School Finance Battles: Survey Says? It's All Just a Change in Attitudes

Joseph S. Patt[*]

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society .... In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[1]

These words, written by Earl Warren in 1954, signaled both an end to the court's approval of segregation in public schools and the beginning of the Supreme Court's journey to expand rights for all Americans.

In the 1960s, the civil rights and anti-poverty communities began to see school finance equality as a major goal. This objective was consistent with their larger aims of guaranteeing the claims of the poor to governmental services.[2] Since the Warren Court had used the Equal Protection Clause to support dramatic social change,[3] the Equal Protection Clause seemed the logical weapon to use to fight this battle.[4]

Public school systems are supported by a mix of federal, state and local sources. Federal funds account for a small fraction of total education expenditure and are focused on specific programs such as school lunches and special education.[5] Most of the money for education comes

---

* M.S./B.S., Yale University, 1995; J.D., Harvard Law School, 1999. The author would like to thank Professor Joseph Singer for his guidance and comments on earlier drafts. In addition, thanks to the editors of the *Harvard Civil Rights-Civil Liberties Law Review*, especially Emily Frug, Luz Herrera, Darin Johnson, Jonathan Soros, and Mike Zamore for their hard work.

[1] Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

[2] *See* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 115–28 (1995).

[3] *See* Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9–11 (1969).

[4] *See* Enrich, *supra* note 2, at 124–25.

[5] Currently, the federal government spends approximately $20 billion on education. *See* Jonathan Weisman, *At Uneasy Time; Clinton to Offer State of Union*, BALTIMORE SUN, Jan. 19, 1999, at 1A. By comparison, the State of California alone spends $29.9 billion. *See* Nick Anderson, *Education: An Exploration of Ideas, Issues and Trends in Education*,

from local and state funds. School districts levy taxes on property within their borders. These taxes, referred to as millages, are usually subject to referendum by the residents of the district. State governments then supplement these millages with state funds allocated on the basis of a district's need. Despite the state supplements, these systems virtually always result in great disparities in the amount of funds available per pupil from school district to school district.[6] Under the Warren Court, then, it seemed possible that an equal protection challenge might win.

By 1973, however, when a class of Mexican-American parents in San Antonio's Edgewood school district brought suit challenging Texas's scheme of school financing in *San Antonio Independent School District v. Rodriguez*,[7] the makeup of the Court had changed. Earl Warren had resigned and been replaced by Warren Burger. The court now had four Nixon appointees: Burger, Harry Blackmun, William Rehnquist, and Lewis Powell. Justice Powell, writing for the majority in *Rodriguez*, said that "[e]ducation, of course, is not among the rights afforded explicit protection under [the] Constitution. Nor do we find any basis for saying it is implicitly so protected."[8]

Following *Rodriguez*, education reformers[9] were forced to abandon federal Equal Protection challenges and turn instead to challenges based on state constitutions to fight finance disparities. Until the late 1980s, the results of the cases were quite bleak for the reformers. Before 1989, only seven out of twenty-two state supreme courts that heard school finance challenges for the first time found their finance systems unconstitutional.[10]

L.A. TIMES, Dec. 30, 1998, at B2.

[6] *See infra* Part I.A.

[7] 411 U.S. 1 (1973).

[8] *Id.* at 35.

[9] When this Note refers to "reformers" it means those pushing for greater equality and greater funding of public school education. In early school finance litigation battles these reformers were often civil rights or anti-poverty groups. *See* Enrich, *supra* note 2, at 121. More recently, the reformers have been coalitions of school districts that receive less funding under the local property tax systems, *see, e.g.*, Mark S. Grossman, *Oklahoma School Finance Litigation: Shifting from Equity to Adequacy*, 28 U. MICH. J.L. REFORM 521, 528 (1995) (describing how 40 of Oklahoma's largest school districts banded together to challenge the school finance system), or the children in these districts, *see, e.g.*, Horton v. Meskill, 376 A.2d 359, 362 (Conn. 1977). The action of poor school districts joining together parallels the action of their state senators in the legislative fights that follow. *See* Mark Yudof, *School Finance Reform in Texas: The Edgewood Saga*, 28 HARV. J. ON LEGIS. 499, 505 (1991).

[10] The states in which plaintiffs prevailed were: Arkansas, California, Connecticut, New Jersey, Washington, West Virginia, and Wyoming. *See* DuPree v. Alma Sch. Dist., 651 S.W.2d 90 (Ark. 1983); Serrano v. Priest, 557 P.2d 929 (Cal. 1976); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); Seattle Sch. Dist. v. State, 585 P.2d 71 (Wash. 1978); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1977); Washakie County Sch. Dist. v. Herschler, 606 P.2d 310 (Wyo. 1980). School finance systems were upheld in Arizona, Colorado, Georgia, Idaho, Illinois, Kansas, Maryland, Michigan, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, and South Carolina. *See* Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Thompson v.

Since 1989, however, eight out of seventeen state supreme courts, examining this question for the first time, found for the plaintiffs.[11] Furthermore, two additional states, Arizona and Ohio, revisited and overturned previous decisions upholding their methods of school financing.[12]

What makes this change in outcome particularly surprising is that the list of states where judges are throwing out school finance systems (including Texas, New Hampshire, and Montana) does not exactly read like a Rand McNally's atlas of progressive judicial activism. To put this in some perspective, in Texas, a state where defendants in capital trials are considered to have adequate representation even when their attorneys fall asleep during trial,[13] the Texas Supreme Court wrote: "Property-poor districts are trapped in a cycle of poverty from which there is no opportunity to free themselves. . . . The amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student."[14] So while the Texas courts are restricting the right to quality representation for the poor, they are dramatically expanding the right of the poor to an education.

Though some state courts are becoming more conservative on education issues, at the same time they are mandating equal funding for

---

Engelking, 537 P.2d 635 (Idaho 1975); People *ex rel.* Jones v. Adams, 350 N.E.2d 767 (Ill. 1976); Knowles v. State Bd. of Educ., 547 P.2d 699 (Kan. 1976); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); East Jackson Pub. Sch. v. State, 348 N.W.2d 303 (Mich. Ct. App. 1984); Board of Educ. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); Britt v. North Carolina State Bd. of Educ., 357 S.E.2d 432 (N.C. 1987); Board of Educ. v. Walter, 390 N.E.2d 813 (Ohio 1979); Fair Sch. Fin. Council v. State, 746 P.2d 1135 (Okla. 1987); Olsen v. State, 554 P.2d 139 (Or. 1976); Danson v. Casey, 399 A.2d 360 (Pa. 1979); Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988).

[11] Finance challenges were successful in Alabama, Kentucky, Massachusetts, Montana, New Hampshire, Tennessee, Texas, and Vermont. *See* Alabama Coalition for Equity v. Hunt, No. CV-90-883-R, 1993 WL 204083 (Ala. Cir. Ct. Apr. 1, 1993); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); McDuffy v. Secretary of the Exec. Office of Educ., 615 N.E.2d 516 (Mass. 1993); Helena Elem. Sch. Dist. v. State, 769 P.2d 684 (Mont. 1989); Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993); Tennessee Small Sch. Systems v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Brigham v. State, 692 A.2d 384 (Vt. 1997). The supreme courts that found their systems constitutional were in Florida, Maine, Minnesota, Missouri, Nebraska, North Dakota, Rhode Island, Virginia, and Wisconsin. *See* Coalition for Adequacy v. Chiles, 680 So.2d 400 (Fla. 1996); School Admin. Dist. v. Commisioner, Dep't. of Educ., 659 A.2d 854 (Me. 1995); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Committee for Educ. Equal. v. State, 967 S.W.2d 62 (Mo. 1998); Gould v. Orr, 506 N.W.2d 349 (Neb. 1993); Bismarck Pub. Sch. Dist. v. State, 511 N.W.2d 247 (N.D. 1994); City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995); Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989). Numerous states have revisited their past decisions and reaffirmed their previous holdings. *See, e.g.*, Campbell County Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995); Coalition for Equitable Sch. Funding, Inc. v. State, 811 P.2d 116 (Or. 1991).

[12] *See* Elementary Sch. Dist. v. Bishop, 877 P.2d 806 (Ariz. 1994); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997).

[13] *See Ex parte* Burdine, 901 S.W.2d 456, 456–58 (Tex. Crim. App. 1995) (Maloney, J., dissenting).

[14] Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989).

schools. In Arizona, the state supreme court recently upheld a tax credit that allows citizens to channel their taxes to organizations that support private and parochial schools.[15] This same court held in *Roosevelt Elementary School District v. Bishop*[16] that the "system the legislature chooses to fund the public schools must not itself be the cause of substantial disparities."[17] In effect, this court is demanding equal funding between public schools, while allowing private and parochial education more funds to the detriment of the public system.

The increasing frequency of favorable rulings for reformers has spawned litigation in other states. Since 1989, school finance challenges have entered the courtrooms in over thirty states.[18] For those who mount school finance challenges, it is important to understand why these efforts are successful in some states and not in others. This Note attempts to explain the change in state supreme court jurisprudence on school finance schemes. Part I provides background to this analysis by explaining how schools are financed and reviewing a system for categorizing state constitution provisions regarding education. Part II reviews the three "waves" of school finance cases since the late 1960s. Part II looks at second and third wave cases and argues that the increased plaintiff success of the third wave is not the result of a shift away from equal protection claims toward adequacy arguments by plaintiffs. Part III examines decisions by the supreme courts of Arizona and Ohio, the two courts which have switched positions on school finance, and argues that the reversals may be the product of political developments in those states and evolving attitudes toward education, not a change in the focus of litigation. This Note concludes by observing that if success in the courts is really a function of attitudes toward education then reformers should cultivate public opinion as they seek to influence judicial opinion.[19]

---

[15] *See* Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999).

[16] 877 P.2d 806 (Ariz. 1994).

[17] *Id.* at 815.

[18] *See* Clare Kittredge, *They Say Others' Examples Leave Room for a Solution Here*, BOSTON GLOBE, Jan. 18, 1998, at 1. *See also* Alan Ehrenhalt, *Schools + Taxes + Politics = Chaos*, GOVERNING MAG., Jan. 1999, at 27; Doug Haselow, *It's Time to Equalize School Spending for Students, Taxpayers*, WIS. ST. J., Feb. 24, 1999, at 11A.

[19] Several commentators have argued that judicial victories have become hollow in the wake of legislative intransigence. *See, e.g.*, Frank Macchiarola and Joseph G. Diaz, *Disorder in the Courts: The Aftermath of* San Antonio Independent School District v. Rodriguez *in the State Courts*, 30 VAL. U. L. REV. 551, 552–53 (1996).

I. Background on School Financing and State Constitution Education Clauses

A. Methods of School Financing in the United States

With one exception,[20] all states fund their public schools systems with some amount of local property taxes assessed upon the value of property within each local school district. Since differing school districts can have vastly differing property values, districts imposing the same tax rate can generate dramatically different amounts of revenue.[21] States then use one of a number of methods for supplementing the local dollars with state revenues. No state uses only local dollars to fund their schools.[22]

The simplest method of state aid to local districts is a flat grant on a per-pupil basis.[23] Since this method assures only an equal division of state revenue, it does little to eliminate inequalities in local funding. Another commonly used method is the Haig-Strayer foundation grant system.[24] This method involves the state setting an expenditure level needed to fund basic education services. School districts are required to set property taxes at or above a minimum rate. If the school districts cannot fund the basic services at that rate, the state makes up the difference. Other more complicated methods include "funding equalization plans,"[25]

---

[20] Hawaii collects all local and state taxes and then distributes the monies to local districts. *See* Norman C. Thomas, *Equalizing Education Opportunity Through School Finance Reform: A Review Assessment*, 48 U. CIN. L. REV. 255 (1979); *see also* 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, 1640 n.6 (1989).

[21] Alternatively, school districts often have to impose dramatically different tax rates to achieve the same levels of revenues. For example, if a school district were fortunate enough to have lots of expensive office space or perhaps a major power plant within its borders, the average per pupil property value might be $500,000 per student. But a district in which the property consisted mostly of middle-class homes might have a per pupil property value of just $20,000. In this case, the second district would have to tax property at 25 times the rate of the first to provide equal funding. *See, e.g.*, Roosevelt Elem. Sch. Dist. v. Bishop, 877 P.2d 806, 809 (Ariz. 1994) (noting disparities in assessed valuation per pupil between the wealthiest and poorest districts in Arizona that were greater than 7000 to 1).

[22] *See* John E. Coons et al., *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305, 312 (1969).

[23] *See id.* at 313.

[24] *See* James Martin, Note, *North Carolina's Court Fails North Carolina's Children:* Leandro v. State *and the Case for Equal School Funding*, 33 WAKE FOREST L. REV. 745, 757–58 (1998). The Haig-Strayer system was devised initially in the 1920s for the New York School system. *See* Coons et al., *supra* note 22, at 314 n.24 (citing GEORGE D. STRAYER & ROBERT M. HAIG, THE FINANCING OF EDUCATION IN THE STATE OF NEW YORK (1923)). The current incarnation of the Haig-Strayer system in New York is a political mess. *See* CAMPAIGN FOR FISCAL EQUITY, INC., THE NEW YORK STATE EDUCATION FINANCE SYSTEM: FAIR FUNDING FOR QUALITY EDUCATION 1–3 (July 1998) (noting the complex system of formulas used to determine school district funding results in funding per pupil ranging from $6462 to $12,209).

[25] Martin, *supra* note 24, at 758. These plans attempt to guarantee the same level of funding for the same rate of taxation. States make up the difference between the spending of a normal or poor district and the wealthiest district taxing itself at the same rate. *See id.*

"penny pool plans,"[26] and "floating cork plans."[27] All of these plans seek to achieve a more equal outcome than what would occur if schools were solely funded by local property taxes. At the same time, these plans seek to retain local control of schools by retaining the property taxes.

The concept of local control is often at the heart of decisions upholding state school finance systems.[28] Since school money is raised through locally imposed taxes, school boards are seen as having greater control over their neighborhood schools than they conceivably would have if the funds all came from the state. The notion of local control involves more than just decision making. It also involves, "the freedom to devote more money to the education of one's children."[29] Some state constitutions have clauses which exalt the value of local control of schools, police, zoning, and the like.[30] The balancing act between local and state dollar sources invariably results in continuing funding inequalities.[31]

B. The State Constitution Education Clauses

The backdrop for the statutory finance systems described in Part I.A are the state constitutions' education clauses. Forty-nine of the fifty state

---

[26] Martin, *supra* note 24, at 759. Under "penny pool plans," localities can set any tax rate they wish, but any excess funds over a state-set minimum are redistributed around the state according to the tax efforts of each district. *See id.*; *see also* Gail F. Levine, Note, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507, 533–34 (1991).

[27] Martin, *supra* note 24, at 759. "Floating cork plans" are variations on the "penny pool plans" except they allow local districts to avoid redistributions if they have revenue above a certain state set amount. *See id.*; *see also* Levine, *supra* note 26, at 535–36.

[28] *See, e.g.*, Pawtucket v. Sundlun, 662 A.2d 40, 62 (R.I. 1995) (finding that the interest in local control allowed an unequal system to withstand rational-basis review); Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1195–96 (Ill. 1996).

[29] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49 (1973).

[30] *See, e.g.*, Olsen v. State, 554 P.2d 139, 147 (Or. 1976). Of course, local control over woefully inadequate funds is of little use. *Cf.* Serrano v. Priest, 487 P.2d 1241, 1260 (Cal. 1971) (labeling the notion of local control for poor districts a "cruel illusion").

[31] Whether or not more school dollars leads to better education is a hotly debated topic. The publication of the *Coleman Report* in the mid-1960s, with its conclusion that school resources have minimal effect on student achievement sparked a still unsettled debate. *See* JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY (1966); Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1166–67 (1995). A resolution of the controversy over the link between well-funded schools and student achievement is probably not on the near horizon. *See, e.g.*, Larry v. Hedges et al., *Does Money Matter? An Analysis of Studies of the Effects of Differential School Inputs on Student Outcomes*, 23 EDUC. RESEARCHER 5, 5–6 (1994) (stating that a consensus has not been reached on measuring student achievement). Nonetheless, if a school does not have necessary funds it cuts programs such as music, theatre, and sports. Foreign language and advanced placement courses follow. Many schools in this country do not even have sufficient funds to provide structurally safe buildings. *See, e.g.*, DeRolph v. State, 677 N.E.2d 733, 762–68 (Ohio 1997). Thus, even if one buys into the notion that the social scientists have shown no link between school dollars and eventual student achievement, one cannot reasonably believe that children in poor districts have the same scholastic opportunities as children in rich districts.

constitutions have clauses requiring the state to maintain some form of public school system.[32] One commentator has grouped these clauses into four categories in ascending order of the duty they impose upon the state.[33] Category I clauses are the weakest. They have the minimal requirement that the state must provide a system of public schools and no more.[34] Oklahoma's education clause fits into Category I. It provides that "[t]he legislature shall establish and maintain a system of free public school wherein all the children of the state may be educated."[35] These clauses are commitments to public education without elaboration as to the scope of that commitment.[36]

Category II clauses demand that the public education offered by the state meet a minimal level of quality. Such clauses normally require that public education be "thorough," "efficient," or both.[37] Maryland's clause, which requires the legislature to "establish throughout the State a thorough and efficient System of Free Public Schools" is a typical example of a Category II clause.[38] Sometimes these clauses contain words like "general" or "uniform" as well.[39] They go beyond Category I clauses by requiring an explicit commitment to public education.

The Category III clauses have both a "stronger and more specific education mandate"[40] than the Category I and II clauses or have "pur-

---

[32] Only Mississippi does not have an education clause, although there is some disagreement on this point. *See* Thro, *supra* note 20, at 1661 & n.102.

[33] *See* Erica Black Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L.REV. 52, 66–70 (1974). The classification system was first developed by Erica Grubb, but Gershon Ratner was the first to actually classify the education clauses. *See* Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 815–16 nn.143–46 (1985). Ratner categorized only 48 state constitutions, believing that Alabama's constitution did not have an education clause. *See id.* at 814 n.138. Thro, however, argues that Alabama's constitution does have an education clause, albeit a weak one, and labels it a Category I clause. *See* Thro, *supra* note 20, at 1661 & n.102.

[34] *See* Grubb, *supra* note 33, at 67.

[35] OKLA. CONST. art. XIII, § 1. Other Category I clauses are: ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; CONN. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; KAN. CONST. art. VI § 1; LA. CONST. art. VIII, § 1; NEB. CONST. art. VII, § 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; S.C. CONST. art. XI, § 3; UTAH CONST. art. X, § 1; and VT. CONST. ch. 2, § 68. *See* Ratner, *supra* note 33, at 815 n.143; *see also* Thro, *supra* note 20, at 1661 n.102 (adding Alabama to Ratner's list of Category I clauses).

[36] *See* Grubb, *supra* note 33, at 67.

[37] *See id.* at 67–68.

[38] MD. CONST. art. VIII, § 1. Other Category II clauses are: ARK. CONST. art. XIV, § 1; COLO. CONST. art. IX, § 2; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; KY. CONST. § 183; MINN. CONST. art. XIII, § 1; MONT. CONST. art. X, § 1; N.J. CONST. art. VIII, § 4; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; VA. CONST. art. VIII, § 1; W.VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3. *See also* Ratner, *supra* note 33, at 815 n.144.

[39] *See, e.g.*, MINN. CONST. art. XIII, § 1.

[40] Ratner, *supra* note 33, at 815.

posive preambles."[41] Rhode Island's educational mandate is an example of a Category III clause. It states:

> The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools . . . , and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education . . . .[42]

Finally, Category IV clauses are those that impose the strongest requirements on the state.[43] These clauses are strengthened with words like "paramount,"[44] "primary,"[45] or "fundamental."[46] Georgia provides an example of a Category IV clause which states: "The provision of an adequate education for the citizens shall be a primary obligation of the State of Georgia."[47] These clauses mandate an explicit duty to support education.[48]

One could reasonably surmise that the strength of a state's education clause would determine the likelihood of success in challenging that state's school finance system. A strong clause aids both adequacy-based and equity-based challenges.[49] It aids an adequacy challenge by raising the rhetorical constitutional bar the state must meet. It aids an equity-based challenge by making it much easier for a court to find that education is a fundamental right within a *Rodriguez* analysis.[50] In general, whatever analysis a court embarks upon, the strength of the words should

---

[41] Grubb, *supra* note 33, at 68.

[42] R.I. CONST. art. XII, § 1. Other Category III clauses are: CAL. CONST. art. IX, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. 9, 2d, § 3; MASS. CONST. pt. 2, ch. 5, § 2; NEV. CONST. art. XI, § 2; S.D. CONST. art. VIII, § 1; and WYO. CONST. art. VII, § 1. *See* Ratner, *supra* note 33, at 816 n.145.

[43] *See* Grubb, *supra* note 33, at 69–70.

[44] *See, e.g.*, WASH. CONST. art. IX, § 1.

[45] *See, e.g.*, GA. CONST. art. VIII, § 1.

[46] *See, e.g.*, ILL. CONST. art. X, § 1.

[47] GA. CONST. art. VIII, § 1. Other Category IV clauses are: ILL. CONST. art. X, § 1; ME. CONST. art. 8, pt. 1, § 1; MICH. CONST. art. VIII, § 1; MO. CONST. art. 9, § 1(a); N.H. CONST. pt. 2 art. 83; and WASH. CONST. art. IX, § 1. *See* Ratner, *supra* note 33, at 816 n.146.

[48] *See* Grubb, *supra* note 33, at 69.

[49] Adequacy-based challenges are those where reformers argue that poor districts do not have the funds to provide the minimum education the state constitution requires. These challenges are based solely upon education clauses. *See, e.g.*, Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989). Equity-based challenges often involve arguing that because education is mentioned in the state constitution it is a fundamental right under the state's equal protection clause. *See, e.g.*, Horton v. Meskill, 376 A.2d 359 (Conn. 1977). In addition, plaintiffs argue that the education clause itself, without any equal protection analysis, mandates an equal education. *See, e.g.*, Helena Elem. Sch. Dist. v. State, 769 P.2d 684 (Mont. 1989).

[50] The *Rodriguez* decision argued that those rights explicitly or implicitly provided by another clause in a constitution are fundamental. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1973).

affect the interpretation.[51] In essence, those states with stronger guarantees of educational rights in their constitutions should have stronger defenders of them in their courts.

The evidence, however, suggests that the strength of education clauses has little determinative effect upon the likelihood of plaintiff success in school finance cases. In Category I states, four out of ten states that have ruled on education finance system challenges found for plaintiffs.[52] The decisions in Category II jurisdictions have favored plaintiffs in eight out of eighteen cases.[53] Category III states have yielded three out of four positive results for reformers.[54] In Category IV states, plaintiffs

---

[51] It is true that some states have different facts and levels of inequity. For example, the Rhode Island Supreme Court, in upholding its school finance system, noted that "only Hawaii and the District of Columbia had a more equalized per-pupil expenditure than Rhode Island." City of Pawtucket v. Sundlun, 662 A.2d 40, 61 (R.I. 1995). Only two courts, Rhode Island, *see id.*, and Minnesota, *see* Skeen v. State, 505 N.W.2d 299, 304–06 (Minn. 1993) (en banc), have claimed, in dicta, that no significant funding inequalities exist. With these exceptions, all state supreme courts have agreed that inequalities are present in their states, yet many of those courts have found such systems constitutional. *See, e.g.*, Olsen v. State, 554 P.2d 139, 140 (Or. 1976) (upholding system with tax base disparities of over 10 to 1 and spending disparities of nearly 3 to 1); McDaniel v. Thomas, 285 S.E.2d 156, 160 (Ga. 1981) (upholding system with funding disparities of greater than 2 to 1).

If courts were relying on the fact that their school finance system was more "equal than others" or "equal enough," they would likely say so. Only Minnesota and Rhode Island have done so. Even opinions that argue that the state legislature has reasonably attempted to address unequal and inadequate funding often leave out any description of just how unequal their systems are. *See, e.g.*, Board of Educ. v. Walter, 390 N.E.2d 813, 816–17 (Ohio 1979).

[52] Alabama, Arizona, Connecticut, and Vermont have overthrown systems, while Kansas, Nebraska, New York, North Carolina, Oklahoma, and South Carolina have upheld them. *See* Alabama Coalition for Equity v. Hunt, 624 So.2d 107 (Ala. 1993); Roosevelt Elem. Sch. Dist. v. Bishop, 877 P.2d 806 (Ariz. 1994); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Brigham v. State, 692 A.2d 384 (Vt. 1997); Knowles v. State Bd. of Educ., 547 P.2d 699 (Kan. 1976); Gould v. Orr, 506 N.W.2d 349 (Neb. 1993); Bd. of Educ. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); Britt v. North Carolina State Bd. of Educ., 357 S.E.2d 432 (N.C. Ct. App. 1987); Fair School Finance Council v. State, 746 P.2d 1135 (Okla. 1987); Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988).

[53] Arkansas, Kentucky, Montana, New Jersey, Ohio, Tennessee, Texas, and West Virginia have overthrown systems, while Colorado, Florida, Idaho, Maryland, Minnesota, North Dakota, Oregon, Pennsylvania, Virginia, and Wisconsin have upheld them. *See* Dupree v. Alma Sch. Dist., 651 S.W.2d 90 (Ark. 1983); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); Helena Elem. Sch. Dist. v. State, 769 P.2d 684 (Mont. 1989); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); Tennessee Small Sch. Systems v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982) (en banc); Coalition for Adequacy v. Chiles, 680 So.2d 400 (Fla. 1996); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Bismarck Public Sch. Dist. v. State, 511 N.W.2d 247 (N.D. 1994); Olsen v. State, 554 P.2d 139 (Or. 1976); Danson v. Casey, 399 A.2d 360 (Penn. 1979); Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989).

[54] California, Massachusetts, and Wyoming have overthrown systems, while Rhode Island has upheld its system. *See* Serrano v. Priest, 557 P.2d 929 (Cal. 1976); McDuffy v. Secretary of the Exec. Office of Educ., 615 N.E.2d 516 (Mass. 1993); Washakie County Sch. Dist. v. Herschler, 606 P.2d 310 (Wyo. 1980); City of Pawtucket v. Sundlun, 662 A.2d

have won two out of seven times.[55] These results show little, if any, correlation between the strength of the education clause and the position of the court.[56] The results are also consistent with the main observation of this Note, that successes are really the result of a change in political and public attitudes toward education, not a legal revolution.

II. The "Three Waves"

Commentators have divided the history of school finance litigation into three phases or "waves."[57] The first wave of cases, which ran from the late 1960s until 1973, were challenges based upon the Equal Protection Clause of the United States Constitution.[58] This avenue of challenge was closed by the *Rodriguez* decision in 1973. *Robinson v. Cahill*,[59] in which New Jersey's Supreme Court found its system of finance unconstitutional, marked the beginning of the second wave.[60] This wave relied on the equal protection clauses of state constitutions.[61] The third wave, the adequacy wave, began in 1989 and continues to the present. It consists of suits arguing that the education provided by the state does not adequately fulfill the mandate of the state education clause.[62] During this third wave, reformers have had greater success in the courts. This Note observes, however, that equity-based arguments continue to resonate with courts and that, consequently, adequacy-based arguments are not the driving force behind plaintiff success in the third wave. This Note argues that, despite changes in the emphasis of plaintiff complaints, all of these

---

40 (R.I. 1995).

[55] New Hampshire and Washington have overthrown systems, while Georgia, Illinois, Maine, Michigan, and Missouri have upheld their systems. *See* Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993); Seattle Sch. Dist. v. State, 585 P.2d 71 (Wash. 1978); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); People *ex rel.* Jones v. Adams, 350 N.E.2d 767 (Ill. App. Ct. 1976); School Admin. Dist. v. Commisioner, Dep't. of Educ., 659 A.2d 854 (Me. 1995); East Jackson Pub. Sch. v. State, 348 N.W.2d 303 (Mich. Ct. App. 1984); Committee for Educ. Equal. v. Missouri, 967 S.W.2d 62 (Mo. 1998).

[56] Plaintiffs succeeded 40% of the time in Category I states, 44% of the time in Category II states, 75% of the time in Category III states, and 28% of the time in Category IV states. One might argue that Category III states look very good for plaintiffs, especially considering that Rhode Island, the lone loss, was a bad case on the facts. *See supra* note 51. But the small sample size, only four states, and the fact that Category IV clauses have been abysmal for plaintiffs, indicate a lack of correlation.

[57] *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, 598 n.4 (1994); Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 517, 520–35 (1991); Levine, *supra* note 26, at 507–08.

[58] The federal Equal Protection Clause provides, in pertinent part, that a state shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[59] 303 A.2d 273 (N.J. 1973).

[60] *See* Levine, *supra* note 26, at 507–08.

[61] *See id.*

[62] *See* Enrich, *supra* note 2, at 108–10 n.35 (1995).

cases are part of the same movement, and that cases in the third wave are being decided on the same issues as those in the second were.

A. The First Wave: Federal Equal Protection

In the 1950s, the Supreme Court's application of the Equal Protection Clause changed dramatically.[63] The use of the Equal Protection Clause to strike down segregated schools in *Brown*[64] and its description of education as "perhaps the most important function of state and local governments,"[65] gave hope to potential reformers.[66]

The first case to overthrow a school finance system using the Fourteenth Amendment was the California Supreme Court's determination in *Serrano v. Priest*[67] that California's school finance system was unconstitutional under the federal Equal Protection Clause.[68] In *Serrano*, the plaintiffs presented evidence of disparities throughout the state created by the property-tax method of financing public schools. For example, the Beverly Hills School District spent more than $1,200 per student during the 1968-69 school year.[69] During the same year, Baldwin Park School District, which is located in the same county as Beverly Hills, spent less than $600.[70] This gulf occurred despite the fact that tax rates in Baldwin Park, $5.48 per $100 of property, were more than twice as high as in Beverly Hills, $2.38 per $100.[71] The source of this disparity was a dramatic difference in property values—$3,706 per pupil in Baldwin Park as compared with $50,885 in Beverly Hills.[72]

In deciding *Serrano*, California Supreme Court relied on the framework the Warren Court had developed for equal protection cases. The California court found that school finance dealt with a suspect class.[73] The court asserted that Supreme Court precedents had shown that wealth was a suspect class for equal protection purposes.[74] It noted that the current system allowed, "affluent districts . . . [to] have their cake and eat it too,"[75] by getting quality education at low tax rates.[76] Accepting that until that time "wealth classifications ha[d] been invalidated only in conjunc-

---

[63] *See id.* at 116.
[64] 347 U.S. 483 (1954).
[65] *See id.* at 493.
[66] *See* Enrich, *supra* note 2, at 117.
[67] 487 P.2d 1241 (Cal. 1971).
[68] *See id.*
[69] *See id.* at 1248.
[70] *See id.* at 1244.
[71] *See id.* at 1251.
[72] *See id.* at 1248. School funding disparities would have been even greater had it not been for state equalization aid. *See id.* at 1247–48.
[73] *See id.* at 1250–55.
[74] *See id.* at 1250.
[75] *Id.* at 1251.
[76] *See id.* at 1252–53.

tion with a limited number of fundamental interests—rights of defendants in criminal cases and voting rights,"[77] the court found that education was nonetheless a fundamental right.[78] Public education's importance in maintaining democracy, its universal relevance, its lengthy period, the way it molds youth, and the fact that it is compulsory were all factors in the California court's finding.[79] The court then applied strict scrutiny[80] and found that interests such as local control[81] were not compelling enough to justify the finance disparities.[82]

The growing number of cases based upon the Equal Protection Clause[83] was stopped quickly, however, by the Supreme Court's decision in *Rodriguez*.[84] In *Rodriguez*, Texas had a property-tax based system of funding public schools.[85] Because different districts in Texas had dramatically different property bases, great disparities in the amount spent per pupil resulted.[86]

By a five-to-four decision, the Court upheld Texas's funding system.[87] Justice Powell, writing for the majority, concluded both that education was not a fundamental right,[88] and that wealth was not a "suspect class."[89] In analyzing whether or not education was a fundamental right, Powell said that fundamental rights were only those "explicitly or implicitly guaranteed by the Constitution."[90] Since there is no education clause in the Constitution, Powell concluded that education is not a fundamental right.[91] Because strict scrutiny is only warranted when a law "create[s] suspect classifications or impinge[s] upon constitutionally protected rights,"[92] the Court applied only a rational basis standard of review.[93] The Court agreed with the defendants that local control provided a rational justification for Texas's system.[94]

The Court criticized the District Court, which had found for the reformers, for its "simplistic" analysis of whether wealth was a suspect

---

[77] *Id.* at 1255.
[78] *See id.* at 1255–59.
[79] *See id.* at 1258–59.
[80] *See id.* at 1263.
[81] *See id.* at 1260.
[82] *See id.* at 1263.
[83] *See, e.g.*, Van Dusartz v. Hatfield, 334 F. Supp. 870 (D.Minn. 1971); Spano v. Bd. of Educ., 328 N.Y.S.2d 229 (N.Y. Sup. Ct. 1972).
[84] *See San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).
[85] *See id.* at 16.
[86] *See id.*
[87] *See id.* at 1.
[88] *See id.* at 30.
[89] *Id.* at 28.
[90] *Id.* at 33–34.
[91] *See id.* at 35. Justice Powell did imply, in dicta, that at some point a deprivation of education could become a federal equal protection violation.
[92] *Id.* at 40.
[93] *See id.*
[94] *See id.* at 44.

class.[95] In the majority opinion, Powell argued that the allegedly suspect class was both undefined and unable to prove an absolute deprivation of a right.[96] Powell claimed that the wealth discrimination described here was "quite unlike any of the forms of wealth discrimination heretofore reviewed by the Court."[97]

The *Rodriguez* decision dashed school finance reformers hopes for the federal Equal Protection Clause. As a result, they turned to state courts and state constitutions to pursue their goals.

B. The Second Wave: State Equal Protection

A mere thirteen days after *Rodriguez* closed the door on Fourteenth Amendment challenges to school finance systems, the New Jersey Supreme Court ruled in *Robinson v. Cahill*[98] that the New Jersey system violated its state constitution.[99] *Robinson* is seen as marking the beginning of the second wave of school finance decisions.[100] The second wave concentrated on achieving equity via state constitution equal protection and education clauses.[101]

According to the wave framework, there were two parts to the typical plaintiff's claim in a second wave case. First, plaintiffs argued that education was a fundamental right under the state constitution.[102] Using *Rodriguez*, plaintiffs reasoned that since education was explicitly mentioned in state constitutions it was a fundamental right for state equal protection purposes. It followed, therefore, that strict scrutiny should be applied to any funding disparities.

In the second half of the typical claim, plaintiffs argued that the language of the state education clause itself demanded substantial equality of funding.[103] Language such as "general,"[104] "uniform,"[105] or "efficient"[106]

---

[95] *See id.* at 19.

[96] *See id.* at 19–23.

[97] *Id.* at 18–19.

[98] 303 A.2d 273 (N.J. 1973).

[99] *See* Thro, *supra* note 20, at 1653.

[100] *See* Thro, *supra* note 57, at 601; Kevin McMillan, Note, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts' Lingering Institutional Concerns*, 58 OHIO ST. L.J. 1867, 1872 (1998). Ironically, *Robinson* was decided solely on education clause grounds. *See Robinson*, 303 A.2d at 297–98. The New Jersey Supreme Court rejected the state equal protection challenge. *See id.* at 297–98. So, in truth, *Robinson* is more similar to supposed third wave cases. *See infra* Part II.C.

[101] *See* Levine, *supra* note 26, at 507–08.

[102] *See* Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); Board of Educ. v. Nyquist, 439 N.E.2d 359, 361–62 (N.Y. 1982).

[103] *See, e.g.*, *Hornbeck*, 458 A.2d at 764 (Md. 1983); *Nyquist*, 439 N.E.2d at 361–62 (N.Y. 1982).

[104] Dupree v. Alma Sch. Dist., 651 S.W.2d 90, 91 (Ark. 1983).

[105] Olsen v. State, 554 P.2d 139, 148 (Or. 1976).

[106] *Hornbeck*, 458 A.2d at 764 (Md. 1983).

systems of education were key to these arguments. The legislative histories of these clauses were used to buttress these attacks.

These two-pronged challenges to school finance systems elicited a diversity of holdings and approaches from state high courts. The Arkansas case *DuPree v. Alma School District*[107] provides a good example of a second wave decision in which the plaintiffs prevailed. Each of the five justices who decided *Dupree* adhered to a different analysis of the law.

The Arkansas Supreme Court was able to side-step the question of whether education was a fundamental right under the Arkansas Constitution.[108] It decided instead that there was no "rational relationship" between the financing system and the "needs of the individual school districts."[109] The court noted that funding per-pupil ranged from a high of $2378 to a low of $873.[110] According to the court, the state's interest in local control was not a rational justification for this disparity.[111] The court found that equal funding and local control of policy could coexist and cited *Serrano* for the idea that local control was a "cruel illusion" for districts that did not have the funds to implement educational objectives.[112] The court refused to focus on the state's education clause, which required a "suitable" and "efficient" education,[113] although it hinted that the system may have violated this clause as well.[114]

While the opinion of the court relied upon equal protection and rational basis analysis, the three justices joining in the conclusion filed concurring opinions that differed in approach.[115] One justice, in addition to joining the majority's equal protection analysis, noted that children were probably not being provided with the "decent education opportunity" required by the Arkansas Constitution.[116] The second justice stated that he agreed with the majority opinion to the extent that they found the finance system in violation of the state's education clause but offered no reasoning. It is therefore not clear whether he reached this conclusion on equity or adequacy grounds.[117] The third justice insisted that education is a fundamental right in Arkansas, implying that disparities in education finance should be subject to strict scrutiny.[118] The lone dissenting judge relied on a constitutional provision that implicitly contemplated local

---

[107] 651 S.W.2d 90 (Ark. 1983).
[108] *See id.*
[109] *Id.* at 93.
[110] *See id.* at 92.
[111] *See id.* at 93.
[112] *Id.*
[113] *See* ARK. CONST. art. 14, § 1.
[114] *See DuPree*, 651 S.W.2d at 93.
[115] *See id.* at 90.
[116] *Id.* at 95–97 (Hickman, J., concurring).
[117] *See id.* at 95 (Dudley, J., concurring).
[118] *See id.* at 97 (Purtle, J., concurring).

control of schools[119] and the fact that the majority of state courts that had heard similar challenges had upheld their finance systems.[120]

The diversity of reasoning within this one case is indicative of the problem of applying the wave framework to school finance litigation. These opinions are often quite difficult to characterize. How could one fairly characterize the decisions in *DuPree*? Are they based on equal protection, adequacy, or both? The variety of approaches leaves open any conclusion.[121] The Arkansas example also shows that, in at least one case, adequacy arguments were taken seriously during the second wave.

C. The Third Wave: State Adequacy Claims

The year 1989 marked the beginning of the third wave of school finance cases.[122] Plaintiffs have met with much better success since 1989 than before and scholars have spent considerable effort to explain the cause of this change.[123] Adherents to the wave theory characterize the third wave as a shift in the typical plaintiff's focus from an equity-based state equal protection claim to an adequacy argument under the state education clause.[124]

At least one commentator has suggested a number of reasons why an adequacy claim might be more palatable than an equity claim, both for reform litigators and courts.[125] However, these reasons are not compelling enough to explain the change in rulings in the third wave. Furthermore, while adequacy has been an important element in many decisions since 1989, equity was a prominent factor in all but two of those decisions and was seemingly indispensable in two others.[126] The inevitable conclusion is that a shift in focus to adequacy alone is not driving the increased plaintiff success in the third wave. Part III of this Note will explore an alternative explanation.

---

[119] *See id.* at 97–98 (Adkisson, J., dissenting).

[120] *See DuPree*, 651 S.W.2d at 97–98.

[121] *See supra* text accompanying notes 107–120. *Dupree* is just one example of the fractured opinions this area of the law generates. *See, e.g., infra* text accompanying notes 209–211 (describing the fractured nature of the opinion in *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997)).

[122] *See* William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 219–22 (1990); Heise, *supra* note 31, at 1152; Levine, *supra* note 26, at 507–08; Margaret Rose Westbrook, Comment, *School Finance Litigation Comes to North Carolina*, 73 N.C. L. REV. 2123, 2126–35 (1995); Martin, *supra* note 24, at 770–72; McMillan, *supra* note 100, at 1875–78.

[123] *See, e.g.*, Heise, *supra* note 31; Thro, *supra* note 57; McMillan, *supra* note 100.

[124] *See* Heise, *supra* note 31; Thro, *supra* note 57; McMillan, *supra* note 100.

[125] *See* Heise, *supra* note 31, at 1168–76.

[126] *See infra* text accompanying notes 136–180.

1. Adequacy Decisions Are No Easier for Courts

Michael Heise has argued that the adequacy route is easier for courts.[127] Heise contends that equity decisions are surprisingly complex, challenge deeply held preferences for local control, and lack the support of major urban school districts.[128] He further asserts that adequacy-based litigation is comparatively less complex, sidesteps direct confrontations with local control, and is appealing to many urban school districts.[129] This assertion simply does not hold.

Adequacy decisions require courts to embroider detailed and complex standards for schools out of scant constitutional cloth.[130] While equity cases do confront courts with difficult questions of where to draw the line between fundamental and non-fundamental rights and between equal and unequal school systems, all that they require at their core is some measurable range of disparity between districts. An adequacy challenge requires a court to define what educational functions are necessary and to use diverse measures to determine whether these functions are being adequately provided. It is much easier to look at a system and say it is unequal than to say it is not adequate. Furthermore, because measures of adequacy are more complicated than measures of equity, courts upholding a challenge on adequacy grounds will have to monitor finance systems much more closely than those relying on equity grounds. The more courts become tangled in school finance, the more the argument that school finance is a "political question" and should be left to legislatures has weight.[131]

Adequacy decisions also present challenges to local control at least as great as equity decisions do. While a court using an equity analysis could force local districts to spend a certain amount or, more likely, force the state to equalize discrepancies, a court using an adequacy analysis

---

[127] *See* Heise, *supra* note 31, at 1168–76.

[128] *See id.* at 1168–74. Heise shows that many urban school districts in fact have relatively high per pupil expenditures. *See id.* at 1172–74.

[129] *See id.* at 1174–76.

[130] The difficulty of fashioning such a standard has caused courts to reject adequacy challenges. *See, e.g.*, Coalition for Adequacy v. Chiles, 680 So.2d 400, 408 (Fla. 1996) (noting that plaintiffs failed to show the court "an appropriate standard for determining 'adequacy' that would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature"). One reasonably non-intrusive method suggested for determining adequacy is the "existing standards" approach. *See* William F. Dietz, Note, *Manageable Adequacy Standards in Education Reform Litigation*, 74 WASH. U. L.Q. 1193, 1215–17 (1996). By this method, courts look at educational standards already promulgated by the legislature and determine if the school system meets those standards. *See id.* However, this approach has an obvious problem: it effectively allows the legislature to amend the education clause through statute.

[131] *See, e.g.*, *Coalition for Adequacy*, 680 So.2d at 408; Kirby v. Edgewood Indep. Sch. Dist., 761 S.W.2d 859 (Tex. Ct. App. 1988); *cf.* City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995) (listing the number of decisions spawned by the New Jersey court's involvement with school finance).

could force districts to teach certain things, meet specific goals, or provide special programs. Taxpayers who might revolt when courts tell them to spend more on other schools are just as likely to revolt when courts also tell them how to spend their money.

Furthermore, the argument that the support of urban districts is necessary, or even helpful, for success in today's increasingly conservative political climate seems weak.[132] As Democrats lose control of state legislatures, urban legislators, most of whom are Democrats, lose power to shape policy.[133]

The notion that it is somehow easier for a court to decide on adequacy grounds is questionable to say the least. It is true that adequacy can and does provide a legal avenue for plaintiffs and that evidence showing inadequate, failing schools can persuade a court to find for plaintiffs. The fact that adequacy reasoning can lead to the overthrow of an entire school system, not just the financing system, suggests that adequacy can be more powerful than equity,[134] but the additional invasiveness of such an outcome should make it harder, not easier, for judges to reach such decisions. The following discussion will show that, in fact, the increased emphasis on adequacy by plaintiffs is not behind their increased success since 1989.[135]

2. *A Survey of Third Wave Cases Shows that Adequacy Arguments Are Not Driving Recent Plaintiff Successes*

The third wave began in 1989 with plaintiff victories in Kentucky,[136] Montana,[137] and Texas.[138] A close look at these cases and those that followed in other states shows that the shift in emphasis to adequacy does not explain reformers' increased success. Of these three cases, only one clearly relied on adequacy arguments. The other two relied heavily on equity ideas to reach their holdings. Later cases in the third wave follow a similar pattern.

---

[132] The reason urban districts would not support equity finance decisions is that nationally urban districts spend slightly more than rural and suburban districts. *See* NAT'L CTR. FOR EDUC. STATISTICS, DISPARITIES IN PUBLIC SCHOOL DISTRICT SPENDING 1989–1990, at 27 (1995). Therefore, a court decision requiring equal funding would cut funding for urban districts. Urban districts probably need more funding than suburban and rural districts because of the extra costs of educating poor students. At least one court, using an adequacy path, has ordered extra spending for urban districts on these grounds. *See* Abbott v. Burke, 575 A.2d 359 (N.J. 1990).

[133] For an example of a legislature passing a plan to equalize funding of schools over the opposition of urban political leaders, see Michael F. Addonizio et al., *Michigan's High Wire Act,* 20 J. EDUC. FIN. 235 (1995).

[134] *See, e.g.*, Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989).

[135] *See infra* text accompanying notes 173–180.

[136] *See Rose*, 790 S.W.2d at 186.

[137] *See* Helena Elem. Sch. Dist. v. State, 769 P.2d 684 (Mont. 1989).

[138] *See* Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

In *Rose v. Council for Better Education*,[139] the Kentucky Supreme Court invalidated every element of the entire school system, not just the finance structure.[140] The record showed that Kentucky ranked fortieth nationally in per-pupil spending and thirty-seventh in mean instructional staff pay.[141] The court found that even Kentucky's wealthier districts were inadequately funded relative to "accepted national standards."[142] Other evidence of failing schools included a thirty-one percent drop-out rate for Kentucky high school students[143] and achievement scores below that of neighboring states.[144] Every one of Kentucky's school districts was below the national average in taxable property and thirty percent were described as "functionally bankrupt."[145]

The court did find that education was a fundamental right under the Kentucky constitution,[146] but did not decide the case using an equal protection analysis. Instead, the court ruled that the school system violated the mandate found in the state constitution's education clause to provide efficient common schools.[147] The opinion focused not on the funding disparities present in Kentucky, but rather on the inadequacy of Kentucky relative to the rest of the nation and its neighboring states.[148]

Because of the "tidal wave of . . . evidence"[149] that Kentucky's schools were inadequate, the court required the legislature to "recreate and re-establish a system of common schools."[150] The Kentucky court described seven elements that must be present for an education to be adequate: (1) competency in oral and written communication; (2) knowledge of economic, social, and political systems; (3) an understanding of governmental process; (4) self-knowledge of mental and physical well-being; (5) a grounding in the arts; (6) preparation for advanced training; and (7) competitive skills.[151] The court wrote further: "Lest there be any doubt, the result of our decision is that Kentucky's entire system of common schools is unconstitutional."[152] Because the overall condition of all the schools was so poor, the problem of inequality between Kentucky

---

[139] 790 S.W.2d 186 (Ky. 1989).
[140] *See id.* at 215.
[141] *See id.* at 197.
[142] *Id.* at 198.
[143] *See id.* at 197.
[144] *See id.*
[145] *Id.*
[146] *See id.* at 208.
[147] *See id.* at 215; KY. CONST. § 183 ("The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.").
[148] *See id.* at 197.
[149] *Id.* at 198.
[150] *Id.* at 214.
[151] *See id.* at 212. Courts in Massachusetts, *see McDuffy v. Secretary of Exec. Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993), and in North Carolina, *see Leandro v. State*, 488 S.E.2d 249, 251 (N.C. 1997), have been heavily influenced by this definition of an adequate education.
[152] *Rose*, 790 S.W.2d at 215.

school districts was not addressed. If this had not been the case, it is likely that the court, having found education to be a fundamental right, would have declared the finance system unconstitutional under equal protection.

The Montana Supreme Court's decision that Montana's school finance system was unconstitutional[153] has been characterized as both an equity and as an adequacy decision.[154] The conclusion that *Helena Elementary School District v. State* is an adequacy decision may be drawn from the court's conclusion that the state's failure, "to adequately fund . . . failed to provide a system of quality public education granting to each student the equality of educational opportunity guaranteed."[155] There was also unrebutted testimony that the financing program fell short of meeting Montana's minimum accreditation standards.[156] A close look at the case, however, shows that it is clearly an equity decision.

Montana's education clause states that "it is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state."[157] The State argued that equality was an aspirational goal, but the court relied on the "plain meaning" of the clause to conclude that equality of education is "guaranteed."[158] The State further argued that even if funding was not equal, student output was a more appropriate measurement of equality.[159] The court rejected this reasoning, using evidence that wealthier districts were using their extra dollars to fund useful educational programs.[160] After finding the school finance system unconstitutional under the education clause, the court found it unnecessary to reach the plaintiff's equal protection claim.[161] Given the court's reliance on the explicit constitutional guarantee of "equality of educational opportunity," *Helena* can easily be classified as an equity decision.[162]

In Texas, the plaintiffs who lost in *Rodriguez* at the federal level succeeded sixteen years later at the state level. The evidence in *Edgewood Independent School District v. Kirby*[163] showed that the wealthiest districts had 700 times the per-pupil property wealth of the poorest dis-

---

[153] Helena Elem. Sch. Dist. v. State, 769 P.2d 684 (Mont. 1989).

[154] *See* Heise, *supra* note 31, at 1163.

[155] *Id.* For commentators who characterize Helena as a third wave decision, *see, e.g.*, James R. Hackney, *The Philosophical Underpinnings of Public School Funding Jurisprudence*, 22 J.L. & EDUC. 423, 461 n.189 (1992); Thro, *supra* note 57, at 603 nn.39–41.

[156] *See Helena*, 769 P.2d at 690.

[157] MONT. CONST. art. X, § 1.

[158] *Helena*, 769 P.2d at 689.

[159] *See id.* at 690.

[160] *See id.* at 687, 690.

[161] *See id.* at 690.

[162] At least one other commentator agrees with this characterization of *Helena*. *See* Enrich, *supra* note 2, at 138 n.192.

[163] 777 S.W.2d 391 (Tex. 1989).

tricts, and that there was a more than ninefold disparity in per-pupil spending.[164] The court examined the legislative history behind the state's education clause and concluded that such disparities were not what the state's education clause framers had in mind when they contemplated an "efficient" education.[165] The State argued that the state constitutional framers had used the word "efficient" to prevent a highly centralized school system and had imagined a simple and inexpensive system.[166]

The court's reading of the history led it to conclude that the framers never contemplated a system as unequal as Texas's had become.[167] The delegate who had proposed the word "efficient" urged the constitutional convention to prevent the wealthy from selfishly educating only their own children.[168] The chair of the convention's education committee had said, "I boldly assert that [an education] is for the general welfare of all, rich and poor, male and female, that the means of a common school education should, if possible, be placed within the reach of every child in the State."[169] The court cited an old dictionary to suggest that "efficient" meant effective or productive of results with little waste.[170] Because property wealth had grown asymmetrically throughout Texas, the court concluded the finance system could no longer be considered "efficient."[171] The court refused to instruct the legislature as to what specific course it should take, but its decision that the finance system was unconstitutional was clearly based on the inequality between districts.[172]

Given the content of the Kentucky, Montana, and Texas decisions, it seems odd that these three cases are seen as marking the beginning of a new phase of jurisprudence. The Texas court's conclusion is clearly based on equality concerns and Montana's court emphasized equal opportunity.[173] Only Kentucky's court focused on adequacy, but it was also willing to label education a fundamental right, the first step in an equal protection analysis. It is likely that had the court in *Rose* not found the

---

[164] *See id.* at 392.

[165] *See id.* at 396.

[166] *See id.* at 394.

[167] *See id.* at 395.

[168] *See id.* at 395 n.4 (citing S. MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 217–18 (1930)).

[169] *Id.* at 395 (Tex. 1989) (citing MCKAY, *supra* note 168, at 198).

[170] *See id.* (citing NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 430 (1864)).

[171] *See id.* at 396.

[172] *See id.* at 399. The Texas legislature responded by passing Senate Bill 1 which equalized much of the school funding by raising new taxes, but, significantly, left the 132 richest districts alone. *See* Act of June 7, 1990, ch. 1, 1990 Tex. Gen. Laws 1 (codified at TEX. EDUC. CODE ANN. § 16 (West 1991)). The Texas Supreme Court responded in Edgewood Indep. Sch. Dist. v. Kirby ("Edgewood II"), 804 S.W.2d 491 (Tex. 1991), with a decision promulgating an equality standard that, at that time, might only have been matched by two states. *See* Yudof, *supra* note 9, at 502.

[173] *See supra* text accompanying notes 153–172.

Kentucky schools entirely inadequate, it would have found them unequal in violation of the state constitution.

The subsequent decisions of the "third wave" further undermine the notion that adequacy is driving the greater plaintiff success in the third wave. Tennessee's and Vermont's supreme courts found their states' school finance systems unconstitutional on straight equal protection analyses.[174] The court in Alabama found Alabama's system unconstitutional on adequacy grounds,[175] but it also found for plaintiffs on both equal protection[176] and due process grounds.[177] The Arizona court required both equal and adequate schools under its education clause,[178] and the court in New Hampshire held for plaintiffs in a school finance decision based on a constitutional requirement for proportional taxation.[179] Arguably, only Massachusetts and Ohio have relied solely on adequacy analyses.[180]

An analysis of the cases undermines the argument that plaintiffs' better success since 1989 is based on their focus on adequacy arguments. The Arkansas Supreme Court's 1983 decision suggests that adequacy played an important part in judicial decision-making even in the second wave. Further, the cases in the third wave make clear that equality arguments remained an important, if not dominant factor in successful school finance challenges.

III. Examination of Reversals

A. Changing Views of Education Could Explain Greater Plaintiff Success at the State Level

If a shift toward adequacy is not the driving force toward greater school finance reform, what is the force? There are other factors that could explain the shift, including a change in political attitudes about education. While one may not be able to generalize about the country as a whole, examining Arizona and Ohio may give insight into the forces

---

[174] *See* Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Brigham v. State, 692 A.2d 384 (Vt. 1997).

[175] *See* Alabama Coalition for Equity v. Hunt, 624 So.2d 107, 151 (Ala. 1993) (rendering advisory opinion that state senate must abide by lower court decisions to provide school children with substantially equitable and adequate educational opportunities).

[176] *See id.* at 160.

[177] *See id.* at 162. No other state has used due process as a basis for striking down its school finance system.

[178] *See* Roosevelt Elem. Sch. Dist. v. Bishop, 877 P.2d 806 (Ariz. 1994).

[179] *See* Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997) (finding that the local property tax levied to fund education is a state tax and that disparities in tax rates therefore violated a constitutional guarantee that all state taxes must be proportional and reasonable).

[180] *See* McDuffy v. Secretary of Exec. Office of Educ., 615 N.E.2d 516 (Mass. 1993); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997).

behind this change, as they are the only two states where courts have flipped positions on school finance.

In 1979, the Ohio Supreme Court held, in *Board of Education v. Walter*,[181] that Ohio's school finance system met a rational basis test and complied with the legislature's constitutional mandate to provide "thorough and efficient" schools.[182] Eighteen years later the court came to a different conclusion in *DeRolph v. State*,[183] holding that the educational system was not "thorough and efficient."[184] Similarly, in 1973, the Arizona Supreme Court upheld its school finance system under a rational basis test,[185] despite finding that education was a fundamental right under the state constitution.[186] But during the third wave, Arizona struck down its system in *Roosevelt Elementary School District v. Bishop*.[187] Examining these two changes in individual state jurisprudence show that there was no evolution of reasoning behind the courts' changes in position. Instead, one must come to the conclusion that, in at least Arizona and Ohio, the political will and attitudes toward education have simply changed on this issue.

1. Ohio

Ohio's first decision on school finance was a straightforward rejection of the usual plaintiff's arguments. In *Board of Education v. Walter* the Ohio Supreme Court upheld the state school finance system against equal protection and education clause challenges by a six-to-one majority.[188] Dealing with the equal protection argument first, the court relied upon New Jersey's *Robinson v. Cahill* decision in holding that education is not a fundamental right[189] and that local control was a rational basis for the system.[190]

Turning to the education clause challenge, the court found the state's "equal yield for equal effort" system provided the "thorough and efficient" education required by the clause.[191] The "equal yield" formula[192] guaranteed $48 per pupil per mill (million dollars of local taxation) up to twenty mills.[193] This system also had provisions for extra

---

[181] 390 N.E.2d 813 (Ohio 1979).
[182] *See id.*
[183] 677 N.E.2d 733 (Ohio 1997).
[184] *See id.*
[185] *See* Shofstall v. Hollins, 515 P.2d 590, 592–93 (Ariz. 1972).
[186] *See id.* at 592.
[187] 877 P.2d 806 (Ariz. 1994).
[188] *See* Bd. of Educ. v. Walter, 390 N.E.2d 813 (Ohio 1979).
[189] *See id.* at 818–19.
[190] *See id.* at 819–21.
[191] *Id.* at 825–26.
[192] *See id.* at 816.
[193] *See id.* at 817.

payments to districts that had more funding before its implementation.[194] The legislature enacted the plan pursuant to a recommendation of the non-partisan Education Review Committee.[195] The Committee had determined that the floor funding of $960 was enough to provide an adequate education.[196]

The lone dissenting justice found that Ohio's system violated both its equal protection and education clauses.[197] Justice Locher argued that education was a fundamental right because of its "nexus to the right to participate in the electoral process and to the rights of free speech and association."[198]

Eighteen years later, all but one of the Justices on the Ohio Supreme Court had changed.[199] In *DeRolph*, the court held four to three that the state constitution educational provision was violated by the inadequate financing.[200] Interestingly, the majority opinion was written by Frank Sweeney, the only justice who had also participated in *Walter*. Justice Sweeney argued that *Walter* no longer controlled because the equal yield formula had been repealed.[201] At the time of *DeRolph*, schools were funded by the School Foundation Program in addition to local property taxes.[202] Under the School Foundation Program, state aid was made available to districts taxing local property at a rate greater than or equal to $20 per $1000.[203] The formula for this aid was: *aid = (state equalization factor)*(formula amount)*(average daily membership)–0.02*(taxable property)*.[204] The "state equalization factor" was an adjustment for differences in cost-of-living across Ohio.[205] The "formula amount" was set by the state each year and was characterized by the court as having "no real relation to what it actually costs to educate a pupil."[206] There was testimony that it was set by the legislature by working backwards from the total amount allocated to schools from the budget.[207] The only major difference in the systems under *DeRolph* and *Walter* was that a legislative committee had determined a dollar amount necessary for an adequate education in *Walter*, but had not done so in *DeRolph*. The minimum dol-

---

[194] *See id.*
[195] *See id.*
[196] *See id.*
[197] *See id.* at 826 (Locher, J., dissenting).
[198] *Id.* at 827 (Locher, J., dissenting).
[199] In 1979, the court was made up of Justices Celebrezze, Herbert, P. Brown, W. Brown, Holmes, Locher, and Sweeney. *See id.* at 813. In 1997, the only remaining Justice was Sweeney. *See* DeRolph v. State, 677 N.E.2d 733 (Ohio 1997).
[200] *See DeRolph*, 677 N.E.2d at 740–42.
[201] *See id.* at 745.
[202] *See id.* at 738.
[203] *See id.*
[204] *See id.* at 738 n.3.
[205] *See id.* at 738.
[206] *Id.*
[207] *See id.*

lar amount in *DeRolph* was higher, in real terms, than the minimum under *Walter*.[208]

This "change" in facts was only needed by Justice Sweeney. Of the three Justices who joined the majority opinion, at least two would have done so without this "change." Justices Douglas and Resnick were willing to go further than Justice Sweeney and hold that education was a fundamental right in Ohio.[209] The third justice to join the majority, Justice Pfeifer, focused his concurrence on the financial disparities present, not on unmet state mandates.[210] The tone at the beginning of Justice Douglas's concurrence suggests that he was the driving force behind the decision and that Sweeney was the swing vote. He wrote: "I concur in the courageous and well-reasoned decision of the majority."[211] The possibility that two judges would have been willing to go the equality route and that another judge was coaxed into the majority suggests a change in the views of judges on the importance of education, not a change in facts or legal argument.

There was evidence in *DeRolph* that state-mandated education minimums could not be met by many districts.[212] Such evidence was absent from *Walter*.[213] The state had determined in 1990 that school buildings were in dire need of repair.[214] Many districts were not able to comply with a maximum class-size requirement of twenty-five,[215] a requirement set by the state in 1986.[216] The court noted that Ohio schools ranked last in the nation in the number of computers per student.[217] Before the court's decision came down, Ohio's Superintendent of Public Education described its finance system as "morally wrong."[218] Clearly, the real change between *Walter* and *DeRolph* was the conception of what was necessary for an adequate education.

---

[208] The minimum amount guaranteed per pupil for the 1973–74 school year in Ohio was $960 or $2675 in 1992–93 dollars (using a conversion factor of 2.79 from the STATISTICAL ABSTRACT OF THE UNITED STATES, Table 751: Purchasing Power of the Dollar (1997)). *See* Board of Educ. v. Walter, 390 N.E.2d 813, 816 (Ohio 1979). But, in 1992–93, the minimum guaranteed amount was $2817. *See DeRolph*, 677 N.E.2d at 738.

[209] *See DeRolph*, 677 N.E.2d at 748 (Douglas, J., concurring); *see id.* at 779 (Resnick, J., concurring).

[210] *See id.* at 780–81 (Pfeifer, J., concurring).

[211] *Id.* at 748 (Douglas, J., concurring).

[212] *See id.* at 745.

[213] *See* Dorothy Brown, *Deconstructing Local Control: Ohio's Contribution*, 25 CAP. U. L. REV. 1, 22 (1996).

[214] *See DeRolph*, 677 N.E.2d at 742.

[215] *See id.* at 744.

[216] *See* OHIO ADMIN. CODE § 3301-35-03(A)(3) (1999).

[217] *See DeRolph*, 677 N.E.2d at 742 n.7.

[218] *See* Jonathan Riskind, *Exiting State School Chief Blasts Budget*, COLUMBUS DISPATCH, July 14, 1995 at 1C.

2. Arizona

Like Ohio, Arizona struck down its system of financing schools in the 1990s after upholding it in the 1970s. In the 1973 case of *Shofstall v. Hollins*,[219] the Supreme Court of Arizona upheld the state's school finance system in a unanimous vote.[220] Using the *Rodriguez* formulation, the court found that education was a fundamental right in Arizona.[221] But, surprisingly, the court chose to use a rational basis test to evaluate this fundamental right.[222] The court cited *Robinson* for this analysis, despite *Robinson's* rejection of fundamental right status for education.[223] The court also held, in a conclusory manner, that the education clause was not violated.[224]

By 1994, Arizona's highest court was ready for a change. In *Roosevelt Elementary School District v. Bishop*,[225] the court held three to two that the education financing scheme violated the state constitution's requirement for "general and uniform" schools.[226] This time, the court actually discussed the facts, noting that the wealthiest district had 7000 times the per-pupil property value of the poorest district.[227] The State Superintendent of Instruction, Diane Bishop, although nominally the defendant, had testified that the school infrastructure was sorely lacking,[228] and that "education is a state responsibility and that all children of the state have the same rights to education."[229]

In dealing with the equal protection question, the court expressed confusion as to how *Shofstall* held education to be a fundamental right, yet employed a rational basis test.[230] Nevertheless, the court refused to rule on these grounds, preferring the "specific" language of the education clause.[231] The court noted two principles from other states in attempting to define "general and uniform."[232] The first was that districts' per-pupil funding need not be exactly the same to comply.[233] The second was that

---

[219] 515 P.2d 590 (Ariz. 1973).

[220] *See id.*

[221] *See id.* at 592.

[222] *See id.* at 592–93.

[223] *See id.* at 592.

[224] There was no discussion whatsoever of the level of disparity present or the adequacy of the education provided. *See id.*

[225] 877 P.2d 806 (Ariz. 1994).

[226] *See id.*

[227] *See id.* at 809.

[228] She had testified there is a "sense of . . . bareness about some of the facilities in the poorer districts, that they are minimal. It is basically four walls, a roof, and classroom inside, and that's the extent of it." *Id.*

[229] *Id.*

[230] *See id.* at 811.

[231] *See id.* Chief Justice Feldman wrote in his concurrence that he would have decided the case on equal protection grounds as well. *See id.* at 816 (Feldman, J., concurring).

[232] *See id.* at 814.

[233] *See id.*

local districts should not be constitutionally required to limit their spending to just an adequate level.[234] Notwithstanding these principles, the majority wrote that, "[e]ven if every student in every district were getting an adequate education, gross facility disparities caused by the state's chosen financing scheme would violate the uniformity clause."[235]

It is hard to discern what changed from *Shofstall* to *Roosevelt Elementary School District* because *Shofstall* is such a thin opinion.[236] Arguments on equity and adequacy grounds were raised in both cases. As in the Ohio discussion above, there is evidence that the judges' attitudes toward education had evolved. In *Shofstall*, the majority likened education to other municipal services.[237] The court saw the inequity in tax rates and educational services as no more unjust than an inequity in police or fire protection or in public utilities.[238] The majority in *Roosevelt Elementary School District*, however, referred to public education as "a key to America's success," and argued that "[f]inancing a general and uniform public school system is in our collective self-interest."[239]

B. The Increasing Success of Reformers Reflects an Across-Party-Line Shift in Attitudes toward Education

What caused these courts to switch? Under the framework of a shift in legal focus from equity to adequacy, the answer would be the legal argument. However, a survey of the cases shows that adequacy is not driving recent plaintiff success. The arguments that won in the second Arizona and Ohio cases were before the courts in the first cases.[240]

One possible explanation is the political trend toward the right. As legislatures become more and more conservative,[241] courts, which may remain more progressive as result of longer terms and less partisan elections, trust them less to remedy school problems.[242]

---

[234] *See id.*

[235] *Id.* at 815.

[236] *See supra* text accompanying notes 219–224.

[237] *See* Shofstall v. Hollins, 515 P.2d 590, 593 (1973).

[238] *See id.*

[239] *Roosevelt Elem. Sch. Dist.*, 877 P.2d at 816.

[240] *See supra* Part III.A.

[241] In 1977, the Democrats controlled 38 state senates and 39 state houses, the Republicans controlled 10 state senates and 9 state houses. *See* THE BOOK OF THE STATES 7 (1978–79). By 1993, Democrats controlled only 31 state senates and 34 state houses, while Republicans controlled 17 state senates and 14 state houses. *See* STATE ELECTIVE OFFICIALS & THE LEGISLATURES at viii–ix (1993–94). Currently, Democrats control 26 state senates and 25 state houses, and Republicans control 23 state senates and state houses. *See id.* at vii–viii.

[242] The reverse of this theory was played out in the Supreme Court of the early 1930s. A conservative court, then faced with overwhelming progressive majorities in the legislature, acted as a political vehicle of last resort, striking down progressive legislation as unconstitutional. *See, e.g.*, Morehead v. Tipaldo, 298 U.S. 587 (1936) (invalidating a New York minimum wage law).

In 1994, the Ohio House went from a small Democratic majority to a large Republican majority.[243] The *DeRolph* decision was opposed by the Republican Governor and the leaders of the legislature.[244] On its face, the Ohio situation fits this anti-New Deal Court model. But of the four Justices who supported the *DeRolph* majority, two were Republicans.[245] The *Walter* court had a four to three Democratic majority, in contrast to the *DeRolph* court's five to two Republican edge.[246] In Arizona, the Republican Governor supported a measure to provide huge subsidies for poor districts' capital needs[247] and viewed the decision in *Roosevelt* as a "positive force."[248]

A more plausible explanation for the change in outcome is simply that attitudes toward education have changed, even across party lines. The publication of *A Nation at Risk*[249] in 1983 helped to focus the attention of both the political elite and the populace. Michael Heise has observed that the recent success of plaintiffs has "cohere[d] with the emerging educational standards movement."[250] Approximately four out of ten Americans had "a great deal" of confidence in public education during the 1970s.[251] During the early 1980s, citizens and public officials became concerned that "a rising tide of mediocrity"[252] was deluging the children in American public schools. By the mid-1990s, less than one-quarter of the American public expressed great confidence in the public school system.[253] The proportion of respondents with "hardly any" confidence in public schools doubled from the beginning to the end of the survey period.[254] Americans' low ratings of public schools throughout the nation reflect this lack of confidence.[255] From 1988 to 1996, the percentage of Americans who believed education was the most important problem facing this country rose from two percent to thirteen percent.[256]

---

[243] *See* Dick Kimmins, GANNETT NEWS SERVICE, Nov. 9, 1994, *available in* LEXIS, Nexis Library, Gannett News Service File.

[244] *4-3 Ruling Ends Fight Begun in '91*, COLUMBUS DISPATCH, Mar. 25, 1997, at 1A.

[245] Justices Pfeifer and Douglas are Republicans while Justices Resnick and Sweeney are Democrats. *See id.*

[246] *See* Bradshaw James, *Court Ruling on Ohio School Financing Looms*, COLUMBUS DISPATCH, Mar. 2, 1997, at 3B. Supreme Court Justices in Ohio are elected to six-year terms. *See* OHIO REV. CODE ANN. § 2503.02-.03 (Anderson 1998).

[247] *See Education Finance: What a Mess*, ARIZONA REPUBLIC, Feb. 22, 1994, at B8.

[248] Pat Flannery, *School-Fund Ruling Means Tax Debate; Legislature Cannot Dodge Issue*, PHOENIX GAZETTE, July 2, 1994, at A1.

[249] *See* NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983).

[250] Heise, *supra* note 31, at 1175.

[251] *See* Jennifer Hochschiled & Bridget Scott, *The Polls-Trends: Governance & Reform of Public Education*, 62 PUB. OPINION Q. 79, 80 (1998).

[252] *Id.*

[253] *See id.*

[254] *See id.*

[255] *See id.*

[256] *See id.* at 82.

Along with changing attitudes toward education, the individualized political fight within a state might impact on court decisions. The suggestion that reformer success can depend on the political fight is confirmed by the narratives about individual school finance battles. In Oklahoma, a decade-long struggle failed after the success of numerous referenda against the taxes needed to support school reform.[257] The Texas story of school finance and its court's position have changed in reaction to the legislature[258] and as the court has changed membership.[259] In Alabama[260] and Arizona,[261] the records were replete with the states' highest officials asking the court to declare their systems unconstitutional. Reformers in Florida successfully passed an amendment to the state's education clause in an attempt to overturn its court's decision.[262]

Furthermore, while at first court decisions demanding that equal education is a fundamental right seem left-wing, they may not necessarily be so. The notion of equal educational opportunity for children does not invoke the same specter of government control that universal health care might. If anything, a society where everybody started out with the same opportunities would be more justified in not providing benefits in later life. A well supported equal education system could effectively undermine the welfare state. Regardless of the political leanings of the reformers, the minimum education that people expect for simple fairness has risen. At one point in history, it was not assumed that one needed to learn to read. Now schools lacking computer labs are backwards.[263] The public's view toward education has changed. That courts are changing

---

[257] *See* Mark Grossman, *Oklahoma School Finance Litigation: Shifting from Equity to Adequacy*, 28 U. MICH. J.L. REFORM 521 (1995).

[258] *See* Yudof, *supra* note 9, at 501, 505.

[259] *See* Clay Robison, *Supreme Court Ruling is No Answer*, HOUSTON CHRON., Feb. 5, 1995, at 2.

[260] *See* Alabama Coalition for Equity v. Hunt, 624 So.2d 107, 151 (Ala. 1993).

[261] *See supra* Part III.B.

[262] *See* Martin Dyckman, *Making Education a State Priority*, ST. PETERSBURG TIMES, Oct. 22, 1998, at 17A. The new education clause reads:

> The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

Fla. Const. art. IX, § 1; *see also* Coalition for Adequacy v. Chiles, 680 So.2d 400, 405 n.7 (Fla. 1996) (discussing how Florida's education clause is only a Category II and therefore requires only a minimum quality of education). This attack on the state constitution was very popular, receiving 70% of the vote, and suggests another avenue for reformers who have lost in their state's courts. *See* Jeff Kunerth, *Voters Go For Most Revisions on the Ballot*, ORLANDO SENTINEL, Nov. 4, 1998, at D1.

[263] *See* DeRolph v. State, 677 N.E.2d 733, 765 (Ohio 1997) (Douglas, J., concurring).

their attitudes toward education as a reflection of that shift is not all that surprising.

IV. Conclusion

After nearly thirty years of court battles over school finance, the situation is unsettled in many jurisdictions. Issues of education are so important to society that these battles will undoubtedly continue so long as disparities exist.

The lesson learned from examining the constitutional clauses and the history of school finance is that plaintiff success is not caused by new legal arguments, but by a change in political will and attitudes toward education. As such, reformers must not simply focus their efforts on mounting successful court challenges. Rather, they must fight within the court of public opinion.

This Note certainly does not suggest that reformers should de-emphasize adequacy arguments. Sometimes they are the key to winning. Sometimes when they win, they win big.[264] But reformers must not forget the equity arguments that have been around from the beginning because they still win too. Finally, reformers must recognize the importance of continuing efforts to influence public opinion. If this arena is ignored, any victory in the courts may end up hollow because school finance reform eventually depends upon the action of state legislatures in implementing the courts' decisions.

---

[264] *See, e.g.*, Heise, *supra* note 31, at 1163–65 (discussing the aftermath of Kentucky's *Rose* decision).