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The Legal Backdrop to Adequacy

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K–12 EDUCATIONAL FINANCING systems in almost twenty states have been declared unconstitutional by state courts because such states are not providing sufficient funding for the "adequate" education guaranteed by their constitutions.[1] The result

1. *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Secretary, Executive Office of Education*, 415 N.E.2d 516 (Mass. 1993); *Roosevelt Elementary School District v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Campbell County School District v. Wyoming*, 907 P.2d 1238 (Wyo. 1995); *Claremont School District v. Governor*, 703 A.2d 1353 (N.H. 1997); *Abbott v. Burke*, 798 A.2d 602 (N.J. 2002); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *Campaign for Fiscal Equity v. New York*, 100 N.Y.2d 893 (N.Y. 2003) (hereinafter "*CFE II*"); *Montoy v. State*, 278 Kan. 769, 102 P.3d 1160 (2005) (hereinafter "*Montoy II*"); *Lakeview School District v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); *Columbia Falls Elem. School Dist. No. 6, et al. v. The State of Montana*, No. 04-390 (Mt. S. Ct. March 22, 2005); *Harper v. Hunt, Op. of Justices*, 624 So.2d 107 (Ala. 1993); *Brigham v. State*, 692 A.2d 384 (Vt. 1997); *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996); *Hoke County Bd. of Educ., et al v. State of North Carolina*, 599 S.E.2d 365 (2004); *Seattle Sch. Dist. v. Steele*, 585 P.2d 71 (Wash. 1978); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979);

has been court orders in many states requiring significant increases in education spending and judicial supervision of the school financing system for many years and even decades into the future, as the courts act as superlegislatures on matters affecting K–12 education. Since "adequacy" is both a legal and factual concept, it is essential that educators, school finance experts, lawyers, legislators, and others considering issues of adequacy in education have an understanding of the legal principles and trends underlying and informing the concept.

The "adequacy movement" reached its peak in New York where a Manhattan trial judge, relying on the state's constitutional obligation to provide "free common schools," ordered the state legislature to increase funding for the New York City public schools by $23 billion over the next five years, including $5.63 billion a year for operations.[2] This is a 45 percent increase over current per-pupil expenditures, already among the highest in the nation, and will bring per-pupil spending in the city's public schools to over $17,000 a year, approximately twice the national average.[3] New York is not alone when it comes to such deci-

Abbeville County School District, et al v. The State of South Carolina, Case No. 93-CP-31-0169 (Ct. Common Pleas, 3rd Jud. Cir., S.C., Dec. 29, 2005); and *Bradford v. Maryland*, No. 94340058/CE 189672 (Cir. Ct., Baltimore City, June 30, 2000).

2. *Campaign for Fiscal Equity v. State of New York, et al.*, Index No. 111070/93 (Sup. Ct. New York County, March 22, 2005). In 2006 the appellate division modified the trial judge's order, and ordered the legislature to increase annual K–12 appropriations for the operations of the city schools by an amount between $4.7 billion to $5.6 billion, plus an additional $9.179 billion for capital spending. *Campaign for Fiscal Equity, Inc., et al. v. The State of New York, et al.,* 6915 Index 111070/93 (App. Div., 1st Dept., N.Y., March 23, 2006). If the legislature appropriates the lowest amount permissible under the court order, annual per-pupil spending in the New York City public schools would still be almost twice the national average.

3. *Quality Counts*, Education Week 25, no. 17, Jan. 5, 2006, at 98 (hereinafter "*Quality Counts 2006*"). In 2002–2003 the average per-pupil expenditures for the nation were $8,041.

sions. In Kansas, for example, a state court trial judge enjoined any further spending on education until the legislature appropriated enough resources to close the achievement gap between poor and minority students and white, middle-class students, an admirable goal, but one which no large school system in the country has yet managed to accomplish.[4] In Wyoming, the Supreme Court ordered the legislature to provide enough money to local school districts to enable them to furnish an education that is the "best" and is "visionary and unsurpassed."[5] While 2005 has seen some pushback from the courts, particularly in Texas, judicial control over educational policy and appropriations remains either the reality or potential future in many states.

This chapter consists of four parts. Part 1 describes the development of school finance case law, including how the courts have moved far beyond their traditional role in ensuring equal opportunity and are now deciding issues of educational funding and policy historically reserved for the legislative branches of government. Earlier federal court desegregation and state court equity cases, which were based on proof of disparate or discriminatory treatment, have now been almost entirely superseded by state court "adequacy" cases that require no such proof.

Part 2 examines the perversion of time-honored legal principles in educational adequacy cases. Instead of courts minimizing their interference with the policymaking and appropriation powers of its coequal branches of government, the courts in sev-

4. *Montoy v. State*, Case No. 99-6-1738, 2004 WL 1094555 (Kan. Dist. Ct., May 11, 2004), at 10 (hereinafter referred to as "*Montoy T.C.*"). On occasion, other trial court decisions in the case will also be referred to as "*Montoy T.C.*," but will be followed by the date of the decision, *e.g.*, "*Montoy T.C.*, Dec. 3, 2003 order."

5. *Campbell County School District v. State*, 907 P.2d 1238, 1279 (Wyo. 1995) ("*Campbell I*"); *Campbell County School District v. State*, 19 P.3d 518, 538 (Wyo. 2001) ("*Campbell II*").

eral states have done just the opposite. Ignoring separation of powers considerations, they have approached adequacy lawsuits in a such a way as to substantially usurp the power of the legislature. Under the guise of "interpreting" vague constitutional language often devoid of qualitative language, a number of courts have ratcheted up the constitutional standards to the point where few, if any, states can now meet them. At the same time, the concept of legal causation has been eroded to the extent that many states are, as a practical matter, held strictly liable for low student performance outcomes with little or no proof that such performance has been caused by insufficient state funding of K–12 education. The result has been to make it very difficult for states to defend against adequacy claims, regardless of how much of the public treasury they devote to education. For example, all five of the highest spending states in the nation on a per-pupil basis—New York, New Jersey, Massachusetts, Vermont, and Wyoming—have had their school financing systems struck down by the courts in an adequacy case.[6]

Part 3 describes and analyzes the legal and practical problems faced by the courts as they become more and more enmeshed in what are essentially political decisions and seek to enforce orders that ignore political and financial realities. As a result, the relationship between the judicial and legislative branches in several states has become severely strained.

Finally, part 4 examines 2005 court decisions in Texas and Massachusetts, which rejected the activist role of the courts that has characterized adequacy cases since the early 1990s, and instead applied long-standing principles of judicial deference to reasonable, non-arbitrary choices made by legislative bodies.

6. *See* footnote 1.

1. The Courts—from Protecting Equal Rights to Dictating Educational Policy and Spending

Adequacy cases are the new kid on the block when it comes to school finance litigation. To understand them, it is useful to examine how the courts got into the business of school finance in the first place and how such court decisions have evolved to the present state of affairs.

Federal Court Desegregation Cases

K–12 education in the United States has traditionally been a state and local responsibility. Before the 1950s, even the involvement of state government was minimal and nearly all important decisions about elementary and secondary schools and their funding were made locally. Neither the federal government nor the courts were involved in any meaningful way. This all changed in 1954 with the landmark decision of the Supreme Court in *Brown v. Board of Education* declaring state-mandated racial segregation of schools unlawful.[7] Since then the courts have been an important institutional player in America's public schools.

After *Brown*, the role of the courts in education expanded exponentially for several decades. Starting in the late 1950s and continuing into the 1990s, court orders governing the desegregation of schools were commonplace as the federal courts, often faced with vigorous opposition from local and state officials, took remedial action to eliminate racially segregated schools, integrate faculty and staff, and ensure the equal allocation of resources. In the early 1970s, civil rights advocates also began to push for extraordinary funding and programs for predominantly

7. *Brown v. Board of Education*, 347 U.S. 483 (1954).

poor and minority schools. In response, several federal courts ordered both states and local school districts to make substantial expenditures to enhance the quality of education offered in predominantly minority schools.

Such court-ordered educational enhancements began with the *Milliken v. Bradley* case involving the Detroit schools, and led to such remedies often being referred to as "*Milliken II* remedies."[8] These "educational enhancement" remedies were justified as desegregation remedies on two grounds: First, the additional programs and funding would make the schools more attractive to nonminority students and aid in attracting or retaining a more racially mixed student body. Second, increased spending would improve the achievement levels of black children who, because of their substandard education in segregated schools, trailed behind those of white children and better prepare them for integrated schools.[9]

The most notorious example of such remedies was the *Missouri v. Jenkins* case involving the desegregation of the Kansas City, Missouri, public schools. In a series of orders beginning in 1986, a federal court ordered the state and local school district to spend about $1.5 billion over and above regular school expenditures to improve the quality of education offered in the school district of 37,000 pupils.[10] The court's orders were based on a previous finding by the court that black children in the school district were performing below the national average on nationally normed tests. To bring test scores up to the national average, the court literally gave the local school officials a "license to dream."[11] They did exactly that, spending hundreds of

8. *Milliken v. Bradley*, 433 U.S. 267 (1977).

9. *Id.* at 283–287; *Missouri v. Jenkins*, 515 U.S. 70, 84 (1995) ("*Jenkins III*").

10. *Jenkins v. Missouri,* 639 F.Supp. 19, 23-24 (W.D.Mo. 1985), *aff'd as modified by*, 807 F.2d 657 (8th Cir. 1986), *cert. denied* 484 U.S. 816 (1987).

11. *Jenkins III,* at 79–80.

millions of dollars of court-ordered funding for such things as new state-of-the-art facilities; a 2,000-square-foot planetarium; a 25-acre farm with an air-conditioned meeting room for 104 people; a Model United Nations wired for language translation, broadcast-capable radio and television studios; movie editing and screening rooms; a temperature-controlled art gallery; a 3,500-square-foot dust-free diesel mechanics room; an 1,875-square-foot elementary school animal room for use in a zoo project; and so on.[12] Besides ordering funding for magnificent facilities, the court made every school in the district a magnet school, ordered significant raises for teachers, and added teachers and staff, thousands of computers, early childhood development programs, and before- and after-school tutorial programs.[13] Unfortunately, none of this court-ordered largesse led to better scores by the school district's students on nationally normed tests, which was the whole purpose of the increased spending in the first place.[14]

The beginning of the end for *Milliken II*-type remedies came in 1995. In the Kansas City case's third trip to the Supreme Court, the Court ruled, in *Jenkins v. Missouri (Jenkins III)* that improving the educational offerings at a school to attract white pupils from outside the district, absent grounds for an interdistrict remedy, was beyond the remedial powers of the courts.[15] It also held that a desire to raise the test scores of black students to the national average was not enough to justify the court's extensive remedial orders without proof such substandard

12. *Id.,* at 79.

13. *Id*., at 76–80.

14. *See* expert report of Dr. John Murphy introduced during 2001 unitary hearing in *Berry v. School District of Benton Harbor*, Civil Action No. 4:67-CV-9 (W.D. Mich. 2001). Dr. Murphy was the court-appointed monitor of the Kansas City, Missouri, School District from 1997 to 2000.

15. *Jenkins III* at 98–99.

scores were attributable to earlier illegal segregation.[16] Following *Jenkins III*, the court orders in the Kansas City case, as well as similar cases against other states, were either dismissed or phased out as it became difficult for plaintiffs to prove that low achievement was causally linked to the earlier de jure segregated school system that had ended decades ago.[17] This ended the efforts of civil rights groups to convince the federal courts to order local and state authorities to increase K–12 education funding in order to increase the quality of education. By then, however, the main battleground had already shifted to the state courts.

State Court Litigation

In the early 1970s, concurrent with their efforts in federal courts, plaintiffs also began to pursue litigation in state courts—first, to divide the education funding "pie" more equitably among school districts, and, second and more recently, to substantially increase the size of the "pie" to provide for an "adequate" education in every school district.

Equity Cases

Education funding systems in most states have historically relied mainly on the local property tax to pay for schools. Because of often large disparities in the property tax bases of wealthy and poor districts, this practice resulted in large disparities in per-pupil funding among school districts in many states. In the early 1970s, plaintiffs began to file lawsuits to require states to equal-

16. *Id.* at 101–102.

17. *E.g.*, *Jenkins v. School District of Kansas City, Missouri*, No. 77-0420-CV-W-DW (W.D. Mo. Aug. 13, 2003). Since the 1995 *Jenkins III* decision, federal court decisions requiring *Milliken II* remedies have also been phased out or dismissed in Yonkers, New York; Detroit and Benton Harbor, Michigan; Little Rock, Arkansas; and Ohio's largest cities.

ize the per-pupil funding among school districts, reasoning that the school district a child resides in should not determine the quality of the education he or she receives. One of plaintiffs' first efforts took place in federal court in a case involving Texas' education funding system. However, in *Rodriguez v. San Antonio*, the United States Supreme Court rejected plaintiffs' claim, holding that education is not a fundamental right under the federal Constitution and that classifications based on wealth were therefore not suspect classes.[18] This meant that the Texas system of funding education would not be strictly scrutinized by the Court but would instead be judged under the more lenient standard of whether the system had any rational basis. The court ruled that reliance on local property taxes satisfied the rational basis test and dismissed the case.[19] The *Rodriguez* decision had nationwide effect, and ended plaintiffs' efforts in the federal courts to equalize spending among school districts.[20]

Undeterred, plaintiffs proceeded to file lawsuits in state courts based on state constitutional provisions guaranteeing equal rights. There they enjoyed more success. Unlike the federal Constitution, most state constitutions specifically require some level of free public education. As a result, the courts of some states have ruled that education is a fundamental right under their constitutions, and that state educational funding systems are therefore subject to the higher test of strict scrutiny. It was these two rulings that had eluded plaintiffs in *Rodriguez*. As a consequence, funding systems that relied mainly on a local property tax to fund schools have been struck down in a number

18. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

19. *Id.* at 54–55.

20. *Rodriguez* addressed funding differences between school districts and not schools. The equality of funding of schools within a school district is important in school desegregation cases, and the federal courts have not hesitated to address such inequalities.

of states.[21] Such cases have become known, in the vernacular of those involved in school finance, as "equity" cases.

Because of these equity cases or the legal threat they presented, many states changed their school finance formulas to include some kind of equalizing mechanism. Such changes have generally taken the form of state school funding formulas that provide less state funding to property-rich districts and more state funding to property-poor districts, thereby reducing disparities in the amounts spent per student in the school districts of the state. As a result, intrastate funding disparities among school districts have been significantly reduced, although hardly eliminated (Murray, Evans, and Schwab 1998).

Equity suits are still being filed in some states, usually as part of an adequacy lawsuit, contending that significant funding disparities among school districts still exist or that disparities previously alleviated by reform to the state financing system have once again raised their ugly heads.[22] However, despite the persistence of these suits, the main focus of current school finance litigation is on the "adequacy" count—the desire to expand the pie rather than reallocate it. There are several reasons for this shift in focus.

First, plaintiffs' record of success in equity cases was mixed. A well-known plaintiffs' attorney estimates that, despite an initial flurry of proplaintiff equity decisions in the early 1970s, plaintiffs have won only seven equity cases compared with fifteen losses (Rebell 2001). A good example is in New York. An equity case was filed in that state in 1974 by several property-

21. *E.g.*, *Serrano v. Priest,* 557 P.2d 929 (Cal. 1976).

22. *E.g.*, *Douglas County School District, et al v. Michael Johanns, et al.*, Doc. 1028, No. 017 (District Court of Douglas County, Neb. 2003); *Williston Public School District No. 1, et al. v. State of North Dakota, et al.*, Civil No. 03-C-507 (Dist. Ct., Northwestern Judicial Circuit. 2003); *Committee for Educational Equality, et al v. State of Missouri, et al.*, Case No. 04CV323022 (Circuit Ct. of Cole County, Mo. 2004).

poor districts. In 1982, after several appeals and a lengthy nonjury trial, the New York Court of Appeals rejected plaintiffs' equal protection claims under both the state and federal constitutions.[23] It was only a decade later when plaintiffs returned to court asserting that the New York City schools were not "adequate" that they were successful.

Second, even in states where plaintiffs won equity suits, they did not always turn out to be the panacea plaintiffs intended. *Serrano v. Priest* in California is a good example.[24] *Serrano* was plaintiffs' first big victory in the equity arena and led to greater spending parity among California's 1,200 school districts. But the insistence on equity eliminated much of the incentive that local communities had previously had to tax themselves to support education and was one of the factors driving California voters to approve Proposition 13, which severely limited the amount of property taxes that could be levied in the state (Fischel 2004). The result of this and other factors, including an economic downturn in many parts of the state, has been a financial disaster for California's schools. In its financial commitment to K–12 education, California has gone from the top to the bottom of the fifty states in a little over one generation due, at least partly, to the *Serrano* decision. In 1977 when *Serrano* was decided, California was one of the highest spending states on education in the country. By 2003 it had sunk to forty-third in per-pupil expenditures, when adjusted for regional cost differences. Even perennially low-spending Alabama spent more.[25]

Finally, such suits are not supported by many school districts, some of which may be pitted against others in their fight for the state education dollars. In contrast, every school district in an adequacy case stands to gain as the funding pie is ex-

23. *Bd. of Educ. v. Nyquist*, 57 N.Y.2d 27, 50 (N.Y. 1982).
24. *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976).
25. *Quality Counts 2006*.

panded. As pro-adequacy author Peter Shrag points out: "Advocates of the adequacy idea argue, quite correctly, that unlike equity, adequacy can be a winner for all schools. It does not require redistribution" (Shrag 2003). Therefore, adequacy suits have become very popular among powerful segments of the community, including the public school establishment, union leaders, many parents, and local taxpayers who believe that further state aid will lessen their tax burden.

Adequacy Cases

Their proponents claim adequacy suits are merely an extension of *Brown* in the fight for equal opportunity, but these suits are in fact quite different from either the federal court desegregation cases or the state court equity cases that preceded them. The objective of earlier school finance cases was to ensure that equal educational opportunities were made available to children regardless of their race or the wealth of the school district in which they lived. Such decisions were based either on the equal protection clause of the Fourteenth Amendment or on similar provisions in state constitutions requiring equality or uniformity, and, as such, involved equal protection issues traditionally handled by the courts. Adequacy cases are another animal entirely. They have their roots not in equal protection, but in the so-called education clause of most state constitutions. No discrimination or inequities need even be alleged, much less proved, for a plaintiff to prevail in an adequacy case.[26]

26. School districts that are the focus of adequacy cases are often funded at higher levels than the average school district in the state. For example, both the St. Paul and Minneapolis, Minnesota, School Districts brought adequacy lawsuits against the state of Minnesota even though at the time they were among the highest spending school districts in the state on a per-pupil basis. In the Missouri adequacy case, the City of St. Louis School District has intervened to assert adequacy claims, even though it is one of the highest spending school districts in the state. Plaintiffs continue to pursue more funding in the

Nearly every state constitution has an "education clause" that requires the state or its legislature to provide some form of free public education to the children of the state. Generally, this constitutional requirement is couched in very vague language, for example, a "thorough and efficient" system of education,[27] "a system of free common schools,"[28] "free instruction,"[29] or "suitable education."[30] Such language gives little guidance on what quality or level of educational resources are required. Therefore, traditionally decisions as to how much of the state's treasury to appropriate for education have been left up to the legislature. In the absence of objective standards in the wording of the constitutions themselves, there are no discernable standards by which a court can reasonably determine if the legislature is performing its duty. The courts would simply be substituting their judgment about the level of education required, and correspondingly its cost, for that of the legislature. Therefore, unless the constitution itself contains "judicially discoverable and manageable standards" on which a court can base its decision, the general rule of law is that issues of educational policy and spending are "political questions" over which the courts have no jurisdiction.[31]

For this reason a number of state courts have held that judicial intrusion into these legislative prerogatives is a violation

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New Jersey adequacy case even though New Jersey spends more per pupil than any other state and the school districts that are the target of the suit spend substantially more than the next highest spending districts in the state. Similarly, if the remedy ordered by the court in New York is funded by the legislature, New York City's public schools will enjoy per-pupil funding of several thousand dollars more than that of the average school district in New York.

27. Minn. Const. Art XIII, §1.

28. N.Y. Const. Art XI, §1.

29. Neb. Const., Art. VII, §1.

30. Kan. Const., Art. 6, §6.

31. *Committee for Education Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996); *Baker v. Carr*, 369 U.S. 186, 209 (1962).

of the doctrine of separation of powers, the system of checks and balances that is the bedrock of our constitutional system of government. Courts in Illinois,[32] Florida,[33] Rhode Island,[34] Nebraska,[35] Pennsylvania,[36] and Arizona[37] have decided that the language of their respective constitutions does not provide "judicially manageable and discoverable standards" sufficient for a court to decide on the proper level of education required. Accordingly, these courts have dismissed adequacy cases, ruling that such issues are political questions reserved for the legislative branch of government and beyond the power of the courts to decide.

However, court decisions dismissing adequacy cases because they involve political questions have been in the minority, especially in recent years. Most courts facing this issue have rejected arguments based on the doctrine of separation of powers and undertaken to decide whether the education being funded is, in their view, adequate.[38] Many people, including plaintiffs, believe that the courts' increasing willingness to enter into what was formerly the political arena is the unintended result of what has become known as the "Standards Movement." Beginning in the 1990s, many states responded to criticism that poor and minority children were the victims of "low expectations" by adopting rigorous academic outcome standards and then hold-

32. *Committee for Education Rights v. Edgar.*

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

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

35. *Douglas County School District, et al v. Michael O. Johanns, et al*, Case No. 1028-017 (Dist. Ct. Douglas County, Neb., May 14, 2004). (Trial court dismissed adequacy count of complaint on separation of powers grounds. The decision is on appeal.)

36. *Merrero v. Commonwealth*, 709 A.2d 956 (Pa. 1998).

37. *Crane Elementary School District v. State*, Case No. CV2001-016305 (Sup. Ct. Maricopa County, Ariz. Nov.25, 2003) (Appeal pending).

38. *See* footnote 1.

ing school districts, schools, and students accountable for meeting these standards through statewide testing programs. Even though such outcome standards often reflect ambitious goals with no relation to the minimum standards of the state constitution, adequacy plaintiffs and the courts have seized on them as the heretofore missing "judicially manageable and discoverable standards" that are a prerequisite for court intervention (Rebell 2001; Heise 2002; Gorman 2001). As discussed further in part 2, not only has the advent of the standards movement resulted in fewer of these cases being dismissed as beyond the power of the courts to decide, but it also has had the effect of raising the standard for adequacy to often ambitiously high levels. As a result, plaintiff groups have been particularly successful in the last decade, at least until 2005. Since 2000, plaintiffs have succeeded in adequacy suits in New York, Arkansas, Kansas, Montana, North Carolina, and to a lesser extent, South Carolina.[39] Emboldened by this string of successes, plaintiffs' groups in a number of other states have also filed adequacy lawsuits which have yet to be finally decided.[40] Although plaintiffs suffered significant setbacks in 2005, when the highest courts of Texas and Massachusetts dismissed adequacy cases after trials on the merits,[41] there is little doubt that adequacy suits are here

39. *Id.*

40. *Douglas County School District, et al v. Michael Johanns, et al*, Doc. 1028, No. 017 (Dist. Ct. of Douglas County, Neb. 2003); *Williston Public School District No. 1, et al v. State of North Dakota*, et al, Civil No. 03-C-507 (Dist. Ct., Northwestern Judicial Circuit. 2003); *Committee for Educational Equality, et al v. State of Missouri, et al*, Case No. 04CV323022 (Circuit Ct. of Cole County, Mo. 2004); *Lobato, et al. v. The State of Colorado, et al.,* Case No. 05CV4794 (Dist. Ct. Denver, Colo. 2005); and *Oklahoma Education Association, et al v. State of Oklahoma, et al*, Case No. CV-2006-2 (District Ct. of Oklahoma County, Okla. 2006).

41. *Shirley Neely, et al v. West Orange-Cove Consolidated Independent School District, et al*, Case No. 04-1144 (Tex. 2005) (hereinafter "*West Orange-Cove*"); *Hancock, et al v. Commissioner of Education, et al*, Case No. SJC-09267 (Sup. Jud. Ct. Mass., Feb. 15, 2005) (hereinafter "*Hancock*").

to stay and will be an important part of the school finance landscape for years to come.

2. A "Presumption" of Unconstitutionality

In assuming the power to decide these traditionally political issues in the first place, the courts have strayed outside of their traditional role. At most these constitutional provisions should be read as establishing the minimum level of education required, leaving maximum discretion in the legislature to decide whether or not it wants and is willing to pay for a level of education higher than the constitutional minimum. Indeed, the court decisions themselves speak of requiring only a "minimally adequate" or "basic" education, suggesting that once that floor is reached or exceeded, the court no longer has a role to play.[42] But in practice, these principles are often ignored when it comes to actually specifying the quality of education or the funding levels that will satisfy the court. The reality is that many state courts only pay lip service to these principles while in fact making evidentiary findings and setting goals for educators that require much more than a minimum or basic education. For example, speaking out of one side of their collective mouths, the New York courts hold that the constitution only requires "minimally adequate" schools, but out of the other side, order funding levels for schools intended to meet perhaps the highest academic standards in the country. In ordering billions of dollars of additional annual payments to New York City, the trial court relied on a costing out study conducted on behalf of the plaintiffs. The goal of the study was to enable all students to meet the Regents Learning Standards, which were described, even by plaintiffs' witnesses, as "rigorous," "world-class," and exceeding notions

42. *Campaign for Fiscal Equity v. State of New York, et al*, 86 N.Y.2d 307, 317 (1995) (hereinafter *CFE I*).

of "basic literacy and verbal skills," the standard first enunciated by the New York Court of Appeals.[43] There seems little doubt that in New York the courts are setting education policy and spending, not enforcing constitutional minimums.

Some argue that education is a fundamental right, and that legislative enactments are therefore not entitled to deference but should be judged under a strict scrutiny standard. However, few courts have relied on this legal principle to justify their sweeping decisions. First, education has not been found to be a fundamental right in most states facing adequacy lawsuits. Second, even in those states where it is a fundamental right, the courts have been reluctant to justify their intrusion into legislative prerogatives by applying a strict scrutiny standard. Instead, they have found such a standard inappropriate in light of the public policy issues before them and the constitutionally based authority of the legislature over appropriations. For example, in the Kentucky adequacy case, the court held that education was a fundamental right but also held that the presumption of constitutionality was substantial and that legislative enactments were entitled to great weight.[44]

In summary, presumptions of constitutionality and deference to legislative choices often give way in adequacy litigation to what amounts to a presumption of unconstitutionality, coupled with little, if any, deference to the work of the legislative branches. The two main reasons for this development are discussed below.

43. *CFE*, Report and Recommendations of the Judicial Referees, Nov. 30, 2004; American Institute for Research and Management Analysis and Planning, Inc., "*The New York Adequacy Study: 'Determining the Cost of Providing All Children in New York an Adequate Education,'*" Vol. 1—Final Report, March 2004, at x, 4 (hereinafter "AIR/MAP Study"); CFE trial record, Transcript at 1108, 1715, 4993–4995, 9210, 9976, 10545; Plaintiffs exhibits 1587, 1588, 2064; Defendants' exhibits 10202, 15470A, 19017A.

44. *Rose v. Council for Better Education*, 790 S.W.2d at 209.

The Conversion of Ambitious Goals into Legal Requirements

In some states, the courts have set the standard of adequacy so high that few, if any, states could meet it. In setting the standard, the beginning point for any court inquiry should be the language of the education clause of the state constitution. Unfortunately, the words used in nearly every state constitution are so vague and general that they offer little practical guidance to someone who must actually formulate a workable definition. As discussed, state constitutions commonly use words like "thorough," "efficient," "free common schools," and "free instruction" in describing the kind of education required.[45] For this reason, the courts' interpretation of what such words mean is what counts. Although they often resort to the minutes, speeches, and other records of the constitutional conventions to divine a more specific definition of what level of education the framers of the constitution intended, the courts are often writing on a largely blank slate. Whether such interpretations have strong or weak support in the constitutional language or record is of little importance since the court's decision is final and is not appealable to any higher authority. This has led to court-imposed standards bearing little or no relation to the words of the constitution itself.

The trend in recent years has been to use student achievement standards set by the state, either directly or indirectly, to measure adequacy and therefore how much money is required to attain it.[46] The courts have moved in this direction despite recognition by at least one of them that "caution should be exercised" in relying on student outcome measures because (1) they are influenced by a "myriad of factors" beyond state fund-

45. *See, e.g.,* footnotes 27–30.

46. This has spawned a cottage industry of consultants who purport to "cost-out" how much money it will take for students to actually achieve at such levels. *See* Hanushek (2005).

ing and (2) such standards may be higher than the constitution requires.[47] The results have been legal standards of adequacy in several states set at very high levels, reflecting ambitious academic goals set by the states for their students to strive for, thereby ensuring court control for many years into the future. Even in cases where the courts have relied more on ensuring that appropriate resources are provided than on achieving particular student outcomes, the bar has been set at an extraordinarily high level. Three cases illustrate this point.

New York

Because it involves the nation's largest school system and astronomical amounts of money, the most notable case to date has been *Campaign for Fiscal Equity v. the State of New York ("CFE").* In *CFE*, the courts had before them a relatively weak constitutional provision that simply required the state of New York to provide "a system of free common schools" without specifying any particular level or quality of education.[48] The case was at first dismissed, but New York's Court of Appeals in *CFE I* reversed and remanded the case for trial, ruling that New York's constitution guaranteed a "sound basic education" requiring "minimally adequate" resources.[49] *CFE I* signified a relatively low constitutional minimum, but on remand, the trial court ruled this meant that the state was required to provide an education that would produce an "engaged, capable voter" with the "intellectual tools to evaluate complex issues, such as campaign finance reform, tax policy and global warming. . . ."[50] It held that the education provided in the New York City public schools did not meet this standard and that insufficient funding was the rea-

47. *CFE I*, at 317.
48. N.Y. Const., Art. XI, §1.
49. *CFE I,* at 318.
50. *CFE*, 187 Misc. 2d 1, 14 (Sup. Ct. New York County 2001).

son, despite the fact that New York City was then the highest spending of the nation's ten largest urban school districts, spending over $10,000 a year per student.[51] Although an intermediate appellate court reversed the trial court on both the facts and the law, the New York Court of Appeals reversed again and reinstated the trial court's decision in *CFE II*.[52] After the state legislature was unable to agree on a remedy, the trial court ordered the legislature to increase New York City's annual funding for operations by $5.63 billion a year to more than $17,000 a student. Although the appellate division later modified the trial court's order regarding funding, the legislature remains under court order to appropriate an additional $4.7 billion to $5.6 billion per year for the city's public schools.[53]

While the New York Court of Appeals in *CFE II* specifically disavowed reliance on the Regents Learning Standards,[54] perhaps the highest state academic standards in the nation, the trial court nevertheless relied on cost studies that used such high standards as its measure of adequacy. Consequently, the court process in New York has converted the words of the New York Constitution requiring only "free common schools" into a court-imposed constitutional requirement that the state provide the highest-quality education in the country and spend double what the rest of the nation is spending to provide it. To put the amounts ordered by the court in perspective, New Jersey is currently the highest spending state in the country on K–12 education at $12,568 per student for the 2002–2003 school year.[55] In the words of one commentator, the trial judge in *CFE* "had

51. *Id*. at 67–68, 82; CFE Trial Record, Defendants' Exhibit 19118.

52. *CFE*, 744 N.Y.S.2d 130 (1st Dept. 2002). This intermediate appellate court decision was reversed by the New York Court of Appeals in *CFE II* (*see* footnote 1).

53. *See* footnote 2.

54. *CFE II,* at 907.

55. *Quality Counts 2006*.

become completely unmoored from the text [of the constitution] and was sailing in purely policy waters" (Dunn and Derthick 2005).

Kansas

The Kansas courts have also suggested a standard so high that the legislature is unlikely to satisfy it, no matter what it does or how much money it spends. In December 2003 in *Montoy v. Kansas*, the trial judge held that the Kansas system of financing schools was unconstitutional because it failed to provide sufficient funding for the "suitable education" required under the Kansas constitution.[56] When the legislature failed to agree on remedial legislation, the court enjoined any further funding of the public schools in Kansas. As part of his order, the trial judge set forth a list of what the legislature would have to do for him to approve any new funding plan and to lift his injunction to allow the reopening of the schools. One requirement was that the new funding plan "must provide resources necessary to close the 'achievement gap.'"[57] In other words, Kansas had to meet a standard of achievement no other state has even come close to achieving for the trial judge to find its educational finance system constitutional.

In 2005, the Kansas Supreme Court affirmed the order of the trial court, and ordered the Kansas Legislature to appropriate an additional $853 million over the next two years, also threatening to enjoin school spending if its demands were not met.[58] Although stating in its 2005 decision that appropriate outcomes would play an important role going forward, the court in 2006 dismissed the case after the legislature responded with $755

56. *Montoy v. State*, Case No. 99-C-1738 (Dist. Ct. Shawnee County, Kan., Dec. 2, 2003).

57. *Montoy v. State,* 2004 WL 1094555 (Kan. Dist. Ct. 2004) at 9.

58. *Montoy v. State*, No. 92032 (S. Ct. Kan. June 3, 2005) at 19.

million in additional aid, without any discussion of whether such an increase was sufficient to achieve desired outcomes. That decision, it stated, would have to be made in a separate lawsuit challenging the newly enacted legislation.[59]

Wyoming

The decisions of the Wyoming Supreme Court have been even more radical. In 1995, in *Campbell County School District v. Wyoming*, the court, relying on constitutional language requiring a "thorough and efficient" and "complete and uniform" education, held that these words meant that the state was obligated to furnish and pay for the "best" education.[60] The court found that the existing education system failed to meet this lofty standard and ordered the legislature to enact a remedy.[61] The legislature responded by substantially increasing school funding, but in 2001 the court found the legislative response insufficient. The court reiterated that, in its view, the Wyoming Constitution requires the "best" education.[62] It embellished its earlier opinion by holding further that such education had to be "visionary" and "unsurpassed," and ordered the legislature once again to dramatically increase spending.[63]

As a result, Wyoming has increased spending to the point that, when adjusted for cost of living differences, it now has the fourth highest per-pupil expenditures in the nation.[64] The constitutional standard, as dictated by the Wyoming courts, has had the practical effect of removing all discretion from the legislature to decide on the quality or level of educational resources to pro-

59. *Id.*, at 17; *Montoy v. State*, No. 92032 (S. Ct. Kan. July 28, 2006), at 7.
60. *Campbell I,* at 1279.
61. *Id.*
62. *Campbell II,* at 538.
63. *Id.*
64. *Quality Counts 2006.*

vide. It effectively guarantees that anything the legislature enacts will be subject to second-guessing by the plaintiffs. Plaintiffs need only argue there is a "better" or more "visionary" education somewhere else that has not yet been made available to Wyoming students. Surprisingly, the latest Wyoming trial court to apply the *Campbell* decisions disregarded this language in finding that the current system of education complies in many respects with constitutional requirements. But whether its decision will be upheld in light of the Wyoming Supreme Court's earlier pronouncements remains to be seen.[65]

To many these decisions sound reasonable. Almost everyone would agree that providing the "best" education possible or having an educational system in which all students achieve at high levels and the achievement gap is closed are worthy goals. And, of course, they are right. The "goal" of any education system should be to educate all children so that they learn at high levels regardless of whether they are poor or wealthy, black or white. But this is a far cry from ruling that a state's educational funding system is unconstitutional unless it actually reaches these aspirational goals. The unfortunate reality is that a significant achievement gap exists in every state. There is not a state or school district of any size in the United States, no matter how good it is or how much money it spends, that has closed the achievement gap between black and white students or between poor and middle-class students (Jencks and Phillips 1998). Ipso facto, under the rationale used by the Kansas trial court, there is not one state in the country that provides an adequate education. The inevitable result of such a standard is to guarantee court supervision for years and even decades as plaintiffs seek even more money, returning to court repeatedly arguing that the unrealistic goals first set by the court have not yet been reached.

65. *Campbell County School District, et al v. State of Wyoming, et al*, Docket No. 129-59 (1st Jud. Dist., Wyo., Jan. 31, 2006) (hereinafter "*Campbell 2006*").

Moreover, state academic standards are not the same as the constitutional standard. If that were so, then the legislature or the state boards of education could amend the state constitutions at will by changing the state academic standards. The New York Court of Appeals recognized the inherent conflict in giving constitutional status to legislatively or administratively created academic standards, but, as discussed, the *CFE* trial court nevertheless used a cost study designed to meet such state academic standards as the constitutional measure of adequacy.

Plaintiffs argue that outcome standards are set by the states themselves and that they are therefore reasonable measures of adequacy. However, while states should encourage all children to learn by setting high standards, holding a state financially liable for the failure of their students to achieve at such levels puts the state in an untenable position. It can either adopt lower expectations for children or run the serious risk that, if it has set the standards too high, it will be held liable for untold hundreds of millions or even billions of dollars. No Child Left Behind (NCLB) has also set lofty goals, but these are not state or constitutional requirements. They are a condition precedent to receiving federal funds. Indeed, NCLB provides that a state is not required to incur costs to comply with any of its requirements that are not covered by federal funding.[66]

For these reasons, court decisions setting unrealistically high outcome requirements ensure a court veto over everything the legislature does. Even if ample inputs are provided, no one can honestly give any assurance that the required outcome standards will be satisfied by all or nearly all children. For example, the consultants in the costing out study relied on in *CFE* to justify another $5.63 billion a year for a "sound basic education" in New York City qualified their conclusions as follows:

66. 20 USC § 7907.

> It must be recognized that the success of schools also depends on other individuals and institutions to provide the health, intellectual stimulus, and family support upon which the public school systems can build. Schools cannot and do not perform their role in a vacuum, and this is an important qualification of conclusions reached in any study of adequacy in education.[67]

The Elimination of Proof of Causation

The courts in some states have further ensured their domination over issues of education policy and funding by effectively rendering meaningless plaintiffs' burden to prove causation. The *CFE* case perhaps best illustrates this development. Before trial, the New York Court of Appeals in *CFE I* ruled that plaintiffs had the burden to prove both (1) that there had been a failure to provide a "sound basic education" in the New York City public schools and (2) that such failures were "caused" by the state financing system.[68] The court further cautioned the trial judge to "carefully scrutinize" outcomes such as standardized test scores because such outcomes were influenced by a "myriad of factors."[69] Thus, in accord with precedent and with common sense, plaintiffs had to prove that any inadequacies in the New York City schools were caused by the state financing system in order to hold the state legally liable. Moreover, because there were many other factors besides the state funding system that influenced achievement, outcomes were not to play a major role in the trial court's decision on whether the education offered was adequate.

However, when it revisited the case after trial in *CFE II*, the same court eviscerated its earlier holding that causation had to be established. First, the court disregarded substantial evidence

67. AIR/MAP Study, at f.n.12, p. 3.
68. *CFE I,* at 318.
69. *Id*.

that alleged funding shortages were caused by mismanagement, waste, and fraud in the New York City School District, and not the state funding system. It avoided examining these difficult, but obviously relevant, issues by ruling, as a matter of law, that the state was legally responsible for the shortcomings of the local district.[70]

Second, it held that factors outside the schools, such as student poverty, were not the cause of substandard achievement by many of the district's "at-risk" pupils, relying largely on a policy adopted by the New York Board of Regents that, "all children can learn given appropriate instructional, social and health services."[71] It scornfully rejected extensive scientific evidence showing the issue was much more complicated than the Board of Regents' simple statement suggested, stating simply "we cannot accept the premise that children come to the New York City schools ineducable, unfit to learn."[72] That, of course, was not the state's position. No one disputed that every child can learn, but it is equally true that because of their differing backgrounds, children start out at different levels, may learn at different rates, may not be similarly motivated, and may face many difficulties and obstacles that schools have not caused and that schools may not be able to solve. These real world problems were never addressed by the court. The court also failed to discuss how a constitutional provision requiring "free common schools" carries with it the constitutional obligation of the state to provide the "social and health services" needed, according to the policy statement relied on by the court, for "all children to learn." However, the court, having the last say on the matter, was under no obligation to explain this gap in its reasoning.

Strangely, the same day it was holding the state liable for

70. *CFE II,* at 922–23.
71. *CFE II,* at 915, 920–21.
72. *CFE II,* at 919.

failing to overcome adverse socio-economic influences in New York City, the court was doing the exact opposite in another adequacy case involving the Rochester, New York, schools. This time, after quoting the words of *CFE I* about the need to exercise "caution" in judging outcomes because of the "myriad of factors" influencing them, it ruled for the state, holding that the claims asserted in the Rochester case did not rest on a lack of funding but "on the failure to mitigate demographics."[73] That, of course, is the very same thing the court was holding the state liable for in the *CFE* case—the failure to mitigate the demographics of New York City's large impoverished public school population.

Because of its rulings, the *CFE II* court effectively eliminated the consideration of evidence of any causes of low student achievement, other than a lack of funding. Other problems having an adverse effect on learning, both inside and outside the schools, were ignored. The practical result was to largely remove the element of causation from the case and hold the state strictly liable for poor test scores and other substandard conditions in the city's schools, regardless of the complicity of others, including the local district, in causing such circumstances.

Part of the court's opinion purports to address causation, but its reasoning is less than persuasive. It concludes that plaintiffs proved causation based on evidence that (1) some of the resource shortcomings plaintiffs alleged could be resolved, for example, large class sizes, if the state funding system provided the school district more money, and (2) such added resources would yield better student performance.[74] There is no doubt that more money could buy more things, but that should never have been the issue. The relevant issue was whether the $10-billion-plus budget then available to the New York City School District was

73. *Paynter v. State of New York*, 100 N.Y.2d 434 (2003), at 3, 6.
74. *CFE II*, at 914–919.

enough for it to provide a "sound basic education," the constitutional standard laid down in *CFE I*, *assuming the money was not wasted*. That issue was never addressed or decided. The only evidence offered on the issue, a cost study offered by the state showing that existing funding was sufficient to provide a sound basic education if used effectively, was rejected by the trial court on hearsay grounds, even though the same court later accepted a cost study offered by plaintiffs during hearings on remedy that relied on exactly the same methodology.[75] Under the rationale employed in *CFE II*, the New York City Board of Education could have been wasting half its budget, and plaintiffs could still have established the necessary causal link by showing that more money from the state would have allowed it to purchase the education resources its schools were lacking because of the board's waste.

The *CFE II* court further ignored the cautionary note in *CFE I* about outcome evidence. It not only relied on test scores and other outcome evidence in reaching its decision but declined to consider the "myriad of factors" that affect student achievement, such as student poverty."[76] In Kansas, the court applied similar reasoning and relied mainly on the evidence of substandard performance of poor and minority students in holding the state li-

75. During subsequent remedial proceedings, CFE retained two of the state's trial experts to conduct a cost study to determine how much an adequate education should cost in New York City. Relying on the same professional judgment approach they used when working for the state, the same experts, working with another group of consultants, conducted another cost study, using as the standard of adequacy the Regents Learning Standards. This time the trial court overlooked the hearsay problems that it had cited in rejecting the study tendered by the state at trial, and relied on the plaintiffs' study in ordering an additional $5.63 billion a year in funding for the New York City public schools. Tr. 18386-18415 (Smith testimony) and DX19415, *CFE* trial record; *CFE* (Orders dated Feb. 14, 2005 and March 22, 2005).

76. *CFE II*, at 915, 919–923.

able, while paying lip service to possible causes of such low performance, besides a lack of funding.[77]

This treatment of the essential element of causation is unprecedented. In earlier federal court school finance litigation, both states and school districts have been held liable and ordered to correct deficiencies that they had caused and that they had the power to correct. However, the courts drew the line at holding them responsible for problems they did not cause. In *Freeman v. Pitts*, the Supreme Court declined to hold school districts liable for eliminating one-race schools caused by demographic forces.[78] In *Milliken I*, the Court refused to extend its remedy to suburban school districts in order to further integrate the schools in a metropolitan area unless it could be shown that such school districts had played a role in causing the segregated schools.[79] In *Jenkins III*, the Court held that the state of Missouri and the Kansas City School District could not be held liable for the low achievement of black children unless it was shown that their actions had caused such low achievement.[80] In the state court equity cases, the states had it in their exclusive power to correct inequities in their school funding laws. There was never a question of the state being held liable to correct problems it had not created and that were beyond its power to remedy.

This critical analysis of the courts' treatment of the element of causation is not just legal nitpicking. By disregarding evidence of waste of existing funds by local school districts and other nonfinancial factors inside and outside of the schools leading to substandard student performance, the courts are traveling down a road of no return that has serious consequences for the legislature, students, taxpayers, educators, and courts themselves.

77. *Montoy v. State*, No. 92032 (S. Ct. Kan., June 3, 2005).
78. *Freeman v. Pitts*, 503 U.S. 467, 491 (1992).
79. *Milliken v. Bradley,* 418 U.S. 717, 744 (1974).
80. *Jenkins III*, 515 U.S. at 101.

Remedies are unlikely to be effective if they disregard the actual causes of the problems. Perhaps the thought is that the real problems can be papered over with enough money. However, that premise is dubious as demonstrated in later chapters of this book.

Since the courts have ruled that all children can learn if only more resources are provided, there is enormous pressure on the legislature to appropriate more money for such things as more teachers, higher teacher pay, smaller class sizes, before- and after-school programs, preschool programs, and other special programs. Other means of educational reform that do not depend on more money but may ultimately be more effective at raising achievement are pushed to the back burner or off the legislative agenda. These include, for example, stronger accountability programs designed to motivate both students and schools to do better, expanded choice options that introduce healthy competition into public education, alternative methods of paying teachers based on merit and their success at improving student performance, and most important, steps to ensure that local districts are effectively using their current funding. They might also include more state spending on programs outside the schools to deal with societal ills faced by at-risk students, such as poverty, crime, and dysfunctional families. Nonschool programs that directly attack the root of the problem may be more effective at improving student achievement than more money spent inside the schools (Rothstein 2004; Armor 2005). However, by ruling that low achievement is caused by insufficient resources, the courts have essentially closed the door on other forms of educational reform.

Substantial spending increases in the past on K–12 education have had little or no effect on improving student performance. Statistics compiled by the National Center for Education Statistics show that from 1960 to 1996, inflation-adjusted spend-

ing on public schools more than tripled. Despite this huge threefold increase in resources, reading and science scores on the National Assessment of Educational Progress (NAEP) showed little or no improvement from 1969 to 1999, while math scores showed only slight improvement (Peterson and West 2004; Burtless 1996). Moreover, the academic research is mixed, at best, over whether increased funding and resources are likely to lead to significantly improved achievement. See Hanushek (1989, 1994), Odden and Picus (1992, 277–281), and Hedges (1994). This suggests that increased spending under an adequacy order is no more likely to improve achievement in the future than it has in the past, unless there are fundamental changes in the way such money is spent. Yet in another twist of irony, adequacy plaintiffs and their supporters in the public school establishment and the teacher's unions strongly oppose fundamental changes in the way education monies are spent (Lindseth 2004).

New Jersey is a good example of the problems inherent in such remedies. It has been in continuous litigation over its school finance system for more than thirty years.[81] At first the litigation focused on equity issues. In 1998, however, the court began to concentrate on the adequacy of the education being offered in thirty "special needs districts."[82] After a dozen trips to the legislature, followed by return trips to the courts in which the courts have ordered billions of dollars in additional resources, New Jersey now spends more per student on education than any other state in the country does.[83] Moreover, the thirty special needs districts are funded at a level about $3,000 per

81. *See* history of New Jersey school funding litigation from 1973 through 1998 in *Abbott v. Burke*, 710 A.2d 450, 455–456. The litigation continues to the present. *See, also Abbott*, 798 A.2d 602 (N.J. 2002), clearing the way for further claims and appeals.

82. *Abbott v. Burke,* 710 A.2d 450 (N.J. 1998) (history of case through 1998).

83. *Quality Counts 2006*.

student higher than even the "wealthy" school districts in the state.[84] As expected, this financial effort has led to more resources and programs for the schools but has done little to bring about higher achievement.[85]

Although many state constitutions use the word "efficient" to describe the education system required, the critical question of whether waste, mismanagement, and inefficiency at the local district level are the reasons for the lack of critical resources or of acceptable outcomes is seldom addressed in the court decisions. The courts sidestep this important issue by ruling that *if* such problems are present at the local level, the state is also liable for them. For example, in the *CFE* case, extensive evidence was introduced at trial of waste, fraud, corruption, and mismanagement in the New York City public schools that cost hundreds of millions of dollars a year. Even though the court of appeals found such evidence "disturbing," it did not rule on the extent of such problems or on whether they constituted a significant cause of the inadequacies found by the court in the city's public schools. Instead, the court ruled that to the extent such problems exist, the state is also responsible for seeing to it that they are corrected.[86] It concludes, without any significant analysis, that elimination of waste will not "obviate the need for changes to the funding system" and that the remedy it favors is increased funding.[87]

84. Center for Government Services, Rutgers, *New Jersey's Public Schools: A Biennial Report for the People of New Jersey 2002–2003 Edition*, Appendix A.4, www.policy.rutgers.edu/cgs/PDF/NJPS02.pdf.

85. A recent report states that third grade test scores in New Jersey have improved in the last three years; however, there has been little or no improvement in achievement in other grades. Long and Goertz (2004). After more than thirty years of litigation and at least ten years of huge funding increases for the thirty special needs districts, such results are, to say the least, disappointing. *See also* Guthrie (2004).

86. *CFE II,* at 921–923.

87. *CFE II*, at 929.

Wyoming's constitution requires, among other things, an "efficient" system of education. However, aside from one sentence in the supreme court's opinions suggesting that "efficient" means "productive without waste," there is no further discussion about requiring the efficient or cost-effective use of funds.[88] Indeed, the court's order that the "best education" and an education "visionary and unsurpassed" be provided indicates that efficiency was not a significant concern to the court.[89] In Kansas, the trial court evinced the same attitude: "Addressing problems of management and accountability is *also* Defendants' responsibility."[90]

Courts are empowered to make determinations about the effects of waste and mismanagement at the local level and about what part of the problem calls for a nonfinancial remedy. Such a finding would notify the legislature that funding is only part of the solution, and perhaps not even the principal solution, and allow it to concentrate on cutting out waste and inefficiency, instead of solely on appropriating more money. Suitable legislation could then be enacted instead of simply throwing money at the problem. Unfortunately, because all other causes of low achievement are given only lip service by the courts in finding liability, the primary and often sole focus of the court orders, and thus of the legislative response, has been on increasing funding for education. Nary a word is said about reform at the local district

88. *Campbell County School District v. State*, 907 P.2d 1238,1258-1259 (Wyo. 1995); *State v. Campbell County School District*, 19 P.2d 518, 538 (Wyo. 2001).

89. Yet in contrast to the state supreme court decisions, the latest Wyoming trial court to rule on adequacy issues relied on the words "productive without waste" in judging recent legislative efforts, without ever mentioning the supreme court's direction that the education provided be the "best." *Campbell 2006*, at 127. How the Wyoming Supreme Court will view this fundamental change in emphasis remains to be seen.

90. *Montoy v. State*, Case No. 99-C-1738 (Dist. Ct. Shawnee County, Kan., Dec. 2, 2003) at 79.

level or about alternative measures of educational reform that might hold out more hope for success.[91]

3. The Efficacy of Court-Ordered Remedies

The intrusion of the courts into what have traditionally been political matters reserved to the executive and legislative branches of government has put a tremendous strain on the relations among the three branches of government in many states. This is most apparent during the remedial phase of adequacy litigation as the court tries to impose its will on recalcitrant legislators who believe that they, and not the courts, are endowed under the constitution to make education policy and to decide how much of the state's public treasury should be spent on education. In New York and other states, the situation has been exacerbated by the court's extraordinary financial demands, which ignore the political and financial realities facing a state and its legislature. The result has been a showdown between the courts and the legislature, leading in some instances to suggestions that the legislature simply refuse to obey the court order. In his column in *Newsweek* magazine, George Will, the well-respected conservative writer, had this to say to the New York legislature about how it should treat the court order in that state which dictated a $23 billion increase in funding for the New York City public schools over the next five years: "New York's Supreme Court can neither tax nor spend. The state legislature is not a party to the suit, so it cannot be held in contempt. Perhaps it should just ignore the court's ruling as noise not relevant to the rule of law. Which happens to be the case."[92]

91. There are other strong reasons why the courts are not suited to decide what are essentially policy and funding issues, but a full treatment of these problems is beyond the scope of this chapter.

92. George Will, *Judges and "Soft Rights," Newsweek*, Feb. 28, 2005.

To date, only one court has been faced with the direct refusal of the legislature to obey its order. Either the courts have backed down, as happened in Ohio and Alabama, where after years of litigation the courts finally dismissed adequacy cases, belatedly acknowledging that educational funding was for the legislature to decide,[93] or the legislature of the state has increased funding for education enough to satisfy the court, at least for the time being. However, the issue has come to a head in both New York and Kansas where the courts expressly ordered the state legislatures to raise K–12 education spending by specific amounts. This places the burden of complying with the court order directly in the lap of the state legislature, which more than likely has not even been a party to the litigation, but is handed the bill after the state's liability has been established.

If a legislature refuses to comply with a court order to increase funding, the courts have two mechanisms to force compliance—enjoining school funding and the power of contempt. Both are problematic in the context of an adequacy case for several reasons.

The clearest power the court possesses is its authority to enjoin any further spending on schools under the education funding statutes of the state until the legislature adopts reforms that will, in the eyes of the court, cure the constitutional defects in the educational funding system. Cutting off education funding and closing the schools is obviously a step any court would be extremely reluctant to take. Implementing such a remedy would hurt the very children that an adequacy remedy is supposed to help. Therefore, it is not a remedial measure but a blunt weapon the courts use to bludgeon the legislature into doing its bidding.

93. *State ex rel. State v. Lewis*, 789 N.E.2d 195 (Ohio 2003), *cert. denied*, 124 S.Ct. 432 (2003); *Alabama Coalition for Equity v. Fob James, et al.* (Case Nos. 1950030, 1950031, 1950240, 1950241, 195040, 1950409, S.Ct. Ala. May 31, 2002).

The courts of only two states have thus far flirted with this enforcement tool. In 1976, the New Jersey courts enjoined any funding of the schools until the legislature appropriated the additional education funding ordered by the court. After eight days, the governor and the legislature blinked first, passed the state's first income tax, and appropriated the court-ordered increase.[94] In 2003 a Kansas trial judge enjoined all further spending on the state's public schools until the legislature acted to pass remedial legislation.[95] It caused a furor in the state, and within a week the Kansas Supreme Court stayed the order.[96] However, in 2005 the Kansas Supreme Court threatened similar action when it upheld the trial court's decision and the Kansas legislature at first failed to comply with its order. In the closing moments of a special session called to address the court order and over the objections of its leaders, the legislature approved the required first installment of $285 million in additional funding ordered by the courts, thereby narrowly averting, for at least the next year, an impasse between it and the courts.[97] Only the appropriation of an additional $466 million increase in 2006 ended the crisis, at least until another suit is filed challenging the new funding system.

Closing the schools is the "nuclear option" and how the courts or legislative bodies would react if the schools were actually closed is unknown. Whether any court ever resorts to this measure, other than during the summer break, most likely depends on the court convincing itself that legislators will not let the public schools close under any circumstances and will "cave in" to the courts' directives.

94. Education Law Center, *History of Abbott*, http://edlawcenter.org/ELCPublic/AbbottvBurke/AbbottHistory.htm.

95. *See* footnote 57.

96. *Montoy v. State*, No. 92032 (Kan. S. Ct., May 19, 2004).

97. Steve Painter, *$148 Million More*, Wichita Eagle, July 7, 2005.

The second measure a court has to enforce an adequacy order lies in its power to hold in contempt the state, its institutions, and the state officials who refuse to comply with the court's order, and either to fine them, or in the case of officials, possibly to put them in jail until they obey the order. However, the legality and the practicality of using the contempt power are uncertain, to say the least. First, there is a serious question about whether a court can order a legislature to appropriate a specific amount for education. Most state constitutions expressly provide that the power of appropriation is vested exclusively in the legislature.[98] Moreover, in most cases, neither the legislature nor its members are even parties to the adequacy case, and the authority of the court to hold nonparties in contempt is limited in most states. Most states require that a nonparty must not only have knowledge or notice of the court order but must also either be in privity with the party named in the injunction, or act in collusion with the named party.[99]

Even if the court has the jurisdiction to hold state officials in contempt, there is the question of exactly who the court should penalize. No single legislator has the power to bind the state or to pass legislation, and therefore the ability to purge himself or herself of contempt. Theoretically, the court could hold all legislators in contempt or perhaps only those who vote against a funding bill. However, such a blanket contempt citation would enmesh the court right into the heart of the legislative process

98. *E.g.*, N.Y. Const., Art. VII, §7; Fla. Const., Art. VII, §c. ("No money shall be drawn from the treasury except in pursuance of appropriation made by law.") Kan. Const., Art. 2, § 24 ("No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law."); Kan. Const., Art. 11, § 5 ("No tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same; to which object only such that shall be applied").

99. *See e.g., Frey v. Willey*, 166 P.2d 659, 662 (Kan. 1946*); State Univ. of N.Y. v. Denton*, 316 N.Y.S.2d 297, 299 (N.Y. App. Div. 1970).

by requiring a "yes" vote on legislation that there might be a hundred reasons for a legislator to oppose. Besides, does anyone seriously believe a court would put the entire legislature in jail, and if it did, who would carry out such an order?

A more likely target of a contempt citation would be the state itself. The "state" could not be imprisoned, but it could be fined. That is the enforcement mechanism plaintiffs are relying on in the *CFE* case, where they are seeking to have the state fined $4 million for each day it fails to comply with the court order. In 2004 the trial court denied plaintiffs' contempt motion because no unequivocal order had yet been entered requiring the state to increase funding by a specific amount.[100] A specific order has now been issued, but it has been stayed during the pendency of the appeal.[101] If the orders of the trial court or appellate division are affirmed, it remains to be seen what action the court will take if the legislature fails to appropriate the sums ordered, but plaintiffs will almost certainly seek large fines.[102] But suppose the state is fined and the legislature refuses to appropriate money to pay the fines, as would be likely if it had already refused to appropriate money to satisfy the courts' spending order? It is possible that the governor, as the chief executive officer of the state, could be fined or jailed for contempt, but that is unlikely. No governor has it within his or her power to appropriate state money, no matter how much he or she might favor such an appropriation. Moreover, who would enforce an order to jail the governor for contempt? A contempt order against the state education department, state superintendent of education, and state board of education, would be equally unavailing because they have no power or financial wherewithal to raise

100. *CFE*, Index No. 111070/93 (Sup. Ct. New York County, Feb. 14, 2005).
101. *See* footnote 2.
102. *See* footnote 100.

spending without additional appropriations from the state legislature.

Because of these inherent legal and practical problems, in the end the power of the courts to enforce their remedies seems to lie in the reasonableness and persuasiveness of their orders. If the voting public believes that the courts are right, and that spending increases in the range ordered by the courts, and the tax increases to support them, are warranted, a legislature is likely to comply with the court orders enough to satisfy the court without the court having to resort to such drastic remedies. However, if legislators are not convinced the public will support such spending and tax increases, the courts are unlikely, as a practical matter, to be able to force their will on a reluctant legislature. The result will be a constitutional crisis that will serve to weaken and diminish respect for both the judicial system and for other branches of government without benefiting children.

4. A New Direction

Until 2005 plaintiffs had won almost every adequacy case that had survived a motion to dismiss on separation of powers grounds and been taken to trial. However, beginning in 2005 this winning streak came to an end, when the highest courts in Texas and Massachusetts ruled for the state defendants. Although the trial courts, reflecting the trends discussed above, had found the educational financing systems in both states unconstitutional, the supreme court of each state soundly reversed. In both cases, the high courts took a fundamentally different view of the state's constitutional obligations than had previously been the case. Picking up on the themes expressed in this chapter, both courts recognized that perfection in the form of all or most students meeting high state academic standards was not demanded by the constitution, that the choices made by the leg-

islature in establishing the state's educational system should be afforded deference by the court, and that evidence that more money was the answer to achievement problems was not to be trusted.

Massachusetts

Of the two decisions, Massachusetts should have been the least surprising, except that its highest court is reputed to be one of the most liberal in the country. The commonwealth had previously been held liable in an adequacy case in *McDuffy v. Secretary, Executive Office of Education*. However, in the decade following that decision, its legislature had not only tripled spending on education from roughly $3 billion to $10 billion a year but had made other important reforms, all to satisfy a vague constitutional command to "cherish education."[103] Because of this enormous effort, if the defense could not win in Massachusetts, it was unlikely to prevail in any state. The main significance of the decision lies in its recognition that attainment by all or most children of academic standards purposely set high to challenge them should not be the measure of whether a state's educational system is constitutional or not. State legislatures have choices to make, the court said, and if those choices are reasonable and are having a positive effect, such choices are entitled to deference by the court.[104] Other courts had not previously given effect to these seemingly simple and obvious principles.

Texas

Texas was a more difficult case for the state. Although it could make claims similar to Massachusetts' of improving student

103. *Hancock,* at 1139.
104. *Hancock,* at 1139, 1156.

achievement, for example, the "Texas Miracle" and the establishment of strong accountability measures, that was where the similarities ended. While Massachusetts was the fourth highest spending state in the country in 2002–2003, Texas was the thirty-fourth highest, spending almost a thousand dollars per pupil below the national average.[105] For money-oriented plaintiffs, this is a critical distinction.

The background of the case is complex in that it involved not only issues of educational adequacy but of whether the state system of financing public schools was a "state property tax" prohibited by the state constitution. Plaintiffs prevailed on the latter issue; however, in the same decision, the court rejected adequacy claims by less affluent intervenor school districts.[106] Thus, although the Texas legislature will still have to wrestle with redoing its state tax system to replace the illegal "state property tax," it is under no duty to increase funding for schools in order to provide an "adequate" education.

In reversing the trial court, the Texas Supreme Court gave substance to the principle that courts should give deference to legislative choices. While it refused to dismiss the case on separation of powers grounds, it heeded long-standing precedent that judicial intrusion be minimized. It expressly recognized that its role was not to make policy but only to decide if the education being provided satisfied the constitution.

> [W]e must decide only whether public education is achieving the general diffusion of knowledge the Constitution requires. Whether public education is achieving all it should—that is, whether public education is a sufficient and fitting preparation of Texas children for the future—involves political and policy considerations properly directed to the Legislature.[107]

105. *Quality Counts 2006*.
106. *West Orange Cove*.
107. *Id.*, at 7.

Therefore, the court held it would not remedy "deficiencies and disparities in public education" in Texas that fell "short of a constitutional violation."[108] Those problems, the court ruled, would have to be remedied "through the political processes of legislation and elections." It acknowledged evidence of "wide gaps in performance" between disadvantaged students and other students, high dropout and noncompletion rates and a low rate of college preparedness but refused to condemn Texas's system because of low achievement, holding that "they [low performance outcomes] cannot be used to fault a public education system that is working to meet their stated goals merely because it has not yet succeeded in doing so."[109] Instead, it focused on the positive—that standardized test scores were improving, even as the tests themselves were being made more difficult, that NAEP scores in Texas had improved relative to those in other states,[110] and that the necessary elements of a system of education had been provided, that is, "a state curriculum, a standardized test to measure how well the curriculum is being taught, accreditation standards to hold schools accountable for their performance, and sanction and remedial measures for students, schools, and districts to ensure that accreditation standards are met."[111]

On the more-money argument crucial in other cases, the court recognized that the "end-product of a public education and resources" are related, but that "the relationship is neither simple nor direct."[112] It flatly rejected the notion that more money was either the solution or the only solution, holding that "more

108. *Id.*, at 8.
109. *Id.*, at 90.
110. *Id.*, at 90.
111. *Id.*, at 35.
112. *Id.*, at 88–89.

money does not guarantee better schools or more educated students."[113]

Showing due deference to its coequal branches of government, the court ruled that the constitution allowed the legislature "much latitude in choosing among any number of alternatives that can reasonably be considered adequate, efficient, and suitable." It therefore held that "[i]f the legislature's choices are informed by guiding rules and principles properly related to public education—that is, if the choices are not arbitrary—then the system does not violate the constitutional provision."[114]

Moreover, it emphasized that "arbitrary" did not mean "a mere difference of opinion [between judges and legislators], where reasonable minds could differ . . ." and that the courts "must not substitute their policy choices for the Legislature's."[115] Based on its examination of the record and applying the previously mentioned principles, the court rejected plaintiffs-intervenors' adequacy claims.[116]

In summary, based on a set of rules that did not preordain the outcome, both states were able to convince the courts that their education systems, while far from perfect, nevertheless satisfied the minimum constitutional standards of their respective states and that control over such systems should therefore properly remain in the legislature.

Conclusions

In conclusion, adequacy cases are increasing in number and intensity. In many states, the courts have made themselves not only the final arbiter of educational policy and of funding deci-

113. *Id.*, at 89.
114. *Id.*, at 81.
115. *Id.*, at 81.
116. *Id.*, at 91.

sions, but have done so in a way that maximizes, and not minimizes, judicial interference with the legislative process. Through their rulings, the courts have adopted definitions of adequacy that are extremely difficult for state legislatures to meet, no matter how much the state spends on education. This ensures court domination for decades as legislatures struggle to meet court orders that ignore political and financial realities.

Several recent court decisions suggest that the courts themselves realize that some of the earlier court decisions have gone too far. The 2005 decision of the Texas Supreme Court, in particular, avoids the "presumption" of unconstitutionality discussed in this chapter and preserves the traditional balance of power between the courts and the legislature. It provides for court review to ensure that minimum constitutional guarantees are satisfied, while at the same time recognizing that the courts' role is a limited one and that substantial discretion should be left in the legislature to decide matters of educational policy and appropriations.

The stakes in adequacy litigation are huge for children, educational reform, and representative government, but only the future will tell which of these radically different paths the courts in other states will take.

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