Leaving Equality Behind: New Directions in School Finance Reform

Peter Enrich

Public education, in most states, is funded in substantial part from local property taxes. As a result, resources vary widely from one school system to another, and schools in poorer communities are often severely underfunded. Over the past quarter century, many of these state financing systems have been challenged as unconstitutional, initially under the federal Equal Protection Clause and subsequently, after the Supreme Court's adverse decision in San Antonio Independent School District v. Rodriguez, under equal protection clauses and education clauses included in state constitutions. These state constitutional provisions can support challenges that attack school financing systems either for the inequalities they produce or, alternatively, for the inadequacy of the education that they provide in the poorer communities.

To date, the preponderance of the challenges have focused on equality claims, rather than on adequacy claims. This emphasis on equality can largely be explained by the historical context within which the education finance challenges arose, but the results from the reliance on equality, whether measured by judicial rulings or by legislative reforms, have not been impressive. The disappointing results reflect the significant vulnerabilities of equality arguments when applied to the education finance problem, vulnerabilities that arise in part from the difficulty of defining equality in the context of education and in part from the threat that equality poses for other values and interests that play a prominent role in educational policy. Arguments grounded on the norm of adequacy, by contrast, appear able to avoid many of the pitfalls that equality arguments encounter, although they are not without difficulties of their own. In consequence, poorer school systems and advocates of expanded educational funding might be better served by leaving equality arguments behind, in favor of a strategy relying instead on adequacy arguments.
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I. INTRODUCTION

The ideal of equal treatment under law holds a powerful sway over the American political and legal imagination. In fields as diverse as the pursuit of racial justice,1 the protection of interstate commerce against interference by the states,2 and the expansion of opportunity for individuals with disabilities,3 our discourse, both legislative and


3. See, for example, Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(3) (Supp. 1994) (characterizing "discrimination against individuals with disabilities" as central problem to be addressed by Act); 42 U.S.C. § 12132(a) (Supp. 1994) (stating that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the facilities and services of any public entity")
judicial, gravitates toward identification of discrimination as the central evil to be attacked and of equality as the fundamental norm to be pursued.

The debate over how communities and states should finance our systems of public education offers a vivid example of the centrality of the ideal of equal treatment in our public discourse. In the courts, in state legislatures, in scholarly analysis, and in the popular press, discussions of education funding over the last several decades have focused on the glaring inequalities between rich and poor school systems, and calls for reform have highlighted the need for equalization.

Yet, at least in the particular case of education funding, the fruits of the rhetoric of equality have been less than bountiful. The majority of decisions in lawsuits brought to challenge inequalities of educational resources have upheld the existing structures, notwithstanding the proof in many cases of wide disparities between rich and poor districts. Meanwhile, the gaps between districts have remained, and often have widened, even in many states where the courts, the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation”).

4. See generally Parts III and IV.

5. At last count, state constitutional litigation challenging locally funded education systems has resulted in final determinations that the systems were unconstitutional in fourteen states (Alabama, Arizona, Arkansas, California, Connecticut, Kentucky, Massachusetts, Montana, New Jersey, Tennessee, Texas, Washington, West Virginia, and Wyoming), whereas in another eighteen (Colorado, Georgia, Idaho, Illinois, Maryland, Michigan, Minnesota, Nebraska, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Virginia, and Wisconsin) the systems have survived constitutional challenges (although in some of the latter group, subsequent suits seeking to revive the constitutional claims are currently pending). For state by state summaries of the decided cases, see the Appendix at the end of this Article.

For purposes of the summary count given here, I have included in the “unconstitutional” category those states that, in a subsequent case, rejected an earlier finding of constitutionality. See, for example, Seattle School Dist. No. 1 v. State, 90 Wash.2d 476, 585 P.2d 711, 83-107 (1979) (overruling Northshore School Dist. No. 417 v. Kinneard, 84 Wash.2d 476, 530 P.2d 178 (1974)). I have not included in the “constitutional” category those states in which, after the court had established a constitutional requirement invalidating the existing system, a modified system was found to satisfy the constitutional norm. See, for example, Serrano v. Priest, 200 Cal. App.3d 597, 226 Cal. Rptr. 584, 406-04 (1986) (“Serrano III”) (approving funding system adopted in response to Serrano v. Priest, 18 Cal.3d 728, 557 P.2d 590 (1977) (“Serrano II”) ). I have, however, included in the “constitutional” category Michigan, where a subsequent court, Milliken v. Green, 389 Mich. 389, 212 N.W.2d 711, 713-21 (1973) (“Milliken I”), vacated an earlier court’s finding of unconstitutionality, Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457, 468-72 (1972) (“Milliken I”), without any change in the funding system under review.

I have placed Arizona in the “unconstitutional” category on the basis of the plurality opinion in Roosevelt Elem. School Dist. No. 66 v. Bishop, 179 Ariz. 233, 877 P.2d 806, 810-16 (1994), despite the fact that the majority holding in Roosevelt apparently applies only to the system for financing school facilities, not school operating budgets, and despite the Court’s failure expressly to overrule Shofstall v. Hollins, 110 Ariz. 99, 515 P.2d 590, 592-93 (1973).
legislature, or both have undertaken efforts toward equalization.\(^6\)
The quality of the educational opportunities offered in the public
schools of most American urban centers, and in many other
underfinanced districts as well, remains shockingly poor.\(^7\)

In this Article, I want to raise the question of whether the
framing of the education funding debate primarily as an issue of
equality is either necessary or optimally effective. In particular, I will
contrast the rhetoric of equality with an alternative rhetoric that
focuses on the adequacy or the quality of the services provided, and I
will consider the comparative virtues of these two frameworks for
addressing the failings of our public education financing systems.
While both frameworks have their strengths and weaknesses, I want
to suggest that, on both conceptual and pragmatic grounds, the rheto-
ric of adequacy shows greater promise than the rhetoric of equality for
overcoming the significant legal and political hurdles confronting
challenges to existing systems for financing public education.

In Part II, I offer a brief overview of the school funding issue as
it has played out both in the courts and in the legislatures. I distin-
guish the two types of arguments—equality arguments and adequacy
arguments—with which the article is concerned. In Parts III and IV,
I explore the equality/adequacy dynamic through a historical lens,
examining both the reasons why equality arguments dominated the
early years of education finance litigation and the degree to which
that dominance has persisted into recent years, even after some of the
reasons for equality’s early appeal have lost much of their power.
Part V offers an assessment of equality arguments, suggesting that
they are subject to a series of difficulties, derived both from the sub-
stance of the arguments and from the political context, that seriously
undermine their effectiveness. Finally, Part VI considers adequacy

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\(^6\) See Allen Odden, School Finance and Education Reform: An Overview, in Allen
Odden, ed., Rethinking School Finance: An Agenda for the 1990’s 1, 8 (Jossey-Bass, 1992)
(stating that “school finance inequities across the country did not change much from the mid
I”); Reform Education Financing Inequities Today (R.E.F.I.T.) v. Cuomo, 152 Misc.2d 714, 578
N.Y.S.2d 969, 971-72 (Sup.Ct. 1991) (finding dramatic increases in interdistrict disparities over
preceding decade). See also Robert Hanley, Tortuous Course to Equal Schools, N.Y. Times 25-26
(Sept. 17, 1994) (describing difficulties in achieving equalization in New Jersey and nationally).

\(^7\) See generally Jonathan Kozol, Savage Inequalities (Crown, 1991); Gershon M. Ratner,
A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills, 63 Tex. L. Rev.
777, 787-94 (1985) (documenting educational failures in urban public schools); Abbott I, 575 A.2d
at 385-87, 400-01; Bismarck Public School Dist. No. 1 v. State, 511 N.W.2d 247, 261-62 (N.D.
1994); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 145-46 (Tenn. 1993);
Appendix to Opinion of the Justices, 624 S.2d 107 (Ala. 1993).
arguments as possible alternatives to equality arguments, exploring both their virtues and their own substantial difficulties.

II. EQUALITY ARGUMENTS AND ADEQUACY ARGUMENTS

Over the past twenty-five years, the courts in all but a handful of states have faced challenges to the methods by which the states provide funding for public education. In virtually all of them, schools are operated by local districts and are funded by a mixture of state grants and locally raised property taxes. Because of wide variations in the property wealth of the districts within a state, the property tax provides sharply disparate levels of support for the various districts, resulting in dramatic disparities in the total funding available for education in the different communities. In the districts with the lowest property values, funding is typically far below the levels prevalent in more affluent communities, and the quality of the public education often is extremely poor. It is these disparities, and the reli-

8. See, for example, Bismarck Public School Dist. No. 1, 511 N.W.2d at 255 n.6 (cataloguing many of the decided cases); Joseph F. Sullivan, Paying For New Jersey's Schools: The Overview; New Jersey Court Orders New Plan for School Funds, N.Y. Times A1 (July 13, 1994) (noting that cases are pending in more than half of states); Keith Henderson, In Many States, Lawsuits Contest the Fairness of School Funding, Christian Science Monitor 1 (March 23, 1993) (noting that cases have been filed in 41 states).

9. See Vincent Munly, U.S. Advisory Commission on Intergovernmental Relations, The Structure of State Aid to Elementary and Secondary Education 11-17 (1990). The states' share of school costs generally has been increasing over the past thirty years (from 41% of the state and local total in 1960 to 50% in 1990), although it decreased somewhat during the 1980s. See J. Fred Giertz and Therese J. McGuire, Regional and Statewide Property Tax Base Sharing for Education, 3 St. Tax Notes 942, 942 (1992). According to Giertz and McGuire, only Hawaii, New Mexico, and Kansas deviated from the standard, locally-based funding pattern by relying primarily on state-based funding. Id. at 943.

10. See, for example, Helena Elementary School Dist. No. 1 v. State, 236 Mont. 44, 769 P.2d 684, 686 (1989); Gould v. Orr, 244 Neb. 163, 506 N.W.2d 349, 351 (1993); Coalition for Equitable School Funding, Inc. v. State, 311 Or. 300, 811 P.2d 115, 117 (1991). Ordinarily, these disparities result almost exclusively from differences in the districts' tax bases, not from differences in the tax rates levied in the various districts. In fact, it is typical to find the highest tax rates in the poorest districts, but the disparities in the tax bases are so vast that high tax rates can do little to counterbalance them. This has been recognized in many cases, such as San Antonio Indsp. School Dist. v. Rodriguez, 411 U.S. 1, 75-76 (1973) (Marshall, J., dissenting); Serrano v. Priest, 5 Cal.3d 584, 487 P.2d 1241, 1252 n.15 (1971) ("Serrano 1"); Horton v. Meskill, 172 Conn. 592, 376 A.2d 359, 366-367 (1977) ("Horton 1"); and Edgewood Indsp. School Dist. v. Kirby, 777 S.W.2d 391, 392-93 (Tex. 1989) ("Edgewood 1").

11. This correlation has been noted in many cases, including McDuffy v. Secretary of Exec. Off. of Educ., 416 Mass. 545, 615 N.E.2d 516, 552-53 (1993); Abbott I, 576 A.2d at 395-97, Bismarck Public School Dist. No. 1, 611 N.W.2d at 261-62; McWherter, 851 S.W.2d at 143-47; Edgewood, 777 S.W.2d at 398; Scott v. Commonwealth, 247 Va. 379, 483 S.E.2d 138, 140 (1994); and R.E.F.I.T. v. Cuomo, 576 N.Y.S.2d at 572. See generally Kozol, Savage Inequalities (cited in note 7) (describing conditions in many schools nationwide).
ANCE ON LOCAL PROPERTY TAXATION FROM WHICH THE DISPARITIES INEVITABLY
ARISE, THAT HAVE BEEN THE TARGETS OF THE PERSUADE LEGAL CHALLENGES.

The early lawsuits found their primary legal basis in the Equal
Protection Clause of the United States Constitution. Only after the
Supreme Court, in San Antonio Independent School District v.
Rodriguez, repudiated the application of federal equal protection
strictures to property-wealth based variations in local education
funding did plaintiffs turn their attention chiefly to arguments
grounded in their state constitutions. State constitutions vary widely, but they typically include two
types of provisions that have provided the primary ammunition for
post-Rodriguez education funding litigation. First, most 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. Second, every state, with the arguable exception of Mississippi, includes in its constitution an "education clause" that assigns to the state the responsibility for establishment of a public school system. A number of these education clauses obli-


14. See, for example, Note, Developments in the Law: The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324, 1444 (1982). Even before Rodriguez, several state courts had included reliance on state equal protection guarantees as an alternate basis for decisions invalidating their school funding systems, although they did not offer any independent analysis of the state constitutional provisions. See Serrano I, 487 P.2d at 1249 (construing several clauses in the California Constitution to be the equivalent of the Equal Protection Clause); Miliken I, 203 N.W.2d at 468-69 (holding that the Michigan Constitution establishes a fundamental interest in education), rev'd on rehearing, 212 N.W.2d 711; Sweetwater County Planning Committee for Organization of School Districts v. Hinkle, 491 P.2d 1234, 1236-37 (Wyo. 1971) (holding that both the Wyoming Constitution and the Fourteenth Amendment of the federal Constitution require ad valorem taxes for school purposes to be equalized throughout the state). The one notable exception to the early reliance on federal equal protection analysis was Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, 277-83 (1973) ("Robinson I"), which is discussed at text accompanying notes 136-147 below.

15. See Robert F. Williams, Equality Guarantees in State Constitutional Law, 63 Tex. L. Rev. 1195, 1196 (1985); Note, 95 Harv. L. Rev. at 1481. For typical examples, see Ill. Const., Art. 1, § 2 (stating that "[n]o person shall . . . be denied the equal protection of the laws"); Minn. Const., Art. 1, § 2 (stating that "[n]o member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land"), described as "the Minnesota Equal Protection Clause" in Skeen v. State, 505 N.W.2d 299, 312 (Minn. 1993). Compare Butt v. State, 4 Cal. 4th 668, 842 P.2d 1240, 1247, n.9 (1992) (identifying three "equal protection guaranties" in California's Constitution).

igate the state legislatures to provide for "a thorough and efficient system" of public schools, while others use a broad variety of other formulations. All of the clauses, however, impose an express duty on the state government to make provision for a system of public education.

These two types of clauses provide the foundations for a range of different arguments attacking property-tax based systems for financing public schools. One class of arguments builds solely on the state's equal protection clause, contending that the state clause, unlike its federal parallel, should be construed to bar distinctions, grounded in differences in property wealth, in the fiscal capacity of different school systems in the state. Such arguments can pick any of a number of points at which to depart from the Rodriguez Court's analysis of the federal equal protection issue: they can insist that, under the state equal protection clause, district wealth constitutes a


Mississippi presents a complex case. In 1960, in response to the threat of desegregation, Mississippi amended its constitution to replace its education clause with a provision that allowed the legislature "in its discretion" to provide for public schools. See 1960 Miss. Acts ch. 547 (amending Miss. Const., Art. VII, § 201). This provision was subsequently amended in 1987, to direct the legislature to "provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe." See 1987 Miss. Acts ch. 671. This history led Thro, 75 Va. L. Rev. at 1661 & n.102, to conclude that Mississippi does not have an education clause, while Hubsch, 65 Temp. L. Rev. at 1345, treats it as having one, although neither appears to have taken cognizance of the 1987 amendment.

17. See, for example, N. J. Const., Art. VIII, § 4, para. 1; Ohio Const., Art. VI, § 3. Compare Colo. Const., Art. 9, § 2 (requiring "a thorough and uniform system of free public schools").

18. See, for example, Mass. Const., Pt. II, ch. V, § 2 (stating that "[w]isdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties... it shall be the duty of Legislators and Magistrates, in all future periods... to cherish the interests of literature and the sciences, and all seminaries of them; especially the... public schools and grammar schools in the towns"); Wash. Const., Art. 9, § 1 (stating that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders").

A number of recent articles have relied on a typology, originated in Erica Grubb, Breaking the Language Barrier: The Right to Bilingual Education, 9 Harv. C.R.-C.L. L. Rev. 52, 66-70 (1974), which sorts education clauses into four categories, ostensibly reflecting the intensity with which they express a commitment to education. See, for example, William E. Thro, Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model, 35 B.C. L. Rev. 697, 699-07, 610-11 (1994); Randall D. Quarles, Note, Education in Alabama: Is There a Right to the Three Rs?, 43 Ala. L. Rev. 133, 162-65 (1991). The typology, however, appears to do little explanatory work and may show more about commentators' predilection for categorization than about the content or intent of the education clauses. See also Molly McUsic, The Use of Education Clauses in School Finance Reform Litigation, 28 Harv. J. Leg. 307, 319-26 (1991) (offering an alternative typology of education clauses, focusing on the contrast between “equity” and “minimum standards” approaches).
suspect classification; or that, for purposes of the equal protection clause, public school education constitutes a fundamental right; or that neither the frequently asserted interest in local control nor any other alleged interest constitutes a rational basis for a property-wealth-based system. Still another possibility is simply to eschew the entire federal constitutional tiers-of-scrutiny approach to equal protection issues in favor of a more open-ended and contextual equal protection analysis that weighs the virtues of a locally-based financing structure against the resultant inequalities of resources available to different districts.

A second class of arguments rests on the two clauses taken together. Such arguments rely on the presence of the state’s education clause as the justification for reaching a different result under the state equal protection clause than under its federal counterpart. The Rodriguez Court, after all, based its conclusion that education does not qualify as a fundamental interest on the fact that education “is not among the rights afforded explicit protection” under the federal Constitution. A state constitution’s education clause, then, can be used to argue that education should be recognized as a fundamental right for state constitutional purposes.

19. See Rodriguez, 411 U.S. at 18-29. See, for example, Serrano II, 557 P.2d at 951 (holding that “discrimination in educational opportunity on the basis of district wealth involves a suspect classification” under the state constitution’s equal protection clauses); Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310, 334 (Wyo. 1980) (holding that wealth-based classifications are suspect, especially when applied to fundamental interests such as education).

20. See Rodriguez, 411 U.S. at 29-39. See, for example, Serrano II, 557 P.2d at 951-52 (recognizing education as a fundamental right deserving of strict scrutiny); Horton I, 376 A.2d at 375-74 (same).

21. See Rodriguez, 411 U.S. at 47-55. See, for example, Dupree v. Alma School Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90, 93 (1983) (finding “no legitimate state purpose to support” existing system); Tennessee Small School Systems, 851 S.W.2d at 153-56 (noting that “local control” is not a justification for a system that discriminates on the basis of residence).

22. See Rodriguez, 411 U.S. at 109-10 (Marshall, J., dissenting). See, for example, Robinson I, 303 A.2d at 282 (comparing the nature of the restraint or denial with the apparent state justification); Olsen v. State, 276 Or. 9, 554 P.2d 139, 144-45 (1976) (same). Compare Bismarck Public School Dist. No. 1, 511 N.W.2d at 259 (applying intermediate level of scrutiny to education funding claims).


A third class of arguments builds exclusively on the state constitution's education clause. The precise form of these arguments may vary with the specific language of the state's constitutional provision, but in general they assert that the state's duty to provide for a system of public schools has not been satisfied, and perhaps cannot be satisfied, by a financing structure that is heavily reliant on highly variable local property wealth. This class of arguments places no reliance on generic constitutional guarantees of equal protection, but focuses exclusively on the state's special and specific obligations in the area of public education.

For arguments in the first two classes, the focus is on equality. The issue may be framed in terms of equality of the education delivered to the children, or equality of the funding for education, or equality of the capacity to raise funds for education. In each case the claimed right is one of equal treatment.

25. See, for example, Rose v. Council for Better Education, 790 S.W. 2d 186, 203-13 (Ky. 1989); McDuffy, 615 N.E.2d at 548-54; Seattle School Dist. No. 1, 585 P.2d at 91-97. Education clause arguments have also been acknowledged in a number of other cases where the courts have concluded that there was insufficient basis for a claim of failure by the state to meet its obligations under the clause. See, for example, McDaniels v. Thomas, 248 Ga. 632, 285 S.E.2d 156, 165 (1981) (deferring to the legislature's definition of "adequate" education); Thompson v. Engletking, 96 Idaho 793, 537 P.2d 635, 652-53 (1975) (holding that the state constitution requires only thorough, not uniform, education); Nyquist, 439 N.E.2d at 389 (finding that the constitutional mandate of a sound education is satisfied). In some of these states, second rounds of litigation have been brought in efforts to establish the factual predicate for education clause violations. See, for example, Idaho Schools for Equal Educational Opportunity v. Evans, 123 Idaho 573, 850 P.2d 724, 734-36 (1993); Reform Educational Financing Inequities Today v. Cuomo, 199 A.D.2d 488, 606 N.Y.S.2d 44, 46-47 (1993).

26. See, for example, Robinson I, 303 A.2d at 283-87 (expressly declining to decide case on equal protection grounds); Underwood and Sparkman, 14 Harv. J. L. & Pub. Pol. at 543-44 (cited in note 24).

27. See, for example, Horton I, 376 A.2d at 374-76 (holding that students are entitled to equal enjoyment of right to education); Tennessee Small School Systems, 851 S.W.2d at 156 (stressing the importance of quality and equality of education). Compare Helena Elem. School Dist. No. 1, 769 P.2d at 690-91 (applying education clause guaranteeing "equality of educational opportunity").

28. See, for example, Dupree I, 651 S.W.2d at 91-95 (holding that disparity in funding for education violates the state constitution); Herschler, 606 P.2d at 534 (holding that disparities in spending preclude equality in educational opportunity).

29. See, for example, Serrano II, 557 P.2d at 953 (finding discrimination because the availability of educational opportunity varies as a function of assessed value of taxable property). Compare Edgewood I, 777 S.W.2d at 397 (applying education clause mandating "efficiency"). The focus on equalized capacity to raise funds was brought to prominence by John Coons, William Chune, and Stephen Sugarman, Private Wealth and Public Education (Belknap, 1970) and John Coons, William Chune, and Stephen Sugarman, Educational Opportunity: A Workable Constitutional Test for State Financial Structures, 57 Cal. L. Rev. 305 (1969), which argue for "power equalization" approaches, to which we will return shortly. See text accompanying note 41.

30. The difficulties posed for equality arguments by these competing measures of equality are discussed in detail in Part V.A.
By contrast, in the third class of arguments, the claimed right is a substantive right to a particular category of governmental services—public schooling. This reorientation opens the way to a crucial shift of focus, away from educational equality and toward educational adequacy. Adequacy arguments, instead of asking comparative questions about the differences in the resources or opportunities available to children in different districts, look directly at the quality of the educational services delivered to children in disadvantaged districts and ask evaluative questions about whether those services are sufficient to satisfy the state's constitutional obligations.3

Not all arguments resting exclusively on education clauses focus on issues of adequacy. In fact, a significant subclass of education clause arguments seek to derive a commitment to educational equality from the use of terms like “uniform” or “efficient” or “system” in the education clause.32 And, as we shall see in more detail below,33 the New Jersey Supreme Court, which played a leading role in identifying educational adequacy as the primary constitutional standard in issue, has more recently fallen back upon equality of resources and opportunities as the appropriate way to give content to standards of adequacy.

Nonetheless, arguments grounded in state constitutional education clauses have the capacity to reframe the debate in education funding litigation from issues of equality to issues of adequacy. Such adequacy arguments have played an occasional role from relatively early in the history of education funding litigation.34 In recent years, as an increasing share of education finance cases have come to focus primarily on education clauses,35 issues of adequacy show signs of


32. See, for example, Nqquis, 439 N.E.2d at 368-69 (discussing use of word “system” in the education article of New York State Constitution); Bismarck Public School Dist. No. 1, 511 N.W.2d at 254 (discussing North Dakota's state constitutional requirement of “uniform system” of public schools); Olesen, 554 P.2d at 148 (analyzing meaning of “uniform” as used in Oregon Constitution); Edgewood I, 777 S.W.2d at 384-86 (analyzing use of word “efficient” in state constitution). Compare Helena Elem. School Dist. No. 1, 769 P.2d at 689-90 (applying education clause that expressly guarantees “equality of educational opportunity”). See generally McUsic, 28 Harv. J. Leg. at 317-26 (categorizing education clauses in terms of their utility in supporting equality arguments) (cited in note 18).

33. See text accompanying notes 136-71.


assuming an increasingly central role in the way that both courts and litigants cast the constitutional debate.36

This dichotomy between concerns for adequacy and for equality has not been confined to the judicial sphere. The same division of perspectives likewise emerges in the state legislative arena. Numerous states have undertaken major reforms of their school financing structures in recent years, some in efforts to respond to judicial decisions invalidating the existing structures,37 but many others either in response to pending litigation38 or in its absence.39

These legislative efforts have been guided by two competing models of the state's role in a shared state/local funding system.40 The first model sees the state primarily as an equalizer, whose role is to

decided by state supreme courts since 1989 included education clause claims, and seven (Kentucky, Massachusetts, Montana, New Hampshire, New Jersey, Texas, and Virginia) were decided entirely on education clause grounds.

36. See, for example, McDuffy, 615 N.E.2d at 522 (noting that central issue was failure to provide an adequate education, not absence of equal educational spending). See also Peter Applebome, Its Schools Ruled Inadequate, Alabama Looks for Answers, N.Y. Times B7 (June 9, 1993) (discussing shift toward adequacy arguments); Hubsh, Note, 65 Temp. L. Rev. at 1325 (cited in note 16) (similar). Among the 15 recent (post-1988) state supreme court cases, five (Idaho, Kentucky, Massachusetts, New Hampshire, and New Jersey) use adequacy considerations as the primary basis for their decisions, while four others (Arizona, Minnesota, Oregon, and Tennessee) devote some attention to adequacy claims.


38. See, for example, McDuffy, 615 N.E.2d at 518 (describing Massachusetts reforms in 1976 and 1985 in response to pending litigation); Committee for Educational Equality v. State, 878 S.W.2d 446, 457 n.1, 458-59 (Mo. 1994) (Robertson, J., concurring) (describing legislative actions taken in response to trial court rulings on constitutionality of school finance system); Seattle School Dist. No. 1, 556 P.2d at 96 n.14, 101 & nn.17-19 (describing Washington state's reforms in 1973 and 1977 during pending litigation). See also Peter J. Howe, School Bill May Answer SJC Demands, Boston Globe A19 (June 16, 1983) (describing 1983 Massachusetts education reform legislation enacted while McDuffy decision was pending); Chris W. Courtwright, Legislature Braces for Renewed School Finance Battle, 3 St. Tax Notes 39 (Dec. 7, 1992) (describing "sweeping K-12 school financing changes" adopted in Kansas after judge agreed to postpone action in funding suit until after legislative session).


40. See Munly, The Structure of State Aid at 19 (cited in note 9).
balance out, or at least to mitigate, disparities in the revenue-raising capacity of various school districts. The most potent tool deployed by this model has been the so-called power equalization method, under which each district determines its own level of local tax-effort and the state then provides each poorer district with the additional revenue that its chosen tax rate would have yielded if its property wealth had equalled some higher statewide standard (typically set by the legislature at some percentage above the statewide average).

States focusing on equalization have also used a variety of other methods, such as distribution of state funding in inverse proportion to property wealth or establishment of county-level school taxing districts. Each of these methods, however, leaves the ultimate determination of how much a district will spend on its schools for local decision. The recurrent feature of these legislative equalization approaches is their focus on the disparities in districts' capacity to generate funding for schools, rather than on the actual level of educational services provided by the districts.

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41. This approach first came to prominence with the publication of Coons, Clune, and Sugarman, 57 Cal. L. Rev. 305 (cited in note 29) (cited in, for example, Serrano I, 487 P. 2d at 1266 n.37) and Coons, Clune, and Sugarman, Private Wealth (cited in note 29) (cited in, for example, Rodriguez, 411 U.S. at 41 n.35). Much the same approach had been explored somewhat earlier in Stephen K. Bailey, et al., Report for the Ohio Foundations, Achieving Equality of Educational Opportunity (May, 1966) (discussed in Arthur E. Wise, Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity 204-206 (U. of Chicago, 1972)).


In its most rigorous form, power equalization also takes away from wealthier districts those revenues they are able to reap from their chosen tax rate by virtue of the portion of their property wealth that exceeds the established statewide norm. See, for example, Buse v. Smith, 74 Wis.2d 550, 247 N.W.2d 141, 143-47 (1976) (holding Wisconsin system violates uniform taxation provision of state constitution).


45. See, for example, Abbott I, 575 A.2d at 378; Coons, Clune, and Sugarman, 57 Cal. L. Rev. at 321 (cited in note 29) (stating that "[p]ower equalizing would not guarantee equal dollars
By contrast, the second model—the adequacy model—views the state’s role primarily as the guarantor that each district can provide its students with an acceptable basic level of educational services. The primary tool of this model is the so-called foundation funding approach, in which the state determines a minimum funding level and then provides each district with the state funds necessary to reach that level (typically after requiring the district to raise what it can by exercising a state-mandated level of local tax effort).\textsuperscript{46} The local district typically retains control over any decision to spend beyond the foundation level, and foundation approaches commonly do little to address the impact of disparities in property wealth on the ability of districts to exceed the foundation level.\textsuperscript{47} The state’s focus, under this model, is not on eliminating the distortions caused by varying local resources but rather on bringing all districts up to an acceptable minimum service level.\textsuperscript{48}

While both judicial and legislative treatments of school funding involve the same basic dichotomy between equality theories and adequacy theories, the interplay between the two branches’ approaches can be far from simple. The history of school finance reform in California offers a vivid example.\textsuperscript{49}

When California’s financing system was first found unconstitutional in 1971, the California Supreme Court relied entirely on equal-per pupil—a goal we consider fatuous and counter-productive; it would merely make the money raising game a fair one...\textsuperscript{46}

\textsuperscript{46} See, for example, Munly, \textit{The Structure of State Aid} at 19-20 (cited in note 9); Wise, \textit{Rich Schools, Poor Schools} at 130-31 (cited in note 41). For a description of Texas’ fairly typical foundation funding structure, see Rodríguez, 411 U.S. at 9-11, 44-46. For other examples, see cases cited in note 119. For more recent examples of foundation approaches, see, for example, Massachusetts Education Reform Act of 1993, 1993 Mass. Acts ch. 71, § 32 (codified at Mass. Gen. L. ch. 70); Skeen, 505 N.W.2d at 303-05 (describing Minnesota’s public education funding system); Bismarck Pub. School Dist. No. 1, 511 N.W.2d at 252-54 (describing North Dakota’s public education funding system).

\textsuperscript{47} In addition to those states that have chosen to rely on either an equalization or an adequacy approach, there are others whose education funding structure contains elements of both approaches. See, for example, Lujan v. Colo. St. Bd. Of Educ., 649 P.2d 1005, 1006-37 (Colo. 1982) (Lohr, J., dissenting) (describing Colorado’s complex system of “authorized revenue bases” and “equalization aid”); Edgewood II, 804 S.W.2d at 494-98 (describing, and rejecting, Texas plan that supplemented standard foundation plan with power equalizing approach for local spending above foundation level).


\textsuperscript{49} New Jersey provides another rich example of the interplay between legislative and judicial concerns for educational equality and adequacy. For a general discussion, see Mark Jaffe and Kenneth Kersch, \textit{Guaranteeing a State Right to a Quality Education: The Judicial-Political Dialogue in New Jersey}, 20 J. L. & Educ. 271 (1991) and Sullivan, N.Y. Times at B6 (cited in note 37). The dynamics in New Jersey have been immensely complicated by the New Jersey Supreme Court’s continuing ambiguity over whether to read the state constitution’s education clause as a guarantee of adequacy or of equality, a topic to which we return at text accompanying notes 138-71.
ity arguments, grounded in the federal and state equal protection clauses.\textsuperscript{50} While the case was on remand, the state legislature acted in an effort to remedy the unconstitutional system.\textsuperscript{51} But in doing so, the legislature ignored the power equalization approach championed by the leading advocates of school finance reform,\textsuperscript{62} and chose instead to modify the existing foundation approach, by dramatically increasing the minimum funding levels and the level of assumed local tax effort.\textsuperscript{52}

The result was a classic mismatch, in which the legislature’s foundation strategy only tangentially addressed the court’s mandate for equal treatment. Thus, it was hardly surprising that the California Supreme Court, when the issue reached it again in 1976, found that the improved system suffered from the same fundamental flaws as its predecessor.\textsuperscript{64} Only in response to the Court’s repeated reaffirmations that the demands of equal protection forbade any system under which educational opportunity was a function of district wealth\textsuperscript{66} did the state legislature adopt a financing structure that constrained local funding and relied on state funds to ensure approximately equal revenues for all districts.\textsuperscript{66}

While the equality-based statutory response to \textit{Serrano II} achieved a fit between the judicial and legislative approaches,\textsuperscript{57} it has not brought an end to the adequacy-equality tensions in California. In fact, the state’s assumption of responsibility for assuring uniform

\begin{itemize}
  \item Serrano I, 487 P.2d at 1249-66. In fact, the opinion’s equal protection analysis focused exclusively on federal law, with only a brief footnote observing that the state equal protection provisions were “substantially the equivalent” of the federal provision. Id. at 1249 n.11.
  \item See \textit{Serrano II}, 557 P.2d at 931 (describing legislative action in response to \textit{Serrano I}).
  \item See generally Coons, Clune, and Sugarman, 57 Cal. L. Rev. 305 (cited in note 29), which the \textit{Serrano I} court had relied upon as “a comprehensive article on equal protection and school financing,” \textit{Serrano I}, 487 P.2d at 1265 n.37.
  \item \textit{Serrano II}, 557 P.2d at 935-36. In fact, the legislature in its reforms abandoned the one component of the old system—so-called supplemental aid—that bore the stamp of equality theory. The new legislation purported to further equalization by introducing “revenue limits” to constrain spending by the wealthier districts, but in fact these “limits” were largely illusory, since they could be overridden by majority vote in each district. See id. at 953.
  \item Id. at 953.
  \item Id. at 944, 953.
  \item For descriptions of California’s so-called “base revenue limit” system, together with statutory citations, see \textit{Serrano III}, 226 Cal. Rptr. at 593-95 and \textit{Butt}, 842 P.2d at 1247 n.11.
  \item Before turning to the base revenue limit system, the California legislature initially responded to \textit{Serrano II} with a power equalization approach. This structure, however, proved unworkable under the constraints of Proposition 13, which was enacted before the power equalization plan went into operation and necessitated its replacement with the base revenue limit system. See \textit{Serrano III}, 226 Cal. Rptr. at 592-93.
  \item See \textit{Serrano III}, 226 Cal. Rptr. at 604 (noting that legislature had done “all that is reasonably feasible to reduce disparities in per-pupil expenditures to insignificant differences”).
\end{itemize}
levels of education spending, together with the constraints imposed on public spending by the "taxpayer revolts" of the late 1970s and the subsequent weakening of the California economy, has resulted in a dramatic erosion in the adequacy of the financial support for public education in California. Once among the highest spending and highest achieving states, California now finds itself near the bottom on many measures.\(^9\)

As the funding has dwindled, both courts and lawmakers in California have been confronted with the problems of inadequacy. In 1988, the state's voters adopted a constitutional amendment establishing a mandatory floor for state financial support of public education,\(^6\) although its requirements have been largely undermined by subsequent legislative actions and constitutional amendment.\(^6\) Additionally, in 1992 the state Supreme Court confronted the question of whether the state has a constitutional duty, beyond the equal allocation of educational funds, to ensure that all districts are able to provide a full year of schooling to their students.\(^6\) The court strained to avoid casting the issue in adequacy terms, relying instead on students' rights to "basic" educational equality, even where the result was to provide a spendthrift school district with a disproportionate share of state funds.\(^6\) Still, the case serves as a reminder that solutions focused on equalization do not resolve, and may in fact exacerbate, concerns about adequacy.\(^6\)

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58. It is an interesting question, though one I will not attempt to answer here, to what extent the California taxpayer revolt was fueled by voter frustration about the loss of local control over the use of property tax revenues to support local schools.


60. The Classroom Instructional Improvement and Accountability Act, adopted by voter initiative on Nov. 8, 1988 ("Proposition 98").

61. See Whitney, 4 St. Tax Notes at 1364-65 (cited in note 59) (discussing legislative and political efforts in aftermath of Proposition 98).


63. Id. at 1251-53.

64. This tension between the goals of equality and adequacy is not new. The Georgia court, for example, in an appendix to *McDaniel*, 285 S.E.2d at 168-75, provides a vivid case study of the dialectical interplay of the competing goals of uniformity and adequate support in the early history of Georgia public education.
My primary interest in this Article is to explore the relationships between equality arguments and adequacy arguments in the context of school-funding litigation. We will repeatedly see, however, that this topic is inextricably and complexly intertwined with the question of their respective roles in the legislative context as well. After all, it is not the courts but the legislatures that ultimately establish and fund a school financing system, and sensitivity to legislative concerns and prerogatives has often been an important consideration guiding the choices and strategies of litigators and courts. In fact, as I will argue in Part VI, much of the promise of judicial adequacy mandates derives from the constructive interaction between legislatures and courts that such mandates can stimulate.

As the next two parts will show, the history of education finance litigation and the popular and scholarly understandings of it have been dominated by equality concerns. While adequacy arguments have at least been mentioned in many of the cases, and while several courts, both in the early years of state constitutional litigation and more recently, have centered their analysis on adequacy issues, the legal debate has primarily focused on whether and how school funding ought to be equalized. My interest in the next two parts is to explore the reasons for this focus.

III. THE INITIAL ALLURE OF EQUALITY

The history of public education in the United States reveals that debates about financing and efforts to satisfy the competing goals of equity, adequacy, and local control are nothing new. Only in the last twenty-five years, though, have the courts been asked to play a significant role concerning these structural issues. A number of forces converged during the late 1960s to transform what had previously converged during the late 1960s to transform what had previously

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65. See text accompanying notes 352-65
66. See, for example, Rodríguez, 411 U.S. at 36-37; McDaniel, 285 S.E.2d at 165; Milliken II, 212 N.W.2d at 713 (concurring opinion); Nyquist, 439 N.E.2d at 388-89. See also Papasan v. Allain, 478 U.S. 265, 285 (1986) (noting that Rodriguez leaves open "the question whether a minimally adequate education is a fundamental right").
67. See cases cited in note 31.
68. See, for example, Seymour Sacks, City Schools/Suburban Schools 88-91 (Syracuse U., 1972) (discussing evolution and growth of state aid for education); Coons, Clune, and Sugarman, Private Wealth at 49-61 (cited in note 29); U.S. Advisory Commission on Intergovernmental Relations, State Constitutions in the Federal System at 109-10 (cited in note 39). For histories of developments in particular states, see, for example, Rodríguez, 411 U.S. at 6-14 (describing the history of school funding in Texas); McDaniel, 285 S.E.2d at 168-75 (providing an overview of the history of public education in Georgia); McDuffy, 615 N.E.2d at 523-47 (describing the history of public education in Massachusetts).
been political struggles over the allocation of educational resources and responsibilities into legal issues about constitutional rights. These same forces made equality arguments the obvious, if not the only, line of legal attack on the prevailing property-tax based structures.

Perhaps the most obvious and important development was the virtual revolution in the Supreme Court’s treatment of the Fourteenth Amendment’s Equal Protection Clause in the 1950s and 1960s. In a range of disparate fields, the Court during this period found in the Equal Protection Clause a powerful weapon for attacking important and well-entrenched elements of the established political order. In the process, the Court crafted the clause into a tool whose promise as an instrument of social change appeared vast. The decision to test equal protection’s potential in the arena of education funding—as in many other fields—was almost inevitable.

For those interested in public school resource allocation, three threads in the evolving equal protection caselaw were particularly intriguing. First and foremost were Brown v. Board of Education and the ensuing line of school desegregation cases. Not only were these cases the most striking early exemplars of the newfound force of the Equal Protection Clause, but they also focused explicitly on the

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72. See, for example, McInnis, 293 F. Supp. at 334 (discussing plaintiffs’ reliance on recent Supreme Court decisions in areas of school desegregation, voting rights, and criminal justice); Wise, Rich Schools, Poor Schools at 4-5, 11-92 (cited in note 41); Coons, Clune, and Sugarman, Private Wealth at 339 (cited in note 29); United States Commission on Civil Rights, Racial Isolation in the Public Schools 261 n.282 (1967); Ferdinand P. Schoettle, The Equal Protection Clause in Public Education, 71 Colum. L. Rev. 1355, 1363 (1971).

73. 347 U.S. 483 (1954).

special place of educational opportunity in our social system as a justification for the exercise of searching constitutional review.

*Brown* offered a ringing description of the importance of education in American life, one that became a veritable rallying cry of the education finance reform movement:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.\(^7\)

Notwithstanding subsequent developments,\(^7\) it was not unreasonable for contemporary audiences to assume that this fundamental importance of public education was part of the basis for the Court's rigorous application of the Equal Protection Clause in the school desegregation suits.\(^7\) Indeed, in its very next sentence the Court concluded that educational opportunity was "a right which must be made available to all on equal terms."\(^8\) The invitation to pursue this clearly stated right to equal educational opportunity into settings other than segregation was both obvious and difficult to decline.

While *Brown* and its progeny were concerned with distinctions based on race, a second crucial line of equal protection cases focused on distinctions based on wealth. Perhaps most prominent among these was the series of cases requiring the states to ensure that criminal defendants could avail themselves of protections offered by

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75. *Brown*, 347 U.S. at 493. This passage was quoted repeatedly in the early education finance cases. See, for example, *Rodriguez*, 411 U.S. at 111 (Marshall, J., dissenting); *Serrano I*, 487 P.2d at 1256-57; *Herschler*, 606 P.2d at 333-34. Indeed it has retained its centrality even in the most recent cases. See, for example, *Rose*, 790 S.W.2d at 190; *Tennessee Small School Systems*, 851 S.W.2d at 151.

76. See *Rodriguez*, 411 U.S. at 35 (stating that education is not a fundamental right).


the criminal justice system, regardless of their financial resources. But similar decisions also required states to ensure that lack of resources not occasion unequal opportunities in such areas as exercise of the franchise and access to divorces.

These cases condemning wealth-based discrimination suggested a substantially broadened scope for the Equal Protection Clause. The school integration cases were concerned with discrimination that was the product of deliberate governmental distinctions based on race. The wealth discrimination cases made clear that the Equal Protection Clause also limited governmental policies and requirements that, while facially drawing no distinctions among classes, had the effect of denying opportunities to one class that were made available to others. The Equal Protection Clause, thus, commanded not only facial neutrality, but also affirmative actions by governments to ensure that at least certain governmental functions were equally available to all citizens, regardless of their financial means.

Both because it identified wealth as an important dimension for equal protection analysis and because it rejected any threshold requirement of facial discrimination, this line of cases reinforced the Equal Protection Clause's appeal to critics of property-wealth based systems of education financing. If wealth was indeed a suspect classification, as these cases suggested, then a system which determined the educational opportunities afforded to a child on the basis of the affluence or poverty of her parents and neighbors would be difficult to justify.

79. See, for example, Griffin v. Illinois, 351 U.S. 12, 19 (1956) (holding that the right to appeal cannot be blocked by inability to pay for trial transcript); Douglas v. California, 372 U.S. 353, 357-58 (1963) (holding the same for right to counsel on appeal).


81. It is important to note that, although the desegregation cases addressed by the Supreme Court up to the time of the explosion of education finance cases had been concerned with instances of de jure segregation, it was not yet clear whether and to what extent the Equal Protection Clause would, in the racial context, also forbid de facto differential treatment based on, for example, housing patterns. See, for example, Serrano I, 487 P.2d at 1255; Harold W. Horowitz, Unseparate But Unequal: The Emerging Fourteenth Amendment Issue in Public School Education, 13 UCLA L. Rev. 1147, 1153-55 (1966); Note, 82 Harv. L. Rev. at 1184-87 (cited in note 69).

82. See Griffin, 351 U.S. at 34 (Harlan, J., dissenting) (stating that the Court's holdings meant that "the Equal Protection Clause imposes on the States an affirmative duty to lift the handicaps flowing from differences in economic circumstances"); Horowitz, 13 UCLA L. Rev. at 1168; Note, 82 Harv. L. Rev. at 1177-1180.

83. See, for example, Van Dusartz v. Hatfield, 334 F. Supp. 870, 875-76 (D. Minn. 1971) (stating that "[w]hen the wealth classification affects the distribution of public education, the constitutional significance is cumulative"); Serrano I, 487 P.2d at 1253-54 (discussing prior
In a couple of significant respects, however, wealth-based variations in educational opportunities looked rather different from the types of wealth-based differentials condemned by the Court. First, in the decided cases, the deprivations were suffered by individuals based on their personal financial circumstances, whereas in the educational context the variations resulted from the financial circumstances of the larger community in which the student lived. Second, in the decided cases, lack of financial resources had the effect, for at least some individuals, of working a complete deprivation of the salient opportunity, whereas in the educational context the consequence was only a relative deprivation, a diminution in the quantity or quality of educational services and opportunities.

At this point a third thread of the Court’s equal protection revolution, the legislative apportionment cases, came into play. These cases suggested that neither absolute deprivation nor individualized impact were prerequisites to rigorous equal protection review. In fact, in many ways the legislative reapportionment cases, although they involved neither education nor wealth, provided the closest and most inviting parallel for the opponents of district-based school fund-

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84. This difference was rendered particularly troublesome by the evidence in several states that poorer families did not necessarily live in poorer districts, with the consequence that financing schemes which disfavored poor districts did not necessarily disfavor poor people. See, for example, Rodriguez, 411 U.S. at 15 n.38, 22-25; Serrano II, 557 P.2d at 969-70 (Clark, J., dissenting); Lujan, 649 P.2d at 1020-21; Michael J. Churgin, Peter H. Ehrenberg, and Peter T. Grossi, Jr., Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars, 81 Yale L. J. 1303, 1305-10 (1972).

85. The Rodriguez majority made much of this distinction, see 411 U.S. at 23-24, although it is far from clear that the prior cases either anticipated or supported its significance, see id. at 117 (Marshall, J., dissenting); Mark G. Yudof, Equal Educational Opportunity and the Courts, 51 Tex. L. Rev. 411, 502-03 (1973).

86. See, for example, Baker v. Carr, 369 U.S. 186 (1962) (holding that complainant’s allegations that the state of Tennessee’s failure to reapportion the seats in the state’s General Assembly caused a debasement of their votes and a denial of equal protection presented a justiciable cognizable cause of action); Reynolds v. Sims, 377 U.S. 533 (1964) (holding that the Equal Protection Clause requires substantially equal legislative representation for all citizens in a state regardless of where they reside).
ing schemes. Indeed, the court in one early education funding challenge characterized the plaintiff's argument as "One scholar, one dollar"—a suggested variant of the 'one man, one vote' doctrine proclaimed in *Baker v. Carr*.

As with education funding, the legislative apportionment cases involved state actions which created differential opportunities for citizens of different political subdivisions of the state. And, as with education funding, no voter was deprived of representation altogether; rather, the states had established structures under which only the amount of representation attaching to each vote varied from district to district. The apportionment cases thus disclosed in the Equal Protection Clause a right of all citizens to mathematically equivalent treatment, regardless of the district in which they resided. They also demonstrated the readiness of the courts to enforce this right, even when the challenged disparities resulted from demographic factors not of the state's making, and even when the effect was a deep intrusion into the state's traditional control over its own internal political structures.

The same arithmetical calculations that, in the apportionment cases, showed the dilution of voting power due to differences in district population could be deployed in the education funding context to show the dilution of education spending power due to differences in district property wealth. Given the Court's strong intimations in the desegregation cases of the constitutional significance of the right to education, and given the additional presence in the education context of the wealth dimension, which was generally absent from the apportionment cases, extension of the

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87. See Schoettle, 71 Colum. L. Rev. at 1366, 1408-09 (cited in note 72) (discussing legislative reapportionment cases as analogous to school funding cases); Yudof, 51 Tex. L. Rev. at 485-489 (cited in note 85).
89. *Baker*, 369 U.S. at 192; *Reynolds*, 377 U.S. at 567 n.43, 583-84.
90. See *Baker*, 369 U.S. at 225-32. Compare id. at 234-36 (Frankfurter, J., dissenting) (arguing that the Court should be unwilling to intervene in matters concerning the structure and organization of the political institutions of the states).
91. See, for example, *Reynolds*, 377 U.S. at 568-69.
92. See, for example, *McInnis*, 293 F. Supp. at 331 (discussing the variation among school districts in actual expenditures per pupil); *Rodriguez*, 337 F. Supp. at 281-82 (comparing the funds per pupil in various school districts), rev'd, 411 U.S. 1 (1973); *Milliken I*, 203 N.W.2d at 463-67, vacated on rehearing, 212 N.W.2d 711; *Coons, Clune, and Sugarman, Private Wealth* at 290-91, 307, 453 (cited in note 29).
93. While the apportionment cases did not involve "discrete and insular minorities," *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), or other suspect classifications, they did raise analogous concerns, because the underrepresented voters, by virtue of the very fact of their underrepresentation, were at the mercy of a "minority stranglehold on the State Legislature[s]," *Reynolds*, 377 U.S. at 569-70.
Reynolds equal protection argument to the field of education finance appeared virtually unstoppable. At the same time that the equal protection revolution invited the development of equality-based challenges to education funding schemes, several constituencies were coming to see education financing issues as central to their broader agendas. The visions and goals of these constituencies likewise favored framing the education funding issue in equality terms.

One critical constituency was the civil rights community; another was the anti-poverty community that was emerging in conjunction with the Johnson administration's "War on Poverty." For both of these communities, during the relevant time period, the establishment of a constitutional foundation for the rights of the poor to governmental services and protections was an important objective. In the contemporary legal environment, the most plausible source for such a constitutional right, at least under the federal constitution, was the recognition of wealth as a suspect class within equal protection analysis. Disparities in educational opportunities offered a fertile ground on which to cultivate such a recognition. So, it is not surprising to find that these constituencies played key roles in initiating a number of the early challenges to state education finance systems, and that the resultant litigation focused on equal protection theorems.

94. See Coons, Clune, and Sugarman, Private Wealth at xx (cited in note 29) (noting two other significant similarities between legislative apportionment and education finance cases—the likelihood of political impotence and the centrality of the contested quantity to democratic participation).


97. See, for example, Malinia, 293 F. Supp. at 328 (discussing Cook County Legal Assistance Foundation); Burress v. Wilkerson, 310 F. Supp. 572 (W. D. Va. 1969) (amicus briefs by Urban Coalition and Western Center on Law and Poverty, as discussed in Spano, 328 N.Y.S.2d at 321-32); Van Dusart, 334 F. Supp. at 871 (Legal Assistance of Ramsey County); Shofstall v. Hollins, 515 P.2d 590, 591 (Ariz. 1973) (Law Reform Unit of Maricopa County Legal Aid Society); Robinson, 287 A.2d at 189 (amicus brief for Education Comm. of NAACP and ACLU and one by State Office of Legal Services "on behalf of the poor of New Jersey"). See also Greenberg, Crusaders in the Courts at 439 (noting the NAACP Legal Defense Fund's role in Nyquist, 439 N.E.2d 359, but its otherwise minimal role in the education finance cases); Richard F. Elmore and Milberry McLaughlin, Reform and Retrenchment: The Politics of California School Finance Reform 21-22 (Ballinger, 1982) (discussing the role of Western Center on Law and Poverty in Serrano I, 487 P.2d 1241 (1971)); Betsy Levin, Future Directions for...
The active role of civil rights organizations in the early education financing cases is an interesting development, because it represented a significant shift in strategy within the civil rights movement. In the years leading up to Brown, the NAACP and its allies expressly chose not to attack the disparity of resources provided to black and white schools but rather to focus their legal challenges on the very existence of racially segregated schools. A decade after Brown, however, several considerations restored the disparity of education resources to the civil rights agenda.

First, the limitations of the frontal assault on segregation were becoming increasingly evident. For one thing, although the Supreme Court did not settle the question until 1973, it was becoming increasingly probable that the constitutional prohibition on segregated schools would be limited to cases of de jure or intentional segregation, and would provide no relief in the common situations where segregation was the result of housing patterns and municipal or district boundaries. Additionally, even where intentional segregation could be shown, the enormous practical obstacles to effective integration remedies, resulting from resistance to busing and similar strategies and from “white flight,” were looking more and more intractable. Thus, the desegregation strategy offered little hope for the vast

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100. See, for example, United States Commission on Civil Rights, Racial Isolation at 262 (cited in note 72) (stating that: "[C]ourts have not been so ready to declare adventitious school segregation unconstitutional. Thus, the result of most judicial decisions thus far has been to leave the question of remedying racial imbalance to the legislative and executive branches of the Federal and State Governments"); Wise, Rich Schools, Poor Schools at 39-42 (cited in note 41).

The education cases were not the only area in which concerns about the difficulties of establishing racially discriminatory intent led plaintiffs to rest their claims on wealth discrimination instead. For example, the poll tax case, Harper v. Virginia Board of Elections, 383 U.S. 663, was brought by a group of African-Americans to attack a system generally understood to have been instituted to disenfranchise blacks, but it nonetheless focused its attack on discrimination grounded on wealth, not race. See Wise, Rich Schools, Poor Schools at 87.

101. See United States Commission on Civil Rights, Racial Isolation at 115 (discussing obstacles to effective remedies for racial isolation); Kluger, Simple Justice at 765-66 (cited in note 98) (discussing the resistance to busing); Yudof, 51 Tex. L. Rev. at 470-72 (cited in note 85) (discussing the weak prospects for future integration); Frank M. Johnson, Jr., School
numbers of minority children isolated in inner city schools whose financial resources were becoming increasingly inferior to those of the outlying districts.102

At the same time, the broader civil rights movement was shifting its focus from the eradication of segregation to the elimination of other systemic obstacles facing people of color. The central legislative goals of the early 1960s, addressed toward deliberate discrimination on the basis of race, had largely been accomplished,103 but the barriers posed by poverty and prejudice remained. As the Kerner Commission Report underlined, the legislative achievements did little to arrest the widening gap between the world of poor, urban blacks and that of middle class, suburban whites.104 Concurrently (and perhaps consequently), growing elements of the civil rights movement were coming to see the emphasis on integration as misguided and were turning instead toward the empowerment of people of color.105

One consequence of these developments was a shift in focus away from the barriers of race and toward the barriers of poverty; the energies which, in 1963, were channeled into the Civil Rights March on Washington were, by 1968, directed instead toward the Poor People's March.106

Disappointment with the accomplishments of the school desegregation efforts and the growing focus on socioeconomic obstacles to opportunity together made the deficiencies in the funding of urban

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102. See United States Commission on Civil Rights, Racial Isolation at 25-31 (discussing fiscal disparities between schools in cities and those in suburbs); Wise, Rich Schools, Poor Schools at 3 (cited in note 41) (stating that "although the school desegregation mandate is a long way from fulfillment, clearly—with or without desegregation—inequalities in education continue to be visited upon Negro children, especially in large cities"). See generally Richard D. Schwartz, Law, Violence, and Civil Rights, 11 L. & Soc'y Rev. 7 (1967) (introducing eight case studies of efforts at school desegregation); Carter, 37 St. Louis U. L. J. at 885 (cited in note 96) (discussing failings of desegregation movement from perspective of 1993).


104. See Report of the National Advisory Commission on Civil Disorders (Kerner Comm'n Report) at 1 (1968) (stating that "[t]his is our basic conclusion: Our nation is moving toward two societies, one black, one white—separate and unequal").


106. See, for example, Greenberg, Crusaders in the Courts at 430 (cited in note 96) (discussing the Poor People's Campaign); Martin Luther King, Jr., Where Do We Go From Here? (1968), reprinted in Levy, ed., Documentary History of the Modern Civil Rights Movement at 228, 230-31 (arguing that the movement must address itself to the problem of the poor in American society).
schools an obvious target. While these setbacks in the fight for racial equality could have led to a turn away from a focus on equality, instead they simply led to a turn away from a focus on race. For the civil rights community, both its history and its continuing concern with race-based disparities in opportunity made an equal protection theory the obvious line of attack. The education finance cases were, after all, the continuation of the struggle to make good on Brown's promise of equal educational opportunity. In fact, a number of the early cases expressly raised claims based on the racially discriminatory effects of the inequities in funding, as a springboard for their more general challenges to property-tax based funding.\textsuperscript{107}

At the same time, insofar as the ambition was to shift the spotlight from race to poverty, these cases offered a promising opportunity to solidify the courts' tentative recognition of wealth as a category which, like color, required a heightened level of judicial scrutiny. In light of the comparable impacts of racial and economic categorizations in education, an area in which the Supreme Court had made clear its concern for equitable treatment, such an outcome seemed within reach.\textsuperscript{108} And, if achieved, the enshrinement of wealth as a suspect classification would have provided an invaluable tool for enlisting the courts as allies in the incipient attack on poverty and its consequences.

Another factor undoubtedly influencing the reliance on equality theories in the early education finance cases was the almost reflexive assumption, conditioned by fifteen years of Warren Court activism, that the federal Constitution and the federal courts provided the most natural and efficacious avenues for correction of social injustices. For constituencies concerned about the inadequacies of educational opportunities for children in poor school districts, the lesson to be drawn from recent developments in areas ranging from the rights of criminal defendants\textsuperscript{109} to prayer in schools,\textsuperscript{110} from the use of con-


\textsuperscript{108} See, for example, Wise, \textit{Rich Schools, Poor Schools} at 167-72 (cited at note 41) (comparing racial discrimination in education and economic discrimination in criminal proceedings to economic discrimination in education).

\textsuperscript{109} See, for example, Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that the prosecution may not use statements resulting from custodial questioning in absence of procedures effective to secure the Fifth Amendment's privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (holding that the right of an indigent criminal defendant to the assistance of counsel is fundamental and essential to a fair trial).
traces to school desegregation, was that the Supreme Court offered the best hope for dramatic change.

In consequence, the plaintiffs in the early education finance cases were inclined to look for their legal theories in the federal Constitution, not in state constitutions or state law. Many of the early cases were brought in federal court, where claims based on state law would not have found a hospitable reception, and where a claim grounded in federal law was a jurisdictional necessity. Even in those suits brought in the state courts, the primary focus (for both the plaintiffs and the courts) was generally on the federal constitutional issues, with appeals to the state’s parallel constitutional provisions thrown in as virtual afterthoughts.

But by turning away from state law, education finance litigants lost sight of the most plausible textual basis for arguments addressing issues of adequacy—the state constitutions’ education clauses. No comparable foundation for an adequacy argument was to be found within the federal Constitution (although some commenta-

110. See, for example, Engel v. Vitale, 370 U.S. 421, 425 (1962) (holding that state officials may not require that prayer be recited in the state’s public schools); Abington School District v. Schempp, 374 U.S. 203, 205 (1963) (holding that no state law or school board may require that passages from the Bible be recited in the state’s public schools).

111. See Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that state statute forbidding the use of contraceptives violates the right of marital privacy).

112. See cases cited in notes 73-74.

113. For an evocative caricature of this perception, see Coons, Clune, and Sugarman, Private Wealth at 288-89 (cited in note 29). See also David C. Long, Rodriguez: The State Courts Respond, 64 Phi Delta Kappan 481, 482 (1983) (stating that “most state courts lacked a tradition of creative constitutional adjudication. At the time of the Rodriguez decision, state courts were long shots for plaintiffs challenging discrimination in school finance systems”).

114. See Note, 95 Harv. L. Rev. at 1328 (cited in note 14) (describing perceived primacy of federal constitutional guarantees during 1960s); Wesley W. Horton, Memoirs of a Connecticut School Finance Lawyer, 24 Conn. L. Rev. 703, 703 (1992) (stating that in 1970 “[t]he state constitution was cited only infrequently, and then usually as an afterthought to some federal constitutional argument”).


116. See, for example, Railroad Comm’n v. Pullman Co., 312 U.S. 496, 500 (1941) (holding that federal courts should avoid needless friction with state policies that may result from tentative constructions of state statutes before the state courts have provided a definitive construction).

117. See, for example, Serrano I, 487 P.2d at 1249 n.11; Spano, 328 N.Y.S.2d at 231. Compare Milliken I, 203 N.W.2d at 468-71 (relying on federal precedent and principles in construing state constitutional provision), vacated on rehearing, 212 N.W.2d 711 (Mich. 1973). The obvious exception was the New Jersey Supreme Court’s decision in Robinson I, 303 A.2d at 277, which expressly chose not to adopt the trial court’s equal protection analysis.
tors observed that the Due Process Clause might be so employed).118 Once the focus was on federal law, the Equal Protection Clause, and the equality arguments it grounded, stood out as the exclusive and obvious line of attack.

A final consideration that probably reinforced the inclination of the plaintiffs in the early education finance cases to rely on equality theories can be found in the existing patterns of school finance that they were confronting. By the late 1960s, many states, including the preponderance of those in which the early lawsuits were brought, had adopted some variant of a foundation approach to the states' participation in school funding.119

At the heart of each such foundation system was a specification by the state legislature of a minimum (or "foundation") level of funding per pupil, together with a method for ensuring that each school system in the state could afford the minimum funding level through a combination of reasonable local property tax levies and supplemental state aid. The problem faced by plaintiffs was not that school districts were unable to meet the foundation funding levels; indeed, in the typical pattern, all of the state's school districts were spending well above the foundation level.120 Rather, the problem lay in the wide variations between rich and poor districts in how much they were able to spend above the foundation.

Such a factual setting was more hospitable to challenges grounded in claims of inequality than in claims of inadequacy. The


119. For a general description of foundation approaches, see text accompanying notes 46-48. See, for example, Rodrigues, 411 U.S. at 9-13 (discussing the "minimum foundation school program" providing approximately $225 per pupil); McInnis, 293 F. Supp. at 330 (discussing foundation plan guaranteeing $400 per pupil); Serrano I, 487 P.2d at 1246 (discussing foundation plan guaranteeing $355 per elementary age pupil, $488 per high school student); Van Dusartz, 234 F. Supp. at 873 (describing the challenged Minnesota system as "structurally indistinguishable . . . from the California system"); Robinson, 287 A.2d at 190 (discussing foundation plan guaranteeing $425 per pupil). The Michigan system challenged in Milliken I, 203 N.W.2d 457, vacated on rehearing, Milliken II, 212 N.W.2d 711, while somewhat more complex than the ordinary foundation plan, also involved state support designed to provide districts with a specified minimum level of funding per pupil. See Milliken I, 203 N.W.2d at 464 n.3.

120. See, for example, Rodriguez, 411 U.S. at 10-11; Serrano I, 487 P.2d at 1246, 1247 n.9; Kinneer, 530 P.2d at 133, 185-86 (plurality opinion) (explaining that every school district in Washington spent over the guaranteed $365 per "weighted pupil"), overruled by Seattle School Dist. No. 1, 585 P.2d 7; Robinson, 287 A.2d at 190 (noting that by 1969-70, every school district in New Jersey had annual budgets which exceeded the level guaranteed by the foundation program).
focus of the foundation approach, after all, was to guarantee a specified level of funding for each child; it was a system grounded in an adequacy-based conception of the state's responsibility. So, any claim that the state had failed in its obligation to provide each child with adequate educational opportunities would have had to attack the implicit legislative determination that the foundation level afforded an adequate, if minimal, level of educational services.

Given the standard judicial reluctance to second-guess legislative judgments, particularly on questions so clearly open to a wide range of reasonable views and so clearly a matter of degree, such an attack could not have looked promising. The fact of universal spending above foundation levels, even in the poorest districts, might have strongly suggested that the foundation levels were, in reality, neither intended nor suited to afford an adequate education, but that is not a conclusion courts would readily reach, especially where the foundation levels were commonly a subject of frequent legislative review and modification.

Far more attractive was a strategy that could attack from a completely different direction, arguing not that a state's legislature had erred in its choice of a particular foundation level, but rather that foundation approaches simply did not address the true problem—the disparities in the levels of funding actually provided by different districts. Such an approach could focus on the undisputed fact of

121. See text accompanying notes 46-48.
122. New Jersey's litigation, Robinson I, 303 A.2d 273, the first case to assign a significant role to adequacy arguments, see discussion at text accompanying notes 140-47, may be the exception that proves the rule. Although the court's analysis focused on the foundation approach which was operative when the suit was brought, by the time of trial this system had been replaced by an early form of power equalization. See Robinson, 287 A.2d at 205-09 (describing provisions of the Bateman Act). Thus, the novel approach taken by the Robinson I Court may reflect the unusual context to which it was responding. In the same way that foundation approaches invite equality-based challenges, power-equalization approaches, which make no effort to establish qualitative norms, invite adequacy claims.
123. For examples of the predictable judicial response to such arguments, see Rodriguez, 411 U.S. at 39-33, 58-59 (concluding that the "ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them"); Nyquist, 439 N.E.2d at 369; McDaniel, 285 S.E.2d at 165 (declining to act as "super-legislature"); Kinneer, 530 P.2d at 195-96 (plurality opinion) (stating that providing for education is the "paramount duty" of the legislature, and not the judiciary), overruled by Seattle School Dist. No. 1, 585 P.2d 71; Robinson, 287 A.2d at 211. See also William H. Clune, New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy, 24 Conn. L. Rev. 721, 727-28 (1992) (arguing that the avoidance of the problem of picking an appropriate level of funding was "probably the greatest strength of fiscal neutrality" strategies).
124. See, for example, Rodriguez, 411 U.S. at 11, 13; McInnis, 293 F. Supp. at 334; Serrano II, 557 P.2d at 935 (emphasizing the significant increase in the foundation level since Serrano I); Bd. of Educ. v. Walter, 390 N.E.2d at 820-21; Yudof, 28 Harv. J. Leg. at 499 (cited in note 42).
interdistrict funding discrepancies—discrepancies that the states, in their reliance on foundation approaches, had chosen not to attempt to remedy. In short, if adequacy were the norm, the standard presumptions favoring legislative judgments would tend to vindicate the status quo, whereas if equality were the norm, foundation approaches would be far less defensible.

So, in light of this assortment of historical circumstances, it is no surprise that the plaintiffs in the early education finance cases, and their scholarly spear-carriers, focused their attention almost exclusively on equality arguments grounded in the federal Constitution's Equal Protection Clause. And it should certainly not be forgotten how close this strategy came to success, nor how very different both the legal and the educational worlds, and indeed the entire world of state-local relationships and of municipal service delivery, would now look if one justice had voted the other way in Rodriguez. 125

IV. EQUALITY'S TENACITY

Considerably more surprising is what has happened subsequent to the Rodriguez decision, once it was settled that equality arguments grounded in federal law were unavailing. In the face of this apparently crushing setback, the resilience of the equality norm has been extraordinary.

In the wake of Rodriguez (and Robinson I126), it was promptly and broadly recognized that the entire legal debate over school funding had become an issue of state, not federal, constitutional law. 127 Still, the almost universal tendency of both litigants and scholars was to continue to conceptualize the issue in the equal protection frame-

125. Nor should it be forgotten that, of the five Justices comprising the Rodriguez majority, only one (Justice Stewart) was on the Court in 1968 when the suit was filed.
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work inherited from its pre-Rodriguez, federal law origins, despite the very different context and range of arguments that state constitutions afforded. Even where alternative, adequacy-based arguments have been deployed, as in the case of New Jersey, which we consider in detail below, courts and commentators have tended to recast them in the mold of equality arguments.

A review of the education finance cases decided in the state courts over the decade after Rodriguez evidences the continuing dominance of equality arguments. Of the seven states whose highest courts found their education finance systems in conflict with their state constitutions during that period, four—California in 1976, Connecticut in 1977, Wyoming in 1980, and Arkansas in 1983—placed their reliance exclusively on rights to equal educational opportunity, grounded primarily in the states' equal protection clauses.

In two of the other three states sustaining challenges—New Jersey and West Virginia—equality arguments continued to play a major role, both in the way the plaintiffs framed their cases and in the courts' analyses. The New Jersey litigation, which, along with the California case, became one of the guiding beacons for the nationwide wave of education finance litigation, is particularly instructive.

Although the New Jersey trial court placed its primary reliance on equal protection theories, the state Supreme Court, in a decision published shortly after Rodriguez but largely crafted before Rodriguez's outcome was known, expressly declined to place any

128. See Note, 95 Harv. L. Rev. at 1448-49 (cited in note 14) (observing that most state education finance cases are framed by reference to federal constitutional doctrine); Underwood and Sparkman, 14 Harv. J. L. & Pub. Pol. at 521 (cited in note 24); William Thro, The Role of Language of the State Education Clauses in School Finance Litigation, 79 Ed. L. Rptr. 19, 20-21 (1993) (noting that only two successful challenges before 1989 were based on education clauses).


130. Horton I, 376 A.2d 559.


132. Dupree, 651 S.W.2d 90.

133. In several of these states, the court looked to the state's education clause as well, but as a supplemental basis for imposing a strict standard of equal treatment, rather than as a ground for an adequacy argument. See Dupree, 651 S.W.2d at 93; Herschler, 606 P.2d at 332.

134. Robinson I, 303 A.2d at 277, 282.


136. Robinson, 287 A.2d at 212-16. The trial court also considered adequacy arguments grounded in the state's education clause at length, but found only a limited violation of the requirement of a thorough education for all. Id. at 211.

137. See Robinson I, 303 A.2d at 279.
reliance on the state's equal protection provisions, turning instead to its education clause as the sole basis for its decision. But in its analysis of the education clause, equality concerns remained a major theme. After carefully considering, but rejecting, the claim that the education clause mandated "statewide equality among taxpayers," the court turned to the question of "equal educational opportunity for children" and concluded that the education clause "can have no other import" than to mandate such equality.

The court's ensuing analysis, however, reflected an uncomfortable tension between concerns of equality and adequacy. Immediately after characterizing the constitutional requirement in terms of equality, the opinion turned instead to a qualitative standard: "A system of instruction in any district of the State which is not thorough and efficient falls short of the constitutional command." The court was also quick to note that the constitutional provision was not intended to preclude localities "with more than ordinary enterprise" from offering educational opportunities beyond those offered statewide.

The court tried to satisfy the competing demands of adequacy and equality by concluding that the education clause "require[s] equality within the intended range," that is, that all districts must provide equally for that quantum of educational services which satisfies the constitution's qualitative requirement. The court further explained that this qualitative standard must evolve with changing social conditions, suggesting, in passing, that the standard "embrace[s] that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."

138. N.J. Const., Art. VIII, § 4, ¶ 1 (stating that "[t]he legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years").
139. Robinson I, 303 A.2d at 294.
140. It is one reflection of this tension that subsequent cases resting on equality arguments commonly cite Robinson I as a model of such arguments, see, for example, Dupre, 651 S.W.2d at 92-93; Thompson, 537 P.2d at 651, at the same time that cases developing adequacy claims cite it as a model for their approach, see, for example, Pauley v. Kelly, 255 S.E.2d at 872-74.
141. Robinson I, 303 A.2d at 294.
142. Id. at 290 (quoting William S. Myers, 1 The Story of New Jersey 472 (Lewis Hist., 1945)). The court rests its conclusion heavily on an 1895 decision, Landis v. Ashworth, 57 N.J.L. 509, 31 A. 1017 (1895), in which the court found no constitutional problem with the decision of some districts to provide high schools, although such schools were not mandated by the state nor provided by other districts. Robinson I, 303 A.2d at 294.
143. 303 A.2d at 294.
144. Id. at 295.
Whether the concept of equality really does anything more than rhetorical work in the Robinson I court’s standard may appear quite doubtful. After all, requiring that all districts provide a certain quantum of education equally seems no different from requiring simply that all districts provide that quantum. But when the court turned to the task of applying its standard, equality retained a central role. In finding a constitutional violation, the court looked only at evidence of spending disparities among districts, the basis upon which the trial court had found an equal protection violation. No evidence was reviewed concerning the substantive content or quality of the education provided in any district, rich or poor. While the court insisted that the real focus of its inquiry remained the substantive requirement of a “thorough and efficient” education, it took inequalities in funding as its touchstone, explaining that the constitution’s substantive standard could not be met by the unequal pattern of spending shown on the record, “unless we were to suppose the unlikely proposition that the lowest level of dollar performance happens to coincide with the constitutional mandate and that all efforts beyond the lowest level are attributable to local decisions to do more than the State was obliged to do.”

But the court saw no need to explain why that proposition struck it as so unlikely nor to defer a momentous constitutional decision until evidence of its falsity could be marshalled. In the end, inequality alone established unconstitutionality.

This uncomfortable marriage of equality and adequacy themes has continued to haunt the New Jersey court in its recurrent efforts to address the state’s school finance problems. Three years after its initial decision in Robinson I, the court was called upon to assess the constitutional validity of the state legislature’s revamping of the education financing structure (a package that had only been reluctantly enacted, in response to continuing pressure from the court).

The restructuring relied in large part on the adoption of a version of power equalization, under which each district retained the

145. Id.
146. Id.
147. The court intimated that its focus on fiscal disparities was because there was nothing more in the record for it to rely on. See id. However, the trial court opinion, in fact, was replete with evidence concerning educational quality, see Robinson, 287 A.2d at 199-202, and contained an explicit finding that “a large number of New Jersey children are not getting an adequate education,” id. at 205.
authority to set its own school tax rate, while the state supplied aid sufficient to provide each district with the revenues it would have reaped from its chosen tax rate had its property wealth equalled 135 percent of the statewide average property wealth per student.\textsuperscript{149} The legislation also articulated, albeit in very general terms, the goals of a "thorough and efficient system of free public schools,"\textsuperscript{150} identified some of the "major elements" to be provided to meet that goal,\textsuperscript{151} and substantially expanded the authority of the state education bureaucracy to articulate statewide standards, monitor the districts' success in meeting them, and require remedial measures by unsuccessful districts.\textsuperscript{152}

In assessing whether this legislative package satisfied the state's constitutional requirements, the New Jersey court found itself deeply divided over the meaning of its decision in Robinson I. A majority, in a relatively brief, matter-of-fact per curiam opinion, approved the act on the ground that it established a realistic framework for assuring that all school districts provided an education that met the constitutional standard, as articulated by the act. The majority read Robinson I as a mandate to the state to assure that each child's education met a uniform substantive standard and primarily focused on the act's enunciation of such standards and its establishment of mechanisms to make sure they were met.\textsuperscript{153} To the extent that the act's financial provisions were considered at all, the majority's question was whether they would "afford sufficient financial support for the system of public education,"\textsuperscript{154} rather than whether they would equalize the resources available to rich and poor districts. Thus, the majority focused entirely on assuring adequacy, and not at all on assuring equality.\textsuperscript{155}

\footnotesize{149. See Robinson V, 355 A.2d at 137 (per curiam) (outlining financial provisions of Public School Education Act of 1975). See also id. at 145-48 (Conford, J., dissenting in part); id. at 177-78 (Pashman, J., dissenting) (offering more details); Abbott I, 575 A.2d at 377-80 (same).


151. Robinson V, 355 A.2d at 132-33 (quoting N.J. Stat. Ann. § 18A:7A-5). The ten listed elements focused on procedural requirements (for example, "[establishment of educational goals at both the State and local levels") and broad characterizations of necessary inputs (for example, "[qualified instructional and other personnel].")

152. See Robinson V, 355 A.2d at 134-35.

153. Id. at 132-36.

154. Id. at 136.

155. See Abbott I, 575 A.2d at 369 (stating that "[t]he change of focus from the dollar disparity in Robinson I to substantive educational content in Robinson V is clear; it was the main theme underlying the Court's determination that the Act was constitutional").}
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The lengthier concurring and dissenting opinions, by contrast, read Robinson I as a mandate for equality of access to educational resources and viewed the act as failing to satisfy that mandate.\textsuperscript{156} These opinions concentrated not on the act’s provisions concerning goals and standards for school performance, but on its power equalization provisions and the ways in which they failed to afford “equality of educational opportunity” for children from poorer districts.\textsuperscript{157} They viewed the majority’s focus on minimum standards as a politically motivated retreat from Robinson I’s promise of “fiscal justice.”\textsuperscript{158}

If the tension between adequacy and equality concerns appeared to have been resolved in favor of adequacy in Robinson V, the court’s return to the issue of the constitutionality of the 1975 act, fourteen years later in Abbott v. Burke,\textsuperscript{159} demonstrated that the ambiguity had not yet been laid to rest. Abbott I presented the court with a challenge to the act, not on its face as in Robinson V, but as applied to certain of the state’s poor, urban school districts. The court, after carefully recounting the evolution of its interpretation of the state constitution’s education clause, purported to reaffirm its adherence to the adequacy approach articulated in Robinson V,\textsuperscript{160} and on that basis found that the act had failed to provide an adequate education in the state’s poor, urban districts.

But, in a number of ways, the court’s opinion in Abbott I restored a substantial role to equality concerns. First, as in Robinson I, the factual foundation on which the court grounded its finding of unconstitutionality was essentially comparative; in evaluating the plaintiff districts’ programs and facilities, instead of assessing them against some standard of adequacy, the court repeatedly contrasted them to the comparable services and facilities in the wealthy suburban districts and concluded that they were deficient simply because of the disparity.\textsuperscript{161} The possibility that the suburban comparison districts were vastly above any constitutional norm was not entertained.

\begin{footnotesize}
\begin{enumerate}
\item[156.] See Robinson V, 355 A.2d at 142 (Hughes, C.J., concurring); id. at 143 (Conford, J., dissenting in part); id. at 178 (Pashman, J., dissenting).
\item[157.] See, for example, id. at 144 (Conford, J., dissenting in part). One of the dissenting opinions raises doubts about the constitutionality of the act on both equality and adequacy grounds and considers both the financing and the standard-setting provisions of the act. Id. at 172, 178 (Pashman, J., dissenting).
\item[158.] Id. at 143 (Conford, J., dissenting in part). For references to the majority’s political motivations, see, for example, id. at 168-70 (Pashman, J., dissenting).
\item[159.] Abbott I, 575 A.2d 399.
\item[160.] Id. at 367-71.
\item[161.] Id. at 395-400.
\end{enumerate}
\end{footnotesize}
Second, the remedy propounded by the court rested far more heavily on norms of equality than of adequacy. In order to assure the plaintiff districts a thorough and efficient education, the court ordered the legislature to “assure that poorer urban districts’ educational funding is substantially equal to that of property rich districts.”

To some degree, these apparent graftings of the logic of equality onto the rhetoric of adequacy can be explained by the Abbott I court’s choice of a formulation of the standard by which a “thorough and efficient system” of education is to be measured. Instead of following Robinson V in its endorsement of the standard articulated in the act (“to provide to all children . . . the educational opportunity which will prepare them to function politically, economically and socially in a democratic society”), the Abbott I court reverted to the formulation mentioned in passing in Robinson I: to provide “that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market.” The court then zeroed in on the concept of competition that was embedded in its newly adopted standard, and repeatedly appealed to the demands of competition to justify its requirement of comparability between poor urban and rich suburban schools. In short, if adequacy demands competitiveness (and not mere competence), then adequacy requires equality.

While the focus on competitiveness helps explain the prominence of equality concerns in Abbott I, the very choice to assign such a central role to competition and comparison evidences the strong pull that the norm of equality continued to exert on the New Jersey court. Indeed, at the same time that it insisted that it was not requiring absolute equality, but only equal ability to provide a thorough and efficient education, the court felt obliged to warn that “changing circumstances, including future development of education in this state, may lead to an interpretation of the constitutional obligation as requiring such equality of funding.” Equality was, at the very least, waiting in the wings.

162. Id. at 408; See id. at 410 (stating: “We have not attempted to address disparity of spending as such. To the extent that the State allows the richer suburban districts to continue to increase that disparity, it will, by our remedy, be required to increase the funding of the poorer urban districts”).
165. See, for example, Abbott I, 575 A.2d at 371, 384, 400.
166. Id. at 394.
When the New Jersey court returned to the issue again four years later, equality had regained center-stage. In *Abbott II*, the court addressed the legislative response to *Abbott I*, a package that substantially narrowed the spending gap between rich suburban and poor urban districts, by establishing spending caps on all districts and a foundation funding system that funneled additional resources to the poor districts. The court found the legislation unconstitutional for the simple reason that it failed "to assure parity of regular education expenditures" between rich and poor districts, although the court agreed to withhold any remedial orders, so long as "a law assuring . . . substantial equivalence, approximating 100%, . . . and providing as well for special education needs" was enacted by September 1996.

Thus, the *Abbott II* court placed its primary reliance on a straightforward equality standard, distilled from *Abbott I*’s more complex blend, although the court still reverted at several points to adequacy-based concerns for "the constitutionally prescribed quality of education" and "the actual achievement of educational success."

Of the states to find constitutional infirmities in their education finance systems in the first decade after *Rodriguez*, then, only Washington entirely eschewed equality concerns in favor of the demands of adequacy. And, in the Washington case, the focus on adequacy arguments was largely dictated by the fact that the plaintiff was a relatively rich school district, with property valuation per student some sixty percent above the statewide average, whose problem was the local voters' repeated rejection of the property tax levies sought by the district.

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168. See id. at 576-78. The legislation succeeded in increasing average spending in the poor urban districts to 84% of the average in the rich districts, up from 70% or 75% prior to the legislation. Id. at 576. For further discussion of the political context of the legislation, see note 274.
169. Id.
170. Id. at 577.
171. Id. at 579, 580. It bears note, however, that, in *Abbott II*, these references to adequacy norms appear only in contexts where the Court is expressly deferring to the political branches. The Court’s own role is focussed entirely on equality.
172. *Seattle School Dist. No. 1*, 586 P.2d at 97. Even here, one justice focused on the inequalities resulting from reliance on local property taxation, arguing that such inequalities violated the education clause’s requirement of a “general and uniform system of public schools.” Id. at 109 (Utter, J., concurring).
173. Id. at 101-02. Another significant factor favoring reliance on adequacy arguments was surely the Washington Supreme Court’s recent rejection of an equal protection challenge to the school finance system, *Kinnear*, 830 P.2d at 201, although the plurality’s opinion in *Kinnear* must have raised severe doubts about the viability of an adequacy-based challenge as well, see id. at 195-96.
In the twelve states whose highest courts rejected challenges to their education finance systems in the decade after Rodriguez, the dominance of equality arguments was even more pronounced.174 With rare exception, these cases focused almost exclusively on claims that reliance on highly variable property tax bases as a critical source of school funding produced unconstitutional variations in the ability of school districts to provide educational services. While most of the cases made some reference to the education clauses of their state constitutions, these clauses were generally cited in support of equality arguments, whether as a basis for finding that education is a fundamental right for purposes of state equal protection analysis or as an independent basis for a right to uniform educational opportunity throughout the state. The possibility that these clauses might ground a separate claim of failure to satisfy the constitutional mandate to provide children with an adequate level of educational services, if raised at all, was only noted in passing—either as a contention that was not argued in the litigation or as one for which no evidentiary foundation had been laid. Not a single one of the courts rejecting the constitutional challenges during this period included a serious

174. The figure of 12 includes both Kinnear, which was subsequently overruled in Seattle School Dist. No. 1, 585 P.2d 71, and Blase v. State, 55 Ill.2d 94, 302 N.E.2d 46 (1973), whose primary concern was not with education funding but with the Illinois property tax system.

175. The same observation holds true for cases in several states that did not advance as far as the highest state court. See, for example, People ex rel. Jones v. Adams, 40 Ill. App.3d 189, 350 N.E.2d 767 (1975); East Jackson Public Schools v. State, 133 Mich. App. 132, 348 N.W.2d 303 (1984).

176. See, for example, Blase, 302 N.E.2d at 48-49 (rejecting claim that Illinois constitution's assignment to state of "primary responsibility for financing" public education requires state to cover more than half of education costs); Nyquist, 439 N.E.2d at 372-74 (Fuchsberg, J., dissenting) (arguing for unconstitutionality of system on both inadequacy and inequality grounds); Kinnear, 530 P.2d at 218, 221 (Stafford, J., dissenting) (same).

177. See, for example, Lujan, 649 P.2d at 1017; Kinnear, 530 P.2d at 198 (plurality opinion), overruled by Seattle School Dist. No. 1, 585 P.2d 71.

178. See, for example, Lujan, 649 P.2d at 1024-25; Thompson, 537 P.2d at 647. Compare Idaho Schools for Equal Educational Opportunity v. Boas, 123 Idaho 573, 850 P.2d 724, 734 (1993) (describing Thompson, 537 P.2d 635, as a case in which "thoroughness" claim was not raised).

179. See, for example, Lujan, 649 P.2d at 1018 (noting that appellees did not allege that they were being denied an educational opportunity); Nyquist, 439 N.E.2d at 363 (noting that no claim was advanced that the educational facilities or services provided in the school districts fell below statewide minimum standard of educational quality and quantity); Danson v. Casey, 484 Pa. 415, 399 A.2d 360, 365 (1979).

180. See, for example, Milliken I, 212 N.W.2d at 713 (concurring opinion) (noting that there was no "concrete claim" of "particular specified educational inadequacies"); Kinnear, 530 P.2d at 184 (plurality opinion) (noting that there was no proof the state ever failed to discharge its paramount duty to make ample provision for the education of its children); id. at 203 (Rossellini, J., concurring).
evaluation of whether the actual education provided in the poor districts satisfied a specific substantive standard.

The 1976 Oregon decision is a good exemplar of these cases. Although the plaintiffs included a claim grounded in the state constitution's education clause, the court identified the wide variations in funds available for education spending as "the essence of plaintiffs' argument" and devoted the bulk of its time and attention to the equal protection claim. As a part of its equal protection discussion, the court confronted the question of whether, following Rodriguez's logic, the state's education clause elevated education to the status of a fundamental interest. The court concluded, however, that in the context of a constitution as comprehensive and far-ranging as Oregon's, interests should not be sorted into neat categories on the basis of their appearance in the constitutional text. Instead the court preferred to balance the impact on the affected interest in educational opportunity against the state's asserted justification for its financing system. In this analysis, the court reviewed considerable specific evidence about the "substantial deficiencies in educational opportunities" in the poorer districts, but made no further reference to the constitution's education mandate or to any requisite standard for what educational opportunities must be provided. Ultimately, the court concluded that the disparities were justified by the state's interest in local control.

In a brief concluding section, the court finally turned to the plaintiffs' education clause arguments. But here, too, the focus was on equality. The court characterized the plaintiffs' "primary argument" here as an effort to derive a mandate for equal school funding from the education clause's requirement of a "uniform" system of schools. In rejecting this effort, the court construed the education clause, not as a mandate for equality, but as a mandate for satisfaction of a minimum substantive standard: the education clause "is complied with if the state requires and provides for a minimum of educational opportunities in the district . . . ." Here, at long last, the court appeared to have identified the ground for an adequacy argument. But, notwithstanding the evidence of "substantial deficiencies" it had catalogued a few pages earlier, the court offered noth-

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181. Olsen, 554 P.2d 139.
182. Id. at 140.
183. Id. at 144.
184. Id. at 146.
185. Id. at 147.
186. Id. at 148.
187. Id.
ing further about whether the state had met this substantive threshold. Either the issue had not been raised by the plaintiffs or the court regarded it as undeserving of even the briefest discussion. The possibility of an adequacy-based challenge simply does not seem to have crossed the court's mind.

So, ten years after *Rodriguez*, education finance reform litigation was still an issue of "equal educational opportunity" and "fiscal neutrality." In light of the almost exclusive focus on equality arguments, it is not surprising that, when a litigator involved in many of the finance cases reviewed the decade's developments in the state courts, he framed the discussion entirely in terms of "discrimination" and "inequalities." And, when John Coons, one of the leading advocates and scholars of the finance reform movement, was asked, a decade after *Rodriguez*, to reflect on the issues and tensions confronting the movement, he painted the central difficulties as disagreements among versions of equality arguments. In particular, Coons highlighted the tension between those for whom the primary goal was equality of actual spending and those for whom it was equality of opportunity to raise funds. The Robinson *v.* Cahill alternative of seeking mandates in state constitutional provisions for a prescribed standard of educational services was dismissed by Coons as an unfortunate aberration.

In the ensuing decade, adequacy arguments have occasionally assumed a more significant role, but equality concerns have generally remained at center stage. Indeed, in New Jersey, as we saw above, the court has apparently retreated from its earlier focus on the state's duty to afford all children an education satisfying a substantive standard to an approach more heavily focused on the demands of equal opportunity. Similarly, in California, the court chose to build upon Serrano's mandate of equal educational opportunity, rather than

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188. See Note, 95 Harv. L. Rev. at 1446 (surveying the caselaw in 1983); McCarthy and Deignan, *What Legally Constitutes an Adequate Public Education?* at 6 (cited in note 118).
189. Long, 8 Clearinghouse Rev. at 335-37 (cited in note 127).
191. Id. at 480 (dismissing it as "an invitation to a political circus").
192. One commentator, Thro, 35 B.C. L. Rev. at 603 (cited in note 18), has recently described a shift in focus from "equality of expenditures" to "quality of education" as one of the hallmarks of recent education finance cases. Unfortunately, the evidence does not substantiate his claim. In fact, of the three cases referenced in Thro's discussion, two, *Helena Elementary School Dist. No. 1*, 769 P.2d 684, and *Edgewood I*, 777 S.W.2d 391, rest on equality, not adequacy, claims.
193. See text accompanying notes 136-71.
invoking a substantive right to education, when acting to shore up a school district whose failings resulted from mismanagement of its admittedly equitable allotment of funds.\textsuperscript{194} And in many of the other states facing constitutional challenges to their educational finance systems, the courts’ analyses have continued to focus predominantly on equality concerns.\textsuperscript{195}

When the Tennessee Supreme Court, for example, recently invalidated the state’s school funding structure, the bulk of the court’s discussion, and the exclusive basis for its holding, rested on the state’s equal protection clause.\textsuperscript{196} While the court did include a discussion of the state’s education clause and concluded that it articulated “an enforceable standard” for the state’s duty to provide an educational system, the court expressly declined the invitation to define or apply that standard and focused instead on the interdistrict disparities in resources and services.\textsuperscript{197}

In a number of other states, as several commentators have observed, emphasis on the analysis of state education clauses has increased during the past decade.\textsuperscript{198} But even with this shift in the primary textual basis of the suits, many litigants and courts have continued to look for the old equality-based arguments in the new education-based texts. In Texas, for example, the court invalidated the education finance system on the ground that the framers of the state’s education clause, which calls for an “efficient system of public free schools,” “never contemplated that such gross inequalities could exist within an ‘efficient’ system.”\textsuperscript{199} Similarly, in Minnesota, the primary claim raised (unsuccessfully) by plaintiffs challenging the state’s school finance system was that the state’s school finance system was that the state’s education clause,

\textsuperscript{194} Butt, 842 P.2d at 1248-51. See discussion at text accompanying notes 62-64.

\textsuperscript{195} See, for example, Sheen, 505 N.W.2d at 315-20; Helena Elem School Dist. No. 1, 769 P.2d at 689-91; Gould v. Orr, 244 Neb. 163, 506 N.W.2d 349, 353 (1993); Bismarck Public School Dist. No. 1, 511 N.W.2d at 254-63; Fair School Finance Council of Oklahoma, Inc. v. State, 746 P.2d at 1135, 1144-49 (Okla. 1987); Richland County v. Campbell, 294 S.C. 346, 364 S.E.2d 470, 472 (1986); Edgewood, 777 S.W.2d at 397; Kukor v. Grover, 148 Wis.2d 469, 436 N.W.2d 568, 579-80 (1988).

\textsuperscript{196} Tennessee Small School Systems, 851 S.W.2d at 152-57.

\textsuperscript{197} Id. at 151-52.

\textsuperscript{198} See, for example, Underwood and Sparkman, 14 Harv. J. L. & Pub. Pol. at 536 (cited in note 24) (stating that several state courts have been receptive to education clause challenges); William Thro, The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation, 19 J. L. & Educ. 219, 238-41 (1990) (discussing implications of cases relying upon education clauses); Gail F. Levine, Note, Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings, 28 Harv. J. Leg. 507, 508 (1991) (citing successful challenges under state education clauses, and predicting their primary role in future school finance reform litigation).

\textsuperscript{199} Edgewood I, 777 S.W.2d at 393, 395.
requiring "a general and uniform system of public schools," forbade use of local property taxes to fund the schools because the "resulting funding differential violates the constitutional duty of uniformity." Even in the most recent cases brought under education clause theories, the courts repeatedly note the absence of any claims relating to the adequacy of the available educational services.

Despite the continuing vitality of equality arguments, litigation in a few states in recent years has shifted the focus to the substantive quality of the educational opportunities provided by the state, especially for students in poorer districts, and to the standards of adequacy implicit in the state constitution's education clause. In Kentucky, for example, a 1989 decision articulated a detailed and ambitious substantive standard for the educational outcomes that must be achieved by the constitutionally required "efficient system of common schools." While the Kentucky court simultaneously addressed the severe inequalities in the state's financing system and found that the state's education clause required substantial uniformity of resources, its findings of substantive inadequacy played a central role in its declaration that "the whole gamut of the common

200. *Skeen*, 505 N.W.2d at 308. Plaintiffs also raised a claim, also unsuccessful, under the state's equal protection clause, but they expressly did not include a challenge to the adequacy of education in Minnesota. Id. at 302-03. For other examples of cases that seek equality principles within the language of state education clauses, see note 32.

201. See, for example, *Roosevelt Elementary*, 877 P.2d at 814 n.7 (plurality opinion); *Scott v. Commonwealth*, 247 Va. 379, 443 S.E.2d 138, 140-41 (1994).

Recent litigation in New York provides another instance of the powerful pull toward continued reliance on equality arguments, even in cases resting on education clauses. See generally *R.E.F.I.T. v. Cuomo*, 606 N.Y.S.2d 44. The 1982 decision of the New York Court of Appeals, *Nyquist*, 439 N.E.2d at 361, had foreclosed equal protection clause arguments, but had left open the possibility of future claims of "gross and glaring inadequacy" under the state's education clause. Id. at 369. Despite this clear signpost pointing toward adequacy arguments, when a coalition of school districts brought their education clause suit, they rested their claim of "gross and glaring inadequacy" on the widening resource and spending gaps between rich and poor districts, and made no claims "that their students are not being provided with a sound, basic education." *Cuomo*, 606 N.Y.S.2d at 46. Although *amici* attempted to append such a claim, the court declined to consider it because it had not been asserted by the plaintiffs, and went on to find the system constitutional. Id. at 47. See also *Campaign for Fiscal Equity v. State*, 616 N.Y.S.2d 851 (N.Y. Sup. 1994) (raising both equality and adequacy claims concerning New York City schools).

202. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 211 (Ky. 1989). The court listed seven specific substantive standards, but two examples should suffice: "(i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; . . . (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; . . ." Id. at 212.

203. Id. at 194-96 (finding wide disparities in funding and programs); id. at 212 (requiring substantially uniform educational system throughout state). See also id. at 211 (stating that "[a]quality is the key word").
school system in Kentucky," and not just the education finance structure, failed to pass constitutional muster.204

A recent decision overturning the school finance system in Massachusetts presents the exceptional case of both plaintiffs and court focusing exclusively on issues of adequacy.205 Although the case was originally filed in 1978 as a typical equality-based suit, the plaintiffs subsequently amended their complaint to refocus on the claim that the substantive quality of the education provided in the plaintiff's poor districts did not satisfy the legislature's constitutional "duty . . . to cherish the interests of literature and the sciences, and all seminaries of them; especially . . . public schools and grammar schools in the towns."206 The court noted that the plaintiffs were not asserting a constitutional right to either equal educational funding or equal educational opportunities,207 and instead directed its inquiry to the qualitative demands implicit in the constitutional text, ultimately adopting the same list of guidelines previously used by the Kentucky court.208

Two other recent state supreme court decisions have also placed the focus squarely on adequacy claims.209 In Claremont School District v. Governor, the New Hampshire court, in a brief opinion, essentially adopted the approach and reasoning of the Massachusetts court in construing New Hampshire's "nearly identical" education clause.210 And, in Idaho Schools for Equal Educational Opportunity v. Evans, despite the plaintiffs' chosen appellation and despite their complaint's inclusion of claims grounded in the state's equal prote-

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204. Id. at 215. Similarly, an Alabama trial court, in a decision that the Governor decided not to appeal, determined that the Alabama Constitution's education clause imposed standards of both equality and adequacy and that the existing Alabama system failed on both counts, and on equal protection grounds as well. Alabama Coalition for Equity v. Hunt, 624 S.2d 110, 121-37, published as an appendix to Opinion of the Justices, 624 S.2d 107, 110 (Ala. 1993). Compare Applebome, N.Y. Times at B7 (cited in note 36) (describing Alabama decision in adequacy terms) with Donald Yacoe, Alabama Follows Growing Trend: School Funding Called Unequal, Bond Buyer 1 (April 8, 1993) (describing it in equality terms).

205. McDuffy, 615 N.E.2d 516, 519. The court makes much of its dislike of the term "adequacy," which it connotes too modest a standard, and instead frames the issue in terms of whether the state's system suffices to provide for "the education of its children," id. at 519 and n.8, but this terminological concern does not significantly affect the court's analysis.


207. McDuffy, 615 N.E.2d at 522.

208. Id. at 554-55.

209. Adequacy claims also played an important supporting role in Arizona's recent decision invalidating its property-tax based system for school capital improvements. Roosevelt Elementary, 877 P.2d at 814-15. Although the plurality relied entirely on equality arguments, the crucial third vote came in a concurring opinion which focused its education clause analysis on an adequacy theory, modeled after Seattle School Dist. No. 1, 586 P.2d 71. See Roosevelt Elementary, 877 P.2d at 818-22 (Feldman, C.J., specially concurring).

tion clause and in its education clause’s mandate for a “uniform . . . system,” the Idaho court determined that the plaintiffs’ only viable claim concerned whether the state had satisfied the education clause’s “thoroughness” requirement.\footnote{Idaho Schools for Equal Educational Opportunity, 850 P.2d at 734. In rejecting the other, equality-based claims, the court reaffirmed its prior resolution of those issues in Thompson, 537 P.2d at 647-53.} The court remanded the case for examination of whether the funding system was adequate to make possible a thorough education throughout the state.\footnote{Idaho Schools for Equal Educational Opportunity, 850 P.2d at 734-36.}

These decisions, however, remain the exceptions. And, even when both plaintiffs and court have expressly eschewed equality arguments in favor of arguments focused on adequacy, the tendency to conceptualize education finance issues in equality terms remains powerful.\footnote{See McUnic, 28 Harv. J. Leg. at 326 n.87 (cited in note 18) (observing that even states adopting adequacy approaches continue to blend in equity concerns).} Thus, the two major Boston newspapers trumpeted the McDuffy case as finding that “Mass[achusetts] denies students equal chance” and that the “state must offer equal ed to all.”\footnote{Doris Sue Wong, Mass. Denies Students Equal Chance, SJC Says; Beacon Hill is Told to Act on Disparity, Boston Globe 1 (June 16, 1993); David Weber, SJC Rules State Must Offer Equal Ed to All, Boston Herald 1 (June 16, 1993). It should be noted that the stories which followed these headlines did a far more accurate job of describing the decision in adequacy terms.}

The durability of appeals to equality in education finance litigation over the past twenty years provides vivid evidence of equality's strong pull on our legal and political sensibilities. The early allure of equality arguments was due, in no small part, to the hope of building on the dramatic expansion of the federal equal protection clause as a tool of social transformation. But after *Rodriguez*, the continuing predominance of equality arguments through the ensuing decades must have other sources.

In part, it may be a simple matter of inertia, of intellectual habit reinforced by continued reliance on previously formulated pleadings, evidence, and arguments. In part, it may represent a choice to highlight the link between the education finance problem and other concerns for social justice, concerns that are commonly clothed in the garb of equality. In part, it may reflect doubts about the likely efficacy of alternative appeals to concepts of adequacy, doubts whose roots we will explore further in the penultimate section of this Article.

I suspect, however, that a very large part of the explanation for the continued vitality of equality arguments lies simply in the tremendous argumentative power we find in the concept of equality. This power derives in large measure from equality's acknowledged normative force, from the unquestioned central place of equality in our conception of a just society. But it also derives, in significant part, from equality's apparent simplicity. Unlike other concepts with comparable normative force, like fairness or efficiency or adequacy, equality offers the promise of a clear standard, measurable by straightforward, quantitative comparisons. So, equality appears to offer the rare easy step from descriptions that are factually unassailable to evaluations that are universally shared. No wonder that it has proven such a persistent touchstone in the education finance arena.

V. EQUALITY'S INADEQUACIES

Despite its powerful attractiveness, and despite its continuing preeminence, equality has proven a disappointing tool in the struggles over education funding. In the judicial forum, the majority of state courts to confront the issue have followed the Supreme Court in finding that constitutional commands of equality do not forbid the dis-

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217. For an intriguing discussion of how equality came to play such a central normative role, see Garry Wills, *Lincoln at Gettysburg* 37-40, 146-47 (Simon and Schuster, 1992).
parities—often quite extreme disparities—in school funding that result from reliance on local property taxation. And in the legislative forum, as well, efforts to equalize educational opportunity have confronted daunting resistance and frequent frustration. The legislative difficulties have perhaps been most visible in the states—most notably California, Texas, and New Jersey\(^ {218} \)—that have struggled to implement judicial mandates of equality, but comparable problems have beset legislative efforts at equalization in many other states where the motivation was either pending litigation or the simple commands of conscience.\(^ {219} \)

Why have appeals to equality fared so poorly? Why have they generated such stubborn resistance? This section is an effort to explore the reasons behind the difficulties, in both the judicial and legislative fora. While the hurdles encountered in the two settings tend to take somewhat different form, I will suggest that a common core of problems emerges.

In particular, equality arguments, at least in the context of education funding, suffer from two fundamental weaknesses that go to the heart of equality's presumed strengths. First, despite the appealing apparent simplicity of the concept of equality, the task of specifying its precise content in the context of education funding turns out to be devilishly difficult. Second, when deployed in relation to a subject as important, and as emotive, as education, equality—whatever its precise meaning and whatever its centrality among our shared societal and legal norms—can suddenly loom too large,


\(^ {219} \) See Odden, School Finance at 6 (cited in note 6); Richard Briffault, Our Localism: Part I—The Structure of Local Government Law, 90 Colum. L. Rev. 1, 59-64 (1990). For examples of the difficulties in particular states, see Buse v. Smith, 74 Wis.2d 550, 247 N.W.2d 141 (1976) (invalidating power equalization plan); McDuffy, 615 N.E.2d at 551-52 (describing shortcomings of legislative efforts to equalize funding in Massachusetts); J. Fred Giercz and Therese McGuire, Fear of Tax Increase Leads Education Amendment to Defeat, 3 St. Tax N. 663 (Nov. 9, 1992) (discussing failure of effort to amend Illinois Constitution to require greater equalization of school funding).
threatening to demand too much and to overwhelm other important concerns. In short, equality, at least in the context of education finance, lacks both the simplicity and the unquestioned normativity that gave it its initial appeal.

A. Simplicity

The very idea of equality evokes the imagery of simple quantitative comparisons. But, in the context of education funding, the imagery has proven deceptive, because the appropriate dimension for comparison has proven elusive. In fact, the debates over educational equality reveal at least four distinct quantities which might be compared in the effort to identify relevant disparities. Each of the four has at times been proposed as the measure that ought to be equalized, but none succeeds in making a clean connection between the differential treatment by government, which is the easiest target for constitutional attacks, and the disparate impact on children's lives, which is the most compelling concern. The proliferation of possible measures both dilutes the potency of equality's appeal and offers multiple footholds for attacks on equality's claims.

At one end of the spectrum of measures is disparity in the capacity to fund education. The most obvious, and incontrovertible, difference between property-rich and property-poor school districts is that the richer can more easily generate tax revenues for their schools. As case after case observes, even lower tax rates can fund higher budgets for districts with greater property wealth. Whatever the actual tax rates and funding levels adopted by the different districts, this disparity in capacity to raise funds constitutes an obvious inequality in the powers endowed on the residents of the different districts, an inequality which derives directly from the state's creation of distinct school districts and its delegation to those districts of the duty to fund education through local property taxation.

220. Compare Wise, Rich Schools, Poor Schools at 143-58 (cited in note 41) (discussing alternative concepts of equality); Dormont, 11 L. & Ineq. at 263 n.9 (cited in note 216) (similar); Yudof, 51 Texas. L. Rev. at 412 (cited in note 85) (distinguishing three "basic categories" of concepts of equal educational opportunity); Schoettle, 71 Colum L. Rev. at 1369 (cited in note 72) (similar).

221. See, for example, Serrano II, 557 P.2d at 944 (invalidating system because it conditions "the availability of school revenues upon district wealth"); Roosevelt Elementary, 977 P.2d at 814-15 (plurality opinion) (holding that local choices of varying funding levels are permissible, so long as funding system established by state is not cause of disparities; Edgewood I, 777 S.W.2d at 397 (stating districts must have equal access to similar revenue at similar levels of tax effort).

222. See, for example, cases cited in note 10.
The reliance on the Equal Protection Clause in the early education finance cases derived much of its attraction from the apparent analogy to the “one person, one vote” cases,223 and it is this measure of disparity, the capacity to fund education, which bears the closest analogy to those cases. So, it is hardly surprising that the early round of education finance cases frequently took this measure as its focus.224 The central problem was government-created inequalities in citizen power to provide for education, and not the more multifaceted inequalities in the education actually provided.225 The straightforward solution lay in power-equalization systems, which respected the interest in local control by leaving tax effort decisions to the local districts but at the same time ensured similar resources from similar choices.226

The virtue of this approach was that, as with the legislative apportionment cases, it placed the spotlight on an easily quantified inequality, and one that was the direct consequence of state decision-making.227 But its failing was that inequalities in access to funding do not translate directly into inequalities in education itself.228 In the one person, one vote cases, the numerical disparities in voting power were the end of the story. Once the differential in votes required to elect a representative was corrected, the demands of equality were

223. See note 86 and accompanying text.


225. This focus, which was cogently articulated and defended in Coons, Clune, and Sugarman, Private Wealth (cited in note 29), may help explain the paucity of data in the early cases concerning differences in educational services provided or in educational outcomes achieved. See, for example, Milliken II, 212 N.W.2d at 719 (concurring opinion); Kinneer, 530 P.2d at 186 (plurality opinion), overruled by Seattle School Dist. No. 1, 586 P.2d 71. See also Horton, 24 Conn. L. Rev. at 707-09 (cited in note 114) (describing litigation strategy in Horton I, 376 A.2d 359).

226. See, for example, Van Dusartz, 334 F. Supp. at 876-77 (stating that the fiscal neutrality principle allows local choice and effort in adopting a school financing system); Coons, Clune, and Sugarman, Private Wealth at 202-03; Briffault, 90 Colum. L. Rev. at 61 n.264 (cited in note 219) (describing local autonomy as dominant feature of power equalization approach).

227. See, for example, Parker, 344 F. Supp. at 1075 (stating variations in resources result from “[s]tate and not merely private action”); Van Dusartz, 334 F. Supp. at 875 (stating that variations are state created); Rodriguez, 337 F. Supp. at 281 n.1 (quoting Van Dusartz), rev'd 411 U.S. 1 (1973). See also Elmore and McLaughlin, Reform and Retrenchment at 41-42 (cited in note 97) (describing strategic considerations leading Serrano plaintiffs to focus on this model).

228. See, for example, Milliken II, 212 N.W.2d at 716 (concurring opinion).
The case of education, however, is not as simple: Equalizing tax capacity does not by itself equalize education. The educationally relevant disparities reflect not only the tax base inequalities, but local political and administrative choices as well, not to mention the impact of preexisting differences in the students and their milieus.

A second measure of inequality, which tries to move a step closer to concrete educational impacts while retaining a close connection to the underlying differences in taxing capacity, focuses on disparities in the actual funding provided for schools in the different districts. This measure retains the virtue of easy quantification. Moreover, compelling statistical evidence is typically available to link discrepancies in expenditure levels with underlying differences in property wealth. This measure has the additional virtue of focusing on a factor which is widely (although by no means universally) regarded as a significant indicator of the relative quality of education delivered in different school systems. Parents, analysts, and poli-

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229. Two caveats are necessary here: First, even in the context of legislative apportionment, exact numerical equality is neither achievable nor required, see Reynolds v. Sims, 377 U.S. 533, 577 (1964), but this fact does not undermine the simplicity of the goal; it only sets limits on its achievement. Second, and more problematic, when attention is turned to the practical ability of particular groups of voters to exercise the franchise effectively, issues of group representation and vote dilution reveal that the simple one-person, one-vote model does not resolve all questions of voting equality. See generally Johnson v. De Grandy, 114 S. Ct. 2647 (1994); Lani Guinier, Regulating the Electoral Process: Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes, 71 Tex. L. Rev. 1589 (1993). Indeed, equality in this realm may ultimately prove as elusive a concept as equality of educational opportunity, although its elusiveness lies further beneath the surface.

230. See, for example, Serrano II, 557 P.2d at 966 (Clark, J., dissenting) (discussing flaws of power equalization); Clune, 24 Conn. L. Rev. at 728-29 (cited in note 123). Consider for example the situation of Seattle, a relatively property-rich community whose school funding was low because of the voters' refusal to support school taxes. Seattle School Dist. No. 1, 558 P.2d at 77-78.

231. See, for example, Elmore and McLaughlin, Reform and Retrenchment at 42-44 (cited in note 97); Levin, 38 L. & Contemp. Probs. at 294 (cited in note 97) (stating equalization of capacity does not help many central cities with relatively high property values and high per pupil costs); Long, 8 Clearinghouse Rev. at 334 (cited in note 127) (similar).

232. See, for example, Dupree, 651 S.W.2d at 92; Skeen, 505 N.W.2d at 308; Herschler, 606 P.2d at 334; Sweetwater County Planning Comm. v. Hinkle, 491 P.2d 1234, 1237-38 (Wyo. 1971); Yudof, 61 Texas L. Rev. at 476-77 (cited in note 85); Wise, Rich Schools, Poor Schools at 159 (cited in note 41).

233. See, for example, Rodriguez, 411 U.S. at 15-16, n.38; Lujan, 649 P.2d at 1038, 1042-44 (Lohr, J., dissenting); Abbott I, 575 A.2d at 381-82; Sweetwater County Planning Comm., 491 P.2d at 1240-42.

234. We will return below to the empirical dispute about the correlation, or lack thereof, between expenditure levels and educational outcomes, and its recurrent prominence in the education funding cases. See text accompanying notes 247-50.

cymakers commonly look to per student expenditure levels as a shorthand measure for interdistrict comparisons, so evidence of substantial spending disparities creates a ready presumption of significant educational inequalities.

At the same time, the expenditure measure of inequality finds itself in an uncomfortable no man's land, between the simplicity of property wealth variations and the significance of substantive educational differences. On the one side, actual expenditures are cut off from the extrinsically determined facts of tax capacity by intervening local political decisions about how heavily to tax. Thus, attacks on spending disparities are susceptible to responses appealing to the importance (or at least the legitimacy) of local political autonomy in ways that attacks on tax-capacity disparities are not. Approaches that merely seek power equalization can legitimately claim that they further the cause of local control, while approaches seeking uniform spending levels cannot.

On the other side, disparities in spending are cut off from differences in concrete educational consequences by the wide range of other factors that determine the quality of schooling. Equal expenditures may fail to produce equal schools because of variations, for example, in efficiency of administration, in resource allocation decisions, or in the demands placed on the schools by their different student populations. Thus, arguments that focus on equalization of funding repeatedly run up against the response that funding differences are not the cause of quality differences, and that equal spending is neither necessary nor sufficient to assure equal educational opportunity.

236. See, for example, Kozol, Savage Inequalities at 120-21 (cited in note 7).
237. See, for example, Roosevelt Elementary, 877 P.2d at 809 (plurality opinion); id. at 825 (Moeller, J., dissenting); Skeen, 505 N.W.2d at 315.
238. See Clune, 24 Conn. L. Rev. at 730-31 (cited in note 123) (stating "power equalization" is the "fiscally neutral system least restrictive of local control" whereas the "redistributive remedy" results in the loss of local control); Yudof, 51 Texas L. Rev. at 485 (cited in note 85) (stating that the "principle strength" of the equalized capacity approach "lies in its consistency with a truly expansive notion of local control"). Compare Serrano I, 487 P.2d at 1260 (stating that the equalization of capacity is necessary to give substance to local control) with Serrano II, 557 P.2d at 967 (Clark, J., dissenting) (decrying loss of local control from equalization of spending).
239. See, for example, Mclnnis, 293 F. Supp. at 335-36 (discussing split between dollar expenditures and educational needs); Danson, 399 A.2d at 366; Serrano II, 557 P.2d at 964 n.3 (Clark, J., dissenting); Hanushek, 28 Harv. J. Leg. at 425 (cited in note 95) (finding no systematic relationship between school expenditures and student performance); Iver Petersen, Where Money Is Not Issue But Administration Is Seen as a Problem, N.Y. Times 24 (July 23, 1994) (discussing failings of Newark, New Jersey school system despite spending of $11,800 per student, equivalent to spending of best suburban districts).
240. See, for example, Rodriguez, 411 U.S. at 42-45 and n.86 (discussing the controversy over the correlation between educational expenditures and the quality of education); Thompson,
This suggests a third candidate for measuring equality, the actual caliber of the educational services available to a district's children. If the goal truly is equal educational opportunity, then comparisons of school facilities, class sizes, teacher qualifications, and the like are more significant than simple disparities in dollars spent. Especially in some of the more recent lawsuits, detailed comparisons between the facilities and services available in typical rich and poor school systems have constituted key evidence before the courts.

There is little room for question that wide disparities in the facilities, equipment, and professional staff in different districts amount to significant inequalities in the education their children receive. But in turning away from comparisons of simple quantities like property wealth or per pupil expenditures, this qualitative measure of equality runs into new difficulties.

For one thing, it further separates the identified problem—unequal schooling—from the challenged governmental decision—district-based funding of schools. The connection between the two is now mediated, not only by political decisions about how heavily to tax, but also by administrative judgments (and skill) in using the resources that are made available. Equalizing tax capacity, or even equalizing revenue, does not guarantee equalization of educational facilities or services. Yet, any remedy that would more directly attack the identified problem—some form of state-level determination of a uniform level of services to be provided by all districts—would

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537 P.2d at 641-42; Abbott I, 575 A.2d at 393, 403-04; Herschler, 606 P.2d at 336 (suggesting that “a flat rate per student distribution . . . may generate a constitutionally offensive classification”). See also text accompanying notes 247-50.

241. See, for example, Danson, 399 A.2d at 365 and n.10 (alleging denial of a “normal program of educational services” commensurate with programs in other districts, despite relatively high spending by district).

242. See, for example, Abbott I, 575 A.2d at 395-400 (comparing the availability of computers, science labs, foreign language, music, art, industrial arts, and physical education programs); McDuffy, 615 N.E.2d at 520-21, 553 (comparing class sizes, building conditions, administration, quality of teachers, advanced courses, science facilities, reading and writing programs, and teacher training); Bismarck Public School Dist. No. 1, 511 N.W.2d at 253, 261-62 (comparing class sizes, text books, equipment, physical education programs, science labs, libraries, counselors, librarians, building conditions, art, music, and foreign language programs).

243. See, for example, Butt v. State, 842 P.2d 1240 (discussed at text accompanying notes 62-64); Abbott II, 643 A.2d at 578-79 (expressing concerns about effective use of additional funds made available to poor districts); Peterson, N.Y. Times at 24 (cited in note 239) (discussing the failures of Newark, New Jersey schools despite high level of funding).
represent a more radical intrusion on school district autonomy than most courts or legislatures are likely to countenance.\(^{244}\)

In addition, this third standard of equality opens the door to endless empirical debate about how to measure and compare levels of services.\(^{245}\) Among the manifold measurable features of a school system's programs and facilities, which are the right ones to evaluate and how are different factors to be weighted? Does smaller class size, for example, compensate for lower levels of teacher salaries or training? The supposed simplicity and certainty of the concept of inequality threatens to be overwhelmed by substantive controversies about educational efficacy, controversies with which both courts and legislatures are justifiably uncomfortable.\(^{246}\)

At the same time, it is not clear that even this third standard of equality goes far enough. After all, even identical services and facilities will not afford an equal educational opportunity to students who come to school with sharply different needs and abilities. In fact, an important body of educational research, growing out of the 1966 Coleman Report,\(^{247}\) has suggested that school spending levels and school resources are at best weakly correlated with academic achievement levels. Although the empirical debate on these questions is far from settled,\(^{248}\) one well-represented side in this so-called cost-quality debate argues that equalization of school resources can be expected to do little to overcome the disparities in students' capabilities that result from stubborn differences in their environments and in the capacities with which they arrive at school.\(^{249}\)

\(^{244}\) Concerns about such intrusions may help to explain the Butt court's careful under-scoring of the narrowness of its decision. See Butt, 842 P.2d at 1255-56. See also Abbott II, 643 A.2d at 579 (expressly leaving issues of monitoring of spending to political branches).

\(^{245}\) See Clune, 24 Conn. L. Rev. at 737 (cited in note 123); Yudof, 51 Tex. L. Rev. at 475-76 (cited in note 85).

\(^{246}\) See, for example, Lujan, 849 P.2d at 1018; McDaniel v. Thomas, 285 S.E.2d at 165. The recent history of education reform in Massachusetts provides a comparable example of legislative discomfort about dictating answers to questions of educational efficacy. Despite urgings by advocates and despite the inclusion in preliminary legislative drafts of language mandating levels of spending on such priorities as professional development, the final legislation emphasized the complete autonomy of local school officials in allocating education funds. See Mass. Gen. Laws Ann., ch.70, § 8 (enacted by 1993 Mass. Acts ch. 71, § 92) (West, Supp. 1994).


\(^{249}\) See, for example, Clune, 24 Conn. L. Rev. at 724-27 (cited in note 123) and sources cited therein (finding that "[t]he heavy influence of student and family inputs on achievement... is now accepted as obvious").
LEAVING EQUALITY BEHIND

But, if equalizing resources cannot be expected to better the relative achievement levels of students in the less well-endowed schools, why should a court (or a legislature) feel impelled to overturn the entrenched system of unequal funding?250

Here, we come to a fourth possible measure of equality, one located at the opposite pole from the tax-capacity measure with which we began. This fourth measure looks to the ultimate outcomes delivered by the educational system and asks whether children in different districts are equally well educated by their schools and equally well prepared to participate in the workplace, in higher education, and in the democratic process.251 Or, phrased in a slightly less extreme version, which allows for variations in individual capacity that the schools cannot (or need not?) redress, do different districts afford all children an equal opportunity to develop their full potential?252 In both courts and legislatures, the interest in equalizing outcomes, not merely inputs, has led to an increased sensitivity to the differing needs of different student populations.253

250. See, for example, Rodriguez, 411 U.S. at 23-24, n. 56; Serrano II, 557 P.2d at 964 n.3 (Clark, J., dissenting); Lujan, 649 P.2d at 1018; Milliken II, 212 N.W.2d at 719-20 (concurring opinion); Kannear, 530 P.2d at 191 (plurality opinion), overruled by Seattle School Dist. No. 1, 585 P.2d 71. For an example of an effort to use similar concerns to derail reform in the political arena, see Stephen Chapman, *School Finance Reform: Irrelevant Remedy*, Chicago Tribune 27 (Oct. 15, 1993) (arguing against proposed Illinois constitutional amendment directed toward equalization of funding).

251. See, for example, Abbott I, 575 A.2d at 384, 402-03; Kukor, 436 N.W.2d at 575-78, 580; David Kirp, *The Poor, the Schools, and Equal Protection*, 38 Harv. Educ. Rev. 635, 636 (1968).

252. See, for example, Helena Elem. School Dist. No. 1, 769 P.2d at 689 (observing that Montana Const., Art. X, § 1, mandates an educational system that "will develop the full educational potential of each person"); Kukor, 436 N.W.2d at 573; Kozol, *Savage Inequalities* at 54 (cited in note 7); Underwood and Verstegen, eds., *The Impacts of Litigation and Legislation on Public School Finance* at iv (cited in note 59). Compare La. Const., Art. VIII, Preamble (mandating school system in which "every individual may be afforded an equal opportunity to develop to his full potential").

253. In the education finance literature, the distinction between this approach and the previous ones is sometimes flagged as the distinction between "mere equality" and true "equity." See, for example, Underwood and Sparkman, 14 Harv. J. L. & Pub. Pol. at 517-18 & nn.1-2 (cited in note 24), and sources cited therein; Horowitz, 13 UCLA L. Rev. at 1148, 1166-68 (cited in note 81). For a forceful example of the argument for recognition of the greater educational needs of poorer districts and their resultant entitlement to greater resources, see Abbott I, 575 A.2d at 400-03. See also Kimberly J. McLarin, *Paying for New Jersey's Schools: The Impact*, N.Y. Times B6 (July 13, 1994) (noting "national trend toward assuring that pupils in poor districts receive not just the same money . . . but also [an] equitable educational opportunity, though it invariably costs more"). In response to these concerns, many states have included provisions in their funding systems that provide supplemental resources for disadvantaged children. See, for example, Robinson, 287 A.2d at 206-08 (describing provisions in New Jersey's
In one sense, this fourth standard is the fundamental one. To the extent that this sort of equality is achieved, inequalities in the other measures are cause for little concern. Conversely, to the extent that reforms do not further this sort of equality, any equalization they may achieve along the other dimensions is of questionable value.

And yet, this standard is, in other respects, the most problematic. Measurements of outcomes are, at best, deeply uncertain, depending on subjective judgments about what education should, and can, achieve. Moreover, this standard places a central focus on differences for which the schools and the school financing system are not causally responsible, but which they are nonetheless asked to rectify. This demand is far more ambitious than the simple expectation that government not create inequalities, and has far less self-evident constitutional or political force.

Each of these four measures of equality has some palpable significance, and each has played a role in the recent debates about educational funding. The problem is that no one of them can fully


254. This was essentially the argument of the New Jersey Commissioner of Education in Abbott I, 575 A.2d at 404-05, where it was claimed that children in the poor urban districts would derive maximum possible benefit from an “effective schools” program that was less expensive than the enriched education appropriate in the wealthier suburban districts. The court rejected the argument because its factual premise concerning the educational needs of urban children was unproven, but it did not reject the focus on children’s differing educational needs. Id. at 405.

255. See Schoettle, 71 Colum. L. Rev. at 1387-88 (cited in note 72).

256. See, for example, Yudof, 51 Tex. L. Rev. at 419-34 (cited in note 85) (criticizing use of “outcome equity” as a judicial standard). Compare Horton, 24 Conn. L. Rev. at 709 (cited in note 114) (explaining that plaintiffs in Horton I, 376 A.2d 359, “decided to keep it simple by focusing solely on inputs and ignoring outputs entirely”).

257. See, for example, Rodriguez, 411 U.S. at 84 (Marshall, J., dissenting) (stating that “[t]he question . . . must be deemed to be an objective one that looks to what the States provides its children, not to what the children are able to do with what they receive”); McInnis, 283 F. Supp. at 329 n.4 (stating that educational need is a “nebulous concept”); Rodriguez, 337 F. Supp. at 283 (observing that focus on educational need would draw court into “the type of endless research and evaluation for which the judiciary is ill-suited”), rev’d, 411 U.S. 1 (1973); McUsic, 28 Harv. J. Leg. at 331 (cited in note 18) (stating that “measuring equality of output is impossible without a method of quantifying all aspects of education, and such a method does not yet exist”).

258. In addition to the four possible measures of equality discussed here, the cases and literature also reflect another cluster of standards which travel under the flag of equality and which look at the same range of dimensions—tax capacity, revenues, educational services, and student outcomes—but from a different perspective. This second cluster of measures looks not at the total magnitudes of the various possible quantities but instead at whether the magnitudes—of tax capacity or of resources or of outcomes—uniformly reach some acceptable floor level. See, for example, Robinson I, 303 A.2d at 294-95; Roosevelt Elementary, 877 P.2d at 819.
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capture the intuitive appeal of the call for equality in education. Measures at the fiscal capacity end of the spectrum lack a close connection to demonstrable educational consequences that discriminate between children. Measures at the educational accomplishment end of the spectrum lack a direct link to the easily quantified, governmentally created distinctions that invite equal protection scrutiny. Finally, efforts to link several of these measures together into a single argument confront thorny problems of proof in trying to establish close empirical connections between the different dimensions of variation.

The difficulties arising from the multiplicity of competing equality standards emerge in the school finance cases in several different forms. In case after case dating back at least to Rodriguez, challenges that have focused on dollar disparities, whether in tax capacity or in actual expenditures, have been attacked for their failure to tie the clear financial variations to significant educational differences. At the same time, challenges that have focused instead on concrete educational differences have suffered from judicial reluctance to hold states responsible for disparities whose causes are far more complex than the tax-capacity variations that result from state policy. Likewise, they have stumbled on the absence of generally accepted yardsticks for measuring educational performance and the resultant judicial reluctance to place great weight on difficult factual determinations extending far beyond the courts' professional expertise.

The plethora of perspectives and the complexity of the empirical connections among them have invited courts to depict the issue of

(Feldman, C.J., specially concurring) (advocating “an equal opportunity for each child to obtain the basic, minimum education that the state would prescribe”); Skeen, 505 N.W.2d at 315; Wise, Rich Schools, Poor Schools at 149-51 (cited in note 41) (discussing a “foundation” and a “minimum-attainment” definition of equality of educational opportunity). In fact, these are not really equality measures at all, but adequacy measures cloaked in the language of equality. The frequency with which they appear within the equality framework is further evidence both of the tenacity of equality's rhetorical grip on the education funding controversy and of the difficulties attendant upon the arguments for any of the measures of true equality. 259. See cases cited in note 250.

260. See, for example, Nyquist, 439 N.E.2d at 365 (finding inequalities result from demographic, economic, and political factors); Kukor, 436 N.W.2d at 580 (stating variations in expenditures result from local level decisions). The recurrent defenses of the legitimate state interest in local control are a variant on this theme. The essence of the local control argument is that it is not state policy decisions, but rather local choices, that account for interdistrict variations in spending, programs, and outcomes. See Nyquist, 439 N.E.2d at 366-67.

261. See, for example, Helena Elem. School Dist. No. 1, 789 P.2d at 690 (finding evidence on output measurements to be unconvincing); Thompson, 537 P.2d at 640-43 (stating that conclusions regarding school financing are “controversial, sketchy, and incomplete”).
educational equality as better suited to legislative policy debates than to hard-and-fast judicial dictates. But, in fact, the same complexities have posed comparable problems for legislative efforts to grapple with issues of educational equality.

Legislative solutions which have focused on disparities of tax capacity have proven inadequate, because local political choices, often influenced by problems of municipal overburden, have maintained the massive disparities in spending. Even where states have sought directly to equalize the available funds, differences in efficiency of service delivery and disparities in student needs have preserved wide variations in the education students can receive. At the same time, efforts to measure districts' financial needs, and the resultant state financial support required, in ways that take account of specific student needs have invited difficult empirical and, ultimately, political debates. Should high proportions of children from AFDC families, for instance, entitle their districts to extra aid, or will that simply pour more money into dysfunctional schools? Additionally, proposals to equalize the services provided by different school districts have encountered strong resistance to the resultant intrusions on traditional district autonomy. As a result, most states that have purported to enact equalization plans have, in fact, preserved substantial opportunity for districts (that is to say, the wealthier districts) to supplement the standard service or spending levels from their own resources.

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 disadvantaged children on a par with those of their better-off peers. The result has been increasing disenchantment with the goal of providing equal

262. See, for example, *Lujan*, 649 P.2d at 1018; *Milliken II*, 212 N.W.2d at 719-20 (concurring opinion). Compare Yudof, 51 Tex. L. Rev. at 413 (cited in note 85) (arguing that functional limitations of courts dictate that they focus on equality of resources, not of outcomes).

263. See, for example, Elmore and McLaughlin, *Reform and Retrenchment* at 44-45, 84-88, 130-31 (cited in note 97).

264. See, for example, *Abbott I*, 575 A.2d at 393-94 (detailing municipal overburden and the failures of the New Jersey power-equalization approach).

265. See discussion of *Butt*, 842 F.2d 1240, at text accompanying notes 62-64; *Serrano III*, 226 Cal. Rptr. at 619 (describing effects of equalization on California's urban school districts); Petersen, N.Y. Times at 24 (cited in note 239) (discussing failures of the Newark, New Jersey schools despite available funds).

266. See, for example, *Edgewood II*, 804 S.W.2d at 495-98 (describing and invalidating partial equalization plan enacted in response to *Edgewood I*; Nauss, L.A. Times at A25 (cited in note 39) (describing opportunity for local supplementation in Michigan's legislative reform).
educational opportunity through equally supported public schools, disenchantment that increasingly has taken the form of support for radically different approaches to educational opportunity, particularly approaches relying on vouchers or other mechanisms for parental choice.267

B. Normativity

At the same time that appeals to equality have been weakened by confusion about what equality properly means in the context of public education, such appeals have also suffered from recurrent doubts about whether equality—whatever its precise measure—is an appropriate norm to apply to government's provision of a service like education.268 While the demand for equal treatment by government has a powerful initial allure, the concrete application of that demand to education has proven deeply threatening to other powerful societal values. The consequence has been fierce resistance to demands for educational equality in both judicial and legislative fora, resistance that has not only limited the scope of educational finance reforms, but that also threatens to erode equality's normative appeal in contexts beyond education.

Equality arguments are most immediately threatening to the wealthier school districts, which provide their children with an education far superior to what the poorer districts can afford, and to the families who benefit directly from the superior education (as well as to the other property owners in such districts, who benefit indirectly

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267. See generally John E. Coons and Stephen Sugarman, Education by Choice: The Case for Family Control (U. of Cal., 1978); John E. Chubb and Terry M. Moe, Politics, Markets, and America's Schools (Brookings Inst., 1990); Wendy E. Parmet and Peter Enrich, Health and Education: A Tale of Two Crises, 22 J. L. Med. & Eth. 63, 57-58 (1994). In one sense, voucher proposals bear a close affinity to arguments for equalization, particularly for equalization of spending. A voucher plan, after all, gives each child an equal pool of government resources with which to acquire educational services in the marketplace. In practical effect, however, voucher plans are likely to intensify inequalities in a number of ways. First, they divert resources from poor school systems to private systems and better-off public systems, at the same time that many families will lack the capacities to avail themselves of the opportunities to escape the poor systems. Second, voucher systems typically allow—and implicitly encourage—families to supplement the vouchers with their own resources in order to purchase premium services, thus producing a tiered system in which children from wealthier families will have access to better services. Third, voucher systems are typically not designed to take account of the greater, and more costly, needs that many children from impoverished backgrounds bring to the schools.

268. See, for example, Serrano II, 557 P.2d at 967 (Clark, J., dissenting) (finding financial equality will have severe consequences on educational system); Britt v. North Carolina State Bd. of Educ., 86 N.C. App. 282, 357 S.E.2d 432, 436 (1987).
from the resultant higher property values). It is little wonder that, although they are not ordinarily defendants in finance reform lawsuits, because they are not the ones whose actions have injured the poorer districts, wealthier districts have frequently intervened or filed amicus briefs on the side of the defenders of the status quo.

The threats to the wealthy districts are multiple. First, a significant fear exists that equality would be achieved by restricting the resources or the services offered by such districts. The alternative of bringing all districts up to the spending or service level of the top districts would be prohibitively expensive in most states. So, if equality really requires that all districts have comparable tax capacity, or resources, or services, the only plausible path to equality involves restrictions on the capacity or spending or services in the wealthier districts.

Second, equality, to the extent that it is achieved by improving the lot of the poorer districts, is likely to be disproportionately paid for by the wealthier districts or their residents. If the problem is that the richer districts have greater available resources (and are making use of them), the solution will typically require them to make some of their resources available to the other districts. Such transfers can be achieved through structures that explicitly divert a portion of the property-tax base, or a portion of its yield, from richer districts to poorer. Or they can be accomplished through state-level taxation, collected on a uniform statewide basis (though typically with the

269. See Clune, 24 Conn. L. Rev. at 721, 730-31 (cited in note 123) (discussing the impact of equalization on the wealthier districts).

270. See, for example, Parker v. Mandel, 344 F. Supp. at 1070 & n.3; Lujan, 649 P.2d at 1010; Serrano II, 557 P.2d at 931 & n.3; Sheen, 505 N.W.2d at 301; Nyquist, 439 N.E.2d at 367. Compare Edgewood III, 826 S.W.2d at 493 (intervening wealthy districts emerge as primary litigants opposing tax-base sharing plan). See also Elmore and McLaughlin, Reform and Retrenchment at 77 (cited in note 97) (discussing the role of wealthy districts in legislative process in California).

271. See, for example, Rodriguez, 411 U.S. at 56-58 & n.111; Horton I, 376 A.2d at 375-76; Nyquist, 439 N.E.2d at 367; Edgewood II, 804 S.W.2d at 495-96 (stating that the “cost of equalizing all districts to the revenue levels attainable by the richest districts would be approximately four times the annual cost of operating the entire state government”). See also discussion at note 274 of anticipated costs of reforms in New Jersey; James Gordon Ward, Reforming the Illinois School Finance System: Legal and Political Realities in 1990, in Robert F. Hall and Bonnie Smith, eds., Financing Illinois Schools in the 1990's: Reaching a Consensus 49, 56 (Illinois Inst. for Rural Affairs, 1990) (estimating the cost of leveling-up in Illinois at $1.25 billion to $1.75 billion).

272. See, for example, Serrano II, 557 P.2d at 966 (Clark, J., dissenting); Abbott I, 575 A.2d at 366. Such fears are not ungrounded, as the experiences of California, see discussion at text accompanying notes 56-59, and New Jersey, see discussion at note 274, demonstrate.

heaviest per capita incidence on the wealthier residents of the wealthier communities but distributed predominantly to the poorer districts. Whatever the mechanism, such devices are commonly lumped together under the epithet of “Robin Hood schemes,” because they expropriate the resources of the wealthy districts for the benefit of the less well off.

Third, to the extent that the financial resources of districts are equalized, the wealthier districts lose their accustomed ability to procure the best educational services for their children. This loss is particularly evident in the competition for the best teachers and other professional staff. The wealthier districts have long been able to attract the most talented and best trained staff by offering superior salaries, working conditions (especially class size), and benefits. But this competitive advantage depends largely on superior financial resources; without that edge, many of the best teachers might instead...

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274. See, for example, State ex rel. Woodahl v. Straub, 164 Mont. 141, 520 P.2d 776, 780 (1974) (approving statewide property tax for education funding); Hinkle, 491 P.2d at 1237-38 (proposing statewide property tax).

The cost of equalization, and the resultant need for tax revenues, can be staggering. Perhaps the best example of the political ramifications of such a strategy can be found in New Jersey's response to the *Abbott I* decision. To satisfy the court's demands, the governor and legislature promptly passed a major restructuring of education finance, funded by a $2.8 billion package of tax increases. The ensuing political furor, which resulted in a dramatic and speedy retreat from the fiscal restructuring and a diversion of much of the new revenue into property tax relief, swept a veto-proof Republican majority into both houses of the legislature in 1991 and subsequently played a key role in Governor Florio's reelection defeat in 1993. See Sullivan, N.Y. Times at A1 (cited in note 8). The substituted approach, which assigned a central role to limitations on spending by the wealthier districts, made only limited progress toward equalization, while raising deep resentments. See Kleinfield, N.Y. Times at 24 (cited in note 218). Subsequent to the 1993 elections, New Jersey has retreated further from its equalization goals, see Hanley, N.Y. Times at 25-26 (cited in note 6), and the resulting financing system was recently found inadequate by the state supreme court to meet the state's constitutional obligations to the poorer districts, see *Abbott II*, 643 A.2d at 578-79. Satisfying the state's obligations to bring the thirty poor urban "special needs" districts, on which the litigation focused, up to the funding level of the high spending suburban districts has been estimated to require an additional $450 to $625 million of state funds. See Charles M. Costenbader, *School Funding Law Held Unconstitutional*, 7 St. Tax Notes 142 (July 18, 1994).

Courts in several states, in declining to find existing systems unconstitutional, have expressed sensitivity to these extraordinary financial, and hence political, implications of a requirement of equalization. See, for example, *McInnis*, 393 F. Supp. at 336 & n.38; *Nyquist*, 439 N.E.2d at 366-67; *Walter*, 390 N.E.2d at 819.

275. See, for example, *Serrano II*, 557 P.2d at 965 (Clark, J., dissenting) (stating that when actual impacts of equalization are understood, "Robin Hood loses his disguise, and we find the Sheriff of Nottingham"); Verhovek, N.Y. Times at A12 (cited in note 218) (describing overwhelming electoral defeat of tax redistribution plan "which anti-tax groups derisively labelled 'the Robin Hood plan").

be drawn to schools offering broader diversity, greater challenges, and an enhanced sense of social benefit.

Finally, and perhaps most significantly, equalization of educational opportunity threatens the wealthy districts' ability to give their children an advantage in the competition for post-school opportunities. Even if the quality of the wealthy schools were undiminished and their resources remained intact, if other schools offered educations of comparable quality, the children of the wealthy districts would no longer have as much of an inside track to the highest test scores, the best colleges, and ultimately the brightest economic prospects. To parents who prize their own economic and social success and who care passionately about their children's futures, preserving their schools' superiority, and not merely their excellence, is of vital importance. Such parents don't want their children to have to compete on even terms, although they are generally too savvy to say so. And they are prepared to spend their money (and their neighbors') to ensure a competitive edge for their children.

Taken together, these concerns help explain the intense resistance that has confronted legislative equalization efforts. While the wealthy districts do not typically command legislative majorities, they tend to be articulate and influential participants in state legislative processes. In many states, the response has been an early acknowledgment that reforms should not attempt to constrain rich districts from using their wealth to spend beyond the means of the other districts. And, in those states (for instance, Texas and New Jersey) where judicial decisions have mandated true equalization, the legislative response has commonly been excruciatingly reluctant.

Not surprisingly, the opponents of equalization have not focused their arguments on preservation of the privileges of the

277. Jonathan Kozol does a superb job of articulating this parental perspective and its powerful force in the education finance debates, in Kozol, Savage Inequalities at 199-200, 206-07 (cited in note 7). See also id. at 105 (reporting similar observations expressed by children in a poor urban school).

278. See Note, 104 Harv. L. Rev. at 1078-79 (cited in note 218).


280. See note 218.
wealthy.\textsuperscript{281} Instead they have turned to arguments and concerns with a broader (if no less self-serving) appeal, particularly with an appeal to middle and working class families living outside of the poor urban centers. One powerful theme, in this era of anti-tax sentiment, looks to the immense costs that equalization would impose on the states, and ultimately on state taxpayers. The references to Robin Hood, after all, derive much of their power from the imagery of theft.

Likewise, the opponents of equalization have gravitated, again and again in both legislative and judicial contexts, to the rhetoric of local control.\textsuperscript{282} The defense of local control serves to give voice to all of the concerns discussed above. Local control empowers districts, if they have the means and the desire, to choose to provide excellent public schools for their children. It ensures that a community’s resources are not siphoned away to benefit other communities. And it invites communities to compete for the quality of the education they will provide and to reap the benefits of their willingness to commit resources to that competition.

The argument for local control has the great virtue of framing these concerns in an apparently neutral manner. Local control over local resources gives all districts, not merely the wealthy ones, the power to decide how heavily to spend on schools. And it guarantees to all districts, whatever their wealth, that local resources are spent to benefit local children. The fact that these universal attributes of local control have radically different implications for differently situated

\textsuperscript{281}. Of course, on occasion, these concerns do see the light of day. Legislative opposition to the Texas plan to limit spending in wealthy districts rested in part on claims that Texas’ children—that is to say, the children of the wealthy districts—“are going to be dumbed down.” Verhovek, N.Y. Times § 4 at 3 (cited in note 37) (quoting State Senator John N. Leedom). See also Kinnear, 530 P.2d at 186-87 (plurality opinion) (expressing concern that equalization would convert “the lowest common denominator... into the highest common denominator”), overruled by Seattle School Dist. No. 1, 585 P.2d 71.

\textsuperscript{282}. See McUsic, 28 Harv. J. Leg. at 328 (cited in note 18) (stating that “some variation of the local control rationale has been used by every state court that has refused to invalidate a school spending regime on equity grounds”). As the Rodriguez Court observed, state policymakers have given great weight to “the vital element of local participation” in addressing “[t]he continual struggle between two forces: The desire... to have educational opportunity for all children, and the desire of each family to provide the best education it can for its own children.” 411 U.S. at 48-49, quoting James Coleman, Foreword to George Strayer and Robert Haig, The Financing of Education in the State of New York (Macmillan, 1923). See also Elmore and McLaughlin, Reform and Retrenchment at 90-91 (cited in note 97) (describing impact of local control concerns on legislative efforts in California). For a thoughtfully skeptical discussion of the role of local control arguments in the school finance cases, see generally Richard Briffault, The Role of Local Control in School Finance Reform, 24 Conn. L. Rev. 773 (1992).
districts does not strip the structure of its formal neutrality, making it an ideal guise for the defense of privilege.\footnote{283}

Arguments for local control have the added virtue of evoking several other powerful currents of our political and legal value system. The imagery of local control paints the contrast between local school district and state in a manner reminiscent of the familiar contrasts between individual and government, and between private and public.\footnote{284} Preserving local fiscal autonomy against state domination is akin to protecting individual control over one’s person and over the use of one’s private property against governmental constraint. In each case, what is at stake is depicted as the freedom to deploy one’s own resources for one’s own purposes and benefit.\footnote{285}

Similarly, the prospect of state-level constraints on local fiscal control raises the fear that local autonomy over substantive educational decisions will be displaced by the dictates of a distant and faceless bureaucracy.\footnote{286} The connection between state-imposed fiscal equalization and state control over curriculum and other matters of educational policy is admittedly a contingent one. Nonetheless, the issue touches a sensitive nerve. Parents have an intimate and powerful interest in what, and in how, their children are taught, and even a possibility of reduced control raises deep concerns.

Equality of education, then, turns out to be in direct conflict with a cluster of other potent interests, such as preserving control over (and in preserving the value of) one’s pocketbook and securing the welfare of one’s children. These countervailing interests clothe

\footnote{283. Indeed, one of the most characteristic differences between the cases rejecting equality-based challenges to local school financing systems and the cases endorsing such challenges is that the former emphasize the power such systems confer on local decision making while the latter focus on the illusory character of such power for many districts. Compare, for example, \textit{Rodriguez}, 411 U.S. at 49-51 and \textit{Lujan}, 649 F.2d at 1023 with, for example, \textit{Serrano I}, 487 P.2d at 1260 and \textit{Lujan}, 649 P.2d at 1039-40 (Lehr, J., dissenting).


285. See, for example, \textit{Rodriguez}, 411 U.S. at 49-50; \textit{Rodriguez}, 337 F. Supp. at 284 (discussing defendants’ argument that plaintiffs were seeking “socialized education”), rev’d, 411 U.S. 1 (1973); \textit{Nyquist}, 439 N.E.2d at 367 (expressing interest in “giving citizens direct and meaningful control over the schools that their children attend”); Briffault, 24 Conn. L. Rev. at 785-86 (discussing association of local control with “parents’ rights”). Compare \textit{Roosevelt Elementary}, 877 P.2d at 815 (noting that, without local control, families with resources would “opt out” of the public system).

286. See, for example, \textit{Rodriguez}, 411 U.S. at 51-52 and nn.108-09; \textit{Roosevelt Elementary}, 877 P.2d at 826 (Moeller, J., dissenting); \textit{Board of Educ. v. Walter}, 390 N.E.2d at 820-22 (discussing the historical tension between the interests in local control of education and the state’s interest in insuring all children quality education); \textit{Olsen v. State}, 276 Or. 9, 554 P.2d 136, 146-47 (1976) (discussing the state’s traditional emphasis on local control over services provided by local government); Briffault, 24 Conn. L. Rev. at 794-95, 800-302 (discussing association of local control with “accountability”).}
themselves in a cluster of values—local control, individual autonomy, property rights—that are powerful competitors for equality’s appeal.

Because education touches on matters of such intimate family concern, and because education spending drives such a major portion of state and local taxation, the goal of educational equality poses a substantial threat to these competing values. This tension between competing values undermines equality’s normative force.287 When equality means my community cannot determine what resources to expend on its schools, and when equality means that my control over the quality and character of my children’s education is significantly diminished, then equality may appear to be more of a menace than a goal.288

Equality’s menacing aspect also reveals itself in the frequently expressed fear that, if equality is required in education, its demands will spread inexorably into every area of municipal services and of publicly provided goods.289 Local control over public safety services, trash collection, recreational facilities—and, perhaps more importantly, local autonomy in determining the level of resources to dedicate to these functions—might be placed in jeopardy. And the ability of particular communities to offer housing or health services to their needy citizens might be threatened by the prospect that the state would thereby become obligated to provide comparable services to all those with comparable needs. Concerns of this sort, which focus the tension between equality and local autonomy by magnifying equality’s impacts, have been a centerpiece of the critique of educational equality arguments from the time of Rodriguez290 to the present.291

The recurrence of these slippery-slope concerns in the state constitutional cases is a bit perplexing. State constitutions, after all,
give special priority to the states' responsibility for education, a priority which is confirmed and reinforced by the history of most states' actual involvement in the supervision and financing of the schools. Familiar equal protection theory, developed at the federal level, but readily available for state constitutional interpretation as well, affords a simple method for confining the most intrusive demands of equal treatment to such constitutionally privileged precincts. And, in the case of equality arguments grounded primarily in the education clauses themselves, the unique language of the education clauses should block generalization of the arguments.

Some courts have followed such strategies of limitation, but a surprising number have ignored or dismissed them. The breadth of subjects encompassed in the typical state constitution may account for some of the reluctance. But the hesitancy also reflects a more general anxiety that equality arguments, in the words of the Robinson I court, may prove "unmanageable" when unleashed "in the vast area of human needs." Equality's potential force is too great and its potential impact too profound to warrant reliance on education's special state constitutional status to provide a secure foothold on the slippery slope.

C. Textual Conflicts

The breadth and detail of the coverage of state constitutions also poses another, more direct, problem for equality arguments in

292. See, for example, Skeen, 505 N.W.2d at 313.
293. Particularly surprising in this regard is Shofstall v. Hollins, 515 P.2d at 592, where the court expressly relied on the state's education clause to deem education a fundamental right.
294. See Note, 95 Harv. L. Rev. at 1355-56 (cited in note 14) (noting that state constitutions "in addition to setting out such fundamental matters as the structure of state and local government and the range of protected individual rights, . . . often address in detail such topics as exemptions from state taxation or the provision of state conservation services").
295. See, for example, Hornbeck v. Somerset County Bd. of Ed., 458 A.2d at 785-87; Robinson I, 303 A.2d at 292, 285-86; Olsen, 554 P.2d at 144-45. This breadth of coverage does not, of course, render education constitutionally indistinguishable from the other covered subjects. The education clauses, both by language and by history, commonly have an evident priority over these other provisions, see, for example, Horton I, 376 A.2d at 373-74 (discussing the state's historical emphasis on providing quality education to children); Skeen, 505 N.W.2d at 313 (concluding that the distinctive language of the education clause functions as a constitutional mandate); Pauley v. Kelly, 255 S.E.2d at 884. Courts are regularly in the business of drawing distinctions on grounds narrower than are commonly available here.
296. Robinson I, 303 A.2d at 283.
297. See Kluger, Simple Justice at 770 (cited in note 98) (noting that "[l]urking unspoken in the background of Rodriguez was the profoundly unsettling question of how far government in a capitalist nation dared to venture toward wiping away the advantages of private wealth in order to provide truly equal public services").
the post-Rodriguez world. In particular, many state constitutions contain explicit provisions relating to the establishment and powers of local school districts298 or to the use of local property tax revenues to fund local schools,299 provisions which may be taken to countenance the inequalities that naturally result from local financing of schools.

So long as the demand for equality was grounded in the federal Constitution, any state constitutional provision mandating inequalities would have been trumped by the superior authority of federal law. But when the right to equal treatment itself must be found within the state constitution, the analysis becomes more complex.

Where an apparent tension exists between a state equality provision (whether contained in a general equal protection clause or derived from the language of the state's education clause) and a constitutionally grounded education finance system, the key issue becomes one of accommodation and harmonization of the competing provisions. For a court engaged in seeking the intent behind a constitutional text, it is a familiar and sensible premise that the component parts are not contradictory and are to be construed in a manner which avoids inconsistencies.300 But this standard strategy tends to disfavor abstract and general provisions, provisions which by their nature are open to and in need of judicial interpretation and elaboration, when they compete with more concrete provisions. The natural conclusion is that the more general provision “couldn’t have been intended” to conflict with its more specific competitor.301

Equality arguments are particularly susceptible to these sorts of responses. For one thing, state constitutional guarantees of equal
protection are commonly couched in broad and indefinite terms. Often they do not even speak specifically of "equality," focusing instead on the prohibition of special privileges or the requirement that general laws serve the common good. Such provisions require sensitive judicial interpretation to determine the scope of their application to varying contexts.

At the same time, the standard of equal treatment, once invoked, is a rigid and stringent norm. If equality is required in educational finance, it will demand a funding structure that severely undermines local fiscal autonomy and sharply curtails the role of local property taxation. Thus, there is little room to harmonize equality requirements with provisions mandating local powers and responsibilities, except by finding the equality requirements inapplicable. As a result, where state constitutions expressly provide for fiscally autonomous local school districts or for local property taxation for education, courts have concluded that constitutional guarantees of equal treatment should not be interpreted to require an equalized school financing structure that would infringe upon local autonomy.

Such state constitutional provisions relating to school districts and local taxation have been an obstacle not only to judicial acceptance of educational equality, but to legislative efforts toward equalization as well. In Texas, for example, after a first reform measure was found to fall short of achieving fiscal equality, the state legislature adopted a complex funding system assigning a primary role to consolidated, county-wide school taxing districts, only to see that system invalidated for violating constitutional provisions protecting local control over property taxation. When the legislature responded by proposing a constitutional amendment to authorize modest interdistrict tax-base sharing, the electorate overwhelmingly

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302. See, for example, N. J. Const., Art. I, ¶ 1 (stating that "all persons are by nature free and independent, and have natural and inalienable rights"); Ore. Const., Art. I, ¶ 20 (stating that "no law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not belong to all citizens"). Similarly, the equality mandates found in state education clauses generally derive from such indefinite terms as "efficient," "uniform," or "system." See note 32. But compare McUsic, 28 Harv. J. on Legis. at 520-21 (cited in note 18) (listing examples of specific equality language in education clauses).

303. See, for example, Lujan, 649 P.2d at 1023; Kukor, 493 N.W.2d at 650-51; Britt, 357 S.E.2d at 435-36.

304. Edgewood II, 804 S.W.2d at 493.

305. Edgewood III, 826 S.W.2d at 492-93. Similarly, in Wisconsin, a power-equalization system, which included "negative aid" payments by wealthy districts to subsidize the state's "positive aid" payments to poorer districts, was invalidated on the ground that the resultant local property taxes in the rich districts violated the state constitution's requirement of "uniform" taxation. Buse, 247 N.W.2d at 145.
rejected the change,\textsuperscript{306} compelling the legislature, under a court-ordered deadline, to adopt yet another more byzantine solution, which is currently under further review in the Texas courts.\textsuperscript{307}

Equality arguments, then, despite their obvious attractions, are also subject to serious weaknesses. The profound difficulties of clarifying exactly what equality demands in the context of public education, the threat it poses to other powerful interests and values, and the state constitutional complexities that undermine its textual foundations, all combine to explain why so many state courts have upheld starkly unequal school financing systems against state constitutional challenges. And they also explain why the decisions of courts striking down wealth-based funding systems on equality grounds have so often seemed strained and uncertain.\textsuperscript{308}

Moreover, it is these same vulnerabilities that have repeatedly tripped up state policymakers in their efforts to reform education finance systems. Where the legislative goal has been equality—whether mandated by courts or by conscience—the result has too frequently been frustration and failure. Measures strong enough to address equality's demands have proven too disruptive to survive, while measures modest enough to reach implementation have proven unequal to the task.

Perhaps, then, the time has come for the advocates of a fairer distribution of educational opportunities and resources to leave equality behind. For all its rhetorical attractions and for all its associations with other noble causes, it has not served them well. Instead, it has mired them in conceptual complexities that they need not have confronted, while arousing anxieties they have been unable to quell. Their massive and persistent efforts have produced only meager practical results, and may, ironically, have contributed to an erosion of equality's normative force in American legal and political discourse.

Perhaps instead the focus should shift to arguments for adequacy, arguments for a universal entitlement to educational opportunities that meet accepted societal standards. As we saw above, a

\textsuperscript{306} Verhovek, N.Y. Times at A12 (cited in note 218).


\textsuperscript{308} See, for example, the contortions in the New Jersey court's explications of the requirements of equality, discussed at text accompanying notes 136-71, or the Arkansas court's collage of alternative strands of equal protection analysis, see Dupree, 651 S.W.2d 90, or the Connecticut court's discomfort about how much equality it was requiring, see Horton I, 376 A.2d at 373-75; see also id. at 379 (Loiselle, J., dissenting) (criticizing the court's waffling on this point).
handful of courts have already followed this path, and the results have been reasonably hopeful. While less far-reaching—and hence less threatening—than the demands of equality, such arguments do call for substantial infusions of needed resources to poorer school districts. And though less ringing than the rhetoric of equality, arguments for adequacy may prove comparably compelling, while avoiding some of equality's pitfalls.

VI. IS ADEQUACY EQUAL TO THE TASK?

From the viewpoint of a potential litigant seeking increased state financial support for poor school districts, or from the viewpoint of an advocate seeking such support through a state's legislative process, adequacy arguments offer several significant virtues.

First, such arguments find an explicit and straightforward textual source in the education clauses contained in the constitutions of every state. Unlike state equal protection provisions, the education clauses are unquestionably addressed to the status of the public schools. And, since they are addressed to a single, specific sphere of governmental responsibility, education clauses do not raise the same concerns of spill-over effects—and the resultant delimiting interpretive frameworks—that confront arguments grounded on equal protection clauses.

Moreover, unlike equality arguments, adequacy arguments typically flow directly from these constitutional mandates. The education clauses, in one form or another, direct the states to provide for the education of their young people. Adequacy arguments simply question whether the particular measures adopted by a state suffice to fulfill that directive. Asking a court to enforce, or a legislature to fulfill, the responsibility to provide for or support the state's public schools does not require interpretive heroics or reference to implicit

309. See text accompanying note 16.
310. See, for example, Robinson I, 303 A.2d at 283; Roosevelt Elementary, 877 P.2d at 811 (plurality opinion) (observing that by focusing on the specific education clause in the state constitution, the court could escape the interpretive difficulties of a generalized equal protection inquiry); Seattle School Dist. No. 1, 585 P.2d at 97.
311. See for example Ariz. Const., Art. XI, § 1 (stating that "[t]he legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system"); Va. Const., Art. VIII, § 1 (stating that "[t]he General Assembly shall provide for a system of free public elementary and secondary schools . . . and shall seek to ensure that an educational program of high quality is established and continually maintained"). See also McUsic, 28 Harv. J. Leg. at 333-39 (cited in note 18) (categorizing education clauses).
constitutional norms. A simple appeal to the positive text of the constitution suffices.

Equality arguments grounded in the education clauses, by contrast, must pass through an intermediate interpretive step. Either they must find in the education clause the intention to elevate education to a special status that subjects it to heightened standards of equal protection, or they must find evidence in the constitutional language of a requirement, not only to provide schools, but to provide them equally. Meanwhile, equality arguments grounded directly on equal protection provisions must navigate the elaborate doctrinal structures that have evolved to contain equality’s disruptive potential.

Second, adequacy arguments appeal powerfully to widely accepted norms of fairness and opportunity. While perhaps less fundamental to our system of shared values than the norm of equality, the notion that a society as well-endowed as ours should be able to provide every child with a decent education undoubtedly commands very broad support. It resonates with the high value our society places on education as the key to individual opportunities for social and economic advancement, and also with the importance we attribute to universal education as a foundation for our democratic institutions and for our place in the global economy. Indeed, adequacy arguments, at least in the education context, may have a stronger claim than equality arguments: a uniformly inadequate educational system is, after all, at least as undesirable as one with a wide range of variations from adequate to excellent.

312. In some cases, the constitutional text is highly amenable to one of these moves, see, for example Wash. Const., Art. IX, § 1 (“paramount”); Mont. Const., Art. X, § 1(1) (“equality”); N.C. Const., Art. IX, § 2(1) (“equal”), while in others it demands more creativity, see, for example, Edgewood I, 777 S.W.2d at 393 (“efficient”). But, as the experiences of litigants in Washington, see Kinnear, 530 P.2d 178, overruled by Seattle School Dist. No. 1, 585 P.2d 71, and in North Carolina, see Britt v. State Bd. of Educ., 357 S.E.2d 432, demonstrate, even the seemingly easy interpretive steps can prove fraught with difficulty when the stakes are high enough.

313. See Stanley M. Elam, Lowell C. Rose, and Alec M. Gallup, The 25th Annual Phi Delta Kappa/Gallup Poll of the Public’s Attitudes Toward the Public Schools, 75 Phi Delta Kappan 137, 142 (Oct. 1993) (showing 90% support for increased funding of poorest schools, as compared to 88% support for equality of funding). Compare Philip M. Dearborn, ACIR 1993 Poll Takes Public Pulse on Taxes, 5 St. Tax N. 780, 781 (Oct. 4, 1993) (showing 56.9% support, and 33.1% opposition, for redistribution of property tax money to equalize educational spending).


315. See Melanis, 293 F. Supp. at 331 n.11 (stating that “[s]urely, quality education for all is more desirable than uniform, mediocre education”); Alabama Coalition for Equity v. Hunt, 624 S.2d at 151 (stating that “[i]t would, of course, be possible for the state to offer plaintiffs
Thus, leaving aside questions of textual grounding, adequacy arguments—like equality arguments—have strong political and moral appeal. In fact, the universality of education clauses in state constitutions, and the priority that they commonly assert for the schools, reflect the value our society long has placed on affording educational opportunities to its children. Neither judges nor legislators risk finding themselves out of step with public sentiment by asserting a governmental duty to ensure all children an adequate education.

Third, at the same time that they command a normative force similar to that of equality arguments, adequacy arguments seem likely to prove far less threatening. In part, this is because they are confined to a single field of governmental activity and, unlike equality arguments, do not raise the specter of parallel arguments applied to the entire panoply of governmental endeavors. But equally important are the very different demands that the two types of arguments posit within the sphere of education. Equality arguments require that the worst off be placed on the same footing as the best off. On some relevant dimension of resources or accomplishments, they demand levelling. This is what is so threatening about equality, because the notion of equalization immediately suggests a zero-sum game in which the lot of the worse off can only be improved at the expense of the better off.

Adequacy arguments evoke a very different image. They concentrate on the appalling condition of the worst off schools and students, and they draw upon deep-seated moral currents that measure a society by how well it treats its least fortunate citizens. The focus is not comparative, so concerns about negative impacts on the better equal educational opportunity but still offer them virtually no opportunity at all”), published as Appendix to Opinion of the Justices, 624 S.2d 107.

316. Of course, to the extent that state constitutions contain provisions comparable to their education clauses that impose mandates on state government in other service areas, adequacy arguments grounded in the education clauses might provide a precedential basis for parallel arguments in the other areas. This prospect, however, is substantially less troubling than the comparable concern with equality arguments. While state constitutions are often long, and commonly cover a wide range of topics in considerable detail, broad mandates of governmental responsibility, like those contained in the typical education clauses, are not common. See Horton I, 376 A.2d at 373-74; Sheen, 505 N.W.2d at 313. And adequacy arguments derive much of their force from the special importance we, and our constitutions, attribute to education. Unlike equality arguments, they are arguments more about education than about adequacy in the abstract, and hence are less suggestive of extension into other areas, even other areas with comparable constitutional foundations.

317. The standard contemporary crystallization of these moral currents is found in John Rawls's “difference principle.” See John Rawls, A Theory of Justice 75-80 (Harvard U., 1971).
off are not as readily aroused. Rather, the vision is one of bringing the bottom tiers up to some threshold of effective basic education, a goal which carries the promise of significant economic and social gains for the whole society.

Of course, in a universe of constrained governmental resources, the practical implications of the two types of arguments may not be so different. In the real world of state budgets, the massive resources needed to bring underfunded schools up to a reasonable foundation level must come from somewhere, whether from increased taxes, which inevitably fall in large part on wealthier segments of the population, or from redirection of school funding away from wealthier districts, or from reductions in other government programs. Adequacy arguments, like equality arguments, lead to a redistribution of resources from richer to poorer. But for adequacy arguments, such redistribution is not the explicit aim, nor are the highly prized educational resources of the richer districts specifically targeted, so the threat is far less palpable.

Adequacy arguments, unlike equality arguments, do not ask judges, lawyers, and legislators to sacrifice their own children’s educations for the sake of a societal norm. Nor do these arguments, even implicitly, condemn them for wanting to assure their own children the best educational opportunities their money can buy. Indeed, adequacy arguments tend to validate the values and choices of the decision-making elites, affirming the priority they place on quality education, by recognizing it as a universal good to which all children should be entitled.

Finally, adequacy arguments are better positioned than equality arguments to rebuff objections grounded in arguably conflicting state constitutional provisions that provide for local school taxation or local control of education. Such objections have their greatest force when used to suggest that a general, structural provision of a state constitution, like an equal protection clause, should not be construed in a manner that is incompatible with far more specific provisions of

318. See McCarthy and Delgman, What Legally Constitutes an Adequate Public Education? at 100-01 (cited in note 118) (discussing appeal of notions of adequacy for advocates of local control); Briffault, 24 Conn. L. Rev. at 798-99 (cited in note 282) (discussing congruence between local control concerns of better off districts and “minimum adequacy” approaches).


320. See text accompanying notes 298-303.
that same document.\textsuperscript{321} Since adequacy arguments build instead on subject-specific education clauses, there is less ground on which such "specific-trumps-general" arguments can build.

Moreover, the demands of adequacy do not conflict as directly with provisions for local control or for local school taxation as do the demands of equality. Adequacy does not require that different districts be equally able to provide resources, but only that the state ensure a reasonable level of resources for all. Thus, there is no conflict with reliance on local property taxation as a mainstay of school finance, so long as the state remains able to fill the role of guarantor.\textsuperscript{322} Nor does adequacy constrain the prerogative of a local district to dedicate additional resources to its schools or to develop educational programs that distinguish it from its neighbors.\textsuperscript{323} Thus, there is no conflict with local governance of the schools, so long as local control does not include the power to reduce educational services below the constitutional norm.\textsuperscript{324}

Thus, adequacy arguments have a number of significant virtues. They rest on a focused and straightforward constitutional command. They are grounded in broadly shared societal values concerning the importance of education and the obligation to provide for the basic needs of society's least advantaged. They sidestep the most threatening aspects of equality arguments, particularly the specter of "levelling." And they avoid the pitfalls of equal protection's doctrinal complexities and potential conflicts with other state constitutional provisions.

At the same time, adequacy arguments face several significant problems that may limit their usefulness as the engines of education finance reform. Perhaps most obvious among these are the definitional difficulties inherent in the concept of adequacy itself. Adequacy, unlike equality, is, after all, essentially a matter of degree.\textsuperscript{325} Thus, adequacy arguments must confront not only the prob-

\textsuperscript{321} See text accompanying notes 300-02.
\textsuperscript{322} Compare \textit{Milliken II}, 212 N.W.2d at 717-18 (concurring opinion) (asserting inherent conflict between equality claim and constitutional provisions authorizing school district property taxation); \textit{Kinnear}, 530 P.2d at 189 (plurality opinion) (similar), overruled by \textit{Seattle School Dist. No. 1}, 585 P.2d 71.
\textsuperscript{323} See \textit{McCusic}, 28 Harv. J. Leg. at 328-29 (cited in note 18) (stating that localities would remain free to exceed the requirements of any state minimum).
\textsuperscript{324} Compare \textit{Rodriguez}, 411 U.S. at 49 (stating that "local control means . . . the freedom to devote more money to the education of one's children"); \textit{Skeen}, 505 N.W.2d at 316 (rejecting equality argument because of state's legitimate interest in encouraging additional spending by school districts).
\textsuperscript{325} See \textit{McCarthy} and \textit{Deignan}, \textit{What Legally Constitutes an Adequate Public Education?} at 97-98 (cited in note 118); First and Miron, 20 J. L. & Educ. at 421, 424-29 (cited in note 31)
lems faced by equality arguments in determining whether the relevant dimension for measurement is school funding, or educational inputs, or student outcomes, but also the additional question of what quantity of funding, what level of services, or what degree of student achievement suffices to meet the constitutional demand.

As courts have recognized, the answers to such questions must change with evolving social and economic conditions and with changing societal expectations about the role of the schools. The standard of adequacy cannot be static. But, even at a particular point in time, adequacy does not seem amenable to objective determination. The constitutional language, whether it calls for “a thorough and efficient system of free schools” or “an educational program of high quality” does not typically specify a concrete level of exertion or accomplishment that is to be achieved. Even to the extent that a consensus is reached that more resources produce better schools and better educational outcomes, no agreement exists about what quantity of resources, or what level of attainment, is enough.

This indeterminacy of the measure of an adequate education poses a particularly daunting challenge to efforts to deploy adequacy arguments in the courts. Legislatures, after all, are accustomed to deciding how far to go in pursuing a particular policy aim, (asserting that “educational adequacy is socially constructed through the political processes of legislation, court decisions, and ideological movements, such as school excellence”).

326. See text accompanying notes 220-58. Adequacy arguments do not lend themselves naturally to measures that focus on ability to raise needed resources, that is, tax capacity, because such measures are so far removed from the constitutional focus on the education itself. But this, at best, removes a small part of the uncertainty about the proper focus. 327. See, for example, McDuffy, 615 N.E.2d at 555; Claremont School Dist. v. Governor, 138 N.H. 183, 635 A.2d 1375, 1381 (1993); Abbott I, 575 A.2d at 367; Danson v. Casey, 399 A.2d at 366; Seattle School Dist. No. 1, 585 P.2d at 94. See also First and Miron, 20 J. L. & Educ. at 425-29 (cited in note 31) (stating that standards of educational adequacy must reflect evolving community values).

331. A few constitutions do contain language that appears to posit a specific standard, for example Ill. Const., Art. 10, § 1 (providing for “the educational development of all persons to the limits of their capacities”); Mont. Const., Art. X, § 1(1) (similar), although objective measures for such standards are far from self-evident. For a general survey of the standards articulated in state constitutions, see McUsic, 28 Harv. J. Leg. at 333-39 (cited in note 18).
332. Even this contention has proven the subject of substantial debate. See text accompanying notes 247-50. Nonetheless, there seems to be a reasonable consensus that one significant problem of the poorer schools is their paucity of resources. See, for example, Rose v. Council for Better Education, 790 S.W.2d at 198; McDuffy, 615 N.E.2d at 552; Abbott I, 575 A.2d at 404-05; Roosevelt Elementary, 877 P.2d at 817 (Feldman, C.J., concurring); Elam, Rose, and Gallup, 78 Phi Delta Kappan at 139 (cited in note 318).
basis of available resources, competing demands for them, and often inarticulate judgments about societal priorities. Courts, however, assert with monotonous regularity that such political or "legislative" judgments are beyond their institutional competence and responsibility.333 Faced with a constitutional provision mandating an indeterminate level of governmental activity, and demanding a commensurate and equally indeterminate (but very large) dedication of governmental resources, a court's most natural inclination is to defer to the choices made by the political branches,334 or even to construe the provision as exclusively a matter for legislative discretion.335

While such concerns about institutional competence are undoubtedly an obstacle for adequacy-based litigation, they need not, and should not, prove insuperable. As an initial matter, it is important to note that, in a number of respects, the institutional structures of state courts and state constitutions diminish the force of arguments for deference to the political branches in the state law context.336 The preponderance of state judges, unlike their federal counterparts, hold office subject to the political process, and many of them have previously served in legislative roles. The state constitutions they are asked to construe are far more comprehensive and statute-like, and in most states far more readily and more frequently revised, than the federal Constitution. Finally, the concerns of federalism, which urge judicial deference in applying federal standards to state-level choices about state priorities and policies, are obviously inoperative in the state constitutional context.337 Together, these institutional considerations suggest that state courts need not be as cautious about elaborating and applying open-ended state constitutional standards as the familiar federally-based paradigm suggests.

333. See, for example, Rodriguez, 411 U.S. at 42-43; McInnis, 293 F. Supp. at 335-36.
334. See, for example, McDaniel v. Thomas, 265 S.E.2d at 165 (finding that it is the legislature, not the judiciary, which should clarify the ambiguous mandate of the constitution); Bd. of Educ. v. Walter, 390 N.E.2d at 524-25. But see Pauley v. Kelly, 255 S.E.2d at 871 (questioning depth of courts' actual deference).
335. See, for example, Danson v. Casey, 399 A.2d at 355-66; Pauley v. Kelly, 255 S.E.2d at 887-900 (Nesly, J., dissenting); Kinnear, 530 P.2d at 195-98 (plurality opinion), overruled by Seattle School Dist. No. 1, 585 P.2d 71. Compare Scott v. Commonwealth, 443 S.E.2d at 142 (noting that the constitution accords the legislature "the ultimate authority for determining and prescribing the standards of quality"). But see Bd. of Educ. v. Walter, 390 N.E.2d at 823-24 (stating that deference to legislative judgment cannot be absolute); Rose v. Council for Better Education, 790 S.W.2d at 208-09 (similar).
336. See Note, 95 Harv. L. Rev. at 1347-56 (cited in note 14) (describing the differences between state constitutions and judiciaries and their federal counterparts).
337. See, for example, Rodriguez, 411 U.S. at 40-44. Compare Robinson I, 393 A.2d at 282 (noting inapplicability of Rodriguez's federalism concerns); Horton I, 376 A.2d at 372 (similar).
LEAVING EQUALITY BEHIND

Even to the extent that state courts do hew to the familiar institutional constraints, paths remain open along which adequacy arguments can make significant headway. One familiar strategy is to focus on the particular facts before the court, rather than on the general rule, standard, or principle to be applied to it. In many states, the conditions in the worst off schools are so poor and the resources available to them so meager that the courts can reasonably be asked to find a dereliction of the state’s educational obligations without the need to articulate or apply a determinate standard of adequacy. Such a finding only commits the court to a minimal floor beneath the constitutional standard of adequacy, not to an articulation of the standard itself.

While such a strategy may not suffice to ensure levels of state financial commitment commensurate to the needs of poorer districts or the hopes of litigants, it may often suffice to support a finding that an existing state system for financing education is impermissible. The simple fact is that the schools in poor districts in many states are so underfunded and so educationally deficient that they would fail even the most minimal measure of adequacy. A strong argument can be made that a court should not decline to recognize such evident failings even if unable or unwilling to articulate a precise constitutional standard to be applied to potential future cases. Although a court ruling based on extreme conditions can assure only limited relief, it at least provides the legislature with a clear mandate to address the glaring needs of the worst off schools.

While a few courts have followed a strategy along these lines, others appear to have taken quite a different tack. In West Virginia

338. Several courts, including the Rodriguez Court itself, while rejecting equality arguments, have signalled their willingness to entertain arguments along these lines. See Rodriguez, 411 U.S. at 36-37; Nyquist, 439 N.E.2d at 369; Bd. of Educ. v. Walter, 390 N.E.2d at 823. See also Ratner, 63 Tex. L. Rev. at 777 (cited in note 118) (proposing constitutional right to an education that equips students with basic educational skills).

339. See, for example, Kozol, Savage Inequalities at 23-38 (cited in note 7) (describing East St. Louis, Illinois schools); id. at 85-115 (describing New York City schools); Abbott I, 575 A.2d at 395-97; Alabama Coalition for Equity v. Hunt, 624 S.2d at 121-37, published as Appendix to Opinion of the Justices, 624 S.2d 107; Patricia Nealon, In Brockton, A Case Study of Crisis: Students, Teachers Feel $5.5M in Cuts, Boston Globe 38 (Nov. 24, 1991).

340. Compare Chambers, 22 Harv. C.R.-C.L. L. Rev. at 62 (cited in note 127) (stating: “In assessing ‘how much’ is enough, . . . ‘[i]t is often helpful to step back and think small, and to ask not ‘What is the whole extent of what we are bound to do?’ but rather ‘What is the clearest thing we ought to do first?’”’) (quoting Charles L. Black, Further Reflections on the Constitutional Justice of Livelihood, 86 Colum. L. Rev. 1103, 1114 (1986)).

341. Perhaps the clearest example is Abbott I, 575 A.2d at 394-95 (stating that “[c]oncerning the poorer urban districts . . . we have found a constitutional failure of education no matter what test is applied to measure thorough and efficient”). Although Abbott I reflects the New Jersey Court’s movement away from adequacy standards and toward equality
and in Kentucky, the courts have responded to challenges to educational adequacy by articulating wide-ranging and ambitious standards for what the schools must achieve. In the eyes of the West Virginia Supreme Court, the state's constitutional requirement of "a thorough and efficient system of free schools" mandates a school system that "develops, as best the state of education expertise allows, the minds, bodies, and social morality of its charges to prepare them for useful and happy occupations, recreation, and citizenship, and does so economically." The court lists eight specific areas in which the schools must enable students to develop their capacities.

The Kentucky Court goes even further in elaborating the standards that flow from the constitutional mandate for "an efficient system of common schools." Not only does this clause demand a system which is "substantially uniform" and which provides "equal educational opportunities" to all children, but it requires that the schools be "operated with no waste, no duplication, no mismanagement, and with no political influence." In addition, the court identifies seven substantive capacities that must be addressed by an efficient system, ranging from "sufficient knowledge of economic, social, and political systems to enable the student to make informed choices" to "sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage" and "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." More recently, the Massachusetts court has borrowed these seven substantive capacities from Kentucky in articulating the qualitative standards demanded by its own education clause.

measures, see text accompanying notes 159-66, it initially frames its question in adequacy terms and answers the question by focusing on the evident failures of the educational system in the poor urban districts. See also Seattle School District No. 1, 585 P.2d at 102-03 (finding, in absence of legislative standards, that actual funding in plaintiff district falls short of any of three possible measures of adequate support).

342. Pauley v. Kelly, 255 S.E.2d at 877. As the court explains, the state constitution mandates "high quality educational standards." Id. at 878.

343. Id. at 877. Representative examples include "(1) literacy; . . . (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; . . . (7) interests in all creative arts, such as music, theatre, literature, and the visual arts. . . ." Id.


346. Id. at 212. The Court is careful to clarify that these standards are only intended as "minimum goals," Id. at 213 n.23.

347. McDuffy, 615 N.E.2d at 544. See also Seattle School Dist. No. 1, 585 P.2d at 93-95 (applying similarly sweeping interpretation of Washington's constitutional mandate for "ample provision for the education of all children").
These courts have not only risen to the challenge of articulating a substantive content for the sparse language of the constitutional clauses, but they have chosen to use very ambitious, aspirational standards in doing so. Indeed, it is doubtful whether even the best public school systems in these states could assert confidently that they meet the criteria put forth by these courts.348

Where have these courts found the basis for their expansive readings of their education clauses? In their opinions, they turn to a variety of sources—constitutional history, expert opinion and testimony, dictionary definitions, the thinking of other courts349—but it remains unclear how any of these can truly ground the crucial step from generic constitutional language to specific substantive criteria. Constitutional history is unlikely to establish more than an intention to impose on the legislature a definite, and hence a judicially enforceable, responsibility for the school system; it is an improbable source for the content of an efficient education.350 Educational experts can do little more than to offer the courts a wide menu of formulations from which to choose.351 Ultimately, these courts have simply, and boldly, taken it upon themselves to define the contours of educational adequacy.

To gain a fuller understanding of where these courts have found the courage to overcome the hurdle of institutional competence, we have to look behind the words of their opinions to the political contexts in which they wrote. In a number of these states, particularly Washington, Kentucky, and Massachusetts, a common pattern

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348. See Editorial, The SJC's Wishful Thinking, Boston Herald 28 (June 16, 1993) (noting that Harvard "probably wishes its graduates possessed all the skills and knowledge" on the McDuffy list).

349. See, for example, Rose v. Council for Better Education, 760 S.W.2d at 205-06, 209-11 (referring to constitutional history, other courts, and educational experts); McDuffy, 615 N.E.2d at 524-26, 528-44 (referring to dictionaries and constitutional history); Pauley v. Kelly, 255 S.E.2d at 866-69, 874-78, Appendix V (referring to constitutional history, dictionaries, other courts, and educational experts). Apparently, the actual model for the seven-point list in Rose, which may be on its way to becoming a conventional judicial standard for adequacy, was a 1918 study proposing performance standards for high schools, although the court makes no express reference to the study. See First and Miron, 20 J. L. & Educ. at 437 and n.64 (cited in note 31).

350. In McDuffy, for example, the court devotes the bulk of its lengthy opinion to constitutional history, see McDuffy, 615 N.E.2d at 528-44, but can derive no more from its research than the general conclusion that the education clause was more than merely hortatory, id. at 547-48. When it turns to the task of specifying the clause's content, the court can do little more than rely on Rose. Id. at 554-55. Similarly, Pauley's careful survey of the history of "thorough and efficient" clauses serves chiefly to establish that the words were meant "to have legal significance," Pauley v. Kelly, 255 S.E.2d at 866, although its examination of Ohio's provision provided evidence for the slightly more concrete conclusion "that excellence was the goal, rather than mediocrity." Id. at 867.

351. See, for example, Rose v. Council for Better Education, 790 S.W.2d at 210-11 (detailing the experts' views on what constitutes an "efficient" school system).
emerges. In each, at the time that the court issued its decision, the state legislature had recently taken significant steps to transform the educational system challenged in the case. In Washington, a major reform package had been enacted while the appeal was pending. In Kentucky, education reform and school finance were high on the political agenda, although the legislature and governor had reached an impasse over the costs of the proposed legislative reforms. In Massachusetts, legislation reforming school finances and governance was on the Governor's desk awaiting his signature.

Thus, while the courts were surely acting boldly, they were not acting alone. Indeed, in both Washington and Massachusetts, the legislative measures, like the courts’ opinions, expressly addressed the need to spell out the content of an adequate education. So, the courts’ efforts at definition must be understood as part of a broader political effort pointing in the same general direction. In large measure, the court’s role, at least in these states, was not to displace the legislative function of identifying realistic parameters for the state’s ambitions, but rather to serve as a goad or as a backstop to the legislature’s accomplishment of that task.

353. See, for example, Editorial, Starting from Scratch in Kentucky, Wash. Post A14 (July 8, 1989); Robert T. Garrett and Tom Loftus, Require That Taxation be More Uniform, Louisville Courier-Journal 1A (June 7, 1989); see also Rose v. Council for Better Education, 790 S.W.2d at 189 (noting the “substantial efforts made by the present General Assembly”).
356. Kentucky provides a vivid example of the “goading” function. The Rose decision decisively broke the executive-legislative logjam, by making clear that the legislature bore the brunt of the responsibility and by making the commitment of new revenues inevitable. See Robert T. Garrett, Louisville Courier-Journal 1A (June 9, 1989) (noting that the Rose decision would probably force the governor to raise taxes to increase school funding). The result was speedy enactment of a complete overhaul of the state’s school system, including provisions for dramatic increases in state funding and for establishment of specific statewide standards for achievement. See Ronald Henkoff, For States: Reform Turns Radical, Fortune 138, 138 (Oct. 21, 1991).
Seen in light of this political context, the insistence by these courts that they were not attempting to usurp the proper responsibilities of the legislative branch but were simply insisting that the political branches do their job\(^{358}\) turns out to be far more than a ritualistic incantation of judicial passivity. Their role truly was limited, if critical. The knowledge that the legislature was ready to take up the challenge of defining and endeavoring to meet standards of educational quality largely mooted concerns about the judicial role. It both spared the courts from the awkward task of attempting a comprehensive judicial definition of adequacy, and it afforded them some confidence that their directives would be heeded without unseemly conflict among the branches.

Shifting the onus of standard-setting back to the legislative branch may seem to accomplish little for poor school districts and their underserved students, but, in fact, as the Kentucky, Washington, and Massachusetts examples suggest, the political dynamics stimulated by such limited judicial intervention are likely to be quite productive.

Whatever the misgivings about the current functioning of our schools and about the financial costs of reform, free public education remains a vital and popular element in our vision of state and local governmental responsibilities. When a legislature is called upon to define standards for the state’s school system, it is unlikely to set its sights too low. Particularly after a decade of well-publicized expressions of concern about the mediocrity of American education,\(^ {359}\) the pressures of both politics and policy are apt to produce legislative standards that aim at excellence, not at minimal sufficiency.\(^ {360}\)

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\(^{358}\) See, for example, *Seattle School District No. 1*, 585 P.2d at 98 (offering mere "guidelines for giving the Legislature the greatest possible latitude to participate in the full implementation of the constitutional mandate"); id. at 95 (stating that "the judiciary is primarily concerned with whether the Legislature acts pursuant to the mandate and, having acted, whether it has done so constitutionally"); *Rose*, 790 S.W.2d at 211 (stating: "[W]e do not engage in judicial legislating. We do not make policy. We do not substitute our judgment for that of the General Assembly. We simply take the plain directive of the Constitution, and... decide what our General Assembly must achieve in complying with its solemn constitutional duty"); *McDuffy*, 615 N.E.2d at 554 n.92 (stating: "We have concluded the current state of affairs falls short of the constitutional mandate. We shall presume at this time that the Commonwealth will fulfill [sic] its responsibility with respect to defining the specifics and the appropriate means to provide the constitutionally-required education").


There is, of course, no guarantee that the measures the political process produces in response to judicial prompting will provide acceptable standards of adequacy. The need may remain for a judicial determination that the legislature or executive has not satisfied its responsibilities.361 The suggestion here is not that courts can simply defer to legislative choices in seeking standards for adequacy,362 but rather that courts can best address the difficult issues of educational adequacy, and of institutional competence, by engaging the legislative branch in a constructive collaboration.

Even when a legislature has adopted appropriate standards, questions will commonly remain about whether it has done enough, and particularly whether it has committed sufficient resources, to meet the standards it has set. As the history of foundation funding approaches reminds us,363 good intentions to support education adequately can rapidly erode, as other demands compete for limited tax resources.

Inevitably, these questions about whether the concrete efforts live up to the articulated standards will come back to the courts. But they will present the judicial branch with a far more tractable, and more institutionally familiar, problem than the prior question of how to define educational adequacy.364 For, while these new challenges will still focus on whether the legislature has satisfied a broadly phrased constitutional mandate,365 the court will nonetheless be able

361. See, for example, Pauley v. Bailey, 324 S.E.2d at 136 (noting unacceptable vagueness of standards articulated by West Virginia Board of Education pursuant to legislation enacted in response to court's earlier mandate in Pauley v. Kelly, 255 S.E.2d 859); Abbott I, 575 A.2d at 408-09.

362. For an example of a court that apparently has taken such a deferential approach, see Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d at 728 (adopting executive branch regulations as establishing measure of "thoroughness" under Idaho constitution). See also Roosevelt Elementary, 877 P.2d at 819 (Feldman, C.J., specially concurring). Compare McUsic, 28 Harv. J. Leg. at 330-31 (cited in note 18) (advocating adoption by courts of minimum educational standards enacted by legislatures).

363. See, for example, McDaniel v. Thomas, 285 S.E.2d at 168-75 (discussing history of Georgia's efforts); Bd. of Educ. v. Walter, 390 N.E.2d at 821 (similar); Yudof, 28 Harv. J. Leg. at 499 (cited in note 42) (discussing the history of Texas efforts).

364. See McUsic, 28 Harv. J. Leg. at 331 (cited in note 18).

365. While litigants may also raise statutory claims that the legislature has failed to live up to the standards it has enacted, such claims will ordinarily fall victim to the familiar maxim that one legislature cannot bind its successors, that is that enactments which appear to impose...
to turn to the legislative articulation of standards as a reasonable and appropriate yardstick for measuring the actual results.

In sum, the examples of Kentucky, Washington, and Massachusetts suggest a strategy by which courts can play an activist and effective role in pursuing educational adequacy without stepping outside of conventional institutional roles. But the prospect of continuing political and judicial struggles over whether appropriate standards of adequacy have been identified and whether the standards have been met points out a second major obstacle to reliance on adequacy arguments.

Like equality, the norm of adequacy is unassailably attractive when considered in the abstract. But when its practical implications—primarily its implications for resource allocations but secondarily its impact on the division of power between state and local authorities as well—are considered, adequacy quickly loses some of its luster. The question, then, is whether we, and particularly our courts and legislatures, are any more prepared to commit to the norm of adequacy than to the norm of equality, when that commitment is understood to have substantial practical ramifications.

Concerns about the costs—both financial and institutional—of implementing adequacy norms may discourage courts, or legislatures, from assuming the initial burden of a commitment to educational adequacy. A court, after all, can easily sidestep adequacy claims as inherently political or as delegated to legislative discretion. And legislatures can, unless courts intervene, confine their attention to particularized issues of funding and regulation, without addressing the underlying standards or goals to be achieved.

Even when a court or legislature has taken up the challenge of mandating educational adequacy, the inherent indefiniteness of the concept of adequacy leaves ample opportunity to abandon the substance, while retaining the formal commitment. A legislature can simply fail to provide the resources required to achieve its stated

duties on the state can be limited, or even impliedly repealed, by subsequent legislative decisions about how much to appropriate in fulfillment of the duty. See, for example, Town of Milton v. Commonwealth, 416 Mass. 471, 623 N.E.2d 482, 484 (1993); Danson v. Casey, 399 A.2d at 366. Of course, while such arguments undermine statutorily-based challenges to legislative action, they have no application to constitutional challenges, since the constitution represents the will of the people, not merely of the legislature.

366. See, for example, cases cited in notes 334-35.
goals. And courts can put the best face on even the most inadequate of legislative efforts.367

Only time will tell whether adequacy arguments can fare better than equality arguments in overcoming the powerful resistance aroused by recognition of the very real costs that both ideals entail. But, as discussed above, there seems reason to hope that the resistance to adequacy claims will be less intense than the resistance to equality demands.368

This is due, in no small part, to the fact that the costs of adequacy are far less than the costs of equality, especially for the elites who derive the greatest benefits from the existing inequalities, because adequacy does not threaten their ability to retain a superior position.369 At the same time, adequacy arguments can draw powerful support from our natural sympathies for the appalling condition of schooling in the poorest communities, and they can make compelling appeals to societal self-interest, both in providing an adequately skilled workforce to support the economy and in affording a meaningful opportunity for self-advancement to society's most disadvantaged elements.

Moreover, even if adequacy arguments cannot ultimately overcome these resistances, they are more apt than equality arguments to achieve at least partial successes. As noted earlier, adequacy, unlike equality, is essentially a matter of degree. Hence, mandates for adequacy are less likely to encounter legislative stonewalling and brinksmanship of the sort engendered, for example, by equality mandates in New Jersey370 and Texas,371 than to invite incremental responses, which offer at least some additional support to the worst off districts. And courts, in turn, recognizing the greater flexibility that adequacy claims offer to policymakers, may be less troubled by concerns about proper institutional roles when presented with adequacy arguments than when faced with equality claims.

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367. Perhaps the classic example of such judicial accommodation is found in Robinson V, 355 A.2d at 132-39 (upholding New Jersey's Public School Education Act of 1975); see id. at 143 (Conford, J., concurring and dissenting) (finding that majority's "blanket facial approval" of the 1975 Act does not comport with prior case law).

368. See text accompanying notes 316-24.

369. See, for example, Seattle School Dist. No. 1, 585 P.2d at 99 (finding that use of local revenues to fund enrichment programs does not conflict with demands of adequacy).

370. See, for example, Jaffe and Kersch, 20 J. L. & Educ. at 279-97 (cited in note 49) (tracing history of legislative responses to New Jersey Supreme Court decisions regarding educational equality).

371. See text accompanying notes 304-07. The simple imperatives of equality raised similar problems for the California legislative process. See Elmore and McLaughlin, Reform and Retrenchment at 155-58 (cited in note 97).
Because its goals are less radical and because it is more receptive to compromise solutions and partial measures, adequacy seems better suited than equality to overcome the incessant resistance that confronts efforts to redirect substantial resources to poorer school districts. But these same aspects of adequacy arguments also expose a third, and final, set of difficulties that challenge the wisdom of reliance on such arguments. In short, is adequacy too modest, and too manipulable, a standard to warrant advocates, litigants, courts, or policymakers in placing reliance upon it?

While I am convinced that the persistent tendency to conceptualize the school funding problem as an issue of inequality has created unnecessary obstacles for funding reform, and while I believe that reframing the debate as an issue of inadequacy holds the promise of generating greater assistance for our poorer schools, I remain troubled by this last difficulty—the question of whether aiming at adequacy is simply aiming too low.

After all, the notion of adequacy limits the state's responsibility to the assurance of a minimum level of educational opportunities for all children. Regardless of how high or low the minimum level in a state turns out to be, adequacy arguments accept that districts with the resources and the will can choose to provide something better for their children. One practical result is that those with the option of living in such more-than-adequate districts—a group that is likely to include a disproportionate share of those who shape state law and policy—have little direct stake in the content of the standard of adequacy at the same time that they are sure to bear a substantial part of its costs.

Thus, when we give up appeals to equality in favor of appeals to adequacy, we in all likelihood relegate vast groups of children to mediocre educational opportunities (or worse), and we ensure that they will face significant competitive disadvantages relative to their peers from privileged communities. It is perhaps little wonder, then, that litigants and advocates representing the interests of poorer communities have been reluctant to cast their arguments in the language of adequacy, rather than equality. These are high prices to pay in exchange for improved chances of progress.

Moreover, when we turn away from appeals to equality, we run the risk of surrendering the moral high ground of absolute standards and falling back onto the slippery slopes of relative judgments of

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372. Compare *Dupree*, 651 S.W.2d at 93 (stating that "bare and minimal sufficiency does not translate into equal educational opportunity").
adequacy. The norm of equality, for all its difficulties, lies near the core of our notions of justice and fairness; it is recognized as a fundamental constitutional value. Educational adequacy, by contrast, is the sort of thing we expect bureaucrats and academicians to squabble over; it has no self-evident core. Especially once it is conceded that adequacy allows for disparities, even quite substantial disparities, between the schooling provided in rich and poor districts, it is unclear whether adequacy is capable of eliciting the commitment and momentum necessary to achieve significant and lasting reform.

In short, adequacy arguments promise results that look relatively meager, and they rest on principles that lack the clarity and force of calls for equality. Hence, advocates of education finance reform face a difficult, if familiar, strategic choice. Do they take the high road of continuing to demand equal educational opportunities for all children, recognizing that the legal and political obstacles that have hampered equality arguments for the last quarter-century will likely continue to frustrate them? Or do they opt to pursue the more achievable, but more modest, goals of adequacy?

I find this choice very troubling. But on balance I am convinced that the adequacy path is the better one to pursue. For one thing, the negative reactions, both legal and political, that are aroused by equality arguments, at least in the area of education finance, are so powerful and so entrenched that significant additional progress along that path is apt to be difficult and rare.

For another, the present conditions in America's underfunded school systems are so tragic, and so damaging to our social fabric, that they cry out for reform, even if it is only incremental. These deplorable conditions provide potent ammunition for adequacy arguments, at the same time that they offer compelling justification for using whatever arguments are most likely to stimulate timely remediation.

Finally, even if the initial results of adequacy arguments are modest, they offer the hope of greater gains over time. Once courts are drawn into the project of compelling legislatures to address adequacy issues, the task of ensuring that the legislatures fulfill these duties responsibly will seem a natural derivative. Once legislatures are drawn into the project of defining standards of adequacy and

373. Indeed, the general statements used by courts in characterizing legislatures' constitutional duties can easily evolve into standards courts can use to assess particular legislative efforts. The changing roles of the New Jersey court's talk of the duty to provide "that educational opportunity which is needed . . . to equip a child for his role as a citizen and as a competitor in the labor market," Robinson I, 303 A.2d at 295, discussed at text accompanying notes 143-71, provide one example of such an evolution.
become convinced that this project is a proper part of their role, political pressures will often render them susceptible to advocacy pursuing heightened standards. Indeed, as more states are drawn into the standard-setting process, interstate rivalry is likely to produce upward pressure on what will count as adequate. In short, if adequacy arguments can secure for the articulation of educational standards a central and legitimate place on a state’s legal and political agenda, the benefits over time may far surpass the early achievements.

VII. CONCLUSION

Every artisan knows the importance of choosing the right tool for the task. In education finance litigation over the past twenty-five years, equality arguments have been the tools of choice. Given the context in which this litigation arose and spread, this choice of tools was entirely understandable. But a quarter century’s experience suggests the choice may not have been wise. The work has gone slowly, and its products have often been marred. Looking back, these disappointments reveal the ways that the tools of equality have been unsuited to the task.

Fortunately, in the education finance arena, another tool is available to lawyers and policymakers in the language of the education clauses of state constitutions. Adequacy arguments, demanding for all students an opportunity to enjoy the schooling mandated by the state’s charter, offer a natural, if infrequently used, alternative. These adequacy arguments provide tools which are more firmly grounded on the constitutional base, more closely matched to the task at hand, and less threatening in their reach and power than arguments focused on equality. Thus, the central suggestion of this article is that adequacy arguments should be the tools of choice for future efforts at education finance reform.

The career of the equal educational finance movement displays in sharp relief both the power and the vulnerabilities of the rhetoric of


375. See Part III.

376. See Part V.
equality in American legal and political discourse. Similar patterns emerge elsewhere in our law and politics where appeals to equality have been called upon to carry a similarly heavy load. Consider, for example, the extended struggles over the role of affirmative action in securing equal employment opportunities for minorities, or the recurrent debates over how steeply the income tax rate structure should be graduated.

The imperatives of equality strike deep chords in American sensibilities at the same time that they arouse deep fears and resistances. Tempting as it may be to deploy equality arguments wherever a disadvantaged group seeks support, reliance on equality often carries a heavy price. This is surely not to say that equality has no place among the norms to which our legal and political discourse should appeal. But, in those contexts, like education finance, where other promising tools are at hand, it may prove better to leave equality behind.
APPENDIX:
SUMMARY OF STATE COURT SCHOOL FINANCE DECISIONS

Most scholars whose research involves national overviews of state policies or actions would agree that, at least for scholarly purposes, fifty is a problematic number of states with which to contend. On the one hand, it is a large enough number to ensure that there will always be anomalies and situations that defy easy categorization, while it is too large a number to invite detailed discussion of the peculiarities of each state. On the other hand, it is too small a number to be readily amenable to meaningful generalizations based on statistical analysis.

This Appendix attempts to find a happy medium, which can supplement the generalizations, examples, and bare citations used to sketch the national overview in the text, but without drowning the reader in the details of each state's own rich story. The Appendix offers summary descriptions, state by state, of the significant post-Rodriguez state court decisions that address the constitutionality, on either equality or adequacy grounds, of educational finance systems that rely on variable local revenue sources.

ALABAMA:
(a) Alabama Coalition for Equity v. Hunt (Ala. Circ. Ct. 1993) (published as Appendix to Opinion of the Justices, 624 So.2d 107, 110 (Ala. 1993)) invalidates school finance system on both adequacy and equality grounds, based on both education and equal protection clauses of state constitution. Court finds independent grounds for equality claims both in education clause itself and in equal protection clause (both on strict scrutiny standard, based on finding that education clause constitutes education a fundamental right, and on rational basis standard). Also finds due process violation based on inadequacy of education.

(b) Opinion of the Justices, 624 So.2d 107 (Ala. 1993), does not address merits of constitutional claims, but simply advises legislature that it is bound by circuit court decision in Alabama Coalition for

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377. For recent examples of such problematic cases in the school finance context, consider Bismarck Pub. School Dist. No. 1, 511 N.W.2d 247, where the court's majority opinion finds the state's financing system unconstitutional but where the system is nonetheless sustained because of North Dakota's requirement of a supermajority of the state's supreme court to invalidate a state statute as unconstitutional, or Roosevelt Elementary School Dist. No. 66 v. Bishop, 877 P.2d 806, where the plurality and concurring opinions leave it unclear whether the court's decision is restricted to Arizona's system for funding school capital projects or whether it reaches the system for funding operating costs as well and overrules Shofstall v. Hollins, 515 P.2d 690.
Equity v. Hunt, which was not yet appealable because circuit court had retained jurisdiction over other aspects of suit.

ARIZONA: (a) Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973), rejects equal protection challenge, essentially on rational basis approach, despite finding that education is fundamental right on basis of education clause.

(b) Roosevelt Elementary School District No. 66 v. Bishop, 179 Ariz. 233, 877 P.2d 806 (1994), invalidates locally based system for funding school facilities, while questioning continued vitality of Shofstall and suggesting application of similar principles to operating costs as well. Plurality rests on prohibition of “gross disparities” grounded in education clause’s “general and uniform” language. Concurrence rests both on strict scrutiny equal protection analysis and on adequacy claim.

ARKANSAS: Dupree v. Alma School District No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983), finds that disparities in financing violate state's equal protection provision, because they fail to satisfy rational basis test. Education clause is noted as reinforcing the importance of education for purposes of equal protection analysis.

CALIFORNIA: (a) Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241 (1971) ("Serrano I"), finds that property-wealth based funding of education violates both state and federal equal protection provisions, both because education is fundamental and because wealth is a suspect category. Trial court's dismissal of suit is reversed and case is remanded for fact-finding.

(b) Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929 (1976) ("Serrano II"), invalidates school finance system as violative of state equal protection provisions, because it conditions funding levels on district wealth. Rejects legislative response to Serrano I as providing insufficient assurance of equalization.


(d) Butt v. State, 4 Cal. 4th 668, 842 P.2d 1240 (1992), imposes duty on state to ensure “basic equality” of educational opportunity, not merely equality of resources, in case involving district whose mismanagement left it with insufficient funds to operate the schools for the full school year.

378. For a more detailed analysis of the California cases, see text accompanying notes 49-64.
COLORADO: *Lujan v. Colorado State Board of Education*, 649 P.2d 1005 (Colo. 1982), upholds constitutionality of financing system against both equal protection clause and education clause challenges. Follows *Rodriguez* in finding that education, notwithstanding state's education clause, is not fundamental, that district wealth is not a suspect classification, and that local control is a legitimate basis for local funding. Education clause does not require uniform expenditure levels.

CONNECTICUT: (a) *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977) ("*Horton I*"), finds that property-tax based system violates state equal protection clause. Basic and fundamental nature of right to education necessitates strict scrutiny of wealth-based variations, with result that substantial equality of educational opportunity is required.

(b) *Horton v. Meskill*, 187 Conn. 187, 486 A.2d 1099 (1985) ("*Horton II"), upholds constitutionality of power-equalization financing system adopted in response to *Horton I*, on grounds that it significantly narrows disparities. Remands the claim that subsequent amendments unconstitutionally delayed full implementation of the new funding system, for analysis of legitimacy of state's decision to delay.

GEORGIA: *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981), upholds financing system as satisfying rational-basis scrutiny, after concluding that education clause does not necessitate stricter equal protection scrutiny and does not itself mandate equality in education. Interprets “adequate education” clause as requiring more than a minimum education, but defers to legislative determination of adequacy, in absence of evidence of lack of basic educational opportunities.

IDAHO: (a) *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975), upholds local property tax-based financing system against challenges under equal protection clause and education clause's uniformity requirement. Declines to employ any standard other than rational basis review in applying state equal protection clause and declines to classify education as fundamental right. Finds no requirement of strict funding equality in education clause.

(b) *Idaho Schools for Equal Educational Opportunity v. Evans*, 123 Idaho 573, 850 P.2d 724 (1993), adheres to *Thompson*'s rejection of claims resting on education clause's uniformity requirement and on equal protection clause, restricting fundamental right status to expressly identified positive rights in state constitution. Finds, however, that *Thompson* did not address claim that system fails
education clause's "thoroughness" requirement, and remands for determination whether funding system provides for a thorough education, as measured by educational standards promulgated by state Board of Education.

ILLINOIS: People ex rel. Jones v. Adams, 40 Ill. App. 3d 189, 350 N.E.2d 767 (1976), upholds state's property tax system against array of constitutional challenges, including claims that resultant disparities in school funding violate federal and state equal protection provisions. Rejects equal protection arguments for failure to demonstrate "invidious discrimination" among school districts, a standard purportedly derived from the Rodriguez opinion.

KENTUCKY: Rose v. Council for Better Education, 790 S.W.2d 186 (Ky. 1989), invalidates "the whole gamut" of state's education system, including its financing structure, as failing to meet standards of both equality and adequacy derived from education clause's requirement of "efficient system of common schools." Articulates ambitious educational standards, involving both equality and specific measures of adequacy, that must be met to satisfy the constitution's efficiency requirement.

MARYLAND: Hornbeck v. Somerset County Board of Education, 295 Md. 597, 458 A.2d 758 (1983), upholds school financing system against equality arguments grounded on state and federal equal protection guarantees and state's "thorough and efficient" education clause. Concludes that education clause does not require equality. Education is not a fundamental right for state equal protection purposes, so rational basis review is applicable.

MASSACHUSETTS: McDuffy v. Secretary of Executive Office of Education, 415 Mass. 545, 615 N.E.2d 516 (1993), finds that property tax based financing structure violates constitutional duty of state to "cherish" the public schools. Decision rests entirely on education clause and on finding of failure of existing system to assure an adequate education to all children. Equality claims not pressed by plaintiffs nor considered by court.

MICHIGAN: (a) Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972) ("Milliken I"), finds, shortly before decision in Rodriguez, that financing system violates state equal protection clause, under strict scrutiny standard. Concludes that education is fundamental under state constitution, that wealth classifications are suspect, and that local control provides neither a compelling justification nor a rational basis for financing system.

(b) Milliken v. Green, 390 Mich. 389, 212 N.W.2d 711 (1973) ("Milliken II"), after Rodriguez and after changes in composition of
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...court, vacates opinion in Milliken I and dismisses case, without opinion. In concurring opinion, two judges argue that case fails to establish that disparities in tax capacity cause educational inequities or constitute invidious discrimination, absent any claim of inadequacy of education.

(c) East Jackson Public Schools v. State, 133 Mich. App. 132, 348 N.W.2d 303 (1984), upholds financing system against equality challenges grounded in state education and equal protection clauses, following reasoning of Milliken II concurrence and concluding that education is not a fundamental interest.

MINNESOTA: Skeen v. State, 505 N.W.2d 299 (Minn. 1993), upholds use of local property taxation to supplement state foundation system against challenge asserting inequality claims grounded in state equal protection and education clauses. Plaintiffs (rapidly growing, relatively low wealth suburban districts) raised no claims of inadequacy.

MONTANA: Helena Elementary School District No. 1 v. State, 236 Mont. 44, 769 P.2d 684 (1989), finds that substantial spending disparities, resulting from local supplementation of state-funded foundation budgets, violate state's education clause, which expressly guarantees "equality of educational opportunity." Does not reach equal protection clause claim or question of whether education is a fundamental right.

NEBRASKA: Gould v. Orr, 244 Neb. 163, 506 N.W.2d 349 (1993), cursorily dismisses claims that wide spending disparities violate state constitutional rights to equal protection, equal educational opportunity, and uniform taxation. Finds that plaintiffs failed to state facts sufficient to constitute a cause of action, because they did not allege that the disparities caused educational inadequacies.

NEW HAMPSHIRE: Claremont School District v. Governor, 138 N.H. 183, 635 A.2d 1375 (1993), finds that state constitution's education clause imposes a duty on state to provide adequate funding for broad educational opportunities for all children. Remands case for determination of whether existing system fulfills state's obligations. Does not reach equality claims based on both equal protection and education provisions.

NEW JERSEY: Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973) ("Robinson I"), invalidates school finance system as

379. For a more detailed analysis of the New Jersey cases, see text accompanying notes 136-71.
violative of "thorough and efficient" education clause, expressly eschewing reliance on equal protection clause arguments. Primary focus is on inequality of funding of constitutionally mandated educational opportunity.

(b) Robinson v. Cahill, 69 N.J. 449, 355 A.2d 129 (1976) ("Robinson V"), upholds constitutionality of legislative reforms in response to Robinson I. Primary focus is on statutory provisions implementing state's responsibility to define and monitor adequacy of education delivered by school districts. Secondary attention is given to sufficiency of provisions for financial support and to steps toward elimination of gross disparities in funding.

(c) Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990) ("Abbott I"), invalidates system approved in Robinson V, on grounds of stark failures of poor urban school districts to enable students to compete with those from wealthier suburban districts. Court's order requires funding of poor urban districts at levels commensurate with wealthy districts, plus additional funding to accommodate special costs of educating poor, urban students.

(d) Abbott v. Burke, 136 N.J. 444, 643 A.2d 575 (1994) ("Abbott II") invalidates system adopted by N.J. legislature in response to Abbott I, on grounds that it fails to achieve "parity" or "substantial equivalence" of funding between rich and poor districts and therefore fails to meet standards articulated in Abbott I.

NEW YORK: (a) Board of Education v. Nyquist, 57 N.Y.2d 27, 439 N.E.2d 359 (1982), upholds financing system against equality arguments based in both equal protection and education clauses, despite acknowledgement of significant inequalities in funding and in educational opportunities. Applies rational basis review under equal protection clause, rejecting claim that education clause makes education a fundamental right. Finds that education clause is not a mandate for equality, but only a guarantee of a basic education, and would only warrant judicial scrutiny upon a showing of "gross and glaring inadequacy."

(b) Reform Educational Financing Inequities Today (R.E.F.I.T.) v. Cuomo, 199 A.D.2d 488, 606 N.Y.S.2d 44 (1993), finds that Nyquist's "gross and glaring inadequacy" standard cannot be met by evidence of widening fiscal and educational disparities among districts, in absence of claims that poor districts fail to provide a sound, basic education. Declines to consider such inadequacy claims raised by amici curiae, since they were not raised by plaintiffs.

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S.E.2d 71 (1987), upholds financing system against equality challenge grounded on state’s “general and uniform” education clause. Education clause only guarantees equal access to schools, and provision mandating “equal opportunity” is interpreted only to bar racial segregation. No adequacy claims raised or considered.

NORTH DAKOTA: Bismarck Public School District No. 1 v. State, 511 N.W.2d 247 (N.D. 1994), upholds constitutionality of school financing system under state constitutional provision requiring four-fifths vote of court to declare statute unconstitutional, although three of five justices found violation of state’s equal protection clause. Majority finds that education is a fundamental right, but applies intermediate level of scrutiny to funding issues and finds lack of sufficiently close correspondence between funding system and legitimate legislative goals. No adequacy claims raised or considered.

OHIO: Board of Education v. Walter, 58 Oh. St. 2d 368, 390 N.E.2d 813 (1979), upholds education finance system against challenges under equal protection and “thorough and efficient” education clause. Declines to apply strict scrutiny to issues of funding of education and finds that local control provides rational basis for system. Declines to interfere with legislative discretion under education clause, absent evidence of absolute deprivation of meaningful education.

OKLAHOMA: Fair School Finance Council v. State, 746 P.2d 1135 (Okla. 1987), upholds school finance system against equality claims brought under state and federal equal protection provisions and state’s education clause. Rational basis scrutiny applies under the equal protection provision, and education clause imports no requirement of equal funding. No adequacy claims raised or considered.

OREGON: (a) Olsen v. State, 276 Or. 9, 554 P.2d 139 (1976), upholds financing system against equality claims grounded on state equal protection and “uniform and general” education clauses. Finds that education is not a fundamental interest, so applies balancing test under equal protection analysis, weighing affected interest in education against state’s objective of furthering local control. Education clause does not mandate equality and is satisfied so long as state provides for minimum educational opportunities.

(b) Coalition for Equitable School Funding v. State, 311 Or. 300, 811 P.2d 116 (1991), rejects equality claims resting on equal protection, education, and uniform taxation provisions, as well as education clause claims based on insufficiency of state funding to meet substantive requirements established by state, on grounds that
1987 state constitutional amendment regulating local property taxation for schools presupposes use of local revenues and precludes challenges to resultant disparities.

Pennsylvania: Danson v. Casey, 484 Pa. 415, 399 A.2d 360 (1979), upholds state financing structure and special statutory provisions governing Philadelphia school finances against claims of failure to equitably fund Philadelphia schools. Finds that neither "thorough and efficient" education clause nor equal protection provision guarantees Philadelphia children an education equal to that available in other districts and that legislative scheme has reasonable relationship to legitimate goals.

South Carolina: Richland County v. Campbell, 294 S.C. 346, 364 S.E.2d 470 (1988), cursorily affirms dismissal of challenge to state's "shared funding" system, alleging that resultant inequalities of resources and of educational opportunities violate state's education and equal protection clauses. Holds that existing system is a rational and valid means of furthering state's objectives.

Tennessee: Tennessee Small School Systems v. McWherter, 851 S.W.2d 139 (Tenn. 1993), holds that state financing system lacks rational basis for inequalities in educational opportunity and therefore violates state equal protection clause. Also examines education clause at length and concludes it embodies "an enforceable standard" for scope of educational opportunities that must be provided, but declines to elaborate or apply such standard, relying instead on equal protection analysis.

Texas: (a) Edgewood Independent School District v. Kirby, 777 S.W.2d 391 (Tex. 1989) ("Edgewood I"), finds that gross inequalities in available resources violate state's "efficient system" education clause and that clause requires substantially equal access to education funding. Does not reach claims under state equal protection and due process clauses.

(b) Edgewood Independent School District v. Kirby, 804 S.W.2d 491 (Tex. 1991) (Edgewood II), finds that legislative reforms in response to Edgewood I, which equalize tax yields for ninety-five students, do not achieve sufficient equalization to satisfy requirements of education clause. Sheltering of wealthiest districts from equalization perpetuates "inefficiency" of funding system.

(c) Carrollton-Farmers Branch Independent School District v. Edgewood Independent School District, 826 S.W.2d 489 (Tex. 1992) (Edgewood III), finds that legislative reform in response to Edgewood II, which pools property wealth and equalizes taxing capacity through
creation of consolidated county-wide taxing districts, violates constitutional provision forbidding state-level property taxation.

VIRGINIA: Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994), upholds financing system against equality claims grounded on state education clauses. Finds that education is a fundamental right, but that constitutional provisions do not ground a requirement of substantial equality of funding or of educational opportunity.

WASHINGTON: (a) Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974), rejects challenge to the school financing system alleging that inequalities in funding violate state and federal equal protection provisions and state education clause. Plurality treats adequacy claims as unsupported by evidence and defers to legislative determinations of scope of education to be provided.

(b) Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978), invalidates school financing system's reliance on local property taxes on ground that state's education clause imposes duty on state to assure all students a basic education. Court holds that state legislature must define the scope of a basic education and make adequate provision for funding it statewide.

WEST VIRGINIA: (a) Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859 (1979), finds that state financing system must satisfy both adequacy standards grounded in state's "thorough and efficient" education clause and equality standards grounded in equal protection clause, and remands for development of standards and application of them to facts. Strict scrutiny applies under equal protection analysis, because education is a fundamental right. Education clause requires satisfaction of ambitious standards of educational adequacy.

(b) Pauley v. Bailey, 174 W.Va. 167, 324 S.E.2d 128 (1984), reviews master plan for educational improvements developed in conjunction with remand of Pauley v. Kelly and orders its implementation, but finds that standards for "high quality" education adopted by state board of education are insufficiently specific to satisfy constitutional mandate.

WISCONSIN: Kukor v. Grover, 148 Wis.2d 469, 436 N.W.2d 568 (1989), upholds financing system against equality claims grounded in state equal protection clause and in uniformity provision of education clause. Education clause does not mandate absolute uniformity of funding or of educational opportunity. Educational opportunity is a fundamental right, but expenditure equality is not, so rational basis review applies and is satisfied by interest in preserving local control.
Wyoming: Washakie County School District No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980), finds financing system in violation of state equal protection clause, applying strict scrutiny because education is a fundamental right and because wealth is a suspect classification when applied in context of a fundamental right. Holds that constitution forbids system where level of spending is function of district wealth, but does not require precise spending equality.