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PUBLIC SCHOOL FINANCE REFORM: IS ILLINOIS "PLAYING HOOKY"?

Upon the subject of education, not presuming to dictate any plan or system respecting it, I can only say that I view it as a most important subject which we as a people can be engaged in. That every man may receive at least a moderate education and thereby be able to read the histories of his own and other countries, from which he may appreciate the value of our free institutions, appears to be an object of vital importance.¹

—Abraham Lincoln

INTRODUCTION

The Federal Constitution does not contain a provision that requires the Federal Government to maintain a system of free public schools. Consequently, the Supreme Court has viewed education as a primarily local concern. Absent a clear constitutional violation, such as racial segregation, the Supreme Court has been reluctant to intervene in disputes involving education.² As a result, advocates of school finance reform have turned to state constitutional provisions.³


   [Educational policy is an] area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. . . . [T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems . . . .

   Id.; see also Board of Educ. v. Rowley, 458 U.S. 176, 207 (1982) ("In assuring that the requirements of the [Education of the Handicapped] Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States."). But cf., e.g., Plyler v. Doe, 457 U.S. 202, 230 (1982) (holding that while education is not a fundamental right subject to strict scrutiny, a state can justify a denial of education only by showing that the denial furthers some substantial state interest); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (holding that where a state has chosen to provide education to its citizens it must make education available to all on equal terms).

A particularly controversial dispute involving education focuses on the methods by which states fund public education. Since local school districts use real estate property tax revenues to fund their schools, and since taxable property values often vary from school district to school district within each state, school districts within a state often raise a disparate amount of money for education. Each state government attempts to alleviate the fundraising disparities that exist between its school districts; however, even after the state provides its aid to the school districts that need it, large disparities in per-pupil expenditures between school districts often persist. The school reform movement seeks to alter the fundraising schemes in various states so that the money available to each school district for education matches the amount of money that each school district needs to adequately educate its pupils.

Advocates of school finance reform have claimed victory under numerous state constitutions. Illinois, however, remains an unreformed state despite the fact that, in fiscal year 1988, expenditures per pupil in Illinois public schools ranged from approximately $12,900 to less than $2100. Indeed, the Committee for Educational Rights—fifty-five Illinois public school districts, and a number of school children and their parents—recently filed a lawsuit against the state's governor, school superintendent, and state board of education, alleging that the school finance system in Illinois is unconstitutional under the Illinois Constitution. This Comment focuses on four different arguments, any one of which mandates school finance reform in Illinois.

First, this Comment argues that the Illinois courts are not properly interpreting the education clause in the 1970 Illinois Constitution. The courts have not adjusted their analysis of the language of the education clause, although it was redrafted in 1970.

Second, this Comment demonstrates that the deferential position toward school finance taken by the Illinois courts is inconsistent with their own decisions involving the public education of handicapped students. It argues that the Illinois courts should maintain the same active role in school finance reform that they have maintained in the area of public education for the handicapped.

Third, this Comment demonstrates that other state courts have appropri-
ately given extensive interpretations to the education clauses of their state constitutions, while Illinois courts have been unduly hesitant to interpret broadly the Illinois Constitution's education clause. Consequently, unlike courts in other states, Illinois courts have refused to apply a heightened judicial review to the school finance issue. This Comment argues that the Illinois courts' interpretation of the education clause in the Illinois Constitution and their deferential position toward school finance have been undermined by school finance litigation in other states.

Finally, this Comment criticizes the Illinois courts' equal protection clause analysis in the school finance reform area. It argues that the courts' analysis is inconsistent with the federal equal protection analysis that the Illinois courts have claimed to adopt.

I. BACKGROUND

A court's consideration of whether Illinois must reform its school finance system necessarily involves analysis of the federal law, case law from outside Illinois, the Illinois Constitution, and, of course, Illinois case law. Federal equal protection adjudication is important because the United States Supreme Court's equal protection decisions have compelled advocates of school finance reform to seek remedial action in state courts. Case law from outside Illinois is important since courts in other states have interpreted their less demanding education clauses to mandate school finance reform. The Illinois Constitution is important because it contains two clauses that arguably mandate school finance reform: the education clause and the equal protection clause. Illinois case law regarding education for the handicapped is also important because it demonstrates the willingness of Illinois courts to interpret the education clause broadly so that it mandates an "appropriate" education for each pupil in light of his or her individual needs.

A. Federal Equal Protection Analysis

Early advocates of public school finance reform sought protection from the federal judiciary. The Federal Constitution, however, contains no provision that requires the Federal Government to provide a system of free schools.

9. See infra notes 47-81 and accompanying text (discussing United States Supreme Court decisions on public school finance based upon the Equal Protection Clause).
10. See infra notes 141-204 and accompanying text (analyzing New Jersey and Texas Supreme Court decisions that found the public school finance systems in their states unconstitutional under the education clauses in their state constitutions).
11. ILL. CONST. art. X, § 1.
13. See infra notes 331-35 (discussing Illinois decisions that interpret the Illinois education clause as granting the right to an "appropriate" education for handicapped students).
Consequently, advocates attacked the constitutionality of school finance systems via the more general Federal Equal Protection Clause. The Equal Protection Clause compels the government to treat similarly situated individuals in a similar manner. However, while the clause prohibits the government from making arbitrary classifications and from basing classifications on impermissible criteria, it does not prohibit the government from classifying individuals entirely. Where the government's classification relates to a proper governmental purpose, it does not violate the Equal Protection Clause. It is this relationship between governmental purpose and classification that controls equal protection adjudication. This relationship is subject to three standards of review, which at the extremes require either a very strong relationship or merely a rational relationship.

Three "levels of scrutiny" are critical in any equal protection adjudication. These three levels of judicial scrutiny are minimal, intermediate, and strict. A court's conclusion as to whether a federal equal protection challenge will be successful depends a great deal upon the level of judicial scrutiny it applies.

Minimal scrutiny is the most deferential level of judicial review. In a minimal scrutiny analysis, a court will ask whether it is conceivable that the classification bears a rational relationship to a legitimate governmental end. Since 1937, courts have used minimal scrutiny in reviewing social and economic legislation. Under the minimal scrutiny standard, a court attaches a presup-
tion of constitutionality to the legislation.\textsuperscript{28} Indeed, the presumption is very difficult to overcome.\textsuperscript{27} Thus, minimal scrutiny allows a high degree of deference to the actions of the legislative and executive branches of government.\textsuperscript{28}

Intermediate scrutiny represents the second level of judicial review under the Federal Equal Protection Clause.\textsuperscript{29} Intermediate scrutiny requires governmental action to be substantially related to an important governmental objective.\textsuperscript{30} Governmental classifications based on gender\textsuperscript{31} and illegitimacy,\textsuperscript{32} for example, are subject to intermediate scrutiny. This standard removes the presumption of constitutionality that exists under minimal scrutiny and also re-

\textsuperscript{26} NOWAK ET AL., supra note 16, at 528-43; Shaman, supra note 20, at 162.

\textsuperscript{27} See Shaman, supra note 20, at 162 ("After the New Deal Court struggle, . . . the presumption of constitutionality was invoked frequently, and not just as a matter of rhetoric; it quickly became a working principle that was used as a matter of course.").

\textsuperscript{28} See, e.g., City of New Orleans v. Dukes, 427 U.S. 297 (1976) (urging that the judiciary should not sit as a superlegislature to judge the wisdom or desirability of legislation made in areas that do not affect fundamental rights or suspect classes); Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (hypothesizing reasons as to why the legislature enacted a law where the legislature failed to explicitly state the reasons behind its judgment); Railway Express Agency v. New York, 336 U.S. 106 (1949) (holding that as long as the classification had some relation to the intended purpose, and did not contain invidious discrimination, the Court would sustain the regulation against an equal protection challenge); see also Shaman, supra note 20, at 161 & n.8 (noting that the Supreme Court has adopted "a posture of extreme deference to the other branches of government" in constitutional adjudication). But see Logan v. Zimmerman Brush Co., 455 U.S. 422, 442 (1982) (Blackmun, J., joined by Brennan, Marshall & O'Connor, J.J.) ("The State's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis."); Zobel v. Williams, 457 U.S. 55 (1982) (invalidating under the rationality test a distribution of state oil revenues based upon the length of each citizen's residence in the state); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (holding exclusion of unrelated household members violated the rationality test).

\textsuperscript{29} See NOWAK ET AL., supra note 16, at 531-33; Shaman, supra note 20, at 162-63.

\textsuperscript{30} See Reed v. Reed, 404 U.S. 71, 76 (1971) (striking down a gender classification, stating that such a classification must be "'reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike' "); Mills v. Habluetzel, 456 U.S. 91 (1982) (holding a one-year period for establishing paternity denied illegitimate children equal protection of the law since such a classification was not substantially related to a legitimate state interest); Matthews v. Lucas, 427 U.S. 495, 510 (1976) (stating that the standard of review applied in illegitimacy classifications is "not a toothless one").

\textsuperscript{31} See, e.g., Craig v. Boren, 429 U.S. 190 (1976) (holding that the Court would uphold a gender classification only where the government was able to demonstrate that the legislation was substantially related to an important governmental interest).

\textsuperscript{32} See Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (striking down a state law which allowed full recovery by legitimate and acknowledged illegitimate children for injury to parents, but limited recovery by unacknowledged illegitimate children, because the law was not substantially related to an important state interest); Levy v. Louisiana, 391 U.S. 68 (1968) (holding statutes that grant a cause of action for wrongful death could not deny recovery to either illegitimate children or their mothers, since such statutes were not substantially related to an important state interest).
quires a more exacting judicial review than does minimal scrutiny.\textsuperscript{33} The highest level of judicial review under the Equal Protection Clause is strict scrutiny.\textsuperscript{34} Strict scrutiny requires a court to examine closely the decisions of the executive and judicial branches of government.\textsuperscript{35} A court will not presume the governmental action to be constitutional and will not uphold the action unless it is necessarily related to a compelling state interest.\textsuperscript{36} Governmental action rarely survives strict scrutiny analysis—such analysis is “strict in theory and fatal in fact.”\textsuperscript{37} Under the Equal Protection Clause, a court will apply strict scrutiny in two general categories of civil liberties cases: first, when state action distinguishes between people on the basis of a “suspect class”;\textsuperscript{38} and second, when state action affects the abilities of people to exercise a fundamental right.\textsuperscript{39} Thus, if a court deemed fundamental the right to

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  \item \textsuperscript{33} See Nowak et al., supra note 16, at 532.
  \item \textsuperscript{34} Id. at 530-31.
  \item \textsuperscript{35} Id. at 530.
  \item \textsuperscript{36} Id. at 530-31; see also Graham v. Richardson, 403 U.S. 365 (1971) (holding that the Court would uphold classification based upon alienage, race, or national origin only if the classification was necessary to promote a compelling state interest); Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidating a state residency requirement for persons wishing to receive welfare benefits because, under strict scrutiny, preservation of fiscal integrity was not compelling enough to inhibit the right of interstate travel); Korematsu v. United States, 323 U.S. 214, 216 (1944) (holding classifications based upon race or national origin were suspect, that these classifications were to be subject to rigid scrutiny, and that such classifications would be upheld only if they were based on public necessity).
  \item \textsuperscript{37} Gerald Gunther, The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).
  \item \textsuperscript{38} See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). The Carolene Products Court stated:

    There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

    It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

    Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry . . . .

    Id.; see also, e.g., Anderson v. Martin, 375 U.S. 399 (1964) (striking down a voting system by which the race of each candidate running for office was noted on the ballot, because the requirement would facilitate and induce racial prejudice); Brown v. Board of Educ., 347 U.S. 483 (1954) (striking down the separate-but-equal doctrine as a means of public school segregation because the doctrine discriminated against black students); Korematsu v. United States, 323 U.S. 214 (1944) (stating classifications based upon race or national origin were inherently suspect and thus subject to rigid judicial scrutiny).

  \item \textsuperscript{39} Professor Nowak has identified six substantive categories of fundamental rights. Nowak et al., supra note 16, at 370-72. First, there is a fundamental right to privacy that includes different freedoms of choice relating to an individual’s personal life. See Roe v. Wade, 410 U.S. 113 (1973)
an education, it would apply strict scrutiny to any state action that affected
the right to obtain an education.

In enacting legislation, state legislatures affect numerous public rights and
interests. For example, states often provide and regulate public housing and
welfare benefits. However, not every state action affects a right that is *fundamenta*l. The Supreme Court has defined the general characteristics of a funda-
mental right. In early cases, the Court considered fundamental only those
time had to be "rooted in the traditions and conscience of our people" to be funda-
mental. Later decisions altered the Court's definition. In these decisions, a
right had to be implicitly or explicitly guaranteed by the Federal Constitution
before the Court would find it to be fundamental.

Although the Court has attempted to classify various constitutional rights,
the concept of what rights are fundamental and what rights are not is very
vague. Consequently, the list of fundamental rights is rather short. It is not
likely, therefore, that the Supreme Court will find the right to an education a
fundamental right.

(fundamental right to choose whether or not to bear children); Loving v. Virginia, 388 U.S. 1
(1967) (fundamental right to freedom of choice in marital decisions); Skinner v. Oklahoma, 316
U.S. 535 (1942) (fundamental right to procreate). Second, the Court has found a fundamental
Third, the Court has held that the right to vote and to participate in the electoral process is a
Court has found a fundamental right to interstate travel. See Shapiro v. Thompson, 394 U.S. 618
(1969). Fifth, the Court has implicitly recognized a fundamental right to fairness in the criminal
process. See, e.g., Bounds v. Smith, 430 U.S. 818 (1977) (right to legal materials and access to
courts); Douglas v. California, 372 U.S. 353 (1963) (right to counsel in first appeal). Sixth, there
is an implicit fundamental right to fairness in procedures involving governmental deprivations of
life, liberty, or property. See e.g., Santosky v. Kramer, 455 U.S. 745 (1982) (holding state can
terminate parental rights only if it proves allegations of parental unfitness by clear and convincing
evidence).

40. See, e.g., Lindsey v. Normet, 405 U.S. 56 (1972) (holding that there is no fundamental
right to decent, safe, and sanitary housing).
42. *Palko*, 302 U.S. at 325.
43. *Id.*
that the determination of whether education is fundamental depends upon whether the Constitu-
tion implicitly or explicitly guarantees it—not upon education's relative societal significance or
importance); Dunn v. Blumstein, 405 U.S. 330 (1972) (holding the right to vote is a fundamental
right because it is guaranteed by the Constitution and it is necessary to preserve other basic civil
and political rights); Police Dep't v. Moseley, 408 U.S. 92 (1972) (applying strict scrutiny to a
regulation which infringed upon freedom of speech—a fundamental right explicitly guaranteed by
the Constitution); Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding that the rights to marry
and to procreate are among the basic civil rights of man, and thus are fundamental rights implicit-
ly guaranteed by the Constitution).
45. See NOWAK ET AL., supra note 16, at 369 ("All that can be said with certainty is that the
justices have selected a group of individual rights which do not have a specific textual basis in the
Constitution or its amendments and deemed them to be 'fundamental'.").
46. *Id.* at 370-72 (listing six general categories of fundamental rights).
B. Federal School Finance Litigation

The Supreme Court first addressed the issue of whether education qualified as a fundamental right in *San Antonio Independent School District v. Rodriguez.* This landmark case set forth the Supreme Court's position in the area of school finance reform. In *Rodriguez,* the petitioner brought a class action on behalf of school children who were members of poor families residing in school districts with a low property tax base. The petitioner claimed that the Texas public school finance system favored wealthier school districts and thus violated the Federal Equal Protection Clause. The petitioner argued that the system created disparities in per-pupil expenditures between districts because of differences in property values between poorer and wealthier districts. The Court held that wealth was not a suspect class, and education was not a fundamental right. Thus, the Court reasoned that the appropriate level of judicial review was only minimal scrutiny. The Court's opinion noted that in no case had the Court ever applied a heightened standard of review solely because a law burdened poor persons in the allocation of benefits that were not deemed to be fundamental constitutional rights. Education was a governmental benefit that the state could allocate unequally. Accordingly, under minimal scrutiny, the Court found the Texas school financing system consistent with the Federal Equal Protection Clause.

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47. 411 U.S. 1 (1973).
48. Regarding school finance schemes, the *Rodriguez* Court stated: [T]he Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. . . . In such a complex arena in which no perfect alternatives exist, the court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.

*Rodriguez,* 411 U.S. at 41.

Regarding the subject of education in general, the Court stated:

[Educational policy is an area] in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels . . . . In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

*Id.* at 42-43.
49. *Id.* at 5.
50. *Id.* at 5-6.
51. *Id.* at 46-47.
52. *Id.* at 28.
53. *Id.* at 29-35.
54. *Id.* at 40.
55. *Id.* at 28.
56. *Id.*
57. *Id.* at 44-55. The Court held that Texas had a legitimate state interest in maintaining each school district's local control of public education. *Id.* at 49-53. Furthermore, the system of local
The Court in Rodriguez, however, did make two critical suggestions that have affected subsequent state court litigation in the area of public school finance. First, the Court suggested that the Fourteenth Amendment required some level of adequate educational services. A federal equal protection attack would be successful if a defined class could show that the state system deprived them of an adequate education. Thus, the Court recognized a difference between the right to an adequate education, and the right to the funding of that education. A state would violate the Equal Protection Clause where it failed to provide an adequate educational opportunity to all students. A state's public school finance system would violate the Equal Protection Clause only if the system resulted in an inadequate educational opportunity for an identifiable class of students. Second, the Court ruled that the importance of education provided by the state did not determine whether the Court would regard it as fundamental for purposes of examination under the Equal Protection Clause. Instead, the critical inquiry was whether there was a right to education explicitly or implicitly guaranteed by the Constitution. Thus, the Court left the door open for state courts to use their state constitutions to declare the right to an education a fundamental right since virtually all state constitutions guarantee free public schools.

Another Supreme Court case addressing the issue of a state's duty to property taxation for local educational expenditures rationally furthered the state's legitimate interest in maintaining local control of public education. Id. at 54-55. In summary, the Court stated that "to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities [in expenditures] are the product of a system that is so irrational as to be invidiously discriminatory." Id. 58. Id. at 36-37. The Court stated:

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [the rights to speak and to vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellants' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved. . . .

Id.; see also Stuart Biegel, Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy After Kadrmas v. Dickinson Public Schools, 74 Cornell L. Rev. 1078, 1084 (1989) (noting that the Court in Rodriguez required the state to meet at least a minimal standard of educational adequacy).

59. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982) (holding a state law that withhold from local school districts state funds for the education of children who were not "legally admitted" into the United States, and that authorized local school districts to deny enrollment to such children, violated the Equal Protection Clause of the Fourteenth Amendment).

60. Rodriguez, 411 U.S. at 33-34.

61. Id.

vide an education is *Plyler v. Doe.* In *Plyler,* the Court reaffirmed its position that the right to an education is not fundamental for purposes of equal protection analysis. *Plyler* did, however, elevate public education to the status of a “quasi-fundamental” right. The Court reiterated that there is some right to an ‘equal educational opportunity’ which, if denied by governmental action, would merit heightened scrutiny. Thus, the Court applied intermediate judicial scrutiny, requiring an “important” state interest to be substantially related to a process that plays a “fundamental role.” Although the Court acknowledged that improving the overall quality of education in the state was an important state interest, the Court held that withholding public funds from school districts that enrolled children of illegal aliens did not substantially further the state’s interest. Consequently, the statute authorizing the state to withhold the funds violated the Equal Protection Clause.

In the subsequent case of *Board of Education v. Rowley,* the Supreme Court expounded on its ideal that there is some right to an “equal educational opportunity.” In *Rowley,* the Court identified a “basic floor of opportunity” with respect to education that the Equal Protection Clause guaranteed. It found that the Equal Protection Clause required “[equal] access . . . sufficient to confer some educational benefit.” Moreover, in *Papasan v. Allain,* the Court reiterated the idea of a minimal educational opportunity guaranteed by the Equal Protection Clause, identifying a constitutionally protected “quantum of education” to which all have an equal opportunity.

*Rodriguez* and subsequent decisions demonstrate the Court’s distinct position regarding public school finance systems. Education is clearly not a funda-

63. 457 U.S. 202 (1982). In *Plyler,* a Texas statute withheld state funds from local districts for the education of children who were not legally admitted into the United States. *Id.* at 205.
64. *Id.* at 221 (“Public education is not a ‘right’ granted to individuals by the Constitution.”).
65. *Id.* at 221-23. The Court noted that education is not “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation. . . . [E]ducation has a fundamental role in maintaining the fabric of our society.” *Id.* at 221.
66. *Id.* at 221-23.
67. *Id.* at 221; see also Biegel, supra note 58, at 1087 (discussing *Plyler’s* framework for heightened scrutiny).
68. *Plyler,* 457 U.S. at 229.
69. *Id.*
70. 458 U.S. 176, 185 (1982). In *Rowley,* the parents of a handicapped child claimed that their child was not provided a “free appropriate public education” pursuant to The Education of the Handicapped Act because the state refused to provide funding for a sign-language interpreter in the child’s classes. *Id.*
71. *Id.* at 200.
72. *Id.*
73. 478 U.S. 265 (1986).
74. *Id.* at 284.
75. In *Papasan,* a Mississippi statute provided that all funds derived from lands once held by the Chickasaw Indian nation could only be expended for education of children in the school district to which the lands belonged. *Id.* at 273. The Court applied only minimal scrutiny. *Id.* at 286. The Court reasoned that only in the situation of a complete denial of educational opportunity to one class would it apply heightened scrutiny. *Id.*
mental right because it is not implicitly or explicitly guaranteed by the Federal Constitution. However, the Federal Equal Protection Clause requires some level of "equal educational opportunity" or a "basic floor of opportunity," a school finance system must allow all students the opportunity to obtain an adequate education. The Federal Equal Protection Clause mandates equal access to education. Thus, the Equal Protection Clause does not embody a fundamental right to an education; but it does require states to provide funding for education at a level adequate to ensure an equal educational opportunity for all students. Therefore, a class claiming denial of equal access to education must show that factors other than individual merit affected its access to an adequate education.

Thus, Rodriguez did not close the door to federal equal protection challenges to state public school finance systems. In fact, Rodriguez and its progeny permitted the development of a "quasi-fundamental" right at the federal level and, perhaps more importantly, provided guidance for de novo litigation at the state court level.

C. State Constitutions and Finance Systems

While a total deprivation of education would raise federal constitutional issues, the Supreme Court's position on school finance leaves the issue of inequalities among school districts largely to state law. In contrast to the Federal Constitution, state constitutions have detailed provisions on education that address the powers and duties of the state and localities in creating and running school systems. A number of state courts have used the education clauses of

76. Plyler, 457 U.S. at 221-23; Rodriguez, 411 U.S. at 33-34.
77. Plyler, 457 U.S. at 221-23. The Court in Plyler articulated a right to educational advancement based on individual merit. Id. at 222. The right to some level of educational opportunity is not new to federal equal protection jurisprudence. See Mills v. Board of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972) (finding a "right to a free and suitable publicly supported education"); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (finding a "right to direct the education of children by selecting reputable teachers and places"); Meyer v. Nebraska, 262 U.S 390, 399 (1923) (identifying a "right to acquire knowledge").
79. See Rodriguez, 411 U.S. at 36-37.
80. See id. at 29-30 ("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. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954))).
81. See Plyler, 457 U.S. at 221-22.
82. 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; Colo. Const. art. IX, § 2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § 7, para. 1; Hawaii Const. art. IX, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. 9, 2d, § 3; Kan. Const. art. VI, § 1; Ky. Const. § 183; La. Const. art. VIII, § 1; Me. Const. art. VIII, § 1; Md. Const. art. VIII, § 1; Mass. Const. pt. 2, ch. 5, § 2; Mich. Const. art. VIII, § 2; Minn. Const. art. XIII, § 1; Mo. Const. art. IX, § 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,
their state constitutions to require more equal funding of schools throughout the state.  

State court challenges to the validity of school district finance systems are not new. Since the late 1960s, litigants who recognized that funding disparities existed between local school districts, and who believed it was wrong for local property values to determine the quality of education, have challenged the constitutionality of their states' public finance systems. These challenges generally have been of two types: (1) alleging that the finance system violated the state's equal protection clause (or if the state did not have an equal protection clause, the state's equality guarantee provision); or (2) alleging

\[\text{\S\ 1; N.C. CONST. art. IX, \S\ 2; N.D. CONST. art. VII, \S\ 2; OHIO CONST. art. VI, \S\ 3; OKLA. CONST. art. XIII, \S\ 1; OR. CONST. art. VIII, \S\ 3; PA. CONST. art. III, \S\ 14; R.I. CONST. art. XII, \S\ 1; S.C. CONST. art. XI, \S\ 3; S.D. CONST. art. VIII, \S\ 1; TENN. CONST. art. XI, \S\ 12; TEX. CONST. art. VII, \S\ 1; UTAH CONST. art. X, \S\ 1; VT. CONST. ch.2, \S\ 68; VA. CONST. art. VIII, \S\ 1; WASH. CONST. art. IX, \S\ 1; W. VA. CONST. art. XII, \S\ 1; WIS. CONST. art. X, \S\ 3; WYO. CONST. art. VII, \S\ 1; see also Thro, supra note 62, at 229 n.48.}


84. See Thro, supra note 219-20.


86. See Abbott v. Burke, 575 A.2d 359, 373 (N.J. 1990) ("[The resolution of cases litigating the constitutionality of the state school finance system] has depended on the court's interpretation of the state's constitutional education provision and/or the state's equal protection doctrine.").

87. See Robert F. Williams, Equality Guarantees in State Constitutional Law, 63 Tex. L. Rev. 1195, 1219-21 (1985); see also Thro, supra note 62, at 228-32 (noting three methods of analysis courts use for state equal protection clauses and equality guarantee clauses). Some courts strictly adhere to federal equal protection analysis. See, e.g., McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981) (strictly adhering to federal equal protection analysis in a school finance reform context). Other state courts remain within the federal levels-of-scrutiny framework, but have their own independent criteria as to what rights are fundamental and what classes are suspect. See, e.g., Serrano v. Priest, 557 P.2d 929 (Cal. 1977) (applying federal equal protection analysis, but finding education a fundamental right and wealth a suspect class). Finally, some state courts totally reject the federal framework and analysis and develop instead their own independent frameworks.
that the system violated the state constitution's education clause.\textsuperscript{88} 

The state equal protection clause argument has not been an effective tool for school district finance reform.\textsuperscript{89} Consequently, most recent litigation has focused on the education clause alone as a basis to effectuate school finance reform.\textsuperscript{90}

1. General Characteristics of State Constitutional Education Clauses

The obligation that the education clause imposes on the state government will determine whether a challenge to the public school finance system based on the education clause can succeed. Generally, a court will hold that an education clause mandates school finance reform if: (1) the education clause imposes an obligation on the legislature; (2) funding disparities exist between school districts in the state; and (3) the existence of the funding disparities indicates that the legislature has not met the obligations that the education clause has imposed upon it.\textsuperscript{91}

Scholars have divided the forty-nine state education clauses into four distinct categories based on the level of obligation imposed on the state legislature.\textsuperscript{92} Category I includes fifteen states that simply mandate a free system of public schools.\textsuperscript{93} Category II contains nineteen states\textsuperscript{94} that require the public school systems to reach some minimum level of quality—usually "thorough and/or efficient."\textsuperscript{95} Category III consists of eight states\textsuperscript{96} that have a "stronger
and more specific educational mandate." 97 Finally, states with Category IV clauses make education the most important state duty. 98 Of course, whether a state's school finance system violates any one of these types of clauses depends to a great extent on the public school finance system in place.

2. State Public School Finance Systems

State legislatures and local school districts have shared the responsibility for financing public education since the early twentieth century. 99 States began to receive federal aid to help finance public education when the Elementary and Secondary Education Act 100 was enacted into law in 1965. However, the vast majority of funding for public education comes from state aid and local revenues. 101

In general, most states and local school districts fund public education from a combination of the state common school fund and local revenues. 102 The legislature appropriates a certain amount of state revenues for the common school fund. 103 The local school districts supplement the state aid by raising

96. See Ratner, supra note 92, at 815-16 n.144. (noting that California, Indiana, Iowa, Massachusetts, Nevada, Rhode Island, South Dakota, and Wyoming all have Category III clauses).

97. Id. at 814-15. ("Provisions in [Category III] contain a stronger and more specific education mandate than those in the first and second groups."). Rhode Island's constitution is typical of a Category III clause: "[The legislature is required] to promote public schools . . . and to adopt all means which it may deem necessary and proper to secure . . . the advantages . . . of education . . . ." R.I. Const. art. XII, § 1.

98. See Ratner, supra note 92, at 816. Georgia, Illinois, Maine, Michigan, Missouri, New Hampshire, and Washington all have Category IV education clauses. Id. at 816 n.145. Washington's constitution is an example of a Category IV clause: "It is the paramount duty of the State to make ample provision for the education of all children residing within its borders . . . ." WASH. CONST. art. IX, § 1; see also Ratner, supra note 92, at 816 ("[P]rovisions in [Category IV] mandate the strongest commitment to education."). The education clause in the 1970 Illinois Constitution is a Category IV clause. Id. at 816 n.146.


In recognition of—(1) the special educational needs of children of low-income families and the impact of concentrations of low-income families on the ability of local educational agencies to provide educational programs which meet such needs, . . . the Congress declares it to be the policy of the United States to—(A) provide financial assistance to State and local educational agencies to meet the special needs of such educationally deprived children at the preschool, elementary, and secondary levels . . .


101. See Abbott v. Burke, 575 A.2d 359, 387 (N.J. 1990) (stating that nationwide, federal aid comprises about eight percent of the budget of school districts.).


103. Id.
revenue for education primarily from local property taxes.\textsuperscript{104} Generally, all districts must levy a minimum tax rate to raise local revenues for education.\textsuperscript{105} However, local voters may approve an increase in the tax rate to a statutory maximum.\textsuperscript{106}

School district finance systems fit into three general categories: (1) flat grant systems; (2) foundation programs; and (3) percentage equalizing or district power equalizing plans.\textsuperscript{107} Illinois law makes use of all three categories of finance systems.\textsuperscript{108} It is necessary to briefly describe each category in order to fully understand the source of funding disparities between school districts.

a. Flat grant systems

Under a flat grant system, the state distributes state aid for education to school districts on a per-pupil or a per-teacher basis.\textsuperscript{109} Thus, the amount of money that the state distributes for education does not depend on each district’s own ability to raise local funds for education.\textsuperscript{110} The underlying assumption behind this system is that each school district can locally raise sufficient funds to supplement the state aid and can thus provide a sufficient education.\textsuperscript{111} Such a system does not contemplate equality in funds for education between school districts in the state.\textsuperscript{112} There may be great disparities in funds available for education between any two school districts.\textsuperscript{113} One district may be able to raise much more local revenue for education than the other because it is able to tax its property at a higher rate, and/or property within its boundaries has a much higher assessed valuation.\textsuperscript{114}

b. Foundation program systems

An alternative finance system—the foundation school finance system—is characterized by the Strayer-Haig\textsuperscript{115} foundation program.\textsuperscript{116} Strayer-Haig establishes a minimum dollar amount per-pupil that is necessary to fund an edu-

\textsuperscript{104} Cf. \textit{id.} at 838 (stating that in Illinois, over 90\% of local tax revenue is raised through the real estate property tax).

\textsuperscript{105} \textit{Id.} at 839.

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} See Johnson, \textit{supra} note 99, at 328-30.

\textsuperscript{108} See \textit{ILL. REV. STAT.} ch. 122, para. 18-8 (1989).

\textsuperscript{109} Johnson, \textit{supra} note 99, at 328.

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} See, e.g., Horton \textit{v.} Meskill, 376 A.2d 359 (Conn. 1977) (holding unconstitutional under the Connecticut Constitution the state's flat-aid school financing system because it resulted in great disparity in per-pupil funding between school districts).

\textsuperscript{114} \textit{Id.} at 365-68.

\textsuperscript{115} George D. Strayer and Robert M. Haig developed the formula to mathematically express a state government's policy as to its distribution of aid to school districts. Schwartz, \textit{supra} note 102, at 835. Illinois adopted the formula in 1927. \textit{Id.}

\textsuperscript{116} Johnson, \textit{supra} note 99, at 328-29; Schwartz, \textit{supra} note 102, at 835-37.
cation that meets state constitutional standards. The state specifies a qualification rate at which each district must tax itself in order to receive state funding. Using the specified qualification tax rate, some districts raise local funds for education at a level lower than the foundation level. The state guarantees an amount of state aid for education for these districts that will bring their per-pupil expenditures to the foundation level.

Thus, the foundation program is an improvement over a simple flat grant system because the foundation program accounts for disparities between school districts in educational funding per pupil. It does, however, have at least two shortcomings. First, it does not create an incentive for school districts to tax themselves at a rate over and above the qualification rate. Second, it does not compensate for the fact that, even if a property-wealthy district and a property-poor district tax at the same rate, the property-wealthy district can raise much more local money for education than can the property-poor district.

c. Equalization systems

A third finance system, the equalization or district power equalizing system, attempts to remedy the foundation system's shortcomings, while also attempting to preserve local control of education. The system attempts to equalize the property bases that districts use to raise local revenue for education. The state uses an equalization formula that guarantees the same amount of funding (state and local funding combined) for education to districts that tax themselves at the same rate. Thus, if both a property-wealthy school district and a property-poor school district tax themselves at the same rate, the poor school district can have the same amount of money available to it to spend on each pupil's education as the wealthy district has available to it to spend on each pupil's education. The state does not consider the amount of money a school district raises through local taxation.

Although the equalization system decreases disparities in funding for education between property-wealthy school districts and property-poor school dis-

117. Johnson, supra note 99, at 329; Schwartz, supra note 102, at 835.
118. Johnson, supra note 99, at 329; Schwartz, supra note 102, at 835.
119. Johnson, supra note 99, at 329; Schwartz, supra note 102, at 835.
120. Johnson, supra note 99, at 329; Schwartz, supra note 102, at 836.
122. Id.
123. Id.
124. A property-wealthy district is a school district with a relatively high assessed valuation.
125. A property-poor district is a school district with a relatively low assessed valuation.
127. Id. at 329-30; Schwartz, supra note 102, at 837.
128. Johnson, supra note 99, at 329-30; Schwartz, supra note 102, at 837.
130. Id.
131. Id.
districts, the system has two critical flaws. First, states place a limitation on the local tax rate that it will equalize. For instance, a state may guarantee $2000 per pupil to spend on education to every district that taxes itself at a set rate. However, if a district taxes above that set rate, the state will not equalize the revenues raised by the higher tax rate. The set tax rate becomes a ceiling above which the state will not equalize. Consequently, a poorer school district that cannot afford to tax at a higher rate is limited to $2000 per pupil while wealthier school districts that can afford to tax at a higher rate are guaranteed $2000 per pupil, plus any "additional funds" they raise from local property taxes. The state does not equalize these "additional funds." Second, the amount of money a given school district spends on education is dependent upon the tax levies voted upon by district voters. Thus, the quality of education each district can afford to provide for its students is dependent upon the value residents of each district place on education. Neither the limitation placed upon the local tax rate nor the variable tax levies voted upon by each district's voters is necessarily related to a student's educational needs.

D. Recent State Court Litigation

Recent litigation at the state court level has focused essentially on the same basic issue: the appropriateness of "an educational funding system that depends on a combination of state and local taxes producing disparity of expenditures in the face of inverse disparity of need." While each state court decision is not binding precedent in other state court jurisdictions, the different decisions influence courts in other states.


In Abbott v. Burke, the New Jersey Supreme Court addressed the constitutionality of the state's public school finance system. The New Jersey Constitution contained a Category II education clause. This clause required the legislature to provide a "thorough and efficient system of free public schools." New Jersey financed public education through a district power
equalizing system that guaranteed a tax base per pupil for each district taxing itself at a certain rate. Despite the equalization of state aid, the disparity in spending per pupil between the wealthiest school districts and the poorest school districts was $1135 in 1984-85. In Abbott v. Burke, the petitioners based their challenge on the state constitution's education clause, and equal protection clause, and claimed that the finance system violated the Law Against Discrimination. The New Jersey Supreme Court based its decision solely upon the education clause. It held that New Jersey's school finance system violated the "thorough and efficient" clause due to funding disparities between the poorest and wealthiest school districts. However, it found no such violation across the board—between all school districts in the state.

The court first defined "thorough and efficient" as the minimal standard required by the state constitution. It acknowledged that the scope and content of "thorough and efficient" had to be flexible and wide in scope. With that in mind, the court defined a "thorough and efficient" education as one that allowed "disadvantaged children... to compete in, and contribute to, the..."

144. N.J. STAT. ANN. §§ 18A:7A-1 to 18A:7A-52 (West 1975); see also Abbott, 575 A.2d at 378 ("In the School budget year 1985-86, the GTB [Guaranteed Tax Base] was $250,927.").
146. Id. at 383.
147. N.J. CONST. art. VIII, § 4, para. 1.
148. N.J. CONST. art. I, § 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.").
150. Abbott, 575 A.2d at 410. The court stated:
We decline to rule on plaintiffs' state equal protection claim. We referred in Robinson I to the monumental governmental upheaval that would result if the equal protection doctrine were held applicable to the financing of education and similarly applied to all governmental services. We need not deal with those implications, for the remedy afforded in this opinion, although not based on equal protection, substantially mitigates plaintiffs' equal protection claim.

Id. (citations omitted).
151. The court defined "richer... districts" as "those suburban districts whose indicators of wealth—per capita income, property values, and socioeconomic status—are the highest." Id. at 382. The court defined "poorer... districts" as school districts in "urban areas with the highest poverty indicators and the lowest socioeconomic status." Id.
152. Id. at 383.
153. Id. at 368-69.
154. Id. at 367. The court stated:

[What a thorough and efficient education consists of is a continually changing concept. ... [T]he definition of a thorough and efficient system of education and the delineation of all the factors necessary to be included therein, depend upon the economic, historical, social and cultural context in which that education is delivered. ... What seems sufficient today may be proved inadequate tomorrow, and even more importantly that only in the light of experience can one ever come to know whether a particular program is achieving the desired end.

Id.
society entered by the relatively advantaged children." A "thorough and efficient" education would equip the student for his role as a citizen and competitor in the labor market and would allow the student to compete with relatively advantaged students in the labor market. The court recognized not only that "the State ... [has] the power to spend in excess of the norm in view of the presumed greater needs of ... [disadvantaged] students, but [also] that it might be required to do so." Armed with its definition of a "thorough and efficient" education, the court found that the existing finance system could not realistically meet the "thorough and efficient" standard. The court reasoned that the critical fault in the system lay in reliance on local property taxation. While the finance system allowed each school district to raise all the money necessary to provide its students with a thorough and efficient education, many districts were simply too poor to raise the money they theoretically were empowered to raise. The state could not sufficiently supplement the money raised by the property-poor school districts. Thus, the court noted that a "thorough and efficient" system of schools could not realistically be met by reliance on local taxation. "The discordant correlations between the educational needs of the school districts and their respective tax bases" suggested that any such effort would likely fail. The court further reasoned that the system created a situation where "the poorer the district, and the greater the need, the less money available and the worse the education." The court noted that the finance system fell short of the constitutional standard in two ways. First, the disparity in expenditures for education between affluent school districts and poor school districts caused students in the poor school districts to receive less than a "thorough and efficient" education—one that would allow them to compete with relatively advantaged students in the

155. Id. at 372 (citing Abbott v. Burke (Abbott I), 495 A.2d 376, 390 (N.J. 1985)).
156. Id. at 368-69. The court used several different means to describe a "thorough and efficient" education throughout the opinion. For example, later in the opinion, the court interpreted a "thorough and efficient" education to mean "being able to fulfill one's role as a citizen ... , the ability to participate fully in society, in the life of one's community, the ability to appreciate music, art, and literature, and the ability to share all of that with friends." Id. at 397.
157. Id. at 371.
158. Id. at 376, 384.
159. Id. at 384.
160. Id.
161. Id. (quoting Robinson v. Cahill, 303 A.2d 273, 279 (N.J.), cert. denied, 414 U.S. 976 (1973)).
162. Id. at 387. The court recognized "municipal overburden" as a bar to increased funding for education at the local level in poorer urban districts. It noted that "municipal overburden" is the excessive tax levy some municipalities must impose to meet governmental needs other than education. Poorer urban districts must use tax money derived from their relatively low property values to satisfy costs for "police and fire protection, road maintenance, social services, water, sewer, garbage disposal, and other similar services." Consequently, poorer urban districts have a local tax levy well above the average rate, and school boards in poor urban districts are hesitant to raise tax rates to add more funding for education. Id. at 393-94.
labor market. Second, the system provided students in poorer urban school districts with an inadequate absolute level of education. The court further found, however, that only the combined effects of these two shortcomings violated New Jersey’s education clause. Consequently, the court concluded that the existing system—which did not alleviate disparity in available funding for education, and which did not provide poor school districts with sufficient funding to educate their disadvantaged students, could not provide a “thorough and efficient” education. Therefore, the system violated the New Jersey Constitution.

Critical to its decision was the court’s finding that the needs of students in poor urban areas differed from and vastly exceeded those of students in property-wealthy areas. Consequently, the court required the state to implement a “significantly different approach to education” in poor urban areas. The state had to assure enough funding for poorer districts to provide more than a

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163. Id. at 382-89.
164. Id. at 394-403. The court identified several shortcomings of the education in poor urban school districts: limited exposure to computers, inadequate physical facilities, limited or no exposure to foreign languages, and limited exposure to music and art. Id. at 394-97. By an inadequate “absolute” level of education, the court meant that students in poor urban areas were receiving an education that was not only insufficient as compared to wealthier school districts, but also inadequate in and of itself. Id. at 394-403.
165. Id. at 399-400.
166. Cf. Johnson, supra note 99, at 330 (discussing the characteristics of equalization systems). An equalization program does not attempt to alleviate disparities in funding between school districts. It simply attempts to alleviate the differences in local effort by equalizing tax bases between school districts. Wealthier school districts can still raise much more funding for education than can poorer school districts because: (1) wealthier school districts generally have tax bases much higher than the guaranteed tax base under the finance system; and (2) taxpayers in wealthier school districts can afford to pay higher taxes for education. Id.
167. Abbott, 495 A.2d at 384. The court later summarized:
Disparity of funding, its relationship to poverty, the critical needs—educational and otherwise—of [poor urban district] pupils, the practicability to raise further funds through taxation (municipal overburden), the likelihood of the permanence of these factors, the level of substantive education actually being given, the failure rate of [poor urban] students, their dropout rate, were all sufficiently shown, and dramatically contrasted with the situation of students in richer districts.
Id. at 388-89.
168. Id. at 319, 340, 344, 371-81, 385. The court noted the many special needs that poorer urban students require:
Many students in poorer urban districts do not have books at home. These students obviously need adequate libraries and media centers. . . . [C]ounseling services [could] help children overcome problems associated with unwanted pregnancies, drugs, crime, or unsupportive families; . . . both crisis counselors and career counselors from elementary school through high school may be needed to assist students to overcome obstacles and receive a worthwhile education.
Alternative education programs for students identified as potential dropouts are suggested as necessary to motivate a substantial number of students in poorer urban districts.
Id. at 402.
169. Id. at 401.
Importantly, the court noted that its decision did not require total equality in funding for education between all school districts. The court’s decision required equalization aid only to a certain level—that level necessary to achieve a thorough and efficient education. School districts could exceed the thorough and efficient level. However, the court did not foreclose the possibility that “changing circumstances, including future development of education in this state, [could] lead to an interpretation of the constitutional obligation as requiring . . . equality of funding.”

Finally, the court instructed the legislature on the constitutional requirements of any public school finance system. Any new legislation had to assure that the educational funding of poorer urban districts was substantially equal to that of property-rich districts. The court required funding to be certain each year. The court mandated that the state assure funding per pupil at a level that was “substantially equivalent” to that spent in those districts providing the kind of education that poor urban students needed; the funding could not depend on the budgeting and taxing decisions of local school boards. Therefore, the legislature was to implement a new public school finance mechanism. However, the amount of available funding could not depend on how much a poorer urban school district was willing to tax. The legislative remedy had to assure that the poorer urban districts had a budget per pupil that was approximately equal to the average of the wealthier suburban districts; and additionally, that budget had to be sufficient to address the poorer students’ “special needs.”


Another recent state court decision that found a violation of a state education clause is Edgewood Independent School District v. Kirby. In Kirby, the Texas Supreme Court declared that the state’s public school finance system

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170. Id. ("Something quite different is needed, something that deals not only with reading, writing, and arithmetic, but with the environment that shapes these students’ lives and determines their educational needs.").
171. Id. at 395.
172. Id.
173. Id.
174. Id.
175. Id. at 408-10. The court also noted, “[G]iven the limitation of judicial power, we recognize that the kind of equity that can be done in this area by the Legislature cannot be accomplished by judicial order.” Id. at 409.
176. Id. at 408.
177. Id.
178. Id.
179. Id. at 409.
180. Id.
181. 777 S.W.2d 391 (Tex. 1989).
violated the Texas Constitution's education clause. The Texas Constitution included a Category II education clause. It required the legislature to provide an "efficient system" of public free schools.

Texas' public school finance system was a foundation type that attempted to provide students in all school districts with "at least a basic education." The state aid given to each school district was equalized so that low property-wealth districts received more state aid than high property-wealth districts. Despite the state aid system, and due to a property wealth disparity of 700-to-1 between the wealthiest school district and the poorest school district, per-pupil expenditures varied from $2112 to $19,333.

The court recognized that the Texas Constitution's education clause imposed an affirmative duty to provide an "efficient" system of public schools. The court then directed its attention toward defining the word "efficient" in the education clause by ascertaining what the framers of the clause intended when they drafted it. The court noted that those who drafted and ratified the education clause "never contemplated the possibility that such gross inequalities could exist within an 'efficient' system." Furthermore, the court emphasized that the constitutional delegates realized the importance of providing an education for both rich and poor citizens. Thus, the court reasoned that the constitutional framers and ratifiers did not intend to sanction a public school finance system that produced such vast disparities between school districts. Instead, the court determined that the framers and ratifiers intended

184. Ratner, supra note 92, at 815.
185. Tex. Const. art. VII, § 1 ("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.").
186. See Johnson, supra note 99, at 333 (describing the characteristics of foundation finance systems).
188. Kirby, 777 S.W.2d at 392.
189. Id.
190. Id. Also, an average of $2000 more per pupil was spent on each of the 150,000 students in the wealthiest districts than was spent on the 150,000 students in the poorest districts. Id. at 392-93.
191. Id. at 394. The court also rejected the state's argument that interpretation of the education clause was a "political question" for the legislature to decide. Id. The court stated: [T]he function of the judiciary in deciding constitutional questions is not one which it is at liberty to decline. . . . [W]e cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution; [w]e cannot pass it by because it is doubtful; with whatever doubt, with whatever difficulties a case may be attended, [w]e must decide it, when it arises in judgment.
Id. (quoting Morton v. Gordon, Dallam 396, 397-98 (Tex. 1841)).
192. Id. at 394-97; see also Thro, supra note 62, at 237 n.98 (stating that the Texas Supreme Court's standard method of state constitutional interpretation is use of the framers' intent).
193. Kirby, 777 S.W.2d at 395.
194. Id. at 395.
195. Id. at 396.
a system that would provide a "general diffusion of knowledge." Since the public school finance system "provide[d] not for a diffusion that [was] general, but for one that [was] limited and unbalanced," the court concluded that the system was "directly contrary to the constitutional vision of efficiency."

After so holding, the court set out the characteristics of a finance system that would meet the education clause's "efficiency" mandate. Efficiency required a direct correlation between each school district's tax effort and the educational resources available to it. The court insisted that school districts enjoy "substantially equal access to similar revenues per-pupil at similar levels of tax effort." Furthermore, the court mandated that the public school finance system provide for a general diffusion of knowledge statewide. The finance system could account for differing costs between school districts, or costs associated with providing an equalized educational opportunity to atypical or disadvantaged students. However, although local districts could supplement the efficient system provided by the legislature, any local enrichment could derive only from local tax effort.

3. The Wisconsin Approach: Kukor v. Grover

Unlike the courts in Abbott v. Burke and Edgewood Independent School District v. Kirby, the Wisconsin Supreme Court in Kukor v. Grover upheld Wisconsin's public school finance system against a constitutional attack. Wisconsin's constitution contained a Category II education clause: it required the legislature to provide public schools that were "as nearly uniform as practicable." Wisconsin used a district power equalizing system that equalized the property tax bases of school districts in Wisconsin. The finance system

196. Id.
197. Id.
198. Id.
199. Id. at 397-99. The court noted its limitations in the area of public school finance:
Although we have ruled the school financing system to be unconstitutional, we do not now instruct the legislature as to the specifics of the legislation it should enact; nor do we order it to raise taxes. The legislature has primary responsibility to decide how best to achieve an efficient system. We decide only the nature of the constitutional mandate and whether that mandate has been met.
Id. at 399.
200. Id. at 397.
201. Id.
202. Id.
203. Id. at 398.
204. Id.
205. 436 N.W.2d 568 (Wis. 1989).
207. Ratner, supra note 92 and accompanying text.
208. WIs. Const. art. X, § 3 ("The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years.").
209. Kukor, 436 N.W.2d at 571-73.
system equalized school district tax bases that fell below the guaranteed tax base level.210 The petitioners claimed that the system violated both the state education clause and the state equal protection clause.211 They claimed that the system violated the state constitution because it "fail[ed] to take into account the fact that children have differing educational needs, some of which may, as a result of socioeconomic factors, require greater financial resources to achieve the same level of educational opportunity."212 The petitioners further claimed that the system failed to address the fact "that those districts with the greatest educational burden are the least capable of raising sufficient financing from property taxation as a result of lower property valuations or 'municipal overburden.'"213 The petitioners' claim did not focus on disparity in per-pupil expenditures. Instead, their claim focused on the perceived inability of poorer school districts to raise enough funding to meet the special needs of disadvantaged students.

The court first considered whether the finance system violated the education clause.214 Accordingly, it sought to define the phrase "nearly uniform as practicable."215 In interpreting the clause, the court used the plain meaning of the words in the context of the constitution, the historical analysis of the constitutional debates, and early interpretations of the clause.216 The court acknowledged that it could not define the clause solely from the plain meaning of its words.217 Furthermore, judicial precedent was unavailable since the Wisconsin courts had not previously decided whether the education clause required the state to allocate resources so as to guarantee that each district could respond to the particularized needs of each student.218

210. See Johnson, supra note 99 and accompanying text (describing the characteristics of equalization school finance systems). The system guarantees a property tax base at which participating districts can tax themselves. Wis. Stat. Ann. § 121.01 (West 1988). The guaranteed tax base in 1985-86 was $270,100 per pupil. Kukor, 436 N.W.2d at 571. If a school district's actual tax base falls below the guaranteed tax base, the state aid formula supplements the actual tax base so that it will reach the guaranteed level. Id. The amount of state aid Wisconsin will grant each district is subject to two "shared cost" ceilings determined by the legislature. Id. The primary shared cost is the amount of a district's costs that is less than the primary ceiling, and the secondary shared cost is the amount that exceeds the ceiling. Id. The state guarantees less aid to equalize a district's secondary shared cost than it guarantees a district's primary shared cost. Id. at 571-72. Thus, a district whose actual tax base is greater than the guaranteed tax base receives no equalization aid; a district whose actual tax base is 37% of the guaranteed tax base pays 37% of the costs that do not exceed the primary ceiling; and districts must pay for a proportionally greater amount of costs that exceed the primary ceiling. Id. at 572.

211. Wis. Const. art. I, § 1 ("All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.").

212. Kukor, 436 N.W.2d at 573.

213. Id.

214. Id. at 574-78.

215. Id. at 574-76.

216. Id. at 574.

217. Id.

218. Id. at 575.
With those findings in mind, the court focused on the constitutional debates and found that the framers intended "uniformity" to apply to the character of instruction given in public schools—to the substantive curriculum offered in public schools. According to the court, "uniformity" did not apply to the revenue raising powers of the school districts. Thus, the court rejected an interpretation of the clause that would have required absolute uniformity in education, although it conceded such an interpretation could be socially desirable.

Finally, the court adopted an interpretation of the phrase "nearly uniform as practicable." The court held this phrase did not mandate uniformity in educational opportunities. The phrase assured that state funds were distributed on an equal per-pupil basis so that the "character" of instruction was as uniform as practicable. However, it did not require the state to meet the special needs of students in property-poor school districts. Applying its interpretation to Wisconsin's school funding system, the court found that the system was actually "more responsive to wealth disparities than the constitutional provision for the school fund" since the system provided equalization funds for poorer school districts.

Unlike the Abbott and Kirby courts, the Wisconsin Supreme Court addressed the petitioners' state equal protection claim. After describing the levels of scrutiny framework it would apply, the court declared that "equal opportunity for education" as defined by art. X, sec. 3 [Wisconsin's 'uniform education' clause], is a fundamental right. The court, however, did not apply strict judicial scrutiny. The court reasoned that since the "uniform education" clause did not mandate absolute equality in districts' per-pupil expenditures, but only that the state distribute state funds on an equal per-pupil basis, and since petitioners did not claim that the state had distributed aid on an unequal basis, no fundamental right was implicated. Consequently, the court applied only minimal judicial scrutiny and upheld the constitutionality of

219. Id. (noting that the framers "were concerned ... with the character of instruction that should be given in ... schools after the districts were formed").
220. Id.
221. Id. ("Whether absolute uniformity of an equal opportunity for education in all school districts of the state is socially desirable, is not for this court to decide. We can only conclude that the plain meaning of sec. 3, art. X does not mandate it.").
222. Id. at 577-78.
223. Id. at 577.
224. Id.
225. Id. at 585.
226. Id. at 577.
228. Kukor, 436 N.W.2d at 579. The framework the court used was the same as federal equal protection analysis: "Unless a statute may be said to affect a 'fundamental right' or to create a classification based on a 'suspect' criterion, the standard this court uses in reviewing the constitutionality of a statutory classification is the 'rational basis' test." Id. (citation omitted).
229. Id.
230. Id.
An Illinois court faced with a challenge to the public school finance system can thus consider two recent decisions that struck down school finance systems in other states, and one that upheld a finance system. However, although the courts in New Jersey and Texas have found their public school finance systems unconstitutional, Illinois courts have refused to do so.

E. Illinois

1. The Illinois Public School Finance System

The Illinois public school finance system combines three sources of revenue to fund public education: the Federal Government, the state government, and revenues generated from local property taxes. Revenues generated from local property taxes are the primary source of funding for public education. Consequently, it is not surprising that disparities in per-pupil spending for education exist between school districts with high property wealth and school districts with low property wealth.

There is a wide variation in property wealth per pupil between the 967 public school districts in Illinois. This variation is quite significant since fifty-four percent of Illinois school district receipts come from local property taxes. In 1989-90, the measured property wealth per pupil in Illinois ranged from a low of $5272 for the poorest district to a high of more than $1.3 million in the wealthiest district.

Most important to an attack on the public school finance system in Illinois is that, despite alternative state aid schemes, expenditures for education per pupil vary substantially. In fiscal year 1988, per-pupil expenditures ranged from approximately $12,900 to less than $2100. Consequently, on November 13,
1990, the Committee for Educational Rights, made up of fifty-five Illinois public school districts and a number of school children and their parents, filed a lawsuit in the Circuit Court of Cook County against then-Governor James R. Thompson, State Superintendent of Education Robert Leininger, and the state Board of Education. Plaintiffs are alleging that the Illinois school finance system fails to provide certain children with an efficient system of high quality public schools. Importantly, plaintiffs allege that the finance system allows a discriminatory distribution of educational resources that results in greatly varied educational opportunities. Thus, the crux of this attack, and of any such attack on the school finance system, is the source of the disparity in per-pupil expenditures between school districts. It is necessary to briefly consider the different methods used to fund public education in Illinois in order to understand the source of such disparity in per-pupil expenditures.

The Federal Government grants aid to education in the form of categorical aid, or a legislative appropriation to fund only certain federal programs. Thus, these programs restrict a school district in its use of the federal funds.

The State of Illinois provides substantial aid to help fund public schools. The complex state funding formula provides three alternative methods of allocating state funds for education. The three alternative methods of allocation are the special equalization computation, the alternate method computation, and the flat grant computation. The method by which a school district re-

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in the Illinois Goal Assessment Program Reading and Mathematics Test. 

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Patients filed the case on the first day of National Education Week. Plaintiffs allege that the statutory scheme of school finance in Illinois violates three provisions of the 1970 Illinois Constitution: (1) the education article, ILL. CONST. art. X, § 1; (2) the equal protection clause, ILL. CONST. art. I, § 2; and (3) the "no special law" clause, ILL. CONST. art. IV, § 13. Complaint of Petitioner, Committee for Educational Rights v. Edgar, No. 90 CH-11097 (Cir. Ct. of Cook County, filed Nov. 13, 1990).

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238. Id. at 12-13. Students in wealthy school districts had higher ACT scores than students in poorer school districts. Id. at 14 (stating that the average composite score for wealthy districts was 19.9, and for poor districts, 18.2). Wealthier school districts employed a higher percentage of teachers with advanced degrees than poorer districts. Id. at 16. Finally, wealthier districts paid their teachers significantly higher salaries than poorer school districts paid their teachers. Id. at 17.

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240. See ILL. CONST. art. X, § 1 ("The State shall provide for an efficient system of high quality public educational institutions and services.").


242. Schwartz, supra note 102, at 833. Categorical aid is funding that the federal government supplies for financing only specific programs such as food services, vocational education, the Emergency School Assistance Act, and special education. Id.

243. Id.

244. Id. at 833-34. The Illinois Constitution requires the state to contribute funds to support public education. ILL. CONST. art. X, § 1.

245. ILL. REV. STAT. ch. 122, para. 18-8 (1989); see also Burroughs & Leininger, supra note 7, at 19-20.

246. ILL. REV. STAT. ch. 122, para. 18-8 (1989); see also Burroughs & Leininger, supra note 7, at 22-25; supra notes 109-39 and accompanying text (describing in detail the flat grant systems, foundation systems, and equalization systems).
ceives state funding depends primarily upon the equalized assessed valuation of property within the district.\textsuperscript{247} All three methods embody the foundation level—a dollar input per “chapter one weighted average daily attendance student” (“CWADA”)\textsuperscript{248}—that represents the guaranteed per-pupil, minimum level of state financial support.\textsuperscript{249} The state will guarantee the per-pupil foundation level in combined state and local funding.\textsuperscript{250}

The special equalization formula was used by 752 of the 967 Illinois school districts in 1989-90.\textsuperscript{251} Basically, the special equalization formula guarantees a property tax base per CWADA student.\textsuperscript{252} It then provides state funding for the difference between the revenues theoretically generated by the guaranteed tax base per CWADA student, and the revenues generated from the actual equalized assessed valuation per CWADA student.\textsuperscript{253} Consequently, a school district with high per-pupil property wealth will receive less state aid per pupil than a school district with a lower per-pupil property wealth.\textsuperscript{254} The poorest school districts use this method to receive state aid.\textsuperscript{255}

Districts with relatively high actual wealth per CWADA student use the alternate method computation to receive state aid for education.\textsuperscript{256} In 1989-90, 149 Illinois school districts used this formula to receive their state aid.\textsuperscript{257} The alternate method formula guarantees less state funding for education to school districts which use it.\textsuperscript{258}

Districts with the highest equalized assessments per CWADA student use the flat grant computation to receive state aid for education.\textsuperscript{259} Under this formula, each school district receives a grant per CWADA student equal to seven percent of the foundation level.\textsuperscript{260}

Public school funding is not limited to state aid; local districts also have an

\textsuperscript{247} See Burroughs & Leininger, \textit{supra} note 7, at 19-20.
\textsuperscript{248} ILL. REV. STAT. ch. 122 para. 18-8 (1989); see also Burroughs & Leininger, \textit{supra} note 7, at 20-25. Chapter One Weighted Average Daily Attendance (“CWADA”) is a weighing system that accounts for low-income students by giving them greater weight for public school finance purposes. This has the effect of adjusting upward the average daily attendance of districts with low-income students. \textit{Id.}
\textsuperscript{249} See Burroughs & Leininger, \textit{supra} note 7, at 20-21. The foundation level was $2,384.25 per pupil in 1989-90. \textit{Id.}
\textsuperscript{250} \textit{Id.} at 21.
\textsuperscript{251} \textit{Id.} at 20.
\textsuperscript{252} \textit{Id.} The guaranteed tax base per CWADA student in 1989-90 was $125,486.84 for elementary school districts, $216,750.00 for high school districts, and $86,385.86 for unit districts. \textit{Id.}
\textsuperscript{253} \textit{Id.} at 22 (stating that in 1989-90, each special equalization district received state aid averaging $209.95 per CWADA student).
\textsuperscript{254} \textit{Id.} at 23.
\textsuperscript{255} \textit{Id.} at 20.
\textsuperscript{256} \textit{Id.} at 23.
\textsuperscript{257} \textit{Id.} at 20.
\textsuperscript{258} See \textit{id.} at 24. For 1989-90, each alternative method district received state aid of between $166.90 and $309.95 per CWADA student. \textit{Id.}
\textsuperscript{259} \textit{Id.}
\textsuperscript{260} \textit{Id.} at 24-25. In 1989-90, the flat grant was $166.89 per CWADA student.
obligation to help support their schools. The local school districts provide their own funding for education primarily through local taxes. The local property tax is the most substantial source of local tax revenue. The local school districts all levy a minimum tax. The district voters may vote to increase the tax rate to a statutory maximum. The use of local property tax revenue allows local school districts to control the education of their children. However, it may also lead to disparities in funding for education between school districts.

Whether a finance system that allows such disparity in per-pupil expenditures can continue to exist depends on the requirements of the Illinois Constitution—specifically the education clause and the equal protection clause. Thus, it is important to determine the requirements of both clauses as applied to public school finance.

2. The Illinois Constitution

The Illinois Constitution was redrafted in 1970. Parties who wish to attack the Illinois public school finance system may rely on two provisions in the Illinois Constitution: the education clause and the equal protection clause.

The education clause in the 1970 Illinois Constitution requires the state to provide for "an efficient system of high quality public educational institutions." The clause also makes educational development "a fundamental goal of the People of the State." Consequently, Illinois has a Category IV education clause as identified above.

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261. See Schwartz, supra note 102, at 838.
262. Id. (stating that, in Illinois, over 90% of local tax revenue is raised through the real estate property tax).
263. See ILL. REV. STAT. ch. 122, para. 17-2 (1989) (tax levies for cities with a population of less than 500,000); id. para. 34-53 (tax levies for cities with a population of more than 500,000).
264. Id. para. 17-3 (1989) (for cities under 500,000 population).
265. See Schwartz, supra note 102, at 838-39.
266. See id. at 835-38, 836 n.25.
267. ILL. CONST. art. X, § 1.
268. ILL. CONST. art. 1, § 2.
269. ILL. CONST. art. X, § 1. The education clause reads as follows:
   A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.
   The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.
   The State has the primary responsibility for financing the system of public education.

Id.

270. Id.
271. Id.
272. Ratner, supra note 91, at 814-16. The 1870 Illinois Constitution also contained an education clause. See ILL. CONST. of 1870 art. VIII, § 1 ("The General Assembly shall provide a thorough and efficient system of free schools, whereby all children of this State may receive a good
A study of the 1970 Constitutional Convention, and in particular the comments of the education committee, may reveal exactly what the education clause requires of the public school finance system in Illinois. At the convention, most educational experts and education committee members agreed that the education clause in the 1870 Illinois Constitution did not emphasize the modern importance of education. The clause required only that the General Assembly provide a “thorough and efficient” system of public schools in order to ensure a “good common school education” for all public school pupils. The education committee noted that “[t]he existing constitutional provision [was] not adequate to express the importance now given to the educational enterprise and its critical influence on the common welfare.” Thus, the education committee set out to draft an education clause that would emphasize the importance of education.

The new education clause was intended to do more than equip students to perform their duties as good citizens. The clause had to emphasize the need for the state to provide an education for the “maximum development of persons of every level of competence, highest to lowest.” Accordingly, the committee noted that:

[T]he objective that all persons be educated to the limits of their capacities would require expansion beyond the traditional public school programs. It [would] recognize[] the need of the person with a physical handicap or mental deficiency who nevertheless is educable. . . . The objective [was] to provide each person an opportunity to progress to the limit of his ability.

However, the final, adopted version of the education clause did not contain a proposed “Section 4” that would have required the state to provide the major source of revenue to the public schools. The committee members who made

common school education.”). However, that clause may be classified as a Category II education clause. See supra notes 94-95 and accompanying text (noting that one characteristic of a category II clause is that it requires public schools to reach a thorough and efficient level of quality). The Supreme Court of Washington in Seattle School District No. 1 v. State, 585 P.2d 71 (Wash. 1978), struck down the state’s school finance system as violative of Washington’s Category IV education clause. Id. at 104. The court held that the education clause required more than a “basic education.” Id. at 96. Instead, the clause placed an affirmative, paramount duty on the state to guarantee ample, dependable funding to provide a basic program of education. Id. Since the state depended on special excess levies to provide funding for education, the state had not met the constitutional mandate. Id. at 104.

274. ILL. CONST. of 1870, art. VIII, § 1.
275. 6 RECORD OF PROCEEDINGS, supra note 1, at 233.
276. See BURESH, supra note 273, at 37.
277. 6 RECORD OF PROCEEDINGS, supra note 1, at 233.
278. Id. at 234.
279. Id. at 291. The proposed section stated:
To meet the goals of Section 1, substantially all funds for the operational costs of the free public schools shall be appropriated by the General Assembly for the benefit of the local school districts. No local governmental unit or school district may levy taxes
the proposal intended it to "equalize tax ratios throughout the State,"\textsuperscript{280} to "permit all districts to benefit from the taxes paid by industry,"\textsuperscript{281} and "to produce a level of educational opportunity that would be more equal throughout the state for all children."\textsuperscript{282}

The fact that the adopted version of the education clause does not include "Section 4" or similar language may impede court reform of educational finance.\textsuperscript{283} However, one education committee member expressed the possibility that the language in the education clause actually encourages court reform.\textsuperscript{284} He speculated that if the Illinois school financing system were challenged in the courts, the new equal protection clause, together with the education clause's "efficient system" language, should compel a finding that the system violates both the equal protection clause and the education clause.\textsuperscript{285} However, an Illinois court may not reach that conclusion because it may reason that the convention, having addressed itself to school finance in the last sentence of the education clause, did not intend any other provisions of the new Illinois Constitution to govern school financing.\textsuperscript{286} But the committee member added, "[I]f the legislature and the new state Board of Education will take the school financing language for what it is—... the urgent prayer for a fair solution—then they will act to equalize educational opportunity and the tax bur-

\textsuperscript{280}See \textit{Buresh}, \textit{supra} note 273, at 125 (quoting Malcolm M. Kamin, delegate to the Illinois Constitutional Convention and education committee member).

\textsuperscript{281}Id.

\textsuperscript{282}Id. at 299.

\textsuperscript{283}See \textit{Buresh}, \textit{supra} note 273, at 125.

\textsuperscript{284}Id.

\textsuperscript{285}Id. The relevant language of the education clause states that "[t]he State shall provide for an efficient system of high quality public educational institutions and services." ILL. CONST. art. X, § 1. This language mandates that the state provide an efficient system of public schools in order to meet the clause's fundamental goal: "[t]he educational development of all persons...to the limits of their capabilities." ILL. CONST., art. X, § 1 constitutional commentary (Robert A. Helman & Wayne W. Whalen, ILL. ANN. STAT. (Smith-Hurd 1971)).

\textsuperscript{286}See \textit{Buresh}, \textit{supra} note 273, at 125.
dens of educational financing without further judicial intervention." 287

A second provision in the 1970 Illinois Constitution that is relevant to public school financing is the equal protection clause. While the Illinois Constitution of 1870 included an education clause, 288 it did not contain an equal protection clause. However, the 1970 drafters added an equal protection clause to the bill of rights. 289 The drafters of the provision intended that it embody the same concept as the Federal Equal Protection Clause. 290 The committee noted that including an equal protection clause in the Illinois Constitution reaffirmed a concept that had been recognized and accepted in Illinois years ago—equal protection of the laws. 291

The Illinois equal protection guarantee gives no additional interpretation to the words "equal protection" than does the Federal Equal Protection Clause. 292 Not surprisingly, the Illinois courts have adopted federal equal protection analysis. 293 Furthermore, Illinois courts have essentially adopted the United States Supreme Court's criteria for defining a suspect class and a fundamental right. 294 The education committee at the Illinois Constitutional Convention rejected a proposed equal protection clause that may have articulated a fundamental right to public education. 295

287. Id. at 126.
288. ILL. CONST. of 1870, art. VIII, § 1.
289. The clause states: "No person shall be deprived of life, liberty, or property without due process of law nor be denied the equal protection of the laws." ILL. CONST. art. 1, § 2.
290. See 3 RECORD OF PROCEEDINGS, supra note 1, at 3043.
291. 6 id. at 19.
292. Compare U.S. CONST. amend. XIV, § 1 ("No State shall ... 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.") with ILL. CONST. art. 1, § 2 ("No person shall be deprived of life, liberty, or property without due process of law nor be denied the equal protection of the laws.").
293. See Aldridge v. Boys, 424 N.E.2d 886 (Ill. App. Ct. 1981) (stating that equal protection analysis, under the rational relationship test, asks whether state action resulting in unequal treatment has a rational relationship to a state purpose); Panko v. County of Cook, 356 N.E.2d 859 (Ill. App. Ct. 1976) (stating that the equal protection test, under both the Federal and Illinois Constitutions, is a bifurcated inquiry that first identifies purposes or objectives of the legislative scheme and then asks whether the classification bears a rational relationship to a legitimate legislative purpose).
294. See People ex rel. Defanis v. Barr, 397 N.E. 895 (Ill. App. Ct.), aff'd, 414 N.E.2d 731 (Ill. 1979) (holding that distinctions not based on race, alienage, or gender will be upheld against an equal protection claim if the distinctions are rationally related to a legitimate governmental interest); Illinois Hous. Dev. Auth. v. Van Meter, 412 N.E.2d 151 (Ill. 1980) (stating that a person's right to housing is a non-fundamental right, and should be examined under a rational relationship standard of judicial review in determining whether the equal protection clause has been violated); Miller v. Illinois Dep't of Pub. Aid, 418 N.E.2d 178 (Ill. App. Ct. 1981) (holding that when social and economic legislation is challenged as being in violation of the equal protection clause, the rational relation test is the appropriate level of judicial review).
295. Member Proposal No. 214 read as follows:

No person shall be subjected to any discrimination in his rights for or in ... public education, or in any other of his inherent and inalienable rights because of race, color, religion, national ancestry, sex, or physical or mental disability, by any individual or by any firm, corporation, or institution, or by the State or any agency or subdivision
3. Illinois Public School Finance Case Law

In addition to examining provisions in the Illinois Constitution, advocates for reform of Illinois' public school finance system must examine Illinois case law. Three lines of case law exist that are relevant to the validity of the Illinois public school finance system under the Illinois Constitution: attacks on the system based upon the education clause, attacks based upon the equal protection clause, and decisions involving public education of handicapped students.

The Illinois courts have not upheld a school finance challenge based upon the education clause. The courts' position has been one of extreme deference to the General Assembly. As to school finance systems, an Illinois court has stated, "[T]he creation of school systems and the manner of financing and administering them is clearly a legislative prerogative and . . . our judicial system cannot impose its views, its ideas, and its will upon the General Assembly." According to Illinois courts, the education clause grants to the General Assembly the unrestricted authority to form school districts and establish the public school system in Illinois.

\textit{Blase v. State} represents one of the few times that the Illinois Supreme Court addressed the requirements of the education clause in a school finance context. In \textit{Blase}, the court dealt a blow to the school finance reform movement when it held that the school finance language in the education clause was only hortatory and thus imposed no legally enforceable duty on the General Assembly to provide a majority of the funds for public education. While

\begin{footnotes}
\footnote{of the State.}
\footnote{7 RECORD OF PROCEEDINGS, supra note 1, at 2934.}
\footnote{296. ILL. CONST. art. X, § 1.}
\footnote{297. ILL. CONST. art. I, § 2.}
\footnote{298. The courts may have the opportunity to uphold such a challenge in the near future. On November 13, 1990 the Committee for Educational Rights filed a lawsuit in the Circuit Court of Cook County against then-Governor James R. Thompson, State Superintendent of Education Robert Leininger, and the State Board of Education. The lawsuit alleges that the Illinois school finance system violates the 1970 Illinois Constitution's education clause, equal protection clause, and special legislation clause. This suit is discussed and fully referenced \textit{supra} note 238 and accompanying text.}
\footnote{299. See, e.g., Cronin v. Lindberg, 360 N.E.2d 360, 365 (III. 1976) ("This court has consistently held that the question of efficiency of the educational system is properly left to the wisdom of the legislature."); Board of Educ. v. Cronin, 367 N.E.2d 501, 503 (III. App. Ct. 1977) ("Even if [a court] might consider the legislative intent of certain public school legislation to be unwise, unjust, oppressive or unworkable, [the court] is nevertheless mindful that such legislative errors are not subject to judicial review.").}
\footnote{300. Board of Educ. v. Cronin, 367 N.E.2d at 504.}
\footnote{301. Id. at 503.}
\footnote{302. 302 N.E.2d 46 (III. 1973). In \textit{Blase}, a group of taxpayers sued the superintendent of public education on behalf of their children, claiming the education clause required the state to provide not less than 50% of the funds required to maintain public schools. \textit{Id.} at 47.}
\footnote{303. \textit{Id.} at 49. Importantly, the court found hortatory that part of the education clause that states, "The State has the primary responsibility for financing the system of public education." \textit{Id.} The court based its decision on the fact that amendments "designed to make specific the respec-}
Blase did not foreclose all future school finance litigation, it reaffirmed the traditional deferential position of the Illinois courts toward public school finance—a position established under the 1870 Constitution. Blase also set the tone for future Illinois public school finance litigation.

The Blase court's interpretation of the education clause in the 1970 constitution indicated that the Illinois courts would require no more of the new education clause than they did of the education clause in the 1870 constitution. The Illinois Supreme Court has interpreted the “thorough and efficient” education clause in the 1870 Constitution to impose only two limitations: first, that the established school system be free; and second, that the system be open to all without discrimination. Consequently, any other questions as to the public school's thoroughness or efficiency are “solely for the legislature to answer and . . . the courts lack [the] power to intrude.” Thus, the court held that, with respect to the amount of money that the state must provide for the financing of its public schools, the education clause in the 1970 constitution did not differ from its predecessor in the 1870 constitution.

A second line of Illinois case law involves the equal protection clause in the 1970 constitution. When confronted with state equal protection challenges to the public school finance system, Illinois courts have refused to apply heightened scrutiny. The latest equal protection challenge to the Illinois public school finance system was made in People ex rel. Jones v. Adams. Although
the defendants claimed that the system violated their equal protection rights under both the federal and state equal protection clauses. The court held that the United States Supreme Court's decision in *San Antonio Independent School District v. Rodriguez* controlled. In fact, the court did not mention the Illinois equal protection clause as a separate basis for its decision. Consequently, the court applied the minimal scrutiny analysis of *Rodriguez* to the finance system.

Importantly, the court acknowledged that in *Rodriguez*, although the United States Supreme Court purported to apply the same minimal scrutiny ordinarily applied in equal protection cases, the court actually fashioned another standard of scrutiny. The Illinois court acknowledged that the scrutiny used by the Supreme Court in *Rodriguez* was more restrictive than ordinary minimal scrutiny, but was less restrictive than strict judicial scrutiny. While the principle of local control of schools was “valid” and “justifi[ed] a state's reliance on local real estate taxes in financing public schools,” the Equal Protection Clause could tolerate discrimination among school districts due to reliance upon real estate taxes “only if it [was] not invidious.” Furthermore, invidiousness was measured by two factors: the adequacy of the education provided by the complaining parties' schools, and the size of the disparity in expenditures per student between the public school districts. As a consequence, a finance system could deny pupils in the poorest school districts equal protection of the laws while remaining constitutional as to pupils in wealthier school districts.

As the *Adams* decision demonstrates, Illinois has not recognized a funda-

sided in poor school districts claimed the Illinois public school finance system violated the Illinois and federal equal protection clauses because the system relied so heavily on local property taxes. Defendants challenged both the foundation program and the district power equalizing system. Defendants' district had an equalized assessed valuation that was $2,293.58 less per capita than the state average. Defendants' school district levied a tax of $2.68 per $100—$0.04 higher than the state average. This tax raised $165 less in per-pupil revenue than the state average of $627 in real estate taxes per pupil. Despite the foundation program aid and equalization aid, defendants asserted the program violated their equal protection rights.
mental right to an education. However, in *Fumarolo v. Chicago Board of Education*, a recent, successful equal protection challenge to the Chicago School Reform Act, the Illinois Supreme Court suggested, in dicta, that a fundamental right to an education exists in Illinois when it stated that education was "a compelling state interest." In *Fumarolo*, plaintiffs successfully argued that the Act's voting scheme for school board elections violated their equal protection rights because it denied an equal vote to a large part of the electorate. The court noted that the operation of schools was a "fundamental governmental activity in which all members of society [had] an interest." Consequently, limiting voter eligibility for school board elections was not the least restrictive means for the state to provide a constitutionally adequate education. *Fumarolo* will affect any similar challenge to Illinois' school finance system.

Decisions by Illinois courts concerning public education for handicapped students make up a third line of case law relevant to the constitutional validity of the Illinois public school finance system. The extreme deference of the Illinois courts to the legislature in equal protection challenges and in chal-

323. 566 N.E.2d 1283 (Ill. 1990).
324. ILL. REV. STAT. ch. 122, para. 34-1 to 34-129 (1989).
325. *Fumarolo*, 566 N.E.2d at 1298-99 ("[E]ducation has a fundamental role in maintaining the fabric of our society." (citing Plyler v. Doe, 457 U.S. 202, 221 (1982))). It is significant that the *Fumarolo* court cited *Plyler* because that indicates federal equal protection jurisprudence remains a strong influence on Illinois equal protection litigation after *Rodriguez*. Thus, there should be, at a minimum, a quasi-fundamental right to education in Illinois. See supra notes 47-81 and accompanying text (describing federal equal protection adjudication in the school finance area and noting the development of a quasi-fundamental right to an education under the Federal Constitution).

326. *Fumarolo*, 566 N.E.2d at 1293. The Chicago School Reform Act decentralized the public school system by placing primary responsibility for local school governance on parents, community residents, teachers, and school principals. *Id.* at 1286. The Act created local school councils for each grammar school and high school in the Chicago public school system. *Id.* Each local school council was made up of six parents of currently enrolled students, elected by the parents of currently enrolled students, two residents of the attendance area, elected by the residents of that area, and two school teachers, elected by that school's staff. *Id.*
327. *Id.* at 1298.
328. *Id.* at 1300.
329. See, e.g., Elliot v. Board of Educ., 380 N.E.2d 1137 (Ill. App. Ct. 1978) (holding that the education clause in the 1970 constitution requires the state to provide more than a basic education for all handicapped children); Doe v. Sanders, 545 N.E.2d 454 (Ill. App. Ct. 1989) (holding that the state must pay for the public education of children residing in homes for treatment of substance abuse); Walker v. Cronin, 438 N.E.2d 582 (Ill. App. Ct. 1982) (holding that the state must reimburse a parent who unilaterally placed her child in a non-public school after the school failed to provide a due process hearing); School Dist. No. 153, Cook County v. School Dist. No. 154 ½, Cook County, 370 N.E.2d 22 (Ill. App. Ct. 1977) (holding that children leaving their districts to receive residential treatment are entitled to a state-funded education). But see, e.g., Pierce v. Board of Educ., 370 N.E.2d 535, 536 (Ill. App. Ct. 1977) (holding that the education clause in the 1970 Illinois Constitution does not impose a duty on boards of education to place students in special education classes, since the clause is not self-executing, i.e. the clause does not mandate that "certain means be provided in any specific form").
lenges based upon the education clause is in sharp contrast to similar challenges made on behalf of handicapped or disabled students.\textsuperscript{330}

Regarding such challenges based upon the education clause, an Illinois court has held that "the present constitution establishe[d] an entitlement broader than the former provision [the education clause in the 1870 Constitution] which mandated only free common school education."\textsuperscript{331} The same court noted that, when read with the constitutional history, the education clause in the 1970 constitution "incorporates programs of instruction other than the standard course of study established in the public school system."\textsuperscript{332} Furthermore, the court was willing to find that the language in the education clause, which proclaims that "[t]he State shall provide for an efficient system of high quality public educational institutions and services,"\textsuperscript{333} was not hortatory.\textsuperscript{334} Instead, the court in \textit{Walker v. Cronin} held that the education clause, through the controlling funding statute,\textsuperscript{335} granted "an appropriate education for all handicapped children."\textsuperscript{336} In addition, the court found that an "overriding objective" of the education clause and the controlling funding statute was "providing an appropriate education for each child in light of his individual needs."\textsuperscript{337}

\textsuperscript{330.} See Elliot, 380 N.E.2d 1137 (Ill. App. Ct. 1978) (where parents of handicapped child claimed the School Code, which limited the amount of tuition which the state, through its school districts, had to pay for the special education of handicapped students who had been excluded from the public schools and had to attend special education facilities, violated the education clause in the Illinois constitution because the education clause required a free public education including more than just the standard course of instruction); \textit{Walker}, 438 N.E.2d 582 (holding the school district must pay for special services rendered to the student by a private special education school although the mother unilaterally placed the student in the program before the public school determined it was appropriate).

\textsuperscript{331.} \textit{Elliot}, 380 N.E.2d at 1142.

\textsuperscript{332.} Id.

\textsuperscript{333.} The clause states: "The State shall provide for an efficient system of high quality public educational institutions and services. Education in the public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law." ILL. CONST. art. X, § 1, para. 2.

\textsuperscript{334.} \textit{Elliot}, 380 N.E.2d at 1142-43. The court interpreted language from the transcripts of the proceedings at the 1970 Constitutional Convention to find that the drafters of the clause did not intend the language in the second paragraph of section one of the education clause to be simply hortatory. \textit{Id.} Particularly, the court relied on the education committee's statement that "[t]he objective that all persons be educated to the limits of their capacities \textit{would require expansion beyond the traditional public school programs.}" \textit{Id.} at 1142 (quoting 6 RECORD OF PROCEEDINGS, supra note 1, at 234 (emphasis added by court)). Furthermore, the court noted the Committee's statement, "The State is mandated to provide a system that is thorough, complete, and useful to all the people of Illinois." \textit{Id.} at 1143 (quoting 2 RECORD OF PROCEEDINGS, supra note 1, at 764).

\textsuperscript{335.} ILL. REV. STAT. ch. 122, para. 14-8.02 (1989).


\textsuperscript{337.} \textit{Id.} at 586; see also supra notes 276-78 and accompanying text (noting that the education committee at the Illinois Constitutional Convention intended the new education clause to provide an appropriate education for all students).
II. ANALYSIS: THE ILLINOIS CONSTITUTION MANDATES PUBLIC SCHOOL FINANCE REFORM

The 1970 Illinois Constitution's education clause provides an educational entitlement that the *Blase* court did not acknowledge. In *Blase v. State*, the Illinois Supreme Court held that the education clause imposed no legally enforceable duty on the General Assembly to provide a majority of the funds necessary for education.\(^{338}\) In fact, the court interpreted the clause to require only that the state provide a free public education, and that the state offer public education to all without discrimination.\(^{339}\) Thus, for an Illinois court to hold that the state must provide an equal educational opportunity for each student, the court would have to break from *Blase*. However, the education clause and the equal protection clause both warrant doing so.

This Section argues that the education clause of the 1970 Illinois Constitution mandates the conclusion that the public school finance system in Illinois is unconstitutional for four reasons: First, the drafters of the clause intended it to require the state to provide an equal educational opportunity for all persons, but the present finance system provides an unequal educational opportunity for students in school districts having low property values. Second, while the education clause requires the state to provide "high quality" and "efficient" public schools, the finance system fails to provide such schools for students in the property-poor school districts. Third, the clause mandates that the state provide an "appropriate" education for all persons, but Illinois courts have only extended that mandate to handicapped students. Fourth, courts in states with less demanding education clauses, but with similar finance systems and similar disparities in per-pupil expenditures, have interpreted their education clauses to mandate school finance reform. These decisions in other states render the Illinois courts' interpretation of the 1970 Illinois Constitution's education clause illegitimate. Under a more well reasoned interpretation of the 1970 Illinois Constitution, the education clause mandates public school finance reform.

This Section further argues that the public school finance system is unconstitutional under the state constitution's equal protection clause. Although the courts have not recognized it, the right to an appropriate education is a fundamental right in Illinois because the state constitution implicitly guarantees that right. The vast disparity in per-pupil spending in Illinois directly affects the educational resources available to the students. This constitutes a denial of equal treatment of students entitled to receive an equal educational opportunity from the state. Under strict scrutiny analysis, the finance system in Illinois is unconstitutional because the system is not necessarily related to a compelling state interest.


\(^{339}\) See *supra* notes 305-09 and accompanying text (discussing *Blase*, and noting that this interpretation of the education clause places no more emphasis on the state's role in public education than did the 1870 education clause).
A. The 1970 Illinois Constitution's New Educational Mandate

Illinois courts have held, incorrectly, that the 1970 Illinois Constitution is substantially the same as the 1870 Illinois Constitution with respect to education.\(^{340}\) A comparison between the education clause in the 1970 Illinois Constitution and its counterpart in the 1870 Illinois Constitution,\(^{341}\) in light of their underlying objectives, reveals crucial differences between the two clauses. These crucial differences clearly demonstrate the 1970 constitution's expression of the modern importance of education that the 1870 Constitution lacked. Consequently, the interpretation by Illinois courts of the 1970 constitution's education clause as wholly consistent with the 1870 constitution's education clause is misplaced.\(^{342}\) An Illinois court that applies a more accurate interpretation of the 1970 constitution's education clause must conclude that the public school finance system is unconstitutional.

The drafters of the 1970 Illinois Constitution realized that the education clause in the 1870 constitution was not sufficient to express the modern importance of education and its influence on public welfare.\(^{343}\) The objective of the education committee was to draft an education clause that would require the state to expand public education beyond traditional programs.\(^{344}\) In fact, the drafters realized the need for the state to provide a public education that was flexible enough to allow a person of any level of competence to maximize his or her educational development.\(^{345}\) Thus, the convention adopted a clause that embodied the objective to provide each person, including a person with a mental or physical handicap, the opportunity to progress to the limit of his or her ability.\(^{346}\) Accordingly, the education clause makes educational development "[a] fundamental goal of the People of the State,"\(^{347}\) and requires the state to provide only "high quality public educational institutions and services."\(^{348}\) Most important to the discussion here, the clause gives the state the "primary responsibility for financing the system of public education."\(^{349}\)

The plain language and objectives of the education clause in the 1970 constitution are in sharp contrast to those characteristics of the 1870 constitution's education clause. The 1870 clause ensured only "a system of free schools."\(^{350}\) It required the state to provide only "a good common school edu-

\(^{340}\) See supra notes 298-309 and accompanying text.
\(^{341}\) ILL. CONST. art. X, § 1.
\(^{342}\) ILL. CONST. of 1870, art. VIII, § 1.
\(^{344}\) See supra notes 273-78 and accompanying text (discussing the education committee's intention to emphasize the importance of education in the new education clause).
\(^{345}\) See 6 RECORD OF PROCEEDINGS, supra note 1, at 234.
\(^{346}\) 6 Id.
\(^{347}\) 6 Id.
\(^{348}\) ILL. CONST. art. X, § 1.
\(^{349}\) Id.
\(^{350}\) Id.
\(^{351}\) ILL. CONST. of 1870, art. VIII, § 1.
cation” for public school students. Accordingly, Illinois courts interpreted the 1870 education clause to require only that the public school system be free and that it be open to all without discrimination.

One need look no further than Illinois history books to realize that the 1870 Constitutional Convention drafted its education clause in a vastly different social and political environment than did the 1970 convention. Consequently, the driving forces behind the two clauses differ significantly. The intended requirements of both clauses reflect these differences.

The 1870 Constitutional Convention took place during the Reconstruction Era, following the Civil War. During the ten-year period from 1860-1870, Illinois' population had increased by about fifty percent. Chicago's population had nearly tripled in size, with foreign-born persons constituting almost one-half its population. Thus, the 1870 conventionees were faced with the problems accompanying the change from an agrarian state to an industrialized, urban state; a problem that Illinois had not faced in the past.

Importantly, the 1848 Illinois Constitution, the predecessor to the 1870 constitution, did not even mention education. In fact, only recently had the constitutions of other states begun to recognize the government's role in financing public education. Thus, the drafters of the 1870 education clause placed a constitutional obligation on the state that the state had not previously acknowledged. Not surprisingly, the convention decided to include the education clause only after heated debate regarding whether the Illinois Constitution should even mention education. In addition, the 1870 convention even contemplated establishing separate state supported schools for white and black children.

352. Id.
353. See supra notes 305-09 and accompanying text.
355. Id. at 56.
356. Id. at 57.
357. Id.
358. Id.
359. Id.
360. See id. at 72.
361. See id.
363. See Cornelius, supra note 354, at 73. The northern counties, whose proportion of taxable property was greater than their proportion of school children, objected to the idea of appropriating funds for education from across the entire state and then apportioning those funds among the counties, according to population. Id.
364. Id. The adopted clause provided that the state would support the public education of all children from one general fund. See Ill. Const. of 1870, art. VIII, § 1.
In contrast, the 1970 Constitutional Convention delegates faced different, unique issues, and the education clause in the 1970 constitution reflects an attempt to resolve those issues. In 1970, Illinois faced social, economic, and political problems that were vastly different and more complex than those the 1870 drafters faced. By 1970, Illinois had become highly urbanized and industrialized, and government regulation and public services had expanded enormously. Unlike the 1870 convention delegates who drafted a document that expanded state government into many new areas such as education, the 1970 convention delegates devoted most of their time and energy to improving specific areas and restating Illinois' organic law.

Regarding education, the 1970 convention delegates, unlike their counterparts in 1870, did not have before them a constitution that failed to mention education. Consequently, the 1970 convention, in contrast to its 1870 counterpart, sought simply to redefine the state's role in public education, rather than create such a role. The 1970 convention debates focused on the extent of that existing state role in education. The delegates never contemplated dispensing with the state's role in supporting public education; instead, they debated the significance of the state's support.

Thus, Illinois courts should interpret the 1970 clause to impose different requirements on the state than did the 1870 clause for at least three reasons: First, the language in the 1870 constitution's education clause differs from that of the 1970 constitution. Second, the two clauses were drafted in two vastly different time periods under differing social, economic, and historical conditions. Finally, the objectives of the two clauses are significantly different.

Illinois courts, however, have failed to differentiate between the two clauses. As a result, Illinois courts have ignored the greater responsibilities that the 1970 clause places on the state: that the state "expand beyond the traditional public school programs," and that the state take the "primary responsibility" to fund the public school system.

366. Id.
367. Id.
368. See Buresh, supra note 273, at 34-38.
369. Id. at 37-47. "[I]t was the topic of educational objectives that caused the most dissension among the members of the Committee on Education at the 1969-1970 convention." Id. at 38.
370. Id. at 37 ("In 1970 everyone agreed that a statement was needed that would place a greater emphasis on the importance of education. How this was to be done and what was to be said [was] a source of much controversy.").
371. See supra notes 305-09 and accompanying text (noting that Illinois courts have interpreted the new education clause in a way that places no more emphasis on education than did the previous clause). But see Fumarolo v. Chicago Bd. of Educ., 566 N.E.2d 1283 (Ill. 1990). In Fumarolo, the Illinois Supreme Court clearly recognized that the 1970 Illinois Constitution's education clause places much more emphasis on education than did its 1870 Illinois Constitution counterpart. Id. at 1298-1300.
372. See 6 RECORD OF PROCEEDINGS, supra note 1, at 234.
373. ILL. CONST. art. X, § 1 ("The state has the primary responsibility for financing the system
Blase v. State\textsuperscript{374} demonstrated the Illinois Supreme Court's unwillingness to properly expand the state's role in financing public education. The court may have correctly determined that the drafters of the education clause in the 1970 constitution did not intend to require the state to provide a specific percentage of the funds needed to operate and maintain public schools.\textsuperscript{375} However, the court overlooked an objective of the education clause itself—to make educational development "a fundamental goal" of the state—when it held that the school finance language in the education clause\textsuperscript{376} was only hortatory.\textsuperscript{377} While the clause may not impose a legal duty on the state to provide a specific percentage of funds for education, it does hold the state primarily responsible for ensuring that all public schools are "efficient" and of "high quality."\textsuperscript{378} The intended meanings of efficiency and high quality embody "expansion beyond the traditional public school programs" to allow each person the opportunity to progress to the limit of his or her ability.\textsuperscript{379} Thus, while the school finance language in the education clause may be only hortatory regarding specific dollar amounts of state support for education, it certainly imposes a "responsibility" on the state to ensure "efficient" and "high quality" public schools. Importantly, that state responsibility extends over and above providing simply a "good common school education."\textsuperscript{380}

B. The Illinois Courts' Refusal To Adopt The Mandate of the New Education Clauses

Illinois courts have improperly extended their analyses of the 1870 constitution's education clause to apply to its counterpart in the 1970 constitution. This unwarranted extension simply ignores the intended purpose of the re-drafted education clause. The drafters intended the new education clause to expand the state's role in financing public education, not to restrict it.\textsuperscript{381} In People v. Deatherage,\textsuperscript{382} the Illinois Supreme Court held that the language in the 1870 education clause was hortatory: it required only that (1) public edu-

\begin{footnotesize}
\begin{enumerate}
\item 374. 302 N.E.2d 46 (Ill. 1973).
\item 375. Id. at 48.
\item 376. ILL. CONST. art. X, § 1 ("A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacity.").
\item 377. "The State has the primary responsibility for financing the system of public education." ILL. CONST. art. X, § 1.
\item 378. See Blase, 302 N.E.2d at 49.
\item 379. ILL. CONST. art. X, § 1 ("The State shall provide for an efficient system of high quality public educational institutions and services.").
\item 380. See 6 RECORD OF PROCEEDINGS, supra note 1, at 234.
\item 381. See supra notes 273-87 and accompanying text (noting that the education committee at the 1970 Illinois Constitutional Convention intended to expand the state's role in public education).
\item 382. See supra notes 273-87 and accompanying text.
\item 383. 81 N.E.2d 581 (Ill. 1948).
\end{enumerate}
\end{footnotesize}
education be free; and (2) the system be free from discrimination.\textsuperscript{384} Consequently, all other questions regarding the public schools' thoroughness or efficiency were clearly the legislature's prerogative, and courts could not intrude.\textsuperscript{385} In a post-1970 case, \textit{Cronin v. Lindberg},\textsuperscript{386} the court essentially applied \textit{Deatherage}, stating, "This court has consistently held that the question of efficiency of the educational system is properly left to the wisdom of the legislature."\textsuperscript{387} In addition, in \textit{Polich v. Chicago School Finance Authority}\textsuperscript{388} the Illinois Supreme Court extended the reasoning of \textit{Blase} and interpreted the 1970 education clause to impose no duty on the state.\textsuperscript{389} The court concluded that school finance is properly left to the wisdom of the General Assembly.\textsuperscript{390} Recent decisions fail to adopt even the language in the new education clause. An Illinois appellate court has referred to the duty that the education clause imposes on the state as "a duty to establish a thorough and efficient system of free schools."\textsuperscript{391}

These decisions ignore the differences in both language and purpose that exist between the 1870 education clause and its 1970 counterpart. The education clause in the 1970 constitution requires the state to provide much more than a "thorough and efficient system of free schools."\textsuperscript{392} The 1970 clause orders the state to provide an "efficient system of high quality public educational institutions and services."\textsuperscript{393} Furthermore, these decisions fail to consider that the 1970 conventioners realized that the 1870 clause was "not adequate to express the importance now given to the educational enterprise and its critical influence on the common welfare."\textsuperscript{394} Clearly, the 1970 convention delegates did not intend to allow Illinois courts to continue interpreting the language in the education clause as a hortatory restatement of the 1870 clause.\textsuperscript{395} In fact, one issue upon which nearly all education committee members, witnesses, and experts agreed was that the education committee should strengthen the education clause so that it would place a greater emphasis on education.\textsuperscript{396} Thus, the Illinois courts' interpretation of the education clause of the 1970 constitution as wholly consistent with the 1870 education clause disregards the underlying objective of the 1970 clause—to place a greater responsibility on the state to finance public education so as to ensure that public

\textsuperscript{384} Id. at 586.
\textsuperscript{385} Id.
\textsuperscript{386} 360 N.E.2d 360 (Ill. 1976).
\textsuperscript{387} Id. at 365.
\textsuperscript{388} 402 N.E.2d 247 (Ill. 1980).
\textsuperscript{389} Id. at 254.
\textsuperscript{390} Id.
\textsuperscript{392} ILL. CONST. art. X, § 1.
\textsuperscript{393} Id. (emphasis added).
\textsuperscript{394} 6 RECORD OF PROCEEDINGS, supra note 1, at 233.
\textsuperscript{395} See supra notes 273-78 and accompanying text (discussing the education committee's intent to emphasize the importance of education in the new education clause).
\textsuperscript{396} See supra notes 273-78 and accompanying text.
students attend “high quality” and “efficient” schools.397

C. Why the Illinois Public School Finance System Violates the 1970 Constitution’s Education Clause

Fumarolo v. Chicago Board of Education399 represents a more accurate interpretation of the 1970 education clause—an interpretation that acknowledges the greater emphasis that the 1970 constitution places on education. In Fumarolo, the Illinois Supreme Court held that the preamble of the new education clause, which proclaims that “the educational development of all persons to the limit of their capacities” is a “fundamental goal” of the people of Illinois,399 makes education a compelling state interest.400 Arguably, this holding places an affirmative duty on the state to provide constitutionally adequate schools.401 Fumarolo rejects, at a minimum, the holding in Blase that the language in the education clause is only hortatory.402

In order to remain consistent with Fumarolo’s added emphasis on education, an Illinois court must conclude that the present finance system in Illinois403 violates the education clause in the 1970 constitution. An interpretation of the education clause that acknowledges the clause’s language is more than just hortatory requires the state to ensure that the public school system has sufficient funds to meet the constitutional standards articulated by the education clause. It is clear that the school finance language in the education clause404 alone does not impose a duty on the state to provide a specific level of funding for public education.405 However, read as a whole, the education clause mandates that: (1) the state public school system be at least capable of allowing the “educational development of all persons to the limits of their capacities”;406 (2) if the system is incapable of allowing that, then the state is “primarily responsible” for funding the schools so that they are capable;407 (3) the state shall provide “high quality” and “efficient” public schools;408 and (4)

397. ILL. CONST. art. X, § 1.
399. ILL. CONST. art. X, § 1.
400. Fumarolo, 566 N.E.2d at 1298-99.
401. “Constitutionally adequate” schools in Illinois are “efficient” and “high quality.” They allow “the educational development of all persons to the limits of their capacities.” ILL. CONST. art. X, § 1.
403. See ILL. REV. STAT. ch. 122, paras. 18-1 to 18-20 (1989).
404. ILL. CONST. art. X, § 1. (“The State has the primary responsibility for financing the system of public education”).
405. See supra notes 302-09 and accompanying text (discussing Blase v. State, 302 N.E.2d 46 (Ill. 1973), in which the court held that the state is under no legal duty to provide the majority of funds for education). In fact, the constitutional convention rejected a version of the education clause that gave the state the “primary duty” to fund public schools. See 5 RECORD OF PROCEEDINGS, supra note 1, at 4145-49.
406. 6 RECORD OF PROCEEDINGS, supra note 1, at 234.
408. See id.
the state is "primarily responsible" for funding public schools so that they are at least "efficient" and of "high quality." The fact that the drafters of the 1970 education clause placed the primary responsibility for funding public schools on the state is significant. Where the public school system is incapable of educating all students to the limit of their capacities, or where the public schools are not "efficient" or of "high quality," the state is responsible over all others and must therefore devise a finance scheme that will meet the constitutional standards.

Blase is not contrary to the proposition that the state must provide sufficient funding to ensure both that the public schools are "efficient" and of "high quality," and that they are at least capable of educating all students to the "limits of their capacities." In Blase, the issue was whether the education clause imposed an affirmative duty on the state to provide a specific percentage of funds to public schools. The court held that it did not impose such a duty on the state. In contrast, the proposed interpretation here only reasons that the state must serve as primary guarantor that the public schools be "efficient" and of "high quality" so that they are capable of providing all persons the ability to develop themselves to the limits of their capacities. Such an interpretation of the education clause is entirely consistent with the constitutional convention's objectives to "place a greater emphasis on the importance of education" and to require "expansion beyond traditional public school programs."

Having determined the education clause's mandate in light of its plain language and its legislative history, that mandate must be applied to the public school finance system in Illinois. The public school finance system fails to meet the required standards because it fails to provide efficient and high quality schools that allow all students the opportunity to develop to the limits of their capacities.

The disparity in per-pupil expenditures renders the finance system unconstitutional. In fiscal year 1988, expenditures per pupil ranged from approximately $12,900 to less than $2100. While this disparity in expenditures alone may not render the system unconstitutional, the relationship in Illinois between per-pupil expenditures and educational performance demonstrates that the public schools are not efficient or of high quality. Students in wealthy school districts had much higher scores in a statewide reading assessment.

409. See id.
410. The education clause drafters intended "primary responsibility" to mean "whose responsibility it is over all others." See 5 RECORD OF PROCEEDINGS, supra note 1, at 4147.
412. Id.
413. See Buresh, supra note 273, at 37.
414. See 6 RECORD OF PROCEEDINGS, supra note 1, at 234.
415. Burroughs & Leininger, supra note 7, at 144.
416. Wealthy school districts are those in the top one-quarter in equalized assessed valuation per pupil. Burroughs & Leininger, supra note 235, at vi.
Students from wealthy school districts also fared better than students from poor school districts in a state-wide mathematics assessment test. They also had significantly higher ACT scores than their counterparts from poor school districts. In addition, wealthy school districts employed a larger percent of teachers with advanced degrees and paid their teachers significantly higher salaries than did poor school districts. In sum, the quality of education a student receives is determined by the wealth of the district in which he or she lives. If the student lives in a wealthy district, that student has a full educational opportunity. If the student lives in a poor district, he or she is deprived of educational advantages. Thus, the present public school finance system fosters unequal educational opportunity throughout Illinois.

It is evident that poor school districts are not providing efficient and high quality public schools. Their students cannot possibly develop themselves to the limits of their capacities. Consequently, the Illinois public school system is unconstitutional. Since the state has the primary responsibility for providing a constitutional system, it must devise a finance system that will equalize the educational opportunity between wealthy and poor school districts so that all public schools are efficient and of high quality. Accordingly, a constitutional school finance system mandates providing greater funds for education for the poorer school districts than the wealthier school districts, and the amount of money spent per pupil in the poorer school districts must be capable of providing each pupil with an appropriate education from an efficient, high quality institution.

1. An Appropriate Education for All Students

The Illinois courts interpret the education clause to guarantee an appropriate education for handicapped students but not for disadvantaged students from poor school districts. Elliot v. Board of Education demonstrates the

417. Id. On a 500-point scale, the difference in favor of students in wealthy districts was at least 33 points at each grade level. Id. Poor school districts are those in the bottom one-quarter of assessed valuation per pupil. Id.

418. See id. On a 500-point scale, the difference in favor of students in wealthy districts was at least 47 points at each grade level. Id.

419. See id. ACT scores run from 1 to 36. The average ACT composite score was 19.9 for wealthy districts and 18.2 for poor districts. The average English score was 19.3 for wealthy districts and only 18.1 for poor school districts. The average mathematics score was 19.1 for wealthy districts and only 16.4 for poor districts. Id.

420. See id. at vii. At the elementary level, the percentage of teachers with at least masters degrees was 44% in wealthy districts and 38% in poor districts; at the high school level the difference was 69% in wealthy districts as compared to 38% in poor districts. Id.

421. Id. The differences in average teacher salaries between wealthy and poor districts were $5800 at the elementary level, and $12,000 at the high school level. Id.

422. See, e.g., Abbott v. Burke, 575 A.2d 359, 371 (N.J. 1990) (stating that the State of New Jersey may be required to spend in excess of the norm in order to meet the needs of disadvantaged students).

willingness of Illinois courts to use the education clause to ensure an equal educational opportunity for handicapped students.\(^4\) However, this position is inconsistent with the unwillingness of the courts to use the clause to ensure an equal educational opportunity for disadvantaged students in poor districts. Illinois courts should use the reasoning in *Elliot* to conclude that the public school finance system violates the education clause in poor school districts.

The court in *Elliot* acknowledged the clear differences in scope between the 1870 education clause and the 1970 education clause. It found that the 1970 clause “establish[ed] a broader entitlement” than the 1870 clause.\(^5\) Thus, the court reasoned that while the 1870 clause mandated only a free common school education, the 1970 clause “incorporate[d] programs of instruction other than the standard course of study established in the public school system.”\(^6\) Furthermore, the court concluded that the wording in paragraph one of section one of the education clause, providing that a “fundamental goal” of the state is the “educational development of all persons to the limits of their capacities,”\(^7\) was mandatory—not hortatory.\(^8\) Thus, the clause required the state to meet the special educational needs of handicapped students.\(^9\)

*Walker v. Cronin*\(^10\) further demonstrates the inconsistencies between school finance decisions and decisions involving education for the handicapped. There, the court interpreted the education clause to guarantee an “appropriate education” for all handicapped students.\(^11\) Furthermore, the court acknowledged that the overriding objective of the education clause was to provide an appropriate education for each student “in light of his individual needs.”\(^12\) Clearly, *Walker* and *Elliot* demonstrate that Illinois courts are willing to require more of the education clause than simply free public schools, open to all without discrimination.\(^13\) However, it is not clear why the court broadly interprets the education clause in the area of education for the handicapped, but not in the public school finance context.

Handicapped students and disadvantaged students from poor school districts have similar needs, and thus Illinois courts should treat them similarly for the purposes of financing public schools. Both groups require an “appropriate education” that takes into account the special needs of the students. Handicapped students require special education that the traditional common school educa-

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\(^{424}\) *Id.* (holding that the 1970 Illinois Constitution’s education clause required more than just a basic education for all handicapped children; instead, it required an appropriate education).

\(^{425}\) *Id.* at 1142.

\(^{426}\) *Id.*

\(^{427}\) ILL. CONST. art. X, § 1.

\(^{428}\) *Elliot*, 380 N.E.2d at 1142-43, 1142 n.4.

\(^{429}\) *Id.*

\(^{430}\) 438 N.E.2d 582 (Ill. App. Ct. 1982).

\(^{431}\) *Id.* at 586.

\(^{432}\) *Id.*

\(^{433}\) See supra notes 331-37 and accompanying text (noting that Illinois courts have held that the new education clause provides a broader entitlement to education than did the education clause in the 1870 constitution).
tion cannot provide; a handicapped student may not be able to benefit from programs available within the public school system.434 Thus, the handicapped student has unique educational needs that the state is constitutionally required to meet.435 Similarly, students from poor school districts have special needs, different from those of relatively advantaged students.436 These needs include, but are not limited to: counseling services to help students deal with the problems associated with drugs, crime, or unsupportive families; alternative education programs for potential dropouts; and adequate libraries and media centers for students who do not have books at home.437 Generally, in these poor school districts a "significantly different approach to education is required" if the poor school districts and their disadvantaged students are to succeed.438 Of course, this may require funds over and above those spent in relatively wealthy school districts.

Thus, the fact that Illinois courts broadly interpret the education clause in the area of education for the handicapped to require the state to ensure an "appropriate" education for all handicapped students, while restricting the clause's scope in the public school finance context, cannot withstand analysis. In both contexts, the state has the duty to fund the public schools so that all students receive at least an "appropriate" education. Under an analysis consistent with Elliot and Walker, a public school finance system that cannot effectively account for the special needs of students in poor school districts is unconstitutional.

2. Illinois' Outmoded Deference Toward School Finance

Courts in other states have given extensive interpretations to the education clauses in their state constitutions.439 Illinois courts, on the other hand, have refused to interpret Illinois' education clause broadly. Consequently, in actual practice, the Illinois education clause is very narrow in scope and lacking in content regarding public school finance; however, the clause was intended to be broad in scope and contain substantial obligations and requirements.440 Courts in other states have invoked the wide scope and substantial obligations and requirements of their education clause to allow public school finance reform in their states.441 These decisions undermine the legitimacy of Illinois decisions that refuse to give true meaning to the Illinois education clause. A fair reexamination of the Illinois education clause, consistent with well rea-
sioned decisions from other states, demonstrates that the public school finance system in Illinois fails to meet the requirements of the education clause.

The disparities between public schools in Illinois are very similar to those once existent in other states that have since struck down their public school finance systems. A significant number of state courts have used the education clauses in their state constitutions to render the school finance systems in those states unconstitutional. The courts in all of these decisions faced the same basic issue: the appropriateness of "an educational funding system that depends on a combination of state and local taxes producing a disparity of expenditures in the face of inverse disparity of need." Illinois faces that same issue. Both New Jersey's equalization system and Texas' foundation program produced disparities between school districts very similar to those that exist in Illinois. Consequently, since the Illinois public school finance system uses both the equalization system and a foundation program, Illinois courts should not stray far from the reasoning used by the courts in Abbott v. Burke and Edgewood Independent School District v. Kirby.

Arguably, the education clauses in the New Jersey Constitution, the Texas Constitution, and the Wisconsin Constitution impose fewer obligations and requirements on the state than does Illinois' education clause. Consequently, the Illinois clause should be a more effective tool for school finance reform than those clauses. New Jersey, Texas, and Wisconsin all have "Category II" education clauses. In general, each of these clauses requires a public school system to reach some minimal level of quality, such as "thorough and efficient." Thus, on its face, a Category II clause requires only that the state finance a public school system so that it is thorough: "marked by completeness: . . . carried through to completion . . . with full attention to details: . . . marked by sound systematic attention to all aspects and details: . . . com-

442. See supra note 83 and accompanying text (citing successful challenges in Kentucky, Montana, New Jersey, Texas, Washington, and West Virginia).
444. See supra notes 234-41 and accompanying text (describing the wide variation in per-pupil expenditures in Illinois public schools).
446. TEX. EDUC. CODE ANN. §§ 16.002 to 16.008; see also supra notes 115-26 and accompanying text (describing foundation programs generally).
447. Compare supra note 145 (noting a disparity of $1135 per pupil) with supra note 190 (noting a disparity of $17,221 per pupil) and supra note 237 (noting a disparity of $10,800 per pupil).
448. See ILL. REV. STAT. ch. 122, paras. 18-1 to 18-20 (1989).
450. 777 S.W.2d 391 (Tex. 1989).
452. TEX. CONST. art. VII, § 1.
453. WIS. CONST. art. X, § 3.
454. ILL. CONST. art. X, § 1.
455. Ratner, supra note 92, at 815 n.144.
456. See Thro, supra note 62, at 244.
plete in all respects\textsuperscript{467} and efficient:

marked by ability to choose and use the most effective and least wasteful means of doing a task or accomplishing a purpose: competent ... marked by qualities, characteristics, or equipment that facilitate the serving of a purpose or the performance of a task in the best possible manner: eminently satisfactory in use ... \textsuperscript{468}

Yet, the courts in Abbott and Kirby interpreted the education clauses of their states to require much more than simply "completeness" and "competence." In New Jersey, a "thorough and efficient" education is one that allows "disadvantaged children ... to compete in, and contribute to, the society entered by the relatively advantaged children."\textsuperscript{469} It allows students from poor school districts the opportunity to compete with relatively advantaged students in the labor market.\textsuperscript{460} Most importantly, a "thorough and efficient" education requires the state to spend in excess of the norm to provide for the greater needs of disadvantaged students.\textsuperscript{461} In Texas, an "efficient system" of public schools must provide for a "general diffusion of knowledge" statewide.\textsuperscript{462} Furthermore, an "efficient system" of public schools requires a direct correlation between the tax effort of each school district and the educational funds available to it;\textsuperscript{463} but the system can also account for differing costs associated with providing an equalized educational opportunity to disadvantaged students.\textsuperscript{464}

On its face, a Category IV clause, such as Illinois' education clause, mandates a much stronger commitment to education than does a Category II clause.\textsuperscript{466} A model Category IV education clause makes providing an education the "paramount" duty of the state.\textsuperscript{468} Thus, by its plain meaning alone, a Category IV clause requires the state to treat public school finance as a paramount responsibility, defined by Webster's Dictionary as "having a higher or the highest rank or authority: ... Chief, Supreme, Preeminent."\textsuperscript{467} Not surprisingly, the Washington Supreme Court required Washington's Category IV education clause to accomplish much more than simply place education at the highest rank of the state's responsibilities.\textsuperscript{469} Indeed, in Washington the state has the affirmative duty to ensure "as a first priority, fully sufficient funds"

\textsuperscript{457.} Webster's Third New International Dictionary 2380 (1981) [hereinafter Webster's Dictionary].
\textsuperscript{458.} Id. at 725.
\textsuperscript{460.} Id. at 382-89.
\textsuperscript{461.} Id. at 371 (citing Abbott I, 495 A.2d at 376).
\textsuperscript{463.} Id. at 397.
\textsuperscript{464.} Id. at 398.
\textsuperscript{465.} See supra notes 92-98 and accompanying text (describing four categories of foundation clauses, and noting that category IV clauses impose the most stringent educational mandate).
\textsuperscript{466.} Ratner, supra note 92, at 816.
\textsuperscript{467.} Webster's Dictionary, supra note 457, at 1638.
\textsuperscript{468.} See Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978) (en banc).
that will provide "effective teaching and opportunities for learning." Consequently, all persons in Washington have "a 'right' to be amply provided with an education." Thus, as the Washington decision demonstrates, the Category IV education clause in the Illinois Constitution should serve as an effective tool for school reform. Clearly, Illinois' clause should be a more likely candidate to accomplish school finance reform than the Category II clauses in New Jersey, Texas, and Wisconsin that mandate a minimum level of education but do not designate education as the most important state duty. However, that has clearly not occurred. The education clause in the Illinois Constitution has been an ineffective tool for the school finance reform movement because Illinois courts have refused to treat the clause as more than hortatory.

The recent New Jersey and Texas decisions discredit the legitimacy of the interpretation by the Illinois courts of the education clause in the Illinois Constitution. The Illinois Supreme Court has clearly held that the language in the education clause is only hortatory and thus imposes no legally enforceable duty on the state. According to decisions in Illinois, the clause requires only that the state provide public schools free of charge, and that the schools be open to all without discrimination. Illinois courts may not even determine whether the public schools are constitutionally adequate; that determination is left to the General Assembly. This position is in contrast to the New Jersey and Texas decisions, despite the fact that the Illinois education clause on its face imposes more obligations and responsibilities on the state regarding education than do the New Jersey and Texas clauses. Surprisingly, although public schools in New Jersey, Texas, and Illinois suffer from similar disparities and shortcomings, and fund their public schools by similar methods, the interpretation by Illinois courts of the more-demanding Illinois education clause imposes substantially fewer obligations on the state.

New Jersey and Texas courts have imposed on their respective states a requirement that the finance scheme affirmatively address the unique needs of relatively disadvantaged students. Thus, the education clauses in New Jersey and Texas require unequal per-pupil spending in favor of disadvantaged students so that the disadvantaged students may compete in the labor market. In addition, the clauses mandate a relationship between tax effort and available funds for education. In contrast, Illinois has a much more restrained

469. Id. at 95 (emphasis added).
470. Id. at 92.
471. Id.
473. Id.
475. See supra notes 298-309 and accompanying text (discussing the Illinois Supreme Court's holding in Blase v. State, 302 N.E.2d 46 (Ill. 1973)).
476. See supra notes 155-57 and accompanying text (New Jersey); supra notes 194-203 and accompanying text (Texas).
477. See supra text accompanying note 157 (New Jersey); supra notes 200-03 and accompany-
interpretation of its more-demanding education clause. In fact, the interpretation by Illinois courts is so restrained, Illinois' category IV clause actually resembles a Category I education clause. 478 Such an interpretation is unfounded, and the recent decisions in New Jersey and Texas make it an anachronism. However, unlike the courts in Abbott v. Burke and Edgewood Independent School District v. Kirby, the Wisconsin Supreme Court, in Kukor v. Grover, rejected a challenge to the state's school finance system based on the state constitution's education clause. A court in Illinois may be influenced by the court's reasoning in Kukor.

An argument that an Illinois court should follow the reasoning in Kukor v. Grover 479 has no merit. In Kukor, the Wisconsin Supreme Court held that Wisconsin's Category II education clause 480 did not require the state to meet the needs of students in property-poor school districts. 481 Consequently, the court concluded that the state's equalization system was even more responsive than necessary to the needs of disadvantaged students. 482

However, an Illinois court interpreting the Illinois clause should not reach the same result. In Kukor, the court necessarily found that the education clause's mandate that the state provide public schools that are "as uniform as practicable" did not even apply to public school finance. Instead, the mandate applied to the substantive curriculum offered in public schools. 483 Thus, in Wisconsin's education clause, "uniformity" requires all public schools to offer substantially the same curriculum. In contrast, Illinois courts have held that, although the education clause imposes no specific duty on the state regarding public school finance, the clause clearly applies to public school finance in some capacity. 484 Indeed, the mere fact that the clause explicitly mentions public school finance demonstrates that the issue is within the scope of the clause. Thus, the Kukor decision should not influence an Illinois court, since Wisconsin courts and Illinois courts have clearly defined the scopes of their state education clauses quite differently.

In sum, if the Illinois courts would reconsider the Illinois education clause in light of the recent decisions in New Jersey, Texas, and Washington, the clause would become an effective tool to strike down the school finance system in Illinois. The Abbott and Kirby decisions undermine Illinois' restrictive interpretation of its education clause. Using a more well reasoned interpretation,

478. See supra note 93 and accompanying text (describing the characteristics of a Category I education clause).
479. 436 N.W.2d 568 (Wis. 1989).
480. See supra notes 94-95 and accompanying text (describing the characteristics of a Category II education clause).
481. Kukor, 436 N.W.2d at 585.
482. Id. at 577.
483. Id. at 577-78.
484. See Buresh, supra note 273, at 125 (Illinois Constitutional Convention Education Committee delegate stating that the last sentence of the education clause was intended to control school finance).
Illinois' clause clearly renders the present school finance system unconstitutional.

D. The Fundamental Right to Education in Illinois

Another basis for striking down the public school finance system in Illinois is the equal protection clause in the Illinois Constitution. In the past, Illinois courts have not properly applied the federal equal protection analysis that they claim to adopt.488 Their refusal to consider whether the Illinois Constitution guarantees the right to an adequate education is unfounded. However, recent litigation in Illinois provides an alternative analysis that arguably acknowledges that a fundamental right to education exists in Illinois. A fair consideration of the Illinois Constitution in light of modern equal protection adjudication reveals that the right to an adequate education is a fundamental right in Illinois.

The delegates to the 1970 Illinois Constitutional Convention added an equal protection clause to the 1970 Illinois Constitution's bill of rights.486 They intended the clause to embody the same concepts as the Federal Equal Protection Clause.487 Thus, Illinois courts have adopted federal equal protection analysis.488 Importantly, Illinois courts have claimed to adopt the criteria of the United States Supreme Court for a suspect class and for a fundamental right.489 Accordingly, past Illinois decisions concerning public school finance have not articulated a fundamental right to an adequate education.490

People ex rel. Jones v. Adams491 demonstrates the Illinois courts' adoption of the United States Supreme Court's fundamental rights analysis in San Antonio Independent School District v. Rodriguez.492 In Adams, the Illinois court correctly acknowledged that the Court in Rodriguez had applied a more restrictive standard of review than just minimal scrutiny.493 The Adams court interpreted the Rodriguez test as allowing discrimination among school districts in the form of unequal expenditures per pupil, as long as such discrimination was not invidious.494 Furthermore, the court measured invidiousness by: (1) the adequacy of the education provided by the state; and (2) the size of

486. ILL. CONST. art. I, § 2.
487. See 3 RECORD OF PROCEEDINGS, supra note 1, at 19.
488. See supra notes 292-94 and accompanying text.
489. See supra note 294 and accompanying text.
494. Id.
the disparity in expenditures per pupil between school districts.\(^{495}\)

The \textit{Adams} court's analysis, while purporting to adopt the \textit{Rodriguez} test, failed to apply it correctly. To the \textit{Adams} court, the lack of a finding of "invidiousness" was dispositive.\(^{496}\) Without it, the court found that a public school finance system could not deny equal protection of the laws to students in any school district.\(^{497}\) Actually, a finding of invidiousness does not control equal protection analysis under "fundamental rights" cases such as \textit{Rodriguez}. Instead, the beginning point of any fundamental rights analysis is to ask whether the "right" in question is indeed fundamental.\(^{498}\) Under the \textit{Rodriguez} test, a right is fundamental when the Constitution explicitly or implicitly guarantees it.\(^{499}\) Therefore, in an attack based upon the Illinois education clause, if the 1970 Illinois Constitution explicitly or implicitly guarantees the right to an adequate education, Illinois courts must find the right to an adequate education fundamental. Consequently, those courts should apply strict scrutiny to any legislation which infringes on the right to receive a constitutionally adequate education.\(^{500}\)

\textit{Fumarolo v. Chicago Board of Education}\(^{501}\) more accurately represents fundamental rights analysis under the state equal protection clause. While the dispute in \textit{Fumarolo} did not involve school finance, it did focus on the public's interest in the operation of public schools.\(^{502}\) There, the Illinois Supreme Court held that education has been a compelling state interest since the education clause in the 1970 Illinois Constitution made the educational development of all persons a "fundamental goal" of the state.\(^{503}\) Furthermore, the court noted that the operation of schools was "a fundamental governmental activity in which all members of society [had] an interest."\(^{504}\) Consequently, the voting scheme for school board elections, which deprived voting power from a substantial portion of the electorate, violated the equal protection clause.\(^{505}\) \textit{Fumarolo} thus accurately represents the relationship between the preamble of the education clause—"A fundamental goal of the people of the State is the educational development of all persons to the limits of their capacities"\(^{506}\)—and the equal protection clause.\(^{507}\) The two clauses implicitly guar-

\(^{495}\) Id.
\(^{496}\) Id.
\(^{497}\) Id.
\(^{498}\) See \textit{Rodriguez}, 411 U.S at 33-34 (stating that the critical inquiry in a fundamental rights analysis is to determine whether the right is implicitly or explicitly guaranteed by the Constitution).
\(^{499}\) Id.
\(^{500}\) Id.
\(^{501}\) 566 N.E.2d 1283 (Ill. 1990).
\(^{503}\) \textit{Fumarolo}, 566 N.E.2d at 1299.
\(^{504}\) Id. at 1298.
\(^{505}\) Id. at 1299.
\(^{506}\) ILL. CONST. art. X, § 1.
antee the right to an adequate education, and thus articulate a fundamental right to an adequate education.\textsuperscript{508}

An examination of the 1970 Illinois Constitution supports the proposition that the constitution articulates the fundamental right to an adequate education. The education clause mandates that the state "shall provide for an efficient system of high quality public educational institutions and services."\textsuperscript{509} Furthermore, the state has the "primary responsibility for financing the system of public education."\textsuperscript{510} The clause defines an adequate education as one that allows all persons the opportunity to attend efficient, high quality public schools, where they will have the opportunity to develop themselves to the limits of their abilities.\textsuperscript{511} Thus, the education clause orders the state to establish efficient and high quality public schools in order to provide an adequate education, and it affirmatively places the primary responsibility for financing public schools on the state. Therefore, the state, through its constitution, guarantees these services to its citizens. While the Illinois Constitution mentions some non-fundamental governmental services,\textsuperscript{512} it guarantees only fundamental rights.\textsuperscript{513} The mentioning of certain services in the Illinois Constitution only grants the General Assembly the authority to act in those areas,\textsuperscript{514} while the fundamental rights guaranteed by the Illinois Constitution require the General Assembly to act.\textsuperscript{515} Thus, since the Illinois Constitution implicitly guarantees the right to an adequate education under the Rodriguez test, the Illinois courts should find that education is a fundamental right. Accordingly, the courts should apply strict scrutiny to any state action that infringes on the right to an adequate education.\textsuperscript{516}

United States Supreme Court decisions concerning education undercut any argument that education is social or economic legislation and thus subject to only minimal scrutiny.\textsuperscript{517} The Supreme Court has held that, while public edu-

507. ILL. CONST. art. I, § 1.

508. See Rodriguez, 411 U.S. at 33-34 (holding that a right is fundamental if the Constitution implicitly or explicitly guarantees it).

509. ILL. CONST. art. X, § 1 (emphasis added).

510. Id. (emphasis added).

511. See 6 RECORD OF PROCEEDINGS, supra note 1, at 234.

512. See, e.g., ILL. CONST. art. XIII, § 7 (public transportation).

513. See, e.g., ILL. CONST. art. III, § 1 (the right to vote).

514. See, e.g., ILL. CONST. art. XIII, § 7 ("Public transportation is an essential public purpose for which public funds may be expended.") (emphasis added).

515. See, e.g., ILL. CONST. art. III, § 1 ("Every United States citizen who has attained the age of 21 or any other voting age required by the United States for voting . . . shall have the right to vote at such election.") (emphasis added).


cation is not a "right" guaranteed to all persons by the Federal Constitution, it is not "merely some governmental 'benefit' indistinguishable from other social welfare legislation." Education has a "fundamental role in maintaining the fabric of our society." Not surprisingly, the United States Supreme Court has stated that providing an education is the most important function of any state. Consequently, since Illinois courts have adopted federal equal protection analysis, they must apply heightened scrutiny to a public school finance system that deprives, interferes with, impinges upon, or eliminates the right of any student to an adequate education. As argued above, that heightened scrutiny must be strict scrutiny since education is a fundamental right in Illinois.

A petitioner before an Illinois court would have to demonstrate that the public school finance system affected his or her fundamental right to an adequate education before the court would apply strict scrutiny in its evaluation of the finance system. The public school finance system in Illinois affects the fundamental right to an adequate education because it denies students from poor school districts an "equal educational opportunity." The system treats students in poor school districts and students in wealthy school districts unequally in a way that denies students from poor school districts an equal educational opportunity. Consequently, the finance system violates the equal protection clause.

The court's decision in People ex rel. Jones v. Adams fails to articulate that the Federal Equal Protection Clause, and therefore the Illinois equal protection clause, guarantees the right to an "equal educational opportunity." The equal protection clause guarantees "equal access . . . [to education] sufficient to confer some educational benefit." The Adams court properly noted that both the adequacy of the public education and the size of the disparity in per-pupil expenditures were important factors in considering whether the public school finance system violated the equal protection clause. However, it failed to consider the focus of the equal protection clause itself—whether the state action denies equal opportunity to all similarly situated persons. Thus, the Adams test fails to correctly apply the equal protection clause because it
does not consider the basic tenet of the equal protection clause—that the government deal with similarly situated individuals in a similar manner.\textsuperscript{528}

Establishing a violation of the equal protection clause does not require proof of an absolute deprivation of a fundamental right. The \textit{Adams} test seems to require a showing that the school finance system \textit{deprives} someone of an adequate education.\textsuperscript{529} However, a more accurate interpretation of the equal protection clause requires only a showing of unequal treatment to establish a violation; for example, an inhibition of some individual's or some group's equal access to a fundamental right.\textsuperscript{530} Thus, a more equitable test for Illinois to apply is whether the public school finance system treats someone unequally, so as to deny or inhibit his or her fundamental right to obtain an education in an efficient, high quality public educational institution.\textsuperscript{531}

Applying this test, an Illinois court should find that the Illinois public school finance system treats students in poor school districts differently from students in wealthy school districts so as to deny or inhibit the ability of students in poor school districts to exercise their fundamental right to obtain an adequate education. Students who live in property-poor districts receive an inferior educational opportunity as compared to their counterparts in wealthy school districts. Each student in the wealthiest school districts has approximately six times the amount spent for his education as a student in the poorest districts.\textsuperscript{532} Accordingly, the educational resources in the wealthiest districts are superior to those that the poorest districts provide.\textsuperscript{533} The vast disparity in per-pupil spending directly affects the educational resources available to the students, and this constitutes a denial of equal treatment of students entitled to receive an equal educational opportunity from the state.\textsuperscript{534} The unequal treatment infringes upon the students' fundamental right to receive an adequate education—an education from an efficient, high quality public educational

\textsuperscript{528} See supra notes 14-20 and accompanying text.

\textsuperscript{529} See \textit{Adams}, 350 N.E.2d at 776. There, plaintiffs were able to demonstrate that their school district did not spend even a substantially equal amount of money per pupil; pupils in their district had $165 less spent on each of them for their education than the state average, despite their district's higher-than-average tax rate. \textit{Id.} at 775. Thus, students in their district were treated unequally, with respect to education, as compared to students in other districts. Consequently, it appears that a court using the \textit{Adams} test would allow significant disparity in per-pupil expenditures for education if students in a property-poor district were receiving simply a basic education, albeit inferior to the education being provided in wealthier districts. Plaintiffs from a property-poor district would have to prove deprivation of a basic education.

\textsuperscript{530} See supra note 39 (discussing Professor Nowak's six substantive categories of fundamental rights).

\textsuperscript{531} This test properly expresses the relationship between the 1970 constitution's education clause and equal protection clause. See supra note 285 and accompanying text (noting that an education committee member at the 1970 Illinois Constitutional Convention suggested a similar test).

\textsuperscript{532} Burroughs & Leininger, \textit{supra} note 7, at 144.

\textsuperscript{533} See \textit{BURROUGHS \\& LEININGER}, \textit{supra} note 235, at 145.

institution.

Since the Illinois public school finance system infringes upon a group's fundamental right to receive an adequate education, an Illinois court must examine the system under strict scrutiny. Thus, the state would have to demonstrate that the finance system is necessarily related to a compelling interest. It is unlikely that any interest advanced by the state would survive strict scrutiny analysis. Legislation subject to strict scrutiny is nearly always struck down under an analysis that is "strict in theory and fatal in fact." Illinois should apply strict scrutiny to public education finance systems. Fumarolo discussed the stringent requirements of strict scrutiny: (1) the legislation must advance a compelling state interest; (2) the legislation must be necessary to attain the compelling state interest; and (3) the provisions in the legislation must be the least restrictive means available to attain the compelling state interest. While it is impossible to ascertain every interest which the state could advance as "compelling," it is likely that the state would claim that preservation of local control over school districts justifies the school finance system. However, in Illinois such an interest is only "valid," and not "compelling." Thus, it does not meet the demands of strict scrutiny. Furthermore, a school finance scheme that depends on property taxes for fifty-four percent of its receipts is not necessary to preserve local control over school districts. Nationally, property taxes account for only about forty-four percent of the required funds for public education. This clearly indicates that other states are able to fund their public schools with less reliance on property taxes.

Finally, a finance system that relies on local property taxes to supply such a substantial portion of funding for education is clearly not the least restrictive means to preserve local control of education. In fact, such a finance system is underinclusive with respect to preserving local control over education. Under the present finance system, only the wealthy school districts that can raise substantial local revenues truly exert local control over their public schools. Only these school districts have the ability to offer to their pupils choices in curriculum, extensive extracurricular activities, and the best teachers. On the other hand, the poorer school districts cannot raise sufficient funds to offer

535. See supra note 39 and accompanying text (noting that a court should apply strict scrutiny where state action affects the abilities of people to exercise a fundamental right).
536. See supra note 36 and accompanying text (articulating the strict scrutiny standard).
539. See, e.g., People ex rel. Jones v. Adams, 350 N.E.2d 767 (Ill. App. Ct. 1976) (state argued that local control over schools was rationally related to the property tax-based finance system).
540. Id. at 776 (stating that the principle of local control over public schools is only a valid state interest).
541. See BURROUGHS & LEININGER, supra note 235, at 19.
542. Fairness in Funding Illinois Schools, supra note 235, at 10.
their students choices in curriculum or in extracurricular activities. Furthermore, these districts cannot simply decide to provide superior facilities or teachers. In sum, lack of money for education preempts any true control over education in the poorer school districts. Thus, the present school finance system in Illinois cannot withstand analysis under strict scrutiny. Accordingly, a court that adjudicates an equal protection challenge to the finance system must strike it down as unconstitutional.

III. PRACTICAL IMPLICATIONS FOR ILLINOIS' PUBLIC EDUCATION SYSTEM

A judicial determination that the Illinois public school finance system violates the Illinois Constitution only acknowledges that a problem exists with public education in Illinois. The Illinois Constitution guarantees students much more than that. The General Assembly must put into place a constitutional public school finance system—one that ensures efficient and high quality public schools. The public school system must grant an appropriate education to each student, in light of his or her individual needs.

The important question still remains: how can the state provide a constitutional public school finance system? This Comment does not attempt to propose a constitutional system. However, it is clear that the state must guarantee more funding—enough to provide a constitutionally adequate education for all students in Illinois. The state must have enough money to spend in favor of disadvantaged students from poor school districts so that they receive an education that allows them to compete in the marketplace with relatively advantaged students.

A constitutional system does not contemplate equal per-pupil spending. Nor does it contemplate decreasing the disparity in per-pupil spending for education by "scaling down" the amount of money that wealthier school districts can choose to grant for public education through higher property taxes. That would only penalize the school districts who are providing a more than adequate educational opportunity to their students. A public school finance system meeting the constitutional mandate would, however, require the state to grant more money to relatively disadvantaged students in poorer school districts. Likewise, the poorer school districts should receive more state funding than wealthier school districts receive. Each pupil in the poorer school districts must have enough money spent on him or her to guarantee the opportunity for that pupil to obtain an appropriate education from an efficient, high quality institution. The present state aid system does not guarantee funds sufficient to grant all students the equal educational opportunity to obtain an adequate education. Thus, the state must contribute more money to public education.

Where can the State of Illinois obtain the additional necessary funds? An increase in the income tax rate may be the answer. The base income tax rate in Illinois is 2.5% for individuals and 4% for corporations.\(^5\) For the next two years, the state will impose a 3% tax on an individual's income and a 4.8%
tax on a corporation's income; but, after July 1, 1993, the income tax rates will drop to 2.75% on individual income and to 4.4% on corporate income. The General Assembly could significantly increase the amount of money available for education by increasing the base income tax rate to 5-6% on an individual's income, and to 8-9% on a corporation's income. The state could also provide more funds for education by increasing the percentage of total income tax revenues allocated to education. Currently, through its Education Assistance Fund, Illinois allocates 7.3% of the total income tax revenues to public primary, secondary, and higher education. The state could consider increasing the percentage of revenues devoted to education to reflect a greater state role in supporting public education.

In addition, the General Assembly should reduce the total number of units requiring state aid. The legislature should decrease the total number of school districts in Illinois by forming county-wide districts outside Cook County and township districts within Cook County. Increasing the amount of state funding for education while decreasing the sheer number of school districts would allow the state to spend in favor of school districts that need funding the most—districts unable to raise sufficient funds via the property tax.

A judicial determination that the Illinois public school finance system is unconstitutional would also have other, far-reaching effects. While it is difficult to predict the effect such a decision would have on the quality of education in Illinois, it is clear that invalidating the school finance system via any of the four suggested means would greatly affect the Illinois judiciary's role in public education.

An immediate impact would be the realization that questions concerning the constitutional adequacy of Illinois public schools should no longer rest with the General Assembly. Thus, a decision that the public school finance system is unconstitutional would overrule a long line of precedent in Illinois. Furthermore, for the first time, Illinois would align its interpretation of what constitutes "efficient" and "high quality" schools with other states' interpretations of similar mandates.

The increased power of the judiciary in the school finance area would not be inconsequential. Illinois courts would be able to require more state funding to support poor, relatively disadvantaged school districts. Consequently, a determination that the present finance system violates the Illinois Constitution may in effect overrule decisions such as Blase v. State—the judicial branch of government in Illinois may be able to mandate that the state provide not less than fifty percent of the funds necessary to operate and maintain public schools. Clearly, this would allow poor school districts to provide their rela-

545. ILL. ANN. STAT. ch. 120, para. 9-901 (Smith-Hurd Supp. 1991).
546. See supra notes 296-330 and accompanying text.
tively disadvantaged students with the services they need in order to receive an "equal educational opportunity."

Finally, a judicial determination that the finance system violates the Illinois Constitution would affect the relationship between the General Assembly and the Illinois courts regarding the means by which Illinois funds its public schools. Currently, approximately fifty-four percent of the funding for local school districts comes from local property taxes; the state provides only about thirty-eight percent of the required funding. Nationally, property taxes account for only about 43.6 percent of the required funds for public education. Thus, in striking down the finance system in Illinois, the judiciary would send a clear message to the General Assembly that it must de-emphasize the property tax, and instead devise a more equitable way to fund public schools that will not deprive students in poor school districts of an adequate education. The General Assembly's answer would likely come in the form of an income tax increase or a tax on services. In any event, the judiciary would abandon its deferential stance toward public school finance, and in its place would establish guidelines for future finance schemes in Illinois.

While, as previously noted, the effect that school finance reform would have on Illinois public schools is difficult to determine, results in other states may predict possible effects in Illinois. In Kentucky, where the state supreme court held that the entire state education system was unconstitutional, the state's General Assembly passed a law which provided a twenty-five percent increase in funding for poor schools and a five percent increase in funding for wealthy schools. Furthermore, the law increased the minimum spending level per student by $1100 for the poorest school districts. Finally, the funding scheme embodies a reward for school districts that upgrade their performance, and a monitoring program for districts failing to improve their performance. Such a system may prove to represent a suitable compromise between quality and equality.

It is unlikely that a court's determination that the Illinois school finance system is unconstitutional would result in the sort of drastic changes to the education system made in Kentucky. Such a determination, however, would open the doors to judicial intervention in the school finance area. Consequently, the courts could effectively mandate an equitable system that would provide all persons with an appropriate education. More importantly, such a determination would allow the judiciary to monitor future public school financing in Illinois to insure that it meets the constitutional standards discussed above.

549. See Fairness in Funding Illinois Schools, supra note 235, at 10.
550. Id.
552. Id. at 84.
553. Id.
Conclusion

The present public school finance system in Illinois is unconstitutional. It fails to provide "efficient" and "high quality" public schools in every school district. It fails to provide an "equal educational opportunity" for all persons so that they will have the opportunity to develop themselves "to the limits of their capacities." The state has failed to assume the "primary responsibility" to provide a constitutional public school system in which all persons receive an "appropriate" education.

This Comment suggests four possible means by which a court could determine that the school finance system violates the Illinois Constitution. Regardless of the means a court uses to reach the conclusion that the system is unconstitutional, the court should hold that a constitutional system does not require equal per-pupil expenditures. Instead, the court should hold that a constitutional system contemplates providing enough funding to each school district so that all persons have an equal educational opportunity to receive an appropriate education. Thus, a constitutional finance system contemplates unequal spending in favor of relatively disadvantaged students in poor school districts; for without additional funds in those districts, many students would not receive an appropriate education that would place them on an "even field" with relatively advantaged students. Furthermore, the system should not decrease per-pupil spending in wealthy school districts, but should increase per-pupil spending in poor school districts in order to gradually eliminate the enormous disparities in spending between poor and wealthy districts. Such a system cannot heavily rely on the property tax, but instead must rely on alternative sources of funding.

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555. See supra notes 276-78 and accompanying text (noting that the delegates to the 1970 Illinois Constitutional Convention intended the new education clause to provide each student with an equal educational opportunity); see also Board of Educ. v. Rowley, 458 U.S. 176, 200 (1982) (articulating the right to an "equal educational opportunity" under the Federal Equal Protection Clause).
557. Id.
558. See supra notes 331-37 and accompanying text (discussing Illinois decisions regarding public education for the handicapped that recognize the right to an "appropriate" education for all students).