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Justice as Fairness: The Equitable Foundations of Adequacy Litigation.

Meaghan Field

NOTE

JUSTICE AS FAIRNESS: THE EQUITABLE FOUNDATIONS OF ADEQUACY LITIGATION

MEAGHAN FIELD*

* Class of 2010, University of Southern California Gould School of Law; B.A., 2005 University of California, San Diego. I would like to thank the members of my family for their continued love and support, especially my father who read umpteen drafts of this Note and was my constant sounding board. I would also like to thank Professor Camille Rich for her invaluable guidance and advice, my seventh and eighth grade students at Gompers Middle School who inspired me and this topic, and my friends who have remained teachers for their input and their constant efforts to give every child a great education.

ABSTRACT

Throughout the past fifty years lawyers and education advocates have used the court system to try to equalize educational opportunities in this country and close the achievement gap. Scholars have previously characterized these cases in two waves: equity and adequacy. Those cases labeled "equity" are those where plaintiffs asked for equalization of education spending. "Adequacy" cases, on the other hand, are those where plaintiffs have asked for certain resources necessary to meet a basic level of education guaranteed by the state's constitution. There has been much debate regarding the efficacy of either type of case, with many scholars arguing for a return to "equity" cases. In this Note, I argue that cases formerly termed "equity" cases are, in fact, "equality" cases and that "adequacy" cases, when brought under the correct conditions, have a greater potential to bring equity to education.

One child says, "That's not fair!" The rest chime in. I grab a post-it off of my desk, climb on a chair, and place the post-it high up on the wall in front of the class, calling their attention to it. I ask Elmer, who is all of four feet five inches tall, and Josue, who is the tallest eighth-grader at school at six feet even, to come to the front of the room. I make the following offer: "First person to get the post-it down gets ten extra credit points." Before they can even move one step, the cries of "that's not fair" fill the room. "What would make it fair?" "Give Elmer a chair to stand on." "But that's not fair," I say, "Josue doesn't get a chair." "But Elmer needs it. It's fair that way." I've proved my point: equal is not the same as fair. Next time one child gets something because he/she needs it but another doesn't, almost no one complains; if they do, the words "remember the post-it" stop the complaint in its tracks.[1]

1. "Equity" is not a concept that eighth-graders generally understand. But I found that once I started using this lesson, the students became more and more accepting of the idea that some people needed more than others and some needed less. It seems clear to me that if a post-it can teach eighth-graders this lesson, there must be a way to teach it to the world as well, and I believe adequacy suits have the potential to do so.

I. INTRODUCTION

In this century, "a good education is no longer just a pathway to opportunity—it is a pre-requisite."[2] Yet more than fifty years since *Brown v. Board of Education* held that every child has an equal right to an education,[3] only some children in this county receive a good education; the rest receive an education that leaves them far from the entrance to that pathway to opportunity.[4]

Throughout the past fifty years lawyers have advanced different arguments in both the federal and the state courts to try to equalize educational opportunity.[5] After the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*, which held that there is no federal right to an education,[6] these cases moved to state courts.[7] Scholars describe these cases as emerging in two waves[8] characterized by the parts of the state constitutions that the plaintiffs used to frame their arguments.[9] In the first ("equality suits"), plaintiffs argued that under the state's equal protection guarantee they were denied an equal education.[10] The remedy in such cases is funding equalization—i.e., districts should

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2. President Barack Obama, Address to Joint Session of Congress (Feb. 24, 2009) (transcript available at 2009 WL 459901).

3. 347 U.S. 483, 493 (1954).

4. *See* John Dayton, Commentary, *Serrano and Its Progeny: An Analysis of 30 Years of School Funding Litigation*, 157 EDUC. L. REP. 447, 462–64 (2001) (discussing school funding shortages and the impact upon educational quality).

5. School Funding Litigation Overview: National Historical Background, http://www.schoolfunding.info/litigation/overview.php3 (last visited Dec. 22, 2009).

6. 411 U.S. 1, 35 (1973).

7. Avidan Y. Cover, Note, *Is "Adequacy" a More "Political Question" Than "Equality?": The Effect of Standards-Based Education on Judicial Standards for Education Finance,* 11 CORNELL J.L. & PUB. POL'Y 403, 409–10 (2002).

8. These two "waves" follow on the heels of what scholars describe as the initial "wave," in which school finance litigation was premised upon the federal Equal Protection Clause, rather than state constitutional guarantees. William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 556–57 (2006).

9. *Id.* at 556–58 (arguing that the primary wave in state courts should be termed "equity" because that was the remedy plaintiffs sought). Although where the distinction is made might be important in other arguments and spheres, the fact that certain cases are termed "equity" and others "adequacy" is sufficient for this Note.

10. *Id.* at 557–58. Koski and Reich explain:

> The essence of the claim . . . was the equity of school funding schemes. More specifically, courts primarily sought to achieve either horizontal equity among school districts such that per-pupil revenues were roughly equalized by the state, or at least fiscal neutrality such that the revenues available to a school district would not be dependent solely on the property wealth of the school district (this usually meant greater state-level involvement in educational funding through the institution of state-guaranteed tax base plans and, on rare occasion, state-backed equal yield, a.k.a. district

receive money from the state in amounts such that expenditures on each student would be equal.[11] In the second wave ("adequacy suits"), plaintiffs relied on the education articles of state constitutions to argue that the education they received failed to meet the state's promise.[12] While that promise varies from state to state—public education must be, for example, "thorough and efficient," "adequate," "minimum," etc.—plaintiffs have construed all of those promises as requiring more than a bare minimum education and resources adequate to meet state education goals.[13] The remedy in these cases generally consists of a package of resources meant to provide the state-guaranteed education.[14]

Scholars categorize the two waves as separate and distinct, discussing the differences between the two and the rationale for bringing one type of case over the other.[15] They are, in fact, treated as so distinct that Professor William S. Koski, an education scholar and one of the expert witnesses in *Williams v. California*,[16] and Professor Rob Reich argue that adequacy suits actually increase inequalities, while equality suits have the potential to remedy inequality—two completely opposing outcomes.[17] Koski and Reich criticize "advocates and courts [for] abandon[ing] the doctrine and rhetoric of equity and adopt[ing] the language of ade-

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power equalization, plans that sought to recapture "excess" revenues from wealthy districts).

Id. at 558.

11. *Id.* at 558. According to these authors, "courts primarily sought to achieve either horizontal equity among school districts such that per-pupil revenues were roughly equalized by the state, or at least fiscal neutrality such that the revenues available to a school district would not be dependent solely on the property wealth of the school district." *Id.* These goals were met through state tax plans or "district power equalization." *Id.*

12. *Id.* at 559.

13. William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat From Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 562 (2006).

14. *Id.* at 565.

15. *See, e.g., id.* at 560–61 (2006) (outlining the advantages of adequacy arguments over equity arguments).

16. *See* The *Williams* Case—An Explanation, http://www.cde.ca.gov/eo/ce/wc/wmslawsuit.asp (last visited Dec. 22, 2009) (discussing the *Williams v. California* litigation and settlement). This case, which was eventually settled in 2004, began as a class action lawsuit filed in 2000 by approximately one hundred students from San Francisco County against the State of California. *Id.* The students claimed that the state "failed to provide public school students with equal access to instructional materials, safe and decent school facilities, and qualified teachers." *Id.* The settlement resulted in the allocation of an extra $138 million to certain schools for "standards-aligned instructional materials." *Id.* Williams Koski's expert report for the *Williams v. California* case is available at http://www.decentschools.org/expert_reports/koski_report.pdf.

17. William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 549 (2006).

quacy."[18] While they note that "adequacy models could be suffused with concepts of . . . equity," they deny that this has happened and that these suits are the best means to achieve equity.[19]

In this Note, I argue that in adopting the language of adequacy, the parties have consistently maintained (and sometimes even enhanced) Koski's and Reich's goal of "equity," through simply changing the words and basing their arguments on different provisions of the law. To the extent that adequacy suits are informed by equity concerns, they have the potential to remedy both absolute and relative deprivation more than the cases that Koski and Reich and other scholars have previously characterized as "equity" suits, even if they have not always been framed in order to achieve this result.[20]

In making this argument, I will use the following terms defined as specified: "adequacy" as the resources necessary to meet the state constitutional guarantee; "equity" as "end-result equality of opportunity" or "fairness," meaning that every student graduates from high school with the education needed to provide an opportunity to succeed as an adult *even if that means that some schools must be given extra resources to make up deficiencies*; and "equality" as sameness, meaning that if one school has resource x, other schools must also be given resource x in the same amount. In defining these terms this way, I depart from the traditional characterizations of education cases, which would exclusively divide them into "adequacy" and "equity" cases. I claim that what have been termed "equity" cases are, in fact, "equality" cases because they mandate not what fundamental fairness would require, but rather absolute equality of resource distribution.

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18. *Id.* at 548. The authors also target the logic behind educational movements of the 1990s, which culminated in the No Child Left Behind Act of 2001. *Id.* This act, according to Koski and Reich, does not focus on whether children receive equal educational resources, but instead focuses simply on whether "all children can learn." *Id.*

19. *Id.* at 568–69.

20. Koski's and Reich's charge that adequacy suits allow relative deprivation above the baseline is likely true at some level. *Id.* at 615. But equality suits are no less likely to allow for relative deprivation at the same level. This is because wealthier parents will always find a way to contribute more to their own children's educations, either by voting for greater local taxes or making personal contributions to the schools. While it would definitely be more fair to disallow such actions, it would be nearly impossible to do so because wealthier people would be against any action contrary to their interests and because lower income groups would see any such as action as contrary to ideals of the "American Dream" and, therefore, refuse to support any such action as well. *See id.* at 593–94 (quoting Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 160–61 (1995)). The goal of education cases should be to give all children a fair chance at educational opportunity; adequacy suits do that even if they leave some relative deprivation.

In Part II, I will describe how scholars' discussions of adequacy cases demonstrates the "adequacy-as-equity" framework and how using that framework instead of the prior "adequacy-versus-equity" framework changes the current debate about adequacy litigation and implementation. In Part III, I will present education cases from California and New Jersey that show how successful adequacy cases have not, as Koski and Reich would contend, abandoned (and, in fact, have maintained) the concepts of equality and equity from the older equal protection and funding equality cases. In Part IV, I will present cases from Oklahoma, Louisiana, and Pennsylvania in which plaintiffs have been unsuccessful, and I will look at how the "adequacy-as-equity" framework would increase the likelihood of success in cases in which defining the constitutional guarantee is at issue and explain how this framework might operate to increase the chances of success where the courts have found a non-justiciable question. Finally, I look at how "adequacy-as-equity" has informed, and can continue to inform, implementation. I conclude that while adequacy suits have not yet made equity any more real than equality suits have, they are the best litigation vehicle available for realizing equitable education.

II. Adequacy Litigation: Unequal and Equity-Minded

Koski and Reich argue that adequacy cases are "equity-neutral."[21] But when the current scholarship on adequacy litigation is examined, it becomes obvious that adequacy cases are, in fact, equity-minded in their ideology as well as in their remedies, and this factor is what makes adequacy suits preferable. In this section, I examine how while the scholarship on the cases has shown that adequacy suits are equitable, scholars' suggestions for implementation often lack the concept of equity and need to be reframed to include it.

The first step in an adequacy suit is defining "adequacy." There is no single way to define the quality of education children should receive. We know when a child receives a good education because we can see the outputs—good test scores, college entrance, and general success. We also know when a child receives a bad education, which is generally characterized by the absence of the factors indicating a good education. But defining the specific factors that constitute the former and those that constitute the latter is not easy. In addition, while Koski and Reich charge that advocates moved to adequacy suits because they were easier to define,[22] it is even more unclear what would constitute an "adequate education"

21. William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 Emory L.J. 545, 549 (2006).

22. *Id.* at 561.

because the referents "good" and "bad" do not necessarily set the boundaries for it.

Regina Umpstead argues, and I agree, that much of the lack of clarity results from the fact that in each of the states where litigation has occurred, each plaintiff and each court has come up with a particularized definition based on the state's constitution.[23] But while Umpstead criticizes the cases for failing to fully define educational goals and accountability,[24] I argue that the lack of a clear-cut definition is a benefit. After all, students, schools, and states differ in a variety of ways, and while the desired outcomes are likely similar, if not identical, the conception of how to reach that point will (and likely should) vary immensely. This flexibility of adequacy suits allows them to reach equitable ends without giving up too much to simple equality. As Umpstead notes, what has remained consistent about adequacy cases is the emphasis on funding and vertical equity.[25] The fact that funding equity remains a standard part of adequacy suits, while general education goals and implementation methods shift, is what allows adequacy suits to be equitable. If these factors were rigid in all cases, plaintiffs would lose the flexibility that allows adequacy to shift over time and adequacy suits would lead to inequity. It is precisely due to the flexibility of the means by which to reach the equitable end that adequacy suits never have to ask for less than equity. In fact, the flexibility ensures that less will never be enough because in cases where the resources were provided in full and educational equality remained out of reach, adequacy suits allow plaintiffs to recalibrate the resources, measuring what is needed by how far the performance fell short of equity and asking for more.

The ability of adequacy suits to achieve equity can be seen in the ways plaintiffs define "adequacy." Deborah Verstegen argues that where plaintiffs have been unsuccessful in courts, they used an antiquated definition of adequacy that rested on the idea that a bare minimum of education satisfied the state constitution's guarantee: so long as children are in school and the school teaches them some material, the education is adequate.[26] This definition fails to reach either equality or equity, and, therefore, cases brought under this definition do justify Koski's and

23. Regina R. Umpstead, *Determining Adequacy: How Courts Are Redefining State Responsibility for Educational Finance, Goals, and Accountability*, 2007 BYU EDUC. & L.J. 281, 281–82.

24. *Id.* at 284.

25. *Id.* at 296.

26. Deborah A. Verstegen, *Towards a Theory of Adequacy: The Continuing Saga of Equal Educational Opportunity in the Context of State Constitutional Challenges to School Finance Systems*, 23 ST. LOUIS U. PUB. L. REV. 499, 507 (2004).

Reich's critique.[27] But successful cases do not deserve this critique and the lessons of these cases can inform the unsuccessful cases.

The suits in which plaintiffs have emerged victorious provide a sharp contrast in their definitions of "adequacy." Verstegen argues that in such cases, the courts found a want of minimum education because adequacy was defined in the context of modern needs, technologies, and specific resources; with these factors in mind, the courts found that equality of opportunity requires an "adequate" education be sufficient to prepare all students, no matter their starting points, to compete equally in the world.[28] This combination of factors shows adequacy suits' intent to reach equity. The fact that "adequate" is defined by ever-changing needs to fit an ever-changing world demonstrates the flexibility of adequacy suits, which allows them to continually look toward equity, not bare minimums of "equality."[29] Adequacy's true concern is equality of opportunity, not equality of resources (even if that is facially what the claim asks for) because the resources consist of what each student needs to reach the state-imposed standards even if those needs differ immensely. Finally, instead of limiting the concept of adequacy to any minimum, the definition of specific resources moves toward equity because it promotes the idea that equality of funding and expenditures would not necessarily lead to an adequate education and that certain resources may be needed in greater or lesser amounts in order to reach equality of opportunity. Therefore, even when the suits are composed entirely of arguments regarding adequate resources, the method by which adequacy is defined within the lawsuit demonstrates that what the suits aim at is, in fact, equity.

If adequacy is defined through the lens of equity it has the ability to do what equality cannot. Asking for equality is often as simple as asking for equal resources (i.e., if one child has something the other should have the exact same), and it is difficult for society and courts to move beyond this quid pro quo analysis, but adequacy suits can move further. Since ade-

27. This failure can be cured by inserting the concept of equity into the language and concepts used to define "adequacy," as discussed in Part IV of this Note.

28. *Id.* at 508, 511–12, 523. At least seven state courts have found school finance plans inadequate when the definition of adequacy was attached to evolving standards. *Id.* at 508–09. To support their findings, courts often cited the contemporary needs facing students today, like the globalization of economies, the rapid evolution of technology, and the rise of the Internet. *Id.*

29. Koski and Reich argue that we should return to equality to reach equity because adequacy allows the "entrenchment" of current disparities. William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 611 (2006). But I believe the opposite is true—adequacy can create systems where current disparities are diminished by accommodating the fact that some students currently need more, while equality can only make things even.

quacy suits define resources, they have the potential to make tangible resources *un*equal in order to achieve equity, thereby clearly doing what Koski and Reich contend they do not. For example, if research shows that in order to get to college, a child in one neighborhood requires three of x for every one of x that a child in a different neighborhood needs, adequacy suits can require that the three of x be given.[30] This is not equality, but it is equity, and it places all children at an equal position to meet the state minimum standards. This corresponds to what Professor Michael Rebell characterizes as a "'meaningful' educational opportunity."[31] But while Rebell sees adequacy suits as currently failing to ask for three of x and organizes his argument around the factors that need to be requested,[32] I would argue that the suits are already making the considerations that Rebell demands and plaintiffs are including those factors in their arguments to the courts.

Adequacy suits are often unsuccessful in complete implementation even when they are successful in court, thereby stalling equity.[33] This frequently happens because the states have little interest in actually im-

30. Koski and Reich argue that defining these factors is a "hidden pitfall" of adequacy cases because there is no defined standard for either what goals should be reached or what resources are needed. *Id.* at 561. But while this is a potential problem, it does not appear to be a practical one. Courts have used the testimony and writings of experts along with state education standards and goals to formulate both what educational equity would look like and what resources would be needed to get there. *See, e.g.*, Abbott v. Burke (Abbott V), 710 A.2d 450, 454 (N.J. 1998).

31. Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1526 (2007). Rebell's definition includes small class sizes, qualified teachers, and special services for English language learners. *Id.* at 1509–10 (citing Campaign for Fiscal Equity v. New York (CFE II), 801 N.E.2d 326, 331, 333–36 (N.Y. 2003)).

32. *Id.* at 1514–26. Rebell argues that the following are needed: intelligible goals that can rationally be met, a comprehensive procedure for attaining meaningful educational opportunities, and a cost-effective means of guaranteeing that the necessary resources are provided to students and teachers. *Id.* at 1515.

33. *See* ACLU FOUND. OF S. CAL., *WILLIAMS V. CALIFORNIA*: THE STATEWIDE IMPACT OF TWO YEARS OF IMPLEMENTATION 15–16 (2007), *available at* http://www.decentschools.org/settlement/WilliamsReportWeb2007.pdf (reporting the mixed results of implementing educational reform in California); W. STEPHEN BARNETT ET AL., FRAGILE LIVES, SHATTERED DREAMS: A REPORT ON IMPLEMENTATION OF PRESCHOOL EDUCATION IN NEW JERSEY'S *ABBOTT* DISTRICTS 24 (2001), *available at* http://www.startingat3.org/_documents/FragileLivesShatteredDreamsReport.pdf (indicating that a severe lack of funding is the reason behind poor quality early education in urban areas like New Jersey's *Abbott* districts); EDUC. LAW CTR., THE *ABBOTT* DISTRICTS IN 2005–2006: PROGRESS AND CHALLENGES 2 (2006), *available at* http://www.edlawcenter.org/ELCPublic/elcnews_060313_AbbottIndicatorsReport_2005_06.pdf (reporting on student progress in the *Abbott* districts, the remaining challenges to improving the quality of education, and proposing solutions to promote positive educational reform).

plementing the remedies or in monitoring compliance.[34] But the potential for easy monitoring, which is what makes adequacy suits attractive, can also help make the implementation successful and the result equitable.

The problem is that some suggestions for monitoring while ensuring implementation will not ensure equity because they stop too soon. For example, Josh Kagan argues that state courts should use educational inputs, rather than outputs (such as test scores), to define and measure adequacy.[35] Kagan argues that inputs are easy for the courts to monitor and for the states to understand and comply with.[36] This factor should not be overlooked, as it is essential for any implementation. It is nearly impossible for any court to monitor a "provide equal educational opportunities" mandate because it is so vague. It is equally difficult for states to meet those mandates because the concept of "equal educational opportunities" varies and so much debate rages over what it really means. Such debates, while beneficial to the situation in general, interfere with the actual provision of an education.

In adequacy suits, however, it is easy for the state to know what to provide (e.g., textbooks) and for the court to monitor what the state has provided (e.g., the percentage of schools that have sufficient textbooks) and what it has not (e.g., the percentage of schools that lack sufficient textbooks), thereby ensuring that the state provided the required inputs. But inputs are not enough to ensure equity; if suits stop there, as Kagan suggests they should, adequacy suits would fall short of equity. This would remain true even if the inputs included factors meant to ensure equity, such as those Kagan suggests, like remedial funding in addition to equal funding, state takeovers of failing schools, court-ordered changes in management, and requirements for teacher quality.[37] All of these factors are meant to ensure equity because they go beyond equality, but if there

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34. *See* W. STEPHEN BARNETT ET AL., FRAGILE LIVES, SHATTERED DREAMS: A REPORT ON IMPLEMENTATION OF PRESCHOOL EDUCATION IN NEW JERSEY'S *ABBOTT* DISTRICTS 24 (2001), *available at* http://www.startingat3.org/_documents/FragileLivesShattered DreamsReport.pdf (describing the stilted progress of post-*Abbott* New Jersey school districts). The report found that "state preschool policy has been trying to create the appearance of compliance with the [c]ourt while minimizing state spending and continuing to treat early education as little more than babysitting." *Id.* As a result of these poor learning conditions, children inevitably end up entering school at a disadvantage compared with students from wealthier suburbs. *Id.* at 23.

35. Josh Kagan, Note, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2244 (2003). Some of the inputs Kagan suggests include "dollars, personnel, curriculum, buildings, supplies, and similar factors . . . ." *Id.*

36. *Id.* at 2254–57.

37. *Id.* at 2274–76.

is no measurement of performance, equity will not necessarily occur. Scholars have an important role to play in defining the additional factors to consider in implementation.

There are implementation models that have the potential to aid adequacy suits in reaching equity, but the scholarship on these suits does not always take the models far enough. In another article, Professor Koski argues for a ground-level monitoring system to keep the system accountable.[38] Koski argues that current enforcement mechanisms impede the success of adequacy actions.[39] He contends that the disadvantaged communities aided by adequacy cases are not well-served by the tools currently used to hold legislatures, school districts, and schools accountable because parents are unable to "[vote] with their feet" (i.e., move to a better district or area when there is a lack of economic resources at home) and because they do not have the resources for full political mobilization.[40] In Koski's view, an effective system would require state education departments to monitor the implementation of resources and provide an "accessible and user-friendly system of complaints management" to parents, students, communities, and teachers through which they can bring lacking resources to the attention of the agency responsible for correcting the problem.[41]

Such a system could have the potential to enforce inequalities and inequity, as Koski accuses adequacy cases of doing, because it reflects only the inputs and puts the burden on those who do not have previous experience carrying it, leaving them to do a job for which they may be unprepared.[42] But the system also has the potential to do the opposite. First, to reach equity, the provided resources must be given and, therefore, no matter who is monitoring it, a system that ensures such a provision is necessary for implementation and equity. Second, an on-the-ground monitoring system can empower the community, giving it a means to improve local control of the schools. This system can then lead to both a push for the resources and a push for more political power and, from that power, a push for equity with or without the lawsuit.

Even the most well-crafted implementation scheme will stall equity if it focuses on input alone, and Koski and Reich criticize adequacy suits for avoiding "[n]ettlesome concerns about input versus outcome equity and

38. William S. Koski, *Achieving "Adequacy" in the Classroom*, 27 B.C. THIRD WORLD L.J. 13, 17 (2007).

39. *Id.* at 30.

40. *Id.* at 30–31.

41. *Id.* at 32–34.

42. Professor Koski, however, does not address that possibility or offer suggestions to prevent it from occurring.

vertical versus horizontal equity."[43] But while the focus on inputs is often the feature highlighted in adequacy suits, adequacy suits do not need to stop there and, in fact, rarely do. Because education involves constantly changing standards that require new knowledge and skills nearly every year (e.g., requiring algebra in eighth grade though it once was a high school subject), necessary inputs can change rapidly. Therefore, agencies (either the agency that brought the lawsuit or another so designated) must monitor outputs in the form of test scores and graduation rates. After all, if inputs fail to produce outputs, the inputs are not valuable and should be reassessed and revised. This is what has already occurred as plaintiffs reenter courts asking for more resources as education changes; while plaintiffs have been requesting resources for over fifty years, they have not always been asking for the same things. A functional implementation remedy demands the same fluidity and flexibility that are fundamental elements of adequacy cases.

The public engagement model advocated by Amanda Broun and Wendy Puriefoy[44] has the ability to maintain the necessary fluidity and flexibility and, so, has less potential to act as a barrier to equity; indeed, their model has a greater potential to aid it. They argue that public engagement is necessary throughout the process of education reform, including litigation and implementation, in order to produce effective changes.[45] They propose a structured and sustained relationship between the affected community, the community-at-large, educational advocates, policymakers, and attorneys in order to hold the state accountable for lasting education reform.[46] They argue that the public voice has been lacking from most education debates and that this has impeded educational change.[47] They define public engagement as including both the "usual suspects" and persons who are not normally included in the debate, as well as involving a structured relationship within which all parties interact and learn to forge common goals that they can take action to implement.[48]

While Broun and Puriefoy concede that this model has only partially worked in some cases, including *Abbott v. Burke* (*Abbott I*),[49] there is

43. William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 561 (2006).

44. Amanda R. Broun & Wendy D. Puriefoy, *Public Engagement in School Reform: Building Public Responsibility for Public Education*, 4 STAN. J. C.R. & C.L. 217, 217–19 (2008).

45. *Id.*

46. *Id.* at 217.

47. *Id.* at 220.

48. *Id.* at 221–23.

49. 495 A.2d 376 (N.J. 1985). See discussion of *Abbott* at Part III(C)(ii) of this Note.

potential for it to do more to ensure equity.[50] Because their model does not exist solely to monitor what has already been required and is not structured to rely on inputs alone, it allows the participants to look at the whole picture and develop the concept of what is equitable. In addition, although the model is very structured, it allows for a number of different approaches to the problem, which gives it requisite flexibility. Finally, it does what Koski's model has the potential to do—create political power—without the downside of placing too much of the burden on the affected communities. The action model pulls in people from outside of the affected communities and from within, breaking down resistance to implementation and moving those who are used to having political power to exercise it in a new direction. An implementation model such as this one is likely to create the most equity because it allows for variations and does not stop at inputs.

The adequacy of education is an evolving concept; therefore, "the definition of a thorough and efficient system of education and the delineation of all the factors necessary to be included therein[ ] depend upon the economic, historical, social[,] and cultural context in which that education is delivered."[51] Adequacy suits have the ability to respond to growth and evolution in the field of education and to change in order to provide the necessary factors to meet updated standards. Because equality suits stop at equal, they do not necessarily provide all of the required factors and, therefore, cannot be as responsive to change as adequacy suits. In addition, because adequacy suits have already started to build in compliance mechanisms and monitoring processes, they can change in response to outputs and, therefore, more effectively serve children.

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50. *See* Amanda R. Broun & Wendy D. Puriefoy, *Public Engagement in School Reform: Building Public Responsibility for Public Education*, 4 STAN. J. C.R. & C.L. 217, 236 (2008) (noting that case studies illustrate the possibilities presented by sustained public engagement in support of public school reform). For example, in New Jersey, the Paterson Education Fund, a local education fund (LEF), engaged the public to pressure government officials to implement the mandates that education advocates had won in court. *Id.* at 232–33. Their success was limited in some areas, such as the initiative to build new schools, which failed to build any new schools within the established five-year time frame. *Id.* at 234. On the other hand, the public engagement model was successful to the extent that it increased community knowledge, garnered the school board's support, increased summer school and preschool opportunities, and upgraded educational materials and existing programs. *Id.* at 235.

51. Abbott v. Burke (Abbott II), 575 A.2d 359, 367 (N.J 1990).

III. EQUITY: HOW ADEQUACY CASES STRIVE FOR MORE THAN JUST ENOUGH

As even a passing familiarity with political debates shows and as the hundreds of articles that have been written demonstrate, there is no question that inequalities remain in educational opportunity today. But despite all of the discussion, no clear solution has emerged. While this does indicate that there is much work to be done, the tenor of the discussion does not demonstrate, as Koski would argue, that the policy behind education litigation has shifted away from a conception of equity, even if the language used to state the claims has changed to "adequacy." What it does demonstrate is that adequacy suits have the potential to be quite effective in achieving equity. In this part, I look at cases that have been argued and won in New Jersey and California under different parts of each state's constitution. Looking at the arguments made in these cases, I argue that successful education cases employ the concept of equity even as they make adequacy arguments.

A. *How Education Cases Arrived in State Courts: A Brief History*

In 1973, the United States Supreme Court decided *Rodriguez v. San Antonio Independent School District.*[52] In a three-part majority opinion, the Court first held that wealth was not a suspect class;[53] second, that education was not a fundamental right under the United States Constitution;[54] and third, having determined that neither a suspect class nor a fundamental right was involved (thus, removing the need for strict scrutiny analysis), that rational basis review would be applied to uphold Texas's system of public school funding, which allocated less money to children in poor neighborhoods than to those in wealthy neighborhoods because it was based on local property taxes.[55]

The decision in *Rodriguez* effectively foreclosed the use of the arguments made in *Brown v. Board of Education.* The lawyers in *Brown* had successfully relied on the Fourteenth Amendment's equal protection guarantee to argue that the (effective) denial of educational opportunity

52. Parents of students who attended school in a district with a small property tax base that received a disproportionately lower amount of funding than other districts brought the suit. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 4–5 (1973). Under Texas's education funding scheme, expenditures were distributed out of the state's general fund in amounts determined by the income share and property taxes in the district. *Id.* at 9–10. Ultimately, the Supreme Court upheld the Texas scheme, recognizing that the question before it did not involve a denial of a fundamental liberty and was, thus, better suited for debate in the state legislature. *Id.* at 31, 58.

53. *Id.* at 28.

54. *Id.* at 31–39.

55. *Id.* at 54–55.

was a violation of equal protection;[56] the decision in *Rodriguez*, however, made it clear that equal protection and due process arguments would no longer be successful in school litigation under the Constitution, at least insofar as economic inequality was concerned.[57] By applying rational basis review to uphold Texas's funding system, *Rodriguez* ended the use of the federal courts as a forum in which to equalize educational opportunities.[58]

The Supreme Court's less than sympathetic decision in *Rodriguez* and cases preceding it led plaintiffs to seek new avenues to demand equal educational opportunities. In 1971, two years before the decision in *Rodriguez*, the Supreme Court of California, relying exclusively on the California constitution, held in *Serrano v. Priest* that education is a fundamental right that must be realized equally; the quality of education cannot depend on the wealth of the community in which the school district is located.[59]

After the defeat in *Rodriguez*, *Serrano* became the model for future educational equality suits,[60] and plaintiffs in nearly every state moved

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56. Brown v. Bd. of Educ., 347 U.S. 483, 495 ("[W]e hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

57. In addition to *Rodriguez*, other cases around the same time led to the demise of *Brown*. Supreme Court decisions withdrawing judicial oversight from school districts that had reached the goal of desegregation and refusing to allow certain methods of desegregation, such as busing, both led to re-segregation of the schools and built precedent that foreclosed the use of the arguments that had made *Brown* successful. *See, e.g.*, Bd. of Educ. v. Dowell, 498 U.S. 237, 249 (1991) (holding that if the school district operates in compliance with *Brown* and is unlikely to return to segregation, the desegregation decree should be lifted); Crawford v. Bd. of Educ., 458 U.S. 527, 536–38 (1982) (upholding an amendment to the California constitution barring the state judiciary from imposing busing). These cases have led to the both the continued segregation and re-segregation of schools. CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 261 (2004).

58. Other cases dealing with education have been brought in federal courts, but they were brought to challenge the constitutionality of school district reforms meant to implement *Brown*. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 709–10 (2007).

59. 487 P.2d 1241, 1244 (Cal. 1971). Under the former California system, a district's tax base determined how much revenue could be raised for a particular school district's education budget. *Id.* Since tax bases varied greatly throughout the state, the "assessed valuation per unit of average daily attendance" of children in elementary school in 1969-1970 ranged from $103 to $952,156—a discrepancy of almost a 1 to 10,000 ratio. *Id.*

60. There is some disagreement as to which case started the finance equity wave. Some scholars use *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) to delineate the starting point of school finance litigation because it was the first case based on the theory of equal funding. *E.g.*, Deborah A. Verstegen, *Towards a Theory of Adequacy: The Continuing Saga of Equal Educational Opportunity in the Context of State Constitutional Challenges to*

from the federal courts to the state courts, challenging school funding schemes and the disparities they create by making equal protection arguments under state constitutions.[61] When these claims proved unsuccessful either in court or in implementation, plaintiffs changed tactics, bringing cases under the state constitutions' education clauses.[62] These latter cases attempted to remedy the disparity between funding and educational opportunity by focusing on the adequacy of the education provided instead of arguing for equal funding.[63] Plaintiffs argued that the educations provided were not sufficient to meet the guarantee of state constitutions' education articles.[64] They defined the resources necessary for an education that would meet that promised in the education articles, often characterized as "adequate," and identified the harm in terms of what resources were missing.[65]

California and New Jersey are good examples both of how the "waves" developed and of how the arguments developed with time. While Koski and Reich argue that the major trend in recent years has been away from targeting specific resources to poor and minority students and toward one-size-fits-all schemes,[66] I argue that the cases from these two states show exactly the opposite. It is clear from looking at the cases from both of these states that, while plaintiffs re-characterized their arguments over time, neither the plaintiffs nor the courts lost the idea of equity and have

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School Finance Systems, 23 ST. LOUIS U. PUB. L. REV. 499, 505 (2004). I use *Serrano*, however, because it was the first case to be decided on equal funding grounds, even if equal funding was not the argument originally advanced by the plaintiffs.

61. Access Quality Education: School Funding Litigation Overview, http://www.schoolfunding.info/litigation/overview.php3 (last visited Dec. 22, 2009).

62. *Id.* During the 1970s and 1980s, defendant states won approximately two-thirds of those cases. *Id.*

63. *Id.*

64. *E.g.*, Abbott v. Burke (Abbott I), 495 A.2d 376, 380 (N.J 1985) (describing plaintiffs' claim that empirical evidence demonstrated that their school districts had inadequate funding due to a "lack of an adequate tax base for educational purposes"); First Amended Complaint for Injunctive and Declaratory Relief at 7, Williams v. California, No. 312236 (Cal. Super. Ct. Aug. 14, 2000), *available at* http://www.decentschools.org/courtdocs/01FirstAmendedComplaint.pdf (pointing out that "[t]he [c]onstitution and laws of California require the [s]tate to ensure the delivery of basic educational opportunities for every child in California and vest the [s]tate with ultimate responsibility for the [s]tate's public elementary and secondary school system").

65. *E.g.*, First Amended Complaint for Injunctive and Declaratory Relief at 9, Williams v. California, No. 312236 (Cal. Super. Ct. Aug. 14, 2000), *available at* http://www.decentschools.org/courtdocs/01FirstAmendedComplaint.pdf (citing a lack of school supplies and unsafe learning conditions).

66. William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 571–72 (2006). The authors argue that this shift "may not enhance equality and indeed may exacerbate existing inequalities." *Id.* at 572.

moved from one-size-fits-all funding equity schemes to remedies for the inequities.

B. *California*

In California, plaintiffs have brought cases both under the federal Equal Protection Clause and the education clause of the California constitution. By examining the contrast between the equality arguments made in *Serrano*[67] and the adequacy arguments made in *Williams*,[68] it is clear that adequacy arguments have the potential to advance equity, while equality arguments do not.

i. *Serrano v. Priest*

While the Supreme Court's holding in *Rodriguez* was the point of transition from federal courts to state courts for most plaintiffs, some plaintiffs, tired of equality "with all deliberate speed," moved to state courts prior to *Rodriguez*. *Serrano v. Priest* exemplifies what happened when equality arguments moved to state courts. In the late 1960s, plaintiffs representing students and their parents brought a class action in the California courts against state and county officials charged with administering the financing of the public school system, alleging that "[a]s a direct result of the financing scheme[,] substantial disparities in the quality and extent of availability of educational opportunities exist . . . [and] [t]he educational opportunities made available to . . . plaintiff children[ ] are substantially inferior to the educational opportunities made available to children attending public schools in many other districts . . . ."[69] The plaintiffs requested a declaration that the financing system was unconstitutional under the equal protection clauses of the United States Constitution and the California constitution.[70] They made clear equality arguments—they received less education money than other children—but this argument was also based on a concept of adequacy because in order to argue that equality would lead to fairness, plaintiffs first had to make the determination that the "equal" education was the education they wanted.

Looking at the plaintiffs' equal protection and due process arguments, the court simultaneously analyzed them for violations of both the United

67. Serrano v. Priest, 487 P.2d 1241, 1249–53 (Cal. 1971).

68. First Amended Complaint for Injunctive and Declaratory Relief of Plaintiffs at 25–26, Williams v. California, No. 312236 (Cal. Super. Ct. Aug. 14, 2000), *available at* http://www.decentschools.org/courtdocs/01FirstAmendedComplaint.pdf.

69. Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971).

70. *Id.*

States Constitution and the California constitution.[71] The court first held that wealth defines a suspect class and, therefore, classifications resting on wealth are subject to strict scrutiny.[72] It found that the school financing system irrefutably classified on the basis of wealth.[73] Second, the court looked at the nature of the right to an education and found that "the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.'"[74] Subjecting the funding system to strict scrutiny, the court found that it was not necessary to accomplish a compelling state interest and that it denied plaintiffs and the rest of their class equal protection of the law.[75] While the court did not issue an order to the state, it remanded the case with instructions to enforce a judgment implementing a transition from an unconstitutional system to a constitutional one if the trial court found the public school financing system invalid in whole or in part.[76]

Although the court did not define the remedy beyond a constitutional funding system, its reliance on spending and funding disparities to reach its holding suggests that this decision essentially set an equal funding standard. The court took the equal protection arguments the plaintiffs made and interpreted them to require horizontal equality but not vertical equity. The decision in *Serrano* makes it clear, contrary to what Koski and Reich argue, that equality cases do not necessarily create equity. Unlike *Robinson I*,[77] decided at nearly the same time, the *Serrano* court did not recognize that some students may require more than "equal" or that the state funding mechanism could be fair if it gave those students more. Because the court relied on plaintiffs' claims of equal protection, the

71. *Id.* at 1249 n.11 (noting that the equal protection provisions of the two constitutions are substantially equal in protections granted and, so, the same analysis can be used for both). This dual analysis allowed the decision in *Serrano* to stand even after the decision in *Rodriguez*.

72. *Id.* at 1250.

73. *Id.* In making this determination, the court rejected the defendants' arguments that (1) the financial system did not discriminate on the basis of wealth, (2) the figures used by the court did not correctly assess wealth of a district or its residents, (3) the problem was with the tax rate, and (4) discrimination on the basis of "wealth is constitutional so long as the wealth is that of the district, not the individual." *Id.* at 1250–53. The court determined that the primary determination of a district's wealth should not be the value of the property, "but the ratio of its resources to pupils," as this figure is what determines what amount a district can allocate to the education of its individual students. *Id.* at 1251.

74. *Serrano*, 487 P.2d at 1258.

75. *Id.* at 1263; *cf.* Robinson v. Cahill (Robinson I), 303 A.2d 273, 287 (N.J. 1973) (analyzing plaintiffs' claim on the basis of New Jersey's constitutional education guarantee, rather than on equal protection grounds).

76. *Serrano*, 487 P.2d at 1266.

77. Robinson v. Cahill (Robinson I), 303 A.2d 273 (N.J. 1973). See discussion in Part III(C)(i) of this Note.

court maintained the language of "equality" and did not consider the concept of equity.[78]

ii. *Williams v. California*

While *Serrano* shows that equality suits do not always have the ability to achieve equity, *Williams v. California* shows that adequacy suits always have the potential to do so. Plaintiffs in *Williams* filed a claim against the State of California, the state superintendant of public education, the state department of education, and the state board of education, alleging that "[n]otwithstanding the [s]tate's assumption of responsibility for some aspects of public education, it has abdicated its responsibility to oversee and superintend the constitutional functioning to ensure that all . . . children receive a free and equal common education."[79] Plaintiffs contended that they were required to attend schools that were without basic educational tools, such as pencils, crayons, paper, and scissors, that they had grossly underprepared and inexperienced teachers, and that they had to attend schools in "slum conditions" that were unsafe and overcrowded and would "shock any reasonable conscience."[80] Therefore, they argued, they were deprived of the "free and common" education guaranteed by the California constitution, while other students in other neighborhoods received the constitutional guarantee.[81]

Plaintiffs requested that the court issue a temporary restraining order, a preliminary injunction, and a permanent injunction ordering the defendants to "establish baseline standards to constitute a floor of minimal constitutional conditions and tools essential for education"; "establish a system of statewide accountability" to ensure that the state would be notified of the absence of such tools and conditions and order the repair of such problems or the supply of such tools; and "provide basic educational

78. *Serrano*, 487 P.2d at 1258.

79. First Amended Complaint for Injunctive and Declaratory Relief of Plaintiffs at 8, Williams v. California, No. 312236 (Cal. Super. Ct. Aug. 14, 2000), *available at* http://www.decentschools.org/courtdocs/01FirstAmendedComplaint.pdf.

80. *Id.* at 9, 25. Additionally, "[i]n at least [one hundred] schools in the [s]tate, as few as [fifty] percent, sometimes as few as [thirteen] percent, of the teachers in a school [had] full, nonemergency teaching credentials." *Id.* at 9.

81. *Id.* at 8–10. Interestingly, Koski and Reich state that "[i]mages of children in crumbling schools with no textbooks and incompetent teachers outrage onlookers," which cannot be entirely true, seeing as these children were in schools that had been crumbling for years and little had been done to fix the problems. William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 561 (2006).

necessities to all California public school children."[82] While this argument at first could be seen as creating a very low baseline above which inequities would be tolerated, the way in which the plaintiffs structured the remedies belies this interpretation. The minimum the plaintiffs asked for is, in fact, the education that the state should aim to provide all students, including concepts of equity.

The *Williams* plaintiffs argued that an adequate education begins with an adequate supply of instructional materials, safe and clean facilities, and qualified teachers.[83] This definition is a minimum of what constitutes an adequate school in which children have the opportunity to learn. But this minimum is based on a concept of equality. It is clear that these factors are always present in "good" schools; in fact, it is widely agreed that such factors are necessary components of any sort of education. What the *Williams* plaintiffs asked for was not the bare minimum education (although it could be interpreted that way), but rather the *required components* of an education. They did not ask for just any components, but did ask for the three that could be construed as *sine qua nons* for a school to provide an education meeting the demands of the modern world.[84] If a fully qualified teacher taught in a classroom located in a clean school with sufficient materials to meet the state standards and in which children felt safe, it is likely that educational equality would be a goal within reach of most of the students at the school. If, in fact, the resources were provided in full and equity remained out of reach, the settlement in *Williams* does not preclude plaintiffs from redefining the resources, measuring what is needed by how far the school remains from equity. While, as discussed below, the *Williams* plaintiffs might have achieved greater equity if they had more carefully phrased the relief sought, their petition was a step in the direction of equity.

There was no court decision issued in *Williams* because the parties settled in 2004.[85] The resulting settlement agreement (the Agreement) affected all schools in California (with the greatest impact on decile 1-3 schools)[86] and granted the plaintiffs nearly everything that was requested

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82. First Amended Complaint for Injunctive and Declaratory Relief of Plaintiffs at 74–75, Williams v. California, No. 312236 (Cal. Super. Ct. Aug. 14, 2000), *available at* http://www.decentschools.org/courtdocs/01FirstAmendedComplaint.pdf.

83. *Id.* at 6.

84. In order to arrive at these resources, they would have to look at higher-performing schools and make comparisons, which infuses equality into the adequacy claim, as well as equity.

85. The *Williams* Case—An Explanation, http://www.cde.ca.gov/eo/ce/wc/wmslawsuit.asp (last visited Dec. 22, 2009).

86. Deciles 1-3 refers to the school's academic performance index score (API), which is based on student performance on the California Standards Test.

in their original petition.[87] The Agreement required the state to implement legislation to provide financial assistance to repair low-performing schools; create a facilities assessment program; create and post in all classrooms standards for instructional materials and facilities; collect and verify data on compliance with those standards, as well as teacher requirements; require a uniform process for complaints on anything failing to meet those standards; require the ending of the Concept 6 calendar;[88] intervene in decile 1-3 schools where the standards were not met, as well as in districts having difficulty in attracting, retaining, or properly assigning teachers; improve the teacher supply by streamlining requirements for out-of-state teachers to earn California credentials; require each district to implement a facilities inspection system; and put additional schools in the High Priority Schools Grant Program after others were phased.[89] In addition, the Agreement contained legislative proposals to provide substantial funding for those programs.[90]

While the Agreement affected all public schools in California, thereby creating horizontal equality, it certainly did not "tolerate inequalities above basic thresholds" or fail to "target additional resources to the demonstrably needy."[91] The Agreement included certain provisions for decile 1-3 schools alone, thus, creating a framework for vertical equity as well.[92] The High Priority Schools Grant Program is available only for

87. *See* Notice of Proposed Settlement at 6–7, Williams v. California, No. 312236 (Cal. Super. Ct. Aug. 13, 2004), *available at* http://www.decentschools.org/settlement/williams_notice_settlement.pdf (listing the terms of the proposed settlement). The Agreement provides for legislative proposals that will ensure students have clean and safe schools, books, and qualified teachers, as well as measures to ensure that schools maintain the availability of such fundamental elements and funding for educational programs. *Id.* at 6.

88. The Concept 6 calendar was created for schools in California that enrolled more than 150% capacity. Jeannie Oakes & Martin Lipton, *"Schools That Shock the Conscience":* Williams v. California *and the Struggle for Education on Equal Terms Fifty Years After* Brown, 19 BERKELEY WOMEN'S L.J. 353, 361 (2004). The schedule accommodates three revolving tracks of students by cutting seventeen days from the school year. *Id.* Almost all of the Concept 6 schools are located in Los Angeles Unified District and have twice as many Latino students as schools not using a Concept 6 calendar. *Id.* In addition, all Concept 6 schools are located in low-income neighborhoods. *Id.*

89. Notice of Proposed Settlement at 7, Williams v. California, No. 312236 (Cal. Super. Ct. Aug. 13, 2004), *available at* http://www.decentschools.org/settlement/williams_notice_settlement.pdf.

90. *Id.* at 8.

91. William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 571 (2006).

92. Notice of Proposed Settlement at 7, Williams v. California, No. 312236 (Cal. Super. Ct. Aug. 13, 2004), *available at* http://www.decentschools.org/settlement/williams_notice_settlement.pdf.

decile 1-3 schools, as are the intervention programs.[93] In addition, some of the resources that are available to all schools disproportionately affect decile 1-3 schools in a way that aids the decile 1-3 schools without also disadvantaging them in relation to the decile 4-10 schools.[94] For example, the increased monitoring of teacher qualifications for classrooms with twenty or more English Language Learners (ELLs) will most affect schools that have high percentages of those students. Because ELLs tended to be concentrated in decile 1-3 schools,[95] this strategy will ensure that they are provided a higher quality of teachers and will bring them closer to the standards met in other schools. This is also true in relation to the Concept 6 calendar; because that calendar was implemented almost exclusively in higher poverty areas where the schools tended to be lower-performing, aiming the correction at all schools really only aided decile 1-3 schools.[96] The ability of these added resources to compensate only the low-performing schools increases both horizontal and vertical equity.

While *Williams* has equity-minded aspects, it did not go far enough to achieve full equity, and there are ways in which it could have taken the adequacy definition further towards equity. For example, *Williams* could have required that decile 1-3 schools get money for instructional materials beyond textbooks, including other books and supplementary programs and materials, even though other schools do not get such supplementary materials from the state. This would be equity-minded because test scores in decile 1-3 schools demonstrate that these students are generally far behind their peers in other schools and, so, are likely to need additional help and multi-leveled material.[97] Therefore, the extra resources would be directed to where there was a specific need. In addition, understanding that the students in decile 1-3 schools often begin school behind their peers, the *Williams* court, like the *Abbott* court, could have required preschool programs.[98] While no one can legitimately ex-

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93. *Id.*

94. *Id.*

95. Jeannie Oakes & Martin Lipton, "*Schools That Shock the Conscience*": Williams v. California *and the Struggle for Education on Equal Terms Fifty Years After* Brown, 19 BERKELEY WOMEN'S L.J. 353, 361 (2004).

96. *Id.*

97. *See* DataQuest (CA Dept of Education), http://dq.cde.ca.gov/dataquest/ (last visited Dec. 31, 2009) (providing test scores for California public schools). Searching DataQuest at the District Level for STAR test scores, when narrowed to Los Angeles Unified School District, Decile 1-3 schools (e.g., Samuel Gompers Middle School and Fremont Senior High School), will demonstrate the lower test scores for decile 1-3 students. The search results can also be limited by year (before or after the *Williams* decision) and to demonstrate graduation rates.

98. This would require plaintiffs and courts to do what Koski and Reich say they do not: "compare the resources of poor children to those of the affluent." William S. Koski &

pect a lawsuit to remedy all of the inequities in education, a more complete definition of "adequate" could have resolved more of the problems and, thus, could have been more equitable. But the fact that *Williams* could have included those factors is a clear sign that adequacy suits have the potential to achieve equity.

C. *New Jersey*

As in California, two cases in New Jersey have impacted education in that state. Unlike California, however, both cases were brought under the New Jersey education clause's guarantee of a "thorough and efficient" education. The first, *Robinson v. Cahill* (*Robinson I*),[99] marked the first time plaintiffs used the education article rather than the equal protection clause of the state constitution to bring their claims. *Robinson I* clearly indicates that while plaintiffs were trying a new tactic, they were continually asking for equity. The second case, *Abbott v. Burke* (*Abbott I*),[100] continued the fight for equity after *Robinson I* failed in implementation and in remedying inequities. *Abbott I* demonstrates that over nearly thirty years of litigation and considerable frustration with failures of implementation, plaintiffs have yet to give up on the concept of equity in favor of something "easier."

i. *Robinson v. Cahill*

Just as in California, advocates in New Jersey wanted more than what the U.S. Supreme Court's education decisions provided them. In 1973, students attending schools in property-poor districts in New Jersey brought an action challenging the state's funding system for public schools.[101] The New Jersey Supreme Court held that the funding scheme violated the state constitution's guarantee of a "thorough and efficient" education.[102] The court defined a "thorough and efficient" education as one that provides equal educational opportunities for all children such that each child is equipped both as a citizen and as a competitor upon

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Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 569 (2006). When courts demand that the state give resources to poorer districts even though wealthier districts do not get them, they make comparisons and look at what is lacking in the schools and the lives of the poorer children and how to remedy that disparity. See discussion of *Abbott V* in Part III(C)(ii)(b) of this Note.

99. Robinson v. Cahill (Robinson I), 303 A.2d 273 (N.J. 1973). See discussion in Part III(C)(i) of this Note.

100. Abbott v. Burke (Abbott I), 495 A.2d 376 (N.J 1985). See discussion in Part III(C)(ii) of this Note.

101. *Robinson I*, 303 A.2d at 276.

102. *Id.* at 294.

entering the working world.[103] While the claim was based on a concept of adequacy, the language with which the court defined the requirement is clearly one based both on equality and equity. While "thorough and efficient" could have been interpreted as requiring the basic or the bare minimum of education, what emerged was a requirement for equality and equity. The court stated that each child would need to be equipped for the world, something that is only possible if fairness is taken into account. These concepts would have been unavailable if the switch from equity to adequacy had, in fact, been complete and distinct.

The concepts of equality and equity are also present in the remedy the court ordered. The court found that funding equality and educational equality, or what I would term "equity," were not the same and, therefore, did not require equal funding, thereby allowing New Jersey to constitutionally "recognize differences in area costs, or a need for additional dollar input to equip classes of disadvantaged children for the educational opportunity."[104] The court, therefore, required that New Jersey "cost out" a constitutionally guaranteed education and base its funding scheme on the application of the costing out plan. At the end of the decision in *Robinson I*, the court firmly required equity as a result of the adequacy case, which is clear from the fact that the court recognized that some children may need more resources than others and that "equal" would not suffice.[105]

But when the case returned to court because of the state legislature's failure to act, the court reframed its opinion in equality terms, requiring equal dollar input per pupil.[106] In *Robinson IV*, adequacy did not require a minimum level of funding or an equitable level of funding; it required an equal level of funding.[107] This remedy required horizontal equality—that is, the same treatment of all students, regardless of the school or the neighborhood they live in. Koski and Reich contend that while horizontal equality is the first step, it still allows for inequalities above the baseline.[108] Equal resources simply cannot result in an equal "opportunity" at

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103. *Id.* at 295 ("The Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."). This definition encapsulates the definition of "equity" used in this Note.

104. *Id.* at 297–98.

105. *Robinson I* is somewhat of a hybrid case. The plaintiffs made their arguments under the education clause of the New Jersey constitution, so, in that way, it was an adequacy case. But the remedy was framed in terms of equality of funding, which is more often associated with the earlier equality cases.

106. Robinson v. Cahill (Robinson IV), 351 A.2d 713, 721–22 (N.J. 1975).

107. *Id.*

108. William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 549 (2006).

high school graduation because some schools require more resources in order to achieve that outcome for their students. As the *Robinson I* decision demonstrated, however, adequacy suits have the ability to move beyond horizontal equality toward vertical equity (i.e., achievement of the high school standards) when courts recognize that the litigants require more in order to meet the constitutional guarantee.

ii. *Abbott v. Burke*

The decision in *Robinson I* and the New Jersey legislature's enactment of the Public School Education Act of 1975 promised the plaintiffs and those like them an education equal to what their wealthier peers received.[109] That promise went unfulfilled and, less than ten years later, new plaintiffs again went to the New Jersey courts to demand the education they were guaranteed.[110]

While the cases known collectively as the *Abbott* litigation have been going on for nearly thirty years, it is not necessary to review all of the decisions to understand how the concept of equity informed the adequacy claim and made it stronger. In this part I present the plaintiffs' original adequacy arguments from *Abbott I* to demonstrate how these arguments used equity, but I look only at the decisions in *Abbott II*[111] and *Abbott V*[112] because those two decisions demonstrate how the concept of adequacy continually requires the consideration of equity and how "adequacy-as-equity" can be maintained and changed with time and circumstances.

a. *Abbott I* and *Abbott II*

The *Abbott* litigation shows how plaintiffs construct arguments about adequacy and how those constructions are informed by equity.[113] In *Ab-*

109. Robinson v. Cahill (Robinson V), 355 A.2d 129, 132 (N.J. 1976) (stating that "[t]he goal of a thorough and efficient system of free public schools shall be to provide to all children in New Jersey, regardless of socioeconomic status or geographic location, the educational opportunity which will prepare them to function politically, economically and socially in a democratic society" (citation omitted)).

110. Abbott v. Burke (Abbott I), 495 A.2d 376, 382–83 (N.J. 1985). The plaintiffs contended that, while the act was found under *Robison V* to be facially constitutional if fully funded, it was unconstitutional as applied. *Id.* The plaintiffs argued that such unconstitutionality was evidenced by the "excessive" disparities that still continued in school funding under the act. *Id.*

111. Abbott v. Burke (Abbott II), 575 A.2d 359 (N.J. 1990). See discussion in Part III(C)(ii)(a) of this Note.

112. Abbott v. Burke (Abbott V), 710 A.2d 450 (N.J. 1998). See discussion in Part III(C)(ii)(b) of this Note.

113. William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 570 (2006).

bott I, plaintiffs argued that sizeable property wealth disparities among school districts resulted in substantial disparities in the amount of money spent per pupil and that the unavailability of financial resources in their school districts deprived them of the "thorough and efficient education" guaranteed by the New Jersey constitution.[114] Plaintiffs presented information showing inadequacies in the following areas: "adequacy of instruction, the breadth of program offerings, the adequacy of programs and services for children with special educational needs, the quality of physical facilities and materials and supplies, the qualifications of school personnel, the effectiveness of administration, and the adequacy of evaluation and monitoring programs."[115] They introduced the state education board's records into evidence to show that children in districts like their own learned significantly less, using state standardized test scores and the disproportionally large dropout rate as the measures of the lack of educational success in the schools they attended.[116]

The *Abbott I* plaintiffs defined the harm both in terms of the inputs (the missing programs) and the outputs (the test scores and the dropout rate).[117] While it might be argued that plaintiffs' focus on the missing resources makes this an adequacy claim that has dropped the concept of equity, both the process of defining the claim and the reliance upon output disproves this argument. Plaintiffs are only able to define what resources are "missing" by what is present in other locations and schools. Therefore, they requested horizontal equality by asking for those resources. While test scores are often questioned for their effectiveness in measuring learning, they are an excellent means of comparison because they are curved through a state to define the level of proficiency.[118] The fact that the *Abbott I* plaintiffs went to school in locations where test scores were far below the norm shows a lack of vertical equity, which plaintiffs attempted to remedy and used as the indicator of the effectiveness of resource provision. By combining the push for horizontal equality with a means by which to measure vertical equity, the plaintiffs, in fact, made an equity claim, although they framed it in terms of adequacy and equality. In essence, they began with the assumption that equal resources would lead to equal proficiency; only later would this be called into question.

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114. *Abbott I*, 495 A.2d at 381.

115. *Id.* at 383–84.

116. *Id.* at 384.

117. *Id.*

118. While Koski and Reich argue that *Abbott* did not initially include the concept of "adequacy," I argue that it necessarily did because the plaintiffs relied on the failure to meet proficiency to demonstrate the failure of the funding system.

The court in *Abbott II* maintained the connection between adequacy and equity in its decision. The court found that "[t]he inadequacy of poorer urban students' present education measured against their needs is glaring. Whatever the cause, these school districts are failing abysmally, dramatically, and tragically."[119] The court set a remedy that required either the amendment of the Public School Education Act of 1975 or the passing of new legislation to ensure (at a constant, year-to-year) that the *Abbott* districts' funding was "substantially equal to that of property-rich districts" or to those that provided the type of educational instruction the students needed.[120] While recognizing that the failures of the school districts might be related to factors outside of the funding issues and that money was not the entire cure, the court found that the districts were "entitled to pass or fail with at least the same amount of money as their competitors."[121]

While measuring the concept of adequacy, the court included discussion and remedies meant to address both equality and equity. First, the court defined the remedy as funding that is "substantially equal" to that of districts that provide the kind of education the students require, thus, creating a system of horizontal equality.[122] Second, while the court set the remedy by establishing an external comparison, it also made two moves that established a framework for vertical equity. The first move was to measure the lacking resources against the needs of the students.[123] This step allows for vertical equity because it leaves room for the argument that some students have greater needs than others and, therefore, the resources provided should reflect that fact. The second step was to limit the remedy to poorer urban school districts, allowing for the provision of additional resources to some schools (which creates vertical equity) instead of a provision to all schools (which might simply raise the bar while maintaining the inequalities).[124]

b. *Abbott V*: "The crisis is obvious; the solutions are elusive."[125]

Abbott V most clearly demonstrates how the courts can use an "adequacy-as-equity" framework to create equality and remedy inequalities above the baseline. In *Abbott V*, the New Jersey Supreme Court addressed reforms and remedial programs that were proposed as a result of

119. Abbott v. Burke (Abbott II), 575 A.2d 359, 366 (N.J. 1990).
120. *Id.* at 408.
121. *Id.* at 403.
122. *Id.* at 408.
123. *Id.* at 403.
124. *Abbott II*, 575 A.2d at 403.
125. Abbott v. Burke (Abbott V), 710 A.2d 450, 527 (N.J. 1998).

the court's order in *Abbott IV*.[126] The court created a comprehensive and detailed plan—including both funding and resources—for how the state and districts would comply with *Abbott II*.[127] In elementary schools, the reforms included the following: restructuring of elementary schools through whole-school reform models; full-day kindergarten; half-day preschool for three- and four-year-olds; and reduced class sizes.[128] In the middle and high schools, the reforms included: remedial education programs; dropout prevention counselors; school-to-work or college transition programs; full-time security personnel; metal detectors; and the establishment of codes of conduct.[129] At all levels, the programs included: health and social support services; comprehensive teacher professional development; increased use of instructional technology, including two media-technology coordinators at the seventh- through twelfth-grade levels; and transition to school-based decision-making and "educationally adequate facilities."[130]

While pieces of the remedy are aimed at horizontal equality, the remedy overall is aimed at vertical equity and, thus, equality of educational *opportunity*, rather than equality of resources. Some of the resources are those found at any school in the state: qualified and trained teachers, use of instructional technology, smaller class sizes, and adequate facilities. Providing just those resources would make the *Abbott* districts "equal" to the other districts. But because of factors outside of the education system that can affect educational opportunity, the court went beyond these minimums to require more than what schools in other districts provided, in effect, creating a new inequality, but one designed to funnel resources to those most in need. Because parents in other districts had the ability to provide preschool education, under *Abbott*, the state would provide it. And because the *Abbott* plaintiffs and those like them were often behind when they reached middle and high school, the court mandated remedial programs and tutoring services even though no evidence was introduced that these resources were present at other schools.[131] The same was also true for the security personnel, dropout counselors, and transition programs.[132] In *Abbott V*, the court, using the concept of adequacy, looked

126. *Id.* In *Abbott IV*, the court ordered the state to "study, identify, fund, and implement *supplemental* programs required to redress the disadvantages of public school children" in *Abbott* schools so that a more specific remedy could be granted. Abbott v. Burke (Abbott IV), 693 A.2d 417, 421 (N.J. 1997) (emphasis added).

127. *Abbott V*, 710 A.2d at 454.

128. *Id.* at 486–89.

129. *Id.* at 494–95.

130. *Id.* at 491–92, 495, 523.

131. *Id.* at 494–95.

132. *Abbott V*, 710 A.2d at 494–95.

at what programs and resources would create equality of opportunity, or "equity," through horizontal inequality.[133] This decision lessened the likelihood that any advancements in *Abbott* districts would be counteracted by equal advancements in non-*Abbott* districts and, therefore, was able to account for relative deprivation.

IV. Changing the Language, Changing the Outcome: How Inserting Equity into the Debate Can Aid Plaintiff Success

While adequacy suits have the potential to guarantee equity, they have not yet been successful in every state, leaving advocates frustrated and many students receiving inequitable educations. I argue that the success of many of these cases can be improved by carefully defining the concept of "adequacy."

There are two ways in which adequacy suits have failed: in the first, the courts stop success; in the second, implementation is stalled. Courts have given essentially two justifications for denying relief in education cases. In the first, the courts have found that the state provided a constitutionally guaranteed education despite disparities between districts. In the second, the courts have refused to decide the issue at all, calling it a nonjusticiable question and, therefore, allowing the decisions of the legislature to stand. In subpart A below, I look at two cases to demonstrate how using the "adequacy-as-equity" framework could have helped the lawsuits in the first category succeed. In subpart B, I address how the "adequacy-as-equity" framework may aid the latter scenario, though lying further from the scope of immediate litigation. Finally, in subpart C, I address how equity can inform strategies for implementation to make them more successful.

A. *Interpreting the Language of the Education Clause*

Each state constitution differs on the protection it affords education. Getting courts to accept the construction of the protection that plaintiffs advance is required for plaintiff success. In this subpart, looking at cases from Oklahoma and Louisiana, I show how a concept of equity could change the understanding of what the state constitution requires, thereby changing the outcome of previously failed adequacy cases.

133. *Id.*

i. Oklahoma

While New Jersey has one clearly defined education requirement ("thorough and efficient"),[134] Oklahoma has a number of statutory principles and provisions that refer to the quality of the required education. This makes litigation trickier because it requires interpretation of a greater number of phrases, each of which can modify the others. In 1987, the Supreme Court of Oklahoma rejected challenges to the constitutionality of Oklahoma's public school financing system.[135] The challenge was brought under the Equal Protection Clause of the Fourteenth Amendment, as well as the Oklahoma constitution's due process clause and specific education provisions.[136] The plaintiffs argued that "the disparities in taxable wealth among the various school districts" and the fiscal impact of those disparities on spending power affected the "ability of the poorer districts to provide their students with educational resources and opportunities comparable to those of the more affluent school districts."[137]

The court pointed to several factors in rejecting the plaintiffs' arguments. First, that the plaintiffs had not alleged that they had "been *absolutely denied* a free public education, *nor* that *they [were] not receiving an adequate one* . . . [but] only that they [were] not able to provide as much money per pupil as do other districts."[138] Second, that language in the Oklahoma school code, which provided, in pertinent part, that Oklahoma would "provide the best possible educational opportunities for every child in Oklahoma" and that the system must "assure that state and local funds are adequate for the support of a realistic foundation program," was not meant to require funding equalization.[139] Third, and lastly, the court stated that the right guaranteed in Oklahoma's education article was a "basic, adequate education according to the standards established by the [s]tate [b]oard of [e]ducation," which was *not* synonymous with equal expenditures.[140]

The "adequacy-as-equity" framework can address each of those three points in a way that could lead to a better result for plaintiffs. First, in an adequacy suit, the plaintiffs, while still not asserting complete denial of

134. Abbott v. Burke (Abbott II), 575 A.2d 359, 367 (N.J 1990).

135. Fair Sch. Fin. Council of Okla., Inc. v. Oklahoma, 746 P.2d 1135, 1137 (Okla. 1987).

136. *Id.* at 1143–50. The challenge under the Fourteenth Amendment is a strange challenge to bring after the Supreme Court's decision in *Rodriguez*, and the Oklahoma Supreme Court's dismissal of the claim is likely to be repeated in any state court where a similar claim is brought.

137. *Id.* at 1137.

138. *Id.* at 1146 (emphases in original).

139. *Id.* (citing OKLA. STAT. tit. 70, § 18-101 (2005)).

140. *Fair Sch. Fin. Council of Okla., Inc.*, 746 P.2d at 1149 (emphasis omitted).

education, assert claims of inadequacy.[141] The Oklahoma Supreme Court implicitly rejected the idea that equality is equivalent to adequacy or equity; reframing the claim as one involving lack of specific resources required for adequacy, rather than lack of equal expenditures, would force the court to acknowledge that funding is directly related to adequacy.[142] The fact that the court did not want to accept the idea that funding equality and educational equity are the same can be turned into a benefit, as it was in *Robinson*. If the plaintiffs framed this case in terms of inadequate resources and inequitable outcomes, it seems likely that some of the court's reasoning on this point would have been moot. This is clear from another section of the opinion in which the court denies the claim based on the fact that there was no showing that children were not receiving at least a basic, adequate education; such a claim is a necessary part of an adequacy suit.

In each of the three issues discussed above, inserting the "adequacy-as-equity" framework would assist the plaintiffs. While the first issue supports the bringing of an adequacy suit over an equality suit, the other issues explain why the concept of equity is important. When the Oklahoma Supreme Court interprets the language of the state constitution, it is interpreting the second and third issues in the absence of the concept of equity. If the plaintiffs could construct the complaint to argue for interpretation in light of equity concerns, the decision might shift to the plaintiffs. While the best possible educational opportunity is a necessarily high standard, the court relies more on the language of the guiding principle—that funds must be "adequate for the support of a *realistic* foundation program"[143]—which brings down the standard.

But the idea of adequacy can inform what "realistic foundation" means so that the high standard of "best possible educational opportunity" remains. The goal of equity can then inform the definition of "adequate" and "realistic" so as to require the resources necessary to attain the high achievement standard. For example, if "adequate" is defined in light of real educational requirements necessary to compete in a modern world and "realistic" is related to the resources the state could make available to reach that goal, the court would be forced to confront the disparity between the promise and the actuality. Inserting the concept of equity into litigation would allow the court to make the transition from the original interpretation to this one. These same arguments also respond to the court's denial of an equality remedy or, alternatively, make that remedy moot. While no one can predict with certainty how the court might rule

141. *Id.* at 1137.

142. *Id.* at 1146.

143. *Id.* (quoting OKLA. STAT. tit. 70, § 18-101 (2005) (emphasis added)).

in a new case, inserting equity into the debate has the potential to change the outcome because it speaks directly to the court's reasoning.

ii. Louisiana

Louisiana's constitution offers little protection for education, requiring only that a "minimum" of education be provided.[144] While this has stalled the success of previous adequacy suits and, therefore, prevented equity from advancing in past litigation, I believe that the "adequacy-as-equity" framework could aid success in Louisiana as well.

In *Charlet v. Legislature of the State of Louisiana*, brought in 1992, the Orleans Parish School Board and a group of parents sued Louisiana, arguing that the state "was not fulfilling its responsibility to provide a minimum foundation of education to all children . . . as required by the Louisiana [c]onstitution, and that the [s]tate's failure to equitably allocate funding for the schools violated the plaintiffs' constitutional right to equal educational opportunity under the law."[145] A similar suit filed on the same day argued that specified deficiencies in public school resources and achievement demonstrated the state's failure to meet the constitutional guarantees.[146] In 1998, the Louisiana court of appeals rejected the plaintiffs' claims, finding that the state's minimum foundation program (MFP), which allocated funds to the school districts, did not violate the plaintiffs' equal protection rights and that the constitutional guarantee of a "minimum foundation of education" meant nothing more than the least that could be provided where "minimum" meant "the least quantity assignable, admissible or possible in a given case."[147]

The first part of the court's finding is interesting because it demonstrates the potential for equity concerns even though the court ultimately granted summary judgment in favor of the defendants.[148] The decision regarding the MFP essentially rests on the fact that the state's expert had testified that the MFP formula was specifically designed to eliminate previous disparities by distributing relatively less money to wealthier districts than to poorer districts.[149] This suggests that the court was swayed by equity concepts even as it rejected the equal protection challenge. There-

144. Charlet v. Legislature, 713 So. 2d 1199, 1203 (La. Ct. App. 1998) (quoting LA. CONST. art VIII, § 13(B)).

145. *Id.* at 1200.

146. *Id.* at 1200–01 (noting the suit brought against the state on the same day by the Minimum Foundation Commission and parents of students).

147. *Id.* at 1206.

148. *Id.*

149. *Charlet*, 713 So. 2d at 1207.

fore, bringing an adequacy suit informed by equity has the potential of changing the decision.[150]

Adequacy and equity can be inserted into the debate regarding the interpretation of what the Louisiana constitution requires by the phrase "minimum foundation." In *Charlet*, the court found that "minimum" meant the least that could be provided such that no less would be possible to provide.[151] This construction of the words of the education statute at first appears to foreclose the provision of additional resources beyond what the bare minimum would be. But looking at the definition the court adopts—"the least quantity assignable, admissible or possible in a given case"[152]—there is the possibility to expand the term "minimum foundation." On its face, the court's conclusion suggests that Louisiana could do even less than it is now doing; that implicitly sets a lower boundary, possibly somewhere around the ability to recite the alphabet. What adequacy suits, however, do is force courts to consider a more realistic definition of "minimum"—that without which a student would be unprepared for the modern world.

While the idea of the "least quantity" is nearly impossible to avoid in light of the language of the Louisiana constitution, the remainder of the *Charlet* court's definition makes that idea susceptible to adequacy and equity expansions. In order to determine what is "assignable" and "possible," there must be a determination of what would be required to meet the goal and a balance of those resources against funding. The idea of adequacy can elevate the idea of what is required to meet the goal, and equity can inform the idea of possibility. After all, if it is possible to give certain students some things to reach a goal, it is possible to give others those things as well. The plaintiffs in the related suit began this process when they asserted that conditions were poor in their schools. But they did not appear to tie these problems to the idea of what was needed, assignable, or possible, which must be done to get around the court's rejection of the idea.

Equity can inform the idea of admissibility as well. If a goal is established (e.g., the Louisiana state education standards), then students must have certain things to reach that goal. Equity can inform this process so

150. In 2005, the plaintiffs filed another suit in Louisiana alleging that the funding system violated the minimum guarantee by failing to include cost analysis in the funding formula and that facilities were inadequate, deteriorating, and unsafe. Jones v. State Board of Elementary and Secondary Education (BESE), 927 So. 2d 426, 428 (La. Ct. App. 2005). The trial court granted summary judgment for the defendants in that case and the appeals court affirmed. *Id.* The claims made in this case are different from those I advance here.

151. *Charlet*, 713 So. 2d at 1206.

152. *Id.*

that it becomes permissible to give certain students more than others in order to reach that goal. This is not equality; it is giving to each the resources essential to meet the state mandate, something that the Louisiana Supreme Court appears to support in its discussion of the funding mechanism. By inserting adequacy and equity language into the debate over what the language of the Louisiana education clauses require, the court would be challenged to face the implications of its own reasoning in light of the actual needs of students today.

B. *Questions of Justiciability*

There are a few states in which defendants have won, almost by default, because the courts have decided that the issue of education funding and adequacy are non-justiciable and that, therefore, the decisions made by the legislature should stand. A decision of non-justiciability stalls the action completely. But there is a way to use the "adequacy-as-equity" framework to try to demonstrate justiciability, as well as to act outside of the court and try to make changes through the political process. As an example, I consider a case from Pennsylvania.

In 1979, just after the California and New Jersey courts upheld challenges to state education funding systems on equality and adequacy grounds, the Pennsylvania Supreme Court refused to do the same, finding in *Danson v. Casey* that the plaintiffs had failed to state a justiciable cause of action.[153] In 1998 in *Marrero v. Pennsylvania*, the Commonwealth Court of Pennsylvania, relying on *Danson*, held that challenges to the adequacy of funding provided under the statutory scheme posed a non-justiciable question.[154] The court stated that the history of public schools in Pennsylvania demonstrated that the legislature had created the schools as integral parts of the state's governmental system.[155] As a result, the court determined that the state's power over education was a

153. 399 A.2d 360, 367 (Pa. 1979). There are a number of explanations for why the Pennsylvania court rejected plaintiffs' claims when other courts were not doing the same. The rejection of the claim is especially interesting when one considers that the language of the Pennsylvania education clause is identical to New Jersey's, and the New Jersey court clearly found the concept justiciable. See discussion of the *Abbott* litigation in Part III(C) of this Note, above. One explanation may be that the Pennsylvania court, watching the action in nearby New Jersey, was reticent to dive into the fray.

154. 709 A.2d 956, 965 (Pa. Commw. Ct. 1998). Just as in *Danson*, the proximity to New Jersey may help explain why the court, when faced with a different question, chose to decline to decide. By 1998, the Pennsylvania courts would have watched the New Jersey Supreme Court exercise substantial power over issues of education without clear benefit to the students or to the power of the courts. Pennsylvania may have been reluctant to open itself up to the same.

155. *Id.* at 961.

fundamental power of the government.[156] The court read the state constitution as placing an affirmative duty on the Pennsylvania legislature to provide a "thorough and efficient *system* of public schools," but not as conferring on individual students the right to receive such an education.[157] Finally, it held that it was unable to judicially define what constituted an "adequate" education and, therefore, would not question the "reason, wisdom, or expediency of the legislative policy with regard to education."[158]

The issue raised by cases such as *Marrero* is more difficult than that raised in cases in which the courts have simply interpreted the language in a way unfavorable to the plaintiffs. But this does not mean that plaintiffs are without recourse or that the "adequacy-as-equity" framework is not helpful to them.[159] There are essentially two options: first, reframe the issue and try to bring it back into court; and second, take the fight out of the courtroom and into the political sphere, maintaining the "adequacy-as-equity" framework.

Starting with the former, it appears from the Pennsylvania court's analysis that that court might be more receptive to equity and equality concerns than to adequacy concerns. Adequacy on its own, as discussed in Part III above, is intentionally a concept without clear boundaries that forces the courts to either construct the definition on their own or rely on a party's proposed definition and constructions. While many courts have done this, courts such as the Commonwealth Court of Pennsylvania have been reluctant to do so. But equality is a concept with which courts are familiar and one that is easy to define: one student should get what the other does. Arguments for equality might advance the debate in courts.

This does not solve the problem though; equality is only half of the battle because it does not get the plaintiffs to equity. Equity is less clearly defined than equality, but it is more clearly defined than adequacy because it is a traditional legal concept familiar to courts and because there are clear lines and statistical frameworks that can be used to guide the definition. For example, if plaintiffs set the goal at high school proficiency (as they have done in other cases) and use the mandated high-

156. *Id.*

157. *Id.* at 962 (emphasis in original).

158. *Id.* at 965. This is contrary to Koski's and Reich's statement that education articles are easier for courts to interpret than "elusive 'fundamental rights' and 'suspect classes.'" William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 560 (2006).

159. While I do not intend this to be a complete list of the ways that advocates can approach the education inequities in these states, this is an issue that requires more debate, and I want to shift the debate by offering this framework as a new means by which to frame it.

stakes test scores to measure the current gap between this goal and the status quo, there would be a clear indication of what hurdle must be cleared on the way to equity. Because education research has done the work to determine what is needed to clear such hurdles, the courts would rely on experts (not on ideas of their own) to construct what equity would require. This approach makes the issue less subjective and more like other issues courts are accustomed to evaluating.

If reconstructing the complaint does not get plaintiffs past the justiciability issue, the "adequacy-as-equity" framework can be used outside of the courtroom as well. For example, advocates can use the initiative process to expand the constitutional guarantee to give all children what they require.[160] The adequacy and equity framework would need to be employed in this process throughout, both to construct the language of the initiative and to sway voters and legislatures to support such a goal. In terms of construction, the initiative can do several things: for example, it can change the language of the state education clause (e.g., from "minimum" to "adequate"), or it can more specifically define the required education (e.g., "The education provided by state *x* will include standards-based textbooks, qualified teachers, and safe and clean environments"). The former is less likely to allow plaintiffs to get back into court in states like Pennsylvania, but it does elevate the level required; if nothing else, it may put pressure on the legislature to meet the new standard. The latter is more easily judged under even a rational basis standard, but it runs the risk of being so specific as to lose flexibility and require constant amendments. However advocates decide to phrase the language, both what would be equal and what would be equitable must be considered in order not to generate still more inequities.

While "adequacy-as-equity" should also guide the campaign for such a change, advocates must recognize that equity poses risks because if someone is getting more, others will necessarily get less. Therefore, the bar for adequacy must be set high enough that parents are comfortable that their own children will be protected.[161] Advocates must determine, based on their own constituencies, how best to direct and frame this argument.

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160. This would be easiest in states such as California where the initiative process can be used to amend the state constitution. *See, e.g.*, Access Quality Education: Florida Litigation Historical Background, http://www.schoolfunding.info/states/fl/lit_fl.php3 (last visited Dec. 22, 2009) (showing how Florida education advocates used the state's initiative and referendum process to strengthen the state's education clause). The new language of Florida's constitution "makes Florida's education clause one of the most strongly worded in the nation." *Id.*

161. Koski and Reich argue that one of the things that have made adequacy suits more palatable is that they do not "level down," but rather allow inequities above "adequate." William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in*

C. *Equity in Implementation*

Much of the debate regarding adequacy and equality cases has centered around implementation, and I would argue that since no court decision or settlement has yet to be completely implemented, this is where it should remain. But because the scholarship discussing implementation has often focused on what would be adequate without any explicit discussion of vertical equity, scholars' focus needs to shift to fit the framework I have outlined. While I cannot address all the ways this might occur, I offer three suggestions in this section to spark the debate on this topic.

First, implementation requires full knowledge of the problem and of the available resources. Therefore, implementation strategies that focus on only one of those factors at the expense of the others, such as Professor Kagan's push to focus on inputs alone,[162] will not be sufficient to achieve equity. This can be seen from the fact that while *Williams* has been nearly fully implemented in some locations, there has been only a slight rise in test scores and very little change in rankings, which are a good judge of outcome equity because they are based on comparative data.[163] A well-rounded implementation strategy would include the following: an educational component to inform stakeholders what they are supposed to be provided; a complaint mechanism, backed by sanctions, to

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Educational Law and Policy and Why It Matters, 56 EMORY L.J. 545, 591–92 (2006) (explaining that "leveling down" occurs when resources afforded to well-off districts are eliminated in order to make those districts more on par with low-income districts, as opposed to simply adding resources to low-income districts to enable them to "level up" to wealthier districts). Even if adequacy suits are perceived thusly, they do not necessarily have this effect. *Id.* If "adequate" is given a construction that levels it up to what is currently afforded to high-performing schools, neither the rich nor the poor suffer, and the claim may still be more easily accepted. *Id.* at 590.

162. Josh Kagan, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2244 (2003).

163. Using data collected by the California Department of Education, it is possible to compare the API scores and rankings of the schools mentioned in the *Williams* complaint. *See* DataQuest (CA Dept of Education), http://dq.cde.ca.gov/dataquest/ (last visited Dec. 31, 2009) (providing test scores for California public schools).

The plaintiffs attended forty-six schools, twenty-six of which were located in the Greater Bay Area and Los Angeles County. First Amended Complaint for Injunctive and Declaratory Relief of Plaintiffs at 26–57, Williams v. California, No. 312236 (Cal. Super. Ct. Aug. 14, 2000), *available at* http://www.decentschools.org/courtdocs/01FirstAmendedComplaint.pdf. Out of those twenty-six schools, all but four saw API scores rise at least slightly, which may be attributable to *Williams*. But only two schools rose in ranking, and three of the schools actually fell in ranking. In addition, all but two of the schools remain decile 1-3 schools. Thus, while the schools made progress, they remain at the bottom of the rankings in California. In addition, in California the graduation rate is somewhere around seventy-five percent with many API 1-3 schools having closer to only fifty percent of their seniors graduate.

allow stakeholders to notify the appropriate agencies when required resources are lacking; and monitoring of outputs to allow for adjustments when the inputs do not have the desired and necessary effects.

Some of these factors are already present in successful cases. For example, as Koski notes, *Williams* defined a complaint mechanism for stakeholders to report lacking resources.[164] But not all successful cases have such a system, as demonstrated by *Abbott*'s lack of any required reporting mechanism. Even where some of the factors are present, others are lacking. *Williams* is lacking the educational component, and many stakeholders remain confused and unaware of what is required and how they can effect change.[165] The lack of an educational component makes the complaint mechanism far less effective than it has the potential to be. Finally, while both *Abbott* and *Williams* require monitoring of the required inputs (by the Education Law Center in New Jersey and the ACLU of Southern California, respectively), neither case required that a system be in place to monitor outputs, a factor that is required in order to keep up with the constantly evolving definition of equity. Moreover, both monitoring entities are, in effect, volunteers, rather than intrinsic parts of the system as they should be; auditing is good business practice, and designated internal auditors can identify problems before they become serious enough to impact the classroom.

Second, even though many advocates and detractors have characterized adequacy suits as more palatable to society than the alternatives, implementation often stalls because of societal resistance. "[U]rban schools are fighting a battle they cannot win without strong support from local, state, and federal political leaders, and from voters and taxpayers outside the cities."[166] Because societal resistance is not something that can be addressed in a lawsuit, litigation must be combined with policy

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164. William S. Koski, *Achieving "Adequacy" in the Classroom*, 27 B.C. THIRD WORLD L.J. 13, 18 (2007) ("[T]he *Williams* litigation provides a good start toward developing monitoring and reciprocal accountability schemes that promise local communities a meaningful voice in school reform.").

165. See surveys taken for this Note, which asked teachers who work in *Williams* schools to respond to questions regarding the *Williams* requirements (questions and responses are on file with *The Scholar: St. Mary's Law Review on Minority Issues*). While most teachers agree that *Williams* requires textbooks in every classroom, the rest of the mandates of *Williams* are misunderstood. Most teachers do not understand exactly what *Williams* provides to schools, stating, for example: "I just know that you can get in trouble if you don't have the required textbooks, I don't know about anything it provides except for visits to check on compliance." More than one teacher said that the only thing *Williams* provides is a printed version of the law to put on classroom bulletin boards.

166. Abbott v. Burke (Abbott V), 710 A.2d 450, 526 (N.J. 1998) (emphasizing that teachers are often called on to solve problems that state legislatures ignore).

moves and public engagement so that, over time, voters see the results in their local schools and programs function more or less automatically.

Amanda Broun's and Wendy Puriefoy's proposed model is likely to be successful and, in fact, has had some success because it involves both the interested parties (educational advocates and the affected community) and those on the outside (policymakers and the larger community).[167] If the outside world can be involved and interested in solving the problems of a community, demands for improvement will meet less resistance. This will allow the problem of funding to be solved as people change their attitudes about education spending and push litigators to do the same. As well as lowering resistance, such a model generates political power and takes some of the burden off of the affected community, as discussed in Part II above. True public involvement and societal change is the only thing likely to change the problem in a way that would eliminate the need for future litigation. This is also likely to aid in efforts to change constitutional protections (as might be helpful in Oklahoma and Louisiana), as well as in creating change outside of the courts (as Pennsylvania has forced advocates to do).

Third, because implementation of equity will never have an endpoint—what is equitable is (necessarily) a constantly evolving concept—there must be a move in the legislative arena to support litigation. Since legislators respond to those who elect them, putting political power behind educational equality is necessary. Much of this can be accomplished through engaging the public, either through Broun's and Puriefoy's model or through a similar model. In addition, the lawsuits themselves have the power to spur lasting change. For example, the settlement in *Williams* involved the state and, therefore, state legislators in the process.[168] Using the lawsuit as cover, legislators were able to put aside politics and consider real solutions. In addition, it made the plan something that involved political power even prior to implementation. This is likely to be successful over time. In contrast, *Abbott* put New Jersey's legislature and its supreme court at odds, something that tests the power of the court and allows state legislators to continue to refuse to act—after all, if the solution is simply imposed on legislators, it is far easier to say *no* than if legislators had developed and adopted the solution on their own. Finally, putting pressure on state legislatures could also have the potential of moving courts to reconsider the issue of justiciability. If the state legis-

167. Amanda R. Broun & Wendy D. Puriefoy, *Public Engagement in School Reform: Building Public Responsibility for Public Education*, 4 STAN. J. C.R. & C.L. 17, 217, 218, 236 (2008).

168. Notice of Proposed Settlement at 4–6, Williams v. California, No. 312236 (Cal. Super. Ct. Aug. 13, 2004), *available at* http://www.decentschools.org/settlement/williams_notice_settlement.pdf.

lature defined the education guarantee so as to allow for judicial interpretation, the courts could comfortably step into the role of interpreter without feeling as if they were at odds with the legislature, thereby avoiding the problems cited by the Pennsylvania court.

V. Conclusion

Dissenting in *Fair School Finance Council of Oklahoma*, Justice Alma Wilson characterized the current funding scheme thusly: "Such legislation is the educational equivalent of sending one child to a thrift shop to buy his school clothes while the neighboring child is sent to the tailor to have his clothes handmade. I suppose we can say that both were clothed."[169] Professor Koski would characterize adequacy suits as only assuring that both children are clothed, but adequacy suits do not, in fact, stop there. Adequacy suits, when informed by equity, push to ensure that both children have the opportunity to get the same set of clothing in the end, even if the resources each is given to reach that end differ.

169. Fair Sch. Fin. Council of Okla., Inc. v. Oklahoma, 746 P.2d 1135, 1153 (Okla. 1987) (Wilson, J., dissenting).