THE RELATIONSHIP BETWEEN PUBLIC SCHOOL DESEGREGATION

AND FUNDING LITIGATION

by

CHRISTINE S. KIRACOFE

(Under the Direction of John Dayton)

ABSTRACT

It has been fifty years since the U.S. Supreme Court held that separate race schools are inherently unequal in *Brown v. Board of Education*. Through judicial efforts, over the past five decades, *de jure* segregation in the United States has been largely eradicated. But, a series of Court decisions in the 1990s has made it increasingly easier for previously segregated school districts to be released from judicial oversight. Many schools have subsequently resegregated – some to pre-*Brown* levels. This paper argues that school funding concerns have been underlying issues in desegregation litigation from the very beginning, and that, similarly, race has frequently been an issue in funding cases. Thus, a natural relationship exists between desegregation and school funding litigation. The relevant legal history of public school desegregation and funding litigation in the United States is reviewed, as is the current status of the law in these two areas. Finally, this paper examines the relationship between these two veins of litigation and considers how recent cases such as *Sheff v. O'Neill*, and *Grutter v. Bollinger* may pave the way for future litigants.

INDEX WORDS: Desegregation, school funding litigation, school law, funding equity, *de jure* segregation, *de facto* segregation, *Brown v. Board of Education*, integration

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CHRISTINE S. KIRACOFE

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CHRISTINE S. KIRACOFE

Major Professor: John Dayton

Committee: Anne Dupre
C. Thomas Holmes
Catherine Sielke

Electronic Version Approved:

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

DEDICATION

To the memory of my Grandpa, Rev. Homer Newton Kiracofe, who taught me by word and example more than he ever could have imagined. I love and miss you Grandpa. Until we meet again.

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CHAPTER 1

INTRODUCTION

Even before the country's political inception there were education laws in the colonial territories of Connecticut, Maine, New Hampshire, and Vermont.[1] Early statesmen such as John Adams, Benjamin Franklin, and Thomas Jefferson believed that education was an essential part of preparing citizens for participation in a democracy.[2] In *A Bill for the More General Diffusion of Knowledge* (1779), Jefferson opined that an educated populace would be better equipped to exercise and protect their civil rights.[3]

Despite the emphasis placed on public education in the U.S., children, whether because of their geographic location, socioeconomic status, race, or gender, have not always received equal or adequate educational opportunities. Concerning racial inequities, there is a substantial body of evidence attesting to the inadequacy of educational facilities for black students in the segregated south. For example, students who attended segregated schools in Turrell, Arkansas in the 1950s and 1960s attended dramatically sub-standard schools. Textbooks used at all grade levels were out-of-date, and school furniture was extremely used and worn. The black high school did not offer any foreign language courses, and biology classes did not include any dissection experience, both of which were commonplace at local white schools. Although the

[1] In 1642, Massachusetts passed a law requiring town officials ("town fathers") to evaluate the education of local children to determine whether children were receiving adequate "religious and occupational training." By 1720, compulsory education laws were on the books in what would become four New England states. DAVID C. THOMPSON & R.CRAIG WOOD, MONEY & SCHOOLS 5 (2d ed. 2001).
[2] Thomas Jefferson, *A Bill for the More General Diffusion of Knowledge*, *in* THE PAPERS OF THOMAS JEFFERSON 526, 526 (Julian P. Boyd, ed., 1950).
[3] *Id*.

black school had a track team, their school did not have a track. Student athletes practiced on a gravel road off-campus, and held "home" track meets at a sister school more than ten miles away. There was no money for extracurricular trips, such as college visits, and the school library was tiny, poorly stocked, and desperately underfunded.[4]

The waves of desegregation and funding litigation over the following four decades attempted to remedy the conditions faced by students attending schools such as Turrell. Although a great deal of progress has been made over the last forty years, the reliance on property taxes to fund education has resulted in disparate educational offerings that frequently run along racial and socioeconomic lines. A 2002 description of a ninety-five percent black, property-poor Arkansas school district just an hour and a half away from Turrell highlights this point. The Arkansas Supreme Court, in *Lake View v. Huckabee*[5], noted that:

> The Holly Grove School District has only a basic curriculum and no advanced courses or programs. . . buildings have leaking roofs. . . the Barton Elementary School in Phillips County has two bathrooms with four stalls for over one hundred students. . . Lee County schools. . . [have] school buses that fail to meet state standards. . . [and] some buildings have asbestos problems and little or no heating or air conditioning.[6]

Another Arkansas district is described as having only:

> One uncertified mathematics teacher who teaches all high school mathematics courses. . . he has an insufficient number of calculators for his trigonometry class, too few electrical outlets, no compasses and one chalkboard. . . [the] basketball team does not have a complete set of uniforms, while its band has no uniforms at all. The college remediation rate. . . is 100 percent.[7]

Historically, differences in educational resources related to race have been dealt with by desegregation litigation. However, over the past fifteen years, the Supreme Court has become

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[4] Sherie Smith, *Teachers rise above a segregated South: Marion High School teacher remembers a different time*, INDIANA CHRONICLE-TRIBUNE.COM, February 4, 2001, at http://www.chronicle-tribune.com/news/stories/20010204/localnews/246275.html.
[5] Lake View v. Huckabee, 91 S.W.3d 472 (Ark. 2002).
[6] *Id.* at 490 *as in* R. CRAIG WOOD & JOHN DAYTON, EDUCATION FUNDING LITIGATION: EDUCATION POLICY AND THE COURTS 182 (March 2002) (unpublished manuscript , on file with the author).
[7] *Id.* at 183.

increasingly unwilling to address continuing desegregation litigation. Hundreds of "desegregating" school districts previously under judicial supervision have been released. Given the Court's reluctance to approve an indefinite continuation of judicial oversight, the number of desegregation lawsuits will likely dwindle to near zero in the coming years. The judiciary's disinclination comes at a time when U.S. schools are rapidly resegregating. A recent report completed by the Harvard Civil Rights Project concluded that:

> *Virtually all* school districts analyzed are showing lower levels of inter-racial exposure since 1986, suggesting a trend towards resegregation. . . As courts across the country end long-running desegregation plans and, in some states, have forbidden the use of any racially-conscious student assignment plans, the last 10-15 years has seen a steady unraveling of almost 25 years worth of increased integration.[8]

The report also highlights research suggesting a high correlation between minority schools and high-poverty schools. These schools also tend to have "low parental involvement, lack of resources, less experienced and credentialed teachers, and higher teacher turnover – all of which combine to exacerbate educational inequality for minority students."[9] Given this correlation, the beneficiaries of funding lawsuits, perhaps filed because of judicial reluctance to hear new desegregation cases, would affect the same population of students as would desegregation lawsuits. Thus, while the Court is unlikely to be receptive to continued judicial oversight of desegregating school districts, the goal of equal educational opportunities for every child, regardless of race, might be met via funding litigation.

Research Questions

This study investigated the following research questions:

1. What is the relevant legal history of public school desegregation and funding litigation in the United States?

[8] Erica Frankenberg & Chugmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts*, HARV. C.R. PROJ. 2, 4 (2002).
[9] *Id.* at 5.

2. What is the current status of the law in these two areas?

3. How can prior litigation in these two areas inform current efforts to achieve equal educational opportunities for all children?

Procedures

Legal research methodology was employed for this study. Research included an extensive search for litigation pertaining to public school desegregation from the mid-19th century to the present and funding litigation from the 1960s to the present. In addition to case law, relevant historical documents, related law review articles, and other scholarly publications were reviewed. These documents were analyzed and synthesized to construct a historical perspective on the legal status of these issues, a current composite perspective on the present legal status of these issues, and to extrapolate the likely future directions for these two areas.

The literature review is arranged in chronological order to provide the reader with a clearer perspective of the historical development of the law concerning both public school desegregation and funding litigation.

Limitations of the Study

This study is intended to provide the reader with an understanding of the past, present, and likely future direction of desegregation and funding litigation. Given the volume of litigation in these two areas, this study does not seek to provide an exhaustive history of public school desegregation and funding litigation. This study is primarily concerned with U.S. and State High Court decisions. Cases from lower courts were included only when necessary. In instances where there is more than one State High Court decision, the most relevant case was selected.

CHAPTER 2

LITERATURE REVIEW

This chapter reviews relevant public school desegregation and funding litigation. The first section of this chapter deals with desegregation litigation from the earliest U.S. school desegregation case, *Roberts v. Boston* (1846), and concludes with *Sheff v. O'Neill* (1996). The second section of this chapter reviews relevant U.S. and State High Court funding litigation cases from *McInnis v. Shapiro* (1968) through *Lake View v. Huckabee* (2002). Due to the volume of litigation in these two areas, the most relevant cases (52 in all) have been only briefly summarized.

A Review of Relevant Public School Desegregation Litigation

America's public schools did not begin as segregated institutions. The first American education law took effect in Massachusetts in 1642 when "town fathers" were ordered to make sure that local children were receiving adequate educational opportunities.[10] At the point of this early legislation, schools in both the Massachusetts and Virginia colonies were entirely integrated.[11] Integration, however, was a double-edged sword: although children were not separated based on the color of their skin, their race largely determined how they would be treated in schools. Concerned about the severe discrimination faced by their children in integrated schools, black parents in the early colonies successfully petitioned the government for

[10] DAVID C. THOMPSON & R. CRAIG WOOD, MONEY & SCHOOLS 5 (2d ed. 2001).
[11] *See* B.J. Butler, The Effects of School Desegregation on the Policy of Integration Established in *Brown v. Board of Education* (1999) (unpublished Ph.D. dissertation, Northern Illinois University) (on file with author). This is not to suggest that the entire white populace was educated in public schools. Many wealthy white citizens employed private tutors to educate their children.

the establishment of segregated schools.[12] However, the establishment of single-race schools was not the panacea parents had hoped for.

In 1846 a group of black parents petitioned Boston's primary school committee to end the practice of single race schools. The petition was denied by the board which stated that "the regular attendance of all such children upon the schools, is not only legal and just but is best adapted to promote the education of that class of our population."[13] Four years later, in 1850, the issue of Boston's single race schools was raised again, this time in the courts, in *Roberts v. Boston*.[14]

At the time the suit was filed, Sarah Roberts was a five year old child and a resident of the 6th district of Boston. When her father, Benjamin Roberts, attempted to enroll her into one of the local 6th district primary schools he was repeatedly denied the "ticket of admission" his daughter would need in order to attend school. He petitioned the primary school committee for redress but was informed that because of his daughter's race she would only be permitted to attend one of Boston's two colored primary schools. The nearest colored[15] school was more than twice as far from Sarah's home as the local primary school in which Roberts attempted to enroll his daughter. Displeased with the committee's decision, on February 15, 1848 Benjamin Roberts took Sarah to the primary school nearest to their home without the requisite ticket of admission. She was thrown out of the school that same day.

Benjamin Roberts filed suit claiming that "colored" schools were not equivalent to white schools and that separate race schools caused undue hardship on Boston's black citizens. Roberts claimed that the exclusion of blacks from Boston's 159 white primary schools was "a

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[12] J. Horton & M. Moresi, *Roberts, Plessy, and Brown: The long, hard struggle against segregation.* CULTURAL RESOURCE MANAGEMENT 19, 10-13 (1996).
[13] Roberts v. Boston, 59 Mass. (5 Cush.) 198 (1850) at 201.
[14] *Id.*
[15] Unless otherwise noted, period terminology will be used when referring to historical cases.

source of practical inconvenience to them and their parents to which white persons are not exposed, and is therefore, a violation of equality."[16] Roberts also claimed that Sarah's exclusion from the primary school nearest to their home was in violation of an 1845 statute:

> Which provides that any child, unlawfully excluded from public school instruction in this commonwealth shall recover damages therefor [sic], in an action against the city or town, by which such public school instruction is supported.[17]

The court rejected all of Roberts' claims. The School Committee argued, and the court accepted, that Boston's colored schools were "equal" to the white schools and disagreed that the establishment of separate schools instituted a type of caste system. Addressing Roberts' claims of the violation of the 1845 statute, the court noted that because there was a school available for Sarah to attend, that she had not been "unlawfully excluded from public school instruction."[18] As the *coup de gras* the court pointedly dismissed Roberts' concerns about his five year old daughter having to walk nearly a mile to school and back each day by claiming that Boston was so small that "a boy of good health could traverse daily the whole extent of it."[19]

Throughout the end of the 19th century, black Americans petitioned courts not only for equal educational rights, but for equal rights in other aspects of daily life. Plaintiffs in a 1879 case argued before the U.S. Supreme Court, *Strauder v. West Virginia*[20], successfully argued that West Virginia's policy of white-only juries was unconsititutional. In 1874, Strauder, a black man, was tried and convicted of murder in the state of West Virginia. He appealed to the state Superior Court to no avail, and finally to the U.S. Supreme Court. Strauder argued that West Virginia's law concerning jury selection violated his rights under the Fourteenth Amendment. The law stated that "all white male persons who are 21 years of age and who are citizens of this

[16] *Id*. at 202.
[17] *Id.* at 204.
[18] *Id.*
[19] *Id.* at 209.
[20] Strauder v. West Virginia, 100 U.S. 303 (1879).

state shall be liable to serve as jurors."[21] The issue before the court was not whether Strauder had a right to have at least one black man serve on the jury in his case, but whether it was constitutional for the courts to exclude black men from the pool from the start. The Supreme Court agreed with the plaintiff's arguments. They held that the Fourteenth Amendment, at least in part, was enacted to afford protection to black Americans, stating:

> The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves.[22]

Despite the apparent equal rights victory, the tone of the decision illustrates the pervasive belief, at least on the part of the court, that black Americans were second class citizens. This belief was affirmed in the landmark case *Plessy v. Ferguson,* decided by the U.S. Supreme Court in 1896.[23] At issue in *Plessy* was the constitutionality of an act passed by the Louisiana General Assembly in 1890. The act stipulated that all intrastate railroad trains operating in Louisiana must:

> Provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations. . . No person or persons, shall be admitted to occupy seats in coaches, other than, the ones, assigned, to them on account of the race they belong to.[24]

Penalties for violation of the separate car act were stiff. Railroad passengers or employees found to be in violation of the act faced a combination of fines and/or jail time. The act stipulated that:

> Any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof [sic] to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs, shall be liable to a fine of twenty-five dollars, or in lieu thereof [sic] to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy

[21] West Virginia Acts of 1872-73, at 102.
[22] Strauder at 306.
[23] Plessy v. Ferguson, 163 U.S. 537 (1896).
[24] Louisiana State Act No. 111, 1890 *as in* Plessy at 540.

> the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this State.[25]

Believing that Louisiana's separate car act was unlawful, a local community group known as the Citizens Committee selected Homer Plessy as a "test plaintiff" to challenge the act.[26] Plessy was described as being of "seven eighths White and one eighth African blood. . . the mixture of colored blood was not discernible in him."[27] On numerous previous occasions railroad officials had seated Plessy in the car reserved for white passengers. However, on the day in question, when Plessy boarded the New Orleans to Covington train he approached a railroad employee and identified himself as "colored."

Railroad officials had been informed beforehand of the Citizens Committee's plan. They in turn had forewarned law enforcement officials, who were likely present at the train station even before Plessy's arrival. Having identified himself as colored, Plessy was promptly directed to a seat in the car reserved for passengers of African descent. As the Committee had predicted, when Plessy refused to sit in his assigned car he was forcibly removed from the train by a police officer and taken to jail.[28]

The Committee appealed Plessy's conviction to the U.S. Supreme Court. They argued that Louisiana's separate car act violated both the Thirteenth and Fourteenth Amendments of the U.S. Constitution. The Court rejected the first claim, opining that the Thirteenth Amendment

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[25] *Id.*

[26] Raphael Cassimere, *Plessy: Like as in Plessy vs. Ferguson*, 103 CRISIS 17, 17 (1996). New Orleans was, in many ways, an ideal test location for discriminatory laws. While African Americans had fewer rights in southern states as a whole, Louisiana could be considered a progressive southern state in regards to rights for African Americans.

[27] Plessy at 541.

[28] The June 9, 1892 issue of the *New Orleans Daily Picayune* printed the following: "On Tuesday evening, a Negro named [Homer] Plessy was arrested by Private Detective Cain on the East Louisiana train and locked up for violating Section 2 of Act III of 1890, relative to separate coaches. . . He waived examination yesterday before Recorder Monlin and was sent before the criminal court under $500 bond" (as in Keith Medley, *The sad story of how 'separate but equal' was born*, 24 SMITHSONIAN 104, 104 (1994).

applied strictly to cases of slavery or involuntary servitude – circumstances not present in *Plessy*. The Court continued:

> This Amendment was said in the Slaughter-house cases, 16 Wall. 36, to have been intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude, and that the use of the word "servitude" was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name. It was intimated, however, in that case that this Amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern States, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value; and that the Fourteenth Amendment was devised to meet this exigency.[29]

The Court similarly dismissed petitioner's Fourteenth Amendment claim, in part, by stating that while the Amendment in question was designed to enforce the "absolute equality of the two races before the law" that it did not and could not address issues of racial social equality.[30]

In reaching their conclusion, the Court largely deferred to state law. Previously, in 1877, in *Hall v. Cuir,* the Court held that the enforced separation of the races on *interstate* trains was unconstitutional.[31] However, the train Plessy boarded operated entirely within the state of Louisiana. Given this, the Court held that:

> The enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the Equal Protection of the laws, within the meaning of the Fourteenth Amendment.[32]

Justice Harlan dissented from the majority opinion, stating that he believed that "the judgment this day will, in time, prove to be quite as pernicious as the decision made by this

[29] Plessy at 542.
[30] *Id.* at 544.
[31] Hall v. De Cuir, 95 U.S. 485 (1877).
[32] Plessy at 548.

tribunal in the Dred Scott case."[33] To underscore his position, he highlighted what he believed to be a glaring injustice in Louisiana's separate car act. He opined that:

> There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race. It is scarcely just to say that a colored citizen should not object to occupying a public coach assigned to his own race. He does not object, nor, perhaps, would he object to separate coaches for his race, if his rights under the law were recognized. But he objects, and ought never to cease objecting to the proposition, that citizens of the white and black races can be adjudged criminals because they sit, or claim the right to sit, in the same public coach on a public highway. . . The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.[34]

Justice Harlan's prediction about the pernicious nature of the *Plessy* decision would prove to be true when, 58 years later, the Court overturned the majority decision in *Plessy* in *Brown v. Board of Education.*[35]

Brown v. Board of Education

In 1954 the U.S. Supreme Court issued what would become the most significant desegregation decision in United States history: *Brown v. Board of Education of Topeka Kansas*, a combination of cases from Kansas, South Carolina (*Briggs v. Elliott*), Virginia (*Davis v. County School Board*), and Delaware (*Gebhart v. Belton*). Plaintiffs in *Brown* were black, elementary-school aged children from Topeka, Kansas. They challenged a Kansas state statute

[33] *Id.* at 559. In Dred Scott v. Sanford, 60 U.S. 393 (1857), the Court held that fugitive slaves were the property of their owners and not citizens of the United States.
[34] *Id.* at 561-562.
[35] Brown v. Board of Education, 347 U.S. 483 (1954).

which allowed cities with populations of 15,000 or more to establish separate schools for white and black children.[36] The District Court ruled against the *Brown* plaintiffs, stating that the "separate but equal" holding in *Plessy* had not been violated.[37] Plaintiffs then applied for a *writ of certiorari,* which was granted.

Petitioners in *Brown* argued that separate schools were inherently unequal, and that the maintenance of racially segregated schools was a violation of their Fourteenth Amendment right that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the Equal Protection of the laws.[38]

One of the arguments put forth by the defense was that when the Fourteenth Amendment was passed, its authors did not directly outline its relevance to the sphere of public education. While the Court acknowledged that the Amendment's "intended effect on public education" was indeed unclear, it held that this was immaterial to the case at hand.[39] The Court noted that when the Amendment was passed in 1868 the state of public education was, at best, in its most rudimentary form. The vast majority of black Americans were illiterate, and there was no formal education provided for black children. Further, educational opportunities provided for white children were largely through private institutions.[40] Highlighting the dramatic difference in the educational systems of 1868 and 1954, the Court stated:

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[36] *Id.* at 486.
[37] Plessy v. Ferguson, 163 U.S. 537 (1896). Lower courts ruled similarly in two of the other "combined" cases: Briggs v. Elliott (South Carolina), and Davis v. County School Board (Virginia). In the Delaware case, Gebhart v. Belton, even though the court "adhered" to the "separate but equal" standard, it ordered that the African American children be allowed to attend white schools because they were of significantly higher quality than the local black schools. *See* Brown at 487.
[38] U.S. CONST. amend. XIV, § 1.
[39] Brown at 490.
[40] *Id.* at 490.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[41]

Having established the critical nature of contemporary education, the Court addressed the implications of this conclusion. They noted:

> Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. . . We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. . . We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the Equal Protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.[42]

Although the Court decision was a plaintiff victory, many states were slow to implement the *Brown* decree.[43] One year later, in *Brown II*[44], the Supreme Court held that public schools should be desegregated with "all deliberate speed."[45] Despite this mandate by the Court, many states continued to drag their feet, seemingly believing that compliance with *Brown II* meant little more than "merely refrain[ing] from additional constitutional violations."[46]

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[41] *Id.* at 493.
[42] *Id.* at 493, 495.
[43] Desegregation was an exceedingly slow process in many parts of the country, but especially slow in the South. By 1964 just 2.14% of black children in 7 of the 11 states in the "deep South" attended desegregated schools. HAROLD. W. HOROWITZ & KENNETH L. KARST, LAW, LAWYERS, AND SOCIAL CHANGE 239-40 (1969) *as quoted in* Kevin Brown, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality Education Lawsuits,* 42 EMORY L.J. 791, 814 (1993).
[44] Brown v. Board of Education (II), 349 U.S. 294, 301 (1955).
[45] *Id.* at 301.
[46] John Dayton, *Desegregation: Is the Court preparing to say it is finished*, 84 EDUC. L. REP. 897, 898 (1993).

In many parts of the country the desegregation process was not a smooth one. One of the earliest post-*Brown* cases involved the effort to desegregate Little Rock's public schools, in *Cooper v. Aaron*.[47] Petitioners in *Cooper* were black students who, in accordance with Little Rock's desegregation plan, had been assigned to attend one of Little Rock's historically all-white high schools. The Governor and many members of the Arkansas Legislature opposed the desegregation effort. As a result, the State Militia was sent to Little Rock to prevent the petitioners from attending their assigned school. In response, federal troops were sent to Little Rock to ensure that the plaintiff children were able to attend the desegregated high school to which they had been assigned. Mobs and anti-desegregation demonstrators were a near-daily occurrence at the school, crippling the educational process.

Citing concerns over the continued presence of mobs and demonstrators, officials petitioned the District Court for a two-and a-half year "hold" on Little Rock's desegregation plan. The District Court found for the officials, sending the petitioners back to the black-only schools which they had previously attended. The Supreme Court held that the violence, while certainly detrimental to the educational process, was not an excuse for allowing the unconstitutional separation of the races in public schools. It stated:

> The process of ending unconstitutional exclusion of pupils from the common school system -- "common" meaning shared alike -- solely because of color is no doubt not an easy, overnight task in a few States where a drastic alteration in the ways of communities is involved. Deep emotions have, no doubt, been stirred. They will not be calmed by letting violence loose -- violence and defiance employed and encouraged by those upon whom the duty of law observance should have the strongest claim -- nor by submitting to it under whatever guise employed. Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms.[48]

[47] Cooper v. Aaron, 358 U.S. 1 (1958).
[48] *Id.* at 24.

Six years later the Court heard a second non-compliance case. In *Griffin v. County School Board*[49] (1964), a lawsuit involving schools in Prince Edward County, Virginia, the Court reported that:

> In 1956 Section 141 of the Virginia Constitution was amended to authorize the General Assembly and local governing bodies to appropriate funds to assist students to go to public or to nonsectarian private schools, in addition to those owned by the State or by the locality. . . The General Assembly met in special session and enacted legislation to close any public schools where white and colored children were enrolled together, to cut off state funds to such schools, to pay tuition grants to children in nonsectarian private schools, and to extend state retirement benefits to teachers in newly created private schools.[50]

The Court found that Prince Edward County's thinly veiled attempts to avoid public school desegregation were unlawful, noting that:

> For reasons to be stated, we agree with the District Court that, under the circumstances here, closing the Prince Edward County schools while public schools in all the other counties of Virginia were being maintained denied the petitioners and the class of Negro students they represent the Equal Protection of the laws guaranteed by the Fourteenth Amendment.[51]

While *Cooper* and *Griffin* had clarified the illegality of two segregationist tactics, districts still had little guidance as to what full compliance entailed. This issue was addressed by the Court four years later in *Green v. County School Board* in 1968.[52] At issue in *Green* was whether a school choice plan established by the New Kent County, Virginia school district would meet the *Brown II* mandate requiring that school boards "achieve a system of determining admission to the public schools on a nonracial basis."[53]

[49] Griffin v. County School Board, 377 U.S. 218 (1964).
[50] *Id.* at 220.
[51] *Id.* at 225.
[52] Green v. County School Board, 391 U.S. 430 (1968).
[53] Brown II at 300-301.

Before *Brown*, New Kent County had maintained racially segregated schools in fulfillment of Virginia state law.[54] However, the decision in the combined *Brown* cases had rendered these laws unconstitutional. In response, the district initiated a school choice program whereby all students (except those entering 1st and 8th grade) were allowed to select which of New Kent's two schools they wished to attend. Students not expressing a choice were assigned to the school they had previously attended.[55]

The Court found that New Kent's school choice program did not meet the objectives of *Brown*. However, the opinion outlined what would come to be known as the *Green* factors, or "important indicia of a racially segregated school."[56] These factors included: student assignments, faculty, staff, transportation, extracurricular activities, and facilities.[57] While *Green* did not explicitly identify *how* school districts should desegregate, the case did offer districts some guidance as to *what* the Court would be looking for.

The desegregation cases heard by the Court in the 1950s and 1960s uniformly concerned instances of *de jure* segregation, or segregation resulting from laws requiring the separation of the races. A 1973 case, *Keyes v. School Dist. No. 1, Denver,*[58] raised the issue of non-mandated segregation, or *de facto* segregation. Unlike Virginia and Arkansas, Colorado had never passed segregation legislation. As highlighted by the Court, "to the contrary, Art. IX, § 8, of the Colorado Constitution expressly prohibits any "classification of pupils . . . on account of race or color."[59] Despite this Constitutional prohibition, plaintiffs asserted that the Denver school district had maintained, through the "manipulation of student attendance zones" and other tactics, a

[54] Va. Const., Art. IX, § 140 (1902); Va. Code § 22-221 (1950).
[55] Green at 434.
[56] Dayton, *supra* note 45, at 898.
[57] Green at 435.
[58] Keyes v. School Dist. No. 1, Denver, 413 U.S. 189 (1973).
[59] *Id.* at 191 n1.

segregated system of schools.[60] The Court held that there was an important distinction between segregation which results from law and that which does not, stating:

> In the case of a school system like Denver's, where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action.[61]

Milliken v. Bradley

In 1974 the Court ruled on *Milliken v. Bradley,*[62] a particularly significant case which "may have marked the beginning of the end of the Supreme Court's support for expansion of desegregation remedies."[63] *Milliken* involved students from Detroit's public schools which, after years of "white flight" to the more affluent suburbs, had left most inner-city Detroit schools almost entirely black or Hispanic.[64] The majority-minority racial composition of Detroit's city schools made desegregation impossible. In an attempt to desegregate Detroit's city schools, a Federal District Court ordered a "metropolitan integration remedy" that would consolidate 53 independent school districts in and around the city of Detroit into a new "super-school district."[65] This decree caused great concern to many parents who had purposely moved out of the Detroit city limits to avoid having their children attend what they perceived to be "inferior and often dangerous schools."[66]

Plaintiffs in *Milliken* questioned the constitutionality of the District Court's integration remedy. Both parties in *Milliken* agreed that the Detroit city school system had been unlawfully segregated. The Court outlined the findings of the District Court, noting:

> The District Court found that the Detroit Board of Education created and maintained optional attendance zones within Detroit neighborhoods undergoing racial transition and

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[60] *Id*. at 191.
[61] *Id.* at 197.
[62] Milliken v. Bradley, 418 U.S. 717 (1974).
[63] Dayton, *supra* note 45, at 900.
[64] *See* MICHAEL W. LAMORTE, SCHOOL LAW 289 (7th ed. 2002).
[65] *Id.*
[66] *Id.*

> between high school attendance areas of opposite predominant racial compositions. These zones, the court found, had the "natural, probable, foreseeable and actual effect" of allowing white pupils to escape identifiably Negro schools. . . Similarly, the District Court found that Detroit school attendance zones had been drawn along north-south boundary lines despite the Detroit Board's awareness that drawing boundary lines in an east-west direction would result in significantly greater desegregation. Again, the District Court concluded, the natural and actual effect of these acts was the creation and perpetuation of school segregation within Detroit. The District Court found that in the operation of its school transportation program, which was designed to relieve overcrowding, the Detroit Board had admittedly bused Negro Detroit pupils to predominantly Negro schools which were beyond or away from closer white schools with available space. . . This practice was found to have continued in recent years despite the Detroit Board's avowed policy, adopted in 1967, of utilizing transportation to increase desegregation. . . "With one exception (necessitated by the burning of a white school), defendant Board has never bused white children to predominantly black schools. The Board has not bused white pupils to black schools despite the enormous amount of space available in inner-city schools. There were 22,961 vacant seats in schools 90% or more black."[67]

The lower court held that the Detroit Board of Education was a "subordinate entity of the State" and as such the responsibility for the injustices perpetrated by the Detroit Board ultimately fell on the State.[68] To underscore its holding the Court offered the following example, stating that:

> Under Michigan law, Mich. Comp. Laws § 388.851 (1970), for example, school building construction plans had to be approved by the State Board of Education, and, prior to 1962, the State Board had specific statutory authority to supervise school site selection. The proofs concerning the effect of Detroit's school construction program were, therefore, found to be largely applicable to show state responsibility for the segregative results.[69]

While the Detroit district had violated the Constitution in the establishment of a *de jure* system of segregation, the surrounding suburban school districts had not. Despite this, the District Court remedy would involve the bussing of children from these suburban areas in order to address the segregated nature of Detroit city schools. The Court held that:

> With no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect, the court went beyond the original theory of the case as framed by the pleadings and mandated a metropolitan area remedy. To

[67] Milliken at 725-726.
[68] *Id.* at 727.
[69] *Id.* at 727-728.

> approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court.[70]

Thus, the *Milliken* decision suggested that the Court was unwilling to widen the permissible means by which districts with a history of *de jure* segregation could be made unitary.

Unraveling Desegregation: *Dowell* and *Freeman*

Desegregation cases were not prominent fixtures on the Court's docket throughout the 1980s.[71] However, two cases in the 1990s – *Board of Education v. Dowell*[72], and *Freeman v. Pitts*[73] – addressed the critical issue of determining when a previously segregated district could be deemed unitary and consequently released from judicial oversight.

Litigation in *Dowell* began in 1961 when plaintiffs (mostly black students and their parents) filed suit against the Oklahoma City schools, claiming *de jure* segregation. The District Court found for the plaintiffs, holding that the Oklahoma City district "had intentionally segregated both schools and housing in the past, and that Oklahoma City was operating a "dual" school system -- one that was intentionally segregated by race."[74] As a result, the District Court ordered the Oklahoma City district to implement measures necessary to effectively desegregate its schools. After an unsuccessful multi-year attempt at desegregating schools through a neighborhood zoning plan, *Dowell* plaintiffs returned to court in 1972. The District Court found that, despite the district's attempts to desegregate, it remained unconstitutionally segregated. The Oklahoma City district was subsequently ordered to implement the "finger plan."[75] This plan stipulated that:

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[70] *Id.* at 745.
[71] Martha M. McCarthy, *Elusive Unitary Status,* 1 WEST'S EDUC. L.Q. 9, 12 (1992).
[72] Board of Education v. Dowell, 498 U.S. 237 (1991).
[73] Freeman v. Pitts, 503 U.S. 467 (1992).
[74] Dowell v. School Board of Oklahoma City Public Schools, 219 F. Supp. 427 (WD Okla.) as in Dowell at 240.
[75] Cited by the court as "Dowell v. Board of Education of Oklahoma City Public Schools, 338 F. Supp. 1256, aff'd, 465 F.2d 1012 (CA10), cert. denied, 409 U.S. 1041, 34 L. Ed. 2d 490, 93 S. Ct. 526 (1972)" *as in* Dowell at 241.

> Kindergartners would be assigned to neighborhood schools unless their parents opted otherwise; children in grades 1-4 would attend formerly all white schools, and thus black children would be bused to those schools; children in grade 5 would attend formerly all black schools, and thus white children would be bused to those schools; students in the upper grades would be bused to various areas in order to maintain integrated schools; and in integrated neighborhoods there would be stand-alone schools for all grades.[76]

The district implemented the plan as outlined by the District Court decree. Five years after the District Court order, the Board of Education returned to court, this time asking that the case be closed. They argued that the desegregation plan had been implemented as outlined and that the constitutional wrongs had been rectified. The District Court agreed, stating:

> The Court has concluded that [the finger plan] worked and that substantial compliance with the constitutional requirements has been achieved. The School Board, under the oversight of the Court, has operated the Plan properly, and the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before the court. . . The School Board, as now constituted, has manifested the desire and intent to follow the law. The court believes that the present members and their successors on the Board will now and in the future continue to follow the constitutional desegregation requirements. . . Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court. . .. . Jurisdiction in this case is terminated *ipso facto* subject only to final disposition of any case now pending on appeal.[77]

In the years that followed, a series of demographic changes led to the Oklahoma district's implementation of a Student Reassignment Plan (SRP) which assigned students to schools largely on the basis of where they lived. However, the SRP carried with it a number of unintended consequences. For example, the court noted that by 1985, 33 of the district's 64 elementary schools were virtually single-race, either 90% black or 90% white.[78] As a result, plaintiffs in *Dowell* petitioned the court to reopen the case on the grounds that "the school district

[76] Dowell at 241.
[77] *Id.* at 241-242.
[78] *Id.* at 242.

had not achieved unitary status, and that the SRP was a return to segregation."[79] The District Court refused plaintiffs' petition, holding that the "board, administration, faculty, support staff, and student body were integrated, and transportation, extracurricular activities, and facilities within the district were equal and nondiscriminatory."[80]

After an unsuccessful round of litigation in the 10th Circuit Court of Appeals, plaintiffs in *Dowell* successfully petitioned the Supreme Court for *certiorari.* Writing for the majority, Chief Justice Rehnquist articulated the Court's position on the continued judicial oversight of desegregation mandates, stating that "from the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination."[81] He also highlighted the Court's use of the word "transition" in previous desegregation cases such as *Brown* and *Green*.

Having established that judicial oversight was never intended to continue indefinitely, the Court outlined several factors which could be taken into account when determining whether a previously segregated district had achieved unitary status. The Court addressed the Court of Appeals' statement that "compliance alone cannot become the basis for modifying or dissolving an injunction" holding that:

> A District Court need not accept at face value the profession of a school board which has intentionally discriminated that it will cease to do so in the future. But in deciding whether to modify or dissolve a desegregation decree, a school board's compliance with previous court orders is obviously relevant. In this case the original finding of *de jure* segregation was entered in 1963, the injunctive decree from which the Board seeks relief was entered in 1972, and the Board complied with the decree in good faith until 1985. Not only do the personnel of school boards change over time, but the same passage of time enables the District Court to observe the good faith of the school board in complying with the decree. The test espoused by the Court of Appeals would condemn a school district, once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future. Neither the principles governing the entry and dissolution of

[79] *Id.*
[80] *Id.* at 242-243.
[81] *Id.* at 247.

> injunctive decrees, nor the commands of the Equal Protection Clause of the Fourteenth Amendment, require any such Draconian result. [82]

Thus, the Court reversed the decision issued by the Court of Appeals, and remanded the case to the District Court for further proceedings to determine whether "the Board was entitled to have the decree terminated."[83] The Court reiterated the criteria to be used in making this determination, stating:

> In considering whether the vestiges of *de jure* segregation had been eliminated as far as practicable, the District Court should look not only at student assignments, but 'to every facet of school operations -- faculty, staff, transportation, extracurricular activities and facilities.'[84]

The Court next addressed plaintiffs' concerns about the Oklahoma City SRP. If, on remand, the District Court found that the termination decree had been rightfully executed, then the district could no longer be required to obtain "court authorization for the promulgation of policies and rules regulating matters such as assignment of students and the like."[85] However, the Court was careful to point out that the termination of a desegregation decree in no way shields a district from its responsibilities under the Fourteenth Amendment. Thus, the termination decree would have no bearing on future instances of unconstitutional segregation of the races.

In *Dowell*, the Court highlighted "indicia of unitary status" which could be used to determine when a district under federal supervision had adequately desegregated.[86] One year later, the Court ruled on a case concerning segregation in DeKalb County, Georgia. In *Freeman*, the Court addressed timing issues related to judicial oversight: namely, whether districts could achieve unitary status incrementally.

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[82] *Id.* at 249.
[83] *Id.* at 250.
[84] *Id.*
[85] *Id.*
[86] Dayton, *supra* note 45, at 901.

In 1969, the DeKalb County school district was directed to desegregate its schools, and placed under judicial supervision by the District Court for Northern Georgia. In the 17 years that followed, DeKalb complied with the desegregation mandate by (amongst other things): implementing a voluntary student transfer program, reassigning teachers to achieve greater racial balance, and establishing a neighborhood school attendance plan.[87] In 1986, believing that the DeKalb district had achieved unitary status, petitioners returned to court, asking that the district be released from judicial oversight. In making its determination, the District Court considered whether the district had achieved unitary status in those areas outlined in *Green.* They also considered a factor not included in the *Green* decision, namely the relative quality of education offered to black and white students.[88] The District Court held that the DeKalb system had achieved unitary status in a handful of the *Green* categories, including: "assignments, transportation, physical facilities, and extracurricular activities."[89] The court held that it would "order no further relief" in these particular areas. However, because DeKalb had not achieved unity in all of the *Green* categories, it retained oversight jurisdiction in the remaining categories.

At issue in *Freeman* was whether courts could release districts from judicial oversight incrementally or only after all *Green* categories had been deemed unitary. Further, the Court addressed the scope of remedies. Answering this question, the Court stated:

> A federal court in a school desegregation case has the discretion to order an incremental or partial withdrawal of its supervision and control. This discretion derives both from the constitutional authority which justified its intervention in the first instance and its ultimate objectives in formulating the decree. The authority of the court is invoked at the outset to remedy particular constitutional violations.[90]

Further, the Court held that the judiciary is only able to remedy instances where there has been a

[87] Freeman at 472-473.
[88] *Id.* at 473.
[89] *Id.*
[90] *Id.* at 489.

previous constitutional violation. Remedies which do not directly address the violation in question are not constitutional – even in cases where *de facto* segregation has occurred. Writing for the majority, Justice Kennedy opined:

> Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure* segregated. Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.[91]

The U.S. Supreme Court docket has had few major desegregation cases in recent years. However in 1996, the Connecticut Supreme Court ruled on *Sheff v. O'Neill,* a case involving both issues of desegregation and funding equity.[92] Plaintiffs in *Sheff* represented students in inner-city Hartford schools, 92% of whom were poor, minority students. In contrast, the suburban "ring" surrounding inner-city Hartford was composed of less than 5% minority students, and was a population which had a very high socio-economic status.[93] Plaintiffs successfully argued that inner-city Hartford children were not receiving adequate or equal funding, leading to decreased educational opportunities. For example, when *Sheff* was filed, the average Connecticut district received $147.68 per-pupil for textbooks and instructional supplies. In contrast, students attending inner-city Hartford schools received just $77.67 in textbooks and instructional supplies.[94]

After a series of lower court appeals and legislative actions, per-pupil spending on inner-city students ($8,126 in 1991-92) had not only been equalized, but actually exceeded the amount spent on

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[91] *Id.* at 495.
[92] Sheff v. O'Neill, 238 Conn. 1 (Conn. 1996).
[93] Even though the state of Connecticut as a whole has the highest per capita income in the United States, the city of Hartford is the 4th poorest city in the U.S., and has the 2nd highest rate of child poverty.
[94] *Id.*

suburban Hartford students and significantly exceeded the national average ($5,500).[95] Despite this funding victory, inner-city Hartford students continued to perform at a significantly lower level than their suburban counterparts.[96] *Sheff* plaintiffs returned to court, arguing that a "substantially equal education includes not only equal funding, but also an integrated student body."[97] The issue of racial integration was of particular significance because, unlike "traditional" desegregation cases, both parties acknowledged that the children attending Hartford's schools had *never* suffered from *de jure* segregation. In fact, the court noted that the State Legislature had actively encouraged racial diversity. Writing for the majority, Justice Peters reported:

> The state has not intentionally segregated racial and ethnic minorities in the Hartford public school system. Except for a brief period in 1868, no students in Connecticut have intentionally been assigned to a public school or to a public school district on the basis of race or ethnicity. . . There has never been any other manifestation of *de jure* segregation either at the state or the local level. In addition to various civil rights initiatives undertaken by the legislature from 1905 to 1961 to combat racial discrimination, the state board of education was reorganized, during the 1980s, to concentrate on the needs of urban schoolchildren and to promote diversity in the public schools. Since 1970, the state has supported and encouraged voluntary plans for increasing interdistrict diversity.[98]

Having held that this was not a case involving *de jure* segregation, the court turned to the Education and Segregation clauses of the State Constitution. The court paid careful attention to transcripts of the Constitutional Convention debates in 1965, holding that the participants intended to provide a constitutional right to freedom from even *de facto* instances of segregation. The court noted:

> Despite the initiatives undertaken by the defendants to alleviate the severe racial and ethnic disparities among school districts, and despite the fact that the defendants did not intend to create or maintain these disparities, the disparities that continue to burden the

[95] James E. Ryan, *Sheff, Segregation, and School Finance Litigation*, 74 N.Y.U.L. REV. 529, 540 note 33 *as quoted in* Council of Great City Schools, National Urban Education Goals: Baseline Indicators, 1990-1991, 85 (1992).
[96] James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 291 n.183 (1999).
[97] *Id.* at 291 n184.
[98] Sheff at 10.

education of the plaintiffs infringe upon their fundamental state constitutional right to a substantially equal educational opportunity.[99]

A Review of Relevant School Funding Litigation

School funding equity is a particularly American issue. In many countries around the world, education is funded primarily by the federal government.[100] This type of funding system tends to produce school districts which are generally equally funded. Although disparities can and do exist under these federal systems, the differences between the poorest and richest schools are relatively minor. In contrast, funding disparities in the United States are uncomfortably common on both inter- and intra-state levels. For example, at the time when the first major funding equity case was decided in 1971, *Serrano v. Priest*[101], "the assessed valuation per unit of average daily attendance of elementary school children ranged from a low of $103 to a peak of $952,156 -- a ratio of nearly 1 to 10,000."[102] In many states, a great deal of progress has been made since 1971, narrowing the gap between the monies available to students in richer versus poorer areas in many states, but significant funding disparities still exist.

A study published by Biddle and Berliner (1998) reported that students in Alaska's richer districts received an average of $16,546 per student compared to the $7,379 Alaska's poorer districts were able to offer their students.[103] A significant gap also exists between the average per-pupil spending between states. In the same study, the authors reported that, on average, in 1998 (adjusting dollars for cost of living) New Jersey spent $8,801 per-pupil whereas Utah spent just $3,804 – less than half of the New Jersey amount.[104]

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[99] *Id.* at 42.
[100] *See* Robert Berne and Leanna Stiefel, *Concepts of School Finance Equity: 1970 to the Present*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 7, 8.
[101] Serrano v. Priest, 487 P.2d 1241 (1971).
[102] *Id.* citing Legislative Analyst, Public School Finance, Part V, Current Issues in Educational Finance (1971), 7.
[103] Bruce Biddle and David Berliner, *What Research Says about Unequal Funding for Schools in America*, WESTED POLICY PERSPECTIVES 1, 2 (2003).
[104] Id at 2.

There are a number of factors which contribute to these spending gaps. In instances of interstate inequity, factors such as regional cost differences and state funding priorities may account for the wide variation in per-pupil spending levels between states. Intrastate per-pupil spending differences are largely a function of how schools are funded. In the United States, the federal government provides, on average, 7% of the funding for primary and secondary education. The remaining 93% is provided, in roughly equal amounts, by state and local governments.[105]

In the majority of states, local dollars are raised through the levy of property taxes. From an equity standpoint, this has been problematic because the amount of money raised is largely a function of a district's property wealth. Consider the following example: three districts tax themselves at a rate of 10 mills. District "A", with $50,000,000 in taxable property, will raise $500,000. The second district, "B", which has $100,000,000 in taxable property, will raise $1,000,000. District "C", with $250,000,000 in taxable property, will raise $2,500,000. Thus, district "C" is able to generate 5 times what "A" is able to, taxing citizens at the same rate. This scenario is further complicated when you consider that poorer districts are often unable to tax themselves at higher millage rates.[106]

Pre-*Serrano* Funding Litigation

The intrastate inequity of per-pupil funds, as resulting from the reliance on property taxes, was at issue in the earliest funding equity cases. In 1968, the United States District Court for the Northern District of Illinois (Eastern Division) issued a ruling in the case *McInnis v. Shapiro.*[107] Plaintiffs in *McInnis* included elementary and high school students attending public schools in four different Chicago-area school districts in Cook County, Illinois. They were

[105] Berne and Stiefel at 8.
[106] DAVID C. THOMPSON AND R. CRAIG WOOD, MONEY & SCHOOLS 82 (2d. ed 2001).
[107] McInnis v. Shapiro, 293 F. Supp. 327 (1968).

joined by a corporate plaintiff, the Concerned Parents and People of the West Side, who represented the Lawndale area of Chicago. Collectively, plaintiffs claimed that the Illinois school funding system (including the collection and disbursement of local property taxes):

> Violate[d] their fourteenth Amendment rights to Equal Protection and due process because they permit wide variations in the expenditures per student from district to district, thereby providing some students with a good education and depriving others, who have equal or greater educational need.[108]

Writing for the majority, Judge Decker noted that there was "little direct precedent" for cases such as these – many of which addressed the additional problem of disparate impact on ethnic minorities. However, plaintiffs in *McInnis* made no claims based on race. Had they been able to do so, the court may have found in favor of the plaintiffs. Judge Decker wrote that "if plaintiffs alleged that Illinois' legislation was designed to avoid the Supreme Court's racial desegregation decisions, they would state a cause of action."[109] While the court's opinion made it clear that they were sympathetic about the intricacies and unintended consequences of Illinois' plan, they opined that plaintiffs should seek relief through the state legislature, and not the courts.

While *McInnis* was being litigated in Illinois, another funding equity case was beginning in Virginia, *Burruss v. Wilkerson*.[110] Plaintiffs in this case represented schoolchildren and residents of Bath County, Virginia. They claimed that the Virginia school funding system, known as the Virginia Basic State School Aid Fund Act, was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment and Section 129 of the Virginia Constitution.[111] The *Burruss* plaintiffs argued that the state funding scheme put children residing in poorer, rural

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[108] *Id*. at 328.
[109] *Id.* at 348.
[110] Burruss v. Wilkerson, 301 F. Supp. 1237 (1968).
[111] *Id*. at 1238. Section 129 states that "The General Assembly shall establish and maintain an efficient system of public free schools throughout the State."

counties at a marked disadvantage to those children residing in counties with greater property wealth.

Judge Dalton was very sympathetic to the plaintiffs' assertions. He stated that the "right" to equal educational opportunities had been "clearly recognized" in *Brown*. Noting that, unlike *Brown,* race was not an issue in this case, he stated that it appeared that poverty was, and noted that:

> At least one recent interpretation of this right to an equal educational opportunity suggests that the right protects individuals not only from discrimination on the basis of race, but also on the basis of poverty.[112]

Concluding that plaintiffs' complaint was meritorious, Judge Dalton recommended the case for a hearing before a three-judge panel.

On April 25, 1969, plaintiffs in *Burruss* argued their case before a three judge panel of the U.S. District Court for the Western District of Virginia. Judge Bryan, writing for the court, noted the court's acceptance of plaintiffs' claims of "deficiencies and differences" created by Virginia's state funding scheme. However, they disagreed with the assertion that these deficiencies and differences amounted to discrimination by the State.[113]

Addressing plaintiffs' request for the court to order a more even disbursement of state funds throughout Virginia's counties, Judge Bryan opined that "this is certainly a worthy aim, commendable beyond measure."[114] As the court in *McInnis* found, however, plaintiffs would need to look to the state legislature for relief. Judge Bryan wrote:

> The courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the State. We can only see to it that the outlays on one group are not invidiously greater or less than that of another. No such arbitrariness is manifest here.[115]

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[112] *Id.* at 1239 citing Hobson v. Hansen, 269 F. Supp. 401, 497 (1967).
[113] Burruss v. Wilkerson, 310 F. Supp. 572, 574.
[114] *Id*. at 578.
[115] *Id.*

Judge Bryan cited the decision in *McInnis* as support for the Virginia court's decision, stating that "the circumstances of that case are scarcely distinguishable from the facts here, Virginia's division of school funds closely paralleling Illinois'."[116]

Serrano v. Priest

The first major funding litigation victory, *Serrano v. Priest,*[117] came just two years later. Like the unsuccessful challenges in *McInnis* and *Burruss*, *Serrano* challenged state reliance on property tax revenue to fund local schools. In the 1968-69 school year more than half (55.7%) of the money available to local California school districts came directly from the levy of property taxes.[118] However, as the court pointed out, there was considerable difference in the property wealth of California districts. The court noted that in 1969-70, "the assessed valuation per unit of average daily attendance of elementary school children ranged from a low of $103 to a peak of $952,156 -- a ratio of nearly 1 to 10,000."[119]

Plaintiffs in *Serrano* were children and parents from Los Angeles county schools disadvantaged by the State's reliance on property taxes to fund public education.[120] They argued that California's reliance on property taxes to fund education created great inequities in educational opportunities and as such was in violation of the Equal Protection Clause of the Fourteenth Amendment. The court reported:

> It is alleged that "As a direct result of the financing scheme . . . substantial disparities in the quality and extent of availability of educational opportunities exist and are perpetuated among the several school districts of the State. . . . [Par.] The educational opportunities made available to children attending public schools in the Districts, including plaintiff children, are

[116] *Id.*
[117] Serrano v. Priest, 487 P.2d 1241 (1971).
[118] Legislative Analyst, Public School Finance, Part I, Expenditures for Education 5 (1970) *as in* Serrano at 1246 n2.
[119] Legislative Analyst, Public School Finance, Part V, Current Issues in Educational Finance 7 n5 (1971) *as in* Serrano at 1246.
[120] *Serrano* was a class action suit comprised of "all public school pupils in California, 'except children in that school district, the identity of which is presently unknown, which school district affords the greatest educational opportunity of all school districts within California'." Serrano at 1244.

> substantially inferior to the educational opportunities made available to children attending public schools in many other districts of the State. . . ." The financing scheme thus fails to meet the requirements of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the California Constitution in several specified respects.[121]

In a second cause of action, plaintiff parents asserted that the current funding system put them at a disadvantage to parents in wealthier districts. They argued that parents in districts with lower property wealth were forced to tax themselves at substantially higher rates than those in wealthier districts in order to provide the same educational opportunities for their children.[122]

Responding to the first part of the complaint, defendants in *Serrano* argued that that this case involved, at worst, *de facto* discrimination. The court addressed this assertion, stating:

> We turn now to defendants' related contention that the instant case involves at most *de facto* discrimination. We disagree. Indeed, we find the case unusual in the extent to which governmental action *is* the cause of the wealth classifications. The school funding scheme is mandated in every detail by the California Constitution and statutes. Although private residential and commercial patterns may be partly responsible for the distribution of assessed valuation throughout the state, such patterns are shaped and hardened by zoning ordinances and other governmental land-use controls which promote economic exclusivity.[123]

The court found for the plaintiffs, holding that the state funding system discriminated against poor children because they were most likely to live in property-poor areas with underfunded schools. Citing, in part, the Supreme Court's decision in *Brown*, the California high court found that education was a fundamental state right[124] and that there was no compelling state purpose for the current funding system.[125] The court opined:

> We, therefore, arrive at these conclusions. The California public school financing system, as presented to us by plaintiffs' complaint supplemented by matters judicially noticed, since it deals intimately with education, obviously touches upon a fundamental interest. For the reasons we have explained in detail, this system conditions the full entitlement to such interest on wealth, classifies its recipients on the basis of their collective affluence and makes the

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[121] *Id.*.
[122] Serrano at 1245. In many cases, parents in property poor districts were unable to provide the same educational opportunities as those in wealthier districts even when they taxed themselves at a *higher* rate.
[123] *Id.* at 1254.
[124] "We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest'." *Id.* at 1258.
[125] *Id.* at 1244.

> quality of a child's education depend upon the resources of his school district and ultimately upon the pocketbook of his parents. We find that such financing system as presently constituted is not necessary to the attainment of any compelling state interest. Since it does not withstand the requisite "strict scrutiny," it denies to the plaintiffs and others similarly situated the Equal Protection of the laws. . . If the allegations of the complaint are sustained, the financial system must fall and the statutes comprising it must be found unconstitutional.[126]

The California victory gave hope to potential equity plaintiffs around the country. A state-by-state dismantling of inequitable funding schemes would have been effective. However, it was far more appealing to attempt to secure a definitive remedy for the entire country in one fell swoop at the U.S. Supreme Court. This test case came two years later with *San Antonio v. Rodriguez.*[127]

San Antonio v. Rodriguez

Plaintiffs in *Rodriguez* were Mexican-American parents of children attending schools in the Edgewood Independent school district in suburban San Antonio, Texas. They claimed that recent demographic changes in Texas had created increasing disparity in the wealth of its districts. The Court stated:

> Until recent times, Texas was a predominantly rural State and its population and property wealth were spread relatively evenly across the State. . . Sizable differences in the value of assessable property between local school districts became increasingly evident as the State became more industrialized and as rural-to-urban population shifts became more pronounced. . . The location of commercial and industrial property began to play a significant role in determining the amount of tax resources available to each school district. These growing disparities in population and taxable property between districts were responsible in part for increasingly notable differences in levels of local expenditure for education.[128]

To highlight the disparity in educational funding, petitioners compared their district, Edgewood, with the neighboring Alamo Heights school district. The Court reported that although Edgewood Heights taxed itself at the highest rate in the metropolitan San Antonio area, they were able to raise significantly less money than districts such as Alamo Heights. In the 1967-1968 school year, children in the Alamo Heights district each received $594, compared to just $356 per-pupil in the

[126] *Id.* at 1263.
[127] San Antonio v. Rodriguez, 411 U.S. 1 (1973).
[128] *Id.* at 7-8.

Edgewood district. This difference is particularly significant in light of the tax effort exerted by the two districts. Residents in the Edgewood district taxed themselves at a rate of 10.5 mills[129], while Alamo Heights' property owners were taxed at the significantly lower rate of 8.5 mills.[130] Thus, children living in the Edgewood district received significantly less per-pupil money than their Alamo Heights counterparts despite the fact that their parents paid taxes at a higher rate.

The *Rodriguez* petitioners were victorious in the U.S. District Court for the Western District of Texas. The District Court found that education was a fundamental right, and as such, required strict scrutiny. However, the court noted that the state had failed to "establish [even] a reasonable basis for these classifications."[131] The Supreme Court overturned the lower court opinion, holding that wealth classifications should not be held to the same high standard as classifications such as race, for example. The Court opined that while poverty may be a disabling condition, it was not a "permanently disabling" condition.[132] It further argued that while education was an essential component of citizenship, they stopped short of naming it as a fundamental right, stating:

> Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that "the grave significance of education both to the individual and to our society" cannot be doubted. . . But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.[133]

Many funding equity advocates believed that *Rodriguez* could have done for funding litigation what *Brown* had done for desegregation. However, after *Rodriguez*, plaintiffs seeking remedies for inadequate and unequal schools would be forced to turn to their individual state courts for relief.

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[129] A "mill" is 1/1000 of a dollar.
[130] *Id.* at 12-13.
[131] Rodriguez v. San Antonio, 337 F. Supp. 280, 284 (1971).
[132] San Antonio v. Rodriguez, 411 U.S. 1, 121.
[133] *Id*. at 30.

Funding Litigation in State High Courts since *Serrano*

In the 32 years since the landmark decision in *Serrano*, the highest state court has ruled on the constitutionality of their state's funding system in 36 states. While 36 State Supreme Courts have *ruled* on funding equity cases, litigation has been *filed* in 45 of the 50 states – with many states experiencing serial litigation.[134] The only states where funding litigation has not been filed are Delaware, Hawaii, Mississippi, Nevada, and Utah.[135] The state has been victorious in 19 of the 36 State High Court cases. Including the decision in *Serrano*, the highest courts in 17 states have ruled that their educational funding systems are unconstitutional.[136]

Funding Litigation Decisions in State High Courts: the 1970s

Including *Serrano,* six states ruled on the constitutionality of their state funding system in the 1970s. The majority of cases in this decade (four plaintiff victories, as compared to two losses) held that the educational funding inequities, created by an over-reliance on property tax revenue, were unconstitutional.

The first state to rule on the Constitutionality of its funding system after the decisions in *Serrano* and *Rodriguez* was Michigan. During the time that the *Rodriguez* decision was pending in the U.S. Supreme Court, Michigan's highest court addressed a constitutional challenge to its system of funding schools in *Milliken v. Green*.[137] Plaintiffs in *Milliken* argued that the Michigan system of funding schools was in violation of both the Education Article of the State Constitution and the Equal Protection Clause of the Fourteenth Amendment. Finding for the state, the *Milliken* court disagreed

[134] In 2002, for example, the Supreme Court of New Hampshire ruled on Claremont v. Governor ("Claremont III"), and the Supreme Court of Tennessee ruled on Tennessee Small School Systems v. McWherter ("Small Schools III").
[135] *See* Molly A. Hunter, *State-By-State Status of School Finance Litigations*, Campaign for Fiscal Equity (2003) available at www.accessednetwork.org.
[136] John Dayton, Anne Dupre, & Christine Kiracofe, Education Finance Litigation: A Review of Recent State High Court Decisions and Their Likely Impact on Future Litigation, WEST'S ED. LAW REP. (forthcoming, 2004).
[137] Milliken v. Green, 212 N.W.2d 711 (Mich. 1973). The Michigan Supreme Court issued an initial ruling which was changed after the U.S. Supreme Court decision in *Rodriguez* was handed down.

with plaintiffs' Education Article claim, and analogized plaintiffs' Equal Protection claim to that of *Rodriguez*, stating:

> It was contended in *Rodriguez,* as here, that such a system of financing public schools invidiously discriminates against students in school districts with relatively less taxable resources. Although the United States Supreme Court conceded that there were significant inequities in the taxable resources available to school districts, it concluded that the school financing system did not violate the Equal Protection Clause. . . In so concluding, the Court said that the "new" Equal Protection strict scrutiny standard would not be applied because the Court had concluded that the legislation did not classify individuals on the basis of a suspect criterion nor impinge upon the exercise of a constitutionally protected right. Instead, the Court applied the old "rational basis" test and found the Texas school financing system was constitutional. . . Accordingly, the certified question raising plaintiffs' Federal Fourteenth Amendment claim must be answered negatively.[138]

Four years after Michigan's highest court found for the State, funding litigation plaintiffs scored their first post-*Serrano* victory. In 1977, the Connecticut Supreme Court ruled on *Horton v. Meskill,* a case filed by students and their representatives attending schools in the Canton district.[139] Plaintiffs in *Horton* successfully argued that the Connecticut funding system was violative of both the Equal Protection Clause and the Education Article of the state constitution at both the trial and State Supreme Court levels.

The court in *Horton* found that Connecticut was somewhat unique in that roughly 70% of educational funding is generated at the local level, in contrast to just 51%, on average, nationally.[140] This funding framework amplified the fiscal disparity created by the relative property wealth of different districts. The court summarized this situation, stating that:

> In sum, taxpayers in property-poor towns such as Canton pay higher tax rates for education than taxpayers in property-rich towns. The higher tax rates generate tax revenues in comparatively small amounts and property-poor towns cannot afford to spend for the education of their pupils, on a per-pupil basis, the same amounts that property-rich towns do. These facts were affirmed by a conclusion of the governor's commission on tax reform: "In short, many towns can tax far less and spend much more; and those less

[138] *Id.* at 714.
[139] *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977).
[140] *Id.* at 366, citing Financing Connecticut's Schools, Final Report of the Commission to Study School Finance and Equal Educational Opportunity at 1.

> fortunate towns can never catch up in school expenditure because taxes are already as high as homeowners can tolerate. . . This dual inequity -- a family can pay more and get less for its children -- is the fundamental issue of school finance.[141]

In its decision, the court referenced *Rodriguez*, noting that it was a 5 to 4 decision, and that the "strength of the dissenting opinions have had great impact on state education-financing systems."[142] They found that education was a fundamental state right that triggered the application of strict scrutiny. The court held that Connecticut's current funding system did not pass this rigorous test.

The following year, 1978, the Washington Supreme Court became the second post-*Serrano* State Supreme Court to overturn its funding system, in *Seattle School District No. 1 v. State*.[143] At issue in *Seattle* was the state's use of "excess levy funding" to subsidize state revenues for education. The court held that children in the State of Washington had a right to an education, stating that:

> All children residing within the State's borders have a "right" to be amply provided with an education. That "right" is constitutionally paramount and must be achieved through a "general and uniform system of public schools." Const. art. 9, § 2. (citation in original).[144]

While the court did not outline what, specifically, would constitute a constitutionally acceptable education they held that funding played a critical part in ensuring this right. The court stated:

> Thus we hold, compliance with Const. art. 9, §§ 1 and 2 can be achieved only if sufficient funds are derived, through dependable and regular tax sources, to permit school districts to provide "basic education" through a basic program of education in a "general and uniform *system of public schools*."[145]

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[141] *Id.* at 367, citing 2 Governor's Commission on Tax Reform, Local Government -- Schools and Property, 53-54.
[142] *Id.* at 372.
[143] Seattle School Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978)
[144] *Id.* at 92.
[145] *Id.* at 79.

The court held that Washington's funding system was unconstitutional. However, they acknowledged that the changes necessitated by their decision would take some time. The court stated:

> We have great faith in the Legislature and its ability to define "basic education" and a basic program of education and also to fund such education without reliance upon special excess levies. Nevertheless, we do not minimize the task. The State has developed its current educational and funding system over a period of many years. Without question the changes required herein will have an immediate and major impact upon that system. Thus, the Legislature must be given an adequate opportunity to comply with our decision. Consequently, we hold that the relief granted herein shall be *prospective* and shall not be construed or considered as invalidating, in any way, acts done or obligations incurred under existing statutes and regulations, if otherwise constitutional. Further, until July 1, 1981, all acts taken under existing statutes shall be deemed valid, if otherwise constitutional. Beyond this, however, it is the duty of the Legislature to enact legislation compatible with this opinion by July 1, 1981. To this extent, the judgment of the trial court requiring compliance by July 1, 1979, is modified.

The court cautioned that their "prospective treatment" of the decision should be in no way interpreted as being inconsistent with their ruling that Washington's funding scheme was unconstitutional.

Funding litigation plaintiffs were victorious again the following year when West Virginia's highest state court ruled on *Pauley v. Kelly*.[146] Appellants in *Pauley* challenged West Virginia's funding scheme on the basis that it violated the Equal Protection Clause and Education Article of the state constitution. The court held that education was a fundamental right in West Virginia, criticizing the U.S. Supreme Court's decision in *Rodriguez,* stating that:

> Our examination of *Rodriguez* 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.[147]

The court went on to identify what comprised a constitutionally acceptable, "thorough and efficient" education in West Virginia. The court stated:

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[146] *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979).
[147] *Id.* at 864.

> 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.[148]

Having defined the constitutionally required components of a thorough and efficient education and having established that education is a fundamental right, the court held that:

> Any discriminatory classification found in the educational financing system cannot stand unless the State can demonstrate some compelling State interest to justify the unequal classification.[149]

Finding no compelling state interest to justify the inequality, the court reversed the lower court decision to dismiss the case and remanded it for further proceedings.

Ending a string of three funding litigation plaintiff victories, Pennsylvania's highest court upheld its educational funding system in 1979, in *Danson v. Casey*.[150] Plaintiffs in *Danson* included school officials and parents of children in the Philadelphia city schools. The court reported:

> Appellants allege that because the Philadelphia School District has and can expect to have inadequate revenues, the statutory system by which the School District of Philadelphia is funded violates Article III, section 32 and Article III, section 14 of the Pennsylvania Constitution.[151]

The court upheld Pennsylvania's funding system, holding that the Philadelphia district's budget shortfall was due to local reasons, and not as a direct result of a flawed state funding system.

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[148] *Id.* at 877.
[149] *Id*. at 878.
[150] *Danson v. Casey*, 399 A.2d 360 (Pa. 1979).
[151] *Id.* at 362.

Funding Litigation in State High Courts: the 1980s

During the first seven years of the 1980s five States' highest courts upheld the constitutionality of their state educational funding systems. This dramatic trend was reversed, however, when three different State Supreme Courts overturned their funding systems within a 12-month period in 1989.

The first decision of the 1980s took place in Georgia. In 1981 Georgia's Supreme Court upheld its state funding system in *McDaniel v. Thomas*.[152] Plaintiffs in *McDaniel* represented parents, children, and school officials residing in low property wealth districts. They challenged that the Georgia funding system was unconstitutional based on the state's Education Article and the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs were successful at the trial court level; the court agreed that the state funding system was in violation of the Equal Protection Clause. The Supreme Court of Georgia reversed the lower court decision, holding that plaintiffs would need to seek relief through the legislature. The court stated:

> Our holding that the current system of financing public education in Georgia is not unconstitutional should not be construed as an endorsement by this court of the status quo. Constitutions are designed to afford *minimum* protections to society. Plaintiffs have shown that serious disparities in educational opportunities exist in Georgia and that legislation currently in effect will not eliminate them. . . It is clear that a great deal more 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.[153]

The following year the highest state courts in two states, Colorado and New York, issued rulings upholding their state funding systems. In May of 1982, the Colorado Supreme Court ruled on *Lujan v. Colorado State Board of Education*.[154] Plaintiffs in *Lujan* had been victorious at the trial court level, challenging that aspects of Colorado's educational funding system violated the Equal

[152] *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981).
[153] *Id.* at 168.
[154] Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982).

Protection Clause and the state Education Article. Colorado's Supreme Court overturned the lower court decision, stating:

> Contrary to the trial court, we hold that Colorado's school finance system does not violate Article IX, Section 2 of the Colorado Constitution, nor does it deny Equal Protection of the law to plaintiffs-appellees, or those similarly situated. We also hold, contrary to the trial court, that Colorado's method of capital outlay financing is constitutional and rule that this method of capital financing, whereby each local school district is governed by a limitation on its taxing authority, is rationally related to a legitimate state purpose.[155]

The following month, New York's highest state court issued a similar ruling in *Board of Education, Levittown v. Nyquist*.[156] As in *Lujan*, the *Levittown* plaintiffs had been successful at the trial court level, securing a judgment that New York's educational funding system was violative of both the state Education Article and the Equal Protection Clause of the Fourteenth Amendment.[157] In reviewing the lower court decision, New York's highest court noted that the *Levittown* trial had been "extensive," producing "23,000 pages of transcript and 400 exhibits."[158] Overturning the lower court decision, the court found fault with the trial court's ruling that the funding system was violative of the Equal Protection Clause, citing the *Rodriguez* decision.[159] Concerning the Education Clause challenge, Justice Jones, writing for the majority, stated that the state's current funding system met the constitutional requirement outlined in New York's constitution, stating:

> Interpreting the term education, as we do, to connote a sound basic education, we have no difficulty in determining that the constitutional requirement is being met in this State, in which it is said without contradiction that the average per-pupil expenditure exceeds that in all other States but two. There can be no dispute that New York has long been regarded as a leader in free public education. Because decisions as to how public funds will be allocated among the several services for which by constitutional imperative the Legislature is required to make provision are matters peculiarly appropriate for formulation by the legislative body (reflective of and responsive as it is to the public will), we would be reluctant to override those decisions by mandating an even higher

[155] *Id.* at 1011.
[156] Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359 (N.Y. 1982).
[157] *Id.* at 362.
[158] *Id.*
[159] *Id.* at 364.

> priority for education in the absence, possibly, of gross and glaring inadequacy -- something not shown to exist in consequence of the present school financing system.[160]

In his dissent, Justice Fuchsburg highlighted the disparate impact the state funding system had on minority children, stating that [it is] "an undisputed fact that the existing education aid formulae have an adverse effect, not only on pupils from impoverished families, but also on a large percentage of the nearly 750,000 "minority" students (black, Hispanic, American Indian, Asian and others)."[161]

The following year, in 1983, the Supreme Court of Maryland upheld its state funding system in *Hornbeck v. Somerset.*[162] Plaintiffs in *Hornbeck* argued that Maryland's reliance on property tax revenue to generate educational funding put children living in lower property wealth districts at a disadvantage. These districts were unable to provide the same level of educational opportunities as districts in higher property wealth areas. The trial court found significant disparities to exist: in the 1979 fiscal year the per-pupil monies for children in Maryland's wealthiest districts were nearly twice that spent on children in the state's poorest districts.[163] The trial court found the state's funding system unconstitutional, noting that the state constitution "requires mathematical equality among pupils with respect to distribution of funds, with some variations from exact dollar per-pupil equality being permitted if tailored with mathematical precision to a clearly demonstrated difference in cost."[164]

On appeal, the State Supreme Court considered the state's constitutional history and recent decisions including *Danson*, *Lujan*, and *Levittown*. Overturning the lower court decision, the court stated that:

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[160] *Id.* at 369.
[161] *Id.* at 375.
[162] *Hornbeck v. Somerset*, 458 A.2d 758 (Md. 1983).
[163] *Id.* at 767.
[164] *Id.* at 769.

> The central role of education in our society is, of course, universally accepted. As the Court of Appeals of New York observed in *Levittown*. . . the issue in cases challenging the constitutionality of state public school finance systems is not whether education is of primary rank in the hierarchy of societal values, for all recognize and support the principle that it is. Nor is the issue whether there are great disparities in educational opportunities among the State's school districts, for the existence of this state of affairs is widely recognized. Neither is the issue in this case whether it is desirable, as a matter of Maryland's social policy, that the same mathematically precise amount of money should be spent on each child's public school education, without regard to the wealth of the subdivision in which the students reside. The issue is whether anything in the constitution, state or federal, requires such a result or prohibits any county, regardless of wealth, from spending any more. Necessarily, we approach these issues with "a disciplined perception of the proper role of the courts in the resolution of our State's educational problems, and to that end, more specifically, judicial discernment of the reach of the mandates of our State Constitution in this regard. . . The expostulations of those urging alleviation of the existing disparities are properly to be addressed to the legislature for its consideration and weighing in the discharge of its continuing obligation to provide a thorough and efficient statewide system of free public schools. . . Otherwise stated, it is not within the power or province of members of the Judiciary to advance their own personal wishes or to implement their own personal notions of fairness under the guise of constitutional interpretation. The quantity and quality of educational opportunities to be made available to the State's public school children is a determination committed to the legislature or to the people of Maryland through adoption of an appropriate Amendment to the State Constitution.[165]

In 1987 the Oklahoma Supreme Court issued its decision in *Fair School Finance Council v. State*.[166] Unlike many of the earlier cases that had secured a lower court victory, plaintiffs in *Fair School Finance Council* lost at both the trial court and State Supreme Court levels. Plaintiffs in *Fair School Finance Council* asserted that Oklahoma's funding system put children from low property wealth districts at a marked educational disadvantage. Plaintiffs included board members, children, and parent-taxpayers in 38 different Oklahoma school districts.[167] Stating that the Oklahoma constitution in no way required equal per-pupil expenditures throughout the state, the court upheld the current funding system. The court concluded:

> The plaintiffs alleged that the present school financing system denies them "equal educational opportunities." The plaintiffs do not allege that they or their children *are completely denied an education. Nor do they allege that the education they are able to provide or receive is in any*

[165] *Id.* at 790.
[166] Fair School Fin. Council v. State, 746 P.2d 1135 (Okla. 1987).
[167] *Id.* at 1137.

> *way an inadequate one.* In fact, the plaintiffs admit that "no schoolchildren in this State are in imminent danger of receiving a wholly inadequate education" . . . Despite this, the plaintiffs seek to strike down an entire state-wide school financing system simply because it is unable to provide as much money per-pupil as do the wealthier districts. Because we find that neither the United States nor the Oklahoma Constitution requires the school funding regime to guarantee equal expenditures per child, at least where there is no claim that the system denies any child a basic, adequate education, we must decline to disturb the trial court's judgment. [emphasis in original][168]

After a string of five defendant victories in the early 1980s, plaintiffs were victorious in State Supreme Court cases in three different states: Montana, Kentucky, and Texas.

The Supreme Court of Montana, in *Helena v. State*, affirmed a lower court holding that its state educational funding system was unconstitutional.[169] The court reiterated District Court findings that, in 1985-86, the state funding system allowed a variation in per-pupil spending at a ratio of 8 to 1 in similarly-sized school districts.[170] Further, the court accepted a significant relationship between expenditures and educational quality, stating that:

> The Study Team identified clear differences between the schools in each of the pairs. . . They found that the 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 equipment, audio-visual 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 . . . In the specialty areas of physical education, music, and art, the wealthier schools offered more opportunities. Gifted and Talented Programs were much stronger in the high expenditure districts. . . With respect to computers, he found significant differences, with the high expenditure districts having more and better computers and computer labs. He also found significant differences between the two expenditure categories for library and media center services, with the high expenditure districts having larger and newer book collections, larger periodical collections, larger reference collections, larger audio-visual collections, and better special collections.[171]

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[168] *Id.* at 1151.
[169] *Helena v. State*, 769 P.2d 684 (Mont. 1989).
[170] *Id.* at 686.
[171] *Id.* at 687-88.

The court found that Montana's funding system violated the Education Article of the state constitution. The court stated that because it had found the funding system unconstitutional on petitioners' first claim, it was not necessary to address their Equal Protection claim.

Later that same year the Kentucky Supreme Court issued what would become a frequently cited educational funding decision, in *Rose v. Council for Better Education.*[172] Plaintiffs in *Rose* included the Council for Better Education, a non-profit organization comprised of representatives from 66 different Kentucky school districts. The court held that Kentucky's educational funding system was unconstitutional, stating that:

> When we apply the constitutional requirement of Section 183 to that evidence, it is crystal clear that the General Assembly has fallen short of its duty to enact legislation to provide for an efficient system of common schools throughout the state. In a word, the present system of common schools in Kentucky is not an "efficient" one in our view of the clear mandate of Section 183. The common school system in Kentucky is constitutionally deficient.[173]

The court elected not to address appellants' Equal Protection claim, having determined that the state's entire educational system was unconstitutional based on appellants' Education Article argument. In closing, the court emphasized the sweeping nature of their decision, stating:

> Lest there be any doubt, the result of our decision is that Kentucky's *entire system* of common schools is unconstitutional. There is no allegation that only part of the common school system is invalid, and we find no such circumstance. This decision applies to the entire sweep of the system -- all its parts and parcels. This decision applies to the statutes creating, implementing and financing the *system* and to all regulations, etc., pertaining thereto. This decision covers the creation of local school districts, school boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. It covers school construction and maintenance, teacher certification -- the whole gamut of the common school system in Kentucky.[174]

Sixteen years after the *Rodriguez* defeat in the U.S. Supreme Court, Texas' highest court found that its funding system violated the Education Article of the state constitution in

[172] *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989).
[173] *Id.* at 189.
[174] *Id.* at 215.

Edgewood v. Kirby.[175] At issue in *Edgewood* was the requirement set forth by Article VII, §1 of the Texas constitution which states:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.[176]

Defendants argued that the inclusion of the term "efficient" in the constitution should be defined as inexpensive. The court disagreed, holding that:

> "Efficient" conveys the meaning of effective or productive of results and connotes the use of resources so as to produce results with little waste. . . Considering "the general spirit of the times and the prevailing sentiments of the people," it is apparent from the historical record that those who drafted and ratified article VII, section 1 never contemplated the possibility that such gross inequalities[177] could exist within an "efficient" system.[178]

The court found that Texas' system was not fiscally efficient, nor was it "efficient in the sense of providing for a "general diffusion of knowledge."[179] The court reiterated that it was the duty of the legislature, and not the judiciary, to provide for a constitutionally acceptable educational funding system. However, the court gave the legislature a general idea of what they would deem to be "efficient," stating that:

> Efficiency does not require a per capita distribution, but it also does not allow concentrations of resources in property-rich school districts that are taxing low when property-poor districts that are taxing high cannot generate sufficient revenues to meet even minimum standards. There must be a direct and close correlation between a district's tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per-pupil at similar levels of tax effort. Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds.[180]

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[175] *Edgewood v. Kirby*, 777 S.W.2d 391 (Tex. 1989).
[176] *Id.* at 393.
[177] *Id.* at 393. The "gross inequalities" described by the court include trial court evidence showing that per-pupil spending in the state, in 1985-86, ranged from a low of $2,978 to a high of $7,233.
[178] *Id.* at 395.
[179] *Id*. at 397.
[180] *Id*. at 397.

Funding Litigation in State High Courts: the 1990s

In the 1990s, 19 States' Highest Courts ruled on the constitutionality of their funding system. During this decade, 10 states upheld the constitutionality of their state funding system: Oregon, Idaho, Minnesota, Kansas, Virginia, Maine, Rhode Island, Illinois, Alaska, and South Carolina. Nine state courts overturned their state funding system: New Jersey, Massachusetts, New Hampshire, Tennessee, North Dakota, Arizona, Wyoming, Ohio, and Vermont.

In 1990, New Jersey's highest court addressed a constitutional challenge to its educational funding system in *Abbott v. Burke*.[181] Plaintiffs in *Abbott* were children from the poor, urban cities of Camden, East Orange, Jersey City, and Irvington. Petitioners argued that New Jersey's Public School Education Act of 1975 was violative of the Education Article of the state constitution.

At the trial court level, plaintiffs produced a vast body of evidence showing that New Jersey's funding system created a significant disparity in educational resources available to children in the state's poorest and wealthiest districts. The court held that in 6 of New Jersey's poorest districts, the state had failed to meet its constitutional responsibility to provide students with a "thorough and efficient" [182] education, stating:

> The extent of failure is so deep, its causes so embedded in the present system, as to persuade us that there is no likelihood of achieving a decent education tomorrow, in the reasonable future, or ever.[183]

The court made it clear that their harsh criticism was directed at only a handful of New Jersey's poor, urban districts. They found that New Jersey's funding system had failed these, and only these, select districts. The court added:

[181] *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990).
[182] *Id.* at 376.
[183] *Id.*

> Measured by any accepted standard, New Jersey has been generous in the amount of money spent for education. We currently spend more dollars per student for education than almost any other state. Given that fact, this Court could not conclude that the State has failed to provide for a thorough and efficient education in all school districts. To so conclude would mean that our State Constitution has invented a standard so different from, and substantially higher than, the rest of the country that even though we spend almost the most, constitutionally that is not enough. The dilemma is that while we spend so much, there is absolutely no question that we are failing to provide the students in the poorer urban districts with the kind of an education that anyone could call thorough and efficient.[184]

As in the *Levittown* decision, the court also acknowledged that race was an important issue in this case. The court opined:

> That the overwhelming proportion of all minorities in the state are educated in these poorer urban districts is of further significance. These are the districts where not only the students and education are failing, these are the districts where society is failing.[185]

The following year, funding equity plaintiffs suffered their first defeat of the decade when the Supreme Court of Oregon upheld its state funding system in *Coalition for Equitable School Funding v. State*.[186] Plaintiffs in this case included parents, children, board members, and taxpayers from 55 different Oregon school districts. Their arguments included: 1.) the state did not give districts enough money to pay for all of the state-required programs and initiatives; 2.) there was a great disparity in property tax rates throughout the state (ranging from roughly 6 to 29 mills during the 1988-89 school year); 3.) per-pupil spending (also from 1988-89) ranged from a low of $2,596 in the district with lowest property wealth to a high of $5,832 in the district with the greatest amount of property wealth.[187] The court rejected all of the plaintiffs' constitutional claims but made clear that their verdict was not a stamp of approval for the current Oregon funding system, stating that:

> We hold that Oregon's method of funding public schools does not violate the Oregon Constitution in the ways that plaintiffs assert. We think it appropriate, however, to repeat an observation that this court first made in *Olsen v. State ex rel Johnson, supra:* "Our

[184] *Id.* at 393.
[185] *Id.* at 387, n19.
[186] Coalition for Equitable School Funding v. State, 811 P.2d 116 (Or. 1991).
[187] *Id.* at 117.

> 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." 276 Or at 27. [Citations in original][188]

Five states' highest courts ruled on their funding systems in 1993 alone. During this year, the court found for the state in two cases, in Idaho and Minnesota. In the Idaho case, *Idaho Schools for Equal Educational Opportunity v. Evans*,[189] the court noted that the circumstances in *Idaho Schools* were similar to those in an earlier funding case in Idaho, *Thompson v. Engelking*.[190] Defendants argued that conclusions in *Thompson* should not be taken into account because "is not a majority opinion or it is either distinguishable, inapposite, or wrongly decided."[191] Addressing this claim, the court stated:

> The appellants argue that *Thompson v. Engelking* should not be followed in that it is not a majority opinion or it is either distinguishable, inapposite, or wrongly decided. We disagree and conclude *Thompson* reaches the correct result and disposes of the appellants' claims that are based upon the "uniformity" language of art. 9, § 1. . . In *Thompson*, the opinion for the Court was written by Chief Justice McQuade, who was joined by Justices McFadden and Shepard. Justices Donaldson and Bakes dissented. In addition to concurring, Justice Shepard wrote a specially concurring opinion in which Justice McFadden also joined. The appellants argue that in *Thompson*, the Chief Justice's opinion must be synthesized with Justice Shepard's specially concurring opinion in order to discern the view of the majority of the court. We disagree. The special concurring opinion of Justice Shepard only provides additional reasoning. The reasoning of the majority of three is contained in Chief Justice McQuade's opinion, which was joined by two other members and is the opinion of the Court. That is the portion of *Thompson* which has precedential effect.[192]

The court held that following the reasoning in *Thompson*, the state's funding system was not violative of the uniformity requirement of the state Education Clause, and upheld its constitutionality.[193]

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[188] *Id.* at 122.
[189] Idaho Schools for Equal Educational Opportunity v. Evans, 850 P.2d 724 (Idaho 1993).
[190] Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975).
[191] Idaho Schools for Equal Educational Opportunity at 718.
[192] *Id.*
[193] *Id.* at 719.

Five months after Idaho's Supreme Court upheld its funding system, the Supreme Court of Minnesota did likewise. Plaintiffs in *Skeen v. State*[194] were suburban and (larger) rural school districts serving approximately 25% of the state K-12 population.[195] The court noted that plaintiffs in *Skeen* were different from those in other state cases, stating that:

> Unlike challenges to state financing of education in other states, which frequently have been initiated by property-poor inner-city districts, this case does not involve the three largest metropolitan school districts, Minneapolis, St. Paul, and Duluth. Although these districts contain the majority of AFDC and minority population, they also have the highest property tax base because the state places a higher property tax rate on commercial entities. In addition, this case is somewhat atypical because the small, rural districts also are not included. These rural districts, which represent less than 12% of the state's pupil population, comprise over half of the total number of school districts.[196]

Addressing plaintiffs' claims that Minnesota's funding system violated the state Education Clause, the court replied:

> Other state courts which have faced similar challenges to constitutional provisions have indicated that "uniform" merely applies to the general system, not to specific funding disparities. The Oregon court stated that the "uniform" language is "complied with if the state requires and provides for a minimum of educational opportunities in the district and permits the districts to exercise local control over what they desire, and can furnish, over the minimum." Olsen v. State, 276 Ore. 9, 554 P.2d 139, 148 (Or. 1976) [citation in original].[197]

Citing the U.S. Supreme Court decision in *Rodriguez*, the court also dismissed plaintiffs' Equal Protection article claim stating that because education is not a fundamental right, the state need only show a "rational relationship to legitimate state purposes."[198]

In three of the five 1993 cases, funding equity plaintiffs were victorious: Massachusetts, New Hampshire, and Tennessee. In Masssachusetts, petitioners challenged the state's educational funding system's reliance on property tax revenues, in *McDuffy v. Secretary of the*

[194] Skeen v. State, 505 N.W.2d 299 (Minn. 1993).
[195] *Id.* at 302.
[196] *Id.*
[197] *Id.* at 310.
[198] *Id.* at 313.

Executive Office of Education.[199] Plaintiffs in *McDuffy* argued that the current funding system violated the Education Article and Equal Protection Clause of the state constitution. After a careful analysis of the history of education in the Commonwealth and a review of the constitutional language used, the court held that Massachusetts had a "duty to provide an education for all its children, rich and poor, in every city and town of the Commonwealth."[200]

Defendants in *McDuffy* argued that even if the court held that Massachusetts had a constitutional duty to provide educational opportunities (which they did), that the state was meeting this constitutional directive. The Supreme Court of Massachusetts disagreed. The court noted that while equal per-pupil spending was not required by the state constitution:

> It is clear that financial disparities exist in regard to education in the various communities. It is also clear, however, that fiscal support, or the lack of it, has a significant impact on the quality of education each child may receive. Additionally, the record shows clearly that, while the present statutory and financial schemes purport to provide equal educational opportunity in the public schools for every child, rich or poor, the reality is that children in the less affluent communities (or in the less affluent parts of them) are not receiving their constitutional entitlement of education as intended and mandated by the framers of the Constitution.[201]

The court held that the creation of a constitutional educational system was the job of the state legislature. However, the court (citing *Rose*) outlined the basic components of an adequate education, stating that:

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

[199] McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993).
[200] *Id.* at 548.
[201] *Id*. at 552.

> 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." Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989). (citation in original).[202]

The Supreme Court of New Hampshire became the second state of the decade to rule that its state funding system was unconstitutional in *Claremont School District v. Governor*.[203] The court in *Claremont* relied heavily on the high court decision in *McDuffy*, holding that:

> We do not construe the terms "shall be the duty . . . to cherish" in our constitution as merely a statement of aspiration. The language commands, in no uncertain terms, that the State provide an education to all its citizens and that it support all public schools. Decisions of this court are consistent with this conclusion.[204]

The court found that New Hampshire's current funding system did not meet this constitutional mandate. Noting that the creation of a constitutional system of education was the job of the state legislature, the court made it clear that the state constitution required more than a basic education, stating:

> Given the complexities of our society today, the State's constitutional duty extends beyond mere reading, writing and arithmetic. It also includes broad educational opportunities needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas. Cf. Seattle Sch. Dist. No. 1 of King Cty. v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978). 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.[205]

Plaintiffs in *Tennessee Small School Systems v. McWherter* challenged Tennessee's funding system in 1993.[206] In *McWherter*, Tennessee's highest court affirmed a trial court decision holding that the state funding system was unconstitutional, remanding the case for further proceedings. Petitioners challenged that the state funding system violated both the Equal Protection Clause and the Education Article of Tennessee's state constitution. The court held

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[202] *Id.* at 554.
[203] Claremont School Dist. v. Governor, 635 A.2d 1375 (N.H. 1993).
[204] *Id.* at 1378.
[205] *Id*. at 1381.
[206] Tennessee Small School Systems v. McWherter, 851 S.W.2d 139 (Tenn. 1993).

that the Education Article guaranteed children "the right to a free public education."[207] However, they declined to comment on "the precise level of education mandated," stating that it was unnecessary because plaintiffs were entitled to relief based on their Equal Protection argument.[208] Concerning plaintiffs' Equal Protection argument, the court held that:

> The proof before us fails to show a legitimate state interest justifying the granting to some citizens, educational opportunities that are denied to other citizens similarly situated, and, thus, fails to satisfy even the "rational basis" test applied in Equal Protection cases. The record supports the Chancellor's finding that the disparities in educational opportunities available to public school students throughout the state, found to be constitutionally impermissible, have been caused principally by the statutory funding scheme, which, therefore, violates the constitutional guarantee of Equal Protection.[209]

In 1994 the Kansas Supreme Court upheld its state funding system in *Unified School District v. State*.[210] Plaintiffs in this case challenged the constitutionality of the "School District Finance and Quality Performance Act"[211] enacted by the Kansas State Legislature in 1992. The plaintiffs' challenge at the District Court level was unsuccessful. Kansas' Supreme Court upheld the lower court decision, stating that:

> The School District Finance and Quality Performance Act represents major changes in the operation and financing of public schools in Kansas. No one contends the Act is perfect. The extraordinarily elaborate review procedures provided by the provisions creating the Kansas Committee on School District Finance and Quality Performance and its inclusion of legislative leadership positions reflect legislative concern over the legislation's impact and possible need for Amendment. The record herein reflects the Act has caused much concern and discomfort in a substantial number of districts. Revolutionary change to correct perceived inequity, unfortunately, almost always has such an effect. The legislature, as the people's representatives, studied the whole gamut of public school education and its funding, heard from many interested persons expressing different concerns, altered the existing public policy, and enacted this legislation into law. In so doing, to paraphrase a popular television show's preamble, the legislature decided to boldly go where Kansas has never gone before. If experience establishes that the Act needs further revision, the legislature will have ample opportunity to do so, as it has already done in a number of significant respects. Applying the

[207] *Id.* at 151.
[208] *Id*. at 152.
[209] *Id.* at 156.
[210] Unified School Disricts v. State, 885 P.2d 1170 (Kan. 1994).
[211] K.S.A. 72-6405 *et seq*.

> appropriate standards of review to this legislation, we conclude the Act is within all asserted constitutional limitations and, accordingly, is constitutionally permissible legislation.[212]

That same year, Virginia's educational funding system was also upheld, in *Scott v. Commonwealth*.[213] Plaintiffs in *Scott* argued that the state funding scheme was unconstitutional because it put students attending schools in low property wealth districts at a disadvantage to those residing in wealthier districts. The court acknowledged that the current system resulted in significant disparities in areas such as: teacher salaries, instructional materials, and instructional personnel to pupil ratio.[214] Further, Virginia's highest court agreed with the trial court holding that education was a fundamental state right. They noted, however, that even when strict scrutiny is applied, "nowhere does the Constitution require equal, or substantially equal, funding or programs among and within the Commonwealth's school divisions."[215]

Unlike the outcomes of the Kansas and Virginia cases, that same year the highest state courts in North Dakota and Arizona overturned their state educational funding systems. In 1994, the North Dakota Supreme Court issued what would be one of the more confusing State High Court decisions on school funding. Plaintiffs in *Bismarck Public School District v. State*[216] claimed that the state funding scheme violated both the Equal Protection Clause and the Education Article of the state constitution. Citing *State v. Rivinius*[217] the court affirmed that education was an "important substantive right" in North Dakota.[218] Applying a test of intermediate scrutiny, in a 3 to 2 decision the court held that:

> We are not persuaded that local control of education justifies the disparities in per-pupil expenditures exhibited in this case. . . An element of local control is clearly a useful and desirable aspect of any education system. However, local control in North Dakota is

[212] Unified School Districts v. State at 1197.
[213] Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994).
[214] *Id.* at 140.
[215] *Id.* at 142.
[216] Bismarck Public School Dist. v. State, 511 N.W.2d 247 (N.D. 1994).
[217] State v. Rivinius, 328 N.W.2d 220 (N.D. 1982).
[218] Bismarck at 250.

> undercut and limited by the Legislature's enactment of requirements for statewide uniformity of education. . . The present method of distributing funding for education fails to offer any realistic local control to many school districts, because it fails to provide many local school boards with a means to generate the funding needed to provide educational opportunities similar to those in other districts, and it fails to give local school boards any realistic credit for the local taxation efforts their patrons bear.[219]

Although the court deemed the North Dakota system to be unconstitutional, the 3 to 2 majority was insufficient to overturn the state statute. The court explained that:

> Article VI, Section 4 of the North Dakota Constitution requires at least four members of this Court to declare a statute unconstitutional. . . 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.[220]

Six months after the North Dakota decision, an Arizona Supreme Court majority decision overturned its state funding scheme in *Roosevelt v. Bishop*.[221] Petitioners in *Roosevelt* argued that Arizona's reliance on property tax revenue to fund education resulted in dramatic disparities in the educational opportunities offered by districts throughout the state.

> The quality of a district's capital facilities is directly proportional to the value of real property within the district. There is wide disparity in assessed valuation per-pupil among the school districts in Arizona. Property-rich districts are not necessarily districts in which rich people live. A district with much taxable commercial property, or with a power plant within its boundaries, is property-rich even though its residents may be lower income. For example, the assessed value of the Ruth Fisher Elementary School District approaches $ 2 billion because the Palo Verde Nuclear Generating Station is located there. As a result, Ruth Fisher Elementary School District has the greatest level of assessed valuation per-pupil at $ 5.8 million. School Management Information Data 1990, Arizona State University, College of Education 75 [hereinafter School Management] (based on selected data 1988/89). In contrast, the San Carlos Unified District has an assessed valuation per-pupil of $ 749. . . There is scarcely any commercial property in the San Carlos district because it lies within Gila county, where only 4% of the land is available for commercial or individual use. . . A property-poor district with high tax rates may generate less revenue for the capital needs of the district than a property-rich district with low tax rates. For example, in 1989-90, the Roosevelt School District in south Phoenix had a composite tax rate of $ 4.37 per $ 100 of assessed value,

[219] *Id.* at 260-261.
[220] *Id.* at 250.
[221] Roosevelt v. Bishop, 877 P.2d 806 (Ariz. 1994).

> while the Ruth Fisher School District had a tax rate of $ .11 per $ 100 of assessed value (citations omitted).[222]

These revenue inequities meant that property-poor districts were only available to provide a fraction of the educational resources available to property-rich districts. The court highlighted some of these differences, stating that:

> Some districts have schoolhouses that are unsafe, unhealthy, and in violation of building, fire, and safety codes. Some districts use dirt lots for playgrounds. There are schools without libraries, science laboratories, computer rooms, art programs, gymnasiums, and auditoriums. But in other districts, there are schools with indoor swimming pools, a domed stadium, science laboratories, television studios, well stocked libraries, satellite dishes, and extensive computer systems.[223]

The court held that the disparities created by Arizona's funding system were violative of both the Equal Protection Clause and the "general and uniform" requirement of the state Education Article.[224]

The following year, Wyoming became the fourteenth state to overturn its educational funding system, in *Campbell County School Dist. v. State*.[225] Plaintiffs in *Campbell* were four Wyoming school districts which challenged the state funding system on grounds that it violated the Equal Protection Clause and Education Article of the state constitution.[226] The District Court upheld the state system, holding that plaintiffs had failed to "establish proof of harm to a constitutionally protected right."[227] Wyoming's highest court overturned this lower court decision, affirming that under a proper application of strict scrutiny:

> The state bears the burden of proving funding disparities are cost-justified or a compelling reason justifies disparity. Where the evidence establishes funding and spending disparities unjustified by educational cost differentials, the challengers are not burdened with proving disparity of educational quality or educational opportunity; those disparities are presumed.

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[222] *Id.* at 809.
[223] *Id.* at 808.
[224] *Id.*
[225] Campbell County School Dist. v. State, 907 P.2d 1238 (Wyo. 1995).
[226] On appeal, one additional Wyoming district and the Wyoming Education Association joined the original plaintiffs.
[227] *Id*. at 1256.

> Washakie, 606 P.2d at 334. A review of the District Court's findings of fact reveals that the disparities caused by the distribution formula are not cost-based.[228] [citation in original]

In 1995, Maine's highest court issued a ruling in *School Administrative District v. Commissioner*.[229] Unlike the vast majority of funding cases, plaintiffs in this case based their litigation on an Equal Protection claim only. The court declined to address the trial court's holding that education was a fundamental state right, stating that "the plaintiffs' argument fails even if education is such a fundamental right."[230] Applying the rational basis test, the court upheld Maine's funding system as "rationally related to a legitimate governmental interest."[231] The court concluded by stating that:

> Although, as we have stated on other occasions, "education is perhaps the most important function of state and local governments," Blount v. Department of Educ. and Cultural Serv., 551 A.2d 1377, 1381 (Me. 1988) (quoting Brown v. Board of Education, 347 U.S. 483, 493, 74 S. Ct. 686, 691, 98 L. Ed. 873 (1954)), under our Constitution, the level of state support is largely a matter for the Legislature. Therefore, whether the funding reduction Amendments to the School Finance Act are wise or not, and whether they are the best means to achieve the desired result, is a matter for the Legislature and not this Court.[232]

That same year, Rhode Island's highest court also upheld its educational funding system, in *City of Pawtucket v. Sundlun*.[233] Plaintiffs in *Pawtucket* included parents, students, taxpayers, and government officials from three Rhode Island cities.[234] The trial court agreed with plaintiffs' claims that education was a fundamental right in the state of Rhode Island. As reported by Rhode Island's highest court:

> The [trial] Court determines and declares that the language of Article XII of the Rhode Island Constitution and the relevant constitutional history demonstrate that there is a fundamental and constitutional right for each child to an opportunity to receive an education in Rhode Island. The opportunity to receive an education is a right which each child has as a resident of

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[228] *Id.* at 1276.
[229] School Administrative Dist. v. Commissioner, 659 A.2d 854 (Me. 1995).
[230] *Id.* at 857.
[231] *Id.* at 858.
[232] *Id.*
[233] *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995).
[234] *Id*. at 42.

> Rhode Island, regardless of where he lives, and that right is to an opportunity to receive an equal, adequate, and meaningful education.[235]

The State Supreme Court rejected this conclusion, stating that "the plain language and the history of article 12 dictate that such a conclusion is clearly wrong."[236] The court rejected petitioners' claims that Rhode Island's funding system was violative of either the Education Article or Equal Protection Clause. In closing, they remarked:

> The recent changes to the operations-aid formula, some enacted after the conclusion of proceedings in the Superior Court, have removed factors that contributed to some inequities in the state's major funding program. In consequence, a funding process that already ranked among the country's most equitable programs has become even more so.[237]

In 1996, the Illinois Supreme Court affirmed a lower court holding dismissing plaintiffs' complaints in *Committee v. Edgar*.[238] To support their case, plaintiffs in *Edgar* presented evidence showing that, in 1989-90 school year, the "average tax base" in the wealthiest 10% of Illinois districts was greater than 13 times the tax base in the poorest 10% of districts. As the Illinois funding system provided local funds for education based on property tax revenues, this created a great disparity in the amount of per-pupil monies available in the various districts.

Plaintiffs charged, in part, that the funding system did not meet the state mandate of "an *efficient* system of *high quality* public educational institutions and services" (emphasis added).[239] After an analysis of the constitutional language, and the transcripts of the constitutional convention, the court held that the language of the Education Article did not require equal per-pupil expenditures. The court found that the existence of funding differences resulting from local property wealth was not

[235] *Id.* at 47-48.
[236] *Id.* at 48.
[237] *Id.* at 75.
[238] *Committee v. Edgar*, 672 N.E.2d 1178 (Ill. 1996).
[239] *Id.*at 1183.

in violation of the state constitution.[240] The court similarly dismissed petitioners' Equal Protection claim, citing the Supreme Court's decision in *Rodriguez*.

> While education is certainly a vitally important governmental function . . . it is not a fundamental individual right for Equal Protection purposes, and thus the appropriate standard of review is the rational basis test. Under the rational basis test, judicial review of a legislative classification is limited and generally deferential. . . The challenged classification need only be rationally related to a legitimate state goal . . . and if any state of facts can reasonably be conceived to justify the classification, it must be upheld. . . In accordance with *Rodriguez* and the majority of state court decisions, and for all the reasons set forth above, we conclude that the State's system of funding public education is rationally related to the legitimate State goal of promoting local control. Plaintiffs' claims under the Equal Protection Clause of Illinois Constitution were properly dismissed.[241]

The Supreme Court of Alaska was the next to uphold its state funding system, in *Matanuska-Susitna v. State*.[242] Plaintiffs argued that the Alaska funding system resulted in "different treatment" of schools in REAA[243] (Regional education attendance area) and non-REAA districts.[244] In contrast to the majority of plaintiffs basing litigation on both Education Article and Equal Protection claims, petitioners in *Matanuska-Susitna* claimed only violation of the latter. The court held that, under a rational basis test, petitioners' Equal Protection claims failed. Citing *Rodriguez*, the court analogized Texas' funding system to their own, stating that:

> In San Antonio Independent School District v. Rodriguez. . . the Court examined Texas's system of school financing, which relied on local property taxes for a significant portion of each school's budget. Unlike in Alaska, school budgets in Texas were not equalized between districts. Using a higher tax rate, the poorest district generated only a fraction of the local support that the most affluent district did. . . The Court rejected an Equal Protection challenge, holding that the local taxation system rationally furthered the legitimate state purpose of local control of school districts.[245]

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[240] *Id.* at 1189.
[241] *Id.* at 1196.
[242] *Matanuska-Susitna v. State*, 931 P.2d 391 (Alaska 1997).
[243] *Id.* at 394 n1. "Areas of the state that lie outside the boundaries of organized boroughs constitute a single, unorganized borough. AS 29.03.010. The unorganized borough is divided into regional education attendance areas, or REAAs. AS 14.08.031."
[244] *Id.* at 394.
[245] *Id*. at 401.

Also in 1997, petitioners from primarily rural Ohio school districts challenged their state funding system in *DeRolph v. State*.[246] As in Connecticut, the majority of money for education in Ohio comes from local funds. Thus, the state's reliance on property tax revenues to fund education results in great funding disparities between schools in property-poor and property-wealthy districts. To prove their point, petitioners in *DeRolph* highlighted some of the deplorable conditions in Ohio's poorest school districts, stating that:

> In the Dawson-Bryant school system, where a coal heating system is used, students are subjected to breathing coal dust which is emitted into the air and actually covers the students' desks after accumulating overnight. Band members are forced to use a former coal bin for practice sessions where there is no ventilation whatsoever, causing students to complain of headaches. Special education classes are also held in a former closet that has one bare lightbulb hanging from the ceiling. . . Deering Elementary is not handicapped accessible. The library is a former storage area located in the basement. Handicapped students have to be carried there and to other locations in the building. One handicapped third-grader at Deering had never been to the school library because it was inaccessible to someone in a wheelchair. . . The Northern Local School District in Perry County has also been plagued with deteriorating facilities, which include bulging bricks and walls which bow out at the now closed Somerset Elementary School, leaking roofs and windows, outdated sewage systems which have actually caused raw sewage to flow onto the baseball field at Sheridan High School, and the presence of arsenic in the drinking water in the Glenford Elementary School buildings. . . Equally alarming are the conditions found in the Southern Local School District in Perry County, where buildings are crumbling and chunks of plaster fall from the walls and ceiling. In fact, the problem was so severe that the principal and custodians at Miller Junior High at Shawnee deliberately knocked plaster off the ceilings so that the plaster would not fall on the students during the day.[247]

The Ohio Supreme Court reached the same conclusion as the trial court: Ohio's funding system "fail[ed] to provide for a thorough and efficient system of common schools, in violation of Section 2, Article VI of the Ohio Constitution."[248]

[246] DeRolph v. State, 677 N.E.2d 733 (Ohio 1997).
[247] *Id.* at 766.
[248] *Id.* at 744.

Later that year, in *Brigham v. State*, Vermont's highest state court overturned its educational funding system.[249] The court found for the petitioners, agreeing with their assertion that funding disparities were related to educational opportunities. They opined that:

> 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.[250]

The court held that the state failed to meet its constitutional duty regardless of whether the rational basis test was employed or if strict scrutiny was applied. In directing the legislature to formulate a constitutional funding system, the court provided some basic guidelines, stating that:

> We emphasize that absolute equality of funding is neither a necessary nor a practical requirement to satisfy the constitutional command of equal educational opportunity. As plaintiffs readily concede, differences among school districts in terms of size, special educational needs, transportation costs, and other factors will invariably create unavoidable differences in per-pupil expenditures. Equal opportunity does not necessarily require precisely equal per-capita expenditures, nor does it necessarily prohibit cities and towns from spending more on education if they choose, but it does not allow a system in which educational opportunity is necessarily a function of district wealth. Equal educational opportunity cannot be achieved when property-rich school districts may tax low and property-poor districts must tax high to achieve even minimum standards. Children who live in property-poor districts and children who live in property-rich districts should be afforded a substantially equal opportunity to have access to similar educational revenues. Thus, as other state courts have done, we hold only that to fulfill its constitutional obligation the state must ensure substantial equality of educational opportunity throughout Vermont.[251]

In 1999, in what would be the final funding equity decision of the 1990s, the South Carolina Supreme Court ruled on *Abbeville County School District v. State*.[252] Plaintiffs in *Abbeville* included parents, children, and taxpayers from 40 of the state's lowest property wealth districts. They challenged that the South Carolina funding system was violative of the petitioners' Equal Protection

[249] Brigham v. State, 692 A.2d 384 (Vt. 1997).
[250] *Id*. at 390.
[251] *Id*. at 397.
[252] Abbeville County School Dist. v. State, 515 S.E.2d 535 (S.C. 1999)

rights, as well as their rights under the state Education Article. Concerning petitioners' Equal Protection claim, the court stated that:

> A neutral law having a disparate impact violates Equal Protection only if it is drawn with discriminatory intent. State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994). There is no claim of discriminatory intent here. We affirm the Circuit Court's dismissal of appellants' Equal Protection claims.[253]

Citing, in part, Oklahoma's high court decision in *Fair School Finance Council*, the *Abbeville* court held that the Education Clause of the South Carolina Constitution required that the state provide only a "minimally adequate education."[254] The court held:

> 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.[255]

In a dissenting opinion, Justice Moore objected to the majority's reading of the state Education Clause, stating that:

> Our Education Clause requires only that the General Assembly "provide for the support and maintenance of a system of free public schools." It contains no directive regarding the quality or adequacy of the education that must be provided. Since neither this clause nor any other provision restricts the legislature's power to control the quality of public education, we may not impose judicial limits on that power by adding education requirements not found in the constitution. It is for the General Assembly, and not this Court, to determine whether statewide standards of adequacy in education should be set and what, if any, those standards should be.[256]

Funding Litigation in State High Courts: the 2000s

Since 2000, three States' highest courts have ruled on the constitutionality of their state educational funding system: Wisconsin, Arkansas, and Alabama. The State court found for the state in Alabama and Wisconsin, whereas plaintiffs were victorious in the Arkansas case.

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[253] *Id.* at 538.
[254] *Id*. at 540.
[255] *Id.*
[256] *Id.* at 541.

In the first decision of the 21st century, in 2000, the Wisconsin Supreme Court affirmed an appellate court ruling which upheld Wisconsin's system of educational funding in *Vincent v. Voight*.[257] Citing previous court decisions, the court affirmed that education was a fundamental state right. The court identified this as "an equal opportunity for a sound basic education."[258] However, they noted that this constitutional directive served as "not a ceiling but a floor upon which the legislature can build additional opportunities."[259]

Addressing the petitioners' Equal Protection challenge, the court referenced an earlier decision, *Kukor v. Grover*, supporting their decision to apply the rational basis test and not strict scrutiny.[260] The court in *Kukor* found that although the implication of a fundamental right (such as education) would seemingly trigger strict scrutiny, that petitioners were not being entirely deprived of this right. In upholding the Wisconsin funding system, the *Vincent* court stated:

> We carefully distinguish between the fundamental right to an equal opportunity for a sound basic education under art. X, § 3 and the wealth-based arguments the Petitioners make. In other words, the fundamental right to an equal opportunity for a sound basic education does not rest on any classification based on wealth. In Kukor we addressed a similar argument. Citing Rodriguez, we concluded that a rational basis standard should be applied "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 within the scope of art. X . . . Since the Petitioners' argument rests on wealth-based classifications and not classifications based on art. X, § 3, we apply the rational basis test.[261]\

The most recent State Supreme Court case upholding their state's educational funding system was *James v. Alabama*, decided in 2002.[262] Plaintiffs in *James* were primarily ethnic minorities from school districts with low property wealth. They had been successful at the trial court level which issued a remedial order "requiring the legislature to formulate a constitutional

[257] Vincent v. Voight, 614 N.W.2d 388 (Wis. 2000).
[258] *Id.* at 408.
[259] *Id.* at 409, citing Jackson v. Benson, 218 Wis. 2d 835, 894-95, 578 N.W.2d 602 (1998),.
[260] Kukor v. Grover, 148 Wis. 2d at 498.
[261] *Id.* at 414.
[262] James v. Alabama, 836 So.2d 813 (2002).

system of school funding."[263] The Alabama High Court vacated this order holding that the funding question in *James* was a political question which would need to be answered via the state legislature.

James was particularly interesting because of the variety of bizarre conditions surrounding the case. These unusual circumstances were outlined in a concurring opinion written by then Chief Justice Moore. He stated that:

> This Court has never had to deal with a case as unusual at this one, and it is unusual in several ways . . . While this case was pending in the trial court, the then governor was convicted of a felony, that, in turn, produced the unusual occurrence that several of the plaintiffs realigned themselves as defendants, so that there appeared to be adverse parties and a case and controversy . . . In reality there was no case or controversy and there were no adverse parties . . . Nor did the trial court allow any other interested parties to intervene in the case. While the case was pending before the trial court, the trial judge campaigned for a position on the Alabama Supreme Court as "The Judge for Education Reform." In his campaign literature he stated that he was a "tough judge" because he had ruled "Alabama's education system unconstitutional," "order[ed] the Legislature back to work," and told "a governor and the Legislature to fix the problem." Those public statements ultimately forced his removal from the case while it remained pending. However, before his removal, the trial judge declared his orders final and then continued to order hearings and different forms of relief, in contradiction to the supposed finality of his own order. Using racism as a basis, the trial court declared all of the education portion of Amendment 111 . . . unconstitutional, but preserved a portion of the original [§ 256] . . . Then, using one word found in § 256–-"liberal"–-the trial judge renovated and reformed the entire education system to the tune of an estimated $1 billion and instituted a scheme of continuing supervision by his court of every aspect and agency of the entire Alabama education system, including the Alabama Legislature, the Governor, and the State Board of Education.[264]

In closing, the court held that:

> The main issue in the complaint filed by the plaintiffs is not education; it is the funding of public education. . .i.e., how the citizens of Alabama are taxed to fund the system of public education. The trial court in this case has criticized the Legislature for enacting a purportedly unconstitutional taxing scheme where funding for education is concerned. Taxing is a distinctly legislative issue.[265]

Arkansas is the only state in this decade, to date, to overturn its educational funding scheme.

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[263] *Id., supra* note 135.
[264] James at 842-43.
[265] *Id*. at 867.

Arkansas' highest court ruled on the constitutionality of its state funding system in 2002, in *Lake View v. Huckabee*.[266] Plaintiffs in *Lake View* were from a rural district whose student population was nearly 100% black. Further, fully 94% of *Lake View* students were eligible for free or reduced lunches, an educational proxy for poverty.

Petitioners were unsuccessful at the trial court level, where Arkansas' funding system had been found constitutional. Over the following 10 years, and in response to a change in the original order which ruled that the state system was in part unconstitutional, the Arkansas legislature passed several acts intended to bring the state funding system into constitutional compliance.[267] The court held that despite the legislative revisions to the state system, it remained constitutionally infirm. The decision cautioned:

> 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 State 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.[268]

Public school desegregation litigation is essentially a thing of the past. The days of *de jure* segregation are over and, aside from *Sheff*, courts have been unwilling to address instances of *de facto* segregation. Conversely, U.S. school funding litigation is far from over. There is ongoing litigation in this area in many states, including Arizona (*Crane Elementary School District v. State*), Montana (*Columbia Falls Public Schools v. State*), North Carolina (*Leandro v. State*), Alaska (*Kasayulie v. Stat*e), California (*Williams v. State*), Colorado (*Haley v. Colorado Department of*

[266] Lake View v. Huckabee, 91 S.W.3d 472 (Ark. 2002).
[267] *Id.* at 478-479.
[268] *Id*. at 511.

Education), Connecticut (*Johnson v. Rowland*), and Iowa (*Coalition for a Common Cents Solution v. State*).[269] State courts will continue to be called on to determine the constitutionality of state funding systems in coming years. And, funding litigation will likely continue to be a vehicle by which would-be desegregation plaintiffs seek relief.

[269] *See* www.accessednetwork.org.

CHAPTER 3

ANALYSIS

It has been 50 years since the U.S. Supreme Court's landmark decision in *Brown v. Board of Education*. In the five decades since the end of legally mandated segregated education, the nature of American education has dramatically changed. The days of *de jure* segregation in the United States are over. There is not a single school district in the country that mandates the separation of the races, and many schools who once did have been deemed unitary and released from judicial oversight. If *de jure* segregation was solely responsible for racial education equality disputes, public school segregation would be a wholly historical issue. This is, however, not the case.

The 1954 decision in *Brown* was a landmark victory for civil rights plaintiffs. After nearly 60 years of living in a country where *Plessy*'s "separate but equal" was the law of the land, plaintiffs in *Brown* achieved formal recognition of the fact that separate is in fact inherently unequal. Initially, recognition was all they received. Non-compliance with the *Brown* mandate was so widespread that one year later the Court issued an implementation remedy directing districts to desegregate at "all deliberate speed."[270] While many districts throughout the United States dragged their feet, the South, as a region, was the slowest to desegregate. Orfield and Eaton note that:

> Under fierce local pressure, most Southern federal courts reacted to the vague mandates by delaying desegregation cases for long periods and then, in the end, ordering limited changes. Often these plans amounted to allowing a few black schoolchildren to attend a few grades in white schools while maintaining a school district's essentially segregated

[270] *Brown v. Board of Education (Brown II)*, 349 U.S. 294, 301.

> character. Sometimes that meant that no whites were ever transferred to the previously all-black schools, faculties remained segregated, and black-and-white schools offered educational programs that differed in content and quality.[271]

Fully one decade after *Brown* only one of every fifty black students in the southern United States attended a racially integrated school.[272]

Although a great number of districts were slow to desegregate, many eventually did. By the early 1970s the South – initially the region plagued with the greatest number of segregated schools – had the greatest number of desegregated schools.[273] As the 1970s progressed, however, civil rights plaintiffs suffered a series of debilitating blows. First, in 1973, the Supreme Court held in *San Antonio v. Rodriguez* that education was not a fundamental right under the U.S. Constitution, nor were American students constitutionally entitled to equal per-pupil funding. The following year, the Court held in *Milliken v. Bradley (Milliken I)* that Detroit's majority-white suburban school districts could not be part of a desegregation plan aimed at integrating the majority-black Detroit public schools because the suburban districts had never mandated *de jure* segregation. While on the surface the High Court's judgment is sensible, its effect was to cripple integration via the creation of large, majority-minority districts which had already experienced "white flight," as white families fled to surrounding suburbs:

> Rejection of city-suburban desegregation brought an end to the period of rapidly increasing school desegregation. . . no longer was the most severe segregation found among schools within the same community; the starkest racial separations occurred between urban and suburban school districts within a metropolitan area. But *Milliken* made this segregation almost untouchable. By 1991, African-Americans in Michigan were more segregated than those in any other state.[274]

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[271] GARY ORFIELD & SUSAN EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 7 (1996).
[272] *Id.*
[273] Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation*, HARV. C.R. PROJ. (2001) *as in* Erika Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts*, HARV. C.R. PROJ. 1, 2 (2002).
[274] GARY ORFIELD & SUSAN EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 12 (1996). Orfield attributes the *Milliken* decision to "Nixon's goal of weakening desegregation requirements. His four appointees made up four of the five votes to protect the suburbs."

The 1980s were also difficult times for desegregation plaintiffs. In 1981, shortly after President Reagan took office:

> The administration won congressional action to rescind the Emergency School Aid Act of 1972, cutting off the only significant source of public money earmarked for the educational and human relations dimensions of desegregation plans.[275]

Also in the 1980s, the Norfolk, Virginia public schools became the first district to receive "court approval to return to segregated neighborhood schools."[276] This lower court decision was hotly debated, and civil rights advocates appealed the decision to the U.S. Supreme Court. However, in 1986 the Court advised the would-be plaintiffs that *certiorari* had been denied.[277]

Ever since the Court identified the so-called *Green* factors, or "important indicia of a racially segregated school"[278] in 1968, school districts have questioned how they might be released from judicial oversight and, in the words of the Court, be deemed unitary. Although the Court in *Green* did not mandate specific criteria for courts to use in determining whether a previously segregated school district had become unitary, the Court did highlight important characteristics of unitary status. As Orfield and Eaton point out, the definition of unitary status changed dramatically from the 1968 decision in *Green* until the 1990s:

> *Green* posited a unitary school system with equitable interracial schools as a long-term, permanent goal, viewing any school board action that worked against or ignored the goal of total desegregation, to be impermissible. By 1990, unitary status in that sense – discrimination-free, racially integrated education – was no longer the objective; it became merely a method of getting out of racial integration.[279]

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[275] *Id.* at 16.
[276] *Id.* at 17.
[277] *Id.*
[278] Dayton, *supra* note 45, at 898.
[279] Orfield and Eaton, *supra* note 273, at 19.

Much of the change can be attributed to two landmark decisions in the 1990s: *Dowell v. School Board of Oklahoma City Public Schools*[280] in 1991 and *Freeman v. Pitts*[281] in 1992.

At issue in *Dowell* was the "permanency" of unitary status. In 1961, plaintiffs in *Dowell* successfully argued that the Oklahoma City school district had operated a system intentionally segregated by race. Over the next decade and a half, the Oklahoma City district implemented a number of redistricting plans aimed at achieving a more natural racial balance in the public schools. In 1977, judicial oversight was terminated, and the Oklahoma City school district was deemed unitary. In the decade that followed, the district implemented a new Student Reassignment Plan (SRP) which led to a large percentage of racially segregated schools once again. Believing that the resegregation caused by the SRP was a violation of Oklahoma City's "status" as a unified system, plaintiffs took the district to court. To the shock of many civil rights advocates, the Supreme Court held that the district's release from judicial oversight (having been granted unitary status) no longer compelled Oklahoma City to run a desegregated district. As pointedly stated by Orfield and Eaton:

> A court-supervised district that has never been declared unitary is obligated under the law to avoid actions that create segregated and unequal schools. But after a declaration of unitary status, the courts presume any government action creating racially segregated schools to be innocent, unless a plaintiff proves that the school officials intentionally decided to discriminate. This burden of proof is nearly impossible to meet, as contemporary school officials can easily formulate plausible alternative justifications. They certainly know better than to give overtly racist reasons for the policy change.[282]

In effect, the declaration of unitary status became a potential "get out of jail free card." Legally, these districts – districts which had actively segregated their public schools – were given far more latitude than districts which had never operated under a policy of *de jure* segregation.

[280] 498 U.S. 237 (1991).
[281] 503 U.S. 467 (1992).
[282] Orfield and Eaton, *supra* note 273, at 19.

One year after the decision in *Dowell,* the Court issued a second, equally controversial ruling in *Freeman v. Pitts*.[283] In 1969, the District Court for Northern Georgia had placed the DeKalb County school district under court order to desegregate. From 1969 – 1986, DeKalb County utilized a number of different strategies to attempt to racially balance its schools, including a voluntary student transfer program and a neighborhood school attendance program.[284] Believing that they had met the court mandate, DeKalb County plaintiffs returned to court, asking that they be released from continuing judicial oversight. The decision was appealed to the U.S. Supreme Court, where the majority held that districts did not need to meet all of the *Green* factors simultaneously in order to be declared unitary. Instead, districts could be declared unitary in a series of smaller steps, that is, one *Green* factor at a time. This meant that a school district could focus all of its money, time, and attention on achieving desegregation in one *Green* factor such as, for example, student assignments. Once the district had thoroughly desegregated the student assignment process, they could petition the court to be released from this *Green* factor and be declared unitary in this area. The following year the district might focus all of its attention on a second *Green* factor. During this time a district may feel little need nor court pressure to continue its previous work to promote desegregation in the area of student assignments. Without district effort, the student population might resegregate – all with no judicial recourse, save a new, outright constitutional violation.

Dowell and *Freeman* made attaining unitary status significantly easier. As a result, a great many districts previously under judicial supervision have been subsequently released. Courts continue to indicate their reluctance to oversee desegregation orders indefinitely; as the title of one

[283] Freeman v. Pitts, 503 U.S. 467, (1992).
[284] *Id.* at 472-473.

review article aptly states "Desegregation: Is the Court Preparing to Say it is Finished?"[285] The timing of this reluctance is somewhat ironic. American schools are indeed rapidly resegregating, some to levels similar to the pre-*Brown* era. Findings from a 2002 report completed by the Harvard Civil Rights Project (CRP) state:

> *Virtually all* school districts analyzed are showing lower levels of inter-racial exposure since 1986, suggesting a trend towards resegregation. . . As courts across the country end long-running desegregation plans and, in some states, have forbidden the use of any racially-conscious student assignment plans, the last 10-15 years has seen a steady unraveling of almost 25 years worth of increased integration.[286]

The most recent CRP school desegregation report echoes these findings. Researchers note that, in stark contrast to the demographics of the 1940s and 1950s, just 60% of students currently attending American public schools are white. Despite this, fully one fourth of white children attend school in states where the majority of students are white.[287] Hispanic students are perhaps the most segregated racial group in the United States. One-ninth of all Latino students attend schools which are 99 – 100% minority.[288] During the 1990s "the proportion of black students in majority white schools. . .decreased by 13 percentage points, to a level lower than any year since 1968."[289] Research shows that resegregation is taking place throughout the country – even in districts which have just recently been declared unitary. Orfield and Lee note that "the courts

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[285] Dayton, *supra* note 45, at 904.
[286] Erica Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts*, HARV. C.R. PROJ. 2, 4 (2002).
[287] Gary Orfield & Chungmei Lee, *Brown at 50: King's Dream or Plessy's Nightmare?*, HARV. C.R. PROJ. 1, 4 (2004).
[288] Erica Frankenberg, Chungmei Lee, & Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, HARV. C. R. PROJ. 1, 5 (2003). The CRP identifies schools which are 95-100% single race as *apartheid* schools. In the Northeast and Midwest, 1/4 of all black students attend apartheid schools; Nationwide, 1/6 of all black students attend apartheid schools.
[289] *Id*. at 6.

assumed that the forces that produced segregation and inequality had been cured. . . they have not been."[290]

The relationship between desegregation and school funding litigation has largely been unexplored. This is surprising, because both share the same basic goal of improving educational opportunities for disadvantaged students.[291] Desegregation cases have frequently arisen around funding issues, and many funding cases have emphasized the disparate impact funding systems have had on minority students. Indeed, decades of research suggest a close relationship between minority status and poverty:

> The vast majority of intensely segregated minority schools face conditions of concentrated poverty, which are powerfully related to unequal educational opportunity. Students in segregated minority schools face conditions that students in segregated white schools seldom experience.[292]

Majority-minority schools also tend to have "low parental involvement, lack of resources, less experienced and credentialed teachers, and higher teacher turnover – all of which combine to exacerbate educational inequality for minority students."[293] Given this correlation, the beneficiaries of finance lawsuits (perhaps filed because of the court's reluctance to hear new desegregation cases) would largely affect the same population of students as would desegregation lawsuits.

Funding issues in Desegregation Cases

From the beginning, inequitable school funding has been a central component of desegregation litigation. The earliest desegregation case in U.S. history, *Roberts v. Boston,* illustrates this point.[294]

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[290] *Id.* at 3.
[291] James E. Ryan, *Sheff, Segregation, and School Finance Litigation*, 74 N.Y.U.L. REV. 529, 529 (1999).
[292] Orfield and Lee, *supra* note 286, at 4.
[293] *Id.* at 5.
[294] Roberts v. Boston, 5 Mass. (Cush.) 198 (1849).

Shortly after the end of the Revolutionary War, Boston became the first urban public school district in the nation.[295] Initially, blacks were not excluded from the majority-white Boston schools. However, the small number of black children who did attend Boston's integrated schools were sorely mistreated.[296] In 1787, a group of black Bostonians headed by Prince Hall petitioned the Massachusetts legislature to order the Boston School Committee to establish a separate school for black children because of the poor treatment they were subjected to in integrated schools.[297] Their petition was denied. The community group petitioned for the establishment of a separate school again in 1800 to no avail. In 1815 a wealthy, white businessman named Abiel Smith died, leaving money earmarked for the establishment of a private school to educate Boston's black children. The establishment of the Abiel Smith School was a small victory for community leaders. However, many black Bostonians remained frustrated about the educational resources available to their children.

In 1848 Benjamin Roberts tried, unsuccessfully, to enroll his five-year old daughter Sarah in five different public schools located between his home and the Abiel Smith School. Sarah was denied admission at all five schools, and told that she would need to enroll at the school set up for black children – the Abiel Smith School.[298] Benjamin Roberts argued that his young daughter should be allowed to attend the school closest to their home. The court noted that the distance from the Roberts home to the Abiel Smith School was nearly half a mile, and that on that half mile walk Sarah would have passed by no fewer than five primary schools – any of which would have been acceptable to Benjamin Roberts.[299]

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[295] Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813, 848 n. 137 (1993).
[296] James Horton & Michelle Moresi, *Roberts, Plessy, and Brown: The long, hard struggle against segregation*, 19 CULTURAL RESOURCE MANAGEMENT 10, 10-13 (2001).
[297] Brown, at 848, note 137.
[298] *Roberts,* 5 Mass. (Cush.) 198, at 200.
[299] *Id.* at 201.

Why would Benjamin Roberts petition the Boston Community School Board, and then the courts, for the privilege of sending his daughter to a school where he knew she would be mistreated? Roberts would have been well aware of the way black children were treated at local integrated schools. For example, a local black Bostonian, Hosea Easton, who had attended an early integrated school remembered being sent to the "nigger seat" when he, or white children, misbehaved. He also noted that the teachers would frequently berate students by saying that "they would be as poor or ignorant as a nigger" and "have no more credit than a nigger."[300] Roberts, like many after him, likely felt that the educational opportunities available at the well-funded and better-equipped white schools would outweigh the negative social consequences. It seems highly unlikely that Roberts would allow, nonetheless petition, for his daughter to be placed in an abusive environment unless he felt that there would be some direct, significant educational benefit.

As early as the 1930s, a handful of lawsuits began addressing the issue of separate-race schools in institutions of higher education. In 1938, with *Gaines v. Missouri*, the Supreme Court ruled that Missouri's practice of maintaining a law school for whites but not blacks "was a discrimination repugnant to the Fourteenth Amendment."[301] Twelve years later the Court, in *Sweatt v. Painter*, ruled that Texas' "makeshift law school" established for black students (specifically to comply with *Gaines*) did not provide black law students with an equal educational experience.[302]

Simply gaining access to integrated facilities did not necessarily mean that black students would receive an "equal educational experience." That same year the Court found, in *McLaurin v.*

[300] Roberts had also likely heard the personal account of Boston Community leader William Cooper Nell. Cooper Nell, who led the campaign to integrate Boston's public schools, recounted his personal experience with racial politics. As a student at the black school in 1829, he was judged to be one of the school's three brightest students. Had he achieved this academic recognition at the white school he would have been eligible to receive the city's prestigious Benjamin Franklin Medal. Cooper Nell attended the awards banquet as a waiter where he was told by Massachusetts Lieutenant Governor Armstrong, that he deserved to be receiving the award with, or in place of, the white students at the banquet. He credited this experience as leading to a persistent feeling that he could "never be anything but a nigger anyhow." Horton & Moresi, *supra* note36, at 11.
[301] Gaines v. Missouri, 305 U.S. 337, 344 (1938).
[302] Sweatt v. Painter, 339 U.S. 629 (1950).

Oklahoma,[303] that unconstitutional discrimination could occur even in desegregated schools. The plaintiff in this case, a student at Oklahoma's integrated law school, was treated very differently than his white classmates. For example, he was made to listen to class lectures from the hallway outside the classroom, was given specific times when he was 'allowed' to use the library, and was routinely mistreated by his fellow white classmates.

Despite the disparate treatment which inevitably awaited them at integrated law schools, plaintiffs likely believed that integration was the way (in cases where there was only one state law school, the only way) to ensure adequate educational opportunities. Pop-history would have us believe that civil rights activists sought integration solely because of a belief in diversity and inter-cultural communication. While these ideals were most definitely part of the impetus for integration, they do not "tell the whole story" so to speak. In cases such as *Gwines, Sweatt,* and *McLaurin*, the lofty ideals of diversity – no matter how worthy – often took a back seat to the basic realization that without integration, black students in many states would not be afforded adequate educational opportunities.

The country's most famous desegregation case, *Brown v. Board of Education*, involved K-12 students – not post-graduate ones. Still, plaintiffs in *Brown* shared a common goal with the post-graduate case precedents, namely the opportunity for an adequate education. This opportunity is only possible through adequate and almost certainly equal educational funding. Although the declaration that separate facilities were inherently unequal was a clear victory for the civil rights movement, in many ways it did not address the true reality facing black students: though black schools were separate, they were in no way equal.[304]

[303] McLaurin v. Oklahoma, 339 U.S. 637 (1950).
[304] There is a vast body of anecdotal evidence attesting to this fact. One scholar notes that "the schools for blacks. . . were older hand-me-downs from the white community, and many lacked playgrounds, ball fields, cafeterias, libraries,

Before the *Brown* decision, black children received just pennies on the dollar as compared to what was spent on white students. For example, in the 1939-40 school year, black students throughout the United States received just a fraction of the per-pupil money allotted for white children. For every dollar spent on a white child: Mississippi spent just 23.1 cents per black child; Louisiana spent 29.7 cents; and Arkansas spent 49 cents.[305] Over the following decade and a half, the spending gap narrowed somewhat. Still, white students continued to receive considerably more per-pupil money than their black counterparts. In the year before the *Brown* decision, 1953-54, Mississippi, Louisiana, and Arkansas spent 44 cents, 73.9 cents, and 72.4 cents, respectively, for every dollar spent educating a white student.[306]

Counsel for *Brown* plaintiffs – which included the man who would 13 years later become the first black Justice on the United States Supreme Court, Thurgood Marshall - elected to attack the "separate but equal" standard established by *Plessy*, arguing that separate schools were inherently unequal. While history shows that this vein of litigious argumentation was successful, it was nonetheless premised on the incorrect assumption that schools for black and white students were, in fact, equal. The Court itself described the question before them, stating that:

> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.[307]

Certainly, all parties involved were well aware that white children, on average, received far more educational resources than their black counterparts. However, this was not the issue *Brown* counsel elected to focus on. Thus, the finance issues in *Brown* were, on the surface, secondary issues. Still,

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auditoriums, and other facilities that were present in the newer schools serving whites." Forrest White, *Brown Revisited*, PHI DELTA KAPPAN 13, 15 (1994).

[305] Michele Foster, *Savage Inequalities: Where have we come from? Where are we going?*, 43 EDUC. THEORY *at* http://www.ed.uiuc.edu/EPS/Educational-Theory/Contents/43_1_Foster.asp.

[306] *Id*., *as in* LOUIS E. LOMAX, THE NEGRO REVOLT 269 (Harper 1962).

[307] 347 U.S. 483, 493.

there is little question that the desire to obtain adequate educational opportunities for black children served as a primary driving force behind *Brown.* Perhaps *Brown* plaintiffs were concerned that per-pupil spending, quality of facilities, etc. would never be equalized without judicial intervention. This would be a sound assumption, given that *Plessy* had been the law of the land for more than 50 years, and had specifically mandated separate but equal treatment of blacks and whites alike. After 50 years of fruitless waiting for funding equity, *Brown* plaintiffs likely felt that the only way to achieve educational equality, or even adequacy, was not to seek alleviation of obvious material inequalities but to attempt to gain access to the educational facilities which were already adequately funded – schools for white children. Had schools for black children been funded, staffed, and supported as equally as white schools, the perceived need for a case such as *Brown* may not have been as strong.

Many people in the black community were staunchly opposed to desegregation. Their distrust arose when it became clear that the process of desegregation would cause some troubling, unintended consequences. Many communities which had previously supported two schools (one black, one white) were now forced to consolidate. When only one principal was needed, the white principal often kept his job. Further, black schools were often considered community centers, giving students and community members alike "a sense of identity in their communities."[308] Not only did black children lose the positive support of this community center, they were often forced to attend schools where they were made to feel unwelcome. For these and other reasons, many black parents often elected to keep their children enrolled in all-black schools until they were closed in the late 1960s.[309]

Birmingham, Alabama is one city where many individuals who were part of the civil rights movement have subsequently questioned its outcomes. Parker High School is a large, urban high school located in Birmingham which has been in existence since the early 1900s. Parker High was

[308] West Virginia State Archives, *Desegregation*, *at* http://www.wvculture.org/history/blachist.html.
[309] *Id.*

recently featured in one of a series of National Public Radio specials commemorating the 50th anniversary of *Brown*.[310]

Parker graduates from the 1940s, 50s, and 60s remember it as a challenging educational institution and an important community center for black Birminghamians. In the 1950s and 60s, many of Parker's students were actively involved with the civil rights movement, and a great number of Parker alumni subsequently went on to achieve a significant level of professional success.[311] Sandra Weems, a 1960s graduate and a current Social Studies teacher at Parker remembers integration as a troubling time in the school's history. She remarks:

> I remember when they said the faculty had to be fifty-fifty black/white. . . I distinctly remember them taking some of our very best teachers and sending them to white schools. . . they sent us all of the teachers that were new, rookies. . . a lot of them [the white teachers] were afraid to be here. . . afraid of black students.[312]

In the decades following integration, Parker went from an institution of academic excellence to one in which most students perform significantly below the national average. In 2002, Parker high school was nearly taken over by the state because of poor performance. Reporter Michelle Norris notes that "no one we spoke with [at Parker] is yearning for the good ol' days of Jim Crow. . . but many question integration."[313] Weems replies "I just don't know if integration was a good thing after all. I think once we were allowed to integrate we lost a lot of our self-respect."[314] When asked if integration, as a social experiment, worked, another interviewee answered "yes and no. . . but we lost our sense of togetherness, a sense of brotherhood."[315]

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[310] Michelle Norris, *Parker High: Integration's Unfulfilled Promise* (National Public Radio broadcast, May 4, 2004).
[311] Michelle Norris, the reporter covering this special, is the daughter of a Parker graduate from the 1940s who went on to be a highly respected school teacher in Minnesota.
[312] *Id*.
[313] *Id.*
[314] *Id*.
[315] *Id.*

In the decades that followed the *Brown* decision, there was a great deal of debate surrounding the benefits of forced integration (usually achieved by busing). Initially, one of the most outspoken proponents of forced integration was University of Chicago sociologist James Coleman. In 1966 Coleman had famously defended busing plans "on the grounds that black kids would benefit from exposure to middle-class whites' study habits."[316] After seventeen years of studying the effects of busing, Coleman changed his opinion stating pointedly that "the assumption that busing would improve achievement of lower-class black children has now been shown to be fiction."[317]

The debate over busing has been particularly significant in recent years, given rapidly changing demographics in many parts of the country. One of the greatest obstacles to public school desegregation has been the continued *de facto* segregation of housing patterns. For example, in the 1970s the majority of citizens living inside the Detroit city limits were white.[318] In the following decades, Detroit's demographics flip-flopped; today Detroit is overwhelmingly black. As one researcher aptly remarked, "with the rise of chocolate cities and vanilla suburbs, racial homogeneity of urban school districts increased."[319] As a result, some school districts had such overwhelming racial homogeneity that desegregation was literally impossible.

Although the impact of *Brown* was felt most heavily in the segregated south, a number of northern cities, such as Detroit, were placed under court ordered busing plans. Busing in Detroit was hotly contested. Consequently, many affluent white families moved from the city limits to the surrounding suburbs. As a result, the inner-city schools became overwhelmingly minority, and the suburban ring schools became overwhelmingly white. Thus, any attempts to desegregate Detroit city

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[316] Tamar Jacoby, *Beyond Busing*, THE WALL STREET JOURNAL, July 21, 1999, *at* http://www.manhattan-institute.org/html/_wsj-beyond_busing.htm.
[317] *Id*.
[318] Cheryl Corley, *Detroit's Racial Divide* (National Public Radio broadcast, April 29, 2004).
[319] Reynolds Farley, Howard Schuman, Suzanne Bianci, Diane Colasanto, and Shirley Hatchett, *Chocolate City, Vanilla Suburbs: Will the Trend Toward Racially Separate Communities Continue?*, SOCIAL SCIENCE RESEARCH 7, 319 (1978) as quoted in DOUGLAS S. REED, ON EQUAL TERMS 3 (2001).

schools would require the inclusion of white students from surrounding districts. A federal judge did just this, holding that "53 of 85 surrounding suburban districts were to be included within a desegregation plan that encompassed most of the Detroit metropolitan area."[320] This interdistrict plan was overturned by the U.S. Supreme Court in *Milliken v. Bradley*. Writing for the majority, Justice Burger stated that:

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. . . Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. . . without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.[321]

Nathaniel Jones, an NAACP attorney involved with *Milliken* remembers that:

> I was sitting in the court when the Chief Justice read the majority opinion. I couldn't believe he was talking about the same case. With one more vote, a different decision would have changed the landscape of American education as we know it today.[322]

After *Milliken*, it became next to impossible to secure an effective desegregation plan for many large, urban districts mostly composed of minority students. Today, three decades after the Supreme Court ruling in *Milliken*, Detroit's inner-city schools remain overwhelmingly black, while the surrounding suburban ring schools are predominantly white. Funding disparities also continue to exist. For example, students attending schools in Bloomfield Hills, a predominantly white Detroit suburb, receive more than $5,000 per-pupil more than their counterparts attending inner-city Detroit schools.[323]

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[320] DOUGLAS S. REED, ON EQUAL TERMS 4 (2001).
[321] *Milliken* at 744-745.
[322] Cheryl Corley, *Detroit's Racial Divide* (National Public Radio broadcast, April 29, 2004).
[323] *Id*.

Race as an Issue in School Funding Cases

Just as desegregation cases have historically involved a debate over financial resources, many school finance cases have similarly involved the issue of race. As discussed above, educational funding and minority status have been negatively linked historically. Much has changed since the *Brown* era. However, minority students are still more likely than their white counterparts to attend poorly funded schools. Students attending Southern schools (which tend to have a higher proportion of minority students - especially black students - than the national average) received $6,419 per pupil, on average, during the 1997 – 1998 school year.[324] In contrast, students attending schools in the Northeast (a part of the country where the minority population is lower than the national average) received an average of $9,546 per pupil.[325] While regional cost differences certainly account for some of the disparity, the per-pupil spending gap is significant. The same Department of Education study found that, nationally, students attending majority-minority schools (schools where more than half of the population is minority) receive approximately $6,500 per-pupil each year. This amount is significantly lower than what is spent on schools with lower minority populations: $7,453 per-pupil in 10–30% minority schools, and $7,617 per-pupil in 30-50% minority schools.[326] Thus, students attending "apartheid"[327] schools where the overwhelming majority of students are minorities, receive significantly less per-pupil funds than students in "whiter" schools.

A 2002 study sponsored by the U.S. Department of Education's National Center for Education Statistics also found a disparate level of funding for minority students. The author of the study, Ross Rubenstein, compared state adequacy rankings to the racial composition of students in all 50 states and the District of Columbia. In order to quantify adequacy, Rubenstein used the Odden-

[324] *Financing Elementary and Secondary Education in the States: 1997-98*, *Table 3.3*, U.S. DEPARTMENT OF EDUCATION: NATIONAL CENTER FOR EDUCATION STATISTICS, 35 (2002).
[325] *Id*.
[326] *Id.*
[327] Frankenberg, Lee, & Orfield, *supra* note 288.

Picus Adequacy Index (OPAI) which "quantifies how far a given finance system is from achieving adequacy, assuming an adequate spending level is determined."[328] Using the OPAI, Rubenstein found that the majority of minority students in six U.S. States attend schools in districts where spending is below the adequacy benchmark: Pennsylvania, Texas, Louisiana, New Mexico, Mississippi, and California.[329] More than one third of minority students attend schools in districts funded at levels below the adequacy benchmark in another twelve states: New Jersey, Virginia, South Carolina, Nevada, Alaska, Colorado, North Carolina, Florida, Alabama, Illinois, Oklahoma, and Arizona.[330]

Just as funding played a major role in desegregation cases, the converse has also proved to be true. Although race was not the primary issue in *Serrano*, plaintiffs did note that "A disproportionate number of school children who are black children, children with Spanish surnames, children belonging to other minority groups reside in school districts in which a relatively inferior educational opportunity is provided."[331]

In 1977 , the Connecticut General Assembly considered a school finance bill drafted in response to the state supreme court's decision, finding for funding plaintiffs. During one debate over the finance bill, "racial code words" used by one Connecticut State Senator suggest that, at least in his eyes, school finance and race are inextricably linked. He stated that:

> The majority party in this circle today is about to commit a travesty on every taxpaying citizen in the State. . . you are legislating a tax that is going to cost every citizen in this state more money and you're funneling it into a cesspool, a political cesspool that spends and spends because they know they're not responsible.[332]

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[328] Ross Rubenstein, *National Evidence on Racial Disparities in School Finance Adequacy*, DEVELOPMENTS IN SCHOOL FINANCE: 2001-02 (NATIONAL CENTER FOR EDUCATION STATISTICS), 102 (2003).
[329] *Id*.
[330] *Id*.
[331] *Serrano*, 487 P.2d at 1244 n.1.
[332] Connecticut General Assembly, 1979, 1785-88 *as in* Reed at 165.

The Senator's comments came under fire from many of his colleagues, the media, and scholars alike. One scholar characterized the Senator's objections as being very clear, stating that the lawmaker described citizens of Connecticut's urban, high-minority areas in derogatory terms while rural residents – far more likely to be white – were characterized as hard-working, honest members of society. Education policy researcher Douglas Reed states that the Senator clearly implied that:

> Residents of the small towns and suburbs were 'honest' and 'hardworking'; they were 'citizens.' Most important, they were 'taxpayers.' Unlike the residents of Hartford, they contributed to the fiscal and moral well-being of the state. The cities were 'wasteful' and 'inefficient'; residents of cities got off 'scot-free' from obligations that fell to the other, more responsible residents of the state. The politics of cities was dominated by 'lobbyists' and political chicanery. The cities were morally suspect.[333]

Whatever the Senator's intentions were, his speech on the Connecticut State Senate floor and the subsequent reactions to the speech suggest that, in the minds of many, the issues of school finance and race are inextricably linked.

The linkage between adequate educational funding and minority status was addressed by New York's highest court in 1982, in *Levittown v. Nyquist.*[334] Together, attorneys from the NAACP Legal Defense and Educational Fund, the New York Metropolitan Council of the American Jewish Congress, and the Department of Education, Diocese of Brooklyn filed a "friend of the court" brief asserting that New York's educational funding system had a disparate impact on ethnic minorities, and as such deprived minority children of both their equal protection and education article rights. In a dissenting opinion in which he quoted the recent U.S. Supreme Court decision in *Plyler v. Doe*, Justice Fuchsburg addressed the nexus between educational funding equity in New York and minority status, stating that:

> [It is] an undisputed fact that the existing education aid formulae have an adverse effect, not only on pupils from impoverished families, but also on a large percentage

[333] Reed at 165.
[334] Levittown v. Nyquist, 439 N.E.2d 359 (N.Y. 1982).

> of the nearly 750,000 "minority" students (black, Hispanic, American Indian, Asian and others).[335]

Fuchsburg is not the only state high court justice to note this relationship. Eight years later, in *Abbott v. Burke*, New Jersey's supreme court found that their state funding system had a similar disparate impact on minority children. The court in *Abbott* noted that:

> That the overwhelming proportion of all minorities in the state are educated in these poorer urban districts is of further significance. These are the districts where not only the students and education are failing, these are the districts where society is failing.[336]

Race was an important aspect of two of the most recent funding equity cases: *James v. Alabama*, and *Lakeview v. Huckabee*. In the former, the Alabama supreme court suggested the importance of race to Alabama's latest funding case in a statement reprimanding the plaintiffs:

> In their briefs filed in response to the January 10, 2002, order of this Court and in answer to four questions propounded by this Court to the parties, the plaintiffs allege, without supporting proof, the following injurious effects of Amendment 111: continuing existence of all-white academies, a reduction of the white population in the public schools. . . For the first time since this case has been litigated, the plaintiffs tell us that "many of the plaintiff parents and schoolchildren are black."[337]

If the students' race was not of significance, why would the late inclusion of this information make a difference? Clearly, the court's language suggests a relationship between educational funding equity and race.

Race was likewise an issue in another 2002 funding case, *Lake View v. Huckabee*.[338] Plaintiffs in *Lake View* were from a rural district whose student population was nearly 100% black. Further, fully 94% of *Lake View* students were eligible for free or reduced lunches, an educational

[335] *Id* at 375 (Fuchsburg, dissenting).
[336] Abbott v. Burke, 575 A.2d 359, 387 n.19 (N.J. 1990).
[337] James v. Alabama, 2002 Ala. LEXIS 166, 172 (Ala. 2002).
[338] Lake View, 91 S.W.3d at 472.

benchmark of poverty.[339] Thus, the plaintiff victory in *Lake View* was not only beneficial to poorer children, but to black children as well. However, the greatest argument over the significance of race to this case did not involve plaintiff children at all, but instead the attorneys representing the district. Attorneys for the Lake View district asserted that:

> The vast differentiation in the fees that has been allowed in this cause is glaring in that the appellant's attorneys are the only African-American team of attorneys who have appeared before this court in a public interest case and are now receiving a disparaging fee. The members of the court must take care to recognize the implications of the 14th Amendment of the United States Constitution and Article 2, Sections 2, 3 and 18 of the Arkansas Constitution require that appellant's attorneys enjoy the same constitutional rights as do Caucasian attorneys in similar situation.[340]

The Arkansas court unequivocally denied these claims, stating that:

> In sum, these unfounded allegations of racism are reckless and disrespectful, both to this court and to the lower court. They are an unwanted distraction from the real issues in this case. The issue of race simply did not enter into this court's decision. Indeed, I am completely confident in saying that the skin color of Lake View's attorneys played no part whatsoever in this court's decision. I am equally confident that it played no part in any of the lower court proceedings. I understand that there was a certain amount of posturing going on in this case, both by the State's and Lake View's attorneys, and that this case was a high-profile media event. Be that as it may, unfounded and unsupported allegations of racism have no business in a lawsuit of this nature.[341]

Academic Achievement and Minority Status

Courts ruling on desegregation cases have frequently embraced, either directly or indirectly, the correlation between minority status and lower levels of academic achievement. In cases as early as *Brown*, court decisions seemed to imply that the only way black children could have the opportunity to reach their academic potential was if they were taught by and seated next to whites. As aptly stated by one scholar:

> If one begins with an assumption of equality of physical facilities and other tangible factors, it becomes apparent that the intangible difference between the white schools and the black schools is the absence of whites in the latter. The valuable

[339] Wood & Dayton, *supra* note 6, at 182.
[340] Lake View at 512.
[341] *Id*. at 512-13.

> "intangibles" lacking in the black schools, therefore, were attributes which must have been endemic only to white teachers and students.[342]

The Court's decision in *Green* similarly echoed this belief. Kevin Brown writes that:

> If the Supreme Court had based desegregation on the firm belief that African-Americans were the equals of Caucasians, then both blacks and whites would have been considered as beneficiaries of the [desegregation] remedies. For the Court to have avoided replicating the message about the inferiority of African-Americans in desegregation, the Court would have also articulated how *de jure* segregation harmed Caucasians as well. . . The Court, however, did not view interracial exposure of Caucasians to African-Americans as a benefit for white students.[343]

Justice Thomas articulated a similar belief in his concurrence in *Missouri v. Jenkins*.[344] Arguing that the District Court had erroneously theorized that "racial imbalances are unconstitutional"[345] Thomas opined that:

> In effect, the court found that racial imbalances constituted an ongoing constitutional violation that continued to inflict harm on black students. This position appears to rest upon the idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites.[346]

Addressing the District Court's reliance on the social science evidence used by the *Brown* Court, Justice Thomas argued:

> The point of the Equal Protection Clause is not to enforce strict race-mixing, but to ensure that blacks and whites are treated equally by the State without regard to their skin color. The lower courts should not be swayed by the easy answers of social science, nor should they accept the findings, and the assumptions, of sociology and psychology at the price of constitutional principle.[347]

Aside from the damaging implications of black inferiority, these rulings may have failed to address the greatest factor in reduced academic achievement - poverty.

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[342] Kevin Brown, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality Education Lawsuits,* 42 EMORY L.J. 791, 810-11 (1993).
[343] *Id.* at 816.
[344] Missouri v. Jenkins, 515 U.S. 70 (1995).
[345] *Id*. at 118.
[346] *Id*. at 118-119.
[347] *Id.* at 122-123.

While social science research completed in the last few decades has shown a correlation between minority status and reduced academic achievement, this correlation is fairly minor. A case study completed by Ken Ellinger and David Wright found that a ten percent increase in minority enrollment in a school is correlated with a 0.9 point decline in test scores, overall.[348] Although this correlation is not statistically insignificant, it pales in comparison to the correlation between poverty and academic achievement. In the same case study, Ellinger and Wright found that a ten percent school-wide increase in students eligible for free or reduced lunches was correlated with a 3.1 point drop in test scores.[349] Thus, poorer black children may well be better served by having attending a school with students of high socio-economic status *of any race* than they would simply by attending a predominantly white school. Simply put, in today's school environments the skin color of one's classmates is of small academic consequence, whereas the size of their parents' pocketbook is of greater academic consequence.

Evidence suggests that racial desegregation alone does not substantially effect academic achievement of any racial group. A study which tracked the academic achievement of 1,731 kindergarten through sixth graders in recently desegregated Riverside, California public schools found that desegregation had essentially no academic effect on any of the groups sampled.

> The results indicated that minority children did not gain in achievement as a consequence of desegregation, nor did the white children suffer. . . [and] that desegregation in and of itself appears not to enhance the achievement of minority students nor negatively affect the achievement of white students.[350]

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[348] Ken Ellinger & David Wright, *Brains for the Bucks? School Revenue and Student Achievement in Oklahoma*, 32 SOCIAL SCIENCE JOURNAL 299, 305 (1995).
[349] *Id.* at 305. *See also Report on Poverty and Achievement*, Chart 11, National Center for Education Statistics, (2000), *at* http://nces.ed.gov//programs/coe/2002/charts/chart11.asp which shows that regardless of a student's personal socio-economic status, 4th graders in this study performed better at schools with a low population of free and reduced lunch eligible students.
[350] HAROLD B. GERARD & NORMAN MILLER, SCHOOL DESEGREGATION: A LONG TERM STUDY (Plenum Press 1975) *as in* Vivian Ikpa, *The Effects of School Desegregation Policies upon the Achievement Gap between African American and White Students in the Norfolk Public Schools*, 21 J. INSTRUCT. PSYCHOL. (1994).

Similarly, a congressionally-authorized study of Title I of the Elementary and Secondary Education Act found that the desegregation of poor schools (leading to a population of poor black students with poor white students) has not led to increased academic achievement for either group, even when these schools receive additional funding.[351] A case study from Wilmington-New Castle County in Delaware concurred with the Title I Report findings. The case study noted that black students' academic achievement did not improve after attending racially desegregated schools. David Armor believes the reason racial desegregation does not work (in regards to academic achievement) is it does not address the core issue responsible for the achievement discrepancy, namely, family poverty and concentrations of neighborhood poverty.[352]

These studies suggest that a plan of socio-economic desegregation may produce more favorable academic results than racial desegregation alone. Certainly, racial diversity is advantageous for reasons far greater than academic achievement. Racial diversity promotes cross-cultural understanding, breaks down unnatural barriers, and teaches children how to interact with people of all different colors and backgrounds – a necessary skill in today's multi-cultural world. However, the switch from racial to socio-economic desegregation would likely not produce single-race schools. Richard Kahlenberg argues that because of the strong correlation between minority status and poverty, a plan of socio-economic desegregation would instead produce racially diverse schools.[353] Thus, it would seem that finance plaintiffs could "have their cake and eat it too," as adequate educational opportunities *and* racial diversity may very well be achieved with one suit.

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[351] M. Puma, C. Karweit, A. Ricciuti, W. Thompson, & M. Vaden-Kiernan, *Prospects: Final Report on Student Outcomes*, Cambridge, MA (1997) *as cited by* Richard D. Kahlenberg, *The New Economic School Desegregation*, EDUCATIONAL LEADERSHIP 16, 17 (2000).
[352] David J. Armor, *Facts and Fictions about Education in the Sheff Decision*, 29 CONN. L. REV. 981, 994-96 (1997).
[353] Richard D. Kahlenberg., *The New Economic School Desegregation*, EDUCATIONAL LEADERSHIP 16, 16 (2000).

Diversity as a Compelling Interest: The Promise of *Grutter v. Bollinger*

In late 2003, the U.S. Supreme Court ruled on two affirmative action cases involving admissions to the University of Michigan: *Gratz v. Bollinger,*[354] and *Grutter v. Bollinger.*[355] Plaintiffs in *Gratz* successfully challenged the undergraduate admissions point system utilized by the University of Michigan which automatically gave minority applicants extra points for their race. Defendants were victorious in *Grutter*, in which a 5-4 Court held that race could be taken into account as one of many different factors in the review of law school applicants. The *Grutter* case was not the first time the Court had addressed the issue of affirmative action in higher education. In 1978, a divided Court struck down, in *Regents of the University of California v. Bakke*, the strict use of racial quotas, but allowed race to be a factor in admissions decisions.[356] Justice O'Connor recalls that:

> We last addressed the use of race in public higher education over 25 years ago. In the landmark *Bakke* case, we reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups. . .The decision produced six separate opinions, none of which commanded a majority of the Court. Four Justices would have upheld the program against all attack on the ground that the government can use race to "remedy disadvantages cast on minorities by past racial prejudice." Four other Justices avoided the constitutional question altogether and struck down the program on statutory grounds. Justice Powell provided a fifth vote not only for invalidating the set-aside program, but also for reversing the state court's injunction against any use of race whatsoever. The only holding for the Court in *Bakke* was that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin" . . Thus, we reversed that part of the lower court's judgment that enjoined the university "from any consideration of the race of any applicant."(Original citations omitted)[357]

[354] Gratz v. Bollinger, 123 S.Ct. 2411 (2003).
[355] Grutter v. Bollinger, 123 S.Ct. 2325 (2003).
[356] Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
[357] Grutter at 322-323.

The University of Michigan law school's "race conscious" admission policy was specifically designed to comply with Justice Powell's opinion in *Bakke*.[358] Justice O'Connor, writing for the majority, held that "today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."[359] While the majority decision in *Grutter* specifically deals with university admissions, the Court's holding may prove to be important for K-12 litigants.

Plaintiffs in both *Brown* and *Grutter* based their claims, in part, on the assertion that the equal protection rights afforded them under the fourteenth amendment had been violated. As outlined previously, the fourteenth amendment assures that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the Equal Protection of the laws.[360]

In many cases which involve fourteenth amendment challenges, the state needs only to show that there is a *rational basis* for the statute in question. However, when fourteenth amendment challenges involve a specific sub-set of issues including national origin, alien status, or race, the court will hold the state actor to a much higher level of review, known as *strict scrutiny*. Thus, because *Grutter* was a fourteenth amendment challenge involving the issue of race, the actions of the University of Michigan (the state actor in this case) were strictly scrutinized by the Court.

In order to withstand the application of strict scrutiny, the state must show "a compelling interest."[361] Further, the state action must be shown to be narrowly tailored. Justice O'Connor notes

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[358] Some legal analysts questioned whether Powell's "lone, plurality opinion" would even be binding. See David Schimmel, *Affirming Affirmative Action: Supreme Court Holds Diversity to be a Compelling Interest in University Admissions*, 180 ED. LAW REP. 401, 403 (2004).
[359] *Grutter* at 325.
[360] U.S. CONST. amend. XIV, § 1.
[361] 394 U.S. 618, 634, *as in* BARRON'S LAW DICTIONARY 171 (4th ed. 1996).

that "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative."[362] Still, the state program must not be over-broad. For example, a racial quota system like the one utilized by the University of California system in *Bakke* involved the quest for diversity - which Justice O'Connor, in *Grutter*, holds is a compelling state interest – however, it was not narrowly tailored.[363]

The Court's assertion in *Grutter* that diversity is a compelling state interest is significant for K-12 plaintiffs not so much for what was specifically said, but for what was implied. Analysis published by the National Association of School Boards (NASB) cautions that both *Gratz* and *Grutter* speak specifically to *post-secondary* educational institutions. "Among legal analysts, there remains no consensus about all of the decision's policy implications for K-12."[364] Despite this, *Grutter* clearly evidences the Court's belief that diversity in educational settings is of great value. Julie Underwood, general counsel for the NASB, argues that the "case for diversity may actually be stronger in elementary and secondary public schools."[365]

To aid in school desegregation, many school districts have utilized a type of "lottery" system for student assignments.[366] This method of student assignment has come under fire as many legal analysts have questioned whether or not it would pass legal muster under a Supreme Court review. In her majority opinion, Justice O'Connor specifically addresses the use of a lottery to determine student assignments. Justice O'Connor notes that an admissions lottery at the University of Michigan law school would "make that kind of nuanced judgment impossible, it would effectively sacrifice all

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[362] Grutter at 340.
[363] Schimmel at 404.
[364] Julie Underwood, *Grutter v. Bollinger, Gratz v. Bollinger: Implications for K-12 Diversity Policies*, NAT'L ASSOC. SCH. BDS., 1, 1 (12/08/03) available at http://www.nsba.org/site/docs/33200/33113.pdf.
[365] Underwood, *supra* note 362, at 4.
[366] *See* Nicole Achs, *Schools Keep Desegregation Plan*, BERKELEY DAILY PLANET (12-11-00) available on-line at http://www.berkeleydailyplanet.com/article.cfm?archiveDate=12-11-00&storyID=2594.

other educational values."[367] This can be valuable information for K-12 districts utilizing a lottery-type plan of student admissions. Underwood writes:

> The *Grutter* opinion is helpful for K-12 schools in that it suggests that lottery admissions programs will likely be viewed as constitutional so long as there is only one lottery, and not separate lottery pools based on race. It will not be permissible for schools or districts to set aside or hold a certain number of slots, or proportion of slots, for specific racial groups of students whether those are in a lottery, or in school or classroom assignments.[368]

While the use of a lottery system by school districts has generally been to target racial diversity, it would also likely result in socio-economic diversity. However, such programs are limited by district demographics, and can only be successful to the extent which those demographics allow for racial and socio-economic diversity. Under *Milliken,* desegregation orders cannot require racial integration on an interdistrict level. The U.S. Supreme Court has never reversed its holding in *Milliken*. Nonetheless, the recent Connecticut Supreme Court ruling in *Sheff v. O'Neill* provides new hope for desegregation and school finance equity plaintiffs alike.

Sheff v. O'Neill

Desegregation and funding equity issues have been clearly linked in one recent Connecticut state case. In 1996, the Connecticut Supreme Court ruled on *Sheff v. O'Neill.*[369] Plaintiffs in *Sheff* represented students from inner-city Hartford schools, 92% of whom were poor, minority students. In contrast, the suburban "ring" surrounding inner-city Hartford was composed of less than 5% minority students, and overall, was a population which had a very high socio-economic status.[370] Plaintiffs successfully argued that inner-city Hartford children were not receiving adequate or equal funding, leading to decreased educational opportunities. For example, at the time of *Sheff*, Connecticut spent a yearly average of $147.68 per student for textbooks and instructional supplies

[367] Grutter, at 340.
[368] Underwood, *supra* note 362, at 4.
[369] Sheff v. O'Neill, 238 Conn. 1 (Conn. 1996).
[370] Even though the state of Connecticut as a whole has the highest per capita income in the United States, the city of Hartford is the 4th poorest city in the U.S., and has the 2nd highest rate of child poverty.

overall. In contrast, students attending inner-city Hartford schools received just $77.67 in textbooks and instructional supplies.[371]

After a series of lower court appeals and legislative actions, per-pupil spending on inner-city students ($8,126 in 1991-92) had not only been equalized, but actually exceeded the amount spent on suburban Hartford students and significantly exceeded the national average ($5,500).[372] Despite this funding victory, inner-city Hartford students continued to perform at a significantly lower level than their suburban counterparts.[373] *Sheff* plaintiffs returned to court, arguing that a "substantially equal education includes not only equal funding, but also an integrated student body."[374] The victory in *Sheff* was highly controversial. It would be seven years before an implementation agreement was finally agreed upon.

In February 2003, the Connecticut state legislature voted 87-60 to accept a settlement in *Sheff*. This settlement called for the state to:

> Create eight new interdistrict magnet schools in Hartford. . . expand the Open Choice program to provide additional seats in suburban schools for minority public school students from Hartford, and . . . provide increased funding for interdistrict cooperative programs serving Hartford public school students. The parties intend for the agreement to remain in effect until June 30, 2007.[375]

As a state supreme court decision, *Sheff* is only binding precedent in Connecticut. However, the recent assertion in *Grutter* that diversity is a compelling interest certainly supports the aims of *Sheff*. Over the next three years, would-be plaintiffs from around the country will undoubtedly be closely evaluating the success of the *Sheff* settlement in raising the level of academic achievement of Hartford area students through racial and socio-economic desegregation. Demonstrated success in

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[371] *Id.*
[372] Ryan, *supra* note 33 at 540 *as quoted in* Council of Great City Schools, National Urban Education Goals: Baseline Indicators, 1990-91, 85 (1992).
[373] James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 291 n.183 (1999).
[374] *Sheff*, 238 Conn. *as quoted in* Ryan, *supra* note 61, at 291 n.184.
[375] Connecticut General Assembly, 2003-R-0112, January 27, 2003, available online at: http://www.cga.state.ct.us/2003/olrdata/ed/rpt/2003-R-0112.htm. The settlement is far from inexpensive: Analysts estimate that the implementation of the *Sheff* agreement will cost the state $45,000,000 in the first four years alone.

Hartford under the *Sheff* plan would be an important first step to securing a similar decision in the highest court of other states around the country.

CHAPTER 4

CONCLUSION

Fifty years have passed since the landmark decision in *Brown v. Board of Education*, and over the past five decades the fabric of American education has changed dramatically. The generation of youth populating today's schools knows legally segregated education only as a topic in U.S. history books. Still, in many parts of the country, schoolchildren in the 2000s attend schools which are every bit as segregated as those their parents, or even grandparents attended. While *de jure* segregation is dead and buried, *de facto* segregation is alive and well.

Recent cases such as *Dowell* and *Freeman* have made it much easier for school districts previously under judicial supervision to attain unitary status. On the surface, this seems to be a positive step in the eradication of desegregation from our national consciousness. However, over the past decades American schools have rapidly resegregated. Today, hundreds of previously segregated districts have been released from judicial oversight; many have subsequently resegregated at a staggering rate. Courts have made it clear that they are unwilling to continue to address desegregation claims *ad infinitum*. Without a new, verifiable Constitutional violation, little help will come from courts hearing desegregation cases.

Over the past thirty years, a new wave of litigation has swept the United States: school funding litigation. Primarily concerned with the disparity in educational funding which results from the reliance on property tax revenues, funding litigation has been filed in forty-five states. A historical review of desegregation and school finance case law shows that these veins of litigation are

not as separate as one might think. It could be argued that the core issue of desegregation cases has always been the issue of funding. To say that desegregation advocates toiled long and hard for the sole purpose of attaining the privilege for black students to attend majority-white schools is an affront to common sense. Black children attending majority-white schools have historically been mistreated, berated, and disparaged. It is difficult to believe that parents would be willing to subject their children to these hostile environments if they did not feel that there was a greater good to be had. Parents like Benjamin Roberts and Oliver Brown fought for the opportunity for their children to attend well-funded schools in safer neighborhoods with adequate educational resources – schools which, up until the last half-century or so, were predominantly populated by white students.

Just as desegregation cases have historically involved funding issues, race has been an issue in many school funding cases, from *Serrano v. Priest* to *Lake View v. Huckabee*. This association is a logical one, as the relationship between race and poverty has been clearly documented. Given that future desegregation lawsuits are unlikely to be successful, educational funding lawsuits can provide another alternative. Funding equity lawsuits can combine the best of both litigious efforts. However, as aptly stated by James Ryan, "school finance advocates, as the saying goes, should accordingly be careful what they wish for, because they may get it – and little else."[376] Thus, funding equity lawsuits must not only focus on the issue of per-pupil spending. Careful consideration of the relative wealth of the school community as a whole, and the benefits of racial diversity will provide maximum benefit to students.

While Connecticut's supreme court is, thus far, the only in the nation to actively seek to remedy *de facto* segregation, the plaintiff victory in *Sheff v. O'Neill* is a significant one. *Sheff*

[376] Ryan, *supra* note 33, at 540.

suggests that, at least in the eyes of one state supreme court, *de facto* segregation and unequal educational expenditures are problems the judiciary should tackle. The success of the *Sheff* settlement will be of utmost importance to plaintiffs who would pattern litigation after *Sheff*. It is simply too early to make any real determinations about the settlement's effectiveness at increasing racial and socio-economic diversity in Hartford-area schools. However, before the first "end date" of the settlement, on June 30, 2007, researchers will have a wealth of information and should be able to weigh the effectiveness of the Hartford plan.

Last year's Supreme Court decision in *Grutter* dealt specifically with post-secondary institutions. However, the Court's holding that diversity is a compelling interest provides hope for those seeking to remedy *de facto* segregation at the K-12 level. Now that the highest Court in the land has recognized diversity as a compelling interest, this gives added credence to future *Sheff*-like litigation.

Although education in America is far from what was dreamt of in *Brown* fifty years ago, there is reason for optimism. Through the combination of desegregation and educational funding litigation, American children can have the best of both worlds: adequate educational funding, *and* the social benefits of a diverse community.

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