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SCHOOL FINANCE ADEQUACY AS VERTICAL EQUITY

Julie K. Underwood*

In this Article, Dean Underwood explains that school finance cases can be divided into three waves of reform. The first wave involved efforts to use the Federal Equal Protection Clause to overturn financing systems. Litigants in the second wave turned to state equal protection and due process clauses. Finally, the third wave involved the utilization of education clauses in state constitutions as the predominant litigation vehicle. These three waves embody two primary approaches to school finance litigation. The first approach involves a challenge to the adequacy of a state's funding system under either the state or federal equal protection clause, the primary focus being equality in spending among districts. The second approach, which was used in school finance litigation during the third wave, is based on the education clauses in state constitutions. The argument in such a case is that the legislature has not fulfilled its obligation to provide an education. The theme in cases using the state education clause is adequacy from the perspective of "vertical equity," meaning that different students should be treated differently based on their special educational needs. More recent school finance cases have concentrated on this second approach and thus have shifted the focus from equal resources to an adequate education for all students. Dean Underwood concludes, however, that this approach still focuses on education inputs rather than on desired educational outcomes.

INTRODUCTION

Although the funding balances among federal, state, and local sources have shifted over the last thirty years,¹ few would argue that education has become a lower social priority.² For any

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1. By the end of the 1950s, the federal share of educational expenditures for the nation's elementary and secondary schools was 4.4% and the local share of expenditures was 56.5%. By the end of the 1970s, the federal share was 9.8% and the local share was 43.4%. Thomas D. Snyder & Charlene M. Hoffman, National Ctr. for Education Statistics, Digest of Education Statistics 50 (1994).

2. Federal support for education was estimated at $87.6 billion in 1994, an increase of 123% since 1980. After adjustment for inflation, this represents a 22% increase during this time. National Ctr. for Educ. Statistics, Federal Support for Education 7 tbl. 39 (1994).
society, education is the most fundamental investment in the future that can be made. As the United States Supreme Court stated in 1954:

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

In the United States, it is generally accepted that state-distributed resources must be distributed equally. This notion holds true unless there is a legitimate rationale to provide

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The “American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.” We have recognized “the public schools as a most vital civic institution for the preservation of a democratic system of government,” and as the primary vehicle for transmitting “the values on which our society rests.” . . . “[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.” And these historic “perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.” In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society.


4. Cf. Allan R. Odell & Lawrence O. Picus, School Finance: A Policy Perspective 10 (1992) (describing how states in the early 1920s created “[a]id structures [that] were designed to distribute larger amounts [of money] to districts with a small property tax base per pupil and smaller amounts [of money] to districts with a large property tax base per pupil”); id. at 20 (suggesting that “[d]ifferences in educational expenditures per pupil across school districts in a state [constituted] the basic school finance problem [that was] recognized as early as 1905”) (citation omitted).
resources unequally. In school finance, this concept is often referred to as horizontal equity, in which every individual is treated the same and all students are considered equivalent. Equity and fairness should dictate that the state not create educational inequities with its own hands—through its school finance mechanisms.

There are three kinds of inequality of educational opportunity: (1) innate, (2) environmental, and (3) state-created. The first type of inequality is natural and exists because human beings have varying abilities and capabilities. It is an innate condition of a child's intelligence, physical strength, disability, or giftedness. I believe that correction of deficiencies due to this type of inequality is desirable. This is in keeping with the widely accepted notion of equity that permits a departure from strict equality of revenues per pupil if the departure is based on an educational need. Thus, more can be given to those who have greater educational needs.

The second kind of educational inequality is created by social and economic conditions that have not been caused directly by governmental policy alone, but rather result from individual or private-sector decisions acting independently or in connection with governmental policy. Many times, such conditions indirectly influence the education of children, rendering real deficiencies in capacity to benefit from educational programs. Environmental inequalities are visited particularly upon children in high-poverty areas, such as poor rural areas and urban centers, where language deficiencies are great, positive parental influence is often minimal, crime is rampant, parental income is low, cultural opportunities are lacking, and stabilizing conditions are at a premium. These two forms of inequality, innate and environmental, bring forth the need for vertical equity—the rationale for treating individuals differently in an attempt to mitigate these inequalities. Vertical equity requires

5. See infra Part I.A.
7. See infra notes 133-38 and accompanying text.
8. See, e.g., notes 138-39 (describing the situation in urban Milwaukee and surrounding suburbs).
9. For a more detailed discussion of the concept of vertical equity, see BERNE & STIEFEL, supra note 6, at 2-3, 35-40.
differences in resource allocation based on legitimate differences between individuals.  

The third form of inequality may be caused by the state's actions or omissions in its statutory provisions for education funding, usually a combination scheme of state and local taxation. In such cases, the legislature, by combining state and local tax revenues, creates revenue inequalities and disparate educational opportunities primarily due to differences in local fiscal capacity.

School finance equity litigation traditionally focuses on the last of these three types of inequalities—the argument being that the state must rectify the inequalities caused by its own creation. Educational benefits should not be a function of district wealth. Instead, the allocation of state resources should be based on a rationale more closely tied to education. In addition, differences in educational opportunity created by natural and environmental conditions should be mitigated to the greatest extent possible to alleviate the debilitating conditions visited upon the least advantaged.

An additional principle useful to a discussion relating to school finance is efficiency or effectiveness, referred to sometimes as accountability standards. Efficiency is an older phrase, often defined as a ratio of outputs to inputs: "Efficiency is increased by increasing desired outcomes secured from available resources or by maintaining a given level of outcomes while using fewer resources." Effectiveness deals with the degree to which resources are allocated in ways shown to be effective through research:

The effectiveness principle shifts the perspective to whether or not resources are deployed in research-proven effective ways. The effectiveness principle suggests that a resource inequity exists not only when insufficient resources are available, but when resources are not used in ways that produce desired impacts on student performance.

10. See id.
11. See infra Part I.A-B.
13. ODDEN & PICUS, supra note 4, at 52.
Consider the following example. The state is mandated by statute to provide a coat for every child to keep that child safe from the winter's cold. Clearly, if the state gives coats only to those children whose parents reside in certain parts of the state, its obligation is not met. Additionally, if the state gives the same size coat to every child, the statute's purpose is not served. Although the state originally fulfills the statute's terms on its face, the large child does not have a coat sufficient to keep him warm and the small child has a coat too large to suit his needs, wasting resources. More specifically, the large child's needs are not met adequately and the small child's needs are not met efficiently. Only when the state provides a coat suitable to each child's needs does the state meet its obligation both adequately and efficiently. Thus, the question within school finance is whether the state financing structure supports the public schools in such a manner as to impose educational disadvantage on certain children of the state while bestowing unique educational privileges on others.

I. SCHOOL FINANCE LITIGATION

Generally, there are two approaches to litigating school finance equity cases. The first theory involves the constitutional doctrine of equal protection. As encompassed by either the federal or state constitution, this doctrine prohibits the government from treating similarly situated individuals differently without a strong justification. In one variation of this theory, litigants argue that the state practice of inequitable funding unjustifiably treats students who reside in poorer districts differently from those students who reside in more affluent districts. The second variation of the equal protection theory asserts that the lower funding level in poorer districts results in a deprivation of education to students who reside in these

14. See infra notes 20–40 and accompanying text; Part I.A–B.
15. See, e.g., JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 14.1, at 523 (3d ed. 1986) (stating that "[t]he fourteenth amendment commands that no person shall be denied equal protection of the law" and that "[t]he equal protection guarantee . . . governs all governmental actions") (emphasis added).
16. See infra Part I.A.
districts. Thus, the first variation focuses on differential
treatment while the second focuses on inadequacy.

The second type of litigation theory, based exclusively on the
education clause in a state constitution, contends that a state
legislature has failed to live up to its state constitutional obli-
gation to provide an education to the children in its state. Scholars have divided the school finance cases into three
separate “waves” of reform. Each wave has its own identifi-
able characteristics and differs in terms of venue and litiga-
tion theory. The first wave starts with the inception of school
finance equity cases and closes with the 1973 Supreme Court
decision in San Antonio Independent School District v. Rodri-
guez. These cases focused on the Equal Protection Clause of
the United States Constitution. Initial efforts to use the
Federal Equal Protection Clause to overturn financing sys-
tems met with little success. The failure of these attempts
led to the development of a legal theory by Coons, Clune, and
Sugarman. They argued that the level of spending for a
child’s education should not be a function of local district
property wealth. This strategy was successfully employed in
Serrano v. Priest in 1971. This case marked the first time

17. See infra Part I.B.
18. See infra Part I.C.
(describing the degrees of inequality in the education system and the movement to
provide greater equity); William E. Thro, Judicial Analysis During the Third Wave
of School Finance Litigation: The Massachusetts Decision as a Model, 35 B.C. L. REV.
597, 598 (1994) [hereinafter Thro, Judicial Analysis] (exploring the methodology of
judicial decision making during the third wave of school finance cases); William E.
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, 222 (1990)
[hereinafter Thro, Third Wave] (analyzing changes in public school finance reform
litigation that signified the inception of the third wave); Julie K. Underwood &
William E. Sparkman, School Finance Litigation: A New Wave of Reform, 14 HARV.
J.L. & PUB. POL‘Y 517 (1991) (discussing litigation theories used in cases occurring
during the third wave).
20. 411 U.S. 1 (1973); see Thro, Judicial Analysis, supra note 19, 600–01; Thro,
Third Wave, supra note 19, at 222–251. Cases leading up to Rodriguez included
(Cal. 1971), and McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), aff’d, 394 U.S.
21. The Equal Protection Clause states: “No State shall . . . deny to any person
within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.
22. See Thro, Judicial Analysis, supra note 19, at 600–03.
24. Id. at 2.
that a state system of school finance was found unconstitutional. In Serrano, the California Supreme Court found that the state funding system violated the Equal Protection Clause of the United States Constitution. This case spawned debate in the area of school finance, the focus of which was achieving equal resources for each child in the system.

This wave was cut short when, in Rodriguez, the Supreme Court effectively precluded litigants from using the Federal Equal Protection Clause as a vehicle for school finance reform. The Court ruled that education was not a fundamental right because it is not explicitly or implicitly protected by the United States Constitution. Further, the Court ruled that the Constitution did not prohibit the government from providing different services to children in poor school districts than it did to children in wealthy school districts. The Court found that, although the Equal Protection Clause may protect the rights of poor school children, it "does not require absolute equality or precisely equal advantages." After this decision, a few decisions in state courts followed the Rodriguez analysis and found the challenged systems to be constitutional.

26. Cf. Eric A. Hanushek, A Jaundiced View of "Adequacy" in School Finance Reform, 8 EDUC. POLY 460, 464 (1994) (describing how "[t]he modern era of school finance reform was launched with the landmark Serrano v. Priest . . . case in California in the late 1960s"); Thro, Third Wave, supra note 19, at 223–24 (describing how the California Supreme Court in Serrano I accepted the "fiscal neutrality" theory, the first time that theory was used in a school finance reform case).


30. Id. at 33–35. The Court's test for fundamentality was as follows:

[T]he key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Id. at 33–34.

31. Id. at 24.

32. Id. The Court also supplied additional reasons for its decision. See id.

The second wave of cases is marked by greater state independence from the United States Supreme Court's precedent in *Rodriguez*. In these cases, with the focus remaining the achievement of equal resources for each child in the system, state courts employed their respective state constitutional provisions of either due process or equal protection. The California Supreme Court may have triggered this wave with its second *Serrano* decision, where it found that education was a fundamental right under the California Constitution. There, the court employed strict scrutiny to determine that children were denied this state constitutional right. The highest courts of West Virginia and Wyoming followed this approach.

The third and final wave took shape during the last part of the 1980s and departed significantly from previous cases. First, this wave is marked by a shift away from traditional horizontal equity arguments of the first two waves and toward a greater emphasis on student programs and opportunities. This shift may have been due, in part, to the publication of *A Nation At Risk*, a report focusing on accountability and...
efficiency issues that drew national attention away from equal allocation of resources and toward achievement and outcomes. Second, the third wave differs from the previous two waves in that the predominant litigation vehicle used is the education clause of state constitutions. Finally, a significant change in this wave is the consistent success plaintiffs have had in over-turning state funding systems. Plaintiffs have been successful in New Jersey, Massachusetts, Alabama, Tennessee, Missouri, Kentucky, Texas, and Montana. But this success is not uniform—plaintiffs have been unsuccessful in


43. See, e.g., McDuffy, 615 N.E.2d at 517–18 (quoting the Massachusetts educational clause as it served as the basis for plaintiffs' challenge to that state's educational finance system).

44. See Abbott v. Burke, 643 A.2d 575, 576 (N.J. 1994) (affirming a lower court's judgment that New Jersey's Quality Education Act was unconstitutional as the act failed to "assure parity of regular education expenditures between the special needs districts and the more affluent districts").

45. See McDuffy, 615 N.E.2d at 516 (holding Commonwealth's school financing system unconstitutional as it failed to provide constitutionally adequate educational opportunities to both the wealthy and poor students in Massachusetts).


47. See Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993) (holding that local control over school administration did not justify state educational funding system that produced substantial disparities in educational opportunities for students in various districts).

48. See Committee for Educ. Equality v. Missouri, No. CV190-1371CC (Cole County, Mo. Jan. 15, 1993) (concluding that the Missouri school financing system was unconstitutional under that state's constitution because the system created vast disparities in the funding of Missouri school districts) (on file with the University of Michigan Journal of Law Reform).

49. See Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989) (holding that the Kentucky common school system violated the state constitution because the system did not operate efficiently).

50. See Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489 (Tex. 1992) (holding the Texas school financing system unconstitutional under the Texas Constitution because the system required levying inappropriate taxes); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989) (concluding that the state school financing system violated the Texas constitution by failing to operate efficiently), mandamus proceeding, 804 S.W.2d 491 (Tex. 1991).

51. See Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989) (holding the state educational funding system invalid under the Montana Constitution because it failed to provide equality of educational opportunity to all students), amended, 784 P.2d 412 (Mont. 1990).
overturning the state systems in Kansas, Illinois, Virginia, North Dakota, Minnesota, and Wisconsin.

A. Differential Treatment

This section examines some cases in which plaintiffs have argued that treating students from poor districts differently from students from wealthy districts—by spending less money per student in poor districts—violates the equal protection clause of either the state or federal constitution. In two cases involving school finance equity litigation, the Supreme Court stated that, under the United States Constitution, the appropriate level of scrutiny is the lowest level, rational basis review. In San Antonio Independent School District v. Rodriguez, the Court held that the state system merely had to bear some rational relationship to a legitimate state purpose, and the disparity in funding was upheld as being a result of the state's

52. Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170 (Kan. 1994) (upholding state school financing system under the Kansas Constitution where the system was applied uniformly throughout the state, even though such application meant that different districts received different amounts of money).

53. See Committee for Educ. Rights v. Edgar, 641 N.E.2d 602 (Ill. App. 1994) (upholding the state education system because there was no showing that the financing arrangement created an unconstitutionally inefficient system of education).

54. See Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994) (upholding Virginia's public school financing where the state constitution recognized education as a fundamental right, but did not require equal or substantially equal funding among or within state school divisions).


56. See Skeen v. State, 505 N.W.2d 299 (Minn. 1993) (upholding Minnesota school financing system that contained a constitutionally permissible referendum levy statute, that guaranteed the citizens' fundamental right to education, and that involved spending disparities throughout the state).

57. See Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989) (rejecting a challenge to state funding system that failed to provide additional funds to districts with higher concentrations of impoverished students).

58. 411 U.S. 1 (1973). In Rodriguez, the Texas system of school finance provided that districts received a portion of their budgets from state funds and supplemented those funds with an ad valorem tax on property within the district. Id. at 9–10. The plaintiffs, Mexican-American parents of children attending school in a property-poor district, id. at 4–5, alleged that reliance on the property taxes favored the property-wealthy districts over the property-poor districts in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, see id. at 19.

59. Id. at 40. The Supreme Court found that no federal right was implicated, id. at 35, and that no suspect class was disadvantaged by the system, id. at 28.
interest in preserving local control of education. The Court's opinion on the applicable equal protection standard did not change with its holding in *Papasan v. Allain*. There, the Court again found that the rational basis test was the correct standard. The case was remanded for further factual findings to determine whether the disparities were rationally related to a legitimate state interest.

The application of the rational basis test does not, however, guarantee that the challenged school financing formula will be upheld; funding disparities may constitute an equal protection violation when it can be shown that they are not rationally related to a legitimate state interest. Nonetheless, it is very difficult to prove that a state system is irrational.

The question, then, is whether the courts will continue to accept the rationales for disparate funding levels as legitimate. The Supreme Court has, in the past, been willing to accept local control of public education as a legitimate state purpose. Finance systems which permit disparities in funding while ensuring a minimum foundation program also have been seen by courts as rationally related to the objective of local control.

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60. See id. at 49-53 (discussing the merits of local control).


62. Id. at 284.

63. See id. at 289. The language in *Papasan* could be interpreted as narrowing the ruling in *Rodriguez*. The Court stated that *Rodriguez* did not "purport to validate all funding variations that might result from a State's public school funding decisions." Id. at 287 (emphasis added). The Court, however, was unable to pursue the issue further because the district court had dismissed the claims without making the necessary factual determination. Id. at 289.


65. See *supra* notes 59–60 and accompanying text.

66. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49-53 (1973); cf. id. at 128 (Marshall, J., dissenting) (stating that local control may be legitimate in many cases but that, in the instant case, "it [was] apparent that the State's purported
This view, however, is changing. More courts are beginning to see the purpose of the funding formula to be the equitable provision of education to all children in a state\(^*\) and the states' highest courts have found specifically that disparities in funding, in fact, may impede local control of school districts.\(^*\)

As stated by the Tennessee Supreme Court:

First, to alter the state financing system to provide greater equalization among districts does not in any way dictate that local control must be reduced. Second, as pointed out in Serrano II, "The notion of local control was a 'cruel illusion' for the poor districts due to limitations placed upon them by the system itself. . . . Far from being necessary to promote local fiscal choice, the present system [of school finance that is based on district wealth] actually deprives the less wealthy districts of the option."\(^*\) Consequently, even without deciding whether the right to a public education is fundamental, we can find no constitutional basis for the present system, as it has no rational bearing on the educational needs of the districts.\(^*\)

### B. Educational Deprivation

Equal protection clauses—both state and federal—also have been used to challenge state action which unjustifiably infringes on an individual's rights.\(^\text{71}\) Central to the analysis under this

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\(^*\) See supra notes 67-68 and accompanying text.
variation is the question of whether public school education is a fundamental right within the framework of constitutional rights. If so, under the traditional three-tier analysis of judicial review, the appropriate level of review would be strict scrutiny, which would require the state to justify its actions in the distribution of funds to public schools by showing that such distribution was necessary to a compelling state interest.

In *San Antonio Independent School District v. Rodriguez*, the United States Supreme Court held that education was not a fundamental right under the Federal Constitution. Federal law, however, is not controlling where a state court determines that state constitutional rights are broader than their federal counterparts. Because state courts are the best interpreters of

72. *See, e.g., Serrano II*, 557 P.2d at 951–52 (holding that, under the California constitution, education is a fundamental right that requires application of strict scrutiny); *cf* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973) (finding that, because education is not a fundamental right under the U.S. Constitution, strict scrutiny is not required).


75. *See, e.g., Serrano II*, 557 P.2d at 950–51 (labelling U.S. Supreme Court precedent persuasive where Federal Equal Protection Clause provides less protection than the analogous provision of the California Constitution); Horton v. Meskill, 376 A.2d 359, 371 (Conn. 1977) (giving persuasive authority to the U.S. Supreme Court's interpretation of the Federal Equal Protection Clause, but "fully recognizing the primary independent vitality of the provisions of [Connecticut's] own constitution"). *But see Northshore Sch. Dist. No. 417 v. Kinnear*, 530 P.2d 178 (Wash. 1974), overruled by *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978). In *Kinnear*, the court found that the equal protection provisions of the U.S. and Washington Constitutions "have the same significance and are to be construed alike." *Id.* at 198. Thus, the court cited *Rodriguez* as the "direct and controlling" case in upholding the Washington school funding and disbursement statutes. *Id.* at 200. However, four years later, that decision was overruled insofar as it held that education was not a fundamental right.

Other state courts have rejected *Rodriguez* because they question the existence of fundamental rights altogether. For example, the New Jersey Supreme Court has stated:

[W]e have not found helpful the concept of a "fundamental" right. No one has successfully defined the term for this purpose. Even the proposition discussed in *Rodriguez*, that a right is "fundamental" if it is explicitly or implicitly guaranteed in the Constitution, is immediately vulnerable, for the right to acquire and hold property is guaranteed in the Federal and State Constitutions, and surely that right is not a likely candidate for such preferred treatment.

their own state constitutional provisions, they are free to delve into their history and discern the meaning of state constitutional provisions without being bound by issues of comity to federal courts.76

The California Supreme Court felt compelled to treat education as a fundamental interest because of the "distinctive and priceless function of education in our society"77 rather than due to any particular constitutional language. The court observed that education: is essential to a free enterprise democracy; is universally relevant; continues over a lengthy period of life; molds the personality of young people; and is so important that the state has made it compulsory.78 The court found that education, in important ways, was at least as vital to a citizen as two other state constitutional rights—voting and the rights of criminal defendants.79 The California court appears to be alone in its adoption of this type of analysis to determine fundamentality.80 The ambiguity of the court's language has prompted at least one commentator to suggest that the ruling offers "little substantive guidance to lower courts."81

Courts also may determine that, even if education is not a fundamental right that requires strict scrutiny, an intermediate-level scrutiny still should be employed. A determination that, although not a fundamental right, a public school education is within the tier of individual interests to be afforded some protection would require the state to show that denial of an education was substantially related to some important state interest.82

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76. Cf. Serrano II, 557 P.2d at 950 n.43 (citing Baker v. City of Fairbanks, 471 P.2d 386, 401–02 (Alaska 1970) (declaring that the Alaska Supreme Court has a "duty" to explore and develop that state's own constitutional history, provided that the state court does not contravene the United States Supreme Court in its interpretation of federal constitutional provisions)).
78. Id. at 1258–59.
79. See id. at 1257–58.
80. See William E. Thro, To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation, 75 VA. L. REV. 1639, 1675 (1989) (suggesting that the California Supreme Court had adopted a "third" and novel "test of fundamentality").
81. Id. (criticizing the California test as "open-ended" and as a potential "license . . . [to] trespass, all too freely, on the legislative domain") (citing Adamson v. California, 332 U.S. 46, 90 (1947) (Black, J., dissenting), overruled by, Halloy v. Hogan, 378 U.S. 1 (1964)).
82. For a discussion of the intermediate level of scrutiny, see NOWAK ET AL., supra note 15, § 14.3 at 531–33.
The state court alternatively could determine that a mid-level analysis is applicable even if fundamentality was established. In *Plyler v. Doe* the United States Supreme Court considered the appropriate level of judicial scrutiny to apply when children are completely denied a public school education. In that case, the Court found that, although education is not specifically set forth as a federal constitutional right, it "has a fundamental role in maintaining the fabric of our society" by preparing citizens to participate in a democracy and to lead economically productive lives. Finding that the state could not demonstrate that a substantial interest was furthered by the statute excluding children of illegal aliens from the Texas public school system, the Court ruled the statute unconstitutional.

In a more recent North Dakota case, the state court found that a mid-level scrutiny should be applied in a school finance setting because it is an "important substantive right." The court stated:

Funding of education promotes "[a] high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people . . . to insure the continuance of that government and the prosperity and happiness of the people" and is essential to the practical realization of the fundamental right enumerated in our state constitution.

Although the statutory method for distributing funding for education may not totally deprive any student of access to the fundamental right to education, we believe the method of distributing funding for that fundamental right involves important substantive matters similar to those rights involved in cases in which we have applied the intermediate level of scrutiny. Accordingly, we analyze these equal protection claims under the intermediate level of scrutiny, and we require the distribution of funding for education to bear a close correspondence to legislative goals.

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84. *Id.* at 221.
85. *Id.* at 230. It is unclear which level of scrutiny the Court adopted, but it appeared to be higher than rational basis. *See id.* at 224 (stating that the statute in question could "hardly be considered rational unless it . . . further[ed] some substantial goal of the State").
87. *Id.* at 259 (quoting N.D. CONST. art. VIII, § 1) (citations omitted). The North Dakota Supreme Court upheld the state educational financing system for procedural reasons. *Id.* at 250.
Using a variety of analyses, courts in thirteen states have held education to be a fundamental right under their state constitutions. For example, the Supreme Judicial Court of Massachusetts found that its constitutional provision provided to all children the right to adequate educational services. The Massachusetts court based its holding on the terms used within the state constitutional provision:

The duty established is, inter alia, placed on the "legislatures and magistrates, in all future periods of this Commonwealth." The common meaning of "duty" in 1780, according to a dictionary of the English language published that year, was "that to which a man is by any natural or legal obligation bound." "[I]n the sense most obvious to the common intelligence," both then and now, a duty that to which one is bound, or an "obligation."

The New Hampshire Supreme Court in Claremont School District v. Governor found a constitutional duty to provide


89. The relevant language of the Massachusetts Constitution is as follows:

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns . . . .


91. Id. at 524–25 (citations omitted).

education from constitutional language requiring the legislature to “cherish” public schools. The Tennessee Supreme Court used a logical approach, analyzing the syntax of the constitutional provision to determine that education was a constitutional right:

The declaration that “[k]nowledge, learning, and virtue, [are] essential to the preservation of republican institutions,” contained in the same provision of the constitution that created a public school system and provided for its support through a common school fund, established the legal right to public education in Tennessee.

The Missouri court in Committee for Educational Equality v. Missouri found that the legislature had a constitutional obligation to provide an equitable and meaningful education to every child of the state. The court reasoned as follows:

The Constitution of Missouri requires that the State of Missouri provide and fund a system of free public schools so that every child in Missouri will be afforded substantially equal educational opportunities without regard to place of residence, wealth or other economic circumstance.

A deviation from equality on a per student basis in the distribution of the total resources (both state and local) among the schools in the Missouri school system should not be permitted except to provide resources either (a) to the least advantaged or (b) for specially identified educational needs.

Similarly, legislative involvement in education since the framing of the state’s constitution convinced the Wisconsin Supreme Court that education was a fundamental right.

93. Id. at 1377–78. The court found that the Encouragement of Literature Clause of the New Hampshire Constitution imposes a duty on the state to provide constitutionally adequate education to every educable child in public schools in the state and to guarantee adequate funding because the phrase “shall be the duty . . . to cherish” is not merely a statement of aspiration; rather, the language commands that the state provide education to all its citizens and that it support all public schools. Id. at 1378.


96. Id. at 30.

Courts during the first and second waves of school finance litigation focused their analyses on state and federal equal protection claims which involve different levels of judicial scrutiny. In the most current, third-wave cases, in which plaintiffs have used state constitutional provisions as a vehicle, both the federal test for determining a fundamental right\(^98\) and for when to apply strict scrutiny\(^99\) are abandoned. The level of scrutiny is sometimes unclear in these cases.\(^{100}\) It appears the focus of litigation in this third wave has shifted away from the three levels of scrutiny and toward the substance of a state's education clause.

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98. See, e.g., Roosevelt Elementary Sch. Dist. v. Bishop, 877 P.2d 806, 811, 815-16 (Ariz. 1994) (holding that the school financing system did not satisfy the Arizona “general and uniform” constitutional mandate, thus leaving undecided the issue of whether education is a fundamental right); Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 732 (Idaho 1993) (rejecting the Rodriguez definition of fundamental right and finding that education is not a fundamental right under the Idaho Constitution); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989) (holding that the common school system was unconstitutional under the Kentucky Constitution and, therefore, not deciding whether education is a fundamental right under the U.S. Constitution); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 256 (N.D. 1994) (containing an agreement by both parties that education was a fundamental right under the North Dakota Constitution); McWherter, 851 S.W.2d at 156 (holding the school funding scheme was unconstitutional without reaching the question of whether education is a fundamental right under the state constitution); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994) (finding education to be a fundamental right under the Virginia Constitution); Kukor, 436 N.W.2d at 568 (rejecting Rodriguez in so far as it held that education was a fundamental right but following Rodriguez by applying the rational basis standard); Committee for Educ. Rights v. Edgar, 641 N.E.2d 602, 606 (I11. App. 1994) (noting that the Illinois Supreme Court’s definition of fundamental right differs from the federal definition).

99. See, e.g., Skee v. State, 505 N.W.2d 299, 315-16 (Minn. 1993) (applying intermediate scrutiny to review educational funding system under the state equal protection clause); Bismarck Pub. Sch. Dist. No. 1, 511 N.W.2d at 259 (applying strict scrutiny in determining whether the legislature provided a “general and uniform” system of education but applying rational basis in reviewing the financing of such a system).

100. See, e.g., Alabama Coalition for Equity v. Hunt, Nos. CV-90-883-R, CV-91-0117-R (Ala. Cir. Ct. Montgomery County filed Apr. 1, 1993), reprinted in Opinion of the Justices No. 338, 624 So. 2d at 110, 161 (Ala. 1993) (declaring the Alabama public school system unconstitutional under any of the three equal protection standards of review); McWherter, 851 S.W.2d at 156 (declaring the state financing arrangement unconstitutional under rational basis review without enumerating the requirements of that level of review); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989) (striking a school financing arrangement without explicitly stating the level of analysis used), mandamus proceeding, 804 S.W.2d 491 (1991); Committee for Educ. Equality v. Missouri, No. CV190-1371CC (Cole County, Mo. Jan. 15, 1993) (declaring the Missouri school finance scheme unconstitutional without indicating the level of scrutiny employed) (on file with the University of Michigan Journal of Law Reform).
An education clause is a state constitutional provision containing some statement about the state’s role in public education. Education clauses vary widely by state. Some states merely pronounce the importance of education, while others mandate a “system” of free public education. Still others qualify the term “system” with such phrases as “thorough and efficient,” “uniform,” or “general and uniform.” 101 Although some scholars have

101. See ALA. CONST. art. XIV, § 256, amended by ALA. CONST. amend. 111 (“a liberal system of public schools”); ALASKA CONST. art. VII, § 1 (“a system of public schools”); ARIZ. CONST. art. XI, § 1 (“a general and uniform public school system”); ARK. CONST. art. XIV, § 1 (“a general, suitable and efficient system of free public schools”); CAL. CONST. art. IX, § 5 (“a system of common schools”); COLO. CONST. art. IX, § 2 (“a thorough and uniform system of free public schools”); CONN. CONST. art. VIII, § 1 (“free public elementary and secondary schools”); DEL. CONST. art. X, § 1 (“a general and efficient system of free public schools”); FLA. CONST. art. IX, § 1 (“a uniform system of free public schools”); GA. CONST. art. VIII, § 1 (“an adequate public education”); HAW. CONST. art. X, § 1 (“a statewide system of public schools”); IDAHO CONST. art. IX, § 1 (“a general, uniform and thorough system of public, free common schools”); ILL. CONST. art. X, § 1 (“an efficient system of high quality public educational institutions and services”); IND. CONST. art. VIII, § 1 (“a general and uniform system of Common Schools”); IOWA CONST. art. IX, § 3 (“encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement”); KAN. CONST. art. VI, § 1 (“establishing and maintaining public schools”); KY. CONST. § 183 (“an efficient system of common schools”); LA. CONST. art. VIII, § 1 (“a public educational system”); ME. CONST. art. VIII, pt. 1, § 1 (“the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision at their own expense, for the support and maintenance of public schools”); MD. CONST. art. VIII, § 1 (“a thorough and efficient System of Free Public Schools”); MASS. CONST. pt. II, ch. V, § II (“to cherish the interests of literature and the sciences, and all seminaries of them; especially the University at Cambridge, public schools and grammar schools in the towns”); Mich. CONST. art. VIII, § 2 (“a system of free public elementary and secondary schools”); MINN. CONST. art. XIII, § 1 (“a general and uniform system of public schools”); MICH. CONST. art. VIII, § 201 (“establishment, maintenance and support of free public schools”); MO. CONST. art. IX, § 1(a) (“establish and maintain free public schools for gratuitous instruction”); MONT. CONST. art. X, § 1(3) (“a basic system of free quality public elementary and secondary schools”); NEB. CONST. art. VII, § 1 (“free instruction in the common schools”); NEV. CONST. art. XI, § 2 (“a uniform system of common schools”); N.H. CONST. pt. 2 art. 83 (“cherish the interest of literature and the sciences, and all seminaries and public schools”); N.J. CONST. art. VIII, § 4, ¶ 1 (“a thorough and efficient system of free public schools”); N.M. CONST. art. XII, § 1 (“a uniform system of free public schools”); N.Y. CONST. art. XI, § 1 (“a system of free common schools”); N.C. CONST. art. IX, § 2(2) (“a general and uniform system of free public schools”); N.D. CONST. art. VIII, § 2 (“a uniform system of free public schools”); OHIO CONST. art. VI, § 2 (“a thorough and efficient system of common schools”); OKLA. CONST. art. XIII, § 1 (“a system of free public schools”); OR. CONST. art. VIII, § 3 (“a uniform, and general system of Common schools”); PA. CONST. art. III, § 14 (“a thorough and efficient system of public education”); R.I. CONST. art. XII, § 1 (“promote public schools”); S.C. CONST. art. XI, § 3 (“a system of free public schools”); S.D. CONST. art. VIII, § 1 (“a general and uniform system of public schools”); TENN. CONST. art. XI, § 12 (“a
attempted to categorize state education clauses according to their language in an attempt to predict the likelihood of success for school finance equity cases based on such clauses, such exercises are not particularly clear or useful. Education clauses, for the most part, defy categorization because they are peculiar to the state's constitutional history and its judiciary's own method of interpretation. State courts have used variously worded educational provisions to reach similar results, and

system of free public schools); TEX. CONST. art. VII, § 1 ("an efficient system of public free schools"); UTAH CONST. art. X, § 1 ("establishment and maintenance of the state's education systems"); VT. CONST. ch. II, § 68 ("a competent number of schools ought to be maintained in each town"); VA. CONST. art. VIII, § 1 ("a system of free public elementary and secondary schools"); WASH. CONST. art. IX, § 2 ("a general and uniform system of public schools"); W. VA. CONST. art. XII, § 1 ("a thorough and efficient system of free schools"); WIS. CONST. art. X, § 3 ("the establishment of district schools, which shall be as nearly uniform as practicable"); WYO. CONST. art. VII, § 1 ("a complete and uniform system of public instruction").


104. The courts recognize the unique nature of state education clauses. For example, the Tennessee Supreme Court observed:

[T]he decisions of the courts in [other] jurisdictions provide little guidance in construing the reach of the education clause of the Tennessee Constitution. This is true because the decisions by the courts of other states are necessarily controlled in large measure by the particular wording of the constitutional provisions of those state charters regarding education and, to a lesser extent, organization and funding.

McWherter, 851 S.W.2d at 148. New Hampshire, however, is an exception to this general rule. See Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1378 (N.H. 1993) (examining the New Hampshire Constitution alongside the Massachusetts Constitution because the former was modeled on the latter).

105. Compare McDuffy v. Secretary of the Executive of Educ., 615 N.E.2d 516 (Mass. 1993) (holding that the Massachusetts Constitution requires that the Commonwealth provide all public school students with an adequate education) with Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989) (finding that the Kentucky Constitution mandates the general assembly to provide an efficient statewide system of common schools). The Massachusetts Constitution uses the phrase, the "duty . . . to cherish the interests of . . . public schools." MASS. CONST. pt. II, ch. 5, § 2. The Kentucky Constitution uses the phrase, an "efficient system of common schools." KY. CONST. § 183. Courts of both states found that the respective education provisions required each state to provide equal access to an education which affords the opportunity for a student to develop skills necessary to participate meaningfully in society. McDuffy, 615 N.E.2d at 548; Council for Better Educ., 790 S.W.2d at 212-13.
state courts have used similarly worded educational provisions to reach different results.\(^{106}\)

In school finance cases across the nation, education clauses have been used in two ways: (1) by applying the provision to determine if the legislature is abiding by its obligation under the clause; or (2) by using the provision to define education as a right protected by equal protection and due process. In many cases, both claims have been made and are basically indistinguishable. The latter arguments have been discussed above.\(^{107}\) The former argument preserves the more interesting and current questions. Here, arguments focus on the question of the type and level of support required to be provided under the state constitution. Thus, the focus is what would have been efficiency, vertical equity, and adequacy. Most importantly, the focus shifts from equal expenditures to spending required for students' needs.

**II. ADEQUACY AND VERTICAL EQUITY**

A state's obligations under an education clause generally has been interpreted as including a substantive component: the education that the state provides must be meaningful.\(^{108}\) The focus is on providing an opportunity for students to receive an education that will prepare them to participate actively in society. This student-oriented focus differs substantially from previous cases that concentrated on equal resources being expended by districts.\(^{109}\)

In the context of public education, this argument is actually very old. Thomas Jefferson, in *A Bill for the More General*

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106. Compare Skeen v. State, 505 N.W.2d 299 (Minn. 1993) (holding that the constitutional requirement of uniformity in education did not require full equalization of local referendum levies) with Britt v. North Carolina State Bd. of Educ., 357 S.E.2d 432 (N.C. Ct. App.) (holding that the state constitution only guarantees equal access to education and not equal educational opportunities), dismissal allowed and review denied, 361 S.E.2d 71 (N.C. 1987). The Minnesota court found that state's educational provision to require only an adequate level of education which meets state standards for all students, Skeen, 505 N.W.2d at 311–12, while the North Carolina court found its provision to require equal access to education. Britt, 357 S.E.2d at 436.

107. See supra notes 104–05 and accompanying text.

108. Cf. supra note 93 (requiring a state to provide adequate school funding).

109. See, e.g., Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989) (finding that districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort), mandamus proceeding, 804 S.W.2d 491 (1991).
Diffusion of Knowledge,\textsuperscript{110} cited the development of citizens’ minds as the most effectual means of preventing tyranny.\textsuperscript{111} He argued that a democratic government works best when its citizens and governmental officers are “rendered by liberal education worthy to receive, and able to guard the sacred deposit of the rights and liberties of their fellow citizens, and . . . they should be called to that charge without regard to wealth, birth or other accidental condition or circumstance . . . .”\textsuperscript{112} Thus, the purpose of education, under this Jeffersonian concept, is to prepare society’s children to be functioning members of the state when they reach the age of majority: able to read, write, work, and be active participants in our democratic society. As stated in Abbott \textit{v.} Burke,\textsuperscript{113} a constitutionally sufficient education under the New Jersey Constitution is “one that will equip all of [the] students of the state to perform their roles as citizens and competitors in the same society.”\textsuperscript{114}

Courts in Alabama,\textsuperscript{115} Arizona,\textsuperscript{116} California,\textsuperscript{117} Massachusetts,\textsuperscript{118} Missouri,\textsuperscript{119} and Texas\textsuperscript{120} have all found similar embodiments of this Jeffersonian principle in their state’s constitutional provisions requiring that the state provide meaningful education to all of its children in an equitable manner. As stated by a

\begin{itemize}
  \item \textsuperscript{110} THOMAS JEFFERSON, \textit{A Bill for the More General Diffusion of Knowledge}, in \textit{THE COMPLETE JEFFERSON} 1048 (Saul K. Padover ed., 1943).
  \item \textsuperscript{111} Id.
  \item \textsuperscript{112} Id.
  \item \textsuperscript{113} 575 A.2d 359 (N.J. 1990).
  \item \textsuperscript{114} Id. at 410.
  \item \textsuperscript{116} Roosevelt Elementary Sch. Dist. \textit{v.} Bishop, 877 P.2d 806, 812, 816 (Ariz. 1994).
  \item \textsuperscript{117} Serrano \textit{v.} Priest, 487 P.2d 1241, 1255–59 (Cal. 1971).
  \item \textsuperscript{118} McDuffy \textit{v.} Secretary of the Executive Office of Educ., 615 N.E.2d 516, 535–41 (Mass. 1993). The Supreme Judicial Court of Massachusetts determined that a provision of their state constitution was based on this Jeffersonian principle.
  \item \textsuperscript{119} Id. at 524.
  \item \textsuperscript{111} Committee for Educ. Equality \textit{v.} Missouri, No. CV190-1371CC (Cole County, Mo. Jan. 15, 1993) (on file with the \textit{University of Michigan Journal of Law Reform}).
\end{itemize}
court in Missouri, "[t]he Constitution of Missouri promotes the Jeffersonian concept that education is fundamental to democracy and that the state should assume the primary educational role." 121

The highest state courts of West Virginia, 122 Kentucky, 123 Washington, 124 New Jersey, 125 Alabama, 126 and Tennessee 127 have stressed that public education must meet a certain substantive level of educational quality in order to satisfy constitutional requirements. 128 For example, the Supreme Court of Tennessee in interpreting that state's constitutional requirement described the constitutional mandate to be as follows:

that the General Assembly shall maintain and support a system of free public schools that provides, at least, the

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121. Committee for Educ. Equality, No. CV 190-1371CC, slip op. at 26. The Missouri Constitution provides:

A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools.

Id. (quoting Mo. Const. art. IX, § 1(a)). The court further stated:

By reason of Article IX, Section 1(a), the State of Missouri is required to maintain a system of free public schools which will provide for that “general diffusion of knowledge and intelligence” which is necessary in any given era to preserve the “rights and liberties of the people.” It is not sufficient that a system be only “establish[ed]”, it is constitutionally essential, as well, that it be “maintain[ed]” at an ever evolving level which will assure the “preservation of the rights and liberties of the people.”

Id.

127. Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 151–52 (Tenn. 1993) (finding that the Tennessee Constitution guarantees children a certain level of education but leaving undecided the precise level required).
opportunity to acquire general knowledge, develop the powers of reasoning and judgment, and generally prepare students intellectually for a mature life.\(^{129}\)

In New Jersey, the supreme court found that constitutional language required a "thorough and efficient" educational system\(^{130}\) offering substantive educational opportunities that will afford each student a chance to become "a citizen and . . . a competitor in the labor market."\(^{131}\)

The highest courts of Kentucky and Massachusetts went so far as to define an adequate system specifically as one in which a student has the opportunity to develop at least the seven following capabilities:\(^{132}\)

1. sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
2. sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
3. sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
4. sufficient self-knowledge and knowledge of his or her mental and physical wellness;
5. sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
6. sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
7. 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.\(^{133}\)

More recent cases no longer focus on the simple equality of per-pupil expenditure. These cases suggest that, as education theory has developed, society has become more aware that not

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129. *McWherter*, 851 S.W.2d at 150–51.
131. *Id.*
132. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989); *see also* McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993) (defining educational adequacy with respect to the seven similar criteria and citing the Kentucky Supreme Court in *Council for Better Education*).
133. *Council for Better Educ., Inc.*, 790 S.W.2d at 212.
all children are equal in terms of their task of learning. They have differing abilities and challenges. The system has shifted its focus in an attempt to meet the individual needs of children. There has been a shift from the paradigm of “one size fits all” curriculum to individualized learning in an attempt to accommodate the needs of diverse learners. Differences in per-pupil expenditures are judged by student needs. As stated by the Arizona Supreme Court: “We emphasize that a general and uniform school system does not require perfect equality or identity. For example, a system that acknowledges special needs would not run afoul of the uniformity clause.” Disparities or differences in the educational services provided to a student are thus being assessed on the grounds of educational needs as opposed to district wealth.

As early as 1985, the New Jersey Supreme Court decided that the New Jersey Constitution required an educational system which provided economically disadvantaged students with the opportunity to compete effectively with students from wealthy districts. The court recognized that the needs of students from poor districts required the state to spend even more money than it spent on students from wealthy districts in an effort to equalize the resources offered to students in the disparate districts.

Children who have greater educational needs should receive greater educational services. It is not logical that children who

135. See Abbott v. Burke, 495 A.2d 376, 390 (N.J. 1985) (comparing “the education received by children in property-poor districts to that offered in property-rich districts” to ensure that the disadvantaged children can “compete in, and contribute to, the society entered by the relatively advantaged children”).
136. See id. at 388.
137. Scholars remain divided over whether dollars can rectify inadequate education. Compare Eric A. Hanushek, When School Finance “Reform” May Not Be Good Policy, 28 HARV. J. ON LEGIS. 423, 454 (1991) (“If schools are ineffective at [translating resources into student achievement], simply heaping more resources on poorly performing districts will do little to improve educational equity.”) with G. Alfred Hess, Jr., METROSTAT, Chicago Panel on Public School Policy and Finance, MONEY MAKES A DIFFERENCE: COMPARATIVE STUDIES OF MIDWESTERN CITY SCHOOL EXPENDITURES—ST. LOUIS AND CHICAGO 2 (1993) and William T. Hartman, District Spending Disparities: What Do Dollars Buy?, 13 J. EDUC. FIN. 436, 458–59 (1988) (concluding that districts with more available funds spend them on resources believed to enhance the quality of education) and JOHN E. COONS ET AL., supra note 23, at 30 (arguing that cost is related to quality). Coons, Clune, and Sugarman have stated:

We regard the fierce resistance by rich districts to reform as adequate testimonial to the relevance of money. Whatever it is that money may be thought to contribute to the education of children, that commodity is something highly prized by those
have fewer educational needs should receive greater educational services merely because of the fact that they reside in a district with great property wealth. The problem is further compounded when one considers that children in need of high-cost programs are typically clustered in property-poor districts. These are students in need of compensatory education, bilingual programs, and special education.

Arguments for compensatory funding of poor districts often are stated in terms of fulfilling the state's constitutional obligation or in terms of defining the rationality of educational funding. The state has a legitimate interest in providing an adequate and equitable education to all of the children of the state. It does not have any legitimate interest in depriving them of such an education. Courts considering systems in which those with the greatest educational needs receive the least money have generally found such systems to be irrational and insufficient under state education clauses.

It is up to each state court to devise a definition of adequacy by which to measure the legislature's efforts in the area of

who enjoy the greatest measure of it. If money is inadequate to improve education, the residents of poor districts should at least have an equal opportunity to be disappointed by its failure.

Id.

138. See, e.g., WISCONSIN LEGISLATIVE AUDIT BUREAU, AN EVALUATION OF THE CHAPTER 220 PROGRAM 38 (1994) (showing that children in Milwaukee, especially minorities, have poorer reading skills than their suburban counterparts).

139. In the evaluation of the desegregation program for Milwaukee Public Schools and the surrounding suburbs, nearly twice as many students were found to be in need of compensatory education in property-poor Milwaukee in comparison to the property-wealthy suburban districts. For example, on the statewide tenth grade reading test, only 35.5% of Milwaukee students scored above the national 50th percentile compared to 72.7% of suburban students scoring above the national 50th percentile. Id.

140. The situation is compounded by funding considerations. Under the Individual with Disabilities Education Act, 20 U.S.C. § 1400 (1988 & Supp. V 1993), federal funds have never exceeded 12.5% of the national average per pupil expenditure. Thomas B. Parrish & Deborah A. Verstegen, The Current Federal Role in Special Education Funding, 22 EDUC. CONSIDERATIONS 36, 36 (1994). From 1982 to 1988, the cost of special education programs borne by local school districts ranged from 36.1% to 37.8%. U.S. DEPT OF EDUC., TO ASSURE THE FREE AND APPROPRIATE PUBLIC EDUCATION OF ALL CHILDREN WITH DISABILITIES: FOURTEENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 146 (1992). The financial impact of this funding imbalance is troublesome, particularly for poor districts, due to cost and incidence rate. For example, in Wisconsin, the incidence of special education students is significantly higher in the 20 poorest school districts in terms of property wealth as compared to the 20 wealthiest districts. Julie K. Underwood et al., Feasibility Study for the Association for Equity in Funding: Wisconsin School Finance Equity Final Report (Aug. 1994) (unpublished manuscript, on file with the University of Michigan Journal of Law Reform).
education. The trend is to find that the constitutional provision requires, at a minimum, a meaningful education which provides each student with the opportunity to develop and become a productive citizen. The language of state constitutions indicates that to fulfill the purpose of the constitutional mandate, students should have an opportunity within the public school system to develop the skills necessary to become meaningful contributors to our economy and democratic process.

This approach still does not address the problem that these remedies and theories still focus on educational inputs rather than on desired educational outcomes. However, this trend too may be changing.\textsuperscript{141} In the area of school desegregation, recent cases involving the question of achieving unitary status have inquired into actual student performance as a criterion rather than the mere percentage of minority members in the population of students and teachers.\textsuperscript{142} It has been argued that certain types of judicial remedies in the area of desegregation have effected actual school reform because they have altered the political power groups involved.\textsuperscript{143} This outcome theory may lay the seeds of the fourth wave of school finance reform litigation.


\textsuperscript{142} \textit{See}, e.g., Jenkins v. Missouri, 38 F.3d 960 (8th Cir. 1994).

\textsuperscript{143} \textit{See}, e.g., Jomills H. Braddock II et al., \textit{A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults}, 66 PHI DELTA KAPPAN 259 (1984) (arguing that school desegregation results in societal desegregation); James S. Liebman, \textit{Desegregating Politics: “All-Out” School Desegregation Explained}, 90 COLUM. L. REV. 1463 (1990) (arguing that school desegregation will solve the problem of systemic racism in the United States).