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*The Adequacy Lawsuit:
A Critical Appraisal*

PUBLIC EDUCATION HAS long been a core government function in the United States—“perhaps the most important function,” according to Chief Justice Earl Warren’s landmark 1954 opinion in *Brown v. Board of Education*. Writing for a unanimous Supreme Court, Warren noted that “compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.”¹ The depth of the nation’s educational commitment is evident also in its state constitutions, forty-nine of which mention the government’s responsibility in this area.²

Yet it is increasingly clear that the American school system is ill-equipped to meet the challenges of the twenty-first century. Although per-pupil spending, adjusted for inflation, has more than doubled since 1970, high school graduation rates and the test scores of seventeen-year-olds have hardly budged from levels attained years ago.³ The performance of American students in mathematics and science continues to lag far behind that of their peers abroad.⁴ A half-century after *Brown* put an end to legally sanctioned segregation in the schools, gaps in basic skills along lines of ethnicity and income remain scandalously wide.⁵

Policymakers seeking to enhance the school system’s flagging productivity have proposed everything from new accountability systems to more parental choice, from data-driven instruction to a return to traditional teaching methods,

and from handing schools over to mayoral direction to altering how teachers are paid. While all these reforms have gained widespread attention, their implementation has been haphazard and idiosyncratic. Pressures to generate sustained improvement, especially in troubled urban districts, have only grown.

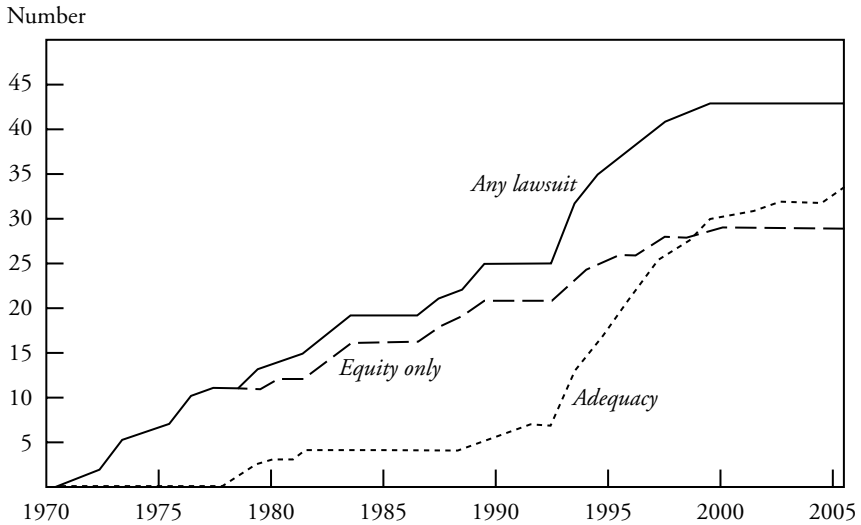
Meanwhile, almost unnoticed, an alternative reform strategy—the adequacy lawsuit—has made rapid headway within the nation’s judicial system (see figure 1-1). Advocates for increased school spending have gone to court in at least thirty-nine states to date. Armed with photographs of rundown school buildings, data revealing large numbers of uncertified teachers, and evidence of abysmal and unequal student performance, teams of lawyers allege that schools lack sufficient funding to provide children with the quality of education guaranteed by the state’s constitution. As a remedy, they ask the courts to mandate large increases in state aid for public schools.

Often the proposed dollar amounts are staggering. A March 2006 ruling in New York, for example, ordered the state’s elected officials to increase operating aid for schools in New York City alone by between \$4.7 billion and \$5.63 billion a year (roughly \$5,000 per student), in addition to \$9.2 billion over five years for capital improvements. If acted on by the governor and legislature, the increment for operations would by itself lift spending by more than one-third over current levels.⁶

Nor is it only in the Democratic “blue” states where courts have been impressed by plaintiff claims. Adequacy lawsuits have been decided in favor of plaintiffs in states as Republican-red as Kansas, Montana, and North Carolina. Meanwhile, the federal No Child Left Behind (NCLB) law, enacted in 2002, has given adequacy advocates new fuel for their claims by requiring states to collect detailed information on student performance. With victories in hand and fresh evidence to bolster the advocates’ case, it is no wonder that at the end of 2005 adequacy claims were pending in at least fourteen states (see the appendix).

Is adequacy litigation a promising avenue for education reform? If success in the courtroom were the appropriate metric, the matter would be settled. Adequacy plaintiffs have won victories in twenty-five states, including ten of the fourteen cases decided between 2003 and 2005. Responding to complaints and court rulings in school finance cases has become a consuming concern of governors and legislators, who must balance educational spending against revenue constraints and other fiscal obligations. If court orders to improve educational outcomes could reliably do so, the story to be reported in the pages that follow would be as happy as the stories of the families that Tolstoy excluded from his canon as too dull to be worth the telling.

Figure 1-1. *Number of States Having Faced a Final Judgment on Equity Grounds and Adequacy Grounds, 1971–2005^a*



Source: Authors' tabulation of judgments listed in the appendix table.

a. Some decisions coded as adequacy judgments include rulings on equity grounds. Delaware, Hawaii, Mississippi, Nevada, and Utah have not faced a school finance lawsuit. Lawsuits in Indiana and Iowa were withdrawn and settled, respectively.

The path from courtroom to classroom is long and uncertain, however. Legislatures may opt not to comply with mandated spending increases, causing the lawsuits to fail on their own terms. Even when additional money reaches the schoolhouse door, there is no guarantee that it will benefit students, and courts may lack the capacity to ensure that new funds are put to good use. Indeed, it may be that these judgments are an instance of judicial overreaching that will do little to rectify the undeniable inadequacies and inequities in American education. The story, if not quite *Anna Karenina*, may not be so boring after all.

Those helping to tell the tale in this volume, all leading scholars in their fields, shed light on the nature and consequences of the adequacy lawsuit with fresh analyses of its legal, political, fiscal, and educational implications. In this chapter, we summarize their findings and offer our own interpretation of the lessons to be drawn. Adequacy litigation, we ultimately conclude, is unlikely to make educational opportunities more adequate or more equitable, and, by inviting ongoing judicial supervision of school spending, it threatens

the separation of powers within state governments. Before reaching that conclusion, however, let's trace the origins of this remarkable development in American education policymaking.

The Origins of Adequacy Litigation

Adequacy lawsuits evolved from a prior legal innovation, the equity lawsuit, in which plaintiffs charged that wealth-related disparities in per-pupil spending among school districts violated students' rights to equal protection under the law. The precise point at which equity arguments morphed into claims rooted in the concept of adequacy is murky, and even the most recent adequacy judgments continue to reflect more than vestigial equity considerations. But the change, if not clear cut, has had significant consequences. A fairly transparent, if debatable, standard gave way to an abstruse concept open to an endless variety of interpretations.

The equity concept was first embraced in *Serrano v. Priest*, the celebrated decision handed down by the California Supreme Court in 1971 and reaffirmed in 1976.⁷ "[Q]uality is money," members of the plaintiff's legal team had argued, and the court ultimately agreed that the state's school finance system would be constitutional if it were to eliminate wealth-related disparities in per-pupil spending across the state's school districts.⁸

The equity claim advanced in *Serrano* had one distinct advantage: the clarity of the legal principle requiring equal treatment for each school district, regardless of its wealth. To be sure, the principle did not give comprehensive guidance. Should state aid be adjusted for local differences in the cost of living? Should districts receive extra funds for students with special needs? But while these and other issues left ample room for debate and deliberation, the remedy could nonetheless be guided by a readily discernible principle that resonated with the concept of equal opportunity set forth in the nation's founding documents and powerfully reiterated in *Brown*.

Perhaps for this reason, the *Serrano* plaintiffs were victorious in court. Yet the case set off a series of developments within California that proved ominous for the equity movement's long-term prospects. By forcing the reallocation of funds from wealthy districts to districts with a smaller property tax base, the decisions provoked a backlash among many of the public schools' strongest supporters and led some families to seek out places in private schools.⁹ Resentment over the legislature's response to *Serrano* also contributed to California's property tax revolt and to the passage of Proposition 13, approved in 1978, which prevents increases in taxes on residential property unless it is sold.¹⁰ In

subsequent years, as the burden of school funding shifted from local to state taxpayers, California's per-pupil spending on education fell dramatically, from among the top-ten states in the 1960s to the bottom ten just three decades later.¹¹

Nor did the equity claim fare well in federal court, when plaintiffs in San Antonio, Texas, invoked the equal protection clause of the Fourteenth Amendment to the U.S. Constitution to challenge disparities in state per-pupil spending. Although they won at trial, on appeal a divided Supreme Court rejected the plaintiffs' claims, ruling in its 1973 decision in *San Antonio I.S.D. v. Rodriguez* that education was not a fundamental right requiring the highest level of judicial scrutiny.¹²

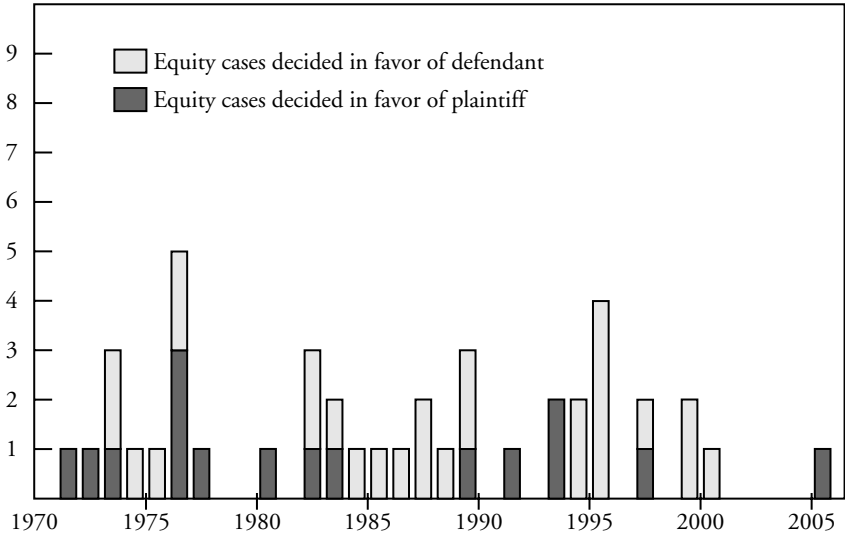
Rebuffed at the federal level, equity advocates redoubled their efforts in the states. If educational equity was not a fundamental federal right, they claimed, it was certainly guaranteed by those state constitutions that explicitly ordered the legislature to provide for the education of the citizenry. Yet many state judges proved hesitant to interpret their own states' equal protection clauses in a way that differed from the Supreme Court's reading of the U.S. Constitution. Others worried about the implications for other policy domains in which spending also varied from one part of the state to another.¹³ When by 1990 the dust had more or less settled, courts had rejected plaintiffs' claims in well over half of the equity cases filed (see figure 1-2, panel A).

Even when plaintiffs in state-level equity litigation were successful—New Jersey's 1973 *Robinson* case being the most celebrated example—the implementation of court orders proved to be a political challenge. Remedies typically pitted the interests of high-spending districts against lower-spending ones, and the shifting of resources from one jurisdiction to another inevitably caused consternation among legislators asked to vote against their constituents' particular interests. Many of the equalization policies that legislatures adopted in response to equity judgments led overall spending on education to fall, much as it had in California. Intended to level school spending up, equity-based reforms, as often as not, leveled it down.¹⁴

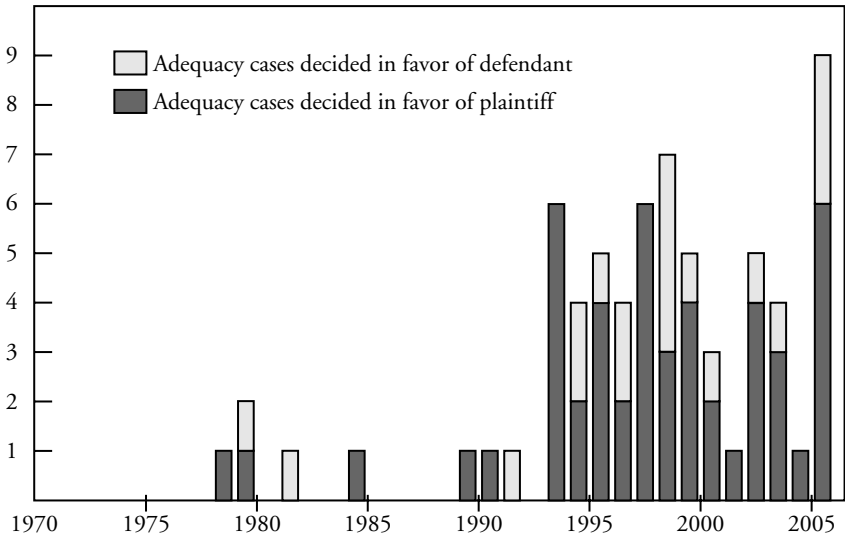
Under the weight of these and other unintended consequences, enthusiasm for the equity movement gradually faltered. But advocates for poor districts soon inserted another, more robust arrow into their legal quiver. Rather than simply asking for fiscal equity, they argued that spending on education must be *adequate* to provide all students with an education of the quality guaranteed by their state's constitution. This new demand promised to halt cuts in educational spending, but it did so at a price. Having set aside the simple, readily justifiable standard of fiscal equity, plaintiffs now had to give specificity to educational adequacy, a much more ambiguous concept.

Figure 1-2. *Final Judgments on Equity and Adequacy Cases by Outcome, 1971–2005*^a

Panel A



Panel B



Source: Authors' tabulation of judgments listed in the appendix table.

a. Some decisions coded as adequacy judgments include rulings on equity grounds. Final judgments include all decisions by the state court of last resort and unappealed decisions by lower courts.

To do so, proponents turned to the education clauses in state constitutions. The wording of these provisions varies from one state to the next. Georgia's constitution, for example, says that "an adequate public education for the citizens shall be a primary obligation of the State."¹⁵ Florida's constitution also refers specifically to an "adequate" education.¹⁶ But the most common formulation reads quite differently, calling for the establishment of a school system that is "thorough and efficient"—a phrase found in the constitutions of Maryland, Minnesota, New Jersey, Ohio, Pennsylvania, and West Virginia.¹⁷ Wyoming's constitution has it both ways, requiring the state to provide an education system that is at once "thorough and efficient" and "adequate to the proper instruction of all youth."¹⁸

Education clauses had figured in equity lawsuits only as evidence that citizens had an enforceable right to equal educational opportunity under state constitutions, even if not (after *Rodriguez*) a federal one. By incorporating adequacy claims into the litigation, plaintiffs infused the clauses with new meaning, arguing that they obligated legislatures to provide all students with an education of a specific quality. As early as 1979, the West Virginia Supreme Court of Appeals defined a "thorough and efficient" education as one that "develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically." It then articulated eight content areas ranging from "literacy" and "the ability to add, subtract, multiply, and divide" to "interests in all creative arts" and even "social ethics," deeming them all to be legally enforceable elements of such an education. The West Virginia court, however, allowed the legislature to determine how best to achieve these goals; it did not explicitly mention funding levels.¹⁹

It was left to a Kentucky case, *Rose v. Council for Better Education*, filed in 1985 and decided in 1989, to become the first case in which the courts mandated fiscal action to achieve an adequate education. When that lawsuit appeared to bear promise—and especially after a favorable decision was reached—plaintiffs incorporated adequacy claims into virtually all subsequent school finance lawsuits. In Kentucky itself, the highest court declared the state's entire public education system unconstitutional and ordered the legislature to provide, along with other reforms, "funding sufficient to provide every child in Kentucky with an adequate education."²⁰ Since that time, courts throughout the country have based their decisions at least partially on adequacy grounds in the vast majority of cases won by the plaintiffs (see figure 1-2, panel B).²¹

The early success of adequacy complaints reflected plaintiffs' skill in highlighting the deplorable conditions that have long existed in far too many

American schools. Dilapidated buildings, outdoor toilets, and other graphic evidence of substandard conditions, which plaintiffs attributed to a lack of funding rather than managerial incompetence, proved capable of spurring judicial action in states where discussions of equity indexes and property tax burdens had failed to do so.²²

Adequacy advocates also drew support from a concurrent, if quite separate, reform effort, the national push for educational standards and accountability. The standards-based reform movement was jump-started in 1983 when the U.S. Department of Education issued a report, *A Nation at Risk*, warning the public of a “rising tide of mediocrity” afflicting America’s schools.²³ In the wake of this widely publicized document, numerous governors called for schools and students to be held accountable for their academic performance.²⁴ Several states moved quickly on their own to establish proficiency standards and regular assessments of the performance of their students. In 1994, Congress, at the behest of the Clinton administration, enacted legislation urging other states to do the same. Plaintiffs in adequacy cases soon began citing newly collected data on student proficiency, which routinely revealed student performance to be lagging well below state targets.

When 2000 came and went with few states in full compliance with the 1994 accountability law and student achievement still stagnant, Congress acted again. The No Child Left Behind Act (NCLB), the much stronger accountability law enacted in 2002, requires that virtually all students achieve a state-determined level of proficiency in mathematics and reading by the year 2014. Schools not making sufficient progress toward that goal are to be identified as needing improvement and eventually subjected to a range of sanctions.²⁵

At the time that NCLB became law, few realized its potential impact on adequacy lawsuits. But now that states, to receive federal funds, had to insist that schools meet statewide performance targets, plaintiffs were provided with a clearer definition of adequacy—one based on proficiency standards adopted by the legislature itself. Without additional fiscal support, they said, schools cannot provide the services necessary for students to achieve state-determined targets. Attorneys have turned classroom failure into courtroom success.

Exactly how this happened—and with what consequences—is explained in the chapters that follow. They cover five topics: the legal rationale for adequacy lawsuits; the character of the evidence presented before the courts; the impact of adequacy decisions on spending and other state policies; the future of adequacy litigation; and the meaning and significance of this far-reaching legal development.

Part 1: Legal Rationale

On one matter there is no disagreement: there is little in the text of state constitutions to guide courts on the amount of money that it takes to provide an “adequate education.” When courts have ruled in favor of plaintiffs, they seldom have justified their decision with reference to the original meaning of the phrase as indicated by the convention debates at which state constitutions were written.²⁶ Nor do judges ordinarily make even a token effort to unpack the language of the particular clause upon which their decision rests. Adequacy, like beauty, is in the eye of the beholder, having more to do with each court’s particular understanding of educational opportunity than the specific wording of a state constitution.

For those that believe that judges have a duty to interpret a state constitution according to either the “original intent” of those who wrote it or the “plain meaning” of the document itself, there is little basis for judicial determinations requiring legislatures to spend more for education.²⁷ But for those who see state constitutions as living documents that acquire new meaning over time, the original meaning of the clause is merely a point of departure. In the aftermath of *Brown*, contemporary beliefs and values have, for many judges, endowed the education clauses of state constitutions with a new meaning that has powerful implications for what states must do.

Court rulings asserting a constitutional right to an adequate education are not all of one piece. Richard Briffault, who provides in chapter 2 a comprehensive survey of state rulings in school finance cases, says that courts use the adequacy concept in three distinct ways. Initially, some courts employed the concept defensively to hold that inequitable school finance systems do not violate state constitutional requirements. Although they conceded the existence of the right to an adequate education, the equity-based plea for more resources for lower-spending schools failed. Other courts invoked the concept to compel states to spend more on lower-spending districts, but they interpreted adequacy narrowly, as requiring something less than full fiscal equity.

In recent years, however, these more limited notions of adequacy have given way to a third, more expansive interpretation. Adequacy judgments now typically require that states increase overall spending, that they spend more on districts with student populations considered more expensive to educate, or that they do both. In its pathbreaking 1989 ruling in *Rose*, for example, the Kentucky Supreme Court concluded that school spending statewide was inadequate by regional and national standards. Similarly, in 1990 the New Jersey Supreme Court ruled in its second *Abbott* decision that the special disadvantages facing

students in poor, urban districts entitled them to educational programs and services “over and above those found in suburban districts.”²⁸

It is this third formulation that has given advocates for increased spending the greatest cause for optimism. Adequacy as “equity plus” avoids many of the perceived shortcomings of pure equity remedies, which, in addition to leaving states room to level down spending, ignore the fact that it may cost more to educate students from disadvantaged backgrounds or those with special needs. It also reflects a broader trend in education policymaking toward establishing minimum standards for student outcomes. Indeed, several courts have acknowledged that an adequate education cannot be achieved simply through fiscal measures and have asked legislatures to undertake specific interventions, such as increasing administrative oversight, defining performance standards, and creating accountability systems to ensure that those standards are met. Meanwhile, they have asserted the judiciary’s role as the final arbiter of whether legislative efforts are sufficient.

This is a novel concept. As John Eastman shows in chapter 3, most of the early state constitutional provisions with respect to education, adopted in the eighteenth and nineteenth centuries, were hortatory rather than prescriptive, and courts treated them as such. A few states amended their constitutions in the twentieth century to include stronger language, but even these intended only that all students be provided with an education of a quality to be determined by the legislature. Not until the 1970s—an era marked by growing judicial willingness to discover new rights in constitutional texts—did courts begin to interpret these clauses as conferring a judicially enforceable right to an education of a particular quality that required a specific level of fiscal support.

Part 2: Evidence

Connecting educational quality to the amount of money spent on schools has proven to be the greatest challenge for adequacy plaintiffs. Their task has been simplified, to be sure, by the fact that all states have now established test-based accountability systems.²⁹ But documenting inadequate outcomes is only the first step; they must also demonstrate that the deficiencies can be remedied by additional expenditures.

The enormity of the challenge has given new impetus to what was once an obscure backwater of the academy, the study of school finance. Consulting firms, think tanks, and university-based academics have devised rival schemes to “cost out” the precise amount needed to provide students with an adequate education. Yet a quest for an objective, scientific solution to a legal question

cannot succeed if available knowledge and tools are not up to the task. A close look at the analytic methods underlying costing out studies shows that they are hardly a reliable source of information for judges seeking guidance on necessary funding levels.

School finance analysts have relied on four main approaches when advising courts and legislatures on appropriate remedies. “Professional judgment” studies rely primarily on a panel of educators to determine the level of resources needed to ensure high achievement, while the “state-of-the-art” model is based on the analysts’ own reading of the research literature on the effects of various educational interventions. The “successful schools” approach uses as the governing standard the spending levels at a set of high-performing schools within the state, the assumption being that average expenditure levels in these schools can help indicate what is needed elsewhere. Finally, analysts using “cost function” techniques make extrapolations based on the overall relationship between expenditures and student achievement within the state—a relationship so slight that this method typically provides the most extravagant cost estimates.

In chapter 4, Eric Hanushek, who has testified for the defense in several adequacy cases, argues that each of these methods has been devised to deal with the simple fact that researchers have yet to determine how much spending is needed to bring students up to a given level of proficiency. As a disclaimer included in one such study puts it, “no existing research demonstrates a straightforward relationship between how much is spent to provide education services and performance, whether of student, school, or school district.”³⁰ That being the case, it would seem to be impossible to use data on existing school operations to identify the amount of money needed to produce an adequate education. No approach currently applied—and none, it seems safe to say, that can currently be devised—can provide scientific evidence on how much to spend to get all students to the achievement level that a state wants them to attain.

In chapter 5, Matthew Springer and James Guthrie show how the unreliability of the available methods of costing out has led to the politicization of the legal process. Guthrie has testified as an expert witness for plaintiffs in both equity and adequacy cases. He and Springer argue that the issues raised by the early equity cases involved distributional issues suitable for judicial intervention, amenable to technical measurement, and within the capacity of courts to correct. Contemporary “adequacy” claims, on the other hand, increasingly reflect the agendas of narrow special interests—either the individual plaintiffs in the case at hand or the teacher unions and advocacy organizations allied with them.

Perhaps the greatest deficiency of most costing out studies is the failure to consider that education might be improved not by increasing resources but by improving the efficiency with which they are used. Nowhere is this more apparent than in the case of teacher pay, which, as the largest line item in most school district budgets, typically receives considerable attention in adequacy trials. With new federal mandates requiring all classroom teachers to be highly qualified, shortfalls in the number of teachers holding appropriate credentials have rhetorical weight. To remedy the problem, plaintiffs typically have proposed across-the-board increases in teacher pay.

The rationale for such proposals is scrutinized in chapter 6 by Michael Podgursky. Using data from the Bureau of Labor Statistics to compare the weekly pay and benefits of teachers with those of other professionals, Podgursky finds little evidence that teachers on average are poorly compensated. Nor does he find that teachers in the private sector earn more than their public school counterparts, an indication that average teacher pay is not out of line with market forces. For courts inclined to use the percentage of teachers lacking formal credentials as a measure of pay adequacy, he offers the helpful reminder that the complexity of current certification systems makes a modest percentage of uncertified teachers all but inevitable for most school districts.

With little evidence that teacher pay on average is too low, Podgursky offers a quite different strategy for recruiting and retaining effective teachers. He proposes the deregulation of teacher credentialing so that school principals have more leeway in determining who might be effective. He also calls for flexible salary schedules that reward teachers according to the scarcity of their skills, the difficulty of their assignments, and their effectiveness in the classroom, rather than simply according to credentials and experience. While these proposals are politically controversial, the documented importance of teacher quality for student achievement makes them worth taking seriously, and several states and districts are now considering proposals along these lines.³¹ Existing costing out techniques, however, ignore the potential efficiency gains from such reforms and others like them.

Part 3: Impacts

Earlier courts may have been reluctant to charge into the political thicket of school finance in part for fear of revealing their own institutional incapacities. As Alexander Hamilton argued two centuries ago in *Federalist 78*, “the judiciary will always be the least dangerous branch.” It has

no influence over either the sword or the purse. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend on the aid of the executive arm even for the efficacy of its judgments.³²

Indeed, when a court orders other branches of government to act, there is always the risk that they will refuse to do so, forcing the court to beat a retreat. Andrew Jackson, when ordered by Chief Justice John Marshall to protect the Cherokees from Georgia's efforts to expel them from their ancestral lands, is said to have replied: "John Marshall has made his decision, now let him enforce it."³³ Apocryphal or not, the statement conveys an important truth: the horrific forced exodus from Georgia took place nonetheless.

Presidents, governors, and legislatures now tend to show more respect for courts than in Jackson's time, and, as a result, judges are more willing to intrude on their affairs. But the more sophisticated state judges, many of whom must stand for election at regular intervals, can be expected to assess the political winds carefully before ordering the legislature to allocate substantial new sums for the state's schools.

So concludes Frederick Hess in his analysis of the political response to adequacy judgments in four states—Kentucky, Maryland, Ohio, and New Jersey—presented in chapter 7. Indeed, when the Kentucky Supreme Court ruled in *Rose* that the state's school system was inadequate and urged an elaborate set of remedies upon the legislature, it did so only after business leaders, elected officials, and influential educators had agreed on a plan for reform. The court decision was not so much an order as an attempt to provide cover for a set of consensus reforms that the state's political elites already planned to undertake. Likewise, a 1994 Maryland lawsuit filed on behalf of "at-risk" students in Baltimore produced a settlement that gave more state money not only to Baltimore but also to wealthier jurisdictions around the state, probably because only by doing so could a political consensus be realized.

When courts either fail to anticipate or choose to ignore entrenched opposition to increasing spending, the ensuing political fireworks can be impressive. The New Jersey Supreme Court's expansive rulings in *Abbott v. Burke* induced Governor James Florio to push through the legislature a measure to increase taxes by \$1.3 billion. Florio soon found himself replaced by a fiscally conservative Republican, Christine Todd Whitman. Twenty-five years after the case was first filed and more than fifteen years since the state's high court handed down its first mandate, spending in the property-poor *Abbott* districts now exceeds spending elsewhere in the state. But the case continues to move from

the courts to the legislature and back again, with advocates repeatedly challenging the legislature's response as insufficient.

A long-running adequacy case in Ohio, initially filed in 1991, has had no apparent impact on school spending. After the case slowly made its way through the state's courts, in 1997 the Ohio Supreme Court ruled, by a 4-3 vote, that the state's funding system was unconstitutional. But when the legislature continued to flout the court-ordered directive, the court withdrew from direct involvement in the case in 2005 with the Delphic proclamation that "the duty now lies with the General Assembly to remedy an education system . . . found . . . to still be unconstitutional." The court's change of heart took place after the election of several new judges, making transparent the issue's obvious politicization.

Nor do Hess's case studies give any reason to think that the quality of the educational system in these four states was dramatically altered simply because judges ruled in favor of the plaintiffs. The management and governance reforms pursued in the wake of the judgments were all quite modest, and student achievement in Baltimore and in New Jersey's *Abbott* districts continues to be dismal. Even in Kentucky, the lodestar of the adequacy firmament, school spending advocates remain disappointed. In 2005, they filed a new lawsuit alleging that court intervention is again required.

Perhaps no case better illustrates the limitations on the courts' ability to spur prompt legislative action than that of *Campaign for Fiscal Equity v. State*. As Joe Williams relates in chapter 8, in June 2003 New York's highest court affirmed the trial court's finding that students in New York City were not being given the "sound basic education" that the court had established as the constitutional standard in its 1982 *Levittown* decision. Ironically, the phrase was originally coined in a decision that denied claims for equal funding. But the court endowed "sound basic education" with new meaning in *Campaign for Fiscal Equity v. State* and ordered the state to come up with a fiscal remedy by July 30, 2004. When the state failed to meet the deadline, the trial court appointed a panel of special masters to devise a specific compliance plan for the state to follow. The eye-popping order for billions of additional dollars for New York City schools was the end result.

Although the judgment appears at first to be an overwhelming victory for the plaintiffs, it also illustrates the challenges that they face. The suit was initially filed in 1993, yet by 2006 no state action had yet been taken. In April 2006, the state agreed to increase spending on facilities but appealed the order to increase annual spending on school operations to the state's highest court. It remains to be seen what action, if any, the court will be willing to take in response to the legislature's recalcitrance. Meanwhile, state and local officials

argue among themselves about who should foot the bill, an issue that the trial court left to the political process. The special masters and the trial court judge also left it to the legislature to devise any policy measures intended to ensure that the new money going to city schools was put to good use, setting aside the detailed accountability plans that the plaintiffs and the state had each submitted at trial.

Some may argue that the cases that Hess and Williams examined are exceptions, not the rule. But Christopher Berry's quantitative analysis of the effects of school finance judgments in chapter 9 suggests otherwise. Using information from all fifty states, Berry compares fiscal policies in states where courts have ruled school funding systems unconstitutional with policies in states where courts have not. He finds that school finance judgments tend to shift spending from the local property tax to statewide taxes, such as the sales and income tax. But a significant share of the increase in spending from state budgets is offset by spending cuts at the local level, making the aggregate impact of the court order on education spending statistically insignificant. Although many of the judgments included in his analysis were issued in equity cases, which were not explicitly intended to boost aggregate spending, Berry finds no evidence that adequacy and equity judgments differ in their effects.

It is important to note that Berry's results indicate that on average, school finance judgments have led to a 16 percent decrease in the inequality of spending between high- and low-spending districts within a state. And even where cases have not been filed, the threat of litigation may have led legislatures to be more aggressive in addressing fiscal inequities. School finance litigation thus seems to have contributed notably to the steady equalization of district resources that has proceeded in recent decades. Even a relatively small impact on spending inequality would be no small matter—if spending increases translated well into improved student outcomes. Unfortunately, the overall relationship between spending and achievement is notoriously weak, and most studies of the effect of court-induced equalization in specific states have found little or no impact of the new spending on student achievement.³⁴

In sum, Berry's findings concerning the impact of past school finance judgments suggest that both the fiscal and the educational significance of adequacy lawsuits have been exaggerated. One can easily understand how this might occur. Plaintiffs are tempted to take pride in and credit for their legal accomplishments. Meanwhile, defendants have just as much reason to dramatize the harsh tax increases that the same remedies entail.

Yet for all the heated rhetoric, there is good reason to expect the fiscal impacts of these decisions to be modest. Complex legal cases usually take years to resolve, and the remedies finally fashioned may be only a distant relative of

those initially proposed. Moreover, implementation of the remedy can be delayed so long that dollar amounts lose their original value, overtaken by both inflation and the steady growth in educational spending even in the absence of a court order. In the end, the adequacy lawsuit seems to have accomplished much less to date than advocates had hoped—or defendants had feared.

Part 4: Future Directions

Yet it may be too soon to dismiss adequacy lawsuits as having only limited impact. There have been only a handful of “equity plus” rulings—perhaps too few to reliably gauge their impact. And the movement’s momentum has only increased in recent years, sustained by sizable grants from the Rockefeller and Ford foundations, by the heavy involvement of teacher unions and high-profile advocacy organizations, and by heightened attention to achievement disparities—attributable, at least in part, to the ongoing implementation of No Child Left Behind.

As Andrew Rudalevige explains in chapter 10, NCLB gives statutory recognition to the adequacy movement’s argument that states have a duty to educate all students to proficiency. Just as important, it seems to offer justiciable standards to determine whether that duty has been fulfilled. There are no doubt tensions in the NCLB-adequacy alliance: many of the law’s supporters see test-based accountability primarily as a way to ensure that schools use existing resources more effectively, and many adequacy sympathizers doubt the validity of standardized test results as a measure of educational quality. Even so, Michael Rebell, the lead attorney for the plaintiffs in *Campaign for Fiscal Equity v. State* and a professor of law and educational practice at Teachers College, Columbia University, contends that the passage of NCLB was “enormously helpful to us from a litigation point of view.”³⁵

If the new federal law has influenced the adequacy movement, the reverse is no less true. School officials in a growing number of states now contend that more federal aid is needed if they are to raise student achievement to mandated levels. They argue that the law, in violation of its own wording, places an unfunded mandate on the states. To press the argument, Connecticut filed a federal lawsuit, as did the National Education Association, in collaboration with various school districts. Ironically, in 2005 a task force convened by the National Conference of State Legislatures issued a report that estimated the costs of raising student proficiency levels under NCLB using the same techniques that Hanushek, Guthrie, and even many of the confer-

ence's member states have criticized as an unreliable gauge of a state's fiscal obligations.³⁶

Indeed, the adequacy argument may ultimately bring about an enhanced federal role in education finance. As a grant in aid of state activity, NCLB does not meet the definition of a federal mandate, so any federal increment is more likely to result from congressional action than from judicial fiat.³⁷ But in the current era of budgetary constraint, additional funding may be less likely than an outcome that neither plaintiffs nor defendants would openly embrace—the dumbing down of state educational standards simply to avoid an adverse judicial decision.

As Michael Heise points out in chapter 11, there is nothing in NCLB that requires any particular level of proficiency by the students of any state. Even now, definitions of appropriate levels of proficiency vary widely from one state to the next.³⁸ States that were leaders in the standards movement set the proficiency bar for their students considerably higher than those states that established standards only in the wake of NCLB, and pressures to lower standards are intensifying as more schools are identified as needing improvement.

Yet there also are hints of a new judicial realism emerging that could shift the adequacy movement in a quite different direction. Heise reports that some courts have recently refused to impose large fiscal obligations on state legislatures. In Illinois and Rhode Island, for example, courts have declined to take up school finance claims on the grounds that the matter is a political question or lacks judicially manageable standards. And a few courts that had previously issued rulings declaring a constitutional violation have, in the context of subsequent litigation, declined to pursue the matter further. In 2005 the Ohio Supreme Court, after several failed attempts to win compliance with a mandated spending increase, left the matter to the legislature to resolve. Its counterpart in Alabama stated explicitly in a 2002 decision that “it is the Legislature, not the courts, from which any further redress should be sought.”³⁹

Perhaps the most telling adequacy case of recent vintage is *Hancock v. Commissioner of Education*, which was decided in 2005 by the Supreme Judicial Court in Massachusetts. The trial court in *Hancock* affirmed the plaintiffs' claims that schools needed more money. But when the case reached the state's highest court, a political consensus supporting the trial court's opinion was noticeably absent. On the contrary, the state education department, the Republican governor's office, and the Democratic attorney general's office worked together to fight the lawsuit vigorously. A group of about fifty state legislators filed an *amicus* brief on behalf of the plaintiffs, but the leaders in the state legislature gave the case no apparent support. Perhaps wary of the controversy

that could follow an adverse ruling, the justices gave the adequacy movement one of its most stinging defeats to date.

The court's decision in *Hancock* is analyzed in chapter 12 by Robert Costrell, who served as an expert witness for the defense. The decision emphasized the state's steady educational progress, the closing of funding gaps between rich and poor districts, and its comprehensive accountability system—a system that includes high curricular standards, an intervention plan for failing schools, and a rigorous exit exam that all students must pass before graduating from high school. But even these signs of progress, Costrell explains, could not have sustained the court's decision if the justices still insisted on seeing strong educational outcomes in every school district. The larger lesson, perhaps, is that states can head off judicial intervention by adopting Massachusetts-style reforms.

Part 5: Reflections

Many of the Massachusetts reforms had little to do with spending levels, but the adequacy argument need not be limited to fiscal policy. Courts could just as easily interpret a less than “thorough and efficient” educational system as one that needs to make better use of existing funds. The courts, it would seem, could order changes in compensation schemes to recruit and retain effective teachers. Or they could order the creation of a student accountability system that would encourage schools and students to perform at higher levels. The case for such remedies is especially strong, given the fact that there is good reason to believe that, if implemented, they would prove more powerful than the fiscal remedies ordinarily attempted.⁴⁰

Courts could even order, as requested by a New York City parent in an unsuccessful motion to intervene in *Campaign for Fiscal Equity v. State*, that students be given the immediate option of attending another school, public or private.⁴¹ The argument for such a remedy appeals to common sense. After all, education reform is a long and arduous process, especially when courts are involved. If past experience is any indication, the students named as plaintiffs in adequacy suits are likely to have completed their scholastic careers before new resources are allocated or accompanying reforms are implemented. In July 2006, Clint Bolick, the chief litigator in the Supreme Court's landmark *Zelman* decision upholding the constitutionality of school vouchers for religious private schools, filed a class action lawsuit in New Jersey asking that children in those public schools where fewer than half of the students are proficient in math and reading be permitted to use the public funds spent on their educa-

tion to attend public or private schools.⁴² Few proposals are as controversial as the provision of school vouchers, however, and courts do not seem likely to order their adoption by a resistant political system.

In chapter 13, Kenneth Starr asks courts considering any remedy, fiscal or otherwise, to recall, with humility, the impact of court decisions on school segregation—an area where the constitutional principle was clear, the harm was obvious, and an appropriate remedy seemed readily apparent. *Brown* had established a principle that proved effective in eliminating de jure segregation in the South, even if reform proceeded at a more “deliberate speed” than reformers hoped. But when courts tried to legislate the particulars of racial balance within jurisdictional boundaries, they entered into a political morass from which they could not easily extricate themselves without doing harm to their own prestige or to the very principle that they had set forth. As central city schools were desegregated, white families moved to the suburbs. In the end, schools remained almost as segregated at the beginning of the twenty-first century as they had been in 1970.⁴³

Courts can enunciate principles to guide policymaking, as did state courts, to a certain extent at least, in the early equity cases that came before them. But they lack the information and institutional capacity to accomplish something as complicated as assessing the best way to achieve an adequate state education system. Effectively executing remedies with the most potential to enhance educational opportunities for all students, including the most disadvantaged, would require a political coalition to support their implementation. Yet the very same coalition would render the judicial mandate unnecessary. In sum, as Joshua Dunn and Martha Derthick point out in this volume’s concluding chapter, “If money—and money alone—were all that is required to educate the nation’s children and if courts alone could provide the money, then perhaps one would be willing to entertain, if only for a fleeting moment, [a] departure” from the normal constitutional processes to allow government by judicial decree. But after reading the pages that follow, few readers will be any more convinced than Dunn and Derthick that the adequacy lawsuit is a promising avenue for reform.

Notes

1. *Brown v. Board of Education*, 347 U.S. 493 (1954).

2. The exception is Mississippi. For one typology of education provisions in state constitutions, see William E. Thro, “To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation,” *Virginia Law Review* 75, no. 8 (November 1989): 1639–79.

3. Eric A. Hanushek, "The Failure of Input-Based Schooling Policies," *Economic Journal* 115 (February 2003): F64-F98. Although observers often attribute the growth in school spending since 1970 to expanded special education programs, research indicates that special education spending accounts for only a small share of the overall increase; see Eric A. Hanushek and Steven G. Rivkin, "Understanding the Twentieth-Century Growth in U.S. School Spending," *Journal of Human Resources* 32, no. 1 (Winter 1997): 35-68. For evidence on high school graduation rates, see Jay P. Greene and Greg Forster, "Public High School Graduation and College Readiness Rates in the United States," Manhattan Institute Education Working Paper 3 (New York: Manhattan Institute, September 2003); Christopher B. Swanson, "Who Graduates? Who Doesn't? A Statistical Portrait of Public High School Graduation, Class of 2001" (Washington: Urban Institute, 2004).

4. Alan Ginsburg and others, "Reassessing U.S. International Mathematics Performance: New Findings from the 2003 TIMSS and PISA" (Washington: American Institutes for Research, November 2005).

5. James J. Heckman and Alan B. Krueger, *Inequality in America: What Role for Human Capital Policies?* (MIT Press, 2003).

6. See chapter 8 in this volume, p. 195.

7. *Serrano v. Priest*, 5 Cal.3d 584, 487 P2d 1241 (1971); *Serrano v. Priest*, 18 Cal.3d 728 (1976). Although the 1971 *Serrano* decision did not rule on the merits of the plaintiffs' claims, by declaring education to be a fundamental constitutional right it provided the legal basis for the superior court's later finding that the state's school finance system was in fact unconstitutional.

8. John E. Coons, William D. Clune, and Stephen D. Sugarman, *Private Wealth and Public Education* (Harvard University Press, 1970), p. 25; *Serrano v. Priest*, 18 Cal.3d 728 (1976).

9. The percentage of California students attending private schools rose by about 50 percent as the *Serrano* decisions were implemented. Thomas Downes and David Schoeman, "School Finance Reform and Private School Enrollment: Evidence from California," *Journal of Urban Economics* 43, no. 3 (May 1998): 418-43.

10. William A. Fischel, "Did *Serrano* Cause Proposition 13?" *National Tax Journal* 42, no. 4 (December 1989): 465-74; and William A. Fischel, "How *Serrano* Caused Proposition 13," *Journal of Law and Politics* 12, no. 4 (Fall 1996): 607-36.

11. Jon Sonstelie, Eric Brunner, and Kenneth Ardon, "For Better or for Worse: School Finance Reform in California" (San Francisco: Public Policy Institute of California, February 2000).

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

13. Molly McUsic, "The Use of Education Clauses in School Reform Litigation," *Harvard Journal of Legislation* 28, no. 2 (1991): 307-41.

14. Caroline M. Hoxby, "All School Finance Equalizations Are Not Created Equal," *Quarterly Journal of Economics* 66, no. 4 (2001): 1189-1232.

15. Georgia Constitution, art. VIII, sec. 1.

16. Florida Constitution, art. IX, sec. 1.

17. Colorado, Idaho, and Montana require "thorough" systems, while Arkansas, Delaware, Illinois, Kentucky, and Texas require "efficient" systems. Thro, "To Render Them Safe."

18. Wyoming Constitution, art. VII, sec. 9.

19. *Pauley v. Kelly*, 162 W.Va. 672, 705-06, 255 S.E.2d 859, 875 (1979).

20. *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989).

21. For an analysis by an early observer of this transition, see William H. Clune, "The Shift from Equity to Adequacy in School Finance," *Educational Policy* 8, no. 4 (1993): 376–94.

22. Michael A. Rebell, "Adequacy Litigations: A New Path to Equity?" in *Bringing Equity Back: Research for a New Era in American Educational Policy*, edited by Janice Petrovich and Amy Stuart Wells (Teachers College Press, 2005), pp. 291–323.

23. National Commission on Excellence in Education, *A Nation at Risk* (U.S. Department of Education, 1983).

24. Diane Ravitch, "A Historic Document," in *Our Schools and Our Future . . . Are We Still at Risk?* edited by Paul E. Peterson (Hoover Institution Press, 2003).

25. Andrew Rudalevige, "No Child Left Behind: Forging a Congressional Compromise," in *No Child Left Behind? The Politics and Practice of School Accountability*, edited by Paul E. Peterson and Martin R. West (Brookings, 2003), pp. 23–54.

26. One exception is the Supreme Court of Ohio, which wrote in its 1997 decision in *DeRolph v. State of Ohio* that debates at the state's 1850–51 constitutional convention revealed the delegates' "strong belief that it is the state's obligation, through the General Assembly, to provide for the full education of all children within the state." Quoted in Rebell, "Adequacy Litigations: A New Path to Equity?" in *Bringing Equity Back*, edited by Petrovich and Wells, p. 300.

27. John Dinan, "The Meaning of the Education Clauses in American State Constitutions," paper presented at the annual meeting of the American Political Science Association, Philadelphia, August 31–September 3, 2006.

28. *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990), 403.

29. Eric A. Hanushek and Margaret Raymond, "Lessons from State Accountability Systems," in *No Child Left Behind*, edited by Peterson and West, pp. 127–51.

30. See chapter 4 in this volume, p. 77.

31. Steven G. Rivkin, Eric A. Hanushek, and John F. Kain, "Teachers, Schools, and Academic Achievement," *Econometrica* 73, no. 2 (March 2005): 417–58; Jonah E. Rockoff, "The Impact of Individual Teachers on Student Achievement: Evidence from Panel Data," *American Economic Review* 94, no. 2 (2004): 247–52.

32. Clinton Rossiter, ed., *The Federalist Papers* (Mentor, 1961), p. 465.

33. C. Herman Pritchett, *The American Constitution* (McGraw-Hill, 1959), p. 99.

34. Thomas A. Downes, "Evaluating the Impact of School Finance Reform on the Provision of Public Education: The California Case," *National Tax Journal*, 45, no. 4 (December 1992): 405–19; William Duncombe and Jocelyn M. Johnston, "The Impacts of School Finance Reform in Kansas: Equity Is in the Eye of the Beholder"; Ann E. Flanagan and Sheila E. Murray, "A Decade of Reform: The Impact of School Reform in Kentucky"; Julie B. Cullen and Susanna Loeb, "School Finance Reform in Michigan: Evaluating Proposal A"; and Thomas A. Downes, "School Finance Reform and School Quality: Lessons from Vermont," all in *Helping Children Left Behind: State Aid and the Pursuit of Educational Equity*, edited by John Yinger (MIT Press, 2004), pp. 148–93, 195–214, 215–49, 284–314.

35. See chapter 10 in this volume, p. 243.

36. National Conference of State Legislatures, *Task Force on No Child Left Behind: Final Report* (Washington: 2005).

37. It is worth noting, however, that at least one prominent legal scholar has advanced a new constitutional argument rooted in the Fourteenth Amendment's citizenship clause: Goodwin Liu, "Education, Equality, and National Citizenship," *Yale Law Journal* 116, no. 2 (November 2006): 330–411.

38. Jennifer Sloan McCombs and Stephen J. Carroll. "Ultimate Test: Who Is Accountable for Education if Everybody Fails?" *RAND Review* 29, no. 1 (Spring 2005): 10–15.

39. *Ex parte James*, 836 So.2d 813, 815 (Ala. 2002). The decision was unusual in that the court chose of its own volition to reopen the case, which it had previously reaffirmed four times.

40. Hanushek, "The Failure of Input-Based Schooling Policies."

41. David J. Hoff, "N.Y. Parent Seeks Tuition from Judge in Aid Case," *Education Week*, January 25, 2006.

42. Clint Bolick, "Remedial Education," *Wall Street Journal*, July 12, 2006.

43. Charles Clotfelter, *After Brown: The Rise and Retreat of School Desegregation* (Princeton University Press, 2004).