Public School Financing Reform: Renewed Interest in the Courthouse, But Will the Statehouse Follow Suit?

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NOTES

PUBLIC SCHOOL FINANCING REFORM: RENEWED INTEREST IN THE COURTHOUSE, BUT WILL THE STATEHOUSE FOLLOW SUIT?

The past two decades have proved turbulent for reformers seeking the assistance of the judiciary in securing changes in public school financing.¹ During this time, federal and state courts have evaluated the constitutionality of public education systems funded primarily through local property tax assessments.² Opponents to


property tax-based funding claimed that these systems resulted in
significant funding disparities between property-wealthy and prop-
erty-poor school districts. Relying on the fourteenth amendment’s
equal protection clause, the equal guaranty or education clauses

Or. 9, 11, 554 P.2d 139, 140 (1976); Danson v. Casey, 484 Pa. 415, 418, 399 A.2d 360, 362
(1979); Richland County v. Campbell, 294 S.C. 346, 348, 364 S.E.2d 470, 472 (1988);
Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 392 (Tex. 1989); Seattle School
Va. 672, 673-74, 255 S.E.2d 859, 864 (1979); Kukor v. Grover, 148 Wis. 2d 469, 471, 436
N.W.2d 568, 570 (1988); Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310, 319

Although local property taxes are the primary source of funds for public education,
states have recognized a need to alleviate some of the disparities through state aid funding.
See Coons, Clune, & Sugarman, Educational Opportunity: A Workable Constitutional Test
funding methods have been employed. Id. at 312-13.

Flat grants, the oldest and simplest form of state aid, are merely an absolute distribu-
tion of state funds to each district based upon a pre-determined unit, i.e. per pupil or per
teacher hired, but the ability of such a system to alleviate disparities is questionable. Id. at
313-14. A second method of distribution of state funds is the foundation plan in which the
state guarantees the district that if it will tax itself at a specified minimum rate, the state
will supplement the difference between the per pupil yield from the tax and a specified per
pupil guaranteed dollar amount. Id. at 314. While such a system may alleviate funding dis-
parities to some extent, it does not eliminate the effect of wealth disparity. Id. Third, some
states utilize a combination of flat grants and foundation plans, which can take one of two
forms. Id. at 315. The flat grant can be added to the amount due the district from the
foundation plan thereby reducing disparities in an amount equal to the foundation plan
alone. Id. In the second approach, the flat grant is added to the amount yielded from the tax
in order to calculate the amount due under the foundation plan, and thus, this type of state
aid is counter equalizing since no benefit is given to the poor districts because they would
have received the same amount of state aid through the foundation plan if no flat grant
existed. Id.

See Coons, Clune, & Sugarman, supra note 2, at 312-16; Note, To Render Them Safe,
supra note 1, at 1648-49 & n.37. All states, except Hawaii, fund their public school systems
through a combination of state and local funding, with much of the funding dependent upon
local revenue generated through property taxes. Coons, Clune & Sugarman, supra note 2.
This dependence on local property taxes results in gross disparities in available funds be-
tween property-wealthy and property-poor school districts. See id. at 317. In Texas, prop-
erty wealth in the 100 wealthiest districts is more than 20 times greater than the average
property wealth of the 100 poorest districts, which results in an average of $2,000 more per
year available to each student in the wealthiest districts than to the students in the poorest
districts. Edgewood, 777 S.W.2d at 392-93.

Another example can be found in New Jersey, where a district of 3,000 students classi-
fied as property-poor has a budget of $8.6 million while a property-wealthy district of 3,000
students has a budget of $12.1 million. Abbott, 119 N.J. at 335, 575 A.2d at 383. This also
equates to an approximate $2,000 per pupil disparity between the property-poor and prop-
erty-wealthy districts. Id. at 334, 575 A.2d at 383-84.

U.S. CONST. amend. XIV, § 1. The fourteenth amendment states, in pertinent part,
that “[n]o State shall . . . deny to any person within its jurisdiction equal protection of the
laws.” Id.; see infra note 16 (discussion of two-tier test applying equal protection clause to
legislative acts).
of state constitutions, or some combination of the three, property-poor districts in twenty-four states challenged the constitutionality of financing systems which had produced disparate public school funding. These challenges met with varying degrees of success.

Until recently, the outlook for public school financing reform through judicial intervention was uncertain at best. However, since February 1989, four of the five state high courts that addressed this issue struck down the school financing mechanism in place in those states. In light of these decisions, the movement toward judicial intervention in public school financing reform litigation appears to be gaining momentum.

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8 State “equal guaranty” clauses are clauses in state constitutions which explicitly provide for equal protection and which state high courts have interpreted as having similar force and effect as the federal equal protection clause. See, e.g., Serrano I, 5 Cal. 3d at 596 n.11, 487 P.2d at 1249 n.11, 96 Cal. Rptr. at 609 n.11 (“[w]e have construed these provisions as ‘substantially the equivalent’ of the equal protection clause of the Fourteenth Amendment to the federal Constitution”). See generally Williams, Equality Guarantees in State Constitutional Law, 63 Tex. L. Rev. 1195, 1196-97 (1985) (detailed discussion of state court interpretation of state equal guaranty clauses).

6 State constitution “education clauses” as used in this Note refer to clauses found in all state constitutions (except Mississippi) which command state legislatures to establish some form of public education system. See generally Ratner, A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills, 63 Tex. L. Rev. 777, 777-814-16 (1985) (general discussion of state education clauses).

7 See supra note 2 (list of relevant decisions).

8 See Abbott v. Burke, 119 N.J. 287, 313-15, 575 A.2d 359, 372-73 (1990). Courts in Arizona, Colorado, Georgia, Idaho, Illinois, Maryland, Michigan, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, and Wisconsin have upheld local property tax-based funding as constitutional on both state equal guaranty and education clause grounds. Id. at 314 n.5, 575 A.2d at 373 n.5. Courts in Kentucky, Montana, New Jersey, Texas, Washington, and West Virginia struck down local property tax-based funding systems based on state education clause violations. Id. at 315 n.6, 575 A.2d at 373 n.6. Courts in Arkansas, California, Connecticut, and Wyoming struck down local property tax-based funding systems based on state equal guaranty violations. Id. at 315 n.7, 575 A.2d at 313 n.7.

9 See Note, To Render Them Safe, supra note 1, at 1641-42 nn. 12-16 (discussing inconsistency of outcomes in school finance reform litigation). An examination of the results reveals that of the 19 state courts to address the issue prior to 1989, 13 challenges to the existing financing schemes failed. See id.; see also Note, School Funding Challenge, supra note 1, at 1034 (“[w]hat actually prompts a court to choose one of the above alternatives may largely be a matter of conjecture”).


11 See Thro, The Third Wave: The Impact of the Montana, Kentucky, and Texas De-
This Note will explore the current trend in public school financing reform litigation. Part One will trace the history of public school financing litigation leading up to the recent successful challenges to local property tax-based funding. Part Two will discuss the rationales of the four state courts which recently rejected property tax-based school funding as violative of the education clauses of their respective state constitutions. Part Two will also note the similarities of these courts’ decision-making processes which may provide persuasive authority to courts considering this issue in the future. Part Three will address the ultimate question of whether this increased judicial activism will be met with the corresponding level of commitment on the part of state legislatures that will be necessary to effectuate an actual improvement in the quality of public education.

I. AN HISTORICAL OVERVIEW OF PUBLIC SCHOOL FINANCING REFORM LITIGATION

In 1971, the California Supreme Court’s decision in Serrano v. Priest (“Serrano I”) was the first high state court ruling to recognize constitutional violations resulting from local property tax based funding of public schools. The plaintiffs in Serrano I argued on the Future of Public School Finance Reform Litigation, 19 J.L. & Educ. 219, 222 (1990) (discussing education clauses of state constitutions).

For purposes of this Note, “trend cases,” “trend decisions,” and “trend courts” refer to the four most recent cases striking down public school funding systems based on local property taxes. See Rose, 780 S.W.2d at 215; Helena, 236 Mont. at 55, 769 P.2d at 691; Edgewood, 777 S.W.2d at 399; Kukor, 148 Wis. 2d at 509-10, 436 N.W.2d at 585.

5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (en banc) (“Serrano I”). The Serrano I proceeding only addressed whether the allegations of the complaint were sufficient to state a cause of action. Id. at 591, 487 P.2d at 1245, 96 Cal. Rptr. at 605. The court recognized that if the factual allegations of disparate funding were true, constitutional violations would exist. Id. at 617-18, 487 P.2d at 1265, 96 Cal. Rptr. at 625. The case was remanded for trial. Id. at 619, 487 P.2d at 1265, 96 Cal. Rptr. at 626. When the case reached the California Supreme Court again in Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (“Serrano II”), cert. denied, 432 U.S. 907 (1977), the local property tax-based funding system was struck down. Id. at 775-77, 557 P.2d at 957-58, 135 Cal. Rptr. at 373-74.

See Serrano I, 5 Cal. 3d at 619, 487 P.2d at 1266, 96 Cal. Rptr. at 626. While the Serrano I decision marked the first time a court recognized that a disparate funding system was unconstitutional, the first challenge to property taxed-based funding of public school systems was brought in 1968 in McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), aff’d sub nom. McInnis v. Ogilve, 394 U.S. 322 (1969). Plaintiffs in McInnis premised their claim on an “education needs” theory, suggesting that the fourteenth amendment required a funding system which apportioned available funding based on educational needs of the students in a particular district. Id. at 331. In ruling that the fourteenth amendment was not
gued that a financing system which causes disparities in expenditures among districts ultimately results in disparities in the quality of educational opportunities provided in those districts. Using the United States Supreme Court's strict scrutiny test for measuring legislative acts against the equal protection clause, the Serrano I court ruled that no compelling state interest was served by a funding system which furthered such disparities. Thus, the

violated, the McInnis court relied on three rationales which would be echoed in future court decisions: (1) the disbursement of educational funds was a legislative question; (2) even if the constitution required funding to be related to educational needs, the lack of "discoverable and manageable standards" by which to measure the fulfillment of the constitutional mandate renders the controversy non-justiciable; and (3) local control justifies a funding system based largely on local property taxes. Id. at 333-37; see also Burruss v. Wilkerson, 310 F. Supp. 572, 574 (W.D. Va. 1969), (pre-Serrano I decision holding that legislature is proper branch to evaluate these standards), aff'd, 397 U.S. 44 (1970). See generally Levin, Current Trends in School Finance Reform Litigation: A Commentary, 1977 DUKE L.J. 1099, 1126-36 (1977) (discussing history of public school financing reform litigation through 1977).

16 See Serrano I, 5 Cal. 3d at 590, 487 P.2d at 1244, 96 Cal. Rptr. at 604.
17 See J. Nowack, R. Rotunda & J. Young, CONSTITUTIONAL LAW § 14.3, at 528-37 (3d ed. 1986). In reviewing legislation under the equal protection clause, the Court has focused on balancing the competing interests of constitutionally protected guaranties with the desire to defer to legislative decisions. See id. at 529. Where the legislation has concerned economic or general social welfare, the Court has applied a "rational relation test." Id. at 529-30. Where as here, the legislation affects "fundamental values," the Court has applied a "strict scrutiny test." Id. The list of rights deemed fundamental by the Court has been substantial. See, e.g., Village of Belle Terre v. Boraas, 416 U.S. 1, 7-9 (1974) (right to associate); U.S. v. Orito, 413 U.S. 139, 142 (1973) (right to privacy in home); Dunn v. Blumstein, 405 U.S. 330, 339-40 (1972) (right to vote); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to procreate); Edwards v. California, 314 U.S. 160, 173 (1941) (right to travel).


17 See Serrano I, 5 Cal. 3d at 597-617, 487 P.2d at 1250-64, 96 Cal. Rptr. at 610-24. The court determined that the wealth based funding system created a suspect classification. Id. at 597-604, 487 P.2d at 1251-58, 96 Cal. Rptr. at 610-14. Additionally, education was found to be a fundamental right. Id. at 604-10, 486 P.2d at 1255-59, 96 Cal. Rptr. at 615-19. These conclusions subjected the funding scheme to the strict scrutiny test whereby the defendants were required to show a compelling state interest supporting the funding system. Id. at 601-15, 487 P.2d at 1259-63, 96 Cal. Rptr. at 619-23. The compelling interest asserted by the state, but ultimately rejected by the court, was the importance of local control over the education in each district. Id. at 610, 487 P.2d at 1260, 96 Cal. Rptr. at 620. The court found that the defendants failed in their burden and concluded that the funding system denied equal protection to the plaintiffs and others similarly situated. Id. at 610-15, 487 P.2d at 1259-63, 96 Cal. Rptr. at 619-23.
court concluded that the funding system violated both the fourteenth amendment equal protection clause and the California state constitution's equal guaranty provisions. This rationale established the foundation upon which future litigants challenged public education financing systems on federal equal protection and state equal guaranty grounds.

However, the 1973 United States Supreme Court decision in *San Antonio Independent School District v. Rodriguez* abruptly terminated the viability of the federal equal protection challenge. The plaintiffs in *Rodriguez* challenged the constitutionality of a public school funding system which resulted in disparate funding among property-wealthy and property-poor school districts on federal equal protection grounds. The *Rodriguez* court, like the *Serrano I* court, considered the strict scrutiny test in evaluating the merits of the equal protection challenge. The *Rodriguez* Court, however, concluded that wealth was not a suspect classification and that education was not a fundamental right protected by the equal protection clause. Thus, the propriety of the property tax-based funding system escaped rigorous strict scrutiny analysis and survived the Court's review on a showing that the system was rationally related to the governmental interest in maintaining local

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18 Id. California's equal guaranty provisions provide "[a]ll laws of a general nature shall have a uniform operation" and "[n]o special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature; nor shall any citizens, or class of citizens, be granted privileges or immunities which, upon the same terms shall not be granted to all citizens." *CAL. CONST.* art. I, §§ 11, 21.


21 *Id.* The *Rodriguez* decision resulted in a "set-back" to the school reform movement by initiating a "trend" of nonintervention in school financing matters. *Johnson*, supra note 1, at 331, 335-36.

22 See *Rodriguez*, 411 U.S. at 5.

23 *Id.* at 34.

24 *Id.* at 28. From the evidence presented, the Court was unable to find discrimination against any of the possible classes: (1) "poor" persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally "indigent," or (2) those who are relatively poorer than others, or (3) all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts. *Id.* at 19-20.

25 See *id.* at 35. In determining whether education is a fundamental right, the Court interpreted the Constitution to see if it was explicitly or implicitly guaranteed. *Id.* at 33-4. The Court found that it was not. *Id.* at 35.
control over public education. The Rodriguez decision foreshadowed three rationales which courts subsequently employed in upholding the constitutionality of property tax-based public school funding: (1) equal protection guaranties do not extend to equal educational funding; (2) judicially determinable standards do not exist for assessing equality and adequacy of education; and (3) the legislature is the proper institution to determine the adequacy of education.

Thirteen days after the Rodriguez decision, the New Jersey Supreme Court's decision in Robinson v. Cahill ("Robinson I") provided reformers with arguably the most important decision supporting public school financing reform litigation. The Robinson court was able to overcome the obstacle Rodriguez seemed to present by basing its decision on the education clause of the New Jersey State Constitution, which mandates that the legislature provide a "thorough and efficient system of free public schools" for New Jersey children. The court recognized "a significant connection between the sums expended and the quality of the educational

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26 See id. at 44. Central to the Rodriguez finding that local control was a rational basis supporting local property tax-based funding was the recognition that such a system offers the opportunity for residents of the district to participate in the decision-making process of how funds should be spent. Id. at 49-50. Plaintiff's argument, which the Court rejected, was that property-tax based funding failed to promote local control in the property-poor districts by virtue of the lack of funds to be controlled. Id. at 50-51.

27 See Johnson, supra note 1, at 333 (acknowledged Rodriguez's rationales and recognized trend of nonintervention which followed Rodriguez).


29 See Thro, supra note 11, at 228 ("second wave" of public school financing reform litigation attributed to Robinson I). See generally Ruvoldt, Educational Financing in New Jersey: Robinson v. Cahill and Beyond, 5 SEVEN HALL 1, 1-30 (1973) (analysis of Robinson I decision by plaintiffs' attorney).

30 N.J. Const. art. IV, § 7.

31 See Robinson I, 62 N.J. at 491, 303 A.2d at 294. The court declined to decide the equal guaranty issue, choosing instead to decide the case on the merits of the education clause challenge, stating "[m]echanical approaches to the delicate problem of judicial intervention under either the equal protection or the due process clauses may only divert a court from the meritorious issue or delay consideration of it." Id. at 491-92, 303 A.2d at 282. The court decided local property tax-based funding does not create a suspect classification based on wealth. Id. at 493-94, 303 A.2d at 283. To so hold, the court stated, would implicate other similarly funded governmental services. Id. The court found the fundamental right concept was too nebulous to determine whether education was a fundamental right in New Jersey. Id. at 498-99, 303 A.2d at 286. Such a finding, the court reasoned, would likewise implicate other governmental services that the state is obligated to provide. Id. at 497, 303 A.2d at 284-85. Equally obscure was the determination of whether or not such a funding scheme could be justified by a compelling state interest. Id. at 499, 303 A.2d at 286.
Having acknowledged this relationship, the court reasoned that New Jersey's property tax-based school funding system could not possibly satisfy the constitutional "thorough and efficient" mandate "unless we were to suppose the unlikely proposition that the lowest level of dollar performance happens to coincide with the constitutional mandate and that all efforts beyond the lowest level are attributable to local decisions to do more than the state was obliged to do." The Robinson I court's reasoning provided the impetus for public school financing reform through subsequent court challenges based on the education clauses of state constitutions.

Since Robinson I was decided, twenty-two state courts of last resort have debated the merits of the Serrano I, Rodriguez, and Robinson I rationales. Four major decisions in 1989 and 1990 suggest a developing trend in the decision-making process. These recent "trend cases," which tend to disregard the equal guaranty claims and focus instead on the state constitution education clause challenges, indicate the emergence of a growing consensus in the judiciary with regard to the issues raised in school financing reform litigation.

It is important to note that the Robinson I court decided that the "thorough and efficient" mandate was not being satisfied solely on the basis of evidence of disparate funding. See id. at 515, 303 A.2d at 295. The court recognized that dollar input is "plainly relevant" and no other evidence was presented by which compliance with the constitutional mandate could be measured. Id. at 515-16, 303 A.2d at 295-96. Many post-Robinson I decisions rejected the presumption of a correlation between dollar input and educational quality. See infra notes 95-96 and accompanying text (citing courts which rejected correlation of dollars and quality).

The ability to produce evidence proving that dollar input is relevant to educational opportunity would appear essential to a successful challenge. See infra notes 97-100 and accompanying text (citing courts recognizing correlation of dollars and quality).

A summary of the results of all of the state courts addressing the issue of the constitutionality reveals that prior to the 1989-90 decisions, 19 courts addressed the issue: three challenges succeeded on equal guaranty grounds, three succeeded on education clause grounds, and 13 challenges failed on both constitutional grounds. Id.; see also Ruvoldt, supra note 29, at 15-20 (detailed discussion of foundations established in Serrano I, Rodriguez, and Robinson I).

The interpretation of state education clauses professed in these recent decisions undoubtedly will be factored into future decisions on school funding. Id. Although none of these interpretations are binding on other states, a failure of a future court to consider the interpretations set forth in these decisions may tend to discredit
II. THE SIGNIFICANCE OF THE CURRENT TREND IN PUBLIC SCHOOL FINANCING REFORM LITIGATION

A. STATE CONSTITUTION EQUAL GUARANTY CHALLENGES

Courts have interpreted the equality provisions of their respective state constitutions to require a general protection of the laws of the state. In determining whether the disparities resulting from local property tax-based funding are violative of such provisions, state judges are free to interpret these provisions without consideration of federal precedent, subject only to the requirement that the interpretation does not contravene rights protected by the federal Constitution. Courts have adopted five distinct equal guaranty analyses in public education funding suits. This diversity in approach is not surprising given the fact that state constitutions contain a variety of equality provisions which were “drafted

the legitimacy of the decision. Id. For instance, citizens would be unlikely to understand why one state’s “thorough and efficient” mandate means equal educational opportunity, while in another state a similar clause demands only a minimum skills education. Id. It seems reasonable that the courts will consider sister state interpretations for guidance subject to the specifics of the education system in the state and of the constitutional history regarding the clauses. Id.

38 See Williams, supra note 5, at 1196. For example, the New Jersey constitution’s equal guaranty provision states that “[a]ll persons are by nature free and independent, and have natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.” N.J. Const. art. I, cl. 1.


40 See Serrano v. Priest, 18 Cal. 3d 728, 775-557 P.2d 929, 957, 135 Cal. Rptr. 345, 373 (1975), cert. denied, 432 U.S. 907 (1977); Horton v. Meskill, 172 Conn. 615, 576 A.2d 359, 374-75 (1977); McDaniel v. Thomas, 248 Ga. 632, 638, 285 S.E.2d 156, 159 (1981); Robinson v. Cahill, 62 N.J. 473, 480, 303 A.2d 273, 281, cert. denied, 414 U.S. 976 (1973); Fair School Fin. Council v. State, 746 P.2d 1135, 1144-47 (Okla. 1987); Note, To Render Them Safe, supra note 1, at 1670-78. Although most courts apply the Supreme Court’s strict scrutiny test, they approach the determination of fundamental right in various ways. Id. at 1671. One approach is to follow the Rodriguez method and determine that education per se is not a fundamental right. Id. at 1672. A second approach, which purports to follow Rodriguez, concludes that because the constitution explicitly provides an education clause, education is a fundamental right under the state constitution. Id. at 1673-74. A third approach is a determination of whether the right is central to a representative form of government. Id. at 1675. The fourth test focuses on an historical analysis and determines whether education is a fundamental right based upon the degree of emphasis the legislature has placed on education. Id. at 1676. A fifth approach is to reject Rodriguez altogether, and to declare a decision without specifying any criteria. Id. The final approach is to reject the federal framework in its entirety and establish an independent state framework. Id. at 1677-78.
differently, adopted at different times, and aimed at different evils."

In addition to this range in the interpretation of state equal guaranty provisions, courts have cautioned that extending equal protection guaranties to public school funding might also require that such protection extend to all governmentally-provided services funded at the local level. For instance, the Rodriguez court cautioned that if local property tax-based funding of public schools were found to be unconstitutional on equal protection grounds, it could also implicate the funding of the local police and fire departments, health care and hospitals, and public utilities. Similarly, the New Jersey Supreme Court in Robinson I cautioned that "the rudimentary scheme of local government . . . [would be] implicated by the proposition that the equal protection clause dictates statewide uniformity." It would appear that the combination of the courts' divergent interpretations of equal guaranty clauses and the concern that equal protection-based decisions on school financing issues could complicate other areas of local government has prompted the courts to rely primarily on education clauses in resolving public school financing reform disputes.

B. State Education Clauses

While the equal guaranty provisions of the various state constitutions differ significantly, the education clauses in forty-nine state constitutions mandating the establishment and maintenance

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41 Williams, supra note 5, at 1196-97.
42 See, e.g., Thompson v. Engelking, 96 Idaho 793, 803, 537 P.2d 635, 646 (1975) (cautioning ruling based on equal protection would implicate many local government entities such as police and fire departments, judiciary, road departments); Robinson I, 62 N.J. 473, 498-99, 303 A.2d 273, 284-85 (expressing concern about implication for other government units with fiscal control responsibility).
43 See Rodriguez, 411 U.S. at 54.
44 Robinson I, 62 N.J. at 482, 303 A.2d at 277. Courts in the past also have concluded that general state equal guaranty provisions do not require statewide uniformity in all situations to which they are applied. See James v. Valtierra, 402 U.S. 137, 147 (1971). In James, the court rejected plaintiffs' equal protection challenge to a state constitutional provision requiring approval by a majority of the voting community for developing, constructing, or acquiring low-rent housing projects, stating that the equal protection clause does not contemplate requiring mandatory referendums in all situations. Id.; West Morris Bd. of Educ. v. Sills, 58 N.J. 464, 477, 279 A.2d 609, 616, cert. denied, 404 U.S. 986 (1971). In Sills, the plaintiffs attacked the constitutionality of a state statute providing free transportation of children to private schools on equal protection grounds, and the court responded "[i]f the subject is appropriate for local preference or decision, a statute may provide for local option or referendum." Id.
of public schools fall neatly into four categories. Each category requires an incrementally stronger commitment by the legislature to education.

The education clauses at issue in the four recent trend cases fall within the category of clauses which imposes the second least stringent obligation. Because thirty-five states require a similar or stronger degree of legislative commitment, courts yet to address public school funding challenges under state education clauses are likely to follow the direction of the trend decisions.

In interpreting education clauses, courts essentially have reached one of two conclusions. Some courts have concluded that the education clause in question mandates substantial equality of educational opportunity, thus requiring equality in available funding. Other courts have concluded that the education clause at issue mandates only a minimum or basic level of education.

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45 See Ratner, supra note 6, at 814-16.
46 See id. The first group requires a general commitment to providing education. Id. at 815. For instance, the Connecticut constitution states “[t]here shall always be free public elementary and secondary schools in the state.” Conn. Const. art. VIII, § 1. The second group emphasizes the quality of the education, such as requiring that the “Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of five and eighteen years.” N.J. Const. art. VIII, § 4. The provisions in the third group are stronger and more explicit. For instance, the Rhode Island Constitution mandates the legislature “to promote public schools and to adopt all means which it may deem necessary and proper to secure . . . the advantages . . . of education.” R.I. Const. art. XII, § 1. The strongest commitment is exemplified by the fourth group, as evidenced in the Washington Constitution which states “[i]t is the paramount duty of the State to make ample provision for the education of all children residing within its border . . . .” Wash. Const. art. IX, § 1.
48 See id. at 814-16 nn.164-66.
49 See, e.g., Rose, 790 S.W.2d at 211 (requiring system to be adequately funded, substantially uniform, and provide each child with equal opportunity to education); Helena, 236 Mont. at 54, 769 P.2d at 691 (financing is one aspect of equal educational opportunity); Abbott, 119 N.J. at 388, 575 A.2d at 409 (remedy requires poorer districts have per pupil budget approximately equal to richer districts); Edgewood, 777 S.W.2d at 397 (“districts must have substantially equal access to similar revenue per pupil at similar levels of tax effort”).
50 See, e.g., Thompson v. Engelking, 96 Idaho 793, 809, 537 P.2d 635, 652 (1975) (gen-
reaching these conclusions, courts repeatedly have encountered three issues in their decision-making processes, each of which is discussed below: (1) the existence of judicially-determinable standards, including a determination of whether the judiciary, or the legislature, is the proper branch of government to evaluate the standards; 51 (2) a determination of the framers' purpose in drafting the clause; 52 and (3) the weight and validity of the evidence in establishing that the constitutional mandate has or has not been satisfied. 53 The similarities in the rationales of the four trend courts suggest a developing uniformity in the judiciary's analyses of state constitution education clauses.

1. Do Judicially-Determinable Standards Exist?

The existence of judicially-determinable standards against which to measure the equality and adequacy of education has perplexed courts since the inception of public school financing reform litigation. 54 Courts concluding that such standards do not exist have reasoned that the legislature is the proper governmental unit to evaluate efficiency, thoroughness, adequacy, or other mandated level of educational equality. 55

Although the determination of measurable standards has been

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51 See infra notes 54-68 and accompanying text.
52 See infra notes 69-93 and accompanying text.
53 See infra notes 94-100 and accompanying text.
54 See, e.g., Rodriguez, 411 U.S. at 36-37 ("logical limitations" exist to plaintiff's argument, such as difficulty in distinguishing education from effects of adequate food and shelter); McInnis v. Shapiro, 293 F. Supp. 327, 335 (1968) (controversy not justiciable due to lack of "discoverable and manageable standards"); Danson v. Casey, 484 Pa. 415, 424, 399 A.2d 360, 366 (1979) (recognizing only possible judicially manageable standard would be requiring equal expenditures per pupil and that expenditures alone are not proper measure of educational quality).
55 See Rodriguez, 411 U.S. at 42 (cautioning against interference in area where Court lacks knowledge and experienced decisionmakers at state and local levels); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1018-19 (Colo. 1982) (recognizing judicial intrusion should be avoided in controversial areas); McDaniel v. Thomas, 248 Ga. 632, 644, 255 S.E.2d 156, 165 (1981)(noting difficulty in establishing "judicially manageable standards for determining whether or not pupils are being provided 'an adequate education' ").
questioned, the recent trend decisions support the argument that these clauses do provide standards and that it is specifically the duty of the judiciary to evaluate whether the legislature has fulfilled its constitutional obligation to ensure that those standards are satisfied. For instance, in *Edgewood Independent School District v. Kirby*, the Texas Supreme Court acknowledged the existence of constitutional standards inherent in the clause mandating that "the legislature must make 'suitable' provision for an 'efficient' system for the 'essential' purpose of a 'general diffusion of knowledge.'" While recognizing that these terms are not exact, the court stressed its duty to measure the constitutionality of legislative acts despite a lack of precision in the standards to be evaluated. Similarly, the New Jersey Supreme Court, in *Abbott v. Burke*, recognized the standard of "thorough and efficient" as necessarily general, but concluded that standards did exist against which to measure educational opportunity. In *Rose v. Council for Better Education, Inc.*, the Kentucky Supreme Court concluded that it is the duty of the judiciary, not the legislature, to determine what is constitutional. Failure of the court to decide this constitutional issue would be a "denigration of [its] own constitutional duty."

Judicially-determinable standards established by education clauses are also acknowledged by those courts which have upheld property tax-based funding systems. These courts have concluded that the applicable standard is a minimum or basic education.

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65 See, e.g., *Helena Elementary School Dist. No. 1 v. State*, 236 Mont. 44, 55, 769 P.2d 684, 690 (1989) (court did not address existence of determinable standards, but its conclusion that constitutional mandate had not been satisfied supports proposition that standards exist); *Seattle School Dist. No. 1 v. State*, 90 Wash. 2d 476, 496, 585 P.2d 71, 83-84 (1978) ("ultimate power to interpret, construe and enforce the constitution of this State belongs to the judiciary").

67 777 S.W.2d 391 (Tex. 1989).
68 Id. at 394.
69 See id.
71 See id. at 316, 575 A.2d at 374.
72 790 S.W.2d 186 (Ky. 1989).
73 See id. at 209.
74 Id.
For example, in the most recent decision upholding a local property tax-based funding system, *Kukor v. Grover*, the Wisconsin Supreme Court determined that compliance with the uniformity provision could be measured in terms of "minimum standards for teacher certification, minimal number of school days, and standard school curriculum." At this point in the decision-making process, courts following both lines of reasoning are in general agreement as to the existence of judicially manageable standards by which to evaluate the constitutional mandate. The first point of divergence occurs in the interpretation of the education clauses.

2. The Interpretation Process

Many courts addressing the issue of local property tax-based funding consider the plain meaning of the constitutional language in conjunction with its history in attempting to identify the intentions of the framers' specific mandate that the legislature provide for public education. Courts have developed two distinct interpretations of education clauses.

Those courts which have concluded that the obligation mandates the providing of a minimum or basic education have concentrated on historical evidence which suggests that the framers supported local property tax-based funding and the local control of education which it promotes. Although sometimes acknowledging


66 148 Wis. 2d 469, 436 N.W.2d 568 (1989).
67 See id. at 492-94, 436 N.W.2d at 577-78.
68 See Johnson, *supra* note 1, at 337 (recognizing state courts have adamantly asserted authority to review constitutionality of education mandates).


70 See, e.g., *Thompson*, 96 Idaho at 805, 537 P.2d at 647 ("history of our constitutional convention does not support the conclusion that the delegates were opposed to local taxation for raising the necessary revenue for local public schools"); *Hornbeck*, 295 Md. at 625, 458 A.2d at 773 (history of constitutional convention reveals delegates expressed support for local control); *Danson v. Casey*, 484 Pa. 415, 427, 399 A.2d 360, 367 (1979) (recognizing history supports local tax revenues as major source of Pennsylvania's school financing).

Upon recognizing concern over local control, courts defer to the legislature's wisdom in implementing a system providing a minimum level of education to all students. See, e.g., *Thompson*, 96 Idaho at 806, 537 P.2d at 649 (legislature has primary and fundamental duty to establish and maintain public education system); *Hornbeck*, 295 Md. at 631, 458 A.2d at
the framers’ concern over the importance of education for societal welfare, these courts generally have concluded that the framers intended the ultimate determination of the funding method to be a matter of legislative discretion, and have recognized that local control through local funding is an important aspect of that funding scheme. Subject to the caveat that no district is “starved for funds” and some minimum level of education is provided to students, local property tax-based funding systems have been found constitutional when historical evidence is interpreted as revealing such intentions.

Other courts, concluding that the mandated obligation is equality of educational opportunity, have concentrated on historical evidence suggesting that the framers’ primary concern was providing quality education to all children of the state. The four recent trend decisions provide renewed emphasis on this focus. These courts typically have based their reasoning on the tenet that the “Constitution was ratified to function as an organic document to govern society and institutions as they evolve through time.”

776 (development of education system is matter for legislature); Board of Educ. v. Walter, 58 Ohio St. 2d 388, 390 N.E.2d 813, 824 (1979) (“judicial department . . . should exercise great circumspection before declaring public school legislation unconstitutional”), cert. denied, 444 U.S. 1015 (1980).

71 See Note, School Funding Challenge, supra note 1, at 1040 (acknowledging importance of local control in school financing reform litigation but discussing flaws of Walter).

72 See Walter, 58 Ohio St. 2d at 388, 390 N.E.2d at 825-26.

73 See, e.g., Hornbeck, 295 Md. at 623-26, 458 A.2d at 772-74 (discussing change from “uniform” mandate to “thorough and efficient” mandate, court stressed framers’ emphasis on local control and deference granted to legislature in implementing details); Walter, 58 Ohio St. 2d at 377, 390 N.E.2d at 820 (noting historic reliance and acceptance of local property taxes as means of financing public education); Danson, 484 Pa. at 427, 399 A.2d at 367 (concluding framers endorsed local control concept to meet diverse local needs).

74 See Rose, 790 S.W.2d at 207; Helena, 236 Mont. at 52-53, 769 P.2d at 689; Abbott, 119 N.J. at 303-15, 575 A.2d at 367-73; Edgewood, 777 S.W.2d at 394-95.

75 See Edgewood, 777 S.W.2d at 394. The Edgewood court stated:

If our state’s population had grown at the same rate in each district and if the taxable wealth in each district had also grown at the same rate, efficiency could probably have been maintained within the structure of the present system. That did not happen. Wealth, in its many forms, has not appeared with geographic symmetry. The economic development of the state has not been uniform. Some cities have grown dramatically, while their sister communities have remained static or have shrunk. Formulas that once fit have been knocked askew. Although local conditions vary, the constitutionally imposed state responsibility for an efficient education system is the same for all citizens regardless of where they live.

Id. at 396.

The New Jersey Supreme Court also recognized that legislative history indicated “a
quire courts first to determine if the language of a provision is clear and unambiguous. Although many courts find the education clauses ambiguous, the Montana Supreme Court in *Helena Elementary School District No. 1 v. State* relied solely on the plain meaning of the provision, "[e]quality of educational opportunity is guaranteed to each person of the state" to determine whether the intent of the framers was to provide equal educational opportunity. However, because most of the mandates are not as clearly articulated, courts must examine legislative history to determine the framers' intent.

Primary sources of information reflecting the intent of the framers are the constitutional debates and commentaries preceding the enactment of the provisions. For instance, the Kentucky Supreme Court concluded in *Rose v. Council for Better Education* that these debates revealed the goal of valuable and effective education for all children and emphasized the importance of education to the welfare of the commonwealth. The Texas Supreme Court's examination of the constitutional convention which enacted the Texas education clause revealed prevailing sentiments "on the importance of education for all the people of [the] state, rich and

perceptive recognition on the part of the Legislature of the constantly evolving nature of the concept being considered." *Abbott*, 119 N.J. at 303, 575 A.2d at 367. The Kentucky Supreme Court determined that the directive of the constitution was that the legislature not only establish a system, but ensure that it will always be maintained in a constitutional manner. *See Rose*, 790 S.W.2d at 211. Thus, the Kentucky Supreme Court also recognized the need to evaluate the satisfaction of the mandate in relation to current societal conditions.


See *Rose*, 790 S.W.2d at 205 (clear it is sole obligation of legislature to provide educational system, but interpretation of "efficient" requires study and analysis); *Edgewood*, 777 S.W.2d at 394 (term "efficient" is not precise); *Kukor*, 148 Wis. 2d at 485, 436 N.W.2d at 574 ("what the framers intended by the phrase 'as nearly uniform as practicable' is not evident from the plain meaning of these words").

See *Helena*, 236 Mont. at 52-53, 769 P.2d at 689.

See *Ratner*, supra note 6, at 822 (state constitution education provisions can generally be interpreted as establishing duty to educate effectively but "language of these provisions is so vague no single interpretation is mandated").


See *infra* note 90 and accompanying text (discussing, in detail, history of provisions in trend decisions).

790 S.W.2d 186 (Ky. 1989).

See *id.* at 206.
The New Jersey Supreme Court in *Abbott v. Burke* relied primarily on the *Robinson I* court's determination that the framers intended to provide each child with the opportunity to function as a citizen and competitor in the labor market. The *Robinson I* court considered the history of public education in New Jersey in relation to the constitutional amendment providing for the appropriation of state funds to public schools. The court reasoned that the history of this amendment revealed the intention that as "a matter of equity . . . the expenses incurred in maintaining the schools needed to impart this education, shall be borne by all alike." Considering the interpreted purposes, legal precedent, persuasive authority, or some combination of the three, these four courts linked the concepts of "efficient," "thorough," and "uniform" to educational equality.

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86 See *Edgewood*, 777 S.W.2d at 395.
87 See *Abbott*, 119 N.J. at 313, 575 A.2d at 372. The *Robinson I* decision determined that "thorough and efficient" education was "that educational opportunity which is needed . . . to equip a child for his role as a citizen and as a competitor in the labor market." *Id.* (quoting *Robinson I*, 62 N.J. at 515, 303 A.2d at 295).
88 See *Robinson I*, 62 N.J. at 505-13, 303 A.2d at 288-95. The State School Fund had been used to support New Jersey schools since 1829. *Id.* at 506, 303 A.2d at 290. The 1844 constitution required that the income in the fund be appropriated "for the equal benefit of all the people of the state." *Id.* (quoting N.J. CONST. art. IV, § 7, cl. 6 (1844)). From this there emerged a system partially funded through state funds and partially through local taxation. *Id.* at 506, 303 A.2d at 290. An 1871 statute provided for free public schools in the state. *Id.* at 507, 303 A.2d at 291. In 1875, the constitution was amended to provide for "thorough and efficient" education. *Id.* Following the enactment of the "thorough and efficient" provision, the 1881 State Superintendent's report revealed the intended equity in the tax burden resulting from the maintenance of the public school system. *Id.* at 511, 303 A.2d at 292.
89 See *id.* at 293.
90 See, e.g., *Edgewood*, 777 S.W.2d at 394-96. The court first determined the framers' intended use of the word "efficient." *See id.* at 395. Journals from the constitutional convention revealed that the framers chose the word "efficient" to describe the manner in which the educational system would be established. *Id.* "Efficient" was then defined as producing an intended effect with little waste. *See id.* Recognizing that the delegates spoke at great lengths about the importance of education for all people in the state and that the financing structure in place at the time of ratification indicated that the constitution provided a system calling for an equal taxation burden, the court concluded gross disparities in funding were "directly contrary to the constitutional vision of efficiency." *See id.* at 396. Additionally, the court considered legal precedent and legislative studies recognizing the link between efficiency and equality to buttress its reasoning. *See id.* at 397. The court quoted from *Mumme v. Mars*, 120 Tex. 383, 397, 40 S.W.2d 31, 37 (1931), for its finding that these appropriations "have a real relationship to the subject of equalizing educational opportunities in the state, and tend to make our system more efficient . . . ." *Id.*

The Kentucky Supreme Court, guided by the framers' expressed purpose, examined legal precedent, case law from other state courts, and expert opinions to link efficiency to equality. *See Rose*, 780 S.W.2d at 266-11. Legal precedent in Kentucky revealed the follow-
The Texas and Kentucky Supreme Courts addressed evidence suggesting that the framers were interested in establishing a specific funding system which relied on local property tax-based funding and left the question of funding to the discretion of the legislature. These courts concluded that this evidence reflected a belief that although such funding methods may once have been an acceptable and desirable means to achieve the goal of equal educational opportunity, the framers’ primary focus was on the intended quality of education and not on the intended methods of funding.

The court supported its conclusion with the West Virginia Supreme Court’s decision in Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979). Rose, 790 S.W.2d at 209. The Pauley court similarly defined the standard of “thorough and efficient” by relying on a “plethora of legal precedent” and legislative history. See id. at 210. The court also considered opinions of experienced and well-qualified teachers, educators, and administrators in defining “efficient.” See id. at 210-11. Using this information, the court determined that among the fundamental elements of an efficient school system was equal educational opportunity. See id. at 212-13.

The New Jersey Supreme Court relied on the interpretation of “thorough and efficient,” which flowed from the Robinson series of litigation, and on other legal precedent linking efficiency to equality, concluding that the mandate required equal educational opportunity. See Abbott, 119 N.J. at 303-15, 575 A.2d at 367-73. The court pointed out that the New Jersey Supreme Court’s first interpretation of the “thorough and efficient” clause in Landis v. Ashworth, 57 N.J.L. 509, 31 A. 1017 (Sup. Ct. 1895), “was permeated by the concept of equality.” Id. at 304, 575 A.2d at 367. The court in Robinson I determined, on the basis of disparate funding per pupil, that the state had not satisfied the constitutional mandate of a “thorough and efficient” education. Id. at 303, 575 A.2d at 368. However, in devising a remedy, the focus in Robinson I was not on equal expenditures but on requiring a minimum level of substantive education to “equip the student to become ‘a citizen and . . . a competitor in the labor market.’” Id. at 306, 575 A.2d at 369 (quoting Robinson I, 62 N.J. 473, 515, 303 A.2d 273, 295, cert. denied, 414 U.S. 976 (1973)). In Abbott, the court determined that the required level of substantive education should be such that the “poorer disadvantaged students must be given a chance to be able to compete with relatively advantaged students.” Id. at 313, 575 A.2d at 372. Given the abundance of evidence presented, the court concluded that gross disparity in funding impeded the opportunity for equal competition among the poorer and wealthier districts. Id. at 394, 575 A.2d at 412.

\(^{91}\) See Rose, 790 S.W.2d at 208-09; Edgewood, 777 S.W.2d at 396-97.

\(^{92}\) See supra note 90 and accompanying text. In answer to the state’s argument that the constitution expressly authorized the current financing system, the court concluded that “this provision was intended not to preclude an efficient system but to serve as a vehicle for injecting more money into an efficient system.” See Edgewood, 777 S.W.2d at 396. It would seem that this answer indicates the court found that the framers were more concerned with achieving the goal of efficient education than authorizing a specific means of achieving it.

The opposing argument in Rose focused on legal precedent suggesting that the constit-
Thus, when the mandated obligation to equal education has not been satisfied, the intended quality of education takes precedence over the intended funding method and, consequently, the deference traditionally granted to the legislature in this area. It is suggested that whether or not courts decide that similar clauses mandate equal educational opportunity or a minimum basic education, courts must evaluate the evidence in light of the interpretation of the imposed obligation.

3. Sufficiency of the Evidence

The nature and extent of the evidence presented in the recent trend cases indicates that any successful challenge to the constitutionality of local property tax-based funding must present abundant and reliable evidence proving that dollars do, in fact, make a difference in educational quality. The failure to provide evidence proving a correlation between funds expended and the quality of education provided was a common rationale cited by courts for upholding the constitutionality of local property tax-based funding.
Stating that the plaintiffs presented no claim or evidence proving they were disadvantaged by the disparate funding, many courts reasoned that evidence of funding disparity alone was not proof of a failure by the legislature to satisfy its constitutional mandate.96 However, an examination of the recent trend decisions reveals records replete with evidence indicating that the amount of funding does make a difference in the quality of education.97 The Kentucky Supreme Court, in *Rose v. Council for Better Education, Inc.*, characterized the evidence presented by the plaintiffs as a "tidal wave" which "literally engulfs" evidence presented by the defendants.98 The New Jersey Supreme Court, in *Abbott v. Burke*, commented that "[v]ery few of the cases have a factual record that even begins to approach that before us."99 However, whatever the

quantum of education is a constitutionally protected prerequisite ... we have no indication that the present levels of educational expenditure in Texas provide an education that falls short"; Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 638, 458 A.2d 758, 780 (1983) ("[n]o evidentiary showing was made ... that these qualitative standards were not being met in any school district, or that [the] financing scheme did not provide all school districts with the means essential to provide [adequate] education"); Milliken v. Green, 390 Mich. 389, 391 n.2, 404, 212 N.W.2d 711, 712 n.2, 718-19 (1973) (no concrete claim that students are suffering from educational inadequacies because of deficient financing system); Board of Educ. v. Walter, 58 Ohio St. 2d 368, 387-88, 390 N.E.2d 813, 825 (1979) (no proof any district was receiving so little funding that it was deprived of educational opportunity), cert. denied, 444 U.S. 1015 (1980); Danson v. Casey, 484 Pa. 415, 424, 399 A.2d 360, 365 (1979) (appellant failed to allege that legal harm was suffered from projected financial deficit).

It is interesting to note that the evidence presented at trial in *Walter* showed "fourteen percent of the schools in Ohio had inadequate pupil-teacher ratios under law, fifty-three percent of the schools were found to be deficient in curriculum and instruction, at least thirty-one percent of the buildings lacked adequate classrooms, libraries, art, music or physical education facilities, and fifty four percent had inadequate textbooks," yet the Ohio Supreme Court found that a minimum acceptable education was being provided. See Note, *School Funding Challenge*, supra note 1, at 1040-41. 96 See, e.g., Hornbeck, 295 Md. at 638, 458 A.2d at 780 (less than adequate education is a prerequisite to judicial intervention); Milliken, 390 Mich. at 409, 212 N.W.2d at 721 (legis- lature not required to equalize spending by either forcing reduced spending in affluent areas or contributing to depressed areas); Walter, 58 Ohio St. 2d at 387, 390 N.E.2d at 825 ("thor- ough and efficient" standard breached solely when student deprived of "educational opportu- nity"); Danson, 484 Pa. at 427-28, 399 A.2d at 367 ("thorough and efficient" standard does not require uniform spending).

97 See *Rose*, 790 S.W.2d at 196-99; *Helena*, 236 Mont. at 48-50, 769 P.2d at 686-87; *Abbott*, 119 N.J. at 362-77, 575 A.2d at 397-404; *Edgewood*, 777 S.W.2d at 392-93.

98 See *Rose*, 790 S.W.2d at 197-98. The *Rose* court noted inadequacies in educational opportunities including differences in curricula, achievement test scores, teacher salary, provisions of basic educational materials, student-teacher ratios, quality of basic management, size, adequacy, condition of school physical plants, and per annum expenditures per stu- dent. *Id.*

99 See *Abbott*, 119 N.J. at 315, 575 A.2d at 373. The court described the level of educa-
characterization, the outcome hinged on the ability of the plaintiffs to employ "[u]niform testimony of the expert witnesses at trial, corroborated by data, [to show] a definite correlation between the money spent per child on education and the quality of the education received."\(^{100}\)

III. WILL JUDICIAL ACTIVISM EFFECTUATE CHANGE IN EDUCATIONAL QUALITY?

The judicial activism practiced by the trend courts raises the question: Will the decisions of these courts lead to new constitutionally sound funding systems, resulting in higher quality public education?\(^{101}\) The application of these judicially imposed remedies offered to some students in the poorer districts as tragically low. See id. at 359, 575 A.2d at 395. The evidence indicated disparities in exposure to computers, in the availability and quality of laboratories for science programs, in the availability of foreign language programs, the quality of music, art, and physical education programs, and physical facilities. Id. at 359-63, 575 A.2d at 398-99. The plaintiffs also offered other indicators such as teacher-student ratios, and the average experience and average level of education of instructional staff. Id. at 366, 575 A.2d at 399. This evidence established the relationship between funding and quality of education. Id. at 367, 575 A.2d at 399.

\(^{100}\) See Rose, 790 S.W.2d at 197-98. “Students in property-poor districts receive inadequate and inferior educational opportunities as compared to those offered to those students in the more affluent districts.” Id.; Helena, 236 Mont. at 55-56, 769 P.2d at 690 (evidence showed unequal educational opportunities were result of spending disparities); Edgewood, 777 S.W.2d at 393 (differences in quality of educational programs dramatic). But see Abbot, 119 N.J. at 336-37, 575 A.2d at 384 (evidence insufficient to prove deficiency on statewide basis).

\(^{101}\) An analogy to the history of judicial activism in the area of civil rights lends support to the idea that judicial decisions alone will not effectuate change. For instance, the Reverend Theodore M. Hesburgh, one of the six members of the 1957 United States Commission on Civil Rights appointed by President Eisenhower, recognized the limits of legal actions and the need for “creative leadership from every segment of American society” in order to provide equality to all races, colors, nationalities, religions, cultures, and classes. See Hesburgh, The End of Apartheid in America, 54 Geo. Wash. L. Rev. 244, 251-52 (1986). The desegregation aspect of the civil rights movement provides a particularly useful analogy in predicting that the success of these judicial decisions will depend upon legislative and societal responses. See Comment, Jenkins v. Missouri: The Future of Interdistrict School Desegregation, 76 Geo. L.J. 1867, 1870 (1988). Brown v. Topeka Bd. of Educ., 347 U.S. 483, 493 (1954), was the landmark decision finding a violation of the equal protection clause of the fourteenth amendment arising from state laws and constitutional provisions providing for racial segregation in public schools. See id. at 495. Subsequent to this decision, which required federal courts to “correct past violations with equitable remedies ‘with all deliberate speed,’” the Brown commands “remained hollow principles for nearly a decade.” See Comment, supra, at 1870.

Throughout the period following Brown, courts were forced to take a stronger position to ensure the enforcement of the Brown commands. See Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 6 (1971) (Court set forth guidelines to assist courts in “grappl[ing] with the flinty, intractable realities of the day-to-day implementation of those constitutional
is limited by the separation of powers doctrine. Although it is emphatically the role of the judiciary to determine whether the constitutional mandate has been satisfied, the judiciary simply cannot command enactment of specific legislation to ensure that schools possess the wherewithal to implement improvements. Consequently, a commitment to higher quality education must involve a long-term relationship between the judiciary and legislature to address the multitude of issues which will continue to arise.

The New Jersey experience illustrates the dynamics of this vital relationship. In deciding Abbott, the New Jersey Supreme...
Court was in the unique position of evaluating the constitutional-ity of an "educational funding system specifically designed to conform to a prior court decision." The conclusion that the system, which was enacted in response to Robinson I, actually resulted in increased disparities strongly indicates that judicial decisions alone will not solve the problems causing inadequate public education. However, the message is clear that, eighteen years after Robinson I, the New Jersey Supreme Court intends to remain involved.

The holding and remedy devised by the Abbott court were also unique. Unlike the other state high courts which almost invariably had struck down the financing systems in total, the Abbott court found that the system was unconstitutional only as to the


The Act focused on elements of substantive education, incorporating a list of educational goals binding on all districts. See id. The court validated the financing scheme despite the disparities in funding which remained. Id. at 211. The court, however, made clear that "only actual operation would reveal whether the law would provide sufficient funds to meet the constitutional mandate." Id. Foreshadowing the Abbott litigation, Judge Conford's dissenting opinion expressed serious doubt that this system which claimed to provide equal substantive educational opportunity, but was heavily dependent on local property taxes, could possibly succeed. See id. at 211-12.

Abbott, 119 N.J. at 315, 575 A.2d at 373.


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Abbott, 119 N.J. at 315, 575 A.2d at 373.
poorer urban school districts. The remedy the court provided was an order that funding made available to the poorer urban districts be substantially equivalent to the funding available to the wealthiest districts. The court recognized that its decision represented only an initial step in public school reform and that much experimentation would be needed to improve the public education system. Increased funding was deemed essential to such experimentation.

The future of school reform in New Jersey will largely depend upon legislative action taken in response to the court’s ruling. Approximately two weeks after the Abbott decision, the New Jersey legislature passed the Quality Education Act (“the Act”). By the 1996 academic year, the Act provides for an additional one billion dollars per year to the state’s thirty poorest school districts. The Act actually exceeded the mandate of the judicial order by also providing increased financial support to over three hundred districts which were not specifically addressed in the Abbott decision. While increasing aid to these districts, the Act requires a reduction in funding available to 232 of the state’s wealthier districts. The primary source of the funding will come from

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113 See Abbott, 119 N.J. at 384, 575 A.2d at 408 (constitutional failure was “clear, severe, extensive, and of long duration”).
114 See id. The determination of which districts were to be classified as the “poorer urban districts” was left to the legislature. Id. at 385, 575 A.2d at 409. The means of implementing the remedy was also left to the legislature, but the court proposed options including revamping the entire system, phasing in a new system while phasing out the old, or equalizing funding statewide. Id. at 387, 575 A.2d at 409.
115 See id. at 374-75, 575 A.2d at 403. The court stated: We realize our remedy here may fail to achieve the constitutional object, that no amount of money may be able to erase the impact of the socioeconomic factors that define and cause these pupils’ disadvantages. We realize that perhaps nothing short of substantial social and economic change affecting housing, employment, child care, taxation, [and] welfare will make the difference for these students; and that this kind of change is far beyond the power or responsibility of school districts. We have concluded, however, that even if not a cure, money will help, and that these students are constitutionally entitled to that help.
116 See id. at 366 n.30, 575 A.2d at 398 n.30.
117 See id.
118 See id. at 385-88, 575 A.2d at 408-09.
121 Id.
122 Id.
substantial increases in New Jersey's income and sales tax. Following passage of the Act, it, along with the Governor and Democrat-controlled legislature, have been the subject of much criticism in New Jersey. In response to political pressures, the legislature has significantly altered the original school-aid program provided for by the Act. The primary change involves shifting $360 million in the form of property-tax relief for middle-income homeowners from the one billion dollars originally allotted to school-aid. Thus, the conflicting interests of a legislature and Governor seeking to appease voters and simultaneously achieve "world class" education demonstrate the complex political realities as-


124 See id. The Quality Education Act cleared both the General Assembly and Senate by 41-33 and 21-17 margins, respectively. Id.

125 See id. The reactions of New Jersey citizens are as volatile as the slim margins by which the Act passed would suggest. For instance, superintendents of some of the wealthier districts who suffer a reduction of funds under the Act, have organized to attack the new legislation. See id. Teachers' associations fear negative impacts from the Act resulting in lower salaries. See N.Y. Times, Sept. 6, 1990, at B3, col. 1. The New Jersey Education Association reported that of 101 unsettled contracts, 86 are at an impasse. Id. Stalled negotiations were consuming the efforts of 60 mediators as of the first day of school. Id. The troubled negotiations are due in large part to "paranoia" concerning the implications of the Act with respect to wages for teachers, custodians, secretaries, bus drivers, and nurses. Id.

126 The American Association of Retired Persons has waged an attack alleging that the loss of aid to the wealthier districts will have a ruinous effect on elderly people with low incomes living in the wealthy district. Id.

127 See N.Y. Times, Jan. 27, 1991, § 12 (NJ), at 1, col. 1 (Governor's Quality Education Commission begins work on "major over-
associated with the implementation of so controversial a law.

This situation may foreshadow the problems which other states whose courts have intervened in public school financing can expect in the future. The New Jersey experience would appear to suggest that if the ideals of educational equality are going to extend beyond the courtroom and actually effectuate change, it will take commitment from society and the legislature, as well as from the courts.

CONCLUSION

The future offers much hope for public school financing reform. Following two decades of judicial ambivalence in this area, four state high courts within sixteen months have found public school funding systems based largely on local property taxes to be constitutionally invalid. Although these decisions have offered no new legal theories on the issue of the constitutionality of local property tax funding systems, they have provided renewed momentum to a judiciary previously inactive in this area. Regardless of judicial participation, however, questions remain as to whether public education in the United States will improve. It is clear at this point that it will take more than judicial activism to achieve a higher quality of public education. Equally committed state legislatures willing to revamp funding systems in accordance with judi-

haul" on public education system).

Richards, Education Tax Hikes are Easy, Higher School Standards Hard, 125 N.J.L.J. 1663 (June 21, 1990). The Texas Legislature has acted in response to the Edgewood decision. See id. The Texas Legislature's response was not as dramatic as the New Jersey response. The legislature increased the sales tax to generate an extra $550 million in revenues for the property-poor districts. Id. The system is essentially a "repetition of the old unconstitutional scheme at higher levels of guaranteed funding for poor districts." Id. This response was a deficient answer to the court's ruling. Id. For instance, there was no provision for the funding of new facilities and the ability of wealthy districts to tax at low rates and achieve high funding remains unchanged. Id. Such an inadequate response by the legislature suggests the probability of "decades of litigation comparable to the New Jersey experience." Id.

The Kentucky Legislature also passed a significant tax increase in response to the Rose decision. The General Assembly reacted immediately to the decision and appointed a task force to study the education system. See Dawahare, 125 N.J.L.J. 1665 (June 21, 1990). The task force studied the situation and proposed reforms, and on April 11, 1990, the Kentucky Education Reform Act of 1990 was passed. Id. Overall, the plaintiffs in Rose appear pleased with the new legislation, but as in all states addressing this issue, time will tell if more money will make a difference in educational quality. Id.
cial orders and dedicate resources are also an integral part of the solution to this complex social problem.

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