EQUITY AND ADEQUACY IN CALIFORNIA SCHOOLS: A ROADMAP FOR A RETURN TO LITIGATION AS A MEANS OF SCHOOL FINANCE REFORM

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"Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship."[1]

I. INTRODUCTION

School finance litigation has been an instrumental and dynamic component of education reform in California and most states over the last four decades.[2] Prior to 1971, public schools in California were primarily financed by local taxes.[3] Under this system, voters determined the rate at which real property would be taxed within their district in order to finance their schools.[4] Because property tax values can vary widely among districts within the state, however, this system created severe inequalities in per-pupil expenditures among districts.[5] School finance litigators successfully challenged this system in 1971 under the equal protection provisions of the federal and California constitutions,[6] and then again in 1976 solely under the equal protection provisions of the California Constitution.[7] As a result of those landmark decisions, the California legislature was forced to design a new school financing system that relied primarily on state funds.[8] Section I of this paper traces the role litigation has played in shifting California's school finance system as it existed before 1971 to its modern form.

Concurrent with the California legislature's efforts to redesign the state's school finance system in the 1970s, Californians were also experiencing rising property taxes.[9] In 1978, voters revolted against

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

[2] *See generally* JON SONSTELIE ET AL., PUBLIC POLICY INSTITUTE OF CALIFORNIA, FOR BETTER OR FOR WORSE? SCHOOL FINANCE REFORM IN CALIFORNIA 33-37 (2000) (discussing early California and Illinois school finance litigation cases).

[3] *See id*. (thoroughly explaining California's system of school financing as it existed before 1971 and after the reforms of the 1970s).

[4] *See id*. at 1.

[5] *See, e.g., id*. at 31.

[6] *See* Serrano v. Priest (*Serrano I*), 5 Cal. 3d 584 (1971).

[7] *See* Serrano v. Priest (*Serrano II*), 18 Cal. 3d 728 (1976).

[8] *See, e.g.*, SONSTELIE, *supra* note 2, at 33.

[9] *See* SONSTELIE, *supra* note 2, at 51. Sonstelie explains that that housing prices rose sharply throughout the 1970s, which increased assessments and property taxes. To compound this problem for property owners, school districts were slow to reduce property tax rates to offset the increases. *Id.*

these tax increases and passed Proposition 13. This proposition was a voter initiative that amended the California Constitution by placing strong restraints on state and local governments' revenue-raising authority.[10] As a result of these restraints, public school budgets statewide have been severely strained. Not surprisingly, California has dropped in rankings of per-pupil expenditure and student performance in the decades since Proposition 13's passage.[11] Section II of this paper examines Proposition 13, the consequences of its passage, and whether the taxpayer revolt that led to Proposition 13 was the unfortunate and unintended outcome of the *Serrano* decision.

After the initial school finance litigation victories nationwide were brought under the equal protection clauses of the various state constitutions, reform litigators pressed forward in many states – although not in California – with another constitutional approach.[12] Under this approach, plaintiffs alleged that the state was failing to perform its obligations under the education clause of the state constitution.[13] These clauses vary from state to state and, therefore, may impose varying obligations on the state, but they generally mandate that the state establish a system of free schools that ensure an adequate education for all children.[14] Section III of this paper explores the issues that have arisen in these "adequacy" lawsuits in several states and concludes that there is a wide range of outcomes a court hearing this type of lawsuit might reach.

Finally, Section IV discusses the future of school finance litigation in California. Considering the success of adequacy challenges in the majority of states in which they have been heard, it is very likely that California will see such a lawsuit in the near future. Lawsuits brought under the state constitution's equal protection provisions,[15] however, have not been abandoned. Indeed,

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[10] *See generally* CAL. CONST. art. XIIIA, §§ 1-4.

[11] *See* William A. Fischel, *How* Serrano *Caused Proposition 13*, 12 J.L. & POL. 607, 613-15 (1996): *see also* SONSTELIE, *supra* note 2, at 121-122.

[12] *See* PAUL A. SRACIC, *SAN ANTONIO V. RODRIGUEZ* AND THE PURSUIT OF EQUAL EDUCATION: THE DEBATE OVER DISCRIMINATION AND SCHOOL FUNDING 132-140 (2006) (giving an overview of a number of states and their histories of school finance reform litigation).

[13] *See id.*

[14] *See id.*

[15] Article I, section 7 of the California Constitution provides, in pertinent part, "[a] person may not be . . . denied equal protection of the laws . . . ." Article IV, section

a 2004 class action settlement of one of these cases resulted in hundreds of millions of dollars in additional funding to the state's poorest schools.[16] In light of this victory, school finance reformers would be wise to carefully consider both equity and adequacy challenges when considering how to best address the problems facing the California school system today.

II. THE ROLE OF LITIGATION IN FORCING RADICAL CHANGES IN CALIFORNIA'S SCHOOL FINANCE SYSTEM

A. *Public School Financing in California Before 1971*

California's public school finance system has undergone a remarkable transformation since the California Supreme Court's landmark constitutional decision in *Serrano v. Priest* in 1971.[17] Prior to *Serrano*, California public schools were primarily locally financed, which means that school districts relied heavily on local property taxes to finance public education.[18] To illustrate, educational revenues for the 1968-69 school year came from the following sources: 55.7% from local property taxes, 35.5% in state aid, 6.1% from federal funds, and 2.7% from miscellaneous sources.[19]

Under this system, each school district taxed real property in its jurisdiction based on the assessed value of the property. Each district was free to set the tax rate for its jurisdiction, subject to a maximum rate established by the state legislature.[20] However, districts were permitted to exceed the maximum rate by a majority vote of the jurisdiction's electorate. In 1968-69, all but 11 of the state's 236 unified school districts had tax rates exceeding the maximum.[21]

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16 of the California Constitution provides, in pertinent part, "[a]ll laws of a general nature have uniform operation."

[16] *See* Christopher R. Lockard, *In the Wake of* Williams v. State*: The Past, Present, and Future of Education Finance Litigation in California*, 57 HASTINGS L.J. 385, 411 (2005),

[17] 5 Cal. 3d 584 (1971).

[18] SONSTELIE, *supra* note 2, at 1.

[19] *Serrano I*, 5 Cal. 3d at 591 n.2 (1971) (citing PUBLIC SCHOOL FINANCE, PART I: EXPENDITURES FOR EDUCATION LEGISLATIVE ANALYST 5 (1970)).

[20] SONSTELIE, *supra* note 2, at 11-12.

[21] SONSTELIE, 12-13. *See also Serrano I*, 5 Cal. 3d at 592 (1971) (noting that at that time nearly all districts had surpassed the statutory maximum in "tax override" elections).

Property taxes levied by school districts in 1968-69, which averaged 3.9% of the assessed value of real property, accounted for roughly 40% of total property taxes in California.[22] In total, California real property owners in 1969-70 were taxed at an average rate of 9.92% of the assessed value of their property.[23]

Because school districts were so reliant on local property taxes as a source of revenue, and because the total value of assessed property varied so widely among districts, the budgets of the various districts under this system were often very unequal.[24] To illustrate, if District A levies a 5% property tax on property assessed at $100,000, it generates $5,000 in revenue. If property in a neighboring district is also taxed at a 5% rate, but the property is assessed at $500,000, the district generates $25,000 in revenue. Thus, District B, solely by virtue of being in a wealthier area, is able to raise five times as much of this type of revenue as District A without placing any greater tax burden on its residents. Conversely, if District A wants to operate with a budget equal to that of District B, it must make the hard choice to increase its taxes by 500%. In other words, in order for the two hypothetical properties to generate $25,000 revenue for their respective districts, the property in District B can be taxed at 5% but the property in District A must be taxed at 25%. Passing such a burdensome tax referendum in relatively poorer areas – even if politically feasible – would likely have very unfavorable economic consequences in those communities.

B. *The First Wave Breaks in California:* Serrano I

Many commentators explain the history of educational reform litigation in the United States as having three distinct waves.[25] The initial wave, which focused on the U.S. Constitution's Equal Protection Clause, began in California in 1971 when the California Supreme Court issued its landmark ruling in *Serrano v. Priest*

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[22] SONSTELIE, 13.
[23] *Id.*
[24] *See* Lockard, *supra* note 16, at 387 ("For example, in 1969 San Francisco generated $1,063 per pupil in property taxes, while property taxes only generated $323 per pupil in Fresno.").
[25] *See, e.g.*, Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152 (1995) [hereinafter Heise, *State Constitutions*].

("*Serrano I*").[26] One set of plaintiffs in that case were Los Angeles County public school children that "represent[ed] a class consisting of all public school pupils in California, except children in that school district . . . [which] afford[ed] the greatest educational opportunity of all school districts within California."[27] The other set of plaintiffs were parents that purported to "represent a class of all parents who have children in the school system and who pay real property taxes in the county of their residence."[28] Together, these plaintiffs brought a class action against state and county officials charged with administering the financing of the California public school system.[29]

The *Serrano I* plaintiffs' first cause of action alleged a violation of the equal protection clauses of both the Fourteenth Amendment of the United States Constitution and the California Constitution.[30] In particular, plaintiffs alleged that as a result of California's public school financing scheme, which relied so heavily on local property taxes, "'substantial disparities in the quality and extent of availability of educational opportunities exist[ed] and [were] perpetuated among the several school districts of the State.'"[31] Moreover, plaintiffs alleged, the financing scheme made the quality of education "'a function of the wealth of [a particular child's] parents and neighbors, as measured by the tax base of the school district in which [the child] resided.'"[32] Finally, the plaintiff children alleged that the use of school districts as a unit for the differential allocation of educational funds, as well as the part of the financing scheme that allowed districts to retain and spend all of the property tax revenue it generated from within that district, did not bear a "reasonable relation" to the legislative purpose of providing education for all children within the state.[33]

The court began its opinion in *Serrano I* by examining the sources of public school financing and the extent to which the

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[26] 5 Cal. 3d 584 (1971).
[27] *Id.* at 589.
[28] *Id.*
[29] *Id.* at 589-90.
[30] *Id.* at 590.
[31] *Id.* at 590 (citing the plaintiff's complaint).
[32] *Id.* at 590, n.1 (citing the plaintiff's complaint).
[33] *Id*.

existing system resulted in funding disparities among districts.[34] It found that funds raised through local property taxes constituted the largest portion of school revenue and were "primarily a function of the value of the realty within a particular school district, coupled with the willingness of the district's residents to tax themselves for education."[35] The court's findings as to the extent of the disparities in the existing system were alarming. For example, the court noted that Baldwin Park Unified School District spent only $577.49 to educate each of its pupils in 1969-70, whereas the Pasadena Unified School District spent $840.19 per student and the Beverly Hills Unified School District spent $1,231.72.[36] The assessed valuation per child totaled $3,706, $13,706, and $50,885 in those three districts, respectively – a ratio of 1 to 4 to 13.[37] Thus, the court reasoned, any state grants intended to offset financing inequalities inherent in a system based heavily on widely varying local tax bases were clearly inadequate.[38] Furthermore, to demonstrate just how widely local tax bases varied, the court noted that in 1969-70, the assessed valuation per unit of average daily attendance[39] of elementary school children ranged from $103 to $952,156 – a ratio of nearly 1 to 10,000.[40]

Next, the court addressed whether a system that created such glaring disparities in school district budgets violates the equal protection provisions of the U.S. or state constitution.[41] In what later proved to be a problematic aspect of the court's analysis, the court expressly considered whether California's school financing system violated the *U.S.* Constitution – not necessarily the California Constitution. The court took the position, from which it later retreated in *Serrano II*,[42] that the equal protection provisions of the

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[34] *Id.* at 591-595.
[35] *Id.* at 592.
[36] *Id.* at 594.
[37] *Id*.
[38] *Id*.
[39] Average Daily Attendance ("ADA") is computed by adding together the number of students actually present on each school day and dividing that number by the number of days school was taught. *Id.* at 592, n.4. *Serrano I* notes that most school aid determinations are based on this unit. *Id.*
[40] *Id.* at 592 (citing PUBLIC SCHOOL FINANCE, PART I: EXPENDITURES FOR EDUCATION LEGISLATIVE ANALYST 7 (1970)).
[41] *Id*. at 596.
[42] *See* discussion *infra* Section I.E.

California Constitution are "substantially the equivalent of the *equal protection clause of the Fourteenth Amendment to the federal Constitution* . . . [and therefore its] analysis of plaintiffs' federal equal protection contention is also applicable to their claim under these state constitutional provisions."[43] The court proceeded to analyze the plaintiffs' equal protection claims using the framework and standards announced by the U.S. Supreme Court when it has addressed Fourteenth Amendment issues.

Despite rejecting the possibility that the California Constitution's equal protection provisions might resolve plaintiff's disputes differently than those of U.S. Constitution, the court left an incredible mark on all future education financing reform when it articulated the standard by which public school finance schemes were to be scrutinized under federal and state equal protection challenges. The court held that (1) public school financing deals intimately with education and thus touches upon a "fundamental interest,"[44] (2) the existing financing system classified entitlement to that fundamental interest on the basis of wealth,[45] a suspect classification,[46] and (3) the existing system did not withstand the requisite "strict scrutiny."[47] In other words, the court deemed that the state failed to demonstrate that the unequal provision of a fundamental interest on the basis of the wealth of one's community was "necessary to the attainment of any compelling state interest."[48]

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[43] *Serrano I*, 5 Cal. 3d at 596 n.11 (citation omitted).

[44] *Id.* at 608-09 ("We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating [education] as a 'fundamental interest.'") (citing Palmer v. Thompson, 403 U.S. 217 (1971)).

[45] *Id.* at 604.

[46] *Id.* at 597 ("'[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth . . . [a] factor which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.'" (alteration in original) (quoting McDonald v. Board of Elections, 394 U.S. 802, 807 (1969)).

[47] *Id.* at 614.

[48] *Id.* The state interest advanced by the state in support of the existing financing scheme was "to strengthen and encourage local responsibility for control of public education." *Id*. at 610. The Court addressed two possible aspects of this goal: (1) the granting to local districts of effective decision-making power over the administration of their schools, and (2) the promotion of local fiscal control over the amount of money to be spent on education. The Court rejected the first aspect because the existing financing system was not necessary for the district to be given

Accordingly, the court remanded the action to the trial court and directed that court, if plaintiffs' allegations were sustained at trial, to declare the state public school financing system invalid as in violation of state and federal constitutional provisions guaranteeing the equal protection of the laws.[49]

C. *After* Serrano I*, the U.S. Supreme Court Removes the Federal Constitutional Issue From School Finance Litigation in Rodriguez*

The *Serrano I* decision drew the immediate attention of litigators nationwide that were contemplating bringing education finance equalization actions in federal and state courts.[50] The emerging importance of this issue did not go unnoticed by the United States Supreme Court, and in 1973 that Court heard a suit brought by Texas plaintiffs that was similar to *Serrano I*. In that case, *Rodriguez v. San Antonio Independent School District*,[51] the Court declined to subject Texas's similar local property tax school financing scheme to the same strict judicial scrutiny that the California Supreme Court had applied to the California school financing system. It held that the wealth-based classification asserted by the plaintiffs was not a suspect classification for federal purposes,[52] nor was education a fundamental right protected by the federal constitution.[53] Accordingly, strict scrutiny was inapplicable, and the financing system was upheld as rationally related to that state's policy of local control of schools.[54] Thus, insofar as the *Serrano I* decision rested on

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control over decision-making power over the administration of schools. The Court also rejected the second aspect of the state's asserted interest, stating that the "fiscal freewill" articulated by the state was a "cruel illusion for poor school districts," refusing to agree "that Baldwin Park residents care less about education than those in Beverly Hills solely because Baldwin Park spends less than $600 per child while Beverly Hills spends more than $1,200. *Id.* at 611.

[49] *Id.* at 618-19.

[50] Isaac Martin, *Does School Finance Cause Taxpayer Revolt?* Serrano *and Proposition 13*, 40 LAW & SOC'Y REV. 525, 529 (2006); *see also* John G. Augenblick et al., *Equity and Adequacy in School Funding*, 7 THE FUTURE OF CHILDREN: FINANCING SCHOOLS 63, 67 (1997) ("During the 12 years between 1971 and 1983, some 17 state high courts ruled on the constitutionality of their state school finance systems.").

[51] 411 U.S. 1 (1973).

[52] *Id.* at 28.

[53] *Id.* at 35.

[54] *Id.* at 55.

federal equal protection grounds, *Rodriguez* clearly called that decision into question.

In addressing the federalism issues implicated in *Rodriguez*, the Court expressed a clear hesitancy to impose on a national level such far-reaching constitutional rules as plaintiffs sought, especially considering its lack of expertise and familiarity with the local problems and conditions that must be considered when designing a school finance system.[55] The equities that the Texas legislature weighed when designing the public school finance system – in particular, the benefits of local control of school financing on one hand, and unbalanced per-pupil financing among districts on the other – were issues the Court believed should be left for individual states to consider.[56] Because "experimentation" in school financing systems among the states was desirable in the Court's view, "the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints."[57]

The Court cited its lack of expertise and familiarity with the local problems that were "so necessary to the making of wise decisions with respect to the raising and disposition of public revenues" as a reason for its hesitancy to issue a constitutional rule with nationwide applicability.[58] Whether intended or not, this rationale provides strong justification for individual state courts, which are better positioned to understand those local problems within the state, to issue a statewide constitutional rule. Stated differently, while the Court in *Rodriguez* was hostile to the notion of imposing a broad constitutional rule on the entire nation, the Court's federalism concerns suggested the Court would not be opposed to individual states adopting that same rule on the basis of their respective state constitutions.

Indeed, Justice William Brennan, who authored a dissenting opinion in *Rodriguez*, admonished state courts (in a law review article published just four years after *Rodriguez*) to consider whether their state constitution affords a particular individual right, *especially*

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[55] *Id.* at 41.
[56] *Id.* at 42-43.
[57] *Id.* at 43.
[58] *Id.* at 41.

when the U.S. Supreme Court has declined to recognize that right.[59] According to Justice Brennan, "the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them."[60] In the wake of *Rodriguez*, Justice Brennan expressed concern that the U.S. Supreme Court, in the name of federalism, had done too much to limit the protective role of the federal judiciary.[61] Precisely for this reason, he encouraged state courts, "whose manifest purpose is to expand constitutional protections," to respond to diminished federal scrutiny by increasing their own.[62]

One of the enduring legacies of *Rodriguez* is that it spurred the expansion of the "judicial federalism" doctrine advocated by Justice Brennan.[63] In accord with this doctrine, which maintains that states retain the right to establish individual liberties more expansively than those conferred by the federal constitution,[64] a large majority of states since *Rodriguez* became involved in school finance litigation. As one commentator notes, the "phenomenon of judicial federalism [led to] three decades of piecemeal litigation [because][a]bsent a federal constitutional requirement, reformers were forced to reargue their basic legal positions repeatedly in each state."[65]

D. *The Legislative Response to* Serrano I *Aimed at Eliminating the Equal Protection Violations Inherent in the Existing System*

The California Supreme Court's momentous *Serrano I* decision also sparked an immediate flurry of legislative action to attempt to bring California's school finance system into *Serrano* compliance.

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[59] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977); *see also* SRACIC, *supra* note 12, at 124.
[60] Brennan, *supra* note 59, at 503. For a discussion regarding the impact of *Rodriguez* and Justice Brennan's article on the doctrine of "judicial federalism," *see* SRACIC, *supra* note 12, at 124-35, 132.
[61] Brennan, *supra* note 59, at 503.
[62] *Id*.
[63] *See* SRACIC, *supra* note 12, at 122 ("Indeed, the school funding cases that followed in the wake of *Rodriguez* are perhaps the best example of what has become known as 'judicial federalism.'").
[64] *See generally id*. at 123-24.
[65] *Id.* at 132.

The first pieces of legislation were Senate Bill No. 90 ("S.B. 90"), passed in 1972, and Assembly Bill No. 1267 ("A.B. 1267"), passed in 1973. Perhaps the most significant reform measure of S.B. 90 and A.B. 1267 was the creation of a "'revenue limit' system, [which] put a ceiling on the amount of general purpose money each district could raise."[66] This system created limitations on the maximum expenditures per pupil in each school district exclusive of revenue generated by "permissive overrides," which were the taxes, over the statutory maximum, that the majority of the electorate in a particular district imposed upon itself. Under this system, therefore, a district without a voted override was allowed to raise taxes at a rate no higher than would increase its expenditures per pupil by more than a permitted yearly inflation increase.[67]

E. *The Second Wave: Equal Protection Challenges Under State Constitutions*

After *Rodriguez*, school finance litigators and state judges in states such as California heeded Justice Brennan's call and, in the words of one commentator, "discovered" state constitutions. In 1976, the California Supreme Court in *Serrano II* again reviewed the California school finance system, this time against a landscape that had changed as a result of *Rodriguez* and the Legislature's reform measures. The most glaring difference between *Serrano I* and *Serrano II* is that the federal constitutional issue had been taken off the table as a result of *Rodriguez*.[68] The court pointed out, however, that *Serrano I* was not solely based on the provisions of the U.S. Constitution, but on the provisions of the state Constitution as well.[69] Perhaps recognizing that its analysis in *Serrano I* under the state equal protection clauses was meager at best (and potentially very problematic, as it essentially construed those provisions as the

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[66] MARY PERRY & BRIAN EDWARDS, EDSOURCE, LOCAL REVENUES FOR SCHOOLS: LIMITS AND OPTIONS IN CALIFORNIA 4-5 (2009), http://www.edsource.org/pub_local-revenues.html.

[67] For a detailed account of the effects of S.B. 90 and A.B. 1267 on California's school finance system, *see Serrano II*, 18 Cal. 3d 728, 743 (1976).

[68] *Id.* at 762 ("We . . . think it is clear that *Rodriguez* undercuts our decision in *Serrano I* to the extent that we held the California public school financing system (if proved to be as alleged) to be invalid as in violation of the *equal protection clause of the Fourteenth Amendment to the United States Constitution*.").

[69] *Id.*

equivalent of the Fourteenth Amendment's equal protection clause), the court in *Serrano II* evaluated the school financing scheme under California's constitutional standards much more thoroughly and independently.

Examining the new system, the court noted that while the changes brought about by the passage of S.B. 90 and A.B. 1267 were "significant," they "did not purport to alter the basic concept underlying the California public school financing system."[70] The court explained that concept, which it labeled the "foundation approach," as undertaking to ensure a certain guaranteed dollar amount for the education of each child in each school district and to defer to the individual school district for the provision of whatever additional funds it deems necessary to the furtherance of its particular educational goals.[71] Ultimately, despite the reform efforts of S.B. 90 and A.B. 1267, the court again held that California's school financing system must be subjected to strict judicial scrutiny because "it establishes and perpetuates a classification based upon district wealth which affects the fundamental interest of education[.]"[72] Because the state failed to establish that the classification in question was necessary to achieve a compelling state interest, the court held that the system still violated the equal protection provisions of the California Constitution.[73] The legislature was thus ordered to draw up a new system of school finance. As guidance, the court suggested that a system would be found constitutional if it equalized wealth-related expenditures across school districts to within $100 per pupil.[74]

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[70] *Id.* at 741.
[71] *Id.* at 741-42.
[72] *Id.* at 768.
[73] *Id.*; *see also* Butt v. State, 4 Cal. 4th 668, 681 (1992) ("Despite contrary federal authority, California constitutional principles require State assistance to correct basic 'interdistrict' disparities in the system of common schools, even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents.").
[74] *Serrano II,* 18 Cal. 3d at 750; *but see* Serrano v. Priest (*Serrano III*), 226 Cal. Rptr. 584, 603 (Cal. Ct. App. 1986) ("The $100 figure is not a point of law. It was neither necessary to the prior decision nor 'actually presented and determined' by the California Supreme Court [in *Serrano II*]. Most importantly, rigid adherence to a $100 standard will result in an unjust decision.").

In response to *Serrano II*, the legislature passed Assembly Bill 65 ("A.B. 65"). Governor Edmund Gerald "Jerry" Brown signed the bill in September 1977 and it was to take effect on July 1, 1978.[75] The legislature attempted in A.B. 65 to comply with the court's "$100-range" suggestion by: adding considerable aid to poorer districts, placing more severe limits on property-rich districts' spending, and transferring some of the property taxes raised in the property rich districts to the state for redistribution to the property poor districts.[76] Before A.B. 65 was ever implemented or challenged in court, however, voters passed Proposition 13 and effectively invalidated most of the bill's reforms.[77]

III. TAXPAYER REVOLT: CALIFORNIA VOTERS PASS PROPOSITION 13 IN THE WAKE OF *SERRANO II*

A. *Proposition 13 and Its Effects*

Serrano II was decided on December 30, 1976, and within months a major property taxpayer revolt was in motion. In December 1977, activists led by Howard Jarvis submitted a petition with 1.3 million signatures in favor of a constitutional amendment to limit local property tax levies throughout the state.[78] The proposed amendment, placed on the ballot as Proposition 13, would establish a 1% limit on the property tax rate for any purpose and a 2% limit on the annual increase in the assessed taxable value of any individual property.[79] Moreover, property could be revalued only upon a change of ownership, which often caused a substantial differential in property taxes assessed on similar properties that was based solely on the dates the properties were purchased.[80] Furthermore, Proposition 13 required a two-thirds majority of local voters to adopt special,

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[75] Fischel, *supra* note 11, at 611.
[76] *Id.* at 611.
[77] *See* PERRY & EDWARDS, *supra* note 66, at 5.
[78] Martin, *supra* note 50, at 529.
[79] *Id.*; Fischel, *supra* note 11, at 612. When Proposition 13 passed, these provisions were added to the California Constitution at article XIIIA, sections 1 and 2, respectively.
[80] LAWRENCE O. PICUS, CALIFORNIA SCHOOL FINANCE SYSTEM, 3 (2010), http://nces.ed.gov/edfin/pdf/StFinance/Californ.pdf.

non-property local taxes[81] and the state was forbidden from imposing new ad valorem taxes on real property,[82] which had previously been discussed as a way to comply with *Serrano*.[83] Proposition 13 was approved by an overwhelming majority (64.8%) of California voters on the June 1978 primary election ballot.[84]

Many commentators agree that the passage of Proposition 13 left California's public school finance system in major disrepair.[85] One obvious consequence of Proposition 13 is that the burden of school financing was shifted almost entirely from local governments to the state.[86] The result of this shift, which was coupled with the legislature's attempt to comply with *Serrano* and equalize funding, was that school spending as a whole in California drastically plummeted.[87] "California has steadily dropped in its ranking among the states in school spending per pupil since 1973[,]"[88] and California's 2005-06 per pupil expenditure of $614 was below the national average.[89] Average pupil-teacher ratio is among the highest of all states.[90] Furthermore, and probably not coincidentally, California has plummeted in various measurements of student performance in the decades since Proposition 13 was passed.[91]

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[81] When Proposition 13 passed, this provision was added to the California Constitution at article XIIIA, section 4.

[82] When Proposition 13 passed, this provision was added to the California Constitution at article XIIIA, section 3.

[83] Fischel, *supra* note 11, at 612; *see also* ASSEMBLY EDUCATION COMMITTEE, SERRANO/PRIEST STAFF TASK FORCE: SUMMARY OF FINDINGS 15 (1977) [hereinafter SERRANO TASK FORCE FINDINGS].

[84] Kirk Stark and Jonathon Zasloff, *Tiebout and Tax Revolts: Did* Serrano *Really Cause Proposition 13?*, 50 U.C.L.A. L. REV. 801, 807 n.27 (2003).

[85] *See, e.g.,* PERRY & EDWARDS, *supra* note 66, at 5; Fischel, *supra* note 11, at 613.

[86] Ninety percent of school district revenue is now controlled by the state. *See* SONSTELIE, *supra* note 2, at 1.

[87] SRACIC, *supra* note 12, at 134-35.

[88] Fischel, *supra* note 11, at 613.

[89] PERRY & EDWARDS, *supra* note 66, at 5. For a thorough analysis of the effect of the post-Proposition 13 financing system on average per-pupil spending, *see* SONSTELIE, *supra* note 2, at 89-104.

[90] Fischel, *supra* note 11, at 613.

[91] *Id*. For a detailed analysis of the effect of California's post-Proposition 13 state finance system on student achievement, *see* SONSTELIE, *supra* note 2, at 121-138. For example, Sonstelie notes that during the 1980s, student performance declined even after adjusting for changing student demographics, and that by the 1990s, California's test scores placed among the worst states in the country. *Id*. at 137.

Finally, Proposition 13, by virtually eliminating school district revenue growth, has also had the effect of eliminating local control over school funding.[92] In sum, Proposition 13 has had very adverse effects on: per-pupil expenditures, student achievement, and the degree of local control over school financing.

B. *Did* Serrano *Cause Proposition 13? Does It Even Matter?*

There is a robust debate among commentators as to whether the school finance equalization mandate of *Serrano* and *Serrano II* caused the taxpayer revolt that resulted in Proposition 13. One school of thought, led by William Fischel, contends that while taxpayers were willing to pay local property taxes to finance local schools, a majority of taxpayers were not willing to pay statewide property taxes that may or may not be redistributed to their local schools. According to Fischel, voters rationally expected that this would be a major consequence of *Serrano II*.[93]

This theory relies heavily on the Tiebout model of local public economics. According to the Tiebout model, when local governments are allowed to levy local property taxes, people can "vote with their feet" to choose a community that provides the optimal bundle of local public services, including education.[94] Thus, when the *Serrano* cases effectively prohibited individual school districts from funding schools at significantly higher levels than neighboring districts could, citizens were deprived of the opportunity to shop for a home in a district that spent the optimal amount on public education.[95]

Perhaps this deprivation would have been more palatable to taxpayers if they were assured that state and local governments alike could not tax their property, but this was not the rule under *Serrano*. Rather, the foreseeable consequence of the *Serrano* decisions was a shift from local to state property tax levies, and then a subsequent redistribution of that revenue such that all districts were in

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That report is careful to note, however, that although "the timing of the drop in test scores is suggestive," the decline "cannot necessarily be blamed on state finance. *Id*. at 137-38.

[92] PERRY & EDWARDS, *supra* note 66, at 5; Fischel, *supra* note 11, at 613.

[93] Fischel, *supra* note 11, at 615.

[94] *See id.*; Stark & Zasloff, *supra* note 84, at 811-12.

[95] Stark & Zasloff, *supra* note 84, at 813-14.

compliance with the *Serrano* equalization mandate. The clear losers in this system are property owners in wealthier areas because their public schools would be financed equally whether they stay in a wealthy area and pay high taxes, or move to a poorer area and pay low taxes.

Fischel contends that homeowners who, before *Serrano*, favored local property taxes as a means of school finance, anticipated that after *Serrano* there would be a surge in state-levied property taxes that probably would not be redistributed to their school district.[96] These concerns were not unfounded, as evidenced by a report by the state Assembly Education Committee released in January 1977.[97] In this report, the "Task Force on the Serrano/Priest Issue" presented several alternatives for *Serrano* compliance, including full state assumption of all costs of public education in grades K-12.[98] The Task Force estimated that this alternative would require an additional $4.2 billion annually in state revenues to replace local property tax revenues, which would be eliminated.[99] At the time, the state was already contributing $2 billion annually to finance education; thus, under the full state assumption plan, the state's annual burden would be $6.2 billion.[100] Determined to prevent this, Fischel argues, taxpayers revolted by drafting and overwhelmingly passing Proposition 13.[101]

There is an opposing school of thought, however, that explains Proposition 13 as an anti-tax backlash caused by rising property values and rising taxation concerns *generally*.[102] For example,

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[96] Fischel, *supra* note 11, at 615. Howard Jarvis, the initiative's coauthor and vocal proponent, warned voters that their property taxes would double or triple if they did not vote to limit taxes, and promotional mailings mimicked assessors' notices informing homeowners of the windfall they would receive if Proposition 13 passed. Martin, *supra* note 50, at 530.

[97] SERRANO TASK FORCE FINDINGS, *supra* note 83, at 15.

[98] *Id.*

[99] *Id.* at 17. The report notes that the $4.2 billion increase would have been equivalent to a 91 percent increase in the state sales tax or a 100 percent increase in the state personal income tax. *Id.*

[100] *Id.* at 16.

[101] *See, e.g.*, Fischel, *supra* note 11, at 617 ("In 1978, however, voters had no reason to continue to tax themselves at high property tax rates for school expenditures that the state supreme court insisted had to be funded as if the base of the property tax did not vary.").

[102] Martin, *supra* note 50, at 530.

Howard Jarvis, Proposition 13's outspoken co-author and proponent, rarely mentioned schools and other public services except when pressed on these issues by the initiative's opponents.[103] Likewise, the text of the amendment did not expressly address school financing or the sections of the state constitution that were at issue in *Serrano*. In other words, if the primary grievance of Proposition 13 proponents concerned the shift from local to state control of school financing, one would expect a proposed amendment to permit local property taxation for school financing.[104] Instead, the text of Proposition 13 concerned limitations on local property tax rates and limitations in increased property assessment. Thus, as one commentator notes, "[t]here is little qualitative evidence to suggest that voters saw any connection between *Serrano* and Proposition 13."[105] Rather, the discussion regarding Proposition 13 appeared to center more on rising tax assessments than on the distribution of school expenditures.[106] In short, "the campaign for Proposition 13 was a campaign for lower taxes."[107]

In total, there are strong arguments and credible empirical data supporting opposing answers to the question of whether *Serrano* caused Proposition 13. The authors cited above, among others, have thoroughly researched the issue, and it is beyond the scope of this paper to reach a conclusion as to which side is correct. Nevertheless, the mere fact that is it possible that court-ordered school finance equalization caused taxpayer revolt, and an anti-tax constitutional amendment in California, should be a sufficient warning to practitioners that the "unintended consequences" doctrine espoused by Fischel and others should not be dismissed lightly. This causation discussion is not merely a warning to litigators in other states who are considering bringing an equalization challenge like *Serrano*. It is also a warning to California school finance litigators to consider

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[103] *Id.* ("The proponents of tax limitation were generally silent about the distributional consequences of their measure for education and other spending programs.").
[104] *See id.* at 531.
[105] *Id.* at 530. Martin suggests that Jarvis was wholly unconcerned with *Serrano* and school finance equalization, noting that Jarvis did not mention *Serrano* or the issue of school finance equalization once in his 300-page memoir, which was mostly devoted to the Proposition 13 campaign. *Id.* at 531.
[106] *Id.* at 530.
[107] *Id.* at 531.

whether contemplated constitutional challenges to the state's education system are liable to trigger adverse electoral or legislative reactions that might undermine any gains achieved in the courtroom.

IV. THE THIRD WAVE: ADEQUACY CHALLENGES

A. *A New Strategy Emerges in Other States*

Although school finance litigation relying on the equal protection provisions of state constitutions remains a viable reform strategy,[108] a new strategy emerged in several states in 1989. In those cases, school finance litigators alleged that the state's current financing system was inadequate to provide an education of sufficient quality as mandated by the state's constitution. All state constitutions have some form of education clause mandating that the state maintain a system of free public education, although the language of these clauses varies widely and courts have interpreted them to impose differing obligations on the state.[109] In states like California, where the Supreme Court has not had occasion to determine the extent of the guarantee in the education clause, examining the text of the clause is a helpful first step in determining the obligations that clause imposes on the state.

Commentators note that the education clauses of state constitutions can be separated into four categories based on the text of the clause.[110] Category I education clauses impose the minimal education obligation on a state.[111] An example of this type of education clause can be found in Oklahoma's constitution,[112] which provides that "[t]he legislature shall establish and maintain a system

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[108] *See, e.g.*, Complaint for Injunctive and Declaratory Relief, Williams v. State, No. 312236 (Cal. Super. Ct., S.F. County, filed May 17, 2000).

[109] Michael Heise, *Education and the Constitution: Shaping Each Other and the Next Century: Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 90-1 (2000) [hereinafter Heise, *Education and the Constitution*].

[110] *See, e.g.*, William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance*, 75 VA.L. REV. 1639, 1661 (1989) [hereinafter Thro, *To Render Them Safe*]. Although several commentators use this framework to distinguish various education clauses, Thro credits Erica B. Grub, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 66-70 (1974).

[111] *See* Thro, *To Render Them Safe*, *supra* note 110, at 1661-62.

[112] *Id.* at 1662, n.107.

of free public schools wherein all the children of the state may be educated."[113] Education clauses in this category are distinct from other education clauses in that there is no mention of a minimum standard of quality of education; all that is required is the establishment of free schools.[114] Thus, as long as the state has provided a system of free schools, a plaintiff's challenge as to the adequacy of that education is nearly certain to fail.[115]

Category II education clauses mandate the establishment of a system of public schools that meets a certain minimum standard of quality, and thus are much more useful to school finance plaintiffs.[116] A typical example of a Category II education clause is found in Pennsylvania's constitution, which provides that "[t]he General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth."[117] Several state courts have required school finance reform on the basis of a violation of this type of constitutional mandate.[118]

Education clauses in the third category are distinguishable from the previous two types of clauses by their "stronger and more specific education mandate and purposive preambles."[119] Due to California's purposive preamble, which reads, "[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people,"[120] it's education clause is typical of this category. Furthermore, this clause is bolstered by

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[113] OKLA. CONST. art. XIII, § 1.

[114] Thro, *To Render Them Safe*, *supra* note 110, at 1662, n.107; *but see* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: the Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 606, n.61 (1994) [hereinafter Thro, *Judicial Analysis During the Third Wave*] (noting that the Category I clauses in the Massachusetts and Tennessee constitutions have been interpreted as imposing a quality standard).

[115] *See* Thro, *To Render Them Safe*, *supra* note 110, at 1662 ("[T]hese clauses have proven useless as vehicles for public school finance reform.").

[116] *Id.* at 1663.

[117] PA. CONST. art. III, § 14.

[118] *See, e.g.*, Rose v. Council for Better Education, 790 S.W.2d 186, 211-12 (Ky. 1989) (interpreting a mandate for an "efficient" education to mean that state must provide each student with an education designed to meet seven broad goals).

[119] Thro, *To Render Them Safe*, *supra* note 110, at 1666 (citations omitted).

[120] CAL. CONST. art. IX, § 1.

section 5 of Article IX, which unequivocally requires the legislature to provide a system of public schools.[121]

The fourth and textually most stringent type of education clause explicitly describes education as a "primary," "fundamental," or "paramount" duty of the state legislature.[122] Illinois's constitution is illustrative of this type of education clause.[123] Textually, Category IV clauses impose the greatest obligation on the state to provide an adequate education,[124] and, therefore, a plaintiff's victory appears more likely in states with such clauses.[125] Cautious plaintiffs will bear in mind, however, that because each state independently interprets its own constitution,[126] plaintiffs are not guaranteed a judicial victory simply by invoking the state's Category III or IV education clause. Nevertheless, despite the uncertainty inherent in independent state constitutional interpretation, evaluating the text of a state's education clause within this framework may be insightful when considering whether to bring an adequacy challenge in states where the courts have yet to define the scope of that guarantee.

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[121] CAL. CONST. art. IX, § 5 ("The Legislature shall provide a system of common schools by which a free school shall be kept up and supported in each district . . . .").

[122] *See* Heise, *Education and the Constitution*, *supra* note 109, at 91.

[123] *See* ILL. CONST. art. X, § 1 ("A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services . . . .").

[124] *See e.g.*, Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 91 (Wash. 1978) ("Therefore all children residing within the borders of the State possess a 'right,' arising from the constitutionally imposed 'duty' of the State, to have the State make ample provision for their calculation . . . . Consequently, all children residing within the State's borders have a right to be amply provided with an education); *but see* Blase v. State, 302 N.E.2d 46, 49 (Ill. 1973) (holding that Illinois' seemingly strong education clause was not intended to impose a specific obligation on the legislature, but "[r]ather its purpose was to state a commitment, a purpose, a goal.").

[125] Thro, *Judicial Analysis During the Third Wave*, *supra* note 114, at 606-07.

[126] *See, e.g.*, Alderwood Assoc. v. Washington Envtl. Council, 635 P.2d 108, 113 (Wash. 1981) ("State courts are obliged to determine the scope of their state constitutions due to the structure of our government."); *see also* Baker v. Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970) ("[W]e are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language.").

B. *Although Generally Successful, the Treatment of Adequacy Challenges in State Courts Varies Widely*

Beyond merely examining the text of the state's education clause, a litigator contemplating bringing an adequacy challenge for the first time in a state, such as in California, must also evaluate the successes and failures of similar challenges in other states. While certainly not comprehensive, the review of several adequacy-based lawsuits presented below provides a glimpse of several of the possible outcomes if an adequacy challenge was brought in California.

Most commentators agree that the third wave of school finance litigation – lawsuits alleging that the state has provided inadequate funding to support an education as mandated by the state constitution – began in 1989 in Kentucky and Montana.[127] In *Rose v. Council for Better Education*,[128] the Kentucky Supreme Court considered whether the state's school finance system was sufficient to provide an "adequate education" as required by the Kentucky Constitution. The court interpreted the state's education clause[129] to require an adequate education – one that had the goal of developing each child in seven basic capacities.[130] After noting that Kentucky ranked fortieth among the states in per-pupil spending and thirty-seventh in average teacher salary, the court held that "the entire system of common schools is unconstitutional," including the state's school finance system.[131] The court directed the General Assembly to "re-create and re-establish a system of common schools,"[132] and the

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[127] Helena Elem. Sch. Dist. v. Montana, 769 P.2d 684 (Mont. 1989).

[128] Rose v. Council for Better Educ. Inc., 790 S.W.2d 186 (Ky. 1989).

[129] KY. CONST. § 183 ("The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State"). Using the framework discussed above, this is a Category II education clause.

[130] *Rose*, 790 S.W.2d at 212 ("[A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills . . . ; (ii) sufficient knowledge of economic, social, and political systems . . . ; (iii) sufficient understanding of governmental processes . . . ; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts . . . ; (vi) sufficient training . . . in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient . . . skills to enable public school students to compete favorably . . . in the job market.").

[131] *Id.* at 215.

[132] *Id.* at 214.

General Assembly swiftly complied.[133] Since *Rose*, several state courts have followed the Kentucky Supreme Court's lead and taken a proactive role in reshaping the state's education system by sketching out the necessary components of an adequate education.[134]

The history of adequacy-based litigation in Massachusetts is instructive because it demonstrates that state courts might assume a more deferential role than the Kentucky court. In 1993, the Massachusetts Supreme Judicial Court held that the state's existing educational system did not provide an adequate education as required by the Massachusetts Constitution.[135] The court held that an adequate education for purposes of the education clause of the Massachusetts Constitution will comply with the seven core guidelines articulated by the Kentucky Supreme Court in *Rose*.[136]

Although the legislature passed a reform act three days later that sharply reduced the system's reliance on property wealth and established standards and accountability measures,[137] a trial court found in April 2004 that districts were not implementing the reform measures and students were still not receiving a constitutionally adequate education.[138] Furthermore, the trial judge found that existing finance structure was insufficient to provide an education that met the constitutional adequacy standard.[139] For this reason, she

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[133] *See* Heise, *State Constitutions*, *supra* note 25, at 1164 (noting that many observers described the new legislation as among the "nation's 'most far-reaching' state educational reform efforts"). "(citation omitted).

[134] *See, e.g.*, Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997). Indeed, the New Hampshire Supreme Court expressly adopted the *Rose* criteria. It said, "We look to the seven criteria articulated by the Supreme Court of Kentucky as establishing general, aspirational guidelines for defining educational adequacy." *Id.* at 1359.

[135] McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993).

[136] *Id.* at 554 ("The guidelines set forth by the Supreme Court of Kentucky fairly reflect our view of the matter and are consistent with the judicial pronouncements found in other decisions.").

[137] *See* Lockard, *supra* note 16, at 401. *See generally* "Education Reform Act," MASS. ANN. LAWS ch. 70-71 (LexisNexis 2011).

[138] Hancock v. Driscoll (*Hancock I*), No. 02-2978, 2004 WL 877984 *5 (Mass. Super. Ct., Apr. 26, 2004).

[139] *Id.* at *8.

recommended the state conduct a costing-out study to determine the actual cost of a constitutionally adequate education.[140]

Upon review, however, the Supreme Judicial Court declined to adopt the recommendations of the trial judge.[141] This court rejected the trial court's assessment that the state was failing to meet its obligations under the education clause of the Massachusetts Constitution,[142] and therefore not only declined to recommend the costing-out study, but also terminated the court's ongoing jurisdiction and disposed of the case entirely.[143] While affirming that the court was not retreating from its position that the education clause guaranteed a minimum standard of quality, Chief Justice Margaret Marshall nevertheless explained that the question of how much money was needed to meet this standard was a "detail[] of educational policymaking" that is to be left to the governor and legislature.[144] This deference to the legislature marked a clear break from the active role that Kentucky and other states had taken in guiding the legislature's remedial response to the constitutional violation.

Similar deference and movement away from the *Rose* model can be seen in Texas. In fact, in Texas, unlike in Massachusetts, the state Supreme Court held that the state failed to meet its constitutional burden under the education clause.[145] Nevertheless, the court expressly declined to provide structural guidance like the *Rose* court provided for the Kentucky legislature, nor did it mandate the legislature to raise taxes to remedy the violation.[146]

Adequacy litigation in Rhode Island shows that plaintiffs also risk the court declining to even consider an adequacy clause on the

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[140] *Id.*

[141] Hancock v. Comm. of Educ. ("*Hancock II*"), 822 N.E.2d 1134, 1136-37 (Mass. 2005).

[142] MASS. CONST. pt II, ch. 5, § 2.

[143] *Hancock II*, 822 N.E.2d at 1136-37.

[144] *Id.* at 1153 (Marshall, C.J., concurring); *see also id*. at 1160 ("[T]he Commonwealth (not this court) must 'devise a plan and sources of funds sufficient to meet the constitutional mandate.'") (Cowin, J., concurring) (quoting McDuffy v. Secretary of Executive Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993)).

[145] Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 398 (Tex. 1989).

[146] *Id.* at 399 ("[W]e do not now instruct the legislature as to the specifics of the legislation it should enact; nor do we order it to raise taxes. The legislature has the primary responsibility to decide how to best achieve an efficient system.").

merits, holding instead that the claim raises a nonjusticiable political question.[147] Seven states have reached this conclusion.[148] In most instances in which other state courts have invoked the political question doctrine in this context, the court has cited a specific criterion of the U.S. Supreme Court's *Baker v. Carr*[149] test: that the courts lack "judicially discoverable and manageable standards" to assess the adequacy of the state's schools.[150]

To summarize, plaintiffs have been remarkably successful in lawsuits alleging that the state is failing to perform its constitutional duty to provide an adequate education. In states with strong education clauses, textual arguments referring to that clause may bolster plaintiffs' position that the constitutional mandate imposes a broad range of obligations on the state. Nevertheless, several state courts have been hesitant to wade to educational policymaking, even where they have held the state's system violates the education clause. Moreover, several states have determined as a threshold matter that adequacy claims raise political questions that the court will not resolve. These various scenarios demonstrate that courts have a wide range of options when hearing an adequacy challenge, and therefore school finance litigators must contemplate a wide range of potential outcomes when deciding whether to file this type of lawsuit.

V. WAITING FOR THE NEXT WAVE IN CALIFORNIA

School finance litigators in California have several options as they decide how to challenge the current educational system, including the way in which it is financed. The remainder of this paper examines arguments for and against future equity or adequacy

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[147] *See* City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995).

[148] Christine M. O'Neill, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims*, 42 COLUM. J.L. & SOC. PROBS. 545, 547 (2009). The seven states are Illinois, Oklahoma, Pennsylvania, Nebraska, Florida, Alabama, and Rhode Island. *Id*.

[149] 369 U.S. 186, 217 (1962).

[150] O'Neill, *supra* note 148, at 547, citing Baker v. Carr, 369 U.S. 186, 217 (1962). *See, e.g.*, *Sundlun*, 662 A.2d at 58-59 (stating that no judicially enforceable standards exist under the state's education clause and that the "proper forum for [the deliberation of what constitutes an appropriate education] is the General Assembly, not the courtroom."). *See generally* O'Neill, *supra* note 148, for a thorough discussion of the political question doctrine and *Baker v. Carr* as applied to adequacy challenges in state court.

litigation, particularly in light of the recently settled *Williams v. California*[151] case.

A. *Is Riding the Adequacy Wave into California a Prudent Strategy?*

As discussed above, there has not been a *Rose*-like adequacy challenge in California; that is, plaintiffs have yet to seek the invalidation of the entire California public school system on the grounds that the state is failing to provide an education that satisfies the minimum constitutional standard of adequacy.[152] Although there are some potential hurdles and risks, bringing an adequacy challenge in California is appealing for several reasons.

First, California's education clause is textually very advantageous to plaintiffs. Article IX, section 1 of the California Constitution, fits into one of the strongest categories of state constitutional education clauses due to its purposive preamble that leaves no doubt as to the high value Californians place on education. That clause, along with article IX, section 5,[153] which unequivocally mandates that the legislature provide a system of free public schools,

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[151] Williams v. State, Complaint for Injunctive and Declaratory Relief, No. 312236 (Cal. Super. Ct., filed May 17, 2000). A First Amended Complaint was subsequently filed. *See* First Amended Complaint, Williams v. State, No. 312236 (Cal. Super. Ct., filed Aug. 14, 2000), *available at* http://www.decentschools.org/courtdocs/01FirstAmendedComplaint.pdf.

[152] To be sure, *Williams*, supra note 151, discussed below, clearly borrows themes from the adequacy line of cases and invokes the education clause of the California Constitution. The thrust of the plaintiffs' allegations in *Williams*, however, is that because the state has a duty to provide an education to all children, it must provide that entitlement equally, which it has failed to do. For this reason, the issue in *Williams* is more of an equal protection issue, and thus it more closely resembles the equity line of school finance cases.

Butt v. State, 4 Cal. 4th 668 (1992) also bore certain resemblances to an adequacy challenge. *See, e.g.*, *id.* at 680 (citing the "constitutional command[s]" of Article IX, which reveal that "[s]ince its admission to the Union, California has assumed specific responsibility for a statewide public education system"). Plaintiffs in that case alleged that if the state was to permit a district to close a school six weeks early, the state would have deprived students in that school of "basic educational equality" in violation of the California Constitution's equal protection provisions. *Id.* at 692. Thus, *Butt*, like *Williams*, is better characterized as an equity challenge.

[153] CAL. CONST. art. IX, § 5 ("The legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district . . . .").

provides plaintiffs a strong textual argument that the California Constitution imposes broad educational obligations upon the state.

A second advantage is that state judges may prefer to decide a case, where possible, on basis of the state's education clause rather than the equal protection clause due to the far-reaching implications of equal protection decisions.[154] Education adequacy decisions narrowly focus on the direct constitutional mandate of the education clause, whereas equity cases indirectly reach the issue of education financing by way of the equal protection clause. Accordingly, there is the risk that a constitutional decision on equal protection grounds might later be applied in a similarly indirect fashion when other entitlements are at issue.[155]

Third, plaintiffs have enjoyed a large statistical advantage in adequacy challenges over the past two decades as opposed to equity challenges, particularly when the adequacy issue has been reached on the merits. In 2009, one commentator noted that no state high court had an adequacy holding against plaintiffs on the merits.[156] Another has claimed that 17 of the 18 plaintiffs' victories in school finance cases between 1990 and 2001 involved "substantial or partial adequacy considerations."[157] The National Access Network, which maintains statistics on judicial and legislative action regarding school financing, reported that as of January 2006, plaintiffs had recorded

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[154] *See* O'Neill, *supra* note 148, at 553-54; *see also* Heise, *State Constitutions*, *supra* note 25, at 1175.

[155] *See* O'Neill, *supra* note 148, at 553; *see also* Robinson v. Cahill, 303 A.2d 273, 283 (N.J. 1973) ("We hesitate to turn this case upon the State equal protection clause. The reason is that the equal protection clause may be unmanageable if it is called upon to supply categorical answers in the vast areas of human needs, choosing those which must be met and a single basis upon which the State must act."); *see also* MICHAEL A. REBELL, EDUCATIONAL ADEQUACY, DEMOCRACY AND THE COURTS (2001), *reprinted in* ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL CONFERENCE SUMMARY 218, 230 (Timothy Ready et al. eds., 2002), available at: http://www.schoolfunding.info/resources_center/research/adequacychapter.pdf ("As a matter of legal doctrine, adequacy avoids the slippery slope problem that concerned the U.S. Supreme Court in *Rodriguez*.").

[156] O'Neill, *supra* note 148, at 545.

[157] Rebell, *supra* note 155, at 230. Rebell points out that some state courts that have declined to invalidate school finance systems might have decided otherwise if an adequacy claim had been raised instead of an equity claim.

victories in adequacy lawsuits in twenty-one of twenty-five states.[158] Thus, although some commentators have reached slightly different conclusions as to the number of state courts that have reached adequacy decisions and the number of those cases in which plaintiffs have prevailed, the broader conclusion is clear: adequacy challenges have been remarkably successful in state courts nationwide since 1989.

However, there are also several challenges and risks that accompany bringing an adequacy-based lawsuit in California. First, plaintiffs risk the court refusing to consider the claim on the merits by finding that it is a nonjusticiable political question. Furthermore, even if the court determines that it may reach the adequacy issue on the merits, the Massachusetts and Texas examples demonstrate that the court might afford significant deference to the legislature and decline to issue the broad *Rose*-like remedy that plaintiffs would prefer. This should be a particularly acute concern among school finance litigators in California, a state with severe budgetary problems stemming in part from the revenue-raising constraints of Proposition 13.

Another challenge facing plaintiffs and courts in adequacy challenges is the threshold determination of how "adequacy" is to be defined and measured. In particular, should courts adopt an "ex ante"[159] or "input"[160] perspective, whereby the proxy measurement for adequacy is the amount of resources that are directed into the educational system? Or should courts adopt an "ex post"[161] or "output"[162] perspective, whereby the adequacy standard is only satisfied if the schools achieve established performance goals? The difficult choice of which perspective to adopt, followed in either case by the secondary question of how to measure "adequacy," provides

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[158] ACCESS, SCHOOL FUNDING "ADEQUACY" DECISIONS SINCE 1989 (2006), http://www.schoolfunding.info/litigation/adequacydecisions12-7-04.pdf. These figures reflect either the decision of the state's highest court or lower court decision that has not been appealed.

[159] *See* Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine*, 33 LAND & WATER L. REV. 281, 307 (1998) [hereinafter Heise, *Schoolhouses, Courthouses, and Statehouses*].

[160] *See* Lockard, *supra* note 16, at 417.

[161] Heise, *Schoolhouses, Courthouses, and Statehouses*, *supra* note 159, at 307.

[162] Lockard, *supra* note 16, at 417.

yet more temptation for a court to either invoke the political question doctrine or afford substantial deference to the legislature to craft a remedy, as discussed above. Thus, potential plaintiffs in California run the genuine risk of a California court following the lead of the Rhode Island Supreme Court in *Sundlun*. There, the court declined plaintiffs' requests for the court to create judicially enforceable standards under the state's education clause, stating that no such standards exist and that the "proper forum for [the deliberation of what constitutes an appropriate education] is the General Assembly, not the courtroom."[163]

Finally, prudent school finance litigators will be sure to consider the "unintended consequences doctrine" discussed above. Fischel's theory that judicial civil rights victories are liable to trigger adverse legislative or electoral reactions raises serious implications for the potential effects of a successful adequacy challenge. Namely, one ought to consider the potential political ramifications of a state court invalidating the entire school system and ordering a restructured system that complies with a set of guidelines, which occurred in Kentucky with *Rose*. Just as California voters revolted against anticipated tax increases after *Serrano* and passed Proposition 13, it is not unforeseeable that voters, predicting that only a very expensive system would satisfy the court's guidelines, would amend the state's constitution to redefine and lower the minimum standard of education the state is obligated to provide. Such a consequence at the ballot box would clearly offset any gains achieved in the courtroom.

B. *Equity Challenges: Successful New Variations on a Traditional Theme*

1. The *Williams v. California* Case

Another option available to school finance litigators is to argue, as the plaintiffs successfully argued in *Serrano*, that California's public school financing system creates financing disparities on the basis of district wealth. *Serrano III*,[164] however, demonstrates why it is now difficult for plaintiffs to prevail using the traditional equity approach. In that case, the court was tasked with deciding whether the school finance system, as it existed in 1983, complied with

[163] City of Pawtucket v. Sundlun, 662 A.2d 40, 58-59 (R.I. 1995).
[164] Serrano v. Priest (*Serrano III*), 226 Cal. Rptr. 584 (Cal. Ct. App. 1986).

Serrano II's requirement that wealth-related disparities in per-pupil expenditures be reduced to insignificant differences.[165] The court noted that the legislature had made extensive changes to the school finance system as a result of *Serrano* and *Serrano II*.[166] Although the system was repeatedly refined by legislation between 1977 and 1982 in order to bring the system into *Serrano* compliance, the plaintiffs alleged that wealth-related disparities in per-pupil expenditures still existed in 1983.

In what proved to be devastating to the plaintiffs' claim, the *Serrano III* court applied rational basis scrutiny because the existing system drew distinctions based on the size and type of school districts, which were not suspect classifications, unlike wealth in *Serrano II*.167 Under such scrutiny, the court upheld the trial court's finding that "the Legislature has done all that is reasonably feasible to reduce disparities in per-pupil expenditures to insignificant differences."[168] The court remarked that although the system was not the only option available to the legislature in response to *Serrano*, it was "the most effective plan for coping with Proposition 13, the *Serrano* mandate, and a state fiscal crisis."[169]

Equity challenges have also taken on a slightly different form, however, as seen in *Williams v. State*, which settled before trial in 2004.[170] *Williams* was a class action lawsuit filed in 2000 by students from forty-six schools in nineteen districts throughout the state, including Oakland, San Francisco, Fresno, Visalia, and Los Angeles County.[171] Most of the plaintiffs' schools consisted of a majority of non-white students; thirty percent of the students were still learning

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[165] *Id.* at 590.
[166] *Id.* at 591-600.
[167] *Id*. at 605-06 ("Although *Serrano* is cited on occasion for the general proposition that education is a fundamental right, only cases involving both that right *and* a suspect classification such as wealth or race have been subjected to strict scrutiny by California courts." (citations omitted)).
[168] *Id*. at 604.
[169] *Id*. at 620.
[170] *See generally* Notice of Proposed Settlement Filed By Plaintiffs, Williams v. State, No. 312236 (Cal. Super. Ct., S.F. County, filed Aug. 13, 2004), *available at* http://www.decentschools.org/settlement/williams_notice_settlement.pdf.
[171] *See* Lockard, *supra* note 16, at 403; Jeannie Oakes & Martin Lipton, "*Schools that Shock the Conscience*": Williams v. State *and the Struggle for Education on Equal Terms Fifty Years After* Brown, 11 ASIAN L.J. 234, 236 (2004).

English.[172] More than half of the students at most of their schools were eligible for free or reduced-price meals at school.[173]

Plaintiffs alleged in *Williams* that the school system violated the California Constitution's equal protections provisions[174] because it failed to provide members of the class with basic educational opportunities.[175] In particular, the plaintiffs alleged that that they were not provided equal access to educational personnel, materials, and facilities that were on par with those available to other students in California.[176]

The First Amended Complaint, consisting of 328 paragraphs over 77 pages, painfully details the squalid conditions of the plaintiffs' schools.[177] For example, at Balboa High School in San Francisco, which had 1,200 students, there was only one bathroom, with four stalls, open for girls to use.[178] Moreover, that bathroom was filthy; "[a] soiled feminine napkin and a moldy ice cream bar remained in one of the stalls in the girls' bathroom for the entire 1999-2000 school year."[179] Moreover, "that school was also infested with mice, and students regularly saw mice in the gym and in their classrooms."[180] The bathrooms at Wendell Helms Middle School in San Pablo seemed to be in equally poor condition, as they were allegedly "regularly strewn with used condoms, cigarette butts, and empty liquor bottles."[181]

Conditions in the classrooms mirrored those of the bathrooms. Many students at John F. Kennedy High School in Richmond, for

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[172] First Amended Complaint, Williams v. State, No. 312236, ¶ 2 (Cal. Super. Ct., filed Aug. 14, 2000), *available at* http://www.decentschools.org/courtdocs/01FirstAmendedComplaint.pdf.
[173] *Id*.
[174] CAL. CONST. art I, § 7(a) and CAL. CONST. art. IV, § 16(a).
[175] *See Williams*, First Amended Complaint, ¶ 2.
[176] *See, e.g.*, *id*., ¶¶ 65, 77; *see also* CALIFORNIA DEPARTMENT OF EDUCATION, THE *WILLIAMS* CASE – AN EXPLANATION, http://www.cde.ca.gov/eo/ce/wc/wmslawsuit.asp (last visited Apr. 12, 2010) ("[T]he basis of the lawsuit was that the agencies failed to provide public school students with equal access to instructional materials, safe and decent schools facilities, and qualified teachers.").
[177] *Id*.
[178] *Williams*, First Amended Complaint, ¶ 92.
[179] *Id.*, ¶ 92.
[180] *Id.*, ¶ 89.
[181] *Id.*, ¶ 100.

example, allegedly did not have "a formal, long-term teacher for the entire year," and instead were taught by a "series of substitutes" that sometimes stayed for as "short as one day."[182] Students at Fremont High School were often forced to stand during class because there were not enough seats – especially in the classes of 65 students for which only 30 seats were available for weeks at a time.[183] Wendell Holmes Middle School, like so many of the plaintiffs' schools, did not have nearly enough textbooks for all the students in the school. Indeed, one algebra class allegedly had no books at all – not even books for students to use in class.[184] The *Williams* complaint is replete with allegations of this nature, leading plaintiffs to conclude that the California school system, including the way in which it is financed, requires "too many California school children . . . [to] go to schools that shock the conscience."[185]

The *Williams* suit settled before trial, and the terms of the settlement reflect a significant victory for the plaintiffs and school finance reformers. The California Department of Education reports that the state is obligated under the settlement to allocate: $138 million in additional funding for standards-aligned instructional materials for schools in the first and second ranks (or "deciles"), $50 million for implementation costs and other oversight-related activities for schools in deciles one through three, and $800 million for critical repair of facilities in future years for schools in deciles one through three, among other obligations.[186] The settlement will benefit an estimated 2.3 million California public school students.[187] Thus, in light of the enormous increase in financing guarantees secured by the terms of the settlement and the fact that millions of California school children stand to benefit from these additional funds, *Williams* was an extremely successful lawsuit.[188]

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[182] *Id.*, ¶ 102.
[183] *Id.*, ¶ 107.
[184] *Id.*, ¶ 98.
[185] *Id.*, ¶ 1.
[186] *See* CALIFORNIA DEPARTMENT OF EDUCATION, THE *WILLIAMS* CASE – AN EXPLANATION, *supra* note 177.
[187] *Id.*
[188] Of course, implementation of the settlement agreement is likely to raise a new set of problems, particularly given California's strained fiscal condition. *See* William A. Koski, *Achieving Adequacy in the Classroom*, 27 B.C. THIRD WORLD L.J. 13, 40-44 (2007) for a thorough discussion of the implementation and

2. Will Equity Challenges Remain a Viable and Prudent Reform Strategy in California?

The *Serrano* cases and *Williams* suggest the potential advantages and disadvantages or risks of bringing future equity-based school finance litigation in California. The *Serrano* strategy of alleging an equal protection violation as a result of unequal school financing on the basis of district wealth was clearly a successful strategy in California and in states nationwide. However, the California legislature has gone to great lengths in the last forty years to eliminate those wealth-based disparities, and *Serrano III* shows that traditional equity challenges to the reformed school financing system are unlikely to succeed.

On the other hand, by shifting the equal protection focus to the equal supply of facilities, materials, and accredited teachers, *Williams* seems to have breathed new life into equity challenges. As long as the state is failing to provide conditions and supplies on an equal basis to students in all districts statewide, a potential equity claim is ripe.

Although the success of *Williams* certainly makes that type of lawsuit an attractive option, there are still several potential problems to consider. For one, plaintiffs and courts involved in an equity challenge face the difficult question of how to measure "equity." This problem is less pronounced in the context of traditional school finance equalization cases such as the *Serrano* cases. In that type of case, the issue is whether the state's financing system permits significant per-pupil expenditure disparities among districts on the basis of district wealth. Even though courts have struggled to precisely define what constitutes a significant expenditure disparity between districts,[189] per-pupil expenditure is a quantifiable variable that can be accurately discovered and compared across districts. Thus, once a court settles upon the degree of variation among districts that is constitutionally permissible, its task in determining whether the financing system is equitable is not difficult.

Equity measurements become more difficult and less precise, however, when plaintiffs allege unequal school conditions and resources, as in *Williams*. Indeed, the opposing positions of the

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monitoring issues relating to the *Williams* settlement that have arisen in the intervening years.

[189] *See, e.g.*, Serrano v. Priest, 226 Cal. Rptr. 584, 611-13 (Cal. Ct. App. 1986).

plaintiffs and the state in *Williams* reflect the same "input vs. output perspective" problem discussed above in the context of adequacy challenges. While the plaintiffs apparently adopted an input perspective by alleging the state was providing less and/or inferior resources to plaintiffs than it did to other students, the state adopted an "output approach."[190] The state's experts argued that "educational outcomes" were the most important issue, not the issue of whether schools are equal in condition and resources.[191] According to this view, the resources that should be equalized are those that cause performance on standardized tests to rise, and school conditions and resources were not proven to have this effect.[192]

Furthermore, even if the court adopts an input approach to equity, there are numerous other complexities to consider. For instance, educational and background differences between students create special problems under a proposal to simply equalize per-pupil expenditures among all districts. Students that have different backgrounds, learning styles, and educational needs, are all likely to impose varying costs on the state to educate.[193] Simply throwing the same amount of money at Student A as is thrown at Student B might be an inefficient and unequal way to finance those students' education.

Finally, the unintended consequences doctrine resurfaces in this context as another risk of bringing future equity challenges in California. The Fischel hypothesis directly concerns traditional equity challenges by suggesting that voters responded to court-ordered school finance equalization in *Serrano*, by passing a tax-limiting constitutional amendment that had an adverse impact on education funding as a whole. Moreover, there are additional foreseeable unintended consequences that concern litigation like *Williams*. It is conceivable that the legislature, facing one or more court orders to direct additional resources to schools where conditions and resources are unequal and lacking, will decide to lower the bar statewide. That is, in order to comply with the state constitution's equal protection provisions while at the same time not

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[190] For an excellent discussion of the plaintiffs' and the state's respective positions, *see* Oakes & Lipton, *supra* note 171, at 234.
[191] *See id.* at 246.
[192] *See id.* at 246-47.
[193] Heise, *State Constitutions*, *supra* note 25, at 1169.

grossly expanding the state's fiscal deficit, the legislature might decide to equalize conditions and resources by bringing the top schools down, rather than the bottom schools up.[194] At some point, of course, underfunding of schools would become so severe as to create fertile conditions for an adequacy challenge to the entire California school system. School reformers, however, surely do not want to tempt the legislature to move toward that breaking point.

VI. CONCLUSION

The California Supreme Court's decision of *Serrano v. Priest* in 1971 was a watershed victory for school finance litigators. This victory was further secured in *Serrano II* in 1976, after the U.S. Supreme Court's 1973 decision in *Rodriguez* signaled that federal courts would not be hospitable fora for future school finance litigation. The passage of Proposition 13 two years later, however, was a sobering event for the school finance litigation movement in California. Whether or not taxpayers revolting against anticipated tax increases as a result of Serrano II caused Proposition 13, it has undoubtedly had detrimental effects on California's education system. California has plummeted in rankings of per-pupil expenditures and student performance in the decades since the proposition's passage, and many scholars correlate these drops with Proposition 13's revenue-raising limitations.

The *Serrano* decisions blazed the trail for other state courts nationwide, many of which quickly followed California's lead in invalidating the state's school finance system on equal protection grounds. Nevertheless, litigators in many of those states have since progressed to challenges based on the state's constitutional duty to establish an "adequate" school system. From an education reform standpoint, these suits have been very successful in several states, allowing the court to order the legislature to craft a new education system that meets a minimum standard of adequacy. Interestingly,

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[194] A California Court of Appeal panel has suggested that this was an actual consequence of legislative efforts to comply with *Serrano*. *See Serrano*, 226 Cal. Rptr. at 619 ("The state's efforts to equalize school district spending have improved educational opportunity for students in low spending districts while at the same time limiting the educational offerings available in high spending districts. Whether intended or not, the effect has been salutary for the low spenders and harmful for the high.").

California, initially a pioneer in school finance litigation, has yet to see a challenge of this type. Indeed, *Williams*, the most successful school financing lawsuit in recent decades in California, was merely another form of equal protection challenge. Thus, although risks and problems exist with regard to adequacy lawsuits, California's poor educational performance and the fact that so many California children attend schools that "shock the conscience" suggest that California is likely to see an adequacy challenge in the near future.