

THE SCHOOL FINANCE REFORM MOVEMENT, A HISTORY AND PROGNOSIS: WILL MASSACHUSETTS JOIN THE THIRD WAVE OF REFORM?

Ensuring equal educational opportunity for all children has long been a cherished American ideal.¹ Since the early days of our republic, the people of the United States have recognized that free public education is one of the most important ways in which our country fulfills its promise of equal opportunity for all citizens.² Public schools have traditionally served as a means by which the immigrant and the disadvantaged are able to enter the mainstream of our society.³ Public schools have provided both a way to ensure equal opportunity for the individual, as well as a means to strengthen and unify our country.⁴ Because of the importance of this dual role of education in our democratic society, a key goal of public education in the United States has been to provide quality schooling for all children.⁵

Although few Americans would quarrel with the ideal of equal educational opportunity, not all would define the concept in the same way.⁶ The initial interpretation of this evolving concept identified equal educational opportunity with overcoming inequalities in schooling stemming from racial discrimination.⁷ Proponents of this interpretation, which dominated the first half of this century, focused initially on the provision of equal services and facilities to all children regardless of race.⁸ By 1950, this concept

¹ Browning & Long, *School Finance Reform and the Courts after Rodriguez* [hereinafter *School Finance Reform*], in *SCHOOL FINANCE IN TRANSITION, THE COURTS AND EDUCATIONAL REFORM* 82 (1974).

² 1 U.S. COMMISSION ON CIVIL RIGHTS, *RACIAL ISOLATION IN THE PUBLIC SCHOOLS* 1 (1967) [hereinafter *RACIAL ISOLATION*].

³ *Id.*

⁴ *Id.*

⁵ *Id.* at ix.

⁶ See *School Finance Reform*, *supra* note 1, at 82-83.

⁷ See *id.*

⁸ *Id.*

of equal educational opportunity also emphasized the need for schools to be equal in terms of intangible factors such as morale and prestige.⁹

During the 1960s, a second interpretation of the concept of equality of educational opportunity emerged.¹⁰ This interpretation focused on the output of education, or on equalizing the educational achievement of various societal groups.¹¹ A third interpretation of the concept of equal educational opportunity emphasizes the equalization of the financial input into a child's education.¹² The focus under this definition is on equalizing such factors as teachers' salaries, teacher-pupil ratios, learning resources, textbooks and course offerings among the schools.¹³ This concept emphasizes equal access to equally funded education, and reflects the belief that factors such as class size and course offerings affect a child's opportunity and ability to learn.¹⁴

For those who believe that the amount of money expended on a child's education can affect educational achievement, one focus of the movement to achieve equal educational opportunity has been to seek court-ordered equalization of funding so that all public school districts within a state receive about the same amount of money per pupil per year (per pupil expenditures).¹⁵ This strategy is, in essence, a constitutional challenge to the state's decision to fund public schools partially through local property tax revenue raised by each school district, though the state recognizes that the amount of money school districts can raise varies with the value of the property within their district.¹⁶ School reform plaintiffs contend that the use of this fi-

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 84. In response to the concern about the disproportionately low academic achievement of students from impoverished and minority backgrounds, federal and state governments developed compensatory education programs. *Id.* These programs were designed to eliminate the effects on school children of racial isolation and economic and cultural deprivation. *Id.*

¹² *Id.* at 82.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See, e.g., *Serrano v. Priest*, 5 Cal. 3d 584, 590, 487 P.2d 1241, 1244, 96 Cal. Rptr. 601, 604 (1971).

¹⁶ See *School Finance Reform*, *supra* note 1, at 87. The financing plans that are being constitutionally challenged in these school finance reform cases are the result of a series of decisions made by the state. Under the United States Constitution, states are not required to provide free public education, but all fifty states have chosen to do so through statutory or constitutional provisions. *RACIAL ISOLATION*, *supra* note 2, at 260. In organizing their statewide

nancing system causes significant, and unconstitutional, differences

systems of public schools, the states have traditionally allowed each city or town to establish its own school district, and to operate it as a relatively autonomous unit. *School Finance Reform*, *supra* note 1, at 87. Instead of funding these locally-organized school districts totally through state funds, states have chosen to fund these school districts through a combination funding plan consisting of state aid derived from statewide taxes, and of tax revenue derived by school districts from local property taxes. Barro, *Alternative Post-Serrano Systems and Their Expenditure Implications* (1974), [hereinafter *Implications*] in *SCHOOL FINANCE IN TRANSITION*, *supra* note 1, at 35. The state funding generally provides only ten to fifty percent of the necessary operating budget of a school district. *See id.*

The remainder of the funds a school district needs to provide for its state-mandated compulsory education is generally derived from local property taxes. *See* H. Levin, *Effects of Expenditure Increases on Educational Resource Allocation and Effectiveness* (1974) [hereinafter *Effects of Expenditures*], in *SCHOOL FINANCE IN TRANSITION*, *supra* note 1, at 177. Property taxes are the mainstay of most school districts' local revenue, though some states permit their school districts to levy nonproperty taxes as well. R. Hartman & R. Reischauer, *The Effect of Reform in School Finance on the Level and Distribution of Tax Burden* (1974), in *SCHOOL FINANCE IN TRANSITION*, *supra* note 1, at 108, 109. Even in these states, however, property taxes are still the major source for local funds. *Id.* at 109, 113, 119.

In contrast to the relatively equal funding that school districts receive from the state, the amount of money that school districts receive from local property taxes varies considerably. *See supra* note 1, at 177. This difference in local tax revenues typically occurs because there is a significant variation among school districts in terms of the per capita value of the property located within the districts' boundaries. *See Final Report to the California Senate Select Committee on School District Finance* 9 (1972) [hereinafter *Final Report*] as quoted in *School Finance Reform*, *supra* note 1, at 87. Because property taxes are calculated on the basis of the value of a piece of property, school districts with high property values ("property-rich school districts") can collect significantly more money to fund their schools. *Id.*

Property-rich school districts can often collect these larger sums of money at a lower tax rate than can school districts with low property values ("property-poor school districts"). *Id.* If a school district levies a tax of \$2.00 on each \$1,000 of property valuation, for example, a piece of property worth \$10,000 will yield \$20.00 in property tax revenues. *See generally* Massachusetts, Department of Education, Bureau of Data Collection and Processing, "School District Comparisons of Boston, Braintree, Lawrence" (Fiscal Year 1988-89). If a piece of property is worth \$2,000, the same tax rate will yield only \$4.00. *See id.* Thus, school districts that have a high average per capita property valuation have a greater ability to raise funds for local schools than do school districts where the average per capita valuation of property is much lower. *See id.*

The differential ability of school districts to raise local funds affects the amount of money a school district is able to spend per year per pupil on education. *See id.* The differences in the amount of money spent per pupil among school districts in turn has a measurable impact on class size, faculty, resources and curriculum. *See RACIAL ISOLATION*, *supra* note 2, at 30. The effect of this differential funding on the quality of education led commentators to observe that when states choose to use a combination system of state aid and local property taxes to fund public schools, and do not equalize the inequities that the use of property taxes cause, the quality of a child's education becomes a function of the wealth of his or her parents, neighbors and school district. *See School Finance Reform*, *supra* note 1, at 85.

The *Final Report* points out how states have created the school finance systems characterized by the inequities condemned in school finance cases:

- (1) The state permits local school districts to exist, (2) the state gives each district the power to raise money through a local property tax on property physically located within the district's border, (3) the state permits each district to keep

in the amount of money spent per child on education between property-rich and property-poor school districts.¹⁷

In seeking court-ordered school finance reform, the plaintiffs' key premise in school finance cases is that disparity in school financing denies children in property-poor school districts educational opportunities substantially equal to those enjoyed by other children.¹⁸ Plaintiffs have thus argued that a funding system that produces significant financial disparities in per pupil expenditures among a state's school districts should be declared unconstitutional because it violates the equal protection clause of the fourteenth amendment by discriminating against children from poor areas of the state.¹⁹ Plaintiffs have also pursued the equal protection argument at the state level, alleging that this type of funding disparity violates their respective state equal protection clauses as well.²⁰

A third basis on which plaintiffs have argued that this type of unequal funding system is unconstitutional relies on the education provision in the state's constitution that authorizes the legislature to establish a state public school system.²¹ The actual wording of these establishment provisions varies from state to state.²² Generally, however, these establishment provisions specify that the state maintain a school system with certain characteristics such as efficiency, thoroughness or uniformity.²³ Plaintiffs in school finance cases have thus charged that a school finance system that results in significant funding disparities among school districts is not "efficient," "uniform" or "thorough," and is thus unconstitutional.²⁴

the money it raises, knowing that from district to district the ability to raise money for schools varies widely because of the dramatically uneven distribution of property wealth about the state, and (4) the state fails to equalize these wealth differences through "state aid"

Final Report as quoted in School Finance Reform, supra note 1, at 87.

¹⁷ *Serrano v. Priest*, 5 Cal. 3d 584, 590, 487 P.2d 1241, 1244, 96 Cal. Rptr. 601, 604 (1971).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See id.*

²¹ *See, e.g., Robinson v. Cahill*, 62 N.J. 473, 501-19, 303 A.2d 273, 287-97 (1973). *Robinson* was the first case in which plaintiffs made this argument successfully.

²² *See, e.g., Rose v. Council for Better Educ.*, 790 S.W.2d 186, 215 (Ky. 1989) (public school system to be efficient); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 396 (Tex. 1989) (public school system to be efficient); Nev. CONST. art. 11, § 2 (school system to be uniform).

²³ *See, e.g., Rose*, 790 S.W.2d at 215; *Edgewood Indep. School Dist.*, 777 S.W.2d at 396.

²⁴ *See, e.g., Robinson*, 62 N.J. at 501-19, 303 A.2d at 287-97.

Since 1968, when the first school finance reform case was decided, plaintiffs from twenty-eight states have argued that their respective state plans for financing public schools were unconstitutional based on equal protection or state education provision grounds.²⁵ In Georgia, Illinois, Maryland, Michigan, Montana, New

²⁵ These states, and their respective cases, include:

Illinois (1968): *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969).
 Virginia (1969): *Burruss v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd*, 397 U.S. 44 (1970).
 California (1971): *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601, *appeal after remand*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied sub nom. Clowes v. Serrano*, 432 U.S. 907 (1977).
 Minnesota (1971): *Van Duzart v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971).
 Wyoming (1971): *Sweetwater County Planning Comm. v. Hinkle*, 491 P.2d 1234 (Wyo. 1971).
 Georgia (1972): *Battle v. Cherry*, 339 F. Supp. 186 (N.D. Ga. 1972).
 Kansas (1972): *Caldwell v. Kansas*, Civil No. 50616 (Kan. Dist. Ct. Aug. 30, 1972).
 Maryland (1972): *Parker v. Mandel*, 344 F. Supp. 1068 (D. Md. 1972).
 Texas (1973): *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).
 New Jersey (1973): *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973), *on reh'g Robinson v. Cahill*, 69 N.J. 133, 351 A.2d 713 (1975), *cert. denied sub nom. Klein v. Robinson*, 423 U.S. 913 (1975).
 Arizona (1973): *Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973).
 Michigan (1973): *Milliken v. Green*, 389 Mich. 1, 203 N.W.2d 457 (1972), *vacated*, 390 Mich. 389, 212 N.W.2d 711 (1973).
 Montana (1974): *State ex rel. Woodahl v. Straub*, 164 Mont. 141, 520 P.2d 776, *cert. denied sub nom. Woodahl v. Straub*, 419 U.S. 845 (1974).
 Washington (1974): *Northshore School Dist. No. 417 v. Kinnear*, 84 Wash. 2d 685, 530 P.2d 178 (1974).
 Idaho (1975): *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975).
 Illinois (1976): *Illinois ex rel. v. Jones v. Adams*, 40 Ill. App. 3d 189, 350 N.E.2d 767 (1976).
 Oregon (1976): *Olsen v. State*, 276 Or. 9, 554 P.2d 139 (1976).
 Wisconsin (1976): *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 147 (1976).
 Connecticut (1977): *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977).
 Washington (1978): *Seattle School Dist. No. 1 v. State*, 90 Wash. 476, 585 P.2d 71 (1978).
 Pennsylvania (1979): *Danson v. Casey*, 484 Pa. 415, 399 A.2d 360 (1979).
 W. Virginia (1979): *Pauley v. Kelley*, 162 W. Va. 672, 255 S.E.2d 859 (1979).
 Ohio (1979): *Board of Educ. v. Walter*, 58 Ohio St. 2d 368, 390 N.E.2d 813, (1979), *cert. denied*, 444 U.S. 1015 (1980).
 Wyoming (1980): *Washakie County School Dist. No. 1 v. Herschler*, 606 P.2d 310, *cert. denied sub nom. Hot Springs County School Dist. No. 1 v. Washakie County School Dist. No. 1*, 449 U.S. 824 (1980).
 Georgia (1981): *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981).
 Colorado (1982): *Lujan v. Board of Educ.*, 649 P.2d 1005 (Colo. 1982).
 New York (1982): *Board of Educ. v. Nyquist*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982).

Jersey, Texas, Washington, Wisconsin and Wyoming, courts have considered issues related to the constitutionality of state school funding plans at least twice.²⁶ Until 1989, however, the school finance reform movement was only marginally successful, and interest in court-ordered school finance reform appeared to be decreasing.²⁷

Then, in 1989, within months of each other, courts in Kentucky, Montana and Texas declared their respective state school financing plans unconstitutional on the grounds that significant disparities in school district funding violated their state education provisions.²⁸ Montana also declared its state system of financing schools unconstitutional because the state had forced school districts to rely on permissive tax levies that voters could reject.²⁹

Maryland (1983): *Hornbeck v. Board of Educ.*, 295 Md. 597, 458 A.2d 758 (1983).

Arkansas (1983): *Dupree v. Alma School Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983).

Michigan (1984): *East Jackson Pub. Schools v. State*, 133 Mich. App. 132, 348 N.W.2d 303 (1984).

Oklahoma (1987): *Fair School Fin. Council of Oklahoma v. State*, 746 P.2d 1135 (Okla. 1987).

S. Carolina (1988): *Richland County v. Campbell*, 294 S.C. 346, 364 S.E.2d 470 (1988).

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

Wisconsin (1989): *Kukor v. Grove*, 148 Wis. 2d 469, 436 N.W.2d 568 (1989).

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

Texas (1989): *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 359 (Tex. 1990).

New Jersey (1990): *Abbott v. Burke*, 119 N.J. 287, 575 A.2d 359 (1990).

²⁶ See *supra* note 25.

²⁷ Prior to 1989, public school financing systems had been declared unconstitutional in only ten states: *Dupree*, 279 Ark. at 345, 651 S.W.2d at 93; *Serrano*, 5 Cal. 3d at 618-19, 487 P.2d at 1266, 96 Cal. Rptr. at 626; *Horton*, 172 Conn. at 648-49, 376 A.2d at 374; *Caldwell*, Civil No. 50616 (Kan. Dist. Ct. Aug. 30, 1972); *Rose*, 790 S.W. 2d at 215; *Van Dusartz*, 334 F. Supp. at 877; *Helena Elementary School Dist. No. 1*, 236 Mont. at 47, 769 P.2d at 691; *Robinson*, 62 N.J. at 480, 303 A.2d at 276; *Edgewood Indep. School Dist.*, 777 S.W.2d at 396; *Washakie County School Dist. No. 1*, 606 P.2d at 322, *cert. denied sub nom.* Hot Springs County School Dist. No. 1 v. Washakie County School Dist. No. 1, 449 U.S. 824 (1980). Only six of these decisions, however, came after the 1973 *Rodriguez* decision. The last decision that held a state financing system unconstitutional occurred in 1983. See *Dupree*, 279 Ark. at 345, 651 S.W.2d at 93. There were no school reform cases decided between 1984 and 1987, and just one case was decided in 1987 and 1988. See *supra* note 25.

²⁸ *Rose*, 790 S.W.2d at 215; *Helena Elementary School Dist. No. 1*, 236 Mont. at 47, 796 P.2d at 691; *Edgewood Indep. School Dist.*, 77 S.W.2d at 396.

²⁹ *Helena Elementary School Dist. No. 1*, 236 Mont. at 55, 796 P.2d at 690.

In addition to these three funding disparity cases, 1989 also saw the revival of an issue first raised in the late 1960s: whether equal educational opportunity requires not just equal access to equally funded programs, but equal access to programs that are equally effective.³⁰ The Wisconsin Supreme Court rejected this concept,³¹ but the New Jersey Supreme Court held in a 1990 case that the state must expend more funds on the education of disadvantaged children from court-identified poor urban school districts because of their special needs.³² Moreover, in light of the municipal overburden faced by the cities, the New Jersey Supreme Court ruled that the state could no longer place the financial responsibility for educating disadvantaged children on these urban school districts, but must instead guarantee adequate funds to meet the educational needs of these children.³³

With the addition of the 1989–1990 court decisions, the school finance reform movement appears to have entered a new phase. Commentators have observed a revived interest in the school finance reform movement as a means of equalizing educational opportunity through equalizing access to equally funded programs.³⁴ In addition, the 1989–1990 decisions have also focused attention on the constitutionality of state school funding systems that require local voter approval of school taxes, or depend on the availability of local resources, to fund a basic education.³⁵ Moreover, the New Jersey decision has added a new branch to the school finance movement that focuses not on equal funding, but on the need to provide more funding for disadvantaged children in order to equalize the effectiveness of a public school education.³⁶

Massachusetts is one of twenty-two states in which courts have yet to rule on the constitutionality of the state's plan for financing schools.³⁷ Factually, however, the current school financing system in

³⁰ See *Abbott v. Burke*, 119 N.J. 287, 295, 575 A.2d 359, 363 (1990); *Kukor v. Grover*, 148 Wis. 2d 469, 474, 436 N.W.2d 568, 570 (1989). The first case in which plaintiffs used educational needs as the definition of equal educational opportunity was *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969).

³¹ *Kukor*, 148 Wis. 2d at 474, 436 N.W.2d at 570.

³² *Abbott*, 119 N.J. at 374, 575 A.2d at 403.

³³ *Id.* at 385, 575 A.2d at 408.

³⁴ See, e.g., Felsenthal, *New Jersey's Public School Financing Is Struck Down by State's Highest Court*, Wall St. J., June 6, 1990, at A18, col. 1–2.

³⁵ See, e.g., *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 215 (Ky. 1989); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 396 (Tex. 1989).

³⁶ See *Abbott*, 119 N.J. at 287, 575 A.2d at 359.

³⁷ See *supra* note 25.

Massachusetts bears a close resemblance to the Kentucky, Montana and Texas systems that have recently been declared unconstitutional. The Massachusetts system of financing schools is characterized by unequal funding, local voter control over funds needed to support the schools and lower levels of funding in many school districts that have large populations of disadvantaged children.³⁸ The history of the school finance reform movement, however, indicates that the ultimate success of a court case challenging the Massachusetts system of financing schools will depend not only on the facts related to unequal funding, but also on the legal arguments that potential plaintiffs choose to make. This note, then, assesses both the factual and legal bases for mounting a successful challenge to the current inequitable system of financing schools in Massachusetts.

In making this assessment, this note first reviews, in Section I, the history of the school finance reform movement and the evolution of the concept of equal educational opportunity under the fourteenth amendment.³⁹ Sections II,⁴⁰ III⁴¹ and IV⁴² examine the three waves of school finance reform cases that federal and state courts have considered between 1968 and 1990. Section V focuses on the statistical and constitutional bases for challenging the legality of the current system of financing public education in Massachusetts.⁴³ Finally, Section VI assesses the likelihood that a successful challenge to the current inequitable system of funding Massachusetts public schools can be mounted based either on the federal or state equal protection clauses or on the Massachusetts constitutional provision on education.⁴⁴ The note concludes that a successful constitutional challenge to the current system of funding schools in Massachusetts can likely be mounted based either on the state's education provision or on the state's equal protection clause.⁴⁵

³⁸ See *Boston Globe*, Feb. 9, 1991, at 1, col. 1; *Boston Globe*, Nov. 22, 1990, at A58, col. 6.

³⁹ See *infra* notes 46–144 and accompanying text.

⁴⁰ See *infra* notes 145–215 and accompanying text.

⁴¹ See *infra* notes 216–90 and accompanying text.

⁴² See *infra* notes 291–360 and accompanying text. The term "third wave" has also been used in this context by William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on Public School Finance Reform Litigation*, J. L. & Educ. 219–50 (March 1990).

⁴³ See *infra* notes 361–453 and accompanying text.

⁴⁴ See *infra* notes 454–69 and accompanying text.

⁴⁵ See *infra* notes 470–71 and accompanying text.

I. THE EVOLUTION OF THE CONCEPT OF "EQUAL EDUCATIONAL OPPORTUNITY" UNDER THE FOURTEENTH AMENDMENT

A. *Plessy v. Ferguson* and Early Fourteenth Amendment Decisions of the United States Supreme Court

In the area of education, the legal definition of equal educational opportunity has been defined and has evolved primarily through federal cases interpreting the fourteenth amendment.⁴⁶ The fourteenth amendment of the United States Constitution provides that it is unlawful for a state to make or enforce any law that will deny any person within its jurisdiction the equal protection of the law.⁴⁷ The primary purpose of the amendment, which Congress passed after the Civil War, was to ensure that states could not make laws that would abridge the rights of, or discriminate against, the newly-freed slaves.⁴⁸ It was unclear, however, what constituted "discrimination," and what types of laws the equal protection clause might affect. These were issues which the Supreme Court would be called upon to interpret on numerous occasions.⁴⁹

The first decision related to the fourteenth amendment that had a direct impact on the legal definition of equal educational opportunity was *Plessy v. Ferguson*, which the Supreme Court handed down in 1896.⁵⁰ In *Plessy*, the Supreme Court examined the constitutionality of a Louisiana law requiring that all railway companies operating in Louisiana provide equal but separate coaches for "white and colored races."⁵¹ The Court held that this law requiring separate accommodations on the basis of race was not unconstitutional in part because it believed the fourteenth amendment applied to the political, but not the social, arena.⁵² Separate but equal accommodations, the Supreme Court therefore concluded, did not deprive the "colored man" of his property without the due process of law, nor deny him the equal protection of the law within the meaning of the fourteenth amendment.⁵³

⁴⁶ *School Finance Reform*, *supra* note 1, at 82.

⁴⁷ U.S. CONST. amend. XIV, § 1.

⁴⁸ See generally G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 586, 588 (11th ed. 1985).

⁴⁹ See *id.*

⁵⁰ *School Finance Reform*, *supra* note 1, at 83.

⁵¹ *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896). The fourteenth amendment was ratified in 1868.

⁵² *Id.* at 544.

⁵³ *Id.* at 542.

The *Plessy* decision was applied not only to public accommodations, but to public schools as well.⁵⁴ Until *Plessy* was overturned in 1954, the "separate but equal" doctrine defined equality of educational opportunity in public education.⁵⁵ Thus, during this sixty-year period, the movement to achieve equality of educational opportunity for all children focused on the elimination of easily identifiable inequalities that existed between black and white schools.⁵⁶ Court suits were primarily designed to force school districts to equalize black schools in terms of tangible factors such as school facilities, teacher-pupil ratios and course offerings.⁵⁷

In addition to court suits during this period that were designed to enforce the "separate but equal" doctrine, efforts to overturn the *Plessy* decision began.⁵⁸ Led by the National Association for the Advancement of Colored People ("NAACP"), the legal battle to overturn *Plessy* and force the desegregation of public schools began in the late 1930s, and spanned two decades.⁵⁹ The initial court cases in conjunction with this effort focused on the desegregation of public graduate and professional schools because the NAACP felt that states could not provide separate but equal schools for blacks at this level.⁶⁰ In addition, Associate Justice Thurgood Marshall, who in the 1950s spearheaded the NAACP's cases, recalled that the higher education strategy was also chosen because the NAACP felt

⁵⁴ See *School Finance Reform*, *supra* note 1, at 83. *Plessy* was overturned in 1954 by *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954).

⁵⁵ *Id.*

⁵⁶ See, e.g., *Blue v. Durham Pub. School Dist.*, 95 F. Supp. 441, 445 (M.D.N.C. 1951). In *Blue*, the United States District Court in North Carolina ruled that the Durham Public School System deprived black children of the equal protection of the law by failing to furnish them with facilities substantially equal to those furnished white children. *Id.* The district court noted advantages for white children in the areas of supervision, curriculum, equipment and teacher load. *Id.* at 444-45. Average daily attendance figures indicated about 55% white and 45% black children. *Id.* at 444. White children, however, had thirteen school buildings built at a cost nearly twice that of the eight buildings allotted to black children. *Id.* White children also had three junior high schools, whereas black children had none, and the buildings allotted to the black children often had fewer facilities than those found in the white schools. *Id.* Based on these findings, and following the separate but equal guideline outlined in *Plessy*, the district court held that the school district violated the equal protection clause of the fourteenth amendment. *Id.*

⁵⁷ See *id.*

⁵⁸ See generally A. Kelley, *The School Desegregation Case*, in *QUARRELS THAT HAVE SHAPED THE CONSTITUTION* 243, 247-49, 253 (1964), as quoted in P. BREST AND S. LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 404-06 (2d ed. 1983).

⁵⁹ *Id.*

⁶⁰ See *id.*

southerners would be less emotional about the integration of colleges and universities.⁶¹

The NAACP's strategy to begin its desegregation campaign with professional and graduate schools proved to be successful, and the first decision requiring the admission of a black student to a previously all-white state-supported law school came in 1938.⁶² In a decision that it would reaffirm in principle ten years later,⁶³ the Supreme Court in *Missouri ex rel. Gaines v. Canada* ruled that Missouri had not provided black students with equal protection of the law by paying their tuition to out-of-state law schools and denying black students admission to state-supported law schools in Missouri.⁶⁴ Emphasizing equality in terms of tangible factors related to schooling, the Court held that black students were entitled to substantially equal facilities *within* the state and, in the absence of these facilities, that they must be admitted to white schools.⁶⁵

A decade later, the NAACP presented the Supreme Court with two higher education cases that focused attention not only on the equalization of tangible factors related to schooling, but on the necessity to equalize intangible factors as well.⁶⁶ Thus in *Sweatt v. Painter*, decided in 1950, the Supreme Court considered whether a black law school which had been quickly established by the state of Texas provided an equal education.⁶⁷ The Supreme Court concluded that it did not, finding that the Texas State University for Negroes was not only inferior to the University of Texas Law School in terms of tangible factors such as library holdings, but also in terms of intangible qualities that "made for greatness" in a law

⁶¹ *Id.* As Marshall stated:

Those racial supremacy boys somehow think that little kids of six or seven are going to get funny ideas about sex and marriage just from going to school together, but for some equally funny reason youngsters in law school aren't supposed to feel that way. We didn't get it, but we decided if that was what the South believed, then the best thing for the movement was to go along.

Id.

⁶² *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

⁶³ The Supreme Court reaffirmed the principle in the *Gaines* decision in *Sipuel v. University of Oklahoma*, 332 U.S. 631, 632-33 (1948). In *Sipuel*, the Court held that a black student denied admission solely because of her race had to be admitted to that state-supported institution. *Id.* at 632-33.

⁶⁴ 305 U.S. 337, 349-50 (1938).

⁶⁵ *Id.*

⁶⁶ *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

⁶⁷ 339 U.S. 629, 633-35 (1950).

school, such as faculty reputation, community standing, traditions and prestige.⁶⁸ The Supreme Court held in *Sweatt* that the state of Texas could require blacks to attend a segregated law school only if that school could offer black students a legal education equivalent to that offered students of other races in terms of tangible and intangible factors.⁶⁹

The Supreme Court further emphasized the importance of intangible factors in judging equality of educational opportunity in *McLaurin v. Oklahoma State Regents for Higher Education*, a decision handed down in 1950 on the same day as *Sweatt*.⁷⁰ In *McLaurin*, the Supreme Court was faced with the necessity of determining if segregating an individual within a classroom, in and of itself, affected the equality of the person's education.⁷¹ The Supreme Court answered in the affirmative, ruling in *McLaurin* that a black student admitted to a state university to pursue a program not offered at the state's black graduate school could not be required to sit in separate sections of the classroom, library and cafeteria.⁷² Such restrictions were unconstitutional, the Court observed, because they impaired the black student's ability to learn his chosen profession by preventing him from engaging in discussions with his peers and professors.⁷³ With *McLaurin*, the attention of the Supreme Court was thus firmly fixed on the intangible psychological effects of segregation on blacks.⁷⁴ After *McLaurin*, the stage was set for the NAACP to present the Supreme Court with a case that would require the court to determine if segregated schools, by their very nature, deprived black children of the equal protection of the law even though their facilities might be equal.⁷⁵

B. *Equal Educational Opportunity Through Integration: The Promise of Brown v. Board of Education*

In 1952, the NAACP was able to present the Supreme Court with not one but four public school cases addressing the doctrine

⁶⁸ *Id.* at 634-35.

⁶⁹ *Id.*

⁷⁰ 339 U.S. 637, 638 (1950).

⁷¹ *Id.* at 640-42.

⁷² *Id.* at 641-42.

⁷³ *Id.* at 642.

⁷⁴ See generally A. Kelley, *The School Desegregation Case in Quarrels That Have Shaped THE CONSTITUTION* 243, 247-49, 253 (1964), as quoted in P. BREST AND S. LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 404-06 (2d ed. 1983).

⁷⁵ See *id.* In *Sweatt*, plaintiffs had argued for a re-examination of *Plessy v. Ferguson*, but the Supreme Court chose to decide the case on narrower grounds. 339 U.S. at 635-36.

of "separate but equal."⁷⁶ Three of these cases had resulted in lower court rulings that the separate public school facilities provided to black children were "equal," and thus constitutional.⁷⁷ Consolidated under the federal district court case from Kansas, *Brown v. Board of Education*, each of the four cases varied in terms of facts, but all involved black children seeking admission to schools attended solely by white children under laws requiring or permitting segregation according to race.⁷⁸ The Supreme Court heard arguments on *Brown* in the 1952 term, and in 1954 held that segregated schools were inherently unequal.⁷⁹

The Supreme Court's decision in *Brown* was based in part on studies that demonstrated that segregated schools had a negative psychological effect on black children.⁸⁰ The Supreme Court noted that segregation had a psychologically detrimental effect on black students because the policy of separating races was usually interpreted as denoting the inferiority of the black race.⁸¹ This sense of inferiority that blacks felt because of segregation affected the motivation of black children to learn, and deprived them of some of the benefits they would receive in a racially integrated school system.⁸² Given this negative effect of segregation on the black child, the Supreme Court in *Brown* held that in the field of public education, the doctrine of "separate but equal" had no place.⁸³

In reaching its decision in *Brown*, the Supreme Court determined that it could only judge if segregated public schools deprived black students of the equal protection of the law by considering public education "in light of its full development and its present place in American life."⁸⁴ In what courts now consider to be the classic statement on the role of education in our society, the Supreme Court in *Brown* wrote:

Today, education is perhaps the most important function of state and local governments It is required in the

⁷⁶ See *Brown v. Board of Educ.*, 347 U.S. 483, 486 (1954).

⁷⁷ *Id.* In the fourth case, the Delaware Supreme Court adhered to the separate but equal doctrine but ordered the plaintiffs admitted to the superior white schools. *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 487-88. The 1954 term reargument focused on the intent of the framers of the fourteenth amendment. *Id.* at 489.

⁸⁰ *Id.* at 494.

⁸¹ *Id.* (quoting the Kansas federal district court's opinion with approval).

⁸² *Id.*

⁸³ *Id.* at 495.

⁸⁴ *Id.*

performance of our most basic public responsibilities 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.⁸⁵

Such an opportunity, the Supreme Court concluded, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms."⁸⁶ Though it did not define the concept of "equal terms," in holding that segregated schools were inherently unequal and unconstitutional, the Supreme Court's decision in *Brown* seemed to many national leaders to offer great promise to those who wished to make equal educational opportunity a reality for all children.⁸⁷

C. *Still Segregated, Still Unequal: Public Schooling After Brown*

Despite the promise of *Brown*, by the mid-1960s government studies began to indicate that *Brown* had had little impact either on providing equal educational opportunity for all children, or on eliminating segregated schooling.⁸⁸ This continued segregation of American schools concerned national leaders in the mid-1960s, both because of the negative effects of segregation on black children,⁸⁹ and because it was difficult to see how such a segregated school system could lead to an integrated society.⁹⁰ In addition, national leaders were also concerned about continued segregation because the segregated schools attended by inner-city minority youth were inferior to those attended by white suburban children.⁹¹ The United States Commission on Civil Rights ("Civil Rights Commission")

⁸⁵ *Id.* at 493.

⁸⁶ *Id.*

⁸⁷ See generally RACIAL ISOLATION, *supra* note 2, at iv.

⁸⁸ See *id.* at 2-3. The United States Office of Education reported in 1966 that most children in the United States went to school with children of backgrounds similar to their own. *Id.* (quoting COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY 3 (1966)). This situation existed not because the state had ordered deliberate segregation of the schools, but because the state mandated that children attend school in their own school district. *Id.* at 41. School districts, in turn, generally required children to attend schools in their own neighborhoods, which were largely segregated. *Id.* at 12-13, 41-42.

⁸⁹ *Id.* at 202-04.

⁹⁰ *Id.* at 214.

⁹¹ *E.g., id.* at 30-31, 213.

placed much of the responsibility for the inferior quality of these urban schools on the state because of the type of school districting plans and funding patterns that states had allowed to develop in metropolitan areas.⁹²

As the Civil Rights Commission detailed in *Racial Isolation in the Schools*, the population in the United States had been gradually shifting to urban areas.⁹³ In making the move to the city, blacks had settled primarily in the inner or central city, and as they did so, the white population in urban areas had shifted from the city to the suburbs.⁹⁴ States had allowed suburbs to set up their own school districts financed and operated separately from city schools.⁹⁵ The Civil Rights Commission reported that a single metropolitan area might be served by forty or more school districts; in the Boston metropolitan area alone the Commission reported that there were seventy-five separate school districts.⁹⁶ Each of these school districts in turn was funded separately, through a combination of state aid and local property taxes.⁹⁷ Had cities and suburbs been equally able to raise funds to support their schools, this type of multi-district plan within a metropolitan area would have had little impact on the quality of education provided in city and suburban schools.⁹⁸

City and suburban school districts, however, were not equal in terms of their ability to raise local funds, their municipal burdens and the state funds they received.⁹⁹ Part of the problem that city school districts faced, according to the Civil Rights Commission, was the competition for funds within the city between the schools and other local services.¹⁰⁰ The central cities in metropolitan areas spent three times as much on welfare and twice as much on public safety as did the suburbs because they had to provide for more poor people, and continue to provide city services for non-resident suburbanites working in the city.¹⁰¹ The city school districts could thus not claim as high a percentage of the city budget as suburban school districts could claim from their suburbs.¹⁰²

⁹² *Id.*

⁹³ *Id.* at 17-18.

⁹⁴ *Id.* at 17-19, 25.

⁹⁵ *Id.* at 17.

⁹⁶ *Id.*

⁹⁷ *See id.* at 25-28.

⁹⁸ RACIAL ISOLATION, *supra* note 2, at 25.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 25-26.

¹⁰¹ *Id.* at 26.

¹⁰² *See id.* at 25-27.

City schools also faced the problem of declining city budgets.¹⁰³ The suburbanization of affluent families and businesses had caused the city tax base to shrink.¹⁰⁴ Cities were generally able to raise less money through taxes on local property than suburbs because the property within the city typically was worth less per capita than that in the suburbs.¹⁰⁵ Moreover, state funds for education did not close the gap caused by property taxes because states were actually funding suburban districts at a higher level than city districts.¹⁰⁶ In many metropolitan areas, including Boston, the states contributed more money per child in 1966 to suburban school districts than to the city school districts.¹⁰⁷

The Civil Rights Commission concluded that because of municipal overburden in cities, unequal state aid, and the use of local property taxes to fund schools, property-rich suburbs could buy significantly better schools than could city school districts.¹⁰⁸ The Commission observed that these facts led to a cyclical problem, as the better schools that suburbs could afford encouraged more whites to flee the city. White flight further decreased the city's tax base, resulting in less funds available for city schools. Cities then had to increase their tax rate to raise even the same amount of money, and the increased tax rate encouraged more white flight and renewed the cycle. The end result of this whole process was that thousands of poor and mostly minority children were isolated in what one member of the Civil Rights Commission described as "inadequately staffed and ill-equipped [urban] slum schools."¹⁰⁹ The urban minority poor, Commissioner Freeman observed, seldom had access to the quality of education provided the mostly white children who attended suburban schools on the other side of what he called "The Great Divide."¹¹⁰

The Civil Rights Commission made a number of recommendations in its 1966 report designed to improve the quality of urban city schools and decrease segregation in public education.¹¹¹ In general it favored massive congressional action rather than court action, because Congress had the ability to appropriate funds to

¹⁰³ *Id.* at 25.

¹⁰⁴ *Id.* at 26.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 27-28.

¹⁰⁷ *Id.* at 28-29.

¹⁰⁸ *Id.* at 31.

¹⁰⁹ *Id.* at 213 (supplementary statement by Commissioner Freeman).

¹¹⁰ *Id.*

¹¹¹ *See id.* at 115-83.

remedy the myriad of problems that had led to the inferior quality of urban inner-city schools.¹¹² In a short but detailed section in the legal appendix of the Commission's report, however, the Commission also discussed the possibility that the substantial fiscal and tangible inequalities that existed between the city and suburban school districts could contravene the fourteenth amendment's equal protection clause.¹¹³ The Commission observed that with respect to public education the state might be under no obligation to provide it, but that once having made a decision to provide it, the state might be under an obligation under the fourteenth amendment to see that rich and poor children received that education on substantially equal terms.¹¹⁴

By the mid-1960s, then, considerable evidence revealed that the public schools in the United States were neither integrated nor equal.¹¹⁵ It was also clear that the *Brown* decision by itself could neither totally eliminate segregated schooling in the United States nor ensure equal educational opportunity for all.¹¹⁶ The *Brown* decision applied only to intentionally segregated schools, and was ineffective in combating segregated schooling caused by segregated housing patterns and state policies requiring children to attend school in their own neighborhoods.¹¹⁷ Moreover, the Court never intended the *Brown* decision to combat inequities in school financing.¹¹⁸ By the mid-1960s most black children were attending neither the integrated schools that *Brown* seemed to promise in 1954, nor the "separate but equal" schools that *Plessy* mandated in 1896.¹¹⁹

D. The Supreme Court Broadens the Scope of the Fourteenth Amendment: Harper v. Board of Education Sets the Stage for the Initial Challenge to State School Funding Plans

Although the fourteenth amendment as interpreted by *Brown* was limited to the prohibition of intentional racial discrimination,

¹¹² *Id.* at 187-88.

¹¹³ *Id.* at 261, n.282; see also Coons, Clune, & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 311, 338-45 (1969), in which the authors argue that the federal Constitution requires fiscal neutrality. Under this concept, states might vary in terms of money spent on education. Such variation, however, would not occur within a single state.

¹¹⁴ RACIAL ISOLATION, *supra* note 2, at 260-61.

¹¹⁵ See generally *id.* at 2-3.

¹¹⁶ See *id.* *supra* note 2, at iv.

¹¹⁷ *Id.*

¹¹⁸ See *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954).

¹¹⁹ See generally RACIAL ISOLATION, *supra* note 2, at 2-3.

after *Brown* the Supreme Court made a series of decisions that broadened the applicability of the fourteenth amendment and offered a new avenue for the legal pursuit of equal educational opportunity.¹²⁰ Historically, as exemplified in *Plessy* and *Brown*, the Supreme Court had interpreted the fourteenth amendment to apply only to laws that had an unequal impact on an identifiable racial group, or on an individual who was a member of the group.¹²¹ If a law classified people on a basis other than the "suspect" category of race or national origin, and was applied differently depending on one's classification, the Court was still likely to uphold the law as long as the classification used was reasonably or rationally related to the legislature's purpose in passing the law.¹²²

The requirement that a law be rationally related to a state goal was generally, as commentator Gerald Gunther noted, easily satisfied.¹²³ Except where race was involved, the Court did not require that the classification used in the law exactly "fit" the purpose of the law.¹²⁴ The Court allowed legislators considerable flexibility in framing laws that classified people according to the benefits conferred or the burdens imposed on the people, unless racial discrimination was involved.¹²⁵

Beginning with the Warren Court, however, Gunther noted that the Supreme Court broadened the situations in which a state law might be subject to the "strict scrutiny" of the Court.¹²⁶ Instead of being limited to laws involving the "suspect category" of race, under the Warren Court, laws that affected "fundamental rights" were also subject to the Court's "strict scrutiny."¹²⁷ This strict scrutiny standard meant that a law affecting the exercise of a fundamental right would only be upheld if the state could show a compelling interest for the law which could not be met in any other way.¹²⁸

The effect of requiring that a law meet the strict scrutiny standard of the Court was considerable.¹²⁹ Under this standard, instead

¹²⁰ See generally G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 586, 588 (11th ed. 1985).

¹²¹ *Id.*

¹²² *Id.* at 587.

¹²³ *Id.*

¹²⁴ *Id.* at 588.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 670.

¹²⁹ *Id.*

of the Court assuming that a state law was constitutional, and requiring only that it bear a rational relationship to a state interest, the Court required the state to assume the burden of proof and demonstrate that it had a *compelling* reason to classify people in a way that might interfere with the exercise of a "fundamental right."¹³⁰ As Gunther noted, determining that a law required the strict scrutiny of the Court meant that the scrutiny was "strict in theory, and fatal in fact."¹³¹

In including "fundamental rights" under the umbrella of the strict scrutiny standard, the Supreme Court initially interpreted fundamental rights to include only those rights specifically guaranteed in the federal constitution, such as the right of interstate migration.¹³² In *Harper v. Virginia Board of Elections*, however, the Supreme Court in 1966 broadened its definition of a fundamental right, and held that a fundamental right could be *implied* rather than explicitly stated in the federal Constitution.¹³³ The *Harper* case involved a constitutional challenge to a state law that required citizens to pay an annual fee, or poll tax, of \$1.50 to vote.¹³⁴ The Supreme Court held that this poll tax law was unconstitutional because it could potentially interfere with a person's fundamental right to exercise his or her power to vote.¹³⁵

The *Harper* Court reasoned that the right to vote was a fundamental right because it was "preservative of all other rights" and thus could be considered to be *implicitly* guaranteed in the Constitution.¹³⁶ In addition, the Supreme Court also seemed to imply that a state could not discriminate on the basis of wealth.¹³⁷ Thus, when a law like the poll tax was used to condition the receipt of a fundamental right, it appeared to some observers that the law would violate the equal protection clause of the fourteenth amendment not just because it interfered with a fundamental right, but also because it discriminated on the basis of wealth.¹³⁸ To some, the *Harper* decision seemed to indicate that the Supreme Court would consider wealth, like race, to be a "suspect" category, requiring a

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 587-88.

¹³³ See 383 U.S. 663, 665, 667 (1966).

¹³⁴ *Id.* at 665.

¹³⁵ *Id.* at 667.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See, e.g., *Serrano v. Priest*, 5 Cal. 3d 584, 596-97, 487 P.2d 1241, 1249-50, 95 Cal. Rptr. 601, 609-10 (1971).

law that assigned benefits based on wealth to meet the "strict scrutiny" standard to be upheld.¹³⁹

After *Harper*, then, there appeared to be two ways in which a state law could be subject to the strict scrutiny of the Court.¹⁴⁰ A law could be subject to strict scrutiny because it interfered with a right that was "fundamental," either because the right was explicitly or implicitly guaranteed in the federal Constitution.¹⁴¹ A state law could also be subject to strict scrutiny if it classified people on the basis of a suspect category, which might include classifications made on the basis of wealth.¹⁴² Since the activation of the strict scrutiny of the Court generally proved to be fatal to the law, successfully arguing that a law affected a fundamental right, or classified people on the basis of a suspect category, would almost surely lead to a declaration that the law was unconstitutional.¹⁴³ Because state school finance laws involved a "right" that was not explicitly stated in the federal Constitution, but was arguably being affected by the "wealth" of a child's school district, *Harper* was an important decision for those interested in school finance reform.¹⁴⁴

II. THE INITIAL LEGAL ARGUMENT IN SCHOOL FINANCE CASES: EQUALITY OF EDUCATIONAL OPPORTUNITY UNDER THE FOURTEENTH AMENDMENT FROM *SERRANO* TO *RODRIGUEZ*

Even before the Supreme Court had handed down the *Harper* decision, the Civil Rights Commission had predicted the possibility of future court action challenging state financing plans under the fourteenth amendment.¹⁴⁵ And just two years after the Commission's 1966 report on *Racial Isolation in the Schools*,¹⁴⁶ the first of the school finance reform cases challenging the constitutionality of a state's school finance system under the fourteenth amendment was decided.¹⁴⁷ This initial court case in the school finance reform move-

¹³⁹ See *id.*

¹⁴⁰ See generally *Harper v. Virginia Board of Elections*, 383 U.S. 663, 665-68 (1966).

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 588 (11th ed. 1988).

¹⁴⁴ See *id.* The *Serrano* court, for example, made a specific reference to the decision in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) with respect to the issue of wealth as a suspect category. *Serrano*, 5 Cal. 3d at 597, 487 P.2d at 1250, 95 Cal. Rptr. at 610.

¹⁴⁵ See *RACIAL ISOLATION*, *supra* note 2, at 187-88.

¹⁴⁶ *Id.*

¹⁴⁷ See, e.g., *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969). Prior to *McInnis*, two court cases had been filed in Georgia that charged that the Georgia method of financing schools violated the equal protection

ment, however, was based not on the differences in funding among a state's school districts, which the Commission had highlighted, but on the state's failure to apportion funds based on the educational needs of children.¹⁴⁸

According to historians, this educational needs argument was spurred by articles published in the late 1960s, which argued that because of their socioeconomic background, disadvantaged children were unable to compete effectively against their more advantaged counterparts.¹⁴⁹ The authors of these articles contended that disadvantaged children actually needed more school funds allotted to their education so that they could compete on an equal basis.¹⁵⁰ Instead, these disadvantaged children actually received less funds for their education than their wealthier peers.¹⁵¹ In the initial constitutional challenges to inequities in school funding using this educational needs argument, however, the cases were ruled nonjusticiable.¹⁵²

A. Suspect Categories and Fundamental Interests: Serrano v. Priest and the First Wave of the School Finance Reform Movement

The educational needs argument of the 1960s proved to be short-lived, and in the 1971 case of *Serrano v. Priest* the California Supreme Court abandoned this approach.¹⁵³ Instead, the California Supreme Court based its 1971 decision declaring California's system of financing public education unconstitutional on a more familiar standard—the difference in per pupil educational expenditures that existed among the state's school districts.¹⁵⁴ The *Serrano* court be-

clause of the fourteenth amendment. In *Ingram v. Payton* and *Rice v. Cook*, however, the issue was the different amount of local funds that certain types of school districts were expected to raise. *Ingram*, 222 Ga. 503, 509, 150 S.E.2d 825, 829 (1966); *Rice*, 222 Ga. 499, 501, 150 S.E.2d 822, 823 (1966). Other commentators have not considered these early Georgia cases to be a part of the school finance reform movement. See, e.g., *School Finance Reform*, *supra* note 1, at 83.

¹⁴⁸ See *McInnis*, 293 F. Supp. at 331.

¹⁴⁹ *School Finance Reform*, *supra* note 1, at 84.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *McInnis*, 293 F. Supp. at 331; *Burruss v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969).

¹⁵³ 5 Cal. 3d 584, 590 n.1, 487 P.2d 1241, 1244 n.1, 95 Cal. Rptr. 601, 604 n.1 (1971). In *Serrano*, the plaintiffs apparently made a brief reference to the educational needs argument in their initial suit. *Id.* at 591, 487 P.2d at 1245, 95 Cal. Rptr. at 605. The initial suit was dismissed by the district court. *Id.*

¹⁵⁴ *Id.* at 594 n.9, 487 P.2d at 1247 n.9, 95 Cal. Rptr. at 607 n.9. The plaintiff's alleged violation of certain state constitutional provisions that the California Supreme Court had

came the first court in the nation to hold that this difference in per pupil expenditures had a significant impact on the quality of education offered in poorer school districts, and that poor children were thus denied the equal protection of the law under the fourteenth amendment.¹⁵⁵

In reaching this decision, the California Supreme Court in *Serrano* first considered the plaintiffs' contention that education was a fundamental right that the federal Constitution implicitly guaranteed.¹⁵⁶ The California Supreme Court began its analysis of this issue by examining the "indispensible" role that education plays in the modern industrial state,¹⁵⁷ and also noted that the United States Supreme Court had recognized the fundamental importance of education in *Brown*. The *Serrano* court observed that although *Brown* was not controlling, it provided persuasive evidence of the importance of education in our society.¹⁵⁸ Moreover, in comparing education with other rights that the Supreme Court had already held to be fundamental, the *Serrano* court maintained that education had a far greater social significance than, for example, the right to a court-appointed attorney.¹⁵⁹ In addition, the California Supreme Court also saw a strong analogy between education and the right to vote, which the Supreme Court had also categorized as a "fundamental right."¹⁶⁰ The *Serrano* court observed that education, like voting, preserved other basic rights, and, at the very least, made voting more effective.¹⁶¹

Given all of these factors, the *Serrano* court concluded that the "distinctive and priceless function of education . . . warranted, and indeed compelled, its treatment as a fundamental interest."¹⁶² In addition, based on its own interpretation of *Harper*, the *Serrano* court held that the state's financing system irrefutably classified school-

previously ruled were essentially equivalent to the equal protection clause of the fourteenth amendment. *Id.* The court stated that the analysis of the plaintiff's federal equal protection claim also applied to the state claim. *Id.*

¹⁵⁵ *Id.* at 608-09, 487 P.2d at 1258, 95 Cal. Rptr. at 618.

¹⁵⁶ *Id.* at 598, 487 P.2d at 1250, 95 Cal. Rptr. at 610.

¹⁵⁷ *Id.* at 605-06, 487 P.2d at 1255-56, 95 Cal. Rptr. at 615-16.

¹⁵⁸ *Id.* at 605-06, 487 P.2d at 1256, 95 Cal. Rptr. at 616.

¹⁵⁹ *Id.* at 607, 487 P.2d at 1258, 95 Cal. Rptr. at 618.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* The California Constitution, the *Serrano* court noted, used almost the same rationale for establishing a public school system. *Id.* This state constitutional provision stated that schools were to be established because a general diffusion of knowledge and intelligence was essential to the preservation of rights and liberties of the people. *Id.* See *infra* note 453 for the text of the California Constitution.

¹⁶² *Id.* at 608-09, 487 P.2d at 1258, 95 Cal. Rptr. at 618.

children on the basis of the "suspect" category of wealth.¹⁶³ These decisions placed the burden on the state to prove that the method by which it financed public schools was necessary to serve a compelling state interest. The state of California was thus required to show that a state interest was so compelling that the fundamental right to an education should be conditioned by the wealth of a child's parents, neighbors and school district.¹⁶⁴

The state of California's rationale for the use of local property taxes to partially fund the schools was to encourage local control of the schools' administration and financial matters.¹⁶⁵ In evaluating this "local control" argument, the California Supreme Court observed that in terms of the goal of leaving administrative control with the school district, no matter how the state decided to finance its system of education, it could still leave decisions concerning teachers, curriculum and other matters to the local districts.¹⁶⁶ The state's second contention, that the use of local property taxes for school funding provided school districts with local fiscal control, was met with disbelief.¹⁶⁷ The *Serrano* court termed the idea of fiscal freewill under such a system a "cruel illusion" for poor school districts.¹⁶⁸ The court thus rejected the local control argument, and held that an absolute right to an education required that a public school financing system not make a child's education a function of the wealth of the school district in which he or she lives.¹⁶⁹

The *Serrano* decision had an immediate impact on many courts considering school finance issues, and most courts found the *Serrano* analysis of the fourteenth amendment requirement persuasive.¹⁷⁰ Only the United States District Court in Maryland, in the 1972 case of *Parker v. Mandel*, disagreed with the *Serrano* conclusion that state school funding systems should be subject to the strict scrutiny of the court.¹⁷¹ But though the *Parker* court's concerns about the *Serrano* reasoning would eventually be repeated in large part by the United States Supreme Court,¹⁷² in 1971 it was the *Serrano* decision

¹⁶³ *Id.* at 598, 487 P.2d at 1250, 95 Cal. Rptr. at 610.

¹⁶⁴ *Id.* at 610, 487 P.2d at 1259-60, 95 Cal. Rptr. at 619-20.

¹⁶⁵ *Id.* at 610, 487 P.2d at 1260, 95 Cal. Rptr. at 620.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 611, 487 P.2d at 1260, 95 Cal. Rptr. at 620.

¹⁶⁹ *See id.*

¹⁷⁰ *See School Finance Reform*, *supra* note 1, at 87-88.

¹⁷¹ *Parker v. Mandel*, 344 F. Supp. 1068, 1071 (D. Md. 1972).

¹⁷² *See San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973). The Supreme

that received nationwide attention.¹⁷³ After the *Serrano* decision was announced, a groundswell of school finance litigation emerged across the country, and by 1973, over thirty school finance cases based on the fourteenth amendment were working their way through the courts.¹⁷⁴

B. *The United States Supreme Court Bows Out: The Impact of Rodriguez on the "First Wave" of Reform*

Given the disagreement that existed among lower courts on the interpretation of fundamental rights and suspect categories under the fourteenth amendment, and the number of school finance cases working their way through the courts, it was likely that the Supreme Court would review a school finance case.¹⁷⁵ In 1973, at the height of the school finance reform movement, the Supreme Court did consider a lower court decision that declared the Texas state system of financing schools unconstitutional.¹⁷⁶ In *San Antonio Independent School District v. Rodriguez*, the Supreme Court reversed the decision of the lower court and held that the inequities in state school funding under the Texas school financing system did not violate the equal protection clause of the fourteenth amendment.¹⁷⁷

At the time the *Rodriguez* suit was filed, local property taxes provided 41.1% of the school budget in Texas, which resulted in significant differences in per pupil expenditures among the school districts.¹⁷⁸ The state of Texas did not dispute that its significant reliance on local property taxes to fund the schools produced obvious disparities in per pupil expenditures, and that state aid failed to offset this difference.¹⁷⁹ The Supreme Court noted that the state of Texas had virtually conceded that this type of system could not withstand the strict scrutiny standard, and that the state could not show a compelling state interest that justified this unequal distribution of school funds.¹⁸⁰ The key issue, the Supreme Court observed, thus became whether the strict scrutiny standard needed to

Court described the analysis process of the *Serrano* and *Van Duzart* courts as "simplistic" in relation to the "suspect" categories arguments. *Id.*

¹⁷³ *School Finance Reform*, *supra* note 1, at 88.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *See Rodriguez*, 411 U.S. at 5.

¹⁷⁷ *Id.*

¹⁷⁸ *See id.* at 12-13.

¹⁷⁹ *See id.* at 16.

¹⁸⁰ *Id.* at 16.

be applied to the state school financing law.¹⁸¹ If the Supreme Court held that the strict scrutiny standard applied, and that the Texas system was unconstitutional, the Court recognized that it would in effect be holding the school financing systems of most other states unconstitutional as well.¹⁸²

The Supreme Court, however, held that the proper level of scrutiny for review of a state's school financing system was the rational basis test,¹⁸³ and that the Texas system of financing schools was thus constitutional.¹⁸⁴ In reaching this decision, the Supreme Court first rejected the argument that such plans were unconstitutional because they discriminated against the "poor" on the basis of the suspect category of wealth.¹⁸⁵ In prior cases where the Supreme Court had considered discrimination on the basis of wealth as a "suspect category," the class of people in question was completely unable to pay for some benefit, and, as a result, sustained an absolute deprivation of the benefit.¹⁸⁶ The undefined "poor" in the Texas case, however, were not totally deprived of a public education, and hence the Supreme Court held that the concept of wealth as a suspect category was inappropriately applied in the Texas school finance case.¹⁸⁷

In reaching its decision to apply the rational basis test in *Rodriguez*, the Supreme Court also rejected the argument that education was a fundamental right under the federal constitution.¹⁸⁸ The Supreme Court reiterated the importance of education in our society as expressed in *Brown* and other decisions.¹⁸⁹ The important

¹⁸¹ See *id.* at 44.

¹⁸² *Id.*

¹⁸³ *Id.* at 40.

¹⁸⁴ See *id.* at 54.

¹⁸⁵ See *id.* at 19.

¹⁸⁶ *Id.* at 22-23.

¹⁸⁷ *Id.* at 25. The case presented by the *Rodriguez* plaintiffs differed from previous cases decided by the Supreme Court in which a classification based on wealth had been subject to strict scrutiny because those plaintiffs had been totally deprived of a right. *Id.* at 20-25. The Texas plaintiffs, however, were not arguing that they had been absolutely deprived of an education, and the Supreme Court held that the fourteenth amendment did not require absolute educational equality or precisely equal educational advantages. *Id.* at 23-24. In view of the infinite number of variables affecting the educational process, the Supreme Court stated that it did not see how any system could assure equal quality of education except in the most relative sense. *Id.* at 24. The State of Texas, through its Minimum Foundation Program, asserted that it provided an adequate education to all children in the state, and the Supreme Court held that an adequate education was sufficient to meet federal constitutional requirements. See *id.* at 24.

¹⁸⁸ *Id.* at 29-31.

¹⁸⁹ *Id.* at 30.

role that education plays in our society, however, did not mean, according to the Court, that it must regard education as fundamental for the purposes of examination under the federal equal protection clause.¹⁹⁰ Instead, to determine if the right to an education was fundamental, the Supreme Court ruled that the proper approach was to examine the federal constitution to determine if the "right" was explicitly or implicitly guaranteed.¹⁹¹ A right to an education was not explicitly guaranteed in the federal constitution, and the Supreme Court held that the fact that education supported the right to free speech and the right to vote did not give education the status of an implied right.¹⁹² As long as the state of Texas school system provided the basic minimal skills necessary for the enjoyment of free speech and full participation in the political process, the Texas school financing system was constitutional.¹⁹³

In reaching its conclusion that the Texas school financing plan was constitutional, the Supreme Court also expressed a number of reservations about the school finance cases,¹⁹⁴ and the Supreme Court's role in this controversy.¹⁹⁵ For example, the Supreme Court did not feel that research evidence was sufficient to prove that the amount of money expended by schools actually influenced the educational achievement of children.¹⁹⁶ The *Rodriguez* Court also noted that taxation was an area in which courts had traditionally deferred to legislatures.¹⁹⁷ The Supreme Court was concerned that invalidating the local property tax as a basis for school funding might make all local fiscal schemes related to health, education and welfare benefits provided by local governments the subjects of criticism under the equal protection clause.¹⁹⁸

With respect to its own role in this controversy, the Supreme Court in *Rodriguez* indicated that the Texas school finance reform case was an inappropriate case for intervention because the Court did not have the specialized knowledge and experience necessary to justify interfering with judgments made at the state and local level.¹⁹⁹ The Supreme Court further observed that every claim aris-

¹⁹⁰ *Id.* at 31.

¹⁹¹ *Id.* at 33.

¹⁹² *Id.* at 35.

¹⁹³ *Id.* at 37.

¹⁹⁴ *See id.* at 23-24.

¹⁹⁵ *Id.* at 41-44.

¹⁹⁶ *Id.* at 23-24.

¹⁹⁷ *Id.* at 40.

¹⁹⁸ *See id.* at 37, 41.

¹⁹⁹ *Id.* at 42.

ing under the equal protection clause had implications for the balance of power between national and state governments under our federal system.²⁰⁰ In refusing to extend the mantle of fourteenth amendment protection to cases involving inequities in school financing systems, the Supreme Court noted that it found it difficult to imagine a case that would have a greater impact upon the federal system than a case in which the Supreme Court was being urged to invalidate the way in which almost all states had chosen to fund their own systems of public education.²⁰¹

The *Rodriguez* decision had immediate implications for two types of school finance cases: those in which decisions had already been made, and those that had been filed but not yet acted upon.²⁰² In the first instance, at the time that the Supreme Court announced the *Rodriguez* decision, courts in Arizona, California, Kansas, Michigan and Minnesota had issued decisions declaring their respective state school financing systems unconstitutional based largely on the fourteenth amendment.²⁰³ Courts in these states had varying responses to *Rodriguez*.

In the Kansas and Minnesota cases, for example, both of which had been tried in federal district court, the courts took no further action after *Rodriguez*.²⁰⁴ In Michigan, however, after *Rodriguez*, the Michigan Supreme Court vacated its earlier 1972 decision in *Milliken v. Green* in which the court had declared the Michigan system of financing schools unconstitutional.²⁰⁵ In Arizona, after the *Rodriguez* decision was handed down, the Arizona Supreme Court in *Shofstall v. Hollins* reversed a trial court's decision that the Arizona system of financing public schools discriminated against taxpayers in property-poor school districts by taxing them at higher rates for less services.²⁰⁶

²⁰⁰ *Id.* at 44.

²⁰¹ *Id.*

²⁰² See *School Finance Reform*, *supra* note 1, at 96.

²⁰³ *Serrano v. Priest*, 5 Cal. 3d 584, 618-19, 487 P.2d 1241, 1266, 96 Cal. Rptr. 601, 626 (1971), *appeal after remand*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied sub nom.* *Clowes v. Serrano*, 432 U.S. 907 (1977); *Van Duzart v. Hatfield*, 334 F. Supp. 870, 877 (D. Minn. 1971); *Caldwell v. Kansas*, Civil No. 50616 (Kan. Dist. Ct. Aug. 30, 1972); *Parker v. Mandel*, 344 F. Supp. 1068, 1071 (D. Md. 1972) (in accord with *Rodriguez*); *Shofstall v. Hollins*, 110 Ariz. 88, 89, 515 P.2d 590, 591 (1973).

²⁰⁴ *Van Duzart*, 334 F. Supp. 870, 877 (D. Minn. 1971); *Caldwell*, Civil No. 50616 (Kan. Dist. Ct. Aug. 30, 1972). In Kansas, the state legislature passed new school finance legislation after the court declared the system unconstitutional. W.N. Grubb, *The First Round of Legislative Reforms in the Post-Serrano World*, 38 LAW & CONTEMP. PROBS. 459, 459 (1974).

²⁰⁵ 389 Mich. 1, 203 N.W.2d 457 (1972).

²⁰⁶ 110 Ariz. 88, 89, 515 P.2d 590, 591 (1973).

In California, however, the original decision of the *Serrano* court declaring the California system of financing schools unconstitutional did not change after *Rodriguez*, though it was affirmed on other grounds.²⁰⁷ The California Supreme Court had originally remanded *Serrano* to the trial court to determine if the facts alleged in the original 1971 case were true.²⁰⁸ In 1976, in *Serrano v. Priest II*, the California Supreme Court held that the California system of financing schools was unconstitutional.²⁰⁹ Instead of basing its decision on the fourteenth amendment's equal protection clause, however, the *Serrano II* decision was based on the equal protection clause of the state constitution. Applying the *Serrano I* fourteenth amendment analysis to the California state constitution, the *Serrano II* court held that the state plan for financing schools was unconstitutional because it classified children on the basis of the suspect category of wealth, and interfered with the exercise of a fundamental right to an education.²¹⁰

In addition to those states where decisions had been handed down, the *Rodriguez* case had a potential impact on school finance cases in progress.²¹¹ At the time of the *Rodriguez* decision, thirty-five school finance cases were pending, all of which were based in whole or in part on the fourteenth amendment argument.²¹² Commentators assessing the impact of *Rodriguez* concluded that to the extent that these cases were based on the fourteenth amendment, *Rodriguez* had probably disposed of them.²¹³ These commentators, however, thought it was difficult to predict the outcome of school finance cases that were based in part on their state's equal protection clause or state education provisions authorizing the establishment of public schools.²¹⁴ Although those interested in school finance reform would clearly now have to turn to their state constitutions for a legal remedy to unequal school financing, it was less obvious what the response of state courts would be.²¹⁵

²⁰⁷ *Serrano v. Priest II*, 135 Cal. Rptr. 345, 346, 557 P.2d at 929, 930, 18 Cal. 3d at 728, 735 (1976).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *School Finance Reform*, *supra* note 1, at 96.

²¹² *See id.*

²¹³ *Id.*

²¹⁴ *Id.* at 98-99.

²¹⁵ *Id.*

III. THE SECOND WAVE OF THE SCHOOL FINANCE REFORM MOVEMENT: STATE BY STATE

A. *The Persuasive Impact of Robinson v. Cahill*

The question of the success of school finance reform in the state courts did not remain unanswered for long.²¹⁶ In April of 1973, just days after the United States Supreme Court announced *Rodriguez*, the New Jersey Supreme Court in *Robinson v. Cahill* declared the New Jersey system of financing schools unconstitutional.²¹⁷ The *Robinson* court reached this decision because it concluded that the funding disparities that existed among the New Jersey school districts did not meet the state constitutional requirement that the public school system be "thorough and efficient."²¹⁸

The *Robinson* court based its holding on findings by the trial court that documented significant differences in per pupil expenditures among school districts because local funds derived from property taxes accounted for sixty-seven percent of the school budget.²¹⁹ The trial court also found that a significant connection existed between the sums expended and the quality of the educational opportunity received.²²⁰ Given these disparities in educational opportunity, the New Jersey Supreme Court concluded that a thorough and efficient education was not being provided to all children, and that the state's financing system was unconstitutional.²²¹

In reaching this decision, the New Jersey Supreme Court traced the history of the state constitutional provision authorizing the establishment of public schools, as well as the history of subsequent amendments to the provision.²²² The New Jersey Supreme Court concluded that an equal educational opportunity for all children was precisely what the framers of the constitution had in mind in mandating a thorough and efficient system of education. In concluding that the existing statutory scheme of financing public

²¹⁶ *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), was decided April 23, 1973. *Robinson v. Cahill* was technically decided April 3, 1973, but the opinion was modified to reflect the *Rodriguez* decision before *Robinson* was published. See *Robinson*, 62 N.J. 473, 473, 303 A.2d 273, 273 (1973).

²¹⁷ 62 N.J. at 480, 303 A.2d at 276.

²¹⁸ *Id.*

²¹⁹ *Id.* at 481, 303 A.2d at 276-77.

²²⁰ *Id.* at 481, 303 A.2d at 277.

²²¹ *Id.*

²²² *Id.*

schools did not meet the thorough and efficient standard, the court noted that the state had not even spelled out the content of the educational opportunity the state constitution required. The New Jersey Supreme Court directed the state to define the content of the education to be provided to New Jersey children, and then revise the funding system to ensure that this education would be provided to all.²²³

In addition to alleging that the current system of financing schools denied children from property-poor school districts a thorough and efficient education, the *Robinson* plaintiffs also alleged that the New Jersey system of financing schools violated the federal and state equal protection clauses by interfering with the exercise of a fundamental right, and by classifying children on the basis of the suspect category of wealth.²²⁴ With respect to the fourteenth amendment argument, the *Robinson* court believed that *Rodriguez* had eliminated its use in school finance reform cases. Courts had not yet, however, considered the use of the "fundamental rights" and "wealth as suspect category" arguments under the state equal protection clause.²²⁵

In considering whether wealth was a suspect category, the New Jersey Supreme Court observed that "wealth" was not at all suspect as a basis for raising revenues.²²⁶ Although it was true that the amount of locally raised revenues varied among school districts, the court noted that education was in this respect no different than other local government services such as police, fire and health.²²⁷ If differences in local expenditures for services handled by the local governments were in and of themselves unconstitutional, the *Robinson* court observed that the entire political structure of local control of local services would be fundamentally changed.²²⁸ Concurring with *Rodriguez*, the New Jersey Supreme Court concluded that it was unwise to find local taxation for education unconstitutional because that decision could make local taxes an equally impermissible means of providing other necessary local services.²²⁹

Although the New Jersey Supreme Court agreed with the *Rodriguez* decision on the topic of wealth, it believed that in defining a

²²³ *Id.*

²²⁴ *See id.* at 492, 303 A.2d at 276-77.

²²⁵ *Id.*

²²⁶ *Id.* at 486-90, 303 A.2d at 279-82.

²²⁷ *See id.* at 493-94, 303 A.2d at 283.

²²⁸ *Id.* at 489, 303 A.2d at 281.

²²⁹ *Id.* at 492, 303 A.2d at 282.

fundamental right as one that was explicitly or implicitly guaranteed in the constitution, the Supreme Court had chosen an approach that was "immediately vulnerable" upon further analysis.²³⁰ The *Robinson* court observed that the right to acquire and hold property was guaranteed in both the federal and New Jersey state constitutions, but the court did not believe that mention in a constitution automatically made property rights a candidate for preferred treatment.²³¹ The *Robinson* court thus rejected the plaintiffs' argument that education was a fundamental right because the state constitution provided for public education. Instead, the *Robinson* court concluded that in determining if a state law violates the equal protection clause, the court must employ a balancing test, and weigh the nature of the restraint or denial against the apparent public justification.²³² In balancing the state interest in local control over local services with the funding disparities among the state's school districts, the *Robinson* court held that the New Jersey system of financing public schools did not violate the state's equal protection clause.

The *Robinson* decision, then, provided a new model for school finance reform cases, but one that was not entirely helpful to those interested in reducing funding disparities among a state's school districts.²³³ *Robinson* demonstrated that a successful argument could be made, on the basis of a state's education provision, that unequal school expenditures were unconstitutional.²³⁴ The *Robinson* court also pointed out, however, why it considered the state equal protection clause to be an inappropriate basis for making a constitutional decision on the validity of a state's school financing plan. In rejecting both the "fundamental rights" and "wealth as a suspect category" arguments, the *Robinson* court left plaintiffs with a single legal basis on which a successful school finance case could be mounted.²³⁵ This remaining education provision argument could only be successfully argued if the plaintiffs could show that a school finance system that resulted in substantial funding disparities among the state's school districts was inconsistent with the meaning of the state education provision.²³⁶

²³⁰ *Id.*

²³¹ *Id.* at 492, 303 A.2d at 282.

²³² *Id.* at 497, 303 A.2d at 285.

²³³ See, e.g., *Thompson v. Engelking*, 96 Idaho 793, 799, 537 P.2d 635, 641 (1975).

²³⁴ See 62 N.J. 473, 473, 303 A.2d 273, 273 (1973).

²³⁵ *Id.* at 481, 303 A.2d at 277.

²³⁶ Compare *Thompson*, 96 Idaho at 799, 537 P.2d at 641 (Idaho system of financing schools constitutional) with *Robinson*, 62 N.J. at 473, 303 A.2d at 273 (New Jersey system of financing schools unconstitutional).

B. 1974-1984: A Decade of Mixed Results and Limited Success

The New Jersey Supreme Court's reasoning in *Robinson*, along with the reasoning in the *Rodriguez* and *Serrano* cases, guided the decisions of many of the courts that considered school finance cases after 1973.²³⁷ Between 1974 and 1984, in this second wave of the reform movement, courts in Montana (1974), Idaho (1975), Illinois (1976), Oregon (1976), Connecticut (1977), Pennsylvania (1978), Washington (1974, 1978), Wyoming (1978), Ohio (1979), West Virginia (1979), Georgia (1981), Colorado (1982), Arkansas (1983), Maryland (1983), New York (1983) and Michigan (1984) considered the constitutionality of their respective school finance systems.²³⁸ Of these sixteen cases, only in Connecticut (1977), Washington (1978), Wyoming (1978), West Virginia (1979) and Arkansas (1983) did state supreme courts declare their respective state plans for financing schools unconstitutional, often citing the *Serrano II* and *Robinson* decisions.²³⁹ In the eleven states that declared their school financing systems constitutional, however, courts also cited *Robinson* in reaching their decision, though the *Robinson* court had declared the New Jersey state school financing system unconstitutional.²⁴⁰

One of the first of the post-*Rodriguez* decisions, the 1975 case of *Thompson v. Engelking*, illustrates the varying effect that the *Robinson* opinion had on courts that found their state systems of financing schools constitutional in the second wave of the school finance reform movement.²⁴¹ In *Thompson*, the Idaho Supreme

²³⁷ See generally *Thompson*, 96 Idaho at 799, 537 P.2d at 641.

²³⁸ Cases in which the courts held their state financing plans constitutional include: *Lujan v. Colorado Bd. of Educ.*, 649 P.2d 1005, 1011 (Colo. 1982); *McDaniel v. Thomas*, 248 Ga. 632, 644, 285 S.E.2d 156, 165 (1981); *Illinois ex rel. Jones v. Adams*, 40 Ill. App. 3d 189, 200, 350 N.E.2d 767, 776 (1976); *Thompson*, 96 Idaho at 799, 537 P.2d at 641 (1975); *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 644-45, 609-610, 458 A.2d 758, 783-84, 765 (1983); *East Jackson Public Schools v. State*, 133 Mich. App. 132, 137-38, 348 N.W.2d 303, 305-06 (1984); *State ex rel. Woodahl*, 164 Mont. 141, 145, 520 P.2d 776, 779 (1974); *Board of Educ. v. Nyquist*, 57 N.Y.2d 27, 48, 439 N.E.2d 359, 369, 453 N.Y.S.2d 643, 653 (1982); *Board of Educ. v. Walter*, 58 Ohio St. 2d 368, 387, 390 N.E.2d 813, 825 (1979); *Olsen v. State ex rel. Johnson*, 277 Or. 9, 18, 554 P.2d 139, 149 (1976); *Danson v. Casey*, 484 Pa. 415, 429, 399 A.2d 360, 367 (1979).

Cases in which the court held the school finance system unconstitutional include: *Dupree v. Alma School Dist. No. 30*, 279 Ark. 340, 345, 651 S.W.2d 90, 93 (1983); *Horton v. Meskill*, 172 Conn. 615, 648-49, 376 A.2d 359, 374 (1977); *Seattle School Dist. No. 1 v. State*, 90 Wash. 476, 526-27, 585 P.2d 71, 98-99 (1978); *Pauley v. Kelley*, 162 W. Va. 672, 719, 255 S.E.2d 859, 884 (1979); *Washakie County School Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980).

²³⁹ See *supra* note 238.

²⁴⁰ See, e.g., *Thompson*, 96 Idaho at 799, 537 P.2d at 641.

²⁴¹ *Id.* at 793, 537 P.2d at 635. Several other cases were similarly handled by their

Court held that significant funding disparities among the state's school districts violated neither the federal or state equal protection clauses, nor the requirement that the state provide a "uniform" system of schools.²⁴² It found *Rodriguez* dispositive of the fourteenth amendment question,²⁴³ and concurred with *Robinson* that if courts found local taxes for school support unconstitutional under a state equal protection argument, local taxes might be unconstitutional for all other local services funded in this manner.²⁴⁴

On the issue of education as a fundamental right under the state constitution, the Idaho Supreme Court in *Thompson* also agreed with the *Robinson* court that the mere mention of education in the state constitution did not make education a fundamental right.²⁴⁵ The Idaho Supreme Court broke with the *Robinson* court, however, in its interpretation of the Idaho provision requiring the legislature to establish and maintain a general, uniform and thorough system of public, free, common schools.²⁴⁶ Though the New Jersey Supreme Court in *Robinson* had found its system unconstitutional on a similarly worded "thorough and efficient" clause, the *Thompson* court held that this clause did not mean that equal educational expenditures were required and that the Idaho system was therefore constitutional.²⁴⁷

While courts like the Idaho Supreme Court were faced with the traditional school finance issue of disparities in funding among a state's school districts, in three cases decided in the second wave of the school finance reform movement, plaintiffs presented a somewhat different argument for declaring a state school financing plan unconstitutional. In these cases, city school districts were the plaintiffs seeking court-ordered reform.²⁴⁸ These city school districts presented a new argument for declaring their respective state fund-

respective courts. In 1976, for example, the Oregon Supreme Court, like the Idaho Supreme Court, held in *Olsen v. State ex. rel. Johnson* that its system of financing public schools was constitutional. 277 Or. 9, 18, 554 P.2d 139, 149 (1976). In 1982, the Supreme Court of Colorado in *Lujan v. Colorado Board of Education* followed much the same pattern as the Idaho and Oregon courts had in declaring the Colorado financing system constitutional. 649 P.2d 1005, 1011 (Colo. 1982).

²⁴² *Thompson*, 96 Idaho at 799, 537 P.2d at 641.

²⁴³ *Id.* at 800, 537 P.2d at 642.

²⁴⁴ *Id.* at 804, 537 P.2d at 646-647.

²⁴⁵ *Id.* at 804, 537 P.2d at 646.

²⁴⁶ *Id.* at 805, 537 P.2d at 647.

²⁴⁷ *Id.*

²⁴⁸ *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 607, 458 A.2d 758, 764 (1983); *Board of Educ. v. Nyquist*, 57 N.Y.2d 27, 48, 439 N.E.2d 359, 369, 453 N.Y.S.2d 643, 653 (1982); *Danson v. Casey*, 484 Pa. 415, 418, 399 A.2d 360, 362 (1978).

ing systems unconstitutional. This argument essentially involved municipal overburden, and the difficulty that city school districts often had in getting adequate funds from a city that had many other budget needs to consider.²⁴⁹ Repeating many of the facts that the Civil Rights Commission had identified in its 1966 discussion of municipal overburden over a decade before these cases, these cities charged that they had to spend more on noneducational needs than the suburbs, and also had more poor children who needed greater, not lesser, aid for their education.²⁵⁰ In all three cases, however, courts rejected the municipal overburden argument and held their respective state systems of financing schools constitutional.²⁵¹

Although the majority of the courts that considered the constitutionality of state public school funding plans in the "second wave of reform" declared their systems constitutional, in Arkansas, Connecticut, Washington, West Virginia and Wyoming, courts reached the opposite conclusion.²⁵² In declaring their systems unconstitutional, however, courts in these five states reached identical conclusions using differing legal bases for their decisions. In Arkansas and Wyoming, for example, courts followed the *Serrano II* approach and declared their systems of financing education unconstitutional on the basis of the state's equal protection clause.²⁵³ In Arkansas, the reason for this decision was the court's finding that its financing system categorized children on the basis of the wealth of their school district.²⁵⁴ In Wyoming, the court also concluded that the state financing system categorized children on the basis of the school district's wealth.²⁵⁵ In addition, the Wyoming court found that its system of financing schools violated the state's equal protection clause because education was a fundamental right. The Wyoming court reached this decision because of the emphasis on education in the state's constitution, and the basic importance of education in modern life.²⁵⁶

²⁴⁹ *Hornbeck*, 295 Md. at 607, 458 A.2d at 764; *Nyquist*, 57 N.Y.2d at 48, 439 N.E.2d at 369, 453 N.Y.S.2d at 653; *Danson*, 484 Pa. 415 at 418, 399 A.2d at 362.

²⁵⁰ *Hornbeck*, 295 Md. at 607, 458 A.2d at 764; *Nyquist*, 57 N.Y.2d at 48, 439 N.E.2d at 369, 453 N.Y.S.2d at 653; *Danson*, 484 Pa. 415 at 418, 399 A.2d at 362.

²⁵¹ *Hornbeck*, 295 Md. at 607, 458 A.2d at 764; *Nyquist*, 57 N.Y.2d at 48, 439 N.E.2d at 369, 453 N.Y.S.2d at 653; *Danson*, 484 Pa. 415 at 418, 399 A.2d at 362.

²⁵² See *supra* note 238.

²⁵³ *Dupree v. Alma School Dist. No. 30*, 279 Ark. 340, 345, 651 S.W.2d 90, 93 (1983); *Washakie County School Dist. No. 1 v. Herschler*, 606 P.2d 310, 322 (Wyo. 1980).

²⁵⁴ *Dupree*, at 344, 651 S.W.2d at 93.

²⁵⁵ *Washakie County School Dist. No. 1*, at 323-24.

²⁵⁶ *Id.* at 333.

In Connecticut, the Connecticut Supreme Court in the 1977 case of *Horton v. Meskill* also declared its state system of financing schools unconstitutional on the basis of the state's equal protection clause.²⁵⁷ The Connecticut Supreme Court, however, based its decision that education was a fundamental right in Connecticut largely on the history of education in Connecticut.²⁵⁸ The Connecticut Supreme Court observed that Connecticut had recognized a duty to provide for the proper education of the young for centuries, and had a lengthy commitment to free public education. As early as 1650, Connecticut had adopted the Massachusetts provision that required towns of fifty or more households to maintain elementary schools; towns with a hundred or more households had to establish grammar or secondary schools as well.²⁵⁹

In addition to the historical tradition of education in the state, the Connecticut Supreme Court also noted that the legislature had recognized in other contexts the state's concern for each child to have an equal opportunity to receive a suitable program of educational experiences.²⁶⁰ The current situation with regard to financial disparities between the school districts had arisen over the years, the *Horton* court noted, and needed to be corrected.²⁶¹ The Connecticut Supreme Court therefore held that in Connecticut the right to education was so basic and fundamental that it had to scrutinize strictly any infringement of that right.²⁶² The Connecticut Supreme Court then concluded that the financing system could not withstand this strict scrutiny test, and declared the public school financing system unconstitutional.²⁶³

Although the *Horton* court used the history of the state's educational efforts to support the finding that education was a fundamental right, in the West Virginia case, the court used history to interpret the language of the state's education provision.²⁶⁴ In *Pauley v. Kelly*, decided in 1979, the Supreme Court of Appeals of West Virginia determined the meaning of the "thorough and efficient" clause of the state's education provision, which eventually led to a declaration in a subsequent court proceeding that the West Virginia

²⁵⁷ 172 Conn. 615, 647, 376 A.2d 359, 374 (1977).

²⁵⁸ *Id.* at 647, 376 A.2d at 373-74.

²⁵⁹ *Id.* at 647, 376 A.2d at 374.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 648, 376 A.2d at 374.

²⁶² *Id.* at 648-49, 376 A.2d at 374.

²⁶³ *Id.*

²⁶⁴ See *Pauley v. Kelley*, 162 W. Va. 672, 707-08, 255 S.E.2d 859, 878 (1979).

system of financing schools was unconstitutional.²⁶⁵ In its deliberations, the *Pauley* court examined the provision mandating a thorough and efficient school system in terms of the framers' intent, in terms of how other state constitutions had used the phrase, and in terms of how the words had been defined both in the past and present.²⁶⁶ Based on this information, the *Pauley* court identified the criteria of an efficient school system, and in 1984, a trial court determined that the West Virginia system of financing schools did not meet these criteria and was therefore unconstitutional.²⁶⁷

In the fifth state in which courts held a school financing plan unconstitutional, the need to provide reliable funding for the schools affected the court's decision.²⁶⁸ In 1978, in *Seattle School District No. 1 of King County v. State*, the Washington Supreme Court overruled its 1974 decision in *Northshore School District No. 417 v. Kinnear* and held the state's system of financing public schools unconstitutional on the basis of the state education provision.²⁶⁹ In *Seattle School District*, as in *Northshore School District*, the case concerned the constitutionality of special tax levies, requiring voter approval, needed to support the schools.²⁷⁰ During the 1975-76 school year, forty percent of the students in the state resided in school districts that had to reduce teachers and curriculum offerings because school districts lost special levy elections.²⁷¹ The loss of these special levies placed public education in immediate danger, the Washington Supreme Court stated, and it held the use of these special levies to fund the basic school program was therefore unconstitutional.²⁷²

In reaching this decision, the Washington Supreme Court noted that the state education provision required the state to make

²⁶⁵ *Id.* at 681-707, 255 S.E.2d at 865-77.

²⁶⁶ *Id.* The New Jersey Supreme Court, for example, had held in *Robinson* in 1973 that the New Jersey system of financing schools was unconstitutional on the basis of this wording; the Ohio Supreme Court in *Board of Education v. Waller*, on the other hand, had found its financing system constitutional on the basis of virtually identical wording. 58 Ohio St. 2d 368, 387, 390 N.E.2d 813, 825 (1979).

²⁶⁷ *Pauley v. Bailey II*, 324 S.E.2d 128, 130 (W. Va. 1984).

²⁶⁸ *Seattle School Dist. No. 1 v. State*, 90 Wash. 2d 476, 526-27, 585 P.2d at 98-99 (1978).

²⁶⁹ *Id.* In *Northshore School Dist. v. Kinnear*, 84 Wash. 2d 685, 688, 530 P.2d 1178, 1181 (1974), plaintiffs also argued that the use of the property tax to partially fund schools was unconstitutional. *Id.* The plaintiffs further argued that taxpayers in property-poor school districts were denied the equal protection of the law because they paid a higher percentage of taxes for less educational services. *Id.*

²⁷⁰ *Kinnear*, 84 Wash. 2d at 711, 530 P.2d at 193; *Seattle School Dist. No. 1*, 90 Wash. 2d at 526-27, 585 P.2d at 98-99.

²⁷¹ *Seattle School Dist. No. 1*, 90 Wash. 2d at 524-25, 585 P.2d at 98.

²⁷² *Id.*

"ample provision" for the education of all children, and described education as the "paramount duty" of the state.²⁷³ A lengthy interpretation of the words of this provision, and an extensive historical analysis of the context in which the education provision was adopted, led the court to conclude that the state had a mandatory duty to provide for an ample education for all children, and that the current financing plan was insufficient to provide for a basic education.²⁷⁴ Special tax levies could be used for enrichment programs, the *Seattle* court noted, but they were an unreliable means of funding the basic education program and were therefore unconstitutional when used in that context.²⁷⁵

In the second wave of the school finance reform movement, then, courts in five of the sixteen states where cases were decided between 1974 and 1984 declared their systems of financing schools unconstitutional.²⁷⁶ In Wyoming and Connecticut, education was declared to be a fundamental right.²⁷⁷ The Connecticut Supreme Court reached this decision largely because of the lengthy commitment to free public education in the state, which dated to 1650, whereas the Wyoming Supreme Court based its decision on the emphasis on education in the state's constitution, and on the basic role of education in society.²⁷⁸ The Wyoming Supreme Court, as well as the Arkansas Supreme Court, also held that its state financing system was unconstitutional because it conditioned the quality of a child's education on the wealth of his or her school district.²⁷⁹ In Washington and West Virginia, on the other hand, courts examined the context in which the education provision was passed, the intent of the framers, and the meaning of the words in the state education provision, before declaring that their respective state school financing plans violated their state constitution's education provision.²⁸⁰

Although courts in Arkansas, Connecticut, Washington, West Virginia and Wyoming did declare their state system of financing

²⁷³ See *id.* at 495, 526, 585 P.2d at 83, 99.

²⁷⁴ *Id.* at 514, 585 P.2d at 93.

²⁷⁵ *Id.* at 527, 585 P.2d at 99.

²⁷⁶ See *supra* note 238.

²⁷⁷ *Horton v. Meskill*, 172 Conn. 615, 648-49, 376 A.2d 359, 374 (1977); *Washakie County School Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980).

²⁷⁸ *Horton*, 172 Conn. at 648-49, 376 A.2d at 374; *Washakie County School Dist. No. 1*, 606 P.2d at 310.

²⁷⁹ *Dupree v. Alma School Dist. No. 30*, 279 Ark. 340, 345, 651 S.W.2d 90, 93 (1983); *Washakie County School Dist. No. 1*, 606 P.2d at 310.

²⁸⁰ *Seattle School Dist. No. 1 v. State*, 90 Wash. 476, 526-27, 585 P.2d 71, 98-99 (1978); *Pauley v. Kelley*, 162 W. Va. 672, 719, 255 S.E.2d 859, 884 (1979).

public schools unconstitutional, the vast majority of the state courts considering school finance cases in this second wave of the reform movement reached the opposite conclusion.²⁸¹ Plaintiffs in the second wave of the school finance reform movement found that courts were not persuaded by efforts to factually distinguish *Rodriguez*, and all courts making decisions between 1974 and 1984 held that *Rodriguez* effectively eliminated the fourteenth amendment as a basis for seeking school finance reform. Almost all of these courts also agreed with the New Jersey Supreme Court's reasoning in *Robinson*, and therefore rejected the use of the state equal protection clause as a basis for declaring a state's school finance system unconstitutional. That left plaintiffs with only one other basis upon which to constitutionally challenge a state school funding system.²⁸² The remaining argument, however, based on the alleged violation of the state education provision, was necessarily fact-specific to a given state and plaintiffs in each state thus had to generate their own historical information to support this position.²⁸³ As the *Thompson* and *Robinson* cases indicated, even states with similarly worded education provisions could reach opposite interpretations of this clause depending upon the strength of the case the plaintiffs were able to present.²⁸⁴ Indeed, in this second wave of the school finance reform movement, the education provision argument failed more often than it succeeded.²⁸⁵

Whether plaintiffs argued that funding disparities among a state's school district were unconstitutional then, or that the state's funding pattern did not take into account the municipal burden faced by cities, most of the courts considering school finance reform between 1974 and 1984 found their respective state systems of

²⁸¹ See *supra* note 238.

²⁸² See, e.g., *Thompson v. Engelking*, 96 Idaho 793, 799, 537 P.2d 635, 641 (1975).

²⁸³ See *id.*

²⁸⁴ See *Robinson v. Cahill*, 62 N.J. 473, 473, 303 A.2d 273, 273 (1973); *Thompson*, 96 Idaho at 799, 537 P.2d at 641.

²⁸⁵ The state provision argument was successful during the second wave of reform (1974-1984) in *Seattle School Dist. No. 1 v. State*, 90 Wash. 476, 526-27, 585 P.2d 71, 98-99 (1978), and *Pauley v. Kelley*, 162 W. Va. 672, 719, 255 S.E.2d 859, 884 (1979). It was not successful in *Lujan v. Colorado Bd. of Educ.*, 649 P.2d 1005, 1011 (Colo. 1982); *McDaniel v. Thomas*, 248 Ga. 632, 644, 285 S.E.2d 156, 165 (1981); *Thompson v. Engelking*, 96 Idaho 793, 799, 537 P.2d 635, 641 (1975); *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 644-45, 609-10, 458 A.2d 758, 783-84 (1983); *Board of Educ. v. Nyquist*, 57 N.Y.2d 27, 48, 439 N.E.2d 359, 369, 453 N.Y.S.2d 643, 653 (1982); *Board of Educ. v. Walter*, 58 Ohio St. 2d 368, 387, 390 N.E.2d 813, 825 (1979); *Olsen v. State ex rel. Johnson*, 277 Or. 9, 18, 554 P.2d 139, 149 (1976); *Danson v. Casey*, 484 Pa. 415, 429, 399 A.2d 360, 367 (1979).

financing schools constitutional.²⁸⁶ As this period drew to a close, the trend in favor of declaring school finance systems constitutional continued, even where significant funding differences existed among school districts.²⁸⁷

In 1984, for example, in what would be the last case decided in the second wave of the school finance reform movement, the Michigan Court of Appeals in *East Jackson Public Schools v. Green* rejected a second challenge to the state's unequal method of funding schools and found the system constitutional.²⁸⁸ Plaintiffs in Illinois were similarly unsuccessful in a second constitutional challenge to their state school financing plan.²⁸⁹ The record for unsuccessful challenges, however, appeared to belong to Georgia, where plaintiffs actually filed four separate cases unsuccessfully challenging the constitutionality of the Georgia system of financing schools.²⁹⁰ For the Georgia plaintiffs, as for most school finance reform plaintiffs, the state by state approach to seeking school finance reform proved to be less than satisfactory.

IV. THE THIRD WAVE OF REFORM: RENEWED INTEREST IN SCHOOL FINANCE REFORM, AND A RETURN TO "EDUCATIONAL NEEDS"

A. *The State Education Provision Argument Triumphs*

Between 1984 and 1987, for the first time since the school finance reform movement began in the late 1960s, there were no decisions on the constitutionality of a state's plan for financing public schools.²⁹¹ When the next decision on this issue did come in 1987, the Oklahoma Supreme Court did not even allow the plaintiffs to present their case. Instead, the court followed the dominant trend in the school finance reform movement and declared the Oklahoma state school finance plan constitutional.²⁹² When the South Carolina Supreme Court followed suit in 1988 and upheld the constitutionality of that state's shared public school funding

²⁸⁶ See *supra* note 26.

²⁸⁷ See, e.g., *East Jackson Pub. Schools v. State*, 133 Mich. App. 132, 137-38, 348 N.W.2d 303, 305-06 (1984).

²⁸⁸ *Id.* at 137-38, 348 N.W.2d at 305-06.

²⁸⁹ *Illinois ex rel. Jones v. Adams*, 40 Ill. App. 3d 189, 200, 305 N.E.2d 767, 776 (1976).

²⁹⁰ *Battle v. Cherry*, 339 F. Supp. 186 (N.D. Ga. 1972); *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981); *Ingram v. Payton*, 222 Ga. 503, 150 S.E.2d 825 (1966); *Rice v. Cook*, 222 Ga. 499, 150 S.E.2d 822 (1966).

²⁹¹ See *supra* note 25.

²⁹² *Fair School Fin. Council v. State*, 746 P.2d 1135, 1151 (Okla. 1987).

system,²⁹³ the effort to seek equality of educational opportunity through court-ordered school finance reform seemed to have lost much of its momentum.

Then, in 1989, within months of each other, courts in Kentucky, Montana and Texas declared their respective state school funding systems unconstitutional.²⁹⁴ This outcome was a milestone of sorts in the school finance reform movement, because it was the first time in its twenty-one year history that three states declared their systems of financing schools unconstitutional in the same year.²⁹⁵ Moreover, many similarities existed between the three cases, both in terms of the plaintiffs' cases, and the manner in which the respective courts reached their decisions.²⁹⁶

In the 1989 Kentucky, Montana and Texas cases, for example, plaintiffs alleged the same basic fact pattern first postulated in *Serrano* a generation ago; that is, that public school funding, and hence the quality of education, varied significantly among school districts within the state.²⁹⁷ Following the *Serrano* pattern, in all three cases plaintiffs alleged that these funding disparities resulted in a lack of equal educational opportunity.²⁹⁸ In all three cases the funding variation that the plaintiffs sought to reduce was due to the partial use of local property taxes to fund the schools, which in turn could be traced to the variations in property wealth among the school districts.²⁹⁹ Following the *Serrano* model, in all three cases the plaintiffs also sought a declaratory judgment seeking to have the state's public school financing system declared unconstitutional.³⁰⁰ The courts in all three cases based their decisions on the premise that the state legislature would restructure the system, and

²⁹³ *Richland County v. Campbell*, 294 S.C. 346, 350, 364 S.E.2d 470, 472 (1988).

²⁹⁴ *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 215 (Ky. 1989); *Helena Elementary School Dist. No. 1 v. State*, 236 Mont. 44, 47, 769 P.2d 684, 691 (1989); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 396 (Tex. 1989).

²⁹⁵ See *supra* note 25.

²⁹⁶ *Rose*, 790 S.W.2d at 215; *Helena Elementary School Dist. No. 1*, 236 Mont. at 47, 769 P.2d at 691; *Edgewood Indep. School Dist.*, 777 S.W.2d at 396.

²⁹⁷ *Rose*, 790 S.W.2d at 197; *Helena Elementary School Dist. No. 1*, 236 Mont. at 47, 769 P.2d at 686-87; *Edgewood Indep. School Dist.*, 777 S.W.2d at 392.

²⁹⁸ *Rose*, 90 S.W.2d at 197; *Helena Elementary School Dist. No. 1*, 236 Mont. at 49, 769 P.2d at 686-87; *Edgewood Indep. School Dist.*, 777 S.W.2d at 393.

²⁹⁹ *Rose*, 790 S.W.2d at 197; *Helena Elementary School Dist. No. 1*, 236 Mont. at 48, 769 P.2d at 686-87; *Edgewood Indep. School Dist.*, 777 S.W.2d at 393.

³⁰⁰ *Rose*, 790 S.W.2d at 190; *Helena Elementary School Dist. No. 1*, 236 Mont. at 47, 769 P.2d at 691; *Edgewood Indep. School Dist.*, 777 S.W.2d at 392.

avoided ruling that exactly equal expenditures were required to equalize educational opportunity.³⁰¹

In addition, the 1989 Kentucky, Montana and Texas cases were all decided on the basis of the same legal argument.³⁰² Following the 1973 lead of the New Jersey Supreme Court in *Robinson v. Cahill*, the Kentucky, Montana and Texas courts rejected the plaintiffs' arguments that their respective state financing plans violated the federal or the state equal protection clause.³⁰³ Instead, all three courts chose to base their decisions on the meaning of the provision in their respective state constitutions that authorized the legislature to establish free public schools.³⁰⁴ Though the wording of the education provisions differed, the three courts followed the same procedure in analyzing the issue, as they examined the history of the constitutional provision, the intent of the framers and the meaning of the words in the statute.³⁰⁵

In *Helena Elementary School District No. 1 v. State*, for example, the plaintiffs charged that the Montana system of financing public schools violated the constitutional provision that the "goal of the people" was to establish a system of education that would develop the "full educational potential of each person."³⁰⁶ The education article of the Montana Constitution further provided that "equality of educational opportunity is guaranteed to each person of the state."³⁰⁷ The plaintiffs charged that because of the disparities in funding among school districts, which at the time of the suit were as high as eight to one, all children did not have equal educational opportunity.³⁰⁸ The plaintiffs provided both expert testimony and the results of a comparison study to establish that these funding disparities resulted in differences among school districts in educa-

³⁰¹ *Rose*, 790 S.W.2d at 215; *Helena Elementary School Dist. No. 1*, 236 Mont. at 55, 769 P.2d at 691; *Edgewood Indep. School Dist.*, 777 S.W.2d at 396, 399.

³⁰² Compare *Rose*, 790 S.W.2d at 190; *Helena Elementary School Dist. No. 1*, 236 Mont. at 65, 769 P.2d at 691 and *Edgewood Indep. School Dist.*, 777 S.W.2d at 398 with *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973).

³⁰³ *Rose*, 790 S.W.2d at 190; *Helena Elementary School Dist. No. 1*, 236 Mont. at 65, 769 P.2d at 691; *Edgewood Indep. School Dist.*, 777 S.W.2d at 398.

³⁰⁴ *Rose*, 790 S.W.2d at 189; *Helena Elementary School Dist. No. 1*, 236 Mont. at 55, 769 P.2d at 691; *Edgewood Indep. School Dist.*, 777 S.W.2d at 398.

³⁰⁵ *Rose*, 790 S.W.2d at 194-95; *Helena Elementary School Dist. No. 1*, 236 Mont. at 55-56, 769 P.2d at 689-90; *Edgewood Indep. School Dist.*, 777 S.W.2d at 393-94.

³⁰⁶ See 236 Mont. at 52, 769 P.2d at 689.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 48-51, 769 P.2d at 686-88.

tional opportunity in terms of curriculum, textbooks, materials, supplies and facilities.³⁰⁹ Given these disparities, the Montana Supreme Court declared the financing system unconstitutional.³¹⁰

In analyzing whether this system of financing schools violated the education provision of the Montana State Constitution, the Montana Supreme Court looked first to the constitutional debates on the provision, and to the plain meaning of its words.³¹¹ The education provision, the court noted, was the only place in the state constitution where a right was guaranteed. The plain meaning of the education provision, the court determined, was that every person is *guaranteed* equality of educational opportunity.³¹² This guarantee was binding on all three branches of the government, the court stated, and applied to each person in the state of Montana.³¹³

In terms of whether the current financing system provided such an equal opportunity, the Montana Supreme Court noted that the state's contribution fell short of even meeting the costs of complying with Montana's minimum school accreditation standards.³¹⁴ As a result, school districts were forced to rely heavily on permissive and voted levies, which voters could reject.³¹⁵ The fact that Montana had experienced fiscal difficulties in the last few years did not, the court ruled, excuse the disparities in spending in the various school districts.³¹⁶ These disparities translated into unequal educational opportunities for students, and thus violated the Montana constitutional provision that guaranteed equal educational opportunity for all.³¹⁷

In Kentucky, in *Rose v. Council for Better Education*, the Kentucky Supreme Court in 1989 held that the system by which Kentucky funded its schools violated the state constitutional mandate to "provide an efficient system of common schools."³¹⁸ The court noted that the evidence that the plaintiffs presented clearly established that the state inadequately funded the *entire* Kentucky public education system.³¹⁹ In addition, there were significant differences in

³⁰⁹ *Id.* at 48-49, 769 P.2d at 686-87.

³¹⁰ *Id.*

³¹¹ *Id.* at 53, 769 P.2d at 689.

³¹² *Id.* at 53, 769 P.2d at 689-90.

³¹³ *Id.*

³¹⁴ *Id.* at 53-54, 769 P.2d at 690.

³¹⁵ *Id.* at 55, 769 P.2d at 690.

³¹⁶ *Id.* at 54, 769 P.2d at 690.

³¹⁷ *Id.*

³¹⁸ 790 S.W.2d 186, 197 (Ky. 1989).

³¹⁹ *Id.*

the taxable property per pupil among school districts, which translated into differences in the amount of money expended on education in a school district.³²⁰ This difference in per pupil expenditures in turn led to a significant difference between the poor and wealthy school districts in terms of teachers' salaries, educational materials, curriculum and facilities, as well as a difference in educational achievement among the school districts.³²¹

In determining whether the method by which Kentucky schools were financed could be considered to meet the "efficient" mandate of the state constitution, the Kentucky Supreme Court surveyed the history of the education provision, and considered the opinions of other courts and experts as to the meaning of the term "efficient."³²² The court determined that "efficient" included the concept that the common schools should be substantially uniform throughout the state, and that the state should provide equal educational opportunity to all Kentucky children.³²³ The court concluded that the present system of education in Kentucky did not meet these guidelines, and emphasized that the *entire system* was unconstitutional, including all statutes that created, implemented and financed the system.³²⁴ The Kentucky Supreme Court noted that it had made its decision only on the grounds of the education provision in the state constitution, but that the basis for the opinion was that education was a fundamental right under the Kentucky constitution.³²⁵

The third 1989 school finance case arose in Texas, and involved the constitutionality of the state school financing system that the United States Supreme Court had held was constitutional a generation earlier in the 1973 case of *San Antonio Independent School District v. Rodriguez*.³²⁶ In *Edgewood Independent School District v. Kirby*, however, the Texas Supreme Court reached the opposite conclusion. The Texas Supreme Court based its 1989 holding of unconstitutionality not on the fourteenth amendment, which had been the legal basis for the *Rodriguez* case, but on the state constitution's education provision. The Texas State Constitution, like the Kentucky and New Jersey constitutions, required the legislature to es-

³²⁰ *Id.* at 196.

³²¹ *Id.* at 197-98.

³²² *Id.* at 194-96, 205-13.

³²³ *Id.* at 211.

³²⁴ *Id.* at 215.

³²⁵ *Id.*

³²⁶ *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 396 (Tex. 1989).

tablish and provide an "efficient system" of free public schools.³²⁷ Like the Massachusetts education provision, the state was to maintain schools because a "general diffusion of knowledge" was essential to the preservation of the "liberties and rights" of the people.³²⁸

In interpreting the Texas State Constitution's education provision, the Texas Supreme Court examined the intent of the framers, the historical context in which the provision was passed, and the plain meaning of the words in the provision.³²⁹ It noted that the provision imposed on the legislature an affirmative duty to establish an efficient system of schools. "Efficient," in turn, meant the same in 1875 when the constitution was adopted as it meant today, and implied not a system that was cheap, but one that was effective and produced results.³³⁰ The court further reasoned that the framers could never have anticipated the existence of the type of disparities in property values that caused the unequal funding that existed among Texas school districts in 1989. When the Texas education provision was adopted in the 1800s, school districts were uniformly funded. The Texas Supreme Court therefore held that the present financing system, which resulted in per pupil expenditures ranging from \$2,112 to \$19,333, was not constitutional because children from property-poor school districts were not receiving an efficient or effective education which "diffused knowledge."³³¹

The 1989 Kentucky, Montana and Texas cases, then, inaugurated a new phase in the school finance reform movement. Based on the model first developed in *Serrano v. Priest* in 1971, courts in these three cases held that funding disparities among a state's school districts did affect the quality of educational opportunity that a child received.³³² Following the model developed in the 1973 case of *Robinson v. Cahill*, the courts in all three of these cases rejected equal protection arguments and instead based their decisions of unconstitutionality on the meaning of the state constitution's education provision.³³³ In reaching these decisions, the courts each first de-

³²⁷ *Id.* at 393.

³²⁸ *Id.* See *infra* note 453 for the complete text of the Texas and Massachusetts constitutional provisions on education.

³²⁹ *Id.* at 394.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Rose*, 790 S.W.2d at 189; *Helena Elementary School Dist. No. 1*, 236 Mont. at 55, 769 P.2d at 691; *Edgewood Indep. School Dist.*, 777 S.W.2d at 398.

³³³ 777 S.W.2d at 378.

terminated the meaning of the state education provision by examining the plain meaning of the words, the intent of the framers, and the historical context in which the clause had been adopted.³³⁴ Having determined the meaning of the constitutional provision, each court then examined the current system of financing schools to determine if the funding inequities that existed among the state's school districts violated the state constitutional provision.³³⁵

B. The Revival of the "Educational Needs" Argument

At the same time that reformers in Montana, Kentucky and Texas found renewed success in arguing that unequal school expenditures among a state's school districts were unconstitutional, the "educational needs" argument was revived.³³⁶ The essence of the educational needs argument, first raised in 1968 in *McInnis v. Ogilvie*, is that equal educational opportunity requires expenditures based on the educational needs of the children.³³⁷ The concept behind this argument is that many children are educationally disadvantaged because of their background and therefore cannot compete with advantaged youngsters.³³⁸ According to this argument, these disadvantaged children need special compensatory programs if they are to achieve equally with other children.³³⁹

The Wisconsin Supreme Court, in the 1989 case of *Kukor v. Grover*, was the first court to consider, and to reject, this revived educational needs argument.³⁴⁰ One year later, however, in the 1990 case of *Abbott v. Burke*, the New Jersey Supreme Court defined equal educational opportunity in terms of educational needs and held that certain poorer urban school districts did not provide a thorough and efficient education as required by the state constitution's education provision.³⁴¹ The New Jersey Supreme Court had pre-

³³⁴ *Rose*, 790 S.W.2d at 194-95; *Helena Elementary School Dist. No. 1*, 236 Mont. at 55-56, 769 P.2d at 689-90; *Edgewood Indep. School Dist.*, 777 S.W.2d at 393-94.

³³⁵ *Id.*

³³⁶ See *Abbott v. Burke*, 119 N.J. 287, 295, 575 A.2d 359, 363 (1990); *Kukor v. Grover*, 148 Wis. 2d 469, 484, 436 N.W.2d 568, 574 (1989).

³³⁷ *School Finance Reform*, *supra* note 1, at 83-84.

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ 148 Wis. 2d at 484, 436 N.W.2d at 574. It was the second time that the Wisconsin Supreme Court had dealt with school financing issues, having previously ruled in *Buse v. Smith* that a plan to have wealthy school districts share their excess revenues with property poor school districts was unconstitutional. *Buse v. Smith*, 74 Wis. 2d 550, 550, 247 N.W.2d 147, 147 (1976).

³⁴¹ 119 N.J. 287, 295, 575 A.2d 359, 363 (1990).

viously declared its entire system of financing schools unconstitutional in the 1973 case of *Robinson v. Cahill* because funding disparities among the state's school districts failed to provide children with equal educational opportunity through equal access to equally funded school programs.³⁴² In the 1990 *Abbott* case, the New Jersey Supreme Court examined the financing system that the legislature had designed to meet the *Robinson* court's 1973 constitutional objections.³⁴³

The *Abbott* court held that despite changes in the state's plan for financing public schools, vast disparities in educational expenditures in the New Jersey school system continued to exist because of differences in property values.³⁴⁴ These fiscal differences, caused by the continued use of the property tax to fund schools, translated into differences in the input into a child's education. The *Abbott* court noted that the present law did allow the commissioner of education to order a district to increase its taxes if its educational system was deficient. The court, however, accepted the *Abbott* plaintiffs' municipal overburden argument, which had been used by earlier plaintiffs in the 1970s, and reasoned that this provision was useless because the cities were already suffering from municipal overburden and had no funds. The court also noted that the state had presented convincing evidence that money alone would not result in equality of educational opportunity.³⁴⁵ The New Jersey Supreme Court, however, concluded that money could make a difference, and that poor urban students were constitutionally entitled to the same type of educational opportunity that money bought for other children.³⁴⁶

In reaching its decision that the current financing system was unconstitutional as applied to certain court-identified poor urban school districts, the New Jersey Supreme Court noted that students in poorer urban districts were unable to participate fully as citizens and workers in society, or to achieve any level of equality in society.³⁴⁷ Without an effective education, these poor students were likely to remain isolated in deteriorating cities.³⁴⁸ The New Jersey Supreme Court also noted that the educational deficiencies of these

³⁴² *Robinson v. Cahill*, 62 N.J. 473, 473, 303 A.2d 273, 273 (1973).

³⁴³ 119 N.J. at 298, 575 A.2d at 363.

³⁴⁴ *Id.* at 323, 575 A.2d at 377.

³⁴⁵ *Id.* at 295-96, 575 A.2d at 363.

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 384-85, 575 A.2d at 408.

³⁴⁸ *Id.* at 391-92, 575 A.2d at 411.

poor urban school districts had an impact not only on the students, but on the social, cultural and economic fabric of the state.³⁴⁹ Failure to correct the deficiencies in the educational system, the court believed, would likely lead to despair, bitterness and hostility on the part of the minority, undereducated poor.³⁵⁰

The New Jersey Supreme Court in *Abbott* held that in order to provide a thorough and efficient education in these poorer districts, the state must ensure that it addressed the special disadvantages of these students so that they received an education equally effective to that provided their more affluent peers.³⁵¹ The court ruled that school funding for these school districts could therefore not depend on the fiscal ability or will of local school boards, but must be guaranteed by the state. The New Jersey Supreme Court in *Abbott* made this ground-breaking decision even though the state of New Jersey at the time of the suit had one of the highest per capita expenditures for public education in the nation.³⁵² For despite this financial effort, the court believed that students in these poor urban districts were not receiving a thorough and efficient education.

In the closing paragraphs of the *Abbott* opinion, the New Jersey Supreme Court reminded the parties involved in this litigation that it was indeed the students and their education that was the real focus of this school finance case.³⁵³ After the court had completed all of its legal analyses of school finance issues, the court noted that it was still left with the need to deal with these students and the reality of the poverty and isolation of their lives. These poor children were not being educated, the court held, and it found this constitutional failure to be "clear, severe, extensive, and of long duration."³⁵⁴ In defining equal educational opportunity in terms of student needs, the New Jersey Supreme Court in *Abbott* added yet another chapter to the evolving and changing story of the legal concept of equal educational opportunity.

Beginning in 1989, then, the school finance reform movement entered a new phase. After over two decades of almost continuous litigation over disparities in school funding among school districts within the same state, more courts in 1989 declared their systems of financing public schools unconstitutional in a single year than

³⁴⁹ *Id.* at 392, 575 A.2d at 411.

³⁵⁰ *Id.* at 393, 575 A.2d at 412.

³⁵¹ *Id.* at 385, 575 A.2d at 408.

³⁵² *Id.* at 393, 575 A.2d at 412.

³⁵³ *Id.* at 394, 575 A.2d at 412.

³⁵⁴ *Id.* at 385, 575 A.2d at 408.

had done so in the previous twenty-one years.³⁵⁵ Defining equality of educational opportunity in terms of the need to reduce funding disparities among school districts, and to provide equal access to equally funded programs, the three cases decided in 1989 gave new life to a movement that previously had limited success.³⁵⁶

In addition to experiencing new success with the traditional school finance case model developed in *Serrano v. Priest*, the emergence of a second branch characterized this new phase of the school finance reform movement.³⁵⁷ Based on the educational needs argument first used in 1968, a 1990 court decision declared a state system of financing schools unconstitutional in part because it did not provide sufficient funds to meet the needs of minority inner-city youth and provide them with an equally effective education.³⁵⁸ In addition to requiring that sufficient funds be allocated to meet the special needs of these disadvantaged children, this court also held that the state must ensure that the necessary funds were available.³⁵⁹ This court focused its attention on the children involved in the case, and held that school funding for these disadvantaged children could not depend upon the ability or willingness of local school districts to provide the programs that these children needed to be able to participate fully in society.³⁶⁰

V. THE STATISTICAL AND CONSTITUTIONAL BASES FOR CHALLENGING THE LEGALITY OF THE MASSACHUSETTS SYSTEM OF FUNDING PUBLIC SCHOOLS

The history of the twenty-two year school finance reform movement suggests that plaintiffs considering a constitutional challenge to their state's system of financing public schools need to collect facts specific to their state in three key areas in order to assess the viability of a potential case. First, plaintiffs need information that focuses on their state's current system of financing schools in order to determine if it is characterized by the three factual bases used

³⁵⁵ See *supra* note 25.

³⁵⁶ Compare *Rose v. Council for Better Educ.*, 790 S.W.2d at 190; *Helena Elementary School Dist. No. 1*, 236 Mont. at 55, 769 P.2d at 689-90 and *Edgewood Indep. School Dist.*, 777 S.W.2d at 398 with *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973).

³⁵⁷ See *Abbott v. Burke*, 119 N.J. 287, 295, 575 A.2d 359, 363 (1990); *Kukor v. Grover*, 148 Wis. 2d 469, 484, 436 N.W.2d 568, 574 (1989).

³⁵⁸ *Abbott*, 119 N.J. at 295, 575 A.2d at 363.

³⁵⁹ See *id.* at 385, 575 A.2d at 408.

³⁶⁰ *Id.* at 394, 575 A.2d at 412.

successfully in previous school finance cases;³⁶¹ namely, if significant funding differences exist among school districts caused by the use of local property tax revenue or municipal overburden; if the reliance on local property tax revenue, or the lack of guaranteed state funds, results in school districts being unable to be assured of adequate funds to provide children a basic education; and if the disadvantaged children in the state are receiving the type of education that compensates for their background and allows them to achieve in school and society.³⁶²

A second area in which potential plaintiffs in a school finance reform case need to collect facts specific to their state involves the state's equal protection clause, including the history of education in the state, and the relative emphasis that the state constitution places on education. Previous plaintiffs have successfully demonstrated that education was a fundamental right in their state by presenting information on the history of education in their state, the state constitution's emphasis on education, and other contexts in which the legislature addressed the question of equality of educational opportunity.³⁶³ This argument, of course, presupposes that the state has an equal protection clause, or, as in the case of Massachusetts, several clauses considered to be the equivalent of the fourteenth amendment.³⁶⁴

A third area in which potential plaintiffs need to collect facts specific to their state involves the meaning of the state provision on education. Previous plaintiffs have examined the history of the education provision, the context in which the state's education provision was adopted, the intent of the framers, and the plain meaning of the words in order to support the argument that unequal financing is unconstitutional.³⁶⁵ Massachusetts plaintiffs can be ex-

³⁶¹ See, e.g., *Rose*, 790 S.W.2d at 190 (unequal school funding among school districts); *Helena Elementary School Dist. No. 1*, 236 Mont. at 55, 769 P.2d at 691 (adequate guaranteed funding not available).

³⁶² See, e.g., *Rose*, 790 S.W.2d at 190; *Helena Elementary School Dist. No. 1*, 236 Mont. at 55, 769 P.2d at 691.

³⁶³ See, e.g., *Horton v. Meskill*, 172 Conn. 615, 648-49, 376 A.2d 359, 374 (1977); *Washakie County School Dist. No. 1 v. Herschler*, 606 P.2d 310, 333 (Wyo. 1980).

³⁶⁴ Articles I, VI, VII and X are the Massachusetts equivalent of the fourteenth amendment. *American Connor v. Metropolitan Dist. Water Supply Comm.*, 314 Mass. 33, 38, 39, 49 N.E.2d 593, 595 (1943) (discussing alleged taking of land without adequate compensation).

³⁶⁵ See *Robinson v. Cahill*, 62 N.J. 473, 473, 303 A.2d 273, 273 (1973); *Rose*, 790 S.W.2d at 190; *Helena Elementary School Dist. No. 1*, 236 Mont. at 55, 769 P.2d at 691; *Edgewood Indep. School Dist.*, 777 S.W.2d at 398; *Seattle School Dist. No. 1 v. State*, 90 Wash. 476, 526-27, 585 P.2d 71, 98-99 (1978); *Pauley v. Kelley*, 162 W. Va. 672, 719, 255 S.E.2d 859, 884 (1979).

pected to follow a similar pattern, because Massachusetts courts in previous unrelated cases have used similar guidelines,³⁶⁶ construing the constitution in light of the conditions under which it was framed, the ends it was designed to accomplish, the benefits it was expected to confer, and the evils it hoped to remedy.³⁶⁷

This section, then, presents statistical and historical data that, based on previous successful school finance cases, may prove useful to potential plaintiffs assessing the viability of a constitutional challenge to the Massachusetts system of financing public schools.³⁶⁸ It is designed to ascertain whether the current educational financing system in Massachusetts contravenes the fourteenth amendment by totally depriving children of an education, or depriving children of the minimum skills that they need to participate in the political process;³⁶⁹ whether the current financing system provides unequal funding that supports the proposition that a child's education in Massachusetts is illegally conditioned on the "suspect" category of wealth and violates the state's equal protection clause;³⁷⁰ whether there is evidence that education in Massachusetts is a fundamental right which under the state's equal protection clause must be made available to all children on equal terms;³⁷¹ and whether unequal funding among school districts, lack of adequate guaranteed state funding to provide a basic education to all children, or failure to provide an education that effectively meets the needs of disadvantaged youth violates the state constitution's education provision.³⁷²

³⁶⁶ See *infra* note 453 for a complete text of this portion of the Massachusetts Constitution. In interpreting the Massachusetts Constitution, one must construe the language of the constitutional provision in accordance with the common understanding at the time of the adoption of the constitution. *Raymer v. Trefrey*, 239 Mass. 411, 412, 132 N.E. 190, 191 (1921) (discussing tax abatement due under constitution). Courts are to interpret words and phrases in the sense most obvious to common understanding. *Opinion of the Justices to the House of Representatives*, 243 Mass. 605, 607, 140 N.E. 463, 464 (1923) (discussing proposed constitutional amendment). In construing constitutional provisions, Massachusetts courts look to the history of the times when the state made the constitution. *Opinion of the Justices to the House of Representatives*, 254 Mass. 617, 619, 151 N.E. 680, 681 (1926) (discussing applicability of referendum to proposed apportionment bill).

³⁶⁷ *Opinion of the Justices to the Senate*, 324 Mass. 746, 749, 85 N.E.2d 761, 763 (1949) (discussing constitutionality of bill defining public highways).

³⁶⁸ See, e.g., *Robinson*, 62 N.J. at 473, 303 A.2d at 273.

³⁶⁹ See, e.g., *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 5 (1973).

³⁷⁰ See, e.g., *Dupree v. Alma School Dist.* No. 30, 279 Ark. 340, 345, 651 S.W.2d 90, 93 (1983).

³⁷¹ See, e.g., *Horton v. Meskill*, 172 Conn. 615, 648-49, 376 A.2d 359, 374 (1977).

³⁷² See, e.g., *Abbott v. Burke*, 119 N.J. 287, 295, 575 A.2d 359, 363 (1990); *Seattle School Dist. No. 1 v. State*, 90 Wash. 476, 526-27, 585 P.2d 71, 98-99 (1978); *Pauley v. Kelley*, 162 W. Va. 672, 719, 255 S.E.2d 859, 884 (1979).

A. *The Statistical Basis for a Constitutional Challenge to the Massachusetts System of Financing Schools*

Chapter 71 of the General Laws of Massachusetts requires that all towns and cities in Massachusetts maintain public schools.³⁷³ The state funds its schools through state aid, local property taxes and federal funds.³⁷⁴ According to the statute, state funds are provided under chapter 70 in order to promote the equalization of educational opportunity, reduce reliance on the local property tax, and promote the equalization of the burden of the cost of school support.³⁷⁵

While the state does provide aid to schools, the majority of the funds needed to support public schools in Massachusetts in fiscal year 1988 came from property tax revenue raised by cities and towns. Thus, in fiscal year 1988, on average, 53.8% of the schools' budget came from local funds raised by property taxes.³⁷⁶ Massachusetts school districts varied significantly, however, in terms of their ability to raise funds because of differences in local property values.³⁷⁷ This property value difference, in turn, was reflected in varying school expenditures, with differences of \$2,000 per pupil, or \$60,000 per thirty-child classroom, not unusual.³⁷⁸ The amount of local funds that a school district contributed to its schools also varied somewhat depending on the percentage of its budget that the municipality allocated to support the schools, and the willingness

³⁷³ MASS. GEN. L. ch. 71, § 1 (1988).

³⁷⁴ See generally Massachusetts Department of Education, Bureau of Data Collection and Processing "School District Comparisons of Boston, Brookline, Lawrence," (FY 1988-89) [hereinafter School District Comparisons].

³⁷⁵ MASS. GEN. L. ch. 70, § 2 (1988). In fiscal year 1988, the Commonwealth of Massachusetts, through this general fund and additional programs, contributed 38.76% of the overall budget of Massachusetts schools. See generally School District Comparisons, *supra* note 374. In terms of individual school districts, the actual contribution that the state made to the education effort varied considerably. *Id.* Some cities, for example, are heavily dependent on state funds to support their schools. State funds accounted for 85% of Lawrence's school budget, 70% of Holyoke's budget, and 57% of Lynn's budget. In other districts, state funds make up a relatively low percentage of the overall school budget. State funds thus accounted for only 11.8% of Brookline's budget, 12.8% of Newton's budget, 14% of Watertown's budget, and 27% of Boston's budget. *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ See generally *id.* Copies of these documents were obtained at the Massachusetts Department of Education. For "All Day Programs," the per pupil expenditure in 1989-1990 ranged from \$2,389 (Wales) to \$36,465 (Gosnold), with the state average \$4,526 per pupil. *Id.* (Summary of All Day Programs). A total of 18 towns spent under \$3,000 per pupil per year of all day programs. *Id.* A total of 42 spent over \$6,000 per pupil. Heath had only a special needs program and was not included in these figures. *Id.*

of the people to assess themselves for local municipal services, including schools.³⁷⁹

In addition to differences in fiscal ability and willingness to expend money on public education, school districts in Massachusetts also vary in the demands placed on the schools because the low-income, minority, bilingual and limited-English speaking populations in Massachusetts are not evenly distributed.³⁸⁰ Statewide, for example, in fiscal year 1988, 16.1% of the children in public schools were minorities, and 11.2% were considered "low income."³⁸¹ Less than ten percent of the children statewide were classified as "bilingual," and approximately four percent were classified as having "limited English."³⁸² In contrast to these state averages, in some Massachusetts towns over half of the children are low-income and bilingual, while in other towns this same population is less than three percent of the public school student body. Those towns with more special populations tend to be funded at a lower level than towns with relatively few special needs children.³⁸³

In addition to the significant differences in per pupil expenditures which exist among Massachusetts school districts, some commentators have characterized the entire school financing system in Massachusetts as inadequately funded.³⁸⁴ Many Massachusetts school districts, for example, are currently facing severe budget problems.³⁸⁵ In Massachusetts, school districts must compete with other municipal programs for their share of funding from property tax revenue.³⁸⁶ In light of the economic downturn,³⁸⁷ cities are asking their local school districts to take their share of the budget

³⁷⁹ *See id.*

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *See generally id.* Newton, for example, had less than two percent of its students classified as low income in 1988; less than three percent had limited English, and a little over ten percent were bilingual. Newton, however, expended \$5,873 per pupil, well above the state average and thousands of dollars per pupil above the expenditure level of school districts like Lawrence, Holyoke and Lynn, which had large numbers of poor, minority, bilingual or limited English-speaking children. *Id.*

³⁸⁴ *See generally* Coletsos, *14 Mass. Schools Get Low Grades*, Boston Globe, Nov. 22, 1990, at A58, col. 6 [hereinafter *Low Grades*].

³⁸⁵ *Cuts Bite Hard in Newton's Schools*, Newton Graphic, Jan. 16, 1991, at 1, col. 3 [hereinafter *Cuts*]; *Low Grades*, *supra* note 384, at col. 1.

³⁸⁶ *Id.*

³⁸⁷ *Id.*

cuts.³⁸⁸ In some cases these budget cuts have resulted in such severe curtailments of the school programs that school accreditation is threatened.³⁸⁹

For the first time in twenty-one years, a Massachusetts high school risked losing accreditation in the spring of 1991; in total, fifteen Massachusetts high schools were in danger of losing their accreditation in 1990-91.³⁹⁰ Most of the troubled schools, according to Robert O'Donnell, the Chairman of the New England Association of Schools and Colleges, were in blue-collar communities that could not afford to fund their schools adequately.³⁹¹ O'Donnell blamed Proposition 2 1/2 for this problem because it limits the amount by which local taxes may be raised without resort to a special election to override the 2 1/2 percent limit on new spending.³⁹² In Dracut, for example, the senior high school was put on probation last year because of poor facilities.³⁹³ Last spring, however, despite this probationary status, the voters failed to pass a Proposition 2 1/2 override.³⁹⁴ Prior to the passage of Proposition 2 1/2, school boards could have sought state intervention when schools were inadequately funded, but no such option now exists.³⁹⁵

Other commentators, however, pinpoint not Proposition 2 1/2, but mismanagement of funds and inadequate state aid as the source of school funding problems.³⁹⁶ A recent study of public spending in Massachusetts indicates that Massachusetts spends approximately \$900 less per public school pupil than it would be expected to spend given the state's characteristics.³⁹⁷ In contrast, Massachusetts spends about \$1,500 more per person for public welfare than might nor-

³⁸⁸ *Id.*

³⁸⁹ *Low Grades*, *supra* note 384, at col. 1.

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² *Id.* Proposition 2 1/2 is the popular name for MASS. GEN. L. ch. 580. This statute sets a limit of two and one-half percent on the amount by which local taxes may be raised over the previous year's taxes without special voter approval. *North Shore Vocational Regional School v. City of Salem*, 393 Mass. 354, 355, 471 N.E.2d 104, 105 (1984).

³⁹³ *Low Grades*, *supra* note 384, at col. 1, 2.

³⁹⁴ *Id.*

³⁹⁵ See generally *Pirrone v. City of Boston*, 364 Mass. 403, 405, 305 N.E.2d 96, 98 (1973). Boston was treated somewhat differently with regard to this law when it was in effect. See *id.* at 405, 305 N.E.2d at 99.

³⁹⁶ *Low Grades*, *supra* note 384, at col. 1, 2.

³⁹⁷ Mohl, *Study: Mass. Stands Apart on Spending*, *Boston Globe*, Nov. 14, 1990, at 31, col. 3.

mally be expected.³⁹⁸ In 1990, Massachusetts ranked forty-fifth in the nation in terms of the percentage of state-generated school funding.³⁹⁹

Regardless of the cause, the lack of adequate guaranteed funds may be affecting both the children and the teachers in Massachusetts public schools. Between 1989 and 1990, the percentage of students in Massachusetts passing state-mandated minimum competency tests in grades three, six, and nine dropped for the first time since the state administered the tests in 1987.⁴⁰⁰ A spokesman attributed the statewide decline in scores to cuts in the state education budget, loss of support staff and special enrichment programs, and the layoff threat that loomed over 10,000 teachers last year.⁴⁰¹ Indeed, in some municipalities like Boston, conflicts over appropriations between the school committees that administer the schools, and the city government that allots city funds, continued throughout the year, with threatened layoffs and program cuts still being proposed well after school had begun.⁴⁰²

The current system of financing public schools in Massachusetts, then, is characterized by significant differences in per pupil expenditures among the state's school districts.⁴⁰³ Children from poor areas of the state, some of whom have high educational needs, have significantly less money spent on their education than children in more affluent areas of the state.⁴⁰⁴ Though the state legislature in chapter 70 legislation recognized the state's responsibility to fund the schools, the need to equalize the burden of school support, and the need to reduce the reliance on the property tax, the state of Massachusetts provides less than half of the funds needed by school districts to support state-mandated schools,⁴⁰⁵ and apparently did not provide sufficient school funds to ensure that all schools could meet even minimum accreditation standards.⁴⁰⁶ In addition, school

³⁹⁸ *Id.*

³⁹⁹ Cohen, *Weld Cuts Would Drop School Aid to 49th in the U.S.*, Boston Globe, Feb. 9, 1991, at 1, col. 1 [hereinafter *Weld Cuts*].

⁴⁰⁰ See *Cuts*, *supra* note 385, at 1, col. 3.

⁴⁰¹ *McDonough Offers Added School Cuts But Committee Members Are Reluctant*, Boston Globe, Nov. 27, 1990, at 22, col. 1. *School Test Scores Decline*, Boston Globe, March 25, 1991, at 17, col. 2, 18, col. 1; *Raynolds: Test Scores Reflect Budget Cuts*, Boston Globe, March 26, 1991, at 25, col. 2-5, 28, col. 1.

⁴⁰² *McDonough Offers Added School Cuts But Committee Members Are Reluctant*, Boston Globe, Nov. 27, 1990, at 22, col. 1.

⁴⁰³ See *School District Comparisons*, *supra* note 374.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Weld Cuts*, *supra* note 399, at col. 1.

⁴⁰⁶ *Low Grades*, *supra* note 384, at col. 1, 2.

districts vary considerably in their ability to raise funds because of differences in property tax values. Moreover, cities are allowed to expend varying portions of their budget for public education, and to tax themselves to support the schools at varying rates.⁴⁰⁷ Yet, in the wake of Proposition 2 1/2, the state has left school districts, and the children they serve, with nowhere to turn if voters fail to approve the local funds needed to run the schools.⁴⁰⁸

*B. The Constitutional Basis for a Challenge to the Legality of the
Massachusetts System for Funding Public Schools*

The picture of Massachusetts schools in 1990 painted by these statistics—threatened loss of accreditation, state funding among the lowest in the nation, thousands of dollars' difference among school districts in per pupil expenditures, falling test scores in basic skills areas—seems to be in sharp contrast to the Massachusetts historical tradition of educational excellence.⁴⁰⁹ If one examines the history of public education in Massachusetts, one finds that even in colonial times Massachusetts was a leader in public education.⁴¹⁰ Indeed it was the model of public education developed by the Puritans of Massachusetts that provided the very principles upon which all American public education is based.⁴¹¹ Moreover, it was in part the contribution that the Massachusetts public education system had made to the struggle to form a democratic government in America that led the framers to include an education provision in the first Massachusetts constitution.⁴¹² According to historians, this unique constitutional provision embodied a conception of education "far ahead of its time."⁴¹³

⁴⁰⁷ See School District Comparisons, *supra* note 374.

⁴⁰⁸ See generally *Pirrone v. City of Boston*, 364 Mass. 403, 405, 305 N.E.2d 96, 98 (1973).

⁴⁰⁹ See generally E. P. CUBBERLEY, *PUBLIC EDUCATION IN THE UNITED STATES* 1-80 (1926).

Although this note discusses Massachusetts public education only through the time that the Massachusetts Constitution was adopted in 1780, the leadership that Massachusetts provided in public education for the rest of the country after this date is well documented in Cubberley's book. See generally *id.*

⁴¹⁰ *Id.* at 23.

⁴¹¹ *Id.*

⁴¹² 8 PAPERS OF JOHN ADAMS, MARCH 1779-FEBRUARY 1780 229 (1989) (editorial note) [hereinafter *PAPERS OF JOHN ADAMS*]. Massachusetts was the first state to submit its constitution directly to the people for ratification. Bellingham, Colrain, and Sutton were the only towns to vote against the education provision. O. AND M. HANDLIN, *THE POPULAR SOURCES OF POLITICAL AUTHORITY, DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780* 29 (1966).

⁴¹³ Cubberley, *supra* note 409, at 89-90.

Massachusetts adopted the education provision in its state constitution in 1780 as part of the original Massachusetts Constitution, and it remains unchanged today.⁴¹⁴ Penned by John Adams, it was the first state provision for education in America that was directly ratified by the people, and it was unique in two other respects. First, it was apparently the only place in the Massachusetts Constitution in which the word "duty" was used, and thus the only area in which the people assigned to the legislature an affirmative duty to act.⁴¹⁵ Second, the education provision was unique, according to historian Hart, simply because it existed.⁴¹⁶ Most states during this period had no provision for public schools in their constitutions at all.⁴¹⁷

⁴¹⁴ Compare PAPERS OF JOHN ADAMS, *supra* note 412, at 236, 260 (draft of constitution) with MASS. CONST. pt. II, ch. V, § 11 (1988). The preliminary deliberations on the Massachusetts Constitution actually date from October of 1779, when delegates from three towns met in Cambridge for the Constitutional Convention. *Id.* These delegates appointed Convention President James Bowdoin, Samuel Adams and future United States President John Adams to draft the constitution. *Id.* This subcommittee turned the writing of the draft over to former schoolteacher John Adams, who, in penning the Massachusetts education provision, wrote the first state provision for education that was directly ratified by the people. *Id.* Reportedly, Adams' favorite section of the constitution, this provision reads:

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of the legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and all the sciences, and all seminaries of them; especially the university at Cambridge, public schools, and grammar schools in the towns; to encourage private societies and public institutions, by rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctation in their dealings; sincerity, good humor, and all social affections and generous sentiment among the people.

Id. The wording of this provision is attributable solely to John Adams, as the Convention and the people of Massachusetts approved the draft of the provision with no change, and little dissent. *Id.*

⁴¹⁵ See MASS. CONST. pt. II, ch. V, § 2 (1988).

⁴¹⁶ A. HART, COMMONWEALTH HISTORY OF MASSACHUSETTS 207 (1929).

⁴¹⁷ CUBBERLEY, *supra* note 409, at 94-95. Historian E.P. Cubberley reported that New Hampshire, New Jersey, Delaware, Maryland, Virginia, South Carolina and New York, for example, all framed constitutions in 1777, and none made reference to education. *Id.* Similarly, Kentucky (1792), Tennessee (1796), Louisiana (1812) and Illinois (1818) made no reference to education in their first constitutions. Of the states that Cubberley noted had "good provisions" for education by 1820—Indiana, Maine, Massachusetts, New Hampshire and Vermont—all but Vermont had apparently based their education provision on sentiments expressed in the Massachusetts provision. The Vermont constitutional provision for education in 1777 expressed a much different idea on education from that which John Adams would pen, as it provided that the legislature should establish schools to instruct youth "at low prices." *Id.*

The success of John Adams in securing approval for the inclusion of a provision on education in the Massachusetts Constitution was, in fact, a feat other colonial leaders found difficult to achieve.⁴¹⁸ Thomas Jefferson, for example, had proposed in 1779 that Virginia approve comprehensive school legislation, but he could not win approval for his proposal.⁴¹⁹ Historian Cubberley noted that Jefferson had difficulty winning approval for this concept because no precedent existed for public schooling in Virginia for Jefferson to build on.⁴²⁰ Colonial Virginia had only provided schools for the poor, and had no history of support for public education. In Massachusetts, in contrast, the state had mandated compulsory public schooling that served all children for one hundred and fifty years before John Adams' constitutional provision on education was presented to the voters for approval.⁴²¹

The tradition of public education in Massachusetts, in fact, dated from the earliest days of the colonial period.⁴²² The Puritans of Massachusetts were the first to give form to the concept of free public education—one of the most important ideas in our country's history.⁴²³ Through a set of four laws passed in 1634, 1637, 1642 and 1647, the Massachusetts Bay Colony laid the foundation upon which all American public schools were constructed. These laws established important new ideas in education: that each town must provide schooling for all children, that the schools would be sup-

⁴¹⁸ *Id.* at 96.

⁴¹⁹ *Id.* at 89.

⁴²⁰ *Id.* at 89 n.1.

⁴²¹ See G. MARTIN, *THE EVOLUTION OF THE MASSACHUSETTS PUBLIC SCHOOL SYSTEM* 83 (1923). By 1700, there were 29 Latin grammar schools in Massachusetts; all but 10 of the secondary schools in existence in colonial America in 1700 were, in fact, found in Massachusetts. See CUBBERLEY, *supra* note 409, at 30, fig. 6. These Latin grammar schools contributed much to the fame of the colony as an education center, and it was the grammar schools of Boston, Braintree, Cambridge, Charlestown, Dorchester, Roxbury and Salem that were the main feeder schools to Harvard. *Id.* at 18 n.1, 31 n.1.

⁴²² K. Paulos [Strickland], *An Historical Review of Curriculum Research, 1918–1976*, 12 (1976) (Doctoral Dissertation available through Dissertation Abstracts). The Puritan schools, like all of the earliest schools in the United States, were based largely on ideas and institutions which the colonists brought from Europe. The purpose of the colonial schools in the United States, like their counterparts in Europe, was based in the church and religion. The real concern of the colonists was that all children learn to read in order to know the word of God. *Id.* at 13. Closely associated with the religious aim of instruction was the desire for schools to provide ethical and moral training. *Id.* at 14. Aims of education concerning the development within pupils of personal and social characteristics such as truth, honesty, justice, kindness and morality were generally included in statements of purposes of schools. The religious motive, however, was by far the dominant motive underlying popular education in the period. *Id.*

⁴²³ CUBBERLEY, *supra* note 409, at 24.

ported by equalized and compulsory taxation, and that the state could compel parents to send their children to school.⁴²⁴ Moreover, in contrast to schooling in other parts of colonial America, the Puritans intended the public schools to serve all children and not simply the poor, and the schools were to serve the state, and not just the church.⁴²⁵ Though the principle of free public education was not recognized in all of the northern states in the United States of America until 1850, the Massachusetts tradition of free public state-supported compulsory schooling was codified by 1647.

The success that Adams had in penning the first state education provision directly ratified by the people, then, was in part due to the strong Puritan tradition of public education that dated from the mid-seventeenth century. It was a tradition that was very much alive when Adams wrote the Massachusetts State Constitution, because the character of public schooling in 1780 was largely unchanged from Puritan times. Throughout the Revolutionary War period, for example, as during the Puritan era, few textbooks were available.⁴²⁶ As a result, the education offered when Adams wrote the state constitution, like the schooling provided in Puritan com-

⁴²⁴ *Id.* In colonial America, at least three clearly marked conceptions of education emerged in early American education. The parochial school concept, represented by Protestant Pennsylvania and Catholic Maryland, saw the church as controlling education with state interference discouraged. In these schools, education was totally dominated by church purposes. A second conception of education, reflecting the attitude of the Church of England, was present in Virginia, New York, New Jersey, Delaware, the Carolinas and Georgia. *Id.* These colonies conceived of public education as intended chiefly for orphans and children of the poor; children from better classes attended private schools. *Historical Review*, *supra* note 422, at 14. In New England, a third concept of education consisted of a religious state supporting an educational system of common schools, Latin grammar schools and a college. Significantly, the schools were seen as serving both religious and civic ends. Moreover, the schools were to instruct all children and be supported by the community. Our modern American school system evolved out of this concept of education following the separation of church and state. *Id.*

⁴²⁵ *Id.* In evaluating these early laws, Massachusetts historian George Martin noted that it was important to recognize that the idea underlying these laws was neither paternalistic nor socialistic. See MARTIN, *supra* note 421, at 87-88. Schools were to be maintained not because education was in the best interest of the child, but because the state would suffer if the child was not educated. The Massachusetts Bay Colony established schools not because they wanted to relieve parents of the responsibility of educating their children, but because the Colony would have more assurance that all children were being educated if the state provided schools. *Id.*

⁴²⁶ CUBBERLEY, *supra* note 409, at 23. At North Grammar School, for example, the curriculum was described as "the *Accidence* . . . *Aesop Fables* . . . *Clarkes Introduction* . . . *Tullies Epistles* . . . *Homer*." A scholar who attended John Lovell's Latin School in Boston from 1752 to 1759 reported: "We studied Latin from 8 o'clock till 11, and from 1 till dark . . ." See R. SEYBOLT, *THE PUBLIC SCHOOLS OF COLONIAL BOSTON, 1663-1775*, 72-73 (1969).

munities, was much simpler than today, and quite uniform throughout the commonwealth.⁴²⁷ As simple as this schooling was, however, the schooling offered in Massachusetts when the state constitution was adopted was significantly superior to that available in other colonies both in terms of the number of schools, and their reputation.⁴²⁸ And though there were apparently some inland districts around the time of the Revolutionary War that were reluctant to continue their financial support of town schools, Massachusetts nevertheless passed the education provision in the state constitution with little opposition.⁴²⁹

⁴²⁷ CUBBERLEY, *supra* note 409, at 111. Although the character of public education remained generally unchanged from colonial days, after 1750, two gradual changes in education occurred in the Massachusetts Bay Colony that had a profound effect not only on schools in Massachusetts, but also on the future organization of public schools across the United States. One key change that would affect the nature and control of the public schools in Massachusetts was the waning of religious influence throughout the colony. *Id.* at 59. By the end of the 1600s, town taxes supported schools and the only power of the minister was to accompany the town authorities in the visitation of schools. *Id.* at 74. The public schools in Massachusetts thus gradually moved from being "church" to state schools. *Id.* at 74-75. Massachusetts schools had always been placed under civil control, but before 1700 the civil and religious authorities were the same. *Id.* at 73. After 1750, the schools were clearly a function of the civic government, and by the time the Revolutionary War was fought, the people of Massachusetts saw the schools as under the control of the state. *Id.* at 75.

This decline in the importance of religion, in the schools and in the everyday life of the colonists as well, occurred in conjunction with another change—the breakdown of the New England "town." *Id.* at 68. Originally, each New England settlement was a unit varying in size from 20 to 40 square miles, and each of these units were called "towns." At the center of each town was a meeting house, and later the town school and town hall were built there. *Id.* at 69. All colonists had to live within one-half mile of the town center, send their children to town schools, and attend town meetings where the issues of the town and colony were discussed. Toward the end of the 1600s, this compact form of settlement disintegrated as the colonists began to scatter out and live on farming land. New settlements arose within the towns that were miles away from meeting halls and schoolhouses. The scattered colonists could not easily attend church in winter, and children could not possibly attend school. *Id.*

By 1725, there were many isolated settlements in the Massachusetts Bay Colony. *Id.* at 70. The colonists began to subdivide the town, and each subdivision fought for and soon obtained "local" rights. The first "local" right obtained by the subdivisions was to appoint their own minister, and then the subdivisions won the right to maintain their own roads. This growth of district-consciousness affected the schools, and each district either wanted its own school or it wanted the town school moved around the town so that all children had equal access to the school. *Id.* at 72-73. The colonists first tried to solve this problem by moving the town school from district to district. Later, each district was allowed to take back its tax from the town, and each district paid for and maintained its own school. By 1789, each school district in Massachusetts was able to elect school trustees, levy school district taxes and select teachers. This rise of the school district as the unit for school maintenance would eventually modify the future educational administration in almost every state, as, once again, a Massachusetts innovation set the pattern for American education. *Id.* at 68.

⁴²⁸ See generally *id.* at 17-31.

⁴²⁹ *Id.* at 59. Cubberley reported that younger people had founded the new towns

The state provision on education penned by John Adams, then, not surprisingly reflected this continuing Puritan tradition. In addition, Adams, like other colonial leaders, recognized the importance of the Puritan tradition in education for the future of Massachusetts and the nation.⁴³⁰ As early as 1765, for example, Adams had discussed the importance of the Puritan heritage and their educational efforts in a "Dissertation on the Canon and Feudal Law."⁴³¹ He considered the Puritan tradition in Massachusetts to be the ideal that his generation should follow.⁴³² Adams and other state leaders appreciated the contribution that the educational system founded by the Puritans had made to the movement for independence. As Governor of Massachusetts, John Hancock noted that education was the most efficient of the means by which the government had been raised to its "present height of prosperity."⁴³³ The early schools, he wrote, had enabled citizens to form and establish a civil constitution calculated to preserve their rights and liberties.⁴³⁴

The education provision that John Adams penned, however, reflected not only the Puritan heritage, but also the new role that the leaders of a new democratic nation envisioned for education.⁴³⁵ John Adams, like many state and national leaders, perceived the schools as an arm of the civil government that would provide the people with knowledge of use to them in their moral, political and

located in the wilderness away from the coast, and they had less interest in religion and learning than the original colonists. The inland towns also found financial support of public schools a heavy burden, and by 1750 there was a clear desire on the parts of the western towns for relief at least from the maintenance of a Latin grammar school, which seemed to many to be inadequate for the needs of the youth of a new land. *Id.* at 61-62, 61 n.1.

In a 1779 letter to John Adams, Samuel Adams wrote of his great fear that some of the gentlemen in the "Country" had begun to think that supporting public schools was too great a financial burden. H. CUSHING, IV *THE WRITINGS OF SAMUEL ADAMS, 1778-1802* 124 (1908). *Id.* "I wish," he wrote, "that they could hear the Enconiums that are given to N[ew] E[ngland] by some of the most sensible and publick spirited Gentlemen in the southern States, for the Care and Experience which have been freely borne by our Ancestors & continued to this time for the Instruction of youth" *Id.* If "Virtue and Knowledge," Samuel Adams continued, "are diffused among the people then [the people] will never be enslavd." *Id.* Samuel Adams, who later became Governor of Massachusetts, concluded that he hoped that his countrymen would never depart from the principles and maxims that the [Puritan] forefathers of Massachusetts handed down. *Id.*

⁴³⁰ J. HOWE, *THE CHANGING POLITICAL THOUGHT OF JOHN ADAMS* 40-42 (1966).

⁴³¹ *Id.*

⁴³² M. Gordon, *Union With A Virtuous Past, The Development of School Reform in Massachusetts, 1789-1837*, 9 (1974) (Doctoral dissertation available through Boston College).

⁴³³ CUBBERLEY, *supra* note 409, at 90.

⁴³⁴ *Id.* at 88-91.

⁴³⁵ See generally *id.*, at 88-91.

civic duties.⁴³⁶ The legislature was to "cherish" the elementary and secondary schools, and all types of educational institutions, and to promote a broad range of practical and academic subjects, including agriculture, arts, sciences, commerce, trades, manufactures and natural history.⁴³⁷ This schooling should include, Adams observed, "not merely . . . children of the rich and noble, but [children] of every rank and class of people, down to the lowest and poorest."⁴³⁸ Several years later, in 1793, Governor John Hancock confirmed that Massachusetts public schools apparently were meeting this goal, as he observed in an address to the state legislature that the grammar [elementary] and secondary schools offered "equal advantages" to rich and poor.⁴³⁹

In describing the type of education that was to be universally offered to the rich and the poor, Adams intentionally painted a broad picture of "education."⁴⁴⁰ This intentionally broad portrayal of education in the constitutional provision was matched by a broad range of values that education was expected to inculcate in the people.⁴⁴¹ Historian Hart interpreted this portion of the constitutional provision on education as describing a new role for the school in terms of the socialization of children.⁴⁴² He noted that the education provision was a general plea for the diffusion of "virtue" as well as "knowledge," and reported that Adams adopted this concept of "virtue" from the French philosopher Montesquieu.⁴⁴³ Virtue meant, in essence, that the people would be capable of using their own power wisely, and when necessary, would sacrifice their own

⁴³⁶ Gordon, *supra* note 432, at 15. Adams emphasized this civic purpose for education, and the importance of a broad and universal education, when he wrote:

The instruction of the people in every kind of knowledge that can be of use to them in the practice of their political and civic duties as members of society . . . ought to be the care of the public, and of all who have any share in the conduct of its affairs, in a manner that never yet has been practiced in any age or nation.

CUBBERLEY, *supra* note 409, at 90.

⁴³⁷ MASS. CONST. pt. II, ch. V, § 2.

⁴³⁸ CUBBERLEY, *supra* note 409, at 90.

⁴³⁹ *Id.*

⁴⁴⁰ See PAPERS OF JOHN ADAMS, *supra* note 412, at 233. One immediate objective that John Adams had in writing this section, historians note, was the establishment of an academy of men interested in arts, natural science and natural history, especially that of the United States. Adams reportedly suggested that such an institution, which he hoped to model on the great academies of England and France, be founded in 1779. In 1780, the year the constitution was adopted, Massachusetts did indeed charter the "American Academy of Arts and Sciences." *Id.*

⁴⁴¹ See MASS. CONST. pt. II, ch. V, § 2 (1988).

⁴⁴² See HART, *supra* note 416, at 207.

⁴⁴³ *Id.*

immediate good for the public good.⁴⁴⁴ In addition to encouraging the development of "virtue," the constitutional provision also reflected the belief that education could inculcate a wide range of moral qualities, including humanity and general benevolence, public and private charity, industry and frugality, honesty, sincerity, good humor and "all social affectations and generous sentiment among people."⁴⁴⁵

This role of education as a means of socializing children, which Adams expressed in the constitutional provision, was apparently widely held. In 1789, the Massachusetts legislature formally codified the earlier Puritan laws requiring that towns maintain schools, though technically the Puritan laws on education had remained in effect under the new constitution.⁴⁴⁶ In passing this law, the legislature specified what subjects the schools were to teach, adding a new provision on teaching morals. The 1789 law required that schools teach not only reading and writing, but also orthography and decent behavior. The teachers were to help their students understand that virtues such as piety, justice, industry and frugality would preserve and perfect the constitution, and secure the blessing of liberty.⁴⁴⁷

The Massachusetts provision on education, then, was originally adopted in 1780 and remains unchanged today. When adopted, this provision signified the importance that Massachusetts citizens attached to education simply by its existence in the state constitution.⁴⁴⁸ This importance was further underlined by the lengthy, detailed nature of the provision, which apparently contained the only place in the constitution where the people specifically assigned a "duty" to the state, and charged the legislature with an affirmative duty to act.⁴⁴⁹

This education provision was adopted at a time when schooling was relatively uniform across the state, and when state leaders extolled the value of these public schools because they provided an equal advantage to rich and poor.⁴⁵⁰ It was also adopted at a time when Massachusetts was a leader in education, both in terms of the quantity and quality of public schools, and when, following the 150

⁴⁴⁴ HOWE, *supra* note 430, at 88.

⁴⁴⁵ MASS. CONST. pt. II, ch. V, § 2 (1988).

⁴⁴⁶ MARTIN, *supra* note 421, at 87-88.

⁴⁴⁷ *Id.*

⁴⁴⁸ See HANDLIN, *supra* note 412, at 29.

⁴⁴⁹ See MASS. CONST. pt. II, ch. V, § 2 (1988).

⁴⁵⁰ CUBBERLEY, *supra* note 409, at 90.

year-old Puritan tradition, Massachusetts considered school attendance so important that it, unlike many other states, required parents to send their children to school.⁴⁵¹ The education provision was also adopted at a time when state leaders envisioned a universal and broad education as a means to improve society, to preserve the rights and liberties of the people, and to develop good citizens and socialize children.⁴⁵² Finally, this provision expressed a view on the role of education that other states apparently found compelling, as the Massachusetts provision on education appears to have served as a model for the education provisions in ten other states.⁴⁵³

⁴⁵¹ *Id.* at 23.

⁴⁵² See generally *id.*, *supra* note 409, at 88-91.

⁴⁵³ Arkansas, California, Indiana, Maine, Missouri, North Dakota, New Hampshire, Ohio, Rhode Island and Texas all have education provisions that are similar in thought to that of Massachusetts.

In New Hampshire, the education provision reads:

Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading of the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affectations, and generous sentiments, among the people.

N.H. CONST. art. 83.

Other state provisions similar to that of Massachusetts are somewhat shorter. The Arkansas provision, for example, reads as follows: "Intelligence and virtue being the safeguards of liberty and bulwark of a free and good government, that State shall ever maintain a general, suitable, and efficient system of free public schools." ARK. CONST. art. 14.

The California provision, for example, reads: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." CAL. CONST. art. IX, § 1.

The Indiana provision reads:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common schools.

IND. CONST. art. VIII, § 1.

Maine's constitutional provision reads:

A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to promote this important object, the Legislature are authorized, and it shall be their duty to require, the

VI. THE VIABILITY OF A CONSTITUTIONAL CHALLENGE TO THE MASSACHUSETTS SYSTEM OF FINANCING SCHOOLS

Between 1968 and 1990, courts in twenty-eight states considered the constitutionality of their state school financing plans. In challenging the constitutionality of these plans, plaintiffs sought court-ordered reform because the finance system resulted in unequal funding among the state's school districts, failed to ensure an adequate guaranteed source of income to provide a basic education, or failed to fund education on the basis of the needs of children. These plaintiffs have used three different legal arguments to estab-

several towns to make suitable provision, at their own expense, for the support and maintenance of public schools.

MAINE CONST. art. VIII, § 1.

The Missouri provision reads: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools . . ." MO. CONST. art. IX, § 1(a).

The North Dakota provision reads:

A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools.

N.D. CONST. art. VIII, § 147.

The Ohio Constitution of 1802 stated: "But religion, morality, and knowledge being essentially necessary to the good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience." OHIO CONST. art. VIII, § 3.

The Rhode Island provision reads:

The diffusion of knowledge, as well as of virtue, among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools, and to adopt all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education.

R.I. CONST. art. XII, § 1.

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

Massachusetts also served as an example for all of New England. The four Massachusetts Bay Colony laws that established free public tax-supported compulsory schools became the basis for legislation in all of the other New England colonies except Rhode Island. In 1650, for example, Connecticut adopted the Massachusetts law of 1647 almost verbatim, whereas in 1671, Plymouth Colony, which did not join Massachusetts until 1692, also adopted the Massachusetts law. In 1680, New Hampshire adopted the Massachusetts law almost unchanged; the state of Maine had identical laws as well because Maine was a part of Massachusetts until 1820. Thus, early in the colonial period most New England states, following the Massachusetts example, had firmly established the notion of state-mandated, state-supervised, and tax-supported schools. CUBBERLY, *supra* note 409, at 20.

lish their case for court-ordered reform: the fourteenth amendment, the state's equal protection clause, and the state constitution's provision on education. In assessing the viability of a constitutional challenge to the Massachusetts system of financing schools, the experiences of previous school finance plaintiffs in using each of these factual and legal arguments may be useful.

A. *The Fourteenth Amendment Argument*

The initial legal argument in school finance cases focused on unequal school expenditures among a state's school districts. This argument alleged that children from property-poor school districts were required to attend a school that provided them with a lower quality education because they lived in a poor area of the state. The fourteenth amendment was a logical basis for plaintiffs to choose to attack the legality of the state financing system that caused these funding disparities because the legal definition of equal educational opportunity had been defined, and had evolved, primarily through United States Supreme Court decisions interpreting the fourteenth amendment. In addition, by the mid-1960s, the Supreme Court had made a number of decisions that seemed to indicate that the Court would find unequal expenditures among a state's school districts unconstitutional under the fourteenth amendment because the finance law did not confer equal educational benefits on all children.⁴⁵⁴

The belief that the Supreme Court would hold unequal school expenditures unconstitutional, however, rested on the assumption that the right to a public education was "fundamental" under the Federal Constitution, and that it was illegal to provide children different educational benefits on the basis of the wealth of their school district. In *Rodriguez*, the Supreme Court rejected both of these assumptions, and held that education was not a fundamental right under the Federal Constitution, and that it was not illegal to provide differing benefits or impose differing burdens on people because of their wealth. A state's system of financing schools, the Supreme Court held in this 1973 decision, would be presumed constitutional unless it totally deprived a child of an education, or failed to provide children with the minimum education needed to

⁴⁵⁴ See *supra* notes 46-144 and accompanying text for a discussion of the evolution of the concept of equality of educational opportunity under the fourteenth amendment.

enjoy their right to free speech and to participate in the political process.⁴⁵⁵

In the years following the *Rodriguez* decision, plaintiffs in school finance cases have continued to allege that their state's system of funding schools violates the fourteenth amendment. All courts, however, that have considered this issue through 1989, have either rejected plaintiffs' attempts to distinguish their cases from *Rodriguez*, or have chosen to make a ruling on some other legal ground. If Massachusetts plaintiffs raised the fourteenth amendment argument, a different answer is unlikely.⁴⁵⁶

In assessing the fourteenth amendment argument, for example, one finds no evidence that any child in Massachusetts is being totally deprived of an education. With regard to the issue of providing a minimum education, accreditation problems and student failure of minimum competency tests may support an assertion that the education children are receiving in some Massachusetts schools is so deficient that they are unable to participate in the political process or to exercise their right to free speech. If plaintiffs could make this case, however, the Massachusetts Supreme Judicial Court ("SJC") would likely find that such a system would violate the state's equal protection clause as well. In this situation, the SJC would probably follow the approach used by all other courts confronting fourteenth amendment arguments after *Rodriguez*, and choose to decide the issue on the basis of the state constitution and avoid Supreme Court review.⁴⁵⁷

B. *The State Equal Protection Argument*

Following *Rodriguez*, school finance plaintiffs turned out of necessity to the state constitutional arena to seek court-ordered reform. One possible argument under the state constitution was that unequal school expenditures violated the state's equal protection clause. This two-part allegation followed the pattern of the fourteenth amendment argument. Specifically, the plaintiffs would attempt to invoke the usually fatal strict scrutiny of the court by arguing that education is a fundamental right, or that differences in per pupil expenditures among a state's school districts illegally

⁴⁵⁵ See *supra* notes 145-201 and accompanying text for a discussion of the *Rodriguez* decision.

⁴⁵⁶ See *supra* notes 216-44 and accompanying text for a discussion of previous cases in which courts have rejected the fourteenth amendment argument.

⁴⁵⁷ See, e.g., the discussion of *Robinson*, *supra* notes 216-236.

classify children on the basis of the suspect category of wealth. The New Jersey Supreme Court in *Robinson*, however, expressed concern about both of these arguments, and following the 1973 decisions in *Robinson* and *Rodriguez*, state equal protection arguments based on wealth as a suspect category have been successful only in California, Arkansas and Wyoming. The fundamental rights argument has been successful since *Rodriguez* and *Robinson* only in California, Connecticut and Wyoming.⁴⁵⁸

In assessing the likelihood that the SJC would declare the Massachusetts system of financing schools unconstitutional on the basis of the state's equal protection clause, it is clear that a statistical basis exists for declaring that the current financing system discriminates on the basis of the wealth of a school district. Massachusetts school districts are heavily dependent on property tax revenue, but their fiscal ability to raise funds based on property taxes varies enormously. Even if the state legislature required all towns to tax at the same rate for public school support, and devote the same amount of their municipal budget to school support, the significant difference in property values among Massachusetts towns would still result in differing amounts of money expended on education.⁴⁵⁹

Although a statistical basis appears to exist to declare that the Massachusetts system of financing schools illegally discriminates against children from property-poor school districts, the SJC might wish to avoid making a decision on this basis because of the implications that this decision might have for funding other services provided by local governments. The vast majority of the courts that have considered this "wealth as a suspect category" argument under their state's equal protection clause have apparently agreed with the New Jersey Supreme Court's observation in *Robinson* that wealth is not at all, per se, a suspect basis for raising revenues. If the SJC can base a decision on the constitutionality of the state's financing system on any other grounds, it will likely follow the route taken by most other courts and avoid holding that it is illegal to condition a state benefit like education or welfare, or a state burden like taxation, on the basis of wealth.⁴⁶⁰

⁴⁵⁸ See *supra* notes 237-91 and accompanying text for a discussion of the fundamental rights argument after *Robinson*.

⁴⁵⁹ See *supra* notes 373-408 and accompanying text for a discussion of the statistical basis for a legal challenge to the current system of financing Massachusetts schools.

⁴⁶⁰ See *supra* notes 237-91 and accompanying text for a discussion of courts which have considered wealth as a suspect category argument after *Robinson*.

The issue of education as a fundamental right in Massachusetts, on the other hand, presents fewer problems because of both the nature of the argument and the unique history of education in Massachusetts. In the first instance, for example, in arguing that a right is fundamental, plaintiffs are essentially trying to demonstrate that the right in question is so important and fundamental to the individual, that it should be treated specially. Under this argument, the state should not be allowed to interfere with this special right, or deliver unequal services that affect this right, unless a compelling reason exists for this interference or inequality. Thus, the fundamental rights argument does not necessarily imply that other services provided by the government are "fundamental" if the right that the plaintiffs seek to have declared fundamental can be distinguished from other state services or benefits. In addition, the fundamental rights argument will also likely present fewer problems for the SJC in the Massachusetts case, because Massachusetts has such a lengthy commitment to public education, and the emphasis on education in the constitution is so strong, that education can readily be distinguished from other services that the state has chosen to provide.⁴⁶¹

A Massachusetts school finance case could be formulated, for example, that would bear a striking resemblance to successful fundamental rights cases in Connecticut and Wyoming. In Connecticut, the Connecticut Supreme Court based its decision to declare education a fundamental right in part on the state's lengthy commitment to public education, dating from 1650.⁴⁶² The Connecticut Supreme Court also pointed to the legislature's recognition in other contexts of the importance of each child receiving an equal opportunity for access to a suitable education program. In Massachusetts, the state legislature has likewise recognized the importance of equal educational opportunity in other contexts, most notably in chapter 70, where part of the stated purpose of this state funding statute was to equalize educational opportunity.⁴⁶³

In Wyoming, the court pointed to the basic importance of education, as well as to its emphasis in the state constitution, in concluding that education was a fundamental right that Wyoming

⁴⁶¹ See *supra* notes 409-53 and accompanying text for a discussion of the history of education in Massachusetts.

⁴⁶² See *supra* notes 257-63 and accompanying text for a discussion of the school finance case in Connecticut.

⁴⁶³ See *supra* notes 409-53 and accompanying text for a discussion of the history of education in Massachusetts.

was illegally conditioning on the wealth of a child's school district.⁴⁶⁴ Massachusetts parallels arise here as well, because the framers of the Massachusetts Constitution apparently intentionally emphasized education in the constitution. The education provision was apparently the only place in the constitution that the legislature was assigned an affirmative duty to act. Moreover, historians have pointed out that it was unusual at the time that Massachusetts was adopting its first constitution for state constitutions to make any provision for public education at all.

In addition, as Jefferson's experience in Virginia illustrates, the inclusion of a provision on education in the Massachusetts state constitution was not an automatic gesture that was taken for granted. In light of evidence that some opposition to the continued public support of schools in Massachusetts arose in the western districts, the inclusion of an education provision in the state constitution is of added importance. Thus, ample reason exists for Massachusetts courts to consider education a fundamental right, and the current financing system unconstitutional, because the system does not distribute the benefits of education equally among all children.⁴⁶⁵

C. *The State Education Provision Argument*

The third legal argument that plaintiffs have used to challenge the constitutionality of their state's funding plan has been to allege that the financing system violates the education provision in the state constitution. This fact-specific argument was successful in the New Jersey, Washington, West Virginia, Kentucky, Montana and Texas cases, and in fact has been the only successful argument in the past seven years. Courts in these cases generally sought to define the meaning of their respective provisions by examining the plain meaning of the words, the context in which the provision was passed, and the intent of the framers. These courts then assessed whether factors such as unequal per pupil expenditures, lack of guaranteed funding, and failure to apportion funds based on the

⁴⁶⁴ See *supra* notes 255–56 and accompanying text for a discussion of the school finance reform case in Wyoming, and the relative importance of education in the Massachusetts State Constitution.

⁴⁶⁵ See *supra* notes 409–53 and accompanying text for a discussion of the history of education in Massachusetts.

needs of children, violated their state constitution's education provision.⁴⁶⁶

In the case of Massachusetts, the current system of financing schools results in substantial disparities in funding among the state's school districts. The state legislature has already implicitly recognized through chapter 70 that these funding disparities affect a child's opportunity and ability to learn. The current system of financing schools in Massachusetts also apparently leaves some school districts, and the children they serve, without adequate and guaranteed funding to meet even minimum accreditation standards. In addition, this system seems to penalize many children who have high educational needs by funding their education at a lower level than that of children in more affluent areas of the state. Unless one assumes that a \$60,000 difference in funds expended on a single classroom makes no difference at all, one must conclude that in Massachusetts the state is forcing children from property-poor school districts to attend state-mandated public schools that are inferior to those maintained in wealthier school districts. In doing so, the state is arguably affecting their ability to achieve not only in school, but in society as well.⁴⁶⁷

When one compares the results of this financing system with the Massachusetts state provision on education, it is difficult not to conclude that the current financing system violates this provision and is thus unconstitutional. The plain meaning of the Massachusetts education provision, the intent of author John Adams, the contemporary views of other state leaders, and the type of schooling that existed when the education provision was passed in 1780, all seem to indicate that the people of Massachusetts in ratifying this provision intended to provide equal educational opportunity to all children. Clearly, the current system of financing schools could not be characterized, as John Hancock described Massachusetts schools in the late 1700s, as providing "equal advantages to rich and poor."⁴⁶⁸ The current financing system also seems incongruent with the constitution's emphasis on virtue, or sacrificing for the public good, and it is doubtful if the current educational system is diffusing

⁴⁶⁶ See *supra* notes 252-75 and accompanying text for a discussion of the state education provision argument in other states.

⁴⁶⁷ See *supra* notes 373-408 and accompanying text for a discussion of the effect of unequal funding in Massachusetts.

⁴⁶⁸ See *supra* notes 435-39 for a discussion of John Adams view of public education at the time the constitution was written.

knowledge to all children in the manner anticipated by the framers of the constitution.

In addition to these factors, the current system of financing schools seems ill-prepared to serve the broad vital role for education outlined in the constitution. A financing system in which school districts have no guaranteed source of funds adequate to meet even minimum accreditation standards is not likely to preserve liberties, promote knowledge or inculcate social and moral values. Moreover, in placing the duty to cherish and monitor education with the state, it is unlikely that the framers of this provision intended to allow voters within a school district the option to fund their schools inadequately. Indeed, the entire tradition of education in Massachusetts prior to the adoption of the state constitution, as well as education as it existed when the constitution was adopted, points to an intent that the state ensure that towns maintain schools that are sufficiently funded to meet the educational goals stated in the constitution. In writing this education provision, John Adams could not have intended to promote a system of education that discriminated against children in poor areas of the state, provided an inferior education to those children with the greatest educational needs, and allowed local voters to choose to provide a less than adequate education for children living in their town.⁴⁶⁹

Thus, the SJC could hold that the current system of financing public schools in Massachusetts is unconstitutional on two potential bases. Both the lengthy commitment to public education in Massachusetts, and the emphasis on education in the state constitution, seem to provide ample reason for the SJC to elevate education to the status of a fundamental right. Such a designation would place the burden on the state to demonstrate why it should be allowed to condition the quality of a child's education on the wealth of his or her school district. Assuming that the state of Massachusetts invokes the "local control argument" used in other school finance cases, the SJC would likely hold that the state could meet the goal of local control of schools in other ways, and thus declare the Massachusetts system of financing schools unconstitutional.⁴⁷⁰

An alternate basis on which the SJC could declare the current system of financing schools unconstitutional would appear to be the

⁴⁶⁹ See *supra* notes 409–53 and accompanying text for a discussion of the history of education in Massachusetts.

⁴⁷⁰ See *supra* notes 409–53 and accompanying text for a discussion of the history of education in Massachusetts.

state's education provision. The current system of financing schools does not provide equality of educational opportunity for Massachusetts schoolchildren, which seems to have been the intent of the people of Massachusetts in ratifying this provision. The current financing system also provides an inferior education to some of the state's neediest children, which would seem to be inconsistent with the attainment of the broad societal goals that the Massachusetts education provision envisions. The current school system arguably does not diffuse knowledge in the manner the framers intended, given the broad role the framers envisioned for education. Finally, the current system of financing schools leaves local voters free to provide inadequate funding for public schools, a situation that clearly seems to contradict the very reason that the people of Massachusetts assigned the duty to cherish the schools to the state, and not to towns.⁴⁷¹

VII. CONCLUSION

The legal fight to achieve equality of educational opportunity for all children has spanned nearly a century, and has involved differing interpretations of this concept. One focus of the movement to achieve equality of educational opportunity has been to reduce the significant funding disparities that exist among a state's school districts when states choose to fund their schools partially through local property tax revenue. Those who believe that differences in the amount of money spent per child on education affect the quality of education the child receives have sought court-ordered reform of the funding plans which led to these differences.

Since 1968, when the first school finance case was decided, courts have considered the constitutionality of the state financing systems of twenty-eight states. School finance reform plaintiffs have argued that unequal funding among a state's school districts was unconstitutional on the basis of the fourteenth amendment, the state equal protection clause and the state education provision. Prior to 1989, however, the school finance reform movement was only moderately successful, and interest in court-ordered school reform seemed to be declining. Then, in 1989, within weeks of each other, courts in three states declared their respective state financing plans unconstitutional on the basis of their state education provision. In

⁴⁷¹ See *supra* notes 409-53 and accompanying text for a discussion of the history of education in Massachusetts.

the following year, another court declared its system of financing schools unconstitutional because it failed to meet the needs of disadvantaged children in certain court-identified urban school districts, and failed to provide adequate guaranteed funds for programs in these districts. By 1991, there was evidence of a revived interest in court-ordered school finance reform.

Massachusetts is one of twenty-two states in which courts have not yet ruled on the constitutionality of the state's system of financing schools. Statistically, the current system seems vulnerable to a constitutional challenge because there is a substantial difference in per pupil expenditures among the state's school districts, arguably a lack of sufficient guaranteed funding to ensure a minimum education for all children, and a failure to apportion funds based on the educational needs of children. Legally, it seems likely that plaintiffs could make a strong case that the current system of financing schools in Massachusetts violates the state's equal protection clause, as well as the state's constitutional provision on education. If Massachusetts is confronted with a legal challenge to the constitutionality of its system of financing schools, an ample statistical and constitutional basis exists for the Supreme Judicial Court to declare the Massachusetts system of financing schools unconstitutional.

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