The Inadequacy of Adequacy Guarantees:
A Historical Perspective

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The state constitutional language that propels most adequacy lawsuits dates back to the 19th century. Applying laws written then to courtroom battles that unfold now, at the start of the 21st century, can be artful, even fanciful. Adequacy clauses do not exist in state constitutions. Lawyers have construed adequacy as a loose legal standard from language that had a different meaning when most of the state constitutions were adopted. That is what lawyers do. Their job is to convince judges that what they seek to achieve for their clients is right there in the law, or better yet, the constitutions that judges interpret and enforce. Class action suits often involve another step in which lawyers strive to convince their clients that what the lawyers want to win for them is in their (the client’s) best interest. Such is not always the case, whether or not the lawyers believe it.

State constitutions reflect not only the thinking and aspirations of the times in which they were written, but the biases as well – or at least the biases of those who ruled when the documents were written. The history that shaped the drafting of state constitutions during the 19th century varied from state to state and region to region. Yet there are discernible patterns. Nineteenth century political history is riddled with racial, ethnic, and religious bigotry, all of which were manifest in the state constitutions under which we live. We are doing a lot better now at moderating the effects of these shameful dispositions from the past, but the legal residue is still with us, and it sometimes gets factored into litigation strategies carried out in the name of poor children.

Adequacy suits are frequently referred to by legal scholars as the “third wave” of school finance litigation. During the first wave, challenges were grounded in the Equal Protection Clause of the Fourteenth Amendment. In Serrano v. Priest, for example, the California Supreme Court found that funding disparities generated by a system based on
local property taxes violated the federal constitutional rights of people who lived in property poor districts. The second wave is marked by the Rodriguez\textsuperscript{3} decision of 1973, in which the United States Supreme Court ruled that funding disparities in education do not necessarily violate rights protected by the federal constitution. The decision was a major setback in the movement for educational and racial equality that began with the landmark Brown v. Board of Education\textsuperscript{4} decision of 1954. Rodriguez, in fact, was a direct contradiction of Brown, which in addition to outlawing racial segregation in public schools, proclaimed that educational opportunity “is a right that must be made available to all on equal terms.”

The practical effect of Rodriguez was to remove the federal courts from the battle over educational finance, and to a certain extent the discussion about educational opportunity. The net result was to place such matters in the hands of the state courts and ultimately the state legislatures. It takes a leap of faith, perhaps a bit of amnesia, to rely on state governments to serve as mechanisms to resolve the injustices heaped on disadvantaged minorities. The American civil rights movement began when the federal courts acted to strike down decisions made by state legislators and judges that perpetuated injustices against disfavored citizens. There has been some progress realized under the banner of school finance reform, but it has been both limited and limiting.

Initially state litigation for school finance reform mimicked the activity from the first generation. Plaintiffs built their claims primarily on the strength of equal protection clauses found in state constitutions, and to a lesser extent on their education clauses. They demanded equality in spending, but more often than not failed to get it.\textsuperscript{5} State courts were reluctant to force legislatures to do something they were not inclined to do: that is,
redistribute locally generated funds from wealthy and powerful suburban districts to benefit mostly poor, mostly urban districts that did not have the same political and economic clout. Politically speaking, the wholesale redistribution of funding would have been an unnatural act.

The third wave of adequacy suits was somewhat of a retreat, once more removed from the promise of educational opportunity outlined in *Brown* and halted by *Rodriguez.* The reasoning went something like this: If the courts could not persuade elected legislators to equalize funding between the rich and the poor, then perhaps they could agree on a minimum level of adequacy to which all children were entitled. This left the door open for wealthy districts to continue to spend more. The claims were tied to a variety of education clauses found in state constitutions, which we will get to shortly. In the first such case that originated in Kentucky, the court had found that spending and achievement were so low compared to other states that it imposed a statewide remedy designed to benefit all districts, including those that had spent more than the average. Shortly thereafter, a Montana court combined equity and adequacy concerns when it ruled that the state “failed to provide a system of quality public education granting to each student the equality of educational opportunity guaranteed.”

The Kentucky legislature responded by prescribing a three-tier system of funding. It guaranteed a foundation level of spending for all districts, offered matching funds to districts that taxed themselves for up to 15% above the foundation level, and allowed wealthy districts to tax themselves an additional 15% thereby spending more than everyone else. Total education spending was increased by $1 billion. While the legislature promised to ensure “high academic standards for all children” and cut the
spending gap between rich and poor by half, it steered clear of the equality rule that guided earlier discussions.

Rather than focus entirely on spending, adequacy lawsuits introduced the notion of a quality education. In the *Rose* case of 1989, the Kentucky Supreme Court identified seven basic developmental capacities that must be targeted for all students. These included such factors as oral and written communication skills, knowledge of economic, social and political systems, self-knowledge for physical and mental wellness, grounding in the arts, preparation for higher education or vocational training, and readiness for gainful employment. The West Virginia court set down similarly specific educational objectives for enforcing an adequacy judgment under its constitution. That being said, most discussions about adequacy came back to the money issue, or exactly how much would be needed to meet goals set for of attaining educational quality.

Unsatisfied with what had been achieved under its previous equity based ruling, in 1990 the New Jersey Supreme Court ordered the state legislature to guarantee spending in poor urban districts on par with the amount spent in wealthy suburban districts, and to further provide supplementary programs designed to “wipe out disadvantages as much as a school district can.” In subsequent rulings the court, at the urging of the plaintiffs, prescribed a number of programmatic entitlements. These included whole school reform, full-day kindergarten, pre-school for all 3 and 4 year olds, the correction of building code violations, the creation of additional classroom space, social services, increased security, after-school programs, and summer-school programs. All of these initiatives were required under the auspices of the “thorough and efficient” clause in the state constitution. In order to address overcrowding and poor maintenance in
disadvantaged, mostly urban, districts, the state created a School Construction Corporation in 2002 with an allocation of $8.6 billion. In September, 2005 the New York Times ran a lead story documenting incompetence, lack of planning, and shady dealings that led to the cancellation of 200 school projects over the previous summer. In the meantime, the New Jersey court routinely adds districts to the list of so called “Abbott districts” so that they can also benefit from the court’s interventions.

It stands to reason that it takes more resources to get disadvantaged students to a desirable level of performance than it does for advantaged students. The New Jersey case, however, also signaled a renewed emphasis on resources or educational inputs as opposed to the kind of educational outcomes that were previously outlined by the Kentucky and West Virginia courts. While educational aspirations can only be achieved through concrete programmatic initiatives, the focus on inputs can also serve as a distraction from the fundamental interests of the children who are the aggrieved parties in school finance litigation. One approach responds to the needs of school systems, the other to the needs of school children. The two can be related, but they are not the same and can in fact be adverse -- rendering a judicial response that is neither thorough, nor efficient, nor effective, nor just. The programmatic nature of the New Jersey ruling also indicated that the courts, at least in some places, could use state constitutions to define adequacy in almost any way they chose.

In 2003, New York State’s highest court declared that New York City had failed to provide all of its children with a “sound basic education” in violation of the state constitution. The court’s finding in this twelve-year “adequacy” suit was rooted in constitutional language that requires the legislature to maintain and support “a system of
free common schools, wherein all children of this state may be educated.” The court equated “sound basic education” with “the basic literacy, calculating and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury,” which it determined was consistent with the purpose that the constitutional framers had in mind when they drafted the education clause in 1894.

When the suit was initially launched, New York City had 37% of the state’s public school students and received only 35% of the education funding. By the time the decision was handed down, the city had benefited from significant funding increases and was receiving 37% of the state’s education dollars. From 1997 to 2004, the school budget rose by more than $6 billion with no measurable improvement in student performance. Based on analyses for the plaintiffs examining educational resources and lagging student performance in the city schools, the trial judge in the case concluded that city school children were receiving an inadequate education. While the court pretended otherwise, experts retained by the plaintiffs failed to demonstrate a causal relationship between spending and student performance. In 2005, a panel utilizing studies prepared for the plaintiffs prescribed a remedy that would increase the $12.9 billion school budget by 43% or $5.6 billion per year, bringing per capital expenditures to more than $18,000. An additional $9.2 billion was called for in the form of capital improvements.

At this writing the legislature has not come up with a plan for funding the remedy, and the governor has been resistant; nor have school administrators determined precisely how the new money might be spent. In an attempt to bring the remedy more in line with the needs of city school children, the governor’s office, several amici in the case, and a
concurring judge encouraged the court to adopt the New York State Learning Standards as method for defining a “sound basic education.” The court responded that elements of the Learning Standards approved by the Board of Regents and Commissioner of Education “exceed notions of a minimally adequate or sound basic education,” suggesting that they might be too rigorous a measure. Instead the court settled on a financial target, with full knowledge that additional spending could not guarantee a satisfactory improvement in student performance. Better to error on the side of more spending than higher student performance, their thinking seed to suggest. We can argue over what the New York legislature had in mind when it wrote the education clause in 1894, but I feel confident in saying that it was not about maintaining educational deprivation at the highest possible cost.

EARLY HISTORY

William Thro has identified four types of education clauses in state constitutions, which impose increasing levels of obligation on state legislatures. Category I type clauses create a minimal obligation for the state, requiring a system of free public schools and nothing more. Such language is found in the New York State Constitution. Category II clauses involve more specific requirements such as the “thorough and efficient clause” that is found in the New Jersey constitution. Others in this category refer to a “uniform” or “general and uniform” system of schools. Category III clauses mention a particular objective that education is to achieve. California’s constitution, for example, requires the legislature to “encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement.” Rhode Island’s instructs the legislature to “adopt
all means which it may deem necessary and proper to secure to all people the advantages and opportunities of education.” Category IV clauses supposedly impose the greatest obligation and designate the priority afforded education in the general mix of functions performed under the auspices of the state. Thus, the Washington Constitution refers to education as a “paramount duty.” Georgia, Illinois and Michigan refer to a “primary duty.” In all, 18 states have Category I provisions, 22 have Category II, 6 have Category III, and 4 have Category IV.\textsuperscript{13}

Despite their rising levels of specificity, these provisions set a rather imprecise standard for defining educational adequacy, and leave open the question of whether adequacy should be defined in terms of inputs or outcomes. Should “thorough” and “efficient” commands be treated with equal weight? Does “uniform” mean that all children should be educated in exactly the same way? At what point does uniformity become rigidity? How far does the legislature need to go to “encourage” the “promotion” of a “suitable” education for “improvement?” If education is the single most important function performed by the state, then all the legislature needs to do to meet such a standard is invest more in schooling than it does in any other state function. Factoring in local expenditures, most, if not all states were already doing that prior to the first wave of school finance litigation.

While most of the state constitutions under which we now live can be traced directly to the 19\textsuperscript{th} century, a serious historical review requires us to reach back further. We might begin with the Puritans of New England, who placed great value on education, and had a firm understanding of why it was important to them. In 1642 the Massachusetts School Law authorized local town officials to hold parents accountable for their
children’s ability “to read and understand the principles of religion and the capital laws of this country.” It was not the intention of the legislature then to either create a school system or require localities to do so. Lawmakers placed the duty to educate squarely with parents, and they meant business. They empowered town officials to set fines for parents who were negligent; and if that didn’t work, selectmen could apprentice out the children of parents who were deemed not “able and fit” to meet their responsibilities. The measure was also indicative of how closely the Puritans associated education with religion.

In 1647 the Massachusetts legislature passed the “Old Deluder Satan Act.” The objective of the law was to foil “the chief project of ye old deluder Satan, to keep men from knowledge of the Scriptures,” which the Puritans believed would have undermined public morality and civil society. Aside from its religious significance, already apparent in the first law, the Act of 1647 was the first in which a state imposed responsibility for education upon local governments. It required towns of more than 50 households to employ a teacher for instruction in reading and writing. The teacher’s wages could be paid by either the parents of students or by the general population. Towns of 100 or more households were required to open a grammar school to prepare students for further education. By this time, many Massachusetts towns had already made arrangements for educating their young. Now the legislature was making it a matter of state law, with no commitment to assist with the financing.

After the colonies declared their independence from England in 1776, eleven of the original thirteen states adopted new constitutions. In only five of these documents were there any mention of education. Of 25 state constitutions adopted or revised between 1776 and 1800, twelve included some kind of provision for education.
According to John Eastman, these early provisions were of two kinds: hortatory and those that appeared to require specific legislative action. The Massachusetts Constitution drafted by John Adams in 1780 is exemplary of the first type. Because it is such an important part of our political, legal, and educational history, I will take the liberty to quote it at length:

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties … it shall be the duty of legislators and magistrates … to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools, and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings, sincerity, good humor, and all social affections, and generous sentiments, among the people.¹⁶

Like Benjamin Franklin, Thomas Jefferson and many of his contemporaries, Adams believed that education is essential to a healthy democracy. If the government needed education to succeed, it was only reasonable for the government to provide for its support in one way or another. When Adams wrote his constitution most education in the Bay State was under the direction of the clergy, including the university in Cambridge that was founded by Congregationalists. Except for a 19th century amendment that prohibited aid to religious institutions, the education clause from Mr. Adams’ constitution remains in effect today.

The Massachusetts Constitution of 1780 was a model for the New Hampshire Constitution of 1784, and for several states that joined the Union in the early part of the 19th century, including Indiana (1816), Tennessee (1834), and Arkansas (1836). Its language was also reflected in the Northwest Ordinance adopted by Congress 1787,
which read “Religion, morality, and knowledge being necessary to government and the happiness of mankind, schools and the means of education shall forever be encouraged.” This language was followed in a number of state constitutions, including Ohio, Missouri, Mississippi, Kansas and North Carolina. More obligatory provisions appeared in the early constitutions of North Carolina, Pennsylvania, Vermont, and Georgia. North Carolina required not only that that “schools shall be established,” but that salaries for teachers will be “paid by the public.” Vermont required that teacher salaries be paid for by each town; Georgia assigned financial responsibility to the state. The Pennsylvania Constitution of 1790 specifically provided for the “free education” of poor children.

Between 1800 and 1834, eight new states joined the Union, and six of the existing states wrote new constitutions. All but three – Louisiana, Illinois and Virginia - contained some provision concerning education. Two included “equality” clauses. Connecticut called for the creation of a school fund for the “support and encouragement of the public or common schools throughout the State, and for the equal benefit of all people thereof.” Indiana called for a “general system of education …equally open to all.” But the latter provision contained an escape clause that read, “as soon as circumstances permit.” This not only left the “equality” commitment uncertain, but overall funding for the education system as well.

In 1816 the Indiana legislature passed legislation to elaborate on its constitutional intent, which would prove to be a conspicuous sign of the times. It read that public schools would be “open and free to all the white children resident in the school district.” Much later, in 1850, the Indiana Supreme Court ruled that “colored” children were not even permitted “to attend public schools, paying their own tuition, where the resident
parents of white children attending, or desiring to attend said schools object.” In reaching its conclusion, the Indiana court cited an Ohio Supreme Court decision deferring to the legislature “as to whom the teacher may admit to the privileges of the school.” While most state constitutions had defined a public obligation to provide education, most state courts and legislatures refrained from deeming education a right, especially when it came to certain people.

In 1849 the Massachusetts Supreme Court heard a case brought by the parents of Sarah Roberts, a five-year old black girl who had been excluded from attending an all white school in Boston. The case was brought on the basis of a Massachusetts statute indicating that “any child unlawfully excluded from public school instruction, in the Commonwealth, shall recover damages…. against the city or town by which such public instruction is supported.” The state supreme court ruled that Sarah was not entitled to attend the school nearest her home because a “colored” school existed in another part of the district. The court further explained that the state constitution “will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment.”

This was not the antebellum South. This was Boston, the cradle of liberty, the place where Horace Mann breathed life into the idea of a common school. It was a generally accepted practice throughout the country to separate children by race in places where black children were educated at all. And the level of education made available to young women was not the same as that afforded men. It was assumed that women didn’t need to be as well educated. Since they were not qualified to vote or hold office, they did
not need to prepare for the duties of citizenship. And the responsibilities they took on in the home did not require them to have as rigorous an education as men, who would go out into the world to pursue serious careers. State law reflected the values, priorities, and prejudices of the time. That’s the way it was at the beginning of the 19th century. That’s the way it is likely to be always.

THE COMMON SCHOOL

Even though the history of the common school varies from region to region and state to state, it is fitting to begin its story with Horace Mann, who served as secretary to the Massachusetts school committee from 1837 to 1848. Mann was more thorough than any educational leader of the time in articulating the goals of public education as it began to emerge in the middle of the 19th century. The widely read and quoted annual reports Mann prepared for the state board of education are the first chapter in the canon of American public schooling. His vision was bold and ambitious, but it was also tainted. The “grand machinery” of education Mann imagined was a response to a large infusion of immigrants who were changing the face of the greater Boston area, many of whom were poor laborers that had come from Ireland to escape famine. Mann saw education as a tool to eliminate poverty, prepare workers, promote morality, and create citizens.

Mann, more than anything else, sought to make Americans of the foreign masses that had come to the city, but his notion of what it meant to be an American was a narrow one. Mann equated being a good American with being a good Protestant. His 1844 report read, “Our system earnestly inculcates all Christian morals.” His schools required the daily reading of the King James Bible, the recitation of Protestant prayers, and the
singing of Protestant hymns. The practice offended many religious minorities including Jews, Catholics, secularists, and even some Protestants who were outside the mainstream. But only the Irish had sufficient numbers to rebel against the Protestant dominated political majority that controlled politics in Massachusetts. During Mann’s tenure as secretary of education, five of eight members of the Massachusetts school board were Protestant ministers, and most local school committees were controlled by churchmen. Mann never went so far as to say that he would prohibit non-Protestants from teaching in his public schools, but he did say that he felt “perfectly authorized to inquire” of such a person whether he would be willing to use the Protestant Bible.  

Children who refused to participate in religious exercises were subjected to corporal punishment. When Catholic leaders failed to rid public schools of their religious content, they began to demand support for their own religious schools. This created a backlash among the Protestant majority. In 1854, the Massachusetts legislature passed the nation’s first compulsory education law, a statute designed as much to exert control over the rebellious Catholic minority, as it was to provide universal education. Two years later with the anti-immigrant Know-Nothing party firmly in control of the governorship and the legislature, Massachusetts passed a constitutional amendment prohibiting aid to religious schools. It simultaneously created a Nunnery Investigating Committee, which conducted surprise visits on Catholic convents, and attempted to pass legislation that would limit voting and office holding to native-born citizens. Through the end of the 19th century, various legislative committees were established to oversee and harass private and parochial schools in the name of common education.
What was going on in Massachusetts was emblematic of what was going on throughout the nation. In 1854, the Know-Nothings sent 75 members to Congress, and were about to take control of the legislatures in Connecticut, New Hampshire, Rhode Island, Maryland, and Kentucky. They also had a strong presence in New York, Pennsylvania, Tennessee, Virginia, Georgia, Alabama, and Louisiana. Although Massachusetts was the only state to require Bible-reading by law, the practice was followed in 75-80% of the schools throughout the country. The practice was upheld by the state courts in most places, since those who sat on the bench were an extension of the political system that created the practice in the first place. One Maine court ruled in 1854, “if the majority of the school be Protestants, the (school) committee can enforce such a system of instruction upon all.”

Between 1835 and the beginning of the Civil War, nine new states were admitted to the Union, and fourteen others revised their constitutions. Of these, only Illinois and Virginia still had no education provisions, nine states had obligatory language, and four – New Jersey, Ohio, Minnesota and Oregon – had either “thorough and efficient” or uniformity clauses. New Jersey passed a law prohibiting schools from excluding children from public schools on account of “religion, nationality, or color,” but a state court subsequently authorized the refusal of admission if “the schools…were full.” Following the terms of the Northwest Ordinance, the Ohio enabling act of 1802 made land grants available to every township for the use of schools. Similar provisions later appeared in the enabling acts of Indiana (1816), Illinois (1818), and Michigan (1837).

The Ohio Constitution not only guaranteed access to state supported schools; it’s Bill of Rights included protections for poor children who had been victimized by
discrimination in some towns. The protections did not cover black or Native American children, who were either educated in separate schools, or not educated at all. In 1837, the same year that Horace Mann became secretary to the Massachusetts state board of education, Ohio appointed Samuel Lewis its first Superintendent of Public Schools. Lewis subscribed to the values and objectives that had been incorporated in the common school model of Horace Mann, including the religious aspects of it. The Ohio legislature subsequently commissioned a study of European systems of education, which resulted in an endorsement of the Prussian system that had impressed Mann.

Reluctant to commit the necessary funding, the Ohio legislature did not enact a constitutional provision calling for “thorough and efficient system of common schools” until 1851. When the issue of public schooling was brought before the constitutional convention of 1850-51, a debate ensued over the wording of a proposal that would have made schooling “free to all white children in the state.” Advocates of the proposal argued that making education available to “the colored race” would encourage unwanted immigration. Immigrants from certain places were not considered part of the white race, and therefore were entitled to the same treatment as blacks. The proposal received serious consideration, and nearly passed.

The delegates to the Ohio constitutional convention of 1850-51 made a conscious decision to have Protestantism thrive in public schools and prohibit aid to other religious schools. The same constitutional provision that organized the patchwork of local schools into a uniform system of state education also provided that “no religious or other sect or sects shall ever have any exclusive right to, or control of, any part the school funds of the state.” As one delegate to the convention explained it, the final arrangement was made
possible through the elimination of a single impediment, “the rivalry of schools created by different sects.” Parents would be permitted to send their children to religious schools, but only at their own expense. As a result, only families of means could attend schools that were not infused with the teaching and rituals of mainstream Protestantism. More than twenty years would pass before the local school boards of Cincinnati and Cleveland, responding to protests by Catholics and Jews, passed resolutions prohibiting Bible reading and religious exercises in the public schools. Similar measures were adopted in Chicago and New York for the same reasons.

When Michigan was admitted to the Union in 1837, its enabling legislation gave title to land for schools directly to the state rather than the towns within it, having a more centralizing effect on education. The Michigan Constitution that called for the creation of public schools granted discretion to the legislature to determine how this obligation would be met. This assumption of legislative supremacy was supported by case law. In 1841 the legislature enacted a law creating a separate school district for Detroit “composed of the colored children.” A year later, it passed a statute that created one school district for the entire city; however the Detroit school board continued to impose a policy requiring children to be segregated by race.

Many states continued to employ constitutional language to impose racial segregation in public schools after the civil war, including states that were not part of the Confederacy. For example, the Missouri Constitution of 1865 has one clause requiring the general assembly to “establish and maintain free schools for the gratuitous instruction of all persons of the state between the ages of five and twenty-one,” and another that allows “separate schools … for children of African dissent.” In 1875 the second clause
was revised to read, “Separate free public schools shall be established for the education of children of African dissent.” The West Virginia Constitution of 1872 that requires a “thorough and efficient system of free schools” also stipulates that “White and colored persons shall not be taught in the same school.” As general rule, former Confederate states incorporated segregation clauses in the same constitutions that carried various educational guarantees, including those that called for “equal education” or the education “all children.”

The history of the common school and the legal provisions that created it in state law cannot be separated from the ugly battles that took place between religious dissenters and the Protestant majority that controlled the legislatures and the courts. 36 Michigan had adopted a constitutional provision against aid to religious schools in 1835. In 1845, after a long dispute with Protestant leaders, the Detroit school board adopted a measure that allowed Catholic children to use their own Bible in public school classrooms.37 In 1850 the state constitution was amended to strengthen prohibitions against aid to religious schools. A Detroit newspaper portrayed the aid controversy as a conflict “between the Jesuit Priesthood and American Citizens.” In 1834 the Ursuline Convent in Boston was burned to the ground after Catholic leaders protested the beating of a young child who refused to read the Protestant Bible. In 1836 the residence of Archbishop John Hughes of New York was destroyed after he demanded that either the Protestant Bible be removed from the public schools or that Catholic schools be given their own funding. In 1844, violent rioting occurred in Philadelphia after Bishop Kendrick made a similar demand. Political confrontations also occurred in Chicago.
Some prohibitions against aid to religious schools were enacted through state law rather than constitutional revision. For example, the general constitutional requirement in New York for a system of free public schools remained virtually unchanged through most of the nineteenth century. In 1844, in the midst of political wars over aid to religious schools, the legislature, at the urging of nativists and Protestant churchmen, passed a law prohibiting such aid. This prohibition was carved into the state constitution in 1894, when the present clause calling for a “system of free common schools” was added. The religion battle brought to a head animosities that had long been simmering between the Republican dominated legislature and downstate Irish Catholics who were feeding enrollments in the Democratic party.  

The “School Question” moved to a national stage in 1875 when President Ulysses S. Grant called on Congress to pass a constitutional amendment that would “Encourage free schools, and resolve that not one dollar appropriated for their support, shall be appropriated to the support of any sectarian school.” It was a bold political gesture because lawmakers generally assumed at the time that both religion and education were state issues. Grant put forward his proposal to distract attention from a widening corruption scandal in his own administration, and to cultivate the support of Protestant and nativist leaders. His proposal was taken up by Representative James Blaine of Maine, who had designs on the presidency, and would later launch a Republican campaign against the evils of “Rum, Romanism and Rebellion.” Blaine had hoped to ride the current of religious bigotry that had swept the nation all the way to the White House. A sign of the times, Blaine’s Amendment received majority support in both houses of Congress, but failed to get the super-majority needed in the Senate to pass. In its stead,
many states passed their own “Blaine Amendments” through legislation, constitutional amendment, or both. By 1876, fourteen states had enacted laws; by 1890 twenty-nine had amended their constitutions.40

Despite its failure to pass the Blaine Amendment, Congress remained active on the education and religion issues. Between 1881 and 1888, Senator Henry Blair, an ally of Blaine, introduced five bills that would have aided the states in the development of common schools. Like Blaine, his objective was to create a system of common schools grounded in a “non-sectarian Protestant ethos,” while at the same time outlawing aid to other religious schools. When Blair’s attempts failed, he blamed the Catholic clergy, whom he denounced as “an enemy of the people” that was intent on “destroying the public schools.”41 By this time Blaine had run for the presidency three times, and had been the Republican Party’s candidate in 1884. His cause lived on.

At the end of the 19th century, as the territories in the northwest and southwest regions of the country sought admission to the union, Blair and his allies passed enabling legislation that required the new states to enact constitutional provisions that both established common schools and prohibited aid to sectarian schools, resulting in the education provisions that are in effect today. The enabling act of 1889 that allowed North Dakota, South Dakota, Montana and Washington to seek statehood included such mandates.42 Speaking in support of the legislation before Congress, Senator Blair explained how it embodied the “very essence” of the Blaine Amendment that had been defeated. The mandates were well received in the new states, where the constitutional delegations were sympathetic to Blaine’s agenda.43 One delegate to the Washington constitutional convention openly drew a connection between the motives behind the
proposals under consideration and the anti-Catholic bigotry that prompted the original Blaine Amendment.

Because the Colorado territory had been sympathetic to the Union cause during the Civil War, President Grant put his full weight behind the enabling legislation that would give the territory its statehood. Grant also arranged to have his friend and political ally Edward Cook become governor of the territory while the legislation was under consideration. The Colorado Constitutional Convention of 1875-1876 was controlled by Republicans who were in philosophical harmony with Grant (as well as Blaine and Blair), and their disposition was reflected in the constitution.44 Like the territories of the Northwest, New Mexico was granted statehood with the explicit condition that it incorporate a Blaine Amendment in its constitution.45 Rather than bold thrusts of federal power, these measures served to connect the national agenda of the Republican party with sentiments that were already ingrained in the political culture of the states and territories. As in the East, the creation of common schools in the West was very much a project organized by the Protestant clergy, which worked simultaneously to insert its beliefs into the public school curriculum while opposing aid to schools run by other religious groups.46

It would be a mistake to conclude that the politics surrounding the Blaine Amendment was entirely about religion. Religion was a marker for other attributes. On one level, there was the element of partisan politics that evolved as Whigs, Know-Nothings, and eventually Republicans became wary of how Irish and German Catholics were enhancing the fortunes of the Democratic Party, especially in urban centers. On another level, it was about class. The crass ways of those who had come to America to
escape poverty offended established elites who feared the impact that the newcomers would have on existing social norms. In a big way, the conflicts stemmed from a general animosity towards foreigners and the multifarious cultures they brought with them.

By 1919 thirty-seven states had passed laws that made it illegal to teach in a language other than English, which was the practice in many immigrant communities.47 In 1923 the United States Supreme Court struck down a Nebraska law that did the same.48 While the Court recognized the state’s legitimate interest in fostering a common civic identity among citizens, it found that the law had interfered “with the calling of modern language teachers, with the opportunities of children to acquire knowledge, and with the power of parents to control the education of their own.” Two years later, the Supreme Court struck down an Oregon law that had required all children to attend public schools.49 The law had been passed though a referendum prompted by the Ku Klux Klan and the Scottish Right Masons in an attempt to close down private and religious schools. Although the Court was sympathetic to the state’s interest in creating a “common education” for its residents, it ruled that the state does not have the authority “to standardize its children by forcing them to accept instruction from public teachers only.” It further opined, “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”

Taken together the fore-mentioned Meyer and Pierce decisions are monumental in defining the rights of parents to determine the education of their own children, and limiting state power to dictate that education. But time would prove the landmark rulings to be limited victories at best. The funding arrangements constitutionalized in most states
under the banner of common schooling discriminated against those parents who would choose to send their children to private or religious schools, by making funding available only to those who sent their children to public schools. Although the right of parents to educate their children how and where they wish still stands, real choice only exists for those who can afford to pay tuition on their own. Given the educational disparities that exist in public and private schools - especially in urban districts that have been the focus of equity and adequacy suits – this restrictive policy has a major impact on the level of educational opportunity provided for poor children. The most reliable studies continue to find that poor African-American students who attend inner city Catholic high schools register significantly better graduation and college attendance rates than their public school peers.50

In 2002, the United States Supreme Court ruled that the expenditure of public funds to pay tuition at religious schools was permissible under the Establishment Clause of First Amendment.51 The case involved the Ohio school voucher program that provided assistance for poor children in Cleveland to attend nonpublic schools. The ruling was based on precedent dating back to a 1983 ruling that approved a tuition tax credit for children who attended private and religious schools in Minnesota.52 The Court’s approval of the spending was conditional in both cases. It said that funding was permissible so long as: (1) the program in question has a valid secular purpose; (2) is neutral with respect religion so that it neither favors one religion over another nor favors religion over non-religion; (3) provides aid to religious institutions only as a result of independent decisions made by parents who attend the religious schools. The Court found that the purpose of the Cleveland program was to improve the educational opportunities of
disadvantaged children beyond the chronically failing public schools in Cleveland, and all who participated in it did so as a matter of parental choice.

While the *Zelman* decision of 2002 settled the federal constitutional question regarding aid to children who attend religious schools, Blaine Amendments that were added to the state constitutions during the 19th century remain in effect. This raises the question as to whether the exclusion of parochial school children from general public benefits constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment and the Free Exercise Clause of the First Amendment, putting the legality of state Blaine Amendments in doubt. The Supreme Court had an opportunity to review the question in 2004. The case involved an appeal from a college student in Washington, whose state scholarship was revoked because he wanted to use it to prepare for a career in the ministry.53 Because of the peculiar facts of the case, the Court approved the state action in dispute, and avoided ruling on the larger question concerning the constitutionality of Blaine Amendments. No doubt, the question will come up again.

**OVERCOMING HISTORY**

Relying on state constitutional law to promote educational opportunity for disadvantaged populations is a precarious venture, especially under the guise of “adequacy” suits. To begin with, the term “adequacy” does not exist in state constitutions that are the subject of most litigation. Most of the provisions that the courts rely on in these suits were written at a time characterized by racial and religious bigotry. During that period the courts in most states tended to defer to the legislatures for determining the scope of education and its entitlements. And since the men who sat on the bench (most of
whom were elected) and the men who sat in the legislatures were a product of the same political establishments, they tended to be in agreement on the values, priorities, and biases that shaped the legal parameters.

There appears to be more tension now between the courts and the state legislatures as we proceed through the “third wave” of school finance litigation, but it is somewhat illusory. Despite the quibbling back and forth over the price of justice, there is a strong consensus on the big questions between the two branches – which continue to draw personnel from the same political organizations. Both branches have been reluctant to establish a direct path between the resources made available for the purposes of education and the specific educational needs of children for whom school finance litigation is supposedly undertaken. There remains a focus on educational resources and programs for failing public school systems and not enough attention to student outcomes. Most reform minded courts cite student performance as a measure of inadequacy, but construct remedies around the needs of school districts rather than children.

Yes, most of the constitutional and statutory provisions that enforced racial segregation and neglect since the 19th century have been struck from the books. But the political system still displays great tolerance – perhaps patience is a more appropriate word - regarding the educational failure of African American and Latino children. It has never accepted the same for white middle class children. The religion question is a bit more complex. Some have argued that restrictions against religion found in Blaine Amendments and other state constitutional provisions that direct public funding exclusively to public schools were not entirely motivated by religious bigotry. That is true, but I wonder how much religious bigotry would have been enough to suit their taste.
The effect of these provisions today is to severely limit the capacity of states to offer meaningful relief to families who are supposed to be the beneficiaries of school finance suits.

A study prepared by Raymond Domanico for the Center for Education and Civil Society at New York University in 2001 underscores the latter point. Domanico, who had previously served as Director of Data Analysis for the New York City school system, compared the academic performance of public and Catholic school children in the city. He based his analysis on state tests in reading and math administered to students in the fourth and eighth grades. He found that Catholic school students not only exhibited higher passing rates on all four exams, but they had a lower percentage of students in the bottom quartile of the test results by the eighth grade. While performance in neither sector was satisfactory, parochial schools did a far better job getting their students to a decent, one might say “adequate,” level of performance than did public schools, despite significant disparities in funding between the two sectors. As has been found in previous comparisons, parochial schools especially excelled in neighborhoods where there were high concentrations of poor and minority children, demonstrating a stronger capacity to break the devastating correlation between race and achievement that has evaded inner city public schools.

The current financial arrangement perpetuates a two-tiered system of opportunity in urban settings – a system of free public schools mostly populated by the poor, and a system of private and parochial schools open to those who can afford them. The great hypocrisy of it all is that the same public officials who support constitutional restrictions against aid for poor children to attend nonpublic schools routinely send their own
children to private and parochial schools. One of the most embarrassing moments of the recent Democratic primary race for mayor of New York occurred when a reporter asked a candidate if he planned to send his children to public schools. The upper East Side Democrat, who himself was a product of private schools, did not want to respond. Further investigation by reporters revealed that all of the candidates for mayor with school-aged children had sent them to private or parochial schools, as did the incumbent mayor and schools chancellor, as well as their predecessors.\textsuperscript{56} Apparently, the people who run urban school systems do not seem to think they are good enough for their own children. If the common school is such an essential feature of American civic life, then why should advantaged families be able to buy their way out while poor children get stuck in failing schools?

The previous analysis indicates that the courts have allowed themselves wide latitude in defining what it means to provide someone with an adequate education, but they have not gone far enough. Given the latitude taken, adequacy suits can and should serve as an ambitious legal venue for advancing educational opportunity for poor children. The definition of a decent education needs to be reconceived - made anew from whole cloth, rather than the soiled tapestry upon which state constitutions are written. My point of departure would be the landmark \textit{Brown} decision of 1954, which, emboldened by the Equal Protection Clause of the Fourteenth Amendment, articulated a call for educational and racial justice that reached beyond the confines of state law. In \textit{Brown}, a unanimous Supreme Court proclaimed that “education must be made available to all on equal terms” -- not as one set of opportunities for the middle class and the wealthy, and another for the poor.\textsuperscript{57} In \textit{Brown}, the Court outlined the true meaning of education in
modern American society, deeming it “the most important function of state and local
governments.”

The Brown court further explained that education is “the very foundation of good
citizenship…the principal instrument in awakening the child to cultural values, in the
preparing him for later professional training, and in helping him adjust normally to his
environment.” These claims have been validated by volumes of social research.
Educational achievement is correlated with practically every social indicator, from civic
participation to political influence, from employment to wealth, from physical health to
mental health. We must strive to equalize educational opportunity, but educational
achievement is the key to real opportunity in modern society. Therefore educational
opportunity must be measured in terms of student outcomes rather than the amount of
money spent on any particular delivery system. What I propose here is more ambitious
than the approach taken in most states. It may require more spending on behalf of the
disadvantaged, but in a less limiting way than is normally practiced.

There are two reasons, I would suggest, why judicial and legislative decision
makers have avoided implementing an outcome approach to its full extent. One is that
judges and legislators are not convinced that it is really possible to get poor minority
children up to an adequate level of performance, no matter how much they spend. This is
as much a reflection of what they think about the children at stake, as what they think
about the school systems we force the children to attend. Years of educational deprivation
have furnished an excuse for low expectations. The other, at least up until very recently,
was an inability to measure the adequacy of student performance with a comfortable level
of certainty. Now under the requirements imposed by the federal government under “No
“Child Left Behind” each state has developed such a capacity. Policy makers must apply this capacity to address the needs of children who have been denied the opportunity of a decent and effective education.

I am not suggesting that giving school vouchers to the poor is a solution to the educational inequities that have been endured by disadvantaged children. I am reacting to an approach undertaken by state courts that awards the proceeds of legal settlements to school systems that have been complicit in the wrong rather than to the children who have been wronged. One does not need to focus entirely on vouchers to understand what is taking place. A recent study prepared by the Thomas Fordham Foundation found that per pupil spending in charter schools is on average 22% lower than that of district schools in the same communities. In some jurisdictions charter school spending is 40% lower. Charter schools are public schools that operate outside the jurisdiction of local school districts. They have been authorized by the legislatures of 41 states as a way to expand educational opportunity for all children. Yet the gross financial inequities incorporated in these laws have escaped the scrutiny of activists who have gone to court to plea for fiscal fairness. These inequities hurt children who attend charter schools the same way that fiscal inequities harm children who attend other public schools. There has been no expression of outrage by those who have launched finance suits in more than 40 states?

Adequacy suits have allowed judges and legislatures to think creatively about correcting past injustices, but they have also been limited by the injustices of the past. Because most children will continue to attend public schools run by local districts, the bulk of attention and resources must be devoted to making these schools better places for teaching and learning. But choice should be part of the remedy, and it should include
adequate funding for disadvantaged children who choose to attend private, parochial, and charter schools – based on criteria set by the U.S. Supreme in the Zelman case from 2002. There is no reason to force poor parents to keep their children in over-crowded failing public schools when other options exist that they might be inclined to pursue if they were provided with the proper funding to do so.

There are many people, including those behind school finance reform efforts, who, without any tendency towards religious bigotry, are philosophically opposed to granting tuition aid for children to attend religious schools. But their position raises the larger question. Their demand for strict separation between church and state is inconsistent with the standard set by the United States Supreme Court at the federal level, and the Blaine Amendments that they invoke at the state level have a dubious past. Why should their philosophical predispositions take precedence over the tangible needs of poor children? They prefer to have children await the turnaround of failing inner city schools, rather than respond to their needs immediately by granting the children a more desirable range of options. There again is that pernicious patience that comes more easily to people who send their children to decent private or public schools, institutions that bear little resemblance to those that other people’s children are forced to attend for the lack of real choice.

Jim Crow and Jim Blaine are dead, yet their spirits hang over the school systems they helped to create. They continue to set the bounds of the discussion. They continue to obstruct the kind of change needed to get us beyond our troubled past, and help those who have been deprived of an adequate education.


8 These included literacy, mathematical ability, knowledge of government, self-knowledge, preparation for work and further education, recreational pursuits, the arts and social ethics. Pauley v. Kelly, 255 S.E.2d 859, 877 (W.Va. 1989).


16 Massachusetts Constitution of 1780, cited in Eastman, pp. 3-4.

17 Eastman, pp. 8-9.


19 Lewis v. Henley, 2 Ind. (2 Cart.) 332, 334 (1850).

21 See Lawrence A. Cremin, ed., The Republic and the School: Horace Mann on the Education of Free

22 See Charles Glenn, The Myth of the Common School (Amherst: University of Massachusetts Press,
1988).

23 Lloyd Jorgenson, The State and the Non-Public School, 1825-1925 (Columbia: University of Missouri


26 David Tyack, Thomas James & Aaron Benavot, Law and the Shaping of Public Education, 1785-11954

27 Donahue v. Richards, 38 Maine 379, 4409 (1854).

28 Eastman, 13-20.

29 Pierce v. Union District School Trustees, 46 N.J. Law (17Vroom) 76, 77 (1884).

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33 The People ex rel. Workman v. The Board of Education of Detroit, 18 Mich. 400, 418 (1869)
(Campbell, J., dissenting).

34 Eastman, pp. 15-16.

35 Eastmen, pp. 20-29.

Greenwood Press, 1975); Diane Ravitch, The Great School Wars: A History of the New York City Public
Schools (New York: Johns Hopkins University Press, rev. 2001); James W. Sanders, The Education of an

37 Jorgenson, pp. 103-104.


39 I have discussed the history and effects of the “Blaine Amendment” in greater detail elsewhere. See,
Joseph P. Viteritti, Choosing Equality: School Choice, the Constitution and Civil Society (Washington,
15 ((1996), pp. 113-192; Joseph P. Viteritti, “Blaine’s Wake: School Choice, the First Amendment and

41 Jorgenson, P. 143.


45 See Tom Larson, Public School Education in New Mexico (1965), pp. 27-31.


55 The Catholic-public comparison for passing: 50% vs. 42% in 4th grade reading, 50% vs. 32.9% in 8th grade reading, 50% vs. 46.3% in 4th grade reading, 35% vs. 23% in 8th grade math. Comparisons for those falling in the lowest quartile in the 8th grade were: 6% vs. 23% in reading, and 18.6% vs 43 in math.


58 See Viteritti, Choosing Equality.