# UNEQUAL TREATMENT IN STATE SUPREME COURTS: MINORITY AND CITY SCHOOLS IN EDUCATION FINANCE REFORM LITIGATION

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*This Note's primary purpose is to test Professor James Ryan's assertion that at least two extra legal factors—the predominant race and setting of plaintiff school districts—have an influence on the outcome of education finance reform litigation. Although the subject matter of this Note is education finance reform litigation, its findings may be significant to readers who have an interest in judicial decision-making as well. Yohance C. Edwards and Jennifer Ahern conduct a quantitative study that surveys the education finance reform litigation that has reached the respective state supreme courts of forty-one states. After analyzing the various factors that have been evaluated in previous quantitative studies of education finance reform litigation, the authors conclude that none of these factors explains why minority and city school districts fare poorly in this litigation. This Note is the first quantitative study of education finance reform litigation to include the number of plaintiff school districts as a variable. The authors find that along with race and school district setting, this variable does have an association with outcome. The authors conclude by discussing how the results of their study suggest that multi-racial coalition building may be beneficial for all potential education finance litigation plaintiffs.*

> Today, education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[1]

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[1] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

Every state in its constitution has an education clause that guarantees public education to all of its citizens.[2] Since 1971, there has been litigation in the highest courts of forty-one of the fifty states regarding precisely what type of education is required under each respective state's constitution and how much education financing is required to produce it.[3] The results of this litigation have been unpredictable by conventional standards.

This Note analyzes the role of race and school district setting[4] in this litigation, demonstrating that these two factors are more accurate predictors of outcome than traditional legal factors. Other factors evaluated in this Note include: constitutional language, wave of litigation, wealth gap between schools in the state, percentage of school revenue from local sources, per-pupil spending, average teacher salaries, judicial selection method, liberalism in the state, percentage of the state population that is urban, percentage of the state population that is minority, median household income in the state, and political culture in the state.

Commentators have argued that the success or failure of these suits does not correlate strongly with the strength of the education clauses, which varies from state to state.[5] Another commentator has

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[2] *See* ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2d, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. LXXXIII; N.J. CONST. art. VIII, § 4, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1. *But see also infra* note 14.

[3] Delaware, Hawaii, Mississippi, Nevada, and Utah have had no litigation at all. Indiana, Iowa, South Dakota, and New Mexico have had education finance reform litigation, but the cases in those states never reached the state supreme courts. *See* Advocacy Ctr. for Children's Educ. Success with Standards (ACCESS), Status of School Funding Litigation in the 50 States, *at* http://www.accessednetwork.org/states/index.htm (last visited Nov. 2, 2003) (summarizing litigation history in every state studied in this analysis).

[4] In particular, this Note demonstrates that minority and city schools fare worse in education finance reform litigation. *See infra* note 84 for the definition of school district setting used throughout this Note.

[5] *See, e.g.*, William E. Thro, *School Finance Reform: A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 540–42 (1998); John Dayton, Serrano *and Its Progeny: An Analysis of 30 Years of School Funding Litigation*,

gone so far as to argue that neither the language of the state constitutions nor the facts of these cases have any correlation to their outcomes.[6] Even if these commentators are correct, there may be alternative explanations for the results in this body of judicial decisions. James E. Ryan, associate professor of law at the University of Virginia School of Law, argues that race is one factor that influences the outcome of education finance reform litigation.[7] He presents strong evidence that predominantly minority school districts, especially urban minority districts, have been less successful in education finance reform litigation than predominantly white districts have been. Although Ryan's recounting of minority school districts' performance record is extremely valuable, he acknowledges that his analysis does not account for a variety of other factors that could explain why these districts have been less successful in court.[8] A few scholars have performed quantitative evaluations of education finance reform litigation, but remarkably, none has included the predominant race of the plaintiff school districts or school district setting in its analysis.[9]

This Note builds on previous studies by including the predominant race and setting of the school districts bringing suit in a quantitative analysis of education finance reform litigation. Race and school district setting are analyzed alongside factors that Paula Lundberg and Karen Swenson examined in their quantitative studies of education finance reform litigation.[10] The analysis in this Note addresses two main questions:

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157 EDUC. L. REP. 447, 456–57 & n.52 (2001) ("There is no strong correlation between the strength of constitutional language and the outcome of school funding cases.").

6 Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 468 (1996) (arguing that it is difficult "to find significant differences among the cases to explain the outcomes").

7 *See* James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432 (1999).

8 *Id.* at 435 (describing Ryan's article as "a first look at the evidence and an invitation to those with the appropriate analytical skills to take a closer inspection of the data"). Professor Ryan has written extensively on race and education. *See generally* James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043 (2002); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999); James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529 (1999); James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335 (2000).

9 *See generally* Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101 (2000); Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147 (2000). There are also some methodological problems with these studies, and therefore their results may be unreliable. *See infra* note 41 and accompanying text.

10 For further discussion of the factors analyzed in this Note, *see infra* Part II.

(1) Do predominantly minority and city schools fare worse than predominantly white and noncity schools in education finance reform litigation?

(2) Do any of the factors examined in previous quantitative studies explain why minority and city schools fare worse in education finance reform?

This Note demonstrates that minority and city schools fare worse in education finance reform litigation. It also shows that the disparity cannot be explained by the factors that were examined in previous quantitative studies of education finance reform litigation. The only factor analyzed in this study that may account for the disparity in minority and city schools is the number of plaintiff school districts involved in the lawsuit.[11]

Part I gives a short overview of the course of modern education finance litigation. Part II lays out the contents of the data set. Part III contains the results and analysis. The results reveal that of all the factors analyzed, only the number of plaintiff school districts shows a meaningful association with school district setting, predominant race of plaintiff school district, and outcome. Part IV discusses the implications of the findings. The discussions of this study's implications include the potential benefits that coalition building may offer to both predominantly minority and predominantly non-minority school districts.

## I

## THE HISTORY OF EDUCATION FINANCE LITIGATION

In every state except Hawaii, school districts must use local property taxes to "raise a significant portion of their budgets."[12] Since mean property values can vary tremendously between property-rich and property-poor school districts, deriving a large portion of funding from local property taxes often creates huge funding inequalities.[13] Because some form of public education is a positive right guaranteed by every state constitution, school districts have pursued education finance reform litigation in the vast majority of states.[14] Contrary to

[11] As is the convention in scientific journals, the accuracy of the data analysis was not confirmed by the *New York University Law Review*. Responsibility for any such errors belongs to the authors.

[12] Thro, *supra* note 5, at 525 n.1; *see also* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 54 (1991).

[13] *See* Dan A. Lewis & Shadd Maruna, *The Politics of Education*, *in* POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS 393, 409 (Virginia Gray et al. eds., 7th ed. 1999) (discussing local funding of schools, property tax, and funding gaps within states).

[14] There is some disagreement as to whether Mississippi guarantees a right to education or not, but since there has been no litigation in Mississippi's supreme court, it does not

popular perception, most education finance reform litigation has been filed by predominantly white rural and/or suburban school districts.[15]

In 1971, the California Supreme Court ushered in the modern era of education finance reform litigation with its decision in *Serrano v. Priest*,[16] holding that the California school financing scheme violated both the state and federal constitutions.[17] Due to a lack of "a tradition of extensive constitutional adjudication, the state courts were 'long shots for plaintiffs challenging discrimination in school finance systems'" prior to *Serrano*.[18] Thus, *Serrano* became a landmark victory for education finance reform plaintiffs, providing an important example of success for future litigants in other states.[19] The case became more important when, only two years later, the United States Supreme Court effectively foreclosed federal litigation by ruling against the plaintiffs in *San Antonio Independent School District v. Rodriguez*.[20]

In *Rodriguez*, parents of predominantly minority school children challenged the major inequities in the Texas education finance system.[21] The plaintiffs alleged that the funding system violated the federal Equal Protection Clause. In a 5-4 decision, the Supreme Court ruled for the state.[22] In doing so, the Court rejected the plaintiffs' argument of wealth-based discrimination. Justice Powell, writing for the majority, distinguished the Supreme Court's prior wealth discrimination cases, which had addressed "absolute" deprivation of a right from *Rodriguez*, which addressed "relative" deprivation.[23] The Court also held that there was no fundamental right to education,

affect this Note. *See* Adrian Y. Cover, *Is "Adequacy" a More "Political Question" Than "Equality?": The Effect of Standards-Based Education on Judicial Standard for Education Finance*, 11 CORNELL J. L. & PUB. POL'Y 403, 404 n.6 (2002) (citing scholars who disagree about whether Mississippi has education clause). *But see* MISS. CONST., *supra* note 2.

15 *See infra* Part II.B.1 and II.B.2.

16 487 P.2d 1241 (Cal. 1971).

17 *See* Dayton, *supra* note 5, at 447 ("Most scholars recognize the [C]ourt's 1971 decision in *Serrano v. Priest* as the beginning of the modern era in school funding litigation.").

18 Michael A. Rebell, *Education Adequacy, Democracy, and the Courts*, *in* ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY 218, 226 (Timothy Ready et al. eds. 2002), *available at* http://www.nap.edu/books/0309083036/html/218.html (quoting David C. Long, Rodriguez: *The State Courts Respond*, 64 PHI DELTA KAPPAN 481, 482 (1983)).

19 Dayton, *supra* note 5, at 447.

20 411 U.S. 1 (1973).

21 Rebell, *supra* note 18, at 221 (explaining that plaintiff's school district had only $356 per student for educational programs compared to $600 per student in a neighboring "Anglo" school district, even though it taxed itself at 20% lower rate than plaintiff's district).

22 *Rodriguez*, 411 U.S. at 2–3.

23 *Id.* at 18–23.

pointing out that there was no specific reference to education in the federal Constitution.[24] The Court then held Texas's funding scheme to be rationally related to the legitimate government interest in creating a "large measure of participation in and control of each district's schools at the local level."[25] After the Supreme Court's rejection of the education finance challenge based on the Fourteenth Amendment's Equal Protection Clause in *Rodriguez*, litigants were forced to turn to state courts and state constitutional law.

Following *Serrano*, plaintiffs found some success in state courts, inspiring similarly-situated people in other states to pursue comparable litigation.[26] These early cases were primarily brought under an "equity" theory.[27] Under this theory, plaintiffs argued that the state constitution entitles all children "to have the same amount of money spent on their education and/or that children are entitled to equal educational opportunities."[28] Several of the early state supreme courts to weigh in on education finance reform after *Rodriguez* found that education was a fundamental right under their respective state constitutions, even if it was not a right guaranteed by the Federal Constitution.[29] Though some education finance reform plaintiffs found early success under the equity theory, by the late-1980s education finance reform plaintiffs in many states were losing their lawsuits.[30]

In response, plaintiffs in education finance reform litigation began to shift their arguments from an equity theory to an "adequacy" theory by 1989.[31] The adequacy theory relies on the notion that the state constitutions entitle all children "to an education of at least a certain quality, and that more money is necessary to bring the worst school districts up to the minimum level mandated by the state constitution."[32] Adequacy continues to be the predominant theory plain-

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[24] *Id.* at 35; *see also* Rebell, *supra* note 18, at 222.

[25] *Rodriguez*, 411 U.S. at 49; *see also* Rebell, *supra* note 18, at 222.

[26] *See* Rebell, *supra* note 18, at 226.

[27] *See* Thro, *supra* note 5, at 534.

[28] *Id.* at 534–35. One obvious flaw in the claim that all students are entitled to have the same amount of money spent on their education is that this theory does not account for real differences in the cost of education between school districts. For example, cost of living differences and special needs of students may impact dramatically the true "buying power" of an education dollar. *See* Ryan, *supra* note 7, at 437–38 & n.22.

[29] *See* Serrano v. Priest, 557 P.2d 929, 948–51 (Cal. 1976); Horton v. Meskill, 376 A.2d 359, 371–73 (Conn. 1977); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 333 (Wyo. 1980).

[30] Rebell, *supra* note 18, at 227.

[31] *See* Thro, *supra* note 5, at 536–37. Thro refers to this type of suit as a "quality" claim, *id.* at 536, while most commentators use the term "adequacy." *See, e.g.*, Rebell, *supra* note 18, at 230.

[32] Precisely what level of education would be required in each state would depend in large part on the language of that state's specific education clause. *See infra* Part II.A.1.

tiffs employ in education finance reform litigation. Though the vast majority of state supreme courts have handed down decisions on their respective education finance systems, there is no foreseeable end to this type of litigation.[33] Therefore, a quantitative investigation of the role that race and school district setting play in state supreme courts' decisionmaking processes is necessary in order to better understand potential outcomes.

## II
## DATA SET

The data set for this study includes the most recent state supreme court decisions in forty-one states regarding the constitutionality of the states' respective education finance schemes at the time of data collection.[34] Nine states have multiple supreme court rulings on the merits of unrelated cases.[35] This Note only includes the most recent case from each state to remove potential autocorrelation.[36] Plaintiffs in eighteen of the forty-one lawsuits (43.9%) were successful in having their states' education funding systems declared unconstitutional.

This Note examines factors that the courts evaluated in the cases themselves and that scholars argue have impacted judicial decision-

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[33] *See* Dayton, *supra* note 5, at 464.

[34] Data collection and analysis were completed by April 2003. Decisions after that date were excluded from this study. For the remainder of the Note, the cases included in the study will be referred to as the most recent cases available. See *infra* appendix, table 1 for a listing of the cases included in this study.

[35] The following cases were in states with subsequent litigation and were therefore excluded from this study: Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); City of Cincinnati v. Walter, 390 N.E.2d 813 (Ohio 1979); Olsen v. State, 554 P.2d 139 (Or. 1976); Northshore Sch. Dist. No. 417 v. Kinnear, 530 P.2d 178 (Wash. 1975); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980).

[36] Autocorrelation occurs when observations are not independent of one another. As an example, the amount that one family spends may influence the spending of a neighbor if they are trying to "keep up with the Joneses." In this scenario, the expenditure of the two families would not be independent and there would be autocorrelation. *See* DAMONDAR N. GUJARATI, BASIC ECONOMETRICS 401 (3d ed. 1995). In the context of litigation, any two rulings from the same court may be autocorrelated. This could be due to the precedential value of the first ruling or the presence of the same judges on the court. As an extreme example, if there were twenty rulings on school funding with ten from the same state, any analysis of the rulings in the cases would be dominated by the characteristics associated with decisions made in that one state. This is not desirable if the goal is to understand the characteristics that affect rulings nationally. The gap in success rates between minority and white school districts is much smaller in this Note than it is in Professor Ryan's work. This difference is due in large part to this Note's analysis of only the most recent available cases. If this Note included multiple cases from each state, the gap in success rates would be much greater.

making.[37] These measures represent an "integrated model" that addresses potential legal and extralegal explanations for the outcomes of the cases.[38] The relative predictive values of these variables are compared to one another. This Note does not attempt to include every factor that might correlate with the outcome in education finance reform litigation. Rather, the selection of variables is limited to the factors included in the quantitative studies of Swenson, Lundberg, and Ryan, examining all of the factors they found important in a single quantitative study.[39] The only factor examined in this Note that was not explicitly analyzed in the above studies is the number of plaintiff school districts.[40]

Although other factors are analyzed, this Note focuses primarily on the role of race and school district setting in predicting the outcome of education finance reform litigation. In order to gauge the influence of race and school district setting accurately, it is necessary to understand the relationship of the other factors in the litigation to race, setting, and the outcomes of the cases. This Note reanalyzes the predictive force of many of Swenson's and Lundberg's factors by using an alternate methodology to test their reliability.[41] Once the

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[37] *See generally* Lundberg, *supra* note 9.

[38] *See* Swenson, *supra* note 9, at 1151 n.20 (citing Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 332–33 (1992) (combining legal model and extralegal model to U.S. Supreme Court death penalty cases)).

[39] *See generally* Lundberg, *supra* note 9; Ryan, *supra* note 7; Swenson, *supra* note 9.

[40] The number of plaintiff school districts is not explicitly examined in Professor Ryan's article. However, he does make a distinction between cases with large coalitions of plaintiffs and those with smaller plaintiff groups. This Note's examination of the number of plaintiff school districts is drawn from Professor Ryan's observation. *See* Ryan, *supra* note 7, at 452–54.

[41] The authors' original analysis examined the same set of cases as Lundberg and Swenson. *See generally* Lundberg, *supra* note 9; Swenson, *supra* note 9. Lundberg's and Swenson's quantitative analyses of the results of school funding litigation have a major methodological limitation. They employed regression analysis when it was not an appropriate technique given the data used in the analyses. Swenson's analysis included forty cases, and Lundberg's included forty-one. To conduct regression analysis, it is necessary to have a sufficient number of observations to support the regression model. The exact number required for any particular analysis depends on several statistical issues, but there are some basic guidelines. For a regression analysis, at least fifty observations are required, plus an additional eight observations for every predictor to be examined in the model. A model with six predictors would require $50 + (8 \times 6) = 98$ observations. Both Lundberg's analysis and Swenson's analysis used regression analysis, one with more than ten predictor variables, without having the requisite fifty cases to support the modeling.

The authors of this Note conducted power calculations for logistic regression with the numbers of cases in the Lundberg and Swenson studies. These calculations show that regression analysis with so few observations should not have been able to distinguish any significant predictors of the outcome. When there is only a small number of observations, as is the situation with school funding cases, an analysis with cross tabulations and stratification is more appropriate because it does not require the assumptions of regression analysis. *See* BARBARA G. TABACHNICK & LINDA S. FIDELL, USING MULTIVARIATE

importance of each of these factors is understood on its own, this Note analyzes each factor in relationship to race and setting.

### A. *Legal Factors*

The legal factors used in this data set—the facts and the law before the court—are derived from traditional legal theory.[42] Traditional legal theory posits that judges are unbiased, neutral arbiters who come to an objective decision based exclusively on the law, facts, and methods of judicial decisionmaking.[43] Under this theory, personal bias and outside pressures have no impact on judicial decisions. This study employs six legal factors deemed important to school finance reform litigation—those explicitly considered by courts in their decisions.[44] These variables include: constitutional language, wave,[45] wealth gap between schools within the state, percentage of revenue from local sources, per-pupil spending, and average teacher salaries.

One would expect the legal variables to be the best predictors of outcome in education finance reform litigation. Various commentators have noted, however, that legal factors do not seem to be correlated to outcome.[46] Previous quantitative studies of education finance litigation also indicate that legal factors are weak predictors of outcome.[47] This Note explores the relationship of the legal factors to race, school district setting, and outcome, with the goal of determining whether legal factors explain differences in outcome between racial

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STATISTICS 132 (3d ed. 1996). For further discussion of the methodology employed in this Note and its limitations, see *infra* Part III.

[42] *See* Lundberg, *supra* note 9, at 1105–14 (describing traditional legal theory and legal factors in her study).

[43] *Id.*

[44] This study focuses almost exclusively on financial factors for the following two reasons. First, the courts have "almost universally ignored non-financial factors" in this type of litigation. Thro, *supra* note 5, at 551. Second, the previous quantitative studies upon which this Note builds have also focused on financial factors as the measures of adequacy in education finance reform litigation. *See generally* Lundberg, *supra* note 9; Swenson, *supra* note 9. The authors acknowledge that there is serious disagreement regarding the degree to which educational funding is correlated with educational achievement. However, for the purposes of this Note, the authors do not delve into that debate but rather work under the assumption that more resources will help students given that the courts have put substantial emphasis on financial factors.

[45] Wave is a proxy measure for the predominant legal theory on which plaintiffs tend to rely during the time period of a given case. *See infra* Part II.A.2 (describing wave in more detail).

[46] *See supra* notes 5–6 and accompanying text.

[47] *See, e.g.*, Lundberg, *supra* note 9; Swenson, *supra* note 9.

groups. Each of the legal factors is examined in detail in the remainder of Part II.A.[48]

### 1. *Constitutional Language*

A state's obligation to provide children with an education is defined in the education clause of the state constitution.[49] Every state constitution includes an education clause.[50] The language used in state constitution education clauses falls into four general categories.[51] The type of language used presumably would be one of the most important factors in determining the outcome of education finance reform litigation. That is, it should be much easier for a state with weaker education provision language to meet its constitutional duty than for a state with particularly strong language. Therefore, one would expect states with weaker education provisions in their constitutions to uphold their education funding schemes as constitutional more often than states with stronger education provisions. The weakest education provisions only guarantee that there will be a system of public schools. For example, Connecticut's Constitution states, "There shall always be free public elementary and secondary schools in the state."[52] The strongest education provisions make education the highest duty of the state government. An example is the Washington Constitution which states, "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders . . . ."[53]

For this Note's analysis, the strength of the constitutional language was categorized into four groups using Gershon Ratner's classifications of constitutional language.[54] The constitutional language is relatively weak in the majority of the states: 26.8% of states are in the weakest category, 46.3% in the second weakest, 9.8% in the second strongest, and 17.1% in the strongest.

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[48] Proceed to Part II.B if a detailed understanding of the legal variables is not of interest. Part II.B includes a brief synopsis of the extralegal variables.

[49] *See* Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814 (1985).

[50] *See supra* note 2 and accompanying text.

[51] Ratner, *supra* note 49, at 815–16; *see also* Molly McUsic, *The Use of Education Clauses in Litigation*, 28 HARV. J. ON LEGIS. 307, 319–26 (1991); William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19, 23–25 (1993).

[52] CONN. CONST. art. VIII, § 1.

[53] WASH. CONST. art. IX, § 1.

[54] *See* Ratner, *supra* note 49, at 814–16.

### 2. *Wave of Litigation*

There have been three "waves" of education finance reform litigation,[55] with each wave relying on a distinct legal strategy. The first two waves were both conducted under an equity theory.[56] The first of these waves relied primarily on federal equal protection and was short-lived. Only *Serrano v. Priest* was decided before *Rodriguez* brought this wave to a close. The second wave relied on the state constitutions' equal protection and education clauses.[57] Under an equity theory, plaintiffs and the courts focus on whether or not substantially equalized funding of schools is required throughout the state.[58]

The third wave of cases, which began in 1989, focuses primarily on sufficiency of funds in each school district to provide an adequate education.[59] Under this "adequacy theory," plaintiffs are not asserting that the state constitution mandates equalized funding throughout the state; rather, they argue that the state constitution requires enough funding to provide an adequate education in their school district. This Note includes this variable because some commentators have argued that claims based on an adequacy theory should be more successful than those based on an equity theory.

For the purpose of analysis, the cases were divided into three waves based primarily on William Thro's classifications.[60] Since the

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[55] *See* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995).

[56] *Id.* at 1157.

[57] *Id.*

[58] *See id.* at 1151–62.

[59] *Id.* at 1163. Heise notes that there is some dispute over whether *Helena Elementary School District No. 1 v. State*, 769 P.2d 684 (Mont. 1989), is properly categorized as an equity suit or as an adequacy suit because the decision exhibits "confluence of equity and adequacy" language. See *infra* note 60 for further explanation.

[60] *See* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 598 n.4 (1994) (referencing the idea of waves of litigation, as described in his article *The Third Wave: The Implications of Montana, Kentucky, and Texas Decisions for the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990)). There is some dispute as to whether Thro was correct in labeling the Montana and Texas cases as third wave cases. *See, e.g.*, Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 138 n.192 (1995) (arguing that Montana and Texas litigation were equity, not adequacy, cases). Regardless of Thro's accuracy in labeling those two cases, the concept of three waves of litigation has been widely adopted by scholars. *See* Heise, *supra* note 55; Gail F. Levine, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507, 507–08 (1991).

This Note uses the theory of three waves but agrees with Enrich's characterization of the Montana and Texas litigation. Therefore, Montana and Texas are classified as second wave cases here. The authors recognize that a major limitation to the usefulness of this variable is the fact that some cases address both adequacy and equity concerns and are not

first two waves both rely on an equity theory, they were combined and compared to the third wave. The cases that were litigated in waves one and two comprise 36.6% of the forty-one cases, and the remaining 63.4% took place in wave three.

### 3. *Wealth Gap between Schools in State*

One of the primary issues that plaintiffs attempt to address in education finance reform litigation is funding disparities within the state. In many states, there is a significant spending gap between the wealthiest and poorest school districts. Courts ruling for plaintiffs often cite the large discrepancy in "intrastate per pupil district spending."[61] Therefore, the larger the gap in spending between school districts within a state, the more likely it should be that a state supreme court would find the funding system unconstitutional.

The data for the wealth gap derives from the Census of Governments, which includes per-pupil spending by school district.[62] The authors divided the highest per-pupil spending in each state by the lowest per-pupil spending in the same state and used the result as a standardized measure of the wealth gap between districts within each state. The greater the value of a state's standardized measure of wealth gap, the larger the spending gap was within the state. The mean standardized score for wealth gap of school districts within a state is 2.0 (1.0 indicates equal spending among districts), which means that, on average, the wealthiest school district has twice as much funding as the poorest one.

### 4. *Percentage of Revenue from Local Sources*

Using local sources such as property taxes to generate a high percentage of school funding often creates large intrastate funding disparities. In many instances, a property-poor district may tax itself at a much higher rate than a neighboring property-rich district and still not be able to generate an equivalent level of funding.[63] Although a significant proportion of education funding in many states comes from local sources, the constitutional duty to provide a certain level of edu-

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easily categorized by wave. Despite this limitation, this variable is included because of its prevalence in scholarly discussions of education finance litigation.

[61] *See* Lundberg, *supra* note 9, at 1109.

[62] *See* Econ. and Statistics Admin., U.S. Census Bureau, *Public Education Finances*, *in* 4 CENSUS OF GOVERNMENTS (1997) (issued every five years). This Note uses the information from the edition which was current at the time of litigation in each state.

[63] *See* Horton v. Meskill, 376 A.2d 359, 367 (Conn. 1977) (providing example of property-poor district that has higher taxes but less funding); *see also* Rebell, *supra* note 18, at 221 (giving example from Texas where poorer district taxed itself 20% higher than its neighbor yet only had $356 per pupil to spend compared to neighbor's $600).

cational opportunity lies with the state—not with local government. When high levels of local funding result in large funding disparities, the courts may see this as evidence that the state is unsuccessfully attempting to delegate its constitutional duty. The authors expected to find that the higher the percentage of education revenue that comes from local sources, the more likely a state supreme court would be to declare the funding scheme unconstitutional.

Data on the percentage of revenue from local sources comes from the Digest of Education Statistics.[64] The authors divided the state average of local revenue by the national average for the same year and used the result as a standardized measure of the local revenue. States with a standardized local revenue value larger than 1.0 had more local revenue than the national average, and states with a value below 1.0 had less. The mean local revenue ratio among the forty-one cases in this study is 1.0.

### 5. *Per-pupil Spending*

A central argument for plaintiffs in many education finance reform cases is that insufficient spending, measured in per-pupil spending, makes it impossible for students to receive an adequate education.[65] For the purposes of this Note, per-pupil spending measures the amount of money being spent on education within the state relative to the amount being spent in other states. In some education finance reform cases, state supreme courts compare the per-pupil spending in their own state to that of neighboring states.[66] Both intrastate and interstate funding discrepancies might be relevant to a state supreme court's analysis. Therefore, a state supreme court in a state that spends less per pupil than the national average should be more likely to find the state's funding scheme unconstitutional.

The data for per-pupil spending comes from the National Center for Education Statistics Digest of Education Statistics, which reports average per-pupil spending by state.[67] The authors divided the average per-pupil spending in each state by the national average of per-pupil spending for the same year; the result is used as a standardized measure of per-pupil spending. States with a standardized per-pupil spending value larger than 1.0 spent more than the national

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[64] NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 179 tbl.158, 180 tbl.159 (2001) (issued annually). This Note uses the information from the edition that was current at the time of litigation in each state.

[65] *See, e.g.*, Lundberg, *supra* note 9, at 1109.

[66] *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 197 (Ky. 1989).

[67] *See* NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 64, at 192 tbl.168.

average; states with a value below 1.0 spent less. The mean per-pupil spending score for the forty-one states in this study is 1.0.

*6. Average Teacher Salaries*

Courts have cited teacher salaries in some education finance cases as an important indicator of educational quality.[68] Underlying this measure is an assumption that states attract better teachers by offering higher salaries. Therefore, a state supreme court in a state with lower average teacher salaries might be more likely to declare the funding scheme unconstitutional.

The data for average teacher salary comes from the National Center for Education Statistics Digest of Education Statistics, which provides average teacher salary by state.[69] To account for inflation, the authors divided the average teacher salary in the state by the national average teacher salary for the same year and used the result as the standardized measure of teacher salary. States with a standardized teacher salary value larger than 1.0 spent more per pupil than the national average, and states with a value below 1.0 spent less. The mean teacher salary ratio among the forty-one states in this study is 0.95.

### *B. Extralegal Characteristics*

Various extralegal characteristics affect judicial decisionmaking.[70] This Note examines a wide range of extralegal factors that scholars have suggested might be important, or have found to be important in their studies.[71] Some of the measures directly address an element that might influence a judge, while others are merely proxies for such an influence.

The extralegal variables used in this study include: predominant race of plaintiff school districts, setting of school district, number of school districts involved in the lawsuit, judicial selection method, liberalism in the state, percentage of the state population that is urban, percentage of the population that is minority, median household income in the state, and political culture in the state.[72] The remainder

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[68] *See* Lakeview Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 488 (Ark. 2002); *Rose*, 790 S.W.2d at 197.

[69] *See* NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 64, at 87 tbls.78–79.

[70] *See* Melinda Gann Hall & Paul Brace, *Toward an Integrated Model of Judicial Voting Behavior*, 20 AM. POL. Q. 149 (1992).

[71] *See, e.g.*, Lundberg, *supra* note 9, at 1105–32; Ryan, *supra* note 7; Swenson, *supra* note 9, at 1177.

[72] Previous quantitative studies of education finance reform litigation indicated that some other extralegal factors are associated with outcome. *See, e.g.*, Lundberg, *supra* note 9, at 1105–32 (stating *inter alia* that political culture, percentage of state that is urban, and

of Part II.B details each of the extralegal factors and how each was quantified.[73]

### 1. *Predominant Race of Plaintiff Districts*

Schools in many states continue to be largely segregated by race, and Professor Ryan argues that the racial composition of the school district or districts involved in education finance litigation influences the outcome of the lawsuits.[74] The lawsuits in this Note can be characterized as those brought by predominantly white school districts, those brought by predominantly minority[75] school districts, and those brought by multiracial coalitions.[76] Professor Ryan found that predominantly minority school districts fared worse in litigation than did predominantly white school districts.[77] He specifically pointed out the extremely low success rate of urban minority school districts.[78]

The data for determining the race of these school districts is derived from the National Center for Education Statistics.[79] This Note uses the 50% mark to define the predominant race of school districts when there was a single or small group of plaintiff districts. However, a few cases involved a large multiracial coalition of school districts, and one case involved a truly integrated school district.[80]

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per capita income are extralegal factors associated with outcome); Swenson, *supra* note 9, at 1177 (stating that state liberalism had "statistically significant relationship" with outcome of education cases). *But see supra* note 41 for a critique of these studies' methodologies.

73 Proceed to Part III if a detailed understanding of the legal variables is not of interest.

74 *See* Ryan, *supra* note 7, at 441 nn.32–33 (citing studies which discuss school segregation in America).

75 Latino students were included in the predominantly minority category even though Latinos are not composed of a single racial group.

76 Multiracial classifications used in this Note derive from academic studies by Ryan, *supra* note 7, at 452–53, and the National Center for Education Statistics, *infra* note 79. This Note uses the term "multiracial" only when the white/minority balance is fairly even or when there is a large multiracial coalition. The authors recognize that there are multiracial school districts and coalitions that may be comprised entirely of minority populations but chose to use the term in this way for the sake of simplicity. Only one case, *Seattle School District Number 1 v. State*, 585 P.2d 71 (Wash. 1978), was brought by a single school district that was well-balanced racially and was therefore included in the multiracial category. *See infra* app., tbl.1 (discussing racial balance in *Seattle School District No. 1*).

77 *See* Ryan, *supra* note 7, at 455–57.

78 *Id.* at 455.

79 Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., School District Locator, *at* http://nces.ed.gov/ccd/districtsearch/ (last visited Mar. 2, 2004) [hereinafter School District Locator]; *see also* Ryan, *supra* note 7, at 451 n.75.

80 See cases cited in the appendix, table 1 (Opinion of the Justices No. 338, 624 So.2d 107 (Ala. 1993); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Comm. for Educ. Equality v. State, 967 S.W.2d 62 (Mo. 1998); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978) (integrated district)); see also *supra* note 76 for further discussion about classification of districts as multiracial.

This Note categorizes the plaintiffs in these cases as "multiracial." Of the plaintiffs in the forty-one cases, 56.1% were predominantly white school districts, 31.7% were predominantly minority, and 12.2% were multiracial.

After their initial analysis, the authors created a subcategory for predominantly African-American school districts, again using the 50% mark as the definitional threshold.[81] This Note compares predominantly African-American school districts to the other categories to see if there is a meaningful distinction between minority districts generally and African-American districts. Plaintiff school districts that were predominantly African-American comprised 19.5% of the cases.

### 2. *School District Setting*

Professor Ryan pointed out that city schools fare worse in education finance reform litigation than do noncity schools.[82] The study presented in this Note analyzed school district setting to see if there was some other characteristic of the city school cases that could explain this phenomenon. It seemed particularly important for this Note to address school district setting in conjunction with race, since the majority of students in urban schools are minorities.

The data for school district setting also comes from the National Center for Education Statistics.[83] School districts are divided into three categories based on setting: city, noncity, and city/noncity coalition.[84] Of the school districts in the forty-one cases, 61.0% were noncity, 24.4% were city and 14.6% were coalition.

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[81] Predominantly African-American school districts were singled out because they were the only subset of predominantly minority school districts that had a sufficient number of cases to discuss meaningfully. There is also a particularly strong link between African-Americans and city schools. The majority of African-Americans are educated in city schools which is the other primary factor being examined in this Note. *See* Ryan, *supra* note 7, at 435.

[82] Ryan, *supra* note 7, at 450–51.

[83] *See* School District Locator, *supra* note 79.

[84] The "city school district" category includes cases where a city plaintiff was joined by a few smaller noncity school districts, but the vast majority of the students affected by the outcome would be from the city school district. *See* Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983) (Baltimore City and twenty-three other school districts as plaintiffs). The "coalition" category includes cases that were statewide class actions or which had large numbers of school districts that included both city and noncity schools. The "noncity" category includes both suburban and rural school districts. In several instances, either rural and suburban school districts were plaintiffs together in litigation or classification of a school district as suburban or rural proved difficult to discern. *See* Ryan, *supra* note 7, at 451–53 (grouping rural and suburban schools together). Ideally, suburban and rural schools should be categorized separately since they are certain to have distinct

### 3. *Number of School Districts Involved in the Lawsuit*

The number of school districts that were plaintiffs in the lawsuit was an additional variable that this Note took in account. This variable was meant to act as a proxy for how widespread the dissatisfaction with funding was within the state. The authors were expecting to find that a court would be more likely to find a funding scheme unconstitutional where there were more school districts involved as plaintiffs in a lawsuit.

The number of plaintiff school districts involved in the lawsuits were gathered from the cases, Professor Ryan's work, and the Advocacy Center for Children's Educational Success.[85] The mean number of school districts that were involved in a lawsuit is 31.6.[86]

### 4. *Judicial Selection Method*

There is no uniform method of state supreme court judicial selection; in some states supreme court justices are elected while in others they are appointed.[87] Several studies generally have found no correlation between judicial selection method and judicial decisions.[88] At the same time, some studies have found that in certain types of cases there can be such a correlation.[89] Specifically, these studies have found that

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characteristics. However, since the analysis here primarily focused on race and city schools, this limitation should not have a tremendously negative impact on the study.

[85] *See infra* app., tbl.1 (enumerating number of plaintiff school districts in each of forty-one states studied); Ryan, *supra* note 7, at 451–54 (same); Advocacy Ctr. for Children's Educ. Success with Standards, *supra* note 3 (same). Intervenor school districts were included in this Note's tally of plaintiff school districts.

[86] Two cases had far more plaintiff school districts than the others, Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971) (describing statewide class action in California); DeRolph v. State, 677 N.E.2d 733, 777 (Ohio 1997) (describing "over five hundred fifty" school districts). *See also* Ryan, *supra* note 7, at 453 (enumerating 553 school districts in Ohio litigation). To avoid drawing any incorrect conclusions from these outlying values, the authors recoded any case with over 200 school districts as having 200 school districts.

[87] Even this dichotomy of appointment and election is not entirely clear cut. In many states, nominating commissions are set up to help the governor select justices, in some the governor selects justices on his own, while in others the state legislature selects justices. In many states where justices are appointed, they must eventually face retention elections. *See* Swenson, *supra* note 9, at 1152–53. *But see* Herbert Jacob, *Courts: The Least Visible Branch*, *in* POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS 252, 267–68 (Virginia Gray et al. eds., 5th ed. 1990) (pointing out that state judges rarely lose retention elections).

[88] *See* Victor Eugene Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make: Selection Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25, 34–35 (1979); Swenson, *supra* note 9, at 1153 (citing Burton M. Atkins & Henry R. Glick, *Formal Judicial Recruitment and State Supreme Court Decisions*, 2 AM. POL. Q. 427, 440–45 (1974).

[89] *See* Lundberg, *supra* note 9, at 1127 (citing studies finding that judges in elective states vote strategically on politically charged issues in order to increase their chances of reelection).

in "death penalty, environmental, gender discrimination and abortion" cases, judges act differently depending on how they were selected.[90] One explanation for this may be that these are highly politicized topics. Since education finance litigation is often considered a highly politicized topic affecting taxpayers and voters directly, judicial selection method seemed to merit inclusion in this study. The authors expected to find that elected judges would be less likely to overturn education finance schemes than appointed judges since they are dependent on voters for their judgeships.[91]

The data for judicial selection method was collected from the various state constitutions.[92] States were grouped by whether the judiciary was elected or appointed.[93] The judges were elected in 48.8% of the states and appointed in 51.2%.

### 5. *Liberalism in the State*

At least one study has found that states with a more liberal population are willing to spend more money on education.[94] State liberalism was one of the factors that both Swenson and Lundberg analyzed in their quantitative studies of education finance reform litigation.[95] Both scholars hypothesized that supreme courts in states with more liberal populations would be more likely to find their states' funding schemes unconstitutional than courts in less liberal states would.[96] They reasoned that the judiciary in liberal states would be more likely to intervene where the judiciary found signifi-

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[90] *Id.* at 1128.

[91] This hypothesis is premised on the idea that if the majority of voters wanted education finance reform, the legislative and executive branches would be pressured to change the financing scheme. See Lundberg, *supra* note 9, at 1128 for further description of this hypothesis.

[92] *See* Swenson, *supra* note 9, at 1150–51 & nn.31–34.

[93] All states where justices are initially appointed were placed in the appointed category, even if those judges later face retention elections. *See* Jacob, *supra* note 87, at 267–68 (pointing out that appointive judges rarely lose retention elections); Swenson, *supra* note 9, at 1151 n.35.

[94] *See* ROBERT S. ERIKSON ET AL., STATEHOUSE DEMOCRACY: PUBLIC OPINION AND POLICY IN THE AMERICAN STATES 85 tbl.4.4 (1993) (summarizing effect of opinion liberalism on per pupil educational expenditures); Lundberg, *supra* note 9, at 1119 (describing Erikson study).

[95] *See* Lundberg, *supra* note 9, at 1119; Swenson, *supra* note 9, at 1166.

[96] *See* Lundberg, *supra* note 9, at 1120; Swenson, *supra* note 9, at 1166.

cant funding disparities[97] or because such a response would be in line with public opinion.[98]

The authors quantified liberalism using Erikson, Wright, and McIver's standardized measure of policy liberalism, which combines measures of several socioeconomic issues used to gauge liberalism.[99] States with a standardized liberalism value above 0 are more liberal than the national average and those with a value below 0 are less liberal. The mean standardized liberalism score was 0.11.

### 6. *Percentage of the State Population That is Urban*

The percentage of populations that are urban varies significantly among the states.[100] Erikson, Wright, and McIver found that states with more urban populations tend to be more liberal on policy issues including education.[101] Lundberg hypothesized that states with a higher percentage of their population in urban areas would be more likely to rule for plaintiffs in education finance reform litigation.[102] However, she found the opposite to be true: Plaintiffs in states with a lower percentage of their population in urban areas were actually more likely to receive favorable rulings in education finance reform litigation.[103] The percentage of each state's population that lives in urban areas derives from census data summarizing total numbers of racial groups living in urban areas.[104] States included in this study have a mean urban population of 67.6%.

### 7. *Percentage of State Population That is Minority*

Minority percentages in state populations vary widely.[105] Lundberg argued that states with large minority populations should tend to be liberal, just as states with large urban populations tend to be liberal

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97 *See* Lundberg, *supra* note 9, at 1119 (arguing that in liberal states—which likely have more liberal funding policies—when school district complains to court of inadequate or unequal funding, judiciary would be more likely to intervene).

98 *See* Swenson, *supra* note 9, at 1167 (arguing that members of judiciary are "products of the ideological environment" that they live in and are therefore likely to be responsive to public opinion).

99 *See* ERIKSON ET AL., *supra* note 94, at 85 tbl.4.4. Erikson only categorized the forty-eight contiguous states, so this Note does not include a political culture categorization for Alaska or Hawaii. *See id.* at 77 tbl.4.2.

100 The urban population ranged from 32.0% to 93.0%. *Id.*

101 *Id.*, *supra* note 94, at 75–89; *see also* Lundberg, *supra* note 9, at 1123.

102 Lundberg, *supra* note 9, at 1123.

103 *Id.* at 1140–41.

104 U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 46 tbl.46 (1999).

105 Minority populations ranged from 2.0% to 49.0%.

on policy issues such as education.[106] Lundberg hypothesized that states where a higher percentage of the population is minority would be more likely to rule for plaintiffs in education finance reform litigation.[107] Given that a premise of this Note is that predominantly minority school districts fare worse in education finance litigation, the authors of this Note expected the opposite to be true. The authors expected to find that states where a high percentage of the population is minority would be less likely to rule for plaintiffs in education finance reform litigation. Census data provided the racial breakdown of each state's population.[108] States included in this study have a mean minority population of 19.8%.

### 8. *Median Household Income in the State*

Median household income is an indicator of the amount of taxpayer money that is available to a state. Erikson, Wright, and McIver also found that income is associated with state opinion liberalism.[109] Therefore, one could reasonably expect that courts in states with higher per capita income levels would be more likely to rule for plaintiffs in education finance reform litigation. Lundberg's study supports this expectation.[110] This Note employs a similar measure of median household income using data from the Statistical Abstract of the United States.[111] States included in this study have a mean household income of $36,724 in 1997 dollars.

### 9. *Political Culture in the State*

Political culture measures the underlying attitude toward the role of government within a state. The particular political culture within a state may influence how the judiciary views its role and the state supreme court's decisionmaking process. This study includes this characteristic in large part because Lundberg found it to be significant in her quantitative study, and it is necessary for this Note to address all factors that have been deemed important by previous quantitative studies of education finance reform litigation.[112] Daniel Elazer has defined three categories of political culture: moralistic states, individ-

106 Lundberg, *supra* note 9, at 1123.

107 *Id.*

108 U.S. CENSUS BUREAU, *supra* note 104, at 34 tbl.34.

109 *See* ERIKSON ET AL., *supra* note 94, at 83; Lundberg, *supra* note 9, at 1121.

110 Lundberg, *supra* note 9, at 1140.

111 U.S. CENSUS BUREAU, *supra* note 104, at 477 tbl.748 (listing median household income, by state, in 1997 dollars).

112 *See* Lundberg, *supra* note 9, at 1145.

ualistic states, and traditionalistic states.[113] Citizens in moralistic states "belie[ve] that government should be an active agent for the public good and a positive force in the lives of the citizenry."[114] In individualistic states, on the other hand, "[c]itizens . . . view politics as a marketplace and have few preconceptions about the goals of government."[115] Individualistic states create government activities or programs only when there is strong public demand.[116] In traditionalistic states, citizens believe that government primarily exists "to secur[e] the continued maintenance of the existing social order."[117] According to these categorizations, states with a moralistic political culture should be most likely to find education finance schemes unconstitutional, and states with traditionalistic political culture should be least likely to do so.[118] Surprisingly, Lundberg actually found that traditionalistic states were the most likely to rule their education finance schemes unconstitutional.[119] Of the states in this study, 31.7% have an individualistic political culture; 34.2% of the states have a moralistic political culture; and another 34.2% have a traditionalistic political culture.

## III
## METHODOLOGY, RESULTS, AND ANALYSIS

The study in this Note assessed the associations between the categorical variables and the outcome of the litigation using cross-tabulations.[120] To examine the associations between the continuous variables and the outcome of the cases, this study compared the means of the variables for those cases where the plaintiffs won with the means of the variables for those cases where the plaintiffs lost to the overall mean for that variable.[121] To examine characteristics of the cases in the predominant race and school district setting groups, the authors created cross-tabulations between these groups and the other categorical variables. For the continuous variables that were

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113 DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 114–21 (3d ed. 1984).

114 *Id.* at 112.

115 *Id.*

116 *Id.*

117 *Id.* at 118–19.

118 *See* Lundberg, *supra* note 9, at 1125–26.

119 *See* ELAZAR, *supra* note 113, at 1144–45.

120 The categorical variables were: predominant race of school districts, school district setting, wave, judicial selection method, constitutional language, and political culture.

121 The continuous variables were: liberalism, household income, percentage of the state that is urban, percentage of the state that is minority, number of school districts, per-pupil spending, percentage of local revenue, wealth gap, and average teacher salary.

associated with the outcome of the cases, the authors examined the means of those variables by race and school district setting. Next, for the categorical variables that had a meaningful magnitude of association with the outcome of the litigation, the authors examined their associations with the outcome of the litigation stratified by race.[122] Finally, for the continuous variables with a meaningful magnitude of association with outcome, the authors examined their means by race and the outcome of the cases at the same time (i.e., the mean for minority cases that won, the mean for minority cases that lost, etc.), and compared these means to the overall mean for each variable to determine how these characteristics were associated with the outcome of the cases within specific race groups.

This analysis includes the most recent state supreme court decisions on school finance litigation from all forty-one states that have such a decision.[123] Unlike many quantitative analyses, which are based on a sample of a population, this analysis includes the entire universe of eligible cases. As this Note includes full ascertainment of this population, the authors do not focus on statistical testing in this analysis, but rather discuss the relationships between the covariates[124] of interest and the outcome of the cases in terms of the magnitude of the associations.

To provide additional support for this approach, the authors conducted a power calculation to determine the number of cases that would have been required to find a statistically significant[125] association between a covariate and the ruling on the case. To find a statistically significant difference ($p<0.05$)[126] between the observed percentage of minority cases that won (31%) and the observed percentage of white cases that won (43%), the authors would have needed 318 of each type of case (assuming equal numbers of each).[127]

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122 Stratification means dividing by group.

123 Follow-up cases regarding sufficiency of remedy are excluded from the analysis (e.g., if *Abbott v. State (Abbott I)* is included, *Abbott II, Abbott III,* and *Abbott IV* would not be included).

124 Covariates are factors that are examined in relation to the outcome in addition to the primary variables (predominant race of the school districts and school district setting in this Note). Examples of covariates from this analysis include number of school districts and per-pupil spending.

125 A test statistic with a p-value of less than 0.05 is statistically significant. The 0.05 level is typically used in statistical analysis. If an association is statistically significant at the 0.05 level, this means that there is less than a 5.0% probability that association was found in error.

126 The p-value is the probability of finding the relationship observed if there were no association between the variables. *See* DAVID S. MOORE & GEORGE P. MCCABE, INTRODUCTION TO THE PRACTICES OF STATISTICS 458–59 (3d ed. 1998) (discussing p-value and statistical significance).

127 There were thirteen minority cases and twenty-three white cases.

This difference of 12% between the proportion of cases won is large enough to warrant further discussion. As the entire universe of cases is limited, at best, to the fifty states, any analysis focusing on the outcomes of the most recent cases in each state will not have sufficient power. But given the importance of understanding what factors contribute to the outcomes of these cases, and the fact that this Note includes all cases rather than a sample, the authors believe an analysis of these associations is warranted despite this limitation.

This Note focuses on associations deemed to be of a meaningful magnitude to merit discussion. To determine what merits discussion, the authors decided a priori that discussion was warranted whenever there was more than a 10.0% difference between two of the groups for categorical variables. For continuous variables, when the authors found a difference of more than 30.0% between the overall mean, and the mean for the cases that won or for those that lost, and 30.0% represented a substantial difference in the means, they considered it a meaningful magnitude of association.

Parts III.A and III.B focus on race and setting of school district but address all of the variables with these two factors in mind. In Part III.A, this Note discusses the association of the various legal and extralegal factors with the outcome of the cases. Part III.B discusses how the factors which demonstrate an association with outcome are associated with race and setting. Part III.C explains the limitations of this study.

### *A. Associations with Outcome*

School district setting, one of the two primary factors on which this Note focuses, had the largest association with outcome of all of the individual variables analyzed in this study: The success rate for education finance reform plaintiffs was 20.0% for city cases, 44.0% for noncity cases, and 83.3% for coalition cases.[128] Though not as strong a predictor as school district setting, predominant race of school districts also demonstrated an association with outcome: The success rate was 30.8% for predominantly minority districts, 43.5% for predominantly white districts, and 80.0% for multiracial districts.[129] The subcategory of predominantly African-American school districts only had a success rate of 25.0%, which was somewhat lower than the

[128] The coalition group only consists of six cases. While the success rate of this group is extremely high and worth addressing, this data may not be as reliable as the data from groups with larger numbers. *See supra* notes 82–84 and accompanying text.

[129] Similar to coalition, this was a small group consisting of only five cases, but the high rate of success is worth addressing here as well.

success rate of predominantly minority school districts in general.[130] Although setting is a much stronger predictor than race, the two factors are closely related. The majority of children educated in city schools are racial minorities,[131] so if city school districts are less successful in litigation, it will have a greater impact on minority children. The implications for African-American children are even greater since the majority of African-American children are educated in city schools.[132] Importantly, predominantly minority city school districts had an extremely low success rate of 12.5%.[133] Thus, districts that were both predominantly minority and located in cities fared especially poorly.

School district setting and predominant race of school districts were not the only variables in this study that were associated with outcome. Plaintiffs in states where judges were elected were successful 50.0% of the time, as compared to only 38.1% of the time in states in which judges were appointed. Political culture was also associated with outcome: The success rate was 38.5% in individualistic states, 42.9% in moralistic states, and 50.0% in traditionalistic states. The final variable that had a significant association with outcome was the number of plaintiff school districts involved in the lawsuit. There was a mean of 20.7 plaintiff school districts in cases where plaintiffs lost, compared to a mean of 45.7 school districts in cases where they won.[134] This indicates that courts may be more willing to overturn a school funding scheme when dissatisfaction with funding disparities appears to be more widespread.

Perhaps more notable than the factors that were associated with outcome are some of the factors that were not. This Note's results confirm what other commentators and scholars have found regarding the legal factors in education finance reform litigation: Legal factors are weak predictors of outcome.[135] Stronger constitutional language was not positively associated with outcome. Plaintiffs in states with the strongest constitutional language have been much less successful

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130 There were eight cases in this category.

131 *See* Ryan, *supra* note 7, at 435 ("Most central city districts . . . are populated primarily by minority students—generally African-American and Hispanic."); *see also supra* note 74 and accompanying text.

132 *See id.* (stating that about two-thirds of African-American students attend elementary and secondary schools in central city districts).

133 Predominantly minority city school districts won one of eight cases. Abbott v. Burke, 119 N.J. 287 (1990). The plaintiff school districts in *Abbott* were also predominantly African-American, as were six of the seven city minority plaintiff districts that lost their lawsuits.

134 The overall mean number of school districts was 31.5.

135 *See supra* notes 5–6 and accompanying text. *But see* Swenson, *supra* note 9, at 1179 (finding per-pupil spending significant).

than those in states with mid-range levels of constitutional language, and only about as successful as those in states with the weakest language.[136] The other legal factors—per-pupil spending, wealth gap, wave, and revenue ratio—also were not associated with outcome.[137] None of these factors can explain why minority and/or city school districts fare worse in education finance litigation, since they do not have a meaningful magnitude of association with outcome.

### *B. Associations with Race and School District Setting*

This Section explores the associations between this Note's two primary variables (race and setting), the other variables associated with outcome, and the outcome itself. Specifically, this Section focuses on whether any of the other variables explain why minority and/or city school districts fare worse in education finance reform litigation.

Predominant race and setting of the plaintiff school districts were significantly intertwined. Most of the minority school district cases (61.5%) were also city school district cases, and most of the city school district cases (80.0%) were minority school district cases. In addition, the vast majority of the African-American school district cases (87.5%) were city school district cases, and most of the city school district cases (70.0%) were predominantly African-American school districts. Along the same lines, most of the predominantly white school district cases (91.3%) were noncity school cases, and most of the noncity school district cases (84.0%) were predominantly white school district cases.

On the basis of this study, judicial selection method can be ruled out as an explanation for why predominantly minority and urban school districts fare worse than other school districts in education finance reform litigation. As mentioned previously,[138] plaintiffs in states with an elected judiciary fare somewhat better overall than those in states with an appointed judiciary. However, city, minority, or African-American plaintiff school district cases are not disproportionately located in appointive states: 50.0% of city school district cases, 53.9% of minority school district cases, and 62.5% of African-American school district cases are located in elective states, rather than appointive states. Therefore, these groups are not disadvantaged simply because more of their cases are heard in appointive states where plaintiffs generally have fared worse than defendants.

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136 *See infra* app., tbl.1 for results based on constitutional language.

137 *See id.*

138 *See supra* notes 89–90 and accompanying text.

At first glance it appears that political culture might explain why predominantly minority and urban school districts fare worse than other school districts. Plaintiffs in traditionalistic states have won the highest percentage of cases (50.0%), while those in individualistic states have won only 38.5%. More city, predominantly minority, and African-American school district cases are in individualistic states when compared to other groups: 60.0% of city cases are in individualistic states, as opposed to only 16.0% of noncity cases; 38.5% of predominantly minority school district cases are in individualistic states, as opposed to 26.1% of predominantly white school district cases; and 50.0% of predominantly African-American school district cases are in individualistic states. However, when city and minority cases were extracted, the discrepancy between the results in individualistic and traditionalistic states disappeared. 50.0% of noncity school districts and 66.7% of coalition school districts prevailed in individualistic states. Only city school districts did particularly poorly in individualistic states, with only 16.7% winning their cases. Similarly, 50.0% of both predominantly white school districts and multiracial school districts prevailed in individualistic states. Minority school districts fared particularly poorly in individualistic states with only 20.0% prevailing.[139] Therefore, it appears that there is an overall low success rate in individualistic states because city and minority school districts performed poorly in these states and not because plaintiffs generally were less successful in individualistic states. In sum, political culture cannot explain why minority and city school districts are less successful in education finance reform litigation.

The number of plaintiff school districts involved in each case did show a meaningful association with race, setting, and outcome, and it cannot be ruled out as an explanation for why city and minority school districts fare poorly in education finance reform litigation. Overall, when there were more school districts involved in a lawsuit, plaintiffs won more often. When comparing the number of plaintiff school districts by race and school district setting, the results were consistent with the overall finding. The mean number of school districts was 10.3 for predominantly minority cases,[140] 23.6 for predominantly white cases, and 123.8 for multiracial cases. The school district mean was 4.8

[139] Only 25.0% of predominantly African-American school districts won in individualistic states.

[140] Predominantly African-American school district cases involved an average of 2.3 plaintiffs.

for city school districts, 24.4 for noncity school districts, and 106.3 for coalition school districts.[141]

### C. *Limitations*

There are several limitations to this analysis, stemming from the small sample size and the limitations of the previous quantitative studies. First, there were not enough cases in the analysis to create a multivariable statistical model, which would have allowed the authors to look at the effects of the predictors of interest, while simultaneously accounting for the effects of the other variables. To compensate, the authors conducted these analyses stratified by race and setting of the case so that they could assess which additional characteristics of the cases plausibly could explain the associations between race, setting, and the outcome of the cases. The authors included only the most recent case from each state to avoid the problem of autocorrelation.[142] The inclusion of all cases from the nine states that had more than one case may have changed the results of this analysis. However, until there are sufficient numbers of cases from each state to conduct an analysis that includes all cases and accounts for autocorrelation within each state statistically, the authors believe the best solution is the one they chose, rather than overrepresenting the results from states with several rulings in the analysis.

Second, the factors the authors selected for this analysis were determined by prior quantitative research on the topic of education finance litigation. However, there may be important characteristics of the school districts, cases, or states that were not included in this analysis that may account for the relation between race, setting, and outcome of the cases.[143] Third, the number of cases in some of the categories, particularly the multiracial and coalition categories, were relatively small, and minor changes would have affected dramatically the results for these categories. However, the results in the existing cases are worth analysis and discussion despite this limitation.

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[141] Interestingly, within each racial or setting category, those plaintiffs who were successful did not necessarily have more school districts involved than those who did not win. The mean number of school districts for successful predominantly white cases was 21.5, whereas the mean was 25.3 for losing predominantly white school district cases. Similarly, successful urban plaintiffs also had a lower school district mean (2.5) than losing urban plaintiffs (5.4). One possible explanation for these results is that for each of these groups, the difference between the mean of winning and losing plaintiffs was not large enough to have any effect on the outcome of the cases.

[142] *See supra* note 36.

[143] For example, although we had a measure of per-pupil spending at the state level, a measure of per-pupil spending for the plaintiff school districts would have been useful in assessing the precise level of funding in those school districts.

Finally, due to the small number of cases in this analysis and the fact that it included a complete population rather than a sample, the authors did not use statistical testing to decide which characteristics had a meaningful association with the outcome of the cases. Therefore, they decided a priori what magnitude of association they thought constituted a meaningful difference. Given different standards for what association would be large enough to discuss, they may have found more or fewer characteristics to merit discussion than others might have found.

## IV
## THE IMPLICATIONS OF THE FINDINGS

These findings demonstrate that minority and city school districts fare worse in education finance litigation than predominantly white and noncity school districts.[144] In particular, this Note demonstrates that urban minority school districts are especially unsuccessful.[145] This Note provides three possible explanations for these results. The first is that there may be a bias against predominantly minority school districts.[146] If race does influence the outcome of education finance reform litigation, it is problematic. It would mean that state supreme courts are less likely to rule in favor of constitutionally underfunded, predominantly minority school district plaintiffs than they are for similarly situated, predominantly white school districts because of race. The authors cannot conceive of a valid reason that race would influence state supreme court decisions in this manner. While this Note does not prove that race influences outcome, it demonstrates that race is a more accurate predictor of success than the legal factors in education finance litigation.[147] This finding alone should be significant for advocates of predominantly minority school districts. This Note does not address the question of what could be done if state supreme court decisions are indeed influenced by race. However, it is the authors' hope that the findings in this study will encourage scholars and advocates to develop strategies to challenge effectively this type of racial bias.

The second explanation for education finance reform litigation outcomes that this Note offers is that there may be a bias against urban school districts. There may be legitimate reasons behind the influence of school district setting on the outcome of education

144 *See supra* Part III.A.

145 *Id.*

146 Part III.B demonstrates that none of the other factors in this study account for the lower success rate of predominantly minority districts.

147 *See supra* Part III.B.

finance cases. It is possible that city schools are distinct in a manner not captured in this study. However, a detailed inquiry into the differences between city schools and noncity schools is also beyond the scope of this Note. By highlighting the fact that none of the legal factors in this study explains why these schools generally are unsuccessful, the authors invite those with the appropriate knowledge and skills to explore further to see if there are such distinctions that could explain the discrepancy accurately.

The third explanation of outcomes that this Note offers is that courts may be more responsive when a larger number of school districts come before them complaining of funding disparities. The remainder of this Section focuses primarily on this third possibility, since it provides a clear strategic suggestion for urban minority school districts.

The analysis in this study demonstrates that large multiracial coalitions of school districts have been extremely successful in education finance reform litigation.[148] Except for the Seattle case,[149] all of the cases in the multiracial category were brought by extremely large coalitions or were statewide class actions encompassing both predominantly white and predominantly minority school districts.[150] The success of large multiracial coalitions may provide the most insight for future litigation strategies.[151] Simply put, urban minority school districts may have more success if they convince a large number of school districts to join them as plaintiffs. As has often been the case for minorities when it comes to education, it appears that tying their fates to whites may be their best option.[152] Linking minority opportunity to that of whites was the thrust of the desegregation movement, and to a large extent it is the underlying notion in affirmative action programs.[153] Whites also stand to gain obvious and immediate benefits from aligning themselves with minorities in this context,[154] since large multiracial coalitions were more successful in this litigation than either

148 *See supra* Part III.B.

149 *See* Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978).

150 *See infra* app., tbl.1 for a listing of cases by race and setting.

151 Although multiracial coalition building may be a sound strategy for urban minority school districts to undertake, it remains troubling that minority school district plaintiffs are less successful than their white counterparts unless they are able to get large numbers of predominantly white school districts to join their lawsuits. See *supra* Part III for a description of results.

152 *See* Ryan, *supra* note 7, at 477 (describing as sound NAACP's strategy of tying together fates of white and black students in school finance litigation).

153 Many whites have shown resistance to these efforts. *See infra* note 169 and accompanying text (discussing resistance along racial lines to desegregation and affirmative action).

154 Whites also benefit from affirmative action and integration, though the benefits may not be as easy for many white people to appreciate. *See infra* notes 159–61.

predominantly minority city school districts or predominantly white noncity school districts standing alone.

In recent years several scholars have written about multiracial coalition building.[155] This Section outlines some general principles that may be useful to advocates for urban minority school districts and provides an example of successful multiracial coalition building in the education context.[156]

As the scholarship points out, multiracial coalition building is challenging.[157] Richard Delgado highlights the challenges of coalition building by observing that "coalition-making efforts never occur in the abstract. Instead, they take place on a set stage replete with histories, grievances, and loyalties to third parties, which may interfere with a coalition that, in the abstract, would appear to be in everyone's best interest."[158]

Racial divisions may be an obstacle for predominantly minority urban school districts trying to convince predominantly white underfunded school districts to join them as plaintiffs. The few population studies that address education finance reform indicate that the popular perception, even amongst whites who stand to benefit from education finance reform, is that these lawsuits mainly benefit minorities.[159] This suggests that many of these white communities might be resistant to joining minority plaintiffs. Other literature suggests that,

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155 *See generally* LANI [NMI] GUINIER & GERALD [NMI] TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2002); ERIK K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA (1999); Taunya Lovell Banks, *Both Edges of the Margin: Blacks and Asians in Mississippi Masala: Barriers to Coalition Building*, 5 ASIAN L.J. 7 (1998); Richard Delgado, *Linking Arms: Recent Books on Interracial Coalition as an Avenue of Social Reform*, 88 CORNELL L. REV. 855, 874–77 (2003) (book review); Phoebe A. Haddon, *Coalescing with Salt: A Taste for Inclusion*, 11 S. CAL. REV. L. & WOMEN'S STUD. 321 (2002); Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341, 353–63 (2003); Michael Omi, *Rethinking the Language of Race and Racism*, 8 ASIAN L.J. 161 (2001); Haunani-Kay Trask, *Coalition building Between Natives and Non-Natives*, 43 STAN. L. REV. 1197, 1210 (1991); Erik K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 ASIAN PAC. AM. L.J. 33 (1995).

156 The particular strategies and challenges that advocates will face in forming such coalitions may vary from state to state depending on the local circumstances. In states where the majority of school districts are adequately funded, large scale coalition building of the sort espoused here will not be possible.

157 *See* Delgado, *supra* note 155, at 880; Haddon, *supra* note 155, at 329–34; Johnson, *supra* note 155, at 358.

158 Delgado, *supra* note 155, at 874.

159 *See* Ryan, *supra* note 7, at 432–34 (citing Douglas S. Reed, *Twenty-Five Years After* Rodriguez*: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 L. & SOC'Y REV. 175, 211–12 (1998)); Kent L. Tedin, *Self-Interest, Symbolic Values, and the Financial Equalization of the Public Schools*, 56 J. POL. 628, 634 (1994).

at least in some contexts, poor and working-class whites have been especially resistant to forming coalitions with minorities because of race.[160] As Professor Cheryl Harris has explained, whiteness has a property value.[161] Poor and working-class whites benefit from the disfavored social and economic position of minorities. From their relatively more favored position poor whites are "able to tell themselves that they are at least better off, materially and psychically, than" minorities.[162] Forming a coalition with minorities might conflict with many poor and working-class whites' narrative of their perceived elevated social status. Poor and working-class whites may also want to keep their distance from minorities so that they do not lose favor with whites in power by being associated with socially disfavored minorities.[163] For these reasons, poor and working-class whites might resist joining forces with minorities, even if such a coalition would increase their chances of receiving increased funding for their schools.

Despite these obstacles to coalition building between poor and working-class whites and minorities, there is reason to believe that in the context of education finance reform, forming such coalitions may be successful. Several indicators of successful reform and coalition building which have been noted by scholars are present in the education finance reform litigation context.

The first indicator of potential success relates to Professor Derrick Bell's "interest convergence" theory.[164] This theory posits that reform benefiting minorities generally only comes about when aligned with white interests.[165] The interests of minorities and whites in underfunded schools are essentially identical in this context: They each want more funding for their schools. This common interest alone may be enough to form a viable coalition which will result in reform in some circumstances.[166]

If predominantly minority school districts can form coalitions with large numbers of predominantly white school districts, those in

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160 *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522–23 (1980); Delgado, *supra* note 155, at 864.

161 *See* Delgado, *supra* note 155, at 864 (citing Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993)).

162 *Id.*; *see also* Marion Crain, *Colorblind Unionism*, 49 UCLA L. REV. 1313, 1320 (2002) (discussing white working class's adoption of belief in whiteness as source of privilege and defining themselves "in relation to and as superior to Blacks").

163 *See* Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1310 (2002) (discussing what he calls "interracial distancing," where minority group adopts strategy of distancing itself from another minority group).

164 *See* Bell, *supra* note 160, at 523.

165 *See id.*

166 *See infra* notes 183–93 and accompanying text (discussing models of multiracial coalition building arising over Ten Percent Plan).

power may believe that reform is in the interest of the state as a whole.[167] Just as fifty years ago many whites in the South saw segregation as a barrier to their transition from a rural agricultural economy to a more industrialized economy,[168] today an unsatisfactorily low level of education provided to a large segment of the population (including many whites) might be seen as a barrier to greater participation in the information economy. Despite notions of judicial independence, judges may feel more free to rule in favor of such reform when a larger segment of the state's population is aligned in support of such a cause.

The second indicator for potential success hinges on a crucial difference between education finance reform on the one hand and affirmative action and desegregation on the other. Because education finance reform litigation is not about race, at least not patently so, it may face less resistance from poor and working-class whites than desegregation and affirmative action.[169] Race is merely a subtext underlying the litigation, given the reality that such a large percentage of minority students are in underfunded schools. In many of the education finance cases, race is not even mentioned.[170] Moreover, education finance reform litigation does not directly raise the same issues as desegregation and affirmative action. While joining minorities as plaintiffs entails an implicit acknowledgement of being similarly situated to minorities, poor and working-class whites do not give up existing resources for the benefit of minorities by forming such a coalition. Rather they join together to demand more resources for their respective schools.

Third, multiracial coalition building around education finance litigation could be narrowly focused, thus increasing the chances of success. Scholars have explained that interracial coalition building that is short-term and that centers around narrow issues is more likely to be successful.[171] Though ideally minority, poor, and working-class communities would form long-term coalitions to deal with broader issues

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167 *See* Bell, *supra* note 160, at 524.

168 *See id.* at 525; *see also* Opinion of the Justices No. 338, 624 So.2d 107, 139 (Ala. 1993) (explaining that Alabama's economy has suffered due to inadequate spending on education).

169 *See* DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 208–09, 257–60 (4th ed. 2000) (describing poor and working-class white opposition to affirmative action and desegregation and threat to social and economic status of whites posed by these two initiatives).

170 *See id.* at 208–21.

171 *See* Johnson, *supra* note 155, at 362; Trask, *supra* note 155.

that they have in common, such a coalition is not necessary in order to coalesce around this one issue.[172]

Fourth, there is an apparent parallel between the potential for multiracial coalition building in education finance reform litigation and at least one previously successful effort. Professor Lani Guinier and Professor Gerald Torres offer a model for successful multiracial coalition building in *The Miner's Canary*.[173] Guinier and Torres provide a concrete example of minorities successfully building a multiracial coalition in an education context where there was arguably greater potential for white resistance than exists in the education finance reform litigation context.[174] They describe the efforts taken in Texas after affirmative action was outlawed in the *Hopwood* decision[175] as an illustration of a model of coalition building based on "political race."[176]

There are three steps to political race coalition building.[177] First, multiracial coalitions that develop out of political race start in racial minority communities explicitly focusing on race.[178] Second, members of the minority community "then move to class and gender while never losing sight of race."[179] Therefore, members of the minority organizing community begin with their experience of racial exclusion and from there expand their vision to include other marginalized groups.[180] Finally, political race leads organizers to "experiment with new democratic practices" such as critical reframing of issues and solutions.[181] Race is used as a catalyst for a broader reform initiative that goes well beyond the boundaries of traditional racial categories.[182]

The Texas interracial coalition building example in *The Miner's Canary* began in 1996 when, in a challenge to the University of Texas Law School's admissions program, the Fifth Circuit Court of Appeals

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172 *See* Bell, *supra* note 160, at 526 (explaining that many poor whites "have employment, education, and social service needs that differ from those of poor blacks by a margin that, without a racial scorecard, is difficult to measure.").

173 *See* GUINIER & TORRES, *supra* note 155, 67–101.

174 *See id.* at 67–74 (discussing multiracial coalition in Texas Ten Percent Plan).

175 Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

176 *See* GUINIER & TORRES, *supra* note 155, 11–31, 67–101 (describing concept of political race).

177 *See id.* at 31, 95–96.

178 *See id.*

179 *Id.* at 31. Guinier and Torres distinguish organizing based on political race from organizing based on class. *See id.* at 98–104.

180 *See id.* at 31, 105 (citing Dr. Martin Luther King, Jr.'s vision of racial injustice as starting point for social reform).

181 *Id.* at 96.

182 *See id.* at 95–96.

declared race-conscious affirmative action programs unconstitutional.[183] The effort began with various Latino and African-American activists, legislators, and academics in Texas drawing on a broad base of resources including "[s]ociologists, demographers, education experts, and historians as well as legal and political experts," organizations such as the Mexican American Legal Defense and Education Fund (MALDEF) and the Texas NAACP, and other activists.[184] Initially, the efforts focused on race and the problem of minorities being excluded from higher education.[185] Over time, however, "the issue of race was finally joined to issues of class and democratic access to public education more generally. Race became a lens through which to focus on the way the university was admitting everyone."[186] The group's research demonstrated that poor and working-class whites were also shut out of the University because the admissions criteria weighed standardized testing so heavily.[187] Their research, which initially focused on race, "revealed the important discovery that 10% of the high schools in Texas routinely filled 75% of all freshmen seats at the university. These high schools were predominantly the more affluent suburban and private schools."[188]

The successful proposal that emerged from the group's research and discussion was the Texas Ten Percent Plan.[189] The Ten Percent Plan admits all high school graduates in the state who finish in the top ten percent of their class to one of the "flagship" University of Texas campuses, regardless of their SAT scores.[190]

Although the Ten Percent Plan, which was proposed by minorities, faced initial resistance, it eventually gained support from rural whites.[191] A strong reason for this support was the revelation "that some counties in West Texas had *never* sent a high school graduate to the University of Texas. Reformers could point to this fact and state forthrightly that the plan would help poor rural white as well as non-

183 *See id.* at 67 (citing Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996)).

184 *Id.* at 69–70.

185 *See id.* at 70.

186 *Id.*

187 *See id.*

188 *Id.* at 71.

189 *See id.* at 72.

190 *See id.* The authors would like to note that they do not endorse the Texas Ten Percent Plan as a truly race-neutral alternative to affirmative action. The Ten Percent Plan creates racial diversity only because of the pervasive segregation that is present in secondary school education. Furthermore, the Ten Percent Plan does not apply to admissions to graduate school programs. However, the authors do think important lessons can be drawn from the multiracial coalition building efforts involved in the development of the Ten Percent Plan.

191 *See id.* at 72–73.

white students."[192] The Ten Percent Plan managed to successfully link the goals of poor and rural whites with those of minorities in Texas, creating class solidarity on an issue that had traditionally involved a racial divide.[193]

Parallels with the post-*Hopwood* effort in Texas may be useful for urban minority education finance reform advocates. This Note demonstrates that predominantly minority urban school districts fare particularly poorly in this litigation.[194] Minority activists, politicians, lawyers, and academics working with these communities should be concerned about the role of race in their low success rates in this litigation. They should engage in intense dialogue and analysis of the role race appears to play in the outcome of education finance reform litigation and what can be done to correct the problem. However, activists within the minority community should also be prepared to go beyond race and broaden their scope to address the common challenges that underfunded white school districts face.[195] They should reach out to these white communities and advocate for creative solutions that further their common interests. Empirical evidence demonstrating that their proposals are beneficial to poor whites as well as to minority communities is a key element to successful multiracial coalition building.[196] The analysis in this Note provides one such piece of evidence suggesting that white school districts may fare better by forming large multiracial coalitions.[197] More work needs to be done in this area by a large, coordinated group of diverse experts.

## CONCLUSION

This Note has demonstrated that the predominant race of the plaintiff school districts, school district setting, and the number of plaintiff school districts involved in litigation are better predictors of outcome than those analyzed in previous studies. The traditional legal factors are worse predictors of outcome in education finance litigation than the ones identified here. This Note has also demonstrated that urban minority school districts fare particularly poorly in education finance reform litigation. This Note makes clear that all underfunded

192 *Id.* at 73.

193 *See id.*

194 *See supra* Part III.A.

195 The discussion should also go beyond litigation strategies. It may turn out, as was the case with the Texas Ten Percent Plan, that ultimately activists decide that litigation is not the best strategy to achieve their goals. *See* GUINIER & TORRES, *supra* note 155, at 68–70 (describing move away from litigation as best post-*Hopwood* strategy).

196 *See id.* at 73 (noting that support for coalition's plan was won without admission of students from western counties in Texas to University of Texas).

197 *See supra* Part III.B.

school districts would do well to join together and bring suit as a large, multiracial coalition. Finally, this Note provides an example of how urban minority school districts may go about initiating this process. Hopefully underfunded schools will find a way to come together regardless of race and school district setting.

## APPENDIX

### TABLE 1: LITIGATION BY STATE, NUMBER OF SCHOOL DISTRICTS, RACE, SETTING, AND OUTCOME

| State | No. of School District(s) | Race | Setting | Prevailing Party |
|---|---|---|---|---|
| (1) Alabama[198] | 129 | Multiracial | Coalition | Plaintiff |
| (2) Alaska[199] | 1 | White | Noncity | State |
| (3) Arizona[200] | 4 | Minority | Coalition | Plaintiff |
| (4) Arkansas[201] | 310 | Multiracial | Coalition | Plaintiff |
| (5) California[202] | 1090 | Multiracial | Coalition | Plaintiff |
| (6) Colorado[203] | 16 | Minority | Noncity | State |
| (7) Connecticut[204] | 1 | White | Noncity | Plaintiff |
| (8) Florida[205] | 45 | White | Noncity | State |
| (9) Georgia[206] | 4 | White | Noncity | State |
| (10) Idaho[207] | 48 | White | Noncity | Plaintiff |
| (11) Illinois[208] | 1 | Minority | City | State |
| (12) Kansas[209] | 4 | White | Noncity | State |
| (13) Kentucky[210] | 73 | White | Noncity | Plaintiff |
| (14) Louisiana[211] | 2 | Minority | City | State |
| (15) Maine[212] | 83 | White | Noncity | State |

198 Opinion of the Justices No. 338, 624 So.2d 107, 113 (Ala. 1993).

199 Matanuska-Susitna Borough v. State, 931 P.2d 391, 394 (Alaska 1997).

200 Roosevelt Elem. Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 806 (Ariz. 1994).

201 Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 480 (Ark. 2002). This case was different from the other statewide class actions. After the class was certified, over 100 school districts attempted to intervene and align themselves with the state. Nevertheless, we made the decision to classify this case as a statewide class action. However, we also analyzed the data with this case classified solely by the named plaintiff, i.e., one school district, which did not change our Note's results and analysis in any significant way.

202 Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971). The plaintiff class consisted of all students except those in the district that "affords the greatest educational opportunity of all school districts within California." *Id.* According to the California Department of Education, there were 1091 school districts in California at the time of the case. Thus, we assigned 1090 as the number of plaintiffs in the case, which was 1091 minus one.

203 Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1010 (Colo. 1982).

204 Horton v. Meskill, 376 A.2d 359, 362 (Conn. 1977).

205 Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So.2d 400, 402 n.1 (Fla. 1996).

206 McDaniel v. Thomas, 285 S.E.2d 156, 157 n.1 (Ga. 1981).

207 Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 724–25 (Idaho 1993).

208 Lewis v. Spagnolo, 710 N.E.2d 798, 800 (Ill. 1999).

209 Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1170 (Kan. 1994).

210 Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 190 (Ky. 1989).

211 Louisiana Ass'n of Educators v. Edwards, 521 So.2d 390, 391 n.1 (La. 1988).

212 Sch. Admin. Dist. No. 1 v. Comm'r, 659 A.2d 854, 855 (Me. 1995).

TABLE 1 (CONTINUED)

| State | No. of School District(s) | Race | Setting | Prevailing Party |
|---|---|---|---|---|
| (16) Maryland[213] | 4 | Minority | City | State |
| (17) Massachusetts[214] | 16 | White | Coalition | Plaintiff |
| (18) Michigan[215] | 556 | Multiracial | Coalition | State |
| (19) Minnesota[216] | 76 | White | Noncity | State |
| (20) Missouri[217] | 89 | Multiracial | Coalition | State |
| (21) Montana[218] | 64 | White | Noncity | Plaintiff |
| (22) Nebraska[219] | 1 | White | Noncity | State |
| (23) New Hampshire[220] | 5 | White | Noncity | Plaintiff |
| (24) New Jersey[221] | 4 | Minority | City | Plaintiff |
| (25) New York[222] | 31 | Minority | City | State |
| (26) North Carolina[223] | 1 | Minority | Noncity | State |
| (27) North Dakota[224] | 9 | White | Noncity | State |
| (28) Ohio[225] | 553 | Multiracial | Coalition | Plaintiff |
| (29) Oklahoma[226] | 38 | White | Noncity | State |
| (30) Oregon[227] | 55 | White | Noncity | State |
| (31) Pennsylvania[228] | 1 | Minority | City | State |
| (32) Rhode Island[229] | 3 | White | City | State |

213 Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 764 (Md. 1983).

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

215 Milliken v. Green, 212 N.W.2d 711, 713 (Mich. 1973). This was a statewide class action. There are 556 school districts in Michigan. Nat'l Ctr. for Educ. Statistics, Michigan School District Demographics *at* http://maps.nces.ed.gov/sddsgis/index.asp?detail=districtnm&state=26 (last visited Feb. 23, 2004).

216 Skeen v. State, 505 N.W.2d 299, 301 (Minn. 1993).

217 Comm. for Educ. Equality v. Missouri, 967 S.W.2d 62, 62 (Mo. 1998).

218 Helena Elem. Sch. Dist. v. Governor, 769 P.2d 684 (Mont. 1989). Sixty-four school districts are represented in the plaintiff class. Molly A. Hunter, Advocacy Ctr. for Children's Educ. Success with Standards (ACCESS), ACCESS – Education Finance Litigation, *at* http://www.accessednetwork.org/litigation/lit_mt.html (last visited Feb. 23, 2004).

219 Gould v. Orr, 506 N.W.2d 349, 351 (Neb. 1993).

220 Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1377 (N.H. 1993).

221 Abbott v. Burke, 575 A.2d 359, 363 (N.J. 1990).

222 Board of Educ. Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 361 (N.Y. 1982).

223 Britt v. N.C. State Bd. of Educ., 357 S.E.2d 432, 432 (N.C. Ct. App. 1987), *appeal dismissed for lack of substantial constitutional question*, 361 S.E.2d 71 (N.C. 1987).

224 Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 251 (N.D. 1994).

225 DeRolph v. State, 677 N.E.2d 733, 734 (Ohio 1997); *see* Ryan, *supra* note 7, at 453.

226 Fair Sch. Fin. Council v. State, 746 P.2d 1135, 1138 (Okla. 1987).

227 Coalition for Equitable Sch. Funding, Inc. v. State, 811 P.2d 116, 117 (Or. 1991).

228 Danson v. Casey, 399 A.2d 360, 362 (Pa. 1979).

229 City of Pawtucket v. Sundlun, 662 A.2d 40, 42–43 n.2 (R.I. 1995).

TABLE 1 (CONTINUED)

| State | No. of School District(s) | Race | Setting | Prevailing Party |
|---|---|---|---|---|
| (33) South Carolina[230] | 4 | Minority | City | State |
| (34) Tennessee[231] | 66 | White | Rural | Plaintiff |
| (35) Texas[232] | 68 | Minority | Noncity | Plaintiff |
| (36) Vermont[233] | 4 | White | Noncity | Plaintiff |
| (37) Virginia[234] | 7 | White | Noncity | State |
| (38) Washington[235] | 1 | Multiracial | City | Plaintiff |
| (39) West Virginia[236] | 1 | White | Noncity | Plaintiff |
| (40) Wisconsin[237] | 3 | Minority | City | State |
| (41) Wyoming[238] | 3 | White | Noncity | Plaintiff |

230 Richland County v. Campbell, 364 S.E.2d 470, 470 (S.C. 1988). Plaintiff Richland County consists of four school districts. Richland County Geographic Info. Sys., Public School Districts Map, *at* http://www.richlandmaps.com/pdfmaps/school_districts.pdf (last visited Feb. 23, 2004).

231 Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993). The number of school districts was identified in an unpublished lower court opinion, 1992 WL 119824 at *1.

232 Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 391–92 (Tex. 1989).

233 Brigham v. State, 692 A.2d 384, 386 (Vt. 1997).

234 Scott v. Commonwealth, 443 S.E.2d 138, 139 (Va. 1994). Plaintiffs are two students representing two school districts, two additional school districts, and several property owners from an unspecified number of "property-poor" school districts. For the purpose of this study, we assigned the number of school districts as four.

235 Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 71 (Wash. 1978).

236 Pauley v. Kelley, 255 S.E.2d 859, 861 (W. Va. 1979).

237 Kukor v. Grover, 436 N.W.2d 568, 568 (Wis. 1989).

238 Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1238 (Wyo. 1995).

TABLE 2A: CATEGORICAL VARIABLES BY OUTCOME

| Variable | State Win (% of group) | Plaintiff Win (% of group) | Total (% of all cases) |
|---|---|---|---|
| **Constitutional Language** | | | |
| Weakest | 8 (72.7%) | 3 (27.7%) | 11 (26.8%) |
| Weak | 9 (47.4%) | 10 (52.6%) | 19 (46.3%) |
| Strong | 1 (25.0%) | 3 (75.0%) | 4 (9.8%) |
| Strongest | 5 (71.4%) | 2 (28.6%) | 7 (17.1%) |
| **Wave** | | | |
| 1 or 2 | 9 (60.0%) | 6 (40.0%) | 15 (36.6%) |
| 3 | 14 (53.9%) | 12 (46.1%) | 26 (63.4%) |
| **Predominant Race of Plaintiff Districts** | | | |
| Minority | 9 (69.2%) | 4 (30.8%) | 13 (31.7%) |
| White | 13 (56.5%) | 10 (43.5%) | 23 (56.1%) |
| Multiracial | 1 (20.0%) | 4 (80.0%) | 5 (12.2%) |
| **School District Setting** | | | |
| City | 8 (80.0%) | 2 (20.0%) | 10 (24.4%) |
| Noncity | 14 (56.0%) | 11 (44.0%) | 25 (61.0%) |
| Coalition | 1 (16.7%) | 5 (83.3%) | 6 (14.6%) |
| **Judicial Selection Method** | | | |
| Appointed | 13 (61.9%) | 8 (38.1%) | 21 (51.2%) |
| Elected | 10 (50.0%) | 10 (50.0%) | 20 (48.8%) |
| **Political Culture** | | | |
| Moralist | 8 (57.1%) | 6 (42.9%) | 14 (34.2%) |
| Individual | 8 (61.5%) | 5 (38.4%) | 13 (31.7%) |
| Traditional | 7 (50.0%) | 7 (50.0%) | 14 (34.2%) |
| | | | |
| **Total** | **23 (56.1%)** | **18 (43.9%)** | **41 (100%)** |

TABLE 2B: CONTINUOUS VARIABLES BY OUTCOME

| Variable | Overall Mean (N=41) | Plaintiff Lose Mean (N=23) | % Diff Lose | Plaintiff Win Mean (N=18) | % Diff Win |
|---|---|---|---|---|---|
| Wealth Gap | 1.99 | 1.89 | –4.83% | 2.11 | 6.17% |
| Local Revenue | 44.48 | 45.61 | 2.54% | 43.03 | –3.25% |
| Per-Pupil Spending | 1.00 | 1.03 | 3.68% | 0.95 | –4.70% |
| Teacher Salaries | 0.96 | 0.97 | 1.94% | 0.93 | –2.48% |
| # of Plaintiff Districts | 31.51 | 20.82 | –33.91% | 45.17 | 43.33% |
| Liberalism in State[239] | 0.10 | 0.14 | 28.57% | 0.06 | –34.92% |
| % State Population Urban | 67.57% | 68.26% | 1.01% | 66.70% | –1.29% |
| % State Population Minority | 19.79% | 20.82% | 4.83% | 18.57% | –6.17% |
| Median Household Income | $36,724.12 | $37,580.52 | 2.33% | $35,629.83 | –2.98% |

[239] Alaska did not have a liberalism score so the mean for plaintiffs who lost in this category is based on 22 states instead of 23.