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Advancing Education Through Education Clauses of State Constitutions

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ADVANCING EDUCATION THROUGH EDUCATION CLAUSES OF STATE CONSTITUTIONS

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PART I: INTRODUCTION

> *[E]ducation is perhaps the most important function of state and local governments . . . It is required in the performance of our most basic public responsibilities . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.*[1]

The above statement presently raises no real argument.[2] An article on such a statement would indeed be void of controversy and interest. If American societies have unanimously come to respect and value education as an integral part of every child's life, then why are state courts encountering a drastic rise in education litigation?[3] Is there some dissatisfaction with the American public school system? Unquestionably, education is vital. Unquestionably, education is worth protecting. But the question we must ask ourselves is whether our education systems need protection, and if so, how do we protect them? This article presumes the "need" of protecting and advancing the

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1. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

2. Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 790 (Md. 1983) (citing Levittown v. Nyquist, 439 N.E.2d 359, 369 n.9, (N.Y. 1982) ("the central role of education in our society is unquestioned").

3. Alexander Natapoff, *1993: The Year of Living Dangerously: State Courts Expand the Right to Education*, 92 W. Educ. L. Rep. 755, 2 (1994) (at one point in the fall of 1994, over half of the states were adjudicating their school finance systems).

quality of the American school system.[4] With that assumption, this article advances to the "how" of education protection.

The premise of this article is that education litigation best advances and protects education when plaintiffs rely heavily on the education clause of the state's constitution and make specific allegations of poor quality and inadequacy. A review of this thesis encounters two basic groups of litigants, those seeking higher educational quality and those seeking increased equality of education taxation, expenditures, or opportunity.

The equality arguments of school litigation usually raise issues of finance, which are legislative in nature. Admittedly, it is true that education litigation is inevitably school finance litigation and any suit advancing the cause of education, either on qualitative or equalitative grounds, will be interwoven with finance system issues. However, plaintiffs arguing the inequality of the educational system, who proceed to get tangled up in the areas of school finance system, often get tangled up in unfavorable adjudications. On the other hand, those plaintiffs, who focus intently upon the quality of the educational offering, most often find themselves untangling education problems with favorable adjudications.

The history of education litigation likewise shows that most fruitful suits cut directly to the issue of quality of the educational offering without getting caught up in the nickel and dime issues of the state system.[5]

Part II of this article surveys the different education clauses in state constitutions, including their various quantitative, qualitative, and equalitative provisions. Part III reviews education litigation and illustrates the less successful arguments under state equal protection clauses. Part IV then establishes the striking success of the state education clause in conjunction with adequacy arguments. These two sections will look closely at the strengths and weaknesses of the two approaches, how the courts have responded, and the overall outcome. As litigants often use a combination of equal protection and education clause arguments, Part V outlines a hybrid approach to school

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4. *Id.* at 1, 3, n.16.

5. Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1335 (1992). ("The state constitutions' education articles have provided the most fruitful source of independent state jurisprudence concerning education.") *See also* Part IV, A.

finance litigation, a method that leans more towards the allegations of inadequacy but incorporates proof and language of inequality. Part VI, more specifically establishes the strengths of the education clause or adequacy type arguments, and explains why the courts are looking for adequacy or qualitative analysis, as opposed to the equal protection or equality type analysis. Finally, Part VII raises a few questions regarding the specific education clauses; whether the success or failure of a given suit is dependant on the individual education clause, and if so, to what extent.

The plaintiff who seeks to protect or advance the educational offering of a given state will be most successful if she relies upon the education clause supported with specific allegations and proof regarding the adequacy or quality of the education offered.

PART II: PREVIEW OF EDUCATION CLAUSES IN STATE CONSTITUTIONS

The education clause in the United States Constitution is not to be found; the Federal Constitution does not mention education. Instead, as stated in *San Antonio Independent School District v. Rodriguez,*[6] the protection of education, along with the duty to define the correlating right is the responsibility of the states, under their state constitutions.[7] In part, this reliance upon the state constitutions is due to the education clauses found in each state's constitution, which are designed to provide for and establish a system of public schools. This section guides the reader through a survey of the education clauses and their various provisions.

A. EDUCATION CLAUSES OF STATE CONSTITUTIONS

All fifty state constitutions contain an education clause designed to establish some form of educational system. These clauses have created a wave of successful litigation protecting and advancing school systems across the nation.[8] Although different clauses, with different language and emphasis, will argu-

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6. 411 U.S. 1 (1973).
7. Natapoff, *supra* note 3, at 9-10. *See also* Part III, A.
8. Natapoff, *supra* note 3, at 9-10.

ably offer different amounts and forms of educational protection, it seems clear that most education clauses have been an integral part behind successful education litigation and the quality of subsequent educational offerings.[9]

Each education clause has its strengths and weaknesses; some are more precise and lengthy, while others are vague and short. Some education clauses seem to establish a clear quality of education, while others are void of any distinct qualitative phrases whatsoever. The absence, abundance, and variety of qualitative phrases in specific state constitutions is wide-ranging.

B. SPECIFIC QUALITATIVE PHRASES

The most effective language of state constitutions found in the efforts advancing and protecting the educational offering will inevitably be that which prescribes a high level of educational quality. Indeed, those states with the strongest "quality phrases" have offered some of the leading cases in the advancement of education.[10] The most familiar phrases, and certainly the most common qualitative phrase of education clauses, are those which emphasize the standard of quality or the "quality statement" for the state's school system. These quality statements vary from challenging levels of quality to nonexistent levels. Such quality statements are found in over half of the education clauses. They include such standards as: "high quality,"[11] "efficient system of high quality,"[12] "efficient,"[13] "general and efficient,"[14] "thorough and efficient,"[15] "general and uni-

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9. *See* Part VII.

10. For example, *see* Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247 (N.D. 1994); McDuffy v. Secretary of Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993), Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993); Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978). Other states with language as equally strong have either not contested their educational clause, such as, Del., Haw., Iowa, Miss., Nev., Utah, Vt. (see PERCEY E. BURRUP, FINANCING EDUCATION IN A CLIMATE OF CHANGE 232 (1996), or have done so without a focus on quality of education, *see*, for example, McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994), People ex rel. Jones v. Adams, 350 N.E.2d 767 (Ill. 1976).

11. ILL. CONST. art. X, §1; VA. CONST. art. VIII, §1.

12. ILL. CONST. art. X, §1.

13. KY. CONST. §183; TEX. CONST. art. VII, §1.

14. DEL. CONST. art. X, §1.

15. MD. CONST. art. VIII, §1; MINN. CONST. art. XIII §1; N.J. CONST. art VIII, §4; OHIO CONST. art VI, §2; PA. CONST. art III, §14; W.VA. CONST. art. XII, §1.

form,"[16] "thorough and uniform,"[17] "general, uniform, and thorough,"[18] "complete and uniform,"[19] "liberal,"[20] "basic,"[21] "competent,"[22] and "suitable."[23] Though such quality statements are the most common, they are not always the most helpful. Some quality statements, in fact, contain the least helpful language, establishing a minimal commitment without a quality standard, such as "uniform,"[24] or even, "as nearly uniform as practical."[25] Fifteen states have no quality statement at all, establishing a commitment only in terms of the existence of a system without any given standard.[26]

C. GOAL, PURPOSE, DUTY

In addition to the main "quality statement," several state constitutions contain other qualitative phrases with unique depth. Washington's education clause, for instance, contains language which places Washington's educational duty above all other state duties.[27] The clause states that, "It is the paramount duty of the state to make ample provision for the education of the children residing within its borders."[28] Akin to Washington's strong language is Illinois': "A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities."[29] The constitutions of

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16. ARIZ. CONST. art. XI §1; IND. CONST. art. VIII §1; MINN. CONST. art. XIII, §1; N.C. CONST. art. IX, §2; OR. CONST. art. VIII, §3; S.D. CONST. art. VIII, §1; WASH. CONST. art. IX, §2.
17. COLO. CONST. art. IX, §2.
18. IDAHO CONST. art. IX, §1.
19. WYO. CONST. art. VII, §1.
20. ALA. CONST. §256.
21. MONT. CONST. art X, §1.
22. VT. CONST. ch. 2, §68.
23. ME. CONST. art. VIII, §1.
24. FLA. CONST. art. IX, §1.
25. WIS. CONST. art. X, §3.
26. Such states included: Alaska, Conn., Haw., Kan., La., Miss., Mich., Mo., N.H., N.Y., Okla., R.I., S.C., Tenn., and Va. It should be noted however, that even education clauses with empty quality statements, have often been interpreted by the courts to carry qualitative suggestions, such as "a sound basic education." For example, *see* Bd. of Educ. V. Nyquist, 439 N.E.2d 359 (N.Y. 1982). *See also* note 127 and accompanying text.
27. Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 91 (Wash. 1978).
28. WASH. CONST. art. IX, pmbl.
29. ILL. CONST. art. VIII, §1.

Georgia, Louisiana, and Montana have similar wording.[30] This type of qualitative language is standard-setting language, establishing constitutional levels of quality which must be reflected in the state's educational offering. Arguments based on such language are ideally the type for which the courts are looking.[31]

Other state constitutions also reflect the high prominence of education with the command "to cherish," or "to encourage," or both.[32] Or, as with Tennessee's education clause: "the state recognizes the inherent value of education."[33] With slightly less vigor, other states require the adoption of "all suitable means to secure to the people the advantages and opportunities of education."[34]

D. DELINEATED SUBJECTS

Some state education clauses actually delineate specific subjects or areas of emphasis upon which the education system should focus: "Intellectual, educational, vocational and scientific improvement."[35] Two states require the emphasis of cultural education,[36] and others require the emphasis of moral or reli-

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30. GA. CONST. art. VIII, §1 ("The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia"); LA. CONST. art. VIII, pmbl. ("The goal of the public educational system is to provide learning environments and experiences, at all stages of human development, that are humane, just, and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop to his full potential"); MONT. CONST. art X, §1 ("it is the goal of the people to establish a system of education which will develop the full educational potential of each person").

31. *See supra* Part IV.

32. MASS. CONST. ch. V, §2; N.H. CONST. Pt. 2 art. 88 (modeled after Mass.); WYO. CONST. art. I, §23; CAL. CONST. art. IX, §1; IND. CONST. art. VII, § 1; IOWA CONST. art. IX, §3; MICH. CONST. art. VIII, §1; N.C. CONST. art. IX, §1 (same as Mich.).

33. TENN. CONST. art. XI, §21.

34. ARK. CONST. art. XIV, §1; R.I. CONST. art. XII, §1; S.D. CONST. art. VIII, §1.

35. The most extensive delineation is found in N.H. CONST. pt. 2, art. 83 ("literature and the sciences . . . agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry, and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments among the people"). *See also* KAN. CONST. art. VI, §1; IOWA CONST. art. IX, §3; MASS. CONST. pt. 2, ch. 5, §2; MISS. CONST. art. VIII, §201; N.D. CONST. art. VIII, §3.

36. HAW. CONST. art. X, §1 ("The State shall promote the study of Hawaiian culture, history and language"); MONT. CONST. art. X, §1 ("The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity").

gious education.[37] Although the delineation of subjects is not specifically a statement of quality, courts have considered it as such, stating that it is a model of thoroughness and importance which the legislature must address in establishing the state's qualitative standard of education.[38]

E. GOVERNMENT, RIGHTS, LIBERTIES, AND HAPPINESS

Many state constitutions also contain phrases recognizing the role of education in the protection of government, rights, liberties, and happiness. Although such statements may not establish any standard of educational quality, per se, they do note the purpose and importance of education. For example, North Dakota's education clause states:

> A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools.[39]

Fourteen other state constitutions contain variations of this wording.[40] Such phrases have been relied on as one important part of the education clause for the protection of education.[41]

F. NON-QUALITATIVE PHRASES

State education clauses are not made up solely of qualitative phrases. In fact, the majority of education clause language deals with administrative matters or specific issues of the education system apart from quality.

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37. MICH. CONST. art. VIII, §1; VT. CONST. ch. 11, §68.

38. For example, *see* McDuffy v. Secretary of Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993), Alabama Coalition for Equity v. Hunt, 624 So.2d 107, 110 (Ala. 1993); Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993).

39. N.D. CONST. art. VIII, §1.

40. ALASKA CONST. art. VIII, §1; CAL. CONST. art. IX, §1; IDAHO CONST. art. IX, §1; IND. CONST. art. VIII, §1; ME. CONST. art. VIII, §1; MASS. CONST. pt. 2, ch. 5, §2; MICH. CONST. art. VIII, §1; MINN. CONST. art. XIII, §1; MO. CONST. art. IX, §1; N.H. CONST. pt. 2, art. 83; N.C. CONST. art. IX, §1; N.D. CONST. art. VIII, §1; R.I. CONST. art. XII, §1; S.D. CONST. art. VIII, §1; TEX. CONST. art. VII, §1.

41. For example, *see* Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979); Serrano v. Priest, 557 P.2d 929 (Cal. 1976).

For instance, one important provision appearing in at least ten of the state constitutions, with varying degrees of specificity, is the non-discrimination phrase.[42] Without discounting the importance of such language, the nondiscrimination phrase has a limited application. Although it has been extremely useful in protecting the individual upon grounds of race, nationality, religion, etc., it has not been used by plaintiffs nor held by courts to provide the protection or advancement of education necessary to ensure the quality of the overall educational outcome. Similarly, many state constitutions contain language of uniformity, again, nonqualitative statements, and again statements which have proven to hold little value for the advancement of educational quality.[43] Other valuable provisions, though not specifically for the protection of quality, include those insuring the education of the deaf, mute, and blind, or establishing compulsory attendance, the general elements of the finance system, or administrative responsibilities.

Recognizing that each state constitution contains a unique education clause provides additional ground on which to synthesize various judicial opinions. Some states have combined all of the strongest qualitative language, while other states seem to be lacking everything vital to the advancement or protection of education. Nonetheless, the weakness of the education clause is not as detrimental as is the weakness of plaintiff's choice of arguments because courts are continually recognizing the inherent value of quality education. Additionally, the courts are recognizing the state education clauses as a sign of the value states place on education.[44]

PART III: EQUAL PROTECTION CLAIMS: A SEMI-SUCCESSFUL TRADITION.

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42. For instance, *see* ILL. CONST. art. X, §1 ("Educational development of all persons"); MONT. CONST. art. X, §7 ("guaranteed to each person of the state"); N.M. CONST. art. XII, §1 ("open to all the children of school age"); N.Y. CONST. art. XI, §1 ("all the children of the State may be educated"); WASH. CONST. art. IX, §2 ("for . . . the children residing within its borders without distinction or preference on account of race, color, caste, or sex . . . free from sectarian control and open to all children in [the] state"). *See also* ARK. CONST. art. XIV, §1; ALASKA CONST. art. VII, §1; HAW. CONST. art. X, §1; MASS. CONST. art. 61; MICH. CONST. art. VIII, §2; N.J. CONST. art. VIII, §4.

43. *See infra* Part III, B.

44. *See infra* Part VII.

Interestingly, education litigation has been termed "school finance litigation" rather than "school system litigation." Perhaps this is because the most common theory of school finance litigation under an equal protection clause, requires plaintiffs to argue that some aspect of the finance system creates inequality or some nonuniformity. (Hereinafter "equal protection/equality claims"). School finance litigation may be misnamed in light of the more successful and increasingly common argument, under the state education clause, which allows plaintiffs to assert that the educational offering a child receives is somehow inadequate. (Hereinafter "education clause/adequacy claims"). The next three sections provide an explanation of equal protection/equality claims, education clause/adequacy claims, and a sort of hybrid claim made up of a mixture of the two. In doing so, these sections establish a rather clear and distinct correlation between successful litigation and arguments that go beyond the financial elements, beyond the equality aspects of the taxation, expenditures, and educational opportunities, and reach out to the quality or adequacy aspects of the educational output.

This section will address two types of equality arguments: equal protection/equality claims and equal protection/uniformity claims. Equal protection/equality claims arise from the state or federal equal protection clause, and equal protection/uniformity claims arise from the state education clause. Other than their point of origin, there is no real difference between the two, neither in terms of analysis or effect, and for that reason the two types are addressed together under an explanation of equal protection.

A. EQUAL PROTECTION/EQUALITY CLAIMS.

Undoubtedly, the most prevalent school finance litigation theory is the equal protection argument based in terms of inequalities. In fact, equal protection arguments have been suggested in all but five cases.[45] However, as will be shown, equal-

45. Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724 (1993); McDuffy v. Secetary of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978). *See also* Appendix.

ity arguments alone have established, at best, only a semi-successful method of protection and advancement of education and school finance systems. The courts have not given equality arguments the weight that plaintiffs and scholars had hoped.

We can quickly dispose of equal protection arguments arising under the Fourteenth Amendment of the U.S. Constitution, under which probably no school finance system will ever be overturned in the future. This is due to *San Antonio Independent School District v. Rodriguez*, a seminal case, argued before the U.S. Supreme Court.[46] That case, strictly a finance case, concerned solely with disparities in per-pupil expenditures, failed under the federal Equal Protection analysis because education was not a "fundamental right"[47] recognized by the Constitution and because the educationally disadvantaged poor did not constitute a "suspect classification."[48] Based on a mere rational basis scrutiny, the Court refused to overturn the school finance system on grounds of inequality. Equally notable, this dispositive case "virtually abdicated any role for the federal courts in guaranteeing educational rights under the Federal Constitution,"[49] leaving future plaintiffs "to state courts and constitutions for the change they seek."[50]

In state courts under state equal protection clauses, the history of school finance litigation has, to a large extent, continued in the unsuccessful ruts of *Rodriguez* and the grounds of equality.

> In most states, courts have interpreted [their state] equality guarantees to be substantially equivalent to the federal Equal Protection Clause. . . . Many state courts use the federal equal protection framework to give the equality guarantees of their respective state constitutions an equivalent effect. Other state courts follow the federal equal protection framework, but utilize different tests for detecting fundamental rights and suspect classifications. A few state courts have adopted their own

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46. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

47. *Id.* at 30.

48. *Id.* at 25.

49. Hubsch, *supra* note 5, at 1329. *See also* Richard J. Stark, *Education Reform: Judicial Interpretation of State Constitutions' Education Finance Provisions—Adequacy vs. Equality*, 1991 ANN. SURV. AM. L. 609, 609 (1992).

50. *See* Natapoff, *supra* note 3, at 4 (referring to "a backdrop of federal judicial hostility to education rights," footnoting Rodriguez). *See also* Hubsch, *supra* note 5, at 1342; Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 Vand. L. Rev. 101, 105 (1995).

> independent interpretations of constitutional equality guarantees.[51]

Of the cases directly mirroring the *Rodriquez* approach on a state level, three of four California cases, have overturned the school finance system.[52] At least seven others have failed.[53]

1. *Serrano v. Priest*, ("*Serrano I*").[54] The California Supreme Court, prior to *Rodriguez*, held, under the federal and California equal protection clauses, that education was a fundamental interest,[55] and that the poor are a suspect classification.[56] Upon such holdings, the court applied strict scrutiny and overturned the state school finance system, because the system resulted in wide disparities in funding per pupil and substantially depended on local property taxes. "We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors."[57] No evidence was offered regarding the quality of any child's education, only the inequality of the method of taxation.

2. *Serrano v. Priest*, ("*Serrano II*").[58] The legislature's response to Serrano I was found to be insufficient. The court's opinion reestablished its previous decision, clarifying—in light of *Rodriguez* which renounced strict scrutiny in such cases under the federal Equal Protection Clause—that Serrano I was based on the equal protection clause of the California state constitution as well as the federal Constitution.[59] Although the defendants requested that the state look at more substantive mat-

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51. Stark, *supra* note 49, at 22 (citations omitted).

52. Serrano v. Priest, 487 P.2d 1241 (Cal. 1971) (Serrano I, overturned); Serrano v. Priest, 557 P.2d 929 (Cal. 1976) (Serrano II, overturned); Butt v. State, 842 P.2d 1240 (Cal. 1992) (overturned).

53. City of Powtucket v. Sundlun, 662 A.2d 40 (R.I. 1995); Jenkins v. Leininger, 1995 WL 758757 (Ill. App. 1995)(upheld, "This court uses the same analysis in assessing equal protection claims brought under the United States and Illinois Constitutions"); Serrano v. Priest 226 Cal. Rptr. 584 (Cal. App. 1986) (Serrano III, upheld); Sch. Admin. Dist. v. Comm'r Dep't of Educ., 659 A.2d 854, 857 n.5 (Me. 1996); Unified Sch. Dist. No. 229, v. State, 885 P.2d 1170 (Kan. 1994) (upheld); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983) (upheld); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (1982) (upheld).

54. 487 P.2d 1241 (Cal. 1971).

55. *Id.* at 1258.

56. *Id.* at 1255.

57. *Id.* at 1244.

58. 557 P.2d 929 (Cal. 1976).

59. *Id.* at 958.

ters such as the "adequacy and equality of the educational programs," the court refused to ascertain more than Serrano I, stating that if a system was discriminatory—basing revenues and quality on wealth—it was unconstitutional regardless of educational outcome.[60]

3. *Serrano v. Priest*, ("*Serrano III*").[61] Having reviewed the state's school finance system history along with Serrano I and Serrano II, the California Supreme Court held, via the adoption of the trial court opinion, that the legislature had decreased per-pupil expenditure disparities to "insignificant" levels.[62] Again, no new issues were raised.

4. *Butt v. State*.[63] One California school district had exhausted its funds and sought to close school six weeks early. The Supreme Court of California granted an injunction, restating the holding of previous decisions that the students of California have a "constitutional right to basic educational equality with other public school students in this state."[64]

These California opinions, are models of successful equal protection/equality arguments following the federal equal protection analysis used in *Rodriguez*. However, they are not representative of the whole. In fact these opinions represent less than a thirty percent success rate.[65] Additionally, as one author points out, the California court having "strained to avoid casting the issue in adequacy terms," has left California "confronted with the problems of inadequacy."[66] From the language of these California opinions, one would have a difficult time rallying any substantial protection for the quality of a child's education. And this is not because California lacks an education clause, or because it lacks a strong eduction clause, but simply because California plaintiffs and courts have not addressed the problem with any qualitative measurement whatsoever.

Even when states do not follow the *Rodriguez* approach and apply their own equal protection analysis to their state constitution, plaintiffs' equality claims continue to be unsuccessful.[67]

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60. *Id.* at 944.
61. 226 Cal. Rptr. 584 (Cal. App. 1986).
62. *Id.* at 620.
63. 842 P.2d 1240 (Cal. 1992).
64. *Id.*
65. *See supra* note 53.
66. Enrich, *supra* note 50, at 114.
67. For a thorough discussion of the evolution of equal protection, from Brown

Even under independent state equal protection analysis, state courts are still responding as did the U.S. Supreme Court in *Rodriguez*: "the existence of 'some inequality' . . . is not alone a sufficient basis for striking down the entire system."[68] This reluctance to require equality marks the majority of all state decisions, as it did in the federal equal protection field.[69] Nonetheless, plaintiffs continue the traditional equality arguments.

Although funding disparities are often easily proven and facts are often readily available, state courts have consistently held that equal protection clauses do not require strict equality of funding.[70] With proof of extensive inequalities, the supreme court of North Carolina held that disparities in funding did not give rise to an equal protection violation.[71] Though education was declared a "fundamental right," educational expenditures did not need to be administered in "absolute uniformity."[72] The case was dismissed for failure to state a claim. Other courts have simply explained "that disparities in funding per pupil were simply not a concern to those who drafted the provisions."[73]

Disparities and inequalities in educational opportunities, as opposed to funding, have likewise not been required under state equal protection arguments.[74] One supreme court stated, "[I]n our view, the only plausible way to interpret [the phrase "equal opportunities shall be provided for all students,"] is to relate it

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v. Bd. of Educ. to the present school finance litigation cases, *see* generally Enrich, *supra* note 50.

68. Rodriguez, 411 U.S. at 51.

69. Although this section will illustrate the reluctance of the courts to require equality, *see* generally Appendix for the unsuccessful nature of equality-based claims.

70. Gould v. Orr, 506 N.W.2d 349 (Neb. 1993); Reform Educ. Fin. Inequities Today v. Cuomo, 606 N.Y.S.2d 44 (1993); Coalition for Equitable Sch. Funding v. State, 811 P.2d 116 (Or. 1991); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (1982); Danson v. Casey, 399 A.2d 360 (Penn. 1979); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975).

71. Britt v. North Carolina, 357 S.E.2d 432 (1987).

72. *Id.* at 436.

73. Powtucket v. Sunland, 662 A.2d 40, 49 (R.I. 1995). *See also* Pauley v. Kelly, 255 S.E.2d 859, 870 (W.Va. 1979) ("equality of funding has not been required in the majority of states with mandated thorough and efficient school systems").

74. Reform Educ. Fin. Inequities Today v. Cuomo, 199 A.D.2d 488, 489 (N.Y. 1993); Alabama Coalition for Equity v. Hunt, 624 So.2d 107 (Ala. 1993) ("need not be strictly equal or precisely uniform"); McDaniel v. Thomas, 285 S.E.2d. 156, 168 (Ga. 1981) (neither the equal protection nor education clause "require the state to equalize educational opportunities between districts"). *But see* Horton v. Meskill, 376 A.2d 359 (Conn. 1977).

to the 'separate but equal' phrase," as a nondiscrimination clause, establishing only "equal access," not equal outcome.[75] There are a few exceptions, one of which lies with a state whose education clause explicitly requires equality of opportunity.[76]

Most courts have simply held that inequality of opportunity or funding is allowed as long as the educational offering is adequate,[77] while others have required that equal protection claims be accompanied by "gross and glaring" inequalities before overturning a school finance system.[78] For example, an Idaho court cited several cases standing for the single proposition that absent a showing of inadequate education, inequality in expenditures is not sufficient to summon an overturning of the state school finance system.[79] In other words, equality arguments alone have not carried the day.

5. *Gould v. Orr.*[80] Facing a school finance system similar to that found in the Serrano cases, with high dependance on local tax revenues, substantial disparity among property wealth, and resulting inequities in per pupil funding, the Nebraska court took the more typical approach and held that neither the equality of taxation nor spending was mandated. Even assuming all pleaded facts were true, plaintiffs failed to state a cause of action.[81] The court redundantly demanded that equalitative arguments and evidence were of themselves meritless; the court wanted allegations and proof regarding "inadequate schooling," "the quality of education" and "the education each student is receiving."[82]

6. *Exira Community School District v. State.*[83] Plaintiffs challenged the constitutionality of an open enrollment statute which required the district from which the students were leaving ("sending district") to release funds to the receiving district. Plaintiffs, the sending district, argued that the finance system

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75. Britt v . North Carolina, 357 S.E.2d 432, 436 (1987).

76. Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989) (citing MONT. CONST. art. VIII, §1).

77. For example, *see* Skeen v. Minnesota, 505 N.W.2d 299, 311 (1993); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 776 (Md. 1983).

78. For example, *see* Reform Educ. Fin. Inequities Today v. Cuomo, 199 A.D.2d 488, 489 (1993).

79. Thompson v. Engelking, 537 P.2d 635, 651 (Idaho 1975).

80. 506 N.W.2d 349 (Neb. 1993).

81. *Id.* at 352.

82. *Id.* at 353.

83. 512 N.W.2d 787 (Iowa 1994).

violated the state equal protection clause and the state due process clause because of the inequalities in expenditures.[84] Plaintiffs offered no facts regarding the quality of education, and the court explained that "[the plaintiffs] do not even pretend to argue that the financing mechanisim—even with the $70,000 shortfall to Exira—is preventing Exira from providing an adequate education to the students who remain."[85] The court therefore refused plaintiffs' claims.

7. *Thompson v. Engelking*.[86] In the Idaho school finance system, local ad valorem taxes raised the majority of the revenue creating inequitable per-pupil funding. However, the court refused to allow strict scrutiny of the school finance system under equal protection analysis and allowed for inequalities within that system. Likewise, the court held that the education clause did not "guarantee to the children of this state a right to be educated in such a manner that all services and facilities are equal throughout the State."[87] After discarding plaintiffs claims, the court concluded by noting that plaintiffs only alleged an inequality of funding, and did not proceed to demonstrate an inadequacy of funding to maintain that system of education.[88]

B. EQUAL PROTECTION/UNIFORMITY CLAIMS: A SLIGHT VARIATION.

Many equality claims are brought under the state's education clause rather than the state's equal protection clause. With the same basic equality focus, the state education clauses often have a semi-equal protection argument couched in terms of "uniformity."[89] With this language plaintiffs essentially have another equality claim with which to argue that the taxation, expenditure, or opportunity per pupil or per district is not equal or uniform as required.[90] Such arguments are equal protection/equality arguments though brought under the education

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84. *Id.* at 794.
85. *Id.* at 795.
86. 537 P.2d 635 (Idaho 1975).
87. *Id.* at 647.
88. *Id.* at 653.
89. *See supra* Part II, B.
90. Reform Educ. Fin. Inequities Today v. Cuomo, 606 N.Y.S.2d 44 (1993) (equality of funding not required, constitution only requires equality of access); Hornbeck v. Somerset County Bd. of Educ., 485 A.2d 758 (Md. 1983); Skeen v. State, 505 N.W.2d 299 (Minn. 1993).

clause. This article only distinguishes such arguments as equal protection/uniformity arguments.

To bolster their unsuccessful equality-based claims, plaintiffs have incorporated the "uniformity" language of education clauses. These uniformity claims however, have been even less successful,[91] as the courts have construed the education clause uniformity requirements even more restrictively than equality requirements under equal protection. In fact, "no court has found that such a uniformity requirement guarantees equality of educational funding."[92] Idaho has actually "concluded that Thompson and cases decided after Thompson mandate dismissal of the uniformity claim."[93]

1. *Olsen v. State ex rel Johnson.*[94] The state school finance system which relied heavily upon local tax revenues and created large disparities among districts, was upheld. Neither the "uniformity" language of the education clause nor the equal protection clause required uniformity or equality of educational facilities, opportunities or expenditures.[95]

2. *Coalition for Equitable School Funding v. State.*[96] In response to the legislative action taken, the Supreme Court of Oregon once again held "that school districts may have disparate amounts to fund schools, depending on the amount that voters are willing to pay,"[97] but the "uniform" language of the education clause did not require otherwise.

3. *Withers v. State.*[98] The Oregon Supreme Court decided this case in accordance with Oregon's two earlier opinions. The plaintiff made "precisely the same arguments that the court rejected in Olsen."[99] Again, equal protection/equality and uniformity arguments brought failure, and the courts in this case explained why: "plaintiffs do not complain that current funding

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91. Hubsch, *supra* note 5, at 1336 n.98 ("Plaintiffs have had less success making claims under the education articles of the state constitution where they have used the education article as a surrogate for, or reiteration of, an equal protection claim").

92. Stark, *supra* note 49, at 630; *see also* Unified Sch. Dist. No. 299 v. State, 885 P.2d 1170,1184 (Kan. 1994) (citing the language of twelve state supreme court opinions holding to this effect); Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994).

93. Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 730 (1993); *See also* Gould v. Orr, 506 N.W.2d 349, 353 (Neb. 1993).

94. 554 P.2d 139 (Or. 1976).

95. *Id.* at 148.

96. 811 P.2d 116 (Or. 1991).

97. *Id.* at 121.

98. 891 P.2d 675 (Or. 1995).

99. *Id.* at 679.

is inadequate to ensure that they receive the minimum education required by law."[100]

4. *Board of Education, Levittown Union Free School District v. Nyquist.*[101] The New York Court of Appeals upheld the school finance system, even with "significant inequalities,"[102] as the state provided a minimum fault grant per pupil that established education at state standards.[103] Any disparities beyond the state level was not unconstitutional, the court held, neither under the state equal protection clause nor under the "uniformity" type language of the education clause.[104]

5. *Reform Educational Financing Inequities Today v. Cuomo.*[105] In a page and a half opinion, the court precisely declared: "Since the plaintiffs in this case merely assert that there are disparities in the financing of rich and poor school districts, and the Court of Appeals has already determined that the Levittown case that such disparities are not unconstitutional, we find that the complaint was properly dismissed."[106] Without reference to any specific facts, the court concluded that the school finance system did not contain any "gross and glaring inadequacies,"[107] and further that "plaintiffs do not allege that their students are not being provided with a sound, basic education."[108]

As these cases illustrate, equal protection/uniformity claims, like equal protection/equality claims, have proven to be rather unsuccessful. Although more uniformity and equality claims have been tried in courts, almost twice as many as education clause/adequacy claims, fewer plaintiffs overall have found favorable verdicts from such uniformity and equality based claims.[109] Even when plaintiffs bolster their equal protection claims with simultaneous uniformity claims,[110] and due

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100. *Id.*
101. 439 N.E.2d 359 (N.Y. 1982).
102. *Id.* at 363.
103. *Id.* at 368.
104. *Id.*
105. 199 A.D.2d 488 (N.Y. App. Div. 1993).
106. *Id.* at 490.
107. *Id.* at 489.
108. *Id.* at 490.
109. Again, only ten out of thirty-eight cases decided solely on grounds of equality have overturned school finance systems or remanded favorably to plaintiffs, for a total of twenty-six percent success. *See generally,* Appendix.
110. City of Pawtucket v. Sundlun, 662 A.2d (R.I. 1995) (good example of a defendant's case, pro equality).

process claims as well. Still, plaintiffs have not found much success absent an argument that cuts to the issue of the adequacy of the educational offering.[111] Notwithstanding the fact that the dominant financial aspects of equality claims have been proven less than nominally successful, plaintiffs have continually emphasized disparity and inequality of the financial aspects of education. This, according to one scholar's thorough treatment of the subject, is a result of the nation's continued overreliance on the historical success of the Equal Protection Clause of the Fourteenth Amendment.[112]

Arguably, these plaintiffs simply want to give their child a better education, a greater opportunity to compete well with others.[113] "School finance litigation" plaintiffs really want quality, not just equality.[114]

PART IV: EDUCATION CLAUSE/ADEQUACY CLAIMS: WHAT COURTS ARE LOOKING FOR.

At first glance, one might judge the success of a school finance suit to be as predictable as the toss of a coin. Indeed, simple addition shows that plaintiffs challenging the school finance system receive almost as many favorable as unfavorable judgments.[115] However, the adequacy argument is a much more successful avenue of advancing education than through the equal protection/equality or equal protection/uniformity arguments outlined above. Such adequacy claims are brought under the education clause of the state constitutions. And though the federal Constitution does not have an education article or any reference to education, state constitutions are specially equipped for education litigation. Sometimes they even have extensive education clauses or explicit and mandatory levels of quality.[116]

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111. *See generally*, Appendix.

112. Enrich, *supra* note 50, at 116.

113. *See generally*, Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989)("Edgewood I")(equality measured strangely in almost qualitative terms regarding the ability to compete).

114. Stark, *supra* note 49, at 613.

115. *See* Appendix (forty-four percent of school finance cases have been favorable to plaintiffs); *see also* Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 814, 815 (Ariz. 1994) (citing eleven cases overturned, sixteen upheld); Fair Sch. Fin. Council v. State, 746 P.2d 1135, 1148 (Okla. 1987) (citing eight cases overturned, ten upheld).

116. Stark, *supra* note 49, at 613. *See also supra* Part II.

These constitutional qualitative standards allow plaintiffs to advance their arguments in terms of the actual adequacy or quality of the educational offering rather than in terms of comparison, one district against another, on difficult financial equalitative terms.

Contrary to what a few uninformed courts and scholars have concluded,[117] there is consistency between success and the use of the education clause. Further and deeper analysis shows a strong correlation between favorable verdicts and the education clause when argued properly with allegations and proof of educational inadequacy.

A. STATISTICAL SUCCESS OF THE EDUCATION CLAUSE.

Courts have found the state school system to be unconstitutional in each challenge to state school system, based on an education clause claim coupled with adequate proof of an inadequate education.[118] These cases have been decided exclusively upon the grounds of the education clause, without any deference whatsoever to equality arguments under equal protection.[119] At least another seven cases have been decided squarely on adequacy grounds, while giving minimal lip service to equality considerations.[120] In one opinion, after plaintiffs had dropped their education clause claim, the court itself incorporated an education clause analysis, in conjunction with that of equal protection, to overturn the school finance system.[121] Still

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117. *See, e.g.*, Lonnie Harp, *No Clear Trend Seen in Recent Finance Decisions*, EDUCATION WEEK, May 4, 1994.

118. *See* Appendix.

119. Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993); Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724 (1993); McDuffy v. Secretary of Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993), Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978). *See also* Enrich, *supra* note 50, at 174 (referring specifically to the latter three cases and also commenting very positively on the first two, as well as Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979)).

120. Campbell County Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995); Roosevelt Elementary Sch. Dist. No. 66 V. Bishop, 877 P.2d 806 (Ariz. 1994); Alabama Coalition for Equity v. Hunt, 624 So.2d 107, 110 (Ala. 1993); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); Pauley v. Kelly, 324 S.E.2d 128 (W.Va. 1984). *See* Enrich, *supra* note 50, at Appendix. The remaining six cases were decided unfavorably toward plaintiffs, due to lack of evidence.

121. Bismarck Pub. Sch. Dist. v. State, 511 N.W.2d 247, 260-63 (N.D. 1994) (plaintiff dropped its education clause claim, but court incorporated, on its own,

other cases have upheld the school finance system on other grounds, but with language favorable to the education clause.[122] On the other hand, in the last fifteen years only three courts have overturned a school finance system without an education clause argument.[123]

Several scholars have recognized the strength of quality-based arguments, but few have recognized the extent of the clause's success. Although approximately forty-five percent of all school finance litigants receive favorable verdicts,[124] those relying solely on equality arguments have been less than thirty percent successful.[125] Those plaintiffs relying on a hybrid of both education clause adequacy claims and equal protection clause equality claims have about a sixty-six percent success rate,[126] while those plaintiffs relying solely on the education clause adequacy arguments have sustained a one hundred percent success rate.[127] That rate of success for education clause/adequacy arguments is even greater if one accounts for opinions with language favorable to the education clause, and plaintiffs who simply didn't have the facts to carry the court to an ultimately favorable decision.[128]

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qualitative analysis focusing on evidence of strong inadequacy and, in many respects, the court recognized a hybrid claim outlining the poor quality and the poor level of funding responsible).

122. *See, e.g.*, Gould v. Orr, 506 N.W.2d 349 (Neb. 1993); Edgewood Indep. Sch. Dist. v. Meno, 893 S.W.2d (Tex. 1995).

123. Exira Community Sch. Dist. v. State, 512 N.W.2d 787 (Iowa 1994); Butt v. State, 842 P.2d 1240 (Cal. 1992); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989). cf. Bismarck Pub. Sch. Dist. v. State, 511 N.W.2d 247 (N.D. 1994).

124. Approximately sixty-one cases have been decided; twenty-seven of those overturned the school finance system or remanded favorably to plaintiffs; *see also* Appendix.

125. Only ten of the thirty-eight cases decided solely on grounds of equality have overturned school finance systems or remanded favorably to plaintiffs, for a total of twenty-six percent success; *see also* Appendix.

126. In all, eighteen cases have been decided on a hybrid (equality/adequacy) basis. Twelve of those have overturned the school finance system or have been remanded favorably; *see also* Appendix.

127. Although all five cases decided solely on grounds of adequacy have overturned the school finance system, when added to hybrid cases arguing on grounds of both adequacy and equality, seventeen of the twenty-three cases have been decided favorably toward plaintiffs. Therefore, of all cases decided, in part, upon an education clause/adequacy basis, seventy-four percent have been successful; *see also* Appendix.

128. *See* Appendix (all five cases argued solely on gounds of adequacy were successful, thirteen of the hybrid cases were successful, and the remaining six were unsuccessful due to lack of evidence).

B. COURTS WANTING QUALITATIVE ANALYSIS.

Moving beyond statistics, the language of the nation's judiciaries confirms these conclusions. Many courts have explicitly stated that they are looking for the qualitative language of education clauses, specifically asking plaintiffs to direct their arguments accordingly.

For instance, in a Nebraska case such a preference was redundantly stated in three consecutive sentences, after the court refused to recognize plaintiff's cause of action:

> Appellants' petition clearly claims there is disparity in funding among school districts, but does not specifically allege any assertion that such disparity in funding is inadequate and results in inadequate schooling. While appellant's petition is replete with examples of disparity among the various school districts in Nebraska, they fail to allege in their petition how these disparities affect the quality of education the students are receiving. In other words, although appellants' petition alleges the system of funding is unequal, there is no demonstration that the education each student is receiving does not meet constitutional requirements.[129]

Along the same lines as this Nebraska opinion, other courts have frequently rejected equal protection arguments for education clause arguments when plaintiffs have presented both.[130] Likewise, where plaintiffs have relied solely on equality claims, courts have frequently expressed surprise at plaintiffs' complete failure to allege poor quality of education, and the court stated such as the grounds for unfavorable judgments.[131] This was the case with one Iowa opinion: "The appellants do not even pretend to argue that the financing mechanism . . . is preventing [the school district] from providing an adequate education to the students."[132]

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129. Gould v. Orr, 506 N.W.2d 349, 353 (Neb. 1993).

130. *See, e.g.*, McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993), Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993), Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989), Robinson v. Cahill, 303 A.2d 273 (N.J. 1973).

131. Hubsch, supra note 5, at 1336 (citing to Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 780 (Md. 1983) and Milliken v. Green, 203 N.W.2d 711, 719 (Mich. 1973). *See also* Fair Sch. Fin. Council v. State, 746 P.2d 1135 (Okla. 1987); Gould v. Orr, 506 N.W.2d 349, 353 (Neb. 1993); Skeen v. State, 505 N.W.2d 299, 302 (Minn. 1993).

132. Exira Community Sch. Dist. v. State, 512 N.W.2d 787, 795 (Iowa 1994).

Thus education clauses are becoming the school finance theory of choice. Statistics show they are more successful, scholars agree.[133] Judicial opinions continually work towards the language of quality and away from the language of equality. There are several reasons for the strength of this education clause/adequacy argument. First, adequacy arguments cut to the core of what most plaintiffs want and what most courts are sympathetic to: a child's educational experience.[134] Second, adequacy arguments are more justiciable and less legislative; courts are more willing and anxious to insure that a student gets an adequate education, than that a student gets an education exactly like that of another student.[135] Third, adequacy arguments are said to be more manageable.[136] Courts have been willing to require an adequate education. Requiring equality, however, brings taxation, expenditures, curricula, facilities, etc., under regulation. It is far more difficult to require that each school be equal, than to require that they all meet at least a certain qualitative standard.

1. *Seattle School District No. 1 of King County v. Washington.*[137] The Washington Supreme Court issued a decision which required the state to increase school funding and refrain from relying on special excess levies, generating additional local taxes, to fund the school system. The opinion does not suggest any glaring educational inadequacies except the inability to maintain a twenty-to-one student-teacher ratio, and the underfunding of the school district as analyzed under three separate tests.[138] The court held—qualitatively on equalitative evidence—that the state's method of funding did not provide "ample provision" for even a "basic education," let alone a "general and uniform" education as required by the state's education clause.[139] The court also held the constitutional language requiring education to be "the paramount duty of the state"[140] to

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133. Stark, *supra* note 49, at 630; Hubsch, *supra* note 5, at 1336; Enrich, *supra* note 50, at 103.

134. *See infra* Part VI, B, addressing this point specifically.

135. *See infra* Part VI, A, addressing this point specifically.

136. *See* Rovinson v. Cahill, 303 A.2d 273, 283 (N.J. 1973) (refusing to consider equal protection arguments due to unmanageability).

137. 585 P.2d 71 (1978).

138. *Id.* at 103.

139. *Id.* at 99.

140. *Id.* at 91.

be mandatory language creating an "absolute right" in every child.[141] The court relied only upon the state's education clause in declaring the school finance system unconstitutional.

2. *Pauley v. Kelly.*[142] The West Virginia Supreme Court of Appeals reinstated plaintiff's cause of action which the lower court had dismissed, after noting the lower court's findings of inadequacies in physical facilities, even extending to "potential health and safety threats," and inequalities suggesting inadequacies in facilities, curricula, test scores from poorer school districts.[143] Although the court did devote some deference to equal protection/equality based arguments, it devoted the majority of its opinion to defining and assessing the language of the education clause, including the "terms that are basic to the case: 'thorough,' 'efficient,' and 'education.'"[144] After looking extensively at other relevant jurisdictions and agreeing with the adequacy standards found mandatory in over fifteen states,[145] the court continued, "[w]e may now define a thorough and efficient system of schools: it develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically."[146] Thereafter the court delineated eight various "legally recognized elements" of education.[147]

3. *Rose v. Council for Better Education, Inc.*[148] Although the Plaintiffs in this case argued that the finance system was discriminatory, in violation of the state and federal equal protection clauses as well as the state education clause, and although

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141. *Id.* at 92 n.13.
142. 255 S.E.2d 859 (W.Va. 1979).
143. *Id.* at 862.
144. *Id.* at 874.
145. *Id.* at 689.
146. *Id.* at 877. *See also* Hubsch, *supra* note 5, at 1337 (citing the same).
147. "Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society." *Id.* at 877.
148. 790 S.W.2d 186 (Ky. 1989).

the trial court agreed, the Kentucky Supreme Court affirmed the unconstitutionality of the school finance system solely and explicitly on grounds of the education clause, for failure to meet the "efficient" standard.[149] Although plaintiffs offered evidence that the educational offering was somewhat inadequate, the court emphasized even the equalitative evidence as establishing inadequacy. Recognizing that the education system was ranked in the lower 20-25% nationally,[150] and that poorer districts had poorer curricula, test scores, and opportunities, the court explained: there is a "definite correlation between the money spent per child on education and the quality of the education received."[151] Building on this evidence and plaintiff's adequacy claims, the court referred to the eight elements mandated by the West Virginia court, and then established for Kentucky an extensive list of its own, what one author has called a "wide-ranging and ambitious standard for what the schools must achieve."[152]

4. *McDuffy v. Secretary of the Executive Office of Education.*[153] Plaintiffs specifically pled along the lines of the Kentucky court's holding that all individuals had a right to an adequate education.[154] Accordingly, the Massachusetts Supreme Court chose to focus on plaintiffs' education clause argument, to determine whether the state constitution created a duty to provide an "adequate" education[155] and whether the state system as a whole had fulfilled that duty.[156] Carefully and extensively the court worked with the education clause language, reviewing constitutional and legislative history and defining and holding mandatory both the duty to provide an "adequate"[157] education, to "cherish"[158] it, and to promote it for the "protection of rights

149. Id. at 215. (The court emphasized that the education clause was the sole grounds for the decision over four times in the opinion). *See also* Stark, *supra* note 49, at 28.

150. 790 S.W.2d 186, 197 (Ky. 1989).

151. *Id.* at 198.

152. Enrich, *supra* note 50, at 174.

153. 615 N.E.2d 516 (Mass. 1993). Another, almost identical opinion is Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993) (the two states, once shared the same border, now share "nearly identical" education clauses, and the two decisions mirror each other, in approach, content, and time).

154. *Id.* at 522.

155. *Id.* at 519, 522.

156. *Id.* at 548.

157. *Id.* at 547.

158. *Id.* at 523.

and liberties."[159] Thereafter, recognizing that the school system had provided inadequate school facilities, curricula, and staff,[160] the court held that the "constitutional duty is not being currently fulfilled by the Commonwealth."[161] The court also noted, the tie between quality and funding, which turned equalitative finance-related evidence into qualitative evidence.[162] Finally, following the Washington court's precedent, and the precise language of the Kentucky court, the Massachusetts Supreme Court established seven requisite capabilities of adequately educated students.[163]

> An educated child must possess "at least the seven following capabilities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job.[164]

5. *Idaho Schools for Equal Educational Opportunity v. Evans.*[165] The Idaho Supreme Court affirmed the lower court's dismissal of equal protection/uniformity claims stating that *Thompson v Engleking* and other subsequent cases "mandate

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159. *Id.* at 523, 548.

160. *Id.* at 553.

161. *Id.* at 555.

162. *Id.* at 552 ("It is also clear, however, that fiscal support, or the lack of it, has a significant impact on the quality of education each child may receive").

163. *Id.* at 554.

164. McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 522 (Mass. 1993).

165. 850 P.2d 724 (1993).

dismissal of the uniformity claim."[166] Accordingly, the court held "unequal per student expenditures between school districts did not violate the education clause or equal protection clause."[167] Then turning to plaintiffs' education clause/adequacy arguments, the court explained "we have further concluded that the plaintiffs have alleged facts which, if proven at trial, would entitle them to relief."[168]

Most scholars agree that these cases speak solely for the advancement of adequacy claims. For example Peter Enrich, speaking of the West Virginia, Kentucky, and Massachusetts cases: "these courts have simply, and boldly, taken it upon themselves to define the contours of educational adequacy."[169] Allen W. Hubsch in conclusion explains that:

> The foregoing state cases indicate that successful claims based on the education articles must address the quality level of education assured to citizens by the state constitution. . . . They address issues of education quality rather than equality and . . . answer the call of the United Sates Supreme Court in Rodriguez of the states to take responsiblity for what is essentially a state function.[170]

Although some of these cases have much stronger fact scenarios than others, in every case the courts relied on plaintiffs' adequacy-based arguments and both equalitative and qualitative evidence to show inadequacy.

A careful review of these cases in light of the statistics presented above, shows that even though all school finance suits taken together offer only a forty-four percent chance of success, adequacy arguments drastically increase that percentage.[171] Conversely equality arguments decrease a plaintiff's chance of success. As judges and scholars have stated and restated, this is a direct effect of the courts' desire to hear adequacy-based arguments.

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166. *Id.* at 730.
167. *Id.*
168. *Id.*
169. Enrich, *supra* note 50, at 173 (the other cases Enrich refers to favorably in his Appendix).
170. Hubsch, *supra* note 5, at 1341.
171. *See* generally Appendix.

PART V: HYBRID CLAIMS: THE BEST OF BOTH, EMPHASIZING ADEQUACY.

Without question, the group of cases with the highest success rate have been those decided solely on grounds of adequacy. Claims stated purely in terms of equality have not been a close second. However, the largest group, in terms of sheer numbers of successful plaintiffs, has used a hybrid approach.[172] A hybrid suit combines the equal protection/equality claim with the education clause/adequacy claim. Such an approach has proven to be a very successful and flexible alternative.[173]

The hybrid suit is essentially an education clause/adequacy suit, using the language of equality as "just one measure of adequacy"[174] to advance the quality of education. Whether the litigant seeks equitable taxing and spending methods or a better quality of education, the litigant will be more successful by alleging inadequacy of education.[175] And with the flexibility of the hybrid approach, the litigant can make use of qualitative as well as equalitative evidence to show such inadequacy. In other words, with a hybrid approach, a plaintiff may allege inadequacy but offer proof of a disparate educational offering or educational funding. Combined with evidence of inadequacy, the evidence of disparity bolsters the claim of poor and inadequate education.

Scholars often call attention to the courts' confusion of the issues; equality arguments and evidence are mixed with adequacy arguments and evidence.[176] For instance, one scholar takes great pains to note the reluctance of both the courts and plaintiffs to let go of the equal protection clause challenge in exchange for the adequacy arguments of the education clause.[177] While admitting the truth of such reluctance, and the resulting confusion of the issues, one should not overlook the fact that courts in hybrid suits are using qualitative language to ground

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172. *See* Appendix.
173. Natapoff, *supra* note 3, at 2.
174. *Id.* at 4.
175. *See supra* Parts III and IV.
176. Natapoff, *supra* note 3, at 3.
177. *See* generally Enrich, *supra* note 50.

their opinions even when plaintiffs present equalitative proof,[178] and such suits are relatively successful.

To yield such favorable opinions to plaintiffs, courts have generally looked at two ideas. First, courts have held that evidence of a disparate or unequal education, is evidence that the education is not comparable and therefore not adequate. In the New Jersey opinions, a child's education was not adequate because of the extensive disparities which made the education uncompetitive in the market, as compared to other school district offerings.[179] Accordingly, an adequate education is a competitive education; to be competitive, you must be somewhere in the range of others and somewhat equal to others. Therefore, with this analysis, a plaintiff alleging inadequacy can use evidence of disparities to bolster proof of inadequacy.

Second, although scholars, courts, and common sense know full well that money does not necessarily equate strictly with quality, numerous courts have been quick to recognize the tie between funding and the adequacy of the educational outcome.[180] In a Minnesota case, for instance, the court stated that "in every case from another state in which a violation of a state constitutional provision was found, there were inadequacies in the levels of basic funding, and, consequently, a deficient overall level of education."[181] A Tennessee court similarly explained that "The evidence indicates a direct correlation between dollars expended and the quality of education a student receives."[182] Both the Minnesota and Tennessee courts, as with many others courts, have decided upon grounds of adequacy, while making use of plaintiff's financial proof under an equality claim. This is continually the case; courts are finding reasons to decide on grounds of adequacy.

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178. *See* generally, cases outlined at the end of this section.

179. *See*, for instance, Abbott v. Burke, 643 A.2d 575, 580 (N.J. 1994); Abbott v. Burke, 575 A.2d 359, 369 (N.J. 1990).

180. For example, *see* Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 814 n.7 (1994) (finding the relationship to be "intuitive"); Alabama Coalition for Equity v. Hunt, 624 So.2d 107, 115 (Ala. 1993) ("accepts the view that there is a positive correlation between spending on education and student performance"); Seattle Sch. Dist. No. 1 v. Washington, 585 P.2d 71, 78 (1978); Thompson v. Engelking, 537 P.2d 635, 642 (Idaho 1975); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973).

181. Skeen v. State of Minnesota, 505 N.W.2d 299, 311 (1993) (citing to four other prominent cases).

182. Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 144 (1993).

1. *Robinson v. Cahill* ("*Robinson I*").[183] The school finance system was first challenged with equal protection/equality arguments, stating that the revenue system discriminated and established unequal burdens. The court explained that

> [w]e hesitate to turn this case upon the State equal protection clause. The reason is that the equal protection clause may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs. . . . we will not pursue the equal protection issue in the limited context of public education.[184]

The system was also challenged with education clause/adequacy arguments alleging that the state did not furnish a "thorough and efficient system." Regarding educational adequacy, the court first recognized the tie between equalitative financing and constitutional standards of adequacy:

> The trial court found the constitutional demand had not been met and did so on the basis of discrepancies in dollar input per pupil. We agree. . . . The constitutional mandate could not be said to be satisfied unless we were to suppose the unlikely proposition that the lowest level of dollar performance happens to coincide with the constitutional mandate.[185]

Although the court did not require equality of funding, it considered the evidence of inequality.[186] The court emphasized heavily that the opinion was based on qualitative analysis. It stated, "Rather than on equality, our decision was based on the proposition that the Constitution required a certain level of education, that which equates with thorough and efficient; it is that level that all must attain; that is the only equality required by the constitution."[187]

2. *Abbott v. Burke* ("*Abbott I*").[188] After reviewing the basis for decision in both *Robinson I* and *Robinson V*—that "a thorough and efficient education requires a certain level of educa-

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183. 303 A.2d 273 (N.J. 1973).
184. *Id.* at 287-83.
185. *Id.* at 295.
186. Pauley v. Kelly, 255 S.E.2d 859, 873 (W.Va. 1979). *See also* Stark, supra note 49, at 632.
187. *See* Abbott v .Burke, 575 A.2d 359, 368 (N.J. 1990) (Abbott I).
188. 575 A.2d 359 (N.J. 1990).

tional opportunity, a minimum level, that will equip the students to become 'a citizen and . . . a competitor in the labor market,' "[189]—the New Jersey Supreme Court once again reviewed the evidence before them. The court noted that plaintiffs offered evidence "more than sufficient to prove the constitutional deficiency in a limited number of [poorer]districts."[190] Specifically, this equalitative evidence showed that poorer districts failed to offer basic courses such as "art, music, drama, athletics, even to a very substantial degree, of science and social studies."[191] Nonetheless, the court refused to overturn the school finance system and find for plaintiffs based on the general disparities and inequalities of the state school system as a whole, without evidence of inadequacy.[192] The court found that qualitative evidence within the disparity of poorer schools: facilities were run down, heating was inadequate, and computer training was extremely limited.[193] The court continued to refer to the disparities, but gave their words teeth by tying both equalitative and qualitative evidence to constitutional standards of educational adequacy. In other words, once the court found that "the level of education offered to students in some of the poorer urban districts is tragically inadequate,"[194] the court did not hesitate to take action, and used all tools possible, both qualitative and equalitative arguments and evidence, to find the school finance system unconstitutional. The court was recognizing the hybrid tie: "We find that under the present system the evidence compels but one conclusion: the poorer the district and the greater its need, the less the money available, and the worse the education. That system is neither thorough nor efficient."[195]

3. *Edgewood Independent School District v. Kirby* ("*Edgewood I*").[196] Some sixteen years after *Rodriguez*, the Supreme Court of Texas invalidated its state school finance system with the aid of adequacy arguments. The court dropped all equal protection and due process claims and proceeded solely

189. Abbott v. Burke, 575 A.2d 359, 369 (N.J. 1990) (Abbott I).
190. *Id.* at 400.
191. *Id.* at 398.
192. *Id.* at 392.
193. *Id.* at 395-396.
194. *Id.*
195. *Id.* at 363. *See also* Abbott v. Burke, 643 A.2d 575, 580 (N.J. 1994) ("Abbott II") (recognizing the same tie).
196. 777 S.W.2d 391 (Tex. 1989).

under plaintiffs' education clause/inequality and inadequacy claims. Plaintiffs presented proof of "glaring disparities" placing property wealth on a 700 to 1 ratio for tax revenues and per pupil expenditures ranging from $2,112 to $19,333.[197] Plaintiffs also presented evidence of "dramatic" inadequacies such as the inability to maintain chemistry, physics, calculus, preparatory or honors programs, and extra curricular activities, as well as the constant oversized classes.[198] Upon such evidence, and after reviewing constitutional debates and legislative history, the court recognized the "implicit link that the Texas Constitution establishes between efficiency and equality."[199] Additionally, the court found a tie between another education clause phrase, "general diffusion of knowledge," and a "substantially equal opportunity to have access to educational funds."[200] Thereupon, the court found the school finance system unconstitutional and affirmed the injuction to fund such a system.

This opinion represents the rare case, where the plaintiff's claim is so compelling that the court could find for the plaintiff on almost any grounds. However, the court rejected the equal protection and due process and proceeded under the education clause. The court used mostly the language of equality, though qualitative arguments could have as easily been made and supported. As is typical of hybrid cases the court explained that if education isn't competitive in today's world, it isn't up to the constitutional level. Therefore, because the "differences in the quality of educational programs offered are dramatic," the court found the school finance system unconstitutional.[201]

4. *Edgewood Independent School District v. Kirby* ("*Edgewood II*").[202] Two years after *Edgewood I*, the legislature had minimally modified the school finance system, and the Texas Supreme Court restated its injunction of the unconstitutional school finance system as it was relatively unchanged.

5. *Edgewood Independent School District v. Meno* ("*Edgewood III*").[203] clarifies and follows the holdings of the previous Edgewood cases. First, addressing the argument brought

197. *Id.* at 392.
198. *Id.* at 393.
199. *Id.* at 397.
200. *Id.*
201. *Id.* at 393.
202. 804 S.W.2d 491 (Tex. 1991).
203. 893 S.W.2d 450 (Tex. 1994).

by the "property poor school districts" regarding the efficiency of the legislative response, the court explained that equality applied only to the funding necessary to reach the constitutional level of quality, and not beyond.[204] In other words, Texas citizens are all entitled to an adequate education as defined by the constitution. The court found that the school finance system provided adequate funding allowing all schools to attain the constitutional level, and any "[d]istricts that choose to tax themselves at a higher rate under these laws are, under this record, simply supplementing an already efficient system."[205] On this basis, the court rejected plaintiffs equal protection arguments.[206] The court held the school finance system "constitutional in all respects,"[207] and noted that the school finance plaintiff's challenge to the adequacy of the facilities failed only because of an evidentiary void."[208]

6. *Alabama Coalition for Equity Inc. v. Hunt.*[209] Relying on grounds of equal protection/eqality, education clause/adequacy, as well as due process the Alabama Supreme Court illustrated that state education was both inequitable and inadequate. Regarding inadequacy, the court found shortages of classrooms, computers, science classes, gym facilities, and basic courses. They also found the existence of unsanitary conditions, leaky roofs, and, in one instance, potable water was not available.[210] Schools were full of inequities due to the same inadequacies, essentially dividing the 'haves and the have-nots."[211] Not surprisingly, the court, several times, established the link between funding and adequate schooling: "The quality of educational opportunities available to a child in the public schools of Alabama depends upon the fortuitous circumstances of where that child happens to reside and attend school."[212]

Responding to the governor's argument that "Alabama cannot afford to fund its schools adequately," the court answered, in part with testimonies offered, "what the state does not pay

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204. *Id.* at 465.
205. *Id.* at 466.
206. *Id.* at 480.
207. *Id.* at 484.
208. *Id.* at 459.
209. 624 So. 2d 107 (Ala. 1993).
210. *Id.* at 128-32.
211. *Id.* at 124.
212. *Id.* at 124-125.

for now in quality education, it pays for later in welfare, lost jobs, and prison costs."[213] Additionally, the court stated that "[i]t is a fundamental principle of constitutional law that constitutional obligations cannot be avoided because of a lack of funding."[214] Then, finally, after reviewing the Washington, West Virginia, Kentucky, and New Jersey cases, the court established nine extensive elements of "adequate educational opportunities"[215] advancing the quality of the state's educational offering.

It is true that these hybrid suits are using equalitative arguments and evidence. But these equality arguments are sometimes easier to prove. Such decisions consistently recognize the tie between money spent and the quality of the education received. Equality arguments, in such cases, are rarely advanced under equal protection clauses, but instead under an education clause/adequacy argument, as a simple sign of contrast between districts meeting constitutional qualitative mandates vs districts not meeting constitutional qualitative mandates. One New Jersey case illustrates

> On this record we find a constitutional deficiency only in the poorer urban districts, and our remedy is limited to those districts. We leave unaffected the disparity in substantive education and funding found in other districts throughout the state, although that disparity too may some day become a matter of constitutional dimension. . . . Our decision deals not with optimum educational policy but with constitutional compliance.[216]

Indeed these cases use, in part, a somewhat equalitative analysis, but as expressly stated by this New Jersey court, their aim and decision is based on the education clause and its standards of educational adequacy.[217]

Unquestionably the mix of equalitative and qualitative analysis can become rather confusing and blurred. However, these hybrid cases firmly illustrate that when adequacy is argued and alleged and backed with either qualitative or equalitative evidence, plaintiffs are extremely successful. Hybrid cases which have failed—or any case alleging adequacy, that has failed—fail

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213. *Id.* at 145.

214. *Id.* (*quoting* McCarthy v. Monson, 554 F.Supp 1275, 1304 (D. Conn. 1982), *aff'd*, 714 F.2d 234 (2nd Cir. 1983).

215. *Id.* at 166.

216. Abbott v. Burke, 575 A.2d 359, 363 (N.J. 1990).

217. *Id.* at 362-63. *See also* Stark, supra note 49, at 658.

for one reason: plaintiffs simply did not offer qualitative evidence or did not relate equalitative evidence to the adequacy of the educational offering. This failure to offer or evaluate evidence in a qualitative manor accounts for all unsuccessful hybrid cases.[218] However, in many of these unsuccessful hybrid cases,[219] it seems from the opinions that evidence was available, if plaintiffs had only relied more on their adequacy arguments and used the same equalitative evidence to show that the deficiencies and inequalities actually resulted in inadeqacy of their schools.

PART VI: GETTING TO THE HEART OF THE MATTER

Several reasons account for equal protection/equality and equal protection/uniforminty arguments being less successful than education clause/adequacy claims. One problem is that equality-based arguments do not cut quite as deeply into the heart of the issue—the educational needs of children—where the courts appear to be more sensitive. A second, and closely related problem, is the separation of power issues inherent in equality/finance arguments which inevitably place courts on the boundary between legislative and judicial duties.

A. SEPARATION OF POWERS.

1. LEGISLATIVE POLICY MAKING

Because education litigation is inevitably school finance litigation, plaintiffs often look to the funding or spending side of education for their arguments. Their claims are often fraught with issues of taxation, spending, and implementation. This threatens the political balance because separation of powers is violated.[220] Funding or spending claims raise policy decisions

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218. Jenkins v. Leininger, 659 N.E.2d 1366, 1371 (Ill. 1995); Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717 (Tex. 1994) (opinion republished as modified 1996); Northshore Sch. Dist. No. 417 v. Kinnear, 530 P.2d 178, 202 (Wash. 1974); Robinson v. Cahill, 355 A.2d 129 (N.J. 1976) ("Robinson V") (didn't consider facts, only whether legislative response would work if fully funded); McDaniel v. Thomas, 285 S.E.2d. 156, 165 (Ga. 1981).

219. *See, e.g.*, McDaniel v. Thomas, 285 S.E.2d 156, 161 (Ga. 1981) (Same facts could have been used to show inadequacy).

220. Unified Sch. Dist. v. State, 885 P.2d 1170, 1174-75 (Kan. 1994) ("[i]t is not

for which the legislature was designed.[221] For that reason, when plaintiffs fail to get beyond mere finance issues, failing to allege and prove that the taxation disparities effect the quality of education, courts are also more hesitant to speak strongly for plaintiffs.

For instance, several courts have explained that they cannot consider whether one funding policy would be better than another.[222] Instead, they can consider whether the present funding method satisfies the provision of equality, meaning general equality.[223] Perhaps this is one reason why courts refuse to require strict equality in school finance, refusing to disturb the status quo except in the face of glaring inequality. This legitimate judicial reluctance is essentially a reaction to plaintiffs putting the courts on the line intended to separate governmental powers, by continually asserting the legislative questions of equal protection arguments.

Courts not expressly recognizing the separation of powers problems are alternatively recognizing the problem of implementing equalization solutions.[224] So in one way or another, this separation of powers problem is one of the reasons equal protection theories have fared as poorly as they have.[225]

2. CONSTITUTIONAL INTERPRETATION

Alternatively, with a strong historical basis, one argument has surpassed the separation of powers problem for the school finance litigant. As federal courts have long held it their duty to interpret the U.S. Constitution,[226] likewise state courts have held it their duty, on an even greater scale, to interpret their

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for this court to set policy or to substitute its opinion for that of the legislature . . . courts must guard against substituting their views on economic or social policy for those of the legislature. Courts are only concerned with the legislative power to enact statutes, not with the wisdom behind those enactments"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41 (1973). *See also* Natapoff, *supra* note 3, at 11.

221. *See, e.g.*, Hubsch, *supra* note 5, at 1326; Enrich, *supra* note 50, at 115.

222. *See, e.g.*, McDaniel v. Thomas, 285 S.E.2d 156, 157 (Ga. 1981).

223. Unified Sch. Dist. No. 299 v. State of Kansas, 885 P.2d 1170, 1184 (1994).

224. Natapoff, *supra* note 3, at 7.

225. *See* Part V (statistics showing that litigants who rely wholly upon equality arguments are faced with nearly a seventy-five percent chance of failure). *See also* Appendix.

226. Marbury v. Madison, 5 U.S. 137, 176 (1803).

individual state constitutions.[227] These arguments have naturally found their way into school finance litigation due to the increasing use of the education clause in every state constitution, thus providing for the expansion of judicial intervention.[228]

As all fifty states have education clauses within their state constitutions, it becomes the province of the judiciary to interpret those clauses and to define their depth and breadth. The judiciary can define the terms and thereby declare the constitutionality of subsequent action taken thereunder.[229] In one prominent school finance case, dealing specifically with the adequacy argument of the state's education clause, the court declared: "To avoid deciding the case because of 'legislative discretion,' 'legislative function,' etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable."[230]

The courts have been consistent on this point; it is a judicial not legislative duty to interpret the state constitution. The issue is often not so easily solved, however. The power of the judiciary under school finance litigation is frequently limited, not by the court's jurisdiction, but by the plaintiffs themselves who confuse the issues and obscure the separation of governmental powers.

3. EDUCATION CLAUSE SOLUTION

The education clause/adequacy claim takes the court away from that borderline and back into the court's declared jurisdiction, constitutional interpretation. The education clause gives the courts concrete language with which to work, terms to which the facts of the case can be manageably compared, and

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227. *See* Natapoff *supra* note 3, at 2 ("State courts have greater authority and ability to participate in educational decision making than their federal counterparts"). *See also* Alabama Coalition for Equity v. Hunt, 624 So.2d 107 (Ala. 1993) (citing to Rose v. Council for Better Educ., 790 S.W.2d 186, 210 (Ky. 1989) (stating "that courts may, should, and have involved themselves in defining the standards of a constitutionally mandated educational system"). See also Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 83, 87, 88 (Wash. 1978).

228. Natapoff, *supra* note 3, at 8, 10.

229. Seattle Sch. Dist. No.1 v. State, 585 P.2d 71, 91 (Wash. 1978).

230. Rose v. Council for Better Educ., 790 S.W.2d 186, 209 (Ky. 1989) (cited in Alabama Coalition for Equity v. Hunt, 624 So.2d 107 (Ala. 1993); also citing to Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 87 (Wash. 1978)).

standards to which educational outcomes can be measured.[231] Such constitutional grounds, like the qualitative standards of the education clause, are always stronger than policy grounds because such language gives the courts a measuring stick and leaves them to constitutional interpretation.

In a Washington case, plaintiffs proffered their arguments under what is perhaps the most zealous education clause, and alleged appropriate facts as to the inadequacy of the educational offering. The Washington Supreme Court decided the case squarely on the same ground, specifically declaring that there was no separation of powers problems:

> [T]he judiciary has the ultimate power and the duty to interpret, construe and give meaning to words, sections and articles of the [state's] constitution. . . . Once it has been determined that the court has the power or the duty to construe or interpret words or phrases in the constitution and to give them meaning and effect by construction, it becomes a judicial issue rather than a matter to be left to legislative discretion . . . [and subsequently] there remains no separation of powers issue.[232]

Though it may be true that most education cases feel the heat of separation of powers issues, plaintiffs that give the court a road of adjudication clearly within its jurisdiction and responsibility, as did the Washington plaintiffs, most often lead the court to a decision in favor of the education clause. Indeed, as claims come nearer to a constitutional basis, and away from a nonjusticiable policy basis—a which-tax-system-is-better basis—the courts are naturally more anxious to find relief for plaintiffs.[233]

Simply put, if the litigant only wants to be taxed equally, courts are very hesitant to intervene and overturn the effort of legislatures and their subsequent school finance systems. The decisions of the courts in strict equality based suits illustrate this fact. Conversely, when the litigant draws upon the state

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231. *See* Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 811 (Ariz. 1994) ("where the constitution specifically addresses the particular subject at issue, we must address that specific provision first. . . . We need not resort to the less specific provision unless the argument based on the more specific fails"). *See also* Enrich, *supra* note 50, at 27.

232. Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 87-88 (Wash. 1978). *See also* Hubsch, *supra* note 5, at 1327.

233. McDaniel v. Thomas, 285 S.E.2d 156, 157 (Ga. 1981).

constitution's education clause and challenges the school finance system on the grounds that the system does not meet the minimal constitutional standard of quality, litigants have been almost twice as successful.[234]

B. QUALITY: THE CONTROLLING ISSUE.

Another limitation to the equality arguments of equal protection is that they do not drive deep enough. They often fail to get to the crux of the educational offering. Although equality arguments, "have a certain allure, the education provisions are better suited to this type of litigation."[235] Even the courts have recognized that equal protection/equality theories tend to be surface level attempts based on traditional language without a strong and direct attack on the system's actual shortcomings. The language of equality is a historical monument, but the language of adequacy is a mark of what a child receives when he goes to school each day.

An Alabama court has stated, "It would, of course, be possible for the state to offer plaintiffs equal educational opportunity but still offer them virtually no opportunity at all."[236] This statement reveals, in part, the limitations of equality claims. It also reveals the fact that equality is often not the ultimately desired end. Recognizing such, courts continually explain that they cannot find unconstitutional a level of equality that does not effect the actual quality of the educational opportunity. For instance, a Nebraska court explained that "[w]hile appellants' petition is replete with examples of disparity among the various school districts in Nebraska, they fail to allege in their petition how these disparities affect the quality of education the students are receiving."[237]

On the other hand, adequacy arguments founded upon an "explicit and straightforward textual source" which is "unquestionably addressed to the status of the public schools" are much more manageable, more specific, and more fully directed to the

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234. Plaintiffs who have made use of adequacy arguments have found success seventy-four percent of the time, while plaintiffs who rely solely on equality arguments are successful only twenty-six percent of the time. *See also* Appendix.

235. Stark, *supra* note 49, at 626.

236. Alabama Coalition for Equity v. Hunt, 624 So.2d 107 (Ala. 1993).

237. Gould v. Orr, 506 N.W.2d 349, 353 (Neb. 1993). *See* notes 72-76 and accompanying text.

actual quality of the school systems themselves.[238] The state is bound by the constitutional standards of quality, but the state is not bound to make all aspects of education equal. Moreover, provisions such as the recognition of education's effect upon government, liberties and general happiness, as well as the delineation of required subjects, when combined with qualitative statements have been used as reliable judicial measuring sticks for the advancement of education.[239] These measuring devices allow the court to get down and compare levels of educational adequacy to constitutional requirements, while leaving alone legislative questions of finance which are inevitably policy questions reaching far beyond the mark.

The message from the courts is rather clear, adequacy is much more compelling and more substantial than is equality. "[D]efendant's opinions" do exist—overturning the school finance system with language strictly grounded in equality and equal protection.[240] Typically, such suits have offered little protection for the educational experience of individual children, unless those claims have gotten to the heart of the educational experience and the adequacy of the education offered.[241] This is confirmed by the statistics of case history, as well as by the language of the courts' opinions. Indeed, the qualitative standards of the state's education clauses "have provided courts with a more satisfactory basis for invalidating education financing systems."[242]

PART VII: SUCCESS OF INDIVIDUAL CLAUSES

The unsuccessful school finance litigation can be distinguished upon several grounds. First, as discussed above, plaintiffs have continually found unfavorable verdicts when they have failed to argue the correct theories and allegations, namely the education clause, whether alone or with the equal

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238. Enrich, *supra* note 50, at 167.

239. *See, e.g.*, Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993); McDuffy v. Secretary of Execute Office of Educ., 615 N.E.2d 516 (Mass. 1993); Rose v. Council for Better Educ., 790 S.W.2d 186, 212 (Ky. 1989); Serrano v. Priest, 557 P.2d 929, 952 (Cal. 1976).

240. City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Serrano v. Priest, 557 P.2d 929 (Cal. 1976).

241. *See* Appendix.

242. Stark, *supra* note 49, at 631.

protection clause, accompanied by allegations of inadequacy. Another possible alternative to plaintiff's unsuccessful verdicts is the actual language of the particular state's education clause.

The U.S. Supreme Court decision in *Rodriguez* emphasized the seriousness of the responsibilities vested with the states, which in turn raises several poignant questions: Does the particular state constitution actually reflect the desires of the state's citizens? Does the language of one education clause offer more or less protection than the language of another? Should the states look towards amending their constitutions?

Several cases have recognized a correlation, albeit tenuous, between the language of a state's education clause and the success of the suit. One court stated:

> In other jurisdictions much of the recent litigation has focused upon the education clauses of the various state constitutions and charters. However, analysis of these decisions reveals that each of these decisions is necessarily controlled by the particular wording of the state's education clause and, to a lesser extent, organization and funding.[243]

Dealing with an education clause containing minimal qualitative language and a brief delineation of subjects, a Kansas court upheld its school finance system stating that "[s]uitability does not mandate excellence or high quality. In fact, suitability does not imply any objective, quantifiable education standard."[244] A few other courts have, to some extent, followed suit. For instance, a Georgia court upheld its school finance system, stating that the constitutional language only required an "adequate" education.[245] Similarly a New York court, based on an education clause with no qualitative language, upheld its school finance system, requiring only a "sound, basic education."[246] Without further analysis, these cases might stand for the proposition that education clause/adequacy arguments are only effective in those states which have strong qualitative language in their state constitutions.

Although the language of these few cases may be read to suggest that the courts' decisions may have been different had

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243. Unified Sch. Dist. No. 299 v. State, 885 P.2d 1170, 1184 (Kan. 1994).
244. *Id.* at 1185.
245. McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981).
246. Reform Educ. Fin. Inequalities Today v. Cuomo, 606 N.Y.S.2d 44, 46 (1993).

the education clause been more bold in its wording, such is not necessarily conclusive. These cases may be distinguished on several grounds. First, each of these cases were argued on grounds of equal protection/equality. Second, the finder of facts in each of these cases stated that there was an absence of any allegation or proof marking the inadequacy of the system.[247] As distinguished, these cases stand for the language of the Kansas court's suggestion; these cases reinforce the need to focus on adequacy, and further illustrate, that when adequacy is beyond proof, inequality will not pull the weight. Moreover, many cases have prevailed based on education clauses with minimal standards of quality.[248] Courts frequently construe weak education clause language to stand for strong educational ideals. One of many examples is that found in the Kentucky opinion. In that case, the court construed an "efficient" system to include:

> at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient oral and written communication skills to enable students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their coun-

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247. Unified Sch. Dist. No. 299 v. State, 885 P.2d 1170, 1186 (Kan. 1994); Reform Educ. Fin. Inequities Today v. Cuomo, 606 N.Y.S.2d 44, 46 (1993); McDaniel v. Thomas, 285 S.E.2d 156, 165 (Ga. 1981).

248. Alabama Coalition for Equity v. Hunt, 624 So.2d 107 (Ala. 1993) (relying on an education clause with no qualitative statements other than "liberal system," a phrase with arguable qualitative meaning); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994) (relying on the word "general" as qualitative standard); Rose v. Council for Better Edu., 790 S.W.2d 186 (Ky. 1989) (relying on the word "efficient"); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (1993) (with no qualitative statement, only a recognition of the inherent value of education, and the encouragement of its support, arguably issues of which any court would take judicial notice).

> terparts in surrounding states, in academics or in the job market.[249]

Most decisions, like this of the Kentucky court, rely on the intentions of the constitutional writers as much as the constitutional language itself, and thereby construe the education clause to reflect the inherent value of education. In effect, the courts are taking judicial notice of the prominent value of education and using the mere existence of the education clause to advance education.

An argument can be made that states should amend their constitutions, where necessary, to reflect the state's actual concern and support for education. However, such an argument poses no threat to the stability of the education clause/adequacy theory as a whole. The entire trend of school finance litigation points to only one conclusion: the courts unanimously value education and lean towards the language of quality. The education clause plays a large role in the courts' emphasis; the actual language of each clause, though important, seems to have been downplayed by the simple fact that the courts have taken the education clauses as a sign of states' strong valuation of education. The advancement of education is more stable and secure under the protection of even the weakest education clause than under any other theory.

PART VIII: CONCLUSION

"In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[250] The protection and advancement of this vital concern is presently in the hands of the education clause/adequacy theory. Courts, scholars, and recent history all illustrate that the advancement of education through litigation

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249. Rose v. Council for Better Educ., 790 S.W.2d 186, 212 (Ky. 1989) (A footnote explains "these seven characteristics should be considered as minimum goals"). *See also* Pauley v. Kelly, 255 S.E.2d 859, 877 (W.Va. 1979) (construing "thorough and efficient" to include a laundry list of items similar to that in Rose); Alabama Coalition for Equity v. Hunt, 624 So.2d 107 (Ala. 1993) (interpreting "liberal" to mean "'generous,' 'bountiful,' and 'broad-based' in the sense of preparing one for future citizenship." The court then sets forth a laundry list even more extensive than that of Kentucky's).

250. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

has come to focus on adequacy, an argument for which there is no other hook but the education clause of every state's constitution.

This is not to say that equal protection has no place in school finance litigation, but instead, that the trend is moving away from equal protection toward the education clause, away from equality and toward adequacy. At times equal protection/equality arguments may be the only theory or even the best theory, as is the case with a discrimination allegation, or when the plaintiff's interests are purely monetary, or when facts simply cannot support the inadequacy of education. However, a simple breakdown of the successful and unsuccessful school finance suits shows that adequacy pulls more weight and is vital to the courts' decisions. Equality arguments have alternatively become appendages to adequacy arguments, using educational disparities to aid in the proof of poor quality.

Several factors account for the shift to qualitative/adequacy emphasis. First, adequacy claims, which are strongly rooted in the state constitutions, require only that the court measure the educational offering up against the constitutional qualitative standards, and the constitutional intent—a job specifically tailored for the courts. At the same time, the adequacy arguments avoid the legislative policy decisions of finance and equality. Second, adequacy claims get right to the heart of the education concern, the quality of education a child will receive. These factors provide courts with strong grounds for adjudication, with a clear view of this country's long-stressed valuation of education.

The "how" of education protection and advancement, is therefore found in the education clause/adequacy claim. Statistics, as well as academic and judicial writings, clearly stress this demand. Perhaps the future will bring a renewed movement to force the constitutional language to reflect the true desire of a state's citizens regarding the adequacy of education. But until then, the education clauses of the states appear to be doing exactly what *Rodriguez* had called for the states to protect and advance education through their own constitutions.

APPENDIX

The following is a chart of school finance system litigation, from a plaintiff's view, broken up into the various types of claims: education clause/adequacy, hybrid, equal protection/equality, and equal protection/uniformity. The breakdown is not absolute; there is some room for difference of opinion. Moreover, statistically, the win/loss ratio and the favorable/unfavorable ratio are not strictly scientific. The fact that only twenty-seven out of sixty-one total school finance cases have been favorable to plaintiffs, is not in and of itself much of an indicator of the litigation field. Again, the fact that one hundred percent of the cases dealing strictly with adequacy arguments were successful, while only twenty-six percent of solely equality-based arguments were successful, does not account for the individual factual situations of the cases. Nonetheless, the following outlay does illustrate to some extent the simple idea that adequacy cases have represented a growing and successful trend in school finance system litigation.

PLAINTIFFS' HISTORY OF ADEQUACY-BASED DECISIONS

EDUCATION CLAUSE/ADEQUACY CLAIMS

FAVORABLE:

McDuffy v. Secretary of the Executive Office of Education, 615 P.2d 516 (Mass. 1993).

Claremont School District v. Governor, 635 A.2d 1375 (N.H. 1993).

Idaho Schools for Equal Educational Opportunity v. Evans, 850 P.2d 724 (1993).

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

Seattle School District No. 1 v. Washington, 585 P.2d 71 (1978).

UNFAVORABLE:

None

HYBRID CLAIMS

FAVORABLE:

Campbell County School District v. State, 907 P.2d 1238 (Wyo. 1995).

Roosevelt Elementary School District No. 66 V. Bishop, 877 P.2d 806 (Ariz. 1994).

Abbott v. Burke, 643 A.2d 575 (N.J. 1994) ("Abbott II")

Alabama Coalition for Equity Inc. v. Hunt, 624 So.2d 107 (Ala. 1993).

Tennessee Small School Systems v. McWherter, 851 S.W.2d 139 (1993).

Carrollton-Farmers Branch Independent School District v. Edgewood Independent School District, 826 S.W.2d 489 (Tex. 1992).

Edgewood Independent School District v. Kirby, 804 S.W.2d 491 (Tex. 1991)("Edgewood II").

Abbott v. Burke, 575 A.2d 359 (N.J. 1990) ("Abbott I").

Pauley v. Bailey, 324 S.E.2d 128 (W.Va. 1984).

Edgewood Independent School District v. Kirby, 777 S.W.2d 391 (Tex. 1989)("Edgewood I").

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

Robinson v. Cahill, 303 A.2d 273 (N.J. 1973)("Robinson I").

UNFAVORABLE: (no proof of inadequacy)

Jenkins v. Leininger, 659 N.E.2d 1366 (Ill. 1995).

Edgewood Independent School District v. Meno, 917 S.W.2d 717 (opinion republished as modified 1996).

Northshore School District No. 417 v. Kinnear, 530 P.2d 178 (Wash. 1974).

Robinson v. Cahill, 355 A.2d 129 (N.J. 1976)("Robinson V").

Shofstall v. Hollins, 615 P.2d 590 (Ariz. 1973).

McDaniel v. Thomas, 285 SE.2d. 156 (Ga. 1981).

EDUCATION CLAUSE/UNIFORMITY CLAIMS

FAVORABLE:

Helena Elementary School District No.1 v. State, 769 P.2d 684 (Mont. 1989).

UNFAVORABLE:
Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994).
Britt v. North Carolina State Board of Education, 357 S.E.2d 432 app. dismissed, 361 S.E.2d 71 (1987).
Hornbeck v. Somerset County Board of Education, 458 A.2d 758 (Md. 1983).

. . EDUCATION CLAUSE/ UNIFORMITY CLAIM & EQUAL PROTECTION/EQUALITY CLAIM

FAVORABLE:
Dupree v. Alma School District, 651 S.W.2d 90 (Ark. 1983).
Bismarck Public School District No. 1 v. State, 511 N.W.2d 247 (N.D. 1994).

UNFAVORABLE:
Withers v. State, 891 P.2d 675 (Or. 1995).
Sheff v. O'Neill, 1995 WL 230992 (Conn. 1995).
City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995).
Unified School District v. State, 885 P.2d 1170 (Kan. 1994).
Skeen v. State, 505 N.W.2d 299 (Minn. 1993).
Reform Educational Financing Inequities Today v. Cuomo, 199 A.D.2d 488 (N.Y. 1993).
Coalition for Equitable School Funding v. State, 811 P.2d 116 (Or. 1991).
Kukor v .Grover, 436 N.W.2d 536 (Wis. 1989).
Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988).
Fair School Finance Council v. State, 746 P.2d 1135 (Okla.1987).
East Jackson Public Schools v. State, 348 N.W.2d 303 (Mich. 1984).
Hornbeck v. Somerset County Board of Education, 458 A.2d 758 (Md. 1983).
Lujan v. Colorado State Board of Education, 649 P.2d 1005 (Colo. 1982).
Levittown Union Free School District v. Nyquist, 439 N.E.2d 359 (N.Y. 1982).
Board of Education v. Walter, 390 N.E.2d 813 (Ohio 1979).
Danson v. Casey, 399 A.2d 360 (Penn. 1979).
Olsen v. State ex rel Johnson, 554 P.2d 139 (Or. 1976).

Thompson v. Engelking, 537 P.2d 635 (Idaho 1975).

EQUAL PROTECTION/EQUALITY

FAVORABLE:

Exira Community School District v. State, 512 N.W.2d 787 (Iowa 1994).
Butt v. State, 842 P.2d 1240 (Cal. 1992).
Horton v. Meskill, 376 A.2d 359 (Conn. 1977)("Horton I").
Washakie County School District No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980).
Serrano v. Priest, 557 P.2d 929 (Cal. 1976)("Serrano II").
Milliken v. Walsh, 203 N.W.2d 457 (Mich. 1972)("Milliken I").
Serrano v. Priest, 487 P.2d 1241 (Cal. 1971)("Serrano I").

UNFAVORABLE:

School Administrative District No.1 v. Commissioner, Department of Education, 659 A.2d 854 (Me. 1995).
Gould v. Orr, 506 N.W.2d 349 (Neb. 1993).
Shofstall v .Hollins, 615 P.2d 590 (Ariz. 1973).
Serrano v. Priest, 226 Cal.Rptr. 584 (Cal. App. 1986)("Serrano III").
Horton v. Meskill, 486 A.2d 1099 (Conn. 1985)("Horton II").
People ex rel. Jones v .Adams, 350 N.E.2d 767 (Ill. 1976).
Milliken v. Green, 203 N.W.2d 457 (Mich. 1973)("Milliken II").

SUCCESS RATIOS

Total:	27 of 61	44%
Solely on adequacy arguments:	5 of 5	100%
Adequacy arguments and equality arguments:	12 of 18	66%
Solely on equality arguments:	10 of 38	26%