Civil Rights and Wrongs in Educational Opportunity: School Funding Litigation in the Southern United States

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I) The Legal Roots of School Funding Litigation: *Brown, Serrano*, and *Rodriguez*

Thomas Jefferson recognized education as the *sine quo non* of a truly viable democracy, and over two centuries of American history have confirmed that education is the key to the American dream, and the surest means of protecting and advancing a free society.[1] In *Brown v. Board of Education*,[2] the U.S. Supreme Court recognized the great importance of education, stating that:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[3]

The importance of educational opportunity is well established. But securing equal educational opportunity for all children remains an illusive goal in the United States. The U.S. Supreme Court's decision in *Brown*, was a major victory in moving towards greater equity in educational opportunity. But to achieve success in the *Brown* litigation, difficult choices had to be made. Thurgood Marshall and the other advocates for the plaintiffs had to make a critical decision. In attacking the *Plessy*[4] doctrine of "separate but equal" they had to decide whether they should focus their efforts on "separate" or "equal." Attacking the concept of "separate" in 1954 was an incredible hurdle that would require massive social and legal changes in the United States, making an attack on the legal precedent of racially separate schools a monumental undertaking. In contrast, a legal challenge based on the "equal" element of the *Plessy* doctrine would have been

relatively easy. There was substantial evidence at the time that the nation's race-based separate schools were grossly unequal in expenditures.[5] However, a victory based on allegations that the racially separate schools were unequally funded would have at best gained some additional resources for minority race schools, but left the *Plessy* doctrine intact. Marshall and the advocates for the plaintiffs decided to attack the broader constitutional issue of racial segregation in public educational institutions, mounting a direct assault on the *Plessy* doctrine. Despite the magnitude of the task, their challenge resulted in a major legal victory leading to massive social changes in the United States, social changes that continue to reverberate through American culture more than a half century later.

But one of the ironies of the *Brown* litigation was that despite the focus on separate rather than equal, many defendants' subsequently attempted to avoid implementation of the *Brown* decision through post-*Brown* efforts to shift more funding to minority race schools. They hoped that the additional new funds for minority race school facilities, etc., would appease civil rights advocates and federal judges, thereby diminishing or avoiding further calls for actual desegregation of schools. But advocates for civil rights and equal educational opportunity knew that to achieve authentic justice and equity in educational opportunity, both parts of the equation had to be remedied. Public schools could no longer be segregated based on race, and consistent with the Court's recognition in *Brown* of the importance of educational opportunity to the future of every child, there had to be greater equity in public school funding, supporting greater equity in educational opportunity for all children.

Scholars and civil rights advocates continue to debate the legacy of *Brown.* Clearly much

remains undone in realizing the goals of *Brown.* Despite the massive changes sparked by the *Brown* decision, few would argue that the egalitarian dreams of racial equity associated with *Brown* were ever fully realized. To the contrary, scholarly studies show that many of the gains achieved through *Brown* are currently eroding. The *Harvard Civil Rights Project* has documented a trend toward resegregation,[6] that appears to have accelerated since the U.S. Supreme Court's 1991 decision in *Board of Education v. Dowell.*[7] The *Brown* litigation broke down many legal and social barriers for minority race children, but the Court's decision was clearly no panacea for the educational needs of disadvantaged children. Further, a series of U.S. Supreme Court opinions in the 1990s have clearly made it more difficult for civil rights advocates to gain the support of federal courts in pushing forward continuing desegregation and racial equity efforts.

But while the "separate" side of the litigation effort may be waning, the "equal" side of this civil rights battle shows no signs of diminishing. Advocates for educationally disadvantaged children have embraced school funding litigation as a powerful tool in the struggle for greater equity in educational opportunity. Although Marshall declined to focus on "equal" in the *Brown* litigation, nonetheless, the modern revolution in school funding equity was sparked by the Court's decision in *Brown*. Law and education scholars have noted that: "The language of the *Brown* case sounded broad enough to apply to unequal expenditures on children's education even when racial discrimination was not involved . . . [t]he constitutional theory that evolved in the Supreme Court civil rights decisions that followed *Brown* also seemed to apply to the school finance situation."[8] In the years following *Brown*, civil rights advocates began to fight for judicial mandates for school funding equity, focusing on inequities in public school funding as the critical

but unresolved remnant of *Brown*.[9] The line of funding equity litigation begun in *Serrano v. Priest,* is rooted in *Brown,* and shows no signs of diminishing. Below are summaries of three of the foundational cases for the modern school funding equity movement, *Serrano v. Priest,*[10] *San Antonio v. Rodriguez,*[11] and *Robinson v. Cahill.*[12] The Supreme Court of California's decision in *Serrano* was a landmark victory for funding equity advocates, legitimizing suits based on equal protection challenges, and introducing a judicially manageable standard of fiscal equity. And although funding equity advocates ultimately lost in *Rodriguez,* the *Rodriguez* decision helped to focus national attention on the need for greater equity in educational opportunity, and redirected this litigation to the states. The decision in *Robinson* recognized the legitimacy of challenges under state education articles, opening the door to a new vein of litigation for funding equity advocates.

This monograph provides an overview of the past, present, and likely future of school funding litigation, particularly in the Southern United States. This overview begins with summaries of the litigation in the landmark *Serrano, Rodriguez,* and *Robinson* cases. This section is followed with a review of the common elements of school funding litigation, the next section presents summaries of the major funding cases in the South since *Serrano,* and the concluding section addresses the potential future of funding litigation in the South.

Serrano v. Priest
Supreme Court of California
Decided August 30, 1971

On August 30, 1971 the California Supreme Court issued its decision in the landmark case of

Serrano v. Priest.[13] *Serrano* was the first successful challenge to a state aid system of public school finance.[14] In addition, *Serrano* was the first case to establish a judicially manageable standard for courts in addressing inequities in school funding,[15] the *Serrano* principle,[16] which commanded that the quality of a child's education cannot be a function of the wealth of the local community. Instead, under the *Serrano* principle, public school funding must be a function of the wealth of the state as a whole.[17]

Plaintiffs in *Serrano* were Los Angeles County children and their parents. They represented all public school children in the state of California and the parents of those children who pay real property taxes, except those in the most privileged district.[18] *Serrano* framed the issues that would become prominent in subsequent school funding cases based on equal protection claims: 1) whether education is a fundamental right; 2) whether the court would apply strict scrutiny; and 3) whether the state's goal of promoting local control constituted a sufficient justification for the challenged funding system under the court's standard of review.

In *Serrano,* the Supreme Court of California held that education is a fundamental right in California, thereby requiring strict scrutiny in reviewing state actions which impinge upon this fundamental right.[19] The court applied strict scrutiny to the California system of public school funding, and determined that California's funding system, which caused substantial disparities in per pupil revenue among school districts, discriminated against the poor and violated the equal protection clause of the U.S. Constitution’s Fourteenth Amendment. The court rejected the defendant's argument that promoting local control constituted a compelling state interest, noting that the state's system rather than being necessary to promote local fiscal choice, "actually

deprives the less wealthy districts of that option."[20]

The *Serrano* court noted the wide fiscal disparities created by the California system of public school funding. Assessed valuation per average daily attendance "ranged from a low of $103 to a peak of $952,156--a ratio of nearly 1 to 10,000."[21] The court further found that within Los Angeles County, per pupil expenditures ranged from $577.49 to $1,231.72.[22] The court also addressed the issue of tax payer equity, noting that "as a practical matter districts with small tax bases simply cannot levy taxes at a rate sufficient to produce the revenue that more affluent districts reap with minimal tax efforts."[23] In the words of the court, "affluent districts can have their cake and eat it too: they can provide a high quality education for their children while paying lower taxes. Poor districts, by contrast, have no cake at all."[24]

The court bolstered its ruling that education was a fundamental right by citing *Brown v. Board of Education*.[25] The court also weighed the importance of education in comparison with the right to vote and the rights of defendants in criminal cases, two fundamental interests which the U.S. Supreme Court had already protected against discrimination based upon wealth.[26] The court concluded: "We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a fundamental interest."[27]

In *Serrano*, the defendants argued that if the court were to find that wealth discrimination in public education violated the equal protection clause, the court must then be deemed to "direct the same command to all governmental entities in respect to all tax-supported public services" and that "such a principle would spell the destruction of local government."[28] The court rejected the defendant's argument, stating that "although we intimate no views on other governmental services, we are satisfied that, as we have explained, its uniqueness among public activities clearly

demonstrates that education must respond to the command of the equal protection clause."[29] The court then remanded the case to the trial court with directions to proceed consistent with the court's opinion.

San Antonio v. Rodriguez
Supreme Court of the United States
Decided March 21, 1973

Following *Serrano*, several state courts struck down school finance laws on similar grounds.[30] Considerable attention was focused on these cases, and many commentators predicted "an unprecedented upheaval in public education"[31] similar to the events following *Brown v. Board of Education*.[32] There is little doubt that the burgeoning revolution in school funding equity was sparked by the U.S. Supreme Court's racial equity decision in *Brown*.[33] In *San Antonio v. Rodriguez,*[34] many believed that the U.S. Supreme Court had an opportunity to establish a national mandate for school funding equity, similar to its racial equity mandate in *Brown*.

However, instead of following what many commentators had perceived as a trend towards judicial promotion of school funding equity established by *Serrano* and its progeny, the U.S. Supreme Court, in a 5-4 decision, delivered a significant defeat to school funding reformers. The Court in *Rodriguez* held that education was not a fundamental right protected under the U.S. Constitution,[35] and that the Texas system of school finance did not disadvantage any suspect class.[36] Since education was not a fundamental right and the challenged system did not disadvantage any suspect class, the Court reversed the district court's judgment for the plaintiffs, finding that the Texas system of school funding need only meet the Court's rational basis test

instead of the strict scrutiny test applied by the district court. Under the rational basis test, challenged state actions need only bear a rational relationship to a legitimate state purpose. The Court held that the defendant's claimed interest in promoting local control of public schools was sufficient under rational basis scrutiny.

In *Rodriguez,* the plaintiffs were Mexican-American parents whose children attended the Edgewood District schools in urban San Antonio. These plaintiffs brought a class action suit on behalf of all school children in the state of Texas who were minority members, or who were poor and resided in school districts having a low property tax base. In the Edgewood District, 90% of the student population was Mexican-American and over 6% was African-American. The Court noted that the average assessed property value per pupil in the Edgewood District was $5,960 and the median family income was $4,686. In contrast, the nearby Alamo Heights District was predominately Anglo with only 18% Mexican-American children and less than 1% African-American children. The average assessed property value per pupil in the Alamo Heights District was over $49,000 and the median income was $8,001.[37] The state of Texas conceded that its system of funding public schools could not withstand the level of scrutiny the Court uses in reviewing legislation which interferes with fundamental rights, and the Court noted "the Texas financing system and its counterpart in virtually every other State will not pass muster"[38] under strict scrutiny. The Court then considered whether strict scrutiny was the appropriate mode of review in *Rodriguez.*

First, the Court considered whether the Texas system disadvantaged any suspect class. More specifically, the Court considered the plaintiffs' allegations that poverty constituted a suspect

classification. Concluding that it did not, the Court found no identifiable disfavored class in *Rodriguez.* The Court further distinguished *Rodriguez* from prior cases protecting indigents by noting that only a relative rather than an absolute deprivation of education was alleged.[39] The Court criticized "the major factual assumption of *Serrano*--that the educational financing system discriminates against the poor," as simply false according to a Connecticut study.[40] The Court noted that "whether a similar pattern would be discovered in Texas is not known, but there is no basis on the record in this case for assuming that the poorest people . . . are concentrated in the poorest districts."[41] The Court further criticized the assumption that the amount of money available for education affects the quality of the education, stating "this is a matter of considerable dispute among educators and commentators."[42] Since the Court refused to recognize any suspect class in *Rodriguez,* the Court would not apply strict scrutiny unless it was determined that education was a fundamental right under the U.S. Constitution.

Justice Powell, writing for the majority in *Rodriguez* stated that "it is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."[43] The Court criticized the *Serrano* method for determining whether education is a fundamental right, which weighed the importance of education in comparison to other fundamental rights recognized by the Court, stating "the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[44] Finding no explicit or implicit guarantees regarding education, the Court determined the rational basis test was the proper standard of review in *Rodriguez.* Lastly, the majority opinion recited a litany of concerns that would later be echoed in virtually every opinion upholding an existing school funding

system: 1) criticism of the plaintiffs' statistical data and conclusions;[45] 2) fear of engaging in judicial activism;[46] 3) fears of opening the floodgates of litigation in other areas of social services;[47] 4) concerns related to judicial competence in an area where courts generally have limited expertise;[48] 5) the importance of judicial deference to the legislature in this area;[49] and 6) the need for the plaintiffs to address their grievances to the legislature instead of the courts.[50]

Justice Brennan, dissenting, disagreed with the majority's test of fundamentality stating "as my Brother Marshall convincingly demonstrates, our prior cases stand for the proposition that 'fundamentality' is, in large measure, a function of the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed,"[51] essentially the test used by the Supreme Court of California in *Serrano*. Justice Brennan further commented that "there can be no doubt that education is inextricably linked to the right to participate in the electoral process and the rights of free speech and association guaranteed by the First Amendment" and therefore any classification effecting the right to education should be subjected to strict scrutiny.[52]

Justice White also filed a dissenting opinion, joined by Justice Douglas and Justice Brennan. Justice White stated that: "Alamo Heights had total revenues of $594 per pupil while the Edgewood District had only $356 per pupil. The majority and the State concede, as they must, the existence of major disparities in spendable funds."[53] In contrast to the majority opinion, Justice White would have found that the Texas system of school funding failed even the rational basis test. Justice White noted that "it is not enough that the Texas system seeks to achieve the valid, rational purpose of maximizing local initiative; the means chosen by the State must also be

rationally related to the end sought to be achieved."[54] According to Justice White, if the state seeks to justify its system as promoting local control, its method of pursuing this goal must be more than a mere "scheme with 'different treatment being accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.'"[55]

Justice Marshall, in a dissent joined by Justice Douglas, asserted that the majority's opinion was "a retreat from our historical commitment to equality of educational opportunity" and an "unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens."[56] Justice Marshall further doubted the sufficiency of the majority's suggestion that the proper remedy was to submit the issue to the political process. He noted that the district court had delayed its decision in *Rodriguez* for two years hoping that the legislature would remedy the gross disparities in the Texas system. Asserting the futility of such delays, Justice Marshall stated:

> The strong vested interest of property-rich districts in the existing property tax scheme poses a substantial barrier to self-initiated legislative reform in educational financing.[57] . . . I, for one, am unsatisfied with the hope of an ultimate "political" solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that "may affect their hearts and minds in a way unlikely to be undone." *Brown v. Board of Education*.[58]

Justice Marshall also noted there were substantial taxpayer inequities which allowed wealthy districts to generate more money for a smaller tax rate.[59] He criticized the majority's assertion that money is unrelated to educational quality, stating:

> [I]f financing variations are so insignificant to educational quality, it is difficult to understand why a number of our country's wealthiest school districts, which have no legal obligation to argue in support of the constitutionality of the Texas legislation, have nevertheless zealously pursued its cause before this Court.[60]

In conclusion, Justice Marshall noted the Court has long recognized that "inequality in the educational facilities provided to students may be discriminatory state action as contemplated by the Equal Protection Clause,"[61] and "personal poverty may entail much the same social stigma as historically attached to certain racial and ethnic groups."[62]

Robinson v. Cahill
Supreme Court of New Jersey
Decided April 3, 1973

In 1972, a New Jersey trial court in *Robinson v. Cahill*, held that the state's system of school funding violated equal protection guarantees of both the U.S. and New Jersey Constitutions, as well as the New Jersey Constitution's education article.[63] The defendants appealed to the Supreme Court of New Jersey. The Supreme Court of New Jersey did not release its opinion until after the United States Supreme Court rendered the *Rodriguez* decision on March 21, 1973. But after the U.S. Supreme Court's decision in *Rodriguez*, in an unanimous opinion,[64] the Supreme Court of New Jersey refused to follow the direction set by the Court in *Rodriguez.* Instead, the Supreme Court of New Jersey affirmed the trial court's holding, with modifications in view of *Rodriguez* and the court's own concerns regarding the implications of a ruling based on equal protection grounds. The Supreme Court of New Jersey agreed that the New Jersey system of school funding was unconstitutional, but based its holding on the mandate of the state's education article rather than the federal equal protection clause.

Based on testimony regarding a correlation between dollar input per pupil and the quality of education, the New Jersey Supreme Court found it "clear that there is a significant connection

between the sums expended and the quality of the educational opportunity" and accepted "the proposition that the quality of educational opportunity does depend in substantial measure upon the number of dollars invested." [65] The court further noted that the legislature accepts the premise that money effects quality when it provides state aid to diminish disparities in educational funding.[66]

The Supreme Court of New Jersey accepted the trial court's holding that disparities in per pupil expenditures could not be reconciled with the requirements of the constitution, but disagreed that equal protection grounds were an appropriate basis for this decision.[67] The court was concerned, as was the majority in *Rodriguez,* that "the equal protection argument goes beyond the educational scene and implicates the entire concept of local government."[68] However, the court noted that the *Rodriguez* Court "did not say that there could never be a successful equal protection attack in this area"[69] and that notwithstanding *Rodriguez* "the question of whether the equal protection demand of our State Constitution is offended remains for us to decide."[70]

The court further rejected the U.S. Supreme Court's explicit-implicit test for fundamentality,[71] as too mechanical. Instead, the court adopted an approach which weighed the value of the reviewed interest against the apparent public justification.[72] Nonetheless, the Supreme Court of New Jersey rejected the trial court's equal protection holding, finding that wealth did not constitute a suspect class in New Jersey.[73] The court further declined to find that education was a fundamental right in New Jersey,[74] preferring to base its holding on the New Jersey Constitution's education clause which requires "a thorough and efficient system of free public schools."[75] The New Jersey Supreme Court agreed with the trial court that "on the basis of

discrepancies in dollar input per pupil" the legislature had failed to meet the constitutional mandate.[76] Although the court noted that per pupil spending disparities are permissible under some circumstances, the present system was found unconstitutional.[77] The court concluded by requesting the "further views of the parties as to the content of the judgment" and set a date for future arguments on these issues.[78]

II) An Overview of School Funding Litigation[79]

Since *Serrano*, funding equity litigation has been contemplated or initiated nation-wide. Plaintiffs have advanced a variety of creative legal theories, defendants have raised an array of legal defenses, and there has been a great deal of diversity in the judicial responses to these cases. Nonetheless, there are many common elements in this litigation, and the funding litigation in the South can only be understood thoroughly when viewed in the broader context of the litigation since *Serrano*. This section reviews the process of school funding litigation since *Serrano*. It is based on an analysis of state high court decisions on the merits of public school funding challenges, and addresses: 1) Jurisdictional and Factual Establishments; Application of the Law to the Facts; Equal Protection Challenges; State Education Article Challenges; and an Examination of the Role of Courts in School Funding Disputes.

1) Jurisdictional and factual Establishments in School Funding Litigation

Before a court can render a decision on the merits of a case, the plaintiffs must first establish a valid cause of action and proper jurisdiction. With few exceptions, these issues generally have not presented a bar to a decision on the merits in school funding litigation cases.[80] In *McDaniel v. Thomas* the Supreme Court of Georgia commented that: "We know of no sister State which has refused merits treatment to such issues, and we would regard our own refusal to adjudicate plaintiffs' claims of constitutional infringement an abdication of our constitutional duties."[81] Nonetheless, since these issues are prerequisites to a decision on the merits, defendants continue to hold plaintiffs to their burden of establishing the existence of a valid cause of action, standing, justiciability, and other preliminary matters.[82]

After satisfying these preliminary concerns, plaintiffs may begin to present evidence in order to prove their case. A common element in post *Serrano* school funding litigation is the allegation that funding inequities among school districts result from the state's reliance on local property taxes to fund education. Plaintiffs introduce evidence of disparities in the assessed valuation of property among local school districts. Plaintiffs argue that disparities in assessed property valuations result in disparities in local financial resources for education and unequal per pupil expenditures. Both plaintiffs and defendants expend significant resources in gathering and presenting numerical data regarding the extent and causes of funding inequities throughout the state.[83] Even if plaintiffs can establish the existence of significant disparities in assessed valuation and per pupil expenditures, these factual establishments are of limited value without persuasive evidence that the quantity of expenditures can be linked to measures of educational quality, and that educational harm results to children in fiscally disadvantaged schools. These last two issues have been the subject of significant legal and academic debate.

a) Linking Expenditures to Educational Quality

Courts have generally agreed that constitutional guarantees of free public education are guarantees of educational opportunity and not guarantees of equal dollar amounts per pupil.[84] Because constitutions guarantee educational opportunity and not equality in expenditures, plaintiffs must link expenditures to educational opportunity in order to use constitutional provisions to obtain more equitable funding.[85] Since *Serrano v. Priest*,[86] no plaintiff has ultimately prevailed without convincing the court of the existence of a positive correlation between expenditures and educational opportunity.[87] The obvious explanation for this is that if

expenditures do not effect the quality of educational opportunity, the funding equalization order sought by plaintiffs would not rationally promote the constitutional interest in educational opportunity the court is charged with protecting.

Because of its crucial importance to the cases of plaintiffs,[88] and the unsettled academic debate regarding this issue,[89] considerable judicial attention has been devoted to examining the alleged correlation between expenditures and educational opportunity. The Coleman Report and various other academic studies have been critical of this asserted correlation between expenditures and educational opportunity.[90] Nonetheless, the decisions of at least 17 states' highest courts attest to the fact that one can make a strong case supporting the existence of a positive correlation between expenditures and educational opportunity.[91] The majority of courts ruling on the expenditure-educational opportunity question have held that money is a significant factor in providing educational opportunities but that exact equality in per pupil expenditures is not constitutionally required.[92] Courts have recognized legitimate differences in educational needs and costs, and no state's highest court has required exact equality in per pupil expenditures.[93] Most courts recognizing the correlation between expenditures and educational opportunity have focused on assuring that all of the state's children have access to the degree of educational opportunity guaranteed by the state's constitution.[94]

However, it should be noted that the U.S. Supreme Court in *San Antonio v. Rodriguez* found the alleged correlation between expenditures and educational opportunity unproven, and upheld the state's system of public school funding.[95] This correlation has been found unproven by four states' highest courts.[96] All courts finding the correlation unproven ruled in favor of the state.[97]

Most, but not all of the courts recognizing a positive correlation between expenditures and educational opportunity ruled in favor of the plaintiffs. In four opinions state high courts recognized this correlation, but ruled in favor of the state.[98] The plaintiffs establishment of a positive correlation between expenditures and educational opportunity appears to be an essential but not a sufficient factual showing necessary to win a school funding case.

b) Establishing Educational Harm

Presenting evidence of educational harm to children in property poor districts is an extension of the expenditure-educational quality correlation argument. Evidence showing a demonstrable harmful impact on children resulting from lower expenditures provides a more tangible example of the inequities produced by the state's system of funding than more academic and abstract expenditure-quality arguments.

In *Roosevelt v. Bishop* the Supreme Court of Arizona recognized tangible harm resulting to children because of inadequate funding for facilities. The court found that:

> There are disparities in the number of schools, their condition, their age, and the quality of classrooms and equipment. Some districts have schoolhouses that are unsafe, unhealthy, and in violation of building, fire, and safety codes. Some districts use dirt lots for playgrounds. There are schools without libraries, science laboratories, computer rooms, art programs, gymnasiums, and auditoriums. But in other districts, there are schools with indoor swimming pools, a domed stadium, science laboratories, television studios, well stocked libraries, satellite dishes, and extensive computer systems.[99]

Courts in other recent school funding opinions have also recognized harm resulting from

inadequate funding.[100] Rather than limiting their consideration to the statistical data discussed in many prior cases, some recent opinions have more thoroughly examined the daily realities of children attending poorer schools in comparison to the circumstances of children in wealthier schools in the state, including an examination of the relative quality of curriculum, teaching staff, facilities, extracurricular offerings, etc. *Abbott v. Burke* contains an extensive account of the disparities in New Jersey schools.[101] However, it should also be noted that despite allegations of educational harm to children, many courts have denied relief to plaintiffs alleging only a relative rather than an absolute deprivation of education opportunity.[102]

2) Legal Theories

Despite considerable divergence in constitutional provisions and interpretations, school funding plaintiffs have adopted a largely uniform approach to litigation. Plaintiffs generally base their litigation strategy on state equal protection guarantees and education article provisions.

a) Equal Protection Challenges

Both the federal and state constitutions contain provisions guaranteeing equal protection of the laws.[103] Arthur Wise in a 1965 article suggested that school funding challenges might be based on equal protection guarantees.[104] In 1971 the Supreme Court of California in *Serrano v. Priest* ruled that inequities in the state's system of public school funding violated the equal protection clause of the U.S. Constitution.[105] But in 1973 the U.S. Supreme Court in *San Antonio v. Rodriguez* held that mere relative differences in funding did not violate the equal protection clause of the U.S. Constitution.[106] After the U.S. Supreme Court's decisions in *Rodriguez*, funding equity plaintiffs suffered a series of defeats.[107] A notable exception to this

trend was the Supreme Court of New Jersey's 1973 decision in *Robinson v. Cahill.*[108] The court based its decision for plaintiffs on guarantees found in the state's education article rather than equal protection claims. Litigation based on equal protection provisions was revived by the Supreme Court of California in 1976. In *Serrano II* the court held that continuing inequities in California's system of school funding violated equal protection provisions of the state constitution.[109] As the Supreme Court of Tennessee's decisions in *Tennessee Small Schools v. McWherter* attest, equal protection challenges continue to be a viable litigation strategy for plaintiffs challenging public school funding inequities.[110]

As indicated by the Supreme Court of California's 1976 decision in *Serrano II*, state courts are free to interpret the provisions of their state's constitution independent of federal precedents, and may find that provisions in their state's constitution provide greater protection for the state's citizens than similar provisions in the Federal Constitution.[111] Since 1970, more than 250 published opinions have held that Federal Constitutional minimums were insufficient to satisfy the requirements of their states' constitutions.[112] If state constitutions were interpreted as guaranteeing no greater rights than the Federal Constitution these guarantees would be largely superfluous since states are prohibited from failing below Federal Constitutional minimums.[113] The Federal Constitution generally provides a floor for protected rights, and not a ceiling.

Most state constitutions contain express guarantees of equality of treatment.[114] The equality provisions contained in the states' bills of rights "are among the most diverse guarantees found in American constitutions."[115] However, despite wide variations in specific constitutional language and adoption histories, state courts' analyses of equal protection challenges in school funding

cases have been largely uniform because of the pervasive influence of the federal model of equal protection analysis.[116] The issues generally considered are: 1) whether education is a fundamental right; 2) whether the plaintiffs constitute a suspect class; 3) what level of judicial scrutiny is appropriate in reviewing the state's system of funding; and 4) whether the state has an appropriate justification for inequities in the public school funding system.

i) <u>Whether Education is a Fundamental Right</u>

In *San Antonio v. Rodriguez* the U.S. Supreme Court applied an explicit-implicit test of fundamentality. Under the *Rodriguez* test of fundamentality the answer to whether education is a fundamental right lies in "assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[117] Since education provisions are not included in the Federal Constitution, the Court in *Rodriguez* concluded that education was not a fundamental right subject to strict scrutiny under the Federal Constitution.

In view of the fact that provisions concerning state support of education are expressly included in all state constitutions,[118] the *Rodriguez* explicit-implicit test would conclude that education is a fundamental right in all states.[119] However, most state courts have rejected the *Rodriguez* test of fundamentality.[120] The Supreme Court of California, for example, rejected the *Rodriguez* test and instead views as fundamental those interests that "because of their impact on those individual rights and liberties which lie at the core of our free and representative form of government, are properly considered 'fundamental'."[121]

Whether education is deemed a fundamental right can be of great significance. Most states require strict scrutiny when reviewing state actions which impinge on fundamental rights.[122] In

contrast, a mere rational basis test is generally applicable to interests which are not deemed fundamental.[123] Generally, the level of scrutiny applied determines the outcome.[124] Therefore, the determination of whether education is a fundamental right is an important issue under equal protection analysis,[125] at least where the federal model of equal protection analysis is followed.[126]

ii) Whether the Plaintiffs Constitute a Suspect Class

Under the federal model of equal protection analysis courts afford strict scrutiny review to both fundamental rights and suspect classifications. If plaintiffs fail to convince the court that education is a fundamental right, they may still obtain strict scrutiny review if they convince the court they constitute a suspect class.[127]

Suspect classes are traditionally "those based on race, alienage, and national origin."[128] However, Justice Marshall, dissenting in *Rodriguez*, argued that "personal poverty may entail much the same social stigma as historically attached to certain racial or ethnic groups."[129] While at least two courts have accepted this argument in the school funding context,[130] it is likely that the majority of courts will continue to reject this argument.[131] Recognizing poverty as a suspect classification may implicate other areas of social welfare legislation, with the possibility of opening the floodgates of litigation in these politically volatile areas.

iii) Level of Judicial Scrutiny

In most cases, when strict scrutiny was applied the state's system of school funding was overturned.[132] When a rational basis test was applied the state's system of school funding was generally upheld.[133] The application of intermediate scrutiny to school funding cases has been

rare.[134]

iv) State Justifications for Inequality

When courts follow the federal model of equal protection analysis, to withstand strict scrutiny the state must "demonstrate some compelling State interest to justify the unequal classification."[135] The state will generally fail to meet this heavy burden of proof.[136] In the cases in which intermediate scrutiny has been applied no adequate justification has been identified.[137] Remaining for consideration is what state justification is accepted when the court applies a rational basis test.

According to La Morte: "The most pervasive rationale employed in upholding the status quo involved the preservation of local control over education."[138] When courts have applied a rational basis test to school funding systems challenged under equal protection guarantees, two courts have rejected the rationale of local control.[139] Other courts have accepted the rationale of local control as sufficient justification for the funding systems.[140]

Courts overturning the state's system of school funding have criticized the argument that local control justifies educational funding inequities. The Supreme Court of California in *Serrano II* described this rationale as a "cruel illusion" which far from being necessary to promote local control, "actually deprives the less wealthy districts of the option."[141] The Supreme Court of Arkansas in *Dupree* agreed, adding that "to alter the state financing system to provide greater equalization among districts does not in any way dictate that local control must be reduced."[142] The Supreme Court of Texas in *Edgewood* found that improved equity "will actually allow for more local control, not less. It will provide property-poor districts with economic alternatives

that are not now available to them. Only if alternatives are indeed available can a community exercise control of making choices."[143] The Supreme Court of Montana in *Helena* also ruled that spending disparities actually deny local control to poorer schools.[144] Tennessee's Supreme Court concluded that "the better reasoned opinions are those which have rejected the argument that local control is justification for disparity in opportunity."[145] The Supreme Court of North Dakota has rejected local control as a justification for disparities, finding that "local control in North Dakota is undercut and limited by the Legislature's enactment of requirements of statewide uniformity of education."[146]

b) Education Article Challenges

Shortly after the plaintiffs' defeat in *San Antonio v. Rodriguez,*[147] plaintiffs' hopes for success in school funding equity cases were revived in *Robinson v. Cahill.*[148] In *Robinson* the Supreme Court of New Jersey ruled that the state's system of public school funding was unconstitutional because it failed to meet the requirements of the New Jersey Constitution's education article. All states have constitutional provisions describing the state's role in supporting public education.[149] The education articles found in state constitutions continue to provide a successful basis for constitutional challenges to school funding inequities.[150]

State judicial resolution of education article challenges involves a three-step process: 1) The court must interpret the meaning of the education article; 2) Based on the results of this interpretation the court must determine the magnitude of the state's constitutional duty to support education; and 3) The court must determine whether the state has met the assigned constitutional obligation.

i) Interpreting the Education Article

Some legal scholars have suggested that education articles can be divided into a four-part framework based on the apparent strength of the constitutional language.[151] Under this framework, category I clauses impose only a minimal educational obligation on the state,[152] category II clauses impose a slightly higher duty requiring a certain minimum standard of quality,[153] category III clauses contain stronger and more specific mandates,[154] and Category IV clauses impose the highest level of state obligation.[155] In theory, the likelihood that a state's system of funding will be overturned is the lowest in category I and the highest in category IV. However, a review of judicial decisions on school funding challenges indicates no consistent pattern.[156]

Although there are wide variations in judicial interpretations of constitutional language, there appears to be some consistency regarding the methodology of interpretation. In school funding cases, courts have used three methods of constitutional interpretation: 1) historical analysis of constitutional debates and early legislative interpretations;[157] 2) the plain meaning of constitutional language;[158] and 3) a review of other judicial interpretations of similar language.[159] The majority approach is historical analysis.[160] However, several courts use a combination of these modes of analysis.[161]

ii) Determining the Magnitude of the Duty

Once the court has determined the meaning of constitutional language, the court attempts to extract a measurable duty for the legislature in supporting education. The magnitude of duty established for the legislature is a function of the court's constitutional interpretation of the

education clause. Judicially interpreted state duties have ranged from a declaration that children had a "constitutionally paramount . . . right to be amply provided with an education,"[162] to near total deference, finding that "the framers of the constitution have left the legislature free to choose the means of funding the schools."[163]

Courts that found high levels of legislative duty to support education generally determined that the constitution allowed less legislative discretion in school funding. These courts were more likely to find that the constitution prohibited significant funding disparities.[164] In contrast, courts that found relatively low levels of legislative duty to support education generally determined that the constitution allowed broad legislative discretion in school funding; did not require substantial equality in expenditures; and required only a basic or a minimally adequate education.[165]

iii) Whether the State Has Met the Assigned Constitutional Obligation

A determination of whether the state has met its constitutional duty to support education involves measuring the factual findings regarding the state's funding system against the judicially determined constitutional standard. Those systems falling below the constitutional standard are overturned,[166] and those meeting or exceeding the constitutional mandate are upheld.[167] If the court determines the constitution establishes a high degree of legislative duty to support education, the state's system is generally declared unconstitutional.[168] If the court finds a low degree of legislative duty, the state's system is generally upheld.[169]

3) Examining the Role of Courts in School Funding Disputes

An examination of the history of school funding litigation since *Serrano v. Priest* raises

numerous questions regarding the proper role of courts in these disputes. Questions arise regarding the appropriateness of judicial involvement in issues of local taxation, the competence of courts to rule on educational and political issues, and the efficacy of judicial decisions that have attempted to resolve these issues.

In commenting on the appropriate judicial role in the funding equity reform process, courts have acknowledged limitations on judicial power under the doctrine of separation of powers.[170] While respecting the domains of the legislative and administrative branches, courts have recognized a clear judicial duty to interpret the meaning of the constitution. Since *Marbury v. Madison*, it has been clearly established that courts hold the power of constitutional interpretation.[171] Courts have found that the constitutionality of the state's school funding system presents a justiciable issue,[172] and that courts have a duty to adjudicate these constitutional questions.[173] But in adjudicating these constitutional disputes courts have generally granted broad deference to legislative decisions on taxation and public school funding.[174]

Courts have declared state systems of funding unconstitutional, sometimes harshly condemning inequities created by the legislature, but rarely going beyond judicial declarations of unconstitutionality and a call for reform.[175] Some courts have questioned whether it is realistic for courts to do more.[176] In recognizing the limitations of court decisions to reform state funding systems the U.S. Supreme Court in *San Antonio v. Rodriguez* stated that:

> At a time when nearly every State and locality is suffering from fiscal undernourishment, and with demands for services of all kinds burgeoning and with weary taxpayers already resisting tax increases, there is considerable reason to question whether a decision of this Court nullifying present state taxing systems would result in a marked increase in the financial commitment to education.[177]

The Court recognized that: "The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax . . . But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them."[178] The Supreme Court of Wisconsin agreed holding that "such demands cannot be remedied by claims of constitutional discrepancies, but rather must be made to the legislature and, perhaps, also to the community."[179]

A realistic assessment of the role of courts in school funding reform requires an understanding of the court's limited role in constitutional governance, and the political differences between federal and state judicial systems. Under the separation of powers doctrine, the legislative branch makes laws, and the judicial branch is empowered to interpret those laws and determine whether they are consistent with the constitution.[180] Judicial activism occurs when the court moves from the realm of interpretation of laws to creation or administration of laws. Judicial activism is avoided through judicial deference in non-judicial realms.[181] However, the line between judicial duty and judicial activism is not always clear. To assure that the court does not exceed its proper scope of authority, before ruling on a case the court must consider issues of judicial competence and deference. While judicial competence concerns whether courts are capable of addressing the issue before the court, judicial deference concerns whether, even if competent to address the issue, the court should defer to another branch of government. Although courts uniformly recognize the judicial duty to rule on the constitutionality of legislative enactments, courts have generally avoided involvement in structuring remedies for school funding inequities.[182] One of

the ironies in this judicial deference may be that "efforts by courts to avoid direct involvement in formulating change may have had the effect of extending the duration of their involvement and thereby arousing the very charges of meddling that they were attempting to prevent."[183] Only one court has mandated specific remedies for funding inequities.[184] When courts fashion specific public school funding remedies, this raises serious questions regarding the proper scope of authority for courts in a constitutional democracy.[185]

Many courts in upholding their state's system of funding suggested that the plaintiffs must address their arguments to the legislature for a political rather than a judicial solution. The Supreme Court of Georgia stated: "It is clear that a great deal more can be done and needs to be done to equalize educational opportunities in this state. For the present, however, the solution must come from our lawmakers."[186] Although recognizing inequities, many courts have turned away plaintiffs deferring to the political process for resolution of these inequities.[187]

But many would argue that there are limitations to the usefulness of the political model as a viable remedy for school funding inequities. As Camp and Thompson noted:

> Districts that have political clout within a legislature continue to influence the design of school finance formulas, and less powerful districts are forced to use the courts to alter and shape the finance systems . . . there is often great [political] resistance to changing a state's school finance formula because [politically powerful groups] fear the loss of a favorable status under the present formula.[188]

In a dissenting opinion in *San Antonio v. Rodriguez,* Justice Marshall stated he could not accept "the notion that it is sufficient to remit [funding plaintiffs] to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination."[189] Though many courts have deferred to legislative

authority on this issue, clearly not all courts are prepared to broadly defer to the political model as the exclusive solution for school funding inequities.[190]

In addition to hesitance because of concerns related to judicial competence or deference, courts may sometimes hesitate to become involved in unpopular school funding reforms for other reasons: The political precariousness of the positions of members of the state's judiciary and of state constitutional provisions. Members of the federal judiciary are largely insulated from majoritarian political pressures by lifetime appointments to their positions.[191] In contrast, state court judges are often subjected to direct public opinion and majoritarian pressures, including popular elections, periodic review by the electorate, the possibility of recall votes, and limited terms.[192] Further, even if members of the state court risk the political wrath of the electorate by interpreting the state's constitution to produce a politically unpopular result, unpopular state constitutional provisions may suffer the same fate as unpopular state judges because "[s]tate constitutions are far easier to amend than the federal Constitution."[193] Therefore "if judicial protection of the rights of politically less-powerful groups proves sufficiently unpopular, the politically mobilized can overrule the court by amending the constitution."[194] Nonetheless, many state courts have resolutely protected rights that are not politically popular.[195]

4) The Role of Politics in School Funding Litigation

Although it may be tempting to embrace judicial action as a panacea for school funding inequities, political reality appears to support the Court's conclusion in *San Antonio v. Rodriguez* that "the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them."[196] In view of this political reality, advocates of school funding reform

may choose to focus more attention on persuading the electorate and lawmakers that educational inequities should be eliminated not only because they are unconstitutional, but because they are unwise public policy.[197]

The pursuit of popular political support in resolving the school funding problem has been advocated by both judges and scholars.[198] Because in a democracy it is ultimately the people who rule, to achieve lasting change school funding reformers must persuade the electorate of the necessity of providing a quality education for all children.[199] If a lasting resolution to educational inequities is to be achieved, this must be consistent with the will of the people. State judges and constitutional provisions are significantly more vulnerable than their federal counterparts to the political influence of the majority.[200] Through their votes the people of the state can promote, prevent, or reverse policy changes they are not sufficiently persuaded to support.[201]

Despite the persistence of school funding reformers, the courts have not produced the desired reforms. In many states economically advantaged districts have retained or even increased their advantaged status, while disadvantaged districts have failed to generate sufficient legislative support to overcome the political influence of advantaged districts.[202] The resolution to this problem may be found in the generation of popular political support for funding reform by convincing the electorate that making egalitarian education ideals a reality is ultimately consistent with their self-interests.

A strong argument can be made that when adequately educated children become adults they are more productive, pay more taxes, enhance the nation's international competitiveness, commit less crimes, and require less social services.[203] If the electorate and educational policy makers

were sufficiently informed about the benefits of the common school and the harms of inadequate education this information could act as a catalyst for reform.[204] And if popular political support for funding reform existed, the political branches might have the fortitude needed to make the reforms that many courts have ordered.[205] Through the texts of their opinions and the public attention paid to significant judicial decisions, courts can play an important role in educating the public about the problems of school funding inequities and the necessity of providing an adequate education for all children. But judicial efforts must be complimented with political efforts to maximize the likelihood of substantial and lasting equity reform.

III) School Funding Litigation in the Southern United States

Like the rest of the nation, the Southern states have seen ongoing school funding litigation since *Serrano.* But unlike the rest of the nation, the Southern states have unique demographics that have given a unique character and urgency to this litigation. The demographics of poverty, rurality, and minority race come together in the South to make it unlike any other region in the Nation. Persistent school funding inequities keep disadvantaged children from receiving an adequate education, and without an adequate education disadvantaged children in the South have little hope of escaping the entrenched cycle of poverty.

The core problem of public school funding inequities is that although state constitutions require the general assembly to provide for the education of all of the state's children, state funding schemes continue to rely on local wealth in funding local schools. Because some local school districts have substantial taxable wealth, while others have relatively little wealth, this system of funding creates funding inequities among the state's school districts. There are generally substantial disparities between the levels of funding available to wealthier metro-area school districts and poorer rural districts, with many rural area districts lacking sufficient local resources to fund an adequate education for their children.

With the continuing financial crisis in agriculture, and the loss of manufacturing jobs, many of the South's small towns and rural areas are struggling economically. The South has areas that are among the poorest in the Nation, and individual family poverty compounds the problems caused by inadequate financial support for local public education. Despite the rapid growth of some metro-areas in the South, the South remains a predominately rural area with high rates of poverty

in many regions. And many of the children that attend the most seriously underfunded schools in the rural South are African-American children. Minority race children face yet another layer of disadvantage, bringing together in the South the triple disadvantages of rurality, poverty, and race in a way that occurs nowhere else in the Nation. Advocates for these children continue to press for funding for adequate educational opportunities in their schools. As in the rest of the Nation, adequate education is the only sure road out of poverty for children in the South.

School Funding Litigation in Alabama

Opinion of the Justices
Supreme Court of Alabama
Decided April 27, 1993

In *Opinion of the Justices*, the Supreme Court of Alabama was not addressing the merits of a constitutional challenge to the Alabama system of public school funding, but was responding to a Senate Resolution requesting an advisory opinion on whether the legislature was required to comply with a circuit court order to provide public school students with a substantially equitable and adequate education.[206] The court concluded that: "Our answer, based upon the principles set out herein, is yes."[207]

Plaintiffs in this case were a non-profit corporation made up largely or poorer rural school districts in Alabama. The trial court's lengthy opinion was included as an appendix to the brief opinion by the Supreme Court of Alabama. The trial court opinion noted significant disparities in the resources and facilities available to the poorer rural districts, including a listing of deficient facilities, "'deplorable' restroom facilities in many schools . . . holes in the floor" and "children at one poorer elementary school playing on *imaginary* playground equipment."[208] Expert

witnesses testified concerning disparities in school facilities, staff, curriculum, supplies and equipment, with one witness testifying "he had never before seen conditions as inadequate as those prevailing among some of Alabama's poorest schools."[209] In invalidating the Alabama system of public school funding, the trial court had concluded that:

> [T]he current school funding formula is inequitable to students in rural areas because it fails to reflect the costs related to low population density to the detriment of the affected students. Transportation costs and other non-instructional expenses represent a disproportionate share of per pupil expenditures in rural counties. In addition, rural students are disadvantaged because they generally live in areas without large shopping centers and are thus unable to generate substantial sales tax revenues for support of their schools; the state funding formula does nothing to equalize sales tax revenues available to local systems. Moreover, property in rural counties is assessed and taxed at extremely low rates.[210]

State defendants had argued that many disparities could be attributed to waste and inefficiency, including, for example, allocating funds for the building of a swimming pool in a poorer school district's high school. The trial court noted that:

> Testimony suggesting that Wilcox County, a poorer, majority-black school system, has wasted money by building a swimming pool in its new high school is clearly insufficient alone to condemn all poorer systems. Further, the Court is not in any case inclined to find that a swimming pool is wasteful in a poorer system as long as wealthier systems are not censured for building such facilities.[211]

State defendants had also asserted that Amendment 111 of the Alabama Constitution granted the legislature broad discretion in establishing and funding public schools in Alabama. Amendment 111 stated that:

> It is the policy of the State of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student, but nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to

> require or impose conditions or procedures deemed necessary to the preservation of peace and order. The legislature may by law provide for or authorize the establishment and operation of schools, by such persons, agencies or municipalities, at such places, and upon such conditions as it may prescribe . . . To avoid confusion and disorder and to promote effective and economical planning for education, the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make election to that end, such election to be effective for such period and to such extent as the legislature may provide.[212]

Amendment 111 had been added to the Alabama Constitution in 1956, and plaintiffs asserted that the Amendment was racially motivated and intended to mitigate the effects of *Brown v. Board of Education*. The trial court declared Amendment 111 invalid under the Fourteenth Amendment of the U.S. Constitution, and stated that Amendment 111 "was done for racial reasons which compelled the invalidation of the amendment."[213] Because Amendment 111 was held invalid, the trial court determined that the prior education article, § 256 should be reinstated. Section 256 stated that: "The Legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years."[214] Based on the language of § 256, the trial court issued an order requiring the legislature to reform the state's public school funding system.

Senate Resolution 607 was drafted in response to the trial court's order in the consolidated cases of *Alabama Coalition for Equity v. Hunt*. The Senate was seeking an advisory opinion from the Supreme Court of Alabama, to determine whether the Legislature was required to comply with the trial court's order. The Senate Resolution mirrored the trial court's order to reform the school funding system, and stated that:

> The Legislature finds that it is constitutionally required to comply with the order of the circuit court in the consolidated cases of Alabama Coalition for Equity, Inc. v. Hunt . . . to

wit:

1. That, pursuant to Ala. Const. Art. I, §§ 1, 6, 13 and 22 and Art. XIV § 256, Alabama school age children, including children with disabilities, have and enjoy a constitutional right to attend school in a liberal system of public schools, established, organized, and maintained by the state, which shall provide all such schoolchildren with substantially equitable and adequate educational opportunities.

2. That the essential principles and features of the "liberal system of public schools" required by the Alabama Constitution include the following:

a. It is the responsibility of the state to establish, organize, and maintain the system of public schools.

b. The system of public schools shall extend throughout the state.

c. The public schools must be free and open to all schoolchildren on equal terms.

d. Equitable and adequate educational opportunities shall be provided to all schoolchildren regardless of the wealth of the communities in which the schoolchildren reside.

e. Adequate educational opportunities shall consist of, at a minimum, an education that provides students with opportunity to attain the following:

(i) Sufficient oral and written communication skills to function in Alabama, and at the national and international levels, in the coming years.

(ii) Sufficient mathematic and scientific skills to function in Alabama and at the national and international levels, in the coming years.

(iii) Sufficient knowledge of economic, social, and political systems generally, and of the history, politics, and social structure of Alabama and the United States, specifically, to enable the student to make informed choices.

(iv) Sufficient knowledge of governmental processes and basic civic institutions to enable the student to understand and contribute to the issues that affect his or her community, state, and nation.

(v) Sufficient self-knowledge and knowledge of principles of health and mental hygiene to enable the student to monitor and contribute to his or her own physical and mental well-being.

(vi) Sufficient understanding of the arts to enable each student to appreciate his or her cultural heritage and the cultural heritages of others.

(vii) Sufficient training, or preparation for advanced training, in academic or vocational skills, and sufficient guidance, to enable each child to choose and pursue life work intelligently.

(vii) Sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in Alabama, in surroundings states, across the nation, and throughout the world, in academics or in the job market.

> (ix) Sufficient support and guidance so that every student feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her full human potential.
> 3. That pursuant to [the Alabama Code] school children with disabilities aged 3-21 have the right to appropriate instruction and special services.
> 4. That the present system of public schools in Alabama violates the afore-stated constitutional and statutory rights of plaintiffs.
> 5. That the state officers charged by law with responsibility for the Alabama public school system, are hereby enjoined to establish, organize, and maintain a system of public schools that provides equitable and adequate educational opportunities to all school-age children, including children with disabilities, throughout the state in accordance with the constitutional mandates of Ala. Const. Art. XIV § 256.[215]

Concerning the question of whether the Legislature is required to comply with the order of the circuit court in the consolidated cases, the Supreme Court of Alabama stated that: "Our opinion is that the order has the force of law unless modified by the trial court, until it is modified or reversed on appeal, and the Legislature, like other branches of government, must comply with it."[216]

James v. Alabama Coalition for Equity
Supreme Court of Alabama
Decided May 31, 2002

In a 6-1 opinion in *James v. Alabama Coalition for Equity*[217] the Supreme Court of Alabama vacated the trial court's remedial order requiring the legislature to formulate a constitutional system of school funding, holding that the issue was non-justiciable. The court stated that:

> This Court "shall *never* exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men." Ala. Const. 1901, Art. 3, § 43 (emphasis added). In Alabama, separation of powers is not merely an implicit "doctrine" but rather an express command; a command stated with a forcefulness rivaled by few, if any, similar provisions in constitutions of other sovereigns . . . Compelled by the weight of this command and a concern for judicial restraint, we hold (1) that this Court's review of the merits of the still pending cases commonly and collectively known

> in this State, and hereinafter referred to, as the "Equity Funding Case," has reached its end, and (2) that, because the duty to fund Alabama's public schools is a duty that–-for over 125 years–-the people of this State have rested squarely upon the shoulders of the Legislature, it is the Legislature, not the courts, from which any further redress should be sought. Accordingly, we hold that the Equity Funding Case is due to be dismissed.[218]

The court noted the "serious difficulties implicated by judicial involvement in the administrative details of school funding"[219] and stated that:

> Our conclusion that the time has come to return the Funding Equity Case *in toto* to its proper forum seems a proper and inevitable end, foreshadowed not only by the obvious impracticalities of judicial oversight, but also by the Court's own actions in *Ex parte James*. While the plurality in *Ex parte James* opined that, in the abstract, the judiciary had the authority to implement a remedy, it did not attempt this task (which may have proven illustrative, because its concrete, rather than abstract, form would have proven its legislative nature) and instead admitted that "the legislature . . . bears the 'primary responsibility' for devising a constitutionally valid public school system" . . . Accordingly, the opinion vacated the trial court's remedy plan and directed the Legislature to formulate a constitutional education system within one year . . . Almost a year later, on rehearing, a majority of the Court modified that opinion to allow the Legislature an undefined and open-ended "reasonable time" within which to formulate such an education system, and the case was remanded to the trial court which would retain jurisdiction. Continuing the descent from the abstract to the concrete, we now recognize that any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively by the

> authorities discussed above–-primarily by our duty under Art. 3, § 43 of the Alabama Constitution of 1901–-we complete our judicially prudent retreat from this province of the legislative branch in order that we may remain obedient to the command of the people of the State of Alabama that we "*never* exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."[220]

In a concurring opinion, Justice Houston stated that:

> It is not that I do not personally agree with what has been attempted–-I do. In my heart and mind, I believe all Alabama children deserve an adequate education . . . It is just that I cannot *judicially* agree with what has been done . . . *judicially* I cannot take the language that pertains to education in the Alabama Constitution, originally as amended, and hold that it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. That fact combined with the strong separation-of-powers provision in the Alabama Constitution prohibits me from attempting to exercise legislative and/or executive powers to fix education in Alabama. Simply put, I believe (1) that the trial court was and is without subject-matter jurisdiction to rule on the parties' challenge to Amendment 111; (2) that the trial court's lack of subject-matter jurisdiction leaves the Equity Funding Case with no foundation; and (3) that Amendment 111 remains part of the Constitution of Alabama and empowers the Alabama Legislature to enact all, part, or none of the plaintiffs' proposed educational reform.[221]

Justice Houston noted that Amendment 111 provides that:

> It is the policy of the State of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student, but nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace and order. The legislature may by law provide for or authorize the establishment and operation of schools, by such persons, agencies or municipalities, at such places, and upon such conditions as it may prescribe . . . To avoid confusion and disorder and to promote effective and economical planning for education, the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make election to that end, such election to be effective for such period and to such extent as the legislature may provide.[222]

Justice Houston argued that the plaintiffs had no standing to challenge Amendment 111, and that the trial court's 1991 declaration that Amendment 111 was unconstitutional was invalid. Justice Houston stated that:

> Decisions by this Court and by a three-judge panel of the federal district court, whose decision was affirmed by the United States Supreme Court, had previously declared that Amendment 111 was the law of Alabama and that the Amendment served as the conduit through which the Legislature was free to repeal school-segregation laws . . . It should be apparent that Amendment 111–-through which the Legislature was able to repeal the various forced segregation laws–-merely *authorizes* certain legislative activities and *requires or precludes* virtually none. The first paragraph states a general policy of "fostering and promoting" education and declares that the Alabama Constitution of 1901 provides no fundamental right to a public education. Of course the citizens of a state are free to construct their state constitution in any way they deem fit, and they are, therefore, not *required* to recognize any particular right. There can be no "injury-in-fact" stemming from this language . . . the Legislature "may" allow parents to choose to send their children to *private* racially segregated schools–-something that, according to decisions of the United States Supreme Court, parents of any race had the right to do at the time Amendment 111 was proposed and ratified. While interpreting this paragraph as somehow allowing parents to send their children to racially segregated *public* schools is wholly irrational, given that such schools were declared unconstitutional before Amendment 111 was even proposed [citing *Brown v. Board of Education*], even this irrational interpretation would not provide a basis for these plaintiffs to demonstrate standing unless racially segregated public schools had in fact been established by the State. Of course this is not the case . . . What the plaintiffs appear to allege as the "injury" *is the effects of school-funding policies promulgated while Amendment 111 was in effect,* i.e., that because Amendment 111 was proposed and ratified with an improper purpose–an attempt to temper the United States Supreme Court's mandate in *Brown*–-the "injuries" stemming from these policies are therefore "injuries" stemming from Amendment 111 . . . Without any basis from which to demonstrate that they have been injured by the existence of Amendment 111 itself . . . the plaintiffs in this case have no standing to challenge the constitutionality of Amendment 111. Without standing, the constitutional challenge to Amendment 111 is nonjusticiable, a fact that renders the trial court without jurisdiction to rule on the issue.[223]

Chief Justice Moore concurred in the result, and stated:

> This Court has never had to deal with a case as unusual at this one, and it is unusual in

several ways . . . While this case was pending in the trial court, the then governor was convicted of a felony, that, in turn, produced the unusual occurrence that several of the plaintiffs realigned themselves as defendants, so that there appeared to be adverse parties and a case and controversy . . . In reality there was no case or controversy and there were no adverse parties . . . Nor did the trial court allow any other interested parties to intervene in the case. While the case was pending before the trial court, the trial judge campaigned for a position on the Alabama Supreme Court as "The Judge for Education Reform." In his campaign literature he stated that he was a "tough judge" because he had ruled "Alabama's education system unconstitutional," "order[ed] the Legislature back to work," and told "a governor and the Legislature to fix the problem." Those public statements ultimately forced his removal from the case while it remained pending. However, before his removal, the trial judge declared his orders final and then continued to order hearings and different forms of relief, in contradiction to the supposed finality of his own order. Using racism as a basis, the trial court declared all of the education portion of Amendment 111 . . . unconstitutional, but preserved a portion of the original [§ 256]. He divided the case into two parts–-a "Liability Phase" and a "Remedy Phase"–-a faulty distinction. Then, using one word found in § 256–-"liberal"–-the trial judge renovated and reformed the entire education system to the tune of an estimated $1 billion and instituted a scheme of continuing supervision by his court of every aspect and agency of the entire Alabama education system, including the Alabama Legislature, the Governor, and the State Board of Education. The orders issued to promulgate this plan would necessarily require an increase in taxation, amounting to taxation without representation, and would create a "right" to public education which was expressly prohibited by Amendment 111. The trial judge proceeded to set up this program even though the Legislature was not properly a party to the action. He went to great lengths to micromanage the State's school system, to the point of requiring that adequate toilet paper be provided to each student. A trial court in a proper case may hold an act of the Alabama Legislature unconstitutional, but to enter an order that would require the Legislature to pass legislation and spend money on an education project of the trial judge's own making is unprecedented in the history of this State. By its wholesale striking of Amendment 111, the trial court appears to have attempted to create a new right to public education, disregarding the expressed wishes of the people as set forth in Amendment 111 . . . Even if the trial court had jurisdiction–-and I conclude that it did not–-we should not ignore an abuse of power by the judicial branch that represents an attempt to change our constitution . . . The trial court made legislative and executive, instead of judicial, decisions. While some states have been willing to allow their courts to make extensive and endless forays into supervising education in the name of necessity, particularly in this type of litigation . . . Alabama must not make such a fundamental error. Any change to our constitution must be effected only by the lawfully established amendment process. Under our constitution, the power over education belongs to the Legislature, not the courts. An attempt to usurp that power by the judicial branch is a fundamental breach of

> the separation-of-powers doctrine and an improper subject of the court's jurisdiction . . . The judges of this State were not elected to formulate policy for education or to spearhead education reform. Judges are elected to ensure that justice is administered in accordance with fundamental principles of law . . . The desire or need for action in a particular area of public policy cannot justify a court's intruding itself into the field of legislation in order to reach a desired result, whether that result concerns education, health care, taxation, or any other area of public interest . . . For the trial judge to have campaigned for a position on the Alabama Supreme Court by claiming that he told the governor and the Legislature what to do is not only unethical, but such orders to the governor and the Legislature are also a clear usurpation of the powers of coequal branches of government and a violation of our Constitution.[224]

In a dissenting opinion, Justice Johnstone objected to the court's current review of the "equity funding cases" and stated that:

> I respectfully dissent from the decision of this Court purporting to dismiss this case. We lack appellate jurisdiction to review these cases, to enter any order affecting these cases, and to express any rationale for any such order. This court issued its last certificates of judgment in these cases . . . on January 6, 1998 . . . Our appellate jurisdiction, construed at its greatest limit of durability, expired either at the end of 120 days following the January 6, 1998, date . . . or at the end of the then existing term of the court . . . Both deadlines for our appellate jurisdiction expired without any application in any form for further appellate review. Indeed, even after the expiration of these deadlines, no party has sought appellate review in any form . . . The entirely unsolicited nature of the instant purported review of these "equity funding cases" exacerbates our lack of appellate jurisdiction. We do not want to become like the Iranian judges who roam the streets of Tehran ordering a whipping here and a jailing there. On the other hand, if this tardy and unsolicited purported review does prevail, I suppose the consolation will be that some old cases which I think or shall think grossly unfair will once again be subject to review.[225]

School Funding Litigation in Arkansas

Dupree v. Alma School District
Supreme Court of Arkansas
Decided May 31, 1983

The Supreme Court of Arkansas affirmed a trial court ruling that the Arkansas system of public school funding was unconstitutional in *Dupree v. Alma School District*.[226] The court held that the state system of school funding made distribution of resources dependent on the local tax base, and established a discriminatory system of vocational funding, in violation of the equal protection provision of the Arkansas Constitution.

In *Dupree*, 11 school districts challenged the Arkansas system of public school funding, claiming it violated the Arkansas Constitution's guarantee of equal protection, and the state's education article which required a "general, suitable and efficient system of education."[227] In addition to the general challenge to the state's system of public school funding, the plaintiffs also challenged the state's "hold harmless" provision,[228] and the state's method of funding vocational programs.[229]

The court noted that the specially assigned trial judge had heard "thirty-nine witnesses and reviewed 287 exhibits resulting in over 7400 pages of transcripts."[230] In reviewing the appellate record, the court found "undisputed evidence that there are sharp disparities among school districts in the expenditures per pupil and the educational opportunities available as reflected by staff, class size, curriculum, remedial services, facilities, materials and equipment."[231] Per pupil expenditures ranged from $2,378 to $873, while disparities in assessed valuation per pupil ranged from $73,773 to $1,853.[232]

In reviewing the equal protection challenge to the Arkansas school funding system the court held:

> We can find no legitimate state purpose to support the system. It bears no rational relationship to the educational needs of the individual districts, rather it is determined primarily by the tax base of each district. The trial court found the educational opportunity of the children in this state should not be controlled by the fortuitous circumstance of residence, and we concur in that view. Such a system only promotes greater opportunities for the advantaged while diminishing the opportunities for the disadvantaged.[233]

The court criticized the state's defense of local control on two grounds. First, the court reasoned that local control and funding equity were not mutually exclusive, in that altering the state funding formula to provide greater equity would in no way dictate that local control must be reduced. Second, the court cited the *Serrano* court's statement that "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 actually deprives the less wealthy districts of the option."[234] The court held that "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."[235] The court further recognized that in addition to creating inequities in per pupil expenditures, the Arkansas public school funding system created tax payer inequities as well.[236]

Regarding the plaintiffs' challenge under the Arkansas education article, the state argued that a "general, suitable and efficient system" of schools establishes only a minimal standard for the state, and that the plaintiffs failed to prove that the state has not met this minimal standard. In responding to the state's argument the court stated that:

> For some districts to supply the barest necessities and others to have programs generously endowed does not meet the requirements of the constitution. Bare and minimal sufficiency does not translate into equal educational opportunity. "Equal protection is not addressed to minimal sufficiency but rather to the unjustifiable inequities of state action." *San Antonio School District v. Rodriguez*, 411 U.S. 1, at 70 (1972). Marshall, J. dissenting.[237]

The court affirmed the trial court's holding that the Arkansas system of funding public schools was unconstitutional, leaving the legislature to develop a constitutional system.[238]

Lake View v. Huckabee
Supreme Court of Arkansas
Decided November 21, 2002

In *1983, in Dupree v. Alma School District*, the Supreme Court of Arkansas held that the state system of school funding was unconstitutional, because it made distribution of resources dependent on the local tax base, and established a discriminatory system of vocational funding, in violation of the equal protection provision of the Arkansas Constitution.[239] In 2002, in *Lake View v. Huckabee*, the Supreme Court of Arkansas again held that the state system of public school funding was unconstitutional.[240]

In *Lake View*, the plaintiffs were school officials and other persons residing in Phillips County Arkansas, representing the Lake View School District. Lake View School District is a poorer, rural district, serving mostly African-American children, with 94% of their students on free or reduced school lunches. Concerning the school district's situation, the court noted that Lake View:

> [H]as one uncertified mathematics teacher who teaches all high school mathematics courses. He is paid $10,000 a year as a substitute teacher and works a second job as a

> school bus driver where he earns $5,000 a year. He has an insufficient number of calculators for his trigonometry class, too few electrical outlets, no compasses and one chalkboard, a computer lacking software and a printer that does not work, an inadequate supply of paper, and a duplicating machine that is overworked. Lake View's basketball team does not have a complete set of uniforms, while its band has no uniforms at all. The college remediation rate for Lake View students is 100 percent.[241]

The court noted that other schools in Arkansas faced similar challenges, for example:

> The Holly Grove School District has only a basic curriculum and no advanced courses or programs. The starting salary for its teachers is $21,000. Science lab equipment, computers, the bus fleet, and the heating and air conditioning systems need replacing. The buildings have leaking roofs and restrooms in need of repair. Because millage increases are difficult to win in the school district, Holly Grove must borrow against next year's revenues to repair a falling library roof and leaking gas line. The Barton Elementary School in Phillips County has two bathrooms with four stalls for over one hundred students. Lee County schools do not have advanced placement courses and suffer also from little or no science lab equipment, school buildings in need of repair, school buses that fail to meet state standards, and only thirty computers for six hundred students. Some buildings have asbestos problems and little or no heating or air conditioning. These are just a few examples of deficiencies in buildings, equipment, and supplies that plague the State's school districts. School districts experiencing fast-growing student populations such as Rogers and Bentonville in Northwest Arkansas need additional

> buildings. Buildings in disrepair are rampant in Eastern Arkansas. And qualification for debt-service-funding supplements from the State depends on how much debt can be incurred by the school districts. Poorer districts with deteriorating physical plants are unable to incur much debt.[242]

Plaintiffs asserted that their disadvantaged status was caused by the state's system of public school funding, and that the funding system violated the education article and the equal protection article of the Arkansas Constitution. Plaintiffs asked for a declaration that the funding system was unconstitutional, and an injunction against implementation of the unconstitutional system.

In reviewing the plaintiffs' claims, and the lower court decision, the court first stated that: "We review chancery cases *de novo* on the record, but we do not reverse a finding of fact by the chancery court unless it is clearly erroneous."[243] The court then turned to determining whether the plaintiffs presented a justiciable claim. The state argued that any judicial mandate to the General Assembly to appropriate additional public school funding would violate the separation of powers clauses of the Arkansas constitution, and that "courts should avoid getting 'mixed up' in endless litigation in an effort to supervise the public schools."[244] However, the court noted that:

> The State's nonjusticiability point appears to have been raised for the first time in this appeal. The State implicitly claims that a violation of separation of powers is a question of subject-matter jurisdiction, which, of course, can be raised at any time or even by this court on its own motion . . . Regardless of this argument, we believe that the issue of nonjusticiability was laid to rest in a previous school-funding case [*Dupree*] in which we discussed the distinctive roles of the legislative and judicial branches . . . We continue to adhere to our opinion in *Dupree* and its discussion of the respective roles of the legislative

> and judicial branches relative to school funding. Clearly, the roles are different, and we conclude that the two branches do not operate at cross purposes in the school-funding context. We further observe that the Education Article in the Arkansas Constitution designates the *State* as the entity to maintain a general, suitable, and efficient system of free public schools: "Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the *State* shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education." Ark. Const., art. 14, § 1 (emphasis added). That is not the case in the state constitutions in four of the five cases cited by the State as authority for its nonjusticiability position; rather, in those state constitutions it is incumbent upon the *General Assembly* to provide, maintain, or promote the public schools.[245]

Concerning whether the constitutionality of Arkansas' public funding system presented a justiciable issue, the court noted that:

> As a historical footnote, our own Education Article in our current state constitution was adopted in 1874 and amended by Amendment 53 in 1968. The four preceding constitutions in Arkansas all stated that the General Assembly would provide for public education[246] . . . In 1874, however, that duty was expressly shifted to the State, which signaled, in our judgment, a deliberate change. The people of this state unquestionably wanted all departments of state government to be responsible for providing a general, suitable, and efficient system of public education to the children of this state. The State's argument appears to be that not only are legislative acts presumed to be constitutional[247] . . . but that they are *per se* constitutional and not subject to judicial review. Thus, the State's position is that the judiciary has no role in examining school funding in light of the Arkansas Constitution, though the annual appropriation constitutes almost one half of the State's total budget and affects the vast majority of school-aged children in this State.

> We reject the State's argument. This court's refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education. As Justice Hugo Black once sagely advised: "[T]he judiciary was made independent because it has . . . the primary responsibility and duty of giving force and effect to constitutional liberties and limitations upon the executive and legislative branches."[248]

Quoting the Supreme Court of Kentucky, the court determined that: "The judiciary has the ultimate power, and the duty, to apply, interpret, define, and construe all words, phrases, sentences and sections of the . . . Constitution as necessitated by the controversies before it. It is *solely* the function of the judiciary to so do."[249] Further, the court determined that: "This duty must be exercised even when such action services as a check on the activities of another branch of government or when the court's view of the constitution is contrary to that of other branches, or even that of the public."[250] The court concluded that: "For these reasons, we conclude the matter before us is justiciable."[251]

The court then turned to the plaintiffs' allegations concerning the Arkansas Constitution's education and equal protection articles. Concerning the plaintiffs' argument that the state system of funding was inadequate under the Arkansas education article, the court first reviewed a lengthy list of deficiencies and disparities in facilities, curriculum, teachers salaries, supplies, etc., and noted the state's low national rankings in educational achievement. The court concluded that:

> [T]his court is troubled by four things: 1) the Department of Education has not conducted

an adequacy study [as ordered by the General Assembly in 1995]; 2) despite this court's holding in [*DuPree*] that equal opportunity is the touchstone for a constitutional system and not merely equalized revenues, the State has only sought to make revenues equal; 3) despite Judge Imber's 1994 order to the same effect, neither the Executive branch nor the General Assembly have taken action to correct the imbalance in ultimate expenditures; and 4) the State, in the budgeting process, continues to treat education without the priority and the preference that the constitution demands. Rather, the State has continued to fund the schools in the same manner, although admittedly taking more steps to equalize revenues. This being said, perhaps the recalcitrance of the State to reform the school-funding system is reason enough to adopt the heightened standard of strict scrutiny. Nevertheless, because we conclude that the clear language of Article 14 imposes upon the State an absolute constitutional duty to educate our children, we conclude that it is unnecessary to reach the issue of whether a fundamental right is also implied. Many states, as we have already discussed, appear to get lost in a morass of legal analysis when discussing the issue of fundamental right and the level of judicial scrutiny. This court is convinced that much of the debate over whether education is a fundamental right is unnecessary. The critical point is that the State has an absolute duty under our constitution to provide an adequate education to each school child. Like the Vermont and Arizona Supreme Courts, we are persuaded that that duty on the part of the State is the essential focal point of our Education Article and that performance of that duty is an absolute constitutional requirement [*citing Brigham* and *Roosevelt*]. When the State fails

> in that duty, which we hold today is the case, our entire system of public education is placed in legal jeopardy. Should the State continue to fail in the performance of its duty, judicial scrutiny in subsequent litigation will, no doubt, be as exact as it has been in the case before us. For the foregoing reasons, we conclude that the State has not fulfilled its constitutional duty to provide the children of this state with a general, suitable, and efficient school-funding system. Accordingly, we hold that the current school-funding system violates the Education Article of the Arkansas Constitution.[252]

Concerning the plaintiffs' equity arguments, the court noted that:

> [T]he State contends that there are two types of equity: 1) horizontal, or dollar, equity where the State equalizes per-student revenues available across the state; and 2) vertical equity where efforts are made by the State to meet the special needs of certain students through categorical funding, such as the English-as-a-second language program, special education, gifted-and-talented programs, and vocational-technical training. According to the State, it is virtually impossible to equalize all revenues when special needs come into play and when certain value judgments must be made . . . Equal revenues per student is the correct test for equality, according to the State, and, thus, [according to the state] the trial court erred in concluding that the test for equality is the *actual money spent* per student rather than state money made available to the school districts. Finally, the State argues that any disparity in the wealth of the school districts is offset by two legitimate governmental purposes in funding the schools the way it does: 1) the necessity to fund other state programs; and 2) local control of public schools by the school districts.[253]

In addressing the issue of funding equity in Arkansas schools, the court stated that:

> There is no doubt in our minds that there is considerable overlap between the issue of whether a school-funding system is inadequate and whether it is inequitable. Deficiencies in certain public schools in certain school districts can sustain a finding of inadequacy but also, when compared to other schools in other districts, a finding of inequality. Bearing that in mind, we first address whether state *revenues* paid to the school districts under the school-funding formula is the test for deciding equality or whether the test is actual *expenditures* spent on the students. We conclude it is the latter . . . The answers to many of the State's arguments can be found in our decision of *DuPree* . . . which, again, was handed down almost twenty years ago . . . With respect to whether local control by the school districts was a legitimate government interest or rational basis for disparities in educational opportunity among the school districts, we said: "[W]e can find no constitutional basis for the present system, as it has no rational bearing on the educational needs of the district" . . . In holding that the system was unconstitutional, we said: "We come to this conclusion in part because we believe the right to equal educational opportunity is basic to our society" . . . We added: "For some districts to supply the barest necessities and others to have programs generously endowed does not meet the requirements of the constitution. Bare and minimal sufficiency does not translate into equal educational opportunity" . . . We concluded: "If local government fails, the state government must compel it to act, and if the local government cannot carry the burden, the state must itself meet its continuing obligation" . . . It is clear to this court that in

DuPree, we concentrated on expenditures made per pupil and whether that resulted in equal educational opportunity as the touchstone for constitutionality, not on whether the revenues doled out by the State to the school districts were equal. We were clearly interested in *DuPree*, as we are here today, on what money is actually being spent on the students. That is the measuring rod for equality . . . Equalizing revenues simply does not resolve the problem of gross disparities in per-student spending among the school districts. It provides an educational floor of money made available to the school districts but in no way corrects the inherent disparity between a wealthy school district that can easily raise additional school funds for educational enhancement . . . We agree that the focus for deciding equality must be on the actual expenditures . . . Looking then to the end result of expenditures actually spent on school children in different school districts, we quickly discern inequality in educational opportunities. The deficiencies in Lake View and Holly Grove have already been noted. In both those districts, the curriculum offered is barebones. Contrast the curriculum in those school districts with the rich curriculum offered in the Fort Smith School District, where advanced courses are offered and where specialty courses such as German, fashion merchandising, and marketing are available. The inequality in educational opportunity is self-evident. The same holds true for buildings and equipment. Whether a school district has rainproof buildings, sufficient bathrooms, computers for its students, and laboratory equipment that functions is all a matter of money. Certain schools in Fort Smith for example, do not suffer from such deficiencies. Other schools in the Delta and in Northwest Arkansas where the student

population is exploding are experiencing dire facility and equipment needs.[254]

Plaintiffs were arguing, that to the extent that the court determines that educational inadequacies and inequities existed, additional funding for disadvantaged schools districts would be an appropriate remedy, a premise rejected by the state. But concerning whether there was in fact a logical nexus between educational opportunity and the level of funding, the court noted that:

> [T]he State makes the implausible argument that more money spent on education does not correlate to better student performance. This position is contrary to Judge Imber's finding in her 1994 order [in a lower court opinion in *Lake View*] and to the Tennessee Supreme Court [declaring in *McWherter* that]: "[T]here is a 'direct correlation between dollars expended and the quality of education a student receives'" . . . The State's argument is farfetched in this court's opinion. We are convinced that motivated teachers, sufficient equipment to supplement instruction, and learning in facilities that are not crumbling or overcrowded, all combine to enhance educational performance.[255]

In ruling on the plaintiffs' equity challenge, the court noted that: "The initial inquiry in our equality analysis is whether school districts are impermissibly classified on the basis of wealth so that discrimination exists."[256] The court determined that: "We hold that a classification between poor and rich school districts does exist and that the State, with its school-funding formula, has fostered this discrimination based on wealth."[257] But in determining the appropriate level of judicial scrutiny to apply to the discrimination in this case, the court stated that:

> Strict-scrutiny review is unwarranted in this case. We have never considered school

districts to be a suspect class for purposes of an equal-protection analysis [citing *DuPree* and *Rodriguez*]. We hold, once again, that requiring the State to show a compelling interest to support the classification is unnecessary in this case, because the State fails to justify the classification even under the more modest rational-basis standard. We turn then to the State's contention that even though disparities in educational opportunities may exist due to the property wealth of the individual districts, there are legitimate government purposes or rational bases for this. Those purposes, according to the State, are local control and other state programs. We rejected the argument of local control in *DuPree* in no uncertain terms and stated that such reasoning was illusory because deference to local control has nothing to do with whether educational opportunities are equal across the state. It is the General Assembly's constitutional duty, not that of the school districts, to provide equal educational opportunity to every child in this state. Furthermore, the State's claim that the General Assembly must fund a variety of state programs in addition to education and that this is reason enough for an inferior education system hardly qualifies as a legitimate reason. It has long been the State's position that its duty is fulfilled under the state constitution if it pays school districts an equal amount in revenues on a per-student basis and then defers to local control as to how that money is spent. Nothing could be farther from the truth. It is the States's responsibility to provide an equal education to its school children and, as we said in *DuPree,* "[i]f local government fails, the state government must compel it to act" [*DuPree* quoting *Robinson v. Cahill*]. Deference to local control is not an option for the State when inequality prevails, and

deference has not been an option since the *DuPree* decision.[258]

Concerning the plaintiffs' equal protection challenge, the court concluded that:

> [T]he current school-funding system violates the equal-protection sections of the Arkansas Constitution in that equal educational opportunity is not being afforded to the school children of this state and that there is no legitimate government purpose warranting the discrepancies in curriculum, facilities, equipment, and teacher pay among the school districts. It is clear to this court that, as we indicated in *DuPree*, whether a school child has equal educational opportunities is largely an accident of residence.[259]

Further, the court recognized a duty of accountability by the state, and noted that:

> It is the State's responsibility, first and foremost, to develop forthwith what constitutes an adequate education in Arkansas. It is, next, the State's responsibility to assess, evaluate, and monitor, not only the lower elementary grades for English and math proficiency, but the entire spectrum of public education across the state to determine whether equal educational opportunity for an adequate education is being substantially afforded to Arkansas' school children. It is, finally, the State's responsibility to know how state revenues are being spent and whether true equality in opportunity is being achieved. Equality of educational opportunity must include as basic components substantially equal curricula, substantially equal facilities, and substantially equal equipment for obtaining an adequate education. The key to all this, to repeat, is to determine what comprises an adequate education in Arkansas. The State has failed in each of these responsibilities.[260]

The court concluded that:

> Because we hold that the current school-funding system is unconstitutional, our schools are now operating under a constitutional infirmity. Other supreme courts facing this dilemma have either remanded the matter to the trial courts or stayed the court's mandate in order to give the General Assembly and Executive Branch an opportunity to cure the deficiencies . . . Clearly, the public schools of this state cannot operate under this constitutional cloud. Were we not to stay our mandate in this case, every dollar spent on public education in Arkansas would be constitutionally suspect. That would be an untenable situation and would have the potential for throwing the entire operation of our public schools into chaos. We are strongly of the belief that the General Assembly and Department of Education should have time to correct this constitutional disability in public school funding and time to chart a new course for public education in this state. Accordingly, we stay the issuance of our mandate in this case until January 1, 2004. This will give the General Assembly an opportunity to meet in General Session and the Department of Education time to implement appropriate changes. On January 1, 2004, the stay will terminate, and this case will be over. Any subsequent challenge will constitute separate litigation. We emphasize, once more, the dire need for changing the school-funding system forthwith to bring it into constitutional compliance. No longer can the State operate on a "hands off" basis regarding how state money is spent in local school districts and what the effect of that spending is. Nor can the State continue to leave adequacy and equality considerations regarding school expenditures solely to local

decision-making. This court admits to considerable frustration on this score, since we had made our position about the State's role in education perfectly clear in the *DuPree* case. It is not this court's intention to monitor or superintend the public schools of this state. Nevertheless, should constitutional dictates not be followed, as interpreted by this court, we will have no hesitancy in reviewing the constitutionality of the state's school-funding system once again in an appropriate case.[261]

School Funding Litigation in Florida

Coalition for Adequacy and Fairness v. Chiles
Supreme Court of Florida
June 27, 1996

In *Coalition for Adequacy and Fairness v. Chiles*, plaintiff students, taxpayers, and school boards asserted that the Florida public school funding system violated the state education clause.[262] The Supreme Court of Florida affirmed the dismissal of the Plaintiffs' allegations, citing concerns related to the separation of powers doctrine, and finding that the Plaintiffs' were raising a nonjusticiable political question.[263]

Concerning the separation of powers doctrine, the court found that "in view of our obligation to respect the separation of powers doctrine, an insufficient showing has been made to justify judicial intrusion."[264] And concerning whether the Plaintiffs were raising a nonjusticiable political question, the court noted that:

> The United States Supreme Court in *Baker v. Carr* . . . set forth six criteria to gauge whether a case involves a political question: (1) a textually demonstrable commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolutions without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; and lastly (6) the potentiality of embarrassment from

> multifarious pronouncements by various departments on one question.[265]

Based on this analysis, the court found that Plaintiffs' challenge to the "adequacy" of the State's funding system raised a nonjustiable political question. The court concluded that:

> While we stop short of saying "never," [Plaintiffs] failed to demonstrate in their allegations . . . an appropriate standard for determining "adequacy" that would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature, both generally (in determining appropriations) and specifically (in providing *by law* for an adequate and uniform system of education). We hold that the legislature has been vested with enormous discretion by the Florida Constitution to determine what provision to make for an adequate and uniform system of free public schools . . . [Plaintiffs] have failed to demonstrate in their allegations a violation of the legislature's duties under the Florida Constitution.[266]

School Funding Litigation in Georgia

McDaniel v. Thomas
Supreme Court of Georgia
Decided November 24, 1981

In *McDaniel v. Thomas*,[267] the Supreme Court of Georgia in an unanimous opinion rejected the plaintiffs' equal protection and education article challenges to the Georgia system of public school funding. The plaintiffs were parents, children, and school officials from school districts with low property values relative to other Georgia school districts.

The court first addressed the issue of justiciability. The court found that constitutional challenges to school funding systems were proper issues for the court, noting that the court was being asked to determine constitutionality, not to make a policy judgement. Citing *Marbury v. Madison*,[268] the court stated "judicial review of legislative enactments is central to our system of constitutional government and deeply rooted in history."[269] Noting that a substantial number of courts had previously addressed this issue, the court stated: "We know of no sister State which has refused merits treatment to such issues, and we would regard our own refusal to adjudicate plaintiffs' claim of constitutional infringement an abdication of our constitutional duties."[270]

The court included in its opinion several statistical tables describing the state's school funding system. The court noted disparities ranging from $138,115 to $17,537 in assessed valuation per student, and per pupil spending disparities ranging from $1,682 to $777.[271] Based on a review of funding data and educational opportunities, the court found that "the evidence in this case establishes beyond doubt that there is a direct relationship between a district's level of funding and the educational opportunities which a school district is able to provide to its children."[272]

In reviewing the plaintiffs' constitutional challenges the court followed the federal model of equal protection analysis, and used historical analysis to interpret the "adequate education" language of Georgia's education article. Rejecting the *Rodriguez* explicit-implicit test of fundamentality, the court found that education is not a fundamental right under the Georgia Constitution.[273] Citing concerns regarding legislative deference, judicial competence, and possible precedential impacts beyond education, the court applied rational basis scrutiny, finding that promoting local control constituted a sufficient justification for Georgia's school funding system.

Regarding the plaintiffs' challenge under the Georgia education article, the court found that the "adequate education" requirement of the Georgia Constitution, did not "incorporate equal educational opportunity as a basic concept."[274] In the absence of evidence showing that any student was being deprived of a basic education, the court rejected the plaintiffs' education article challenge. The court concluded "it is clear that a great deal more can be done and needs to be done to equalize educational opportunities in this state. For the present, however, the solutions must come from our lawmakers."[275]

School Funding Litigation in Kentucky

Rose v. Council for Better Education
Supreme Court of Kentucky
Decided June 8, 1989

In *Rose v. Council for Better Education*,[276] the Supreme Court of Kentucky affirmed a lower court ruling that the Kentucky system of public school funding was unconstitutional. In the opening section of the Kentucky high court's opinion, the court stated:

> The goal of the framers of our constitution, and the polestar of this opinion, is eloquently and movingly stated in the landmark case of *Brown v. Board of Education*:
>
> > "*[E]ducation is perhaps the most important function of state and local governments* . . . 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 reasonable 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*."[277]

The court held that education was a fundamental right in Kentucky, and that the Kentucky system of public school funding failed to meet the constitutional mandate of an efficient system of schools throughout the state.

The plaintiffs in *Rose* were a non-profit corporation called "Council for Better Education,"

made up of 66 Kentucky school districts, joined by several Boards of Education, and 22 public school students. The plaintiffs filed a declaratory judgment action challenging the Kentucky system of public school funding. The state answered the complaint by alleging the plaintiffs failed to state a valid cause of action, the issue was non-justiciable, service of process was defective, the plaintiffs lacked standing, and by entering a general denial regarding all constitutional and factual allegations. The state also entered an "affirmative defense" claiming that statutory changes had already corrected the situation alleged.[278] The court rejected the state's procedural arguments, and moved to a review of the factual findings by the court.

The court noted that before an evidentiary finding of a trial court can be overturned "such finding must be clearly erroneous."[279] The court cited the extensive evidence heard by the trial court, stating that the "case consists of numerous depositions, volumes of oral evidence heard by the court, and a seemingly endless amount of statistical data, reports, etc."[280] The court found that the overall effect of the evidence "is a virtual concession that Kentucky's system of common schools is underfunded and inadequate" and is "fraught with inequalities and inequities" among the districts.[281] Regarding the testimony of the numerous witnesses, the court stated:

> Without exception, they testified that there is great disparity in the poor and the more affluent school districts with regard to classroom teachers' pay; provision of basic educational materials; student-teacher ratio; curriculum; quality of basic management; size, adequacy and condition of school physical plants; and per year expenditure per student.[282]

The court found that "the quality of education in the poorer local school districts is substantially

less in most, if not all, of the above categories"[283] and that: "Children in 80% of local school districts in this Commonwealth are not as well-educated as those in the other 20%."[284] The court accepted the plaintiffs' assertion that there was a correlation between per pupil expenditures and educational quality,[285] and noted that the "disparity in per pupil expenditure by the local school boards runs in the thousands of dollars per year."[286] The court concluded "the total local and state effort in education in Kentucky's primary and secondary education is inadequate and is lacking in uniformity. It is discriminatory as to the children served in 80% of the local school districts."[287] Having established the factual state of education in Kentucky based on a review of the trial evidence, the court turned to interpreting the language of Kentucky's education article to determine the legislature's educational duty under the Kentucky Constitution.

The court noted that § 183 of the Kentucky Constitution stated that the "General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State."[288] In interpreting the language of the constitution the court accepted an historical analysis of the constitutional debates as an appropriate method.[289] The court also found that the interpretation of similar language by the Supreme Court of Appeals of West Virginia in *Pauley* provided useful guidance.[290] Based on the above analysis, the court determined that:

> The essential, and minimal, characteristics of an "efficient" system of common schools, may be summarized as follows:
>
> 1) The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly.
> 2) Common schools shall be free to all.
> 3) Common schools shall be available to all Kentucky children.
> 4) Common schools shall be substantially uniform throughout the state.
> 5) Common schools shall provide equal educational opportunities

to all Kentucky children, regardless of place of residence or economic circumstances.
6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.
7) The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education.
8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.
9) An adequate education is one which has as its goal the

development of the seven capacities.[291]

Regarding these seven capacities, the court stated that:

> [A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities:
>
> 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 of 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.[292]

In conclusion, the court noted it had decided only one legal issue, "that the General Assembly

of the Commonwealth has failed to establish an efficient system of common schools throughout the Commonwealth."[293] This conclusion was based solely on the requirements of the Kentucky Constitution.[294] Regarding the scope of the decision, the court held that "the result of our decision is that Kentucky's *entire system* of common schools is unconstitutional"[295] (emphasis added by the court). More specifically the court stated:

> This decision applies to the entire sweep of the system--all parts and parcels. This decision applies to the statutes creating, implementing and financing the *system* and to all regulations, etc., pertaining thereto. This decision covers the creation of local districts, school boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. It covers school construction and maintenance, teacher certification--the whole gamut of the common school system in Kentucky[296] (emphasis added by the court).

Lastly, the court addressed tax payer equity holding that all property must be assessed at 100% of its fair market value, and a tax rate that is uniform throughout the state must be established.[297]

School Funding Litigation in Louisiana

Livingston School Board v. Louisiana
United States Court of Appeals, Fifth Circuit
Decided October 22, 1987

In *Livingston School Board v. Louisiana* [298] two Louisiana school boards, along with children and parents residing in the parish, brought suit under 42 U.S.C § 1983 claiming that the Louisiana system of school funding violated their constitutional rights under the equal protection clause of the Fourteenth Amendment. The U.S. district court granted the defendant's motion for summary judgement. The U.S. Court of Appeals affirmed, and the U.S. Supreme Court denied certiorari.

The Court of Appeals noted that the record contained no evidence indicating that any Louisiana child was being denied a minimally adequate education.[299] Therefore, the court found that based upon *Papasan*, heightened scrutiny was inappropriate, and that *Rodriguez* supported the application of rational basis scrutiny.[300] Under rational basis scrutiny, the court held that the plaintiffs had failed to meet their burden of proving that the Louisiana system of school funding violated the Fourteenth Amendment.[301]

Although the court denied relief to the plaintiffs, the court noted significant disparities between Louisiana parishes. Per pupil expenditures ranged from $6,099 to $1,892. Assessed valuation per student ranged from $59,700 to $3,333.[302] Nonetheless, the court ruled that the Louisiana system of school funding balanced the assurance of basic educational opportunity with the state's interest in promoting local control in a constitutionally acceptable manner.[303] The court concluded that under *Rodriguez*, the state's system was constitutional, noting that the Louisiana economic disparities were smaller than those in *Rodriguez.*[304] Despite the

imperfections of the Louisiana system, "the system cannot be condemned because it imperfectly and incompletely effectuates the state's goals."[305] Accordingly, the court affirmed the dismissal of the case.

School Funding Litigation in Mississippi

Papasan v. Allain
Supreme Court of the United States
Decided July 1, 1986

In *Papasan v. Allain,*[306] school officials and children in 23 Mississippi school districts claimed that they were being denied the economic benefit of public school land grants. The plaintiffs claimed that the Mississippi system of distributing these funds violated the Fourteenth Amendment of the U.S. Constitution. The U.S. district court granted the defendants' motion to dismiss the complaint, based on *Rodriguez.* The United States Court of Appeals, Fifth Circuit, affirmed. However, the U.S. Supreme Court vacated the dismissal and remanded the case, holding that the plaintiffs' allegations were sufficient to support a cause of action if it were determined that the Mississippi system was not rationally related to a legitimate state interest.

In reviewing the *Papasan* case, the Court referred to its holdings in *Rodriguez* and *Plyler*. The Court noted that although *Rodriguez* held that education was not a fundamental right, "the Court did not, however, foreclose the possibility that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote]."[307] The Court also cited *Plyler*, stating that "the Court did not . . . measurably change the approach articulated in *Rodriguez* . . . nevertheless, it concluded that the justifications for the discrimination offered by the State were wholly insubstantial in light of the costs involved to these children, the State, and the Nation."[308] As the Court noted: "*Rodriguez* did not . . . purport to validate all funding variations that might result from a State's public school funding decisions. It merely held that the variations that resulted from allowing local control over local

property tax funding of the public schools were constitutionally permissible in that case."[309]

The Court stated: "As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review."[310] However, finding that the plaintiffs in *Papasan* were not alleging a denial of a minimally adequate education,[311] the Court remanded the case for determination of whether the Mississippi system was rationally related to a legitimate governmental interest.

School Funding Litigation in North Carolina

Britt v. North Carolina State Board of Education
Supreme Court of North Carolina
Decided October 7, 1987

The Supreme Court of North Carolina allowed dismissal, and denied review in *Britt v. North Carolina State Board of Education*.[312] The plaintiffs, children and parents in a low property wealth district, had alleged that the North Carolina system of public school funding denied them equal educational opportunity. The Court of Appeals of North Carolina held that the plaintiffs' claim failed to state a valid cause of action.[313]

The court noted that Article IX, section 2(1) of the North Carolina Constitution stated that "equal educational opportunities shall be provided for all students."[314] The court stated "the outcome of this appeal depends entirely upon the interpretation to be given the constitutional provisions relied upon by plaintiffs."[315]

In interpreting the language of the North Carolina Constitution, the court used historical analysis to search for the intent of the framers in adopting the constitutional provision in question.[316] The court stated "more importance is to be placed upon the intent and purpose of a provision than upon the actual language used."[317] Based on an historical analysis of the constitutional history, the court determined that under the North Carolina Constitution "equal opportunities" did not mean identical opportunities, but merely "equal access."[318]

Leandro v. State
Supreme Court of North Carolina
Decided July 24, 1997

In *Leandro v. State*, the Supreme Court of North Carolina reviewed a funding equity dispute

involving both poorer rural schools and relatively wealthy large urban area schools.[319] Poorer rural schools filed the original suit, alleging that the state's reliance on local property taxes resulted in inadequate and unequal education in their schools, despite higher local tax rates. They alleged that school facilities in poorer rural districts were inadequate, and that poorer rural schools could not afford the smaller class sizes, high quality teachers, books, media centers, and technology available in larger, wealthier districts.[320]

After the poorer rural schools filed their suit, relatively large and wealthy urban schools filed a motion to intervene. Larger and wealthier urban schools alleged that the state's system of funding "does not sufficiently take into consideration the burdens faced by their urban school districts which must educate a large number of students with extraordinary educational needs" including "a large number of students who require special education services, special English instruction, and academically gifted programs."[321] They complained that "deficiencies in physical facilities and educational materials are particularly significant in their systems because most of the growth in North Carolina's student population is taking place in urban areas."[322] They alleged that "because urban counties have high levels of poverty, homelessness, crime, unmet health care needs, and unemployment which drain their fiscal resources, they cannot allocate as large a portion of their local tax revenues to public education as can the more rural poor districts." They urged the court to conclude that "the state's singling out of certain poor rural districts to receive supplemental state funds, while failing to recognize comparable if not greater needs in the urban school districts, is arbitrary and capricious in violation of the North Carolina Constitution and state law."[323]

Although the court did not issue a final decision on the merits of the parties' claims, the court held that the state constitution did not require equal expenditures, but did guarantee students the right to a "sound basic education."[324] The court remanded the case to the trial court for further proceedings, commenting that the school districts' claims must be "supported by substantial evidence" before they may be granted any relief.[325] The court noted that: "Ironically, if plaintiff-intervenors' [large wealthy urban districts] argument should prevail, they would be entitled to an unequally large per-pupil allocation of state school funds for their relatively wealthy urban districts."[326]

School Funding Litigation in South Carolina

Richland County v. Campbell
Supreme Court of South Carolina
Decided January 25, 1988

In *Richland County v. Campbell*,[327] the plaintiffs sought a declaratory judgment that the South Carolina system of public school funding was unconstitutional. The district court dismissed the case, and the plaintiffs appealed. The Supreme court of South Carolina held that the South Carolina system of school funding did not violate the state constitution's free public schools mandate, nor did the system violate equal protection guarantees.

The court noted that Article XI, Section 3, of the South Carolina Constitution stated that the legislature "shall provide for the maintenance and support of a system of free public schools."[328] In interpreting the meaning of this provision, the court adopted the trial court's historical analysis of the South Carolina Constitution. The Supreme Court of South Carolina determined "the framers of the Constitution have left the legislature free to choose the means of funding the schools of this state to meet modern needs."[329]

The plaintiffs cited *Robinson* and *Serrano* as persuasive authority for their position. However, the court found "this controversy is distinguishable from appellants' cited authorities."[330] Given the court's finding of broad legislative discretion under the public school funding mandates in the South Carolina Constitution, the court determined the South Carolina system was constitutional under a rational basis test.[331]

Abbeville v. State
Supreme Court of South Carolina
Decided April 22, 1999

Plaintiffs in *Abbeville v. State* were 40 less wealthy school districts, and their students and taxpayers.[332] They alleged that South Carolina's public school funding system violated the South Carolina Constitution's education clause, and the equal protection clauses of the state and federal constitutions. The Supreme Court of South Carolina noted that: "Unlike similar suits brought in other states, appellants do not seek 'equal' state funding since they already receive more than wealthier districts, but instead allege that the funding results in an inadequate education."[333] The court stated that: "Essentially, they allege that the system is underfunded, resulting in a violation of the state Constitution's education clause."[334]

The court noted that the U.S. Supreme Court's decision in *Rodriguez* disposed of the Plaintiffs' federal equal protection claim. Concerning the state equal protection claim, the court found that: "A neutral law having a disparate impact violates equal protection only if it is drawn with discriminatory intent . . . There is no claim of discriminatory intent here."[335] Having disposed of the equal protection claims, the court stated that: "The novel issue in this case involves the education clause of the state constitution."[336]

The trial court had held that the education clause "imposes no qualitative standards, and that absent an allegation that there was no system of free public schools open to all children in the state, no claim was stated under the education clause."[337] The trial court had found that the

Plaintiffs' "'bald legal conclusion' that the education furnished is inadequate did not state a clear and convincing constitutional claim" and concluded that "judicial restraint, separation of powers, and/or the political question doctrine" prevented consideration of the education clause claim.[338] However, the Supreme Court of South Carolina stated that: "It is the duty of this Court to interpret and declare the meaning of the Constitution . . . Accordingly, the circuit court erred in using judicial restraint, separation of powers, and the political question doctrine as the bases for declining to decide the meaning of the education clause."[339] The court stated that:

> We will not accept this invitation to circumvent our duty to interpret and declare the meaning of this clause . . . We hold today that the South Carolina Constitution's education clause requires the General Assembly to provide the opportunity for each child to receive a minimally adequate education . . . We define this minimally adequate education required by our Constitution to include providing students adequate and safe facilities in which they have the opportunity to acquire: 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and 3) academic and vocational skills . . . We recognize that we are not experts in education, and we do not intend to dictate the programs utilized in our public schools. Instead, we have defined, within deliberately broad parameters, the outlines of the constitution's requirements of minimally adequate education. Finally, we emphasize that the constitutional duty to ensure the provision of a minimally adequate education to each student in South Carolina rests on the legislative branch of government. We do not intend by this opinion to suggest to any party that we will usurp the authority of that branch to determine the way in which educational opportunities are delivered to the children of our State. We do not intend the courts of this State to become super-legislatures or super-school boards.[340]

School Funding Litigation in Tennessee

Tennessee Small School Systems v. McWherter
Supreme Court of Tennessee
Decided March 22, 1993

A coalition of small and mostly rural school districts, superintendents, school board members, parents, and students alleged that Tennessee's system of school funding violated the state's education article and equal protection provisions of the state's constitution. Nine urban and suburban school districts joined the state as defendants. The court noted that "the larger, more affluent systems do not want the funding scheme which favors their systems disturbed . . . They express grave concern that the result will be 'a redistribution of education funds away from the central cities and the growing suburbs.'"[341]

Regarding the impact of funding disparities in the state, the court stated that: "The evidence indicates a direct correlation between dollars expended and the quality of education a student receives" and recognized tangible disparities among schools in facilities, curricula, libraries, accreditation rates, and corresponding educational harm to students in economically disadvantaged districts.[342] The court found that under the state's funding system "most school districts in the state--especially non-urban--cannot reasonably raise sufficient revenues from local sources to provide even the average amount of total funds for education per pupil statewide" and that disparities in funding are not the result of lack of effort by economically disadvantaged districts.[343] The court further noted the continued movement of economic resources from small local communities toward larger urban areas, and the spiral of poverty resulting from inadequate schools in disadvantaged poorer districts,[344] and stated that:

> The record shows that over the years, the distribution of sales tax and property tax revenues has become more concentrated as economic activity has moved from small local communities to larger regional retail centers. Purchases previously made by residents of rural school districts locally, are now made in the more urban counties, and the sales tax on those purchases is collected in the wealthier counties. With the construction of large retail centers in the urban counties, property tax revenues, though much less significant than sales tax revenues, also are concentrated in those same communities rather than distributed more evenly throughout the entire state. Because all revenues from the property tax and the local option sales tax are received by the county or city where collected, the result is the progressive exacerbation of the inequity inherent in a funding scheme based on place of collection rather than need.[345]

The court held that the state's system of funding violated the state constitution's guarantee of equal protection.[346] The court rejected the argument that local control justified funding disparities throughout the state and found that: "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."[347] Having declared the state's system of funding unconstitutional, the court declined to rule on the education clause challenge, and affirmed the trial court's order to the General Assembly to fashion an appropriate remedy.

Tennessee Small School Systems v. McWherter (Small Schools II)
Supreme Court of Tennessee
Decided February 16, 1995

In 1993, in *Tennessee Small School Systems v. McWherter (Small Schools I)*, the Supreme Court of Tennessee held that the Tennessee Constitution guaranteed children the right to substantially equal educational opportunities, and that disparities caused by the State's funding system were unconstitutional.[348] While the decision in *Small Schools I* was pending, the

legislature enacted the Basic Education Program (BEP) to aid in equalizing funding and educational opportunities in the state. In *Tennessee Small School Systems v. McWherter (Small Schools II)*, plaintiffs representing rural school districts asserted that the BE violated the equal protection provisions of the Tennessee Constitution "because complete equalization is accomplished over a period of years rather than immediately, and because the plan contains no provision for equalizing teachers' salaries."[349] The court stated that: "The plaintiffs rely upon the principle that the violation of constitutional rights must be corrected with all deliberate speed."[350]

Concerning the State's public school funding systems, the court found that:

> The funding scheme that caused the constitutionally impermissible disparities in educational opportunities was the Tennessee Foundation Program (TOP) augmented by categorical grants from the State to local school systems. Funding under that program, which included only a token amount for equalization of the local systems, was not related to the costs of providing programs and services by the several local school systems. State funding for the local systems was based primarily on average daily attendance of students. Local funding depended upon local sales tax collections and discretionary appropriations by local governments. The TOP was principally a state-ordered program with little managerial discretion at the local level. The BE is quite different from the TOP in concept. It is designed to provide, when fully funded, the programs and services essential to a basic education for public school children in grades K through 12 throughout the State. That objective is to be accomplished by defining the essentials of an effective education plan suitable for every local system and implementing that plan through organizational structure, disciplined management and adequate funding.[351]

Concerning the BE, the court noted that:

> The significant provisions of the BE other than funding are characterized as governance and accountability measures. These reforms are designed to address "the relative indifference" to education demonstrated by some local systems, which this Court found to be a contributing factor to the inequities in educational opportunities. The BE purports to accomplish these objectives by granting to local officials more discretion in the management of the system and holding those officials accountable for obtaining

> measurable accomplishments in providing an effective educational system. Each local system is required to develop a long-range plan, including goals and strategies, and distribute annually a report that shows the results of the system's management. Performance by each local system is monitored by State officials. Any local system that fails to achieve the objective standards set forth in the plan may be "placed on probation" by the Commissioner of Education with the approval of the State Board of Education.[352]

In addressing the plaintiffs' allegation concerning the failure to include a provision in the BE that would equalize teacher salaries, the court stated that:

> Funding based on determined costs is mandated for each component of the basic education plan except teachers' salaries. The allocation for teachers' salaries to each local system is the product of the amount of the system's average teacher salary, based on the State salary schedule plus the mandated local supplement, multiplied by the number of BE teacher positions in that local system. Local systems are allowed to use classroom funds for any of the classroom components and they are allowed to use system support funds for any of the system support components. However, they are prohibited from using BE funds for the purpose of increasing teachers' salaries. Since the adoption of the BE, teachers have received the same increases in salaries as other State employees, except the total amount paid teachers has been distributed according to the BE formula. However, there is no provision in the BE for increasing teachers' salaries or equalizing teachers' salaries. The State's explanation, and justification, for this treatment of the funding of teachers' salary increases is that historically all funds made available to local systems have been applied to teachers' salaries, resulting in other needs being neglected. The State takes the position in this case that increasing and equalizing teachers' salaries is not a component of a basic education, that it "does not affect student performance." The argument is dramatically weakened by the inclusion of this item in earlier BE proposals.[353]

Based on a review of the BE, the court determined that:

> The omission of a requirement for equalizing teachers' salaries is a significant defect in the BE. The rationale supporting the inclusion of the other important factors constituting the plan is equally applicable to the inclusion of teachers' salaries. Teachers, obviously, are the most important component of any education plan or system, and compensation is, at least, a significant factor determining a teacher's place of employment. The costs of teachers' compensation and benefits is the major item in every education budget. The failure to provide for the equalization of teachers' salaries according to the BE formula, puts the entire plan at risk functionally and, therefore, legally. The Court accepts the State's insistence that substantial improvement in educational opportunities throughout the State under the BE can best be accomplished incrementally and only if complete

> equalization of funding is accomplished incrementally also. The Court finds, however, that exclusion of teachers' salary increases from the equalization formula is of such magnitude that it would substantially impair the objectives of the plan; consequently, the plan must include equalization of teachers' salaries according to the BE formula. The record does not support the plaintiffs' contention that funding for capital improvements should be given priority over other needs. The plan, as modified, is approved for the purposes of this proceeding. It appears that the BE addresses both constitutional mandates imposed upon the State--the obligation to maintain and support a system of free public schools and the obligation that that system afford substantially equal educational opportunities.[354]

The court concluded that: "Adequate funding is essential to the development of an excellent education program, and immediate equalization of funding would not necessarily insure immediate equalization of educational opportunities or a more excellent program."[355] Concerning the source of the funding, the court determined that this was at the discretion of the legislature, but cautioned that: "The inadequacy of particular sources of revenue would not justify modification of the education program or the funding schedule."[356]

Tennessee Small School Systems v. McWherter (Small Schools III)
Supreme Court of Tennessee
Decided October 8, 2002

In 1993, in *Tennessee Small School Systems v. McWherter (Small Schools I)* the Supreme Court of Tennessee ruled in favor of a coalition of rural school districts, superintendents, school board members, students, and parents who asserted that disparities in resources between rural and urban schools violated the Tennessee Constitution.[357] While the court's decision in *Small Schools I* was pending, the state legislature passed the Basic Education Plan (BE), a funding formula based on the cost of forty-three components that were deemed necessary "for [Tennessee] schools to succeed."[358] The court noted that:

> The components included items such as the cost of vocational education, guidance counseling, textbooks, physical education, computer technology, transportation, library services, special education, art, music, classroom supplies, alternative schools, travel, and capital expenditures for facilities. The components also included the costs of hiring secretaries, nurses, librarians, social workers, principals and their assistants, assessment personnel, coordinators, supervisors, custodians, psychologists, and superintendents but, significantly, omitted the cost of hiring teachers, the most important component of any education plan and a major part of every education budget.[359]

In 1995, in *Tennessee Small School Systems v. McWherter (Small Schools II)* the Supreme Court of Tennessee ruled that the absence in the BE of a requirement to equalize teachers' salaries was a significant defect both functionally and legally, and concluded that "the plan must include equalization of teachers' salaries" in order to be constitutional.[360] In *Tennessee Small School Systems v. McWherter (Small Schools III)* the court was asked to determine "whether the State's current method of funding salaries for teachers . . . equalizes teachers' salaries 'according to the BE formula' or whether it fails to do so and violates equal protection by denying students substantially equal educational opportunities."[361] The court held that:

> [W]e find that the salary equity plan . . . does not equalize teachers' salaries according to the BE formula and contains no mechanism for cost determination or annual cost review of teachers' salaries, unlike the BE conditionally approved in *Small Schools II*. We further find that no rational basis exists for structuring a basic education program consisting entirely of cost-driven components while omitting the cost of hiring teachers, the most important component of any education plan and a major part of every education budget. Therefore, the lack of teacher salary equalization in accordance with the BE formula continues to be a significant constitutional defect in the current funding scheme. Accordingly, we hold that the salary equity plan fails to comply with the State's constitutional obligation to formulate and maintain a system of public education that affords a substantially equal educational opportunity to all students.[362]

In reaching this conclusion, the court reviewed the extended history of this case, noting that:

> In 1988, a group of rural school districts, superintendents, board of education members, students, and parents filed suit claiming that Tennessee's education funding system

> violated article XI, section 12 of the Tennessee Constitution because the funding system denied public school students the right to an equal education due to a disparity in resources between rural and urban counties . . . The State, along with several school systems located in urban and suburban counties across the state who were allowed to intervene, opposed the plaintiffs' suit on the ground that the funding scheme enacted by the legislature was not review able by the courts. In sum, the defendants argued that article XI, section 12, of the state constitution provided no qualitative standards for measuring the quality of education or the sufficiency of funding and that such matters were left to the exclusive province of the legislative and executive branches. On appeal, this Court agreed with the trial court's findings that there were impermissible disparities in the educational opportunities available to public school students, as evidenced by significant differences in teacher qualifications, student performance, and basic educational programs and facilities. We noted, for example, that many schools in the rural districts had decaying physical plants, inadequate heating, showers that did not work, buckling floors, leaking roofs, inadequate science laboratories, and outdated textbooks and libraries . . . Furthermore, the evidence showed that some of the school districts were unable to offer advanced placement courses, more than one foreign language, or the state-mandated art and music classes, drama instruction, and athletic programs . . . We also agreed with the trial court that the gross disparities in educational opportunities available to public school students were caused by the State's then-existing funding scheme, the Tennessee Foundation Program ("TOP"), which included only a "token amount" of state funds for the equalization of school systems and, significantly, was unrelated to the costs of providing programs and services by the local schools . . . Indeed, state funding under the TOP was based primarily on average daily attendance of students, while local funding depended heavily on local sales tax collections and discretionary funding by local governments . . . We therefore concluded that the state funding scheme violated equal protection principles.[363]

After reviewing the history of the case, the court determined that concerning the omission of a requirement to equalize teacher salaries in the basic education program:

> We can think of no rational basis, and the defendants have not suggested one, for structuring a basic education program where all of its components, including salaries for custodians, secretaries, nurses, librarians, social workers, principals and their assistants, assessment personnel, coordinators, supervisors, psychologists, and superintendents, are cost-driven, except for the largest and most important component of all, the cost of providing teachers. It seems to us, as we said in *Small Schools II,* that the rationale for cost determination and annual review of the BE components applies with equal if not greater force to teachers' salaries, for it is undeniable that teachers are the most important

> component of any effective education plan, and that their salaries, a major item in every education budget, are a significant factor in determining where teachers choose to work . . . We recognized this fact seven years ago in *Small Schools II*, and we strongly reiterate it again today. Likewise, we recognized in *Small Schools II* that teacher salaries are an indispensable part of any constitutional funding plan, and that no part of that plan can be compromised without destroying the integrity and effectiveness of the entire plan . . . the State has not complied with the unambiguous finding in *Small Schools II* that a constitutional plan "must include equalization of teachers' salaries . . . The lack of cost determination and periodic cost review of teachers' salaries is a problem of constitutional dimensions today and will constitute a much larger problem over time, given that the salary equity plan is based solely on average teacher compensation as of 1993, or $28,094. Indeed, the average teacher salary in Tennessee as of 1998-1999 was $31,894 according to the parties' joint statement of undisputed facts; $35,273 according to a report prepared by the BE Review Committee; and $36,896 according to a report produced by the Department of Education. Whatever the average salary may have been in 1998-1999, it is clear that the target salary in the equity plan bears no relationship to the current, actual cost of providing teachers as this opinion is written in 2002, leaving a gap that will widen with each passing year . . . In short, we hold that the lack of teacher salary equalization according to the BE formula continues to be a significant constitutional defect in the State's funding scheme. We have now held on two occasions since 1988 that the legislature's constitutional mandate is to maintain and support a system of public education that affords substantially equal educational opportunities to all students. Although we have left policy considerations such as the funding and level of salaries to the legislature, the constitutional mandate has not changed. Moreover, whatever mechanism is chosen by the legislature, it must comport with the principles we have been espousing since the inception of the *Small Schools* saga. Until that mandate is met, the inherent value of education will not be fully realized by all students in the state, regardless of where they live and attend school, and the students of Tennessee will continue to be unconstitutionally denied substantially equal educational opportunities.[364]

The court further noted that: “The State’s contention that salaries have been equalized because all public school teachers have a minimum salary based on training and experience is unconvincing” and stated that “we observed in *Small Schools I* that making adjustments based on training and experience benefitted wealthier school districts because more funds were channeled to districts where better trained and experienced teachers worked.”[365] Concerning the causes and effects of disparities in teacher salaries, the court concluded that:

[T]he record supports the plaintiffs' argument that for the most part, the same disparities in teachers' salaries that existed when *Small Schools II* was decided still exist today. For example, in 1995, the City of Alcoa paid teachers an average of $40,672, while Jackson County paid teachers an average of $23,934, a difference of $16,738. In 1997, Oak Ridge paid its teachers an average of $42,268, while in Monroe County the figure was $28,025, a disparity of $14,243. In 1998-1999, the disparity between Oak Ridge and Monroe County grew to $14,554. Thus, wide disparities still exist, and it takes little imagination to see how such disparities can lead to experienced and more educated teachers leaving the poorer school districts to teach in wealthier ones where they receive higher salaries[366] . . . The intervenors [urban and suburban school districts] cite a survey of teachers suggesting that [only] 21% of teachers moving to another district to teach did so primarily because of salary considerations. However, the same study reveals that 61.7% of those surveyed cited salary as the reason they preferred working in their current school system over their former one, and 53.3% said that salary influenced their decision to migrate from one system to another[367] . . . In the end, the rural districts continue to suffer the same type of constitutional inequities that were present fourteen years ago when this litigation began.[368]

Plyler v. Doe
Supreme Court of the United States
Decided June 15, 1982

Although *Plyler v. Doe*[369] concerned illegal alien children being denied admission to Texas public schools, it is relevant to school funding litigation for the following reasons: 1) *Plyler* reaffirms that education is not a fundamental right under the U.S. Constitution, citing *Rodriguez*; 2) many of the policy arguments discussed in *Plyler* can be applied to school funding litigation as well; and 3) the Court in *Plyler* extended intermediate scrutiny to the education context.

In *Plyler*, the plaintiffs were Mexican-American children who could not establish that they had been legally admitted to the United States. Texas had enacted a statute which denied public school admission to these children. The Court found this statute unconstitutional as a violation of the equal protection clause of the U.S. Constitution. The Fourteenth Amendment to the U.S. Constitution declares "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[370] The Court rejected the state's argument that aliens were not persons within the jurisdiction of the United States, and after applying intermediate scrutiny to the Texas statute, ruled in favor of the plaintiffs.

The Court reaffirmed the *Rodriguez* holding that education was not a fundamental right, but added "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[371] In distinguishing education from other social welfare legislation, the Court noted "both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child."[372] The Court identified several policy

arguments against depriving any group of educational opportunity. Although these argument were made in the context of a total deprivation of education in *Plyler*, they could also be used to argue against relative deprivations in school funding litigation cases.[373]

Justice Marshall, in concurrence with the majority opinion ruling the Texas statute unconstitutional, stated: "While I join the Court's opinion, I do so without in any way retreating from my opinion in *San Antonio Independent School District v. Rodriguez*" that "an individual's interest in education is fundamental."[374] Justice Marshall concluded "it continues to be my view that a class-based denial of public education is utterly incompatible with the Equal Protection Clause of the Fourteenth Amendment."[375]

Edgewood Independent School District v. Kirby
Supreme Court of Texas
Decided October 2, 1989

In *Edgewood Independent School District v. Kirby*,[376] the Supreme Court of Texas declared the state's system of public school funding unconstitutional under the education article of the Texas Constitution. The high court of Texas affirmed a trial court judgment which had been reversed by the court of appeals. The Supreme Court of Texas held that due to financial disparities resulting from the Texas public school funding system, the state failed to maintain an efficient system of schools as required by the Texas Constitution.

The court found that "the basic facts of this cause are not in dispute."[377] The state provides 42% of public school funds, while about 50% come from local taxation. Property wealth in Texas ranges from $14,000,000 per student to $20,000 per student, a disparity which "reflects a

700 to 1 ratio."[378] According to the court, "the 300,000 students in the lowest-wealth schools have less than 3% of the state's property to support their education while the 300,000 students in the highest-wealth schools have over 25% of the state's property wealth."[379] Because of the disparities in property wealth "spending per student varies widely, ranging from $2,112 to $19,333."[380] The court also addressed tax payer equity noting that "the 100 poorest districts had an average tax rate of 74.5 cents and spent an average of $2,978 per student. The 100 wealthiest districts had an average tax rate of 47 cents and spent an average of $7,233 per student."

The court described the effects of inequities in educational funding, stating that:

> Property-poor districts are trapped in a cycle of poverty from which there is no opportunity to free themselves. Because of their inadequate tax base, they must tax at significantly higher rates in order to meet minimum requirements for accreditation; yet their educational programs are typically inferior. The location of new industry and development is strongly influenced by tax rates and the quality of local schools. Thus, the property-poor districts with their high tax rates and inferior schools are unable to attract new industry or development and so have little opportunity to improve their tax base.[381]

The court accepted the plaintiffs' assertion that there was a correlation between per pupil expenditures and educational opportunity.[382] In comparing the programs of high and low wealth districts the court found that "the differences in the quality of educational programs are dramatic."[383] After addressing factual conclusions, the court turned to an examination of the law.

The court of appeals had reversed the trial courts ruling in favor of plaintiffs, finding that the

plaintiffs' challenge presented a nonjusticiable political question. The Supreme Court of Texas reversed the court of appeals regarding this issue, finding that the court has a duty to decide constitutional questions, and "fortunately . . . for the people, the function of the judiciary in deciding constitutional questions is not one which it is at liberty to decline."[384]

In interpreting the language of the Texas Constitution's education article the court used both historical analysis, and an examination of the plain meaning of the constitution's language.[385] Based on this analysis the court determined, "in mandating 'efficiency,' the constitutional framers and ramifies did not intend a system with such vast disparities as now exist . . . the resultant inequalities are thus directly contrary to the constitutional vision of efficiency."[386]

The court rejected the state's justification of local control, and stated that:

> Some have argued that reform in school finance will eliminate local control, but this argument has no merit. An efficient system does not preclude the ability of communities to exercise local control over the education of their children. It requires only that the funds available for education be distributed equitably and evenly. An efficient system will actually allow for more local control, not less. It will provide property-poor districts with economic alternatives that are not now available to them. Only if alternatives are indeed available can a community exercise the control of making choices.[387]

In holding the system unconstitutional, the court noted that although a revised system did not require "a per capita distribution," the system must provide "a direct and close correlation between a district's tax effort and the educational resources available to it."[388] The court stayed

the effect of an injunction until May 1, 1990, in order to allow time for legislative action. However, the court warned "let there be no misunderstanding. A remedy is long overdue. The legislature must take immediate action."[389]

School Funding Litigation in Virginia

Scott v. Commonwealth
Supreme Court of Virginia
Decided April 15, 1994

The Supreme Court of Virginia affirmed a dismissal of plaintiffs' challenge to the constitutionality of the state's system of public school funding.[390] Plaintiffs were 11 public school students and seven local school boards. They alleged that the state's system of public school funding violated two sections of the Virginia Constitution concerning education: Article I, § 15 of the Virginia Constitution mandating "an effective system of education throughout the Commonwealth" and Article VIII, § 1 calling for "a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth."[391] Plaintiffs' further alleged that funding disparities violated their fundamental right to education, and that unless funding disparities were eliminated, the Commonwealth "will never have an 'effective' system of education."[392]

The court recognized disparities in per student expenditures, teacher salaries, teacher-student ratios, instructional programs and materials, and that: "The disparity in State and local funding between the highest-funded and the lowest-funded school divisions continues to increase."[393] Nonetheless, the court noted that the plaintiffs "do not claim that they are being denied an educational program that meets the prescribed standards of quality."[394]

In its decision the court agreed that education is a fundamental right in Virginia, but stated that:

> Even applying a strict test . . . we hold that nowhere does the Constitution require equal,

or substantially equal, funding or programs among and within the Commonwealth's school divisions. The Constitution does mandate that the General Assembly provide for a system of free public schools throughout the Commonwealth, and the General Assembly has provided for such a system . . . The Constitution also accords the General Assembly the ultimate authority for determining and prescribing the standards of quality for the school divisions . . . Finally, the Constitution requires the General Assembly to determine the manner of funding to provide the cost of maintaining an educational program that meets the prescribed standards of quality and how the cost shall be apportioned between the Commonwealth and the localities . . . while the elimination of substantial disparity between school divisions may be a worthy goal, it simply is not required by the Constitution. Consequently, any relief to which the Students may be entitled must come from the General Assembly.[395]

School Funding Litigation in West Virginia

Pauley v. Kelly
West Virginia Supreme Court of Appeals
Decided February 20, 1979

In *Pauley v. Kelly*, West Virginia's high court reversed a trial court's dismissal of an action challenging the constitutionality of the state's school funding system.[396] The court held that the cause must be remanded for a trial and further development of the evidence, and proposed guidelines for the court on remand.

Based on *Rodriguez*, the court recognized that Fourteenth Amendment protection is not available to children seeking educational equality.[397] However, the court criticized the *Rodriguez* majority, stating "our examination of *Rodriguez* and our research in this case indicates an embarrassing abundance of authority and reason by which the majority might have decided that education is a fundamental right of every American."[398] The court further noted that the General Assembly of the United Nations "appears to proclaim education to be a fundamental right of everyone, at least on this planet."[399] The court declared that education is a fundamental right in West Virginia, and that under the state's equal protection clause, strict scrutiny should be applied to state actions which impinge upon this right.[400]

In determining whether the state's funding system violated the West Virginia education clause, the court looked at the histories of state constitutions that used the terms "thorough and efficient."[401] Based on this analysis, the court defined a thorough and efficient system of schools as one 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."[402] The court set out a thorough list of elements related to this definition.[403] The court stated that:

> Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (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; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work-to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theater, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society. Implicit are supportive services: (1) good physical facilities, instructional materials and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency . . . there are undeniable legal basis for all our conclusions, including the elements specifically distilled from the debates and cases that are the specifications of what a thorough and efficient school system should have, and should do.[404]

The court concluded that the trial court must hear evidence to determine whether these standards are being met, and whether any failure to meet these standards is due to inefficiency and the failure to follow existing statutes.[405]

Pauley v. Bailey (Pauley II)

Supreme Court of Appeals of West Virginia
Decided December 12, 1984

In 1979, in *Pauley v. Kelly*,[406] (*Pauley I*) the Supreme Court of Appeals of West Virginia held that the plaintiffs' challenge to the West Virginia system of public school funding stated a valid cause of action, and remanded the case for further development of evidence. In *Pauley v. Bailey*[407] (*Pauley II*) the plaintiffs appealed to the West Virginia high court for a directive compelling the state to implement the "Master Plan" developed in accordance with *Pauley I*, and to otherwise compel the state to performs its constitutional and statutory duties related to education.[408]

The "Master Plan for Public Education" was a document developed by the state, and submitted to the trial court for approval in accordance with the court's order on remand from *Pauley I*. The Master Plan was an "extensive compilation of detailed concepts and standards that defines the educational role of the various state and local agencies, sets forth specific elements of educational programs, enunciates considerations for educational facilities and proposes changes in the educational financing system."[409] Although the state had suggested an implementation schedule requiring compliance within 17 years, the trial court ordered implementation of the Master Plan at the "earliest practicable time."[410]

The West Virginia high court noted that the Master Plan itself was not before the court for review. Instead, the court was being asked to determine whether the trial court erred regarding enforcement and timing procedures related to the Master Plan. In ruling on these issues the court stated that:

> We believe that it is sufficiently clear from the language of the Final Order, and the tenor and language of the May 11, 1982 Opinion of the circuit court, that the State educational respondents have a specific duty to implement and enforce the policies and standards of the Master Plan . . . we hold that the West Virginia Board of Education and the State Superintendent of Schools . . . have a duty to ensure the complete executive delivery and maintenance of a "thorough and efficient system of free schools" in West Virginia as that system is embodied in A Master Plan for Public Education which plan was proposed by agencies of the executive branch and found acceptable by the Circuit Court of Kanawha County, and that plan will be enforced until such time as it is altered or modified by this Court or the circuit court.[411]

The court reaffirmed its holding in *Pauley I* that education was a fundamental right under the West Virginia Constitution,[412] and held that the trial court's ruling that the Master Plan should be completed "at the earliest practicable time" should not be disturbed.[413]

IV) The Future of School Funding Litigation in the Southern United States

Funding litigation remains a promising legal tool for promoting greater equity in educational opportunity. Despite the continued decline in judicial support for *Brown*-type litigation, the line of litigation that began in *Serrano* remains strong, showing no signs of diminishing. To the contrary, school funding litigation may even continue to expand in scope and strength in the future. For example, the recent "accountability" movement rooted in the No Child Left Behind (NCLB) legislation may open powerful new doors for school funding plaintiffs.[414] In the past, school funding plaintiffs have struggled to define what constituted a legally adequate education in their attempt to hold states accountable for funding an adequate education for every child. Although there had been successes in this vein of litigation, clearly defining the state's legal responsibility remained a challenge. But under the NCLB, states' own education statutes and regulations are now more clearly defining this standard for potential plaintiffs. As a result it will be increasingly difficult for states to argue that they should not be held accountable for complying with their own educational standards, opening the door to fertile new legal ground for advocates representing educationally disadvantaged children.[415]

The Southern States are likely to be a major battle ground in future school funding litigation. The unique demographics of the South bring together three critical issues in the battle to achieve equal educational opportunity: minority race, poverty, and rurality. Race, poverty, and rurality were prominent issues in many recent school funding cases in the South, including *James v. Alabama*[416] and *Lake View v. Huckabee*.[417] Many rural area schools in the South serve large populations of economically disadvantaged African-American and Hispanic children. Although

rural poverty is a national problem, it continues to be most extreme in the South, with rural minorities, women, and children being the most disadvantaged.[418] For example, a report from the *U.S. Department of Agriculture* found that: "The poverty rate for rural children was 23.0 percent. For rural Black children, who face the combined economic disadvantages of rurality, minority status, and childhood, the poverty rate was 48.2 percent. The majority of rural poor children (59.1 percent) lived in single-parent families, most (53.2 percent) in female-headed families."[419] Given the extreme poverty many rural area minority children face, and the persistent lack of adequate educational opportunities necessary to escape this poverty, it is likely that in the future the South will be a major battle ground in the continuing struggle for greater school funding equity.

Substantial additional funding will be necessary to support adequate educational opportunities for all children. But where this additional funding will come from is uncertain. The entire Nation is increasingly under economic pressure, which will increase the difficulty of resolving the problem of school funding inequities in the future. With the continuing financial crisis in agriculture, and the loss of manufacturing jobs, many of the Nation's small towns and rural areas are struggling economically. These economic challenges are also a serious problem in the South. The South has areas that are among the poorest in the Nation. And the less money local residents have, the less money they can afford to contribute to support local schools. Further, poorer children have greater needs, further increasing the gap between resources and needs in poorer communities.

Although some metro-areas in the South continue to grow, the South remains a predominately

rural area with high rates of poverty in many regions. And many of the children in the rural South are poorer African-American children. As noted above, in addition to the challenges of family and community poverty in many rural areas of the South, minority race children face yet another layer of disadvantage, bringing together in the South the triple disadvantages of rurality, poverty, and race in a way that occurs nowhere else in the Nation.

It is disturbing to realize that over 50 years after the Court's decision in *Brown*, the grandchildren and great-grandchildren of children segregated by race in 1954 must still continue to struggle for an equal right to educational opportunity in today's public schools. Anyone who doubts this reality need only review the current status of children in the South's poorer school districts, as documented by plaintiffs in the above school funding litigation. Notwithstanding the egalitarian dreams that produced *Brown*, ultimately the *Brown* litigation did not provide an adequate remedy for the educational needs of disadvantaged children, especially in the South. The Court's decision in *Brown* signaled a new era in civil rights, but despite the continuing vestiges of civil wrongs, the *Brown* era is rapidly coming to a close.[420] The loss of continuing judicial support for *Brown*-type litigation has required a new approach by civil rights advocates. In the future, advocates for educationally disadvantaged children will likely continue to use *Serrano* and its progeny to press for adequate educational opportunities in their schools. Despite the challenge, the fight for equal educational opportunity is a battle that must be won, because, as in the rest of the Nation, adequate education is the only sure road out of poverty and the gateway to a positive future for children in the South.

1. *See* John Dayton & Carl Glickman, *American Constitutional Democracy: Implications for Public School Curriculum Development, in* 69 PEABODY J. EDUC. 62, 62 (1994).

2. 347 U.S. 483 (1954).

3. *Id.* at 493.

4. Plessy v. Ferguson, 163 U.S. 537 (1896).

5. *See* John Dayton, *Book Review: The Record of Brown v. Board of Education, edited by Mark Whitman,* 63 J. NEGRO EDUC. 1, 501 (1994) ("This book recalls the dreadful inequities between White and Black schools under segregation stating: 'In 1929, for instance, the state of Alabama spent $36 a year per white student on schools, and $10 per Black student. In Arkansas, Blacks constituted 23% of the school enrollment, yet received 12% of the funds. In Florida, Georgia, and Louisiana, the ration was more than 4 to 1 in favor of white education' (p. xix). However, the disparities Whitman cites are relatively modest when compared with more recent and widespread expenditure disparities, rooted in differences in property wealth, described in Kozol's *Savage Inequities* (1991)").

6. Gary Orfield & Chungmei Lee, *Brown at 50: King's Dream or Plessy's Nightmare?,* Harvard Civil Rights Project, www.civilrightsproject.harvard.edu

7. 498 U.S. 237 (1991).

8. *See* Joseph T. Henke, *Financing Public Schools in California,* 21 U.S.F. L. REV. 1, 5 (1986).

9. *See* Sheryll D. Cashin, *American Public Schools Fifty Years After Brown: A Separate and Unequal Reality,* 47 HOW. L.J. 341, 347 (2004) ("The battle for equal or adequate funding would be left to a later generation of civil rights lawyers and it would be fought in state courts based upon state constitutions"). David Long is the most prominent of this next generation of civil rights attorneys focused on funding equity, regularly representing plaintiffs since his seminal work in the 1970s with the Washington, D.C., Lawyers Committee for Civil Rights under Law. *See also* James E. Ryan, *School, Race, and Money,* 109 YALE L.J. 249, 251 n.9 (noting David Long's extensive work in school funding equity litigation).

10. 487 P.2d 1241 (Cal. 1971).

11. 411 U.S. 1 (1973).

12. 303 A.2d 273 (N.J. 1973).

13. 487 P.2d 1241 (Cal. 1971). *See also* Note, *The Serrano Documents*, 2 YALE REV. L. & SOC. ACTION 77 (1971).

14. D. FRANKLIN, THE CONSTITUTIONALITY OF THE K-12 FUNDING SYSTEM OF ILLINOIS 19 (Vol. I, 1987).

15. MICHAEL LA MORTE, SCHOOL LAW 353 (3rd ed. 1990).

16. The *Serrano* principle is one of fiscal neutrality. *See* NATIONAL EDUCATION ASSOCIATION, UNDERSTANDING STATE SCHOOL FINANCE FORMULAS 5 (1987).

17. Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971).

18. *Id*. at 1244.

19. *Id*. at 1244.

20. *Id*. at 1260.

21. *Id*. at 1246.

22. *Id*. at 1248.

23. *Id*. at 1250.

24. *Id*. at 1251-1252.

25. *Id*. at 1256, *citing*, Brown v. Board of Educ., 347 U.S. 483 (1954). *See also* Henke, *Financing Public Schools In California*, 21 U.S.F. L. REV. 1, at 5 (1986) (noting the influence of *Brown* and the desegregation cases on school funding litigation).

26. Serrano v. Priest, 487 P.2d 1241, 1257 (Cal. 1971).

27. *Id*. at 1258.

28. *Id*. at 1262.

29. *Id*. 1262-1263.

30. *See* Van Dusartz v. Hatfield, 334 F. Supp. 870 (D.C. Minn. 1971) (U.S. District Court held that state system of funding that made spending per pupil a function of local wealth violated the equal protection clause of the U.S. Constitution); Robinson v. Cahill, 287 A.2d 187 (N.J. 1972) (New Jersey Superior Court Judge held that funding system that created disparities in local districts' abilities to fund an adequate education denies equal protection guaranteed by the New Jersey and Federal Constitutions); Milliken v. Green, 203 N.W.2d 457 (Mich. 1972) (Supreme Court of Michigan held that funding system relying on local wealth and resulting in substantial inequality in educational support denies equal protection of the laws guaranteed by the Michigan Constitution whether measured by the "compelling state interest" test or the "rational" basis test).

31. San Antonio v. Rodriguez, 411 U.S. 1, 56 (1973).

32. 347 U.S. 483 (1954). *See* Henke, *Financing Public Schools in California*, 21 U.S.F. L. REV. 1, 5 (1986). As Henke noted: "The language of the *Brown* case sounded broad enough to apply to unequal expenditures on children's education even when racial discrimination was not involved . . . The constitutional theory that evolved in the Supreme Court civil rights decisions that followed *Brown* also seemed to apply to the school finance situation."

33. 347 U.S. 483 (1954). *See* Henke, *Financing Public Schools in California*, 21 U.S.F. L. REV. 1, 5 (1986). As Henke noted: "The language of the *Brown* case sounded broad enough to apply to unequal expenditures on children's education even when racial discrimination was not involved . . . The constitutional theory that evolved in the Supreme Court civil rights decisions that followed *Brown* also seemed to apply to the school finance situation."

34. 411 U.S. 1 (1973).

35. *Id*. at 37.

36. *Id*. at 28.

37. *Id*. at 12-13.

38. *Id*. at 16-17.

39. *Id*. at 19.

40. *Id*. at 23, *citing*, Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303, 1328-1329 (1972).

41. San Antonio v. Rodriguez, 411 U.S. 1, 23 (1973).

42. *Id*. at 23, n.56.

43. *Id*. at 33.

44. *Id*.

45. *Id*. at 27, n.61.

46. *Id*. at 31.

47. *Id*. at 37.

48. *Id*. at 41.

49. *Id*. at 40.

50. *Id*. at 59.

51. *Id*. at 62 (Brennan, J., dissenting).

52. *Id*. at 63 (Brennan, J., dissenting).

53. *Id*. at 63-64 (White, J., dissenting).

54. *Id*. at 67 (White, J., dissenting).

55. *Id*. at 69 (White, J., dissenting) *citing*, Reed v. Reed, 404 U.S. 71, 75-76 (1971).

56. San Antonio v. Rodriguez, 411 U.S. 1, 71 (1973) (Marshall, J., dissenting).

57. *Id*. at 71, n.2 (Marshall, J., dissenting).

58. *Id*. at 71-72 (Marshall, J., dissenting) *citing*, Brown v. Board of Educ., 347 U.S. 483, 494 (1954).

59. San Antonio v. Rodriguez, 411 U.S. 1, 75-76 (1973) (Marshall, J., dissenting).

60. *Id*. at 85 (Marshall, J., dissenting).

61. *Id*. at 84 (Marshall, J., dissenting) *citing*, Sweatt v. Painter, 339 U.S. 629, 633-634 (1950).

62. *Id*. at 121 (Marshall, J., dissenting).

63. 287 A.2d 187 (N.J. Super. Ct. Law Div. 1972).

64. Robinson v. Cahill, 303 A.2d 273 (N.J. 1973).

65. *Id*. at 277 (N.J. 1973).

66. *Id*. at 277.

67. *Id*. at 277.

68. *Id*. at 281.

69. *Id*. at 280.

70. *Id*. at 282.

71. *See* San Antonio v. Rodriguez, 411 U.S. 1, 33 (1973).

72. Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973).

73. *Id*. at 283. The court noted that if wealth were classified as suspect "our political structure would be fundamentally changed."

74. *Id*. at 284.

75. *Id*. at 294.

76. *Id*. at 295.

77. *Id*. at 298.

78. *Id*. at 298.

79. This section updates ongoing research on the process of school funding litigation. *See* John Dayton, *Serrano and its Progeny: An Analysis of 30 Years of School Funding Litigation*, 157 EDUC. L. REP. 447 (2001); John Dayton, *An Anatomy of Public School Funding Litigation*, 77 EDUC. L. REP. 627 (1992).

80. *But see* Gould v. Orr, 506 N.W.2d 349, 353 (Neb. 1993) (finding that the plaintiffs' petition failed to state a valid cause of action and dismissing without leave to amend).

81. McDaniel v. Thomas, 285 S.E.2d 156, 157 (Ga. 1981).

82. For a more thorough treatment of these issues *see* John Dayton, *An Anatomy of School Funding Litigation*, 77 EDUC. L. REP. 627, 628 (1992).

83. *See* Dupree v. Alma School Dist., 651 S.W.2d 90, 95 (Ark. 1989) (the trial judge heard 39 witnesses and reviewed 287 exhibits); Rose v. Council for Better Educ., 790 S.W.2d 186, 196 (Ky. 1989) (the trial court reviewed "numerous depositions," heard "volumes of oral evidence," and "a seemingly endless amount of statistical data, reports, etc."); Hornbeck v. Somerset Co. Bd. of Educ., 458 A.2d 758, 766 (Md. 1983) (the trial lasted four months and produced a voluminous record many thousands of pages in length); Abbott v. Burke, 575 A.2d 359, 373 (N.J. 1990) (recognizing the complexity of the factual contentions, and the production of a record of enormous length); Board of Educ. v. Walter, 390 N.E.2d 813, 815 (Ohio 1979) (the trial court heard 78 days of testimony, 77 witnesses, viewed 2,400 exhibits, and produced a transcript 7,530 pages long).

84. *See* San Antonio v. Rodriguez, 411 U.S. 1, 24 (1973); Serrano v. Priest, 557 P.2d 929, 939 (Cal. 1976); Lujan v. Colorado, 649 P.2d 1005, 1018 (Colo. 1982); Thompson v. Engelking, 537 P.2d 635, 641-642 (Idaho 1975); Helena v. State, 769 P.2d 684, 691 (Mont. 1989); Abbott v. Burke, 575 A.2d 359, 369 (N.J. 1990); Robinson v. Cahill, 303 A.2d 272, 297-298 (N.J. 1973); Fair School Fin. Council v. State, 746 P.2d 1135, 1149 (Okla. 1987); Edgewood v. Kirby, 777 S.W.2d 391, 398 (Tex. 1989); Pauley v. Kelly, 255 S.E.2d 859, 865 n.7 (W. Va. 1979); Washakie v. Herschler, 606 P.2d 310, 336 (Wyo. 1980).

85. As Underwood noted: "All plaintiffs in school finance litigation rely on the common assumption that the level of funding of a school district has a direct effect on the quality of the program provided and the education the children receive." Julie Underwood, *Changing Equal Protection Analyses in Finance Equity Litigation*, 14 J. EDUC. FIN. 413, at 414-415 (1989).

86. 487 P.2d 1241 (Cal. 1971).

87. *See* Roosevelt v. Bishop, 877 P.2d 806, 809 (Ariz. 1994);Dupree v. Alma School Dist., 651 S.W.2d 90, 92 (Ark. 1983); Serrano v. Priest, 557 P.2d 929, 939 (Cal. 1976); Serrano v. Priest, 487 P.2d 1241, 1253 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 368 (Conn. 1977); Rose v.

Council for Better Educ., 790 S.W.2d 186, 198 (Ky. 1989); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 552 (Mass. 1993); Helena v. State, 769 P.2d 684, 687 (Mont. 1989); Bismarck Public School Dist. v. State, 511 N.W.2d 247, 261 (N.D. 1994) (affirming a district court judgment that "the overall impact of the entire statutory method for distributing funding for education in North Dakota is unconstitutional" but lacking the super-majority required by the North Dakota Constitution to declare statutes unconstitutional); Abbott v. Burke, 575 A.2d 359, 377 (N.J. 1990); Robinson v. Cahill, 303 A.2d 273, 277 (N.J. 1973); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 144 (Tenn. 1993); Edgewood v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989); Seattle v. State, 585 P.2d 71, 97 (Wash. 1978); Pauley v. Bailey, 324 S.E.2d 128, 131 (W. Va. 1984); Campbell Co. School Dist. v. State, 907 P.2d 1238, 1276-1277 (Wyo. 1995); Washakie Co. School Dist. v. Herschler, 606 P.2d 310, 332 (Wyo. 1980). *But see* McDaniel v. Thomas, 285 S.E.2d 156, 160 (Ga. 1981); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 363 n.3 (N.Y. 1982) (recognizing this correlation but ruling in favor of the state).

88. *See* San Antonio v. Rodriguez, 411 U.S. 1, 24 n.56 (1973); Serrano v. Priest, 487 P.2d 1241, 1244 n.1 (Cal. 1971); Milliken v. Green, 212 N.W.2d 711, 716 (Mich. 1973). *See also* Underwood, *supra* note 447.

89. There is considerable disagreement among scholars regarding the alleged correlation between expenditures and educational opportunity, and an abundance of expert testimony and research supporting both sides of the debate. For articles generally supporting the correlation between expenditures and educational opportunity, *see* Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465 (1991); Christopher F. Edley, Jr., *Lawyers and Education Reform*, 28 HARV. J. ON LEGIS. 293, 296 (1991); Richard J. Murnane, *Interpreting the Evidence on "Does Money Matter?"* 28 HARV. J. ON LEGIS. 457, 461 (1991); REPORT ON SHORTCHANGING CHILDREN, *infra* note 8, at 25. Those supporting the correlation between expenditures and educational opportunity have had to contend with contrary findings in the well known *Coleman Report*. *See* JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY (1966). For articles generally refuting the alleged correlation between expenditures and educational opportunity *see* Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 425 (1991); *The Economist: A Survey of Education*, THE ECONOMIST, Nov. 21, 1992, at 6. However, the ideological camps are not unequivocal divided. Even individual scholars have displayed indecision regarding this issue. Underwood noted that in *Rodriguez*, the U.S. Supreme Court relied on scholarly research in declining to accept the correlation between expenditures and educational opportunity. The author cited by the Court later reversed his position. Underwood, *supra* note 447, at 415.

90. *Id*.

91. For cases recognizing a correlation between expenditures and educational opportunity, *see*

Roosevelt v. Bishop, 877 P.2d 806, 809 (Ariz. 1994); Dupree v. Alma School Dist., 651 S.W.2d 90, 92 (Ark. 1983); Serrano v. Priest (Serrano II), 557 P.2d 929, 939 (Cal. 1976); Serrano v. Priest (Serrano I), 487 P.2d 1241, 1253 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 368 (Conn. 1977); McDaniel v. Thomas, 285 S.E.2d 156, 160 (Ga. 1981); Rose v. Council for Better Educ., 790 S.W.2d 186, 198 (Ky. 1989); Hornbeck v. Somerset, 458 A.2d 758, 764 (Md. 1983); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 552 (Mass. 1993); Helena v. State, 769 P.2d 684, 687 (Mont. 1989); Bismarck v. State, 511 N.W.2d 247, 261-262 (N.D. 1994); Abbott v. Burke, 575 A.2d 359, 377 (N.J. 1990); Robinson v. Cahill, 303 A.2d 273, 277 (N.J. 1973); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 363 n.3 (N.Y. 1982); Coalition for Equitable School Funding v. State, 811 P.2d 116, 117 (Or. 1991); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 141 (Tenn. 1993); Edgewood v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989); Pauley v. Bailey, 324 S.E.2d 128, 131 (W. Va. 1984); Washakie Co. School Dist. v. Herschler, 606 P.2d 310, 332 (Wyo. 1980).

92. *Id*. *But see* Lujan v. Colorado, 649 P.2d 1005, 1018 (Colo. 1982); Thompson v. Engelking, 537 P.2d 635, 641-642 (Idaho 1975); Milliken v. Green, 212 N.W.2d 711, 719 (Mich. 1973); Danson v. Casey, 399 A.2d 360, 366 (Pa. 1979) (finding this correlation unproven).

93. *See* Dupree v. Alma School Dist., 651 S.W.2d 90, 93 (Ark. 1983); Serrano v. Priest, 557 P.2d 929, 939 (Cal. 1976); Horton v. Meskill, 376 A.2d 359, 376 (Conn. 1977); Hornbeck v. Somerset, 458 A.2d 758, 780 (Md. 1983); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 522 (Mass. 1993); Helena v. State, 769 P.2d 684, 691 (Mont. 1989); Robinson v. Cahill, 303 A.2d 273, 297-298 (N.J. 1973); Edgewood v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989); Pauley v. Kelly, 255 S.E.2d 859, 865 n.7 (W. Va. 1979); Washakie Co. School Dist. v. Herschler, 606 P.2d 310, 336 (Wyo. 1980).

94. The substantive degree of educational opportunity is determined by judicial interpretation of the state's constitutional provisions. *See* Dayton, *supra* note 2, at 641; William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 WEST'S EDUC. L.Q. 277 (1993).

95. 411 U.S. 1, 23-24 (1973).

96. Lujan v. Colorado, 649 P.2d 1005, 1018 (Colo. 1982); Thompson v. Engelking, 537 P.2d 635, 641-642 (Idaho 1975); Milliken v. Green, 212 N.W.2d 711, 719 (Mich. 1973); Danson v. Casey, 399 A.2d 360, 366 (Pa. 1979) (finding this correlation unproven).

97. *Id*.

98. McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Hornbeck v. Somerset, 458 A.2d 758

(Md. 1983); Levittown v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); Coalition for Equitable School Funding v. State, 811 P.2d 116 (Or. 1991).

99. 877 P.2d 806, 808 (Ariz. 1994).

100. *See* Roosevelt v. Bishop, 877 P.2d 806, 808 (Ariz. 1994); Rose v. Council for Better Educ., 790 S.W.2d 186, 197 (Ky. 1989); Helena v. State, 769 P.2d 684, 687 (Mont. 1989); Bismarck Public School Dist. v. State, 511 N.W.2d 247, 261 (N.D. 1994); Abbott v. Burke, 575 A.2d 359, 395 (N.J. 1990); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 144 (Tenn. 1993); Edgewood v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989).

101. *See* Abbott v. Burke, 575 A.2d 359, 394 (N.J. 1990).

102. *See* Milliken v. Green, 212 N.W.2d 711, 716 (Mich. 1973) (no total exclusion of plaintiffs from benefits); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 363 (N.Y. 1982) (plaintiffs do not allege denial of a minimum standard of education); Fair School Fin. Council v. State, 746 P.2d 1135, 1144 (Okla. 1987) (plaintiffs do not allege an absolute denial of education); Olsen v. State, 554 P.2d 139, 145 (Or. 1976) (no total deprivation found); Danson v. Casey, 399 A.2d 360, 365 (Pa. 1979) (plaintiffs do not allege denial of a minimal education).

103. *See* Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985).

104. Author Wise, *Is Denial of Equal Educational Opportunity Constitutional?* 13 ADMIN. NOTEBOOK 1 (1965), *cited in*, Robert E. Lindquist, *Buse v. School Finance Reform: A Case Study of the Doctrinal, Social, and Ideological Determinants of Judicial Decision making*, 1978 WIS. L. REV. 1071, 1075, n.8 (1978).

105. 487 P.2d 1241, 1244 (Cal. 1971).

106. *See* San Antonio v. Rodriguez, 411 U.S. 1 (1973).

107. Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Serrano v. Priest, 557 P.2d 929 (Cal. 1976); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Milliken v. Green, 212 N.W.2d 711 (Mich. 1973); Olsen v. State, 554 P.2d 139 (Or. 1976).

108. 303 A.2d 273 (N.J. 1973)

109. Serrano v. Priest, 557 P.2d 929 (Cal. 1976).

110. 851 S.W.2d 139 (Tenn. 1993).

111. 557 P.2d 929 (Cal. 1976). *See also,* William Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977).

112. 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, 227 (1990).

113. U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States").

114. *See* THE AMERICAN BENCH--1985/86 2491 (1986) ("seven states have no express equality guarantee in their individual rights provisions: (Del., Minn., Miss., Neb., Okla., R.I. (cf. Art. I, § 2), and Tenn.").

115. *See Id.* at 2492 (provides a table categorizing the provisions of state equal treatment guarantees).

116. For cases following the federal model of equal protection analysis, *see* Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Hornbeck v. Somerset, 458 A.2d 758 (Md. 1983); Board of Educ. v. Walter, 390 N.E.2d 813 (Ohio 1979); Fair School Fin. Council v. State, 746 P.2d 1135 (Okla. 1987); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989); Washakie Co. School Dist. v. Herschler, 606 P.2d 310 (Wyo. 1980). For cases rejecting this approach, *see* Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); Olsen v. State, 554 P.2d 139 (Or. 1976).

117. San Antonio v. Rodriguez, 411 U.S. 1, 33 (1973).

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

119. All states except Mississippi mandate legislative support for public education. The Mississippi Constitution makes education a discretionary function for the legislature. *See* Miss. Const. art. VIII, § 201.

120. For cases expressly rejecting the *Rodriguez* explicit-implicit test of fundamentality, *see* Serrano v. Priest, 557 P.2d 929, 952 (Cal. 1976); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1017 (Colo. 1982); Thompson v. Engelking, 537 P.2d 635, 644 (Idaho 1975); Hornbeck v. Somerset, 458 A.2d 758, 784-785 (Md. 1983); Robinson v. Cahill, 303 A.2d 273, 283 (N.J. 1973); Board of Educ. v. Walter, 390 N.E.2d 813, 818 (Ohio 1979); Fair School Fin. Council v.

State, 746 P.2d 1135, 1149 (Okla. 1987); Olsen v. State, 554 P.2d 139, 144 (Or. 1976) (application of the *Rodriguez* test in Oregon would make "liquor by the drink" a fundamental right). Note also that the Supreme Court of New Jersey in *Robinson* rejected the entire framework of federal equal protection analysis, making a decision on fundamentality unnecessary. Instead, the court adopted a balancing test for analyzing equal protection claims. Under the *Robinson* test, "the court weighs the detriment to the education of the children of certain districts against the ostensible justification for the scheme of school financing. If the court determines the detriment is much greater than the justification, the financing scheme violates the guarantee of equal protection." Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973). *See also* Olsen v. State, 554 P.2d 139, 145 (Or. 1976) (adopting the *Robinson* test).

121. Serrano v. Priest, 557 P.2d 929, 952 (Cal. 1976).

122. *But see* Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989) (holding that education is a fundamental right, but applying a rational basis test). The method used by the Supreme Court of Arizona in *Shofstall* was later criticized by the Supreme Court of Arizona in *Roosevelt v. Bishop*, 877 P.2d 806, 811 (Ariz. 1994) ("We do not understand how the rational basis test can be used when a fundamental right has been implicated. They seem to be mutually exclusive. If education is a fundamental right, the compelling state interest test (strict scrutiny) ought to apply").

123. *Roosevelt v. Bishop*, 877 P.2d 806, 811 (Ariz. 1994).

124. *See* 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, 225, n.30 (1990) (noting that strict scrutiny is strict in theory, fatal in fact).

125. For cases expressly ruling that education is a fundamental right, *see* Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973) (*but see* Roosevelt v. Bishop, 877 P.2d 806, 811 (Ariz. 1994) declining to decide whether education is a fundamental right under the state's constitution); Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976); Serrano v. Priest, 487 P.2d 1241, 1255 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977); Rose v. Council for Better Educ., 790 S.W.2d 186, 192 (Ky. 1989); Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993); Bismarck Public School Dist. v. State, 511 N.W.2d 247, 256 (N.D. 1994); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979); Kukor v. Grover, 436 N.W.2d 568, 579 (Wis. 1989); Washakie Co. School Dist. v. Herschler, 606 P.2d 310, 333 (Wyo. 1980). For cases expressly rejecting education as a fundamental right, *see* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1017 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156, 167 (Ga. 1981); Idaho Schools for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 732 (Idaho 1993); Thompson v. Engelking, 537 P.2d 635, 647 (Idaho 1975); Gould v. Orr, 506 N.W.2d 349, 350 (Neb. 1993); Fair School Fin. Council v. State, 746 P.2d 1135, 1149 (Okla.

1987).

126. A determination of fundamentality is unnecessary under the *Robinson* balancing test. For cases adopting the *Robinson* test, *see* Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973); Board of Educ. v. Walter, 390 N.E.2d 813, 818 (Ohio 1979); Olsen v. State, 554 P.2d 139, 145 (Or. 1976).

127. *See* Julius Menacker, *Poverty as a Suspect Class in Public Education Equal Protection Suits*, 54 EDUC. L. REP. 1085 (1989).

128. BLACK'S LAW DICTIONARY 1297 (5th ed. 1979).

129. San Antonio v. Rodriguez, 411 U.S. 1, 121 (Marshall, J., dissenting).

130. *See* Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976); Washakie Co. School Dist. v. Herschler, 606 P.2d 310, 334 (Wyo. 1980).

131. *See* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1021 (Colo. 1982); Thompson v. Engelking, 537 P.2d 635, 645-646 (Idaho 1975); Hornbeck v. Somerset, 458 A.2d 758, 787 (Md. 1983).

132. *See* Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976); Serrano v. Priest, 487 P.2d 1241, 1259 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979). *But see* Skeen v. State, 505 N.W.2d 299, 315-316 (Minn. 1993) (ruling for the state and holding that education is a fundamental right but applying strict scrutiny only up to the baseline of minimal adequacy in education, while applying a rational basis test to funding beyond the level of minimal adequacy); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994) (ruling for the state and holding that education is a fundamental right and that the state's system of funding withstands a strict scrutiny test).

133. *See* Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1011 (Colo. 1982); Thompson v. Engelking, 537 P.2d 635, 645 (Idaho 1975); Hornbeck v. Somerset, 458 A.2d 758, 788 (Md. 1983); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 366 (N.Y. 1982); Board of Educ. v. Walter, 390 N.E.2d 813, 821 (Ohio 1979); Fair School Fin. Council v. State, 746 P.2d 1135, 1150 (Okla. 1987); Danson v. Casey, 399 A.2d 360, 367 (Pa. 1979); Richland Co. v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988); Kukor v. Grover, 436 N.W.2d 568, 579 (Wis. 1989). *But see* Dupree v. Alma School Dist., 651 S.W.2d 90, 93 (Ark. 1983); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 155 (Tenn. 1993) (holding that public school funding systems failed even a rational basis test).

134. *See* Hornbeck v. Somerset, 458 A.2d 758, 788 (Md. 1983) (noting that Maryland's system

of public school funding would withstand intermediate scrutiny, but rejecting intermediate scrutiny in favor of a rational basis test); Bismarck v. State, 511 N.W.2d 247, 259 (N.D. 1994) (holding that education is a fundamental right and applying intermediate scrutiny).

135. Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979).

136. *See* Serrano v. Priest, 487 P.2d 1241, 1260 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 374 (Conn. 1977). *But see* Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994) (finding that the state's system of funding withstood strict scrutiny review).

137. *See* Bismarck v. State, 511 N.W.2d 247, 259 (N.D. 1994) ; Hornbeck v. Somerset, 458 A.2d 758, 788 (Md. 1983) (noting that Maryland's system of public school funding would withstand intermediate scrutiny, but rejected intermediate scrutiny in favor of a rational basis test).

138. *See* Michael W. La Morte, *Courts Continue to Address the Wealth Disparity Issue*, 11 EDUC. EVALUATION & POL'Y ANALYSIS 3, 11 (1989). *But see* Skeen v. State, 505 N.W.2d 299 (Minn. 1993) (holding that the state's interest in encouraging local districts to supplement educational funding satisfied the rational basis test applied to that portion of funding that exceeds minimal adequacy).

139. Dupree v. Alma School Dist., 651 S.W.2d 90, 93 (Ark. 1983) (rejecting the rationale of local control as justification for funding disparities, and holding that the Arkansas system of school funding failed even a rational basis test); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 155 (Tenn. 1993) (holding that public school funding systems failed even a rational basis test); *See also* Bismarck v. State, 511 N.W.2d 247, 260-261 (N.D. 1994) (applying intermediate scrutiny and rejecting the state's rationale of local control, holding that local control in North Dakota "is undercut and limited by the legislature's enactment of requirements for statewide uniformity of education").

140. *See* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1023 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156, 167 (Ga. 1981); Hornbeck v. Somerset, 458 A.2d 758, 789 (Md. 1983); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 366 (N.Y. 1982); Board of Educ. v. Walter, 390 N.E.2d 813, 821 (Ohio 1979); Olsen v. State, 554 P.2d 139, 146 (Or. 1976); Danson v. Casey, 399 A.2d 360, 367 (Pa. 1979); Kukor v. Grover, 436 N.W.2d 568, 580-581 (Wis. 1989).

141. Serrano v. Priest, 557 P.2d 929, 948 (Cal. 1976).

142. Dupree v. Alma School Dist., 651 S.W.2d 90, 93 (Ark. 1983).

143. Edgewood v. Kirby, 777 S.W.2d 391, 398 (Tex. 1989).

144. Helena v. State, 769 P.2d 684, 690 (Mont. 1989).

145. Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 154 (Tenn. 1993).

146. Bismarck v. State, 511 N.W.2d 247, 260-261 (N.D. 1994).

147. 411 U.S. 1 (1973).

148. 303 A.2d 273 (N.J. 1973).

149. For a listing of the specific language found in the education clauses of all states, *see* Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 134 (1989).

150. *See* Roosevelt v. Bishop, 877 P.2d 806 (Ariz. 1994) (ruling for plaintiffs based on the state constitution's education article).

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

152. State constitutions with category I clauses are: Ala. Const. art. XIV, § 256; Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Conn. Const. art. VIII, § 1; Haw. Const. art. X, § 1; Kan. Const. art. VI, § 1; La. Const. art. VIII, § 1; Miss. Const. art. VIII, § 201; Neb. Const. art. VII, § 1; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, § 2; Okla. Const. art. XIII, § 1; S.C. Const. art. XI, Utah Const. art. X, § 1; Vt. Const. ch. 2. § 68.

153. State constitutions with category II clauses are: Ark. Const. art. XIV, § 1; Colo. Const. art. IX, § 2; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Idaho Const. art. IX, § 1; Ky. Const. § 183; Md. Const. art. VIII, § 1; Minn. Const. art. XIII, § 1; Mont. Const. art. X, § 1; N.J. Const. art. VIII, § 4; N.D. Const. art VIII, § 1; Ohio Const. art. VI, § 3; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, § 1; Va. Const. art. VIII, § 1; W. Va. Const. art. XII, § 1; Wis. Const. art. X, § 3.

154. State constitutions with category III clauses are: Cal. Const. art. IX, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX, 2d, § 3; Mass. Const. pt. 2, ch. 5, § 2; Nev. Const. art. XI, § 2; R.I. Const. art. XII, § 1; S.D. Const. art. VIII, § 1; Wyo. Const. art. VII, § 1.

155. State constitutions with category IV clauses are: Ga. Const. art. VIII, § 1; Ill. Const. art. X, § 1; Me. Const. art. VIII, pt. 1, § 1; Mich. Const. art. VIII, § 2; Mo. Const. art. IX, § 1(a); N.H. Const. pt. 2, art. LXXXIII; Wash. Const. art. IX, § 1.

156. *See,* John Dayton, *Serrano and Its Progeny: An Analysis of 30 Years of School Funding Litigation,* 157 EDUC. L. REP. 447, 457 (2001).

157. For cases using the historical mode of analysis, *see* Roosevelt v. Bishop, 877 P.2d 806, 812 (Ariz. 1994); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1011 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156, 163 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635, 641 (Idaho 1975); Rose v. Council for Better Educ., 790 S.W.2d 186, 205 (Ky. 1989); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 523 (Mass. 1993); Claremont School Dist. v. Governor, 635 A.2d 1375, 1377 (N.H. 1993); Robinson v. Cahill, 303 A.2d 273, 287 (N.J. 1973); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 368 (N.Y. 1982); Board of Educ. v. Walter, 390 N.E.2d 813, 820 (Ohio 1979); Danson v. Casey, 399 A.2d 360, 367 (Pa. 1979); Richland Co. v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988); Seattle School Dist. No. 1 v. State, 585 P.2d 71, 85 (Wash. 1978); Pauley v. Kelly, 255 S.E.2d 859, 866 (W. Va. 1979).

158. For cases using the plain meaning mode of analysis, *see* Hornbeck v. Somerset, 458 A.2d 758, 776 (Md. 1983); Helena v. State, 769 P.2d 684, 689 (Mont. 1989); Fair School Fin. Council v. State, 746 P.2d 1135, 1149 (Okla. 1987); Edgewood v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989); Scott v. Commonwealth, 443 S.E.2d 138, 141 (Va. 1994); Kukor v. Grover, 436 N.W.2d 568, 574 (Wis. 1989).

159. *See* Dupree v. Alma School Dist., 651 S.W.2d 90, 92-93 (Ark. 1983). Note also that other courts use this method in addition to other modes of analysis, *see* Hornbeck v. Somerset, 458 A.2d 758, 777 (Md. 1983); Pauley v. Kelly, 255 S.E.2d 859, 866 (W. Va. 1979); Rose v. Council for Better Educ., 790 S.W.2d 186, 210 (Ky. 1989).

160. *See supra* note 520. Some courts have included an extensive historical analysis in their opinions. *See* McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 523 (Mass. 1993); Claremont School Dist. v. Governor, 635 A.2d 1375, 1377 (N.H. 1993).

161. For courts using multiple modes of analysis, *see* Rose v. Council for Better Educ., 790 S.W.2d 186, 205, 210 (Ky. 1989); Hornbeck v. Somerset, 458 A.2d 758, 776 (Md. 1983); Skeen v. State, 505 N.W.2d 299, 308 (Minn. 1993); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 150-151 (Tenn. 1993); Edgewood v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989); Pauley v. Kelly, 255 S.E.2d 859, 866 (W. Va. 1979); Kukor v. Grover, 436 N.W.2d 568, 574 (Wis. 1989).

162. Seattle School Dist. No. 1 v. State, 585 P.2d 71, 92 (Wash. 1978).

163. Richland Co. v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988).

164. *See* Robinson v. Cahill, 303 A.2d 273, 295, 297 (finding that a disparity in expenditures violated the constitutional mandate, and that education funding was a state legislative

responsibility, not a local responsibility); Seattle School Dist. No. 1 v. State, 585 P.2d 71, 92 (Wash. 1978) (holding that the legislature has a paramount duty to support education, and that children have a right to be amply provided with an education); Rose v. Council for Better Educ., 790 S.W.2d 186, 205 (Ky. 1989) (holding that the legislature has the sole obligation to provide for education throughout the state by appropriate legislation, and that the system must be an efficient one); Edgewood v. Kirby, 777 S.W.2d 391, 396-397 (Tex. 1989) (holding that large disparities in funding are prohibited by the constitution, and that the legislature must devise a system which correlates tax efforts and educational resources).

165. *See* Board of Educ. v. Walter, 390 N.E.2d 813, 824-825 (Ohio 1979) (granting the legislature wide discretion in school funding, limited only where a student is effectively deprived of educational opportunity); McDaniel v. Thomas, 285 S.E.2d 156, 165 (Ga. 1981) (the constitution requires only an adequate education and basic educational opportunity); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 359 (N.Y. 1982) (requiring only a sound basic education); Hornbeck v. Somerset, 458 A.2d 758, 780 (Md. 1983) (rejecting mathematical equality in school funding); Fair School Fin. Council v. State, 746 P.2d 1135, 1149 (Okla. 1987) (the constitution requires only a basic, adequate education); Richland Co. v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988) (the legislature is free to choose the method of school funding).

166. *See* Seattle School Dist. No. 1 v. State, 585 P.2d 71, 97 (Wash. 1978); Washakie Co. School Dist. v. Herschler, 606 P.2d 310, 332 (Wyo. 1980); Helena v. State, 769 P.2d 684, 690 (Mont. 1989); Edgewood v. Kirby, 777 S.W.2d 391, 398 (Tex. 1989).

167. *See* Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973); Thompson v. Engelking, 537 P.2d 635, 641 (Idaho 1975); McDaniel v. Thomas, 285 S.E.2d 156, 165 (Ga. 1981); Hornbeck v. Somerset, 458 A.2d 758, 780 (Md. 1983).

168. *See* Robinson v. Cahill, 303 A.2d 273, 295 (N.J. 1973) (holding discrepancies in dollar input per child inconsistent with the demands of the constitution); Seattle School Dist. No. 1 v. State, 585 P.2d 71, 92 (Wash. 1978) (establishing a paramount constitutional duty for the state to amply provide for education); Edgewood v. Kirby, 777 S.W.2d 391, 396 (Tex. 1989) (the constitution prohibits the vast disparities as now exist).

169. *See* Board of Educ. v. Walter, 390 N.E.2d 813, 824-825 (Ohio 1979) (interpreting the constitution as providing wide discretion in funding for the state, limited only where a child is effectively deprived of educational opportunity); McDaniel v. Thomas, 285 S.E.2d 156, 165 (Ga. 1981) (requiring merely a basic adequate education); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 369 (N.Y. 1982) (the constitution only requires a basic sound education); Fair School Fin. Council v. State, 746 P.2d 1135, 1149 (Okla. 1987) (only a basic, adequate education is required); Richland Co. v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988) (the constitution leaves the legislature free to determine the method of school finance).

170. John Dayton, *An Anatomy of School Funding Litigation*, 77 EDUC. L. REP. 627, 631 (1992).

171. 5 U.S. (1 Cranch) 137 (1803).

172. A justiciable issue is one which is "appropriate for judicial determination." Black's Law Dictionary 777 (5th ed. 1979). *See* Washakie Co. School Dist. v. Herschler, 606 P.2d 310, 317-318 (Wyo. 1980) (discussing the elements of a justiciable controversy). *See also* Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 147 (Tenn. 1993) (citing courts that have held that a challenge to the constitutionality of the state's public school funding system presents a justiciable dispute).

173. As the Supreme Court of Georgia noted: "We know of no sister State which has refused merits treatment to such issues, and we would regard our own refusal to adjudicate plaintiffs' claims of constitutional infringement an abdication of our constitutional duties." McDaniel v. Thomas, 285 S.E.2d 156, 157 (Ga. 1981). For other cases recognizing a judicial duty to adjudicate constitutional disputes over school funding *see* Idaho Schools for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 734 (Idaho 1993); Rose v. Council for Better Educ., 790 S.W.2d 186, 209 (Ky. 1989); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 550 (Mass. 1993); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 363 (N.Y. 1982); Board of Educ. v. Walter, 390 N.E.2d 813, 823 (Ohio 1979); Edgewood v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989); Seattle School Dist. No. 1 v. State, 585 P.2d 71, 83-84 (Wash. 1978); Washakie Co. School Dist. v. Herschler, 606 P.2d 310, 319 (Wyo. 1980).

174. *See* McDaniel v. Thomas, 285 S.E.2d 156, 165 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635, 640 (Idaho 1975) (cautioning against an "unwarranted entry into the controversial area of public school financing, whereby this Court would convene as a 'super-legislature' legislating in a turbulent field of social, economic and political policy"). *But see* Rose v. Council for Better Educ., 790 S.W.2d 186, 211 (Ky. 1989) ("we do not engage in judicial legislating. We do not make policy. We do not substitute our judgement for that of the General Assembly. We simply take the plain directive of the Constitution, and armed with its purpose, we decide what our General Assembly must achieve in complying with its solemn constitutional duty").

175. *But see* William E. Camp & David C. Thompson, *School Finance Litigation: Legal Issues and Politics of Reform*, 14 J. EDUC. FIN. 221, 237 (1988) (describing an instance in which the Supreme Court of New Jersey "forced the State Department of New Jersey to withhold state aid from all districts after the legislature failed to provide sufficient money for the new finance plan. The court closed the schools until funding was assured and forced immediate action by the legislature to allow the schools to open").

176. *But see* Seattle School Dist. No. 1 v. State, 585 P.2d 71, 89 (Wash. 1978) ("We cannot abdicate our judicial duty to interpret and construe [the constitution] merely because, as

appellants seem to suggest, we lack apparent available physical power. We do not see the threat of confrontation visualized by appellants. To the contrary, we are firmly convinced the other branches of government also will carry out their defined constitutional duties in good faith and in a completely responsible manner"). *See also* Idaho Schools for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 734 (Idaho 1993) (citing *Seattle School Dist. No. 1*, at 89).

177. 411 U.S. 1, 56 n.111 (1973). The Court qualified this statement by explaining that: "These practical considerations, of course, play no role in the adjudication of the constitutional issues presented here. But they serve to highlight the wisdom of the traditional limitations on this Court's function." *Id*. at 58.

178. *Id*. at 58-59.

179. Kukor v. Grover, 436 N.W.2d 568, 585 (Wis. 1989). *See also* McDaniel v. Thomas, 285 S.E.2d 156, 168 (1981); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 369 n.9 (1982).

180. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

181. La Morte and Williams noted that "although most courts have commented on their need to defer to [other] branches (including courts which held plans unconstitutional), decisions upholding finance methods were more inclined to argue that any order changing the system would act as an unwarranted intrusion into the powers of other governmental units." Michael W. La Morte & Jeffrey D. Williams, *Court Decisions and School Finance Reform*, 21 EDUC. ADMIN. Q. 59, 79 (1985). For decisions upholding state funding system and addressing the need for judicial deference, *see* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156, 165 (Ga. 1981); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 363 (N.Y. 1982); Board of Educ. v. Walter, 390 N.E.2d 813, 824 (Ohio 1979); Richland Co. v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988); Kukor v. Grover, 436 N.W.2d 568, 582 (Wis. 1989). *But see* Washakie Co. School Dist. v. Herschler, 606 P.2d 310, 319 (Wyo. 1980) (recognizing a limitation to judicial deference and overturning the state's school finance system).

182. Michael W. La Morte & Jeffrey D. Williams, *Court Decisions and School Finance Reform*, 21 EDUC. ADMIN. Q. 59, 71 (1985).

183. *Id*. at 72.

184. Pauley v. Bailey, 324 S.E.2d 128 (W. Va. 1984).

185. Courts play an integral role in protecting the ideals of the constitution. It is the duty of the judiciary to interpret the mandates of the constitution, and to decide whether the legislature has

complied with its constitutional duties. McDaniel v. Thomas, 285 S.E.2d 156, 157 (Ga. 1981) ("Judicial review of legislative enactments is central to our system of constitutional government and deeply rooted in our history"). However, while a court can order reform, it cannot dictate the method of reform. Creating law is the exclusive domain of the legislature. *See* San Antonio v. Rodriguez, 411 U.S. 1, 31 (1973) (cautioning against assuming a legislative role for which the Court lacks both authority and competence); Thompson v. Engelking, 537 P.2d 635, 640 (Idaho 1975) (cautioning against "an unwise and unwarranted entry into the controversial area of public school financing, whereby this Court would convene as a 'super-legislature'").

186. McDaniel v. Thomas, 285 S.E.2d 156, 168 (Ga. 1981).

187. McDaniel v. Thomas, 285 S.E.2d 156, 160 n.8, 167 (Ga. 1981); Hornbeck v. Somerset, 458 A.2d 758, 764, 786 (Md. 1983); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 363 (N.Y. 1982); Kukor v. Grover, 436 N.W.2d 568, 573, 582 (Wis. 1989).

188. William E. Camp & David C. Thompson, *School Finance Litigation: Legal Issues and Politics of Reform*, 14 J. EDUC. FIN. 221, 223-224 (1988).

189. San Antonio v. Rodriguez, 411 U.S. 1, 71 (1973) (Marshall, J., dissenting).

190. *See* Dupree v. Alma School Dist., 651 S.W.2d 90, 96 (Ark. 1983) (Hickman, J., concurring).

191. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior").

192. Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1084 (1991) ("Many state constitutions provide for an elected judiciary or periodic review of appointed judges. Seven states subject sitting judges to the possibility of popular recall. Rather than enjoy the life tenure afforded federal judges, most judges on state high courts serve limited terms ranging from six to fourteen years").

193. *Id*.

194. *Id*.

195. *Id*.

196. 411 U.S. at 59.

197. *See The Fair Chance Act: Hearing on H.R. 3850 Before the Subcomm. on Elementary, Secondary, and Vocational Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 2d Sess.

(1990).

198. *See* San Antonio v. Rodriguez, 411 U.S. 1, 59 (1973); DAVID C. THOMPSON ET AL., FISCAL LEADERSHIP FOR SCHOOLS 290 (1994) ("rapid change is often available only at the polls").

199. Courts can play a role in educating the electorate and lawmakers about harm to children caused by inequities and inadequacies in public school funding. Four recent opinions overturning school funding systems discussed educational harm to children because of funding inequities and inadequacies. *See* Rose v. Council for Better Educ., 790 S.W.2d 186, 197 (Ky. 1989); Helena v. State, 769 P.2d 684, 687 (Mont. 1989); Abbott v. Burke, 575 A.2d 359, 395 (N.J. 1990); Edgewood v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989). At least one court has recognized the potential public relations impact of school funding litigation. *See* Kukor v. Grover, 436 N.W.2d 568, 587 (Wis. 1989) ("This case has been a public cry to the legislature, disguised as a constitutional attack, that additional funds are necessary to improve education in some districts").

200. *See* Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1084 (1991) ("Many state constitutions provide for an elected judiciary or periodic review of appointed judges. Seven states subject sitting judges to the possibility of popular recall. Rather than enjoy the life tenure afforded federal judges, most judges on state high courts serve limited terms ranging from six to fourteen years"). Even if state court judges risk the political wrath of the electorate in supporting an unpopular interpretation of the constitution, if facing significant political opposition their judicial fortitude could be in vain, because "if judicial protection of the rights of politically less-powerful groups proves sufficiently unpopular, the politically mobilized can overrule the court by amending the constitution." *Id*.

201. *See* Coalition for Equitable School Funding v. State, 811 P.2d 116, 119 (Or. 1991) (declining to rely on a former decision by the Supreme Court of Oregon on school funding because: "The people have added a new provision that addresses specifically how public schools are to be funded").

202. *See* Tricia E. Bevelock, *Public School Financing Reform: Renewed Interest in the Courthouse, but will the Statehouse Follow Suit?*, 65 ST. JOHN'S L. REV. 467, 489 (1991) ("the system, which was enacted in response to *Robinson I*, actually resulted in increased disparities").

203. *See* Charles S. Benson, *Definitions of Equity in School Finance in Texas, New Jersey, and Kentucky*, 28 HARV. J. ON LEGIS. 401, 403 (1991) ("School failure is associated with incarceration, welfare dependency, and bad health, all of which drain the public coffers"). Political representatives and the public must be persuaded to focus on long term investment in education for the nation's common good and beyond short term self-interests.

204. *See* Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 HARV. J. LEGIS. 341, 356-359 (1991); Mary J. Guy, *The American Common Schools: An Institution at Risk*, 21 J.L. & EDUC. 569 (1992).

205. In a democracy the votes of the many can serve to counterbalance the economic influence of the few. Alexander Hamilton described an electorate composed of: "Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States." THE FEDERALIST No. 57 (Alexander Hamilton).

206. 624 So.2d 107 (Ala. 1993).

207. *Id.* at 110.

208. *Id.* at 121.

209. *Id.*

210. *Id.* at 124.

211. *Id.* at 118, n.14.

212. ALA. CONST. Amend. 111 (1956).

213. 624 So.2d 107, 147 n.41 (Ala. 1993).

214. ALA. CONST. § 256 (1956).

215. 624 So.2d 107, 107-108 (Ala. 1993).

216. *Id*. at 109.

217. 2002 WL 1150823 (Ala. 2002).

218. *Id.* at 1.

219. *Id.* at 3.

220. *Id. at 4-5.*

221. *Id.* at 7 (Houston, J. concurring).

222. *Id.* at 8 (Houston, J. concurring).

223. *Id.* at 8-13 (Houston, J. concurring).

224. *Id.* at 26-55 (Moore, J. concurring).

225. *Id.* at 56-58 (Johnstone, J. dissenting).

226. 651 S.W.2d 90 (Ark. 1983).

227. *Id*.

228. *Id*. The "hold harmless" provision guaranteed that no school would receive less money than it did the previous year, in effect locking in inequities. If the district had a declining enrollment, this provision would actually increase per pupil disparities.

229. *Id*. at 92. Under the Arkansas vocational funding plan schools had to establish an operational vocational program before being eligible for any state funding. This method of funding disadvantaged poorer districts who lacked the funds to establish the initial program.

230. *Id*. at 95.

231. *Id*. at 92.

232. *Id*.

233. *Id*. at 93.

234. *Id*.

235. *Id*.

236. *Id*. at 94.

237. *Id*. at 93.

238. *Id*. at 95.

239. 651 S.W.2d 90 (Ark. 1983).

240. 91 S.W.3d 472 (Ark. 2002).

241. *Id*. at 490.

242. *Id.*

243. *Id.* at 482.

244. *Id.* at 483.

245. *Id.* at 483-484, *citing* cases holding that funding litigation presented a nonjusticiable question, including: Ex Parte James, 2002 WL 1150823 (Ala. May 31, 2002); Marrero v. Commonwealth, 739 A.2d 110 (Pa. 1999); Coalition v. Chiles, 680 So.2d 400 (Fla. 1996); Committee v. Edgar, N.E.2d 1178 (Ill. 1996); and Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995), but noting that the Arkansas Constitution designates the *State* as the entity responsible for supporting education, while in 4 out of 5 of the cases holding that the issue was nonjusticiable, (excluding Committee v. Edgar) their respective state constitutions made in the responsibility of the *General Assembly* and not the State to support education.

246. *Id.* at 484, *citing*, Ark. Const. of 1836, art. VII; Ark. Const. of 1861, art. VII, § 1; Ark. Const. of 1864, art. VIII; Ark. Const. of 1868, art. IX, § 1.

247. *Id., citing* Ford v. Keith, 996 S.W.2d 20 (Ark. 1999).

248. *Id., citing* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 870 (1960).

249. *Id.* at 485, *citing* Rose v. Council for Better Education, 790 S.W.2d 186, 208-210 (Ky. 1989) (emphasis in original).

250. *Id.*

251. *Id.*

252. *Id.* at 495.

253. *Id.* at 495-496.

254. *Id.* at 496-498.

255. *Id*. at 498-499.

256. *Id.* at 499.

257. *Id.*

258. *Id.* at 499-500.

259. *Id.* at 500.

260. *Id.* at 500.

261. *Id.* at 510-511.

262. 680 So.2d 400 (Fla. 1996).

263. *Id*. at 408.

264. *Id*. at 407.

265. *Id*. at 408, *citing* Baker v. Carr, 369 U.S. 186 (1962).

266. *Id*. at 408.

267. 285 S.E.2d 156 (Ga. 1981).

268. 5 U.S. 137, 176 (1803).

269. McDaniel v. Thomas, 285 S.E.2d 156, 157 (Ga. 1981).

270. *Id*., *citing,* Board of Educ., Levittown v. Nyquist, 443 N.Y.S.2d 843 (1981).

271. *Id*. at 160.

272. *Id*.

273. *Id*. at 167.

274. *Id*. at 165.

275. *Id*. at 168.

276. 790 S.W.2d 186 (Ky. 1989). *See also* Barwick, *A Chronology of the Kentucky Case*, 15 J. EDUC. FIN. 136 (1989).

277. *Id*., *citing* Brown v. Board of Education, 347 U.S. 483, 493 (1954) (emphasis added by the court).

278. *Id*. at 191.

279. *Id*. at 196.

280. *Id*.

281. *Id*. at 197.

282. *Id*. at 198.

283. *Id*.

284. *Id*.

285. *Id*.

286. *Id*. at 199.

287. *Id*. at 198.

288. *Id*. at 205.

289. *Id*.

290. *Id*. at 210, n.19. The court stated: "We recommend a study of this opinion for those who are interested in the historical background of similar constitutional provisions. We are persuaded that the history and reasoning expressed in the *Pauley* case is applicable and persuasive in the decision of the case before us."

291. *Id*. at 212-213.

292. *Id*. at 212.

293. *Id*. at 215.

294. *Id*.

295. *Id*. at 215.

296. *Id*. at 215.

297. *Id*. at 216.

298. 830 F.2d 563 (5th Cir. 1987), *cert. denied*, 487 U.S. 1223 (1988). *See* Comment, *Inequality in Louisiana Public School Finance*, 60 TUL. L. REV. 1269 (1986).

299. *Id*. at 568.

300. *Id*.

301. *Id*. at 569.

302. *Id*. at 570.

303. *Id*. at 572.

304. *Id*. at 573.

305. *Id*. at 572, *citing*, San Antonio v. Rodriguez, 411 U.S 1 (1973).

306. 478 U.S. 265 (1986).

307. *Id*. at 284, *citing*, San Antonio v. Rodriguez, 411 U.S. 1 (1973).

308. *Id*. at 285, *citing*, Plyler v. Doe, 457 U.S. 202 (1982).

309. *Id*. at 287.

310. *Id*. at 285. *See also* Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 466, n.1 (1988) (Marshall, J., dissenting) (noting that the question of whether denial of access to a minimally adequate education violates the protections of the U.S. Constitution remains open).

311. *Id*. at 286.

312. 357 S.E.2d 432 (N.C. App. 1987), *dismissal allowed and affirmed*, 361 S.E.2d 71 (N.C. 1987).

313. *Id*. at 437.

314. *Id*. at 434.

315. *Id*.

316. *Id*.

317. *Id*.

318. *Id*. at 436.

319. 488 S.E.2d 249 (N.C. 1997).

320. *Id*. at 252.

321. *Id*.

322. *Id*. at 253.

323. *Id*.

324. *Id*. at 255. The "sound basic education" described by the court is similar to the educational programs described in Rose v. Council for Better Educ., 790 S.W.2d 186, 212 (Ky. 1989), and Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979).

325. *Id*. at 259.

326. *Id*. at 257.

327. 364 S.E.2d 470 (S.C. 1988).

328. *Id*. at 471.

329. *Id*. at 472.

330. *Id*.

331. *Id*.

332. 515 S.E.2d 535 (S.C. 1999).

333. *Id*. at 538.

334. *Id*. at 538.

335. *Id*. at 538.

336. *Id*. at 539.

337. *Id*. at 539.

338. *Id*. at 539.

339. *Id*. at 539.

340. *Id*. at 540-541.

341. Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 141-142 (Tenn. 1993).

342. *Id*. at 144.

343. *Id*. at 145.

344. *Id*. at 144-145.

345. *Id.* at 144.

346. *Id*. at 156.

347. *Id*. at 155.

348. 851 S.W.2d 139 (Tenn. 1993).

349. 894 S.W.2d 734 (Tenn. 1995).

350. *Id*. at 735, *citing* Watson v. City of Memphis, 373 U.S. 526 (1963) (concerning the duty to desegregate Memphis' parks and recreational areas).

351. *Id*. at 735-736.

352. *Id*. at 736-737.

353. *Id.* at 738.

354. *Id*.

355. *Id.* at 738-739.

356. *Id.* at 739.

357. 851 S.W.2d 139 (Tenn. 1993).

358. Tennessee Small School Systems v. McWherter (Small Schools III), No. M2001-01957-SC-R3-CV, slip op. at *5 (Tenn. Oct. 8, 2002).

359. *Id.* at *5-6.

360. Tennessee Small School Systems v. McWherter (Small Schools II) 894 S.W.2d 734, 738 (Tenn. 1995).

361. Tennessee Small School Systems v. McWherter (Small Schools III), No. M2001-01957-SC-R3-CV, slip op. at *1 (Tenn. Oct. 8, 2002).

362. *Id*. at *2.

363. *Id*. at *3-4.

364. *Id*. at *10-11.

365. *Id*. at *11-12.

366. *Id*. at *12.

367. *Id*. at n.17.

368. *Id*.

369. 457 U.S. 202 (1982).

370. U.S. Const. amend. XIV.

371. Plyler v. Doe, 457 U.S. 202, 221 (1982).

372. *Id*.

373. Among the policy arguments found in *Plyler* which could be adapted for school funding litigation are the following: 1) equal protection was intended to abolish caste based and invidious class based legislation (*Id*. at 213); and legislation that imposes disabilities on groups disfavored by virtue of circumstances beyond their control constitutes the type of caste or class based legislation that equal protection was designed to abolish (*Id*. at 216, n.14); 2) legislation that denies educational benefits imposes a lifetime hardship on children who are not responsible for their status (*Id*. at 223) and since children are not responsible for the circumstances of their birth, imposing disabilities on children because of accidents of birth is contrary to the basic concept of our system that burdens should bear some relationship to individual responsibility (*Id*. at 220); 3) denial of educational benefits results in significant social costs which must later be borne by society (*Id*. at 221) including unemployment, welfare, and crime, making it likely that whatever savings are achieved through denial of educational opportunity are outweighed by the long term social costs (*Id*. at 230); and 4) denial of educational benefits presents an affront to advancement on the basis of merit, and thereby forecloses the means by which disadvantaged individuals can escape their disadvantaged status (*Id*. at 221-222).

374. *Id*. at 230 (Marshall, J., concurring).

375. *Id*. at 231 (Marshall, J., concurring).

376. 777 S.W.2d 391 (Tex. 1989). *See* William E. Sparkman, *Texas School Finance System Unconstitutional*, 57 EDUC. L. REP. 333 (1990).

377. *Id*. at 392.

378. *Id*.

379. *Id*.

380. *Id*.

381. *Id*. at 393.

382. *Id*.

383. *Id*.

384. *Id*. at 394.

385. *Id*.

386. *Id*. at 396.

387. *Id*. at 398.

388. *Id*. at 397.

389. *Id*. at 399.

390. Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994).

391. *Id*. at 141.

392. *Id*. at 141.

393. *Id*. at 140.

394. *Id*. at 141.

395. *Id*. at 142-143.

396. Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979).

397. *Id*. at 863.

398. *Id*. at 863-864, n.5, *citing,* Martha McCarthy, *Is the Equal Protection Clause Still a Viable Tool for Effecting Education Reform?*, 6 J.L. & EDUC. 159, 168, n.53 (1977).

399. *Id*. at 864.

400. *Id*. at 878.

401. *Id*. at 866.

402. *Id*. at 877.

403. *Id*.

404. *Id.* at 877-878.

405. *Id*. at 878.

406. 255 S.E.2d 859 (W. Va. 1979).

407. 324 S.E.2d 128 (W. Va. 1984).

408. *Id*. at 133.

409. *Id*. at 132.

410. *Id*.

411. *Id*. at 135.

412. *Id*. at 134.

413. *Id*. at 137.

414. 20 U.S.C. 6301 (2004).

415. *See* Campaign for Fiscal Equity v. State, 801 N.E.2d 326 (N.Y. 2003). *See also* Michael Heise, *Educational Jujitsu*, EDUCATION NEXT, Fall 2002, p. 3 ("a new wave of litigation may be upon us, one that turns the states' efforts to improve achievement through standards against the state and enables school districts to gain financially from their inability to perform at desired levels. These failures are used in court to bolster legal claims that

such schools underachieve because their resources are inadequate and, therefore, unconstitutional").

416. 836 So.2d 813 (Ala. 2002).

417. 91 S.W.3d 427 (Ark. 2002).

418. *Highest Poverty Rates in Border Counties, Rural Areas,* Associated Press, Oct. 30, 2002.

419. Doug Bowers & Peggy Cook, *Rural Conditions and Trends: Socioeconomic Conditions Issue*, Economic Research Service, U.S. Department of Agriculture, *at* http://www.ers.usda.gov/publications/rcat73 (Feb. 1997).

420. John Dayton, *Desegregation: Is the Court Preparing to Say It is Finished?*, 84 EDUC. L. REP. 897 (1993).