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**THE INADEQUACY OF ADEQUACY GUARANTEES:
A HISTORICAL COMMENTARY ON STATE
CONSTITUTIONAL PROVISIONS THAT ARE THE BASIS
FOR SCHOOL FINANCE LITIGATION**

JOSEPH P. VITERITTI*

I. INTRODUCTION

The constitutional provisions that propel most adequacy lawsuits date back to the nineteenth century. Applying language formulated then to courtroom battles that unfold now can be artful, even fanciful. Adequacy clauses do not exist in most state constitutions. Attorneys have construed adequacy as a loose legal standard from language that had a different meaning when most of the state constitutions were adopted. In order to be effective, lawyers need to persuade jurists that what they seek to achieve for their clients is compelled by the law, or better yet, by the constitutions that judges interpret and enforce. Class action suits often involve another step in which attorneys strive to convince their clients that a settlement won is not only in their best interest, but that it will also benefit others similarly situated. Such is not always the case, whether or not the lawyers believe it.

State constitutions reflect not only the thinking and aspirations of the times in which they were written, but the biases as well—or at least the prejudices of those who held political power when the documents were written. The history that shaped the drafting of state constitutions during the nineteenth century varied from state to state and from region to region. Yet there are discernible patterns. Nineteenth-century political history is riddled with racial, ethnic, and religious bigotry, all of which are manifest in the state constitutions under which we live. While recent jurisprudence has moderated the effects of these shameful dispositions from the past, the legal residue is still with us

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and sometimes gets factored into court rulings handed down in the name of poor children.

This article traces how judicial interpretation of nineteenth century language that appears in most state constitutions inhibits the ability of state courts and legislatures to meet the legitimate educational needs of poor and minority students. Part II outlines the judicial retreat from an equity standard to an adequacy standard in school finance litigation. Part III explains the evolution and nature of adequacy suits. Part IV documents the early history of state constitutional language requiring education and mandating its inherent racial discrimination. Part V concerns the origins of the common school model and its ingrained religious, ethnic, and class biases. Part VI reviews the ignoble history of "Blaine Amendments" that exist in contemporary state constitutions. Part VII explains the effects of the legal legacy previously outlined and its negative effects on the outcome of school finance litigation. Part VIII proposes a way to refashion the legal remedies of school finance suits so that they are more equitable and responsive to the needs of the children they are supposed to benefit.

II. FROM EQUITY TO ADVOCACY

Adequacy suits are frequently referred to by legal scholars as the "third wave" of school finance litigation.¹ During the first wave, challenges were grounded in the Equal Protection Clause of the Fourteenth Amendment. In *Serrano v. Priest*,² for example, the California Supreme Court found that funding disparities generated by a system based on local property taxes violated the federal constitutional rights of people who lived in property poor districts. The second wave is marked by *San Antonio Independent School District v. Rodriguez*,³ the 1973 decision in which the United States Supreme Court ruled that funding disparities in education do not necessarily violate rights protected by the federal constitution. In *Rodriguez*, a five-person majority

1. See generally William E. Thro, *The Third Wave: The Implications of Montana, Kentucky, and Texas for the Future of School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990); William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as Model*, 35 B.C. L. REV. 597 (1994) (hereinafter "Judicial Analysis"); Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995); Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 517 (1991); Gail F. Levine, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Ruling*, 28 HARV. J. ON LEGIS. 507 (1991).

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

3. 411 U.S. 1, 29-30 (1973).

ruled that “education, of course is not among the rights afforded explicit attention under our Federal Constitution. Nor do we find any basis for saying that it is explicitly protected.”⁴ The decision was a major setback in the movement for educational and racial equality that began with the landmark *Brown v. Board of Education*⁵ decision of 1954. *Rodriguez*, in fact, was a direct contradiction of the holding of *Brown*, which in addition to outlawing racial segregation in public schools, proclaimed that educational opportunity “is a right that must be made available to all on equal terms.”⁶

The practical effect of *Rodriguez* was to remove the federal courts from the battle over educational finance, and to a certain extent from the continuing discussion about educational opportunity. The net result was to place such matters in the hands of the state courts and ultimately the state legislatures. It takes a leap of faith, and perhaps a bit of amnesia, to rely on state governments to serve as mechanisms for resolving the injustices heaped on disadvantaged minorities. The American civil rights movement began when the federal courts struck down decisions made by state legislators and judges that perpetuated injustices against disfavored citizens.⁷ The practices in question not only enforced racial discrimination in education and other public facilities, but also created obstacles to voting for African Americans, especially in the South.⁸ The *Brown* decision established an important precedent for later federal court rulings that would outlaw discrimination in public facilities outside of education, many of which were further undermined at the state level.⁹

Brown also moved Congress to take aggressive action by promoting educational opportunity through compensatory funding for disadvantaged children. The Elementary and Secondary Education Act (ESEA) of 1965 was then the most ambitious investment of federal money to date.¹⁰ Subsequent evaluations, however, revealed that the

4. *Id.* at 24.

5. 347 U.S. 483 (1954).

6. *Id.* at 493.

7. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS 27-74, 157-80, 217-302* (2000); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 39-156 (1991).

8. Joseph P. Viteritti, *Unapportioned Justice: Local Elections, Social Science and the Evolution of the Voting Rights Act*, 4 CORNELL J.L. & PUB. POL’Y 199, 199-214 (1994).

9. ROSEMARY C. SALOMONE, *EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST-BROWN ERA 43-44* (1986).

10. STEPHEN K. BAILEY & EDITH MOSHER, *ESEA-THE OFFICE OF EDUCATION ADMINISTERS A LAW 23-30, 60-71* (1968).

states had treated the new money as general aid rather than channeling it to the neediest children and bridging the achievement gap.¹¹

The No Child Left Behind Act of 2002 represents the most recent attempt by the federal government to hold the states accountable for narrowing the achievement gap,¹² but reports indicate that many states are responding by reducing their standards in order to minimize the risk of noncompliance.¹³ This has led to a new demand for national standards among many education advocates, in which the federal government would once again be cast in the role of rescuing the states from their own hidebound inclinations.¹⁴ Given the pull and tug of federal-state relationships since *Brown*, it is difficult to put much faith in the ability of the states to act in the best interests of the most underachieving students. A close examination of state history with regard to “adequacy” provisions is even more discouraging.

There has been some notable progress realized under the banner of school finance reform, but it has been both limited and limiting.¹⁵ Initially, state litigation for school finance reform mimicked the activity from the first wave. Plaintiffs built their claims primarily on the strength of equal protection clauses found in state constitutions, and to a lesser extent on their education clauses.¹⁶ They demanded equality in spending, but more often than not failed to get it.¹⁷ State courts were reluctant to force legislatures to do something they were not inclined to do: redistribute locally generated funds from wealthy

11. Launor F. Carter, *The Sustaining Effects Study of Compensatory and Elementary Education*, 13 EDUC. RESEARCHER 3 (1984); Geoffrey D. Borman & Jerome V. D'Agostino, *Title I and Student Achievement: A Meta-Analysis of Federal Evaluation Results* 18 EDUC. EVALUATION & POL'Y ANALYSIS 309 (1996); MICHAEL PUMA ET AL., PROSPECTS: THE FINAL REPORT ON STUDENT OUTCOMES (ABT Assocs. 1997).

12. See PAUL MANNA, *SCHOOL'S IN: FEDERALISM AND THE NATIONAL EDUCATION AGENDA* (2006); PATRICK J. MCGUINN, *NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965-2005* (2006).

13. CHESTER E. FINN, JR. ET AL., *THE STATE OF THE STATE STANDARDS 2006*, <http://www.edexcellence.net/foundation/publication/publication.cfm?id=358>; Lynn Olson, *Gaps in Proficiency Levels on State Tests and NAEP Found to Grow*, EDUC. WK., Apr. 18, 2007, at 12.

14. Alyson Klein, *Education Trust Offers NCLB Renewal Plan*, EDUC. WK., Apr. 18, 2007, at 21-22.

15. Michael Heise, *Equal Education Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543 (1998) (providing a sobering empirical analysis of the tangible benefits derived from school finance suits); see also James Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 290-93 (1999).

16. See *supra* note 1.

17. Plaintiffs did manage to win court battles in Arkansas, California, Connecticut, New Jersey, Washington, West Virginia, and Wyoming. *Judicial Analysis*, *supra* note 1, at 601-03. Suits in thirteen other states failed. *Id.*

and powerful suburban districts to benefit mostly poor, mostly urban districts that did not have the same political and economic clout.¹⁸ Politically speaking, the wholesale redistribution of funding would have been an unnatural act.

There are three broad ways to conceive of justice with regard to school spending.¹⁹ The most progressive approach would allocate the greatest amount of resources and opportunities to children with the greatest educational and social needs, since these students have more challenges to overcome to reach an acceptable level of academic achievement.²⁰ A middle range approach would allocate the same amount of resources and opportunities to all children, based on a simple definition of equality.²¹ The most regressive approach would give more resources and opportunities to the most advantaged children of society, based on the assumption that their parents have more to give to them, and that they ought to be able to do so if they desire.²² The distributional arrangement derived from adequacy suits fits squarely in the third category. It does not guarantee that the bulk of the resources that result from the settlement of these suits is awarded to those students who are supposedly the object of the litigation. As a consequence, even the most generous of settlements have failed to generate significant improvement in student academic performance among the economically disadvantaged.²³ It is not a strong starting point for a campaign launched in the name of the poor.

III. ADEQUACY SUITS

The third wave of school finance litigation, formulated under the adequacy banner, was somewhat of a retreat from the promise of educational opportunity demanded by *Brown* and halted by *Rodriguez*. The reasoning went something like this: if the courts could not persuade elected legislators to equalize funding between the rich and the poor, then perhaps they could agree on a minimum level of adequacy

18. Paul Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995).

19. JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 23-25 (1999).

20. *Id.* at 25.

21. *Id.* at 24.

22. *Id.* at 39.

23. Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact and Future*, in SCHOOL FINANCE: ISSUES AND PERSPECTIVES 65 (Helen Ladd et al. eds., 1999).

to which all children were entitled.²⁴ This left the door open for wealthy districts to continue spending more. The claims were tied to a variety of education clauses found in state constitutions,²⁵ which will be examined below. In *Rose v. Council for Better Education*,²⁶ the Supreme Court of Kentucky found that educational spending and achievement were so low compared to other states that it imposed a statewide remedy designed to benefit all districts, including those that had allocated more than the average.²⁷

The Kentucky legislature responded by prescribing a three-tier system of funding.²⁸ It guaranteed a minimum level of spending for all districts, offered matching funds to districts that taxed themselves at up to 15% above the foundation level, and allowed wealthy districts to tax themselves an additional 15%, thereby spending more than all other localities.²⁹ Total education spending was increased by more than \$1 billion.³⁰ While the legislature promised to ensure “high academic standards for all children” and cut the spending gap between rich and poor by half, it steered clear of the equality rule that guided earlier discussions.³¹

Rather than focus entirely on spending, adequacy lawsuits introduced the notion of a quality education. In *Rose*, the Kentucky Supreme Court identified seven basic developmental capacities that must be targeted for all students, which included such factors as oral and written communication skills; knowledge of economic, social, and political systems; respect for physical and mental wellness; appreciation of the arts; preparation for higher education or vocational training; and readiness for gainful employment.³² The Supreme Court of Appeals of West Virginia set down similarly specific educational objectives for

24. See *supra* note 1.

25. *Id.*

26. 790 S.W.2d 186 (Ky. 1989).

27. *Id.* at 215-16.

28. Kentucky Education Reform Act of 1990, ch. 476, 1990 Ky. Acts 1208 (codified as amended in scattered sections of KY. REV. STAT. ANN., chs. 156-65 and other scattered chapters).

29. *Id.*; see also Jacob E. Adams, Jr., *School Finance Policy & Students' Opportunities to Learn: Kentucky's Experience*, THE FUTURE OF CHILDREN, Winter 1997, at 79; C. Scott Trimble & Andrew C. Forsaith, *Achieving Equity and Excellence in Kentucky Education*, 28 U. MICH. J.L. REFORM 599 (1995).

30. Jacob E. Adams, Jr., *supra* note 29, at 81.

31. C. Scott Trimble & Andrew C. Forsaith, *supra* note 29, at 599, 605-09, 612-13; see also JENNIFER L. HOCHSCHILD & NATHAN SCOVRONICK, THE AMERICAN DREAM AND THE PUBLIC SCHOOLS 74 (2004).

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

enforcing an adequacy judgment under its constitution in *Pauley v. Kelley*.³³

Unsatisfied with what had been achieved under its previous equity-based ruling, the New Jersey Supreme Court in *Abbott v. Burke*³⁴ ordered the state legislature to guarantee spending in poor urban districts on par with the amount spent in wealthy suburban districts and to provide supplementary programs designed to eliminate disadvantages.³⁵ In subsequent rulings, the court, at the urging of the plaintiffs, prescribed a number of programmatic entitlements.³⁶ These included whole school reform, full-day kindergarten, pre-school for all three and four-year olds, the correction of building code violations, the creation of additional classroom space, social services, increased security, after-school programs, and summer-school programs.³⁷ All of these initiatives were required under the auspices of the “thorough and efficient” clause of the New Jersey Constitution.³⁸ As time passed, New Jersey continued to add districts that were eligible for relief under the *Abbott* ruling, finally bringing the number to thirty-one.³⁹

In order to address overcrowding and poor maintenance in disadvantaged, mostly urban districts, New Jersey created a School Construction Corporation in 2002 and endowed it with an \$8.6 billion budget.⁴⁰ In September 2005, the *New York Times* ran a lead story documenting incompetence, lack of planning, and shady dealings that led to the cancellation of two hundred school projects over the previous summer.⁴¹ Then, in March 2006, a report by the State Commission of Investigation revealed that school districts had lavished local education officials throughout the state with cars, computers, cell phones, excessive pension benefits, and tax-deferred annuities.⁴² The following

33. These included literacy, mathematical ability, knowledge of government, self-knowledge, preparation for work and further education, recreational pursuits, the arts and social ethics. *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1989).

34. *Abbott v. Burke*, 575 A.2d 359, 400, 402 (N.J. 1990).

35. *Id.*; see also Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827 (1998).

36. *Abbott v. Burke*, 710 A.2d 450, 455-57 (N.J. 1998).

37. See Education Law Center, <http://www.edlawcenter.org> (last visited Aug. 8, 2007) (providing up-to-date developments related to *Abbott*).

38. N.J. CONST. art. VIII, § 4, para. 1.

39. Education Law Center, <http://www.edlawcenter.org/ELCPublic/AbbottvBurke/AbbottProfile.htm> (last visited Sept. 5, 2007).

40. Jeffrey Gettleman, *In New Jersey, Another Year of Cramped and Dated Schools*, N.Y. TIMES, Sept. 7, 2005, at B1.

41. *Id.*

42. Richard Lezin Jones, *Leading New Jersey's Schools Has its Price: High*, N.Y. TIMES, Mar. 14, 2006, at B1.

month, Governor John Corzine, a newly elected liberal Democrat, received approval from the New Jersey Supreme Court to freeze the amount of state aid given to the “Abbott districts,” which ended a routine of annual spending increases.⁴³

It stands to reason that it takes more resources to bring disadvantaged students to a desirable level of performance than it does for advantaged students. By requiring significant increases in expenditures, the New Jersey case also signaled a continued emphasis on educational inputs in addition to the kinds of educational outcomes that were previously outlined by the Kentucky and West Virginia courts.⁴⁴ While educational aspirations can only be achieved through concrete programmatic initiatives, the focus on resources can also serve as a distraction from the fundamental interests of the children who are the aggrieved parties in school finance litigation. One approach responds to the needs of school systems, the other to the needs of school children. The detailed programmatic nature of the New Jersey ruling also indicated that the courts, at least in some jurisdictions, could use state constitutions to define adequacy in almost any way they chose.

In 2003, New York State’s highest court declared that New York City had failed to provide all of its children with a “sound basic education” in violation of the state constitution.⁴⁵ The Court of Appeals of New York’s finding in this 10 year adequacy suit was rooted in constitutional language that requires the legislature to maintain and support “a system of free common schools, wherein all children of this state may be educated.”⁴⁶ The court equated “sound basic education” with “the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury,” which it determined was consistent with the purpose that the constitutional framers had in mind when they drafted the education clause in 1894.⁴⁷

Between the 1989-1990 and the 2003-2004 academic years, the school budget in New York had risen by 23% in inflation-adjusted dol-

43. Gregory J. Volpe, *Court OKs Freezing Aid*, HOME NEWS TRIB. (New Brunswick, N.J.), May 10, 2006, at A1.

44. See *supra* text accompanying notes 26-33.

45. Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 340 (N.Y. 2003) [hereinafter Campaign for Fiscal Equity, Inc. I]. See also Brian J. Nickerson & Gerald M. Denihan, *From Equity to Adequacy: The Legal Battle for Increased Funding of Poor Districts in New York*, 30 FORDHAM URB. L.J. 1341 (2003) (providing a history of the case).

46. *Campaign for Fiscal Equity, Inc.*, 801 N.E.2d at 361 (quoting N.Y. CONST. art. XI, § 1).

47. *Id.* at 330.

lars.⁴⁸ In November 2006, the Court of Appeals of New York ruled that the state legislature must provide an additional \$1.93 billion per year to the city schools in order to settle the suit,⁴⁹ even though total operating and capital spending for schools grew 42.3% to \$15.2 billion.⁵⁰ The amount was derived from a recommendation made by the governor, who had commissioned a study to determine the cost of remedying the state constitutional violation.⁵¹ In its ruling, the court rejected a proposal put forward by the trial judge, based on his own expert report, which would have increased the operating budget by \$5.63 billion per year.⁵² The four to two majority determined that as a matter of law, the trial court had overstepped its judicial authority in substituting its own calculation for that of the executive branch.⁵³

In an attempt to bring the remedy more in line with the needs of city school children, the governor's office, several *amici* and a concurring judge had originally encouraged the court to adopt the New York State Learning Standards as a method for realizing a "sound basic education."⁵⁴ The Court of Appeals of New York responded that elements of the Learning Standards approved by the Board of Regents and Commissioner of Education "exceed notions of a minimally adequate or sound basic education," suggesting that they might be too rigorous a measure.⁵⁵ Instead, the court ultimately settled on a financial target, with full knowledge that additional spending could not guarantee a satisfactory improvement in student performance.⁵⁶ Its judgment seemed to suggest that it was better to err on the side of more spending than higher student performance.⁵⁷ While reasonable people can argue over the original meaning of the education clause intended by the 1894 New York State Legislature, it is fairly safe to say that its aim was not maintaining educational deprivation at the highest possible cost.

48. *Lawsuit Remains Unsettled, But School Spending Continues to Rise*, INSIDE THE BUDGET (New York City Indep. Budget Office, New York, N.Y.), July 19, 2005, at 1.

49. *Campaign for Fiscal Equity, Inc. v. State*, 861 N.E.2d 50, 52 (N.Y. 2006) [hereinafter *Campaign for Fiscal Equity, Inc. II*]. See also Gail Robinson, *The Last Word in School Funding*, GOTHAM GAZETTE, Nov. 27, 2006, <http://www.gothamgazette.com/print/2044> (providing a useful historical overview of the case).

50. See *supra* note 48.

51. *Campaign for Fiscal Equity, Inc. II*, 861 N.E.2d at 55.

52. *Id.* at 57-58.

53. *Id.* at 57-59.

54. See *Campaign for Fiscal Equity, Inc. I*, 801 N.E.2d at 354-55 (Smith, J., concurring).

55. *Id.* at 332.

56. *Campaign for Fiscal Equity, Inc. II*, 861 N.E.2d at 360-61 (Smith, J., concurring).

57. *Id.*

IV. EARLY HISTORY

William Thro has identified four types of education clauses in state constitutions that impose increasing levels of obligation on state legislatures.⁵⁸ Category I clauses create a minimal obligation for the state, requiring nothing more than a system of free public schools.⁵⁹ Such language is found in the New York State Constitution.⁶⁰ Category II clauses involve more specific mandates such as the “thorough and efficient clause” found in the New Jersey constitution.⁶¹ Others in this category refer to a “uniform” or “general and uniform” system of schools.⁶²

Category III clauses embody an aspirational objective that education is to achieve.⁶³ California’s constitution, for example, requires the legislature to “encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement.”⁶⁴ Rhode Island’s education clause instructs the legislature to “adopt all means which it may deem necessary and proper to secure to all people the advantages and opportunities of education.”⁶⁵ Category IV clauses impose the greatest obligation and designate the proper priority afforded education for the state.⁶⁶ Thus, the Washington Constitution refers to education as a “paramount duty.”⁶⁷ Georgia refers to a “primary obligation.”⁶⁸ Florida’s recently amended constitution refers to education as “fundamental” and “paramount” and calls for the “adequate provision” of education.⁶⁹ In all, eighteen states have Category I provisions, twenty-two have Category II, six have Category III, and four have Category IV.⁷⁰

58. William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform*, 75 VA. L. REV. 1639, 1661-70 (1989).

59. *Id.* at 1661-62.

60. N.Y. CONST. art. XI, § 1 (mentioning “a system of free common schools”).

61. Thro, *supra* note 58 at 1663-64 (citing N.J. CONST. art. VIII, § 4, cl.1.)

62. *Id.* at n.111.

63. *Id.* at 1666.

64. CAL. CONST. art IX, § 1.

65. R.I. CONST. art XII, § 1.

66. Thro, *supra* note 58 at 1667.

67. WASH. CONST. art. IX, § 1.

68. GA. CONST. art VIII, para. 1.

69. FLA. CONST. art. IX, § 1. See Jon Mills & Timothy McLendon, *Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State to Make “Adequate Provision” for Florida Schools*, 52 FLA. L. REV. 329, 343 (2000). See also Barbara J. Santos, *School Finance Litigation in Florida: A Historical Analysis*, 23 STETSON L. REV. 497 (1994).

⁷⁰Mills & McLendon, *supra* note 69 at 343-46. See also Mills & McLendon, *supra* note 69, at 342-43 (providing a complete breakdown of state constitutional provisions).

Despite their rising levels of specificity, these provisions set an imprecise standard for defining educational adequacy and leave open the question of whether it should be realized in terms of financial inputs or student outcomes. Should “thorough” and “efficient” commands be treated with equal weight? Does “uniform” mean that all children should be educated in exactly the same way? At what point does uniformity become rigidity? How far does the legislature need to go to “encourage” the “promotion” of a “suitable” education for “improvement?” If education is the single most important function performed by the state, then all the legislature is required to do is invest more money in schooling than any other state function. Factoring in local expenditures, most, if not all, states were already doing exactly this prior to the first wave of school finance litigation.⁷¹

While most of the state constitutions can be traced to the nineteenth century, a serious historical review requires us to reach back even further. The Puritans of New England placed great value on education and had a firm understanding of its importance to society.⁷² In 1642, the Massachusetts School Law authorized local town officials to hold parents accountable for their children’s ability “to read and understand the principles of religion and the capitall lawes of this country.”⁷³ It was not the intention of the legislature then to create a school system or require localities to support one.⁷⁴ Lawmakers placed the duty to educate squarely with parents.⁷⁵ Yet with judicial approval, select men could apprentice out the children of parents who were deemed “not to be able and fitt” in order to meet their educational responsibilities.⁷⁶

In 1647, the Massachusetts legislature passed the Old Deluder Satan Act.⁷⁷ This law was to frustrate the “chiefe project of that ould deluder, Satan, to keepe men from the knowledge of the Scriptures,” which the Puritans believed would have undermined public morality

71. JOSEPH F. ZIMMERMAN, *STATE AND LOCAL GOVERNMENT* 285 (Barnes & Noble, Inc. 1973) (1962) (providing a table indicating that as of 1967 state and local expenditures on education exceeded those in every other category of state and local expenditures). See generally Ronald K. Snell, Corina Eckl & Graham Williams, *State Spending in the 1990’s*, NATIONAL CONFERENCE OF STATE LEGISLATURES (2003), <http://www.ncsl.org/programs/fiscal/stspend90s.htm> (discussing how state and federal spending grew in the 1990’s and the impact it had on various social programs).

72. William E. Sparkman, *The Legal Foundations of Public School Finance*, 35 B.C. L. REV. 569, 570 (1994).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 571.

and civil society.⁷⁸ The legislation required towns of more than fifty households to employ a teacher for instruction in reading and writing.⁷⁹ The teacher's wages could be paid by either the parents of students or by the general population.⁸⁰ Towns of 100 or more households were required to open a grammar school to prepare students for further education.⁸¹ By this time, several Massachusetts localities had already made arrangements for educating students. Now the legislature was mandating education without a commitment to assist the funding of schools.⁸²

After the colonies declared their independence from England in 1776, eleven of the original thirteen states adopted new constitutions.⁸³ Only five of these documents included references to education.⁸⁴ Of twenty-five state constitutions adopted or revised between 1776 and 1800, twelve incorporated some kind of provision for education.⁸⁵ According to John Eastman, these early inclusions were of two kinds: hortatory additions and specific demands for legislative action.⁸⁶ The Massachusetts Constitution drafted by John Adams in 1780 is exemplary of the first type.⁸⁷ Because it is such an important part of our political, legal, and educational history, it is worth quoting at length:

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties . . . it shall be the duty of legislators and magistrates . . . to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools, and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades manufac-

78. MASSACHUSETTS SCHOOL LAW OF 1647 (1647), reprinted in EDUCATION IN THE UNITED STATES A DOCUMENTARY HISTORY at 394 (Sol Cohen ed., Random House, Inc.) (1974).

79. Sparkman, *supra* note 72 at 571.

80. *Id.*

81. *Id.*

82. *Id.*

83. John Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776-1900*, 42 AM. J. LEGAL HIST. 1, 3 (1998).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

tures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings, sincerity, good humor, and all social affections, and generous sentiments, among the people.⁸⁸

Like Benjamin Franklin, George Washington, Thomas Jefferson and many of his contemporaries, Adams believed that education was essential to a healthy democracy.⁸⁹ If the success of the state depended on a knowledgeable, well-rounded, and civically responsible populace, it was only reasonable for government to provide for its education. When Adams wrote his constitution, most education in the Bay State was under the direction of the clergy, including the university in Cambridge founded by Congregationalists.⁹⁰ Except for a nineteenth century amendment that prohibited aid to religious institutions, the education clause from Mr. Adams' constitution remains in effect today.⁹¹

The Massachusetts Constitution of 1780 was a model for the New Hampshire Constitution of 1784 and for those of several states that joined the Union in the early part of the nineteenth century, including Indiana (1816), Tennessee (1834), and Arkansas (1836).⁹² The United States Congress also drew inspiration from the language of the Massachusetts Constitution when it adopted the Northwest Ordinance in 1787.⁹³ This law, which was to provide for the orderly settlement of lands north of the Ohio River, read: "Religion, morality, and knowledge being necessary to government and the happiness of mankind, schools and the means of education shall forever be encouraged."⁹⁴ These aspirations were embraced by a number of state constitutions, including Ohio, Missouri, Mississippi, Kansas, Nebraska and North Carolina.⁹⁵ More obligatory provisions appeared in the early constitu-

88. *Id.* at 3-4 (referencing the Massachusetts Constitution of 1780 as the first constitution with a hortatory provision).

89. LORRAINE SMITH PANGLE & THOMAS L. PANGLE, *THE LEARNING OF LIBERTY: THE EDUCATIONAL IDEAS OF THE AMERICAN FOUNDERS* 91-105 (1993).

90. GEORGE M. MARSDEN, *THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF* 33-47 (1994).

91. Eastman, *supra* note 83, at 4.

92. *Id.* at 7.

93. *Id.* at 7-8.

94. Northwest Ordinance of 1781 art. III, *reprinted in* 1 U.S.C. at LIII (2000).

95. Eastman, *supra* note 83 at 8.

tions of North Carolina, Pennsylvania, Vermont and Georgia.⁹⁶ In addition to requiring that “schools shall be established,” North Carolina provided that teacher salaries be “paid by the public.”⁹⁷ While Vermont called for teacher salaries to be supported by each town, Georgia assigned financial responsibility to the state.⁹⁸ Finally, the Pennsylvania Constitution of 1790 specifically provided for the “free education” of poor children.⁹⁹

Between 1800 and 1834, eight new states joined the Union, and six of the existing ones wrote new constitutions.¹⁰⁰ All but three, Louisiana, Illinois and Virginia, contained some provision concerning education, and two included “equality” clauses.¹⁰¹ Connecticut called for the creation of a school fund for the “support and encouragement of the public or common schools throughout the State, and for the equal benefit of all people thereof.”¹⁰² Indiana called for a “general system of education . . . equally open to all,”¹⁰³ but the provision contained an escape clause that read, “as soon as circumstances permit.” This phrase not only left the “equality” commitment uncertain, but the overall funding for the education system as well.

In 1816, the Indiana legislature passed a law created to elaborate on its constitutional intent, which would prove to be a conspicuous sign of the times. Lawmakers agreed that public schools should be “open and free to all the white children resident in the school district.”¹⁰⁴ Much later, in 1850, the Indiana Supreme Court ruled that “colored” children were not even permitted “to attend public schools, paying their own tuition, where the resident parents of white children attending, or desiring to attend said schools object.”¹⁰⁵ In reaching its conclusion, Indiana’s high court cited an Ohio Supreme Court decision deferring to the legislature “as to whom the teacher may admit to the privileges of the school.”¹⁰⁶ While most state constitutions had defined a public obligation to provide education, most state courts and legisla-

96. *Id.*

97. *Id.* (citing N.C. CONST. of 1776, art. XLI).

98. *Id.*

99. *Id.* at 9.

100. *Id.* at 10.

101. Eastman, *supra* note 83, at 11-12.

102. *Id.* at 12 (citing CONN. CONST. of 1818, art. VIII, § 2).

103. *Id.* at 11-12 (citing IND. CONST. of IX, § 2).

104. *Id.* at 12 (citing An Act for Revising and Consolidating the Statutes of the State of Indiana, ch. 15, art. V, § 102, 1843 Rev. Stat. of Ind. 65, 320).

105. *Lewis v. Henley*, 2 Ind. 332, 334 (1850).

106. Eastman, *supra* note 83 at 12.

tures refrained from deeming education a right, especially when it came to minority children.¹⁰⁷

In 1849, the Massachusetts Supreme Court heard a case brought by the parents of Sarah Roberts, a five-year-old black girl who had been excluded from attending an all white school in Boston.¹⁰⁸ The suit was brought to enforce a Massachusetts statute authorizing that “any child unlawfully excluded from public school instruction, in the Commonwealth, shall recover damages . . . against the city or town by which such public instruction is supported.”¹⁰⁹ The court ruled that Sarah was not entitled to attend the school nearest her home because a “colored” school existed in another part of the district.¹¹⁰ The court further explained that the state constitution “will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment.”¹¹¹ This was not the antebellum South, but Boston, the cradle of liberty, the place where Horace Mann breathed life into the idea of a common school.

It was a generally accepted practice throughout the country to separate children by race in places where black children received any education. The fathers of public schooling were not particularly open-minded when it came to women either. As late as 1789, when the city of Boston first considered creating grammar schools for girls, opponents protested that female minds were inferior and that educating them would disturb the social order.¹¹² Since women were not qualified to vote or hold office, they did not need to prepare for the responsibilities of citizenship.¹¹³ And the duties women took on in the family did not require them to have the same education as men who went out into the world and pursued serious careers in business and government.¹¹⁴ State law reflected the values, priorities, and prejudices of the nineteenth century. Unfortunately, this restrictive social paradigm continued to affect subsequent education policy.

107. *Id.* at 13.

108. *Id.* at 7.

109. *Id.*

110. *Id.*

111. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206 (1849).

112. DAVID TYACK & ELISABETH HANSOT, *LEARNING TOGETHER: A HISTORY OF COEDUCATION IN AMERICAN PUBLIC SCHOOLS* 26 (1990).

113. *Id.* at 16-24.

114. *Id.*

V. THE COMMON SCHOOL

Even though the history of the common school varies from region to region and state to state,¹¹⁵ it is fitting to begin its story with Horace Mann.¹¹⁶ Mann, who served as secretary to the Massachusetts school committee from 1837 to 1848, was more thoroughly influential than any educational leader of the time in articulating the goals of public education as it began to emerge in the middle of the nineteenth century.¹¹⁷ The widely read and quoted annual reports Mann prepared for the state board of education are the first chapter in the canon of American public schooling.¹¹⁸ His vision was bold and ambitious, but it was also tainted. The “grand machinery”¹¹⁹ of education that Mann imagined was a reactionary response to a large infusion of immigrants, many of whom were poor laborers that had come from Ireland to escape famine.¹²⁰ Mann saw education as a tool to eliminate poverty, prepare workers, promote morality, and create citizens.¹²¹

Mann, more than anything else, sought to make Americans of the foreign masses that had come to the city, but his notion of what it meant to be an American was a narrow one. Mann equated being a good American with being a good Protestant.¹²² His 1844 report read, “no student of history, or observer of mankind, can be hostile to the precepts and the doctrines of Christian religion.”¹²³ Only the Irish had sufficient numbers to rebel against the Protestant dominated political majority that controlled politics in Massachusetts.¹²⁴ During Mann’s tenure as secretary of education, five of eight members of the Massa-

115. LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925* (1987); DAVID TYACK, *THOMAS JAMES & AARON BENAVIDE, LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954* (1987).

116. CHARLES LESLIE GLENN, JR., *THE MYTH OF THE COMMON SCHOOL 146-178* (1988).

117. See *THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MAN 3-28* (Lawrence Cremin ed., 1957).

118. *Id.* at 29-112.

119. Horace Mann, *Twelfth Annual Report, in THE REPUBLIC AND THE SCHOOL 79* (Lawrence Cremin ed., 1957).

120. GLENN, *supra* note 116, at 146-206. See generally FREDERICK M. BINDER, *THE AGE OF THE COMMON SCHOOL, 1830-1865* (1974) (providing a more general history of the common school).

121. MANN, *supra* note 119, at 79-112.

122. GLENN, *supra* note 116, at 146-206. See generally STANLEY K. SCHULTZ, *THE CULTURE FACTORY: BOSTON PUBLIC SCHOOLS, 1789-1860* (1973) (offering a critical look at the development of the common school in Boston).

123. MANN, *supra* note 119, at 102.

124. See STEVEN P. ERIE, *RAINBOW’S END: IRISH AMERICANS AND THE DILEMMAS OF MACHINE POLITICS, 1840-1985 25-26* (1988) (noting that between 1846 and 1855, the percentage of the Boston population that was Catholic grew from 2% to 20%).

chusetts school board were Protestant ministers, and most local school committees were controlled by churchmen.¹²⁵ Mann never went so far as to say that he would prohibit non-Protestants from teaching in his public schools, but he did feel “perfectly authorized to inquire” of such a person’s willingness to use the Protestant Bible.¹²⁶

Having failed to rid public schools of Protestant religious content, Catholic leaders demanded support for their own parochial schools, creating a backlash from the Protestant majority.¹²⁷ In 1854, the Massachusetts legislature, urged on by the anti-immigrant Know-Nothing Party, passed the nation’s first compulsory education law.¹²⁸ This statute was designed as much to exert control over the rebellious Catholic minority, as it was to provide universal education.¹²⁹ Two years later, with the Know-Nothing party firmly in control of the governorship and the legislature, Massachusetts passed a constitutional amendment prohibiting aid to religious schools and created a Nunnery Investigating Committee.¹³⁰ This committee conducted surprise visits to Catholic convents and proposed legislation limiting voting rights and public office to native-born citizens.¹³¹ Through the end of the nineteenth century, the legislature established various committees that oversaw and harassed private and parochial schools in the name of common education.¹³²

What was going on in Massachusetts was emblematic of developments taking place throughout the country. In 1854, the Know-Nothings sent seventy-five members to Congress, and were about to take control of the state legislatures in Connecticut, New Hampshire, Rhode Island, Maryland, and Kentucky.¹³³ They also had a strong

125. JORGENSEN, *supra* note 115, at 31.

126. *Id.* at 37.

127. There is an extensive literature on the Catholic protests that took place in various cities. See generally DIANE RAVITCH, *THE GREAT SCHOOL WARS*: NEW YORK CITY, 1805-1973 33-66 (1976); JAMES SANDERS, *THE EDUCATION OF AN URBAN MINORITY: CATHOLICS IN CHICAGO, 1833-1965* 121-39 (1977); MICHAEL FELDBERG, *THE PHILADELPHIA RIOTS OF 1844: A STUDY OF ETHNIC CONFLICT* 23-27, 33-38, 78-95, 99-116, 143-159 (1975); SCHULTZ, *supra* note 122, at 235-36, 251, 255-57.

128. Thomas James, *Rights of Conscience and State School Systems in Nineteenth Century America*, in *TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS* 126 (Paul Finkelman & Stephen Gottlieb eds., 1991).

129. *Id.* at 117, 126-27.

130. See JORGENSEN, *supra* note 115, at 87-89. See also JOHN R. MULKERN, *THE KNOW-NOTHING PARTY IN MASSACHUSETTS: THE RISE AND FALL OF A PEOPLE’S MOVEMENT* 102-103 (1990).

131. JORGENSEN, *supra* note 115, at 87-89.

132. *Id.*

133. RAY ALLEN BILLINGTON, *THE PROTESTANT CRUSADE: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM, 1800-1860* 388-89 (1938).

presence in New York, Pennsylvania, Tennessee, Virginia, Georgia, Alabama, and Louisiana.¹³⁴ Although Massachusetts was the only state to require Bible-reading by law, the practice was followed in seventy-five to eighty percent of schools throughout the country.¹³⁵ Compulsory Bible-reading was upheld by the state courts in most places since those who sat on the bench were an extension of the dominant sociopolitical system that created the challenged education policies.¹³⁶ One Maine court ruled in 1854 that “if the majority of the school be Protestants, the [school] committee can enforce such a system of instruction upon all.”¹³⁷

Between 1835 and the beginning of the Civil War, nine new states were admitted to the Union and fourteen others revised their constitutions.¹³⁸ Of these, only Illinois and Virginia still did not have education provisions, and nine states had obligatory constitutional mandates for education.¹³⁹ Four states—New Jersey, Ohio, Minnesota and Oregon—had either “thorough and efficient” or uniformity clauses.¹⁴⁰ New Jersey passed a law prohibiting schools from excluding children from public schools on account of “religion, nationality, or color,” but a state court subsequently authorized the refusal of admission if “the schools . . . were full.”¹⁴¹ Following the terms of the Northwest Ordinance, Ohio’s enabling act made land grants available to every township for the use of schools in 1802.¹⁴² Similar provisions later appeared in the enabling acts of Indiana (1816), Illinois (1818), and Michigan (1837).¹⁴³

The Ohio Constitution not only guaranteed access to state supported schools; the state Bill of Rights included provisions for poor children who had been victimized by discrimination in some towns.¹⁴⁴ These protections did not cover black or Native American children, who were either educated in separate schools or not educated at all.¹⁴⁵ In 1837, the same year that Horace Mann became secretary to Massa-

134. *Id.*

135. TYACK, JAMES & BENAVIDE, *supra* note 115, at 164.

136. JAMES, *supra* note 128, at 128-35.

137. *Donahue v. Richards*, 38 Me. 379, 387 (1854).

138. *Eastman*, *supra* note 83, at 13.

139. *Id.*

140. *Id.* at 19.

141. *Pierce v. Union District School Trustees*, 46 N.J.L. 76, 78 (N.J. Sup. Ct. 1884).

142. *Eastman*, *supra* note 83, at 14.

143. *Id.* at 14-15.

144. OHIO CONST. art. VIII, § 25 (1802).

145. CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860* 88-89 (1983).

chusetts' state board of education, Ohio appointed Samuel Lewis as its first Superintendent of Public Schools.¹⁴⁶ Lewis subscribed to the values and objectives that had been incorporated in the common school model of Horace Mann.¹⁴⁷ The Ohio legislature subsequently commissioned a study of European systems of education, which resulted in an endorsement of the Prussian system that had impressed Mann.¹⁴⁸

Reluctant to commit the necessary funding, the Ohio legislature did not enact a constitutional provision calling for a "thorough and efficient system of common schools" until 1851.¹⁴⁹ When the issue of public schooling was brought before the Constitutional Convention of 1850-1851, a debate ensued over the wording of a proposal that would have made schooling "free to all white children in the state."¹⁵⁰ Advocates of the provision argued that making education available to "the colored race" would encourage unwanted immigration.¹⁵¹ The proposal was eventually defeated after serious consideration.¹⁵²

The delegates to the Ohio Constitutional Convention of 1850-1851 made a conscious decision to have Protestantism thrive in public schools while at the same time prohibiting aid to other religious schools. The same constitutional provision that organized the patchwork of local schools into a uniform system of state education also provided that "no religious sect shall, in any manner control the dispensation of the school funds of the state."¹⁵³ As one delegate to the convention explained, the final arrangement was made possible through the elimination of a single impediment: "the rivalry of schools created by different sects."¹⁵⁴ More than twenty years would pass before the local school board of Cincinnati, responding to protests, passed resolutions prohibiting Bible reading and religious exercises in the public schools.¹⁵⁵ Similar measures were adopted in Chicago, New York, Rochester (NY), and Buffalo (NY) at around the same time.¹⁵⁶

146. Molly O'Brien & Amanda Woodrum, *Symposium: The Ohio Constitution-Then and Now: An Examination of the Law and History of the Ohio Constitution on the Occasion of its Bicentennial: The Constitutional Common School*, 51 CLEV. ST. L. REV. 581, 594, 599 (2004).

147. *Id.* at 599.

148. *Id.* at 598-600.

149. OHIO CONST. art. VI, § 2 (1851).

150. See O'Brien & Woodrum, *supra* note 146, at 615.

151. *Id.*

152. *Id.*

153. *Id.* at 617.

154. *Id.*

155. Stephen K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 46 (1992).

156. *Id.* at 47.

When Michigan was admitted to the Union in 1837, its enabling legislation gave title to land for schools directly to the state rather than the towns within it: this method resulted in a more centralized approach to education.¹⁵⁷ The Michigan Constitution that called for the creation of public schools granted discretion to the legislature for determining how to meet this obligation.¹⁵⁸ This assumption of legislative supremacy was supported by case law.¹⁵⁹ In 1841, the state legislature enacted a law creating a separate school district for Detroit “composed of the colored children.”¹⁶⁰ A year later, it passed a statute that created one school district for the entire city.¹⁶¹ However, the Detroit school board continued to impose a policy requiring children to be segregated by race.¹⁶²

Many states, including states that had not been a part of the Confederacy, continued to employ constitutional language to impose racial segregation in public schools after the Civil War.¹⁶³ For example, the Missouri Constitution of 1865 had one clause requiring the state legislature to “establish and maintain free schools for the gratuitous instruction of all persons of the state between the ages of five and twenty-one”¹⁶⁴ and another that allowed “separate schools . . . for children of African descent.”¹⁶⁵ In 1875, the latter clause was revised to read: “Separate free public schools shall be established for the education of children of African descent.”¹⁶⁶ The West Virginia Constitution of 1872 that required a “thorough and efficient system of free schools”¹⁶⁷ also stipulated that “[w]hite and colored persons shall not be taught in the same school.”¹⁶⁸ As a rule, former Confederate states incorporated segregation clauses in the same constitutions that carried various educational guarantees, including those that called for “equal education” or the education of “all children.”¹⁶⁹

157. Eastman, *supra* note 83, at 15.

158. *Id.*

159. People *ex rel.* Workman v. Bd. of Educ. of Detroit, 18 Mich. 400, 418 (1869) (Campbell, J., dissenting).

160. Eastman, *supra* note 83, at 15-16.

161. *Id.* at 16.

162. *Id.* at 15-16.

163. *Id.* at 20-29.

164. MO. CONST. art. IX, § 1 (1865).

165. *Id.* at art. IX, § 2.

166. Eastman, *supra* note 83, at 24.

167. W.VA. CONST. art. X, § 2 (1861).

168. W.VA. CONST. art. XII, § 8 (1872).

169. Eastman, *supra* note 83, at 26-29.

The history of the common school and the state laws that created it cannot be separated from the ugly battles that took place between religious dissenters and the Protestant majority that controlled the legislatures and the courts.¹⁷⁰ Michigan had adopted a constitutional provision against aid to religious schools in 1835.¹⁷¹ In 1845, after a long dispute with Protestant leaders, the Detroit school board adopted a measure that allowed Catholic children to use their own Bible in public school classrooms.¹⁷² In 1850, the Michigan Constitution was amended to confirm prohibitions against aid to religious schools.¹⁷³ A Detroit newspaper portrayed the aid controversy as a conflict “between the Jesuit Priesthood and American Citizens.”¹⁷⁴ In 1834, the Ursuline Convent in Boston was burned to the ground by nativists seething from anti-Catholic sermons.¹⁷⁵ In 1842, the residence of Archbishop John Hughes of New York was destroyed after he demanded that either the Protestant Bible be removed from the public schools or that Catholic schools be given their own funding.¹⁷⁶ In 1844, violent rioting occurred in Philadelphia after Bishop Kendrick made a similar demand.¹⁷⁷

Some prohibitions against aid to religious schools were altered through state law rather than constitutional revision. In 1844, in the midst of political wars over aid to religious schools, the New York State legislature passed a law prohibiting such monetary support.¹⁷⁸ This prohibition was carved into the state constitution in 1894 when the present clause calling for a “system of free common schools” was added.¹⁷⁹ The battle over religion exacerbated animosities that had long been simmering between the Republican dominated legislature and downstate Irish Catholics who were feeding enrollments in the Democratic party.¹⁸⁰

170. See JORGENSEN, *supra* note 115; TYACK, JAMES & BENAVIDES, *supra* note 115.

171. JORGENSEN, *supra* note 115, at 101.

172. *Id.*

173. *Id.*

174. *Id.* at 102.

175. *Id.* at 29.

176. RAVITCH, *supra* note 127, at 75.

177. Vincent P. Lannie & Bernard C. Diethorn, *For the Honor and Glory of God: The Philadelphia Bible Riots of 1844*, 8 HIST. EDUC. Q. 44, 46 (1968).

178. Act of Jan. 2, 1844, ch. 320, § 12, 1844 N.Y. Laws 494.

179. N.Y. CONST. art. IX, § 4 (1894), *amended by* N.Y. CONST. art. XI, § 3 (2002).

180. SAMUEL T. MCSEVENEY, *THE POLITICS OF DEPRESSION; POLITICAL BEHAVIOR IN THE NORTHEAST, 1893-1896* 63-86 (1972).

VI. THE BLAINE AMENDMENT

The "School Question" moved to a national stage in 1875 when President Ulysses S. Grant called on Congress to pass a constitutional amendment that would "[e]ncourage free schools, and resolve that not one dollar, appropriated for their support, shall be appropriated to the support of any sectarian school."¹⁸¹ It was a bold political gesture because lawmakers generally assumed at the time that both religion and education were state issues.¹⁸² The purpose of the First Amendment was to protect the states from encroachment by the federal government.¹⁸³ Grant put forward his proposal to distract attention from a widening corruption scandal in his own administration and to cultivate the support of Protestant and nativist leaders.¹⁸⁴ His proposal was taken up by Representative James Blaine of Maine, who had designs on the presidency and would later launch a Republican campaign against the evils of "Rum, Romanism and Rebellion."¹⁸⁵ Reflecting the current political landscape, Blaine's amendment received majority support in both houses of Congress, but failed to get the super-majority needed in the Senate.¹⁸⁶ In its stead, many states passed their own Blaine Amendments through legislation, constitutional amendment, or both.¹⁸⁷ By 1876, fifteen states had enacted such laws; by 1890, twenty-nine had amended their constitutions.¹⁸⁸

Despite its failure to pass the Blaine Amendment, Congress remained active on the issue of education and religion. After Blaine's departure from Congress, his ally Senator Henry Blair of New Hampshire unsuccessfully took up his cause by introducing five similar bills between 1881 and 1888.¹⁸⁹ Like Blaine, he aimed to create a system of

181. Green, *The Blaine Amendment Reconsidered*, *supra* note 155, at 47.

182. In 1845, the United States Supreme Court ruled, "[t]he Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws. . . ." *Permoli v. Municipality No. 1*, 44 U.S. 589, 609 (1845).

183. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 33-39 (1998).

184. See VITERITTI, *supra* note 19, at 152-54; Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 *YALE L. & POL'Y REV.* 113, 144-47 (1996); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment and State Constitutional Law*, 21 *HARV. J.L. & PUB. POL'Y* 657, 670-72 (1998).

185. KIRK PORTER & DONALD JOHNSON, *NATIONAL PARTY PLATFORMS, 1840-1964* 51-52 (1962).

186. Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 *HARV. L. REV.* 939, 944 (1951).

187. Green, *supra* note 155, at 43.

188. *Id.*

189. JORGENSON, *supra* note 115, at 141.

common schools grounded in a “non-sectarian” ethos while prohibiting aid to religious schools.¹⁹⁰ When Blair’s attempts failed, he blamed the Catholic clergy, whom he denounced as “an enemy of this country” intent on “destroying the public school system.”¹⁹¹ By this time, Blaine had sought his party’s nomination for the presidency three times and had actually received it in 1884.¹⁹² His cause lived on.

At the end of the nineteenth century, as the territories in the Northwest and Southwest regions of the country sought statehood, Blair and his allies passed enabling legislation that required the new states to enact constitutional provisions that both established common schools and prohibited aid to sectarian schools; this legislation resulted in the education provisions still in effect today.¹⁹³ The enabling act of 1889 that allowed North Dakota, South Dakota, Montana, and Washington to seek statehood included such mandates.¹⁹⁴ Speaking in support of the legislation before Congress, Senator Blair explained that it embodied the “very essence” of the defeated Blaine Amendment.¹⁹⁵ The mandates were well received in the new states, where the constitutional delegations were sympathetic to Blaine’s agenda.¹⁹⁶ One delegate to the Washington Constitutional Convention openly drew a connection between the motives behind the proposals under consideration and the anti-Catholic bigotry that prompted the original Blaine Amendment.¹⁹⁷

President Grant proclaimed Colorado a member of the Union in 1876 after the former territory ratified its constitution.¹⁹⁸ The Colorado Constitutional Convention of 1875-1876 was controlled by Republicans who were in philosophical harmony with Grant (as well as Blaine and Blair), and their disposition was reflected in the state constitution.¹⁹⁹ Like the territories of the Northwest, New Mexico was

190. *Id.* at 142.

191. *Id.* at 143.

192. GAIL HAMILTON, *BIOGRAPHY OF JAMES G. BLAINE* 572 (The Henry Bill Publ’g Co. 1895).

193. Robert F. Utter & Edward Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451, 458-62 (1988).

194. *Id.* at 458. See also Frank Conklin & James M. Vache, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, 8 U. PUGET SOUND L. REV. 411, 436 (1985).

195. 20 CONG. REC. 2101 (1889).

196. *Id.*

197. Utter & Larsen, *supra* note 193, at 474.

198. See PERCY STANLEY FRITZ, *COLORADO: THE CENTENNIAL STATE* 245-50 (1941).

199. *Id.* at 246; Harry M. Barrett, *Education in Colorado*, in *COLORADO: SHORT STUDIES OF ITS PAST AND PRESENT* 127-28 (1927).

granted statehood with the explicit condition that it incorporate a Blaine Amendment in its constitution.²⁰⁰ As in the East, the creation of common schools in the West was very much a project organized by the Protestant clergy, which worked simultaneously to insert its values into the public school curriculum while opposing aid to schools run by other religious groups.²⁰¹

It would be a mistake to conclude that the politics surrounding the Blaine Amendment were solely motivated by religion. Religion was in fact a proxy for other attributes. On one level, there was the element of partisan politics that evolved as Whigs, Know-Nothings, and eventually Republicans became wary of how Irish and German Catholics were enhancing the fortunes of the Democratic Party, especially in urban centers.²⁰² On another level there was the element of class, for the crass ways of those who had come to America to escape poverty offended the sensibilities established elites, who feared the impact that the newcomers would have on existing social norms. In a big way, the conflicts stemmed from a general animosity towards foreigners and the multifarious cultures they brought with them.²⁰³

By 1919, thirty-seven states had passed laws that made it illegal to teach in a language other than English, which was a common practice in many immigrant communities.²⁰⁴ Four years later in *Meyer v. Nebraska*, the United States Supreme Court struck down a Nebraska law that did the same.²⁰⁵ While the Court recognized the state's legitimate interest in fostering a common civic identity among citizens, it found that the law interfered "with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."²⁰⁶

Just two years later in *Pierce v. Society of Sisters*,²⁰⁷ the Supreme Court struck down an Oregon law that had required all children

200. See TOM LARSON, PUBLIC SCHOOL EDUCATION IN NEW MEXICO 27-31 (1965).

201. David Tyack, *The Kingdom of God and the Common School: Protestant Ministers and the Educational Awakening in the West*, 36 HARV. EDUC. REV. 447, 447-69 (1966).

202. See generally ERIE, *supra* note 124, at 25-66 (providing a background on the conflicts that accompanied the political incorporation of new ethnic groups in American cities); ROBERT MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 125-36 (1968); ROBERT DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY 32-62 (1961); JEROME MUSHKAT, TAMMANY: THE EVOLUTION OF A POLITICAL MACHINE, 1789-1865 158-207 (1971).

203. See BILLINGTON, *supra* note 133; JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (4th prtg. 1998).

204. WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION AND THE CONSTITUTION 61 (1964).

205. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

206. *Id.* at 401.

207. 268 U.S. 510 (1925).

to attend public schools.²⁰⁸ The law had been passed though a referendum prompted by the Ku Klux Klan and the Scottish Right Masons in an attempt to close down private and religious schools.²⁰⁹ Although the Court was sympathetic to the state's interest in creating a "common education" for its residents, it ruled that the state did not have the constitutional authority "to standardize its children by forcing them to accept instruction from public teachers only."²¹⁰ It further opined, "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."²¹¹

VII. FROM LEGAL DOCTRINE TO PUBLIC POLICY

Taken together, the *Meyer* and *Pierce* decisions are monumental in defining the rights of parents to determine the education of their own children as well as limiting state power to dictate that education. But time would prove the landmark rulings to be limited victories at best. Because of Blaine Amendments and other provisions incorporated in state law, the funding arrangements constitutionalized in most states under the banner of common schooling discriminated against those parents who would choose to send their children to private or religious schools by making funding available only to those who sent their children to public schools.²¹² Although the right of parents to educate their children how and where they wished was recognized by the Supreme Court, real choice only existed for those who could afford to pay tuition on their own.²¹³ Given the educational disparities that exist in public and private schools, especially in urban districts that have been the focus of equity and adequacy suits, this restrictive policy has had a major impact on the level of educational opportunity provided by the state for poor children. The most comprehensive studies have found that poor African-American students who attend inner city

208. See JORGENSEN, *supra* note 115, at 205-215.

209. *Id.* See also David Tyack, *The Perils of Pluralism: The Battleground of the Pierce Case*, 74 AM. HIST. REV. 74 (1968).

210. *Pierce*, 268 U.S. at 535.

211. *Id.*

212. See generally Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493 (2003) (providing an analysis of state constitutional provisions that prohibit public aid to religious schools); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551 (2003); Toby J. Heytens, *School Choice and State Constitutions*, 86 VA. L. REV. 117 (2000).

213. Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI L. REV. 937, 942, 1024-25 (1996).

private (especially Catholic) high schools register significantly better proficiency, graduation, and college attendance rates than their public school peers, even when the demographic characteristics of the students are taken into account.²¹⁴ More recent surveys of private voucher programs indicate that parents and students at private, mostly religious schools, report higher levels of satisfaction than their counterparts in public schools.²¹⁵

A study released by the United States Department of Education in 2006 has cast some doubt on these prior comparisons. Based on representative samples of reading and math scores recorded for fourth and eighth graders, it found the academic performance of public and private school students to be more similar when student demographics are taken into account.²¹⁶ Specifically, it found the differences in fourth grade reading and eighth grade math to be insignificant, while fourth graders in public schools did better in math, and eighth graders in private school did better in reading.²¹⁷ Viewing the data from the perspective of the total public-private experience being examined, specifically eighth grade scores, suggests that private school students come out better readers, while the math skills of the two populations are about the same. Among the acknowledged methodological limitations of the study was the relatively small sample of private schools surveyed, which makes it impossible to account for wide variations among these institutions.²¹⁸

Most importantly, the study does not account for variations in resources between public schools and private schools, which is a typi-

214. See generally JAMES S. COLEMAN, THOMAS HOFFER & SALLY KILGORE, *HIGH SCHOOL ACHIEVEMENT* (1982); JAMES S. COLEMAN & THOMAS HOFFER, *PUBLIC AND PRIVATE HIGH SCHOOLS: THE IMPACT OF COMMUNITIES* (1987); WILLIAM G. HOWELL & PAUL E. PETERSON, *THE EDUCATION GAP: VOUCHERS AND PUBLIC SCHOOLS* 142-43 (2002); Jeffrey Grogger & Derek Neal, *Further Evidence on the Effects of Catholic Secondary Schooling*, 2000 BROOKINGS-WHARTON PAPERS ON URB. AFF. 152-53; 159-65.

215. HOWELL & PETERSON, *supra* note 214, at 170-72.

216. HENRY BRAUN, FRANK JENKINS, & WENDY GRIGG, *NAT'L ASSESSMENT OF EDUC. PROGRESS, U.S. DEP'T OF EDUC. COMPARING PRIVATE AND PUBLIC SCHOOLS USING HIERARCHICAL LINEAR MODELING* (2006), <http://nces.ed.gov/nationsreportcard/pdf/studies/2006461.pdf>. But see William H. Jeynes, *Religion, Intact Families, and the Achievement Gap*, 3 INTERDISC. J. RES. ON RELIGION art. 3, (2007), <http://www.religjournal.com/pdf/ijrr03003.pdf> (drawing on federal longitudinal data to find a narrower achievement gap in religious schools).

217. HENRY BRAUN ET AL., *NAT'L ASSESSMENT OF EDUC. PROGRESS, U.S. DEP'T OF EDUC. COMPARING PRIVATE AND PUBLIC SCHOOLS USING HIERARCHICAL LINEAR MODELING* 16, 23 (2006), <http://nces.ed.gov/nationsreportcard/pdf/studies/2006461.pdf>.

218. *Id.* at 4.

cal flaw in the existing body of comparative research.²¹⁹ It would be quite remarkable if students who attend private schools did similarly well academically, because parochial students do not receive public support and therefore attend schools that are economically disadvantaged.²²⁰ If, as school finance reformers allege, money can matter in determining educational outcomes, it is reasonable to assume that a more equitable distribution of resources between public and private schools would allow the latter to excel in bridging the achievement gap between advantaged and disadvantaged students. A system of school finance that funded the child rather than the school and made more resources available to poor and low performing students would be a more just and effective way to address existing educational disparities. But, as we have already seen, most state constitutions and the courts that interpret them would not allow it.

In *Zelman v. Simmons-Harris*,²²¹ the United States Supreme Court ruled that the expenditure of public funds to pay tuition for religious schools was permissible under the Establishment Clause of the First Amendment.²²² The 2002 case involved an Ohio school voucher program that provided assistance for poor children in Cleveland to attend nonpublic schools.²²³ The ruling was based on Court's 1983 ruling in *Mueller v. Allen*,²²⁴ which approved a tuition tax credit for children who attended private and religious schools in Minnesota.²²⁵ The Court's approval of the spending was conditional in both cases. It held that funding was permissible so long as the program in question (1) has a valid secular purpose; (2) is neutral with respect religion so that it neither favors one religion over another nor favors religion over non-religion; (3) and provides aid to religious institutions only as a result of independent decisions made by parents who attend the religious

219. See Joseph P. Viteritti, *Schoolyard Revolutions: How Research on Urban School Reform Undermines Reform*, 118 POL. SCI. Q. 233, 253-254 (2003).

220. For example, a federal report published in October 2005 based on data from 2002 indicates that per capita spending in public schools is \$8,044. JASON HILL & FRANK JOHNSON, NAT'L CENTER FOR EDUC. STAT., REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION: SCHOOL YEAR 2002-2003 3 (2005), <http://nces.ed.gov/pubs2005/2005353.pdf>. Tuition at Catholic schools, the largest segment of the nonpublic sector, was reported to be \$2,432 at the elementary level and \$5,870 at the secondary level. NCEA.org, Frequently Asked Questions-Catholic Education, <http://ncea.org/faq/catholiceducationfaq.asp> (last visited Feb. 25, 2008).

221. 536 U.S. 639 (2002).

222. *Id.* at 664. See also Joseph P. Viteritti, *Reading Zelman: The Triumph of Pluralism, and its Effects on Liberty, Equality and Choice*, 76 S. CAL. L. REV. 1105 (2003).

223. *Zelman*, 536 U.S. at 644-45.

224. 463 U.S. 388 (1983).

225. *Zelman*, 536 U.S. at 649-50.

schools.²²⁶ The Court found that the purpose of the Cleveland program was to improve the educational opportunities of disadvantaged children beyond the chronically failing public schools in Cleveland and that all who participated in it did so as a matter of parental choice.²²⁷

While the *Zelman* decision settled the federal constitutional question regarding aid to children who attend religious schools, Blaine Amendments that were added to the state constitutions during the nineteenth century remain in effect. This raises the question as to whether the exclusion of parochial school children from general public benefits constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment and the Free Exercise Clause of the First Amendment. The Supreme Court had an opportunity to revisit the issue in *Locke v. Davey*.²²⁸ The 2004 case involved an appeal from a college student in Washington, whose state scholarship was revoked because he wanted to use it to prepare for a career in the ministry.²²⁹ Because of the peculiar facts of the case, the Court approved the state action in dispute, and avoided ruling on the larger question concerning the constitutionality of Blaine Amendments.²³⁰ This question is likely to arise again. Until it does, state law remains the chief obstacle to a form of educational opportunity sought by many under-served families.²³¹

VII. OVERCOMING HISTORY

Relying on state constitutional law to promote educational opportunity for disadvantaged populations is a precarious venture, especially under the guise of adequacy suits. The term “adequacy” does not exist in most state constitutions.²³² As previously mentioned, most of the constitutional provisions that courts interpret in such suits are products of an era where racial and religious bigotry permeated the legislative process. During this time, the courts in most states tended to defer to the legislatures for determining the scope of education and its entitlements. And since the men who sat on the bench, most of whom were elected, and the men who sat in the legislatures were a product of

226. *Id.* at 648-54.

227. *Id.* at 649.

228. 540 U.S. 712 (2004).

229. *Id.* at 715-18.

230. *Id.* at 723 n.7, 725.

231. See Joseph P. Viteritti, *Davey's Plea: Blaine, Blaire, Witters, and the Protection of Religious Freedom*, 27 HARV. J.L. & PUB. POL'Y 299, 317-23 (2003).

232. See Mills & McLendon, *supra* note 69, at 387-401 (listing all of education provisions in state constitutions).

the same sociopolitical environment, they tended to reflect the same values, priorities, and biases that shaped the legal landscape.

There appears to be more tension now between the courts and the state legislatures in the current third wave of school finance litigation, but it is somewhat illusory. Despite the quibbling back and forth over the price of justice, there is a strong consensus on the most significant questions between the two branches, which continue to draw personnel from the same political organizations. While plaintiffs have prevailed in the great majority of adequacy cases decided thus far,²³³ no court has moved to equalize funding among districts, let alone establish allocation formulae based solely on student needs.²³⁴ And while additional funding is allocated to poorer districts, there has not been a discernable improvement in the educational outcomes of the districts that have been awarded financial supplements.²³⁵ School districts and their representatives in the legislative branch historically have been protective of their political and fiscal autonomy, and the courts have been careful not to tread too far in overstepping these established boundaries.²³⁶ With homeowners rebelling against rising property taxes,²³⁷ states are less likely to impose new burdens to promote educational equity for the poor, especially if the additional revenue is used to increase spending in inner city public schools that have shown little promise of improvement.

In the past several years the courts have accepted a certain push back from the executive and legislative branches. In 2005, the Supreme Judicial Court of Massachusetts ended twenty-seven years of litigation by rejecting a lower court ruling holding that the state constitution required all local school districts to achieve proficiency in seven specific areas of performance.²³⁸ In 2006, the New York Court of Appeals arrived at a settlement that was much less ambitious than the

233. Between 1989 and 2007, plaintiffs won 20 of the 30 cases decided, while 11 others remained pending. Molly A. Hunter, *School Funding Adequacy Decisions Since 1989* (2007), <http://www.schoolfunding.info/litigation/adequacydecisions.pdf>.

234. Heise, *Equal Education Opportunity*, *supra* note 15, at 547.

235. Minori & Sugarman, *supra* note 23, at 65. See also William N. Evans, *The Impact of Court Mandated School Finance Reform*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* 72, 78-89 (Helen Ladd, et al. eds., 1999).

236. James Ryan & Michael Heise, *The Political Economy of School Choice*, 111 *YALE L. J.* 2043, 2056 (2002).

237. Editorial, *Homeowners Rebellion*, *WALL ST. J.*, May 1, 2007, at A20.

238. *Hancock v. Comm'r of Educ.*, 822 N.E.2d. 1134, 1153, 1155 (Mass. 2005). In previous decisions, the Supreme Courts in Rhode Island (*City of Pawtucket v. Sundlum*, 662 A.2d 40, 62 (R.I. 1995)) and Illinois (*Comm. for Educ. Rights v. Edgar*, 672 N.E.2d. 1178, 1196 (Ill. 1995)), deferring to the authority of the legislatures on such matters, declined to substitute their judgment for that of the legislature in school finance disputes.

amount targeted by the trial judge in the case.²³⁹ After the New Jersey Supreme Court allowed the governor to freeze spending levels for districts in the Abbott case in 2006,²⁴⁰ the state legislature, with the endorsement of the State Attorney General, finally agreed on a funding plan that eliminated the special needs designation established by the courts for so called “Abbott districts” so that a new formula could be applied that targeted more aid to needy suburban and rural districts.²⁴¹ Since 2005, courts in Oklahoma, Indiana, Nebraska, Colorado, Oregon, and Kentucky ruled that education funding is a political issue that falls under the discretion of the legislature rather than the judiciary; as in Massachusetts, the Texas high court reversed a trial court ruling that had favored the plaintiffs in an adequacy suit.²⁴²

The same state constitutional language that has been used as a basis for adequacy suits has also been creatively applied to eliminate a school choice program in Florida that was designed to enhance the educational opportunities of disadvantaged students. In the 2005 case of *Bush v. Holmes*,²⁴³ the Florida Supreme Court applied the “uniformity” clause of its state constitution to strike down a six-year-old voucher program that provided private school alternatives to students who had attended chronically failing public schools. Ninety-five percent of the 730 children who had participated in the program were either African-American or Latino.²⁴⁴ Article IX, Section 1 of the Florida Constitution requires the state legislature to make “adequate provision” for a “uniform, efficient, safe, secure, and high quality system of free public schools.”²⁴⁵ Rather than requiring the state to provide every child with a decent education, the five to two majority ruled that Florida could only fulfill its constitutional obligation through the means of public schools.²⁴⁶ However, it was the failure of these schools to fulfill that mandate in the first place that precipitated the enactment of the Florida voucher law.²⁴⁷

239. Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, at 57-58 (N.Y. 2006).

240. Abbott v. Burke, 901 A.2d 299, 301-02 (N.J. 2006).

241. See Catherine Gewertz, *New Funding Formula in N.J. Faces Hurdles: Governor Notes Plan's Passage in Annual Speech to Lawmakers*, EDUCATION WEEK, Jan. 16, 2008, at 13, 13-14.

242. See Alfred A. Lindseth, *A Reversal of Fortunes: Why the Courts Have Cooled to Adequacy Lawsuits*, EDUCATION WEEK, Sept. 12, 2007, at 32.

243. 919 So. 2d. 392, 412-13 (Fla. 2006).

244. Brief for Black Alliance for Educ. Options et al. as Amici Curiae Supporting Appellants at 3, *Bush v. Holmes*, 919 So. 2d. 392 (Fla. 2006) (Nos. SC04-2323, SC04-2324, SC04-2325).

245. FLA. CONST. art. IX, § 1.

246. *Holmes*, 919 So. 2d. at 407-08.

247. *Id.* at 400.

The same reasoning that the Florida court used to strike down the voucher program could be used to outlaw public charter schools that offer educational alternatives to disadvantaged students stuck in low-performing public schools. The Ohio Supreme Court came very close to doing just that in November 2006 when it ruled four to three that the 1997 charter school law did not violate a state constitutional provision mandating a system of common schools.²⁴⁸ However, public charter schools that can offer alternatives to underachieving students in forty-one jurisdictions remain vulnerable to more litigation of this kind.

Most of the constitutional and statutory provisions that enforced racial segregation and neglect since the nineteenth century have been struck from the books. But the political system still displays great tolerance for, or perhaps patience with, the educational deprivation of African-American and Latino children. It has not customarily accepted the same for white middle class children. The religion question is a bit more complex. Some have argued that restrictions against religion found in Blaine Amendments and other state constitutional provisions that direct public funding exclusively to public schools were not entirely motivated by religious bigotry.²⁴⁹ That being true, the pertinent legal questions are whether a sufficient level of bigotry is at work to make the provisions suspect, and more importantly, whether the current provisions result in any form of discrimination. The current financial arrangement perpetuates a two-tiered system of opportunity in urban settings—a system of free public schools mostly populated by the poor, and a system of private and parochial schools available to those who can afford them.

The courts have allowed themselves wide latitude in defining what it means to provide someone with an adequate education, but they have not gone far enough.²⁵⁰ Given the latitude available for creative legal advocacy, adequacy suits can and should serve as an ambitious venue for advancing educational opportunity for poor children. The definition of a decent education needs to be reconsidered and made anew from whole cloth, rather than the soiled tapestry upon which state constitutions are written. A suitable point of departure would be the landmark *Brown* decision of 1954, which, emboldened by the language of the Equal Protection Clause of the Fourteenth

248. State ex rel. Ohio Cong. of Parents and Teachers v. State Bd. of Educ., 857 N.E.2d 1148, 1166 (Ohio 2006). See also, Erik Robelen, *Ohio Supreme Court Narrowly Upholds State Charter Law*, EDUC. WK., Nov. 1, 2006, at 22.

249. See Steven Green, *Blaming Blaine*, 2 FIRST AMEND. L. REV. 107, 110-11 (2004).

250. See *supra* text accompanying notes 22, 28-31, 43, 47 and 112.

Amendment, articulated a call for educational and racial justice that reached beyond the confines of state law. In *Brown*, a unanimous Supreme Court proclaimed that education is “a right that must be made available to all on equal terms,” not as one set of opportunities for the middle class and the wealthy and another for the poor.²⁵¹ In *Brown*, the Court outlined the true meaning of education in modern American society, deeming it “the most important function of state and local governments.”²⁵²

The Court in *Brown* further explained that education is “the very foundation of good citizenship . . . the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment.”²⁵³ Volumes of social research have validated these claims. Educational achievement is correlated with practically every social indicator imaginable, from civic participation to political influence, from employment to wealth, from physical health to mental health.²⁵⁴

School vouchers that allow disadvantaged students to attend private and religious schools of their choice should be part of the remedy derived from school finance suits. What is proposed here is more ambitious than the approach taken in most states. It may require more spending on behalf of the disadvantaged, but in a less limiting way than is normally practiced. The policies that influence the allocation of education funding need to be reassessed. Despite the fact that school vouchers have been controversial in middle class communities, they can offer heavily taxed suburban residents a more cost-effective way to redistribute resources and opportunities to disadvantaged children in urban school districts than simply pouring money into failing schools. Vouchers for the poor provide a more politically and economically feasible way to address poor students’ needs than adequacy settlements which have proven to be of limited utility in bridging the achievement gap.

This is not to suggest that giving school vouchers to the poor is the sole antidote to curing the educational inequities endured by disadvantaged children, but a genuine system of choice for poor students that includes private, religious, and charter schools should be part of

251. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

252. *Id.*

253. *Id.*

254. See generally CHRISTOPHER JENCKS & MEREDITH PHILLIPS, EDs., *THE BLACK-WHITE TEST SCORE GAP* (1998); SUSAN MAYER & PAUL E. PETERSON, EDs., *EARNING AND LEARNING: HOW SCHOOLS MATTER 4-5* (1999); NORMAN H. NIE, JAN JUN & KENNETH STEHLICK-BARRY, *EDUCATION AND DEMOCRATIC CITIZENSHIP IN AMERICA* (1996).

any remedy.²⁵⁵ State courts undertake the approach that awards the proceeds of legal settlements entirely to school systems that have been complicit in sustaining the education gap rather than assisting the children who have been wronged.

One does not need to focus entirely on private school alternatives to understand how limited the current policies of state decision makers are. Charter schools are public schools that operate outside the jurisdiction of local school districts.²⁵⁶ They have been authorized by the legislatures of forty states and the District of Columbia as a way to expand educational opportunity for all children.²⁵⁷ A recent study found that per pupil spending in charter schools is on average twenty-two percent lower than that of district schools in the same communities.²⁵⁸ In some jurisdictions per capita spending on charter schools is as much as forty percent lower.²⁵⁹ Yet the gross financial inequities incorporated in these laws have escaped the scrutiny of activists who have gone to court to plea for fiscal fairness. These inequities harm children who attend charter schools the same way that fiscal inequities harm children who attend district public schools. However, there has been no expression of outrage by those who have launched finance suits in more than forty states.

Adequacy suits have allowed judges and legislatures to think creatively about correcting past injustices, but they have also been bound by the codified injustices of the past. Because most children will continue to attend public schools run by local districts, the bulk of attention and resources must be devoted to making these schools better places for teaching and learning. The necessary emphasis on public schools, however, does not have to result in the exclusion of private and religious schools for parents who desire them as options for their children. Any proper remedy should include adequate funding for disadvantaged children who choose to attend private, parochial, and charter schools based on criteria set by the United States Supreme Court in

255. See VITERITTI, *supra* note 19, at 213-24. See also Joseph P. Viteritti, *Defining Equity: Politics, Markets and Public Policy*, in *SCHOOL CHOICE: THE MORAL DEBATE* 13, 25-30 (Alan Wolfe ed., 2003).

256. See VITERITTI, *supra* note 19, at 64-77.

257. As of 2007, there were 3,940 such schools educating and estimated 1,156,874 children. CENTER FOR EDUCATION REFORM, *ANNUAL SURVEY OF AMERICA'S CHARTER SCHOOLS 2* (Alison Consoletti & Jeanne Allen eds., 2007), http://www.edreform.com/_upload/cer_charter_survey.pdf.

258. SHEREE SPEAKMAN & BRYAN HASSELL, THOMAS B. FORDHAM INSTITUTE, *CHARTER SCHOOL FUNDING: INEQUITY'S NEXT FRONTIER* 8 (2005), <http://www.edexcellence.net/doc/Charter%20School%20Funding%202005%20FINAL.pdf>.

259. *Id.* at 2.

the 2002 *Zelman* case.²⁶⁰ While the provisions of the federal No Child Left Behind law require school districts to provide alternatives for children who attend public schools, thirty-nine percent of public school districts have failed to meet that obligation.²⁶¹

A test case launched in 2006 by a group of parents illustrates this dilemma.²⁶² Frustrated with the lack of educational progress after thirty-three years of litigation and enormous increases in spending on failing institutions, this class action suit on behalf of 60,000 students in ninety-six schools sought to structure a remedy that would provide poor parents with a *pro rata* share of public funds that could be directed by the parent to a public, charter, private, or parochial school of choice.²⁶³ In each of these schools, a majority of the students failed the state proficiency tests in both language arts and math in 2005, and 75% failed one.²⁶⁴ The lead plaintiff in the case was Van-Ness Crawford, a widower with three sons in Newark's public schools.²⁶⁵ While per capita spending in the district is \$16,351,²⁶⁶ Mr. Crawford's sons were slated to attend Malcolm X Shabazz High School, where in 2005, where fewer than one in five students reach the threshold for basic math proficiency.²⁶⁷ The suit was supported by the Black Ministers Council of New Jersey and the Latino Leadership Alliance of New Jersey.²⁶⁸ As might be expected, the court decided the case against the parents. Yet the case remains indicative of the kind of remedy that must be considered if educational, racial, and economic justice is to be attained. It is simply inexcusable to force poor parents to keep their children in over-crowded failing public schools when other effective options can be realized with proper funding and the willingness to implement new solutions to an old problem.

260. *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-54 (2002).

261. As of 2007, there were 3,940 such schools educating and estimated 1,156,874 children. Press Release, Center for Education Reform, Number of Charter Schools Up 11% Nationwide. (May 10, 2007) available at <http://www.edreform.com/index.cfm?fuseAction=document&documentID=2632>.

262. ALLIANCE FOR SCHOOL CHOICE, *CRAWFORD V. DAVY: DEMANDING IMMEDIATE AND MEANINGFUL REMEDIES FOR CHILDREN DEPRIVED OF A CONSTITUTIONALLY ADEQUATE EDUCATION 1* (2006), available at <http://www.allianceforschoolchoice.org/files/story/NJBackgrounder.pdf>.

263. *Id.*

264. *Id.* at 3-4.

265. *Id.* at 4.

266. *Id.*

267. *Id.*

268. *Id.* at 6.

VIII. CONCLUSION

The debate over school finance reform remains stymied. Advocates on the left, inclined to channel more resources into ailing public schools, instinctually resist remedies that would provide poor children with better educational options outside of traditional schools systems. Advocates on the right, who embrace school choice and vouchers as a mechanism to empower parents, are skeptical of plans that would increase the costs of education by investing more dollars in public schools. The result is a tiered system of schooling that offers different opportunities to students based on economic affluence and perpetuates deeply rooted injustices. Jim Crow and Jim Blaine are dead, yet their spirits hang over the school systems they helped to create. They continue to set the bounds of the discussion. They continue to obstruct the kind of change needed to get us beyond our troubled past and help those who have been deprived of an adequate education.