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The Fourth Wave of Educational Finance Litigation: Pursuing a Federal Right to an Adequate Education

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NOTE

THE FOURTH WAVE OF EDUCATION FINANCE LITIGATION: PURSUING A FEDERAL RIGHT TO AN ADEQUATE EDUCATION

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INTRODUCTION

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.[1]

Litigation challenging the amount of funding available to low-income school districts is one of several initiatives reformers have pursued to improve the quality of public schools. This particular approach, so-called education finance litigation, is specifically focused on reducing the funding disparity that continues to persist among school districts.[2] The federal government provides approximately seven percent of funding for public education,[3] making local property taxes a major source of funds for public schools and resulting in substantial funding disparities among school districts. Therefore, the amount of money available for school funding is primarily a function of the tax rate and the assessed value of the property taxed. Because no state draws its school districts to equalize the value of the property base from which it raises taxes, the variation in the amount of money available for school funding from one district to the next reflects the substantial disparities in local property values.[4] Furthermore, because the current school-funding scheme depends on local property values, it precludes poorer school districts from raising revenues equivalent to those that wealthier districts raise. Even where poor districts impose high tax rates, low property values prevent them from raising the same amount of money that wealthy districts are able to raise by imposing lower tax rates on higher-valued property.[5]

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

2 For example, in East St. Louis, Illinois, Martin Luther King Junior High School is located downwind from one of the nation's largest hazardous-waste-incineration companies. Students have been forced repeatedly to evacuate after sewage lines back-up and flood the food-preparation area and gymnasium. In an effort to save costs, the school has hired seventy "permanent substitute teachers," each earning $10,000 per year. Arguably worse than the conditions in East St. Louis is the close proximity of this school district to the affluent public school systems in Fairview Heights. There, students benefit from modern science labs, playgrounds, and libraries. For an in-depth description of the conditions in the nation's poorest school districts, see JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991).

3 *See* Quentin A. Palfrey, *The State Judiciary's Role in Fulfilling* Brown *'s Promise*, 8 MICH. J. RACE & L. 1, 7 & n.23 (2002) (referencing information from the U.S. Census Bureau about federal funding for the 1998–99 school year).

4 Basing public school funding largely on local property taxes originated when the United States had an agricultural economy and rural population. The application of this property-based finance model to today's urban society creates substantial education-funding disparities. *See* Penny L. Howell & Barbara B. Miller, *Sources of Funding for Schools*, 7 THE FUTURE OF CHILDREN: FINANCING SCHOOLS, at 39, 41 (Winter 1997); Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1478 (2007). For an in-depth explanation of the variety of public school finance systems states may adopt, see Howell & Miller, *supra*, at 39.

5 Although Title I of the Elementary and Secondary Education Act provides grants for educational and secondary programs for children of low-income families, the dollar

Education finance litigators seek to improve the quality of education in low-income school districts by increasing the amount of available funding. Litigants initially sought to raise the amount of money available to poor districts by challenging funding disparities between school districts in federal court. Litigants argued that under the Equal Protection Clause, per-pupil spending differences between school districts violated the constitutional right of students in low-income school districts to receive an education equal to that of their peers in wealthier districts and that the education finance system discriminated against poor persons, thereby creating a suspect classification on the basis of wealth. This approach proved unsuccessful in *San Antonio Independent School District v. Rodriguez*,[6] and this defeat prompted litigants to change both the venue in which they filed education finance suits—from federal to state court—and subsequently the strategy pursued—from seeking equitable funding across all school districts to ensuring that all districts have sufficient funding to provide their students an adequate education.

In light of these changes, the history of education finance litigation is traditionally divided into three waves: federal equality litigation, state equality litigation, and state adequacy litigation. These various litigation strategies have produced mixed results for securing increased funding for poor public schools. Current reformers are in the third wave of education finance litigation, pursuing an adequacy-based strategy in state courts. This Note argues, however, that given both the change in focus from equality to adequacy and the political and legal changes since litigants originally pursued a federal strategy, education finance litigants should augment their current efforts by initiating a fourth wave of education finance litigation and pursuing a federal adequacy litigation strategy. Litigants would base this federal claim on the U.S. Constitution's Equal Protection Clause and/or the substantive rights under the Due Process Clause. This approach would also find support from the federal No Child Left Behind Act, the Supreme Court's own dicta supporting a potential constitutional guarantee of a minimally adequate education, and the definition of an adequate education that has emerged from education finance litigation in state courts.

In Part I of this Note, I discuss advocates' initial pursuit of an equity-based litigation strategy and the change in venue from federal

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amounts are low relative to the overall cost of public education. Title I allocates funds depending in large part upon the number and concentration of poor children in the state's school districts and the average per-pupil expenditure in the state. In light of the focus on existing per-pupil spending, Title I funding "causes the existing pattern of interstate inequality in education spending to be reproduced." Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2095 (2006).

6 411 U.S. 1 (1973).

to state court. In Part II, I discuss the shift at the state court level from an equality-based to an adequacy-based litigation strategy and analyze the advantages of the adequacy movement. Finally, in Part III, I argue that litigants should pursue a federal adequacy litigation strategy. Under this new litigation paradigm, advocates for the children of poor school districts would file a suit in federal court alleging that the federal government has failed to provide students with a minimally adequate education. In this Part, I consider how adequacy litigation in state court and the federal education statute, No Child Left Behind, have developed judicially manageable standards that enable a federal court to define an adequate education. I further consider how political and legal changes since litigants unsuccessfully filed an equity-based education finance case in federal court have undermined the Supreme Court's earlier rationale for refusing to hold that public school students have a federal right to an education. Finally, I consider possible bases upon which a federal court could find a right to an adequate education without overruling the Supreme Court's precedent. These bases include: the Supreme Court's own dicta that there may be federal protection for students' right to receive an adequate education and the compulsory school attendance laws' implication of substantive due process requirements. This Note concludes with a brief discussion of the value of a federal court decision holding that the Constitution guarantees all students the right to receive an adequate public education.[7]

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[7] For purposes of this Note, I accept that the money school districts gain through successful school finance litigation will improve the quality of education they provide. However, there is contentious debate as to whether increasing monetary inputs improves student achievement. This discussion arose following James S. Coleman's 1966 study on education equality in the United States. The report, "Equality of Educational Opportunity," referred to today as the "Coleman Report," found that student achievement is not highly correlated with per-pupil spending alone, but rather is a function of various inputs, particularly socioeconomic status and student background. *See* JAMES S. COLEMAN ET AL., U.S. DEP'T OF HEALTH, EDUC., & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 302–04 (1966); *see also* Michael Heise, *Educational Adequacy as Legal Theory: Implications from Equal Educational Opportunity Doctrine* 8–10 (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 05-028, 2005), *available at* http://ssrn.com/abstract=815665 (summarizing the debate over the unclear relationship between educational resources and student achievement). For a study criticizing the belief that "money matters," see ERIC HANUSHEK ET AL., MAKING SCHOOLS WORK: IMPROVING PERFORMANCE AND CONTROLLING COSTS (1994). For a discussion supporting the benefits of increased funding, see Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465, 488 (1991).

I
THE HISTORY OF EQUITY-BASED EDUCATION FINANCE LITIGATION

A. Federal Equality Litigation: *San Antonio Independent School District v. Rodriguez*

Litigants initiated the first wave of school finance lawsuits in federal court, grounding their arguments in the Equal Protection Clause of the U.S. Constitution. The allure of this litigation strategy stemmed largely from the fact that during the 1950s and 60s, the Supreme Court interpreted the Fourteenth Amendment such that the Equal Protection Clause could be used as a powerful weapon to attack public policy and other well-entrenched areas of the political order.[8] The Clause's promise as an instrument of social change appeared immense, and when advocates applied this newfound constitutional sword to the area of public education in *Brown v. Board of Education* and subsequent desegregation cases, the powerful result illustrated the latent force of the Equal Protection Clause.[9] Given the Court's clear acknowledgement in *Brown* of education's central importance to both individuals and the nation, advocates for equal educational opportunities expected the Court to find in favor of a need to reform inequitable school funding among districts.[10]

The Court decided two other categories of cases that furthered this expectation: wealth-based discrimination cases and apportionment cases. In one wealth-based discrimination case, the Court required that states ensure that criminal defendants could utilize the protections of the criminal justice system, regardless of their financial resources.[11] This case and other wealth-based discrimination cases made it clear that the Equal Protection Clause limited government policies that, while facially neutral, had the practical effect of denying opportunities to one class that were available to other classes.[12] Thus, both the identification of wealth as an important aspect of equal protection analysis and the rejection of a requirement that there be facial discrimination to establish an equal protection violation seemed to

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8 *See* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1153–54 (1995).

9 *See* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 116 (1995).

10 *See* Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, *in* ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY 218, 221 (Timothy Ready et al. eds., 2002), *available at* http://www.schoolfunding.info/resource_center/research/adequacychapter.pdf.

11 *See* Douglas v. California, 372 U.S. 353, 357–58 (1963) (holding that the right to appeal cannot be blocked by inability to pay for appellate representation).

12 *See* Enrich, *supra* note 9, at 117–18.

lend further support to those advocating for equality in school funding.[13]

The second category of cases, legislative apportionment cases, involved state actions that created different opportunities for citizens of different political subdivisions of the state.[14] Under the then-existing structure, the weight of each vote varied by district. These cases seemed especially supportive of the argument for equality in education funding by illustrating the federal right of all citizens to mathematically equivalent treatment, even when intruding into the state's traditional control over its own internal political structures.[15]

Against this backdrop, parents of students in underfunded school districts filed suit in federal courthouses, arguing that funding disparities across school districts violated the Fourteenth Amendment. When pursuing this equity-based litigation strategy, litigants largely followed the "district power equalizing" approach developed by John Coons. Disparities in education finance were due to variations in education spending across school districts. However, basing successful litigation upon this geographical discrimination was problematic because local variation in the provision of public services, like roads and police officers, is not constitutionally suspect.[16] Coons's strategy avoided the pitfalls of geographic discrimination by not insisting on a uniform state education finance system and, in fact, explicitly allowing for local variation in education spending. Coons's approach focused on making wealth variation neutral in order to remedy the fact that even when a poor school district taxed itself at a higher rate than a wealthy district, the poor district still had less money available per pupil because of its low property values.[17] By drawing upon prior cases in which the Supreme Court expressed concern for wealth discrimination in areas of fundamental importance, like the right to vote, Coons

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13 *See id.* at 118. However, Enrich goes on to note that there are significant differences between the forms of wealth-based discrimination the Court struck down and the wealth-based inequality in education finance. In cases like *Douglas*, the wealth-based deprivation was a result of the individual's personal financial circumstances, and the deprivation was an absolute, not relative, deprivation of the opportunity at issue. *See id.* at 119.

14 *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 568 (1964) (holding that the Equal Protection Clause requires "substantially equal state legislative representation for all citizens" in a state, regardless of where they reside); Baker v. Carr, 369 U.S. 186, 237 (1962) (holding that whether a Tennessee reapportionment statute unconstitutionally violated the plaintiffs' right to equal protection was a justiciable question).

15 *See* Enrich, *supra* note 9, at 119–20 (noting that in one education funding challenge, the court characterized the plaintiff's argument as "'[o]ne scholar, one dollar'" (quoting Spano v. Bd. of Educ., 328 N.Y.S.2d 229, 235 (N.Y. Sup. Ct. 1972))).

16 *See* Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 175, 179–85 (Helen F. Ladd et al. eds., 1999).

17 *See* JOHN E. COONS ET AL., PRIVATE WEALTH AND PUBLIC EDUCATION 159, 201–03 (1970).

hoped that courts would similarly invalidate school funding systems that permit the quality of education to vary on the basis of wealth.[18]

In one of the first cases to apply Coons's district power equalizing theory, *San Antonio Independent School District v. Rodriguez*, parents of students in the Edgewood Independent School District challenged the inequities in Texas's public school funding system.[19] Edgewood was one of seven school districts within the San Antonio area, and its student body was ninety percent Mexican-American and six percent African-American.[20] Given the district's low property values, even after taxing itself at a relatively high rate and receiving supplemental aid from both the state and federal government, Edgewood could spend only $356 per pupil. By way of comparison, another San Antonio school district, the relatively affluent and predominately white Alamo Heights, could tax itself at a rate twenty percent below the rate in Edgewood and still have $594 available per pupil.[21] The litigants argued that variations in education quality, as illustrated by unequal per-pupil spending across districts, constituted differential treatment that violated the Equal Protection Clause.[22]

The litigants argued both that poverty was a suspect classification and that education was a constitutionally protected fundamental right. They based the contention that education was a fundamental right upon the close relationship, or so-called nexus, between education and an individual's ability to meaningfully exercise explicitly protected constitutional rights, like the right to free speech and the right to vote.[23] According to traditional equal protection analysis, if the Court were to hold either that poverty was a suspect classification or that education was a fundamental right, Texas could sustain its funding system only by proving a compelling state interest. The district court held for the plaintiffs, finding that Texas's education finance system discriminated on the basis of wealth and that the State failed "'even to establish a reasonable basis'" for creating suspect classifications and infringing upon a fundamental right.[24]

However, in a five-to-four decision, the Supreme Court reversed and held that neither the plaintiffs' poverty nor the importance of education justified applying strict scrutiny when reviewing Texas's ed-

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18 *See* Minorini & Sugarman, *supra* note 16, at 181.

19 *See* 411 U.S. 1 (1973).

20 *See* Rebell, *supra* note 10, at 221–25.

21 *See Rodriguez*, 411 U.S. at 11–14 (noting that the average assessed property value per pupil in Edgewood was $5,960 whereas the average assessed property value per pupil in Alamo Heights exceeded $49,000).

22 *See id.* at 16; Heise, *supra* note 8, at 1155–56.

23 *See Rodriguez*, 411 U.S. at 35.

24 *See id.* at 16 (quoting Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 284 (W.D. Tex. 1971)).

ucation finance system. Writing for the majority, Justice Powell first stated that poverty was not a suspect class. He questioned whether poor persons "necessarily clustered in the poorest property districts"[25] and described poor persons as too "amorphous" and "diverse" a group to justify being treated under strict scrutiny.[26] Justice Powell also distinguished *Rodriguez* from prior Supreme Court precedent condemning wealth-based discrimination because those prior cases involved absolute deprivations; by contrast, in *Rodriguez*, Texas merely afforded less funding to the plaintiffs than to others.[27]

Justice Powell then found that education is not a fundamental right by emphasizing that the Constitution neither implicitly nor explicitly guaranteed it.[28] While acknowledging the importance of education both to individuals and to society, Justice Powell stated that the "importance of a service performed by the State does not determine whether it must be regarded as fundamental."[29] The majority likewise rejected the litigants' nexus theory. Although the majority acknowledged the validity of the argument that education was essential to the effective exercise of the right to free speech and the right to vote—two rights that the Court had "long afforded zealous protection"—Justice Powell went on to say that the Court has "never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice."[30] Though "desirable goals" in their own right, such values should not "be implemented by judicial intrusion into otherwise legitimate state activities."[31]

Having rejected both of the plaintiffs' arguments for applying strict scrutiny, the Court applied a rational basis test and found that the Texas funding scheme was rationally related to the legitimate government interest of assuring a "large measure of participation in and control of each district's schools at the local level."[32] Although the Court acknowledged that the Texas system's reliance on local prop-

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25 *Id.* at 23; *see* Rebell, *supra* note 10, at 222.

26 *See Rodriguez*, 411 U.S. at 28.

27 *See id.* at 20–23 (describing prior cases in which the Court struck down state laws that denied indigent criminal defendants the right to a transcript or the right to court-appointed counsel and in which a substantial filing fee for primary elections was invalidated). The Court distinguished the facts in *Rodriguez* from its prior holdings by stating: "The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." *Id.* at 20.

28 *See id.* at 33–35.

29 *Id.* at 30.

30 *Id.* at 36–38.

31 *Id.* at 36.

32 *Id.* at 47–49.

erty-tax revenues resulted in "some inequality" across districts, the Court said that this was "not alone a sufficient basis for striking down the entire system."[33] Thus, *Rodriguez* has come to stand for the proposition that education is not a fundamental right.

However, even in light of the holding in *Rodriguez*, there remains a viable argument that there is a constitutionally protected federal right to a certain minimum level of education. The plaintiffs in *Rodriguez* focused heavily upon per-pupil funding disparities between rich and poor districts and argued that these differences violated the Equal Protection Clause. However, the plaintiffs did not argue that the quality of education in Edgewood fell below a constitutionally protected minimum floor and that Texas had therefore failed to provide an adequate education.[34] In fact, the Court itself acknowledged this possibility by noting in dicta that the Constitution might guarantee "some identifiable quantum of education" to ensure the meaningful opportunity to exercise other fundamental rights, like free speech.[35] The Court continued by saying:

> Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.[36]

The issue of whether education constituted a fundamental right arose again at the federal level in *Plyler v. Doe*,[37] where the Court considered the constitutionality of a Texas statute that withheld state funds from school districts that used funding to educate children who illegally entered the United States and permitted school districts to refuse to enroll these children. In another five-to-four decision, the Court found that the Texas statute was unconstitutional. However, in so holding, the Court refrained from classifying education as a fundamental right.[38] Rather, the *Plyler* Court held that Texas could not establish "some substantial state interest" for completely denying children who illegally entered the country from receiving an educa-

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33 *Id.* at 50–51 (citing McGowan v. Maryland, 366 U.S. 420, 425–26 (1961)).

34 *See* Justin J. Sayfie, Comment, *Education Emancipation for Inner City Students: A New Legal Paradigm for Achieving Equality of Educational Opportunity*, 48 U. MIAMI L. REV. 913, 921–22 (1994).

35 *See Rodriguez*, 411 U.S. at 36.

36 *Id.* at 37.

37 457 U.S. 202 (1982).

38 *See id.* at 223–24.

tion.[39] By so holding, the Court did not decide whether the fact that the Texas statute allowed total denial of public education to illegal immigrants required analysis under a strict scrutiny test, a test which, if applied, would have suggested that education is a fundamental right. While the *Plyler* Court did not recognize education as a fundamental right, the Court distinguished education from other "governmental 'benefit[s]'" and discussed the importance of education and its ability to empower disadvantaged groups.[40] Furthermore, in keeping with the *Rodriguez* dicta and the *Plyler* decision, the Court in *Papasan v. Allain* explicitly recognized that it remains open whether a minimally adequate education is a fundamental right.[41]

B. The Aftermath of *Rodriguez*: Equity-Based Education Finance Cases in State Courts

Despite the possibility that a constitutionally protected minimum level of education might exist, *Rodriguez* seemed to foreclose the possibility of federal courts requiring states to provide public school students with equal funding. Thus, in the wake of *Rodriguez*, advocates for equal funding redirected their litigation strategy to focus on state courts. Litigants in the earliest state court suits continued to make an equality-based argument, now grounded in the equal protection clauses of various state constitutions[42] in combination with state constitutions' education clauses, which require the states to provide educational services.[43] During this so-called second wave of education

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39 *See id.* at 230; Daniel S. Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case out of Education*, 59 S.C. L. REV. 755, 769 (2008) (stating that the *Plyler* Court applied a heightened form of scrutiny that it developed further in later years).

40 *See Plyler*, 457 U.S. at 221–22.

41 *See* 478 U.S. 265, 285 (1986) ("As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.").

42 *See* Enrich, *supra* note 9, at 105 ("[M]ost state constitutions contain one or more provisions that either parallel the federal Equal Protection Clause or have been interpreted to impose substantially the same limitations.").

43 *See id.* at 105–06. Education clauses impose a duty on states to provide a form of public education. Gershon Ratner describes these education clauses as falling into four basic groups. *See* Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 815 & nn.143–46 (1985). First are education clauses containing only general education language, like the provision of the Connecticut Constitution that guarantees "free public elementary and secondary schools in the state." CONN. CONST. art. VIII, § 1. Second are education clauses that specify the quality of public education that the state will provide. For example, the New Jersey Constitution provides for a "thorough and efficient system of free public schools." N.J. CONST. art. VIII, § 4. Third are those education clauses that contain a more specific mandate, like the Rhode Island Constitution's requirement that the legislature "adopt all means which it may deem necessary and proper to secure . . . the advantages . . . of education." R.I. CONST. art. XII, § 1. Finally, the fourth category consists of those education clauses that provide for the

finance litigation, plaintiffs continued to make similar arguments to those the litigants in *Rodriguez* made—mainly that education constitutes a fundamental right or, alternatively, that school-district poverty constitutes a suspect classification entitling students to substantial educational equality.[44]

Initially, this litigation strategy produced some successful results. Prior to *Rodriguez*, the California Supreme Court found the state's education finance system unconstitutional in *Serrano v. Priest*.[45] The court emphasized the indispensible role of education in a modern society and compared the importance of education to the importance of two widely recognized fundamental rights—the rights of defendants in criminal cases and the right to vote.[46] In this pre-*Rodriguez* decision, the court held that education is a fundamental right and that the school finance system implicated a suspect classification on the basis of wealth.[47] As a result, the court evaluated the system under a test of strict scrutiny.[48] Acknowledging that the state education finance system furthered legitimate government interests such as local control over schools, the court nevertheless found the system unconstitutional. The court held that rather than promoting local control, the rampant interdistrict funding disparity deprived poor districts of financial control. Unlike more populous and affluent districts, poor districts did not have the choice to create high-quality public schools by imposing a high tax rate because a poor district's overall property-tax revenue was insufficient to support educational excellence at any reasonable tax rate.[49]

In response, the California legislature addressed the court's call for equal treatment and sought to produce convergence between rich and poor districts by modifying the existing funding approach. Specifically, the legislature increased the minimum funding levels and

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strongest commitment to public education. For example, the Washington Constitution states, "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders." WASH. CONST. art. IX, § 1.

44 *See* Palfrey, *supra* note 3, at 16–17. Where the plaintiffs relied either in full or in part upon the state constitution's education clause, they argued that the education clause itself demanded that the state provide substantially equal educational opportunities for poor and wealthy school districts. *See* John C. Eastman, *Reinterpreting the Education Clauses in State Constitutions*, *in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 55, 55–56 (Martin R. West & Paul E. Peterson eds., 2007) (criticizing state courts that find a new fundamental right to an adequate education based on the education clauses in state constitutions).

45 *See* Serrano v. Priest (*Serrano I*), 487 P.2d 1241, 1255–59 (Cal. 1971).

46 *See id.*; *see also* Jonathan Banks, Note, *State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?*, 45 VAND. L. REV. 129, 143–44 (1992) (noting the court's emphasis on the "indispensible role of education in a modern industrial society").

47 *See Serrano I*, 487 P.2d at 1250, 1258.

48 *See id.* at 1258.

49 *See id.* at 1259–60; Heise, *supra* note 8, at 1155.

limited the maximum per-pupil expenditure by capping the tax rate a school district could levy without a voter override.[50] The constitutionality of this new funding system reached the California Supreme Court again in 1976, following the Supreme Court's decision in *Rodriguez*.[51] Notwithstanding the federal precedent, the court reaffirmed that education in California is a fundamental right, a liberty at the core of a democratic government, and that the education finance system involved a suspect classification on the basis of district wealth.[52] Applying the same analysis from its earlier *Serrano I* decision, the court found that despite the legislative improvements, educational opportunity under the new finance system still depended largely on local taxable wealth.[53] Accordingly, the court held that the revised education finance system violated the California Constitution's equal protection provisions.[54]

While this California decision suggested that the pursuit of a state court, equality-based litigation strategy held promise, the initial success was short lived. The court orders that resulted from such cases directed state legislatures generally to eliminate the inequities in the funding system, but provided little specific guidance about how the legislatures should achieve this goal. Some legislatures adopted district power equalizing plans that guaranteed each local district a specific amount of revenue for a given local tax rate.[55] Under these plans, states redistributed the extra revenue that school districts with high property values generated to districts with low property values.[56]

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50 *See* Serrano v. Priest (*Serrano II*), 557 P.2d 929, 935–37 (Cal. 1976) (summarizing the legislation the California legislature passed in light of *Serrano I*, Senate Bill No. 90 and Assembly Bill No. 1267).

51 *See id.* at 929.

52 *See id.* at 952; Banks, *supra* note 46, at 143.

53 *See Serrano II*, 557 P.2d at 953, 968–69 ("The system in question . . . suffer[s] from the same basic shortcomings as that system which was alleged to exist in the original complaint—to wit, it allows the availability of educational opportunity to vary as a function of the assessed valuation per [average daily attendance] of taxable property within a given district.").

54 *See id.* at 957–58.

55 *See* Rebell, *supra* note 10, at 226.

56 *See id.* The Texas legislature implemented this type of redistributive plan after the Texas Supreme Court struck down its earlier efforts to implement less drastic reform. *See* Edgewood Indep. Sch. Dist. v. Kirby (*Edgewood II*), 804 S.W.2d 491, 496 (Tex. 1991); Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (*Edgewood III*), 826 S.W.2d 489, 514 (Tex. 1992). Referred to as the "Robin Hood" plan, the financing scheme capped each school district's taxable property at $280,000 per student. The plan permitted any revenues collected in excess of the cap to be redistributed to poorer districts. *See* Edgewood Indep. Sch. Dist. v. Meno (*Edgewood IV*), 917 S.W.2d 717, 728 (Tex. 1995). The constitutionality of the Robin Hood system was upheld after it was challenged on the basis of the Texas Constitution's requirement that the state provide "an efficient system" of public schools. *See id.* at 725 (internal quotations omitted). However, such success was short lived. In *Neeley v. West Orange-Cove Consolidated Independent School District*, the Texas Supreme Court found that the education finance system was an unconstitutional ad valorem

Unsurprisingly, wealthy districts staunchly opposed such funding schemes. Furthermore, strategies aimed at reducing disparities in educational expenditures proved similarly unsuccessful.[57] Thus, the resistance to judicial attempts to enforce fiscal equity and the difficulty of actually achieving equal educational opportunity dissuaded other state courts from issuing similar holdings.[58] By the early 1980s, plaintiffs had won only two education finance cases. By 1988, fifteen state supreme courts had denied any relief, while only seven had found for the plaintiff.[59] Professor Peter Enrich summarized the shortcomings of equality-based litigation theories by stating:

> In short, equalization of outcomes, or even of actual services, has proven too ambitious a standard in the political process. And yet, mere equalization of tax capacity, or even the significant progress some states have achieved toward equalization of school budgets, has proven insufficient to put the educational opportunities of dis-

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tax. *See* 176 S.W.3d 746, 797–98 (Tex. 2005). The history of education finance litigation in Texas illustrates many of the difficulties state legislatures face when creating a plan that is both constitutional and politically tenable. For a summary of Texas's education finance litigation history since *Rodriguez*, see Angela Marie Shimek, Comment, *The Road Not Taken: The Next Step for Texas Education Finance*, 9 SCHOLAR 531, 538–44 (2007).

57 *See* Rebell, *supra* note 10, at 226–27. In California, the trial judge in *Serrano II* held that interdistrict funding disparities must be reduced to insignificant amounts, defined as "considerably less than $100.00 dollars per pupil." *Serrano II*, 557 P.2d at 940 n.21. However, California voters followed this judicial mandate with Proposition 13, a popular initiative that amended the state constitution to cap increases in local property taxes. The effect of the equalization mandate and property cap was a leveling down of California's education expenditures. During the 1964–65 school year, California ranked fifth in the nation in per-pupil spending, but by the 1994–95 school year, the state had dropped to forty-second. *See* Rebell, *supra* note 10, at 227.

58 *See* Rebell, *supra* note 10, at 227. In *Lujan v. Colorado State Board of Education*, the Colorado Supreme Court determined that neither low-income people nor low-income school districts qualified as a suspect class. *See* Banks, *supra* note 46, at 134–35. The court rejected the possibility of low-income school districts constituting a suspect class by finding that because its terms embodied only personal rights, the state equal protection clause applied only to individuals. *See* Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1020 (Col. 1982) (citing Shelley v. Kraemer, 334 U.S. 1, 22 (1948)). The court further found that low-income people were insufficiently distinct and insular to satisfy the requirements of equal protection analysis. Poor persons lacked common attributes or characteristics, and the plaintiff failed to demonstrate that the group was centered in low-wealth property districts. The court viewed poor persons as an amorphous group that historically has not been subject to purposefully unequal treatment. *See id.* at 1020–22. Even equality arguments grounded in both the equal protection and education clauses of the state constitution failed. In *Olsen v. State*, the Oregon Supreme Court upheld the state's school finance system. *See* 554 P.2d 139, 149 (Or. 1976). The Oregon Constitution guaranteed a "uniform, and general" system of schools. OR. CONST. art. VIII, § 3. There, rather than deciding whether the state's education clause elevated education to the status of a fundamental right, the court used a balancing test, weighing the impact on the interest in educational opportunity against the state's justification for its financing system. *See Olsen*, 554 P.2d at 145. Reviewing substantial evidence about the deficient educational opportunities in poor districts, the court found that the state's interest in local control justified these disparities. *See id.* at 145–49.

59 *See* Rebell, *supra* note 10, at 227.

> advantaged children on a par with those of their better-off peers. The result has been increasing disenchantment with the goal of providing equal educational opportunity through equally supported public schools . . . .[60]

II
THE TRANSITION FROM EQUITY TO ADEQUACY: THE THIRD WAVE OF EDUCATION FINANCE LITIGATION

A. A Newfound Focus on Adequacy

Faced with state courts becoming markedly less receptive to equality-based arguments, advocates again redirected their litigation strategy. In this third wave of education finance litigation, litigants moved away from the traditional focus on per-pupil spending disparities and, instead, towards the overall sufficiency of funds that states allocated to public schools. In doing so, litigants concentrated almost exclusively on education clauses of state constitutions, rather than on equal protection clauses or a combination of the two.[61] State courts have been receptive to these new adequacy-based arguments; adequacy plaintiffs have prevailed in twenty-five states and have been victorious in ten of the fourteen cases decided between 2003 and 2005.[62]

This shift from equity to adequacy was largely the result of the standards-based reform movement of the 1980s. During this period, numerous national studies compared America's education system with that of other industrialized nations.[63] The findings were staggering, calling into question the quality of schools not only in impoverished

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60 *See* Enrich, *supra* note 9, at 154–55.

61 *See id.* at 165–66; *see also* James E. Ryan, *A Constitutional Right to Preschool?*, 94 CAL. L. REV. 49, 69–84 (2006) (arguing for a constitutional right to preschool based on state constitutions' education clauses as supported by education finance adequacy litigation).

62 *See* Martin R. West & Paul E. Peterson, *The Adequacy Lawsuit: A Critical Appraisal*, *in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY, *supra* note 44, at 1, 2–6 (graphing the number of states in which a court rendered a final judgment in an education finance case on equity or adequacy grounds and comparing the outcomes in equity versus adequacy cases); *see also* MICHAEL A. REBELL & JESSICA R. WOLFF, CAMPAIGN FOR EDUC. EQUITY, LITIGATION AND EDUCATION REFORM: THE HISTORY AND THE PROMISE OF THE EDUCATION ADEQUACY MOVEMENT 8 (2006), *available at* http://www.schoolfunding.info/resource_center/adequacy-history.pdf (noting that adequacy plaintiffs have prevailed in twenty-one of twenty-eight major education funding decisions by states' highest courts). *But see* Richard Briffault, *Adding Adequacy to Equity*, *in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY, *supra* note 44, at 25, 26–27 (discussing the overlap between equity and adequacy and the difficulty of classifying a case as exclusively adequacy or equity based).

63 *See* REBELL & WOLFF, *supra* note 62, at 4. Arguably the most conspicuous study was the National Commission on Excellence in Education's 1983 report entitled *A Nation at Risk*. *See* Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance in the 1990s*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES, *supra* note 16, at 136, 147. The findings from these various studies led President George H. W. Bush to commission a National Education Summit in 1989 to put forth national education goals

districts, but in all public schools—wealthy and poor alike—and warning that the poor quality of American education was undermining the country's ability to compete in the international economy. In response to these reports, many states enacted extensive reforms imposing more rigorous academic requirements.[64] These standards-based reforms built upon substantive standards in English, math, history, and other major subject areas to set standards at the level necessary for students to compete in the global economy.[65] The reform movements thereby gave substantive content to plaintiffs' adequacy-based litigation strategy.[66]

The influence of the standards-based reform movement is illustrated in *Rose v. Council for Better Education, Inc.*,[67] arguably the most successful adequacy-based litigation. In *Rose*, the Kentucky Supreme Court noted that "Kentucky ranked fortieth nationally in per-pupil spending and thirty-seventh in average teacher salary."[68] Although the plaintiffs brought the case on behalf of poor school districts that sought more equitable funding for their students, the court went further and found that even Kentucky's more affluent school districts were inadequately funded when compared against acceptable national standards.[69] The court declared that Kentucky's entire system of public schooling was inadequate and unconstitutional, directing the Kentucky General Assembly to "re-create, and re-establish a system of common schools."[70]

Rose was important both for its holding and for its definition of an adequate education, which has proved especially influential. The Kentucky Supreme Court held that an adequate education was one that had the goal of developing the following seven basic capacities in each child:

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
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> (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;

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and establish education standards. Every state governor and CEOs of many major corporations attended the summit. *See* REBELL & WOLFF, *supra* note 62, at 4.

64 *See* Rebell, *supra* note 10, at 229.

65 *See id.*

66 *See* James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1227–39 (2008) (discussing the relationship between the creation of academic standards and school finance litigation and criticizing litigants' reliance on testing and failure to adopt a comparative perspective).

67 *See* 790 S.W.2d 186 (Ky. 1989).

68 Heise, *supra* note 8, at 1163.

69 *See id.*

70 *See Rose*, 790 S.W.2d at 214.

(iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
(iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
(v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
(vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
(vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[71]

The court's detailed definition of the skills necessary for participation in a democratic society and the modern economy provided an outline of the goals for standards-based education cases but left further development and implementation of the system to the legislative and executive branches of government.[72] Subsequently, two state supreme courts adopted this definition of an adequate education,[73] and numerous other courts have explicitly relied upon it when defining a constitutionally adequate education.[74]

B. Advantages of an Adequacy-Based Litigation Strategy

As the recent proliferation of pro-plaintiff holdings suggests, adequacy-based arguments present numerous advantages over equality-based arguments for improving educational opportunity. Three of these advantages, discussed in greater detail below, are that: (1) ade-

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71 *Id.* at 212. This detailed definition of an adequate education was the result of substantial dialogue between the Kentucky Supreme Court, the public, and the standards-based education reform movement. In crafting it, the Kentucky Supreme Court heard extensive expert testimony and read an extensive post-trial brief filed by a citizens' education advocacy group. In fact, after issuing his liability decision, the trial judge withheld his remedy decision for six months. During that time, a special committee held five hearings across the state and enumerated five outcomes that it perceived as an adequate education. The trial court largely adopted the committee's findings, with the Kentucky Supreme Court including the key findings in its final decision. *See* Rebell, *supra* note 10, at 235.

72 *See Rose*, 790 S.W.2d at 215–16 (further holding that the legislature must monitor the state education system to prevent waste or mismanagement); Rebell, *supra* note 10, at 235.

73 *See* McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1359 (N.H. 1997).

74 *See, e.g.*, Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1186 (Kan. 1994) (noting the striking resemblance between *Rose*'s definition of an adequate education and the standards that the Kansas legislature subsequently adopted); *Claremont*, 703 A.2d at 1359–60 (rejecting an adequacy definition promulgated by the state education department and advising that the department look to the seven specific criteria from *Rose* as guidance); Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997) (citing *Rose* and defining a "sound basic education" in terms of four basic skills that schools must develop in students).

quacy is normatively more appealing and consistent with widely held societal values; (2) adequacy allows for continued local control of public education; and (3) adequacy directly focuses on the quality of education the state provides.

First, given that it is financially prohibitive to bring all school districts' education spending up to the level of the highest spending district in the state, equality suggests a zero-sum game, demanding that wealthier school districts surrender their resources and accomplishments to the relatively worse-off districts.[75] This is a contentious and, for some, a normatively unappealing objective. Adequacy arguments instead focus on the appalling conditions in the poorest school districts so as to raise the quality of education at the bottom levels. By refraining from adopting a comparative posture, adequacy advocates can invoke a broader vision in which both the quality of education in poor districts improves and society as a whole experiences significant social and economic gains.[76] In contrast to equity's emphasis on redistribution and leveling between districts, adequacy's focus on education as a universal good to which all children are entitled more closely aligns with traditional values of fairness and opportunity, thus tending to be more widely accepted by courts and society.[77]

Second, because adequacy conflicts less with local control of public education, adequacy challenges are less threatening to the status quo of public education.[78] By seeking to ensure a reasonable level of resources across all school districts, adequacy does not prohibit a state from continuing to rely on local property taxes as a major source of local school funding.[79] Entitling all students to receive an adequate education still allows wealthy school districts to tax themselves at a higher rate to provide a more-than-adequate education for their own students. Thus, adequacy preserves the political goal that local resources should benefit local students.[80]

Third, a focus on adequacy allows both the courts and state legislatures to adopt a more holistic approach to improving the quality of education. The equity-based strategy relied on per-pupil expenditure

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75 *See* Frederick M. Hess, *Adequacy Judgments and School Reform*, *in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY, *supra* note 44, at 159, 160. For an example of how this precise concern played out in California, see *supra* note 57.

76 *See* Enrich, *supra* note 9, at 168–69 (acknowledging that although the reality of achieving adequacy may in fact be a redistribution of resources, the focus on betterment rather than competition among the districts nevertheless makes affluent districts more tolerant of adequacy arguments).

77 *See id.* at 167.

78 *See id.* at 169–70.

79 *See id.* at 170.

80 *See id.*; Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2440 (2004).

as a proxy for the quality of education.[81] Equity's limited focus on fiscal equality was especially unfavorable for urban school districts because it failed to account for the fact that some districts faced higher costs than others and that some districts had larger numbers of students with special needs.[82] These shortcomings made advocates for poor students in inner cities question whether equity, even if successful, would be capable of generating meaningful educational reform. In contrast, adequacy encourages development of "a framework that addresses the myriad components of a quality education rather than confining it to the narrower and less promising task of equalizing a finite set of inputs."[83]

III
THE FOURTH WAVE OF EDUCATION FINANCE LITIGATION: AN ARGUMENT FOR THE PURSUIT OF A FEDERAL ADEQUACY LITIGATION STRATEGY

Because of the success of adequacy litigation at the state level and the advantages of challenging the adequacy of education rather than the relative equality of education finance, plaintiffs continue today to use an adequacy-based litigation theory in battling to improve the quality of public education. In light of the previously discussed history of the three waves of education finance litigation, this Note argues that litigants should augment these efforts by pursuing an adequacy-based litigation strategy at the federal level as well. Various changes since the 1973 *Rodriguez* decision strengthen the viability of a claim that the federal government has failed to meet its duty to provide students with an adequate education. Significant political and legal developments since 1973 have undermined many of the *Rodriguez* Court's reasons for refusing to find a positive federal right to education. The changes have also resulted in judicially manageable standards and Supreme Court decisions analyzing education quality, both of which further justify pursuit of a federal adequacy litigation strategy.

A. The Viability of a Federal Adequacy Litigation Strategy

A viable litigation strategy must assure courts that: (i) there are judicially manageable standards by which courts believe they can effect change in the area, and (ii) a decision in the litigant's favor would

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81 *See* Palfrey, *supra* note 3, at 13; Ryan, *supra* note 61, at 75 ("[T]he underlying rights in [adequacy cases] need not be defined solely in terms of money. . . . [F]unding remedies do not exhaust the scope of the underlying rights at stake in school finance cases.").

82 *See* Minorini & Sugarman, *supra* note 16, at 183–84.

83 *See* Palfrey, *supra* note 3, at 13.

be consistent with previous judicial decisions.[84] In light of the developments in education litigation since *Rodriguez*, a federal adequacy-based litigation strategy fulfills both of these criteria. The availability of judicially manageable standards and continuity with precedent necessarily strengthen the litigation strategy's claim that the quality of education in poor and underfunded school districts falls below federal minimum guarantees.

1. *Judicially Manageable Standards*

A likely factor underlying the Court's decision in *Rodriguez* was the Justices' concern that there was a lack of judicially manageable standards in the area of educational quality. However, this concern appears far less trenchant considering the proliferation of state court decisions finding and defining a positive right to an adequate education and the passage of the federal No Child Left Behind Act (NCLB).[85] State court litigation and federal legislation have provided precisely the judicially manageable standards that the *Rodriguez* Court sought.

Four years prior to *Rodriguez*, the Supreme Court reviewed a fiscal equality suit involving disadvantaged urban students.[86] At trial, the plaintiffs argued that the state's education finance system was inadequate to meet their educational needs and that there existed a federal constitutional right to a school funding system that "apportions public funds according to the educational needs of the students."[87] Focusing on the difficulty of measuring student need, the lower court dismissed the case on nonjusticiability grounds. There were, in the district court's view, no discoverable and manageable judicial standards by which to determine whether such a system violated students' constitutional rights.[88] The district court noted that even the remedies that the plaintiffs proposed would not satisfy their claim that education funding should directly relate to student need.[89] The Supreme Court affirmed without opinion,[90] with the lack of judicially manageable

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84 *See* COONS ET AL., *supra* note 17, at 317.

85 20 U.S.C. §§ 6301–7941 (2006).

86 *See* Rebell, *supra* note 10, at 224.

87 *See* McInnis v. Shapiro, 293 F. Supp. 327, 330–31 (N.D. Ill. 1968) (involving a state funding system that provided each student with a minimum foundation financing level of $400); Rebell, *supra* note 10, at 228.

88 *See McInnis*, 293 F. Supp. at 335–36.

89 *See id.* at 331–36. The plaintiffs offered two possible solutions: first, that all students across the state receive the same dollar appropriation; or second, that the state eliminate all variations in local property values but continue to allow districts to set their own tax rates. *See id.* at 331–32; Rebell, *supra* note 10, at 224–25.

90 McInnis v. Ogilvie, 394 U.S. 322 (1969).

standards likely influential not only in that action but also in the Court's decision in *Rodriguez*.[91]

In fact, the *Rodriguez* Court itself expressed concern about the effect of finding a constitutionally protected right to education, a right that would have invalidated the Texas education finance scheme.[92] Justice Powell, writing for the majority, described such a decision as being an "unprecedented upheaval in public education" and noted that "there is nothing simple or certain about predicting the consequences of massive change in the financing and control of public education."[93] Justice Powell also expressed specific concern for the lack of judicially manageable standards by stating, "[E]qually unsettled [is the] controversy as to the proper goals of a system of public education."[94]

Having allowed school finance litigation to percolate at the state court level, much of the *Rodriguez* majority's expressed concern is no longer valid. A consensus definition of an adequate education has emerged from the proliferation of state court litigation.[95] This consensus defines an adequate education as one that prepares students to participate meaningfully in modern-day life.[96] As discussed above, the Kentucky Supreme Court's definition of an adequate education as one that develops students' skills in seven basic areas has proven especially influential.[97] Rebell and Wolff divide the consensus definition of an adequate education that has emerged from state court decisions into three parts: (1) the constitutional standard for an adequate education; (2) the types of knowledge and skills an adequate education must provide students; and (3) the essential resources students need to acquire the knowledge and skills an adequate education provides.[98] The first part requires that education empower students to function effectively in a democratic society and to compete effectively in the economy. The second specifies the types of knowledge and skills that students need to be effective citizens in a rapidly changing society.

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91 *See* Rebell, *supra* note 10, at 225.

92 *See id.* at 221–24.

93 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 56 (1973).

94 *See id.* at 43; *see also* Betsy Levin, *The Courts, Congress, and Educational Adequacy: The Equal Protection Predicament*, 39 MD. L. REV. 187, 190 (1979) ("The Supreme Court's reluctance to find that education is a fundamental right entitled to special protection was at least in part due to the Court's fear that there are no judicially manageable standards for determining what amount of education is constitutionally guaranteed.").

95 *See* REBELL & WOLFF, *supra* note 62, at 10–11.

96 *See id.* at 10. As Michael Rebell and Jessica Wolff explain, "[t]here is widespread agreement that an adequate system of education is one that 'will equip students for their roles as citizens and enable them to succeed economically and personally.'" *Id.* at 11 (quoting Vincent v. Voight, 614 N.W.2d 388, 396 (Wis. 2000)).

97 *See supra* notes 73–74 and accompanying text.

98 *See* REBELL & WOLFF, *supra* note 62, at 11 (giving the full consensus definition of an adequate education).

These skills include: the ability to read, write, and speak English; knowledge of basic math, science, geography, history, and the political system; intellectual tools to evaluate complex issues and communicate ideas; and vocational skills to compete in further schooling or to gain employment. The third standard describes the essential resources students need in order to attain the above-listed knowledge and skills. These include: qualified teachers and principals; appropriate class sizes and school facilities; early childhood services; supplemental programs for students with disabilities, students from high-poverty backgrounds, or students learning English; and educational resources like textbooks, libraries and computers.[99] Furthermore, by setting specific educational goals and measuring student achievement, the standards-based reform movement produces data on whether schools are successfully providing students with an adequate education.[100] These substantial education statistics create a much different landscape than the one faced by the *Rodriguez* Court, when federally funded education research was just beginning.[101]

In addition to adequacy litigation, No Child Left Behind has similarly provided contours to the definition of an adequate education.[102] Signed into law in January 2002, the legislation had a stated purpose to ensure that "all children have a fair, equal, and significant opportunity to obtain a high-quality education" by "closing the achievement gap between . . . disadvantaged children and their more advantaged peers."[103] Although the legislation does not specifically define an adequate education, NCLB requires states to develop one.[104] States must set specific, rigorous education standards in various subjects and annually test their students' performance to determine whether they are proficient under the applicable state standard.[105] NCLB conditions

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99 *See id.* at 11 n.49 (quoting seven state courts' definitions of an adequate education).

100 *See id.* at 14 (describing state adequacy cases as the best current example of Justice Brandeis's formulation of federalism in which states serve as "'laboratories'" for innovation in public policy).

101 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973) (stating that the alternatives to Texas's funding scheme were "only recently conceived and nowhere yet tested").

102 *See* David J. Hoff, *Federal Law Bolsters Case for Aid Suits: Experts Warn States of Greater Exposure*, EDUC. WEEK, Oct. 1, 2003, at 1.

103 *See* 20 U.S.C. § 6301 (2006).

104 *See* James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1706 (2003) (noting that because NCLB contains no enforcement mechanisms, courts will be forced to generate judicially manageable standards, the absence of which had previously prevented courts from desegregating public schools).

105 *See* Kimberly A. Murakami, Annotation, *Construction and Application of No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (Codified at 20 U.S.C.A. §§ 6301* et seq.*)*, 4 A.L.R. FED. 2D 103 (2005). On March 13, 2010, Present Barack Obama announced that he would send an "education blueprint" to Congress. This education-reform proposal seeks to change and strengthen many aspects of NCLB—such as rewarding the academic

each state's receipt of federal Title I education funding upon its creation of a statewide accountability system and assessment of its "Adequate Yearly Progress."[106] NCLB further requires that *all* students be proficient by 2014.[107] Additionally, NCLB requires states to ensure that all teachers are "highly qualified" and to allocate a certain percentage of Title I funding to specific school-improvement activities.[108] Like the standards-based reform movement, the required Adequate Yearly Progress reports will provide litigants with data and statistics illustrating the current status of public education and will further provide courts with a means by which to assess whether public schools are providing an adequate education.[109]

2. *Continuity with Earlier Decisions*

In addition to the development of judicially manageable standards through state adequacy litigation and NCLB, one can also look to Supreme Court precedent in which the Court has analyzed whether the quality of education satisfied a guaranteed minimum standard. In both early civil rights education litigation and in later cases, the Court has supported students' receipt of a meaningful educational opportunity and shown a willingness to consider and articulate the features that contribute to an adequate education. These prior cases illustrate that when evaluating a particular educational experience, the Court has tended to reject those factors that were central to an equity-based argument, such as per-pupil expenditure. Instead, the Court has given weight to those criteria that an adequacy-based theory tends to

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growth of students rather than continuing the current Act's pass-fail system—while retaining some aspects of the federal law, such as required annual reading and math tests. One of the proposed changes includes evaluating schools' success in narrowing the achievement gap between affluent and poor students. *See* Sam Dillon, *Obama Proposes Sweeping Change in Education Law: Readiness for College; Continued Testing, but Less Interference for Well-Run Schools*, N.Y. TIMES, Mar. 14, 2010, at A1.

106 *See* Michael Salerno, Note, *Reading is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 509, 536–37 (2007) (quoting 20 U.S.C. § 6319(b)(3)(C)).

107 *See* Rebell, *supra* note 4, at 1489.

108 *See* Salerno, *supra* note 106, at 536–37 (quoting 20 U.S.C. § 6319(a)).

109 *See* Hoff, *supra* note 102. Present Obama's proposal for revising NCLB would require states to create rating systems for teachers and principals based largely on their students' performance. Currently, many school districts do not have the capacity to do so, but if such studies were required, these ratings would provide additional data upon which a court could evaluate the adequacy of the education a school district provides to its students. *See* Editorial, *Mr. Obama and No Child Left Behind*, N.Y. TIMES, Mar. 18, 2010, at A24.

This discussion of No Child Left Behind is, of course, not a suggestion that the congressional statute define the substance of the constitutional right to an adequate education. *C.f.* City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997) (holding that Congress cannot define by statute the content of a constitutional right). Nonetheless, federal courts in search of judicially manageable standards can refer to No Child Left Behind in deciding the contours of the right.

emphasize, considering the overall learning experience and the amount of knowledge students receive.[110] During the civil rights movement, the Court evaluated whether students were receiving a meaningful educational opportunity by considering both tangible and intangible factors. Prior to *Brown v. Board of Education*,[111] the Court illustrated in *Sweatt v. Painter*[112] that a meaningful education could not be defined solely by tangible factors, such as the student-faculty ratio or the number of books in the library. In *Sweatt*, the Court found that a newly opened, black-only law school failed *Plessy*'s "separate but equal" doctrine because it did not provide African-American law students with a legal education that was equivalent to the education their white counterparts received at the University of Texas Law School. The Court stated that the University of Texas Law School's superiority resulted in part from intangible factors such as the "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige."[113] The Court's broad consideration of a meaningful educational experience continued when it struck down *Plessy*'s "separate but equal" doctrine in *Brown I*. There, the Court considered social-science data showing that separating students solely according to race "generates a feeling of inferiority as to their status in the community."[114] In focusing on the stigmatic harm that black school children experienced, the Court again adopted a more holistic definition of a meaningful educational experience that was not limited to tangible features alone.[115]

In *Lau v. Nichols*,[116] the Court again considered whether a state was providing students with a meaningful educational opportunity.[117] *Lau* addressed whether the Civil Rights Act of 1964 required California to provide additional educational services to Chinese students who did not speak English. In finding that California violated the Act by failing to provide English-language instruction, the Court held that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students

110 *See* Sayfie, *supra* note 34, at 933 (describing the Court's past decisions as focusing on educational ends—such as the amount of knowledge the student obtained, rather than upon education means, such as the amount of money spent or the types of programs implemented—and characterizing this as an "educational-attainment context").

111 347 U.S. 483 (1954) (*Brown I*).

112 339 U.S. 629 (1950).

113 *Id.* at 633–34.

114 *Brown I*, 347 U.S. at 494.

115 *See* Rebell, *supra* note 4, at 1493–94.

116 414 U.S. 563 (1974).

117 *See* Rebell, *supra* note 4, at 1496.

who do not understand English are effectively foreclosed from any meaningful education."[118]

The Court again considered the parameters of a meaningful educational opportunity in the *Rodriguez* case itself.[119] Even though the plaintiffs were contesting the constitutionality of the funding disparity between wealthy and poor school districts, the Court did not measure education quality by per-pupil expenditure. Rather, the Court defined the value of education in terms of its ability to empower students to participate effectively in a democratic society.[120] As in *Lau*, the Court in *Rodriguez* focused on the amount of knowledge students were able to attain, rather than measuring education in terms of relative resources.

The Court's consistent adoption of an output-based evaluation of educational opportunity in *Sweatt*, *Brown*, *Lau*, and *Rodriguez* supports this Note's argument that litigants should now pursue a federal adequacy-based litigation strategy. Adequacy, like those precedents, analyzes education in terms of the overall quality of education provided to students rather than on relative disparities in per-pupil expenditures. Thus, the emergence of a consensus definition of an adequate education combined with earlier cases where the Court analyzed students' educational experiences in holistic terms support the claim that litigants should bring a challenge in federal court. In such a challenge, litigants should allege that the education provided to students in poor and underfunded school districts fails to provide the students their constitutionally protected opportunity to acquire a minimally adequate education.

B. Changes Undermining Major Aspects of the *Rodriguez* Majority's Opinion

In addition to these developments, significant political and legal changes have occurred that undermine *Rodriguez*. These changes further justify the adoption of a new litigation paradigm in which advocates pursue a federal adequacy-based litigation strategy. This Note argues below that litigants who challenge the adequacy of education in federal court should adopt legal theories that would not require the Court to overrule *Rodriguez*. Nevertheless, the significant political and legal changes since *Rodriguez* illustrate that current circumstances are considerably more conducive to federal judicial involvement in education.

Preserving federalism and maintaining state control over education was one of the Court's primary concerns in *Rodriguez*. The Court

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118 *Lau*, 414 U.S. at 566.

119 *See* Sayfie, *supra* note 34, at 933.

120 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30–31, 35–36 (1973).

described the merits of local control by stating that "'[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint.'"[121] While historically education has been regarded as an area best relegated to the states, the post-*Rodriguez* passage of federal legislation involving the federal government in public education illustrates that local control over public schools is diminishing. Legislation such as the No Child Left Behind Act and the Individuals with Disabilities Education Act (IDEA)[122] directly involve the federal government in education by imposing specific requirements on states and local schools.[123] Under NCLB, federal funding for education is conditioned upon states' development of rigorous education standards and annual testing of their students to determine whether local schools have met the state-created requirements.[124] Likewise, the IDEA entitles students with disabilities to receive a "free appropriate public education" and requires school districts to develop an "individualized education program" (IEP) for each child with a disability.[125] This IEP ensures that the child receives educational instruction "specially designed" to meet his "unique needs."[126] When announcing NCLB, President George W. Bush stated, "Change will not come by disdaining or dismantling the Federal role of education. . . . [E]ducational excellence for all is a

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121 *Rodriguez*, 411 U.S. at 49 (quoting Wright v. Council of Emporia, 407 U.S. 451, 478 (1972) (Burger, C.J., dissenting)). The Court also expressed the magnitude of the federalism principles the case put at stake: "While '[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action,' it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State." *Id.* at 44 (quoting Allied Stores of Ohio v. Bowers, 358 U.S. 522, 532 (1959) (Brennan, J., concurring)).

122 20 U.S.C. § 1400 et seq. (2006).

123 *See* Salerno, *supra* note 106, at 538–39. Although technically any state is free to ignore NCLB if it is willing to forgo federal education funding, this possibility is not a reality because public schools are fiscally dependent upon federal assistance. *See id.* at 538. President Obama's education initiative "Race to the Top" further increases federal involvement in education. For states that undertake drastic school improvement initiatives, the program rewards those who apply and whose proposal is rated most highly with federal grants totaling nearly four billion dollars. During the first round of competition, Delaware was awarded $100 million of federal grant money and Tennessee was awarded about $500 million. Secretary of Education Arne Duncan plans to divide the remaining $3.4 billion among the second-round winners. President Obama has requested an additional $1.3 billion to extend the competition for 2011. *See* Sam Dillon, *Delaware and Tennessee Win U.S. School Grants*, N.Y. TIMES, Mar. 30, 2010, at A15.

124 *See supra* notes 104–09 and accompanying text.

125 20 U.S.C. § 1412(a)(1), (4).

126 *Id.* § 1401(9), (14), (29); *see also* Ann K. Wooster, Annotation, *What Constitutes Services that Must Be Provided by Federally Assisted Schools Under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C.A. §§ 1400* et seq.*)*, 161 A.L.R. FED. 1 (2000).

national issue."[127] As President Bush's statement suggests, the widespread, bipartisan backing of these two pieces of legislation signals broad political support for a federal role in education.

Intertwined with its concerns about preserving federalism, the *Rodriguez* Court also expressed its belief that involvement in education was not something to which federal courts were suited.[128] The Court noted that matters of "educational policy" and matters of "fiscal policy" are both areas "in which th[e] Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels."[129] The passage of federal education legislation, however, has likely undermined this rationale. For example, the IDEA directly expands the federal judiciary's involvement in education by giving an aggrieved party the right to seek review in federal court of a state educational agency's determination as to whether a disabled child's education satisfies the IDEA's guarantee of a "free appropriate public education."[130] In 2007, the Court interpreted its judicial review power under the IDEA to include suits brought by parents in their own right, not derivative from their child. In *Winkelman ex rel. Winkelman v. Parma City School District*, the Court held that parents had an individual right to sue under the IDEA concerning their child's receipt of the IDEA's entitlement to a "free appropriate public education."[131]

In addition to expressing a desire to preserve local control over education, the *Rodriguez* Court also articulated a slippery-slope argument. The Court questioned how education was distinguishable from other "significant personal interests" like basic "food and shelter"[132] and, therefore, how a finding that education is a fundamental right could be necessarily and logically limited so as not to warrant constitutional protection for other basic necessities. The Court likely based its concern in part on the fact that at the time of *Rodriguez*, the Department for Housing, Education, and Welfare was responsible for overseeing education.[133] That the federal government grouped education with these other government benefits at the agency level supported the Court's concern that the judicial branch could not meaningfully distinguish education from other important social interests. However,

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127 Remarks on Submitting the Education Reform Plan to the Congress, 1 PUB. PAPERS 11, 12 (Jan. 23, 2001); *see* Salerno, *supra* note 106, at 539.

128 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 58 (1973) (describing the "wisdom of the traditional limitations on this Court's function").

129 *Id.* at 42.

130 *See* 20 U.S.C. § 1415(a), (i)(1)–(2); Rebell, *supra* note 4, at 1534.

131 *See* 550 U.S. 516, 527–28 (2007) (citing 20 U.S.C. § 1415(a)).

132 *See Rodriguez*, 411 U.S. at 37.

133 *See* Greenspahn, *supra* note 39, at 771 (noting that some commentators have distinguished education from other benefits because it is the only government benefit for which attendance is compelled).

a basis for distinguishing education occurred in 1979 with the "creation of an independent cabinet-level Department of Education."[134] Indeed, several years later in *Plyler v. Doe*, the Court itself characterized education as not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[135]

In sum, many political and legal changes have occurred since the Court decided *Rodriguez* more than thirty years ago. These changes indicate that local control over education is diminishing, that judicial involvement in education is permissible, and that education is firmly established as distinct from other government benefits. In the current landscape, federal judicial involvement to improve the quality of education in the nation's poorest schools is now widely desired.

C. Basis for a Federal Right to an Adequate Education

The pursuit of a federal adequacy-based litigation strategy has drawn strength from political and legal changes that have spurred judicially manageable standards, developed Supreme Court precedent evaluating education quality, and addressed major concerns of the *Rodriguez* majority. Successful adequacy litigation in state court, however, has been grounded in the education clauses of state constitutions. The federal Constitution does not provide a similarly explicit guarantee of free public education. Nevertheless, the South Carolina Supreme Court's decision in *Abbeville County School District v. State*[136] and the U.S. Supreme Court's decision in *Jackson v. Indiana*[137] both support the claim that students have a federally protected right to receive an adequate education. Scholars have put forth numerous additional bases upon which the Court could justify finding a positive right to education.[138] However, in light of the success and advantages that adequacy litigation has enjoyed at the state level, two theories best allow litigants and courts to draw strong parallels to adequacy litigation in state court and thereby incorporate the advantages of an

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134 *Id.*

135 457 U.S. 202, 221 (1982).

136 515 S.E.2d 535 (S.C. 1999).

137 406 U.S. 715 (1972).

138 *See generally* Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 553 (1992) (analyzing a right to education under substantive due process, the First Amendment, the right to vote, and the Privileges and Immunities Clause, and providing principles of constitutional construction that further support a positive right to education derived from international agreements, the Ninth Amendment, international human rights law, and historical evidence of original intent); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334 (2006) (arguing that the Citizenship Clause of the Fourteenth Amendment requires Congress to ensure a meaningful floor of educational opportunity).

adequacy-based theory. The Court is more likely to accept these theories because neither directly contradicts the *Rodriguez* holding.

Under the first theory, litigants could base the positive right to an adequate education upon the *Rodriguez* Court's own suggestion that there may exist a federally protected "identifiable quantum" of education.[139] As discussed in Part I, the *Rodriguez* majority did not absolutely reject the possibility that there exists a federally protected right to education. Rather, the Court never reached the issue of whether the plaintiffs' Fourteenth Amendment rights would have been violated if the quality of public education in Texas fell below a hypothetical floor because the State repeatedly claimed in its brief that Texas "assures 'every child in every school district an adequate education'" and the plaintiffs offered no proof at trial "persuasively discrediting or refuting the State's assertion."[140] As a result of this pleading deficiency, the Court could only hint that the Constitution might implicitly guarantee students "some identifiable quantum" of education.[141] The constitutional basis for this dictum was a partial embrace of the litigants' nexus argument that education is a protected right because it facilitates the exercise of explicitly protected constitutional rights like free speech and voting.[142] The *Rodriguez* majority hypothesized that the Constitution might protect some minimum amount of education because students must have at least some education "to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[143]

The *Rodriguez* Court's reference to this "identifiable quantum" is best understood as a "high minimum" that comports with the consensus definition of an adequate education that developed in state adequacy litigation and NCLB.[144] The South Carolina Supreme Court's decision in *Abbeville County School District v. State*[145] supports this analysis. The case exemplifies the tendency of state high courts to define the constitutionally guaranteed standard of education as of a high-minimum sort even where the applicable state constitution does not explicitly provide such an educational guarantee. Although the education clauses of some state constitutions specifically describe the

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139 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 (1973). The possibility of a constitutionally protected minimum floor of education has been preserved in subsequent federal education litigation. *See supra* notes 34–41 and accompanying text.

140 *See Rodriguez*, 411 U.S. at 24; Ratner, *supra* note 43, at 831 & n.233 (concluding that in light of the state's pleadings, when the Court used the phrase "'absolute deprivation of education,' it implicitly defined education as adequate education" (footnote omitted)).

141 *See Rodriguez*, 411 U.S. at 36.

142 *See id.* at 36–37.

143 *See id.* at 37.

144 *See* Briffault, *supra* note 62, at 38 (noting that in school finance litigation, adequacy has developed as a theory of "equity plus").

145 515 S.E.2d 535 (S.C. 1999).

quality of guaranteed education—such as the New Jersey Constitution, which promises a "thorough and efficient"[146] education—the South Carolina Constitution contains no such promise.[147] Instead, its education clause provides only for the "maintenance and support of a system of free public schools."[148]

The trial court found that given this constitutional language, the only viable claim under the education clause of the state constitution was that there was *no* system of free public schools open to all children in the state.[149] Despite the minimal language in the state constitution, the South Carolina Supreme Court reversed for the plaintiffs and interpreted this provision as "requir[ing] the General Assembly to provide the opportunity for each child to receive a minimally adequate education."[150] The court then defined a minimally adequate education in accordance with the consensus definition of an adequate education. The court described the level of education guaranteed to students as one that provides the opportunity to acquire "(1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; (2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and (3) academic and vocational skills."[151] As with the Court's dictum in *Rodriguez*, the bare language of the South Carolina Constitution required that the state provide only a minimum education. Despite the lack of qualitative standards, the South Carolina Supreme Court adopted a high-minimum definition of education that is largely consistent with the consensus definition of an adequate education. Therefore, the *Abbeville* decision supports the position that the federal government has a duty to provide an adequate education even though *Rodriguez* suggested only that some minimum amount of education is federally protected. While such state decisions are not binding precedent on federal courts, the Supreme Court can look to the prevailing policy in the states for guidance.[152]

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146 N.J. CONST. art. VIII, § 4.

147 *See supra* note 43 and accompanying text (describing the four categories of education clauses in state constitutions).

148 S.C. CONST. art. XI, § 3.

149 *See Abbeville*, 515 S.E.2d at 539.

150 *See id.* at 540.

151 *See id.* (citing the seven-factor definition of an adequate education the Kentucky Supreme Court articulated in *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989)).

152 *See* Salerno, *supra* note 106, at 510–11 & n.14 ("[T]he objective indicia of national consensus here—the rejection of the juvenile death penalty in the majority of States . . . — provide sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal.'" (quoting Roper v. Simmons, 543 U.S. 551, 567 (2005))).

Alternatively, litigants could argue for a positive right to an adequate education on the substantive due process requirements that compulsory school-attendance laws trigger. Developed by Gershon Ratner, this theory analogizes compulsory education to the criminal context and concludes that the required level of schooling must provide students with an adequate education.[153] Compulsory school-attendance laws deprive students of various liberties, including the freedom to travel and freedom from confinement. Ratner argues that this implicates the substantive due process requirement that any deprivation be reasonably related to a legitimate government interest.[154] In *Jackson v. Indiana*, the Supreme Court considered the substantive due process rights of a criminal defendant who had been involuntarily committed to a state mental institution. The Court held that the nature of the confinement must "bear some reasonable relation to the purpose for which the individual is committed."[155] In other words, when a defendant is committed for treatment, the state mental institution must provide treatment.[156] Although the facts of *Jackson* concerned compulsory confinement in a state mental institution, compulsory school-attendance laws similarly require children of a certain age to attend public school. Therefore, by extending the Court's constitutional analysis beyond its facts, *Jackson* supports a viable argument that there exists a federal right to an adequate education.

In the context of education, the purpose of compulsory attendance is to educate students. Applying *Jackson*, compulsory education must be reasonably related to the purpose that it serves.[157] In other words, just as confinement for treatment requires the mental institution to treat its patients, confinement for education requires the school to educate its students. Because it is not rational for schools to provide an ineffective education, Ratner concludes that "compulsory education is not reasonably related to its purposes unless schools provide adequate education in basic skills."[158]

Both theories would allow the Court to find a federal positive right to an adequate education without overruling *Rodriguez*. These litigation strategies are preferable to equity litigation strategies because they draw specific parallels to cases in which courts have found

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153 *See* Ratner, *supra* note 43, at 823–28.

154 *See id.*

155 406 U.S. 715, 738 (1972).

156 *See* Ratner, *supra* note 43, at 826 (noting that while the Supreme Court itself has not explicitly addressed whether *Jackson* requires a state mental institution to provide treatment where a criminal defendant has been committed for the purpose of treatment, the United States Court of Appeals for the Fifth Circuit so held in *Wyatt v. Aderholt*, 503 F.2d 1305, 1312 (5th Cir. 1974)).

157 *See id.* at 828.

158 *See id.*

that an aggrieved party has the right to an adequate benefit. Therefore, the strategies allow litigants to argue not only that the Court should find a positive right to education but also that the guaranteed standard of education is an adequate one, as defined in state court adequacy decisions and No Child Left Behind.

CONCLUSION

In light of both federal and state court decisions holding that disparities in school funding do not violate the federal Equal Protection Clause, advocates' dedication and willingness to develop a new adequacy-based litigation strategy to improve the quality of public education for the nation's underprivileged children was "remarkable."[159] Given the continued success of adequacy litigation in state court, it is now time for advocates to build upon these successes by redirecting education litigation to focus on the development and pursuit of a federal adequacy-based strategy. Justice Oliver Wendell Holmes once wrote, "The Fourteenth Amendment is not a pedagogical requirement of the impracticable."[160] In the first wave of education litigation—in which litigants asked the Supreme Court to find that the Constitution required equal funding among school districts—the litigants were arguably asking the Court to do the "impracticable." However, in light of the development of an adequacy-based theory at the state court level and the advantages of adequacy over equity, a litigation strategy that asks the Court to recognize students' right only to receive a minimally adequate education cannot be characterized as similarly "impracticable." During the quarter-century since *Rodriguez*, the development of judicially manageable standards, the accumulation of Court precedent applying an output-based analysis of education quality, and the legal and political changes undermining much of the *Rodriguez* majority's reasoning all support the pursuit of a new litigation paradigm—a federal adequacy-based strategy—that will initiate the fourth and final wave of education finance litigation.

Even though state high courts continue to issue decisions in favor of education reform, this federal strategy must be pursued because it offers unique advantages that make it better suited to improve the national education crisis.[161] The advancement of equal educational opportunity would not have occurred without the Supreme Court's

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159 *See* Rebell, *supra* note 10, at 228 ("In light of the U.S. Supreme Court's rejection of plaintiffs' claims in *Rodriguez* and the difficulties experienced by the state courts that issued remedial decrees in the early years, it is remarkable that advocates and state court judges continued to seek new ways to ensure fair funding and meaningful educational opportunities for poor and minority students.").

160 Dominion Hotel, Inc. v. Arizona, 249 U.S. 265, 268 (1919).

161 Even in light of these advantages, there are substantial limitations on the Court's power. If the Court were to recognize a positive right to a minimally adequate education,

decision in *Brown*.[162] If the Court were to affirm students' right to an adequate education, the decision would be a similar "agent of moral suasion," focusing national attention on improving the quality of education for students in poor and underfunded districts.[163] Furthermore, if the Court were to recognize a federal right to a minimally adequate education, the federal government would then bring its "uniquely national perspective, powers, and resources to bear upon what has become, in scope and consequence, a truly national problem."[164] State-by-state litigation is too slow and piecemeal to resolve the current crisis in education effectively.[165] Therefore, the Court should use its "power and legitimacy to demand that the political branches actually live up to their constitutional obligations to minorities when majoritarian institutions fail over time."[166] The federal judiciary's inaction is contributing to the gradual erosion of the expectation that "[s]tudents, even from the most difficult backgrounds, can academically and socially succeed."[167] The federal courts cannot continue to damage one of the nation's most fundamental social values. A federal adequacy-based litigation strategy must therefore be pursued so that the Court can fulfill its responsibility of "declaring and insisting on the vindication of constitutional rights."[168]

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realizing such a holding would require much work on the part of the political branches and education experts. *See generally* Heise, *supra* note 80.

162 *See* Rebell, *supra* note 4, at 1540.

163 *See* Bitensky, *supra* note 138, at 552–53.

164 *See id.*

165 *See* CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, AN IMPERILED GENERATION: SAVING URBAN SCHOOLS xiv–xv (1988) (stating the need for a "unified response" to the urban school crisis); Banks, *supra* note 46, at 153–55 (describing the lack of predictability in state court responses to education litigation because of each state's unique constitutional provision and various equal protection analyses).

166 Palfrey, *supra* note 3, at 40.

167 CARNEGIE FOUND., *supra* note 165, at xv.

168 Rebell, *supra* note 4, at 1540.