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INTRODUCTION

Issues surrounding the amount of funding allotted for public schools have consistently been at the forefront of public debate. The September 2003 Phi Delta Kappa/Gallup Poll reports that, for the third straight year, school funding issues were cited by polled American taxpayers as the "biggest problem. . . that the public schools [in their community] must deal with", beating out other grave concerns such as discipline issues, overcrowding, and drug usage in the schools.[1] While some school funding equity advocates have lobbied successfully for remedy via the legislature, many have chosen to take their concerns before the courts.

The California Supreme Court decision in *Serrano v. Priest* (1971) marked what many scholars believe to be the beginning of the modern era in school funding litigation.[2] Inspired by the *Serrano* plaintiffs' success, many funding equity advocates believed that a U.S. Supreme Court victory would shortly follow. Two years after *Serrano*, however, the nation's highest Court largely foreclosed the option of federal funding equity challenges in *San Antonio v. Rodriguez.*[3] Thus, equity plaintiffs were forced to turn to state courts for relief. In the thirty-two years since *Serrano*, 36 states' highest courts have ruled on the merits of constitutional challenges to their states' funding systems, with 19 courts upholding states' systems of public school funding,[4] and 17 courts declaring school funding systems unconstitutional.[5]

While 36 state supreme courts have *ruled* on funding equity cases, litigation has been *filed* in 45 of the 50 states – with many states experiencing serial litigation.[6] The only states where funding equity litigation has not been filed are Delaware, Hawaii, Mississippi, Nevada, and Utah.[7] Despite the great number of funding equity cases which have already taken place, there is no suggestion that this stream of litigation is slowing. School funding cases are pending (at various levels) in at least 12 states, including: Alaska, California, Colorado, Connecticut, Iowa,

Kansas, Massachusetts, Montana, New York, North Carolina, Tennessee and West Virginia.[8]

Although the issues litigated in the post-*Serrano* cases are similar, the judicial approaches and outcomes have varied significantly. Plaintiffs have advanced a variety of legal theories, defendants have raised an array of legal defenses, and courts have often reached dissimilar results on apparently similar issues. Understandably, both scholars and practitioners experience difficulty acquiring a thorough understanding of school funding litigation because of the volume of cases, differences in state constitutional provisions, legislation, legal precedents and history, the difficulty of tracking serial litigation, and other factors.[9] Without a thorough understanding of legal developments in this area, it is difficult to make competent decisions about potential or pending school funding litigation. Since those disadvantaged by public school funding systems will likely continue to consider the use of litigation for relief, it is important that the scholars and practitioners potential litigants turn to for counsel have a comprehensive understanding of the law in the area of school funding litigation.

Based on an analysis of public school funding litigation since *Serrano v. Priest*,[10] this paper summarizes the law concerning several significant funding litigation issues including: factual establishments; linking expenditures to educational quality; establishing educational harm; equal protection challenges; education article challenges; and an assessment of the efficacy of school funding litigation since *Serrano*.

EXPENDITURES & EDUCATIONAL QUALITY

A common element in post-*Serrano* school funding litigation is the allegation that funding inequities among school districts result from the state's reliance on local property taxes to fund education. Plaintiffs commonly introduce evidence of disparities in the assessed valuation of property among local school districts. Plaintiffs then argue that disparities in assessed property valuations result in unequal financial resources for education and per pupil expenditures. Both plaintiffs and defendants expend significant resources in gathering and presenting statistical data regarding the extent and causes of funding inequities throughout the state.

Thus, it is key that plaintiffs establish the existence of significant disparities in assessed valuation and per pupil expenditures. However, even when this is achieved, these factual establishments are of limited value without persuasive evidence that the quantity of expenditures can be linked to measures of educational quality, and that educational harm results to children in fiscally disadvantaged schools. These last two issues have been the subject of significant legal and academic debate.

Courts have generally agreed that constitutional guarantees of free public education are guarantees of educational opportunity and not guarantees of equal dollar amounts per pupil.[11] Given this, plaintiffs must link expenditures to educational opportunity in order to use constitutional provisions to obtain more equitable funding. Since *Serrano*, no plaintiff has ultimately prevailed without convincing the court of the existence of a positive correlation between expenditures and educational opportunity.[12] The obvious explanation for this is that if expenditures do not effect the quality of educational opportunity, the funding equalization order sought by plaintiffs would not rationally promote the constitutional interest in educational opportunity the court is charged with

protecting.

Of the 36 state high courts which have ruled on funding equity cases, 17 have recognized the existence of a positive correlation between expenditures and educational opportunity.[13] The majority of courts ruling on the expenditure-educational opportunity question have held that money is a significant factor in providing educational opportunities, but that exact equality in per pupil expenditures is not constitutionally required.[14] Courts have recognized legitimate differences in educational needs and costs, and no state's highest court has required exact equality in per pupil expenditures.[15] Most courts recognizing the correlation between expenditures and educational opportunity have focused on assuring that all of the state's children have access to the degree of educational opportunity guaranteed by the state's constitution.[16] Thus, courts recognizing this correlation have tended to favor the employment of vertical, rather than horizontal, equity.

Four states' highest courts have expressly *not* accepted the correlation between expenditures and educational opportunity.[17] Further, the U.S. Supreme Court in *San Antonio v. Rodriguez* found the alleged correlation between expenditures and educational opportunity unproven, and upheld the state's system of public school funding.[18] To date, all courts finding the correlation unproven ruled in favor of the state.[19] Most, but not all of the 17 state courts recognizing a positive correlation between expenditures and educational opportunity ruled in favor of the plaintiffs. In four opinions state high courts recognized this correlation, but ruled in favor of the state.[20] Thus, the plaintiffs' establishment of a positive correlation between expenditures and educational opportunity appears to be an essential but not a sufficient factual showing necessary to win a school funding case.

Presenting evidence of educational harm to children in property poor districts is an extension of the expenditure-educational quality correlation argument. Evidence showing a demonstrable harmful impact on children resulting from lower expenditures provides a more tangible example of the inequities produced by a state's system of funding than more academic and abstract expenditure-quality arguments.

Rather than limiting their consideration to the statistical data discussed in many prior cases, some more recent opinions have more thoroughly examined the daily realities of children attending poorer schools. These more recent cases compare the circumstances of children in poorer schools to children in wealthier schools in the state, including an examination of the relative quality of facilities, curriculum, teaching staff, extracurricular offerings, etc.[21] But instead of merely comparing poorer and richer schools, these more recent cases attempt to make factual establishments concerning poorer schools' instructional programs in order to later measure these programs against an objective standard of adequacy required by the state's constitution.[22]

Although state constitutions vary widely, equity plaintiffs' claims have been largely similar. Plaintiffs have generally based their litigation strategies on state equal protection guarantees and/or education article provisions.[23]

EQUAL PROTECTION CHALLENGES

State courts' analyses of equal protection challenges in school funding cases have been largely uniform because of the pervasive influence of the federal model of equal protection analysis.[24] The issues generally

considered are: 1) whether education is a fundamental right; 2) whether the plaintiffs constitute a suspect class; 3) what level of judicial scrutiny is appropriate in reviewing the state's system of funding; and 4) whether the state has an appropriate justification for inequities in the public school funding system.

Whether Education is a Fundamental Right

In view of the fact that provisions concerning state support of education are expressly included in all state constitutions, the *Rodriguez* explicit-implicit test of fundamentality would conclude that education is a fundamental right in all states. However, most state courts have rejected the *Rodriguez* test of what constitutes a fundamental right.[25] The Supreme Court of California, for example, rejected the *Rodriguez* test and instead views as fundamental those interests that "because of their impact on those individual rights and liberties which lie at the core of our free and representative form of government, are properly considered 'fundamental'."[26]

Whether education is deemed a fundamental right can be of great significance. Most states require strict scrutiny when reviewing state actions which impinge on fundamental rights.[27] In contrast, a mere rational basis test is generally applicable to interests which are not deemed fundamental.[28] Generally, the level of scrutiny applied determines the outcome.[29] Therefore, the determination of whether education is a fundamental right is an important issue under equal protection analysis,[30] at least where the federal model of equal protection analysis is followed.[31]

Whether the Plaintiffs Constitute a Suspect Class

Suspect classes under federal precedents are traditionally "those based on race, alienage, and national origin."[32] Justice Marshall, dissenting in *Rodriguez*, argued that "personal poverty may entail much the same social stigma as historically attached to certain racial or ethnic groups."[33] While at least two courts have accepted this argument in the school funding context,[34] it is likely that the majority of courts will continue to reject this argument.[35] Recognizing poverty as a suspect classification may implicate other areas of social welfare legislation, with the possibility of opening the floodgates of litigation in these politically volatile areas.

Level of Judicial Scrutiny

The level of judicial scrutiny applied to a state funding system largely determines the outcome.[36] To survive strict scrutiny the state must establish that its differential treatment is necessary to a compelling interest and narrowly tailored to achieving that interest, a very difficult burden to meet.[37] In practice, state actions subjected to strict scrutiny rarely survive this rigorous legal test.[38] State actions tested under intermediate scrutiny are subjected to a less rigorous test, but must be substantially related to an important interest to survive a legal challenge.[39] In contrast, it is relatively easy to satisfy the low level scrutiny applied to state actions not subject to strict or intermediate scrutiny. These state actions need only be rationally related to a legitimate governmental interest.[40]

In most cases, when strict scrutiny was applied the state's system of school funding was overturned.[41] When a rational basis test was applied the state's system of school funding was generally upheld.[42] The application of intermediate scrutiny in school funding cases is infrequent.[43]

State Justifications for Inequality

When courts follow the federal model of equal protection analysis, to withstand strict scrutiny the state must "demonstrate some compelling State interest to justify the unequal classification."[44] The state will generally fail to meet this heavy burden of proof.[45] In the cases in which intermediate scrutiny has been applied no adequate justification has been identified.[46] Remaining for consideration is what state justification is accepted when the court applies a rational basis test. When courts have applied a rational basis test to school funding systems challenged under equal protection guarantees, two courts have rejected the rationale of local control.[47] Other courts have accepted the rationale of local control as sufficient justification for unequal funding systems.[48]

EDUCATION ARTICLE CHALLENGES

State judicial resolutions of education article challenges generally involve a three-step process: 1) The court must interpret the meaning of the education article; 2) Based on the results of this interpretation the court must determine the magnitude of the state's constitutional duty to support education; and 3) The court must determine whether the state has met the assigned constitutional obligation.

Interpreting the Education Article

Some legal scholars have suggested that education articles can be divided into a four-part framework based on the apparent strength of the constitutional language.[49] Under this framework, category I clauses impose only a minimal educational obligation on the state,[50] category II clauses impose a slightly higher duty requiring a certain minimum standard of quality,[51] category III clauses contain stronger and more specific mandates,[52] and Category IV clauses impose the highest level of state obligation.[53] In theory, the likelihood that a state's system of funding will be overturned is the lowest in category I and the highest in category IV. However, a review of judicial decisions on school funding challenges indicates no consistent pattern.[54]

Although there are wide variations in judicial interpretations of constitutional language, there appears to be some consistency regarding the methodology of interpretation. In school funding cases, courts have used three methods of constitutional interpretation: 1) historical analysis of constitutional debates and early legislative interpretations;[55] 2) the plain meaning of constitutional language;[56] and 3) a review of other judicial interpretations of similar language.[57] The majority approach is historical analysis. However, courts commonly use a combination of these modes of analysis.[58]

Determining the Magnitude of the Duty

Judicially interpreted state duties have ranged from a declaration that children had a "constitutionally paramount . . . right to be amply provided with an education,"[59] to near total deference, finding that "the framers of the constitution have left the legislature free to choose the means of funding the schools."[60] Courts that found high levels of legislative duty to support education generally determined that the state constitution allowed less legislative discretion in school funding. These courts were more likely to find that the constitution prohibited significant funding disparities.[61] In contrast, courts that found relatively low levels of legislative duty to support education generally determined that the state constitution allowed broad legislative discretion in school funding; did not require substantial equality in expenditures; and required only a basic or a minimally adequate education.[62]

Determining Whether the State Has Met the Assigned Constitutional Obligation

A determination of whether the state has met its constitutional duty to support education involves measuring the factual findings regarding the state's funding system against the judicially determined constitutional standard. Those systems falling below the constitutional standard are overturned,[63] and those meeting or exceeding the constitutional mandate are upheld.[64] If the court determines the constitution establishes a high degree of legislative duty to support education, the state's system is generally declared unconstitutional.[65] If the court finds a low degree of legislative duty, the state's system is generally upheld.[66]

REVIEWING THE EFFICACY OF SCHOOL FUNDING LITIGATION

Scholars have examined the efficacy of judicial mandates for school funding reform, reaching diverse conclusions.[67] School funding litigation has resulted in roughly as many decisions upholding challenged funding systems as it has in decisions declaring challenged systems unconstitutional. In many cases, decisions declining to declare school funding systems unconstitutional have been perceived by legislators as judicial approval of the challenged funding system, making it even more difficult to persuade reluctant legislators of the need for reform. But even in those cases declaring funding systems unconstitutional, adequate reform is not guaranteed merely by success in litigation.

Once a court decides to issue an order for reform in a school funding equity case many factors effect the efficacy of that order. Among these factors are the fiscal situation of the state. Several courts have held that state fiscal difficulties do not excuse failure to comply with constitutional mandates to support education. In declaring the entire public education system of Kentucky unconstitutional and requiring a complete revision, the Supreme Court of Kentucky stated: "The taxpayers of this state must pay for the system, no matter how large, even to the point of being unexpectedly large or even onerous."[68] The Supreme Court of Texas held that "the legislature must establish priorities according to constitutional mandates; equalizing educational opportunity cannot be relegated to

an 'if funds are left over' basis."[69] The Supreme Court of Montana concurred, stating that "fiscal difficulties in no way justify perpetuating inequities."[70] While no court has stated they would allow state fiscal difficulties to effect their decision, La Morte and Williams recognized that:

> [E]conomic recessions, can act to thwart plaintiffs' hopes since the unavailability of revenue makes change more difficult and bolsters defendants' contention that workable solutions do not exist. When the fiscal condition of state governments is relatively healthy, equity may well enjoy popularity: state revenue is available for a "leveling up" process, which is clearly a more palatable task for both courts and legislatures than requiring a "leveling down." Speculation is difficult, however, as to whether economic conditions would lead to different judicial treatment of the issues presented.[71]

It may be difficult to establish that economic conditions effect judicial decisions on funding cases. But it is likely that the availability of funds will effect the legislative response to judicial reform mandates.[72] If the prospects for an acceptable legislative response are remote, courts may be hesitant to order reform when the environment for remedial efforts appears inhospitable, fearing judicial entanglement in protracted and unproductive serial litigation or legislative defiance that may call into question the power and authority of the court.

There are many other factors that critics of school funding litigation can identify to argue against using litigation to achieve equity goals. One factor is the apparent disparity between judicial goals and funding outcomes. In many instances the goals mandated by court orders were not the goals pursued through legislative reform. Funding suits were directed towards achieving equity, but gains were often in tax payer equity and in the overall adequacy of educational funding.[73] Further, even if courts are able to influence legislation, they cannot control private choices in education. As Yudof noted: "Affluent parents may even opt to minimize taxes in order to free up income for tuition expenses at private schools."[74] Court decisions may initially gain wide media attention, but after several years of serial litigation and little progress these cases may come to represent little more than a confirmation of the futility of reform where political will is lacking. Critics of school funding litigation can also point to the irony that many states are closer to equity without litigation than are other states with long histories of serial litigation.[75]

Despite the many problems associated with school funding litigation, there are still many instances in which litigation may be a useful tool in the struggle for greater funding equity. Courts can help to educate both the legislature and the public about the requirements of the state's constitution and the wisdom and necessity of complying with the educational mandates of the constitution.[76] In addition to this educative function, courts may also provide useful political cover for politicians. As Alexander recognized, if the state's legislature and governor have the will to change public school funding systems, but not the political courage, the court can provide the necessary political cover.[77] Members of the political branches can deflect political fallout towards the court's decision. A judicial-political coalition supporting reform may significantly aid reform efforts.[78]

Despite the many disappointments documented by researchers following judicial mandates for reform, it appears that under appropriate circumstances court mandates for reform have served to further legitimize the position of funding reformers, have generated significant media attention, and have been reasonably successful at

getting funding reform on the legislative agenda. Although judicial mandates for school funding reform are not the panacea some reformers had hoped for, nonetheless, litigation can be a useful tool in the struggle for legislative attention and in the attempt to communicate to the electorate the need for equitable and adequate educational opportunities for all children.

CONCLUSION

More than three decades after the Supreme Court of California's decision in *Serrano v. Priest* sparked nation-wide funding equity litigation, this litigation continues unabated, with no foreseeable end.[79] While *Serrano* served as the catalyst for the past thirty years of funding equity litigation, nether *Serrano* nor its progeny are mark the beginning or the end of the judicial-political dialogue concerning school funding equity. Because of the significant public interests in matters concerning education and taxation, controversy over funding of public schools is inevitable. As the nation's founders envisioned, perpetual debate continues concerning all significant public issues. This debate is necessary in a healthy democracy in order to promote an open and public exploration of the truth concerning controversial matters, to avoid the establishment of a rigid political orthodoxy, and to promote needed change in accordance with changing circumstances. As with other significant matters of public concern, the democratic debate and judicial-political dialogue concerning equitable funding of public schools will likely continue as long as there are public schools, courts, and open democratic forums for debate.

[1] Lowell C. Rose & Alec M. Gallup, *The 35th Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools*, PHI DELTA KAPPAN 41, 50 (September 2003).
[2] 487 P.2d 1241 (Cal. 1971). *See also* Note, *The Serrano Documents*, 2 YALE REV. L. & SOC. ACTION 77 (1971).
[3] 411 U.S. 1, 58-59 (1973) (although rejecting plaintiffs' federal constitutional claims, the Court noted that "this Court's action is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax . . . But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them").
[4] The public school funding systems of Alabama, Alaska, Colorado, Georgia, Idaho, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Virginia, and Wisconsin, have been upheld by their states' highest courts. *See* 2002 Ala. LEXIS 166 (Ala. 2002), Matanuska-Susitna v. State, 931 P.2d 391 (Alaska 1997); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Idaho Schools for Equal Educ. Opportunity v. Evans, 850 P.2d 724 (Idaho 1993); Committee v. Edgar, 672 N.E.2d 1178 (Ill. 1996); Unified School Dist. v. State, 885 P.2d 1170 (Kan. 1994); School Administrative Dist. v. Commissioner, 659 A.2d 854 (Me. 1995); Hornbeck v. Somerset, 458 A.2d 758 (Md. 1983); Milliken v. Green, 212 N.W.2d 711 (Mich. 1973); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); Fair School Fin. Council v. State, 746 P.2d 1135 (Okla. 1987); Coalition for Equitable School Funding v. State, 811 P.2d 116 (Or. 1991); Danson v. Casey, 399 A.2d 360 (Pa. 1979); City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995); Abbeville County School Dist. v. State, 515 S.E.2d 535 (S.C. 1999); Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994); Vincent v. Voight, 614 N.W.2d 388 (Wis. 2000).
[5] The public school funding systems of Arizona, Arkansas, California, Connecticut, Kentucky, Massachusetts, Montana, North Dakota, New Hampshire, New Jersey, Ohio, Tennessee, Texas, Vermont, Washington, West Virginia, and Wyoming have been declared unconstitutional by the state's highest court. *See* Roosevelt v. Bishop, 877 P.2d 806 (Ariz. 1994); Dupree v. Alma School Dist., 651 S.W.2d 90 (Ark. 1983); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); Helena v. State, 769 P.2d 684 (Mont. 1989); Bismarck Public School Dist. v. State, 511 N.W.2d 247 (N.D. 1994) (affirming a district court judgment that "the overall impact of the entire statutory method for distributing funding for education in North Dakota is unconstitutional" but lacking the super-majority required by the N.D. Constitution to declare statutes unconstitutional); Claremont School Dist. v. Governor, 635 A.2d 1375 (N.H. 1993); Abbott v. Burke, 575 A.2d 359 (N.J. 1990); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139 (Tenn. 1993); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); Edgewood v. Kirby, 777 S.W.2d 391 (Tex. 1989); Brigham v. State, 692 A.2d 384 (Vt. 1997); Seattle School Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Campbell County School Dist. v. State, 907 P.2d 1238 (Wyo. 1995).
[6] In 2002, for example, the Supreme Court of New Hampshire ruled on Claremont v. Governor ("Claremont III"), and the Supreme Court of Tennessee ruled on Tennessee Small School Systems v. McWherter ("Small Schools III").
[7] *See* Molly A. Hunter, *State-By-State Status of School Finance Litigations*, Campaign for Fiscal Equity (2003) available at www.accessednetwork.org.
[8] Pending cases include: Alaska (*Kasayulie v. State)*, California (*Williams v. State)*, Colorado (*Haley v. Colorado Department of Education)*, Connecticut (*Johnson v. Rowland)*, Iowa (*Coalition for a Common Cents Solution v. State*), Kansas (*Monoy v. State*), Massachusetts (*Hancock v. Driscoll*), Montana (*Columbia Falls Public Schools v. State*, New York (*CFE v. State*), North Carolina (*Hoke County v. State*), Tennessee (*McWherter v. State*), and West Virginia (*Tomblin v. State Board of Education*).
[9] There is substantial variation among scholars regarding which cases and issues should be considered in analyzing school funding litigation outcomes, resulting in significant differences in the sets of cases and issues reviewed. Even if agreement could be reached concerning the selection of cases and issues for review, merely counting outcomes in school funding cases can be difficult and misleading. For example, in Bismarck Public School Dist. v. State, 511 N.W.2d 247, 263 (N.D. 1994) a majority of North Dakota Supreme Court Justices affirmed a district court judgment that "the overall impact of the entire statutory method for distributing funding for education in North Dakota is unconstitutional" but the court lacked the super-majority required by the North Dakota Constitution to

declare statutes unconstitutional, creating confusion about whether plaintiffs or the state prevailed and uncertainty about the continued legality of the state's public school funding system. Similarly, in Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973) the Supreme Court of Arizona held that education was a fundamental right. Subsequently, in Roosevelt v. Bishop, 877 P.2d 806, 811 (Ariz. 1994) the Supreme Court of Arizona questioned this holding but declined to resolve it definitively, casting doubt regarding whether education remained a fundamental right in Arizona. Categorizing cases by plaintiff or defendant victories can also create confusion. Although plaintiffs in school funding cases generally represent economically disadvantaged districts, in Buse v. Smith, 247 N.W.2d 141, 144 (Wis. 1976) plaintiffs represented wealthy districts challenging a property tax recapture provision.

[10] 487 P.2d 1241 (Cal. 1971).

[11] *See* San Antonio v. Rodriguez, 411 U.S. 1, 24 (1973); Serrano v. Priest, 557 P.2d 929, 939 (Cal. 1976); Lujan v. Colorado, 649 P.2d 1005, 1018 (Colo. 1982); Thompson v. Engelking, 537 P.2d 635, 641-642 (Idaho 1975); Helena v. State, 769 P.2d 684, 691 (Mont. 1989); Abbott v. Burke, 575 A.2d 359, 369 (N.J. 1990); Robinson v. Cahill, 303 A.2d 272, 297-298 (N.J. 1973); Fair School Fin. Council v. State, 746 P.2d 1135, 1149 (Okla. 1987); Edgewood v. Kirby, 777 S.W.2d 391, 398 (Tex. 1989); Pauley v. Kelly, 255 S.E.2d 859, 865 n.7 (W. Va. 1979); Washakie v. Herschler, 606 P.2d 310, 336 (Wyo. 1980).

[12] *See* Dupree v. Alma School Dist., 651 S.W.2d 90, 92 (Ark. 1983); Serrano v. Priest, 557 P.2d 929, 939 (Cal. 1976); Serrano v. Priest, 487 P.2d 1241, 1253 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 368 (Conn. 1977); Rose v. Council for Better Educ., 790 S.W.2d 186, 198 (Ky. 1989); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 552 (Mass. 1993); Helena v. State, 769 P.2d 684, 687 (Mont. 1989); Abbott v. Burke, 575 A.2d 359, 377 (N.J. 1990); Robinson v. Cahill, 303 A.2d 273, 277 (N.J. 1973); Edgewood v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989); Seattle v. State, 585 P.2d 71, 97 (Wash. 1978); Pauley v. Bailey, 324 S.E.2d 128, 131 (W. Va. 1984); Washakie Co. School Dist. v. Herschler, 606 P.2d 310, 332 (Wyo. 1980). *But see* McDaniel v. Thomas, 285 S.E.2d 156, 160 (Ga. 1981); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 363 n.3 (N.Y. 1982) (recognizing this correlation but ruling in favor of the state).

[11] For cases recognizing a correlation between expenditures and educational opportunity, *see* Roosevelt v. Bishop, 877 P.2d 806, 809 (Ariz. 1994); Dupree v. Alma School Dist., 651 S.W.2d 90, 92 (Ark. 1983); Serrano v. Priest (Serrano II), 557 P.2d 929, 939 (Cal. 1976); Serrano v. Priest (Serrano I), 487 P.2d 1241, 1253 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 368 (Conn. 1977); McDaniel v. Thomas, 285 S.E.2d 156, 160 (Ga. 1981); Rose v. Council for Better Educ., 790 S.W.2d 186, 198 (Ky. 1989); Hornbeck v. Somerset, 458 A.2d 758, 764 (Md. 1983); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 552 (Mass. 1993); Helena v. State, 769 P.2d 684, 687 (Mont. 1989); Bismarck v. State, 511 N.W.2d 247, 261-262 (N.D. 1994); Abbott v. Burke, 575 A.2d 359, 377 (N.J. 1990); Robinson v. Cahill, 303 A.2d 273, 277 (N.J. 1973); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 363 n.3 (N.Y. 1982); Coalition for Equitable School Funding v. State, 811 P.2d 116, 117 (Or. 1991); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 141 (Tenn. 1993); Edgewood v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989); Pauley v. Bailey, 324 S.E.2d 128, 131 (W. Va. 1984); Washakie Co. School Dist. v. Herschler, 606 P.2d 310, 332 (Wyo. 1980).

[13] For cases recognizing a correlation between expenditures and educational opportunity, *see* Roosevelt v. Bishop, 877 P.2d 806, 809 (Ariz. 1994); Dupree v. Alma School Dist., 651 S.W.2d 90, 92 (Ark. 1983); Serrano v. Priest (Serrano II), 557 P.2d 929, 939 (Cal. 1976); Serrano v. Priest (Serrano I), 487 P.2d 1241, 1253 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 368 (Conn. 1977); McDaniel v. Thomas, 285 S.E.2d 156, 160 (Ga. 1981); Rose v. Council for Better Educ., 790 S.W.2d 186, 198 (Ky. 1989); Hornbeck v. Somerset, 458 A.2d 758, 764 (Md. 1983); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 552 (Mass. 1993); Helena v. State, 769 P.2d 684, 687 (Mont. 1989); Bismarck v. State, 511 N.W.2d 247, 261-262 (N.D. 1994); Abbott v. Burke, 575 A.2d 359, 377 (N.J. 1990); Robinson v. Cahill, 303 A.2d 273, 277 (N.J. 1973); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 363 n.3 (N.Y. 1982); Coalition for Equitable School Funding v. State, 811 P.2d 116, 117 (Or. 1991); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 141 (Tenn. 1993); Edgewood v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989); Pauley v. Bailey, 324 S.E.2d 128, 131 (W. Va. 1984); Washakie Co. School Dist. v. Herschler, 606 P.2d 310, 332 (Wyo. 1980).

[14] *Id*. *But see* Lujan v. Colorado, 649 P.2d 1005, 1018 (Colo. 1982); Thompson v. Engelking, 537 P.2d 635, 641-642 (Idaho 1975); Milliken v. Green, 212 N.W.2d 711, 719 (Mich. 1973); Danson v. Casey, 399 A.2d 360, 366 (Pa. 1979) (finding this correlation unproven).

[15] *See* Dupree v. Alma School Dist., 651 S.W.2d 90, 93 (Ark. 1983); Serrano v. Priest, 557 P.2d 929, 939 (Cal. 1976); Horton v. Meskill, 376 A.2d 359, 376 (Conn. 1977); Hornbeck v. Somerset, 458 A.2d 758, 780 (Md. 1983);

McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 522 (Mass. 1993); Helena v. State, 769 P.2d 684, 691 (Mont. 1989); Robinson v. Cahill, 303 A.2d 273, 297-298 (N.J. 1973); Edgewood v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989); Pauley v. Kelly, 255 S.E.2d 859, 865 n.7 (W. Va. 1979); Washakie Co. School Dist. v. Herschler, 606 P.2d 310, 336 (Wyo. 1980).

[16] The substantive degree of educational opportunity is determined by judicial interpretation of the state's constitutional provisions. *See* John Dayton, *An Anatomy of Public School Funding Litigation*, 77 EDUC. L. REP. 627, 641 (1992); William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 WEST'S EDUC. L.Q. 277 (1993).

[17] Lujan v. Colorado, 649 P.2d 1005, 1018 (Colo. 1982); Thompson v. Engelking, 537 P.2d 635, 641-642 (Idaho 1975); Milliken v. Green, 212 N.W.2d 711, 719 (Mich. 1973); Danson v. Casey, 399 A.2d 360, 366 (Pa. 1979) (finding this correlation unproven).

[18] 411 U.S. 1, 23-24 (1973).

[19] *Id*.

[20] McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Hornbeck v. Somerset, 458 A.2d 758 (Md. 1983); Levittown v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); Coalition for Equitable School Funding v. State, 811 P.2d 116 (Or. 1991).

[21] *See* Roosevelt v. Bishop, 877 P.2d 806, 808 (Ariz. 1994); Rose v. Council for Better Educ., 790 S.W.2d 186, 197 (Ky. 1989); Helena v. State, 769 P.2d 684, 687 (Mont. 1989); Bismarck Public School Dist. v. State, 511 N.W.2d 247, 261 (N.D. 1994); Abbott v. Burke, 575 A.2d 359, 395 (N.J. 1990); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 144 (Tenn. 1993); Edgewood v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989).

[22] *See* William H. Clune, *Educational Adequacy: A Theory and its Remedies*, 28 U. MICH. J.L. REF. 481 (1995).

[23] *See* John Dayton, *An Anatomy of Public School Funding Litigation*, 77 EDUC. L. REP. 627 (1992). *See also* R. CRAIG WOOD & DAVID C. THOMPSON, EDUCATIONAL FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS--AN ANALYSIS OF STRATEGIES (1996). The vast majority of plaintiffs in state supreme court cases (27 out of a total of 36) claim that their state finance scheme is unconstitutional for a combination of reasons, including both an equal protection, and education article claim. See *Milliken v. Green,* 212 N.W.2d 711 (Mich. 1973); *Horton v. Meskill* 376 A.2d 359 (Conn. 1977); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979); *McDaniel v. Thomas,* 285 S.E.2d 156 (Ga. 1981)*; Lujan v. Colorado*, 649 P.2d 1005 (Colo. 1982); *BOE, Levittown v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982); *Hornbeck v. Somerset*, 458 A.2d 758 (Md. 1983); *Dupree v. Alma*, 651 S.W.2d 90 (Ark. 1983)*; Fair School Finance Council v. State*, 746 P.2d 1135 (Okl. 1987); *Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988); *Helena Elem. School District v. State*, 769 P.2d 684 (Mont. 1989); *Abbott v. Burke,* 575 A.2d 359 (N.J. 1990); *Idaho Schools v. State*, 850 P.2d 724 (Ida. 1993*); Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *McDuffy v. Secretary of Education,* 615 N.E.2d 516 (Mass. 1993); *Skeen v. State,* 505 N.W.2d 299 (Minn. 1993); *Bismarck Public School District v. State*, 511 N.W.2d 247 (N.D. 1994)*; Scott v. Commonwealth*, 443 S.E.2d 138 (Va. 1994); *Roosevelt v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Unified School District v. State*, 885 P.2d 1170 (Kan. 1994); *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995); *Campbell County School District v. State*, 907 P.2d 1238 (Wyo. 1995); *Committee for Educational Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996); *Brigham v. State*, 692 A.2d 384 (Vt. 1997); *Vincent v. Voight*, 614 N.W.2d 388 (Wisc. 2000); and *James v. Alabama*, 2002 Ala. LEXIS 166 (Ala. 2002). The plaintiffs in four cases based their litigation on an equal protection claim only. See *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); *School Administrative District v. Commissioner*, 659 A.2d 854 (Me. 1995); *Matanuska-Susitna v. State*, 931 P.2d 391 (Alas. 1997); and *Claremont v. Governor*, 703 A.2d 1353 (N.H. 1997). Five plafintiffs based their litigation on an education article claim only. See *Seattle School District No. 1 v. State*, 585 P.2d 71 (Wash. 1978); *Rose v. Council for Better Education, 790 S.W.2d 186 (Ky. 1989); Edgewood v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Coalition for equitable school funding v. State*, 811 P.2d 116 (Ore. 1991); and *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997).

[24] For cases following the federal model of equal protection analysis, *see* Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Hornbeck v. Somerset, 458 A.2d 758 (Md. 1983); Board of Educ. v. Walter, 390 N.E.2d 813 (Ohio 1979); Fair School Fin. Council v. State, 746 P.2d 1135 (Okla. 1987); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989); Washakie Co. School Dist. v. Herschler, 606 P.2d 310 (Wyo. 1980). For cases rejecting this approach, *see* Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); Olsen v. State, 554 P.2d 139 (Or. 1976).

[25] For cases expressly rejecting the *Rodriguez* explicit-implicit test of fundamentality, *see* Serrano v. Priest, 557 P.2d

929, 952 (Cal. 1976); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1017 (Colo. 1982); Thompson v. Engelking, 537 P.2d 635, 644 (Idaho 1975); Hornbeck v. Somerset, 458 A.2d 758, 784-785 (Md. 1983); Robinson v. Cahill, 303 A.2d 273, 283 (N.J. 1973); Board of Educ. v. Walter, 390 N.E.2d 813, 818 (Ohio 1979); Fair School Fin. Council v. State, 746 P.2d 1135, 1149 (Okla. 1987); Olsen v. State, 554 P.2d 139, 144 (Or. 1976) (application of the *Rodriguez* test in Oregon would make "liquor by the drink" a fundamental right). Note also that the Supreme Court of New Jersey in *Robinson* rejected the entire framework of federal equal protection analysis, making a decision on fundamentality unnecessary. Instead, the court adopted a balancing test for analyzing equal protection claims. Under the *Robinson* test, "the court weighs the detriment to the education of the children of certain districts against the ostensible justification for the scheme of school financing. If the court determines the detriment is much greater than the justification, the financing scheme violates the guarantee of equal protection." Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973). *See also* Olsen v. State, 554 P.2d 139, 145 (Or. 1976) (adopting the *Robinson* test).

[26] Serrano v. Priest, 557 P.2d 929, 952 (Cal. 1976).

[27] *But see* Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989) (holding that eduction is a fundamental right, but applying a rational basis test). The method used by the Supreme Court of Arizona in *Shofstall* was later criticized by the Supreme Court of Arizona in *Roosevelt v. Bishop*, 877 P.2d 806, 811 (Ariz. 1994) ("We do not understand how the rational basis test can be used when a fundamental right has been implicated. They seem to be mutually exclusive. If education is a fundamental right, the compelling state interest test (strict scrutiny) ought to apply").

[28] *Roosevelt v. Bishop*, 877 P.2d 806, 811 (Ariz. 1994).

[29] *See* William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 225, n.30 (1990) (noting that strict scrutiny is strict in theory, fatal in fact).

[30] For cases expressly ruling that education is a fundamental right, *see* Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973) (*but see* Roosevelt v. Bishop, 877 P.2d 806, 811 (Ariz. 1994) declining to decide whether education is a fundamental right under the state's constitution); Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976); Serrano v. Priest, 487 P.2d 1241, 1255 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977); Rose v. Council for Better Educ., 790 S.W.2d 186, 192 (Ky. 1989); Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993); Bismarck Public School Dist. v. State, 511 N.W.2d 247, 256 (N.D. 1994); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979); Kukor v. Grover, 436 N.W.2d 568, 579 (Wis. 1989); Washakie Co. School Dist. v. Herschler, 606 P.2d 310, 333 (Wyo. 1980). For cases expressly rejecting education as a fundamental right, *see* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1017 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156, 167 (Ga. 1981); Idaho Schools for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 732 (Idaho 1993); Thompson v. Engelking, 537 P.2d 635, 647 (Idaho 1975); Gould v. Orr, 506 N.W.2d 349, 350 (Neb. 1993); Fair School Fin. Council v. State, 746 P.2d 1135, 1149 (Okla. 1987).

[31] A determination of fundamentality is unnecessary under the *Robinson* balancing test. For cases adopting the *Robinson* test, *see* Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973); Board of Educ. v. Walter, 390 N.E.2d 813, 818 (Ohio 1979); Olsen v. State, 554 P.2d 139, 145 (Or. 1976).

[32] BLACK'S LAW DICTIONARY 1297 (5th ed. 1979).

[33] San Antonio v. Rodriguez, 411 U.S. 1, 121 (Marshall, J., dissenting).

[34] *See* Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976); Washakie Co. School Dist. v. Herschler, 606 P.2d 310, 334 (Wyo. 1980).

[35] *See* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1021 (Colo. 1982); Thompson v. Engelking, 537 P.2d 635, 645-646 (Idaho 1975); Hornbeck v. Somerset, 458 A.2d 758, 787 (Md. 1983).

[36] *See* William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 225, n.30 (1990).

[37] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[38] As Justice Marshall recognized, strict scrutiny is generally "strict in theory, but fatal in fact." Fullilove v Klutznick, 448 U.S. 448, 519 (1980).

[39] Craig v. Boren, 429 U.S. 190 (1976).

[40] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

[41] *See* Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976); Serrano v. Priest, 487 P.2d 1241, 1259 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979). *But see* Skeen v. State, 505 N.W.2d 299, 315-316 (Minn. 1993) (ruling for the state and holding that education is a fundamental right

but applying strict scrutiny only up to the baseline of minimal adequacy in education, while applying a rational basis test to funding beyond the level of minimal adequacy); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994) (ruling for the state and holding that education is a fundamental right and that the state's system of funding withstands a strict scrutiny test).

[42] *See* Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1011 (Colo. 1982); Thompson v. Engelking, 537 P.2d 635, 645 (Idaho 1975); Hornbeck v. Somerset, 458 A.2d 758, 788 (Md. 1983); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 366 (N.Y. 1982); Board of Educ. v. Walter, 390 N.E.2d 813, 821 (Ohio 1979); Fair School Fin. Council v. State, 746 P.2d 1135, 1150 (Okla. 1987); Danson v. Casey, 399 A.2d 360, 367 (Pa. 1979); Richland Co. v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988); Kukor v. Grover, 436 N.W.2d 568, 579 (Wis. 1989). *But see* Dupree v. Alma School Dist., 651 S.W.2d 90, 93 (Ark. 1983); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 155 (Tenn. 1993) (holding that public school funding systems failed even a rational basis test).

[43] *See* Hornbeck v. Somerset, 458 A.2d 758, 788 (Md. 1983) (noting that Maryland's system of public school funding would withstand intermediate scrutiny, but rejecting intermediate scrutiny in favor of a rational basis test); Bismarck v. State, 511 N.W.2d 247, 259 (N.D. 1994) (holding that education is a fundamental right and applying intermediate scrutiny).

[44] Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979).

[45] *See* Serrano v. Priest, 487 P.2d 1241, 1260 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 374 (Conn. 1977). *But see* Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994) (finding that the state's system of funding withstood strict scrutiny review).

[46] *See* Bismarck v. State, 511 N.W.2d 247, 259 (N.D. 1994) ; Hornbeck v. Somerset, 458 A.2d 758, 788 (Md. 1983) (noting that Maryland's system of public school funding would withstand intermediate scrutiny, but rejecting intermediate scrutiny in favor of a rational basis test).

[47] Dupree v. Alma School Dist., 651 S.W.2d 90, 93 (Ark. 1983) (rejecting the rationale of local control as justification for funding disparities, and holding that the Arkansas system of school funding failed even a rational basis test); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 155 (Tenn. 1993) (holding that public school funding systems failed even a rational basis test); *See also* Bismarck v. State, 511 N.W.2d 247, 260-261 (N.D. 1994) (applying intermediate scrutiny and rejecting the state's rationale of local control, holding that local control in North Dakota "is undercut and limited by the legislature's enactment of requirements for statewide uniformity of education").

[48] *See* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1023 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156, 167 (Ga. 1981); Hornbeck v. Somerset, 458 A.2d 758, 789 (Md. 1983); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 366 (N.Y. 1982); Board of Educ. v. Walter, 390 N.E.2d 813, 821 (Ohio 1979); Olsen v. State, 554 P.2d 139, 146 (Or. 1976); Danson v. Casey, 399 A.2d 360, 367 (Pa. 1979); Kukor v. Grover, 436 N.W.2d 568, 580-581 (Wis. 1989).

[49] William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661 (1989).

[50] State constitutions with category I clauses are: Ala. Const. art. XIV, § 256; Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Conn. Const. art. VIII, § 1; Haw. Const. art. X, § 1; Kan. Const. art. VI, § 1; La. Const. art. VIII, § 1; Miss. Const. art. VIII, § 201; Neb. Const. art. VII, § 1; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, § 2; Okla. Const. art. XIII, § 1; S.C. Const. art. XI, Utah Const. art. X, § 1; Vt. Const. ch. 2. § 68.

[51] State constitutions with category II clauses are: Ark. Const. art. XIV, § 1; Colo. Const. art. IX, § 2; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Idaho Const. art. IX, § 1; Ky. Const. § 183; Md. Const. art. VIII, § 1; Minn. Const. art. XIII, § 1; Mont. Const. art. X, § 1; N.J. Const. art. VIII, § 4; N.D. Const. art VIII, § 1; Ohio Const. art. VI, § 3; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, § 1; Va. Const. art. VIII, § 1; W. Va. Const. art. XII, § 1; Wis. Const. art. X, § 3.

[52] State constitutions with category III clauses are: Cal. Const. art. IX, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX, 2d, § 3; Mass. Const. pt. 2, ch. 5, § 2; Nev. Const. art. XI, § 2; R.I. Const. art. XII, § 1; S.D. Const. art. VIII, § 1; Wyo. Const. art. VII, § 1.

[53] State constitutions with category IV clauses are: Ga. Const. art. VIII, § 1; Ill. Const. art. X, § 1; Me. Const. art. VIII, pt. 1, § 1; Mich. Const. art. VIII, § 2; Mo. Const. art. IX, § 1(a); N.H. Const. pt. 2, art. LXXXIII; Wash. Const. art. IX, § 1.

[54] Category I Category II Category III Category IV

Ala.	- Ark.	-Cal.	+ Ga.
Alaska	+ Colo.	Ind.	Ill.
- Ariz.	Del.	Iowa	Me.
- Conn.	Fla.	- Mass.	+ Mich.
Haw.	+ Idaho	Nev.	Mo.
Kan.	- Ky.	R.I.	N.H.
La.	+ Md.	S.D.	-Wash.
Miss.	+ Minn.	- Wyo.	
Neb.	- Mont.		
N.M.	- N.J.		
+N.Y.	- N.D.		
N.C.	+ Ohio		
+Okla.	+ Or.		
+S.C.	+ Pa.		
Utah	- Tenn.		
Vt.	- Tex.		
	+ Va.		
	- W. Va.		
	+ Wis.		

+ (upheld)
- (declared unconstitutional)

There is no strong correlation between the strength of constitutional language and the outcome of school funding cases. However, in defense of this framework, it should be noted that factors unrelated to constitutional language (differences in factual findings, constitutional histories, decisions based on equal protection rather than education article language, etc.) may have skewed the results in reported cases.

[55] For cases using the historical mode of analysis, *see* Roosevelt v. Bishop, 877 P.2d 806, 812 (Ariz. 1994); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1011 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156, 163 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635, 641 (Idaho 1975); Rose v. Council for Better Educ., 790 S.W.2d 186, 205 (Ky. 1989); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 523 (Mass. 1993); Claremont School Dist. v. Governor, 635 A.2d 1375, 1377 (N.H. 1993); Robinson v. Cahill, 303 A.2d 273, 287 (N.J. 1973); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 368 (N.Y. 1982); Board of Educ. v. Walter, 390 N.E.2d 813, 820 (Ohio 1979); Danson v. Casey, 399 A.2d 360, 367 (Pa. 1979); Richland Co. v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988); Seattle School Dist. No. 1 v. State, 585 P.2d 71, 85 (Wash. 1978); Pauley v. Kelly, 255 S.E.2d 859, 866 (W. Va. 1979).

[56] For cases using the plain meaning mode of analysis, *see* Hornbeck v. Somerset, 458 A.2d 758, 776 (Md. 1983); Helena v. State, 769 P.2d 684, 689 (Mont. 1989); Fair School Fin. Council v. State, 746 P.2d 1135, 1149 (Okla. 1987); Edgewood v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989); Scott v. Commonwealth, 443 S.E.2d 138, 141 (Va. 1994); Kukor v. Grover, 436 N.W.2d 568, 574 (Wis. 1989).

[57] *See* Dupree v. Alma School Dist., 651 S.W.2d 90, 92-93 (Ark. 1983). Note also that other courts use this method in addition to other modes of analysis, *see* Hornbeck v. Somerset, 458 A.2d 758, 777 (Md. 1983); Pauley v. Kelly, 255 S.E.2d 859, 866 (W. Va. 1979); Rose v. Council for Better Educ., 790 S.W.2d 186, 210 (Ky. 1989).

[58] For courts using multiple modes of analysis, *see* Rose v. Council for Better Educ., 790 S.W.2d 186, 205, 210 (Ky. 1989); Hornbeck v. Somerset, 458 A.2d 758, 776 (Md. 1983); Skeen v. State, 505 N.W.2d 299, 308 (Minn. 1993); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 150-151 (Tenn. 1993); Edgewood v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989); Pauley v. Kelly, 255 S.E.2d 859, 866 (W. Va. 1979); Kukor v. Grover, 436 N.W.2d 568, 574 (Wis. 1989).

[59] Seattle School Dist. No. 1 v. State, 585 P.2d 71, 92 (Wash. 1978).

[60] Richland Co. v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988).

[61] *See* Robinson v. Cahill, 303 A.2d 273, 295, 297 (finding that a disparity in expenditures violated the constitutional mandate, and that education funding was a state legislative responsibility, not a local responsibility); Seattle School Dist. No. 1 v. State, 585 P.2d 71, 92 (Wash. 1978) (holding that the legislature has a paramount duty to support education, and that children have a right to be amply provided with an education); Rose v. Council for

Better Educ., 790 S.W.2d 186, 205 (Ky. 1989) (holding that the legislature has the sole obligation to provide for education throughout the state by appropriate legislation, and that the system must be an efficient one); Edgewood v. Kirby, 777 S.W.2d 391, 396-397 (Tex. 1989) (holding that large disparities in funding are prohibited by the constitution, and that the legislature must devise a system which correlates tax efforts and educational resources).

[62] *See* Board of Educ. v. Walter, 390 N.E.2d 813, 824-825 (Ohio 1979) (granting the legislature wide discretion in school funding, limited only where a student is effectively deprived of educational opportunity); McDaniel v. Thomas, 285 S.E.2d 156, 165 (Ga. 1981) (the constitution requires only an adequate education and basic educational opportunity); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 359 (N.Y. 1982) (requiring only a sound basic education); Hornbeck v. Somerset, 458 A.2d 758, 780 (Md. 1983) (rejecting mathematical equality in school funding); Fair School Fin. Council v. State, 746 P.2d 1135, 1149 (Okla. 1987) (the constitution requires only a basic, adequate education); Richland Co. v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988) (the legislature is free to choose the method of school funding).

[63] *See* Seattle School Dist. No. 1 v. State, 585 P.2d 71, 97 (Wash. 1978); Washakie Co. School Dist. v. Herschler, 606 P.2d 310, 332 (Wyo. 1980); Helena v. State, 769 P.2d 684, 690 (Mont. 1989); Edgewood v. Kirby, 777 S.W.2d 391, 398 (Tex. 1989).

[64] *See* Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973); Thompson v. Engelking, 537 P.2d 635, 641 (Idaho 1975); McDaniel v. Thomas, 285 S.E.2d 156, 165 (Ga. 1981); Hornbeck v. Somerset, 458 A.2d 758, 780 (Md. 1983).

[65] *See* Robinson v. Cahill, 303 A.2d 273, 295 (N.J. 1973) (holding discrepancies in dollar input per child inconsistent with the demands of the constitution); Seattle School Dist. No. 1 v. State, 585 P.2d 71, 92 (Wash. 1978) (establishing a paramount constitutional duty for the state to amply provide for education); Edgewood v. Kirby, 777 S.W.2d 391, 396 (Tex. 1989) (the constitution prohibits the vast disparities as now exist).

[66] *See* Board of Educ. v. Walter, 390 N.E.2d 813, 824-825 (Ohio 1979) (interpreting the constitution as providing wide discretion in funding for the state, limited only where a child is effectively deprived of educational opportunity); McDaniel v. Thomas, 285 S.E.2d 156, 165 (Ga. 1981) (requiring merely a basic adequate education); Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 369 (N.Y. 1982) (the constitution only requires a basic sound education); Fair School Fin. Council v. State, 746 P.2d 1135, 1149 (Okla. 1987) (only a basic, adequate education is required); Richland Co. v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988) (the constitution leaves the legislature free to determine the method of school finance).

[67] *See* John Dayton, *Examining the Efficacy of Judicial Involvement in Public School Funding Reform in Public School Funding Equity Cases*, 22 J. EDUC. FIN. 1 (1996) (reviewing scholarly opinions concerning the efficacy of judicial action in funding equity litigation).

[68] Rose v. Council for Better Educ., 790 S.W.2d 186, 208 (Ky. 1989).

[69] Edgewood v. Kirby, 777 S.W.2d 391, 397-398 (Tex. 1989).

[70] Helena v. State, 769 P.2d 684, 690 (Mont. 1989).

[71] Michael W. La Morte & Jeffrey D. Williams, *Court Decisions and School Finance Reform*, 21 EDUC. ADMIN. Q. 59, 81 (1985).

[72] Many states' constitutions require the legislature to operate under a balanced budget. Law makers cannot spend funds the state is not legally authorized to spend, even for the most noble of purposes.

[73] G. Alan Hickrod et al., The Effect of Constitutional Litigation on Education Finance: A Preliminary Analysis, 18 J. EDUC. FIN. 180, 207-208 (1992).

[74] Mark G. Yudof, *School Finance Reform: Don't Worry, Be Happy*, NOLPE NOTES, May 1992, at 3.

[75] *See* Abbott v. Burke, 575 A.2d 359 (*Abbott II*) (N.J. 1990); Abbott v. Burke, 495 A.2d 376 (*Abbott I*) (N.J. 1985); Robinson v. Cahill (*Robinson VII*), 360 A.2d 400 (N.J. 1976); Robinson v. Cahill (*Robinson VI*), 358 A.2d 457 (N.J. 1976); Robinson v. Cahill (*Robinson V*), 355 A.2d 129 (N.J. 1976); Robinson v. Cahill (*Robinson IV*), 351 A.2d 713 (N.J. 1975); Robinson v. Cahill (*Robinson III*), 335 A.2d 6 (N.J. 1975); Robinson v. Cahill (*Robinson II*), 306 A.2d 65 (N.J. 1973); Robinson v. Cahill (*Robinson I*), 303 A.2d 273 (N.J. 1973). *See also* Carrollton-Farmers Branch v. Edgewood, 826 S.W.2d 489 (Tex. 1992); Edgewood v. Kirby, 804 S.W.2d 491 (Tex. 1991); Edgewood v. Kirby, 777 S.W.2d 391 (Tex. 1989); San Antonio v. Rodriguez, 411 U.S. 1 (1973).

[76] Many courts have written about the critical importance of public education in our democratic system of governance. *See* McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 524, 554-555 (Mass. 1993); Claremont School Dist. v. Governor, 635 A.2d 1375, 1381 (N.H. 1993).

[77] *See* Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28

HARV. J. LEGIS. 341, 343 (1991).
[78] John Dayton, *The Judicial-Political Dialogue*, 22 J.L. & EDUC. 323, 332 (1993).
[79] Serrano v. Priest, 487 P.2d 1241 (Cal. 1971).