



## School Funding: The Role of the Courts

In March 2018, the Washington State legislature voted to increase spending on teacher salaries and special education services by \$776 million, capping a six-year effort to comply with an order of the Washington Supreme Court. In June, the

court held that the state had complied and ended its jurisdiction. The court had ruled in 2012 that the state “had not met its duty to make ample provision for basic education.”<sup>1</sup> The court accepted a legislative task force’s plan for providing

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**by Michael A. Rebell**

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all students in the state an ample education, but because the legislature had not taken adequate steps to ensure that the plan would be sufficiently funded, the court had retained jurisdiction until its ruling this summer.

This far-reaching court decision, which has resulted in more than a 50 percent increase and an overall boost in annual K-12 spending of \$3.7 billion in the state, is part of a much larger national movement to ensure sufficient funding to provide all students an adequate education. Lawsuits challenging state methods for funding public schools have been launched in 46 of the 50 states, and in recent years they have been extraordinarily successful. Since 1989, plaintiffs have prevailed in over 65 percent of the final liability decisions in cases based on “adequacy claims”—assertions that all students have a constitutional right to a meaningful educational opportunity.

Although most of these cases are brought against the state, the governor, and the legislature, state boards of education and/or state superintendents and state education departments are also often joined as defendants. Generally, the state’s attorney general defends the action, with the active involvement of the governor and, at times, the legislative leadership. State boards and state superintendents are often asked to provide information and testimony to support the state’s case, but the extent to which they become involved in defending the state’s position varies substantially from case to case. Indeed, in New York, both the state commissioner and the head of the state Board of Regents cooperated extensively with the plaintiffs and provided strong testimony to support their case,<sup>2</sup> and in Kansas, the state board took an independent stance in the litigation.<sup>3</sup>

## Origins of the State Courts’ Involvement

The state courts’ active involvement in promoting equal educational opportunity in the schools resulted from the U.S. Supreme Court’s refusal to consider the extensive inequities in state systems for financing education. Substantial inequities in school funding have historically plagued education systems in almost all of the states, due to the fact that

the financing of public education has long been based primarily on local property taxes. Consequently, children who live in districts with low wealth and low property values—as most low income and most minority students do—will have substantially less money available to meet their educational needs.

A legal challenge to Texas’s education finance system, *Rodriguez v. San Antonio Independent School District*, reached the U.S. Supreme Court in 1973.<sup>4</sup> The *Rodriguez* plaintiffs lived in Edgewood, a district in the San Antonio metropolitan area whose students were approximately 90 percent Mexican American and 6 percent African American. The district’s property values were so low that even though its residents taxed themselves at a substantially higher rate than did the residents of the neighboring largely Anglo district, their average per pupil spending was only about half of that of the neighboring affluent district—even though their students’ needs were much greater. The Supreme Court acknowledged that Texas’s school finance system was highly inequitable, but it nevertheless denied the plaintiffs’ claim, primarily because it held that education is not a “fundamental interest” under the federal constitution.

The Supreme Court’s ruling in *Rodriguez* precluded the possibility of obtaining fiscal equity relief from the federal courts. Somewhat surprisingly, the state courts, which traditionally had not been innovators on constitutional civil rights issues, picked up the baton. Shortly after the U.S. Supreme Court issued its decision in *Rodriguez*, the California Supreme Court held that education is a fundamental right under the California constitution, even if it was not under the federal constitution.<sup>5</sup> Soon thereafter, courts in states like New Jersey, Connecticut, and West Virginia also declared their state education finance systems unconstitutional.

Although plaintiffs prevailed in most of the initial state court litigations, difficulties in actually achieving equal educational opportunity in these early cases seem to have made other courts less inclined to uphold similar claims. In some states, equity decisions resulted in more state aid flowing to low-wealth districts, but the main beneficiaries were taxpayers whose property tax bills were cut or capped while

little extra money actually went to the schools. In other situations, courts deferred to the legislature to devise a remedy for the inequities and then found themselves embroiled in prolonged litigations to compel the legislature to act or to improve inadequate remedies. Thus, in New Jersey, three years after the court's initial decision in *Robinson v. Cahill*,<sup>6</sup> the New Jersey Court had been involved in no less than five follow-up compliance litigations.

Courts in other equity cases directed the state legislatures to remedy the inequities by taking the seemingly obvious path of simply eliminating disparities in educational expenditures. Thus, in the *Serrano* litigation in California, the court held that wealth-related disparities among school districts (apart from categorical special needs programs) must be reduced to "insignificant differences," which it defined as "amounts considerably less than \$100 dollars per pupil." This equalization mandate, combined with the California vote for a constitutional cap on increases in local property taxes known as Proposition 13, dramatically leveled educational expenditures down. California had ranked fifth in the nation in per pupil spending in 1964–65; by 1994–95 it had fallen to 42nd.<sup>7</sup>

Despite an initial flurry of pro-plaintiff decisions in the mid-1970s, 15 state supreme courts had denied any relief to the plaintiffs as of 1988, compared with 7 states in which plaintiffs had prevailed. More recently, however, there has been a dramatic reversal: Since 1989, the highest courts in 25 states have issued decisions affirming or enforcing that right, while courts in 13 states have upheld defendants' positions. (Plaintiffs' success rate, though still substantial, has dropped somewhat since the 2008 recession; from 2009 through 2017 they have prevailed in about 50 percent of the cases.)

This dramatic turnaround in judicial outcomes appears to be related to a major shift in legal strategy by plaintiff attorneys. At the end of the 1980s, civil rights lawyers changed their focus—from equal protection claims based on disparities among school districts in the level of educational funding to claims based on opportunities for a basic level of education guaranteed by specific provisions in state constitutions. The education clauses

of virtually all state constitutions contain language that requires the state to provide all its students "an adequate public education,"<sup>8</sup> "a thorough and efficient education,"<sup>9</sup> a "high quality system of free public schools,"<sup>10</sup> or a "sound basic education."<sup>11</sup>

## The Shift to "Educational Adequacy"

The roots of this constitutional movement extend back to the 18th and 19th centuries. From our country's earliest years, public education advocates such as John Adams, Thomas Jefferson, and Benjamin Rush recognized that if the new experiment in republican government were to succeed, all citizens would need to take on basic civic responsibilities, and they would need a sound basic education in order to do so. As John Adams put it, the country's education system would need to be substantially expanded to increase knowledge and "raise the lower ranks of society nearer to the higher."<sup>12</sup>

State constitutions of the 18th century codified this democratic view of the importance of education. For example, the Constitution of the Commonwealth of Massachusetts, part II, ch. V § 2, penned largely by Adams in 1780, proclaims:

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 Legislators, and Magistrates, in all future periods of the Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the . . . public schools and grammar schools in the towns.

In the 19th century, Horace Mann and other proponents of the common school movement began to implement this vision by replacing the prior patchwork of private, religious, and pauper schools with a single school system available to the children of rich and poor alike. Excluded, of course, were the children

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of black slaves—the consequences of which haunt the United States to the present day. But the common schools nonetheless represented a significant leap in spreading the benefits of education across class lines.

The fierce political battle to implement these common school reforms culminated, in the latter half of the 19th century, in the incorporation of language into dozens of state constitutions that guaranteed the establishment of “a system of free common schools in which all the children in the state may be educated.” Some states further emphasized the importance of fully educating all citizens by calling for a “thorough and efficient system of common schools throughout the state.” The adequacy movement’s legal claims are based on such language in state constitutions, with plaintiffs in nearly every state using these phrases to argue that poorly funded schools violate students’ constitutional rights to a quality education.

“Standards-based” reforms in recent decades, adopted by virtually all states, provided an additional impetus for the adequacy approach. International comparisons in the 1980s revealed American students’ poor performance relative to their international peers, especially in science and mathematics. The standards-based reform movement responded by establishing high expectations for all students and by expanding educational opportunities to allow all students to meet these standards. The movement was initiated at the 1989 National Education Summit, which all 50 of the nation’s governors and a cadre of CEOs of major corporations attended, and the No Child Left Behind Act in 2002 accelerated it.

By the early 1990s, nearly every state had made a commitment to develop thoroughgoing statewide academic learning standards that would identify what students at each grade level needed to know, specify requirements for the proper training of teachers capable of providing instruction aligned with those standards, and provide aligned curricula or curricular guidelines, as well as the books, facilities, and other resources, necessary for proper instruction. Indeed, the proliferation of state standards, more than any other development, launched the current wave of adequacy lawsuits and spurred plaintiff victories.

State defendants had won most of the early educational funding cases, in part because judges lacked manageable standards for determining what amount of funding was equitable or for overseeing legislative formulas. This view was also clearly manifested in *Rodriguez*, where the U.S. Supreme Court stated that one of its reasons for refusing to remedy the blatant inequities in Texas’s system was a reluctance to jump into a maelstrom of unresolved education policy controversies. With the advent of the standards movement, plaintiffs in the state courts could point to a clear state definition of an “adequate” education—that is, the state education standards that state boards had set. These provided the courts “judicially manageable standards” that they could use as the basis for estimating the amount of money necessary to provide the opportunity for a sound basic education. The availability of these manageable remedial standards inclined many more judges to rule in plaintiffs’ favor.

Not surprisingly, most school districts that serve predominantly poor and minority students lack adequate funding to provide their students the opportunity to achieve the targets that states themselves had set. In these “adequacy” cases, courts focus on the substance of the education students are actually receiving in the classroom rather than comparing the funds that are available to each school district, as in the equity cases. Across the country, plaintiffs’ success in these cases resulted from the evidence they marshaled of widespread patterns of educational inadequacy that primarily affected low-income and minority students. For example, one poor rural Arkansas school district had a single uncertified mathematics teacher to cover all high school mathematics courses.<sup>13</sup> And although passing an examination in a laboratory science course is required for high school graduation in New York State, at the time of the trial, 31 of approximately 100 New York City high schools had no science labs.<sup>14</sup> Defendants have rarely been able to demonstrate that adequate resources are in fact being provided to students in low-income and minority areas. Where defendants have prevailed in adequacy cases, most state courts have leaned on arguments based on separation of powers and in their decisions declined to accept jurisdiction and



to even review the evidence because they have held that it is constitutionally inappropriate for courts to review policy decisions of the legislative and executive branches.<sup>15</sup>

The adequacy approach tends to elicit less political resistance at the remedial stage because rather than raising fears of “leveling down” educational opportunities available to affluent students, it promises to “level up” academic expectations. That is, although the lowest achieving students have the most to gain from standards-based reform, the reforms are comprehensive and meant to benefit all students.

The courts generally have rejected defendants’ attempts to interpret these education clauses in state constitutions as providing only limited rights, and “the concept of an adequate education emerging from state courts . . . goes well beyond a basic or minimum educational program that was considered the acceptable standard two decades ago.”<sup>16</sup> Essentially, what the court orders have done in these cases is to

require states to ensure that schools—and especially schools in poor urban and rural areas—have the resources to provide their students a fair opportunity to meet the state’s own standards and federal accountability requirements. They have ordered states to revise their education finance systems to ensure that districts with low property tax wealth will have sufficient funding to provide all their students a sound basic education.

## Accomplishments of the Adequacy Movement

Judicial intervention does not always spark achievement gains, especially when legislatures resist reform and courts do not steadfastly enforce their remedies. Yet overall, the results of judicial interventions in this area have been impressive. A January 2015 National Bureau of Economic Research study considered the impact of state supreme court decisions in 28

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states between 1971 and 2010.<sup>17</sup> It concluded that school finance reforms stemming from court orders have tended both to increase state spending in lower-income districts and to decrease expenditure gaps between low- and high-income districts.

Authors C. Kirabo Jackson et al. went further. In analyzing the effects of court-ordered funding reforms on students' long-term success, they found that a 20 percent increase in annual per pupil spending for K-12 low-income students led to almost one more year of completed education. In adulthood, these students experienced 25 percent higher earnings and a 20 percent decrease in adult poverty. The researchers posit that these results could reduce the achievement gap of adults who were raised in low- and high-income families by at least two-thirds.<sup>18</sup> Other recent studies have reached similar results.<sup>19</sup>

State boards of education have overwhelmingly approved standards-based reforms and have often stated that all children can achieve at the proficiency levels called for in the standards. The history of the state court education adequacy cases has shown that substantial gains in reducing achievement gaps can indeed be realized—if states provide schools sufficient resources to do so and schools use them well. In states where court orders to ensure adequate levels of education funding have been issued, state boards should therefore support judicial efforts. They should also support efforts of teachers and advocacy groups to ensure adequate funding in states where the courts have declined to take a stand. ■

<sup>17</sup>McCleary v. State 269 P.3d 227 (WA, 2012).

<sup>18</sup>In CFE v. State of New York, 801 N.E.2d 306 (2003), plaintiffs had originally joined the commissioner and the Board of Regents as defendants, but after the commissioner objected that much of the evidence of inequities in funding that plaintiffs had described in their papers was based on official reports and positions of the state's education department, the plaintiffs entered into a stipulation with the commissioner that removed him, the regents, and the education department as named defendants so long as they agreed to cooperate with plaintiffs in the discovery process and to testify without being subpoenaed if called to do so. (I was co-counsel for plaintiffs in this litigation.)

<sup>19</sup>See interview with Jim Porter and Jim McNiece on the Kansas state board in this issue, p. 32.

<sup>4</sup>Rodriguez v. San Antonio Independent School District, 411 U.S. 1 (1973).

<sup>5</sup>Serrano v. Priest, 557 P.2d 929 (Cal. 1976).

<sup>6</sup>Robinson v. Cahill, 303 A.2d 273 (N.J. 1973).

<sup>7</sup>Mark Schauer and Steve Durbin, "Protecting School Funding," *Sacramento Bee* (June 28, 1993), p. B14.

<sup>8</sup>Ga. Const. art. VIII, § 1, ¶ 1.

<sup>9</sup>N.J. Const. art. VIII, § 4, ¶ 1.

<sup>10</sup>Fla. Const. art. IX, § 1.

<sup>11</sup>N.Y. Constitution. Art. XI, § 1; *Levittown v. Nyquist*, 439 N.E.2d 359, 368-69 (NY, 1982).

<sup>12</sup>David McCullough, *John Adams*, quoted letter from John Adams to Matthew Robinson, 23 March 1786 (New York: Simon and Schuster, 2001), p. 364.

<sup>13</sup>Lake View Sch. Dist., No. 25 of Phillips County v. Huckabee (2001).

<sup>14</sup>CFE, 326, 334 n.4.

<sup>15</sup>See Michael A. Rebell, *Courts and Kids* (Chicago: University of Chicago Press, 2009), pp. 22-23. The majority of the state courts have, however, held that it is appropriate—and indeed it is the courts' responsibility—to determine whether the political branches are meeting their constitutional responsibilities. *Ibid.*, 25-26.

<sup>16</sup>Deborah A. Verstegen, "Judicial Analysis during the New Wave of School Finance Litigation: The New Adequacy in Education," *Journal of Education Finance* 24, no.1 (1998): 52-68, <http://eric.ed.gov/?id=EJ568583>.

<sup>17</sup>C.K. Jackson et al., "The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms," *NBER Working Paper* No. 20847 (Cambridge, MA: National Bureau of Economic Research, 2015).

<sup>18</sup>The authors note, however, that the spending changes they analyzed occurred during a period in which average school funding levels were much lower than they are at present. It is possible, therefore, that increases in education spending could have diminishing marginal impacts, meaning that to obtain learning gains of the same magnitude in future, even higher increases in spending might be required.

<sup>19</sup>See, e.g., Julien Lafortune et al., "School Finance Reform and the Distribution of Student Achievement," *IRLE Working Paper* #100-16 (Berkeley, CA: IRLE, revised 2016), <http://irle.berkeley.edu/files/2016/School-Finance-Reform-and-the-Distribution-of-Student-Achievement.pdf>. The authors find that the "reforms cause increases in the achievement of students in these districts, phasing in gradually over the years following the reform."

**Michael A. Rebell is executive director of the Center for Educational Equity, professor of practice in educational policy and law at Teachers College, Columbia University, and adjunct professor at Columbia Law School. He is author of *Flunking Democracy: Schools, Courts, and Civic Participation* (University of Chicago, 2018).**