Who Should Govern?
Adequacy Litigation and the Separation of Powers

Joshua Dunn – University of Colorado at Colorado Springs
Martha Derthick – University of Virginia

PEPG 05-35

Preliminary draft
Please do not cite without permission

Prepared for the conference:
"Adequacy Lawsuits: Their Growing Impact on American Education"
Kennedy School of Government, Harvard University, October 13-14, 2005
Substantively, the distinction between equity and adequacy in school finance litigation is often hard to detect. Pure equity cases can occur in the new era of adequacy, as in Vermont in 1996. And cases nominally fought on grounds of adequacy—as for example in Kansas—look more and more like equity cases as one plumbs arguments and remedies. Yet we will argue that there are important differences between the two and that these differences are essentially political. Adequacy cases have enjoyed greater success in the courts because they mobilize more support and less opposition than equity cases did, and, if only because of the greater success, they are a deeper challenge to the traditional constitutional order.

**Adequacy as a Political Success**

At first glance it appears ironic that plaintiffs have enjoyed a higher rate of success in adequacy cases than in the earlier cases grounded in equity, because courts would seem to have greater legitimacy and competence in adjudicating the latter. The irony disappears, however, if we conceive of school finance lawsuits as essentially political rather than legal events. As political events, equity cases suffered the handicap of compelling the redistribution of wealth and of spending for education, which incited a strong reaction from the losing parts of the population in property-rich school districts. By contrast, adequacy cases have the political advantage that they aim to enlarge the educational pie. Any interest that benefits from school spending—districts rich and poor or urban and rural, teachers and administrators, equipment suppliers, building contractors, pension funds, along with the advocacy organizations that everywhere push for more school spending—can detect opportunities for gain, at least up to the point at which remedies are specified and the bigger pie begins to be sliced. If beneficiaries appear to be insufficiently encompassing, they can be broadened, as when the plaintiffs in New York’s highly
controversial case in 2004-05 prepared legislation to extend statewide the benefits of increased
spending that until then had been focused by litigation on New York City alone.

Adequacy suits have gained politically also from their link to the standards-and-accountability movement, which spread nationwide through the 1990s and reached a climax with passage of the No Child Left Behind Act (NCLB) in 2002. Courts are most confident when they are buttressed by other institutions. It has helped the adequacy cases to have support from presidents and Congress. Michael Rebell, leader of the adequacy movement in New York City and more broadly, has chastised critics for failing “to grasp that the education adequacy lawsuits have become the driving force for achieving the aims of the standards-based-reform movement.”

Implementation of national statutes is always problematic in a federal system and with a national legislature that habitually underfunds its promises. The adequacy movement, using lawsuits in state courts, conceives of itself as stepping into this breach.

The head litigators in adequacy lawsuits—lawyers in state capitals and other cities around the country who plead the cases in trial and appellate courts—are keenly aware of their role and responsibilities as coalition builders, and are likely recruited for their political savvy as well as their skill as litigators. Thus, for example, Robert Spearman of Parker Poe Adams & Bernstein in Raleigh, who is the lead lawyer in North Carolina’s long-running Leandro case, has been the Democratic state party chairman.

Because litigators know that judicial decisions depend on effectuation by the political branches, they are alert to the ways in which this might be achieved. At a conference of the adequacy movement that one of us attended in 2005, winning lawyers from North Carolina, Montana, and Kansas constituted a panel devoted to the subject of converting court victories into solid remedies. Beyond speaking of standard litigating tactics, such as picking plaintiffs,
witnesses, and exhibits with due attention to their anticipated effects in court, they spoke also of success at spinning the media, hiring public relations firms, and hiring a lobbying firm to work with the legislature (in Kansas), all standard political tactics. One lawyer hinted at success in having a school board attorney “from one of our [plaintiff] districts” appointed to the state supreme court (again, Kansas). They spoke of the utility of lawsuits as a tactic of agenda-setting—of keeping school spending inescapably before the legislature when otherwise it might fall from view.\(^2\)

The conference did not consist of litigators only. It included community organizers and a wide representation of organizations of teachers, school administrators, school boards, and other advocates of more school spending, as well as officials from the foundations that finance the litigation movement. Among the speakers were experts in state finance and how to run ballot initiatives. The keynote speaker was Representative George Miller, a California Democrat and one of the principal authors of NCLB. He told the conference that “You have to continue to litigate. Only through litigation will we capture attention. . . . . You can help us realize the goals and live up to the promise of No Child Left Behind.”

**Shaping the Role of the Courts**

Adequacy lawsuits are, then, political events: they allocate things of value; they propel the courts into an institutional sphere normally reserved for the legislature, which has authority to raise revenue and appropriate funds; and they depend for implementation on action by governors and legislatures.

Because the challenge to separation of powers is so plain, one might expect adequacy lawsuits to have given rise to constitutional debates within the states. State constitutions are
much more open to revision than is the federal one, so that constitutional development takes place in periodic conventions or in proposals for amendment initiated by or submitted to the electorate. It does not proceed, as interpretation of the U. S. constitution does, almost entirely through judicial decisions.³

Angered legislators have sometimes proposed constitutional amendments in defense of their prerogatives, as when conservative Republican members of the Kansas legislature in 2005 tried to couple school spending that had been compelled by courts with a proposed amendment that would have prohibited courts from ordering the legislature to make appropriations. The proposal failed to get the two-thirds majority in the Kansas house that was needed for submission to the electorate.⁴ More school spending had support from Democrats and a few Republicans in the legislature despite the challenge to the institution.

Where legislatures have fought back by statute, courts have struck the statutes down. In Idaho, for example, the supreme court in 2004 invalidated a law that required parents who were seeking safe school buildings through litigation to sue their local district instead of the state, authorized the legislature to sue the local school districts that were joined with the parents as plaintiffs, and required Idaho’s courts to order property tax increases in school districts if unsafe building conditions were found. The supreme court held that this was a special law designed to affect one particular lawsuit, contrary to the constitution, and also that it violated the constitutional separation of powers by assigning the power to tax to the judiciary.⁵

Legislatures per se are not normally defendants in the lawsuits, and so cannot mount their own defense in that forum. State officials who are in charge of the defense do not necessarily have strong incentives to conduct it vigorously. No attorney general has yet won a large following as a champion of opposing more spending on schools or supporting the constitutional
principle of separation of powers, and state superintendents of instruction, who often have a great deal of influence in shaping the defense, have even less incentive to oppose increased spending on schools.  

State electorates are another potential source of constraint, inasmuch as state courts are often elected. Half of state supreme courts are subject to popular election, and another thirteen are subject to retention elections even though appointed initially. In the notable case of Ohio, a series of supreme court decisions in favor of adequacy plaintiffs have been thwarted by an electorally driven change in the composition of the court, following an election in which school finance lawsuits and the role of the court were a partisan issue. Also in Alabama, a change in the supreme court’s composition in an election caused the court to reverse itself, but in contrast to Ohio, school finance was not a leading issue in the election. Electorates have also fought back against spending increases generally with Tabor (Taxpayer Bill of Rights) laws, pioneered by Colorado in the 1990s, which are designed to prevent state spending from increasing faster than the state population plus inflation. But there is nothing to prevent electorates from violating their own rules, as happened in Colorado in 2000, when voters passed an initiative that in effect exempted education spending from their Tabor. 

Given the absence of widespread constraints on the courts originating in electoral contests or with legislators pushing back, it has been up to the courts to work their way through the issues of justiciability that the cases pose. While most courts have elected to advance into the legislative terrain, all the while denying that they are doing any such thing, some have stopped short.
Justiciability

Justiciability has forced adequacy advocates to overcome two arguments. One is that judicial action violates the principle of separation of powers because school spending is a political question. The other is that the language of the constitution is unclear and, therefore, provides no justification for regulating the elected branches’ policies. For political reasons rather than constitutional ones, the political question doctrine is likely to remain a troubling issue while constitutional language will not.

The Political Question Doctrine

Based on evidence from state courts, where its application is wildly uneven in remarkably similar cases, the political question doctrine does not have much force of its own. Courts use it only if they are predisposed not to enter into a controversy, deploying it or ignoring it as they want to.9 There is nothing in the doctrine to demand that courts restrain themselves. However, one of the standards in the classic formulation of the doctrine is likely to trouble intervening courts for political if not legal reasons.

William Brennan gave the standard formulation of the political question doctrine. In, ironically, *Baker v. Carr*, he said that the doctrine is “a function of separation of powers” and involves cases where there is

a textually demonstrable commitment of the issue to a coordinate political department; or

a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or
the potentiality of embarrassment from multifarious pronouncements by various
departments on one question.\textsuperscript{10}

This definition could potentially justify dismissing education reform litigation for many reasons. But for advocates of judicially imposed reform “judicially manageable standards” has been a longstanding obstacle. The other components of the definition are left to the courts to determine. But judicially manageable standards requires that there actually be a solution. If courts do not think that they have a manageable solution institutional self-interest can restrain them.

The lack of manageable standards has, in fact, been a longstanding source of frustration for education reform. In \textit{Rodriguez v. San Antonio Independent School District} Justice Powell cited the lack of judicially manageable standards as a reason for leaving the issue to elected bodies. “This case,” he said, “involves the most persistent and difficult questions of educational policy, another area in which this Court’s lack of specialized knowledge and experience counsels against premature interference with the informed judgment made at the state and local levels.”\textsuperscript{11} The lack of standards continued to plague education reform litigation at the state level until the advent of adequacy. The relatively manageable standard of equal spending proved unattractive to plaintiffs since it provided powerful incentives to simply reduce spending. As a result, justiciability faced a legal and political obstacle. Legally anything more than equal spending seemed devoid of precise content or guidance. Politically equal spending risked reducing spending for everyone. In particular, it failed to promise more money for the poverty populations of central cities, in which per pupil expenditures were often relatively high.\textsuperscript{12}

The solution to the dilemma came courtesy of the standards movement. According to Rebell the standards movement “provided the courts with practical tools for developing judicially manageable approaches for implementing effective remedies” All that remained was
marrying standards to the idea of adequacy. Instead of reducing spending for everyone, “adequacy offers the possibility of increasing the size of the pie for all.”

Hence, adequacy solves the legal and political problem of justiciability. Courts now ostensibly know how to improve education and create a stable political coalition.

However, this optimism is unjustified. Despite the claims of adequacy advocates that they have a precise definition of an adequate education, on closer inspection it becomes clear that without evidence of inequity there is no evidence of inadequacy. Courts can evade the problems of justiciability raised by equity for a while by claiming that they have a new standard that bypasses those previous problems. But the evidence from their opinions indicates that all roads eventually lead back to the inequitable distribution of resources. For courts that engage in what Michael Heise has called “passive dialogue” this is not a problem since they are not actually trying to manage a judicially imposed program of reforms.14 But as courts engage in more and more “active dialogue” and try to oversee reforms the problem of justiciability is likely to return.

The evidence since the adequacy era began in 1989 reveals the difficulty in solving this problem. In *Rose v. Council for Better Education* the Kentucky Supreme Court established an “operative definition of adequacy” which other state courts have since “adopted.” The court concluded that an adequate education requires among other things “sufficient oral and written communication skills” for functioning “in a complex and rapidly changing civilization,” “sufficient knowledge of economic, social and political systems to enable the student to make informed choices,” and a “sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage.” Since the Kentucky court did not mandate a specific set of reforms, this broad definition is more political rhetoric than a reasonable judicially
manageable standard. Leaving aside the inherent ambiguity of terms such as “sufficient,” “informed,” and “grounding,” the court’s definition in fact assumes that in a complex and rapidly changing society the skills needed, and therefore constitutionally required, will change as well. Imposing a manageable judicial standard is impossible because the standard must constantly change.

When courts have dismissed adequacy suits it has most often been on the merits. But on occasion courts have dismissed the claims because they find the issue nonjusticiable. The Pennsylvania Supreme Court explicitly argued that educational requirements are constantly evolving which meant that it could not impose its own static standards on the state legislature:

The Constitution ‘makes it impossible for a legislature to set up an educational policy which future legislatures cannot change’ because ‘the very essence of this section is to enable successive legislatures to adopt a changing program to keep abreast of educational advances.’ It would be no less contrary to the ‘essence’ of the Constitutional provision for this Court to bind future Legislatures and school boards to a present judicial view of a constitutionally required ‘normal’ program of educational services.

For this reason, the court argued that the only “judicially manageable standard” it “could adopt would be the rigid rule that each pupil must receive the same dollar expenditures” which it ruled is “not the exclusive yardstick of educational quality, or even of educational quantity.” The premise of adequacy presumes this as well. Some districts need more to provide an adequate education than others.

Two prominent and recent adequacy cases--from New York (CFE v. New York) and Kansas (Montoy v. State)--show that when courts attempt to overcome the problem of
justiciability either they will founder trying to establish what an adequate education actually is or they will retreat to the legally safe but politically dangerous standard of equity.

In *CFE v. New York*, Judge Leland DeGrasse ruled that an adequate education included the “foundational skills that students need to become productive citizens capable of civic engagement and sustaining competitive employment,” the “intellectual tools to evaluate complex issues, such as campaign finance reform, tax policy, and global warming,” the ability to “determine questions of fact concerning DNA evidence, statistical analyses, and convoluted financial fraud.” These requirements are frustratingly vague, a fact DeGrasse inadvertently demonstrated when arguing that New York City’s public schools were inadequate.

When marshalling evidence for inadequacy DeGrasse looked at what he called the “inputs” and “outputs” of the system. The inputs were “the resources available in public schools” and the outputs were the “measure of student achievement.” Both the inputs and outputs, he said, demonstrated the school system’s inadequacy. But the evidence for their inadequacy was based solely on equity. For example, New York City teachers were found on a variety of levels to be inferior to their statewide counterparts. However, simply being less qualified does not demonstrate inadequacy. Teachers can be less qualified but still manage to impart the “intellectual tools” needed “to evaluate complex issues.” The same problem plagues the rest of DeGrasse’s evaluation of the “inputs” such as facilities, curricula, and class sizes.

DeGrasse was also unable to present any independent standards of inadequacy when discussing the outputs of the school system. His evidence is, once again, comparative. New York City public schools have lower graduation rates and test scores than other New York schools. But this is at best a demonstration of inequity.
Socio-economic factors initially seem to offer a way out of this dilemma. It could be that New York City’s educational system is inadequate for the particular needs of its students. But this opening quickly closes on closer analysis. DeGrasse offers a very grim picture of the socio-economic condition of New York City public school students. They suffer from poverty, homelessness, poor health, teen pregnancy, and frequent change of residence. With such obstacles it seems implausible that more spending on education is the solution. It also raises the question of whether the lower “outputs” of the school system are the result of inadequate “inputs.” DeGrasse seems to make the case that the quality of the New York schools is not to blame. The state’s highest court, the Court of Appeals, apparently recognized this even as it approved DeGrasse’s ruling. It said, “Decisions about spending priorities are indeed the Legislature’s province, but we have a duty to determine whether the State is providing students with the opportunity for a sound basic education. While it may be that a dollar spent on improving ‘dysfunctional homes’ would go further than one spent on a decent education, we have no constitutional mandate to weigh these alternatives.”

In *Montoy v. State* the Kansas supreme court has blurred the line between equity and adequacy even more. The Kansas legislature allowed a variety of different taxes based on local circumstances such as high cost of living, low-enrollment, and extraordinarily declining enrollment. But the state supreme court struck all of these down because of their “disequalizing effects.” Normally such accommodations would be allowed under rational basis scrutiny but the court objected because they could possibly lead to unequal amounts of spending. The supreme court did say that “once the legislature has provided suitable funding for the state school system, there may be nothing in the constitution that prevents the legislature from allowing school districts to raise additional funds for enhancements to the constitutionally adequate education
already provided.”21 However, the court gave no indication at what point some school districts could spend more than others. For the time being the court is demanding more spending alone to equalize expenditures across school districts.

These cases then indicate that outside of equity adequacy has little precise content. Without inequity there is no evidence of inadequacy. But the appeal of adequacy is that it is not based on equity.

The adequacy advocates driving the litigation have searched along with the courts for conceptual foundations. Rebell says that a “core constitutional concept” has emerged from recent adequacy lawsuits. This concept, he says,

emphasizes that an adequate education must (1) prepare students to be citizens and economic participants in a democratic society; (2) relate to contemporary, not archaic educational needs; (3) be pegged to a “more than minimal” level; and (4) focus on opportunity rather than outcome.22

What characterizes these components is that they are hopelessly unclear. For instance, to explain the meaning of “to be citizens and economic participants in a democratic society” he says that “there is widespread agreement that an adequate system of education is one that ‘ensures that a child is equipped to participate in political affairs and compete with his or her peers in the labor market.’” As evidence of this agreement, he quotes the Vermont Supreme Court’s opinion in its largely equity, rather than adequacy, based decision, which held that the state constitution guarantees “preparation ‘to live in today’s global marketplace.’” The idea that education should “relate to contemporary, not archaic educational needs” means that as “the level of skills necessary to participate as a citizen and as a wage-earner in society rise, expectations for an adequate education will also necessarily rise.”23 These tautological explanations have no content
because tautologies have no content. Defining a generality with more generalities does not make a generality more precise. As a result, adequacy advocates turn to money. The way courts guarantee this core constitutional concept is by ensuring “the availability of essential resources.” As CFE v. New York shows, the easiest way to gauge “essential resources” is by comparison with other school districts.

Costing out studies could potentially provide a solution to this dilemma. With these studies, judges allegedly are given a precise measure of how much it costs to educate students. But they are unlikely to solve it for several reasons. If these costing out studies come back with a single figure for all students then it is nothing more than equity. If they return different numbers for different districts it increases the likelihood of political resistance. If they return an extravagantly high number, as seems invariably to be the case, legislatures and governors are likely to ignore them.  

Constitutional Language

The state constitutional education clauses also raise questions about the appropriateness of judicial intervention based on separation of powers. However, while the language raises questions, it is unlikely to undermine the movement as the political question doctrine potentially could. Simply put, saying that the constitution requires an “adequate” education is politically popular. It will become unpopular only if voters start connecting higher taxes with the definition. But that the public does not oppose broad interpretations of education clauses does not mean that the interpretation is proper.

The state education clauses are characterized by generality and often by their delegation of authority to the legislature. Scholars have divided the different clauses based on their language. Some clauses simply require free public schools. Others imply a standard of quality
such as “thorough and efficient” or of “high quality.” The strongest give education a special status calling it “fundamental” or “primary.”

While scholars and activists have made much of the difference in constitutional language and sometimes hazarded—incorrect—predictions about the success of reform litigation based on the language, it seems fairly clear that constitutional language has little influence on state courts. One would expect that constitutional language would affect the outcome of adequacy suits, but this has not been the case. Rebell argues that “[s]pecific definitions of education adequacy are, of course, created by particular state constitutional provisions, statutes, and regulation.” But in a footnote in the same article, he points out that state constitutional language apparently has little relationship to court decisions. Adequacy suits have failed in states with stronger language such as Maine and Illinois but won in states with weaker language such as North Carolina and New York.

The reason for this is relatively clear. The distinctions between weak and strong education clauses have been too finely drawn. It is not unfair to call all of them, as one scholar has, “inherently nebulous.” Even the most specific clauses are hopelessly general. What for instance does it mean to say that education is a “primary” obligation of a state? How does one know when the state has not made it (or some other constitutionally grounded function such as transportation) a “primary” obligation?

The obvious question is whether it is appropriate for the judiciary to find the specific standards that it imposes on legislatures in these generalities. In states that have rejected adequacy suits the courts’ analysis has hinged on the inherent arbitrariness of finding a specific standard and the unconstitutionality of applying a static interpretation on clauses whose meaning must evolve. In Pennsylvania, the court ruled that the “Constitution ‘makes it impossible for a
legislature to set up an educational policy which future legislatures cannot change’ because ‘the very essence of this section [the education clause] is to enable successive legislatures to adopt a changing program to keep abreast of educational advances.’” Thus, it would be unconstitutional to impose “a present judicial view” of what the constitution requires. In Illinois, which has one of the more demanding education clauses, the court also ruled that it would be impossible to divine any meaning from it. The Illinois constitution says that the state must “provide for an efficient system of high quality public educational institutions and services.” But twice the court held that “[i]t would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense.” Judicial standards then would be hopelessly capricious, comprised of nothing but a court’s own preferences.

A potential way around this problem is the model adopted by many state courts, finding that the educational system is unconstitutional but leaving it to the legislature to provide a remedy. Much like Justice Stewart’s definition of pornography, they simply know inadequate education when they see it. Of course, saying that something is unconstitutional implies that you have some standard of unconstitutionality. This approach helps ameliorate the danger of violating separation of powers but it does little to overcome the arbitrariness of judicial intervention. In fact, it exacerbates it because the court does not have to define any meaningful standard. It just strikes down the system because the system strikes the court the wrong way and never has to explain precisely why it is inadequate.

Since education clauses provide little textual substance, it is unsurprising that their analysis by courts in successful adequacy suits is sparse. It is occasionally nothing more than a bald assertion obscured by fallacious reasoning. For instance in Abbeville v. State from South
Carolina, the supreme court simply asserted that the education clause, in spite of its lack of qualitative language, must have a qualitative component. The circuit court had initially dismissed the case on the ground that the state constitution’s education clause, “The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the state,” did not impose a qualitative standard on the legislature. However the supreme court said that in refusing to find any qualitative standard the circuit court had failed “to decide the meaning of the education clause.” The supreme court said that it had a “duty to interpret and declare the meaning” of the clause. In reality, the supreme court was simply saying that the circuit court’s interpretation was wrong. But by saying that the circuit court had failed to interpret the clause and neglected its judicial duty, the supreme court was able to smuggle an unstated premise into its interpretation of the clause, which was that if you interpret the clause you must find a qualitative requirement. Thus, the supreme court does not have to justify, and never does, its interpretation: it is simply doing its job. Interpretation means you will arrive at the court’s interpretation.

In New York, also owner of a spare education clause, Judge De Grasse without apology explained that in the “third wave” of education litigation courts “are called on to give content to Education Clauses that are composed of terse generalities” which in New York’s case is “The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” From that clause, De Grasse determined that the New York City schools were unconstitutional in everything from library expenditures to arts courses. The judge had become completely unmoored from the text and was sailing in purely policy waters.
Judicial Competence

When considering the competence of state courts, the analysis must distinguish between courts that order specific remedies and those that find the educational system unconstitutional but let elected branches decide what should be done. When courts are more reticent not only is the principle of separation of powers less likely to be offended but also it limits concerns about the judicial capacity for policymaking. This analysis will concentrate on the problems confronting more aggressive courts, whose number has increased in the era of adequacy. Despite the assurances of adequacy advocates that courts now have the tools necessary for implementing effective reforms, there are historical and institutional reasons for skepticism.

Rebell has argued that evidence “has demonstrated to the courts’ satisfaction that educational resources, if effectively utilized, can result in impressive learning gains by at-risk students” but “that these demonstrations have not yet been brought to scale because sufficient resources have never been made available in large urban school districts or other systems with large numbers of at-risk students.” Initially it should be noted that even academic supporters of equity and adequacy suits are cautious and tentative about advancing claims that “money matters,” a question that is the subject of a growing and contested academic literature. Confidence that money will be effectively utilized is largely confined to political advocates. But more fundamentally there is in fact historical evidence that bringing resources “to scale” is the most difficult part of educational reform.

In Missouri v. Jenkins, the long-running (1977-2003) desegregation case that provides the closest federal parallel to the adequacy cases, a district judge ordered massive state expenditures, over $2 billion in the end, to improve the Kansas City, Missouri, school system with the dual aims of attracting white students from the suburbs and private schools back into the system and
offering a better education to the majority black population already enrolled. A central focus of the remedial plan was the implementation of an “effective schools” program. There was substantial evidence that this program actually worked, but all of the studies looked at implementation in single schools, not at system-wide implementation. The plaintiff’s attorney, who called the case an “end run” on San Antonio v. Rodriguez, said that the problem was that no one “understood the problems of scaling something up to a district wide remedy.”

Implementing the program across such a large and dysfunctional system proved impossible. The inertia of the system overwhelmed the best efforts of the court, the plaintiff’s attorney, and their team of educational experts. Desegregation was not achieved, nor did the money improve the quality of education in Kansas City, judging from evidence such as test scores and graduation rates, which if anything grew worse.

While Missouri v. Jenkins is only a single case, it should give pause to anyone convinced that a reform program can be “scaled up” in a district as large as New York City’s. Not only did the court call on the expertise of the best and brightest in urban education, but also the Kansas City school system had around 35,000 students compared to 1.5 million in New York City today.

Adverse evidence is emerging also from New Jersey, home of one of the most aggressive supreme courts with one of the longest histories of school finance litigation. A recent story in the New York Times describes the inability of the state’s government to carry out an $8.6 billion capital improvement program that the supreme court ordered in 1998 to reduce the disparity between suburban and urban facilities. The legislature responded with authorization in 2000, but a special Schools Construction Corporation that the governor created in 2002 has proved more adept at demolition of homes than construction of new schools, with demoralizing consequences for the cities that are putative beneficiaries of judicial largesse. Administrative agencies of
ordinary capacity falter under the burden of extraordinary responsibilities, even those as simple, relatively, as the construction of buildings.\textsuperscript{39}

There is a well-developed body of literature documenting the institutional difficulties that courts have in creating social change, beginning with Donald Horowitz’s pioneering book of 1997.\textsuperscript{40} This literature grew up around the study of federal courts, which, as Missouri v. Jenkins illustrates, were not shy about imposing their own policies. To the extent that state courts are beginning to behave like federal courts, much of this literature applies.

Horowitz said that litigation is a poor vehicle for making policy because among other things the adversarial format produces unreliable information, leads to unintended consequences, and artificially isolates issues that are connected in the real world. Examples of all of these problems, \textit{inadequate information}, \textit{unintended consequences}, and \textit{isolated issues}, can be found in the adequacy litigation.

Horowitz argued that generalist judges lack a capacity to assimilate and evaluate the specialized information that policymaking often requires. We doubt, however, that state court judges are so bound to the profession of law that they have the trained incapacity that Horowitz feared. Often elected, often subject as well to mandatory retirement for age, and physically located in state capitals close to officials of the other branches, state supreme courts are more fluid and exposed to the social context of their policymaking than are federal courts, whose members are appointed for life. Their members often bring to the bench eclectic experience in civic affairs and public office. We found that as of 1997 more than half of the state supreme courts included one or more members who had served in the state legislature either as an elected member or as staff. Nevertheless, once on the bench state judges are subject to the constraints and liabilities of their role, which lead them to credit expert witnesses and to act as if they know
more than they do because only with the pretense of knowledge can they settle cases and
controversies and issue authoritative decrees. Being judges requires them to pretend to a wisdom
that in truth no one possesses in the fiercely disputed world of education policy, curriculum
design, and school management.

An example of judicial action with inadequate information is to be found in Kansas,
where a willfully blinkered court chose to rely on one consultant’s study, by the firm of
Augenblick & Myers (A&M), in ordering how much the legislature should appropriate.
Ironically, the study had been commissioned by the legislature, and to compound the irony, John
L. Myers, the firm’s co-principal, had served six years (1977-83) in the Kansas legislature, as
well as in offices in the Kansas government’s executive branch.

In *Montoy v. State*, the Kansas supreme court said it would be guided by the A&M study
because: 1) it was “competent evidence presented at trial”; 2) the legislature “maintained the
overall authority to shape the contours of the study”; 3) it was “the only analysis resembling a
cost study” before the court; and 4) the state Board of Education and Department of Education
had concurred with the results. The implication of this reasoning—other than that legislatures
must follow the recommendations of studies that they commission—is that the court was
unwilling to seek as much information as possible. The court assumed the reliability of the study
and impugned the motives of members of the legislature who disputed its findings. It repeatedly
said that it must make its decision “based solely on the record before us,” an artificial but
convenient standard peculiar to litigation. Despite the court’s exaggerated rhetoric saying that it
could not ask “current Kansas students to ‘be patient’” and that “[t]he time for their education is
now,” there was no compelling reason for haste, unless it was that a Shawnee County district
court judge in Topeka, the trial judge, was threatening to close the state’s schools. Making a
more informed decision was apparently sacrificed to reach an outcome under circumstances of mounting stress.

A contrasting example of inadequate information is available from the Abbott litigation in New Jersey, where the courts have ordered implementation of the well-known Success for All (SFA) reading program of Robert Slavin and Nancy Madden of Johns Hopkins University. Because of their high degree of autonomy, the New Jersey courts resemble federal courts more than those of any other state, but in this case a trial judge followed the advice of the state’s education commissioner in ordering the adoption of SFA, perhaps reasoning that this would increase the chances of acceptance by teachers. SFA had been opposed by the Education Law Center of New Jersey, a leading participant in the litigation movement. The judge visited schools in advance of his ruling to watch SFA in action and gathered all the information he could, but many New Jersey teachers nonetheless were resentful and frustrated at having the program thrust upon them. Meanwhile, critical evaluations of SFA from professional experts around the nation proliferated. Peter Schrag concluded that the mixed early results in the Abbott districts “were a cautionary signal about the danger of any judicial romance with across-the-board programmatic remedies imposed by even the most thorough judges . . . .”

Closely related to the problem of inadequate information is the problem of unintended consequences. Litigation and legislation both produce unintended consequences, but because the remedy in litigation is designed to restore a right or fulfill a government obligation it cannot easily be modified. In Democracy by Decree, Ross Sandler and David Schoenbrod explain how court control over special education in New York City created a variety of perverse incentives to place students in special education programs who were not learning disabled. Most importantly, when a student is placed in special education, that placement increases the amount of money that
is supposed to be spent on the child. With a federal court requiring that these resources be made available, it becomes quite tempting for schools to place students in special education. Each special education student means more money for the school. The case, *Jose P*, led to an explosion of children in special education and of staff needed to comply with the consent decrees. In the end, this litigation strained the school system’s budget and starved general education of needed resources." In *CFE v. New York* Judge De Grasse observed that reforming the bloated special education program could save “tens of millions of dollars annually” for the school district.46

In *Montoy v. State*, it appears that the Kansas supreme court is on the verge of repeating the mistakes of the federal court in *Jose P*. In Kansas the state wanted to control the percentage that it reimburses local school districts for special education pupils in order to deter “over-identifying”, such as occurred in New York. Normally, this is the sort of justification that easily passes “rational basis” scrutiny. But the court found the argument unpersuasive because the state did not provide evidence that over-identification was occurring.47 The court did not entertain the possibility that the state’s policy, already in place, had been effective because it required local districts to absorb a significant share of the costs of special education. The court has ordered the state to assume a progressively-increasing share of the cost of special education.

The final institutional defect is that courts must isolate problems that are connected and need a comprehensive approach if they are to have any chance of being solved. When courts look at the problems of education, they do so through the narrow lens of the legal process. But education is a broad and complicated area of public policy, which is intertwined with other broad and complicated areas of social policy. But courts can deal only with the issue before them, so that their approach is inherently piecemeal. For example, in New York, as mentioned before, the
trial and appeals courts admitted that the problem of educational performance in New York City did not arise solely out of deficiencies in the educational system. Poverty, family structure, crime, and poor health obviously affect whether a child will succeed in school. Improving educational performance would require confronting all of these social problems, a task that a lawsuit is poorly equipped for. The appeals court, as quoted before, said, “While it may be that a dollar spent on improving ‘dysfunctional homes’ would go further than one spent on a decent education, we have no constitutional mandate to weigh these alternatives.”

Weighing these alternatives and considering their opportunity cost would be the mark of a rational approach to public policy. Unless courts are willing to expand the scope of these cases beyond education, then they cannot do this. The statement from the appeals court is tantamount to an admission that they are obligated to waste resources.

Even defenders of judicial policy-making, such as Rebell in his academic work, acknowledge that courts will be hampered by many of the same obstacles to successful problem-solving that other institutions encounter. In an empirical study that lauded courts for their rationality and distinctive competence in giving voice to principles, Rebell wrote that “the most notable defects in judicial performance, whether they concern interest representation, fact-finding, or remedies, are often caused not by comparative incapacities of the judiciary vis-à-vis other governmental agencies, but by the social, political, and technical characteristics of the particular controversies; or by the limitations of the participants in resources, skill, and motivation, which manifest themselves similarly regardless of whether a given dispute is addressed by a court or by another governmental institution.” In devising remedies for what are found to be poorly performing schools, for example, courts appear to be no less inhibited than other actors by the power of teachers’ unions. In New York, Judge De Grasse cited
bountiful evidence that New York City’s teachers have lower certification rates, lower scores on certification tests, and a lower quality undergraduate education than teachers elsewhere in New York State. The New York City school district, he said, has “too many ill-trained and inexperienced teachers to meet the difficult challenges” of the school system.\textsuperscript{50} It is arguable that any remedy in New York City should include dismissing these teachers and replacing them with better ones, but it is not a remedy that the judge ordered. Challenging the organized teachers could be particularly difficult in an adequacy lawsuit given the strength that teachers bring to the supporting coalition.

**Radical and Unnecessary**

The advocates of school finance litigation distrust the political branches in the belief that they serve the interests mainly of suburban constituencies, which are both relatively well populated (hence electorally powerful) and relatively wealthy (hence able to finance schools to their own satisfaction). The advocacy movement attempts to unite the poverty populations of central cities and rural districts in order to bypass legislatures whose defect, in the wake of *Baker v. Carr* \textsuperscript{51} and *Reynolds v. Sims* \textsuperscript{52}, is, ironically, that they are at last correctly apportioned.

Both through the efforts of elected officials—mainly Southern governors, who initiated the modern drive for better financed and more accountable schools—and through the impact, both real and threatened, of the equity lawsuits—state spending for elementary and secondary schools rose rapidly in the 1980s and 1990s. Between 1980 and 2001 state school revenues more than quadrupled, rising from $45.3 to $199.1 billion, while enrollment in public elementary and secondary schools was rising by a mere 13.3 percent (from 41,651,000 to 47,204,000 students).\textsuperscript{53} The state share of school revenue, which passed the local share in the late 1970s, rose from 46.8
to 49.7 percent. Recent history suggests both that state elected officials take seriously their constitutional obligation to provide public education and that courts are available to correct flagrant interdistrict inequalities in spending, such as had existed in Texas, although we discern that the precise impact of court-ordered reforms on the inter-district distribution of spending remains at issue among economists specializing in education finance.  

If adequacy lawsuits with active and continuing judicial supervision of school spending were to be institutionalized, the result would be a radical—and unnecessary—revision of a bedrock feature of the American constitutional system, under which elected, representative legislatures have responsibility for raising revenue and appropriating public funds. Instead, judgments of courts in combination with a new industry of costing-out consultants would be substituted for the bargaining and mutual adjustment—that is, the politics—of state legislatures. Indeed, this new day has already dawned, according to a presentation that the financial consultant John Myers made to the National Association of State Budget Officers in the summer of 2005. “Historically adequacy was determined politically using input measures and available resources,” he said. “Now adequacy is technically determined and output orientated.”

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, this constitutional departure. But then one would recall that other public functions exist, such as health, transportation, and higher education, that make large and urgent claims on the budgets of state governments, that problems other than a lack of money afflict the schools, such as students who arrive unprepared for learning or life in a classroom, and that evidence for the efficacy of money per se is weak and mixed. One might then be less
willing to have the core institutions of democratic government cast aside as incapable or biased and to have courts-with-consultants put in their place.

Going Federal

It is a well-established function of American courts to protect individuals from violations of their rights by the other branches of government. It is not a proper or well-established function of the courts to determine the level of expenditures for major public services, even if, in the course of supervising state and local public institutions such as prisons, schools, and mental institutions, federal courts have frequently used equal protection and due process clauses to compel expenditures in an effort to remedy conditions that they found to be unconstitutional. Missouri v. Jenkins was an example of this practice. The practice is one from which the federal judiciary in recent years has tended to retreat, yet state litigation on school finance has sometimes proceeded in tandem with lawsuits filed in federal court under civil rights or disability statutes, as plaintiffs hedge their bets. In Kansas, litigators began in 1999 with one lawsuit that was filed in a federal court in Wichita and asserted both federal and state causes of action. The state’s objection to that approach led to the filing of a second suit in a state court in Topeka, which culminated in a victory for the plaintiffs. The federal judge “paused” while he awaited the state outcome.56

Fully cognizant of such facts, and grown battle-weary from several decades of labor with mixed progress in state courts, the adequacy movement would like to secure a foundation in federal law for its claims, which could then have access to federal courts. This might be done by importing, via amendments to the No Child Left Behind Act, some of the rights language produced by state courts. “We want to see the issue of equity on the national agenda,” Arthur E.
Levine, president of Teachers College of Columbia University, told an interviewer in 2005. Rebell has moved to Teachers College to direct its equity campaign. More or less simultaneously with the reorganized effort based in New York, a West Coast branch of the movement has set up operations as the Earl Warren Institute on Race, Ethnicity and Diversity at the school of law at the University of California in Berkeley. One of its initial projects in 2004-05 was to convene an interdisciplinary working group entitled “Rethinking Rodriguez: Education as a Fundamental Right,” which was followed by a national call for papers on the same subject. The aim was not necessarily to overturn the Supreme Court decision, a daunting task if strictly conceived, but to inquire into what would be required to make education a fundamental right—“that is, a right belonging to all children, protected by an enforceable guarantee of ‘adequacy’ or ‘equality’ or both.”

The successes of the adequacy movement in state courts thus are to be seen as stepping stones to the broader arena of national legislation and litigation, in keeping with a common pattern of the development of law and policy in the American federal system. Rodriguez may have pushed action down to the states, but action in the states has laid the foundation for a climb back to Washington. If the adequacy-cum-equity advocates succeed in wedding centralization and judicialization in a regime of a federally-guaranteed right to education and federally-prescribed school spending, transformation of the traditionally local and democratic regime of school governance in the United States, already far advanced, will be complete.

---

“Idaho Supreme Court Thwarts Legislature’s Attempt to End School Funding Suit,”

Alfred A. Lindseth, “Educational Adequacy Lawsuits: The Rest of the Story,”


legislature. See “Education Law Center Files Motion for School Construction Funding,”

40 Donald L. Horowitz, The Courts and Social Policy (Brookings Institution, 1977); Gerald N. Rosenberg, The
Hollow Hope: Can Courts Bring About Social Change? (University of Chicago, 1991); Ross Sandler and David
Schoenbrod, Democracy by Decree (Yale University Press, 2003).
42 Id. at 55.
43 For an extended analysis of New Jersey’s supreme court, see G. Alan Tarr and Mary Cornelia Aldis Porter, State
Supreme Courts in State and Nation (Yale University Press, 1988), chap. 5.
44 Final Test, p. 120.
45 See chapter 3 of Democracy by Decree for a comprehensive analysis of Jose P v. Ambach, No. 79 Civ. 270 (E. D.
49 Michael A. Rebell and Arthur A. Block, Educational Policy Making and the Courts: An Empirical Study of
August 29, 2005.
54 William N. Evans, Sheila E. Murray, and Robert M. Schwab, “The Impact of Court-Mandated School Finance
Reform,” in Ladd, Chalk, and Hansen, eds., Equity and Adequacy in Education Finance, pp. 72-98; Douglas S.
chap. 2; Matthew H. Bosworth, Courts as Catalysts: State Supreme Courts and Public School Finance Equity (State
University of New York Press, 2001); John Dinan, “Can State Courts Produce Social Reform? School Finance
433-449.
55 “School Finance Litigation,” a presentation by John L. Myers of Augenblick, Palaich and Associates to the
National Association of State Budget Officers, July 20, 2005. We thank the Rockefeller Institute of Government in
Albany for sending this source to us.
56 John S. Robb and Alan L. Rupe, “Kansas School Finance Litigation Chronology,” in Derthick’s files.
57 Karla Scoon Reid, “Campaign for Equity to Push Beyond Dollars,”
based also on Rebell’s remarks at the June 2005 conference of the Movement for Education Adequacy.
58 “Rethinking Rodriguez: Education as a Fundamental Right, A Call for Paper Proposals,” no date, but the deadline
for proposals is September 6, 2005. This document is in Derthick’s files. We thank Gareth Davies for giving us a
copy.