d 360 (N.J. 2008)

Abbott v. Burke, 790 A.2d 842 (N.J. 2002)
Abbott v. Burke, 751 A.2d 1032 (N.J. 2000)
Abbott v. Burke, 710 A.2d 450 (N.J. 1998)
Abbott v. Burke, 693 A.2d 417 (N.J. 1997)
Abbott v. Burke, 575 A.2d 359 (N.J. 1990)

**New York:**
Campaign for Fiscal Equity v. New York, 861 N.E.2d 50 (N.Y. 2006)
New York Civil Liberties Union v. New York, 824 N.E.2d 947 (N.Y. 2005)
Paynter v. New York, 797 N.E.2d 1225 (N.Y. 2003)
Campaign for Fiscal Equity v. New York, 801 N.E.2d 326 (N.Y. 2003)
Campaign for Fiscal Equity v. New York, 655 N.E.2d 661 (N.Y. 1995)
Reform Educ. Fin. Inequities Today v. Cuomo, 655 N.E.2d 647 (N.Y. 1995)

**North Carolina:**
Hoke County Board of Educ. v. North Carolina, 599 S.E.2d 365 (N.C. 2004)
Leandro v. North Carolina, 488 S.E.2d 249 (N.C. 1997)

**North Dakota:**
Bismarck Public Sch. Dist. v. North Dakota, 511 N.W.2d 247 (N.D. 1994)

**Ohio:**
DeRolph v. Ohio, 780 N.E.2d 529 (Ohio 2002) (Partial)
DeRolph v. Ohio, 758 N.E.2d 1113 (Ohio 2001) (Partial)
DeRolph v. Ohio, 754 N.E.2d 1184 (Ohio 2001) (Partial)
DeRolph v. Ohio, 728 N.E.2d 993 (Ohio 2000)
DeRolph v. Ohio, 677 N.E.2d 733 (Ohio 1997)

**Oklahoma:**
Oklahoma Educ. Ass'n v. Oklahoma, 158 P.3d 1058 (Okla. 2007)

**Oregon:**
Pendleton Sch. Dist. v. Oregon, 217 P.3d 175 (Or. 2009)
Pendleton Sch. Dist. v. Oregon, 200 P.3d 133 (Or. 2009)
Coal. for Equitable School Funding v. Oregon, 811 P.2d 116 (Or. 1991)

**Pennsylvania:**
Marrero v. Gen. Assembly of the Commonwealth of Pennsylvania, 739 A.2d 110 (Pa. 1999)

**Rhode Island:**
City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995)

**South Carolina:**
Abbeville County Sch. Dist. v. South Carolina, 515 S.E.2d 535 (S.C. 1999)

**Tennessee:**
Tennessee Small Sch. Sys. v. McWherter, 91 S.W.3d 232 (Tenn. 2002) (Partial)
Tennessee Small Sch. Sys. v. McWherter, 894 S.W.2d 734 (Tenn. 1995) (Partial)
Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993)

**Texas:**
Neely v. West Orange Grove Consol. ISD, 176 S.W.3d 746 (Tex. 2005)
Edgewood ISD v. Meno, 917 S.W.2d 717 (Tex. 1995)

**Vermont:**
Brigham v. Vermont, 889 A.2d 715 (Vt. 2005) (Partial)
Brigham v. Vermont, 889 A.2d 715 (Vt. 1997)

**Wisconsin:**
Vincent v. Voight, 614 N.W.2d 388 (Wis. 2000)
Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989)

**Wyoming:**
Campbell County Sch. Dist. v. Wyoming, 2008 WY 2, 181 P.3d 43 (Wyo. 2008)
Wyoming v. Campbell County Sch. Dist., 2001 WY 90, 32 P.3d 325 (Wyo. 2001)
Wyoming v. Campbell County Sch. Dist., 2001 WY 19, 19 P.3d 518 (Wyo. 2001) (Partial)
Campbell County Sch. Dist. v. Wyoming, 907 P.2d 1238 (Wyo. 1995)

**Appendix B: Data Template**

***Data Template:***
**State:**

Citation:

Who won?

Was there an Equal Protection claim?
If there was an Equal Protection claim, what standard was used?
If Rational Basis was used, was *Rodriguez* cited?
Was wealth considered a suspect class?
Was education considered a fundamental right?

Was there an Education Clause claim?
Was Equal Education discussed?
Was Equal Educational Opportunity discussed?
Was Adequate Education discussed?
What did the Constitution mandate?

Was funding discussed?
Were resources/facilities discussed?
What was the funding conclusion? (i.e., adequate/sufficient funding, etc.?)

What was the Court's view of its role in relation to the legislature?
Did the Court exercise absolute restraint?
Did the Court exercise deference to the legislature?

Did the Court provide a list of required inputs/outputs? (If yes, provide!)
Did the Court provide a definition of adequacy or parallel term? (If yes, provide!)

Truncated Overview:

Miscellaneous:

**Appendix C: Data**

***Example:***

**Alabama:**
*Ex Parte James*: 836 So. 2d 813, May 31, 2002

Who won? State via dismissal

Was there an Equal Protection claim? Originally, yes. (815)
If there was an Equal Protection claim, what standard was used? N/A.
If Rational Basis was used, was *Rodriguez* cited? See below.
Was wealth considered a suspect class? N/A
Was education considered a fundamental right? No, and Rodriguez was cited for this proposition.

Was there an Education Clause claim? N/A
Was Equal Education discussed? N/A
Was Equal Educational Opportunity discussed? N/A
Was Adequate Education discussed? N/A
What did the Constitution mandate? N/A

Was funding discussed? Yes, it was what was originally challenged. (815)
Were resources/facilities discussed? Not found.
What was the funding conclusion? (i.e., adequate/sufficient funding, etc.?) N/A

What was the Court's view of its role in relation to the legislature? The legislature has to grant any further redress to be sought The Constitution puts the power over education in the Legislature or General Assembly. (815)
Did the Court exercise absolute restraint? Yes (815)
Did the Court exercise deference to the legislature? Absolutely (815)
Did the Court provide a list of required inputs/outputs? (If yes, provide!) No.
Did the Court provide a definition of adequacy or parallel term? (If yes, provide!) No.

Truncated Overview: Plaintiff citizens had sued defendant state government over 10 years earlier, and the trial court found the state's public education financing system unconstitutional and ordered certain remedies. The supreme court had, on various occasions, limited the extent of the trial court's rulings. The supreme court held Ala. Const. amend. 582 reflected Alabama's adherence to the principle of separation of powers in Ala. Const. art. III, § 43, by effectively nullifying any state court order requiring the disbursement of public funds, until such order was approved by the legislature. Also, Ala. Const. art. XIV, § 256, placed the power over the state's public education in the legislature. The failure of opinions on the

same subject in other states to find that the judiciary lacked the power to order a specific remedy if the legislature failed to address a constitutional deficiency did not support judicial intrusion into legislative matters. The judiciary was required by Ala. Const. art. III, § 43, to refrain from becoming involved in a subject clearly within the legislature's purview. **OUTCOME:** The cases were dismissed.

Miscellaneous: The original claim was filed on May 3, 1990. (815).

*Ex Parte James*: 713 So. 2d 869, January 10, 1997

Who won? State via more deference and more time to act

Was there an Equal Protection claim? Originally yes.
If there was an Equal Protection claim, what standard was used? N/A
If Rational Basis was used, was *Rodriguez* cited? Dissent only.
Was wealth considered a suspect class? N/A
Was education considered a fundamental right? N/A

Was there an Education Clause claim? N/A
Was Equal Education discussed? N/A
Was Equal Educational Opportunity discussed? N/A
Was Adequate Education discussed? N/A
What did the Constitution mandate? N/A

Was funding discussed? N/A
Were resources/facilities discussed? N/A
What was the funding conclusion? (i.e., adequate/sufficient funding, etc.?) N/A

What was the Court's view of its role in relation to the legislature? It has judicial review and the trial court did not exceed its constitutional authority in considering on the merits whether Alabama's public education system violated provisions of the Constitution (879). The Court also rejected that the SOP prohibited the judiciary from fashioning a remedy for constitutional violations of the nature in the case (881). The legislature bears the primary responsibility for devising a constitutionally valid public school system. (882). The best approach is once the judiciary invalidates the system is to stay action for a reasonable time, thus affording the legislative and executive officials the first opportunity to devise a constitutional public educational system. (882)
Did the Court exercise absolute restraint? Not exactly.
Did the Court exercise deference to the legislature? Yes. The judiciary shouldn't assume that the executive/legislature is going to do a bad job–give them a chance!
Did the Court provide a list of required inputs/outputs? (If yes, provide!) No.

Did the Court provide a definition of adequacy or parallel term? (If yes, provide!) No.

Truncated Overview: Petitioner state parties including governor, state finance director, state board of education, and next friend in a suit by the state coalition for equity in a suit regarding challenges to public education funding sought permission to appeal overruled motions to dismiss and vacate the school funding remedy plan. The court granted permission to appeal, affirmed liability, vacated the remedy plan, and denied the petition for writ of prohibition. The court explained the remedy plan had to be vacated and remanded because although the lower court did not lack the power to implement a remedy plan once the funding system was found invalid, it nevertheless abused its discretion in doing so before allowing coordinate branches of government an opportunity to act. The court further explained the judiciary should not have presumed at the outset that legislative and executive officials would be derelict in their duties. The court observed the legislature bears the primary responsibility for devising a constitutionally valid public school system. *The court rejected the argument that the judiciary's exercise of jurisdiction over the remedy phase of the suit violated separation of powers.*

*Opinion of the Justices*: 624 So. 2d 107, April 27, 1993

Who won? Students

Was there an Equal Protection claim? Yes, a lack of equitable educational opportunities (895).
If there was an Equal Protection claim, what standard was used? N/A
If Rational Basis was used, was *Rodriguez* cited? N/A
Was wealth considered a suspect class? N/A
Was education considered a fundamental right? Yes, in contravention of Rodriguez.

Was there an Education Clause claim? Yes, a lack of adequate educational opportunities (895). The Alabama Constitution, Article XIV, § 256 guarantees Alabama citizens access to a "liberal system of public schools" (896).
Was Equal Education discussed? N/A
Was Equal Educational Opportunity discussed? Yes, by the circuit court. The Court understands the term "educational opportunities" to mean, in the broadest sense, the educational facilities, programs and services provided for students in Alabama's public schools, grades K-12, and the opportunity to benefit from those facilities, programs and services (115). They need not be strictly equal or precisely uniform ...
Was Adequate Education discussed? Yes, by the circuit court.
What did the Constitution mandate? That Alabama schoolchildren ... have and enjoy a constitutional right to attend school in a liberal system of public

schools, established, organized, and maintained by the state, which shall provide all such schoolchildren with substantially equitable and adequate educational opportunities (896–quote from Opinion 338).

Was funding discussed? Yes, by the circuit court.
Were resources/facilities discussed? Yes, by the circuit court.
What was the funding conclusion? (i.e., adequate/sufficient funding, etc.?) The circuit court concluded that it was not sufficient.

What was the Court's view of its role in relation to the legislature? The circuit court invalidated the system, but left it to the legislature to make the improvements.
Did the Court exercise absolute restraint? No.
Did the Court exercise deference to the legislature? Yes.
Did the Court provide a list of required inputs/outputs? (If yes, provide!) No, it's a Senate bill. See below!
Did the Court provide a definition of adequacy or parallel term? (If yes, provide!) "The essential principles and features of the liberal system of public schools required by the Alabama Constitution include the following:

(a) it is the responsibility of the state to establish, organize, and maintain the system of public schools;
(b) the system of public schools shall extend throughout the state;
(c) the public schools must be free and open to all schoolchildren on equal terms;
(d) equitable and adequate educational opportunities shall be provided to all schoolchildren regardless of the wealth of the communities in which the schoolchildren reside: and
(e) adequate educational opportunities shall consist of, at a minimum, an education that provides students with opportunity to attain the following:
    i. sufficient oral and written communication skills to function in Alabama, and at the national and international levels, in the coming years;
    ii. sufficient mathematic and scientific skills to function in Alabama, and at the national and international levels, in the coming years;
    iii. sufficient knowledge of economic, social, and political systems generally, and of the history, politics, and social structure of Alabama and the United States, specifically, to enable the student to make informed choices;
    iv. sufficient understanding of governmental processes and of basic civic institutions to enable the student to understand and contribute to the issues that affect his or her community, state, and nation;
    v. sufficient self-knowledge and knowledge of principles of health and mental hygiene to enable the student to monitor and contribute to his or her own physical and mental well-being;

vi. sufficient understanding of the arts to enable each student to appreciate his or her cultural heritage and the cultural heritages of others;
vii. sufficient training, or preparation for advanced training, in academic or vocational skills, and sufficient guidance, to enable each child to choose and pursue life work intelligently;
viii. sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in Alabama, in surrounding states, across the nation, and throughout the world, in academics or in the job market; and
ix. sufficient support and guidance so that every student feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her full human potential. (107-108)

Truncated Overview: After the circuit court held that the Alabama public school system violated the equal protection mandate of Ala. Const. art. XIV, § 256, the Senate responded by introducing Senate Bill 607 and sought an advisory opinion as to whether that bill was constitutionally required. The court agreed to answer the legislature's request pursuant to its powers under the Advisory Opinion Act, *Ala. Code § 12-2-10*, because it found that the legislature's question was one of great public interest, and because the question raised a question of fundamental constitutional law relating to the separation of powers of government under Ala Const. art. III, § 42. The court stated their opinion that the circuit court's order had the force of law unless modified by the trial court, until it was modified or reversed on appeal, and that the legislature, like other branches of government, had to comply with it. Pursuant to Ala. Const. amend. 328, § 6.04, the circuit court had the power and the duty to interpret the constitution in cases involving justiciable controversies, and therefore, such orders must be accepted and followed by the legislature.