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**NEW YORK'S EDUCATION FINANCE
LITIGATION AND THE TITLE VI WAVE: AN
ANALYSIS OF *CAMPAIGN FOR FISCAL
EQUITY V. STATE****

*Sarah S. Erving***

*Above all things, I hope the education of the common
people will be attended to; convinced that on their good
sense we may rely with most security for the preservation
of a due degree of liberty.¹*

INTRODUCTION

Nearly fifty years have passed since the Supreme Court decided in *Brown v. Board of Education*² that state action maintaining racially segregated schools violates the Equal Protection Clause of the United States Constitution.³ Since *Brown*, public education policy has remained a critical issue in our nation's jurisprudence. In holding that separate is inherently unequal, the Court established that equality in education is the

* 655 N.E.2d 661 (N.Y. 1995) ("*CFE I*"), remanded to 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001).

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¹ Letter from Thomas Jefferson to James Madison (1787), available at <http://etext.lib.virginia.edu/jefferson/quotations> (last visited Jan. 15, 2002).

² *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that state mandated segregation in schools violates the Equal Protection Clause).

³ U.S. CONST. amend. XIV.

ideal our schools should achieve.⁴

Today, equality remains a core issue for education advocates, but the battleground has shifted from racial segregation to inequality in educational resources.⁵ With this change in focus, the tools advocates use to obtain equality in schools have also changed dramatically since *Brown*. Instead of relying on federal and state equal protection clauses to litigate equality issues, education advocates make claims based on education provisions in state constitutions and, most recently, on regulations of Title VI of the Civil Rights Act (“Title VI regulations”).⁶ Advocates no longer rely on equal protection claims because the remedy associated with those claims, forcing states to distribute money equally among school districts, has had disastrous results.⁷ Instead of seeing an increase in funds to underfunded schools, this remedy has inevitably caused states to reduce their per pupil spending and student achievement.⁸

Despite our nation’s long history of deeming equality a vital

⁴ *Brown*, 347 U.S. at 483.

⁵ See *infra* Part I (discussing the shift in education finance litigation from equality to adequacy issues).

⁶ 42 U.S.C. § 2000d (2000); 34 C.F.R. § 100.3(b) (2000). Since the Supreme Court held in *Alexander v. Sandoval*, 531 U.S. 1049 (2001), that there exists no private right of action under Title VI regulations, two district courts have held that Title VI regulations can be privately enforced through § 1983. See *Lucero v. Detroit Pub. Sch.*, ___ F. Supp. 2d ___, available at 2001 WL 1013368 (E.D. Mich. 2001); *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Protection*, 145 F. Supp. 2d 505 (D.N.J. 2001). See also *Alexander*, 531 U.S. at 1523 (Stevens J., dissenting). For the purposes of this note, I assume that Title VI regulations may be enforced privately through § 1983. 42 U.S.C. § 1983.

⁷ See *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); see also Molly S. McUsic, *The Law’s Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in *LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* 88, 114 (Jay P. Heubert ed., 1999). “[T]he aftermath of equalization efforts inspired by school finance litigation . . . show that on average, states that adopt plans that reduce local funding inequalities tend to see lower than average growth over time in educational spending.” *Id.*

⁸ See *infra* Part I.A.1 (discussing the problems associated with equal protection claims).

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element of our democratic society,⁹ especially in education,¹⁰ courts are not willing to provide equality at the price of mediocrity.¹¹ Recognizing that strict notions of equality may result in second-rate education for all, courts now determine if the education financing system provides a minimum level of education set by the education article of the applicable state constitution.¹² As a result, advocates seeking to reform public school financing bring claims based on the failure of the state to provide children with an adequate education.¹³ However, this movement is waning due to the reluctance of courts to implement the detailed and comprehensive remedies associated with adequacy litigation.¹⁴ Holdings in New York public school

⁹ See generally THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (stating that “[w]e hold these truths to be self-evident, that all men are created equal”); RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 1 (2000) (“No government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance.”); JOHN P. MCKAY ET AL., A HISTORY OF WESTERN SOCIETY 669 (3d ed. 1987) (claiming that “[t]he ideas of liberty and equality—the central ideas of classical liberalism—have deep roots in Western history”); Martin Luther King, Jr., *I Have a Dream*, Speech delivered on the steps of the Lincoln Memorial in Washington D.C. (Aug. 28, 1963), available at <http://web66.coled.umn.edu/new/MLK/MLK.html> (last visited Nov. 19, 2000) (“I have a dream that one day this nation will rise up and live out the true meaning of its creed. We hold these truths to be self-evident that all men are created equal.”).

¹⁰ See *Brown*, 347 U.S. at 495 (holding that “[s]eparate educational facilities are inherently unequal”).

¹¹ See Jon Mills & Timothy Mclendon, *Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State to Make “Adequate Provision” for Florida Schools*, 52 FLA. L. REV. 329, 356 (2000) (stating that “[a] finding of constitutional uniformity does not necessarily mean that the system is good because, in fact, a uniformly poor system would be constitutional”).

¹² *Id.* at 340 (stating that “[t]he idea of focusing on adequacy as requiring some basic level of educational quality was also attractive to those who realized that equity arguments often failed in court or in the public forum by pitting poorer districts against richer districts, raising poor schools only by handicapping those schools that are succeeding”).

¹³ See, e.g., *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990).

¹⁴ See, e.g., *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995).

financing cases tend to show that New York State is also reluctant to provide remedies in equity and adequacy cases. The New York Court of Appeals has thrice rejected plaintiffs' federal and state equal protection claims and twice rejected their adequacy claims.¹⁵

Campaign for Fiscal Equity v. State,¹⁶ ("CFE I") is the most recent challenge to New York State's public school financing system. Upon defendants' motion, the New York Court of Appeals dismissed plaintiffs' state and federal equal protection claims.¹⁷ In addition, the court held that the plaintiffs successfully alleged a cause of action under the Education Article of the New York Constitution and under the Title VI regulations.¹⁸ Six years later in 2001, plaintiffs won on those claims at the trial level,¹⁹ and the defendants quickly appealed.²⁰ Plaintiffs' success on appeal will be determined to a large extent by the willingness of the New York Court of Appeals to issue an enforceable remedy.

Equity claims have proven unworkable because their remedy requires equal distribution of funding.²¹ Although the remedies for adequacy claims do not require such distribution, they too have proven unworkable as implementation requires a large amount of judicial intervention.²² Because enforcement of Title

¹⁵ See *Levittown v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982); *REFIT v. Cuomo*, 655 N.E.2d 647 (N.Y. 1995); *Campaign for Fiscal Equity v. State*, 655 N.E.2d 661 (N.Y. 1995) ("CFE I").

¹⁶ 655 N.E.2d 661 (N.Y. 1995), *remanded to* 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001).

¹⁷ *Id.* at 663.

¹⁸ *Id.* See also *supra* note 4.

¹⁹ *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001) ("2001 CFE").

²⁰ Richard Pérez-Peña with Abby Goodnough, *Pataki to Appeal Decision by Judge on Aid to Schools*, N.Y. TIMES, Jan. 17, 2001, at A1.

²¹ See *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

²² See, e.g., *Abbott v. Burke*, 575 A.2d 359, 384 (N.J. 1990). The *Abbott* decision provided poor urban school districts in New Jersey with a comprehensive plan to improve the state's urban schools. Since then, the New Jersey Supreme Court has made many additional rulings in an attempt to implement the 1990 decision. See, e.g., *Abbott v. Burke*, 643 A.2d 575 (N.J. 1993); *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997); *Abbott v. Burke*, 710

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VI remedies avoids the pitfalls of equity and adequacy claims, Title VI regulations claims could be the new wave of education finance litigation.

The courtrooms in nearly every state of the country have entertained litigation attempting to overturn education financing systems with varying degrees of success.²³ Plaintiffs in these cases are generally concerned community members, including parents, teachers, and school boards.²⁴ Defendants tend to be the state education departments, city boards of education, or officials acting under the color of law.²⁵ Plaintiffs have won in nineteen states, successfully overturning their states' education financing systems.²⁶ However, plaintiffs have also lost claims in sixteen

A.2d 450 (N.J. 1998); *Abbott v. Burke*, 751 A.2d 1032 (N.J. 2000); *Abbott v. Burke*, 748 A.2d 82 (N.J. 2000).

²³ See *infra* note 26-28 (listing cases).

²⁴ For example, Campaign for Fiscal Equity is a New York State not-for-profit corporation consisting of community school boards, students, parents, and advocacy organizations. See *CFE I*, 655 N.E.2d at 663.

²⁵ For example, in *CFE I*, defendants are the State of New York and state officials responsible for implementing New York's funding scheme. 655 N.E.2d at 661.

²⁶ See *Alabama Coalition for Equity, Inc. v. Hunt*, 624 So. 2d 107 (Ala. 1993); *Hull v. Albrecht*, 950 P.2d 1141 (Ariz. 1997); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973); *Tucker v. Lake View Sch. Dist. No. 25*, 917 S.W.2d 530 (Ark. 1996); *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); *Sheff v. O'Neil*, 678 A.2d 1267 (Conn. 1996); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Sec'y. of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973); *Milliken v. Green*, 203 N.W.2d 457 (Mich. 1972); *Helena Elementary Sch. Dist. No. 1 v. State*, 784 P.2d 412 (Mont. 1990); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Bismarck Public Sch. Dist. v. State*, 511 N.W.2d 247 (N.D. 1994); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Brigham v. State*, 692 A.2d 384 (Vt. 1997); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978); *Pauley v. Bailey*, 324 S.E.2d 128 (W. Va. 1984); *State v. Campbell County Sch. Dist.*,

other states,²⁷ and in two states, courts have refused to adjudicate the matter, holding that to do so would usurp the role of the legislature.²⁸

This note focuses on New York's struggle for fair funding in its public school system in *Campaign for Fiscal Equity v. State* ("2001 CFE")²⁹ and argues that its Title VI holding should motivate state legislatures to provide appropriate funding without the need for extensive judicial intervention. Part I provides a background of the national trends in school finance litigation, and discusses 2001 CFE's place among those trends. Part II demonstrates that finance claims will only succeed if courts issue enforceable remedies and that past school finance litigation strategies have failed due to courts' refusals to intrude upon the

19 P.3d 518 (Wyo. 2001); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980).

²⁷ See *Matanuska-Sustina Borough Sch. Dist. v. State*, 931 P.2d 391 (Alaska 1997); *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Idaho Sch. for Equal Educ. Opportunity v. State*, 976 P.2d 913 (Idaho 1998); *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170 (Kan. 1994); *Charlet v. State*, 713 So. 2d 1199 (La. Ct. App. 1998); *Sch. Admin. Dist. No. 1 v. Comm'r*, 659 A.2d 854 (Me. 1995); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993); *Gould v. Orr*, 506 N.W.2d 349 (Neb. 1993); *Reform Educ. Fin. Inequities Today v. Cuomo*, 655 N.E.2d 647 (N.Y. 1995); *Levittown v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135 (Okla. 1997); *Coalition for Equitable Sch. Funding v. State*, 811 P.2d 116 (Or. 1991); *Olsen v. State*, 554 P.2d 139 (Or. 1976); *Withers v. State*, 891 P.2d 675 (Or. Ct. App. 1995); *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995); *Scott v. Commonwealth*, 443 S.E.2d 138 (Va. 1994); *Scott v. Commonwealth*, No. HC-77-1, 1992 WL 885029 (Va. Cir. Ct. Nov. 20, 1992); *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000); *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989).

²⁸ See *Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996); *Lewis E. v. Spagnolo*, 710 N.E.2d 798 (Ill. 1999); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996); *Marrero v. Commonwealth*, 709 A.2d 956 (Pa. Commw. Ct. 1998).

²⁹ 2001 CFE, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001).

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province of state legislatures.³⁰ Finally, Part III argues that claims based on Title VI regulations will be successful because Title VI, enacted pursuant to congressional spending power, allows courts to enforce remedies by issuing injunctions “against the payment of federal monies” to the state, “should the state not develop a conforming plan within a reasonable period of time.”³¹ Part III further demonstrates that courts will consistently rule in favor of plaintiffs who can show the state’s funding scheme violates Title VI regulations because the enforcement mechanism will prevent courts from interfering with a state legislature, “who is better positioned to gauge the effects of reform on the state as a whole.”³² This note concludes that advocates for education finance reform should include Title VI claims in their pleadings as they are most likely to lead to consistent plaintiff victories in state and federal court.

I. BACKGROUND

Educators have hailed *2001 CFE* as “the most important judicial decision since *Brown*.”³³ Its strength reflects the plaintiffs’ careful analysis of both national and New York finance litigation, distilling thirty years of triumph and mistake into a succinct rule of law: a funding system violates federal and state law when it fails “to provide the opportunity for a sound basic education.”³⁴ The maxim did not reveal itself easily as “[c]ases do not unfold their principles for the asking. They yield up their

³⁰ See *Pawtucket*, 662 A.2d at 59 (commenting that New Jersey’s battle to enforce its decision in *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990), “provide[s] a chilling example of the thickets that can entrap a court that takes on the duties of a Legislature”); see also *Comm. for Educ. Rights*, 672 N.E.2d 1178; *Rose*, 790 S.W.2d 186; *Marrero*, 709 A.2d at 956.

³¹ *Rosado v. Wyman*, 397 U.S. 397, 420 (1970); see also *Guardians Ass’n v. Civil Serv. Comm’n of N.Y.*, 463 U.S. 582 (1983); *Pennhurst v. Halderman*, 451 U.S. 1 (1981).

³² *2001 CFE*, 719 N.Y.S.2d at 549.

³³ Randi Weingarten, *Getting Our Fair Share: Fair Funding For Public Education*, Address at Manhattan’s Public School 9 (Feb. 15, 2001).

³⁴ *2001 CFE*, 719 N.Y.S.2d at 549.

kernel slowly and painfully.”³⁵ The following is a history of how the 2001 CFE’s rule of law came to be.

A. *A Synopsis of Education Litigation*

1. *Waves*

Since the Supreme Court declared in *San Antonio v. Rodriguez*³⁶ that education is not a fundamental right, advocates have pursued state constitutional claims as the avenue for change.³⁷ *Rodriguez* shut the door to education challenges in federal courts but opened many doors in the state court systems, resulting in a large amount of state education litigation.³⁸ In an attempt to understand the enormous amount of litigation, scholars have placed the finance cases into categories based on the plaintiffs’ litigation strategies.³⁹

Scholars refer to the several litigation strategies employed by advocates as “waves.”⁴⁰ Plaintiffs using the first wave strategy argue that the state’s funding system violates the Federal Equal Protection Clause.⁴¹ Prior to 1973, this federal claim was

³⁵ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 29 (1921).

³⁶ 411 U.S. 1 (1973) (holding that education is not a fundamental right).

³⁷ See generally Michael Heise, *State Constitutions, School Finance Litigation, and The “Third Wave”: From Equity To Adequacy*, 68 TEMP. L. REV. 1151 (1995).

³⁸ See *supra* notes 26-28 (citing over forty cases).

³⁹ See, e.g., Erica B. Grubb, *Breaking the Language Barrier: The Right to a Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 87-92 (1974); Mills & Mclendon, *supra* note 11, at 335-42. In addition, scholars place states into one of four categories depending on the strength of the language of the education provision in the state’s constitution. Mills & Mclendon, *supra* note 11, at 342-47.

⁴⁰ See Grubb, *supra* note 30, at 87-92; Mills & Mclendon, *supra* note 11, at 335-42.

⁴¹ U.S. CONST. amend. XIV (stating that “[n]o state shall deny . . . to any person within its jurisdiction equal protection of the laws”).

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successful in several state courts.⁴² *Rodriguez*, however, marked the end of the first wave of education litigation.⁴³ In *Rodriguez*, the Supreme Court held that education is not a fundamental right, and thus, state education financing systems need only be “rationally related” to an important state interest.⁴⁴ Some courts, however, have ruled favorably on the federal claim, maintaining that state financing schemes do not even pass the standard of rational basis review.⁴⁵

The second wave, also known as the “equity” wave, is an attempt to answer *Rodriguez*’s bar to federal education litigation.⁴⁶ Advocates argue in state courts that the funding systems violate states’ equal protection and education provisions of their respective constitutions.⁴⁷ Most scholars agree that, although more fruitful than the first wave, the second wave creates confusion for advocates due to courts handing down inconsistent rulings.⁴⁸ Scholars also agree that the courts usually disregard equity claims because second wave remedies merely level out funding, that is, they take funding from the wealthy and

⁴² See, e.g., *Serrano v. Priest*, 487 P.2d. 1241 (Cal. 1971) (holding that the state’s system of funding was inequitable in violation of the Federal Equal Protection Clause).

⁴³ See *Rodriguez*, 411 U.S. at 35 (holding that education is not a fundamental right under the Federal Constitution and therefore financing schemes would be reviewed only for rationality).

⁴⁴ *Id.*

⁴⁵ See, e.g., *Tucker v. Lake View Sch. Dist. No. 25*, 917 S.W.2d 530 (Ark. 1996).

⁴⁶ See Mills & Mclendon, *supra* note 11, at 336-37.

⁴⁷ See, e.g., *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977) (holding that the state’s education system was inadequate under the state’s Equal Protection Clause); *Bismark Pub. Sch. Dist. v. State*, 511 N.W.2d 247 (N.D. 1994) (holding that the state’s funding system was inequitable under the state’s Equal Protection provision).

⁴⁸ See, e.g., Mills & Mclendon, *supra* note 11, at 337 (citing Frank J. Macchiarola & Joseph G. Diaz, *Disorder in the Courts: The Aftermath of San Antonio Indep. Sch. Dist. v. Rodriguez in the State Courts*, 30 VAL. U. L. REV. 551 (1996)) (stating that “[t]he result of the second equity wave was a patchwork of inconsistent state court decisions, continuing legal uncertainty as to the sufficiency of many education finance systems”).

give it to the poor.⁴⁹

For example, in *Serrano v. Priest*,⁵⁰ the California Supreme Court ordered that the state spend an equal amount of money financing rich and poor school districts. The court order resulted in Proposition 13,⁵¹ which placed strict limits on property taxes, pushing California's average spending per student downward relative to the rest of the country.⁵² As a consequence, California placed forty-second in the nation in per pupil spending, down from fifth.⁵³ Some scholars suggest that equalizing spending does not guarantee "that all school districts within a state spend enough money per pupil to provide all with an adequate education."⁵⁴ In November 2000, attempting to combat its declining quality of education, California put to the voters Proposition 38,⁵⁵ which would have given every student a \$4,000

⁴⁹ See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 155 (1995). Criticizing the equity wave, Enrich states: "While the demand for equal treatment by government has a powerful initial allure, the concrete application of that demand to education has proven deeply threatening to other powerful societal values." *Id.* at 155. See also *McDaniel v. Thomas*, 285 S.E.2d 156, 164 (Ga. 1981) (showing vehement opposition to equalizing funding, the court states that "[n]owhere in [Georgia's] Constitution is there any obligation of the state to equalize educational opportunities"); Michael Rebell, *Campaign for Fiscal Equity, Blueprint for Better Schools: Definition of a Sound Basic Education, Statewide Fair Funding Principles for Effective Accountability* (Fall 1998) [hereinafter *Blueprint*] (on file with the *Journal of Law and Policy*) (stating that "[t]he state should increase aid to poor districts but should not impose ceilings on expenditures of any other districts").

⁵⁰ 557 P.2d 929 (Cal. 1976).

⁵¹ CAL. CONST. art. 13A, § 4.

⁵² See generally Seebach, *Equal School Funding Doesn't Pass the Test*, ORANGE COUNTY REG., Mar. 30, 1994, at B10.

⁵³ Editorial, *The Fight for a Sound Education*, N.Y. TIMES, Sept. 11, 2000, at A24. But see CHILDREN'S DEFENSE FUND, YEARBOOK 2000: THE STATE OF AMERICA'S CHILDREN 148 (2000) (ranking California thirty-fifth in the 1995-96 school year with a per student expenditure of \$4,973).

⁵⁴ Andrew Reschovsky, *Fiscal Equalization and School Finance*, NAT'L TAX J., Mar. 1, 1994.

⁵⁵ 2000 Cal. Legis. Serv. Prop. 38.

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voucher, enabling each child to attend a private school.⁵⁶ Proposition 38 did not pass, but the state's reaction to equal fund distribution became a lesson for advocates in education finance reform.⁵⁷ Advocates realize that a successful claim must not take away funding from the wealthier districts; it must only increase funding in the poorer districts.⁵⁸

Courts view the aftermath of *Serrano* as a disaster that should be avoided at all costs.⁵⁹ For this reason, many courts dismiss both state and federal equal protection claims altogether.⁶⁰ Courts' fears of *Serrano*'s "Robin Hood" solution has made equal fund distribution an increasingly unattractive remedy and hence an unsuccessful claim.⁶¹

In response to the failure of state and federal equal protection claims, many advocates instead claim violations of state constitutions that require or are interpreted to require a minimum level of education quality.⁶² This "adequacy" argument is known

⁵⁶ *Id.* at § 4(d)(1). See generally Ted Halstead & Michael Lind, *The National Debate over School Funding Needs a Federal Focus*, L.A. TIMES, Oct. 8, 2000.

⁵⁷ See, e.g., McUsic, *supra* note 7.

⁵⁸ *Blueprint*, *supra* note 49 and accompanying text (suggesting that New York adopt a school financing plan that provides adequate funding for poor districts without taking money from wealthier districts).

⁵⁹ See, e.g., Seebach, *supra* note 52, at B10 ("[California's] slide into educational decrepitude began with . . . *Serrano*."); see also McUsic, *supra* note 7, at 112 (stating that "California is now becoming the best argument against its own school financing approach. . . . Only seventeen states spend less per pupil on public education, and Mississippi is the only state with lower average reading proficiency scores.").

⁶⁰ See, e.g., *CFE I*, 655 N.E.2d at 663.

⁶¹ See Robert W. Wassmer, *School Finance Reform: An Empirical Test of the Economics of Public Opinion*, 25 PUB. FIN. Q. 393 (1997), available at 1997 WL 13741398.

⁶² See, e.g., *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989) (citing KY. CONST. § 183) (holding that the education system was inadequate under the state education provision that states "[t]he General Assembly shall . . . provide for an efficient system of common schools"); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994) (citing ARIZ. CONST. art. XI § 1) (invalidating an education funding system as inequitable under the education provision of the state constitution providing

as the third wave in finance litigation.⁶³ Third wave litigation avoids the “Robin Hood” effect by focusing on the adequacy of a district’s financing scheme.⁶⁴ In so doing, the adequacy wave necessarily focuses, to some extent, on the language of education provisions in state constitutions. For example, in *Seattle School District Number 1 v. State*,⁶⁵ the Supreme Court of Washington held that the education system was inadequate under the state’s education provision.⁶⁶ The court held that the legislature failed to meet its “paramount duty” to fully fund the school system as required by the Washington State Constitution.⁶⁷

The second and third waves proved increasingly more successful as state courts used the claims to overturn nineteen state education systems rendering them unconstitutional.⁶⁸ Although preferable to equity claims, adequacy claims present their own problems. Some courts admonish those states where the judiciary acts as a “self-appointed overseer of education.”⁶⁹ In *City of Pawtucket v. Sundlun*,⁷⁰ the Supreme Court of Rhode Island criticized New Jersey’s long court battle to enforce the remedy declared in *Abbott v. Burke*,⁷¹ stating that “[t]he volume of litigation and the extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on the duty of the legislature.”⁷² Fear of judicial activism and judicial

that “[t]he Legislature shall . . . provide for the establishment and maintenance of a general and uniform public school system”).

⁶³ See Heise, *supra* note 37.

⁶⁴ See Heise, *supra* note 37.

⁶⁵ 585 P.2d 71 (Wash. 1978).

⁶⁶ WASH CONST. art. IX, § 1 (“It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.”).

⁶⁷ *Id.*

⁶⁸ See *supra* note 26 (citing those cases overturning the state’s education funding scheme).

⁶⁹ *City of Pawtucket v. Sundlun*, 662 A.2d 40, 59 (R.I. 1995).

⁷⁰ *Id.*

⁷¹ *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990).

⁷² *Id.* (stating that the New Jersey Supreme Court took on the role of the legislature and violated separation of powers in the process). *But see* Kevin M.

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encroachment on the legislative branch has caused some courts to relinquish their duty to interpret the constitution altogether.⁷³ Four decisions in three states illustrate judicial refusal to adjudicate first, second, and third wave claims on the grounds that to do so would violate the doctrine of separation of powers.⁷⁴

Mulcahy, Note, *Modeling the Garden: How New Jersey Built the Most Progressive State Supreme Court and What California Can Learn*, 40 SANTA CLARA L. REV. 863, 876 (2000) (“Beyond providing the opportunity for school-finance reform, the Robinson series of decisions reflect perhaps the best example of the New Jersey Supreme Court’s activism.”).

⁷³ See MICHAEL A. REBELL & ARTHUR R. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM 201 (1982). The authors state:

When courts are properly operating within the sphere of principle as defined by the Supreme Court, the institution of American government that has been acknowledged (at least since *Marbury v. Madison*) to have the responsibility for determining ultimate constitutional principles, they cannot be said to be violating separation-of-powers limitations or to have usurped policy roles of other branches.

Id. at 201-02.

⁷⁴ See *Coalition for Adequacy and Fairness in Sch. Funding v. Chiles*, 680 So. 2d 400 (Fla. 1996) (refraining from adjudication on grounds of separation of powers); *Lewis v. Spagnolo*, 710 N.E.2d 798 (Ill. 1999) (holding that students have no cause of action under the state constitution in alleging that the state has not provided an adequate education); *Comm’n. for Educ. Rights v. Edgar*, 641 N.E.2d 602 (Ill. 1996) (refraining from adjudication on grounds of separation of powers); *Marrero v. Commonwealth*, 709 A.2d 956, 963-64 (Pa. Commw. Ct. 1998) (noting that “all matters, whether they be contracts bearing upon education, or legislative determinations of school policy or the scope of educational activity, everything directly related to the maintenance of a ‘thorough and efficient system of public schools’ must at all times be subject to future legislative control”). It should be noted that at the time *Coalition for Adequacy* was decided, Florida had weak language in its state constitution. FLA. CONST. art. VIII, § 2 (1868) (stating that “the legislature shall provide for a uniform system of public free schools”). It has since amended its constitution to include stronger language. FLA. CONST. art. VIII, § 2 (1998) (stating that it is the “paramount duty of the state to make adequate provision for the education of all children residing within its border”). It is unclear whether new finance litigation would result in a plaintiff victory given the stronger language. See generally *Mills & McLendon*, *supra* note 11, at 380-81. The new provision reads:

Because courts want to avoid the remedies associated with second and third wave litigation, the law in this area is inconsistent.⁷⁵ For this reason, advocates have taken the opportunity to litigate claims based on Title VI regulations.⁷⁶ These advocates claim that state funding schemes disparately impact minority children.⁷⁷ Because Title VI school finance litigation is in its embryonic stage, scholars have not yet named this fourth wave of litigation. This comment argues, however, that claims based on Title VI through § 1983 constitute the new and hopefully, final wave of litigation.

2. *History of Education Litigation in New York*

New York's first Constitution of 1777⁷⁸ made no reference to

The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

FLA. CONST. art. IX, § 1. Because statistics show that strong language does not always result in success for the plaintiff, amending New York's Constitution to include stronger language would be a moral victory at best and would do nothing to solve the enforcement problems attributed to third wave litigation. *See Mills & McLendon, supra* note 11, at 387-409. The appendix of the authors' article indicates that even states with very strong language in their constitutions are not assured a plaintiff victory. *See Mills & McLendon, supra* note 11, at 387-409. For example, despite the fact that the Georgia Constitution states that education "shall be a primary obligation" of the state, plaintiffs lost when they challenged the state's funding scheme as inadequate and in violation of equal protection. *See McDaniel v. Thomas*, 285 S.E.2d 421 (Ga. 1981).

⁷⁵ *Compare Abbott*, 575 A.2d 359, with *Pawtucket*, 662 A.2d 40.

⁷⁶ *See, e.g., CFE I*, 655 N.E.2d 661 (N.Y. 1995).

⁷⁷ *Id.*

⁷⁸ N.Y. CONST. (1777). The Charter of Liberties and Privileges, adopted in 1683 and re-enacted by the charter of 1691 predates the Constitution of

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education. The current Education Article first appeared in the Constitution of 1894 and has remained unchanged.⁷⁹ However, many legislative decisions on education were made between 1777 and 1894⁸⁰ that allowed New York to develop a world-renowned education system.⁸¹ New York's rich history, recognizing the importance of education as a means for the state's intellectual and material prosperity for all classes of people, is eloquently

1777. It remained the Constitution for the Colony until the American Revolution in 1776 and also did not mention education. See CHARTER OF LIBERTIES AND PRIVILEGES 1683, available at <http://www.montauk.com/history/seeds/charter.-htm> (last visited Nov. 19, 2000).

⁷⁹ N.Y. CONST. art. IX (1894) ("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.").

⁸⁰ See generally THE STATE EDUC. DEP'T, EDUC. AND THE 1967 CONVENTION: AN ANALYSIS OF SELECTED PROPOSALS AFFECTING EDUCATION WHICH MAY COME BEFORE THE CONVENTION 19 (1966). This book cites ten legislative decisions: (1) establishment of the Regents (1784); (2) provisions for public elementary schools (1812); (3) division of the state into local school districts and local property tax support for public elementary schools (1812); (4) creation of a separate state department to administer the public elementary school (1812-1854); (5) discontinuance of state support for denominational schools in New York City (1842); (6) state provisions for the professional education and certification of elementary school teachers (1834-1844); (7) state tax support for schools and a beginning toward state equalization of educational opportunities (1851); (8) provisions for public and secondary schools (1853); (9) provisions for state scholarships for higher education (1865); and (10) free school principle adopted (1867). *Id.*

⁸¹ See State of New York, *In Convention Document No. 62: Report of the Committee on Education and the Funds Pertaining Thereto*, 2 Documents / Constitutional Convention (1894) (presented by Frederick W. Holls, Chairman) [hereinafter *Document No. 62*]:

In the regard of other states and countries it is this university which has given New York her reputation and her position in the literature of education. At the world's fair in Paris, in 1889, the Grand Prix, the highest award was given to the Regents of the University in recognition of the fact, which is well known to students of French educational history, that Napoleon modeled the National University of France upon the University of the State of New York.

Id. at 5.

recorded in the Report of the Committee on Education⁸² for New York State's 1894 Constitutional Convention.⁸³ The Committee successfully argued that New York should have a provision for education in its constitution.⁸⁴ The provision states, in pertinent part, "[t]he 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."⁸⁵

The notion of equal educational opportunity pervades the Education Committee's Report. The Committee, in arguing that New York State should fund education stated the following:

In some way we have lost sight of the laws made in the early days of New York, and the views held by the great men who first gave shape to its policy. They made a law which they meant should reach all classes, and to give a chance for all to gain knowledge. . . . [Education] will always get great aid from [private sources], but if it depends upon that alone only a class can enjoy it.⁸⁶

⁸² *Id.*

⁸³ The education provision proposed by the Committee ("[t]he 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") was adopted by the Convention of 1894 and has since remained unchanged. *Id.* at 1.

⁸⁴ New York's current education provision dates back to 1894. *See* N.Y. CONST. art. XI § 1.

⁸⁵ *Document No. 62, supra* note 81, at 1.

⁸⁶ *Document No. 62, supra* note 81, at 7. Throughout the document there are references to the state's intention that an adequate education should be provided to all children in the State of New York. The Committee writes: "[T]he people well know, or instinctively feel that it is the highest wisdom to make their own schools so good that the rich will attend them, and to put schooling before the poor in the light of a duty rather than a privilege." *Document No. 62, supra* note 81, at 8. They also write:

Prof. Huxley's definition of a system of education worthy of the name has become classical, as requiring an educational ladder with its foot in the gutter and its top in the university, every single step and rung complete and within the reach of every climber. The vision of just this system was, in no doubt, in the minds of the founders of the University of the State of New York, and it is for this Convention to determine how far that vision shall now be realized.

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New York State continues to value education. Today, not only does the media report extensively on education issues, but the candidates for the 2000 New York Senate Race based major parts of their campaigns on education.⁸⁷

Concerned New Yorkers have channeled their energy into New York State courtrooms where, in the past twenty years, three major lawsuits have been filed in an attempt to overturn New York's education funding scheme.⁸⁸ Finance litigation precedent in New York was created in 1982 when the New York Court of Appeals "modified" the lower court's decision in *Levittown v. Nyquist*.⁸⁹ The lower court found that the state's public school financing system violated New York's Equal Protection Clause and Education Article of its constitution.⁹⁰ The Second Circuit disagreed, holding that the existing state funding scheme to finance public education did not violate the equal protection clauses of the federal or state constitutions, nor did it violate the Education Article of the New York Constitution.⁹¹ However, the court left the door open for future third wave litigation by holding that the New York Constitution requires the state to provide enough funding so that every child receives a

Document No. 62, supra note 81, at 10.

⁸⁷ See, e.g., Karen W. Arenson, *Vision of CUNY as a Contender in Select Fields*, N.Y. TIMES, Oct. 31, 2000, at B1; Jim Dwyer, *A Financial School Daze*, DAILY NEWS, Oct. 12, 1997, at 3; Anemona Hartocolis, *Brooklyn School Breaks from the Pack*, N.Y. TIMES, Oct. 19, 2000, at B1; Owen Moritz, *African-Americans Gain in School, Lag in Income*, N.Y. DAILY NEWS, July 30, 1998, at 28; Jacques Steinberg, *Answers to an English Question*, N.Y. TIMES, Oct. 22, 2000, at 37.

⁸⁸ *CFE I*, 655 N.E.2d 661 (N.Y. 1995); *REFIT v. Cuomo*, 655 N.E.2d 647 (N.Y. 1995); *Levittown v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982). *Ceaser v. Pataki*, No. 98 Civ. 8532, 2000 WL 1154318 (S.D.N.Y. Aug. 14, 2000), is a recent federal class action lawsuit also attempting to overturn New York's funding scheme claiming Title VI violations.

⁸⁹ 439 N.E.2d 359 (N.Y. 1982).

⁹⁰ N.Y. CONST. art. XI, § 1 (stating that "[t]he 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").

⁹¹ *Levittown*, 439 N.E.2d at 370.

“sound basic education.”⁹²

Not discouraged, plaintiffs in *Reform Educational Financing Inequities Today* (“REFIT”) v. *Cuomo*⁹³ brought a lawsuit challenging New York State’s school funding, claiming that funding disparities between rich and poor school districts violated New York’s education provision.⁹⁴ Although they attempted to revive the third wave adequacy claim left open in *Levittown*, plaintiffs erred by only proffering second wave evidence of inequities.⁹⁵ Plaintiffs alleged that the system of education financing in New York had resulted in such a “gross and glaring inadequacy” as to warrant intervention by the courts.⁹⁶ However, because plaintiffs tried to prove their claim by showing the “dramatic widening in tax-base gap between rich and poor districts,” that is the *inequities*, the challenge failed.⁹⁷ The Second Circuit stated that plaintiffs failed to allege that students were not provided with a sound, basic education required by the court in *Levittown*.⁹⁸

Attempts to overturn New York’s education finance scheme have failed because of misguided pleadings. In *Levittown*, plaintiffs failed to claim that children did not receive a “sound basic education,” in other words, to allege “that the educational facilities or services provided in the school districts fall below the

⁹² *Id.* at 369.

⁹³ 655 N.E.2d 647 (N.Y. 1995).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *REFIT*, 655 N.E.2d at 648 (emphasis added).

⁹⁷ *REFIT*, 606 N.Y.S.2d 44 (App. Div. 1993), *aff’d*, 655 N.E.2d 647 (N.Y. 1995):

We find that the Supreme Court properly found in favor of the defendants, since the plaintiffs do not allege that their students are not being provided with a sound, basic education. Since plaintiffs in this case merely assert that there are disparities in the financing of rich and poor school districts, and the Court of Appeals has already determined in the *Levittown* case that such disparities are not unconstitutional, we find that the complaint was properly dismissed.

Id. at 46.

⁹⁸ 439 N.E.2d 359.

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statewide minimum standard of educational quality and quantity.”⁹⁹ Instead, plaintiffs erroneously argued that the “system results in grossly disparate financial support.”¹⁰⁰ As a result, the court refused to follow *Serrano v. Priest*,¹⁰¹ and to equalize funding, reasoning that such a holding would inevitably result in diminished quality of education.¹⁰² Similarly, in *REFIT*, the New York Court of Appeals recognized that disparities in funding between rich and poor districts exist, but refused to equally distribute education funding between them.¹⁰³ Because plaintiffs failed to demonstrate that students were receiving education below minimum standards, the court could not rule appropriately on the adequacy theory.¹⁰⁴

B. Campaign for Fiscal Equity v. State: A Procedural History

For the third time in twenty years, plaintiffs brought a lawsuit to overturn New York’s education funding system.¹⁰⁵ In May of 1993, CFE, a coalition of parents, students, educators and organizations brought a lawsuit against the State of New York claiming that the state’s funding scheme violates the Equal Protection Clause of the Federal Constitution,¹⁰⁶ the Equal Protection Clause¹⁰⁷ and Education Article of the New York State Constitution,¹⁰⁸ and the Title VI regulations.¹⁰⁹ At trial, the court

⁹⁹ *Id.* at 363.

¹⁰⁰ *Id.* at 361-62.

¹⁰¹ *Serrano v. Priest*, 557 P.2d 929 (Cal. 1977).

¹⁰² See *supra* notes 49, 61 and accompanying text (discussing why equity claims are usually unsuccessful).

¹⁰³ *REFIT*, 655 N.E.2d at 648.

¹⁰⁴ *REFIT*, 606 N.Y.S.2d 44, 46 (App. Div. 1993).

¹⁰⁵ See *Levittown*, 439 N.E.2d 359; *REFIT*, 655 N.E.2d 647; *CFE I*, 655 N.E.2d 661.

¹⁰⁶ U.S. CONST. amend. XIV, § I (stating that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws”).

¹⁰⁷ N.Y. CONST. art. 1, § 11 (stating that “[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof”).

¹⁰⁸ N.Y. CONST. art. XI, § 1 (stating that “[t]he legislature shall provide

granted defendants' motion to dismiss with respect to the first and second wave equity claims based on the federal and state constitutions, but denied their motion with respect to the third wave adequacy claim and the fourth wave Title VI regulations claim.¹¹⁰ On appeal, the New York Court of Appeals affirmed the lower court's decision.¹¹¹ The court held that CFE properly alleged that the defendants' method of financing schools violated both the Education Article of New York's Constitution and the Title VI regulations, and it remanded the case to the Supreme Court for adjudication on those claims.¹¹²

Beginning October 12, 1999, the parties presented their arguments to Judge Leland DeGrasse in New York County Supreme Court.¹¹³ The court held that the defendants violated both New York's Education Article and the Title VI regulations.¹¹⁴ Judge DeGrasse stated:

The education provided [to] New York City students is so deficient that it falls below the constitutional floor set by the Education Article of the New York State Constitution. . . . With respect to plaintiffs' claim under Title VI's implementing regulations, the court finds that the State school funding system has an adverse and disparate impact on minority public school children and that this disparate impact is not adequately justified by any reason related to education.¹¹⁵

for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated").

¹⁰⁹ 34 C.F.R. § 100.3(b)(2) (2000) (prohibiting any recipient of federal funding from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin").

¹¹⁰ *CFE v. State*, 162 Misc. 2d 493, 500 (N.Y. Sup. Ct. 1994).

¹¹¹ *CFE I*, 655 N.E.2d 661 (N.Y. 1995).

¹¹² *Id.*

¹¹³ *2001 CFE*, 719 N.Y.S.2d 475, 480 (N.Y. Sup. Ct. 2001).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 478. The trial lasted seven months, seventy-two witnesses took

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1. The Third Wave Education Article Claim

CFE rectified the inadequate pleadings that plagued previous attempts to reform New York's education system by consciously adopting third wave language consistent with *Levittown's* holding. "Plaintiffs here, unlike the *Levittown* plaintiffs," Judge DeGrasse noted, "specifically allege that the education provided to thousands of New York City public school students falls below minimum statewide standards and therefore deprives them of a 'sound basic education.'"¹¹⁶ The plaintiffs' meticulous attention to the specific shortfalls in the pleadings of *Levittown*¹¹⁷ and *REFIT*¹¹⁸ forced the court to "determine precisely what level of education is required by the Education Article and whether defendants' financing scheme denies any schoolchildren that level of education."¹¹⁹

In determining whether the defendants violated the Education Article, the court undertook a three part inquiry. First, the court defined a sound basic education as the "constitutional floor set by the Education Article" under which the quality of education may not fall.¹²⁰ According to the court, a sound basic education consists of "the foundational skills that students need to become productive citizens capable of civic engagement and sustaining competitive employment."¹²¹ Second, the court found that New York City's school children are not provided with the opportunity to obtain a sound basic education in the city's public schools.¹²²

the stand, and over 4,300 documents were admitted into evidence. *Id.* at 480.

¹¹⁶ Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 3, *CFE I*, 655 N.E.2d 661 (N.Y. 1995) (No. 93-111070) [hereinafter Plaintiffs' Memorandum of Law].

¹¹⁷ 439 N.E.2d at 363. Plaintiffs failed to claim that "educational facilities or services provided in the school districts that they represent fall below . . . minimum standard of educational quality and quantity." *Id.*

¹¹⁸ 655 N.E.2d at 648. Plaintiffs failed to claim that "students in their district are receiving something less than a sound basic education." *Id.*

¹¹⁹ Plaintiffs' Memorandum of Law, *supra* note 116, at 11.

¹²⁰ 2001 *CFE*, 719 N.Y.S.2d at 478.

¹²¹ *Id.* at 487.

¹²² *Id.* at 549.

In so finding, the court examined the “‘inputs,’ the resources available to students in public schools,”¹²³ and the “‘outputs,’ the measures of student achievement, primarily test results and graduation rates.”¹²⁴ The court concluded that the “majority of the City’s public school students leave high school unprepared for more than low-paying work, unprepared for college, and unprepared for the duties placed upon them by a democratic society.”¹²⁵

Finally, in the most difficult part of its decision, the court decided that there is a “causal link” between the state’s funding scheme and the meager opportunity for education in New York City.¹²⁶ In asserting that there is a causal link between education funding and an opportunity for a sound basic education, the court held that “increased educational resources, if properly deployed, can have a significant and lasting effect on student performance.”¹²⁷ In addition, the court found that “the City’s ability to contribute to education is hampered by its diversified tax base, its higher costs for other municipal services, and by its debt burden.”¹²⁸ The court, however, determined that “it is the legislature’s duty” to remove those barriers to educational opportunity.¹²⁹

¹²³ The “inputs” examined by the court in its 2001 CFE decision are teachers, school facilities, curricula, class size, and instrumentalities of teaching such as textbooks, library books, and instructional technology. *See* 2001 CFE, 719 N.Y.S.2d at 491-515. The court found that New York City’s students are provided with “inadequate resources” leaving students “unprepared for more than low-paying work, unprepared for college, and unprepared for duties placed upon them by a democratic society.” *Id.* at 520.

¹²⁴ *Id.* at 515-20. The court found that the “graduation/dropout rates and performance on standardized tests demonstrate that students are not receiving a minimally adequate education.” *Id.* at 520.

¹²⁵ *Id.* at 520.

¹²⁶ *Id.* at 478, 520-40.

¹²⁷ *Id.* at 525.

¹²⁸ *Id.* at 540.

¹²⁹ *Id.*

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2. *The Fourth Wave Title VI Regulations Claim*

The plaintiffs also succeeded on their second claim, that the state's school funding scheme disparately impacts minority students in violation of the Title VI regulations.¹³⁰ Title VI provides that "[n]o person in the United States, shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."¹³¹ Although a showing of intentional discrimination is necessary under Title VI,¹³² the Supreme Court has held that the Title VI implementing regulations are valid and that disparate impact claims may be brought under them.¹³³ The implementing regulation provides that recipients of federal funds may not do the following: "Utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program."¹³⁴

A validly stated cause of action under Title VI regulations has two components. First, a plaintiff has the burden of establishing a prima facie case "that a facially neutral practice has had an adverse and disparate impact upon a protected class of people."¹³⁵

¹³⁰ *Id.* at 478. The court decided 2001 CFE before the Supreme Court decided *Alexander v. Sandoval*, 531 U.S. 1049 (2001). In *Alexander*, the Court held, 5-4, that no private right of action exists under Title VI regulations standing alone. *Id.* However, since then, two district courts have held that claims under Title VI regulations can be maintained under § 1983. See *Lucero v. Detroit Pub. Sch.*, ___ F. Supp. 2d ___, available at 2001 WL 1013368 (E.D. Mich. 2001); *S. Camden Citizens in Action v. N.J. Dep't. of Env'tl. Protection*, 145 F. Supp. 2d 505 (D.N.J. 2001).

¹³¹ 42 U.S.C. § 2000d (2000).

¹³² See *Alexander v. Choate*, 469 U.S. 287, 292 (1985); *Guardians Ass'n v. Civil Serv. Comm'n.*, 463 U.S. 583, 610 (1983); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 287 (1978); *African American Legal Defense Fund v. State*, 8 F. Supp. 2d 204, 337 (S.D.N.Y. 1998).

¹³³ See *Alexander*, 469 U.S. at 292; *Guardians*, 463 U.S. at 584.

¹³⁴ 34 C.F.R. § 100.3(b)(2) (2000).

¹³⁵ 2001 CFE, 719 N.Y.S.2d at 541 (citing *New York City Env'tl. Justice*

If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to demonstrate a “substantial legitimate justification” for the practice.¹³⁶ If the defendant meets this burden, the plaintiff can still prevail by showing either that “the defendant overlooked an equally effective alternative with less discriminatory effects or that the proffered justification is no more than a pretext for racial discrimination.”¹³⁷

In *2001 CFE*, the court held that the evidence demonstrated “the existence of a disparate adverse impact on minority students caused by the State’s funding system.”¹³⁸ The court measured the disparate impact by comparing funding to enrollment figures.¹³⁹ In doing so, the court found the following:

[Seventy-three percent] of the State’s minority public school students are enrolled in New York City’s public schools, minority students make up approximately 84% of New York City’s public school enrollment, and New York City receives less funding per capita, on average than districts in the rest of the state.¹⁴⁰

Furthermore, the court held as insufficient the four justifications defendants articulated for the disparate impact.¹⁴¹ The court was

Alliance v. Giuliani, 214 F.3d 65, 69 (2d. Cir. 2000)); *see also Georgia State Conference of Branches of NAACP v. State*, 775 F.2d 1403, 1417 (11th Cir. 1985); *Groves v. Ala. State Bd. of Educ.*, 776 F. Supp. 1518, 1523 (M.D. Ala. 1991).

¹³⁶ *Larry P. v. Riles*, 793 F.2d 969, 982-83 (9th Cir. 1984) (en banc).

¹³⁷ *2001 CFE*, 719 N.Y.S.2d at 541 (citing *Powell v. Ridge*, 189 F.3d 387, 394 (3d Cir. 1999)).

¹³⁸ *Id.* at 546.

¹³⁹ *Id.* at 542.

¹⁴⁰ *Id.* In comparing the funding per capita, the court found that New York City consistently received less total state aid than its percentage share of enrolled students. *Id.* Between the school years of 1994-95 and 1999-2000, New York had approximately 37% of the state’s enrolled students and received a percentage of total state aid ranging from 33.98% to 35.65%. *Id.* at 543.

¹⁴¹ *Id.* at 547.

First, defendants argue that school funding formulas are wealth-equalizing and New York City is a relatively more affluent school district. Second, they argue that directing funding according to

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particularly critical of the state's argument that directing funding according to districts' average attendance rates, as opposed to enrollment rates, is "related to the State's legitimate objectives of encouraging districts to keep attendance up and discouraging their inflation of enrollment figures."¹⁴² The court held that "[t]he state's choice to base school funding on districts' average attendance is unnecessarily punitive. It creates a perverse direction of state aid by directing aid away from districts with large numbers of at risk students."¹⁴³ Therefore, plaintiffs established a violation of Title VI regulations.

3. *The Remedy*

Unlike remedies from second and third wave cases, *2001 CFE* evades the remedy problems of past litigation strategies, that is the problems of equalizing funding and judicial activism, by placing the ultimate burden of creating a remedy on the state legislature.¹⁴⁴ The New York State Legislature is more likely to develop an appropriate funding scheme given the nature of the federal spending power; if the state legislature fails to comply with the Title VI regulations, the state's federal funding will be revoked.¹⁴⁵ This is a substantial motivating factor absent from second and third wave claims.¹⁴⁶

districts' average attendance, rather than to enrollment, is related to the State's legitimate objectives of encouraging districts to keep attendance up and discouraging their inflation of enrollment figures. . . . Third, defendants argue that distributing transportation and building aid on a reimbursement basis, which has historically harmed the City, is justified. Fourth, defendants argue that their formulas take student need into account.

Id.

¹⁴² *Id.*

¹⁴³ *Id.* at 549.

¹⁴⁴ *Id.* at 540 (stating that it is the "legislature's duty . . . to reform how education is financed in New York State").

¹⁴⁵ See *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983); see also *infra* Part III (discussing the remedy for violations of Title VI and its regulations, including revocation of federal funds).

¹⁴⁶ Enforcing old wave claims entails more litigation. The most notorious

In holding that defendants violated both the Education Article and the Title VI regulations, the court ordered a remedy requiring the state legislature to revamp the state's funding scheme.¹⁴⁷ The court purposely delegated the creation of the remedy to the state legislature and gave three reasons for doing so:

First, the Court of Appeals held . . . that the State Constitution "imposes a duty on the Legislature to ensure the availability of a sound basic education to all of the children of the State." Second, this action has focused principally on how the current system affects New York City, but any remedy will necessarily involve the entire State. The legislature is in a better position to gauge the effects of reform on the State as a whole. Third, the legislature is better positioned to work with the Governor and other governmental actors who have a role in reforming the current educational system. In particular, the Regents, SED (State Education Department) and BOE (Board of Education) have far greater expertise than this court in crafting solutions to the educational problems discussed in this opinion. This expertise should guide the State as it reforms the current system. There is no need, at least at this time, for the court to supersede the legislature, the Governor, the State Education Department, and the Regents, in imposing a remedy.¹⁴⁸

In its lengthy opinion, the court provided the legislature with

example is the ongoing litigation in New Jersey where the New Jersey Supreme Court has twice rejected legislative reforms as insufficient to address the inadequacies of the education system. *See* *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994); *Abbott v. Burke*, 639 A.2d 417 (N.J. 1997); *see also* *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996) (holding that Connecticut's legislature failed to provide plaintiffs with a substantially equal education opportunity); *State v. Campbell County Sch. Dist.*, 19 P.3d 518 (Wyo. 2001) (rejecting a legislature's attempt to remedy unconstitutional school funding).

¹⁴⁷ *2001 CFE*, 719 N.Y.S.2d at 551 (ordering that "the defendants shall put in place reforms of school financing and governance designed to redress the constitutional and regulatory violations set forth in this opinion").

¹⁴⁸ *Id.* at 549-50 (quoting *CFE I*, 655 N.E.2d at 665).

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guidelines to create an appropriate remedy and required implementation of the remedy by September 15, 2001.¹⁴⁹

Shortly after the court delivered its opinion, George Pataki, the Governor of the New York, announced that he would appeal *2001 CFE*.¹⁵⁰ Notwithstanding the court's deliberate deference to the legislature, Pataki gave the following reason for his decision: "You can't have a judge running an entire educational system."¹⁵¹ Ignoring the decision's language, he stated that he "will challenge the decision because we want to make sure that the responsibility [to revamp the state's education financing scheme] rests with the elected officials."¹⁵² Governor Pataki's concerns are misplaced. The court was conscious of its role as interpreter of the law and, as such, declared the state's actions unconstitutional and in violation of federal regulations.¹⁵³ The court left the role of creating education legislation to the state legislature, stating that "it is the legislature that must . . . take steps to reform the current system."¹⁵⁴

II. OLD WAVE ENFORCEMENT OF EDUCATION FINANCE
REMEDIES

*The work of a judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast off in the laboratory of the years.*¹⁵⁵

¹⁴⁹ *Id.* at 550-51. The legislature has not yet crafted a remedy because the state has appealed the decision. *Id.*, *appeal docketed*, No. 111070/93 (N.Y. App. Div. Aug. 13, 2001).

¹⁵⁰ See Richard Pérez-Peña, *Pataki to Appeal Decision by Judge on Aid to Schools*, N.Y. TIMES, Jan. 17, 2001, at A1.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See *2001 CFE*, 719 N.Y.S.2d at 478.

¹⁵⁴ *Id.* at 549-50.

¹⁵⁵ CARDOZO, *supra* note 35, at 178.

The second and third waves of litigation have been unsuccessful or unpredictable at best.¹⁵⁶ The second wave has been unsuccessful because it requires courts to remedy violations of the state and federal claims by forcing legislatures to distribute funding equally to school districts.¹⁵⁷ Similarly, the third wave has not always been effective because it too requires a certain amount of judicial activism to oversee the enforcement of remedies.¹⁵⁸ In some cases, the subsequent litigation enforcing remedies has taken years.¹⁵⁹ For this reason, some courts have criticized the courts that rule favorably on third wave claims opining that they have inappropriately entered the political thickets.¹⁶⁰

A. The Equity Wave: Equality Means Mediocrity for All

Equal protection analysis begins with the identification of the appropriate standard of review.¹⁶¹ Strict scrutiny, triggered by the infringement of a fundamental right, does not apply in federal cases in which the right claimed is education.¹⁶² Education is not a fundamental right protected explicitly or implicitly by the United States Constitution.¹⁶³ Moreover, although it is generally recognized that state constitutions may afford greater protection than found under the equivalent provision in the United States

¹⁵⁶ See *infra* Part II.A-B (discussing the shortfalls of both the equity and adequacy waves).

¹⁵⁷ See *infra* Part II.A (discussing the shortfalls of the equity wave).

¹⁵⁸ See *infra* Part II.B (discussing the shortfalls of the adequacy wave).

¹⁵⁹ See *supra* note 146 (discussing the numerous cases and years of litigation required to enforce the *Abbott*, 575 A.2d 359, decision).

¹⁶⁰ See *City of Pawtucket v. Sundlun*, 662 A.2d 40, 59 (R.I. 1995).

¹⁶¹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (stating that the Court “must decide, first, whether the Texas system of financing public education . . . impinges upon the fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny”).

¹⁶² *Id.*

¹⁶³ *Id.*

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Constitution,¹⁶⁴ the New York Court of Appeals has explicitly provided that its Equal Protection Clause “is no broader in coverage than the Federal Provision.”¹⁶⁵

Therefore, the New York Court of Appeals in *CFE I* dismissed both the federal and state equal protection claims despite the plaintiffs’ compelling arguments that intermediate scrutiny should be applied. Plaintiffs distinguished their case from early education finance challenges by arguing that thousands of New York City children are deprived of an adequate education unlike the arguments made by plaintiffs in *Rodriguez* and *Levittown*.¹⁶⁶ Here, plaintiffs argued that this case is similar to *Plyler v. Doe*, where the plaintiffs alleged that thousands of alien children were being deprived of an education.¹⁶⁷ In *Plyler*, the Supreme Court applied intermediate scrutiny, and held that the state must further a substantial goal when denying a basic education to undocumented alien children.¹⁶⁸ Plaintiffs further argued that because *Plyler* was decided eight days before the court issued its decision in *Levittown*, the New York Court of Appeals did not consider the full implications of the decision.¹⁶⁹

¹⁶⁴ See Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 42 Record, N.Y.C.B.A. 285, 299 (1987) (“In [New York], in fact, there is a long tradition of reading the parallel clauses independently and affording broader protection, where appropriate, under the State Constitution.”); see also *Bismarck Pub. Sch. Dist. v. State*, 511 N.W.2d 247, 255 (N.D. 1994).

¹⁶⁵ *Under 21 v. City of New York*, 482 N.E.2d 1, 8 n.6 (N.Y. 1985).

¹⁶⁶ Plaintiff’s Memorandum of Law, *supra* note 116, at 12-14 (“Plaintiffs’ allegation here that students are receiving an education below minimum standards thus dramatically shifts the legal landscape, not only in regard to claims under the New York State Constitution’s Education Article, but also under the state and federal equal protection clauses.”).

¹⁶⁷ *Plyler v. Doe*, 457 U.S. 202, 206 (1982). The Court held that defendants’ denial of a free public education to plaintiffs was not justified by a showing that the denial furthered a substantial state interest. *Id.* at 230.

¹⁶⁸ *Id.* at 224.

¹⁶⁹ Plaintiff’s Memorandum of Law, *supra* note 116, at 17 n.9. An argument, not offered by plaintiffs in *2001 CFE*, but may have convinced the court that education is a fundamental right in New York, is based purely on the history of education in New York and the intent of the framers of the Education Article. See *supra* notes 61-69 and accompanying text (describing

Arguably, the New York Court of Appeals also decided to dismiss both the federal and state equal protection claims because the equal protection remedies in education finance cases have invariably led to court mandates requiring equal funding among wealthy and poor school districts.¹⁷⁰ In states where courts have granted the equal protection remedies, the wealthy school districts suffered huge budget cuts without much increase in funding to the poorer school districts because the number of poor school districts far exceeded the number of wealthy school districts. In *Levittown*, the New York Court of Appeals exhibited trepidation in requiring equal distribution of funding when it stated that “[a]ny legislative attempt to make uniform and undeviating the educational opportunities offered by the several hundred local school districts . . . would inevitably work the demise of the local control of education available to students in individual districts.”¹⁷¹

As a result of the problems encountered in implementing equity remedies, the courts have practically urged parties to plead third wave adequacy claims. For example, when Virginia plaintiffs brought second wave equality claims based on the state’s Equal Protection Clause, the Virginia Circuit Court in *Scott v. Commonwealth*¹⁷² refused to equate “high quality” with

the importance of education in New York as evidenced by historical documents). For example, in *Brigham v. State*, 692 A.2d 384 (Vt. 1997), the Vermont Supreme Court held that its system of financing education deprived children of an equal educational opportunity in violation of its constitution. Despite the fact that the state’s Education Act lacks strong language like New York’s, the court found a fundamental right on the basis of the history of education in democratic civilizations, the United States, and Vermont. *Id.* at 393 (“[T]he greatest legislators from Lycurgus down to John Locke, have laid down a moral and scientific system of education as the very foundation and cement of a State.”). The court held that “in Vermont the right to education is so integral to our constitutional form of government, and its guarantees of political and civil rights, that any statutory framework that infringes upon the equal enjoyment of that right bears a commensurate heavy burden of justification.” *Id.*

¹⁷⁰ See *supra* notes 46-61 (discussing the shortfalls of equity claims).

¹⁷¹ *Levittown v. Nyquist*, 439 N.E.2d 359, 367 (N.Y. 1982).

¹⁷² 29 Va. Cir. 324, 1992 WL 886029 (Va. Cir. Ct. 1992), *aff’d*, 443

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“equality.”¹⁷³ The court stated that “[t]he Virginia Constitution, while establishing education as a fundamental right, does not as written make equalized funding on the part of the Commonwealth a constitutional right.”¹⁷⁴ As if to ask future plaintiffs to make third wave claims, the court compared the plaintiffs’ equity claim to the adequacy claim in *Rose v. Council for Better Education*.¹⁷⁵ The Virginia Circuit Court stated that “[t]he Rose plaintiffs alleged that Kentucky public school students were receiving an inadequate education, one that did not even meet minimal standards.”¹⁷⁶ Because the plaintiffs in *Scott* did not allege a third wave adequacy claim, the court dismissed the case.¹⁷⁷

Few courts strike down education funding schemes on the basis of equity claims, making it clear that courts are aware of the dangers that a state faces when it tries to provide equal funding to all school districts.¹⁷⁸ Hence, in the post-*Serrano* era, courts that find funding systems in violation of their states’ equal protection clauses are reluctant to issue remedies.¹⁷⁹ For this reason, advocates have ultimately come to rely on third wave adequacy arguments to overturn funding schemes.¹⁸⁰ However, this reliance should be met with caution as more courts refuse even third wave adequacy arguments on the grounds that the remedies associated with them require excessive judicial oversight.¹⁸¹

S.E.2d 138 (Va. 1994).

¹⁷³ *Id.* at *4.

¹⁷⁴ *Id.* at *5.

¹⁷⁵ 790 S.W.2d 186, 207-08 (Ky. 1989) (holding that the Kentucky Constitution requires substantial uniformity and equality).

¹⁷⁶ *Scott*, 1992 WL 885029, at *5.

¹⁷⁷ *Id.* at *6.

¹⁷⁸ This is a result of *San Antonio v. Rodriguez*, 411 U.S. 1 (1973) (holding that education is not a fundamental right protected by the Federal Constitution).

¹⁷⁹ See *supra* Part I.A.1 (discussing the dissatisfaction that scholars felt in the aftermath of equity cases such as *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971)).

¹⁸⁰ See generally Heise, *supra* note 37.

¹⁸¹ See, e.g., *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995).

B. The Adequacy Wave and Judicial Activism

Opposition to judicial activism in the realm of education started most notably after the Warren Court decided *Brown v. Board of Education* in 1954.¹⁸² The Warren Court affected a change in the power relationships between branches of the government, resulting in “a massive transfer of power from elected officials . . . to [the judiciary].”¹⁸³ The Court’s decision to exercise its remedial power to supervise and maintain detailed control over various school desegregation plans caused some backlash on the part of conservative scholars.¹⁸⁴ Hostility towards the Court’s expanded power to bring about social reform, initiated by the Warren Court in *Brown*, is a prominent factor in the mixed results of adequacy claims.

Of course, not all courts take such a harsh stance. Many are willing to exercise their remedial powers to bring about much needed reform in inadequate school systems.¹⁸⁵ However, even the most progressive courts have expressed some trepidation in

¹⁸² See JOHN DENTON CARTER, *THE WARREN COURT AND THE CONSTITUTION: A CRITICAL VIEW OF JUDICIAL ACTIVISM* 7 (1973). Referring to the *Brown* decision, the author states:

It was in the school desegregation decree that the Warren Court took the plunge directly into the political and legislative thickets to bring about what it considered to be desirable social and political reforms and thereby introduced into the judicial process a sense of abandon that the New Deal Court had only approached.

Id.

¹⁸³ *Id.* at 8.

¹⁸⁴ See *id.* at 6. The author states:

From all of the warped decisions of the Warren Court, serious consequences have followed. Some of the results have been: . . . a breakdown in law and order . . . federal court supervision of the public schools in the most minute details . . . the flooding of the country with pornography; the downgrading of religious training of children in the public schools.

Id. at 10. The author goes on to link the remedial action of the Warren Court in *Brown* to “death of the great cities” and eventually “[c]haos.” *Id.* at 11.

¹⁸⁵ See, e.g., *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 207-08 (Ky. 1989).

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issuing broad remedies that define guidelines for legislative action.¹⁸⁶ For example, in *Rose v. Council for Better Education*, the Kentucky Supreme Court held that the state's education system was inadequate under the state education provision, but stayed its extensive remedial order allowing time for its legislature to act on its own.¹⁸⁷ The concept of giving deference to the state legislature to formulate its own remedy before court action permeates many of the recent education funding cases, including *2001 CFE*.¹⁸⁸

To rely on the success of an adequacy claim is to rely on a court's view that it has the remedial power to bring about social change, a recognized court function that still meets opposition in a fair number of our nation's courts.¹⁸⁹ Although most scholars agree that "[f]ew people in contemporary society see the effect of *Brown* itself as anything other than a great triumph for justice,"¹⁹⁰ they also agree that courts exercising their remedial power, like the Warren Court in *Brown*, have "more often followed the policies that are generally supported by liberals and opposed by conservatives."¹⁹¹ Therefore, even with a clear showing of inadequacy, court implemented remedies are not always certain to follow.

The old waves of equity and adequacy are ineffective or unreliable at best because courts fear implementing the associated

¹⁸⁶ See, e.g., *Pawtucket*, 662 A.2d at 59. "The volume of litigation and the extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on the duty of the Legislature." *Id.*

¹⁸⁷ *Rose*, 790 S.W.2d at 186; see also *Paynter v. State*, 220 N.Y.S.2d 712, 720 (2000) (encouraging the parties to "consider committing their resources to the fashioning and application of remedies, and not to further litigation and a court mandated solution").

¹⁸⁸ See *supra* Part II.B.3 (discussing the respective roles of state legislatures and courts in *2001 CFE*); see also *Paynter*, 220 N.Y.S.2d at 720. However, after encouraging the parties to develop their own remedy, the court stated that "should this court find that the State has discriminated against the [plaintiffs], the State will be held accountable and a remedy ordered." *Id.*

¹⁸⁹ CHRISTOPHER WOLFE, *JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY?* 24 (rev. ed., Rowman & Littlefield 1997) (1991).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 25.

remedies.¹⁹² Equity remedies require states to distribute funding equally among school districts and, in the aftermath of cases like *Serrano*, are rarely implemented.¹⁹³ In addition, because adequacy remedies seek to implement an adequate education, and because state definitions of an adequate education are multi-faceted and comprehensive, remedies are difficult to implement and enforce.¹⁹⁴ Therefore, courts, in ruling for plaintiffs on adequacy grounds, must often be prepared to oversee the implementation and enforcement of the remedy for years, which, in many cases, they are unwilling to do.¹⁹⁵

III. TITLE VI AND ENFORCING FINANCE REMEDIES

*We are confronted primarily with a moral issue. It is as old as the Scriptures. . . . [T]he question is whether we are going to treat our fellow Americans as we want to be treated.*¹⁹⁶

It has been nearly thirty years since the first education finance cases were litigated. For the first time, it seems, advocates have found the proper tool to litigate such cases. Because Title VI was enacted pursuant to the Spending Clause, its remedy avoids the problems of past litigation strategies, and is therefore our best hope for ending discriminatory funding in our nation's public schools.

The Spending Clause of Article I provides that "Congress shall have Power To lay and collect Taxes, Duties, Imposts, and

¹⁹² See *supra* Part I.A.1, II (discussing the shortfalls of second and third waves of litigation).

¹⁹³ See *supra* Part I.A.1 (discussing the dissatisfaction that scholars felt in the aftermath of equity cases such as *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971)).

¹⁹⁴ See, e.g., *Pawtucket*, 662 A.2d at 59; *but see* *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990).

¹⁹⁵ See, e.g., *Pawtucket*, 662 A.2d at 59; *State v. Campbell County Sch. Dist.*, 19 P.3d 518, 526 (Wyo. 2001).

¹⁹⁶ President John F. Kennedy, Television Address Introducing the Civil Rights Bill (June 11, 1963).

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Excises, to pay the Debts and provide for the common Defence and Welfare of the United States.”¹⁹⁷ The clause allows Congress to spend its money to provide for the general welfare of the United States. In other words, Congress, in exchange for federal funds, can require recipients to comply with all of the requirements of the statute.¹⁹⁸ The use of congressional spending power has been upheld in numerous situations.¹⁹⁹ For example, in *South Dakota v. Dole*, the Supreme Court upheld a federal statute conditioning the states’ receipt of federal highway funds on the adoption of a minimum drinking age of twenty-one.²⁰⁰ In the decision written by then-Justice Rehnquist, the Court held that “[e]ven if Congress might lack the power to impose a national

¹⁹⁷ U.S. CONST. art. 1, § 8, cl. 1.

¹⁹⁸ See *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974).

¹⁹⁹ See, e.g., *id.*; *Helvering v. Davis*, 301 U.S. 619 (1937) (defining the limits of Spending Clause legislation); *United States v. Butler*, 297 U.S. 1, 65 (1936) (holding for the first time that Congress can enact legislation pursuant to the Spending Clause).

²⁰⁰ 483 U.S. 203 (1987). The court in *Dole* articulated the scope of the spending power. *Id.* at 207-08. First, the exercise of the spending power must be in pursuit of the general welfare of the people. *Id.* Second, if Congress desires to condition the states’ receipt of federal funds, it must do so unambiguously. *Id.* Third, the conditions on federal grants might be illegitimate if they are unrelated to federal interests, in particular national projects or programs. *Id.* Fourth, other constitutional provisions may provide an independent bar to the conditional grant of federal funds. *Id.* Title VI satisfies the four criteria outlined by *Dole*. First, that Title VI is in pursuit of the general welfare is undisputable; in fact, the Civil Rights Act has been hailed by scholars as the most effective tool in ending insidious racial discrimination. 24 U.S.C. § 2000d; see, e.g., Gary Orfield, *Conservative Activists and the Rush Toward Resegregation*, in *LAW AND SCHOOL REFORM* 42 (Jay P. Huebert ed., Yale University Press 1999) (1998). The author states: “The courts provided clear leadership only after Congress acted in 1964 and 1965 to transform civil rights law and the Johnson Administration employed . . . the threat of cutoff of federal funds.” *Id.* The language of Title VI unambiguously conditions the receipt of federal funds on compliance with its provision. See *infra* note 207 (citing language of the relevant provision) and accompanying text (discussing the effect of Spending Clause legislation). Also, the federal funds relate to a particular national project, the education of America’s children. Lastly, the goal of minimizing racial inequality is far from unconstitutional. See *Mills & McIendon*, *supra* note 11, at 334-35.

drinking age directly, we conclude that the encouragement to state action . . . is valid use of the spending power.”²⁰¹

The need for Title VI legislation, enacted pursuant to the Spending Clause in order to end discriminatory state action, surfaced most notably in the aftermath of *Brown v. Board of Education*.²⁰² In the ten years between *Brown* and the enactment of Title VI, “the Deep South remained almost entirely segregated.”²⁰³ Because court ordered remedies to end segregation were met with great opposition, Congress enacted Title VI to facilitate integration: “The 1964 Act’s manifestation of federal determination, at both the legislative and executive levels, to end unlawful segregation played a major role in making *Brown* a reality.”²⁰⁴

Title VI conditions the receipt of federal funds on a state’s compliance with its guidelines.²⁰⁵ The statute provides that “[n]o person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the

²⁰¹ *Dole*, 483 U.S. at 212. It should be noted that many scholars are wary of the congressional spending power, fearing that the legislation enacted pursuant to the Spending Clause could be overly coercive. See Lynn A. Baker, *Conditional Spending After Lopez*, 95 COLUM. L. REV. 1911, 1914-16 (1995) (arguing that the four part *Dole* test is unworkable as it allows Congress to infringe on state sovereignty in violation of the principles of federalism); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987) (arguing that conditions infringing on individual rights should be struck down as unconstitutional). All are in agreement, however, that Title VI is validly enacted pursuant to the Spending Clause. See, e.g., Brett D. Proctor, Note, *Using the Spending Power to Circumvent City of Boerne v. Flores: Why the Court Should Require Constitutional Consistency in Its Unconstitutional Conditions Analysis*, 75 N.Y.U. L. REV. 469, 490 (2000). “The validity of Title VI as Spending Clause legislation is beyond question.” *Id.* (citing *Lau v. Nichols*, 414 U.S. 563, 569 (1974)).

²⁰² BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS 51 (1997).

²⁰³ *Id.*

²⁰⁴ *Id.*; see also STONE ET AL., CONSTITUTIONAL LAW 537 (3d ed. 1996). The authors state that Title VI is “important not only because the threatened fund cutoff provided an impetus for desegregation, but also because the guidelines provided the courts with an escape from the morass of case-by-case litigation over individual desegregation plans.” *Id.*

²⁰⁵ See 28 U.S.C. § 2000d.

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benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”²⁰⁶ The statute was conceived of by President Kennedy who, during his administration, requested that “Congress grant executive departments and agencies authority to cut off federal programs that discriminate against Negroes.”²⁰⁷ Title VI rests on the principle that “taxpayers’ money, which is collected without discrimination, shall be spent without discrimination.”²⁰⁸ In other words, the legislators intended to reserve federal funds for those states willing to end discrimination.²⁰⁹

Advocates are just realizing now that Title VI is more than a tool to end desegregation, but also a tool to end the discriminatory distribution of education funding.²¹⁰ Its effectiveness stems from its unique ability to enforce remedies. In ruling for plaintiffs on Title VI regulation claims, courts will avoid the old wave problems of equalization and judicial activism by providing court enforcement of private remedies through the revocation of federal funding. Congress’ clear intention was to equip courts with such enforcement power:

We come then to the crux of the dispute—how this right [to participate in federally funded programs without discrimination] should be protected. And even this issue becomes clear upon the most elementary analysis. If federal funds are to be dispensed on a nondiscriminatory basis, the only possible remedies must fall into one of two categories: First, action to end discrimination; or second, action to end payment of funds.²¹¹

The plurality in *Guardians Association v. Civil Service Commission of the City of New York* laid out the framework for remedies in Title VI disparate impact cases, stating that “where

²⁰⁶ Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000).

²⁰⁷ *Bakke*, 438 U.S. 265, 328-29 (1978) (app. to Opinion of Powell, J.).

²⁰⁸ 110 CONG. REC. 6546, 7064 (1964) (statement of Sen. Ribicoff).

²⁰⁹ *Id.* at 1542 (statement of Rep. Lindsay).

²¹⁰ *See, e.g., 2001 CFE*, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001).

²¹¹ 110 CONG. REC. 7065 (1964) (statement of Sen. Ribicoff), *cited in Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 421 n.28 (1978).

legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to afford full relief.”²¹² The Court specified that the relief “should be limited to declaratory and injunctive relief ordering future compliance with the declared statutory and regulatory obligations.”²¹³ The Court further added that to enforce the remedy, “it is presumed that private litigants . . . are entitled to . . . the limited remedy deemed available to the plaintiffs in *Pennhurst v. Halderman*.”²¹⁴ In *Pennhurst*, the Court held that “relief may well be limited to enjoining the Federal Government from providing funds to the [state].”²¹⁵ Similarly, in *Rosado v. Wyman* the Supreme Court held that federally funded welfare recipients were entitled to “declaratory relief and an appropriate injunction by the District Court against the payment of federal monies” to the program “should the State not develop a conforming plan within a reasonable period of time.”²¹⁶

Because Title VI is spending-power legislation, the remedy for its violation allows courts to defer to state legislatures to enact remedial legislation if it chooses. Not only may the state legislature decide not to enact any law at all, but also, if it chooses to remedy the violation, it may formulate the law in any way that does not have a disparate impact on minorities. The Supreme Court of New York recognized this in stating the following:

The legislature must be given the first opportunity to reform the current system. . . . That said, the court’s deference to the coordinate branches of State government is contingent on these branches taking effective and timely action to address the problems set forth in this option. The

²¹² 463 U.S. 582, 595 (1983).

²¹³ *Id.* at 598 (1983).

²¹⁴ *Id.* at 599 (citing *Pennhurst v. Halderman*, 451 U.S. 1 (1981)).

²¹⁵ *Pennhurst*, 451 U.S. at 28.

²¹⁶ *Rosado v. Wyman*, 397 U.S. 397, 420 (1970). “New York is, of course, in no way prohibited from using only state funds according to whatever plan it chooses, providing it violates no provision of the Constitution.” *Id.*

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parlous state of the City's schools demands no less. The court will not hesitate to intervene if it finds that the legislative and/or executive branches fail to devise and implement necessary reform.²¹⁷

If the New York Legislature chooses to comply with *2001 CFE*'s remedy, the court may be asked to intervene once more to decide if the proposal disparately impacts minorities. The intervention, however, will not require the court to look over the shoulders of the New York State Legislature. Rather, the court will make a simple calculation, comparing funding distributed to minorities and whites in the state, and will intervene if the comparison shows that the new funding scheme disparately impacts minorities.²¹⁸ If the proposal does disparately impacts minorities, the court may issue an order to revoke the state's federal funding for education altogether.²¹⁹ If it does not, no further intervention is required.

Although the revocation of federal funding could be drastic, having a deleterious effect on the program, there are safeguards protecting against such an outcome. The Supreme Court has stated that Spending Clause legislation allows states to make a choice: either the state "compl[ies] with what a court has announced is necessary to conform to federal law," or the state can "withdraw[] from the program."²²⁰ If the state chooses to comply, it must "prospectively perform [its] duties incident to the receipt of federal money," or the court may revoke those funds.²²¹

In the case of education funding, however, revocation of funds would be antithetical to the goal of providing equal and adequate education for all children.²²² But if the state refuses to

²¹⁷ *2001 CFE*, 719 N.Y.S.2d at 549-50.

²¹⁸ *See, e.g., 2001 CFE*, 719 N.Y.S.2d at 542.

²¹⁹ *See, e.g., Guardians v. Civil Serv. Comm'n of N.Y.*, 463 U.S. 582, 596 (1983) (citing *Rosado*, 397 U.S. at 420-21).

²²⁰ *Id.*

²²¹ *Id.*

²²² 110 CONG. REC. 7065 (1964) (statement of Sen. Ribicoff), *cited in Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 421 n.28 (1978). "Obviously action to end discrimination is preferable since that reaches the

comply, it is clear that the courts are left with no other choice except to terminate federal funds.²²³ Fortunately, the political process will most likely prevent state noncompliance resulting in the withdrawal of federal funds for education.²²⁴ It seems beyond reason that state legislators would fail to approve a funding scheme that is nondiscriminatory, especially if their failure to do so would result in drastic funding cuts to education. Such an action would infuriate constituents and effectively sound the death knell for any legislator seeking to remain in office.

In sum, a court ruling for plaintiffs on Title VI grounds will avoid the problems inherent in equity and adequacy claims, namely, reluctance to equalize funding and judicial activism. Legislatures will be self-motivated to create funding schemes that do not disparately impact minorities because Title VI threatens states with the loss of federal funds otherwise. By removing the remedy from the courts, the legislative decision of whether and how to make funding schemes equitable and adequate will not be questioned further by the courts. Upon a court's finding that a state's funding scheme violates Title VI, the courts will simply decide whether the remedy proposed by the legislature has a disparate impact on minorities. There is, in effect, a mathematical neutrality to the court's role in enforcing Title VI regulations claims.²²⁵

objective of extending the funds on a nondiscriminatory basis. But if the discrimination persists and cannot be effectively terminated, how else can the principle of nondiscrimination be vindicated except by nonpayment of funds?" *Id.*

²²³ *Id.*

²²⁴ *Cf.* Baker, *supra* note 201, at 1941. "Few congressional representatives, after all, should be eager to support legislation that gives the states money only if they comply with a condition that a majority of their own constituents would independently find unattractive." Baker, *supra* note 201, at 1941. It follows then that state legislatures would comply with legislation that a majority of their own constituents find attractive, such as legislation providing for nondiscriminatory education fund distribution.

²²⁵ Two recent federal decisions show that the fourth wave is building momentum. In *Robinson v. Kansas*, 117 F. Supp. 2d 1124 (D. Kan. 2000), plaintiffs survived defendants' motion to dismiss after bringing suit in federal district court alleging that the state's funding laws create a discriminatory

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CONCLUSION

Old wave claims are relatively unsuccessful because their remedies play into courts' fears of distributing equal funding in the wake of *Serrano v. Priest*²²⁶ and judicial activism in the wake of *Brown v. Board of Education*²²⁷ and, more recently, *Abbott v. Burke*.²²⁸ Both federal and state equity claims have been harshly criticized by scholars as inevitably decreasing states' overall per pupil spending, which in turn decreases student achievement. Although less so than equity claims, adequacy claims have also been criticized because they have been known to require decades of further litigation to implement the initial ruling requiring adequate funding for all school districts.

Title VI remedies evade the problems of equity and adequacy claims while providing significant legislative discretion in formulating a remedy without the need for excessive judicial intervention. Because Title VI conditions the receipt of federal funds on the non-discriminatory distribution of education funding, a court's role in developing and implementing remedies associated with these claims will be greatly diminished. Courts should look to see statistically whether minorities are discriminated against in state education finance plans and then

disparate impact against the state's minority students, non-U.S. origin students, and disabled students in violation of Title VI. Likewise, in *Ceaser v. Pataki*, No. 98 Civ. 8532, 2000 WL 1154318 (S.D.N.Y. Aug. 14, 2000), a lower court held that a complaint alleging that "educational services provided by a school system are disproportionately less beneficial to members of one race than another" is a validly stated claim under Title VI. *Id.* at *4. The complaint alleged that defendants, including Governor Pataki and the State of New York, have adopted a policy of not enforcing New York State education law requiring that the state provide school districts with "certified teachers, remedial instruction, school facilities and grounds, libraries, and regents courses and diplomas." *Id.* See also *Paynter v. State*, 220 N.Y.S.2d 712 (N.Y. Sup. Ct. 2000) (denying defendants' motion to dismiss a Title VI regulation claim that state law has an adverse discriminatory impact on African-American and Latino students).

²²⁶ 487 P.2d 1241 (Cal. 1971).

²²⁷ 347 U.S. 483 (1973).

²²⁸ 575 A.2d 359 (N.J. 1990).

leave developing and implementing the remedies to the state legislatures. Under the circumstances, claims will undoubtedly be more successful and more consistent than claims brought under the old waves, and could perhaps be the new wave in education finance litigation. For these reasons, the plaintiffs in *2001 CFE* should succeed before the New York Court of Appeals, setting solid precedent upon which the fourth wave can be built.