SCHOOL FUNDING LITIGATION: A STUDY OF THE ALABAMA CASES

by

CARLTON WILSON

(Under the Direction of John Dayton)

ABSTRACT

This study examined the decisions of the Alabama Judiciary concerning public school funding litigation, with a review of major state and federal high court decisions since *Serrano v. Priest.* The Alabama Public School Equity Funding Case began in 1990 with the organization of the Alabama Coalition for Equity (ACE), which was composed of 25 school districts and a number of individual parents and school children. ACE filed a lawsuit in the Montgomery Circuit Court challenging the constitutionality of the method by which Alabama funded public education. The plaintiffs claimed that the funding method violated the equal protection laws guaranteed the Alabama Constitution of 1901 and the Fourteenth Amendment to the U.S. Constitution.

Joining the ACE plaintiffs were the Alabama Disabilities Advocacy Program and the American Civil Liberties Union. The lawsuit asked the court to nullify Amendment 111 of the Alabama Constitution, which was added in 1956 allegedly in reaction to the 1954 desegregation decision in *Brown v. Board of Education*. This case was in the court system more than 12 years, outlasting four governors, three trial court judges, seven supreme court justices.

Costing-Out plans were reviewed as a method of funding public education. Alabama developed a court ordered costing-out plan; however, before the plan was approved by the lower court, the high court dismissed the case.

Based on a review of the relevant caws law and scholarly commentary, this study found that 1) after the development of a plan that would possibly rectify the inadequacies of public education in the State of Alabama, the high court dismissed the case, and the state legislature chose not to implement the plan; 2) during the life of the Equity Funding Case, the Alabama Supreme Court reversed several of its own decisions in addition to rehearing the case after the time limits had expired; 3) many argue that the contested Amendment 111 was born out of a racist disregard for the U.S. Supreme Court decision in *Brown v. Board of Education*. As a result of Amendment 111, the children of the State of Alabama do not have a right to a public education.

INDEX WORDS: School Funding Litigation, Equity Funding Cases, Alabama's Costing-Out Plan, and Alabama Coalition for Equity

SCHOOL FUNDING LITIGATION: A STUDY OF THE ALABAMA CASES

by

CARLTON WILSON

B.B.A., Mercer University, 1985

M.Ed., The State University of West Georgia, 1998

A Dissertation Submitted to the Graduate Faculty of The University of Georgia in Partial Fulfillment of the Requirements for the Degree

DOCTOR OF EDUCATION

ATHENS, GEORGIA

2004

SCHOOL FUNDING LITIGATION: A STUDY OF THE ALABAMA CASES

by

CARLTON WILSON

Major Professor: John Dayton

Committee: Catherine Sielke
C. Thomas Holmes

Electronic Version Approved:

Maureen Grasso
Dean of the Graduate School
The University of Georgia
December 2004

ACKNOWLEDGEMENTS

I want to thank a number of people who have been a great encourager for me. I would like to start with my wife. She has endured this entire process. During this time she has encouraged, praised, and loved me through it. She is my motivation, my love, and my soul mate. My children have understood, and I thank you for your understanding. Torey and Mike, Jodi, Leigh Ann, and Blake, I love you. And to my grandchildren, AK and Katie, I am looking forward to enjoying more time we can spend together. I love you.

Having support from you family is invaluable; however, it is also very important from your peers. Thank you, Nonnie, Myra, and Dana for all of your support. I want to thank Matthew for editing this study. I could not have begun to finish this program without the support and assistance of great professors. My Committee has been wonderful. To Dr. Holmes, I only regret not taking more of your classes. Dr. Sielke, you challenge me to be a better student. You have opened my eyes to the finance side of education, which isn't as boring as it sounds. Dr. Dayton, you have been such a mentor and friend. I have such a high degree of respect and admiration for you. I can only try to thank you for all of your help.

I do want to thank the most important person in my life; the one who open the right doors and closed the wrong ones, the one who helped me ever step of the way, my Lord Jesus. Thank you.

TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

Problem Statement

This study examines the decisions of the Alabama Judiciary concerning public school funding litigation. The litigation reviewed is known as the Public School Equity Funding Case,[1] which is an accumulation of several cases combined by the Alabama Supreme Court.[2] The current school funding litigation in Alabama began over 12 years ago when the Alabama Coalition for Equity (ACE) filed a lawsuit in the Montgomery Circuit Court challenging the constitutionality of the method in which Alabama funded public education. As noted by the trial court, the school districts reported significant disparities in the resources and facilities available to the poorer rural districts; these disparities included deplorable restroom facilities, holes in the floor, and children at one school playing on imaginary playground equipment. The plaintiffs claimed that the funding method violated the equal protection of the laws guaranteed by §§1, 6, and 22 of Alabama's Constitution of 1901.[3]

In 1990, the Alabama Coalition for Equity was organized by 25 school districts and a number of individual parents and school children. The Alabama Disabilities Advocacy Program representing disabled students joined ACE. The American Civil Liberties Union filed a similar complaint on behalf of all school-aged children in Alabama, alleging that the public school funding method violated a fundamental right to education guaranteed in Article XIV § 256. The lawsuit asked the court to nullify Amendment 111 of the Alabama Constitution. The plaintiffs believed that Amendment 111 was added to the constitution in 1956 allegedly in reaction to the

1954 landmark desegregation decision in *Brown v. Board of Education*.[4] They contended that, by using Amendment 111, the State of Alabama had sought to disavow any responsibility for public education and that this amendment violated the Equal Protection and Due Process guarantees under the Fourteenth Amendment of the U.S. Constitution.

This case outlasted four governors. Moreover, during the 12 years that this case was being litigated, a number of significant events occurred. Several defendants became plaintiffs and later became defendants again. One of the original defendants, Governor Guy Hunt, was removed from office due to criminal conviction. The trial judge declared that the Alabama system of funding education violated the U.S. Constitution and ruled that sections of the Alabama Constitution were in violation of the Fourteenth Amendment. The trial judge was removed from this case when, while running for a seat on the Alabama Supreme Court, he declared himself the "education candidate" base on his decision in the funding equity case during a speech at a PTA conference.

The case was divided into two phases, a liability phase and a remedy phase. The liability phase, during which the system of education was declared unconstitutional and part of the Alabama's Constitution was declared to have violated the Fourteenth Amendment of U.S. Constitution, was never appealed. In the remedy phase, the trial judge ordered the state legislature to fund his required remedy plan. The legislature asked the Alabama Supreme Court whether it had to comply with the trial judge's order. The state's high court stated that they did and ruled several times that the trial court's decisions were constitutional.

In an unsolicited request, the Alabama Supreme Court placed this case on its rehearing docket on January 11, 2002. During the hearing in May of 2002, the court reversed its early opinion and dismissed the entire case. In writing a dissenting opinion, Justice Johnstone stated,

"The entirely unsolicited nature of the instant purported review of these 'equity-funding cases' exacerbates our lack of appellate jurisdiction. We do not want to become like the Iranian judges who roam the streets of Tehran ordering a whipping here and a jailing there."[5]

This study also discusses the main element of most school funding cases, adequacy, and examines how scholars, courts, and legislators have defined adequacy. In chronologically order, it reviews the development of school funding litigation in state high courts across the county, focusing on the litigation in the State of Alabama. Furthermore, this study examines a newer school funding reform model known as "costing out," briefly reviewing how the states of Ohio, Wyoming, and Tennessee have enacted variations of this model. This study then specifically examines Alabama's proposed costing out model, which was presented to the Circuit Court in 2001.

Research Questions

This study investigated the following research questions:

1. What is the relevant legal history of public school funding equity litigation in Alabama?
2. What is the current legal status of the public school funding equity litigation in Alabama?
3. How do the judiciary, legislators, and scholars define *adequacy* in school funding?

Procedures

This study used legal research methodology. Research included an extensive survey of relevant sources of law, including federal and state constitutional provisions, legislation, regulations, and case law; scholarly commentary; and other relevant documents found using "Lexis," "Westlaw," "Findlaw," "ERIC," and the libraries of the University of Georgia,

University of Alabama, and Auburn University. The resulting relevant documents were reviewed, analyzed, and synthesized to construct an accurate historical perspective on the law concerning the Alabama School Equity Funding Case[6] and a composite perspective on the current legal status of school funding litigation in the state of Alabama.

Chapter 2 is divided into four sections organized in chronological order to provide the reader with a perspective on the historical development of the law concerning these issues. The first section reviews school funding litigation since *Serrano v. Priest*.[7] The second section reviews school funding litigation in the State of Alabama, including the trial court decisions, the appellate decisions, and Alabama Supreme Court decisions and opinions. The third section reviews adequacy in school funding. The last section reviews the costing-out model as a remedy in school finance litigation; the costing-out model and variations of its use in the states of Ohio, Wyoming, and Tennessee are reviewed. The costing-out plan developed in response to litigation in Alabama is later reviewed in chapter 3.

Chapter 3 reviews and analyzes the Alabama Supreme Court's *Opinion of the Justices No. 338 1993*[8] and the court's 2002[9] ruling. This chapter also summarizes the concurring and dissenting opinions of the justices and concludes with a review of the Alabama Costing-Out Plan that was presented to the circuit court on February 14, 2002 by the Alabama State Board of Education and the State School Superintendent as a solution to an early court order.[10] Chapter 4 describes the findings and conclusions drawn from this study.

Limitations of the Study

This study focuses on published decisions and opinions of the Montgomery Circuit Court, Alabama Appellate Court, and Alabama Supreme Court which relate to the "Public School Equity Funding Case of Alabama."[11] This study is limited to the review of public school

funding litigation in state high courts since *Serrano v. Priest*.[12] This study is also limited to the review of the costing out model of school funding and its use in the states of Ohio, Wyoming, Tennessee, and Alabama.

CHAPTER 2

A REVIEW OF THE LITEATURE CONCERNING

ADEQUACY AND SCHOOL FUNDING LITIGATION

Review of Significant State and Federal High Court Cases since *Serrano v. Priest*[13]

Serrano v. Priest (Serrano I)
Supreme Court of California
Decided August 30, 1971

In *Serrano v. Priest,*[14] the Supreme Court of California became the first to declare a state's school funding system unconstitutional. It was a landmark decision,[15] establishing several guidelines for future cases. This case established a judicially manageable standard, the *Serrano* Principle,[16] for courts to apply in addressing inequities in school funding.[17] This standard holds that the quality of education cannot be a function of local property wealth; instead, it must be a function of the state as a whole.[18]

The Plaintiffs were school-aged children in the State of California and the parents of school-aged children who paid real property taxes, but it excluded some of the wealthier districts.[19] The court framed several issues that became important in subsequent public education funding litigation based on equal protection claims: (a) whether education is a fundamental right, (b) whether the court can apply strict scrutiny, and (c) whether the state's goal of promoting local control constitutes a sufficient justification for the challenged funding system under the court's standard of review.

The high court in California found that education was a fundamental right, that strict scrutiny could be used, and that the poorer property districts did constitute a suspect class. In

addressing the plaintiffs' argument of promoting local control, the court noted that "the state's system, rather than being necessary to promote local fiscal choice, actually deprives the less wealthy districts of that option."[20]

In addressing the tax payer equity issue, the court stated, "Affluent districts can have their cake and eat it too: they can provide a high quality education for their children while paying lower taxes. Poor districts, by contrast, have no cake at all."[21] Pertaining to the issue of education as a fundamental right, the court stated, "We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a fundamental interest."[22] Concerning the issue of the equal protection clause, the court found that "although we intimate no views on other governmental services, we are satisfied that, as we have explained, its uniqueness among public activities clearly demonstrates that education must respond to the command of the equal protection clause."[23] In remanding the case to the trial court, the Supreme Court of California instructed the trial court to proceed in light of the court's opinion.

San Antonio v. Rodriguez
Supreme Court of the United States
Decided March 21, 1973

San Antonio v. Rodriguez[24] was the first school finance case to make its way to the United States Supreme Court. Many school reform experts believed that the U.S. Supreme Court had an opportunity, in the aftermath of *Brown v. Board of Education*, to establish a national mandate for school funding equity. In a 5-4 decision, the High Court found that education was not a fundamental right protected by the U. S. Constitution, due to the fact that education is not mentioned by the Constitution.[25] They also found that property wealth per pupil is not a suspect class because it is related to governmental entities and not individuals.[26] The Court stated that the

Texas school funding system need only to meet the rational basis test, which requires that state actions need only bear a rational relationship to a legitimate state purpose.

In the majority opinion, written by Justice Powell, the Court listed concerns that would become a part of most opinions upholding existing school funding systems across the county: (a) criticism of the plaintiffs' statistical data and conclusions,[27] (b) fear of engaging in judicial activism,[28] (c) fears of opening the floodgates of litigation in other areas of social services,[29] (d) concerns related to judicial competence in an area where courts generally have limited expertise,[30] (e) the importance of judicial deference to the legislature in this area,[31] and (f) the need for the plaintiffs to address their grievances to the legislature instead of the courts.[32]

In a dissenting opinion, Justice Marshall wrote,

> The strong vested interest of property-rich districts in the existing property tax scheme poses a substantial barrier to self-initiated legislative reform in educational financing.[33] . . . I, for one, am unsatisfied with the hope of an ultimate "political" solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that "may affect their hearts and minds in a way unlikely to be undone." *Brown v. Board of Education*.[34]

This ruling ended the federal role in school finance litigation and gave jurisdiction back to the state, on the basis that most state constitutions mention education.

Robinson v. Cahill
Supreme Court of New Jersey
Decided April 3, 1973

The Supreme Court of New Jersey held the release of their decision in *Robinson v. Cahill* until the U.S. Supreme Court ruled on *Rodriguez*. In releasing its decision, the high court of New Jersey affirmed with modification a trial court's declaration that the New Jersey system of funding schools was unconstitutional.[35] The court based its decision on the state's education article, rather than on the federal equal protection clause. The court found that it was "clear that there is a significant connection between the sums expended and quality of the educational

opportunity."[36] The high court agreed with the trial court, that disparities in per pupil expenditures violate the state constitution; however, the court stated that this violation was not based on the equal protection clause.[37]

In using the state's education clause, which requires "a thorough and efficient system of free public schools,"[38] the high court declined to find education to be a fundamental right.[39] The court concluded by requesting the "further views of the parties as to the content of the judgment" and set a date for future arguments on these issues.[40]

Shofstall v. Hollins
Supreme Court of Arizona
Decided November 2, 1973

The plaintiffs in *Shofstall v. Hollins*, students and parents in the Roosevelt School District, claimed that the system of funding education in Arizona was unconstitutional based on two grounds: (a) wealth disparities between school districts and (b) the unequal taxpayer burden in poorer school districts.[41] The court rejected the application of strict scrutiny in favor of the rational basis test, which requires the state's system of funding education to be rational, reasonable, and neither discriminatory nor capricious.[42] Although the court required the state to use the rational basis test, they ruled that education was a fundamental right under the Arizona Constitution, rejecting the judicial analysis of *Serrano* and *Robinson*.[43] Disposing of the plaintiffs' issue of taxpayer equity, the court cited *Rodriguez*, stating, "It has simply never been within the constitutional prerogative of the Court to nullify statewide measures of financing public services merely because the burdens and benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which the citizens live."[44]

Milliken v. Green
Supreme Court of Michigan
Decided December 14, 1973

On deciding *Milliken v. Green,* the Supreme Court of Michigan vacated its earlier opinion, in which it had struck down the school funding system in Michigan.[45] In upholding the system of school funding, the court stated that "neither the evidence presented at the hearing nor the judge's findings support the legal arguments advanced against the present system of financing public education."[46] Citing a Michigan legislative study, the court noted that "there is very little evidence that dollar expenditures, per se, are closely related to achievement in school."[47] The court found that the disparities in pupil expenditures were not constitutionally significant.[48] In rejecting the plaintiffs' claims, the court stated, "Instead of substantiating with evidence their claims of educational inequities and demonstrating that a decree of this Court would overcome those inequities, all have concentrated exclusively on the disparities in taxable resources among local school districts."[49] The court continued, "We have not been provided with nor have we discovered any evidence which would help us establish the point at which the marginal return in incremental expenditures becomes educationally significant."[50]

Thompson v. Engelking
Supreme Court of Idaho
Decided May 1, 1975

The Supreme Court of Idaho, in deciding *Thompson v. Engelking,* cited *Rodriquez* to support its rejection of the plaintiffs' claims[51] while declining to use the *Rodiguez* explicit-implicit test[52] for fundamentality or the federal model of equal protection analysis. The court stated that they could interpret the Idaho Constitution wholly independently of federal precedents. In the court's decision that the Idaho system of school funding did not violate the state constitutional requirement of a uniform system of schools,[53] the court used a historical

review of the events and proceedings of the adoption of its constitution.[54] The court concluded that the legislature had complied with its mandate to establish a system of basic, thorough, and uniform education.[55]

Knowles v. State Board of Education
Supreme Court of Kansas
Decided March 6, 1976

The Kansas system of funding public education was declared unconstitutional when a trial court decided in February of 1975 that it violated the Fourteenth Amendment to the U.S. Constitution, as well as the Kansas Constitution's Education Article and Equal Protection Provisions.[56] The trial court postponed its order until July 1, 1975, giving the legislature time to correct the inequities in the school funding system. After the legislature and governor made changes in the funding system, the court dissolved and dismissed its earlier order.[57] On March 6, 1976, the Kansas Supreme Court vacated the trial court's order and reinstated the earlier judgment, which declared the Kansas system of school funding unconstitutional. The court then remanded the case for further examination of the new amendments to the state's funding laws.[58]

Olsen v. State
Supreme Court of Oregon
Decided September 3, 1976

The Supreme Court of Oregon declared that the state's system of funding public education was constitutional, affirming a lower court's ruling. The court concluded that although inequities in tax payer burdens did exist,[59] the school funding system did satisfy the constitutional requirement of a uniform system of schools, providing a minimum of educational opportunities in the district.[60] The court stated, "our decision should not be interpreted to mean that we are of the opinion that the Oregon system of school financing is politically or educationally desirable. Our only role is to pass upon its constitutionality."[61]

Buse v. Smith
Supreme Court of Wisconsin
Decided November 30, 1976

Wisconsin's system of funding public education used a negative-aid provision aimed at district power equalization. This recapture provision required wealthy school districts to pay a portion of its property tax revenues to a state general fund which would be distributed to poorer school districts. The Supreme Court of Wisconsin held that this negative-aid provision violated the Wisconsin Constitution.[62] The high court interpreted the Wisconsin Constitution provision of the right to equal educational opportunity as a fundamental right; however, the court state that this provision only guarantees "the right of all school children to attend a public school free of charge."[63]

Serrano v. Priest (Serrano II)
Supreme Court of California
Decided February 1, 1977

In *Serrano I*, the California Supreme Court declared that the California system of funding public education was unconstitutional and remanded the case back to the trial court for a full trial on the merits.[64] After the high court's ruling, the state legislature enacted two education bills for school funding reform.[65] The Supreme Court of California's hearing of *Serrano II* was a review of the trial court's decision in light of the new school reform legislation.[66] In deciding *Serrano II*, the high court found not only that the school reform legislation had not corrected the constitutional deficiencies of the school funding system but also that the deficiencies could actually increase the disparities.[67] In linking educational expenditures with education quality, the court stated, "It is clear that substantial disparities in expenditures per pupil will continue to exist."[68] The court further stated that substantial disparities in expenditures per pupil among

school districts cause and perpetuate substantial disparities in the quality and extent of availability of educational opportunities."[69]

In defining *educational opportunity*, the court noted that "quality cannot be defined wholly in terms of performance on state-wide achievement tests because such tests do not measure all the benefits and detriments that a child may receive from his educational experience."[70] In agreeing with Justice Marshall's dissent in *Rodriquez,* the California Supreme Court found that wealth discrimination in education constituted a suspect classification, that education was a fundamental right, and that strict scrutiny should be applied.[71] Using these findings, the high court declared that the system of school funding was unconstitutional.

Horton v. Meskill
Supreme Court of Connecticut
Decided April 19, 1977

In affirming a lower court decision, the Supreme Court of Connecticut declared that the state's system of funding public education was unconstitutional.[72] The court defined the criteria for evaluating the quality of education: (a) class size; (b) training, experience, and background of teaching the teaching staff; (c) materials, books, and supplies; (d) school philosophy and objectives; (e) type of local control; and (f) test scores (adjusted for various factors).[73] The high court found that education was a fundamental right in Connecticut. In using strict scrutiny and declaring the funding system unconstitutional, the court directed the legislature to enact appropriate legislation to provide equal educational opportunity.[74]

Seattle School District No. 1 v. State
Supreme Court of Washington
Decided September 28, 1978

In affirming a lower court's decision, the Supreme Court of Washington declared that the state's system of funding public education violated the Washington Constitution Education

Article.[75] The high court noted that "all children residing within the State's borders have a right to be amply provided with an education. This right is constitutionally paramount and must be achieved through a general and uniform system of public schools"[76] and must be provided "without distinction or preference on account of race, color, caste, or sex."[77]

The state argued that the language of "paramount duty" was merely a preamble. In reviewing the history of the state's 1889 constitution, the court rejected the state's argument and founded that the state's constitution established a "paramount duty" that the state had to support.[78] The high court continued with their review of the history of the constitution and noted that the constitution must be interpreted "in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning."[79] The court gave the state legislature until July 1, 1981 to remedy this constitutional violation.[80]

Pauley v. Kelly (Pauley I)
West Virginia Supreme Court of Appeals
Decided February 20, 1979

In *Pauley I*, the West Virginia Supreme Court of Appeals reversed a lower court's decision to dismiss the case. Plaintiffs challenged the constitutionality of the state's school funding system.[81] In remanding the case back to the trial court, the high court proposed guidelines for the trial court.

The court noted that under *Rodiguez*, the equal protection of education equality was not guaranteed by the Fourteenth Amendment to the U.S. Constitution. The court stated, "our examination of *Rodriquez* and our research in this case indicates an embarrassing abundance of authority and reason by which the majority might have decided that education is a fundamental right of every American."[82] The court further noted that the General Assembly of the United

Nations "appears to proclaim education to be a fundamental right of everyone, at least on this planet."[83] The West Virginia court declared that education was a fundamental right and that strict scrutiny should be applied to the equal protection challenge.[84] The court defined a "thorough and efficient" system of public education:

> 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. Implicit are supportive services: (1) good physical facilities, instructional materials, and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher, and administrative competency. . . . There are undeniable legal basis for all our conclusions, including the elements specifically distilled from the debates and cases that are the specifications of what a thorough and efficient school system should have, and should do.[85]

The high court ordered the trial court to hear the evidence and to determine whether any of these standards were not being met and whether the cause of not meeting them was a result of inefficiency and the failure to follow existing statutes.[86]

Danson v. Casey
Supreme Court of Pennsylvania
Decided March 14, 1979

In addressing the plaintiffs' claims that the Pennsylvania school funding system was unconstitutional, the high court declared that the constitutional language of "thorough and efficient" did not guarantee identical education services. The court noted that the plaintiffs' claims were insufficient to state a cause of action.[87] The Supreme Court of Pennsylvania used the rational basis test to determine whether the state's claims that promoting local control

justified the existing funding scheme and ultimately declared that the current system of funding education was constitutional.[88]

Board of Education v. Walter
Supreme Court of Ohio
Decided June 13, 1979

In *Walter*, the Supreme Court of Ohio reversed a lower court's ruling in favor of the plaintiffs.[89] The high court used the rational basis test as the standard of review and held that the state's reason of promoting local control satisfied this test. Although the court noted the vast disparities among school districts in per pupil expenditures, the court stated, "We cannot say that such disparity is a product of a system that is so irrational as to be an unconstitutional violation."[90] The court concluded, "The fact that a better financing system could be devised which would be more efficient and thorough is not material."[91] In cautioning the state, the court also stated that the wide discretion given to the legislature was not without limits.[92]

Washakie County v. Herschler
Supreme Court of Wyoming
Decided January 15, 1980

In reversing a trial court's motion to dismiss, the Wyoming Supreme Court held that the Wyoming Constitution's Equal Protection Clause was being violated by the method the state used in funding public education.[93] The Court sited *Serrano*: "We affirm the proposition that, as nearly as practicable, funds . . . must be equally divided amongst the school districts of the entire state."[94] The Court reviewed statistical data that found children's quality of education was dependent upon the tax resources of their district. The court concluded that the equal protection clause could not protect the right of a child's education as long as wealth per district was a measure in funding education.[95]

The Court declared this case did not need to be remanded back to a trial court, due to the fact that a trial was not necessary in declaring the system of funding public education unconstitutional. They stated, "As a matter of law, the statutory structure is inherently defective and the now obvious disparities demand that the system's constitutional infirmities be remedied."[96] After declaring that education is a fundamental right protected by the Wyoming Constitution and that wealth classifications were a suspect class,[97] the court suggested that a system of state-wide distribution of tax funds may remedy the constitutional violations. The court noted, "We only express the constitutional standard and hold that whatever system is adopted by the legislature, it must not create a level of spending which is a function of wealth other than the wealth of the state as a whole."[98]

McDaniel v. Thomas
Supreme Court of Georgia
Decided November 24, 1981

The plaintiffs' argument in *McDaniel v. Thomas* challenged the equal protection clause and the education clause of the Georgia Constitution. In addressing these two challenges, the court concluded that "the evidence in this case establishes beyond doubt that there is a direct relationship between a district's level of funding and the educational opportunities which a school district is able to provide to its children."[99] However, the court also concluded that the term *adequate education* in the education clause did not mean equal education opportunity. The court ruled that education was not a fundamental right under the Georgia Constitution and that promoting local control constituted a sufficient justification for Georgia's school funding system.[100] The court further stated, "It is clear that a great deal can be done and needs to be done to equalize educational opportunities in this state. For the present, however, the solutions must come from our lawmakers."[101]

Lujan v. Colorado State Board of Education
Supreme Court of Colorado
Decided May 24, 1982

In reversing a trial court's decision, the Supreme Court of Colorado ruled that the Colorado system of funding public education was constitutional.[102] In reaching this finding, the court used the similarities between the equal protection clause of the U.S. Constitution and the Colorado Constitution.[103] In determining whether the plaintiffs' challenge of equal protection was one of a fundamental right or a suspect class, the court applied the three levels of scrutiny: (a) rational basis scrutiny, (b) intermediate scrutiny, and (c) strict scrutiny.[104]

Having found that education was not a fundamental right in Colorado,[105] the court attempted to determine whether a suspect class had been established by a correlation between poverty within the state and low spending districts.[106] In concluding that a correlation did not exist, the high court used a rational basis test and found the state's use of local control satisfied this requirement.[107] In reviewing the language of the educational clause of the constitution, the court concluded that "thorough and uniform system of free public schools" was not a mandate for absolute equality in educational expenditures and services.[108]

Plyler v. Doe
Supreme Court of the United States
Decided June 15, 1982

Plyler v. Doe was not a school finance litigation case; rather, it concerned illegal alien children in Texas who were denied admission to the public schools. The Supreme Court's ruling in this case has been important for school finance litigation. The Court reaffirmed their earlier ruling in *Rodriquez,* stating that education is not a fundamental right under the U.S. Constitution. Another important issue emanating from this case and potentially impacting future school finance litigation was that the Court extended intermediate scrutiny to the education context.[109]

In finding that the Texas statute that denied admission to these children was unconstitutional, the Court rejected the state's argument that aliens were not protected by the Fourteenth Amendment to the U.S. Constitution. In concurring with the majority opinion, Justice Marshall stated, "While I join the Court's opinion, I do so without in any way retreating from my opinion in *San Antonio Independent School District v. Rodriguez*" that "an individual's interest in education is fundamental."[110] He concluded, "It continues to be my view that a class-based denial of public education is utterly incompatible with the Equal Protection Clause of the Fourteenth Amendment."[111]

Board of Education, Levittown v. Nyquist
New York Court of Appeals
Decided June 23, 1982

A New York trial court ruled that the New York school funding system was unconstitutional based on the state's equal protection clause and education clause. The New York Court of Appeals not only rejected this ruling, but they also affirmed the constitutionality of the state's school funding system.[112] The high court of New York agreed with the plaintiffs regarding disparities in financial support, educational opportunity, and the effects of municipal overburden.[113] The court agreed that there was a significant correlation between pupil expenditures and the quality and quantity of educational opportunity provided.[114] However, the court found that the New York Constitution only required a "sound and basic" education and that this requirement was being met.[115]

In dissenting, Justice Fuchsberg stated, "Nothing was more vital, and therefore fundamental, to the future of our nation than education." He went on to state, "Without education there is no exit from the ghetto, no solution to unemployment, no cutting down on crime."[116]

Justice Fuchsberg concluded by stating that education is "the great equalizer of men, and by alleviating poverty and its social costs, more than pays for itself."[117]

Hornbeck v. Somerset County Board of Education
Court of Appeals of Maryland
Decided April 5, 1983

In reversing a trial court's decision, the highest court of Maryland, the Court of Appeals, ruled that Maryland's system of funding public education did not violate the U. S. Constitution's Equal Protection Clause, the Maryland Constitution's Equal Protection Clause, or the Maryland Constitution's Education Clause.[118] Citing *Rodriquez,* the court affirmed that "every state appellate court which has considered the question since *Rodriquez* was decided has held that the state's school finance system does not offend the federal equal protection clause."[119] In deciding on Maryland's equal protection challenge, the court used the three tiered model of federal analysis of equal protection claims.[120] The court found that Maryland's funding system satisfied the rational basis test of promoting local control.[121] The court went on to find that education was not a fundamental right under the Maryland Constitution and that wealth or lack of wealth did not constitute a suspect class.[122] Ruling on the education clause challenge, the court used the statement of the trial court regarding the Maryland Constitution requirement of a "thorough and efficient" system of schools. However, the court rejected the trial court's interpretation of its meaning. The Court of Appeals ruled the constitution did not mandate exact equality in per pupil funding and expenditures by requiring the establishment and maintenance of a "thorough and efficient" system of public schools.[123]

Dupree v. Alma School District
Supreme Court of Arkansas
Decided May 31, 1983

The plaintiffs in *Dupree* challenged the Arkansas system of funding public education, claiming that it violated the Arkansas Constitution's Equal Protection Clause, the Education Clause,[124] the state's method of funding vocational programs,[125] and the state's "hold harmless" provision.[126] The Arkansas Supreme Court affirmed the trial court's ruling in favor of the plaintiffs, stating that the Arkansas system of funding public education was unconstitutional.

In addressing the plaintiffs' challenge of the equal protection violation, the court held,

> We can find no legitimate state purpose to support the system. It bears no rational relationship to the educational needs of the individual districts, rather it is determined primarily by the tax base of each district. The trial court found the educational opportunity of the children in this state should not be controlled by the fortuitous circumstance of residence, and we concur in that view. Such a system only promotes greater opportunities for the advantaged while diminishing the opportunities for the disadvantaged.[127]

In criticizing the defense of local control, the court found that local control and funding equity were not mutually exclusive. The court cited the *Serrano* court's statement that "the notion of local control was a 'cruel illusion' for the poor districts due to limitations placed upon them by the system itself . . . far from being necessary to promote local fiscal choice, the present system actually deprives the less wealthy districts of the option."[128] The court went on to state, "Even without deciding whether the right to a public education is fundamental, we can find no constitutional bases for the present system, as it has no rational bearing on the educational needs of the districts."[129]

The state argued that the Arkansas education article requirement of a "general, suitable and efficient system" of schools establishes only a minimal standard. The high court stated that

> For some districts to supply the barest necessities and others to have programs generously endowed does not meet the requirements of the constitution. Bare and minimal

> sufficiency does not translate into equal educational opportunity. "Equal protection is not addressed to minimal sufficiency but rather to the unjustifiable inequities of state action." *San Antonio School District v. Rodriguez,* 411 U.S. 1, at (1972). Marshall, J. dissenting.[130]

The Arkansas Supreme Court found that the Arkansas system of funding public education was unconstitutional. The court left the state legislature to correct the constitutional violations.[131]

Pauley v. Bailey (Pauley II)
Supreme Court of Appeals of West Virginia
Decided December 12, 1984

In *Pauley I*, the Supreme Court of Appeals of West Virginia remanded the case back to the circuit court for further development of evidence.[132] On remand, the circuit court entered a remedy order, known as The Master Plan for Public Education, which had been developed by the state. This plan called for the "extensive compilation of detailed concepts and standards that defines the educational role of the various state and local agencies, sets forth specific elements of educational programs, enunciates considerations for educational facilities and proposes changes in the educational financing system."[133] The circuit court ordered the execution of the plan at the "earliest practicable time," though the state requested a 17 year schedule.[134] This remedy order was made final on May 11, 1982. Two years later, the plan had not be executed. The plaintiffs appealed to the high court of West Virginia, asking the court to compel the state to implement the court order Master Plan.[135] In reaffirming its early ruling in *Pauley I*, the high court restated that education was a fundamental right under the West Virginia Constitution.[136] The court declared that the trial court's ruling that the Master Plan should be completed "at the earliest practicable time" should not be disturbed.[137]

Papasan v. Allain
Supreme Court of the United States
Decided July 1, 1986

In *Papasa v. Allain*, the plaintiffs claimed that the Mississippi system of distributing public school land grants violated the Fourteenth Amendment to the U.S. Constitution.[138] The U.S. district court dismissed the complaint, based on *Rodriguez*, and the U.S. Court of Appeals, Fifth Circuit, affirmed. Subsequently, the U.S. Supreme Court vacated the dismissal and remanded the complaint back to the district court. The High Court stated that if the Mississippi system of disturbing public school land grants was not rationally related to a legitimate state interest, the plaintiffs had a cause of action.[139]

Britt v. North Carolina State Board of Education
Supreme Court of North Carolina
Decided October 7, 1987

In *Britt*, the plaintiffs alleged that the North Carolina system of funding public schools denied them equal education opportunity under Article IX, section 2(1) of the North Carolina Constitution.[140] The section states that "equal education opportunities shall be provided for all students."[141] The North Carolina Court of Appeals ruled that the language used in Article IX, section 2(1), specifically "equal opportunities," does not mean identical opportunities but merely "equal access." Consequently, the court dismissed the plaintiffs' action.[142] The Supreme Court of North Carolina refused to review *Britt v. North Carolina State Board of Education* and allowed the dismissal to stand.[143]

Livingston School Board v. Louisiana
United States Court of Appeals, Fifth Circuit
Decided October 22, 1987

The plaintiffs alleged that the Louisiana system of funding public schools violated the Fourteenth Amendment's Equal Protection Clause.[144] In determining the level of scrutiny to use,

the court found that heightened scrutiny based on *Papasa* was not appropriate; however, the rational basis scrutiny based on *Rodriguez* was appropriate.[145] Although the court noted significant disparities in per pupil expenditures between Louisiana parishes, they ruled that the school funding system that balanced local control with educational opportunities was constitutional. The court stated, "The system cannot be condemned because it imperfectly and incompletely effectuates the state's goals."[146] The U.S. Court of Appeals, Fifth Circuit, affirmed the district court's decision to grant the defendant's motion for summary judgment. The United States Supreme Court denied certiorari.[147]

Fair School Finance Council of Oklahoma v. State
Supreme Court of Oklahoma
Decided November 24, 1987

The plaintiffs challenged the constitutionality of the state's school funding system. Judgment was granted by the District Court of Oklahoma in favor of the state.[148] Although the court found wide disparities in per pupil revenues,[149] it concluded based on *Rodriquez* and *Plyler* that the Oklahoma system of funding public education did not violate the Fourteenth Amendment to the U.S. Constitution. The plaintiffs contended that the provision of Oklahoma Constitution that set the maximum levy rates on school property taxes was unconstitutional.[150] The Supreme Court of Oklahoma found, "We do not believe that these restrictions render the present system unconstitutional. . . . it is reasonable and proper for the people of a state to limit the degree of taxation to which they will subject themselves."[151] In affirming the lower court's judgment in favor of the state, the Supreme Court of Oklahoma found that the Oklahoma Constitution only guarantees a "basic, adequate education" under the direction of the State Board of Education.[152]

Richland County v. Campbell
Supreme Court of South Carolina
Decided January 25, 1988

Article XI, Section 3 of the South Carolina Constitution states that the legislature "shall provide for the maintenance and support of a system of free public schools."[153] The plaintiffs in *Richland County v. Campbell* sought to have the South Carolina system of funding public schools declared unconstitutional. The plaintiffs appealed a district court's dismissal of the case. Using a rational basis test, the Supreme Court of South Carolina found that the state's funding system did not violate either the equal protection guarantees or the state constitution's free public school requirement.[154]

Kadrmas v. Dickinson Public Schools
Supreme Court of the United States
Decided June 24, 1988

A North Dakota statute allowed the collection of a user fee to ride a school bus for unreorganized school districts. *Kadrmas* concerned an indigent student who was denied school bus transportation for failure to pay school bus user fees. The student lived 16 miles from the nearest school. The Supreme Court cited its early rulings in *Rodriguez*, *Plyler*, and *Papasa* in reaffirming its finding that education is not a fundamental right subject to strict scrutiny. The High Court ruled the North Dakota statue constitutionally permissible.[155]

Using the Court's decision in *Kadrmas*, Justice Marshall restated his dissenting view in *Rodriquez*:

> In *San Antonio Independent School Dist. V. Rodriguez*, 411 U.S. 1 (1973), I wrote that the Court's holding was a "retreat from our historic commitment to equality of educational opportunity and [an] unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential." Id., at 71 (dissenting). Today, the court continues the retreat from the promise of equal educational opportunity by holding that a school district's refusal to allow an indigent child who lives 16 miles from the nearest school to use a school bus service without paying a fee does not violate the Fourteenth Amendment's Equal Protection Clause. Because I do not believe

> that this Court should sanction discrimination against the poor with respect to perhaps the most important function of state and local governments, *Brown v. Board of Education*, 347 U. S. 483, 493 (1954), I dissent.[156]

Justice Marshall and Justice Brennan stated that "a child must reach the schoolhouse door as a prerequisite to receiving the educational opportunity offered them."[157] Justice Marshall went on to state, "By denying equal opportunity to exactly those who need it most, the law not only militates against the ability of each poor child to advance herself of himself, but also increases the likelihood of the creation of a discrete and permanent underclass."[158] Justice Marshall concluded,

> The Court's decision . . . "demonstrates once again a 'callous indifference to the realities of life for the poor.'" Selective Service System v. Minnesota Public Interest Research Group, 468 U.S., at 876 (Marshall, J. dissenting), quoting *Flagg Bros., Inc. v. Books*, 436 U.S. 149, 166 (1978) (Marshall, J., dissenting). . . . For the poor, education is often the only route by which to become full participants in our society. In allowing a State to burden the access of poor persons to an education, the Court denies equal opportunity and discourages hope. I do not believe the Equal Protection Clause countenances such a result. I therefore dissent.[159]

Helena Elementary School District v. State
Supreme Court of Montana
Decided February 1, 1989

The plaintiffs in *Helena* challenged the constitutionality of the Montana system of funding public education on two grounds: (a) the funding system was unconstitutional and (b) the system violated the equal protection clause of the Montana Constitution. The Supreme Court affirmed a trial court's declaration that the Montana system of public school funding was unconstitutional. Having found the system of funding unconstitutional, the court declined to act on the equal protection challenge.[160]

The plaintiffs used expert witnesses and a Study Team of educational experts during the six week trial. The Study Team findings, affirmed by the high court, stated,

> The study identified clear difference between the schools. . . . They found that better funded schools tended to offer more enriched and expanded curricula than those offered in the schools with less money. The richer schools were also better equipped in the areas of textbooks, instructional materials, and consumable supplies. With respect to buildings and facilities, the districts with more money were better able to maintain their facilities than were the poorer districts. The Study Team concluded:
>
> - Availability of funds clearly affect the extent and quality of the educational opportunities.
> - There is a positive correlation between the level of school funding and the level of educational opportunity.
> - The better funded districts have a greater flexibility in the relocation of resources to programs where there is a need.
> - The differences in spending between the better funded and underfunded districts are clearly invested in educationally related programs.
> - All 12 school districts in this study exhibited a responsible and judicious use of their financial resources.[161]

In interpreting Article X, Section I of the Montana Constitution, the court stated that the phrase "equality of educational opportunity is guaranteed to each person of the state" means "that each person is guaranteed equality of educational opportunity. The plain meaning of that sentence is clear and unambiguous."[162] The court gave the legislature until July 1, 1989 to "search for and present an equitable system of school financing."[163]

Kukor v. Grover
Supreme Court of Wisconsin
Decided February 22, 1989

The Supreme Court of Wisconsin upheld a trial court's decision, stating that the Wisconsin school funding system did not violate either the education clause or the equal protection clause of the Wisconsin Constitution.[164] In its decision relating to the interpretation of the constitution, the court looked at (a) the meaning of the words used in context, (b) the proceedings and debates at the time of the writing of the constitution, and (c) the earliest legislative interpretation of the constitution following its adoption.[165] In its decision regarding the equal protection challenge, the court found that "equal opportunity for education is a fundamental right."[166] However, the court further stated that "equal opportunity for education

does not mandate absolute equality in districts' per-pupil expenditures. In fact, such complete equalization is constitutionally prohibited to the extent that it would necessarily inhibit local control."[167] Using strict scrutiny, the court cited the Arizona Supreme Court opinion in *Shofstall*:

> Notwithstanding our recognition that education is, to a certain degree, a fundamental right, we apply, as did the United States Supreme Court in *Rodriquez*, a rational basis standard because the rights at issue in the case before the court are premised upon spending disparities and not upon a complete denial of educational opportunity.[168]

The high court noted that it would have upheld the trial court's decision using either the rational basis or the strict scrutiny review: "The requirement that local control of schools be retained is of constitutional magnitude and necessarily compelling."[169]

Rose v. Council for Better Education
Supreme Court of Kentucky
Decided June 8, 1989

A trial court in Kentucky declared that the entire system of education in Kentucky was unconstitutional. The Supreme Court of Kentucky upheld this decision[170] and stated,

> The goal of the framers of our constitution, and the polestar of this opinion, is eloquently and movingly stated in the landmark case of *Brown v. Board of Education*:
>
> > "Education is perhaps the most important function of state and local governments . . . 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 reasonable be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[171]

The court further stated that education is a fundamental right in Kentucky, a claim based on the constitutional mandate of an efficient system of schools throughout the state. In defining *efficient*, the court looked at historical analysis of the constitutional debates and the Supreme Court of Appeals of West Virginia's interpretation of similar language:

> The essential, and minimal, characteristics of an "efficient" system of common schools, may be summarized as follows:

1) The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly.
2) Common schools shall be free to all.
3) Common schools shall be available to all Kentucky children.
4) Common schools shall be substantially uniform throughout the state.
5) Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances.
6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.
7) The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education.
8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.
9) An adequate education is one which has as its goal the development of seven capacities.[172]

The court then described the seven capacities that shall be provided to each child as defined by an "efficient system of education":

1) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
2) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
3) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
4) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
5) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
6) 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
7) sufficient levels 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 market.[173]

In declaring the entire system of education unconstitutional, the high court decreed that property must be assessed at 100% of its fair market value and that a uniform tax rate be established throughout the state.[174]

Edgewood Independent School District v. Kirby
Supreme Court of Texas
Decided October 2, 1989

Under the Education Article of the Texas Constitution, the Supreme Court of Texas affirmed a trial court's decision, which was later reversed by the court of appeals, that the Texas system of funding public education was unconstitutional. The high court declared that the state failed to maintain an efficient system of schools as required by the Texas Constitution due to the vast disparities in school funding. These disparities reflect a 700 to 1 ratio.[175] The court described the effects of these vast disparities:

> Property-poor districts are trapped in a cycle of poverty from which there is no opportunity to free themselves. Because of their inadequate tax base, they must tax at significantly higher rates in order to meet minimum requirements for accreditation; yet their educational programs are typically inferior. The location of new industry and development is strongly influenced by tax rates and the quality of local schools. Thus, the property-poor districts with their high tax rates and inferior schools are unable to attract new industry of development and so have little opportunity to improve their tax base.[176]

The court also addressed the issue of local control:

> Some have argued that reform in school finance will eliminate local control, but this argument has no merit. An efficient system does not preclude the ability of communities to exercise local control over the education of their children. It requires only that the funds available for education be distributed equitably and evenly. An efficient system will actually allow for more local control, not less. It will provide property-poor districts with economic alternatives that are not now available to them. Only if alternatives are indeed available can a community exercise the control of making choices.[177]

The court allowed the legislature until May 1, 1990 to fix the funding system; however, it warned the legislature, "Let there be no misunderstanding. A remedy is long overdue. The legislature must take immediate action."[178]

Abbott v. Burke
Supreme Court of New Jersey
Decided June 5, 1990

The New Jersey Supreme Court declared the state's funding of poorer school districts was unconstitutional.[179] In citing *Serrano*, the court noted that funding cannot depend on local wealth and that funding of special needs in urban districts must be at an adequate funding level.[180] The court noted that *Abbott v. Burke* was a follow-up to their earlier decision of *Robinson v. Cahill (Robinson V)*: "the issue now before us is whether the Act, declared facially constitutional [in *Robinson V*], is constitutional as applied."[181] As the court began its review, it stated, "The inadequacy of poorer urban students' present education measured against their needs is glaring. Whatever the cause, these schools are failing abysmally, dramatically, and tragically."[182]

In its defense, the state argued that the socioeconomic status was the most important factor in explaining the failure of poor urban children.[183] The plaintiffs responded by stating,

> The State contends that the education currently offered in these poorer urban districts is tailored to the students' present need, that these students simply cannot now benefit from the kind of vastly superior course offerings found in the richer districts. . . . The state's conclusion is that basic skills are what they need first, intensive training in base skills. We note, however, that these poorer districts offer curricula denuded not only of advanced academic courses but of virtually every subject that ties a child, particularly a child with academic problems, to school—of art, music, drama, athletics, even, to a very substantial degree, of science and social studies. . . . However desperately a child may need remediation in basic skills, he or she also needs at least a modicum of variety and a chance to excel. Equally, if not more important, the State's argument ignores the substantial number of children in these districts, from the average to the gifted, who can benefit from more advanced academic offerings. Since little else is available in these districts, they too are limited to basic skills.[184]

The court addressed the state's argument about the curriculum for poor urban students by declaring,

> We have decided this case on the premise that the children of poorer urban districts are as capable as all others; that their deficiencies stem from their socioeconomic status; and

> that through effective education and changes in that socioeconomic status, they can perform as well as others. Our constitutional mandate does not allow us to consign poorer children permanently to an inferior education on the theory that they cannot afford a better one or that they would not benefit from it.[185]

The court agreed with the argument of the correlation between the quality of education and money; however, the court declined to review the equal protection challenge. The high court ordered the state to fund poor school districts to an equal level of funding of wealthy districts and to provide adequate funding to address the disadvantages of special needs students in the poorer districts.[186] In conclusion, the court noted,

> They face, through no fault of their own, a life of poverty and isolation that most of us cannot begin to understand or appreciate. . . . After all the analyses are completed, we are still left with these students and their lives. They are not being educated. Our Constitution says they must be.[187]

Coalition for Equitable School Funding v. State
Supreme Court of Oregon
Decided May 2, 1991

Coalition for Equitable School Funding v. State was the second time the Supreme Court of Oregon addressed school funding litigation. The court first ruled that Oregon's system of funding public education was constitutional in the 1976 decision in *Olsen v. State*.[188] The plaintiffs in *Coalition for Equitable School Funding* argued that the circumstance had changed since the court's earlier decision.[189] In addressing the plaintiffs' challenge, the court noted that the people of Oregon amended the Oregon Constitution in 1987, allowing for district-to-district disparities in taxation and level of per pupil funding.[190] In concluding, the court restated its earlier opinion from *Olsen v. State*: "Our decision should not be interpreted to mean that we are of the opinion that the Oregon system of school financing is politically or educationally desirable. Our only role is to pass upon its constitutionality."[191] In so stating, the court found that the system of school funding did not violate Oregon's Constitution.[192]

Idaho Schools v. State
Supreme Court of Idaho
Decided March 18, 1993

The Supreme Court of Idaho found that the ruling of a lower court in *Idaho Schools v. State* was correct, [193] based on its earlier decision in *Thompson v. Engelking*.[194] The trial court dismissed the plaintiffs for failure to state a cause of action and lack of standing. However, the high court decided that part of the plaintiffs' argument did have standing and noted that the plaintiffs did have the right to challenge the state's differential treatment of chartered and non-chartered schools under the state's equal protection provision.

Tennessee Small School Systems v. McWherter (Small Schools I)
Supreme Court of Tennessee
Decided March 22, 1993

This challenge of Tennessee's school funding method pitted small rural schools against the state and nine urban and suburban school districts. The small rural schools alleged that the state's school funding system violated the state's education article and the equal protection clause of the Tennessee Constitution. The larger school districts that joined the state as defendants were concerned that the results could create a redistribution of education funds, rather than new money for education, and could lead to funds being taken away from central cities and their growing suburbs.[195]

The court found that a direct correlation between the quality of an education and the amount of dollars expended did exist.[196] The court stated that the economically disadvantaged districts could not raise enough money to provide an average amount of total funds needed for education, by no fault of their own.[197] The high court also noted that there was a movement of economic resources from poorer districts to larger urban districts resulting in a continual downward spiral of capacity to an adequate level of education.[198]

The Supreme Court of Tennessee found that the state's system of funding public education did violate the equal protection clause of the Tennessee Constitution.[199] However, the court declined to rule on the education clause challenge. In rejecting the plaintiffs' argument that local control justified the disparities, the court declared, "Consequently, even without deciding whether the right to a public education is fundamental, we can find no constitutional basis for the present system, as it has no rational bearing on the educational needs of the districts."[200] The court upheld the trial court's order to the General Assembly to fashion an appropriate remedy.

McDuffy v. Secretary of Education
Supreme Judicial Court of Massachusetts
Decided June 15, 1993

The plaintiffs in *McDuffy v. Secretary of Education* claimed that the state's system of funding public education violated the equal protection provision and the education article of the Massachusetts Constitution.[201] The defendants argued that "the educational guarantees in the state's constitution were 'aspirational' and a 'noble expression of the high esteem' in which the framers held education but were not mandatory."[202] The high court addressed the defendants' claims by reviewing the history of education in Massachusetts, looking back to the founding of Massachusetts Bay Colony in 1630. The court cited the historical importance of common schools to a republican form of government, citing Governor Books' speech in 1822: "knowledge generally diffused among the people is necessary for the preservation of their rights and liberties."[203]

In discussing the importance of common schools, the court noted that "an educated people are viewed as essential to the preservation of the entire constitutional plan: a free, sovereign, constitutional democratic State."[204] At the conclusion of its review, the court declared,

> What emerges from this review is that the words are not merely aspirational or hortatory, but obligatory. What emerges also is that the Commonwealth has a duty to provide an

> education for all its children, rich and poor, in every city and town of the Commonwealth at the public school level, and that this duty is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts.[205]

After acknowledging that the quality of education can be significantly impacted by level of fiscal support, the court concluded that

> we have declared today the nature of the Commonwealth's duty to educate its children. We have concluded the current state of affairs falls short of the constitutional mandate. We shall presume at this time the Commonwealth will fulfill its responsibility with respect to defining the specifics and the appropriate means to provide the constitutionally required education.[206]

Skeen v. State
Supreme Court of Minnesota
Decided August 20, 1993

The plaintiffs in *Sheen v. State* were suburban and adjacent rural school districts with lower than average property tax base to student ratios. The defendants, the state, were joined by the larger inner-ring suburban and Iron Range schools with property tax bases above the state average.[207] The supreme court noted that this case was different than many of the school finance cases in other states: it did not involve a challenge to the adequacy of education. The court noted that the plaintiffs conceded that all of the school districts involved met or exceeded the educational requirements of the state.[208]

In addressing the plaintiffs' challenge of the state's education article, the court ruled that the state funding system did not violate the state's constitution. Although it found that education is a fundamental right in Minnesota, the court, using strict scrutiny, concluded that

> Because the present system provides uniform funding to each student in the state in an amount sufficient to generate an adequate level of education which meets all state standards, the state has satisfied its constitutionally-imposed duty of creating a "general and uniform system of education." Therefore, the state's present system of education withstands strict scrutiny analysis.[209]

In addressing the part of the state's funding system that exceeds the necessary level to support an adequate education, the court used the rational basis test and found that the state's interest in encouraging local districts to supplement educational funding was constitutional. The court concluded, "Finally, cases which have struck down educational financing systems under state equal protection clauses have involved either wide disparity in funding or outright inadequacies, neither of which exists in the present case."[210]

Gould v. Orr
Supreme Court of Nebraska
Decided September 17, 1993

The Supreme Court of Nebraska stated that the plaintiffs, as appellants, "failed to state a cause of action, and because there appeared no reasonable possibility that the defect could be remedied, the appellants' petition should have been dismissed."[211] The court further described the flaw in the plaintiffs' case:

> 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 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. 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.[212]

Claremont School District v. Governor (Claremont I)
Supreme Court of New Hampshire
Decided December 30, 1993

In *Claremont School District v. Governor*, the Supreme Court of New Hampshire remanded the case back to a trial court, after the trial court had dismissed the case.[213] The high court limited its scope to whether the New Hampshire Constitution imposed an enforceable duty on the state to provide a constitutionally adequate education and to guarantee adequate funding.[214] To determine the meaning of the education clause, the high court reviewed the past

300 years of education history in New Hampshire. The court found that "since 1647, education has been compulsory in New Hampshire, and our constitution expressly recognizes education as a cornerstone of our democratic system. We must conclude, therefore, that in New Hampshire, a free public education is at the very least an important substantive right."[215] In remanding the case back to the trial court, the high court stated, "We are confident that the legislature and the Governor will fulfill their responsibility with respect to defining the specifics of, and the appropriate means to provide through public education, the knowledge and learning essential to the preservation of a free government."[216]

Bismarck Public School District v. State
Supreme Court of North Dakota
Decided January 24, 1994

Although a majority of the Supreme Court of North Dakota found that the state's method of funding public education was unconstitutional, the court had to uphold a lower court's dismissal of the case, due to the constitutional requirement to have a super majority in declaring statutory provisions unconstitutional.[217] The court explained that "because only three members of this court have joined in this opinion, the statutory method for distributing funding for primary and secondary education in North Dakota is not declared unconstitutional by a sufficient majority."[218]

Scott v. Commonwealth of Virginia
Supreme Court of Virginia
Decided April 15, 1994

The plaintiffs in *Scott v. Commonwealth of Virginia* challenged two sections of the Virginia Constitution, claiming that its system of funding public education violated Article I, § 15 and Article VIII, § 1. Article I, § 15 mandated "an effective system of education throughout the Commonwealth" and Article VIII, § 1 required "a system of free public elementary and

secondary schools for all children of school age throughout the Commonwealth."[219] The plaintiffs argued that the fundamental right to education was being violated due to funding disparities and "that unless these disparities were eliminated, the Commonwealth will never have an effective system of education."[220] After the court found that funding disparities did exist and that education was a fundamental right in Virginia, they noted, "the plaintiffs do not claim that they are being denied an educational program that meets the prescribed standards of quality."[221] The high court affirmed the dismissal of the plaintiffs challenge.[222]

Roosevelt Elementary School District v. Bishop
Supreme Court of Arizona
Decided July 21, 1994

In 1973, the Arizona Supreme Court, having used the rational basis test, declared the state's school funding system constitutional.[223] However, in *Roosevelt Elementary School District v. Bishop*, the high court reversed its reasoning and declared the state's funding system unconstitutional.[224] The high court criticized the *Shofstall* decision:

> We do not understand how the rational basis test can be used when a fundamental right has been implicated. They seem to us to be mutually exclusive. If education is a fundamental right, the compelling state interest test (strict scrutiny) ought to apply. . . . On the other hand, if the rational basis test properly applies, education is not a fundamental right. . . . We need not, however, resolve this resolve this conundrum because where the constitution specifically addresses the particular subject at issue, we must address that specific provision first.[225]

After noting the disparities between districts, defining the terms *general* and *uniform*, and defining the division of local and state responsibilities for educational support, the high court stated,

> The present system for financing public schools does not satisfy the constitutional mandate of a general and uniform school system. We emphasize that a general and uniform school system does not require perfect equality or identity. . . . While injunctive relief is inappropriate at this time, the districts are entitled to a declaration that the existing statutory scheme for the financing of public schools in Arizona fails to comply with Article XI, § 1 because it is itself the source of substantial nonuniformities. There

> are doubtless many ways to create a school financing system that complies with the constitution. As the representatives of the people, it is up to the legislature to choose the methods and combinations of methods from among the many that are available. Other states have already done so.[226]

Unified School District v. State
Supreme Court of Kansas
Decided December 2, 1994

The School District Finance and Quality Performance Act was enacted by the Kansas Legislature in 1992 for the purpose of eliminating existing inequities in public education and its funding[227] by reducing disparity among school districts.[228] Four different lawsuits were filed challenging the constitutionality of this Act, which were consolidated in *Unified School District v. State*.[229] The plaintiffs challenged the act on several grounds, including violations of the Fifth and Fourteenth Amendments to the U.S. Constitution and violations of the education and equal protection clauses of the Kansas Constitution.[230] In reviewing the case, the high court noted that its role was limited in scope: "The wisdom or desirability of the legislation is not before us. The constitutional challenge goes only to testing the legislature's power to enact the legislation."[231] The court further stated that "courts have no power to overturn a law enacted by the legislature within constitutional limitations, even though the law may be unwise, impolitic or unjust. The remedy in such a case lies with the people."[232]

In addressing the plaintiffs' challenge of the Fifth and Fourteenth Amendments, the high court stated that "one of the principal purposes of the Taking Clause is to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[233] The Act created a state wide district for the purpose of leveling taxes for education. The court ruled that all taxpayers received the benefit from the quality of or suffered from the lack of the education received by all Kansas students.[234] The court ruled that the legislature, through the will of the people, enacted a constitutional School

District Finance and Quality Performance Act. The court concluded by stating, "If experience establishes that the Act needs further revision, the legislature will have ample opportunity to do so."[235]

Tennessee Small School Systems v. McWherter (Small Schools II)
Supreme Court of Tennessee
Decided February 16, 1995

The State of Tennessee implemented a new state school funding program called the Basic Education Program (BEP) before the Supreme Court of Tennessee could rule on *Tennessee Small School Systems v. McWherter*.[236] The BEP called for full implementation of the school funding program over a period of six years and did not contain provisions for equalizing teachers' salaries. Plaintiffs in *Small Schools II* challenged these two concerns of BEP, claiming that they violated the equal protection provisions of the Tennessee Constitution.[237] The court stated,

> The omission of a requirement for equalizing teachers' salaries is a significant defect in the BEP. The rationale supporting the inclusion of the other important factors constituting the plan is equally applicable to the inclusion of teachers' salaries. Teachers, obviously, are the most important component of any education plan or system, and compensation is, at least, a significant factor determining a teacher's place of employment. The costs of teachers' compensation and benefits are the major item in every education budget. The failure to provide for the equalization of teachers' salaries, according to the BEP formula, puts the entire plan at risk functionally and, therefore, legally. The court accepts the State's insistence that substantial improvement in educational opportunities throughout the State under the BEP can best be accomplished incrementally and only if complete equalization of funding is accomplished incrementally also. The Court finds, however, that exclusion of teachers' salary increases from the equalization formula is of such magnitude that it would substantially impair the objectives of the plan; consequently, the plan must include equalization of teachers' salaries according to the BEP formula. The record does not support the plaintiffs' contention that funding for capital improvements should be given priority over other needs. The plan, as modified, is approved for the purposes of this proceeding. It appears that the BEP addresses both constitutional mandates imposed upon the State—the obligation to maintain and support a system of free public schools and the obligation that the system afford substantially equal education opportunities.[238]

The court found that "adequate funding is essential to the development of an excellent education program, and immediate equalization of funding would not necessarily insure immediate equalization of educational opportunities or a more excellent program."[239]

School Administrative District v. Commissioner
Supreme Judicial Court of Maine
Decided June 7, 1995

The plaintiffs in *School Administrative District v. Commissioner* challenged the state school funding scheme under the equal protection provision of the Maine Constitution.[240] The high court stated that "plaintiffs challenged the manner in which the available funds for education were distributed. They did not challenge the adequacy of the education in their school units."[241] Using strict scrutiny as the standard of review, the court upheld the state's finance system:

> The issue before us does not involve an inherently suspect classification, and we need not address whether education is a fundamental right under the Maine Constitution because the plaintiffs' argument fails even if education is such a fundamental right. Plaintiffs presented no evidence at trial that any disparities in funding resulted in their students receiving an inadequate education.[242]

Campaign for Fiscal Equity v. State
Court of Appeals of New York (CFE I)
Decided June 15, 1995

A non-profit group known as the Campaign for Fiscal Equity (CFE) challenged the State of New York public school funding system in court, claiming that the system violated the New York Constitution's education article, the New York and Federal Constitution's equal protection provisions, the antidiscrimination clause of the state constitution, Title VI of the U.S. Civil Rights Act of 1964, and the U.S. Department of Education's regulations implementing Title VI.[243] The high court stated that it would be ruling on the motion to dismiss and not on the merits of the state's funding system.[244] The high court first looked at the meaning of the state's

education article and concluded, "The Article requires the State to offer all children the opportunity of a sound basic education." The court dismissed all of the plaintiffs' allegations except the claims under the education article[245] and the Title VI. The court held that these claims could proceed.[246]

R.E.F.I.T. V. Cuomo
Court of Appeals of New York
Decided June 15, 1995

Reform Educational Financing Inequities Today (R.E.F.I.T.) were plaintiffs in another case in which the high court of New York addressed a motion to dismiss challenges to the state's school funding system. Plaintiffs alleged violations of the New York Constitution's education article and New York and U.S. equal protection guarantees.[247] In ruling on the education article challenge, the court stated,

> Plaintiffs in this action do not claim that students in their districts are receiving something less than a sound basic education. Rather their pleadings and supporting papers demonstrate that there now exists a greater disparity in the amount of money spent per pupil in property-poor as compared to property-rich school districts than the disparity in existence at the time *Levittown* was decided. . . . The Education Article does not by its express terms contain an egalitarian component. Nor does a study of history of the Article reveal an intent to preclude disparities in the funding for education or in relative educational opportunities among the State's school districts.[248]

The court further stated that

> In *Levittown* and again in *Campaign for Fiscal Equity v. State*, . . . we have made clear that the State educational financing system will be upheld if it is supported by a rational basis. The desire to provide local control of education provides such basis. As plaintiffs' other equal protection arguments are dependent upon this Court adopting a more exacting standard, those equal protection challenges must also fail.[249]

The court concluded, "Finally, rather than affirm the Appellate Division's broad and definitive declaration of the constitutionality of the State educational financing system, we modify to declare that the school financing scheme of the State of New York has not been shown in this case to be unconstitutional."[250]

City of New York v. State
Court of Appeals of New York
Decided June 15, 1995

The plaintiffs in *City of New York v. State* were the City of New York, Board of Education of the City of New York, the Mayor, and the Chancellor of the City School District.[251] The Court of Appeals of New York dismissed the plaintiffs' claims that the public funding of schools violated the State's Education Article, the equal protection clauses of the both the state and federal constitutions, and Title VI of the Civil Rights Act of 1964. The plaintiffs alleged that these violations created a disparate impact on racial and ethnic minorities.[252] The high court stated that "municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation."[253] The court further stated, "Constitutionally as well as a matter of historical fact, municipal corporate bodies—counties, towns, and school districts—are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents."[254]

In addressing the plaintiffs' argument that the court's decision in *Levittown* created a controlling precedent, the high court replied,

> As the municipal plaintiffs have virtually conceded, . . . when *Levittown* reached the Court of Appeals, the State did not appeal on the capacity to sue issue. The issue of lack of capacity to sue does not go the jurisdiction of the curt, as is the case when plaintiffs lack standing. Rather, lack of capacity to sue is a ground for dismissal which must be raised by motion and is otherwise waived.[255]

The court explained that because the state failed to raise the motion in Levittown, the state waived the issue of lack of capacity and that the court's decision was not a precedent for the plaintiffs in *City of New York v. State*.[256] The high court affirmed dismissal of all of the plaintiffs' claims.[257]

City of Pawtucket v. Sundlun
Supreme Court of Rhode Island
Decided July 20, 1995

The history of education in Rhode Island dates back to the "1640s when it is believed that Newport was the first town in the English Colonies to establish a public school." The charter of the Colony of Rhode Island was granted in 1633 and remained in effect until the State Constitution was established in 1843.[258] The plaintiffs in *City of Pawtucket* alleged that the public school funding violated the state's education clause and equal protection provision.[259] In reviewing the history of education and the education clause, the court found that

> Since the adoption of the constitution, this court has consistently held that the powers of both the Crown and Parliament reside in the Legislature, unless that power has been subsumed by the Constitution of the United States or has been removed from the General Assembly by the Constitution of the State of Rhode Island. . . . The power of the General Assembly is, therefore, plenary and unlimited, save for the textual limitations to that power that are specified in the Federal or State Constitutions"[260]

The State of Rhode Island held a constitutional convention in 1986. The delegates of the convention had ample opportunities to address the education provision and chose not to.[261] The court noted that the delegates must have known of the school funding litigation across the county. The convention occurred 13 years after the United States Supreme Court's ruling in *San Antonio Independent School District v. Rodriquez*.[262] The court concluded, "Because the Legislature is endowed with virtually unreviewable discretion in this area, plaintiffs should seek their remedy in that forum rather than in the courts."[263] In ruling on the equal protection challenge, the court used the rational basis test of the federal model: "the current financing system is rationally related to legitimate state interests such as balancing competing needs and encouraging local participation in education."[264]

Campbell County School District v. State
Supreme Court of Wyoming
Decided December 6, 1995

In *Campbell*, five school systems, along with the Wyoming Education Association, became plaintiffs, while 23 school districts joined the state as defendants. The plaintiffs challenged the state's school funding system, claiming that the five components of the system[265] violated the equal protection provision and the education article of the Wyoming Constitution.[266] The Supreme Court of Wyoming agreed with the plaintiffs and declared all of these components unconstitutional: "The constitution requires the legislature to create and maintain a system providing an equal opportunity to a quality education. That system must be a function of state wealth."[267]

In addressing the equal protection challenge, the court used strict scrutiny: "Because the right to an equal opportunity to a proper public education is constitutionally recognized in Wyoming, any state action interfering with that right must be closely examined."[268] The court further stated that "the state must establish its interference with that right is forced by some compelling state interest and its interference is the least onerous means of accomplishing that objective."[269] Turning to the plaintiffs' challenge of the state's education article, the court declared,

> Substantively, the constitution uses terms commanding the legislature to provide and fund an education system which is a quality "appropriate for the times." . . . Supporting an opportunity for a complete, proper, quality education is the legislature's paramount priority; competing priorities not of constitutional magnitude are secondary, and the legislature may made for elementary and secondary education. As nearly as possible, and making allowances for local conditions, special needs and problems, and educational cost differential, the education system must achieve financial parity.[270]

The court concluded:

> [T]he state financed basket of quality educational goods and services available to all school-age youth must be nearly identical from district to district. If a local district then

> wants to enhance the content of that basket, the legislature can provide a mechanism by which it can be done. But first, before all else, the constitutional basked must be filled. . . . We shall provide a reasonable period of time for the legislature to achieve constitutional compliance.[271]

Coalition for Adequacy and Fairness v. Chiles
Supreme Court of Florida
Decided June 27, 1996

The plaintiffs' challenges in *Coalition for Adequacy and Fairness v. Chiles* were dismissed, and the dismissal was upheld by the Florida Supreme Court. The court contended that the plaintiffs were raising a nonjusticiable political question and had concerns about the separation of powers doctrine.[272] In addressing the separation of powers doctrine, the high court stated that "in view of our obligation to respect the separation of powers doctrine, an insufficient showing has been made to justify judicial intrusion."[273] Concerning whether the plaintiffs were raising a nonjusticiable political question, the court used the six criteria set forth in the decision of the United States Supreme Court in *Baker v. Carr*.[274] The Supreme Court of Florida concluded,

> While we stop short of saying "never," [plaintiffs] failed to demonstrate in their allegations . . . an appropriate standard for determining "adequacy" that would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature, both generally (in determining appropriations) and specifically (in providing by law) for a legislature has been vested with enormous discretion by the Florida Constitution to determine what provision to make for an adequate and uniform system of free public schools. . . . [Plaintiffs] have failed to demonstrate in their allegations a violation of the legislature's duties under the Florida Constitution.[275]

Sheff v. O'Neill
Supreme Court of Connecticut
Decided July 9, 1996

The Supreme Court of Connecticut declared that education was a fundamental right and that the system of funding public education violated the constitutional requirement that provides equal educational opportunity in *Horton v. Meskill*.[276] In a split decision of 4-3 in *Sheff v.*

O'Neill, the high court ruled in favor of the plaintiffs' claims that permitting the existence of racial and ethnic isolation in public schools was violating the equal protection opportunity clause.[277] The court stated, "The issue presented by this case is whether the state has fully satisfied its affirmative constitutional obligation to provide a substantially equal educational opportunity if the state demonstrates that it has substantially equalized school funding and resources."[278]

With a 92.4% minority student population in Hartford's public schools, the court found that "a majority of the children who constitute the public school population in Hartford come from homes that are economically disadvantaged, that are headed by single parent, and in which language other than English is spoken."[279] The high court noted that "according to the findings of the trial court, poverty, not race or ethnicity, is the principal causal factor in the lower education achievement of Hartford students."[280] In addressing the plaintiffs' arguments, the court found,

> No statue, no common law precedent, no federal constitutional principle provides this state's schoolchildren with a right to a public education that is not burdened by de facto racial and ethnic segregation. The plaintiffs make no such claim. The issue they raise is whether they have stated a case for relief under our state constitution, which was amended in 1965 to provide both a right to a free public elementary and secondary education . . . and a right to protection from segregation. This issue raises questions that are difficult; the answers that we give are controversial. We are, however, persuaded that a fair reading of the text and the history of these amendments demonstrates a deep and abiding constitutional commitment to a public school system that, in face and in law, provides Connecticut schoolchildren with a substantially equal educational opportunity. A significant component of that substantially equal educational opportunity is access to a public school education that is not substantially impaired by racial and ethnic isolation.[281]

In ruling for the plaintiffs, the court granted declaratory relief only but retained jurisdiction, if needed, for future consequential relief.[282] The court concluded,

> In staying our hand, we do not wish to be misunderstood about the urgency of finding an appropriate remedy for the plight of Hartford's public schoolchildren. Every passing day denies these children their constitutional right to a substantially equal educational opportunity. Every passing day shortchanges these children in their ability to learn to contribute to their own well-being and to that of this state and nation. We direct the

> legislature and the executive branch to put the search for appropriate remedial measures at the top of their respective agendas. We are confident that with energy and good will, appropriate remedies can be found and implemented in time to make a difference before another generation of children suffers the consequences of a segregated public school education. The defendants counsel us, however, to stay our hand entirely. They claim that no judicial mandate can properly take into account the daunting, if not intractable, difficulties of crafting a remedial solution to the problem of de facto racial and ethnic segregation in the public schools. . . . Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.[283]

Committee for Educational Rights v. Edgar
Supreme Court of Illinois
Decided October 18, 1996

The Supreme Court of Illinois affirmed a lower court's decision to dismiss the plaintiffs' challenges in *Committee for Educational Rights v. Edgar*.[284] The plaintiffs argued that the state's system of funding education allowed vast disparities between districts based on property tax base and, thus, was violating the state's constitutional provision of equal protection and the education clause.[285] In addressing the educational article challenge, the court stated that "the framers of the 1970 Constitution had considered and rejected specific proposals for a constitutional provision designed to reduce funding disparities among districts by limiting the amount of funds that could be raised by local property taxes."[286] The court stated that the new constitution "does not mandate equal educational benefits and opportunities as the constitutionally required means of establishing and maintaining an efficient system of free public schools."[287]

The court, in addressing the plaintiffs' equal protection argument, stated that

> while education is certainly a vitally important government function, . . . it is not a fundamental right for equal protection purposes, thus the appropriate standard of review is the rational basis test. . . . We conclude that the State's system of funding public education is rationally related to the legitimate State goal of promoting local control.[288]

In concluding, the high court stated:

> Our decision in no way represents an endorsement of the present system of financing public schools in Illinois, nor do we mean to discourage plaintiffs' efforts to reform the

system. However, for the reasons explained above, the process of reform must be undertaken in the legislative forum rather than in the courts.[289]

Matanuska-Susitna v. State
Supreme Court of Alaska
Decided January 31, 1997

In Alaska, the state is divided into three entities: cities, boroughs, and lands that lie outside boroughs, known as Regional Educational Attendance Areas (REAA). Cities and boroughs have tax bases that can support local government functions. REAA are divided into districts; however, they function as one unorganized borough. The tax base in the REAA districts is very limited.[290]

Plaintiffs in *Matanuska-Susitna v. State* [291]were city and borough districts. They claimed that the state method of funding schools created inequities, due to the disparities between local contributions and state aid. The high court concluded, "No evidence indicates that altering the amount a district contributes to basic need will alter the overall amount of funding available. As noted by the State, 'the funding level remains constant regardless of the source of revenue.'"[292] The court further stated, "REAAs are constitutionally unable to tax . . Given the differences in constitutional status between REAAs and borough and city districts, we hold that the legislative decision to exempt REAAs from the local contribution requirement . . . was substantially related to the legislature's goal of ensuring an equitable level of education opportunity across the state."[293]

Brigham v. State
Supreme Court of Vermont
Decided February 5, 1997

The Supreme Court of Vermont declared that the state's method of funding public education violated the state's education article and the equal protection provision of the state constitution in *Brigham v. State*.[294] The court stated that "public education revenues raised

through local property taxes represented over 60% of the total cost of public education, one of the highest local shares in the nation":[295]

> While we recognize that equal dollar resources do not necessarily translate equally in effect, there is no reasonable doubt that substantial funding differences significantly affect opportunities to learn. To be sure, some school districts may manage their money better than others, and circumstances extraneous to the educational system may substantially affect a child's performance. Money is clearly not the only variable affecting educational opportunity, but it is one that government can effectively equalize.[296]

In addressing the constitutional claims, the court explained by citing *Serrano v. Priest*,

> We are simply unable to fathom a legitimate governmental purpose to justify the gross inequities in educational opportunities evident from the record. . . . The State has not explained, however, why the current funding system is necessary to foster local control. Regardless of how the state finances public education, it may still leave the basic decision-making power with the local districts. Moreover, insofar as "local control" means the ability to decide that more money should be devoted to the education of children within a district, we have seen—as another court once wrote—that for poorer districts "such fiscal freewill is cruel illusion."[297]

The court stated that the school funding system violated the right to equal education opportunities under Chapter II, § 68 and Chapter I, Article 7 of the Vermont Constitution. The high court concluded, "Finally, we underscore the limited reach of our holding. Although the Legislature should act under the Vermont Constitution to make educational opportunity available on substantially equal terms, the specific means of discharging this broadly defined duty is properly left to its discretion."[298]

DeRolph v. State
Supreme Court of Ohio (DeRolph I)
Decided March 24, 1997

The high court of Ohio declared the system of funding public schools unconstitutional.[299] The court noted that "the 'formula amount' has no real relation to what it actually costs to educate a pupil"[300] and that "the cost-of-doing-business factor assumes that costs are lower in rural districts than in urban districts."[301] In addition to recognizing the deplorable conditions of

many schools, the court also noted "the limited curricula, class sizes that exceed state law, insufficient availability of textbooks leading to lottery for allocating textbooks to students, and inadequate supplies forcing schools to ration such necessities as paper, chalk art supplies, paper clips and even toilet paper"[302] and concluded,

> Obviously, state funding of school districts cannot be considered adequate if the districts lack sufficient funds to provide their students a safe and healthy learning environment. In addition to deteriorating buildings and related conditions, it is clear from the record that many of the school districts throughout the state cannot provide the basic resources necessary to educate our youth.[303]

Leandro v. State
Supreme Court of North Carolina
Decided July 24, 1997

In *Leandro v. State*, the Supreme Court of North Carolina had two sets of plaintiffs, who presented arguments from two extreme ends of the state funding system. The original plaintiffs, the poorer rural school districts, claimed lack of funds created inadequate facilities, larger class sizes, less qualified teachers, lack of books, poorer media centers, and less technology than that available in larger, wealthier districts.[304] Joining the poorer rural districts as plaintiffs, larger and wealthier urban districts claimed that the system of funding schools "does not sufficiently take into consideration the burdens faced by their urban school districts which must educate a large number of students with extraordinary educational needs." These needs included "a large number of students who require special education services, special English instruction, and academically gifted programs."[305] The larger urban districts stated that "deficiencies in physical facilities and educational materials are particularly significant in their systems because most of the growth in North Carolina's student population is taking place in urban areas."[306] They continued by explaining that "because urban counties have high level of poverty, homelessness, crime, unmet health care needs, and unemployment which drain their fiscal resources, they

cannot allocate as large a portion of their local tax revenues to public education as can the more rural poor districts." They asked the court to consider that "the state's singling out of certain poor rural districts to receive supplemental state funds, while failing to recognize comparable if not greater needs in the urban school districts, is arbitrary and capricious in violation of the North Carolina Constitution and state law."[307] In remanding the case back to the trial court, the high court directed the lower court that, before granting relief, the plaintiffs' claims must be "supported by substantial evidence."[308] The court concluded, "Ironically, if plaintiff-intervenors' argument should prevail, they would be entitled to an unequally large per-pupil allocation of state school funds for their relatively wealthy urban districts."[309]

Claremont v. Governor (Claremont II)
Supreme Court of New Hampshire
Decided December 17, 1997

The plaintiffs in *Claremont II* asked that the Supreme Court of New Hampshire grant declaratory judgment that the state system of public school funding violated the New Hampshire Constitution.[310] The court stated,

> The present system of financing elementary and secondary public education in New Hampshire is unconstitutional. To hold otherwise would be to effectively conclude that it is reasonable, in discharging a State obligation, to tax property owners in one town or city as much as four times the amount taxed to others similarly situated in other towns or cities. This is precisely the kind of taxation and fiscal mischief from which the framers of our State Constitution took strong steps to protect our citizens. . . . We hold that the property tax levied to fund education is, by virtue of the State's duty to provide a constitutionally adequate public education, a State tax and as such is disproportionate and unreasonable in violation of . . . the New Hampshire Constitution. Having so decided, we need not reach the plaintiffs' other claims.[311]

In addressing the issue of proportionality, the court looked to a precedent that was set in 1880: "In order . . . that the tax rate should be proportional, . . . it is required that the rate shall be the same throughout the taxing district—that is, if the tax is for the general purposes of the state, the rate should be the same throughout the state; if for the county, it should be uniform

throughout the county."[312] The court concluded, "We find the purpose of the school tax to be overwhelmingly a State purpose and dispositive of the issue of the character of the tax. . . . The local school district, an entity created by the legislature almost two centuries ago, exists for the public's benefit, to carry out the mandates of the State's education law."[313] The court further stated,

> Our society places a tremendous value of education. Education provides the key to individual opportunities for social and economic advancement and forms the foundation for our democratic institutions and our place in the global economy. The very existence of government was declared by the framers to depend upon the intelligence of its citizens.[314]

In addressing the equal protection argument, the court stated, "First and foremost is the fact that our State Constitution specifically charges the legislature with the duty to provide public education. . . . This fact alone is sufficient in our view to accord fundamental right status to the beneficiaries of the duty." The court concluded, "We are confident that the legislature and the Governor will act expeditiously to fulfill the State's duty to provide for a constitutionally adequate public education and to guarantee adequate funding in a manner that does not violate the State Constitution."[315]

Anderson v. State
Supreme Court of Vermont
Decided December 22, 1998

The Vermont Legislature created a new public school funding system due to the Supreme Court of Vermont decision in *Brigham v. State*. This new funding system generated a "Robin Hood" effect: some funds collected on the local district level by local voted education property taxes would be "redistributed to property-poor districts to equalize the yield."[316] The plaintiffs' claimed, "The voters will not approve spending beyond the level of the state support grant because of the high tax rate required and the knowledge that part of the tax revenues will go to

other school district." Plaintiffs contended that "as a result, they are deprived of their constitutional right to equal educational opportunities and equal educational funding opportunities."[317] The State argued that the plaintiffs' claims were "premature and speculative,"[318] and the high court agreed.[319] The court declared, "In the absence of an actual controversy, any decision of the court would be merely an advisory opinion and thus beyond the authority vested in the judicial branch by the constitution." The court dismissed the plaintiffs' claims on the grounds that the plaintiffs had failed to present any actual or justiciable controversy.[320]

Abbeville v. State
Supreme Court of South Carolina
Decided April 22, 1999

In addressing the plaintiffs' claims, the Supreme Court of South Carolina stated, "Unlike similar suits brought in other states, appellants do not seek 'equal' state funding since they already receive more than wealthier districts, but instead allege that the funding results in an inadequate education."[321] The court clarified that "essentially, they allege that the system is underfunded, resulting in a violation of the State Constitution's education clause."[322] The court dismissed the federal equal protection claims, citing the U.S. Supreme Court decision in *Rodriquez*. As far as the state equal protection claims, the court found "A neutral law having a disparate impact violates equal protection only if it is drawn with discriminatory intent. . . . There is no claim of discriminatory intent here."[323] The court noted, "The novel issue in this case involves the education clause of the state constitution."[324]

An early trial court declared that "the education clause imposes no qualitative standards, and that absent an allegation that there was no system of free public schools open to all children in the state, no claim was stated under the education clause."[325] The trial court concluded that

"judicial restraint, separation of powers, and/or the political question doctrine prevented consideration of the education clause claim."[326] However, the high court stated, "It is the duty of this Court to interpret and declare the meaning of the Constitution. . . . Accordingly, the circuit court erred in using judicial restraint, separation of powers, and the political question doctrine as the bases for declining to decide the meaning of the education clause."[327] The court declared,

> We will not accept this invitation to circumvent our duty to interpret and declare the meaning of this clause. . . . We hold today that the South Carolina Constitution's education clause requires the General Assembly to provide the opportunity for each child to receive a minimally adequate education. . . . We define this minimally adequate education required by our Constitution to include providing students adequate and safe facilities in which they have the opportunity to acquire: 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and 3) academic and vocational skills. . . . We recognize that we are not experts in education, and we do not intend to dictate the programs utilized in our public schools. Instead, we have defined, within deliberately broad parameters, the outlines of the constitution's requirements of minimally adequate education. Finally, we emphasize that the constitutional duty to ensure the provision of a minimally adequate education to each student in South Carolina rests on the legislative branch of government. We do not intend by this opinion to suggest to any party that we will usurp the authority of that branch to determine the way in which educational opportunities are delivered to the children of our State. We do not intend the courts of this State to become super-legislatures or super-school boards.[328]

Marrero v. Commonwealth
Supreme Court of Pennsylvania
Decided October 1, 1999

In a second attempt, plaintiffs challenged the education article of the state constitution. Earlier, in *Danson v. Casey*, the court held that plaintiffs' claims were insufficient to constitute a valid cause of action.[329] Again, the Supreme Court of Pennsylvania ruled in *Marrero v. Commonwealth*, affirming a lower court ruling that the plaintiffs' claims presented a nonjusticiable political question. The plaintiffs argued that the system of funding education violated the education article of the state constitution, which called for the General Assembly to

"provide for the maintenance and support of a thorough and efficient system of public education."[330] The high court referred to its decision in *Sweeny v. Tucker*:

> Ordinarily, the exercise of the judiciary's power to review the constitutionality of legislative action does not offend the principle of separation of powers. There may be certain powers which our Constitution confers upon the legislative branch, however, which are not subject to judicial review. A challenge to the Legislature's exercise of a power which the Constitution commits exclusively to the Legislature presents a nonjusticiable "political question."[331]

The Supreme Court of Pennsylvania concluded, "These matters which are exclusively within the purview of the General Assembly's powers, and they are not subject to intervention by the judicial branch of our government.[332]

DeRolph v. State
Supreme Court of Ohio (DeRolph II)
Decided May 11, 2000

After the 1977 *DeRolph I* decision, the legislature changed the state method of funding education.[333] In *DeRolph II*, the high court of Ohio was asked to review the state's funding system again.[334] The plaintiffs petitioned the court to (a) declare that education was a fundamental right under the Ohio Constitution, (b) specify what programs and services must be provided for students at every level, (c) retain jurisdiction and appoint a special master to oversee a settlement conference, and (d) issue an interim funding order setting the state per pupil foundation level at $5,051 and requiring a minimum of $1 billion per fiscal year for school facilities funding.[335]

In defining a "thorough and efficient" education, the court explained,

> The definition of "thorough and efficient" is not static; it depends on one's frame of reference. What was deemed thorough and efficient when the state's Constitution was adopted certainly would not be considered thorough and efficient today. Likewise, an education system that was considered thorough and efficient twenty-five years ago may not be so today. Moreover, it is impossible to generate an all-inclusive list that specifically enumerates every possible component of a thorough and efficient system. In light of this, we offer the following guidance: A thorough system means that each and

> every school district has enough funds to operate. An efficient system is one in which each and every school district in the state has an ample number of teachers, sound buildings that are in compliance with state fire and building codes, and equipment sufficient for all students to be afforded an educational opportunity.[336]

After reviewing the new funding system, the court concluded that the system of funding public education did not fulfill the Constitutional requirements. However, the court stated, "We are confident that, given the additional opportunity presented by this extension of time, the General Assembly and the Governor will continue to deliberate over the many obstacles they face, and will continue to seek solutions to these complex problems."[337] The court identified seven areas of concern for the state to resolve: (a) continued reliance on local property taxes; (b) the basic aid formula may not in fact reflect the funding required to provide an adequate education; (c) continuing problems with decaying school buildings and funding of repairs and new construction; (d) the need for many districts to seek emergency funding to pay for unfunded state and federal mandates or daily expenses; (e) unfunded mandates in the revised funding system; (f) the problem of "phantom revenue" (funding expected but not realized); and (g) the need for the establishment of strict, academic guidelines throughout the state.[338]

Abbott v. Burke
Supreme Court of New Jersey
Decided May 25, 2000

The Speaker of the General Assembly of New Jersey requested clarification from the New Jersey Supreme Court on several questions. First, must the state fully fund school construction in districts previously identified as special needs districts, or may the State require these districts to contribute a fair share for construction cost? The court answered this question as follows: "The State is required to fund all of the cost of necessary facilities remediation and construction in the Abbott districts."[339] The Speaker asked the court to determine whether a poorer school district could be removed from the Abbott districts if the district became property

and income rich. The court concluded, "When a district no longer possesses the requisite characteristics for Abbott district status . . . the State Board and the Commissioner may take appropriate action in respect of that district."[340]

Vincent v. Voight
Supreme Court of Wisconsin
Decided July 11, 2000

In *Vincent v. Voight*, the "plaintiffs must meet a higher standard in challenging legislative provisions, rather than the more lenient proof by a preponderance of the evidence standard due to negative precedents of prior high court decisions."[341] The plaintiffs claimed that the State's system of funding public education violated the equal protection provision and the education clause of the Wisconsin Constitution.[342] The court noted that the plaintiffs' evidence, "however meticulously gathered, fails to demonstrate that any children lack a basic education in any school district."[343] The court further stated, "There is no evidence . . . of poor standardized test scores, college entrance rates, or the like."[344] The court noted that the constitution only requires that each child receive an equal opportunity for a sound basic education.[345] Under the Wisconsin Constitution, the court determined that "children had a fundamental right to a sound basic education, not absolute equality in expenditures."[346] The Supreme Court of Wisconsin concluded,

> An equal opportunity for a sound basic education acknowledges that students and districts are not fungible and takes into account districts with disproportionate numbers of disabled students, economically disadvantaged students, and students with limited English language skills. So long as the legislature is providing sufficient resources so that school districts offer students the equal opportunity for a sound basic education as required by the constitution, the state school finance system will pass constitutional muster.[347]

Opinion of the Justices
Supreme Court of New Hampshire
Decided December 7, 2000

The Supreme Court of New Hampshire ruled in *Claremont I* on the right of every child to an adequate education and the funding of an adequate education.[348] In *Claremont II*, the court held that education was a fundamental right, that the school taxing district was the entire state, and that the funding system was unconstitutional.[349] The New Hampshire Senate requested the high court's direction on two questions: (a) whether a proposed funding system satisfied the requirements of the education provisions of the New Hampshire Constitution and (b) whether the proposed funding system violated any other parts of the New Hampshire Constitution.[350]

In addressing the Senate's questions, the high court responded to the first question and declined to answer the second.[351] The court advised,

> The bill contains legislative finds which acknowledge that its proposed funding mechanism would rely, in part, upon local property taxes to pay for some of the cost of an adequate education. These findings directly contradict the mandate of [the New Hampshire education article] which imposes upon the State the exclusive obligation to fund a constitutionally adequate education. The State may not shift any of this constitutional responsibility to local communities as the proposed bill would do.[352]

The court concluded "that this court has never directed or required the selection of a particular funding mechanism. If the legislature choose to use a property tax, however, the tax must be equal and proportional across the State."[353]

DeRolph v. State
Supreme Court of Ohio (De Rolph III)
Decided September 6, 2001

In *DeRolph I*, the court ruled that the Ohio system of funding education was unconstitutional. In *DeRolph II*, the court gave the state more time to comply with its earlier ruling, noting the court's concern with the state's reliance on local property taxes.[354] In *DeRolph III*, the court stated that if the state followed the court's prior decision, the state funding system

would be constitutional, the state could use a joint state-local financial support, and some use of property tax would be permitted.[355] The court noted the struggle between the justices:

> Despite our differences . . . we all agree upon the fundamental importance of education to the children and citizens of this state. Educated, informed citizens sustain the vitality of our democratic institutions. We differ little in support of the desired ends so trenchantly recited by Justice Sweeney when he observed that our forefathers, drafting our state Constitution, "carried within them a deep-seated belief that liberty and individual opportunity could be preserved only by educating Ohio's citizens."[356]

The court summarized,

> we observe that the state has chosen to retain a foundation program of funding primary and secondary public education. We find that, having so elected, it must, in order to meet the requirements of *DeRolph I* and *DeRolph II*, formulate the base cost of providing an adequate education by using all school districts meeting twenty of twenty-seven performance standards as set forth by the General Assembly in R.C. 3317.012(B0 (1) (a) through (aa), without adjustments to exclude districts based on wealth screens, without rounding adjustments to include additional lower-spending districts, and without use of the "echo effect" adjustment, beginning July 1, 2001. In addition, the parity aid program established by the General Assembly must be fully funded no later than July 1, 2003. With full implementation of these modifications to the funding plan adopted by the General Assembly the plan will meet the test for constitutionality created in *DeRolph I* and *DeRolph II*.[357]

Claremont v. Governor (Claremont III)
Supreme Court of New Hampshire
Decided April 11, 2002

In *Claremont I*, the court found that the state school funding system was unconstitutional and that each child was entitled to an adequate education with adequate funding.[358] In *Claremont II*, the court declared that education was a fundamental right and that the school tax district was the entire state.[359] In *Claremont III*, high court was presented with two questions: (a) whether the State's obligation to provide a constitutionally adequate education required the State to provide standards of accountability and (b) to what extent statutory exemptions for financial hardship excused compliance with minimum educational standards established by the State.[360] In addressing both questions, the court replied with a 3-2 decision that "accountability is an

essential component of the State's duty and that the existing statutory scheme has deficiencies that are inconsistent with the State's duty to provide a constitutionally adequate education."[361] The court concluded, "We hold that because of deficiencies in the system as set out in this opinion, the State has not met its constitutional obligation to develop a system to ensure the delivery of a constitutionally adequate education."[362]

Campaign for Fiscal Equity v. State Supreme Court,
Appellate Division, New York (CFE II)
Decided June 25, 2002

This case was not decided by the Supreme Court of New York; it was a decision of the state's appellate level court. A trial court ruled in favor of the plaintiffs[363] and the state appealed. The appellate court overturned the trial court's decision.[364] The court held that the "sound basic education" standard adopted by the Supreme Court of New York in *CFE I* "requires the State to provide a minimally adequate educational opportunity, but not . . . to guarantee some higher, largely unspecified level of education, as laudable as that goal might be."[365]

Tennessee Small School Systems v. McWherter (Small Schools III)
Supreme Court of Tennessee
Decided October 8, 2002

The Supreme Court of Tennessee declared the state school funding system violated the State's Constitution in *Small Schools I*. Before the high court could rule in *Small Schools I*, the state legislature enacted the Basic Education Program (BEP). In *Small Schools II*, the court held that the BEP must include the equalization of teachers' salaries. In *Small Schools III*, the plaintiffs asked the high court to decide "whether the State's current method of funding salaries for teachers . . . equalizes teachers' salaries 'according to the BEP formula' or whether it fails to do so and violates equal protection by denying students substantially equal educational opportunities."[366] The court found that

> the salary equity plan . . . does not equalize teachers' salaries according to the BEP formula and contains no mechanism for cost review of teachers' salaries, unlike the BEP conditionally approved in *Small Schools II*. We further find that no rational basis exists for structuring a basic education program consisting entirely of cost-driven components while omitting the cost of hiring teachers, the most important component of any education plan and a major part of any education budget. Therefore, the lack of teacher salary equalization in accordance with the BEP formula continues to be a significant constitutional defect in the current funding scheme. Accordingly, we hold that the salary equity plan fails to comply with the State's constitutional obligation to formulate and maintain a system of public education that affords a substantially equal educational opportunity to all students.[367]

Lake View v. Huckabee
Supreme Court of Arkansas
Decided November 21, 2002

The plaintiffs in *Lake View v. Huckabee*, a rural school district with 94% free and reduced lunch and a primarily African-American student population, claimed the state school funding system violated the state's constitution. The Supreme Court of Arkansas agreed with the plaintiffs and found the system unconstitutional.[368] The court noted that Lake View

> has one uncertified mathematics teacher who teaches all high school mathematics courses. He is paid $10,000 a year as a substitute teacher and works a second job as a school bus driver where he earns $5,000 a year. He has an insufficient number of calculators for his trigonometry class, too few electrical outlets, no compasses and one chalkboard, a computer lacking software and a printer that does not work, an inadequate supply of paper, and a duplicating machine that is overworked. Lake View's basketball team does not have a complete set of uniforms, while its band has no uniforms at all. The college remediation rate for Lake View students is 100 percent.[369]

The high court went on to note that

> this court is troubled by four things: 1) the Department of Education has not conducted an adequacy study [as ordered by the General Assembly in 1995]; 2) despite this court's holding in [*DuPree*] that equal opportunity is the touchstone for a constitutional system and not merely equalized revenues, the State has only sought to make revenues equal; 3) despite Judge Imber's 1994 order to the same effect, neither the Executive branch nor the General Assembly have taken action to correct the imbalance in ultimate expenditures; and 4) the State, in the budgeting process, continues to treat education without the priority and the preference that the constitution demands. Rather, the State has continued to fund the schools in the same manner, although admittedly taking more steps to equalize revenues. This being said, perhaps the recalcitrance of the State to reform the school-funding system is reason enough to adopt the heightened standard of strict

> scrutiny. Nevertheless, because we conclude that the clear language of Article 14 imposes upon the State an absolute constitutional duty to educate our children, we conclude that it is unnecessary to reach the issue of whether a fundamental right is also implied. Many states, as we have already discussed, appear to get lost in a morass of legal analysis when discussing the issue of fundamental right and the level of judicial scrutiny. This court is convinced that much of the debate over whether education is a fundamental right is unnecessary. The critical point is that the State has an absolute duty under our constitution to provide an adequate education to each school child. Like the Vermont and Arizona Supreme Courts, we are persuaded that the duty on the part of the State is the essential focal point of our Education Article and that performance of that duty is an absolute constitutional requirement [citing *Brigham* and *Roosevelt*]. When the State fails in that duty, which we hold today is the case, our entire system of public education is placed in legal jeopardy. Should the State continue to fail in the performance of its duty judicial scrutiny in subsequent litigation will, no doubt, be as exact as it has been in the case before us. For the foregoing reasons, we conclude that the State has not fulfilled its constitutional duty to provide the children of this state with a general, suitable, and efficient school-funding system. Accordingly, we hold that the current school-funding system violates the Education Article of the Arkansas Constitution.[370]

The court declared,

> Because we hold that the current school-funding system is unconstitutional, our schools are now operating under a constitutional infirmity. Other supreme courts facing this dilemma have either remanded the matter to the trial courts or stayed the court's mandate in order to give the General Assembly and Executive Branch an opportunity to cure the deficiencies. . . . Clearly, the public schools of this state cannot operate under this constitutional cloud. Were we not to stay our mandate in this case, every dollar spent on public education in Arkansas would be constitutionally suspect. That would be an untenable situation and would have the potential for throwing the entire operation of our public schools into chaos. We are strongly of the belief that the General Assembly and the Department of Education should have time to correct this constitutional disability in public school funding and time to chart a new course for public education in this state. Accordingly, we stay the issuance of our mandate in this case until January 1, 2004. This will give the General Assembly an opportunity to meet in General Session and the Department of Education time to implement appropriate changes. On January 1, 2004, the stay will terminate, and this case will be over. Any subsequent challenge will constitute separate litigation. We emphasize, once more, the dire need for changing the school-funding system forthwith to bring it into constitutional compliance. No longer can the State operate on a "hands off" basis regarding how state money is spent in local school districts and what the effect of that spending is. Nor can the Sate continue to leave adequacy and equality considerations regarding school expenditures solely to local decision-making. This court admits to considerable frustration on this score, since we had made our position about the State's role in education perfectly clear in the *DuPree* case. It is not this court's intention to monitor or superintend the public schools of this state. Nevertheless, should constitutional dictates not be followed, as interpreted by this

> court, we will have no hesitancy in reviewing the constitutionality of the state's school-funding system once again in an appropriate case.[371]

DeRolph v. State
Supreme Court of Ohio (DeRolph IV)
Decided December 11, 2002

In the fall of 2002, two new Justices were elected to the bench of the Ohio Supreme Court. Many believed that the two new Justices could tilt the bench on the school funding litigation issues. Before the new Justices could be seated on the bench in January, 2003, the court ruled on *DeRolph IV*[372] on December 11, 2002. In a 4-3 decision, the court declared that the Ohio funding system remained unconstitutional, calling for a complete systematic overhaul of the state's school funding system and terminating jurisdiction over the case, effectively ending the *DeRolph* litigation.[373]

Review of Alabama's School Funding Litigation

Alabama's Public School Equity Funding Case began on May 3, 1990, when the Alabama Coalition for Equity (ACE) filed a lawsuit challenging the constitutionality of the method in which Alabama was funding public education The lawsuit claimed that the funding method violated the equal protection of the laws allegedly guaranteed by sections 1, 6, and 22 of Alabama's Constitution of 1901.[374] The Alabama Coalition for Equity was founded by DeWayne Key, Lawrence County Superintendent, along with Barbour, Butler, Clarke, Coosa, Crenshaw, Geneva, Hale, Lawrence, Loundes, Macon, Pickens, Pike, Winston, Greene, Bullock, Conecuh, Henry, Perry, Walker, Wilcox, Chambers, Talladega, and Dallas Boards of Education and The Troy City Board of Education, along with a number of individual parents and school children.[375]

The defendants in this case were named as Guy Hunt in his official capacities as Governor of the State of Alabama and as President of the State Board of Education, State

Director of Finance Robin Swift, Lieutenant Governor James Folsom, Speaker of the House of Representatives James Clark, State Superintendent of Education Wayne Teague, and the members of the Alabama State Board of Education.[376] In May and June of 1990, Folsom, Clark, Teague, and the members of the State Board of Education petitioned and were granted by the court to align with the plaintiffs, having agreed with their claims. This rearrangement left only Governor Hunt and State Finance Director Swift as defendants.[377] The lawsuit was filed in Montgomery Circuit Court and was to be heard by Judge Mark Montiel.[378] From 1990, the defendants changed due to the changes in the governor's office. Governor Guy Hunt was the governor until April 22, 1993, when he was removed from office due to a criminal conviction.[379] James E. Folsom Jr. served as governor from April 22, 1993 to 1995. Forrest "Fob" James served from January 16, 1995 to 1999. Don Siegelman served from January, 1999 to January, 2003, at which time Bob Riley became governor.

On August 3, 1990, The Alabama Disabilities Advocacy Program on behalf of John Doe, a disabled student, filed a motion to intervene in the ACE lawsuit.[380] Before Judge Montiel ruled on this motion, he was defeated in the November elections by Democrat Eugene W. Reese. The motion was granted on January 9, 1991.[381] In a separate case, The Alabama affiliate of the American Civil Liberties Union, representing Mary Harper, filed a similar complaint to the ACE complaint on January 18, 1991.[382] Mary Harper sued as next of friend on behalf of Deion Harper and Kerry Phillips, minors. The Harper Complaint challenged the funding of Public Elementary and Secondary Schools as a violation of a fundamental right to education for all of Alabama's children between the ages of 7 and 21, allegedly guaranteed in Article XIV § 256 of the Alabama Constitution of 1901.[383] This suit also sought to nullify Amendment 111 of this constitution, added in 1956 allegedly in reaction to the 1954 landmark desegregation decision in *Brown v.*

Board of Education.[384] In Amendment 111, the State of Alabama sought to disavow any responsibility for public education.[385] The suit declared that Amendment 111 violated the Equal Protection and Due Process guarantees under the Fourteenth Amendment to the U.S. Constitution. This declaration was added as a jurisdictional ground for action.[386]

On March 18, 1991, Montgomery Circuit Court Judge Reece consolidated the Harper Complaint and the Alabama Coalition for Equity Complaint. Then, on April 21, he certified Harper as a statewide class action representing all children who were presently enrolled or would be enrolled in public schools in Alabama that provide less than a minimally adequate education.[387] The complaint filed by the Alabama Disabilities Advocacy Program on behalf of John Doe, a disabled student, was certified by the circuit court as a sub-class of all school children in Alabama on July 24, 1992. The Doe sub-class represented Alabama's children between the age of 3 and 21 with identified disabilities and intervened to add claims under the Alabama Code of 1975 § 16-39-3 and 16-39A-2. These cases were consolidated into what is now known as the "Equity Funding Case."[388]

The court granted a motion that allowed Mountain Brook, Hoover, Homewood, Shelly, Mobile, and Decatur School Systems along with The Alabama Association of School Boards and A+, an organization dedicated to reforming and improving public education, to appear as *amicus curiae*.[389] The plaintiffs were granted partial summary judgment on August 13, 1991. The court ruled that section 256 of Amendment 111 of the Alabama Constitution was in violation of the Fourteenth Amendment to the U.S. Constitution. The only part of Section 256 that was left intact states, "The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years." This order was certified as a final order and was not appealed by the defendants.[390]

The plaintiffs also requested that the non-jury trial be a bifurcated trial and divided into liability and remedy phases.[391] The court granted the request.

The liability phase lasted for 24 days, concluded on August 27, 1992, with Judge Reese's resolution, and was summarized in the *Opinion of the Justices No. 338*:

> The ACE and Harper plaintiffs claim that the educational opportunities provide to schoolchildren in Alabama's system of public elementary and secondary schools are: (1) inequitable, because such opportunities vary widely from system to system without constitutionally sufficient justification; and (2) inadequate by virtually any measure of educational adequacy, including the state's own standards and other professionally recognized measures of adequacy.[392]

Plaintiffs emphasized, as a factual matter, that "the disparities and inadequacies of which they complain are substantial, meaningful and, in many cases, profound." Plaintiffs argued that these educational conditions were the responsibility of the state government and that these conditions violated their rights under Alabama Constitution Article XIV, § 256 (the state's education clause), Alabama's Constitution Article I, §§ 1, 6, 13, and 22, (the state equal protection and due process clause), and the U.S. Constitution Amendment 14 (The federal equal protection and due process clauses). They believed that this court was the proper forum in which plaintiffs' constitutional rights should be "declared and vindicated."[393]

The defendants argued that the disparities in school funding resulted from local control (local taxation) and not from state funding. They also claimed that education was the responsibility of the state legislature and that the court's intervention was illegal, based on the separation of powers mandated by the state constitution.[394]

On March 31, 1993, the court entered the liability phase judgment; quoting from the *Opinion of the Justices No. 338,* the court restated,

> 1. That, pursuant to Alabama Constitution art. I, §§ 1, 6, 13, and 22 [guaranteeing Alabama citizens equal protection of the laws] and art. XIV [guaranteeing Alabama citizens access to a liberal system of public schools], § 256, Alabama school-age

children, including children with disabilities, have and enjoy a constitutional right to attend school in a liberal system of public schools, established, organized, and maintained by the state, which shall provide all such schoolchildren with substantially equitable and adequate educational opportunities;

2. That the essential principles and features of the liberal system of public schools required by the Alabama Constitution include the following:
    (a) It is the responsibility of the state to establish, organize, and maintain the system of public schools;
    (b) The system of public schools shall extend throughout the state;
    (c) The public schools must be free and open to all schoolchildren on equal terms;
    (d) Equitable and adequate educational opportunities shall be provided to all schoolchildren regardless of the wealth of the communities in which the schoolchildren reside; and
    (e) Adequate education opportunities shall consist of, at a minimum, an education that provides students with opportunity to attain the following:
        (i) sufficient oral and written communication skills to function in Alabama, and at the national and international levels, in the coming years;
        (ii) sufficient mathematic and scientific skills to function in Alabama, and at the national and international levels, in the coming years;
        (iii) sufficient knowledge of economic, social, and political systems generally, and of the history, politics, and social structure of Alabama and the United States, specifically, to enable the student to make informed choices;
        (iv) sufficient understanding of governmental processes and basic civic institutions to enable the student to understand and contribute to the issues that affect his or her community, state, and nation;
        (v) sufficient self-knowledge and knowledge of principles of health and mental hygiene to enable the student to monitor and contribute to his or her own physical and mental well-being;
        (vi) sufficient understanding of the arts to enable each student to appreciate his or her cultural heritages of others;
        (vii) sufficient training, or preparation for advanced training, in academic or vocational skills, and sufficient guidance, to enable each child to choose and pursue life work intelligently;
        (viii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in Alabama, in surrounding states, across the nation, and throughout the world, in academics or in the job market; and
        (ix) sufficient support and guidance so that every student feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her full human potential;
3. That, pursuant to Ala. Code §§ 16-39-3 and 16-39A-2, Alabama schoolchildren with disabilities aged 3-21 have the right to appropriate instruction and special services;
4. That the present system of public schools in Alabama violates the aforestated constitutional and statutory rights of plaintiffs;

5. That the state officers charged by law with responsibility for the Alabama public school system, are hereby enjoined to establish, organize, and maintain a system of pubic schools that provides equitable and adequate educational opportunities to all school-age children, including children with disabilities, throughout the state in accordance with the constitutional mandates of Ala. Const. Art. XIV, § 256; art. I, §§ 1, 6, 13, and 22; and to provide appropriate instruction and special services to children with disabilities aged three through twenty-one pursuant to Ala. Code §§ 16-39-3 and 16-39A-2.[395]

On May 28, 1993, the Speaker of House of Representatives, James Clark; the State Superintendent of Education, Wayne Teague; and Alabama State Board of Education members John Tyson Jr., Steadman Shealy, Jr., Dan Cleckler, Ethel Hall, Willie Paul, Betty Fine Collins, Victor Poole, and Tazewell Shepard petitioned the court to be realigned as defendants in their official capacities.[396] On June 8, 1993, Governor Folsom moved to replace Governor Hunt as a defendant in his official capacity as Governor.[397] On June 9, 1993, the trial court granted the motions of substitution and realignment of the defendants, certified the liability-phase order as a final judgment, and ordered the defendants to work with the plaintiffs to develop a single comprehensive Remedy Plan for the purpose of ensuring full and complete compliance with the liability-phase judgment. The court appointed J. Wayne Flynt as a facilitator to work with the plaintiffs on this plan.[398] On July 19, 1993, the court ordered the substitution of Senator Ryan de Graffenried, in his capacity of presiding officer of the Senate, as a replacement to assume the duties that had been formerly performed by Lieutenant Governor Folsom. [399] On October 1, James White Sr., State Finance Director, replaced James Rowell who had replaced Robin Swift as a defendant. Swift resigned his position on September 30, 1991.[400]

A Remedy Plan was offered to the court and given preliminary approval on October 22, 1993. The court scheduled a fairness hearing on November 18, 1993, pertaining to the fairness, reasonableness, and adequacy of the proposed remedy order.[401] Before the scheduled fairness hearing, three motions to intervene were filed with the court. These motions were brought by

Walter Anderton and others, Joyce Pinto and others, and Robin Swith.[402] The court denied these motions. All three petitioners appealed; however, Swith took no active role in this appeal and notified the court through counsel that he lacked standing to intervene. His appeal was dismissed. The Supreme Court of Alabama reversed *Pinto and Anderton*.[403] *Pinto* sought to intervene on behalf of three classes of persons. One class was composed of students who were enrolled or would be enrolled in statutory gifted programs in public schools in Alabama (Gifted Student Class). The second class represented students who were enrolled or would be enrolled in public school systems in Alabama that at a minimum were providing constitutionally adequate educational opportunities (General Student Class). The third class was composed of parents of students who were enrolled or who would be enrolled in public schools in Alabama (Parent Class).[404] Anderton attempted to intervene on behalf of taxpayers and citizens of Alabama.[405] The supreme court ruled that Pinto and Anderton were entitled to intervene in the remedy phase as a matter of right; however, this ruling did not extend to the liability phase.[406]

On November 8, 1994, Fob James Jr. defeated Governor Jim Folsom in the general election. Governor elect James petitioned the court with a Writ of Prohibition. This writ directed Judge Reese to vacate his orders of March 31, 1993, October 22, 1993, and December 3, 1993; to dismiss the actions for lack of subject-matter jurisdiction; and to exercise no further jurisdiction in the cases.[407] The Alabama Supreme Court ruled on April 10, 1995 to deny Governor James' petition as it pertained to the liability phase of the case. They also denied the petition as it pertained to the remedy phase; however, they stated that issues that were raised could be presented on appeal following the entry of a final order. The court concluded that Judge Reese's December 3, 1993, ruling was not a final order, due to the fact that he retained jurisdiction of this

case. The December 3 ruling was an order that formally approved a modified form of the Remedy Plan.[408] The Remedy Plan operates from the following assumptions:

1. All Alabama students can learn at significantly higher levels.
2. The knowledge exists to help all Alabama students learn at significantly higher levels.
3. The diversity, including racial and ethnic, that parents, teachers, and students bring to Alabama's education system must be respected, and all education must be provided in an atmosphere free from prejudice of whatever variety.
4. All learning environments in the state must be safe, sanitary, conducive to learning, and have adequate resources.
5. Teachers, provided with necessary support, are key to school success.
6. All special education needs, including the needs of students with disabilities, must be addressed.
7. A partnership among educators, students, families, businesses, and communities is necessary for students to achieve educational success.

The system must include the following components in order to provide equitable and adequate educational opportunities for all Alabama school children:

1. The public school system must be performance based
    (a) Student Performance Standards
    (b) Educator Performance Standards
2. The system must incorporate mechanisms to ensure accountability at all levels.
3. Principals, Teachers, and Parents must have a major role in instructional decisions.
4. School Staff must be provided with staff development opportunities, instructional support, and reasonable compensation.
5. Significant non-school barriers to learning must be addressed and minimized.
6. Early childhood programs must be provided for certain populations.
7. The system's infrastructure must be sound.
    (a) Buildings
    (b) Transportation
    (c) Textbooks, Instructional Materials, and Supplies
    (d) Technology shall be used to raise student and teacher productivity and expand access to learning.
    (e) Special education shall be part of an inclusive system of education.
    (f) Public School Funding must be equitable and adequate.
        (i) General Funding Program
        (ii) Transportation Funding
        (iii) Facilities Funding
        (iv) Periodic Review
    (g) General Provisions.
        (i) Representativeness
        (ii) Monitoring
        (iii) Continuing Obligation
        (iv) Continuing Cooperation and Consultation among the parties

(v) Objections to Submissions
(vi) Retention of Jurisdiction[409]

On August 18, 1995, the Judicial Inquiry Commission ruled on a petition filed by Governor James and Finance Director James Baker that Judge Eugene Reese was disqualified from continuing to sit on this case. Their ruling was based on the Alabama Canons of Judicial Ethics, Canon 3(C) (1), which states that "a judge should disqualify himself in a proceeding in which his . . . impartiality might reasonably be questioned." The commission stated that they could not find any evidence of actual bias; however, they felt that the circumstances surrounding this case and Judge Reese's election campaigning for the office of Associate Justice of the Alabama Supreme Court did cause a reasonable basis for questioning the judge's impartiality. Judge Reese campaigned on his leadership while involved in proceeding over this important case.[410] On August 23, 1995, Judge Reese withdrew from the case, and it was reassigned to Judge Sarah M. Greenhaw.[411]

On September 15, 1995, Governor James, Finance Director Baker, and Attorney General Jeff Sessions petitioned the court to vacate the order relating to both the Remedy Plan and the Liability Phase and to dismiss the case for lack of subject matter jurisdiction.[412] Judge Greenhaw denied this motion on October 6 and then directed the entry of final judgment on the Remedy Plan. She struck section XI of the plan, which stated, "Retention of Jurisdiction: The court hereby retains jurisdiction of this matter and will issue such further orders as may be required to secure the implementation of its orders."[413] The state parties along with the *Pinto* intervenors appealed this judgment on November 8, 1995.[414] On February 6, 1996, Judge Greenhaw appointed an independent monitor to oversee the Remedy Plan and its implementation.[415]

The state parties petitioned the Alabama Supreme Court on March 14, 1996 to vacate Judge Greenhaw's February 6 order and to stay the proceedings in the trial court until the

Supreme Court could rule on this appeal. The defendants' petition was based on three grounds and challenged the validity of the judgment on which both the liability and remedy plans were based. First, they challenged that the judgment violated the separation of powers doctrine. Second, they challenged the lack of sufficient adversarial interest on the part of the early state parties. Third, they contended that Judge Reese's campaign conduct created a question of impartiality of the entire judicial proceedings.[416] In dealing with the first issue, the question of separation of powers, the high court stated, "We hold, therefore, that the trial court did not exceed its constitutional authority in considering on the merits whether Alabama's public education system violated provision of the Constitution of 1901." Regarding the Remedy Plan, the court ruled, "We hold, therefore, not that the trial court lacked the power to implement the Remedy Plan, but that it abused its discretion in attempting to do so before providing the coordinate branches of government the opportunity to act unilaterally. The question is not one of power, but of expedience."[417] On the issue of "lack of sufficient adversarial interest," the court ruled that "this action suffered no infirmity through an absence of adversity; any infirmity allegedly attaching after Governor Hunt left the case was assuredly cured by the participation of the present State parties and the intervenors."[418] On the grounds of that Judge Reese's campaign conduct created a question of impartiality of the entire judicial proceedings, the Supreme Court ruled, "we hold that where a part seeks the recusal or disqualification of a trial judge on the ground that 'his impartiality might reasonable be questioned,' that is, without evidence of actual bias, orders entered by that judge before the occurrence of the conduct for which recusal was sought are valid."[419] In so far as the *Pinto* intervenors were concerned, the court concluded that this ruling did not entirely resolve their petition regarding the Remedy Plan.

The Supreme Court affirmed Judge Reese's ruling on his Liability Plan; however, it stayed further proceedings on the Remedy Plan in order to give the state legislature one year to resolve the issue concerning the plan. The court stated, "Although the judiciary is not without the power to enforce judgments designed to remedy constitutional defects in the educational system, the judiciary should exercise this power only in the event the legislature fails or refuses to take appropriate action." They went on to reiterate that "the power inherent in this judicial scrutiny also includes the power to fashion a remedy and to require compliance therewith."[420]

Dissenting Justice Hooper argued that "the trial court violated separation of powers; the intervenors should have had a chance to challenge the Liability Order; the majority should still have ruled on the correctness of the orders holding that the school system was unconstitutional, even though the defendants did not appeal the orders; and the stay of one year does not make an unconstitutional order constitutional." He also stated that "the majority's refusal to address the correctness of the liability ruling due to the defendant's refusal to appeal those orders may now change the entire Alabama Constitution."[421] On December 12,1997, the Supreme Court ruled that the liability phase was a final order that would support an appeal and affirmed the trial court's award of attorney's fees.[422] The court also rejected the appeal that the state had sovereign immunity in the award of these fees.[423]

The plaintiffs submitted a plan for upgrading Alabama's schools to the Montgomery County Circuit Court on October 2001. The court scheduled a hearing on the progress toward implementing a remedy plan in December 2001; however, it was re-scheduled for July 2002.[424] Before the July 2002 hearing, on January 11, 2002, the Alabama Supreme Court, on its own initiative, placed this case on its rehearing docket. On May 31, 2002, the court stated,

> This court shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men. Alabama Constitution of

> 1901 §43. In Alabama, separation of powers is not merely an implicit doctrine but rather an express command; a command stated with a forcefulness rivaled by few, if any, similar provisions in constitutions of other sovereigns. Amendment 582 to the Alabama Constitution of 1901 reflects this State's adherence to this command by effectively nullifying any order of a state court, which requires disbursement of state funds, . . . until the order has been approved by a simple majority of both houses of the Legislature. Compelled by the weight of this command and a concern for judicial restraint, we hold (1) that this Court's review of the merits of the still pending cases commonly and collectively known in this State, and hereinafter referred to, as the Equity Funding Case, has reached its end, and (2) that, because the duty to fund Alabama's public schools is a duty that—for over 125 years—the people of this State have rested squarely upon the shoulders of the Legislature, it is the Legislature, not the courts, from which any further redress should be sought. Accordingly, we hold that the Equity Funding Case is due to be dismissed.[425]

Justice Johnston dissented,

> The entirely unsolicited nature of the instant purported review of these "equity funding cases" exacerbates our lack of appellate jurisdiction. We do not want to become like the Iranian judges who roam the streets of Tehran ordering a whipping here and a jailing there. On the other hand, if this tardy and unsolicited purported review does prevail, I suppose the consolation will be that some old cases which I think or shall think grossly unfair will once again be subject to review.[426]

Review of Adequacy in School Funding

One of the earlier cases of school finance litigation was *Plessy v. Ferguson* in 1896,[427] in which the Supreme Court ruled that a "Separate but Equal Doctrine" was the law of the land. In this case of equity, the court stated that, as long as both systems of education, one for white students and one for black students, were equal, the state could keep them separated. This judgment remained the law of the land until 1954.

Before the 1920s, state support of public education usually came in the form of a flat grant program.[428] This type of state support was a lump sum amount per unit. In the beginning, the unit of support was the school, then the classroom, then the student. By the 1920s, most states had recognized that the flat grant program was not sufficient. Professors Stayer and Haig developed the next generation of state funding for the state of New York. This new funding

program was known as the Stayer Haig Foundation Program,[429] though better known as the minimum foundation program. This type funding program, or a version of it, is used by most states today. The minimum foundation program is a state equalization aid program that typically guarantees a certain foundation level expenditure for each student, and with a minimum tax rate that each school district must levy for education purposes. The difference between what a local school district raises at the minimum tax rate and the foundation expenditure is covered in state aid.[430]

In 1954 *Brown v. Board of Educatio*n,[431] the Supreme Court reversed its decision in *Plessy* stating that "Separate but Equal" could no longer be "Separate and Equal." This case is known as the landmark desegregation case; however, it began as a case about equity and ended as a case about adequacy. The case started out as a case of unequal resources between white schools and black schools, and, thus, was a case of equity. It ended with the Supreme Court ruling that no amount of funds could replace the level of outcomes achieved by combining the two systems of education. The sum of the quality of education was greater than the parts, even if both parts were equal; thus, *Brown* ended as a case about adequacy. The justices in *Brown* stated that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[432] This declaration became a springboard for waves of litigation that focused on the differences in educational opportunity related to the socioeconomic, racial, and physical characteristics of students.[433]

Due to the slow pace of the legislative and executive branches of government, courts became the central players in school finance reform. The waves of litigation began as equity cases and later evolved into cases of adequacy. Many legal scholars believe that three distinctive waves of school finance litigation have developed over the past 40 years.[434] The first wave began

in the 1960s with litigation primarily brought to the federal district courts.[435] Most of these cases involved claims that school-funding systems violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The plaintiffs achieved a major victory in wave one, with a California Supreme Court decision in *Serrano v. Priest* in 1971.[436]

In *Serrano v. Priest,*[437] the plaintiffs argued the strategy of John Coons, William Clune, and Stephen Sugarmen[438] and Arthur Wise.[439] Wise developed the argument that education was a fundamental right and that the Equal Protection Clause of the Fourteenth Amendment required that education be provided equally across all school districts. Coons, Clune, and Sugarman formed the concept of what became known as fiscal or wealth neutrality. They named this concept *Proposition I*: no relationship should exist between the education of children and the property wealth that supports the public funding of that education. Using this concept, Coons, Clune, and Sugarman argued that education funding created a suspect classification defined by district property wealth per pupil. The California Supreme Court ruled that this case was justiciable using the fiscally neutrality standard, that education was a fundamental right, and that property wealth per pupil was a suspect class. Therefore, the court found that the school finance system was unconstitutional.[440] As a result of this first successful state court case related to state school finance equity, other similar cases were filed in various states.

In *Private Wealth and Public Education,*[441] Coons, Clune, and Sugarman, using their concept of wealth neutrality, developed a school finance formula known as District Power Equalizing or Guaranteed Tax Base (GBT). Berne and Stiefel in *The Measurement of Equity in School Finance* presented statistical formals that measured the degree of wealth neutrality.[442]

The first school finance case in wave one that made it to the U.S. Supreme Court was a Texas case known as *Rodriguz v. San Antonio*.[443] In a 5-4 decision, the High Court found that

education was not a fundamental right protected by the U.S. Constitution due to the fact education is not mentioned by the Constitution. They also found that property wealth per pupil was not a suspect class because it is related to governmental entities and not individuals. This ruling ended the federal role in school finance litigation and gave jurisdiction back to the state, for most state constitutions did mention education.[444] The battle of school finance funding litigation became a state-by-state battle. During this wave of litigation, state legislatures in 28 states passed school finance reform plans.[445] Although school finance litigation only occurred in 12 of these 28 states, it is important to note that the possibility of litigation played an important role in prompting executive and legislative branches to improve school funding systems.[446] Wave one lasted from 1960 until 1972, during which state funding for schools rose to about 45%.[447]

In wave two,[448] after the *Rodriguez* case, plaintiffs concentrated on state constitutional claims. Most state constitutions stated an equal protection right for its citizens similar to the federal protection clause and contained wording that the state was not only responsible for a system of education but that it was the state's duty to do so. One of the first cases in wave two was *Robinson v. Cahill* [449] from New Jersey. A trial court ruled that the state's school funding system violated equal protection guarantees in both the state constitution and the U.S. Constitution. The New Jersey Supreme Court held its ruling on this case until the U.S. Supreme Court rendered its findings in *Rodriquez*. The New Jersey Supreme Court found that the New Jersey system of school funding was unconstitutional based on the state's education article, rather than the Equal Protection Clause of the U. S. Constitution.[450] Wave two lasted from 1973 to1989 and resulted in few victories for school reformers. During wave two, school finance litigation slowed down; however, school reform saw dramatic increases. Over 40 states enacted

state testing programs, and over 1000 pieces of legislation were introduced in state legislatures concerning teacher certification and compensation.[451] State school funding increased 21% during this time period. However, many of the equity gains that had been made in the 1970s eroded in the 1980s.

Wave three began in 1989 and has continued to the present. In 1989, the state supreme courts in Texas, Kentucky, and Montana ruled that their state's school finance systems violated their respective constitutional clauses concerning education.[452] Most court cases in wave three that overturned school finance systems relied primarily on the state's education clauses.[453] During this wave, courts began to focus on adequacy in addition to equity, while ordering major systemic reform.

In Kentucky, *Rose v. Council for Better Education*,[454] the court found that the minimum foundation program and the power equalization program fell short of ending the unequal education opportunities across the state. The Kentucky Supreme Court found the entire education system unconstitutional. *Rose* was the first case in which the system of financing education, as well as entire system of education, was declared unconstitutional. The influence of the Kentucky case on other states, therefore, was direct. Courts in Alabama, Massachusetts, and New Hampshire relied specifically on the Kentucky court's definition of an adequate education when remedies for finance systems were declared inadequate.[455] Some courts began to redefine the constitutionally required level of education a state had to provide from a minimum education to a quality education.[456] These courts determined constitutional compliance by looking at both input and output indicators, and their interpretation of the education article of their states' constitutions opened the door to broad school finance reform across the county. Finally, the courts focused on adequacy, in addition to equity, while calling for major systemic reform.

According to Evans, Murray, and Schwab, there is convincing evidence that the distribution of school spending is more equal in states that have experienced judicially mandated reforms.[457] Lukemeyer stated that courts and court interpretations of what the constitution requires have played an important role in the development of school finance systems.[458] The possibility, if not the reality, of a court challenge must be considered in designing a state's school finance system.

As of 1994, thirty-seven states use the Foundation Program approach to state aid.[459] Verstegen claimed that school finance systems do not need to be repaired; rather, they need to be reinvented and aligned to curriculum and assessment standards that reflect state constitutions. She stated that redesigned finance systems, the new adequacy, would be based on a conception of quality education for all children, not on a basic or minimum education, which was an old adequacy standard. The current school finance systems were created in the 1920s and 1930s.[460] According to Verstegen, these systems are antiquated, obsolete, and aging.

With the movement of high stakes testing, greater accountability of local schools, and the increased role of the federal government in the No Child Left Behind Act (NCLB),[461] the next decade will be exciting to watch. This author believes that school finance litigation will continue at a greater pace than in the past decade and will include a greater role of the federal court system, due to the federal mandates of NCLB. The National Education Association, along with several states, has already filed suit against the federal Department of Education in regards to the No Child Left Behind Act.[462] It will be interesting to see what direction states will take in school funding, whether new funding programs will be created, and how far courts and states will go in the move toward adequacy. The next 40 years may be as interesting as, if not more than, the last 40 years.

As school finance reform moves from equity to adequacy or from equity to the inclusion of adequacy, the definition of what is adequate has been somewhat elusive. Akin to the old saying "I don't know how to explain it, but I know it when I see it," the definition varies depending on the arena: academic, judicial, or legislative. Berene and Stiefel stated,

> The idea of "America as a land of opportunity" captures an essential part of our national spirit and heritage, and public education is often viewed as the institution that can transform that idea into a reality. Thus, to many, an equitable system of education is one that offsets those accidents of birth that would otherwise keep some children from having an opportunity. . . . The idea of providing opportunity by using education as a vehicle has occupied social scientists and educational policy makers throughout the twentieth century.[463]

In 1983, the National Commission on Excellence and Equity in Education issued a report known as *A Nation at Risk*.[464] This report discussed the need for excellence. According to Berene and Stiefel, adequacy has its roots in this 1983 report.[465] Massell, Kirst, and Hoppe stated that as education excellence reforms of the 1980s transformed into systemic and standards based education reform of the 1990s, the concept of educational adequacy matured.[466]

Adequacy surfaced on a national scale in the early 1990s, as part of the congressional reauthorization debate surrounding the Elementary and Secondary Education Act.[467] The proposal from the Clinton administration suggested a school reform initiative on the basis of three measures: academic content and performance standards, student assessment standards, and opportunity-to-learn standards.[468] The opportunity-to-learn standards would have established criteria by which policymakers and educators could have determined the cost of students reaching the academic standards as measured by the state assessments.[469] As legislators began to realize the cost involved, they dropped the concept of opportunity-to-learn from the reauthorization bill.[470] Two of the three measures, academic standards and student assessment, have remained a policy centerpiece in most states and in the federal No Child Left Behind Act of

2001. However, Ramirez stated, “an ironic dynamic is developing in state legislatures and courts. The academic standards and state assessments are pointing straight to school districts with inadequate academic performance.” He continued, “many policymakers now see that improving the academic circumstances for students in these school districts will require a lot more money.”[471] Ladd and Hansen noted that

> in the past decade, the concept of fairness in school finance has taken on a new emphasis, spawning another round of litigation and reform. The pursuit of fairness has moved beyond a focus on the relative distribution of educational inputs to embrace the idea of educational adequacy as the standard to which school finance systems should be held. [472]

They further stated:

> Despite the success of adequacy arguments in several prominent school finance court decisions, there is as yet no consensus on its meaning and only limited understanding about what would be required to achieve it. Adequacy is an evolving concept, and major conceptual and technical challenges remain to be overcome if school finance is to be held to an adequacy standard.[473]

The Committee on Education Finance has offered three possible meanings of *adequacy*: (a) adequacy is exclusively focused on school children and not the taxpayers; (b) adequacy differs from other measures of equity in that adequacy places an emphasis on outputs and outcomes; and (c) adequacy seems to be less the input-output distinction and more its greater emphasis on absolute rather than relative standards.[474] They ask two questions in discussing the development of absolute standards of adequacy: Adequacy of what? and How much is adequate? They classified *adequacy of what* as qualitative adequacy and *how much is adequate* as quantitative adequacy.[475] Qualitative adequacy in school reform would pertain to issues that directly affect the measured outputs, such as student achievement. These issues would be items such as reading and math curriculum. Quantitative adequacy might be an achievement level that is set and then funded until it is reached.[476]

Guthrie and Rothstein defined *adequacy* as "sufficient resources to ensure students an effective opportunity to acquire appropriately specified levels of knowledge and skills."[477] They declared,

> Old school finance concepts evaluate education in terms of revenue. New finance concepts of adequacy evaluate revenue in terms of education. . . . When the 'foundation' finance distribution concept was originally adopted by states, and as it continues in most states today, governors and legislatures defined 'adequate' by determining how much state revenue is available, or how much additionally they are willing to generate through taxation.[478]

The National Education Association (NEA) defined *adequacy* in the following way: "after you crank out educational standards, you cost out what it takes to implement them. It's really that simple." The NEA asked the following question: "If you ran a company, would you build a state-of-the-art production facility by obsessing over blueprints and directives to your contractors without ever inquiring about their choice of materials and skilled labor, or wondering if the completed building had the capacity to produce quality products?"[479]

Picus stated, "In the past, states have defined adequacy on the basis of the revenue available. This is, in essence, a political decision, rather than a decision based on student needs." He further suggested that "driving the change now is the establishment, for the first time, of ambitious education goals at all levels of the educational system. These goals are aimed at raising outcomes for all students."[480]

According to Duncombe, Lukemeyer, and Yinger, in order for states to develop adequacy-based school finance systems, they must first develop three components:

1) A state must select measures of adequacy, either in terms of resources or student performance. Such measures are necessary to identify school districts below the standard.
2) A state must estimate the cost of reaching a given performance standard in each district.
3) A state must develop a school aid formula. This formula should provide all school districts the resources they need to reach the adequacy standard selected by the state.[481]

Before a state can develop an adequacy-based school finance system, the state must first decide on an adequacy standard. Duncombe, Lukemeyer, and Yinger suggested that "a state must first decide whether the standard is intended to guarantee each district some minimum level of resources or to give all students the opportunity to reach a minimum level of student performance."[482] In defining a resource standard and a performance standard, they suggested that "a resource standard is typically represented in terms of a bundle of resources and course requirements that represent an opportunity for an adequate education." A performance standard is defined as "a standard expressed as a level of student performance on standardized exams." They went on to state that the use of one state exam is unlikely to demonstrate all of the dimensions of an adequate education. However, many states have been setting adequacy standards by making the passage of specific tests either an objective or a graduation requirement.[483]

Many experts believe adequacy can only be achieved by constructing and implementing a new school finance structure linked to educational standards.[484] A report by the National Conference of State Legislatures in 1998 identified three building blocks of an adequate school finance structure: "(a) articulating educational objectives for students, (b) identifying and acknowledging the education capacity needed to accomplish those objectives, and (c) supporting that capacity with sufficient funding."[485] Odden suggested that an adequacy-driven statewide policy initiative must contain four elements: "a base spending level considered adequate for the

average child to reach high standards, an additional amount of money for low-income, disabled and LEP students to reach standards, a price adjustment for all dollar figures to ensure comparable spending power, and annual inflation adjustments to stabilize base spending levels."[486] According to Guthrie, "Measuring revenue distribution 'equity' is hard but technically doable. Measuring educational 'adequacy' is far more challenging." He went on to state, "Measuring 'equity' is not simple. Still, in retrospect, it appears like the first effort of the Wright Brothers compared to a modern day F-22 when conceptualizing and measuring 'adequacy.'"[487] According to Guthrie, the evolving concept of educational adequacy builds on most of the components of equity; however, adequacy requires more than a consideration of equity. Adequacy incorporates matters of educational expectations, modes of instruction, means for measuring student and school achievement, issues of schooling special needs students, and research about matters such as school effectiveness.[488] According to Augenblick and Myers,

> When most policy makers say that they want to study education adequacy what they mean is that they want to set the parameters in a state formula so that school districts are assured that they will have enough money—where enough money means a sufficient amount to provide a specific set of inputs to accomplish a particular set of outcomes.[489]

Based on this definition, Augenblick and Myers suggested that the issue of whether a public school is being adequately funded depends in part on the educational outcomes that are desired by the state.[490] According to Odden and Picus, developing measures of educational adequacy in a statistical context has seen little progress. They offered an approach called the Odden-Picus Adequacy Index (OPAI).[491] This approach calculates an index that indicates the percentage of students in schools or districts spending at an adequate level. If the calculation is conducted on the basis of weighted students, or if all expenditures are adjusted by an overall cost function index, the OPAI includes vertical equity, as well.[492] The difficulty in using the OPAI is how to determine the adequate spending level. A standard level must be determined before this type of

index is used. The difficulty is determining what standards will be used and what level constitutes an adequate benchmark.[493]

Review of Costing-Out Models

During the past decade, educational scholars have developed four different methodologies for determining school finance adequacy:[494] 1) cost of effective school-wide strategies, or the evidence-based approach, 2) economic cost function approach, 3) identifying expenditure levels in districts/schools that meet performance benchmarks, and 4) professional judgment approach. The cost of effective school-wide strategies approach identifies high performance comprehensive school-wide designs. After identifying the school-wide programs, the research identifies the different elements of the program and determines the cost of each element. The elements are added together, giving a total cost of the program at each high performing school, thus establishing an adequate funding level. This type of funding method includes effective educational strategies that represent current evidence-based professional knowledge in education. This approach is also known as the School Reform Programs.[495] A major change in favor of school-wide reform programs emerged with the federal legislation allowing the use of Title I funds to support school-wide educational programs in high-poverty schools.[496] Title I funding has been the primary source of federal assistance to at-risk students from high-poverty schools since 1965. The national study of Title I funding, known as the Special Strategies Study,[497] found that the whole-school methods, which were externally developed programs funded by Title I, appeared more likely to have positive impacts on academic achievement than either traditional Title I pullout programs or locally developed reforms.[498]

In 1991, President Bush announced the creation of a private-sector organization called the New American Schools Development Corporation (NAS), which was intended to support the creation of new whole-school restructuring models for the next century. Using a business model, NAS looked to the marketplace for proposals for new models of American schools that would enable them to help all students achieve world-class standards in core academic subjects, to operate at costs comparable to current schools, and to address all aspects of a schools operation. After receiving 700 proposals, NSA chose 11 models.[499] Odden identified the cost of several school-wide designs that were created by the New American Schools. He then illustrated, using resource reallocation, how schools spending at the average or median levels of expenditure per pupil in the country could afford the design.[500] Some of the advantages of the School Reform Programs are that they provide schools with a concrete plan for changing their current practices and provide a clear idea of what the money is buying. Some of the disadvantages of this program are the mixed evidence of success for many of the reform models and mixed evidence of program transferability across districts.[501]

The economic cost function approach uses extensive district data, such as poverty rate, student characteristics, and complex statistical analysis, to correlate levels of student performance with dollar amounts needed to meet those targets. The model also identifies desired performance level and funds according to the cost-function associated with that level. At the time of this study, no state was currently using this approach to determine school finance adequacy; however, this methodology had recently been applied by Duncombe and Yinger in 1999 to New York data, and by Reschovsky and Imazeki in 1998 to Wisconsin and Texas data.[502] This approach originated in efforts to determine how inter-governmental aid formulas should be adjusted to take into account public service costs beyond the control of local jurisdictions.

Researchers tried to develop cost indicators that would measure how each district compared with a statewide average. This approach represents the efforts of econometricians to apply the tools of statistical modeling to the determination of educational costs.[503] Duncombe and Yinger developed a more sophisticated version of this approach. Their model entered a measure of efficiency that allowed the model to adjust estimates of adequacy and/or state aid programs to provide incentives for districts to become more efficient.[504] The advantages of the economic cost function approach are that it provides a specific dollar amount for particular performance levels and uses controls for district and student characteristics, including price differences across the state and economies and diseconomies of scale. Some of the disadvantages are that this model is complex and difficult to explain. It relies on data from assessments that may not measure the desired student outcomes.[505]

The third model, identifying expenditure levels in districts/schools that meet performance benchmarks, identifies districts that are already performing at the desired level and uses their average per-student spending to determine an adequate amount. Simple, straightforward, and understandable, this model is also known as the typical high-performing districts model.[506] The disadvantages are that it relies on data from assessments that may not measure the desired student outcomes and district data that may be limited or not available to make estimates.[507] Another major criticism of this approach is that the result usually identifies districts that are non-metropolitan districts of average size and relatively homogeneous demographic characteristics, which generally spend below the state average. This adequate expenditure level is not relevant to big city districts, even when adjustments for pupil needs and geographic price differentials are added to the base.[508] According Ladd and Hansen, statistical methods for determining adequate educational costs appear to have a greater level of precision than the other models. Given

restrictions on current ability to quantify desirable outcomes and the weaknesses in the production theory on which cost models are constructed, the apparent precision of statistical models may be misleading. While these methods may, especially as they are improved, provide important comparisons with methods of determining costs that are less elegant, they are not yet ripe for use as the primary means for policy makers and the public to discern or understand these costs.[509]

The fourth model is known as the Professional Judgment Model. This model does not use statistical or empirical methods for determining adequacy; instead, it relies on professional judgment to construct an ideal delivery system. The Professional Judgment approach uses multiple panels of educators to determine the kinds of resources needed to achieve a particular set of objectives in prototypical elementary, middle, and high schools. The resources identified by the panels are then cost out.[510] The professional judgment approach that utilizes consultation with local experts was first implemented by Chambers and Parrish in proposals they made for adequate education systems in Illinois in 1992 and in Alaska in 1994.[511] This approach is known as the Resource Cost Model (RCM).[512] It uses groups of professional educators who first identify base staffing levels for the regular education program and then identify effective program practices and their staffing and resource needs for compensatory, special, and bilingual education. All components are priced using average price figures, but in determining the foundation base dollar amount for each district, the totals are adjusted by an education price index. An expansion of the Resource Cost Model, supplementing panels of local experts with reliance on national research and whole school designs, was adopted in 1996 by Guthrie. Guthrie's group used this newer design to calculate an adequate level of resources to be distributed to Wyoming school districts.[513] They used the findings of the Tennessee STAR class

size reduction study to set a class size of 15 in elementary schools and then used the panel to determine additional resources for compensatory, special, and bilingual education.[514]

The American Institutes for Research and the Management Analysis and Planning, Inc. were joint contractors for a "costing out" study for the state of New York.[515] This study determined the level of funding each district needed for its operations. They planned to identify specific resources and conditions necessary for students to meet state standards and then systematically calculate the amounts needed to fund each of those prerequisites. Due to the use of a number of different committees, public forums, and community meetings, this process would make New York's costing-out study the most ambitious and most comprehensive one undertaken to date.[516] The policy brief form WestED *From Equity to Adequacy* states,

> Adequacy formulas expose the gap between what schools now receive and what they may really need, particularly those schools facing the costs of educating large numbers of students with special needs. The adequacy approach to school finance, driven by new standards, high-stakes accountability, and litigation, is gaining an audience because of its common-sense appeal. By replacing such questions as "Where do we stand in relation to the national spending average?" with "How much is enough to reach our goals?" adequacy speaks to the public's desire to link spending and results. By targeting resources directly toward classrooms and students, adequacy-based funding also reduces a common perception that too much education money is spent on the "wrong" things.[517]

In reviewing costing-out studies, the following state programs were examined: Ohio, Wyoming, and Tennessee.

Ohio

The current state funding system in Ohio is based on a foundation formula that requires a specified level of local effort. The state's basic aid program includes categorical grants that supplement the foundation program. This funding program is known as the School Foundation Funding Program. The average daily membership (ADM), using either current pupil enrollments or a three year average of pupil enrollment, is used as the unit for allocation. To determine the

funding amount, the state uses a two part formula: (a) Foundation × Membership × Cost Of Doing Business (cost of living or cost of procurement of goods and services base on regional differences) = Basic Program Cost and (b) Basic Program Cost – (Property Valuation × Charge-off Millage) = The State Formula Aid, which is then supplemented by categorical grants.[518]

The Education Clause of the Ohio Constitution states that the state must provide a "thorough and efficient" system of common schools throughout the state.[519] In 1923, in *Miller v. Korns*,[520] the Ohio Supreme Court interpreted this provision to mean that a thorough and efficient system could not be one in which any school districts were "starved for funds" or "lacked teachers, buildings, or equipment."[521] In 1979, the Supreme Court of Ohio upheld the Ohio system of public school funding in *Board of Education v. Walter*.[522] The court found the state's funding system was constitutional: "The fact that a better financing system could be devised which would be more efficient and thorough is not material." They warned that the wide discretion given to legislation was not without limits: "For example, in a situation in which a school district was receiving so little local and state revenue that the students were effectively deprived of educational opportunity, such a system would clearly not be thorough and efficient."[523]

In 1990, many of Ohio's poorer school districts joined together to form the Ohio Coalition for Equity and Adequacy of School Funding. Over the next several years, the Coalition grew to 550 school districts.[524] After the Coalition filed the *DeRolph* suit in 1991, approximately 24 affluent school districts formed the Alliance for Adequate School Funding to prevent a redistribution of funding at the expense of the property-rich districts.[525] The Alliance was the first group to call for objective funding criteria applied through a cost-base analysis. They hired Augenblick to complete this study.[526] Also in 1991, Ohio Governor Voinovich established The

Governor's Education Management Council. The council members included CEOs, educators, and legislators. The task of the council was to answer the question: "Do we have any reasonable assurance that Ohio has a chance to reach the national goals for student achievement, Goals 2000?"[527] The council responded by stating that Ohio could not reach these goals unless a robust reform agenda was passed.[528]

In 1993, business leaders who had served on the Governor's Education Management Council along with the State Superintendent of Public Instruction formed the Ohio Best Partnership.[529] Membership in Ohio Best grew to over 100 statewide organizations, including the Ohio PTA and the NAACP.[530] In 1995, Augenblick, Alexander, and Guthrie used the empirical observation method of determining adequacy to investigate and report to the Ohio Chief State School Officer T. Sanders and the Ohio State Legislature.[531] Augenblick's team involved all school districts in Ohio, except the wealthiest and the poorest districts in property wealth and per-pupil spending. The team ranked the remaining districts using student performance standards in reading, math, writing, and science. The districts with student's performance measuring at the 70th percentile or higher on most of the standards were defined as providing an adequate education. Using these high performing districts, the team then examined instructionally related components, including the ratio of professionals to pupils, class sizes, school sizes, and course offerings. These components were then inspected to determine exemplary conditions and practices. It was then possible to assign costs to these instructional components. One concern with this type funding system is that it suggests that the identified instructional components are highly desirable.[532]

In 1997, the Supreme Court of Ohio revisited the school funding issue by declaring the state's system of public school funding unconstitutional in *DeRolph v. State*.[533] The court found

that the state's funding system did not meet the needs of districts that were poor in real property value.[534] The court noted the deplorable condition of many schools in rural areas, including unsafe buildings with serious structural, heating, plumbing, sanitation, and asbestos problems, limited curricula, class sizes exceeding the state's legal limit, insufficient availability of textbooks leading to a lottery system for allocating textbooks to students, and inadequate supplies forcing schools to ration such necessities as paper, chalk, art supplies, paper clips, and even toilet paper. In its findings, the court echoed the language of its 1923 *Miller* decision, declaring that the school districts were "starved for funds, lacked teachers, buildings, and equipment, and had inferior educational programs."[535] In 1997, Augenblick revised his earlier report using only the average per-pupil spending levels and not using the empirical observation of school inputs. The report changed from using the norm reference test to using a criterion-referenced measure as the norm of student achievement. Using the new measures, Augenblick identified 102 of 607 Ohio school districts whose students meet 17 of 18 performance criteria. Eliminating the outlier districts, Augenblick then used a weighted per-pupil revenue amount to derive a $3,930 per-pupil dollar amount, based on 1996 Ohio spending levels. This calculation became Augenblick's basis for defining adequacy for Ohio school districts.[536]

In 2000, the same constitutional question, "Can the revised funding system be characterized as thorough and efficient pursuant to the Ohio Constitution?" returned to the Supreme Court of Ohio as *DeRolph II*.[537] The court defined *thorough and efficient*, reviewed the progress of the Governor and the General Assembly, and identified seven major areas that warranted further attention. The court then gave more time to the state to comply with the constitution.[538] On May 16, 2003, the court in *DeRolph V* reiterated the *DeRolph IV*'s order, which directed the General Assembly to enact a school financing system that is thorough and

efficient, as defined in *DeRolph I* and *DeRolph II*.[539] Although the court reiterated in December 2002, and again in May 2003, that the school funding system was still unconstitutional, they released jurisdiction of the *DeRolph* case.[540]

Without pressure from the court, the legislature reduced the percentage of the state budget allocated to education. In fiscal year (FY) 2004, the percentage of the state budget assigned to public K-12 education declined to 38.6% and to 38.5 % in FY 2005.[541] The governor formed the Blue Ribbon Commission on Financing Student Success and commissioned them to "make recommendations for reforming the funding system for Ohio's schools."[542] The Commission determined what education opportunities had to be available for Ohio schools and what was expected of students. They had more than ten years of research from some of the leading scholars at their disposal. After the past decade of litigation, committees, research, and politics, the question has become how much progress is necessary or how much more does the state need to do to satisfy their constitutional requirement of providing a thorough and efficient system of public education. In answering this question, a review of the state budget priority for public K-12 education funding since the late 1970s indicated that very little, if any, progress has been made. In the late 1970s, the state allotted over 40% of its budget to K-12 public education. By FY 1992, the year *DeRolph* was filed, the state percentage had decreased to 34.5%. Due to litigation, the percentage increased in FY 2003 to 39.3%.[543] One could say that the *DeRolph* litigation only restored the level of school funding to the level it reached in the 1970s.

Wyoming

The current Wyoming state school funding program is a foundation program using average daily membership (ADM) as the unit of allocation. The foundation program is known as The Education Resource Block Grant Model, also called the MAP model, named after its

developers, Management Analysis & Planning Associates. This model determines the competitive market cost of the court mandated components that make up what is known as the Wyoming Basket. The funding formula has two parts. First, there is determination of dollars per ADM based on the prototypical school type. Second, an adjustment is made to school districts based on student characteristics, specific services, and unique school district and regional properties. ADM is calculated on a rolling three average.[544]

In 1971, the Wyoming Supreme Court declared that the unequal funding among school districts was unconstitutional. This decision was followed in 1980 by *Washakie County School District Number One v. Herschler*,[545] when the court found the entire school finance system unconstitutional. The court held that pubic education is a fundamental right under the Wyoming Constitution, and the court matched equality of financing with equality of quality. The court held, "whatever system is adopted by the legislature, it must not create a level of spending which is a function of wealth other than the wealth of the state as a whole."[546]

In 1995, Wyoming Supreme Court found in *Campbell County School District v. State*[547] that differences in the funding and distribution formulas of the school finance system were not based on differences in the cost of education, thereby violating the Wyoming Constitution's equal protection and education provisions. The court then directed the legislature to define a proper educational package to be available to every Wyoming student and then to fund the package.[548] In responding to the court order, the legislature identified and passed into law a list of core knowledge and skills that delineated a proper education. They then declared that a proper education was one that was a "legislatively prescribed basket of educational goods and services, comprised primarily of common core of knowledge and skills, together with programs addressing special needs of identified student populations and mandatory statewide graduation

requirements."[549] The state then hired a group of consultants led by James W. Guthrie to determine the necessary components of an educational plan that would satisfy the court mandate and the legislature's law of a proper education. The consultants used the professional judgment approach in their proposal. Guthrie and Rothstein used panels of local experts and relied on national research and whole school designs to calculate an adequate level of resources to be distributed to Wyoming School districts.[550]

Guthrie created prototypical elementary, middle, and high schools using two stages of independent panels of education experts. The principal objective of the first stage, comprised of educational experts from Wyoming, was to identify the components of an instructional system that could deliver an adequate education. The objective of the second stage, comprised of regional educational experts, was to verify that the delivery components in the prototypical schools designed by the panels in the first stage could achieve the instructional objectives specified by the legislature.[551] After the prototypical school models were created, the consultants had to attach the cost of each of the model's components. Guthrie's team then had to calculate individual district circumstances and adjust for inflation in order to achieve true adequacy. A prototypical elementary school was defined as a K-5 school with 288 students, class sizes of 16, student/teacher ratios of 14.4, and a cost of $6,165 per pupil. A prototypical middle/junior high school was defined as a 6-8 grade school with 300 students, class sizes of 20, student/teacher ratios of 15.4, and a cost of $6,403 per pupil. A prototypical high school had grades 9-12 with 600 students, class sizes of 17, student/teacher ratios of 17, and a cost of $6,781 per pupil.[552] The legislature met in a special session in June of 1997, to meet a court deadline of July, 1997. They passed the work completed by Guthrie's team; however, a district court found in December, 1997 that some of the special session's work was still inadequate. During a special

budget session in 1998 additional legislation was enacted to address these deficiencies. In 2001, the court in *Campbell II* upheld portions of the new financing system and invalidated others.[553] The court ordered the legislature to devise a cost-based capital construction plan. They then granted a request for a rehearing to clarify the capital construction issues in *Campbell III*.[554] Guthrie's team (MAP) responded to concerns about their work:

> The Cost Based Block Grant will work only if the data upon which it depends are accurate and reliable. The system is complex, but no more than is necessary to comply with the Wyoming Supreme Court's ruling. It is important for the legislature to recognize how dramatically it has changed school finance laws in Wyoming. We know of no state which has made more fundamental changes to its school finance formula and which has increased funding at a rate faster than has Wyoming. The accomplishment is all the more remarkable considering that it has been accomplished in only four years.[555]

Tennessee

Tennessee uses a weighted regression school funding formula known as the Basic Education Program (BEP). Preceding the BEP, the state used a minimum foundation program, known as the Tennessee Foundation Program, that was based on weighted average daily attendance. Due to the small level of equalization, the Supreme Court of Tennessee ruled in *Tennessee Small Schools v. McWherter* that the Tennessee Foundation Program violated the Tennessee Constitution's equal protection provision.[556] The court stated that it was the responsibility of the state legislature to develop a funding system that would substantially provide equal education opportunities to the children of the state of Tennessee. In anticipation of the court's ruling, the legislature had already enacted new finance legislation during their 1992 session as a part of a comprehensive reform bill called the Education Improvement Act (EIA). The Basic Education Plan is the finance component of the EIA and was phased in over a five-year period. Full funding was to be reached during the 1997-1998 school year.[557]

The Basic Education Plan, the Basic Education Plan Account, and the Education Trust Fund were all created under the Education Improvement Act of 1992. The EIA provides for any excess monies that remain in the BEP Account to be transferred to the Education Trust Fund and not returned to the state's general fund. The BEP creates a funding formula that provides flexibility for school systems to determine how state funds should be spent. The funding formula provides 75% of state school funding for classroom components and 50% for non-classroom components.[558] The Basic Education Program is based on the cost of providing specific services and programs, taking into account 42 components of a basic education. These components have been referred to as a "full tool box," the cost of which is reviewed annually by the legislature.[559] Tennessee used both the professional judgment approach by Guthrie and Rothstein and the resource cost model by Chambers and Parrish. The educational components and their cost were determined using a diverse group of researchers, policymakers, and practitioners. The educational components were chosen specifically because analysis of Tennessee education data linked these inputs with student outcomes. A previous study known as Project Star influenced the setting of maximum class size mandates.[560]

Equity and adequacy are both addressed in the design of the Basic Education Program. Equity is established through fiscal equalization among local school districts. Adequacy of funding programs is adjusted by annual reevaluation of inflation and unit cost based on actual expenditures.[561] Tennessee has established several checks and balances in the education finance system. The following agencies have played major roles in overseeing the education fiscal process: The Tennessee General Assembly, the Department of Finance and Administration, the Comptroller of the Treasury, the Department of Education, and the State Board of Education.

The Tennessee Advisory Commission on Intergovernmental Relations researches and publishes an annual study on education funding accountability.[562]

In 1995, the Supreme Court of Tennessee upheld the educational components of the Basic Education Program. A third appeal was made in *Small Schools II* in 2002.[563] The court found that "the omission of a requirement for equalizing teachers' salaries was a significant defect in the Basic Education Program, which put the entire plan at risk both functionally and legally, and we concluded that the plan must include equalization of teachers' salaries according to the BEP formula in order for the plan to be constitutional."[564]

In a paper entitled *Funding Public Schools: Is the BEP Adequate?*[565] John Morgan stated, "Although the Tennessee Supreme Court's *Small Schools* decisions and Tennessee's education statutes describe requirements and goals of public education, neither explicitly defines the minimum state responsibility or meaning of basic in the Basic Education Program." In his report, Morgan gave the following analysis and conclusions:

1. The BEP formula is based primarily on inputs required for K-12 education rather than outcomes expected.
2. Because the state has not determined what standards should be used to measure adequacy, it is difficult to assess whether the BEP funds an adequate education.
3. Once an adequacy standard (or standards) is defined, several approaches may be used to reach it.
    a. Professional judgment
    b. Successful school or successful school district
    c. School reform models
    d. Statistical estimation
4. Because adequacy implies helping all students reach a certain performance level regardless of student characteristics, an adequate finance system would likely focus resources or reforms on subsets of the student population.
5. The BEP does not include some components that may help achieve adequacy. These include:
    a. Pre-kindergarten programs
    b. Additional, targeted class-size reduction
    c. Quality professional development[566]

It appears that the Basic Education Program, with recommended changes, will bring Tennessee closer to an adequate system of education, but only time will tell.

Guthrie and Rothstein stated,

> Adequacy as a concept holds the promise of rendering education less dismal and more rational. It holds the promise of elevating debate about education to a consideration of what ought to be learned, how it ought to be taught, and how we should measure the outcomes. It holds the potential for elevating debate about the purposes of schooling and taking attention away from the sources, as opposed to the levels, of revenue. It also holds the prospect of helping improve the learning lives of millions of students. To fulfill this potential, however, adequacy must be provided with a far more solid research base than now exists.[567]

Ohio, Wyoming, and Tennessee have shown progress toward that allusive term *adequacy*. All three states are using some of the most recent funding strategies developed by the leading researchers in education finance today. It appears that Ohio and Tennessee may be headed back to the courts. Of the three states, this author believes that Wyoming has developed the best school funding system and may be closer to reaching the mark of an adequate school system for all of their students than Ohio or Tennessee. All three states are among several others taking the advice of experts in the field of education and attempting to develop adequate school funding systems. A new driving force for states and school funding systems are the federal mandates of No Child Left Behind. According to Odden, NCLB essentially has the same objective as standards-based education reform: students achieving to high standards.[568] It will be interesting to watch school funding methods evolve over the next decade, to observe what role the federal government will play, and to speculate about when federal standards of adequacy might be established.

CHAPTER 3

REVIEW OF ALABAMA'S SUPREME COURT

OPINION OF THE JUSTICES NO. 338 AND RULING OF MAY 31, 2002

Opinion of the Justices No. 338

On April 27, 1993, the Alabama Supreme Court issued *Opinion of the Justices No. 338*.[569] This opinion responded to the State Senate Resolution 97, which asked the justices whether Section One of Senate Bill 607 was required according to the Alabama Constitution. Section One of Senate Bill 607 reads as follows:

> Section 1. The Legislature finds that it is constitutionally required to comply with the order of the circuit court in the consolidated cases of *Alabama Coalition of Equity, Inc. v. Hut* CV-90-883-R, and *Harper v. Hunt*, CV-91-117-R, to wit:
>
> 3. That, pursuant to Alabama Constitution art. I, §§ 1, 6, 13, and 22 and Art. XIV, § 256, Alabama school-age children, including children with disabilities, have and enjoy a constitutional right to attend school in a liberal system of public schools, established, organized, and maintained by the state, which shall provide all such schoolchildren with substantially equitable and adequate educational opportunities;
> 4. That the essential principles and features of the liberal system of public schools required by the Alabama Constitution include the following:
>   (a) It is the responsibility of the state to establish, organize, and maintain the system of public schools;
>   (b) The system of public schools shall extend throughout the state;
>   (c) The public schools must be free and open to all schoolchildren on equal terms;
>   (d) Equitable and adequate educational opportunities shall be provided to all schoolchildren regardless of the wealth of the communities in which the schoolchildren reside; and
>   (e) Adequate education opportunities shall consist of, at a minimum, an education that provides students with opportunity to attain the following:
>   (i) sufficient oral and written communication skills to function in Alabama, and at the national and international levels, in the coming years;
>   (ii) sufficient mathematic and scientific skills to function in Alabama, and at the national and international levels, in the coming years;

(iii) sufficient knowledge of economic, social, and political systems generally, and of the history, politics, and social structure of Alabama and the United States, specifically, to enable the student to make informed choices;
(iv) sufficient understanding of governmental processes and basic civic institutions to enable the student to understand and contribute to the issues that affect his or her community, state, and nation;
(v) sufficient self-knowledge and knowledge of principles of health and mental hygiene to enable the student to monitor and contribute to his or her own physical and mental well-being;
(vi) sufficient understanding of the arts to enable each student to appreciate his or her cultural heritages of others;
(vii) sufficient training, or preparation for advanced training, in academic or vocational skills, and sufficient guidance, to enable each child to choose and pursue life work intelligently;
(viii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in Alabama, in surrounding states, across the nation, and throughout the world, in academics or in the job market; and
(ix) sufficient support and guidance so that every student feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her full human potential;

3. That, pursuant to Ala. Code §§ 16-39-3 and 16-39A-2, Alabama schoolchildren with disabilities aged 3-21 have the right to appropriate instruction and special services;
4. That the present system of public schools in Alabama violates the aforestated constitutional and statutory rights of plaintiffs;
5. That the state officers charged by law with responsibility for the Alabama public school system are hereby enjoined to establish, organize, and maintain a system of pubic schools that provides equitable and adequate educational opportunities to all school-age children, including children with disabilities, throughout the state in accordance with the constitutional mandates of Ala. Const. art. XIV, § 256; art. I, §§ 1, 6, 13, and 22; and to provide appropriate instruction and special services to children with disabilities aged three through twenty-one pursuant to Ala. Code §§ 16-39-3 and 16-39A-2.[570]

Rendering opinion was not a new practice for the Justices; in 1923 a law was enacted that permitted, but did not require, the Justices to render an opinion. The 1923 law was part of the 1975 Alabama Code in § 12-2-10. The high court set forth the following principles, to which they still adhere:

> Interpreting the act according to its manifest effects, these conclusions must, of necessity prevail: (a) That the act does not at all contemplate the advice or the advisory opinions of the Justices upon any matter relating to the wisdom, desirability, or policy of prospective

> legislative or executive action; (b) that the merely advisory opinions contemplated are those of the individual Justices, not of the Supreme Court of Alabama in its judicial capacity; (c) that specific inquiries, within the intent of the act, must involve or concern concrete, important constitutional questions upon matters or subjects of general public nature, as distinguished from questions involved in the ascertainment or declaration of private right or interest; (d) and that responses to questions within the purview of the act are designed to be advisory, consultative only, not concluding or binding the Governor or the House or Houses propounding inquiries or the Justices responding thereto.[571]

In responding to the requested opinion, the Justices stated,

> Because the question you pose is one of great public interest, and because the question raises a question of fundamental constitutional law relating to the separation of powers of government, we elect to express our opinion on the question you ask, but we must point out, as we did on another occasion when the Legislature asked for the opinion of the Justices on the constitutionality of pending legislation while the basic constitutionality of the same Act was being raised on appeal in an adversary setting: "The procedure, as well as the advisability, of rendering advisory opinions is not without difficulty, particularly in view of the fact that the questions are presented outside the normal adversary system wherein pertinent facts from the record of a trial court would be presented, and the issues would be briefed by attorneys and most times orally argued before the Court." *Opinion of the Justices No. 289*, 410 So. 2d 388 at pages 391-92 (Ala. 1982).[572]

The Justices reviewed the trial court's order and the procedural history of these consolidated cases. The circuit court's order stated,

> Plaintiffs in this action challenge the constitutionality of Alabama's system of public elementary and secondary education, which they contend does not offer equitable and adequate educational opportunities to the schoolchildren of the state, including children with disabilities. They seek declaratory and injunctive relief from the constitutional and statutory violations alleged. Defendants deny that the public school system is unlawful and deny further that this Court is the proper forum for resolution of this dispute. Pursuant to the findings of face and conclusions of law which follow, the Court finds and determines that the plaintiffs are entitled to a declaratory judgment that the present system of public schools in Alabama violates the constitutional mandate of Art. XIV, § 256, and the provisions of Art. I §§ 1, 6, 13, and 22 of the Alabama Constitution, because the system of public schools fails to provide equitable and adequate educational opportunities to all schoolchildren and, with respect to children with disabilities ages 3 through 21, fails to provide appropriate instruction and special services in violation of Ala. Code (1975) §§ 16-39-3 and 16-39A-2.[573]

On May 3, 1990, the Alabama Coalition for Equity, Inc. (ACE) filed a complaint in the Circuit Court for Montgomery County.[574] ACE is a non-profit corporation comprised of 25

school systems, Barbour, Butler, Clarke, Coosa, Crenshaw, Geneva, Hale, Lawrence, Lowndes, Macon, Pickens, Pike, Winston, Greene, Bullock, Conecuh, Henry, Limestone, Perry, Walker, Wilcox, Chamber, Talladega, and Dallas County Boards of Education, and the Troy City Board of Education, along with a number of individual parents and schoolchildren.[575] On August 3, 1990, the Alabama Disabilities Advocacy Program, on behalf of John Doe, a disabled student, filed a motion to intervene in the ACE lawsuit.[576] Before Judge Mark Montiel could rule on this motion, he was defeated in the November elections by Democrat Eugene W. Reese. Judge Reese granted the motion on January 9, 1991.[577]

In a separate case, the Alabama affiliate of the American Civil Liberties Union, representing Mary Harper, filed a similar complaint to the ACE complaint on January 18, 1991.[578] Mary Harper sued as next of friend on behalf of Deion Harper and Kerry Phillips, minors. The Harper Complaint challenged the funding of Public Elementary and Secondary Schools as violating a fundamental right to education for all of Alabama's children between the ages of 7 and 21, allegedly guaranteed in Article XIV § 256 of the Alabama Constitution of 1901.[579] This suit also sought to nullify Amendment 111 of the Constitution. Amendment 111 was added to the constitution in 1956, allegedly in reaction to the landmark desegregation decision in *Brown v. Board of Education*.[580] In Amendment 111, the State of Alabama sought to disavow any responsibility for public education.[581] The suit declared that Amendment 111 violated the Equal Protection and Due Process guarantees under the Fourteenth Amendment to the U.S. Constitution. This declaration was added as a jurisdictional ground for action.[582]

On March 18, 1991, Montgomery Circuit Court Judge Reece consolidated the Harper Complaint and the Alabama Coalition for Equity Complaint. Then, on April 21, he certified Harper as a statewide class action representing all children who were presently enrolled or would

be enrolled in public schools in Alabama that provide less than a minimally adequate education.[583] The complaint filed by the Alabama Disabilities Advocacy Program on behalf of John Doe, a disabled student, was certified by the circuit court as a sub-class of all school children in Alabama on July 24, 1992. The Doe sub-class represented Alabama's children between the age of 3 and 21 with identified disabilities and intervened to add claims under the Alabama Code of 1975 § 16-39-3 and 16-39A-2. These cases were consolidated into what is now known as the "Equity Funding Case."[584]

The court granted a motion that allowed Mountain Brook, Hoover, Homewood, Shelby, Mobile, and Decatur School Systems, along with The Alabama Association of School Boards and A+, an organization dedicated to reforming and improving public education, to appear as *amicus curiae*.[585] The plaintiffs were granted partial summary judgment on August 13, 1991. The court ruled that section 256 of Amendment 111 of the Alabama Constitution was in violation of the Fourteenth Amendment to the U.S. Constitution. The only part of Section 256 that was left intact was that which states, "The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years." This order was certified as a final order and was not appealed by the defendants.[586] The plaintiffs also requested that the non-jury trial be a bifurcated trial and divided into liability and remedy phases.[587] The court granted their request.

The liability phase lasted for 24 days, concluded on August 27, 1992, with Judge Reese's resolution, and was summarized in the *Opinion of the Justices No. 338*:

> The ACE and Harper plaintiffs claim that the educational opportunities provide to schoolchildren in Alabama's system of public elementary and secondary schools are: (1) inequitable, because such opportunities vary widely from system to system without constitutionally sufficient justification; and (2) inadequate by virtually any measure of educational adequacy, including the state's own standards and other professionally recognized measures of adequacy.[588]

Plaintiffs emphasized, as a factual matter, that "the disparities and inadequacies of which they complain are substantial, meaningful and, in many cases, profound." Plaintiffs argued that these educational conditions were the responsibility of the state government and that these conditions violated their rights under Alabama Constitution Article XIV, § 256 (the state's education clause), Alabama's Constitution article I, §§ 1, 6, 13, and 22 (the state equal protection and due process clause), and the U.S. Constitution, Amendment 14 (the federal equal protection and due process clauses). They believed that this court was the proper forum in which plaintiffs' constitutional rights should be "declared and vindicated."[589]

The defendants argued that the disparities in school funding was a result of local control (local taxation) and not a result of state funding. They also claimed that education was the responsibility of the state legislature and that the court's intervention was illegal based on the separation of powers per the state constitution.[590]

The court stated, in the liability phase judgment:

1. That, pursuant to Alabama Constitution art. I, §§ 1, 6, 13, and 22 [guaranteeing Alabama citizens equal protection of the laws] and art. XIV [guaranteeing Alabama citizens access to a liberal system of public schools], § 256, Alabama school-age children, including children with disabilities, have and enjoy a constitutional right to attend school in a liberal system of public schools, established, organized, and maintained by the state, which shall provide all such schoolchildren with substantially equitable and adequate educational opportunities;
2. That the essential principles and features of the liberal system of public schools required by the Alabama Constitution include the following:
    a. It is the responsibility of the state to establish, organize, and maintain the system of public schools;
    b. The system of public schools shall extend throughout the state;
    c. The public schools must be free and open to all schoolchildren on equal terms;
    d. Equitable and adequate educational opportunities shall be provided to all schoolchildren regardless of the wealth of the communities in which the schoolchildren reside; and
    e. Adequate education opportunities shall consist of, at a minimum, an education that provides students with opportunity to attain the following:

(i) sufficient oral and written communication skills to function in Alabama, and at the national and international levels, in the coming years;
(ii) sufficient mathematic and scientific skills to function in Alabama, and at the national and international levels, in the coming years;
(iii) sufficient knowledge of economic, social, and political systems generally, and of the history, politics, and social structure of Alabama and the United States, specifically, to enable the student to make informed choices;
(iv) sufficient understanding of governmental processes and basic civic institutions to enable the student to understand and contribute to the issues that affect his or her community, state, and nation;
(v) sufficient self-knowledge and knowledge of principles of health and mental hygiene to enable the student to monitor and contribute to his or her own physical and mental well-being;
(vi) sufficient understanding of the arts to enable each student to appreciate his or her cultural heritages of others;
(vii) sufficient training, or preparation for advanced training, in academic or vocational skills, and sufficient guidance, to enable each child to choose and pursue life work intelligently;
(viii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in Alabama, in surrounding states, across the nation, and throughout the world, in academics or in the job market; and
(ix) sufficient support and guidance so that every student feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her full human potential;

3. That, pursuant to Ala. Code §§ 16-39-3 and 16-39A-2, Alabama schoolchildren with disabilities aged 3-21 have the right to appropriate instruction and special services;
4. That the present system of public schools in Alabama violates the aforestated constitutional and statutory rights of plaintiffs;
5. That the state officers charged by law with responsibility for the Alabama public school system, are hereby enjoined to establish, organize, and maintain a system of pubic schools that provides equitable and adequate educational opportunities to all school-age children, including children with disabilities, throughout the state in accordance with the constitutional mandates of Ala. Const. Art. XIV, § 256; art. I, §§ 1, 6, 13, and 22; and to provide appropriate instruction and special services to children with disabilities aged three through twenty-one pursuant to Ala. Code §§ 16-39-3 and 16-39A-2.

The high court restated the issue:

> The ACE and Harper plaintiffs claim that the educational opportunities provided to schoolchildren in Alabama's system of public elementary and secondary schools are: (1) inequitable, because such opportunities vary widely from system to system without constitutionally sufficient justification; and (2) inadequate by virtually any measure of

> educational adequacy, including the state's own standards and other professionally recognized measures of adequacy. Plaintiffs emphasize, as a factual matter, that the disparities and inadequacies of which they complain are substantial, meaningful, and, in many cases, profound. Plaintiffs argue that these conditions violate their rights under Ala. Const. Art. XIV, § 256, Ala. Const. Art I §§ 1, 6, 13, and 22, and the United States Constitution Amend. 14 and that this Court is the proper forum in which plaintiffs' constitutional rights should be declared and vindicated.[591]

The John Doe plaintiffs made two additional claims: (a) that they were deprived of the right to an appropriate education and special services under Ala. Code §§ 16-39-3 and 16-39A-2; (b) that under the due process clause of the Ala. Const. Art. I §§ 6 and 13, the manner in which the state distributed special educational funding was based on total pupil enrollment and that this system was arbitrary and irrational and resulted in the denial of an appropriate education for students with disabilities.[592]

In addressing the claim of equal educational opportunity, the court agreed with the plaintiffs, stating that, as a matter of fact, Alabama schoolchildren did not receive substantially equal or equitable educational opportunities in the state public schools.[593] The court further stated that educational opportunities meant the educational facilities, programs, and services provided for students in Alabama's public schools and the opportunity to benefit from those facilities, programs, and services.[594] The court began its review of the evidence by focusing on the issue of substantial equity and fairness in the system the state used to allocate educational opportunity to its students. The court concluded, " Although equal opportunity cannot be measured exclusively in terms of public school funding, there is no question that educational facilities, programs and services—from field trips to computers—cost money to provide, so disparities in school funding must play a major role in the Court's analysis."[595]

The plaintiffs showed that in 1989-90 school year, there was a disparity of $2,449 revenues per pupil between the highest and lowest ranked systems. Testifying on behalf of ACE,

Kern Alexander, a nationally recognized authority on school finance, reviewed funding disparities across the systems. He identified the five wealthiest and the five poorest systems, finding a difference of almost $29,700 per classroom of 25 students in one year between the average total state and local revenues of these five wealthiest and five poorest systems.[596] Alexander testified further that the 20% of students receiving the most funds in Alabama had 78 million more education dollars spent on them in a single year than did the 20% of students in the lowest funded systems.[597] Margaret Goertz, also a nationally recognized school finance expert, testified for the Harper plaintiffs.[598] In her research, she grouped students by wealth into five quintiles. She discovered a $790 per student disparity between the first and fifth quintile, which resulted in a 4.4 million dollars per year difference between the wealthiest and poorest quintile.[599] Goertz also found that a sizable difference existed among all the quintiles in her analysis.[600] Based on this testimony, the court found "disparities in public school funding in Alabama do not just affect those students in the very wealthiest and the very poorest systems; instead, the effects are widespread and systemic."[601]

The court disagreed with Governor Hunt's argument that the studies were flawed due to the fact that they did not include federal funding in their studies; however, the court stated that including federal revenues in an equity analysis would make the funding disparities appear smaller. The court found that most of the federal funds were targeted toward special programs, such as ROTC, breakfast and lunch programs, and special populations, such as Indian education. Some funds went to non-K12 programs, including head start and adult education.[602]

The court stated,

> To the extent that the remaining federal funds do finance instruction within the public schools, the evidence showed that these funds typically do not pay for the schools' basic educational programs, but for remedial or compensatory services aimed at bringing disadvantaged children up to the same starting line, as it were, with their peers. In short,

> the Court finds that federal aid does not close the gap between wealthier and poorer school systems by financing basic, system-wide school programs or facilities and, thus, it cannot be held to mitigate the disparities in resources that are of primary concern among these systems. Nor are federal revenues intended to have this effect; by law, these funds may be used only to supplement, not to supplant, the public schools' regular programs. Perhaps most importantly, the state of Alabama does not collect or, for the most part, control these revenues, which are not available to advance state educational goals but rather serve federal mandates. The issue before the Court is whether the state meets constitutional mandates in providing public schools, not the federal government. Accordingly, the Court finds that plaintiffs' equity analyses are proper in excluding federal aid.[603]

The court noted that the defendant's study, conducted by their expert Wolkoff, included federal funding, and that they found a $55,575 difference per classroom of 25 between the wealthiest and poorest systems in a single year. Excluding the outliers, the difference was $33,775 per classroom. Wolkoff admitted that "these amounts might look like a lot of money to the teacher at the bottom."[604] He also admitted that these disparities in Alabama's public school funding exceeded those deemed acceptable under Federal standards.[605]

Governor Hunt suggested that local citizens did not want better schools or that they did not have confidence that more money would improve them. He based this belief on the fact that local citizens continued to vote down tax referenda that would improve funding.[606] In response to these suggestions, the plaintiffs showed that

> opposition to public school taxes in some parts of the state is led by parents and supporters of all-white private schools—schools that the state of Alabama supported at the time of their establishment. . . . Thus, in some areas of the state, opposition to school taxes may be motivated by opposition to integrated education rather than opposition to education generally.[607]

Testifying for the plaintiffs, Harvey, author of the leading history of school finance in Alabama, stated that "the state funds do not today play their intended role in the school finance system."[608] Harvey explained his position:

> Since Alabama's statewide public school system was established in 1854, revenues for schools collected at the state level have been intended in varying degrees to equalize, or

> compensate for differences in local school funds. This concept achieved its greatest refinement in Alabama in 1935, when the legislature enacted the Minimum Program Fund, a so-called "foundation" program which was widely regarded as among the leading equalization plans in America. Such programs require a certain level of local tax effort for schools, and then allocate state funds in inverse proportion to local revenues to equalize funding so as to pay for a state-determined minimum education program for all students. Local revenues beyond the minimum level are not equalized.[609]

Harvey claimed that the Minimum Program Fund did not currently work as it was intended for a couple of reasons:

> First, less that one percent of local school funds are now equalized with state revenues, in part because the level of required local effort has not been adjusted since 1938, and it no longer represents a large portion of total local school revenues. Further, only a small part—some $4.7 million—of the limited local effort that the state does require is actually equalized, because of an unusual historical circumstance. The 1939 Alabama legislature, concerned that property values and, therefore, local school funds from ad valorem taxes were decreasing as a result of the depression, decided to freeze the assessed valuation of property in the state at $93,297,005 (the 1938 level) for purposes of calculating required local effort. Although property values have in the succeeding 53 years increased to approximately $20 billion, the equalization requirement for the local funds has never been recalculated. Second, that the state equalization program also fails to operate as intended because roughly 60 percent of state school appropriations now bypass the Minimum Program Fund, which was originally designed as the primary vehicle for distributing state school funds.[610]

The 60% of state school appropriations that bypassed the Minimum Program Fund fell into two categories: the financial assistance program and fringe benefits paid by the state to local school employees. These funds came from the Alabama Special Education Trust Fund which was the primary repository of state school revenues.[611] These allocations were based on either student numbers or number of employees in the system. Wealthier systems, who could hire more staff from local funds, received more state funding than poorer systems did. According to Harvey, "The extraordinary result of these departures from the original intent of the school finance system is that not only do state funds fail to compensate for variations in local funds, the state actually allocates more state dollars to the wealthier systems than to poorer systems, thus exacerbating the inequalities."[612] In response, Governor Hunt called this funding formula

"hopelessly out-of-date" and "too arbitrary."[613] The court found that "the state school funds are clearly part of the problem, not part of the solution, and the state cannot simply pin the blame for current funding inequalities on local school revenues."[614] The court further stated that the defendant's argument about whether funds were local or state was irrelevant. By Alabama law, all public school taxes are the state's, and all public school funds are state funds, whether collected at the state or local level.[615] For this reason, the court stated that the appropriated funds to consider were all funds raised at local and state levels.[616]

A disparity study was conducted by Ross, Trentham, and McLean for the plaintiffs and presented at trial. The study examined facilities, staffing, curriculum, supplies, and equipment in the eight poorest school systems and the seven wealthiest systems. Ross testified that, during the conduct of the study, he witnessed "deplorable" restroom conditions in a number of schools, a gym constructed using a portable classroom with holes in the floor, and children playing on imaginary playground equipment at one elementary school. He stated that, in his extensive studies of schools, he had never before seen conditions as inadequate as those prevailing at some of Alabama's poorest schools.[617] In every area that the study reviewed, wealthier school systems far exceeded the poorer systems in facilities, equipment, supplies, staffing, salaries, curriculum, and extra-curricula activities.

The State of Alabama established an advanced diploma program that would meet the admission requirements beginning in 1995 of the University of Alabama.[618] According to Alexander, 49% of students in the wealthier systems graduated with the advanced diploma, while only 29% of students from the poorer systems obtained the advanced diploma. Several of the superintendents and principals who testified stated that they could not offer the advanced diploma due to lack of funding.[619]

Barton, assistant state superintendent of schools for instruction, testified that disparities in educational resources and opportunities existed not only between school systems but also between schools in the same system:[620] "Such disparities are evident among schools within the same system but on opposite sides of the tracks—a difference, between the haves and the have-nots," which she said "frequently in Alabama means the difference between black and white." Buckley-Commander, education advisor to Governor Hunt, admitted that intra-system disparities did exist. Harvey testified that "the boundaries of the separate school tax districts within a local system have, at times, been used to gerrymander taxable wealth into the predominantly white districts at the expense of black citizens."[621]

The court found that disparities of educational opportunities did exist and that this evidence was undisputed by the defendants.[622] The court also stated that great disparities existed in the funding of special education.[623] Governor Hunt argued that local school boards, rather than the state, were responsible for providing students with disabilities an appropriate education.[624] The court stated,

> It is clear that substantially all critical decisions regarding allocation of special education funds rest with the state. The state distributes the majority of the total special education revenues used locally. The state altered the mechanism for allocating of this money from total enrollment to weighed child count. The state is the only entity capable of monitoring the effects of this change. As a practical matter, it is clear that meaningful change in special education funding is and must be the responsibility of state, and not local, authorities.[625]

The plaintiffs argued that not only were facilities, programs, and services in Alabama's public schools inequitable but that they were also inadequate. The court responded,

> This court is not empowered to determine whether the Alabama education system is sufficient to meet the standards or achieve purposes that the Court might itself prefer. But the essence of plaintiffs' adequacy claim is that the state education system fails to meet the standards or achieve the purposes of public education mandated by the Alabama Constitution.[626]

In their adequacy claim, the plaintiffs showed that Alabama schools did not meet state or regional accreditation standards in schools across the state. The state department of education and the legislative had developed the Alabama Education Improvement Act, Performance-Based Accreditation, and the Plan for Excellence.[627] The plaintiffs also showed that the three initiatives developed by the state to produce adequate levels of education failed. During the trial, Governor Hunt and Buckley-Commander testified that, in their opinion, the Alabama Education Improvement Act of 1991 was necessary to provide an adequate education. Both sides agreed that this act was an important beginning for assessing minimal education adequacy.[628] All three documents acknowledged the present inadequacy of Alabama schools. The Alabama Education Improvement Act states that "attainment of these goals will require a serious reexamination of every aspect of Alabama's education system and some profound changes in our public schools."[629] Performance-Based Accreditation calls for "a major change in the way accreditation historically has been obtained."[630] In introducing the Plan for Excellence, the Department of Education indicated that its "analyses of problems and recommendations for addressing these problems are extensive, touching on almost every area of public elementary and secondary education."[631] Although the State Department of Education and the legislature adopted all three plans to bring Alabama schools closer to adequacy, testimony indicated that none of the plans had been funded.[632]

The plaintiffs indicated that social and economic cost to State of Alabama had also been affected by the failure to provide adequate educational opportunities for its children. Flynt and Harvey testified that the decades of failing to fund education adequately all too often resulted in racial conflict.[633] Elder testified that his study found "a definite and consistent positive relationship between funding levels for elementary and secondary schools and state income and

employment growth and concluded that greater educational support generally leads to larger incomes and higher employment."[634] The John Doe plaintiffs also argued that children with disabilities do not receive an appropriate education. Testifying for the plaintiffs were Snell and Rostetter, special education experts. They testified along with Wilson and Blackwell, employees of the State Department of Education in the Division of Special Education Services. Their testimony confirmed that many children with disabilities in Alabama were not receiving an adequate or appropriate education.[635]

The court concluded that the ACE, Harper, and John Doe plaintiffs proved the inequity and inadequacy of the public school system.[636] Although the Governor conceded the inequity and inadequacy of educational opportunity, he argued that this court "is not the forum to solve the educational woes of this state." He stated that "a ruling in favor of plaintiffs would constitute an encroachment upon the separation of powers doctrine and invade the legislature's discretion in this area."[637] In the court's conclusion of law, Justice Reeves stated,

> This Court acknowledges the broad authority of the executive and legislative branches in the area of public education. However, it is black-letter law that such authority is bounded by the constitution, which is the fundamental and paramount law and represents the supreme will of the people. When as in this case constitutional rights are at issue, it is emphatically the province and duty of the judicial department to say what the law is, even though the judiciary may interpret the constitution in a manner at variance with the construction given the document by another branch. As the Alabama Supreme Court put it in an analogous case, "we are not persuaded that the legislature has the unbridled authority to govern all aspects of our social and economic life. The legislative discretion is limited by the Constitution to the enactment of laws which do not deny to persons of this state the equal protection of the laws," *Peddy v. Montgomery*, 345 So. 2d 631, 636-37 (Ala. 1977)—or, this Court would add, any other constitutional right.[638]

The court reviewed cases from other state high courts before rendering its decision. It reviewed Kentucky's *Rose v. Council for Better Education, Inc.*, Washington's *Seattle School District No. 1 v. State*, and other cases in Montana, Arkansas, New Jersey, and California.

Governor Hunt maintained that the court would be ordering tax increases and setting priorities for government spending if it ruled for the plaintiffs. The court looked to almost an identical case concerning this argument. In 1974, Governor Wallace argued that the federal court Justice Johnson's ruling that required Alabama to increase funding for psychiatric care and treatment to civilly committed patients would "require heavy expenditures of state funds; that these funds will have to come from other state programs; and that the duty of compromising and allocating funds among the many programs competing for them is a duty which must be discharged by the state governor and the legislature alone." *Wyatt v. Aderholt,* 503 F. 2d 1305, 1314 (5th Cr. 1974). The Fifth Circuit Court of Appeals disagreed:

> It goes without saying that state legislatures are ordinarily free to choose among various social services competing for legislative attention and state funds. But that does not mean that a state legislature is free, for budgetary or other reasons, to provide a social service in a manner which will result in the denial of individuals' constitutional rights.[639]

Governor Hunt then argued that Alabama could not afford to fund education to the level that the plaintiffs were requesting due to the limited tax base.[640] The court first looked to the earlier testimony of Flynt that "what the state does not pay for now in quality education, it pays for later in welfare, lost jobs, and prison cost."[641]

The argument that Alabama was too poor to fund education was not a new argument. However, at the turn of the century the prevailing view was that the state "was too poor not to invest adequately in public education."[642] In 1896, Turner, Superintendent of Education, declared that "the only way to make Alabama able to support a public school system is to educate her people and they will become prosperous. This will have to come first, poverty or not poverty."[643] In his opening statement during the 1901 constitutional convention, Convention president Knox stated, "It will not do to say you are too poor to educate the people—you are too poor not to educate them."[644] In deciding this issue, the court cited *Waytt v. Aderhol*:[645]

> The state may not fail to provide treatment for budgetary reasons alone. Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations. Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights.[646]

The plaintiffs' next argument was that the state's system of funding public education violated Section 256 of the Alabama Constitution, which states that "The Legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one."[647] The court first looked at the question of whether schoolchildren in Alabama had a fundamental right for equal protection under § 256 and stated,

> This provision is clearly mandatory: "the Legislature shall establish," the system of public schools. The Court notes in particular here that the duty imposed is a state rather than a local duty, rendering defendant's argument that localities are responsible for inadequate or inequitable educational opportunities untenable as a matter of law. § 256 placed the primary responsibility for providing education upon the state government. Every public school is a state school, created by the state, supported by the state, supervised by the state, through statewide and local agencies, taught by teachers licensed by the state, employed by agencies of the state.[648]

The court went on the state that "Under these circumstances, there can be no question that Alabama Schoolchildren have an enforceable constitutional right to an education as guaranteed by § 256."[649] The court confirmed its decision, referring to its earlier ruling concerning Amendment 111.[650] The court ruled that this 1956 constitutional amendment, which reads, "Nothing in the Constitution shall be constructed as creating any right to education at public expense," was involution of the Fourteenth Amendment to the U.S. Constitution.[651] The court noted that this amendment was added to the Alabama Constitution for racial reasons which compelled the invalidation of the amendment.[652] One federal district concluded that Alabama's Constitution provided all children with an entitlement to a public education, even with Amendment 111 still in effect.[653] Governor Hunt argued that, according the constitution, all the

state had to provide was "maintenance of a public system of education, with no qualitative standards of adequacy nor any financial duty regarding education."[654] The plaintiffs disagreed and so did the court.

The court considered the definition of a *system of public schools*. Harvey testified that Alabama's first state-wide system of public schools, established in 1854, stated its intent "to extend, upon equal terms, to all the children of our State, the inestimable blessings of liberal instruction." 1853-54 Ala. Acts 6 at 8.[655] The court reviewed the decision of an earlier Alabama case, *Ellsberry v. Seay*,[656] which specifically developed the meaning of the system of public schools. This decision was an earlier version of § 256 and became apart of the 1875 Alabama Constitution, which states, "The General Assembly shall establish, organize, and maintain a system of public schools throughout the state, for the equal benefit of the children thereof, between the ages of seven and twenty-one years."[657]

Although the Education Clause of the 1901 Constitution omitted the word *equal*, the court looked to the 1901 Constitutional Convention for the meaning. In his opening address, Convention President Knox called for "a system of public schools that would place an adequate education within the reach of every child of the state, both rich and poor."[658] In introducing the Education Committee's proposed education article, which omitted the word *equal*, chairman John Brown Graham stated, "I believe that the delegates of this Convention are unified upon the one subject of public education for all children of this State, and that they believe it should fall, as the dews and gentle rain, upon all alike, without reference to their condition."[659] Before the ratification of the 1901 Constitution and § 256, the Alabama Supreme Court in the *Opinion of the Justices 155* stated that the same definition given in the *Elsberry* decision to the constitutional system of public schools in 1875 applied to § 256 of the 1901 Constitution:

"Educational opportunities in this state do not fall, as the dews and gentle rain, upon all alike, without reference to their condition. The Court holds that Alabama's present system of public schools violates the constitutional right of plaintiffs to equal educational opportunity as guaranteed by Alabama Constitution Art. XIV, § 256."[660]

In addressing the plaintiffs' claim that the current system of public education violated the equal protection guarantees of §§ 1, 6, and 22 of the Alabama Constitution, the court found that education is a fundamental right under the Alabama Constitution.[661] Although the defendants argued that the Supreme Court's ruling in *San Antonio Independent School District v. Rodriguez*, (1973) that education is not a fundamental right under the federal constitution should control this court's decision, the court declared that "the question for this court, self-evidently, is not whether education is a fundamental right under the federal constitution; the question is, instead, the nature of the right to education under the constitution of Alabama. Thus *Rodriquez* does not control."[662] The court stated,

> Because education is a fundamental right under the Alabama Constitution, stark inequities in educational opportunity offered schoolchildren in this state must be justified under strict scrutiny by a compelling state interest to pass constitutional muster. While Governor Hunt contends in his briefs that the state's interest in local control justifies the differential treatment complained of by plaintiffs, he does not argue that local control represents a compelling state interest, only a legitimate state purpose under rationality review. Although the court agrees with Governor Hunt that local control is presumptively a legitimate state interest, too often in Alabama, local control has actually been synonymous with local discrimination. Plaintiffs showed that in some parts of the state, white flight from school desegregation has siphoned support from the public schools. Parents and other promoters of all-white private academies, which were often begun with the state's assistance in defiance of the Supreme Court's desegregation mandate, have campaigned against public school taxes and successfully resisted to improve the public schools. Given the state's role in fostering polarization along racial lines in these school systems, it cannot now wash its hands and abandon public schools to unfettered local control not friendly to their interest. Thus, the Court holds that the differential treatment in question cannot be sustained under the rational relationship test as permissible, or even effective, means of promoting local control. Further, the Court cannot conceive any rational justification, educational or otherwise, for school funding and educational opportunity to depend upon the happenstance of local wealth and of student's places of

> residence. Accordingly, the Court holds that no matter what standard of equal protection review is employed, the present system of public schools in Alabama violates the Constitution of Alabama, Article I, §§ 1,6, and 22.[663]

The court addressed the special education claims:

> With regard to the Doe plaintiffs' claims, the Court emphasizes the schoolchildren with disabilities have the same constitutional right to an equitable and adequate education as all other schoolchildren in Alabama. In addition, however, the sub-class represented by John Doe asserted two additional claims unique to children with disabilities: (1) that children with disabilities are deprived of their statutory right under Ala. Code §§16-39-3 and 16-39A-2 to an appropriate education and special services, and (2) that the Alabama system of funding for special education is irrational and violates the due process clause of the Alabama Constitution. The Court rules in favor of the Doe plaintiffs on both.[664]

In conclusion, the court declared,

> The Court is mindful of the importance of this case. In reaching its decision, the Court has carefully considered the delicate balance among the three departments of state government under the doctrine of separation of powers, all of the evidence relevant to resolve the important constitutional issues presented by competent counsel for all parties involved, as well as their arguments and written briefs. The defendant, Governor Hunt, through his counsel, has admitted that deficiencies exist in Alabama's public school system and that additional funds are needed to remedy some of the unsatisfactory conditions. The real issue here is whether these deficiencies and conditions rise to the level of deprivations of constitutional and statutory rights. In the opinion of the Court, they do. Therefore, it is ordered, adjudged, and decreed as follows:
>
> 1. That, pursuant to Alabama Constitution art. I, §§ 1, 6, and 22 and art. XIV, § 256, Alabama school-age children, including children with disabilities, have and enjoy a constitutional right to attend school in a liberal system of public schools, established, organized, and maintained by the state, which shall provide all such schoolchildren with substantially equitable and adequate educational opportunities;
> 2. That the essential principles and features of the liberal system of public schools required by the Alabama Constitution include the following:
>   (a) It is the responsibility of the state to establish, organize, and maintain the system of public schools;
>   (b) The system of public schools shall extend throughout the state;
>   (c) The public schools must be free and open to all schoolchildren on equal terms;

(d) Equitable and adequate educational opportunities shall be provided to all schoolchildren regardless of the wealth of the communities in which the schoolchildren reside; and

(e) Adequate education opportunities shall consist of, at a minimum, an education that provides students with opportunity to attain the following:

(i) sufficient oral and written communication skills to function in Alabama, and at the national and international levels, in the coming years;

(ii) sufficient mathematic and scientific skills to function in Alabama, and at the national and international levels, in the coming years;

(iii) sufficient knowledge of economic, social, and political systems generally, and of the history, politics, and social structure of Alabama and the United States, specifically, to enable the student to make informed choices;

(iv) sufficient understanding of governmental processes and basic civic institutions to enable the student to understand and contribute to the issues that affect his or her community, state, and nation;

(v) sufficient self-knowledge and knowledge of principles of health and mental hygiene to enable the student to monitor and contribute to his or her own physical and mental well-being;

(vi) sufficient understanding of the arts to enable each student to appreciate his or her cultural heritages of others;

(vii) sufficient training, or preparation for advanced training, in academic or vocational skills, and sufficient guidance, to enable each child to choose and pursue life work intelligently;

(viii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in Alabama, in surrounding states, across the nation, and throughout the world, in academics or in the job market; and

(ix) sufficient support and guidance so that every student feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her full human potential;

3. That, pursuant to Ala. Code §§ 16-39-3 and 16-39A-2, Alabama schoolchildren with disabilities aged 3-21 have the right to appropriate instruction and special services;
4. That the present system of public schools in Alabama violates the aforestated constitutional and statutory rights of plaintiffs;
5. That the state officers charged by law with responsibility for the Alabama public school system, are hereby enjoined to establish, organize, and maintain a system of pubic schools that provides equitable and adequate educational opportunities to all school-age children, including children with disabilities, throughout the state in accordance with the constitutional mandates of Ala. Const. Art. XIV, § 256; art. I, §§ 1, 6, 13, and 22; and to provide appropriate instruction and special services to children with disabilities aged three through twenty-one pursuant to Ala. Code §§ 16-39-3 and 16-39A-2.

6. That this matter is set for status conference on 9th day of June, 1993, at 8:30 a.m. for the purpose of establishing the procedures and timetable for determination of an appropriate remedy in this case.

Done on this 31st day of March, 1993.
Eugene W. Reece
Circuit Judge[665]

Ruling of May 31, 2002

On January 11, 2002, the Alabama Supreme Court, on its own initiative, placed this case on its rehearing docket.[666] On May 31, 2002, the court stated,

> This court shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men. Alabama Constitution of 1901 §43. In Alabama, separation of powers is not merely an implicit doctrine but rather an express command; a command stated with a forcefulness rivaled by few, if any, similar provisions in constitutions of other sovereigns. Amendment 582 to the Alabama Constitution of 1901 reflects this State's adherence to this command by effectively nullifying any order of a state court, which requires disbursement of state funds . . . until the order has been approved by a simple majority of both houses of the Legislature. Compelled by the weight of this command and a concern for judicial restraint, we hold (1) that this Court's review of the merits of the still pending cases commonly and collectively known in this State, and hereinafter referred to, as the Equity Funding Case, has reached its end, and (2) that, because the duty to fund Alabama's public schools is a duty that—for over 125 years—the people of this State have rested squarely upon the shoulders of the Legislature, it is the Legislature, not the courts, from which any further redress should be sought. Accordingly, we hold that the Equity Funding Case is due to be dismissed."[667]

The court stated that "concerns regarding judicial restraint and the separation of powers have constituted a repeated refrain in this litigation."[668] In concurring in the result but dissenting from the rationale, Justice Maddox noted that "this case involves a debate about the doctrine of separation of powers among coordinate, independent branches of state government and about whether certain orders were final or not."[669] Maddox went on to state that "the question of the power of the circuit court, in the remedy phased, might, and probably will, present questions involving the division of powers between the Executive Branch and the Legislative and Judicial

Branches of government."[670] Justice Houston concurred: "the legislative and executive branches have the responsibility of providing for public education."[671]

The court noted that "members of this Court have expressed serious concerns regarding the underlying foundations of this case and the trial court's actions and legal conclusions leading up to and included in its March 31, 1993 Liability Order. Justice Hooper, in dissenting, described the proceedings before the trial court as a "violation of the separation-of-powers doctrine and as a sham due to a lack of true adversity between the parties."[672] Justice Houston concurred and criticized "the trial court's interpretation of the Constitution of 1901, § § 1, 6, and 22 which [the trial court interpreted] to provide equal protection."[673] The Court stated,

> Given our ultimate holding in this opinion, we deem it judicially imprudent now—after issuing four decisions in this case over the past nine years—to test the bounds of judicial restraint in such a manner. Our present concerns parallel the rationale that undergirds the principle of *stare decisis*:
>
> The rule of *stare decisis* is founded on principles of conservatism. Not intended to prevent progress in the science of the law, and such modifications and adaptations of judicial decisions as may be required by the varying and advancing conditions of society and industries; but most beneficial, when applied in the exercise of a sound and wise discretion. The rule does not rest on a disaffirmance of judicial fallibility. Its invocation implies, that former decisions may be erroneous, adherence to which, though erroneous, will be productive of much less evil than a departure therefore. . . . The quieting of litigation; the public peace and repose; respect for the judicial administration of the law and confidence in its reasonable certainty, stability, and consistency; and all considerations of public policy call for permanently upholding acts done, contracts executed, rights vested, and titles to property acquired on the faith of decisions of the court of last resort.[674]

The Court went on to state,

> However, our restraint should not be seen as establishing some new formula for determining when this Court will decline to rule on an issue or to exercise its inherent appellate and supervisory power; the undisputedly *sui generic* nature of this case precludes such an interpretation. Like the issues surrounding the Liability Order, the issue of the proper remedy in this case raises concerns for judicial restraint, albeit of a different type. With regard to the remedy, our concern is not that this Court should refrain from potentially harming the public's confidence in the reasonable certainty, stability, and consistency of decisions of the judicial branch, but rather that the pronouncement of a specific remedy from the bench would necessarily represent an exercise of the power of

> that branch of government charged by the people of the State of Alabama with the sole duty to administer state funds to public schools: the Alabama Legislature.[675]

The court repeated what Justice Houston noted in *Ex parte James*:

> Circumstances have denied this Court the opportunity to review the trial court's liability order. Even so, it is the duty of the Judicial Department of Alabama government only to determine what the Constitution of Alabama requires. In my opinion, the Legislative Department and the Executive Department, and not the Judicial Department, have the power and duty to implement a plan that would make this system equitable (and hence, according to the trial court's liability order, constitutional). I trust that the Legislative Department and the Executive Department will proceed to exercise the power and perform the duty they have been called upon to exercise and perform to make Alabama's public educational system constitutional. The "Separation of Powers" provision of the Constitution of Alabama of 1901 (Art. III, § 43) prohibits me from doing more, without resorting to unconstitutional judicial activism, which I have heretofore avoided.[676]

The court explained:

> Our consideration of this issue stems from our June 29, 2001 order vacating the remand in *Ex parte James*; however, our conclusion merely purifies and extends—in the light of § 43 of the Alabama Constitution of 1901—the analysis previously undertaken in *Ex parte James*. In *Ex parte James*, the Court recognized the serious difficulties implicated by judicial involvement in the administrative details of school funding. In its discussion of whether the judiciary had the authority to provide a specific remedy directing the administration of public-schools funds, a plurality of this Court summarized the relevant decisions of other jurisdictions as follows, acknowledging that courts defer to the legislative branch in matters of public education, but apparently finding solace in what those decisions do not say:
>
> > "Other courts have deferred to their legislatures, expressing in language similar to that used in *Rose v. Council for Better Education Inc*., 790 S.W. 2d 186 (Ky. 1989) confidence that their legislatures would promptly act to remedy constitutional infirmities in their public educational systems. . . . None of the cases we have found in our research, however, has held that the judiciary lacks the power to order a specific remedy if the legislature ultimately fails adequately to address the constitutional deficiency."[677]

The Court declared,

> We find nothing in the plurality's argument, based on silence that could justifiably support judicial intrusion into legislative matters. Arguments based on what courts do not say, logically speaking, are generally unreliable and should not be favored by the judiciary; this is especially true when the judiciary is faced with, as we are here, a contrary constitutional mandate such as § 43 of the Alabama Constitution of 1901. Moreover, such judicial intrusion would represent a jurisprudential divergence with other state courts, who have refused to become involved with school-funding matters,

> acknowledging, as we do today, such matters to be purely legislative in nature. Our conclusion that the time has come to return the Equity Funding Case in toto to its proper forum seems a proper and inevitable end, foreshadowed not only by the obvious impracticalities of judicial oversight, but also by the Court's own actions in *Ex parte James*. While the plurality in *Ex parte James* opined that, in the abstract, the judiciary had the authority to implement a remedy, it did not attempt this task (which may have proven illustrative because its concrete, rather than abstract, form would have proven its legislative nature) and instead admitted that the legislature bears the primary responsibility for devising a constitutionally valid public school system. Accordingly, the opinion vacated the trial court's remedy plan and directed the Legislature to formulate a constitutional education system within one year. Almost a year later, on rehearing, a majority of the Court modified that opinion to allow the Legislature an undefined and open-ended reasonable time within which to formulate such an education system, and the case was remanded to the trial court, which would retain jurisdiction.
>
> Continuing the descent from the abstract to the concrete, we now recognize that any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature. Accordingly, compelled by the authorities discussed above—primarily by our duty under § 43 of the Alabama Constitution of 1901—we complete our judicially prudent retreat from this province of the legislative branch in order that we may remain obedient to the command of the people of the State of Alabama that we never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.
>
> CASES DISMISSED[678]

Concurring, Justice Houston began by stating that if the court had been asked to set aside the Liability Order from the trial court, he would have done so.[679] He cited Alabama Code 1975, § 12-2-13: "The Supreme Court, in deciding each case when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what, in its opinion, at that time is law, without any regard to such former ruling on the law by it."[680] Justice Houston continued,

> My opinion now, as it was in 1995 and in 1997, is that the Liability Order was wrongly decided, and that § 256 of Amendment No. 111 of the Constitution of Alabama of 1901 was a duly ratified constitutional amendment that does not violate the Fourteenth Amendment to the Constitution of the United States. My opinion now differs from my opinion in 1995 and 1997, because now I believe that the trial court was without subject-matter jurisdiction to decide the liability issue.[681]

Houston addressed three issues that led him to his decision: (a) subject-matter jurisdiction of the trial court ability to issue this liability order; (b) the trial court's declaration that Amendment 111 violated the Fourteenth Amendment of the U.S. Constitution and the court's revitalization of §256 of the Alabama Constitution of 1901; and (c) the court's decision to pick and choose which parts of § 256 were to be used.[682] Justices Houston stated,

> Simply put, I believe (1) that the trial court was and is without subject-matter jurisdiction to rule on the parties challenge to Amendment 111; (2) that the trial court was and is without subject-matter jurisdiction leaves the Equity Funding Case with no foundation; and (3) that Amendment 111 remains part of the Constitution of Alabama and empowers the Alabama Legislature to enact all, part, or none of the plaintiffs' proposed educational reform.
>
> Both complaints in the Equity Funding Case list as their "First Claim" what in fact serves as the foundation and essential first step of these cases: a requested declaration that Amendment 111 is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, so that educational reform can be accomplished by judicial fiat and not by legislative will. Education is not listed as a right in the Declaration of Rights in the Alabama Constitution of 1901. Additionally, there is no federal fundamental right to education, as the United States Supreme Court, in *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1 (1973), has held that no such right exists under the federal constitution.[683]

Amendment 111 provides that

> It is the policy of the state of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student, but nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace and order.
>
> The legislature may by law provide for or authorize the establishment operation of schools by such persons, agencies or municipalities, at such places, and upon such conditions as it may prescribe, and for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the state for educational purposes under such circumstances and upon such conditions as it shall prescribe. Real property owned by the state or any municipality shall not be donated for educational purposes except to nonprofit charitable or eleemosynary corporations or associations organized under the laws of the state.
>
> To avoid confusion and disorder and to promote effective and economical planning for education, the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make

> election to that end, such election to be effective for such period and to such extend as the legislature may provide.[684]

The plaintiffs submitted a brief requesting a partial summary judgment during the trial. The motion asked that the court declare that Amendment 111 be ruled unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[685] The plaintiffs argued that

> Amendment 111, the current education clause of the Alabama Constitution, was enacted with an invidious discriminatory purpose as evidence by (1) the express language of the amendment, (2) the historical background of the legislation, and (3) the amendment's legislative history. Therefore, because of its discriminatory purpose, Amendment 111 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by providing for legislative authority to establish a dual educational system in direct opposition of *Brown*.[686]

In response to the an anticipated Supreme Court ruling in *Brown v. Board of Education*, the Alabama Legislature formed the Alabama Interim Legislative Committee to propose strategies to evade the *Brown* ruling.[687] The committee offered several proposals that (1) eliminated the express end of segregation but made it clear that Alabama would not coerce anyone to attend integrated schools and would not be obligated to fund an integrated education system and (2) eliminated the requirement that the legislature provide for public schools.[688] The Alabama Legislature passed these proposals and the citizens of Alabama ratified the amendment on August 28, 1956.

The plaintiffs believed that Amendment 111 attempted to eliminate the state's traditional responsibility for providing public education by stating that "nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense." Moreover, Amendment 111 also permits the use of legislative authority to allow "parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make such election to that end."[689] The plaintiffs stated,

> In order to establish a violation of the Equal Protection Clause, a complaining party must demonstrate that a statute has a racially discriminatory intent or purpose. See generally *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252,265, 97 S.Ct. 555, 563 (1977). Several factors may be considered to determine "whether invidious discriminatory purpose was a motivating purpose" in enacting the stature, including but not limited to: (1) the impact of the official action—whether it affects one race more heavily than another; (2) the historical background of the decision; (3) departures from normal procedures; and (4) the legislative history. When applying these factors to the case, it is clear that Amendment 111 violates the Fourteenth Amendment. Amendment 111 was clearly enacted at the expense of black school children. However, a showing of disparate impact is unnecessary to trace the invidious quality of Amendment 111 to a racially discriminatory purpose. See *Washington v. Davis*, 426 U.S. 229, 240 (1976).

The plaintiffs went on to state that the U.S. Supreme Court explicitly addressed state attempts to circumvent the effects of their decision in *Brown* with their ruling in *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401 (1958). The High Court stated,

> In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."

In their motion the plaintiffs restated the findings of United States District Court in *Lee v. Macon County Board of Education*, 231 F. Supp.743 (M.D. Ala. 1964) concerning Amendment 111.

The district court stated,

> Alabama's grant-in-aid system appears to have been first proposed by the Special Interim Committee of the Alabama Legislature in 1954. The legislative history of the stature subsequently enacted by the Alabama Legislature reflects that this committee was formed to consider means of meeting the decision of the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 873 (1954). The Committee's report to the Legislature set forth a number of proposals for delaying or avoiding racial desegregation in education, and it proposed a number of specific amendments to the Alabama Constitution, all of which were ultimately adopted.

The plaintiffs concluded in their motion,

> By enacting Amendment 111 as the vehicle to maintain segregated schools, Alabama has established the authority in the legislature to maintain a system of public education that is divided between black and white. This discriminatory, segregationalist system cannot

> overcome the rights of the citizens of this state to public education that is equal for all, regardless of the color of one's skin.

The Circuit Court of Montgomery agreed with the plaintiffs and declared Amendment 111 unconstitutional.

Justice Houston examined what Judge Richard Rives wrote in *Shuttlesworth v. Birmingham Bd. of Edu.*, 162 F. Supp. 372, 379-81 (N.D. Ala. 1958), while addressing Amendment 111 and the constitutionality of the "School Placement Law" enacted in conjunction with the Amendment. Judge Rives pointed out that without Amendment 111, the original § 256, which explicitly mandated segregated schools, would represent the law in Alabama. Houston stated, "Although the *Shuttleswort* Opinion dealt with the constitutionality of the School Placement Law enacted after ratification of Amendment 111, the plaintiffs in that case proffered the same evidence of 'improper motivation' that the parties in this case offered."[690] Houston quoted Judge Rives: "If, however, we could assume that the Act was passed by the legislature with an evil and unconstitutional intent, even that would not suffice, because the impact of the implementation of the law must also be unconstitutional."[691] The court noted that the trial court declared this order final on October 18, 1991, pursuant to Rule 54 (b), Ala. R. Civ. P.; however, the high court never addressed the finality of the August 13, 1991 Liability Order.[692] According to Houston, this order provided the necessary foundation for the trial court's March 31, 1993 order, which "essentially held that the present system of public schools in Alabama violates the constitutional mandate of Art. I, §§ 1, 6, 13, and 22 of the Alabama Constitution."[693]

In addressing the trial court's subject-matter jurisdiction, Justice Houston stated that "any examination of an order issued by a trial court includes a jurisdictional defect, when discovered, is of such an important nature that it may be raised by a reviewing court, ex mero motu if

necessary."[694] The justice went on to state that in the court's earlier opinion, *Opinion of the Justices No. 338*, the court had stated,

> Because the Liability Phase was never appealed, we are here presented with no issue as to the correctness of that holding. The only issue that we may consider is whether the trial court—in addressing the merits of this dispute—violated the separation of powers doctrine of our constitution. If it did, then it had no subject-matter jurisdiction and the judgment was void. We may address this issue because the lack of subject matter jurisdiction is not waivable and may be raised at any time by the suggestion of a party or by a court ex mero motu. Judgments entered without subject-matter jurisdiction can be set aside at any time as void, either on direct or on collateral attack.[695]

The justice noted the chief component of justiciability was the plaintiffs' standing, which had not been addressed:

> Not all controversies, even very public ones, are justiciable. Justiciability is a compound concept, composed of a number of distinct elements. Chief among these elements is the requirement that a plaintiff have "standing to invoke the power of the court in his behalf." *Ex parte Izundu*, 568 So. 2d 771 (Ala. 1990).[696]

Houston declared that "as this court stated in *State v. Property at 2018 Rainbow Drive,* 740 So. 2d 1025, 1027-28 (Ala. 1999), standing requires injury in fact. Standing . . . turns on whether the party has been injured in fact and whether the injury is to a legally protected right."[697] The high court justice went on to state,

> My review of this case convinces me that the plaintiffs have no standing to challenge the facial constitutionality of Amendment 111. As stated, standing to challenge Amendment 111 would require that the plaintiffs demonstrate that they have been "injured in fact" by the existence of Amendment 111. The problem is that Amendment 111 cannot itself be the source of the alleged injuries. It should be apparent that Amendment 111—through which the Legislature was able to repeal the various forced segregation laws—merely authorizes certain legislative activities and requires or precludes virtually none. The first paragraph states a general policy of "fostering and promoting" education and declares that the Alabama Constitution of 1901 provides no fundamental right to a public education. Of course, the citizens of a state are free to construct their state constitution in any way they deem fit, and they are, therefore, not required to recognize any particular right. There can be no "injury-in-fact" stemming from this language.[698]
>
> The second paragraph includes the only actual requirement to be found in the entire Amendment 111—that real property owned by the state or any municipality shall not be donated for educational purposes except to nonprofit charitable or eleemosynary corporations or associations organized under the laws of the state. Not surprisingly, the

> plaintiffs do not allege any injury under this language. The remainder of the second paragraph, as characterized by the first three words ("The legislature may"), is a mere authorization for the establishment of schools upon such conditions as the Legislature may prescribe. There is no method prescribed, duty imposed, or action required or prohibited; therefore, there is no possible injury-in-fact to the plaintiffs.
>
> Likewise, in terms of active language that binds or compels the actions of the Legislature, the third paragraph is similarly barren. Under this paragraph, the Legislature "may" allow parents to choose to send their children to private, racially segregated schools—something that, according to decisions of the United States Supreme Court, parents of any race had the right to do at the time Amendment 111 was proposed and ratified. While interpreting this paragraph as somehow allowing parents to send their children to racially segregated public schools is wholly irrational, given that such schools were declared unconstitutional before Amendment 111 was even proposed, see *Brown v. Board of Education*, 347 U.S. 483 (1954), even this irrational interpretation would not provide a basis for these plaintiffs to demonstrate standing unless racially segregated public schools had in fact been established by the State. Of course, this is not the case and the plaintiffs do not so allege.
>
> What the plaintiffs appear to allege as the "injury" is the effects of school-funding policies promulgated while Amendment 111 was in effect.[699]

Justice Houston then declared,

> Without any basis from which to demonstrate that they have been injured by the existence of Amendment 111 itself, rather than by school-funding policies promulgated while Amendment 111 happened to be in effect, the plaintiffs in this case have no standing to challenge the constitutionality of Amendment 111. Without standing, the constitutional challenge to Amendment 111 is nonjusticialbe, a fact that renders the trial court without jurisdiction to rule on the issue.[700]

In section two of his special writings, Justice Houston addressed the issue of the revival of § 256. He stated that the "voidance of an amendment does not automatically revive the unamended provision":[701]

> Revival of predecessor statutes has long been a part of American jurisprudence. See E. Crawford, *The Construction of Statutes*, § 321 (1940). Simply stated, revival means that the very act of declaring a statute unconstitutional brings the predecessor statute or the applicable common law rule back into full force. See id.; and *Dewrell v. Kearley*, 250 Ala. 18, 32 So. 2d 812 (1947). Thus, the trial court's declaration that Act No. 82-444 was unconstitutional gave new life to the predecessor statutes, Acts No. 76-710 and 80-797.[702]

Justice Houston further stated,

> However, the rule of automatic revival of predecessor statutes is not similarly applicable to the revival of constitutional provisions. With regard to constitutional provisions, the intent of the Legislature to repeal the predecessor provision is controlling. Where the Legislature has intended that the subsequent amendment repeal the predecessor provision, there is no revival of the pre-existing provision. Therefore, the question becomes: did the Alabama Legislature intend for Amendment 111 to repeal the original § 256? The answer is yes. Furthermore, the differences between the original § 256 and the amended provisions make it clear that Amendment 111 was intended to replace the original § 256. Therefore, because by ratifying Amendment 111 the people clearly repealed the original § 256, it could not automatically be revived by a declaration that Amendment 111 is unconstitutional.[703]

In Justice Houston's special writings section three, he argued that "Amendment 111 cannot logically, rationally, or coherently be unconstitutional and wholly void while part of the original § 256 is constitutional and remains in effect."[704] The clause that the trial court ruled unconstitutional was "the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their on race, to make election to that end."[705] The clause in § 256 stated that "separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race." Houston noted that Amendment 111 used the world "may," while the original § 256 used the word *shall*:[706]

> The original § 256 mandated that public schools be provided for children and mandated that public schools be provided for children and mandated that those schools be segregated, while Amendment 111 mandated nothing. Therefore, under the trial court's reasoning, if Amendment 111, which mandates nothing, is unconstitutional in its entirety, based only upon a racist intent, then certainly, the original § 256 must also be unconstitutional in its entirety because it commands that the State provide segregated schools.[707]

In section four of his special writings, Justice Houston addressed Justice Johnstone's dissent:

> It cannot be denied that our review of the Equity Funding Case has proceeded along an unusual path; however, given the highly unusual nature of the Equity Funding Case, that fact should be unremarkable. However, the fact that a court's action does not navigate a familiar course does not automatically indicate that the court is without authority so to navigate. Instead, as is true in this case, it may simply mean that unusual circumstances have compelled the court to exercise little-used but quite legitimate powers. I believe

> that our June 29, 2001 order implicated two such powers: our general powers of supervisory authority as the Supreme Court of Alabama over courts of inferior jurisdiction and our inherent appellate power to recall our judgments.[708]

Chief Justice Moore concurred in the result in part and dissented in part:

> I not only agree that this case should be dismissed, but I would go further and say that it should be vacated. As I explain in this special writing, the trial court never had subject-matter jurisdiction over the original complaints. Therefore, the circuit court's every act—from the first day—was illegal and is void. I cannot concur with the rationale of the majority opinion because the "Liability Order," which was not a legal order in the first place, could never be final. Therefore, while I agree with this Court in finally ending the judicial system's usurpation of legislative power by dismissing this case, I state unequivocally my opposition to a court even beginning to exercise such power.[709]

The Chief Justice stated that the Liability Order could never have been made final and appealable because it was "void ab initio."[710] Moore went on to state that, even if it was not void, there was a fundamental problem with one of the grounds upon which the order was based.[711] The problem was the claim of equal protection under the Alabama Constitution of 1901. The justice explained,

> In *Ex parte Melof*, So. 2d 1172 (Ala. 1999), this Court determined that an equal protection clause does not exist and has never existed in a combination of §§ 1, 6, 22, Ala. Const. 1901. Also, with respect to the trial court's August 13, 1991 order, because no party had standing to contest the constitutionality of § 256 and/or Amendment 111, which, among other things, amends § 256, the court lacked jurisdiction; I would vacate all judgments heretofore entered in these cases and then dismiss them.[712]

The justice went on to state that the trial court used racism as a basis to declare all of the education portion of Amendment of 111 unconstitutional but preserved a portion of the original Article XIV, § 256. Then, using one word found in § 256, *liberal*, the trial court reformed the entire system of education at an estimated cost of $1 billion.[713] Moore declared that this plan would constitute a tax increase resulting in taxation without representation and would create a legal right to a public education, which is prohibited by Amendment 111.[714] The Chief Justice noted,

> The trial court made legislative and executive, instead of judicial, decisions. While some states have been willing to allow their courts to make extensive and endless forays into supervision education in the name of necessity, particularly in this type of litigation, Alabama must not make such a fundamental error. Any change to our constitution must be effected only by the lawfully established amendment process. Under our constitution, the power over public education belongs to the Legislature, not the courts. An attempt to usurp that power by the judicial branch is a fundamental breach of the separation-of-powers doctrine and an improper subject of the court's jurisdiction.[715]

In addressing the finality the March 31, 1993, order, Chief Justice Moore stated that he believed that the main problem with this order was to determine whether the matter was equitable or legal in nature.[716] He also stated that this problem provided the resolution to the matter because courts do not have subject-matter jurisdiction over political questions:

> The nature of this lawsuit and the various orders it has engendered is such that the orders are not susceptible to analysis by traditional judicial and common-law rules. Legal remedies and traditional equitable remedies have in common the purpose of restoring an injured party to his status before the injury or of making him whole. Those remedies, despite their differences, are designed to return the parties to the status quo they occupied before the alleged injury. The order of March 31, 1993, in spite of its apparent form as a judicial remedy, is not judicial in nature; it is a political decree, in the nature of a legislative enactment or an executive order. The nonjudicial character of the order makes it impossible for that order to be a final judgment. Legal remedies return the parties to their condition before the injury; the trial judge's order of March 31, 1993 creates an entirely new relationship between the parties in the future. This lack of judicial character to the March 31, 1993 order is the primary reason it was not a final, appealable order. It was a political decree issued to coequal branches of the government, one of which—the Legislature—was not properly a party to the case. The order did not direct a party to perform an identifiable legal duty, which the court had authority to issue. The order did not provide a judicial remedy but pretended to establish an ongoing relationship between the trial court and the Legislature and the governor. The circuit court, by that order and by the others that followed it, established itself as the Superintendent of the Alabama Public Education System. The potential term of that position was, at the time the order was issued, and is now, indeterminable. The number of prospective orders is also indefinite.[717]

Moore noted that, although this type of lawsuit was not common in Alabama, its recent legal history in other states had resulted in its becoming known as the "Structural Injunction" and being identified by certain characteristics.[718] He stated that traditional lawsuits seek to restore a party by ordering an offending party to cease some harmful behavior, to undo some harm done,

or to perform a specific legal duty. The justice noted that "the types of remedy imposed in equity funding cases in some states are so different that they have been termed 'structural injunctions,' meaning that their purpose is to restructure a governmental institution, a power clearly outside the purview of the judiciary."[719] Moore went on to state,

> In order to restructure the education system, the trial judge must restructure the relationship of the tree branches of government. This de facto amending of the constitution usurps not only the powers of the legislative and executive departments, but also usurps a basic principle of the rule of law requiring the consent of the governed. The people of Alabama have not entrusted to the courts the executive and legislative powers, nor have they delegated to the courts the authority to make major structural changes to the Alabama constitution.[720]

The Chief Justice Moore concluded as follows:

> In his farewell address, the first President of the United States warned us to "resist with care the spirit of innovation upon [the Constitution's] principles, however specious the pretexts." Farewell Address at 47. The division of powers between different branches of government, each with a distinct area of operation, is a basic principle of the Constitution of the United States and the Constitution of the State of Alabama. Equally true is the fact that there exist many "pretexts" that invite a violation of that separation by the usurpation of the powers of one branch by another, such as the genuine desire for quality education.
>
> We are all legitimately concerned about the education of our children. The Constitution of Alabama wisely placed the issue of public education in the hands of those best able to discern the wishes of the people—the elected representatives of the people, the Alabama Legislature. The judges of this State were not elected to formulate policy for education or to spearhead education reform. Judges are elected to ensure that justice is administered in accordance with fundamental principles of law. The acknowledged role of a judge is to interpret the law, not to make the law; "he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one." 1 William Blackstone, *Commentaries on the Laws of England*, at 69. The job of making law belongs exclusively to the Legislature. The desire or need for action in a particular area of public policy cannot justify a court's intruding itself into the field of legislation in order to reach a desired result, whether that result concerns education, health care, taxation, or any other area of public interest.
>
> With regard to one branch of civil government breaching the separation-of-powers principle by acting outside its assigned sphere of authority, Washington said that "the precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield." Farwell Address at 50. That permanent evil begins to be reflected in this case in the myriad of conflicting orders, the alignment and realignment of parties attempting to create adversity, the lack of standing of any party to challenge the constitutionality of § 256 and Amendment 111, the pendency of the case

for over 12 years with no foreseeable conclusion, and the threatened imposition by one trial court judge of over a billion dollars of taxes on the people of Alabama without their consent.

For the trial judge to have campaigned for position on the Alabama Supreme Court by claiming that he told the governor and the Legislature what to do is not only unethical, but such orders to the governor and the Legislature are also a clear usurpation of the powers of coequal branches of government and a violation of our Constitution. I agree with the majority opinion that the judicial branch should leave the repair, renovation, improvement, and/or overhaul of the education system of this State to the Legislature, the governor, the State Board of Education, local boards of education, and the people of Alabama, where it properly belongs.

That this matter was outside the subject-matter jurisdiction of the Montgomery Circuit Court is clear. No justiciable controversy existed, not only because of the absence of a plaintiff with standing to bring an action alleging racial discrimination but also because of lack of adversity, both before and after the certification of the March 31, 1993 order. Moreover, the lack of subject-matter jurisdiction is clearly evident in the fact that the circuit court had absolutely no authority to make legislative and executive decisions necessary to operate a school system or to set public policy in the field of education. Such decisions are political in nature and not within the purview of the judicial branch of government.

The finality of any order depends on the existence of a court's jurisdiction over the case. The lack of subject-matter jurisdiction may not be waived and may be raised by the parties at any time or by the court ex mero motu. That question is a fundamental one, preliminary to any adjudication. Absence of subject-matter jurisdiction deprives the court of all authority to act whatsoever.

The courts must ever be cognizant of their own limitations under our Constitution. I recognize the inherent evil in usurping the power of the legislative branch, and reaffirm the proper role of the courts not to make the law, but to say what the law is.

Because the trial court never had subject-matter jurisdiction, all orders the trial court issued were therefore void. In addition to dismissing these cases, I would also overrule, *Ex parte James*, *Pinto v. Alabama Coalition for Equity*, and *Opinion of the Justices No. 338*, supra, to the extent that those cases are inconsistent with the proper exercise of the judicial power by the courts of this state.[721]

Justice Johnstone dissented:

I respectfully dissent from the decision of this Court purporting to dismiss these cases. We lack appellate jurisdiction to review these cases, to enter any order affecting these cases, and to express any rational for any such order.

This Court issued its last certificates of judgment in these cases and in a subsequent review of the same cases under different case numbers on January 6, 1998. Our corresponding opinions are reported as *Ex parte James*, 713 So. 2d 869 (Ala. 1997), and *James v. Alabama Coalition for Equity, Inc.*, 713 So. 2d 937 (Ala. 1997). Our appellate jurisdiction, construed at its greatest limit of durability, expired either at the end of 120 days following the January 6, 1998 date of those certificates of judgment, Internal Rule VI. J.3., or at the end of the then existing term of court, *Brown v. State*, 277 Ala.

108, 109, 167 So. 2d 291, 293 (1964), *Childress v. Yunger*, 258 ala. 219, 220-21, 61 So. 2d 317, 318-19 (1971), *Martin v. State*, 22 Ala. App. 191, 192-93, 113 So. 452, 453 (1927). That term of court, mandated by § 12-2-8, Ala. Code 1975 and Internal Rule V.A., expired on June 30, 1998.

Both deadlines for our appellate jurisdiction expired without any application in any form for further appellate review. Indeed, even after the expiration of those deadlines, no party has sought appellate review in any form. I respectfully submit that all of our orders issued since the expiration of our appellate jurisdiction are nullities and any rationales for those orders are not holdings or ever obiter dicta.

I will discuss only Part IV of Justice Houston's special concurrence, which addresses this dissent of mine. On the one hand, Justice Houston's Part IV contains a splendid explanation of the supervisory powers of this Court, although I do not agree with Justice Houston's diminution of the importance of the doctrine of stare decisis on questions of constitutional law, see my dissent in *Ex parte Melof*, 735 So. 2d 1172, 1205 (Ala. 1999). On the other hand, and of particular pertinence to this dissent of mine in these equity funding cases, I respectfully disagree with Justice Houston's assertion that the time limits imposed by this Court on its own power to recall its judgments are not still in effect. They are still in effect.

"Regular terms of the Supreme Court" are expressly mandated by § 12-2-8, Ala. Code 1975, and special terms are allowed by § 12-2-9, Ala. Code 1975. Likewise, § 12-3-12, Ala. Code 1975, mandates like regular terms for "the courts of appeals." Article I, § 43, Alabama Constitution of 1901 commands judicial respect for these legislatively mandated terms of court. Section 43 reads:

> "In the government of this state, except in the instances of this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."

While Justice Houston's special writing asserts that terms of court "have not served a significant jurisprudential role," that assertion begs the very question at issue, in that terms of court have served the significant jurisprudential role of limiting the willingness of the Alabama appellate courts to recall their own mandates.

Only one of the Alabama cases cited by Justice Houston reveals any deviation from our self-imposed recall time limits of the 120th day after our issuance of the certificate of judgment or the end of the term when the certificate was issued. While the recall in *Ex parte Martin*, 616 So.2d 353 (Ala. 1992) did occur 23 days after the end of the term when the certificate had been issued, the recalls in *Youngblood v. State*, 372 So. 2d 34 (Ala. Crim. App. 1979), *Watts v. State*, 337 So. 2d 91 (Ala. Crim. App. 1976), and *Brown v. State*, 277 Ala. 108, 167 So. 2d 291 (1964) all occurred during the respective terms when the respective certificates of judgment had been issued. *Ex parte Martin* appears to have been an oversight rather than an intended departure from our express limits.

> The entirely unsolicited nature of the instant purported review of these "equity funding cases" exacerbates our lack of appellate jurisdiction. We do not want to become like the Iranian judges who roam the streets of Tehran ordering a whipping here and a jailing there. On the other hand, if this tardy and unsolicited purported review does prevail, I suppose the consolation will be that some old cases which I think or shall think grossly unfair will once again be subject to review.[722]

Alabama's Costing-Out Model

In the Alabama school funding litigation, Judge Eugene Reese identified nine criteria that the Public School System must meet:

1. Sufficient oral and written communication skills to function in Alabama and at national and international levels.
2. Sufficient mathematical and scientific skills to function in Alabama and at national and international levels.
3. Sufficient knowledge of economic, social, and political systems generally, and of the history, politics, and social structure of Alabama and the United States specifically, to enable the students to make informed choices.
4. Sufficient understanding of governmental processes and of basic civic institutions to enable the student to understand and contribute to the issues that affect his or her community, state, and nation.
5. Sufficient self-knowledge and knowledge of principles of health and mental hygiene to enable the student to monitor and contribute to his or her own physical and mental well being.
6. Sufficient understanding of the arts to enable each student to appreciate his or her cultural heritage and the cultural heritage of others.
7. Sufficient training or preparation for advanced training, in academic or vocation skills, and sufficient guidance to enable each child to choose and pursue life's work intelligently.
8. Sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in Alabama, in surrounding states, across the nation, and throughout the world in academics or in the job market.
9. Sufficient support and guidance so that every student feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her human potential.[723]

Judge Reese's 1993 Liability Order was never appealed; however, the Remedy Order was appealed. In December, 1997, the Alabama Supreme Court stayed the Remedy Order to allow the defendants a reasonable time to devise a plan that would satisfy the circuit court.[724] Even during the time of the appeals in the case, improvements in public education were being made.

The Alabama Legislature enacted a comprehensive change in the manner in which the state provided funding to public schools in 1995. Additionally, the Legislature provided a series of laws designed to improve accountability in classrooms throughout the state. The Legislature created the Foundation Program, which gave school districts throughout the state a funding formula requiring a local contribution for public education. The 1995 legislation also called for the submission of plans from local school districts on how the district was meeting obligations from finance to safety.[725] In October of 1995, the State Board of Education hired Ed Richardson to lead the Department of Education in the reform effort. Richardson led the DOE in an effort to initiate a method of establishing standards and factors that would lead to an adequate educational opportunity. This effort considered various ways of attempting to cost out the ingredients of a quality education. In 1998, the State Department of Education developed Goals and Initiatives.[726] These goals and initiatives were compared with the requirements set out in the 1993 Liability Order. The next step Richardson initiated was to determine how the initiatives could be built into factors supporting an education cost factor model.[727]

The State Superintendent directed various sections within the Department of Education to seek out standards on a regional and national basis. Standards came from reliable industry standards or from standards generally accepted in the educational community, such as Southern Association of Colleges and Schools standards. These standards were then correlated with the initiatives of the State Board of Education and the standards identified by the National Center for Educational Statistics.[728] Once a model was developed, some costs were weighted if there were some intangible costs associated with the particular characteristics of the services.[729] Before a model was developed, Richardson outlined his beliefs on how an adequacy plan should be developed:

I. Assumptions

A. The courts will ultimately determine whether or not the Alabama Board of Education's or substitute plan will meet constitutional requirements.

B. As currently structured and financially supported, it is my opinion that Alabama's public schools do not meet any reasonable standard of educational adequacy.

C. Judge Eugene W. Reese stated in his conclusion of the Liability Order: The defendant, Governor Hunt, through his counsel, has admitted that deficiencies exist in Alabama's public school system and that additional funds are needed to remedy some of the unsatisfactory conditions. The real issue here is whether these deficiencies and conditions rise to the level of deprivations of constitutional and statutory rights. In the opinion of the court, they do. Therefore, it is ORDERED, ADJUDGED, and DECREED as follows:

1. That, pursuant to Ala. Const. art. I, §§1, 16, 13, and 22 and art. XIV, § 256, Alabama school-age children, including children with disabilities, have and enjoy a constitutional right to attend school in a liberal system of public schools, established, organized, and maintained by the state, which shall provide all such schoolchildren with substantially equitable and adequate educational opportunities;
2. That Alabama has a state system of public education with specified authority delegated to the County and City Boards of Education.
3. That the essential principles and features of the "liberal system of public schools" required by the Alabama Constitution include the following:
    (a) It is the responsibility of the state to establish, organize, and maintain the system of public schools;
    (b) The system of public schools shall extend throughout the state;
    (c) The public schools must be free and open to all school children on equal terms;
    (d) Equitable and adequate educational opportunities shall be provided to all schoolchildren regardless of the wealth of the communities in which the schoolchildren reside; and
4. That, pursuant to Ala. Code §§ 16-39-3 and 16-39-A-2, Alabama schoolchildren with disabilities aged 3-21 have the right to appropriate instruction and special services;
5. That present system of public schools in Alabama violates the aforestated constitutional and statutory rights of plaintiffs;

D. The Alabama Board of Education bears some responsibility to develop a plan that meets a reasonable definition of educational adequacy.

1. § 16-13-11 Powers Generally. The State Board of Education shall exercise, through the State Superintendent of Education and his professional assistants, general control and supervision over the public schools of the state, except institutions of higher learning, which by law are under the general supervision and control of a board of trustees.

2. That the state's officers charged by law with responsibility for the Alabama public school system, are hereby enjoined to establish, organize, and maintain a system of public schools, that provides equitable and adequate educational opportunities to all school-age children, including children with disabilities, throughout the state in accordance with the constitutional mandates of Ala. Const. Art XIV, §§ 16-39-3 and 16-39A-2;

E. There is no one right answer for educational adequacy. It is up to the Alabama Board of Education to fashion the most appropriate definition. The Alabama Board of Education's definition of adequacy is: To provide a state system of public education, which is committed to high academic standards and to providing every public school student, an opportunity for graduation and to acquire the requisite skills to be prepared for the 21st century.

F. The Circuit Court has offered criteria for meeting adequate educational opportunities.

G. We must support this philosophical position with a standards based definition reflective of the Alabama Board of Educational Goals and Initiatives document.

H. The Circuit Court's criteria have been previously cross-referenced with the Alabama Board of Educational Goals and Initiatives document.

I. Considerable progress has been made so we are not starting at zero.

J. A "Robin Hood" plan should not be acceptable, as it will serve as a disincentive.

K. Any Plan to meet educational adequacy will have to be periodically adjusted to reflect changing requirements, costs, and more accurate data.

II. Recommended Procedure

A. Complete the standards based discussion.

B. Review and refine the established standards relative to adequate educational opportunities.

C. Do not produce any dollar figures until the Alabama Board of Education has approved the appropriate standards.

D. The basic components of the model are:

1. Develop a software package that can assimilate the data necessary to make financial decisions.
2. Alabama Board of Education approves standards relative to adequate educational opportunities.
3. Determine the cost-standard by standard.
   (a) This model has included a review of selected school systems that meet Alabama's average demographic criteria such as racial balance, percentage of students on free and reduced program, per pupil expenditure, and good student achievement.
   (b) There are many models that reflect only professional judgment, but few that consider factors confirming whether or not educational adequacy can be met.
   (c) This model should not reward poor management or oversight.

4. Present completed document to the Governor, Lt. Governor, and Speaker of the House.
5. Continue discussion in regard to:
    (a) revenue options including increased local support
    (b) more stable revenue sources
    (c) phase in of proposed plan
    (d) changes to Foundation Program sufficient to support school systems that make the financial effort, but have limited capacity and the unique requirements of special education
    (e) Department of Education's role in providing support for:
        (1) schools and systems placed on Academic Alert status
        (2) school systems placed on Financial Alert status

III. Standards

A. The standards may come from the following sources:
    1. Southern Association for Colleges and Schools
    2. Alabama Board of Education
    3. Existing laws (state and federal)
    4. Industry
    5. State comparisons
    6. Research
    7. Professional organizations
    8. Courts
    9. Other

B. The National Council for Educational Statistics has developed functional categories of expenditures, which covers all aspects of educational funding. We use these standards in our existing accounting system.

C. We are about to start a difficult and tedious process. Once we have completed the review of the appropriate standards. I believe it will be worth the effort.[730]

On September 13, 2001, the Alabama State Board of Education adopted standards and benchmarks for the public schools of Alabama to define and measure the characteristics of an adequate education. The following are the Standards and Benchmarks approved by the State Board of Education:

Standards and Benchmarks
for
Achieving Educational Adequacy
in
Alabama Public Schools

Adequacy Standards and Benchmarks for Administration and Finance:

Standards

The state's responsibilities for adequacy in facility renewal are:

- To ensure that local boards of education have the financial capability to provide school facilities that are safe, sound, and adequate for the education of all students.
- To provide state support for facility renewal planning that is cost-effective and creates school environments conducive to teaching and learning.

Benchmarks

An adequate facility renewal program must include:

- A stream of funds sufficient over the expected life of school facilities to renew or replace buildings, components, and equipment as based upon the Division of Risk Management database.
- Appropriate funds for school systems with severe facility needs.

Adequacy Standards and Benchmarks for Facility Operations and Maintenance:

Standards

The state's responsibilities for adequacy in facility operation and maintenance are:

- To ensure that local boards of education have the financial capability to operate and maintain school facilities that are safe, sound, sanitary, and adequate for the education of all students.
- To provide state support for facility operations and maintenance activities that are cost-effective and create school environments conducive to teaching and learning.

Benchmarks

An adequate facility operations and maintenance program must provide sufficient resources to cover the cost of:

- Janitorial and grounds keeping services that keep facilities clean and grounds well groomed.
- Utility services that provide adequate lighting, heat, air conditioning, and telephone connections.
- Security services that maintain campus safety.

Adequacy Standards and Benchmarks for School Administration:

Standards

The state's responsibilities for adequacy in school administration are:

- To ensure that local boards of education have the financial capability to provide adequacy for school administration.

- To provide state support for school administration that is cost-effective and gives every student the opportunity to meet academic standards.

Benchmarks

An adequate school administration program must include:

- A principal to provide administrative direction for the school.
- One or more assistant principals when justified by the student population of the school.
- Adequate clerical assistance for the principal's office.
- Sufficient funds to cover the operating costs that are necessary to the administration of the school.

Adequacy Standards and Benchmarks for General Administration:

Standards

The state's responsibilities for adequacy in general administration of local school systems are:

- To ensure that local boards of education have the financial capability to provide adequacy for administration of the school system.
- To provide state support for general administration that is cost-effective and supplies sound leadership for all programs of the school system.

Benchmarks

An adequate general administration program must include sufficient resources to operate the superintendent's office; business services such as purchasing, accounting, auditing, printing, data processing, and personnel management; program coordination for instruction, instructional support, and facility management; legal services; insurance; and other administrative requirements.

Adequacy Standards and Benchmarks for Food Services:

Standards

The state's responsibilities for adequacy in school food services are:

- To ensure that local boards of education have the financial capability to provide a nutritional and cost-effective meal program in each school.
- To provide state support for food service programs that are cost-effective and able to meet applicable standards of the U.S. Department of Agriculture and the State Department of Education.

Benchmarks

An Adequate food service program must provide sufficient resources for:

- Food service operations that can provide nutritional and cost-effective meals in each school.
- Equipment replacement as required to maintain the efficiency of food service operations.

Adequacy Standards and Benchmarks for Student Transportation:

Standards

The state's responsibilities for adequacy in student transportation are:

- To ensure that local boards of education have the financial capability to provide a student transportation program that is safe and cost-effective.
- To provide state support for student transportation programs that meet safety standards and are cost-effective.

Benchmarks

An adequate student transportation program must provide sufficient resources for:

- Transportation operations that are safe and cost-effective.
- Fleet renewal to maintain the safety and efficient operation of school bus equipment.

Adequacy Standard and Benchmarks for Instruction:

Standards

The state's responsibilities for instructional adequacy are:

- To ensure that local boards of education have the financial capability to provide an instructional program that gives every child the opportunity to succeed academically and to complete the requirements for a high school diploma.
- To define accountability standards and provide state support for instructional programs that improve student achievement.

Benchmarks

An adequate instructional program must include:

- The instructional staff required to meet the educational needs of all students in math, reading, language arts, science, social studies, foreign languages, fine arts, health and physical education, special education, and career/technical education.
- Supplement programs for at-risk students inclusive of Limited English Proficient (LEP) students and/or homeless that end social promotion, provide preschool education, create additional instructional time, offer remediation, promote attendance services, and sustain alternative school programs as appropriate.
- Current textbooks and related materials such as kits, software, and classroom reading library books for every student in each course taken.

- Instructional supplies, materials, and fees that are adequate for the instruction of each student in every course taught during the school year.
- A State Department of Education with resources to provide accountability, student assessments, courses of study, graduation requirements, personnel evaluation programs, teacher preparation coordination, and teacher testing.

Adequacy Standards and Benchmarks for Instructional Support:

Standards

The state's responsibilities for instruction support adequacy are:

- To ensure that local boards of education have the financial capability to support the instructional program with necessary services aimed at improving the delivery of instruction and overcoming barriers to student learning.
- To provide state support for cost-effective instructional support activities that result in improved instruction and the reduction of barriers to student learning.

Benchmarks

An adequate instructional support program must include:

- Services to improve the delivery of instruction which include an adequate professional development program, library media program, and a program to integrate technology into instruction.
- Services to overcome the barriers to student learning, which include guidance counseling, school nurse services, and services relate to student disabilities.
- Resources to support student activities related to the instructional program.[731]

On February 14, 2002, The Alabama State Board of Education, with the recommendation of the State Superintendent of Education, approved a listing of programs and initiatives to be phased in over five years, with required funding by fiscal year. The State Board of Education and the State Superintendent believed that this plan would satisfactorily comply with the nine characteristics outlined by the circuit court. These recommendations were presented to the circuit court on February 14, 2002, in order to satisfy the court's liability and remedy order. The following is a list of the categories of expenditures:

Total Additional Funds Needed All Sources

I. Facility Renewal	
A. Eliminate Severe Conditions	$ 38,200,000
B. Deferred Maintenance	$ 136,700,000

II. Operations & Maintenance	$ 164,883,151
III. Child Nutrition Program	
A. Salary Add-Ons	$ 59,000,000
IV. Transportation	
A. Fleet Renewal	$ 1,370,700
B. Proration	$ 12,000,000
V. A. Instruction	
1. Teachers (Additional)	$ 165,626,928
2. Five Student Days (Additional)	$ 58,364,700
3. Three Teacher Days (Additional)	$ 35,018,820
4. Teacher Salaries	$ 198,262,987
5. Pre-School	$ 112,482,000
6. Supplemental At-Risk	$ 159,121,000
7. Textbooks	$ 17,184,469
8. Materials/Supplies/Fees	$ 32,155,167
B. Instructional Support	
1. Student Assessment	$ 5,640,000
2. Teacher Testing	$ 1,000,000
3. Courses of Study	$ 500,000
4. PEPE	$ 600,000
5. Teacher Preparation	$ 1,000,000
6. Alabama Reading Initiative	$ 30,729,500
7. Math, Science, and Technology	$ 37,660,000
8. Accountability	$ 2,000,000
9. Career Tech	
a. Equipment Upgrade	$ 15,000,000
b. Equipment Renewal	$ 5,000,000
c. Materials/Supplies	$ 3,900,000
10. Professional Development	$ 88,872,824
11. Library/Media	$ 11,399,336
12. Technology	$ 72,900,000
13. Overcoming Barriers to Student Learning	
a. Counseling/Guidance	$ 10,763,059
b. School Nurses	$ 8,523,900
c. Special Education	$ 100,000,000
d. Gifted	$ 4,000,000
e. Catastrophic Fund	$ 6,408,967
VI. School Administration	$ 1,160,000
VII. General Administration	$ 97,256,782

VIII. Student Support (The cost of student support is defrayed with Tobacco Settlement monies)

IX. Other Support (The cost of other support has been include in other expenditures. This reflects existing accounting practices in Alabama's school systems.)

Total $1,694,685,190[732]

The State Board of Education and the State School Superintendent also presented to the court constitutional considerations to finance educational adequacy:

I. Background
   A. Tax reform in Alabama requires substantial reform of the Constitution of 1901.
   B. Tax fairness is the first step to tax reform in Alabama.
   C. Application of the Ad Valorem and income taxes is nearly one hundred percent governed by provisions in the Constitution of 1901.
   D. Only the transaction taxes (Franchise, Excise, and Privilege License) have been left to the Legislature to implement.

II. Assumptions
   1. The Ad Valorem tax can be made fairer by minimizing differences in assessment ratios and reducing abatements and exemptions.
   2. The income tax can be made fairer by reducing or eliminating the tax burden on the poorest of Alabama's families by reducing the rate, raising the threshold, and increasing the exemptions allowed by individuals and dependents.
   3. The sales tax can be made fairer by eliminating or reducing the application of the sales tax to food or by granting an additional tax credit to the income tax for Alabama's poorest families.
   4. Make the tax system progressive to adequately fund the essential services of state government.
   5. Provide the opportunity for the level of government nearest the people to make decisions about the level of taxation necessary for the community.[733]

On May 31, 2002, the Alabama Supreme Court issued the following order:

> This Court "shall never exercise the legislative and executive powers, or either them; to the end that is may be a government of laws and not of men." Ala. Const. 1091 § 43. In Alabama, separating of powers is not merely an implicit "doctrine" but rather an express command; a command stated with a forcefulness rivaled by few, if any, similar provisions in constitutions of other sovereigns, Amendment 582 to the Alabama Constitution of 1901 reflects this State's adherence to this command by effectively nullifying any "order of a state court, which requires disbursement of state funds, . . . until the order has been approved by a simple majority of both houses of the Legislature." Compelled by the weight of this command and concern for judicial restraint, we hold (1)

> that this Court's review of the merits of the still pending cases commonly and collectively known in this State, and hereinafter referred to, as the "Equity Funding Case," has reached its end, and (2) that, because the duty to fund Alabama's public schools is a duty that—for over 125 years—the people of this State have rested squarely upon the shoulders of the Legislature, it is the Legislature, not the courts, from which any further redress should be sought. Accordingly, we hold that the Equity Funding Case is due to be dismissed.[734]

After the Alabama Supreme Court dismissed the Equity Funding Cases, the implementation of costing-out plan known as the Standards and Benchmarks stopped. The legislature did not fund the program.

CHAPTER 4

SUMMARY, FINDINGS, AND CONCLUSIONS

Summary

The purpose of this study was to review relevant public school funding litigation in the State of Alabama. The review included examining the Alabama costing-out study. Included in the study was a review of judicial, legislative, and academic definitions of adequacy in school funding.

The Alabama Public School Funding Case falls within the third wave of school funding litigation. Like most of the reviewed cases during this wave, the Alabama case was based on an adequacy claim. During the 12 years of litigation, this case saw three trial judges, four governors as defendants, a complete change in the Justices of the Alabama Supreme Court, except for one, and a liability order that was never appealed; the case was ruled final by the Alabama Supreme Court and then dismissed by the high court. The high court upheld the circuit court's subject matter jurisdiction only to reverse the decision later, and the Alabama Supreme Court did not follow the court's own rules for reviewing decision. The State Board of Education and the State School Superintendent completed a plan that may have satisfied the circuit court's liability and remedy orders to improve the public school system to an adequate level of education. This costing-out plan was presented to the circuit court several months before the high court dismissed the case. After the high court dismissed the case, the costing-out plan was never implemented. The following is a chronological summary of the school funding litigation in Alabama:

- Litigation was filed in Montgomery County Circuit Court in May 1990, by three groups challenging the state public school funding formula as unconstitutional.
- The initial plaintiffs included the Alabama Coalition for Equity (ACE), the Harper class, which was represented by the ACLU, and the Doe group which was represented by the Alabama Disabilities Advocacy Program.
- Other parties participated as intervenors—the Pinto class—or as *amicus curiae* (friends of the court).
- In March 1991, Circuit Court Judge Gene Reese entered an order granting summary judgment that Amendment 111, Section 256 to the Alabama Constitution of 1901 was unconstitutional and restored portions of the original Article XIV, Section 256 of the Alabama Constitution of 1901.
- The March 1991 order reestablished a child's right under the Alabama Constitution to receive a public education.
- A trial was conducted in August 1992, with many of the original defendants realigned as plaintiffs in the case. Extensive testimony was presented on the problems and effects of lack of school funding on many schools and districts.
- In March 1993, Judge Reese issued an order in favor of the plaintiffs, declaring significant deficiencies throughout the state. This liability order included nine criteria that should be included in an adequate educational opportunity.
- The liability order was not appealed to a higher court (it was affirmed as being in effect and binding by the Alabama Supreme Court in December 1997).
- A remedy phase and orders directing the state to implement a court plan were issued in 1994.

- Governor Fob James appealed the remedy order in 1995.
- On January 10, 1997, the Alabama Supreme Court issued an order that set aside the remedy order as premature and gave the Alabama Legislature one year to come up with a plan to meet the requirements of the liability order.
- In December 1997, following a request for reconsideration, the Alabama Supreme Court changed the time for the state to come up with a plan from one year to a reasonable period. The Alabama Supreme Court remanded the case to the trial court with instructions to retain jurisdiction of the case in the event the plaintiffs wanted to reopen the remedy phase at a later time.
- In 1998, Ed Richardson, State Superintendent of Education, began efforts to develop a plan to meet the requirements set out in the liability order.
- In February 2001, following a declaration of proration in the Education Trust Fund, motions were filed by the plaintiffs in Montgomery Circuit Court to reopen the remedy phase of the case.
- On May 9, 2001, Judge Sally Greenhaw conducted a status hearing. She officially reopened the case for the remedy phase. She agreed with the parties to establish an October 15, 2001 date for the filing of the plan developed by the Alabama Department of Education and approved by the State Board of Education. Judge Greenhaw set December 5, 2001, as a date to conduct the remedy trial, if necessary.
- On January 11, 2002, in an unsolicited request, the Alabama Supreme Court placed this case on its rehearing docket.
- On May 31, 2002, the Alabama Supreme Court dismissed the Equity Funding Case after 12 years of litigation.

A review of school funding litigation across the county since 1970 reveals that plaintiffs have been successful in 25 states, while state defendants have prevailed in 18 states.[735] High court decisions on the merits of funding challenges have been handed down in Delaware, Hawaii, Indiana, Iowa, Mississippi, Nevada, or Utah. However, Iowa had pending litigation in a lower court at the time of this study.[736]

Findings

In reviewing the Alabama cases, this study made the following findings:

1. The make-up of the Alabama Supreme Court changed dramatically from its first ruling in 1993 to its final ruling in dismissing the case in 2002. Only one justice, Justice Gorman Houston, was serving for both decisions.

The Opinion of the Justices 1993	*2002 Supreme Court Ruling*
Sonny Hornsby	Jean Brown
Hugh Maddox, Chief Justice	Robert Harwood
Reneau P. Almon	Jacquelyn Stuart
Janie L. Shores	Thomas Woodall
Oscar W. Adam Jr.	Douglas Johnstone
Gorman Houston	Gorman Houston
Henry B. Stegall II.	Champ Lyons
Kenneth F. Ingram	Roy Moore, Chief Justice

The Alabama Supreme Court that ruled in May, 2002 was, at the time of the study, the current sitting court, with the exception of Chief Justice Roy Moore. Chief Justice Moore was removed from the high court by Chief Justice Myron Thompson of the United States District Court for the Middle District of Alabama. Justice Moore was ordered by Justice Thompson to remove a multi-ton black granite monument depicting the King James Version of the Ten Commandments from the court building. After Thompson's deadline to remove the monument, the eight justices of the Alabama Supreme Court ordered that the monument be removed "as soon as practicable." The

United States 11th Circuit Court of Appeals upheld Justice Thompson's ruling while the United States Supreme Court declined to hear Justice Moore's appeal.[737]

2. As noted above, the only Justice on the Alabama Supreme Court from its first ruling in 1993 until its last ruling in 2002 was Justice Gorman Houston. Justice Houston changed his mind between rulings concerning subject-matter jurisdiction: "My opinion now differs from my opinion in 1995 and 1997, because now I believe that the trial court was without subject-matter jurisdiction to decide the liability issue."[738]

3. The Alabama Supreme Court upheld the 1993 liability order in its 1997 ruling, stating that the liability order was binding. The high court later reversed its order in a 2002 ruling. The court stated in 2002 that the trial court did not have subject-matter jurisdiction; therefore, the liability order was invalid.

4. The Alabama Supreme Court did not follow its own rule of rehearing cases. In response to this possible rule infraction, Justice Houston explained in his special writings in the court's 2002 ruling that the court had not only the right but also the duty to recall a case if it met certain conditions. Justice Johnstone stated, "I respectfully dissent from the decision of this Court purporting to dismiss these cases. We lack appellate jurisdiction to review these cases, to enter any order affecting these cases, and to express any rationale for any such order."[739] Justice Johnstone believed that the court's appellate jurisdiction expired either on the 120th day after its last certificates of judgment in case or at the end of the then existing term of the court.[740]

5. The plaintiffs and Chief Justice Moore offered differing opinions on whether Amendment 111 of the Alabama Constitution violated the Fourteenth Amendment to the U.S. Constitution. The Circuit Court of Montgomery County agreed with the plaintiffs and, using racism as a basis, declared Amendment 111 unconstitutional.[741] In reversing the circuit court's

ruling, Chief Justice Moore stated that "the racially discriminatory portion of Amendment 111 was not, when this action was filed, and is not now, applied in this State, nor did the plaintiffs allege that they had been discriminated on the basis of this provision."[742]

6. The Alabama Supreme Court issued five decisions in this case:

1) The 1993 *Opinion of the Justices No. 338*, 624 So. 2d 107 (Ala. 1993)
2) *Pinto v. Alabama Coalition for Equity*, 662 So. 2d 894 (Ala. 1995)
3) *Ex parte Governor Fob James*, 713 So.2d 869 (Ala. 1997)
4) *Siegelman v. Alabama Association of School Boards*, So. 2d (Ala. 2001
5) *Ex parte James 836 So. 815* (Ala. 2002)

7. During the 12 years of litigation, the main defendant in the Alabama School Funding Case was the Office of the Governor. Since the beginning of litigation, the following governors have served in Alabama; the first four were defendants:

1) H. Guy Hunt 1987-1993
2) James E. Folsom Jr. 1993-1995
3) Forrest H. "Fob" James Jr. 1995-1999
4) Don Siegelman 1999-2003
5) Robert Riley 2003- present

8. Three different circuit judges were assigned to the Alabama School Funding Cases.

1) Judge Mark Montiel: scheduled to hear the case, but was defeated in November election and replaced before the hearing.
2) Judge Eugene Reese: removed from the case after the ethics hearing.
3) Judge Sara Greenhaw: setting judge when the case was dismissed by the Alabama Supreme Court.

9. The Costing-Out Model for the State of Alabama was approved by the plaintiffs and the defendants and submitted to the circuit court for the court's approval. The model included a definition of an adequate level of education for the children of Alabama, a phase-in schedule, and the estimated funding cost of the plan. After the plan was submitted to the circuit court, the Alabama Supreme Court dismissed the litigation in May of 2002, and the plan was never implemented.

Conclusions

1. The Alabama State Board of Education, the State School Superintendent, along with the other plaintiffs and defendants had reached a consensus on a costing-out plan that they believed would raise public schools in Alabama to an adequate level of education. This model included a definition of adequacy, standards and benchmarks, and assessments and estimated the necessary funding with a phase-in schedule. After 12 years of litigation, when the remedy plan was nearing final approval, the Alabama Supreme Court dismissed the litigation. The state legislature chose not to implement the proposed school reform plan. Several initiatives were attempted by various groups with very little success. The Governor's office attempted a large bond referendum to fund an overhaul of the education system; however, this referendum failed in a statewide election.

2. The Alabama Supreme Court appeared to be indecisive in its decisions over the 12 years of litigation in the *Equity Funding Cases*, due to the reversal of several rulings. The following are two examples: In its May 31, 2002 ruling, the Justice Houston stated, "My opinion now differs from my opinion in 1995 and 1997, because now I believe that the trial court was without subject-matter jurisdiction to decide the liability issue." In 1997, Justice Cook wrote:

> In a real sense, the court's holding that Amendment 111 violated the Fourteenth Amendment is the linchpin of this entire action. We hold, therefore, that the plaintiffs-cross appellants, who prevailed on the pivotal question of federal constitutional law as the basis for the entire action, are entitled to an award of attorney fees, pursuant to § 1988.[743]

3. Amendment 111 was born out of a racial disregard for the U.S. Supreme Court's decision in *Brown v. Board of Education* in 1954. As a result of Amendment 111, the students of the State of Alabama do not have a right to a public education. The plaintiffs stated:

> Amendment 111, the current education clause of the Alabama Constitution, was enacted with an invidious discriminatory purpose as evidence by (1) the express language of the

> amendment, (2) the historical background of the legislation, and (3) the amendment's legislative history. Therefore, because of its discriminatory purpose, Amendment 111 violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by providing for legislative authority to establish a dual educational system in direct opposition of *Brown*.[744]

Chief Justice Moore wrote in his 2002 opinion, "A certain section of Amendment 111 appears on its face to be discriminatory."[745] He went on to state, "The racially discriminatory portion of Amendment 111 was not, when this action was filed, and is not now, applied in this State, nor did the plaintiffs allege that they had been discriminated on the basis of this provision."[746] The Chief Justice continued,

> If ever the State of Alabama uses the provisions of Amendment 111 and § 256, Ala. Const. 1901, to discriminate against citizens of this State on the basis of race and a party with standing exercises a challenge to those provisions seeking a declaratory judgment, then, on appeal, this Court can review that case and analyze those parts of the constitution under appropriate legal guidelines.[747]

After the Alabama Supreme Court dismissed the Equity Funding Case in May of 2002, two major school reform initiatives were launched that summer.[748] More than 20 organizations came together to build support for the State Board of Education's adequacy funding plan. In November, members of the Alabama business communities unveiled the Campaign for Alabama, to form support for a statewide education and tax reform movement.[749] Governor Riley proposed an amendment that would raise $1.2 billion in new taxes over four years for education.[750] Riley stated "Alabamians are a faithful people who believe that creating a better world for our children and helping our neighbors are both sacred duties."[751] However, the people of Alabama voted "no" to the Governors plan with 68 % of the votes voting "no".[752] On November 2, 2004, the voters of Alabama got another opportunity with Amendment 2 on the ballot. Amendment 2 called for the removal of language in Amendment 111 of the Constitution which provides for separate but equal schools for white and black children, authorizes poll taxes, and declares that

there is no constitutional right to a public education in Alabama.[753] As of the writing of this study, with 99 % of precincts reporting, Amendment 2 did not pass with 2,560 votes; however, absentee and provisional ballots have yet to be counted. With this slim margin, a recount is mandated by Alabama law.[754]

Opposition to Amendment 2 was led by former Chief Justice Roy Moore and John Giles, Chief of the Alabama Christian Coalition. In declaring victory Giles stated: "The Christian Coalition of Alabama will work to ensure that reckless trial lawyers and activist judges will not be able to open the floodgates to increase taxes and that private, Christian, parochial and home-school families will be protected."[755]

In the opinion of the author of this study, with the condition of public education in the State of Alabama, parts of the current constitution having racial overtones, and the indecisiveness of the Alabama Supreme Court in reversing several of its early rulings concerning school funding, school funding litigation is not over for the State of Alabama. It is only a matter of time before more litigation is filed. This author believes that filing in the federal court system is a very strong possibility and may be only a matter of time.

ENDNOTES

1. Ex parte James, 836 So. 2d. 815 (Ala. 2002).

2. *Id.*

3. Alabama Constitution of 1901 §§ 1, 6, 22.

4. Brown v. Board of Education, 347 U.S. 483 (1954).

5. 836 So. 2d. 878 (Ala. 2002) (Jonhnstone, J. dissenting).

6. 836 So. 2d. 815 (Ala. 2002).

7. Serrano v. Priest, 487 P. 2d 1241 (Cal. 1971).

8. Opinion of the Justices No. 338, 624 So. 2d 107 (Ala. 1995).

9. 836 So. 2d. 815 (Ala. 2002).

10. Alabama State School Superintendent, Status Report to the Montgomery Circuit Court, (Feb. 2002), (unpublished report, on file with the author).

11. 836 So. 2d. 816 (Ala. 2002).

12. 487 P. 2d. 1241 (Cal. 1971).

13. The author wishes to acknowledge the contribution and assistance of John Dayton in the review of cases since *Serrano.* See also, John Dayton, *Serrano and its Progeny,* 157 Edu. L. Rep. 447 (2001)

14. Serrano v. Priest, 487 P.2d 1241 (Cal. 1971).

15. *Id*.

16. *Id.*

17. Michael La Morte, School Law 353 (3rd ed. 1990).

18. The Serrano principle. See National Education Association, Understanding State School Finance Formulas 5 (1987).

19. Serrano v. Priest 487 P.2d 1241, 1244 (Cal. 1971).

20. *Id*. at 1244.

21. *Id*. at 1260.

22. *Id.* at 1258.

23. *Id.* at 1262-1263.

24. San Antonio v. Rodiguez, 411 U. S. 1, 56 (1973).

25. *Id*. at 37

26. *Id.*

27. *Id*. at 27, n.61.

28. Id. at 31.

29. *Id.* at 37

30. *Id*. at 41.

31. *Id*. at 40.

32. *Id*. at 59.

33. *Id.* at 71, n.2 (Marshall, J., dissenting).

34. *Id*. at 71-72 (Marshall, J., dissenting) citing, Brown v. Board of Education., 347 U.S. 483, 494 (1954).

35. 287 A.2d 187 (N.J. Super. Ct. Law Div. 1972).

36. Robinson v. Cahill, 303 A.2d 277 (N.J. 1973).

37. *Id.*

38. *Id.*

39. *Id*. at 284.

40. *Id.* at 298.

41. Shofstall v. Hollis, 515, P.2d. 591 (Ariz. 1973).

42. *Id*. at 592

43. *Id*.

44. *Id*. at 590, 593.

45. Milliken v. Green, 203 N. W. 2d 457 (Mich. 1972).

46. *Id***.** at 712.

47. *Id.* at 713.

48. *Id.* at 719.

49. *Id.*

50. *Id.*

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

52. 411 U.S. 1, 33 (1973).

53. 537 P.2d 635 (Idaho 1975).

54. *Id*. at 647.

55. *Id*. at 653.

56. Knowles v. State Board of Education, 547 P.2d 699, 700 (Kan. 1976).

57. *Id*. at 701.

58. *Id.* at 706.

59. Olsen v. State, 554 P.2d 141 (Or. 1976).

60. *Id.* at 148.

61. *Id*. at 149.

62. Buse v. Smith 247 N. W. 2d 141 (Wis. 1976)

63. *Id*. at 148.

64. 487 P.2d 1241 (Cal. 1971).

65. Serrano v. Priest, 557 P.2d 929, 931 (Cal. 1976).

66. 557 P.2d. 929 (Cal. 1976).

67. *Id.* at 937.

68. *Id*. at 938.

69. *Id*. at 939.

70. *Id.*

71. *Id*. at 951.

72. Horton v. Meskill, 376 A.2d 359 (Conn. 1977).

73. *Id*.

74. Id. at 374-375.

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

76. *Id*. at 92.

77. *Id*.

78. *Id.*

79. *Id*. at 94.

80. *Id*. at 105.

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

82. *Id*. at 863-864.

83. *Id*. at 864.

84. *Id.* at 878.

85. *Id.* at 877-878.

86. *Id.* at 878.

87. Danson v. Casey, 399 A.2d 360 (Pa. 1979).

88. Id. at 367.

89. Board of Education v. Walter, 390 N.E.2d 813 (Ohio 1979).

90. *Id*. at 822.

91. *Id.* at 826.

92. *Id*. at 825.

93. Washakie County v. Hershler, 606 P.2d 315 (Wyo. 1980).

94. *Id.* at 310, 319.

95. *Id.* at 322.

96. *Id.* at 333.

97. *Id.*

98. *Id.* at 336.

99. McDaniel v. Thomas, 285 S.E.2d 160 (Ga. 1981).

100. *Id*. at 167.

101. *Id*. at 168

102. Lujan v. Colorado, 649 P.2d 1005 (Colo. 1982)

103. *Id*. at 1014.

104. *Id.* at 1015-1016.

105. *Id.* at 1017.

106. *Id*. at 1021.

107. *Id.* at 1023.

108. *Id.* at 1018.

109. Plyler v. Doe, 457 U.S. 202 (1982).

110. *Id*. at 230 (Marshall, J., concurring).

111. *Id*. at 231 (Marshall, J., concurring).

112. Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359 (N.Y. 1982).

113. *Id.* at 363.

114. *Id*. at 363, n.3.

115. *Id.* at 369.

116. *Id*. (Fuchsberg, J., dissenting).

117. *Id.*

118. Hornbeck v. Somerset Co. Board of Educ., 458 A.2d 758 (Md.1983).

119. *Id*. 783

120. *Id*. at 781-782.

121. *Id*. at 789.

122. *Id*. at 787.

123. *Id*. at 770.

124. Dupree v. Alma School District, 651 S. W. 2d 90 (Ark. 1983).

125. *Id*. at 92.

126. *Id.* at 90.

127. *Id*. at 93.

128. *Id*.

129. *Id.*

130. *Id*. at 95.

131. *Id.*

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

133. Pauley v. Bailey, 324 S.E. 2d 132 (W. Va. 1984).

134. *Id.*

135. *Id*. at 133.

136. *Id.* at 134.

137. *Id.* at 137.

138. Papasan v. Allain, 478 U.S. 265 (1986).

139. *Id.*

140. Britt v. North Carolina State Board of Education, 357 S.E. 2d 437 (N.C. App. 1987), dismissal allowed and affirmed, 361 S.E. 2d 71 (N.C. 1987).

141. *Id.* at 434.

142. *Id*. at 436.

143. *Id*. at 432.

144. Livingston School Board v. Louisiana, 830 F.2d 563 (5th Cir. 1987), cert. denied, 487 U.S. 1223 (1988).

145. *Id.*

146. *Id.* at 572, citing, San Antonio v. Rodiriguez, 411 U.S. 1 (1973).

147. *Id.* at 563.

148. Fair School Finance Council of Oklahoma v. State, 746 P.2d 1135 (Okl. 1987).

149. *Id.*

150. *Id*. at 1141.

151. *Id* at 1147

152. *Id.*

153. Richland County v. Campbell, 364 S.E. 2d 470 (S.C. 1988).

154. *Id.* at 472.

155. Kadrmas v. Dickinson Public Schools, 487 U.S. 450 (1988).

156. *Id.* at 466 (Marshall, J., dissenting).

157. *Id.* at 467 (Marshall, J., dissenting).

158. *Id.* at 470 (Marshall, J., dissenting).

159. *Id.* at 471 (Marshall, J., dissenting).

160. Helena Elementary School District v. State, 769 P. 2d 684 (Mont. 1989).

161. *Id*. at 687.

162. *Id.* at 689.

163. *Id. at* 693.

164. Kukor v. Grover, 436 N. W. 2d 568 (Wis. 1989).

165. *Id.* at 574.

166. Id. at 579.

167. *Id.* citing, Buse v. Smith, 247 N.W. 2d 141 (Wis. 1976).

168. *Id*. at 580.

169. *Id.* at 582, n.13.

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

171. *Id.* citing Brown v. Board of Education, 347 U.S. 483, 493 (1954) (emphasis added by the court).

172. *Id.* at 212-213.

173. *Id*. at 212.

174. *Id.* at 216.

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

176. *Id.* at 392.

177. *Id.* at 393.

178. *Id.* at 398.

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

180. *Id*. at 363.

181. *Id.* at 366.

182. *Id.*

183. *Id*. at 385.

184. *Id.* at 398-399.

185. *Id.* at 385-386.

186. *Id.* at 409.

187. *Id.* at 412.

188. Coalition for Equitable School Funding v. State, 554 P.2d 139 (Or. 1976).

189. 811 P.2d 120 (Or. 1991).

190. *Id.* at 122.

191. *Id.*

192. *Id.*

193. Idaho Schools v. State, 850 P.2d 724,729 (Idaho 1993).

194. 537 P.2d 635 (Idaho 1975).

195. Tennessee Small School System v. McWherter, 851 S.W.2d 139, 141-142 (Tenn. 1993).

196. *Id.* at 144.

197. *Id.* at 145.

198. *Id*. at 144-145.

199. *Id*. at 156.

200. *Id*. at 155.

201. McDuffy v. Secretary of Education, 615 N.E. 2d 51,517 (Mass. 1993).

202. *Id.* at 524.

203. *Id.* at 540.

204. *Id.* at 524.

205. *Id.* at 548.

206. Id. at 555, n. 92.

207. Skeen v. State, 505 N.W.2d 302 (Minn. 1993).

208. *Id*. at 302-303.

209. *Id.* at 315.

210. *Id.* at 317-318.

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

212. *Id.*

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

214. *Id.* at 1376.

215. *Id.* at 1381.

216. *Id*.

217. Bismarck Public School District v. State, 511 N.W.2d 247 (N.D. 1994).

218. *Id*. at 250.

219. Scott v. Commonwealth of Virginia, 443 S.E.2d 138 (Va. 1994).

220. *Id*. at 141.

221. *Id.*

222. *Id.*

223. 515 P.2d 590 (Ariz. 1973).

224. Roosevelt Elementary School District v. Bishop, 877 P.2d 806 (Ariz. 1994).

225. *Id.* at 811.

226. *Id.* at 816.

227. Kan. Stat. 72-6405 (1992).

228. Unified School District v. State, 885 P.2d 1170, 11195 (Kan. 1994).

229. *Id*. at 1173.

230. *Id.*

231. *Id.*

232. *Id.* at 1174.

233. *Id.* at 1194 citing Armstrong v. United States, 364 U.S. 40, 49 (1960).

234. *Id*. at 1195.

235. *Id*. at 1197.

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

237. 894 S.W. 2d 734 (Tenn. 1995).

238. *Id.* at 738.

239. *Id.* at 738-739.

240. School Administrative District v. Commissioner 659 A.2d 854, 855 (Me. 1995).

241. *Id*. at 856.

242. *Id*. at 857

243. Campaign for Fiscal Equity v. State, 655 N.E.2d 663-664 (N.Y.1995).

244. *Id.* at 661.

245. *Id*. at 667.

246. *Id.* at 670.

247. R.E.F.I.T. v. Cuomo, 655 N.E. 2d 647 (N.Y. 1995).

248. *Id.* at 648.

249. *Id*. at 649.

250. *Id.*

251. City of New York v. State, 655 N.E.2d 649 (N.Y. 1995).

252. *Id.* at 650-651.

253. *Id*. at 651.

254. *Id.*

255. *Id.* at 652.

256. *Id.*

257. *Id.* at 651.

258. City of Pawtucket v. Sundlun, 662 A.2d 44 (R.I. 1995).

259. *Id.* at 40.

260. *Id.* at 44.

261. *Id.* at 49.

262. *Id.* at 49-50.

263. *Id.* at 57.

264. *Id*. at 61.

265. Campbell County School District v. State, 907 P.2d 1244 (Wyo. 1995).

266. *Id*.

267. *Id*.

268. *Id.* at 1246.

269. *Id*. at 1266-1267.

270. *Id.* at 1279.

271. *Id*. 1279-1280.

272. Coalition for Adequacy and Fairness v. Chiles, 680 So.2d 408 (Fla. 1996).

273. *Id*. at 407.

274. *Id*. at 408, citing Baker v. Carr, 369 U.S. 186 (1962).

275. *Id*. at 408.

276. 376 A.2d 359 (Conn. 1977).

277. Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996).

278. *Id*. at 1281.

279. *Id.* at 1273.

280. *Id.* at 1274.

281. *Id*. at 1280-1281.

282. *Id*. at 1290.

283. *Id*. at 1290-1291, citing Reynolds v. Sims, 377 U.S. 533, 566 (1964).

284. Committee for Educational Rights v. Edgar, 672 N.E.2d 1182 (Ill.1996).

285. *Id*.

286. *Id.* at 1184.

287. *Id.*

288. *Id*. at 1196.

289. *Id*.

290. Matanuska-Susitna v. State, 931 P.2d 391 (Alaska 1997).

291. *Id*. 400 n.13.

292. *Id*. 397.

293. *Id*. 400.

294. Brigham v. State, 692 A.2d 384 (Vt. 1997).

295. *Id*. at 389.

296. *Id.* at 390.

297. *Id.* at 396, citing Serrano v. Priest, 487 P.2d 1241,1260 (Cal. 1971).

298. *Id*. at 397.

299. DeRolph v. State, 677 N.E. 2d 733 (Ohio 1997).

300. *Id*. at 738.

301. *Id*

302. *Id*. at 744 See also Id. at 743.

303. *Id.* at 744.

304. Leandro v. State, 488 S.E. 2d 252 (N.C. 1997).

305. *Id*.

306. *Id*. at 253.

307. *Id*.

308. *Id.* at 259.

309. *Id*. at 257.

310. Claremont v. Governor, 703 A.2d 1353 (N.H. 1997).

311. *Id*. at 1354.

312. *Id*. at 1356.citing State v. U.S.&C. Express Co.,60 N.H. 219, 243 (1880) (emphasis added by court).

313. *Id.*

314. *Id*. at 1358, citing N.H. Const. pt. II, art. 83.

315. *Id.* at 1361.

316. Anderson v. State, 723 A.2d 1147, 1148 (Vt. 1998).

317. *Id.* at 1148.

318. *Id.*

319. *Id*. at 1149.

320. *Id.*

321. Abbeville v. State, 515 S.E.2d 538 (S.C. 1999).

322. *Id.*

323. *Id.*

324. *Id.* at 539.

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.* at 540-541.

329. Marrero v. Commonwealth, 399 A.2d 360 (Pa. 1979).

330. 739 A.2d 111 (Pa. 1999), citing Pa. Const. art. III, § 14).

331. *Id*. at 112, citing Sweeney v. Tucker, 375 A.2d 698,706 (Pa. 1977).

332. *Id*. at 113-114.

333. DeRolph v. State, 677 N.E.733 (Oho 1997).

334. 728 N.E.2d 993 (Ohio 2000).

335. *Id*. at 998.

336. *Id*. at 1001.

337. *Id*. at 1020-1021.

338. *Id*. at 1021.

339. 751 A.2d 1034 (N.J. 2000).

340. *Id.* at 1035.

341. Vincent v. Voight, 614 N.W. 2d 388, 408 (Wis. 2000), citing Norquist v. Zeuske, 564 N.W.2d 748 (Wis. 1997).

342. *Id*. at 388.

343. *Id.* at 411.

344. *Id*. at 412.

345. *Id*. at 409.

346. *Id*. at 414.

347. *Id*. at 415.

348. 635 A. 2d 1375, 1376 (N.H. 1993).

349. 703 A.2d 1353 (N.H. 1997).

350. 765 A.2d 673 (N.H. 2000).

351. *Id*. at 675-676.

352. *Id.* at 676.

353. *Id.* at 677.

354. DeRolph v. State (II), 728 N.E.2d 993 (Ohio 2000).

355. DeRolph v. State (III), 754 N.E. 2d 1184 (Ohio 2001).

356. *Id.* at 1189, citing DeRolph v. State (I), 677 N.E.2d 733 (Ohio 1997), at 736; 779-780 (Resnick, J., concurring).

357. *Id*. at 1201.

358. 635 A.2d 1375, 1376 (N.H. 1993).

359. 703 A.2d 1353 (N.H. 1997).

360. 794 A.2d 744 (N.H. 2002).

361. *Id*. at 745.

362. *Id.* at 758.

363. 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001).

364. 744 N.Y.S.2d 130 (N.Y. Sup. Ct. 2002).

365. *Id*. at 134.

366. Tennessee Small School Systems v. McWherter (Small Schools III), No. M2001-01957-SC-R3-CV, slip op. at *1 (Tenn. Oct. 8, 2002).

367. *Id.* at *2

368. 91 S.W.3d 472 (Ark. 2002).

369. *Id*. at 490.

370. *Id*. at 495

371. *Id*. at 510-511.

372. 780 N.E.2d 529 (Ohio 2002).

373. *Id.* at 530.

374. 624 So.2d 107 (Ala. 1993).

375. *Id.*

376. *Id.*

377. *Id.* at 165 - 166.

378. *Id.* at 110.

379. *Id.*

380. *Id*. 111.

381. 662 So.2d. 894 (Ala. 1995).

382. *Id*.

383. 624 So.2d. 147, n.14 (Ala. 1993).

384. *Id.*

385. *Id.*

386. 662 So.2d. 896 (Ala. 1995).

387. 624.So.2d. 110 – 112 (Ala. 1993).

388. 662 So.2d. 871 (Ala. 1995).

389. *Id.* at 891.

390. Ala. Const. § 256 (1956).

391. 662 So.2d. 899 (Ala. 1995).

392. 624 So.2d. 125 (Ala. 1993).

393. *Id.* at 126.

394. *Id.* at 107 – 108.

395. *Id.* at 165 -166.

396. *Id.*

397. 662 So.2d. 912 (Ala. 1995).

398. *Id.*

399. *Id*. at 912. n.2.

400. *Id.* at 920.

401. *Id*. at 898.

402. *Id.*

403. *Id.*

404. *Id*.

405. *Id.* at 900.

406. *Id.* at 897.

407. 713 So.2d. 929 (Hooper, J., dissenting).

408. *Id.* at 909.

409. *Id.*

410. *Id.* at 871.

411. *Id.* at 872.

412. *Id*.

413. *Id*. at 871.

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id*. at 873.

418. *Id.*

419. 713 So.2d.873 (Ala. 1997).

420. *Id.* at 869.

421. *Id*. at 870.

422. *Id.*

423. *Id*. at 873.

424. *Id.* at 882.

425. Ex parte James 836 So. Ed 813 (Ala. May 2002).

426. *Id*. at 877-878 (Johnstone, J., dissenting).

427. Plessy v. Ferguson, 163 U.S. 537 (1896).

428. National Research Council. (1999). *Making Money Matter: Financing America's Schools.* Committee on Educational Finance, Helen F. Ladd and Janet S. Hansen, editors. Commission on Behavioral and Social Sciences and Education. Washington D.C. National Academy Press. pp. 105-106.

429. *Id.*

430. *Id.*

431. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

432. National Research Council. (1999). *Making Money Matter: Financing America's Schools.* Committee on Educational Finance, Helen F. Ladd and Janet S. Hansen, editors. Commission on Behavioral and Social Sciences and Education. Washington D.C. National Academy Press. p. 68.

433. *Id.*

434. National Research Council. (1999). *Equity and Adequacy in Education Finance: Issues and perspectives.* Committee on Educational Finance, Helen F. Ladd and Janet S. Hansen, editors. Commission on Behavioral and Social Sciences and Education. Washington D.C. National Academy Press. pp.72-95 . citing Heise, M., *State Constitutional litigation, education - finance, and legal impact: An empirical analysis.* University of Cincinnati Law Review 63. 1735-1736.

435. *Id.*

436. Serrano v. Priest, 487 P.2d 1241 (Cal. 1971).

437. *Id.*

438. National Research Council. (1999). *Equity and Adequacy in Education Finance: Issues and perspectives.* Committee on Educational Finance, Helen F. Ladd and Janet S. Hansen, editors. Commission on Behavioral and Social Sciences and Education. Washington D.C. National Academy Press. pp.34-37.

439. *Id.*

440. *Id.*

441. *Id*. citing Private Wealth and Public Education

442. *Id.* at 7-33.

443. *Id.* citing San Antonio Indep. School District v. Rodriguez, 411 U.S. 1 (1973).

444. National Research Council. (1999). *Making Money Matter: Financing America's Schools.* Committee on Educational Finance, Helen F. Ladd and Janet S. Hansen, editors. Commission on Behavioral and Social Sciences and Education. Washington D.C. National

Academy Press. p. 67-100 citing San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973).

445. National Research Council. (1999). *Equity and Adequacy in Education Finance: Issues and perspectives.* Committee on Educational Finance, Helen F. Ladd and Janet S. Hansen, editors. Commission on Behavioral and Social Sciences and Education. Washington D.C. National Academy Press. pp.72-98

446. *Id*.

447. *Id.*

448. *Id.*

449. *Id.* citing Robinson v. Cahill, 355 A.2d 129 (N.J. 1976).

450. *Id.*

451. *Id*. at 136-174.

452. *Id.*

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

454. National Research Council. (1999). *Equity and Adequacy in Education Finance: Issues and perspectives.* Committee on Educational Finance, Helen F. Ladd and Janet S. Hansen, editors. Commission on Behavioral and Social Sciences and Education. Washington D.C. National Academy Press. pp.136-174.

455. *Id.*

456. *Id.* at 72-98.

457. Lukemeyer, A. Financing a Constitutional Education: Views from the Bench. paper presented at the Conference on State Aid to Education. April 5-6, 2002.

458. Sielke, C. The Quest for Equity. *School Business Affairs, (*August 2000). pp. 3-6.

459. Verstegen D. The New Wave of School Finance Litigation. *Phi Delta Kappan* (November 1994), v76 n3 pp. 243-250.

460. *Id.*

461. No Child Left Behind Act of 2001, Elementary and Secondary Education Act of 1965, (20 U.S.C. 6301 et seq.).

462. *Id.*

463. Berne, R., & Stiefel, L. (1999). Concepts of school finance equity: 1970 to present. In H. Ladd, R.Chalk, & J. Hansen (Eds.), *Equity and adequacy in education finance issues and Perspectives.* Washington, D.C.: Committee on Education Finance of the National Research Council, National Academy Press.

464. The National Commission on Excellence in Education, A Nation at Risk The Imperative for Education Reform. A report to the Nation and the Secretary of Education United States Department of Education, April, 1983.

465. Berne, R., & Stiefel, L. (1999). Concepts of school finance equity: 1970 to present. In H. Ladd, R.Chalk, & J. Hansen (Eds.), *Equity and adequacy in education finance: Issues and Perspectives.* Washington, D.C.: Committee on Education Finance of the National Research Council, National Academy Press.

466. Massell, D., Hoppe, M., & Kirst, M. (1997). *Persistence and Change: Standards-based reform in nine states.* Philadelphia: University of Pennsylvania, Graduate School of Education, Consortium for Policy Research in Education. Retrieved September 20, 2003, from http://www.cpre.org.

467. Ramirez, A. (2003, January). The shifting sands of school finance: Adequacy, equity and student learning drive today's school funding debate. *Educational Leadership*, 54-57. Association for Supervision and Curriculum Development.

468. *Id.*

469. *Id.*

470. *Id.*

471. *Id.*

472. Ladd, H., & Hansen, J. (Eds.). (1999). *Making money matter: Financing America's schools.* Washington, D.C.: Commission on Behavioral and Social Sciences and Education. National Research Council. National Academy Press. pp 104-107.

473. *Id.*

474. *Id.*

475. *Id.*

476. *Id.*

477. Guthrie, J., & Rothstein, R. (2001). A new millennium and a likely new ear of education finance. In S. Chaikind & W. Fowler (Eds.), *Education finance: in the new millennium.* New York: American Education Finance Association 2001Yearbook. Eye on Education, Inc.

478. *Id.*

479. National Education Association (2002). School funding adequacy: What it costs to do the job right . Retrieved April 20, 2003, http://www.nea.org/neatodya/ 0209/news18.html

480. Picus, L.O. (2000). Adequate funding: Courts wrestle with a new approach to fair and equitable funding for education. *American School Board Journal* Retrieved May 5, 2003, from http://www.asbj.com/schoolspending/picus.html

481. Duncombe, W. Lukemeyer, A., & Yinger, J. (2003). Financing an adequate education: A Case study of New York. In W. J. Fowler (Ed.), *Developments in school finance: 2001-02: Fiscal proceedings from the annual state data conferences of July 2001 and July 2002.* Washington, D.C.: National Center for Education Statistics, U.S. Department of Education.

482. *Id.*

483. *Id.*

484. Hadderman, M. (1999). School finance: Trends and issues. *National Parent Information Network Virtual Library*, Eric Clearinghouse on Education Management. Retrieved April 20, 2003, from http://npin.org/libarary/2001/n00504/n00504.html

485. *Id.*

486. *Id*. citing Alan Odden 1998 study

487. Guthrie, J.W. (2001). Twenty-first century education finance: Equity, adequacy, and the emerging challenge of linking resources to performance. Retrieved September 25, 2003, from Florida State University, Learning Systems Institute Web site: http://www.lsi.fsu.edu/project/ feps/4.doc.

488. *Id.*

489. Augenblick and Myers (2001)

490. *Id.*

491. Odden, A.R., & Picus, L.O. (2000). School finance: A policy perspective (2nd ed.). New York: McGraw-Hill.

492. *Id.*

493. *Id.*

494. Consortium for Policy Research in Education (2000). Program adequacy. Retrieved September 22, 2003, from http://www.wcer.wisc.edu/cpre/finance/research/.

495. WestEd (2000, July). *School funding: From equity to adequacy*. Retrieved September 22, 2003, http://www.wested.org/policy/

496. Borman, G. D., Hewes, G. M., & Brown, S (2002). *Comprehensive school reform and student achievement: A meta-analysis* (No. 59). Retrieved September 28, 2003, from Johns Hopkins University, Center for Research on the Education of Students
Placed at Risk Web site: www.csos.jhu.edu.

497. *Id*.

498. *Id.*

499. *Id.*

500. Odden, A.R. & Picus L.O. (2000). School finance: A policy perspective (2nd ed.). New York: McGraw-Hill.

501. WestEd (2000, July). *School funding: From equity to adequacy*. Retrieved September 22, 2003, http://www.wested.org/policy/

502. Reschovsky, A., & Imazeki, J. (1998), July). The development of school finance Formulas to guarantee the provision of adequate education to low income students. *Developments in school finance 1997*. Washington, DC: NationalCenter for Education Statistics, U.S. Department of Education, NCES 98-212.

503. Ladd, H., & Hansen, J. (Eds.). (1999). *Making money matter: Financing America's schools.* Washington, D.C.: Commission on Behavioral and Social Sciences and Education. National Research Council. National Academy Press.

504. Duncombe, W., & Yinger, J. (1999). Performance standards and educational cost indexes: You can't have one without the other. In H. Ladd, R.Chalk, & J. Hansen (Eds.), *Equity and adequacy in education finance: Issues and Perspectives.* Washington, D.C.: Committee on Education Finance of the National Research Council, National Academy Press.

505. WestEd (2000, July). *School funding: From equity to adequacy*. Retrieved September 22, 2003, http://www.wested.org/policy/

506. *Id*.

507. *Id.*

508. *Id.*

509. Ladd, H., & Hansen, J. (Eds.). (1999). *Making money matter: Financing America's schools.* Washington, D.C.: Commission on Behavioral and Social Sciences and Education. National Research Council. National Academy Press.

510. Commission on Education Finance, Equity, and Excellence (2002, January). Annapolis, Maryland. Retrieved September 28, 2003, from Library and Information Services Office of Policy Analysis Department of Legislative Services Web site: http://mlis.state.md.us

511. Chambers, J. & Parrish, T. (1994). State level education. In W. S. Barnett (Ed.), *Cost Analysis for education decision: Methods and examples: Advances in education productivity: Vol. 4.* Greenwich, Ct. JAI Press.

512. *Id.*

513. Guthrie, J., & Rothstein, R. (2001). A new millennium and a likely new ear of education finance. In S. Chaikind & W. Fowler (Eds.), *Education finance: in the new millennium.* New York: American Education Finance Association 2001Yearbook. Eye on Education, Inc.

514. Odden, A.R. & Picus L.O. (2000). School finance: A policy perspective (2nd ed.). New York: McGraw-Hill.

515. Campaign for Fiscal Equity (2003). Adequate funding for New York schools: A community conversation on what our students really need to succeed The New York State Council on Costing Out. Retrieved September 25, 2003,
from Web site: http://www.cfequity.org

516. *Id.*

517. WestEd (2000, July). *School funding: From equity to adequacy*. Retrieved September 22, 2003, http://www.wested.org/policy/

518. Sweetland, S. R. (2001). Ohio. In Sielke, C., Dayton, J., & Holmes, C.T. (Eds.), *Public school finance programs of the United States and Canada: 1998-99.* Washington, DC: National Center for Education Statistics, Office of Educational Research and Improvement, U.S. Department of Education.

519. Hunter, M. A. (1999). Trying to bridge the gaps: Ohio's search for an education finance remedy. *Studies in Judicial Remedies and Public Engagement 1 (6)*. Campaign for Fiscal Equity. Retrieved September 25, 2003, from http://www.cfeequity.org

520. *Id.* citing Miller v. Korns

521. *Id.*

522. *Id.* citing Board of Education of City School District of Cincinnati v. Walter, 390 N.E. 2d 813 (Ohio 1979).

523. *Id.*

524. *Id.*

525. *Id.*

526. *Id.*

527. *Id.*

528. *Id.*

529. *Id.*

530. *Id.*

531. Guthrie, J. W., & Rothstein, R. (1999). Enabling adequacy to achieve reality: Translating adequacy into state school finance distribution arrangements. In H. Ladd, R.Chalk, & J. Hansen (Eds.), *Equity and adequacy in education finance: Issues and Perspectives.* Washington, D.C.: Committee on Education Finance of the National Research Council, National Academy Press.

532. *Id.*

533. DeRolph v. State, 677 N. E. 2d 733, 740 (Oho 1997)

534. *Id.*

535. *Id.*

536. Augenblick, J. (1997). *Recommendations for a base figure and pupil-weighted adjustments to the base figure for use in a new school finance system in Ohio.* School Funding Task Force, Ohio Department of Education, July 17.

537. Ohio Coalition of Equity & Adequacy of School Funding. (n.d.). *Cost of adequate education = actual cost of essential learning resources.* Retrieved September 25, 2003, from http://www.ohiocoalition.org

538. *Id.*

539. *Id.*

540. *Id.*

541. *Id.*

542. *Id.*

543. *Id.*

544. Wyoming Legislative Service Office. (1998). *School Finance Synopsis*. Retrieved September 20, 2003, from http://legisweb.state.wy.us/usage/synop.htm

545. Washakie Co. School Dist. v. Herschiler, 606 P. 2d 310 (Wyo. 1980).

546. *Id.*

547. Campbell v. State, 907 P 2d 1238, 1267 (Wyo. 1995).

548. *Id.*

549. Wyoming Legislative Service Office. (1998). *School Finance Synopsis*. Retrieved September 20, 2003, from http://legisweb.state.wy.us/usage/synop.htm

550. Guthrie, J., & Rothstein, R. (2001). A new millennium and a likely new ear of education finance. In S. Chaikind & W. Fowler (Eds.), *Education finance: in the new millennium.* New York: American Education Finance Association 2001Yearbook. Eye on Education, Inc.

551. Guthrie, J. W., & Rothstein, R. (1999). Enabling adequacy to achieve reality: Translating adequacy into state school finance distribution arrangements. In H. Ladd, R.Chalk, & J. Hansen (Eds.), *Equity and adequacy in education finance: Issues and Perspectives.* Washington, D.C.: Committee on Education Finance of the National Research Council, National Academy Press.

552. Wyoming Legislative Service Office. (1998). *School Finance Synopsis*. Retrieved September 20, 2003, from http://legisweb.state.wy.us/usage/synop.htm

553. Equality State Policy Center (n.d.). *History of Wyoming school finance cases* Retrieved October 12, 2003, from http://www.equalitystate.org

554. *Id*.

555. Smith, J. R. (2002, January). *Wyoming education finance: Proposed revision to the cost based block grant.* Paper presented to Wyoming State Legislature. Management Analysis & Planning, Inc., Davis, Ca.

556. Tennessee Small School Systems v. McWherter, 851 S.W. 2d 139, 141-142 (Tenn.1993).

557. Cohen-Vogel, L. A., & Cohen-Vogel, D. R. (2001). School finance reform in Tennessee: Inching toward adequacy. *Journal of Education Finance, 26,* 297 -318.

558. Peevely, G., & Dunbar, K. D. (2001). Tennessee. In Sielke, C., Dayton, J., & Holmes, C.T. (Eds.), *Public school finance programs of the United States and Canada*: *1998-99.* Washington, DC: National Center for Education Statistics, Office of Educational Research and Improvement, U.S. Department of Education.

559. Rural School and Community Trust (2003). *Tennessee Supreme Court strikes down rural school funding plan.* Retrieved October 14, 2003, from http://ruraledu.org

560. Cohen-Vogel, L. A., & Cohen-Vogel, D. R. (2001). School finance reform in Tennessee: Inching toward adequacy. *Journal of Education Finance, 26,* 297 -318.

561. Peevely, G., & Dunbar, K. D. (2001). Tennessee. In Sielke, C., Dayton, J., & Holmes, C.T. (Eds.), *Public school finance programs of the United States and Canada*: *1998-99.* Washington, DC: National Center for Education Statistics, Office of Educational Research and Improvement, U.S. Department of Education.

562. *Id.*

563. Tennessee Small School Systems v. McWherter, 851 S.W. 2d 139, 141-142 (Tenn.1993).

564. *Id.*

565. Morgan, J. G. (2003). *Funding public schools: Is the BEP adequate?* Office of Education Accountability. State of Tennessee: Comptroller of the Treasury.

566. *Id.*

567. Guthrie, J., & Rothstein, R. (2001). A new millennium and a likely new ear of education finance. In S. Chaikind & W. Fowler (Eds.), *Education finance: in the new millennium.* New York: American Education Finance Association 2001Yearbook. Eye on Education, Inc.

568. Odden, A. (2003). Equity and adequacy in school finance today. Phi Delta Kappan

569. Opinion of Justices No. 338, 624 So. 2d. 107 (Ala. 1993).

570. *Id.* at 107-108.

571. *Id.* at 109.

572. *Id.*

573. *Id.* at 110-111.

574. *Id.* at 111.

575. *Id.*

576. *Id*. at 114.

577. *Id*. at 112.

578. *Id.*

579. *Id.* at 110.

580. *Id.* at 111.

581. *Id.*

582. *Id.*

583. *Id.* at 112.

584. *Id.*

585. *Id*.

586. *Id*. at 119.

587. *Id*. at 107-108

588. *Id.* at 110-111.

589. *Id.* at 112.

590. *Id*. at 114-115.

591. *Id.*

592. *Id.* at 115

593. *Id.* at 116.

594. *Id.*

595. *Id.*

596. *Id.*

597. *Id.*

598. *Id.*

599. *Id.*

600. *Id.* at 117.

601. *Id.*

602. *Id.* at 118.

603. *Id.*

604. *Id.*

605. *Id.* at 119.

606. *Id.*

607. *Id.*

608. *Id.*

609. *Id.*

610. *Id.* at 120.

611. *Id.*

612. *Id.*

613. *Id.* at 121.

614. *Id.* at 122.

615. *Id.*

616. *Id.* at 122-123.

617. *Id.* at 124.

618. *Id.*

619. *Id.* at 126.

620. *Id.*

621. *Id.*

622. *Id*. at 127.

623. *Id.*

624. *Id.*

625. *Id.* at 128.

626. *Id.*

627. *Id.*

628. *Id.* at 138.

629. *Id*. at 140.

630. *Id.* at 142.

631. *Id.*

632. *Id.* at 144.

633. *Id.*

634. *Id.*

635. *Id.* at 145.

636. *Id*.

637. *Id.*

638. *Id.*

639. *Id.*

640. *Id.*

641. *Id.* at 146.

642. *Id.* at 145-146.

643. *Id.* at 146.

644. *Id.* at 146-147.

645. *Id.* at 147

646. *Id*.

647. *Id*.

648. *Id.*

649. *Id.*

650. *Id.*

651. *Id.* at 148.

652. *Id.*

653. *Id.*

654. *Id*. at 150.

655. *Id.*

656. *Id.*

657. *Id.* at 161.

658. *Id.*

659. *Id.*

660. *Id*.

661. *Id.* at 166-167.

662. Ex parte James, 836 So. 2d. 815 (Ala. 2002).

663. *Id.*

664. *Id.*

665. *Id.*

666. *Id*. at 816.

667. *Id.*

668. *Id.*

669. *Id.*

670. *Id.*

671. *Id.* at 817.

672. *Id.*

673. *Id.* at 818.

674. *Id.* at 819.

675. *Id*. at 820.

676. *Id.*

677. *Id.*

678. *Id*. at 822.

679. *Id.*

680. *Id*. at 822-823.

681. Alabama Coalition for Equity, Inc. et. al., Brief in Support of Plaintiffs' Motion for Partial Summary Judgment, filed in the Montgomery Circuit Court, February 7, 1991, (unpublished report, on file with the author).

682. *Id.*

683. *Id.*

684. *Id.*

685. *Id.*

686. *Id.*

687. *Id.*

688. *Id.*

689. *Id.*

690. Ex parte James, 836 So. 2d. 823 (Ala. 2002).

691. *Id.*

692. *Id.*

693. *Id.*

694. *Id*. at 824-825.

695. *Id.* at 825.

696. *Id.*

697. *Id*.

698. *Id*. at 826-827.

699. *Id.* at 827-828.

700. *Id.* at 828-829.

701. *Id*. at 830.

702. *Id.*

703. *Id.*

704. *Id.* at 831.

705. *Id.*

706. *Id.*

707. *Id.*

708. *Id*. at 833.

709. *Id.* at 841.

710. *Id*. at 842.

711. *Id.*

712. *Id*.

713. *Id.* at 844.

714. *Id*. at 845.

715. *Id.* at 854.

716. *Id.*

717. *Id.* at 855.

718. *Id.* at 855-856.

719. *Id*. at 856.

720. *Id.*

721. *Id.* 875-876.

722. *Id*. 877-878.

723. Report of the Alabama State Board of Education and the State School Superintendent on the status of Alabama Coalition for Equity Inc. v. Siegelman, Remedy Plan filed with the Montgomery Circuit Court Oct. 12, 2001, Nov. 9, 2001, and Feb. 14, 2002 (unpublished report, on file with the author).

724. *Id.*

725. *Id.*

726. *Id.*

727. *Id.*

728. *Id.*

729. *Id.*

730. *Id.*

731. *Id*.

732. *Id.*

733. *Id.*

734. Ex parte James, 836 So. 2d. 820 (Ala. 2002).

735. Hunter, M., State-By-State Status of Finance Litigation, Campaign for Fiscal Equity, Inc. 2003. Retrieved September 29, 2003, from www.schoolfunding.info

736. *Id.*

737. CNN.com/Law Center, Judge suspended over ten commandments, Ethics complaint: Chief Justice failed to respect, obey law. Posted Saturday August 23, 2003 at 11:46 EDT. Retrieved November 11, 2004, from www.Cnn.com

738. Ex parte James, 836 So. 2d. 877 (Ala. 2002).

739. *Id.*

740. *Id.*

741. Alabama Coalition for Equity, Inc. et. al., Brief in Support of Plaintiffs' Motion for Partial Summary Judgment, filed in the Montgomery Circuit Court, February 7, 1991, (unpublished report, on file with the author).

742. Ex parte James 836 So. 2d 824-825 (Ala. 2002).

743. *Id*. at 824 citing James v. Alabama Coalition for Equity, Inc. 713 So. 2d at 950.

744. Alabama Coalition for Equity, Inc. et. al., Brief in Support of Plaintiffs' Motion for Partial Summary Judgment, filed in the Montgomery Circuit Court, February 7, 1991, (unpublished report, on file with the author).

745. Ex parte James 836 So. 2d 871-873 (Ala. 2002).

746 *Id*.

747. *Id.*

748. Advocacy Center for Children's Educational Success with Standards, Finance Litigation, Alabama: Recent Events: Other Advocacy Strategies. Retrieved September 16, 2003 from www.accessdnetwork.org/litigation

749. *Id.*

750. Libaw, O. Matthew 1040: A Biblical Tax Policy? One Governor Says Yes. ABCNEWS.com retrieved September 4, 2003 form http:// abcnews.go.com

751. *Id.*

752. Advocacy Center for Children's Educational Success with Standards, In the News. Alabama Voters Say No to Tax Restructuring and More Education Funding. Retrieved September 16, 2003 from www.accessdnetwork.org/states

753. CNN.com, Inside Politics. Alabama faces recount over segregationist laws, Amendment would remove long-unenforced provision. Retrieved November 5, 2004 from www.CNN.com

754. *Id.*

755. *Id.*