UNLOCKING THE POWER OF STATE CONSTITUTIONS WITH EQUAL PROTECTION: THE FIRST STEP TOWARD EDUCATION AS A FEDERALLY PROTECTED RIGHT

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ABSTRACT

This Article analyzes the intersection of state constitutional law with federal equal protection, revealing how federal equal protection, by relying on state constitutional education standards, can force states to further equalize and increase the resources available to struggling schools. It begins by exploring the extent of inequality and inadequacy in our public schools and the remedies that are necessary to address them. State-based litigation has produced gains in these areas, but lingering problems persist. Scholars have proposed several measures to address these problems, but most require either extraordinary changes at the federal level or modest changes that would do little to guarantee results. This Article proposes a middle road that builds upon the successes in state courts but makes the changes in state law relevant to federal litigation and enforcement. Of course, the traditional obstacle to such proposals has been the Supreme Court's holding in San Antonio Independent School District v. Rodriguez*, but this Article demonstrates a strategy that would not require the Supreme Court to overturn its precedent but simply apply equal protection in a manner that accounts for developments in state law. In particular, this Article posits that an educational revolution in the states has fundamentally changed the nature of the education*

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right at stake and the responsibility for enforcing it. Thus, the scrutiny of this right under federal equal protection would be far different than it was just a few decades ago. Given the states' weakened ability to enforce these rights, the future of education equity depends on federal intervention.

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INTRODUCTION

At the turn of this century, elected officials, educational administrators, and advocates began to characterize education as the civil rights issue of our generation.[1] This notion even seemed to stretch across party affiliation. On the floor of the 2008 Republican Presidential Convention, John McCain stated that "education is the civil rights issue of this century."[2] Attempting to expand this concept and transform it into reality, advocates and administrators have stated the matter affirmatively, declaring that "[e]ducation is a civil right" that entitles students to quality instruction and resources.[3] In fact, Arne Duncan and the past three Secretaries of the U.S. Department of Education have echoed this declaration.[4] The declaration may seem unremarkable to many Americans because they assume that education is a constitutional or civil right

1. Cynthia G. Brown, *Public Education from Pre-Kindergarten Through High School*, 35 HUM. RTS. 20, 20 (2008); Editorial, *Education as a Civil Rights Issue*, N.Y. TIMES, Aug. 1, 2008, at A18; Educational Equality Project, About Us, http://www.edequality.org/who_we_are/about_us (last visited Feb. 10, 2010) ("To me this is not just an issue of school reform, it is a civil rights issue, the civil rights issue of our time." (quoting Chancellor Joel Klein)); Educational Equality Project, Signatories, http://eep.bluestatedigital.com/who_we_are/the_signatories (last visited Feb. 10, 2010) (listing a U.S. Senator, several mayors, former governors, and numerous superintendents among its signatories for an educational civil rights movement).

2. Senator John McCain, Acceptance Speech at the Republican National Convention (Sept. 4, 2008), http://elections.nytimes.com/2008/president/conventions/videos/transcripts/20080904_MCCAIN_SPEECH.html.

3. Education Equality Project, Our Mission, http://www.edequality.org/what_we_stand_for/our_mission (last visited Feb. 10, 2010) (describing its mission as "a civil rights movement to eliminate" the educational "achievement gap"); Los Angeles County Alliance of Black School Educators, About Us, http://www.educationisacivilright.com/Page_2.html (last visited Feb. 10, 2010); National Alliance of Black School Educators, Education is a Civil Right, http://www.nabse.org/civilright.htm (last visited Feb. 10, 2010).

4. Sean Cavanagh, *The Black-White Achievement Gap Narrows on NAEP*, EDUC. WK., July 14, 2009; Press Release, The White House, Mrs. Bush and Sec'y of Educ. Margaret Spellings Announce the Newark Pub. Schools' Striving Readers' Grant (Mar. 16, 2006), http://georgewbush-whitehouse.archives.gov/news/releases/2006/03/20060316-5.html; Press Release, Dep't of Educ., Remarks by Educ. Sec'y Paige to Nat'l League of Cities Cong. Conference (Mar. 10, 2003), http://www.ed.gov/news/pressreleases/2003/03/03102003a.html; Richard W. Riley, U.S. Sec'y of Educ., Seventh Annual State of Am. Educ. Address: Setting New Expectations (Feb. 22, 2000), *available at* http://www.ed.gov/Speeches/02-2000/000222.html.

protected by the federal government.[5] Unfortunately, this is not our current reality.

Advocates have consistently attempted to engage the federal government and federal courts on the need for substantive education rights,[6] but neither have ever recognized education as a civil, fundamental, or constitutional right.[7] In 1954, the Supreme Court characterized education as a benefit that the state could choose to offer or not.[8] Thus, the state had no affirmative obligation in education. Likewise, in 1973, the Court indicated that although education is important, it is but "a service performed by the State,"[9] the importance of which does not determine whether it must be

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5. *News & Notes: Algebra Project Teaches Math Skills That Pay* (NPR radio broadcast Feb. 20, 2007), *available at* http://www.npr.org/templates/story/story.php?storyID=7495586 (responding that most people assume they have a right to education); *see also* Jeannie Oakes et al., *Grassroots Organizing, Social Movements, and the Right to High-Quality Education*, 4 STAN. J. C.R. & C.L. 339, 341 (2008) (noting universal agreement that education is a right, but the contradiction of no public willingness to force it into legal reality); S. EDUC. FOUND., NO TIME TO LOSE: WHY AMERICA NEEDS AN EDUCATION AMENDMENT TO THE US CONSTITUTION TO IMPROVE PUBLIC EDUCATION 28 (2009), http://www.sefatl.org/pdf/No%20Time%20to%20 Lose%20-%20Final%20PDF.pdf (quoting Goodwin Liu as stating "Most Americans would be troubled to learn that at the dawn of the twenty-first century, education is not a fundamental right protected by the United States Constitution").

6. *See, e.g.*, Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450 (1988); Papasan v. Allain, 478 U.S. 265 (1986); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

7. In all fairness, the Court did attempt to desegregate schools, but this was not based on an effort to improve education generally, but solely to prevent discrimination. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954). Likewise, the federal government has become more involved in education over the past four decades, but it has primarily been an antidiscrimination effort. *See generally* Betsy Levin, *The Courts, Congress, and Educational Adequacy: The Equal Protection Predicament*, 39 MD. L. REV. 187, 226-45 (1979) (discussing federal intervention through Title VI of the Civil Rights Act, Title IX of the Education Amendments, the Individuals with Disabilities in Education Act, and Equal Educational Opportunities Act). Congress has also allotted money to provide supplemental resources to low income students. Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301(2)-(3) (2006). However, these funds were largely distributed to give federal agencies the power to enforce the antidiscrimination statutes. *See* Phyllis McClure, Ctr. for Am. Progress, *The History of Educational Comparability in Title I of the Elementary and Secondary Education Act of 1965*, *in* ENSURING EQUAL OPPORTUNITY IN PUBLIC EDUCATION: HOW LOCAL SCHOOL DISTRICT FUNDING PRACTICES HURT DISADVANTAGED STUDENTS AND WHAT FEDERAL POLICY CAN DO ABOUT IT (2008), http://www.americanprogress.org/issues/2008/06/pdf/comparability.pdf.

8. *Brown*, 347 U.S. at 493 (requiring equality in education when the state has chosen to provide education); *see also* Oakes et al., *supra* note 5, at 344-45 (discussing the Court's treatment of education as an optional benefit).

9. *Rodriguez*, 411 U.S. at 30.

"afforded explicit protection under the federal constitution."[10] Education was a gratuitous service akin to transportation, health care, and housing, which the state was free to degrade, upgrade, or eliminate, so long as its decision was not based on racial discrimination or some other prohibited motivation. Even as late as 1991, former Chief Justice Warren Burger characterized education as merely "a statutory right" and emphasized that this statutory right was actually a sign of progress given the previous legal status of education.[11]

Based on this precedent and perception, advocates have abandoned federal litigation as a strategy for improving educational quality and equity.[12] This Article posits that the time has finally come to revisit a federal strategy. Various scholars have posed theories by which the federal courts could intervene in these matters,[13] but all have been largely premised on overturning *San Antonio Independent School District v. Rodriguez*, in which the Court held that education is not a fundamental right under the Federal Constitution.[14] Given the Supreme Court's current composition and general legal trends, a direct repudiation of *Rodriguez* is unlikely.[15] Other scholars have posed federal legislative agendas, but legislation alone cannot guarantee long term assurance of educational funding, equity, and quality.[16] Rather, mere legislation would leave education subject to the same political pressures that plague it now. Moreover, passing new legislation, or even a constitu-

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10. *Id.* at 35.

11. Chief Justice Warren E. Burger, Address, *Celebrating the Bicentennial of The Bill of Rights In Honor of the Centennial of the Detroit College of Law*, 1991 DETROIT C. L. REV. 1141, 1148.

12. *See* James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1229 (2008) (noting that after *Rodriguez* claims based on federal equal protection ended).

13. *See infra* Part II.B.1-2.

14. 411 U.S. at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

15. *See generally* Daniel S. Greenspahn, *A Constitutional Right To Learn: The Uncertain Allure of Making a Federal Case out of Education*, 59 S.C. L. REV. 755, 778-79 (2008) (discussing the composition of the current Court and its disposition toward affirming *Rodriguez*).

16. *See infra* Part II.B.2.

tional amendment, would require far more political will and public outrage than what seems to currently exist.[17]

This Article demonstrates that neither sweeping legislation nor an explicit reversal of *Rodriguez* is necessary. Rather, federal courts are in the position to intervene without any change in constitutional law or enactment of new legislation. The states have already made the necessary changes. However, many national advocates and scholars fail to account for the educational revolution in the states, focusing instead on federal law. In the years following *Rodriguez*, and the last two decades in particular, state constitutions and supreme courts have recognized education as a constitutional and/or fundamental right with substantive dimensions.[18] Moreover, states have expanded their statutory structures beyond simply compelling students to attend school. They now also guarantee students a particular curriculum and a level of quality therein.[19] When *Rodriguez* was decided, none of this had occurred. The Court was evaluating what appeared to be a mere gratuitous state benefit.

While a state may have the discretion to permit numerous inequities in gratuitous public benefits, a state does not have discretion to afford some citizens full access to a state constitutional right while denying it to others. Federal equal protection would heavily scrutinize inequities in state constitutional rights. Because education was but a basic public benefit with no substantive content, the Court in *Rodriguez* had no standards by which to evaluate education and, in any event, was unwilling to evaluate it closely.[20] Today education is a fully evolved state constitutional right.[21] Thus, the Court's analysis of that right would be far

17. *See generally* Oakes et al., *supra* note 5, at 348-49 (indicating there has been no support for current legislation to treat education as a federal right and discussing the general public's disinterest in the issue).

18. *See, e.g.*, Rose v. Council for Better Educ., 790 S.W.2d 186, 212 (Ky. 1989) (holding that a child has a fundamental right to adequate education under the Kentucky Constitution); Campaign for Fiscal Equity, Inc. v. State (*CFE II*), 801 N.E.2d 326, 330 (N.Y. 2003) (reinstating the trial court's holding that students were entitled to a sound basic education); Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997); Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979).

19. *See, e.g.*, N.C. GEN. STAT. § 115C-81 (2008); VA. CODE ANN. § 22.1-253.13:1 (2006).

20. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 23-24, 36-37 (1973).

21. *See, e.g.*, Abbott v. Burke (*Abbott V*), 710 A.2d 450, 454-57 (N.J. 1998) (recounting the long history of educational litigation under the state constitution and the affirmation of various rights); *id.* at 460-71 (evaluating whether several programs and resources were

different. Unless it was simply blind to these changes, the Court could not permit many of the vast disparities and inadequacies that continue to persist.

This strategy would not render education the federal fundamental right that some seek. Nor would it obligate the federal government to provide additional funding or raise the quality of education beyond the level to which a state has already committed itself. But unlike other theories, this Article's strategy is immediately within advocates' reach. Moreover, although it would not inherently bring federal dollars to schools, it would bring federal enforcement power to schools.[22] Additional federal involvement in and responsibility for education would also provide the practical and theoretical basis for eventually recognizing education as a fundamental right. Without these incremental steps, there is little sign of achieving full recognition of educational rights at the federal level.[23]

For these same reasons, federal equal protection has the capacity to produce some results that have escaped litigation in state courts. Not only does the federal government inherently have larger enforcement capacity, its involvement could resolve the problems that have stymied some state litigation, such as separation of powers tensions between state courts and state legislatures[24] or judicial elections that cause state courts to reverse or retreat from earlier decisions.[25] Most important, there are troubling signs that

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necessary to provide an adequate education); *CFE II*, 801 N.E.2d at 349 (recognizing the right to a sound basic education); *Leandro*, 488 S.E.2d at 255; *see also* Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1500-05 (2006) (discussing the results in state cases and the substantive meaning of the constitutional right to education in those cases).

22. In particular, the existence of federal equal protection violations would raise the issue of Congress's constitutional responsibility to remedy. For a full analysis of Congress's responsibility, see Derek W. Black, *The Congressional Failure To Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. (forthcoming 2010).

23. *See* Greenspahn, *supra* note 15, at 775-79 (analyzing the barriers to federal litigation); Oakes et al., *supra* note 5, at 348-49 (discussing the lack of political will to take legislative action).

24. Christine M. O'Neill, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine To Deny Access to Educational Adequacy Claims*, 42 COLUM. J.L. & SOC. PROBS. 545, 560-76 (2009) (discussing several states that have dismissed education claims based on separation of powers or political question doctrines).

25. *See, e.g.*, Sonja Ralston Elder, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755, 777-78 (2007) (discussing how the election of new judges affected Ohio's school finance litigation).

state courts may be reaching their exhaustion point and need assistance.

School finance, adequacy, and inequity cannot be resolved in a single case or year. Equity and adequacy in one year does not ensure the same the following year. Lasting success requires yearly evaluations and continued commitment as legislatures pass new budgets and schools develop different needs. The inherent nature of litigation, both state and federal, is to resolve a finite issue and terminate. Neither litigants nor courts are designed to be perpetual monitors.[26] Yet state constitutional cases have asked this of courts. The most successful of all has been in New Jersey, which for thirty-six years has continually forced the state to meet students' needs.[27] However, this past year, for the first time, the Supreme Court of New Jersey held that the state has fulfilled its constitutional obligation, signaling that the court may withdraw from its vigilant monitoring of the state.[28] Some state courts withdrew well before New Jersey,[29] but if other currently engaged courts follow, students might see the hard fought gains of past court rulings slip away. State educational agencies are beholden to state legislatures and will be powerless to check those that might seek to shirk their duty. In short, the federal government would stand alone in its capacity, not only to monitor equity and adequacy across time, but also in its power to force states to act accordingly. This Article provides a viable strategy to make this federal enforcement possible.

Part I of the Article begins with a further discussion of the current inequities and inadequacies that plague schools and the importance of resources and money in remedying them. This Part

26. *See generally* RONALD J. BACIGAL, THE LIMITS OF LITIGATION: THE DALKON SHIELD CONTROVERSY (1990) (using the Dalkon Shield controversy as a case study to follow the role of judges and litigants in litigation); Francis R. Kirkham, *Problems of Complex Civil Litigation*, 83 F.R.D. 497, 497-98 (1980) (discussing the limitations of litigation). *But see* David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 745-54 (2009) (arguing that courts have significant power to play the role of monitor and change actions through the threat of enforcement).

27. The first case was *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973). The New Jersey Supreme Court issued its twentieth decision in this line of cases this year in *Abbott v. Burke* (*Abbott VII*), 971 A.2d 989 (N.J. 2009).

28. *Abbott VII*, 971 A.2d at 992.

29. *See, e.g.*, Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1164-65 (Mass. 2005); Tomblin v. W. Va. State Bd. of Educ., No. 75-1268, at *14-15 (W. Va. Cir. Ct. Jan. 3, 2003), *available at* http://www.schoolfunding.info/states/wv/Tomblin2003.doc.

also recounts past litigation strategies to address these problems and then evaluates the successes and failures of this litigation. Part II describes the general goal of current educational reform strategies as being the delivery of meaningful educational opportunities to learn, regardless of race, wealth, or geography. A meaningful opportunity entails an education that responds to the particular needs of students and offers them a realistic chance of academic and workforce success. The rest of Part II categorizes the major proposals for achieving this goal and identifies their weaknesses, contrasting them to the strategy this Article offers. The final Part of the Article explains how developments in state law now provide a basis to apply rigorous equal protection review to education. This section includes a systematic analysis of how the factual and legal circumstances that formed the basis of the Court's rationale in *Rodriguez* have all changed and opened the door for a new litigation strategy.

I. THE PERSISTENCE OF AND RESPONSE TO SCHOOL RESOURCE INEQUITIES

A. School Inequities and the Importance of Resources and Money

Rhetoric surrounding education as a civil right is largely a plea for federal intervention to address the continuing inequity and inadequacies of our public school system.[30] This plea resounds because our schools do an excellent job preparing some students, but an abysmal job preparing masses of others. As measured by the National Assessment of Educational Progress, only one out of three eighth grade students are "proficient" in reading.[31] The results are similar in math.[32] The numbers are less shocking when measuring whether students are achieving at a "basic level," but about a

30. *See generally* Oakes et al., *supra* note 5, at 347-48 (discussing the various strategies aimed at establishing education as a constitutional right under the Federal Constitution).

31. NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2009, at 31 fig.12.1 (2009), http://nces.ed.gov/pubs2009/2009081.pdf (indicating that 28 percent of eighth graders were proficient in reading and 3 percent were advanced).

32. *Id.* at 33 fig.13.1 (indicating that 25 percent of eighth graders were proficient in math and 7 percent were advanced).

quarter of students still achieve below basic in math and reading.[33] The statistics are even worse for minority students. African American students' achievement on the national assessment lags twenty-seven scaled points behind whites in reading and thirty-one points in math.[34] This achievement gap is equivalent to two to three years of learning.[35] Thus, African American eighth graders are earning scores equivalent to sixth grade white students. Minority students, however, are not the only ones left behind. Students, regardless of race, are also disadvantaged based on the state in which they happen to live. For instance, only one out of four students—and in some instances less—achieve at or above proficiency in fourth grade math in Alabama, Mississippi, and the District of Columbia, whereas over half of the students in Kansas, Massachusetts, Minnesota, New Hampshire, and New Jersey achieve at or above proficiency.[36]

If states were putting forth their best efforts to offer these children what they need to succeed and these gaps were solely attributable to students, the need for systemic intervention might be questionable. But the inconvenient truth is that we spend the least money on the students who need it the most, which frequently translates to inadequate services and resources. Fifty years after *Brown v. Board of Education*, we still spend less money to educate African American and Latino children than we do to educate white children.[37] Moreover, the low scoring states of Alabama and Mississippi generate only five thousand dollars per pupil for edu-

33. *Id.* at 31 fig.12.1 (indicating 33 percent of students are below basic in fourth grade reading and 26 percent are below basic in eighth grade reading); *id.* at 33 fig.13.1 (indicating 18 percent of students are below basic in fourth grade math and 29 percent are below basic in eighth grade math).

34. *Id.* app. A at 153 tbl.A-12-2, 157 tbl.A-13-2.

35. Sarah Theule Lubienski & Christopher Lubienski, *School Sector and Academic Achievement: A Multilevel Analysis of NAEP Mathematics Data*, 43 AM. EDUC. RES. J. 651, 661-62 (2006) (explaining how to interpret achievement gaps on the NAEP); NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 31, app. A at 153.

36. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 31, app. A at 158-59 tbl.A-13-3.

37. Ross Wiener & Eli Pristoop, Educ. Trust, *How States Shortchange the Districts That Need the Most Help*, *in* FUNDING GAPS 2006, at 7 tbl.4 (2006), http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/28/Oc/92.pdf (comparing the spending per pupil in high minority school districts to that in predominantly white school districts); *see also* S. EDUC. FOUND., *supra* note 5, at 14-18 (detailing the various funding and resource inequities in public schools).

cation whereas the above mentioned high scoring states generate around eight thousand dollars per pupil, with the exception of New Jersey, which generates ten thousand.[38] Similar racial and geographic inequities exist in regard to an even more important resource: high quality teachers.[39]

In comparison to where they were, many states have made significant strides to reduce unequal educational opportunities in their schools, but these strides have not eliminated the existence of widespread inequalities. The achievement levels of poor, rural, and minority children consistently lag significantly below that of their counterparts.[40] Demographic factors explain a portion of this gap, but unequal educational inputs also account for a significant portion of the gap.[41] In particular, states consistently spend less on the education of students who attend predominantly poor and/or minority school districts.[42] Based on the state and national averages, we spend $908 less per pupil on students in minority schools than we do on students in predominantly white schools.[43] Similarly, we spend $825 less per pupil in schools with high numbers of low income students than in schools with low levels of impoverished

38. Goodwin Liu, Educ. Trust, *How the Federal Government Makes Rich States Richer*, *in* FUNDING GAPS 2006, *supra* note 37, at 4 tbl.2. The calculation above the line excludes federal funds.

39. *See* Catherine E. Freeman et al., *Racial Segregation in Georgia Public Schools, 1994-2001: Trends, Causes, and Impact on Teacher Quality*, *in* SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 148, 157-59 (John Charles Boger & Gary Orfield eds., 2005); Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: Why It Persists and What Can Be Done*, BROOKINGS REV., Spring 1998, at 24, 26 ("Predominantly white schools seem to attract more skilled teachers than black schools."); Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 35-37 (2008) (evaluating research showing that white teachers tend to leave high-minority schools); Jay Mathews, *Top Teachers Rare in Poor Schools*, WASH. POST, Sept. 10, 2002, at A5 (discussing the dearth of high-quality teachers in low-income schools); ERICA FRANKENBERG, THE SEGREGATION OF AMERICAN TEACHERS 34-39 (2006), http://www.civilrightsproject.ucla.edu/research/deseg/segregation_american_teachers12-06.pdf (demonstrating that as the percentage of minority students in a school rises, the qualification and experience level of teachers therein tends to decrease).

40. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 31, app. A at 153 tbl.A-12-2, 157 tbl.A-13-2; THOMAS B. FORDHAM INST., FUND THE CHILD: TACKLING INEQUITY & ANTIQUITY IN SCHOOL FINANCE 8-9 (2006), http://www.edexcellence.net/doc/FundtheChild062706.pdf (noting that tests show that the achievement gap between lower-income African American and Hispanic students and affluent whites is at least 20 percent across grade levels).

41. *See* THOMAS B. FORDHAM INST., *supra* note 40, at 9-13.

42. Wiener & Pristoop, *supra* note 37, at 7 tbls.3&4.

43. *Id.* at 7 tbl.3.

students.[44] In an average elementary school of 400 students, these spending practices create an average shortfall of one-third of a million dollars in each low income or predominantly minority school.

School quality and student achievement, rather than money, must be our primary concern in evaluating education, but money is far from irrelevant to school quality and student achievement. Critics of school funding reform regularly charge that school funding increases are often squandered and fail to produce tangible results.[45] Based on these historic critiques, even the *Rodriguez* Court assumed that money and educational quality are disconnected.[46] This premise, however, has been undermined by more recent evidence and scrutiny. Michael Rebell, reviewing cases since *Rodriguez*, finds that no state court addressing the issue has ever found that money does not affect educational opportunities.[47] Most poignantly, after evaluating the evidence on both sides of an adequacy case at trial, one conservative judge wrote, "Only a fool would find that money does not matter in education."[48]

Rob Greenwald analyzed thirty-eight different studies regarding the relationship between money and educational outcomes and found that positive student outcomes correlate with higher per pupil spending.[49] New Jersey, where the supreme court has forced the state to direct additional funding to low performing school districts, provides an excellent example. Between 1999 and 2007, a period of major finance reform in New Jersey, the overall student scores on the statewide fourth grade mathematics assessment rose twenty-six points, with the greatest increases occurring in those school districts receiving supplemental funding.[50] Moreover, "the achievement gap

44. *Id.* at 7 tbl.4.

45. *See, e.g.*, ERIC A. HANUSHEK & ALFRED A. LINDSETH, SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS 45-50 (2009) (arguing increased school funding has had little effect on student achievement); Editorial, *More Money?*, WALL ST. J., Dec. 20, 2000, at A22.

46. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 23-24 (1973).

47. Rebell, *supra* note 21, at 1485.

48. Hoke County Bd. of Educ. v. State, No. 95CVS1158, 2000 WL 1639686, at *57 (N.C. Sup. Ct. Oct. 12, 2000).

49. Rob Greenwald et al., *The Effect of School Resources on Student Achievement*, 66 REV. EDUC. RES. 361, 362 (1996) ("[A] broad range of school inputs are positively related to student outcomes, and ... the magnitude of the effects are sufficiently large to suggest that moderate increases in spending may be associated with significant increases in achievement.").

50. Michael A. Rebell & Bruce D. Baker, *Assessing 'Success' in School Finance Litigations*,

between those districts and the rest of the state declined by more than one-third."[51] Gordon MacInnes attributes the closing of the achievement gap to districts' ability to focus new financial resources on early childhood education and reading.[52] New Jersey is not alone. Kansas, Kentucky, Massachusetts, and New York have made similar gains in conjunction with school funding litigation and reform.[53]

In particular, studies show that access to core inputs such as high quality teachers, early reading programs, and tutoring have a significant impact on student achievement.[54] But the ability of low performing and high minority school districts to secure these services is entirely dependent on money.[55] For instance, school districts that serve these student populations would need to provide salaries anywhere from around 50 to 100 percent higher than they currently offer to attract and retain high quality teachers.[56] Thus,

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EDUC. WK., July 8, 2009, http://www.schoolfunding.info/news/09.07.08%20RebellBaker.pdf.

51. *Id.*

52. GORDON MACINNES, IN PLAIN SIGHT: SIMPLE, DIFFICULT LESSONS FROM NEW JERSEY'S EXPENSIVE EFFORT TO CLOSE THE ACHIEVEMENT GAP 13-15 (2009).

53. Rebell & Baker, *supra* note 50.

54. *See generally* COMM. ON EDUC. FIN., NAT'L RES. COUNCIL, MAKING MONEY MATTER: FINANCING AMERICA'S SCHOOLS (Helen F. Ladd & Janet Hansen eds., 1999) (analyzing the need for adequate funding and the ways in which to maximize the effect of funding on student outcomes); MICHAEL A. REBELL & JOSEPH J. WARDENSKI, OF COURSE MONEY MATTERS: WHY THE ARGUMENTS TO THE CONTRARY NEVER ADDED UP 11-14, 22-23, 27-28 (2004), http://schoolfunding.info/resource_center/research/MoneyMattersFeb2004.pdf (providing an overview of the research and court opinions on the importance of these inputs and resources to secure them).

55. *See generally* Student Bill of Rights, H.R. 2373, 110th Cong. § 3(a)(9) (2007) (referencing findings by the Secretary of Education regarding the lack of access to key resources for minority students); COMM. ON EDUC. FIN., *supra* note 54, at 46-47 (highlighting the resources problems that confront poor and minority school districts).

56. *See, e.g.*, Bill Turque, *In Second Year, Rhee Is Facing Major Tests*, WASH. POST, Aug. 21, 2008, at DZ07 (discussing administrators' efforts to entice high-quality teachers to the D.C. public school system by offering salaries of up to $120,000 a year); *see also* Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39 J. HUM. RES. 326, 350 (2004) (finding that a 10 percent salary increase would be necessary for each increase of 10 percent in minority student enrollment to induce white females to teach in the school); *id.* at 351 (finding that a 25 to 40 percent salary increase would be necessary to induce white females with two or fewer years of experience to transfer from teaching in a suburban to an urban school); *Improving the Distribution of Teachers in Low-Performing High Schools*, POLICY BRIEF (Alliance for Excellent Educ., Washington, D.C.), Apr. 2008, at 7, http://www.all4ed.org/files/TeachDist_PolicyBrief.pdf (indicating that several states already have incentive pay for low-performing schools, but pay increase alone is insufficient to attract teachers).

money necessarily determines the quality of instruction that many students receive. And when states have created inequalities in these respects for low-income, minority, or rural children, state supreme courts have consistently found these students have been deprived of their constitutional right to a basic quality education.[57] Rebell succinctly makes the point by saying "money matters," and rhetorically adds that, if money did not matter, parents would not move to the suburbs and spend high amounts of money per pupil, nor would others pull their children from public schools and spend even larger sums in private schools.[58]

B. Past Strategies To Remedy School Inequity

Since money matters and most poor and minority schools have so frequently had limited access to it, the challenge has always been finding a way to change school funding systems. Unfortunately, although various changes have occurred, the problem has never been fully cured. Rather, we continue to suffer from a segregation of resources that produces "haves" and "have-nots."[59] Civil rights attorneys initially assumed that school desegregation would naturally produce an equalization of school resources.[60] However,

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57. *See, e.g.*, McDuffy v. Sec'y of Executive Office of Educ., 615 N.E.2d 516, 552-53 (Mass. 1993) (finding that the state was depriving many students in poor communities of an adequate education); Abbott v. Burke (*Abbott V*), 710 A.2d 450, 461-71 (N.J. 1998) (finding that the state must provide several programs and resources to provide an adequate education); Campaign for Fiscal Equity, Inc. v. State (*CFE II*), 801 N.E.2d 326, 340-46 (N.Y. 2003) (concluding that the state's funding scheme was causing New York City students to receive an inadequate education).

58. Rebell, *supra* note 21, at 1479 ("If money did not matter, wealthy parents would not ... move to wealthy suburbs that spend in excess of $20,000 to educate their students well.").

59. DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY, at xiv (2001) ("The segregation of educational resources has increasingly characterized American schools since the suburban boom of the post-World War II era. This form of segregation results not so much from the explicit confinement of poor students to particular schools, but from the confinement of educational revenues to particular schools."); William S. Koski & Rob Reich, *When "Adequate Isn't": The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 554 (2007).

60. *See* Martha Minow, *School Finance: Does Money Matter?*, 28 HARV. J. ON LEGIS. 395, 395-96 (1991) (noting the NAACP notion that "green follows white: money for schooling follows the white students"); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 258-59 (1999) (articulating the goal of desegregation as an equalization of money and resources); Ryan, *supra* note 12, at 1261 (explaining the assumption that desegregation would

desegregation had little, if any, effect on the allocation of funds between school districts on a statewide basis because it primarily restructured schools at the local level and within individual school districts.[61] Moreover, as more affluent and white parents fled to the suburbs to escape desegregation, equalization often only meant equalization among the disadvantaged schools within a school district.[62]

In an attempt to supplement the efforts of civil rights advocates and willing school districts, the federal government made its first real intervention into public schools during the 1960s by enacting Title I of the Elementary and Secondary Education Act, which appropriated specific funds to supplement the budgets of schools servicing poor students.[63] Unfortunately, these funds were relatively modest. The overwhelming source of school funds comes from local property taxes, which vary widely in the amount of revenues they generate for schools.[64] Thus, federal funds failed to abate the significant disparities that school funding policies produce.[65] To overcome desegregation and Title I's limitations, advocates directly challenged the structure of school funding in *San Antonio Independent School District v. Rodriguez*.[66]

The plaintiffs argued that funding inequalities in Texas violated students' rights on two bases. First, the plaintiffs argued that education is a fundamental right under the Federal Constitution.[67]

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create new political alliances and equalize school funding).

61. *See generally* Ryan, *supra* note 60, at 258-66 (discussing the role of school funding in desegregation).

62. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 471-75 (1992) (recounting the demographic shifts that caused a predominantly white school district to become almost entirely minority); Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 270-71 (1977) (limiting desegregation remedies to within a single school district, rather than the entire metropolitan area). Indeed, scholars have noted that the *Milliken* decision encouraged white flight and segregation of resources. *See, e.g.*, Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1462 (2003).

63. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in 20 U.S.C. §§ 6301-7491 (2006)).

64. *See generally* DAPHNE A. KENYON, LINCOLN INST. OF LAND POL'Y, THE PROPERTY TAX-SCHOOL FUNDING DILEMMA 4-12 (2007) (detailing the history of school financing).

65. *See generally* Greenspahn, *supra* note 15, at 758-59 (explaining that public schools' reliance on funding through state and local taxes leads to inequities in terms of teacher quality, textbooks, and facilities).

66. 411 U.S. 1, 4-6 (1973).

67. *Id.* at 17.

Although there is no explicit right to education in the Constitution, the plaintiffs posited that education is an implicit fundamental right[68] because education is a predicate to citizens' ability to exercise other constitutional rights, such as freedom of speech, voting, and citizenship, which the Constitution explicitly guarantees.[69] The plaintiffs' second theory was that poor students comprised a suspect class against whom the funding structure in Texas discriminated; therefore any discrimination against the poor students would be subject to strict scrutiny.[70] The Supreme Court rejected both arguments, holding that education is not a fundamental right and that poverty is not a suspect class.[71] Although the Court's rejection of these claims was nuanced in several respects,[72] most advocates, as well as other courts, saw it as foreclosing any serious prospect of school funding remedies under the Federal Constitution.[73] Consequently, advocates abandoned school quality and funding litigation in the federal courts.[74]

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68. *Id.* at 33.

69. *See id.* at 33-34 & nn.73-76 (explaining the Court's overturning of laws on the basis that they violated rights implicitly protected by the Constitution).

70. *Id.* at 17.

71. *Id.* at 18. The Court, however, concluded that, even if poverty were a suspect class, there was no showing in the instant case that the funding scheme specifically disadvantaged poor students as a group. *Id.* at 25 & n.60.

72. *See, e.g.*, *id.* at 25 (ruling against students based on the lack of evidence of discrimination or inadequacy); *id.* at 36 (leaving open whether some minimal level of education might be constitutionally protected); *see also* Greenspahn, *supra* note 15, at 768-73 (arguing that *Rodriguez* did not foreclose the recognition of education as a fundamental right); Penelope A. Preovolos, Rodriguez *Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75, 83 (1980) (discussing the nuances of *Rodriguez*).

73. *See, e.g.*, Toledo v. Sanchez, 454 F.3d 24, 33 (1st Cir. 2006) ("[P]ublic education is not a fundamental right."); Angstadt v. Midd-W. Sch. Dist., 377 F.3d 338, 343 (3d Cir. 2004) ("[T]he right to education is not constitutionally protected."); Manbeck v. Katonah-Lewisboro Sch. Dist., 435 F. Supp. 2d 273, 276 n.2 (S.D.N.Y. 2006) ("[I]t is well established, however, that there is no fundamental right to education."); Boone v. Boozman, 217 F. Supp. 2d 938, 957 (E.D. Ark. 2002) ("[I]t is firmly established that the right to an education is not provided explicit or implicit protection under the Constitution and is not a fundamental right or liberty."); *see also* William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1223-27 (2003) (discussing the end of school finance litigation under federal equal protection).

74. The only exceptions were based on unique circumstances. *See* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 452 (1988) (challenging the failure to provide school bus transportation); Papasan v. Allain, 478 U.S. 265, 274 (1986) (challenging the disbursement of land

They did not, however, abandon educational funding equity and quality improvements altogether. Advocates continued to press claims analogous to those in *Rodriguez*, but did so under education and equal protection clauses in state constitutions. This change in venue resulted in a rapid expansion of educational rights. In the years following *Rodriguez*, state supreme courts immediately recognized the right to challenge school funding and quality inequalities under their respective state constitutions.[75] For instance, the California Supreme Court, just three years after *Rodriguez*, held that education was a fundamental right under the California Constitution and that funding inequalities violated that right.[76] As of today, nearly every state has experienced litigation under its respective education or equal protection clause.[77] Moreover, in more than 60 percent of the states experiencing litigation, plaintiffs have achieved significant victories.[78]

The underlying legal theories in these state cases vary, but scholars have attempted to categorize the state cases into at least three major waves of litigation.[79] The first wave of litigation occurred in both state and federal courts and included *Rodriguez*. The primary theory was that school funding inequities, caused by variations in local property wealth, violated the Equal Protection Clause of the Federal Constitution. At the heart of this first wave of litigation was the notion that all students are roughly equal, should be treated as equal, and are entitled to absolute equity in resources. The California Supreme Court initially ruled in favor of the plaintiffs based on this theory in *Serrano v. Priest* before the U.S. Supreme Court rejected the theory in *Rodriguez*.

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grant money to schools).

75. *See, e.g.*, Serrano v. Priest (*Serrano II*), 557 P.2d 929, 951 (Cal. 1976); Robinson v. Cahill (*Robinson I*), 303 A.2d 273, 295 (N.J. 1973); *see also* Koski, *supra* note 73, at 1227-41 (discussing developments in the states following *Rodriguez*).

76. *Serrano II*, 557 P.2d at 951.

77. Rebell, *supra* note 21, at 1482-83.

78. *Id.* at 1483 & n.73.

79. Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 132-33 (2006); Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REFORM 493, 498-502 (1995) (explaining that cases involving school finance reform can be divided into three waves of reform); *see* William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 239-42 (1990).

The second wave of litigation came in response to *Rodriguez*. The litigation was premised on notions of equity similar to those in the first wave, but advocates based their claims on untested state equal protection and education clauses, rather than federal equal protection. Relying on state law, advocates returned to the California Supreme Court, which then held that even if an inequitable education system does not violate the U.S. Constitution, it violates the state equal protection clause.[80] New Jersey's Supreme Court had likewise decided that funding inequities violated its education clause.[81] With California and New Jersey lending credence to recognition of state education rights, courts in Arkansas, Connecticut, Washington, and Wyoming shortly thereafter found a fundamental right to education in their state constitutions, furthering advocates' ability to promote equitable financing of public schools.[82]

Although this second wave of litigation did not present a drastically new theory of education litigation, it did begin to broaden the concept of equity to include a substantive component requiring states to offer all students a meaningful education that would prepare each student to participate actively in society.[83] This evolving concept of equity, moreover, recognized that some students have greater learning needs than others and may require greater educational resources to obtain a meaningful education.[84] These claims, therefore, raised new issues about how educational re-

80. *Serrano II*, 557 P.2d at 951-52.

81. Robinson v. Cahill (*Robinson I*), 303 A.2d 273, 295 (N.J. 1973). *Robinson* preceded *Serrano II* and held that the state school finance system relied too heavily on property taxes and thus violated the state's education clause. *Robinson* and the *Serrano* litigation are generally credited with launching the second wave of school finance litigation. *See, e.g.*, Deborah A. Verstegen & Robert C. Knoeppel, *Equal Education Under the Law: School Finance Reform and the Courts*, 14 J.L. & POL. 555, 557 (1998) (stating *Serrano* and *Robinson* "signaled the onset of the second wave of school finance litigation, spanning the 1970s and early 1980s").

82. Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 71 (Wash. 1978); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 333 (Wyo. 1980).

83. *See, e.g.*, Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1381 (N.H. 1993); Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 484-85 (N.Y. App. Div. 2001); *see also* Underwood, *supra* note 79, at 513 (noting that the focus of education should be on students receiving an education that will prepare them to participate actively in society).

84. Underwood, *supra* note 79, at 516-17.

sources should be distributed, particularly because most poor children, who have higher levels of educational need, live in property poor school districts located in rural areas and inner cities.

The second wave of litigation achieved mixed success[85] because equalizing spending was in some respects at odds with meeting student needs.[86] Equalization of funding alone would not necessarily equalize educational opportunities, which was the ultimate purpose of most litigation.[87] Moreover, public opposition to an equity based shifting of funds arose in some states and frustrated progress.[88] This

85. Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 34, 53-56 (Helen F. Ladd et al. eds., 1999).

86. William H. Clune, *New Answers to Hard Questions Posed by* Rodriguez*: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 730 (1992).

87. *See* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 147 (1995); Liz Kramer, *Achieving Equitable Education Through the Courts: A Comparative Analysis of Three States*, 31 J.L. & EDUC. 1, 3 (2001) (stating that although increased and equalized funding would help several students, much more structural reforms need to be made). Kramer writes, "Most experts agree that money is not the only solution for the education crisis plaguing the nation, but it is disingenuous to argue that money is not efficacious in producing results and then argue that some districts should be permitted to spend multiple times what other districts spend." *Id.* at 11-12 (footnote omitted); *see also* Michael A. Rebell, *Education Adequacy, Democracy, and the Courts*, *in* ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY 218, 227 (Timothy Ready et al. eds., 2002); Julie Zwibelman, *Broadening the Scope of School Finance and Resource Comparability Litigation*, 36 HARV. C.R.-C.L. L. REV. 527, 530 (2001) (arguing that financial equity alone does not create equal opportunities). West Virginia, for instance, saw a new funding system that was supposed to result in a more equitable distribution of funds among students. However, the results of this new system may not have actually improved the education of the students on whose behalf the litigation was originally brought. Research suggests that these students are now struggling to receive an adequate education because they are being bused long distances over rough terrain and taught in large and unfamiliar schools. *See generally* Marty Strange, *Equitable and Adequate Funding for Rural Schools: Ensuring Equal Educational Opportunity for All Students*, 82 NEB. L. REV. 1, 5 (2003) (citing the lengthy times rural students spend on buses and the toll that it takes on them); BETH SPENCE, CHALLENGE W. VA., SMALL SCHOOLS: WHY THEY PROVIDE THE BEST EDUCATION FOR LOW-INCOME CHILDREN 9 (2000), http://challengewv.org/WP-content/uploads/publications/small_schools.pdf (stating that students "described in excruciating and painful detail the long bus rides" that left them exhausted).

88. *See, e.g.*, Douglas S. Reed, *Twenty-Five Years After* Rodriguez*: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 LAW & SOC'Y REV. 175, 207 (1998) (recognizing the inherent problem of public and legislative opposition to redistribution of education revenues); *see also* William A. Fischel, *Did* Serrano *Cause Proposition 13?*, 42 NAT'L TAX J. 465, 469 (1989) ("If households in wealthy communities expected that *Serrano* would eliminate their fiscal advantages ... they would find that the property tax was a

opposition led states to equalize funds by driving down overall spending across the state rather than leveling up those school districts at the bottom.[89] These undesirable results suggested the need for another strategy.

The third wave of school finance litigation coincided with a "standards-based reform" movement during the 1980s. Standards-based reform was a response to a series of reports, summits, and cultural notions that our children were not mastering core educational concepts, were falling behind their counterparts in other countries, and, in some instances, were simply educationally unequipped.[90] Seizing on constitutional language in state constitutions that entitles students to some basic level of education, plaintiffs began weaving elements of standards-based reform into their legal claims. They argued that state constitutional phrases such as "efficient," "thorough," or "sound basic" education obligated the states to provide children with an education that prepares them for later challenges in life,[91] whether they be college, trade school, work, or the obligations of citizenship. They then attempted to measure whether students were receiving that education with new standard-

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deadweight loss to them, ... a virtual fee for public school services.").

89. *See* Molly S. McUsic, *The Law's Role in Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, *in* LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 88, 114 (Jay P. Heubert ed., 1999). A review of recent economic findings shows that education finances are not a zero sum game and that the amount of educational expenditures in states that have faced financing reform has increased rather than decreased. Kramer, *supra* note 87, at 7-8 (citing Sheila A. Murray et al., *Education-Finance Reform and the Distribution of Education Resources*, 88 AM. ECON. REV. 791, 801, 804, 807 (1998)). Yet while wide disparities still exist, Kramer concludes that these disparities are more a characteristic of the differences between states than a characteristic of the wealth disparities within a state. *Id.* at 8.

90. *See* NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK 5 (1983) (warning of a "rising tide of mediocrity" in American education); Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 555-61 (1992) (discussing the nature and scope of the national crisis in education); Christopher F. Edley, Jr., *Lawyers and Education Reform*, 28 HARV. J. ON LEGIS. 293, 293-94 (discussing the debate about whether our education system is in crisis); Kramer, *supra* note 87, at 3; Joetta L. Sack, *The End of an Education Presidency*, EDUC. WK., Jan. 17, 2001, at 1 (discussing the first National Education Summit in 1989, called by President Bush to bring together the nation's governors, which resulted in a set of national and state education goals).

91. Kramer, *supra* note 87, at 6-7; Minorini & Sugarman, *supra* note 85, at 59-62.

ized tests and other indicators being developed in the general educational reform effort.[92]

This third wave of litigation is generally characterized as a pursuit of "educational adequacy." Courts faced with this litigation must determine exactly what type of education a state constitution or statute requires the state to deliver. The earliest cases fleshed out an adequate education in only the broadest terms, making the right difficult to enforce.[93] But in 1989, in *Rose v. Council for Better Education*, the Kentucky Supreme Court delved deeper into the meaning of an adequate education.[94] The court held that a constitutionally adequate or "efficient" education included several specific skills in each of the major content areas.[95] Since then, several other states have looked to *Rose* as an example and have prescriptively established what is meant by similar language in their own constitutions.[96] Some courts established standards directly fashioned after those in *Rose*, whereas others looked to their own state

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92. *See, e.g.*, Abbott v. Burke (*Abbott IV*), 693 A.2d 417, 427-29 (N.J. 1997) (discussing achievement on standardized state tests and its relevance to the constitutionality of the school system); Hoke County Bd. of Educ. v. State, No. 95-CVS-1158, 2000 WL 1639686, at *10-11 (N.C. Super. Ct. Oct. 12, 2000) (analyzing curriculum and student performance on standardized state tests).

93. *See, e.g.*, Robinson v. Cahill (*Robinson I*), 303 A.2d 273, 295 (N.J. 1973); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 94 (Wash. 1978).

94. 790 S.W.2d 186, 212 (Ky. 1989).

95. *Id.* The court wrote that an efficient education requires,

> (i) sufficient oral and written communication skills to enable students to function in ... 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 ... nation; (iv) sufficient self-knowledge of mental and physical wellness; (v) sufficient ... arts [education] to enable each student to appreciate [their] cultural and historic heritage; (vi) sufficient preparation for advanced training in either academic or vocational fields ...; and (vii) sufficient levels of academic or vocational skills to enable ... students to compete ... in the job market.

Id.

96. *See, e.g.*, Opinion of the Justices No. 338, 624 So. 2d 107, 155 (Ala. 1993); Idaho Schs. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 730-31 (Idaho 1993); McDuffy v. Sec'y of Executive Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1359 (N.H. 1997); Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997); Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999).

academic standards as a point of departure in determining the meaning of a constitutional education.[97]

The third wave of litigation overcame some of the limitations of equity litigation. Because the claims for a constitutional education began to focus on standards and quality, the state could not level down everyone's education to create basic equality. However, it also allowed the state to leave the educational resources and opportunities in good school districts untouched so long as the state provided resources to assist other school districts in improving the quality of education delivered therein. By avoiding any inherent threat to the standing of well-funded school districts, this standards-based third wave of litigation posed fewer judicial and political objections, which probably explains state supreme courts' receptivity to adequacy theories. Between 1989 and 2006, plaintiffs prevailed nearly 75 percent of the time, winning twenty out of twenty-seven final decisions by the highest reviewing court in the litigation.[98] In the earlier nonadequacy cases, plaintiffs were successful less than half the time.[99]

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97. *See, e.g.*, *Evans*, 850 P.2d at 734 (incorporating state educational standards into the meaning of constitutional adequacy); *Abbott IV*, 693 A.2d at 427 (upholding standards that had been adopted by the legislature); Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 484 (N.Y. App. Div. 2001) (finding that several of the Board of Regents's learning standards fell within the constitutional requirements for a "sound basic education"); *Hoke County Bd. of Educ.*, 2000 WL 1639686, at *82 (evaluating state standards with regard to whether they offer students a sound basic education); Edgewood Ind. Sch. Dist. v. Meno, 917 S.W.2d 717, 730 (Tex. 1995) (concluding the state standards system was consistent with constitutional adequacy); *see also* Rebell, *Educational Adequacy*, *supra* note 87, at 230 ("[N]ew state standards provided the courts with practical tools for developing judicially manageable approaches for implementing effective remedies.").

98. Rebell, *supra* note 21, at 1527. That percentage has dipped to two-thirds more recently. *See* NAT'L ACCESS NETWORK, EDUCATION "ADEQUACY" LIABILITY DECISIONS SINCE 1989 (2009), http://www.schoolfunding.info/litigation/New_Charts/09_2009ed_ad_equacy liability.pdf.

99. *Compare* EDUCATION "ADEQUACY" LIABILITY DECISIONS, *supra* note 98, *with* NAT'L ACCESS NETWORK "EQUITY" AND "ADEQUACY" SCHOOL FUNDING LIABILITY COURT DECISIONS (2009), http://www.schoolfunding.info/litigation/New_Charts/09_2009eq_ad_schoolfundin liability.pdf.

C. The Successes, Failures, and Continuing Efficacy of State-Based Litigation

The amount of prior litigation and the number of victories necessitate that any proposal for educational reform accounts for the role this litigation has played in the past and will likely play in the future. Unfortunately, the education advocacy community is partially fractured in regard to these cases. Local advocates, particularly those who have been directly involved in the state-based litigation, extol the virtues of the litigation and give no indication of changing their focus and strategy.[100] Conversely, many of those who are less involved in the litigation, particularly advocates at the national level, are unconvinced that the litigation has significantly reduced inequality or has the capacity to do so in the future.[101] Both sides, however, may paint the litigation with too broad of a brush. Any fair estimation of the litigation must deal with the nuances that make some aspects of the litigation ambiguous.

The first step in evaluating the litigation is simply to understand what a court or advocate means by saying students are entitled to an adequate education. Otherwise, it is nearly impossible to determine whether the adoption of that phrase represents a net gain or loss in educational opportunities. When a court uses the term "adequate education," it is, at a minimum, indicating that students are entitled to a particular qualitative level of education.[102] The dispute among commentators is whether the use of such a term sets a qualitatively high or low standard. Courts have complicated the issue by using variations on the term, none of which necessarily

100. *See, e.g.*, Greenspahn, *supra* note 15, at 779-81; Paul L. Tractenberg, *Beyond Educational Adequacy: Looking Backward and Forward Through the Lens of New Jersey*, 4 STAN. J. C.R. & C.L. 411, 439-40 (2008); *see also* Rebell, *supra* note 21, at 1483-85 (discussing "money matters" state litigation).

101. *See, e.g.*, Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 399 (2006) (finding that state litigation has done nothing to address interstate disparities, which are larger and more significant than intrastate disparities); *see* Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1671 (2007) (concluding that the litigation has not significantly raised the level of education and has established low standards); S. EDUC. FOUND., *supra* note 5, at 5, 27-29.

102. *See, e.g.*, Rose v. Council for Better Educ., 790 S.W.2d 186, 212 (Ky. 1989); McDuffy v. Sec'y, 615 N.E.2d 516, 519 n.8 (Mass. 1993); Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997).

answer the question. The North Carolina Supreme Court and the New York Court of Appeals have termed the guaranteed level of education as being a "sound basic education,"[103] whereas New Jersey has termed it a "thorough and efficient" education,[104] and South Carolina a "minimally adequate education."[105] One could certainly argue that phrases such as "basic" and "minimally adequate" ring of low level standards, but past history demonstrates that the words lack inherent meaning. Rather, the level of education that these terms reflect is entirely dependent on the court defining and applying them.

For instance, although terming a constitutional education as "sound basic," the North Carolina Supreme Court defined it to require more than just basic or minimal academic skills. The court wrote: "An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate."[106] Similarly, New York's highest court wrote that "a sound basic education conveys not merely skills, but skills fashioned to meet a practical goal: meaningful civic participation in contemporary society."[107]

What may be most telling is not the actual language or standards that courts have adopted, but rather those standards that they have rejected. In an attempt to defend deficiencies in their school systems, states have often argued that their constitution only requires them to provide a minimal level of education.[108] Most courts, however, have rejected their claims in favor of standards that guarantee more than just a minimum education. For instance, the North Carolina Supreme Court rejected the state's argument that students who achieved slightly below grade level were receiving a constitutional education and found instead that achieving at or above grade level was the measure of an adequate education.[109]

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103. Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 369 (N.Y. 1982); *Leandro*, 488 S.E.2d at 254.

104. Robinson v. Cahill (*Robinson I*), 303 A.2d 273, 295 (N.J. 1973).

105. Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999).

106. *Leandro*, 488 S.E.2d at 254.

107. Campaign for Fiscal Equity, Inc. v. State (*CFE II*), 801 N.E.2d 326, 330 (N.Y. 2003).

108. Rebell, *supra* note 21, at 1502.

109. Hoke County Bd. of Educ. v. State, 599 S.E.2d. 365, 382 (N.C. 2004); *see also* Abbott v. Burke (*Abbott II*), 575 A.2d 359, 398-99 (N.J. 1990) (rejecting the argument that the

Similarly, New York argued that an eighth grade education was an adequate education, only to be squarely rebuked by the state's highest court.[110] Reviewing adequacy cases collectively, William Clune concludes that the cases generally do not require a high level of education, but neither do they permit a low level of education.[111] Instead, they reflect a high minimum level of education.[112]

Others do not dispute that some states have adopted high- or mid-level standards, but they find that those states are in the minority.[113] Moreover, regardless of what courts intend, these scholars argue that the litigation has not resulted in a widespread leveling up of educational standards.[114] The disagreement probably stems from each side's over- and understatements of the effects of the litigation, with the truth somewhere in the middle.

First, state courts have not acted uniformly in adopting adequacy and quality standards. Thus, reaching any general conclusion regarding whether courts have adopted a high or low level of adequacy is beset with inherent problems. In practice, courts have adopted both, and neither has clearly predominated. Second, courts consistently adopt some standard for measuring the quality of education. The only exception to this is those cases where courts have simply rejected adequacy theories altogether as nonjusticiable.[115] Third, the very act of adopting some standard, whether high or low, is to establish a qualitative floor below which no school should fall.[116] Prior to adequacy cases, there was no floor. Thus, the

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plaintiffs need only basic instruction and instead finding that they also need advanced courses and the chance to excel).

110. *CFE II*, 801 N.E.2d at 331.

111. William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL'Y 376, 378 (1994).

112. *Id.*

113. Robinson, *supra* note 101, at 1671.

114. *See id.* at 1671-72 (explaining that some litigation with successful outcomes for plaintiffs has actually created a backlash of negative effects on education reform); *see also* Koski & Reich, *supra* note 59, at 549 (arguing that one's position in regard to others' education is important and, thus, adequacy leaves large inequities that must still be remedied).

115. *See, e.g.*, Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191-92 (Ill. 1996); Marrero *ex. rel.* Tabalas v. Commonwealth, 739 A.2d 110, 113-14 (Pa. 1999).

116. *See, e.g.*, Rose v. Council for Better Educ., 790 S.W.2d 186, 203 (Ky. 1989); McDuffy v. Secretary, 615 N.E.2d 516, 519 n.8 (Mass. 1993); Leandro v. State, 488 S.E.2d 249, 254

basic recognition of a standard is almost a per se net gain for students. The only caveat would be if schools were uniformly delivering educational opportunities that exceeded the minimum standard prior to litigation but responded to the litigation by reducing their efforts to only those necessary to meet the minimums. Regardless of how one interprets courts' chosen characterizations of a constitutional education, no evidence exists to suggest that the standards have permitted states to reduce their educational efforts.[117] In fact, empirical data indicates the opposite is true.[118]

In a study of the 10,000 schools affected by court-ordered reform in the 1980s and 90s, William Evans found that the court decisions increased overall spending on education, reduced disparities between districts, and leveled education resources.[119] Another similar study quantifies the reduction in inequity, finding that the litigation has reduced intrastate spending inequality by 19 to 34 percent.[120] Further research indicates that states have achieved this reduction in inequality by redistributing resources to poorer school districts.[121] Christopher Berry concurs in the efficacy of the litigation but cautions against overestimating the litigation's effect.[122]

(N.C. 1997).

117. California might be one exception, as after *Serrano* the overall funding of school districts suffered. William A. Fischel, *How* Serrano *Caused Proposition 13*, 12 J.L. & POL. 607, 613 (1996) (noting that California fell to nearly last in the country in terms of the percent of personal income spent on public education and concluding that equalization killed the incentive to support increased spending on the local level). *Serrano*, however, was an equity rather than adequacy case. It was in the court's attempt to make all districts equal that funding went down. *Id.* Adequacy theory has no such incentive, as equality is not the constitutional measure, rather, that measure is meeting and exceeding the adequacy threshold.

Some commentators project that adequacy litigation, as well as No Child Left Behind, may have their own negative consequence: legislatures lowering their qualitative standards to demonstrate more easily that students are meeting them. Michael Heise, *Adequacy Litigation in an Era of Accountability*, *in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATION ADEQUACY 262, 266 (Martin R. West & Paul E. Peterson eds., 2007); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 946-48 (2004).

118. MACINNES, *supra* note 52, at 33-34.

119. William N. Evans et al., *The Impact of Court-Mandated School Finance Reform*, *in* EQUITY AND ADEQUACY, *supra* note 85, at 77.

120. Sheila Murray et al., *Education Finance Reform and the Distribution of Educational Resources*, 88 AM. ECON. REV. 789, 806 (1998).

121. David Card & A. Abigail Payne, *School Finance Reform, the Distribution of School Spending, and the Distribution of Student Test Scores*, 83 J. PUB. ECON. 49, 67 (2002).

122. Berry confirms that litigation has produced a 16 percent reduction in inequity, but concludes that this is at the low end of the range suggested by the previous studies and

When accounting for multiple variables, Berry concludes that increases in funding are nuanced and not as large as the above data might facially suggest. He finds that court decisions upholding the constitutionality of a school system have resulted in those states actually reducing their subsequent level of funding.[123] Conversely, court orders striking down funding systems have resulted in additional funding for school districts.[124] The effect on total educational funding, however, is more complicated. First, when courts have upheld the constitutionality of a funding system, the states have sometimes lowered their educational contributions, but local school districts have often increased their contribution to offset the change.[125] Second, when courts have forced states to provide additional funds for schools, overall education funds have initially increased.[126] But over time, local school districts have often reduced their educational spending and offset much of the initial increases by the state.[127] In short, adequacy and equity litigation has increased the amount spent on education and reduced the inequity between districts, but these effects have often been marginal at times.[128]

In light of the foregoing, the divergence of opinion among advocates regarding this state-based litigation may be attributable to their differing expectations rather than any underlying reality that could be defined as success or failure. This Article's analysis and empirical data will demonstrate three basic points that should not be in dispute: first, courts have established floors below which no school should fall, which previously did not exist; second, litigation has reduced inequity and increased overall funding for

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generally a "modest" reduction in inequity. Christopher Berry, *The Impact of School Finance Judgments on State Fiscal Policy*, *in* SCHOOL MONEY TRIALS, *supra* note 117, at 233.

123. *Id.* at 222.

124. *Id.* at 227.

125. *Id.* at 223.

126. *Id.*

127. *Id.* Berry finds that this seems to be the result in adequacy cases, but when looking at all cases and across time, the data is insufficient to allow him to confidently reach this conclusion as a general principle. *Id.*

128. *Id.* at 233-34; *see also* W. Norton Grubb, *What Should Be Equalized? Litigation, Equity, and the "Improved" School Finance* (Feb. 2006), http://www.law.berkeley.edu/files/grubb_paper.pdf (stating adequacy litigation has had a negligible effect on resource distribution).

education; and third, these gains have not eliminated inequity, nor achieved the amount of funding necessary for all students to achieve at high levels. The most accurate general characterization of adequacy and equity litigation, therefore, is that it has produced a net benefit, but significant and troublesome inequalities still persist.[129]

These problems continue for at least two reasons. First, even if courts were qualified for the job, courts lack the authority to do legislatures' job of allocating funds and drafting legislation. Courts simply strike down unconstitutional statutes and funding formulas. Creating funding formulas and distributing resources remain within the sole purview of legislatures and their political processes. Thus, legislatures can and do make the minimal changes necessary to satisfy court orders, without also eliminating other historical ways of inequitably allocating funds.[130] In fact, many, if not most, state funding formulas still fail to distribute resources based on actual student needs.[131] Instead, they distribute resources based on politics and the availability of funds.[132]

Second, although equity and student-based funding can be achieved at a single moment in time, litigation is not a suitable vehicle for maintaining equity and student-based funding over time. Whereas litigation has been the only force sufficient enough to move state legislatures toward greater equity and quality in their schools,[133] litigation is an inherently inefficient means of reform.

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129. John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2409-10 (2004) (indicating that school funding victories still often leave serious inequalities and problems behind).

130. John Podesta & Cynthia Brown, Ctr. for Am. Progress, *Introduction*, *in* ENSURING EQUAL OPPORTUNITY IN PUBLIC EDUCATION, *supra* note 7, at 3.

131. Rebell, *supra* note 21, at 1523; Robinson, *supra* note 101, at 1670.

132. Rebell, *supra* note 21, at 1523; Robinson, *supra* note 101, at 1670; *see also* THOMAS B. FORDHAM INST., *supra* note 40, at 28 (explaining that the amount of school funding a state receives depends greatly on how much each state spends per student).

133. Of course, litigation cannot take credit alone. The wider standards-based reform movement and federal legislation have also encouraged change. *See generally* 20 U.S.C. §§ 6300-7491 (2006) (providing various funding programs and standards for schools); Rebell, *supra* note 87, at 229 (noting that between 1980 and 1986, forty-five states increased their standards). However, these policy and social initiatives alone generally lack the power to break the back of vested political interests that have maintained inequity and inadequacy for years. It has taken unambiguous legal mandate, or even the focused attention of a failed litigation strategy, to push certain reforms over the top. *See generally* Alexandra Greif,

Litigation costs are staggering and the production of research circumscribed. Most important, litigation is finite, starting and ending at definite points. Courts lack the capacity to project into the future and fashion remedies that are self-perpetuating. The only other option is to monitor legislatures directly on a yearly basis to ensure compliance, but most courts lack the will for what can become a perpetual battle.[134] In fact, some commentators suggest that although state courts became increasingly involved in education reform over the last decade, they are now less receptive to litigation and are questioning their own ability to produce long term solutions.[135]

Given continuing inequalities and inadequacies and questions about state courts' ability to remedy them, we must seriously consider how we should supplement these efforts in the future and toward what end. Litigation's apparent singular power to affect change in this area, regardless of how modest one might characterize it, suggests that it cannot be discarded. But neither can we continue to do the same things and expect to get different results. This is true both of our means and our reform remedies. Most notably, we have thus far largely experimented with equity and

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Politics, Practicalities, and Priorities: New Jersey's Experience Implementing the Abbott V *Mandate*, 22 YALE L. & POL'Y REV. 615 (2004) (analyzing the decades long litigation effort to force the legislature to meet the demands of the Constitution).

134. New Jersey is an exception and for this reason has been most successful. *See, e.g.*, Abbott v. Burke (*Abbott XIX*), 960 A.2d 360 (N.J. 2008) (plaintiff victory); Abbott v. Burke (*Abbott VI*), 748 A.2d 82 (N.J. 2000) (plaintiff victory); Abbott v. Burke (*Abbott V*), 710 A.2d 450 (N.J. 1998) (plaintiff victory); Abbott v. Burke (*Abbott IV*), 693 A.2d 417 (N.J. 1997) (plaintiff victory); Abbott v. Burke (*Abbott III*), 643 A.2d 575 (N.J. 1994) (plaintiff victory); Abbott v. Burke (*Abbott II*), 575 A.2d 359 (N.J. 1990) (plaintiff victory); Abbott v. Burke (*Abbott I*), 495 A.2d 376, 394 (N.J. 1985) (plaintiff victory). Conversely, states like Ohio, Alabama, and Massachusetts have issued decisions in favor of plaintiffs only to reverse course entirely in later years. *Ex parte* James, 836 So. 2d 813 (Ala. 2002); Hancock v. Comm'r of Educ., 822 N.E.2d 1134 (Mass. 2005); State v. Lewis, 786 N.E.2d 60 (Ohio 2003). However, for the first time in over three decades, the New Jersey Supreme Court has held that the state's funding formula is constitutional and has signaled the potential end of its intervention. Abbott v. Burke (*Abbott XX*), 971 A.2d 989 (N.J. 2009). However, this shift, like in other states, might have been a reaction to external political pressures; most notable in this case are those arising from the severe economic downturn of the country.

135. Heise, *supra* note 117, at 269-72; Ryan, *supra* note 12, at 1261-62 (concluding that courts cannot deliver the victory that advocates seek and that only political measures can produce real solutions in this area). The above, however, is not to suggest state-based litigation has ended or will end. To the contrary, new successes are still occurring. *See, e.g.*, Labato v. State, 218 P.3d 358 (Colo. 2009) (reinstating a school finance case).

adequacy as separate theories and remedies, but in many respects the two are intertwined.[136] Equality without adequacy would simply mean everyone suffers.[137] However, it may be the case that adequacy is impossible without certain levels of equity.[138] So long as gross disparities are permitted to exist between schools, the schools on the lower end will always have to compete against other schools for vital resources, such as teachers, principals, and administrators, and struggle to attract racially and socioeconomically diverse student populations, which have significant effects on the overall achievement of a school and its individual students.[139] Producing adequate schools may also require states to examine how they distribute key resources among schools and how they draw districts and assign students.[140] The remainder of this Article, however, will focus on resources, reserving the details of student assignment and enrollment for other articles.[141]

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136. Koski & Reich, *supra* note 59, at 595-607.

137. *Id.*

138. *Id.* at 589-93. Recognizing this problem, one scholar proposes the school finance notion of "equity-plus." A system based on "equity-plus" would include three components: (1) funding for a high foundation program that supports equal spending for schools; (2) funding for compensatory aid and services for high need students; and (3) performance oriented educational policies that look to results and efficiency. Clune, *supra* note 111, at 379-80; *see also* Lake View Sch. Dist. v. Huckabee, 91 S.W.3d 472, 496 (Ark. 2002) ("Deficiencies in certain public schools in certain school districts can sustain a finding of inadequacy but also, when compared to other schools in other districts, a finding of inequality.").

139. A few years ago, it appeared that the state courts might recognize and address this problem. *See* Gregory C. Malhoit & Derek W. Black, *The Power of Small Schools: Achieving Equal Educational Opportunity Through Academic Success and Democratic Citizenship,* 82 NEB. L. REV. 50, 66-67 (2003). Subsequent experience suggests they have not.

140. Derek W. Black, *In Defense of Voluntary Desegregation: All Things Are Not Equal*, 44 WAKE FOREST L. REV. 107, 122-25 (2009); Grubb, *supra* note 128, at 2-3 (discussing resource distribution).

141. For further explanation of how racial and socioeconomic isolation drive certain resource inequities, see Black, *supra* note 140, at 116-22; Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 7, 29-30 (2008) (noting that eliminating segregation is necessary to provide "key educational resource[s]" to minority students and prevent minority students from being disadvantaged in relationship to white students).

II. THE CONTINUING SEARCH FOR A SOLUTION

A. Delivering a Meaningful Opportunity To Learn for All

To deliver all students—not just some—a meaningful opportunity to achieve at high levels, schools need, at least, two things that they currently lack: more money and allocations of money based on student needs.[142] As discussed earlier, money matters for the educational opportunities that students receive. In recent decades, scholars have discredited both contrary and agnostic positions.[143] With that said, meaningful educational opportunities will not result from simply increasing funding. Additional resources must be allocated through structures that respond to or account for actual student need. That individual students have different needs should be obvious, but state funding formulas do not consistently reflect this basic principle.[144]

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142. Goodwin Liu, *Interstate Inequality in Education Opportunity*, 81 N.Y.U. L. REV. 2044, 2051-52 (2006) (including an adjustment for student need and finding that significant interstate inequalities persist that must be remedied); Rebell, *supra* note 21, at 1523 (maintaining that if children are to receive a quality education, resources must be provided to the children who have been determined to have particularized needs); Wiener & Pristoop, *supra* note 37, at 6-8 (detailing the extent of funding gaps and arguing that they must be closed); THOMAS B. FORDHAM INST., *supra* note 40, at 5 (explaining that the chances of meeting student achievement goals will increase greatly if money is allocated based on the resources needed to educate disadvantaged students).

143. *See, e.g.*, Rebell, *supra* note 21, at 1469. A series of studies, aimed to refute the idea that money does not matter, have shown a positive correlation between expenditures on education and student gains. *Id.* at 1480-81.

144. For instance, until just last year, Pennsylvania did not even fund schools based on the number of students in them, much less student needs. *See* Mary Ann Zehr, *Pennsylvania Bucks Tide on Funding Squeeze*, EDUC. WK., Aug. 27, 2008, at 19 (detailing the changes to Pennsylvania's school funding policy); *see also* ELISE MARIE FRATTURA & COLLEEN A. CAPPER, LEADING FOR SOCIAL JUSTICE: TRANSFORMING SCHOOLS FOR ALL LEARNERS 197-202 (2007) (noting that some states such as Wisconsin have reduced the weighting that student need receives in their funding formulas and discussing the ways states fund schools); THOMAS B. FORDHAM INST., *supra* note 40, at 2 (indicating that "staff allocations, program-specific formulae squeaky-wheel politics, property wealth, and any number of other factors that have little to do with the needs of students" drive school funding). In 1998, thirty-two states were using student need in some form to allocate funds; although that student need was a factor, it does not follow that the states were ensuring that schools actually had sufficient funds to meet student needs. Catherine C. Sielke & C. Thomas Holmes, *Overview of Approaches to State School Funding*, *in* AM. EDUC. FIN. ASS'N, PUBLIC SCHOOL FINANCE PROGRAMS OF THE UNITED STATES AND CANADA: 1998-99, at 209-59 (2002), http://www.ed.sc.edu/aefa/reports/

Insofar as students have different needs, those needs often require different resources.[145] Likewise, the demographic and geographic characteristics of a school district also affect the cost of delivering basic educational resources.[146] If students are to receive the qualitative education to which their constitutions entitle them, state funding formulas must account for these differential needs and provide funds to meet them. In short, adequate educational school systems require student-based funding driven by actual educational need, rather than broad-based funding formulas that treat most students and districts as fungible.[147]

Many states currently lump students into two basic categories: general education students and students with a disability. At the beginning of the school year, schools report their average daily attendance to the state, and the state allots a standard amount per pupil to the school or district.[148] Included in these attendance numbers are indications of the number of students with disabilities, and sometimes English language learners, for which the state may

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ch1.pdf (discussing student need in funding formulas).

145. *See* Rebell, *supra* note 21, at 1480-81 (rebutting the argument that increasing school funding to "needy" schools would be harmful to those schools); Corrine Taylor, *Does Money Matter? An Empirical Study Introducing Resource Costs and Student Needs to Educational Production Function Analysis*, *in* DEVELOPMENTS IN SCHOOL FINANCE 1997, at 77, 80 (William J. Fowler ed., 1997), *available at* http://nces.ed.gov/pubs98/98212-1.pdf (noting that studies often do not account for students with special needs who need more resources); THOMAS B. FORDHAM INST., *supra* note 40, at 8 (explaining that differences in backgrounds, circumstances, and disabilities among children have made it so that some require more resources than others in order to achieve high levels of education).

146. *See, e.g.*, Abbott v. Burke (*Abbott II*), 575 A.2d 359, 377-79 (N.J. 1990) (accounting for the municipal overburden that some urban districts suffer that limit their ability to raise revenue for schools); Hoke County Bd. of Educ. v. State, No. 95CVS1158, 2000 WL 1639686, at *38 (N.C. Sup. Ct. Oct. 12, 2000) (finding that despite various recruitment programs by the state, rural counties like Hoke cannot attract teachers); *see also* NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., OVERVIEW AND INVENTORY OF STATE EDUCATION REFORMS: 1990 TO 2000, at 46 (2003), *available at* http://nces.ed.gov/pubs2003/ 2003020.pdf (noting the relevance of geographic differences and indicating that few states make any adjustment on this basis).

147. FRATTURA & CAPPER, *supra* note 144, at 197-200 (evaluating the role that student need should play in school funding formulas); NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 146, at 34 (finding that school funding formulas are complex and that district need, of which student need is only one component, along with other factors, determines state funding allotments); THOMAS B. FORDHAM INST., *supra* note 40, at 1-2; *see also id.* at 36 (discussing the varying categories of funding formulas).

148. *See generally* NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 146, at 34.

also provide a supplemental amount per student.[149] Putting aside whether current supplemental funds for students with disabilities are sufficient, most states either ignore or underfund nondisabled special needs students.

The term "special needs," or "at-risk," refers to students whose demographic characteristics put them at risk of academic failure.[150] This category of students can include students with disabilities, but need not. In large part, these are regular curriculum students, but factors such as race, ethnicity, language skills, socioeconomic status, familial status, parental education, behavioral issues, and past academic performance make it likely that they will need additional educational supports to be successful.[151] Moreover, when these students are concentrated in single school buildings and classrooms, their educational needs become even higher.[152]

That these students, and schools with high concentrations of these students, need additional resources is not in dispute. In fact, the entire purpose of allocating federal funding to public schools through Title I is to direct additional funds to low income students.[153] Federal formulas and the Department of Education

149. *See generally id.* at 36-37.

150. *See, e.g.*, Hoke County Bd. of Educ. v. State, 599 S.E.2d 365, 387 n.13 (N.C. 2004) ("[S]uch students are those who, due to circumstances such as an unstable home life, poor socio-economic background, and other factors, either enter or continue in school from a disadvantaged standpoint, at least in relation to other students who are not burdened with such circumstances.").

151. *Id.*

152. *See* ANURIMA BHARGAVA ET AL., NAACP LEGAL DEF. & EDUC. FUND, INC. & THE CIVIL RIGHTS PROJECT, STILL LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION 21 (2008) (discussing the negative impact racial isolation has on graduation rates); JAMES S. COLEMAN, DEP'T OF HEALTH, EDUC. & WELFARE, THE CONCEPT OF EQUALITY OF EDUCATIONAL OPPORTUNITY 20-21 (1966); RICHARD D. KAHLENBERG, CENTURY FOUND., RESCUING BROWN V. BOARD OF EDUCATION: PROFILES OF TWELVE SCHOOL DISTRICTS PURSUING SOCIOECONOMIC SCHOOL INTEGRATION 6-7 (2007), *available at* http://www.tcf.org/publications/education/districtprofiles.pdf; Molly S. McUsic, *The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools,* 117 HARV. L. REV. 1334, 1355-56 (2004) (arguing the best way to reach the goal of *Brown* is desegregation by economic class); UNC CTR. FOR CIV. RTS., THE SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS: A CRUCIAL CONSIDERATION IN STUDENT ASSIGNMENT POLICY 1-4 (2005), http://www.law.unc.edu/documents/civilrights/briefs/charlottereport.pdf.

153. 20 U.S.C. § 6301 (2), (6) (2006) (stating its purpose as meeting the needs of low income and disadvantaged students and "improving and strengthening accountability, teaching, and learning by using State assessment systems designed to ensure that students are meeting challenging State academic achievement and content standards and increasing achievement

indicate that these students require 40 percent more funding than their middle class peers.[154] Others, however, find that these estimates are conservative and that low income students need 60 percent or more resources.[155]

Regardless of the exact number, all agree that low income and special needs students require significantly more resources than others. The trend, however, has been to actually provide these students with fewer resources than their peers. Recent studies show that over half of the states actually spend less money per child in schools that have high percentages of low income students than they do in schools that have low percentages of poor students.[156] The same inequality exists between predominantly minority and predominantly white schools.[157] Moreover, if one calculates what low income schools should be receiving based on the federal standard, thirty-four states underfund poor kids.[158] This bleak picture, however, does not even account for the possibility that some states are also providing inadequate funding for middle class schools. In a state where this was the case, low income students would be in an even worse position, as they are disadvantaged in regard to their peers who are themselves being shortchanged. The fact that per pupil funding in states like Alabama and Arkansas lags significantly behind some comparable states suggests that this possibility is likely.[159] In fact, some note that interstate funding inequalities

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overall, but especially for the disadvantaged").

154. No Child Left Behind Act of 2001, Pub. L. No. 107-10, § 1125(A), 115 Stat. 1425, 1525-26 (2002) (setting the standard for whether low-income schools are fairly funded as whether they receive a 40 percent funding increase adjustment); NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., INEQUALITY IN PUBLIC SCHOOL DISTRICT REVENUES 62 (1998) (identifying 40 percent as the appropriate adjustment for low income students); *see also* U.S. GENERAL ACCOUNTING OFFICE, SCHOOL FINANCE: PER PUPIL SPENDING DIFFERENCES BETWEEN SELECTED INNER CITY AND SUBURBAN SCHOOLS VARIED BY METROPOLITAN AREA 5-6 (2002).

155. Wiener & Pristoop, *supra* note 37, at 6 (noting that Liu used a 60 percent adjustment in his calculations and that Maryland determined it would need to double its base funding for low income students).

156. *Id.*

157. *Id.* at 7 tbl.4.

158. *Id.* at 6 (factoring in the needed cost adjustment for poor kids causes the underfunding to rise from $825 per pupil to $1307).

159. *Id.* at 4 tbl.2 (showing that Georgia and Missouri spend around $2000 more per pupil than Alabama and Arkansas).

are larger than the inequalities within states and thus are equally significant problems.[160]

B. Proposed Strategies for Increasing Opportunities

Researchers, advocates, and legislators at the state and national levels have offered several proposals to address some or all of the above inequities and system failures. The fault lines in these proposals revolve around which government actors have the responsibility and capacity to affect change and the efficacy of litigation in prodding this change. The proposals fall into four major categories: 1) pursuing education as a federal fundamental right either through federal litigation or a Constitutional amendment; 2) expanding federal education legislation and funding; 3) continuing litigation and advocacy under state constitutions; and 4) a combination of the foregoing three categories.

1. Federal Constitutional Strategies

Among these proposals, pursuing education as a fundamental right under the Federal Constitution is the oldest, dating back to *Rodriguez*.[161] Some simply argue that the Court's rationale in *Rodriguez* was wrong in 1973 and continues to be wrong today.[162] Others have developed rationales distinct from those argued in *Rodriguez* or have identified subsequent jurisprudential changes in the Supreme Court that would dictate a different outcome now.[163] Most in this latter group emphasize that the opinion in *Rodriguez* explicitly left open the possibility that there was some minimum

160. *See* Liu, *supra* note 101, at 388-89 (noting that interstate disparities in revenue-raising capacities were reflected in enrollment and illiteracy rates); Robinson, *supra* note 101, at 1712-13 (suggesting that reducing interstate disparities could have significant effects for disadvantaged children).

161. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 19 (1973).

162. *See, e.g.*, Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 121-23 (2004) (concluding that federal courts have simply erred in rejecting a constitutional right to education); Stephen E. Gottlieb, *Communities in the Balance: Comments on Koch,* 37 HOUS. L. REV. 711, 718 (2000); Timothy D. Lynch, Note, *Education as a Fundamental Right: Challenging the Supreme Court's Jurisprudence*, 26 HOFSTRA L. REV. 953, 956 (1998).

163. *See, e.g.*, Bitensky, *supra* note 90, at 574.

level of education that the Constitution would protect, but the plaintiffs in *Rodriguez* simply did not establish what that level was, much less that it was violated.[164] This group also points to the Court's holdings since *Rodriguez*, which they argue establish principles that require more rigorous scrutiny of educational inequalities and deprivations.[165] Beyond these points, these "federal constitutionalists" vary in the extent to which they focus their rationales on due process, equal protection, or privileges and immunities.

Susan Bitensky's analysis incorporates all three constitutional rationales. In addition, she argues that a federal right to education emanates from the First Amendment and the right to vote, as well as the Due Process Clause, the Privileges and Immunities Clause, and the Equal Protection Clause.[166] Her arguments overlap with those in *Rodriguez* in several respects, but she adds significant depth to a substantive due process approach—which *Rodriguez* did not address—based on more recent Supreme Court decisions.[167] In particular, she relies on Justice Scalia's methodology. Scalia has argued that the test for substantive due process rights is whether the asserted liberty interest is rooted in history and tradition.[168] Bitensky finds that recently developed history and jurisprudence reveal a strong tradition of protecting and promoting education.[169] She then reasons that if education warrants substantive due process protection under Scalia's narrow test, it would warrant the same under the analysis of more moderate justices.[170] Former Justices O'Connor, Brennan, Marshall, and Blackman were clear in their adherence to a more flexible standard.[171] Moreover, Justice

164. *See, e.g.*, Greenspahn, *supra* note 15, at 768-69; Preovolos, *supra* note 72, at 78-83; Eli Savit, Note, *Can Courts Repair the Crumbling Foundation of Good Citizenship? An Examination of Potential Legal Challenges to Social Studies Cutbacks in Public Schools*, 107 MICH. L. REV. 1269, 1284-85 (2009).

165. *See, e.g.*, Bitensky, *supra* note 90, at 568-72.

166. *Id.* at 553.

167. *See id.* at 581-84 (explaining the development of privacy rights under a substantive due process theory). The Court decided *Rodriguez* under equal protection principles, not substantive due process. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 7 (1973).

168. *See* Bitensky, *supra* note 90, at 585 (citing Michael H. v. Gerald D., 491 U.S. 110, 112 (1989)).

169. *Id.* at 588-90.

170. *Id.* at 590-92.

171. *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring in part); *id.* at 136-41 (Brennan,

Kennedy, who currently serves as the swing vote on the Court, recently relied on an evolving and modern historical record to recognize a new substantive due process liberty interest that protects the privacy rights of homosexuals.[172]

A recent note argues that even if history and tradition do not establish education as a fundamental right under substantive due process, the compulsory nature of modern education impairs students' liberty to such an extent that it imposes an affirmative obligation on schools to provide education.[173] The note points out that the Court has consistently imposed affirmative obligations on the state in other instances where it takes citizens into custody, such as in prisons, mental health facilities, or guardianship.[174] Although the state generally has no responsibility to ensure these persons' health or safety, in these instances it assumes that responsibility when it takes them into custody.[175] Compulsory education similarly deprives students of physical liberty[176] and sometimes even the right to be educated at home.[177] Thus, the note concludes that the state now has an affirmative responsibility to provide education.[178]

Goodwin Liu's scholarship distinguishes itself by locating a fundamental right to education, not in due process or equal protection, but rather in the Privileges and Immunities Clause. Revisiting the legislative history of the Fourteenth Amendment and congressional actions following its passage, Liu argues that Congress intended education to be one of the privileges and immunities of national citizenship that the Amendment protected.[179]

J., dissenting) (Blackmun & Marshall, J.J., joining the dissent); *see also* Bitensky, *supra* note 90, at 592.

172. Lawrence v. Texas, 539 U.S. 558, 571-74 (2003) (focusing on the recent historical trend of moving away from outlawing and enforcing prohibitions on homosexual sodomy).

173. Note, *A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process*, 120 HARV. L. REV. 1323, 1324 (2007).

174. *See id.* at 1328-30 (referencing DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 191 (1989); Youngberg v. Romeo, 457 U.S. 307 (1982); Estelle v. Gamble, 429 U.S. 97 (1976)).

175. *Id.* at 1329.

176. *Id.* at 1331.

177. *See, e.g.*, Jonathan L. v. Sup. Ct., 81 Cal. Rptr. 3d 571, 592 (Ct. App. 2008) (holding that a state interest may outweigh a parent's desire to homeschool a child).

178. Note, *supra* note 173, at 1331.

179. Liu, *supra* note 101, at 392-99.

Of course, if the quality of education guaranteed was only equivalent to that of the nineteenth century, the right would be meaningless, but Liu reasons that the right is dependent on the evolving social demands of citizenship.[180] Liu further notes that, since Section 1 of the Fourteenth Amendment guarantees citizens a level of education, Section 5 would explicitly obligate Congress to implement and support education.[181]

Those less confident in the courts, but convinced of the need for constitutional protections, have advocated amending the Constitution itself. Although introduced and sponsored by only one representative, a current proposed constitutional amendment is before the U.S. House of Representatives.[182] The proposal simply states: "All persons shall enjoy the right to a public education of equal high quality," and "Congress shall have power to enforce and implement this [right] by appropriate legislation."[183] Probably of more note, however, are the efforts outside of Congress. Due in part to the mixed results of state-based litigation, groups of scholars, advocates, legal institutions, and communities have been theorizing and organizing a grassroots movement to amend the Constitution.[184] Currently, their work is largely in its initial stages, but if their efforts proceed, they will likely find numerous natural allies in several states, where other groups have been engaged in active

180. *Id.* at 346.

181. *Id.* at 354.

182. H.R.J. Res. 29, 111th Cong. (2009).

183. *Id.*

184. ROBERT MOSES ET AL., QUALITY EDUCATION AS A CONSTITUTIONAL RIGHT: CREATING A GRASSROOTS MOVEMENT TO TRANSFORM PUBLIC SCHOOLS (forthcoming 2010); JEANNIE OAKES ET AL., LEARNING POWER: ORGANIZING FOR EDUCATION AND JUSTICE (2006); S. EDUC. FOUND., *supra* note 5; Gary K. Clabaugh, *Schooling as a Fundamental Right: Should an Equal Education Amendment Be Enacted?*, 85 ED. HORIZONS 141, 144 (2009); Oakes et al., *supra* note 5, at 358; Conference, *Rethinking* Rodriguez*: Education as a Fundamental Right*, http://www.law.berkeley.edu/3164.htm (last visited Feb. 10, 2010); Omo Moses, Quality Education as a Constitutional Right (Dec. 30, 2008), http://www.merrow.org/ed_advice/ 2008/12/quality-education-as-a-constitutional-right/; Quality Education as a Constitutional Right, http://www.qecr.org/index.html (last visited Feb. 10, 2010); Zheng Yang, *Audience Becomes Discussion Group as Educator Moses Raises Question of Quality Education as a Civil Right*, CHRONICLE ONLINE, Feb. 2, 2007, http://www.news.cornell.edu/stories/Feb07/moses.cover.html; *see also* ROSANNA BAYON MOORE & SUSAN SANDLER, SUPPORTING THE EDUCATION ORGANIZING MOVEMENT: AN EXCHANGE BETWEEN INTERMEDIARIES 3-4 (2003), http://www.justicematters.org/jmi_sec/jmi_dwnlds/Ed_Organizing_Intermed_Exch.pdf (describing general efforts to organize communities around educational movements).

campaigns to amend and strengthen their own state constitutions' education clauses.[185] Presumably seeing this potential, some national foundations have begun directing resources in this direction.[186] Only time will tell of the efficacy of this work.

2. Federal Legislative Strategies

Others, looking for more immediately obtainable and narrow results, have shifted away from constitutional strategies and, instead, have advocated specific federal legislative agendas. Some of these legislative proposals, however, are still consistent with Liu's notion of Congress as a facilitator of educational equity and other movements toward education as a constitutional right. For instance, in the last Congress, Congressman Fattah introduced a student bill of rights.[187] In short, the bill would create a substantive right to an adequate and equitable education and provide individuals with a federal cause of action if a state failed to provide sufficient educational resources or to comply with existing state or federal court orders in regard to student resources.[188] The bill would also require states to submit yearly compliance reports to the Department of Education. These reports would identify the extent to which states afford students adequate opportunities, specify remedial plans to

185. *See, e.g.*, Goodbye Minimally Adequate.com, Constitutional Amendment, http://www.goodbyeminimallyadequate.com/ (last visited Feb. 10, 2010) (petition to amend South Carolina Constitution and overturn its supreme court holding that a minimally adequate education is all that the state constitution guarantees); Legislative Council of the Colo. General Assembly, 2008 State Ballot Information Booklet, http://www.colorado.gov/cs/Satellite/CGA-Legislative Council/CLC/1200536136114 (select "Blue Book English 2008") (amendment to divert additional funds to Colorado's schools); Mo. Sec'y of State, 2008 Ballot Measures (Aug. 27, 2009), http://www.sos.mo.gov/elections/2008ballot/ (constitutional amendment to assist in raising money for education in Missouri); Neb. Sec'y of State, Proposed Constitutional Amendments Appearing on the 2006 General Election Ballot (2006), http://www.sos.state.ne.us/elec/pdf/const_amd_gen_elect2006.pdf (constitutional amendment to provide for early childhood development in Nebraska); Nancy Tobi, Constitutional Amendment on Education Proposed (Mar. 3, 2007), http://www.democracyfornewhampshire.com/node/view/3681 (discussing a proposed amendment in New Hampshire); *see also* Education Voters Institute, About Us, http://www.edvotersinstitute.org/about-us/ (last visited Feb. 10, 2010).

186. *E.g.*, Opportunity to Learn Fund, http://www.schottfoundation.org/drupal/funds/otl (last visited Feb. 10, 2010) (characterizing its agenda as establishing a "federal right to an 'Opportunity to Learn'").

187. Student Bill of Rights, H.R. 2373, 110th Cong. (2007).

188. *Id.* §§ 111-12, 132.

rectify deficiencies, and analyze the effect of per-pupil expenditure on student achievement.[189]

Kimberly Jenkins Robinson and Michael Rebell also endorse legislation to secure a federal education right, but they each separately express concern with the vagueness and room for interpretation that a right to adequacy or equity might entail. Robinson cautions that adequacy can be interpreted as a qualitatively low level of education and thus advocates for a federal right that would guarantee every child the right to develop to their "fullest potential."[190] Tying the right to children's abilities should "curb any tendency to level down rather than up."[191] Rebell, attempting to characterize education in a way that avoids later manipulation, focuses on the specific inputs that represent a quality education. He argues that Congress should not measure education based on its, or the states', notions of "proficiency," but should emphasize 100 percent meaningful educational opportunity, which is represented by necessary resource inputs.[192] Moreover, meaningful educational opportunity is attainable by 2014, whereas 100 percent proficiency is not.[193] Looking back at Congress's previous "opportunity to learn standards," which failed, Rebell recognizes that these standards were also subject to potential vagueness and dispute.[194] Thus, he would have the federal government set standards in major categories of inputs but leave the states to define other more particularized measures, such as how to measure the effectiveness of teachers.[195]

3. Non-Federal/Continued State Strategies

At least three commentators, who probably echo the sentiments of larger constituencies, caution against legislation and litigation to secure education rights at the federal level. David Greenspahn

189. *Id.* § 131.
190. Robinson, *supra* note 101, at 1714.
191. *Id.*
192. Rebell, *supra* note 21, at 1514.
193. *See id.* at 1513-14 (arguing that Congress should focus on setting achievable goals, rather than aiming for 100 percent proficiency).
194. *Id.* at 1517-18.
195. *Id.* at 1518.

points out the inherent practical risks and problems with federal litigation. First, litigation would require the acquiescence of federal courts that, even during mandated desegregation, have always afforded significant deference toward educational systems.[196] Second, putting past experience aside, the current composition of the Supreme Court is predisposed against the recognition of new substantive rights.[197] Third, in addition to being unreceptive to expanding educational rights, the current Court might pose a threat to prior precedent that suggests that there may be a federal right to at least some minimal level of education.[198] Thus, litigation could actually make things worse.

Putting the details of litigation aside, scholars also raise substantive concerns with federalizing educational rights through the courts or legislation. Paul Tractenberg notes that there is no guarantee that the federal government will be any better than the states at identifying educational needs or responding to them.[199] But we do know that if the federal government was poor at this task, students across the country would suffer, as they all would be governed by a single standard.[200] If the federal standard and effort reflected principles similar to those in New Jersey,[201] few could deny it would produce significant gains for students, but of course there is no guarantee. Thus, the federalization of education has the potential of driving down the quality of education for some students while elevating it for none, much like what occurred in California, our largest state.[202] In short, Tractenberg cautions that federalizing

196. Greenspahn, *supra* note 15, at 777.

197. *See id.* at 775 (noting that the current Court would be likely to scrutinize an educational system with the same rigor that the *Plyler* Court applied).

198. *See id.* (noting that turning to federal courts could lead to the Supreme Court's outright denial of a right to adequate education).

199. *See* Paul L. Tractenberg, The Refusal To "Federalize" the Quest for Equal Education Opportunity, The Role of State Courts, and the Impact of Different State Constitutional Theories: A Tale of Two States 30 (Apr. 28, 2006), http://www.law.berkeley.edu/files/tranctenberg_paper.pdf.

200. *Id.* at 34.

201. *See, e.g.*, Abbott v. Burke (*Abbott V*), 710 A.2d 450, 460-72 (N.J. 1998) (taking an active role in mandatory education improvements).

202. Tractenberg, *supra* note 199, at 33 (noting that the spending approach suggested by the California Supreme Court "has proven wholly inadequate").

education may sound good in theory, but could produce unpleasant surprises in practice.[203]

Other critiques of federalizing education are partially emphases of the positive aspects of state-based education. For instance, Michael Heise finds that, to the extent that many school districts are currently successful, success is the result of local pressure and political accountability.[204] But if accountability were shifted to the federal level, political pressure and accountability would be largely removed, as this sort of pressure inherently occurs at the community level.[205] Thus, even if federalized education could offer some positives, they would likely be offset by what is lost at the local level.[206] Greenspahn, likewise, cautions against federalized education, not simply because of a fear of the federal courts, but because of the virtues of state litigation.[207] He points out that much of the past state litigation has been effective and instrumental to finance reforms.[208] So advocates should stay the course rather than abandon it.[209]

C. Limitations of the Proposed Strategies

Although many of the foregoing approaches have significant appeal, they are all saddled with drawbacks or limitations. Federal litigation suffers not only from practical problems, noted above by Greenspahn, but also doctrinal limitations. First, all of the proposals based on federal litigation would require a significant extension of the Constitution. For instance, much of Bitensky's theory, although well reasoned, would nonetheless require the Court to reverse itself with regard to education as a fundamental right.[210] Similarly, Liu's argument that a right to education rests in the

203. *Id.* at 34-35.

204. *See* Heise, *supra* note 79, at 154.

205. *Id.*

206. *See id.*

207. *See* Greenspahn, *supra* note 15, at 772 (noting that state litigation has resulted in clearer guidelines, studies to measure the cost of educational reforms, and "judicially manageable standards").

208. *Id.*

209. *See id.*

210. *See* Bitensky, *supra* note 90, at 552-53 (arguing that a positive right to education exists under the Federal Constitution).

Privileges and Immunities Clause would require the Court to recognize a right in the exact clause in which the Court has refused to recognize substantive rights for nearly a century and a half.[211] Moreover, not only would the Court have to rely on this clause, it would have to recognize a revised historical account of the federal role in education that is contrary to both popular notion and the Court's own past accounts. Although Liu's argument is appealing in that it does not rehash old arguments or require an explicit reversal of *Rodriguez*, it still requires a significant reversal of thought and other precedent.

Second, in recognizing a federal fundamental right to education, the Court would have to provide substance to the right. A basic holding that education is a fundamental right is no more self-executing than was the holding that separate but equal is inherently unequal. That holding alone resulted in virtually no desegregation until the Court specified additional standards nearly two decades later[212] and was joined by the executive branch.[213] Consequently, the components of an educational right, rather than the basic holding, become all important to educational improvements. As in school desegregation, the Court could develop the standards over time and through the lower courts, but such an approach is impractical and would not be urged upon the Court by the sort of social concerns at play in *Brown*.[214] Moreover, whereas the concept of nonsegregation does have some explicit substance, education as a fundamental right does not. It requires a definition at the outset if any lower court is going to determine whether the right has been infringed. Of course, states and others have developed various educational standards since the *Rodriguez* Court confronted this very issue,[215] but today's

211. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1414 (1992) (noting that the Supreme Court has nullified the Clause since 1873).

212. *See, e.g.*, Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 23-33 (1971); Green v. County Sch. Bd., 391 U.S. 430, 439-42 (1968); *see also* GARY ORFIELD & CHUNGMEI LEE, BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE? 19 (2004) (showing no desegregation following *Brown* until the mid-1960s), http://www.civilrightsproject.ucla.edu/research/reseg04/brown50.pdf.

213. Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000d (2006) (conditioning federal funds on compliance with antidiscrimination).

214. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955); LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 257-59 (4th ed. 2006).

215. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 23-24, 36-37 (1973).

Court would still be tasked with sanctioning a particular set of education minimums that would apply across all of the nation's schools. Moreover, this doctrinal task is fraught with the long-term practical problems that will arise if the Court is not as comprehensive, conscientious, and vigilant as the most successful state courts.[216] In short, the basic recognition of education as a fundamental right would raise as many issues as it would resolve because the right itself is subject to wide interpretation. The possibility of winning the battle but losing the war would continually loom.

Beyond the doctrinal issues, the Court would also face significant policy concerns. Most notably, recognizing education as a federal fundamental right or privilege would obligate the federal government to become far more financially and administratively involved in public schools.[217] Liu and Bitensky would respond that, of course, this obligation is the point.[218] However, the policy and financial ramifications of the Court ushering in this responsibility cannot be understated. First, this responsibility has been solely reserved to states for the entirety of our history.[219] Second, this responsibility would be contrary to the conventional—although contested—wisdom that the Federal Constitution does not create affirmative rights.[220] The Court itself has endorsed this notion in some instances.[221] To

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216. *See* Tractenberg, *supra* note 199, at 22-23 (noting especially the comprehensiveness of the educational quality standards established in *Abbott*).

217. Heise, *supra* note 79, at 153-54; Tractenberg, *supra* note 199, at 6-8 (analyzing the impact an opposite ruling in *Rodriguez* would have had on school finance reform).

218. *See generally* Bitensky, *supra* note 90, at 552-53; Liu, *supra* note 101, at 399-409.

219. *See* O'Neill, *supra* note 24, at 547-48.

220. *See* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272-78 (1990) (discussing the negative rights concept as the conventional wisdom). *But see id.* at 2279-308 (critiquing the negative rights assumptions); Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 410 (1990).

221. *See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195-97 (1989). The Court in *DeShaney* wrote:

> The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text.... [The Clause's] purpose was to protect the people from the State, not to ensure that the State protected them from each other. The

those supporting such a view of the Constitution, education would either oddly stand alone as an obligation of the federal government, or it would provide the basis for further expansion of federal responsibility in other areas, the fear of which scholars surmise motivated the *Rodriguez* Court.[222]

The legislative proposals suffer from opposite problems: unaccountability and unreliability. Legislative proposals could undoubtedly resolve a number of educational shortcomings, but legislation is inherently subject to the goodwill of the decision makers, which has proved continually problematic at the state level.[223] The possibility of the federal government varying its commitment to education from year to year and providing inadequate resources during times of economic hardship is no less likely than the failures at the state level. In this respect, students might be trading one unreliable benefactor for another. Second, if Congress wished to ensure educational equity and adequacy, it could have done so long ago. Thus far, however, Congress has only expressed a willingness to serve a limited role in education.[224] Even when the federal role

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> Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.
>
> Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid .... If the Due Process Clause does not require the State to provide its citizen with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.

Id.; *see also* Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) ("[T]he Constitution is a charter of negative rather than positive liberties.").

222. Jeffrey S. Sutton, San Antonio Independent School District v. Rodriguez *and Its Aftermath*, 94 VA. L. REV. 1963, 1978-80 (2008) (discussing the motivations of the Court in *Rodriguez*); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41 (1973) (finding that it is best to leave complex education responsibilities to the states).

223. *See, e.g.*, Bryan L. Adamson, *The H'aint in the (School) House: The Interest Convergence Paradigm in State Legislatures and School Finance Reform*, 43 CAL. W. L. REV. 173, 181-84 (2006) (describing the Ohio legislature's resistance to court-ordered school finance reform); Robert A. Garda, Jr., *Coming Full Circle: The Journey from Separate but Equal to Separate and Unequal Schools*, 2 DUKE J. CONST. L. & PUB. POL'Y 1, 56-57 (2007) (discussing the general efforts of states to evade school finance reform).

224. *See, e.g.*, 20 U.S.C. § 6575 (2006) (prohibiting federal officials from mandating any content, assessment, curriculum, or standards to local educational agencies); 20 U.S.C. § 6576 (2006) (making clear that federal education statutes "shall [not] be construed to mandate equalized spending per pupil for a State, local educational agency, or school"); *see also* Renae Waterman Groeschel, Comment, *Discipline and the Disabled Student: The IDEA*

has expanded, the federal government has always refrained from enforcing qualitative, pedagogical, or financial benchmarks on schools.[225] Thus, legislative leadership in education, like constitutional concepts, is inimical. And even if this is not the case, it is unreliable.

A constitutional amendment obviously overcomes these legislative drawbacks and would enshrine the federal obligation. The primary limitation of an amendment is simply public and political will.[226] If we lack the will to make significant federal legislative steps, the chances of a constitutional amendment may be even slimmer, as it would require an even larger majority. Moreover, as noted above, only a single member of Congress is sponsoring such a constitutional amendment.[227] Although advocates outside of Congress are more numerous and represent tremendous brain and organizing power, they too are relatively small. As a recent analysis of necessary public engagement effort demonstrates, this movement may have begun, but it is far from maturing to a point of securing political results.[228] In short, an amendment is a long term goal, unlikely to address immediate needs.

Currently, an amendment faces the large obstacle of simply convincing the public that it is necessary. Many assume that a federal right to education already exists.[229] Others, including powerful suburban constituents, do not realize the lack of equality and adequacy in schools because their own are generally quality schools.[230] Thus, a constitutional amendment may require a reshaping of public consciousness that is more drastic than convincing the courts or legislators to accept a leadership role in education. With that said, high profile litigation, failed litigation in particular, could easily educate the public and focus its attention on immediate

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Reauthorization Responds, 1998 WIS. L. REV. 1085, 1108-09 (detailing the congressional objections that erupted due to the Department of Education issuing regulations relating to discipline).

225. *See, e.g.*, 20 U.S.C. §§ 6575-6576.

226. *See* Oakes et al., *supra* note 5, at 348-51.

227. *Supra* note 182 and accompanying text.

228. *See* Oakes et al., *supra* note 5, at 370-71.

229. *E.g.* Posting of Carl Kaestle to Rethinking *Rodriguez*, http://rethinkingrodriguez.blogspot.com (Apr. 19, 2006, 8:52 EST).

230. *See* Aaron J. Saiger, *Legislating Accountability: Standards, Sanctions, and School District Reform*, 46 WM. & MARY L. REV. 1655, 1664-65 (2005).

change in a way that organizing alone might take years to do. This has proven true on more than one occasion at the state level.[231] However, this requires a commitment to litigation and national coordination with grassroots community organizers.

All of the foregoing strategies presuppose that state-based litigation is insufficient or ineffective. This Article agrees that decades of state litigation has not completely resolved inequity and inadequacy and is unlikely to do so in the future. However, as noted earlier, state-based litigation has produced net gains and will likely continue to do so. Thus, this Article does not advocate an either/or approach to state litigation, but rather seeks to identify the best strategy for expanding educational opportunities beyond what is currently being achieved.

III. THE MIDDLE ROAD: GUARANTEEING QUALITATIVE STATE STANDARDS THROUGH FEDERAL EQUAL PROTECTION

Pointing out the barriers or practical problems in the foregoing proposals is not to suggest that these strategies are fruitless or should be abandoned. However, many of these strategies appear mutually exclusive, suggesting that we may only get one shot at lasting reform, so we must place our efforts behind our single best strategy.[232] On the contrary, the perfect need not be the enemy of the good, nor need progress occur in one giant step. This Article disagrees with the notion of a single strategy or that even one narrow strategy is capable of producing significant results. Instead, it proposes an incremental approach that will either serve as a bridge to greater federal involvement and support of education or,

231. For example, after school finance litigation in Florida failed, Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996) (per curiam), the constitution itself was amended. *See* FLA. CONST. art. IX, § 1 (requiring the state to provide all students with a "high quality system of free public schools that allows students to obtain a high quality education"). Likewise, in Maryland, even though litigation had not forced it, the Maryland Legislature adopted the recommendations that grew out of the litigation and instituted a new finance system. *See* MOLLY A. HUNTER, NAT'L ACCESS NETWORK, MARYLAND ENACTS MODERN, STANDARDS-BASED EDUCATION FINANCE SYSTEM: REFORMS BASED ON ADEQUACY COST STUDIES (2002), http://www.schoolfunding.info/resource_center/research/MDbrief.pdf.

232. *See, e.g.*, Greenspahn, *supra* note 15, at 783 (stating that the most viable strategy is to continue to use state courts and legislatures).

as a practical matter, abate the need to have education recognized as a federal fundamental right. An incremental approach could immediately move forward based on existing law that would prohibit many educational inequities. In the simplest terms, this Article emphasizes that most state supreme court cases and statutes already provide qualitative guarantees in regard to education—none of which existed in *Rodriguez*—and given that these guarantees now exist, federal equal protection law need only be applied to these qualitative guarantees. Thus, unlike other strategies, this approach does not require extraordinary judicial action, nor explicitly overturning prior precedent.

Yet like other strategies, this approach also has its own set of limitations. The most federal equal protection can do is enforce equity at the level of quality a state itself has already recognized. In addition, equality would only apply within states, not between them. Thus, this approach could not directly address the interstate inequalities that Liu demonstrates can be larger than intrastate inequalities,[233] nor would this theory necessarily raise the qualitative standards of education in a state that chose to set them low across the board. With those caveats, a federal equal protection strategy is viable and capable of producing substantial gains.

First, even if equal protection had absolutely no effect on improving qualitative standards or the funding levels in the poorer states, one would still be justified in pursuing it. Equality is among the foremost values and aspirations in our society and, to the extent disparities persist, there is progress to be made.[234] Ensuring equality within each state, even if the minimum quality standards are low within some, would be no small victory. Second, as a practical matter, furthering equality would have a significant effect on the quality of education. As discussed above, the adequacy concepts developed in the states are not inherently low level standards of quality. That so many states have been found to be in

233. Liu, *supra* note 101, at 399.

234. *See, e.g.*, Koski & Reich, *supra* note 59, at 607 ("Equality of opportunity, as many social scientists have shown and as countless politicians have proclaimed, is central to the American Dream."). Yet disparities continue to exist across racial and socioeconomic lines. *See, e.g.*, Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*, 47 HOW. L.J. 243, 249-58 (2004).

violation of these standards,[235] resisted the financial obligation of meeting them,[236] or simply were never forced to meet them[237] is evidence that either the standard is not artificially low or that states cannot meet even these low standards and are delivering qualitatively abysmal education. In those states that have failed to live up to their own standards or where state courts have grown weary, federal equal protection could provide the added force needed to require states to elevate the quality of education of disadvantaged students, making it equal to their peers. If Liu and others' point is solely that the quality of education must be increased across the board, an equal protection approach based on state standards may have little if any effect. But, if the point is generally to raise the quality for those at the bottom, then equal protection can affect this progress within states.

In sum, state and federal law, as they stand currently, provide the basis for intervention into the various educational inequities that persist in the states, whereas other theories do not. Other theories require a significant shift or reversal of Supreme Court doctrine. Although this Article's proposal may not provide the basis for remedying all of the current education deficiencies that other proposals would, it could uniquely produce immediate net gains. Moreover, these initial small steps could incrementally provide the foundation for a full recognition of education as a fundamental right or larger federal engagement in education.[238]

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235. *See, e.g.*, Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 495 (Ark. 2002); Rose v. Council for Better Educ., 790 S.W.2d 186, 213 (Ky. 1989); McDuffy v. Sec'y of Executive Office of Educ., 615 N.E.2d 516, 552 (Mass. 1993); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1360 (N.H. 1997); Abbott v. Burke (*Abbott II*), 575 A.2d 359, 408 (N.J. 1990); Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 478 (N.Y. App. Div. 2001); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 156 (Tenn. 1993).

236. *See, e.g.*, Adamson, *supra* note 223, at 181-84 (describing the Ohio legislature's resistance to court ordered school finance reform); Garda, *supra* note 223, at 56-57 (discussing the general efforts of states to evade school finance reform); NAT'L ACCESS NETWORK, LITIGATION: TEXAS, http://www.schoolfunding.info/states/tx/lit_tx.php3 (last visited Feb. 10, 2010) (discussing the legislature's school finance changes in 2006, which proved counterproductive and came after five previous decisions by the Supreme Court).

237. *See, e.g.*, *Ex parte* James, 836 So. 2d 813, 815 (Ala. 2002); State *ex rel.* State v. Lewis (*DeRolph V*), 789 N.E.2d 195, 198, 202-03 (Ohio 2003); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994) (finding that although education is a fundamental right, neither equal nor substantial equal funding systems are required).

238. Black, *supra* note 22 (manuscript at 151-52) (concluding that Congress has a

A. The Intersection of State Constitutional Law and Federal Equal Protection

In contrast to others, this Article's theory does not emanate directly from the Federal Constitution. Rather, it starts with state constitutional rights to which federal equal protection law then attaches. Combining state constitutional rights with federal equal protection has largely been overlooked because state constitutional rights have developed relatively recently. However, with the development of these rights, there is no need to look to the federal government for leadership on the substance or creation of educational rights. Rather, federal law is necessary only to ensure the enforcement of equality in already existing state rights. In the simplest terms, this Article posits that states have already created constitutional and statutory rights to education, and federal equal protection prohibits states from delivering unequal access to these constitutional rights. Of utmost importance is that the Federal Constitution does not independently obligate states to deliver education or a specific level of educational quality. But once the state decides to extend such rights, it may not provide them unequally in practice among its students.

For instance, the Supreme Court of North Carolina held that its constitution "guarantee[s] every child of this state an opportunity to receive a sound basic education in our public schools."[239] This right requires that state schools "provide the student with at least" the English, math, science, geography, history, economic, political, vocational, and academic skills and knowledge necessary to function in society and be successful in higher education and employment.[240] Thus far, this right, like analogous ones in other states, has been enforced exclusively in state courts, and many times successfully.[241] However, some state courts have left these educational rights unenforced, citing separation of powers concerns or simply succumb-

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constitutional duty to enforce equal protection in education based on developments in state courts).

239. Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997).

240. *Id.*

241. *See generally* NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 146, at 41-43 tbl.3.3 (listing all plaintiff victories by state).

ing to legislative recalcitrance that prevents a full remedy.[242] Moreover, some court members took initially strong stances, only to regress after the more aggressive members found themselves subsequently unelected.[243] In these states, the extent to which educational opportunities and resources meet constitutional and statutory standards vary significantly across school districts.[244] Here federal equal protection can provide otherwise unavailable remedies. Federal courts do not face a separation of powers concern between themselves and state legislatures, nor are they subject to the same reelection and political repercussions as state courts.[245] With the power and purse of the federal government, they are also better positioned to force state legislatures into action. Finally, on a doctrinal level, federal equal protection simply does not afford states the luxury of unequal opportunities in regard to rights that

242. *See, e.g.*, *Ex parte* James, 836 So. 2d at 815 (concluding that "[i]n Alabama, separation of powers is not merely an implicit 'doctrine' but rather an express command; a command stated with a forcefulness rivaled by few, if any, similar provisions in constitutions of other sovereigns"); Coal. for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 408 (Fla. 1996) (setting the "standard for ... 'adequacy' ... would ... present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature"); Lewis E. v. Spagnolo, 710 N.E.2d 798, 802-04 (Ill. 1999) (finding that the educational claims presented political questions); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191-93 (Ill. 1996) (same); *see also* Adamson, *supra* note 223, at 181-84 (describing the Ohio legislature's resistance to court-ordered school finance reform); Garda, *supra* note 223, at 56-57 (discussing the general efforts of states to evade school finance reform).

243. *See, e.g.*, Elder, *supra* note 25, at 777-78 (discussing how the election of new judges changed the result in Ohio's school finance litigation).

244. *See, e.g.*, Liu, *supra* note 38, at 4 tbl.2. Liu's data revealed a $656 per pupil need-based gap in Alabama. This amounts to over 10 percent of the state's contribution per pupil to education. Wiener & Pristoop, *supra* note 37, at 7 tbl.3. Alabama initially took a strong stance on educational adequacy only to reverse court later. *Compare* Opinion of the Justices, 624 So. 2d 107, 107-08 (Ala. 1993) (finding that the legislature was constitutionally required to provide school children with substantially equitable and adequate educational opportunities), *with Ex parte James*, 836 So. 2d 815 (dismissing plaintiffs' claims as nonjusticible). The New Hampshire Supreme Court also dismissed plaintiffs claims in *Londonderry School District v. State*, 958 A. 2d 930, 931-33 (N.H. 2008), after ruling in their favor several previous times. However, significant funding gaps persist there. Liu reveals a $1297 per pupil need-based gap in New Hampshire, *supra* note 38, at 4 tbl.2, and Wiener and Pristoop show that this amounts to over 15 percent of the state's contribution per pupil to education, *supra* note 37, at 7 tbl.3.

245. U.S. CONST. art. III, § 1 (providing for the lifetime appointment of judges, subject only to "good Behaviour"); *see also* Julie A. Robinson, *Judicial Independence: The Need for Education About the Role of the Judiciary*, 46 WASHBURN L.J. 535, 540 (2007) (writing that the founders saw the "need for a judiciary free of political or undue influence necessitated a judiciary that could render decisions without allegiance to the popular opinions or the most vocal proponents in the community").

the state has recognized as "constitutional" or "fundamental," nor state-based excuses for failing to remedy the inequalities.

On its face, combining federal equal protection with state rights is so simple that the failed enforcement of it is troubling. Most likely, advocates have not pursued this approach because of the seeming finality of the Supreme Court's holding in *Rodriguez*. Any court confronted with this claim, or any state defending itself, would immediately cite to *Rodriguez* as justifying immediate dismissal of the claim. This Article concedes that were this claim pressed thirty years ago, dismissing the claim would have been correct. But in the years following *Rodriguez*, every predicate upon which the Court made its decision has changed. Today, the Court would be adjudicating an entirely different right in an entirely different context. In this respect, one might posit that it would be a case of first impression, rather than a revisiting of *Rodriguez*. One only needs to draw the comparison to *Rodriguez* to illuminate why this is the case.

In fact, at least four of the major premises or rationales for the Court's holding in *Rodriguez* have been proven false or changed in subsequent years. First, the Court conceptualized education as mere economic state legislation.[246] Second, the Court assumed adjudicating education as a protected right would require it to develop qualitative standards.[247] Third, the Court believed that educational authority rested with local districts and that the state's decision to further such a system was well intentioned and defensible.[248] Fourth, the Court believed that federalism principles required it to refrain from scrutinizing education.[249] These notions can no longer find any support in the law or facts.

B. The Changed Legal and Factual Environment

1. The Educational Interest at Stake

The current state of educational rights is inapposite to the Court's characterizations in *Rodriguez*. In addition to finding that education

246. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).
247. *Id.* at 42.
248. *Id.* at 36-37.
249. *Id.* at 44.

was not a fundamental right, the Court treated education as a low-level interest that placed no obligations on the State.[250] In effect, the Court treated education as being equivalent to a state-sponsored bus voucher that the State might freely offer or withhold.

At the time of *Rodriguez*, the Court may have been correct to trivialize education as being no different than any other public benefit. As of 1973, California was the only state whose supreme court had given any substantive meaning or protection to education under state law, and that had occurred just a little over a year prior to *Rodriguez*.[251] Although their various constitutions mentioned education, state courts had not formally recognized, enforced, or given any substance to the right.[252] Thus, the United States Supreme Court had no basis on which to interpret equal and quality education in state constitutions as being anything other than an aspirational goal and unenforceable right when the states themselves had gone no further. The only unambiguous and enforceable statement of state education law was compulsory attendance,[253] which required little more than a building for students to attend. It is this basic education right upon which the Court decided *Rodriguez*.[254] Even in the decade following *Rodriguez*, little changed in the state courts.[255]

Beginning in the late 1980s, however, an explosion of successful litigation regarding state education clauses and rights occurred. Prior to then, state defendants prevailed in approximately two-thirds of the cases that asserted a qualitative or an equity right in

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250. *Id.* at 35 (categorizing education as merely part of the State's "social and economic legislation" and refusing to distinguish it from "other services and benefits provided by the State").

251. *Compare id.* at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."), *with* Serrano v. Priest (*Serrano I*), 487 P.2d 1241, 1258 (Cal. 1971) (deeming education to be a fundamental right).

252. *See generally* Underwood, *supra* note 79, at 497-502 (discussing the waves of litigation).

253. *See Rodriguez*, 411 U.S. at 29-30 (noting that education was compulsory, which only suggested education's importance, not its substance).

254. *Id.*; *see also id.* at 111-12 (Marshall, J., dissenting) (arguing that education was important because forty-eight of fifty states compelled it).

255. *See* NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 146, at 41-43 tbl.3.3 (listing plaintiff losses by year and state).

regard to education.[256] But since 1989, plaintiffs have succeeded in approximately two-thirds of their cases.[257] In total, over half of the state supreme courts have now ruled in favor of plaintiffs in these cases.[258] The chart below reflects each state constitutional education victory that occurred from the time of *Rodriguez* until 2005. Just a few years before *Rodriguez,* there were none, but by 2005, the total number of victories had grown to more than fifty, as plaintiffs in some states had returned to the courts and secured additional victories. Moreover, even in states where plaintiffs have lost their specific claims, some courts have still recognized that students have a right to education under their state constitution or statutes.[259] These courts simply found that the state was meeting its obligation[260] or refused to enforce the right based on separation of powers limitations.[261]

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256. MOLLY A. HUNTER, SCHOOL FUNDING LITIGATION OVERVIEW, http://www.schoolfunding.info/litigation/overview.php3 (last visited Feb. 10, 2010) (noting that in the two decades following *Rodriguez*, defendants won two-thirds of the time).

257. *Id.*

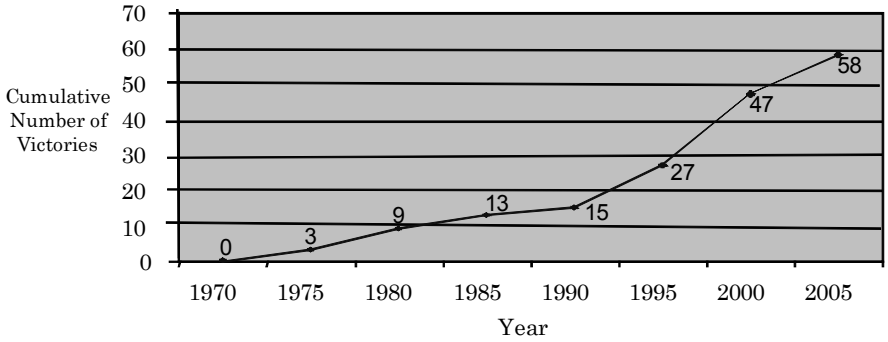
258. Nat'l Access Network, State by State, http://www.schoolfunding.info/states/state_by_state.php3 (last visited Feb. 10, 2010).

259. *See, e.g.*, Scott v. Commonwealth, 443 S.E.2d 138, 141-43 (Va. 1994) (finding education is a fundamental right, but rejecting plaintiffs' claim).

260. *See, e.g.*, Sch. Admin. Dist. v. Comm'r, 659 A.2d 854, 857 (Me. 1995) ("Plaintiffs presented no evidence at trial that any disparities in funding resulted in their students receiving an inadequate education."); Skeen v. State, 505 N.W.2d 299, 313, 318 (Minn. 1993) (affirming that education is a fundamental right, but finding that "the present system of education funding withstands constitutional scrutiny"); *Scott*, 443 S.E.2d at 141 (recognizing education is a fundamental right, but finding that the financing system was constitutional).

261. *See, e.g.*, *Ex parte* James, 836 So. 2d 813, 815 (Ala. 2002) ("In Alabama, separation of powers is not merely an implicit 'doctrine' but rather an express command; a command stated with a forcefulness rivaled by few, if any, similar provisions in constitutions of other sovereigns."); Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996) (holding that a court setting the "standard for ... 'adequacy' ... would ... present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature"); Lewis E. v. Spagnolo, 710 N.E.2d 798, 800 (Ill. 1999) (finding that the educational claims presented political questions); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996) (finding that the educational claims presented political questions); City of Pawtucket v. Sundlun, 662 A.2d 40, 57 (R.I. 1995) ("We concur with plaintiffs that the right to an education is a constitutional right in this state, but we stress that article 12 assigns to the General Assembly the responsibility for that right.").

Constitutional Education Victories
1970-2005[262]



Although it is impossible to capture the particulars of these various state decisions in a single principle or chart, the Constitutional Education Victories chart demonstrates a radical change in the state of the law. Each of the case victories represent a state court creating an educational right where none previously existed and/or enforcing that new right. Currently, all fifty states have constitutional clauses that guarantee the right to education.[263] But more importantly, since *Rodriguez*, numerous state supreme court decisions and extensive statutory schemes have further defined, specified, and regulated this right.[264] These cases dictate that education encompasses more than just the right to enter a school building; states must deliver a certain qualitative level of education therein.[265] Thus, education is not on the level of a bus voucher, housing, health care, food stamps, police protection, or any other state benefit. Education is an express state constitutional right and one that a legislature is bound to deliver, often above all else.[266]

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262. SCHOOL MONEY TRIALS, *supra* note 117, app. at 345-58; *see also* NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 146, at 41-43 tbl.13.3 (listing all plaintiff victories by state).

263. *See* Allen W. Hubsch, *Education and Self Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 96-97 (1989).

264. *See, e.g.*, N.C. GEN. STAT. § 115C-81 (2009); Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997).

265. *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212-13 (Ky. 1989); Campaign for Fiscal Equity, Inc. v. State (*CFE II*), 801 N.E.2d 326, 339 (N.Y. 2003); *Leandro*, 488 S.E.2d at 254-55.

266. *See, e.g.*, *Rose*, 790 S.W.2d at 205, 211; *CFE II*, 801 N.E.2d at 327-28; *Leandro*, 488 S.E.2d at 254.

This understanding of education was not available to inform the Court's rationale in *Rodriguez*. Whether this understanding would lead the Court to find that education is a federal fundamental right is uncertain and, for purposes of this Article, irrelevant. However, this state constitutional shift does make certain that it would be unjustifiable for today's Court to treat education as fungible with public benefits. State courts have simply ruled out this rationale. Thus, as one commentator generally observes, the federal enforcement of educational rights is the most viable it has been since 1973.[267] Nothing short of an education rights revolution has occurred.

2. Qualitative Educational Judgments

When *Rodriguez* came before the Court, the state courts and statutes had yet to establish significant qualitative education standards. The Court reasoned, however, that such standards were necessary for it to evaluate plaintiffs' claims and that the Court itself was unqualified to establish these standards.[268] In essence, the Court believed that it would be called upon to make pedagogical and policy decisions. Greenspahn finds that the lack of a manageable educational standard as a general matter is what drove both federal and state courts to dismiss plaintiffs' claims in the early years of finance litigation.[269]

Today, ruling in favor of plaintiffs, under either equal protection or fundamental rights theories, would no longer require any independent qualitative judgment by a federal court because state courts and legislatures have already made the qualitative judgments themselves.[270] In those states that have held that students are entitled to a sound basic, high quality, or minimally adequate education, the states have defined the required qualitative level of education and set standards to measure it.[271] For instance, the

267. Greenspahn, *supra* note 15, at 778-79.

268. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 23-24, 36-37 (1973).

269. Greenspahn, *supra* note 15, at 762.

270. *See, e.g.*, *Rose*, 790 S.W.2d at 212-13; *CFE II*, 801 N.E.2d at 339; *Leandro*, 488 S.E.2d at 254-55; Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999); Pauley v. Kelly, 255 S.E.2d 859, 877 (W.Va. 1979).

271. *See supra* notes 93-97 and accompanying text.

Kentucky Supreme Court has specified that an "efficient and thorough" education consists of seven specific student capacities:

> (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 so 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.[272]

Legislatures have gone even further in giving content to these qualitative education rights. Like other states, Kentucky's statutes direct the Kentucky Board of Education to "promulgate administrative regulations establishing standards which school districts shall meet in student, program, service, and operational performance."[273] Pursuant to this authority, the Kentucky Board of Education has issued the course of study that students should take in each grade and the specific content of every course.[274] For instance, these regulations indicate that in eighth grade math, "[s]tudents will convert, compare and order multiple numerical representations (for example, fractions, decimals, percentages) of rational numbers and irrational numbers (square roots and π only)."[275] This is just one content requirement among dozens for a single course in a single grade. In addition to requiring the Board of Education to specify

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272. *Rose*, 790 S.W.2d at 212.

273. KY. REV. STAT. ANN. § 156.160 (2009).

274. See *infra* note 275 for the full list of courses and content.

275. Ky. Dep't of Educ., Combined Curriculum Document: 8th Grade-Mathematics, http://www.education.ky.gov/users/jwyatt/CCD2006/CCD_Math_8.doc (last visited Feb. 10, 2010).

content, the legislature also directs the Board of Education to develop tests and assessments to measure the extent to which each student is acquiring the required knowledge and skills.[276]

This education structure and the extensive qualitative standards that it generates are not unique to Kentucky, but rather, are a standard facet of education today.[277] Although Kentucky's and other states' standards have often grown out of their state courts' recognition of education as a constitutional or fundamental right, other state legislatures have enacted similar schemes regardless of whether a court has mandated it. However, in states where the courts have been involved, many have held that schools must have a specific level of funds and particular resources to be able to deliver these qualitative educational components. Thus, both as to content and its connection to resources, states have set the qualitative and absolute measures themselves.

When *Rodriguez* was decided, almost none of this was available. The standards-based movement in education had yet to occur, and local districts were free to exercise wide discretion as to curriculum.[278] States had yet to establish a standardized state curriculum or develop statewide assessments of students on that curriculum. There was simply no one accountable for educational quality, nor means by which to hold anyone accountable. In short, if standards had in fact been necessary to decide *Rodriguez*, the task of developing and imposing them would have largely fallen on the Court. But given the subsequent state constitutional and statutory changes, the federal courts would not be forced to make independent qualitative judgments. They would need only to rely on what the states themselves have already established.

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276. KY. REV. STAT. ANN. § 156.010 (2009).

277. *See, e.g.*, N.C. GEN. STAT. § 115-81 (2009); VA. CODE ANN. § 22.1-253.13:1 (2006); *see also* Martha I. Morgan, Adam S. Cohen & Helen Hershkoff, *Establishing Education Program Inadequacy: The Alabama Example*, 28 U. MICH. J.L. REFORM 559, 568-71 (1995) (discussing Alabama's legislative and administrative structure for education).

278. The publication of A NATION AT RISK, *supra* note 90, in 1983 is largely credited with launching the standards-based movement.

3. Local Control and Legislative Purposes

The Court in *Rodriguez* also conceptualized education as primarily a matter of local control, effort, and discretion.[279] Under this conception, a state has limited power and responsibility in regard to disparities between, and deficiencies in, school districts. Any efforts by the state were therefore gratuitous and to be commended, rather than actions to be scrutinized. Consistent with this notion, the Court afforded the state almost unbridled deference in the way it funded and managed education,[280] so long as the state's intent represented some effort to provide or improve education.[281] The Court accepted the Texas legislature's preference for local control and funding as an appropriate and natural part of the school system. Thus, regardless of the disparities and inadequacies in school districts, the state could sit idly by.[282]

This conception of state responsibility for education is no longer tenable.[283] First, the language of state educational clauses consistently indicates that the responsibility for providing education rests with the state or, more specifically, with the state legislature.[284] Second, in an attempt to defend against school inadequacies and disparities, states have often argued that the responsibility to provide education rests with local school districts and/or that the various failures were those of the school districts rather than the state.[285] Courts, however, have routinely rejected these arguments.[286] States are free to delegate responsibility and authority

279. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49-51 (1973).

280. *Id.* at 40-44, 49-50.

281. *Id.* at 26 (looking to the program's intended design); *id.* at 38-39 (taking into account "what Texas is endeavoring to do with respect to education" and deferring to it).

282. *Id.* at 43-44, 49-50.

283. Heise, *supra* note 79, at 131 (asserting that local control is an illusion).

284. *See, e.g.*, N.C. CONST. art. I, § 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."); R.I. CONST. art. XII, § 1 ("The diffusion of knowledge ... being essential to the preservation of [the people's] rights and liberties, it shall be the duty of the general assembly to promote public schools ... and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education.").

285. *See, e.g.*, Robinson v. Cahill, 287 A.2d 187, 212 (N.J. Super. Ct. Law Div. 1972) ("It is argued that the system is justified by the State's desire to afford local control over education.").

286. *See, e.g.*, *id.* ("[L]ocal control and responsibility cannot be used to justify a system that breeds substantial disparities in the quality of education.").

for providing education to local school districts, but courts have held that the final responsibility rests with one entity: the state.[287] The state, not the local school district, has the constitutional responsibility for creating an educational system and ensuring that it delivers particular opportunities. Thus, a state is free to create a system that shares power with local school districts. But if those school districts fail to deliver an education consistent with the constitution, the fault is with the state for failing to remedy the failure or for creating a system that permitted the failure to occur in the first instance.

Third, even in the absence of a state supreme court directing a state to assume its responsibility, state legislatures have voluntarily accepted and taken control of school districts in various practical ways over the past decades, most notably, financially. State legislatures have assumed a much larger financial responsibility for education and, in many instances, have provided the majority of school funds.[288] At the time of *Rodriguez*, most states provided only a small share of school funds. Local school districts regularly generated well over half of their operating budget through local taxes.[289] Of course, this huge local burden was the core problem in *Rodriguez* because property poor districts could not raise sufficient funds.[290] Today, however, the equation has reversed in many states, with state legislatures providing two-thirds or more of school funding.[291] The chart below demonstrates the shift experienced by ten states during the 1990s. During this period, these ten states led the nation in shifting financial responsibility from school districts

287. *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 216 (Ky. 1989); Robinson v. Cahill (*Robinson I*), 303 A.2d 273 (N.J. 1973).

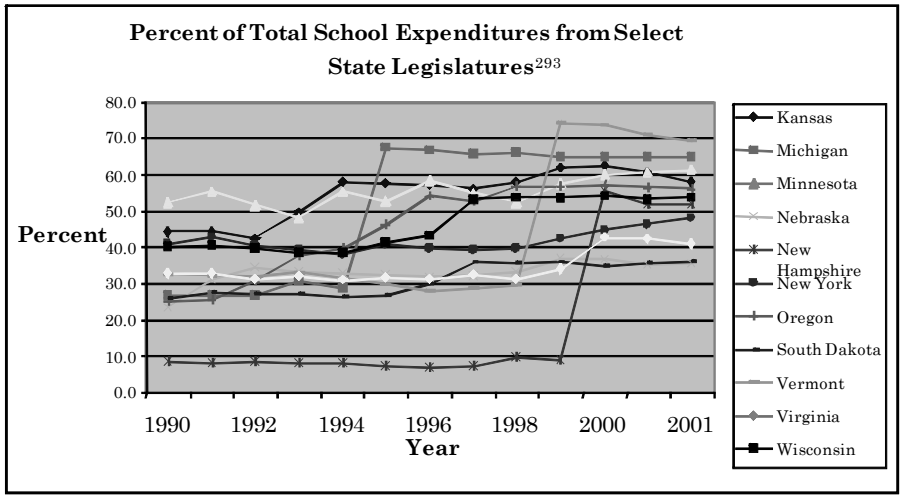
288. Heise, *supra* note 79, at 133.

289. *See* Sharon Keller, *Something To Lose: The Black Community's Hard Choices About Educational Choice*, 24 J. LEGIS. 67, 93 n.118 (1998); *see also* S. EDUC. FOUND., *supra* note 5, at 15 (charting the historical sources of public school funding).

290. *See* Juan Carlos Sanchez, *Texas' Public School Financing: Share and Share Alike—Not!*, 19 J. MARSHALL L. REV. 475, 486-87 (1994).

291. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC. AN HISTORICAL OVERVIEW OF REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION, BY STATE: FISCAL YEARS 1990-2002, at 65-66 tbl.3.e (2007), *available at* http://nces.ed.gov/pubs2007/2007317.pdf [hereinafter HISTORICAL OVERVIEW OF REVENUES] (indicating that the percentage of school funds generated in 2002 by the state legislatures in Delaware, Hawaii, Idaho, Michigan, Minnesota, New Mexico, North Carolina, Vermont, and Washington was 64.3, 89.1, 61.1, 64.6, 61.4, 72, 64.5, 69.5, and 62.4, respectively).

to the state. Other states have also experienced significant shifts, but during other periods of time.[292]



Along with taking larger control of school funding, states have exerted significant power in how schools actually operate. As indicated earlier, state legislatures have tasked central agencies with developing curricula and other academic requirements, from which local school districts may not deviate.[294] Likewise, the states, rather than the local school districts, set teacher qualification and certification standards, as well as control teacher preparation programs.[295] Thus, as a general matter, no core course is offered and no teachers teach other than those approved by the state. At the time of *Rodriguez*, states may have given the impression that

292. The National Center for Educational Statistics does not provide comprehensive data on school funding prior to 1986, but a comparison of 1986 data with data found in table 3.e of HISTORICAL OVERVIEW OF REVENUES, *supra* note 291, reveals that some states made shifts in financial responsibility prior to the 1990s. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC. COMMON CORE OF DATA (on file with author). Others have also done so after 2000. *Id.*

293. This chart is derived from data available in HISTORICAL OVERVIEW OF REVENUES, *supra* note 291, at 65-66 tbl.3e.

294. *See supra* notes 273-77 and accompanying text.

295. *See, e.g.*, FLA. STAT. § 1001.10 (2009) (maintaining a teacher certification database at the state level); *id.* § 1004.04 (granting authority for teacher certification and teacher preparation program to the state department of education); 105 ILL. COMP. STAT. ANN. 5/1A-4 (West 2006) (granting authority for teacher certification and teacher preparation program to the state board of education).

education was not their responsibility, but since that decision, both the courts, in writing, and the states, in practice, have demonstrated that educational responsibility and power rests with the state, not the school district.

It is worth noting that since the state has an affirmative responsibility in regard to education, its intent in how it organizes, funds, and monitors schools is largely irrelevant. What really matters are the actual results of its action. In *Rodriguez*, the Court lauded the state for its financial contribution to failing school districts, crediting the state with good intentions and gratuitous efforts.[296] Such a response today would simply miss the point. The state has no choice but to support education and no excuse when it fails to do so properly. The only relevant question is whether the state's actions produce educational opportunities on par with constitutional requirements.

4. Federalism

The Court in *Rodriguez* indicated that interceding in educational financing and structure would raise serious federalism problems.[297] Even assuming this was the case then, it is no longer true. Federalism concerns have largely been resolved in the same way that the Court's qualitative judgment concerns have been resolved because states have already exercised those powers reserved to them. They have adopted education as a fundamental right, for instance, and set up funding structures. The federal courts would not be requiring states to recognize fundamental rights or fund schools at a particular level. But once states have unilaterally made choices in these regards, equal protection requires that states implement these educational choices fairly. This is far different than a federal court unilaterally imposing education obligations on states, which recognizing a federal fundamental right to education might have done.

Moreover, that state tax schemes and revenues might be implicated in an equal protection analysis is of no import. A federal court

296. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973).

297. *Id.* at 44, 50 (assuming that a decision in the plaintiffs' favor would force the court to invalidate the education structures of many states); *see also id.* at 39 (protecting those "rights reserved to the States").

would not be exercising judgment over a state's tax scheme itself. Rather, a court's judgment would be confined to whether a state was providing necessary and equal resources to deliver its own self-imposed educational standards. Once a state exercises its discretion to extend its citizens a constitutional right to education, it has an obligation to provide the necessary resources for all to enjoy that right on an equal basis. If it fails to do so, it is no defense that providing an equitable constitutional education would require changes in its tax structure, nor would courts forcing such changes amount to an encroachment of state and legislative prerogative.[298] The state has full discretion in how it structures its funding scheme, but it has no discretion as to whether it will provide equal educational opportunities. If achieving the latter requires a state to make change in the former, it is simply an indirect effect of meeting its constitutional obligation.

C. The Option Rodriguez *Left Open*

Finally, accounting for these developments and extending a more rigorous equal protection scrutiny to education is not inconsistent with the Court's opinion in *Rodriguez*. Most often, *Rodriguez* is understood through what it ruled out, but rarely is it understood by what it left open. In fact, the Court's opinion left significant issues open. The Court in *Rodriguez* suggested that the outcome may have been different had the state failed to deliver a minimally adequate education,[299] leaving open the question of whether there is a federal fundamental right to a minimally adequate education. The Court reiterated this same point later in *Papasan v. Allain*, allowing that there may be such a right.[300]

The right to a minimally adequate education does not raise the same concerns that the Court expressed in regard to a general fundamental right to education. Most important, recognizing and

298. In fact, the court in *Robinson v. Cahill* (*Robinson IV*), 358 A.2d 457 (N.J. 1976), did not order the state to change its tax scheme, but it did order an injunction on school funding until the schools were operated consistent with the constitution. The legislature then responded with tax changes of its own and instituted the state's first income tax. MARK G. YUDOF, ET AL., EDUCATIONAL POLICY AND THE LAW 818 (4th ed. 2002).

299. *Rodriguez*, 411 U.S. at 37.

300. 478 U.S. 265, 285 (1986).

enforcing a minimally adequate education would not require the Court to delve into the more difficult qualitative issues of education. In *Rodriguez*, the problem with a fundamental right to education was not just that of making a qualitative judgment, but that to be consistent, one would need to identify an objective and precise floor.[301] Thus, even if the Court could evaluate quality, it was uneasy with deciding at what point a certain level of quality becomes insufficient and, hence, unconstitutional.

Unlike other fundamental rights that the Court had previously protected, such as criminal appeals[302] and the ability to travel,[303] there was no inherent or clear demarcation in education by which to say that someone had been absolutely denied that right.[304] However, the Court seemed to understand a minimally adequate education as representing such a basic type of education that it might be an objective floor and provide a basis for finding an absolute deprivation. In short, the Court's reluctance toward a general fundamental right to education in contrast to its receptivity toward a minimally adequate education indicates that the Court did not, in principle, object to constitutionalizing education, but rather objected to constitutionalizing education if there was no objective floor by which to evaluate it.

The Court's concept of a minimally adequate education is consistent with the exact theory this Article advocates. If the Court seeks an objective floor, below which an absolute deprivation occurs, we now have one. In 1973, a minimally adequate education might have been the most basic level of education one could conceive, as the only firm educational rights in Texas and the only ones consistent across the states at the time were those that were inherent in compulsory attendance or in the right to attend school.[305] Thus, one could at least expect to be admitted to school and have instruction therein. But, of course, the state had not denied students those basic

301. *Rodriguez*, 411 U.S. at 19.

302. Mayer v. Chicago, 404 U.S. 189, 193-94 (1971); Griffin v. Illinois, 351 U.S. 12, 19 (1956).

303. Shapiro v. Thompson, 394 U.S. 618, 630-31 (1969).

304. *Rodriguez*, 411 U.S. at 23.

305. *See* Wisconsin v. Yoder, 406 U.S. 205, 236 (1972) (analyzing education only in terms of whether attendance laws impair the free exercise of religion, and ignoring the child's right to obtain a quality education from the state). *See generally supra* note 262 and accompanying chart (demonstrating the absence of constitutional education rights prior to the early 1970s).

rights. Today, however, a minimally adequate education would include far more. A minimally adequate education can be nothing less than the qualitative minimums that the states have indicated students must receive.[306] In this respect, today's evolved notion of what is minimally adequate resolves the core problem in *Rodriguez*, which was that no qualitative standard of adequacy—or even minimal adequacy—existed. At the time, the *Rodriguez* Court had only the state's word that it was delivering adequate educational opportunities.[307] The plaintiffs presented no evidence to refute the state's claims. Thus, the Court had no basis upon which to find that an absolute deprivation of an educational right had occurred. The Court could only evaluate the more concrete, but far less pertinent, question of whether spending differences themselves were constitutionally prohibited, regardless of the qualitative effect.

Today the Court has the tools to define a minimally adequate education in qualitative terms, not just basic admission. Moreover, a minimally adequate education need not be a minimalist education. In essence, the Court could combine its minimally adequate concept with the subsequent state cases that have raised the floor of what is adequate, minimally adequate, or required.[308] By relying on these state cases to define the substance of a minimally adequate education, today's Court would have the objective floor that apparently motivated it previously. The issue of a minimally adequate education would be collapsed into the question of what a state's qualitative predetermined floor is. This approach would not require the Court to overturn *Rodriguez*, but rather would be consistent with both the Court's rationale and the questions it left open in *Rodriguez*. More important, it would bring the Court's jurisprudence in line with state courts and modern concepts of education.

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306. Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 832 (1985) (arguing that a plaintiff could now show an "absolute deprivation of adequate education," and a defendant cannot defeat this by showing that some students are receiving any education).

307. *Rodriguez*, 411 U.S. at 24; *see also* Ratner, *supra* note 306, at 831 n.232 (discussing the role this assertion of minimal adequacy had on the outcome in *Rodriguez*).

308. The problem in *Rodriguez* was first that there was no standard of adequacy. Second, even though there was no standard, the state's briefs assured the Court that it was delivering adequate opportunities. Third, the plaintiffs presented no evidence to refute the state's claims of adequacy. Thus, the Court could not assess whether an absolute deprivation of a right occurred; rather, all it could do was evaluate whether spending differences among districts were constitutionally prohibited.

D. What Scrutiny Applies?

1. Strict Scrutiny Versus Heightened Scrutiny

The most difficult question before the Court would not be identifying or defining the educational right, but rather determining what degree of scrutiny to apply. If the Court recognized a minimally adequate education as a fundamental right (relying on state standards for the definition), strict scrutiny would apply, just as it would to any other fundamental right.[309] Although recognizing this right is consistent with this Article's analysis, this Article is not predicated on recognizing a new federal right. Rather, the Court need only apply equal protection to existing state-based rights. However, the scrutiny that would apply to these rights could be rational basis, intermediate, or strict scrutiny, depending on how the Court characterized or interpreted the underlying state education right.

In the past, the Court has made its choice of scrutiny based on whether the underlying right was fundamental or nonfundamental, applying strict scrutiny to deprivations of fundamental rights and rational basis to deprivations of nonfundamental rights.[310] But in previous cases, including *Rodriguez*, this distinction was based on whether the interest at stake was a fundamental right under the Federal Constitution.[311] The theory proposed in this Article would present a slightly different question. If a state has already defined the interest at stake as being a state fundamental or constitutional right, fundamental rights status under the Federal Constitution should have no bearing on the scrutiny a federal court applies to the right. The Court would, instead, face the unique question of whether

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309. *See generally* Pleasant Grove v. Summum, 129 S. Ct. 1125, 1132 (2009) (holding that strict scrutiny applies to content restrictions on the fundamental right of speech); Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 457-58 (1988).

310. *See, e.g.*, Ysursa v. Pocatella Educ. Ass'n, 129 S. Ct. 1093, 1098 (2009) (applying rational basis to a ban on political payroll deductions); *Rodriguez*, 411 U.S. at 40 (applying rational basis to a nonfundamental right); Roe v. Wade, 410 U.S. 113, 162-63 (1973) (applying strict scrutiny to fundamental right of privacy); Shapiro v. Thompson, 394 U.S. 618, 634 (1968) (applying strict scrutiny to fundamental right to travel).

311. *Rodriguez*, 411 U.S. at 37; *see also supra* note 310. *See generally* Clark v. Jeter, 486 U.S. 456, 461 (1987) ("[C]lassifications affecting fundamental rights are given the most exacting scrutiny.") (citations ommitted).

strict scrutiny also applies to rights that are fundamental or constitutional under state law, but not federal law.

The answer may be different, depending on whether the underlying state right is a fundamental right or simply a constitutional right based on an explicit guarantee in the state constitution. In regard to fundamental state rights, strict scrutiny should apply for at least two reasons. First, the Court's own analysis of whether a right is fundamental is largely based on the extent to which states have protected the right or given special importance to it.[312] A state's own recognition of a right as fundamental is explicit evidence of its high importance. Of course, a single state's recognition of a right as fundamental does not make the right fundamental in all states. But if the question before the Court was what level of scrutiny to apply to educational inequalities in Kentucky, for instance, the scrutiny should be strict because education is of the highest importance in Kentucky, evidenced by the fact it is a fundamental right there.[313] Second, those states that have recognized education as a fundamental right apply strict scrutiny themselves.[314] It would be illogical for the federal courts to apply a lower level of scrutiny when evaluating the same right.[315]

In those states that have avoided the fundamental rights question and instead addressed education as a constitutional right that imposes affirmative obligations on the state, predicting the appropriate level of scrutiny in federal court is more difficult. These states have not broached the issue of scrutiny, but simply mandated that the state meet its obligations. One might still argue that strict scrutiny should also apply to the constitutional right to education because there is no meaningful difference between a fundamental right and a constitutional right other than that constitutional rights

312. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 126-27 (1989) (plurality opinion); *see also* Lawrence v. Texas, 539 U.S. 558, 571-73 (2003) (focusing on the recent historical trend in states of moving away from outlawing and enforcing prohibitions on homosexual sodomy).

313. Rose v. Council for Better Educ., 790 S.W.2d 186, 206 (Ky. 1989).

314. *See, e.g.*, Serrano v. Priest (*Serrano II*), 557 P.2d 929, 951 (Cal. 1976).

315. One might query what additional benefit, if any, would come from pursuing this claim in federal court since the state already applies strict scrutiny. As indicated earlier, the largest benefit is in those states that started but did not finish the task of equalizing schools for various reasons, including judicial fatigue, legislative recalcitrance, and separation of powers concerns. The federal claim is not only better suited to resolve these problems, but it would pave the way for larger federal involvement and eventually recognition of education as a federal fundamental right. *See infra* notes 329-32 and accompanying text.

are explicitly enumerated in the state constitutions whereas fundamental rights are implicit in the constitution. Rather than inherent substantive differences, a determinative factor in how some courts have characterized the right to education may simply be how the plaintiffs frame their complaint. If plaintiffs frame their complaint solely upon the education clause, courts need not address whether education is a fundamental right, but only whether the state is meeting its obligations under the education clause.[316] In some instances, plaintiffs have brought claims under both their education and equal protection clauses, the latter of which raises the question of fundamental rights status.[317] Some courts, however, have not reached the fundamental rights question because it was not necessary to their holdings.[318] The state could be in violation of the education clause regardless of whether it was classified as a fundamental right.[319] In short, randomness and practicalities appear to play more of a role in whether states treat education as fundamental or constitutional. In substance, the rights are largely the same, and thus, both demand strict scrutiny.

However, if the Court did not find that a state constitutional right warrants strict scrutiny, it would be illogical to apply the cursory, deferential rational basis review that the Court applied in *Rodriguez*.[320] First, as demonstrated above, the right at issue and the responsibility for delivering it is entirely dissimilar from that in

316. For example, in holding that the school funding system was unconstitutional because it did not meet the requirements of the education clause of the state constitution, the Montana Supreme Court explicitly refused to address whether education is a fundamental right under the state constitution. Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 690-91 (Mont. 1989) ("[W]e ... in particular do not rule upon the determination by the District Court that education is a fundamental right.").

317. *See, e.g.*, Lake View Sch. Dist. v. Huckabee, 91 S.W.3d 472, 495-500 (Ark. 2002); Robinson v. Cahill (*Robinson I*), 303 A.2d 273, 283-87 (N.J. 1973).

318. *See, e.g.*, DuPree v. Alma Sch. Dist., 651 S.W.2d 90, 93 (Ark. 1983); Milliken v. Green, 212 N.W.2d 711, 717-18 (Mich. 1973); Bd. of Educ. of City Sch. Dist. of Cincinnati v. Walter, 390 N.E.2d 813, 819 (Ohio 1979); Fair Sch. Fin. Council of Okla. v. State, 746 P.2d 1135, 1149 (Okla. 1987); Olsen v. State, 554 P.2d 139, 144 (Or. 1976) ("We share New Jersey's opinion that this approach of categorizing an interest as a fundamental or nonfundamental interest and deciding this issue upon the basis of whether the interest is explicitly or implicitly guaranteed by the Constitution, is not a helpful method of analysis."); Richland County v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988).

319. *See, e.g.*, *DuPree*, 651 S.W.2d at 93.

320. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40-41 (1972) (noting that the Court showed deference because of a lack of expertise).

Rodriguez.[321] Second, the Court's own precedent in regard to rational basis, intermediate, and strict scrutiny has moved toward a more rigorous scrutiny since *Rodriguez*. The Court, although not stating it explicitly, has decided cases in which it subjects some nonfundamental rights to scrutiny that is higher than traditional rational basis review.[322] Most notably, in *Plyler v. Doe*, the Court recognized that education was not a fundamental right and found that no suspect classification was involved,[323] but nonetheless applied a rational basis review that was far more searching than in *Rodriguez*.[324] Had the *Plyler* Court applied the type of rational basis review applied in *Rodriguez*, the statute in question would have survived.[325] In contrast to *Rodriguez*, the Court in *Plyler* second-guessed the wisdom of the state's laws in several respects, ultimately finding that the law lacked a rational basis.[326] The Court was explicit that it was not applying strict scrutiny, indicating that its rational basis review was "heightened" review.[327]

The Court has repeated this type of heightened rational basis scrutiny in other cases as well.[328] Although offering less protection than strict scrutiny, this heightened rational basis review would

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321. *See supra* notes 301-08 and accompanying text.

322. Of course, these cases do not involve discrimination against a suspect class. Otherwise, this discrimination would be the basis for stricter scrutiny rather than the nature of the underlying right. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2002) (applying strict scrutiny in regard to a nonfundamental right based on the existence of race based decisions).

323. 457 U.S. 202, 221, 223 (1982). Although undocumented immigrants as a group were being excluded, the Court held that they were not a suspect class that required strict scrutiny analysis.

324. *Id.* at 217.

325. *See id.* at 248-53 (Burger, C.J., dissenting).

326. *Id.* at 227 (majority opinion) (rejecting the state's assertion that denying an education to illegal immigrants would conserve limited state resources).

327. *Id.* at 217. The Court in *Kadrmas v. Dickinson Public Schools* later reiterated that the *Plyler* Court had applied heightened scrutiny, indicating heightened rather than traditional rational basis was appropriate where the state was placing a special burden or disadvantage on a group of children based on their parents' conduct. 487 U.S. 450, 459 (1988). Of course, this Article does not contemplate any sort of class legislation against a group of children, but the situation is analogous. A special burden is placed on children when they receive an "inadequate education" because, by definition, it generally makes them unfit for employment and higher education. Moreover, this unfitness is not a result of their own misdoings, but a result of where they attend school and the state's failure to make appropriate educational offerings.

In *Kadrmas*, the Court refused to apply this heightened scrutiny, but the Court's rationale was that the denial was of transportation, not basic education. *Id.* at 458-60.

328. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996).

still force a state to make a reasoned defense of its educational system. The defenses from *Rodriguez*—that the state was fostering local control and was already exerting significant fiscal effort—may not even survive a basic rational basis review any longer, much less a heightened rational basis review. For instance, if the responsibility for delivering constitutional educational opportunities rests solely with the state, a state could not argue that fostering local control at the expense of meeting the state's constitutional responsibilities was a legitimate goal. Nor could the state argue that its methods were rationally related to a legitimate goal. In essence, any system that deliberately or consciously fails to provide an adequate education to students, when that education is constitutionally required, is irrational and would fail a heightened rational basis review. Of course, some protections are lost with heightened review: strict scrutiny would reject inequities that arose from mere legitimate goals, whereas heightened review might permit them. Strict scrutiny would require states to justify inequity with a compelling interest. However, insofar as many inequities are a result of historical practices or modern politics rather than legitimate or reasoned goals, heightened rational basis would be sufficient to protect most educational interests. The distinction between the levels of scrutiny would likely arise and be determinative only when the state was faced with financial crisis or another pressing exigency.

2. The Practical Effect of Heightened Versus Strict Scrutiny in Education

To the extent there is any meaningful difference between a constitutional right to education and a fundamental right to education, it lies in the extent to which inequity between schools can be tolerated. Under a fundamental rights analysis, any inequality between schools would be subject to strict scrutiny, even if all schools were delivering a quality education.[329] For instance, assuming that every school in the state had a student body that was

329. *See* Serrano v. Priest (*Serrano II*), 557 P.2d 929, 951 (Cal. 1976); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977); Pauley v. Kelley, 255 S.E.2d 859, 878 (W. Va. 1979); Washakie Cty. Sch. Dist. v. Herschler, 606 P.2d 310, 335 (Wyo. 1980).

achieving "at grade" level, a court could find that the educational system overall was delivering an adequate education. But if the most well-funded schools in the state had populations that were achieving not just "at grade" level, but "above grade" level, a fundamental rights analysis might require the state to justify, the differential spending and achievement in those schools (with a compelling interest).[330]

In contrast, if education was analyzed only under the constitutional right to an adequate education, the differing funding and elevated achievement in some schools would present no legal problems.[331] The only inequity that would be of concern under the constitutional right to education would be if some were achieving an adequate education while others were not.[332] Of course, the education clause would also prohibit the wholesale inadequacy of education, even if the state was treating all students equally in depriving them of an adequate education. In short, the primary difference between education as a constitutional and fundamental right is that a fundamental rights analysis would demand equality no matter how good the general educational system was, whereas constitutional analysis would disregard inequality so long as the system provided a quality education to all. Thus, a fundamental rights analysis potentially places a higher burden on states, as they must continually raise education to the highest levels being offered in the state. Constitutional analysis requires only that all educational offerings be leveled up to the baseline of adequacy.

The above distinction, however, should be of no consequence in terms of the scrutiny that federal equal protection requires. Regardless of whether a state had recognized education as a constitutional or fundamental right, both should warrant strict scrutiny. The only difference that should occur is at the level of practical application in determining which inequities or inadequacies federal law prohibits. In a state where education is a constitutional right, strict scrutiny would still apply, but the only inequities it would concern itself with would be those where some students

330. *See supra* note 329 and accompanying text.

331. *See, e.g.*, Robinson v. Cahill *(Robinson I)*, 303 A.2d 273 (N.J. 1973).

332. *See, e.g.*, Hoke County Bd. of Educ. v. State, No. 95CVS1158, 2000 WL 1639686, at *88-89 (N.C. Super. Ct. Oct. 12, 2000) (tolerating inequity among students achieving above grade level, but not tolerating inequity in regard to adequacy or basic inadequacy).

were not receiving an adequate education. In a state where education was a fundamental right, strict scrutiny would apply across the board to all educational inequalities.

In summary, an equal protection claim based on inequality in students' access to their state constitutional or fundamental right to education would require more scrutiny than applied in *Rodriguez*. The very fact that the underlying right is constitutional or fundamental would demand as much. The federal courts might have some flexibility in choosing between heightened and strict scrutiny, but either would be sufficient to challenge many existing inequalities. Most inequalities simply lack any defensible purpose in light of the fact that the state has an affirmative constitutional duty to provide education.

CONCLUSION

Education rights have fully matured in state courts, creating affirmative rights and substantive standards where there formerly were none. The time has now come to account for these developments at the federal level. For forty years, Congress and the federal courts have taken a hands-off approach to educational funding and quality. Equal protection principles dictate that both branches of government engage to ensure that the rights states have extended to children are delivered on an equitable and consistent basis. By engaging, federal courts and Congress can overcome many of the practical and legal problems that have prevented full implementation of education rights in state courts. Recent decisions by state courts to withdraw from enforcing these rights suggest that advocates may soon be scrambling to protect the gains they have achieved thus far in state venues. Assistance in the federal courts would come none to soon.

Although advocates may be forced to federal courts, unlike in previous decades, *Rodriguez* no longer stands as a road block to this strategy. Almost every factual and legal premise upon which *Rodriguez* stood has changed. Furthering educational rights in federal court does not require overturning *Rodriguez*, but simply that courts account for these changes and analyze them appropriately. This approach would not render education a fundamental right under the Federal Constitution, but it would bring federal

enforcement to existing state rights. Moreover, it would provide the basis and impetus for the eventual recognition of education as a fundamental right, and further federal support of education. In this respect, protecting state rights through federal equal protection provides something that no other current proposals can: an immediately viable claim with long-term prospects of expansion.