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## School Finance Litigation Comes to North Carolina

On May 25, 1994, the debate over education funding in North Carolina intensified when five low-wealth school districts and students in those districts filed *Leandro v. State*,<sup>1</sup> a suit that charges the State with failing to provide proper resources to educate North Carolina children.<sup>2</sup> The suit marks the beginning of a struggle that many other states have experienced.<sup>3</sup> Because education is so vital to our society

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1. No. 94 CVS 520 (N.C. filed May 25, 1994).

2. Plaintiffs' Complaint at 2, *Leandro v. State*, No. 94 CVS 520 (N.C. filed May 25, 1994); see also Tim Simmons, *Suit Hits School Funding*, NEWS & OBSERVER (Raleigh), May 26, 1994, at A1 (describing the lawsuit).

3. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Parker v. Mandel*, 344 F. Supp. 1068 (D. Md. 1972); *Van Duzart v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *Burruss v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970); *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969); *Opinion of the Justices*, 624 So. 2d 107 (Ala. 1993); *Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973); *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976), *cert. denied sub nom. Clowes v. Serrano*, 432 U.S. 907 (1977) (*Serrano II*); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (*Serrano I*); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982) (en banc); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Blase v. State*, 302 N.E.2d 46 (Ill. 1973); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993); *Helena Elem. Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Gould v. Orr*, 506 N.W.2d 349 (Neb. 1993); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), *cert. denied sub nom. Dickey v. Robinson*, 414 U.S. 976 (1974) (*Robinson I*); *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982); *Britt v. North Carolina State Bd. of Educ.*, 86 N.C. App. 282, 357 S.E.2d 432, *disc. rev. denied*, 320 N.C. 790, 361 S.E.2d 71 (1987); *Bismark Public Sch. Dist. No. 1 v. State*, 511 N.W.2d 247 (N.D. 1994); *Board of Educ. v. Walter*, 390 N.E.2d 813 (Ohio 1979), *cert. denied*, 444 U.S. 1015 (1980); *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135 (Okla. 1987); *Coalition for Equitable Sch. Funding, Inc. v. State*, 811 P.2d 116 (Or. 1991) (en banc); *Olsen v. State*, 554 P.2d 139 (Or. 1976); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979); *Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978) (en banc); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980).

Many commentators have discussed these cases and the legal theories supporting them. See, e.g., Kate Strickland, Ph.D., Note, *The School Finance Reform Movement, A History and Prognosis: Will Massachusetts Join the Third Wave of Reform?*, 32 B.C. L. REV. 1105 (1991); William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994) [hereinafter Thro, *Judicial Analysis*]; William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 Educ. L. Rep. (West) 19 (1993).

and integral to our daily lives, any conflict over the issue is certain to arouse strong emotions and heated debate.<sup>4</sup> Although some states have experienced great revitalization of their entire educational systems through school finance litigation,<sup>5</sup> the result in many other states has been anger, confusion, and more litigation, with few good solutions and no end in sight.<sup>6</sup>

This Comment attempts to explain the history, process, issues, and possible outcomes of the upcoming school finance litigation in North Carolina. Part I addresses the history and development of school finance litigation throughout the nation.<sup>7</sup> Part II outlines the history of public school financing in North Carolina and describes current funding problems.<sup>8</sup> Part III focuses on the current suit, *Leandro v. State*,<sup>9</sup> and evaluates the plaintiffs' claims in light of North Carolina case law, federal constitutional law, and relevant decisions from other states.<sup>10</sup> Part IV surveys various materials and opinions from other states and speculates on the possible policy implications of a North Carolina court decision.<sup>11</sup> The Comment concludes with the argument that, although school finance litigation may be long and difficult, it can be an ideal opportunity for defining the state's commitment to education and setting the state on a planned, coordinated path designed to provide all children with the education they need to compete in the next century.<sup>12</sup>

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[hereinafter Thro, *Role of Language*].

4. See Strickland, *supra* note 3, at 1105.

5. See Bert T. Combs, *Creative Constitutional Law: The Kentucky School Reform Law*, 28 HARV. J. ON LEGIS. 367, 376 (1991); Richard Fossey, *The Constitutional Duty to "Cherish" Public Schools in Massachusetts: More Than a Matter of Money*, 87 Educ. L. Rep. (West) 699, 702, 706-08 (1994); Ronald G. Dove, Jr., *Acorns in a Mountain Pool: The Role of Litigation, Law and Lawyers in Kentucky Education Reform*, 17 J. EDUC. FIN. 83, 105-17 (1991); see also *infra* note 543 and accompanying text.

6. See Gail F. Levine, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507, 509-13, 515-16, 542 (1991); Joshua S. Wyner, *Toward a Common Law Theory of Minimal Adequacy in Public Education*, 1992/1993 ANN. SURV. AM. L. 389, 398 (1994); see also *infra* notes 487-500 and accompanying text. See generally Mark Yudof, *School Finance Reform in Texas: The Edgewood Saga*, 28 HARV. J. ON LEGIS. 499, 499 (1991) (comparing school finance reform to a Russian novel: "it's long, tedious, and everybody dies in the end").

7. See *infra* notes 13-81 and accompanying text.

8. See *infra* notes 82-189 and accompanying text.

9. No. 94 CVS 520 (N.C. filed May 25, 1994).

10. See *infra* notes 190-451 and accompanying text.

11. See *infra* notes 452-535 and accompanying text.

12. See *infra* notes 536-44 and accompanying text.

## I. THE HISTORY AND DEVELOPMENT OF SCHOOL FINANCE LITIGATION

### A. *The Problems*

With the advent of comprehensive public schools, almost every state adopted a system of financing that relied on local property taxes to fund local school systems.<sup>13</sup> The conflicts over school financing that have been litigated during the past thirty years arose out of the disparities that are inherent in this type of system.<sup>14</sup> Because taxes for public schools were not universally popular, state legislatures declined to levy state taxes to fund public schools; choosing instead to leave the taxing authority to the local governments, which implemented property taxes.<sup>15</sup> However, counties with higher property values could maintain lower property tax rates and still produce more revenues for public schools than could poorer counties with higher tax rates.<sup>16</sup> As a result, extreme inequalities developed among the local school systems of many states.<sup>17</sup> Today, small "enclaves of affluence" exist alongside poor inner-city and rural school districts throughout the United States.<sup>18</sup>

Most state governments contribute to local educational funding, and many even have equalization programs that attempt to relieve disparities between wealthy and poor school systems. However, localities are still expected to provide a large portion of the money necessary for public educational operations. This scheme perpetuates funding inequalities.<sup>19</sup> There is considerable debate over the effect

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13. See William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1647-48 (1989) [hereinafter Thro, *To Render Them Safe*].

14. Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 HARV. J. ON LEGIS. 341, 348 (1991); Thro, *To Render Them Safe*, *supra* note 13, at 1647-48.

15. Alexander, *supra* note 14, at 348.

16. *Id.*

17. *Id.* For example, at the time of Kentucky's school finance suit, the poorest county spent \$1,700 per-pupil while the wealthiest spent \$4,800 per-pupil. *Id.*; see also *infra* notes 128-31 (describing spending disparities in North Carolina).

18. Alexander, *supra* note 14, at 348.

19. Thro, *To Render Them Safe*, *supra* note 13, at 1647. In North Carolina, local funds account for 25% of operation expenditures. NORTH CAROLINA CIVIL LIBERTIES UNION, A RIGHT DENIED: EDUCATIONAL INEQUITY IN NORTH CAROLINA'S SCHOOLS, A REPORT TO THE NORTH CAROLINA GENERAL ASSEMBLY 10 (June 5, 1991) (citing NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION, NORTH CAROLINA PUBLIC SCHOOLS STATISTICAL PROFILE 1990, I-41 (1990)) [hereinafter A RIGHT DENIED]; see also *infra*

of disparities in school funding on student achievement,<sup>20</sup> but there is some consensus that inadequate funding is linked to low achievement.<sup>21</sup> Concern over the perceived deleterious effects of inadequate school funding on student achievement has led to lawsuits in a majority of states.<sup>22</sup>

### B. *The Three Waves of Reform Litigation*

William E. Thro, the Assistant Attorney General of Colorado and an expert in school finance law,<sup>23</sup> has divided the history of American school finance litigation into three sections, or "waves."<sup>24</sup> Thro's "waves" scheme has been generally accepted by school finance scholars,<sup>25</sup> and is helpful in understanding the issues in school finance suits and the development of the applicable legal theories.

The first wave began in 1971 with a California case, *Serrano v. Priest*,<sup>26</sup> and ended abruptly at the United States Supreme Court with a Texas case, *San Antonio Independent School District v. Rodriguez*.<sup>27</sup> In *Serrano*, the California Supreme Court held that the state's funding plan, a typical system based on local property tax revenues, violated the Equal Protection Clauses of the federal and state constitutions because of the extent to which educational expenditures were influenced by the wealth of individual neighbor-

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notes 113-21 and accompanying text.

20. Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 316 (1991) [hereinafter McUsic, *Education Clauses*]; Fossey, *supra* note 5, at 708-10.

21. See, e.g., Charles S. Benson, *Definitions of Equity in School Finance in Texas, New Jersey, and Kentucky*, 28 HARV. J. ON LEGIS. 401, 402 (1991); Fossey, *supra* note 5, at 708-10; Martha Minow, *School Finance: Does Money Matter?*, 28 HARV. J. ON LEGIS. 395, 400 (1991); Thro, *To Render Them Safe*, *supra* note 13, at 1649. But see Eric A. Hanushek, *When School Finance "Reform" May Not be Good Policy*, 28 HARV. J. ON LEGIS. 423, 425 (1991); Richard J. Murnane, *Interpreting the Evidence on "Does Money Matter?"*, 28 HARV. J. ON LEGIS. 457, 464 (1991). See generally JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991) (recounting author's observation of vast disparities during visits to schools across the country).

22. See Thro, *Judicial Analysis*, *supra* note 3, at 598 n.3.

23. Thro, *Role of Language*, *supra* note 3, at 19.

24. William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 222-32, 250 (1990) [hereinafter Thro, *The Third Wave*].

25. See, e.g., R. CRAIG WOOD & DAVID C. THOMPSON, *EDUCATION FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS—AN ANALYSIS OF STRATEGIES* 90 (1993); Levine, *supra* note 6, at 507 n.1; McUsic, *Education Clauses*, *supra* note 20, at 314; Strickland, *supra* note 3, at 1125.

26. 487 P.2d 1241 (Cal. 1971), *cert. denied*, 432 U.S. 907 (1977).

27. 411 U.S. 1, *reh'g denied*, 411 U.S. 959 (1973); see also Thro, *The Third Wave*, *supra* note 24, at 222-23 (introducing the wave theory).

hoods.<sup>28</sup> The court held that the difference in per-pupil expenditures among the various school districts had a significant impact on the quality of education in the low-wealth districts, and that this disparity denied poor children equal protection of the law.<sup>29</sup> In striking down the California financing method as unconstitutional, the court acknowledged the importance attached to education in the United States Supreme Court's opinion in *Brown v. Board of Education*.<sup>30</sup> In *Brown*, the Court stated: "Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."<sup>31</sup> The language in *Brown* and the *Serrano* court's analysis of the equal protection claim together suggested broad grounds for judicial intervention, and the first wave began as suits were filed in more than thirty states.<sup>32</sup>

However, decisions in many of these cases were never rendered. In 1973 the United States Supreme Court halted the first wave by upholding the Texas finance system in *San Antonio Independent School District v. Rodriguez*.<sup>33</sup> The Court held that education, although important, was neither explicitly nor implicitly established in the text of the Constitution as a fundamental right.<sup>34</sup> Moreover, the Court refused to recognize classification by wealth as "suspect" for the purpose of equal protection analysis; thus, strict scrutiny did not apply.<sup>35</sup> Instead, the Court applied the more lenient "rational basis"

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28. *Serrano*, 487 P.2d at 1244.

29. *Id.* at 1247.

30. *Id.* at 1256.

31. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

32. Strickland, *supra* note 3, at 1128; Thro, *The Third Wave*, *supra* note 24, at 224 n.24 (citing Betsy Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 1977 DUKE L.J. 1099, 1099).

33. 411 U.S. 1, 6 (1973); *see also* Thro, *The Third Wave*, *supra* note 24, at 224-25 (describing the impact of *Rodriguez* on the first wave of litigation).

34. *Rodriguez*, 411 U.S. at 35.

35. *Id.* at 40-41; *see also* John Dayton, *An Anatomy of School Finance Litigation*, 77 Educ. Law Rep. (West) 627, 638-40 (1992) (discussing *Rodriguez* and its impact); Strickland, *supra* note 3, at 1129 (describing *Rodriguez* and its methodology); Thro, *The Third Wave*, *supra* note 24, at 224-25 (discussing *Rodriguez*). The Supreme Court uses different levels of scrutiny for equal protection claims under the Constitution. Claims under statutes that involve a fundamental right, such as the right to vote, or a suspect classification, such as race, are strictly scrutinized by the Court and are generally found to be unconstitutional. Under strict scrutiny, the court considers whether the state action bears a necessary relationship to a compelling governmental interest. Statutes not involving a fundamental right or a suspect class are subject to a more lenient rational basis test to determine whether the challenged state action bears a rational relationship to a

scrutiny and held that the inequities of the Texas system did not violate the Equal Protection Clause,<sup>36</sup> because the system of funding was rationally related to the state's interest in maintaining local control over education.<sup>37</sup>

With *Rodriguez*, the United States Supreme Court effectively closed the door on school finance reform litigation based on the federal Equal Protection Clause.<sup>38</sup> School finance reform litigants were forced to turn to a new strategy: protection under state constitutions.<sup>39</sup> A New Jersey case, *Robinson v. Cahill*,<sup>40</sup> pioneered this strategy and began the second wave.<sup>41</sup>

*Robinson* was decided within days of the *Rodriguez* decision, and the second wave of cases mounted quickly.<sup>42</sup> The *Robinson* court considered whether New Jersey's public schools had met the state's constitutional mandate of "a thorough and efficient system of free public schools"<sup>43</sup> and found that they had not because of discrepancies in per-student funding.<sup>44</sup> *Robinson* demonstrated that state constitutions provided two sources of claims for litigants—one based on equal protection clauses, and the other based on the guarantees of public education provided in education articles in almost every state constitution.<sup>45</sup> The two sources of claims worked together: the

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legitimate state interest. See Thro, *The Third Wave*, *supra* note 24, at 225 nn.28-30. The Court ignored several earlier holdings implicitly based on wealth as a suspect class. See Thro, *The Third Wave*, *supra* note 24, at 224 n.28; see, e.g., *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 668 (1966) (holding monetary barriers to the right to vote unconstitutional); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (holding that criminal defendants may not be denied appeals of right because of inability to pay for trial transcripts).

36. *Rodriguez*, 411 U.S. at 55; see also Strickland, *supra* note 3, at 1128 (discussing *Rodriguez*).

37. *Rodriguez*, 411 U.S. at 55.

38. Thro, *The Third Wave*, *supra* note 24, at 225. However, some commentators believe that the federal constitution may still provide relief. See, e.g., Julius Chambers, *Adequate Education for All: A Right, An Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 68-72 (1987); James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 405-13, 416-23 (1990).

39. Strickland, *supra* note 3, at 1132.

40. 303 A.2d 273 (N.J. 1973) (*Robinson I*).

41. Thro, *The Third Wave*, *supra* note 24, at 228.

42. *Id.*

43. See *Robinson I*, 303 A.2d at 285 (quoting N.J. CONST. art. VIII, § 4, para. 1).

44. *Id.* at 295; see also Strickland, *supra* note 3, at 1133 (describing the *Robinson* court's methodology).

45. Thro, *The Third Wave*, *supra* note 24, at 228-30. See, e.g., ARIZ. CONST. art. 11, §§ 1-10; N.D. CONST. art. VIII, §§ 1-6; TEX. CONST. art. 7, § 1. Thro maintains that every state but Mississippi has an education article. Thro, *The Third Wave*, *supra* note 24, at

education article in the state constitution demonstrated that education was a fundamental right, and the state's equal protection clause prohibited wealth-based disparities in the level of education provided by the state.<sup>46</sup>

According to the *Rodriguez* Court, the test for a fundamental right under the federal Constitution is whether the text of the Constitution explicitly or implicitly establishes the right.<sup>47</sup> Had state courts uniformly applied the *Rodriguez* analysis of fundamental rights to their own constitutions, they would have been forced to recognize education as a fundamental right, because almost every state constitution explicitly provides for an educational system.<sup>48</sup> However, not all state courts accepted *Rodriguez*,<sup>49</sup> and the decisions of the second wave became so inconsistent that the opinions offered little guidance to potential plaintiffs, commentators, or other courts.<sup>50</sup> The second wave of cases ultimately failed to bring about successful finance reform litigation.<sup>51</sup> From 1983 to 1989, no state invalidated its funding scheme; school finance reform litigation was considered a dead issue.<sup>52</sup>

In 1989, however, state courts in Montana, Texas, and Kentucky struck down school funding schemes on state constitutional grounds.<sup>53</sup> The third wave began with these three monumental

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229; Thro, *Role of Language*, *supra* note 3, at 19. But see McUsic, *Education Clauses*, *supra* note 20, at 311 n.5 (arguing that the Mississippi clause does require a system of schools).

46. Thro, *The Third Wave*, *supra* note 24, at 228-30.

47. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973).

48. Dayton, *supra* note 35, at 638-39.

49. *Id.* at 639.

50. Compare *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (holding that education is a fundamental right under the West Virginia constitution) with *Olsen v. State*, 554 P.2d 139, 147 (Or. 1976) (rejecting the state constitution's equal protection clause as a basis for reform); see also Thro, *The Third Wave*, *supra* note 24, at 231-32 & nn.56-57 (describing the unpredictable outcomes of the second wave cases).

51. *Id.* at 232. Thro, obviously frustrated in his attempts to construct a pattern of the second wave cases, stated that "[r]egardless of when the case was brought, the state constitutional provision relied upon, or the wording of the state constitutional provision, the outcomes were totally unpredictable." *Id.* at 231-32.

52. Fossey, *supra* note 5, at 704; William E. Thro, *The Significance of the Tennessee School Finance Decision*, 85 Educ. Law Rep. (West) 11, 19 (1993) [hereinafter Thro, *Tennessee*]; Thro, *The Third Wave*, *supra* note 24, at 232.

53. In *Helena Elem. Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989), the Montana Supreme Court found that the state system, where property tax revenues and federal funds provided 35% of educational funding, caused disparities in educational quality, *id.* at 686-88, and violated the state constitution's mandate of a "basic system of free quality public elementary and secondary schools," *id.* at 686-88 (quoting MONT. CONST. art. X, § 1). Disparities in per-pupil expenditures were as high as eight-to-one due to disparities in local



victories for school finance plaintiffs,<sup>54</sup> and a new litigation strategy emerged that state courts found more attractive than the strategies employed in the second wave.<sup>55</sup> Since then, the New Jersey Supreme Court has again declared the state's system unconstitutional,<sup>56</sup> and Tennessee,<sup>57</sup> Massachusetts,<sup>58</sup> and Arizona<sup>59</sup> have followed in

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property values. *Id.* at 686. The funding disparities resulted in substantial differences in the quality of education provided. *Id.* at 687-88. The Montana Supreme Court based its decision on the plain meaning of the constitutional education provision and failed to reach the equal protection issue. *Id.* at 690-91; *see also* Thro, *The Third Wave*, *supra* note 24, at 234 n.77 (discussing the Montana Supreme Court's methodology). The Texas Supreme Court, in *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989), found a 700-to-1 property wealth disparity between some districts, *id.* at 392, and concluded that a system with such inequalities was not encompassed by the constitutional drafters' choice of an "efficient system," *id.* at 393 (quoting TEX. CONST. art. 7, § 1). In addition, the court declared that the system failed to provide for a "general diffusion of knowledge" throughout the state, as was also required by the constitution. *Id.* (quoting TEX. CONST. art. III, § 1). In *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989), the Kentucky Supreme Court took a bold step by finding education to be a fundamental right under the state's constitution. *Id.* at 215. The court found that students in property-poor districts were afforded inferior educational opportunities, and held that the system failed to meet the constitutional standard of "an efficient system of common schools." *Id.* at 189 (quoting KY. CONST. § 183). Dramatically, the court then declared Kentucky's entire system of public schools unconstitutional. *Id.* at 215. This holding forced the legislature to restructure the state school system. Alexander, *supra* note 14, at 343; *see also* Fossey, *supra* note 5, at 706 (discussing *Rose* and its impact).

54. Thro, *The Third Wave*, *supra* note 24, at 238 n.105 ("Prior to 1989, there had never been more than one victory in a single year."). Thro pointed out the persuasive value of the three decisions for subsequent state court decisions: Reliance on state educational clauses by these three courts made it easier for other courts to justify pro-reform results and to move away from other negative precedent. *Id.* at 242; *see also infra* notes 221-50 and accompanying text (discussing negative precedent in North Carolina).

55. *See* Thro, *The Third Wave*, *supra* note 24, at 241-42; Thro, *Tennessee*, *supra* note 52, at 19-20; *see also infra* notes 61-67 and accompanying text (explaining the advantages of litigating solely under state constitution education articles).

56. *See Abbott v. Burke*, 575 A.2d 359 (N.J. 1990). The *Abbott* court held the state's educational financing system unconstitutional with regard to the poor, urban districts of the state. *Id.* at 363. The court's rationale rested on the state education clause, but the decision does not represent the typical school finance reform case. Benson, *supra* note 21, at 412-14. In addition, *Abbott* may demonstrate how future courts will deal with the problems of urban schools—some of the worst educational situations. *See* Benson, *supra* note 21, at 413; *see also infra* notes 444-51 and accompanying text (discussing *Abbott* and its applicability to *Leandro v. State*).

57. *See Tennessee Small Sch. Sys., Inc. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993). The court based its decision to strike down the state's educational funding system on the state constitution's equal protection clause. *Id.* at 152-57. Applying a rational relation test similar to that used by federal courts, the Tennessee Supreme Court found the Tennessee financing system irrational and not sufficiently related to local control of education. *Id.* at 154-57 (citing *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983)). The court's use of the equal protection clause broke from the recent trend of reliance on the education clause; however, the court still found that the education clause established a qualitative standard of education. Thro, *Tennessee*, *supra* note 52, at 13, 21-22; *see also*

the third wave of litigation.<sup>60</sup>

The third wave cases differ from the previous two waves in several respects. First, the decisions are generally based on the education clauses in state constitutions.<sup>61</sup> Many commentators agree that reliance on an education clause rather than an equal protection theory is a better litigation strategy, and courts seem more receptive to this type of argument.<sup>62</sup> Education clause arguments make it easier for a court to decide in favor of reform because the decision rests only on interpreting the state constitutional language that defines the legislature's duty to provide an educational system.<sup>63</sup> Courts had been reluctant to reform education funding by designating education as a fundamental right, or poverty-stricken students as a suspect class,

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*infra* notes 80, 377-79 and accompanying text (discussing the language of the Tennessee Constitution).

58. See *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993). The *McDuffy* court followed in the footsteps of the Kentucky Supreme Court by finding a duty under the state constitution to provide an educational system of high quality. *Id.* at 554-55; see also Thro, *Judicial Analysis*, *supra* note 3, at 612-13 (describing the quality standard required in *McDuffy*). The court held that the state had failed in its obligation under the education clause to educate "all its children, rich and poor, in every city and town of the Commonwealth." *McDuffy*, 615 N.E.2d at 548. For further discussion of the Massachusetts decision see *infra* notes 343-44, 376, 399, 417 and accompanying text.

59. See *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994). The Arizona Supreme Court found that the state's system of financing public schools violated the state's education article requiring a "general and uniform" system of public schools. *Id.* at 808 (quoting ARIZ. CONST. art. XI, § 1). The court held that the "general and uniform" language required more than a uniform framework, but did not require actual equality among schools. *Id.* at 814. The court found that a system that provided "sufficient funds to educate children on substantially equal terms" met the "general and uniform" requirement. *Id.* Because the financing system itself caused the inequalities, the legislature had failed to satisfy its constitutional mandate. *Id.* at 815-16.

60. Although two victories in the second wave were based solely on education clauses, see *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 77 (Wash. 1989), commentators failed to credit the decisions as significant because the second wave is seen as very incoherent. See Thro, *Tennessee*, *supra* note 52, at 18-19; *supra* notes 50-52 and accompanying text. However, many commentators now include the *Robinson* and *Seattle* cases in the class of cases in which school finance systems were overturned through the use of the education clause strategy. See Fossey, *supra* note 5, at 705-06; Levine, *supra* note 6, at 508 n.9.

61. Levine, *supra* note 6, at 508; Thro, *The Third Wave*, *supra* note 24, at 239-40.

62. McUsic, *Education Clauses*, *supra* note 20, at 308-10; Thro, *The Third Wave*, *supra* note 24, at 241; Thro, *Tennessee*, *supra* note 52, at 19-20; see, e.g., *Roosevelt Elem. Sch. Dist. No. 66*, 877 P.2d at 811 (Ariz. 1994).

63. Thro, *The Third Wave*, *supra* note 24, at 241; see *supra* notes 45-48 and accompanying text (demonstrating that almost all state constitutions require a system of public education); *infra* notes 309-414 and accompanying text (discussing the scope of the legislature's duty under the language of a state education clause).

because these broad pronouncements would increase litigation in areas unrelated to school finance.<sup>64</sup> In contrast, a court that defines the legislature's duty under an education clause produces virtually no impact in other areas of the law.<sup>65</sup> In an education clause case, a court can evaluate the language and requirements of the state constitution and then determine whether the legislature's performance meets the constitutional mandate.<sup>66</sup> These claims have other advantages as well. They do not conflict with federal laws in any way, and they do not force the plaintiffs or the court to prove a link between educational spending and student achievement; rather, they merely require the court to determine if the system set up by the legislature meets the terms of the state's constitutional mandate.<sup>67</sup>

Another difference between the third wave cases and previous cases is evident in the manner in which courts evaluate the legislation. The decisions of the courts hearing these cases have been based on the "quality" of education being offered rather than the equality of funding and resources.<sup>68</sup> In most of the cases, the court struck down the state's school finance system not because of fiscal inequalities, but

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64. McUsic, *Education Clauses*, *supra* note 20, at 309-10; Thro, *The Third Wave*, *supra* note 24, at 241-42.

65. Thro, *The Third Wave*, *supra* note 24, at 241; McUsic, *Education Clauses*, *supra* note 20, at 309-10.

66. Thro, *The Third Wave*, *supra* note 24, at 241. Thro also points out that state courts, unlike federal courts, are allowed to develop constitutional law and may declare greater rights under their state constitutions than those granted by the federal constitution. *Id.* at 226-27.

67. McUsic, *Education Clauses*, *supra* note 20, at 309-10. Equal protection claims, unlike education clause arguments, have the potential to trap plaintiffs into theoretical debates over "input measures." *Id.* at 315-16. Input measures refer to the dollars spent, or what resources or equipment can be purchased with those dollars. *Id.* at 316 (citing Betsy Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 1977 DUKE L.J. 1099, 1107). In contrast, "output measures" involve the quality of education received. *Id.* Although there is debate on the subject, output measures are often based on student performance on achievement tests. *Id.* Because input measures are easier to comprehend, courts often place the burden on the plaintiffs in an equal protection case to show the relation between the money spent and the quality of education received. *Id.* Through an education clause argument, however, the plaintiffs may bypass this morass by arguing that the state's education clause demands a uniform system, which involves comparison among districts rather than an often impossible statistical debate. *Id.* at 310, 315-16.

68. Thro, *Tennessee*, *supra* note 52, at 19; *see, e.g.,* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 189 (Ky. 1989) (holding the entire system of public education unconstitutional due to inferior education); *Helena Elem. Sch. Dist. No. 1 v. State*, 769 P.2d 684, 689 (Mont. 1989) (finding funding disparities but holding system unconstitutional based on substantial differences in the quality of education offered); *see also supra* notes 53-60.

because some of the districts had fallen below the state constitution's requirement of quality education.<sup>69</sup> The courts have avoided ruling on the issue of absolute equality of funding by simply ordering the state to restructure the system.<sup>70</sup>

Restructuring entire school systems to provide adequate quality demonstrates another characteristic of the third wave suits: State courts now seem to be more willing than pre-1989 courts to make sweeping holdings and to exercise control over the finance system to ensure its constitutionality.<sup>71</sup> For instance, in Kentucky, the state supreme court not only eliminated the entire bureaucracy of the Kentucky public school system,<sup>72</sup> but also issued guidelines to the legislature for formulating an adequate, constitutional system.<sup>73</sup> Likewise, the Texas Supreme Court refused to accept a legislative remedy enacted to correct the problems, holding that the new statutory provisions still failed the constitutional mandate.<sup>74</sup> Earlier decisions from various state courts had often deferred to legislative reforms.<sup>75</sup>

In addition to the significance of the rebirth of school finance litigation, and its positive publicity and influence on potential plain-

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69. Thro, *Tennessee*, *supra* note 52, at 19; *see, e.g.*, *Abbott v. Burke*, 575 A.2d 359, 363 (N.J. 1990) (holding the financing system unconstitutional as applied to poor, urban districts of the state); *see also supra* note 56; *infra* notes 436-37, 444-46 (further discussion of *Abbott*).

70. Strickland, *supra* note 3, at 1144-45; *see* *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 816 (Ariz. 1994); *Rose*, 790 S.W.2d at 212, 215; *Helena Elem. Sch. Dist. No. 1*, 769 P.2d at 691; *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 396, 399 (Tex. 1989); Alexander, *supra* note 14, at 363-65.

71. Thro, *Tennessee*, *supra* note 52, at 20. Alexander believes that while sweeping holdings are attempts to control, they can also preserve the balance of power by allowing legislative autonomy in restructuring the system. Alexander, *supra* note 14, at 364-65; *see also* Levine, *supra* note 6, at 528-33, 541-42 (emphasizing that a narrow court mandate can interfere with legislative reform options). For a discussion of judicial restraint in designing a remedy, *see infra* notes 461-500 and accompanying text.

72. *Rose*, 790 S.W.2d at 215; *see also* Alexander, *supra* note 14, at 363 (discussing the breadth of the Kentucky court's mandate); Strickland, *supra* note 3, at 1147 (providing an overview of *Rose*); Thro, *Tennessee*, *supra* note 52, at 20 (reviewing the history of school finance litigation).

73. *Rose*, 790 S.W.2d at 212.

74. *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 493 (Tex. 1991) (*Edgewood II*).

75. Thro, *Tennessee*, *supra* note 52, at 20; *see* *Washakie Co. Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 337 (Wyo. 1980) (recognizing the legislature's "valiant and sincere efforts to arrange the financing of an adequate school program"); Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1075-78 (1991) (discussing the deference of the New Jersey Supreme Court in the *Robinson* case).

tiffs,<sup>76</sup> the legal arguments developed in the third wave have independent significance.<sup>77</sup> The very fact that state constitutions contain education clauses highlights the importance of education as a state duty.<sup>78</sup> Thus, the language of the clauses, their framers' intent, and the history of their interpretation are likely to play an important role in litigation strategy.<sup>79</sup> In some cases, courts have simply interpreted the language literally and have accepted the plaintiffs' interpretation over that of the defendants.<sup>80</sup> Nevertheless, the constitutional

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76. Thro, *The Third Wave*, *supra* note 24, at 238. Clearly, a trend of winning cases may encourage potential plaintiffs to file suits in their own states. *Id.* at 238. In support of this point, Thro cites several legal articles, as well as articles on school finance in national newspapers. *Id.* at 238 n.106.

77. See Thro, *The Third Wave*, *supra* note 24, at 238-40.

78. *Id.* at 239, 243-49; Thro, *Role of Language*, *supra* note 3, at 22-23. Thro argues that when history and precedent are inconclusive, the language of the education clause, as categorized in his articles and by other scholars, should be determinative. In Thro's opinion, this approach would help make school finance litigation more predictable and legitimate. Thro, *Role of Language*, *supra* note 3, at 31. See *infra* notes 318-39 and accompanying text for further discussion of the classification of education articles and its significance to *Leandro*.

79. See Strickland, *supra* note 3, at 1145.

80. Thro, *Tennessee*, *supra* note 52, at 25. The Tennessee Supreme Court suggested that the wording of the education clause was a key issue. *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 148 (Tenn. 1989); see also Thro, *Tennessee*, *supra* note 52, at 21, 24-25 (describing how the Tennessee Supreme Court dealt with the language issue). However, the court ignored the defendant's argument, which was based on commentators' views that, compared to other state constitutions, Tennessee's represented a weak commitment to a standard of education. *McWherter*, 851 S.W.2d at 150; see also McUsic, *Education Clauses*, *supra* note 20, at 338 (characterizing Tennessee's education clause as one that offers almost no support for educational quality); Thro, *Role of Language*, *supra* note 3, at 23 (classifying Tennessee's education clause with other state clauses that mandate only a "system of free public schools"); Thro, *The Third Wave*, *supra* note 24, at 244 n.133 (citing Gershon Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814-16 nn.143-46 (1985)) (classifying Tennessee's education clause with other state clauses that offer a minimal commitment to education); *infra* notes 318-39 and accompanying text (explaining commentators' classifications of the education clauses). Instead, agreeing with the plaintiffs' interpretation, the court stated that the education clause indeed mandated an enforceable, qualitative standard of education. *McWherter*, 851 S.W.2d at 150. The court failed to define the standard, choosing to hold the system unconstitutional based on the state's equal protection clause. *Id.* at 152-57; see also Thro, *Tennessee*, *supra* note 52, at 22 (discussing the Tennessee court's use of the state constitution's equal protection clause). Thro suggests that the Tennessee decision placed less importance on the exact wording of the education clauses, relying more on the implications of the state equal protection clause. *Id.* at 23-25; see also *infra* notes 318-31 and accompanying text (explaining the significance of the language of education clauses).

language and its interpretation appear to be the key battleground for third wave litigants.<sup>81</sup>

## II. SCHOOL FINANCE IN NORTH CAROLINA

### A. History<sup>82</sup>

Of the original thirteen colonies, North Carolina was one of six to include an education article in its first constitution,<sup>83</sup> and North Carolina was second only to Pennsylvania in establishing a state public school system.<sup>84</sup> The state provided two-thirds of school funds until the Civil War bankrupted the treasury.<sup>85</sup> After the war, the Constitution of 1868 gave the North Carolina General Assembly full responsibility to provide "for a general and uniform system of public schools."<sup>86</sup> Until the late nineteenth century, however, the General Assembly could only require that taxes levied by counties (additional property and poll taxes) be used for specified purposes.<sup>87</sup> Therefore, school funding consisted of the state property tax, supplemented by the counties' additional property taxes.<sup>88</sup> This system was flawed because many counties could not raise the needed funds without exceeding constitutional property tax limitations.<sup>89</sup> Moreover, efforts by county commissioners to generate tax revenues specifically to fund education were thwarted by a court ruling that taxes levied to finance schools required approval by popular vote.<sup>90</sup>

At the beginning of the twentieth century, Governor Charles B. Aycock led the drive to increase state funding for education, and in 1901 the General Assembly doubled the state's funding commitment

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81. See Thro, *The Third Wave*, *supra* note 24, at 245-50. Thro argues that the interpretation of the education clause has remained the key issue in school finance reform cases. See Thro, *Judicial Analysis*, *supra* note 3, at 605-15.

82. See *infra* notes 233-42, 340-48 and accompanying text for a discussion of how North Carolina's school finance history relates to the legal issues of *Leandro*.

83. William E. Sparkman, *The Legal Foundations of Public School Finance*, 35 B.C. L. REV. 569, 572 (1994).

84. Charles D. Liner, *Financing North Carolina's Public Schools*, SCH. L. BULL., Summer 1987, at 28, 30 n.11. North Carolina's public school system was founded in 1838. *Id.*

85. *Id.* at 31.

86. *Id.* (quoting N.C. CONST. of 1868, art. 9, § 2).

87. *Id.* Using state taxes for schools was not an established practice until the late nineteenth century. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*; see *Smith v. School Trustees*, 141 N.C. 143, 156 (1906).

in order to provide for a four-month school term in all districts.<sup>91</sup> In 1933, when the Great Depression threatened the school system and local governments, the General Assembly chose to save the system by financing an eight-month school term,<sup>92</sup> making North Carolina the only state to fund its school system fully.<sup>93</sup> The General Assembly also established a funding system based on state grants supplemented by county tax revenues.<sup>94</sup> This system of financing—flat state grants to each district based on the number of students in the district<sup>95</sup> plus local supplements from property taxes—remains virtually intact today.<sup>96</sup>

Until 1985 this system continued with few modifications, despite some disparities in local school districts that resulted from the use of local supplements to the financing system.<sup>97</sup> However, in the 1980s, legislators began to notice that the percentage of total education funding provided by the state was declining.<sup>98</sup> In 1985, the General

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91. Liner, *supra* note 84, at 31 (citing Act of Mar. 11, 1901, ch. 543, § 3, 1901 N.C. Pub. Laws 749, 749). North Carolina continued to increase the funding for schools and eventually enacted the Haig-Strayer foundation grant system that soon became popular in many states. *Id.* This foundation grant system provided each county with the necessary funding to finance the mandated term as long as the county continued to impose a minimum property tax rate set by the state. *Id.* (citing Act of Mar. 9, 1927, ch. 256, § 4, 1927 N.C. Pub. Laws 621, 623).

92. *Id.* at 32 (citing Act of May 15, 1933, ch. 562, § 1, 1933 N.C. Pub. Laws 916, 917). The legislature repealed all existing local school taxes but authorized localities to levy new school taxes and draw on other revenue sources for supplemental school funding. *Id.* at 32. Therefore, the state accepted the burden of providing a basic level of support, but allowed local units the discretion to supplement that support. *Id.*

93. *Id.*; A RIGHT DENIED, *supra* note 19, at 6. However, it appears that local funds were still allowed and were still a part of the funding scheme. See Liner, *supra* note 84, at 32.

94. Liner, *supra* note 84, at 32.

95. This financing pays for fixed numbers of teachers and certain operating expenses without regard to the district's wealth or "local tax effort"—i.e., the amount a county or school district taxes its citizens to provide funding for education. See WOOD & THOMPSON, *supra* note 25, at 16-18; PUBLIC SCHOOL FORUM OF NORTH CAROLINA, NORTH CAROLINA LOCAL SCHOOL FINANCE STUDY, 1994, at 4 [hereinafter LOCAL FINANCE STUDY]. To accurately rank the districts' support for education, the Public School Forum's annual studies evaluate tax effort based on the tax rate for the district compared with a district's ability to pay. LOCAL FINANCE STUDY at 4-5, 11-13; see *infra* notes 113-32 and accompanying text (describing local effort in North Carolina).

96. A RIGHT DENIED, *supra* note 19, at 7; see WOOD & THOMPSON, *supra* note 25, at 37-38. The localities are responsible for almost all of their school facilities' needs. A RIGHT DENIED, *supra* note 19, at 10 n.30. See also *infra* note 187 and accompanying text for a discussion of the Critical School Facilities Needs Fund and the Public School Building Capital Fund.

97. See Liner, *supra* note 84, at 32, 33-34.

98. See *id.* at 32. The state percentage share of the total educational expenditures fell from 70% in 1947-48, to 67.5% in 1974-75, to 65% in 1984-85. *Id.*

Assembly enacted the Basic Education Program (BEP) to reverse this trend, and attempted to define the state's obligation of support to include the elimination of some disparities between districts.<sup>99</sup> By increasing the funding levels of the previous per-pupil funding scheme, the legislature intended to guarantee for all students in North Carolina a comprehensive educational program conforming to standards developed by the State Board of Education.<sup>100</sup> Unfortunately, the program has fallen short of its goals; its per-pupil method of distribution fails to provide sufficient funding for districts with large populations of disadvantaged students, and fails to address districts' facility needs.<sup>101</sup> Moreover, the program—originally planned to be fully implemented by 1993—has yet to be fully funded.<sup>102</sup>

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99. *Id.* at 28, 32, 37; see also N.C. GEN. STAT. § 115C-81(a) (1994) (defining the mission of the BEP). Despite this language, there is no equalization mechanism included in the plan. See N.C. GEN. STAT. § 115C-81; see also A RIGHT DENIED, *supra* note 19, at 37 (criticizing the BEP).

100. A RIGHT DENIED, *supra* note 19, at 7-8. The BEP did not attempt to replace the existing flat grant program; rather, its purpose was to define the state's obligation under the flat grant approach. See Liner, *supra* note 84, at 32. The BEP requires instruction in "art, music, physical education, a foreign language, and computer skills," and sets requirements for, among other things, student achievement as measured by test scores, maximum class size, student-staff ratios, and instructional materials and equipment. A RIGHT DENIED, *supra* note 19, at 8 (citing N.C. GEN. STAT. § 115C-81(b) (1994)). The program is ostensibly guaranteed to every child in the public schools of the state. *Id.* at 8. But see *infra* notes 101-12, 135-37, 141 and accompanying text (describing the inadequacies of the BEP and the funding of the program itself).

101. A RIGHT DENIED, *supra* note 19, at 9, 36. Although the state and the BEP recognize that greater resources are necessary to educate students from disadvantaged backgrounds, the BEP distributes funds on a per-pupil basis without consideration of the fact that some districts have disproportionately large populations of disadvantaged students. *Id.* at 9 (citing Office of the State Auditor, *Performance Audit Report, North Carolina Department of Public Instruction, Chapter VII—Impact of the Basic Education Program on Public Schools and a Review of School Financing* 3, 5 (1990)). Also, the BEP sets standards for facilities but fails to assist with the resources required to meet the standards. *Id.* at 36. Further, the BEP's mandates of class size and increased staff create additional space and facility problems for low-wealth districts. *Id.*

102. *Id.* at 35-36. The scheduled funding was delayed and placed on a ten-year implementation schedule and continues to fall further behind schedule. *Id.* at 35. The program needs some \$350 million of additional funds annually to be fully funded. *Id.* at 35; see also LOCAL FINANCE STUDY, *supra* note 95, at 2 (urging the 1994 session of the General Assembly to fund the formula fully).



### B. Current Inequities<sup>103</sup>

A flat grant program providing significant base support from the state on a per-pupil basis—such as North Carolina's BEP—would seem to alleviate inequities because it provides equal amounts of money to districts with equal numbers of pupils.<sup>104</sup> However, empirical analysis has demonstrated that there are disparities in the system.<sup>105</sup> In addition, reports have noted that the state's per-pupil method of distribution in fact enhances inequality.<sup>106</sup> Larger school systems benefit from greater economies of scale,<sup>107</sup> and wealthy, populous communities receive money shifted away from the less populated, impoverished districts.<sup>108</sup> There is also evidence that the

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103. The following section provides a factual assessment of the inequalities of the North Carolina school finance system. See *infra* notes 190-258 and accompanying text for a description of the equality issues of *Leandro*.

104. See Liner, *supra* note 84, at 34.

105. LOCAL FINANCE STUDY, *supra* note 95, at 4-6. The Public School Forum has conducted studies for the years 1987-1994 that recognized the disparities.

106. See, e.g., PUBLIC SCHOOL FORUM OF NORTH CAROLINA, ALL THAT'S WITHIN THEM 1 (Dec. 1990) [hereinafter ALL THAT'S WITHIN THEM]; NORTH CAROLINA RURAL EDUCATION INSTITUTE, ARE EQUAL ADM ALLOTMENTS EQUITABLE? 2-5 (Apr. 1, 1992) [hereinafter ADM ALLOTMENTS]; PUBLIC SCHOOL FORUM OF NORTH CAROLINA, GRADING ON THE CURVE 3 (Feb. 1993) [hereinafter GRADING ON THE CURVE]; LOCAL FINANCE STUDY, *supra* note 95, at 4-6; A POSITION PAPER OF THE EASTERN NORTH CAROLINA CHAMBER OF COMMERCE ON EQUALIZATION OF EDUCATIONAL OPPORTUNITY IN NORTH CAROLINA 1 (Apr. 1993) [hereinafter EASTERN NORTH CAROLINA]; A RIGHT DENIED, *supra* note 19, at 10-19. But see Liner, *supra* note 84, at 33-35 (arguing that the effects of disparities in spending are reduced by the high level of state support). Publications of the Public School Forum are available from the group's Raleigh, North Carolina office. Other publications of the Public School Forum are cited *supra* at note 95.

107. Economies of scale is an economic concept illustrating that marginal costs increase more slowly as an operation becomes larger. See ALL THAT'S WITHIN THEM, *supra* note 106, at 14. A concept familiar to business, it is also applicable to schools and school systems. See *id.* For example, it is less expensive to offer a curriculum to 800 students receiving the state's per-pupil allotment than to offer the identical program to a school of 275 students. *Id.* Because state allotment formulas are based on typical schools, small schools and small school systems suffer under the current funding method. *Id.*; see also ADM ALLOTMENTS, *supra* note 106 at 2-4 (describing how larger systems benefit from economies of scale).

108. A RIGHT DENIED, *supra* note 19, at 17. A little over one-fourth of North Carolina's 100 counties are generally classified high-wealth; these counties have 40% of the school-age population and therefore receive a similarly large share of the state's per-pupil-based allotments. GRADING ON THE CURVE, *supra* note 106, at 3; see also ADM ALLOTMENTS, *supra* note 106, at 2-4 (discussing the impact of decreasing enrollment on the financial resources of a school system). The North Carolina Rural Education Institute also argues that the problems will worsen as low-wealth areas of the state continue to lose population to the wealthy areas and as per-pupil funding to these areas decreases due to declining enrollments. ADM ALLOTMENTS, *supra* note 106, at 3-4; see also EASTERN

BEP itself has increased disparities between poor and wealthy counties rather than alleviating them.<sup>109</sup> According to the Eastern North Carolina Chamber of Commerce, statistics from 1982-83 (before the BEP) revealed a gap of \$661 per-pupil in funds received from the state between a typical elementary school in a wealthy county and a similar school in a poor county.<sup>110</sup> Statistics from 1990-91 (after the BEP's implementation) showed a \$1,495 per-pupil difference.<sup>111</sup> Even after the BEP, the most significant disparities exist as a result of the relative wealth of the districts themselves.<sup>112</sup>

Currently, state support is insufficient to cover all necessary operating costs of school systems in North Carolina; as a result, local funding provides around twenty-five percent of the total education budget.<sup>113</sup> In addition, the state provides very little funding for capital projects—only about five percent of all public education capital outlays.<sup>114</sup> Therefore, differences in a district's wealth directly affect the amount of money the district has available to spend on education.<sup>115</sup> For example, Hoke County, one of the plaintiffs in *Leandro*, has an adjusted tax base per child of \$110,296 and total local spending per-pupil of \$467, while Dare County, the county ranked highest in ability to pay, has an adjusted tax base per child of \$1,059,100 and total local spending per-pupil of \$2,410.<sup>116</sup> A district with a large tax base holds an advantage in raising revenues: it may tax its citizens at lower tax rates than a district with a small tax base,

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NORTH CAROLINA, *supra* note 106, at 1-2 (describing migration to the wealthy counties and benefits of economies of scale in large counties).

109. A RIGHT DENIED, *supra* note 19, at 35-37; *see also* EASTERN NORTH CAROLINA, *supra* note 106, at 3 (arguing that the BEP does not address the problem of inequity in school funding).

110. EASTERN NORTH CAROLINA, *supra* note 106, at 3.

111. *Id.*

112. A RIGHT DENIED, *supra* note 19, at 10-11. The relative wealth is mostly a result of property wealth disparities, *see infra* notes 115-21 and accompanying text; however, it also includes per capita income. The average per capita income in the 74 low-wealth counties is about \$2,100 less than the state average and about \$4,000 less than that of the five wealthiest counties. GRADING ON THE CURVE, *supra* note 106, at 3 (citing data from North Carolina Department of Public Instruction).

113. A RIGHT DENIED, *supra* note 19, at 10. "All localities use local revenues to supplement their state share." *Id.* Because the BEP is not fully funded, the state's contribution falls below the cost of what the state itself has guaranteed as a basic education. *Id.* at 36.

114. A RIGHT DENIED, *supra* note 19, at 10.

115. LOCAL FINANCE STUDY, *supra* note 95, at 5; A RIGHT DENIED, *supra* note 19, at 11.

116. LOCAL FINANCE STUDY, *supra* note 95, at 14-15, 20.

while still collecting more tax revenue.<sup>117</sup> For example, a one cent property tax increase in a poor county, with a tax base of around \$600 million,<sup>118</sup> would only raise eleven dollars per school-age child.<sup>119</sup> In contrast, a wealthy county, with a tax base of \$4 billion, would raise over \$100 per child.<sup>120</sup> Despite comparatively meager amounts of potential revenue, North Carolina's poor counties tax themselves at much higher rates than wealthy counties: The ten poorest counties in the state average a tax rate of seventy-five cents per \$100 of assessed real estate value, while the wealthiest ten counties average fifty-two cents per \$100.<sup>121</sup>

"Property-poor districts" also suffer from what economists term "municipal overburden."<sup>122</sup> North Carolina requires counties to provide funding for services such as jails and waste disposal.<sup>123</sup> Unlike most other states, North Carolina also requires a county to provide matching funds for state-mandated welfare payments.<sup>124</sup> These matching funds impose a heavy burden on the poorest counties, which face a host of societal problems as well.<sup>125</sup> For example, one plaintiff in *Leandro*, Hoke County, must spend a third of its local revenue to meet its welfare obligation, while a wealthy county, like Mecklenburg, spends less than seven percent of its budget on

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117. *Id.* at 5; A RIGHT DENIED, *supra* note 19, at 11. The wealthy counties are wealthy only in comparison to the poor counties of the state and not in comparison to wealthy counties of other states; the state's poorest counties rank among the poorest in the nation. ALL THAT'S WITHIN THEM, *supra* note 106, at 3.

118. Hoke County, one of the *Leandro* plaintiffs, has an adjusted property tax base of \$589,754,323. LOCAL FINANCE STUDY, *supra* note 95, at 19.

119. LOCAL FINANCE STUDY, *supra* note 95, at 5.

120. *Id.* Dare County has an adjusted tax base of \$4,111,427,668. *Id.*

121. *Id.* When all counties are included, the average state tax rate is 60 cents per \$100. *Id.*

122. *Id.*; EASTERN NORTH CAROLINA, *supra* note 106, at 1-2. Municipal overburden is the concept that localities must shoulder a large portion of the costs of human services ranging from welfare to solid waste disposal. ALL THAT'S WITHIN THEM, *supra* note 106, at 6, 15; A RIGHT DENIED, *supra* note 19, at 17. The burden falls most heavily on poorer counties, which often face higher costs of human services and have nearly exhausted their tax bases. ALL THAT'S WITHIN THEM, *supra* note 106, at 15-18; A RIGHT DENIED, *supra* note 19, at 17.

123. A RIGHT DENIED, *supra* note 19, at 17.

124. LOCAL FINANCE STUDY, *supra* note 95, at 6.

125. *Id.* at 6-7; EASTERN NORTH CAROLINA, *supra* note 106, at 2. Poor counties, which face skyrocketing welfare and social service costs due to large low-income populations, also tend to have disproportionate numbers of children living in poverty. See UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS—NORTH CAROLINA 326-35 (1993). Therefore, in many of these low wealth counties, a cycle of "educational deprivation" and poverty continues. EASTERN NORTH CAROLINA, *supra* note 106, at 2.

matching welfare funds.<sup>126</sup> Thus, disparities in local school funding are exacerbated by the costs of addressing local social needs.<sup>127</sup>

Although North Carolina's school districts are not "as starkly unequal" as districts in some other states,<sup>128</sup> the differences are quite substantial nevertheless.<sup>129</sup> For instance, the state's top ten counties annually spend \$1,294 more per-pupil than the bottom ten counties.<sup>130</sup> When \$1,294 per-pupil becomes \$33,644 for an average class of twenty-six and \$647,000 for a school of 500 children, it is clear that the gap is considerable.<sup>131</sup> The spending discrepancies affect numerous aspects of local public education, including curriculum quality, staffing, supplies, student achievement, and school facilities themselves.<sup>132</sup>

The curriculum selection in a school in North Carolina is often a clear indicator of a district's wealth.<sup>133</sup> Low-wealth schools are unable to offer courses that more affluent schools may consider basic.<sup>134</sup> For example, calculus—a course with a demonstrated positive effect on college admissions test scores—is not included in the BEP and therefore must be supported by local funds.<sup>135</sup> Small and poor schools often cannot afford to offer a range of courses, especially in areas such as math and science, because it is too expensive to hire enough teachers and, in the case of small schools, to schedule classes

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126. LOCAL FINANCE STUDY, *supra* note 95, at 6.

127. See *id.* at 6-7; see also ALL THAT'S WITHIN THEM, *supra* note 106, at 15-18 (describing state and federal burdens placed on localities, their increasing costs, and some proposals for relief). See LOCAL FINANCE STUDY, *supra* note 95, at 3 (citing demographics of the five plaintiff counties).

128. ALL THAT'S WITHIN THEM, *supra* note 106, at 2; see also *supra* note 53 and accompanying text (describing disparities found by courts in other school finance cases).

129. ALL THAT'S WITHIN THEM, *supra* note 106, at 2; LOCAL FINANCE STUDY, *supra* note 95, at 5.

130. LOCAL FINANCE STUDY, *supra* note 95, at 5.

131. *Id.* Other figures show slightly higher discrepancies: \$1,800 per student and \$47,000 for an average class of 26 and more than \$900,000 for a school of 500. NORTH CAROLINA LAW AND EDUCATION PROJECT, WHO WILL CONTROL PUBLIC EDUCATION IN NORTH CAROLINA: THE COURTS OR THE GENERAL ASSEMBLY? 1 (1994) [hereinafter CONTROL].

132. See *infra* notes 134-68 and accompanying text. School facilities are provided almost solely by localities. See N.C. GEN. STAT. § 115C-408 (1994); A RIGHT DENIED, *supra* note 19, at 10; see also *infra* note 187 (describing nominal state support for facilities).

133. See ALL THAT'S WITHIN THEM, *supra* note 106, at 7-8; A RIGHT DENIED, *supra* note 19, at 26-27.

134. A RIGHT DENIED, *supra* note 19, at 27.

135. ALL THAT'S WITHIN THEM, *supra* note 106, at 8. A study by the Educational Testing Service found that students who had taken calculus scored, on average, 37 points better on the Scholastic Achievement Test than those who had taken only pre-calculus. *Id.*

for very small numbers of students.<sup>136</sup> Even subjects ostensibly covered by the BEP, such as art and music, often go unscheduled in poor school districts due to staff shortages.<sup>137</sup>

Low-wealth counties experience staffing problems due in part to a lack of resources.<sup>138</sup> While wealthy counties can supplement state salaries to attract more experienced and better-trained teachers to their schools, poor counties often cannot.<sup>139</sup> In addition, good teachers and staff frequently choose schools in wealthy areas because teaching and social environments are more attractive; with low supplements—or none at all—poor counties suffer a double disadvantage in hiring quality teachers.<sup>140</sup> Wealthy schools can also hire a greater number of teachers, and while some well-to-do schools have fulfilled their BEP requirements ahead of schedule, many poor schools fall beneath the BEP specifications for adequate teaching staffs.<sup>141</sup> Other staff areas also suffer: Poorer schools often cannot afford to hire librarians, counselors, and nurses, even though it is generally agreed that disadvantaged children need more of these resources than do wealthier children.<sup>142</sup>

Poor teaching environments are exacerbated by lack of supplies, a perennial problem in many poor counties.<sup>143</sup> School library collections are out-of-date, and some schools cannot even supply enough textbooks.<sup>144</sup> Classes that require laboratory equipment, such as biology and chemistry, have few or no supplies.<sup>145</sup> Computer hardware and software are outdated and scarce.<sup>146</sup> In fact, many school buildings are so old that their wiring cannot support

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136. *Id.*; A RIGHT DENIED, *supra* note 19, at 26. A RIGHT DENIED also highlights the lack of funding for vocational education programs, noting that a rural high school in Jackson County had 116 fewer curriculum choices than a large urban high school in Durham County. A RIGHT DENIED, *supra* note 19, at 26-27.

137. *Id.* at 27.

138. *Id.* at 28.

139. *Id.* The report states that in 1991, 44 school systems were unable to provide any local supplements to their teachers. *Id.*

140. See generally EASTERN NORTH CAROLINA, *supra* note 106, at 2 (describing the drain of qualified workers from many low wealth areas).

141. A RIGHT DENIED, *supra* note 19, at 28. Due to shortages, teachers are often forced to teach outside of their areas of training. *Id.*

142. *Id.* at 29-30.

143. *Id.* at 23-25.

144. *Id.* at 23.

145. *Id.*; see ALL THAT'S WITHIN THEM, *supra* note 106, at 8.

146. A RIGHT DENIED, *supra* note 19, at 23-25

computer labs.<sup>147</sup> In contrast, affluent schools may offer media centers, extensive libraries, and a vast array of supplies for classes and activities, such as a kiln for the art room, digital equipment for chemistry, and a publishing center for the student newspaper.<sup>148</sup>

Although many factors affect student performance, it is difficult to deny the correlation between resources—such as curriculum, staffing, and supplies—and achievement.<sup>149</sup> For example, the average Scholastic Aptitude Test (SAT) score of the top five counties in the Public School Forum's Ability to Pay survey of North Carolina counties was more than 120 points above that of the lowest-ranked counties in the survey.<sup>150</sup> These top five counties spend significantly more per student than any of the lower-ranked counties.<sup>151</sup> In many poor counties in North Carolina, including some that are *Leandro* plaintiffs, students test one to two years behind the state average score on standardized tests.<sup>152</sup> End-of-course tests reveal the greatest disparities between students in poor schools and wealthy schools in subjects requiring equipment for adequate instruction, such as biology and chemistry.<sup>153</sup> Also, all six of the systems that are on warning status for not meeting the state's new accountability measures are in some of the state's poorest counties and have the lowest per-pupil expenditures.<sup>154</sup> A school's curriculum affects the students' standards and their progress through the system; therefore, schools with limited course offerings also limit their students' achieve-

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147. PUBLIC SCHOOL FORUM OF NORTH CAROLINA, BUILDING THE FOUNDATION: HARNESSING TECHNOLOGY FOR NORTH CAROLINA'S SCHOOLS AND COMMUNITIES 44-45 (May, 1994) [hereinafter TECHNOLOGY]. See *infra* notes 164-68 and accompanying text for a more detailed discussion of school facility needs, including those for technology.

148. A RIGHT DENIED, *supra* note 19, at 25.

149. See ALL THAT'S WITHIN THEM, *supra* note 106, at 7.

150. *Id.* The five highest ranked counties were Dare, Mecklenburg, Wake, Forsyth, and Polk counties. The lowest ranked counties were Caswell, Bertie, Columbus, Robeson, and Hoke. *Id.* Both Robeson and Hoke are plaintiff counties in *Leandro*. For more recent ability-to-pay rankings, see LOCAL FINANCE STUDY, *supra* note 95, at 18-19.

151. ALL THAT'S WITHIN THEM, *supra* note 106, at 7.

152. A RIGHT DENIED, *supra* note 19, at 30-31. Mentioned are both Hoke and Halifax, plaintiff counties in *Leandro*. *Id.* at 30. Some students have tested up to five grades behind their actual grade levels. CONTROL, *supra* note 131, at 1. The gap between actual achievement and grade level widens with time. A RIGHT DENIED, *supra* note 19, at 30-31.

153. ALL THAT'S WITHIN THEM, *supra* note 106, at 8.

154. LOCAL FINANCE STUDY, *supra* note 95, at 4. Four of the plaintiff counties—Halifax, Vance, Hoke, and Robeson—are included in this group. Tim Simmons, *State's Worst Schools Give Board a Lesson*, NEWS & OBSERVER (Raleigh), June 2, 1994, at 1A.

ment.<sup>155</sup> These statistics do not merely reflect slower students, for even those students from impoverished areas who are bright enough to be admitted to the state's university system disproportionately require time in remedial classes to catch up with their peers.<sup>156</sup> Over twenty-five percent of state university students admitted from poor counties need remedial course work.<sup>157</sup> Thus, the inequalities affect even those students who should be among the best and brightest of the state's future work force.<sup>158</sup>

Most critically, low-wealth school systems lack adequate buildings.<sup>159</sup> About fifty percent of school buildings in North Carolina were built before 1960 and around thirteen percent were constructed between 1900 and 1939.<sup>160</sup> Many poor districts lack resources to pay for new construction or maintenance and repairs. Many buildings are not fire-resistant and contain asbestos and faulty wiring, as well as other safety and health hazards.<sup>161</sup> Space is a problem in many schools, and mobile units are often the only feasible alternative to provide additional classroom space.<sup>162</sup>

Not only are these old buildings unsuitable for general classroom space,<sup>163</sup> but the facilities may prevent students in disadvantaged counties from learning the modern technology they must understand in order to compete in the job market.<sup>164</sup> Computer labs and modern equipment require space, climate control, proper wiring, telephone lines, and security systems.<sup>165</sup> Poorer, older schools are often neither air-conditioned nor equipped with wiring adequate to handle the high-tech systems.<sup>166</sup> Most classrooms do not have

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155. *Id.* The report demonstrates this point by showing that a student would have no incentive to strive to take a course such as Algebra I in 8th grade, as many students do, if the high school's highest math class were Algebra II or Geometry. *Id.* A report from 1991 noted that in 26 poor school districts, not one student took an Advanced Placement exam. A RIGHT DENIED, *supra* note 19, at 26.

156. A RIGHT DENIED, *supra* note 19, at 34.

157. *Id.* at 34 n.55. In addition, students from low-wealth districts fail to meet the state university system's admission requirements at double the rate of students at other high schools in the state. CONTROL, *supra* note 133, at 1.

158. A RIGHT DENIED, *supra* note 19, at 33-34; see ALL THAT'S WITHIN THEM, *supra* note 106, at 7.

159. A RIGHT DENIED, *supra* note 19, at 20; see also *infra* note 187 (describing nominal state support for capital needs).

160. TECHNOLOGY, *supra* note 147, at 43.

161. A RIGHT DENIED, *supra* note 19, at 20-21.

162. *Id.* at 20.

163. *Id.*

164. See TECHNOLOGY, *supra* note 147, at 43.

165. *Id.* at 44-47.

166. A RIGHT DENIED, *supra* note 19, at 20; TECHNOLOGY, *supra* note 147, at 44-45.

telephone lines, or have lines that cannot accommodate computer modems.<sup>167</sup> Furthermore, the more technology is used, the greater the costs become to operate, maintain, and protect that technology.<sup>168</sup> Low-wealth schools, already behind, will only fall further as modern technology becomes more essential to education and the job market.

As the *Leandro* plaintiffs realized, the disparities among North Carolina's school districts make the state vulnerable to school finance litigation.<sup>169</sup> However, hope that the state would address the problems on its own initiative, without being forced to endure expensive and disruptive litigation, prompted the plaintiffs to wait until 1994 to file their case.<sup>170</sup>

### C. Efforts to Avoid Litigation

Publicity regarding the success of school finance litigation in other states, particularly the third wave cases,<sup>171</sup> caused increased concern that North Carolina would be the next defendant in a suit; the obvious inequities in the current system became a hot issue.<sup>172</sup> A 1990 report by the Public School Forum pointed out that, although studies of inequities had been conducted previously in North Carolina, one as early as 1925, few of the policy recommendations resulting

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167. TECHNOLOGY, *supra* note 147, at 43, 46.

168. *Id.* at 46-47.

169. In addition, the needs of the wealthy districts in North Carolina deserve mention. As already noted, *see supra* note 117, the wealthy districts are only wealthy in comparison to the poorer districts in the state. ALL THAT'S WITHIN THEM, *supra* note 106, at 3. The author does not mean to imply that the wealthy urban districts of Wake and Mecklenburg counties are as affluent as some other wealthy areas of the United States, such as wealthy districts in California, New York, or Connecticut. *Id.* No school in North Carolina approaches the spending levels of most wealthy communities across the nation. LOCAL FINANCE STUDY, *supra* note 95, at 7. In addition, several of the urban counties in North Carolina, such as Wake County, are facing critical space needs due to a rapidly increasing population. *Id.* Other North Carolina counties, such as Durham, Guilford, and Buncombe, struggle with consolidation and merger issues. *Id.* Finally, even in wealthy urban areas, some inner-city problems are likely to develop, creating a costly at-risk population of school children. *Id.* Thus, few of North Carolina's schools are sufficiently secure in their funding. It is not surprising that six wealthy urban districts—the City of Asheville, Buncombe County, Charlotte-Mecklenburg, Durham County, Wake County, and Winston-Salem/Forsyth—have moved to intervene in the lawsuit. *See infra* notes 438-51 and accompanying text for a discussion of their claims.

170. *See infra* notes 182-89 and accompanying text.

171. *See supra* notes 53-81 and accompanying text (discussing the third wave cases).

172. *See* ALL THAT'S WITHIN THEM, *supra* note 106, at 2; A RIGHT DENIED, *supra* note 19, at 53.



from those studies were ever enacted.<sup>173</sup> The Public School Forum suggested that the state was a prime target for litigation because the third wave legal theories, focusing on opportunities and educational outcomes, addressed North Carolina's disparities more directly than earlier equality arguments.<sup>174</sup> That study recommended that a supplemental funding plan be formulated;<sup>175</sup> the task was undertaken by the Public School Forum's Study Group III in 1991.<sup>176</sup> Supporters of the supplemental funding plan promoted it as a defense against possible litigation.<sup>177</sup>

Following the Study Group's recommendation, the General Assembly initiated a supplemental funding program targeted at low-wealth and small schools.<sup>178</sup> The funds are distributed each year based on an ability-to-pay formula assessing such variables as district property values and local tax effort, among others.<sup>179</sup> The supplemental fund's purpose was to bring the low-wealth counties up to the state average for local support.<sup>180</sup> The projected annual cost of fully funding this formula was approximately \$198 million.<sup>181</sup>

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173. ALL THAT'S WITHIN THEM, *supra* note 106, at 1.

174. *Id.* at 2. The report acknowledged that the disparities among North Carolina districts were not as severe as those in some other states. *Id.*; see also *supra* notes 104-12 and accompanying text (discussing the deceptiveness of apparent equality among North Carolina's districts).

175. ALL THAT'S WITHIN THEM, *supra* note 106, at 11. The purpose of a supplemental funding plan is to bring school spending in low-wealth counties up to the state average. GENERAL BACKGROUND: LOW WEALTH SCHOOLS SUPPLEMENTAL FUNDING 3. A supplemental plan differs from an equalization funding plan, which attempts to equalize per-pupil spending in all districts. *Id.*

176. LOCAL FINANCE STUDY, *supra* note 95, at 2.

177. *Id.*

178. *Id.*

179. See NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION, LOW WEALTH SUPPLEMENTAL FUNDING: WHAT REALLY CHANGED? 5-6 (July 1993) [hereinafter CHANGES]. Other variables included per-capita income of the district and the county's overall ability to generate revenue as compared to other counties. *Id.* A county or district must tax its local property at the state average effective tax rate, or must contribute more local dollars to its schools than what the county should be expected to provide based on state average local contributions and ability-to-pay rankings. *Id.* at 6. In disbursing the funds, the formula gives the most money on a per-pupil basis to the poorest counties meeting the criteria. *Id.* Along with a good explanation of the original formula, this report shows the changes the General Assembly made in the formula in 1993. See *id.* at 5-6.

180. LOW WEALTH SCHOOLS FUNDING AND EQUALIZATION CONSORTIUM, GENERAL BACKGROUND: LOW WEALTH SCHOOLS SUPPLEMENTAL FUNDING 3-4 (1993) [hereinafter GENERAL BACKGROUND].

181. *Id.* at 4.

Low-wealth and small districts hoped that litigation would not be necessary to alleviate the disparities, but they were disappointed by the 1993 session of the General Assembly.<sup>182</sup> In that session, the legislature appropriated more funds to the supplementation fund, but the amounts fell far short of the full \$198 million needed to fulfill the formula.<sup>183</sup> Even worse, the General Assembly altered the funding formula to make it appear that only \$100 million—rather than close to \$200 million—would be needed to meet the program's goal.<sup>184</sup> This restructuring left some counties that previously were eligible for the supplemental funding ineligible under the new formula.<sup>185</sup>

Angered by this action, frustrated with the state's pattern of failing to fund programs such as the BEP fully,<sup>186</sup> and disappointed with the state's nominal efforts to aid funding of school facilities,<sup>187</sup> five counties decided to take the legal action they believed necessary to force the state to deal with school finance issues.<sup>188</sup> Five counties—along with students and parents of students from those counties—filed *Leandro v. State* on May 25, 1994.<sup>189</sup>

### III. LEANDRO V. STATE

The plaintiffs in *Leandro* allege that the state of North Carolina has violated state statutes and the North Carolina Constitution by failing to provide adequate and equal educational opportunities for all

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182. See LOCAL FINANCE STUDY, *supra* note 95, at 2.

183. See *id.*; GENERAL BACKGROUND, *supra* note 180, at 4.

184. LOCAL FINANCE STUDY, *supra* note 95, at 2. One change in the funding formula consisted of including additional sources of revenue that counties have available—such as local sales and use taxes, food stamp reimbursements, fines, and forfeitures—in the counties' ability to pay. CHANGES, *supra* note 179, at 5. Previously, property tax value defined the formula. *Id.*

185. LOCAL FINANCE STUDY, *supra* note 95, at 2.

186. *Id.* Although the BEP was not enacted as an equalization program, because it provides money equally on a per-pupil basis, the BEP attempted to define the state's obligation of support. The BEP also contained statements of legislative intent to pursue true equalization plans. See N.C. GEN. STAT. § 115C-81(a) (1994); GENERAL BACKGROUND, *supra* note 180, at 1.

187. See LOCAL FINANCE STUDY, *supra* note 95, at 2. By May 1994, only \$10 million was appropriated to the Critical School Facilities Needs Fund. *Id.* The only state support provided for capital projects, other than a portion of state sales tax revenues returned to the counties, is channelled through two funds: the Critical School Facility Needs Fund, A RIGHT DENIED, *supra* note 19, at 7 n.18 (citing N.C. GEN. STAT. §§ 115C-489.1 to 489.4 (1994)), and the Public School Building Capital Fund, *id.* (citing N.C. GEN. STAT. §§ 115C-546.1 to 546.2 (1994)). The amount of money from these three sources is small; in fact, it only amounts to around 5% of annual capital expenditures on education. *Id.*

188. LOCAL FINANCE STUDY, *supra* note 95, at 2.

189. No. 94 CVS 520 (N.C. filed May 25, 1994).

of the students in its public school system.<sup>190</sup> The plaintiffs include the school boards of Hoke, Halifax, Robeson, Cumberland, and Vance counties, children who are currently enrolled in these school systems, and their parents.<sup>191</sup> The plaintiffs assert five claims for relief against the State of North Carolina and the State Board of Education: a claim under the equal protection clause of the North Carolina Constitution;<sup>192</sup> two claims under the constitution's education article;<sup>193</sup> a claim under the constitution's "law of the land" clause;<sup>194</sup> and a claim based on various state statutes that guarantee certain levels of education.<sup>195</sup>

### A. Claims of State Constitutional Violations

According to Thro, a five-step judicial methodology for addressing constitutional claims in school finance suits is emerging from third wave cases.<sup>196</sup> The North Carolina court may be persuaded to use this methodology, or some version of it, when it considers *Leandro* because the methodology draws on the analyses of state courts that have already dealt with these issues.<sup>197</sup> The five steps are: (1) determining if the suit is primarily an equality or a quality suit; (2) analyzing the constitutional language to determine if a specific quality standard is mandated; (3) describing the meaning of that standard, if one exists; (4) applying the standard to the school system in question; and (5) determining the role that inadequate funding plays in the system's deficiencies, if the court identifies a constitutional violation.<sup>198</sup> This part of the Comment analyzes the *Leandro* plaintiffs' claim according to Thro's methodology.

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190. Plaintiffs' Complaint at 2, *Leandro* (No. 94 CVS 520).

191. *Id.* at 2-5.

192. *Id.* at 25 (citing N.C. CONST. art. I, § 19); see also *infra* notes 201-58 and accompanying text.

193. Plaintiffs' Complaint at 24, 26-27, *Leandro* (No. 94 CVS 520) (citing N.C. CONST. art. IX, § 2); see also *infra* notes 259-427 and accompanying text.

194. Plaintiffs' Complaint at 27, *Leandro* (No. 94 CVS 520) (citing N.C. CONST. art I, § 19).

195. *Id.* at 27-29 (citing N.C. GEN. STAT. §§ 115C-1, -81, -122(3), -408 (1994)); see also *infra* notes 428-37 and accompanying text.

196. Thro, *Judicial Analysis*, *supra* note 3, at 604-08.

197. See *id.*

198. *Id.* at 605-08.

### 1. Determining Whether the Suit is an Equality Suit or a Quality Suit

The first and most important step in Thro's methodology requires determining whether the suit is primarily an equality suit, focusing on the legislature's duty to provide an equal education for each student, or a quality suit,<sup>199</sup> focusing on the legislature's duty to provide an adequate education.<sup>200</sup> According to Thro, the characterization of the suit as equality or quality may determine the court's analysis and methodology.<sup>201</sup> An equality suit will follow the typical equal protection analysis detailed below.<sup>202</sup> A quality suit, as characteristic of the third wave, should follow some form of the Massachusetts court's methodology described by Thro and discussed below.<sup>203</sup>

#### a. The Equal Protection Claim

The *Leandro* complaint, like most second and third wave suits,<sup>204</sup> raises an equal protection claim under the state constitution.<sup>205</sup> However, *Leandro* is not merely an equality suit, because the complaint raises education clause arguments as well as equal protection clause arguments, and emphasizes educational quality.<sup>206</sup>

Dual arguments of quality and equality under both clauses can be confusing for many courts; therefore, it is difficult to predict how a court will treat the claims.<sup>207</sup> However, there appear to be three

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199. The terms "adequacy" and "quality" will be used interchangeably to describe suits or claims that establish or assert that a state constitution's education article requires a certain standard of educational quality. See Thro, *Judicial Analysis*, *supra* note 3, at 605; McUsic, *Education Clauses*, *supra* note 20, at 308-09 (referring to the claims as "minimum standards claims").

200. Thro, *Judicial Analysis*, *supra* note 3, at 605.

201. *Id.*

202. *Id.*; see *infra* notes 208-11 and accompanying text.

203. Thro, *Judicial Analysis*, *supra* note 3, at 599 n.17, 605-06; see *infra* notes 285-427 and accompanying text.

204. See *supra* notes 42-81 and accompanying text (discussing second and third wave cases).

205. Plaintiffs' Complaint at 25, *Leandro* (No. 94 CVS 520); see also Thro, *Judicial Analysis*, *supra* note 3, at 609 (describing the nature of the third wave suits).

206. See Plaintiffs' Complaint at 24-27, *Leandro* (No. 94 CVS 520) (emphasizing equality of "opportunities" rather than simply funding). Thro notes that third wave plaintiffs follow a pattern of raising both arguments while emphasizing quality. Thro, *Judicial Analysis*, *supra* note 3, at 609.

207. See Thro, *Judicial Analysis*, *supra* note 3, at 609. Interpreting a state constitution's equal protection clause can prove difficult for a court because it may have little history or precedent on which to rely. McUsic, *Education Clauses*, *supra* note 20, at 312.

general methods a court could use to handle these issues. First, a court could apply its normal equal protection analysis to the claims, just as courts did in the second wave of reform.<sup>208</sup> To prevail under this method, the plaintiffs would have to show that education qualified as a fundamental right under the constitution,<sup>209</sup> or that the state's funding system was irrational,<sup>210</sup> two hurdles that the second wave cases frequently could not surmount.<sup>211</sup> Second, the court could disregard the equality issues and concentrate on the quality analysis.<sup>212</sup> For instance, the Massachusetts Supreme Judicial Court analyzed a school finance case as a quality suit, although it failed to state explicitly whether the suit was an equality or quality suit.<sup>213</sup> Third, a court could merge the two claims by applying both analyses.<sup>214</sup> A Tennessee court employed this approach and found both that an adequate education was a fundamental right, and that the system was irrational under the state constitution's equal protection clause.<sup>215</sup>

The *Leandro* plaintiffs' inclusion of the equal protection claim reflects a trend in recent litigation that demonstrates renewed confidence in the effectiveness of equal protection arguments.<sup>216</sup> If the North Carolina courts choose to use a standard equal protection

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208. Thro, *Judicial Analysis*, *supra* note 3, at 605; *see supra* notes 42-52 and accompanying text (discussing second wave suits generally based on equal protection claims); *see, e.g.*, *Serrano v. Priest*, 557 P.2d 929, 930 (Cal. 1976), *cert. denied sub nom. Clowes v. Serrano*, 432 U.S. 907 (1977); *Horton v. Meskill*, 376 A.2d 359, 361 (Conn. 1977).

209. If the plaintiffs could establish that education is a fundamental right under the state constitution, the school system would most likely be subject to strict scrutiny. *See supra* note 35 (explaining levels of scrutiny under the federal constitution); *see, e.g.*, *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979).

210. If the plaintiffs did not prevail on the fundamental right issue, the state's financing system would be subject to the more lenient rational relation test. *See supra* note 35 and accompanying text; *see e.g.*, *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983).

211. Thro, *The Third Wave*, *supra* note 24, at 230-31. *See also supra* notes 47-52 and accompanying text (discussing problems of the second wave of reform).

212. Thro, *Judicial Analysis*, *supra* note 3, at 604-09. The analysis for quality suits will be discussed *infra* at notes 285-427 and accompanying text.

213. *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516, 522 (Mass. 1993). The *McDuffy* court noted, however, the plaintiffs' assertion that the state denied them "the opportunity to receive an adequate education." *Id.*; *see also* Thro, *Judicial Analysis*, *supra* note 3, at 608-09 (detailing the *McDuffy* court's methodology).

214. *See* Thro, *Judicial Analysis*, *supra* note 3, at 609; Thro, *Tennessee*, *supra* note 52, at 21-22.

215. *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 141 (Tenn. 1993); *see* Thro, *Tennessee*, *supra* note 52, at 21-22 (discussing the significance of the *Tennessee* decision); *supra* note 80 and accompanying text.

216. Thro, *Tennessee*, *supra* note 52, at 25-26.

analysis or a merged equality and quality analysis, the plaintiffs must argue either that education is a fundamental right under the North Carolina Constitution or that the current funding system is irrational. The *Leandro* plaintiffs prepared for both possibilities. They claim a fundamental right to education under the constitution,<sup>217</sup> and also allege that the state system is irrational and arbitrary because it allows the funding and quality of education to vary according to where children live.<sup>218</sup>

The argument for education as a fundamental right poses a challenge for the plaintiffs, not only because declaring a fundamental right will necessarily affect other areas of the law,<sup>219</sup> but also because there is contrary precedent in this area.<sup>220</sup> In 1987, several North Carolina school children attempted to bring the second wave of reform to the state in *Britt v. North Carolina State Board of Education*.<sup>221</sup> The plaintiffs were minors enrolled or soon to be enrolled in the public schools of Robeson County.<sup>222</sup> They alleged that the state's financing system created inequities within Robeson County's multiple school districts and between Robeson County and other counties in the state, and that these disparities violated both the equal protection clause and the constitutional duty of a general and uniform system of schools.<sup>223</sup> The Court of Appeals dismissed the complaint, finding that the state constitution guarantees equal access to public school education, but it does not require the state to provide absolutely equal educational opportunities to all students.<sup>224</sup>

The court looked to the 1970 revision of the state constitution<sup>225</sup> and determined that the uniformity and equality provisions were simply replacements for those "obsolete provisions" requiring separation of the races.<sup>226</sup> Therefore, it concluded,

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217. See Plaintiffs' Complaint at 25, *Leandro* (94 CVS 520); N.C. CONST. art. I, § 15; art. IX, §§ 1, 2.

218. Plaintiff's Complaint at 25, *Leandro* (94 CVS 520).

219. See McUsic, *Education Clauses*, *supra* note 20, at 312-14; *supra* notes 65-68 and accompanying text.

220. See *Britt v. North Carolina State Bd. of Educ.*, 86 N.C. App. 282, 357 S.E.2d 432, *disc. rev. denied*, 320 N.C. 790, 361 S.E.2d 71 (1987).

221. *Id.*

222. *Id.* at 282, 357 S.E.2d at 432. Robeson County is again a plaintiff in the *Leandro* case. See Plaintiffs' Complaint at 3-4, *Leandro* (94 CVS 520).

223. *Britt*, 86 N.C. App. at 283, 357 S.E.2d at 433.

224. *Id.* at 289, 357 S.E.2d at 436.

225. N.C. CONST. art. IX § 2(1).

226. *Britt*, 86 N.C. App. at 286-87, 357 S.E.2d at 434-35 (citing *Report of the North Carolina State Constitution Study Commission* 34 (1968)).

"equal" meant equal access to the public schools of the state for all races;<sup>227</sup> the constitution did not require identical opportunities for each student.<sup>228</sup> The court determined that the drafters of the 1970 revision of the constitution intended to preserve the previous system entirely, except for its obsolete and unconstitutional "separate but equal" provisions.<sup>229</sup> The court also stated that the intent of the drafters and the people adopting the provision commanded more respect than the actual language of the clause.<sup>230</sup> Because inequalities in district property wealth had existed in 1970, and because the constitutional history contained no discussion of revising the school financing system, the court held that the constitution did not require identical opportunities for each student.<sup>231</sup> The court then deferred to the legislature's selection of the funding formula, since it involved a "political question."<sup>232</sup>

The *Britt* decision has been the object of significant criticism.<sup>233</sup> One report accused the court of ignoring the plain language of the constitution, and cited evidence suggesting that the court's interpretation of the constitution did not accurately reflect the

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227. *Id.* at 290, 357 S.E.2d at 436.

228. *Id.* at 289, 357 S.E.2d at 436 ("Our Constitution clearly does not contemplate such absolute uniformity across the State.").

229. *Id.* at 287, 357 S.E.2d at 435 (citing *Report of the North Carolina State Constitution Study Commission* 34 (1968)).

230. *Id.* at 286, 357 S.E.2d at 434.

231. *Id.* at 288-89, 357 S.E.2d at 435-36.

232. *Id.* at 290, 357 S.E.2d at 437 (citations omitted). The court stated that because the plaintiffs claimed no right recognized under the constitution, they were merely questioning "the wisdom of the Legislature in providing for the present method of funding public education." *Id.* Because the matter was of legislative concern and therefore a political question, the court dismissed the complaint. *Id.* The North Carolina Supreme Court declined to review the decision. *Britt v. North Carolina State Bd. of Educ.*, 320 N.C. 790, 361 S.E.2d 71 (1987) (denying discretionary review). The political question issue could resurface in the present suit; however, the third wave has overcome separation of powers problems in some states, including Kentucky, because of the strong separation of powers language in their state constitutions. Combs, *supra* note 5, at 370; *see also* KY. CONST. § 28 ("No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either one of the others . . ."). In addition, the education clause claims arguably give the court more flexibility to preserve legislative authority in its verdicts. The Kentucky Supreme Court used this flexibility to overturn the entire system, which left the legislature with only broad guidelines rather than a narrow judicial mandate eliminating certain types of reform options. *See Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212, 215 (Ky. 1989); Alexander, *supra* note 14, at 363-65; Levine, *supra* note 6, at 542; *see also supra* notes 62-67, *infra* notes 294-99 and accompanying text (discussing advantages of education clause claims).

233. A RIGHT DENIED, *supra* note 19, at 50 n.91. The report calls the ruling "clearly erroneous." *Id.*

framers' intent.<sup>234</sup> The language by which North Carolina demonstrated its commitment to education in its very first state constitution<sup>235</sup> provides a strong argument that education is a fundamental right in North Carolina.<sup>236</sup> The North Carolina Constitution provides, "The people have a right to the privilege of education, and it is the duty of the state to guard and maintain that right."<sup>237</sup> The education article creates a general and uniform system of education, makes attendance compulsory, and declares that "the means of education shall forever be encouraged."<sup>238</sup> The *Britt* court failed to consider the history of the text of the 1868 education clause,<sup>239</sup> which was similar to the revised education clause.<sup>240</sup> Testimony from the Constitutional Convention of 1868 reveals the delegates' goal of " 'level[ing] upwards' " the difference in the education that was available to rich and poor children of the state.<sup>241</sup> In addition, case law from as early as 1871 emphasized the importance

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234. *Id.* The report offers two reasons for its conclusion that the *Britt* court erred in interpreting the "equal opportunities" language added to the 1970 Constitution as merely eliminating obsolete segregationist provisions. *Id.* at 49-50; see N.C. CONST. art. IX, § 2(1). First, A RIGHT DENIED cites a 1968 report prepared by the Governor's Study Commission which stressed the importance of equal educational opportunities for all children. A RIGHT DENIED, *supra* note 19, at 49 (citing "A CHILD WELL TAUGHT," THE REPORT OF THE GOVERNOR'S STUDY COMMISSION ON THE PUBLIC SCHOOL SYSTEM OF NORTH CAROLINA (1968)). A RIGHT DENIED argues that the study commission report influenced the decision to add the "equal opportunities" language to the education article to strengthen the "general and uniform" language. *Id.* at 49-50; see N.C. CONST. art. IX, § 2(1). Second, the report accuses the court of ignoring precedent that interpreted the segregationist language as supportive of equalized financing. A RIGHT DENIED, *supra* note 19, at 50 n.91 (citing *Hooker v. Greenville*, 130 N.C. 472, 474, 42 S.E. 141, 141 (1902)).

235. See N.C. CONST. of 1776, § XLI 9 (stating that "a school or schools, shall be established by the legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public"); see also *Liner*, *supra* note 84, at 30 (describing how North Carolina's system of public education developed).

236. See A RIGHT DENIED, *supra* note 19, at 37-44; see also *supra* notes 83-96 and accompanying text (discussing the history of school finance in North Carolina).

237. N.C. CONST. art. I, § 15.

238. N.C. CONST. art. IX, §§ 1, 2(1), 3.

239. See A RIGHT DENIED, *supra* note 19, at 40, 49-50. The 1868 education clause read: "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." N.C. CONST. of 1868, art. IX, § 1. "The general assembly, at its first session under this Constitution, shall provide by taxation and otherwise, for a general and uniform system of public schools . . ." *Id.* § 2.

240. See *Britt v. North Carolina State Bd. of Educ.*, 86 N.C. App. 282, 287, 357 S.E.2d 432, 435, *disc. rev. denied*, 320 N.C. 790, 361 S.E.2d 71 (1987).

241. A RIGHT DENIED, *supra* note 19, at 40-41 (citing JOURNAL OF THE CONSTITUTIONAL CONVENTION 487 (N.C. 1868)).



of education.<sup>242</sup> Until *Britt*, school reformists had reason to believe that it was likely that the court would declare education to be a fundamental right in North Carolina.

On the issue of equality under the Equal Protection Clause, the *Britt* court declined, like other second-wave courts,<sup>243</sup> to find that unequal funding failed under rational basis analysis.<sup>244</sup> The court asserted that the constitutional provision expressly authorizing local revenues to supplement the state's funding directly contradicted the plaintiffs' arguments and "the possibility that exactly equal educational opportunities can be offered throughout the State."<sup>245</sup> The *Britt* court's disregard for the history of the 1970 constitutional studies and proposals—proposals which had led to the addition of the language "wherein equal opportunities shall be provided for all students"<sup>246</sup> to the education clause<sup>247</sup>—allowed the court to conclude, contrary to a literal reading of the language, that equal opportunities were not required.<sup>248</sup> The revised language obviously strengthened the education clause's requirement of equality,<sup>249</sup> but the *Britt* court's focus on the need to revise the constitution to rid it of segregationist provisions allowed it to avoid the stronger interpretation advocated by the plaintiffs.<sup>250</sup>

Even if the *Leandro* court follows the *Britt* court's reasoning, *Leandro* could still result in school finance reform in North Carolina through equal protection analysis. It is possible for a third wave case to result in the reversal of earlier school finance decisions. The Montana Supreme Court, in *Helena Elementary School District No. 1*

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242. *Id.* at 41 (citing *Lane v. Stanly*, 65 N.C. 153, 157-58 (1871)). In *Collie v. Commissioners*, a 1907 case, the North Carolina Supreme Court stated that "we must assume that there is no article in our organic law which the people regarded as more important to their welfare and prosperity [than article IX]." 145 N.C. 170, 174, 59 S.E. 44, 45 (1907); see also *A RIGHT DENIED*, *supra* note 19, at 43 (arguing that early court cases provide precedential support for the proposition that education is a fundamental right under the North Carolina Constitution).

243. See Thro, *Judicial Analysis*, *supra* note 3, at 609; Thro, *The Third Wave*, *supra* note 24, at 230-31; see *supra* note 35 and accompanying text (explaining levels of equal protection scrutiny); *supra* notes 42-52 and accompanying text (discussing second wave equal protection claims and listing case citations).

244. See *Britt*, 86 N.C. App. at 288-90, 357 S.E.2d at 435-37.

245. *Id.* at 288, 357 S.E.2d at 435-36; see also *supra* notes 221-32 and accompanying text (describing the rationale of *Britt*).

246. N.C. CONST. art. IX, § 2.

247. *A RIGHT DENIED*, *supra* note 19, at 49-50.

248. See *Britt*, 86 N.C. App. at 287-88, 357 S.E.2d at 435.

249. *A RIGHT DENIED*, *supra* note 19, at 50.

250. *Britt*, 86 N.C. App. at 290, 357 S.E.2d at 436.

v. *State*,<sup>251</sup> overturned an earlier case upholding the Montana finance system.<sup>252</sup> Such a complete reversal suggests that *stare decisis* need not be determinative in *Leandro*, especially if compelling facts, such as increased funding disparities, demand a different result.<sup>253</sup> The plaintiffs in *Leandro* could argue that they have waited for full implementation of the BEP, the state's supplemental funding, and increased funding for facilities, and none of these reforms have progressed as promised.<sup>254</sup> They could also cite studies that demonstrate the widening of funding disparities.<sup>255</sup> Furthermore, they could point to discussions in other states that have breathed new life into equal protection analysis in school finance cases.<sup>256</sup> The plaintiffs in *Leandro* therefore were wise to include an equal protection claim in their complaint.<sup>257</sup> Although the complaint emphasizes quality over equality,<sup>258</sup> the plaintiffs nevertheless have left every avenue open for the North Carolina courts to require reform of the state's current finance system.

#### b. State Education Article Claim

Both equality and quality claims<sup>259</sup> may successfully be made under the state constitution's education article.<sup>260</sup> This section will discuss each type of claim separately.

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251. 769 P.2d 684 (Mont. 1989).

252. See Thro, *The Third Wave*, *supra* note 24, at 238 (stating that *Helena* overturned *State ex. rel. Woodahl v. Straub*, 520 P.2d 776 (Mont. 1974)).

253. See *id.* Thro agrees that evidence of increased funding disparities or new evidence of the impact of disparities would be appropriate reasons for overturning a precedent. *Id.* at 238 nn.108-09.

254. See LOCAL FINANCE STUDY, *supra* note 95, at 2; *supra* notes 171-81 and accompanying text (discussing the need for funding under the BEP and the enactment of the Low Wealth and Small Schools Supplemental Fund).

255. See LOCAL FINANCE STUDY, *supra* note 95, at 4-6.

256. In *Tennessee*, the Supreme Court accepted the theory that the state's system of finance was irrational and thus violated the Equal Protection Clause. *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 156 (Tenn. 1993); see also Thro, *Tennessee*, *supra* note 52, at 26 (predicting that, if other states follow *Tennessee's* lead in using rational basis review to strike school finance schemes, *McWherter* "will be regarded as one of the true landmarks of the school finance litigation movement").

257. Plaintiffs' Complaint at 25, *Leandro* (No. 94 CVS 520).

258. See *id.* at 24.

259. The distinction between quality and equality suits is described *supra*, at notes 199-203.

260. McUsic, *Education Clauses*, *supra* note 20, at 308-09.

*i. Equality Claim Under the Education Clause*

The plaintiffs in *Leandro* assert that they have a fundamental right to a general and uniform system of public schools under the North Carolina Constitution.<sup>261</sup> They claim that the state's educational system does not meet this constitutional mandate because the quality of education varies throughout the state.<sup>262</sup> The plaintiffs also allege that the state fails to provide equal educational opportunities for children as required by the state constitution.<sup>263</sup> Although the complaint does not explicitly address the *Britt* decision—which held that North Carolina was not required to provide identical educational opportunities to all students<sup>264</sup>—it clearly seeks to skirt that negative precedent. It argues that, although only “substantial equality” is required under the constitution, the wide disparities in funding show that the state's system does not provide even that.<sup>265</sup>

Making an equality argument under the state's education clause may help the plaintiffs avoid the equal protection traps that captured many second wave cases. For example, the strategy avoids the problem of having to demonstrate the correlation between dollars spent and increased educational quality.<sup>266</sup> Instead, plaintiffs can simply argue that the constitution requires a standard of equality for the entire system, and that the legislature is failing its constitutional mandate by allowing the system to continue with unequal funding.<sup>267</sup>

Thro and other scholars have categorized education clauses by the extent to which they provide textual support for adequacy

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261. Plaintiffs' Complaint at 26, *Leandro* (No. 94 CVS 520). The plaintiffs contend that Article IX, § 2 of the North Carolina Constitution establishes this right. *Id.*

262. *Id.*

263. *Id.*; see also N.C. CONST. art. IX, § 2(1) (stating that “equal opportunities shall be provided for all students”).

264. *Britt v. North Carolina State Bd. of Educ.*, 86 N.C. App. 282, 289, 357 S.E.2d 432, 436, *disc. rev. denied*, 320 N.C. 790, 361 S.E.2d 71 (1987); see also *supra* notes 221-32 and accompanying text.

265. Plaintiffs' Complaint at 26, *Leandro* (No. 94 CVS 520). The plaintiffs could rely on the persuasive authority of *Roosevelt*, which used a similar definition of “general and uniform” to strike down Arizona's school finance scheme because the state failed to educate the children of the state on “substantially equal terms” due to gross disparities within the system. *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 814 (Ariz. 1994); see also *infra* note 273-76 and accompanying text.

266. See McUsic, *Education Clauses*, *supra* note 20, at 315; see also *supra* notes 62-67 and accompanying text; *infra* notes 294-99 and accompanying text (discussing advantages of education clause claims).

267. See McUsic, *Education Clauses*, *supra* note 20, at 319.

arguments.<sup>268</sup> One scholar, Molly McUsic, has further categorized education clauses by their textual support for equality arguments.<sup>269</sup> North Carolina's education clause received high marks from McUsic, who noted that it provides one of the clearest textual commitments to equality by actually stating that "equal opportunities shall be provided for all students."<sup>270</sup> In addition, the constitution uses the language of uniformity,<sup>271</sup> which some courts have employed to overturn their school finance systems.<sup>272</sup>

In *Roosevelt Elementary School District No. 66 v. Bishop*,<sup>273</sup> the Arizona Supreme Court found that the "general and uniform" language appearing in the state constitution did not require identical equality.<sup>274</sup> Yet, the *Roosevelt* court concluded that school finance systems "which themselves create gross disparities are not general and uniform."<sup>275</sup> In addition, the Arizona court concluded that a "general and uniform" system required "sufficient funds to educate children on substantially equal terms."<sup>276</sup> In *Rose v. Council for Better Education, Inc.*,<sup>277</sup> the Kentucky Supreme Court used the terms "uniformity" and "equality" interchangeably and held that an efficient system required both elements.<sup>278</sup> However, the *Britt*

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268. Thro, *Role of Language*, *supra* note 3, at 22-31; see also *infra* notes 318-25 and accompanying text (detailing the categories of state constitutional education clauses).

269. See McUsic, *Education Clauses*, *supra* note 20, at 319. McUsic classified the state education articles by their support for an "equity" theory, *id.*, and support for a "standards" theory, *id.* at 326.

270. See *id.* at 321 (quoting N.C. CONST. art. IX, §2(1) (internal quotation marks omitted)). McUsic acknowledged that the North Carolina Court of Appeals has nevertheless held that this language does not require the state to "provide identical opportunities to each and every student." *Id.* (quoting *Britt v. North Carolina State Bd. of Educ.*, 86 N.C. App. 282, 289, 357 S.E.2d 432, 436, *disc. rev. denied*, 320 N.C. 790, 361 S.E.2d 71 (1970) (internal quotation marks omitted)).

271. N.C. CONST. art. IX, § 2 (requiring a "general and uniform system of free public schools").

272. See, e.g., *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 815-16 (Ariz. 1994); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211-12 (Ky. 1989).

273. 877 P.2d 806 (Ariz. 1994).

274. *Id.* at 814.

275. *Id.*

276. *Id.*

277. 790 S.W.2d 186 (Ky. 1989).

278. See *id.* at 211. Professor McUsic points out that "uniform" is generally interpreted to mean "equal" and that courts may use the terms interchangeably. McUsic, *Education Clauses*, *supra* note 20, at 322-23; see, e.g., *Kukor v. Grover*, 436 N.W.2d 568, 577 (Wis. 1989) (stating that the education article requires that the character of instruction be "as uniform as practicable"); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 396 (Tex. 1989) (using "uniform" and "equal" interchangeably to require "exactly the same distribution of funds").

decision, which stated that the language of the article was not as important as the intent behind the provision,<sup>279</sup> could have a negative effect on equality claims made under the education article in North Carolina.<sup>280</sup> Because the *Britt* court concluded that the North Carolina Constitution does not require absolute uniformity, it presents a significant obstacle to the *Leandro* plaintiffs' equality claim.<sup>281</sup> The plaintiffs hope, however, that the North Carolina courts will alter their interpretation of the constitution and read the language of the education clause according to its plain meaning, as suggested by McUsic.<sup>282</sup> In addition, a North Carolina court might now be inclined to examine decisions in other states where courts have concluded that a logical and sound constitutional interpretation required them to find a true mandate for the legislature under the uniformity language.<sup>283</sup> Finally, the *Leandro* plaintiffs could argue that the disparities of the current system are so far from absolute uniformity that even the *Britt* requirement of "substantial equality" is unfulfilled.<sup>284</sup>

## ii. *Quality Claim Under the Education Clause*

Although analytically and methodologically distinct, equality and quality claims<sup>285</sup> are interrelated.<sup>286</sup> Although there are ad-

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279. *Britt v. North Carolina State Bd. of Educ.*, 86 N.C. App. 282, 286, 357 S.E.2d 432, 434, *disc. rev. denied*, 320 N.C. 790, 361 S.E.2d 71 (1987).

280. The *Britt* court concluded that the uniformity language did not contemplate "absolute uniformity." *Id.* at 289; 357 S.E.2d at 436. Another part of the *Britt* decision demonstrates that the North Carolina Constitution is ambiguous on the issue of equality because, although it requires equality, it grants localities the constitutional right to supplement their schools with local funding. *See id.* at 288, 357 S.E.2d at 435-36; *see also* N.C. CONST. art. IX, § 2(2) (authorizing local governments to "use local revenues to add to or supplement any public school"). According to the *Britt* court, this right of local supplements directly conflicts with the equality provision. *Britt*, 86 N.C. App. at 288, 357 S.E.2d at 435-36. For a full discussion of *Britt*, *see supra* notes 221-50 and accompanying text.

281. *See supra* notes 221-50 and accompanying text.

282. *See* McUsic, *Education Clauses*, *supra* note 20, at 320; *see also supra* notes 269-70 and accompanying text.

283. *See* *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 815-16 (Ariz. 1994); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211 (Ky. 1989). According to Thro, third wave decisions could start a revolution in school finance reform. Not only will the education clauses take on more significance, but the courts will be forced to look to other state decisions as well. Thro, *The Third Wave*, *supra* note 24, at 241. A court may find that reaching a different outcome than another state court with similar constitutional language threatens its legitimacy. *Id.* at 248-49. For a discussion of a Montana decision that overturned an adverse precedent, *see supra* notes 251-52 and accompanying text.

284. *See* Plaintiffs' Complaint at 26, *Leandro* (No. 94 CVS 520).

285. *See supra* notes 199-200 and accompanying text.

vantages to litigating under an adequacy theory,<sup>287</sup> adequacy of education is difficult to measure, and there is a danger that the court will adopt a minimal standard of adequacy.<sup>288</sup> Some scholars warn against separating the two types of claims and proceeding solely on the basis of adequacy.<sup>289</sup> Jonathan Kozol has expressed his concern that an adequacy standard could be determined by the wealthy and then imposed on the poor.<sup>290</sup> Kozol believes that requiring equality, rather than a minimum quality level, is fairer and more likely to bring about true reform because the rich will not tolerate being leveled down. To ensure their own children's education, then, the wealthy will be forced to bring the poor schools up to higher standards.<sup>291</sup> As Kern Alexander has pointed out, "[A]dequacy is in the eye of the beholder."<sup>292</sup> However, Alexander has also recognized that adequacy and equality are interrelated, and that it can be argued convincingly that equal access to an adequate education is the real issue.<sup>293</sup>

Other scholars point out the advantages of adequacy claims.<sup>294</sup> Such claims allow a court the flexibility to target the neediest children and provide remedies tailored to their particular situation.<sup>295</sup> Adequacy claims can also avoid the problems associated with

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286. See John A. Nelson, *Adequacy in Education: An Analysis of the Constitutional Standard in Vermont*, 18 VT. L. REV. 7, 18-19, 43 (1993).

287. See McUsic, *Education Clauses*, *supra* note 20, at 315-17; *supra* notes 62-67 and accompanying text.

288. See, e.g., *Skeen v. State*, 505 N.W.2d 299, 315 (Minn. 1993) (declaring that the state "satisfied its constitutionally-imposed duty of creating a 'general and uniform system of education' " by providing funding "in an amount sufficient to generate an adequate level of education which meets all state standards").

289. See Nelson, *supra* note 286, at 18-19.

290. See *id.* (quoting an interview with Jonathan Kozol, the author of *Savage Inequalities*); Lonnie Harp, *School Finance Suits Look Beyond Money to Issues of Quality*, EDUC. WK., June 17, 1992, at 1, 28. See generally JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* 206-33 (1991) (describing the author's views about public education finance schemes).

291. See Harp, *supra* note 290, at 28; Nelson, *supra* note 286, at 18-19.

292. Nelson, *supra* note 286, at 18 (quoting Kern Alexander, *School Financing as Prescribed by the Fundamental Law of Vermont* (1992) (unpublished manuscript on file with Kern Alexander)). Kern Alexander is a leading expert and consultant in numerous school finance reform cases. See *id.*

293. See Nelson, *supra* note 286, at 43 (referring to Alexander's testimony during *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 210-11 (Ky. 1989)).

294. See, e.g., Julius Chambers, *Adequate Education for All: A Right, An Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 61-62 (1987); McUsic, *Education Clauses*, *supra* note 20, at 339-40; Nelson, *supra* note 286, at 16-17.

295. Nelson, *supra* note 286, at 16; see also *Abbott v. Burke*, 575 A.2d 359, 408 (N.J. 1990) (holding that the state's school system failed its constitutional mandate with respect to poor, inner-city schools).

measuring inputs of educational quality, such as the amount of money spent on education, and allow the court to concentrate on the outcomes of education, including student achievement.<sup>296</sup> Although spending levels seem conceptually simple, outcome measures such as student achievement and drop-out rates are actually more easily presented to courts than the complex studies that may be required to prove a correlation between spending and educational quality.<sup>297</sup> Courts can circumvent the scientific issues and simply assume that wealthy schools would not waste money offering more classes or better equipment if they did not improve performance.<sup>298</sup> Adequacy claims also allow courts the flexibility to render a broad verdict that returns the policy-making power to fashion a remedy to the legislature.<sup>299</sup>

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296. *McUsic, Education Clauses*, *supra* note 20, at 315; Nelson, *supra* note 286, at 17; see also *supra* note 67 and accompanying text (defining input and output measures).

297. *McUsic, Education Clauses*, *supra* note 20, at 315-16; see also *supra* note 67. Convincing a court of the correlation may prove to be an impossible burden for plaintiffs because social scientists cannot agree on whether educational expenditures and educational quality are correlated. *McUsic, Education Clauses*, *supra* note 20, at 316; see also *supra* note 21 (citing various social science studies).

298. See *McUsic, Education Clauses*, *supra* note 20, at 316-17. *McUsic* highlights the trend in state courts hearing school finance cases of finding a link between spending and quality based on common sense, practical considerations, and evidence that the wealthier districts are not funding "frills." See *id.*; see, e.g., *Helena Elem. Sch. Dist. No. 1 v. State*, 769 P.2d 684, 690 (Mont. 1989) (stating that the evidence "demonstrated that the wealthier school districts are not funding frills or unnecessary educational expenses"); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 334 (Wyo. 1980) (stating that "[i]t would be unacceptable logic to deduce that wealthy counties are squandering their money" from the fact that adequate education can be provided for less).

299. *McUsic, Education Clauses*, *supra* note 20, at 330. The Kentucky court's holding provides a good example of a flexible ruling that maintains enforcement power over the legislature. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215-16 (Ky. 1989); *Alexander*, *supra* note 14, at 364-65. But see *McUsic, Education Clauses*, *supra* note 20, at 332 n.111 (noting that flexible decrees can lead to difficulties in interpreting and enforcing courts' verdicts). The Kentucky court defined a constitutionally adequate education by listing seven capacities all children in the state should develop: (1) oral and written communication skills, (2) knowledge of social, economic, and political systems, (3) understanding of governmental processes, (4) knowledge of mental and physical wellness, (5) grounding in the arts, (6) training or preparation for academic work or a vocation sufficient to choose and pursue work intelligently, and (7) sufficient academic and vocational skills to compete favorably in academics or the job market with students from other states. *Rose*, 790 S.W.2d at 212. The legislature's task was to design a new system with these output goals in mind. *Id.*; see also *Alexander*, *supra* note 14, at 362-64 (analyzing the *Rose* decision and its impact on the Kentucky legislature's task). Similarly, output standards were articulated by the West Virginia Supreme Court of Appeals in *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979). *McUsic* asserts that goals such as those of the Kentucky and West Virginia cases are too vague to be enforced. She suggests defining minimum standards according to achievement tests to aid enforcement.

Given these advantages and the success other third wave plaintiffs have had with quality arguments under state education clauses,<sup>300</sup> the plaintiffs' claim in *Leandro* that they have a fundamental right to "adequate educational opportunities"<sup>301</sup> under the North Carolina Constitution is well chosen. The plaintiffs recognize the interrelation between equality and quality claims by stating that inequities and inadequacies in opportunities result from inadequate funding.<sup>302</sup> They support their claim of inadequate funding by asserting that the BEP has not been fully funded;<sup>303</sup> however, they are careful not to suggest that the BEP represents an adequate level of funding.<sup>304</sup> Instead, they argue that it represents merely the "minimum" of what the state should provide.<sup>305</sup>

## 2. Analyzing Constitutional Language for a Specific Quality Standard

If the court determines that the *Leandro* plaintiffs are primarily making a quality or an adequacy claim, it should consider following the remaining steps of Thro's methodology<sup>306</sup> to determine the nature of the state's responsibility. The best example of the use of this methodology is the Massachusetts case,<sup>307</sup> other third wave cases have used variations of the methodology.<sup>308</sup> The crucial second step in Thro's methodology is for the court to interpret the constitution's education clause to determine whether it places a duty upon the

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See McUsic, *Education Clauses*, *supra* note 20, at 332. Alexander also acknowledges that the verdicts attempting to define an adequate education are not without problems, see Alexander, *supra* note 14, at 362 n.92, but he remains supportive of the Kentucky court's approach, *see id.* at 362-63.

300. See *supra* notes 53-81 and accompanying text; see e.g., *Rose*, 790 S.W.2d at 213; *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516, 522, 548 (Mass. 1993).

301. Plaintiffs' Complaint at 24, *Leandro* (No. 94 CVS 520) (citing N.C. CONST. arts. I, IX, § 2).

302. See *id.* at 24.

303. *Id.*

304. See *id.* at 28-29 (seeking a declaration that North Carolina's system of funding violated statutory requirements "by failing to provide every student with equal access to the *minimum requirements* of the [BEP]" (emphasis added)).

305. *Id.*

306. See Thro, *Judicial Analysis*, *supra* note 3, at 605-08; see also *supra* notes 196-98 and accompanying text. Another commentator has proposed a similar methodology for analyzing quality suits. See Dayton, *supra* note 35, at 641.

307. See *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516, 522-48 (Mass. 1993); see also Thro, *Judicial Analysis*, *supra* note 3, at 610-16 (discussing the application and results of the *McDuffy* methodology).

308. See, e.g., *Tennessee Small Sch. Sys. v. McWhorter*, 851 S.E.2d 139, 150-51 (Tenn. 1993); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989).



legislature with regard to public education.<sup>309</sup> If the court identifies a duty, it must analyze the clause to see if the language suggests any specific standard of educational quality.<sup>310</sup> Scholars recommend interpreting state education clauses with traditional constitutional interpretation methods:<sup>311</sup> analysis of the language and text;<sup>312</sup> historical analysis,<sup>313</sup> including analysis of the intent of the framers of the constitution;<sup>314</sup> analysis of other state court decisions;<sup>315</sup> and structural analysis.<sup>316</sup> William Thro also asserts that when history, decisions from other jurisdictions, and state statutes are inconclusive, the plain language of the clause should control.<sup>317</sup>

Without a doubt the most controversial aspect of the interpretation of an education clause is the analysis of its language. Many scholars have categorized the language of state constitutional education clauses,<sup>318</sup> but there is disagreement over the

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309. See Thro, *Judicial Analysis*, *supra* note 3, at 610.

310. *Id.*

311. Nelson, *supra* note 286, at 21-22 & nn.79-80. These methods are not discrete entities but often overlap and involve analyzing the same sources. See *infra* notes 314-15.

312. Nelson, *supra* note 286, at 21; Thro, *Role of Language*, *supra* note 3, at 25-27. The language or textual analysis involves determining the plain meaning of the text. See *id.* at 25. Earlier decisions in the same jurisdiction that interpret the language of the provision are helpful. See Nelson, *supra* note 286, at 22.

313. Thro, *Role of Language*, *supra* note 3, at 25; Nelson, *supra* note 286, at 21. Historical analysis involves an examination of the constitutional history of the education clause, any records of the intentions of the framers who drafted the provision that are available, and any precedential court interpretations of the provision. See Thro, *Role of Language*, *supra* note 3, at 25 & n.41; Nelson, *supra* note 286, at 22 & n.81.

314. Thro, *Role of Language*, *supra* note 3, at 22 n.22, 25 n.41. Determining the intentions of the constitution's framers involves surveying the constitutional records and documents leading up to the final version of the constitution. See *id.* at 25 n.41 (citing *Blase v. State*, 302 N.E.2d 46, 49 (Ill. 1973)). It may also involve examining current influential writings or opinions of the time. Cf. *A RIGHT DENIED*, *supra* note 19, at 49-51 (analyzing the significance of the Governor's Study Commission Report on the drafting of the North Carolina education clause).

315. Thro, *Role of Language*, *supra* note 3, at 25; Nelson, *supra* note 286, at 21. This area also relates to textual analysis because a court may find other state decisions interpreting similar constitutional language useful. See Thro, *The Third Wave*, *supra* note 24, at 248. There is some evidence that many state constitutions borrowed clauses from other states previously admitted to the Union. See Thro, *Role of Language*, *supra* note 3, at 22 n.22. Therefore, it may be necessary to look to the original state's constitutional history as well. See Alexander, *supra* note 14, at 352 (noting that one common state constitutional clause is called the "New England clause" because "it emanated from early consideration of public education in that region").

316. See Thro, *Judicial Analysis*, *supra* note 3, at 610.

317. Thro, *Role of Language*, *supra* note 3, at 22, 31.

318. *Id.* at 22.

categories.<sup>319</sup> In addition, courts have not always adhered to the scholars' categories, so the outcome of the textual analysis in a particular case is somewhat unpredictable; this may result in the scholars' categorizations having less influence on other courts.<sup>320</sup> Still, the classifications provide a means for comparing the standards of the different state constitutions. Most commentators place the education clauses into four groups.<sup>321</sup> According to Thro's classification scheme, Category I clauses require only that the legislature set up a system of free public schools.<sup>322</sup> Category II clauses require a minimal level of quality such as "thorough" or "efficient."<sup>323</sup> Those clauses with stronger mandates, but without explicit quality standards, are considered to be in Category III.<sup>324</sup> Finally, Category IV clauses establish education as an important—in some cases, the *most* important—duty of the state.<sup>325</sup>

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319. See *id.* Compare Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814-16 nn.143-46 (1985) (categorizing the clauses according to the strength of the educational mandate they impose) with Thro, *Role of Language*, *supra* note 3, at 23-25 (adopting Ratner's basic framework, but disagreeing with Ratner about the placement of some states' claims). McUsic categorizes the clauses differently, depending on their support for different types of claims. See McUsic, *Education Clauses*, *supra* note 20, at 319-26 (categorizing the clauses according to the extent to which they support an "equity" claim); *id.* at 333-39 (categorizing the clauses according to the extent to which they support a claim that a minimum standard of education is required).

320. Cf. Thro, *Judicial Analysis*, *supra* note 3, at 611 (concluding that "if one accepts the proposition that the language of the state education clauses matters, both the *McDuffy* and the *McWherter* courts reached the wrong result"). In fact, the Tennessee case, *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 150 (Tenn. 1993), may make the categories even less persuasive to other courts. See Thro, *Tennessee*, *supra* note 52, at 24-25 (concluding that, despite the Tennessee Supreme Court's "lengthy discussion" of the education clause, it ultimately was unclear whether the Court had accepted or rejected the theory that the language of the clause should be outcome-determinative).

321. This Comment uses the classification scheme initially developed by Ratner and modified by Thro. See Thro, *Role of Language*, *supra* note 3, at 22 & n.23 (citing Erica Black Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 66-70 (1974); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814-16, nn.143-46 (1985)). Other scholars have also favored a classification scheme that consists of four categories. See, e.g., McUsic, *Education Clauses*, *supra* note 20, at 320-26, 334-39; see also *supra* notes 326-27 and accompanying text.

322. Thro, *Role of Language*, *supra* note 3, at 23; see, e.g., TENN. CONST. art. XI, § 12; N.Y. CONST. art. XI, § 1; MICH. CONST. art. VIII, § 2.

323. Thro, *Role of Language*, *supra* note 3, at 23-24; see, e.g., DEL. CONST. art. X, § 1; KY. CONST. § 183; W. VA. CONST. art. XII, § 1.

324. Thro, *Role of Language*, *supra* note 3, at 24; see, e.g., CAL. CONST. art. IX, § 1; IOWA CONST. art. IX, 2d, § 3; NEV. CONST. art. XI, § 2.

325. Thro, *Role of Language*, *supra* note 3, at 25; see, e.g., WASH. CONST. art. IX, § 2; GA. CONST. art. VIII, § 1.

Because scholars disagree as to how North Carolina's education clause should be classified,<sup>326</sup> there are arguments that support both sides in *Leandro*. At least two scholars believe that North Carolina's clause imposes a minimal quality standard, if any, on the legislature.<sup>327</sup> However, the plaintiffs should emphasize that other scholars classify the North Carolina Constitution in a category that demands a slightly higher quality standard.<sup>328</sup> Thro places North Carolina in his Category II,<sup>329</sup> and points out that some of the plaintiffs in the leading cases of the third wave obtained victories in Category II states.<sup>330</sup> Yet Thro concedes that "uniform" language

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326. Thro concludes that the language of uniform quality in North Carolina's clause, see N.C. CONST. art. IX, § 2, requires a minimal level of quality. See Thro, *Role of Language*, *supra* note 3, at 23-24 & n.24. McUsic places language requiring education to be "general" and "uniform" in her weakest category—clauses that offer a minimum commitment to educational quality but no specific standard. See McUsic, *Education Clauses*, *supra* note 20, at 338-39 & n.147.

327. See McUsic, *Education Clauses*, *supra* note 20, at 338-39 & n.147; Thro, *Role of Language*, *supra* note 3, at 23-24 (citing Gershon Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 815 n.144 (1985)). (Thro himself disagrees with Ratner's categorization. See Thro, *Role of Language*, *supra* note 3, at 23 nn.24, 28.) McUsic analyzes the clauses in terms of their textual support for equality in addition to their textual support for an adequacy standard. Therefore, she concludes that some states' constitutions have strong textual support for one type of claim, but not another. For example, she includes North Carolina in the category of state constitutions that "provide the strongest commitment to equality, by actually using the word 'equality' in defining the state's obligation." McUsic, *Education Clauses*, *supra* note 20, at 320. However, North Carolina scores considerably worse on the measure of support for an adequacy claim. McUsic places North Carolina in the category of "state constitutions that require education for all but express a minimal commitment to educational quality." *Id.* at 338.

328. See Thro, *Role of Language*, *supra* note 3, at 23-24 & nn.24, 28. Alexander also considers "general" and "uniform" language to have substantive meaning. See Alexander, *supra* note 14, at 353-54. Classification of the North Carolina Constitution's education clause as Category II does not guarantee a victory for the plaintiffs because cases in states with these types of clauses have resulted in outcomes favoring either side. See Thro, *Role of Language*, *supra* note 3, at 26-27.

329. Thro, *Role of Language*, *supra* note 3, at 23 n.28. Thro originally agreed with Ratner that North Carolina was a "typical" Category I state. See Thro, *The Third Wave*, *supra* note 24, at 243 n.131. Later, however, he concluded that some of Ratner's classifications were erroneous and that North Carolina was more properly classified as a Category II state. Thro, *Role of Language*, *supra* note 3, at 23 n.28.

330. Thro, *The Third Wave*, *supra* note 24, at 247-49 n.168; see *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Helena Elem. Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). However, the reader should note that, at the time Thro made this observation, he still considered North Carolina to be a Category I state. See Thro, *The Third Wave*, *supra* note 24, at 243 n.131; see also *supra* note 327. His later classification of North Carolina in Category II appeared to be simply a correction of the previous classification, rather than a reconsideration of the parameters of Category II. See Thro, *Role of Language*, *supra*

standing alone provides weak support for these claims.<sup>331</sup> A court could use the word "uniform" to uphold a system of underfunded and inadequate schools.<sup>332</sup> Furthermore, every Category II state in which a plaintiff won, except Montana, had "efficient" language in its education clause.<sup>333</sup> McUsic observes that while constitutions with "thorough and efficient" language have been held to require a specific quality standard, no state court has held the language "general" or "uniform" to do so.<sup>334</sup> Nevertheless, more recent successful cases in Tennessee<sup>335</sup> and Massachusetts<sup>336</sup>—both states without a constitutional quality standard<sup>337</sup>—support the *Leandro* plaintiffs' position on this issue. The Tennessee Constitution does not require uniformity, efficiency, or a thorough system,<sup>338</sup> yet the Tennessee Supreme Court interpreted the entire education clause, which recognizes the "inherent value of education," to be a specific mandate to the legislature.<sup>339</sup>

The *Leandro* court may also choose to consult the relevant history of North Carolina's education clause, including the intent of the framers and the more general history of education in the state, as well as the treatment of the history of education by courts in other states. The Kentucky Supreme Court took this approach in *Rose v. Council for Better Education, Inc.*,<sup>340</sup> which suggested that the importance of education may be more persuasive than any particular

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note 3, at 23-24 & n.28. Therefore, the cases from other Category II states could provide persuasive authority for the *Leandro* plaintiffs.

331. Thro, *Role of Language*, *supra* note 3, at 27.

332. *Id.* at 29.

333. *Id.* at 27.

334. McUsic, *Education Clauses*, *supra* note 20, at 338.

335. *Tennessee Small Sch. Sys. v. McWhorter*, 851 S.W.2d 139 (Tenn. 1993).

336. *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993).

337. Thro, *Judicial Analysis*, *supra* note 3, at 611 (noting that "[b]oth the Massachusetts and Tennessee education clauses are Category I clauses which cannot be regarded as imposing a quality standard").

338. See TENN. CONST. art. XI, § 12.

339. *McWhorter*, 851 S.W.2d at 150 (citing TENN. CONST. art. XI, § 12); see also Thro, *Tennessee*, *supra* note 52, at 21 (describing the Tennessee Court's interpretation of this constitutional provision). North Carolina's constitution contains supplemental language, both in the education article and elsewhere in the text, that the court could incorporate in its interpretation. The education article states that "the means of education shall forever be encouraged." N.C. CONST., art. IX, § 1. The constitution also includes a Declaration of Rights, which states: "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. CONST., art. I, § 15.

340. 790 S.W.2d 186 (Ky. 1989).

language in the constitution.<sup>341</sup> The *Rose* court examined the motives of the Kentucky Constitution's framers, and determined that they believed education to be fundamental to a republican form of government.<sup>342</sup> The Massachusetts Supreme Judicial Court also conducted an extensive historical analysis of the framing and language of its state constitution, as well as a lengthy review of the history of public education in the state, to determine in *McDuffy v. Secretary of the Executive Office of Education*<sup>343</sup> that its system was unconstitutional.<sup>344</sup>

The outcome of such an analysis by a North Carolina court is difficult to predict, because it appears to depend on the court's interpretation of the state's history in the area of public education. If the court accepts the view taken by the court of appeals in *Britt*,<sup>345</sup> it is unlikely that it will strike down the school finance system based on the state's historical commitment to education, as Kentucky and Massachusetts did.<sup>346</sup> However, a strong argument may be made that North Carolina has a history of supporting public schools—as one of the first states to establish a public education system, the state has historically provided substantial funding—and there may indeed be a fundamental right to an adequate education under the North Carolina Constitution.<sup>347</sup> If the court embraces the view that there is a historically based fundamental right, it could reject the *Britt* version of history as flawed and reach a different result in *Leandro*.<sup>348</sup>

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341. *Id.* at 205-06; see also Alexander, *supra* note 14, at 350-51 (detailing the Kentucky Supreme Court's methodology).

342. *Rose*, 790 S.W.2d at 205; see also Alexander, *supra* note 14, at 350-51 (discussing the Kentucky court's adoption of the "common school" philosophy).

343. 615 N.E.2d 516 (Mass. 1993).

344. *Id.* at 523, 548.

345. *Britt v. North Carolina State Bd. of Educ.*, 86 N.C. App. 282, 357 S.E.2d 432, *disc. rev. denied*, 320 N.C. 790, 361 S.E.2d 71 (1987). See *supra* notes 221-50 and accompanying text for the view taken in *Britt* and criticism of that analysis.

346. Courts in Kentucky and Massachusetts used their states' historical commitment to education as a basis for the conclusion that their school finance systems were unconstitutional. See *Rose*, 790 S.W.2d at 205-06, 212; *McDuffy*, 615 N.W.2d at 522-48.

347. See *supra* notes 235-50 and accompanying text.

348. There appears to be ample evidence to bolster a revision of *Britt*'s historical accounts. See *supra* notes 83-96 and accompanying text. John A. Nelson also argues that the third wave cases are so persuasive that any state court finding wide disparities but failing to find an adequacy standard must do so only by concluding that its state's historical commitment to education is weaker than that of other states, such as Kentucky and West Virginia. Nelson, *supra* note 286, at 46.

Another standard method of constitutional interpretation available to the court is an analysis of cases from other states with similar constitutional provisions.<sup>349</sup> In *Pauley v. Kelly*,<sup>350</sup> a case based on an adequacy argument, the West Virginia Supreme Court reviewed the treatment of similar constitutional language in other states and determined that history should serve as a guideline for the court in defining the meaning of "thorough and efficient."<sup>351</sup> The Kentucky Supreme Court also used this method of analysis and recommended it to other states faced with interpreting their education clauses.<sup>352</sup>

Predicting the *Leandro* court's conclusion on the basis of numerous decisions from other states is virtually impossible. Because of the substantial number of cases decided both for and against reform of school finance systems, both sides will find persuasive support from other jurisdictions. However, the plaintiffs would benefit by downplaying the losses in the first and second waves<sup>353</sup> and emphasizing the third wave cases,<sup>354</sup> especially the most recent, as clear trends in case law addressing state school financing.<sup>355</sup> For example, North Carolina's public school finance system has much in common with the system struck down in Kentucky.<sup>356</sup> Both systems suffer from extreme property wealth inequities between urban and rural areas<sup>357</sup> and poor student achievement overall.<sup>358</sup> Furthermore, the first major third wave cases occurred in states with

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349. See *supra* note 315 and accompanying text. The court should choose states with history and constitutional language that are similar to North Carolina's. See *infra* notes 356-59 and accompanying text.

350. 255 S.E.2d 859 (W. Va. 1979).

351. *Id.* at 874; see also Nelson, *supra* note 286, at 41-42 (discussing the *Pauley* decision).

352. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 210 n.19 (Ky. 1989).

353. See *supra* notes 26-52 and accompanying text.

354. See *supra* notes 53-81 and accompanying text.

355. Cf. Alexander, *supra* note 14, at 345-47 (describing how decisions such as *Rose* in Kentucky are eroding judicial deference to legislative control over education); see also *supra* notes 53-81 and accompanying text.

356. "[T]he Kentucky Supreme Court was deeply affected by the poor record of achievement of the state's public schools when compared to other states in the Union. Much the same story could be told about the state of public education in North Carolina." A RIGHT DENIED, *supra* note 19, at 52 (referring to *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 139 (Ky. 1989)).

357. See LOCAL FINANCE STUDY, *supra* note 95, at 6 (describing inequities in North Carolina); Alexander, *supra* note 14, at 348 (describing inequities in Kentucky).

358. See A RIGHT DENIED, *supra* note 19, at 52 (noting this similarity between the two states).

education clauses similar to North Carolina's.<sup>359</sup> Finally, two of the most recent successful third wave cases occurred in Tennessee<sup>360</sup> and Massachusetts,<sup>361</sup> states whose constitutions are viewed by some scholars as containing no quality standard.<sup>362</sup>

On the other hand, the State would benefit from relying on the unsuccessful challenges to state school finance systems of the second wave,<sup>363</sup> especially North Carolina's own negative precedent.<sup>364</sup> The State should point out that no court has based a decision solely on constitutional language mandating a "uniform" system of schools.<sup>365</sup> In addition, the State could counter the plaintiffs' recitation of the recent trend of plaintiff victories by detailing a recent state victory in Minnesota, *Skeen v. State*.<sup>366</sup> The Minnesota Constitution contains language almost identical to the North Carolina Constitution, calling for a system that is "general and uniform."<sup>367</sup> Although the Minnesota Supreme Court found that the education clause placed a duty on the legislature, it held that the current funding system was adequate, because it "provide[d] uniform funding to each student in the state in an amount sufficient to generate an adequate level of education which meets all state standards."<sup>368</sup> Thro notes that the state standards referred to by the court probably were "the

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359. Thro, *The Third Wave*, *supra* note 24, at 247-48 (noting that Montana, Kentucky, and Texas have Category II education clauses—the same category into which North Carolina's clause falls). Recently in Arizona—a Category I state, see Thro, *Role of Language*, *supra* note 3, at 23 n.24—the state supreme court overturned its school finance system on the basis of "general" and "uniform" language. See *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 815-16 (Ariz. 1994).

360. See *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993).

361. See *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993).

362. See *supra* notes 57-58, 80, 335-44 and accompanying text for a discussion of these cases. For a discussion of different scholars' analyses of state constitutional clauses, see notes 318-25 and accompanying text.

363. See *supra* notes 40-52 and accompanying text.

364. *Britt v. North Carolina State Bd. of Educ.*, 86 N.C. App. 282, 357 S.E.2d 432, *disc. rev. denied*, 320 N.C. 790, 361 S.E.2d 71 (1987). For a complete discussion of this case, see *supra* notes 221-50 and accompanying text.

365. See *McUsic, Education Clauses*, *supra* note 20, at 338.

366. 505 N.W.2d 299 (Minn. 1993).

367. See *id.* at 308; MINN. CONST. art. XIII, § 1; N.C. CONST. art. IX, § 2.

368. *Skeen*, 505 N.W.2d at 315. Although the Minnesota Supreme Court found that "[t]he structure and history of the Minnesota Constitution indicates that . . . there is a fundamental right to a 'general and uniform system of education,'" it separated out the issue of funding and concluded that the "fundamental right does not extend to the *funding* of the education system, beyond providing a basic funding level to assure that a general and uniform system is maintained." *Id.*

minimum standard[s] for accreditation set by the State Board of Education.<sup>369</sup> Because state boards of education revoke the accreditation of few, if any, school systems,<sup>370</sup> this amounts to an extremely low quality standard for the legislature to uphold.

Despite the persuasive authority of *Skeen*, the State must be careful in relying on it, because that may require conceding that the constitution does mandate a quality standard.<sup>371</sup> This concession places the State in danger of losing at the next stage,<sup>372</sup> since the North Carolina court could impose a higher standard than the Minnesota court did.<sup>373</sup> In addition, the North Carolina State Board of Education's own performance system has placed four of the plaintiff districts on warning status for their failure to meet state accountability standards.<sup>374</sup> Therefore, even under a Minnesota-type decision, although the plaintiffs would not obtain their goal of substantial system-wide reform, the state still could be forced to make some adjustments to the finance system to bring some of the state's districts into compliance with the BEP.

Reviewing constitutional structure is the third method of interpretation the *Leandro* court may employ.<sup>375</sup> The Massachusetts Supreme Judicial Court suggested that the purpose of the legislature's duty to provide education, as revealed through the structure of the state constitution, was "to meet the needs and interests of a republican government," not simply to benefit the children of the state.<sup>376</sup> The plaintiffs could use the Massachusetts court's theory of constitutional structure to construct a similar argument. The argument would assert that the education clause protects the entire state by requiring the legislature to ensure that the children of the state become

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369. Thro, *Judicial Analysis*, *supra* note 3, at 613.

370. *Id.*

371. The plaintiffs in *Skeen* conceded adequacy but argued that some districts of low wealth suffered harm from having fewer resources than the wealthier districts. *See Skeen*, 505 N.W.2d at 303, 315.

372. *See infra* notes 395-402 and accompanying text (describing Thro's methodology for determining the meaning of the quality standard articulated by the education clause).

373. *Cf. Thro, Judicial Analysis, supra* note 3, at 612-14 (contrasting the standards selected by different courts that have considered this issue).

374. LOCAL FINANCE STUDY, *supra* note 95, at 4.

375. *See supra* note 316 and accompanying text.

376. *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516, 548 (Mass. 1993). The Arizona Supreme Court also recognized this point, stating that "[t]he education provisions of the constitution acknowledge that an enlightened citizenry is critical to the existence of free institutions, limited government, economic and personal liberty, and individual responsibility." *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 816 (Ariz. 1994).



productive citizens. Similarly, the Tennessee Supreme Court used a constitutional structure argument to dismiss the lack of language specifically mandating a quality standard.<sup>377</sup> The court asserted that the failure of the Tennessee constitution to include modifiers for the word "education" was of little importance.<sup>378</sup> The court stated: "[T]he word 'education' has a definite meaning and needs no modifiers in order to describe the precise duty imposed upon the legislature. . . . Indeed, modifiers would detract from the eloquence and certainty of the constitutional mandate . . . ."<sup>379</sup>

Several urban districts that have intervened in *Leandro* have raised another structural argument.<sup>380</sup> These urban districts argue that the state has a duty under the constitution and state statutes to provide an adequate education to the children of the state.<sup>381</sup> North Carolina has delegated some of this authority to the local school boards.<sup>382</sup> The intervening urban school boards allege that they are unable to fulfill their duties as school boards under state law because the state has failed to provide sufficient funding, in violation of its constitutional and statutory obligations.<sup>383</sup> The intervening districts' claim could be read as a declaration that the state's ultimate responsibility for education under the constitution cannot be delegated—that is, that only the specific duties implementing the responsibility are delegable, but not the responsibility per se—and therefore, any delegation of authority to local school boards fails to relieve the state of its responsibility to provide a general and uniform system of public schools.<sup>384</sup> Because the five plaintiff counties also

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377. Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 150-51 (Tenn. 1993).

378. *Id.* at 150.

379. *Id.*

380. The intervening school boards are Asheville City, Buncombe County, Charlotte-Mecklenburg, Durham, Wake County, and Winston-Salem/Forsyth County. Intervening Complaint, *Leandro v. State*, No. 94 CVS 520 (N.C. filed May 25, 1994).

381. *Id.* at 2, 6.

382. N.C. GEN. STAT. § 115C-47(1) (1994) ("It shall be the duty of local boards of education to provide adequate school systems within their respective local school administrative units, as provided by law.")

383. Intervening Complaint at 6, *Leandro* (No. 94 CVS 520).

384. *See id.* at 6. The North Carolina Civil Liberties Union has alleged that "the State does not satisfy its duty to fund a basic education simply by delegating financial responsibility to the localities." A RIGHT DENIED, *supra* note 19, at 43. The plaintiffs in *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994), argued this point under similar constitutional language. *See Roosevelt*, 877 P.2d at 813. The Arizona Supreme Court accepted this argument and held that because the legislature chose a finance system which created disparities, the legislature failed to fulfill its duty under the state constitution. *Id.* at 813, 815.

include local school boards that are fiscally responsible under the North Carolina statutes,<sup>385</sup> an identical argument could be made on their behalf.<sup>386</sup>

In turn, the State should argue that the North Carolina Constitution, unlike the Tennessee Constitution,<sup>387</sup> *does* include modifiers such as "general and uniform"<sup>388</sup> and that these modifiers alone have never been held to require a specific quality standard.<sup>389</sup> Therefore, the State could assert that, because the two state constitutions have dissimilar language, the North Carolina court should not follow the Tennessee case<sup>390</sup> and should not find a quality standard in the North Carolina Constitution. In response to the structural argument suggested by the intervening districts, the State could counter that the legislature's duty toward education is defined by the constitution, and that statutory and constitutional obligations should be considered separately.<sup>391</sup> Thus, the State could argue that if the state constitution mandates no duty or quality standard for the legislature, there can be no constitutional

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385. See N.C. GEN. STAT. §115C-47(1) (1994).

386. For an example of how such an argument could be constructed in North Carolina, see *A RIGHT DENIED*, *supra* note 19, at 43-44. The North Carolina Civil Liberties Union finds support for this structural argument in a 1907 case, *Collie v. Commissioners of Franklin County*, 145 N.C. 170, 59 S.E. 44 (1907). In *Collie*, the North Carolina Supreme Court found that a constitutional limitation on taxation did not prohibit the legislature from levying additional taxes to support public schools. *Id.* at 173, 59 S.E. at 46. The *Collie* court acknowledged that the constitution must be "construe[d] . . . as a whole, for it was adopted as a whole," *id.*, and stated, "It is hardly probable [the people] intended by a previous enactment in the same instrument to render it impossible to carry out [the educational] purposes expressed in such earnest and unmistakable language," *id.* at 175, 59 S.E. at 46. The North Carolina Civil Liberties Union argues that this case means that "the obligation to finance an adequate education supersedes even constitutional limitations on the taxing power," and concludes that "if an expenditure is necessary to a basic education, it must be paid for." *A RIGHT DENIED*, *supra* note 19, at 43. Thus, "the State does not satisfy its duty to fund a basic education simply by delegating financial responsibility to the localities." *Id.*

387. See TENN. CONST. art. XI, § 12.

388. See N.C. CONST. art. IX, § 2(1).

389. McUsic, *Education Clauses*, *supra* note 20, at 338; see also *supra* note 326-27.

390. *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993). The Tennessee Supreme Court held that "the word 'education' . . . needs no modifiers in order to describe the precise duty imposed on the legislature." *Id.* at 150.

391. Since the State has strong arguments that the North Carolina Constitution defines no quality standard, separating the two issues seems practical. Also, claims of statutory violations have not been used successfully to bring about radical reform in a school finance system. See *infra* notes 436-37 and accompanying text.

violation,<sup>392</sup> and statutory obligations cannot increase this constitutional duty.

The final chapter of the analysis for a quality standard under a state constitution depends on whether or not the foregoing analysis—of the text, the history, and the original intent of the education clause—is conclusive on the issue of whether a standard of educational quality is required.<sup>393</sup> If the *Leandro* court fails to find the analysis up to this point conclusive, it must determine the plain meaning of the text of the constitution.<sup>394</sup>

### 3. Describing the Quality Standard

If the *Leandro* court finds that the North Carolina Constitution mandates a quality standard, additional steps in Thro's analysis are required. The third step in this methodology requires the court to define the quality standard.<sup>395</sup> This decision becomes outcome-determinative because while a high, demanding standard will almost always result in finding that a system is in violation of its constitutional mandate, a lower, more lenient standard will generally result in the current system being upheld.<sup>396</sup> Courts often have failed to detail their reasons for choosing one standard over numerous others.<sup>397</sup> The range of decisions is vast. The Kentucky<sup>398</sup> and Massachusetts<sup>399</sup> decisions represent the most sweeping pronouncement of constitutional requirements of adequacy,<sup>400</sup> the Minnesota Court chose a minimal standard,<sup>401</sup> and several decisions lie in between these two extremes.<sup>402</sup>

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392. Thro, *Judicial Analysis*, *supra* note 3, at 610.

393. See Thro, *Role of Language*, *supra* note 3, at 31.

394. See *id.*

395. Thro, *Judicial Analysis*, *supra* note 3, at 612. Thro refers to this step as the least predictable in the analysis since it involves a value judgment for the members of the court. *Id.*

396. *Id.*

397. *Id.*

398. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

399. *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993).

400. Thro, *Judicial Analysis*, *supra* note 3, at 612. Both Kentucky and Massachusetts chose high, demanding quality standards and gave detailed guidelines for a constitutionally adequate school system. See *Rose*, 790 S.W.2d at 211-12; *McDuffy*, 615 N.E.2d at 554. In addition, the Kentucky decision invalidated the state's entire public school system. See *Rose*, 790 S.W.2d at 215; see also *infra* note 424 and accompanying text.

401. Thro, *Judicial Analysis*, *supra* note 3, at 613 (interpreting *Skeen v. State*, 505 N.W.2d 299, 308 (Minn. 1993)).

402. Thro, *Judicial Analysis*, *supra* note 3, at 613. See, e.g., *Helena Elem. Sch. Dist. No. 1 v. State*, 769 P.2d 684, 691 (Mont. 1989) (declaring Montana's state accreditation

In *Leandro*, the plaintiffs claim a fundamental right to an adequate education under the constitution and leave the court to struggle with defining adequacy.<sup>403</sup> Clearly, North Carolina courts will wrestle with this issue with little guidance.<sup>404</sup> Because the state's constitution contains language similar to the Minnesota Constitution,<sup>405</sup> it is possible that a court could choose a standard similar to the minimal one chosen in *Skeen v. State*.<sup>406</sup> There, the Minnesota Supreme Court apparently concluded that an education was "adequate" if it met standards set by the State Board of Education.<sup>407</sup> In North Carolina, a parallel standard would be the BEP's promise of a "basic" education.<sup>408</sup> The choice of this standard would not guarantee a complete victory for the State.<sup>409</sup> The BEP remains underfunded, and many North Carolina counties fail to

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standards the minimum standards only, and not the basis for defining educational quality); *Abbott v. Burke*, 575 A.2d 359, 365-66 (N.J. 1990) (requiring at least "a modicum of variety and a chance to excel").

403. Plaintiffs' Complaint at 24, *Leandro* (No. 94 CVS 520). Commentators and courts have struggled with this concept. See Nelson, *supra* note 286, at 41-46. John Nelson points out that the court's definition of a constitutional adequacy standard can be helpful to the state in other areas of educational policy. *Id.* at 12-15. For example, adequacy guidelines could assist a state in determining spending levels and proficiency standards. See *id.* at 14-15. There is no federal standard of adequacy, *id.* at 15, although *Rodriguez* does suggest that an implied adequacy standard may exist in the Federal Constitution, *id.* at 16 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973)). The *Rodriguez* court upheld Texas's school finance scheme, which was challenged under the federal Equal Protection Clause. *Rodriguez*, 411 U.S. at 55. However, some scholars have concluded that the Court "implied that an adequacy standard might be found," Nelson, *supra* note 286, at 14, because it stated:

Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, . . . no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

*Rodriguez*, 411 U.S. at 37.

404. Thro notes that a few courts have ignored the question altogether. One court dismissed the complaint and another decided for the plaintiffs on another ground. Thro, *Judicial Analysis*, *supra* note 3, at 613-14; see *Gould v. Orr*, 506 N.W.2d 349, 353 (Neb. 1993) (dismissing complaint for failure to state a claim); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993), 151-52 (holding that the Tennessee constitution mandated a quality standard, but declining to describe the parameters of the standard).

405. See *supra* note 367 and accompanying text.

406. 505 N.W.2d 299 (Minn. 1993).

407. *Id.* at 315; see also Thro, *Judicial Analysis*, *supra* note 3, at 613 (discussing *Skeen*); *supra* notes 365-69 and accompanying text.

408. See N.C. GEN. STAT. § 115C-81(a1) (1994); see also *supra* notes 99-100 and accompanying text.

409. See *supra* notes 366-74 and accompanying text.

offer the full program prescribed by the statute.<sup>410</sup> Therefore, even adoption of a minimum standard based on state requirements may create trouble for the State, because not all the districts are complying with the state's own standards for a basic education.<sup>411</sup> In addition, there is also a chance that the North Carolina court would follow the Kentucky Supreme Court's lead,<sup>412</sup> because of North Carolina's similar history of poor student achievement,<sup>413</sup> and choose a high standard with guidelines for the legislature.<sup>414</sup>

#### 4. Applying the Chosen Quality Standard to the System

The fourth step in the analysis is an assessment of the performance of the state legislature in upholding its duties under the court's definition of the quality standard.<sup>415</sup> Thus, the chosen standard greatly affects, and may conclusively determine, the outcome in this stage.<sup>416</sup> The plaintiffs should present expert testimony and statistical studies addressing the correlation between expenditures and quality of education, disparities in property wealth and tax base, disparities in per-pupil expenditures, and actual harm to the children.<sup>417</sup> Although the plaintiffs in *Leandro* will have many studies, reports, and position papers to present to the court to demonstrate the inequalities and inadequacies of the North Carolina school system,<sup>418</sup> the evidence presented may be insufficient to justify overturning the system, unless they convince the court to adopt a demanding quality standard.<sup>419</sup>

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410. See *supra* notes 101-02, 137, 141 and accompanying text; A RIGHT DENIED, *supra* note 19, at 35-36.

411. LOCAL FINANCE STUDY, *supra* note 95, at 4; see also *supra* notes 137, 141 and accompanying text.

412. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

413. See *id.* at 197; see also *supra* notes 356-58 and accompanying text.

414. See *Rose*, 790 S.W.2d at 212; see also *supra* notes 299, 400 and accompanying text.

415. See Thro, *Judicial Analysis*, *supra* note 3, at 614.

416. *Id.* Thro goes so far as to say that the resolution of these issues is "academic. If the standard is high, the system fails. Conversely, if the standard is low, the system passes muster." *Id.*

417. See Dayton, *supra* note 35, at 636-37; cf. *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.W.2d 516, 553-54 (Mass. 1993) (reviewing evidence of poor school facilities and poor student achievement); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 196-97 (Ky. 1989) (reviewing evidence of student achievement and comparing the opportunities of students in poor versus affluent districts).

418. See ADM ALLOTMENTS, *supra* note 106; ALL THAT'S WITHIN THEM, *supra* note 106; EASTERN NORTH CAROLINA, *supra* note 106, at 1-3; GRADING ON THE CURVE, *supra* note 106, at 1-4; LOCAL FINANCE STUDY, *supra* note 95; A RIGHT DENIED, *supra* note 19, at 10-35.

419. See *supra* notes 396, 398-402 and accompanying text.

### 5. Determining the Role Played by Funding in School System Deficiencies

If the court finds a constitutional violation, it should proceed to the next stage of the analysis in Thro's methodology and determine the relationship between money and the violation.<sup>420</sup> This relationship can be quite complex, and courts that explore it in depth may find that factors other than funding bear—or at least share—responsibility for the violation.<sup>421</sup> Thro suggests that the only court yet to address this issue has been the Kentucky Supreme Court.<sup>422</sup> According to Thro, while other courts have simply assumed that the problem was money<sup>423</sup> and have ignored numerous other possibilities, the Kentucky court faced the problem squarely and declared the entire system of schools unconstitutional.<sup>424</sup> As Thro points out, courts that focus solely on money may fail to reach the root of the problems, and therefore ultimately fail to improve the system.<sup>425</sup>

It is impossible to predict a North Carolina court's determination of the role of money in any constitutional violation that may be identified.<sup>426</sup> Furthermore, if the court follows Thro's methodology, it will consider a number of factors in addition to money. The outlook of the Kentucky court demonstrates the realistic view that there is likely more than one cause of a system with low overall achievement and significant disparities in quality of education.<sup>427</sup>

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420. Thro, *Judicial Analysis*, *supra* note 3, at 615.

421. *Id.* at 616. Relevant "other factors" could include "mismanagement, excessive administration, lack of competent teachers, misplaced spending priorities, outright corruption, nepotism, an improper emphasis on some programs, the need to bus to achieve racial desegregation and the necessity of complying with other federal mandates." *Id.* at 615.

422. Thro, *Judicial Analysis*, *supra* note 3, at 616 (citing *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989)).

423. *Id.* (citing *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516, 556 (Mass. 1993)).

424. *Id.* at 616-17. The Kentucky court stated, "Lest there be any doubt, the result of our decision is that Kentucky's *entire system* of common schools is unconstitutional. . . . This decision applies to the statutes creating, implementing and financing the *system* and to all regulations, etc., pertaining thereto." *Rose*, 790 S.W.2d at 215.

425. Thro, *Judicial Analysis*, *supra* note 3, at 616. Thro suggests that these courts abdicate their judicial responsibility and take an unrealistic view of modern education by focusing solely on funding remedies. *Id.* at 616.

426. The court in *Leandro* may want to address this issue, however, given that other courts have been criticized for ignoring it. *Id.* at 616.

427. *See id.* at 616 & n.112.

### B. Claims of Statutory Violations

The plaintiffs in *Leandro* claim relief under four sections of the North Carolina General Statutes.<sup>428</sup> Section 115C-1 codifies the constitutional commitment to a "general and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students."<sup>429</sup> Section 115C-81 mandates that the state system provide "equal access" to the BEP,<sup>430</sup> and section 115C-408 states that it is the policy of the state to provide for "current operations . . . as defined in the standard course of study."<sup>431</sup> Finally, section 115C-122(3) requires the state to "prevent denial of equal educational and service opportunity on the basis of national origin, sex, economic status, race, religion, [or] . . . handicap."<sup>432</sup>

The plaintiffs in *Leandro* have reason to feel confident that their claims of several statutory violations will succeed. For instance, the court may easily find that the lack of funding for the BEP violates sections 115C-81 and 115C-408.<sup>433</sup> Furthermore, in addition to using the statutory claims for their own reform potential,<sup>434</sup> the plaintiffs are using the statutes to support their claim that the state education clause does indeed confer a standard of quality, and that the state legislature has recognized this fact and its obligation by enacting these statutes.<sup>435</sup> Although no decision to date has relied solely upon a state statute to reform a school finance system, a statutory violation combined with a constitutional violation may be quite convincing to a court. For example, the New Jersey Supreme Court held in *Abbott v. Burke*<sup>436</sup> that the state's system of public education financing

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428. Plaintiffs' Complaint at 27-28, *Leandro* (No. 94 CVS 520) (alleging violations of N.C. GEN. STAT. §§ 115C-1, -81, -408, -112(3) (1994)).

429. N.C. GEN. STAT. § 115C-1 (1994).

430. *Id.* § 115C-81(a1) (1994).

431. *Id.* § 115C-408(b) (1994).

432. *Id.* § 115C-122(3) (1994). The plaintiffs' complaint highlights the portion of this statute that refers to "economic status." Plaintiffs' Complaint at 28, *Leandro* (No. 94 CVS 520).

433. N.C. GEN. STAT. § 115C-81 mandates "equal access" to the BEP. Section 115C-408 provides for funding for the BEP; see *supra* notes 99-102 and accompanying text. The plaintiffs' complaint asserts that 36.1% of the BEP remains unfunded and that if funding continues at the rate set in the 1994 budget, full funding will not be complete for 30 years. Plaintiffs' Complaint at 10, *Leandro* (No. 94 CVS 520).

434. See Plaintiffs' Complaint at 27-28, *Leandro* (No. 94 CVS 520).

435. See *id.*

436. 575 A.2d 359 (N.J. 1990).

violated the state constitution *and* the New Jersey Code, which called for “[a] breadth of program offerings.”<sup>437</sup>

### C. Intervening Complaint

The *Leandro* plaintiffs are not alone in their dissatisfaction with the state's funding system. Six urban districts filed an intervening complaint in the litigation that echoes the claims of the plaintiffs.<sup>438</sup> These six urban districts all display some of the characteristics attributed to the wealthy districts of the state.<sup>439</sup> However, they face funding problems similar to those of the poorer counties because the state has failed to fund the entire cost of education.<sup>440</sup> In addition, the urban districts face their own distinct problems.<sup>441</sup> The urban districts' claims for relief mirror those of the low-wealth districts, and they raise similar issues.<sup>442</sup> This is evidenced by the intervenors' support of the plaintiffs' call for increased state funding.<sup>443</sup> However, the intervening districts will rely on slightly

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437. *Id.* at 398 (quoting N.J. STAT. ANN. § 18A:7A-5d (West 1989)).

438. See Intervening Complaint, *Leandro* (No. 94 CVS 520).

439. See LOCAL FINANCE STUDY, *supra* note 95, at 18-19. Four of the intervening districts—Charlotte-Mecklenburg, Durham, Wake, and Winston-Salem/Forsyth—ranked among the top six counties in the state in 1994 in their ability to pay. The other two intervening districts, Buncombe County and Asheville, are both in Buncombe County, which ranked 24th. *Id.* The “ability to pay” measure was calculated as follows:

It is a combined measure of revenue that would have been generated at the state average tax rate based on 1993/94 property valuations per student adjusted to reflect current market prices and to account for differences in income levels and the value of non-property tax revenues, such as the county's share of local option sales taxes, and fines and forfeitures. Each county's mandated welfare payments were also subtracted from the total adjusted revenues.

*Id.* at 19.

440. See A RIGHT DENIED, *supra* note 19, at 36 (“The state share is thus far less than what North Carolina itself has calculated to be the cost of a minimally adequate education.”). The urban counties also allege difficulties funding capital projects, municipal overburden, and high concentrations of students living in poverty. Intervening Complaint at 12, 14-15, 17, *Leandro* (No. 94 CVS 520).

441. See *supra* note 169. Some urban districts face growing inner-city problems such as high security costs, the higher cost of educating disadvantaged students, and costs of desegregation efforts. See Intervening Complaint at 11-17, *Leandro* (No. 94 CVS 520). Some face problems associated with a rapidly growing urban population such as higher costs of living, leading to a demand for increases in teacher salaries; a disproportionate number of handicapped, special education, and academically gifted students; as well as the costs of extra space and supplies needed to accommodate the increased school population. See *id.*

442. See Intervening Complaint at 19-25, *Leandro* (No. 94 CVS 520); Plaintiffs' Complaint at 24-28, *Leandro* (No. 94 CVS 520).

443. Intervening Complaint at 3, *Leandro* (No. 94 CVS 520). The intervenors most likely are motivated as well by their own desire to protect themselves from remedies that



different authority than will the plaintiffs, including one of the most significant cases in the development of school finance litigation. In 1990, the New Jersey Supreme Court handed down *Abbott v. Burke*,<sup>444</sup> which may have been the first case to target the distribution of resources to inner-city districts.<sup>445</sup> The court held the system unconstitutional for failing to address the needs and increased costs of districts educating disadvantaged urban students.<sup>446</sup>

In *Leandro*, the intervening school districts hope for at least some elements of an *Abbott* verdict, although the two situations are very different.<sup>447</sup> North Carolina's urban districts are experiencing some inner-city problems,<sup>448</sup> but these districts overall are still among the wealthiest in the state.<sup>449</sup> The intervening districts must be careful not to overstate their plight, or they could inadvertently invite the court to dismiss their claim quickly on the assumption that they are exaggerating.<sup>450</sup> The urban districts would benefit from focusing on the analysis used in *Abbott*, in which the court recognized the increased costs of meeting the needs of disadvantaged children,<sup>451</sup>

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would negatively affect their own resources. See *infra* notes 528-29 and accompanying text (discussing proposals to take funds from wealthy districts to increase funding for poorer areas).

444. 575 A.2d 359 (N.J. 1990).

445. Benson, *supra* note 21, at 413.

446. *Abbott*, 575 A.2d at 402-03, 408. The court declared, "If the educational fare of the seriously disadvantaged student is the same as the 'regular education' given to the advantaged student, those serious disadvantages will not be addressed, and students in the poorer, urban districts will simply not be able to compete." *Id.* at 402-03. One commentator has concluded that this statement means that, "in order to meet its objectives in the poor, urban school districts, those districts required a level of resources beyond the levels of educational provision in the richer, suburban districts." Benson, *supra* note 21, at 415.

447. North Carolina does not have the severe disparities of wealth between urban and suburban school districts that plagued New Jersey, see *Abbott*, 575 A.2d at 394-98; instead, North Carolina grapples with disparities between rural and urban districts, see NORTH CAROLINA RURAL ECONOMIC DEVELOPMENT CENTER, NORTH CAROLINA RURAL PROFILE: ECONOMIC AND SOCIAL TRENDS AFFECTING RURAL NORTH CAROLINA 3-5 (1992).

448. See *supra* notes 169, 440-41 and accompanying text (discussing problems of the urban districts).

449. LOCAL FINANCE STUDY, *supra* note 95, at 7, 18; see also *supra* note 439 and accompanying text.

450. The characterization of some of these districts as "high wealth," LOCAL FINANCE STUDY, *supra* note 95, at 7, and their high rankings on the ability to pay measure, *id.* at 18; see also *supra* note 439, could lead a court to question the legitimacy of the districts' claims. However, the districts could point out that even North Carolina's "wealthy" schools are only average or below average in wealth when compared with schools throughout the nation. *Id.* at 7; see also *supra* note 115 and accompanying text.

451. *Abbott v. Burke*, 575 A.2d 359, 402-03 (N.J. 1990).

rather than attempting to address the factual similarities between the urban inner-city problems of northeastern cities and the cities of North Carolina.

#### IV. POLICY IMPLICATIONS OF *LEANDRO*

The plaintiffs in *Leandro*, like most third wave plaintiffs,<sup>452</sup> request a declaratory judgment that the state's system of financing violates the state constitution and state statutes.<sup>453</sup> Because they claim that the public education system, "including its system of funding," violates the constitution,<sup>454</sup> the plaintiffs appear to be seeking a broad Kentucky-type verdict striking down the entire system.<sup>455</sup>

The verdict the court renders can hold numerous policy implications for the reform process,<sup>456</sup> so the court must choose its strategy and wording carefully.<sup>457</sup> Vaguely phrased mandates can leave legislators confused about precisely how to comply<sup>458</sup> and can render the search for a proper remedy problematic.<sup>459</sup> On the other hand, aggressive court oversight of the legislature may invite criticism if the court's action is perceived to be beyond the scope of its proper role.<sup>460</sup>

One scholar, George D. Brown, has noted that cases such as *McDuffy v. Secretary of Executive Office of Education*<sup>461</sup> contain a "dissonance between rights and remedies."<sup>462</sup> While the courts'

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452. Cf. George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 564 (stating that "it is noteworthy that several courts have emphasized that the case before them involved a request for declaratory judgment").

453. Plaintiffs' Complaint at 28-29, *Leandro* (No. 94 CVS 520).

454. *Id.* at 28.

455. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215 (Ky. 1989); see also *supra* note 424 and accompanying text.

456. See Brown, *supra* note 452, at 545-46; Nelson, *supra* note 286, at 47.

457. See Levine, *supra* note 6, at 510-13; Nelson, *supra* note 286, at 47.

458. The hazards of an unclear mandate were demonstrated in Texas in the years following the Texas Supreme Court's decision in *Edgewood v. Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). See Levine, *supra* note 6, at 510-13; see also Nelson, *supra* note 286, at 50 (noting that "[t]he frustration has caused one member of the Texas Senate to remark that he wanted to surrender to the Court but he did not know where to turn himself in" (internal quotation marks and citation omitted)).

459. Brown, *supra* note 452, at 544, 548-50.

460. See Alexander, *supra* note 14, at 345-47 (acknowledging this criticism but concluding that an "expanded judicial role in the oversight of legislative enactments" is necessary in school finance cases).

461. 615 N.E.2d 516 (Mass. 1993).

462. Brown, *supra* note 452, at 544.

decisions on the merits of these cases may be bold and sweeping,<sup>463</sup> the boldness appears to evaporate when the court must decide on a remedy: Courts tend to defer to the legislature to fashion the specifics of the remedy.<sup>464</sup> As a result, "[t]he plaintiffs have come away from the case with a nice sounding declaration, but the state judicial system has essentially remitted them to the legislature which created them in the first place."<sup>465</sup>

A few theories have been applied by scholars attempting to explain state courts' restrained approaches to remedies in school finance litigation.<sup>466</sup> The disparity theory, which seeks to explain differences between federal and state courts,<sup>467</sup> supports the view that state court judges tend to defer to legislatures in these cases because, as elected officials, the judges are not in a good position to protect individual rights, if to do so would run counter to majoritarian preferences.<sup>468</sup> However, Brown argues in favor of a more expansive view of the theory—one that recognizes the reality that state courts and legislatures exist as partners in state government, with substantial amounts of interaction.<sup>469</sup> State courts may be reluctant to order their partners to take specific actions.<sup>470</sup>

Brown views the state courts' decisions in the third wave cases as generally positive and believes that state courts are developing a judicial model of their own<sup>471</sup> as they struggle to deal with their new

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463. *Id.* at 543-44. Brown states, "[*McDuffy*] is a highly interesting example of state judicial methodology, particularly in its bold derivation of individual rights and legislative duties from the education clause of the Massachusetts Constitution. The opinion leaves no doubt that the current legislation will be overturned." *Id.*

464. *Id.* at 544.

465. *Id.*

466. *See id.* at 545-46.

467. *See id.* at 544. The disparity theory suggests that state courts cannot protect individual rights and liberties as vigorously as federal courts, because of inherent structural differences between the state and federal court systems. *Id.* at 544. A particularly important difference between the two systems, according to disparity theorists, is the relative insulation of federal courts from majoritarian pressures as compared to state courts. *Id.* at 552. While federal judges are appointed to life terms, state judges are usually elected. *Id.* Disparity theorists also contend that state and federal judges differ in terms of their technical competence and their attitudinal proclivities. *Id.* at 551-52.

468. *See id.* at 552-53.

469. *Id.* at 554. In Brown's view, "state supreme courts are, indeed, fearful of the political consequences of ordering explicit remedies, but the consequences are those that flow from a direct confrontation with the legislature"—*not* from the wrath of the electorate. *Id.*

470. *Id.*

471. *Id.* at 563-67.

role as protectors of individual rights.<sup>472</sup> Because state courts often seem to recognize that their decisions in school finance cases are near the edge of the judiciary's realm of power,<sup>473</sup> they are developing a dialogic model in this area rather than adopting the managerial model that is typical of federal court decisions.<sup>474</sup> In this model, the cases create dialogue between the legislature and the courts—partners in state government—in finding solutions to complex problems such as school finance litigation.<sup>475</sup> Although the court declares the legislative duty, its opinion merely serves as advice to the legislature on the method of fulfilling the duty.<sup>476</sup> Because these opinions are often advisory in nature, and the court may analyze only the general problems that extend across the state, Brown refers to them as “binding advisory opinions.”<sup>477</sup> These “binding advisory opinions,” in the form of declaratory judgments, take the first step in the remedial process by informing the parties of their respective rights and duties.<sup>478</sup> While the courts defer to the legislature for the specifics of the remedy, they hold the advantage of initiating the reform process and maintaining control over the subsequent implementation.<sup>479</sup>

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472. *Id.* Because federal judicial relief has been unavailing in the school finance reform area since the holding in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44, *reh'g denied*, 411 U.S. 959 (1973) (holding that equal protection challenges to school finance schemes would be scrutinized under the rational relation test); see also *supra* notes 33-38 and accompanying text (explaining *Rodriguez*), Brown argues that the state courts must now provide protection in this area. See Brown, *supra* note 452, at 560-61.

473. Brown, *supra* note 452, at 563. Brown notes that the courts often refer to the political question doctrine, indicating their consciousness of how close they are to the legislative line. *Id.*

474. *Id.*, at 564-66. This model appears to serve as a solution to the political question problem. See *supra* note 232 and accompanying text for more discussion of the political question doctrine.

475. *Id.* at 566. Brown concludes that this approach to complex reform litigation demonstrates “remedial wisdom”: “Real change acceptable to the citizenry at large can only come from the legislature.” *Id.* at 566 (citing Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 79-82 (1979)).

476. *Id.* at 546; see, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) (giving guidelines but not directing the legislature to “enact any specific legislation”).

477. *Id.* at 564. This terminology is merely descriptive; Brown points out the differences between true advisory opinions and these opinions. Most importantly, the state courts’ treatment of these cases follows normal litigation procedure and requirements. *Id.* at 564-65.

478. *Id.* at 564.

479. *Id.* at 564-66. Note that in many third wave cases, the court retains jurisdiction over the case while the legislature formulates remedial action. Thro, *The Third Wave*,

Because the dialogic model offers these advantages and circumvents the political question doctrine,<sup>480</sup> the North Carolina court in *Leandro* is likely to follow the advisory approach used by many third wave courts. However, the court should be careful to give clear direction to the legislature, while allowing it some flexibility of remedies.<sup>481</sup> The Kentucky decision<sup>482</sup> is viewed as the most successful court-developed standard of adequacy,<sup>483</sup> detailing seven areas in which all students should achieve competency.<sup>484</sup> Central to the success of the Kentucky case, Alexander argues, was the fact that the decision to strike the entire system kept the court from intruding into the legislature's prerogative.<sup>485</sup> The court was then able to give its "advice" in the form of general guidelines to help the legislature develop a constitutional remedy.<sup>486</sup>

On the opposite end of the spectrum, the Texas Supreme Court's decision in *Edgewood Independent School District v. Kirby* (*Edgewood I*),<sup>487</sup> which invalidated the school finance system, did not clearly articulate any standards; this led to confusion, frustration, and further litigation.<sup>488</sup> The Texas legislature's subsequent reform efforts revealed this confusion, as it failed to distinguish between adequacy and equality,<sup>489</sup> and thereby allowed the wealthiest districts to be excluded from the equalization plan.<sup>490</sup> The plan

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*supra* note 24, at 234-35 & n.78, 236 & n.93.

480. The political question issue was present in *Britt v. State Bd. of Educ.*, 86 N.C. App. 282, 290, 357 S.E.2d 432, 437, *disc. rev. denied*, 320 N.C. 790, 361 S.E.2d 71 (1987); *see also supra* note 232 and accompanying text (discussing *Britt*).

481. *See Levine, supra* note 6, at 510-13 (describing the Texas legislature's confusion in meeting the court's mandate); *see also supra* notes 458-59 and accompanying text.

482. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989).

483. *Nelson, supra* note 286, at 47; *see also Alexander, supra* note 14, at 362 (noting that the Kentucky court's guidelines "resolved the question" of what constitutes an adequate education for purposes of the Kentucky constitution).

484. *Rose*, 790 S.W.2d at 212. The seven areas are listed *supra* in note 299.

485. *Alexander, supra* note 14, at 363-65. *Alexander* argues that striking selected statutes would have required statutory revision, rather than allowing the legislature the discretion to analyze the problem and tailor the remedy. *Id.* at 364. With this approach, the legislature was free, in some respects, to study the issue and reform its school finance plan by rewriting the statutes from a clean slate; thus, the legislature could attack the problems that it determined to be the most appropriate. *See id.*

486. *Id.* at 364.

487. 777 S.W.2d 391 (Tex. 1989).

488. *Nelson, supra* note 286, at 47, 49-51.

489. *Id.* at 47.

490. *Levine, supra* note 6, at 510-11. The *Edgewood I* court required the legislature to ensure that poor children would have "substantially" equal access to school funds. This allowed some latitude for the legislature, which proceeded to omit some of the wealthiest districts in computing the cost of equalizing the districts of the state. *Id.* at 510-11 (citing

promised equal revenue for equal tax effort,<sup>491</sup> but "only up to the point necessary to maintain equality in the system as a whole," and it still authorized local districts to supplement their schools with local funding.<sup>492</sup> It appeared, therefore, that the legislature had misunderstood the holding in *Edgewood I*.<sup>493</sup> The proposed reform plan was immediately challenged in court.<sup>494</sup> In *Edgewood II*,<sup>495</sup> the Texas court clarified its holding, but in doing so it removed most of the legislature's discretion: The new holding required the state to guarantee equal revenue for equal tax effort.<sup>496</sup> As a result, equality rather than quality has become the goal of many Texas legislators' reform packages.<sup>497</sup> Thus, while Kentucky's verdict in *Rose v. Council for Better Education, Inc.*<sup>498</sup> aided the legislature in reform, the Texas court in *Edgewood I*<sup>499</sup> only generated more problems.<sup>500</sup>

If the North Carolina court determines that the plaintiffs in *Leandro* should prevail, it should heed the lesson from third wave cases such as those in Kentucky and Texas. The guidelines for reform in those cases fall into three general categories, each of which has positive and negative policy implications.<sup>501</sup>

The first category, total revenue equality, requires that all school district budgets be equal, and directs the state to guarantee this result

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*Edgewood I*, 777 S.W.2d at 397).

491. *Id.* at 511; see also *infra* notes 523-30 and accompanying text (explaining access equality).

492. Levine, *supra* note 6, at 511.

493. See *id.* at 511-12.

494. *Id.*, at 511.

495. *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991) (*Edgewood II*).

496. *Id.* at 496-97; see also Levine, *supra* note 6, at 512-13 (contrasting the holdings in *Edgewood I* and *Edgewood II*).

497. See Levine, *supra* note 6, at 529. Levine notes that it is ironic that "in many of these proposals, the drive for equality, emphasized by the *Edgewood* opinions, often outstrips the need for improved educational quality, an underlying motivation for the entire litigation." *Id.*

498. 790 S.W.2d 186 (Ky. 1989).

499. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

500. See Levine, *supra* note 6, at 510-13. In February 1991, the Texas court clarified its holding in *Edgewood II* in a response to a motion for rehearing. *Edgewood Indep. Sch. Dist. v. Kirby*, No. D-0378, 1991 Tex. LEXIS 21 (Tex. Sup. Ct. Feb. 25, 1991). The court stated, "[o]nce the Legislature provides an efficient system . . . it may, so long as efficiency is maintained, authorize local school districts to supplement their educational resources if local property owners approve an additional local property tax." *Id.* at \*6. Thus, a certain amount of unequalized local revenue apparently is permitted under the Texas constitution. Levine, *supra* note 6, at 542.

501. Levine, *supra* note 6, at 508-09, 520-528.

regardless of differences in property wealth.<sup>502</sup> This scheme prevents future inequalities, as legislatures would no longer be allowed to let the state share of funding decline, forcing local districts to make up the difference.<sup>503</sup> However, the plan acts as a spending cap on rich districts.<sup>504</sup> Critics of this type of plan argue that spending caps eliminate local control and create the danger that the state education budget will become stagnant, as the continuous pressure from poor districts to raise funding diminishes instead of being led forward by higher spending districts.<sup>505</sup> Proponents of the theory believe the opposite: Rich districts will increase pressure on the state to spend more, and because the spending would be equal, poor districts would benefit from the political power of the rich.<sup>506</sup>

A North Carolina court considering this type of proposal would have to take into account the state constitutional language.<sup>507</sup> Any proposal that requires spending caps may prove to be unconstitutional because localities in North Carolina have a constitutional right to supplement their school funding with local funds.<sup>508</sup> In addition, there appears to be little support for capping spending in wealthy districts; as policy studies reveal, this stifles the initiative of wealthy communities that would otherwise lead the state's definition of adequacy forward.<sup>509</sup>

The second and most popular reform of the third wave courts is minimum revenue equality.<sup>510</sup> This concept calls for equal funding at a level sufficient to provide an adequate education for every student.<sup>511</sup> One drawback of this plan is that legislatures are left

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502. *Id.* at 520-21. There are many ways to achieve this equality, including a state tax or local tax that is redistributed, or a uniform local tax that the state uses to equalize the amount of revenue between poor and wealthy districts. *Id.* at 520. Total revenue equality has been required in only one case. *Abbott v. Burke*, 575 A.2d 359, 408 (N.J. 1990).

503. *Levine*, *supra* note 6, at 521.

504. *Id.* at 521-22.

505. *See id.* With the rich districts unable to raise additional local funding, the level of education will become equal, but there will be no districts investing in new methods and technology, setting higher goals of quality education for the poor districts to attain through political pressure. *See id.*

506. *Id.* at 522.

507. *See id.* at 537 (noting that many of the proposals in Texas may require a constitutional amendment).

508. Local units "may use local revenues to add to or supplement any public school or post-secondary program." N.C. CONST. art. IX, § 2(2). *See also supra* notes 231, 280 and accompanying text.

509. *See ALL THAT'S WITHIN THEM*, *supra* note 106, at 3.

510. *See Levine*, *supra* note 6, at 509, 523-26.

511. *Id.* at 524.

with the difficult task of defining the standard of adequacy, and finding a reliable funding source so that the state can provide an adequate education to all children each year.<sup>512</sup> The definition forces legislatures—and sometimes courts—to determine which aspects of funding are necessary and which are luxuries.<sup>513</sup> In addition, the courts and the people must trust the legislature not to set low adequacy standards or to let adequacy standards stagnate.<sup>514</sup> Total revenue equality may be more easily managed, but minimum revenue equality guarantees adequate funding and allows districts to supplement, therefore eliminating the “leveling down” effect of total revenue equality.<sup>515</sup> Preserving local control without disadvantaging poorer districts is the goal of minimum revenue equality.<sup>516</sup>

Minimum revenue equality seems better suited for North Carolina than total revenue equality because it retains the local control guaranteed by the constitution while taking advantage of a forward-looking standard of adequacy. A North Carolina court should be skeptical of the legislature’s political courage to enact true reforms, however, if events in Texas are any indication of the likely response. North Carolina’s Basic Education Plan<sup>517</sup> resembles Texas’s Foundation School Program,<sup>518</sup> and North Carolina’s lack of commitment to funding that program is also similar to that in Texas.<sup>519</sup> Because of Texas’s dismal performance with the Foundation School Program, the Texas Supreme Court was reluctant to trust the legislature to improve its support for the program, and eliminated some of the legislature’s discretion by mandating equal access equality.<sup>520</sup> A court may protect against this disadvantage by

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512. *Id.*

513. *Id.* at 525.

514. *Id.* Levine points out that Texas had a minimum foundation program, based on the principle of minimum revenue equality, that the legislature failed to fund. *Id.* at 525-26. The court, obviously reluctant to trust the legislature to improve its performance with this program, mandated access equality, which gave the legislature little room to maneuver in reform. *Id.* at 526.

515. Levine, *supra* note 6, at 524-25.

516. *Id.* at 524.

517. N.C. GEN. STAT. § 115C-81 (1994); *see also supra* notes 100-02 (describing the plan).

518. TEX. EDUC. CODE ANN. § 16.001 (West Supp. 1995). The program is designed to provide equal funding up to the point considered necessary to finance an adequate education. TEX. EDUC. CODE ANN. §§ 16.001-.002 (West Supp. 1995).

519. *See* Levine, *supra* note 6, at 526 (describing Texas’s commitment to funding the Foundation School Program); *supra* notes 100-02, 137, 141 and accompanying text.

520. *See* Levine, *supra* note 6, at 525.



drafting an opinion with a clear but flexible standard of adequacy.<sup>521</sup> Another possible safeguard would be for the court to lock the legislature into true reform by maintaining jurisdiction over the case, thus sending a message that the court will aggressively enforce the standard.<sup>522</sup>

The third alternative, access equality, requires equal tax rates to yield equal tax revenue.<sup>523</sup> Property-poor districts cannot raise as much revenue as property-rich districts can at the same tax rate.<sup>524</sup> In fact, some property-rich districts tax themselves at higher rates and still generate less revenue.<sup>525</sup> To help these poorer districts raise the same amount of revenue as wealthier districts taxed at the same rate, the state must supplement the funds to equalize revenue.<sup>526</sup> Under an equal access plan, local control is encouraged because poor districts will have more money to spend, and no spending caps are necessary.<sup>527</sup> However, use of this theory may require the politically unpopular "recapture" technique, which redistributes funds from wealthier school districts to poorer ones;<sup>528</sup> wealthy districts may go to great lengths to prevent this result.<sup>529</sup> Also, without a minimum funding level set by the state, the plan does not ensure that adequate education will be provided, because the funding will be in the hands of the taxpayers and subject to the whims of the political process.<sup>530</sup>

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521. See *supra* notes 481-86 and accompanying text. The *Leandro* court could use the Kentucky case as a model. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989). The court's goal should be to maintain control over the legislature while avoiding the problems that the Texas court's mandate caused.

522. See *supra* note 479 and accompanying text.

523. Levine, *supra* note 6, at 527. The difference between equal access and total revenue equality is that with total revenue equality, the tax rates and revenue levels are set centrally, while equal access allows spending to vary as local commitment to education varies. See *id.* at 522, 528.

524. LOCAL FINANCE STUDY, *supra* note 95, at 5.

525. *Id.*

526. *Id.* at 527.

527. *Id.*

528. *Id.*

529. *Id.*

530. *Id.* at 527-28. One feature of equal access is that local taxpayers determine their commitment to education by setting the tax rate; therefore, spending may vary with local commitment. See *id.* at 522, 528. Levine suggests that the "drive for equality" has overshadowed the greater issue of educational quality. *Id.* at 529; see also *supra* notes 487-500 and accompanying text (describing lessons from the Texas decision). Also, the recapture plan has been associated with a "leveling down" effect, by which districts become equal, but not by bringing the poorer district's quality and funding levels up to the quality enjoyed in wealthy districts—instead, the wealthy districts' funding and education drops to meet the poorer districts at some midpoint. See ALL THAT'S WITHIN THEM, *supra* note 106, at 3.

It is unlikely that a pure equal access theory will be accepted in North Carolina. Although such a plan preserves local control, recapture remains extremely unpopular politically.<sup>531</sup> Moreover, the intervention of urban districts in *Leandro* may demonstrate that, because wealthier districts face their own funding problems, recapture is not a viable option for providing the state with an equalized base for adequate education.<sup>532</sup> The equal access option can be modified, however, and recapture can be avoided.<sup>533</sup> In fact, all three of the proposals can be tailored to meet specific state needs or court mandates.<sup>534</sup> Therefore, regardless of the court's exact holding, the legislature would do well to examine these proposals, perhaps combining several to incorporate the best aspects of each option while minimizing their disadvantages.<sup>535</sup>

### CONCLUSION

As North Carolina prepares for what could be one of the most explosive and emotional struggles of the decade, this Comment attempts to introduce the history and predict the possible future of school finance litigation. *Leandro* clearly represents a third wave case raising the issues and utilizing the strategies of the other successful plaintiffs.<sup>536</sup> It is uncertain, though, which third wave cases from other jurisdictions the North Carolina courts will find persuasive.

Although school finance litigation may be long and trying,<sup>537</sup> it forces the state to evaluate its school finance system—an outcome which most likely would not occur without legal intervention.<sup>538</sup> Several commentators have compared the struggle of school finance reform to the struggle for racial desegregation—another long and painful undertaking in which litigation proved to be a primary impetus

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531. See ALL THAT'S WITHIN THEM, *supra* note 106, at 3-4; LOCAL FINANCE STUDY, *supra* note 95, at 7.

532. See *supra* notes 438-51 and accompanying text for discussion of the urban districts and their complaint. See also LOCAL FINANCE STUDY, *supra* note 95, at 7 (acknowledging the problems facing urban districts in North Carolina).

533. Levine, *supra* note 6, at 528. Recapture may be avoided by substituting state aid from sources other than local property taxes. *Id.*

534. See *id.*, at 528-37. Levine details plans considered by the Texas legislature in 1991. Most of the plans combined two or more of the options with the court's mandate of access equality. *Id.* at 528.

535. See *id.* at 528-29.

536. See Thro, *Judicial Analysis*, *supra* note 3, at 604-17 for a discussion of common issues in third wave cases and their legal strategies.

537. See *supra* note 6 and accompanying text.

538. Wyner, *supra* note 6, at 399-400.

for real reform.<sup>539</sup> Despite the many studies and pleas for education finance reform, little progress has been realized through the political process.<sup>540</sup> Thus, as education reformers weigh their options, they may see opportunity in the litigation-based strategy of the civil rights movement.<sup>541</sup>

The notion that litigation is bad pervades our society, and the upcoming bitter fight over school funding is sure to convince some that courts should not be involved in determining financial policy in the area of education.<sup>542</sup> Yet, North Carolina should look ahead with anticipation to the state's encounter with school finance litigation. States like Kentucky greeted their mandate with enthusiasm to help make Kentucky a leader in education reform,<sup>543</sup> while others have struggled along, resisting each step of the way.<sup>544</sup> In *Leandro*, the attorneys and the plaintiffs should educate the people of North Carolina about the need for school finance reform, so that no matter the outcome in court, the public will demand adequate—and better—education for every child in the state.

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539. *Id.* at 399; Christopher F. Edley, Jr., *Introduction: Lawyers and Education Reform*, 28 HARV. J. ON LEGIS. 293, 293-94 (1991). Even with judicial mandates, legislatures are often drawn "kicking and screaming into the remedial phase." *Id.* at 297.

540. Edley, *supra* note 539, at 293-94.

541. *See id.*; Wyner, *supra* note 6, at 399-400.

542. *See* Edley, *supra* note 539, at 297-99.

543. Alexander, *supra* note 14, at 344; Combs, *supra* note 5, at 375-76. The people of Kentucky accepted the decision as if they knew it was morally necessary and long overdue. Alexander, *supra* note 14, at 344. Experts from across the nation were employed to revamp the Kentucky school system, and the three branches of government fulfilled their constitutional obligations. Combs, *supra* note 5, at 376.

544. Wyner, *supra* note 6, at 398. Wyner cites the New Jersey legislature for modifying an education reform measure designed to follow the state supreme court's ruling in *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990). Wyner, *supra* note 6, at 398. The modification replaced increased spending for schools with property tax relief and capped school spending to further relieve the tax burden. *Id.*