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JUDICIAL ANALYSIS DURING THE THIRD WAVE OF SCHOOL FINANCE LITIGATION: THE MASSACHUSETTS DECISION AS A MODEL†

WILLIAM E. THRO*

Since the late 1960s, litigants, alarmed at the existence of funding disparities between local school districts¹ and believing that it is wrong for local property values to determine the quality of a child's education,² have challenged the validity of their state's public school financ-

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The views expressed in this Article are entirely those of the author and do not necessarily represent the views of the Attorney General of Colorado, the Colorado State Board of Education or any agency of the State of Colorado. The Author gratefully acknowledges the comments and suggestions of Robin R. Rossenfeld.

¹ Indeed, these disparities in local funding have become so great that "[i]f a state without a previous history of public financing were now proposing the initiation of a plan, it is highly unlikely that the system of dual responsibility . . . [both local and state] would be adopted." Annette B. Johnson, *State Court Intervention In School Finance Reform*, 28 CLEV. ST. L. REV. 325, 327-28 (1979).

² Although local school districts receive funds from both federal and state sources, all local school districts, except those in Hawaii, raise much of the money necessary for operations through a percentage tax, with the rate set by the local residents, on the value of the real property in the district.

The states, however, have recognized the existence of funding disparities and have utilized three distinct methods of correcting the disparities. First, the state may give flat rate grants of a certain amount of money per pupil or per teacher to a given school district, regardless of its ability to raise funds through the local tax base. Second, the state may enact a so-called foundation

ing methods in an effort to win finance reform.³ These challenges to the school finance systems of the various states can be divided into three distinct "waves" of cases.⁴ Each wave has its own identifiable set of characteristics with respect to legal theory, methods of judicial analysis and the plaintiffs' success rate. Although each wave has profound implications for American education, the most significant wave,

program which guarantees that the state will provide funds up to a certain level for any district that is unable to raise that level of money through taxes. Third, and probably most effectively, the state may enact a power equalization plan whereby the state guarantees the same amount of money per pupil to all districts that tax themselves at the same rate. Johnson, *supra* note 1, at 328-30.

For the most part, these remedies have failed to correct the vast disparities. Indeed, public school finance reform litigation has consistently involved states using either the second or third method, or both methods. *Id.*; see also John E. Coons et al., *Educational Opportunity: A Workable Test For State Financial Structures*, 57 CAL. L. REV. 305, 313-16 (1969).

³ See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1978); Parker v. Mandel, 344 F. Supp. 1068 (D. Md. 1972); Van Duzart v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970); McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969); Opinion of the Justices, 624 So.2d 107 (Ala. 1993); Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971) (hereinafter *Serrano I*); Serrano v. Priest, 557 P.2d 929 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977) (hereinafter *Serrano II*); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982) (en banc); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1982); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Blase v. State, 302 N.E.2d 46 (Ill. 1973); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989); Gould v. Orr, 506 N.W.2d 349 (Neb. 1993); Abbott v. Burke, 575 A.2d 359 (N.J. 1990); Robinson v. Cahin, 303 A.2d 273 (N.J. 1973), *cert. denied sub nom.* Robinson v. Dickey, 414 U.S. 976 (1974) (hereinafter *Robinson I*); Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); Britt v. North Carolina State Bd. of Educ., 357 S.E.2d 432 (N.C. Ct. App.), *aff'd mem.*, 361 S.E.2d 71 (N.C. 1987); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247 (N.D.), *petition for reh'g filed*, 1994 N.D. LEXIS 26 (N.D. 1994); Board of Educ. of the City Sch. Dist. of the City of Cincinnati v. Walter, 390 N.E.2d 813 (Ohio 1979); Fair Sch. Fin. Council of Oklahoma, Inc. v. State, 746 P.2d 1135 (Okla. 1987); Olsen v. State, 554 P.2d 139 (Or. 1976); Coalition for Equitable Sch. Funding v. State, 811 P.2d 116 (Or. 1991); Danson v. Casey, 399 A.2d 360 (Pa. 1979); Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988); Tennessee Small Sch. Sys. v. McWhorter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978) (en banc); Northshore Sch. Dist. No. 417 v. Kinnear, 530 P.2d 178 (Wash. 1974); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1986), *cert. denied*, 449 U.S. 824 (1980). For a discussion of those cases decided before 1990 and of the general role of state constitutional provisions in public school finance reform litigation, see generally *Render Them Safe*, *supra* note *, at 1656-78.

⁴ The idea of waves of litigation comes from Thro, *Third Wave*, *supra* note *. This idea has been reiterated by other scholars, see, e.g., Gail F. Levine, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. LEGIS. 507, 507-08 (1991); Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POLICY 517, 520-35 (1991).

in terms of cases,⁵ numbers of plaintiffs' victories⁶ and amount of substantial change,⁷ is the current third (post-1988) wave of cases.⁸ Indeed, since 1988, supreme courts in seven states, Alabama,⁹ Kentucky,¹⁰ Massachusetts,¹¹ Montana,¹² New Jersey,¹³ Tennessee¹⁴ and Texas,¹⁵ have struck down their respective school finance systems.¹⁶

This Article explores the methodology of judicial decision-making in this most recent and significant wave of litigation by focusing on the 1993 Massachusetts decision of *McDuffy v. Secretary of the Executive Office of Education*, and comparing the Massachusetts methodology with that of other third wave decisions.¹⁷ The Article accomplishes its

⁵ At present, third wave cases have been decided or are pending in more than half of the states. Indeed, litigation is so widespread that the National Association of Attorneys General is attempting to coordinate efforts and share resources among its members.

⁶ To date, the plaintiffs are 7-3-1 at the state supreme court level. The tie comes from North Dakota where a majority of the North Dakota Supreme Court wished to invalidate the system, but the vote was short of the super majority required by the State Constitution. *Bismarck Pub. Sch. Dist. No. 1*, 511 N.W.2d at 247. While this Article was being written, the North Dakota Supreme Court was considering a petition for rehearing on the case. 1994 N.D. LEXIS 26 (N.D. 1994). The plaintiffs have won trial court victories in several other states.

⁷ Unlike the plaintiffs' victories in the first and second waves, which often resulted in only cosmetic changes, the third wave cases have resulted in major changes. For example, Kentucky completely reformed all of its education laws and diminished the power of the Superintendent of Public Instruction; meanwhile, the Texas Legislature continues to search for an acceptable method of funding education.

⁸ Opinion of the Justices, 624 So.2d 107 (Ala. 1993); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Bismarck Pub. Sch. Dist. No. 1 v. State*, 511 N.W.2d 247 (N.D. 1994); *Coalition for Equitable Sch. Funding v. State*, 811 P.2d 116 (Or. 1991); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989); *McDuffy v. Secretary of the Exec. Office of Educ.*, 615 N.E.2d 516 (Ma. 1993); *Gould v. Orr*, 506 N.W.2d 349 (Neb. 1993).

⁹ Opinion of the Justices, 624 S.E.2d at 109. This decision is unique in that the Alabama Supreme Court simply said that the State had to obey a trial court ruling which was never appealed. The Alabama Supreme Court did not pass on the merits. *Id.*

¹⁰ *Rose*, 790 S.W.2d at 213.

¹¹ *McDuffy*, 615 N.E.2d at 553-54.

¹² *Helena Elementary Sch. Dist. No. 1*, 769 P.2d at 690.

¹³ *Abbott*, 575 A.2d at 407-08.

¹⁴ *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 154-55 (Tenn. 1993).

¹⁵ *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989).

¹⁶ The Supreme Courts of three states, Minnesota, Nebraska and Oregon have upheld their school finance systems. See *Skeen v. State*, 505 N.W.2d 299, 315-16 (Minn. 1993); *Gould v. Orr*, 506 N.W.2d 349, 353 (Neb. 1993); *Coalition for Equitable Sch. Funding v. State*, 811 P.2d 116, 118-19 (Or. 1991). For a commentary on the Oregon decision, see Thro, *Implications, supra* note *, at 1016-21.

¹⁷ 615 N.E.2d 516 (Ma. 1993). The Massachusetts decision really is the best model to date for third wave judicial analysis. Unlike the courts in other states, the Massachusetts Supreme Judicial Court explicitly addressed most of the questions common to third wave cases. *Id.* at 523.

objective in three sections. The first section explores the history of school finance and the characteristics of all three waves.¹⁸ It pays special attention to the distinguishing characteristics of third-wave cases that separate them from the first two waves. The second section identifies issues which are common to all third-wave school finance cases.¹⁹ Finally, the Article examines third-wave judicial analysis by reviewing the way the Massachusetts court resolved these common issues, and by comparing the Massachusetts resolution to those of other states.

I. HISTORY OF SCHOOL FINANCE LITIGATION AND CHARACTERISTICS OF THE THIRD-WAVE CASES

During the first wave of school finance cases,²⁰ which lasted from the late 1960s until the 1973 United States Supreme Court decision in *San Antonio Independent School District v. Rodriguez*,²¹ litigation arose under the Federal Constitution's Equal Protection Clause.²² Essentially, the plaintiffs asserted either that all children were entitled to have the

Courts confronted with this issue in the future could do much worse than imitate the Massachusetts court.

¹⁸This section is intended to provide general background for readers who may not be familiar with school finance litigation and the surrounding literature.

¹⁹As explained *infra* notes 47-54 and accompanying text, the five common questions are: (1) is the suit primarily a quality suit or an equality suit; (2) if a quality suit, does the education clause provide a particular standard of quality; (3) if a particular standard is mandated, what is that standard; (4) does the present system meet that standard; and (5) if the present system does not meet the standard, what role, if any, does the present financial system play in this determination.

²⁰*San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Parker v. Mandel*, 344 F. Supp. 1068 (D. Md. 1972); *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

²¹411 U.S. 1 (1973).

²²It was thought that the Federal Constitution's equal protection clause, U.S. CONST. amend XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the law."), might include a guaranteed right to substantially equal funding for all school districts within a given state. This theory of using the Federal Equal Protection Clause to gain public school finance reform was initially rejected by two federal district courts. In *McInnis v. Shapiro*, an Illinois federal district court conceded that higher funding levels meant a higher quality of education. 293 F. Supp. 327, 331 (N.D. Ill. 1968). However, the court could not articulate a standard for determining if the Constitution was violated. *Id.* at 335-36. Similarly, in *Burruss v. Wilkerson*, a Virginia district court, relying on *McInnis*, urged the plaintiffs to lobby the legislature to implement finance reform. 310 F. Supp. 572, 574 (W.D. Va. 1969). As one scholar observed: "Neither suit was successful because the courts, having construed the plaintiffs' claims as seeking a system which provided resources on the basis of educational 'need,' felt there were no manageable standards for a court to determine such 'need.'" Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 1977 DUKE L.J. 1099, 1101 (1977).

Accordingly, the public school finance reform advocates developed a new, less complex theory, called the "fiscal neutrality" theory, which "focused on freeing the tie between level of expenditures and district property wealth" rather than on the more amorphous concept of

same amount of money spent on their education, or that children were entitled to equal educational opportunities ("equality suit"). In effect, those equality suits were premised on the belief that more money meant a better education and on a lack of tolerance for any differences in money or opportunities.²³

Similarly, during the second wave,²⁴ which began with the New Jersey Supreme Court's decision in *Robinson v. Cahill*²⁵ and lasted until early 1989, the emphasis continued to be on equality suits.²⁶ However, because *Rodriguez* had foreclosed the use of the Federal Constitution, the plaintiffs were forced to rely on state constitutional

"need." *Id.* The fiscal neutrality theory was developed in JOHN E. COONS ET AL., *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970) and discussed in Levin, *infra*, at 1101 n.10.

The new "fiscal neutrality" theory was first presented to a court in *Serrano I*, 487 P.2d 1241, 1244 (Cal. 1971). In *Serrano I*, the California Supreme Court accepted the new theory and, accordingly, held that the state's school financing plan violated both the federal and state equal protection guarantees because it made an education "a function of the wealth of (the child's) parents and neighbors." *Id.* at 1244, 1263.

The acceptance of the fiscal neutrality theory by the California Supreme Court in *Serrano I* led to the first wave of public school finance reform litigation. "For eighteen months, school finance systems in state after state were challenged on the basis of the 'fiscal neutrality' theory . . ." Levin, *supra* at 1099. In fact, suits were filed in more than two thirds of the states. *Id.* at 1101.

²³To prevail under this equality theory, the plaintiffs had to persuade the court that education was a fundamental right, see *Serrano II*, 557 P.2d 929, 951 (Cal. 1976); *Horton v. Meskill*, 376 A.2d 359, 378-74 (Conn. 1977); *Pauley v. Kelly*, 255 S.E.2d 859, 864-65 (W. Va. 1979); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 333 (Wyo. 1980), or that wealth was a suspect class or that the finance system was irrational, see *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983).

²⁴See, e.g., *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Serrano II*, 557 P.2d 929 (Cal. 1976); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982) (*en banc*); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1982); *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *Britt v. North Carolina State Bd. of Educ.*, 357 S.E.2d 432 (N.C.), *aff'd mem.*, 361 S.E.2d 71 (N.C. 1987); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1993); *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982); *Board of Educ. of the City of Cincinnati v. Walter*, 390 N.E.2d 813 (Ohio 1979); *Fair Sch. Fin. Council of Oklahoma, Inc. v. State*, 746 P.2d 1135 (Okla. 1987); *Olsen v. State*, 554 P.2d 139 (Or. 1976); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979); *Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978) (*en banc*); *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980).

²⁵303 A.2d 273 (N.J. 1973). For a contemporary assessment of the potential impact of the *Robinson* decision, see Paul L. Tractenberg, *Reforming School Finance Through State Constitutions: Robinson v. Cahill Points The Way*, 27 RUTGERS L. REV. 365, 372 (1973); Paul L. Tractenberg, *Robinson v. Cahill: The Thorough and Efficient Clause*, 38 LAW & CONTEMP. PROBS. 312, 329-31 (1973); Ruvoldt, *Educational Financing In New Jersey: Robinson v. Cahill And Beyond*, 5 SETON HALL L. REV. 1, 15-26 (1973).

²⁶The exception was the Washington case which was a quality suit. *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 85-87 (Wash. 1978).

provisions,²⁷ particularly state equal protection clauses²⁸ and, to a much lesser extent, state education clauses.²⁹ Although the plaintiffs were

²⁷The state constitutions are fundamentally different from their federal counterpart, Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Constitution's Declaration of Rights*, in RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 239, 241-42 (Bradley D. McGraw ed., 1984). As Professor Howard observed, "[i]n ways that are simply beyond their reach at the federal level, the people of a state have the opportunity to make immediate choices about fundamental issues of constitutional law." A.E. Dick Howard, *Introduction: A Frequent Recurrence To Fundamental Principles*, in RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW xxi (Bradley D. McGraw ed., 1984) (hereinafter *Introduction*).

For example, it has been observed that the Federal Constitution is one of limited powers (the federal government can only do those things explicitly or implicitly specified in the document) while the state constitutions are limitations on otherwise unlimited power (the states can do anything except that prohibited by the federal or state constitutions). State constitutions are also much more "political" in that they can be easily amended to reflect the current values. In addition, state constitutions often protect individual rights, such as the right to an education, that are not guaranteed by the federal charter. Utter, *supra*, at 242. See also Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1144-45 (1978).

Finally, unlike the Federal Constitution which has been amended only seventeen times since 1791, state constitutions are frequently amended and often completely rewritten and revised. For a review of the factors that should be considered in revision of a state constitution, see generally May, *Texas Constitutional Revision: Lessons*, 66 NAT'L CIVIC REV. 64 (1977); A.E. Dick Howard, *Constitutional Revision: Virginia and the Nation*, 9 U. RICH. L. REV. 1 (1974); Bradshaw, *Constitutional Revision in a Southern State*, 19 TENN. L. REV. 734 (1947); MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 67-85 (W.B. Graves ed., 1960). See also Courts Oulahan, *The Proposed New Columbia Constitution: Creating a "Manacled State"*, 32 AM. U. L. REV. 635 (1983) (discussing proposed constitution for Washington, D.C. if it ever became state).

²⁸For purposes of this Article, the term "state equal protection clause" refers to the few specific equal protection clauses or those provisions which have been interpreted as mandating equal protection. See Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1196 (1985). For example, N.J. CONST. art. I, ¶ 1, which while not being an explicit equal protection clause, has been interpreted as having the same or at least a substantially similar effect as the Federal Equal Protection Clause. For a discussion of equal protection analysis during the first and second waves, see generally, *Render Them Safe*, *supra* note *.

²⁹An education clause, which exists in every state constitution except that of Mississippi, mandates that some sort of system of free public education system be maintained. See ALA. CONST. art. 14, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, §§ 1, 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § VII, ¶ 1; HAWAII CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. 8, § VIII, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. 8, § VIII; MD. CONST. art. VIII, § 1; MASS. CONST. ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MO. CONST. art. 9, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. 83; N.J. CONST. art. VIII, § 4; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. VIII, § 2; N.D. CONST. art. VII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14, R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. 22, § 3 WYO. CONST. art. VII, § 1.

able to prevail in Arkansas,³⁰ California,³¹ Connecticut,³² New Jersey,³³ Washington,³⁴ West Virginia³⁵ and Wyoming,³⁶ the overwhelming majority of the cases resulted in victories for the state.³⁷

In contrast, the third wave,³⁸ which began with plaintiff victories in Montana,³⁹ Kentucky⁴⁰ and Texas⁴¹ in 1989 and continues to the present, has been fundamentally different in three ways. First, instead of emphasizing equality of expenditures, the plaintiffs have argued that all children are entitled to an education of at least a certain quality and that more money is necessary to bring the worst school districts up to the minimum level mandated by the state education clause ("quality suit"). In these suits, the emphasis has been on differences in quality of education delivered, rather than on the resources available to the districts.⁴² The school systems are being struck down not because some districts have more money than others, but because the quality of education in some schools, not necessarily the poorest in financial terms, is inadequate.

Second, rather than relying on the state equal protection clause, which had been the focus of the school finance provisions prior to 1989, the new wave decisions have been based exclusively on the education clauses of individual states' constitutions. This represents a profound shift in litigation strategy.⁴³ Because the interpretation of the education clauses has fewer implications for other areas of the law, this shift appears to make plaintiffs' victories more likely. Consequently, if the plaintiffs can prove that some schools are below the constitutional

To hold that an education clause mandates school finance reform, a court would have to find that the presence of funding disparities indicates that the legislature has failed to meet the obligation imposed by the clause.

³⁰ *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 95 (Ark. 1983).

³¹ *Serrano II*, 557 P.2d 929, 952-53 (Cal. 1976).

³² *Horton v. Meskill*, 376 A.2d 359, 374-75 (Conn. 1977).

³³ *Robinson v. Cahill*, 303 A.2d 273, 296-97 (N.J. 1973).

³⁴ *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 104 (Wash. 1978).

³⁵ *Pauley v. Kelly*, 255 S.E.2d 859, 883-84 (W. Va. 1979).

³⁶ *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 335-36 (Wyo. 1980).

³⁷ See *supra* note 24 for other cases.

³⁸ See *supra* note 8.

³⁹ *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 690 (Mont. 1989).

⁴⁰ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 213 (Ky. 1989).

⁴¹ *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989).

⁴² Underwood & Sparkman, *supra* note 4, at 536-37, 543; Buchanan & Versteegen, *School Finance Litigation in Montana*, 66 EDUC. L. REP. 19, 32 (1991); Thro, *Third Wave*, *supra* note *, at 238-39.

⁴³ Underwood & Sparkman, *supra* note 4, at 536; Buchanan & Versteegen, *supra* note 42, at 32; Thompson, *School Finance and the Courts: A Reanalysis of Progress*, 59 ECON. L. REP. 945, 960-61 (1990); Thro, *Third Wave*, *supra* note *, at 239.

standard and that this deficiency is caused by a lack of resources, it becomes, theoretically, much easier for them to prevail.⁴⁴

Third, the courts have been more sweeping in their pronouncements and their willingness to take control of the financing of education. In the 1989 decision of *Rose v. Council for Better Education, Inc.*, Kentucky's highest court invalidated not only the finance system but every statute relating to the public schools, and then ordered the legislature to design a new system.⁴⁵ When the Texas Legislature attempted to correct its educational finance system, the Texas Supreme Court, in the 1991 decision of *Edgewood Independent School District v. Kirby*, held that the remedy was inadequate and ordered the legislators to try again.⁴⁶ Previously, the courts had readily accepted the legislative correction.

This emphasis on quality of education rather than on equality of funding, based on the narrow education clauses rather than the broad equal protection provisions, and requesting sweeping reform accompanied by continued court supervision, represents the future of school finance reform litigation.

II. COMMON QUESTIONS IN ALL THIRD WAVE CASES

In every school finance case in the third wave, there are a number of common issues.⁴⁷ In *McDuffy v. Secretary of the Executive Office of Education*, the Supreme Judicial Court of Massachusetts identified several significant issues when it observed:

[W]e shall restrict ourselves to a determination whether the constitutional language of Part II, C. 5, § 2, is merely hortatory or aspirational, or whether [it] imposes instead a constitutional duty on the Commonwealth to ensure the education of children in the public schools.

We conclude that a duty exists. Second, we shall attempt to describe the nature of that duty and where it lies. Third, we shall consider whether on this record such a duty is shown to be violated.⁴⁸

⁴⁴ In the recent Oregon case, however, the plaintiffs were unable to prevail. See *Coalition for Equitable Sch. Funding v. State*, 811 P.2d 116, 121 (Or. 1991).

⁴⁵ 790 S.W.2d 186, 213 (Ky. 1989).

⁴⁶ *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 495-96 (Tex. 1991).

⁴⁷ Many, but not all, third wave cases also raise questions involving standing, adequacy of pleading, and issues related to claims under the state equal protection clause.

⁴⁸ *McDuffy*, 615 N.E.2d at 519.

The *McDuffy* court, however, neglected to mention two additional issues: (1) whether the suit was a quality suit or an equality suit; and (2) if there was a violation, what role, if any, money played in the violation.⁴⁹ When these two additional issues are combined with the three issues expressly identified in *McDuffy*, a five-question model for all third wave judicial analysis emerges.

First, before a court can properly analyze any school finance suit, it must ascertain, preferably explicitly, whether the litigation before it is primarily an equality suit or a quality suit. Obviously, if the case is primarily an equality suit, application of quality suit analysis, which is detailed below, is totally inappropriate. In such a case, the court should utilize the equal protection analysis that was common to first and second wave cases. Consequently, such questions as whether education is a fundamental right⁵⁰ or whether the school finance system is irrational will dominate the analysis.

Second, if the court finds that it has a quality suit, it must begin its analysis by determining if the education clause imposes a specific standard of quality or is "merely hortatory or aspirational."⁵¹ In making this assessment, the court should recognize that the mere fact that a state constitution has an education clause does not mean that a particular standard of quality is necessarily mandated. After all, forty-nine states have education clauses of some form.⁵² Yet, the clauses have a variety of different wordings. Given the differences in wording, courts should not assume that all of them mandate the same or nearly the same quality standard.⁵³ Instead, the court should focus on the actual language of the education clause and the way it compares to the educational provisions of other states.

As Professors Grubb and Ratner have independently observed, the state education clauses can be divided into four categories based upon

⁴⁹ Arguably, there is an additional issue of whether the judiciary or the legislative branch will craft the remedy for the violation. Because every court to date has deferred to the legislature, however, at least initially, this appears to be a non-issue. Moreover, if a court did not defer to the legislature, it probably would be exceeding its proper role.

⁵⁰ When confronted with a state equal protection argument in public school finance reform cases, state courts generally behave as they do in other equality contexts and use the federal strict scrutiny/rational basis framework. The state courts, however, have consistently chosen to employ a variety of independent tests for fundamentality within the federal framework. See *Render Them Safe*, *supra* note *, at 1670-78.

⁵¹ *McDuffy*, 615 N.E.2d at 519.

⁵² See the list of education clauses, *supra* note 29.

⁵³ As discussed *infra* notes 54-59 and accompanying text, the education clauses can be divided into four distinct categories based on the degree of duty imposed.

the duty imposed on the state legislature.⁵⁴ In some states, "Category I" clauses impose a legislative duty which is met by simply establishing a public school system.⁵⁵ In other states,⁵⁶ "Category II" clauses require that the system be of a specific quality or have some characteristic such as "uniformity."⁵⁷ The "Category III" education clauses go beyond the specific quality level of Category II and set up the school system for a specific purpose.⁵⁸ Finally, in the few states with "Category IV" clauses, education is the "primary," "fundamental" or "paramount" duty of the state legislature.⁵⁹ If this language is taken literally, the needs of the public school system must be addressed *before* the state's needs for roads, parks and other social services.

It is quite easy to see how these differences could manifest themselves in judicial analysis.⁶⁰ For example, because Category I clauses do not specify any level of quality, courts would not find such a mandate; to find a quality mandate with a Category I education clause is to ignore the plain language of the provision.⁶¹ Similarly, because Cate-

⁵⁴ Grubb, *Breaking The Language Barrier: The Right To Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 66-70 (1974); Gershon M. Ratner, *A New Legal Duty For Urban Public Schools: Effective Education In Basic Skills*, 63 TEX. L. REV. 777, 814-16, n.143-46 (1985). Although I have utilized the work of Grubb and Ratner in several school finance articles, I have modified some of their classifications to reflect more accurately the language of the education clauses. This Article uses the classifications articulated in Thro, *Role of Language*, *supra* note *, at 25-27.

⁵⁵ See ALA. CONST. art. 14, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; CONN. CONST. art. VIII, § 1; HAWAII CONST. art. IX, § 1; KAN. CONST. art. VI, § 1; LA. CONST. art. VIII, § 1; MASS. CONST. ch. 5, § 2; NEB. CONST. art. VII, § 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; OKLA. CONST. art. XIII, § 1; S.C. CONST. art. XI, § 3; TENN. CONST. art. XI, § 12; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68.

⁵⁶ See ARK. CONST. art. XIV, § 1; COLO. CONST. art. IX, § 2; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; KY. CONST. § 183; MD. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; MONT. CONST. art. X, § 1; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; TEX. CONST. art. VII, § 1; VA. CONST. art. VIII, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3.

⁵⁷ Generally, the specific quality is "thorough and/or efficient." As the West Virginia Supreme Court observed, Maryland, Minnesota, New Jersey, Ohio and Pennsylvania have thorough and efficient clauses; Colorado, Idaho and Montana require thorough systems; and Arkansas, Delaware, Illinois, Kentucky and Texas require efficient systems. *Pauley v. Kelly*, 255 S.E.2d 859, 865 (W. Va. 1979).

⁵⁸ See CAL. CONST. art. IX, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. 9, § 2; NEV. CONST. art. XI, § 2, R.I. CONST. art. XII, § 1; S.D. CONST. art. VIII, § 1; WYO. CONST. art. VII, § 1. Ratner, *supra* note 54, at 815 & n.145; Grubb, *supra* note 54, at 68.

⁵⁹ See GA. CONST. art. VIII, § 1, ¶ 1; ILL. CONST. art. X, § 1; ME. CONST. art. 8, § 1; MICH. CONST. art. VIII, § 2; MO. CONST. art. 9, § 1(a); N.H. CONST. pt. 2, art. 83; WASH. CONST. art. IX, § 1.

⁶⁰ This theory is explained more fully in Thro, *Role of Language*, *supra* note *, at 25-27.

⁶¹ Only two Category I clauses, those in Massachusetts and Tennessee, have ever been interpreted as imposing a quality standard. See *McDuffy*, 615 N.E.2d 516, 548 (Ma. 1993); *McWherter*, 851 S.W.2d 139, 150-51 (Tenn. 1993).

gory III and IV clauses appear to impose either a greater quality standard or a greater duty than Category II clauses,⁶² a plaintiffs' victory, theoretically, should be easier in states with these clauses.⁶³

Third, if the court answers the second question by determining that the education clause does impose a standard of quality, it must move to the next question and define exactly what that quality standard means.⁶⁴ The answer to this inquiry effectively determines the outcome of the litigation.⁶⁵ If the court sets an extremely high standard, then it will be virtually impossible for school districts to measure up. In contrast, if the court sets a low standard, such as the minimum standards for accreditation required by the State Board of Education,⁶⁶ the system will almost always pass muster.⁶⁷

Fourth, having answered the third question and determined what the quality standard means, the court then must apply that standard to the particular school districts and determine if there has been a violation. Although, as noted above, the exact definition of quality will effectively determine whether school districts fall below the standard, arguably there remains an issue as to how widespread the failure must be in order for there to be a violation.⁶⁸ If only one school district fails to measure up, does that mean that the entire system is in violation? What if ten, twenty, or even fifty percent fail to meet the constitutionally mandated standard? Does the size of those districts which fail to meet the standard matter?⁶⁹

Fifth, if the court determines that the failure to meet the constitutional standard is extensive enough to warrant a finding of a system-wide violation, there remains the question of the significance of fund-

⁶² Category II is the lowest category for which it is possible to find a quality standard mandate based on the language of the education clause.

⁶³ This is particularly true with Category IV clauses which, on their face, appear to require that the schools be funded before other concerns.

⁶⁴ Ideally, a court would practice "horizontal federalism" and look to the decisions of other states which interpret similarly worded education clauses.

⁶⁵ Moreover, as explained *infra*, there is no way to determine which choice the court will make. It appears to be entirely arbitrary.

⁶⁶ This was the standard articulated by the Minnesota Supreme Court in *Skeen v. State*, 505 N.W.2d 299, 308-09 (Minn. 1993).

⁶⁷ For example, in the last three years, the Colorado State Board of Education has never failed to accredit a school district which was up for accreditation. A similar pattern pervades in other states.

⁶⁸ Similarly, because it is possible that there will be individual schools which meet or fail to meet standards *within a given school district*, there is an issue as to how widespread within a district the failure must be for the district to be in violation.

⁶⁹ For example, although Colorado has 176 school districts, approximately 30% of the students are in *three* school districts (Jefferson County, Denver and Douglas County).

ing in the failure of the system to meet the constitutionally mandated standard.⁷⁰ The mere fact that all school districts do not measure up does not necessarily mean that this failure is caused by a lack of money. There are a wide variety of other factors, including mismanagement, excessive administration, too many incompetent teachers, misplaced spending priorities, outright corruption, nepotism, an improper emphasis on some programs, the need to bus to achieve racial desegregation⁷¹ and the necessity of complying with other federal laws such as the Individuals With Disabilities Education Act⁷² or Title IX,⁷³ which might cause a school district to fall below the constitutional standard. Even if lack of money is a cause, or even the primary cause, of the district's inadequacy, it is almost inevitable that there will be other non-financial causes. Thus, in order to correct the inadequacy, it may be necessary to do more than restructure the finance system. Indeed, it may be necessary for a district to undergo fundamental reform of its entire educational system rather than simply to distribute more money.⁷⁴

III. THE MASSACHUSETTS APPROACH TO RESOLVING THE COMMON QUESTIONS IN ALL THIRD-WAVE CASES

A. *Is the Suit Primarily an Equality Suit or a Quality Suit?*

Unfortunately, the Massachusetts Supreme Judicial Court, in *McDuffy*, like every court to consider a school finance case, failed to identify *explicitly* whether the suit before it was a quality suit or an equality suit. However, the *McDuffy* Court did acknowledge *implicitly* that the suit was a quality suit:

⁷⁰ This question apparently has never been addressed explicitly in a school finance case.

⁷¹ For example, the Denver School District, which has court ordered busing, spends more, per pupil, on transportation than most Colorado school districts.

⁷² 20 U.S.C. §§ 1401-1420.

⁷³ 20 U.S.C. §§ 1681-1688. This is particularly true now that the federal courts have held that the athletic participation of each sex must mirror the enrollment. See *Roberts v. Colorado State Univ.* 814 F. Supp. 1507, 1510-11 (D. Colo.), *aff'd in part, rev'd in part sub nom.* *Roberts v. Colorado State Bd. of Agric.* 998 F.2d 824 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993); *Cohen v. Brown Univ.*, 809 F. Supp. 978, 988-89 (D. R.I. 1992), *aff'd* 991 F.2d 888, 907 (1st Cir. 1993); *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 584 (W.D. Pa.) *aff'd*, 7 F.3d 332, 344 (3d Cir. 1993). For a commentary on the potential impact of these and similar cases, see William E. Thro & Brian A. Snow, *Cohen v. Brown University and the Future of Intercollegiate and Interscholastic Athletics*, 84 Educ. L. Rep. 611, 622-27 (1993).

⁷⁴ This was the result in Kentucky, where the Kentucky Educational Reform Act (the "KERA") was passed in response to the *Rose* decision.

We note that the plaintiffs do not seek judgment that the Commonwealth has an obligation to equalize educational spending across all towns or cities or that the Commonwealth has an obligation to provide equal educational opportunities to its students. Instead, they seek a declaratory judgment that these constitutional provisions require the State to provide every young person with an "adequate" education.⁷⁵

Although all third-wave cases to date can be characterized as quality suits, this statement is the clearest and most explicit statement in any third-wave opinion that the suit is a quality, and not an equality, suit.⁷⁶ In contrast, other courts appear to be confused about whether they are deciding a quality suit or an equality suit.⁷⁷ This confusion is probably due to the fact that the litigants, although clearly emphasizing quality of education, make both education clause (quality suit) and equal protection clause (equality suit) arguments.⁷⁸ For example, in the 1993 Tennessee case of *Tennessee Small School Systems v. McWhorter*, the plaintiffs alleged that the education clause:

[E]stablishes a fundamental right to an adequate education and that the defendants are depriving the students, on whose behalf the suit was filed, of this fundamental right. The complaint further alleges that the funding system violates the equal protection provisions of Article XI, Section 8 and Article I, Section 8 of the Tennessee Constitution because the system results in inequalities in the provisions of these educational opportunities guaranteed by Article XI, Section 12.⁷⁹

Thus, there were both quality suit arguments (adequacy) and equal protection arguments (fundamental right and differing treatment) in the same quality suit.

⁷⁵ *McDuffy*, 615 N.E.2d 516, 522 (Ma. 1993). As noted above, allegations of a state obligation to equalize educational spending across cities and towns, or to provide equal education opportunities are both consistent with the idea of an equality suit.

⁷⁶ The Minnesota decision had a similar emphasis on quality. See *Skeen v. State*, 505 N.W.2d 299, 308-09 (Minn. 1993).

⁷⁷ This distinction was not made in the school finance literature until the early 1990s. See, e.g., Thro, *Third Wave*, *supra* note *; Underwood & Sparkman, *supra* note 4.

⁷⁸ Given that the equal protection argument has worked in the past, the plaintiffs cannot be faulted for attempting to use every possible weapon.

⁷⁹ 851 S.W.2d 139, 141 (Tenn. 1993).

B. *If It is a Quality Suit, Does the State Education Clause Confer a Specific Quality Standard?*

The second question, whether the education clause imposes a particular quality standard, is of vital importance. Obviously, if the education clause does not impose a quality standard, there can be no violation. The Massachusetts Supreme Judicial Court in *McDuffy* devoted *sixteen* pages of a volume of the *Northeastern Reporter*⁸⁰ to the issue reviewing language, constitutional structure and a comprehensive history of education in the Commonwealth. The opinion then concluded:

What emerges from this review is that the words are not merely aspirational or hortatory, but obligatory. What emerges also is that the Commonwealth has a duty to provide an education for *all* its children, rich and poor, in every city and town of the Commonwealth at the public school level, and that this duty is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts.⁸¹

The only other third-wave court to address explicitly this issue was the Tennessee court in the 1993 decision of *Tennessee Small School Systems v. McWherter*, which utilized an approach similar to the one in *McDuffy*. After reviewing the history of the education clause and the language of the clause, the *McWherter* court observed:

The defendants also note as significant the absence in the 1978 amendment of such words as "uniform" or "efficient," relied upon by other courts to grant relief.⁸²

The defendants' argument overlooks the plain meaning of Article XI, Section 12. That provision expressly recognizes the *inherent value* of education and then requires the General Assembly to "provide for the maintenance, support and eligibility standards of a system of free public schools." The constitution speaks directly to a right of inherent value, education. As used in Article XI, Section 12, the word "education"

⁸⁰ *McDuffy*, 615 N.E.2d at 522-48.

⁸¹ *Id.* at 548.

⁸² As noted *supra*, notes 54-57 and accompanying text, the presence of these modifiers distinguishes a Category I education clause from a Category II education clause.

has a definite meaning and needs no modifiers in order to describe the duty imposed upon the legislature. . . . Indeed, modifiers would detract from the eloquence and certainty of the constitutional mandate—that the General Assembly shall maintain and support a system of free public schools that provides, at least, the opportunity to acquire general knowledge, develop the powers of reasoning and judgment and generally prepare students intellectually for a mature life. Contrary to the defendants' assertion, this is an enforceable standard for assessing the educational opportunities provided in the several districts throughout the state.⁸³

Unfortunately, if one accepts the proposition that the language of the state education clauses matters, both the *McDuffy* and the *McWherter* courts reached the wrong result. Both the Massachusetts and Tennessee education clauses are Category I clauses which cannot be regarded as imposing a quality standard.⁸⁴ Rather, each simply mandates that the state set up a system of free public schools.

Some courts, however, have simply avoided this question and assumed that the education clause imposes a specific standard of quality.⁸⁵ For example, in 1993, the Minnesota Supreme Court, in *Skeen v. State*, stated that, "This clause places a duty on the legislature to establish a general and uniform system of public education."⁸⁶ Similarly, the Kentucky Supreme Court observed in the 1989 decision of *Rose v. Council for Better Education, Inc.*:

Several conclusions readily appear from a reading of this section [the education clause]. First it is the obligation, the sole obligation of the General Assembly to provide for a system of common schools in Kentucky. . . . The creation, implementation and maintenance of the school system must be achieved by appropriate legislation. Finally, the system must be an efficient one.⁸⁷

The *Skeen* and *Rose* courts simply assumed the existence of a duty and proceeded to define that duty.

⁸³ *McWherter*, 851 S.W.2d at 150–51.

⁸⁴ See Thro, *Role of Language*, *supra* note *, at 25–27.

⁸⁵ This approach is appropriate in those circumstances where the education clause is Category II or higher.

⁸⁶ 505 N.W.2d 299, 308 (Minn. 1993).

⁸⁷ 790 S.W.2d 186, 205 (Ky. 1989).

C. *If there is a Quality Standard, What does that Quality Standard Mean?*

As noted above, the question of the exact meaning of the quality standard is critical to the outcome of the case. If the standard is set very high, it is almost inevitable that the system will fail. In contrast, if the standard is set relatively low, the state likely will prevail. Unfortunately, no court has ever articulated a reason for choosing one standard or the other. Instead, the courts have simply imposed the value judgment of a majority of its members. As a result, this question is probably the least predictable of the common issues.⁸⁸

*McDuff*⁸⁹ and the Kentucky opinion, *Rose*,⁹⁰ represent the best examples of a court unilaterally imposing a high standard. In analyzing this question, the Massachusetts Supreme Judicial Court, simply observed:

The crux of the Commonwealth's duty lies in its obligation to educate all of its children. As has been done by the courts of some of our sister States, we shall articulate broad guidelines and assume that the Commonwealth will fulfill its duty to remedy the constitutional violations we have identified. The guidelines set forth by the Supreme Court of Kentucky fairly reflect our view of the matter and are consistent with the judicial pronouncements found in other decisions. 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 which affect his or her community, state, or 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 like work intel-

⁸⁸ Indeed, the answers to this question appear to be quite arbitrary.

⁸⁹ 615 N.E.2d 516 (Ma. 1993).

⁹⁰ 790 S.W.2d 186 (Ky. 1989).

ligerly; and (vii) sufficient level of academic and vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market."⁹¹

Although the Kentucky-Massachusetts standard is a wonderful aspiration, and probably should be the goal of every public school, it would be next to impossible to implement. For example, under this standard, if graduates of public schools do not understand the Clinton Health Care Plan, the North American Free Trade Agreement, the war in Bosnia or the significance of school finance litigation, then the students do not understand the issues confronting society and, thus, the schools are constitutionally deficient. With its constant references to each child or student on some points, the *McDuffy* Court implies that the failure of any child to meet that standard creates a constitutional violation.

In contrast, the 1993 Minnesota decision, in *Skeen v. State*,⁹² represents the other extreme. The Minnesota Court appeared to hold that the quality standard was identical to the minimum standard for accreditation set by the State Board of Education.⁹³ Because the basic educational needs of the district were met, there was no violation. In effect, the judiciary is deferring to the State Board of Education. Yet, because state boards of education rarely, if ever, withdraw a school district's accreditation,⁹⁴ all school districts would meet the constitutional standard and, thus, the system would always be constitutional.

The other third-wave decisions that have articulated a quality standard fall somewhere in the middle, but tend to lean toward the Kentucky-Massachusetts standard. For example, in the 1990 decision of *Abbott v. Burke*,⁹⁵ the New Jersey Supreme Court, concluded that a "thorough and efficient" educational system was one which gave every student "a modicum of variety and a chance to excel."⁹⁶

Finally, at least two courts have completely avoided the issue. The Supreme Court of Nebraska, in the 1993 decision of *Gould v. Orr*, while implicitly holding that there was a quality standard under the State

⁹¹ 615 N.E.2d 516, 554 (Ma. 1993) (citation omitted).

⁹² 505 N.W.2d 299 (Minn. 1993).

⁹³ *Id.* at 308.

⁹⁴ Indeed, although there are statutory provisions for the reorganization of a school district if it fails to meet the accreditation standard, it appears that this has never happened in Colorado since the districts were reorganized in the 1960s.

⁹⁵ 575 A.2d 359 (N.J. 1990).

⁹⁶ *Id.* at 398.

Constitution, declined to define exactly what the standard meant.⁹⁷ Instead, the court declared that the plaintiffs' complaint did not allege that the school system was inadequate and, thus, dismissed the complaint for failure to state a claim.⁹⁸ The *Gould* court went on to deny the plaintiffs leave to amend, thereby avoiding the issue indefinitely.⁹⁹ The Supreme Court of Tennessee, in *McWhorter*, explicitly held that the state constitution mandated a particular quality standard,¹⁰⁰ but then decided it was unnecessary to define the contours of that standard.¹⁰¹ Instead, the *McWhorter* court decided the case on the basis of the State Equal Protection Clause.¹⁰²

D. *When the Quality Standard is Applied to the School Districts of the State, Does the Educational System Measure Up?*

Once the quality standard is determined, the resolution of whether the system meets the quality standard becomes academic. If the standard is high, the system fails. Conversely, if the standard is low, the system passes muster. For example, the *McDuffy* court,¹⁰³ after reviewing the testimony and affidavits regarding the state of the schools, simply held: "The bleak portrait of the plaintiffs' schools and those they typify, painted in large part by the defendants' own statements and about which no lack of consensus as been shown, leads us to conclude that the Commonwealth has failed to fulfill its obligation."¹⁰⁴

Similarly, the Kentucky Supreme Court, in *Rose v. Council for Better Education, Inc.*, after reviewing the evidence of the current state of the schools, concluded:

In spite of the past and present efforts of the General Assembly, Kentucky's present system of common schools falls short of the mark of the constitutional mandate of "efficient." When one juxtaposes the standards of efficiency as derived from our Constitution, the cases decided thereunder, the persuasive

⁹⁷ 506 N.W.2d 349, 351 (Neb. 1993).

⁹⁸ *Id.* at 353.

⁹⁹ *Id.*

¹⁰⁰ *McWhorter*, 851 S.W.2d at 150-51.

¹⁰¹ *Id.* at 152.

¹⁰² *Id.* at 152-56.

¹⁰³ Interestingly, in its opinion, the Massachusetts Supreme Judicial Court decided that the system was unconstitutional *before* it articulated the exact contours of the duty. *McDuffy*, 615 N.E.2d at 552, 554-55.

¹⁰⁴ *Id.* at 553-54.

authority from our sister states and the opinion of experts, with the virtually unchallenged evidence in the record, no other decision is possible.¹⁰⁵

Interestingly, in reaching the opposite result, the Minnesota Supreme Court, in *Skeen v. State*, was equally conclusive. The court stated:

[P]laintiffs here are unable to establish that the basic system is inadequate or that the "general and uniform" requirement somehow implies full equalization of local referendum levies. Any inequities which exist do not rise to the level of a constitutional violation of the state constitutional provisions Thus, we hold that the present system of educational financing does not violate the "general and uniform system of public schools" of the Education Clause of the Minnesota Constitution.¹⁰⁶

In all three cases, as in most third-wave cases, the result was preordained once the quality standard was established.

E. *If the System Does Not Meet the Constitutional Standard, What Role, If Any, Does a Lack of Money Play in the Violation?*

If the court concludes that the system does not meet the constitutional standard, there is still the additional requirement of accounting for the deficiency. The lack of money may or may not be a factor, and it almost certainly is not the only one. Other factors may include mismanagement, excessive administration, lack of competent teachers, misplaced spending priorities, outright corruption, nepotism, an improper emphasis on some programs, the need to bus to achieve racial desegregation and the necessity of complying with other federal mandates.¹⁰⁷ It may be possible that a constitutionally adequate system can only be achieved through "radical" reform of the existing system.¹⁰⁸ Thus, a deficiency in the public school system theoretically could become the basis for a public school voucher program, for single sex schools, or for the public schools to offer a smorgasbord of curricula

¹⁰⁵ *Rose*, 790 S.W.2d at 212.

¹⁰⁶ 505 N.W.2d at 312.

¹⁰⁷ If one or more of these conditions exist, simply pouring more money into the system will not necessarily improve the quality of the schools. Indeed, the net result may be that nothing changes significantly, but that more money is spent.

¹⁰⁸ As the United States enters the high technology age, its public schools generally continue to function on an industrial age model using an agrarian age calendar.

so that each child could reach his or her potential.¹⁰⁹ Indeed, a finding that a public school system is unconstitutional could be the springboard for implementation of a conservative or liberal agenda of reform.

Unfortunately, with the exception of Kentucky,¹¹⁰ every third-wave court to find a constitutional violation has automatically assumed that money and money alone is the problem. Indeed, the other courts have not even addressed the issue of whether something other than funding might be the problem. The *McDuffy* Court made its holding money-specific by issuing a mandate for the legislature "to take such steps as may be required in each instance effectively to devise a plan and *sources of funds* sufficient to meet the constitutional mandate."¹¹¹

By focusing only on money and ignoring other potential factors, these courts effectively have abdicated a large degree of their responsibility to define the nature of the violation. To conclude, as these courts apparently have, that money will solve everything is to endorse a view of modern education that is extraordinarily naive. Indeed, just as the legislatures have done a disservice to children in failing to enact a constitutional system, these courts are also doing a disservice.

In contrast to this judicial abdication, the Supreme Court of Kentucky, in *Rose v. Council for Better Education, Inc.*, recognized that quality education involves much more than money.¹¹² The court observed:

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. The 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

¹⁰⁹ Similar arguments have been made in both the cases currently pending in Connecticut and Illinois.

¹¹⁰ *Rose*, 790 S.W.2d at 212.

¹¹¹ *McDuffy*, 615 N.E.2d at 556 (emphasis added).

¹¹² *Rose*, 790 S.W.2d, at 215. Although I may disagree with certain public policy choices which the Legislature made in the aftermath of the Kentucky decision, it is clear that the Supreme Court of Kentucky recognized the realities of modern education and fulfilled all of its responsibilities as a judicial tribunal.

construction and maintenance, teacher certification—the whole gamut of the common school system in Kentucky.¹¹³

Essentially, the Kentucky court threw everything out and ordered the Legislature to start over. The result, the Kentucky Educational Reform Act of 1990,¹¹⁴ has been a sweeping overhaul of public education in Kentucky.¹¹⁵

IV. CONCLUSION

Over a quarter of a century after the first cases were filed, school finance litigation continues to be a significant factor in education law. However, despite decisions in more than half of the states, there appears to be no coherent pattern of litigation results. The primary reason for this lack of coherence is that the litigation strategy employed by the plaintiffs has moved from federal equal protection clause challenges seeking to ensure equality of funding or equality of educational opportunities (first wave), to state equal protection challenges seeking the same (second wave), to state education clause challenges seeking a minimum quality standard (third wave).

This last strategy, emphasizing quality and the state education clause, has resulted in a method of legal analysis which is distinctly different from those employed in the first or second waves of litigation. This third-wave model of judicial decision-making, which is best illustrated and most clearly articulated by the recent 1993 Massachusetts decision of *McDuffy v. Secretary of the Executive Office of Education*, consists of five questions, resolution of which will decide the suit. If other states follow the lead of Massachusetts and utilize this comprehensive model, perhaps, some coherence will emerge in this area of the law.

¹¹³ *Id.* at 215.

¹¹⁴ 1990 Ky. Acts 476.

¹¹⁵ For example, KERA mandated site based management of schools, stricter policies on nepotism, ungraded primary education, increased teacher salaries, tougher teacher certification standards, the diminishing of the powers of the Superintendent of Public Instruction and the effective endorsement of outcome based education.

At this point, no one can say whether Kentucky's grand experiment in educational reform will be successful. Although some aspects of KERA have very vocal critics, including this author, there is no denying that the Kentucky Supreme Court has forced the Legislature at least *to try* to live up to the mandate of the State Constitution.