COURTS AND LEGISLATURES IN A FEDERAL SYSTEM: THE CASE OF SCHOOL FINANCE

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Debate over the allocation of public responsibility for social welfare between the states and the nation is not a new phenomenon in American government. Since the Constitutional Convention of 1787 and the ratification debates, the major political parties have been fundamentally divided on the role of the states in the federal system of government. President Reagan's proposal for a "new federalism" is only the most recent dramatic assault on Washington's fiscal and regulatory role. Although the Administration’s effort to achieve a dramatic decentralization of governmental services has not been embraced by Congress, President Reagan's goals may be achieved nonetheless—not by legislative enactment, but by a steady attrition in the national government's financial contribution to public programs.

Throughout nearly two centuries of debate over the meaning of federalism, there has been a general consensus that elementary and secondary education are primarily the responsibility of state and local government and, for at least the last century, the responsibility has been discharged on this basis. The states authorize the creation

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1. See, e.g., Statement of Patrick Henry, in III The Debates in the Several State Conventions on the Adoption of the Federal Constitution 22 (J. Elliot 2d ed. 1836)(1st ed. "n.p." 1830); The Kentucky Resolutions of 1798, in IV The Debates in the Several State Conventions on the Adoption of the Federal Constitution 540, 540-41 (J. Elliot 2d ed. 1836) (1st ed. "n.p." 1830); The Virginia Resolutions of 1798, in id. at 528; The Federalist No. 84 (A. Hamilton); The Federalist No. 45 (J. Madison).


3. See Cohen, Meanwhile in Congress, the Long Knives are Out, 14 Nat'l J. 381 (1982).

4. See Stanfield, 'Turning Back' 61 Programs: A Radical Shift of Power, 14 Nat'l J. 369, 372 (1982) (noting that "states and local school districts pay more than 90 per cent of the
of elementary and secondary schools through an elected board of public citizens and a professional staff of administrators, instructors, and supporting personnel. The states commonly empower the districts to assess and collect a local tax on real property for the benefit of the school system, and they normally make an effort, not always very successful, to equalize the measurement of those levies by enforcing uniform assessment procedures. The states also supplement local funds with school aid payments that are distributed on a per pupil basis in proportion to the expenditure budgets set by the local districts or according to a plan aimed at equalizing the capacity of individual districts with varying levels of property wealth to finance effective school systems. The disparities resulting from differential property tax wealth in local districts are frequently very large, permitting one district to raise funds by taxing at a small fraction of the rate required to raise a similar amount of revenue in a nearby town.

State aid generally does little to correct these inter-district disparities. Despite this fact, it has been almost universally accepted that the decentralized system of school finance is desirable, because it promotes local political control over educational services, fostering diversity, participation, and other democratic virtues. Thus, the lo-


local district selects a level of spending appropriate to its ambition and its taste in educational services, and individual families are free to settle in a community where the policies governing schools match their own preferences. To some extent, property values themselves are affected inversely by the local tax rate and directly by the local reputation for educational quality.\(^\text{10}\)

Before 1970, the state role in education was a matter of political debate, with suburban and city representatives disagreeing over the amount and distribution of state aid for local schools. Most governors and legislators were eager to keep the state's administrative control to a minimum, and as a result, state governments often limited their supervision to regulating licensing requirements for teachers and occasionally to directing minimum standards for school calendars and curriculum. Generally, the states had little direct involvement in the formulation of local budgets, planning, or educational programs. Similarly, the courts were not much of a factor in local education, with the significant exception of anti-discrimination litigation to implement the principle established by *Brown v. Board of Education*\(^\text{11}\) in 1955.

In the late 1960's and early 1970's, however, an assortment of educational interest groups and public interest lawyers began a legal assault on the states' dependence on local property wealth for financing public education.\(^\text{12}\) At first, these complaints prompted little response from the judiciary. Equal protection based on wealth classifications had found more success in the academic journals\(^\text{13}\) than in

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the courts, and the classification asserted in the context of school finance cases—a classification between property-rich and property-poor districts, not directly linked to family income—was also not readily embraced. Among the many reasons for the judges' rejection of these claims was the fact that the most obvious alternative to the prevailing system of school finance, full state assumption of the cost of education, jeopardized the continuing viability of local control over educational budgets.

What turned the tide in school finance litigation was the development by social scientists of an attractive remedy for school finance inequities. Professor John Coons and others supplied a simple, understandable formula for reform that stimulated the public interest law movement to litigate school finance issues—a concept of "wealth neutrality" aimed at eliminating the direct relationship between fiscal capacity and district wealth. Coons' proposal promised to sever the connection between the local capacity to spend on education and the local property tax base.

The legislative expression of this concept was a proposal for "power equalizing" grants, under which comparable tax rates would produce comparable sums available to spend on education. In its purest form, district power-equalization could be implemented by determining on a state-wide basis an appropriate tax base per pupil, and then providing that each local district have that taxing capacity. If a district in fact had less property wealth, the state would supplement its resources up to the appropriate level. If a district had more than the targeted level of property wealth, part of its tax revenue would be drawn off and redistributed to poorer dis-

19. Id. at 35.
20. Id. at 34.
By itself, power-equalizing assistance was intended to promote not equality, but fiscal neutrality. The state could go further and equalize spending by mandating that a particular tax rate be applied to the uniform base. The objective of wealth neutrality, however, need not be linked with that of spending equality.

Armed with this appealing method for correcting the dramatic disparities among school districts' property wealth, state courts proceeded to evaluate claims that existing statutory schemes violated constitutional guarantees. Federal judicial involvement was effectively terminated in 1973 by the Supreme Court's five to four ruling in San Antonio Independent School District v. Rodriguez. In that case, the Court held that education was not a "fundamental interest" under the federal constitution, that the classification based on property wealth was not "suspect" in equal protection terms, and that the states' interest in local control over educational decisions supplied a rational basis for the allocation of fiscal burdens selected by Texas and other states. Although the Rodriguez decision abruptly eliminated the federal judiciary's potential involvement in the allocation among school districts of financial resources for public schools, the controversy continued in the state courts, with various participants including legislative and executive officials, as well as parents, school officials, teachers, and taxpayers. It is on this controversy, and its broader implications, that this article will primarily focus.

The school finance debate implicates at least three issues of importance beyond its immediate parameters: (1) The desirability of federal court intervention in areas involving constitutional claims based on the structure of state institutions; (2) the difficulties encountered by a court confronted with the necessity to rely on sociological, technical, or scientific information in deciding a constitutional claim; and (3) the delicate problems engendered by a court's
remedial restructuring of institutions or bureaucracies normally within the control of other branches of government. Initially, the article discusses some of the general problems raised by the school finance controversy; it then examines two contrasting cases in the area decided by the highest courts of neighboring states in one of which the author participated in actively. The remaining sections consider the extent to which the cases shed light on the broader issues raised above.

I. THE DILEMMAS OF SCHOOL FINANCE

School funding schemes have been challenged in the courts of numerous states since 1972. Typically, most state constitutions include an express general commitment to free public education. Often, such broad provisions can be readily construed, by reason of its phraseology as much as anything else, to impose the responsibility for providing educational services directly upon the state government itself. Under the typical formulation, the state constitution mandates that "the state shall provide" free public schools. However, every state legislature, except for one, has delegated its authority over schooling to local boards of education. The tradition of local citizen and community control over schools is deeply rooted in the United States, notwithstanding the increasing professionalization and bureaucratization in education. Local governments provide education and subsidize it essentially by relying upon local property taxes. Ex-

29. See infra notes 33-49 and accompanying text.
31. As Counsel to the Governor of New Jersey from 1974 to 1976, I participated actively in the remedial phase of much of the Robinson proceedings. See infra notes 160-200 and accompanying text.
32. See infra notes 205-310 and accompanying text.
34. See infra note 35.
35. See, e.g., Mich. Const. art. VIII, § 2 ("The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law."); N.J. Const. art. VIII, § 4, para. 1 ("The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."); N.Y. Const. art. XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.").
cept in a few large cities, school costs consume the majority of local tax revenues.38 The states’ role is generally limited to making additional financial contributions to the cost of education, usually through a combination of per capita or per pupil grants and some form of fiscal aid intended to correct imbalances or disparities in local resources or local taxing capacity.39

Fiscal capacity varies widely among different local school districts in each state. For example, while an affluent district may have many times the property tax base per pupil of the average district within the state, an urban or rural area—which includes many poor or lower income families—generally has a small fraction of the average property value per pupil. The property-rich district, however, may not be composed of affluent families; it may be rich in property value because it includes many large industrial facilities, or because it attracts retirement communities and relatively few families with children of school age.

Generally, property-poor districts are more likely to be found in rural regions than in urban areas. Large cities, however, often have many other demands on their local tax sources, including welfare, health care, social services, and transit burdens (collectively known as “municipal overburden”).40 Urban districts may also have extraordinary education needs, including greater demand for remedial services, bilingual instruction, security, and other programs needed to deal with the consequences of family poverty on young children. These demands are commonly referred to as “educational overburden.”41 Together, these two kinds of overburden can drain significant resources, with the result that a property-rich but overburdened urban district may not be able to provide any greater expenditure for educational development per pupil than a property-poor rural district.

There is a great deal of diversity in the extent to which elemen-

38. See Advisory Commission on Intergovernmental Relations, Central City-Suburban Fiscal Disparity & City Distress 1977 17 (1980).
39. See Brest, supra note 17, at 593.
40. The California Supreme Court described “municipal overburden” as a “phenomenon, prevalent in concentrated urban areas, of high property tax rates for governmental services other than education.” Serrano v. Priest, 18 Cal. 3d 728, 757-60, 557 P.2d 929, 945-47, 135 Cal. Rptr. 345, 361-63 (1976); See also Robinson v. Cahill, 69 N.J. 133, 169-73, 351 A.2d 713, 732-34, (1975) (Pashman, J., concurring and dissenting).
tary and secondary education in the United States is funded by sources other than local property tax revenues. Overall, during 1979-1980, it is estimated that the states contributed 48.9% to the cost of education, local taxpayers paid 42%, and federal aid accounted for 9.1%.\textsuperscript{42} The range, excluding Hawaii, extends from a 71.2% state share in Delaware to 6.8% in New Hampshire.\textsuperscript{43} Furthermore, a 50% state contribution in \textit{per capita} grants will have a very different distribution than the same share under a rigorously equalizing formula for financial assistance. Many states also provide state funds for specific programs, including transportation for school children, education for physically or mentally handicapped pupils, as well as a variety of other services.\textsuperscript{44}

In addition, local spending habits vary widely. One district, with an average fiscal capacity, will spend a considerable percentage of its available resources on schooling, while another will commit much less of its tax base to education. Similarly, one district will spend freely on its physical plant—including playing fields, swimming pools and tennis courts—while another school board will emphasize basic instruction and provide few frills. Moreover, educators do not agree on the correlation between spending and educational quality. Every state cites its favorite example of a district with high spending and low achievement, which it contrasts with a low-spending district renowned for its scholastic prowess. To complicate matters further, even the measurements are controversial, thereby raising questions as to whether educational quality should be measured by test scores or by various program ingredients, such as teacher qualification standards and staff benefits, the quality of physical facilities and equipment, or the ratio of pupils to staff; or, whether it might be better to avoid relying on either output or input measurements and instead require an elaborate process of evaluating school programs, identifying deficiencies, and supervising corrective action by the local school board. The latter raises the additional problems of whose evaluation is to be accepted, by what manner it is to be reached, and what degree of state intervention or control is to be exercised. All of these issues figure into the calculus of school finance decisions.

It may be conceded that judges are poorly equipped to deal with such complex social and economic considerations. They are generally
expert neither in education nor in public finance, and their sophistication in matters concerning the political processes of either local or state government varies widely. As Professor Charles Fried has concluded, judges are learned, if at all, in the law—a process of reasoning from analogy and precedent to the application of general provisions in constitutions or statutes.46 Unfortunately, the typical state constitution offers little guidance to aid judges in their difficult task. Rather, they often have only the general directives that the state provide educational opportunity, without charge, to children of appropriate age, and that the government assure equal protection of the laws. In San Antonio Independent School District v. Rodriguez,47 the Supreme Court held that the federal guarantee of equal protection does not reach a state’s reliance on local property taxes for financing educational services.47 Yet, with roughly comparable resources to draw upon, some state judges have reached dramatically different results in school finance cases. In particular, courts of several states have struck down finance formulas similar to the scheme in Rodriguez.48 Other states, however, have rejected constitutional challenges to similar statutes.49 The next two sections will consider how two particular states—New York and New Jersey—have dealt with the school finance dilemma.

II. SCHOOL FINANCE IN THE STATE OF NEW YORK

The property tax base per pupil varies widely among the seven hundred school districts in the State of New York. Excluding both extremes, a district in the 90th percentile has four times times the average property value behind each student as a district in the 10th percentile.50 While spending is not perfectly correlated with taxing

47. Id. at 55.
capacity, the average district in the 90th percentile spends twice as much as the district in the bottom 10th.51

Based upon these statistics, twenty-seven boards of education in relatively property-poor districts—along with twelve children and parents—brought suit, in Board of Education v Nyquist,52 against various state officials responsible for education. The plaintiffs alleged violations of the federal and state53 equal protection clauses, as well as the education article of the New York State Constitution, which provides that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated."54

City governments and school boards from New York City, Buffalo, Syracuse, and Rochester intervened as additional plaintiffs,55 arguing that in the circumstances of a large urban center, property wealth comparable to that of a suburban district does not translate into comparable capacity to provide educational opportunity.56 The plaintiff-intervenors made two basic arguments: first, that a number of factors, including the extraordinary number of educationally disadvantaged school children in the cities, higher teacher salaries, and vandalism, require additional spending in urban areas on education,57 and, second, that service demands other than education constitute a relatively more serious drain on the cities' limited taxing capacity than in suburbs or rural districts.58 Non-school spending in New York City, for example, was $401.06 per capita in 1980, while the amount of spending for comparable services in the rest of the state was $183.17.60 Put another way, the four intervenor cities spent


54. See Nyquist, 94 Misc. 2d at 476, 408 N.Y.S.2d at 609; N.Y. CONST. art. I, § 11.

55. N.Y. Const. art. XI, § 1; see Nyquist, 94 Misc. 2d at 477, 408 N.Y.S. 2d at 609-10.

56. See Nyquist, 94 Misc. 2d at 475-76, 408 N.Y.S.2d at 608.

57. See id. at 479-80, 494-95, 408 N.Y.S.2d at 611, 619-20.

58. See id. at 502, 510-19, 408 N.Y.S.2d at 624, 629-34.

59. See id. at 479-80, 496-97, 408 N.Y.S. 2d at 611, 620-21.

60. Id. at 497, 408 N.Y.S.2d at 621.
28% of local tax revenues on schools, while districts outside the cities allocated 45% of their municipal budgets to educational services.\textsuperscript{61}

This combination of "educational overburden" and "municipal overburden," the cities argued, effectively reduced the value of the cities' property wealth to the level where they were no better able to educate students than property-poor rural districts, even though the taxing capacity per pupil in the larger cities was above average.\textsuperscript{62}

Both plaintiff groups in \textit{Nyquist} contended that the state aid scheme in effect in New York State did not adequately compensate for disparities in the relative taxing capacities of different districts.\textsuperscript{63} At the time of the trial in 1976, state aid amounted to approximately 40% of the cost of elementary and secondary school in the State of New York.\textsuperscript{64} This fiscal assistance was distributed through a combination of flat grants, equal to a minimum of approximately $360 per weighted pupil, and an equalization formula designed to allow each district to produce $1,200 per weighted pupil for schools based on a tax of "15 mills."\textsuperscript{65} Thus, a district with a tax base below $80,000 per pupil was entitled to receive a sum from the state sufficient to compensate for the difference between that property tax base and the guaranteed base.\textsuperscript{66} Various "save-harmless" provisions in the statute assured that no district would receive less aid under the new funding scheme than it had received under the prior law.\textsuperscript{67}

\textsuperscript{61} \textit{Id.}
\textsuperscript{62} See \textit{id.} at 494-95, 408 N.Y.S.2d at 619-20. The cities later bolstered this argument on appeal by submitting actual statistics showing that their "effective tax base"—or the property tax base per pupil actually available for school spending—was generally lower than the state average, despite higher revenues. For example, the "effective tax base" in New York City was calculated at $20,576 per pupil, compared to the statewide average of $32,642; despite the fact that on a full-value basis, New York City's tax base of $75,926 per pupil was higher than the state average of $72,700. See Brief for City Plaintiffs-Respondents at 20, Board of Educ. v. \textit{Nyquist}, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982).
\textsuperscript{63} See \textit{Nyquist}, 94 Misc. 2d at 478-80, 408 N.Y.S.2d at 610, 611.
\textsuperscript{64} \textit{Id.} at 485-86, 408 N.Y.S.2d at 614.
\textsuperscript{65} \textit{Id.} at 483-84, 408 N.Y.S.2d at 613. One mill is equal to "one-tenth of one cent."
\textsuperscript{66} See \textit{Nyquist}, 94 Misc. 2d at 483-84, 408 N.Y.S.2d at 613.
\textsuperscript{67} See \textit{id.} at 484-85, 408 N.Y.S.2d at 613-14. Districts with a declining number of pupils are entitled under the statute to receive the same amount of state financial assistance that they received in the past. Alternatively, a district with increasing property value can calculate its aid entitlement on the basis of receipts per pupil in the previous year. N.Y. Educ. LAW § 3602, (18) (West Supp. 1982-1983). The appellate division findings indicated that in 1980-1981, "approximately 230 districts exercised the special aid [per pupil save harmless] option and 21 the total dollar save harmless option." See Factfindings, \textit{supra} note 50, at A6438 (emphasis omitted), \textit{reprinted in} Brief for Plaintiffs-Respondents ("Original Plaintiffs") at 89, Board of Educ. v. \textit{Nyquist}, 57 N.Y.2d 27, 439 N.E.2d 359, 453, N.Y.S.2d 643.
The original plaintiffs, representing the interest of property-poor districts, argued that this aid scheme left them incapable of providing educational programs on a par with those districts enjoying greater property wealth. The large urban districts maintained that their entitlement to state aid under the existing scheme was actually "disequalizing,"—since it assumed that their schools would draw on local resources to the same extent as their suburban neighbors and that their educational service demands were comparable—when, in fact, the phenomena of a greater proportion of disadvantaged children and a higher cost of living negated these assumptions. During 122 days of trial testimony before a state supreme court on Long Island, the plaintiffs sought to substantiate these assertions through a combination of statistical analysis, expert testimony, official studies, and reports. They sought to establish the logical linkages implicit in their allegations—that spending is related to taxing capacity; that capacity is related to property wealth; that educational quality can be measured; and that quality is correlated to spending. The plaintiffs also sought to tie these findings to the constitutional protections they were seeking to enforce, and in so doing, confronted the legal dilemmas common to school finance litigants generally: Does the state constitution articulate a mandate for equality, or does it require only the maintenance of minimally adequate standards of educational opportunity? Furthermore, does either the state equal protection clause or the educational article impose on the state government an obligation to achieve equal inputs in school districts throughout the state? Does it mandate equal levels of achievement, or does it require merely that every district (or every child) receive an education which satisfies some defined standard of minimal adequacy? Simply to state these questions suggests the complexity of the judicial inquiry.

The first level of complexity confronts the court in deciding the appropriate constitutional standard to apply. Does equal protection in this context mean equal or roughly equal capacity to spend, or does it refer to equality in actual spending? Should school funding schemes be subject to a more searching inquiry under the state's equal protection clause than the Supreme Court applied pursuant to

(1982).
68. Nyquist, 94 Misc. 2d at 478, 408 N.Y.S.2d at 610.
69. See id. at 479-80, 408 N.Y.S.2d at 611.
70. See Nyquist, 83 A.D.2d at 223, 443 N.Y.S.2d at 847 (discussing length of trial and volume of testimony and evidence).
the fourteenth amendment? In *San Antonio Independent School District v. Rodriguez*, the Court declined to classify education as a fundamental right, and thus did not apply "strict scrutiny" in its constitutional analysis, because, inter alia, the federal Constitution never mentions education. This landmark case raises several important considerations. Should the inclusion of the education article in the state constitution be regarded as evidence that, in New York, education is constitutionally "fundamental," or, conversely, is such an argument belied by the long list of services specifically protected in the state charter? Is the education article itself an alternative basis for imposing affirmative legal obligations on the state legislature to achieve greater equality, or a basis for finding that the current scheme fails a lesser standard of a "minimally adequate" educational opportunity which each district must provide? Does the constitution, in fact, preclude the longstanding preference of the state legislature for shared control over schools, an arrangement under which the direct responsibility for education is delegated by the state to local school boards? All these questions must be considered by a court attempting to formulate a constitutional standard in a school finance case based on an equal protection claim.

Assuming that a court determines that a particular school finance scheme violates the constitutional mandate, it is still faced with yet another equally difficult task—namely, to fashion an appropriate remedy. Can and should a court actually design a school funding scheme to meet the constitutional standard? Might a negative restraint be sufficient to prompt development of a constitutional plan? A judicial response to these questions necessarily places a court directly in conflict with the "political" branches. This confrontation forces a court to consider how to deal with defiance where a political stalemate inhibits legislative or judicial initiatives to bring school funding into compliance with the constitutional standard de-

73. *Id.* at 35.
74. N.Y. Const. art. XI.
75. *See, e.g.*, N.Y. Const. art. XV, § 3 (state shall superintend and repair canals); *id.*, art. XVII, § 1 (state shall provide for aid, care, and support of needy); *id.*, § 3 (state shall make provisions for protection and promotion of public health); *id.*, § 4 (state officer shall visit and inspect, or cause to be visited and inspected by his staff, institutions for the care of the mentally ill); *see also* Nyquist, 57 N.Y.2d at 43 & n.5, 439 N.E.2d at 366 & n.5, 453 N.Y.S.2d at 650 & n.5; (not all matters specifically referred to in the state constitution rise to level of fundamental constitution rights); *supra* note 38 and accompanying text.
scribed by a court.

Like the State of Texas in Rodriguez,\textsuperscript{76} the state defendants argued throughout the Nyquist litigation that the design of a school funding scheme is a matter appropriately left to the legislative and executive branches.\textsuperscript{77} The defendants emphasized the difficult questions set out above to bolster their argument that the courts had no capacity to resolve this essentially political contest over the distribution of state tax revenues among school districts in the state.\textsuperscript{78}

The state defendants were eventually joined in this argument by eighty-five school districts, most of them relatively property rich, who intervened in opposition to the plaintiffs' claims.\textsuperscript{79} The intervening districts argued that the existing fiscal scheme was premised upon local control of educational decisions, which in turn required local taxing authority;\textsuperscript{80} that the state aid formula represented a reasonable effort to provide more equity in the distribution of capacity to spend while respecting the basic legislative choice for local autonomy over policy decisions;\textsuperscript{81} and that judicial intervention would provoke a remedial nightmare and a political confrontation which would work to the disadvantage of both the educational program and the governmental process.\textsuperscript{82}

On the constitutional controversy, the intervening districts supported the "minimum rationality" test of equal protection,\textsuperscript{83} and—citing the majority opinion in Rodriguez—argued that the legislative scheme was a rational means of advancing the legitimate state objective to maintain local control over schools.\textsuperscript{84} They further argued that while the education article in the state constitution did not make the state authorities responsible for educational opportunity,\textsuperscript{85} the aggregate or average levels of spending and achievement in New


\textsuperscript{77} See Nyquist, 94 Misc. 2d at 480, 408 N.Y.S.2d at 611, modified and aff'd, 83 A.D.2d at 222, 234, 443 N.Y.S.2d at 847, 853-54; cf. Board of Educ. v. City of New York, 41 N.Y.2d 535, 538, 362 N.E.2d 948, 951, 394 N.Y.S.2d 148, 151 (1977) (judicial review appropriate to determine whether state legislature "has complied with constitutional prescriptions as to legislative procedures").

\textsuperscript{78} See Nyquist, 94 Misc. 2d at 480-81, 408 N.Y.S.2d at 611.


\textsuperscript{80} Id. at 3-5.

\textsuperscript{81} See id. at 7-10.

\textsuperscript{82} See id. at 10-14.

\textsuperscript{83} See id. at 16-33.

\textsuperscript{84} See id. at 38-46.

\textsuperscript{85} See id. at 62-64.
York schools compared favorably with that of other states, belying any contention of constitutional insufficiency. 86

The trial court, finding an egalitarian objective in the education article, held that by making educational resources a function of local property wealth, the state violated that constitutional provision. 87 It also held that the school funding scheme violated the state equal protection clause, which required a higher level of scrutiny of policies in the area of educational finance than that of “minimum rationality” because of the central role of schooling in the state’s obligation to provide for the public welfare. 88 The plan was defective under this stricter test because the state failed to show that an important objective was served by the funding arrangements. 89 Finally, in response to the cities’ arguments, the trial court also found that the fiscal aid scheme lacked a rational basis, thereby also violating federal equal protection guarantees. 90

In October 1981, seven years after the complaint was filed, the appellate division affirmed the lower court’s ruling, 91 unanimously holding that the school finance statute violated the state education article. 92 After modifying the extensive findings of fact below to bring the record up to date with the 1980-1981 school year, 93 the appellate court concluded that a school aid plan under which resources depended so significantly on local property wealth—with such dramatic disparities in spending capacity—failed to assure a system “capable of providing an education for many educable children.” 94

In addition, a majority of the appellate division panel found that the plan violated the equal protection clause of the state constitution. 95 It did so by applying a test that required the state to show not only that the funding scheme was substantially related to an important state interest (local control), but also that “the objectives ad-

86. See id. at 10.
87. See Nyquist, 94 Misc. 2d at 532-34, 408 N.Y.S.2d at 642-43.
88. See id. at 522-25, 408 N.Y.S.2d at 636-38.
89. See id. at 523-24, 408 N.Y.S.2d at 636-37.
90. Id. at 530-32, 408 N.Y.S.2d at 641-42.
92. Id. at 251, 443 N.Y.S.2d at 865.
95. Id.
vanced by the classification cannot be achieved by a less intrusive alternative." While local control was an appropriate and even an important state interest, the wealth based system was not, in the majority's view, substantially related to this goal; nor did it deem it likely that a constitutionally satisfactory fiscal scheme need be "inconsistent with local freedom of choice." Although it cast the decision in terms of this particular formulation of "intermediate scrutiny," the court seemed to make a finding of irrationality as well, stating that:

[the] freedom to choose and deliver desired educational output is so inextricably and demonstrably linked [in the plan] to the degree of property wealth behind each pupil that meaningful local independence is largely reserved for areas with the real estate resources to exercise it. . . . [W]e reject the defendants' contention that local independence of choice is furthered by the fiscal scheme by which education is currently funded.  

On June 23, 1982 the New York Court of Appeals, by a vote of six to one, reversed the appellate division's ruling, thereby ending the lengthy school finance litigation in New York with an order dismissing all complaints. The court assumed, essentially without discussion, the correlation between school spending and educational quality. It also assumed, notwithstanding the expenditure of $9.6 billion of state and local resources in the 1981-1982 school year—of which the state contributed $4 billion in financial aid—that there existed "significant inequalities in the availability of financial support for local school districts . . . resulting in significant unevenness in the educational opportunities offered." Yet, the court rejected all arguments that the state constitution offered some special protection to an interest in equality of education, thus precluding any real scrutiny of the admitted disparities in quality. As to equal protection, the test the court of appeals applied was whether there ex-
isted a rational relationship to a legitimate state objective. Despite the resulting discrepancy in capacity to spend, the court concluded, the shared funding scheme was rationally designed to further the legitimate objective of local control over education. Underlying this application of the legal standard were two more critical perceptions shared by both the New York Court of Appeals and the Rodriguez court: first, that issues of such "enormous practical and political complexity" as the distribution of tax funds for educational programs are better left to "the interplay of the interests and forces . . . in the arenas of legislative and executive activity"; and second, that the "great difficulty in fashioning and then enforcing particularized remedies appropriate to repair unconstitutional action," while not justifying "judicial abstention in every case," is also not to be ignored.

Plainly, the court of appeals did not ignore the complex remedial obstacles which lay ahead of a judgment affirming the violations found by the lower courts. The problem of designing a decree effective to repair the unconstitutional condition weighed heavily in the court's result. Indeed, the presumed remedial hazards induced the court to narrow its jurisdiction at the outset to an assumption of present geographical borders for school districts, thereby setting aside several potential remedial options which, at least in theory, might be available to correct an unconstitutional school funding scheme: namely, realigning districts to ensure a more equitable distribution of property wealth and generating some revenue source to pay for schools other than the continued reliance on local property taxes. While these remedies might have ultimately been found to be imprudent, impractical, or even beyond the court's power, they are options which have been considered at the remedial stage of proceedings in other school finance cases. The court of appeals, however, assumed these options away without debate or argument and proceeded to consider the constitutional challenges to school finance statutes "in the light of the present geographical boundaries of such districts fixed by legislative action and of legislative authorization for local

106. See id. at 44, 439 N.E.2d at 366, 453 N.Y.S.2d at 651.
107. See id.
110. See id. at 39 n.4, 439 N.E.2d at 364 n.4, 453 N.Y.S.2d at 648 n.4.
district real property taxation . . . "111

The court relied on Rodriguez to support the finding that the school finance scheme applicable to Levittown and the other property-poor districts was rationally related to the objective of local control over public schools.112 Although the United States Supreme Court had not considered the cities’ “overburden” argument,113 this basis for distinguishing the two cases was rejected by the Nyquist court on the rather curious basis that “demographic, economic, and political factors,” rather than legislative determinations, were responsible for the cities’ unequal capacity.114 Presumably, inattention to economic realities should not excuse the lawmakers’ failure to equalize spending capacity if it is their responsibility to do so. Demographic factors should create the setting for legislative action and reaction, rather than constitute a justification or excuse if the state falls short of the mark. Thus, the cities’ claims might have failed because the legislature had done enough to satisfy a test of simple rationality, but not because the court lacked the power to get involved in local decisions of allocating tax resources among competing needs. If some of those needs are constitutionally protected, they will enjoy a special status. Even if none are “fundamental,” the state’s determinations affecting their allocation must be based on some rational calculation of means to achieve a legitimate goal.

The appellate division’s heightened scrutiny, or any reformulated version of that “intermediate” test for equal protection, was rejected by the court of appeals on the basis of its prior decisions applying the “minimum rationality” standard of review to the right to a free public education.115 The court noted that under the state constitution, no special significance could be attached to the distinction between subjects specifically mentioned in its text and those omitted but left to statutory discretion, because the government is one of general, not limited, authority.116 It also noted that the char-

111. Id.
112. See id. at 40-41, 439 N.E.2d at 364-65, 453 N.Y.S.2d at 649.
113. See Rodriguez, 411 U.S. at 11-17 (1973); Nyquist, 57 N.Y.2d at 41, 439 N.E.2d at 365, 453 N.Y.S.2d at 649.
114. See Nyquist, 57 N.Y.2d at 41, 439 N.E.2d at 365, 453 N.Y.S.2d at 649.
116. See Nyquist, 57 N.Y.2d at 43 & n.5, 439 N.E.2d at 366 & n.5, 453 N.Y.S.2d at 650 & n.5.
ter includes references to many subjects which scarcely qualify as “fundamental” rights.117

In rejecting the equal protection claims, the court of appeals criticized the equality objective set forth in the complaint.118 Regarding any legislative attempts to make uniform and unvarying the educational opportunities offered by different local school districts, the court referred to the statement accompanying a bill adopted by the Hawaii legislature allowing local districts to supplement equal state allocations for schools: “[T]o go above and beyond established minimums . . . encourages the best features of democratic government.”119 Of course, an authorization for local supplements may be provided separate and apart from provisions assuring a greater measure of equality in spending capacity.

The court also found that the per capita minimum aid, amounting to $360 per pupil regardless of local district wealth, was immune from equal protection because, “on its face,” this aid was equally distributed.120 This extraordinary statement ignores the fact that apportioning scarce resources in this manner to property-rich districts exacerbates the discrepancies which make educational programs a function of district wealth and denies poorer districts the power to exercise their “local control” by choosing quality programs or by providing opportunities above the minimum standard set by the state. To rely on the superficial equality of minimum grants, rather than considering their effect in the overall system of school funding, is plainly misleading.

What emerges from the court of appeals’ cursory opinion is a flat rejection of the equality principle, based on an equal protection argument, upon which the plaintiffs relied. That could have left the court of appeals with the task of evaluating whether the aid scheme prevents poor districts from exercising local control in a manner necessary to provide an educational program adequate to the constitutional mandate set forth in the constitution’s education article. To do so, however, the court would have had to give content to the education article by deciding first what minimum level of adequacy is con-

117. See id. For a list of provisions in the New York Constitution which confer obligations on the state government but which rather clearly were not intended to create “fundamental” rights, see supra note 75.
119. Id. at 45, 439 N.E.2d at 367, 453 N.Y.S.2d at 652 (quoting Rodriguez, 411 U.S. at 48 n.102); see HAWAII REV. STAT. § 27-1(1) (1976).
stitutionally required by the article. While this would have been an admittedly difficult task, the court should not have hesitated to undertake it. The article's existence clearly establishes that, wholly apart from funding arrangements, it is the state’s responsibility to provide for education. As a result, the state, and ultimately the courts, are obliged to define the content of a quality educational program and to ensure through evaluation, diagnosis, and corrective action that each local district satisfies the test of educational opportunity. Surprisingly, nothing in the court of appeals’ treatment of the issues deals with this critical, non-financial component of the state’s role. Choosing to value local control does not excuse the state from ensuring the quality of educational service. Rather, it ought to oblige the state to establish mechanisms which will guarantee each child that minimal amount of educational opportunity promised by the education article, while allowing as much local autonomy as is compatible with that standard. Whether New York State meets the constitutional norm is, however, impossible to determine, since the content of even an “adequate” educational program was not so much as mentioned by the court.

The plaintiffs may have relied excessively on the funding formula, thereby missing an opportunity to have the court define the state role necessary to satisfy the education clause. The court was thus able to avoid deciding whether any district fell short of the constitutionally required minimum standards for an educational program. Making the case turn on a choice between local control, with its dramatic discrepancies in fiscal capacity, or state control,
with its uniform funding, seriously misstates the alternatives available to the state legislature. Yet recognition of any more subtle constitutional requirements, which inevitably bear on the financing arrangements adopted by the state, is absent from the court’s opinion. The opinion attacks the “straw man” of equal and uniform educational spending. Accepting, as did the court, that the New York Constitutional Convention of 1894, which adopted the education article, contemplated only a “system assuring minimal acceptable facilities and services in contrast to the unsystematized delivery of instruction” within the 11,000 New York school districts then in existence, the plaintiffs could have forced the court of appeals to grapple with the elaborate technical evidence showing the state’s failure to maintain the promise of this article through either its administrative oversight in not defining and assuring the level of educational quality guaranteed each child or its neglect in providing adequate financial contribution toward that goal. The court’s failure to address such evidence may have been as much the result of the litigants’ misplaced emphasis on the funding formula, as it was the court’s unwillingness to confront the issue. Both factors combined to allow the facile objective of equal spending—or equal capacity to spend—to dominate the case, obscuring the more difficult aspects of the constitutional question of school finance.

Notwithstanding this shortcoming, the court’s willingness to defer to legislative choices without much analysis is striking. The test articulated by the court of appeals would require a new challenge to decisions allocating school funds to show a “gross and glaring inadequacy” in the providing of a “sound basic education.” Given the relatively high average school spending in New York State districts and the court’s sweeping rejection of the challenge to the existing school finance system, any future reform is likely to depend on legislative and executive action.

125. Id. at 47, 439 N.E.2d at 368, 453 N.Y.S.2d at 653.
126. Id. at 47, 439 N.E.2d at 368, 453 N.Y.S.2d at 652.
127. See id. at 48, 439 N.E.2d at 369, 453 N.Y.S.2d at 653.
128. See id.
129. In February 1982, the New York State Special Task Force on Equity and Excellence in Education (the “Rubin Commission”) issued its report and recommendations regarding needed reforms in the school finance system in New York. NEW YORK STATE SPECIAL TASK FORCE ON EQUITY AND EXCELLENCE IN EDUCATION, THE REPORT AND RECOMMENDATIONS OF THE NEW YORK STATE SPECIAL TASK FORCE ON EQUITY AND EXCELLENCE IN EDUCATION (1982) (microfiche edition, Educational Resources Center, ERIC Documents ED 218 781, ED 218 782, ED 214 268). Both former Governor Hugh Carey and present Governor
III. SCHOOL FINANCE IN NEW JERSEY

Whatever the merits of the result in *Board of Education v. Nyquist*, the New York Court of Appeals' approach and the force of its analysis are sharply at odds with the original 1973 school finance decision by the New Jersey Supreme Court in *Robinson v. Cahill (Robinson I).* The New Jersey experience also provides a dramatic contrast with that of New York in a variety of other respects.

In March 1970, Kenneth Robinson, then a nine year old child attending school in Jersey City, joined with other children, parents, taxpayers, and municipal governments in challenging the constitutionality of New Jersey's system for financing education. The plaintiffs alleged violations of the federal and state equal protection clauses, as well as the state education clause which states that the "[l]egislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen." 

Although the legislature had adopted a new funding scheme in October 1970, the superior court decided in December 1972, after expedited discovery and a brief hearing, that the current system violated both the state constitutional guarantee of equal protection and the mandate allocating to the state legislature responsibility for the schools. The lower court held that education must be financed out of state revenues, but made its order prospective, allowing the state legislature until January 1, 1974, to adopt a constitutional school finance system. If the legislature did not act prior to that date, the court would require certain existing categories of state aid, including minimum per pupil grants and save-harmless aid, to be redistributed.

Mario Cuomo have sent messages to the New York State Legislature proposing school finance reforms, but to date, there has been no action on either of these proposals.

133. Id. at 227, 287 A.2d at 189; U.S. Const. amend. XIV, § 1.
135. N.J. Const. art. VIII, § 4, para. 1; *see Robinson I*, 118 N.J. Super. at 227, 287 A.2d at 189.
137. Id. at 280, 287 A.2d at 217.
138. Id.
through the equalization formula of the state law.\textsuperscript{139}

A direct appeal was certified by the New Jersey Supreme Court, and on April 3, 1973, that court unanimously invalidated the statute on the ground that it violated the state education clause.\textsuperscript{140} First, however, it disposed of both the federal and state equal protection claims which had been raised below.\textsuperscript{141} Just a month earlier, in March 1973, the United States Supreme Court had decided \textit{San Antonio Independent School District v. Rodriguez},\textsuperscript{142} rejecting a federal equal protection challenge to the Texas scheme for school finance.\textsuperscript{143} The \textit{Robinson I} court relied heavily on \textit{Rodriguez}, despite the admitted factual differences between the two disputed plans, in finding that the New Jersey plan did not violate the federal equal protection clause.\textsuperscript{144} Furthermore, New Jersey's high court declined to "turn this case upon the State equal protection clause,"\textsuperscript{145} thereby refusing to accept the notion that constitutional equal protection clauses embody some category of "fundamental rights," the alleged impingement of which would necessitate "strict scrutiny" of a challenged legislative classification.\textsuperscript{146} The United States Supreme Court's attempt in \textit{Rodriguez} to clarify this issue by declaring that "a right is 'fundamental' if it is explicitly or implicitly guaranteed in the Constitution"\textsuperscript{147} was, to the \textit{Robinson I} court, obviously insufficient, as the New Jersey court noted: While the right to acquire and hold property is guaranteed in both the federal and state constitutions, "that right is not a likely candidate for such preferred treatment" (i.e. to be declared a fundamental right).\textsuperscript{148} In a manner anticipating Justice Marshall's subsequent calls for a more flexible standard for examining equal protection challenges, Chief Justice Weintraub, writing for the \textit{Robinson} court stated:

Mechanical approaches to the delicate problem of judicial intervention under either the equal protection or the due process clauses may only divert [us] from the meritorious issue . . . .

\textsuperscript{139} See id. at 280-81, 287 A.2d at 217.


\textsuperscript{141} See id. at 482-501, 303 A.2d at 277-87; infra notes 142-49 and accompanying text.

\textsuperscript{142} 411 U.S. 1 (1973).

\textsuperscript{143} Id. at 55; see supra notes 24-27 and accompanying text.

\textsuperscript{144} \textit{Robinson I}, 62 N.J. at 488-89, 303 A.2d at 280-81.

\textsuperscript{145} Id. at 492, 303 A.2d at 283.

\textsuperscript{146} Id. at 491, 303 A.2d at 282. The court also dismissed the claim that the plan made an invidious discrimination based on wealth. Id. at 492-94, 303 A.2d at 283.

\textsuperscript{147} Id. at 491, 303 A.2d at 282 (discussing \textit{Rodriguez}, 411 U.S. at 33-34).

\textsuperscript{148} \textit{Robinson I}, 62 N.J. at 491, 303 A.2d at 282.
The equal protection clause may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs, choosing those which must be met and a single basis upon which the State must act.\textsuperscript{149}

Having thus disposed of both the federal and state equal protection claims, the New Jersey Supreme Court turned to the plaintiffs' education clause claim. Before considering treatment of this issue, it would be useful to establish the factual background from which the case arose.

At the time of the Robinson I trial court decision, state aid in New Jersey accounted for only 28% of the funds expended on education, with local taxes contributing 67% and federal grants responsible for the remaining 5%.\textsuperscript{150} State financial aid was to be distributed under the Bateman Act of 1970, which sought to increase the state's share through a grant of $110 per pupil, provide save-harmless aid guaranteeing that no district would receive less assistance than in prior years, and create an equalization formula designed to guarantee each district at least a $30,000 tax base per pupil.\textsuperscript{151} The statute also provided weightings for AFDC children, vocational school pupils, and different grade levels.\textsuperscript{152} Although the 1970 statute was intended to increase the state’s share of school costs to 40%,\textsuperscript{153} the legislature's failure to fund the formula fully meant that, at the time of the New Jersey Supreme Court decision in Robinson I, the state's share had not significantly increased. Each district was receiving only its pre-1970 aid plus 20% of the difference between that sum and the entitlement under the new statute if fully funded.\textsuperscript{154}

The New Jersey Supreme Court accepted the "significant connection" between school spending and the quality of educational opportunity.\textsuperscript{155} It found, however, that even if fully funded, the legislative scheme was "not demonstrably designed to guarantee that local effort plus . . . State aid [would] yield to all the pupils in the State [the] level of educational opportunity" mandated by the 1875 amendment to the education clause.\textsuperscript{156} While intimating some doubt

\textsuperscript{149} Id. at 491-92, 303 A.2d at 282-83.
\textsuperscript{150} Robinson I, 118 N.J. Super. at 231, 287 A.2d at 191.
\textsuperscript{151} See id. at 259-64, 287 A.2d at 206-08.
\textsuperscript{152} Id. at 258-59, 287 A.2d at 205-06.
\textsuperscript{153} See Robinson I, 62 N.J. at 517, 303 A.2d at 296.
\textsuperscript{154} Id. at 518, 303 A.2d at 297.
\textsuperscript{155} Id. at 481, 303 A.2d at 277.
\textsuperscript{156} Id. at 519, 303 A.2d at 297.
about whether the constitution could in fact be satisfied by reliance on local taxation, the court anticipated that the state might choose to delegate authority for school programs to local districts and expressly sanctioned the use of supplementary local funds to support programs to meet the special needs of the district. The design of a satisfactory school finance formula, however, would not, by itself, automatically satisfy the state's obligation, which the court found to include a significant non-fiscal responsibility. In the critical passage on this point, Chief Justice Weintraub wrote:

[I]f the State chooses to assign its obligation under the 1875 amendment to local government, the State must do so by a plan which will fulfill the State's continuing obligation. To that end the State must define in some discernible way the educational obligation and must compel the local school districts to raise the money necessary to provide that opportunity. The State has never spelled out the content of the constitutionally mandated educational opportunity.

On the question of remedies, the court requested further argument, thereby initiating a protracted exchange that lasted from 1973 through 1976 and involved the original litigants, the legislative and executive branches of government, other school boards, as well as teacher, and taxpayer groups. Only in New Jersey has the school finance controversy progressed so far through the remedial phase of the litigation. Finally, after additional briefs and arguments on the remedial issues, the Weintraub court, on June 19, 1973, issued its second opinion in the continuing Robinson v. Cahill litigation (Robinson II), deferring further action and giving the legislature until December 31, 1974, to adopt "legislation compatible with our decision in this case [to be] effective no later than July 1, 1975."

School funding decisions in New Jersey are a product of both local and state budgetary procedures. State law, at that time, required that local budgets be adopted by February 1, and local tax rates chosen by March 1, for a school year beginning July 1.
These budgets assumed a particular level of state aid based on statistics received from the Commissioner of Education, although the state budget in New Jersey is actually not available until the legislature adopts it shortly before the July 1 starting date for the next fiscal year. The Commissioner's notice to local districts is usually based, therefore, on the executive budget which the governor is obliged to submit to the legislature in February.

In November 1973, Brendan T. Byrne, a Democrat, was elected governor of New Jersey, succeeding the Republican incumbent, William T. Cahill. Cahill had unsuccessfully urged the legislature to adopt a comprehensive tax reform plan, including both a graduated income tax and a state-wide property tax to finance education. After reviewing the recommendations of a special study group appointed to review the most recent Robinson decision, Byrne acted in May 1974, proposing a revised financing formula which featured continued reliance on local authority over schools with costs shared between state and local tax sources. The Byrne proposal would have guaranteed each district twice the average property value per pupil, assuring each district a tax base of $106,000 per pupil in 1974-1975, compared with the $38,000 per weighted pupil under the unconstitutional statute. Minimum-aid and save-harmless aid would be eliminated, and the state would assume the local share of welfare and judicial costs. In addition, a new state aid program was proposed to compensate local districts for taxes lost as a result of tax-exempt budget proposals be submitted to the State Commissioner of Education by January 15 for the school year beginning the following July 1. See id. at § 18A:7A-28 (West Supp. 1983-1984). Following the Commissioner's review, see id., a local school board "shall prepare a budget for the school district for the ensuing year, on or before the first Tuesday in March." Id. at § 18A:22-7. A public hearing is held "between the first Tuesday in March and March 18," id. at § 18A:22-10, and the budget and tax rate must be affixed and in place before April 28. See Act of March 31, 1983, ch. 119, § 2, 1983 N.J. Sess. Law Serv. 649, 650 (West) (amending N.J. STAT. ANN. § 18A:22-37 (West Supp. 1983-1984)).


165. See id. at § 52:5-1 (West 1970).

166. See id. at § 52:27B-20 (West 1955); N.J. CONST. art. IV, § 1, para. 3.


168. Id.

property owners. These tax reform proposals, designed to relieve "municipal overburden" in the major urban areas of the state, would have significantly reduced local property tax rates. The state aid programs were to be funded by a new state income tax, graduated at rates roughly half the level of the New York State income tax.

Although the State Assembly adopted the income tax proposal and the State Senate passed the school funding bill, the program failed when the Senate could not muster a majority for the tax bill. Rebuffed by the Senate, Governor Byrne appeared personally before the state supreme court to request remedial relief, essentially aligning himself with the plaintiffs in the school finance litigation. The two houses of the legislature each retained separate counsel to oppose judicial action to impose a remedy. Thereafter, the original parties, including the local plaintiffs, the Attorney-General—representing the state and the Department of Education—and various suburban school districts, teachers' associations, parents, and others, played secondary parts in the courtroom clash between the executive and legislative branches of the state government.

On January 23, 1975, a six to one majority of the New Jersey Supreme Court refused to disturb the existing statutory scheme for the school year 1975-1976, in Robinson v. Cahill (Robinson III), citing the inequity and chaos of effecting a change "at this late date" in the school budget process. The court set a date for further argument on a remedy appropriate for the 1976-1977 year. On May 23, 1975, in Robinson IV, the court adopted an interim remedy, to be implemented "should the other [b]ranches of government fail to devise and enact a constitutional system of education in time for its effectuation for [the 1976-1977] school year." In the event of such a default, the court ruled, minimum-support and save-harmless aid appropriated under the old statute—about $300 million in all—would be distributed instead through the equalization portion of

170. Id. at 4, 24.
171. Id. at 4, 26; see N.Y. Times, July 25, 1974, at 69, col. 6.
172. See N.Y. Times, July 25, 1974, at 69, col. 6; id., July 17, 1974, at 78, col. 8; see also id., July 9, 1974, at 77, col. 4.
174. Id. at 36-37, 335 A.2d at 6-7.
175. Id. at 37, 335 A.2d at 7.
177. Id. at 344, 339 A.2d at 198, republished at 69 N.J. at 144, 351 A.2d at 718.
This reallocation of appropriated aid would have had the effect of increasing the property guarantee to $67,000 per weighted pupil. Nothing was said in the court's order concerning the consequences of legislative failure to appropriate any aid in the categories destined for reallocation as a result of the proposed decree.

Computerized charts were quickly distributed showing the effect of the court's order on each district, and the legislature continued debate over a new school formula. On September 29, 1975, a day before the deadline, the lawmakers sent Governor Byrne a new school aid bill. Unlike the Governor's proposed 200%-per-pupil property guarantee, the new bill assured each district 130% of the average property wealth per pupil in the entire state. It also included a continuation of some minimum-aid and a save-harmless guarantee as well, but no provision for the assumption of local welfare or court costs to relieve the consequences of "municipal overburden." The legislative action also did not deal at all with the need for approximately $375 million in additional state revenues to fund the new formula. Taking comfort in the fact that the lawmakers had at least taken some action, Governor Byrne signed the bill and promptly submitted it to the New Jersey Supreme Court for review.

The court scheduled argument on a specific series of questions described on its own motion, including the propriety of review prior to implementation of the new education law, the constitutionality of the act, and the status of the court's own May 23 reallocation order. On January 30, 1976, in Robinson v. Cahill (Robinson V), the court affirmed the facial constitutionality of the educational

178. Id. at 350, 339 A.2d at 201-02, republished at 69 N.J. at 150, 351 A.2d at 721-22.
179. Id. at 350, 339 A.2d at 202, republished at 69 N.J. at 150, 351 A.2d at 722.
182. Id. at §§ 19A:7A-18 to -20, 24-25.
183. See Executive Budget, State of New Jersey, Fiscal 1975 [hereinafter cited as Budget]. Under the usual budgetary procedures, this sum would have been included in appropriations recommended to the legislature by the Governor in his Executive Budget. Although the Education Act of 1975 called for this amount of increased funds, there was no existing revenue source available to produce them. The Governor's Executive Budget thus merely indicated a $375 million gap and invited legislative consideration of revenue raising measures. See Budget, supra. An alternative approach would have been to reduce recommended appropriations in other areas by this amount.
finance formula by a vote of five to two, on the condition that the legislature fund it in full in time for the 1976-1977 school year. Acting by a per curiam opinion with two separate concurrences, the majority expressed some hesitation whether the new law would in fact hold up after implementation, but also reflected the court's unspoken pleasure that the legislature had done something, however tentative or limited, toward ending the constitutional confrontation between the branches of government. Two justices dissented, one objecting vigorously to the approval of minimum-aid and save-harmless aid, and another arguing that nothing less than the degree of equalization in the Governor's own program—twice the state average property wealth—could salvage a shared cost approach to school finance.

On February 19, 1976, the court issued an order to show cause specifying four alternative remedies which it might apply for the upcoming school year in the event the legislature failed to appropriate the funds needed to implement the new formula: (1) a reallocation of any appropriated school aid through the equalization formula of the 1975 act; (2) judicial action imposing a uniform property levy at a rate sufficient to fund in full all school costs; (3) a reallocation of other state revenues to fund the school finance statute (in this regard, the court requested a classification of state budget items into constitutionally compelled provisions, spending pursuant to federal mandate, and discretionary expenditures); or (4) injunctive orders against either state or local expenditures for education until the constitutional mandate was satisfied.

In briefs and argument, the counsel for Governor Byrne maintained that the court should design a remedy based on three criteria: (1) the likelihood that the court's action would prompt the legislature to resolve the controversy; (2) the desirability of assuring a constitutional school funding scheme in the upcoming school year; and (3) the potential for further judicial action, if needed, to assure a constitutional school system. The Governor's analysis strongly sug-
gested a preference for injunctive relief in an effort to pressure the legislature into funding the school aid formula. Both the New Jersey State Senate and Assembly argued just as vigorously against any such relief, contending that the judiciary lacked authority to take affirmative action affecting revenue raising or the distribution of revenue, and that any pressure from the court was beyond the judiciary's proper role in such a controversy.  

With two dissents, one objecting to any exercise of remedial power at all, and the other arguing for the more adventurous alternative of a uniform state-wide property tax established by judicial decree to fund revised school budgets created on the basis of the 1975 statute, the court ultimately enjoined all spending for schools on and after July 1, 1976, in Robinson v. Cahill (Robinson VI). The order carved out limited exceptions as needed to maintain property and equipment and to meet school district obligations for insurance and pension contributions. The court further provided that if the legislature acted prior to the July 1 date to fund the 1975 Act or otherwise to comply with the constitutional mandate embodied in the education clause, the injunctive order would be withdrawn.

When the legislature did not act in time, the injunction went into effect, causing considerable disruption, confusion, and defiance, notwithstanding the summer vacation period. The United States Government sought to restrain the implementation of the New Jersey Supreme Court's order on the ground that it violated the federal constitutional rights of New Jersey school children and taxpayers. In an extraordinary en banc proceeding just hours before the injunction was to become effective, the eleven members of the United States District Court for the District of New Jersey voted nine to two to reject the United States' application, concluding that the federal government had not shown sufficient likelihood of success on the merits to warrant interim relief. The controversy was finally concluded near midnight on July 7, 1976, when the legisla-

192. Id. at 5-9.
194. See id. at 170-73, 358 A.2d at 465-66 (Pashman, J., dissenting).
196. Id.
197. Id. at 161, 358 A.2d at 459-60.
tured enacted the state's first statewide income tax, thereby supplying the funds to implement the Public School Education Act of 1975.\textsuperscript{199} A recent challenge to the statute, as applied in subsequent years, was unsuccessful.\textsuperscript{200}

IV. "CONSTITUTIONALIZING" INSTITUTIONAL DISPUTES: FEDERAL V. STATE INVOLVEMENT

Reflecting on the school finance cases prompts a series of observations concerning: (1) the advisability of federal court involvement in state institutional disputes raising constitutional claims, and the potential of state courts to give meaning to constitutional values in a federal system; (2) the nature of the judicial function in responding to constitutional claims which turn in critical part on the judge's evaluation of complex, scientific, and technical information; and (3) the potential and limitations of the judicial responsibility to define the content of constitutional values in circumstances where the exercise of that responsibility requires a state court to restructure a state bureaucratic organization, thus casting it into conflict with the legislative and executive branches of government. These observations suggest that the role of the federal courts in "constitutionalizing" state institutional disputes should be a limited one,\textsuperscript{201} that the role of the state courts in the same disputes should be more active,\textsuperscript{202} and should not be constricted by hesitation in dealing with either complex factual data\textsuperscript{203} or conflict with other branches of state government.\textsuperscript{204}

A. The Limits of Federal Judicial Involvement in School Finance Litigation

In our federal system, the federal courts perform what Professor Freund has called an umpire's role between the nation and the states,\textsuperscript{205} intervening only when needed to resolve disputes concerning the allocation of political authority. The larger responsibility for

\textsuperscript{199} See Robinson v. Cahill, 70 N.J. 464, 360 A.2d 400 (1976) (order dissolving the injunction).


\textsuperscript{201} See infra notes 205-42 and accompanying text.

\textsuperscript{202} See id.

\textsuperscript{203} See infra notes 243-63 and accompanying text.

\textsuperscript{204} See infra notes 264-310 and accompanying text.

maintaining the constitutional balance of federalism rests with the more political branches, although the judicial power to measure state policies against the protected powers of the national government is basic to the constitutional system. This form of judicial review was substituted at the 1787 convention for an earlier proposal "to give Congress a veto of state enactments deemed to trespass on the national domain."

The lower federal courts also share with the state courts a responsibility for protecting individual rights against governmental intrusion, giving voice to the guarantees of liberty and equality enshrined in the Bill of Rights. When an institutional reform claim of this type is brought before a federal judge, however, the effort to give meaning to the constitutional values at issue raises the prospect of continuing involvement in the administration of a public bureaucracy under the jurisdiction of another level of government. When the judge's orders directly affect not only the authority and behavior of state and local bureaucracies, but also the fundamental governmental responsibility to distribute the burden of paying the cost of public services—as in the school finance cases—the foundations of constitutional federalism are plainly tested.

In a sense, school finance cases present more of a challenge to judicial legitimacy than other institutional reform litigation. In a structural reform case involving a prison, hospital or school...
segregation, the conditions under attack are limited to the institution or the district before the bench. Even though similar circumstances may exist in other areas, the court's role is generally constrained by the parameters of the individual facility. The decree in such a case remedies the unconstitutional conditions in that prison, hospital, or school district. In these kinds of constitutional cases, the court's authority may be tested, and its resources strained to a limited extent, by either the ongoing remedial obligations or the emotions generated as a result of the subject matter of the case and its impact on the particular community. In fact, the institutional reform decrees in these areas have tended to engender greater controversy only when the remedy either reached beyond the boundaries of the particular discriminatory school district or sought to reform the "totality of circumstances" in the institution.

By contrast, in school finance cases, the challenged state policy represents a system of taxation and school administration similar to that prevailing in every state of the union. If such a challenge was ever upheld by the Supreme Court, the determination of such an action under the Federal Constitution could thus have the effect of invalidating virtually every school aid statute in the country. In a state mental health institution that conditions were unconstitutional in that, inter alia, food and sanitary conditions were inadequate; hospital was overcrowded; hospital was understaffed; staff was poorly trained; and patients had no privacy; Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), aff'd in part, rev'd and remanded in part, 612 F.2d 84 (3rd. Cir. 1979) (en banc), rev'd and remanded, 451 U.S. 1 (1981) (granting mentally retarded patients involuntarily confined in a state mental hospital the federal statutory right to "habilitation" and ordering the institution closed) (On remand the Third Circuit, sitting en banc, upheld the same deinstitutionalization remedy under a state statute. See 673 F.2d 647 (3d Cir. 1982) (en banc)). For a discussion of the interactions between mental health issues and the law, see A. Stone, Mental Health and Law: A System in Transition (center for studies of Crime and Delinquency, National Institute of Mental Health, Crime, and Delinquency Issues Monograph Series 1975) (U.S. Department of Health, Education, and Welfare Pub. No. (ADM) 75-176).


215. The Court in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), noted that the plan challenged therein was "comparable to the systems employed in every state in the union." See id. at 47-48; see also id. at 48 n.102.

216. That this concern weighed heavily on the majority in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), cannot be doubted: "It cannot be questioned that the constitutional judgment reached by the District Court and approved by our dissenting Brothers today would occasion in Texas and elsewhere an unprecedented upheaval in public education."
circumstances where the claim is supported by complex and speculative theories of educational cause and effect, the Court's hesitation to do so may be understandable. Thus, one of the lessons of school finance litigation during the 1970's may be the justification for tempering the development of federal constitutional relief in circumstances where a challenge is brought against a state policy in effect throughout the country and where the effects of alternative reforms are difficult to predict.

Achieving effective reform through federal decrees is likely to be difficult. One of the virtues of a federal system is its capacity to accommodate diverse responses to social and economic data. In school finance, the opportunity might be offered for standards of adjudication, remedial options, and patterns of judicial intervention to vary among different states. Constitutional norms can be developed and refined in the states before the Supreme Court addresses the issue definitively under the Federal Constitution. The interest in federalism supports this kind of temporary deferral to state constitutional adjudication in a context involving complex technical information and uncertain boundaries for judicial power.

An opportunity for the state courts to experiment with these institutional reform controversies has another advantage as well. It may avoid shortcomings inherent in the mechanical application of shorthand formulas in the adjudication of complex constitutional claims, a product of the judicial habit of employing Supreme Court "tests" as crutches, applying them uncritically to difficult controversies. Equal protection jurisprudence is a good example. When a government classifies beneficiaries of public benefits or targets of public regulation on an invidious basis such as race, it is appropriate for a court carefully to examine the justification for the classification and to inquire whether the government's objective might be achieved in some less restrictive manner. Few discriminations will survive such examination; and so it should be if we are to enforce the policy against racial bias under government sponsorship which is embedded in the fourteenth amendment. It is artificially constraining, however,
to establish this virtually insuperable standard of judicial inquiry as the only alternative to a test which asks simply whether the government's means bear a rational relationship to a legitimate objective. Most public choices support some appropriate goal. The "rationality" test, as it is called, will catch few of the many techniques of regulation available to the legislature.\textsuperscript{219} A two-tier approach to equal protection analysis has the consequence of dividing public policies into those which almost always withstand attack and those which virtually always fail.\textsuperscript{220}

In school finance cases, resort to the equal protection inquiry has produced sterile and unsatisfactory legal analysis. Rejecting strict scrutiny and resorting to a simple rationality test almost always means that the challenge fails, as it did in both \textit{San Antonio Independent School District v. Rodriguez},\textsuperscript{221} and \textit{Board of Education v. Nyquist}.\textsuperscript{222} Justice White, dissenting in \textit{Rodriguez},\textsuperscript{223} closely probed the links between a funding scheme, which relied significantly on taxation of local property, and the objective of local control over school decisions. White conceded that local decision making plays "an important part in our democratic system of government"\textsuperscript{224} but found that the Texas system provided "a meaningful option" to increase their per-pupil expenditures only "to Alamo Heights and like school districts [with a high per-pupil tax base]."\textsuperscript{225}

In districts where the property value per pupil is low, the tax base barely sustains or may fail to sustain a minimal program. Thus, 

\textsuperscript{219} For perhaps the most extreme example of deference to legislative choice, see \textit{Williamson v. Lee Optical Co.}, 348 U.S. 483 (1955) (upholding a state statute which prohibited opticians, but not sellers of ready-to-wear glasses, from selling, inter alia, "eye glasses, lenses, frames . . . or any other optical devices" without a prescription issued by a licensed ophthalmologist or optometrist).


\textsuperscript{221} 411 U.S. 1 (1973).


\textsuperscript{223} 411 U.S. 1, 63-70 (1973) (White, J., dissenting).

\textsuperscript{224} \textit{Id.} at 64 (White, J., dissenting).

\textsuperscript{225} \textit{Id.} (White, J., dissenting). The per-pupil market value of the taxable property in Alamo Heights, at the time of trial in \textit{Rodriguez}, was $49,078; in contrast with the comparable figure in property-poor Edgewood was $5,960. \textit{Id.} at 65 (White, J., dissenting).
White concluded, that the plan, while granting local control over spending in the abstract, "utterly fails to extend a realistic choice to parents [in property-poor districts to spend more on improved programs] because the property tax, which is the only revenue-raising mechanism extended to school districts, is practically and legally unavailable." If the facts support this conclusion, then it should follow, White argued, that the legitimate goal of local control is essentially unrelated to the statutory scheme which allows different districts to have widely varying capacity to make spending decisions.

It is not the intention of this article to suggest that this is the correct result. The logical gaps between spending and the quality of education, between property values and fiscal capacity, between the educational goal of fiscal neutrality and the actual effect of a power-equalization formula, should make us more skeptical about the constitutional claim, particularly if the decision is to establish a federal standard applicable throughout the country. There is no facile escape, however, from the necessity of evaluating the state's justification for its policy choices, the real effects of the existing funding scheme, and the likely consequence of real remedial options. A court fails in its responsibility when it mechanically finds the goal of local control automatically served by local financial responsibility, or when it abandons any effort to make a careful examination of the relationship because it concludes that education is not "fundamental" and wealth not "suspect."

Unfortunately, the tendency of Supreme Court decisions on the merits is sometimes to foreclose continuing experimentation in the state. Recognition of the states' capacity to contribute to the resolution of critical political controversies is especially appropriate when the dispute involves functions basic to the role of state government, of which the responsibility to raise revenue and administer education programs is an example. By contrast, there should be less sympathy to a wider state role in matters more directly involving state action which interferes with the individual's interest in liberty or equality. For example, in gender discrimination cases, the Court has generally declined to subject the classifications made by state actions to the level of examination applied to racial classifications. Yet, its inter-

226. Id. at 65 (White, J., dissenting).
227. Id. at 67-70 (White, J., dissenting).
mediate standard of review, which requires the state to show that the classification serves an important governmental interest, has been "strict" enough to strike down a number of gender based classifications.\textsuperscript{229} Similarly, in contraception and abortion cases, the Supreme Court has given little weight to the interest in federalism.\textsuperscript{230} State autonomy is overridden in these areas by the need to assure protection of individual rights. Dean Sandalow thought that

\begin{quote}
[t]he Court's failure to concede any role to the states in mediating the conflicts generated by the most important social change of the decade [the 1970's]—indeed, its seeming unawareness that the denial of such a role required justification or even comment—is a remarkable demonstration of the extent to which a unitary system of government has evolved in the United States.\textsuperscript{231}
\end{quote}

Considerable evidence exists, however, that the Court has recently shown renewed concern for the role of the state in the federal

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{229} See, e.g., Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982) (denial of admission to state school of nursing to male nurse, based solely on sex, violates equal protection clause); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (state statute giving husband, as "head and master" of property owned jointly with wife, unilateral right to dispose of such property without spouse's consent violates equal protection clause); Orr v. Orr, 440 U.S. 268 (1979) (state statute providing that husbands, but not wives, may be required to pay alimony on divorce violates equal protection clause).
\item \textsuperscript{230} "[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." Roe v. Wade, 410 U.S. 113, 162 (1973) (woman's right to privacy encompasses her right to choose to have an abortion; state statute restricting such right violates due process clause); see also Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (state statute requiring parental consent for an unmarried minor and spousal consent, under certain circumstances, for an adult woman to obtain abortion is unconstitutional); Eisenstadt v. Baird, 405 U.S. 438 (1972) (state statute making it a felony to distribute contraceptives without a license unconstitutionally burdens personal right to access to contraception); Griswold v. Connecticut, 381 U.S. 479 (1965) (state statute prohibiting use of contraceptive devices unconstitutionally infringes personal privacy right). But see H.L. v. Matheson, 450 U.S. 398 (1981) (rejecting constitutional challenge to state law requiring physicians to notify parents if possible, prior to performing abortion on unmarried minor). Only in cases challenging a state's refusal to fund non-therapeutic abortions has the Court consistently departed from a standard of national uniformity. See Poelker v. Doe, 432 U.S. 519 (1977) (per curiam); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977).
\item \textsuperscript{231} Sandalow, Federalism and Social Change, 43 LAW & CONTEMP. PROBS., Summer 1980, at 29, 38.
\end{enumerate}
\end{footnotesize}
system.232 Some of this solicitude may simply be a byproduct of the changing substantive principles in cases involving the reach of federal constitutional protections for individual rights. Yet other cases, of which Rodriguez may be an unwitting example, recognize the virtue of allowing the states more room for experimentation in areas of public policy where certainty bespeaks ignorance.233 It is difficult to believe that the gender,234 or child bearing235 cases undercut this judicial sensitivity to the virtues of federalism. Although it is true that the Court’s decisions in these cases reflect the enormous social change brought about by the women’s rights movement and the sexual revolution; these decisions also transcend contemporary societal trends by exemplifying the Court’s essential role as a guardian of individual liberty against threats from the collective society. Even when cast in terms of equal protection, the gender discrimination


233. See cases cited supra note 232. In fact, Rodriguez’ recognition of the value of state experimentation may not have been entirely unintended. See Rodriguez, 411 U.S. at 56 (discussing dangers of imposing a single federal standard on states). In fact, one of the Court’s statements about why local school district control is desirable disingenuously made the federalism argument as well: “Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate.” Id. at 50. The Court then quoted Justice Brandeis on the value of state experimentation. Id.; see supra note 74.

234. See cases cited supra note 229.

235. See cases cited supra note 230.
cases more accurately involve women's drive for autonomy—for freedom to participate in this society without the burdens or obstacles not shared by men.

Although the individual's right to educational opportunity and equality lies at the root of school finance claims, the education cases directly involve the state's political processes for making decisions concerning the way the benefits and burdens of government are distributed. The women's rights decisions do not interpose the federal courts into the ongoing operations of state government or state politics in a similar manner. Like traditional negative decrees of equity courts, they merely impose a barrier against implementation of a particular state policy. Even in the circumstances of a school desegregation claim where more affirmative relief is involved, the court does not have to intrude nearly as much into the state's fiscal arrangements as is the case with school funding claims. Finally, the gender cases seldom involve the same technical complexity or uncertainty regarding the consequences on a society of a particular type of judicial order. School finance claims thus seem an especially appropriate category to remit to the diverse treatment under state constitutional guarantees, holding in reserve the prospect of federal intervention by the courts or the Congress to establish uniform national rules.

In the school finance area, a chance for the states to experiment has been the consequence of the Supreme Court's decision in Rodriguez. It is likely that the federalism argument for remitting school finance to the states, given the complexity and uncertainty of what the plaintiffs were asking the courts to do, played a role in the Court's ultimate decision in Rodriguez. One may certainly indulge in the suspicion that concerns other than the reach of substantive equal protection played some role in the disposition of Rodriguez. The majority's wary analysis supports that possibility. For at least some members of that bare majority of five justices, the prospect of interjecting the federal judiciary into the heart of state and local fiscal decisions throughout the country, without any real guidance as to a form of relief effective to improve educational quality, must have been discouraging. Given these uncertainties and the lack of empirical evidence concerning the different legislative reforms debated in the scholarly literature and presented to the courts by ex-

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236. See cases cited supra note 213.
237. See Rodriguez, 411 U.S. at 56.
238. See id. at 40-56.
pert witnesses, it is hard to think of a better case to leave to the mediating influences of the judicial as well as political processes in the several states.

Unfortunately, the federalism rationale was not expressly relied upon in *Rodriguez*. Instead, the majority grounded its ruling on the proposition that education is not a "fundamental right," nor wealth a suspect classification. It would have been better for the Court to make the federalism rationale the explicit basis for the decision, or more precisely, the basis for not deciding the issue at all. Had the Court been explicit about this reason for its decision rejecting the claims, the decision would not have had the distorting effects on equal protection jurisprudence necessitated by the urge to produce a uniform answer to the school finance issue. The federalism interest in withholding the development of national constitutional standards in complex cases could provide a better basis for rejecting such claims—a new kind of abstention by the federal courts in certain kinds of institutional reform cases.  

B. The Justiciability of Complex, Technical, and Scientific Information within Institutional Litigation

The notion that federal courts should practice a form of abstention in state institution cases suggests a result similar to that which occurred in school finance litigation in the wake of *San Antonio Independent School District v. Rodriguez*: namely, the throwing back of the issue to the state courts, to be decided under provisions of the individual state constitutions. As was postulated above, this will have a number of desirable effects. Such effects will be severely undercut, however, if state courts confronted with the issue fail in their responsibility to test the challenged programs under the constitutional provisions at issue or to fashion remedies if the programs do not pass constitutional muster. This section of the article raises some questions about one basis often advanced for doing so—that courts are ill-equipped to deal with litigation involving the evaluation of complex, technical, and scientific information.

239. See id. at 28, 37.
240. Such a basis for abstention would, of course, be significantly different than federal court abstention to preserve the institutional autonomy of a state court system, see *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Younger v. Harris*, 401 U.S. 37 (1971), or abstention in order to require that litigants exhaust available state administrative remedies, see *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).
242. See supra notes 227-40 and accompanying text.
School finance cases were nurtured by social science, and found ultimate success as a result of judges’ attraction to the expert testimony of social scientists.\textsuperscript{243} Yet, the legal assault on the universal practice of financing education substantially through local property taxes at first evoked little response, in part because the most obvious alternative to the prevailing system—full state assumption of educational costs—seemed to jeopardize the viability of local control over education policy. This prompted the development of the theory of wealth neutrality, and its legislative expression in district power-equalizing grants, which promised to liberate local districts from the limitations of the property tax base while continuing to permit them to enjoy the benefits of delegated authority over education.\textsuperscript{244} Fiscal neutrality by itself promised equal \textit{capacity} to spend. By its own terms, it said little about equality in spending, and less about equality in educational programs.\textsuperscript{245}


The principal evidence adduced in support of this comparative-discrimination claim [in the District Court] is an affidavit submitted by Professor Joel S. Berke of Syracuse University's Educational Finance Policy Institute. The District Court, relying in major part upon this affidavit . . . noted, first, a positive correlation between the wealth of school districts, measured in terms of assessable property per pupil, and their levels of per-pupil expenditures. Second, the court found a similar correlation between district wealth and the personal wealth of its residents, measured in terms of median family income.


For a discussion of wealth in relation to the issue of public school financing, see generally J. Coons, \textit{supra} note 17; \textit{The Urban Institute, Public School Finance: Present Disparities and Fiscal Alternatives} (1972) (report prepared for the President's Commission on School Finance).

\textsuperscript{244} See \textit{supra} notes 17-23 and accompanying text.


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Bolstered by this inviting evidence of a means to resolve the tension between the state's commitment to local policy control and the desire to reduce dependence on local property wealth, numerous litigants plunged the state courts into the school finance controversy. Since virtually every person in the state is affected by a court's decision in this area, either as a taxpayer, parent, or pupil, many interest groups—including school boards, municipal officials, teachers, and taxpayers—sought a means of participation in these cases, each hoping to sway the courts with a barrage of statistical and sociological data in its favor.246 Many courts, to whom the theory of wealth neutrality had considerable appeal, declared that the prevailing statutory arrangements violated either the state constitutional guarantee of equal protection or specific provisions specifying that the state would provide a system of free public schools.247 Others, swayed in part by the difficulty in dealing with the complex matrix of factual issues presented by the cases or by a perceived inability to fashion an appropriate remedy, failed to invalidate the existing school finance schemes.248

An examination of the school finance issue, and the confusing array of facts and statistics implicated therein, might seem to support such a judicial abdication on this basis. School finance is, however, not the only area of complex litigation characterized by conflicting expert testimony on technical questions for which judges are arguably poorly prepared by training and experience. Economic testimony is often critical to the trial of claims under the antitrust laws.249 Expert psychiatric evidence may dominate a criminal trial in which the accused asserts an insanity defense or a related claim of diminished responsibility.250 Experts in the physical or natural sciences regularly testify in court cases involving hazardous working
conditions or dangerous products. Sociological evidence has been used extensively in the anti-discrimination area as exemplified by the Supreme Court's reliance on sociological literature in its opinion in *Brown v. Board of Education* and the subsequent cases expanding on the anti-discrimination principle. Such evidence was also relied upon when the Court confronted the question of how many persons are required to satisfy the constitutional guarantee of a trial by jury.

Judges admittedly start out as amateurs in each of these areas, not professionally equipped to evaluate the technical arguments of any of the expert witnesses brought before them. Yet, the lack of professional training should not discourage courts from attempting to apply some kind of truth-testing to the intuitive judgments they may have about such matters. The effort to understand empirical studies should render the judicial function more objective than simple reliance on personal intuition, preference, or experience.

All of us start out with an intuitive sense about many of these claims, although decisions on these matters, of course, cannot be based on intuition alone. For example, in national labor policy there has been considerable controversy regarding the appropriate degree of regulatory control over misrepresentation or coercive statements by employers in the course of campaigns to select bargaining representatives for employees. Close scrutiny of campaign speech may

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253. See *Brown v. Board of Educ.*, 347 U.S. at 493-95; see also cases cited *supra* note 11. The appendix to appellants' brief in *Brown*, signed by 32 sociologists, anthropologists, psychiatrists, and psychologists, all of whom had done work in the field of American race relations, is reprinted as *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, 37 Minn. L. Rev. 427 (1953).
255. Compare *Midland Nat'l Life Insurance*, 263 N.L.R.B. No. 24 (Aug. 4, 1982), overruling both *General Knit of Cal.*, Inc., 239 N.L.R.B. 619 (1978) and Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962), and *Shopping Kart Food Market*, 228 N.L.R.B. 1311 (1977), also overruling *Hollywood Ceramics* (both *Midland* and *Shopping Kart* held that representation elections will not be set aside solely because of misleading campaign statements) with *General Knit of Cal.*, Inc., 239 N.L.R.B. at 620, overruling *Shopping Kart* and *Hollywood Ceramics* Co., 140 N.L.R.B. at 224 (both *General Knit* and *Hollywood Ceramics* held that representation elections may be set aside if campaign misstatements are made which: (1) are a substantial departure from the truth and (2) may reasonably be expected to have a significant impact on the election).
be necessary if one assumes that employees are attentive to campaign propaganda, unable to distinguish truth from falsity, and likely to be intimidated by the employer's statements. On the other hand, if one thinks that employees are inattentive, capable of sorting out truthful statements from misrepresentations, and more likely to be emboldened to join the union in the face of an employer's threats, one might decide to deregulate campaign speech and save administrative resources for other tasks. Empirical studies of employee behavior by competent social scientists should have more to contribute to this debate than the individual intuitions of the National Labor Relations Board members or judges. In recent years, the National Labor Relations Board has adopted four different positions on the regulatory standards applied to misrepresentations in campaign speech, first embracing one particular study, then rejecting it, and more recently shifting ground again. In a circumstance like this, a court's careful examination of available research should be welcomed.

This is not to imply that a judge will be "ruled" by the evidence in cases of this type. Even when empirical data is available to the court, judges will draw varying inferences from it. Professor Maurice Rosenberg has noted the different conclusions drawn by Justices Brennan and Marshall after their review of studies which sought to demonstrate whether jury performance was a function of panel size.

Several judges have commented on the relative inadequacy of judicial devices for gathering and evaluating complex data as compared to the procedures available to legislative committees or administrative agencies. Others have suggested innovative procedures, including a panel of scientific advisors, impartial consultants func-

256. See cases cited supra note 255. The study in question was one which found, after a survey of voters in 31 union representation elections, that less than 20% of the voters had been persuaded to change their votes by the campaign propaganda to which they had been exposed prior to the election. See Getman & Goldberg, The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation, Part II, 28 STAN. L. REV. 263 (1976); see also J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976).


tioning on an ad hoc basis as an adjunct to the courts, or “a public agency [acting] as an information resource or depository for social and technological data.” Such an agency would be charged with collecting and validating the methodology of technical studies, thereby screening the research for judicial reference. To the extent these devices are intended to function outside the adversary process, without the opportunity for criticism and confrontation, they are certain to arouse the opposition of many lawyers. Yet, it cannot be doubted that the courts are expanding their reach through intervenors participating in complex cases, law clerks searching the libraries for non-legal materials, and special investigative masters engaged in field work.

For better or worse, judges and their law clerks are surveying a wide territory in search of useful information. In a complex case involving efforts to reform public bureaucracies, the large number of participants and affected interests not only changes the nature of the judicial function, but also opens up the court to new channels of information. If judges maintain a healthy skepticism about the theories presented to them and recognize that their conclusions are inevitably subject to later correction as the techniques grow more sophisticated, they need not be hesitant about the need to deal with technical areas in which they are not professionally competent. It would be better for the judicial process if the clash of expert testimony and empirical studies has the effect of opening the judges’ minds to different sides of the issue, obliging them to apply this information and to go beyond their own experiences, testing their own intuitive judgments. Each of us begins with a personal sense as to whether separate but equal can be equal, whether a six member jury will reach different results than a panel of twelve, or whether more money for schools is likely to produce better educated students. One expects the courts, however, to take account of a wider range of available information and to avoid grounding their decisions on individual instinct. Our aversion to the influence of the judge’s individual preference lies at the root of the limitations we deem necessary to place the stamp of legitimacy on the exercise of judicial power.

The complexity of the issues and the conflicts generated by the

259. See Rosenberg, supra note 257, at 590.
260. See supra notes 56-62 and accompanying text.
261. See infra note 294 and accompanying text.
information presented to the court in these cases are not a reason for abstaining from giving meaning to constitutional values, but rather a reason to be explicit about the limitations. The court need speak with no greater certainty and finality than the state of the art permits. For judges as for others, the process of fact-finding in a complex area is always subject to the imperfections and limits of human knowledge. Judges faced with complex constitutional claims can acknowledge that fact while still making use of all the information available to guide their decisions as objectively as possible.

C. The Political Dialogue Between the Judiciary, the Legislature, and the Bureaucracy

There is another aspect of institutional reform suits that arguably makes them less appropriate for judicial remedy than typical lawsuits. The structural reform lawsuits challenge conditions prevailing as a result of the conduct of administrative organizations, including school systems, hospitals, prisons, and zoning boards. The public bureaucracy is alleged to have violated a constitutional value or standard in circumstances where the infringement is not limited to a particular individual whose claim might be easily redressed by an order that the officials in charge of the institution change their conduct toward him. Rather, the interest which the plaintiffs seek to protect is widespread, and the effects of which they complain often have consequences not only for those immediately subject to the bureaucratic arrangement, but ultimately for many others in the community. Even when the issue is framed more narrowly—the request of a group of inmates for better treatment within the institution, the interest of school children in equal educational opportunity, or the petition of black persons for protection against police abuse—the claim actually raises much broader implications. At issue in such a case is the bureaucratic system, which the petitioners claim imperils the realization of the constitutional values encompassed in the broad guarantees of equality, liberty, or due process.

These cases are no doubt a product of the modern administrative state, in which the individual's interest can be threatened much more by the systematic behavior of large-scale organizations than by any particular rule or policy affecting his conduct. Several commentators have charted the differences between this kind of lawsuit and the classic model of private dispute settlement, including the multiplicity of parties, the different focus of the issue at the root of the claim, the prospective and affirmative nature of the remedy sought,
and the impersonal character of the defendants' responsibility for the condition of which the plaintiffs complain.263

There can be no doubt that the institutional reform cases litigated during the last decade or two are markedly different from the typical contract or tort dispute between private parties. It is, however, misleading to describe that difference by reference to the "public" nature of the value at stake in the litigation. When common law judges describe a standard of negligence or decide whether there is sufficient consideration to make a contract binding, they are no less involved in giving meaning to important public values than Supreme Court Justices are when they decide a constitutional claim.264 Our legal system provides a mechanism for third party determination at public expense for virtually any public or private controversy where the claim is grounded in a right as opposed to an interest.265 Whether their grievance is against a private or public party,266 the


264. See Fiss, supra note 263, at 30, 31.

265. Disputes over interest are generally left to the processes of voluntary settlement, including negotiation. See id. at 30. See generally H. RAFFA, THE ART AND SCIENCE OF NEGOTIATION (1982); Eisenberg, Private Ordering through Negotiation: Dispute-Settlement and Rulemaking, 89 HARV. L. REV. 637 (1976); Private Alternatives to the Judicial Process, 8 J. LEGAL STUD. 231 (1979).


The eleventh amendment to the United States Constitution generally precludes suits by individuals against a state even for actions arising under the Constitution itself, Hans v. Louisiana, 134 U.S. 1 (1890). The effect of this sovereign immunity is, however, lessened as a result of decisions permitting actions to proceed against an officer of the state for either money damages or injunctive relief, so long as the actions at issue are alleged to be unconstitutional and thus outside the officer's sphere of legitimate functions. See Home Tel. & Tel. v. City of Los Angeles, 227 U.S. 278 (1913); Ex parte Young, 209 U.S. 123 (1908). An example of such an action is one for damages brought by an individual arising out of allegedly unconstitutional tortious conduct by a state official acting under color of law. See 42 U.S.C. § 1983 (1976). Such damages may only be sought from the individual officer, Scheuer v. Rhodes, 416 U.S. 232 (1974), unless the state has explicitly waived its eleventh amendment immunity, see Fitz-
person who believes that a right established under constitutional, statutory, or common law has been infringed has direct recourse to the courts to have that claim resolved and to seek redress. By resolving the controversy in a manner applicable to similar cases that arise in the future and justified by reference to the resolution of comparable claims in the past, judges perform their function of giving content to the public values which underlie legal rules. The judge clarifies the meaning of a legal rule and applies it to the particular circumstances of the controversy brought before the court. Whether the claim is grounded, for example, in the contractual requirement of consideration or the constitutional mandate of due process, should not affect the judicial obligation to fill in the outline of that value, to imbue it with meaning, and then to apply that meaning to the immediate dispute. This basic function should neither change because the case involves a condition or relationship in the society with implications that radiate over a wide terrain, nor because there are many parties who potentially have an interest in the particular meaning given by the court to the value which supports the claim.

When the value at stake is constitutional, rather than one arising from statutory or common law, however, the issue of judicial legitimacy takes on even greater force because the court is being asked to override the meaning given that value by the legislative or executive branch of government. In taking the bold step of invalidating the value definition adopted by another branch, especially one whose authority is more directly rooted in popular consent, the court’s power is most vulnerable and in need of a rationale supporting its extraordinary exercise. Such a support structure is typically found in one or more of the following sources: some combination of a variant on the consent theory which supports the power of the political branches; methodological constraints which confine judges’ own preferences and make their interpretations of constitutional values more objective; procedural requirements with the same goal; or, substantive guidelines to constrict their interpretations of the constitutional mandate.


268. See J. Choper, supra note 267, at 138; The Federalist No. 78 (A. Hamilton).

269. See A. Cox, The Role of the Supreme Court in American Government 25-
These supports are obviously more interrelated than mutually exclusive. For example, Professor Archibald Cox has argued that "the power to command acceptance and support from the community" is crucial to judicial legitimacy. Cox saw the court earning this acceptance by the method of reasoning from analogy and precedent to a resolution of the claim before it. Similarly, Professor Herbert Wechsler thought the community's tolerance of judicial review would be enhanced if judges strictly adhered to the method of relying solely on their capacities to articulate general principles capable of resolving future cases and transcending any particular result. To be legitimate, Wechsler theorized, the power of judicial review had to be exercised without reliance on the judge's own personal preferences. Professor Owen Fiss similarly contrasted the personal or popular preferences which influence the legislator with the judge's objective search for "true" values, although he disputed the view of others that the legislative branch has a superior claim to responsibility for articulating constitutional values. Fiss found the basis of judicial competence in the independence of judges (in the sense of impartiality and detachment from political controversy), as well as in their obligation both to respond to the litigant's agenda and to justify their decisions by articulating the reasons for them. Only these methodological and procedural constraints allow judges to give content to important constitutional values and override the meaning given those values by the other


270. A. Cox, supra note 269, at 103; see also sources cited supra note 268.
272. See Wechsler, supra note 262, at 11-20.
274. See Fiss, supra note 263, at 9.
275. See id. at 9, 41.
276. See id. at 9.
277. Id. at 13.
278. Id.
branches. The implication is that without these limits and constraints on their intuition, a judge’s effort to impart meaning to the broad generalities of constitutional provisions might have no more claim to validity than the individual legislator’s preference, and much less than the collective preference of the majority expressed through the political branches.

Other commentators would go further toward constraining the court procedurally by imposing a normative requirement of individual participation by each affected party as a standard of legitimacy for the exercise of judicial power. If every affected interest must participate, it will be much more difficult to justify the kind of representative process of dispute settlement involved in institutional reform cases. Professor Lon Fuller, however, has defined acceptable adjudication in terms of bipolar dispute settlement and has opposed judicial involvement in polycentric conflicts where participation is not so readily assured and the implications of a decision on other affected interests are much harder to predict.

The difficulty with this view is that if the rules of the game require it, even the most complex institutional reform case can readily be restated as a bipolar dispute which the court is asked to settle: for example, Kenneth Robinson has been deprived of the educational opportunity or program which the constitution guarantees as a result of the state government’s decision to leave funding to the discretion of the Jersey City School Board; the state maximum security prison has violated John Smith’s right to humane treatment by housing him with 100 others in a single dormitory where he is at the mercy of assaults by other inmates; or, the state has breached Mary Jones’ right to live near her work by allowing a municipality to zone in a way that excludes all low or moderate income housing. Simply to state the issue, however, suggests the limitations of the formulation. Even in the absence of a team of public interest lawyers, the judge will quickly perceive that the plaintiff is only one

279. See Fuller, supra note 269, at 382-85 (quoting Fuller & Randall, Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1160-61, 1162, 1216 (1958)).
280. See Fuller, supra note 269, at 394-95.
of many individuals and interest groups affected by the practice of which he complains and that a declaration that the bureaucracy has violated the individual plaintiff’s right only goes part of the way to impart meaning into the constitutional value raised by the case. The court must proceed to make a choice about how to redress the unconstitutional condition, and that effort is likely to mean continuing judicial involvement, polycentric effects of the court’s decree, and the possibility of conflict with the political branches.

These are undoubtedly threats to the judicial function, posing some real risk to the court’s legitimacy. Yet, the risk cannot be avoided by a policy against judicial recognition of claims which depart from the model of bipolar, individualized dispute settlement. In the school finance case itself, an individual student’s constitutional claim cannot be dismissed any more than it can be resolved without regard to the similar condition of other pupils and other school districts. Neither can our hypothetical prison inmate’s claim, nor that of our alleged victim of exclusionary zoning, be so easily dismissed. A decision denying the substantive claim has the same sweeping implications as a declaration that the plaintiff’s rights have been violated.

Similarly, after declaring that the current condition of school financing violates the constitutional value, the court cannot abstain from ordering a remedy because the remedial phase of the litigation might jeopardize the judge’s independence or confront the court with choices not usually determined by reference to the scope of the violation. “Not to act,” as Professor Cox said in his Oxford lectures, “would be to acknowledge judicial futility.”284 Yet, Professor Fiss is surely on target in citing the desire to be effective in the ensuing conflict with the bureaucracy as the central threat to the judge’s independence.285 As a strategist in an environment where success depends on the reaction of a complex, political, and bureaucratic organization, the court’s detachment as well as its patience might be strained.

Consider, for example, the recent exclusionary zoning decision, Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II),286 issued by a unanimous New Jersey Supreme Court. After restating the declaration of constitutional values incor-

284. A. Cox, supra note 269, at 95.
285. Fiss, supra note 263, at 53-54.
oporated in the Mount Laurel I decision,\textsuperscript{287}—which had established the principle that a municipality violates the state constitution when it fails to provide a realistic opportunity for low and moderate income housing\textsuperscript{288}—the court noted that administration of the promise made in its earlier decision had been frustrated by endless litigation in the lower courts.\textsuperscript{289} Based on its conviction that “[t]he doctrine is right but its administration has been ineffective,”\textsuperscript{290} the court proceeded to actualize the constitutional guarantee by a variety of substantive and procedural devices, including: more objective standards to apply the Mount Laurel doctrine to particular cases;\textsuperscript{291} stronger remedies (such as the more frequent use of an affirmative order permitting the builder to go forward with his project);\textsuperscript{292} the assignment of specially designated judges in each region of the state to hear all such claims in an effort to speed up the judicial process;\textsuperscript{293} and the frequent use of special masters to investigate the facts necessary to dispose of exclusionary zoning claims.\textsuperscript{294}

One might as well be candid about the risk in such circumstances. The Mount Laurel II court was plainly not “detached” about its desire to be effective.\textsuperscript{295} Nor was Judge Johnson in the protracted litigation involving the Alabama mental health institutions.\textsuperscript{296} Similarly, the Robinson court was hardly disinterested in the consequences of its strategic response to the legislative failure to fund the school aid formula in the Public School Education Act of 1975.\textsuperscript{297} Its injunction against spending for schools was clearly aimed at pressuring the lawmakers to adopt the income tax and provide the revenues needed to fund the schools.\textsuperscript{298} Yet, the solution cannot be to abstain from a ruling on the constitutional claim, to stop short with a declaration of a right, or to tailor the remedy to the

\begin{itemize}
\item \textsuperscript{287} Id. at 208-09, 456 A.2d at 415-17. See Mount Laurel I, 67 N.J. 151, 336 A.2d 713 (1974).
\item \textsuperscript{288} Mount Laurel I, 67 N.J. at 173-74, 336 A.2d at 724-25.
\item \textsuperscript{289} See Mount Laurel II, 92 N.J. at 199-200, 456 A.2d at 410-11.
\item \textsuperscript{290} Id. at 201, 456 A.2d at 411.
\item \textsuperscript{291} See id. at 214-16, 456 A.2d at 418-19.
\item \textsuperscript{292} See id. at 217-18, 456 A.2d at 419-20.
\item \textsuperscript{293} Id. at 215, 216-17, 456 A.2d at 418, 419.
\item \textsuperscript{294} See id. at 218, 280-85, 456 A.2d at 420, 453-55.
\item \textsuperscript{295} See id. at 212-13, 456 A.2d at 417-18.
\item \textsuperscript{297} See supra notes 160-200 and accompanying text.
\item \textsuperscript{298} See supra notes 190-200 and accompanying text.
\end{itemize}
narrowest definition of the violation. None of those options are adequate to fulfill the court's responsibility for explaining the meaning of the constitutional mandate.

In the modern administrative state, the task of protecting individual rights against bureaucratic abuse may frequently place the courts in conflict with the other branches of government. Given the array of complex issues raised in school finance cases, one may doubt the judicial capacity to describe either the right or the remedy. Once a violation is found, however, as it was in Brown v. Board of Education,299 or in Robinson v. Cahill,300 the court making the declaration is inescapably involved, strategically committed to a political process to resolve the dimensions of the right and the means by which it is to be vindicated.301 That should not necessarily discourage the declaration, but it should sound a warning that the remedial issues be considered early in the litigation.

In an institutional reform case the court faces a variety of exceptional challenges. It must undertake to assure the participation of adverse interests.302 In a school finance claim, for example, this responsibility generally requires the judge to permit the more affluent school districts and urban school boards to intervene.303 It may also counsel separate participation by taxpayer and teacher groups and by various political officials in the legislative and executive branches.304 The court has to take a stronger hand in managing the case, determining both the trial schedule and the scope of pretrial proceedings. In the same way, the judge should oblige the parties to address the questions: "What relief do you seek?" or "What remedial options are available to this court in the event a violation is found?" Forcing consideration of that issue early in the proceeding helps to frame the substantive claims and inform the court's interpretation of the applicable constitutional standard. It also avoids the risk that an appellate court will indulge in its own presumptions

302. See Eisenberg, Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller, 92 HARV. L. REV. 410, 427-28 (1978). This must normally be done by actively involving representatives of different interest groups; obviously, it is impossible in such cases to afford participation by each affected individual.
303. See supra notes 56-62 and accompanying text.
304. See supra notes 172-73 and accompanying text.
about the appropriate range of remedies.  

Legitimacy in complex public litigation will ultimately be grounded, as it is in other cases, on the court's respect for the methods of reasoning characteristic of adjudication, and the procedural rules which guide the exercise of its power. A judicial decision in this area will command acceptance by the force of its analysis and the extent to which the opinion convinces the relevant audience that it represents an honest effort to find and articulate the true meaning of the constitutional value at stake in the case, not merely the judge's own preference or calculation of the popular will.  

When the nature of the issue places the court in conflict with an agency of a political branch, the judge should take comfort in the dialectical quality of the process. In devising a remedy for a condition which violates a constitutional standard, the court has to be concerned that it is effective as well as fair. That desire requires the judge to gain an understanding of the complex patterns of bureaucratic behavior  

and to think strategically about the remedial options. As a result, the remedial order will inevitably be tentative and subject to revision. It may also be a product of bargaining or consultation, and the judge need not apologize if the result is less than ideal because it seeks to account for the complex responses from the organization to which it is directed.  

The dialogue in which the court is involved is not merely an exchange between adverse parties to establish the agenda to which the judge must respond. It is more a continuing discourse about constitutional norms between the court and the other branches of government, in which the court speaks through its orders and the institutional responses of the political branches determine whether  

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305. See supra notes 110-11 and accompanying text.  
308. But see Diver, The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions, 65 Va. L. Rev. 43, 90-94 (1979) (ability to identify adequately and take account of needs and potential responses of competing political factions in an institutional case beyond judicial competence).  
309. See Fiss, supra note 263, at 15 & n.34.
the judge's previous statement was sufficient or ought to be followed with another decree.

Viewed in this manner, the injunction issued in *Robinson VI* may have been the most cautious exercise of judicial power: prompting the legislature to fund its own formula, avoiding by that response the need for more continuing or far-reaching judicial relief, and yet still permitting the court another volley if the legislature failed to act.\textsuperscript{310} This kind of discourse should be a feature of the remedial stages of institutional reform litigation. In cases of this type, the debate over remedies should properly inform the declaratory phase of the litigation.

V. CONCLUSION

After a decade of state experimentation in and out of court, considerable doubt remains concerning the most effective and equitable method of funding education. The consequences of different reform schemes, some prompted by state court decisions, and others enacted by legislative bodies, are still largely uncharted. Both educators and legal commentators have recently reflected serious skepticism about the educational results produced by the power-equalization formula.

The search for an acceptable method of school funding will undoubtedly continue to lead to the courts. The strength of the local interests in these claims, combined with the desirability of state experimentation, make it clear that the effect of *San Antonio Independent School District v. Rodriguez*,\textsuperscript{311}—effectively to foreclose federal involvement in the school finance dispute—has been a beneficial one. State court involvement should not, however, be similarly foreclosed by a reluctance to become involved in what is admittedly a complex and politically oriented dispute. A challenge to the constitutionality of existing funding arrangements initiates a dialogue among the branches of state government and a wide variety of affected interest groups; properly managed by the courts, that communication

\textsuperscript{310} See supra notes 193-200 and accompanying text. If the injunction had remained in effect as the September opening of schools approached, it is likely that the court would have taken further action. It is interesting to speculate whether the court would have ordered the more affirmative remedies put forward by Justice Pashman in *Robinson VI*, 70 N.J. 155, 166-78, 358 A.2d 457, 462-69 (Pashman, J., dissenting), or a more modest reallocation of existing appropriated funds.

\textsuperscript{311} 411 U.S. 1 (1973).
can ultimately prompt significant improvements in the education system.