# SCHOOL FINANCE LITIGATION: A NEW WAVE OF REFORM

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## I. INTRODUCTION

The principle of fiscal equity is founded on the belief that the education a child receives should not depend on the wealth of the district in which the child resides. Indeed, "[t]he quality of public education may not be a function of wealth other than the wealth of the state as a whole."[1] The concept of fiscal equity, however, is not one of strict equalization of resources. In many situations, the public policy objective should be to encourage differentials in spending in order to achieve greater equity in results. Fiscal equity dictates that each child, regardless of circumstances—residence, socio-economic status, national origin, or handicapping condition—be provided adequate educational opportunities.[2]

The criteria used to measure fiscal equity have changed over time. Traditionally, the major, if not sole, criterion used to evaluate fiscal equity was the per-pupil expenditure for each district. In view of the differences among districts, including the students they serve, this approach has proven to be an inadequate measure of equity. The education that some children require to meet their needs is more expensive than the educa-

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1. J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 2 (1970). *See generally* R. BERNE & L. STIEFE, THE MEASUREMENT OF EQUITY IN SCHOOL FINANCE (1984) (comprehensive philosophical discussion of the concept of equity and its application to public school finance).

2. As stated by Professor Kern Alexander:

> Herein lies the essential difference between the educational finance definition of mere equality and a more pervasive standard of equity. A system of educational finance which merely fiscally equalizes, or naturalizes, or provides equal distribution to low school districts with low fiscal capacity is admittedly inferior, on this scale of social justice, to a system which attempts to fully fiscally equalize and, in addition, to provide resources to the "least favored" children in the Rawlsian tradition.

Alexander, *Concepts of Equity*, in FINANCING EDUCATION 193, 201 (W. McMahon & T. Geske eds. 1982).

tion required by others. For example, an education for an economically deprived, non-English speaking, or disabled child is more expensive than for an average child. Thus, the criteria used have become more result-oriented.

The issue of fiscal equity is complicated by a number of fundamental value conflicts in this area.[3] For example, there is the question of whether to adopt the "best" principle,[4] which holds that each student should have the best education possible, or the "equal" principle, which holds that each student should have an education as good as that provided for others. Another conflict arises with respect to which governmental level or branch has the authority to control the public schools. Tensions in this regard exist among the federal, state, and local governments,[5] as well as among the branches of government.[6]

3. The issues that public school finance involves, like all political issues, are value-laden. In a democratic form of government, we turn to our political institutions as forums for resolving competing interests and values. Although the courts are often viewed as an objective forum, they are in fact a passionately subjective forum for the resolution of competing interests. Litigation is based on individual advocacy. The issues are narrowed and disputed from an advocacy position. In fact, if issues were not litigated with fervor, the system would probably not work. In order to have standing to sue, a plaintiff must have a real and substantial interest in the outcome of the litigation. *See* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 202 (Ky. 1989) (discussing the standing of local school boards). Although judges making final decisions apply the law to the facts in front of them, their decisions are not devoid of value judgments or subjective determinations. Likewise, legislatures make value-laden decisions in an attempt to resolve value conflicts. Because elected officials represent diverse and often competing values and interests in our society, their solutions reflect these conflicts.

4. The "best" principle is reflected in the following assertion by the American philosopher, John Dewey:

> What the best and wisest parent wants for his own child, that must the community want for all its children. Any other ideal for our schools is narrow and unlovely; acted upon it destroys our democracy. . . . Only by being true to the full growth of all the individuals who make it up, can society by any chance be true to itself.

J. DEWEY, THE SCHOOL AND SOCIETY 19-20 (1900), *reprinted in* 1 JOHN DEWEY: THE MIDDLE WORKS, 1899-1924, at 5 (A. Boydston ed. 1976).

5. Education is not mentioned in the United States Constitution. It is generally accepted as a truism that because of the Reserved Powers Clause, education is a state function. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Rossmiller, *Federal Funds: A Shifting Balance?*, in THE IMPACTS OF LITIGATION AND LEGISLATION ON PUBLIC SCHOOL FINANCE: ADEQUACY, EQUITY, AND EXCELLENCE 3, 3 (J. Underwood & D. Verstegen eds. 1990); *see also* Alexander, *Equitable Financing, Local Control, and Self-Interest*, in THE IMPACTS OF LITIGATION AND LEGISLATION ON PUBLIC SCHOOL FINANCE: ADEQUACY, EQUITY, AND EXCELLENCE, *supra*, at 293, 297 (discussing the concept of local control).

6. Courts currently defer issues involving competing social values to the legislative branch of government. For example, in the school finance context, in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), although the Texas system of finance was "chaotic and unjust," one justice observed that "the ultimate solution must

Fiscal equity advocates generally have concentrated their efforts on state legislatures and in federal and state courts. Historically, these arguments were made at the state level, reflecting the belief that education is exclusively within the realm of state authority.[7] During the height of the civil rights

come from the lawmakers and from the democratic pressure of those who elect them." *Id.* at 59 (Stewart, J., concurring). The majority stated:

> In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social and even philosophical problems". . . . [W]ithin the limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect.

*Id.* at 42 (citations omitted).

The Texas Court of Appeals similarly deferred to the legislative branch in Edgewood Indep. School Dist. v. Kirby, 761 S.W.2d 859 (Tex. Ct. App. 1988), referring to the interpretation of that state's education clause as a "political question." *Id.* at 867. The court stated:

> [Article VII, Section One of the Texas Constitution] does, of course, require that the school system be "efficient" . . . . Given the enormous complexity of a school system educating three million children, this Court concludes that which is, or is not, "efficient" is essentially a political question not suitable for judicial review.

*Id.* This language was noted with disapproval by the Texas Supreme Court in its decision reversing the court of appeals, Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989).

The New Jersey Supreme Court has also spoken to the risk of interbranch conflict:

> That potential confrontation [among the branches of government] concerns one of the most important functions of government—education—and involves substantial public funds, implicates the taxing power, and is potentially of a continuing nature. The Legislature's role in education is fundamental and primary; this Court's function is limited strictly to constitutional review. The definition of the constitutional provision by this Court, therefore, must allow the fullest scope to the exercise of the Legislature's legitimate power.

Abbott by Abbott v. Burke, 110 N.J. 287, 304, 575 A.2d 359, 367 (1990). *See also* Kukor v. Grover, 148 Wis. 2d 469, 502, 436 N.W.2d 568, 581-82 (1989).

7. As noted above, it is generally accepted that education is exclusively a state function. *See supra* note 5. Courts have adopted this view in discussions of whether access to public education or receipt of a minimal education is a federal constitutional right. *See infra* text accompanying notes 30-40. As stated by the Supreme Court: "Today, education is perhaps the most important function of state and local governments." Brown v. Board of Educ. of Topeka, 347 U.S. 483, 493 (1954).

Nevertheless, over time the federal government has become increasingly involved in public school education. This involvement has come primarily through the provision of federal funds. *See, e.g.*, 20 U.S.C. § 236 (1988) (block grant of federal funds for education); Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1485 (1988)) (federal funding and regulation of the education of handicapped children). The federal government also regulates schools that receive federal funds. *See, e.g.*, Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-908, 88 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681-1687 (1988)) (prohibiting discrimination on the basis of sex); Family Education Rights and Privacy Act of 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484, 571-74 (codified as amended at 20 U.S.C. § 1232g (1988)); Equal Access Act, Pub. L. No.

movement and federal judicial activism, the legal theories for litigating fiscal equity cases in the federal courts were developed. Because of the length of the litigation process,[8] however, many cases were ultimately decided by less activist federal courts. Advocates, therefore, have returned to state courts and legislatures to effect change.

## II. Litigation Theories

Generally, three litigation approaches are used in school fi-

98-377, §§ 801-805, 98 Stat. 1267, 1302-04 (1984) (codified at 20 U.S.C. §§ 4071-4072 (1988)).

In addition, schools have been affected by Congress's increasing exercise of authority over states through the Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States."); Lipner, *Imposing Federal Business on Officers of the States: What the Tenth Amendment Might Mean*, 57 Geo. Wash. L. Rev. 907 (1989); Murchison, *The Burger Court and the Commerce Clause: An Evaluation of the Role of State Sovereignty*, 60 Notre Dame L. Rev. 1056 (1985).

Public education is not beyond the scope of congressional control. Congress, however, has been more willing to regulate than to fund. Education, and specifically the financing of education, has been held to be the province of state authorities. As stated recently by the Supreme Court: "[N]o matter has been more consistently placed upon the shoulders of local government than that of financing public schools." Missouri v. Jenkins, 110 S. Ct. 1651, 1663 (1990).

8. Significant problems arise in fiscal equity litigation because of the lengthy process. For example, the legislature of a state involved in school finance litigation might enact a new school finance law or amend its present law during the pendency of the case. Such legislation might render a subsequent judgment moot. *See, e.g.*, Knowles v. State Bd. of Educ., 219 Kan. 271, 278-80, 547 P.2d 699, 705-06 (1976) (vacating order dismissing case as moot because of intervening legislation). If the parties so stipulate, the new legislation might become the subject of the lawsuit. *See, e.g.*, Serrano v. Priest, 18 Cal. 3d 728, 736-37, 557 P.2d 929, 931-32, 135 Cal. Rptr. 345, 347-48 (1976) (*Serrano II*). In cases in which a court has retained jurisdiction after declaring a school finance law unconstitutional, it may decide to rule on motions challenging newly enacted legislation in order to expedite the judicial process, even though the law has not gone into effect. In such cases, the court is in the position of ruling on the facial validity of the law rather than the program's actual operation. *See, e.g.*, Robinson v. Cahill, 69 N.J. 449, 355 A.2d 129 (1976) (*Robinson II*).

School finance cases frequently are remanded numerous times before being resolved. The most notable example of this tendency occurred in New Jersey. *See infra* notes 81-87 and accompanying text. Changes in the courts' personnel during such a case's pendency can alter the outcome of litigation. For example, in 1974, the Washington Supreme Court upheld the constitutionality of the state school finance system. *See* Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974). Four years later, though, the same court ruled that the special excess levy was an unconstitutional method of discharging the state's duty to educate children. *See* Seattle School Dist. No. 1 v. Washington, 90 Wash. 2d 476, 585 P.2d 71 (1978) (en banc). Justice Stafford, who wrote a dissenting opinion in 1974, wrote the majority opinion in 1978.

As factors change within the school districts, such as local wealth, educational needs, and taxation methods, or as economic changes brought about by inflation or recession affect a state's fiscal outlook, school finance reform legislation may be ineffective in reducing fiscal disparities. Furthermore, changes to the school finance formula itself may fail to rectify inequities.

nance equity cases. Two center on the constitutional theory of equal protection. In the first of these approaches, plaintiffs argue that the state unjustifiably treats students who reside in poorer districts differently from those who reside in more affluent districts by allowing a disparity to exist in the funding of educational programs. The other argument based on equal protection is that the lower funding level in poorer districts results in a deprivation of education to students who reside in these districts. The third approach is to rely on the education article of the individual state's constitution as a basis for relief.

### A. *Differential Treatment*

Most school finance equity cases have focused on the argument that the differential treatment of students from poor districts and students from wealthy districts, in terms of money expended per student, is a violation of the Equal Protection Clause.[9] Equal protection guarantees require that similarly situated persons be treated similarly, or that differential treatment of persons be justified by classifications based on actual differences among people.[10] The standard of review generally applied in school finance equity litigation has been traditional rationality, upholding school finance formulae if they are rationally related to a legitimate state interest.

In fact, the United States Supreme Court, in the two cases it has considered involving school finance equity litigation, has stated that the appropriate level of scrutiny in analyzing a disparity in funding argument is the lowest level, that is, the ra-

9. U.S. CONST. amend. XIV, § 1 ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws").

10. To determine the reasonableness of a governmental classification scheme under the Equal Protection Clause, a three-tier approach has evolved. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 644 (3d ed. 1986). For most classifications, a rational-basis test is applied. The classification scheme is upheld if it is rationally related to a legitimate state interest. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2 (2d ed. 1988). When the state uses a "suspect" classification in treating groups differently, a stricter level of scrutiny is employed. A classification is deemed "suspect" if it affects a group of persons who are isolated, have immutable characteristics, and are politically powerless. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); L. TRIBE, *supra*, § 16-6. *See also* Ambach v. Norwich, 441 U.S. 68 (1979) (alienage); Graham v. Richardson, 403 U.S. 365 (1971) (national origin); Loving v. Virginia, 388 U.S. 1 (1967) (race). To be upheld, such a classification must be narrowly tailored to further a compelling state interest. Finally, intermediate scrutiny has been applied in cases where the court was reluctant to deem a particular classification "suspect," yet wanted to afford some protection. To pass intermediate scrutiny, a classification must be substantially related to an important governmental interest. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978) (illegitimacy); Craig v. Boren, 429 U.S. 190 (1976) (gender).

tional-basis test. In *San Antonio Independent School District v. Rodriguez*,[11] the Court stated that wealth itself does not constitute a suspect classification.[12] Even if wealth were suspect, the Court found that differential treatment in school finance litigation is based not on individual wealth, but on school district wealth. The classification of children living within a poor school district, however, does not fit the established criteria for suspect classification: isolation, immutable characteristics, and political powerlessness.[13] The traditional level of scrutiny was therefore applied, and the disparity in funding was upheld as a result of the state's legitimate interest in preserving local control of education.[14] Thirteen years later, in *Papasan v. Allain*,[15] the Supreme Court reiterated its view that the rational-basis test is the correct standard;[16] however, it vacated the court of appeals decision and remanded the case for further factual findings to determine whether the disparities were actually ra-

11. 411 U.S. 1 (1973). The plaintiffs in this litigation alleged that the funding disparity between more and less affluent school districts in the state of Texas was a violation of the federal Equal Protection Clause. Two districts within the San Antonio area were used for comparison: Edgewood was an inner-city district, Alamo Heights was an affluent residential district. In Edgewood, a district with low property values, the annual local contribution to the education program was $26 per pupil, and the state minimum foundation program contributed $222. Federal funds added $108 for a total expenditure of $356 per pupil per year. In Alamo Heights, a district with high property values, the local share was $333 (even with a lower local tax rate than Edgewood), and the foundation program contributed $225. Federal funds contributed $36 for a total expenditure of $594 per student annually. The plaintiffs argued that this system of financing public schools discriminated against the poor citizens of Texas by providing them with an inferior education. *See Rodriguez*, 411 U.S. at 13.

12. *See id.* at 28.

13. *See id.*

14. *See id.* at 43.

15. 478 U.S. 265 (1986). The plaintiffs in *Papasan* argued that their districts received far less money per pupil than did other districts in Mississippi. The case, however, involved a rather complicated set of facts. Since 1802, in almost every state admitted to the Union, certain parcels of land have been set aside in each school district to generate revenue for public schools. In the plaintiffs' districts, the lands originally set aside to generate revenue for public schools had been sold, and the proceeds invested in the state railroad, in 1856. That investment was later lost when the railroads were destroyed in the Civil War. To compensate for this loss, the state appropriated a sum in the approximate amount of the original interest paid on the land investment. In 1981, this sum amounted to $0.63 per pupil, compared to the average income of $75.34 per pupil from school lands in other districts. *See Papasan*, 478 U.S. at 273. In 1981, the plaintiff school districts and the children residing in them challenged the funding disparity. Among their allegations was that the disparities in the level of financial support between the districts deprived the children in the poorer districts of equal protection. *See id.* at 274.

16. The Court stated: "Concentrating . . . on the disparities in terms of Sixteen Section Lands benefits . . . we were persuaded . . . that *Rodriguez* indicated the applicable standard of review." *Id.* at 286.

tionally related to a legitimate state interest.[17]

The *Rodriguez* standard of rationality is typically applied without question by courts[18] when they are faced with an equal protection challenge based on differential treatment due to funding disparities.[19] In fact, in only four cases have courts ap-

17. The district court originally dismissed the complaints, holding that they were barred "by the applicable statute of limitations and by the Eleventh Amendment." *Id.* at 275. The Fifth Circuit Court of Appeals affirmed the decision, although it reversed the specific holding regarding the applicability of Eleventh-Amendment immunity. *See* Papasan v. United States, 756 F.2d 1087 (5th Cir. 1985). The Supreme Court affirmed the court of appeals decision regarding Eleventh-Amendment immunity, but vacated and remanded the case for further factual findings on the equal protection issue. Interestingly, Justice White, who dissented in *Rodriguez*, wrote the opinion for the Court in *Papasan*.

18. A number of school finance equity challenges based on equal protection provisions of state constitutions have been brought in state courts. The application of the federal standard of equal protection to the equal protection provisions of state constitutions presents an interesting issue. Beginning in the late 1970s and continuing into the early 1980s, legal scholars began to focus on the role of state courts in constitutional analysis. Many argued that state courts should make an independent evaluation of standards rather than automatically adopt federal standards. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 504 (1977); Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1050 (1985); Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1224 (1985) [hereinafter Williams, *Equality Guarantees*]. Federal standards may be inappropriate because of differences between the state and federal judicial systems and constitutions. *See* Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. REV. 353, 404 (1984).

Only 18 states have specific equal protection clauses in their constitutions: ALASKA CONST. art. I, § 1; CAL. CONST. art. I, § 7; CONN. CONST. art. I, § 20; GA. CONST. art. I, § 1; HAW. CONST. art. I, § 5; IDAHO CONST. art. I, § 2; ILL. CONST. art. I, § 2; KAN. BILL OF RIGHTS; LA. CONST. art. I, § 3; ME. CONST. art. I, § 6-A; MICH. CONST. art. I, § 2; MONT. CONST. art. II, § 4; N.M. CONST. art. II, § 18; N.Y. CONST. art. I, § 11; N.C. CONST. art. I, § 19; OHIO CONST. art. I, § 2; S.C. CONST. art. I, § 3; and UTAH CONST. art. I, § 2. If a state constitution contains no specific equal protection guarantee, courts have determined that other provisions embody this principle. *See, e.g.*, Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1014 (Colo. 1982) (due process clause encompasses equal protection principle); McDaniel v. Thomas, 248 Ga. 632, 646, 285 S.E.2d 156, 166 (1981) (equal protection contained in the clause, "[p]rotection to person and property is the paramount duty of government, and shall be impartial and complete"). *See also* Williams, *Equality Guarantees, supra*, at 1197.

Some state courts have adopted the federal standards of review at face value and have not made independent inquiries into suspect classifications and fundamental rights. *See, e.g.*, Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974). On the other hand, some courts have followed federal equal protection standards, but have conducted their own independent analyses of the claims based on their respective state constitutions. *See, e.g.*, Horton v. Meskill, 172 Conn. 615, 641-42, 376 A.2d 359, 371 (1977). Finally, some courts have rejected the federal doctrine, and applied their own analytical framework. *See, e.g.*, Robinson v. Cahill, 62 N.J. 473, 491-92, 303 A.2d 273, 282 (1973) (*Robinson I*); Olsen v. Oregon, 276 Or. 9, 20-21, 554 P.2d 139, 145 (1976).

19. *See, e.g.*, Livingston School Bd. v. Louisiana State Bd. of Educ., 830 F.2d 563, 568 (5th Cir. 1987). In litigation in state courts, the rational-basis standard is also typically adopted. In Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974), the court found no suspect class, used a rational-basis test, and upheld the

plied a higher level of scrutiny based on an argument of differential treatment.[20] In those cases, the courts found a suspect classification, applied strict scrutiny, and struck down the state schemes as unconstitutional.

As the Supreme Court's ruling in *Papasan* indicates, the application of the rational-basis test does not guarantee that the challenged school financing formula will be upheld. Moreover, the Court's language in *Papasan* can be interpreted as a narrowing of the ruling in *Rodriguez*. The Court stated that *Rodriguez* did not "purport to validate all funding variations that might result from a State's public school funding decision."[21] Funding disparities may constitute an equal protection violation, the Court stated, when it can be shown that they are not rationally related to a legitimate state interest. The Court was unable to pursue the issue further in *Papasan* because the district court had dismissed the claims without making the necessary factual determination. The factual differences between *Rodriguez*, in which the state funding scheme passed the rational-basis test, and *Papasan* might therefore require a different result. *Papasan*, which involved only disparities between districts that received substantial school land funds and those that did not, did not involve a challenge to the overall system of state school finance, as did *Rodriguez*. In *Rodriguez*, the funding disparities arose from local decisions regarding funds derived from local property taxes; in *Papasan*, the disparities arose directly from the state's decision regarding the level of compensation for the school land funds lost by the plaintiff districts. Granting credence to these differences, the Court in *Papasan* concluded that the facts provided a sufficient basis on which the plaintiffs could allege a federal equal protection violation.[22]

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state financing scheme as constitutional. *Accord* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975); Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 458 A.2d 758 (1983); Board of Educ., Levittown v. Nyquist, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982); Fair School Finance Council of Oklahoma, Inc. v. Oklahoma, 746 P.2d 1135 (Okla. 1987).

20. *See Serrano II*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (district wealth found to be suspect); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (*Serrano I*) (district wealth and wealth of residents found to be suspect); Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979) (various classifications found to be suspect); Washakie County School Dist. v. Herschler, 606 P.2d 310 (Wyo. 1980) (district wealth found to be suspect).

21. *Papasan*, 478 U.S. at 287.

22. *See id.* at 287-89.

In sum, the courts will apply a rational-basis test to evaluate an equal protection claim based on unequal funding between poor and wealthy districts. If a rational relationship to a legitimate state interest exists, the financing program will survive. *Papasan* contains specific language indicating that plaintiffs may be successful at this minimum level of scrutiny in challenging disparate funding levels. The question then is whether the courts are willing to accept the theoretical rationales for disparate funding levels as legitimate. Most courts have been willing to accept local control of public education as a legitimate state purpose. Thus, financing structures that allow for disparities in funding while ensuring a minimum foundation program are generally seen by courts as rationally related to the objective of local control.[23] A court, however, could just as easily see the purpose of a school funding formula to be the equitable provision of education to all children of the state. If this posture were taken, it would be easy for the court to conclude that funding disparities do nothing to further this state interest.[24] As such, the funding formula would be found unconstitutional under minimum equal protection scrutiny.

### B. *Educational Deprivation*

The theory of "substantive equal protection" is often employed to challenge state action that impinges on an individual's rights.[25] Crucial to the outcome of a school finance equity

23. *See, e.g., Livingston School Board*, 830 F.2d at 572.

24. *See, e.g.*, DuPree v. Alma School Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983); *see also Rodriguez*, 411 U.S. at 63-75 (White, J., dissenting).

25. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 10, at 367-72. Substantive equal protection is really a reincarnation of substantive due process; the only difference between the two is the constitutional provision upon which the challenge is based. The analysis remains the same under both theories. The Supreme Court rejected the substantive due process approach as a control over economic and social welfare legislation in 1937; as a result, litigants and courts in recent years have shifted many claims involving the substance of state action from due process challenges to equal protection challenges. This has been styled the "new" equal protection. *See* Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). The "new" equal protection doctrine has not been without its critics. *See, e.g.*, Williams v. Illinois, 399 U.S. 235, 259 (1970) (Harlan, J., concurring) (emphasis in original):

> The "equal protection" analysis of the Court is, I submit, a "wolf in sheep's clothing," for that rationale is no more a masquerade of a supposedly objective standard for *subjective* judicial judgment as to what state legislation offends notions of "fundamental fairness." Under the rubric of "equal protection" this Court has in recent times effectively substituted its own "enlightened" social philosophy for that of the legislature no less than did in the older days

challenge under the theory of substantive equal protection is the importance of a public school education within the framework of fundamental liberties. A determination that public school education is a fundamental right, for example, implies that the school financing plan in question must survive strict scrutiny. Under strict scrutiny, the state must justify its actions by showing that they are narrowly tailored to achieve a compelling state interest.[26] A determination that a public school education, although not a fundamental right, falls within the middle tier of individual interests that are afforded some protection would trigger intermediate scrutiny; the state would be required to show that denial of an education is substantially related to some important state interest.[27]

At this point, it is unclear whether state actions impinging on the right to a public school education trigger heightened scrutiny under federal substantive equal protection analysis. Although education is not explicitly a federal constitutional right, each individual deserves access to the opportunity to develop the skills necessary to be a productive member of society and to be able to participate in the democratic process.[28] In *Papasan*, the Supreme Court deliberately left the issue unresolved, stating: "As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the question whether a minimally adequate education is a fundamental right and whether a

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the judicial adherents of the now discredited doctrine of "substantive" due process.

In both substantive equal protection and substantive due process suits, individuals challenge the substance of a state action that has restricted their liberties or rights. The state must justify the restriction with an overriding governmental concern. Courts have grown increasingly dissatisfied with rigid classifications of what constitute overriding governmental concerns and are thus moving toward a three-tier or basic reasonableness approach. To justify an imposition on an individual's general (not constitutional) liberties or interests, the state must show only that its action was rationally related to a legitimate state interest. *See* L. TRIBE, *supra* note 10, § 16-2. The middle level of scrutiny is reserved for those individual interests that are important but not raised to the level of constitutional rights. To justify a restriction on this tier, the state must show that its action was substantially related to some important state interest. *See* Plyler v. Doe, 457 U.S. 202 (1982). Strict scrutiny is applied only in those situations in which the governmental action deprives a person of a constitutionally protected right. To justify this deprivation, the state must show the action was necessary to achieve a compelling state interest. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (right to privacy and personal autonomy); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel); Loving v. Virginia, 388 U.S. 1 (1967) (right to marry); Harper v. Virginia State Bd. of Election, 383 U.S. 663 (1966) (right to vote). This approach parallels the three levels of scrutiny used in substantive due process analysis.

26. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

27. *See* Plyler v. Doe, 457 U.S. 202 (1982).

28. *See, e.g., id.* at 221-23.

statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review."[29]

### 1. *Education as a Federal Constitutional Right*

In *Brown v. Board of Education of Topeka*,[30] the Supreme Court stated that education is one of the most important state functions and is vital to the development of an informed citizenry.[31] The Court retreated from this language in *Rodriguez* when it found no explicit constitutional right to public school education in the school finance equity context.[32] In the 1982 case of *Plyler v. Doe*,[33] however, the Court applied intermediate scrutiny in ruling on the constitutionality of a statute that excluded undocumented alien children from public school attendance.[34]

29. *Papasan*, 478 U.S. at 285-86. The Court's holding focused on the disparities in the funding system and not on whether a minimally adequate education is a fundamental right.

30. 347 U.S. 483 (1954).

31. As Justice Warren stated:

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

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

32. *See Rodriguez*, 411 U.S. at 35. In *Rodriguez*, the Court declined to apply heightened scrutiny because it did not find public school education to be a fundamental right. Some identifiable quantum of education, however, may be a constitutionally protected prerequisite to the meaningful exercise of other constitutional rights. As the Court noted:

> Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

*Id.* at 37.

33. 457 U.S. 202 (1982).

34. The Texas statute withheld "from local school districts any state funds for the education of children who were not 'legally admitted' into the United States." *Plyler*, 457 U.S. at 205 (citing TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981)). The statute also "authorized local districts to deny enrollment . . . to children not 'legally admitted' to the country." *Id.* (citing TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981)). The Court determined that Texas violated the Fourteenth Amendment's Equal

Although still not recognizing education as a constitutionally protected right, the Court determined that the case involved an "area of special constitutional sensitivity,"[35] one requiring that the state distinction be substantially related to the furtherance of "some substantial goal of the state."[36] Thus, the Supreme Court softened slightly the impact of *Rodriguez* less than ten years after that decision.[37]

The Court again avoided resolving the issue whether there is a constitutional right to education in *Kadrmas v. Dickinson Public Schools*.[38] *Kadrmas* involved the constitutionality of a state law permitting certain school districts to charge a school bus fee. The case was distinguished from *Plyler* because the user fee did not "promot[e] the creation and perpetuation of a sub-class of illiterates within our boundaries."[39] As pointed out by Justice Marshall in his dissent:

> The Court therefore does not address the question whether a state constitutionally could deny a child access to a mini-

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Protection Clause by refusing to provide undocumented alien children with the same educational services that were provided to other children residing in the state. *See id.* at 210-16.

35. *Id.* at 226.

36. *Id.* at 224. The Court emphasized that the opportunity to acquire an education is very important in our society. In language reminiscent of *Brown*, written nearly 30 years earlier, the Court stated:

> [E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

*Id.* at 221.

37. The Court distinguished *Plyler* from *Rodriguez* by noting that in *Plyler*, the children were totally excluded from the educational system, whereas in *Rodriguez* children residing in poor districts merely received unequal funding. In addition, the classification of undocumented alien children itself might warrant strict scrutiny under a differential-treatment theory. *See id.* at 224-26.

38. 487 U.S. 450 (1988). In an effort to encourage school consolidation, North Dakota allowed non-reorganized districts to assess fees for bus transportation, but did not allow reorganized districts to do so. *See* N.D. CENT. CODE § 15-43-11.2 (1981). Sarita Kadrmas, an indigent student in a nonreorganized district, did not pay the transportation fee assessed; therefore, she was not allowed to use the school bus. She did, however, attend school using private transportation. The Kadrmas family alleged that the charging of a bus fee was a violation of equal protection. The Court, finding no equal protection violation, noted that Sarita was not denied an education and that the fee could, in fact, be waived by the school board if the parents were unable to pay. *See Kadrmas*, 487 U.S. at 458.

39. *Kadrmas*, 487 U.S. at 459 (quoting *Plyler*, 457 U.S. at 230). This distinction recasts the issue in *Plyler* more as one of classification of students rather than one of exclusion from public school education. The Court also noted that Sarita Kadrmas actually was not denied admission to the school; she was only denied free transportation to it. *See id.* at 459-60.

> mally adequate education. In prior cases, this Court explicitly has left open the question whether such a deprivation of access would violate a fundamental constitutional right. That question remains open today.[40]

### 2. *Education as a State Constitutional Right*

A state constitutional claim of educational deprivation takes the form of an argument that the state's education article[41] establishes education as a fundamental right and that any infringement of that right triggers strict scrutiny of the state action in question. A court hearing such a claim must determine whether education is in fact a fundamental right under the respective state constitution, and, if so, whether that right has been violated by the educational deprivations resulting from the fiscal disparities. This inquiry requires courts to determine the nature of the constitutional right and the level of scrutiny to be used in determining whether the legislature has acted consistently with that right.

State courts disagree on whether education is a fundamental right under their respective state constitutions. The language in different state constitutions vary, and state courts differ in interpreting similar provisions and in construing what is fundamental under their states' constitutions. Most state courts, however, reject the Supreme Court's view that a fundamental right is one that is "explicitly or implicitly guaranteed by the Constitution."[42]

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40. *Id.* at 466 n.1 (Marshall, J., dissenting) (citations omitted).

41. *See infra* text accompanying notes 54-62. The education article of a state constitution is that provision containing some statement about the state's role or the legislature's obligation in public school education. The state education articles are typically invoked in school finance equity litigation either by alleging that they create a state constitutional right to an education or, more directly, by alleging that the finance program in the state does not fulfill the obligation set forth in the constitution.

42. *Rodriguez*, 411 U.S. at 33-34. Only two states have accepted the *Rodriguez* formulation. In 1974, the Washington Supreme Court followed *Rodriguez* explicitly and refused to give education standing as a fundamental right, but that decision was reversed four years later, Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974), *rev'd on other grounds*, Seattle School District No. 1 v. Washington, 90 Wash. 2d 476, 585 P.2d 71 (1978) (en banc). The Arizona Supreme Court followed the *Rodriguez* formulation but determined that education is a fundamental right. *See* Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973).

State courts have more commonly rejected the *Rodriguez* approach altogether. The New Jersey Supreme Court, in rejecting an equal protection claim, stated:

> [W]e have not found helpful the concept of a "fundamental" right. No one has successfully defined the term for this purpose. Even the proposition discussed in *Rodriguez* . . . is immediately vulnerable, for the right to acquire and hold

The highest courts of seven states have determined that education is not a fundamental right provided by the state constitution.[43] For example, New York's highest court observed that public education is not automatically entitled to designation as a fundamental right even though it is an important priority of government, involves the expenditure of enormous sums of money, and is an explicit provision of the New York Constitution.[44]

The highest courts of six states have determined that education is a fundamental right provided by the state constitution.[45]

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property is guaranteed in the Federal and State Constitutions, and surely that right is not a likely candidate for such preferred treatment.

Robinson v. Cahill, 62 N.J. 473, 491, 303 A.2d 273, 282 (1973) (*Robinson I*). The supreme courts of Georgia and Idaho have noted with approval the New Jersey Supreme Court's discussion of fundamental rights. *See* McDaniel v. Thomas, 248 Ga. 632, 646, 285 S.E.2d 156, 166-67 (1981); Thompson v. Engelking, 96 Idaho 793, 804, 537 P.2d 635, 646 (1975).

Courts in Colorado, Georgia, Idaho, Maryland, New York, and Oklahoma have rejected the *Rodriguez* formulation, but nevertheless have refused to find education to be a state fundamental right. *See* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1017-18 (Colo. 1982) (en banc); McDaniel v. Thomas, 248 Ga. 632, 645-47, 285 S.E.2d 156, 166-67 (1981); Thompson v. Engelking, 96 Idaho 793, 802-05, 537 P.2d 635, 644-47 (1975); Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 650, 458 A.2d 758, 786 (1983); Board of Educ., Levittown v. Nyquist, 57 N.Y.2d 27, 43-44, 439 N.E.2d 359, 365-66, 453 N.Y.S.2d 643, 650 (1982); Fair School Finance Council of Oklahoma, Inc. v. Oklahoma, 746 P.2d 1135, 1149-50 (Okla. 1987). Courts in California, Connecticut, West Virginia, Wisconsin, and Wyoming concluded that the *Rodriguez* decision was applicable only to federal equal protection claims, but that there were adequate and independent state grounds to determine that education was a state fundamental right. *See Serrano II*, 18 Cal. 3d 728, 763-66, 557 P.2d 929, 949-51, 135 Cal. Rptr. 345, 365-67 (1976); Horton v. Meskill, 172 Conn. 615, 641-45, 376 A.2d 359, 371-73 (1977); Pauley v. Kelly, 162 W. Va. 672, 707, 255 S.E.2d 859, 878 (1979); Buse v. Smith, 74 Wis. 2d 550, 567, 247 N.W.2d 141, 149 (1976); Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310, 332-33 (Wyo. 1980). It thus appears that whether a court bases its analysis on the *Rodriguez* formulation has little effect on whether the court finds education to be a fundamental right.

43. *See* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982) (en banc); McDaniel v. Thomas, 248 Ga. 632, 285 S.E.2d 156 (1981); Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975); Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 458 A.2d 758 (1983); Board of Educ., Levittown v. Nyquist, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982); Fair School Finance Council of Oklahoma, Inc. v. Oklahoma, 746 P.2d 1135 (Okla. 1987); Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974).

The Arkansas Supreme Court ruled that it was unnecessary to determine whether education was fundamental because the school finance system failed the rational-basis test. *See* Dupree v. Alma School Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983). On two occasions, the New Jersey Supreme Court has addressed whether education is a fundamental right in a school finance context, finding that the concept was not "helpful," *Robinson I*, 62 N.J. at 491, 303 A.2d at 282, and, later, that it had "no talismanic significance." Abbott by Abbott v. Burke, 100 N.J. 287, 295, 495 A.2d 359, 390 (1990). The court rejected the equal protection claims altogether and based its decision on the state's education article. *See infra* notes 81-87 and accompanying text.

44. *See Levittown*, 57 N.Y.2d at 43, 439 N.E.2d at 366, 453 N.Y.S.2d at 650.

45. *See* Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); *Serrano I*, 5 Cal. 3d

The California Supreme Court felt compelled to treat education as a fundamental interest because of the "distinctive and priceless function of education in our society."[46] The court observed that education is essential to a free enterprise democracy, is universally relevant, continues over a lengthy period of life, molds the personality of young people, and is so important that the state has made it compulsory.[47] The Wyoming Supreme Court concluded that education is a fundamental right because of the emphasis placed on it in the state's constitution.[48] Legislative involvement in education since the framing of the state's constitution convinced the Wisconsin Supreme Court that education is a fundamental right.[49]

As is the case for differential treatment claims, state courts do not necessarily apply the federal formulation of scrutiny to determine whether the state is justified in impinging on an individual's right to an education. In each case in which a court has held that education is not a fundamental right, the court has sustained the constitutionality of the school finance law by finding a rational relationship between the school finance laws and a legitimate state interest, usually local control of education.[50] In cases in which state courts have found education to be a fundamental state interest, however, the analyses have varied. Four of the six state courts invoked strict scrutiny to test the equal protection claims.[51] In each of the cases in which strict scrutiny has been invoked, the school finance system was declared unconstitutional. Nevertheless, a finding that education is a state constitutional right does not necessarily ensure that the school financing scheme will be invalidated. The supreme

584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977) (*Horton I*); Pauley v. Kelley, 162 W. Va. 672, 255 S.E.2d 859 (1979); Kukor v. Grover, 148 Wis. 2d 469, 436 N.W.2d 568 (1989); Washakie County School Dist. v. Herschler, 606 P.2d 310 (Wyo. 1980).

46. *Serrano I*, 5 Cal. 3d at 608-09, 487 P.2d at 1258, 96 Cal. Rptr. at 618.

47. *See id.*

48. *See Herschler*, 606 P.2d at 333.

49. *See Kukor*, 148 Wis. 2d at 496, 436 N.W.2d at 579.

50. *See* cases cited *supra* note 42.

51. *See Serrano II*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976); *Horton I*, 172 Conn. 615, 376 A.2d 359 (1977); Pauley v. Kelley, 162 W. Va. 672, 255 S.E.2d 859 (1979); Washakie County School Dist. v. Herschler, 606 P.2d 310 (Wyo. 1980). *But see* Horton v. Meskill, 195 Conn. 24, 486 A.2d 1099 (1985) (*Horton II*) (remanding to determine whether the statutes furthered a rational state policy).

The Wisconsin Supreme Court found education to be a constitutional right, but concluded that the plaintiffs had not been deprived of that right because each of the districts provided an education that met minimum state standards. *See Kukor*, 148 Wis. 2d at 496-97, 436 N.W.2d at 579 (citing WIS. STAT. § 121.02).

courts of Arizona and Connecticut, after finding education to be a state constitutional right, upheld school financing systems as justifiable deprivations of that right.[52]

According to the courts, in order to prevail under a deprivation theory, it must be argued successfully that the plaintiffs were not receiving a minimum level of education, and that deprivation of minimal education triggers heightened scrutiny under the federal or state equal protection clause. It must also be proven that the plaintiffs have not been provided with a minimal level of education, thereby producing a constitutional violation. The history of school finance litigation shows that this latter element is more easily established by focusing on an individual's needs and the opportunities offered by the system to meet those needs, rather than the number of dollars expended per student within a district.[53]

### C. *Education Articles*

The education article of a state constitution articulates the state's role in public education. Education articles vary widely by state. Some states merely pronounce the importance of education, while others mandate a "system" of free public education. Still others qualify the term "system" with such phrases as "thorough and efficient," "uniform," or "general and

52. *See* Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973) (using a rational-basis test even though it found that education is a state constitutional right); *Horton II*, 195 Conn. 24, 486 A.2d 1099 (1985) (employing a three-part test and upholding the facial validity of the finance system).

53. *See* Abbott by Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990). The New Jersey Supreme Court stated that "[t]his record shows that the educational needs of students in poorer urban districts vastly exceed those of others, especially those from richer districts. The difference is monumental, no matter how it is measured." *Id.* at 338, 575 A.2d at 400. *But see* McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969). In *McInnis*, the court found that educational needs was a "nebulous concept." *McInnis*, 293 F. Supp. at 329 n.4. It ruled that the plaintiffs' claim that the state school finance system was irrational because funds were allocated on allegedly arbitrary factors could not be supported. According to the court, even if equal protection required school expenditures to be made solely on the basis of pupils' needs, there were "no discoverable and manageable standards" to determine constitutional compliance. *Id.* at 335. .

A federal court in Virginia also touched on the educational needs issue in disclaiming any ability to fashion a remedy. It stated that

> the courts have neither the knowledge, nor the means nor the power to tailor the public moneys to fit the varying needs of these students throughout the State. We can only see to it that the outlays on one group are not invidiously greater or less than that of another.

Burruss v. Wilkerson, 310 F. Supp. 572, 574 (W.D. Va. 1969), *aff'd*, 397 U.S. 44 (1970).

uniform."[54]

In school finance litigation, education articles can be used in two different ways, either by direct application of the provision to void a finance scheme, or by a more circuitous route—using the provision to define education as a fundamental right requir-

54. *See* ALA. CONST. art. XIV, § 256 ("a liberal system of public schools"); ALASKA CONST. art. VII, § 1 ("a system of public schools"); ARIZ. CONST. art. XI, § 1 ("a general and uniform public school system"); ARK. CONST. art. XIV, § 1 ("a general, veritable and efficient system of free public schools"); CAL. CONST. art. IX, § 1 ("a system of common schools"); COLO. CONST. art. IX, § 2 ("a thorough and uniform system of free public schools"); CONN. CONST. art. VIII, § 1 ("free public elementary and secondary schools"); DEL. CONST. art. X, § 1 ("a general and efficient system of free public schools"); FLA. CONST. art. IX, § 1 ("a uniform system of free public education"); GA. CONST. art. VIII, § 1 ("an adequate public education"); HAW. CONST. art. X, § 1 ("a statewide system of public schools"); IDAHO CONST. art. IX, § 1 ("a general, uniform and thorough system of public, free common schools"); ILL. CONST. art. X, § 1 ("an efficient system of high quality public educational institutions and services"); IND. CONST. art. 8, § 1 ("a general and uniform system of common schools"); IOWA CONST. art. IX, § 3 ("encourage by suitable means, the promotion of intellectual, scientific, moral and agricultural improvement"); KAN. CONST. art. 6, § 1 ("establishing and maintaining public schools"); KY. CONST. § 183 ("an efficient system of common schools"); LA. CONST. art. XIII, § 1 ("a public educational system"); ME. CONST. art. VIII, § 1 ("the Legislature is authorized, and it shall be its duty to require, the several towns to make suitable provision at their own expense, for the support and maintenance of public schools"); MD. CONST. art. VIII, § 1 ("a thorough and efficient System of Free Public Schools"); MASS. CONST. ch. V, § II ("to cherish the interests of literature and the sciences and all seminaries of them, especially at the University at Cambridge, public schools and grammar schools in the towns"); MICH. CONST. art. VIII, § 2 ("a system of free public elementary and secondary schools"); MINN. CONST. art. XIII, § 1 ("a general and uniform system of public schools"); MISS. CONST. art. 8, § 201 ("maintenance and establishment of free public schools"); MO. CONST. art. IX, § 1(a) ("establish and maintain free public schools for the gratuitous instruction"); MONT. CONST. art. X, § 1(3) ("a basic system of free quality public elementary and secondary schools"); NEB. CONST. art. VII, § 1 ("free instruction in the common schools"); NEV. CONST. art. XI, § 2 ("a uniform system of common schools"); N.H. CONST. art. LXXXIII ("cherish the interest of literature and the sciences, and all seminaries and public schools"); N.J. CONST. art. VIII, § 4 ("a thorough and efficient system of free public schools"); N.M. CONST. art. XII, § 1 ("a uniform system of free public schools"); N.Y. CONST. art. XI, § 1 ("a system of free common schools"); N.C. CONST. art. IX, § 2 ("a general and uniform system of free public schools"); N.D. CONST. art. VIII, §§ 1-2 ("a uniform system of free public schools"); OHIO CONST. art. VI, § 2 ("a thorough and efficient system of common schools"); OKLA. CONST. art. XIII, § 1 ("a system of free public schools"); OR. CONST. art. VIII, § 3 ("a uniform and general system of common schools"); PA. CONST. art. III, § 14 ("a thorough and efficient system of public education"); R.I. CONST. art. XII, § 1 ("promote public schools"); S.C. CONST. art. XI, § 3 ("a system of free public schools"); S.D. CONST. art. VIII, § 1 ("a general and uniform system of public schools"); TENN. CONST. art. XI, § 12 ("a system of free public schools"); TEX. CONST. art. VII, § 1 ("an efficient system of public free schools"); UTAH CONST. art. XI, § 1 ("a uniform system of public schools"); VT. CONST. ch. II, § 68 ("a competent number of schools ought to be maintained in each town"); VA. CONST. art. VIII, § 1 ("a system of free public elementary and secondary schools"); WASH. CONST. art. IX, § 2 ("a general and uniform of public schools"); W. VA. CONST. art. XII, § 1 ("a thorough and efficient system of free schools"); WIS. CONST. art. X, § 3 ("the establishment of district schools, which shall be as nearly uniform as practicable"); WYO. CONST. art. 7, § 1 ("a complete and uniform system of public instruction").

ing a high level of scrutiny under equal-protection analysis.[55] In some cases, both claims have been made, though they often overlap.

In the past, state supreme courts were reluctant to adopt either an education article theory to void school financing schemes[56] or to require specific legislative action.[57] Instead,

55. *See supra* text accompanying notes 9-29. The primary method by which the education article is brought within the purview of equal protection is to allege a claim of educational deprivation. *See* Kaster, *A "Uniform" Education: Reform of Local Property Tax School Finance Systems Through State Constitutions*, 62 MARQ. L. REV. 565, 570 (1979). While determining whether education is a fundamental right justifying strict scrutiny, a court must interpret the education clause of its state's constitution. Usually, this requires the court to determine whether the education article mandates equality in the distribution of or access to educational resources.

State courts have reached varying conclusions when confronted with claims involving education articles. For example, even though it found education to be a fundamental right under the state constitution, the Arizona Supreme Court held that the contested school finance program was constitutional because it provided for a system that was statewide and uniform, as required by the education article. *See* Shofstall v. Hollins, 110 Ariz. at 90, 515 P.2d at 592-93. The Oklahoma Supreme Court concluded that the education article of the Oklahoma Constitution merely mandates action by the legislature to establish and maintain a system of free public schools. *See* Fair School Finance Council of Oklahoma, Inc. v. Oklahoma, 746 P.2d 1135, 1149 (Okla. 1987). The Oklahoma court did not find a state right to an education.

Maryland's highest court ruled that the words "thorough and efficient" are not equivalent to "uniform" and, therefore, do not dictate exact equality in pupil funding and expenditures. *See* Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 631-32, 458 A.2d 758, 776 (1983). The Arkansas Supreme Court, on the other hand, concluded that equal protection requires equal educational opportunities; as such, bare and minimal sufficiency of programs does not suffice. *See* Dupree v. Alma School Dist. No. 30, 279 Ark. 340, 345, 651 S.W.2d 90, 93 (1983). The court found no legitimate state purpose to support the school finance system, which had no rational relationship to the educational needs of the individual school district. *See id.*

The West Virginia Supreme Court of Appeals stated that "[e]qual protection, applied to education, must mean an equality in substantive educational offerings and results, no matter what the expenditure may be." Pauley v. Kelly, 162 W. Va. at 680 n.7, 255 S.E.2d at 865 n.7.

56. Notable exceptions include *Robinson I*, 62 N.J. 473, 303 A.2d 273 (1973); and Seattle School Dist. No. 1 v. Washington, 90 Wash. 2d 476, 585 P.2d 71 (1978). Recently, courts have increasingly adopted such a theory. *See* Rose v. The Council for Better Educ., Inc. 790 S.W.2d 186 (Ky. 1989); Helena Elementary School Dist. No. 1 v. Montana, 236 Mont. 44, 769 P.2d 684 (1989); Abbott by Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990); Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); *infra* notes 66-87 and accompanying text.

In 1978, the Washington Supreme Court was confronted with a challenge to the state's "special excess levy" elections, which were authorized by state statute to allow local school districts to supplement state funds. *See* Seattle School Dist. No. 1 v. Washington, 90 Wash. 2d 476, 585 P.2d 71 (1978). The basis for the lawsuit was the Washington Constitution's education article, which provides in part that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders." WASH. CONST. art. 9, § 1. Just four years earlier, in Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974), the same court had upheld the constitutionality of the school finance law, finding that the legislature's duty in education was no greater than its responsibility for other functions of state government. In the later case, the court reversed its earlier ruling and held that the constitutional terms "paramount duty" and "ample provision" were mandatory,

they were largely content to determine that the articles established a general obligation to provide public education,[58] and then to defer to the legislature on the exact content of the education system.[59] Courts have justified this deference with a few common arguments. First, some have pointed to the large amount of money spent on education, arguing that such expenditures represent adequate legislative attention to the constitutional obligation.[60] Second, some have emphasized that no one has been absolutely deprived of an education, or received an education that did not meet some very basic or minimum standard.[61] Finally, finding that there existed statewide qualitative standards promulgated by the legislature and state department of education, some courts have simply upheld lenient interpretations of education articles, thus limiting the legislature's responsibility to provide educational equality.[62]

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and imposed a judicially enforceable duty on the legislative and executive branches of state government. As such, the legislature was required to define and give substantive content to the requirement of a basic education, as well as provide sufficient funds to support the system. *See Seattle School District*, 90 Wash. 2d at 510-23, 585 P.2d at 90-97.

57. The South Carolina Supreme Court concluded that the education article's command that the legislature "shall provide for the maintenance and support of a system of free public schools" did not require the state to pay for the cost of education, but left the legislature free to select the means of financing the schools. *See* Richland County v. Campbell, 294 S.C. 346, 349, 364 S.E.2d 470, 471-72 (1988).

58. The Illinois Supreme Court declared that the purpose of the education article "was to state a commitment, a purpose, a goal" rather than to impose upon the legislature any specific obligation regarding education. Blase v. Illinois, 55 Ill. 2d 94, 100, 302 N.E.2d 46, 49 (1973).

59. The Idaho Supreme Court held that the constitution's directive of "a general, uniform and thorough system" of schools mandated action by the legislature, but did not require a "central state system of equal expenditures per student." Thompson v. Engelking, 96 Idaho 793, 806, 537 P.2d 635, 648 (1975). In sustaining the validity of the school finance system, the court held that the constitution was satisfied when every child had free access to "certain minimum and reasonably standardized educational and instructional facilities and opportunities." *Id.* at 810, 537 P.2d at 652.

60. *See, e.g.*, McDaniel v. Thomas, 248 Ga. 632, 285 S.E.2d 156 (1981). In *Thomas*, the Georgia Supreme Court held that the legislature had not disregarded the education article's command to provide an "adequate education." *Id.* at 644, 285 S.E.2d at 165. The court noted the "massive" financial commitment to public education and was satisfied that no students were deprived of basic educational opportunities as a result of the school finance system. The education article did not require the state to equalize educational opportunities, nor did it prohibit the local school districts from doing whatever necessary to improve education locally. In attempting to define "adequate education," the court observed that it was something more than a minimum education, but there were no "judicially manageable standards for determining whether or not pupils are being provided an adequate education." *Id.* (quoting Deriso v. Cooper, 246 Ga. 540, 543, 272 S.E.2d 274, 277 (1980)). The court refused to become embroiled in the process of specifying the exact content of the term for fear of usurping legislative prerogatives. *See id.*

61. *See, e.g.*, Kukor v. Grover, 148 Wis. 2d 469, 436 N.W.2d 568 (1989).

62. The Wisconsin Supreme Court, for example, ruled that the uniformity requirement in the Wisconsin Constitution does not mandate equal educational opportunities

## III. Recent Cases

Following the example set nearly two decades ago by the New Jersey Supreme Court in *Robinson v. Cahill*,[63] several state courts have recently shown receptiveness to challenges to school financing systems based on education articles of state constitutions. In light of this recent development, state courts that formerly applied a minimal level of scrutiny under equal protection and found state funding schemes justified may now be required to confront the issue anew. Plaintiffs challenging school finance programs under education articles have met with success in Kentucky, Texas, Montana, and New Jersey.[64] The same approach was employed in litigation in Wisconsin, though the plaintiffs were unsuccessful.[65]

In June 1989, the Supreme Court of Kentucky found that its public school system violated both the state constitutional requirement of an "efficient" school system and the Kentucky Constitution's equal protection clause.[66] More important than the court's analysis of unequal resources under equal-protection doctrine was the finding that the entire system was inadequate under the education article.[67]

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in the state, but was only intended to assure that state resources "were applied in such a manner as to assure that the 'character' of instruction was as uniform as practicable." *Id.* at 492, 436 N.W.2d at 577.

63. 62 N.J. 473, 303 A.2d 273 (1973) (*Robinson I*).

64. *See* Rose v. The Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Helena Elementary School Dist. No. 1 v. Montana, 236 Mont. 44, 769 P.2d 684 (1989); Abbott by Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990); Edgewood v. Kirby Indep. School Dist., 777 S.W.2d 391 (Tex. 1989).

65. *See* Kukor v. Grover, 148 Wis. 2d 469, 436 N.W.2d 568 (1989).

66. *See Rose*, 790 S.W.2d 186. The Kentucky Constitution requires the Kentucky General Assembly to "provide an efficient system of common schools throughout the state." Ky. Const. § 183.

67. A similar result was reached in the earlier West Virginia case, Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979). West Virginia's education article requires legislative provision of "a thorough and efficient system of free schools." W. Va. Const. art. XII, § 1. Unlike the Kentucky Supreme Court, the West Virginia Supreme Court was unable to discern any state standards to implement the provision. The court thus defined the provision more generally and remanded the case to the circuit court, so that more specific standards could be developed. The instructions to the lower court were clear and unequivocal: Given a set of guidelines, develop high-quality education standards and evaluate the existing education system accordingly. The circuit court was also directed to develop an evidentiary record on practically every major dimension of the state's education system, including, for example, the state finance program, the role of the state tax commissioner, and local property tax appraisals.

Following the instructions from the high court, the circuit court developed specific standards and requirements for curriculum, personnel, facilities, and materials and equipment for all programs and support services. The court also identified the resources necessary to implement the specific standards. Comparing the existing education system with the judicially-developed standards, Judge Recht concluded that the

The Kentucky high court found that wide variations in funding resulted in unequal opportunity, that achievement scores and wealth were positively related, that residence determined educational opportunity, that resources were not only unequal but inadequate, and that the constitutional mandate of an efficient education system created a fundamental right. In sum, the court viewed the constitutional mandate as placing "an absolute duty on the General Assembly to re-create, [and] re-establish a new system of common schools in the commonwealth."[68]

The court went further to make an independent determination of what would be necessary before the public school system could comply with the state's obligation under the state education clause.[69] The court focused on the product involved—the education actually delivered to the students—rather than on the resources allocated to districts, as had been done in past equal-protection cases.

In November 1989, the Texas Supreme Court in *Edgewood Independent School District v. Kirby*[70] declared that the state's edu-

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current system was "woefully inadequate" and failed to meet constitutional standards. Pauley v. Bailey, No. 75-1268, slip op. at 100 (Cir. Ct. Kanawha Co. May 11, 1982). The court invalidated the school finance system and that portion of the state tax system relating to the assessment of local property. The judge ordered that a special master be appointed to develop a master plan that would encompass all the elements of a thorough and efficient education system, as developed by the court. In September 1982, Judge Recht agreed to a plan permitting the state department of education to supervise the restructuring of the state's education system. *See* Ward, *W. Va. Agency to Comply with Judge's Standards*, Educ. Week, Sept. 22, 1982, at 8, col. 1. *See also* Pauley v. Bailey, 324 S.E.2d 128 (W. Va. 1984) (state board of education and the state superintendent of schools had a duty to implement the "thorough and efficient system" embodied in the master plan). It should be noted that West Virginia continues to struggle with the fallout from this landmark school finance case. *See* Pauley v. Gainer, 353 S.E.2d 318 (W. Va. 1986).

68. *Rose*, 790 S.W.2d at 215.

69. The court found that, in order to pass state constitutional muster, a child's education must include seven essential aspects:

> (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 the student 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 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 as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

*Id.* at 212.

70. 777 S.W.2d 391 (Tex. 1989).

cational funding system violated the Texas Constitution.[71] Although the *Edgewood* decision was not as sweeping as the Kentucky decision, it was equally significant. Rather than finding the Texas system unconstitutionally inadequate based on educational services provided,[72] the court found the system unconstitutionally inefficient because it failed to cover even the costs of mandated programs,[73] and because the correlations among wealth, educational revenues, and the education provided by districts were found to impede rather than implement the "general diffusion of knowledge," as required by the Texas Constitution.[74]

Montana was the third state in which a statewide school financing system was struck down on fiscal equity grounds in 1989.[75] In the Montana case, plaintiffs again challenged the state funding system as a violation of the state's education article, this time as a violation of Montana's guarantee of an "equal educational opportunity" for all students.[76] Because of the language of the state constitution, the Montana Supreme Court focused on the equality of educational opportunities. In doing so, it relied on evidence of actual program availability in poor and wealthy districts. The evidence presented showed that the

71. The Texas Constitution includes the following provision regarding education: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." TEX. CONST. art. VII, § 1.

72. The Texas Supreme Court did note the disparity in course offerings between poor and wealthy districts. "The differences in the quality of educational programs offered are dramatic. For example, San Elizario I.S.D. offers no foreign language, no pre-kindergarten program, no chemistry, no physics, no calculus, and no college preparatory or honors program. It also offers virtually no extracurricular activities such as band, debate, or football." *Edgewood*, 777 S.W.2d at 393.

73. *See id.* at 392.

74. "The present system . . . provides not for a diffusion that is general but for one that is limited and unbalanced. The resultant inequalities are thus directly contrary to the constitutional vision of efficiency." *Id.* at 396.

75. *See* Helena Elementary School Dist. No. 1 v. Montana, 236 Mont. 44, 769 P.2d 684 (1989).

76. Article X, Section One of the Montana Constitution provides in part:

> (1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state. . . .
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> . . . .
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> (3) The legislature shall provide a basic system of free quality public elementary and secondary schools. . . . It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.

MONT. CONST. art. X, § 1.

spending differences in the state among similarly sized school districts resulted in unequal educational opportunities for students.[77] The court was not persuaded that because the districts provided educational programs sufficient to meet the state accreditation standards, all students' educational opportunities were met.[78] Instead, the court found that these standards are a minimum; it did not define in constitutional terms what an adequate program would be, however.[79] The court struck down the system and ordered the legislature to revise the program.[80]

The New Jersey Supreme Court also recently found the New Jersey school financing system invalid under the education article of that state's constitution.[81] The court found that the New Jersey Constitution does not require equal expenditures per pupil[82] but that it does require "a certain level of education, that which equates with thorough and efficient; it is that level that *all* must attain; that is the *only* equality required by the Constitution."[83] The required levels of thoroughness and effi-

77. The court relied on the findings of an expert to this effect. The court stated:

> Dr. Gray concluded that there are substantial differences in educational opportunities among Montana school districts, which are manifested significantly between the high versus low expenditure categories which he studied. More specifically, he found that wealthier districts offered more science classes, in labs which were typically larger, better stocked with more equipment and consumable supplies, with more storage, and generally more functional than those in poorer districts.

*Helena*, 236 Mont. at 50, 769 P.2d at 687-88.

78. The court did note that state funding under the state's foundation program was insufficient to cover the costs of complying with the minimum state accreditation standards. *See id.* at 54, 769 P.2d at 690.

79. The court amended the findings to read: "The Montana School Accreditation Standards do not fully define either the constitutional rights of students or the constitutional responsibilities of the State of Montana for funding its public elementary and secondary schools." *Id.* at 57, 769 P.2d at 692.

80. The court's opinion was revised to afford the legislature more time to devise and implement a new financing structure for the state. *See* Helena Elementary School Dist. No. 1 v. Montana, 236 Mont. 44, 784 P.2d 412 (1990).

81. *See* Abbott by Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990). The New Jersey Constitution provides in part that "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools . . . ." N.J. CONST. art. VIII, § 4.

82. *See Abbott*, 119 N.J. at 306-07, 575 A.2d at 369.

83. *Id.* at 305, 575 A.2d at 368 (emphasis in original). The court noted that the purpose of education is to develop productive citizens. It took this concept one step further by stating:

> Thorough and efficient means more than teaching the skills needed to compete in the labor market, as critically important as that may be. It means being able to fulfill one's role as a citizen, a role that encompasses far more than merely registering to vote. It means the ability to participate fully in society, in the life of one's community, the ability to appreciate music, art, and literature, and the ability to share all of that with friends.

ciency, the court concluded, are spelled out in the state statute.[84] Though the financing structure was not deficient for all districts, the court found that it was deficient for poor urban districts. The court focused on the needs of the students in poor urban districts, their schools' lack of curricular offerings, and their facilities in comparison to wealthy school districts.[85] The court found that, although students in poor districts have greater educational needs, the system provided them fewer educational resources:

> Obviously, we are no more able to identify what these disadvantaged students need in concrete educational terms than are the experts. What they don't need is more disadvantage, in the form of a school district that does not even approach the funding level that supports advantaged students. They need more, and the law entitles them to more.[86]

The court stated that its focus was not on per-pupil expenditure alone, but on the needs of the students in the poor districts and the state's response to those needs.[87]

The Wisconsin Supreme Court adopted a different view in *Kukor v. Grover*.[88] The plaintiffs in *Kukor* challenged the Wiscon-

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*Id.* at 363-64, 575 A.2d at 397.

84. The court reiterated the definition of thorough and efficient as:

> (a) establishment of educational goals at both the state and local levels; (b) encouragement of public involvement in goal-setting; (c) instruction intended to produce the attainment of reasonable levels of proficiency in the basic communications and computational skills; (d) a breadth of program offerings designed to develop the individual talents and abilities of pupils; (e) programs and supportive services for all pupils especially those who are educationally disadvantaged or who have special educational needs; (f) adequately equipped, sanitary, and secure physical facilities and adequate materials and supplies; (g) qualified instructional and other personnel; (h) efficient administrative procedures; (i) an adequate State program of research and development; and (j) evaluation and monitoring programs at both the state and local levels.

*Id.* at 348-49, 575 A.2d at 390 (quoting N.J. STAT. ANN. § 18A:7A-5 (West 1989)).

85. *See id.* at 357-58, 575 A.2d at 394.

86. *Id.* at 372, 575 A.2d at 401-02.

87. The court stated:

> We therefore adhere to the conventional wisdom that money is one of the many factors that counts. Staff ratios, breadth of course offerings, teacher experience and qualifications, and availability of equipment make a real difference in educational opportunity. We do not mean that money guarantees a thorough and efficient education, nor that, given the approach recommended by the Commissioner, a lower spending district with an effective schools program will not do better than a higher spending district without it. All we mean is that if "effective schools" is a desirable approach, it should be superimposed on a structure that starts out equal.

*Id.* at 381, 575 A.2d at 406.

88. 148 Wis. 2d 469, 436 N.W.2d 568 (1989).

sin school finance system under the education article[89] and the equal protection clause of the Wisconsin Constitution. They argued, as had the successful plaintiffs in New Jersey, that the greater needs of economically disadvantaged students and the municipal overburden of poor urban areas required a constitutional finding that these people and areas deserve more funding than others.[90] The Wisconsin court, however, found that this reapportionment of state funds is not required by the Wisconsin Constitution; instead, it held that only uniformity of educational standards is required.[91]

The court found that the substance of the constitutional uniformity provision is embodied in a state statute that establishes certain minimum standards for school districts.[92] The court stated that

> the uniformity provision . . . could only have been intended to assure that those resources distributed equally on a per pupil basis were applied in such a manner as to assure that

89. The Wisconsin Constitution provides that "[t]he legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable . . . ." WIS. CONST. art. X, § 3.

90. The court summarized this argument as follows:

> The appellants maintain that the unconstitutional deficiency in the system is that the school finance program fails to take into account the fact that children have differing educational needs, some of which may, as a result of socioeconomic factors, require greater financial resources to achieve the same level of educational opportunity. It is further argued that those districts with the greatest educational burden are the least capable of raising sufficient financing from property taxation as a result of lower property valuations or "municipal overburden" placing greater tax demands upon the property.

*Kukor*, 148 Wis. 2d at 481, 436 N.W.2d at 573.

91. *See id.* at 485-92, 436 N.W.2d at 575-77.

92. The statute lists the following minimum requirements:

(a) employment of certified personnel;
(b) annual staff development plans;
(c) remedial reading services;
(d) five-year-old kindergarten;
(e) guidance and counseling services;
(f) 180 days of scheduled instruction;
(g) emergency nursing services;
(h) adequate instructional materials, texts, and library facilities;
(i) safe and healthful facilities;
(j) instruction in health, physical education, art and music;
(k) development of sequential curriculum plans;
(l) instruction in reading, language arts, social studies, math, science, health, physical education, art, and music for elementary; additional instruction in career exploration for grades 5-8; and access to instruction in vocational education and foreign language for grades 9-12;
(m) access to education for employment; and
(n) a plan for children at risk.

*See* WIS. STAT. § 121.02 (Supp. 1991).

> the "character" of instruction which is constitutionally compelled to be uniform is legislatively regulated by [the statute]. . . . The appellants have not asserted that due to the distribution of school aid under the equalization formula, their districts were unable to meet these standards.[93]

Unlike the Montana, Texas, and Kentucky courts, the Wisconsin court concluded that the present funding scheme was adequate to meet constitutional and statutory requirements. Unlike the New Jersey court, the Wisconsin court was unwilling to impose a requirement that greater educational services be provided to students with greater needs.[94]

Nor was the Wisconsin court willing to find a violation of the state equal protection clause. The court stated that, because all districts were able to offer a program in compliance with the statutorily mandated minimum standards, and because there was no allegation that the funding scheme totally deprived any students of an education altogether, there was no equal-protection violation.[95] Disparities in the system, the court stated, are justified[96] by the governmental interest in local control.[97] Accordingly, the system was upheld.

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93. *Kukor*, 148 Wis. 2d at 492-94, 436 N.W.2d at 577-78.

94. The Wisconsin court recognized the educational needs of economically disadvantaged youth. It was not willing, however, to find a constitutional violation on the basis that schools were not serving these needs:

> What has been challenged in the case at bar is not that less affluent schools have insufficient funds to provide for basic education, but that they have inadequate funds to provide specialized programs and to meet the particularized needs of students related to the effects of poverty. We recognize that more and improved programs are needed in the less affluent or overburdened districts but find that these legitimate demands may not be correctly described as claims for uniformity under [the education article]. . . . Such demands cannot be remedied by claims of constitutional discrepancies, but rather must be made to the legislature and, perhaps, also to the community.

*Id.* at 509-10, 436 N.W.2d at 585.

95. The court stated:

> [S]ince the deficiency allegedly exists not in the denial of a right to attend a public school free of charge, nor in the less affluent districts' failure to meet the educational standards delineated under [the statute], nor in the state's failure to distribute state resources to the less affluent districts on at least an equal per-pupil basis as distribution is made to wealthier districts, no fundamental right is implicated in the challenged spending disparity.

*Id.* at 496-97, 436 N.W.2d at 579.

96. The court employed a rational-basis test because the fundamental right of education was not being deprived. "[W]e apply . . . a rational basis standard because the rights at issue . . . are premised upon spending disparities and not upon a complete denial of educational opportunity with the scope of [the education article]." *Id.* at 498, 436 N.W.2d at 580. The court noted that it would reach the same result if strict scrutiny were applied. *See id.* at 504 n.13, 436 N.W.2d at 582 n.13.

97. *See id.* at 499-501, 436 N.W.2d at 580-81.

## IV. Lessons to Be Learned

Many fiscal equity litigants in recent cases have been able to effect reform through the use of education clauses in state constitutions. They have thereby been successful without needing to achieve the elusive heightened scrutiny under state or federal equal protection.

To succeed in a fiscal equity action today, one should explore several issues. First, one should examine whether the relevant state constitution carries with it some substantive requirement for the legislature to implement a state system of public schools. Second, one should determine whether the state has, by legislation or regulation, adopted academic performance standards or minimum programs for districts. Third, one should ascertain whether districts in fact meet these minimum obligations. As an alternative to this third component, one can explore whether the education system provides a minimally adequate education, as defined by some normative standard.

This new wave of litigation has had two primary effects. First, it has changed the focus of finance equity litigation from per-pupil expenditure to the broader concept of meeting students' educational needs. This in turn has shifted attention in such cases from mechanical funding formulae to the product of education. The profundity of this change is best seen in the New Jersey case. There, the New Jersey Supreme Court concluded that the legislature had shirked its constitutional obligation by failing to meet the needs of students who live in poor urban districts, even though New Jersey ranked second in per capita educational expenditures in the nation.[98] Focusing on the educational product and student needs changes the question from how much is spent to *how* it is spent and with what effects.

Second, the new wave of litigation changes the likely forum from federal to state courts. The focus on state constitutional provisions removes many of these cases from the overloaded federal docket and permits state citizens to interpret the requirements of their own state constitutions. This enhances state power in our federal system and reduces federal-state comity concerns.[99]

98. *See* Abbott by Abbott v. Burke, 119 N.J. 287, 302 n.4, 575 A.2d 359, 366 n.4 (1990).

99. It is interesting to note that, as this trend toward state self-determination regarding school finance occurred, the United States Supreme Court permitted federal judi-

It is unlikely that the debate over the services to be provided by the public schools—including the type, cost, and method of delivery—will wane. In fact, during these times of fierce attention to governmental spending, increased demands on public schools, and growing activism of state judiciaries, it is likely that this debate will only grow. It does appear likely, however, that the forums for this debate over competing social values will, for the most part, be state courts and legislatures.

cial control over a state's taxing authority to remedy the effects of school segregation. *See* Missouri v. Jenkins, 110 S. Ct. 1651 (1990).