

Judging Money

When courts decide how to spend taxpayer dollars

Since the 1970s, proponents of greater spending in disadvantaged school districts have pursued their goal through litigation in state courts. They have brought suits in 45 of the 50 states. These suits began with claims of equity, which sought to redistribute revenues from rich to poor districts. Disappointed with the results, within a decade the plaintiffs substituted “adequacy” for “equity”—and have had more success (see Figure 1).

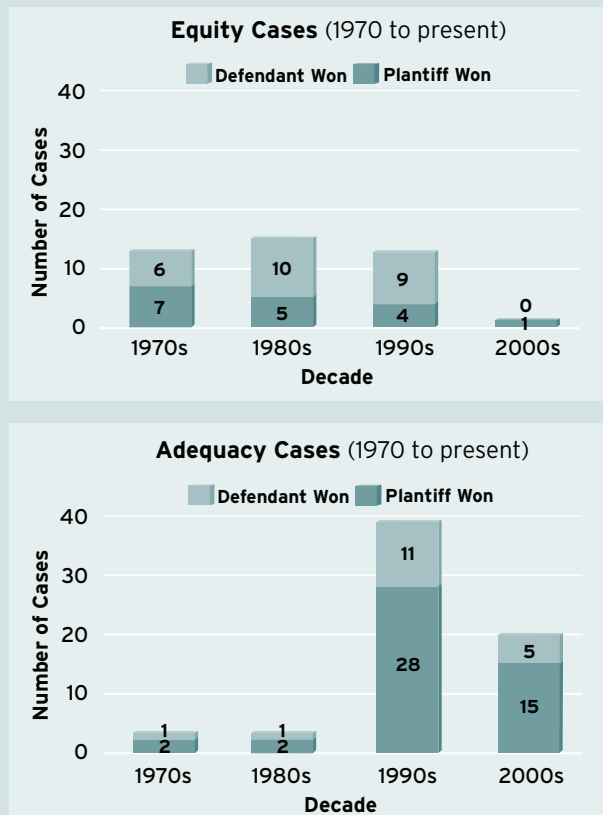
Often the victories for adequacy are only the beginning of prolonged and inconclusive struggles within the ruling courts and between the courts and legislatures or governors. But sometimes the outcomes are radical. In a path-breaking suit in Kentucky, the state supreme court in 1989 found virtually everything about that state’s schools to be unconstitutional, and the legislature responded with major reforms. More recently, in March 2006, an appellate court in New York State ordered its elected officials to increase operating aid for New York City schools by between \$4.7 and \$5.63 billion a year and by \$9.2 billion over five years for capital improvements. Adequacy lawsuits have proved a serious threat to the right of citizens to have their taxes determined by elected officials who are in a position to weigh competing claims for public support and to judge the relative efficacy of spending for particular purposes.

ILLUSTRATION / WESLEY BEDROSIAN

BY JOSH DUNN AND MARTHA DERTHICK

Adequacy En Vogue (Figure 1)

After a steady flow of equity cases during the 1970s and 80s, school finance litigation saw a huge shift to the adequacy lawsuit. Sixty-five decisions have been issued in adequacy cases through 2005, with plaintiffs winning 47 of them.



Note: Adequacy cases often include equity arguments as well.

SOURCE: Martin R. West and Paul E. Peterson, eds., *School Money Trials: The Legal Pursuit of Educational Adequacy* (Brookings Institution Press, forthcoming)

Adequacy as a Political Campaign

At first glance it appears ironic that plaintiffs have enjoyed a higher rate of success in adequacy cases than in those grounded in equity. Courts would seem to have greater legitimacy and competence in adjudicating the latter. The irony disappears, however, if school finance lawsuits are viewed as political rather than legal events. As political events, equity cases compelled the redistribution of spending for education, inciting a strong reaction from those property-rich school districts with the most to lose. Adequacy cases have the clear political advantage: they aim to enlarge the educational pie. Districts rich or poor and urban or rural, teachers and administrators, equipment suppliers, consultants, building contractors, pension funds—along with the advocacy organizations that everywhere push for more school spending—

can detect such opportunities for gain and join forces, at least up to the point at which remedies are specified and the bigger pie begins to be sliced.

Adequacy lawsuits are political events: they allocate things of value, and they propel the courts into an institutional sphere normally reserved for the legislature and the governor. Head litigators in adequacy lawsuits know that judicial decisions depend on implementation by the political branches and are alert to ways in which this might be achieved. At a 2005 conference of the adequacy movement, winning lawyers from North Carolina, Montana, and Kansas constituted a panel devoted to the subject of converting court victories into solid remedies. Beyond speaking of standard litigating tactics, such as picking plaintiffs, witnesses, and exhibits, they spoke of success at spinning the media, hiring public relations firms, and engaging a lobbying firm to work with the legislature (in Kansas), all standard political tactics. One lawyer hinted at success in having a school board attorney “from one of our [plaintiff] districts” appointed to the state supreme court (again, Kansas). They spoke of the utility of lawsuits for agenda setting—of keeping school spending inescapably before the legislature.

Implementation of national statutes is always problematic in a federal system and with a national legislature that habitually underfunds its promises. The adequacy campaign, a national movement committed to litigating in state courts, conceives of itself as stepping into this breach. The standards-and-accountability movement—which spread nationwide through the 1990s and reached a climax with passage of the No Child Left Behind Act (NCLB) in 2002—has provided a political stepstool to adequacy suits. The keynote speaker at the adequacy movement conference was Representative George Miller, a California Democrat and one of the principal authors of NCLB. He told the conference, “You have to continue to litigate. Only through litigation will we capture attention. . . . You can help us realize the goals and live up to the promise of No Child Left Behind.” Michael Rebell, leader of the adequacy movement in New York City and more broadly, has chastised critics for failing “to grasp that the education adequacy lawsuits have become the driving force for achieving the aims of the standards-based-reform movement.”

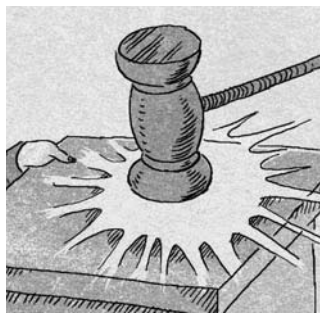
The Expanding Reach of the Courts

Because the challenge to separation of powers from adequacy lawsuits is so plain, one might expect them to have given rise to constitutional debates within the states. Angered legislators have sometimes proposed constitutional amendments in defense of their prerogatives. Conservative Republican members of the Kansas legislature in 2005 tried to couple school spending that had been compelled by courts with a proposed amendment that would have prohibited courts from ordering

the legislature to make appropriations. The proposal failed to get the two-thirds majority in the Kansas house that was needed for submission to the electorate. More school spending had support from Democrats and a few Republicans in the legislature despite the challenge to the institution.

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

describing it as “a function of separation of powers.” His detailed definition could justify dismissing education reform litigation for many reasons, among them “a lack of judicially discoverable and manageable standards for resolving it . . . or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.” For advocates of judicially imposed reform, “judicially manageable standards” has been a long-standing obstacle, as it requires that there actually be a solution. If courts do not think that they have a manageable solution, institutional self-interest can restrain them. In *San Antonio Independent School District v. Rodriguez*, a Supreme Court case on equity of school finance, Justice Lewis F. Powell in 1973 cited the



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Given the absence of widespread constraints on the courts from legislators pushing back, it has been up to the courts to work their way through the issue of whether or not these cases are appropriate for court determination (“justiciability”). Most courts have elected to advance into the legislative terrain, all the while denying that they are doing any such thing.

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

The Political Question Doctrine

Based on evidence from state courts, where its application is wildly uneven in remarkably similar cases, the political question doctrine does not have much force of its own. Courts deploy it or ignore it as they wish and use it only if they are predisposed not to enter into a controversy.

Justice William F. Brennan gave the standard formulation of the political question doctrine in *Baker v. Carr*,

lack of judicially manageable standards as a reason for leaving the issue to elected bodies.

The lack of manageable standards has been a continuing source of frustration for education reform litigants. The standard of equal spending ultimately proved unattractive to plaintiffs since it provided powerful incentives to simply reduce spending for everyone. Justiciability here faced both legal and political obstacles: equal spending failed to promise more money for the poverty populations of central cities, where per-pupil expenditures were often relatively high (see “Educational Jujitsu,” *features*, Fall 2002). Arguments for anything more than equal spending seemed devoid of precise content or guidance. The solution to the dilemma came courtesy of the standards movement. According to Rebell, the standards movement “provided the courts with practical tools for developing judicially manageable approaches for implementing effective remedies.” All that remained was marrying standards to the idea of adequacy. Adequacy tied to standards solves the legal and political problems of justiciability.

Defining Adequacy

In *Rose v. Council for Better Education* the Kentucky Supreme Court established an “operative definition of adequacy,” which other state courts have since “adopted,” according to Rebell. The court concluded that an adequate education requires among other things “sufficient oral and written

communication skills” for functioning “in a complex and rapidly changing civilization,” “sufficient knowledge of economic, social and political systems to enable the student to make informed choices,” and a “sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage.” Since the Kentucky court did not mandate a specific set of reforms, this broad definition is more political rhetoric than a reasonable judicially manageable standard. Leaving aside the inherent ambiguity of terms such as “sufficient,” “informed,” and “grounding,” the court’s definition in fact assumes that in a complex and rapidly changing society the skills needed, and therefore constitutionally required, will change as well.

On close inspection it becomes clear that there is no evidence of inadequacy without evidence of inequity. Two prominent and recent adequacy cases—from New York (*Campaign for Fiscal Equity v. New York*) and Kansas (*Montoy v. State*)—show that when courts attempt to overcome the problem of justiciability either they will founder trying to establish what an adequate education actually is or they will retreat to the legally safe but politically dangerous standard of equity.

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

When marshaling evidence for inadequacy, DeGrasse looked at what he called the “inputs” and “outputs” of the system. The inputs were “the resources available in public schools” and the outputs were the “measure of student achievement.” Evidence for the inadequacy of the inputs was based solely on equity. For example, New York City teachers were found on a variety of levels to be inferior to their statewide counterparts. DeGrasse was also unable to present any independent standards of inadequacy when discussing outputs. New York City public schools have lower graduation rates and test scores than other New York schools. This is at best a demonstration of inequity.

Socioeconomic factors initially seem to offer a way out of this dilemma. DeGrasse offers a very grim picture of the socioeconomic condition of New York City public school students. They suffer from poverty, homelessness, poor health, teen pregnancy, and frequent change of residence. Such obstacles raise the question of whether the lower “outputs” of the school system are the result of inadequate “inputs.” DeGrasse seems to make the case that the quality of the New York City

schools is not to blame. The state’s highest court, the Court of Appeals, apparently recognized this even as it approved DeGrasse’s ruling, stating, “Decisions about spending priorities are indeed the Legislature’s province, but we have a duty to determine whether the State is providing students with the opportunity for a sound basic education. While it may be that a dollar spent on improving ‘dysfunctional homes’ would go further than one spent on a decent education, we have no constitutional mandate to weigh these alternatives.”

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

The adequacy advocates driving the litigation have searched along with the courts for conceptual foundations. Rebell says that a “core constitutional concept” has emerged from recent adequacy lawsuits. This concept, he says, “emphasizes that an adequate education must (1) prepare students to be citizens and economic participants in a democratic society; (2) relate to contemporary, not archaic educational needs; (3) be pegged to a ‘more than minimal’ level; and (4) focus on opportunity rather than outcome.”

These components are hopelessly unclear. For instance, to explain the meaning of “to be citizens and economic participants in a democratic society” he says that “there is widespread agreement that an adequate system of education is one that ‘ensures that a child is equipped to participate in political affairs and compete with his or her peers in the labor market.’” As evidence of this agreement, he quotes the Vermont Supreme Court’s opinion in its largely equity-, rather than adequacy-based decision, which held that the state constitution guarantees “preparation ‘to live in today’s global marketplace.’” The idea that education should “relate to contemporary, not archaic educational needs” means that as “the level of skills necessary to participate as a citizen and as a wage-earner in society rise, expectations for an adequate education will also necessarily rise.” Defining a generality with more generalities does not make a

generality more precise. Thus, adequacy advocates turn to money. The courts ensure “the availability of essential resources.” As *CFE v. New York* shows, the easiest way to gauge “essential resources” is by comparison with other school districts.

Constitutional Language

The state constitutions’ education clauses also raise questions about the appropriateness of judicial intervention based on separation of powers. However, the language is unlikely to undermine the movement as the political question doctrine potentially could. The notion that the constitution requires an “adequate” education is politically popular. But that does not mean that the interpretation is proper.



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State education clauses are characterized by generality and often by their delegation of authority to the legislature. Some clauses simply require free public schools. Others imply a standard of quality such as “thorough and efficient” or of “high quality.” The strongest give education a special status, calling it “fundamental” or “primary.” While scholars and activists have made much of these differences, constitutional language has had little apparent influence on state courts. Adequacy suits have failed in states with stronger language such as Maine and Illinois, but won in states with weaker language such as North Carolina and New York. The reason is the distinctions between weak and strong education clauses have been too finely drawn. It is not unfair to call all of them, as Clayton Gillette has, “inherently nebulous.” What for instance does it mean to say that education is a “primary” obligation of a state? How does one know when the state has not made it a “primary” obligation?

The obvious question is whether it is appropriate for the judiciary to find the standards that it imposes on legislatures in these generalities. In states that have rejected adequacy suits, the courts’ analyses have hinged on the inherent arbitrariness of finding a specific standard and the unconstitutionality of applying a static interpretation on clauses whose meaning must evolve. The Illinois Constitution, with one of the most demanding education clauses, says that the state must “provide for an efficient system of high

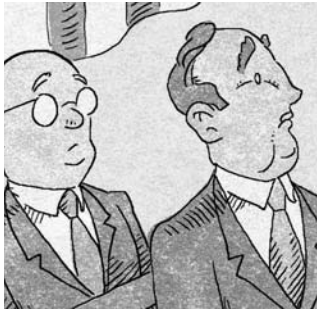
quality public educational institutions and services.” But twice the court held that “[i]t would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense.”

Since education clauses provide little textual substance, it is unsurprising that their analysis by courts is occasionally nothing more than a bald assertion obscured by fallacious reasoning. In *Abbeville v. State* from South Carolina, the state supreme court simply asserted that the education clause, in spite of its lack of qualitative language, must have a qualitative component. In *CFE v. New York*, another state with a spare education clause, Judge De Grasse without apology explained that in education litigation courts “are called on to

give content to Education Clauses that are composed of terse generalities,” which in New York’s case is “The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” From that clause, De Grasse determined that the New York City schools were unconstitutional in everything from library expenditures to arts courses. The judge had become completely unmoored from the text and was sailing in purely policy waters.

Policymaking in the Courts

Despite the assurances of adequacy advocates that courts now have the tools necessary for implementing effective reforms, there are reasons for skepticism. For one, there is a well-developed body of literature documenting the institutional difficulties that courts have in creating social change, beginning with Donald Horowitz’s pioneering book of 1977, *The Courts and Social Policy*. This literature grew up around the study of federal courts, and to the extent that state courts are beginning to behave like federal courts, much of it applies. Horowitz said that litigation is a poor vehicle for making policy because among other things the adversarial format produces unreliable information and artificially isolates issues that are connected in the real world. Examples of these problems can be found in adequacy litigation.



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An example of judicial action with inadequate information is to be found in Kansas, where a willfully blinkered court chose to rely on one consultant's study, by the firm of Augenblick & Myers (A&M), in ordering how much the legislature should appropriate. In *Montoy v. State*, the Kansas Supreme Court said it would be guided by the A&M study because 1) it was "competent evidence presented at trial"; 2) the legislature "maintained the overall authority to shape the contours of the study"; 3) it was "the only analysis resembling a cost study" before the court; and 4) the state board of education and department of education had concurred with the results. The implication of this reasoning—other than that legislatures must follow the recommendations of studies that they commission—is that the court was unwilling to seek as much information as possible. The court assumed the reliability of the study and impugned the motives of members of the legislature who disputed its findings. It repeatedly said that it must make its decision "based solely on the record before us," an artificial but convenient standard peculiar to litigation.

A second institutional defect is that courts must isolate problems that are connected and need a comprehensive approach if they are to have any chance of being solved. Education is a broad and complicated area of public policy, which is intertwined with other broad and complicated areas of social policy. As courts look at the problems of education through the narrow lens of the legal process, their approach is inherently piecemeal.

A Radical Transformation Is Underway

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

If money—and money alone—were all that is required to educate the nation's children, and if courts alone could

provide the money, then perhaps one would be willing to entertain, if only for a fleeting moment, this constitutional departure. But then one would recall that other public functions exist, such as health, transportation, and higher education, that make large and urgent claims on the budgets of state governments; that problems other than a lack of money afflict the schools, such as students who arrive unprepared for learning or life in a classroom; and that evidence for the efficacy of money per se is at best mixed. One might then be less willing to have the core institutions of democratic government cast aside.

The adequacy movement would like to secure a foundation in federal law for its claims. This might be done by importing, via amendments to the No Child Left Behind Act, some of the rights language produced by state courts. "We want to see the issue of equity on the national agenda," Arthur E. Levine, then president of Teachers College of Columbia University, told an interviewer in 2005. Rebell has moved to Teachers College to direct its equity campaign. A West Coast branch of the movement has set up operations as the Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity at the school of law at the University of California, Berkeley. One of its initial projects in 2004–05 was to convene an interdisciplinary working group called "Rethinking *Rodriguez*: Education as a Fundamental Right." The aim was to inquire into what would be required to make education a fundamental right—"that is, a *right belonging to all children, protected by an enforceable guarantee of 'adequacy' or 'equality' or both.*"

The successes of the adequacy movement in state courts thus are to be seen as stepping stones to the broader arena of national legislation and litigation. If the adequacy-cum-equity advocates succeed—wedding centralization and judicialization in a regime of a federally guaranteed right to education and federally prescribed school spending—transformation of the traditionally local and democratic governance of schools in the United States, already far advanced, will be complete.

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