IS "ADEQUACY" A MORE "POLITICAL QUESTION" THAN "EQUALITY?": THE EFFECT OF STANDARDS-BASED EDUCATION ON JUDICIAL STANDARDS FOR EDUCATION FINANCE

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INTRODUCTION

"There are two human inventions which may be considered more difficult than any others – the art of government, and the art of education; and peoples still contend as to their very meaning."[1] These words, written by Immanuel Kant over two centuries ago, characterize the longevity of the battle over government and education and reveal why the conflict deepens when the two intersect. Public financing of education has bedeviled this country and its leaders since at least the end of the nineteenth century.[2] In particular, government funding of education produces immense disagreement resulting in litigation that is as much about economics as it has been about questions concerning race, class, gender or housing.[3] Indeed, the question of how society funds education is simultaneously a question regarding the definition of education itself and hence a vision of that society as well.[4]

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1 IMMANUEL KANT, KANT ON EDUCATION (UBER PADAGOGIK) 12 (Annette Churton trans., 1900).

2 *See* R. CRAIG WOOD & DAVID C. THOMPSON, EDUCATION FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS - AN ANALYSIS OF STRATEGIES 4 (1996) (reviewing the early history of education finance litigation).

3 *See* United States v. Virginia, 116 S.Ct. 2264 (1996) (declaring unconstitutional the exclusion of women from Virginia Military Institute); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (upholding Texas' education finance system which resulted in unequal levels of spending among local school districts caused by unequal amounts of taxable wealth); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (declaring unconstitutional racially segregated education).

4 Amy Gutmann expounds upon this idea in great detail in her democratic theory of education which focuses on "the ways in which citizens are or should be empowered to influence the education that in turn shapes the political values, attitudes and modes of behavior . . . on practices of deliberate instruction by individuals and on the educative influences of institutions." AMY GUTMANN, DEMOCRATIC EDUCATION 14 (1999). Gutmann's theory of education financing upholds a democratic distribution, which would require increased federal and state spending to ensure that all children receive an education at a certain threshold. Local districts would be free to increase their own funding above that threshold. Unfortunately Gutmann

Although there is no Federal Constitutional right to education,[5] the constitution of every state obligates the legislature to provide a system of public schools.[6] Except for special education and certain aid requirements such as Title I, the Federal Government has little impact on the structure of schools.[7] States retain the primary legal responsibility for the financing of the public schools along with hiring, curricula and standards decisions. However, states may often apportion such authority to the local districts.[8] Thus most plaintiffs bring education finance litigation cases in state courts. Litigation generally challenges the state funding schemes that usually rely on local school district property taxes as the primary source of expenditures or as the basis for the state funding scheme.[9] On the whole, wealthy property districts can more generously fund their schools at a lower tax rate than poor property districts. In fact, poor districts may tax property at an even higher rate than the wealthy districts, yet generate less revenue.[10]

Education finance litigation began with challenges of disparities in funding based on Federal Constitutional Equal Protection claims.[11] In the wake of the *San Antonio Independent School District v. Rodriguez* decision, however, litigants moved to challenges of such disparities based in part on the state constitution equal protection and education clauses.[12] The tenor of the cases remained focused on the *inequality* of funding. The mixed success of these challenges prompted plaintiffs to focus increasingly on the state constitution education clauses and bring claims of unconstitutionally *inadequate* schooling.[13] These recent cases have not necessarily demanded equal funding but have sought judicial

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does not provide any workable framework from which either legislative or judicial body could determine a precise standard or number. *See id.* at 139-148.

5 *See Rodriguez*, 411 U.S. at 35. The Court declared that education was not a fundamental interest regardless of its clear social importance.

6 Scholars disagree as to whether or not Mississippi has an education clause. For an argument that the state does have such a clause see Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. LEGIS. 307, 311 n.5 (1991). *Contra* William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661 (1989). State constitution education clauses may be found in Wood, *supra* note 2, at 111.

7 A 1992-1993 breakdown of school funding determined the average state share was 45.6%. The average local district share was 47.4% and the average Federal share was just under 7%. *See* Molly McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, *in* LAW AND SCHOOL REFORM 88, 99 (Jay P. Heubert ed., 1999).

8 *See id.*

9 *See* WOOD, *supra* note 2, at 19 (describing education finance distribution formulas); *see also* JOSEPH E. STIGLITZ, PUBLIC SECTOR ECONOMICS, 368-78 (1988) (characterizing the methods of allocation of public educational funds).

10 *See id.*

11 *See* Serrano v. Priest, 487 P.2d 1241 (Cal. 1971).

12 *See* Robinson v. Cahill, 303 A.2d 273 (N.J. 1973).

13 *See* Pauley v. Kelly, 324 S.E.2d 128 (Ky. 1989).

enforcement of a constitutional minimum standard of education. In addition, the growing movement of state legislature or state education department imposed uniform education standards has provided plaintiffs the necessary amplification of state constitution education clauses.[14]

Some scholars view the shift in litigation strategy from claims of inequality to claims of inadequacy as an inevitable and logical response to court resistance to equalization.[15] Critics charge the consequences of equality arguments include complex financial arrangements, intrusion on local control, and threats to wealthy districts.[16] Adequacy claims, on the other hand, appeal to general notions of fairness, do not threaten rich localities, better cohere with the educational standards movement, and find clear textual basis in state constitutions.[17]

The difficulty with the above analysis is that the shift has not been so pronounced.[18] Plaintiffs usually bring multiple claims, including adequacy and equality causes of action. Moreover, equality concerns inform the adequacy argument. Defining adequacy inevitably entails comparisons of disparate district wealth and spending. In addition, remedies will invariably include directives to change spending formulae, thereby affecting local control and potentially taking money from wealthy districts. Finally, proponents of adequacy do not address the ability or wisdom of the courts' larger role in defining education and its standards. Nor do they sufficiently address the loss of the moral suasion of the equality argument.

Within the recent adequacy cases the courts confront two significant issues. Whether they *explicitly* address these matters may be a matter of the facts of the case itself, the court's temperament or a myriad of other factors. First, in adjudicating the financing of schools the judiciary must circumscribe its own role relative to legislative and executive prerogatives. This is the question of separation of powers and the court's own institutional competence. Second, the courts must define, in some manner, the purposes of education.

This Note argues that the recent shift in state court litigation from an equality claim to one of adequacy has compelled many courts to insert themselves in the discussion and creation of educational policy that was previously viewed as unacceptable. This evolution may render courts

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14 *See* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1175 (1995).

15 *See, e.g.*, Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 157 (1995).

16 *Id.* at 155-62; *see also State Constitutions, School Finance Litigation, and the "Third Wave," supra* note 14, at 1168-72.

17 Enrich, *supra* note 15, at 166-83; *see also* Heise, *supra* note 14, at 1174-76.

18 *See* Joseph S. Patt, *School Finance Battles: Survey Says? It's All Just a Change in Attitudes*, 34 HARV. CR-CL. L. REV. 547, 562-67 (1999).

vulnerable to appellate challenges and criticisms of nonjusticiability and political question doctrine violations regarding institutional competence and judicial prudence. In addition, the demise of the equality argument diminishes the moral strength of the court's normative valuation capacity. Section I examines the history of education finance cases and reviews the three waves of litigation strategies, which evolved from an equality argument to one of adequacy. Section II explores in greater detail the concerns of state court judicial policymaking, including issues of separations of powers, justiciability and the political question doctrine. Section III analyzes the difficulties and benefits of judicial administration of the adequacy standard. Section IV examines the changes in the New York courts' jurisprudence as manifested in the equality case of *Board of Education of Levittown v. Nyquist*[19] and the current adequacy case of *Campaign for Fiscal Equity, Inc. v. New York*.[20] Section IV will also ascertain the effect of the standards-based education movement on litigation and jurisprudence. This Note concludes that state courts should cautiously embrace adequacy arguments because they will more likely enmesh the judiciary in the legislative realm raising questions of competence and anti-majoritarian concerns. Furthermore, the courts should not abdicate their role of articulating normative values by precluding equality challenges. Federal regulations that address disparate impact may afford state courts one means of ensuring equal educational opportunities.

I. EDUCATION FINANCE REFORM LITIGATION STRATEGIES

Despite the moral rhetorical reverberations of the first decision of *Brown v. Board of Education* (*Brown* I)[21] the practical effects of desegregation do not resonate in American classrooms today.[22] Generally education reform strategy no longer focuses on racial or even class integration, but rather seeks financial reform.[23] In the last thirty years courts and litigants have increasingly distanced themselves from the discourse of race, equality, and integration and spoken more often in terms of money, adequacy and local control.[24] Rather than accept the current state of education jurisprudence as inevitable, it is necessary to examine the antecedent legal strategy and thought in order to best appraise today's goals and methods.

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19 439 N.E.2d 359 (N.Y. 1982).

20 Campaign for Fiscal Equity v. State, 187 Misc.2d 1 (N.Y. Sup. 2001).

21 347 U.S. 483 (1954).

22 *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 1 (1993).

23 *But see* James E. Ryan, *Schools, Race, and Money*, 109 YALE L. J. 249, 307 (1999) (proposing reorientation of school finance litigation to focus on racial and socioeconomic integration rather than financial equalization as more effective education policy).

24 *See id.* at 258-72.

A. *BROWN*, EQUALITY, AND THE DEMISE OF DESEGREGATION

In *Brown* the Supreme Court recognized "education is perhaps the most important function of state and local governments."[25] The Court expressed doubts "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."[26] The overturning of the "separate but equal" doctrine of *Plessy v. Ferguson*[27] led to numerous desegregation cases. However, just as the remedies of *Brown* proved difficult to implement, so too did the later court resolutions often escape implementation.[28] In fact, some question the realized efficacy of the decision.[29] Notwithstanding the importance of *Brown*, within twenty years of that landmark case, courts began a process of judicially enforced resegregation that dismantled previous mandated integration and has maintained or imposed segregation that society still suffers today.[30]

From 1954 through 1974 the Supreme Court defined desegregation as the means to achieving equality. The Court did not defer to states' rights argument or the cause of local control, but voiced concern for the protection of individual rights and respect for the law.[31] Passage of the 1964 Civil Rights Act led to incentives for desegregation and Federal prosecution of discrimination.[32] By emphasizing the constitutional necessity of equal education in *Brown*, the Court had arguably precipitated concerted governmental action in all three branches against racism and inequality.[33]

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25 *Brown* I, 347 U.S. at 493.

26 *Id.* at 493.

27 163 U.S. 537 (1896).

28 *See* Brown v. Bd. of Educ., 349 U.S. 294 (1955) (*Brown* II) (ordering the states to desegregate with the vague phrase of "all deliberate speed").

29 *See* GERALD N. ROSENBERG, THE HOLLOW HOPE 42-169 (Univ. of Chicago Press 1991) (questioning the effects of court decisions on policy, primarily the effect of the *Brown* I decision on civil rights).

30 *See* Gary Orfield, *Conservative Activists and the Rush Toward Resegregation*, *in* LAW AND SCHOOL REFORM, *supra* note 7, at 43 (describing the larger and more activist role of contemporary judges in resegregation cases than that of 1950s and 1960s judges in desegregation cases).

31 *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (finding local school districting did not preclude busing as a means to desegregate); Griffin v. County Sch. Bd. of Prince Edward County, 375 U.S. 391 (1964) (granting certiorari without awaiting final action by the Court of Appeals for the Fourth Circuit on the issue of closing public schools to avoid desegregation); Cooper v. Aaron, 358 U.S. 1 (1958) (ordering Arkansas Governor to obey a federal district court order to integrate a Little Rock high school).

32 *See* Orfield, *supra* note 29, at 46. Until Congress acted in 1964, 98% of southern African Americans were still in completely segregated schools. *See id.*

33 By 1970 southern states that had legally mandated segregation were the most desegregated in the United States. *See id.* at 47.

In the early 1970s the Court limited the range and scope of equality through two education cases. In *Rodriguez* the Court made clear education was not a fundamental right.[34] Finding no issue of race, the Court held that the differences in different district spending were a matter of local prerogative and thus did not violate the Constitution.[35] In *Milliken v. Bradley* the Court held a metropolitan desegregation plan unconstitutional that would have required integration of urban and suburban areas without a showing of suburban intent to segregate.[36] Subsequently, the Federal courts began limiting desegregation policies.[37] The two decisions represented a turning point in the Court's education jurisprudence. While *Rodriguez* stood for the proposition that education was not a fundamental right, both cases shared the high court's decisive resistance to implementing interdistrict remedies. To what degree state courts have been constrained by these two holdings remains the underlying concern of the rest of this Note.

B. EDUCATION FINANCE LITIGATION

School funding cases derive their impetus from the civil rights cases. Judges and litigants embroiled in disparities of school district spending invariably cite *Brown* and quote its emphasis on the importance of education.[38] However, finance and desegregation cases diverge at the critical juncture of race. Viewed by some litigants as either a more practical or palatable strategy, education funding claimants principally rely on differences in money, rather than on variances in color. The strategy has undergone many permutations, reacting to both adjudication and popular sentiment. Generally, scholars depict three "waves" of education finance litigation.[39]

1. *The First Wave*

Efforts to dismantle the funding schemes of public schools as unconstitutional succeeded in 1971 with the California case *Serrano v. Priest*.[40] The California Supreme Court held that the state's school district funding based on property tax caused disparities that violated the Fourteenth Amendment's Equal Protection Clause. The California court

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[34] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); *infra* Section II.B.1

[35] *See Rodriguez*, 411 U.S. 1.

[36] 418 U.S. 717 (1974).

[37] *See* Orfield, *supra* note 30, at 48-53.

[38] *See e.g.*, Campaign for Fiscal Equity v. New York, 655 N.E.2d 661 (N.Y. 1995).

[39] *See* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C.L. Rev. 597, 600-04 (1994); Enrich, *supra* note 15, at 104-15; Heise, *supra* note 14, at 1153-66.

[40] 487 P.2d 1241 (Cal. 1971).

found education was a fundamental right[41] and wealth a suspect class.[42] Applying strict scrutiny, the court ruled local control was not a compelling interest justifying different treatment.[43]

Excitement over this case was short lived. In 1973 the United States Supreme Court declared in *Rodriguez*[44] that education was not a fundamental right[45] and wealth was not a suspect class.[46] The Court made clear that the *Brown* rhetoric concerning education's significance did not render education a fundamental right.[47] Without explicit or implicit Constitutional guarantee education could not be considered a fundamental right.[48] By a 5 to 4 margin, utilizing the rational basis standard, the Court found local control rationally justified the school funding system.[49]

2. *The Second Wave*

Though the *Rodriguez* decision essentially foreclosed Federal Equal Protection arguments, education finance litigants found hope in state constitution equal protection arguments. Plaintiffs continued to focus on the unequal state distribution of funding.[50] Most state constitutions have equal protection clauses similar in language and in scope to the federal clause.[51] Moreover, every state constitution includes an education clause, providing litigants a clearer textual basis than the United States Constitution affords for arguing education is a fundamental right.[52] State Constitution arguments also permitted plaintiffs to apply different scrutiny approaches, potentially expanding suspect classes to include wealth or constricting governmental interests to exclude local control.[53]

Commentators usually point to the New Jersey Supreme Court *Robinson v. Cahill*[54] decision as the beginning of this wave of litigation. In light of the *Rodriguez* decision, the New Jersey court focused only on the state constitution's education clause. This approach differed from later second wave cases by excluding reliance on the state's equal protection clause. However, the *Robinson* court found the language of the New

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41 *See id.* at 1258-59.
42 *See id.* at 1250.
43 *See id.* at 1263.
44 *See* 411 U.S. 1 (1973).
45 *See id.* at 30.
46 *See id.* at 28.
47 *See id.* at 30.
48 *See id.* at 35.
49 *See id.* at 2.
50 *See* Heise, *supra* note 14, at 1157.
51 *See* WOOD, *supra* note 2, at 111-32.
52 *See id.*
53 *See* Enrich, *supra* note 15, at 105-07.
54 303 A.2d 273 (N.J. 1973).

Jersey constitution's education provision gave each New Jersey child the right to receive from the state equal education opportunities.[55] Thus the court held disparities in district funding violated the New Jersey Constitution.[56]

Whether litigants relied solely on the state constitution education clause or attacked their state education funding schemes with a dual emphasis on the education clause and equal protection clause of state constitutions, the articulated wrong was one of inequality in district spending. From 1973 to 1989 about as many state courts upheld state education systems as declared them unconstitutional under the equality theory.[57] One critical reason for resistance to the equality theory was state court concern over the ramifications of mandated uniform education spending in other areas of state government funding.[58] Courts hesitated to call for equal education funding because others might infer a mandate for equalization of funding in all areas of government, thereby encroaching on local autonomy.[59] The mixed success led education finance reformers to seek a new theory distinguishing school funding from the panoply of other state funded services.[60]

3. *The Third Wave*

The language of equality receded slightly, as litigants began to emphasize adequacy of education as their primary concern. The transition entailed focusing more on the education clause, its legislative history and the status of statewide education. Rather than address the legal question of whether the education clause required equal funding, courts were asked to define or amplify the meaning of the education clause. Instead of determining the factual issue of whether there was disparate school funding, state judges had to decide what amount of funding would achieve that constitutionally required level of education. The adequacy theory involved a more substantive rather than comparative assessment of education and its funding.

In *Rose v. Council for Better Education*[61] the Kentucky Supreme Court declared unconstitutional the entire state education system.[62] The Kentucky court found even the state's wealthy districts inadequately

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55 *See id.* at 291, 292; *see also* N.J. CONST. art. VIII, § 4.

56 *See id.* at 297.

57 *See* Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, at 576 (1998).

58 *See* Enrich, *supra* note 15, at 161-62.

59 *See id.*

60 *See* Heise, *supra* note 14, at 1162.

61 790 S.W.2d 186 (Ky. 1989).

62 *Id.* at 215.

funded in comparison to the rest of the country.[63] The court did not limit itself to striking down simply the finance scheme but created or redefined what constituted an adequate education. The court articulated seven clear goals that must be achieved in order to meet the standard of an adequate education.[64] The verdict led to massive state reform by the legislature and much acclaim for Kentucky's present education system.

The *Rose* decision led many state courts to craft similarly more detailed education standards out of state constitutional provisions.[65] However, it is unclear that adequacy cases have fared any better than equality cases.[66] While the adequacy theory permits courts to avoid the "Robin Hood" epithets that accompanied comparing and curing school district funding disparities under equality theory, the courts arguably intrude even more into the legislative realm of education. Such separation of powers concerns and the newness and difficulty of creating education standards may explain the third wave's mixed success. Whether such judicial anxieties should limit courts in invalidating school funding structures is the primary question in current education finance jurisprudence.

II. STATE COURT INVOLVEMENT IN EDUCATION POLICY

A. THE COURT'S QUESTIONABLE CAPACITY AND LEGITIMACY TO MAKE POLICY

Critics of judicial intervention in policy matters question both the legitimacy and capacity of courts to address such issues.[67] The Supreme Court articulated such concerns regarding education finance in *San Antonio Independent School District v. Rodriguez*.[68] Noting the economic, social, and philosophical complexities of education, the Court advised lower courts to "refrain from imposing on the states inflexible constitutional restraints that could circumscribe or handicap the contin-

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63 *See id.* at 198.

64 *See id.* at 212. The seven goals are: 1) oral and written communication skills; 2) knowledge of social, economic, and political systems; 3) understanding of governmental processes; 4) knowledge of mental and physical wellness; 5) foundation in the arts; 6) training for life work; and 7) academic and vocational training to compete with students from other states. *Id.*

65 *See e.g.*, McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993).

66 *See* Heise, *supra* note 57.

67 *See* MICHAEL A. REBELL & ARTHUR R. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM 5-10, 11-15 (1982). Policy making may be defined as the action or inaction of governments—"specifically the regulation of behavior and the distribution of benefits." CHARLES S. LOPEMAN, THE ACTIVIST ADVOCATE: POLICY MAKING IN STATE SUPREME COURTS 2 (1999). Though it is arguable courts make policy every time they render a decision, critics are primarily concerned with instances where court decisions affect parties beyond the dispute and change established policies of the legislature or the executive. *See id.* at 3.

68 411 U.S. 1 (1973).

ued research and experimentation so vital to finding even partial solutions to educational problems."[69] Despite these admonitions education finance litigation did not abate, finding particularly fertile ground in state courts.[70]

1. *Illegitimacy*

Judicial action in education finance elicits questions of legitimacy because decisions of education financing are viewed as the province of the legislature.[71] The basis of these concerns derives largely from separation of powers conceptions. Since determinations of state funding affect the whole population of the state, the legislature is regarded as the body best suited for expressing the will of the people. This branch is seen as most representative of the people in that its members are elected, hence accountable, and is the body invested with responsibility for making the law. In contrast, the judiciary is often an unelected body, gaining much of its respect and authority from its distance from political matters, whose power is to adjudicate disputes, not to make law. Judicial involvement in education finance is thus anti-majoritarian, elitist and diminishes people's faith in the power of representative government.

2. *Incapacity*

While the question of legitimacy invites vigorous debate on largely ideological grounds with little resolution in sight, concerns over the capacity of courts to decide matters of education finance are more susceptible to some empirical analysis and hence resolution. Critics suggest that the courts are not as well equipped to determine proper education financing formulae and related issues, as are the legislative and executive branches.[72] They charge that the adversary process and rules of evidence hamper the synthesizing of information necessary for proper policy determinations. In addition detailed and complex matters of policy require specialized training and background rather than generalized judicial experience.[73]

Perhaps the most damming criticism of judicial involvement, however, addresses judicial inability to implement, oversee, and enforce remedies. Rather than deliver decisive case-by-case determinations, the court must engage itself in an ongoing process, taxing its time and re-

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69 *Id.* at 43.

70 *See supra* Section I. B. 2 -3.

71 *See* Rodriguez 411 U.S. at 38-53, 58-59 (determining that the "ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them"); Enrich, *supra* note 15, at 127 n.123.

72 *See* REBELL & BLOCK, *supra* note 67, at 5-15.

73 *See id.*

sources.[74] More significantly, courts have limited powers of coercion, whereas policy implementation may require a variety of incentives for statewide action as well as extensive and continuous modification. In contrast the legislature and executive have berths of power that include subsidizing or taxing certain behaviors, as well as normative clout to declare policy.

B. THE POLITICAL QUESTION DOCTRINE

The distinguishing characteristics of the three branches of government contribute to the much debated and maligned "Political Question" doctrine. The basic premise of the doctrine is that there are certain issues that are nonjusticiable because they are outside the judiciary's proper domain.[75] The determination that an issue implicates a political question may also be characterized as acknowledging "the possibility that a constitutional provision may not be judicially enforceable."[76] Whether this is a constitutional or a prudential limitation on courts is unclear. The ambiguity regarding the doctrine's underlying authority is due in part to what may be charitably characterized as inconsistent invocation of the doctrine.[77]

Notwithstanding arguments regarding the doctrine's basis, at the very least most courts will entertain prudential considerations of the issue's justiciability. Professor Alexander Bickel articulated the view that courts should hesitate to hear cases where certain factors are present.[78]

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74 Such judicial oversight is characteristic of public action litigation where the court essentially acquires the role of manager of the assailed institution. *See* OWEN FISS, THE CIVIL RIGHTS INJUNCTION 7 (1978).

75 *See* Baker v. Carr, 369 U.S. 186, at 217 (1962). The Supreme Court characterized political questions as normally involving at least one of the following aspects:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

76 United States Dep't of Commerce v. Montana, 503 U.S. 442, 458 (1992).

77 *See, e.g., id.* (upholding a statutorily-mandated method of representative apportionment and rejecting the government's argument that this was a nonjusticiable political issue); *contra* Nixon v. United States, 506 U.S. 224 (1993) (rejecting an impeached judge's challenge of the Senate impeachment process on grounds that it presented a nonjusticiable political question because of clear commitment of the issue to the Senate and a lack of judicial standards). Professor Erwin Chemerinsky has characterized the *Baker v. Carr* criteria as "useless in identifying what constitutes a political question." ERWIN CHEMERINSKY, FEDERAL JURISDICTION 144-45 (1994).

78 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 184 (1962).

Bickel's theory presumes judicial incapacity from the outset and appears to suggest that concerns of its own legitimacy should dictate whether the court grants jurisdiction on a case-by-case basis. Unfortunately, the prudential viewpoint does not suggest what factors, if any, would require judicial review. But as Justice Souter noted in a concurrence in a recent political question case, "[n]ot all interference is inappropriate or disrespectful, however, and application of the doctrine ultimately turns, as Learned Hand put it, on 'how importunately the occasion demands an answer.'"[79] Whether education finance is such an occasion may depend on which state court the litigants go before and what claim they make.

Some scholars have questioned the existence of a political question doctrine at all. They have pointed, in particular, to the lack of political question cases in domestic affairs. However, even if the political question doctrine does not serve as a constitutional bright-line limitation on judicial review of state education funding, the prudential concerns discussed above may lead courts to reject a challenge rather than refuse jurisdiction. Indeed, it is unclear how often a court may *choose* to find certain legislative action does not violate the Constitution, largely animated by justiciability concerns, rather than cite the political question doctrine. Such a possibility invites us to ask: what in fact is the functional difference between declaring a constitutional provision is not judicially enforceable and upholding a legislative act as constitutional?

C. IN SUPPORT OF JUDICIAL LEGITIMACY AND CAPACITY TO MAKE POLICY

1. *A Theoretical Framework*

Professor Edward B. Foley has argued that the judiciary should not defer to the legislature on the matter of a child's Federal Constitutional right to adequate education.[80] Foley puts forth John Hart Ely's representation-reinforcing theory of judicial review as a particularly legitimate basis for intervention in education finance. Given the centrality of education in the democratic process, representation-reinforcing theory militates against deference because the court "may insist that the legislature grant citizens any rights essential to the operation of a democratic political process."[81] In addition, the theory argues persuasively for judicial protection of interests of persons who are often ignored in the political process. Clearly, the education of a child is such an interest.[82]

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79 Nixon v. United States, 506 U.S. 224, 253 (Souter, J., concurring).

80 *See* Edward B. Foley, *Rodriguez Revisited: Constitutional Theory and School Finance*, 32 GA. L. REV. 475, 498-515 (1998).

81 *Id.* at 502.

82 *See id.* at 508.

Even if it is accepted that the judiciary should protect underrepresented children's interests, there remains concern over the competency of the courts: might the judiciary overreach in its protection? Acknowledging this possibility, Foley suggests that the risk is balanced by the equally likely possibility of "legislative underprotection" of the children's interests.[83] Foley concludes the effects of legislative underprotection (inadequate education for poor children) are more deleterious than the consequences of judicial overprotection (increased taxes).[84]

In response to criticism that judicial intervention in education finance intrudes on the legislative powers, Foley's conception of a Federal Constitutional right to an adequate education suggests "there are certain budget categories that are truly nondiscretionary."[85] Thus, an understanding of an adequate education as a fundamental right argues for the judiciary's upholding of such a positive right and its concomitant funding from the legislature. As to what an adequate education should consist of, Foley argues legislatures have no more education expertise than judges. A well-constructed standard of adequate education could assure one of accurate and fair court determinations.[86]

2. *Legitimacy*

An ascendant judicial role in education finance gains support from a conception of the Constitution as the fundamental safeguard of individual rights. In such a construct the judiciary serves as guardian interpreter of the Constitution in order to constrain the legislative powers from restraining individual liberty.[87] Thus the increased role of government in peoples' lives compels further judiciary intervention.

Criticisms that judicial intervention in policy matters is anti-democratic ignore alternative means of popular accountability. First, the legislature may pursue a Constitutional amendment to modify judgments it disdains. It should be noted that the state constitutional amendment process is often not an as cumbersome and extraordinary as the process within the Federal structure. Second, popular sentiment, depending on how loudly voiced, may alter later decisions by the court.[88] Third, many states elect their judges, removing anti-majoritarian critics' electoral ac-

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83 *See id.* at 509.

84 *See id.* at 510. The balancing of risks is largely predicated on John Rawls's theory of the "veil of ignorance." The theory postulates what principles of justice would be chosen by persons behind a "veil of ignorance" which blinded them to any distinguishing characteristics of other people. *See* JOHN RAWLS, A THEORY OF JUSTICE 12 (1971). Foley argues that a person behind the veil of ignorance would prefer a certain qualitative education for all over fewer taxes. *See* Foley, *supra* note 80, at 510.

85 Foley, *supra* note 80, at 513.

86 *See id.* at 514-15. Foley's definition of adequate education follows on pages 515-40.

87 *See* REBELL & BLOCK, *supra* note 67, at 6.

88 *See id.* at 7.

countability concerns. Even where states do not hold judicial elections, legislatures may hold some control over courts given their power over judiciary budgets. Finally, as Foley suggests above, the potentially underrepresentative legislature may require a balance of an imperfectly democratic political process with an imperfectly anti-democratic judicial process.[89]

3. *Capacity*

While critics cite the complex and discrete information involved in policy decisions as obstacles to judicial involvement, defenders can assert the very means of judicial factfinding as particularly well suited to policy decisions. The adversarial process arguably ferrets out the truth more successfully than could any legislative committee. Coupled with public law litigation and class actions, courts have developed proficiency in addressing areas of generalized public concern.[90] In his article on public law litigation,[91] Abram Chayes posits a number of the court's other institutional advantages for making broader policy related decisions, including: (1) the judge's likely public policy experience and deliberative and reflective disposition;[92] (2) extensive participation by representatives of those affected by the decision; (3) the necessity of judicial response to complaints of the aggrieved as distinguished from the legislature or administrative bureaucracy; and (4) efficiency of a non-bureaucratic entity.[93]

4. *Distinctions of State Courts*

State courts may be better suited for interpreting equal education rights obligations than are federal courts because of differences in (1)

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89 *See id.* It should also be noted that a court's legitimacy might also be buttressed by the manner in which it renders a verdict and the relationship it sustains with the other branches, the media and the general populace. Professor Abram Chayes wrote on this matter regarding public law litigation:

> judicial participation is not by the way of sweeping and immutable statements of *the* law, but in the form of a continuous and rather tentative dialogue with other political elements - Congress and the executive, administrative agencies, the profession and the academics, the press and wider publics. Bentham's "judge and company" has become a conglomerate. In such a setting, the ability of judicial action to generate assent over the long haul become[s] the ultimate touchstone of legitimacy.

Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1316 (1976).

90 *See* REBELL & BLOCK, *supra* note 67, at 13.

91 *See* Chayes, *supra* note 89.

92 This observation regards only federal judges. Charles Lopeman finds significantly more public policy experience in the federal bench than in the state courts. *See* CHARLES S. LOPEMAN, THE ACTIVIST ADVOCATE: POLICY MAKING IN STATE SUPREME COURTS 4-5, 8-10 (1999).

93 *See* Chayes, *supra* note 89, at 1307-08.

textual basis; (2) positive rights tradition; (3) flexibility; (4) popular accountability;[94] (5) population size; and (6) amendment processes. Yet there also remain arguments against state court policy making. Under one critical view of state courts, Professor Neuborne articulates the view that only Federal courts may effectively uphold individual rights in a countermajoritarian manner.[95] State courts are not as well suited to asserting anti-majoritarian policy determinations due to their inferior competency,[96] which implicates their psychological sense of legitimacy, and their electoral accountability,[97] which suggests a logical resistance to contending with the majority. However, Neuborne maintains that state courts are well suited to addressing positive rights embedded in the state constitutions.[98]

In his call for judicial federalism, Justice Brennan made much of the differences between the state and federal constitutions. Brennan encouraged state judges to construe their state constitution provisions regarding individual rights even more broadly than their Federal counterparts.[99] Moreover, Brennan argued "the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach."[100] Brennan urged state courts to heighten their scrutiny of state individual rights where Federal Courts had lowered theirs.[101] The Supreme Court Justice also invoked federalism as a basis

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94 These four factors are addressed in general in Professor Burt Neuborne's article. *See* Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L. J. 881, 893 (1989).

95 *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1131 (1977).

96 *See id.* at 1124.

97 *See id.* at 1127.

98 *See* Neuborne, *supra* note 94.

99 *See* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495-502 (1977). Until recently, however, state courts were not so inclined to undergo independent state constitutional analysis, and in particular, not an investigation of the state's constitutional history. Moreover, state constitutions do not enjoy the level of prominence of the United States Constitution, out of which constitutional values might be said to emanate. This may be due to both state court reluctance to utilize the sources and the public's ignorance. *See* Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. PITT. L. REV 231, 286-88 (1998); *see also* Hans E. Linde, *E Pluribus - Constitutional Theory and State Courts, in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 273, 278-79 (Bradley D. McGraw ed., 1985) arguing that state courts are less inclined to turn to state constitutional law because the courts resolve a greater array of legal dilemma than the Supreme Court, consisting of federal and state statutes, common law, federal case law, sister state sources and federal constitutional law. A national survey conducted in 1988 found 52% of respondents did not know their states had a constitution. *See Introduction*, 20 RUTGERS L.J. 878 (1989).

100 *See* Brennan, *supra* note 99, at 503.

101 *See id.*

for state courts developing greater protections for even Federal rights.[102] Under Brennan's analysis, *Rodriguez* should not serve as an obstacle to equal protection claims brought in State court. Rather, into this breach must state courts enter.

State court involvement may also be hastened by the insertion of positive rights into state constitutions. In contrast, the purpose and structure of the United States Constitution is largely one of negative rights, protecting the citizenry from the tyranny of government. Indeed, it is difficult to read the U.S. Constitution as a source of positive rights for two institutional reasons. First, this would require development of nationwide uniform rules, which the federal courts would have difficulty in applying given regional differences.[103] Second, the lack of democratic influence on the federal judiciary makes sense within the realm of negative rights, where the court's insulation may steel its opposition to government action, but not within positive rights, where the court compels government action.[104]

A plausible argument can be made that state court adjudication within the realm of positive rights raises more issues of separation of powers because it involves court action in response to legislative inaction – a behavior more susceptible to charges of judicial tyranny. On the other hand, the very notion of positive rights focuses not on the tyrannical tendencies of government, as would separation of powers, but rather obligates it to act beneficently.

Arguably, state court adjudication of positive rights such as education is less invasive of the legislative realm. Jonathan Feldman has observed "[w]hen negative rights are violated, the offending legislation must be struck down, an absolute rebuke to the legislature. When positive rights are violated, however, the legislative process is set in motion, which allows for the exercise, albeit within judicially-prescribed boundaries, of legislative power."[105] However, it is unclear whether a rebuke is a greater intrusion than continuous judicial oversight over the legislating and executing of remedial measures.

State courts also often enjoy greater flexibility than their federal counterparts. State courts are arguably more functionally disposed to ad-

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102 *See id.* Paul W. Kahn views Brennan's federalism as puzzling given the Justice's common resistance to states' rights arguments in federalism disputes. *See* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993). In addition, Kahn criticizes notions of individual state constitutional culture, and suggests there really is one national constitutional culture where state courts generally fall in step with federal court decisions. *See id.*

103 *See* Neuborne, *supra* note 94, at 890.

104 *See id.*

105 Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1061 (1993).

judicating policy matters than Federal courts because there is no Article III limitation on state courts.[106] This constitutional requirement of an actual "case" or "controversy" before the court enters into a Federal court's determination of whether a matter is a political question. Absent this limitation, state courts may more readily find the issue justiciable. Thus the decision whether to grant jurisdiction becomes entirely prudential.[107]

State court involvement with the electorate also makes the state judiciary a more appropriate venue than the federal courts for deciding issues such as education. Viewing the court as protector against majoritarian oppression, this role is even more critical in the state context. James Madison observed:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.[108]

Of course this impetus for a greater role for judiciary involvement elicits charges of antimajoritarianism. Counseling against that is the fact that in many states judges are electorally accountable and that judges' opinions are not as final because of the ease of the amendment process of state constitutions. The latter point suggests that state courts should be no less inclined to adjudicate constitutional matters than they would statutory claims. Furthermore antimajoritarian criticism may be muted by the fact that state constitutions were more recently enacted and directly ratified by the people.[109]

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106 *See* U.S. CONST. art. III, §§ 1,2.

107 One commentator suggests that the lack of this constitutional requirement enables state courts to offer binding advisory opinions in education finance cases, thereby deferring to the legislature as to remedy, but still upholding state constitutional individual rights. *See* George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 563-67 (1994).

108 THE FEDERALIST, No. 10, 83 (Kendall & Carey, eds., 1966).

109 *See* Blanchard, *supra* note 99, at 262. But compare Paul Kahn's belief that the state constitution's accessibility to the populace makes it more likely courts will not enter the policy realm. He writes:

> The argument has been made that because state constitutions are generally of more recent vintage and are more easily amended than the federal constitution, they provide a more vital democratic legitimacy to judicial review. In theory, such popular checks could embolden a court to take risks, to allow its vision of fairness publicly to compete and to receive a kind of popular legitimation from its own survival. However, it usually does not work this way. To adjudicate under the threat of popular

III. THE ALLURE OF THE ADEQUACY STANDARD

Reports of the demise of the equality standard and claim have been greatly exaggerated.[110] Both where adequacy claims have failed and succeeded litigant and judge have often seen fit to raise equality concerns.[111]

Professor Peter Enrich suggests that the continued appeal of the equality cause of action is due in part to the detritus of "inertia."[112] In addition to mere habit, Enrich speculates that equality may enjoy prominence in the education finance courts because of similarly related causes that invoke the same touchstone. Citation of equality may also owe much to doubts concerning the sufficiency of adequacy claims. Finally, and not unrelated to the "inertia" rationale, Enrich points both to equality's normative force in our idea of a just society and its apparent simplicity as reasons for its continued reference.[113]

While Enrich's explanations of equality's staying power are quite plausible many education finance cases over the last twelve or so years have dealt with the newer standard of adequacy. Adequacy claims have often arisen in state courts that had previously rejected challenges to the state education finance system on equality claims.[114] The change in strategy was a necessary response to a court's previous resistance to equality arguments. Still, it remains noteworthy how much of the language and even the arguments remained the same, whether under the rubric of equality or adequacy.[115] In order to best understand the way things have changed and stayed the same it is necessary to examine why courts may have resisted equality arguments, been receptive to adequacy claims, and why often there is little difference between the two.

> politics is to be reminded of the countermajoritarian burdens of judicial activism. It is a reminder of the contested character of what it means to be fair. It serves, therefore, as yet another force pushing toward judicial deference to political decisions.

See Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 Val. U. L. Rev. 459, 471 (1996). New York's current constitution has been in effect since 1895 and was amended 207 times between 1895 and 1991. *See* Gerald Benjamin & Melissa Cusa, *Constitutional Amendment through the Legislature in New York*, in CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 53 (G. Alan Tarr ed., 1996). Comparable statistics for other states and their respective constitutions may be found in Donald S. Lutz, *Patterns in the Amending of American State Constitutions*. *See id.* at 32-34 (Table 2.1 listing basic data on state constitutions' amendments). Thus, New York state's constitutional history and the *CFE* and *Levittown* decisions reveal both support for and opposition to Blanchard's and Kahn's views. *See infra* IV.A.B.

110 *See* Enrich, *supra* note 15, at 128-43; *see also* Patt *supra* note 18, at 563-87.

111 Some commentators dispute that third wave cases have succeeded due to reliance on the adequacy claim. They point to shifts in popular sentiment regarding education. *See* Patt, *supra* note 18, at 573; *see also* Heise, *supra* note 14, at 1175.

112 *See* Enrich, *supra* note 15, at 143.

113 *See id.*

114 *See* Heise, *supra* note 57.

115 *See* Patt, *supra* note 18.

A. WEAKNESSES OF EQUALITY

Equality challenges address different components of education and its state financing. The equalization sought may apply to the disparity between districts' tax capacity, actual expenditures, quality of educational services, or quality of educational outcomes.[116] The first difficulty attendant upon any of these measures of equality is complexity. Tax capacity and expenditures elicit a continual debate over the relevance of financial input to educational output.[117] Education services and outcomes remain plagued by debate over how to measure at all.[118] All four methods are subject to arguments that inequalities cannot be simply attributed to state legislative decisions but to a myriad of factors, most notably socio-economic background of students.[119]

The second difficulty attendant to an equality argument is its encroachment on wealthier districts.[120] If equality means uniformity in spending, districts with more favorable tax bases may have their own local spending restricted. Such "dumbing down" is anathema to many a person's sense of fairness. If a district chooses to place a certain level of importance on education spending, why should this prerogative be denied? If not restricted in its own spending, a wealthy district might be taxed more heavily to raise the poorer districts' education spending to a level equal to that of the wealthy district. Such financing schemes raise criticisms of unequal treatment and concerns over violation of local control.

Local control may also stand alone as a third critical weakness in the equality argument. Dressed in the incandescent light of neutrality local control appeals to many as the most formidable response to equalization. Each district should be permitted its own autonomy and decisions on spending. Such arguments resonate on the most primal level of parent-child relationships. A court may not be inclined to dictate that the state must determine entirely how or to what extent a child may be edu-

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116 *See id.* at 145-51.

117 *See* Martha Minow, *School Finance: Does Money Matter?*, 28 HARV. J. ON LEGIS. 395 (1991).

118 The standards-based movement is the current popular method. Many characterize the process, particularly with regard to student outcomes as entirely test-driven. Recently, President George W. Bush has proposed a Federal program including such testing. *See* David E. Sanger, *Bush Pushes Ambitious Education Plan*, N.Y. TIMES, Jan. 4, 2001, at A1.

119 This is a constant theme in many state defenses: Schools take students as they find them. Students themselves are not equal and hence schools cannot be blamed for not making them all equal. Of particular potency has been the now thirty-five year old Coleman Report, which found student success attributable to other factors besides money, such as parents' education level, wealth, and involvement in school. *See* JAMES S. COLEMAN, ET AL., U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY, 290-302 (1966).

120 *See* Enrich, *supra* note 15, at 156-58.

cated.[121] Finally, advocates of local control fear that the necessity of equalization of education will require subsequent application in other areas of commonly enjoyed local control such as garbage collection and recreational services.[122]

The concerns above, particularly with respect to local control, were all articulated in *Rodriguez* and to some extent in *Milliken*. Local control remains a cross of gold that too many states will not tread upon. However, local control may be attacked on the grounds that it is an unfair illusion for property poor districts. No matter what discretionary actions a poor district takes, its local school funding cannot match that of its wealthy counterparts.[123]

It then falls on the states to compensate for these discrepancies. Since the *Rodriguez* decision so colored many states' readings of their own constitutions' equal protection clauses, equality arguments could only trump local control on education clause grounds.[124] However, with the exception of a few state constitutions,[125] most states do not readily permit conferral of a fundamental right status on education. Thus equality arguments require some liberal textual construction. Depending on the clause's language and court's interpretive bent a fairly loose reading may be required.

The difficulty in textual readings is the fourth significant weakness attributed to equality claims.[126] Where a requirement of equal funding, for example, may be interpreted from an education clause, such an obligation on the state might not be permitted if the subsequent funding formula and scheme violated other constitutional clauses regarding local control of property taxes.[127] The greater challenge may be, however, to even interpret an obligation of equal funding from the education clause

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121 *See* AMY GUTMANN, DEMOCRATIC EDUCATION 139-48 (1999).

122 *See* Enrich, *supra* note 15, at 161.

123 This argument was made most forcefully in *Serrano* regarding the illusion of local control for poor districts. Serrano v. Priest, 487 P.2d 1241, 1260 (Cal. 1971).

124 In addition, where an equality argument might be principally based on the state's equal protection clause rather than an education clause, the specificity of a potentially less expansive state right to education clause would take precedence over the general equality clause in constitutional interpretation, thereby inhibiting the constitutional equality argument. *See* Enrich, *supra* note 15, at 163.

125 William E. Thro considers these states to include Georgia, Illinois, Maine, Michigan, Missouri, New Hampshire, and Washington. In his analysis of state education clauses Professor Thro developed four categories of state constitutional language. His taxonomy may serve as a prognostic aid for education finance litigation. Category I clauses reveal only a slight state duty to provide education. Category II clauses state certain standards, while category III provisions have more specific and stronger language regarding the state duty. Finally category IV clauses read so as to easily infer education a fundamental right. *See* William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639 (1989).

126 *See* Enrich, *supra* note 15, at 162-66.

127 *See id.* at 163.

alone. Given the dominant precedent *Rodriguez* still holds over even state constitution equal protection clause interpretation in terms of education, the furtive search for equality in education clauses may be the only chance for a constitutionally required equal education.[128]

B. STRENGTHS OF ADEQUACY

Where state courts might have resisted invalidating state education finance schemes due to notions of judicial restraint from interference in the business of the coordinate political departments, some litigants attributed these failures to reliance on equality standards.[129] One fault in the equality standard was that it entailed expansive and liberal interpretation of constitutional provisions. Such necessarily broad interpretation might suggest the matter was a nonjusticiable political question. Vague equality arguments could often evince charges of "a lack of judicially discoverable and manageable standards for resolving it. . ."[130] If equality was susceptible to charges that the claim lacked textual basis and a coherent means of measurement, then adequacy was hoped to resolve these criticisms.

The principal support for an adequacy standard is that it is clearly textually embedded in each state's education clause.[131] Thus the judicial inquiry may simply involve inquiring whether the state has fulfilled the textual mandate as articulated in the education clause. Proponents argue the adequacy inquiry contrasts with the equality argument, which either required the two-step process of also examining the equal protection clause and/or then discerning a specific requirement of equality in the education clause, and all of the attendant difficulties with such a process as outlined above.[132]

The second advantage of the adequacy argument is its exclusivity. Unlike equality, which may be applied as a measure of all government services, adequacy, as rooted in the education clauses, serves to only calibrate the constitutionality of education. Thus, local leaders need not fear the extension of this measurement to other realms of local government.[133]

Third, adequacy appeals to many because it appears to only promise a "floor" criteria and no "ceiling" for education funding.[134] In contrast to equality, which suggests to many an inevitable restriction on maximum

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128 The taxonomy of state constitution education clauses suggests the difficulty with such a process. *See* Thro, *supra* note 125.

129 *See* Heise, *supra* note 57.

130 Baker v. Carr, 369 U.S. 186, 217 (1962).

131 *See* Enrich, *supra* note 15, at 166.

132 *See id.* at 166-67.

133 *See id.* at 168

134 *See id.*

amount of funding, adequacy merely requires a minimal level of funding to be in accord with the constitution. Thus adequacy arguments are not susceptible to as many fears of the wealthy or local control advocates.[135] Adequacy would appear to require a less comparative assessment than inheres to equality.

The *Rose v. Council for Better Education*[136] Kentucky Supreme Court decision illustrates many of the critical components of the adequacy standard. First, the court began with the Kentucky constitutional provision requiring the legislature to "provide for an efficient system of common schools throughout the State."[137] Notably the court recognized education as a fundamental right under its state constitution (a step not necessarily taken by all state courts that have employed the adequacy standard). Second, the court studied educational data including comparative test scores and drop-out rates.[138] Third, the court examined the state's education spending in comparison to the rest of the nation.[139] Finally, the court did not simply hold that the funding of Kentucky schools was unconstitutional, but that the entire education system was constitutionally inadequate.[140] The court stated "an adequate education must have as its goal the development within each child of seven basic capacities."[141]

Providing a primarily substantive and expansive definition permitted the court to remain within the traditional domain of judicial interpretation (albeit liberal) yet provide some general framework from which the legislature could then act. One participant in the Kentucky school finance case noted that the adequacy standard as

> used by the court enabled it to define the intent of the constitution, set forth constitutional guidelines, and compel legislative adherence without seriously encroaching on legislative powers. . . . The court's unique approach in effecting the comprehensive invalidation of the entire system tended to preserve legislative autonomy rather than to diminish it, and in so doing the court was able to maintain the proper balance in the separation of powers.[142]

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135 *See id.*

136 790 S.W.2d 186 (Ky. 1989).

137 *Id.* at 216.

138 *See id.* at 197.

139 *See id.*

140 *See id.* at 215.

141 *Id.* at 212; *see also supra* Section I. B. 3.

142 Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 HARV. J. ON LEGIS. 341, 364-65 (1991).

The "guidelines" holding facilitated a quick legislative response including tax legislation that resulted in significant increases in public school funding for all schools, ranging from 8% changes in the richest districts to 25% growth in the poorest.[143]

C. ADEQUACY'S WEAKNESSES

Adjudicating adequacy claims requires courts to insert themselves firmly in the educational realm. The first step in the deliberative process involves defining an adequate education. Where equality claims mainly demanded an inquiry into disparity of economic inputs, the adequacy claims necessitate a more complex and expansive analysis. A substantive definition of an adequate education requires a prescription of some minimum inputs into schools, but also of outputs from schools. The composition of these inputs and outputs is not self-evident under adequacy analysis. Rather than confine itself to measurements of dollars inserted into a school district as compared to another district, the adequacy standard invites measurements of many education sectors, including but not limited to teacher experience, classroom size, reading levels, and enrichment programs, in addition to state funding. These different facets of education undergo an interdependent analysis. For example, the minimum adequate levels of a reading score (output) inform the requisite number of dollars to be spent (input). It is unclear whether these levels of achievement outputs are to be derived from standardized tests, statewide average school scores, nationwide average school scores, legislatively determined educational goals, or simply judicial fiat.

Whether an adequacy standard provides an easier ground of constitutional interpretation than equality certainly warrants further discussion. Just what constitutes an adequate education would appear to have far less constitutional basis than what constitutes an equal education. Any methodological difficulties encountered in measuring equality remain with adequacy and are arguably even more pronounced.

Applying the equality standard is largely a comparative process, well suited to the court's competency and legitimacy. The process of defining an adequate education requires the court to delve into the more creative policy realm of the legislature, at the very least raising questions as to institutional propriety and capability. While the *Rose* decision appeared to enjoy positive legislative as well as popular response, one must not ignore that the court found education to be a fundamental right.[144] Such a holding brought many of the equality arguments to the fore. This

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143 *See id.* at 343 n.80.

144 *See* 790 S.W.2d 215.

practice of merging equality standards into the adequacy argument remains common.

Arguments that adequacy claims provide refuge from the local control concerns raised by equality causes of action are of questionable validity. Given a state's limited budget and resources, a judicial order that all districts must fund at a minimum level may often interfere with the state funding of wealthy districts. A state may need to raise the percentage of money it allots to poorer districts to achieve the adequate level. Hence, the percentage of that likely finite amount of state funding will diminish the coffers of the wealthy districts which are already well above the adequate floor. While the wealthy district may choose to increase its own local funding, the adequacy mandate would infringe on the previously enjoyed local spending amount.

It is the very palatability of adequacy claims to wealthy districts that may give one pause to endorse this approach. While adequacy may receive less legislative resistance because a verdict against the state does not require leveling funding, the verdict would not heal the disparities between districts and their students. As many courts have noted, education serves the purpose of enabling students to compete in the workplace. The workplace does not remain intradistrict forever. Presumably, even where all children receive an adequate education, the inequities permitted would no doubt produce students who could always outperform their peers who had received inferior educations, however adequate they may have been. The most significant weakness of the adequacy argument is that it often presumes segregated, localized worlds.[145]

Finally, the adequacy argument lacks the very normative force of equality. To disparage the latter as merely rhetorical is inaccurate. Adequacy arguments, for their very circumscribed specificity in education, may diminish the importance of education to society and preserve inequitable disparities. Justice Marshall recognized this anomaly in his dissent in *Rodriguez:*

> Even if the Equal Protection Clause encompassed some theory of constitutional adequacy, discrimination in the provision of educational opportunity would certainly seem to be a poor candidate for its application. Neither the majority nor appellants inform us how judicially

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145 The emphasis on continued segregated improvement of schools is Professor Ryan's fundamental criticism of education finance reform strategies. Ryan suggests a strategy to improve schools by encouraging integration; such efforts may even include a voucher system. The courts' acceptance of the continued state of segregated schools, no matter how "adequate" each may be, demonstrates the continuing hold *Milliken* still has on courts and society today. Ryan's argument is underscored by much recent data suggesting a strong correlation between successful student outcomes and integrated classrooms. *See* Ryan, *supra* note 23, at 307.

> manageable standards are to be derived for determining how much education is enough to "excuse" constitutional discrimination. One would think that the majority would heed its own fervent affirmation of judicial self-restraint before undertaking the complex task of determining at large what level of education is constitutionally sufficient.
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> . . . .
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> In my view, then, it is inequality - not some notion of gross inadequacy - of educational opportunity that raises a question of denial of equal protection of the laws. I find any other approach to the issue unintelligible and without directing principle.[146]

Equality arguments raise education to that more fundamental perch. Equality does not defer simply to the whims of the legislature. State courts should recall the Supreme Court's famous words in *Brown*: "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."[147] Whether in the guise of adequacy arguments or not, state courts should not ignore the Supreme Court's rhetoric of equality.

IV. THE NEW YORK EXPERIENCE: FROM EQUALITY TO ADEQUACY

On January 10, 2001 a New York trial court ruled that the New York state education system was unconstitutional.[148] The court ruled that the funding system was invalid on both adequacy and equality grounds. First, Judge DeGrasse found that New York had failed to provide adequate funding to assure New York City students a "sound basic education" guaranteed by the New York State Constitution Education Article.[149] Second, the court found the system unequal due to its "adverse and disparate impact upon the city's minority public school students," thus violating the specific implementing regulations of Title VI of the Civil Rights Act of 1964.[150]

The trial court verdict was hailed by many as a necessary decision that had been too long in coming. Meanwhile, Governor Pataki prom-

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146 San Antonio Indep. Sch. Dist. v. Rodriguez , 411 U.S. 1, 89-90 (1972) (Marshall, J., dissenting).

147 347 U.S. at 493.

148 *See* Campaign for Fiscal Equity v. State, 187 Misc.2d 1 (N.Y. Sup. 2001).

149 *See id.* at 3.

150 *See id.*

ised to appeal the decision.[151] The verdict was not merely the culmination of a case begun back in May of 1993 but rather may be seen as the evolution of a different set of claims brought in a separate case from 1982.

In order to best understand how the court ruled as it did, it is necessary to understand why the very claims the court decided even materialized at all. The very substance of the plaintiffs' claims in *CFE v. New York* owe much to the earlier New York Court of Appeals decision on the legitimacy of these claims in 1995[152] and must be traced back to the 1982 New York Court of Appeals *Levittown v. Nyquist*[153] decision which upheld the education financing system on different grounds. In addition, facts outside of the courtroom also contributed to the possibility of ruling the education finance system unconstitutional. With the New York Assembly's assumption of a larger role in education and the rise of the standards based movement, the adequacy argument became more palatable and less intrusive to the legislature.[154]

A. *LEVITTOWN* V. *NYQUIST*

The plaintiffs in the *Levittown* case included a number of property poor districts as well as intervenors from four of the largest cities in the state.[155] The plaintiffs contended that the public school financing system violated the State and Federal Equal Protection Clauses as well as the State Education Article because the system resulted in "grossly disparate financial support (and thus grossly disparate educational opportunities) in the school districts of the state."[156] The Court of Appeals candidly acknowledged the inequalities in availability of financial aid and accepted the argument that such disparity in aid correlated with the unequal qual-

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151 *See* Richard Perez-Pena with Abby Goodnough, *Pataki to Appeal Decision by Judge on Aid to Schools*, N.Y. TIMES, Jan. 17, 2001, at A1. This case was just argued before the First Department, Appellate Division, on October 25, 2001. A decision is expected within two to four months.

152 *See* Campaign for Fiscal Equity v. New York, 655 N.E.2d 661 (N.Y. 1995).

153 439 N.E.2d 359 (N.Y. 1982).

154 *See* Richard Rothstein, *The Unforeseen Costs of Raising Standards*, N.Y. TIMES, Jan. 11, 2001, at B4.

155 *See* 439 N.E.2d 359, 361-62.

156 *Id.* The property poor districts argued that the system's dependence on property taxes enabled property-rich districts to raise more local tax revenue permitting them to provide educational services beyond the fiscal ability of poor districts. The intervenors did not cite property tax inequities as the source of disparate education services but pointed to four factors peculiar to cities: (1) municipal budgets required local funds for certain noneducation purposes ("municipal overburden"); (2) disparate regional costs which adversely affected the municipal dollar's value; (3) greater student absenteeism which diminished the State aid that was determined on the basis of daily attendance; and (4) larger concentrations of students with special education needs and hence higher costs. *See id.* at 362.

ity and quantity of educational opportunity.[157] However, at the outset of the opinion, the court noted that no claim was made that the quality or quantity of education in the property poor districts or the urban regions was below that of the minimum standard set by the Board of Regents.[158] Such distinctions bear significant relevance to the differences between the equality and adequacy arguments and may well have served as a road map of sorts for the later education finance challenge.

1. *The Equal Protection Claims*

The court held that under *San Antonio School District v. Rodriguez* the Federal Constitutional Equal Protection claim failed.[159] The court dismissed the intervenors' "metropolitan overburden" claims on the grounds that "the cited inequalities existing in cities are the product of demographic, economic, and political factors intrinsic to the cities themselves, and cannot be attributed to legislative action or inaction."[160] The court's reluctance to lay responsibility for the disparity on the legislature may indicate some doubt as to the prudence of judicial pronouncement on financing schools. Though the court found the system constitutional, undergirding the decision may likely have been concerns of nonjusticiability.[161]

The court of appeals also found the education financing system did not violate the New York Constitution Equal Protection Clause.[162] The court, citing *Rodriguez* as well as New York precedent, applied the rational basis test to determine the validity of the educational funding and opportunity disparity.[163] The court found preserving and promoting local control of education to be a legitimate government interest reasonably related to the financing system, thereby justifying district disparities.[164]

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157 *See id.* at 363 n.3.

158 *See id.* at 363.

159 *See id.* at 364. The dissent sought to distinguish this case from *Rodriguez*, arguing that this case presented a different claim that the statute authorized inequitable state school financing based upon incorrect calculations of needs and funding capacities of city districts. *See id.* at 375.

160 *Id.* at 365.

161 The Court of Appeals questioned whether it even had the jurisdiction to declare the entire funding system unconstitutional, at the very least because of the attendant difficulties of creating remedies and implementation. The court did however, suggest that clearly justiciable issues would include legislative appropriations of state aid to localities owing to legislative determinations of geographic boundaries of districts and authorization of the districts' real property taxation. *See id.* at 364.

162 *See id.* at 366.

163 *See id.* at 365. The trial court had applied a standard of strict scrutiny under which that court found the system invalid. The Appellate Division applied intermediate scrutiny and also found the system unconstitutional. *See id.*

164 *See id.* at 366.

In contrast, the dissent would have upheld the Appellate Division's application of intermediate scrutiny and found the education finance system violated the New York Equal Protection Clause.[165] According to the dissent the funding disparities were unconstitutional because (1) equality of educational opportunity was an important State constitutional interest; (2) the disparities were due to classifications based upon the property wealth of districts; (3) given limited local tax bases, preserving and promoting autonomy through local control is implausible; and (4) the State had not shown that the local interests could not be achieved by less intrusive means.[166]

The court dismissed the contention that the state constitution's inclusion of an education clause demanded heightened equal protection scrutiny. The court suggested such an argument would apply to Federal Constitutional analysis but not to the state constitution. The court distinguished the state constitution as a document that did not contain an exhaustive list of state powers, and thus the items contained in the constitution did not represent a "hierarchy of values" and should not be afforded more significance for equal protection analysis.[167] The problem inherent with this argument is it would appear to place the state constitution on the same level as statutory obligations. Under such a view of the state constitution, the significance of any constitutional provision is thus placed in doubt. In addition, the dissent suggested that the Tenth Amendment's reservation of all nondelegated powers to the States gives the State Constitution's Education Article added significance. Given the absence of an education provision in the Federal Constitution, the State Constitution did not have to articulate this obligation. Thus its very explicit textual citation suggests the importance the State Constitution framers placed on education.[168]

2. *The State Education Clause Claim*

The New York Education Clause reads: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated."[169] Refusing the gloss of legislative history and loose textual construction, the court found the state public school financing system did not violate the educational clause.[170] The majority noted the clause does not refer to

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165 *See id.* at 374 (Fuchsberg, J., dissenting).

166 *See id.* at 375.

167 *See id.* at 374 n.5.

168 *See id.* at 370.

169 N.Y. CONST. art XI, § 1. W.E. Thro places the New York Education Article in Category I of his taxonomy of State education clauses, indicating the relative difficulty to infer significant duties and rights from the clause. *See* Thro, *supra* note 125, at 1662.

170 *See* Bd. of Educ. of Levittown v. Nyquist, 439 N.E.2d 359, 369 (N.Y. 1982).

equal education, nor does it foreclose districts from making education expenditures exceeding those of other districts, nor does it abolish local control.[171] The court also observed that the clause was crafted in 1894 at a time when there were 11,000 local school districts across the state with varying property wealth and educational opportunity.[172]

Denying any constitutional mandate of equality of education, the court of appeals found that the clause required "a State-wide system assuring minimal acceptable facilities and services."[173] Thus, the court constructed a largely structural inquiry regarding the constitutional validity of the education system, seemingly without any adjectival component. The inquiry is twofold, simply asking: (1) whether there is a system in place providing education; and (2) whether what is being provided is in fact an education.

The state may easily fulfill the systemic component by providing a structure that simply exceeds "unsystematized delivery of instruction."[174] The court then defined the constitutional requirement of education as "a sound basic education," and found that the fact that New York's average per pupil expenditures exceeded those of all but two states demonstrated the state did meet the constitutional obligation.[175]

In dissent, Judge Fuchsberg utilized legislative history to craft a more expansive interpretation of the education clause and applied a more rigorous standard by which to measure state education financing.[176] The dissent noted that the spokesman for the Education Committee of the Constitutional Convention regarded the Education Article as "'more important to the people of the State, to every man, woman and child in the State, than any other article that has been under consideration in this Convention.'"[177] Moreover, a preliminary report on an Education amendment stated "'the first great duty of the State is to protect and foster its educational interests.'"[178] The report went on to add that "[n]o desire to confine the new Constitution to the narrowest possible limits of space should prevent the adoption of an enactment declaring in the strongest possible terms the interest of the State in its common

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171 *See id.* at 368.

172 *See id.*

173 *Id.*

174 *Id.* The court understood "system" to only apply to "a system of free common schools," *i.e.* education, and not to maintenance and support. Such an interpretation precludes a view of the education clause as requiring a systemic, *i.e.* uniform and equal maintenance and support, *i.e.* financing, of education. *See id.* at 369 n.7.

175 *See id.* at 369.

176 *See id.* at 371. In what may be characterized as executive contemporary reporting, the dissent also noted that in response to the lower courts' decisions the Governor had proposed a program to achieve "equal educational opportunity." *See id.* at 370.

177 *Id.* at 371.

178 *Id.*

schools.'"[179] Though interpreting the education clause as a far more stringent demand on the quality of education, even under the standard of "sound and basic education" the dissent would have found the current education finance system unconstitutional.[180] Judge Fuchsberg further argued that as acceptable education levels have risen over the century the constitutional requirements must maintain their relevance. Advocating a dynamic interpretation of the Education Article, Fuchsberg envisioned the Federal Constitution as the floor for individual rights while the State Constitution could build the ceiling.[181]

3. *The Political Question*

Throughout the opinion the court demonstrated its ambivalence over the justiciability of this matter. The majority characterized the ultimate issue before the court as "a disciplined perception of the proper role of the courts in the resolution of our State's educational problems, and to that end, more specifically, judicial discernment of the reach of the mandates of our State Constitution in this regard."[182] The court disparaged invalidating the education finance system on inequality grounds as result-oriented and trespassing on the legislative domain. Such judicial actions ignore separation of powers concerns, disrespect the legislature, and deprive the court of its neutral position.[183]

Having articulated a fairly minimal standard of "sound basic education," which will rarely require judicial intrusion, the court emphasized its separation of powers concerns by stressing its hesitancy to void legislative educational financing decisions. The court explained:

> Because decisions as to how public funds will be allocated among the several services for which by constitutional imperative the legislature is required to make provision are matters peculiarly appropriate for formulation by the legislative body (reflective of and responsive as it is to the public will), we would be reluctant to override those decisions by mandating an even higher priority for education in the absence, possibly, of gross and glaring inadequacy - something not shown to exist in consequence of the present school financing system.[184]

Citing anti-majoritarian anxiety, the court appeared largely concerned with prudential considerations implicating its own institutional le-

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179 *Id.*
180 *See id.* at 373, 375.
181 *See id.* at 374.
182 *Id.* at 370.
183 *See id.*
184 *Id.* at 369

gitimacy rather than competency. The reference to "gross and glaring inadequacy" evinces a remarkably low standard for the legislature to meet in order to escape judicial intervention. It is unclear what constitutes such a low level of education that would resist judicial deference to the legislature.

B. *CFE* v. *NEW YORK*

Cognizant of the obstacles created by the *Levittown* decision, in 1993 the Campaign for Fiscal Equity, Inc. (CFE)[185] brought a cause of action in the State Supreme Court in Manhattan, alleging the state education finance system denied New York City students the opportunity for a basic sound education.[186] Citing *Rodriguez* and *Levittown*, the court struck down the plaintiffs' Federal and State Equal Protection claims.[187] In addition, the court dismissed the plaintiffs' claims based on Title VI of the Civil Rights Act of 1964 due to a lack of any allegations of discriminatory intent.[188] The court decision permitted an adequacy argument to be made that the financing system did not provide for an opportunity of an education satisfying minimum requirements. The court also permitted the plaintiffs' claim under implementing regulations of the Federal Department of Education under Title VI, which did not require discriminatory intent but rather disparate impact.[189]

1. *The 1995 Court of Appeals Decision*

In 1995 the matter came before the New York Court of Appeals on an appeal from the Appellate Division, which had granted the State's motions to dismiss CFE's Education Article claim because it did not allege a violation as so defined in *Levittown*, as well as a motion to dismiss CFE's Title VI cause of action. The Court of Appeals found the plain-

185 CFE is a coalition of school boards, community organizations, and advocacy groups. *See* Campaign for Fiscal Equity v. New York, 162 Misc.2d 493 (1994).

186 *See id.*

187 *See id.* at 499.

188 *See id.*

189 *See id.* at 499-500. The factual allegations of these claims were also quite similar to those in *Levittown*. The same injuries encapsulated in the "municipal overburden" term were asserted here. Importantly, the plaintiffs' discriminatory impact claim involved allegations that 74% of New York State's minority students attend city school, that these students constitute 81% of the city school enrollment in contrast with 17% of school enrollment in the rest of the state, and that the city's minority students receive 12% less aid than the State average. In addition, the city comprises 37% of State students but receives only 34% of all State education financing. *See* Campaign for Fiscal Equity v. New York, 655 N.E.2d 661, 670, n.9 (N.Y. 1995).

tiffs had pleaded sustainable claims under the Education Article and Title VI's implementing regulations.[190]

a. Defining the Adequacy Standard

The court made clear that *Levittown* did not preclude the plaintiffs' claim because the present adequacy argument was precisely what that court stated was *not* before it in 1982.[191] Whether the plaintiffs' adequacy claim was in fact a viable cause of action was the critical question before the Court of Appeals. Without any explanation of its rationale the court then proceeded to greatly expand upon the *Levittown* decision's construction of the Education Article. The court elaborated upon what constituted a sound and basic education, stating

> [s]uch an education should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury. If the physical facilities and pedagogical services and resources made available under the present system are adequate to provide children with the opportunity to obtain these essential skills, the State will have satisfied its constitutional obligation.[192]

While the Court of Appeals exegesis added many words to guide a legislature's and a court's judgment, the substance of skills necessary for productive civic participation remained elusive.

Recalling the *Levittown* reference to "minimum State-wide educational standards established by the Board of Regents and the Commissioner of Education," CFE proposed an adequacy standard based on the state's own Regents Learning Standards and standardized competency examinations.[193] The Court of Appeals resisted such arguments, characterizing some of the Regents' standards as "aspirational," and advising

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190 *See* Campaign for Fiscal Equity v. New York, 655 N.E.2d 661, 663 (N.Y. 1995). The majority held the community school board plaintiffs lacked capacity to sue and dismissed all claims made on behalf of community school board plaintiffs. *See id.* at 663 n.1.

191 *See id.* at 665. *See also* Bd. of Educ. of Levittown v. Nyquist, 439 N.E.2d 359, 363 (N.Y. 1982) (observing that "no claim is advanced in this case . . . that the educational facilities or services provided in the school districts . . . fall below the State-wide minimum standard of educational quality and quantity").

192 *Campaign for Fiscal Equity v. New York*, 655 N.E.2d at 666. The court went on to require "minimally adequate physical facilities" to provide sufficient light, space, heat, and air. "Minimally adequate instrumentalities of learning" must include desks, chairs, pencils and "reasonably current textbooks". The court also required a "minimally adequate teaching of reasonably up-to-date curricula . . . by sufficient personnel adequately trained." *See id.*

193 *See id.*

"prudence should govern utilization of the Regents' standards as benchmarks of educational adequacy."[194]

Finally, the Court of Appeals made clear that it could not and would not determine what constitutes a sound and basic education at such an early stage in the proceedings. This responsibility would fall back upon the State Supreme Court. The Court of Appeals explained that "[o]nly after discovery and the development of a factual record can this issue be fully evaluated and resolved. Rather, we articulate a template reflecting our judgment of what the trier of fact must consider in determining whether defendants have met their constitutional obligation."[195] The trial court must determine whether students in the plaintiffs' districts receive the opportunity to obtain the requisite skills for productive juror and voter duty. Finally, the trial judge must find "a causal link between the present funding system and any proven failure to provide a sound basic education to New York City school children."[196] Delegating the responsibility of defining a "sound and basic education" to the trial court on the grounds that it was a fact laden decision obfuscates the court's probable discomfort with the substantive education policy component underlying the adequacy cause of action.

Notwithstanding the potential anxiety, the court departed from the limited *Levittown* understanding of what constituted a sound basic education and its restriction of judicial involvement in the realm of education policy. In his concurrence, Judge Levine found the adequacy claim legally sufficient but took great exception to the majority's template or expansion of the *Levittown* definition of education.[197] Judge Levine cautioned the majority's standard "invites and inevitably will entail the subjective, unverifiable educational policy making by Judges, unreviewable on any principled basis, which was anathema to the *Levittown* Court."[198] Similar separation of powers concerns were articulated even more strongly in the dissent. Judge Simons criticized the majority's creation of the new adequacy standard on five grounds. Simons first echoed the *Levittown* political question contention that courts should generally not intrude on constitutional responsibilities delegated to the legislature and executive unless they did not "establish a State-wide system of education and fund it."[199] The dissent considered this duty fulfilled so long as the structure of education was created. Only this duty was reviewable by the court. The majority's new standard, however, is qualitative, enabling the

194 *Id.*

195 *Id.*

196 *Id.* at 667.

197 *See id.* at 671.

198 *Id.* at 675 (Levine, J., concurring).

199 *Id.* at 681 (Simons, J., dissenting).

court to both define the substantive standard of education and to review its implementation by the other branches.[200]

Second, the legislature is best suited to make education aid evaluations due to its responsibilities of reviewing education needs and distributing resources including financial assistance. Given the ample representation of New York City in the State Assembly, the legislature must be aware of the inferior qualitative status of education opportunity in the city. Absent a judicial finding that the funding is "grossly inadequate" the courts should not force states to do more.[201]

Third, the Education Article does not provide an individual constitutional right but prescribes a general duty. Reiterating his understanding of the Education Article as assigning a solely structural obligation and not a qualitative one, Judge Simons stated "[t]he Constitution is satisfied if the majority has worked its will through its elected officials and their action represents a reasonable response to the duty imposed."[202] Since the Education Article imposes an obligation on the government rather than providing an individual entitlement, the court cannot be justified in placing qualitative burdens on the state.

Fourth, judicially compelling greater funding of education encroaches on the legislature's appropriations powers.[203] The dissent argued that either a general increase in education funding or a specific reallocation of funds to New York City would interfere with the legislature's power to determine State priorities and distribute resources.[204] Finally, the dissent expressed the concern that the court's assumption of qualitative judicial oversight of educational opportunity sets a precedent for other areas of government service ranging from ski trails to nursing homes.[205]

Thus the fundamental attack on sustaining the adequacy claim was entirely motivated by the dissent's concerns over judicial legitimacy and capacity. Notwithstanding the changes on the Court of Appeals over thirteen years, these anxieties regarding political question doctrine and justiciability appear more pronounced in the wake of this adequacy claim as opposed to the earlier equality cause of action. Doubtless, the rhetoric is often more pitched in dissent than in a majority opinion, but the concerns may in fact have a greater validity in the context of adequacy rather than equality. Indeed, it is noteworthy that Judge Simons did not dissent from the part of the majority's opinion sustaining a cause of action alleg-

200 *See id.* at 676.
201 *See id.* at 681.
202 *Id.*
203 *See id.*
204 *See id.*
205 *See id.* at 682.

ing violation of the Title VI implementing regulations.[206] Hence the dissent was immunized from attacks charging result-oriented jurisprudence. Simons would entertain claims that the education finance system does have a disproportionate impact on minority children.

b. The Equality in Title VI Implementing Regulations

As with so many of the heralded third wave cases, the adequacy claim of *CFE v. New York* appears unable to shirk its predecessor claim of equality. Here, however, the equality claim is neither rooted in Federal or State Equal Protection Clause nor in the New York Education Article, but rather derives from a Federal statute.

Title VI prohibits discrimination "on the ground of race, color, or national origin . . . under any program or activity receiving Federal financial assistance."[207] The difficulty inherent in a Title VI claim is it requires proof of intent to discriminate.[208] However, the plaintiffs also alleged a violation of the United States Department of Education's regulations implementing Title VI.[209] Though the regulations address the same nature of and substantive discrimination as Title VI itself, the regulations do not require proof of discriminatory intent to sustain an action. Rather, "[p]roof of discriminatory *effect* suffices to establish liability under the regulations promulgated pursuant to title VI. . ."[210] In addition, the plaintiffs must also show that the practice having this adverse effect is not "adequately justified."[211] Even where the State may prove a legitimate reason, the plaintiffs can still prevail if they demonstrate less discriminatory means could have achieved the State's interests.[212]

The Court of Appeals sustained CFE's implementing regulations cause of action because it met the two components of a valid claim.[213] First, plaintiffs alleged a disparity of total and per capita education spending between the minority students of New York City and the nonminority students of the rest of the State.[214] Second, the State did not aver any justification for the disparity.[215]

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206 *See id.* at 676.

207 42 U.S.C. § 2000d (1994).

208 *See Campaign for Fiscal Equity*, 655 N.E.2d at 669.

209 *See id.* at 661; 34 CFR 100.3 [b] [2].

210 *Campaign for Fiscal Equity*, 655 N.E.2d at 669.

211 *Id.* at 670.

212 *See id.*

213 As recipient of Federal Funds for education New York was within the ambit of these regulations.

214 *See Campaign for Fiscal Equity*, 655 N.E.2d at 670. The State always contended that it was the City that was at fault for any disparate impact. The State argued it merely distributed funds to the city, which was then responsible for allocation to the various districts. *See id.*

215 *See id.*

c. The Trial Court Decision

Some five years, 111 trial court days, 72 witnesses, and 4,300 documents later, the New York State Supreme Court ruled the State education finance system unconstitutional. This holding was based upon the Education Article adequacy claim. The court also held the plaintiffs had established their Federal Law claim of discrimination under the Title VI implementing regulations. With respect to remedies the court returned the matter to the legislature and executive for resolution of a new financing system. Such a gesture was a pyrrhic victory at best for foes of judicial intervention. The court abjured the State to have crafted a new system by September 15, 2001 when the court would judge its viability.[216] The fences between the branches of government had been substantially diminished in size.

The court made significant findings regarding education policy that would bind the legislature and executive, ranging from the determination that there was a correlation between financial assistance and student success to articulating specific education goals that should serve as the standard for measuring the adequacy of student education.[217] Throughout the case, the plaintiffs sought to utilize new Regents Learning Standards produced by the State Education Department as the standard of an adequate education.[218] Such a tactic placed the State in the peculiar position of seemingly denigrating its own new standards as "aspirational," and forced the state to argue for a lower standard of adequacy.[219] In fact, the State continually argued for lower expectations of education outcomes, directly at odds with its own Education Department's initiatives and popular sentiment.[220]

Despite the awkward State defenses and astute strategies of the plaintiffs' utilization of the very education standards proposed by the state, the verdict is mired in a morass of complex educational policy. Although Judge DeGrasse excoriated the current financing system as without formula and a "three men in a room" determination, it is unclear whether the judicial oversight by one man over many qualitative components of education is any better.[221] Doubtless, concerns preponderate that the court has overstepped the bounds of its institutional competency. Whether this is in fact the case may well be a matter to be decided more squarely on appeal.

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216 187 Misc.2d at 116. The Septmeber 15, 2001 deadline was stayed given the present appeal.

217 *Id.* at 114.

218 *See* Campaign for Fiscal Equity, Inc., 1 *In Evidence: Policy Reports from the CFE Trial, Setting the Standard for a Sound Basic Education*, Oct. 2000, at 4.

219 *Id.* at 11.

220 *See* Rothstein, *supra* note 154.

221 *Id.* at 83.

Finally, the Title VI implementing regulations claim played a larger role in this litigation than as simply an overture to public sentiment. Although the remedies for such a violation are provided for in other regulations, the utilization of this Federal law claim served the adequacy state claim very well. To have found a violation of the regulations and yet upheld the education finance system as constitutionally adequate would have been a judicial affirmation of an unequal education system. This finding would have placed state standards beneath that of Federal standards. Furthermore, the Federal holding may insulate both the judiciary and the education system from attack. Neither constitutional amendment nor other political machinations would alter the finding of discriminatory effect. In addition, the Federal claim compelled the court to examine more data on racial disparities, merging the claims and emphasizing the inequitable results of the education finance system. The implementing regulations claim ensures that race is not forgotten.

CONCLUSION

Almost fifty years after *Brown v. Board of Education* we remain far from that cherished idea of equal education. The concurrent demise of the civil rights movement and desegregation largely removed racial integration from the landscape of education reform. Technological advancement and dismay over falling test scores have brought education revitalized attention.

Focusing on the substantive content of education, one danger of the adequacy claim is it gives rise to criticisms of nonjusticiability. Courts become more entrenched in the creation of educational policy rather than adjudicating its legality. Unfortunately, given the powerful impact of prior Federal and State cases regarding equality claims, adequacy may often be a litigant's and court's only recourse to correcting education finance wrongs. However, litigants should take note of the dual claim strategy employed in *CFE v. New York* and plead additional equality causes of action whenever possible.

Concentrating on financial disparity, the greater danger of the adequacy claim is its appeasement of local control justification and near endorsement of a newly enlightened "separate but equal" doctrine. Too many advocates of local autonomy adhere to the illusion that this cherished internal distinction has no outward effect. Without focusing on equality, education finance litigation permits us to ignore the fact that local control can too easily justify a hierarchy of education funding, opportunity, and achievement. Without merging such concerns of equality within an adequacy standard, we may only replicate this dangerous cycle of disparity and segregation.