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Adding Adequacy to Equity: The Evolving Legal Theory of School Finance Reform

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Chapter 2

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The law of school finance reform is conventionally described as consisting of three "waves," each associated with a distinctive legal theory.[1] In the first wave, which began in the late 1960s, plaintiffs relied on the Equal Protection Clause of the federal constitution to challenge the disparities in per pupil expenditures among school districts within a state attributable to the state's reliance on the local property tax to fund elementary and secondary education. This wave ebbed abruptly in 1973 when the United States Supreme Court rejected the federal equal protection theory in *San Antonio Independent School District v Rodriguez.*[2] It was, however, immediately followed by a second wave, in which plaintiffs continued to focus on the interdistrict spending inequities resulting from the property-taxed based system of school funding but grounded their legal attack on the equal protection provisions of state constitutions. Plaintiffs won a number of notable state cases on this theory in the 1970s and 1980s. By the mid-1980s, however, this wave, too, receded, as more state courts rebuffed equal protection challenges.

The third wave arose in 1989 with decisions by the state supreme courts of Kentucky, Montana, and Texas that assertedly shifted the basis of litigation and adjudication from state equal protection clauses to the state constitutional provisions directing state governments to provide public elementary and secondary education, and the theory of reform shifted from equity to adequacy. Under the adequacy theory, the constitutional violation is not that school districts depend on drastically unequal property tax bases or that per pupil expenditures vary across districts largely according to local wealth, but that the state government has failed to

assure that all public school children in the state are receiving an adequate education. Concomitantly, the appropriate remedy shifts from equalizing tax bases or per pupil spending to assuring that an adequate education is provided to all schoolchildren. The shift from equity to adequacy has been credited with the greater success school finance reform plaintiffs have enjoyed in the last fifteen years.

The Limits of the Wave Theory of School Finance Reform

This "wave" metaphor and especially the attendant differences between the second and third waves have been sharply overstated – temporally, textually, in terms of litigation success, and as a matter of legal theory. Temporally, some pre-1989 cases also addressed the financing question in adequacy terms and, more broadly, raised the question of whether state governments were doing enough to discharge their state constitutional education mandates. Indeed, in the late 1970s and early 1980s courts in Washington[3] and West Virginia[4] awarded victories to plaintiffs on what we would call adequacy grounds. By the same token, even after 1989 school finance litigants have continued to bring equity cases, and during the 1990s courts in several states – including Tennessee,[5] Wyoming,[6] Vermont,[7] and New Hampshire[8]– awarded victories to litigants on what are best recognized as equity grounds. Indeed, even in the *annus mirabilis* of 1989 at least two of the plaintiffs' victories – in Montana and Texas – are at least as much about equity as adequacy.[9]

Textually, many of the pre-1989 equity decisions relied to a significant degree on state education articles. The presence of constitutional provisions requiring state legislatures to create and maintain public school systems enabled some state supreme courts to find that education is a fundamental interest for state equal protection purposes, thus leading to the

application of strict judicial scrutiny to interdistrict funding disparities. Indeed, this is precisely what occurred in the decision that ushered in the "second wave," *Robinson v. Cahill*.[10] Handed down by the New Jersey Supreme Court just days after the United States Supreme Court's *Rodriguez* decision, *Robinson* was textually grounded in the New Jersey Constitution's "thorough and efficient" education clause[11] but embraced an equity theory.[12]

Conversely, many recent adequacy cases rely on state constitutional education provisions that explicitly incorporate equity concerns. Very few state constitutions explicitly use the term "adequate" education[13] – and the supreme courts of two of those states (Florida and Georgia) rejected school finance reform claims predicated on adequacy theories.[14] Typically, the state constitutional text creating the duty to provide public schools refers to a "thorough and efficient" or "general and uniform" educational system. A number of courts that have focused on the education articles have found an egalitarian principle, rather than or in addition to adequacy, implicit in the "thorough" or "uniform"[15] requirements. Indeed, some constitutional texts appear to fuse the adequacy and equity concepts, as in the Montana provision that announces "it is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state."[16]

With respect to litigation success, although the emergence of the adequacy theory was accompanied by a number of significant plaintiff victories, adequacy has by no means been a panacea for school finance reform. Since 1989, state supreme courts have rejected adequacy challenges to school finance systems in Florida,[17] Illinois,[18] Minnesota,[19] North Dakota,[20] Oregon,[21] Pennsylvania,[22] Rhode Island, [23] Virginia,[24] and Wisconsin.[25] Even where inadequacy has been found, courts have been uncertain as to just how far they can push their

state legislatures in adopting a remedy, as indicated by recent decisions by the Alabama and Ohio supreme courts terminating judicial proceedings and leaving the matter of remedies entirely to the legislature.[26]

The Blurring of Adequacy and Equity

More importantly for understanding the relationship between adequacy and equity in legal theory, courts have repeatedly recognized the interconnections of adequacy and equality, even as they have also struggled to maintain some degree of separation between the two ideas.[27] In many cases, judicial analysis of adequacy is heavily suffused with equity concerns. A judicial determination of educational inadequacy in a particular school district is almost always predicated on some finding of inequity. Typically, the court will compare the education provided in the plaintiff district or districts – measured either in terms of inputs like class size, teacher qualifications, curricular scope, physical plant, or quality of textbooks and other educational materials, or in terms of educational outputs like performance on standardized tests, graduation and dropout rates and need for remedial education – with the quality of the education provided in other, usually more affluent, districts.[28] Significant inequalities are treated as powerful evidence of inadequacy.

Moreover, although one of the basic distinctions, in theory, between adequacy and equity is that adequacy permits some districts to spend above an adequate level, while equity might insist on eliminating inter-district differences, some adequacy courts have also been concerned about the gap between low and high spenders. The Montana Supreme Court, for example, assumed that "the wealthier school districts are not funding frills or unnecessary education expenses."[29] Others have noted that when a significant number of districts spend above the adequacy level, the resulting inequality can lead to a redefinition of what is needed

to achieve adequacy as "today's supplementation tomorrow become[s] necessary to satisfy the constitutional mandate" of what is needed to provide an adequate education.[30]

Not only is proof of inadequacy often grounded on evidence of inequality, but the judicial definition of adequacy often incorporates equality concerns. Several state supreme courts have emphasized that a central purpose of the state constitution's education mandate education is to enable children upon graduation to compete successfully with other graduates.[31] Competitiveness looms large in the most widely-noted judicial definition of an adequate education – the seven capacities identified by the Kentucky Supreme Court in *Rose v. Council for Better Education*.[32] Specifically, the court required that in order to satisfy its state constitution, the state legislature must create an education system that gives every child "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."[33] The New Jersey Supreme Court in the *Abbott* litigation repeatedly emphasized that an adequate education must enable disadvantaged children to compete against children who hail from affluent suburban districts.[34] Adequacy defined in terms of competitiveness necessarily has a comparative and egalitarian component. In order to vie with their future competitors in higher education or the labor market, the plaintiff students will need an education that is at least as good as the ones their competitors receive. In other words, an adequate-as-competitive education must be (at least) an equal one.

Courts frequently blur adequacy and equity concerns, so that it may be difficult to determine whether a case is premised on equity or adequacy, let alone what either equity or adequacy means. This can occur as a court's analysis unfolds over a succession of cases, or can even be seen as the court grapples with the school finance problem in a single case.

A nice example of how a court's school finance theory can morph over time comes from the New Hampshire Supreme Court's decisions in the *Claremont* litigation. In *Claremont I,* decided in 1993, the New Hampshire court determined that the state constitution's education clause – which makes it "the duty of the legislators and magistrates . . . to cherish the interest of literature and the sciences, and all seminaries and public schools" – provided a constitutional basis for an attack by five property-poor districts on the state's local property-tax-based school finance system. The court determined that the constitution imposed on the state a duty "to provide a constitutionally adequate education to every educable child . . . and to guarantee adequate funding."[35] However, the court gestured at an egalitarian theory of what adequacy requires when it indicated that an adequate education is one that prepares "citizens for their role as participants and as potential competitors" in the marketplace.[36]

When *Claremont* returned to the court four years later – following a remand to the lower court, a lower court trial, and an appeal – the court shifted gears and determined that the state education system was unconstitutional because it violated the state constitutional requirement that taxes be "proportional and reasonable."[37] With different local districts taxing at different rates, reflecting, in significant part, disparate local property tax bases, the school finance system violated the constitutional tax uniformity requirement – a kind of equality theory, albeit one that emphasized the equal treatment of taxpayers, not the equal treatment of students. The next three New Hampshire Supreme Court school finance decisions over the next three years all dealt with the tax uniformity provision and considered whether various state legislative reforms of the school tax system satisfied the requirements of taxpayer equity.[38] To be sure, the taxpayer equity decisions were linked to the education article and the adequacy requirement. The court required the property tax for education had to be uniform

statewide, rather than within a district, because the state constitution's education article makes an adequate education a state responsibility, so the property tax for education must be treated as a state tax.[39] Moreover, the court reiterated the need for the state to fund education at a level sufficient to achieve adequacy. Even in discussing funding rather than taxing, the court combined adequacy and equity concepts, reiterating its earlier concern that an adequate education be one that enables students to compete,[40] and that "comparable funding must be assured in order that every school district will have the funds necessary to provide such education."[41] Finally, in 2002, the *Claremont* court added a new concept to the mix when it held that the state's "duty to provide a constitutionally adequate education includes accountability,"[42] that is, measures designed to assure that even adequately funded local districts actually provide an adequate education. Thus, over the course of a decade of doctrinal shape-shifting, the court fused notions of adequacy, taxpayer equity, spending equity, and accountability into its evolving approach to public education.[43]

A striking instance of the simultaneous separation and blurring of adequacy and equity concerns in a single case is the 1994 decision of the Arizona Supreme Court in *Roosevelt Elementary School District. No. 66 v. Bishop,*[44] which challenged the state's reliance on local school taxes to fund capital facilities, although the court expanded its analysis to include the entire educational financing scheme.[45] The court focused its analysis on the state's education article – which contains a "general and uniform" clause -- at least in part to avoid reopening an earlier, second wave decision[46] in which it rejected a state equal protection challenge to the school financing system. The court repeatedly sought to separate adequacy and equity, noting they present separate issues,[47] and yet it repeatedly combined the two. Thus, the court observed that the constitution does not require that all school districts offer a program that is

"exactly the same, identical, or equal. Funding mechanisms that provide sufficient funds to educate children on substantially equal terms tend to satisfy the general and uniform requirement."[48] It went on to find that the education article "does not require perfect equality and identity"[49] and does not limit the ability of more affluent districts to devote more resources to their schools. Indeed, the court stressed that "it is . . . not the existence of disparities between or among districts that result in a constitutional violation." But the court also said that the "critical issue is whether those disparities are the result of the financing scheme the state chooses" and described the state's financing system as characterized by "heavy reliance on local property taxation, arbitrary school district boundaries, and only partial attempts at equalization"[50] – supporting the inference that, indeed, unequalized disparities violate the "general and uniform" requirement. It is difficult to tell from the Arizona court's opinion whether it was relying on adequacy, equity, or some hybrid of the two. [51]

Three Versions of the Adequacy-Equity Relationship

Although courts have often blended adequacy and equity concerns, in many cases, adequacy does add something new to the legal analysis. Some courts treat state equal protection and state education article claims as involving distinct legal arguments and they analyze them separately. Moreover, a significant number of courts have reached different results on equality and adequacy theories. Courts in Arizona,[52] Idaho,[53] Kansas,[54] New Jersey,[55] New York,[56] and Ohio[57] rejected equality challenges to school financing systems but found for the plaintiffs on an education clause-based adequacy theory. On the other hand, many state supreme courts resolved adequacy and equality claims the same way: the

Arkansas, Tennessee and Wyoming courts found for plaintiffs on both adequacy and equality theories, while state supreme courts in another ten states rejected both adequacy and equity claims.[58] Nonetheless, although some state supreme courts found for plaintiffs on equal protection grounds without considering an adequacy claim (or found for plaintiffs on an adequacy theory without considering equality), there do not appear to be any courts that combined the rejection of an adequacy attack with the validation of an equality challenge. In other words, no court has found that a state was providing an education that is adequate but also unconstitutionally unequal. The adequacy theory, thus, adds to the arsenal of plaintiffs' legal weapons, although it is by no means certain of leading to a victory in court.

Although equity and adequacy are distinct legal theories, judicial approaches to adequacy have clearly been shaped by equity concerns. This is true partly as a matter of history, as earlier court decisions that focused primarily on equity informed later cases in which adequacy took center stage. It is also, as previously suggested, a matter of theory, as equity ideas have influenced judicial approaches to the meaning of adequacy. The finding that a state is failing to provide an adequate education, however, can lead to different remedies than a determination that a system is unequal. Affirmative decisions in equity cases have, not surprisingly, sought to equalize tax bases or per pupil spending. Affirmative decisions in adequacy cases, by contrast, have not focused on equity – although greater equity in funding typically results – but in assuring an "adequate education" in all districts. That has often proven to be a complex task, requiring judicial attention to the structure of the state-local educational system and the content of the education provided, in addition to how that education is financed.

In a fifty-state legal system – with at least one state supreme court decision concerning school financing reform in three-quarters of the states, and multiple decisions from several states – it is difficult to find a consistent relationship between adequacy and equity in the law. Judicial decisions in this area are often far from models of clarity, and doctrines within a state can and do change over time. Very roughly, however, state judicial decisions concerning the adequacy-equity relationship can be grouped into three categories – to be examined in the following sections of this Chapter. These may be labeled: "inequity excused," "equity minus," and "equity plus."

In the first, adequacy and equity are separate concerns, but adequacy is invoked to excuse or mitigate a court's determination that an education system does not violate constitutional equality norms. Adequacy is treated as a relatively minimal requirement, easily satisfied by the state education system subject to challenge.

In the "equity minus" cases, the main significance of adequacy is to compel states to devote more resources to the schools in their poorest districts, without requiring that the poorest districts be made fully equal to the rich. In other words, adequacy operates to level up the poor to some middle, acceptable level, but not to require that the poor be brought up to the top – or that the top be brought down to a lower level of spending or achievement in the name of equality.

In the "equity plus" decisions, courts have held that adequacy requires *more* than equity. That "more" can be more resources, either for the state as a whole, or for the poorest districts in the state, so that their hard-to-educate students can reach the same level of educational attainment as students in more affluent areas. The "more" can also mean state government activity beyond financing, such as greater state definition of the components of

an adequate education, and the creation of a monitoring and oversight structure that assures that students throughout the state in fact receive the state-defined adequate education. In these cases, courts focus on educational outputs – such as student performance on tests designed to measure academic achievement – as well as on inputs. There is still a strong egalitarian component, as the purpose of these "equity plus" requirements is often to assure that the children in the poorest areas actually receive the same education as more affluent children. But some of these cases also indicate a state judicial intention to upgrade the state educational system overall.

Adequacy as Inequality Excused (or Mitigated)

The origins of adequacy as an excuse for, or mitigation of, inequality can be seen in the Supreme Court's *Rodriguez* decision. In holding that interdistrict spending inequalities in Texas, linked to disparities in local tax bases, did not violate the equal protection clause, the Court noted that "no charge fairly could be made that the basic system fails to provide each child with an opportunity to acquire the basic minimal skills necessary"[59] to constitute an education. In other words, although the right to an adequate education was not strictly speaking before the Court, *Rodriguez* did appear to take some comfort from the fact that even though the Texas school system was marked by spending inequalities, the system at least provided all school children with "basic minimal skills."

The New York Court of Appeals took a similar approach to adequacy in its 1982 *Levittown*[60] decision, although in *Levittown*, unlike *Rodriguez*, plaintiffs had stated a cause of action under the state's education article as well as its equal protection clause, so educational adequacy theory was actually before the court. Having rejected plaintiffs' equal protection

claim, the court acknowledged that the education clause – which requires that the legislature "provide for the maintenance and support of a system of free common schools" – in theory could support a constitutional challenge to the state's school financing system, but then rejected the claim on the merits by simply declaring that "a sound basic education" with "minimally acceptable facilities and services" is being provided throughout New York.[61] The only evidence the court cited that a constitutionally adequate education was being provided was the fact that compared with other states New York – which was the third highest of the fifty states in expenditures per pupil – was devoting a significant amount of resources to public schools.[62] At about the same time, the Georgia Supreme Court in *McDaniel v. Thomas* also took comfort in the presumed adequacy of the education its state was providing. The Georgia court rejected an equity claim, took up an adequacy claim – the Georgia constitution is the rare one that actually uses the term "adequate" in establishing the duty to provide education[63] – denied that adequacy included any egalitarian component,[64] and then found, based on the "massive" level of state support for education, that the adequacy requirement had been satisfied.[65] Courts in Colorado, Idaho, Maryland, Ohio, Oklahoma, and Pennsylvania reached similar conclusions in the "second wave" era of the 1970s and 1980s.[66]

Even in the 1990s, courts in Maine, Minnesota, and Nebraska continued to mitigate the sting of their rejection of equality challenges by asserting the adequacy of their school systems, although in each case the court found that plaintiffs had failed to make out or support an adequacy argument so that adequacy could be assumed.[67] In another decision in the early 1990s, the Kansas Supreme Court acknowledged that some districts were underfunded relative to others but concluded that did not make the financing system "unsuitable" within the meaning of the Kansas constitutional provision requiring "suitable provision for financing

of the educational interest of the state."[68] The Wisconsin Supreme Court has been clearest in linking a rejection of an equity claim to a presumption of adequacy in a case in which adequacy was at least implicitly put at issue by plaintiffs' invocation of the Wisconsin education article. Moreover, the Wisconsin court's approach to adequacy was strikingly limited. It held that adequacy requires no more than that the state offer students the "opportunity to be proficient" in core subjects; "adequacy" does not require that students attain proficiency: "This means that poor student performance on proficiency tests in school districts is not, without much more, an indicia of the unconstitutionality [on adequacy grounds] of the state school finance system."[69]

Three factors seem to characterize this first set of adequacy cases. First, as exemplified by the Wisconsin decision, they typically adopt a fairly limited definition of what constitutes an adequate education. Courts may refer to "minimally acceptable facilities and services" or a "basic adequate education,"[70] rather than the high quality version of adequacy that has become more common in recent cases. Second, they may restrict the scope of the constitutional adequacy requirement. In a number of the states where the education article refers to a "uniform" education, these courts have found that uniformity does not require equal spending but rather concerns only matters like the length of the school year, or the content of the curriculum.[71] Third, these cases rarely involve a full judicial investigation of the adequacy of the education actually offered. Adequacy is generally inferred from the amount of state money devoted to education or the existence of state standards, or adequacy is deemed to be conceded by the plaintiffs. It is in the last set of cases – where adequacy has not even been at issue -- that it is clearest that the courts are turning to adequacy to excuse or mitigate inequality rather than to consider what "adequacy" means. But in all these cases, it is

implicit that adequacy has little to do with equity, and imposes no more than a modest burden on the states, which the states can easily satisfy.

In these cases, of course, the adequacy argument failed – or wasn't even tried. Educational adequacy, while nominally required for state school systems, is not taken all that seriously by the courts. However, this judicial minimization of the content and significance of adequacy appears to be on the wane. Most of the adequacy-as-excuse cases predate the contemporary dominance of the adequacy theory. The more recent judicial statements occurred in disputes where plaintiffs did not even bring an adequacy claim. In most recent cases in which constitutional inadequacy has been alleged, courts have either taken the issue seriously and required a full-scale fact-finding or have rejected it on justiciability grounds, that is, they have treated adequacy as a matter for the political process, not litigation. Still, in taking the full measure of the impact of the adequacy theory on the school finance reform, it is worth noting the significant set of cases in which adequacy had little impact at all, except perhaps to excuse or mitigate the judicial acquiescence in an unequal school funding system.

Adequacy as "Equity Minus"

In the adequacy as "equity minus" cases, the thrust of the adequacy theory is to assure greater parity in the funds available to and in the education supplied by local school districts but not to require complete equalization across the board. This version of adequacy responds to some of the practical and political shortcomings of equity as a legal theory of school finance reform. As some scholars have suggested, state courts might have found it awkward to use state equal protection provisions in school financing cases because that would involve adopting an interpretation of equal protection sharply at variance with that of the Supreme

Court in *Rodriguez*. While as a matter of legal doctrine, state judges are free to construe state constitutional provisions differently from even identically-worded provisions of the federal constitution, such a divergence might still seem arbitrary and subject a state court to criticism. By relying on a state constitutional provision that has no federal counterpart, adequacy avoids this problem.[72]

More significantly, the "equity minus" version of adequacy responds to one of the flaws identified early on with the equity theory, which is that due to the drastic disparities in local property wealth per pupil across districts – as demonstrated by the record of nearly every school finance reform case – it is likely to be extremely costly for a state to assure all districts the same resources the wealthiest districts enjoy. In theory, equality would require leveling all districts up to the wealthiest district, or bringing down the expenditures of the wealthiest in order to achieve equity at a lower level of spending. The former course of action is likely to be prohibitively expensive, but the latter is a direct challenge both to the widespread practice of decentralized school district decision-making and to the political power of the wealthiest districts. Although some states have moved to cap local spending, courts may well be reluctant to force such a dramatic and politically difficult action. Moreover, at a time when the quality of the public schools seems increasingly uncertain, and many have stressed the need for paying greater attention to achieving excellence in education, some judges have doubted the wisdom of limiting spending on public education, even by affluent districts.[73] Adequacy as "equity minus" eliminates this problem by requiring an infusion of resources into less affluent districts while treating higher levels of spending by more affluent districts as acceptable. Courts that adhere to this view treat adequacy as a means for improving the

quality of the education provided by the poorest school districts, and thus securing a greater measure of equality, without requiring that the poor districts be made fully equal to the rich.

Probably the first state court to embrace adequacy as "equity minus" was the New Jersey Supreme Court in the *Robinson* saga. In *Robinson V*, the New Jersey Supreme Court upheld the Public School Education Act of 1975 – the state legislature's response to earlier court decisions holding that the state school financing system violated the "thorough and efficient" education provision of the state constitution. The Act provided for a significant increase in state support for education which would effectively equalize spending in roughly two-thirds of the school districts of the state, and guarantee each district an effective tax base somewhat higher than the statewide average per pupil tax base.[74] Although that fell well short of full equalization, the Act was such a significant improvement in equity that – combined with other improvements in the state educational system, including greater state oversight of local district performance – the state supreme court held that it satisfied the constitutional requirement if it was fully funded.[75]

In *Robinson* the court's treatment of adequacy as "equity minus" came late in the litigation story as the court assessed the state's response to its earlier mandates. In other states, the judicial distinction between adequacy and equity, and the determination that adequacy requires more money for poorer districts but not necessarily as much money as is available to the more affluent, came earlier on as courts set out the criteria for determining whether state school finance measures satisfy constitutional adequacy requirements.

Thus, in the first *DeRolph* decision in Ohio, the state's supreme court, which had previously rejected an equal protection challenge, held that plaintiff school districts had proven that the current school finance system violated the state constitution's "thorough and

efficient" requirement because those districts "were starved for funds" and therefore lacked teachers, buildings and equipment and were compelled to offer inferior educational programs compared to those of other districts.[76] Insufficient funding and the resulting unequal educational offerings made out a case for inadequacy, but full equalization of funding or programs would not be required: "We recognize that disparities between school districts will always exist . . . We are not stating that a new financing system must provide equal educational opportunity for all."[77] Indeed, the court insisted that state satisfaction of the "thorough and efficient" requirement was consistent with both higher spending and more expansive programs in more affluent districts.[78] But the court insisted that all districts must have enough money to offer an adequate educational program.

Similarly, the South Carolina Supreme Court in *Abbeville County* found that a claim that education in forty less-wealthy school districts was underfunded and therefore inadequate could go forward under the state constitution's education article -- despite the court's earlier determination that interlocal school revenue disparities are not unconstitutional -- because a requirement of adequacy would not mandate equity.[79] And in the *McDuffy* decision, the Massachusetts Supreme Judicial Court walked the line between adequacy and equity by holding on the one hand that the state constitution's education provision did not mandate equal expenditures per pupil but that, on the other hand, "fiscal support, or the lack of it, has a significant impact on the quality of education each child may receive."[80]

Finally, in a decision handed down in 2005, the Kansas Supreme Court, which had made adequacy -- that is, "suitable provision" for education in the words of the state constitution – a judicially enforceable mandate only in 2003,[81] again illustrated the idea of adequacy as partial, but not full, equality. The court held that a state school finance law

permitting "local option budgets" that enable districts to spend beyond the basic state definition of an adequate education was consistent with the constitution since adequacy did not require equality and instead permitted local "enhancements" above the adequacy level. But it invalidated the law anyway because the state's aid formula was too low, so local districts remained too heavily dependent on property taxes to fund an adequate education and "the result is wealth-based disparity."[82] In other words, suitability/adequacy required some amelioration of wealth-based differences but was not offended by the ability of wealthier districts to spend above the suitable/adequate level.

Adequacy as "equity minus" seems a pragmatic tempering of the potentially radical thrust of a pure equity theory. In fact, it is not so clear that equity and adequacy as "equity minus" are all that different in practice. Even in states in which courts embraced an equity approach and invalidated the school finance system under the state equal protection clause, courts were sometimes willing to accept legislative remedies that brought up the bottom and leveled spending to the middle or upper-middle without fully equalizing spending or revenue-raising capacity by all districts.

In Connecticut, for example, the state supreme court, which invalidated its state school finance system on equal protection grounds, ultimately accepted a state legislative response that significantly increased the state's share of total education expenditures (although the state's share was still below the local share) and provided all districts with a "significant equalizing state support" but also left "significant disparities in the funds that local communities spend on basic public education."[83] As the reform measure created "substantially equal educational opportunities," the "remaining disparities do not undermine the basic policy of equalizing state support for education."[84] Similarly, in Texas, the

Edgewood saga began with the state supreme court determining that the "efficient system" of education mandated by the state constitution requires all school districts to have "substantially equal access to similar revenue per pupil at similar levels of tax effort"[85] – in essence adopting the fiscal neutrality version of equity found in the early school finance reform cases. Six years later, the Texas court concluded that "an efficient system does not require equality of access to revenue at all levels."[86] The court sustained a school financing scheme in which most money for schools was still raised by local taxation and still allowed the wealthiest school districts to raise and spend more money than their less affluent peers. As the court subsequently observed, legislation that significantly reduced without eliminating wealth-based disparities was constitutionally sufficient "only when viewed through the prism of history. In other words, it was better than it had been."[87]

Adequacy as "equity minus" may have emboldened some otherwise reluctant state courts to enter the school finance reform arena, and may have also provided courts with a principled rationale for making peace with their legislatures by accepting less-than-fully equalizing finance reform measures. Adequacy as "equity minus" is more modest than full equity, carries a less costly price tag, and makes space for a significant continuing local financing role. It achieves the leveling up goal of equity for the poorest districts of a state without threatening the school financing system as a whole. Yet, as noted, it may not be all that different from equity in practice.

Relatively few state courts have embraced adequacy as "equity minus," or, rather, few have limited their understanding of adequacy to just leveling up the bottom. Most state courts that adopted the adequacy theory either moved over time from "equity minus" to "equity plus" or came to add aspects of "equity plus" to the limited equalization of "equity minus."

Despite its pragmatic appeal, "equity minus" appears increasingly to be giving way to adequacy as "equity plus."

Adequacy as "Equity Plus"

Probably the most significant development in school finance litigation has been the rise of the theory of adequacy as "equity plus." Although aspects of "equity plus" can be seen as far back as the original New Jersey *Robinson* decision and West Virginia's *Pauley* decision, adequacy as "equity plus" only really emerged in 1989-90 with the Kentucky *Rose* decision and the New Jersey Supreme Court's *Abbott* line of cases. Adequacy as "equity plus" draws on three related strands of thinking that address some of the shortcomings of the pure equity theory of school finance reform.

First, adequacy as "equity plus" has focused on the need for school financing systems to provide more than equal funding to certain groups of school children, particularly the urban poor, in order for those children to receive truly adequate educations. One problem with equity as either tax base equalization or per pupil spending equalization – the two dominant versions of equity in the case law of the first and second waves – is that neither fits well with the needs of the urban poor. As the Supreme Court noted in *Rodriguez*, many urban areas are not property-poor but, due to the presence of industrial and commercial property, are close to, if not above, the average property wealth of the state. Moreover, due to the many competing demands for urban services, many urban areas are often unable to devote as high a fraction of their tax dollars to education as can suburban and rural districts. Many of these districts would benefit little from tax base equalization.[88] Further these districts often have high concentrations of poor, harder to educate children, and so must incur considerably higher per

pupil education costs. Although most courts that embraced the equity theory rejected the idea that a strict equality of educational expenditures per child was constitutionally mandated and, instead, agreed that higher needs and higher costs could justify greater state aid, equity theory did not provide much affirmative support for such additional assistance.[89] The adequacy as "equity plus" theory, by contrast, provides a basis for arguing that if more state funds are needed in some districts than in others in order to provide an adequate education then those additional funds must be provided.[90] This could also be described as adequacy as "vertical equity," in which differently situated children require different amounts of public school dollars in light of their differing educational needs, in contrast to the traditional "horizontal equity" approach which has sought to provide different school districts with relatively equal dollars per child.[91]

The prime instance of adequacy as "equity plus" for the educationally needy is the New Jersey Supreme Court's second *Abbott* decision in 1990.[92] In that case, the court concluded that the children in the vast majority of the state's school districts were receiving the "thorough and efficient" education required by the state constitution but that a thorough and efficient education was not being provided in twenty-eight poor urban districts "based both on the absolute level of education in those districts and the comparison with the education on affluent suburban districts."[93] Noting that due to social, economic, and demographic factors the "educational needs of students in poorer, urban districts vastly exceed those of others, especially those from richer districts,"[94] the court held that the educational offerings in what subsequently became known as the "special needs districts" ("SNDs") "must contain elements over and above those found in the affluent suburban districts. . . . [I]n poor urban districts, something more must be added to the regular education

in order to achieve the command of the Constitution."[95] The court specifically required that educational expenditures per pupil in the SNDs must be equal to the average of the current expense budget of the state's top school districts, with the SNDs' budgets rising as the budgets of the top districts rise, and that "in addition, their special disadvantages must be addressed."[96] Four years later, the court invalidated one state legislative response to its holding because, although the law reduced the spending gap between the SNDs and the top districts, some disparities remained. Moreover, the state failed to fund "special funds and services targeted to the needs of those disadvantaged students."[97] Three years later the court held unconstitutional the funding provisions of another state legislative response because once again the state's financial assistance to the SNDs was "incapable of providing the remediation that will overcome that constitutional deprivation."[98] Ultimately, in order to provide the extra support to which the SNDs were deemed constitutionally entitled under the "equity plus" theory, the court ordered adoption of a special master's report that called for the implementation of "whole-school reform" for elementary schools, full-day kindergarten for 5-year-olds, half-day pre-kindergarten for 3- and 4-year-olds, provision of health and social services, additional security measures, and other special programs for the SNDs.[99] In other words, adequacy required not merely that the neediest districts receive funding equal to that of the most affluent, but that they actually provide extra programs, and receive the funding necessary to pay for them, in order to overcome the educational disadvantages children in these districts face.

The North Carolina Supreme Court embraced a similar "equity plus" approach in its 2004 decision in *Hoke County*,[100] when it held that its state constitution's education provisions were violated in the poor rural districts which had brought suit. Following the trial

court, the state supreme court found that the "bulk of the core" of the state's "educational delivery system" was sound and passed constitutional muster, but that the state's failure to provide an effective mechanism to deal with the educational needs of "at-risk children" – defined by a complex of social, economic, and demographic factors[101] – meant that the state was failing to secure the education guaranteed by the state constitution.[102] The state was directed to assess the special needs of at-risk children and to develop a plan to address them, including the redeployment of state education aid. But the court drew back from the lower court's determination to mandate pre-kindergarten programs for at-risk four-year-olds, finding that it unduly trenched on the authority of the executive and legislative branches.[103]

A second strand of adequacy as "equity plus" can be seen in the state court decisions requiring their state governments to devote more money to education statewide, and not just in the property-poorest districts. The prime exemplar of this version of adequacy as "equity plus" is the Kentucky supreme court's *Rose* decision. Although *Rose* discussed inequalities within the Kentucky school system which meant that "students in property poor districts receive inadequate and inferior educational opportunities as compared to those offered to those students in the more affluent districts,"[104] the court concluded that the level of support for education in Kentucky was inadequate in all districts.[105] The court found that Kentucky overall was marked by low educational effort and low educational achievement – in per pupil expenditures, teacher salaries, graduation rates, and scores on achievement tests. Rather than just compare inputs and outputs across districts within the state, the court also compared Kentucky against other states within the region and nationally in terms of the resources devoted to education and the measures of educational attainment, and found that Kentucky fell short. Adequacy required an increase in resources for education throughout the state.

Other state courts, such as those in Alabama and Arkansas, have followed Kentucky's lead in assessing adequacy in terms of the state's dedication of resources to education and the performance of the state's school districts compared to that of other states. Like Kentucky, they found their school systems inadequate in an absolute sense – although that inadequacy was evidenced by the comparison of these states to other states. In these states, adequacy would require not just bringing up the poorest districts to some undefined middle, but increasing the resources devoted to education in the state as a whole.[106]

This aspect of adequacy of "equity plus" also derives from some of the perceived shortcomings of early equity cases. First, in the fiscal neutrality aspect of equity embraced by the California Supreme Court in *Serrano,* the equity problem was often tax-base inequity. Taxpayers in low-wealth districts paid higher tax rates but generated less revenue per pupil than taxpayers in high-wealth districts. Power equalization could remedy this by assuring each district an equivalent tax base and thus equal revenue for equal effort. But that did nothing to assure that low-wealth districts would devote their equalization aid to education, as opposed to cutting their tax rates. Second, and relatedly, even if equalization were achieved by a general take-over of school funding, there did not assure improvement of the education provided in the poorest districts. Although equalization often leads to an increase in per pupil school spending, California provides evidence that equalization can be accomplished by leveling down, as well as by leveling up.[107] Adequacy defined as increasing the resources for education in the course of reducing inequalities within a state is clearly about improving education funding, not taxpayer equity, and it is unlikely to permit equality to be achieved at lower levels of spending.

Adequacy as "equity plus" also clearly reflects the growing public concern in the 1980s about the uncertain quality of public education. In the aftermath of the publication of *A Nation at Risk* early in that decade, excellence (or its lack) replaced equity as the public's "top concern" about education.[108] "Equity plus" unites equity and excellence into a court-ordered call, rooted in the state constitution, for devoting greater resources to education.

Rose's vision of adequacy as more than just equalizing spending within a state has not been limited to court decisions based solely on an adequacy theory. In both the Alabama and Arkansas decisions, the courts combined equal protection and education clauses, and equity and adequacy reasoning, in finding that their state constitutions require the devotion of additional funding to education. The Wyoming Supreme Court, relying on both equal protection concepts and constitutional education provisions, found that the state constitution requires both "financial parity" and sufficient funding statewide to provide all students with the "best educational system." In the Wyoming court's view, equity involves not merely equal slices of the funding pie: "the pie must be large enough to fund [educational] need" statewide."[109] Similarly, the Montana supreme court, which, in 1989, had relied on the "equality of educational opportunity" guarantee of the state constitution to invalidate a school funding system marked by substantial inter-district disparities in per pupil spending, in 2005, held that even though a legislative school financing reform had eliminated most inter-district spending differences, the state's education funding legislation failed the "basic system of free quality public elementary and secondary schools" clause of the state constitution because the state was not providing enough money overall.[110]

The third strand in "equity plus" goes beyond financing. These adequacy courts have required their state governments to spell out the elements of a constitutionally adequate

education, determine the inputs – including curriculum, staffing, facilities, and educational materials – necessary to provide it, and more effectively oversee whether an adequate education is being provided by local school districts. This may involve state measures for assessing students' academic attainments, greater state monitoring of local school district performance, and state intervention when local districts fall short. This aspect of adequacy dates back to the initial reliance on state education articles during the so-called second wave. Both the New Jersey court in *Robinson* and the West Virginia court in *Pauley v. Kelley* called on their states to define the "thorough and efficient education" their state constitutions require, with attention to the necessary facilities, instructional materials, personnel, performance standards, and administrative oversight.[111] State definition of educational content and greater state monitoring of and responsibility for local school district performance was also central to the Kentucky court's decision in *Rose*. In recent years, courts in Kansas, New Hampshire, Ohio, and Texas have focused their interpretations of their states' education clauses on educational content definition, the monitoring of local performance, and state and local accountability for performance short-falls.[112] Indeed, as with the enhanced funding aspect of "equity plus," this increasing judicial attention to state satisfaction of content-definition and oversight requirements has not been limited to adequacy states. Courts in Arkansas, Montana, Tennessee, and Wyoming have all looked to whether states have set curricular requirements, adopted accountability standards, and put in place means of measuring pupil performance in their analysis of school finance reform claims.[113]

In these cases, educational content issues are not separate from financing issues. Rather, increasingly, courts are treating state specification of educational content and state provision of adequate financing as closely connected. An important new development is the

adequate education cost study. In just the years since the turn of the millennium state courts in Arkansas, Kansas, Montana, New York, Ohio, Tennessee and Wyoming have required their legislatures or state education departments to determine the components of an adequate education, specify the inputs necessary to achieve adequacy, and then cost out those inputs in order to determine the amount of funding that must be devoted to education, either statewide or in the plaintiff school districts.[114] Where states have failed to justify their funding decisions in terms of such a cost-of-adequacy study, or a state legislature has departed from the cost-of-adequacy study's conclusion when it enacted a state aid formula, the state supreme court may be sharply critical and even invalidate the state financing measure.[115] Moreover, as the list of state courts that have looked to cost-of-adequacy studies in making their decisions indicates, as with other aspects of adequacy as "equity plus," the requirement that state funding decisions be closely justified in terms of the funds needed to pay for an adequate education is not limited to state courts that have premised their interventions on adequacy requirements. Rather, such cost-justified decision-making is a theme in many recent school finance reform cases.

The three strands of adequacy as "equity plus" clearly demonstrate equity concerns – to make sure that poor districts get the funding that, in light of their special needs, they need in order to be truly equal with more affluent districts; to bring up the funding of education in states which have provided limited support for education to regional or national levels; and to adopt administrative measures and cost studies that assure that funding is sufficient to truly provide equal educational opportunities within a state. From this perspective adequacy as "equity plus" reflects a maturation of the equity idea from simple inter-district tax-base or per pupil spending equalization to a more sophisticated understanding of the additional resources,

structural reforms, enhanced oversight, and cost-justified spending that may be necessary in order to actually equalize educational opportunities. Indeed, this evolution of what equity requires can also be seen in contemporary cases that rely on equity, or a combination of equity and adequacy, rather than adequacy alone.

On the other hand, in many state courts adequacy as "equity plus" also goes beyond even the most sophisticated definition of fiscal equity to encompass an overall assessment of the state's role in discharging the constitutional mandate to provide public education. It is theory of education *governance* reform rather than of education *finance* reform. Indeed, as noted, this version of adequacy incorporates into school finance reform the public concern about improving school quality and educational outcomes that first became politically salient in the 1980s and can also be seen in the No Child Left Behind law. Under adequacy as "equity plus," courts are requiring legislatures to do more than equalize school funding; they are requiring the states to create stronger, more accountable educational systems.

Adequacy, Equity, and the Judicial Role in Education Finance Reform

Early in the "third wave" period some academic advocates of the adequacy approach asserted, pragmatically, that adequacy is the better approach for reformers to take because courts will see it as both more legitimate and less challenging to the political branches than arguments from equity.[116] Adequacy is arguably more legitimate because it builds on the special state constitutional commitment to education, thus providing a judicial theory with more constitutional purchase than the equality requirement which the United States Supreme Court rejected in this very context. And adequacy is less challenging to the political branches than arguments from equity since adequacy leaves some inequalities in place and, in

particular, does not threaten the threaten the ability of politically powerful affluent districts to spend more on their children. These arguments for an adequacy approach are best reflected in the "equity minus" form of adequacy. For courts that define adequacy as "equity plus," however, the adequacy theory tends to extend courts to the limits of their institutional competence and power by embroiling them in efforts to define "education," to appraise the sufficiency of state measures to oversee and finance local provision of such an education, and to force state legislatures to give a greater priority to education than the legislators themselves would prefer. With courts increasingly viewing adequacy as "equity plus," the question of the judicial role in defining and enforcing adequacy becomes more difficult.

Conceptually, the very notion of an "adequate" education is inherently fraught with uncertainty. State constitutions say virtually nothing about what constitutes an adequate education. By comparison with adequacy, equality is a relatively determinate idea. Equality requires that all districts be treated alike. In theory, equity can be achieved without any decision about what an education ought to achieve or how much money ought to be devoted to education. Equity can work from existing levels of education spending to set the standard. Adequacy, on the other hand, is totally free-floating and requires difficult and deeply contestable determinations about the purposes of education, how that is to be achieved, and what resources are necessary to do so. As opposed to equity, adequacy would appear to lack "judicially manageable standards" and, thus, be a poor candidate for judicial enforcement.

Indeed, a number of state supreme courts – in Florida,[117] Illinois,[118] Pennsylvania,[119] Rhode Island[120] and Virginia[121] – have taken this position. When school finance reform plaintiffs have pressed arguments based on the education requirements of their state constitutions, these courts determined not that their states satisfied the adequate education

mandated but that the educational quality required by the constitution is a matter for the political process, and not fit for judicial resolution. Most of these decisions were issued in the mid- and late-1990s. Although it is not clear they were driven by the rise of the "equity plus" idea, it is not surprising that some courts would be concerned about the scope of the judicial role at a time when adequacy was increasingly turning into a vehicle for judicial oversight of entire state school systems.

On the other hand, many state courts have determined that education article challenges to school financing systems are justiciable, and these courts have found ways of making the definition of an adequate education judicially manageable. Most commonly, this has involved a combination of judicial articulation of some unexceptionable general principles of the purpose of education coupled with a directive to the state legislature and/or state education department to develop more specific standards, including the components of an adequate education, and the educational inputs and performance measures necessary to assure an adequate education is actually provided. The general criteria listed by the West Virginia court in *Pauley* and the Kentucky court in *Rose*, have been repeatedly cited, sometimes with modifications, by other state courts. State legislatures have typically acceded to such court decisions by adopting laws that define educational requirements, and call for the monitoring local school districts, and the testing student performance. The definition of a "general and uniform" or "thorough and efficient" education, then, has been a surprisingly cooperative and interactive process, with courts initially forcing the legislatures to take the necessary steps, and then generally accepting the results.[122]

The greater difficulty for many adequacy courts, like equity courts, has been getting state legislatures to fully fund the adequate education that the legislature has been willing to

define and test. State supreme court orders requiring additional school funding to meet adequacy requirements have frequently encountered legislative resistance, necessitating multiple trips to the court house and numerous follow-up court decisions and orders. In states like Arizona,[123] Kansas,[124] New Jersey,[125] and Ohio,[126] school financing and administrative reforms have ping-ponged between the legislatures and the courts, as legislatures have adopted measures in response to court declarations of unconstitutional inadequacy, and the courts have found the state enactments wanting.

At least three state supreme courts – in Arkansas, Massachusetts, and Ohio – that adopted "equity plus" requirements backed down and accepted state actions (and inactions) that arguably fell short of both adequacy and equity.[127] These courts decided to declare victory, over the opposition of dissenters and in the face of evidence that the state reform measures fell short of fully addressing the issues that triggered the initial finding of a state constitutional violation. In the Massachusetts case, a plurality of the court found that the state's Education Reform Act provided a "long-term measurable, orderly and comprehensive process of reform,"[128] with greater state articulation of educational requirements, new additional financial assistance to poorer schools, and significant performance and accountability standards. To be sure, "significant shortcomings" also remained in the plaintiff school districts but they did not constitute an "egregious" departure from the adequacy goal previously articulated by the court. Moreover, the plurality emphasized the primacy of the governor and legislature in "educational policy-making."[129]

The Ohio Supreme Court was, if anything, even more candid in describing its action as a compromise. After generally praising the latest legislative reform, the court indicated that certain modifications would be necessary in order for the law to pass constitutional muster,

and that adequacy would also depend on full funding, but held that it was willing to assume the "good faith" of the legislature and terminated the case.[130] The Arkansas court also praised the "progress" the legislature had made in standardizing the curriculum, increasing state oversight, and improving funding, and released jurisdiction of the case.[131] Within a year, however, both the Arkansas and Ohio supreme courts recanted, found that their legislatures had not sufficiently funded their reform measures, and issued new orders requiring further legislative action[132] – although the Ohio court thereafter changed its mind again, declared an end to further judicial involvement and announced that it was leaving the question of remedies to the legislature.[133]

On the other hand, some state courts have been relatively successful at forcing dramatic state-level legislative or administrative changes in the definition of education, financing of school districts, and monitoring of school changes without protracted legislative-judicial conflicts. Kentucky and Vermont, for example, seem to be examples of fairly radical court decisions followed by substantial compliance by the political branches. Moreover, it is not clear that adequacy decisions create more difficulties for political implementation and judicial enforcement than equality decisions. In the face of legislative noncompliance with its orders, the Alabama Supreme Court declared that judicial involvement in school finance reform was over, with plaintiffs directed "to seek further redress from the legislature not the courts."[134] Yet the judicial invalidation of the school finance system in Alabama was based as much on equality as on adequacy. More generally, "equity plus" concerns with governance, monitoring, performance measures, and accountability have spread to courts relying on state equal protection clauses, or on equal protection and education clauses together, rather than just equality alone.[135]

In practice, as in theory, then, there does not appear to be a significant difference between equity and adequacy approaches to school finance reform. As plaintiffs combine equal protection and education article claims, and as courts track developments in other jurisdictions, equity ideas have come to play an important role in adequacy thinking much as adequacy concerns about educational definition, governance, monitoring, and performance have come to affect courts initially concerned primarily with the equalization of tax bases or spending. So, too, even though adequacy claims and judicial adequacy holdings have become more ambitious – folding in, inter alia, accountability mandates and requirements that states justify education spending in terms of an expert-determined cost of an adequate education – so that it is hard to argue that adequacy is a safer, less interventionist theory for courts than equity, it is not clear that adequacy holdings have become less judicially enforceable, or, at least, that they are less judicially enforceable than rulings premised on the equity theory. To be sure, a significant number of courts have stressed justiciability concerns in declining to enter the thicket of court-ordered school finance reform. But once courts have entered the adequacy battle it does not seem that they are any less successful overall than courts that have endorsed the equity theory.

As a matter of legal theory, the general blurring of adequacy and equity concerns appears to have led those courts willing to engage with school finance reform to converge on a common set of goals. These include: greater state definition of educational requirements; state adoption of performance standards, state monitoring of and accountability for local educational outcomes; requirements that states cost-out the price of an adequate education and then assure provision of the necessary funds; partial equalization of financing, aimed more at bringing up the bottom than holding down the top; and a special concern with the needs of

educationally at-risk students or the poorest districts. The success of this judicial program is uncertain, and results vary considerably across the states. But that is mostly a matter of differences in state politics and in the judicial stomach for conflict with the political branches, and not the legal theory – equity or adequacy -- on which judicial intervention is based.

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[1] See, e.g., 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); Deborah A. Verstegen, The New Wave of School Finance Litigation, 76 Phi Delta Kappan 243, 244 (1994).

[2] 411 U.S. 1 (1973).

[3] Seattle School Dist No. 1 v. State, 585 P.2d 71, 102 (Wash. 1978) (state failed to fund sufficiently a basic program of education).

[4] Pauley v. Kelley, 255 S.E.2d 859 (WVa 1979) (state required to define and assure the funding of a "thorough and efficient system" of public education).

[5] Tennessee Small School Systems v McWherter, 851 S.W.2d 139, 156 (Tenn. 1993) (requiring state to provide "substantially equal educational opportunities").

[6] Campbell Co. School Dist. v. State, 907 P.2d 1238, 1276 (Wyo. 1995) (any interdistrict funding disparity that is not cost-based is "constitutionally infirm').

[7] Brigham v. State, 692 A.2d 384 (Vt. 1997) ("state must ensure substantial equality of educational opportunity throughout Vermont").

[8] Claremont School Dist. v. Governor, 703 A2d 1353, 1354-56 (N.H. 1997) (New Hampshire school finance system violates tax uniformity provision of state constitution because different districts are taxing at different rates)

[9] See Helena Elementary School Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989) (funding system fails to provide equal educational opportunity); Edgewood I.S.D. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989) (state financing system unconstitutional because it fails to provide that districts "have substantially equal access to similar revenues per pupil at similar levels of tax effort').

[10] 303 A.2d 273 (N.J. 1973)

[11] Id. at 283 (rejecting state equal protection clause as "unmanageable" and turning to the "thorough and efficient" clause).

[12] Id. at 294 (in interpreting the thorough and efficient clause "we do not doubt that an equal educational opportunity for children was precisely in mind").

[13] See, e.g., McDuffy v. Secretary of the Executive Office of Education, 615 N.E.2d 516, 519 n. 8 (Mass. 1993).

[14] See McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Coalition for Adequacy and Fairness in School Funding v. Chiles, 680 So.2d 400 (Fla. 1996).

[15] See, e.g., Roosevelt Elem. School Dist. No. 66 v. Bishop (interpreting "uniform"); Lake View School Distr. #25 v. Huckabee, 91 S.W.3d 472 (Ark. 2002) ("general, suitable, and efficient" requires both adequacy and equality); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139 (Tenn. 1993) ("maintenance and support" requires "substantially equal educational opportunities"); Campbell Co. School Dist. v. State, 907 P.2d 1238 (Wyo 1995) ("complete and uniform" and "thorough and efficient" provisions mandate equality).

[16] Mont. Const., Art. X, § 1.

[17] Coalition for Adequacy and Fairness in School Funding v. Chiles, 680 So.2d 400 (Fla. 1996).

[18] Committee for Education Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996).

[19] Skeen v. State 505 N.W.2d 299 (Minn. 1993).

[20] Bismarck Public School Dist No. 1 v. State, 511 N.W.2d 247 (N.D. 1994). In *Bismarck*, three out of the five members of the North Dakota Supreme Court determined that the state's school financing system violated the education article of the state constitution, but the North Dakota constitution requires that four votes on the court are necessary to invalidate a state law, so that despite winning a favorable majority opinion plaintiffs lost the case.

[21] Coalition for Equitable School Funding, Inc. v. State, 811 P.2d 116 (Ore 1991).

[22] Marrero v. Commonwealth, 739 A.2d 110 (Pa. 1999).

[23] City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995).

[24] Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994).

[25] Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989), Vincent v. Voight, 614 N.W.2d 388 (Wis. 2000).

[26] See, e.g., Ex parte James, 836 So.2d 813 (Ala. 2002) (terminating proceedings in Alabama school finance reform case); State ex rel State v. Lewis, 789 N.E.2d 195 (Ohio 2003) (issuing writ prohibiting further litigation in Ohio school finance reform case).

[27] As the Arkansas Supreme Court put it, "there is no doubt in our minds that there is a considerable overlap between the issue of whether a school funding system is inadequate and whether is it inequitable." Lake View v. Huckabee, supra, 91 S.W.3d at 496.

[28] See, e.g., Opinion of the Justices, 624 So.2d 107, 155 (Ala. 1993); Lake View, supra; Rose v. Council for Better Education, Inc., 790 S.W.2d 186, 198 (Ky. 1989); McDuffy, supra, 615 N.E.2d at 519; Helena, supra, 769 P.2d at 690; Abbott v. Burke, 495 A.2d 376, 390 (N.J. 1985) (both "thorough and efficient" and equal protection claims "turn on proof that plaintiffs

suffer educational inequities and that these inequities derive in significant part from the funding provisions" of state law).

[29] Helena, supra, 769 P.2d at 690.

[30] Edgewood Ind. School Dist. v. Meno, 917 S.W.2d 717, 732 (Tex. 1995).

[31] Professor Enrich has emphasized the pivotal role of competitiveness in adequacy, and how the focus on competitiveness embeds equality concerns in the adequacy theory. See Peter Enrich, Leaving Equality Behind: New Directions in School Finance Reform, 48 Vand. L. Rev. 101, 134 (1995).

[32] 790 S.W.2d 186 (Ky. 1989).

[33] Id. at 212 (emphasis supplied).

[34] Abbott v. Burke I, 495 A.2d at 390; Abbott v. Burke II, 575 A.2d 359, 372 (N.J. 1990).

[35] Claremont School Dist. v. Governor, 635 A.2d, 1375, 1376 (N.H. 1993).

[36] Id.

[37] Claremont School Dist. v. Governor, 703 A.2d 1353 (N.H. 1997).

[38] See Opinion of the Justices (School Finance), 712 A.2d 1080 (N.H. 1998); Claremont School Dist. v. Governor, 744 A.2d 1107 (N.H. 1999); Opinion of the Justices (Reformed Public School Financing System) 765 A.2d 673 (N.H.. 2000).

[39] Tax issues loomed large in the most recent Texas school finance decision, but from the opposite perspective. The Texas Supreme Court held that Texas is providing a constitutionally adequate education, but that state law effectively requires many school districts to tax at the statutory property tax ceiling, thus effectively converting the local property tax into a state tax in violation of the state constitution's prohibition of a state property tax. See Neeley v. West Orange-Cove Consol. Ind. Sch. Dist., 176 S.W.2d 746, 794-98 (Tx. 2005).

[40] 703 A.2d at 1359.

[41] Id. at 1360.

[42] Claremont School Dist. v. Governor, 794 A.2d 744 (N.H. 2002).

[43] Some of these concerns are reflected in the most recent New Hampshire judicial action, the March 2006 decision of the superior court holding unconstitutional the legislature's response to the state supreme court's mandate because the legislature failed to provide an accountability mechanism for assuring that underperforming schools come into compliance with state standards and failed to provide for a uniform state-wide property tax rate to fund education. See Londonderry School Dist. SAU #12 v. State, __ N.H. __, 2006 WL 563120 (N.H. Super. Mar. 3, 2006).

[44] 877 P.2d 806 (Ariz. 1994).

[45] Id. at 810 n.3.

[46] Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973).

[47] See, e.g., 877 P.2d 814, n.7 ("Satisfaction of the substantive education requirement does not necessarily satisfy the uniformity requirement, just as satisfaction of the uniformity requirement does not necessarily satisfy the substantive education requirement.").

[48] Id. at 814.

[49] Id. at 816.

[50] Id. at 815.

[51] In a later decision, a lower Arizona appellate court determined that inequality of funding alone was not enough to support a determination that the state's building renewal fund violates the "general and uniform" clause, holding that there could be no constitutional violation unless plaintiffs could show that a cutback in state aid had an impact on students' academic achievement. See Roosevelt Elem. School Dist. No. 66 v. State, 74 P.3d 258 (Ariz. Ct. App. 2003).

[52] Roosevelt Elem. School Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994).

[53] Idaho Schools for Equal Educational Opportunity v. Evans, 850 P.2d 724 (Idaho 1993)(dismissing equity theories based on equal protection and the term "uniform" in the state's "general, uniform, and thorough system" of education clause, but permitting an adequacy case to go forward based on violation of the "thorough" requirement).

[54] Montoy v. State, 102 P.3d 1160 (Kan. 2003).

[55] Robinson v. Cahill, 303 A.2d 273 (N.J. 1973).

[56] Compare R.E.F.I.T. v Cuomo, 86 N.Y.2d 279 (N.Y. 1995) with Campaign for Fiscal Equity v. State, 86 N.Y.2d 307 (N.Y. 1995).

[57] DeRolph v. State, 677 N.E.2d 733 (Ohio 1997) (upholding adequacy claim and distinguishing earlier *Walter* decision rejecting equity claim).

[58] See, e.g., Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Committee for Educ. Rights v. Edgar, 710 N.E.2d 798 (Ill. 1996); Hornbeck v. Somerset Co. Bd. of Educ., 458 A.2d 758 (Md. 1983); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Fair School Finance Council of Oklahoma, Inc. v. State, 746 P.2d 1135 (Ok. 1987); Olsen v. State, 554 P.2d 139 (Ore. 1976); Marrero v. Commonwealth, 739 A.2d 110 (Pa. 1999); City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995); Vincent v. Voight, 614 N.W.2d 388 (Wis. 2000).

[59] 411 U.S. at 37.

[60] Board of Education, Levittown Union Free School Dist. v Nyquist. 57 N.Y.2d 27 (1982).

[61] Id. at 47-48.

[62] Id. at 48.

[63] See Ga. Const., Art. VIII, Sec. 1, Para. 1.

[64] McDaniel v. Thomas, 285 S.E.2d 156, 165 (1981).

[65] Id.

[66] See Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Hornbeck v. Somerset Co. Bd. of Educ., 458 A.2d 758 (Md. 1983); Board of Ed. of City School Dist. of City of Cincinnati v. Walter, 390 N.E.2d 813, (Ohio 1979); Fair School Finance Council of Oklahoma, Inc. v. State, 746 P.2d 1135 (Ok. 1987); Danson v. Casey, 399 A.2d 360 (Pa. 1979).

[67] See School Admin. Dist. No. 1 v. Comm'r, Dep't of Educ., 659 A.2d 854, 856-57 (Me. 1995); Skeen v. State, 505 N.W.2d 299, 302, 312 (Minn. 1993); Gould v. Orr, 506 N.W.2d 349, 353 (Neb. 1993).

[68] Unified School Dist. No. 229 v. State (Kan. 1994).

[69] Vincent v. Voight, 614 N.W.2d 388, 402 n. 22 (Wis. 2000)

[70] Fair School Finance Council of Oklahoma, Inc. v. State, 746 P.2d 1135 (Ok. 1987).

[71] Idaho Schools for Equal Educational Opportunity v. Evans, 850 P.2d 724, 730-31 (Ida. 1993); Withers v. State, 891 P.2d 675 (Ore. App. 1995); Kukor v. Grover, 436 N.W.2d 568, 577 (Wis. 1989); Vincent v. Voight, 614 N.W.2d 388, 402 (Wis. 2000).

[72] See, e.g., Molly McUsic, The Use of Education Clauses in School Reform Litigation, 28 Harv. J.Legis. 307, 312-15 (1991). Similarly, some state courts may have been concerned that the equity argument cannot be limited to education but would have to be extended to other public services. Rooted as it is in state education articles, adequacy eliminates that concern. Id.

[73] See, e.g., Roosevelt Elem. School Dist. No. 66. v. Bishop, 877 P.2d 806, 815 (Ariz. 1994) (arguing that it is important to let some districts "go above and beyond the state financed system" otherwise "public education statewide might suffer" as "those who could might opt out of the system for private education" and thus reduce public support for education funding).

[74] 355 A.2d 129, 137 n, 4. (N.J. 1976).

[75] Id. at 139.

[76] DeRolph v. State, 677 N.E.2d 733, 742-44.

[77] Id. at 746.

[78] Id.

[79] Abbeville County School Dist. v. State, 515 S.E.2d 535 (S.C. 1999).

[80] McDuffy v. Secretary of the Executive Office of Education, 615 N.E.2d 516 (Mass. 1993).

[81] Montoy v. State, 62 P.3d 228 (Kan. 2003).

[82] Montoy v. Kansas, 112 P.3d 923, 937 (Kan. 2005).

[83] Horton v. Meskill, 486 A.2d 1099, 1107 (Conn. 1985).

[84] Id. at 1108.

[85] Edgewood I.S.D. v Kirby, 777 S.W.2d 391, 397 (Tex. 1989).

[86] Edgewood I.S.D. v Meno, 917 S.W.2d 717, 729-30 (Tex. 1995).

[87] West Orange-Cove Consolidated I.S.D. v. Alanis, 107 S.W.3d 558, 572 (Tex. 2003). In its most recent school finance decision, the Texas Supreme Court again held that funding disparities between the richest and poorest districts are constitutionally acceptable. Neeley v. West Orange-Cove Consolidated Ind. Sch. Dist., 176 S.W.2d 746, 790-93 (Tex. 2005).

[88] As the California court of appeal noted, "some of the state's most urban districts, with large concentrations of poor and minority students, are high-revenue districts" including San Francisco, Oakland, and Berkeley. Serrano v. Priest, 220 Cal. Rptr. 584, 619 (Cal. Ct. App. 2d 1986). The school finance reform adopted by the California legislature in the aftermath of Serrano (and Proposition 13) made these districts worse off financially than before. See id. at 618.

[89] See, e.g., Paul A. Minorini & Stephen D. Sugarman, Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm, in Helen F. Ladd, Rosemary Chalk, and Janet S. Hansen, eds., *Equity and Adequacy in Education Finance: Issues and Perspectives* (Washington D.C.: National Academy Press, 1999), p. 183.

[90] These are not the only arguments in the literature for the superiority of adequacy to equity as a theory of reform. Scholars have suggested that some state courts find it awkward to interpret their equal protection provisions differently than the United States Supreme Court has construed the federal equal protection clause. By avoiding the equity argument, adequacy avoids this problem. See, e.g., Molly McUsic, The Use of Education Clauses in School Reform Litigation, 28 Harv. J.Legis. 307, 312-15 (1991). Similarly, some state courts may have been concerned that the equity argument cannot be limited to education but would have to be extended to other public services. Rooted as it is in state education articles, adequacy eliminates that concern. Id.

[91] See, e.g., Robert Berne & Leanna Stiefel, Concepts of School Finance Equity: 1970 to the Present, in Ladd et al, *supra*, pp. 18-21.

[92] 575 A.2d 359 (N.J. 1990).

[93] Id. at 394.

[94] Id. at 400.

[95] Id. at 403.

[96] Id. at 408.

[97] Abbott v. Burke III, 643 A.2d 575, 580 (N.J. 1994).

[98] Abbott v. Burke IV, 693 A.2d 417, 432 (N.J. 1997).

[99] Abbott v. Burke V, 710 A.2d 450 (N.J. 1998).

[100] Hoke County Bd. of Educ. v State, 599 S.E.2d 365 (N.C. 2004).

[101] These included belonging to a low-income family, participating in free or reduced-cost lunch program, having parents with a low-level education, showing limited proficiency in

English, being a member of a racial or ethnic minority group, or living in a home headed by a single parent or guardian. Id, at 389 n. 16.

[102] Id. at 387.

[103] Id. at 393-95.

[104] 790 S.W.2d 186, 197.

[105] Id. at 198.

[106] See Opinion of the Justices, 624 So.2d 107 (Ala. 1993); Lake View School Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 488 (Ark. 2002).

[107] Minorini & Sugarman, supra, at 186.

[108] See, e.g., Melissa C. Carr & Susan H. Fuhrman, The Politics of School Finance in the 1990s in Ladd et al, *supra*, p. 146.

[109] Campbell Co. School Dist. v. State, 907 P.2d 1239, 1279 (Wyo. 1995).

[110] Columbia Falls Elem. School Dist. No. 6 v. State, 109 P.3d 257 (Mont. 2005).

[111] Robinson v. Cahill, 303 A.2d at 295-97; Pauley v. Kelley, 255 S.E.2d 859, 877 (W.Va. 1979).

[112] See Montoy v. State, 102 P.3d 1160 (Kan. 2005); Claremont Sch. Dist. v. Governor, 794 A.2d 744 (N.H. 2002); DeRolph v. State, 728 N.E.2d 993 (Ohio 2000); Edgewood Ind. Sch. Dist. v. Meno, 917 S.W.2d 717 (Tex. 1995).

[113] See, e.g., Lake View School Dist.No. 25 v. Huckabee, 2004 WL 1406270 (Ark. 2004); Columbia Falls Elem. Sch. Dist No. 6 v. State, 109 P.3d 257 (Mont. 2005); Tennessee Small School Systems, Inc. v McWherter. 91 S.W.2d 232 (Tenn. 2002); State v. Campbell Co. Sch. Dist., 19 P.3d 518 (Wyo. 2001).

[114] See, e.g., Lake View School Dist.No. 25 v. Huckabee, 2004 WL 1406270 (Ark. 2004); Montoy v. State, 102 P.3d 1160 (Kan. 2005); Columbia Falls Elem. Sch. Dist No. 6 v. State, 109 P.3d 257 (Mont. 2005); Campaign for Fiscal Equity v. State, 100 N.Y.2d 893 (2003); DeRolph v. State, 728 N.E.2d 993 (Ohio 2000); Tennessee Small School Systems, Inc. v

McWherter. 91 S.W.2d 232 (Tenn. 2002); State v. Campbell Co. Sch. Dist., 19 P.3d 518 (Wyo. 2001).

[115] See Lake View Sch. Dist. No. 25 v. Huckabee, __ S.W.3d __, 2005 WL 3436660 (Ark. 2005) (adopting special master's report and finding that public school funding system constitutionally inadequate because state legislature failed to undertake required study of the costs of an adequate education); Londonderry Sch. Dist. SAU #12 v. State, __ N.H. __, 2006 WL 563120 (N.H. Super. 2006) (holding New Hampshire education finance law unconstitutional for failure to define and determine the cost of a constitutionally adequate education). See also Campaign for Fiscal Equity, Inc. v State, ___ N.Y.S.2d ___, 2006 WL 724551 (N.Y., App. Div., 1st Dep't 2006) (reviewing and adopting, with modifications, report of referees concerning the cost of providing a constitutionaklly adequate education in New York City schools.)

[116] See McUsic, supra; Michael Heise, State Constitutions, School Finance Litigation, and the 'Third Wave': From Equity to Adequacy, 68 Temp. L. Rev. 1151 (1995)

[117] Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So.2d 400 (Fla. 1996).
[118] Committee for Educ. Rights v. Edgar, 710 N.E.2d 798 (Ill. 1996).
[119] Marrero v. Commonwealth, 739 A.2d 110 (Pa. 1999).
[120] City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995).
[121] Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994).

[122] Indeed, the Texas Supreme Court recently concluded that *progress* toward meeting state standards – even when actual achievement levels are low – is enough to satisfy the state's constitutional requirements. See Neeley v. West Orange-Cove Consol. Ind. Sch. Dist., 176 S.W.2d 746, 787-90 (2005).

[123] See Hull v. Albrecht, 950 P.2d 1141 (Ariz. 1997); Hull v. Albrecht, 960 P.2d 634 (Ariz. 1998).

[124] Montoy v. State, 62 P.3d 228 (Kan. 2003); Montoy v. State, 102 P.3d 1160 (Kan. 2005); Montoy v. Kansas, 112 P.3d 923 (Kan. 2005).

[125] Abbott v. Burke, 643 A.2d 575 (N.J. 1994); Abbott v. Burke, 693 A.2d 417 (N.J. 1997).

[126] DeRolph v. State, 728 N.E. 2d 993 (Ohio 2000); DeRolph v. State, 754 N.E.2d 1184 (Ohio 2001); De Rolph v. State, 780 N.E.2d 529 (Ohio 2002).

[127] Lake View School Dist. No. 25 v. Huckabee, __ S.W. 3d __, 2004 WL 1406270 (Ark. 2004); Hancock v. Commissioner of Education, 822 N.E.2d 1134 (Mass. 2004); DeRolph v.

Ohio, 754 N.E.2d 1184 (Ohio 2001). The Texas Supreme Court has also been relatively deferential in accepting the state's definition of a proper educational curriculum, state accreditation standards, and state accountability mechanisms. It has held that in reviewing education legislation to see if the state has met the state's constitutional requirements it will apply the extremely deferential "arbitrariness" standard, e.g., it will uphold the law unless its provisions are arbitrary, Neeley v. West Orange-Cove Consol. Ind. Sch. Dist., 176 S.W.2d 746, 783-85 (Tx. 2005), and it has concluded that given the improvements in the Texas schools, the state's education system cannot be called "arbitrary" even though many students fall short of state standards. *Id. at 789-90.*

[128] 822 N.E.2d at 1140.

[129] Id. at 1152-53.

[130] DeRolph, 754 N.E,2d at 1201.

[131] Lake View v. Huckabee, 2004 WL 1406270.

[132] Lake View v. Huckabee, 2005 WL 1041144 (Ark. 2005), Lake View v. Huckabee, 2005 WL 3436660 (Ark. 2005); DeRolph v. State, 780 N.E.2d 529 (Ohio 2002).

[133] State ex rel State v. Lewis, 780 N.E.2d 529 (Ohio 2003).

[134] Ex parte James, 836 So.2d 813 (Ala. 2002).

[135] See, e.g., Tennessee Small School Systems, Inc. v. McWherter, 91 S.W.3d 232 (Tenn. 2002); State v. Campbell Co. Sch. Dist., 19 P.3d 518 (Wyo. 2001).