

RETHINKING JUDICIAL ACTIVISM AND RESTRAINT IN STATE SCHOOL FINANCE LITIGATION

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* J.D., Yale Law School, 2003; B.A., Ohio State University, 2000. The author wishes to thank George Priest, Lee Harris, Pablo Sandoval, Carolina Maharbiz, Inayat Delawala, and Heather Mann for comments on earlier drafts and for sharing their insights into the subject matter.

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Although state and local governments devote significant resources toward primary and secondary education, more than forty states have faced some form of litigation aimed at increasing school funding. Such cases have focused on the interdistrict inequalities that stem from states' reliance on local property taxes and, more recently, on deprivations of various constitutionally required levels of educational opportunity. While it sometimes proves difficult for courts to properly balance the principles of judicial review and judicial restraint, few areas have been so vexing as school finance litigation. Indeed, these cases are notable not only for their practical impact but also for their jurisprudential extremes. Some courts have been hesitant to provide even adequate judicial review, while others have seemed almost uninhibited in their willingness to act as quasi-legislatures that set educational goals and states' fiscal policies. This Article examines the various approaches taken by state supreme courts in deciding school finance cases and rejects both jurisprudential extremes in favor of a more moderate approach that better balances the principles of judicial review and judicial restraint.

I. THE IMPORTANCE OF EDUCATION

The establishment and maintenance of schools is one of—if not the—most important functions of state and local governments.¹ Since the very founding of the Republic education has been seen as both a private and a public good. The United States Supreme Court acknowledged in *Brown v. Board of Education* that education is central to democracy and the success of civic republicanism. “[Education] is required in the performance of our most basic public responsibilities It is the very foundation of good citizenship.”²

Why is education so important? The economic benefits that a society gains from having well-trained and educated workers are well known.³ Educated citizens are also better able to choose—and serve

1. See Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance in the 1990s*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 136, 136 (Helen F. Ladd et al. eds., 1999) (stating that “education is one of the most important investments that a state can make in the future of its individual citizens and of the society as a whole”) [hereinafter EQUITY AND ADEQUACY IN EDUCATION FINANCE].

2. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

3. Elizabeth Reilly, *Education and the Constitution: Shaping Each Other and the Next*

as—responsible and knowledgeable public officials, and citizens who are informed of their rights and responsibilities serve as a check against governmental abuse. Perhaps most importantly, though, the American social system rests on two goals that require access to education: the “melting pot” that absorbs diverse populations into a pluralistic society and the upward mobility that allows us to overcome class barriers.⁴ State and local governments recognize the importance of these factors and therefore devote significant resources to education finance. Education budgets are staggering, and such expenditures make up the bulk of both state and local outlays. In fact, in many states the education department is not only the largest of executive departments but accounts for more resources than all other departments combined.⁵

Such efforts notwithstanding, the past three decades have seen a series of lawsuits brought against states and localities to increase funding of primary and secondary education. These cases initially focused on the interdistrict inequalities that result from states’ reliance on local property taxes. The most recent wave of school finance litigation, however, has focused on alleged deprivations of some constitutionally required level of educational opportunity, often set forth in ambiguous state constitutional provisions.

This Article begins by briefly discussing why school finance litigation occurs. I explain why elected officials have disincentives to providing strong education reform and that this causes plaintiffs to turn to the courts as a catalyst for change. The Article then offers an overview of school finance litigation. I describe the evolution from cases arising under federal equal protection claims to those relying on equity-based funding arguments to the more recent adequacy-based

Century, 34 AKRON L. REV. 1, 2 (2000). This point has been made explicit in a number of school finance decisions. *See, e.g.,* *Sheff v. O’Neill*, 678 A.2d 1267, 1290 (Conn. 1996) (stating that the state’s economy is dependent on “skilled workers, technically proficient workers, [and] literate and well-educated citizens”).

4. Reilly, *supra* note 3, at 2. *See also* ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 121-22 (1970) (stating that public schools are “nationalizing, assimilating agent[s]” that are “charged with the task of Americanization, of melding backgrounds and creating one nation”); Jessica J. Josephson, *T.V. and the Not-So-Soft Sell*, WASH. POST, June 12, 1977, at D3 (describing America as a “melting pot” and noting that “our culture is fundamentally defined by upward mobility”).

5. Consider, for example, one of the arguments made by the state defendants in recent school finance litigation. “[W]ell over 50% of State revenue in the capital and non-capital budget now goes to primary, secondary or college education The Department of Education now receives more State money than any other agency or department in the State.” Brief of the State Appellants at 2, 11, *DeRolph v. State*, 728 N.E.2d 993 (Ohio 2000) (No. 99-0570).

cases arising under state constitutions' education provisions. I argue that "adequacy" cases have been more successful than their predecessors for both legal and political reasons. I then briefly critique the effects of such litigation, finding that while court-mandated reforms have generally led to increased funding and greater equality among school districts, the overall academic effects are more ambiguous.

I next examine the range of litigation outcomes through the lens of several recent cases. These cases illustrate two extremes that tend to dominate school finance litigation: judicial activism and a level of judicial restraint that some commentators have called "judicial abdication."⁶ Some state supreme courts have found school funding to be a nonjusticiable political issue. In so doing they have abdicated their responsibility to provide adequate judicial review.⁷ Others have been so activist that the words of state constitutions and the principle of deference to legislatures become almost meaningless.⁸

This Article offers examples of each approach. I first discuss the holding and reasoning of the *Committee for Educational Rights v. Edgar*.⁹ In *Committee for Educational Rights*, the Illinois Supreme Court concluded that school finance issues should be left solely to the legislative branch and were therefore nonjusticiable.¹⁰ This reasoning echoed that of several other courts, including Florida,¹¹ Georgia,¹² and Rhode Island.¹³ I then critique *Brigham v. State*, a sweeping decision by the Vermont Supreme Court that seemingly rewrote a relatively weak educational provision in the Vermont Constitution in order to support an equity requirement.¹⁴

These cases demonstrate that constitutional language itself is sometimes less important than a court's will to reach a specific outcome. Indeed, some courts have moved beyond stating what the

6. See generally William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J. L. & POL. 525 (1998).

7. *Id.* at 530.

8. *Id.* at 532.

9. 672 N.E.2d 1178 (Ill. 1996).

10. *Id.* at 1189 (stating that questions relating to the quality of education are solely for the legislative branch to answer).

11. See *Coalition for Adequacy v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996) (stating that "appellants have failed to demonstrate . . . 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").

12. See *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981).

13. See *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995).

14. *Brigham v. State*, 692 A.2d 384 (Vt. 1997).

law is and have instead sought to define what should be required by law. Such decisions intrude upon the authority of the other governmental branches. The courts' relative insulation from the political process also raises some concerns. The judiciary is the least democratic branch of government. There is little reason to believe that courts are either more in touch with the citizenry or more capable of formulating sound public policy decisions than the other branches of government.

After addressing the relative merits of judicial restraint and activism, I propose a third course of action that better balances judicial review and separation of powers concerns. A middle ground approach is seen in *DeRolph v. State*, in which the Ohio Supreme Court held the state's funding system unconstitutional on adequacy grounds but declined to fashion a remedy, leaving that to the state legislature and governor.¹⁵ I conclude by setting forth some guidelines that state courts should consider when deciding school finance cases. These guidelines eschew extreme restraint and activism and instead seek to bring much-needed balance and predictability to school finance litigation.

II. WHY LITIGATION? A LOOK AT THE POLITICS OF SCHOOL FINANCE

It is obvious that policymakers and voters recognize education as one of the most important functions of state and local governments. Why, then, would school finance litigation ever be necessary? Could we not expect that elected officials would adequately fund schools, even if only to protect their own electoral careers? There are in fact strong disincentives for governors and legislators to make comprehensive changes to school finance systems.¹⁶ First—and perhaps most important—is the fear of being associated with the introduction of new taxes.¹⁷ A related problem stems from the nature of legislative representation. Individual legislators represent individual districts, whose goals (and need for increased spending)

15. See *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997) [hereinafter *DeRolph I*]. The Ohio Supreme Court did not require the legislature to take any specific course of action. The majority made clear, though, that it was not advocating a "Robin Hood" approach and did not support placing spending ceilings on wealthier districts. *Id.* at 746. The court also admonished the General Assembly: "[The General Assembly] must create an entirely new finance system It is a statewide system . . . the establishment, organization, and maintenance of public education are the state's responsibility." *Id.* at 747.

16. Carr & Fuhrman, *supra* note 1, at 136.

17. *Id.* at 140.

may differ from that of the state as a whole. Legislators who raise taxes that are likely to improve schools primarily in other districts may draw the ire of voters at home. These factors are amplified by the fact that representatives from poor districts, who are likely to support reform, tend to be outnumbered by the representatives of middle class and wealthy districts combined, who often oppose it.¹⁸

For their part, governors are accountable to the entire state and are therefore less likely to be constrained by local interests. Governors have a limited amount of political capital, however, and are generally reluctant to expend it on a single issue.¹⁹ Like legislators, they must also be careful not to spend too much of a state's resources only on education. Thus, while governors are often more willing than legislators to support education reform, they are unlikely to do so without an outside catalyst such as pressure from the courts.²⁰

Many states have had a need for such a catalyst. The debates about the importance of money notwithstanding,²¹ educational opportunity is typically defined in terms of resource inputs, such as funding levels, as well as the number and quality of teachers, texts, and other quantifiable factors.²² Variations on these measures, including per pupil expenditures, are significant both within and among states.²³ In any system where local property taxes account for a significant portion of the school finance system, a basic, inescapable problem remains: property values are unequally distributed across school districts and across states.²⁴ Inequalities in revenues per pupil

18. *Id.*

19. *Id.* at 141.

20. *Id.*

21. *See infra* notes 61-67 and accompanying text.

22. MARK G. YUDOF ET AL., *EDUCATION POLICY AND THE LAW* 591 (4th ed. 1992) (citing James S. Coleman, *The Concept of Educational Opportunity*, 38 HARV. EDUC. REV. 7 (1968)).

23. *See id.* Yudof points out that there are at least three kinds of disparities in school finance: interstate, intrastate/interdistrict, and intradistrict. Among these, both interstate and interdistrict disparities appear prominent. "[I]nterstate disparities in per pupil expenditures are significant . . . [and] the disparity between the poorest district in one state and one of the highest spending districts in another state are orders of higher magnitude." *Id.* Interdistrict disparities within a state, often the subject of school finance litigation, are also significant. In many states the level of spending in one district may be four times that of another district within the same state. *Id.* at 592.

24. Robert Berne & Leanna Stiefel, *Concepts of School Finance Equity: 1970 to the Present*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE*, *supra* note 1, at 7, 8. "Local property tax-based finance schemes result in some school districts collecting substantially more tax dollars than others depending on the taxable wealth available in the district, regardless of the tax rate imposed." Karen Swenson, *School Finance Reform Litigation: Why are Some Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147, 1147-48 (2000) (citing R. CRAIG WOOD & DAVID C. THOMPSON, *EDUCATIONAL FINANCE*

therefore exist within and among school districts; these inequalities “are primarily the result of differences among districts in per pupil taxable property base.”²⁵

As Jonathan Kozol so aptly stated in the seminal book *Savage Inequalities*, “[t]he shock of going from one of the poorest schools to one of the wealthiest cannot be overstated.”²⁶ Indeed, this author has visited public schools that have “Astroturf” football fields, larger and better kept than those of many colleges; indoor track and field facilities; Olympic-sized swimming pools; and weight rooms that surpass the quality of most private clubs. At the same time, and in some cases only a few miles away, children attend schools that do not have enough money to purchase textbooks or provide students adequate or even safe school facilities.

The courts sometimes offer these poor districts and their students the only viable option for increasing school funding. Because even elected courts are relatively insulated from the political processes that constrain legislators and governors, plaintiffs often find that courts are more likely to advocate for underrepresented groups.²⁷ Furthermore, it is the responsibility of courts to interpret their state’s constitution and determine whether or not the finance schemes at issue meet the constitutional requirements. If a state has not met this requirement, a court can find the system unconstitutional and effectively require increased or more equitable funding.

Overall, this strategy has served plaintiffs fairly well. To date, more than forty states have faced some form of school finance litigation. Although twenty-four courts of last resort have upheld a state’s school funding system, seventeen have relied on either their state’s education clause or its equal protection clause to find the school finance system unconstitutional.²⁸ In several of these cases, courts that had previously rejected challenges to their states’ school finance systems later retreated and found these systems unconstitutional.²⁹

LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS—AN ANALYSIS OF STRATEGIES 54 (2d ed. 1996)).

25. YUDOF ET AL., *supra* note 22, at 593; *see also* Introduction to EQUITY AND ADEQUACY IN EDUCATION FINANCE, *supra* note 1, at 1 (stating that districts with small property tax bases typically find it harder than those with larger tax bases to generate local revenue for schools).

26. JONATHAN KOZOL, *Savage Inequalities* 2 (1991).

27. Carr & Fuhrman, *supra* note 1, at 141.

28. Paula J. Lundberg, *State Courts and School Funding: A Fifty State Analysis*, 63 ALB. L. REV. 1101 (2000); Swenson, *supra* note 24, at 1149.

29. Lundberg, *supra* note 28, at 1103-04 (2000) (“Supreme courts in two states, Arizona and Ohio, originally declined to overturn their school funding systems, but later

III. SCHOOL FINANCE LITIGATION: A BRIEF OVERVIEW

School finance cases have been divided into at least three distinct “waves.”³⁰ The first two waves, which began in the early-1970s and continued until the early-1990s, focused on achieving greater educational “equity,” which often meant a search for equal funding for school districts within a given state. In positive terms, the search for greater educational “equity” has typically meant that all students should be given an equal opportunity to succeed.³¹ In negative terms, it has meant that a student’s success should not depend upon circumstances outside of his or her control, such as geographic location or wealth of the family.³²

A. *The Search for Equity in School Finance*

The first wave of school finance litigation involved state and federal challenges to funding schemes based on the Federal Equal Protection Clause.³³ This phase was short-lived, beginning in 1971 with *Serrano v. Priest*³⁴ and ending in 1973 with the U.S. Supreme Court’s rejection of this approach in *San Antonio Independent School District v. Rodriguez*.³⁵ In *Serrano*, the California Supreme Court held that education is a fundamental right and that the state’s property tax-based funding system violated that right by creating vast spending disparities between school districts.³⁶ The U.S. Supreme Court

overruled these decisions and found their systems unconstitutional.”); Swenson, *supra* note 24, at 1149 n.12 (“The Arizona, Ohio, and Washington high courts have also previously upheld their respective state’s financing schemes . . .”).

30. Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine*, 33 LAND & WATER L. REV. 281 (1998), reprinted in ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 1019 (3d ed. 1999) [hereinafter Heise, *Schoolhouses, Courthouses*]; Gail F. Levine, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507, 507-08 (1991) (describing the “three waves” of school finance litigation); 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); see also Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 TEMPLE L. REV. 1151 (1995) (stating the reasons for the replacement of equity with adequacy theory in school finance litigation) [hereinafter Heise, *The Third Wave*].

31. Berne & Stiefel, *supra* note 24, at 13.

32. *Id.*

33. James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 266 (1999).

34. 487 P.2d 1241 (Cal. 1971) [hereinafter *Serrano I*] (holding that wealth is a suspect classification and that education is a fundamental right; striking down a property-based funding scheme on state and federal equal protection grounds).

35. 411 U.S. 1 (1973) (holding that education is not a fundamental right and upholding an unequal school funding scheme under a rational basis review).

36. See *Serrano I*, 487 P.2d at 1264-66. The California Supreme Court emphasized that

quickly closed this door with *Rodriguez*, in which it stated that education is not a fundamental federal right and that the states are free to balance the values of local control and equality of educational resources.³⁷ This struck at the heart of the *Serrano* ruling. Because education is not a fundamental right, property wealth is not a “suspect classification,” and inequities in school spending do not violate the federal Constitution.³⁸

The second wave of school finance cases immediately followed *Rodriguez* and focused on the education and equal protection clauses of state constitutions.³⁹ Only one month after the U.S. Supreme Court rejected federal equal protection arguments, the New Jersey Supreme Court held that although education was not a fundamental federal right, wide spending disparities among school districts violated the New Jersey Constitution’s requirement that the state maintain a “thorough and efficient” system of public schools.⁴⁰ In 1976 the California Supreme Court reaffirmed *Serrano*, this time on the grounds that funding disparities violated the California Constitution’s equal protection clause.⁴¹

Plaintiffs in other states quickly followed this lead, and by the late-1970s more than twenty states faced challenges to their school finance systems. Like the first wave, plaintiffs in these cases generally sought equalized per pupil funding. The results of this stage were mixed: thirteen of the twenty cases resolved by state supreme courts were rejected, and seven were successful.⁴² During the 1970s, more than

per pupil expenditures differed by as much as 100 percent even within the same county. “[I]n Los Angeles County . . . the Baldwin Park Unified School District expended only \$577.49 to educate each of its pupils in 1968-1969; during the same year the Pasadena Unified School District spent \$840.19 on every student; and the Beverly Hills Unified School District paid out \$1,231.72 per child.” *Id.* at 1248. The court also found that these disparities were the result of differences in local tax bases. “[I]n Baldwin Park the assessed valuation per child totaled only \$3,706; in Pasadena, assessed valuation was \$13,706; while in Beverly Hills, the corresponding figure was \$50,885—a ratio of 1 to 4 to 13.” *Id.*

37. See 411 U.S. at 50-54; see also Richard Rothstein, *Equalizing Education Resources on Behalf of Disadvantaged Children*, in *A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY* 31, 66-67 (Richard D. Kahlenberg ed., 2000).

38. See Rothstein, *supra* note 37, at 67.

39. Ryan, *supra* note 33, at 266.

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

41. See *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) [hereinafter *Serrano II*].

42. See Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE*, *supra* note 1, at 34, 41-47 (providing a state-by-state listing of school finance litigation cases and their results); see also Carr & Fuhrman, *supra* note 1, at 146 (stating that plaintiffs won 7 out of 16 school finance cases decided between 1973 and 1980).

twenty states modified their education finance systems, some due to political pressures, and some as a result of judicial decisions and orders.⁴³ By 1980, roughly thirty states had been involved in some form of school finance litigation.⁴⁴ A number of the equity lawsuits brought in the 1970s, however, were rejected. These included cases in Oregon, Idaho, Pennsylvania, and Ohio.⁴⁵

B. *The Shift from Equity to Adequacy in School Finance Litigation*

State supreme courts heard only eight school finance cases from 1981 to 1988.⁴⁶ Plaintiffs were successful in only one of these.⁴⁷ This did not compare favorably with the period 1973-1980, during which plaintiffs had won seven out of sixteen cases.⁴⁸ The recession of 1981-1982, combined with a growing sentiment that the problems of school finance had been "dealt with" in the prior decade, weakened both legal and popular support for equity measures.⁴⁹ It is therefore not surprising that most of the cases in the 1980s were characterized by judicial restraint and deference to the legislative branch.⁵⁰ Courts often dealt with state equal protection challenges by holding that education is not a fundamental right and therefore is not entitled to strict scrutiny under state constitutions.⁵¹ Applying the more deferential rational basis test—as the U.S. Supreme Court did in *Rodriguez*—led the majority of these courts to uphold their finance systems under the basis of protecting local control.⁵²

While most of the second wave cases focused on equality, some also dealt with state constitutional provisions requiring the states to provide and maintain "adequate" or "thorough" systems of public schools.⁵³ This trend became increasingly common as plaintiffs

43. YUDOF ET AL., *supra* note 22, at 592.

44. *Id.*

45. Minorini & Sugarman, *supra* note 42, at 53. See, e.g., *Bd. of Educ. v. Walter*, 390 N.E.2d 813 (Ohio 1979) (rejecting challenges based on state equal protection clause and education clause on the grounds that the legislature has discretion in educational matters and the courts will not interfere with such discretion where education appears adequate).

46. Carr & Fuhrman, *supra* note 1, at 146.

47. *Id.*; see also Minorini & Sugarman, *supra* note 42, at 55 (stating that from 1980 to 1988, only two state courts invalidated their states' school funding schemes, while eight upheld their systems as constitutional).

48. Carr & Fuhrman, *supra* note 1, at 146.

49. See *id.* at 146-47.

50. Minorini & Sugarman, *supra* note 42, at 55.

51. *Id.*; see also J.K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REFORM 493 (1995).

52. Minorini & Sugarman, *supra* note 42, at 55.

53. Kelly Thompson Cochran, Comment, *Beyond School Financing, Defining the*

recognized a number of problems with the equity approach. Among the most important was the fact that the equalized funding offers no solutions if all districts are equally funded at an inadequate level.⁵⁴ Indeed, early cases prompted a leveling down of funding in wealthier districts. This led to a more equitable distribution of funding, but did so at the expense of per pupil expenditures.⁵⁵ Eleven states that enacted significant school funding reforms in the 1970s also enacted significant property tax relief.⁵⁶ Eight of those states saw per pupil expenditures fall relative to the national average.⁵⁷ Furthermore, due to the well-known problems in California following *Serrano* and its unfortunate progeny, Proposition 13, many saw the banner of “equity” as “equally bad for all.”⁵⁸

By the late 1980s, any theory that hoped to succeed had to shed the idea of leveling down funding from the highest spending districts. Unfortunately, “leveling up” the lowest spending districts even to the state average often proved economically infeasible. Consider, for example, the difficulties faced by the state of Texas during its attempts in the 1990s to remedy the finance system at issue in *Edgewood Independent School District v. Kirby*.⁵⁹ Plaintiffs in that series of cases sought a system that would fund all districts at the level of those at the 100th percentile. Such complete equalization was, for all practical purposes, impossible; it would have required a school finance budget nearly four times as large as that of the entire annual state budget.⁶⁰

Constitutional Right to an Adequate Education, 78 N.C. L. REV. 399, 411 (2000).

54. See, e.g., YUDOF ET AL., *supra* note 22, at 811 (stating that “the fiscal neutrality approach offered no solution if all districts were equally inadequately funded, the situation that existed in California after *Serrano* and Proposition 13”).

55. Carr & Fuhrman, *supra* note 1, at 145-46.

56. *Id.* at 146.

57. *Id.* (citing Patricia R. Brown & Richard F. Elmore, *Analyzing the Impact of School Finance Reform*, in *THE CHANGING POLITICS OF SCHOOL FINANCE* 107, 112 (Nelda H. Cambron-McCabe & Allan Odden eds., 1982)).

58. Following *Serrano II*, the voters of California passed Proposition 13, a constitutional amendment that limited property tax rates to 1 percent of the cash value of real property subject to taxation. Minorini & Sugarman, *supra* note 42, at 49. Proposition 13 also required a two-thirds vote of the legislature to increase state taxes and absolutely prohibited the imposition of a statewide property tax. *Id.* Over time the effect of Proposition 13 has been to slow the overall growth in spending. California has therefore gone from being one of the highest spending states for elementary and secondary education to one of the lowest. *Id.* The *Serrano* cases and Proposition 13 became increasingly unpopular, and in fact may have dramatically reduced public support for education. William N. Evans et al., *The Impact of Court-Mandated School Finance Reform*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE*, *supra* note 1, at 72, 75.

59. 777 S.W.2d 391 (Tex. 1989).

60. J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for*

An additional complication of the equity approach stems from the fact that equalizing funding does not guarantee either an equal or an adequate education. There are in fact important theoretical and empirical disputes as to the importance of finance in the delivery of a quality education.⁶¹ Even supportive commentators have found that school "finance" cases need not be about money.⁶² "[T]he underlying right recognized in school finance cases—the right to an adequate or equal education—need not be defined solely in monetary terms" and perhaps should not be.⁶³ School finance lawsuits often seek to compensate for the shortcomings of other impact litigation, particularly school desegregation. More recent cases, such as *Sheff v. O'Neill*,⁶⁴ represent an attempt to use other methods to overcome the perceived inadequacy of school finance reform.⁶⁵

Education Equity, 17 YALE L. & POL'Y REV. 607, 649 (1999).

61. Chief Justice Thomas Moyer's dissents to several of the Ohio Supreme Court's *DeRolph* decisions highlight the idea that spending is not the most important predictor of student performance. Moyer argues that "factors related to families and economic opportunity"—and not school finance—are the most influential. See *DeRolph v. State*, 728 N.E.2d 993, 1034-35 (Ohio 2000) (Moyer, C.J., dissenting) [hereinafter *DeRolph II*].

Similar findings abound in the academic literature. Eric Hanushek authored one of the most thorough surveys on the relationship between school finance and education in 1986. His conclusion was unmistakably clear: "There appears to be no strong or systematic relationship between school expenditures and student performance." Eric A. Hanushek, *The Economics of Schooling: Production and Efficiency in Public Schools*, 24 J. ECON. LITERATURE 1141, 1162 (1986). Although Hanushek's conclusion has been challenged by many educators, it remains the prevailing view among economists. Gary Burtless, *Introduction and Summary*, in DOES MONEY MATTER?: THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND SUCCESS 1, 3 (Gary Burtless ed., 1996). "For more than two decades . . . researchers have tried to identify inputs that are reliably associated with student achievement. The bottom line is, they have not found any. Researchers have found no systematic relationship between student achievement and the inputs that reformers (and researchers) always assumed matter." John E. Chubb & Eric A. Hanushek, *Reforming Educational Reform*, in SETTING NATIONAL PRIORITIES: POLICY FOR THE NINETIES 213, 220 (Henry J. Aaron ed., 1990).

There is, however, evidence that school finance affects students' labor market outcomes. Indeed, some scholars have found that graduates of resource-rich schools perform better in the labor market than graduates who attended resource-poor schools. Burtless, *supra*, at 3-4. These findings may be more important than those regarding academic achievement. Test scores and other achievement measures merely approximate how successful we expect a student to be in the labor market—it is labor market success itself that is the most relevant standard of measurement. See *id.* at 17 ("Arguably, schools should try to maximize the earnings gains their graduates can obtain as a result of school attendance.").

62. James E. Ryan, *Sheff, Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 532 (1999).

63. *Id.*

64. 678 A.2d 1267 (Conn. 1996).

65. Despite the problems (both real and perceived) with equity-based reforms, expenditure disparities were significantly reduced from 1972-1992 in states that had enacted court-ordered reforms. YUDOF ET AL., *supra* note 22, at 812; see also NAT'L RESEARCH COUNCIL, MAKING MONEY MATTER: FINANCING AMERICA'S SCHOOLS 90-91

Policymakers have increasingly distinguished school funding per se from providing an adequate education. When *A Nation at Risk* was published in 1983, it called attention to the inadequacies of education in the United States.⁶⁶ Governors and state legislators responded by turning their attention toward “achieving excellence in education,” often by changing education standards, graduation requirements, and teacher certification requirements and compensation.⁶⁷

The rhetoric of adequacy also showed legal promise for plaintiffs. The U.S. Supreme Court’s decision in *Rodriguez* had recognized the difference between an “unequal system” and one that “occasioned an absolute denial of educational opportunities to any of its children.”⁶⁸ The Court admitted that a system that absolutely precluded poor children from receiving an education “would present a far more compelling set of circumstances for judicial assistance” than mere equity suits.⁶⁹ The second wave cases demonstrated that such a showing would have to be made, as courts were frequently dismayed at what appeared to be an insufficient showing of injury.⁷⁰ Several courts criticized plaintiffs for failing to show that spending inequalities actually denied plaintiffs their constitutional rights.⁷¹ By the late 1980s, it had become clear that most state courts would not uproot a school funding system based on spending disparities alone.

C. The “Third Wave”

The third wave of school finance litigation began in 1989, with important plaintiff victories in Kentucky⁷² and Montana.⁷³ In contrast

(Helen F. Ladd & Janet S. Hansen eds., 1999). In states with court-ordered reforms, spending rose by 11 percent in the poorest districts, by 7 percent in the median district, and remained stable in the wealthiest districts. YUDOF ET AL., *supra* note 22, at 812. This compares favorably to the states in which litigation was unsuccessful. In those states, funding to the lowest spending districts often decreased, while the disparity in expenditures either significantly increased or remained unchanged. Douglas S. Reed, *Twenty-Five Years After Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 L. & SOC’Y REV. 175, 190-91, 197, 201 (1998).

66. See NATIONAL COMM’N ON EXCELLENCE IN EDUC., U.S. DEP’T OF EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983).

67. Carr & Fuhrman, *supra* note 1, at 147.

68. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

69. *Id.* at 25 n.60.

70. *Minorini & Sugarman*, *supra* note 42, at 55.

71. *Id.*; see also *Hornbeck v. Somerset Co.*, 458 A.2d 758 (Md. 1983); *Britt v. North Carolina*, 357 S.E.2d 432 (N.C. 1987); *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1987); *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989).

72. *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989).

73. *Helena Elementary Sch. Dist. v. State*, 769 P.2d 684 (Mont. 1989).

to earlier school finance cases, which focused on reducing spending disparities in order to increase equity, the adequacy-based litigation concentrated on the sufficiency of school funding.⁷⁴ Plaintiffs in these cases began seeking to invalidate school finance systems not because of funding disparities per se, but rather because the quality of education provided in some school districts failed to meet some constitutionally required minimum standard.⁷⁵ Plaintiffs have relied on state education clauses to argue that all children are entitled to a base level of educational quality.⁷⁶ They have typically sought remedies that would bring the worst school districts up to the minimum level mandated by the state constitutions.⁷⁷

The greater promise of adequacy suits has proven true in the courtroom. Between 1990 and 1999, more than a dozen states recognized a cause of action for failure to provide an adequate education.⁷⁸ Like the earlier equity suits, the results of these cases have been mixed. A number of courts have been persuaded by evidence that their state's poorest school districts fail to meet even minimum standards.⁷⁹ Thus, the third wave has been better for plaintiffs, who have won eleven of twenty-two cases.⁸⁰ Additionally, courts in a few states that had previously rejected equity challenges to their school finance systems have found their states' systems unconstitutional under the burgeoning "adequacy" standard.⁸¹

Why is adequacy more compelling than equity? Perhaps the adequacy approach's appeal stems from the fact that it refers to a more modest, but also more important, goal than equity. The most useful definition of educational adequacy "refers to resources which are sufficient (or adequate) to achieve some educational result, such as a minimum passing grade on a state achievement test,"⁸² or some

74. Heise, *Schoolhouses, Courthouses*, *supra* note 30, at 1019.

75. *Id.*

76. Every state constitution has some provision guaranteeing a right to public education. Cindy M. O'Neil, Note, *Ohio's School Funding Dilemma: A Review of DeRolph v. State*, 27 CAP. U. L. REV. 891, 892 (1999) (stating that all fifty states mention education in their constitutions); see also Swenson, *supra* note 24, at 1148 n.9 (listing state constitutional provisions); Thro, *supra* note 6, at 538-39 n.33 (same). These provisions vary significantly in strength. See *infra* note 144.

77. Ryan, *supra* note 33, at 268; see also Thro, *supra* note 30, at 603; Heise, *The Third Wave*, *supra* note 30, at 1153.

78. Cochran, *supra* note 53, at 415-16.

79. Swenson, *supra* note 24, at 1149.

80. Ryan, *supra* note 33, at 269. These successes notwithstanding, twenty-six courts of last resort have upheld their states' funding schemes. Swenson, *supra* note 24, at 1149.

81. See *supra* note 29 and accompanying text.

82. YUDOF ET AL., *supra* note 22, at 773 (citing William Clune, *Accelerated Education*

other measurement of educational attainment. It is an outcome-oriented strategy. The adequacy approach emphasizes the quality of education itself and asks what inputs are needed to attain a desired level of achievement.⁸³ Thus, whereas equity focuses most on distribution of resources, the adequacy approach to school finance is more concerned with achieving sufficient, absolute levels of school funding.⁸⁴ Adequacy also changes the focus from inputs to outputs and “leaves behind the idea of equal resources for all.”⁸⁵

Legal commentators have generally supported the shift from equity to adequacy.⁸⁶ Many have recognized that pragmatic considerations make adequacy a more promising approach. “[I]t is less complicated a notion, more normatively appealing, and does not conflict with the principle of local control. Adequacy is also less costly”⁸⁷ The adequacy standard is perhaps also more palatable to legal commentators and the public because it intrudes less upon the principle of separation of powers. It is one thing to find that a system does not meet the constitutionally required minimum standard and is therefore unconstitutional until it is improved to meet that standard. This is the fundamental function of courts: to say what the law is.⁸⁸ It is quite different to hold, based on a typically vague equal protection provision, that all districts must be funded at an equal level. Because state constitutions have education clauses, which have in fact left the establishment and maintenance of public schools to the state legislatures, courts finding equity violations may intrude on the proper functions of the state legislatures. It is the fundamental province of the courts to say what the law is, but not what it should be.⁸⁹

as a Remedy for High-Poverty Schools, 28 U. MICH. L. REV. 655 (1995)).

83. Introduction to EQUITY AND ADEQUACY IN EDUCATION FINANCE, *supra* note 25, at 1-2.

84. YUDOF ET AL., *supra* note 22, at 773.

85. *Id.* at 774.

86. Ryan, *supra* note 33, at 270.

87. *Id.*

88. See THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) [hereinafter Hamilton, FEDERALIST NO. 78] (stating that it is the duty of courts “to declare all acts contrary to the manifest tenor of the Constitution void”); THE FEDERALIST NO. 80, at 475 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that federal courts are the apparatus that should give efficacy to constitutional provisions).

89. Alexander Hamilton offered the classic argument against judicial encroachment on the functions of the legislature and executive. “[T]here is no liberty if the power of judging be not separated from the legislative and executive powers.” Hamilton, FEDERALIST NO. 78, *supra* note 88, at 466 (quoting Baron de Montesquieu’s *The Spirit of Laws*). The courts are only to say what the law is, Hamilton argued, and not what it should be. “If [courts]

As we shall see below, even among adequacy cases, separation of powers questions are treated in different ways. Some courts have taken an activist approach, outlining a grab bag of goods that the courts believe constitute an appropriate education. These standards are often set impossibly high, and look more like aspirations than sound public policy choices. Before we discuss the appropriateness of these decisions, however, it is important to note that they have had a positive overall effect.

D. *What are the Results of School Finance Litigation?*

School finance cases have generally had a positive effect on school funding. Successful litigation or legislative education reform significantly increases education spending.⁹⁰ Court-mandated education finance reforms have also greatly reduced interdistrict inequalities. State reforms stemming from court decisions tend to reduce inequalities by 19 to 34 percent.⁹¹ With few exceptions, court-ordered reforms have done this not by leveling down wealthier districts, but by increasing spending for districts at the bottom.⁹² On average, court-ordered reforms have increased spending in poor and median districts by 11 percent and 7 percent, respectively, while leaving wealthy-district spending relatively constant.⁹³ Econometric analysis also shows that in states that have found their school finance systems unconstitutional, subsequent reforms have led to a 23 percent average increase over what would have occurred absent court

should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." *Id.* at 469.

90. Evans et al., *supra* note 58, at 75 (citing R.L. Manwaring & S.M. Sheffrin, *Litigation, School Finance Reform, and Aggregate Educational Spending*, 4 INT'L TAX & PUB. FIN. 107 (1995)).

91. *Id.* at 77; *see also* Rothstein, *supra* note 37, at 68-70. This may actually understate the effects of such reforms. Some researchers have found that without court-mandated reforms, average intrastate, interdistrict inequalities would have increased significantly between 1972 and 1992. Evans et al., *supra* note 58, at 78 (stating that states which had responded to school finance litigation by reforming their finance systems would have experienced an average increase in inequality of 9 percent from 1972-1992).

92. *See* Evans et al., *supra* note 58, at 77; *see also* Rothstein, *supra* note 37, at 71 (stating that legislatures have generally reacted to equalization pressures by increasing state funding to poor districts while maintaining wealthier districts' prior funding levels).

93. Evans et al., *supra* note 58, at 77; *see also* Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE, *supra* note 1, at 175, 186 ("Research has shown that in other states where courts have ordered school finance reform, school spending has gone up. Essentially, the judiciary has forced a leveling up of lower spending districts." (citing W.S. Evans et. al, *Schoolhouses, Courthouses, and Statehouses after Serrano*, 16 J. POL'Y ANALYSIS & MGMT. 10, 10-31 (1997))).

decisions.⁹⁴

Have these reforms improved the quality of education provided by low-wealth school districts? Measures of actual academic improvement have been less decisive. Some states have shown vast improvements in student achievement as funding for poor districts has increased. In Texas, for example, the reforms resulting from school finance litigation have led to a measurable increase in educational achievement. As the funding scheme has changed, the link between a school district's property wealth and achievement, as measured by the state's proficiency tests, has deteriorated.⁹⁵

A number of studies have been less optimistic. The California experience following *Serrano* resulted in greater funding equity, but not greater equality in student performance.⁹⁶ Data from the National Educational Longitudinal Survey (NELS) also suggest that court-mandated school finance reforms do not significantly change either the mean or the distribution of student performance on standardized tests.⁹⁷ The same data suggest, however, that legislative reforms do lead to higher test scores in general and that this effect is particularly large in low-wealth districts.⁹⁸

Because such reforms have typically not resulted in spending cuts to other areas of states' budgets, states' total spending has risen.⁹⁹ In a sense, school finance reforms have therefore led to judicially imposed tax increases or, alternatively, greater deficit spending. One must question whether this is the proper role of the judiciary. Are these not the exact choices that legislators are elected to make?

IV. A LOOK AT RECENT CASE LAW

Many school finance cases have failed to balance the principles of judicial review and separation of powers. William Thro has argued that there are two extremes that tend to dominate school finance

94. Rothstein, *supra* note 37, at 73.

95. See *Law Erases Link Between Schools' Wealth, TAAS Results*, DALLAS MORNING NEWS, May 19, 1999, at 23A.

96. Evans et al., *supra* note 58, at 90 (citing T.A. Downes, *Evaluating the Impact of School Finance Reform on the Provision of Education: The California Case*, 45 NAT'L TAX J. 405 (1992)).

97. *Id.* (citing T.A. Downes & D.N. Figlio, *School Finance Reforms, Tax Limits, and Student Performance: Do Reforms Level Up or Level Down?* (1997) (unpublished working paper)).

98. *Id.*

99. *Id.* at 77.

litigation: judicial activism and judicial abdication.¹⁰⁰ Some courts have declined to provide even adequate judicial review; others have been so activist as to seemingly replace the text of state constitutions with judicial policy preferences.¹⁰¹ Courts in Alabama, Arizona, Connecticut, Massachusetts, Nebraska, New York, North Carolina, Tennessee, and Vermont have found a quality standard or a “fundamental right” to education even though their constitutions merely establish a system of education and in fact contain no such standard.¹⁰² Other courts, such as Georgia and Illinois, have declined to make this finding even though the relevant constitutional provisions suggest that education is a fundamental right.¹⁰³

The cases discussed below provide insight into undue judicial restraint and judicial activism. After critiquing each method of decision-making, I will illustrate a more moderate third approach that better balances judicial review and the separation of powers.

A. School Finance as a Nonjusticiable Issue? Committee for Educational Rights v. Edgar

A number of courts have held questions of educational quality to be nonjusticiable. In some cases, these decisions have been handed down even though the state’s education clause is quite strong. In *Committee for Educational Rights v. Edgar*, for example, the Illinois Supreme Court held that disparities in educational funding that resulted from differences in local property wealth did not offend the state’s education clause.¹⁰⁴ It did this despite interpreting one of the strongest education clauses in the country. In doing so, the court avoided the issue of adequacy altogether by holding that the question of whether the educational institutions were “high quality” was “outside the sphere” of the judicial function.¹⁰⁵

In *Committee for Educational Rights*, a coalition of school districts and a number of individual students and parents brought an action for declaratory judgment that the statutory scheme governing the funding of public schools violated the education clause and equal protection provisions of the Illinois Constitution.¹⁰⁶ The plaintiffs alleged that

100. Thro, *supra* note 6, at 530, 532.

101. *Id.* at 532.

102. *Id.* at 540-41.

103. *Id.* at 542.

104. 672 N.E.2d 1178, 1189 (Ill. 1996).

105. *Id.* at 1193.

106. *Id.* at 1180.

Illinois's finance scheme was over-reliant on local property taxes and therefore resulted in vast differences in educational resources between school districts based primarily upon differences in taxable property wealth.¹⁰⁷ Disparities in property wealth were quite large. In the 1989-1990 school year, the average tax base in the wealthiest 10 percent of elementary schools was over thirteen times the average tax base in the poorest 10 percent.¹⁰⁸ The ratio of the average tax bases in the wealthiest and poorest high school districts was 8.1 to 1.¹⁰⁹

Illinois's wealth disparities translated into spending disparities. The state itself acknowledged that the interdistrict disparities in Illinois were among the nation's most severe.¹¹⁰ The 1989 "School Report Card" published by the Illinois State Board of Education found that wealthy districts employed a greater percentage of teachers with advanced degrees and paid teachers consistently higher salaries than poor districts.¹¹¹ Poor school districts, on the other hand, had significantly fewer resources to educate their students.¹¹² One district, for example, used textbooks that were up to twenty years old and lacked even the funds necessary to remove asbestos and repair leaking roofs.¹¹³

The plaintiffs in *Committee for Educational Rights* enjoyed the benefit of a very strong education clause. Article X, Section 1 of the Illinois Constitution lists the "educational development of all persons" as a "fundamental goal" of the state.¹¹⁴ The clause also imposes "primary responsibility for financing the system of public education" directly upon "the State."¹¹⁵ Furthermore, the Illinois Constitution requires not merely a thorough or efficient system but rather "an

107. *Id.* at 1182.

108. *Id.*

109. *Id.*

110. The 1989 Annual Report of the State Board of Education found that Illinois ranked sixth nationally in funding disparities. *Id.* at 1198 (Freeman, J., concurring in part and dissenting in part).

111. *Id.* at 1197.

112. *Id.* (Freeman, J., concurring in part and dissenting in part).

113. *Id.* at 1197-98 (Freeman, J., concurring in part and dissenting in part).

114. ILL. CONST. art. X, § 1. This is important for a number of reasons. First, it demonstrates that the provision of education is primarily a state—and not local—function. Perhaps more importantly, it implies that all three branches of government play a role in providing an efficient system. Other parts of the education clause refer directly to the General Assembly; it is clear that the drafters of the provision knew how to limit its requirements to the legislature if they so desired. *See Comm. for Educ. Rights*, 672 N.E.2d at 1200 (Freeman, J., concurring in part and dissenting in part) ("[I]f the Framers of the 1970 Illinois Constitution had intended the education system provision to command the legislature alone, they could have named the legislature specifically.").

115. ILL. CONST. art. X, § 1.

efficient system of *high quality* public educational institutions and services.”¹¹⁶ The plaintiffs relied on these protections to argue that the large disparities in the state’s funding system precluded the system from being efficient.¹¹⁷ They also argued that the system left some districts without adequate resources and therefore failed to provide the “‘high quality’ educational institutions and services” required by the state constitution.¹¹⁸

The Illinois Supreme Court brushed aside these seemingly strong provisions. The court held that education was not a fundamental right in Illinois. “[W]hile the framers of the 1970 Constitution recognized the importance of ‘the educational development of all persons to the limits of their capacities,’ they stopped short of declaring such educational development to be a ‘right,’ choosing instead to identify it as a ‘fundamental goal.’”¹¹⁹ The court therefore applied the rational basis test and concluded that local control provided the justification for maintaining the current system.¹²⁰

The court also found the plaintiffs’ argument that the system was not efficient unconvincing. The court stated that disparities in school funding were already a controversial subject at the time of the Illinois constitutional convention, and therefore could have been dealt with directly within the education clause. The convention had rejected any such wording.¹²¹ The court thus reasoned “that the framers of the [Illinois] Constitution viewed educational equality and ‘efficiency’ to be separate and distinct subjects.”¹²²

It is the Illinois Supreme Court’s treatment of the plaintiffs’ chief adequacy claims that has led some commentators to refer to the *Committee for Educational Rights* decision as “judicial abdication.”¹²³

116. *Id.* (emphasis added).

117. *See Comm. for Educ. Rights*, 672 N.E.2d at 1183-84.

118. *Id.* at 1189.

119. *Id.* at 1195 (quoting ILL. CONST. art. X, § 1).

120. *See id.* at 1195-96. In reaching its conclusion, the court was quite critical of equity arguments. A guarantee of equal educational funding does not, the court argued, necessarily procure any level of educational quality. To the contrary, the court stated that equal funding “does ensure a high level of equality and a low level of liberty. . . . Centralization reduces the freedom of localities and families to choose their own levels of educational spending.” *Id.* at 1195 (quoting Richard J. Stark, *Education Reform: Judicial Interpretation of State Constitutions’ Education Finance Provisions—Adequacy vs. Equality*, 1991 ANN. SURV. AM. L. 609, 665-66).

121. *See id.* at 1186-87. In fact, the framers of the Illinois Constitution rejected several proposals that would have limited the percentage of total funding from local sources in order to decrease interdistrict disparities. *See id.*

122. *Id.* at 1187.

123. *See, e.g., Thro, supra* note 6, at 542 (stating that the Illinois Supreme Court

As noted above, the education clause requires high quality institutions and services.¹²⁴ Courts in a number of jurisdictions had already found violations of less stringent state constitutional standards, such as “thorough” or “efficient.”¹²⁵ These courts defined constitutional requirements differently; the courts applied “varying degrees of specificity and deference to the other branches of government.”¹²⁶ The Illinois Supreme Court, however, declined to apply any constitutional requirement at all. “[W]e conclude that questions relating to the quality of education are solely for the legislative branch to answer.”¹²⁷

The Illinois court offered forceful arguments in favor of judicial restraint. The court noted the separation of powers concerns inherent in school finance litigation.¹²⁸ Then, quoting the U.S. Supreme Court’s decision in *Baker v. Carr*,¹²⁹ the Illinois court argued that there were no judicially discoverable and manageable standards for resolving the issues of the case.¹³⁰ Any such determinations would require an “initial policy determination,” which the separation of powers forbids.¹³¹ The court also emphasized its lack of institutional competence in the matter: “It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution Nor is education a subject within the judiciary’s field of expertise”¹³²

The Illinois Supreme Court declined to even address the question of what would constitute an adequacy standard. Rather than defining the state’s constitutional requirement, the court stated that it would not “presume to lay down guidelines or ultimatums for [the legislature].”¹³³ Many courts, however, have not only declined to follow this lead, but have instead resorted to the opposite extreme of judicial activism.

abdicated its duty in *Committee for Educational Rights* because it refused to declare education a fundamental right notwithstanding a clear implication to the contrary in the text of the Illinois Constitution).

124. *Comm. for Educ. Rights*, 672 N.E.2d at 1189.

125. *See id.* at 1191-92.

126. *Id.* at 1191.

127. *Id.* at 1189.

128. *See id.* at 1191.

129. 369 U.S. 186 (1962).

130. *Comm. for Educ. Rights*, 672 N.E.2d at 1191 (citing *Baker*, 369 U.S. at 217).

131. *Id.*

132. *Id.*

133. *Id.* at 1192 (alteration in original) (quoting *Seattle School Dist. No. 1 v. State*, 585 P.2d 71, 128 (Wash. 1978) (Rosellini, J., dissenting)).

B. *Activism [and Equity] in Vermont—Brigham v. State*

Although the adequacy approach is more common and has been more successful, equity challenges continued throughout the 1990s. Some state supreme courts held that their state constitutions did not mandate equalization.¹³⁴ Others interpreted their education clauses in conjunction with state equal protection guarantees and found that an approximate equalization of resources was required. The Vermont Supreme Court dealt with such issues in *Brigham v. State* in 1997.¹³⁵ *Brigham* contrasts sharply with *Committee for Educational Rights* and serves as one of the most radical examples of judicial activism in the area of school finance litigation.

In *Brigham*, students from low-wealth districts sought a declaratory judgment against the state of Vermont.¹³⁶ The plaintiff students claimed that the state's method of financing schools deprived them of their right under the state and federal constitutions to the same educational opportunities as students from wealthier districts.¹³⁷ The plaintiffs plainly sought equity rather than adequacy¹³⁸—they did not even allege that Vermont's education system was fundamentally inadequate or failed to impart basic skills.¹³⁹ This was probably done for strategic reasons. Even before the litigation began, Vermont did not suffer from the wide disparities that plague other states.¹⁴⁰ Vermont did, however, have a well-developed state doctrine of equal protection law.

134. YUDOF ET AL., *supra* note 22, at 804. See, e.g., *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000) (stating that Wisconsin's "uniformity clause" guarantees a basic education but not an equal allocation of resources).

135. 692 A.2d 384 (Vt. 1997).

136. *Id.* at 386.

137. *Id.* See also Michael A. Rebell & Jeffrey Metzler, *Rapid Response, Radical Reform: The Story of School Finance Litigation in Vermont*, 31 J.L. & EDUC. 167, 171-72 (2002) (stating that the plaintiffs' primary claim was that Vermont's education finance system deprived students of their right to equal educational opportunities).

138. See Rebell & Metzler, *supra* note 137, at 174 ("[I]t is the equal educational opportunity [that a person is entitled to] . . . So, if the state of Vermont provides a gold-plated education to the students going to school in Killington, the state is not treating similarly circumstanced people equally." (quoting Robert Gensburg, *The Road to Equal Educational Opportunity for Vermont School Children*, 22 VT. L. REV. 1, 17-18 (1997))).

139. *Brigham*, 692 A.2d at 387.

140. Rebell and Metzler cite the difference between the towns of Richford and Peru, which spent per pupil averages of \$3,734 and \$6,476, respectively, as an example of the "accelerated . . . disparities between property-rich and property-poor towns." Rebell & Metzler, *supra* note 137, at 169. At less than 2-to-1, this ratio seems somewhat small when compared to that of other states. In Texas, for example, the ratio of education spending reached as high as 9-to-1. Farr & Trachtenberg, *supra* note 60, at 615 (stating that the wealthiest Texas district could spend \$19,333 per pupil, while the poorest could only spend \$2,112).

The trial court found no equal protection violation. The court relied on the U.S. Supreme Court's decision in *Rodriguez* to apply a rational basis test and held that interdistrict funding disparities were rationally related to the purpose of fostering local control over education programs.¹⁴¹ The Vermont Supreme Court quickly overturned this decision in shocking fashion.

Rare is the case in which a court so clearly oversteps its authority. On an appeal of summary judgment in the defendant's favor, the Vermont Supreme Court ruled not on the equity issue with which it had been presented, but on "some of the most significant education adequacy issues, which had been raised but never decided" in other cases.¹⁴² In so doing the court greatly expanded upon any reasonable interpretation of Vermont's education clause and substituted its will for that of the legislature. The court also disregarded the actual facts of the case, and held that no fact-finding was necessary to prove that Vermont's system was unconstitutional.

Vermont's education clause requires that "a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth."¹⁴³ By most accounts this is a very weak protection.¹⁴⁴ Yet from this simple statement the Vermont Supreme Court derived a right to education "so integral to our constitutional form of government . . . that any statutory framework that impinges upon the equal enjoyment of that right bears a commensurate heavy burden of justification."¹⁴⁵ The court offered a hyperbolic discussion of the history of the clause and then brushed aside the state's arguments regarding local control. The court stated that the constitutional level of review was irrelevant, because there was no legitimate governmental purpose to justify the state's interdistrict inequities.¹⁴⁶

141. *Brigham*, 692 A.2d at 386-87.

142. *Rebell & Metzler*, *supra* note 137, at 177.

143. VT. CONST. ch. II, § 68.

144. *See Rebell & Metzler*, *supra* note 137, at 174. By way of comparison, eight state constitutions mandate a "thorough and efficient" system of free public schools. These states include Maryland, Minnesota, New Jersey, Ohio, Pennsylvania, South Dakota, West Virginia, and Wyoming. *YUDOF ET AL.*, *supra* note 22, at 810. Seven additional states require either "thorough" or "efficient." These include Arkansas, Colorado, Delaware, Idaho, Illinois, Kentucky, and Texas. *Id.* Most others contain the less stringent requirements of "general" or "uniform." *Id.* Vermont's requirement that "a competent number of schools ought to be maintained in each town" is among the nation's weakest protections.

145. *Brigham*, 692 A.2d at 390.

146. *See Rebell & Metzler*, *supra* note 137, at 178.

In doing so, the court cited Justice Marshall's *Rodriguez* dissent for the proposition that there must be an egalitarian dimension to the amount of educational opportunity provided in a democratic society.¹⁴⁷ The court was apparently content, however, to ignore the *Rodriguez* majority's holding in that case.

The Vermont Supreme Court used *Brigham* to establish substantive benchmarks for measuring the extent of educational opportunities provided by the state.¹⁴⁸ These included preparing students to participate in democratic self-government and to compete in a "global marketplace."¹⁴⁹ Unfortunately, the court also concluded that no trial was necessary in order to determine whether the state was already meeting these standards.¹⁵⁰ There was therefore no factual record either verifying or disputing that Vermont's pre-*Brigham* funding scheme offered an adequate education, nor a basis on which to find that the system violated the weak requirements of the Vermont education clause.¹⁵¹

Legal scholars Michael A. Rebell and Jeffrey Metzler have asked,

Why did the Vermont Supreme Court hand down a powerful decision on the merits barely four months after initial filings without requiring any of the facts to be developed at a trial, and why did that decision establish important new precedents for defining an "adequate education" when plaintiffs did not even raise an adequacy claim?¹⁵²

The answer is actually quite obvious. Neither the remedies the plaintiffs sought, nor the facts surrounding Vermont's funding system, nor the text of the Vermont Constitution mattered as much as the court's political will.

Few would dispute that the effects of *Brigham* have been far-reaching. Indeed, the case resulted in "the most prompt and arguably

147. See *Brigham*, 692 A.2d at 396-97 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 89 (1973) (Marshall, J., dissenting)).

148. Rebell & Metzler, *supra* note 137, at 179.

149. See *Brigham*, 692 A.2d at 396-97.

150. *Id.* at 397; see also Rebell & Metzler, *supra* note 137, at 178-79 ("The court then concluded that . . . no further trial was necessary [Therefore] there was no opportunity to determine the extent to which Vermont school districts were providing an education that met this standard").

151. Absent claims to the contrary, one must assume that there was no absolute deprivation stemming from Vermont's finance scheme. There is little doubt that Vermont's pre-*Brigham* funding sufficiently maintained a "competent number of schools in each town."

152. Rebell & Metzler, *supra* note 137, at 167-68.

the most equitable remedy to a court's fiscal equity decision."¹⁵³ The Vermont legislature took advantage of the atmosphere created by the court's decision in *Brigham* to pass the Equal Educational Opportunity Act of 1997, known as "Act 60."¹⁵⁴ The law replaced most local property taxes with a statewide property tax; established a per-pupil block grant for every district; and initiated a "sharing pool," whereby districts that choose to impose a local property tax above the basic state allocation must give part of their additional revenues to property-poor districts.¹⁵⁵

Roughly 91 percent of Vermont's school districts receive more funding under the new scheme, and the residents of property-poor districts have actually experienced tax reductions.¹⁵⁶ Taxes have more than doubled in the wealthiest districts, though, and per pupil spending in those districts has decreased. These results engendered an intense response from Vermont's wealthier districts, sparking civil disobedience, local withholding from the state education fund, circumvention of the "sharing pool" through the use of tax deductions, and an unsuccessful lawsuit challenging the constitutionality of Act 60.¹⁵⁷ This case therefore illustrates both the promise and the pitfalls of judicial activism. Regardless of results, the basic question remains: Are these the kinds of decisions that we want judges to make?

V. JUDICIAL ACTIVISM OR JUDICIAL ABDICATION?

There are problems with each of the approaches followed above. Some have argued that finding a statewide system of school finance unconstitutional is the "quintessential example of judicial activism."¹⁵⁸ It involves the least accountable branch of government overruling policies set not only by state and local legislative bodies,¹⁵⁹ but also by voters themselves. School finance cases also typically rely on novel legal precedent.¹⁶⁰ Furthermore, such cases inevitably lead to court involvement in taxation issues, which even the courts

153. *Id.* at 189.

154. *See id.* at 167, 179-82.

155. *Id.* at 167, 181.

156. *Id.* at 182.

157. *See id.* at 183-86.

158. *See, e.g.,* Swenson, *supra* note 24, at 1149-50.

159. *Id.* at 1150.

160. *Id.*

themselves are often wary to do.¹⁶¹

There are a number of other reasons why state judiciaries should be, and often are, reluctant to get involved in school finance litigation.¹⁶² Courts generally lack the institutional competence to act in an area as complex as school funding.¹⁶³ Indeed, determining what constitutes an “adequate” education often requires judges to go beyond what even educators and social scientists can determine. This has in turn “spawned a huge industry of competing expert witnesses, traveling from state to state, from one ‘adequacy’ hearing to another.”¹⁶⁴

Even the courts themselves often emphasize why courts should defer to the legislature in such situations. This is consistent with the traditional view of separation of powers. It is not the purpose of judicial review to make sure that “fundamental values” are respected.¹⁶⁵ The role of the judiciary is to “say what the law is and to direct the popularly elected officials back to the proper course.”¹⁶⁶ These facts have been key to defendants’ arguments and may play an even more important role in the public sphere than the legal one.

There is little doubt that some courts have simply substituted their own judgment about the importance of education for that of the constitutional text and their own beliefs about the appropriateness of states’ finance systems for that of the legislatures. A number of activist courts have created their own standards for education finance and have set these standards very high. Consider, for example, the requirements set by the supreme courts of Kentucky and Massachusetts. According to those courts, an educated child must demonstrate:

at least the seven following capabilities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and

161. See James C. Joslin, Note, *Developing a School Funding Remedy Framework for Ohio and Beyond*, 56 OHIO ST. L.J. 1247, 1254 (1995).

162. See *id.*

163. *Id.*

164. Rothstein, *supra* note 37, at 74-75.

165. Thro, *supra* note 6, at 528.

166. *Id.* See also Hamilton, FEDERALIST NO. 78, *supra* note 88, at 437.

physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.¹⁶⁷

However laudable these goals, they have little or no support as a constitutional requirement in either state. Kentucky's education clause requires only that the General Assembly "provide for an efficient system of common schools throughout the State."¹⁶⁸ The Massachusetts Constitution does not go even that far. It requires only that the legislature "cherish the interests of literature and the sciences . . . [and] encourage private societies and public institutions, rewards and immunities . . ." ¹⁶⁹ Can one credibly argue that either state has not met its minimum required standard if a student lacks "sufficient self-knowledge" or an ability to react to a "complex and rapidly changing situation?" Of course not. As legal requirements, these guidelines are also essentially useless. They are vague and overbroad, and it is doubtful that a single school system in America meets these standards.¹⁷⁰

There is little reason to believe that courts are either more in touch with voters' views or more capable of formulating sound public policy decisions than the other branches of government. Additionally, courts frequently place too much emphasis on money and minimize the fact that not all education problems stem from a lack of resources. Although one would hardly know it by reading most school finance decisions, there are significant theoretical and empirical disputes as to the importance of finance in the delivery of a quality education.¹⁷¹

At the other extreme, courts in Georgia and Illinois have declined to declare education a fundamental right even though the relevant constitutional provisions suggest that it is.¹⁷² Other courts have echoed their reasoning and held that questions of educational quality are nonjusticiable. In *Coalition for Adequacy & Fairness, Inc. v.*

167. *McDuffy v. Sec'y of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993) (quoting *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989)).

168. KY. CONST. § 183.

169. MASS. CONST. pt. 2, ch. 5, § 2.

170. Thro, *supra* note 6, at 548.

171. See *supra* notes 61-67 and accompanying text.

172. Thro, *supra* note 6, at 542.

Chiles,¹⁷³ for example, the Florida Supreme Court stated, “appellants have failed to demonstrate . . . an appropriate standard for determining ‘adequacy’ that would not present a substantial risk of judicial intrusion into the powers” of the other branches of government.¹⁷⁴

Courts generally lack the institutional competence to establish their own educational standards. Indeed, they are not only permitted but also required to apply a standard created by another branch.¹⁷⁵ That is the very essence of judicial review. Justice Freeman made this point clear when he dissented in part from *Committee for Educational Rights*: “[C]ourts cannot exercise legislative powers or compel their proper action. However, ‘the judiciary has always had the right and duty to review all legislative acts in the light of the provisions and limitations of our basic charter.’”¹⁷⁶ A court should be constrained by the limitations of its role. It should not, however, abandon its duty to determine whether or not the legislature has complied with the constitution.¹⁷⁷

173. 680 So.2d 400 (Fla. 1996).

174. *Id.* at 408. The Rhode Island Supreme Court echoed these sentiments in *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995), by stating that finding for the plaintiffs would have been “far beyond the Judiciary’s constitutional powers or institutional capacity.” *Id.* at 55.

175. Thro, *supra* note 6, at 547.

176. Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1203 (Ill. 1996) (Freeman, J., concurring in part and dissenting in part) (citations omitted) (quoting *Donovan v. Holzman*, 132 N.E.2d 501, 506 (Ill. 1956)).

177. *Id.* at 1204 (Freeman, J., concurring in part and dissenting in part). In fairness to the courts, it is worth noting that some of them face the unfortunate Hobson’s Choice of either knowingly exceeding their constitutional authority or effectively sitting back and ignoring widespread deprivations of educational opportunities. This problem was perhaps best exemplified by the dilemma presented to the New York court system in *Campaign for Fiscal Equity v. State*, 100 N.Y.2d 893 (N.Y. 2003).

Far from the requirements of a “high quality” or even “thorough and efficient” system, the New York Education Article mandates only “the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” N.Y. CONST. art XI, § 1. In upholding the constitutionality of a system with large funding disparities and widespread racial segregation, the Appellate Division of the Supreme Court held that this weak provision required only that the state provide the resources necessary for children to “eventually function productively as civic participants capable of voting and serving on a jury.” *Campaign for Fiscal Equity v. State*, 744 N.Y.S.2d 130, 142-43 (App. Div. 2002); see also Derooy Murdock, *A \$12.3 Billion Cautionary Tale: How Not To Run a School System*, NAT’L REV. ONLINE (Sept. 7, 2001), at <http://www.nationalreview.com/Murdock/murdock090701.shtml> (stating that New York is “the most segregated state in the nation in terms of public schools. . . . lead[ing] the pack in intense segregation of both black and Hispanic students”). This holding, while perhaps jurisprudentially appropriate, probably did little to reassure New York City’s schoolchildren, who we can presume would someday like to be able to earn more than a juror’s daily wage to support themselves and their families.

The Court of Appeals reversed, stating that the term “function productively” implied the

VI. DEMARCATING THE LINE FOR COURT INVOLVEMENT IN SCHOOL FINANCE

How can courts achieve a proper balance between their responsibilities and those of the legislature? William Thro has suggested an approach to school finance litigation that balances the principles of judicial review and judicial restraint. First, courts should emphasize the importance of the constitutional text.¹⁷⁸ The courts should examine the text and determine: (1) whether the state constitution sets a quality standard at all, and if so (2) what that standard is.¹⁷⁹ Courts should not discard this approach in order to substitute their own opinions for the wording of the state's education clause. Doing so oversteps a court's authority to interpret—but not make—the law.

Second, courts should acknowledge that they are not “omnipotent in educational matters.”¹⁸⁰ What is “adequate” often comes down to a court's judgment.¹⁸¹ Judges, however, are trained and work in the interpretation of law—not in the formation of public

ability to obtain competitive employment, and that a high school education was all but indispensable in preparing students to support themselves. *Campaign for Fiscal Equity*, 100 N.Y.2d at 906. “[S]tudents require more than an eighth-grade education to function productively as citizens, and [] the mandate of the Education Article for a sound basic education should not be pegged to the eighth or ninth grade . . .” *Id.* While this is almost certainly correct as a policy matter, it is, however, a stretch to say that it is required by the constitutional text. Therein lies the difficulty that some courts face: they must choose between a jurisprudentially sound but socially unacceptable result or a much more desirable outcome that has a somewhat more dubious legal basis.

Two important points are worth mentioning. First, New York is an outlier. It has, throughout the *Campaign for Fiscal Equity* litigation, suffered from problems such as segregation which, while more common than many people think, are less prevalent in states with smaller urban and immigrant populations. New York also has one of the weakest education clauses nationwide. Most states do not face both of these factors, and their courts are therefore given a more desirable set of alternatives. Second, this case illustrates the shortfalls of relying on litigation to solve all of society's ills. When faced with such circumstances, a state's citizens can replace their elected representatives with those who would more strenuously support education funding or, alternatively, amend the state's constitution to increase the strength of its education provisions. These measures are undoubtedly more difficult, and more resource-dependent, but each is a more democratic alternative than litigation.

178. Thro, *supra* note 6, at 533. Thro's approach emphasizes the “plain meaning” of the constitutional text, as well as a review of other states' interpretations of the same or similar language. *Id.* at 533 n.18. Thro rejects historical analysis because education provisions are often borrowed from other states' constitutions and may therefore reflect only an intention to borrow, rather than some specific intent towards the functioning of a state's school finance system. *Id.*

179. *Id.* at 534.

180. *Id.* (citing *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 536 (7th Cir. 1997) (stating that “[t]he conceit [that courts are competent to decide every issue] belongs to a myth of the legal profession's omniscience that was exploded long ago”).

181. *Minorini & Sugarman, supra* note 93, at 189.

policy. School finance is not—nor should it be—a judge’s area of expertise. Separation of powers arguments aside, the judiciary is simply the least equipped branch to decide the means to enforce education standards.

A third and related issue stems from this. Courts should defer to the other branches of government in the making of public policy.¹⁸² Some have argued that most legislators are no more expert in the area of school finance than the courts. Perhaps this is true. The basic fact remains, however, that it is a legislator’s job, indeed his or her responsibility, to formulate public policy. Those policies, furthermore, must take into account the scarcity of resources and the other goals and functions for which the state is responsible. A court that focuses solely on school finance is not capable of making policy judgments that will invariably affect other areas.¹⁸³

In a world of scarce resources, legislators and governors are called upon to determine which distribution of resources will benefit society the most. That is what they—and only they—are elected to do.

A. *Is there a Middle Ground? Ohio’s Search for Adequacy*

The case of *DeRolph v. State* illustrates Thro’s approach in practice. In its first *DeRolph* decision, the Ohio Supreme Court found the state’s funding system unconstitutional.¹⁸⁴ There remains strong debate as to the merits of the case,¹⁸⁵ but the Ohio Supreme Court’s

182. Thro, *supra* note 6, at 534.

183. In Ohio, for example, the various *DeRolph* cases have had what can only be viewed as a negative effect on other areas of the state’s budget. Universities’ budgets have seen limited growth, and some have estimated that Ohio’s higher education budget is between 10-15 percent lower than what it would have otherwise been without *DeRolph*. Telephone Interview with Herb Asher, Professor of Political Science and Advisor to the President of Ohio State University (Apr. 18, 2003) (stating that although most areas of Ohio’s budget have grown significantly in recent years, funding for higher education has not); Telephone Interview with William Batchelder, Former Speaker Pro Tempore of the Ohio House of Representatives (May 5, 2003) (estimating that Ohio’s higher education budget would have been 10-15 percent higher without the reforms enacted in response to *DeRolph*). Job training programs have also suffered, which may have indirectly lowered the state’s income. *Id.* (“As factory training programs were cut, we lost skilled workers, which lowered the future tax base and led to long-term losses in state income.”).

184. *DeRolph v. State*, 677 N.E.2d 733, 737 (Ohio 1997) [hereinafter *DeRolph I*].

185. Strong arguments against the majority’s holding are found in Chief Justice Thomas Moyer’s dissents to *DeRolph I* and *DeRolph II*. Moyer found the majority’s decision in both cases “legally unwarranted and inappropriate.” *DeRolph II*, 728 N.E.2d 993, 1035 (Ohio 2000) (Moyer, C.J., dissenting). In addition to presenting separation of powers concerns, Chief Justice Moyer noted that much of the evidence presented was anecdotal and not systematic. “This inference is reinforced by the majority’s recitation of instances of deficiencies in *individual schools* But problems in individual schools do not in and of themselves demonstrate a failure of the statewide system of common schools

decision offers a good example of a court balancing judicial review and judicial restraint. Although a number of other state courts had already adopted Kentucky's definition of adequacy,¹⁸⁶ the Ohio Supreme Court eschewed such an approach.

DeRolph I was brought by a coalition of Ohio school districts and various individuals seeking injunctive and declaratory relief, including a determination that Ohio's public school financing system was unconstitutional.¹⁸⁷ The case focused on the adequacy of Ohio's school funding system.¹⁸⁸ By the time it heard *DeRolph I*, the Ohio Supreme Court had already attempted to explain the "thorough and efficient" standard of the state's education clause.¹⁸⁹ The court had previously held in *Miller v. Korns*¹⁹⁰ that under Section 2, Article VI of the Ohio Constitution, attaining a thorough and efficient system of public education was an expressly statewide—not local—purpose.¹⁹¹ Having determined that Ohio's goal of appropriating funding statewide was not merely a legitimate government purpose, but indeed was constitutionally mandated,¹⁹² the court defined "thorough

as a whole." *Id.* at 1031 (emphasis added).

186. YUDOF ET AL., *supra* note 22, at 823. As noted above, the Massachusetts Supreme Court adopted Kentucky's definition of adequacy verbatim. *See supra* note 167 and accompanying text. Unlike the Kentucky court in *Rose*, however, the Massachusetts court in *McDuffy* limited its holding to funding issues and did not seek the restructuring of the entire school system. The New Hampshire Supreme Court also embraced the *Rose* standards as a measure of adequacy. *See* *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997).

187. 677 N.E.2d at 734.

188. The *DeRolph I* plaintiffs have steadfastly maintained an adequacy-based approach. "The mission of the [Ohio Coalition for Equity and Adequacy of School Funding] is to secure high quality educational opportunities for all Ohio school children without diminishing opportunities for students who reside in high capacity districts." Ohio Coalition for Equity & Adequacy of Sch. Funding Homepage, *Our Mission*, at <http://www.ohiocoalition.org> (last visited Mar. 22, 2004).

189. *See* OHIO CONST. art. VI, § 2. The state's education clause imposes a relatively stringent standard by requiring that "[t]he General Assembly [] secure a thorough and efficient system of common schools throughout the State."

190. 140 N.E. 773 (Ohio 1923).

191. *Id.* at 776 (stating that Ohio's thorough and efficient clause "calls for the upbuilding of a system of schools throughout the state, and the attainment of efficiency and thoroughness in that system is thus expressly made a purpose, not local, not municipal, but state-wide"); *see also DeRolph I*, 677 N.E.2d at 774 (Douglas, J., concurring) (same); Anne M. Haynes, Note, *Tension in the Judicial-Legislative Relationship: DeRolph v. State*, 32 U. TOL. L. REV. 611, 621 (2001) (same); Janis J. Winterhof, Note, *From Rationing Toilet Paper to Computer Hook-ups with Moscow: Wealth-based Disparities in Public School Financing are Held Unconstitutional in DeRolph v. Ohio*, 31 CREIGHTON L. REV. 1251, 1272 (1998) (same).

192. *Miller*, 140 N.E. at 776 ("[T]he sovereign people made it mandatory upon the General Assembly to secure not merely a system of common schools, but a system thorough and efficient throughout the state.").

and efficient” in negative terms. A thorough system was not one, the court stated, in which any number of the school districts were “starved for funds.”¹⁹³ An efficient system, it further stated, could not be one in which part or any number of the school districts “lacked teachers, buildings, or equipment.”¹⁹⁴

In *Board of Education v. Walter*,¹⁹⁵ the court unambiguously stated that it had jurisdiction in school finance cases. The court acknowledged that it is the province of the legislature to determine a funding scheme, but stated that where legislative enactments violate the fundamental law (such as the requirements of the Ohio Constitution), the courts have not only the power but also the duty to declare such enactments invalid. “One of the basic functions of the courts under our system of separation of powers is to compel the other branches of government to conform to the basic law.”¹⁹⁶ The *Walter* court then held that the legislature had not violated its broad discretion in enacting the system at issue.¹⁹⁷ In so doing the court noted that as long as each child received an adequate education the possibly of creating an even more thorough or efficient system was immaterial to the constitutionality of the current one.¹⁹⁸ Thus, prior to hearing *DeRolph I*, the Ohio Supreme Court had already determined that the state constitution set a quality standard and that the standard prohibited a system in which schools were starved for funds and resources. By doing so, it avoided substituting its will for that of the legislature, at least in cases where the required standard was met.

The *DeRolph I* majority began by explicitly rejecting the contention, so central to the Illinois Supreme Court’s decision in *Committee for Educational Rights*, that school finance is a

193. *Id.*

194. *Id.*

195. 390 N.E.2d 813 (Ohio 1979).

196. *Id.* at 823 (quoting *State ex rel. Scott v. Masterson*, 183 N.E.2d 376, 379 (Ohio 1962)).

197. The court rejected the plaintiffs’ claims on both adequacy and equity grounds. The Court did not find a fundamental right to education; as a result, it applied a rational basis test, which the state met because the goal of “local control” was held rational. *Id.* at 819-20. The majority thus held that inequality alone is not a sufficient basis for striking down the state’s funding scheme. Justice Ralph S. Locher disagreed. Locher argued that education was a fundamental right “implicitly mandated” by the Ohio Constitution. *Id.* at 826-27 (Locher, J., dissenting). He applied the two-pronged *Rodriguez* test and found that there was no compelling interest for the system’s inequalities. Locher further argued that the system was not “thorough and efficient” because school districts were “starved for funds” and children were “deprived of educational opportunity.” *Id.* at 829 (Locher, J., dissenting).

198. *Id.* at 825-26.

nonjusticiable political issue. “Under the long-standing doctrine of judicial review, it is our sworn duty to determine whether the General Assembly has enacted legislation that is constitutional.”¹⁹⁹ The court acknowledged the legislature’s discretion in such areas and noted that such legislation is presumptively valid. It followed, however, that the presumption of constitutionality is rebuttable and stated that the court would not “dodge [its] responsibility” by declaring the case nonjusticiable.²⁰⁰ “[T]he function of the judiciary in deciding constitutional questions is not one which [the court] is at liberty to decline.”²⁰¹

The Ohio Supreme Court applied the *Miller* and *Walter* standards of “thorough and efficient” and found that many districts were in fact “starved for funds” and lacked teachers, buildings, and equipment.²⁰² The court relied on substantial evidence that many districts had unsafe and inadequate facilities, lacked current textbooks and adequate supplies, had limited curricula, and lacked access to modern technological education.²⁰³ The record from the trial court was replete with evidence of unsafe and inadequate conditions.²⁰⁴ The court also found that many of the appellant districts could not provide the basic resources necessary to educate their students. Many relied on old, outdated books that failed to mention Neil Armstrong or the war in Vietnam.²⁰⁵ For some classes, moreover, there were no textbooks at all.²⁰⁶ The court reasoned that these factors could lead to poor academic performance and would hamper the labor market prospects

199. *DeRolph I*, 677 N.E.2d at 737.

200. *Id.*

201. *Id.* (quoting *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989)).

202. *Id.* at 745.

203. Martha S. West, *Equitable Funding of Public Schools Under State Constitutional Law*, 2 J. GENDER RACE & JUST. 279, 290 (1999) (citing *DeRolph I*, 677 N.E.2d at 745).

204. For example, some schools were more than 100 years old. Many schools were not handicap accessible; some lacked appropriate structures and were forced to use closets, windowless storage rooms, and even a coal bin that lacked ventilation as classrooms. Asbestos had yet to be removed from 68.6 percent of Ohio’s school buildings, and over 99 percent of all Ohio public school structures had asbestos in them. Schools had leaking roofs, windows, and outdated sewage systems—some even had arsenic in their drinking water. *DeRolph I*, 677 N.E.2d at 743.

These problems were well-known to the legislature. The 1990 Ohio Public School Facility Survey, commissioned by the General Assembly to determine the cost of bringing school facilities into compliance with state building codes and asbestos removal requirements, identified a need for approximately \$10.2 billion in facility repair and construction. *Id.* at 742.

205. Haynes, *supra* note 191, at 611 (citing *Children in America’s Schools with Bill Moyers* (PBS television broadcast, Sept. 13, 1996)).

206. *DeRolph I*, 677 N.E.2d at 744.

of the plaintiff districts' students.²⁰⁷

The majority of the *DeRolph* court was shocked by the state's interdistrict wealth disparities.²⁰⁸ Although the question of whether education is a fundamental right in Ohio had been a central point of contention between the trial and appellate courts, the *DeRolph I* majority never decided the issue.²⁰⁹ This was not necessary for the court to find the system unconstitutional. For the reasons outlined above, the court held that the state's funding system violated the thorough and efficient requirements of Section 2, Article VI of the Ohio Constitution. "A thorough and efficient system of common schools includes facilities in good repair and the supplies, materials, and funds necessary to maintain these facilities in a safe manner"²¹⁰ Put simply, the court required the legislature to provide sufficient funds for each student in Ohio to have an opportunity for an adequate education.²¹¹

The Ohio Supreme Court acknowledged its limitations and did not require the legislature to take any specific course of action. Nor did it engage in the surplusage of prior courts, such as those of Kentucky and Massachusetts.²¹² The Ohio Supreme Court merely found that there was a constitutional standard, stated what that standard was, and applied it to the factual record to find the system unconstitutional. Rather than recommending specific legislation, the court stayed its decision for twelve months to allow the General Assembly to act upon

207. "[I]t does not appear likely that the children in the appellant school districts will be able to compete in the job market against those students with sufficient technological training." *Id.* Indeed, districts with high local funding tended to have substantially higher test scores. Haynes, *supra* note 191, at 627.

208. The court rejected the notion that these disparities were caused by a lack of effort on the part of poorer districts. "[P]oor districts simply cannot raise as much money even with identical tax effort. For example, total assessed property valuation in the Dawson-Bryant School District in 1991 was \$28,882,580, while Beachwood School District in Cuyahoga County had \$376,229,512." *DeRolph I*, 677 N.E.2d at 746. These districts had approximately the same number of pupils, *id.*, and thus spent vastly different sums per pupil.

209. Justice Douglas' concurrence argued that the right to education was implicit in the Ohio Constitution and in Ohio's history. "To hold otherwise," he argued, "is to bury our heads in the sand." *Id.* at 776 (Douglas, J., concurring). Because he found education to be a fundamental right, Justice Douglas applied a strict scrutiny standard to school funding legislation and found that the system also violated the Equal Protection Clause of Section 2, Article I of the Ohio Constitution. *Id.* "Local control . . . in the Plaintiff school districts is a cruel illusion The fact that school districts have the 'ability' to determine how dollars are spent . . . is a hollow argument when there are not sufficient funds . . ." *Id.* at 777.

210. *Id.* at 747.

211. West, *supra* note 203, at 291.

212. See *supra* notes 167-70 and accompanying text.

the court's decision.²¹³ This highly unusual procedure was criticized by some of the justices,²¹⁴ and the court may have intruded on the functions of the General Assembly by retaining jurisdiction and thereby effectively requiring legislation.

That major caveat aside, *DeRolph I* illustrates a more sound approach than the activism and abdication more commonly seen in school funding cases. The middle ground approach left the court open to criticism not only from political conservatives, who attacked the court for essentially requiring legislation, but also from liberals who criticized the court for not going far enough and for giving too little guidance to the legislature. Despite much political rhetoric to the contrary, however, the decision showed neither extreme activism nor restraint, but rather a medium between the two.²¹⁵

1. *Balancing States' Responsibilities and Local Control*

The *DeRolph* and *Walter* courts responded to "local control" arguments by stating that school funding was not the responsibility of localities, but of the state itself. The view that the states themselves—and not local districts—bear the primary responsibility for funding public education has its roots in state constitutional provisions expressly making education a state purpose.²¹⁶ In states where such provisions exist, this view also reflects an implicit acceptance of the local government law known as "Dillon's Rule," which states that local governmental power is restricted to actions authorized by

213. *DeRolph I*, 677 N.E.2d at 747.

214. Justice Deborah Cook wrote a sharp dissent upon a motion for clarification. See *DeRolph v. State*, 678 N.E.2d 886, 890-91 (Ohio 1997) (Cook, J., dissenting). She reasoned that the plaintiffs had sought a declaratory judgment and obtained it, and that there was therefore no longer a case or controversy before the courts. "There remains nothing more for this, or any other, court to do If the majority's concern is enforcing its judgment, then, upon the enactment of new laws for school funding, *new* challenges may be brought." *Id.* at 890.

215. As State Senator Jeff Jacobson, who later devised a finance plan that the Ohio Supreme Court approved in *DeRolph v. State*, 754 N.E.2d 1184 (Ohio 2001), stated in April 2001, "I think the that the court was right in what they did . . . it was a very moderate decision It was not the type of decision that would lead itself to a constitutional crisis and yet that's the way many people treated it." *Id.* at 1215 (Ohio 2001) (Douglas, J., concurring).

Unfortunately, the Ohio Supreme Court later abandoned this approach and even went so far as to advise the legislature as to what policies would make the system constitutional. See *id.* at 1200-01. For the purposes of this Article, though, *DeRolph I* remains a good example of the middle ground approach.

216. Ohio's education clause, for example, requires the state legislature to "secure a thorough and efficient system of common schools *throughout the state*." OHIO CONST. art. VI, § 2 (emphasis added).

enabling legislation enacted by the state legislature.²¹⁷ This rule, which has been cited in hundreds of cases, codifies the dominant view that cities and other localities are delegates of the state.²¹⁸ As such, they do not possess reserved powers in the way that states do vis-à-vis the federal government, but rather depend on state law delegations for any power that they exercise.²¹⁹

The application of Dillon's Rule requires not only that local school districts trace their power to state legislation, but also that judges narrowly construe state laws that might be interpreted as delegating authority to school districts.²²⁰ Thus, a school finance system that is constitutionally made a purpose of the state should not, absent unambiguous statements from the state legislature, be permitted to cede primary responsibility to local school districts. Even a historical pattern of self-governance or local primacy in school funding should not overcome this.²²¹

This rule should apply in most states, where the constitutional text often imposes the burden of maintaining public schools specifically upon the state. Some courts have dodged this issue. In *Committee for Educational Rights*, for example, the Illinois Supreme Court discussed at length the meaning of its education clause's provision that places "primary responsibility for financing the system of public education" directly upon "[t]he State."²²² Much of the debate turned on whether this made financing the education system mandatory upon the General Assembly or upon the state government as a whole.²²³ The suit alleged that the system's reliance on local property taxes made it inefficient and inadequate. Perhaps the court's point of

217. GERALD E. FRUG ET AL., LOCAL GOVERNMENT LAW 139 (3d ed. 2001) [hereinafter FRUG, LOCAL GOVERNMENT LAW]. Other scholars have rephrased or paraphrased Dillon's Rule. The basic core of these restatements is an emphasis on the strict construction required of grants of power from states to municipalities. See GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 45-50 (1999).

218. FRUG, LOCAL GOVERNMENT LAW, *supra* note 217, at 139.

219. *Id.*

220. *Id.*

221. Most states' school finance systems have historically relied upon local property taxes, a fact that has not gone unnoticed by defendants or judges. For example, in his *DeRolph I* dissent, Ohio Supreme Court Chief Justice Thomas Moyer noted that local property taxes had funded Ohio schools since 1825—before the adoption of the state's education clause. *DeRolph I*, 677 N.E.2d at 782 (Moyer, C.J., dissenting). Moyer argued that dispensing with this historically based funding method was a usurpation of the legislature's authority by the courts. *Id.*

222. ILL. CONST. art. X, § 1.

223. This was central to the majority's argument that the courts have no jurisdiction in school funding cases.

inquiry should have therefore been whether or not the education clause put the burden on the state government vis-à-vis localities and not on the relationship between the legislature and the courts.

B. *The Benefits of the Middle Ground Approach*

The approach suggested by here—and loosely followed by the Ohio Supreme Court in *DeRolph I*—has practical benefits that supplement its legal underpinnings. It would bring much-needed predictability to school finance cases.²²⁴ Many policymakers face great uncertainty as to whether education reforms will result in a system becoming or remaining unconstitutional.²²⁵ Removal of this uncertainty would undoubtedly be a good thing.

Future courts should examine the constitutional text and determine first whether their state's constitution sets a quality standard. If so, they should determine what that standard is, and whether the state's system meets its burden. Courts have the duty to review legislative acts and the limitations or requirements of the constitution. They should not abandon their duty to determine whether or not the legislature has complied with the constitution.²²⁶ Courts should be wary, however, of extending too far beyond their area of expertise. Courts lack the authority to exercise legislative powers or compel their proper action. They also lack the institutional competence to make the policy decisions involved in reforming an education system.

Limiting decisions to the issue of constitutionality—and not remedies—would help courts restore the proper balance of judicial authority. The legislatures and governors are elected to set policy. They are the most competent and the legally proper branches to do so. Courts should emphatically state what the law is, but should limit their role to exactly that.

224. Thro, *supra* note 6, at 534.

225. This problem has continued in several states even after court decisions, often prompting a series of cases where the courts restate or in some cases alter or change their decisions. In Texas, for example, several rounds of attempted legislative remedies were met with further litigation. Texas's post-*Edgewood* experience was marked by strong legislative proposals and enactments, but nonetheless included three additional cases before reaching an acceptable outcome. The holdings of the Texas Supreme Court gradually shifted alongside electoral politics, ultimately redefining "efficiency" from an equity standard to an adequacy standard. See Farr & Trachtenberg, *supra* note 60, at 650-70 (discussing the series of *Edgewood* cases and decisions).

226. See *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1204 (Ill. 1996) (Freeman, J., concurring in part and dissenting in part).

VII. CONCLUSION

Although state and local governments recognize the importance of education—and devote significant resources to it—the majority of state governments have faced legal challenges to their respective school funding systems. Plaintiffs in these cases typically aim to increase funding of primary and secondary education and to decrease the interdistrict inequalities that stem from states' reliance on local property taxes. Most recent cases have focused on alleged deprivations of some constitutionally required level of educational opportunity. Court-mandated reforms have generally led to increased funding and greater funding equity among school districts.

Although courts generally succeed in balancing the principles of judicial review and judicial restraint, school finance cases have proven particularly troublesome in this regard.²²⁷ Indeed, school finance cases are notable for their jurisprudential extremes. They are marked on one side by courts that have abdicated their responsibility to provide judicial review; they are marked on the other by courts that have engaged in unhindered judicial activism.²²⁸

The cases examined in this Article illustrate each of several approaches adopted by state courts. Many courts have found issues of school finance to be nonjusticiable political questions. In other states, such as Ohio, the courts have answered the question of constitutionality but left it to the legislature and governor to meet the constitutional standard. Some courts, such as the Vermont Supreme Court, have even moved beyond stating what the law is and have instead sought to define what should be required by law. Others have gone even further and prescribed their own remedies.²²⁹ This has led to uncertainty for lawmakers and for education reformers.

Many of these decisions suffer from critical constitutional and practical defects. Courts that decline to offer judicial review abandon their responsibility. Courts that take an activist approach often exceed their authority and impinge on the rightful duties of the other branches of government. The courts also tread dangerously far from their area of expertise and sometimes make policy choices that they are neither empowered nor competent to make. This Article has recommended that courts instead take a moderate approach—one that

227. See Thro, *supra* note 6, at 529 (stating that state courts have mostly failed to achieve this balance in school finance litigation).

228. See *id.* at 530-32.

229. Carr & Fuhrman, *supra* note 1, at 141.

balances the responsibilities of judicial review and judicial restraint. Under this approach, a court would first determine whether or not the state constitution sets a minimum standard of education. If so, the court would then determine what the standard is. It would then apply that standard to the facts of the case at hand and rule on the constitutionality of the system at issue. The court would limit its ruling to this. Courts should neither set policy nor compel the legislature to do so, except within the confines of holding the system unconstitutional.

The ability to declare legislative enactments unconstitutional is a powerful tool. It is powerful enough to achieve substantive change. It is also powerful enough to usurp the rightful duties of the legislature and the governor. Courts should better balance these concerns, and where constitutional text requires it, seek the former without imposing the latter. This would protect other branches of government from judicial encroachment on their authority, but continue to allow responsible courts to serve as the oft-needed impetus for substantive education reform.

