Note to readers: This is a rough draft; the footnotes, in particular, are sketchy and incomplete. I'd ask that you not circulate it, so as to limit the scope of my potential embarrassment. I apologize for not yet including full citations, but I promise I'm not making it (all) up. I also expect to have a more complete draft by the time of the conference, which I'll happily share with anyone interested. In the meantime, this draft is far enough along for you to follow the basic plot line, and I hope there is enough here to spark discussion at the conference.

Best,

Jim Ryan

Standards, Testing, and School Finance Litigation

James E. Ryan*

Introduction

This essay addresses the intersection of two important phenomena in the world of education law and policy: the standards movement and school finance litigation. All states, with the prodding of the federal No Child Left Behind Act,[1] have established academic standards that describe what students are expected to know and be able to do at various stages in their K-12 education. They have also instituted tests to assess whether those standards are being met.[2]

Nearly all states, at the same time, have been subject to lawsuits challenging the way they fund their schools. According to conventional wisdom, most school funding suits over the last 15 years have focused on the right to an adequate education. One of the obvious difficulties confronting courts in such cases involves defining what constitutes an adequate education. This task is not only conceptually difficult, but it also strains the institutional integrity of courts.

Academic standards, it is thought, can relieve courts of this onerous task, because the standards themselves essentially define what counts as an adequate education.[3] Better still, these definitions come from legislatures, not courts. To be sure, courts that rely on these legislative definitions of adequacy would still have to determine if schools are meeting the standards and what remedy (such as increased funding) to order if they are not. But at least the difficult definitional issue would be resolved. This would help school finance plaintiffs, so the conventional account continues, because it would make courts less hesitant to get involved in school funding cases and would provide them a helpful benchmark by which to assess the sufficiency of funding.[4] Indeed, most commentators seem to believe not only that standards *could* help school finance plaintiffs, but that they *already have* helped them.[5]

I think the conventional wisdom is wrong, on two levels. First, standards have not yet proven especially attractive to courts in school funding cases. Second, if and when they do, school finance plaintiffs – and school finance reform generally – will more likely suffer than benefit. This essay explains why. It also explains why politics, not court decisions, will ultimately play the dominant role in shaping school funding and why, given that reality, racial and socioeconomic integration should be of concern even to those primarily interested in increasing school funding.

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[1] Cite to act

[2] Education Week, Quality Counts 2006

[3] Rebell, *Educational Adequacy, Democracy, and the Courts*; Heise, *Educational Adequacy as Legal Theory*. Cf. Liebman, *Brown* article in VA L. Rev.

[4] Statements from Rebell and others.

[5] *E.g.,* Martin and Peterson

I. History and Theory

A. The Standards Movement

Standards and testing currently dominate the landscape of public education. Over the last twenty years, states, with strong encouragement from the federal government, have established academic standards that set out what students are expected to learn. They have also relied heavily on standardized tests to determine if students are meeting established academic standards. The movement traces back to the 1983 publication of *A Nation at Risk*, which warned in ominous terms that public schools were being flooded by a "rising tide of mediocrity." Advocates of academic standards sought to raise expectations for all students, and to hold them and schools accountable for any failure to meet those expectations.[6]

States began the trend on their own, but the federal government has been leading the charge over the last decade. Beginning in the late 1980s, some states created standards that set out what students were expected know and be able to do in each grade. They also devised tests that were supposed to gauge the results and provide a basis for rewarding or punishing schools and students.

The federal government became involved in 1994, when it enacted two pieces of legislation. The first, the Goals 2000 Act, offered money to states willing to establish academic standards and conduct regular assessments of students.[7] The second, the Improving America's Schools Act (IASA), reauthorized and reoriented Title I of the Elementary and Secondary Schools Act by embracing standards-based reform. In the past, Title I provided funds to support remedial instruction for disadvantaged students. Under the IASA, Title I funds now had to be used to create standards for all students. Thus in order to receive Title I funds, states had to create "challenging" content and performance standards in at least reading and math, develop assessments that were aligned with those standards, and formulate plans to assist and ultimately sanction failing schools. Standards and assessments for Title I schools had to be the same as those established for all other schools within a state. In this way, the federal government hoped to ensure that states would hold all students to the same high expectations and hold all schools, regardless of their student population, accountable for failure.[8]

The No Child Left Behind Act, passed in 2001, follows the same basic approach as the IASA, but it establishes more ambitious goals and places greater constraints on the states. States must still develop "challenging" content and performance standards, now not only in reading and math, but also in science. States must still use assessments that are aligned with those standards, and must hold schools and school districts accountable for failing to meet ambitious achievement goals. But the frequency of tests has increased, and the sanctions for failure have become more severe. In addition, the NCLB requires

[6] See generally Ryan, *Perverse Incentives of the No Child Left Behind Act*, NYU L. Rev.
[7] Cite Act.
[8] See Ryan, *Perverse Incentives*.

that all schools have virtually all of their students scoring at the proficiency level in math and reading by 2014.[9]

As a result of these combined state and federal efforts, all states have now adopted standards and standardized tests, which drive both their curricula and accountability systems. The standards and testing movement has generated a good deal of criticism, much of it focused on the NCLB. Critics charge, among other things, that schools waste too much time teaching to the test, which has the effect of dumbing down the curriculum in many schools; that basing accountability on test scores provides an inaccurate measure of schools and unfairly punishes schools with poor and minority students; and that the federal government has failed to provide sufficient resources to states to enable them to meet the demanding requirements of the NCLB.[10] Much of the criticism, especially of the dominance of standardized tests, comes from the political left – although there is also some criticism from the right regarding the unprecedented federal intrusion into an area traditionally reserved to the states.

One important group on the left, however, has remained muted in its criticism of standards and testing: school finance reform advocates. These advocates have generally made their peace with standards and testing because they believe this movement serves their own goal of increasing resources for schools. To understand why, it is helpful to have some familiarity with the progression of school finance litigation.

B. School Finance Litigation

The conventional account of school finance litigation goes something like this: School finance litigation began in the 1960s and has since proceeded through three waves. The first wave involved federal claims, based on the equal protection clause. Litigants sought equalized funding. This wave ended shortly after it began, when the Supreme Court in *San Antonio v. Rodriguez* upheld Texas' unequal school funding system. Litigants then turned to state courts and state constitutions. They continued to seek equalized funding, arguing that equal protection and education provisions in state constitutions required as much. They met with mixed success, though the losses outnumbered the victories.

Beginning about 1989, roughly the same time that the standards movement began, litigants switched their focus from equitable funding to adequate funding. Thus began the current, third wave, in which litigants rely exclusively on education clauses in state constitutions in order to secure adequate funding for all students. Litigants have also met with mixed success during this time period, but the balance has been in their favor.[11]

Despite plaintiffs' success, so-called adequacy cases have for some time been plagued by an obvious difficulty, which is both definitional and institutional: What constitutes an adequate education, and are courts the proper institution to make that

[9] Cite Act.
[10] Education Week; NYT articles; Fair Test publications.
[11] For description, see Thro; Briffault; Koski and Reich articles.

determination? In order to decide whether states are providing students the opportunity to receive an adequate education, courts need to know what an adequate education looks like. It's not at all obvious. Is adequacy, for example, measured by the mastery of certain skills and the attainment of certain knowledge, regular advancement from grade-to-grade, on-time graduation, preparation for the workforce or college, or perhaps all of these things? Is it an absolute standard or a relative one, such that adequacy itself requires some degree of comparison among schools?

These questions are clearly difficult and concrete answers cannot be found in the usual materials of constitutional interpretation – i.e., neither the text nor drafting history of education clauses offers much help in defining what constitutes an adequate education. Whether courts are the appropriate institution to define an adequate education has thus been a serious concern for all involved in school finance litigation.

C. A Match Made in Theory

Enter the standards movement. Commentators recognized right away that the creation of academic standards, at least in theory, could prove quite useful to school finance plaintiffs.[12] By setting out the knowledge and skills students must acquire, standards essentially define an adequate education. Even better, this definition comes from the legislature, not the courts. Courts in adequacy cases, so the reasoning went, could simply point to the standards established by the state, and simultaneously relieve themselves of the burden of creating their own definition and avoid the charge of extending beyond their proper institutional role. Courts would then presumably be able to look to results on increasingly ubiquitous tests to determine if the standards were being met.

To be sure, if some schools were not meeting legislatively defined goals, courts would still have to determine the cause and identify a relevant remedy. This would shift much of the pressure in school finance cases to the equally difficult question of the link between resources and outcomes. In other words, courts would still have to determine whether schools had sufficient resources to meet the prescribed outcomes.

But at least the knotty definitional problems would be solved. Solving this particular problem was supposed to work to the benefit of school finance plaintiffs. To the extent courts were no longer deterred by the difficulty of defining an adequate education, they would be more willing to examine the adequacy of state funding systems, in order to determine whether schools have sufficient funds to meet the legislature's own definition of an adequate education.

This initial insight highlighted a *theoretical* connection between standards and school finance litigation. Oddly, however, it has developed over the last decade into something resembling conventional wisdom regarding the *actual* relationship between standards and school finance litigation. Commentators who support court involvement in school funding litigation, as well as those who oppose it, share the assumption that the

[12] Liebman

standards movement has already been and will continue to be a boon to school finance plaintiffs. Thus, proponents of school finance reform tend to celebrate the synergy between standards and school finance reform,[13] while opponents lament that standards will continue to fuel court involvement that is illegitimate, futile, or counterproductive.[14] Indeed, both groups seem to believe, in the words of two critics of court-ordered school finance reform, that "plaintiffs across the nation are turning classroom failure into courtroom success."[15]

As I mentioned at the outset, I think this conventional wisdom is wrong. Contrary to what most commentators assume, standards have not yet proven especially attractive to courts, and if and when they do, school finance plaintiffs will more likely suffer than benefit. To understand why, one has to pay close attention to how courts are actually deciding so-called adequacy cases.

II. Reality

A. Neither Equity Nor Adequacy, But Comparability

If courts relied on academic standards in adequacy cases, these cases would follow a pretty similar pattern. Standards would define the outcomes that would constitute an adequate education, and courts would work backwards to determine the resources necessary to provide an adequate education. In this version of reverse engineering, courts might rely on costing-out studies, which use a variety of methodologies to determine the rough amount of resources necessary to achieve the stated goals.[16] Those resources themselves would be considered "adequate," or the amount necessary for all schools to provide a realistic opportunity to reach the preferred outcomes. Notice that adequacy, under this formulation, does not really have a comparative element: schools would be free to go above and beyond adequacy, either in the results they achieve or in the resources they provide.

But this is not how the cases have proceeded. Most successful cases have a strong comparative focus.[17] A surprising number of cases, given that we are supposedly in the "adequacy" wave of decisions, focus explicitly on equality of educational opportunity.[18] Those that focus more on adequate inputs or outcomes still have a comparative aspect,

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[13] Rebell; Schrag; and others

[14] Martin & Peterson; Heise; Rudalevige

[15] Martin & Peterson

[16] See Hanushek; Costrell for descriptions of costing-out approaches.

[17] Cases have been brought in all but five states, and plaintiffs have succeeded in roughly twenty states and failed in twenty. Most of my discussion focuses on states where plaintiffs have succeeded. I am not aware of any state court that previously rejected a school funding challenge that has since changed its mind because of the advent of the standards movement. Until that occurs, it remains sheer speculation as to whether the standards movement will help plaintiffs in states that have rejected at least one school funding challenge. Standards have begun, but just barely, to influence courts that have already ruled in favor of school finance plaintiffs at least once. Because successful school funding cases are essentially never-ending, at this point it seems more likely that standards, if they have much influence at all, will influence the future path of on-going cases.

[18] E.g., cases from MT; TX; TN; VT.

either in the proof relied upon or in the definition of the adequacy standard.[19] Even those decisions that have only a minimal comparative component do not rely primarily, or at all, on legislative academic standards but articulate their own. Indeed, I found only a single decision, from Kansas, that incorporated state outcome standards as the definition of an adequate education.[20] Some states appear to be moving in that direction, as I discuss below. But the most simple and basic point to recognize about these cases is that they have not yet caught up with the commentary. Courts have not yet taken advantage of the standards movement when defining an adequate education.

The more complicated and ultimately more important point relates to what the courts have done instead. Seventeen state courts of last resort have ruled in favor of school finance plaintiffs since 1989, the advent of the so-called adequacy wave of cases.[21] If one studies these opinions, an interesting pattern emerges: Time and again, courts in so-called adequacy cases have focused on disparities in funding, curricular and extracurricular offerings, qualified teachers, school facilities, and instructional materials. That is, they have focused primarily on disparities in *inputs*, and they have spent less time focusing on disparities in *outputs*. To be sure, the two are often connected, and some decisions highlight disparities in outcomes that are presumed to be caused by disparities in resources. But the driving force in most of these cases seems clearly to be the lack of comparable resources and opportunities among different schools.

This is apparent even in the *Rose* decision, out of Kentucky, said to mark the beginning of the adequacy wave. In that case, the Kentucky Supreme began, as many do, recounting the relevant facts established by the trial court. The facts cited all relate to disparities.[22] The Court described the unequal funding and the resulting curricular disparities among schools with regard to offerings in foreign language, science, math, music, and art. It concluded that "[s]tudents in property poor districts receive inadequate and inferior educational opportunities *as compared* to those offered to students in the more affluent districts." The Court referred to different outcomes on tests, but the bulk of this portion of the opinion focused on disparities in inputs, leading the Court to observe that "[c]hildren in 80% of local school districts in this Commonwealth are not as well-educated as those in the other 20%."

The Court continued the same theme of comparability when defining what the state constitution requires. The constitutional text mandates the provision of an "efficient" system of schools, which the Kentucky Court read to mean a system of "practical equality in which the children of the rich and poor meet upon a perfect level." The system must be "substantially uniform" and provide every child with "an equal opportunity to have an adequate education." The Court then proceeded to list the seven goals of an adequate education, in the form of a list of capacities or skills that students should acquire by the end of their education. This list of outcome goals and the emphasis on adequacy have led most commentators to characterize the Kentucky decision as the

[19] E.g., cases from KY; WY; NH; NJ.
[20] Montoy, 112 P.3d 923 (2005).
[21] Cite cases from: KY; MT; TX; ID; MA; TN; AZ; KS; NY; WY; AR; NC; VT; NH; SC; OH; NJ.
[22] Rose, 790 S.W.2d 186 (1989).

first in a new breed of adequacy cases. But this characterization misses the repeated and clear focus on disparities in opportunities and the concern for equalizing those opportunities. Indeed, after stating that the Constitution requires the state to provide children "an equal opportunity to have an adequate education," the Court emphasized: "Equality is the key word here."

Requiring the state to provide an equal opportunity to obtain an adequate education may not, in theory, be much different than simply requiring the state to provide an adequate education. This may be why most have characterized this as an adequacy case, pure and simple.[23] But doing so obscures the concern with and emphasis on comparability of resources. There is no suggestion in the opinion that the Court would tolerate wildly different resources made available be schools. The Court, for example, acknowledges that local school districts can supplement state funding, but it emphasizes that local efforts cannot be used as a substitute for an "adequate, equal, and substantially uniform educational system throughout the state." In other words, there is a limit to which locally-driven disparities will be tolerated.

Similar concern for disparate resources and opportunities runs through almost all of these decisions. The Montana Supreme Court, in a case also decided in 1989, begins its discussion of the evidence by highlighting funding disparities and disparities in curricula, materials, and instructional equipment.[24] It struck down the funding system because "the *comparative* evidence establishe[d] that spending differences among similarly sized school districts in the state result in unequal educational opportunities for students." In the same year, the Texas Supreme Court also struck down Texas' school funding system, for the same reason: disparities in funding and opportunities.[25] The Court described different levels of school spending, as well as disparities in curricular and extracurricular offerings, including band, debate, and football. The Court concluded that the Texas Constitution, which requires the legislature to create an "efficient system" of schools, prohibits substantial funding inequalities. It requires "substantially equal access to similar revenues per pupil at similar levels of tax effort."

And on it goes. The Massachusetts Supreme Court struck down that state's funding system after comparing the opportunities available in some districts with those available in others.[26] The Tennessee Supreme Court held that there were impermissible disparities in educational opportunities throughout the state, as demonstrated by significant differences in teacher qualifications, student performance, basic educational programs, and facilities.[27] It required that opportunities be substantially equal. The Arizona Supreme Court held that the Arizona Constitution requires the state to educate students "on substantially equal terms."[28] A school funding system which itself "creates gross disparities," the Court concluded, is unconstitutional. The New York Court of

[23] E.g., Thro.
[24] Helena Elementary Sch. Dist., 769 P.2d 684 (1989).
[25] Edgewood, 777 S.W.2d 391 (1989).
[26] McDuffy, 615 N.E.2d 516 (1993)
[27] McWherter, 851 S.W.2d 139 (1993)
[28] Roosevelt Elem., 877 P.2d 806 (1994).

Appeals focused on disparities in teaching, facilities, instructional materials, and student outcomes that exist between New York City schools and the rest of the State.[29] In explaining and justifying its ruling, the Court emphasized that "New York City schools have the *most* student need in the state and the *highest* local costs yet received some of the *lowest* per student funding and have some of the *worst* results." The New Jersey Supreme Court focused on disparities in opportunities and needs between poor, urban districts and their wealthy suburban counterparts.[30] It ordered the state to ensure not just equal funding among these districts, but *additional* funding for the poor, urban districts above and beyond what suburban districts were spending.

Opinions from Wyoming, Arkansas, Vermont, and Ohio follow the same pattern. The Wyoming court ruled that the State must provide an equal opportunity to a quality education.[31] While recognizing that localities could spend above the amount required for a quality education, the court emphasized that the definition of a quality education is dynamic, and "necessarily will change." Should the definition change because of "local innovation," all students would be "entitled to the benefit of that change as part of a cost-based, state financed proper education." The Arkansas court emphasized disparities in expenditures, curriculum, buildings and equipment, and ruled that the state constitution requires equality of educational opportunity.[32] "Equality of opportunity must include as basic components substantially equal curricula, substantially equal facilities, and substantially equal equipment for obtaining an adequate education." The Vermont Court struck down that state's funding system because it resulted in wide disparities in revenues available to local districts.[33] Children in that state, the court concluded, are entitled to "substantially equal opportunity to have access to similar educational revenues." And the Ohio opinion focuses extensively on differences in curricular offerings and facilities among districts, which the court held violated the constitutional requirement that that the state provide a thorough and efficient system of education.[34]

This is not to suggest simply that these cases are "equity" decisions as opposed to "adequacy" decisions. Some surely are better characterized as the former rather than the latter, including those from Montana, Texas, Tennessee, Arizona, New Jersey, Arkansas, and Vermont. But the problem is not (just) with the labeling of these cases, which has given the false impression that most cases since 1989 are about adequacy as opposed to equity.[35] The more important problem is with the labels themselves.

The labels suggest that there is a neat divide between adequacy and equity. The cases demonstrate otherwise by their focus on comparability of resources and opportunities.[36] Courts in these cases generally do not seek to enforce some absolute notion of adequacy, where disparities in resources are ignored, nor do they focus on some

[29] CFE, 801 N.E.2d 326 (2003).
[30] Abbott, 693 A.2d 417 (1997).
[31] Campbell County Sch. Dist., 907 P.2d 1238 (1995).
[32] Huckabee, 91 S.W.2d 472 (2002).
[33] Brigham, 622 A.2d 384 (1977).
[34] DeRolph, 677 N.E.2d 733 (1987).
[35] Cf. Briffault article on equity and adequacy.
[36] Explain theoretical overlap b/w adequacy and vertical equity; see Ryan and Saunders symposium intro.

absolute notion of equity, where exactly equal resources must be provided or where all students must be funded according to their individual needs. Instead, they focus on disparities and seek to ensure rough comparability. One sees this in the focus on disparities in funding, curricula, teacher quality, facilities, and instructional materials. One sees this in legal standards that require "substantial" equality of opportunity. One also sees this in decisions that emphasize the ability of localities to spend more than necessary to provide an adequate education, but caution – as the Wyoming court did – that adequacy is a dynamic standard. The clear implication is that, at some point, local add-ons will create intolerable disparities in opportunities, which will require the state to achieve greater comparability between wealthy and poor districts.

If one were to give in to the temptation to label and categorize these decisions, I suggest that the "adequacy" and "equity" labels be replaced by "comparability." No two decisions turn on precisely the same facts or establish precisely the same legal standard. But if one were looking to capture what seems to be motivating these decisions, as well as the obligations that these courts impose on legislatures, the idea of comparability is quite useful. These courts seem moved by gross disparities in resources and concomitant disparities in opportunities, and they require legislatures, in either specific or general terms, to address those disparities.

To be sure, some courts have established outcome goals, and I do not mean to suggest that courts are not concerned with results. But as I mentioned, only one court has concluded that an adequate education is defined by legislatively-created academic standards. Courts are much more likely to define an adequate education themselves, and many of the court-created standards incorporate notions of comparability. Courts in Wyoming, North Carolina, New Hampshire, and New Jersey, for example, have described the ultimate aim of public education in similar terms: to prepare students to participate as citizens and compete in the employment market or for admission to higher education. Clearly, one's ability to compete for employment or admission to higher education requires comparable educational opportunities at the elementary and secondary level. Thus, the very definition of a suitable or "adequate" education in these cases requires a degree of comparability in opportunity. Otherwise, the ultimate aim of preparing students to compete with one another is a meaningless gesture.

B. Academic Standards and Comparability

Once it is understood that these cases focus primarily on disparities in resources, it is easy to see why academic standards have not proven very attractive to courts. Academic standards do not fit so comfortably within the dominant analytical framework used by courts in successful school finance cases. Indeed, relying on legislative standards to define an adequate education would render irrelevant much of the concern with resource disparities that one finds in current school finance decisions. If the real concern were making sure that students had a realistic opportunity to meet legislatively-created standards, disparities in resources would only be relevant in a tangential way, insofar as schools with greater resources might be producing better results on tests. The central question, however, would be non-comparative: What is the amount of resources

needed to meet the standards? If some schools could provide greater resources and go above and beyond what the standards require, in theory that should not matter.

Similarly, disparities in resources that could not be linked to performance in subjects covered by legislative standards would also be irrelevant insofar as they would not bear on whether students are provided an opportunity for an "adequate" education. Many courts, however, routinely express concern with disparities across a wide range of educationally relevant factors, including extracurricular offerings, facilities, instructional equipment, or the breadth of curricular offerings. Some of these inputs, such as the quality of facilities, might be linked to academic performance, but not all could be. For example, if legislatures can define an adequate education by creating standards for only some subjects, the relative breadth of curricular offerings – not to mention extracurricular activities – would be irrelevant. Even where links could be drawn, the link would be somewhat tenuous, making disparities with regard to these factors less important than they currently are and thus likely reducing the need to address them.

More generally, most courts that have ruled in favor of school finance plaintiffs seem to recognize that an "adequate education" is necessarily a relative concept. Frank Michelman made a similar point about educational adequacy in a seminal article in 1969,[37] and the point has been developed ably by William Koski and Robert Reich.[38] The basic idea is simple: to determine whether one child is receiving an adequate education, you have to know what others are learning. We cannot know, for example, whether an athlete has received adequate training until we know what sort and amount of training her competitor has received. The same is true in education. This comparative perspective is pervasive in current school finance decisions, given their focus on comparability in resources and their use of "adequacy" standards that focus on the ability of students to compete for jobs and admission to higher education. This perspective is in serious tension with the standards movement, which rests on the tacit assumption that meeting the standards is enough, even if some schools and students go well beyond legislatively-created standards.

III. Looking Ahead

I have identified substantive reasons why courts in school funding cases would not be attracted to standards. But it is quite possible that some courts have avoided standards simply because they are relatively new. Assuming standards become more entrenched in the future, we might see more courts relying on them to define an adequate education, even it means shifting focus away from resource disparities to performance. (And rest assured, in the never-ending saga of school finance litigation, there are *always* more cases. So courts interested in shifting focus will have an opportunity to do so.) Indeed, there are some signs of this trend already, as at least two courts – in Texas[39] and

[37] Michelman, 1969 Harv. Foreword.
[38] Koski and Reich, *When Adequacy Isn't*
[39] Neeley, 176 S.W.3d 746 (2005).

Arkansas[40] – have stressed that the legislature should define what constitutes an adequate education.

Here, too, I take issue with the conventional wisdom, which suggests that such a trend will benefit school finance plaintiffs. In my view, using standards to define an adequate education creates three related dangers for school finance plaintiffs and school finance reform generally. First, the use of standards will likely narrow the definition of an adequate education. Second, inevitable reliance on test scores by courts to determine whether an adequate education is being provided will allow states to escape responsibility for resource disparities. And, third, reliance on legislatively-created standards creates perverse incentives for states to lower expectations.

A. Narrowing The Definition of An Adequate Education

Academic standards that exist in the fifty states cover an increasing number of topics, including math, reading, history, science, and foreign languages. But states differ in the subjects covered by standards, as well as in the subjects that are tested. (Tests generally cover fewer subjects than standards.). Even in those states with wide-ranging standards, it is unlikely that the standards capture all that schools can (and should) offer. More to the point, it seems fairly clear that if legislative standards are the primary or sole definition of an adequate education, that definition would be narrower than the definitions (loosely) employed by courts. Indeed, one of the persistent criticisms of the standards and testing movement is that it is narrowing the curriculum, leading schools to abandon subjects that are not tested. Such a trend seems destined to hurt, not help, school finance reform.

As described above, courts that have decided school funding cases in favor of plaintiffs point to disparities not just in academic performance in core classes like reading, math, and science. They also point to disparities in the state of science labs, the availability of foreign language classes and extracurricular activities, and the state of facilities and physical plants. Similarly, those courts that have articulated output goals as their definition of an adequate education tend to speak in broad terms. In the well-known *Rose* decision from Kentucky, for example, the court articulated seven goals, which have since been adopted by other courts when they have defined the meaning of an adequate education. These goals include not just "sufficient oral and written communication skills," but "sufficient grounding in the arts," "sufficient understanding of governmental processes," and "sufficient knowledge of economic, social, and political systems to enable the student to make informed choices." The last goal is the broadest of all and incorporates a comparative element: "Sufficient levels of academic and vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market."[41]

[40] Huckabee, __ S.W.3d __ (2005).

[41] Note as well that with goals stated at this high a level of abstraction, comparability of resources will matter a great deal, for the simple reason that it will be difficult if not impossible for courts to monitor whether these goals are being achieved.

Academic standards generally do not cover territory as broad as that covered by many courts in school finance decisions. If these standards become the measurement of a constitutionally sufficient education, the amount of resources required by court decisions will almost surely decline. After all, the broader the definition of adequacy or the scope of relevant disparities, the more likely that courts will require additional resources.

Consider what (almost) happened in New Jersey. In 1996, the New Jersey Supreme Court ordered the legislature to fund poor, urban districts (the "Abbott Districts") at a level equal to the funding of the wealthiest suburban districts, and also to provide additional resources to address the needs of the impoverished students in the Abbott Districts. Instead of complying with the court order, the legislature articulated educational standards and then calculated – through a jerry-rigged process -- the costs of meeting those standards. The supposed costs of meeting the legislative standards were well below the funding required by the court, and barely above current funding levels. The court stuck to its guns and rejected the legislation as non-responsive to the court's earlier order.[42] But the very fact that the legislature saw enacting standards as a way to avoid an expensive court judgment gives a decent indication of how standards could lead to less, not more, resources for schools if accepted as the benchmark for a constitutionally sufficient education.

More than just money is at stake. To the extent that determining the adequacy of one student's education requires a comparative judgment, using academic standards as the sole measure of an adequate education necessarily invites tolerance of inadequacy. The reason is simple: some schools, because of resources and demographics, will necessarily be able to go well beyond what is required by standards. Where some schools, for example, will be able to do little more than focus on preparing for tests in some subjects, other schools will be able to keep test preparation to a minimum while offering students broader curricular opportunities.[43] Those who champion reliance on standards to define adequacy presumably would be satisfied provided test scores are good and there is perhaps additional evidence that standards are being met. But this is a cramped notion of adequacy, where disparities in opportunities beyond what standards require are all but ignored.

To be sure, the current focus on test preparation in many schools, and the correspondingly narrowed curricular focus, is driven primarily by state and federal accountability systems. These accountability systems, pushed most aggressively by the No Child Left Behind Act, punish schools, teachers, and in some states students for poor performance on tests. Simply increasing resources will not necessarily alter this focus in schools that are doing poorly on tests. But to the extent accountability systems align with the definition of an adequate education, there will be correspondingly less pressure to require schools to do any more. Whatever pressure exists, moreover, will have to contend with the fact that resources are pegged to standards and not meant to support curricular offerings, facilities, or extracurricular activities that are not covered by those standards.

[42] Abbott, 639 A.2d 417 (1997).
[43] Cf. Traub NYT Mag. article.

One could accept, of course, that standards may hurt school finance plaintiffs in states where courts have already ruled in their favor, but nonetheless argue that the use of standards can only help plaintiffs in states that have already rejected or have never decided a school funding challenge. After all, if standards persuade courts to enforce educational rights when they were not willing to do so before, how could that not help plaintiffs? It is a fair point. A win is better than a loss. But there are at least three things to keep in mind in thinking through this issue.

First, standards would only seem to be relevant to adequacy cases, and some states have already rejected adequacy claims. There is little reason to believe that a new claim, based on academic standards, will cause these courts to change their minds. Second, some state courts have rejected claims seeking equalized funding but have not yet addressed claims based on an adequacy theory, while others have not confronted a school finance case at all. It is not clear that the mere existence of standards will motivate these courts to rule favorably in an adequacy suit. Indeed, given the degree to which resource disparities have already motivated many courts in successful "adequacy" cases, there seems to be just as much reason to expect that similar disparities would motivate courts in other states. If this assumption is correct, it follows that plaintiffs may be settling for less if they successfully persuade courts to rely on standards to define an adequate education, rather than persuading courts to rule that gross disparities in resources deny students adequate educational opportunities. Reliance on standards can therefore help plaintiffs in states where it is clear that courts would rule in their favor *only because* of the existence of standards, and *not* because of resource disparities. It is impossible to guess how many states will fall into that category, but it is unlikely to be a large number. So far, the number is one, at most – Kansas arguably falls into this category.

B. Test Scores as Shield, Not Sword

Although standards and tests are not identical, it is difficult to disentangle the two. In theory, standards define a broad range of knowledge and skills that should be acquired in a number of subjects at each grade level. These standards are supposed to drive the curriculum, not tests. Test results give some indication of whether those standards are being met, but they usually cover only a small portion of what standards cover. Nonetheless, for accountability purposes, test scores are the primary if not sole measurement of success. As a result, in many states and schools, tests are the de facto standards because they drive the curriculum. That is, schools teach to the tests and ignore standards (and entire subjects) that are not tested.[44]

Test scores will undoubtedly become relevant in school funding cases if standards are used to define an adequate education. Test scores, after all, offer the best existing proof of whether standards are met. It is possible, as I discuss below, to imagine courts adopting standards as the definition of an adequate education and then placing little weight on test scores, at least initially. But those scores will likely prove difficult to

[44] See recent Ed. Week and NYT articles.

ignore for very long, and states can be expected, where scores are favorable, to press the point that test scores prove that funding is sufficient.

Indeed, a moment's reflection reveals that increased reliance on test scores will most likely help defendants, not plaintiffs, in school funding cases. Many courts have held that disparities in resources alone prove that states are not providing a constitutionally sufficient education, whether the constitutional requirement is defined in equity or adequacy terms or something in between. Switching to standards to define an adequate education necessarily means switching from an input focus to an output focus. Standards, after all, define what students should know and be able to do, not what they must be provided by way of teachers, class sizes, and funding.

Inadequate test scores could be used as proof that the standards are not being met. This in itself, however, would not necessarily lead a court to order increased funding. Instead, it would trigger an inquiry into whether the disparities in test scores relate to insufficient funding. If, but only if, that connection can be made, will plaintiffs succeed in their quest for more funding. In a sense, then, test score disparities might be necessary but not sufficient to prove the need for greater funding.

Now imagine that test scores are not inadequate but there are nonetheless large resource disparities. Under the dominant approach in school funding cases, the resource disparities themselves would be enough to trigger corrective action by courts. Under a standards-based approach, however, presumably the test scores would go a long way toward excusing resource disparities. This is because the resource disparities themselves would not matter, only the results. If adequate results could be achieved within a system marked by disparate resources, presumably the constitutional standard would be satisfied. In this way, test scores will likely emerge as a one-way ratchet downward toward less, rather than more, funding.

If this seems overly pessimistic, consider three different decisions, from three different states. In 1989, the Texas Supreme Court held that the state constitution, which required the legislature to create an "efficient" system of public schools, required substantially equal resources for schools.[45] "[I]n other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort." The court made clear that localities could supplement funding, provided that the state created an "efficient system" of schools. But the focus of the opinion was on the vast disparities in resources available to schools, and the court made it clear that these "inequalities are . . . directly contrary to the constitutional vision of efficiency."

By 2005, however, the Texas Supreme Court had altered its focus from disparities in inputs to results.[46] The constitutional standard, the court now emphasized, was "plainly result-oriented," creating "no duty to fund public education at any level other than what is required to achieve a general diffusion of knowledge." The court went on to

[45] Edgewood, 777 S.W.2d 391 (1989).
[46] Neeley, 176 S.W.3d 746 (2005).

reject plaintiffs' argument that existing funding disparities, and disparities in educational achievement, were unconstitutional. Why? Because test scores were rising. Period.

The court recognized that there were still funding disparities, and that funding might not be sufficient to meet all curricular demands. It recognized that there were wide gaps in performance, that drop out rates were high, that relatively few students were prepared to enter college, and that there was a shortage of highly qualified teachers. But none of this ultimately mattered "because the undisputed evidence is that standardized test scores have steadily improved over time, even while tests and curriculum have been made more difficult." Because the legislature was not acting arbitrarily in determining the funding necessary for students to perform well on the tests, the court was satisfied.

In the most recent decision from North Carolina, the supreme court also placed a good deal of emphasis on test scores.[47] These scores were used, along with other output measures, such as graduation rates and post-secondary education success, to gauge whether the state was meeting its constitutional requirement. The court acknowledged that "at-risk" students failed to achieve proficiency on standardized tests in numbers far below the state average. But this was not enough to deem the funding system unconstitutional. It simply suggested a problem, but it remained necessary to determine whether poor test performance was related to a lack of resources. Plaintiffs, in other words, still had the burden to "show that their failure to obtain [a constitutionally sufficient] sufficient education was due to the State's failure to provide them with the opportunity to obtain one." Ultimately, the court determined not that the legislature had to provide more funds or reduce resource disparities, but simply that it "assess its education-related allocations" to local schools.

In the most recent decision from the Court of Appeals in New York, that state's highest court, the state contended that rising test scores indicated that children in New York City were receiving a constitutionally sufficient education.[48] The court's response was telling. The court first began by detailing the resource disparities between New York City schools and the remainder of the state. The court then indicated that "[a] showing of good test results and graduation rates among [New York City] students – the 'outputs' – might indicate that they somehow still receive the opportunity" for a constitutionally sufficient education. It went on to conclude that the test scores, contrary to the state's assertion, were not good enough to excuse the input disparities. But notice that the court tacitly accepted the state's premise: that decent test scores can excuse inadequate or unequal resources. And notice, too, that it was the state – not plaintiffs – who sought to use test scores in order to defend the funding system.

These three decisions are cautionary tales. All suggest that adequate test scores may be used by courts to excuse resource inadequacies and disparities. At best, inadequate test scores will lead courts to examine resource deficiencies to determine if there is a connection between the resources and the test scores. If test results captured all that schools should offer to students and were decent measures of whether students were

[47] Hoke, 599 S.E.2d 365 (2004).
[48] CFE, 801 N.E.2d 326 (2003).

truly receiving an adequate education, this entire approach would make a great deal of sense. But even the strongest testing advocate would have difficulty asserting that test results tell you everything you need to know about the adequacy of education being offered at a particular school. Yet if test scores become the main benchmark to determine if an adequate education is being provided, test scores may indeed tell courts all they need to know about adequacy when it comes to funding.

There is one possible way to avoid focusing exclusively or primarily on test scores: costing-out studies. These studies seek to determine the resources schools need to achieve a particular outcome. There are a number of different ways to conduct costing-out studies, but the two most dominant seem to be the professional judgment approach and the successful school approach. Under the former, a group of school professionals, including teachers and administrators, give their best judgment about the resources needed to meet particular goals. Under the latter, schools that are performing well provide the benchmark used to determine the resources necessary for success. Some courts have already ordered costing-out studies, and it is possible that more will.

Relying on these studies could lead courts to downplay test results. Courts might simply order that states provide whatever the studies indicate is necessary to achieve success. But it seems difficult to imagine that courts will be able to ignore test scores for very long, even if they initially order legislatures to abide by costing-out studies. Suppose test scores rise while funding disparities remain, or before the legislature has funded schools at the level required by the relevant costing-out study? It is not as if costing-out studies are hard science. They are good guesses about what is needed to succeed. Test scores, in turn, are hard proof of success. Courts will have to be strong-willed to remain focused on what a group of school professionals estimate is needed, or on what other schools are spending, if concrete evidence suggests that some schools can perform well on tests while spending relatively little.

Notice, too, that even if costing-out studies are followed, they will likely bring many courts right back to where they started, because the studies essentially focus on comparability of resources. This is easiest to see with regard to those studies that use "successful" schools as the benchmark. Those successful schools are most likely schools that are funded at or above the state average; it would be astonishing if they were funded below the state average. If courts order legislatures to match the resources available at these schools, they will be effectively ordering legislatures to ensure a rough comparability of resources.[49] Indeed, it's possible that courts will discount the resources needed to succeed if it turns out that the comparison schools are more successful than necessary, meaning they go beyond meeting legislative standards. At the end of the day, then, using legislative output standards to define an adequate education and a costing-out study to determine the necessary inputs may be, at best, no more than a circuitous route back to where many courts already are. At worst, it might be a circuitous way to take one step back.

[49] See Costrell, *Massachusetts'* Hancock *Case and the Adequacy Doctrine*.

C. Manipulable Standards and Perverse Incentives

Relying on legislative standards to define adequacy, and test results to determine if an adequate education is being provided, suffers from an additional flaw: it creates perverse incentives for states. If states are going to be forced to provide sufficient resources to ensure adequate opportunities to meet standards and pass tests, they will have an incentive to make that enterprise cheaper by lowering standards and making tests easier to pass. Thus, even if costing-out studies are followed by courts, and even if those studies indicate the need for greater resources, states under a standards-based approach still have an out: make education cost less by lowering standards and making tests easier to pass.[50]

A similar phenomenon is already occurring as a result of the No Child Left Behind Act, which creates similar, perverse incentives. NCLB penalizes school districts and schools if an insufficient number of students in any given school fail to reach "proficiency" on state tests in reading, math, and science. The sanctions increase in severity every year that the benchmarks are not met, while the benchmarks themselves become more ambitious every year. The NCLB oddly couples this regime of sanctions and ambitious goals with complete laxity regarding state standards and tests. States still get to articulate their own standards, make up their own tests, and set the scores needed to be considered proficient.

It should not have been hard to foresee what states might do to avoid being sanctioned: play around with either the tests themselves or the scores needed to be considered proficient. And this is exactly what a number of states have already done. Louisiana, Texas, Colorado, and Connecticut have all lowered the test scores needed to be considered proficient for purposes of the NCLB.[51]

If courts rely on legislative standards to define a constitutionally sufficient education, they will essentially be replicating the problem created by the NCLB. Legislatures will be required to fund an "adequate" education, but they will be allowed to determine the content of an adequate education. If states have lowered standards or manipulated test scores to avoid NCLB sanctions, it is hard to see why they would not also lower standards or manipulate test scores (or the test themselves) to avoid paying the check delivered by courts.

If comparability of resources is the benchmark, by contrast, it is harder for the state to game the system, for the simple reason that localities typically have the freedom to spend what they want on their local schools. Unless the politics of school finance change dramatically, there will always be localities that are allowed to and do spend a good deal more on their schools than other localities spend on theirs. State courts generally allow this, but caution, either explicitly or implicitly, that local, supplemental funding cannot grow so large that it creates gross disparities between property-rich and property-poor school districts. Thus, if rough comparability of resources remains the

[50] See Heise, *Educational Adequacy as Legal Theory*.
[51] Ryan, *Perverse Incentives*.

goal, the benchmark of a constitutionally sufficient education will not be within the control of the legislature. Indeed, state legislatures inevitably will be forced to keep up with spending increases by localities, so as to avoid large gaps between what poor districts spend and what rich districts spend.

In sum, increased reliance on academic standards to define an adequate education seems just as likely to disadvantage school finance plaintiffs and retard school funding reform as it is to move it forward, if not more so. Compared to an approach that focuses on comparability of resources, a standards-based approach seems certain to narrow the definition of an "adequate" education, which in turn will reduce entitlement to resources. The shift in focus from resources to outputs seems likely to help states more than plaintiffs insofar as inadequate outputs will be necessary but not sufficient to prove the need for more resources. By contrast, adequate outputs, namely decent test scores, may be used to excuse resource disparities. Even if courts act aggressively and order states to increase resources to schools that need them, states would always have the option of lowering standards and dumbing down tests in order to reduce the costs of education.

IV. Incentives, Institutional Capacity, and Integration

Whether courts should focus on resource disparities or academic standards is a question of interest not only because the choice will affect school finance plaintiffs and school finance reform generally. It is also of interest because it highlights a deeper and more fundamental issue regarding school funding reform: the efficacy of court decisions and the institutional capacity of courts to force legislatures to comply with court rulings.

A. Interminable Cases and Intractable Legislatures

The two central problems with "successful" school finance cases are that they never end and legislatures tend to be recalcitrant. In states where legislatures are already interested in school funding reform, court orders can provide both a useful nudge and political cover. In these states, the particular theory used by a court is not irrelevant, but it probably matters less than a court's basic directive to legislatures (however described) to increase funding for schools that lack necessary resources. Legislatures already interested in reforming school funding will act on that directive and use it to justify legislative measures that might not be universally supported in their states.

Although this dynamic characterizes the litigation and legislative responses in some states, including Kentucky, it is the exception rather than the rule. In most states, legislatures are not keen to follow a court's directive regarding school funding, which explains why so many of these cases involve multiple trips to a state's highest court. In these states, courts must recognize that how they define the right at stake may matter quite a bit. They must also pay close attention to the incentives created by their rulings and the ease or difficulty with which legislatures can circumvent court decisions. Ultimately, courts must also recognize, as should those interested in school funding reform, the limits of a court's institutional capacity to force legislatures to comply with judicial rulings in both the near term and the more distant future.

If we start with the assumption that legislatures have an incentive to minimize the effect of a court decision striking down a school funding system, it becomes apparent why using legislative standards to define an adequate education may be counterproductive. This approach effectively allows the party interested in maintaining the status quo to define for itself its own obligations to improve upon the status quo. An approach that focuses instead on resource disparities and requires states to achieve some rough comparability in resources is less easily avoided, for reasons described above. Using resources rather than outcomes as the benchmark also raises far less complicated questions for courts, as it avoids the need both to define outcome benchmarks and calculate the resources needed to achieve them. Focusing on resources thus seems a better fit with the limited institutional capacity of courts.

Indeed, requiring legislatures to avoid gross disparities in resources is a relatively straightforward task for courts as compared to defining outcomes and determining the resources needed to achieve those outcomes. Courts can plausibly explain that comparable resources are required to provide adequate educational opportunities for all students, based on the common sense observation that resources create opportunities. Courts need not define the precise content of an adequate education nor determine the precise level of resources needed to fund an adequate education. Instead, they can simply ensure that schools have comparable resources and leave decisions about how to spend those resources with school officials.

To be sure, what is actually achieved with resources provided to schools is ultimately what matters the most. But courts are not educators, and it is unrealistic to expect that they can ensure that money is effectively spent. (It is also reasonable to expect that state legislatures have every incentive to ensure that state money is well spent.) Courts are also at a comparative disadvantage when it comes to figuring out how much money is "enough" to achieve adequate outcomes, or even to define what those outcomes ought to be – except, perhaps, at a high level of abstraction. Those in the best position to determine what is "enough" to provide adequate opportunities are those property-rich school districts that have the ability to spend what they wish to spend on their schools. Courts need not ensure, and cannot realistically ensure, that all school districts are funded at the same level as the wealthiest districts in a state. But they can at least attempt to ensure that a state's school funding system is not marked by gross resource disparities. I would submit that if courts are trying to ensure that all students have adequate educational opportunities, eliminating gross resource disparities should be the primary focus of school funding cases.

This approach, even if successful, will not solve all of the problems faced by schools. In particular, it would not completely address the stubborn fact that students with greater needs require more resources in order to have a meaningful chance at succeeding in school. Schools of concentrated poverty thus will need more resources than the average school in order to provide comparable opportunities for their students.

It may be that assuring additional resources to such schools is simply beyond the capacity of all but the most tenacious state courts.[52] But even here, courts would do well to pay attention to political incentives. Legislatures are not going to have a huge incentive to provide significant, additional resources to impoverished schools if, as is the case in most states, those schools do not have much political clout. Most state legislatures are dominated by suburban legislators, while most impoverished schools are in urban or rural areas. One can expect legislatures to resist court orders that direct them to devote substantial resources – above and beyond that necessary to eliminate gross disparities – to schools not of interest to the bulk of their constituents. This is precisely what happened in New Jersey, and it is precisely what is happening in New York: both state legislatures resisted or are resisting court orders requiring substantial increases in funding directed to urban schools.

A more politically productive approach would be to focus on needy students, not needy schools. Nearly all districts, not just urban or rural ones, have some poor students, meaning those who are eligible for free and reduced-price lunch. If courts require legislatures to provide additional aid for needy students, nearly all districts would receive some benefit. Obviously, the amount of the benefit will be greater in schools that educate a larger number of poor students than schools that educate relatively few. But at least more districts would have a stake in the benefit, which presumably would create more legislative support for programs that provide additional assistance to needy students.[53]

Spreading money across states and districts played a key role in the continued support for the federal Title I program, which, at least prior to the No Child Left Behind Act, ostensibly sought to provide greater assistance to needy students. To be sure, dispersing money rather than concentrating it will mean that the neediest schools will receive less than they might through a more targeted program. But the real choice is most likely between receiving nothing and receiving something, not between receiving a lot and receiving a little.

B. The Continued Relevance of Integration

The problems facing urban schools lead to the final point. Educational and funding needs are not static, but evolve over time and change. Courts that commit to enforcing education clauses and superintending funding systems are necessarily committing to a never-ending process, whether they admit as much or not. In states where legislatures do not embrace court decisions in school funding suits, the need for continued oversight is even greater. Even if courts pay attention to political incentives and structure their decisions to avoid creating perverse incentives, legislatures will have opportunities to dampen the effect of any court decision.

This creates tremendous pressure on courts. Some, like the Supreme Court of New Jersey, may be up to the task and willing to issue decision after decision, imposing more and more precise obligations on legislatures. Others, like the Supreme Courts of

[52] New Jersey is the obvious example of an unusually tenacious court.
[53] Discuss Maryland example in Ryan and Saunders.

Ohio and Alabama, might simply throw in the towel and retreat from earlier rulings in the face of legislative resistance (and a change in the make up of the court). Even those courts that appear now to have the necessary stamina may ultimately tire of the project, which, to repeat, has no ending point.

All of which suggests that, ultimately, politics will play the dominant role in setting funding levels.[54] Legislatures will not necessarily defy court orders, but they can be expected to use whatever room they are given to reach an outcome that is politically acceptable, even if legally deficient. The politics of school funding, in turn, are not especially healthy. As already discussed, school districts that may have the greatest needs often do not have much political clout in state legislatures. Legislatures will have every incentive, therefore, to do as much as is politically acceptable or necessary with regard to needy schools, but not much more.[55]

School funding decisions can and do fight against this tendency. But these decisions do nothing to change the basic politics of school funding. It is therefore not surprising that funding reforms required by courts are rarely self-sustaining and instead require persistent monitoring by courts. Some courts have stayed the course, while others have tired and faded from view. It seems unrealistic to expect that many courts are up to the task of perpetually telling legislatures what to do.

The ultimate challenge with regard to school funding is thus to consider ways to create incentives for legislatures to care equally about all schools. This necessarily means looking beyond courts and school funding cases and focusing directly on school funding politics. One obvious fact that leaps off of this particular page is that schools – and school districts – are highly segregated by race and class. When schoolchildren are separated by race and family income, as they are in many school systems today, it is all too easy to shortchange schools that house disadvantaged students, for the simple reason that legislatures – both state and local – can direct resources where their more powerful constituents demand they be directed.

If – and it's obviously a big if -- schools were instead integrated by race and income, advantaging already advantaged schools and students becomes much more difficult. And, indeed, the political incentives to do so would be reduced. This basic tying strategy, developed by advocates for school desegregation, has become lost in the recent embrace of standards and testing, which operate from the implicit premise that an adequate education can be provided in schools that are isolated racially and socioeconomically. But tying the fate of poor and middle-class children may still be the most effective strategy for assuring a meaningful opportunity for an adequate education for all students.[56]

This essay is not the place to describe the ways in which integration could be increased, and I do not mean to suggest that increasing integration would be easier than

[54] This is obviously also true in states whose courts have rejected school funding challenges.
[55] See Ryan, *Influence of Race on School Finance Reform*.
[56] See Ryan, *Schools, Race, and Money*.

securing some increased funding from courts. It will most likely be more difficult. My only point is that even those dedicated primarily to increasing resources for schools ought to recognize that integration may be the key to creating a stable, adequate, and equitable funding system, one which is not perpetually dependent on the tenacity of state courts. Unless and until the basic politics of school funding change, courts will necessarily be fighting uphill battles in a war of attrition.

Conclusion

I am obviously skeptical about the usefulness of relying on standards and testing in the context of school finance litigation. That said, I do not mean to deny the usefulness of test-based accountability in crafting political arguments demanding that legislatures provide resources sufficient to enable schools to prepare students for the battery of tests they must take. Short-term needs for basic resources, however, should not cloud judgments about the proper definition of a right to education. This is equally true in states whose courts have already recognized an enforceable right to education as well as in those states whose courts have not done so. In both sets of states, it may be tempting and even useful in the short run to hitch any definition of a right to education to standards and testing, but in the long run, doing so will inevitably diminish or confine the meaning of that right.

More importantly, advocates for school finance reform should recognize that court-created rights, even robust ones, are a temporary fix and ultimately may be no match for the politics of school funding. If courts, state or federal, recognize a "fundamental" right to education, which is the subject of this conference, students may indeed benefit in the short run – although even this is not guaranteed. In the long run, however, educational opportunity will be determined primarily by local, state, and federal legislators. Court decisions fight against school funding politics, but they do little to change them. Gaining recognition of a fundamental right to education, therefore, may be less important than figuring out ways to alter current political incentives, which seem aligned to shortchange the neediest schools.