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Education Emancipation for Inner City Students: A New Legal Paradigm for Achieving Equality of Educational Opportunity

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COMMENTS

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Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.¹

I. INTRODUCTION

This year marks the fortieth anniversary of the landmark decision of *Brown v. Board Education*. The Court's words in that decision are even truer today than they were four decades ago. The rapid advance of technology and the intense economic competition from other nations have raised the educational threshold that every American needs to attain a decent standard of living. Economic self-sufficiency is no longer readily available for those who do not have at least a high school education.² Education is not only more important to the economic opportunities of each American, but also to the economic vitality of the country itself.³

Unfortunately, in a tragically inverse relationship, as time has increased the importance of being educated, by almost every indicator, the quality of education delivered to America's children has declined.⁴ The current breakdown of the American educational system cannot be attributed to a lack of effort or to a lack of government resources. In addition to President Johnson's War on Poverty, the unprecedented peacetime economic growth of the 1980s allowed federal and state gov-

1. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

2. This was recognized by Senator Paul Simon in 1985: "The number of unskilled jobs is going down, but the pool of unskilled labor is going up. Those two lines present a basic problem for our society." Steve Sanders, *Retraining Forecast as Common in '90s Panelists Urge More Spending*, CHI. TRIB., June 18, 1985, at 6C (quoting Senator Simon). "From 1980 to 1991, the weekly real earnings of full-time workers over the age of 25 who had graduated from college rose 9 percent. . . . But the real weekly earnings of similar workers who had only completed high school dropped 7 percent. And similar workers without high school diplomas suffered a drop in earnings of 14 percent. . . . [In 1992,] only 3.2 percent [of college graduates] were unemployed . . . compared with 11.4 percent of those who had dropped out of high school." Robert B. Reich, *Workers of the World, Get Smart*, N.Y. TIMES, July 20, 1993, at A19.

3. See Steven Greenhouse, *Wider Investment Tax Credits Urged*, N.Y. TIMES, Mar. 17, 1993, at C2. The Presidentially-appointed Competitiveness Policy Council reported, "A country cannot compete effectively unless its human resources are world class, and ours are falling toward the bottom of the league." *Id.*

4. See *infra* part I.A.

ernments to make substantial financial investments in the nation's educational system. "[A]fter allowing for inflation, expenditures per pupil more than doubled between 1966 and 1989."⁵ Elementary and secondary public school expenditures went from \$75.7 billion in 1970-71 to \$392.6 billion in 1990-91.⁶ Yet one measure of educational performance, achievement on the Scholastic Aptitude Test, fell below mid-1960s levels.⁷ In 1983, a report entitled "A Nation at Risk" catalogued in horrific detail the failings of America's educational system.⁸ The paradox of the past two and one half decades is that as government has invested more resources in the educational system, the quality of education provided in government-operated schools has steadily deteriorated. A failing educational system is problematic for all Americans, but for America's urban minority students, it is devastating.

The two most conspicuous methods previously used by the legal system to remedy the harmful shortcomings of the educational system were desegregation and school financing litigation. Segregation litigation was used to rectify the de jure racism that characterized the American educational system prior to *Brown*; school financing litigation was employed to improve funding for property-poor school districts. Equal educational opportunities have been sought for all children, regardless of race or class, primarily through these two forms of litigation.

Yet after decades of litigation, court orders and legislative fixes, the very students who these traditional lawsuits were intended to help continue to receive a woefully substandard education. Many minority students in America's largest cities are today consigned to schools which, by failing to provide for their basic educational needs, are sentencing them to unproductive lives.⁹ Inner city schools have been referred to as

5. Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 428 (1991).

6. NAT'L CENTER FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 1 (1992).

7. Hanushek, *supra* note 5, at 428. Professor Hanushek also notes other changing aspects of the educational system which, despite the sagging indicators of student learning, would lead one to expect an improvement in the educational performance of students. Student/teacher ratios have steadily fallen from twenty-five students per teacher in public elementary and secondary schools in 1965, to eighteen students per teacher in 1985; the proportion of teachers holding a master's or higher-level degree rose from under one-quarter in 1965 to over one-half in 1985; median teacher experience rose from eight years in 1966 to fifteen in 1986. *Id.* at 429.

8. See *infra* notes 14-27 and accompanying text.

9. See *supra* note 2. The frustration at the utter lack of improvement in urban schools was aptly described by the New Jersey Supreme Court in *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990). "Studies of the most sophisticated design, pilot projects, reams after reams of case histories of schools, districts, and students, learned treatises, books, television programs—all directed at the same question: what produces good education in urban schools? The only thing universally agreed on is that those schools are failing." *Id.* at 404.

“the most glaring failures of our American educational system.”¹⁰ As a means of bringing equal educational opportunities to the neediest students, the traditional education litigation efforts have fallen short of their goals.¹¹

Perhaps the single biggest shortcoming of these traditional litigation approaches is that attaining *quality* in education for needy students has never been an objective *in its own right*.¹² In the parlance of American pop culture, previous litigation efforts have been “quality-free.” The implicit assumption underlying these traditional lawsuits was that court-enforced integration orders and finance equalization laws would indirectly uplift the quality of education for these particular students. After decades of litigation, this strategy either does not work or will take a few more decades to work. Either way, minority urban students cannot afford to wait to find out the answer. They need to receive the benefits of a quality education today.

This Comment will now address the “quality-free” inadequacy of traditional litigation approaches. An innovative litigation strategy designed to provide America’s neediest students with true equal educational opportunities and true educational *quality* is needed immediately. A new litigation paradigm must be constructed, one that achieves real equality in the quality of educational opportunities.

This Comment will suggest a blueprint for this new education litigation model. Three distinct features characterize this new paradigm:

10. Charles S. Benson, *Definitions of Equity in School Finance in Texas, New Jersey, and Kentucky*, 28 HARV. J. ON LEGIS. 401, 413 (1991).

11. De facto segregation plagues many urban schools. See *infra* notes 182-195. In states where funding equalization has occurred, no noticeable gains in educational quality have taken place over those states where interdistrict spending disparity remains legally problematic. Two examples are California and Connecticut. California has one of the most equalized school finance formulas, yet the quality of education in California is not significantly higher than in other states. Rochelle L. Stanfield, *Learning Curve*, NAT’L J., July 3, 1993, at 1691. California students rank 34th in the nation on SAT achievement and 29th on NAEP tests. Bruno Manno, *Deliver Us from Clinton’s Schools Bill*, WALL ST. J., June 22, 1993, at A14. Connecticut has also had successful finance-equity legislation which increased and equalized expenditures for predominantly minority students, yet the performance of these students has remained “depressingly low.” See James S. Liebman, *Implementing Brown*, 76 VA. L. REV. 349, 392-93 (1990). One commentator has suggested that further school financing challenges will exacerbate the existing problems in the school system until the issue of school efficiency is addressed. See Hanushek, *supra* note 5, at 453. Helen Hershkoff, the associate legal director of the American Civil Liberties Union, acknowledged the shortcomings of finance equalization as a tool for improving education when she stated, “The problems go deeper than fiscal equity.” William Celis 3d, *School Financing: Arguing Equity is Not Enough*, N.Y. TIMES, April 29, 1992, at B8 (quoting Ms. Hershkoff).

12. “[E]quitable funding for our public schools has dominated our three opinions and the ensuing legislative debate. Only in passing has the *quality* of the public education system in Texas been addressed. Yet our system of public education languishes in mediocrity with no improvement in sight.” *Carrollton-Farmers v. Edgewood Indep.*, 826 S.W.2d 489, 525 (Tex. 1992) (Cornyn, J., concurring and dissenting). See also Hanushek, *supra* note 5, at 449.

(1) The states should have a duty imposed upon them under the United States Constitution and/or many state constitutions to provide their students with an education of minimum quality or adequacy, (2) The legally required minimum quality of education in a particular school or school district should be measured by aggregate student learning in basic subjects (educational output), not by processes, programs, procedures or per pupil expenditures (educational input), and (3) The remedy for a state's failure to meet its duty should be designed so as to provide aggrieved plaintiffs with immediate and instantaneous opportunities for a quality education. This Comment will review the legal arguments available to plaintiffs who may challenge states and school systems under this new litigation paradigm. Section II will assess the current state of the American educational system and note the disproportionate, destructive effects of the educational system's inadequacies on minority students. Section III will refer to the United States Constitution to determine the government's duty to provide students with a certain minimum quality of education. Section IV will look at various state constitution education clauses and review state supreme court cases to analyze the duty that states have imposed upon themselves to provide students with an education of a certain basic quality. Section V will discuss the merits of measuring the legally required educational quality by output measures instead of input measures. Section VI will discuss the merits of an innovative remedy that could provide plaintiff schoolchildren with a quality education instantaneously.

II. THE CURRENT STATE OF THE AMERICAN EDUCATIONAL SYSTEM

A. *In General*

The value of receiving a quality education in today's information society is inestimable. Just as industrialization created the need for workers to possess more "knowledge, skills and training,"¹³ the post-industrial era requires workers to possess even greater knowledge and skills. Yet much evidence supports the conclusion that American schools are failing to meet this post-industrial challenge.

The report receiving the most attention during the last decade for highlighting the inadequacies of the American school system is the National Commission on Excellence in Education's report "A Nation at Risk."¹⁴ The Commission's findings starkly display the shortcomings of the American educational system. "The educational foundations of our

13. Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 783 (1985).

14. NATIONAL COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983) [hereinafter NATIONAL COMM'N, NATION AT RISK].

society are presently being eroded by a rising tide of mediocrity that threatens our very future as a nation and a people," the report states. "We have, in effect, been committing an act of unthinking, unilateral educational disarmament."¹⁵

The commission found that nearly 40% of 17-year-olds could not draw inferences from written materials, only 20% could write a persuasive essay, and only one-third could solve a math problem entailing several steps.¹⁶ The Commission also noted that an incredibly high percentage of American students were functionally illiterate: 13% of all seventeen-year-olds, and up to 40% of all young adults.¹⁷

Even five years after "A Nation at Risk" sounded the siren call for improvement in American education, Education Secretary William J. Bennett concluded that American students' educational performance was lacking.¹⁸ Again, the data in 1988 showed that American students were receiving a substandard education. American students finished last in international comparisons of math performance, fewer than 40% of those between the ages of twenty-one and twenty-five could read well enough to interpret a newspaper article, and one in three seventeen-year-olds did not know that Abraham Lincoln was the President who issued the Emancipation Proclamation.¹⁹

More recently, additional evidence of the school system's failure has surfaced. Only 72% of fourth graders can do third grade math and only 14% of eighth-graders can do seventh-grade math.²⁰ Eighteen to twenty-four-year-old Americans finished last among ten countries, including Mexico, in a 1989 *National Geographic* survey of geography knowledge.²¹ A 1991 National Assessment of Educational Progress test revealed that half of America's eighth graders scored just above the proficiency level expected of *fifth-grade students*.²²

The high number of uneducated students affects American society in many negative ways. Functionally illiterate adults are very likely to be unable to find a job.²³ Not surprisingly, functional illiterates com-

15. NATIONAL COMM'N, NATION AT RISK, *quoted in* WILLIAM J. BENNETT, THE DE-VALUING OF AMERICA 42 (1992).

16. NATIONAL COMM'N, NATION AT RISK 8-9, *quoted in* Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 555 (1992).

17. NATIONAL COMM'N, NATION AT RISK 8, *quoted in* Bitensky, *supra* note 16, at 555.

18. Bitensky, *supra* note 16, at 556.

19. *Id.*

20. BENNETT, *supra* note 15, at 43.

21. *Id.*

22. Barbara Kantrowitz & Pat Wingert, *A Dismal Report Card*, NEWSWEEK, June 17, 1991, at 64.

23. *See* Ratner, *supra* note 13, at 784.

prise a high number of those who commit crimes. Some estimates suggest that as many as "60 to 80 percent of the nation's prison population is functionally illiterate;"²⁴ only one in four prisoners has a high school diploma.²⁵ The cost of incarcerating these criminals is high, as is the cost of providing government assistance to illiterates who do not commit crimes.²⁶ The cost of crime itself takes a toll on society as well, with one of every four households affected by crime every year.²⁷ Beyond the measurable costs to society, the ultimate cost is borne by the person whose human dignity has been degraded by an inability to achieve a meaningful existence due to receiving an inadequate education from his/her government.

B. *Minorities and the Urban Schools*

In the ideal classless society, a miserable government-run educational system would harm all members of society in equal proportions. In a stratified society such as America's, a crumbling educational system wreaks disproportionate damage on those at the bottom of the class system. Because members of minority groups have historically been discriminated against, they are much more likely to be poor, and as a result, are more in need of a quality education. Minorities receive disproportionate harm from the school system's failings. Unlike those who have the financial ability to secure good schooling by sending their children to private schools or by moving to a better school district, minority parents are disproportionately forced to bear the full brunt of the public school system's inadequacies head on. Providing minority citizens with substandard education dramatically lessens their prospects for entering society's economic and social mainstream.

For those who do not receive an adequate education, the consequences are debilitating. "Inadequate education . . . perpetuates economic caste distinctions."²⁸ Some civil rights activists fear that minority students who fail to learn the necessary critical thinking skills provided by a quality education will become modern-day serfs, relegated to a meaningless social existence.²⁹ The harmful consequences of the low quality education received by many minorities is best stated by Charles Murray in his book *Losing Ground*. "[T]he gap in educational achieve-

24. See Ratner, *supra* note 13, at 784 n.18. See also Bitensky, *supra* note 16, at 559.

25. Bitensky, *supra* note 16, at 559.

26. See Ratner, *supra* note 13, at 784.

27. Bitensky, *supra* note 16, at 559.

28. Julius Chambers, *Adequate Education for All: A Right, An Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 58 (1987).

29. Bob Moses, an organizer of the 1964 Freedom Summer, *quoted in* Alexis Jetter, *Mississippi Learning*, N. Y. TIMES MAGAZINE, Feb. 21, 1993, at 28, 30.

ment between black and white students leaving high school [is] so great that it threaten[s] to defeat any other attempts to narrow the economic differences separating blacks and whites."³⁰

The disparities between the academic performance of black and white students continue to divide the potential economic opportunities between them. Two Brookings Institute scholars have concluded: "Minorities have made only modest progress in reducing the yawning gap that separates their academic achievement from that of nonminorities, and they continue to exhibit alarming rates of illiteracy and high school noncompletion."³¹ It has been reported that "[o]n standardized achievement tests in reading, . . . black nine-year-olds scored an average of ten points lower than white nine-year-olds."³² In addition, as many as forty percent of minority youth are functionally illiterate.³³ Only "one in ten black young adults and two in ten Hispanic young adults can satisfactorily interpret a newspaper column."³⁴ And "[t]he 'unofficial' dropout rate . . . for some urban high schools in New Jersey can be as high as 47%."³⁵ Blacks and other minority students are far more likely to drop out of high school than are white students.³⁶ "[B]lack youths are 60% more likely and Hispanic youths are 290% more likely to drop out of secondary school than whites."³⁷ There has been a decrease in the percentage of black high school graduates that enroll in college while white enrollment has held steady.³⁸ According to the Urban Institute, "[t]he reading scores of black 17-year-olds from disadvantaged urban communities are no better than the reading scores of white 13-year-olds from more advantaged communities."³⁹ These dismal statistics are made worse by the fact that a type of resegregation appears to be taking place in the nation's urban schools.⁴⁰

30. CHARLES MURRAY, *LOSING GROUND* 105 (1984).

31. John E. Chubb & Terry M. Moe, *Effective Schools and Equal Opportunity*, in PUBLIC VALUES, PRIVATE SCHOOLS 161-183 (Neal E. Devins ed., 1989). For a brief description of the educational performance of minority and low-income students in Texas, see also Allan E. Parker, Jr. & Michael David Weiss, *Litigating Edgewood: Constitutional Standards and Application to Educational Choice*, 10 REV. LITIG. 599, 614-15 (1991).

32. Chambers, *supra* note 28, at 57 n.12.

33. *Id.* at 57.

34. BENNETT, *supra* note 15, at 43.

35. *Abbott v. Burke*, 575 A.2d 359, 401 (N.J. 1990).

36. Chambers, *supra* note 28, at 56.

37. George C. Galster, *Polarization, Place and Race*, 71 N.C. L. REV. 1421, 1423 (1993).

38. Chambers, *supra* note 28, at 56.

39. Michael A. Stegman, *National Urban Policy Revisited*, 71 N.C. L. REV. 1737, 1747 (1993) (quoting THE URBAN INST., *CONFRONTING THE NATION'S URBAN CRISIS: FROM WATTS (1965) TO SOUTH CENTRAL LOS ANGELES* 3 (1992)).

40. See *infra* notes 182-195 and accompanying text. Public school spending in urban areas is anything but frugal. In Milwaukee, Wisconsin, educators spend \$6,000 per year on each student. Rogers Worthington, *Split Milwaukee School System Urged*, CHI. TRIB., Mar. 28, 1991, at M3. In

In the context of this brief summary of the state of American education today, this Comment will now look at the Federal and state constitutions to determine potential sources of rights to a minimum level of education and the corresponding duties owed by the states to provide such an education.

III. THE RIGHT TO AN ADEQUATE EDUCATION UNDER THE FEDERAL CONSTITUTION

Aside from the Supreme Court's decision in *Brown v. Board of Education*, the high court's decision in *San Antonio School District v. Rodriguez*⁴¹ is its most well-known modern case dealing with education.⁴² The black letter constitutional law that most law students learn from *Rodriguez* is that no constitutional right to an education exists. This limited view of *Rodriguez* holds true only in the context of traditional old paradigm litigation strategies. In the new litigation paradigm, *Rodriguez* is potentially a right-creating case, and not a right-limiting case. Both commentators and the Court itself have recognized this potential application of *Rodriguez* and generally agree that *Rodriguez* has left open the possibility of a constitutional right to a certain minimum level or "floor" of education that government must provide.⁴³

Rodriguez was a typical Fourteenth Amendment equal protection challenge to the State of Texas's school financing mechanism. In *Rodriguez*, the plaintiffs challenged the state's educational financing scheme. The scheme, similar to other states' financing schemes at that time, relied heavily upon local property taxation as the source of revenue for each school district. As a result of this heavy reliance, substantial interdistrict disparities resulted in school expenditures.⁴⁴ Property-rich

New York City, educators spend \$7,300 per year on each student. Seth Mydans, *Teachers Union in Los Angeles Accepts Pay Cut*, N.Y. TIMES, Feb. 27, 1993, at L7. In Washington, D.C., educators spend about \$9,000 per year on each student, almost as much as the tuition at the exclusive private school President Bill Clinton and his wife Hillary send their daughter. Tex Lezar, *School Choice Actually Saves Public Money*, DALLAS MORNING NEWS, Feb. 5, 1993, at 23A. Detroit educators spend \$4,100 per year on each student. *Detroit Given Deadline to Find Truant Students*, CHI. TRIB., Sept. 20, 1990, at M3. Given these numbers, it would be hard to make the case that what's needed in the urban school systems is more money. See, e.g., *Abbott v. Burke*, 575 A.2d 359, 363 (N.J. 1990).

41. 411 U.S. 1 (1972).

42. In the previous two decades, no other schooling issue except racial segregation has received the same attention as school financing issues. See Hanushek, *supra* note 5, at 423 n.1.

43. See, e.g., *Papasan v. Allain*, 478 U.S. 265, 284 (1985); TYLL VAN GEEL, AUTHORITY TO CONTROL THE SCHOOL PROGRAM 39 (1976); Chambers, *supra* note 28, at 68; Penelope A. Prevolos, *Rodriguez Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75, 83 (1980); Patricia M. Harris, Note, *Student Fees in Public Schools: Defining the Scope of Education*, 72 IOWA L. REV. 1401, 1413 (1987).

44. 411 U.S. at 15.

districts had a greater capacity to raise funds for school expenditures than did property-poor districts. The plaintiffs in *Rodriguez* alleged that these relative disparities themselves violated the Equal Protection Clause, but never contended that the quality of education received in the poorer districts fell below a constitutionally required minimum.⁴⁵

The Court failed to apply the strict scrutiny standard of review under the Equal Protection Clause of the Fourteenth Amendment and instead found the financing system constitutional using the rational basis standard. The Court reasoned that no suspect class was involved and that education was not a fundamental right deserving strict scrutiny.⁴⁶

While the Court refused to rule that the severe funding inequities themselves violated the Constitution in a strict equal protection context, it explicitly suggested that a minimally adequate education could receive federal constitutional protection.⁴⁷ The Court stated, "[e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right [to speak or to vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short⁴⁸ [of such a hypothesized constitutional prerequisite]."⁴⁹ The Court continued,

Whatever merit appellees' 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 and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.⁵⁰

The plaintiffs' fatal flaw was that they never denied the State of Texas's assertions that they were receiving an adequate education.⁵¹ Having no evidence that the plaintiffs were receiving an education fall-

45. *Id.* at 37.

46. "[T]he Court concluded that classifying children on the basis of *district* wealth, as opposed to their personal family wealth, did not amount to a suspect classification . . ." VAN GEEL, *supra* note 43, at 102. In its oft-quoted statement in *Rodriguez*, the Court stated, "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." 411 U.S. at 35. See VAN GEEL, *supra* note 43, at 39.

47. 411 U.S. at 36-37.

48. *Id.*

49. *Papasan v. Allain*, 478 U.S. 265, 284 (1985) (quoting *Rodriguez*, 411 U.S. at 36-37).

50. *Rodriguez*, 411 U.S. at 37 (emphasis added).

51. 411 U.S. at 24. See also Prevolos, *supra* note 43, at 75.

ing below a hypothesized constitutional floor, the Supreme Court was forced to decide the case based simply on expenditure differences, not on the actual quality of education students in poorer districts were receiving. Plaintiffs only demonstrated that they suffered a *relative* disadvantage, not an absolute harm.⁵² The Court's opinion that such relative disadvantages are not protected by the Equal Protection Clause of the Fourteenth Amendment explains the traditional interpretation of *Rodriguez* as a decision that limited the right to education. However, the Court never stated what it would have decided had the plaintiffs demonstrated that the quality of education in the schools descended below a certain level on an absolute, not relative, scale.

So while *Rodriguez* may have closed one door to recognition of a constitutional right to education, it simultaneously opened another door for recognizing of such a right based on the inadequacy of educational outcomes.⁵³

The single Supreme Court case that supports this conclusion more than any other is the 1985 decision in *Papasan v. Allain*.⁵⁴ In *Papasan*, the Supreme Court explicitly stated that the question of whether a minimally adequate education deserved constitutional protection was still an open one. "[T]his Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right"⁵⁵ With respect to the holding in *Rodriguez*, the Court in *Papasan* stated, "[t]he Court did not, however, foreclose the possibility 'that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote].'"⁵⁶ This statement by the Court is crucial because "the Court confirmed what was not quite said outright before—it remains an open question whether there can be a positive right to education under the Constitution."⁵⁷

The Supreme Court's recognition of the possibility of a constitutional right to an "identifiable quantum of education" certainly helps prospective plaintiffs who believe they are receiving an inadequate education in an absolute sense. Remarkably, despite the scope of the educational crisis, no plaintiff has yet taken the Supreme Court up on the invitation first extended in *Rodriguez*, and reaffirmed in *Papasan*, to challenge the adequacy of state-provided education solely on the basis of

52. Chambers, *supra* note 28, at 68.

53. See Preovolos, *supra* note 43, at 83; Chambers, *supra* note 28, at 68; Ratner, *supra* note 13, at 831.

54. 478 U.S. 265 (1985).

55. 478 U.S. at 285.

56. *Id.* at 284 (quoting *Rodriguez*, 411 U.S. at 36).

57. Bitensky, *supra* note 16, at 570.

a minimum quality.⁵⁸

This may be due to the difficulty of actually identifying the quantum of education that merits constitutional protection. In other words, how poor would the quality of education have to be before the Supreme Court could determine that one's constitutional rights are violated?⁵⁹ No federal court has yet ventured to define a minimally adequate education.⁶⁰ Section IV of this Comment will suggest, as part of a new model of litigation, a method for courts to use in making this determination. In any case, the Supreme Court has left the courthouse doors wide open for a future plaintiff to offer proof that a school system has not provided him/her with the opportunity to acquire a minimally adequate education in an absolute sense.⁶¹

IV. THE RIGHT TO AN ADEQUATE EDUCATION UNDER STATE CONSTITUTIONS

Because the United States Constitution does not explicitly mention a right to education, the possibility of a federal right to a minimally adequate education derives from a person's right of expression and right to vote.⁶² State constitutions, unlike the federal Constitution, do not suffer from the absence of provisions regarding education. Thus, plaintiffs proceeding under state constitutions have more concrete grounds on which to base their claims. While no state constitution explicitly grants its citizens a fundamental right to education, all have education clauses that require the state to provide free public schooling.⁶³ These clauses offer aggrieved plaintiffs the most direct method of challenging inadequate educational opportunities.⁶⁴ Education litigation involving these clauses has become increasingly popular in the last fifteen years.⁶⁵

A. *Different Categories of State Constitution Education Clauses*

State constitution provisions on education differ considerably, although all impose duties on the state to provide some form of public

58. One explanation, of course, is that such a challenge does not conform to the traditional litigation models.

59. This is assuming that the state is providing children with an education of some sort. If the state refuses to provide any education at all, it has no duty to provide education to all children on equal terms. See *Plyler v. Doe*, 457 U.S. 202, 223 (1981).

60. See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 327 n.88 (1991).

61. See, e.g., Chambers, *supra* note 28, at 70.

62. See *supra* part III.

63. McUsic, *supra* note 60, at 311; Bitensky, *supra* note 16, at 587.

64. See Ratner, *supra* note 13, at 814. See also McUsic, *supra* note 60, at 308.

65. See *infra* part IV.B.

education.⁶⁶ Commentators have tried to group the states' education clauses into different categories. The earliest attempts to categorize state education clauses failed to respect the distinction between claims based on equity of financing and claims based on minimum education standards.⁶⁷ These older categorizations focused on the equity of the school system required by the states' education clauses, not on the states' duty to provide a certain quality of education.

Recently, however, a new categorization of state constitutional education provisions has been outlined that recognizes possible state constitutional claims under a minimum quality education theory.⁶⁸ This new categorization is based upon language in state constitutions that can be interpreted as requiring a certain quality of education. Looking at the state education clauses from this minimum quality, new litigation paradigm perspective, the different types of state clauses fall into four categories.

The first type of clause requires a guarantee of high quality and directs states to provide an "explicit and significant level of education."⁶⁹ The second category of education clause does not contain as strong a commitment to quality as those in the first group, but does command the state legislatures to provide for educational improvement,⁷⁰ or to adopt all suitable means to educate its people.⁷¹ Constitutions which

66. Ratner, *supra* note 13, at 815-16.

67. See McUsic, *supra* note 60, at 309 n.4. This initial categorization separated the types of clauses into four groups and was based upon a 1974 article by Professor Grubb which separated the state constitutions by their ability to provide a right to bilingual education. See Erica B. Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 66-70 (1974). The first group contains the weakest language for plaintiffs to use; it merely establishes public schools. The second group of state constitution education clauses declares that the state shall provide a "thorough and efficient" school system. The third group contains stronger language, such as calling for advancement of education by "all suitable means." The fourth group, containing the strongest provisions, defines the state's duty to provide education as "paramount." See Ratner, *supra* note 13, at 815-16.

68. Because it recognizes the possibility of minimum quality claims under state constitution education clauses, the categorization framework used here follows and relies on that developed by McUsic, *supra* note 60, at 333-39. But even McUsic's minimum quality categorization is seemingly intended to be used in school finance reform litigation, not minimum quality type litigation as proposed in this article. See McUsic, *supra* note 60, at 317. Some state courts have found their constitution to require a minimum quality of education. See *infra* part IV.B.1-3.

69. McUsic, *supra* note 60, at 334. The constitutions of Virginia and Illinois require a "high quality" public education. The Virginia General Assembly is required to "ensure that an educational program of high quality is established and continually maintained." VA. CONST. art. VIII, § 1. The Illinois Constitution requires the state to "provide for an efficient system of high quality public educational institutions and services." ILL. CONST. art. X, § 1. Other states require a system of "quality" schools or for "ample provision" to be made for the education of all children. MONT. CONST. art. X, § 1(1); WASH. CONST. art. IX, § 1.

70. ARIZ. CONST. art. XI, § 10; KAN. CONST. art. VI, § 1.

71. ARK. CONST. art. XIV, § 1; R.I. CONST. art. XII, § 1; S.D. CONST. art. VIII, § 1.

mandate a "thorough and efficient," or simply "efficient" educational system fall into this category as well.⁷² The state constitution education provisions in the third class fall into two subcategories: those which "encourage," "promote," or "cherish" specific and broad educational standards, and those which require only an "adequate" or "sufficient" education.⁷³ The final category of education clauses offers the weakest support for minimum quality claims and again falls into two sub-groups: those which merely require establishment of a "uniform," "general," or "thorough" system of schools,⁷⁴ and those which merely require the legislature to set up and maintain a system of schools.⁷⁵

B. *Litigation Using the State Constitution Education Clauses*

The use of these educational clauses in school reform litigation is a fairly recent phenomenon. Because plaintiffs in past traditional education litigation sought greater equality in school district funding, they preferred to litigate under the equal protection clauses found in most state constitutions. However, this strategy produced less than the desired results in some cases, thus education litigators looked elsewhere to ground the state's duty to equalize school financing. They began to use state constitution education clauses as a possible means to achieve the success in school financing litigation that state equal protection clauses could not provide.⁷⁶

The evolving trend in litigation using these state education clauses is heading in a direction favorable to those who wish to legally challenge the educational system based solely upon a minimum quality, or basic standards claim. The use of these clauses has steadily progressed from challenges to school financing to challenges of inadequate quality of education.⁷⁷ Courts have gone from analyzing school funding formulas

72. These include: DEL. CONST. art. X, § 1, sec. 1; KY. CONST. § 183; MD. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; N.J. CONST. art. VIII, § 4, para. 1; OHIO CONST. art. VI, § 2; PA. CONST. art. III, § 14; TEX. CONST. art. VII, § 1; W. VA. CONST. art. XII, § 1.

73. See *McUsic*, *supra* note 60, at 336. CAL. CONST. art. IX, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2d div., § 3; MASS. CONST. pt. 2, ch. V, § II; NEV. CONST. art. 11, § 1; N.H. CONST. pt. 2, art. 83; N.M. CONST. art. XII, § 1; N.D. CONST. art. VIII, § 4.

74. Included in this category are: COLO. CONST. art. IX, § 2; IDAHO CONST. art. IX, § 1; OR. CONST. art. VIII, § 3; WIS. CONST. art. X, § 3.

75. ALASKA CONST. art. VII, § 1; MICH. CONST. art. VIII, § 2, sec. 2; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); N.Y. CONST. art. XI, § 1; OKLA. CONST. art. XIII, § 1; S.C. CONST. art. XI, § 3; UTAH CONST. art. X, § 1.

76. Some states' school financing laws were invalidated under the particular state constitution's equal protection clause. See *Serrano v. Priest*, 557 P.2d 929, 953 (1976).

77. *McUsic*, *supra* note 60, at 308-09. For a listing of some of the cases litigated under these changing theories, see Jonathan Banks, Note, *State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?*, 45 VAND. L. REV. 129, 133 nn.19-21 (1991).

and expenditures to evaluating the level and quality of education being provided to students.

Following a litigation taxonomy accepted by a number of commentators, school finance litigation has been described as taking place in three separate "waves."⁷⁸ The first wave challenged school financing systems under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Supreme Court's decision in *Rodriguez* closed this avenue of litigation. The second wave began after *Rodriguez* and involved challenges to state school financing systems under state constitution equal protection clauses and state constitution education clauses.⁷⁹

The third wave, currently underway, is the challenge to financing systems based *solely* upon state constitution education clauses, rather than jointly with the state's equal protection clauses as in wave two.⁸⁰ Within wave three, two distinct strands of claims exist.⁸¹ The first strand is the more traditional equity financing challenge. The second strand, however, offers hope for a new paradigm of education litigation: it is a claim that the state has failed to meet its duty, under the state constitution education provision, to provide a minimum quality standard of education. This newly developing strand of litigation is significant because, for the first time, courts are willing to judge the state constitutional adequacy of the state's educational system using a standard other than equality of per pupil spending.⁸² It is important to note that a case challenging a state's failure to fulfill its duty under the state constitution education clause has never been based *solely* on a minimum quality standards claim. However, the trend is undeniably heading in this direction.⁸³

Although all of the cases litigated thus far have been decided in the equity financing context, the decisions can be analyzed to determine the possibility for a successful challenge to a violation of a state constitution

According to David S. Tatel, an attorney specializing in school financing, "Most of the litigation in the past decade focused on equity. . . . But what's been happening in the past few years is people are increasingly focusing on adequacy. This is the cutting edge of education litigation." See *Celis*, *supra* note 11, at B8.

78. See Gail F. Levine, Note, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507-08, 507 n.1 (1991).

79. *Id.* at 507-08. According to Levine, these first two waves produced few victories.

80. *Id.* at 508.

81. See McUsic, *supra* note 60, at 308, 326.

82. See McUsic, *supra* note 60, at 326 n.87. In deciding questions of minimum quality, courts still look at per pupil spending numbers, although those statistics are not central to the holding of these cases.

83. See McUsic, *supra* note 60, at 326 n.87 (*Rose*, *Abbott*, and *Pauley* were not solely minimum standards decisions, but a blend of equity and minimum standard rationales). See also *Banks*, *supra* note 77, at 147.

education clause based solely on a minimum quality standard. Indeed, many of the cases contain language that can fairly and reasonably be construed as placing a duty upon states with strong constitutional education clauses to provide students with an education of a certain minimum quality, even in the absence of a school financing challenge. Although in these third wave cases courts are still speaking in an equal financing context, their language conveys more than just a duty to remedy interdistrict financing disparities; it conveys the duty to give students a particular quality of education. Three third wave cases particularly support this position.⁸⁴

1. *PAULEY V. KELLY*⁸⁵

Pauley was a landmark decision, decided in 1979. The reason for its distinction was its unprecedented interpretation of West Virginia's state constitution education clause, which contains the "thorough and efficient" language used in many other state constitutions.⁸⁶ The first section of West Virginia's education article states: "The legislature shall provide, by general law, for a thorough and efficient system of free schools."⁸⁷ *Pauley* involved a challenge to the state's financing system, but the court devoted a significant portion of its opinion to interpreting the meaning of the state constitution's "thorough and efficient" clause. In doing so, the court noted that it was entering an "unexplored" area.⁸⁸ After an extensive historical analysis, the court arrived at its definition of a "thorough and efficient" education: "It develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically."⁸⁹ The court then went on to list some of the legally recognized elements of this definition. Among these were literacy and the ability to add, subtract, multiply, and divide numbers. The court also stated that the clause itself requires the development of high quality educational standards.⁹⁰

Furthermore, *Pauley* advocated a strong role for the judiciary in enforcing state constitutional education standards. "There is . . . ample

84. The fourth case in this category is *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (1978) (en banc). Because of the uniqueness of the Washington state constitution education clause (a "paramount duty" provision), it will not be discussed in this comment. See WASH. CONST. art. IX, § 1. It is still worth noting that the court in this case spoke of a constitutionally required minimum education standard under this provision. 585 P.2d at 95. See Ratner, *supra* note 13, at 820.

85. 255 S.E.2d 859 (W. Va. 1979).

86. See *supra* notes 69-71.

87. W. VA. CONST. art. XII, § 1.

88. 255 S.E.2d at 865 n.8.

89. *Id.* at 877.

90. *Id.* at 878.

authority [from many jurisdictions] that courts will enforce constitutionally mandated education quality standards."⁹¹ This is important because of the possible reluctance of some courts to uphold quality standards under state education clauses. In *Pauley*, the Supreme Court of West Virginia made clear its duty to enforce state constitutional requirements related to education.

Pauley's significance is that it interpreted the state constitutional education provision to establish a duty to provide a certain quality of education to every child, not simply a required level of expenditure.⁹² *Pauley* began to answer questions about the content of a state's duty under its education clause. This case is also notable because the duty it imposes on the state cannot be satisfied merely by meeting certain input requirements, but only by successfully educating students.⁹³

2. *ROSE V. COUNCIL FOR BETTER EDUCATION, INC.*

Rose v. Council for Better Education, Inc.,⁹⁴ decided in 1989, challenged the state's school financing system as unconstitutional under Kentucky's state constitution education article. There are two remarkable points about the court's decision in *Rose*: (1) its relative neglect of the traditional judicial concern with interdistrict financing disparities and its focus upon the quality of the schools in the state, and (2) its ruling that the entire school system, not simply a statute, was invalid under the state constitution.⁹⁵

Kentucky's state constitution education clause states: "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State."⁹⁶ The court, without much guidance from previous state court decisions, sought to determine whether the school system in Kentucky fulfilled the state's duty of being "efficient."⁹⁷ The court rejected the defendant's argument that the legislature has the sole and exclusive authority to determine whether or not the state school system is efficient.⁹⁸ In a bold statement regarding the judicial role with respect to state education, the court said, "Courts may, should and have involved themselves in defining the standards of a constitutionally mandated educational system."⁹⁹ In ruling the entire Ken-

91. *Id.* at 874.

92. See Ratner, *supra* note 13, at 819.

93. Ratner, *supra* note 13, at 819.

94. 790 S.W.2d 186 (Ky. 1989).

95. See Benson, *supra* note 10, at 417. Benson acknowledges that financial questions did play a role, but this role was only "subsidiary."

96. KY. CONST. § 183.

97. 790 S.W.2d at 205.

98. *Id.* at 208-09.

99. *Id.* at 210.

tucky school system unconstitutional, the court outlined nine characteristics of an "efficient" system of public schools.¹⁰⁰ Issuing no remedy to the plaintiffs, the court left the task of re-creating a constitutional system to the Kentucky General Assembly.¹⁰¹ In his concurring opinion, Justice Gant stated that the Court has a duty to declare a remedy and that he would have issued a writ of mandamus compelling performance of a "plain duty" required by the constitution.¹⁰² Again, the court's focus on the standard of education, and not simply the disparity in funding departs from the traditional judicial method of analyzing a school system's adequacy under the state constitution.

3. *ABBOTT V. BURKE*

In *Abbott v. Burke*,¹⁰³ decided by the New Jersey Supreme Court in 1990, the court found that the state's education law violated the state constitution's "thorough and efficient" education clause. This case involved a school financing challenge, which was surprising because in recent years, New Jersey spent more money per pupil than any other state in the continental United States.¹⁰⁴ The court in *Abbott* did not get involved too deeply in the nuances of education finance.¹⁰⁵ The court instead noted that its past decisions had made clear that the state constitution did not mandate equal expenditures per pupil, but instead required a certain level of educational content and quality.¹⁰⁶ The court then concluded that the quality and level of education provided in certain poorer urban districts did not satisfy the state constitution's "thorough and effi-

100. *Id.* at 212-13. These characteristics include:

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

101. 790 S.W.2d at 215.

102. *Id.* at 216-17 (Gant, J., concurring).

103. 575 A.2d 359 (N.J. 1990).

104. *Id.* at 366.

105. Benson, *supra* note 10, at 413.

106. 575 A.2d at 369. The court also noted the change in focus of previous education litigation away from dollar disparity and toward substantive educational content. *Id.*

cient" clause.¹⁰⁷ The New Jersey high court, just as the West Virginia and Kentucky high courts had done, based a large part of its analysis on the standard of education necessary to fulfill the state constitution's education clause.¹⁰⁸

As these three cases demonstrate, state courts have used their state's education clauses to invalidate entire school systems, or a limited number of school districts, not solely on the theory that severe disparate expenditures were violative of the clause, but on the theory that these state constitutional education provisions guaranteed students a certain quality of education that they were not receiving.

No state supreme court has yet held a school system violative of an education clause based solely on a minimum quality theory. Issues of finance have always entered the picture. But the trend is unquestionably headed toward a purely quality-based inquiry. Twenty years ago, finance was the only issue in education litigation. Within the past six years, however, state high courts have spoken of educational quality, educational content, and educational standards. Future opinions will likely scrutinize educational quality without the slightest reference to issues of finance.

Under the suggested new litigation paradigm, state and federal courts would take the above mentioned legal trend to its logical conclusion and scrutinize each state's compliance with its educational duties solely on the basis of quality. Courts must then decide how to judge whether a particular school or school system is failing to provide a legally adequate quality of education.

V. JUDGING THE LEGAL SUFFICIENCY OF A SCHOOL OR SCHOOL SYSTEM'S QUALITY

A. *Using Output Measures, Not Input Measures, to Determine Whether Schools Are Providing Legally Adequate Education*¹⁰⁹

Determining whether schools are fulfilling their legal duty to provide a minimum level of education is complicated by the variety of factors a court could analyze in answering this question. These factors generally fall into two categories: (1) The Court can ask the "means" question by looking at the means, or inputs, the school is using to achieve this minimum quality of education (special programs, proce-

107. 575 A.2d at 400.

108. See Benson, *supra* note 10, at 416.

109. When the word "legally" is used in this context, it refers to the legal duty schools have under either the United States Constitution or the respective state constitution education clauses. On the source of these duties, see *supra* parts III, IV.A.

dures, taxes, expenditures, student-teacher ratios, administrative efficiency, staff-instructor ratios etc.); or (2) The court can ask the "ends" question by looking solely at the results of the school's efforts, and the output of student learning.¹¹⁰ Because courts historically thought that the criteria in the "means" question lend themselves more easily to judicial scrutiny, courts asked the "means" question and were reluctant to simply ask the "ends" question.

In a new litigation paradigm, however, courts would cease to look at questions of means and focus strictly on the ends analysis in determining whether a school has met its legal duty. The most obvious reason for this shift in emphasis is that letting legislators and other politically-accountable officials determine the precise means by which they will meet their constitutionally required duty is always preferable. Judicial inquiries should only concern themselves with determining whether the required quality standard is being met and with providing plaintiffs a remedy should they determine the school quality inadequate.¹¹¹

Judging educational adequacy through student performance, or output standards, has been advocated since the early 1970s.¹¹² One scholar observed in 1976 that "there is evidence to indicate the states are moving toward a radically different approach to the control of the curriculum; namely, states are attempting to regulate not what goes into the school program but what comes out."¹¹³ Courts should look to what children have learned to assess whether schools have complied with their duty to provide a minimum quality education. The benefits of this type of approach over an input based approach are numerous.

110. Put another way, the courts can look at what the school bureaucracy is doing or it can look at what the students are learning.

111. See Section VI for a discussion of the appropriate remedy. Just as a court's inquiry as to whether the duty is being met should ignore the means used to achieve that duty, the remedy should also not involve dictates to the schools as to how to comply with the duty.

112. Stephen W. Gard, *San Antonio Independent School District v. Rodriguez: On Our Way to Where?*, 8 VAL. U. L. REV. 27, 30 (1973). In its 1971 report, the Committee for Economic Development stated:

We insist that educational equality must be judged by school "outputs," by the actual achievements of pupils in intellectual skills, knowledge, creativity, and action. We believe that the American people should refuse to settle for anything less than universal literacy and those intellectual skills which accompany literacy. Except for the less than one per cent of any population group who are incapable of normal learning, the schools should be expected and required to bring their pupils up to minimal standards of intellectual achievement—not *some* of them, but *all* of them.

COMM. FOR ECONOMIC DEV., EDUC. FOR THE URBAN DISADVANTAGED: FROM PRESCHOOL TO EMPLOYMENT 13 (1971), *quoted in* Gard at 31. Another commentator has suggested that the court impose an output requirement on schools in order to comply with the right. See Prevolos, *supra* note 43, at 115.

113. VAN GEEL, *supra* note 43, at 85.

1. THIS APPROACH IS CONSISTENT WITH PAST JUDICIAL ANALYSIS

As has already been noted,¹¹⁴ even in the context of equity financing litigation, courts have recently shown more interest in the quality of education provided than in the equality of funding. This is true both for the United States Supreme Court and state supreme courts.

When the United States Supreme Court has spoken of a potential right to education, it has not spoken in terms of inputs such as specific spending, specific programs, student/teacher ratios, and the like. Instead, the Court has spoken of the level of knowledge or learning that a person must possess to have received a constitutionally adequate education. The Court has stated that the education must be so bad that the meaningful exercise of voting or speech rights are affected.¹¹⁵ In other words, persons educated by the state must have a level of education that allows them to meaningfully exercise their right to freedom of speech and vote. The Supreme Court's rationale in *Rodriguez* suggests that the adequacy of educational opportunity be measured by output, by what students can do with their education, not what programs schools have implemented or how much money schools have spent.¹¹⁶ In another case, the Court accepted the State's proposition that, "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."¹¹⁷ Again, the Court's language refers to the level of knowledge attained by the student—educational ends rather than educational means. Understanding *Rodriguez* in this educational-attainment context supports the argument for judicial measurement of the legal adequacy of education based on what students have learned in school.¹¹⁸

In their education litigation decisions, state supreme courts have also turned their attention away from input standards and towards performance standards in discussing whether a state has fulfilled its obligation under the state constitution education clause. Even in an early education finance case, the New Jersey Supreme Court defined the state constitution's guarantee as providing students the education "needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."¹¹⁹ Other state courts have also focused on what the student should actually learn.¹²⁰

114. See *supra* part III, IV.B.

115. *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1972).

116. See, e.g., 411 U.S. at 88 (Marshall, J., dissenting) *discussed in* Gard, *supra* note 112, at 32.

117. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

118. Bitensky, *supra* note 16, at 637.

119. *Robinson v. Cahill*, 303 A.2d 273, 295 (1973).

120. See *supra* part IV.B.1-3.

2. BY STRICTLY LOOKING AT EDUCATIONAL ENDS, COURTS NEED NOT ENGAGE IN THE DEBATE ABOUT THE RELATIONSHIP BETWEEN CERTAIN EDUCATIONAL INPUTS AND EDUCATIONAL OUTPUTS

Input-based measurements are inherently flawed because they do not necessarily reflect what students have learned in school; they focus on the wrong side of the equation. The inputs that work in one school district may be totally ineffective or irrelevant in another. For plaintiffs or courts to use input-based measurements in determining the legal adequacy of an education, they must make a causal connection between input and output. This type of proof has been difficult, however, because expert opinion is divided on this question. No positive correlation has been established between particular inputs and student performance. The 1991 National Assessment of Educational Progress test of eighth-graders' math skills serves as evidence of this failure. North Dakota, ranked 32nd in the nation in terms of per-pupil spending, performed the best while the District of Columbia, which spends the most per student, finished second to last.¹²¹ Utah spent less money per student than every other state in the union in 1992, \$2,993, yet ranked 4th and 8th respectively among all states in SAT and NAEP scores.¹²²

Given this evidence, findings based strictly on inputs offer little to courts about the actual learning taking place in the school. The Supreme Court in *Rodriguez* noted the seemingly intractable nature of this dilemma:

[O]ne of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education. . . . The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues.¹²³

As the Court rightly predicted, scholars are no closer today than they were 20 years ago in proving these correlations.¹²⁴ By looking only to the outcomes of educational practices, courts need not consider the input question, thus removing the input-output causation problem altogether.¹²⁵ Plaintiffs can then sidestep the task of proving that more

121. Kantrowitz & Wingert, *supra* note 22, at 65.

122. See Bruno Manno, *Deliver Us from Clinton's Schools Bill*, *supra* note 11, at A14.

123. San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 42-43 (1972).

124. "Any correlation between funding and educational results is tenuous at best." Carrollton-Farmers v. Edgewood Indep. Sch. Dist., 826 S.W.2d 498, 531 (Tex. 1992). "A majority of studies have indicated that there is no strong correlation between expenditures and educational quality." Preovolos, *supra* note 43, at 117 (citation omitted).

125. See Liebman, *supra* note 11, at 431 n.281.

inputs provides more education.¹²⁶

3. ALLOWS COURTS TO JUDGE ADEQUACY OF EDUCATION WITHOUT
MAKING EDUCATIONAL POLICY

By declining to use input-based standards in determining whether the state has fulfilled its duty to provide the required level of education, courts can escape deciding on the merit of one particular educational policy versus another. Courts can avoid placing themselves into this policy-making role by simply scrutinizing the student performance indicators rather than the particular educational policies adopted by the school system.¹²⁷ "By simply looking to the results of the educational process, the courts can avoid becoming enmeshed in debates over educational policy, an area in which the judiciary lacks the specialized knowledge and expertise."¹²⁸ The resulting simplification of analysis reduces the issue to a pure question of whether or not the schools are meeting their legal duty, and leaves educators to determine the best way to meet this duty.¹²⁹ Schools would be free to experiment as they wished, as long as the court's output requirements were met.

B. *The Use of Competency Tests*

In the absence of legislative guidance, courts should adopt a standard based on educational outputs (i.e. knowledge acquired by the students, competency tests). Output measurement is the most manageable, most successful, and most reliable indicator of the actual level of learning taking place in the schools. Output standards address the judicial reticence toward defining the content of a minimal education because they are judicially manageable and easily enforceable.¹³⁰

How exactly would courts measure outputs? Through the well-recognized and commonly-used method of measuring student knowledge, standard proficiency tests.¹³¹ These standardized achievement tests, although not without their detractors, are uniformly and extensively used by the schools. At least one court has described these tests as the "most

126. McUSIC, *supra* note 60, at 310.

127. *See id.*

128. Gard, *supra* note 112, at 33-34.

129. *Id.* at 34.

130. Prevolos, *supra* note 43, at 115. Output measures may not be as conceptually simple or as easily quantifiable as input measurements, but can easily be measured by student achievement tests. *See* McUSIC, *supra* note 60, at 316.

131. *See* Chambers, *supra* note 28, at 61 n.27: "Achievement levels required for entrance into the military, societally accepted reading and math norms as reflected by newspapers and modes of exchange, and basic competency standards might all be applied to the task of defining adequate education."

objective standard now in use for measuring educational progress.”¹³² Under the duty to educate in the United States Constitution, a federal court would probably require that students attain specified achievement levels in certain basic skills that would provide him/her with meaningful access to the political system.¹³³ State courts, under the duty to educate demanded by their constitutions, could require a higher level of proficiency than would be imposed by a federal court. Such broader requirements could include student passage of basic high school competency tests.¹³⁴ Some commentators suggest that in setting achievement levels, courts should follow the standards set by state legislatures.¹³⁵ Courts, in the absence of such legislative assistance, could employ a set of nationally accepted standards.¹³⁶

A concern with this competency or proficiency testing approach is that the school system may be held legally accountable for poor student performance where the cause of a student's or a small group of students' poor performance rests not with the school at all, but elsewhere. The students, not the schools, may be at fault for poor performance.¹³⁷ A practical and workable solution would be to impose a *prima facie* burden upon the plaintiffs to show that “not just a few but many or most students in a given school fail tests not only on the first but also on successive tries.”¹³⁸ For example, this could occur where seventy-five percent of a school or school district fail to meet an established educational standard. The presumption would then arise that the school system was not fulfilling its duty, resulting in poor student performance.¹³⁹ The school could attempt to overcome this presumption by offering contrary proof.¹⁴⁰ The key to this practical solution is holding the school or school system legally liable only where it produced a disproportionate number of failing students.¹⁴¹

VI. REMEDY

Just as courts need a paradigm shift in the way they determine what constitutes a constitutionally adequate education, courts must also shift

132. Gard, *supra* note 112, at 33 (citations omitted).

133. See Prevolos, *supra* note 43, at 115.

134. *Id.*

135. See McUsic, *supra* note 60, at 330.

136. McUsic, *supra* note 60, at 330.

137. Ratner, *supra* note 13, at 794-95.

138. Liebman, *supra* note 11, at 390.

139. *Id.*

140. *Id.*

141. Leroy D. Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 CATH. U. L. REV. 795, 804 (1989). See also Ratner, *supra* note 13, at 785-94.

away from using constitutionally inadequate educational remedies. In the past, a typical judicial remedy included a mandate or requirement for the schools or the legislature to perform a specific action. More money is often thought to be a cure-all for every type of education distress. This assertion, however, is no longer credible.¹⁴² As the Supreme Court of New Jersey stated in 1990, "[B]eyond doubt . . . money alone has not worked."¹⁴³ Although courts and legal scholars have preferred them in the past,¹⁴⁴ little evidence exists to suggest that the input-oriented programs previously tried had much positive impact.¹⁴⁵ The success of other judicially mandated remedies is also dubious. Even when plaintiffs have walked out of court as successful litigants, full redress is rarely achieved.¹⁴⁶ These traditional remedies raise other problems such as judicial activism into educational policies. Recognizing the limitations of these traditional remedies and the urgency of the education crisis's effect on minorities, the Director-Counsel of the NAACP Legal Defense and Educational Fund, Julius Chambers, stated in 1987, "we cannot afford to overlook new ways in which to remedy the immediate harm now befalling so many poor and black students."¹⁴⁷

An innovative remedy is available which would avoid the pitfalls of previous remedies, while simultaneously providing aggrieved plaintiffs an adequate education, without the usual delay that accompanies traditional judicial remedies. This innovative approach would grant injunctive relief, giving the aggrieved plaintiffs the *pro rata* share of their children's state-allotted education funds to use at a quality school of the plaintiff's choice. Inner-city parents are then empowered to choose the same educational options and opportunities now exclusively possessed by those with significant financial means.

The irony of the political and academic concern over the failing

142. See *supra* notes 5-8 and accompanying text. See also Liebman, *supra* note 11, at 392-93. One anecdotal example is found in the story of two Missouri counties, South Callaway and Osage. South Callaway County has half as many students (2,778 vs. 5,684) and spends almost twice as much money per student (\$5,854 vs. \$3,133) than Osage County, yet has a dropout rate over five times higher than Osage's, and average ACT scores lower than Osage. See Ron Stodghill II, *A Tale of Two School Districts*, BUS. WK., Aug. 2, 1993, at 63. Houston's Hollibrook Accelerated Elementary School serves a students body where 85% are from non-English speaking homes and spends far less than the state's average of \$3,939 per student. Yet over the past five years, Hollibrook's fifth grade students went from a third-grade to a fifth-grade level of achievement on their mean scores for reading, math, and social studies. Stephanie Anderson Forest, *True or False: More Money Buys Better Schools*, BUS. WK., Aug. 2, 1993, at 63.

143. *Abbott v. Burke*, 575 A.2d 359, 404 (N.J. 1990).

144. See generally Ratner *supra* note 13; Liebman, *supra* note 11.

145. Hanushek, *supra* note 5, at 452.

146. See, e.g., Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1078 (1991).

147. Chambers, *supra* note 28, at 73.

quality of the nation's inner city schools is that some educational success stories exist in inner urban areas.¹⁴⁸ Perhaps the reason for the relative lack of judicial and academic focus on these successful schools is that many of them are not operated by the government, but rather, exist in the private sector. These private schools exist in the very same neighborhoods as the government-run schools and yet provide "at-risk" children with an education over and above constitutionally required standards.¹⁴⁹

A good example of this is New York City where the *public* government-operated schools spend \$7,300 per student.¹⁵⁰ At the private Cardinal Hayes High School in the South Bronx, per student spending is a meager \$2,300.¹⁵¹ Ironically, over three times as much money is spent per pupil at William H. Taft High School, a public school, than at Cardinal Hayes, only a few blocks away. Yet incredibly, ninety-eight percent of Cardinal Hayes seniors graduate, while the dropout rate at William H. Taft High is nearly forty percent.¹⁵²

Some attempt to explain the success of the inner city non-government schools with misinformed stereotypes about these schools' ability to selectively admit good students and screen out bad students. According to former Education Secretary William Bennett, only twelve percent of applicants to Catholic schools are rejected, while eighty-eight percent are accepted.¹⁵³ These facts may suggest that the screening that takes place in many inner-city private schools is minimal and that these inner-city private schools are able to succeed while drawing from the same student population as the public schools.

Courts should no longer ignore and discriminate against these non-government schools when crafting remedies for students receiving sub-standard education. Indeed, non-government operated schools are part of the solution to the education crisis in America's inner cities. Granting aggrieved plaintiffs the *pro rata* share of state funds allotted for their child's education offers numerous benefits and advantages over traditional judicial mandate-type remedies.

148. See Ratner, *supra* note 13, at 795-808.

149. For an excellent presentation of successful inner city non-government schools that work, see PAUL T. HILL ET AL., *HIGH SCHOOLS WITH CHARACTER* (1990).

150. See Mydans, *supra* note 40, at A7.

151. Michael Specter, *Catholic School Cash Crisis; Private Cutbacks Pose Public Problem in Cities*, WASH. POST, May 14, 1991, at A1.

152. *Id.*

153. *Bennett Plan Blurs Church-State Line*, CHI. TRIB., Apr. 8, 1988, at C4. Admittedly, Catholic schools are only one subset of non-government education providers, but this figure certainly damages the stereotype that attributes the success of non-government schools to school selectivity.

A. *Unlike Other Possible Traditional Remedies, a Voucher Remedy Gives Students Immediate Relief*

The most attractive and strongest attribute of a voucher remedy is the speed with which it gives plaintiffs relief; the results are instantaneous. Aggrieved plaintiffs begin receiving a constitutionally required quality of education the day after a judge grants the remedy. A voucher remedy sharply contrasts to traditional education remedies that take years, or even decades to implement,¹⁵⁴ while each student who continues to receive inferior education suffers irreparable harm indefinitely.

A voucher remedy eliminates this tragic human cost of lengthy reform efforts. While the schools and legislature implement the reforms needed to bring the quality of inner-city schools up to constitutional adequacy, students in those schools will get an adequate education in a qualified school. Without such an immediate remedy, students could languish in substandard schools for years before an improvement in school quality takes place, irreparably harming the future economic opportunity of these children and their ability to compete in the labor market. Once the schools meet the minimum quality standard required by the court, the need for the remedy would no longer exist and it would be terminated.

B. *A Voucher Remedy Equalizes Power of Choice for Minorities*

A voucher remedy can do what no other remedy, including equalization of school funding, can do; it gives the poor and the less fortunate more control and power over the decisions that affect their lives. As Professor Hanushek noted, "the economically disadvantaged are handicapped by less ability to secure good schooling through moving—the route to better schooling by middle- and upper-income families."¹⁵⁵ Moreover, minorities living in the inner cities are disproportionately harmed by this lack of options because many middle-class whites have pursued quality education in suburban areas.¹⁵⁶ Families with substantial resources can either leave a school that they regard as unfit by moving to another district, or they can pay tuition at a private school.¹⁵⁷ Families dissatisfied with a legally inadequate school who do not have

154. For example, in a concurring opinion in *Carrollton-Farmers v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 525 (1992), Justice Cornyn predicted that the school finance litigation that began in 1984 would not be resolved until *at least* 1994, maybe longer, while also noting that the case had dominated three Texas Supreme Court opinions.

155. Hanushek, *supra* note 5, at 453.

156. Stephen Arons, *Educational Choice as a Civil Rights Strategy*, in *PUBLIC VALUES, PRIVATE SCHOOLS* 63 (Neal E. Devins ed., 1989).

157. *Id.* at 73.

these resources have no options—they are bonded to substandard schools.

Providing aggrieved plaintiffs with vouchers would equalize power in a very different manner than the traditional idea of equalizing financial resources between school districts. Vouchers given to minority parents living in inner cities would help equalize power among all families.¹⁵⁸ As Stephen Arons has stated, "Schooling . . . will become truly public only when choice and bargaining power are truly equal among all families."¹⁵⁹ This family-equalizing judicial remedy would break the "link between residential location and school quality," and between economic resources and educational opportunity.¹⁶⁰ Regardless of a family's residential mobility or economic ability to afford a private school, all children would have roughly the same opportunity to attain a legally adequate education.

The Supreme Court of New Jersey said it best, while admittedly in another context, when it stated, "[t]hey [students] have the right to the same educational opportunity that money buys for others."¹⁶¹ The basic premise behind the court's language also animates the need for a voucher remedy for students suffering from inadequate educations: education is a public good that should not be allocated based upon wealth or class, and even those at the bottom of the social or economic strata should have access to the same educational opportunities as those at the wealthier levels of society.¹⁶²

Because a voucher remedy for aggrieved inner-city plaintiffs uniquely addresses this problem, it plays a central part of the new educa-

158. "Family choice for the nonrich could lead to an end of the American double standard: Among those who can afford private school, society leaves the goals and means of education to the family; for the rest of society, the informing principles are politically determined and implemented through compulsory assignment to a particular public school." JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE* 2-3 (1978).

159. Arons, *supra* note 156, at 72.

160. Hanushek, *supra* note 5, at 453.

161. *Abbott v. Burke*, 575 A.2d 359, 363 (N.J. 1990).

162. A similar argument can be made in this context based on the 1924 Supreme Court decision in *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1924). In that case, the Supreme Court ruled unconstitutional under the 14th Amendment an Oregon law which required all parents to send their children to public schools, thus establishing a parental right to send their children to the school of their choice without interference from the state. Although the Supreme Court has determined that this right belongs to parents, only those parents with sufficient financial means have the ability to exercise it. An argument can be made that by intentionally depriving parents of the financial means to exercise this right, the state functionally deprives parents of their constitutional rights. In the modern context, a similar argument is often made regarding poor women's inability, due to a lack of financial resources, to exercise certain privacy rights pertaining to abortion. *See, e.g., Harris v. McRae*, 448 U.S. 297 (1980); *Maier v. Roe*, 432 U.S. 464 (1977).

tional litigation paradigm.¹⁶³

C. *A Voucher Remedy Will Deter Continuation of Policies That Do Irreparable Harm to the Students Receiving Inadequate Education*

Penalizing schools to deter them from continuing ineffective practices is a desirable method.¹⁶⁴ If a court finds that a government school system is providing a legally inadequate education and aggrieved plaintiffs are given court-ordered vouchers, the government school system will lose money proportionate to the number of students who decide to leave it. This remedy will do something no other remedy has done: link the interests of institutional actors with the interests of minority inner-city students. Once this linkage is established, one would expect all the complacency and benign neglect of the failing schools to come to a screeching halt. In short, the judicial voucher remedy would provide a powerful disincentive for school systems and legislatures to ignore the educational inadequacies of their worst schools.

This remedy is performance-oriented because it sets up an incentive system that rewards successful schools, while penalizing substandard schools. The quantity of inputs will become less important than the quality of output. Schools will be deterred from piling ineffective programs upon ineffective programs and will seek to maximize the quality of education with its given resources. With a voucher remedy regime in place, society can expect a greater efficiency and effectiveness in education.

D. *A Voucher Remedy Does Not Require Courts to Know What to Tell Schools to Do to Fix the Problem*

While judges and legal scholars have recognized the problems in the inner-city schools, they are generally reluctant to propose remedial measures because there is no academic consensus regarding what precisely should be done to improve the quality of education in these schools.¹⁶⁵ In the words of the United States Supreme Court, "the court-

163. The desire of urban minority parents to exercise the same options as those with greater financial resources has been overwhelmingly demonstrated in cities where private voucher funds have been established. See Patricia Farman, *A Choice for Etta Wallace*, POL'Y REV., Spring 1993, at 24. A poll done by the Joint Center for Political and Economic Studies found that 88 percent of black Americans approve of private-school vouchers. See John J. Miller, *Whose Choice?*, NATIONAL REV., Dec. 14, 1992, at 44. Equalizing power would appear to be an attractive reason for minority parents to support such proposals.

164. See Ratner, *supra* note 13, at 810.

165. Liebman, *supra* note 11, at 415. When courts shed this reluctance, they do so ambiguously. Legislators and scholars must then guess which measures would receive court approval. See Parker & Weiss, *supra* note 31, at 600-01. Guessing results in an incredible waste

room is not the arena for debating issues of educational policy."¹⁶⁶ This attitude is further typified by the statement of Dean Mark G. Yudof in 1973: "The truth is that we know very little about the relationship between particular resources and policies and educational outcomes"¹⁶⁷ Dean Yudof also stated that, "the problem here is not one of 'will not' but one of 'cannot.'"¹⁶⁸ He concluded that only when empirical evidence can establish a successful course of action will judicial intervention be appropriate.¹⁶⁹

Some scholars address this problem by arguing that empirical evidence of successful educational strategies for inner-city schools is now available,¹⁷⁰ and by proposing that courts require schools to mandate "minimum standards" promulgated by state legislatures.¹⁷¹

The presumption that judges *must* possess favorable empirical evidence for particular reforms, policies, practices, and expenditures *before* they grant remedies is no longer useful or practical in light of the depth and scope of the damage inflicted on minority students in inner-cities and in light of the availability of innovative remedies not requiring judicial educational policy-making. In fact, the entire presumption that judges be omniscient in matters of educational policy before granting relief is based on the misconception that all judicial educational remedies must come in the form of an order to the schools to take some judicially mandated action. This philosophy is understandable in light of the traditional judicial experience with school systems that began with the Supreme Court's desegregation order in *Brown*. Courts should accept the fact that they may never possess the expertise needed to order specific mandates upon schools, especially when remedies are available that do not require this presumptive judicial certitude.¹⁷² One such remedy is the voucher regime.

One of the many strengths of providing inner-city plaintiffs with a voucher remedy is that it does *not* require judges to know what works. It leaves the problem of what works in the rightful hands of those most competent to address it—the teachers, administrators and educators who

of time, resources, and energy. Were the court to simply define the constitutionally required quality of education as proposed in Section V.B and grant plaintiffs the voucher remedy, there would no longer be a need for this wasteful legal guessing game.

166. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 598 (1940).

167. Mark G. Yudof, *Equal Educational Opportunity and the Courts*, 51 *TEX. L. REV.* 411, 422 (1985).

168. *Id.* at 418.

169. *See id.* at 430.

170. Ratner, *supra* note 13, at 795-804.

171. *See generally* Liebman, *supra* note 11.

172. "Obviously, we are no more able to identify what these disadvantaged students need in concrete educational terms than are the experts." *Abbott v. Burke*, 575 A.2d 359, 401 (N.J. 1990).

work on the front lines in the schools. The judge's sole responsibility is to determine whether students are provided with a legally sufficient education, and if he/she finds that they are not, to provide a remedy that guarantees such an education. The court need not look to *how* this goal is achieved by educators, only that it is being achieved. Courts need not engage in academic debate over which educational policies, practices, and expenditure levels are most effective. The school systems and state legislatures will resolve these questions on their own. Courts would, in effect, say to the schools and other political institutions, "just do it, and in the meantime, these aggrieved plaintiffs will receive a constitutionally adequate education at a qualifying school." The voucher remedy prevents unnecessary judicial intrusion into educational policy matters best left to educators while simultaneously providing the plaintiffs with a quality education.

The second component is often forgotten when discussing the problems of educating inner city minority students: there are both government and non-government school systems which effectively provide inner-city minority students with high quality education. These successful schools demonstrate that inner city education is not an unsolvable mystery.¹⁷³

E. *Voucher Remedy Does Not Require Force*

As noted briefly above, providing plaintiffs with a voucher remedy is distinct from other remedies because it does not require or force schools to take any specific action. The non-force nature of this remedy is beneficial because it encourages schools and legislatures to arrive at reform measures through democratic processes rather than through undemocratic judicial mandates.

Judicial respect for allowing the representative branches of government the freedom to experiment and address social problems was aptly stated by the Supreme Court in *Rodriguez*: "[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 and to keeping abreast of ever-changing conditions."¹⁷⁴ A voucher remedy would avoid direct judicial intrusion into the governance of schools.¹⁷⁵ Others have noted the importance of leaving the means of accomplishing effective educational practices to the represen-

173. See *supra* notes 148-152 and accompanying text.

174. *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43 (1972).

175. See John S. Elson, *Suing to Make Schools Effective, or How to Make a Bad Situation Worse: A Response to Ratner*, 63 TEX. L. REV. 889, 904 (1985).

tative departments of government,¹⁷⁶ and the need for experimentation to solve education problems.¹⁷⁷ This remedy reduces the anti-democratic nature of judicial decrees. As well, one would expect that voluntary educational reform would be exercised with more vigor and interest than court-imposed reform.

F. *A Voucher Remedy Could Potentially Provide Inner-City Students with a More Integrated Learning Environment*

Even almost forty years after *Brown*, the issue of school desegregation remains alive. Judicial efforts aimed at integrating America's schools have met with mixed success and recent evidence suggests that an unintended resegregation of the schools is taking place. The unique aspect of this recent resegregation is that it eludes the corrective reach of traditional judicial remedies. Along with its primary goal of providing students with a legally adequate education, state-funded education vouchers could also assist integration efforts in the cities as a secondary goal. Ironically, the traditional view among legal scholars and commentators was that private schools posed a problem to desegregation efforts. But through the voucher remedy, private schools can become part of the solution to the resegregation problem.¹⁷⁸

The 1974 Supreme Court case of *Milliken v. Bradley*¹⁷⁹ exempted surrounding suburban areas from the reach of urban school desegregation orders absent proof of segregation by the suburban schools.¹⁸⁰ Some legal commentators have cited this case as a further encouragement of white flight to suburban areas.¹⁸¹ Whether urban whites were keeping up with the latest Supreme Court decisions is uncertain, but the demographic trends are clear.

In 1974, when a federal court ordered forced busing in Boston, the city school system serviced 93,000 students.¹⁸² In 1985, this number had dwindled to 57,000 students. In 1975, white students made up 65% of the school population. In 1985, whites comprised only 28% of the

176. *Carrollton-Farmers v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 534 (Tex. 1992).

177. *Abbott v. Burke*, 575 A.2d 359, 398-99 n.30 (N.J. 1990). See also Liebman, *supra* note 11, at 395.

178. Stephen D. Sugarman, *Part of the Solution Rather than Part of the Problem: A Role for American Private Elementary and Secondary Schools in the 1990s*, 31 WM. & MARY L. REV. 681 (1990) (reviewing PUBLIC VALUES, PRIVATE SCHOOLS (Neal E. Devins ed., 1989)).

179. 418 U.S. 717 (1974).

180. *Id.* at 744-45. See generally Wendy R. Brown, *The Convergence of Neutrality and Choice: The Limits of the State's Affirmative Duty to Provide Equal Educational Opportunity*, 60 TENN. L. REV. 63, 103 (1992).

181. Clark, *supra* note 141, at 800.

182. Timothy J. McNulty, *Roots of Underclass Found in Racism, Failed Policies*, CHI. TRIB., Sept. 16, 1985, at C1.

school population.¹⁸³ The population of the city of Boston itself is 70% white.¹⁸⁴ In Minneapolis, minority students made up 21% of public school enrollment in 1975, but by 1991-92 that number increased to 54%.¹⁸⁵ In neighboring St. Paul, minority enrollment went from 14% in 1975 to more than 45% in 1991-92.¹⁸⁶ In New York City, minorities comprise more than 80% of the public school population.¹⁸⁷ In Hartford, Connecticut, whites accounted for over half the student body in 1974, but now make up roughly 20%.¹⁸⁸ In Chicago in 1990, three out of four black children and two out of three Hispanic children attended Chicago public schools, while only one of twenty white children attended Chicago's public schools.¹⁸⁹ As a result of the changing demography of urban schools, some school boards have given up on integration and envision all-black schools as inevitable.¹⁹⁰ This evidence suggests that America has regressed to a "separate but unequal" school system with minorities attending urban public schools and whites attending urban private or suburban public school of their choice.¹⁹¹ A perfect example of this occurred recently in Philadelphia where a twenty-four-year-old segregation lawsuit was revived. In the twenty-four years since the litigation began, the percentage of white students in the Philadelphia district, "has fallen by more than one-third, to 23 percent, as families moved to the suburbs or put their children in the city's private and parochial schools."¹⁹² Yet while 77% of the students in the public school population are minorities, they represent only 47% of the city's entire population.¹⁹³ In 1984, 63.5% of black students and 70.6% of Hispanic students attended schools where minorities constituted over

183. *Id.*

184. Dudley Clendinen, *Hope of Desegregation is Fading in Boston's Troubled Schools*, N.Y. TIMES, Apr. 1, 1982, at A18.

185. James Walsh, 'Brown' Revisited: *Can Separate Schooling Be Equal?*, STAR TRIB., Sept. 19, 1992, at 1A.

186. *Id.*

187. Neil A. Lewis, *Court Hears Arguments in Key Desegregation Case*, N.Y. TIMES, Oct. 8, 1991, at A23.

188. Robert A. Frahm, *Expert Backs Boston Plan for Desegregation*, THE HARTFORD COURANT, Jan. 14, 1993, at B1.

189. See Galster, *supra* note 37, at 1439.

190. Barbara Vobejda, P.G. 'Compensatory' Schools: *A Quandary*, WASH. POST, Mar. 12, 1986, at A1.

191. See, e.g., ROBERT L. CRAIN & CHRISTINE H. ROSSELL, *Catholic Schools and Racial Segregation*, in PUBLIC VALUES, PRIVATE SCHOOLS 184 (Neal E. Devins ed., 1989). For additional statistical information on urban school segregation rates, see generally Galster, *supra* note 37, at 1455-61.

192. Michael deCourcy Hinds, *Busing Debated in Philadelphia*, N.Y. TIMES, Mar. 1, 1993, at A11.

193. *Id.*

half of the student body.¹⁹⁴ These apparent disparities are easy to explain. Urban whites have taken advantage of their economic ability by moving away from urban areas or by placing their children in private schools. Minority families in urban areas lack this ability and their children are therefore left in urban schools with increasing concentrations of minorities.

Equalizing the power between minority parents and non-minority parents would not only level the education-quality playing field, but it would also give minority children access to more integrated learning environments. Providing minority parents with the proposed voucher remedy could achieve higher levels of integration without being subject to the "forced busing" complaint that has proved so troublesome in past desegregation judicial efforts.¹⁹⁵

One group of plaintiffs has already attempted to receive vouchers in a desegregation case.¹⁹⁶ In *Rivarde ex rel. Rivarde v. Missouri*,¹⁹⁷ black students who were members of a certified class brought a separate action asking the court to provide them with funds to attend either the government or private school of their choice. Fifty non-government schools, many with less than a five percent minority enrollment, agreed to participate in the desegregation remedy.¹⁹⁸ After five years of court-ordered desegregation, the Kansas City District schools remained overwhelmingly black, and spending per student was between \$6,000 and \$9,000 per year.¹⁹⁹ The Kansas City school population was only 26% white.²⁰⁰ The court ruled that because the plaintiffs stated no separate cause of action, they could not seek to modify the plan of the original litigation.²⁰¹

Although the court dismissed the plaintiffs' claim in this case, the simplicity and efficiency of the *Rivarde* plaintiffs' segregation remedy

194. Chambers, *supra* note 28, at 58 n.14.

195. Liebman, *supra* note 11, at 395. The concept of using vouchers to promote integration also applies in other social areas. President Clinton's Secretary of Housing and Urban Development is examining the feasibility of expanding "voucher programs that give public housing residents the opportunities to move to private apartments in the suburbs." Jason DeParle, *Housing Secretary Carves Out Role As a Lonely Clarion Against Racism*, N.Y. TIMES, July 8, 1993, at A8.

196. *Rivarde ex rel. Rivarde v. Missouri*, 930 F.2d 641 (8th Cir. 1991). Plaintiffs in this case were not using the quality of education theory proposed in this Comment. However, their attempt to use a voucher remedy for desegregation purposed demonstrates this secondary benefit of this innovative remedy in general.

197. 930 F.2d 641 (8th Cir. 1991).

198. Sugarman, *supra* note 178, at 697.

199. Charles-Edward Anderson, *Curing Segregation: Parents Sue for Kids' Private Education at Public Expense*, 75 A.B.A. J. 22 (1989).

200. *Id.*

201. Sugarman, *supra* note 178, at 699.

contrasts with the extravagant remedy approved by the federal court. While the *Rivarde* plaintiffs sought only \$1,500 to \$3,000 per student per year to cover the costs of integrating their children into private schools (compared with the \$6,000 to \$9,000 spent per student by the public schools), the school board, hoping to comply with the judge's desegregation order, ordered construction of a \$32 million high school featuring an Olympic-sized swimming pool and track, racquetball courts, a new stadium, whirlpool baths, and a personal computer for almost every student—all just to induce a meager 460 white students to enroll.²⁰²

Under the quality of education theory proposed in this Comment, the voucher remedy is designed to instantly provide aggrieved plaintiffs with a legally adequate education. The above discussion shows that a byproduct of this remedy could also be to enhance desegregation where traditional paradigm remedies have failed.

VII. CONCLUSION

The problems facing America's educational system are clear. While this Comment cannot attempt to solve the larger problem of reforming the nation's educational system, it has attempted to demonstrate the need for the law to develop a new approach and a new way to think about helping society's neediest children achieve equal educational opportunity. Recent trends suggest that such a new approach is evolving. As traditional legal constructs become antiquated in a changing society, new legal paradigms must emerge. This Comment has outlined a potential blueprint for such a transformation. It begins by recognizing a source of governmental duty within the Federal and State Constitutions to provide a certain quality of education, by showing the benefits of measuring the fulfillment of this duty by student learning, and concludes by granting aggrieved plaintiffs a voucher remedy. This reinvented litigation paradigm offers promise for students whose future depends on receiving an education that will enable them to lead productive lives.

JUSTIN J. SAYFIE

202. Anderson, *supra* note 199, at 22.