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State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?

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NOTES

State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?

I. INTRODUCTION

The public education system in the United States fails to educate economically disadvantaged children. Students from poor families are

more likely to repeat grades,[1] to have below average basic academic skills,[2] to drop out of school,[3] and to forego attending college.[4] These gaps in educational achievement translate into an inability to compete effectively in the employment market place.[5] In an attempt to remedy these inequalities, plaintiffs have attacked the most obvious source of disparity: state school financing schemes.[6]

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1. The likelihood of repeating a grade corresponds directly to the number of years a child has lived in poverty. *See* CHILDREN'S DEFENSE FUND, A VISION OF AMERICA'S FUTURE, 70 (1989) [hereinafter CDF] (containing a table demonstrating the correlation between repeating a grade and the number of years in poverty for 16-year-olds in the United States) (citing U.S. DEP'T OF EDUCATION, OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT (1986)). With 1-2 years in poverty, 20% have repeated one or more grades; with 3-7 years in poverty, 27.7% have repeated one or more grades; with 8 or more years in poverty, 42.2% have repeated one or more grades. *Id.*

2. CDF, *supra* note 1, at 69. *See also* NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP'T OF EDUCATION, 1989 EDUCATION INDICATORS, 124, 150 (showing the failure of students from disadvantaged urban homes to achieve an average proficiency in reading, history, and literature); Julius Menacker, *Poverty as a Suspect Class in Public Education Equal Protection Suits*, 54 WEST EDUC. L. REP. 1085, 4-6 (1989) (showing that data from school districts in and around Chicago demonstrates a clear connection between the percentage of low-income students and substandard results on the American College Test).

3. CDF, *supra* note 1, at 70 (stating that children from poor homes are almost three times more likely to drop out of school than those from nonpoor homes); *see also id.* at 71 (showing chart entitled "Dropout Rates: High School Dropout Rates for 18- to 21-Year-Old Youths by Race and Poverty, 1987" compiled by the U.S. Bureau of the Census, unpublished data from CURRENT POPULATION SURVEY).

4. CDF, *supra* note 1, at 70-71 (showing the widening gap between poor and nonpoor students who attend college). In 1975 about one-third of both poor and nonpoor 18- to 21-year-olds had completed one or more years of college. By 1986 the number of poor 18- to 21-year-olds completing one or more years of college had dropped 4%, while the number of their nonpoor counterparts had increased 5%. *Id.*

5. CDF, *supra* note 1, at 71 (showing that median income, adjusted for inflation, of young family heads—under 30-years-old—who dropped out of high school declined from 1973 to 1986 by 53%, while median income of young family heads who graduated from high school dropped 31%, and median income of young family heads who graduated from college dropped only 3%).

6. *See, e.g.*, Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971) (*Serrano I*); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Blase v. State, 302 N.E.2d 46 (Ill. 1973); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); Milliken v. Green, 203 N.W.2d 457 (Mich. 1972), *vacated*, 212 N.W.2d 711 (Mich. 1973); Helena Elementary Sch. Dist. No. One v. State, 769 P.2d 684 (Mont. 1989); Robinson v. Cahill, 303 A.2d 273 (N.J.), *cert. denied*, 414 U.S. 976 (1973); Board of Educ. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1139 (1983); Britt v. North Carolina State Bd. of Educ., 357 S.E.2d 432 (N.C. Ct. App.), *appeal dismissed mem.*, 361 S.E.2d 71 (N.C. 1987); Board of Educ. v. Walter, 390 N.E.2d 813 (Ohio 1979), *cert. denied*, 444 U.S. 1015 (1980); Fair School Fin. Council, Inc. v. State, 746 P.2d 1135 (Okla. 1987); Coalition for Equitable Sch. Funding, Inc. v. State, 811 P.2d 116 (Or. 1991); Danson v. Casey, 399 A.2d 360 (Pa. 1979); Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Seattle Sch. Dist. No. One v. State, 585 P.2d 71 (Wash. 1978); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989); Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980). Because of the nature of financ-

Plaintiffs and courts have resorted to an examination of financing schemes in terms of per-pupil expenditure because expenditure is the easiest counter-equalizing factor to identify.[7] Not all courts, however, have accepted the correlation between dollars expended and academic achievement.[8] Both the Colorado Supreme Court and the Idaho Supreme Court have refused to recognize any relationship between school financing and educational quality.[9] Those courts found the evidence of such a correlation inconclusive because of the ongoing controversy among educators and commentators over the relationship between expenditure and academic achievement.[10]

Recently, however, the controversy appears to have subsided and few educators or commentators argue that educational expenditure is not at least a factor in academic achievement.[11] The case law reflects this change. Most recent cases sustaining challenges to school financing schemes recognize the correlation between spending and achievement and address it in determining whether states are maintaining a sufficient level of educational opportunity.[12] Furthermore, those jurisdictions that have rejected such challenges no longer rely on a lack of a demonstrated nexus between funding and educational quality to justify

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ing scheme litigation in many jurisdictions, a series of determinative cases have reached the highest state courts. The list above includes the first case of each such series. The list is limited to state court decisions because federal remedies have been virtually foreclosed hy the decision in San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

7. The New Jersey Supreme Court was very candid about its examination of the state financing scheme in terms of revenue disparities in Robinson v. Cahill, 303 A.2d 273 (N.J.), *cert. denied*, 414 U.S. 976 (1973). The court stated that it "deal[t] with the problem in those terms because dollar input is plainly relevant and because we have been shown no other viable criterion for measuring compliance with the constitutional mandate." *Id.* at 295.

8. *See, e.g., Rodriguez*, 411 U.S. at 43 (questioning the correlation between cost and quality in deciding a federal equal protection challenge to a state financing scheme); *Lujan*, 649 P.2d at 1018 (refusing to accept a correlation between school financing and educational quality and opportunity); *Thompson*, 537 P.2d at 641-42 (declining to enter into the controversy over the relationship of per-pupil expenditure and the quality of education).

9. *Lujan*, 649 P.2d at 1018; *Thompson*, 537 P.2d at 641-42.

10. *Lujan*, 649 P.2d at 1018; *Thompson*, 537 P.2d at 642.

11. *See, e.g.*, NEIL G. AMOS & LAMAR MOODY, THE RELATIONSHIP OF SCHOOL DISTRICT SIZE AND COST FACTORS TO ACHIEVEMENT OF FOURTH AND EIGHTH GRADE STUDENTS, BUREAU OF EDUCATION RESEARCH, MISSISSIPPI STATE UNIVERSITY 11-12 (1981). This study of 152 school districts in a southeastern state found a direct correlation between total regular classroom expenditure per pupil and vocabulary, reading comprehension, and mathematics scores at the fourth- and eighth-grade levels. *Id. See also* Menacker, *supra* note 2, at 4 (citing findings reported in ALLAN C. ORNSTEIN & DANIEL U. LEVINE, FOUNDATIONS OF EDUCATION 409 (4th ed. 1988) of the "powerful effect of community income characteristics in determining school achievement").

12. *See, e.g.*, Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989) (stating that "[t]he amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student"); Helena Elementary Sch. Dist. No. One v. State, 769 P.2d 684, 687 (Mont. 1989) (accepting the finding of the trial court that "[t]here is a positive correlation between the level of school funding and the level of educational opportunity").

their decisions.[13] This acceptance of the effect of per-pupil expenditures on educational achievement has shifted the focus of courts confronting school financing challenges to an examination of what level of educational opportunity and equality is required by their state constitutions.

The financing schemes that have been the basis for this reform litigation all have in common the dual nature of their funding.[14] Essentially, all challenges to these schemes are attacks on the reliance upon local funding supplemented by state monies. Varying property values among the individual districts within a state create wide disparities, both in the funding available to a district and in the tax burden on district residents.[15] Plaintiffs attack these disparities in the finance reform cases.[16]

The 1973 United States Supreme Court decision in *San Antonio Independent School District v. Rodriguez*[17] essentially foreclosed any federal Constitutional remedy for these inequalities.[18] As a result, plain-

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13. In fact, although it rejected a challenge to the Georgia school financing scheme, the Georgia Supreme Court found specifically that "there is a direct relationship between a district's level of funding and the educational opportunities which a school district is able to provide its children." McDaniel v. Thomas, 285 S.E.2d 156, 160 (Ga. 1981). In addition, the New York Court of Appeals assumed the existence of a "significant correlation between amounts of money expended and the quality and quantity of educational opportunity provided" when it rejected a challenge to New York's financing scheme in Board of Educ. v. Nyquist, 439 N.E.2d 359, 363 & n.3 (1982), *appeal dismissed*, 459 U.S. 1139 (1983).

14. Every state except Hawaii relies on a system of funding consisting of both local and state contributions. Hawaii collects all local and state funds and then distributes them equally between the two at-large districts. *See* William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1640 n.6, 1647 & n.33 (1989).

15. *See, e.g.*, Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989) (*Edgewood I*) (demonstrating that "[t]he 100 poorest districts had an average tax rate of 74.5 cents and spent an average of $2,978 per student" while "[t]he 100 wealthiest districts had an average tax rate of 47 cents and spent an average of $7,233 per student"). In *Edgewood I* the Texas Supreme Court pointed out that the disparities in funding do not result from a lack of tax effort, but rather from inadequate tax bases.

> Property-poor districts are trapped in a cycle of poverty from which there is no opportunity to free themselves. Because of their inadequate tax base, they must tax at significantly higher rates in order to meet the minimum requirements for accreditation; yet their educational programs are typically inferior. The location of new industry and development is strongly influenced by tax rates and the quality of local schools. Thus the property-poor districts with their higher tax rates and inferior schools are unable to attract new industry or development and so have little opportunity to improve their tax base.

Id.

16. Different states have enacted different types of financing schemes in an attempt to alleviate some of the inequalities. *See* Annette B. Johnson, *State Court Intervention in School Finance Reform*, 28 CLEV. ST. L. REV. 325, 328-31 (1979); Note, *supra* note 14, at 1648 & n.36. As the vast number of cases still being filed demonstrate, these schemes have thus far met with little success. *See, e.g., Edgewood I*, 777 S.W.2d 391 (Tex. 1989); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989).

17. 411 U.S. 1 (1973).

18. *Id.* (holding that strict scrutiny was not applicable to the Texas financing scheme because

tiffs have been forced to seek redress under state constitutional provisions. Plaintiffs have based school finance challenges on state equal protection clauses,[19] state education clauses,[20] or both.[21] This Note examines selected finance reform cases and outlines some of the factors that have led to differing results in various jurisdictions. Part II considers the methodologies of state courts and notes that at face value the courts' decisions suggest that the success or failure of finance challenges turns on distinctions between the states' constitutions. Part III of this Note argues that the state courts' inconsistent application of the constitutional provisions demonstrates that the outcomes of these cases rarely, if ever, turn upon the characteristics of the state constitutions. Part IV suggests that there are many factors that can contribute to, and in some cases determine, the outcome of this type of litigation. The Note concludes by identifying one characteristic that all successful finance scheme litigation has in common: a frustration with legislative inaction.

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wealth is not a suspect class and education is not a fundamental right). The Texas financing scheme did not violate the equal protection clause of the Fourteenth Amendment because the system bore a rational relationship to a legitimate state purpose. *Id.* at 55. Because of this essential foreclosure of federal remedies, this Note will not examine the federal equal protection claims that have been raised in some cases.

19. Examples of cases decided under an equal protection rationale include: DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); Serrano v. Priest, 557 P.2d 929 (Cal. 1976) (*Serrano II*), *cert. denied*, 432 U.S. 907 (1977); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Milliken v. Green, 203 N.W.2d 457 (Mich. 1972), *vacated*, 212 N.W.2d 711 (Mich. 1973); Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980).

20. Examples of cases decided under state education clauses include: Blase v. State, 302 N.E.2d 46 (Ill. 1973); Rose v. Council For Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Helena Elementary Sch. Dist. No. One v. State, 769 P.2d 684 (Mont. 1989); Britt v. North Carolina State Bd. of Educ., 357 S.E.2d 432 (N.C. Ct. App.), *appeal dismissed mem.*, 361 S.E.2d 71 (N.C. 1987); Coalition For Equitable Sch. Funding, Inc. v. State, 811 P.2d 116 (Or. 1991); Danson v. Casey, 399 A.2d 360 (Pa. 1979); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Seattle Sch. Dist. No. One v. State, 585 P.2d 71 (Wash. 1978).

21. Examples of cases decided under both equal protection and education clause rationales include: Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); Board of Educ. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1139 (1983); Robinson v. Cahill, 303 A.2d 273 (N.J.), *cert. denied*, 414 U.S. 976 (1973); Board of Educ. v. Walter, 390 N.E.2d 813 (Ohio 1979), *cert. denied*, 444 U.S. 1015 (1980); Fair School Fin. Council, Inc. v. State, 746 P.2d 1135 (Okla. 1987); Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989).

II. Methodological Approaches of the State Courts

A. *Minimally Adequate Education: Jurisdictions That Have Upheld Their State's Financing Scheme*

1. Equality Claims

The equal protection provisions of state constitutions[22] promise fairness of treatment to all people in the exercise of fundamental rights and eliminate suspect classification based on impermissible criteria.[23] If a state's action has an impact on a fundamental right or a suspect classification, the usual presumption of validity disappears and the act will be judged under a more exacting standard.[24] Under this "strict scrutiny" test the state must demonstrate that its action is necessarily related to a compelling governmental interest.[25] By contrast, if a court finds that the state's act does not affect a fundamental right or a suspect class, then the state must show only a rational relation to a legitimate purpose.[26]

a. Suspect Classification

When rejecting equal protection challenges, state courts have been uniform in their approach to suspect classification claims.[27] The Colorado Supreme Court examined such a claim in *Lujan v. Colorado State Board of Education*.[28] The court was faced with two different claims

22. Some state constitutions do have an explicit state equal protection clause. *See, e.g.*, Wyo. Const. art. I, § 34 (providing that "[a]ll Laws of a general nature shall have a uniform application"); Idaho Const. art. 1, § 2 ("Government is instituted for [the people's] equal protection"). Most state constitutions have other provisions that the state courts have interpreted as having the same effect. *See, e.g.*, Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1014 (Colo. 1982) (stating that Colorado's due process clause, Colo. Const. art. II, § 25, encompasses equal protection guarantees); Olsen v. State, 554 P.2d 139, 142-43 (Or. 1976) (stating that Oregon's privileges and immunities clause, Or. Const. art. I, § 20, encompasses the same protections as the federal equal protection clause).

23. *E.g.*, *Lujan*, 649 P.2d at 1014-15; Board of Educ. v. Walter, 390 N.E.2d at 818 (Ohio 1979), *cert. denied*, 444 U.S. 1015 (1980).

24. *E.g.*, *Lujan*, 649 P.2d at 1015.

25. In addition to the compelling interest element, the *Lujan* court also required the state to show, where appropriate, that the action is narrowly tailored to meet that interest. *Id.* at 1016. *Accord* Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310, 333 (Wyo.) (requiring a least restrictive means prong in the analysis), *cert. denied*, 449 U.S. 824 (1980).

26. *E.g.*, *Lujan*, 649 P.2d at 1016.

27. Many jurisdictions have not even discussed a suspect class analysis. *See, e.g.*, Fair Sch. Fin. Council, Inc. v. State, 746 P.2d 1135 (Okla. 1987); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981). Several other jurisdictions have dismissed such claims summarily by asserting that the United States Supreme Court decided that the taxable wealth of a school district is not, by itself, a suspect class in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). *See* Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 787 (Md. 1983); Kukor v. Grover, 436 N.W.2d 568, 579 (Wis. 1989).

28. 649 P.2d 1005 (Colo. 1982).

asserting the existence of a "suspect class." The plaintiffs urged the court to recognize either a class composed of low-wealth school districts or a class composed of low-income people.[29]

The court summarily rejected the plaintiffs' claim that the low-wealth school districts composed a suspect class. The court found that Colorado's equal protection clause applied only to individuals because by its very terms it embodies personal rights.[30] This restrictive definition meant that a political body such as a school district could not be a suspect class.[31] The court also found that poor persons were insufficiently distinct and insular as a class to satisfy the requirements of equal protection analysis.[32] The court found that this putative class had no relevant common attributes or characteristics.[33] The plaintiffs failed to demonstrate that the group was centered in low-property wealth districts, that poor people received a consistently lower level of education, or that the districts in which poor people lived spent less money on education.[34]

The court also found that even if the plaintiffs had demonstrated any of these correlations, their suspect class argument would fail because the group lacked the traditional features associated with suspectness.[35] The court concluded that as a group, poor people have no readily identifiable racial or lineal traits; they are instead an amorphous group that varies by time and place.[36] The poor have not been historically subject to purposeful unequal treatment,[37] and have not been reduced to complete political powerlessness.[38] The court, therefore, determined that the low-income group failed to qualify as a suspect class.[39]

b. Fundamental Right

The issue of whether educational opportunity is a fundamental right under state constitutional provisions has presented the courts

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29. *Id.* at 1020.

30. *Id.*

31. *Id.* The New York Court of Appeals also rejected a claim of a suspect class based upon "units of local government." Board of Educ. v. Nyquist, 439 N.E.2d 359, 366 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1139 (1983).

32. *Lujan*, 649 P.2d at 1020.

33. *Id.*

34. *Id.* at 1020-21.

35. *Id.* at 1021. *But see* Menacker, *supra* note 2 (arguing that wealth should be a suspect classification characteristic in education cases).

36. *Lujan*, 649 P.2d at 1021.

37. *Id.* The court pointed out that Colorado had made a concerted effort te lessen the impact upon the poor through its school financing scheme. *Id.*

38. *Id.* at 1022.

39. *Id.*

with a much more difficult question than the suspect class analysis. Courts generally deem a right fundamental if it has "been recognized as having a value essential to individual liberty in our society."[40] In *San Antonio Independent School District v. Rodriguez*[41] the Supreme Court attempted to establish a more specific means of identifying fundamental rights. The Court found that rights are fundamental for equal protection purposes only if they are guaranteed "explicitly or implicitly" by the Constitution.[42] The vast majority of state courts, however, have refused to apply the *Rodriguez* test, basing their refusal primarily on the inherently different nature of the federal and state constitutions.

State courts have been quick to point out that the federal Constitution is one of delegated powers and specified authority.[43] The Tenth Amendment states that all powers that are not delegated to the United States by the Constitution and that the Constitution does not deny to the states belong to the states or to the people.[44] Consequently, the expressed or implicit inclusion of a right in the Federal Constitution has great significance.[45]

State constitutions, on the other hand, do not restrict governmental authority to the boundaries of their text.[46] The states are not constrained by the explicit or implicit contents of their constitutions. Accordingly, the fact that a state constitution includes a particular provision does not necessarily reflect any fundamental importance attached to the activity itself.[47] This crucial difference between the nature of the Federal Constitution and its state counterparts has led virtually all

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40. *Id.* at 1015 n.7. *See, e.g.*, Carey v. Population Services Int'l, 431 U.S. 678 (1977) (finding that a right of privacy protects contraception); Roe v. Wade, 410 U.S. 113 (1973) (holding that the right to privacy encompasses abortion); Dunn v. Blumstein, 405 U.S. 330 (1972) (addressing the right to vote and tbe right to interstate travel); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (involving the right to vote); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (addressing the right to procreate); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (acknowledging the right of a parent to direct upbringing and education of children).

41. 411 U.S. 1 (1973).

42. *Id.* at 33-34. In order for a right to be fundamental, this test requires that it be based on or derived from a specific constitutional provision. *Id. See also id.* at 34 nn.73-76.

43. Board of Educ. v. Nyquist, 439 N.E.2d 359, 366 n.5 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1139 (1983). *Accord Lujan*, 649 P.2d at 1017; Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 785 (Md. 1987) (quoting *Nyquist*).

44. U.S. CONST. amend. X.

45. *E.g., Nyquist*, 439 N.E.2d at 366 n.5.

46. *See, e.g., Lujan*, 649 P.2d at 1017.

47. *See, e.g., id.* (citing provisions in the Colorado State Constitution discussing mining and irrigation, COLO. CONST. art. XVI, and nuclear detonations, COLO. CONST. art. XXVI). *See also Nyquist*, 439 N.E.2d at 366 n.5 (citing provisions in the state constitution discussing superintendence and repair of canals, N.Y. CONST. art. XV, § 3); Board of Educ. v. Walter, 390 N.E.2d 813, 818 (Ohio 1979) (pointing to a provision in the state constitution discussing worker's compensation), *cert. denied*, 444 U.S. 1015 (1980).

state courts to reject the *Rodriguez* test.[48]

The natural assumption after the rejection of the *Rodriguez* test was that the courts would turn to a more general means of determining the importance of a right to individual liberty.[49] At first glance this is exactly what most courts have appeared to do. The Supreme Court of Colorado noted the economic and social role of education in a child's development and the effect of education on the level of future involvement in political and community life.[50] The New York Court of Appeals recognized that education is of primary importance to the State.[51] The expected declaration, however, that a right with such great consequences to individual liberty should be considered a fundamental right for equal protection analysis was not forthcoming. The courts instead used an ad hoc balancing test to determine what level of scrutiny should be applied, foregoing the fundamental rights analysis.

State courts have enumerated several factors that make the strict scrutiny standard inappropriate in school finance cases. The courts have emphasized the lack of expertise of the judicial branch in dealing with finance reform.[52] This lack of institutional competence manifests itself in two ways. First, the courts seek to avoid excessive involvement in questions of taxation. The Georgia Supreme Court was particularly worried about its lack of familiarity with local problems which undergird decisions involving public revenues.[53] Second, the courts are reluc-

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48. In Serrano v. Priest, 557 P.2d 929, 952 (Cal. 1977) (*Serrano II*), the California Supreme Court specifically stated that its finding of a fundamental right "should in no way he interpreted to imply an acceptance of the [*Rodriguez* test]." The court went on to say that it was "constrained no more hy inclination than by authority to gauge the importance of rights and interests . . . by the terms of our compendious, comprehensive, and distinctly mutable state Constitution." *Id.* In a footnote, the court discussed the ease and number of times the California Constitution has been amended. *Id.* n.47. *See also* Note, *supra* note 14, at 1656-57 (noting the political nature and ease with which state constitutions can be changed).

The New Jersey Supreme Court went so far as to argue that the *Rodriguez* test is inappropriate even for federal equal protection analysis by pointing out that "the right to acquire and hold property is guaranteed in the Federal and State Constitutions, and surely that right is not a likely candidate for [strict scrutiny]." Robinson v. Cahill, 303 A.2d 273, 282 (N.J.), *cert. denied*, 414 U.S. 976 (1973). *Accord* Board of Educ. v. Walter, 390 N.E.2d 813, 819 (Ohio 1979) (quoting *Robinson* with approval), *cert. denied*, 444 U.S. 1015 (1980).

But see Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980) (both cases relying implicitly on a *Rodriguez*-type fundamentality test).

49. *See supra* note 40 and accompanying text.

50. Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1017 (Colo. 1982). *See also* Hornbeck v. Somerset County Bd. of Educ. 458 A.2d 758, 786 (Md. 1983) (recognizing the vital role education plays in society and quoting *Lujan* with approval).

51. Board of Educ. v. Nyquist, 439 N.E.2d 359, 366 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1139 (1983).

52. *See, e.g.*, McDaniel v. Thomas, 285 S.E.2d 156, 167 (Ga. 1981); *Hornbeck*, 458 A.2d at 786; *Walter*, 390 N.E.2d at 819; *Lujan*, 649 P.2d at 1018.

53. *McDaniel*, 285 S.E.2d at 167 (quoting *Rodriguez*, 411 U.S. at 41, with approval). *See also*

tant to interfere in the area of educational planning. The lack of any authoritative consensus on how to provide the greatest educational opportunity for all students leads courts to conclude that the legislature is best equipped to choose between the many approaches.[54]

Courts also are concerned by the difficulty of distinguishing the right to an education from any of the other rights or interests enumerated in their state constitutions. The Maryland Court of Appeals was quick to point out that the right to an adequate education is "no more fundamental" than the right to personal security, fire protection, welfare subsidies, health care, or any other governmental service.[55] This difficulty in distinguishing between education and other governmental services, when combined with the courts' concern over lack of expertise in the area of taxation and education policy, convinces many courts that the strict scrutiny standard is inappropriate in school finance cases.[56]

Hornbeck, 458 A.2d at 786 (noting the courts' "lack of expertise and familiarity with local problems implicated in the raising and disposition of public revenues," and citing *Rodriguez* with approval); *Walter*, 390 N.E.2d at 819 (noting the "difficult questions of local and statewide taxation"), *cert. denied*, 444 U.S. 1015 (1980).

54. *See Lujan*, 649 P.2d at 1018 (stating that this is basically a question of "what is the best public policy" and should be left to the legislature); *McDaniel*, 285 S.E.2d at 167 (quoting *Rodriguez*, 411 U.S. at 42, which stated that this "involves the most persistent and difficult questions of educational policy"); *Walter*, 390 N.E.2d at 819 (noting that finance reform involves educational policy choices and finding strict scrutiny inappropriate).

55. *Hornbeck*, 458 A.2d at 786. The Georgia Supreme Court enlisted the help of New Jersey's highest court to make the same point when it quoted from *Robinson v. Cahill*:

> This is not to say that public education is not vital. Of course it is. Rather we stress how difficult it would be to find an objective basis to say the equal protection clause selects education and demands inflexible statewide uniformity in expenditure. Surely no need is more basic than food and lodging . . . Essential also are police and fire protection, as to which the sums spent per resident vary with local decision. Nor are water and sundry public health services available (on an equalized basis).

McDaniel, 285 S.E.2d at 166-67 (quoting Robinson v. Cahill, 303 A.2d 273, 284 (N.J.), *cert. denied*, 414 U.S. 976 (N.J. 1973). *See* Thompson v. Engelking, 537 P.2d 635, 644-45 (Idaho 1975) (holding that a rational basis analysis was required because of inherent problems with the strict scrutiny test and because of the fact that the court had applied rational basis to equal protection claims involving liquor licensing statutes and motor vehicle negligence claims). *But see infra* part II.B.1.

56. The New York Court of Appeals found that strict scrutiny was only to be applied when faced with the "intentional discrimination against a class of persons grouped together by reason of personal characteristics." *Nyquist*, 439 N.E.2d at 366. Since the court rejected the suspect classification claim, it applied a rational basis standard. *Id.*

Two courts did find education to be a fundamental right. The Wisconsin Supreme Court in Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989), and the Arizona Supreme Court in Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973), both held that although education was a fundamental right, the application of that right was limited to the scope of the relevant educational provision. *Kukor*, 436 N.W.2d at 579-80 (stating that the state education provision does not call for equality in per-pupil expenditure); *Shofstall*, 515 P.2d at 592 (setting out specific standards required by the education provisions). When the courts determined that the state was fulfilling the constitutional mandate of the education provision, they found that an equal protection claim was entitled only to a rational basis standard. *Kukor*, 436 N.W.2d at 580; *Shofstall*, 515 P.2d at 592-93.

c. Rational Basis

Those courts that have found a strict scrutiny standard to be improper for finance scheme cases instead apply a traditional rational basis test. Under this standard, a court must determine whether the challenged scheme rationally furthers a legitimate state interest.[57] The state interest at stake in the finance cases is the preservation of local control over education.

The dual nature of the finance schemes gives the local taxpayers control over the education system through their power to establish the school budget.[58] The taxpayers determine how much money will be raised and influence how it should be spent.[59] The courts have used various tools of statutory interpretation to ascertain the validity of the local control rationale. The history of educational funding within the state,[60] certain provisions of the state constitutions interpreted in light of the concerns of their framers and contemporaneous statutes,[61] and the observations of educational commentators[62] have all been enlisted as support for the importance of local control of the schools. Courts have also determined that local control fosters "experimentation, innovation, and a healthy competition for educational excellence."[63] In virtually every case, the state goal of local control has been sufficient[64] to satisfy the rational basis test.

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57. *E.g., Lujan*, 649 P.2d at 1022; *Hornbeck*, 458 A.2d at 788.

58. *E.g., Lujan*, 649 P.2d at 1023; *Nyquist*, 439 N.E.2d at 367.

59. *E.g., Lujan*, 649 P.2d at 1023; *Nyquist*, 439 N.E.2d at 367. In *Nyquist* the New York court found "a direct correlation between the system of local school financing and implementation of the desires of the taxpayer." *Id.*

60. *See* Board of Educ. v. Walter, 390 N.E.2d 813, 820 (Ohio 1979) (finding that "[t]he history of educational funding in Ohio . . . has been an accommodation between two competing interests—the interest in local control of educational programs and the means to fund them and the interest of the state in insuring that all children receive an adequate education"); *Hornbeck*, 458 A.2d at 788 (stating that "Maryland's public school system has been financed by a combination of local tax revenues and State contributions virtually throughout its entire history").

61. *See* Kukor v. Grover, 436 N.W.2d 568, 580-81 (Wis. 1989) (concluding that "[t]he principle of local control in Wisconsin . . . is not merely a theoretical notion, but rather is a constitutionally based and protected precept as to which the framers of our constitution were firmly committed").

62. *See Walter*, 390 N.E.2d at 820 (quoting GEORGE D. STRAYER & ROBERT M. HAIG, THE FINANCING OF EDUCATION IN THE STATE OF NEW YORK (1923) (discussing the competing interests of equal educational opportunity and local control)).

63. *Walter*, 390 N.E.2d at 822 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973)).

64. The Arkansas Supreme Court, however, found that local control was not sufficiently important for the purpose of the rational basis test. Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983). The court found two problems with the local control argument. First, it would be possible to alter the state financing scheme to equalize funding without reducing local control. Second, the notion of local control was actually an illusion in low-wealth districts that lacked the financial ability to exercise any legitimate choice. *Id.* at 93.

2. Education Provision Claims

Every state constitution includes some provision relating to education.[65] These provisions have served as the basis of plaintiffs' second type of funding challenge. The state courts have been asked to examine their public school financing schemes to determine if the schemes satisfy the requirements of these provisions.[66] The question of what level of educational opportunity the state constitutions require lies at the heart of these types of challenges.[67]

The school finance challenges that rely on constitutional education provisions usually consist of two basic arguments. First, plaintiffs claim that equality in educational opportunity is required, and that any disparities automatically violate their state's education provisions.[68] Sec-

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65. An explicit duty to educate is included in the constitutions of 48 states. The educational provisions in the Alabama and Mississippi constitutions have elicited a great amount of controversy about their viability as a basis for finance litigation. Gershon M. Ratner, in one of the most frequently cited articles on this type of litigation, contends that only 48 states have an "explicit protection for education" eliminating any discussion about Alabama and Mississippi. Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814-15 (1985) (those citing Ratner include F. Clinton Broden, Note, *Litigating State Constitutional Rights to an Adequate Education and the Remedy of State Operated School Districts*, 42 RUTGERS L. REV. 779, 779 (1990); Note, *supra* note 14, at 1661; Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J. L. & EDUC. 93, 96, 97 (1989)). Although another commentator does not discuss the individual provision of every state constitution, he specifically mentions the Alabama provision and concludes that it "provides for an explicit but unelaborated commitment" to education. Eric B. Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 67 (1974). Professor Hubsch states that the wording of the Alabama and Mississippi provisions forecloses any reliance on them for the enforcement of a right to education. Hubsch, *supra*, at 97 n.7. But Professor Hubsch does note the existence of a case in each jurisdiction that suggests that the constitutions may nevertheless support litigation of this type. *Id.* (citing Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So. 2d 237, 240 (Miss. 1985) (labeling education as a fundamental right) and Smith v. Dallas County Bd. of Educ., 480 F. Supp 1324 (S.D. Ala. 1979) (examining a procedural due process claim based on Alabama's education provision)).

66. *See supra* notes 20-21.

67. Professor Grubb was the first person to attempt to categorize the varying levels of protection afforded by the education provision. Grubb, *supra* note 65, at 67-70. Professor Grubb's construct was picked up and refined by Professor Ratner in his article. Ratner, *supra* note 65, at 814-16. *See also* Note, *supra* note 14, at 1661-68 (applying Professor Grubb's four-category approach). The first level of education provisions contains an explicit commitment to education but uses only general education language. Grubb, *supra* note 65, at 67. The next group imposes a greater obligation by emphasizing the quality of education provided. Ratner, *supra* at 65, at 815. The third set of constitutional provisions is similar to the second but uses differing language and preambles to strengthen the commitment. Grubb, *supra* note 65, at 68-69. The fourth group mandates the highest level of educational opportunity by setting out specific duties and using terms such as the " 'paramount duty of the state.' " *Id.* at 69 (quoting WASH. CONST. art. IX, § 1). For a complete examination of individual state constitutions' education provisions and how they fit into the four-category analysis see Grubb, *supra* note 65, at 66-70; Ratner, *supra* note 65, at 814-16; Note, *supra* note 14, at 1661-70.

68. *See, e.g.*, Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 770-80 (Md. 1983) (rejecting an interpretation of the Maryland state education provision requiring exact equality in

ond, plaintiffs argue that the disparities demonstrate that some districts do not provide the minimum level of educational opportunity required by the provisions.[69] The state courts examine their constitutional provisions in light of both of these assertions.

The state courts first determine whether their constitutions' education clauses embody the concept of equal educational opportunity for all children. Although this issue has involved an assortment of differing constitutional provisions, the state courts have followed remarkably similar reasoning when rejecting this assertion.[70] A few courts have found the absence of any provision specifically setting out a duty to equalize educational opportunity to be determinative of the question.[71] Most courts, however, have used the legislative history of the provision to demonstrate that the framers did not intend to ensure equality of opportunity.[72] Consequently, these courts have decided that the constitutions do not mandate equal educational opportunity.

Courts have been more receptive to the argument that at some

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per-pupil expenditure); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1024-25 (Colo. 1982) (rejecting the plaintiffs' claim that the Colorado education provision requires equal educational opportunities); Thompson v. Engelking, 537 P.2d 635, 647 (Idaho 1975) (finding that the Idaho state education provision does not require "that *all* services and facilities are equal throughout the State").

69. *See, e.g.*, Kukor v. Grover, 436 N.W.2d 568, 574-78 (Wis. 1989) (rejecting the plaintiffs' claim that the Wisconsin education provision requires a reduction in disparities so as to assure the educational needs of the school districts with the lowest expenditures available); Board of Educ. v. Walter, 390 N.E.2d 813, 826 (Ohio 1979) (finding that although funding disparities might reach the point where the poorest schools are "starved for funds," there is no evidence that this has happened yet). The Georgia Supreme Court was faced with both types of education clause challenges. *See* McDaniel v. Thomas, 285 S.E.2d 156, 162-65 (Ga. 1981) (holding that Georgia's education provision does not require equality of educational opportunity between districts and that there has been no proof that the low-wealth districts are failing to achieve that minimal level required).

70. Although the courts were faced with provisions which supposedly offered different levels of protection, *see supra* note 67, these variations had little if any effect on the outcome in education clause cases. *See infra* text accompanying notes 169-71.

71. For example, in interpreting New York's education provision, the New York Court of Appeals found that:

> [i]t is significant that this constitutional language—adopted in 1894 at a time when there were more than 11,000 local school districts in the State, with varying amounts of property wealth offering disparate educational opportunities—makes no reference to any requirement that the education to be made available be equal or substantially equivalent in every district.

Board of Educ. v. Nyquist, 439 N.E.2d 359, 368 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1139 (1983).

72. The Maryland Supreme Court found that when an original education provision requiring a "uniform" public school system was replaced by a new amendment with no such clause, it was an indication that there was no intention to make equality of educational opportunity mandatory. *Hornbeck*, 458 A.2d at 772. In addition, the Idaho Supreme Court relied on the legislative history of that state's education provision in rejecting a similar claim. This court found it siguificant that the state's first legislators, acting within two years of the passage of the education provision, enacted legislation allowing school districts' total expenditures to depend on local funds. *Thompson*, 537 P.2d at 648-49.

point funding may be so inadequate as to fail to provide the minimum level of education required by the state constitution.[73] The plaintiffs' principal difficulty in this type of argument is to find sufficient evidence to prove it. Some courts have found that the plaintiffs failed to offer enough evidence of a locality's failure to achieve that minimum level of education.[74]

The state courts that have rejected either the equal protection claim, the education clause claim, or both have determined that their state constitutions require no more than a minimal level of educational opportunity for children.[75] Once the state provides such minimal opportunity, it has fulfilled its constitutional obligation.

B. A Step Toward Equality of Educational Opportunity: Jurisdictions That Have Sustained Challenges to Their School Financing Schemes

1. Equality Claims

Those states that have sustained challenges to their education financing schemes under an equal protection analysis have employed a wide variety of methodologies and no clear test has emerged from the vast number of jurisdictions that have ruled on such challenges. Although at times some courts have referred to the reasoning of other courts,[76] courts generally have employed independent analyses when finding a violation of equal protection provisions.[77]

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73. The Ohio Supreme Court recognized that "in a situation in which a school district was receiving so little local and state revenue that the students were effectively being deprived of educational opportunity, such a system would clearly not be thorough and efficient." *Walter*, 390 N.E.2d at 825.

74. *See, e.g.*, *Kukor*, 436 N.W.2d at 578 (finding that plaintiffs failed to assert that the state was not meeting the minimum standards); *McDaniel*, 285 S.E.2d at 165 (stating that no evidence existed to demonstrate that any student was deprived of "basic educational opportunities"). *But see supra* notes 11-13 and accompanying text.

75. *See, e.g.*, *Kukor*, 436 N.W.2d at 585 (finding no claim that insufficient funds exist to achieve a basic education); Fair Sch. Fin. Council v. State, 746 P.2d 1135, 1149 (Okla. 1987) (stating that a school system should supply such a degree of education that children may become useful citizens).

76. The Connecticut Supreme Court appeared to accept the New Jersey Supreme Court's formula for an equal protection analysis of an education claim. Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977) (*Horton I*) (citing Robinson v. Cahill, 303 A.2d 273 (N.J. 1973)). The Connecticut court, however, in its most recent statement on the subject adopted a new three-part test for reviewing educational equal protection claims. Horton v. Meskill, 486 A.2d 1099, 1106 (Conn. 1985) (*Horton III*).

77. *Compare* Serrano v. Priest, 487 P.2d 1241 (Cal. 1971) (*Serrano I*) (using a strict scrutiny analysis to examine the importance of the right to education in society) *with* Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979) *and* Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980) (both relying on the textual commitment of a right to education in their state constitutions in following a strict scrutiny analysis) *with Horton III*, 486

The California Supreme Court first set out its test for fundamentality in *Serrano I*,[78] which was decided before the United States Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*,[79] and later reaffirmed the test after the *Rodriguez* decision was handed down, in *Serrano II*.[80] In *Serrano I* the California court emphasized the indispensable role of education in a modern industrial society and determined that education is a fundamental right.[81] In *Serrano II* the court further defined fundamental rights as those rights and liberties that are at the core of a democratic government.[82] The court used many sources to demonstrate the importance of education, both to government and to society as a whole. A multitude of statements in federal and state case law affirmed the vital role of education in the modern world.[83] The court also compared the importance of education with two fundamental interests that were already widely recognized—the rights of defendants in criminal cases and the right to vote.[84] Without minimizing the value of an individual's interest in freedom, the court noted that education may be even more important to society than certain criminal defendant's rights.[85] The court also stated

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A.2d 1099 (using a three-part test) *and* Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983) (applying a rational basis standard).

78. 487 P.2d 1241 (Cal. 1971).

79. 411 U.S. 1 (1973).

80. 557 P.2d 929 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977).

81. *Serrano I*, 487 P.2d at 1255.

82. *Serrano II*, 557 P.2d at 929. The *Serrano II* holding reiterated the court's holding in *Serrano I*. The California court held that its original decision in *Serrano I* was still valid notwithstanding the United States Supreme Court's *Rodriguez* decision. *Id.* at 950-51.

83. The court first recited one of the most famous declarations of the value of education, the Supreme Court's opinion in Brown v. Board of Education, 347 U.S. 483 (1954), stating that

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In 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. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Serrano I, 487 P.2d at 1256-57 (quoting *Brown*, 347 U.S. at 493).

The state court opinions cited were no less emphatic about the role of education in modern life. " 'Unequal education, then, leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society.' " *Id.* at 1257 (quoting San Francisco Unified Sch. Dist. v. Johnson, 479 P.2d 669, 676 (Cal. 1971)).

84. *Id.* at 1257-58.

85. "From a larger perspective, education may have a far greater social significance than a free transcript or a court-appointed lawyer." *Id.* at 1258. The court quoted a group of noted commentators who concluded that "[E]ducation not only affects a vastly greater number of persons than the criminal law, but it affects them in ways which— to the state— have an enormous and

that education at the very least makes voting more meaningful.[86] The court concluded that the unique and pivotal role of education demands that it be treated as a fundamental constitutional interest.[87]

The post-*Rodriguez* cases of *Pauley v. Kelly*[88] and *Washakie County School District No. One v. Herschler*[89] used a different approach to find that education was a fundamental right. Without specifically acknowledging it, the West Virginia and Wyoming Supreme Courts relied upon the "explicitly or implicitly guaranteed" test of *Rodriguez*.[90] In *Pauley* the West Virginia court found that a clause in the state constitution requiring "a thorough and efficient system of free schools," sufficed to create a fundamental constitutional right.[91] Similarly, the Wyoming court in *Washakie* held that the emphasis on education in the state constitution left no doubt that education is a fundamental right.[92] As the two courts made clear, the inclusion of education provisions in their state constitutions was the key consideration in concluding that education was a fundamental right for equal protection purposes.[93]

The Arkansas Supreme Court also applied a fundamentality test to determine the appropriateness of an equal protection analysis.[94] The court relied on both the education clause and the role of education in society to find an equal protection analysis appropriate.[95] The Arkansas court then held that the scheme failed to pass even a rational basis test.[96]

The California and Wyoming Courts also relied on a finding that

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much more varied significance." *Id.* (quoting John E. Coons et al., *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305, 362 (1969)). These commentators also observed that education reduces the crime rate and "supports each and every other value of a democratic society." *Id.* (quoting Coons, *supra*, at 362).

86. *Id.* at 1258.

87. *Id.* The court pointed out that education was necessary for effective participation in the free enterprise system. *Id.* at 1258-59. Furthermore, the court found significance in the fact that education was compulsory for a period of time ranging from 10 to 13 years. *Id.* at 1259.

88. 255 S.E.2d 859 (W. Va. 1979).

89. 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980).

90. *See supra* note 42 and accompanying text.

91. 255 S.E.2d at 878 (citation omitted).

92. 606 P.2d at 333.

93. For additional discussion of the tests applied in *Pauley* and *Washakie*, see generally Note, *supra* note 14, at 1673-74.

This reliance on the explicit or implicit inclusion of a right in a state constitution to determine whether or not it is a fundamental interest for equal protection purposes is extremely misplaced. *See supra* notes 40-48 and accompanying text.

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

95. *Id.* at 93.

96. *Id.* (finding that the financing scheme "b[ore] no rational relationship to the educational needs of the individual districts" and holding that the system violated the state equal protection clause).

the financing schemes affected the rights of a suspect class.[97] In *Serrano I* the California court found that the local funding aspect of the financing scheme made a district's wealth the major factor in educational expenditures.[98] The court concluded that the wealth of the districts, rather than that of individuals, was a valid basis for finding a suspect class.[99] The Wyoming court, however, stated that a suspect classification based on wealth may not be enough to support an equal protection claim, but found that it was sufficient when the classification was applied to a fundamental interest.[100]

No matter what reasoning these courts employ, they all come to the conclusion that their financing scheme violates the state equal protection clause. These findings constitute a practical mandate from the courts for the state legislatures to amend their financing scheme or adopt a new financing scheme that does not create a level of spending dependent on any wealth other than the wealth of the state as a whole.[101] In effect, the courts provide reluctant legislators with a set of criteria to follow in designing a new plan.

2. Education Provision Claims

Those states which have found that a school financing scheme violated their constitution's education clause have adopted an analysis very similar to those that have rejected similar arguments.[102] Using traditional tools of constitutional interpretation, the courts arrive at one of two different definitions of the type of educational opportunity

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97. *See* Serrano v. Priest, 487 P.2d 1241, 1250-55 (Cal. 1971) (*Serrano I*); *Washakie*, 606 P.2d at 334.

98. 487 P.2d at 1250.

Although the court found that the scheme did partially alleviate the disparities in revenue, it also found that the system as a whole generated resources in proportion to the wealth of the individual school districts. *Id.* at 1250-51. The court admitted that the state was correct when it argued that the local tax rate was a factor in determining total revenues. *Id.* at 1251. In the court's view, this argument only enhanced the equal protection claim. The court found constitutional significance in the fact that one district can provide the same or greater level of educational quality for its children with a lesser tax burden than another. *Id.*

99. *Id.* at 1252-53. The court found that "[t]o allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of [commercial and industrial] property is to make the quality of a child's education dependant upon the location of [such] establishments." *Id.*

100. *Washakie*, 606 P.2d at 334.

101. *Washakie*, 606 P.2d at 336. *Accord* Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 95 (Ark. 1983) (finding a state scheme unconstitutional and turning the reform problem over to the legislature); Pauley v. Kelly, 255 S.E.2d 859, 863 (W. Va. 1979) (remanding for further evidentiary development to allow the court to review the state's performance of duty better); Serrano v. Priest, 557 P.2d 929, 946-47 n.38 (Cal. 1977) (*Serrano II*) (stating that the court's role is to determine the constitutionality of the scheme and then to "leav[e] the matter of achieving a constitutional system to the body equipped and designed to perform that function").

102. *See supra* part II.A.2.

required by their constitutions. The earlier cases found that the constitutional education provisions established a minimum level of educational opportunity that the state had to ensure every school district reached.[103] In the more recent cases, however, courts have defined educational opportunity in terms of equality.[104]

The Supreme Courts of Washington and West Virginia defined their education clauses in substantive terms. The focus of both courts was on the individual terms of the constitutional provisions. The West Virginia Court in *Pauley v. Kelly*[105] found it necessary to define the words "thorough," "efficient," and "education" to ascertain the boundaries of the legislature's constitutional mandate.[106] The court concluded that a thorough and efficient education is one that prepares students mentally, physically, and morally for their future occupations and for productive citizenship, and that does so in a cost-effective manner.[107] The court also recognized several specific elements, such as literacy, math, politics, vocational training, and cultural enrichment, that each child must learn to the level of his capacity.[108] In addition, the court found that sufficient support services were implied in the definition, including physical facilities, instructional material, and personnel.[109]

The Washington court in *Seattle School District No. One v. State*[110] found that Washington's education provision also delineated certain guidelines for the legislature to follow.[111] Although not as specific as the rule set out in *Pauley*, the Washington court's broad guidelines mandated effective teaching and the opportunity to learn

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103. *Pauley*, 255 S.E.2d at 877-78; Seattle Sch. Dist. No. One v. State, 585 P.2d 71, 90-96 (Wash. 1978).

104. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 396-97 (Tex. 1989); Helena Elementary Sch. Dist. No. One v. State, 769 P.2d 684, 690-91 (Mont. 1989). The Kentucky Supreme Court has found that Kentucky's education clause sets substantive criteria in addition to requiring a degree of equality. *See* Rose v. Council For Better Educ., Inc., 790 S.W.2d 186, 211-13 (Ky. 1989).

105. 255 S.E.2d 859 (W. Va. 1979).

106. *Id.* at 874. To arrive at suitable definitions, the court used dictionaries,—both contemporaneous with the passage of the provision and modern—case precedent, and statements by the framers of the provision. *Id.*

107. In the court's words, the West Virginia constitution requires a system that "develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically." *Id.* at 877.

108. *Id.*

109. *Id.* These specific elements appear to derive mostly from precedent, although the court is quite vague about their origin. *Id.* at 875-77.

The Kentucky Supreme Court laid down an almost identical standard. *Rose*, 790 S.W.2d at 212.

110. 585 P.2d 71 (Wash. 1978).

111. *Id.* at 95.

minimum essential skills.[112] The court defined these essential skills as those necessary to function in the political system, the labor market, or in the "market place of ideas."[113] After articulating this standard, both courts concluded that their state was failing to provide the required level of education.[114] The Washington court went so far as to assert that the state could only comply with the provision if sufficient funds were available from a "dependable and regular" tax source.[115]

In more recent cases, the Montana and Texas courts found that their education provisions require a substantial equality of educational opportunities rather than a substantive level of education that must be achieved.[116] These courts relied almost exclusively on the plain meaning of the text,[117] the statements of the education provision framers,[118] and other contemporaneous evidence.[119] This material provided the courts with enough information to conclude that, although equal expenditure per pupil was not required, districts should be able to raise similar revenues per pupil at similar levels of tax effort.[120]

The result of a violation under either type of education clause is the same. Both these courts and those finding an equal protection violation,[121] instructed the legislatures to establish a new system that met the newly determined constitutional criteria.[122]

C. *The Second Round*

Although many jurisdictions have a long history of finance scheme litigation, only two have resolved what can be considered a second round of these cases.[123] The Connecticut and New Jersey Supreme

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112. *Id.*

113. *Id.* at 94-95.

114. *Pauley*, 255 S.E.2d at 878; *Seattle*, 585 P.2d at 102.

115. *Seattle*, 585 P.2d at 98.

116. Helena Elementary Sch. Dist. No. One v. State, 769 P.2d 684, 690 (Mont. 1989); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989).

117. *See Helena*, 769 P.2d at 689 (stating that by its plain meaning the text guarantees each person equality of educational experience).

118. *See Kirby*, 777 S.W.2d at 395. The court quotes the chairperson of the education committee at the Constitutional Convention of 1875, stating that "[education] is for the general welfare of all, rich and poor, male and female, that the means of a common school education should, if possible, be placed within the reach of every child in the State." *Id.*

119. *Id.* at 396 (noting that the structure of the school finance system at the time of the provision's adoption demonstrates that gross disparities were not contemplated).

120. *Id.* at 397.

121. *See supra* part II.B.1.

122. *See, e.g., Kirby*, 777 S.W.2d at 399 (stating that "[t]he legislature has the primary responsibility to decide how best to achieve an efficient system"); *Seattle*, 585 P.2d at 95 (stating that "the Legislature must hereafter act to comply with its constitutional duty by defining and giving substantive meaning to [the mandate]").

123. *See* Horton v. Meskill, 486 A.2d 1099 (Conn. 1985) (*Horton III*) (involving a state court

Courts both have addressed challenges to plans adopted by their state legislatures in response to prior court decisions. In fact, in New Jersey plaintiffs challenged a plan that the court had already ruled was facially constitutional.[124] The two courts applied very different standards to test the constitutionality of the revised funding schemes.

1. The Connecticut Experience and the *Horton* Three-Part Test

In its second round case, the Connecticut Supreme Court found the application of the traditional two-tiered strict scrutiny test to be inappropriate in education financing cases. In *Horton v. Meskill* (*Horton III*)[125] the court reiterated its earlier findings to demonstrate the sui generis nature of finance scheme litigation.[126] The *Horton III* court noted that because educational deprivation was relative rather than absolute, the *Horton I* holding required only that the State provide all students with substantially equal educational opportunities.[127] The use of the traditional equal protection analysis that requires the State to demonstrate a compelling interest to justify the inequalities was thus improper.[128]

Instead, the court adopted the analytical framework developed by federal courts to determine the constitutionality of apportionment plans.[129] The court found this standard of review was appropriate since it lacked a narrowly tailored prong.[130] The *Horton III* court's test consisted of three parts. The plaintiff first must prove a prima facie case of discrimination by showing that any inequalities are more than minor

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review of a financing scheme adopted in 1979 after the original plan was deemed unconstitutional); Abbott v. Burke, 575 A.2d 359 (N.J. 1990) (*Abbott II*) (involving a state court review of a financing scheme adopted in 1975 after the original plan was deemed unconstitutional). The West Virginia case history might also appear to include a second round case. The decision in State *ex rel.* Bds. of Educ. v. Chafin, 376 S.E.2d 113 (W. Va. 1988), however, does not directly address a challenge to the plan adopted in response to a prior decision. Instead, it deals with another aspect of the state funding scheme and tbus is beyond tbe scope of this Note. In addition, several states have a prolonged history of litigation being transferred back and forth between the state supreme courts and lower courts. Most of this litigation has dealt with the problem of fashioning a proper remedy. *See, e.g.*, Edgewood Indep. Sch. Dist. v. Kirby, 1991 Tex. LEXIS 21 (*Edgewood III*); Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991) (*Edgewood II*); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989) (*Edgewood I*). This remedial litigation sheds little light on the factors behind the success or failure of the original finance litigation. The cases are not, therefore, discussed in this Note.

124. *See Abbott II*, 575 A.2d at 373.

125. 486 A.2d 1099 (Conn. 1985). The *Horton III* case was an examination of a state financing scheme designed in response to a finding that the state's original scheme was unconstitutional in *Horton I*, 376 A.2d 359 (Conn. 1977).

126. *Horton III*, 486 A.2d at 1105.

127. *Id.* (quoting *Horton I*, 376 A.2d at 373).

128. *Horton III*, 486 A.2d at 1105.

129. *Id.* at 1106.

130. *Id.*

deviations.[131] After such a demonstration the burden falls on the State to justify the inequalities by showing that the funding plan reasonably advances a rational state policy.[132] Finally, the plan must fail if the disparities are so great as to defeat the underlying state goal.[133]

The first prong presented the court with little difficulty. Both parties conceded that the evidence demonstrated a substantial disparity among the individual districts' expenditures.[134]

Since the plaintiffs established a prima facie case, the burden of proof shifted to the State. The court found that the new plan, if successfully implemented, would result in an equitable distribution of educational funds and an acceptable balance between state and local contributions.[135] Thus, the plan was likely to fulfill the requirements of *Horton I*, meeting the State's burden under the second prong.

Finally, the court found that the State also had fulfilled the requirements of the third prong. Connecticut had reduced disparities in funding and the State's share in the overall funding had increased under the new plan.[136] The court concluded that although disparities still existed under the new plan, they did not undermine the achievements in equalizing state support.[137]

2. *Abbott II*: An Evolution of New Jersey's Education Clause

New Jersey has perhaps the longest history of school finance litigation in the country.[138] In the latest of these cases, the New Jersey Supreme Court in *Abbott v. Burke* (*Abbott II*)[139] examined the constitutionality of a previously approved financing scheme as it applied to individual districts.[140] Unlike the Connecticut Court in *Horton III*, which based its analysis on equal protection grounds,[141] the New Jersey court relied on the State's education clause.[142] As other jurisdictions' experiences with their own education provisions have demonstrated,[143] the key element of a finance challenge involves the

131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 1107.
135. *Id.*
136. *Id.* at 1108.
137. *Id.*
138. The New Jersey Supreme Court first decided Robinson v. Cahill, 303 A.2d 273 (N.J. 1973), in April of 1973. The litigation has endured for more than 17 years and will surely continue at least into the foreseeable future.
139. 575 A.2d 359 (N.J. 1990).
140. *Id.* at 373.
141. *See supra* part II.C.1.
142. *Abbott II*, 575 A.2d at 363.
143. *See supra* parts II.A.2 and II.B.2.

requirements of a particular constitutional clause.

The New Jersey Constitution provides for a "thorough and efficient system of free public schools."[144] The *Abbott II* court's approach to defining this education clause differed from that employed in other jurisdictions. The court relied on state precedent and traced the historical evolution of the "thorough and efficient" concept.[145] The court noted that as early as 1895, within twenty years of the clause's passage, judicial interpreters found that the concept of equality was included in the notion of thorough and efficient.[146] Since that time, the court has been trying to determine precisely what that equality means.

The *Abbott II* court first examined the 1973 case of *Robinson v. Cahill* (*Robinson I*).[147] It found that case to require only that the state provide a certain level of substantive education.[148] The *Robinson I* court was unwilling to accept the proposition that every district was providing education above the substantive level and that all of the disparities in funding were due solely to a decision by some local districts to provide a higher level of education.[149]

This focus on monetary disparities did not last very long. The *Abbott II* court noted that the emphasis on funding disparity had already been reduced by a 1975 decision that ordered a provisional remedy for the legislature's failure to act within the time limit set by the court.[150] The *Robinson IV* court, in providing the legislature with guidelines for a new education plan, noted that *Robinson I* relied solely on differences in funding only because of an absence of other viable criteria for measuring compliance.[151] After accepting a variety of other factors that affect educational quality, the *Robinson IV* court concluded that funding was no longer "the overriding answer to the educational problem."[152] The *Abbott II* court viewed the approval of the state's redesigned scheme in *Robinson V*[153] as the completion of a movement away from funding disparities to substantive education.[154]

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144. N.J. CONST. art. VIII, § 4.

145. *Abbott II*, 575 A.2d at 367-72. The court also noted that any definition of thorough and efficient must continually change since it depends on "the economic, historical, social, and cultural context in which that education is delivered." *Id.* at 367 (quoting N.J. STAT. ANN. § 18A:7A-2a(4) (West 1989)).

146. *Id.* at 367 (citing Landis v. Ashworth, 31 A. 1017 (N.J. 1895), which found that the amendment required equality within an intended range).

147. 303 A.2d 273 (N.J. 1973).

148. *Abbott II*, 575 A.2d at 368.

149. *Robinson I*, 303 A.2d at 295.

150. *Abbott II*, 575 A.2d at 369.

151. *Id.* (citing *Robinson IV*, 351 A.2d at 717).

152. *Id.* (quoting *Robinson IV*, 351 A.2d at 717 n.3).

153. Robinson v. Cahill, 355 A.2d 129 (N.J. 1976).

154. *Abbott II*, 575 A.2d at 369.

In upholding the new educational plan, the *Robinson V* court focused on the fact that the State had provided a specific definition of education and a method for its implementation and supervision.[155] Dollar disparity no longer constituted evidence of a violation of the education provision. The *Abbott II* court concluded that after *Robinson V*, per-pupil expenditure was relevant only if it adversely affected the substantive education provided by a particular district.[156]

Before turning the challenge to the way the plan was applied over to an administrative agency to build a factual record, the *Abbott I* court defined a thorough and efficient education. The court stated that to determine whether or not the new scheme met the mandate of the education provision, the State must weigh the quality of education provided in property-poor districts with the quality of education in property-rich districts.[157] The scheme's validity would be judged by the ability of children from the poorer districts "to compete in, and contribute to, the society entered by the relatively advantaged children."[158] The court proceeded to examine the factual findings of the Administrative Law Judge in light of this definition.

The court compared the type of education provided by poorer districts under the new plan with that provided by wealthier ones. It first concluded that great funding disparities existed among districts in the state that were tied directly to property wealth.[159] Next, the court compared course offerings,[160] the number of children receiving education at a basic skills level,[161] physical facilities,[162] and the quality of teachers in

155. *Id.* at 369-70.

156. *Id.* at 370.

157. *Abbott I*, 495 A.2d 376, 390 (N.J. 1985).

158. *Abbott II*, 575 A.2d at 372 (quoting *Abbott I*, 495 A.2d at 390).

159. *Id.* at 383. *See also id.* at 382-89.

160. *Id.* at 395-97. The court found, for example, that Princeton has one computer for every eight students, while Camden has one for every 58; Princeton has seven built-in science laboratories, while in East Orange, science is taught out of a cart that is wheeled into a tiny area without water, gas, or electrical lines; Montclair begins foreign language instruction at the preschool level, while Jersey City begins such instruction in ninth grade. *Id.* Although evidence of course offerings was too scarce to allow for firm conclusions about most districts, the findings demonstrated that the "level of education offered to students in some of the poorer urban districts [was] tragically inadequate." *Id.* at 395.

161. *Id.* at 397. As of 1985, Camden was teaching remedial education to 53% of its children, East Orange to 41%, and Irvington to 30%. *Id.* Millburn, by contrast, taught only 4% of its students in such a program.

162. *Id.* at 396-97. The court found that many poor districts were operating out of schools that "due to their age and lack of maintenance, are crumbling." *Id.* at 397. In one district the court discovered that children ate lunch in the hoiler room in the basement, and that remedial education classes were taught in a converted bathroom. *Id.* Another district had no cafeteria at all, and students took turns eating in a corridor. In yet another district, a converted cloakroom served as the library. *Id.*

different districts.[163] From this evidence, the court concluded that the State failed to provide a thorough and efficient system of education, at least in poorer urban districts.[164]

When the court combined this evidence with its finding that the existing system would never be able to raise every district to a thorough and efficient level,[165] it concluded that the present system was fundamentally inadequate.[166] In light of New Jersey's long history of school finance reform cases, and the evidence in the case, the court ordered the State to alter the scheme to provide poorer urban districts with a level of funding equal to that in the richest districts in the State.[167]

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163. *Id.* at 366-68. The court compared the teacher-pupil ratios, the average experience level of the instructional staff, and the average level of education among teachers. The poorer urban districts suffered in comparison to other districts in each one of these areas. *Id.* at 399.

The court made several observations about the importance of these different factors. For example, the court noted the wide course offerings of wealthier districts and asked "if these courses [were] not integral to a thorough and efficient education, why [did] the richer districts invariably offer them?" *Id.* at 397. Moreover, "[i]f absolute equality were the constitutional mandate, and 'basic skills' sufficient to achieve that mandate, there would be little short of a revolution in the suburban districts when parents learned that basic skills is what their children were entitled to, limited to, and no more." *Id.* at 397-98.

164. The court engaged in a complex analysis using two Department of Education categories—socioeconomic status and urban districts—to rank each district. The group of schools with the lowest socioeconomic status rating in the largest cities composes what the court refers to as "poor urban districts." *Id.* at 388-44. The court stated that when the characteristics of the poor urban districts

> are combined with the evidence in the record of the substantive failure of thorough and efficient education in these districts, such as their failure to achieve what the DOE considers passing levels of performance on the High School Proficiency Test (HSPT), the constitutional failure becomes apparent, the need for a remedy urgent, and the focus of that need clear.

Id. at 387.

165. The concept of municipal overburdening served as a major factor in the determination that the present system will never be able to meet constitutional requirements. *Id.* at 393. Urban districts are unable to raise taxes for education because of the extremely heavy existing tax load due to the extraordinarily high cost of other necessary services.

166. The court concluded that

> [d]isparity of funding, its relationship to poverty, the critical needs—educational and otherwise—of its pupils, the practical inability to raise further funds through taxation (municipal overburden), the likelihood of the permanence of these factors, the level of substantive education actually being given, the failure rate of its students, their dropout rate, were all sufficiently shown, and dramatically contrasted with the situation of students in richer districts

to demonstrate that the state is not achieving a thorough and efficient system of public schools. *Id.* at 388-89.

167. *Id.* at 363. Throughout the opinion, the court intimated that equality of funding alone may be inadequate. The constitutional mandate required "such level of education as will enable all students to function as citizens and workers in the same society, and that necessarily means that in poorer urban districts something more must be added to the regular education in order to achieve the command of the Constitution." *Id.* at 403. Furthermore, after declaring that the poorer districts must be funded at a level "substantially equal to that of property-rich districts," the court stated without explanation that "[t]he level of funding must also be adequate to provide for the special educational needs of these poorer urban districts and address their extreme disadvantages." *Id.* at 408. A strong argument could be made that the court's opinion required poorer districts to

Moreover, such funding could not be dependent on the ability of the local district to tax.[168] Only such a remedy would satisfy the constitutional mandate.

III. A Lack of Predictability

The state courts of the many jurisdictions that have been faced with school finance challenges have addressed these claims in numerous ways. These courts' opinions suggest that the varying degrees of educational opportunity provided result from the straightforward construction of unique constitutional provisions. When faced with either equal protection or education clause challenges, courts have articulated various methodologies based on their state constitutions and have ordered varying levels of protection for students in poorer districts. The state courts' inconsistent application of these constructs suggests that the individual courts' purported methodologies obscure the real reasons for the success or failure of school finance challenges.

If the unique characteristics of state constitutions were in fact the key to the outcome of finance scheme challenges, the educational requirements would correlate closely with the level of protection ostensibly afforded by the education clause at issue. This has not been the case, however.[169] The vast majority of successful challenges have not been won in states categorized as having the highest level of protection for education in their constitutions. Only one state with a strong consti-

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be funded at an even higher level than the wealthier districts.

The court rejected the argument that no amount of funds could eliminate the disadvantages of students from poorer districts with one of the most eloquent statements on the need for state intervention in education since Brown v. Board of Education, 347 U.S. 483 (1954):

> If the claim is that additional funding will not enable the poorer urban districts to satisfy the thorough and efficient test, the constitutional answer is that they are entitled to pass or fail with at least the same amount of money as their competitors.
>
> If the claim is that these students simply cannot make it, the constitutional answer is, give them a chance. The Constitution does not tell them that since more money will not help, we will give them less; that because their needs cannot be fully met, they will not be met at all. It does not tell them they will get the minimum, because that is all they can benefit from. Like other states, we undoubtedly have some "uneducable" students, but in New Jersey there is no such thing as an uneducable district, not under our Constitution.
>
> All of the money that supports education is public money, local money no less than state money. It is authorized and controlled, in terms of source, amount, distribution, and use, by the State. The students of Newark and Trenton are no less citizens than their friends in Millburn and Princeton. They are entitled to be treated equally, to begin at the same starting line. Today the disadvantaged are doubly mistreated: first, by the accident of their environment and, second, by the disadvantage added by an inadequate education. The State has compounded the wrong and must right it.

Id. at 403.

168. *Id. See supra* note 165.

169. *See supra* sources cited in note 67. *See also* Note, *supra* note 14, at 1661-70 (discussing the successes and failures of state challenges under the various education clauses).

tutional commitment to education has sustained a school finance challenge.[170] Rather, those states with the seemingly lowest levels of protection have more often ordered reform.[171] This lack of any discernible relationship between the strength of commitment to education in the state constitution and the success rate of school finance challenges makes it clear that the outcome of these cases does not depend on the interpretation of the constitution involved.

A second characteristic of school finance litigation is the inconsistent application of the equal protection analysis. Many jurisdictions that have rejected an equal protection claim did so because they found that education was not a fundamental right.[172] The key to these holdings was a determination that the "explicitly or implicitly guaranteed" test of *Rodriguez* was inappropriate in the state constitutional context.[173] Although this argument seems persuasive, several states have adopted the *Rodriguez* approach and applied a strict scrutiny test using the fact that an education provision was included in their constitution as the basis for a finding of fundamentality.[174] Two jurisdictions that have found education to be a fundamental right, however, rejected the application of strict scrutiny and instead used the rational basis test.[175]

The state courts' erratic application of the various methodologies suggests that they are being less than candid when they point to the individual characteristics of their state constitutions to justify their decisions. The traditional analytical technique of examining the varying constitutional constructs used by individual state courts sheds little light on what truly motivates the results in these cases.

IV. Why Have the Courts Decided the Way They Have?

If the outcome of finance litigation is not explained by the unique construction of the states' constitutions, what causes the success or failure of this type of litigation? All state courts have intimated that the area of school financing is best left to the legislature. Only when courts conclude that their legislature is unwilling or unable to pass effective

170. *See* Seattle Sch. Dist. No. One v. State, 585 P.2d 71 (Wash. 1978) (sustaining an education provision challenge under the Washington clause that declares education to he a "paramount" state duty).

171. *See* Ratner, *supra* note 65, at 815-16; Note, *supra* note 14, at 1661-70 & accompanying footnotes (classifying Arkansas, Connecticut, Kentucky, Montana, New Jersey, Texas, and West Virginia as having education clauses that fall in the two lowest tiers of protection).

172. *See supra* part II.A.1.b.

173. This is due to the fact that state constitutions, unlike the Federal Constitution, are not documents of delegated power and specified authority. *See supra* text accompanying notes 43-48.

174. *See supra* notes 88-93 and accompanying text.

175. *See* Kukor v. Grover, 436 N.W.2d 568, 580 (Wis. 1989); Shofstall v. Hollins, 515 P.2d 590, 592-93 (Ariz. 1973).

remedial legislation will they intervene.

Other factors contribute to, and in some cases may even be determinative of, the success or failure of school finance challenges. The method by which judges are selected could affect a court's willingness to intervene in the school reform arena. Appointed judges may be more likely to find in favor of a plaintiff because of their insulation from direct political accountability.[176] In addition, the political orientation of the court is another potential predictive factor. A court that may fairly be described as "liberal" as opposed to "conservative" in terms of its substantive doctrine and activism likely would be more inclined to interfere with this traditionally legislative prerogative.[177] Another predictor of the outcome of this type of legislation is the particular social values of a state's people—state courts may interpret their constitutions in light of the social values of their population.[178] As a result, a court in a state with a very strong tradition of school reform might be more likely to interpret its state constitution in the light most favorable to such reform.

While these and other factors undoubtedly contribute to the success of school finance challenges, frustration with continual legislative inaction is implicit in virtually every case.[179] Only when a court is convinced that the legislature is unwilling or unable to effectuate financing reform will the court take on the responsibility.

All state courts accept the basic premise of judicial deference in the school financing area. This belief is readily apparent in virtually every

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176. *See* Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1090 (1991). This writer suggests that the appointment of the New Jersey Supreme Court by the governor makes the court less likely to succumb to majoritarian opposition to the costs of reform. *Id.* An examination of the states with appointed justices compared to those that have elected judges demonstrates little direct statistical correlation with the success of this type of challenge. Of the 10 jurisdictions upholding finance scheme challenges (including Michigan, whose decision was vacated as improvidently granted, see Milliken v. Green, 212 N.W.2d 711, and Connecticut, which first upheld and later rejected this type of challenge), only New Jersey and Connecticut appoint their justices. Of the 15 jurisdictions rejecting finance scheme challenges (also including Connecticut), only Arizona, Connecticut, and New York appoint their justices. This lack of a nationwide correlation does not mean that in an individual case the independence of the judiciary could not be a very significant factor in the outcome.

177. For example, the New Jersey Supreme Court, which has been very active in finance reform litigation and has continually found for the plaintiffs in these types of cases, *see supra* part II.C.2, has been compared to the Warren Court due to its desire to effectuate social change. *See* Rorie Sherman, *In N.J., Who's Really the Boss? Jury Still Out*, NAT'L L.J., Dec. 19, 1988, at 1.

178. Adam S. Cohen, *More Myths of Parity: State Court Forums and Constitutional Actions for the Right to Shelter*, 38 EMORY L.J. 615, 643 (discussing Alaska's tradition of privacy that has protected possession of marijuana in the home).

179. *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 189, 198, 213 (Ky. 1989); *Abbott II*, 575 A.2d 359, 377 (N.J. 1990); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989).

decision that rejected a finance challenge.[180] These courts were concerned with their lack of expertise in the area[181] and were reluctant to intrude upon the legislature in the realm of social policy.[182]

Language of judicial deference to the state legislature also exists in the decisions of those courts that upheld the challenges. These decisions invariably include a seemingly obligatory statement by the court that it is the legislature's responsibility to provide adequate education.[183] These state courts recognize their duty to give due deference to their legislatures' attempts to achieve a level of education which meets their constitutional mandate.[184]

The state courts' deference to legislatures has manifested itself not only in the language of judicial opinions, but also in the remedial process. When the courts have found a violation of the state constitution, they have turned the task of formulating a proper remedy over to the legislature without so much as maintaining jurisdiction to oversee the process.[185] All state court opinions on this topic suggest that solving the problems of school financing is the province of state legislatures.

For the state courts to intervene in this presumptively legislative

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180. *See, e.g.*, Kukor v. Grover, 436 N.W.2d 568, 582 (1989) (stating that the court owes deference to the legislature when a fiscal dispute involves educational policy); Board of Educ. v. Nyquist, 439 N.E.2d 359, 363 (N.Y. 1982) (stating that it is inappropriate for a court to intrude on legislative decisions involving educational expenditures), *appeal dismissed*, 459 U.S. 1139 (1983); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982) (stating that school expenditure questions are properly decided by the legislature).

181. *See supra* notes 52-53 and accompanying text.

182. *See, e.g., Lujan*, 649 P.2d at 1018.

183. *See, e.g.*, Seattle Sch. Dist. No. One v. State, 585 P.2d 71, 95 (Wash. 1978) (stating that it is the "[l]egislature's obligation . . . to provide 'basic education' through a basic program").

184. *See, e.g., Abbott II*, 575 A.2d 359, 393 (N.J. 1990) (stating that plaintiffs must meet a high burden of proof before the court will overturn such legislation); Washakie Co. Sch. Dist. No. One v. Herschler, 606 P.2d 310, 319 (Wyo. 1980) (noting that "the supreme court has the duty to give great deference to legislative pronouncements and to uphold constitutionality whenever possible").

185. *E.g., Seattle*, 585 P.2d at 77, 95-97; Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 399 (Tex. 1989).

The Wyoming Supreme Court's *Washakie* decision provides perhaps the most eloquent example of this judicial deference. After finding the state system unconstitutional, the court stated:

> The legislature has made valiant and sincere efforts to arrange the financing of an adequate school program, using a combination of local and state funds. It has only been since 1971 that a successful attack has won in the courts so that an enlightened course of reasoning is available to guide reform from an inequitable disparity in spendable funds for education which has relied too long and too heavily on the local property tax . . . . It will not be an easy task. It will require time for adequate study, drafting of appropriate legislation and transition from the present scheme of financing to one in conformity with the sense of this decision; so this court will provide a period of time in which to convert to constitutional compliance.

606 P.2d at 337. *See also supra* notes 101, 122 and accompanying text. *But see, e.g., Washakie*, 606 P.2d at 337 (retaining jurisdiction until a "constitutional body of legislation is enacted and in effect").

area required a recognition that the legislators had been unwilling or unable to implement their constitutional mandate. This frustration with the legislature may be the real key to successful finance reform challenges. Impatience with legislative inaction is reflected in several ways.

The clearest evidence of judicial frustration is the language of the various state court opinions. The Kentucky Supreme Court's statement in *Rose v. Council For Better Educ., Inc.* is typical: "In spite of the past and present efforts of the General Assembly, Kentucky's present system of common schools falls short of the mark of the constitutional mandate of 'efficient.' "[186] The Washington Supreme Court was equally candid when it stated, after an examination of the practices of that state's earliest legislatures, that, "[i]n the final analysis . . . it is not the failure of our early legislatures that troubles us. Rather, our current concern is the failure of subsequent legislatures to make ample provision for . . . education. . . ."[187]

In addition to the language of state court decisions, an individual state's history of reform can be equally revealing. The State of Tennessee has been trying to institute an educational finance reform program since the 1970s, when the state education commission issued several reports declaring the existing financing scheme to be unfair and unreasonable.[188] The failure of the Tennessee legislature to implement reform

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186. 790 S.W.2d 186, 213 (Ky. 1989). In its opinion, the Kentucky court repeatedly mentioned the inability of the General Assembly to live up to its constitutional duty. *Id.* at 189, 198.

187. Seattle Sch. Dist. No. One v. State, 585 P.2d 71, 93 (Wash. 1978). *Accord Abbott II*, 575 A.2d 359, 376 (N.J. 1990) (stating that "for ten years and more there has been no thorough and efficient education in these districts . . . . Judicial deference can go just so far"); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989) (stating that Texas's legislative efforts have not been enough and that "[a] band-aid will not suffice; the system itself must be changed"); *Washakie*, 606 P.2d at 320 (stating, after a discussion of past legislative acts and other court decisions, that "[t]he question of inequality in school financing has been smoldering too long," and that "[t]he continuing dispute must be settled"); *Serrano II*, 557 P.2d 929, 953 (Cal. 1977) (holding that the improvements made by the California legislature were not sufficient to overcome the inequality caused by the system).

As these cases and others suggest, the courts' observations about legislative inaction are usually sympathetic. *See, e.g., Rose*, 790 S.W.2d at 189 (stating that the court "intend[s] no criticism of the substantial efforts made by the present General Assembly"). Another court noted that "[t]he record is replete with evidence of [the state legislators'] dedication, industriousness, perseverance and, ultimately, their considerable accomplishments. The problems they face have bedeviled the entire nation. No one has solved them. Our constitutional conclusion in no way belittles their prodigious efforts and their many achievements." *Abbott II*, 575 A.2d 359, 363 (N.J. 1990). This apparent understanding in no way undermines the conclusion that frustration with legislative inaction is a factor that is crucial to the success of challenges to school financing schemes. It merely demonstrates that legislative inaction does not always result from the legislature's unwillingness to pursue its constitutional mandate. Often the legislature simply is incapable of doing so.

188. *See* Duren Cheek, *Rural Schools Decided Suit Only Hope for Equality*, THE TENNESSEAN, July 26, 1991, at 4A. *See also* Duren Cheek, *Rural Schools Press Court for Quick Fix*, THE TENNESSEAN, Sept. 7, 1991, at 1B.

programs both before and after the filing of a lawsuit by small county school systems substantiated the reformers' conclusion that a lawsuit represented the only hope for change.[189]

The legislature's unwillingness to take any action became evident during the trial. The plaintiffs' attorney offered to drop the lawsuit if the State agreed to implement the State Board of Education's proposed reform, which the State had relied on as an indication that a judicial remedy was unnecessary. The State refused.[190] The legislature's opposition to any financing reform became even more evident when it passed a resolution urging the Tennessee Attorney General to appeal the decision if the State lost at the Chancery Court level.[191] Although the chancellor's decision was couched strictly in equal protection language,[192] there can be little doubt that the repeated failure of the State legislature to pass any reform legislation directly affected the outcome of the suit.

The procedural history of the New Jersey finance litigation demonstrates the New Jersey courts' continued attempts to prompt legislative action. Time after time either legislative inaction or insufficient action prompted judicial response. In 1973 the New Jersey Supreme Court outlined the level of education guaranteed by that state's constitution and held that the State's financing scheme was insufficient to meet that constitutional mandate.[193] Adopting a deferential position, the court turned the formulation of a remedial financing scheme over to the legislature.[194] In 1975, however, after two years of virtual inactivity by the legislature, the court finally was forced to act.[195] The court stated that

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189. *See* Duren Cheek, *Rural Schools Decided Suit Only Hope for Equality*, THE TENNESSEAN, July 26, 1991, at 4A. (reporting that a small county school attempted to get a $100,000 increase in expenditure from the state legislature in 1986 after a cut in federal funding); *Chancellor Awaits Hearing on School Funding Remedies*, THE NASHVILLE BANNER, Sept. 9, 1991, at B4 (reporting that Governor McWherter's 1988 reform bill failed to receive legislative approval); Duren Cheek, *Rural Schools' Lawsuit Returns to Court Today*, THE TENNESSEAN, Sept. 12, 1991, at 4B (reporting that Governor McWherter's plan failed to receive legislative approval in 1991); Duren Cheek, *Rural Schools Now Feel Justified in Suing State*, THE TENNESSEAN, July 21, 1991, at 1A (quoting the superintendent of one of the plaintiff school systems stating that "[t]he legislature's inability to pass school and tax reform bills proves that suing the state was the proper action for poor, rural school systems to pursue"); *No More Excuses! Fund State's Schools*, THE TENNESSEAN, Aug. 8, 1991, at 12A (commenting in an editorial that the legislature probably would not call a special session to deal with the financing issue and stating that "[i]f [the legislators] had it their way, they'd dodge and duck Tennessee's obvious problem forever").

190. Duren Cheek, *Curve Ball: From Left Field, Small Schools' Lawyer Says He'll Drop Case if Reforms Adopted*, THE TENNESSEAN, Nov. 22, 1990, at 1A.

191. Duren Cheek, *Small Systems Win Case*, THE TENNESSEAN, July 26, 1991, at 1A.

192. Tennessee Small Sch. Sys. v. McWherter, No. 88-1812-II (Tenn. Chancery Ct. July 25, 1991) (nonfinal decision awaiting completion of remedy phase of bifurcated trial).

193. *See Robinson I*, 303 A.2d 273, 297 (N.J. 1973).

194. *Id.*

195. *See Robinson IV*, 351 A.2d 713 (1975).

it had given the legislature ample opportunity to remedy the constitutional defects in the New Jersey school finance scheme and now had no alternative but to impose a judicial remedy.[196] After this expression of utter dissatisfaction with the progress of the State legislature in remedying the constitutional defect, the court provided for a contingent remedy that greatly increased the aid to poorer districts.[197]

In response to the court's 1975 decision the legislature finally passed a new financing scheme.[198] Although this legislation addressed many of the problems identified by the court, it still failed to remedy the primary defect of funding disparity.[199] As a result, in 1976 a facial challenge to the legislation came before the court.[200] Out of deference to the legislature the court found the new scheme facially valid.[201] It took almost ten more years before a challenge to the application of the new legislation reached the New Jersey Supreme Court.[202] After years of factfinding by an administrative agency the court held the New Jersey financing scheme unconstitutional, concluding that the lack of thorough and efficient education in the poorest districts had persisted for too long and that judicial deference was no longer appropriate.[203] Once again, the inability of the legislature to respond to constitutional requirements forced the court to intervene.

V. CONCLUSION

An examination of the various state court opinions involving financing schemes demonstrates that the outcome of this litigation has less to do with the methodological approach of the court or the individual characteristics of the state's constitution than with a variety of other factors involving the relationship between the court and the legislature. Foremost among these factors is the determination by the court that the legislature has abdicated its constitutional duty to provide

196. In the court's own words,

> Having previously identified a profound violation of constitutional right, based upon the default in a legislative obligation imposed by the organic law in the plainest of terms, we have more than once stayed our hand, with appropriate respect for the province of other Branches of government. *In final alternative, we must now proceed to enforce the constitutional right involved.*

Id. at 716 (emphasis added).

197. *Id.* at 722.

198. *Abbott II*, 575 A.2d 359, 369 (N.J. 1990).

199. *Id.*

200. *Robinson V*, 355 A.2d 129 (N.J. 1976).

201. *Abbott II*, 575 A.2d 370-71 (stating that the constitutionality of the act must turn on its application and pointing to Chief Justice Hughes's concurrence emphasizing the importance of allowing the legislature to design a remedy).

202. *See Abbott I*, 495 A.2d 376 (N.J. 1985).

203. *Abbott II*, 575 A.2d at 376.

educational opportunity to all of the state's children. If the legislature and the electorate fulfilled their responsibility more effectively through the enactment of legislation that effectuates equal educational opportunity for all children, then judicial intervention would not be justified or needed. Until that happens, however, the realization of states' promises of education for all their children will fall to the state courts.

Jonathan Banks