2010

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Macrothink Institute™

International Journal of Education
ISSN 1948-5476
2010, Vol. 2, No. 1: E5

From Equity to Adequacy: Evolving Legal Theories in School Finance Litigation: The Case of Connecticut

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Abstract

Since the landmark school finance decision *Serrano v. Priest* (1971) ruled that California's reliance on the property tax to finance public schools violated equal protection provisions in state and federal constitutions, a wave of school finance litigation swept the United States. Connecticut followed with *Horton v. Meskill* (1977) and most recently with *CCJEF v. Rell* (2005). The Connecticut State Supreme Court has been a key actor in the policy making process concerning school finance reform in Connecticut. This study will trace the history of school finance litigation in Connecticut and the evolving legal theories used to undergird major court cases. The legal theories that have been developed in Connecticut school finance litigation cases over a thirty year time period have mirrored national trends evolving from the utilization of equity claims then turning to adequacy provisions based on state constitutions in an attempt to redress spending inequities. This study will argue that despite the increasing sophistication of legal strategies as well as a broadening coalition of participants and earlier favorable court rulings in sister states, the plaintiffs now face a less hospitable environment towards school finance reform making the outcome of this latest case uncertain. This study will examine the major legal theories advanced in *Horton I* (1977), *Horton III* (1985) and *CCJEF v. Rell* (2008) and conclude by offering some tentative explanations of the jurisprudence of school finance litigation by providing a closer examination of judicial-legislative dynamics and the prospects for reform in Connecticut.

Keywords: School finance reform, Court cases, Legal theories, Equity, Adequacy, Equalization

1. Introduction

School finance reform has been one of the most controversial and contentious issues in public policy over the last thirty years. Public schools have served as battlegrounds over fundamental questions of equality, liberty, and access to social and economic opportunities. The school finance litigation movement constitutes a thirty year quest by plaintiffs to redress spending inequities in public education. The disparities between school districts wrought by varying property tax levels as a source of funding for public schools have been the focal point for reformers since the 1970's. This paper will outline the dominant national legal trends as they have played out in Connecticut and underscore the major legal theories that have been advanced to press for greater equity and adequacy in Connecticut's system of funding public schools. The study will specifically analyze the role of the Connecticut Supreme Court as a key policy maker in the area of school finance and make some predictions based on the court's jurisprudence in previous decisions as well as the outcomes of court cases in sister states.

The role of the courts in policy making in the area of school finance has been thoroughly examined in numerous national level studies (Murray, Evans and Schwab, 1988). The foci of these inquiries has been on the dynamics of judicial decision making, the specific holdings in each of the cases, and finally, the impact of court ordered reforms on school finance equalization plans. With regard to the dynamics of judicial decision making, scholarship on the role of courts in the area of school finance reform is reflective of larger concerns as the judiciary grapples with its role in the American political system. Portrayals of judicial behavior have tended to support a dichotomous view of the courts as either engaging in "judicial activism" or as exercising "judicial restraint". Judicial activism views the court as construing its role as promoting certain goal-oriented behavior particularly as it relates to a vision of the common good. Such approaches have tended to produce court decisions that are prescriptive in nature as they devise remedies to redress inequities. Judicial activism was ushered in during the Warren court years and is exemplified by the decision in *Brown v. Board of Education* (1954) which called for the desegregation of public schools. According to Bosworth (2001), "Federal courts cast aside traditional boundaries of federalism and separation of powers to supervise a wide range of state institutions." (Bosworth, p. 80). Judicial restraint, on the other hand, views the proper role of the judiciary as interpreting the law according to original intent which entails hearing a case and refraining from prescribing remedies which is viewed as an unwarranted intrusion into another branch of government.

Aside from the normative considerations regarding what the courts ought to do is a separate but related concern of the judicial impact of court decisions on policy outcomes. One portrayal casts the judicial branch as having a catalytic effect on policy outcomes particularly in prompting legislative reforms (Bosworth, 2001) while the latter portrays it as having a negligible effect (Rosenberg, 2008). Rosenberg's seminal study concerning the judicial impact in the aftermath of *Brown v Board of Education* 1954 is pessimistic about the courts ability to effect social change and is reflective of the "constrained court." Among the many lessons from the desegregation battles after *Brown*, the judicial branch learned that court decisions by themselves cannot compel other political actors to resolve social problems.

Treading a middle ground, Dinan (1996) found that courts can be effective when certain conditions are met such as when the general public and at least one political branch support the goals of the decision and when the court gives the legislature flexibility in crafting a remedy.

Exactly where does Connecticut fall within the spectrum of judicial activism and judicial restraint and how might such a categorization provide insight into the pending school finance litigation case? In examining the series of school finance decisions issued by the Connecticut Supreme Court, this study will attempt to make some predictions regarding the outcome of the pending litigation. A retrospective look at judicial behavior in Connecticut with respect to school finance decisions issued by the Superior Court and Supreme Court demonstrates a marked tendency towards judicial restraint. Dating back to the first decision in *Horton v. Meskill* (1977), the court reflected this tendency as it recognized its duty to interpret the law and stayed its hand in ordering a specific remedy for school finance. In declining to prescribe a remedy for school finance reform, it called upon the legislature to devise an equalization plan. By so deciding, the court set in motion a dynamic between the judicial and legislative branches that has resulted in an iterative process with repeated trips back to the courtroom on the part of plaintiffs when faced with a recalcitrant legislature.

Given the prevailing legal trends nationwide for far reaching reforms among jurists after *Serrano*, the Connecticut Supreme Court's restraint is understandable in light of two factors. One factor is the omnipresent political consideration in Connecticut that reflects a political culture steeped in strong traditions of local control. In fact, when directing the General Assembly to fashion a plan to equalize spending in *Horton v. Meskill* (1977), the decision specifically states that an equalization plan would not require towns to spend the same amount on education. The second factor relates to timing of the case which emerged during the second wave of litigation late 1970s. As Roelke et al (2004) observed in their national study of legal trends, second-wave courts were not prescriptive in their mandates out of deference to the legislative branch. In *Horton* (1977), the majority decision references the consideration given to both local control and judicial restraint by leaving the matter to political bodies to devise "ultimate solutions" (Note 1) Later, in the context of *Horton* (III) the court continued this approach by treading a middle ground in devising a three-part test making it more difficult for plaintiffs to demonstrate inequities while at the same time prompting the state legislature to return to the drawing board in devising a new equalization plan. This sentiment would be echoed again in the *CCJEF v. Rell* (2005) trial court's decision. Since the first and second waves of school finance litigation, courts are less likely to view plaintiffs claims favorably and have exhibited a reluctance that revolves three principle areas of concern: 1) separation of powers concerns, 2) sister state decisions, and 3) general skepticism displayed towards the relationship between expenditures and performance. Each of these concerns will be elaborated on in greater detail in the section that follows.

2. The Early School Finance Reform Movement in the United States

The inception of school finance reform in the United States during the 1970s was in many respects an outgrowth of the civil rights movement. *Horton v. Meskill* (1977), the landmark school finance case in Connecticut, emerged amidst the backdrop of a civil rights movement

that was entering a second and more mature phase marked by redressing economic inequities in every corner of American life. It came on the heels of a time period that was marked by feverish activity and policy innovation unleashed by *Brown v. Board of Education (1954).* The landmark Supreme Court decision declared "separate but equal" to be unconstitutional and called for schools to begin desegregation with "all deliberate speed". Buoyed by this victory, the Brown decision propelled the civil rights movement forward and ushered in a period of intense public policy activity. Reformers examined virtually every corner of American life in an effort to remedy past discrimination in the areas of voting rights, fair housing, public schools, and employment among others.

In revisiting the Brown decisions nearly two decades later, however, many of the hoped for results in pursuing equal educational opportunity had not been fully achieved. There was a sense of disappointment among those who were active in the civil rights movement that the legacy of Brown had lost momentum (Eaton 2004). While *de jure* segregation had largely been defeated, *de facto* segregation in schools persisted due to residential housing patterns. Two decades after the Brown decision, there was a growing realization that despite desegregation policies, inequalities still persisted in many public schools across the United States owing to a concentration of poor minorities in urban centers. Reformers set their sights on the financing of education as another avenue to remedy inequities.

In his book *Courts as Catalysts,* Matthew Bosworth (2001) referred to the ensuing litigation over school finance as "a continuation of Brown by other means. (Bosworth, p. 10). This sentiment was echoed by the Connecticut State Department of Education in 1976.

In the past generation, a second edge of that cutting sword of equality has emerged with real force. Its fundamental thrust is money: how it is to be most fairly generated in support of public education, and how it is to be distributed so that equal resources support the education of each child. (Note 2)

School finance reform became the second front to wage the battle against inequality. The landmark decision that ushered in school finance litigation in virtually every state was *Serrano v. Priest* (1971). Acknowledging that the mere removal of legal barriers to education such as ending desegregation would not accomplish the hoped for effects of equalizing educational opportunity, a second prong in the legal strategy would challenge the constitutionality of school funding systems at the state level. The policy impetus found its intellectual parentage in the seminal work in a book on school finance reform by Coons, Clune and Sugerman (1970) entitled *Private Wealth and Public Education*. Coons et al. summarized the relevant legal issues first raising the specter of litigation with the contention that funding disparities violate the 14th amendment equal protection clause. Reliance on the property tax resulted in wide variation in spending between districts making equality of educational opportunity largely dependent on where one lived. Equal protection of the laws in terms of educational opportunity, they argued, was violated by such a funding scheme.

The lead counsel for the plaintiffs in *Serrano v. Priest* (1971) was John Coons. After mounting a vigorous argument showing the stark spending disparities between wealthy districts such as Beverly Hills and Baldwin Park, the latter being home to a largely

low-income Hispanic population, Coons arguments resonated with the court which ruled that significant disparities between districts in terms of spending due to an uneven distribution of taxable wealth violated the equal protection clause of the state constitution. Moreover, the Serrano court held that property wealth should not play a role in the amount of money available for education declaring that all children are guaranteed a right to public education regardless of where they lived. The Serrano case created widespread interest whose impact was far reaching.

Serrano provided a blueprint for continued litigation by its success on state level fundamentality and equal protection claims, and it showed that state constitutions might be vulnerable in ways unavailable at the federal level. (Thompson, Wood and Crampton, p. 60)

Serrano became to school finance reform what *Brown* was to the civil rights movement, both a rallying cry and a blueprint for action for school finance reformers. In fact, the *Serrano* decision cited *Brown* in its decision stating unequivocally that education was the most important service provided by state and local government. The next year, eleven states reformed their school finance systems as the result of court decisions. At present, nearly every state has had a major school finance case. The Serrano court articulated a standard referred to as fiscal neutrality which held that property wealth should not play a role in the amount of money available for education. The fiscal neutrality standard would later be utilized by school reformers in Connecticut in devising the Guaranteed Tax Base formula.

Legal entrepreneurs in other states detected a fertile landscape to test their theories in the arena of school finance reform. John Coons, the "Father of Fiscal Neutrality" and lead Counsel on the *Serrano* case, captured the prevailing political and legal climate when he addressed a group of Connecticut policymakers in 1978:

In the late 1960s, I suppose inflamed by the hope of the Warren Court, lawyers around the country decided it would be a good thing to apply some of the doctrines relating to poverty that were emerging from the Supreme Court to education. (Note 3)

One such legal entrepreneur was a freshly minted, Harvard trained lawyer, Wesley Horton, who later went on to achieve prominence arguing the now famous *Horton v Meskill* (1977, 1985) cases, the Sheff desegregation case (1996), and the eminent domain case *Kelo v. New London* (2005). Having just completed a clerkship under Connecticut Supreme Court Justice House in the late 1960s, he concluded that "the Connecticut Supreme Court was a grossly underused resource." (Note 4) Horton articulated a new trend that is referred to as "new judicial federalism" (Tarr, 1998; Reed, 1998) New judicial federalism refers to the increased reliance on state courts to pursue rights unavailable under the U.S. Constitution. Two developments spurred this movement in the area of school finance reform. First, the appointment of conservative Chief Justice Warren Burger to the U.S. Supreme Court resulted in a less hospitable environment for civil rights claims. Secondly, the U.S. Supreme Court decided in *Rodriguez* decision that the U.S. Constitution did not provide a right to a public education. With federal courts foreclosed as a venue to pursue school finance claims, reformers turned to state supreme courts to press their claims undergirded by provisions in state constitutions.

In the case of Connecticut, Wesley Horton quickly set his sights on school funding informed from the unique vantage point of a father whose son was enrolled in the Canton school system, a rural town outside of Hartford. Horton also happened to be a member of Canton's School Board. Dealing with the complexities of school finance from the ground up, he discovered in the course of his duties that Connecticut used a flat grant of $250 per town as the only method of equalizing spending across school districts. (Eaton 2004) Horton would argue that Canton as a property poor rural district was unable to garner sufficient revenues through the property tax to provide an adequate education.

An examination of the facts led Horton to the conclusion that the method for financing Connecticut's public schools was particularly susceptible to litigation. After the landmark school finance reform decision of *Serrano v. Priest* (1971) in California declared the reliance on the property tax to fund public schools as violating the principle of equal educational opportunity, Connecticut was among several states that followed suit with the case of *Horton v. Meskill* (1977) in the so-called second wave of school finance litigation. (Note 5) The lawsuit filed in 1974 on behalf of then 10 year old Barnaby Horton against the administration of Governor Meskill, was the first to challenge the way Connecticut financed public education. At that time, local property taxes in Connecticut provided approximately seventy percent of the revenue to finance public schools. The remaining thirty percent was derived from state and federal funds. Such a funding scheme, the plaintiffs argued, created wide spending disparities between property-rich and property- poor towns. Similar to the reasoning in the California ruling, the Connecticut Supreme Court found that the heavy reliance on the property tax to fund public education violated the mandate to provide an equal educational opportunity to all children. When *Horton v. Meskill* was filed in Superior Court in 1973, Connecticut ranked fiftieth in terms of equalization measures and was one of only five states which utilized a flat grant system which was considered to be the most conservative and least equalizing method of providing state support to public schools, points Horton raised during the trial. (Note 6) In his discussion of the types of reforms and funding formulas enacted by state legislatures in the area of school finance, Odden (1982) noted that reforms fell into three categories: Guaranteed Tax Base (GTB), foundational grant, and Guaranteed Tax Base with a foundation model. The latter was considered to be more effective in meeting equity standards by adjusting for local contribution. (Note 7) These reforms can be placed along a spectrum with the GTB as the more conservative option and the foundation model as entailing a greater contribution by the state. While Connecticut eventually moved to a foundation plan, it was largely prompted to do so by the court after *Horton III* 1985.

Horton v. Meskill (1977) was the first case to challenge school funding in Connecticut and test out legal principles set forth in *Serrano*. The case was representative of equity claims during the second wave (1971-1989) of school finance reform which drew upon education clauses in state constitutions and equal protection claims. As noted by Bosworth, after *Rodriguez*, plaintiffs employed state education clauses coupled with state equal protection clauses as "evidence of the importance of education in each state and as evidence that each state was obligated to provide education equally" (2001, 34). Horton argued that the school financing system violated Article I of the Connecticut State Constitution's equal protection

clause and Article VIII which provided for free public elementary and secondary schools in the state. Armed with social scientific studies and quantitative data, the plaintiffs successfully made the case that Connecticut's method of financing public education, primarily through the property tax, violated the state constitution.

The court's decision included a comparative analysis of several Connecticut towns to demonstrate the disparities in tax effort and the sharp differential that the tax effort of different towns yielded for school expenditures. The highest per pupil operating expenses were for Darien at $1570.47 while Canton's was $945 yet Canton had to levy a higher mill rate. (Note 8) "Levelling" up to the Darien standard would animate policy reformers in subsequent years. In upholding the Superior Court's ruling, Horton's mentor, Justice House spoke for the majority and agreed with the plaintiffs that the linking of the quality of a child's education to the property wealth of his or her community was.

Sheer irrationality as of the state's system of financing education in the state on the basis of property values would be similar and no less tenable should the state make educational expenditures dependent upon some other irrelevant factor such as the number of telephone poles in the district (Note 9).

In a 4-1 decision, the court decision mirrored much of the logic and reasoning of the Serrano decision. In fact as Bosworth points out that:

Legislatures and courts across the nation did (and do) pay close attention to one another. Most state courts deciding a school finance case cited decisions from other states justifying their own reasoning (p. 39).

The court also ruled that the school finance plan was unconstitutional on the grounds that it violated the education clause and the equal protection clause of the Connecticut state constitution. (Note 10) Moreover, the court declared education to be a fundamental right under the state constitution's equal protection provision by virtue of the degree of support given to education by the legislature through the state's history. (Note 11) Significantly, the court did not consider local control to be a "compelling state interest" an oft cited argument to justify differential treatment for education among districts.

In directing the state legislature to fashion a remedy, the Connecticut Supreme Court exercised judicial restraint and stayed its hand largely due to separation of powers concerns. Such restraint and deference to the legislature unwittingly set in motion a thirty year quest to equalize school funding across Connecticut's municipalities. Successive legislatures, while rhetorically supporting reform, have failed to fully fund equalization schemes. After thirty years of equalization efforts, the state still lags well behind the national average of a fifty percent with approximately 40% of the share of public school funding derived from state funds. (Note 12) Some studies argue that despite modest strides in equalizing spending, the gap between rich and poor districts in Connecticut has widened. (Note 13).

3. Equity: A Legal Strategy Runs Its Course

The following section will discuss the conditions that have given rise to the abandonment of equity claims and the subsequent adoption of a renewed legal strategy that utilizes adequacy claims. I will then turn to the case of Connecticut, where a pending case, *CCJEF v. Rell*, relies on adequacy claims to challenge the state's public school finance system. The paper concludes with some tentative predictions about the future of school finance reform in Connecticut.

As a legal standard, equity claims have undergirded plaintiffs' arguments and legislative reforms to craft remedies to equalize school funding during the first and second waves of school finance litigation. Devising equalization plans entailed a relative standard and a determination of how schools districts were funded relative to other school districts within a given state. While the goal in devising school aid formulas was to provide a more equitable distribution of funds across school districts, the process engendered a politics of redistribution that pitted rich towns against poor towns. The Connecticut State Legislature's predicament was not unusual in this regard. In many state legislatures across the U.S., lawmakers have dealt with this political minefield by deftly avoided fully funding equalization schemes while attempting to not draw the ire of the courts. By so doing, they have contributed to the protracted nature of serial court cases and repeated trips back to courts by plaintiffs.

Courts, plaintiffs and legislators have all had to adapt to the changing legal environment.

"Legislators are not the only ones to have recognized the political difficulty in equalizing resources. Advocates have as well and they have generally altered the goal of school finance litigation." (Ryan and Heise, 2002) Further to the point, Sturm and Kerr state that the "ultimate shift from equity litigation to adequacy litigation has been at times something of an ad hoc process, driven as much by the preferences of the bench as by education plaintiffs." (2008, 16). Finally, Bosworth also noted that as the debates and theories changed, court decisions followed (2001, 39)

There was a general sentiment on the part of plaintiffs that equity claims had run their course in terms of their persuasiveness before state supreme courts to redress spending inequities. In part, this was driven by the skepticism of policymakers that funding alone would narrow the achievement gap. The relative standard of equity claims gradually gave way to adequacy claims which employed an absolute standard. In fact, some have attributed the shift from equity to adequacy as driven in part on reliance on the state education clause which lends itself to an interpretation that supports claims for providing minimum education standards rather than equity between districts. Every child would be entitled to an adequate education regardless of what other school districts were spending. As Minorini and Sugerman (1999) note "Many of those who complain about the public schools seem to care less that their children are relatively worse off and more that they are badly off in an absolute sense" (1995, 63)These factors have prompted a changed legal strategy. Each school district would now be examined solely in terms of whether it was providing an adequate education to its students and not relative to other districts.

This shift in strategies presented both opportunities and challenges. In a certain respect, plaintiffs were responding to a changed political climate in which state judiciaries were no longer as sympathetic to equity claims and recalcitrant legislatures, in turn, were failing to fully fund equalization schemes. In contrast to equity claims, adequacy claims use an absolute standard requires that students be provided with an adequate educational opportunity defined as sufficient resources usually measured by increased spending. At first glance, adequacy would appear to involve a lower threshold for courts yet as some scholars have noted adequacy can entail a higher threshold in terms of a legal strategy than fiscal neutrality because it focuses more than dollar inputs and relies on constitutional language that is harder to quantify. At the behest of courts who want more defensible estimates how much spending is required to produce an adequate education, many plaintiffs have undertaken "costing out" studies that attempt to place a dollar amount on what constitutes an adequate education. (Note 14).

The cost function approach, however, is fraught with difficulties as some studies which attempt to measure actual costs simply replicate district spending levels and their reliance on professional judgement. Nevertheless, adequacy plaintiffs have been successful in arguing for more state funding by utilizing education clauses in state constitutions that call for a certain minimum or adequate level of education to be provided all students.

4. Adequacy Claims in School Finance Litigation

Since 1989, equity based claims have been largely supplanted by adequacy claims. During the first phase of the adequacy movement, lawsuits employing adequacy based claims enjoyed a high success rate with plaintiffs prevailing in more than 75% of the cases between 1989 and 2005 (Sturm and Kerr, 2008). As a result of court decisions, twenty three states have had their state funding systems ruled unconstitutional on adequacy grounds. (Guthrie and Springer, 2007) Most of these cases relied on phrases contained in state constitutions dealing with public education.

Kentucky ushered in the adequacy phase of the school finance litigation movement in what has been characterized as "leaving equality behind" (Enrich, 1995). In *Rose v. Council for a Better Education* (1989), the plaintiffs challenged Kentucky's school finance system under the equal protection clause, due process clause, and education clause in the state constitution. Grounding their decision in the state's education clause, specifically the mandate to provide an "efficient" education, the court found Kentucky's school system unconstitutional. In addition, the court addressed the issue of adequacy in education vis a vis the contention that a quality education entailed provision of several capacities which were deemed critical for students to function and compete. (Note 15). The Kentucky court set the stage for numerous adequacy lawsuits nationwide.

While 1989-2005 was marked by numerous plaintiff victories on adequacy grounds, Sturm and Kerr have described the 2005-2009 as marking downtrend with a "string of disappointing decisions to adequacy plaintiffs" (2008, p. 3), courts have become increasingly uneasy about interfering in an area viewed as the prerogative of legislatures. Their concerns revolve around

separation of powers issues but also an underlying skepticism about the connection between expenditures and school performance.

In Connecticut, the history of school finance litigation mirrors national trends. The early phase of school finance litigation revolved around equity claims. *Horton* I and *Horton* III ruled that the method for funding public schools based primarily on the property tax produced widespread spending disparities that created inequities between school districts. The latest case utilizes adequacy as a legal theory to undergird the plaintiffs' claims. The chronic underfunding of school aid formulas for thirty years through capping provisions of the Education Cost Sharing formula prompted a public advocacy group to file a lawsuit against the administration of Governor Rell. The Connecticut Coalition for Justice in Education Funding or CCJEF filed a lawsuit against the Rell administration in the spring of 2005. The lawsuit alleges that "the state's failure to suitably and equitably fund its public schools has irreparably harmed thousands of Connecticut schoolchildren." (Note 16) The complaint alleges that "Connecticut's schoolchildren have a constitutional right to suitable educational opportunities which will prepare them to function as responsible citizens, compete in obtaining productive employment, and advance through to higher education." (Note 17) Moreover, the complaint states that this right is being denied them by the state's maintenance of an unconstitutional system for funding public education. The plaintiffs are seeking to have the court declare the scheme for financing public education unconstitutional and to create and maintain a public education system that will provide "suitable" educational opportunities for all children. (Note 18)

In a memorandum of decision dated September 17, 2007, the Superior Court dismissed three of the four counts of the complaint leaving only the allegation of the denial of "substantially equal" opportunities as the sole justiciable claim. The Superior Court first addressed the justiciability of the issues raised in the complaint and viewed *Horton I, Horton III* and *Sheff v. O'Neill* as making it clear that the issues are justiciable. After establishing the subject matter jurisdiction, the memorandum turned to the question of whether or not there is a constitutionally guaranteed right to a "suitable" educational opportunity which the court may define and enforce. The crux of the lawsuit revolves around constitutional language surrounding the reference to education in the state constitution. Although many state constitutions refer to the provision of a "thorough and efficient" or "adequate" education, the reference to education in Connecticut's state constitution is a relatively terse statement: "There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." (Note 19)

The brevity of the wording of the education clause is at the center of the controversy in latest stage of school finance litigation in Connecticut. Before 1965, there was no reference to education in the state constitution at all. In looking for guidance, the court turned to federal decisions and sister state decisions to determine the content of Connecticut's constitutional right to education. The meaning of state constitutions and the role they play in equity and adequacy cases has been examined with an eye in determining whether there exists a correlation between constitutional language and court decisions. An analysis of constitutional language presents a mixed bag in terms of the robustness of the language. However, some

courts have read into even terse language a "substantive" or "qualitative" component in their constitution's education clauses without any explicit mention in the wording of the document. Some studies have not found any significant correlation between constitutional language and the court decisions (Dinan, 2007).

In Dinan's (2007, p. 15) classificatory scheme of education clauses in state constitutions, he categorizes Connecticut's education clause as a "confirmational provision whose purpose it is to recognize or confirm actions already taken by state legislatures. (Note 20) After an analysis of the constitutional language surrounding education, the Connecticut Superior Court stated that:

While the decisions of other state courts provide perspective on deciding whether the constitutional right to education includes some particular level of educational quality, however labeled or defined, they are a decidedly mixed bag and of limited utility based as they are on each state's history and the context in which the education clause of its constitution was adopted. (Note 21)

The "mixed bag" prompted the superior court to look to other factors for guidance. Thus the court turned to an historical approach and examined statements made at the constitutional convention of 1965 when Connecticut's constitution corrected a long-standing omission by inserting a reference to public education. In response to the plaintiff's assertion that the constitution guarantees a right to a suitable education, the Superior Court reviewed the historical context of the constitutional convention and their reliance on Delegate Bernstein's references at the convention to Connecticut's history of supporting "good" public education as far back as the Connecticut code of 1650" reading into those expressions to "indicate an intent on the part of the provision's proponent and the convention to insert what the plaintiff's refer to as a "substantive level of educational opportunity". (Note 22)However, the court viewed the expressions as "far too slender a reed to support the conclusion that there exists a constitutional right to a "suitable educational opportunity." (Note 23) The court added that

If it had been delegate Bernstein's intent or that of the convention to guarantee some minimum level of educational content as part of the constitutional right, the convention could have required public elementary and secondary education that is not just "free" but also adequate" or, even, "suitable", as do some other state constitutions. (Note 24)

In further conducting their analysis, the Superior Court applied a Geisler test which centered on a discussion of public policy considerations to determine whether the recognition of a constitutional right is warranted. (Note 25) In reviewing the complaint, the trial court noted that the plaintiffs' listing of resources in the form of inputs that constitute an educational system such as a high quality pre-school, appropriate class size, highly qualified teachers and administrators, among others would place the court in the uncomfortable position of having to quantify and measure such inputs and continue to monitor them to ensure compliance. Before a consideration of each of the inputs as to their validity, the court affirmed the importance of education to society even referencing the *Horton* decision but went on to reiterate concerns that revolve around separation of powers.

It is not the function of the courts to establish the public policy of the state, absent a constitutional foundation for such a policy. The people through their elected representatives at the state and local level, determine public policy. (Note 26)

In citing the relevant case law, the court went on to say that it must "resist the temptation to enhance their own constitutional authority by trespassing upon an area clearly reserved as the prerogative of a coordinate branch of government. (Note 27) In considering the fourteen components of a suitable educational opportunity, the court stated its reluctance to entertain the various inputs to such an education and that to grant the plaintiffs the relief they seek would constitute a "deep intrusion by the court into the constitutional prerogatives to other branches of state government." (Note 28) The court further expressed reservations and the need for "prudential cautions' in citing the court's lack of expertise and the familiarity with local problems in order to make decisions with regarding raising revenue and expenditures, activities generally reserved for the legislature. Finally, in addressing the plaintiff's desire to have state education funding statutes declared unconstitutional, the court cited an opinion that upholds a

well settled principle of judicial construction that before an act of the legislature ought to be declared unconstitutional its repugnance to the provisions or necessary implications of the constitution should be manifest and free from reasonable doubt. If its character in this regard be questionable, then comity and a proper respect for a co-ordinate branch of government should determine the matter in favor of the action of the latter." (Note 29)

Based on the aforementioned considerations, the Superior Court dismissed three out of the four claims prompting the CCJEF plaintiffs to appeal the case to the Connecticut Supreme Court. Oral arguments were heard before the Supreme Court in April, 2008. While a decision is still pending, some tentative predictions will be offered in the section below.

There are a number of factors militating against a favorable court decision for the plaintiffs in *CCJEF v. Rell* (2005). Between 2005 and 2009 the court has retreated from upholding adequacy claims in nine out of the thirteen cases brought during this time period. Adequacy suits during this second and more mature phase of the litigation strategy would seem more prone to success given the time spent by plaintiffs in refining their strategies. However, just the opposite has occurred. Judges are less likely to view plaintiffs claims favorably and have exhibited a reluctance that revolves four principle areas of concern: 1) justiciability, 2) separation of powers concerns, 3) sister state decisions, and 4) general skepticism displayed towards the relationship between expenditures and performance.

In the first wave of adequacy suits, judges were inclined to pronounce a constitutional right and ask the legislature to design a remedy. The first round of judicial intervention also took place in the context in which state legislatures had altogether avoided their constitutional responsibilities in the educational arena. Some thirty years later it would be increasingly difficulty to justify such intervention when legislatures had taken action and allocated funds, albeit insufficient, to finance reforms. In second generation lawsuits, plaintiffs generally envision a more involved role for the courts in mandating concrete remedies as well as

continual monitoring and oversight to ensure that adequacy reforms are being met, a role which they appear to be unwilling to play.

As Sturm and Kerr (2008, 10) note:

Separation of powers concerns are contagious. Many recent opinions echo the justiciability arguments of sister states. As courts weigh the benefits of engaging their coercing power against the risk of diluting their own legitimacy or encroaching on another branch's prerogatives, recent experiences in other states are a primary source of guidance.

Another factor working against the CCJEF plaintiffs are the spillover effects of sister state decisions in Rhode Island, Alabama, Ohio and Massachusetts. Adams (2009) noted judicial restraint may be on the rise due to the desire to avoid the ongoing litigation of other states. In the *Pawtucket v Sundlun*, the court referenced the litigation in New Jersey that lasted over 21 years and called it a "chilling example" of what can happen when the court takes on the duties of a legislature. In *Massachusetts the McDuffy v. Secretary of the Office of Education* (1993) decision, the court ruled that the state's financing system was inadequate. The legislative took drastic steps to remedy the spending inequities. However, years later in the successor case of *Hancock v. the Commission of Education* (2005), the plaintiffs argued that the funding system was inadequate due to persistent achievement gaps. The court found that the school system met constitutional standards despite funding disparities. Chief Justice Marshall noted the legislature's attempts throughout the 1990s to increase funding and the necessity to recognize the state's overall fiscal situation. Third wave adequacy courts have been hesitant to overturn state financing systems when legislatures appear to be taking corrective steps to correct for funding disparities.

A third area of concern reflected in many court decisions and serving as a backdrop is a generalized skepticism regarding the connection between school expenditures and academic performance. One of the earliest and well known studies that explored the connection between expenditures and performance was written by James Coleman and resulted in the Equality of Educational Opportunity (1966) study. Coleman found that socioeconomic backgrounds of students was highly correlated with student performance outweighing other factors including expenditures. Coleman's study has cast doubt on claims regarding funding and academic achievement.

5. Concluding Thoughts

Given the myriad objections that the Superior Court raised regarding *CCJEF's* claims regarding the suitability of public education in Connecticut, a favorable ruling is unlikely based on the previous analysis. Chief among their concerns is the reticence to prescribe a remedy in line with the plaintiffs that would, in the courts view, constitute a deep intrusion into another political branch as voiced in sister state decisions in Nebraska, Oklahoma, Indiana, Massachusetts, and Colorado. In light of these concerns, plaintiffs appear to be altering their strategies again due to the disappointing outcomes in the above mentioned cases and are pursuing non-monetary alternatives as in the case of *Campbell County School District v. State of Wyoming (*2008). Whether or not this will usher in a new trend or perhaps a "fourth

wave" in school finance remains to be seen (Note 30). However, the mounting evidence of state courts' reluctance to enter the political fray in adequacy cases does not bode well for plaintiffs in Connecticut.

Notes

Note 1. The majority decision in Horton echoed the sentiments expressed in *San Antonio Independent School District v. Rodriguez, 411 U.S. 1973* which stated that the legislature is the appropriate body to devise "ultimate solutions.

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Note 2. In a manual prepared by the Connecticut State Department of Education, the report reflects the conventional wisdom of the time that equalizing aid to towns will have an impact on equal educational opportunities. *GTB An Aid To Understanding*,(1976)

Note 3. John E. Coons, "What Are Connecticut's Choices Under Horton v. Meskill, Presentation at Connecticut School Finance Seminar, March 13, 1978

Note 4. Wesley Horton (1991) "Memoirs of a Connecticut School Finance Lawyer", Connecticut Law Review , 24, 3 (1992b), p. 704

Note 5. Legal scholars have divided school finance litigation history into three waves to describe the differences in legal strategies employed by plaintiffs during each time period. Second wave lawsuits challenged school finance systems through state education clauses, state equal protection clauses or both. For a full discussion see Roelke, Christopher, Green, Preston and Erica H. Zielewski (2004) "School Finance Litigation: The Promises and Limitations of the Third Wave", Peabody Journal of Education, volume 79, 3 pages 104-133.

Note 6. In the Horton v. Meskill 172 CONN majority opinion, the Supreme Court stated that of all the ways that states throughout the country distribute state funds, "the flat grant has the least equalizing effect on local financial abilities."

Note 7. For example, a foundation of $7,000 per pupil could lead to a state distribution of $5,000 per pupil in a poor district and a state distribution of $2,000 in a rich district. The poor district would contribute $2,000 while the rich district would contribute $5,000 per pupil.

Note 8. In the Court's decision, the disparities were noted: taxpayers in property-poor towns such as Canton pay higher tax rates for education than taxpayers in property-rich towns. The higher tax rates generate tax revenues in comparatively small amounts and property poor towns cannot afford to spend for the education of their pupils, on a per pupil basis, the same amounts that property rich towns do." Horton v. Meskill 1977 Conn.

Note 9. See Horton v Meskill [376 A 2d 359 (Ct. 1977). This statement was originally made by Justice Thurgood Marshall in dissenting opinion in the Rodriguez decision.

Note 10. The Connecticut Constitution was rewritten in 1965 to include a constitutional right to a free public education. Until that time, Connecticut was the only state without a constitutional guarantee to a public education. For a full discussion of the constitutional history see Collier (2008).

Note 11. Horton v Meskill [376 A 2d 359 (Ct. 1977) quoting "A Statistical Analysis of the School Finance Decisions,: On Winning Battles and Losing Wars", 81 Yale Law Journal 1303, 1307]

Note 12. This figure was derived from a report compiled by the Connecticut Conference on

Municipalities based on estimates for the Connecticut State Office of Fiscal Analysis. For a full discussion see K-12 Public Education: The State of the State and Local Partnership CCM Public Policy Report CCM January 2009

Note 13. One longitudinal study of Connecticut's school finance equalization plan found that after the first six years, inequalities were worse than at the time of the court's decision. For a full discussion, see Douglas Reed. "Court Ordered School Finance Equalization: Judicial Activism and Democratic Opposition"

Note 14. The plaintiffs in the CCJEF v. Rell cost commissioned a costing out study to undergird their arguments and as the basis to argue for more funding. (http://ccjef.org/documents/new-pdfs/CCJEF_APA_Adequacy_Study_6.05.pdf)

Note 15. See Rose v. Council for Better Education, 790 S.W. 2d 186, 190 (Ky. 1989)

Note 16. CCJEF v. Rell Overview. http://ccjef.org/overview.htm

Note 17. CCJEF v. Rell (2005)

Note 18. The plaintiffs define "suitable" educational opportunity as consisting of the following components: an educational experience that prepares them to function as responsible citizens and enables them to fully participate in democratic institutions; an opportunity to complete a meaningful high school education that enables them to advance through institutions of higher learning or enables them to compete on equal footing to find productive employment and contribute to the state's economy; to meet standards which the state in order to achieve the goals of the preceeding paragraphs. See Nekita Caroll-Hall et al v. M. Jodi Rell e. al., Superior Court Memorandum of Decision on Motion to Strike, September 17, 2007.

Note 19. Article I, Section 8, Connecticut State Constitution

Note 20. Dinan's classificatory scheme includes the following types of education clauses found in state constitutions: hortatory, conformational, aspirational and obligatory provisions.

Note 21. Memorandum of Decision, Connecticut Superior Court, September 17, 2007, page 29

Note 22. In an amici curiaie brief, Christopher Collier and Simon Bernstein, urged the court to interpret the clause in "accordance with the state's historical commitment to good education defined by its success in preparing students for active participation as citizens of the state." Tracing Connecticut's history, the brief attempts to demonstrate that the school system has reformed and adapted to demands over time demonstrating its commitment to education. They argued that this historical commitment became a formal constitutional duty with the adoption of the education clause in 1965.

Note 23. Memorandum of Decision, Connecticut Superior Court, September 17, 2007, page 31

Note 24. Ibid

Note 25. In State v. Geisler, 222 Conn. 672, the court set forth six factors to consider in conducting such an analysis. These are: 1) the test of the constitutional provisions at issue, 2) holdings and dicta of that court and Appellate Court, 3) federal precedent, 4) sister state decisions, 5) the historical approach including historical constitutional setting and the debates of the framers, and 6) contemporary economic and sociological or public policy considerations as tools of analysis.

Note 26. Memorandum of Decision, page 34

Note 27. *Pellegrino v. O'Neill 193, Conn 681.*

Note 28. Memorandum of Decision, September 17, 2007, page 35 The memorandum lists

in detail each of the fourteen components expressing its reservations about the enormity of the work involved and expertise it would require to make a determine as to "what is a high quality preschool?', what are appropriate class sizes?, what programs and services are necessary for at-risk students? Etc.

Note 29. Memorandum of Decision, September 17, 2007 page 38

Note 30. McMillan (1997-1998) detects a new trend or fourth wave of litigation characterized by claims that combine both education and desegregation claims.

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