Educational Adequacy Lawsuits: The Rest of the Story

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PEPG 04-07

Preliminary draft
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Prepared for the conference:
"50 Years after *Brown*: What Has Been Accomplished and What Remains to Be Done?"
Kennedy School of Government, Harvard University, April 23-24, 2004

In any discussion over what reform measures can best close the achievement gap between white and minority children, one cannot ignore what the courts have had to say about the issue. Advocates have historically used the court system to require elected branches of government to increase education spending and resources, even when the political will to do so is absent. Such educational enhancement "remedies" began in the early 1970s in school desegregation cases when federal courts mandated additional spending in an effort to remedy the effects of *de jure* school segregation. The most notable of these cases were in Kansas City and St. Louis where the State of Missouri was ordered to spend over $3 billion on desegregation aid, much of it for additional facilities and programs.[1] In more recent years, as federal court-ordered school desegregation remedies have all but disappeared, plaintiffs have turned to the state courts where they argue that additional resources are needed to provide the "adequate" education guaranteed under many **state** constitutions.

This paper examines the positive effects of state court educational "adequacy" cases on increasing school funding, especially in school districts with high enrollments of poor and minority students. However, as the well-known radio commentator, Paul Harvey, says, it also looks at "the rest of the story," and explores other ramifications of adequacy suits that raise questions as to whether such suits are the positive force in American education portrayed by their supporters, as well as much of the media.

I. FEDERAL COURT LITIGATION OVER SCHOOL RESOURCES

The court-ordered enhancement of educational resources and programs began in the federal courts with the *Milliken II* case decided by the United States Supreme Court in

[1] *Liddell v. Board of Education*, 491 F. Supp. 351, 359 (E.D. Mo. 1980), *aff'd and remanded* 667 F.2d 643 (8th Cir. 1981), *cert. denied* 454 U.S. 1081 (1981); *Jenkins v. Missouri*, 639 F. Supp. 19, 23-24 (W.D. Mo. 1985); *aff'd as modified by*, 807 F.2d 657 (8th Cir. 1986), *cert. denied* 484 U.S. 816 (1987).

1977.[2] In *Milliken I* decided three years earlier, the Supreme Court had refused to permit a desegregation remedy that would have made possible the racial integration of Detroit's predominately black school district by requiring the predominately white suburban school districts surrounding Detroit to participate in the desegregation remedy.[3] Since without the suburban school districts it was impractical, racially, to integrate the schools in Detroit, the Court in *Milliken II* approved remedies that provided enhanced educational resources in predominately black schools to compensate for the substandard education black children had received in segregated schools. While the remedies approved in *Milliken II* itself were fairly modest, other federal courts seized upon the court decision to order significantly expanded resources and programs, particularly in school districts in which there were not enough white students to significantly alter the predominately minority enrollment of the schools. In many such cases, the *Milliken II* components of the remedy far outweighed more traditional remedial measures.

The best example of the expansive use of *Milliken II* remedies took place in the Kansas City, Missouri School District. While the federal court also sought to further integrate the schools, it ordered the state and school district to implement and fund extensive educational programs and facilities in an effort to increase black student achievement. The court literally allowed school administrators a license to "dream" and dream they did, requesting and obtaining such resources as "a 2,000-square-foot planetarium; green houses and vivariums; a 25-acre farm with an air-conditioned meeting room for 104 people; a model United Nations wired for language translation" and so on.[4]

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[2] *Milliken v. Bradley* ("*Milliken II*"), 433 U.S. 267 (1977).
[3] *Milliken v. Bradley* ("*Milliken I*"), 418 U.S. 717 (1974).
[4] *Missouri v. Jenkins*, 515 U.S. 70, 79 (1995) (*Jenkins III*). By 1991-92, per-pupil operating expenditures in Kansas City had reached $9,412 versus $2,854 to $5,956 per student in the surrounding suburban

Over the years, similar, albeit less extravagant *Milliken II* remedies were ordered in other school districts and states, although most such cases have now been dismissed.[5]

While the federal courts played an important role in many states during the 1980s and 1990s in requiring additional resources for predominately minority schools, their role has steadily decreased over the years, and is presently minimal. Two developments have led to this result. First, federal court remedial orders must be based on the continuing existence of a violation of the United States Constitution. By the early 1990s, many school districts had been under court order for decades, and they increasingly were able to persuade courts that they had remedied the violations that originally gave rise to their court orders, *i.e.,* the purposeful segregation of students and faculty under state law or official policy and practice. Hence, desegregation cases during the 1990s were largely characterized by school districts seeking unitary status and a dismissal of their court orders. Once a school district was released from federal court supervision, there was no longer a legal basis for court-ordered programs and resources (unless the mandate was somehow continued by state law).

Second, developments in the law have made it more difficult for plaintiffs to obtain relief intended to increase educational achievement of black students in the federal courts. Although many plaintiffs have argued that the achievement gap between black and white students was a "vestige" of the formerly dual school system and that remedial programs must continue in force until such "vestige" was eliminated, such arguments have, for the most part, been rejected. In its third hearing of the Kansas City desegregation case, the Supreme Court struck down a federal district court order designed

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districts. Total per-pupil expenses in Kansas City, including capital expenditures, were $13,500. *Jenkins et al. v. Missouri,* 19 F.3d 393, 399 (8th Cir. 1994).

[5] *E.g., Berry v. School District of Benton, et al.*, 195 F.Supp.2d 971 (W.D. 2002).

to raise the test scores of black children to the national average. Rather, it ruled that a federal court would have to determine "the incremental effect that segregation has had on minority student achievement" and limit its remedy to eliminating such "incremental effect". The court further indicated that the trial court on remand should "sharply limit, if not dispense with, its reliance" on test scores.[6] As a consequence, only one school district, Kansas City itself, has to the author's knowledge, succeeded in proving the "incremental effect necessary to justify further court-ordered resources."[7]

Consequently, the federal courts are no longer a viable avenue of relief for plaintiff groups seeking increased educational resources. It is simply too difficult to prove the link between the prior dual school system of many decades ago and current low achievement levels of black children that is the prerequisite for the continuation of court-ordered programs designed to eliminate the achievement gap. However, while the federal court window has largely closed, an even more promising avenue has opened for plaintiffs in the state courts. Moreover, it is one that does not depend on proof of intentional racial discrimination or proof that low student performance is linked to the prior dual school system of the distant past.

[6] *Jenkins III* at 101-102.

[7] On remand, the district court in *Jenkins* found that 26% of the achievement gap was traceable to the prior dual school system, and required the Kansas City School District to take measures to address that portion of the gap. *Missouri v. Jenkins*, 959 F.Supp. 1151, 1164-1165 (W.D. Mo. 1997). In 2003, the court ruled that the School District had met its obligations and declared the district unitary. *Jenkins v. School District of Kansas City, Missouri, No. 77-0420-CV-W-DW (W.D. Mo. 13 August 2003).*

II. STATE COURT LITIGATION OVER SCHOOL RESOURCES

As federal court litigation has wound down, the battleground over increased educational resources for poor and minority children has shifted to the state courts. These cases began, ironically, with a significant defeat for plaintiffs in the United States Supreme Court in *San Antonio Independent School District v. Rodriquez.*[8] In that case, plaintiffs argued that the state system for financing local schools in Texas, which relied principally on the property tax, resulted in wide funding disparities between school districts and that such disparities violated the equal protection clause of the federal Constitution. However, the Supreme Court ruled that education was not a fundamental right under the Constitution[9] and that therefore even glaring disparities in funding between school districts were not subject to "strict scrutiny", but the minimal "rational basis" test. The Court further held that a state system of funding based on local property taxes met the "rational basis" test, and dismissed the case.[10] This ended plaintiffs' hopes that the federal courts could be used to force states to reform their financing systems to insure funding equity between school districts.

However, plaintiffs then took their case to the state courts, where they have been much more successful. Beginning with *Serrano v. Priest* in California, many state courts have ruled that the constitution in their respective state makes education a fundamental right and requires greater funding equity between school districts in order to meet **state** constitutional guarantees.[11] This wave of cases has resulted in significant reforms, both

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[8] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).
[9] The recent decisions of the Supreme Court in the University of Michigan student admissions cases stressing the importance of education raise the issue of whether the Court still adheres to this view. *Grutter v. Bollinger*, 123 S.Ct. 23 (2003); *Gratz v. Bollinger*, 123 S.Ct. 2411 (2003).
[10] *San Antonio Independent School District* at 1308.
[11] *E.g.*, *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976).

by court order and by legislation, in many states. The result has been to significantly reduce, although not entirely eliminate, disparities in funding among school districts in most states.

While "equity" cases had a profound effect when it came to equalizing the amounts spent by school districts in a state on each pupil, they did not necessarily result in more money for the schools. In some states the education financing laws were changed so that the disparities in spending between school districts were significantly narrowed; but overall education spending remained static. California is a classic example. As a result of the decision in *Serrano v. Priest*, the state educational financing system was overhauled to provide equal resources to every school district through a uniform statewide cap on property taxes. Therefore, while California now has a high level of equity in spending between school districts, it has gone from a relatively high spending state on education to one of the lowest spending states in the country.[12]

For these reasons, equity cases have not been the panacea plaintiffs' groups hoped for when it comes to increasing spending on public schools. Therefore, plaintiffs have in recent years relied more and more on a theory of law that looks at the adequacy of the level of funding as opposed to the equitable allocation of such funding between school districts. While "equity" continues to be an important aspect of school funding cases, plaintiffs' main focus has shifted to the "adequacy" of such funding in which the goal is not to necessarily equalize funding between districts, but to insure that every district has sufficient funding available to it to provide an "adequate" education. Since some school districts have higher needs due to a more difficult to educate student enrollment, *i.e.*,

[12] According to Education Week, California ranked 45th in the nation in education spending per pupil in 2001, when adjusted for regional cost differences. *Quality Counts 2004: Count Me In,* Education Week, January 8, 2004, p. 118.

significant populations of poor and minority students, this may mean they actually require greater funding than others in order to provide the required "adequate" education. Thus, a school district may actually spend significantly more than the state or national average, but still contend that the state financing system does not provide it with sufficient funds to provide an "adequate" education.[13]

III. ADEQUACY CASES

A meaningful discussion about education reform in today's world cannot be held without taking into account the effect of adequacy cases. "Adequacy" lawsuits have been brought in over 25 states. More to the point, plaintiffs have been successful in the majority of the cases brought.[14] At least three state legislatures – New York, Arkansas and Kansas – are currently under imminent court-ordered deadlines to revise their school funding formulas to provide adequate educational opportunities.[15]

Adequacy suits are based on an alleged violation of the state's duty to provide the necessary educational opportunities guaranteed by the state constitution. Virtually every state has a provision in its constitution requiring the state to provide some level of free education for its children. Commonly referred to as the "Education Article," the language of these constitutional provisions varies greatly from state to state. In some, the

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[13] This was the situation in an adequacy case brought by the St. Paul, Minnesota School District against the State of Minnesota. St. Paul spent considerably more than the state average. *Independent School District No. 625, ST. Paul, Minnesota v.* Minnesota, No. C2-96-9356(1) 1st Ct. Ramsay Co. 1999). In the New York adequacy case, New York City spent below the state average in New York, but it spent significantly more than the national average and was the highest spending of the largest 10 school districts in the United State. *CFE* trial record, Defendants' Exhibit 19118. If New York City had been counted as a state, it would have ranked fifth highest in per pupil expenditures. *CFE* trial record, transcript, pp. 15651-52 and Defendants' Exhibits 19584 and 19119.

[14] Access website, www.accessednetwork.org/states/index.htm (such victories include a number that may be more accurately characterized as "equity" cases).

[15] *Campaign for Fiscal Equity v. New York ("CFE")*, 100 N.Y.2d 893 (2003); *Montoy v. State*, Case No. 99-C-1758 (Dist. Ct. Shawnee County, Kansas, December 2, 2003); *Lakeview School District v. Huckabee*, 91 S.W.3d 472 (Ark. 2002).

constitution merely requires "free common schools" (New York)[16] or "free instruction" (Nebraska)[17]. In others, the language requires a "thorough and efficient" system of education to be established.[18] In a few states, the guarantee is more specific, requiring, for example, a "uniform, efficient, safe, secure and high quality" system of education (Florida).[19]

In several states, the courts have refused to be drawn into the debate over how much should be spent on schools, and have dismissed adequacy cases on the rationale that the state constitution leaves such decisions up to the legislative and executive branches of government, and that the courts should not interfere with legislative prerogatives under the separation of powers doctrine. [20] However, in the majority of the cases, the courts have decided such questions are appropriate for adjudication and have declared existing state financing systems unconstitutional.[21]

The year 2003 alone saw significant plaintiffs' victories in New York, Kansas and Arkansas. The most significant decision was in New York, in which the State's highest court held that the state was obligated to provide the opportunity for a "meaningful high

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[16] N.Y. Const., Art. XI, § 1.
[17] Neb. Const., Art. VII, § 1..
[18] N.J. Const., Art. VII, § IV; Wyo. Const., Art. 7, § 9.
[19] Fla. Const., Art. IX, § 1.7
[20] *See, Coalition for Adequacy and Fairness in School Funding v. Chiles*, 680 So.2d 400 (Fla. 1996); *Committee for Educational Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996); *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995). In addition, the trial court in an Arizona adequacy case has dismissed the case on separation of powers grounds, however, the decision is on appeal. *Crane Elementary School District v. State,* Case No. CV2001-016305 (Sup. Ct. Maricopa County, Ariz., 25 November 2003).
[21] *See, e.g.*, *CFE*, *supra*; *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Secretary, Executive Office of Education*, 415 N.E.2d 516 (Mass. 1993); *Roosevelt Elementary School District v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Campbell County School District v.* Wyoming, 907 P.2d 1238 (Wyo. 1995); *Claremont School District v. Governor*, 703 A.2d 1353 (N.H. 1997); *Lakeview School District*, *supra*, f.n. 15 (Ark.); *Montoy v. State*, *supra*, at f.n. 15 (Kan.); *Abbott v. Burke*, 798 A.2d 602 (N.J. 2002); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997).

school education" under the state's constitution[22], but was not doing so in New York City, the country's largest school district with over 1.2 million students. The Court gave the state legislature until July 30, 2004 to remedy the situation, declaring that the state should first determine what an "adequate" education costs and should then provide for the necessary funding.[23]

The Supreme Court of Arkansas also upheld a trial court decision holding the state's education finance system unconstitutional, and ordered the state to come up with a solution by January 1, 2004.[24] The court has since appointed a special master to hear evidence on the legislative response.[25] In Kansas, a trial court ruled in plaintiffs' favor, relying in large part on a "costing-out" study that showed that the state was underfunding K-12 education by approximately $1 billion per year.[26]

Because adequacy suits have either resulted in or have the potential for significant increases in spending on education, such lawsuits are enthusiastically hailed by the public educational establishment, including local school district officials, teacher's unions and educational lobbying organizations, as important tools in the fight to improve education.[27] Such suits almost always also enjoy the enthusiastic support of the media. There is little doubt that plaintiffs' victories in such lawsuits often lead to substantially increased funding for the school districts that are the focus of such suits and sometimes for school districts across the state. For example, one of the earliest plaintiffs' victory in

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[22] The Court found this obligation even though the language of the New York Constitution provides merely for "free public schools." N.Y. Const., Art. XI, § 1.
[23] *CFE* at 930.
[24] *Lakeview School District v. Arkansas*, 91 S.W.3d 472 (Ark. 2002).
[25] Access Website: www.accessednetwork.org/states/ar/SpecialMasters1-26-04.htm.
[26] *Montoy v. State* at *5.
[27] Most political leaders are reluctant to question the decisions in such cases or their implications when it comes to true educational reform. To question the efficacy of such court decisions is often equated with being "anti-children" and "anti-education", an epitaph that no one holding or running for political office relishes.

an "adequacy" case was in Wyoming. In 2001, in *State v. Campbell County School District*, the Supreme Court of Wyoming held that the state constitution guaranteed the "best" education, one that was "**visionary and unsurpassed**", and that the state was obligated to pay the cost.[28] In response, Wyoming has significantly increased its per pupil expenditures for K-12 education. By 2001, it was eighth in the per pupil spending in the entire country, in the same company as historically high spending northeastern states like New York, New Jersey, Vermont, Connecticut and Delaware.[29] Another good example is New Jersey. Although the remedy in New Jersey is limited to 28 special needs districts, per pupil spending in those districts has dramatically increased under the court order to match the spending levels of the state's highest spending districts.[30]

To supporters of such lawsuits, particularly teachers unions and other members of the public school establishment who benefit from such funding increases, such funding increases provide ample evidence of the positive effect of such lawsuits.

IV. THE REST OF THE STORY

While there is little doubt that plaintiffs' victories in such lawsuits often lead to significantly increased education spending, there are other ramifications to adequacy litigation that are equally important, but rarely discussed. These suggest that such lawsuits and their fruits come at a high price, and may not in the end significantly contribute to improving student achievement and closing the achievement gap between white and minority students. In fact, some believe such cases may divert attention from

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[28] *Campbell County School District v.* State, 907 P.2d 1238, 1279 (Wyo. 1995); *State v. Campbell County School District*, 19 P.3d 515,538 (Wyo. 2001), (the words "visionary and unsurpassed" are in bold type in the court's opinion.

[29] *Quality Counts 2004: Count Me In*, Education Week, January 8, 2004, p. 118.

[30] *Abbott v. Burke,* 798 A.2d 602 (N.J. 2002).

many of the real problems facing public education and the solutions to such problems. This then is the rest of the story!

Adequacy Lawsuits and Student Performance

The necessary underpinning to the adequacy movement is that increased education spending will lead to improved student performance, especially among poor and minority children. However, if more money results in nicer buildings, higher paid teachers and more programs, but does not lead to improved student achievement, many would argue that the money spent will have been largely wasted. Unfortunately, little research yet exists on the ultimate effect of such suits when it comes to increasing student achievement. Those states that have been under state court supervision the longest, New Jersey, Wyoming and Ohio, are rarely cited for exceptional gains in student achievement.[31]

Adequacy plaintiffs are adamant that "money matters" and that arguments to the contrary are silly.[32] But since the early 1960s, inflation-adjusted spending for K-12 education has almost tripled and pupil teacher ratios have dramatically decreased, but there has been little or no improvement in student achievement.[33] Moreover, researchers have been hard pressed to find a significant statistical relationship between per pupil

[31] The two states most often cited for improving the performance of poor and minority students are North Carolina and Texas, yet both are relatively low-spending states.

[32] Michael J. Rebell and Joseph J. Wardensky, *Of Course Money Matters: Why the Arguments to the Contrary Never Added Up* (CFE website, www.cfequity.org.) (Mr. Rebell was lead counsel for plaintiffs in the *CFE* case).

[33] NCES statistics show that from 1960 to 1996, inflation-adjusted spending on public schools almost tripled. Despite such spending increases, reading and wiring scores on the National Assessment of Educational Progress showed little or no improvement from 1969 to 1999, while math scores showed only slight improvement. *See also,* Paul E. Peterson and Martin R. West, *Money Has Not Been Left Behind* p. 72 (Education Week, March 17, 2004).

expenditures and student achievement.[34] Whatever the past shows, however, there is consensus among educators and researchers that money can indeed make a difference **if it is well spent**.[35] However, since increased spending in the past has borne little or no relationship to improved student performance, it seems clear that for increased funding to make a difference in the future, fundamental changes in the way education dollars are spent must be made. If education budgets are spent on the same things that they have been spent on in the past, there is no logical reason to expect any better outcomes. Yet the very organizations that are solidly behind adequacy litigation are also among the most resistant to change when it comes to how education monies should be spent.

For example, teachers' unions are some of the leading supporters of adequacy litigation,[36] but vigorously oppose any changes in the *status* quo when it comes to what such higher spending should be used for in the schools. They enthusiastically support higher teacher pay and smaller pupil teacher ratios, but oppose changes that might make such increased spending more effective at improving student performance. They continue to support compensating teachers based on their experience and number of education units and degrees, factors which most researchers agree have little or no impact on student performance.[37] They oppose merit pay for teachers that would reward teachers successful at improving student performance and keep them in the teaching

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[34] *See, e.g.,* GARY BURTLESS, DOES MONEY MATTER? THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS. 43-73 (Brookings Institution Press 1996).

[35] Even Eric Hanushek, a well-known economist, who has found little evidence linking school spending in the past with student achievement agrees that money, if spent appropriately, will be productive. Eric A. Hanushek, *Have We Learned Anything New? The RAND Study of NAEP Performance*.

[36] Such support can be in the form of financial backing, assistance with witnesses and, perhaps most important, political support.

[37] *See* Allan Odden and Marc J. Wallace, Jr., *Leveraging Teacher Pay, How We Can Raise Student Achievement Through Better Systems of Compensation*, Education Week, August 6, 2003 ("But research shows that, except for the first three years or so of experience, these factors [experience and education degrees] are not linked to student-learning gains").

field.[38] They support union contracts that make it difficult to retain experienced teachers in inner-city schools.[39] They oppose anything that might introduce choice or competition into the schools.[40] Instead, they basically support spending money the same way it has always been spent – more special programs, more teachers and higher pay.

By inseparably aligning themselves with the educational establishment and its insistence on the *status quo*, adequacy plaintiffs have significantly diminished the chances that the increases in spending which they have so successfully obtained will return significant dividends in the form of improvement in achievement and a closing of the achievement gap.

Adequacy Lawsuits and Other Types of Education Reforms

If one believes that more money is the answer to a state's education woes, and that an increase in funding for K-12 education will result in significant increases in student performance, then adequacy suits may sound like just the thing. While some may be nervous about placing so much power in the hands of the courts and plaintiff groups, if the result is to pump more money into the public schools, the end may well justify the means in the minds of many. If, on the other hand, one believes that more and more spending is not the solution to such problems, but that high standards, strong accountability, expanded school choice and more efficient use of existing resources are also necessary, then adequacy lawsuits present a significant problem for several reasons.

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[38] Although a few school systems and their local unions have experimented with incentive pay, the national teachers unions oppose it. American Federal of Teachers website: www.aft.org/issues/meritpay/index.html; Bess Keller, *Next Pay-Plan Decision Up To Denver Voters*, Education Week, March 31, 2003 ("The National Education Association, the nation's largest union and the parent of the Denver Association, officially opposes departures from the traditional pay scales").

[39] For example, under the New York City teacher's contract, experienced teachers can transfer out of difficult to staff schools after spending as little as one year at a school. *CFE* trial record, plaintiffs' exhibit 1155, p. 116.

[40] National Education Association website: www.nea.org/topics; American Federation of Teachers website: www.aft.org/Edissues/Schoolchoice/Index.html.

First, plaintiffs and their supporters are almost always opposed to such alternative reform measures. Plaintiffs generally fall into two groups. The first group consists of school districts seeking more funding. They certainly do not support measures such as charter schools or vouchers. Nor do they support accountability measures to force them to become more efficient in the way in which they spend money. The second group consists of various advocacy and civil rights groups primarily concerned about funneling more resources into predominately poor and minority urban schools. These groups are almost always aligned with and supported by the educational establishment, including not only the school districts for which they are trying to obtain more money and their lobbying organizations, but also by the teachers unions. They are primarily after increased funding, and pay, at best, lip service to accountability and efficient use of resources. While they might espouse high standards as a means of justifying their demand for more money, they rarely endorse strong accountability measures to insure that students and teachers actually meet such high standards. A good example is the opposition of the teacher unions to merit pay for teachers or any kind of compensation system that would pay teachers based on their success in actually educating children.[41] The long-standing opposition of the public school establishment and teacher's unions to any type of voucher or expanded charter school legislation is well known.

Second, a court victory gives plaintiffs tremendous leverage in both court and legislative proceedings. Following a plaintiffs' victory in an educational adequacy case, the case will normally be referred by the court to the legislature to adopt necessary legislation to insure an "adequate" education is provided in accord with the state's constitution. One might believe that this presents an opportunity to convince the

[41] See, *supra*, f.n. 38.

legislature that stronger accountability, more parental choice or different ways of paying teachers are needed to insure an "adequate" education for every child; however, by that stage, the deck is already stacked against such remedies. While the court may not have ordered a specific remedy, it is very likely that it will have indicated the resource shortcomings it feels must be addressed and spelled out some of the measures that the legislature should take. If the legislature ignores the court's directions, it does so at its risk and will more times than not find itself back in court. Each time the case comes back the court is likely to get more and more detailed as to the increased spending that is required.

Third, any alternative agenda will be lost in the shuffle as the legislature struggles to comply with the financial demands of the court decision. The legislature is likely to be so preoccupied dealing with the specifics of the court decision and trying to find additional funding that legislators will have little time or inclination to address other education issues that are not directly called for by the court decision. For example, the New York legislature must significantly increase funding for the NYC public schools by July, 2004 or face court sanctions. Besides determining how much more money is sufficient, the legislature will have to deal with a host of other related financial issues. Where is the money going to come from? Is it going to be taken from other school districts? If so, which ones? What non-education programs will have to be cut to fund increased payments to NYC? What portion of the bill should NYC taxpayers themselves pay, as opposed to state taxpayers. Moreover, it will have to accomplish all of this in the middle of one of the worse financial crises the state has ever faced. The point is that issues of funding will dominate the legislative session, and not issues of how to reform

the NYC school district, how to more efficiently pay and assign teachers, or whether school choice options should be expanded.

Finally and perhaps most discouraging, during the never ending fight over more money, fundamental problems at the local level are likely to be ignored. As the fight continues in both the legislature and courts, children may suffer a double whammy. First, other promising solutions will be shifted to the back burner in the wake of a "victory" for plaintiffs. Second, problems of waste and inefficiency at the local level will be ignored as the legislature wrestles with complying with the court mandate that spending be increased.

Adequacy Cases and the Efficient Use of Resources

Although many state constitutions use the word "efficient" to describe the education system required, efficient use of resources is almost totally ignored in adequacy court decisions. As discussed, the main focus of the court decisions has been on insuring that the state funding formulas make an "adequate" level of resources available in every school. Unfortunately, the critical questions of whether money and resources are in fact being efficiently utilized by local school districts and whether current funding levels would be adequate if spending on ineffective programs were eliminated, are almost never addressed in the court decisions. The courts avoid this ticklish and admittedly more complicated issue by simply ruling that **if** such problems are present at the local level, the state is also liable for them.

For example, in *Campaign for Fiscal Equity v. State,* extensive evidence was introduced at trial of waste, fraud, corruption and mismanagement in the New York City public schools that cost hundreds of millions of dollars a year. However, even though it

found such evidence "disturbing", the Court of Appeals did not make any particular rulings as to the extent of such problems or whether they constituted a significant cause of the inadequacies found by the Court in the City's public schools. Instead, the Court ruled that to the extent such problems existed, the state is responsible for seeing to it that they are corrected.[42] The Court's remedy is directed primarily at increasing the funding available to the City's public schools and holding the state accountable if such increases do not result in an "adequate education." Although it acknowledges some of the problems can be addressed "administratively," it makes it clear, without any analysis, that this alone will not "obviate the need for changes to the funding system."[43] The Court totally ignored the important issue of whether current funding (approximately $10,400 per child at the time or over $250,000 per classroom) would be adequate if waste and mismanagement at the local level were eliminated and available funds were spent in an efficient manner.

Wyoming's constitution also requires a "thorough and efficient" system of education. However, aside from one sentence in the court's opinion suggesting that "efficient" means "productive without waste," there is no further discussion about requiring the efficient or cost-effective use of funds.[44] Instead, the legislature was ordered to fund, without any limitations, the "best education" and an education "**visionary and unsurpassed**", hardly suggestions that efficiency was of significant importance to the court.[45]

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[42] *CFE* at 921-923.
[43] *CFE at 929.*
[44] C*ampbell County School District v. State,* 907 P.2d 1238,1258-1259 (Wyo. 1995); *State v. Campbell County School District*, 19 P.2d 518, 538 (Wyo. 2001).
[45] *State v. Campbell County School District*, 19 P.2d 518, 538 (Wyo. 2001).

In its recent decision finding the Kansas school finance system unconstitutional, the trial court adopted the same rationale, holding: "Addressing problems of management and accountability is also Defendants' responsibility."[46]

The North Carolina trial court decisions come closest to recognizing that it is "how" and not "how much" money that is spent that is critical. However, while the court orders the State and local districts to work together to find solutions, like other state courts, it makes no rulings finding local districts at fault. Moreover, in the end, it holds the state directly liable for insuring efficiency, including insuring that inadequate teachers and principals are removed from the classroom, a province of school operations almost always heretofore reserved to the local districts.[47]

Admittedly, courts may not be able to hold local school districts directly liable because they are not normally parties to these lawsuits. Moreover, state constitutional provisions often identify the state, and not the local district, as having the primary obligation to provide an "adequate" education. However, courts are empowered to make determinations as to the effect of waste and mismanagement at the local level and what portion of the problems calls for a non-financial remedy. This would notify the legislature that funding is only part of the solution, and perhaps not even the principal solution, and allow it to concentrate on eliminating waste and inefficiency, instead of solely on appropriating more money. Suitable legislation could then be enacted instead of simply throwing money at the problem. Unfortunately, as it is now, the total focus of most of the court orders, and consequently the legislative response, has been on increasing funding for education.

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[46] *Montoy* at 79.
[47] Order entered in *Hoke County Board of Education v. North Carolina*, Case No. 95-CVS-1158 (Sup. Ct., N.C. 4 April, 2002).

Adequacy Lawsuits and Local Control of Schools

In *Freeman v. Pitts,* the Supreme Court reaffirmed that "local autonomy of school districts is a vital national tradition."[48] However, courts in adequacy cases have been almost totally unwilling to recognized any local autonomy, and with it, responsibility. Thus, the New York Court of Appeals ignored significant evidence of waste and inefficiency by the New York City School District in assessing whether it was the state's failure to provide sufficient funds or the local district's mismanagement of such monies that caused the shortcomings found by the Court in New York City. Instead, the Court ruled that, to the extent local waste and inefficiency was a problem, it was the state's problem to fix.[49] Other courts have made similar rulings, and have avoided examining the effect that local mismanagement has contributed to the shortage of necessary funding.[50]

Given the inclination of the courts to hold the state financially liable for the spending decisions of local school districts, it seems likely that state legislators will require state agencies to assume an ever-increasing role in the management of local districts. More money may flow from the state, but it will not be without strings attached to it. Unless states are willing to suffer the financial consequences of local decisions, more state supervision and control are the logical result.

Many will see this as a positive outcome, especially where the local school systems have proven to be inept. However, to others for whom local control of schools is a time-honored American tradition, increasing state control will be anathema.

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[48] *Freeman v. Pitts*, 503 U.S. 467, 490 (1992).
[49] *CFE* at 921-923.
[50] *See, infra,* footnotes 44, 46 and 49.

Adequacy Lawsuits and High Standards

In the long run, the "standards" movement may be another casualty of adequacy litigation. Proponents of such litigation have wholeheartedly embraced the setting of high academic standards by most states because it gives them and the courts specific benchmarks by which to measure whether an adequate education is being offered in the state. If, for example, only one-third of the children in the state are rated proficient under the state academic standards, it gives adequacy plaintiffs an argument that the education being provided is not up to state standards.[51]

However, if states continue to be held financially liable for the failure of their students to meet the high standards set by the state for them, one inevitable result of the adequacy movement may be the lowering or "watering down" of such standards. A good example is the State of New York in which the Regents Learning Standards are among the highest, if not the highest, standards in the country. In the debate over how to respond to the court order in the CFE case, lowering such standards has already been discussed as a potential avenue to explore.[52] Given the plaintiffs' demand for an additional $9.5 billion per year in K-12 education funding to meet such standards, it will be interesting to see if the State of New York retains its high, world-class standards or lowers them in the interest of reducing its financial exposure.

6. Adequacy Lawsuits and the Democratic Process. The separation of powers between the legislative, executive and judicial branches of government is not only a

[51] It should be noted that standards set by the legislature or state department of education are not necessarily the same as the constitutional standard. For example, in the *CFE* case, the academic standards set by the Board of Regents were the Regents Learning Standard, which were expressly rejected by the New York Court of Appeals as the constitutional standard. Instead, the Court held that the constitution required "a meaningful high school education", a standard significantly lower than the world-class Regents Learnings Standards. *CFE* at 907-908.

[52] "Governor's Commission considers watering down Regents Standards," *CFE* website: www.cfequity.org/10-10-03govcommission.htm.

hallmark of our federal constitution, but is the basis for almost every state constitution. Adequacy cases almost always strain to the utmost the traditional relationships and power sharing between the courts and elected branches of government. This is especially true during periods of fiscal stress for most states.

Historically, the decision of how much money to spend on K-12 education (typically one-third to one-half of most state budgets) versus other state needs, such as higher education, health care, prisons, parks, highways, etc. has been the exclusive province of the state legislature, subject, of course, to the governor's veto power. This legislative authority may, however, be seriously eroded in the aftermath of an adequacy case loss. Depending on the particulars of the court order, the decisions of the legislature on how much to appropriate for K-12 education and how to allocate such appropriations between school districts, programs and students will be subject to oversight and veto by a state court judge. If the plaintiffs decide that the legislature is not spending enough, they will take the case back to court, and the courts will decide if the amounts appropriated are sufficient. The final word on legislative appropriations will lie with the court, and not the legislature or governor.[53]

A court striking down a state finance system will almost always initially refer the matter to the legislature to come up with a new system that passes constitutional muster; however, such cases invariably wind up back in the courts. Moreover, by the time the legislature gets the case, many of the rules that will determine the future shape of the

[53] In New Jersey, for example, the adequacy case has bounced back and forth between the courts and the legislature for over 30 years. *See* history of New Jersey school funding litigation from 1973 through 1998 in *Abbott v. Burke*, 710 A.2d 450, 455-456. The litigation continues to the present.

education finance system, as well as its cost, have already been determined in a proceeding in which the legislature played no part. [54]

Less havoc would be wreaked with the separation of powers doctrine if the courts merely set a constitutional floor, and allowed the legislature discretion to decide how much to spend above the floor. But in some states, the courts have interpreted the constitution so as to leave virtually no discretion over education spending in the legislature. The best example of this is in Wyoming where the courts have set the constitutional standard so high that any legislative enactment regarding school funding will, as a practical matter, always be subject to court review because it does not provide the "best" education possible.[55]

Adequacy cases can have a dramatic effect on the legislature in other ways. The fight for more money for K-12 education in the wake of a plaintiffs' victory in an adequate case invariably dominates the legislative agenda. As a consequence, there is rarely much discussion of other methods of education reform, such as increased choice, more accountability and vouchers, in those states struggling to comply with court orders in adequacy cases. As a result, such cases greatly reduce the legislature's influence over the direction of education reform in the state, another role traditionally that of the Legislature.

A state loss in an adequacy case also has serious ramifications over other areas of state government. Since priority must be given to complying with the court order, other governmental budgets and responsibilities may have to be cut in order to come up with the necessary money for K-12 education. This can include not only higher education

[54] As discussed, *infra*, p.24, state legislatures are not normally parties to the court proceedings during the liability phase of an adequacy case.
[55] *Campbell County School District v. State,* 907 P.2d 1238, 1279 (Wyo. 1995).

programs, but health care, foster-child care, family protective services and other programs for families and children that may be as important for combating the adverse effects of poverty on student achievement as schools.

Adequacy suits also give special interest groups associated with the plaintiffs enormous leverage. Everything the legislature does is subject to the threat of judicial veto unless the plaintiffs and their supporters are satisfied with the direction and scope of the legislative remedy. Since such plaintiffs' groups are normally interested in directing more funding into public education, particularly schools in high poverty neighborhoods, and are almost always supported by the teacher's unions, they are particularly averse to other types of education reform, such as school choice and vouchers, which may divert money from the court's remedy.

In summary, the control and influence of the people's elected representatives in what many regard as the most important function of government, the education of our children, can be and almost always is greatly diminished in the aftermath of an adequacy case that has been lost by the state. Moreover, this can go on for years and even decades, as the New Jersey experience demonstrates.

Adequacy Lawsuits and the Integrity of the Court System

As discussed, many state courts have decided that their intervention is necessary and appropriate to insure that the constitutional right of the students in their states are protected. While protecting constitutional rights has been the traditional role of courts, there are significant questions, beyond the separation of powers issue, as to whether the courts are a proper forum in which to decide issues of educational adequacy.

First, the legislature is rarely a party to the case during the liability phase of the case. Thus, unlike virtually every other litigated case, the party that will one day have to design and pay for remedial measures is not even present or represented when the most important decisions are made. Plaintiffs do not normally include legislative bodies as defendants, and, if they do, often later dismiss them from the suit. Legislative leaders readily agree to be dismissed because no one likes to be the subject of a lawsuit. The defense of the case is then normally left to the executive branch. The result is that the legislature may have little or no input into the defense of the lawsuit since it is not a party, even though it will invariably be the main, and sometimes the sole, focus of the remedy if the case is lost.

Second, the state officials with the most influence over the defense will almost always be officials in the state department of education, whose interests may not coincide with those of the legislature. They are the state's experts when it comes to education matters. They are often charged by law with establishing state education policy, academic standards and many other things that are relevant in an adequacy case. Quite naturally state departments of education are likely to be advocates for higher spending on education, and therefore often not averse to a court decision which accomplishes that aim.[56] Unlike legislators, they do not have to worry about funding other operations of the state. Therefore, in most cases, the state superintendent of schools, the state department of education and the state board of education tend to be ambivalent, at best, when it comes to vigorously defending such lawsuits. In some situations, they openly side with

[56] For example, a task force formed by the New York Commissioner of Education in 1992 had as one of its principal purposes to "establish a body of work that others who may be so inclined can use to challenge in the courts the equity of the current system [of school finance in New York]". *CFE* trial record, transcript, Defendants' exhibit 19529, p. 4.

plaintiffs. After all, the worse that can happen to them is that the Legislature will have to dramatically increase their role in education and appropriate a lot more money for education. Therefore, if the state legislature expects the state education leaders to defend their interests, that is like having the "fox guard the henhouse".[57]

Nonetheless, under most state governments, that is exactly what happens! The legislature, who will bear the entire burden of the remedy, has virtually no role or influence in the defense of the case. Instead, parties with interests often adverse to those of the legislature have the most influence. Such a process in any other system of government or business would seem silly to the extreme, but that is the norm in adequacy lawsuits, and are good reasons why such cases do not belong in the courts.

Finally, and perhaps most important, the inability of the courts to bring about real improvements, either because legislatures simply cannot or will not provide the level of resources demanded by the courts or because problems external to the schools make spending solutions irrelevant, will ultimately weaken the judicial legal system. Indeed, that has already happened in two states, where the highest courts of the states have basically given up and dismissed adequacy cases, despite having previously declared the school financing systems in such states to be unconstitutional. After many years of adequacy litigation in Ohio, during which period the state system of financing schools was declared unconstitutional, the state Supreme Court ruled in 2003 that plaintiffs were precluded from even having their claim that the system was still unconstitutional heard by the court.[58] The Alabama Supreme Court did essentially the same thing in 2002,

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[57] This is particularly problematic in view of term limits in many state legislatures, which result in the lack of a long-term view of education funding and policy among legislators and their leadership. State education bureaucracies and special interest groups are more than ready to fill this void.

[58] *State ex rel. State v. Lewis*, 789 N.E.2d 195 (Ohio, 2003), *cert. denied*, 124 S.Ct. 432 (2003).

closing off any further relief to plaintiffs, despite its early finding of unconstitutionality.[59] There is no logical rationale for either decision other than both courts wanting nothing further to do with adequacy litigation in their respective states.

V. CONCLUSION

Adequacy cases are the current rage, and are likely to be with us a long time. While they have been successful in increasing educational expenditures in many states, the real test of their worthiness will be whether they result in significant improvements in student performance in coming years. To the extent that it can be shown that student performance has been positively affected by such litigation, the fight will have been worth it. Unfortunately, the jury is still out on that issue.

At the same time, we should not ignore other possible ramifications of such litigation. We should be concerned about the strain and damage such litigation may do to our most cherished democratic institutions and the judicial process. We should also be concerned to the extent that the money solution is so often the focus of an adequacy remedy that other means of education reform are ignored in the process. Increased resources have not proven to be a solution in the past. For more resources to be a solution in the future, it seems clear that fundamental changes will have to be made in how education dollars are spent. Thus far, at least, adequacy litigation proponents have been unwilling to take that additional step. Until they do, patterns of student achievement are unlikely to significantly change.

[59] *Alabama Coalition for Equity, Inc. v. Fob James, et al.*, (Case Nos. 1950030, 1950031, 1950240, 1950241, 195040, 1950409, S.Ct. Ala. 31 May, 2002).