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EDUCATION ADEQUACY, DEMOCRACY AND THE COURTS

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The United States Supreme Court's 1973 holding in *San Antonio Independent School District v. Rodriguez*² that education was not a fundamental interest under the federal constitution has led to an unprecedented era of constitutional activity by the state courts in rectifying inequities in state education finance systems. Over the past three decades, litigations have been brought in 44 out of the 50 states. This chapter reviews the history of these litigations and focuses on the significance of the emergence in recent years of a core constitutional concept of students' right to the opportunity for an adequate education.

The emphasis on adequacy has involved the courts in a significant dialogue with state legislatures and state education departments. Emerging from this dialogue are reinvigorated claims for increased resources for students in underfunded school districts as well as a new focus on the purposes of education and the states' obligation to ensure that students actually develop the cognitive skills they need to succeed in the workplace and to be effective citizens in the modern world.

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² 411 U.S. 1 (1973).

The chapter begins with a brief retrospective review of *Rodriguez*. It then provides an overview of the state education finance cases. Although plaintiffs prevailed in the early litigations, by the early 80s, defendants were winning most of these cases, primarily because the courts had great difficulty in devising solutions for the problems of funding inequities. Beginning in 1989, however, the pendulum again shifted: plaintiffs have won about two-thirds of the recent cases, mainly because the focus has shifted from equal protection claims to provisions of state constitutions that guarantee some substantive level of adequate education to all students. Instead of dealing with equal funding concepts and complex property tax reforms, the adequacy approach allows courts to focus on the concrete issues of what resources are needed to provide the opportunity for an adequate education to all students and the extent to which those resources are actually being provided.

The third section analyzes the new state court adequacy litigations. It considers the link between the standards-based reform movement which is now being implemented in virtually all of the states and the courts' recent emphasis on adequacy. It describes how standards-based reforms have provided the courts with judicially-manageable tools which allow them to devise effective remedial orders in these cases. It also discusses a core constitutional definition of adequacy which has emerged from these cases in recent years. Forged through an implicit standards dialogue with legislatures and state education departments, this core constitutional concept: defines the purpose of an adequate education in terms of preparation for civic participation and for the competitive job market; emphasizes the importance of relating constitutional requirements to contemporary needs; is pegged at a more than minimal level, and guarantees educational opportunities rather than specific educational outcomes.

The final section considers the implications of this emerging definition of an adequate education for the education system ---- and for our democratic society. Describing testimony and evidence

submitted in the recently-completed trial in the New York adequacy litigation, it demonstrates the critical link between mastery of the skills required under standards-based reforms and the constitutional requirements for an adequate education. Consideration of the specific skills students need to be effective voters and jurors and economic competitors can issue that was finessed rather than faced in years past demonstrates that the standards-based reform movement cannot be considered merely aspirational. Actual fulfillment of the stated goals of standards-based reform (the development of high level cognitive skills in virtually *all* American high school students) may, in fact, be a *sine qua non* for the survival of American democracy in the twenty-first century.

I - *RODRIGUEZ* IN RETROSPECT

The significance of *Rodriguez* can only be understood in the context of the implementation of the U.S. Supreme Court's earlier landmark civil rights ruling, *Brown v. Board of Education*.³ Emphasizing that today, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity for an education,⁴ the Court held in *Brown* that "[s]eparate educational facilities are inherently unequal."⁵ The Supreme Court's dramatic declaration of the unconstitutionality of school segregation, was, however, followed by a decade of minuscule progress in actually integrating Southern schools. During the 1963-64 school year, barely 1% of black children attended

³ 347 U.S. 483 (1954).

⁴ *Id.* at 493.

⁵ *Id.* at 495.

school with white children in the 11 Southern states.⁶ It was not until the late 60s, after the Supreme Court announced in *Green v. County School Board*⁷ that Southern school boards must develop desegregation plans that promise *realistically to work now*,⁸ that substantial desegregation began to take place. The *Green* ruling, together with Congress' passage of the 1964 Civil Rights Act which held out a credible threat of a loss of federal funds, finally led to a substantial dismantling in many parts of the South of *freedom of choice* plans and other devices that were intentionally created by state and local officials to limit progress towards desegregation. By 1972 over 90% of black students in the deep South and over 75% in the border states attended school with at least some whites.⁹

⁶ See *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 854 (5th Cir. 1966).

⁷ 391 U.S. 430 (1968).

⁸ *Id.* at 439 (emphasis added).

⁹ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 50 (1991).

Two of the major Supreme Court decisions of the early 70s, however, precluded the possibility of large numbers of black and other minority students attending integrated schools in the North and the West. In *Keyes v. School District No.1*,¹⁰ the Court held that *Brown*'s mandate did not require desegregation of school systems that were segregated *de facto* because of housing patterns rather than intentional state actions. Then, in *Milliken v. Bradley*,¹¹ the Court held that predominantly white suburbs would not be required to participate in metropolitan area desegregation schemes, in the absence of evidence that these districts had, in the past, intentionally discriminated against minority students. Taken together, these rulings meant that the vast majority of black and other minority students in the United States would continue to attend segregated schools with inadequate educational resources. Thus, at the present time, more than two-thirds of the black and Latino students in the United States attend segregated schools in which most students are also poor.¹²

Soon after the glow began to fade from *Brown*'s initial luster, educational reformers saw the need to devise political and legal methods for ensuring the provision of adequate resources to the large numbers of poor and minority students who would continue to attend segregated schools. Funding for remedial education programs became a major component of desegregation decrees, especially in Northern and Western cities where metropolitan area remedies could no longer be pursued or where opposition to bussing was intense. Following the Supreme Court's reversal of its metropolitan area desegregation remedy, for example, the U.S. District Court in Michigan approved a

¹⁰ 413 U.S. 189 (1973).

¹¹ 418 U.S. 717 (1974).

¹²Jay P. Heubert, *Six Law-Driven School Reforms: Developments, Lessons and Prospects*, in LAW & SCHOOL REFORM 1, 2 (Jay P. Heubert ed., 1999). [hereinafter, LAW & SCHOOL REFORM]

A Detroit only remedial plan, which involved about \$12 million worth of compensatory education programs, guidance and counseling programs, and in-service training programs for teachers.¹³

¹³ The Supreme Court upheld this approach in *Milliken v. Bradley*, 433 U.S. 267, 287 (1977) (*Milliken II*) as being aptly tailored to remedy the consequences of the constitutional violation. The Court's optimistic expectations have not, however, been realized. A recent report, noting the continuing pattern of low achievement of Detroit's students, found that although the *Milliken* programs may have some positive effect, . . . the programs simply did not prove to be the systemic remedy needed by urban Detroit. GARY ORFIELD, ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 155 (1996).

Reformers also noted early on that the core problem behind the lack of equal education opportunity for many poor and minority students was the inequitable systems of education finance which existed in almost every state. Rooted in the traditional pattern of local control of schooling in America, most state systems required much of the funding for public schools to be obtained from local property taxes, a method which inherently disadvantaged students who attended schools in areas that had low property wealth. Responding to this problem, several legal scholars developed constitutional theories which sought to equalize the funding capacity of all local school districts.¹⁴ These theories were tested in a number of state and federal litigations beginning in the late 1960s.

¹⁴ See JOHN E. COONS ET AL., PRIVATE WEALTH AND PUBLIC EDUCATION (1970); John E. Coons et al., *Educational Opportunity; A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305 (1969); ARTHUR E. WISE, RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY (1972); also Paul A. Minorini and Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact and Future*, 34, 36-37 in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES. (Helen F. Ladd et al. eds., 1999). [hereafter, EDUCATION FINANCE]

One of these cases, *Rodriguez v. San Antonio Ind~~t~~. Sch. Dist.*, which challenged the extreme inequities created by Texas' educational finance system, reached the U.S. Supreme Court in 1973. It seemed at the time an ideal vehicle for establishing a new legal doctrine to make good on *Brown*'s promise of equal educational opportunity. Given the strong emphasis the Supreme Court had placed on the preeminent role of education in modern society in *Brown*,¹⁵ and the prior precedent of the legislative reapportionment cases¹⁶ which had invalidated differential opportunities for citizens of different political subdivisions of a state, there was much expectation among civil rights advocates that the high court would respond favorably to a case calling for reform of inequitable school funding formulae.¹⁷

Rodriguez was initiated by parents whose children attended elementary and secondary schools in the Edgewood Independent School District, one of seven public school districts in the metropolitan

¹⁵ 347 U.S. at 483, 493 (1957). "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

¹⁶ See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

¹⁷ As one commentator has noted:

"Given the Court's strong intimations in the desegregation cases of the constitutional significance of the right to education, and given the additional presence in the education context of the wealth dimension, which was generally absent from the apportionment cases, extension of the [legislative reapportionment] equal protection argument to the field of education finance appeared virtually unstoppable."

Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 120-121 (1995).

San Antonio area. Edgewood's students were approximately 90% Mexican-American and approximately 6% African-American. The District's average assessed property value per student was so low that even with a relatively high local tax rate and supplemental state and federal state education aid, the District had only \$356 per student to support educational programs. By way of contrast, neighboring Alamo Heights, which was a predominantly Anglo school district, had such high property wealth that it could tax itself at a rate 20% below that of its poorer neighbor and still have nearly \$600 available to spend on each of its students. Even when the largely minority citizens in the Edgewood District taxed themselves at a substantially higher rate, they were able to provide their students only about half the resources that were available to the more advantaged students in Alamo Heights.

Although the 3-judge District court had held that Texas's education finance system violated the federal equal protection clause,¹⁸ the United States Supreme Court reversed.¹⁹ Closely parsing each of the equal protection arguments put forward by the plaintiffs, the Court held that neither the poverty of the plaintiffs nor the importance of education would justify applying strict scrutiny to its review of the Texas education finance system. Justice Powell's decision for the majority first dealt with the wealth discrimination issue by questioning whether in Texas or anywhere else poor persons necessarily lived in the poorest school districts. He also noted that the Supreme Court's prior wealth discrimination cases had dealt with situations involving an absolute deprivation of the right at issue, rather than the type of relative deprivation at issue here.²⁰ Next, although not denying the importance of education

¹⁸ *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F.Supp. 280 (W.D. Tex. 1971).

¹⁹ 411 U.S. 1 (1973).

²⁰ *Id.* at 19. The main precedents, *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Williams v.*

in modern society, the Court emphasized the absence of any specific reference to education in the federal constitution and rejected the argument that education is essential to the effective exercise of First Amendment freedoms like the right to vote. Justice Powell set forth a “slippery slope” argument, noting that if some level of education were to be considered a *sine qua non* for exercise for political rights under the federal constitution, similar arguments could be made that “the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process.”²¹

Illinois, 399 U.S. 235 (1970), dealt with poor criminal defendants’ access to transcripts for preparing an appeal or their incarceration because of inability to pay a fine.

²¹ 411 U.S. at 37. This concern with the expansive precedential impact that a favorable ruling for plaintiffs in *Rodriguez* might have on other equal protection areas indicated that the Court was using this case to signal the end of the dynamic expansion of equal protection doctrine of the Warren Court era.

Having denied plaintiffs calls for strict scrutiny based on the poverty of the plaintiffs and the fundamentality of education, the Court held that Texas funding scheme was rationally related to the legitimate governmental interest of achieving a large measure of participation in and control of each district's schools at the local level.²² Rejecting the dissent's argument that lack of funding precluded poor districts from exercising any meaningful local control, the majority held that some inequality in the ability of local residents to make educational choices affecting their children is not alone a sufficient basis for striking down the entire system.²³

Justice Powell's decision was supported by only a 5-4 majority. Justice Marshall was the most vociferous of the four dissenters. He rebuked the majority for setting aside the District Court's finding that poor and minority group members tend to live in property poor districts on the basis of a law review note of doubtful methodological validity.²⁴ Justice Marshall also argued that the close nexus between education and our established constitutional values with respect to freedom of speech and participation in the political process,²⁵ compelled the Court to recognize that education and participation in the political process constitute a fundamental constitutional interest.

Justice Powell, writing for the majority, accepted this constitutional connection between education and political participation:

²² *Id.* at 49.

²³ *Id.* at 51.

²⁴ *Id.* at 95 n.56. The Yale Law Journal Note at issue discussed the demographics of urban districts in Connecticut. For a scathing critique of the methodology of this Note, see W. Norton Grubb & Stephen Michelson, *Public School Finance in a Post-Serrano World*, 8 HARV. C.R.-C.L. L. REV. 550, 554-559 (1973).

²⁵ 411 U.S. at 115 n.74. Justice Marshall also stated that the majority's insistence that the prior precedents dealing with discrimination against the poor dealt with absolute and not relative deprivations ignored the powerful precedent of the legislative reapportionment cases which involved relative, rather than absolute, deprivations of political representation. *Id.* at 119.

Exercise of the franchise, it is contended, cannot be divorced from the educational foundation of the voter. The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.

We need not dispute any of these propositions.²⁶

Justice Powell ruled, however, that the Court did not have to fully consider the implications of this constitutional connection in the present case because:

The State repeatedly asserted in its briefs . . . that it now assures A every child in every school district an adequate education.@ No proof was offered at trial persuasively discrediting or refuting the State=s assertion.

. . . .

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditure in Texas provide an education that falls short...[No] charge fairly could be made [in the present case] that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.²⁷

²⁶ *Id.* at 35-36 (citations omitted).

²⁷ *Id.* at 24, 36-37. Justice Powell specifically noted that under Texas= minimum Foundation program, AFunds are distributed to assure that there will be one teacher -- compensated at the state-supported minimum salary -- for every 25 students. Each school district=s other supportive personnel are provided for: one principal for every 30 teachers; one xspecial service=teacher -- librarian, nurse, doctor etc. -- for every 20 teachers; superintendents, vocational instructors, counselors and educators for exceptional children are also provided. Additional funds are earmarked for current operating expenses, for student transportation, and for free textbooks.@*Id.* at 45 (citations omitted). He also stated that the system assures Aa basic education for every child in the State.@*Id.* at 49.

Thus, the majority decision implicitly left open the possibility of reconsidering this issue and taking some remedial action if, in a future case, it were to be established that students were being deprived of the type of basic minimum education the Court assumed every Texas child was receiving. In fact, the Court went out of its way to reiterate this point in a later case when it stated that it still had not definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.²⁸

Despite its denial of relief to the plaintiffs in *Rodriguez*, the majority also noted the apparent need for reform of an education finance system that may well have relied too long and too heavily on the local property tax, and it went out of its way to state that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo.²⁹ The Court clearly hoped that both scholars and the legislatures in the various states would come up with ultimate solutions³⁰ to these complex problems.

Justice Powell's evident sympathy for the plaintiffs' plight and the majority's implicit recognition that *Brown*'s vision of equal educational opportunity could not be realized without fundamental reform of the educational funding system raise the question of why the Court did not

²⁸ *Papasan v. Allain*, 478 U.S. 265, 285 (1986); *See also* *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 467 n.1 (1988) (Marshall, J, dissenting, stating that whether a denial of a minimally adequate education would violate a fundamental right remains open today.) Note also that in *Plyler v. Doe*, 457 U.S. 202 (1982), the Court applied an intermediate level of scrutiny to an equal protection challenge to Texas' denial of access to education for children of undocumented aliens because of the importance of education in maintaining our basic institutions. *Id.* at 221. In that case, none of the justifications the state offered for its policy were deemed to constitute a substantial goal for the complete denial of education for these children and Texas' plan was, therefore, held invalid.

²⁹ 411 U.S. at 58.

³⁰ *Id.* at 58-59.

remand the case for a trial to determine whether Texas was, in fact, providing a minimally adequate education to the plaintiff children under the challenged funding scheme. The Court's quick acceptance of the state's passing reference to the adequacy of the current system without any proof being presented on this critical issue leads one to speculate that other implicit concerns may have led one or more of the Justices who sided with the majority to conclude that despite the gravity of plaintiffs' claims, fiscal equity reform was not a feasible reform route for the court to pursue at that time.

Justice Powell, in fact, seemed to allude to such underlying concerns when he stated that upholding the lower court's decision for the plaintiffs would lead to "an unparalleled upheaval in public education" and that there was no way of predicting "the consequences of massive change in the financing and control of public education."³¹ He and the other members of the Court majority were apparently deeply concerned about the dearth of clear solutions and the lack of judicially manageable standards for navigating this rough policy terrain:

"This case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgment made at the state and local levels On even the most basic questions in this area the scholars and educational experts are divided. . . . Equally unsettled [is the] controversy as to the proper goals of the system of public education. . . . In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions."³²

³¹ *Id.* at 56.

³² 411 U.S. at 42-43. *See generally* Betsy Levin, *The Court's Congress and Educational Adequacy; The Equal Protection Predicament*, 39 MD. L. REV. 187, 190 (1979) ("The Supreme Court's reluctance to find that education is a fundamental right entitled to special protection was at least in part due to the Court's fear that there are no judicially manageable standards for determining what amount of education is constitutionally guaranteed."); Deborah A. Verstegen & Terry Whitney, *From Courthouses to Schoolhouses: Emerging Judicial Theories of Adequacy and Equity*, in 11 EDUC. POL'Y, 330, 331 (1991) ("The first wave of court challenges was largely

unsuccessful because of the lack of a justiciable standard and culminated with [Rodriguez]).
411 U.S. at 89.

Justice Marshall's dissent in *Rodriguez* also noted the significance of the lack of judicially manageable standards, but he felt that it was the defendants', rather than the plaintiffs', burden to propose such standards:

Neither the majority nor appellants inform us how judicially manageable standards are to be derived for determining how much education is enough to excuse constitutional discrimination. One would think that the majority would heed its own fervent affirmation of judicial self-restraint before undertaking the complex task of determining at large what level of education is constitutionally sufficient.

411 U.S. at 89.

The Court's awareness of the difficulties of formulating judicially manageable standards in this area did not, in fact, originate with *Rodriguez*. Four years earlier, it had reviewed a fiscal equity litigation involving disadvantaged urban students in *McInnis v. Shapiro*.³³ Plaintiffs in that case had argued that the State's education finance system, based on a minimum foundation level of \$400 per student, was inadequate to meet their educational needs. They argued that there was a federal constitutional right to a financing system which apportions public funds according to the educational needs of the students³⁴ The lower Court dismissed their complaint, holding that the controversy was non-justiciable because there are no discoverable and manageable standards by which a court can determine when the Constitution is satisfied and when it is violated.³⁵

³³ 293 F. Supp. 327 (N.D. Ill. 1968).

³⁴ *Id.* at 331.

³⁵ *Id.* at 335.

The *McInnis* plaintiffs seemed unable to help the court out of this dilemma. They suggested two alternative remedies: either that all students receive the same dollar appropriation or that the State, in effect, eliminate all variations in local property values while allowing districts to establish their own tax rates.³⁶ As the court noted, however, neither one of these remedies would respond to Plaintiffs' own claim that educational funding should be directly related to student needs. The U.S. Supreme Court affirmed this holding, without opinion.³⁷ *McInnis*'s strong emphasis on the lack of discoverable and manageable standards³⁸ no doubt formed an important backdrop for the later Supreme Court decision in *Rodriguez*.

Legal reformers in subsequent cases sought to meet this difficulty. Plaintiffs in *Serrano v. Priest*³⁸ adopted a fiscal neutrality³⁹ approach developed by Professor John Coons and his colleagues at the Berkeley Law School.³⁹ Avoiding entirely the difficulties involved in responding to students' differing needs, this principle put forth a simple contention: that the level of resources available to students in each school district should not be a function of wealth, other than the wealth of the state as a whole. In other words, the fiscal neutrality principle holds that the state has a constitutional obligation to equalize the value of the taxable wealth in each district, so that equal tax efforts will yield equal resources.

³⁶ *Id.* at 331-332.

³⁷ *McInnis v. Ogilvie*, 394 U.S. 322 (1969). *See also* *Burruss v. Wilkerson*, 310 F.Supp. 572 (W.D. Va. 1969), *aff'd per curiam*, 397 U.S. 44 (1970).

³⁸ 487 P.2d 1241 (Cal. 1971).

³⁹ *See* n.14 *supra*.

In *Serrano*, the California Supreme Court ruled in plaintiffs' favor and adopted the fiscal neutrality principle as a judicially manageable standard that avoided the nebulous concept of educational needs raised by *McInnis*.⁴⁰ Although the fiscal neutrality principle provided courts a clear benchmark for determining whether disparities in available wealth have been eliminated, it finessed the critical issue of educational need. Since the fiscal neutrality approach allowed local districts to retain broad discretion to set their own tax rates, this principle in no way guaranteed that districts would, in fact, set sufficiently high tax rates or utilize their resources in a manner that would assure that all students were actually provided an opportunity for an adequate education. In other words, the fiscal neutrality principle provided a judicially manageable standard only because it avoided dealing with the complexities at the core of the issue -- how to assure an adequate level of education for all students and especially for those with distinctive educational needs.

Although the fiscal neutrality principle was not accepted as a constitutional doctrine by the Supreme Court in its *Rodriguez* ruling,⁴¹ a number of state courts, following the *Serrano* precedent, did issue rulings which invalidated their state education finance systems on these grounds in the years following *Rodriguez*. By the mid-80s, however, most of the state supreme courts which faced this problem tended to rule in defendants' favor, often citing *Rodriguez* as the prime precedent. Beginning in 1989, however, the pendulum swung back in plaintiffs' favor, in large part, it seems, because the problems of judicially manageable standards, first raised in *McInnis* and *Rodriguez*, began to be overcome by new legal and educational developments.

⁴⁰ 487 P.2d at 1265.

⁴¹ The 3-judge District Court in *Rodriguez* had specifically held for plaintiffs on the basis of the fiscal neutrality principle, distinguishing *McInnis* on this ground. 337 F.Supp. 280, 284 (W.D. Tex. 1981).

II - CONSTITUTIONAL INITIATIVES IN THE STATE COURTS

A - The Equity Decisions

Since most state courts have lacked a tradition of extensive constitutional adjudication, the state courts were long shots for plaintiffs challenging discrimination in school finance systems.⁴² Nevertheless, armed with the California Supreme Court's favorable initial ruling in *Serrano* -- and seeing a fertile legal argument in the U.S. Supreme Court's distinction between the role of education in federal and state constitutions -- legal reformers in the mid 1970s initiated challenges to state education finance systems in a number of state courts. Several of the major rulings in these initial cases found for plaintiffs, inspiring a plethora of follow-up litigations, and in the years since *Rodriguez*, constitutional challenges to state education finance systems have been launched in 44 of the 50 states. Thus, over the past twenty-five years, the development of constitutional doctrine concerning fiscal equity in education -- and the quest for judicially manageable standards -- have become matters of state rather than federal constitutional law.

⁴² David C. Long, *Rodriguez: The State Courts' Response*, 64 PHI DELTA KAPPAN 481, 482 (1983).

Most of the state courts which initially found for plaintiffs in the years following *Rodriguez* accepted the basic equal protection arguments that had been rejected by the U.S. Supreme Court. Thus the California Supreme Court, reconsidering its initial *Serrano* ruling in the wake of *Rodriguez*, unequivocally held that even if education is not a fundamental right under the federal constitution, it clearly was so under the California Equal Protection Clause.⁴³ The Connecticut⁴⁴ and the Wyoming Supreme Courts⁴⁵ also found that education was a fundamental interest under their state Equal Protection Clauses. The Arkansas Supreme Court adopted the same *rational relationship* equal protection standard as the U.S. Supreme Court, but, in contrast to the federal High Court, it determined that the State's reliance on local property taxes had *no* rational bearing on the educational needs of the districts.⁴⁶

The orders issued by these courts tended to direct the state legislatures to eliminate the inequities of the old system, but provided little specific guidance on precisely how they should do so. Following the fiscal neutrality principle, some state legislatures adopted district power equalizing plans (*DPE*)⁴⁷ which guaranteed each local district a specific amount of revenues for a given local tax rate, sometimes by *recapturing* the extra revenues generated by property- rich districts and redistributing

⁴³ *Serrano v. Priest*, (ASerrano II) 557 P.2d 929, 949-952 (Cal. 1976).

⁴⁴ *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977).

⁴⁵ *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980).

⁴⁶ *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983).

⁴⁷ Under a DPE system, every school district which imposed a particular tax rate was guaranteed a particular amount of revenue per child. If a district's actual tax rules yielded an amount greater than the established per student expenditure level, the difference would be forfeited to the state; if the actual tax receipts were less, the state would make up the difference.

them to property- poor districts. District power equalizing soon proved problematic, however, because:

A... the variability of local tax rates proved troublesome from several different perspectives. For example, some districts raised spending very little, taking almost all of the aid in the form of local tax relief. At the other extreme, some districts were hyper-stimulated because they received large subsidies from the state for each dollar of local educational taxes.⁴⁸

Moreover, recapture procedures involved in DPE schemes raised stiff opposition from wealthy districts, causing substantial legislative resistance to remedies in fiscal equity cases.⁴⁹

Difficulties with district power equalizing led some courts to focus on reducing disparities in educational expenditures. Thus, in the second round of the *Serrano* litigation, the trial judge held that wealth-related disparities among school districts (apart from categorical special needs programs), must be reduced to insignificant differences,⁵⁰ which he defined as amounts considerably less than \$100 dollars per pupil.⁵⁰ Unfortunately, this equalization mandate, combined with a constitutional cap on increases in local property taxes known as Proposition 13 which had been adopted by California voters at the time, resulted in a dramatic leveling down of educational expenditures: whereas California

⁴⁸ 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, 729 (1992).

⁴⁹ *Id.* at 731, noting that DPE has proven to be the single greatest practical problem with judicial decrees of fiscal neutrality...[w]ealthier districts have proven the most determined foes of fiscal neutrality in constitutional litigation. Much of the delay and uncertainty in reaching stable legislative solutions has revolved around rich districts.

⁵⁰ *Serrano v. Priest*, 557 P.2d at 940 fn 21.

had ranked 5th in the nation in per pupil spending in 1964-65, by 1994-95 it had fallen to 42nd.⁵¹

⁵¹ Mark Schaur and Steve Durbin, *Protecting School Funding*, SACRAMENTO BEE, June 28, 1993 at B14. William A. Fischel argued in *Did Serrano Cause Proposition 13?* 42 NAT'L TAX J. 465 (1989), that Serrano removed any incentive for residents in affluent districts to oppose Proposition 13. Fischel has recently broadened his thesis to argue more generally that court orders which increase the level of education funding dampen voter support for public education. William A. Fischel, *How Judges are Making Public Schools Worse*, CITY JOURNAL 30 (Summer, 1998). Professor Briffault rejects this contention, stating that the significance of local control lies in opportunities for accountability and participation; he also argues that an over-emphasis on local funding for education distorts fiscal support for education as school districts seek to minimize tax rates in order to attract or keep wealthy property owners. Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773 (1992).

In short, the call for equality through the fiscal neutrality principle had a powerful initial appeal, but in practice the quest for fiscal equality has proved elusive. Although judicial intervention has apparently narrowed the funding disparities somewhat among school districts,⁵² the core issues raised in *Rodriguez B* determining an adequate level of education and ensuring that all students have a fair opportunity to achieve it *B* were not satisfactorily addressed by these fiscal equity concepts. As Peter Enrich concluded:

Equalizing tax capacity does not by itself equalize education. The educationally relevant disparities not only reflect the tax base inequalities, but local political and administrative choices as well, not to mention the impact of preexisting differences in the students and their milieus.⁵³

⁵² See, e.g., William N. Evans et al., *The Impact of Court-Mandated Finance Reform, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES*. (Helen F. Ladd et al. eds., 1999) (study of 10,000 school districts from 1972-1992 finding that court-ordered reform levels up disparities and increases overall spending on education); Alan G. Hickrod et al., *The Effect of Constitutional Litigation on Educational Finance; A Preliminary Analysis*. 18 J. EDUC. FIN. 180 (1992) (finding *inter alia* reduced disparities in states where litigation has occurred, regardless of whether plaintiffs have prevailed); Bradley W. Joondeph, *The Good, The Bad and The Ugly; An Empirical Analysis of Litigation Prompted School Finance Reform*. 35 SANTA CLARA L. REV. 763 (1995) (Study of six school districts finding narrowing of disparities in education expenditures, but lowering of rate of overall increase in expenditures for education); cf. Michael Heise, *State Constitutional Litigation, Educational Finance and Legal Impact*, 63 U. CIN. L. REV. 1735, 1752 (1995) (criticizing Hickrod methodology).

⁵³ Enrich, *Leaving Equality Behind*, *supra* note 17 at 147. (Citations omitted). Molly McUsic also points out that states which equalize educational spending through greater state assumption of funding responsibility tend to spend less than the national average per student. Molly S. McUsic, *The Law's Role in the 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 Heubert ed., 1999).

The difficulties of actually achieving equal educational opportunity through the fiscal neutrality principle, as well as political resistance to judicial attempts to enforce court orders in the initial fiscal equity cases, seem to have dissuaded other state courts from venturing down this path. Despite an initial flurry of pro-plaintiff decisions in the mid-1970's, by the mid-1980's, the pendulum had decisively swung the other way: plaintiffs won only two decisions in the early 80s, and, as of 1988, 15 years after *Rodriguez*, 15 of the State Supreme Courts had denied any relief to the plaintiffs -- essentially for reasons similar to those articulated by the U.S. Supreme Court in *Rodriguez* -- compared to the seven states in which plaintiffs had prevailed.⁵⁴

B. The Adequacy Decisions

⁵⁴ The States in which defendants prevailed were: Arizona (*Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973)); Illinois (*Blase v. State*, 302 N.E.2d 46 (Ill. 1973)), Michigan (*Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973)); Montana (*Woodahl v. Straub*, 520 P.2d 776 (Mont. 1974)); Idaho (*Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975)); Oregon (*Olsen v. State*, 554 P.2d 139 (Or. 1976)); Pennsylvania (*Danson v. Casey*, 399 A.2d 360 (Pa. 1979)); Ohio (*Board of Educ. (Cincinnati) v. Walter*, 390 N.E.2d 813 (Ohio 1979)); Georgia (*McDaniel v. Thomas*, 285 S.E.2d 156, 167 (Ga. 1981)); New York (*Board of Educ. (Levittown Union Free Sch. Dist.) v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982)); Colorado (*Lujan v. Board of Educ.*, 649 P.2d 1005 (Colo. 1982)); Maryland (*Hornbeck v. Board of Educ.*, 458 A.2d 758 (Md. 1983)); Oklahoma (*Fair Sch. Finance Council of Okla., Inc. v. State*, 746 P.2d 1135 (Okla. 1987)); North Carolina (*Britt v. North Carolina State Bd. of Educ.*, 357 S.E.2d 432, *aff=d mem.*, 361 S.E.2d 71 (N.C. 1987)) and South Carolina (*Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988)). Plaintiff victories occurred during that period in New Jersey (*Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973)); California (*Serrano v. Priest*, 557 P.2d 929 (Cal. 1977)); Connecticut (*Horton v. Meskill*, 376 A.2d 359 (Conn. 1977)); Washington (*Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978)); West Virginia (*Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979)); Wyoming (*Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980)); and Arkansas (*Dupree v. Alma Sch. Dist. No 30*, 651 S.W.2d 90 (Ark. 1983)).

In light of the U.S. Supreme Court's rejection of plaintiffs' claims in *Rodriguez*, and the difficulties experienced by the state courts which issued remedial decrees in the early years, it is remarkable that advocates and state court judges continued to seek new ways to assure fair funding and meaningful educational opportunities for poor and minority students. Even more extraordinary is the fact that in the last decade there has been a strong reversal in the outcomes of state court litigations: plaintiffs have, in fact, prevailed in almost two-thirds (18 of 28) of the major decisions of the state highest courts since 1989.⁵⁵

⁵⁵ Specifically, plaintiffs have prevailed in major decisions of the highest state courts or final trial court actions in the following 18 states: Kentucky (*Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989)); Montana (*Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989)); Texas (*Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989)); Alabama (*Harper v. Hunt*, Appendix to the Opinion of the Justices, 624 So.2d 107 (Ala. 1993) (unappealed trial court decision)); Idaho (*Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724 (Idaho, 1993); *Idaho Sch. for Equal Educ. Opportunity*, 976 P.2d 913 (Idaho, 1998)); Massachusetts (*McDuffy v. Secretary*, 615 N.E.2d 516 (Mass. 1993)); Tennessee (*Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993)); Arizona (*Roosevelt Elementary Sch. Dist. v. Bishop*, 877 P.2d 806 (Ariz. 1994)); Kansas (*Mock v. Kansas*, No.91-CV-1009 (Shawnee Co. Dist. Ct. 1991) (Preliminary trial court decision, leading to settlement)); Missouri (*Committee for Educ. Equal. v. State*, 878 S.W.2d 446 (Mo. 1994) (final trial court decision; appeal dismissed on procedural grounds)); New York (*Campaign for Fiscal Equity, Inc. v. State* 655 N.E.2d 661 (N.Y. 1995)); Wyoming (*Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995)); Arkansas (*Tucker v. Lake View Sch. Dist. No. 25*, 917 S.W.2d 530 (Ark. 1996)); *see also* *Lake View Sch. Dist. No. 25 v. Huckabee*, 10 S.W.3d 892 (Ark. 2000) (pending appeal claims from prior case mooted by enactment of new funding statute); North Carolina (*Leandro v. State*, 488 S.E.2d 249 (N.C. 1997)); Vermont (*Brigham v. State*, 692 A.2d 384 (Vt. 1997)); New Hampshire (*Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997)); Ohio (*DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997)) and South Carolina (*Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999)). A number of these cases involved reconsideration (generally based on new legal theories) of challenges to state education finance systems by courts which had previously held for defendants.

During the same time period, defendants have prevailed in the following 10 states: Wisconsin (*Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989)); Vincent *v. Voight*, 614 N.W.2d 388 (Wis. 2000); Minnesota (*Skeen v. State*, 505 N.W.2d 299 (Minn. 1993)); Nebraska (*Gould v. Orr*, 506 N.W.2d 349 (Neb.1993)); Virginia (*Scott v. Commonwealth*, 443 S.E.2d 138 (Va. 1994)); Maine (*School Admin. Dist. No. 1 v. Commissioner*, 659 A.2d 854 (Me. 1995)); Rhode Island (*City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995)); Florida (*Coalition for Adequacy*

and Fairness in Sch. Funding, Inc. v. Chiles, 680 So.2d 400 (Fla. 1996)); Illinois (Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996) and Lewis E. v. Spagnolo, 710 N.E.2d 798 (Ill. 1999), Louisiana (Charlet v. State, 713 So.2d 1199 (La. Ct. App.), *cert. denied*, 730 So.2d 934 (La. 1998)), and Pennsylvania (Pennsylvania Ass'n of Rural and Small Sch. v. Ridge 737 A.2d 246 (Pa. 1999)). The 1994 decision of the North Dakota Supreme Court (Bismarck Public Sch. Dist. No. 1 v. State, 511 N.W.2d 247 (N.D. 1994)) held that the state's education finance system was unconstitutional but not by the requisite *Asuper majority@* vote; the 1997 decision of the Alaska Supreme Court in *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391 (Ala.1997), denied plaintiffs relief regarding two technical aspects of the state's funding system, but did not involve a fundamental challenge to the system itself.

What is the explanation for the new willingness of state courts **B** which have historically been reluctant to innovate in areas of constitutional adjudication **B** to uphold challenges to state education finance systems? One answer might be the receptivity of the state courts to a powerful **A**democratic imperative⁵⁶ at the core of the American political tradition. By the mid 80's, civil rights advocates were being battered not only by defeats in state court fiscal equity decisions, but also by judicial retrenchment in federal school desegregation cases.⁵⁷ Although some might have expected these setbacks to extinguish the ardor of civil rights advocacy, the growing realization that more than 40 years after *Brown v. Board of Education*, large numbers of children were still being denied an adequate education, and the awareness of the accelerating income gaps between the haves and have nots had the opposite effect.⁵⁸ The blatant inconsistency between the gnawing reality of continued denial of equal

⁵⁶ This point is discussed at length in Michael A. Rebell, *Fiscal Equity Litigation and The Democratic Imperative*, 24 J. EDUC. FIN 23 (1998).

⁵⁷ See *Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237 (1991); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (*Jenkins II*). In sum, these cases and other **A**[d]evelopments in federal desegregation jurisprudence in the early 1990s suggest that the litigation era reaching back to *Brown v. Board of Education* is now drawing to a close. [*Dowell*, *Pitts* and *Jenkins*] essentially relaxed the standard that applied to school districts which had previously discriminated, had implemented a judicially approved remedy, and were now seeking to end federal court involvement in their affairs. @Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in EDUCATION FINANCE *supra* n. 14 at 175, 187 [hereinafter *Educational Adequacy and the Courts*.] Gary Orfield sees in the recent desegregation cases a **A**pattern of rushing toward resegregation@by conservative federal judges who have terminated desegregation plans without holding full evidentiary hearings, and without fairly assessing the educational ramifications of these terminations. See Gary Orfield, *Conservative Activists and the Rush Toward Resegregation*, in LAW AND SCHOOL REFORM *supra* n. 12 at 39, 41. See also, James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH L. REV. 432 (1999) (arguing that loss of desegregation funds will eliminate current relative funding advantages of many predominantly minority school districts.)

⁵⁸ Between 1977 and 1999, the share of all income earned by the bottom 20% of all household groups fell from 5.7% to 4.2%, while the share of the highest 20% rose from 44.2% to

educational opportunity and the nation's democratic ethos inspired plaintiff attorneys to devise new legal theories and galvanized the courts to considering them.

50.4%. During the same time period, the share of the richest 1% rose from 7.3% to 12.9%. Congressional Budget Office data quoted in David Cay Johnston, *A Gap Between Rich and Poor Found Substantially Wider*, N.Y. TIMES (September 5, 1999) at A-14. See also Robert B Reich, *Foreword* to RICHARD B. FREEDMAN, *THE NEW INEQUALITY: CREATING SOLUTIONS FOR POOR AMERICA* (1999) (describing how growing disparities between haves and have-nots may sever the bonds that allow a democratic society to function). For a compelling portrayal of the continuing brutal impact of the denial of educational opportunities to urban minority schoolchildren, see JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991).

The sensitivities engendered by a focus on the democratic imperative would not, however, have resulted in a dramatic turn-around in plaintiffs' fortunes in these cases unless the courts felt that they had effective methods for remedying the educational inadequacies that were being brought to their attention. The standards-based reform movement which responded to a widespread sentiment that the American education system was in serious trouble in the late-80s provided the tools that courts needed to deal with complex educational issues.⁵⁹ The courts' assumption in *Rodriguez* and other early cases that virtually all students were receiving an adequate education was now turned on its head: it appeared now that a large number -- maybe even a majority -- of America's students were not receiving an education adequate to compete in the global economy. The extensive educational reform initiatives most states adopted to meet this challenge provided the courts workable criteria for developing the "judicially manageable standards" that were necessary to craft practical remedies in these litigations.

III - ADEQUACY AND STANDARDS-BASED REFORM

A. The Standards- Based Reform Movement

⁵⁹ Standards-based reform, by emphasizing the need to provide adequate educational opportunities to *all* children, also gave promise of rectifying the apparent tendency of the fiscal equity cases to provide effective remedies for small, largely white school districts, but not for largely minority, urban districts. See Ryan, *supra*, note 57. The shift to adequacy has spurred extensive new litigation on behalf of students in largely minority urban districts like New York, Philadelphia and Baltimore.

In the mid-80's a slew of commission reports had warned of a rising tide of mediocrity⁶⁰ in American education that was undermining the nation's ability to compete in the global economy. Comparative international assessments revealed poor performance by American students, especially in science and mathematics,⁶¹ and United States Department of Education assessments indicated that few American students show the capacity for complex reasoning and problem solving.⁶²

⁶⁰ NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 5 (1983); *see also* CARNEGIE FORUM ON EDUCATION AND THE ECONOMY, *TASK FORCE ON TEACHING AS A PROFESSION, A NATION PREPARED: TEACHERS FOR THE 21ST CENTURY* (1986); THEODORE SIZER, *HORACE'S COMPROMISE: THE DILEMMA OF THE AMERICAN HIGH SCHOOL* (1989).

⁶¹ NATIONAL ASSESSMENT OF EDUCATIONAL PROGRAMS, *AMERICA'S CHALLENGE: ACCELERATED ACADEMIC ACHIEVEMENT* (1990); *see also* Robert L. Linn & Stephen B. Dunbar, *The Nation's Report Card: Good News and Bad About Trends in Achievement*, 72 *PHI DELTA KAPPAN* 127, 131 (1990)

⁶² INA V.S. MULLIS ET AL., *NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS 1992 TRENDS IN ACADEMIC PROGRESS* 4-5 (1994); *see also* U.S. DEPARTMENT OF EDUCATION, *AMERICA 2000: AN EDUCATION STRATEGY* (1991) (finding that America's schools are not developing the skills and knowledge that students need today to compete in a globally competitive economy).

The first response to these reports was the enactment in most states of extensive reform laws imposing more rigorous academic requirements. For example, between 1980 and 1986, 45 states increased their requirements for earning a standard high school diploma.⁶³ It soon became clear, however, that simply raising requirements, without clarifying systemic goals and providing resources and techniques for reaching those goals, would not be effective. Consequently, commencing with the 1989 National Education Summit, convened by President Bush and attended by all 50 governors, the nation's governors, business leaders, and educators began to work with the federal government to articulate specific national academic goals.⁶⁴ Continued focus on the need for comprehensive, effective reforms geared to specific goals led to enactment of the federal Goals 2000 Act,⁶⁵ to an increasing

⁶³Charles F. Faber, *Is Local Control of the Schools Still a Viable Option?* 14 HARV. J.L. & PUB. POL'Y 447, 450 (1991).

⁶⁴Two additional national summits were held in 1996 and 1999; the President, most of the nation's governors and CEOs of major corporations, as well as commissioners of education from most of the states attended these events. Following the first national summit, a consortium known as the "New Standards Project" was formed to spearhead research and development of academic standards and assessments. Seventeen states and 10 large urban school districts soon joined the project. Following the 1996 summit, a new organization, Achieve, Inc., with a board of directors consisting of 6 governors and 6 CEOs was formed to further promote the standards movement. For a discussion of the origin of the national standards movement see MARC S. TUCKER & JUDY B. CODDING, *STANDARDS FOR OUR SCHOOLS* 40-43 (1998) [hereinafter, *STANDARDS FOR OUR SCHOOLS*], and DIANE RAVITCH, *NATIONAL STANDARDS IN AMERICAN EDUCATION* (1995).

⁶⁵Goals 2000: Educate America Act, 20 U.S.C. §§ 5801-5871 (1994). The Act sets forth eight national goals involving school readiness, high school graduation rates, school safety, teacher professional development, etc. and procedures for promoting the development of academic standards and programs designed to achieve them by the states. When initially enacted in 1994, the Act provided a process for assisting and certifying state efforts to develop content, performance and "opportunity to learn" standards. Many of these provisions were, however, eliminated by Congress in 1996. Nevertheless, Goals 2000 funding still provides a system of grants that promote the development of state standards and local school improvement plans to meet the national goals.

emphasis on thorough-going standards and assessments in other federal laws and regulations,⁶⁶ and to the development of an extensive state-level standards-based reform approach. Because education remains primarily a state and local responsibility in the United States, and most of the federal laws and regulations are geared to promoting the development of standards at the state rather than the national level, the state standards based reform movement has, in recent years, become the primary arena for these reform initiatives.

⁶⁶ Recent revisions to Title I of the Elementary and Secondary Education Act, 20 U.S.C. ' 6301 *et seq.*, the Individuals With Disabilities Education Act, 20 U.S.C. ' 1401 *et seq.*, and the Carl D. Perkins Vocational and Applied Technology Education Act, 20 U.S.C. ' 2301 *et seq.*, and their implementing regulations all require program recipients to actively promote standards-based reforms. For a detailed discussion of the standards-oriented provisions of these laws, see Paul Weckstein, *School Reform and Enforceable Rights to Quality Education*, in LAW AND SCHOOL REFORM, *supra* note 12.

Standards-based reform is built around substantive content standards in English, mathematics, social studies and other major subject areas. These content standards are usually set at sufficiently high cognitive levels to meet the competitive standards of the global economy, and they are premised on the assumption that virtually all students can meet these high expectations, if given sufficient opportunities and resources.⁶⁷ Once the content standards have been established, every other aspect of the education system including teacher training, teacher certification, curriculum frameworks, textbooks and other instructional materials, and student assessments is revamped to conform to these standards. The aim is to create a seamless web of teacher preparation, curriculum implementation, and student testing, all coming together to create a coherent system which will result in significant improvements in achievement for all students.⁶⁸

B. Adequacy's Appeal to the Courts

⁶⁷ All children can learn; and we can change our system of public elementary, middle, and secondary education to ensure that all children do learn at world-class levels. @ NEW YORK STATE BOARD OF REGENTS, ALL CHILDREN CAN LEARN: A PLAN FOR REFORM OF STATE AID TO SCHOOLS (1993); see also NATIONAL RESEARCH COUNCIL, INSTITUTE OF MEDICINE, FROM NEURON TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT (Jack P. Shonkoff & Deborah A. Phillips eds., 2000) (discussing recent brain development research indicating that experiential catalysts can positively impact brain development in the early years and throughout the life cycle); JOHN T. BRUER, SCHOOLS FOR THOUGHT; A SCIENCE OF LEARNING IN THE CLASSROOM (1993) (describing techniques of cognitive science that enable all students to develop higher order reasoning and learning skills.)

⁶⁸ For general descriptions of the standards-based reform approach, see SUSAN H. FUHRMAN, DESIGN OF COHERENT EDUCATION POLICY: IMPROVING THE SYSTEM (1993); STANDARDS FOR OUR SCHOOLS, *supra* note 64, ROBERT ROTHMAN, MEASURING UP: STANDARDS, ASSESSMENT AND SCHOOL REFORM (1995). For detailed up-dates on progress toward implementing this comprehensive ideal, see Education Week, *Quality Counts 2000* (January 13, 2000); Education Week, *Quality Counts 2001* (January 11, 2001).

Standards-based reform substantially enhanced the fledgling educational adequacy notions alluded to in *Rodriguez* and the other early fiscal equity cases. Adequate education was no longer a vague notion which could be assumed almost in passing to describe any state education system. The concept now had substantive content, and its underlying message was that most state education systems and certainly school districts that served predominantly poor and minority students were probably below, and not above, the level of substantive expectations.

Standards-based reform also put into focus the fundamental goals and purposes of our system of public education. In the judicial arena, it inspired increased attention to the intent of the eighteenth and nineteenth century drafters of the clauses in most state constitutional clauses which established public education systems and to the contemporary significance of these provisions. In addition, the new state standards provided the courts practical tools for developing judicially manageable approaches for implementing effective remedies.

Not surprisingly, therefore, the marked trend toward plaintiff victories in the challenges to state systems for financing public education since 1989 can be directly correlated to a greater reliance by plaintiffs in these cases on claims of a denial of basic educational opportunities guaranteed by the applicable state constitution, in contrast to the earlier practice of pleading equal protection claims based on disparities in the level of educational funding. Specifically, 17 of the 18 plaintiff victories in the past 11 years have involved substantial or partial adequacy considerations.⁶⁹ Moreover, even most

⁶⁹ Adequacy concerns were major factors in the highest state court or final trial court decisions in Kentucky (1989), Alabama (1993), Idaho (1993), Massachusetts (1993), Tennessee (1993), Arizona (1994), New York (1995), Wyoming (1995), North Carolina (1997), Ohio (1997), New Hampshire (1997), Vermont (1997), and South Carolina (1999). Adequacy considerations were also significant in the remedies ordered by the state Supreme Courts in Missouri (1993), New Jersey (1990, 1995, 1998), Texas (1995), and in the settlement entered into in Kansas in 1992.

of the state courts which have denied relief to plaintiffs seeking to invalidate state educational finance systems have indicated that the result might have been otherwise if they had raised educational adequacy rather than classical *equity* claims.⁷⁰

⁷⁰ See *Skeen v. State*, 505 N.W.2d 299, 303 (Minn. 1993) (Unlike many cases in other states, this case never involved a challenge to the adequacy of education in Minnesota.); *Kukor v. Grover*, 436 N.W.2d 568, 578 (Wis. 1989) (The appellants have not asserted that . . . their districts are unable to meet these [legislative] standards. . .); *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994) (The students do not contend that the manner of funding prevents their schools from meeting the standards of quality); *School Admin. Dist. No. 1 v. Commissioner*, 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.).

Adequacy has become the predominant theme of the recent wave of state court decisions because the adequacy approach resolves many of the legal problems that had arisen in the early fiscal equity cases and because it provides the courts judicially manageable standards for implementing effective remedies. As a matter of legal doctrine, adequacy avoids the slippery slope problem that concerned the U.S. Supreme Court in *Rodriguez*.⁷¹ Invalidating a state education finance system on the basis of a state constitution's education clause establishes no direct precedent for other areas of social policy reform, as might be the case with a claim grounded in equal protection. Moreover, adequacy does not threaten the concept of local control of education, the main rationale for most court decisions which had held for defendants in the past, because it does not necessarily undermine the prerogative of local communities to set their own tax rates and because locals would remain free to augment their programs above the state-mandated minimum.⁷² To the extent that the emphasis on statewide standards is inconsistent with local control, those centralizing tendencies were already created by the regulatory framework of the standards-based reform movement.

⁷¹ See discussion, *supra*, at 8.

⁷² Molly McUsic, *The Use of Education Clauses in Litigation*, 28 HARV. J. ON LEGIS. 307, 328 (1991); see also Michael Heise, *State Constitutions, School Finance Litigations, and the Third Wave: From Equity to Adequacy*, 68 TEMPLE L. REV. 1151, 1175 (1995) (adequacy decisions do not pose a direct and immediate threat to local control of schools). For more detailed discussions of the strategic advantages of the adequacy approach, see Enrich, *Leaving Equality Behind*, *supra* note 17 at 166-170, and Molly S. McUsic, *supra* note 53. For general discussions of the shift from equity to adequacy holdings in the recent cases, see Allen W. Hubsch, *The Emerging Right To Education Under State Constitutional Law*, 65 TEMPLE L. REV. 1325 (1992); Richard J. Stark, *Education Reform: Judicial Interpretations of State Constitutional Education Finance Provisions* *B Education vs. Equality* 1991 ANN. SURV. AM. L. 609; William Thro, *Note, To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform*, 75 VA. L. REV. 1639 (1989); Alexandra Natapoff, *1993: The Year of Living Dangerously: State Courts Expand the Right to Education*, 92 WEST EDUC. L. REP 755 (1994), and Verstegen and Whitney, *supra* note 32.

Adequacy also tends to invoke less political resistance at the remedial stage because rather than raising fears of **A**leveling down@educational opportunities currently available to affluent students, it gives promise of **A**leveling up@academic expectations for all other students. Although standards-based reforms would most dramatically improve the performance of the lowest achieving students, the reforms are comprehensive and intended to provide benefits to almost all students. Instead of threatening to shift money from rich districts to poor districts, therefore, adequacy offers the possibility of increasing the pie for all.

The appeal of the adequacy approach is reflected in the emerging consensus among the courts, the other branches of government --- and sometimes **B** the public -at-large.⁷³ that all students should be provided a reasonable opportunity to obtain an **A**adequate@education. This consensus is reflected in the recent report of a Task Force of the National Conference of State Legislatures which stated that: **A**State policy makers and the courts should apply the test of >adequacy= as a primary criterion in examining the effectiveness of any existing or proposed state school finance system.⁷⁴ The NCSL then set forth basic

⁷³ In many of the states where there have been effective remedies, the productive interchange among the branches has been accompanied by significant public engagement processes. For example, in Kentucky, the remedial principles developed by the Select Committee and adopted by the Kentucky Supreme Court were strongly influenced by an extensive round of state-wide dialogues **C** including a 20,000 person televised town meeting **B** which the Prichard Committee had initiated years before the courts' decision. The legislature's quick enactment of far-reaching reform legislation, and the state education department's aggressive implementation of the new law have also been aided by the on-going public dialogues of the Prichard Committee and a number of other citizen groups. The Campaign for Fiscal Equity, Inc., has instituted a state-wide public engagement process in New York in conjunction with its on-going adequacy litigation.

For a detailed analysis of the use of public engagement in the remedial phase of institutional reform litigations, see Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by Sheff v. O'Neill C and a Proposed Solution*, 29 CONN. L. REV. 1115 (1997).

⁷⁴ NATIONAL CONFERENCE OF STATE LEGISLATURES, EDUCATIONAL ADEQUACY: BUILDING AN ADEQUATE SCHOOL FINANCE SYSTEM 5 (1998).

principles for building an adequate education system which emphasized 1) articulating A clear and measurable educational goals, or objectives,@2) identifying A the conditions and tools that provide ...every student a reasonable opportunity to achieve expected educational goals or objectives@and 3) ensuring that Asufficient funding is made available and used to establish and maintain these conditions and tools..@⁷⁵

IV - THE CONSTITUTIONAL CONCEPT OF ADEQUACY

⁷⁵ *Id.* at 10-18. Additional principles set forth in the NCSL Task Force Report relate to the capacity of state education departments to support the conditions for essential learning and the establishment of an appropriate accountability system.

Despite the wide-spread support for the general concept of Adequacy, however, there has been much uncertainty about precisely how such an adequate education should be defined --- and or how it should be achieved.⁷⁶ In the early stages of the adequacy movement the focus was on clarifying student entitlements in relation to gross denials of educational opportunities, and bringing to the fore the fallacy of the assumption in *Rodriguez* and many of the early state cases that all or almost all students were receiving an adequate education. As Peter Enrich has noted:

In many states, the conditions in the worst off school are so poor and the resources available to them so meager that the courts can reasonably be asked to find a dereliction of the state's educational obligations without the need to articulate or apply a determinate standard of adequacy.⁷⁷

Now, however, as courts and state legislators and state education departments are increasingly facing the realities of actually implementing adequacy standards, the need to focus on substantive definitions of adequacy and effective methods for funding and implementing them has come to the fore.⁷⁸ It has

⁷⁶ There is also, of course, substantial concern and controversy about how to ensure sufficient funding to provide all students a genuine opportunity for an adequate education. See, e.g., *Tomblin v. Gainer*, C.A. No 75-1268 (Circuit Ct, Kanawha Co. W. Va., Aug., 2000) (stipulating implementation of standards-based reforms in long-standing West Virginia litigation, but leaving open outstanding funding issues.) A proposal concerning specific mechanisms for ensuring sufficient funding to provide a genuine opportunity for an adequate education for all students will be the subject of a future article by the author.

⁷⁷ Enrich, *supra* note 17 at 173.

⁷⁸ Initially, some courts and commentators tended to define adequacy in comparative terms based on the assumption that [a]n educational system that precluded the students of poorer districts from competing in the same market and society as their peers could not, by definition, be providing an adequate education. McUsic, *Promises and Pitfalls*, *supra* note 53 at 116-117; see also Allan Odden and William H. Clune *School Finance Systems: Aging Structures in Need of Renovation*, 20 EDUC. EVAL. & POLICY ANALYSIS 157, 158 (discussing use of the median district spending level as a standard for establishing the foundation level for a state aid system).

become increasingly clear that **A**the right to an adequate education . . . is meaningless without a workable, and hence enforceable, standard to measure adequacy.⁷⁹

Specific definitions of education adequacy are, of course, created by particular state constitutional provisions, statutes and regulations which vary from state to state. Nevertheless, a growing number of judicial interpretations of adequacy concepts in state constitutions **C** forged at times through a creative dialogue with state legislatures and state education departments **B** has resulted in recent years in an emerging consensus on a core constitutional concept of adequacy, based on general principles which establish the parameters for legislative and executive actions. This section will, therefore provide an overview of the major court decisions dealing with adequacy definitions and will then set forth the specific elements of this core constitutional concept.

A. Education Adequacy Clauses in State Constitutions

⁷⁹ Note, *Manageable Adequacy Standards in Education Reform Litigation*, 74 WASH. U.L.Q. 1193, 1203 (1996).

The education clauses of almost all of the state constitutions require the establishment of a system of free common schools,⁸⁰ and the need in such systems to provide students a thorough and efficient education, an adequate public education or an ample education.⁸¹ These provisions generally were incorporated into the state constitutions as part of the common school movement of the mid-nineteenth century, which created statewide systems for public education and attempted to inculcate democratic values by bringing together under one roof students from all classes and all ethnic backgrounds.⁸²

⁸⁰The general language requiring the legislature to maintain and support a system of free common schools, has also been interpreted to require some level of substantively adequate education. See, e.g., *Tennessee Small Sch. Syst. v. McWherter*, 851 S.W.2d 139, 150-51 (Tenn. 1993) (education clause requires a system that generally prepare[s] students intellectually for a mature life.); *Fair Sch. Fin. Council of Okla. v. State*, 746 P.2d 1135, 1149 (Okla. 1987) (education clause requires a basic, adequate education); *Campaign for Fiscal Equity v. State*, 655 N.E.2d 661, 665 (N.Y. 1995) (education clause requires a sound basic education); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999) (education clause requires a minimally adequate education.)

⁸¹ For a summary overview of the education clauses in the state constitutions, discussed in terms of four basic categories related to the relative strength of the educational clauses, see William E Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19 (1993). See also Molly McUsic, *supra* note 72. Thro's categorization of the education clauses in the state constitutions in terms of the strength of the language and his predictions regarding the likely outcome of court cases based on his categorizations have been belied by the actual decisions. For example, based on Thro's categorization, plaintiffs should have won the recent cases in Maine, Rhode Island and Illinois, which they lost, and lost the recent decisions in New York, North Carolina and Vermont, which they won.

⁸² See generally LAWRENCE CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783-1876* (1980); C. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780-1860* (1983).

Several of the state constitutions' education clauses were enacted in the 18th century, and contained phrases concerning the duty of the legislature to cherish...public schools, Mass. Const. Part 2, C. 5 ' 2, which courts have interpreted to mandate an adequate education. *McDuffy v. Secretary of Educ.*, 615 N.E. 2d 516, 545 (Mass. 1993). *Accord* *Claremont Sch. Dist. v. Governor*, 635 A. 2d 1375, 1381 (N.H. 1993); see also *Brigham v. State*, 692 A.2d 384, 675 (Vt. 1997) (drafters of Vermont Constitution sought to foster republican values or public virtue.)

Compulsory schooling, which became prevalent in most states by the beginning of the twentieth century, added an additional rationale for the emphasis on education in the state constitutions.⁸³

1. The Early Cases

Although the major wave of state court adequacy decisions has occurred over the past decade, a few state courts began to articulate adequacy concepts right after the United States Supreme Court's ruling in *Rodriguez*. While most court decisions at the time were focused on equal protection precepts, the supreme courts of three states, New Jersey, Washington and West Virginia, relied on their state constitution's adequacy clauses to strike down their state educational finance systems.

⁸³ Cf. *Serrano v. Priest* 487 P.2d 1241, 1259 (1971) ("Education is so important that the state made it compulsory"). In *Yoder v. Wisconsin*, 406 U.S. 205 (1972), the Supreme Court analyzed in detail the purposes of compulsory education before allowing the Amish plaintiffs a limited exemption from it. In doing so, the Court accepted the state's two-fold justification for compulsory education, i.e. preparation of citizens "to participate effectively and intelligently in our open political system" and preparation of individuals "to be self-reliant and self-sufficient participants in society." *Id.* at 221; see also Betsy Levin, *Education as a Constitutional Entitlement: A Proposed Judicial Standard for Determining How Much Is Enough*, 3 WASH. U.L.Q. 703, 712 (1979).

For historical discussions of the purposes of compulsory education and its relation the common school movement of the nineteenth century see LAWRENCE KOTIN AND WILLIAM F. AIKMAN, *LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE* (1980); LAWRENCE CREMIN, *supra* note 82, and CARL F. KAESTLE, *supra* note 82.

The New Jersey Supreme Court based its 1973 ruling in *Robinson v. Cahill*⁸⁴ on the constitution's thorough and efficient education clause. The Court defined the constitutional requirement as that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market.⁸⁵ It recounted the history of the thorough and efficient clause in the context of a nineteenth century concern for ensuring that a free public education be extended to all students in the state in order to secure the common rights of all.⁸⁶

The Washington Supreme Court also defined the state's constitutional duty to make ample provision for the education of all children⁸⁷ in terms of the educational opportunities needed in the contemporary setting to equip children for their role as citizens and as potential competitors in today's market as well as in the marketplace of ideas.⁸⁸ West Virginia's analysis of the purpose of its state constitution's thorough and efficient clause was similar: It defined the core adequacy requirement in terms of preparation for useful and happy occupations, recreation and citizenship.⁸⁹

⁸⁴303 A.2d 273 (N.J. 1973), *cert. denied, sub nom* Dickey v. Robinson, 414 U.S. 976 (1973).

⁸⁵*Robinson v. Cahill*, 303 A.2d at 295.

⁸⁶*Id.* New Jersey's thorough and efficient clause was added to the Constitution of 1844 by amendments adopted in 1875. *Id.* at 287.

⁸⁷WASH. CONST., Art. 9, ' 1

⁸⁸*Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978).

⁸⁹*Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979)

In sum, then, the three state supreme courts that first attempted to define adequacy in the early years articulated a similar concept of Adequate education, drawn from basic notions of a citizen's role in a democracy and the obligations of the state's compulsory education system to prepare the child for competitive employment. These early attempts to ground funding reform litigations in the adequacy clauses of the state constitutions, however, did not prove fully successful. The New Jersey Supreme Court, upheld on its face the Public School Education Act of 1975, which articulated general goals for a thorough and efficient education, but delegated the development of actual standards and assessments to the local school districts and the state Commissioner of Education.⁹⁰ Years later, finding that the quality of education in poorer urban districts was significantly inferior to other school districts within the state, the Court held that as applied to the 28 poorest urban districts, the Act was unconstitutional.⁹¹ The West Virginia courts issued very detailed guidelines⁹² and standards,⁹³ which

⁹⁰ Robinson v. Cahill, 355 A.2d 129 (1976).

⁹¹ Abbott v. Burke, 575 A.2d 359 (N.J. 1990). Noting that the system of delegated responsibility resulted in district level goals, but no statewide commonly accepted educational standards, Id at 374, the Court utilized comparative data regarding expenditures and performance in the poor and rich districts to reach its result Id at 375. For a discussion of a trend toward increasing reliance on equity approaches in the remedial phase of the New Jersey litigation see Enrich, *supra* note 17 at 131-135.

The New Jersey legislature's attempt to develop process standards and problems that developed in their implementation are discussed in Margaret E. Goertz & Malek Edwards, *In Search of Excellence for All : The Courts and New Jersey School Finance Reform*, 25 J. EDUC. FIN. 5 (1999).

⁹² In *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W.Va. 1979), the West Virginia Supreme Court defined the goals of a constitutionally-acceptable education system in terms of literacy, ability to add, subtract, multiply and divide, knowledge of government, work-training, interest in creative arts, and social ethics.

⁹³ The trial court then developed the goals articulated by the Supreme Court into detailed standards in a 238-page decision. For example, the standards for Early Childhood Education required, among other things, a maximum student teacher ratio of 1 to 20, plus support personnel,

were, however, largely ignored by the legislature.⁹⁴ The Washington Supreme Court remanded to the Legislature the responsibility for defining a basic education without providing specific guidelines on how to do so.⁹⁵ The Basic Education Act passed by the Washington legislature in 1977,⁹⁶ initially was quite promising, but not being tied to any substantive adequacy goals, it failed to take account of changing needs and developments. Within a decade it had become clear that the new system was not meeting the educational requirements of the state's neediest children.⁹⁷

including a nurse two days a week; a facility containing at least 50 square feet per child, and furniture which permits easy reorganization of the room. Pauley v. Bailey, No. 7-1268, 24-25 (Kanawha Co. Cir Ct., 1982). This order was supplemented by a 356 page master plan for its implementation drafted by an advisory committee appointed by the state superintendent of schools and incorporated into a later court order.

⁹⁴ The state Supreme Court of Appeals took no active steps to enforce the trial court's order. Pauley v. Bailey, 324 S.E.2d 128 (W. Va. 1984). For discussions of the lack of effective implementation after this ruling, see Jack L. Flannagan, *West Virginia's Financial Dilemma: The Ideal School System in the Real World*, 15 J. EDUC. FIN. 229 (1989) and Margaret D. Smith & Perry A. Zirkel, Pauley v. Kelley: *School Finances and Facilities in West Virginia*, 13 J. EDUC. FIN. 264 (1988).

⁹⁵ Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 at 95 (Wash., 1978). The plaintiffs had asked the court to mandate explicit standards for defining the state's constitutional obligations in terms of student/teacher ratios, requirements for special education, and other elements of an educational program. The Court rejected this request, but it did instruct the legislature to utilize dependable and regular tax sources and stated that the state's constitutional duty goes beyond mere reading, writing and arithmetic. See JAY G. CHAMBERS, *THE ISSUE OF ADEQUACY IN THE FINANCING OF PUBLIC EDUCATION: HOW MUCH IS ENOUGH?* 55 (1982).

⁹⁶ 1977 ex. s. c359 ' 1. The Act defined a basic education in terms of broad educational goals and specified the minimum hours, days and instructional programs that school districts were required to offer. The state assumed the responsibility for fully funding the newly defined basic education through an allocation formula based on a ratio of students to certificated staff, with additional compensation for books, supplies, utilities and other specified costs. For details of the Washington legislation, see DIANE W. CIPOLLONE (CAMPAIGN FOR FISCAL EQUITY INC.), *DEFINING A BASIC EDUCATION; EQUITY AND ADEQUACY LITIGATION IN THE STATE OF WASHINGTON*, 10-11(1998).

⁹⁷ Between 1976-77 and 1989-90, the share of state and local revenues received by

districts educating the highest percentage of students eligible for free or reduced lunches fell 4.9%, while the share of districts with the lowest percentage of such students rose 2.5%. Neil D. Theobald & Faith Hannah, *Ample Provision for Home? The Evolution of State Control Over School Finance in Washington*, 17 J. EDUC. FIN., 7, 222-225 (1991). The trial court, in a decision that was not appealed to the Supreme Court, had at one point expanded the definition of basic education to include special education, transitional bilingual, vocational and remedial programs, as well as pupil transportation, but did not guarantee a specific level of funding. For a discussion of the implementation of the Basic Education Act, see Cippolone, *supra* note 96 at 17-21 .

2. *The Recent Decisions*

The difficulties experienced by the New Jersey, Washington and West Virginia Supreme Courts in implementing their decrees undoubtedly discouraged other state courts from focusing on their constitution's education clauses. It was not until 1989 -- a decade after the last of these initial attempts -- that any state supreme court again considered concepts of adequate education. The first to do so was the Kentucky Supreme Court in *Rose v. Council for Better Education*.⁹⁸ The Kentucky case was decided the same year as the first National Education Summit, and the decision clearly reflects the influence of the standards-based reform environment.

Although *Rose* had been brought on behalf of poor school districts seeking more equitable funding for their students, the Kentucky Supreme Court went further and invalidated the entire state system of education, because it was inadequate and well below the national effort.⁹⁹ The Court then went on to hold that an efficient education is one which has as its goal the development in each and every child of the following seven 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

⁹⁸790 S.W.2d 186 (Ky. 1989).

⁹⁹ *Id.* at 197.

(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.¹⁰⁰

Thus, the Kentucky court went beyond the earlier New Jersey and Washington courts in articulating the types of basic skills that students would need to develop in order to participate effectively as citizens in a democratic society and to be prepared to compete in the contemporary economy. In contrast to the West Virginia Court, however, it did not describe the skills or the manner in which they should be developed in explicit detail. In essence, the Court outlined the goals for a standards-based educational system and then left to the legislative and executive branches its further development and implementation.¹⁰¹

¹⁰⁰ *Id.* at 212.

¹⁰¹ *Id.* at 212-213. The Court also held, *inter alia*, that the state education system must be monitored by the Legislature to assure that there is no waste or mismanagement, and that the General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.®

In formulating these specific educational goals, the Kentucky court did not draw solely upon prior judicial precedents or legal sources. Extensive expert testimony and a post-trial brief filed by a blue ribbon citizens= education advocacy group, the Prichard Committee, had brought to the trial judge=s attention the significant national education reform initiatives, including the emphasis on educational standards. In fact, after issuing his liability decision, the trial court judge stayed his decision on the appropriate remedy for six months. During that time, a select committee he had appointed held five hearings around the state B one of which was attended by the governor and all of which were covered extensively by the pressB and then enumerated five student outcomes that it believed would constitute an adequate education.¹⁰² The select committee=s recommendations were substantially adopted by the trial court, and their key elements were also included in the final decision of the Supreme Court.

The Kentucky court=s formulation of the goals of an adequate education system aptly reflected the essential aims of the developing state standards-based reform movement. The *Rose* decision can, in essence, be viewed as the starting point in what has become a significant dialogue between the public, the courts, and the legislature on standards-based reform. It articulated the basic goals of a standards-based reform system, but left it to the legislative and executive branches to determine the specific structure and content of an Aefficient@ education system. The Kentucky Education Reform Act (AKER@) enacted by the legislature to comply with the Court order has become a national model for implementing standards-based reforms.¹⁰³

¹⁰² For a discussion of this process and the earlier public engagement activities on education reform that were led by the Prichard Committee, see Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J. L. & Educ. 485 (1999).

¹⁰³ *See id.*

The Kentucky Supreme Court's statement of educational goals has been directly adopted as the operative definition of adequacy by two other state supreme courts,¹⁰⁴ and it has served as the acknowledged inspiration for substantive definitions of constitutional definitions of adequacy by other courts. For example, citing *Rose*, the Supreme Court of North Carolina has defined the constitutional concept of a "sound basic education" in the following terms:

a "sound basic education" is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.¹⁰⁵

In recent years, the state courts have begun to focus even more directly on the relationship between the newly- adopted state academic standards and constitutional requirements. The Idaho Supreme, for example, reviewed the existing state educational standards, approved them and directly incorporated them into its constitutional definition, thereby making their effective implementation the

¹⁰⁴ See *McDuffy v. Secretary*, 615 N.E.2d 516, 554 (Mass. 1993), *Claremont v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997).

¹⁰⁵ *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997); The *Rose* decision also directly influenced the Constitutional definitions adopted by the courts in Alabama and South Carolina. See *Alabama Opinion of the Justice*, 624 So.2d 107 (Ala. 1993); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999); See also *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170, 1186 (Kan. 1994) (Noting "striking resemblance" between *Rose* standards and standards enacted by Kansas legislature.)

hallmark of constitutional compliance. Thus, the Court stated, in defining the requirements for a thorough education, that:

Balancing our constitutional duty to define the meaning of the thoroughness requirement of art. 9 ' 1...with the political difficulties of the task has been made simpler for this Court because the executive branch of government has already promulgated educational standards pursuant to the legislature's directive....We have examined the standards and now hold that, under art.9, s. 1 [of the Constitution] the requirements for school facilities, instructional programs and textbooks, and transportation systems as contained in those regulations presently in effect, are consistent with our view of thoroughness.¹⁰⁶

Similarly, in *Edgewood Ind. Sch. Dist v. Kirby*, the Texas Supreme Court held in 1995 that Texas's standards-based accountability system met constitutional adequacy requirements.¹⁰⁷ In New Hampshire, the State Supreme Court rejected an adequacy definition promulgated by the State Education Department, which had been upheld by the lower Court, holding that it is the legislature's obligation, not that of individual members of the board of education, to establish educational standards that comply with constitutional requirements.¹⁰⁸ It then pointed to the seven specific criteria articulated by the Kentucky Supreme Court as guidelines to the Legislature for defining educational

¹⁰⁶ Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 734 (Idaho 1993); see also Idaho Sch. for Equal Educ. Opportunity v. State, 976 P.2d 913, 920 (Idaho 1998) (upholding new State Board rules as being consistent with constitutional requirements). See also Fair School Fin. Council v. State, 746 P.2d 1135, 1149 (Okla. 1987) (holding that the constitution guarantees a basic, adequate education according to the standards that may be established by the state Board of Education.); Unified Sch. Dist No. 229 v. State, 885 P.2d 1170, 1186 (Kan. 1994) (Court will use as a base for defining adequacy the standards enunciated by the legislature and the state education department.)

¹⁰⁷ 917 S.W.2d 717, 730 (Tex. 1995)

¹⁰⁸ Claremont Sch. Dist. v. Governor, 703A.2d 1353, 1358 (N.H. 1997).

adequacy.¹⁰⁹

¹⁰⁹ Id. at 1359. For a detailed discussion of the legislature's handling of this charge in the context of strong pressures to limit state taxes and maximize local control, see DREW DUNPHY (CAMPAIGN FOR FISCAL EQUITY, INC.), *MOVING MOUNTAINS IN THE GRANITE STATE: SCHOOL FINANCE AND ADEQUACY REFORM IN NEW HAMPSHIRE* (2001).

In 1997, the New Jersey Supreme Court upheld a set of content standards which, it noted, had been adopted by the New Jersey Legislature consistent with the national trend in favor of a standards-based approach to the improvement of public education.¹¹⁰ Although it concluded that the standards are facially adequate as a reasonable legislative definition of a constitutional thorough and efficient education,¹¹¹ the Court nevertheless also found that the funding system and the funding levels provided to implement the standards were insufficient to provide a thorough and efficient education to students in the poor urban districts.¹¹²

¹¹⁰ *Abbott v. Burke*, 693 A.2d 417, 427 (N.J. 1997). The standards provide achievement goals applicable to all students in seven core academic areas: visual and performing arts, comprehensive health and physical education, language-arts literacy, mathematics, science, social studies, and world languages. Infused throughout the seven core academic areas are five cross-content workplace readiness standards, which are designed to incorporate career-planning skills, technology skills, critical-thinking skills, decision-making and problem-solving skills, self-management, and safety principles. *Id.* at 425 (citations omitted).

¹¹¹ *Id.* at 428.

¹¹² *Id.* at 429 (Because [it] does not in any concrete way attempt to link the content standards to the actual funding needed to deliver that content, we concluded that [the Act] is clearly inadequate and thus unconstitutional as applied to the special needs districts. The court then ordered, (at least as an interim remedy, pending a showing that a thorough and efficient education can be assured through other means) spending for the poor districts at the same level as average spending in affluent districts, and additional supplemental programs to overcome educational disadvantages. *Id.* at 439.

In New York, a trial court, under remand directions from the state's Court of Appeals to gather evidence on the meaning of the constitutional right to a "the opportunity for a sound basic education,"¹¹³ closely analyzed the extensive set of Learning Standards that had been issued by the state's Board of Regents over the course of a lengthy seven-month trial. Although indicating that a constitutional standard cannot be synonymous with a specific set of state regulations,¹¹⁴ the Court nevertheless equated the standards=core, high level cognitive skills with the requirements for a sound basic education. Specifically, it held that certain of the standards, such as the graduation level standard for English Language Arts, which, among other things, requires students to demonstrate the ability to "discover [] relationships, concepts and generalizations, [and].... interpret and analyze complex informational texts"¹¹⁵ falls well within the constitutional requirements for a sound basic education.¹¹⁶

¹¹³ The New York Court of Appeals, in a preliminary decision on a motion to dismiss, had issued a "template" definition of "the opportunity for a sound basic education" required by its state constitution. This definition included both substantive educational goals ("basic skills "necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury") and specific resource essentials (including "minimally adequate facilities," "minimally adequate instrumentalities of learning," "sufficient personnel adequately trained to teach....up-to-date basic curricula..."). These definitional concepts had not been suggested by either party to the litigation and had been developed by the Court on its own initiative. In remanding the case for a trial to determine the extent to which children in New York City are actually being provided these opportunities, the Court indicated that it was interested in a thorough adversarial analysis of these concepts at trial and that it would finally resolve the question of how a sound basic education should be defined, after reviewing the trial record, on a subsequent appeal. *Campaign for Fiscal Equity v. State*, 655 N.E.2d 661 (N.Y. 1995). The author is co-counsel for the plaintiffs in this case.

¹¹⁴ *Campaign for Fiscal Equity v. State*, 719 N.Y.S. 2d 475 (NY Sup Ct. 2001). The Court stated that equating the Constitutional requirement with a set of state regulations "would essentially define the ambit of a constitutional right by whatever a state agency says it is." *Id.* at 484.

¹¹⁵ Regents of the University of the State of New York, Learning Standards for English Language Arts Standard 1, Language for Information and Understanding: Listening and Reading.

Other standards, like the graduation level science requirements in physics, which, *inter alia*, call upon students to compare energy relationships within an atom's nucleus to those outside the nucleus,¹¹⁷ the Court deemed to exceed a sound basic education.¹¹⁸

Commencement (Rev. ed. March 1996).

¹¹⁶ 719 N.Y.S.2d at 484.

¹¹⁷ REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, LEARNING STANDARDS FOR MATHEMATICS, SCIENCE AND TECHNOLOGY, STANDARD 4 - SCIENCE, COMMENCEMENT (REV. ED. MARCH 1996).

¹¹⁸ 719 N.Y.S.2d at 484.

A similar conclusion was reached in a recent North Carolina ruling which also was based on a detailed analysis of the new state standards. There, the Court held that the state standards were insufficient to provide North Carolina students with the opportunity for a sound basic education if properly implemented in the classroom...¹¹⁹ Because the standards included areas such as art, physical education, and second languages, which went beyond the list of core academic skills that comprise a sound basic education, the Court further held that the current North Carolina standards are more than sufficient.¹²⁰

¹¹⁹ Hoke County Bd. of Educ. v. State, 95 C.V.S. 1158, 2000 WL 1639686, slip op. at 30 (N.C. Sup. Ct. Oct. 12, 2000). This case is a follow-up to Leandro v. State, 488 S.C.2d 249 (N.C. 1997). In *Leandro*, the State Supreme Court defined the constitutional concept of a sound basic education and remanded the case for a trial to determine whether children in North Carolina were receiving an education that comported with those requirements.

¹²⁰ *Id.* The New York Court also ruled that art and physical education were beyond the scope of a sound basic education, but it also stated: However, arts education and physical education are important means of supporting the teaching of other subject areas that are part of a sound basic education. 719 N.Y.S.2d at 500.

In *CFE v. State*, the New York Court explicitly rejected defendants' argument that reading, writing and mathematics skills at an 8th to 9th grade level C the former state competency standard which the Regents were replacing with their more demanding Learning Standards --- would meet constitutional requirements.¹²¹ Instead, the Court held that sound basic education requires the Afoundational skills that students need to become productive citizens capable of civic engagement and sustaining competitive employment.¹²² ACivic engagement,@the Court defined to include acting as a knowledgeable voter who has the Aintellectual tools to evaluate complex issues, such as campaign finance reform, tax policy, and global warming,@and serving as a capable juror who may be called upon to A determine questions of fact concerning DNA evidence, statistical analyses, and convoluted financial fraud ...¹²³ Preparation for competitive employment involves Ahigher levels of skills and knowledge¹²⁴, and not preparation for A low level service jobs.¹²⁵

¹²¹ 719 N.Y.S.2d at 485. The North Carolina court similarly rejected the state's contention that performance ALevel II@on the state's AEnd of Grade@tests for grades 3 through 8 met Constitutional requirements. Level II was defined as performance demonstrating A inconsistent mastery@of grade level skills as set forth in the State's Standard Course of Study. The Court specifically held that A Academic performance below grade level (Level II) is a constitutionally unacceptable minimal standard...@*Hoke County*, slip op. at 18.

¹²² 719 N.Y.S.2d at 487.

¹²³ *Id.* at 485.

¹²⁴ *Id.* at 487.

¹²⁵ *Id.* at 486.

Clearly, what is occurring in the recent education adequacy cases is a multi-faceted dialogue between state courts and legislatures¹²⁶ on the critical question of how to define an adequate education. These dialogues take a variety of forms. A number of courts have, for example, placed greater emphasis on providing explicit guidelines to the legislature on how an adequate educational system should be developed. Thus, the Ohio Supreme Court declared in broad terms that children must be educated adequately so that they are able to participate fully in society.¹²⁷ It then declared the current school foundation program unconstitutional, and directed the state legislature to create an entirely new school financing system, in accordance with certain basic guidelines laid down by the court. These included eliminating the emphasis on the local property tax, and ensuring that the system include an appropriate student-teacher ratio, ...and sufficient computers,¹²⁸ as well as facilities in good repair and the supplies, materials and funds necessary to maintain these facilities in a safe manner...¹²⁹

The Wyoming Supreme Court went even further in providing substantive instructions to the

¹²⁶ George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on State Court School Finance Decisions*, 35 B.C. L. REV 543, 567 (1994). Brown distinguished this new form of dialogic public law litigation in the state courts from the managerial model of the federal courts. *Id.* at 566.

¹²⁷ *DeRolph v. State*, 677 N.E.2d 733, 745 (Ohio, 1997).

¹²⁸ *Id.* at 744.

¹²⁹ *Id.* at 747. In Arizona, where the core issue was capital facilities disparities, the Supreme Court enunciated guidelines for a new capital funding system which emphasized that:

The baseline chosen must establish the level of funds necessary to 1) bring existing facilities up to an adequate standard; 2) construct new and adequate facilities for growing districts; and 3) maintain all capital facilities at the adequacy level.

Hull v. Albrecht, 950 P.2d 1141, 1145 (Ariz. 1997).

legislature on how it should go about defining the specific elements of an adequate education. It held that:

To fulfill the constitutional command ...the legislature must state and describe what a proper education is for a Wyoming child. The constitution requires that it be the *best* that we can do. The legislature, in fulfilling its constitutional duty, must define and specify what that is. Trial testimony indicated aspects of a quality education will include:

1. Small schools, small class size, low student/teacher ratios, textbooks, low student/personal computer ratios.
2. Integrated, substantially uniform substantive curriculum
3. Ample, appropriate provision for at-risk students, special problem students, talented students.
4. Setting of meaningful standards for course content and knowledge attainment intended to achieve the legislative goal of equipping all students for entry to the University of Wyoming and Wyoming Community Colleges or which will achieve the other purposes of education.
5. Timely and meaningful assessment of all students= progress in core curriculum and core skills...¹³⁰

¹³⁰ Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995).

Finally, an especially interesting variation of the inter-branch dialogue was the recent enactment of a new adequacy clause to the Florida Constitution. In 1996, the Florida Supreme Court, in a close plurality decision, had determined that the prior constitutional language did not provide any judicially discoverable and manageable standards for determining adequacy.¹³¹ Two years later, the voters, through a 71% favorable referendum vote, amended the state constitution to include the following provision, which was largely influenced by the adequacy perspective of the dissenting and concurring judges in the prior case:¹³²

The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.¹³³

B. The Emerging Core Constitutional Concept

Constitutional doctrine in the state courts regarding student rights to an adequate education clearly has resulted in recent years in a growing convergence on certain core concepts. This

¹³¹ Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So.2d 400, 408 (Fla. 1996). A majority of the justices did agree that the constitution created a duty for the Legislature to provide some minimal level of support for public education, which would, for example, be triggered if a county had a 30 percent illiteracy rate. *Id.* at 409 (Overton, J., concurring).

¹³² See Jon Mills & Timothy McLendon, *Setting A New Standard for Public Education: Revision 6 Increases the Duty of the State to Make Adequate Provision For Florida Schools*, 52 FLA. L. REV. 329, 367 (2000).

¹³³ FLA. CONST., art. IX, § 1. Public Education of Children.

constitutional core emphasizes that an adequate education must 1) prepare students to be citizens and economic participants in a democratic society 2) relate to contemporary, not archaic educational needs; 3) be pegged to more than a minimal level; and 4) focus on opportunity, rather than outcome.

1. Democratic Purposes

As discussed above, most state constitution education clauses were written in the nineteenth century and reflect the democratic ideals of the common school movement, as well as the employment preparation orientation of the compulsory education movement. In interpreting the adequacy requirements of these clauses, the courts, therefore, have been strongly influenced by this original intent. Thus, there is wide-spread agreement that an adequate system of education is one that ensures that a child is equipped to participate in political affairs and compete with his or her peers in the labor market ...¹³⁴

¹³⁴ Verstegen and Whitney, *supra* note 32.

The overwhelming majority of state highest courts that have defined an adequate education have used some variation of this central focus on preparing students to be effective citizens and competitive participants in the economy. For example, the Vermont Supreme Court in its recent decision in *Brigham v. State*, 692 A.2 at 680, declared that the state's right to education clause guarantees political and civil rights and preparation to live in today's global marketplace. Similarly, the Wisconsin Supreme Court, although finding for defendants in its recent fiscal equity decision, stated that a sound basic education is one that will equip students for their roles as citizens and enable them to succeed economically and personally.¹³⁵

2. Relation to Contemporary Needs

¹³⁵ *Vincent v. Voight*, 614 N.W.2d 388, 396 (Wis. 2000); *see also* *Robinson v. Cahill*, 303 A. 2d 273, 295 (N.J. 1973); *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W.Va. 1979); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978); *Serrano v. Priest*, 487 P.2d. 1241, 1258-59 (Cal. 1971) (education is crucial to ...the functioning of democracy [and to] an individual's opportunity to compete successfully in the economic marketplace...); *Edgewood Indep. Sch. Dist v. Kirby*, 777 S.W.2d 391, 395-96 (Tex. 1989)(citing intent of framers of education clause to diffuse knowledge for the preservation of democracy...and for the growth of the economy.); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (defining constitutional duty in terms of preparing citizens for their role as participants and as potential competitors in today's marketplace of ideas); *Campbell Sch. Dist.v. State*, 907 P.2d 1238, 1259 (defining the core constitutional requirement in terms of providing students with a uniform opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually); *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E. 2d 661, 666 (N.Y. 1995) (defining a sound basic education in terms of preparing students to function productively as civic participants capable of voting and serving on a jury, a definition which was further refined in the recent trial court decision 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001) to include a specific reference to skills needed for sustaining competitive employment); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 540 (defining minimum adequacy , *inter alia*, in terms of fundamental knowledge of...history and governmental processes, and Vocational skills).

Though grounded in nineteenth century democracy and work preparation concepts, the court decisions emphasize the need to relate these concepts to contemporary needs. The constitutional text and the constitutional precedents establish basic parameters for a concept of adequacy that is substantive, yet evolving. Courts have specifically held that A... that which may have been ample= in 1889 may be wholly unsuited for children confronted with contemporary demands.@¹³⁶ for example, although a high school education was not an attribute of a thorough and efficient education in 1895, it clearly is today.¹³⁷ As the Wyoming Supreme Court put it, Athe definition of a proper education is not static and necessarily will change.@¹³⁸

¹³⁶ Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 94 (Wash. 1978).

¹³⁷ Robinson v. Cahill, 303 A. 2d 273 (1973)

¹³⁸ Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1274 (Wyo. 1995); *see also* Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997) (holding that framers of education clause intended to allow students to Aparticipate fully in society as it existed in his or her lifetime.@); Mc Duffy v. Secretary, 615 N.E.2d 516, 555 (Mass. 1993) (AOur Constitution, and its education clause, must be interpreted in accordance= with the demands of modern society or it will be in constant danger of becoming atrophied...@) (citing Seattle Sch. Dist. No.1 v. State, 585 P.2d 71 (Wash. 1978)).

In this context, the courts' implicit dialogue with the other branches of government on standards-based reform concepts has been particularly instructive. The standards-based reforms have made clear that to be effective citizens and productive workers in contemporary society, students need to develop high-order cognitive skills. The constitutional requirements set forth in many of the recent cases reflect an awareness of the need to prepare students to compete in the global society of the twenty-first century.¹³⁹ Courts have specifically stated that contemporary adequacy standards must be pegged well above a nineteenth century reading, writing and arithmetic level.¹⁴⁰ In essence, the emerging constitutional concept of adequacy is a prudent judgment concerning the basic educational opportunities that a child will need to take his or her place as a functioning adult in contemporary society. As the level of educational skills necessary to participate as a citizen and as a wage-earner in the society rise, expectations for an adequate education will also necessarily rise.

3. More Than A Minimal Level

Consistent with their understanding of contemporary needs as articulated by the standards-based reform movement, the courts deciding recent adequacy cases have implicitly rejected the

¹³⁹ See, e.g., *Unified Sch. Dist. 229 v. State*, 885 P.2d 1170, 1186 (Kan. 1994) (noting striking resemblance between legislative standards based on the goals of preparing learners to live, learn and work in a global society and constitutional definitions of adequate education in *Rose, Hunt* and *Abbott*); *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475, 487 (making explicit references to the reports of the National Education Summits and employers' and educators' perspectives).

¹⁴⁰ *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993); see also *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978); Martin Carnoy, *Education Adequacy: Alternative Perspectives and Their Implications For Educational Finance*, 8 J. EDUC. FIN. 286, 288 (1982) (The notion that...level of achievement [defines adequacy] is historically defined. In 1920, the level may have been literacy; in 1950, it may have been an eighth grade reading level; in 1980 it probably would be thought of in terms of tenth to twelfth grade skills and some knowledge of algebra and geometry.)

A minimalist standard of adequacy set in *Rodriguez* and have called instead for an education system which is at more than a minimum level.¹⁴¹ This

high minimum approach focuses on what would be needed to assure that all children have access to those educational opportunities that are necessary to gain a level of learning and skills that are now required, say, to obtain a good job in our increasingly technologically complex society and to participate effectively in our ever more complicated political process.¹⁴²

The policy statement of the 1996 National Education Summit, endorsed by President Clinton, 41 Governors and 48 CEOs of major American corporations, specifically described the type of cognitive skills students need for the contemporary job market:

In addition to basic skills, all individuals must be able to think their way through the workday, analyzing problems, proposing solutions, communicating, working collaboratively and managing resources such as time and materials.

* * * *

¹⁴¹ See *Brigham v. State*, 692 A. 2d 384, 397 (Vt. 1997); See also William H. Clune, *The Shift From Equity to Adequacy in School Finance*, 8 EDUC. POL'Y 376 (1994) (describing the thrust of the cases as calling for a high minimum level).

¹⁴² Minorini and Sugarman, *supra* note 57 at 188.

Today's economy demands that all high school graduates, whether they are continuing their education or are moving directly into the workforce, have higher levels of skills and knowledge.¹⁴³

Accordingly, some of the cases have specified that an adequate education must include, in addition to traditional reading and mathematical skills, knowledge of the physical sciences and A... a fundamental knowledge of economic, social, and political systems, and of history and governmental processes [and] academic and vocational skills.¹⁴⁴ The repeated emphases in the liability findings in these cases is on the relative inability of poor districts to provide their students the type of appropriate contemporary education that is available to residents in the affluent districts:

High-wealth districts are able to provide for their students broader educational experiences including more extensive curricula, more up-to-date technological equipment, better libraries and library personnel, teacher aides, counseling services, lower student-teacher ratios, better facilities, parental involvement programs, and drop-out prevention programs....¹⁴⁵

¹⁴³ 1996 NATIONAL EDUCATION SUMMIT POLICY STATEMENT; *see also*, ACHIEVE, INC., BENCHMARKING THE BEST, 3 (1999) (Almost two-thirds of today's workforce needs advanced reading, writing, mathematical and critical thinking skills, compared to only 15% of workers just twenty years ago.); REPORT OF THE SECRETARY'S COMMISSION ON ACHIEVING NECESSARY SKILLS (ASCANS) (1991) (finding that students need much higher levels of technical skill and knowledge in the past, including the ability to manage and comprehend complex texts and information); NATIONAL CENTER ON EDUCATION AND THE ECONOMY, AMERICA'S CHOICE: HIGHER SKILLS OR LOW WAGES (1990) (comparing skill levels of students graduating from American schools with graduates of other industrial nations and concluding that American workers need higher level skills to be competitive).

¹⁴⁴ *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 540 (Ala. 1999); *see also* *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Secretary*, 615 N.E.2d 516 (Mass. 1993), *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993), *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997).

¹⁴⁵ *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 393 (Tex. 1989); *see also*, e.g., *McDuffy*, 615 N.E. 2d at 521 (comparing facilities, libraries, computers, staffing etc in specific poor and affluent school districts); *Abbott v. Burke*, 575 A. 2d 359, 395-396 (comparing, *inter alia*, availability of computers, science laboratories, foreign language and advanced placement courses in rich and poor districts.)

The Montana Supreme Court was explicit in articulating the implications of these comparisons. After contrasting the offerings in a number of poor and rich districts, it stated that “the wealthier school districts are not funding frills.”¹⁴⁶ In short, it is clear that “the concept of an adequate education emerging from state courts invalidating school finance systems goes well beyond a basic or minimum educational program that was considered the acceptable standard two decades ago.”¹⁴⁷ The Florida Constitutional referendum, reflecting these contemporary trends, specifically defined an adequate education as one which “allows students to obtain a high quality education.”¹⁴⁸

4. Opportunity, Not Outcome

¹⁴⁶ Helena Elementary Sch. Dist. No. 1 v. State, 769 P. 2d 684, 690 (Mont. 1989).

¹⁴⁷ Deborah A. Verstegen, *Judicial Analysis During the New Wave of School Finance Litigation: The New Adequacy in Education*, 24 J. EDUC. FIN. 51, 67 (1998).

¹⁴⁸ FLA. CONST. art IX, § 1.

State educational standards provide courts with useful tools for ensuring that all students are actually provided the level of education guaranteed by the state constitution. In articulating the core requirements of their state education clauses, the judges' thinking has clearly been informed by the contemporary needs and values that have impelled the national standards-based reform movement.¹⁴⁹ At the remedial stage, state standards provide courts effective tools for assessing the extent to which educational opportunities are being made available to meet the needs of all students. In contrast to the *McInnis* courts' perplexity about how to define and deal with educational needs,¹⁵⁰ courts in the recent adequacy cases have felt confident in asserting that students in high need, low resource districts not currently receiving a constitutionally adequate education because their education **A** fall[s] short of the very educational standards that the state...has determined are basic to providing its school children with minimally adequate educational opportunities.¹⁵²

In formulating their remedial criteria, the courts do not, however, apply the state standards in a wooden way. Thus, although many state accountability systems, especially in states that have adopted

¹⁴⁹ This does not, however, mean that constitutional adequacy requirements are synonymous with current legislative or regulatory standards in any particular state. Constitutional criteria represent enduring fundamental values and principles; although their application will be influenced by contemporary needs, that need is assessed by the courts in terms of fundamental principles and not periodic legislative or administrative policy revisions. *See also* discussion of *Campaign for Fiscal Equity v. State*, *supra* note 114.

¹⁵⁰ *See* discussion, *supra* at 14.

¹⁵² Opinion of the Justices, 624 So.2d 107, 128 (1993). The Alabama trial court utilized three sets of state standards in determining that the state's schools were not providing an adequate education: the substantive educational standards set forth in the Alabama Education Improvement Act, state and regional accreditation standards; and indicators utilized by state officials such as drop out rates, college remediation rates, and workforce preparation. *Id.* at 127. *See also* Martha I. Morgan, et al., *Establishing Education Program Inadequacy: The Alabama Example*, 28 U. MICH. J.L. Reform 559 (1995).

High stakes testing programs, emphasize student achievement scores as the basic determinants of whether students are obtaining an appropriate education, the constitutional criterion for determining the level of educational services that must be provided for an adequate education tends to emphasize educational opportunity, not educational results.¹⁵³ Output measures are considered important guideposts for determining whether an education system is functioning well and whether further scrutiny is warranted, but they are not seen as constituent elements of a constitutional definition of adequacy.¹⁵⁴

¹⁵³ For a detailed discussion of the concepts of equality of opportunity and equality of results in American political history and in the evolution of federal desegregation doctrine, see MICHAEL A. REBELL AND ARTHUR R. BLOCK, EQUALITY AND EDUCATION: FEDERAL CIVIL RIGHTS ENFORCEMENT IN THE NEW YORK CITY SCHOOL SYSTEM, 3-33 (1985).

¹⁵⁴ See, e.g., Campaign for Fiscal Equity v. State, 655 N.E.2d 661, 666 (N.Y. 1995) (Performance levels on such examinations are helpful but should also be used cautiously as there are a myriad of factors which have a causal bearing on test results.); Leandro v. State, 488 S.E. 2d 249, 259-60 (N.C. 1997) (Holding that the level of performance of the children of the state and its various districts on standard achievement tests may be considered, but they may not be treated as absolutely authoritative on this issue.); see also Linda Darling-Hammond, *Standards of Practice for Learner-Centered Schools*, in ROBERT BERNE AND LAWRENCE O. PICUS, OUTCOME EQUITY IN EDUCATION 191, 192-194 (1994) (discussing limits of outcome data); Henry M. Levin, *Little Things Mean A Lot*, 8 EDUC. POL'Y 396 (1994) (discussing lack of sufficient measurement tools to assess precisely the quality of education received by all students or the costs of reaching full substantive equality).

Courts tend to enforce students' rights to an adequate education, therefore, by seeking to ensure the availability of essential resources such as decent facilities, a safe environment, qualified teachers, and up-to-date textbooks;¹⁵⁵ or by providing feasible additional support for students with special needs or at risk of educational failure that will give all students the opportunity to develop necessary academic skills.¹⁵⁶ They do not, however, guarantee that all students will fully meet demanding state standards or that unlimited resources must be made available to overcome all impediments to equal educational outcomes.

The emerging core constitutional concept of adequacy has enhanced the courts' ability to frame workable remedies and to enter into dialogues with state legislatures and state education departments on methods for actually providing a meaningful opportunity for an adequate education to all students.

¹⁵⁵ See, e.g., *Campaign for Fiscal Equity v. State*, 655 N.E.2d at 666 (articulating "education essentials" required to provide the opportunity for a sound basic education in terms of "a minimally adequate physical facilities, instrumentalities of learning, sufficient numbers of adequately trained teachers, etc."); see also Gary Orfield, *Asking the Right Question*, 8 EDUC. POL'Y 404 (1994) (discussing minimum prerequisites that schools should provide for "a fair minimum standards of opportunity, rather than for equal education"); W. Steven Barnett, *Obstacles and Opportunities: Some Simple Economics of School Finance Reform*, 8 EDUC. POL'Y 436, 444-445 (arguing for cost benefit analysis of reforms that make substantial difference in educational performance of poor students.); Richard F. Elmore, *Thoughts on Program Equity: Programs and Incentives for Equity in Education*, 8 EDUC. POL'Y 453 (same).

¹⁵⁶ See, e.g. *Vincent v. Voight*, 614 N.W. 2d 388, 397 (Wis, 2000). (requiring legislature to "take[] into account districts with disproportionate numbers of disabled students, economically disadvantaged students and students with limited English language skills."); *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001) (further elaborating on the education essentials required for a sound basic education by, *inter alia*, emphasizing the need for "adequate resources for students with extraordinary needs" and "an expanded platform of programs for "at risk" students; *Hoke County Bd. of Educ. v. State*, 95 C.V.S. 1158, 2000 WL 1639686, slip op. at 30 (N.C. Sup. Ct. Oct. 12, 2000) (holding that "at-risk" students are constitutionally entitled to a pre-school education.); *Hull v. Albrecht*, 950 P.2d 1141, 1145 (Ariz. 1997) (requiring the state to provide financing sufficient to provide the facilities and equipment necessary "to enable students to master the [state's] educational goals.")

Although evidence presented in many of these cases has demonstrated to the courts= satisfaction that educational resources, if effectively utilized, can result in impressive learning gains by **A** at-risk@ students, the fact remains that these demonstrations have not yet been brought to scale because sufficient resources have never been made available in large urban school districts or other systems with large numbers of such students . Restructuring state education finance systems, and obtaining sufficient resources to implement standards-based reforms and workable accountability systems remain formidable challenges. The critical importance for the future of American education **B** and for the future of American democracy **C** of fully meeting these challenges and actually providing the opportunity for an adequate education to all students will be the subject of the concluding section of this chapter.

V- ADEQUACY=S IMPLICATIONS

The previous section has described the emerging core constitutional concept of adequacy in terms of providing all students a reasonable opportunity, at **A** more than a minimal level,@ to become effective citizens and economic competitors, in accordance with contemporary needs. On first impression, this emerging constitutional concept may seem rather unexceptional; much of it appears to be merely restating in contemporary terms historical understandings regarding the links between education and democracy. Thomas Jefferson pointed out early in our history that **A** some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.@¹⁵⁷ and de Toqueville recognized

¹⁵⁷ Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)

almost 150 years ago that in the United States the instruction of the people powerfully contributes to the support of the democratic republic...¹⁵⁸

This historical vision was, however, actually quite myopic. The link between democracy and an educated electorate recognized by Jefferson and de Toqueville was articulated at a time when the scope of public discussion was limited and when both the franchise and access to education were limited largely to upper income white males. Throughout most of America's history, women, blacks and other minorities and lower class workers who did not own property were excluded from the franchise and from exercising most of the rights of citizenship.¹⁵⁹

¹⁵⁸ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 329 (Vintage 1961).

¹⁵⁹ *See, e.g.*, ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997). (discussing systematic exclusion of women, minorities and working class from exercise of the franchise); *Thiel v. Southern Pacific County*, 328 U.S. 217, 222 (1946) (discussing systematic exclusion from jury list of those who work for a daily wage.); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (discussing systematic exclusion of women from jury roles.)

As discussed above, the United States Supreme Court acknowledged in *Rodriguez* that our democracy depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.¹⁶⁰ This concept of an informed electorate composed of citizens who intelligently consider and analyze issues before voting, was, however, a relatively recent phenomenon; it emerged during the Progressive Era at the beginning of the twentieth century. Michael Schudson, after analyzing the history of American civic life from colonial days to the present, concluded that the kind of knowledge the electorate required has, in fact changed dramatically over time:

...in an age of gentlemen, the citizen's relatively rare entrances into public discussion or controversy could be guided by his knowledge of social position; in the era of rule by majorities, the citizen's voting could be led by the enthusiasm and rhetoric of parties and their most active partisans; in the era of experts and bureaucracies, the citizens had increasingly to learn to trust their own canvass of newspapers, interest groups, parties and other sources of knowledge¹⁶¹

In short, the combination of a vastly expanded electorate encompassing individuals of both genders and of all classes, races and ethnic groups, with expectations that a citizen's role is to rationally analyze issues and make individual electoral decisions is a recent development, the implications of which have yet to be fully explored.

A. An Adequate Education for Citizenship

¹⁶⁰ *Rodriguez v. San Antonio Indep. Sch. Dist.*, 411 U.S. 1, 36.

¹⁶¹ MICHAEL SCHUDSON, *THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE* 8 (1998).

Even though democratic theory in the United States in recent decades has extolled the concept of the *informed citizen*,¹⁶² there has, in fact, been little discussion, let alone analysis, of the specific skills individuals need to carry out the functions of an *informed citizen*. The standards-based reform movement has now put this question into focus, and, at the same time, it has provided specific tools for determining the extent to which the schools are actually producing students who can effectively carry out their presumed societal responsibilities.

¹⁶² *See, e.g.*, AMY GUTMANN, *DEMOCRATIC EDUCATION* 134 (1987) (Asserting that inequalities in distribution of educational goods can be justified only if they do not deprive any child of the ability to participate effectively in the democratic process.)

For example, the Council on Curriculum and Assessment which developed the Regents Learning Standards for New York State,¹⁶³ specifically considered the analytical skills that would allow students to read the kinds of texts that they would encounter in carrying out their duties as citizens, would equip them to participate and deliberate in civic discussions, and which would provide them specific knowledge about the functioning of the American governmental system.¹⁶⁴ The goals for a constitutionally-acceptable education system articulated by the highest courts in Kentucky, Massachusetts, New Hampshire and North Carolina similarly included specific references to developing a sufficient understanding of governmental processes to enable the student to understand the

¹⁶³ Research and analysis and the drafting of the standards in New York was conducted by seven different curriculum committees, one for each key area of the school curriculum. The members of these committees included teachers, principals, experts in the disciplines from higher education and also people from public life from the professions, unions, business and industry. An overarching Council on Curriculum and Assessment oversaw and coordinated the work of the separate committees. Memorandum from Thomas Sobol, New York State Commissioner of Education, to the New York Board of Regents: Implementing a New Compact for Learning: Strategic Plan 2 (1991). Throughout the drafting process, New York's State Education Department and Thomas Sobol, the Commissioner of Education, maintained ongoing communications on standards developments with their counterparts in other states, and with the New Standards Project, of which Commissioner Sobol was, at the time, the chair. Testimony of Commissioner Sobol in Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001) (Record at pp.1020:23-1022:13). For a summary of a comparable standards development process in the State of North Carolina, see Hoke County Bd. of Educ. v. State, 95 C.V.S. 1158, 2000 WL 1639686, slip op. at 30 (N.C. Sup. Ct. Oct. 12, 2000).

¹⁶⁴ THE NEW YORK STATE CURRICULUM AND ASSESSMENT COUNCIL, LEARNING CENTERED-CURRICULUM ASSESSMENT FOR NEW YORK CITY. (1994) at 8-9, 63-65; Testimony of Linda Darling Hammond in Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475; Record at pp. 6472:12-6473:17. The Council also fully considered evidence on workplace skills such as the 1991 SCANS report (*see* discussion at *supra*,) and stated that one of the primary purposes of the extensive standards development process they undertook was to identify the higher-levels of technical as well as reasoning and analytical skills that workers need to function. @ *Id.* at 6460: 19-21.

issues that affect his or her community, state, and nation.¹⁶⁵

With these new state standards, courts are now in a position to probe unanalyzed past assumptions about students' preparation to function as productive citizens. The trial court in *CFE v. State of New York* did exactly that during the seven-month trial which concluded in July, 2000. In order to develop a trial record that would fully evaluate the Court of Appeals' concept that a sound basic education must provide the skills students need to function productively as civic participants capable of voting and serving on a jury,¹⁶⁶ Justice Leland DeGrasse first instructed the parties to have their expert witnesses analyze a charter referendum proposal that was actually on the ballot in New York City at the time the trial was in progress. The specific question posed was whether graduates of New York high schools would have the skills needed to comprehend that document. The witnesses were also asked to conduct a similar analysis of the jury charges and of certain documents put into evidence in two complex civil cases that had recently been tried in state and federal courts.

Dr. Linda Darling-Hammond was the primary witness for the plaintiffs on these issues. She first closely reviewed the charter revision proposal and identified the specific reading and analytical skills that an individual would need in order to understand that document. She then related these skills to particular standards set forth in the Regents' Learning Standards in English Language Arts, Social Studies, and Mathematics and Sciences.¹⁶⁷

¹⁶⁵ *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989).

¹⁶⁶ See discussion *supra* note 113.

¹⁶⁷ *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475; Record at pp. 6484, 6489. Dr. Richard Jaeger, a psychometrician and professor at the University of North Carolina, Greensboro, also testified that in order to comprehend ballot propositions on subjects like budget issues, voters need analytic, synthesizing and evaluative skills which are properly assessed by the Regents examinations, which are based on the Learning Standards. *Id.* at 13452 - 13460. Dr. Henry Levin,

an educational economist and Professor at Teachers College, Columbia University, testified that the kinds of reasoning, communication, problem-solving, decision-making, informational and other skills that are needed in the contemporary workplace are also specifically incorporated into the Regents Learning Standards. *Id.* at 12107 - 12117.

Dr. Darling-Hammond also described the types of skills a juror would need to comprehend and apply concepts like *the preponderance of evidence* in terms of being able to understand how to weigh the evidence, how to decide what the preponderance of the evidence might mean, what kind of testimony is credible and how to use the evidence in drawing an opinion.¹⁶⁸ The specific types of skills needed to undertake this complex reasoning, process are also cultivated by the Learning Standards, according to Dr. Darling-Hammond.¹⁶⁹ She further explained how skills such as the ability to analyze statistical tables and graphs, understand economic concepts like *opportunity costs*, and comprehend scientific studies are developed by the mathematics, science, and social studies standards.¹⁷⁰ In sum, the types of cognitive skills imparted by the Regents' Learning Standards are, according to Dr. Darling-Hammond, precisely the types of skills which the New York Court of Appeals had previously indicated that citizens need in order to perform adequately as jurors.¹⁷¹

¹⁶⁸ *Id.* at p. 6516.

¹⁶⁹ *Id.* at p. 6517.

¹⁷⁰ *Id.* at pp. 6522-6524;6528-6534.

¹⁷¹ *See People v. Guzman*, 555 N.E.2d 259, 261 (N.Y. 1990) (At a minimum, a juror must be able to understand all of the evidence presented, evaluate that evidence in a rational manner, communicate effectively with the other jurors during deliberations, and comprehend the applicable legal principles, as instructed by the court.)

Defendants= primary expert on the ballot comprehension issue was Dr. Christine Rossell, a political science professor from Boston University. Dr. Rossell did not testify about the specific skills a student would need to be an effective voter. Instead, she introduced polling data which showed that the vast majority of American voters obtain their information from radio and television news and make up their minds on how to vote for candidates and propositions before they enter the voting booth.¹⁷² Her implicit argument was that comprehending radio and television news does not require high level cognitive skills and since most voters make up their minds without actually reading ballot propositions, the level of skills necessary to comprehend such documents is not a significant issue.

¹⁷² Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475; Record at pp.16874, 16878-79. 16886, 16888089; Defendants Exhibit No. 19290, (Primary News Sources in Presidential and Congressional Campaigns, U.S., 1996.) Defendants Exhibit No. 19293; (Percentage of People who Watch Network News Two or More Times Weekly by Education Level, U.S., 1983.)

Dr. Herbert Walberg, an education professor from the University of Illinois-Chicago, also testified for the defendants in the *CFE* trial. He undertook a computerized Readability analysis of various newspaper articles dealing with electoral issues and of some of the jury documents that had been analyzed by plaintiffs=experts. He concluded that only a seventh or eighth grade level of reading skills was needed to comprehend these materials.¹⁷³ Dr. Walberg also indicated that dialogue among members of the jury can substitute for a lack of understanding on the part of some of the individual jurors.¹⁷⁴

Overall, then, the implied premise of the defendants=position was that citizens do not actually need to function at a high skill level, and that they need not be capable of comprehending complex written material, so long as the subjects dealt with in the material are regularly discussed in the mass media, or so long as they can obtain assistance from other citizens in carrying out their civic responsibilities. Justice De Grasse=s decision resoundingly rejected this position. He held:

An engaged, capable voter needs the intellectual tools to evaluate complex issues, such as campaign finance reform, tax policy, and global warming, to name only a few. Ballot propositions in New York City, such as the charter reform proposal that was on the ballot in November 1999, can require a close reading and a familiarity with the

¹⁷³ *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475; Record at pp. 17182-17183. Plaintiffs argued that Walberg=s analysis relied on reading scales that focus on sentence length and other mechanical factors, rather than on the cognitive level of the materials being reviewed, and that by doing so he reached the implausible conclusion that the New York Times and the New York Daily News are essentially at the same level of reading difficulty. They also charged that Dr. Walberg analyzed only selected parts of the jury documents which Plaintiffs= witnesses had reviewed, and he omitted precisely those materials that would have called for the highest level of reading skills. *Id.* at pp.17185, 17201, 17215; 17317-17321, 17335-336. Dr. Walberg did not undertake any readability analysis of the ballot which Dr. Darling-Hammond had analyzed. *Id.* at p.17329.

¹⁷⁴ *Id.* at 17220. If one person didn=t understand something, perhaps another person could help them.

structure of local government.

Similarly, a capable and productive citizen doesn't simply show up for jury service. Rather she is capable of serving impartially on trials that may require learning unfamiliar facts and concepts and new ways to communicate and reach decisions with her fellow jurors. To be sure, the jury is in some respects an anti-elitist institution where life experience and practical intelligence can be more important than formal education. Nonetheless, jurors may be called on to decide complex matters that require the verbal, reasoning, math, science, and socialization skills that should be imparted in public schools. Jurors today must determine questions of fact concerning DNA evidence, statistical analyses, and convoluted financial fraud, to name only three topics.¹⁷⁵

¹⁷⁵ Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 485 (N.Y. Sup. Ct. 2001).

Although society may have unreflectively accepted a wide gap between its democratic ideal and the actual functioning level of its citizens participants in the past, now that the issue has come to the fore, it is difficult to conceive of our society knowingly perpetuating a state of affairs in which voters can not comprehend the ballot materials about which they are voting and jurors can not understand legal instructions or major evidentiary submissions in the cases they are deciding. In order to function productively in today's complex world, citizens need a broad range of cognitive skills that will allow them to function capably and knowledgeably, not only as voters and jurors, but also in petitioning their representatives, asserting their rights as individuals, engaging in deliberations with other citizens and otherwise taking part in the broad range of interchanges and relationships involved in the concept of civic engagement.¹⁷⁶

B. Implications of the Skills Gap

¹⁷⁶ See *id.* at 485. (The Court of Appeals invoked voting and jury service as synecdoches for the larger concept of productive citizenship...Productive citizenship means more than just being *qualified* to vote or serve as a juror, but to do so capably and knowledgeably. It connotes civic engagement.; cf *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993) (A...a free government is dependent for its survival on citizens who are able to participate intelligently in the political, economic and social functions of our system.)

The focus on the citizenship and employment purposes of public education in state constitutional provisions combined with the analytic tools provided by state standards have now dramatically put the spot light on the jarring gap between the skills students need to function effectively as productive civic participants and the actual level at which large numbers of our high school graduates perform. This gap has two basic consequences: large numbers of American citizens currently do not vote or serve on juries because they feel incapable of carrying out these civic functions¹⁷⁷ and/or large numbers are voting or serving inappropriately and inadequately. Both of these possibilities are philosophically and politically unacceptable. Accordingly, the notion that all students can learn at a reasonably high cognitive level, which is the educational premise of standards based reform, must also become a political imperative for a well-functioning contemporary democratic society.

The possibility of actually excluding those with inadequate cognitive skills from civic responsibilities has, in fact been seriously debated in recent years as a growing number of complex litigations in areas like product liability, antitrust, and environmental regulation, have raised critical questions regarding the capacity of juries to deal with the problems posed by contemporary litigation. Serious issues have arisen concerning the ability of contemporary juries to understand complex statistical, scientific and technical data,¹⁷⁸ and there is wide-spread concern about their capability to

¹⁷⁷ Many citizens also do not vote or serve on juries because they feel disengaged or are cynical about the current political system. America's voter participation rate - 48.9% in the 1996 Presidential election (down from 62.8% in 1960) ranks below 22 other established democracies. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 31-31 (2000). Putnam explains the substantial decline in civic participation in America in recent years in terms of a rapid decline in social capital. He recommends improved civic education in schools as one route for restoring such social capital. *Id.* at 405.

¹⁷⁸ *See, e.g.,* MOLLY SELVIN AND LARRY PICUS, *THE DEBATE OVER JURY PERFORMANCE:*

understand legal instructions.¹⁷⁹

OBSERVATIONS FROM A RECENT ASBESTOS CASE 45-46 (1987), ARTHUR D. AUSTIN, COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM: A CASE STUDY (1984); William C. Thompson, *Are Juries Competent to Evaluate Statistical Evidence?* 52 LAW & CONTEMP. PROB. 9, 24-41. (1989).

¹⁷⁹ A...if the jury has an Achilles heel, it is the comprehension of legal instructions.@Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons From Civil Jury Trials*, 40 AM. UNIV. L. REV. 727, 749 (1991). The authors cite a recent in-depth examination of jury decision-making in complex cases by the Litigation Section of the American Bar Association found significant juror difficulty in understanding and applying judicial instructions and substantial variability in juror comprehension between cases and among jurors. *Id.* at 752-754; *see also, e.g.*, Franklin Strier, THE EDUCATED JURY: A PROPOSAL FOR COMPLEX LITIGATION 47 PAUL L. REV 47, 53 (discussing studies indicating that pattern jury instructions are difficult for juries to understand); AUSTIN, *supra* note 178 at 84-85 (case study of 2 separate juries in anti-trust litigation found that A their comprehension level of the instructions was very low, if not nonexistent.@); Robert E. Litan, *Introduction* to VERDICT: ASSESSING THE CIVIL JURY SYSTEM 11, 18 (Robert W. Litan ed., 1993) (Awhere as juries appear to be at fault for misplaced verdicts, the principal culprit seems to be difficulty in understanding the legal instructions, a problem which that is found in complex and noncomplex cases.@)

In 1979, the former Chief Justice of the U.S. Supreme Court, Warren E. Burger, stated that contemporary jurors are not capable of comprehending technical evidence in complex cases.¹⁸⁰ He said that Jefferson would be appalled at the prospect of a dozen of his yeomen and artisans trying to cope with some of today's complex litigation in a trial lasting many weeks or months.¹⁸¹ A fiery debate then ensued among legal scholars and federal judges on whether juries in complex cases should be limited to college graduates,¹⁸² or whether the Seventh Amendment right to a trial by jury should be re-interpreted to exclude complex cases.¹⁸³

¹⁸⁰ Warren E. Burger, *The Use of Lay Jurors in Complicated Civil Cases*, Remarks to the Conference of State Chief Justices (3-5) (Aug 7, 1979)(asserting that technical evidence is too complex for lay juries); *see also* Warren E. Burger, *Agenda for Change*, 54 JUDICATURE 232, 235 (1971) (recommending consideration of use of experts to assist judges in complex cases); Sperlich, *The Case for Preserving Trial By Jury in Complex Civil Litigation*, 65 JUDICATURE 394, 397 (1982) (Discussing Chief Justice Burger's concern and its impact.)

¹⁸¹ *Burger Suggests Waiving Juries in Complex Civil Trials*, NAT'L L.J., Aug.13, 1979, at 21.

¹⁸² *See, e.g.,* William Luneberg & Mark A. Nordenberg, *Specially Qualified Juries & Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887, 945-50 (1981); Mark A. Nordenberg & William Luneberg, *Decision-Making in Complex Federal Civil Cases: Two Alternatives to the Traditional Jury*, 65 JUDICATURE 420, 425-27 (1982) (proposing that jurors in complex cases be required to hold a college degree); Strier *supra* note 179.

¹⁸³ *See, e.g., In re Japanese Elec. Prods Antitrust Litig.*, 631 F.2d 1069, 1084 (3rd Cir. 1980, (denying right to jury in complex litigation); *Bernstein v. Universal Pictures*, 79 F.R.D. 59 (S.D. N.Y, 1978) (same); *But see In re U.S. Financial Securities Litig.*, 609 F.2d 411 (9th Cir. 1979) (holding that there is no complexity exception to the Seventh Amendment); *see also* *Ross v. Bernhard* 396 U.S. 531, 538 n. 10 (noting that in determining whether an issue was of a legal nature, and, therefore, jury triable, courts should consider the practical abilities and limitations of juries.); Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 Harv. L.Rev 898 (1979).

This call for elite juries actually amounted to a return to the historical practice of convening blue ribbon juries in important cases that had been prevalent throughout the United States prior to the passage of the federal Jury Selection and Service Act in 1968,¹⁸⁴ and a series of Supreme Court cases that banned practices that led to the systematic exclusion of women and minorities from jury panels.¹⁸⁵ The incompatibility of such blue ribbon panels with basic democratic principles was scathingly set forth by U.S. Supreme Court Justice Frank Murphy, dissenting in a 1948 case which upheld the verdict of a blue ribbon jury operating in accordance with a New York state statute B since repealed B which permitted such elite jury panels:

¹⁸⁴ 28 U.S.C. § 1861. The Act States that A It is the policy of the United States that all litigants in federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community.@This right was apparently extended to the states by *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975), at least in regard to criminal cases. *But cf.* *United States v. Potter* 552 F.2d 901, 905 (9th Cir. 1977) (holding that Athe less educated@are not a Acognizable group@entitled to the constitutional protections); *United States v. Butera*, 420 F.2d 564, 571 (1st. Cir 1970) (indicating that the Aless educated@are a distinctive group).

¹⁸⁵ *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986) (black defendant may challenge prosecutors= use of peremptory challenges against racial minorities); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (banning exclusion of women as a class from jury service).

The vice lies in the very concept of "blue ribbon" panels -- the systematic and intentional exclusion of all but the "best" or the most learned or intelligent of the general jurors. Such panels are completely at war with the democratic theory of our jury system, a theory formulated out of the experience of generations. One is constitutionally entitled to be judged by a fair sampling of all one's neighbors who are qualified, not merely those with superior intelligence or learning....Any method that permits only the "best" of these to be selected opens the way to grave abuses. The jury is then in danger of losing its democratic flavor and becoming the instrument of the select few.¹⁸⁶

¹⁸⁶ Moore v. New York, 333 U.S. 565, 570 (1948). The New York elite jury panel practice had previously been upheld by the Court in *Fay v. New York*, 332 U.S. 261 (1946). As late as 1967, 60% of federal courts still relied heavily on blue-ribbon juries. (Results of a 1967 survey of federal courts cited in JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 99 (1994).

Juries have historically played a more critical role in America than in other nations, including England. In colonial days, the colonists relied on the jury to restrain governmental excesses, as in the Peter Zenger trial, and juries played an important role in keeping the judicial branch independent. In the 19th century, they were an important counterforce to pro-business judges. For an overview discussion of the historical role of American juries, see Stephan Landsman, *The History and Objectives of the Civil Jury System*, in *VERDICT*, *supra* note 179 at 22. See also, LEONARD W. LEVY, *THE PALLADIUM OF JUSTICE; ORIGINS OF TRIAL BY JURY* (1999). De Toqueville also noted the important role juries play in training citizens in the democratic virtues:

It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged. And this is especially true of the jury in civil causes; for while the number of persons who have reason to apprehend a criminal prosecution is small, everyone is liable to have a lawsuit...it invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society and the part which they take in its government. By obliging men to turn their attention to affairs of their own, it rubs off that private selfishness which is the rust of society.

DE TOCQUEVILLE, *supra* note 158 at 295.

The outcome of the scholarly and judicial debate on the use of juries in complex cases has largely re-affirmed the importance of jurors being representative of the broad community and has rejected the proposals for elite juries.¹⁸⁷ There remain, however, persistent concerns about the ability of juries to function effectively, especially in complex civil cases. Although empirical studies of jury functioning in the past had shown that A... the jury does by and large understand the facts and get the case straight,@¹⁸⁸ many contemporary studies Abuttress the contention of lay jury incompetence in complex cases.@¹⁸⁹

The recent literature on jury functioning, therefore, bears out Prof. Darling-Hammond's testimony in the CFE litigation that students need to develop high level cognitive skills if they are to function productively as civic participants in today's complex society. The wide-spread rejection of the suggestion that blue-ribbon juries be re-instated in complex cases makes clear that in this age of

¹⁸⁷ See, e.g., R. Lempert, *Civil Juries and Complex Cases: Taking Stock After 12 Years*, in VERDICT *supra* note 179 at ___; Steven A. Saltzburg, *Improving the Quality of Jury Decision-making*, in VERDICT, *supra* note 179 at 341, Barbara Allen Babcock, *Jury Service and Community Representation*, in VERDICT, *supra* note 179 at 460. In a 1989 survey, 58% of federal judges and 66% of state court judges disagreed with the proposition that A In complex civil cases, there should be some minimum level of education or qualifications to avoid jurors who cannot understand the case. Louis Harris & Associates, Inc., *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B.U. L. Rev. 731, 747 (1989).

¹⁸⁸ HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 149 (2d ed., 1971). Kalven and Zeisel's study was based on questionnaires concerning a sample of approximately 3500 criminal jury trials conducted in the mid-1950s. Among other things, the researchers asked presiding judges how they would have decided cases and found that the actual verdicts reached by the juries corresponded the judges' views in 78% of the cases. *Id.* at 63. Judge-jury disagreements tended to be on issues of community values and not on factual issues. *Id.* at 116; see also, JOHN GUINTEHER, *THE JURY IN AMERICA* 208-209 (1988)(stating that heterogenous juries recognize and offset each others biases).

¹⁸⁹ Strier, *supra* note 179 at 55; See notes 178-182, *supra*.

broadened civil rights= assertion, restriction of the franchise and denial of the right to a jury representing a full cross-section of the community, do not constitute viable options. The nation can no longer tolerate a state of affairs in which the graduates of many of high schools lack the cognitive skills to be civically engaged and to sustain competitive employment in the 21st century. In the end, then, the stated goal of the standards-based reform movement cannot be merely aspirational. There really is no alternative to actual fulfillment of the vision that today the schools must ensure that virtually *all* students meet high expectations and develop high level cognitive skills.