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Breaking Through the Courtroom Door: Reexamining the Illinois Supreme Court's Public Education Finance Cases

By Nicholas Infusino *

I. INTRODUCTION

*"We cannot close our eyes to the perceptual and exceptional child; the mentally or physically handicapped or the gifted; the underprivileged; the oppressed. No, we have realized on our committee—and we hope that you will realize—that they, too, are human beings with the same rights as everyone else. We, the people, the state, society can no longer hide from the fact that thousands and thousands and thousands of youngsters in our community are not being developed to the fullest of their capacity."*¹

Illinois public schools have faced significant fiscal challenges for decades.² Following the 2008 recession, however, these challenges have escalated into a full-blown crisis, exacerbated by unpaid state government debts and new levels of fiscal austerity.³ During the 2011-12 school year, just 32.5% of public school funding came from the state, a share lower than almost all other states in the U.S.⁴ This is despite the fact that in recent years Illinois has spent less on education, as a share of the state gross domestic product, than thirty-two other states.⁵

* Loyola University Chicago School of Law, May 2013. Many thanks to my parents Jim and Gaby and siblings Katie and Alex for their constant love, encouragement, and humor. Thanks also to the *Children's Legal Rights Journal's* staff, who have been tremendously helpful during the editing process of this article.

¹ 1 SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, RECORD OF PROCEEDINGS 764 (1970) [hereinafter RECORD OF PROCEEDINGS] (remarks by Delegate Samuel Patch).

² See Bob Secter, *Reliance on Local Money Drives School Funding Imbalances*, CHI. TRIB. (Mar. 30, 2010), <http://www.chicagotribune.com/news/local/ct-met-school-funding-20100330,0,5052098.story> (noting that, due to legislative inertia and factional politics, "Illinois schools have lurched from financial crisis to financial crisis" without enacting any substantial funding reforms); see also JANE GALLOWAY BURESH, A FUNDAMENTAL GOAL: EDUCATION FOR THE PEOPLE OF ILLINOIS 74 (1975) (noting that at the time of the last Illinois constitutional convention in 1970, Illinois had worked "for decades" in an attempt to overcome inequalities in educational spending).

³ In 2011, for example, Illinois Governor Pat Quinn signed into law a state budget that cut \$171 million in funding for public schools. Monique Garcia & Ray Long, *Quinn Signs State Budget Hours Before Deadline*, CHI. TRIB. (Jun. 30, 2011), <http://www.chicagotribune.com/news/politics/clout/chi-quinn-signs-state-budget-hours-before-deadline-20110630,0,6257424.story>.

Most of the cuts—\$152.2 million—came from the general state aid provided to all districts based on student enrollment numbers. See Tara Malone & Ray Long, *Budget Would Cut \$171 Million from Public Schools*, CHI. TRIB. (Jun. 1, 2011), http://articles.chicagotribune.com/2011-06-01/news/ct-met-budget-education-20110601_1_early-childhood-education-school-districts-state-budget-plan. Because the statutory minimum amount of per-pupil funding remained the same, the cut forced local districts to pay a greater share of overall school funding. *Id.* Governor Quinn again proposed severe cuts to education funding in the most recent budget—more than \$300 million—but the General Assembly ultimately defeated the proposal. See Monique Garcia & Rick Pearson, *Democrats Forge \$35 Billion State Budget*, CHI. TRIB. (May 29, 2013), http://articles.chicagotribune.com/2013-05-29/news/ct-met-illinois-budget-0529-20130529_1_state-budget-house-gop-state-worker; see also Diane Rado & Andy Grimm, *Quinn's Proposed Budget Squeezes Educators*, CHI. TRIB. (Mar. 8, 2013), http://articles.chicagotribune.com/2013-03-08/news/ct-met-school-cuts-20130308_1_state-aid-school-districts-class-sizes. Making the problem even worse, however, is the fact that the state continues to simply not pay school districts the funding owed to them. See Malone & Long, *supra*. Illinois owed schools an astonishing \$981 million during the 2011-2012 school year. *Id.* In 2013, the state owed districts \$634 million in past state aid payments. Rado & Grimm, *supra*.

⁴ Local funds derived from property taxes accounted for 55.0% of funds, and 12.5% came from federal monies. ILL. STATE BD. OF EDUC., 2012 ANNUAL REPORT 5 (2013) [hereinafter 2012 ANNUAL REPORT], available at <http://www.isbe.state.il.us/reports/annual12/report.pdf>; see *Total Revenues and Percentage Distribution for Public Elementary and Secondary Schools, by Revenue Source and State: School Year 2007-08*, NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/pubs2010/expenditures/tables.asp> (last visited Nov. 1, 2013) [hereinafter *Total Revenues and Percentage Distribution*] (providing funding data for all fifty states).

⁵ BAKER ET AL., IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 26-27 (2010), http://www.schoolfundingfairness.org/National_Report_Card.pdf. See generally STATE OF ILL., ILLINOIS STATE BUDGET: FISCAL YEAR 2014 6-263 – 6-295 (2013), available at

Instead, Illinois school districts are primarily funded through local property tax revenues.⁶ Because property wealth varies significantly across the state, such a funding scheme produces great disparities in how much money school districts are able to spend on their students.⁷ To illustrate, Northbrook School District 28, located in the affluent Chicago suburb of Northbrook, was able to spend \$11,332 on each of its elementary school students during the 2011-12 school year.⁸ Conversely, Calumet Public School District 132, serving blue-collar Calumet City, was able to spend just \$5,007 per student in the same year.⁹ While many other states employ similar school finance systems, and also often face funding disparities between districts,¹⁰ Illinois' heavy reliance on property tax-based funding produces especially profound economic inequality between school districts.¹¹ In turn, this creates broad disparities in teaching quality,¹² school infrastructure,¹³ and ultimately, the academic achievement of wealthy versus poor districts.¹⁴

<http://www2.illinois.gov/gov/budget/Documents/Budget%20Book/FY%202014/FY2014IllinoisOperatingBudgetBook.pdf> (providing a detailed summary of the most recent proposed Illinois state budget).

⁶ See 2012 ANNUAL REPORT, *supra* note 4, at 2, 5.

⁷ See Seter, *supra* note 2 (“[T]he sharp divide between state and local resources means that schools in towns with pricier homes or big shopping centers, factories or thriving commercial centers simply have far more to spend than schools in communities with housing and job markets that are chronically wheezing.”). See generally BAKER ET AL., *supra* note 5, at 10-12 (analyzing disparities in education spending across the U.S.).

⁸ ILLINOIS INTERACTIVE REPORT CARD, <http://iirc.niu.edu/> (last updated Oct. 25, 2013) [hereinafter ILLINOIS INTERACTIVE REPORT CARD]. According to the U.S. Census Bureau's most recent American Community Survey, Northbrook has a median household income of \$110,902. *Selected Economic Characteristics: 2007-2011 American Community Survey 5-Year Estimates, Northbrook Village, Illinois, U.S. CENSUS BUREAU, AM. FACTFINDER*, http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/11_5YR/DP03/1600000US1753481 (last visited Nov. 6, 2013). According to the same survey, the median household income for the entire state of Illinois is \$56,576. *Selected Economic Characteristics: 2007-2011 American Community Survey 5-Year Estimates, Illinois, U.S. CENSUS BUREAU, AM. FACTFINDER*, http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/11_5YR/DP03/0400000US17 (last visited Nov. 6, 2013).

⁹ ILLINOIS INTERACTIVE REPORT CARD, *supra* note 8. Calumet City's median household income is \$41,978. *Selected Economic Characteristics: 2007-2011 American Community Survey 5-Year Estimates, Calumet City, Illinois, U.S. CENSUS BUREAU, AM. FACTFINDER*, http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/11_5YR/DP03/1600000US1710487 (last visited Nov. 6, 2013). At the high school level, wealthy Lake Forest CHSD 115 in Lake Forest (median household income of \$133,264) was able to spend just over \$12,000 per student, while J. Sterling Morton High School District 201 in Cicero (median household income of \$45,101) spent just \$6,901. ILLINOIS INTERACTIVE REPORT CARD, *supra* note 8; *Selected Economic Characteristics: 2007-2011 American Community Survey 5-Year Estimates, Lake Forest, Illinois, U.S. CENSUS BUREAU, AM. FACTFINDER*, http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/11_5YR/DP03/1600000US1741105 (last visited Nov. 6, 2013); *Selected Economic Characteristics: 2007-2011 American Community Survey 5-Year Estimates, Cicero, Illinois, U.S. CENSUS BUREAU, AM. FACTFINDER*, http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/11_5YR/DP03/1600000US1714351 (last visited Nov. 6, 2013). Note that these figures represent the instructional expenditure per pupil, and not the full operating expenditure per pupil. ILLINOIS INTERACTIVE REPORT CARD, *supra* note 8. Thus, the figures may be less than the foundation level amount set by the state. For the 2012-2013 school year, the foundation level of funding per pupil was \$6,119. *Funding*, ILL. STATE BOARD OF EDUC. (2013), <http://www.isbe.net/funding/html/gsa.htm>.

¹⁰ See BAKER ET AL., *supra* note 5, at 2, 16-17 (discussing common characteristics of education funding systems in all states, and comparing education funding disparities between high- and low-income student populations in all states); see also U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCE: 2009 1 (2011), available at <http://www2.census.gov/govs/school/09f33pub.pdf> (providing a detailed breakdown of revenue sources for schools in all fifty states).

¹¹ See CTR. FOR TAX & BUDGET ACCOUNTABILITY, MONEY MATTERS: HOW THE ILLINOIS SCHOOL FUNDING SYSTEM CREATES SIGNIFICANT EDUCATIONAL FUNDING INEQUITIES THAT IMPACT MOST STUDENTS IN THE STATE 5 (2008) (The state's relatively small contribution to school funding “pushes the primary obligation for education funding down to local resources, primarily property taxes, creating great disparities between districts across Illinois, based on local property wealth”). A 2010 report examining funding inequalities in public schools across the country found that Illinois has the third most regressive (i.e. providing more money to wealthier districts than poorer districts) public education finance system in the U.S. BAKER ET AL., *supra* note 5, at 16-18. This was measured by examining the distribution of state and local funding across schools districts relative to the percentage of impoverished students attending each district. *Id.* The report found that districts with lower levels of poverty received significantly more money per pupil than districts with high levels of poor students. *Id.*

¹² Perhaps the most significant difference between wealthy and poor districts is their ability to pay for highly educated teachers. Wealthy districts are able to spend approximately \$18,000 more per teacher than less affluent districts. CTR. FOR TAX & BUDGET ACCOUNTABILITY, *supra* note 11, at 9. Wealthy districts are able to attract significantly more teachers with advanced teaching degrees. *Id.* In 2012, about 90% of elementary school teachers in Winnetka School District 36, which is able to spend over \$11,000 per student, had masters degrees; in contrast, 9.4% of teachers in Burnham School District 154-5 (spending \$5,411 per student) had masters degrees. ILLINOIS INTERACTIVE REPORT CARD, *supra* note 8.

In fact, education-funding issues are not new, nor have they gone unnoticed by Illinois lawmakers.¹⁵ Delegates to the 1970 Constitutional Convention (which produced Illinois' current constitution) were well aware of the inequalities in the state's school finance system and fought over potential constitutional remedies, but they ultimately failed to produce a solution.¹⁶ In 1992, a state constitutional amendment that would have largely eliminated Illinois' property tax-based finance system was defeated in a referendum after heated public debate.¹⁷

Following these failures, Illinois students in low-income school districts took their fight to the courts, first in *Committee for Education Rights v. Edgar* in 1996 and then *Lewis E. v. Spagnolo* in 1999.¹⁸ Despite successful legal challenges to property tax-based funding systems in several other states,¹⁹ the Illinois Supreme Court upheld the current funding system in both cases.²⁰ Moreover, the court held that school funding was a topic exclusively for the Illinois state

¹³ *Lewis E. v. Spagnolo*, 710 N.E.2d 798, 817 (Ill. 1999) (Freeman, J., concurring in part and dissenting in part) (describing the conditions in poor East St. Louis schools, including exposed asbestos, overflowing sewage pipes, broken windows, unheated classrooms, etc.).

¹⁴ Students in wealthier school districts routinely score higher on the Illinois Standards Achievement Test ("ISAT") and Prairie State Achievement Exam ("PSAE"), Illinois' primary measure of student achievement for elementary and high school students, respectively. See *Student Assessment—Illinois Standards Achievement Test (ISAT)*, ILL. STATE BOARD OF EDUC., <http://www.isbe.state.il.us/assessment/isat.htm> (last updated Oct. 2013) [hereinafter *Student Assessment Illinois*] (discussing the ISAT, the primary tool for measuring student achievement throughout grades three through eight); *Student Assessment—Prairie State Achievement Examination (PSAE)*, ILL. STATE BOARD OF EDUC., <http://www.isbe.state.il.us/assessment/psae.htm> (last updated Oct. 2013) [hereinafter *Student Assessment Prairie State*] (discussing the PSAE, the primary measurement of student achievement for high school students); CTR. FOR TAX & BUDGET ACCOUNTABILITY, *supra* note 11, at 10, 16. In 2012, for example, 96% of students in wealthy Northbrook School District 28 met or exceeded state reading standards on the ISAT. ILLINOIS INTERACTIVE REPORT CARD, *supra* note 8. In comparison, 62% of students in Calumet Public School District 132 met or exceeded reading standards that same year. *Id.* Similarly, 81% of students in Lake Forest CHSD 115 met or exceeded reading standards on the 2012 PSAE, while just 29% of J. Sterling Morton High School District 201 students met or exceeded the goals. *Id.* Nationally, students in poorer districts also tend to perform worse academically than their peers in wealthier districts. See Timothy D. Lynch, Note, *Education as a Fundamental Right: Challenging the Supreme Court's Jurisprudence*, 26 HOFSTRA L. REV. 953, 960-64 (1998) (describing poor academic performance in various low-income areas in the U.S.).

¹⁵ See BURESH, *supra* note 2, at 72-74 (noting that at the 1970 Illinois Constitutional Convention, education funding was a major concern of the delegates tasked with rewriting Illinois' Article X education clause); *infra* Part III-B (summarizing the failed effort in 1992 to amend Article X to increase funding equality in Illinois Public Schools).

¹⁶ See BURESH, *supra* note 2, at 74-79, 84-86. Buresh notes that in 1969 a school district with an assessed property value of \$5,462 per pupil would only generate \$210 per pupil if it levied a 4% education property tax; the same tax levy assessed in a district with property values of \$105,815 per pupil would generate \$4,230. *Id.* Even if taxing at a significantly higher level, it would be virtually impossible for the property-poor district to fund its schools at a level comparable to the property-rich district. *Id.* at 73-74. As will be discussed later in this Article, the 1970 Constitutional Convention delegates settled on a re-worded education article that ultimately did little to change Illinois' system of financing public schools. See *infra* Part IV-B (noting that the Illinois Supreme Court has held that much of the revised education clause—but not all, including the important phrase "high-quality"—was intended to be merely "hortatory," and not legally binding on the state).

¹⁷ See *Constitution of the State of Illinois, Amendments and Conventions Proposed*, ILL. GEN. ASSEMBLY (Sept. 16, 2011), <http://www.ilga.gov/commission/lrb/conampro.htm> [hereinafter *Amendments and Conventions Proposed*]. See generally Rob Karwath & Sue Ellen Christian, *Education Amendment Falling Short*, CHI. TRIB. (Nov. 4, 1992), http://articles.chicagotribune.com/1992-11-04/news/9204090956_1_amendment-victims-rights-advisory-referendum (summarizing the debate surrounding the amendment referendum).

¹⁸ *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1185-86 (Ill. 1996); *Lewis E.*, 710 N.E.2d at 816-17.

¹⁹ See, e.g., *Serrano v. Priest*, 487 P.2d 1241, 1244, 1258 (Cal. 1971) (finding that education is a fundamental right, and as such, applying strict scrutiny and finding that California's education funding system violated both state and federal equal protection clauses); *Sheff v. O'Neill*, 678 A.2d 1267, 1270-71 (Conn. 1996) (finding that Connecticut's education funding system violated the state constitution's education clause because the funding system had failed to eliminate spending disparities between wealthy and poor districts); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215-16 (Ky. 1989) (finding that Kentucky's education funding system was unconstitutional under the state constitution's education clause because it failed to provide an "efficient system of common schools"); *Abbott v. Burke*, 575 A.2d 359, 385 (N.J. 1990) ("[I]n order to provide a thorough and efficient education [under the state's constitutional education clause], the State must assure that their educational expenditures per pupil are substantially equivalent to those of the more affluent suburban districts, and . . . special disadvantages must be addressed.").

²⁰ *Edgar*, 672 N.E.2d at 1180; *Lewis E.*, 710 N.E.2d at 816. As of September 2011, plaintiffs have scored victories in twenty-seven states, while defendants have won in nineteen states excluding Illinois. NAT'L EDUC. ACCESS NETWORK, "EQUITY" AND "ADEQUACY" SCHOOL FUNDING LIABILITY COURT DECISIONS, SEPTEMBER 2011 (2011), http://schoolfunding.info/wp-content/uploads/2011/07/Equity%E2%80%99-and-%E2%80%98Adequacy%E2%80%99-School-Funding-Decisions-by-Outcome_2011.pdf [hereinafter EQUITY AND ADEQUACY DECISIONS].

legislature to decide, ostensibly foreclosing future litigation.²¹ With federal litigation largely precluded by the United States Supreme Court in *San Antonio Independent School District v. Rodriguez*,²² the *Edgar* and *Lewis E.* decisions left potential school funding litigants with few legal options.²³

This Article will examine the Illinois Supreme Court's education finance jurisprudence, arguing that the court should strike down the current funding system as unconstitutional under the Illinois State Constitution. Part II examines the history of education finance litigation at the national level, discussing the United States Supreme Court's landmark ruling in *Rodriguez* and how it drove funding litigation to state supreme courts. Part III discusses Illinois' education finance system and Article X of the Illinois State Constitution, and summarizes the Illinois Supreme Court's rulings in *Edgar* and *Lewis E.* Part IV argues that (1) the court erred in finding education finance issues to be non-justiciable political questions in both cases; (2) Article X of the Illinois State Constitution should be read to guarantee some minimally adequate level of education quality; and (3) the current funding system does not rationally further the state's preference for "local control" of public schools. Part V concludes by prescribing a course of action for future plaintiffs, courts, and state legislatures in challenging and ultimately reforming Illinois' school finance system.

II. BACKGROUND

Despite several major plaintiffs' victories in the past two decades, education-funding litigation remains a convoluted and politically volatile area of the law.²⁴ In *Rodriguez*, Justice Powell noted "[e]ducation, perhaps even more than welfare assistance, presents a myriad of intractable economic, social, and even philosophical problems."²⁵ The *Rodriguez* opinion spans 133 pages and discusses the Equal Protection Clause, fundamental rights, federalism, and public education policy in the majority opinion alone.²⁶ State supreme court cases contain similar legal sprawl, touching on issues including state-level separation of powers and the political question doctrine,²⁷ state constitution education articles,²⁸ federal and state equal protection clauses,²⁹

²¹ See *Lewis E.*, 710 N.E.2d at 816 (Freeman, J., concurring in part and dissenting in part) (In *Edgar*, the "court shut the courthouse door to claims alleging violations of section 1 of the education article of the Illinois Constitution," and in *Lewis E.*, "the majority nails that door shut"); *Litigation- Illinois*, NAT'L EDUC. ACCESS NETWORK, http://www.schoolfunding.info/states/il/lit_il.php3 (last updated Apr. 2010) (noting that subsequent cases have been dismissed for failure to state a justiciable claim).

²² *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). In *Rodriguez*, students and parents in a poor San Antonio school district challenged the state's funding system under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 4-6. After finding that education is not a fundamental right guaranteed by the United States Constitution, the majority then determined that education funding was a state matter best left to the Texas legislature. *Id.* at 38-39, 54. See *infra* Part II-B for a summary of the U.S. Supreme Court's ruling in *Rodriguez* and its impact on school funding litigation.

²³ See *Lewis E.*, 710 N.E.2d at 816-17 (Freeman, J., concurring in part and dissenting in part) (discussing the impact of the *Lewis E.* and *Edgar* decisions on future education funding litigation). Recently, plaintiffs again attempted to challenge the school funding system, this time under a novel taxpayer discrimination argument, but their case was dismissed in short order for lack of standing. See *Carr v. Koch*, 981 N.E.2d 326, 327, 330 (Ill. 2012); *supra* note 144 and accompanying text.

²⁴ See *Rodriguez*, 411 U.S. at 17-18 (noting the "novelty and complexity of the constitutional questions" at issue in *Rodriguez*); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 764-66 (1992) (describing in vivid detail the various inconsistencies and contradictions in landmark education funding cases throughout the United States).

²⁵ *Rodriguez*, 411 U.S. at 42. Note, however, that Justice Powell then goes out of his way to explain that education policy makers are sharply divided over the best method for funding schools. *Id.* While this is still true, it is a somewhat irrelevant point in school funding litigation. As this Article will demonstrate, most plaintiffs have *not* asked the court to formulate new funding systems, instead merely asking for declaratory judgment that a current system is unconstitutional. See *infra* Part IV-A (noting that education funding litigants usually seek declaratory judgment, and arguing that ruling on education finance litigation would *not* force the Illinois Supreme Court to "legislate from the bench"). Thus, courts ruling on education funding cases should not be concerned with developing an alternative funding system.

²⁶ *Rodriguez*, 411 U.S. at 20-29, 30-39, 42-43, 55-59.

²⁷ The political question doctrine is a federal law principle that defines some issues as inherently political and thus inappropriate for courts to decide. See JOHN E. NOWAK & RONALD D. ROTUNDA, *PRINCIPLES OF CONSTITUTIONAL LAW* 58 (4th ed. 2010) ("[C]ertain

uniformity of taxation,³⁰ state school code statutes,³¹ and the policy preference for local control of schools.³²

This Part will first briefly discuss *Serrano v. Priest* and other court cases that challenged state education funding systems before *Rodriguez*. After summarizing the Supreme Court's ruling in *Rodriguez*, this Part will argue that the Court's opinion clashes with (if not wholly contradicts) other education cases both before and after *Rodriguez*. Finally, this Part explains the lasting impact of *Rodriguez* on modern education funding litigation.

A. *Serrano and the First Wave of Education Finance Cases*

Although school funding systems have faced legal challenges since at least 1912,³³ the California Supreme Court's 1971 ruling in *Serrano v. Priest* is considered the first modern landmark in education finance litigation.³⁴ In *Serrano*, the California Supreme Court found that education plays a vital role in a citizen's ability to participate politically and economically in American life, and as such, must be a fundamental right.³⁵ Consequently, the court reviewed the state's funding scheme under the strict scrutiny standard of review, requiring the state to demonstrate that the funding system was necessary and narrowly tailored to serve a compelling state interest.³⁶ Rejecting the state's argument that the school funding system promoted local

matters are really political in nature and best resolved by the body politic rather than suitable for judicial review."). Essentially, the doctrine works to preserve the separation of powers. See Christine M. O'Neill, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims*, 42 COLUM. J.L. & SOC. PROBS. 545, 556-57 (2009) ("The political question doctrine is the judiciary's attempt to respect the structural boundaries between the three branches of federal government."); see also Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191-93 (Ill. 1996) (discussing the political question doctrine); O'Neill, *supra* (discussing and arguing against application of the federal political question doctrine in state education funding cases); *supra* Part IV-A (arguing against the Illinois Supreme Court's use of the political question doctrine in *Edgar and Lewis E.*).

²⁸ *Edgar*, 672 N.E.2d at 1183-93; *Lewis E.*, 710 N.E.2d at 802-05; *Robinson v. Cahill*, 303 A.2d 273, 287-98 (N.J. 1973); see also *infra* Part IV-B (examining the *Edgar* court's analysis of the Illinois State Constitution's education clause).

²⁹ *Serrano v. Priest*, 487 P.2d 1241, 1249-60 (Cal. 1971); *Edgar*, 672 N.E.2d at 1193-94.

³⁰ Complaint at 7-11, *Carr v. Koch*, 981 N.E.2d 326 (Ill. 2012) (No. 2010MR000169), available at http://www.bpichicago.org/pe_litigation.php (arguing that Illinois' school funding system illegally discriminates against taxpayers in property-poor school districts because the system in effect forces them to pay higher property taxes than wealthier communities). Ultimately, the Illinois Supreme Court dismissed the plaintiffs' case for lack of standing. See *Carr v. Koch*, 981 N.E.2d 326, 336 (Ill. 2012).

³¹ *Lewis E.*, 710 N.E.2d at 812-15.

³² *Edgar*, 672 N.E.2d at 1195-96; see also *infra* Part IV-C (analyzing the *Edgar* court's invocation of local control in its majority opinion).

³³ See Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. PITT. L. REV. 231, 244 (1998) (citing *Sawyer v. Gilmore*, 83 A. 673 (Me. 1912) as the earliest major school funding litigation).

³⁴ See *id.* (citing *Serrano* as the first modern education finance case). The *Serrano* plaintiffs, a group of students and parents served by Los Angeles County public schools, argued that the state funding system's heavy reliance on local property taxes produced unconstitutional disparities in per-pupil funding. *Serrano*, 487 P.2d at 1244.

³⁵ *Serrano*, 487 P.2d at 1255-60. Note that in *Edgar*, the Illinois Supreme Court rejected a similar argument made by the plaintiffs, and held that it could only find fundamental rights "at the heart of the relationship between the individual and a republican form of nationally integrated government." *Edgar*, 672 N.E.2d at 1194-95.

³⁶ *Serrano*, 487 P.2d at 1259-60. Briefly, federal courts review various government actions under three levels of judicial scrutiny depending on the type of right or class of citizens affected by the action (and, as is the case in *Serrano*, state courts typically adopt a substantially similar system of judicial review). See NOWAK & ROTUNDA, *supra* note 27, at 390-91 (summarizing the three levels of judicial review). Courts will apply strict scrutiny to government actions that discriminate against a suspect class of citizens (such as those based on race, national origin, or alienage) or affect a fundamental right (such as the right to free speech). *Id.* This means that the court will not defer to the decisions of the other branches of government and will instead independently determine whether the action is necessary and narrowly tailored to serve a compelling interest. *Id.* On the other end of the spectrum, government actions that do not affect a suspect class or fundamental right are generally reviewed under the "rational relationship" test. *Id.* Here, a court will not conduct any significant independent review of the legislation, and instead will defer to the government in determining whether the action in question is rationally related to a legitimate governmental interest. *Id.* Finally, more recent cases involving classifications based on sex or illegitimacy have invoked an "intermediate scrutiny" test that is less stringent than strict scrutiny, but also does not entirely defer to the state, in determining whether the challenged action bears a substantial relationship to an important governmental interest. *Id.*

control of schools,³⁷ the court concluded that California's funding system violated both state and federal equal protection clauses because it predicated a child's education funding on the property wealth of his or her surrounding district.³⁸

The *Serrano* decision was the first to invalidate a state's school funding system and represents the "first wave" of education finance litigation.³⁹ From roughly the late 1960s to the 1973 Supreme Court ruling in *Rodriguez*, "first wave" plaintiffs in school funding cases relied on federal and state equal protection clauses to argue that all school districts should receive substantially equal funding per pupil.⁴⁰ Litigation thus turned on whether state courts found wealth to be a suspect classification or education to be a fundamental right, which would result in application of strict scrutiny review and probable victory for plaintiffs.⁴¹

B. *Rodriguez and the Removal of Education Funding Litigation from Federal Courts*

Just two years after *Serrano*, however, the United States Supreme Court's opinion in *Rodriguez* dealt a serious blow to education finance reform by effectively removing school funding litigation from federal courts, and thus precluding any uniform, national invalidation of property tax-based funding systems.⁴² In 1971, parents and students in a poor San Antonio school district filed an equal protection complaint in federal district court, arguing that Texas' funding system discriminated on the basis of wealth and denied plaintiffs their fundamental right to education.⁴³ When *Rodriguez* came before the United States Supreme Court two years later, it presented three challenging issues for the Court's decision: whether wealth should be treated as a suspect class similar to race and thus trigger strict scrutiny, whether the Federal Constitution protected education as a fundamental right similar to speech or privacy, and whether federal courts had the authority to review state education policy.⁴⁴

³⁷ "Local control" of schools—the idea that public schools are best run by local school boards and communities rather than the state—is a common policy preference running throughout both state and federal school funding litigation. See *infra* Part IV-C.

³⁸ *Serrano*, 487 P.2d at 1259-64. The state defendants' primary argument was that the California school funding system facilitated local fiscal control of schools. *Id.* at 1259. The California Supreme Court rejected this argument, noting that "such fiscal freewill is a cruel illusion" for poor districts because their lack of property wealth often made it virtually impossible to generate funds comparable to that of wealthy districts, regardless of their willingness to tax at higher levels. *Id.* at 1259-60. The court's critique of fiscal local control under property tax-based funding schemes would be echoed by Justice White's dissent in *Rodriguez*. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 63-70 (1973) (White, J., dissenting) (noting that in poor districts, "no matter how desirous parents are of supporting their schools with greater revenues, it is impossible to do so through the use of the real estate property tax"). As this Article will demonstrate, the Illinois school funding system also fails to provide poor districts with meaningful fiscal control of their schools. See *infra* Part IV-C (arguing that the Illinois Supreme Court should not continue to defer to the concept of "local control" of public schools).

³⁹ See generally Matt Brooker, *Riding the Third Wave of School Finance Litigation: Navigating Troubled Waters*, 75 UMKC L. REV. 183 (2006) (discussing the various "waves," or phases of education finance litigation in the United States); Lynch, *supra* note 14, at 968-84 (summarizing several landmark state supreme court school funding cases).

⁴⁰ See Brooker, *supra* note 39, at 185 ("Plaintiffs during the first wave of cases relied heavily on the Equal Protection Clause of the United States Constitution and asserted that all children within a state were entitled to have the same amount of money allocated and spent toward providing them a public education and/or were entitled to equal educational opportunities."); see, e.g., *Milliken v. Green*, 203 N.W.2d 457 (Mich. 1972).

⁴¹ See Brooker, *supra* note 39, at 185; *Serrano*, 487 P.2d at 1259-66 (applying strict scrutiny review). Legal scholars generally view strict scrutiny as "strict" in theory and fatal in fact" because laws do not often survive this level of scrutiny. See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny as "'strict' in theory and fatal in fact").

⁴² See Brooker, *supra* note 39, at 186 (noting that *Rodriguez* "all but eliminated the ability to attack school systems based on the Federal Constitution"); Lynch, *supra* note 14, at 968 (noting that since *Rodriguez*, plaintiffs have been "left with no other choice but to challenge" funding systems under state constitutional law).

⁴³ *Rodriguez*, 411 U.S. at 11-15 (1973). The district court initially delayed hearing of the case for two years while the Texas legislature investigated possible reforms. *Id.* at 6 n.4. When the Texas legislature failed to act, the district court finally heard the case and ruled in favor of the plaintiffs. *Id.* at 11-15. Following its ruling, the court stayed its decision for another two years but retained its right to fashion remedial actions in case the legislature failed to act. *Id.* at 6 n.5.

⁴⁴ See *id.* at 17-18 (noting the various "novel" and "complex" constitutional issues raised by the case). Before concluding its opinion, the Court re-emphasized the complexity of school funding issues in a "cautionary postscript" that warned such issues may be outside the ability or authority of the Court to adequately decide. *Id.* at 56-59.

The Court first found that classifications based on wealth are not suspect.⁴⁵ The plaintiffs failed to define a clear “class” of impoverished students, the Court found, because they presented insufficient criteria for determining who would fall into this suspect class.⁴⁶ Moreover, the plaintiffs had not been *wholly* deprived of educational opportunity.⁴⁷ They had merely received a *relatively* worse educational experience than students in wealthier districts.⁴⁸ Finally, the Court concluded by noting that wealth classifications generally lack the “traditional indicia of suspectness” of racial classifications, solidifying the Court’s refusal to recognize the poor as a protected class.⁴⁹

The Court then turned to the issue of whether education is a fundamental right.⁵⁰ Quoting *Brown v. Board of Education*, the Court acknowledged the importance of education in American society as well as the Court’s own unique treatment of education in its jurisprudence.⁵¹ Nevertheless, the Court emphasized that not all *important* rights are *fundamental*.⁵² Instead, fundamental rights must be found, explicitly or implicitly, within the Constitution itself.⁵³ Simply put, education may be important to the exercise of constitutional rights, but because it is not promised by the Constitution itself, it is not a fundamental right.⁵⁴

By declining to recognize wealth as a suspect classification or education as a fundamental right, the Court determined it should apply a rational basis review to the Texas funding system.⁵⁵ The Court found it lacked the expertise and jurisdiction to pass judgment on Texas’ school funding system.⁵⁶ Moreover, invalidating the Texas funding system would violate the long-standing American tradition of locally controlled schools.⁵⁷ Ultimately, reform might very well

⁴⁵ *Id.* at 28-29.

⁴⁶ *Id.* at 20. The Court’s focus on the income level of individual persons or family units, however, seems misguided. The thrust of the plaintiffs’ argument was that they were discriminated against as residents of *property-poor districts*. *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 281-82 (W.D. Tex. 1971), *rev’d*, 411 U.S. 1 (1973). Regardless of variations in individual wealth amongst residents of a given district, the overall property-wealth of the district is quantifiable and easily comparable to that of other districts, and creates a clear member class of citizens negatively impacted by the state funding system. *See infra* Part IV-A (arguing that, within Illinois, making wealth comparisons between districts is easily facilitated by public financial data as well as the state’s own method of classifying districts within its funding system).

⁴⁷ *Rodriguez*, 411 U.S. at 20-24 (finding that the plaintiffs’ lack of “personal resources has not occasioned an absolute deprivation” of education). The Court distinguished the plaintiffs’ case from other “wealth class” cases where it believed poor parties were being wholly deprived of some benefit or right. *Id.* In *Williams v. Illinois*, for example, the Court struck down criminal penalties that imprisoned indigents if they were unable to pay a fine. *Williams v. Illinois*, 399 U.S. 235, 236-38, 245 (1970). In *Bullock v. Carter*, the Court invalidated a filing-fee scheme for primary elections in Texas that required potential candidates to pay very large sums of money to get on the ballot, effectively precluding the poor from participation. *Bullock v. Carter*, 405 U.S. 134, 135-36, 149 (1972).

⁴⁸ *Rodriguez*, 411 U.S. at 23.

⁴⁹ *Id.* at 28-29 (“The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”).

⁵⁰ *Id.* at 35-36. Education, the plaintiffs argued, is necessary for the proper exercise of voting and free speech rights; as such, the right to education is implicitly protected by the Constitution. *Id.*

⁵¹ *Id.* at 29-30. In *Brown*, the Court noted that “education is perhaps the most important function of state and local governments.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

⁵² *Rodriguez*, 411 U.S. at 35 (“[T]he key to discovering whether education is ‘fundamental’ is not to be found in comparisons of the relative societal significance of education.”).

⁵³ *Id.* In one of the most famous—and for education reformers, infamous—lines of the majority opinion, the Court emphasized that it could not guarantee citizens “the most effective speech or the most informed electoral choice.” *Id.* at 36. Note that the *Edgar* court largely adhered to the Supreme Court’s fundamental rights analysis in *Rodriguez*, emphasizing that even critically important rights may not be fundamental. *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1194-95 (Ill. 1996); *infra* Part III-C (summarizing *Edgar* and *Lewis E.*).

⁵⁴ *Rodriguez*, 411 U.S. at 36.

⁵⁵ *See id.* at 41-50 (applying rational basis review to the Texas funding system).

⁵⁶ *Id.* at 44. Curiously, the majority nonetheless criticizes plaintiffs for not suggesting an alternative system of funding. *Id.* at 41 n.85 (“Those who urge that the present system be invalidated offer little guidance as to what type of school financing should replace it.”). Given the Court’s steadfast refusal to rule on state education issues, it is unclear what value such a proposal would have had.

⁵⁷ *Id.* at 49. Local control essentially refers to the devolution of control of schools from state governments to local school boards. *See* Charles F. Faber, *Is Local Control of Schools Still a Viable Option?*, 14 HARV. J.L. & PUB. POL’Y 447, 447 (1991) (noting that “[m]uch of the responsibility for actually conducting educational programs has historically been delegated to local school districts,

have been needed, however, only the Texas state legislature had authority to make such decisions.⁵⁸ The Supreme Court thus reversed the district court, ending the plaintiff's fight.⁵⁹

1. The Supreme Court's Inconsistent Treatment of Education as a Fundamental Right

The *Rodriguez* decision appears to clash with (if not wholly contradict) the Court's opinions in education cases both before and after *Rodriguez*.⁶⁰ In *Sweatt v. Painter* (1950), a pre-*Rodriguez* case, the Court held that Texas could not bar qualified African Americans from attending the University of Texas Law School even if it provided a separate, all-black alternative institution.⁶¹ Critically, the Court's decision was heavily based on the fact that the alternative school was not comparable to the University of Texas in terms of educational quality, resources, and prestige.⁶² Although *Sweatt* involved a law school, and ultimately rested on the Equal Protection Clause, the Court's willingness to evaluate the schools' relative quality clashes with the *Rodriguez* Court's refusal to judge Texas' public school policy, and its apparent acceptance of public schools providing vastly different levels of educational quality.⁶³ In *Brown v. Board of Education* (1954), also pre-*Rodriguez*, the Court stated that "education is perhaps the most important function of state and local governments . . . the very foundation of good citizenship," thus elevating the status of education beyond that of a "typical" right.⁶⁴

Cases after *Rodriguez* also call into question the Court's refusal to recognize education as a fundamental right.⁶⁵ In *Ambach v. Norwick* (1979), the importance of public education in civic life was the determinative factor in finding that a state may deny resident-alien teaching certification.⁶⁶ The Court upheld the teaching certification restriction, it explained, because some state functions are so critical to democratic self-governance that it is permissible to exclude all those who had "not become part of the process of self-government."⁶⁷ Nevertheless, Justice

governed by local boards of education" and that "[l]ocal control of education manifests itself in an American invention, the local school board"). As this Article will demonstrate, however, such deference to the concept of local control is misguided. See *infra* Part IV-C (arguing that property tax-based funding systems do not give poor school districts any meaningful fiscal control); see also *Serrano v. Priest*, 487 P.2d 1241, 1259-60 (Cal. 1971) (finding that California's school funding system failed to provide poor districts with local fiscal control).

⁵⁸ *Rodriguez*, 411 U.S. at 58-59. It would take the Texas state legislature more than two decades—and prodding from several state supreme court decisions—before it passed meaningful education funding reform measures. See *School Funding Cases in Texas*, NAT'L EDUC. ACCESS NETWORK, <http://schoolfunding.info/2011/10/school-funding-cases-in-texas/> (last updated Jul. 2013) (summarizing education funding litigation and legislative action in Texas following *Rodriguez*).

⁵⁹ *Rodriguez*, 411 U.S. at 58-59.

⁶⁰ See, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Ambach v. Norwick*, 441 U.S. 68 (1979); *Plyler v. Doe*, 457 U.S. 202 (1982); see Lynch, *supra* note 14, at 997 (noting that *Plyler* "conflicts sharply with the *Rodriguez* court's conclusion that a fundamental right to education does not exist").

⁶¹ *Sweatt*, 339 U.S. at 634-36.

⁶² *Id.* at 632-34 (comparing, unfavorably, the number of faculty members, size of law libraries, existence of moot court teams and law review, professional affiliations, etc. of both schools).

⁶³ See *Rodriguez*, 411 U.S. at 84 (Marshall, J., dissenting) (arguing that in *Sweatt*, the Court "acknowledged that inequality in the educational facilities provided to students may be discriminatory state action as contemplated by the Equal Protection Clause").

⁶⁴ *Brown*, 347 U.S. at 493. *Brown*, of course, was also decided on the basis of equal protection of African American students, and it did not rule on whether education is a fundamental right. *Id.* Nevertheless, it clearly characterized education as something more than just "important" to American life. See Greg Rubio, Note, *Surviving Rodriguez: The Viability of Federal Equal Protection Claims by Underfunded Charter Schools*, 2008 U. ILL. L. REV. 1643, 1667 (2008) (arguing that the "remarkably sweeping recognition of the importance of education" in *Brown* suggested, at least immediately after the ruling, that the Court was ready to recognize a fundamental right to education).

⁶⁵ See *Ambach*, 441 U.S. 68; *Plyler*, 457 U.S. 202.

⁶⁶ *Ambach*, 441 U.S. at 74-75. Two foreign nationals, both long-time residents of the U.S. and married to Americans, were denied certification by New York State because they had not attained citizenship. *Id.* at 71-72.

⁶⁷ *Id.* at 74. The Court found that teaching in public schools "go[es] to the heart" of representative government because education fosters American values in children and prepares them to engage in civic life; thus, a state may have a legitimate interest in only employing U.S. citizens as teachers. *Id.* at 76. Under these circumstances, only rational relationship review should apply. *Id.* The Court's reasoning in *Ambach* is difficult to reconcile with its rejection of the *Rodriguez* plaintiffs' fundamental rights argument. Compare *Rodriguez*, 411 U.S. at 35 ("It is appellees' contention [which the Court rejected] that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. . . . [T]hey insist that education is itself a fundamental personal right because it is essential to the

Powell—writing the majority opinion in both *Ambach* and *Rodriguez*—did not believe the case contradicted his previous reasoning.⁶⁸ In *Plyler v. Doe* (1982), the Court invalidated a Texas law that withheld state funds from local school districts that educated illegal immigrant children.⁶⁹ Once again, the Court seemed to ascribe a unique “importance” to education beyond that of many other functions of the state.⁷⁰

2. *Rodriguez's* Impact on School Funding Litigation

Regardless of *Rodriguez's* inconsistencies, the decision had a profound impact on future education funding cases.⁷¹ Although the California Supreme Court would affirm its *Serrano* decision in 1976 (in a second, follow-up opinion known as *Serrano II*) based on the state constitution's equal protection clause,⁷² plaintiffs in post-*Rodriguez* cases shifted their focus to state constitution education clauses.⁷³ In *Robinson v. Cahill*, decided just one month after *Rodriguez*, the New Jersey Supreme Court held that the state's education funding system violated the New Jersey state constitution's guarantee of a “thorough and efficient” system of public education found in the New Jersey state constitution's education article.⁷⁴ In time, state equal protection arguments largely ceded to education article complaints, and focused on education adequacy rather than absolute funding equality.⁷⁵ Under this logic, plaintiffs argued that inequitable finance schemes denied certain students a minimum level of education quality.⁷⁶ Plaintiffs proceeding under education article/adequacy claims fared considerably better than those making state equal protection arguments similar to *Serrano*.⁷⁷

Some legal scholars have noted that the shift from federal to state claims in education funding litigation echoes Supreme Court Justice William Brennan's call for a new judicial

effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote.”), with *Ambach*, 441 U.S. at 76 (“Public education . . . ‘fulfills a most fundamental obligation of government to its constituency.’ The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions.”).

⁶⁸ *Ambach*, 441 U.S. at 78 n.7 (“As *San Antonio Independent School Dist. v. Rodriguez* recognized, there is no inconsistency between our recognition of the vital significance of public education and our holding that access to education is not guaranteed by the Constitution.”).

⁶⁹ *Plyler*, 457 U.S. at 221-22, 229; see also NOWAK & ROTUNDA, *supra* note 27, at 467-68 (summarizing *Plyler*).

⁷⁰ While noting that, pursuant to *Rodriguez*, education is not a fundamental right, the Court nonetheless explained that “neither is [education] merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation . . . the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.” *Plyler*, 457 U.S. at 221. *Plyler* largely rested on the premise that illegal immigrant children have not made the choice to illegally immigrate to the United States on their own, and should be distinguished from adult illegal immigrants (such as their parents). *Id.* at 219-20. The case is nonetheless difficult to explain in relation to the Court's denial of education as a fundamental right. See NOWAK & ROTUNDA, *supra* note 27, at 594 (stating that the Court's decision in *Kadrmas v. Dickinson Public School*, 487 U.S. 450 (1988), which reaffirmed that education is not a fundamental right, is “difficult to explain” in relation to *Plyler*); see also Rubio, *supra* note 64, at 1668 (suggesting that federal Equal Protection Clause claims regarding education rights should trigger “intermediate” scrutiny pursuant to *Plyler*).

⁷¹ See Brooker, *supra* note 39, at 186 (noting that *Rodriguez* “all but eliminated the ability to attack school systems based on the federal Constitution”); O'Neill, *supra* note 27, at 545 (“Beginning with *San Antonio Independent School District v. Rodriguez*, plaintiffs concerned with educational equity have gradually lost access to the federal court system.”).

⁷² *Serrano v. Priest* (*Serrano II*), 557 P.2d 929, 958-59 (Cal. 1976); see also Brooker, *supra* note 39, at 186 (discussing the impact of *Rodriguez* on the original *Serrano* decision).

⁷³ See Brooker, *supra* note 39, at 186 (noting that post-*Rodriguez* plaintiffs, often referred to as the “second wave” of school funding litigants, turned to state constitution equal protection clauses and education clauses in their arguments); *Robinson v. Cahill*, 303 A.2d 273, 287-98 (N.J. 1973) (resting its decision on a violation of the state's education clause).

⁷⁴ *Robinson*, 303 A.2d at 295.

⁷⁵ See Brooker, *supra* note 39, at 186-88 (discussing the shift in legal arguments following *Rodriguez*).

⁷⁶ *Id.*; see, e.g., *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 191 (Ky. 1989).

⁷⁷ NAT'L EDUC. ACCESS NETWORK, EDUCATION ADEQUACY LIABILITY DECISIONS SINCE 1989, SEPTEMBER 2011 (2011), http://schoolfunding.info/wp-content/uploads/2011/07/School-Funding-%E2%80%98Adequacy%E2%80%99-Decisions-by-Outcome_2011.pdf [hereinafter ADEQUACY LIABILITY DECISIONS] (noting that twenty-two of thirty-four state adequacy cases have resulted in plaintiff victories, and that cases were pending in nine other states); see also Brooker, *supra* note 39, at 187-89 (noting that most cases arguing equal protection claims failed, whereas plaintiffs scored major victories under adequacy claims in Montana, Kentucky, and Texas).

federalism.⁷⁸ As the Court took on a more conservative bent under Chief Justice Burger, Brennan argued that plaintiffs should turn to state courts for expanding protection of individual rights and liberties.⁷⁹ Following *Robinson*, several state supreme courts answered Justice Brennan's call and invalidated inequitable school funding systems under their state's education clause.⁸⁰ Yet when plaintiffs from some of Illinois' most impoverished schools brought similar arguments before the Illinois Supreme Court, the court firmly rebuked Justice Brennan's call.

III. DISCUSSION

Before examining the Illinois Supreme Court's primary education funding decisions, *Committee for Education Rights v. Edgar* and *Lewis E. v. Spagnolo*, it is necessary to briefly review the mechanics of Illinois's school funding system⁸¹ as well as the education clause of the Illinois Constitution.⁸² Thus, this Part will first explain Illinois' public education finance system, and illustrate how it results in funding disparities between property-poor (those communities with low property values) and property-wealthy (those with high property value) school districts. This Part will then review Article X of the Illinois State Constitution, which requires the state to establish a system of free public schools. Finally, this Part summarizes the Illinois Supreme Court's rulings in *Edgar* and *Lewis E.*, and discusses their impact on education funding litigation.

A. Illinois' Public School Finance System

Illinois' school funding system assigns school districts to one of three funding groups for the purpose of determining how much general state aid ("GSA") will be given to each district.⁸³ Each year, the state first sets the foundation, or minimum level of funding per pupil for all public schools in Illinois.⁸⁴ The state then calculates how much local revenue each district will theoretically be able to generate and apply towards achieving this foundation funding level.⁸⁵ This is done by multiplying the equalized assessed value of local property within a district by a standardized property tax rate, and then dividing this value by the school district's average daily

⁷⁸ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (arguing that plaintiffs should seek out expanded civil rights under state constitutions, and describing this push as a "new judicial federalism"); see also Blanchard, *supra* note 33, at 237 (tying Justice Brennan's call for a new judicial federalism to the shift in education funding cases to state courts).

⁷⁹ See Brennan, *supra* note 78. Justice Brennan criticizes several of the Supreme Court's civil liberties opinions issued under Chief Justice William Burger, including those affecting free speech; the rights of women, criminal defendants, and the poor; and tenured public employees. See *id.* at 495-96 (arguing that the Supreme Court in the 1970s had begun to "pull back" from its more progressive civil liberties jurisprudence in the previous decade). State courts and constitutions, Justice Brennan urged, are "font[s] of individual liberties" and should reach beyond the Supreme Court's jurisprudence in protecting individual rights. *Id.* Criminal law often provided examples of state supreme court independence in constitutional matters. See Blanchard, *supra* note 33, at 238-39 (citing as examples of state supreme court independence *Commonwealth v. Upton*, 476 N.E.2d 548 (Mass. 1985), in which the Massachusetts Supreme Court rejected the U.S. Supreme Court's Fourth Amendment analysis in *Illinois v. Gates*, 462 U.S. 213 (1983), and *State v. Morris*, 680 A.2d 90 (Vt. 1996), in which the Vermont Supreme Court expanded the expectation of privacy beyond the limits established by the U.S. Supreme Court in *California v. Greenwood*, 486 U.S. 35 (1988)).

⁸⁰ See ADEQUACY LIABILITY DECISIONS, *supra* note 77 (noting that twenty-two of thirty-four state adequacy cases, which are generally argued based on state constitution education clauses, have resulted in plaintiff victories); see, e.g., *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973) (resting its decision on a violation of the state's education clause).

⁸¹ See 105 ILL. COMP. STAT. ANN. 5/18-8.05 (West 2013) (setting the Illinois general state aid system for the 2013-2014 school year).

⁸² ILL. CONST. art. X, § 1.

⁸³ 105 ILL. COMP. STAT. ANN. 5/18-1 to 18-20; see ILL. STATE BD. OF EDUC., GENERAL STATE AID (2011), http://www.isbe.net/funding/pdf/gsa_overview.pdf [hereinafter GENERAL STATE AID] (providing an explanation of the education finance statute).

⁸⁴ 105 ILL. COMP. STAT. ANN. 5/18-8.05; see GENERAL STATE AID, *supra* note 83. For the 2012-2013 school year, the foundation level of funding per pupil was \$6,119. *Id.*; 2012 ANNUAL REPORT, *supra* note 4, at 2. Due to reductions in General State Aid in the Illinois State Fiscal Year 2013 budget, however, the effective amount of funding per pupil during this time was actually \$5,734. See *id.*

⁸⁵ See GENERAL STATE AID, *supra* note 83 (providing additional explanation of the school funding statute).

attendance.⁸⁶ Districts that will generate less than 93% of the foundation funding level based on this calculation are referred to as “foundation formula” districts.⁸⁷ In most cases, the state will provide these districts with enough GSA to be able to fund at the foundation level for the school year.⁸⁸ Districts that will generate 93% to 175% of the foundation funding level are referred to as “alternate formula” districts, and will receive GSA equaling between 5 and 7% of the current year’s foundation funding level.⁸⁹ Finally, districts that will generate more than 175% of the foundation funding level receive a flat GSA grant of \$218 per pupil.⁹⁰ In 2011, approximately 73.1% of Illinois’ public school children were served by property-poor foundation level districts, 21.9% of students attended alternate formula districts, and just 5.0% of students attended flat grant districts.⁹¹

A few additional features of Illinois’ funding system are important to note. All districts are statutorily required to fund their schools at the annual foundation level.⁹² For foundation and some alternate formula districts, this means that they must, at a minimum, assess education property taxes at the levels used by the state to calculate their GSA allotment.⁹³ Flat grant districts, however, may assess property taxes at a lower rate as long as they still achieve the foundation funding level.⁹⁴ While all districts are free to tax at a level *higher* than these minimum percentages, the Illinois School Code limits maximum tax assessment levels for school districts.⁹⁵ In many districts, it may thus be legally impossible for foundation formula districts to fund their schools at a level comparable to wealthier flat grant districts, even if politically willing to tax property owners at a very high level.⁹⁶ Nevertheless, poorer districts frequently do tax at a significantly higher level than wealthier districts in an attempt to provide greater funding to their schools.⁹⁷

⁸⁶ The rates are 2.3% for districts consisting of elementary and middle schools only, 1.05% for high school districts, and 3.0% for unit districts containing elementary, middle, and high schools. 105 ILL. COMP. STAT. ANN. 5/18-8.05(D)(3); *see* GENERAL STATE AID, *supra* note 83 (providing additional information on property taxing rates for the various types of school districts).

⁸⁷ 105 ILL. COMP. STAT. ANN. 5/18-8.05(E)(2). Note that revenue generated from a corporate personal property replacement tax is also added into this calculation. GENERAL STATE AID, *supra* note 83.

⁸⁸ 105 ILL. COMP. STAT. ANN. 5/18-8.05(E)(2); *see* GENERAL STATE AID, *supra* note 83 (providing additional explanation of the funding statute).

⁸⁹ 105 ILL. COMP. STAT. ANN. 5/18-8.05(E)(3); *see* GENERAL STATE AID, *supra* note 83 (providing additional explanation of the funding statute).

⁹⁰ 105 ILL. COMP. STAT. ANN. 5/18-8.05(E)(4); *see* GENERAL STATE AID, *supra* note 83 (providing additional explanation of the funding statute).

⁹¹ GENERAL STATE AID, *supra* note 83.

⁹² 105 ILL. COMP. STAT. ANN. 5/18-8.05(B); *see* GENERAL STATE AID, *supra* note 83 (providing additional explanation of the funding statute).

⁹³ 105 ILL. COMP. STAT. ANN. 5/18-8.05(E).

⁹⁴ *Id.*; GENERAL STATE AID, *supra* note 83 (providing additional explanation of the funding statute). Although some flat grant districts do choose to tax at higher rates to maximize school funding, others can tax at rates lower than foundation or alternate formula districts and still generate more money to spend on students. For example, in 2012 Skokie School District 68 had an equalized assessed property value of \$743,619 per pupil, a total school tax rate of \$2 per \$100, and spent \$8,402 per pupil. ILLINOIS INTERACTIVE REPORT CARD, *supra* note 8. Conversely, Cicero School District 99 had an equalized assessed value of \$78,372 per student, taxed at a rate of \$2.79 per \$100, but could only spend \$5,368 per pupil. *Id.*

⁹⁵ 105 ILL. COMP. STAT. ANN. 5/17-2. Note that this provision does not apply to Chicago Public Schools. *Id.*

⁹⁶ GENERAL STATE AID, *supra* note 83; *see infra* Part IV-C (arguing that because Illinois’ school funding system forces property-poor districts to tax within a statutorily prescribed range of tax rates, and because the system fails to yield sufficient funding for these districts, it limits true local control over school finance).

⁹⁷ *See* Secter, *supra* note 2 (noting that poor districts frequently tax at a much higher rate than wealthy districts, and citing as an example East St. Louis, which assesses property taxes six times higher than Rosemont, a relatively more prosperous suburb of Chicago). East St. Louis has a median household income of \$19,934, while Rosemont has a median household income of \$39,196. *Selected Economic Characteristics: 2007-2011 American Community Survey 5-Year Estimates, East St. Louis, Illinois*, U.S. CENSUS BUREAU, AM. FACTFINDER, http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/11_5YR/DP03/1600000US1722255 (last visited Nov. 6, 2013); *Selected Economic Characteristics: 2007-2011 American Community Survey 5-Year Estimates, Rosemont, Illinois*, U.S. CENSUS BUREAU, AM. FACTFINDER, http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/11_5YR/DP03/1600000US1765819 (last visited Nov. 6, 2013); *see also* Complaint, *supra* note 30 (comparing property tax rates in two foundation formula districts to the considerably lower tax rates in two flat grant districts). Illinois’ overall state tax system is considered one of the most regressive in the

B. The Education Clause of the Illinois Constitution

Unlike the Federal Constitution, state constitutions include articles explicitly providing for some form of a public school system.⁹⁸ Illinois is no exception—Article X, Section 1 of the Illinois State Constitution provides for a state-created system of free public schools.⁹⁹

The education article was first added to Illinois' constitution in 1870, and took its present form following revisions made at the 1970 Constitutional Convention.¹⁰⁰ Illinois' education article shares much of its language with other state education provisions,¹⁰¹ including phrases that have served as the basis for several plaintiff victories in education funding cases.¹⁰² A 1992 amendment referendum, however, would have reformed Illinois' school funding system just four years before *Edgar*.¹⁰³ Following a bitter debate in the Illinois General Assembly, a bi-partisan coalition of urban Democrats and downstate Republicans voted to add the referendum to the November ballot.¹⁰⁴ The referendum proposed adding language to Article X that would have forced the state to provide the majority of education funding in Illinois, effectively prohibiting

nation. DAVIS ET AL., INST. ON TAXATION AND ECON. POL'Y, WHO PAYS? A DISTRIBUTIONAL ANALYSIS OF THE TAX SYSTEM IN ALL 50 STATES 4 (3rd ed. 2009). The poorest 20% of residents pay on average 13% of their total annual income towards taxes, whereas the middle 60% pay about 9.7% of their income towards taxes, and the top 1% pay about 4.9%. *Id.* at 42. Similarly, Illinois' poorest residents tend to pay about five times as much of their annual income towards property taxes as the state's wealthiest residents. *Id.*

⁹⁸ See Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147, 1148 n.9 (2000) (citing education clauses for all fifty states).

⁹⁹ A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.

The state shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.

The State has the primary responsibility for financing the system of public education.

ILL. CONST. art. X, § 1.

¹⁰⁰ BURESH, *supra* note 2, at 34; ILL. CONST. art. X, § 1.

¹⁰¹ See Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Schools*, 63 TEX. L. REV. 777, 814-16 (1985) (categorizing state education articles into four groups depending on the "strength" of their wording). The weakest provisions merely provide for system of "free" schools; most education articles contain this language. *Id.* at 815. The next strongest provisions contain some characterization of quality of the education system, typically "thorough and efficient." *Id.* This language is used in the education articles of New Jersey, Arkansas, Colorado, Florida, and many other states. *Id.* at 815 n.144. Still stronger are those that compel state legislatures to specifically provide for state education systems. *Id.* at 815-16. Finally, the strongest provisions include some language (such as "fundamental" or "paramount") that makes education a top priority of state government. *Id.* at 816, 816 n.146. Washington, Maine, Michigan, and Illinois are some of the states in this final category. *Id.* at 816 n.146.

¹⁰² Several courts in other states have relied on the words "thorough and efficient," or substantially similar language, to invalidate funding systems. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979). *But see* *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191-94 (Ill. 1996) (discussing, unfavorably, cases in other states that have relied on this language to invalidate state funding systems).

¹⁰³ See Hugh Dellios & Rick Pearson, *School-Fund Question on Nov. 3 Ballot*, CHI. TRIB. (May 1, 1992), http://articles.chicagotribune.com/1992-05-01/news/9202080590_1_state-income-tax-amendment-school-funding-task-force

(summarizing generally the 1992 amendment referendum); Karwath & Christian, *supra* note 17 (discussing the failure of the amendment).

¹⁰⁴ The Illinois House of Representatives voted 71-44 to include the referendum, including 61 Democratic and 10 Republican "yea" votes, but not before a post-debate fist-fight between downstate and suburban Chicago representatives. Dellios & Pearson, *supra* note 103. The tenor of the debate surrounding the amendment vote is illustrative of the politics involved in school funding reform. While pushes for reform are traditionally associated with larger urban districts—the plaintiffs in *Edgar* included Chicago Public Schools as well as districts located in Elgin and Rockford; the plaintiffs in *Lewis E.* were from East St. Louis—downstate Republicans also strongly supported the referendum. *Id.* This is because rural areas generally have low property values as well as high transportation costs for students living far from schools. See *CTR. FOR TAX & BUDGET ACCOUNTABILITY*, *supra* note 11, at 13-14 (noting the "stark" disparity in funding between wealthier school districts in the northern part of Illinois and poorer downstate districts south of Interstate 80). Thus, rural schools often suffer from the same sort of chronic underfunding typical of large, urban schools. See generally *id.* (noting that most downstate school districts are foundation formula districts). As one might expect, opposition to funding reform usually comes from wealthy districts that fear that any changes in the financing scheme would result in higher taxes that ultimately benefit poor districts and not their own. Dellios & Pearson, *supra* note 103.

Illinois' property tax-based system.¹⁰⁵ The language would have also strengthened Article X's language to clearly define education as a fundamental right receiving enhanced protection from the courts.¹⁰⁶ Ultimately, the amendment was defeated at the polls, largely based on fears of increased taxes and decreased funding for wealthier districts.¹⁰⁷

C. The Major Illinois School Funding Cases: Edgar and Lewis E.

Around the time of the 1992 amendment referendum, a group of more than sixty school districts, students, and parents filed a suit in state court seeking declaratory judgment that Illinois' school funding system was unconstitutional.¹⁰⁸ The plaintiffs' primary claims alleged that the school funding system violated the Illinois State Constitution's equal protection clause and Article X because it failed to remedy the significant funding disparities between wealthy and poor districts.¹⁰⁹

When *Committee for Education Rights v. Edgar* came before the Illinois Supreme Court in 1996, the court's first task was determining exactly what education rights, if any, were guaranteed by Article X.¹¹⁰ The plaintiffs argued that the disparities produced by the state's funding system violated Article X's guaranty of an "efficient" educational system, and that the system prevented children in poor districts from attaining a "high quality" education.¹¹¹ Crucially, the court observed that the plaintiffs had made both equity and adequacy arguments.¹¹² While the former claim would require a construction of Article X to determine whether the word "efficient" means "equal," the latter claim raised the issue of whether the court had the

¹⁰⁵ The amendment would have incorporated the following language into Article X, Section 1:

1. Education of all persons is a fundamental "right," not just a "goal" of the state government.
2. It is the "paramount duty" of the State to:
 - a) provide a thorough and efficient system of high quality public education, and;
 - b) guarantee equality of educational opportunity as a fundamental right.
3. The State has the "preponderant financial responsibility" for financing public education.

League of Women Voters of Illinois, *Statewide Referendums*, CHI. TRIB. (Oct. 25, 1992), http://articles.chicagotribune.com/1992-10-25/news/9204060922_1_public-education-education-amendment-jim-edgar; see also Dellios & Pearson, *supra* note 103 (summarizing the potential impact of the amendment on the state funding system); Karwath & Christian, *supra* note 17 (noting that "perennially cash-strapped schools stand to benefit most" from the amendment).

¹⁰⁶ Dellios & Pearson, *supra* note 103 ("Proponents say the amendment is intended to strengthen language in the Illinois Constitution."). See *infra* Part IV-B for a more extensive discussion of Article X's language and legal ramifications.

¹⁰⁷ *Amendments and Conventions Proposed*, *supra* note 17. Although there were 1,882,569 votes for the amendment, more than those voting against it, the number nonetheless fell short of the three-fifths majority vote needed to pass constitutional amendments in Illinois. See *id.*; ILL. CONST. art. XIV, § 2(b); see also Dellios & Pearson, *supra* note 103 (noting that leading up to the amendment vote, Illinois residents could expect to hear "frequent warnings about massive income-tax hikes," that then-governor Jim Edgar warned the amendment could lead to a fifty percent increase in the state income tax, and that representatives from wealthier districts believed the state's funding system already "unfairly gives poorer areas a disproportionate share of state funds"); Karwath & Christian, *supra* note 17 (noting that the amendment fell short due to opposition from voters in wealthy suburban counties outside of Chicago who were concerned that the amendment could lead to property tax increases).

¹⁰⁸ *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1180 (Ill. 1996); Dellios & Pearson, *supra* note 103. A "declaratory judgment" is a binding adjudication of one or more party's rights, "whether or not any consequential relief is or could be claimed." See 735 ILL. COMP. STAT. ANN. 5/2-701 (West 2013).

¹⁰⁹ *Edgar*, 672 N.E.2d at 1182-83. According to the plaintiffs, during the 1989-90 school year, the average tax base in the wealthiest 10% of districts was thirteen times larger than that of those in lowest 10%, allowing wealthy districts to spend substantially more on their students. *Id.* at 1182. One plaintiff district noted that it could not afford to clean up exposed asbestos, patch leaking roofs, or replace rotting football bleachers. *Id.* at 1197-98 (Freeman, J., dissenting).

¹¹⁰ The plaintiffs' case had been dismissed by the circuit and appellate courts for failure to state a claim. *Id.* at 1182-83 (majority opinion).

¹¹¹ By alleging that the state funding system was not "efficient," the plaintiffs asserted that children in poor districts were receiving a comparatively worse education than those in wealthier districts; by alleging that students poor districts were not receiving a "high quality" education, however, the plaintiffs were asking the court to find their students' education *absolutely* inadequate. *Id.*

¹¹² *Id.* at 1183; see also *supra* Part II (contrasting the equity claims made in *Serrano* to the adequacy claims made in *Robinson* and other post-*Rodriguez* cases).

constitutional authority to adjudicate an adequacy claim at all.¹¹³ The plaintiffs also argued that the final line of Article X, Section 1, added at the 1970 Constitutional Convention, required the state to be the primary source of funding for public schools.¹¹⁴

The court first determined the meaning of “efficient” in Article X.¹¹⁵ Examining the 1970 Constitutional Convention record, the court found that the delegates did not intend for “efficient” to mean “equal,” and instead simply wanted the word to retain the limited meaning it had taken on since it was first used in Article VIII of the 1870 constitution.¹¹⁶ The court further found that opinions in other states addressing this issue, including many of the most significant plaintiff victories following *Rodriguez*, were inapposite to the case at hand or wrongly decided.¹¹⁷ Thus, Article X’s use of “efficiency” could not be read to guarantee equal educational funding.¹¹⁸

The court next turned to the final sentence in Article X, Section 1—“[t]he State has the primary responsibility for financing the system of public education.”¹¹⁹ The court noted that the line was added only after two alternative proposals—both of which explicitly delegated funding responsibilities to the state and limited local property tax funding—were voted down by the delegates.¹²⁰ Moreover, the court noted that the delegate who proposed the language intended merely “to put the Convention on record” (in other words, to put the Convention on notice that a change needed to be made), and that the line was “only to express a goal or objective, and not to state a specific command.”¹²¹ As such, the sentence did not provide a legal basis to challenge the state’s funding system.¹²²

Finally, the court analyzed the plaintiffs’ adequacy claim—that they were being denied a “high quality” education.¹²³ The court noted that the 1870 education article had originally assigned responsibility for providing public education to the “General Assembly,” or state legislature.¹²⁴ Even though the 1970 Convention delegates substituted “the state” for “General Assembly,” the court found that Article X retained the 1870 draft’s limited jurisdiction for courts.¹²⁵ The court also applied the United States Supreme Court’s political question test,

¹¹³ *Edgar*, 672 N.E.2d at 1183. Following *Rodriguez*, most successful state-level education funding cases made adequacy arguments alleging students in poor districts were being deprived of some base level of educational opportunity. See Brooker, *supra* note 39, at 187-89 (noting that most cases arguing equal protection claims failed, whereas plaintiffs scored major victories under adequacy claims in Montana, Kentucky, and Texas); see, e.g., *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 201, 210 (Ky. 1989).

¹¹⁴ *Edgar*, 672 N.E.2d at 1190 (“[P]laintiffs stress that while the 1870 Constitution specified that the *General Assembly* shall provide a system of public schools, the 1970 Constitution expressly places that duty on *the State*.”); see also BURESH, *supra* note 2, at 84-86, 114-18 (summarizing the debate over Article X’s final sentence).

¹¹⁵ *Edgar*, 672 N.E.2d at 1185-86.

¹¹⁶ *Id.* at 1186. Before the 1970 Constitutional Convention, the Court’s interpretation of “efficient” in the 1870 education clause held that issues of education “efficiency” could only be determined by the state legislature, with the narrow exception that courts could judge whether school boundaries were drawn efficiently in terms of geography. *Id.*; see, e.g., *People ex rel. Cmty. Unit Sch. Dist. No. 5 v. Decatur Sch. Dist. No. 61*, 203 N.E.2d 423, 424-25 (Ill. 1964); *People v. Deatherage*, 81 N.E.2d 581, 586 (Ill. 1948).

¹¹⁷ *Edgar*, 672 N.E.2d at 1188-89. The Court further emphasized its negative view of recent education funding litigation by finding *Abbott v. Burke* (in which the New Jersey Supreme Court invalidated the state’s funding system following several years of stalled legislative reform efforts) was simply decided incorrectly. *Id.* at 1188.

¹¹⁸ *Id.* at 1186.

¹¹⁹ *Id.* at 1186-87.

¹²⁰ *Id.* at 1186.

¹²¹ *Id.* at 1187.

¹²² *Id.* See *infra* Part IV-B for an analysis of the 1970 Constitutional Convention record.

¹²³ *Edgar*, 672 N.E.2d at 1189. The plaintiff’s central argument was that Article X’s assertion that “the state” was responsible for providing an efficient system of public schools placed responsibility for maintaining high quality schools on all three branches of the government. *Id.* at 1190-91. As such, the plaintiffs argued, ruling on the adequacy of public education would fit squarely within the court’s jurisdiction. *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 1190 (“Courts may not legislate in the field of public education any more than they may legislate in any other area. . . . Courts are no more capable of defining ‘high quality educational institutions and services’ under our present constitution than they were able to define a ‘good common school education’ under the 1870 Constitution.”).

developed in *Baker v. Carr*, to the adequacy issue.¹²⁶ The court found that there was “a lack of judicially discoverable and manageable standards” for defining “high quality” and determining whether the plaintiffs had received an adequate education.¹²⁷ The court further emphasized that a ruling on the issue would be anti-democratic because the justices were less politically accountable to the public than state representatives.¹²⁸ Thus, the court found that claims of inadequate educational opportunity were essentially political questions best left to the General Assembly.¹²⁹

With the education clause issues settled, the court turned to the plaintiffs' state equal protection argument, dismissing the claim based on the United States Supreme Court's ruling in *Rodriguez*.¹³⁰ Because wealth was not a suspect classification and because education was not a fundamental right, rational basis review would apply.¹³¹ As in *Rodriguez*, the court found that local control of public schools was a legitimate state interest effectively served by the state's funding scheme.¹³²

The *Edgar* court's ruling was a stunning defeat for education reformers. Not only had the court rendered Article X's language largely toothless,¹³³ but it also erected a barrier between future litigants and the court by finding school funding issues outside the purview of the judiciary.¹³⁴ Three years later, a second school funding case affirmed and reinforced the court's jurisprudence.¹³⁵

In 1999, children and parents in Illinois' East St. Louis' school district came before the Illinois Supreme Court seeking a declaration that the school funding system produced underfunded, dilapidated schools within their district, and thus violated Article X.¹³⁶ Once again, the plaintiffs made an adequacy claim, as well as claims based on the state's due process clause, Illinois School Code, and common law principles.¹³⁷ The court examined the education clause claim first and reaffirmed its holding in *Edgar*, that it had no authority to judge the adequacy of

¹²⁶ *Id.* at 1191. In *Baker*, an equal protection case involving discriminatory political districting, the United States Supreme Court provided a six-factor test to determine when an issue was “political” and thus outside the gambit of the courts. *Id.* If the issue involved any of the following six factors, it could not be reviewed by the court:

[(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [(2)] or a lack of judicially discoverable and manageable standards for resolving it; [(3)] or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; [(4)] or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; [(5)] or an unusual need for unquestioning adherence to a political decision already made; [(6)] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). See *infra* Part IV-A for an analysis of the Illinois Supreme Court's use of the *Baker* standard.

¹²⁷ *Edgar*, 672 N.E.2d at 1191.

¹²⁸ *Id.* Note, however, that Illinois Supreme Court justices *are* elected, and serve ten-year terms. ILL. CONST. art. VI, §§ 3, 10.

¹²⁹ *Edgar*, 672 N.E.2d at 1191 (noting that to rule on the merits would be a violation of the separation of powers); see O'Neill, *supra* note 27 (discussing how a minority of state courts, including Illinois, have avoided full adjudication of adequacy claims based on the political question doctrine and deference for the separation of powers). See generally NOWAK & ROTUNDA, *supra* note 27, at 58-66 (providing a general overview of the United States Supreme Court's political question jurisprudence).

¹³⁰ *Edgar*, 672 N.E.2d at 1193-94; see *supra* Part II-B (summarizing the United States Supreme Court's ruling in *Rodriguez*).

¹³¹ *Edgar*, 672 N.E.2d at 1193-96.

¹³² *Id.* at 1195-96.

¹³³ This is despite the fact that some have read Illinois' education clause as one of the strongest in the nation. See William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1667-69 (1989) (noting that Illinois' education clause is among the strongest worded clauses of all state constitutions).

¹³⁴ See *Lewis E. v. Spagnolo*, 710 N.E.2d 798, 816 (Ill. 1999) (Freeman, J., concurring in part and dissenting in part) (stating that in *Edgar* the “court shut the courthouse door to claims alleging violations of section 1 of the education article of the Illinois Constitution”); see also NOWAK & ROTUNDA, *supra* note 27 (“Unlike other restrictions on judicial review—doctrines such as case or controversy requirements, standing, ripeness and prematurity—all of which may be cured by different factual circumstances, a holding of nonjusticiability [premised on the political question doctrine] is absolute in its foreclosure of judicial scrutiny.”).

¹³⁵ *Lewis E.*, 710 N.E.2d at 800.

¹³⁶ *Id.* at 800-01.

¹³⁷ *Id.* at 801-02.

the state's public education system.¹³⁸ The court then turned to the plaintiffs' remaining claims and dismissed them in short order.¹³⁹ Again citing to *Rodriguez*, the court dismissed the due process claim, reasoning that there was no fundamental right to education.¹⁴⁰ The court then dismissed the school code claims for failure to point to a specific provision in the code that had been violated, and the common law claims failed due to the plaintiffs' failure to prove actual harm.¹⁴¹

In his dissent, Justice Charles E. Freeman disclaimed the precedent set by *Edgar* and *Lewis E.*¹⁴² East St. Louis schools were in deplorable condition, exposing students to asbestos, overflowing sewage pipes, broken fire alarms, unheated classrooms, and fire-damaged school libraries.¹⁴³ The court's opinions in *Edgar* and *Lewis*, Justice Freeman believed, permanently precluded the court from ever taking on the gross inequalities in Illinois' public schools, leaving the matter to languish under legislative inaction.¹⁴⁴

¹³⁸ *Id.* at 804 (“[Q]uestions relating to the quality of education are solely for the legislative branch to answer.” quoting *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1189 (Ill. 1996)). The plaintiffs argued that the *Edgar* opinion was not dispositive because the plaintiffs in that case had sought a “high quality” education rather than a minimal level of education, however the court found the difference indistinguishable. *Id.* The plaintiffs also argued that the historical education clause “efficiency” exception, whereby the court has the limited authority to determine the fairness of newly drawn school district boundaries, should apply because East St. Louis students were being entirely deprived of educational opportunity (much like a student included in district boundaries that place his home school so far away from his residence that he cannot attend). *Id.* The court, however, simply did not agree that the students were being wholly deprived of education. *Id.* The boundary exception would only apply, the court speculated, in situations where a “district provides a school that consists of nothing more than a vacant building marked with the word ‘School.’” *Id.*

¹³⁹ *Id.* at 805-16.

¹⁴⁰ *Id.* at 805. The plaintiffs also made a due process argument that, because students in Illinois are legally required to attend schools, and because the school facilities in East St. Louis were in dangerous disrepair, the state was in effect forcibly subjecting them to a harmful environment. *Id.* at 805-11. The court rejected this theory as well, finding that compulsory education laws did not raise due process issues because the precedent cited by the plaintiffs—cases involving harmful prisons—were legally dissimilar. *Id.* at 805-09. Furthermore, despite the poor condition of many East St. Louis schools, the plaintiffs had failed to demonstrate any actual harm caused by the facilities. *Id.* at 808-11.

¹⁴¹ *Id.* at 813-16. The plaintiffs had based their common law claim on premises liability, alleging that the schools their children attended were physically dangerous due to their lack of maintenance. *Id.* At common law, negligence claims require plaintiffs to show actual harm or an invasion of some interest. See RESTATEMENT (SECOND) OF TORTS § 281 (1965). The court further held that a permanent injunction was inappropriate because the plaintiffs had failed to point to specific hazardous condition that could lead to irreparable injury. *Lewis E.*, 710 N.E.2d at 815-16.

¹⁴² “In [*Edgar*], this court shut the courthouse door to claims alleging violations of section 1 of the education article of the Illinois Constitution. In this case, the majority nails that door shut. The majority holds that these plaintiffs may not-not do not, or could not, but may not-state a cause of action for a declaratory judgment based on a violation of the education article.”

Lewis E., 710 N.E.2d at 816 (internal citations omitted) (Freeman, J., concurring in part and dissenting in part).

¹⁴³ *Id.* at 817. Justice Freeman quoted extensively from the plaintiffs' complaint:

By any reasonable measure, the public schools of District 189 are neither safe nor adequate. Strangers wander in and out of junior high schools. Fire alarms malfunction, and firefighters find emergency exits chained shut as they rescue children from burning schools. Classrooms are sealed to protect students from asbestos and dangerous structural flaws. In dark corridors, light bulbs go unreplaced and rain seeps through leaky roofs. In heavy rains, backed-up sewers flood school kitchens, boilers, and electrical systems, resulting in student evacuations and cancelled classes. Bathrooms are unsanitary and water fountains are dry or spew brown water. In winter, students sit through classes wearing heavy coats because broken windows and faulty boilers go unrepaired. They struggle to learn using meager instructional equipment and tattered, dated textbooks. School libraries are locked or destroyed by fire.

Id.

¹⁴⁴ *Id.* This is not to say, however, that no other legal challenges have been attempted since *Lewis E.* In March 2010, the Chicago-based public policy organization Business and Professional People for the Public Interest (“BPP”), in conjunction with their pro bono partner Sidley Austin, filed a school funding suit against State Superintendent of Education Christopher Koch, Governor Quinn, and the Illinois State Board of Education. See Complaint, *supra* note 30, at 1-3. Working around *Edgar* and *Lewis E.*'s constraining precedent, the plaintiffs argued that the state's school funding system effectively forced residents of property-poor school districts to pay property taxes at significantly higher rates than residents of property-rich districts, a violation of the state constitution. See *id.* Additionally, the suit alleged that various other elements of how the state now runs public schools, including increases in state-level performance requirements and standardized testing, have effectively ended “local control” of public schools. See *id.* Nevertheless, the suit was dismissed in short order by the Illinois Supreme Court in late 2012, ruling that because localities ultimately set local property

Evidence suggests Justice Freeman's fears were well founded.¹⁴⁵ While the *Edgar* majority's minimalist reading of Article X was fairly accurate,¹⁴⁶ the delegates to the 1970 Constitutional Convention nonetheless believed that Article X's strong wording would compel the Illinois state legislature to pass significant funding reforms in order to remedy educational inequality.¹⁴⁷ More than forty years later, the legislature has yet to act.¹⁴⁸ In other states as well, legislative inaction has often prevented meaningful reform.¹⁴⁹ Thus, it may be time to once again challenge Illinois's school funding system in court.

IV. ANALYSIS

Since 1999, the Illinois state legislature has not reformed the state's education funding system, and the state continues to fund schools at one of the lowest rates in the U.S.¹⁵⁰ With *Rodriguez* preventing plaintiffs from pursuing federal claims against the Illinois state government, and *Edgar* and *Lewis E.* ostensibly preventing state claims, it would appear education reformers are left with few options.

As this Part will demonstrate, however, the *Edgar* and *Lewis E.* opinions leave open a few points of attack for future litigants. The Illinois Supreme Court's reliance on the United States Supreme Court's political question jurisprudence, which precludes courts from hearing certain inherently political issues, defers unnecessarily to federal law, and also contradicts the Illinois Supreme Court's own political question precedent. Moreover, the *Edgar* court's interpretation of Article X failed to define a key provision—whether the promise of a “high quality” education establishes some minimal level of educational adequacy.¹⁵¹ Finally, the Illinois Supreme Court's deference to local control is unnecessary and ignores the fact that the current funding system does not provide meaningful control for property-poor school districts.

A. The Illinois Supreme Court's Misapplication of the Federal Political Question Doctrine in Edgar and Lewis E.

Before examining the *Edgar* and *Lewis E.* courts' political question analysis, some background on the doctrine is necessary. The political question doctrine is a federal law principle that preserves the separation of powers by helping courts to determine when ruling on an issue

taxing rates, the plaintiffs' injuries were not properly traceable to the named defendants and thus could not provide standing. *See Carr v. Koch*, 981 N.E.2d 326, 331-36 (Ill. 2012).

¹⁴⁵ *See Sectar*, *supra* note 2 and accompanying text.

¹⁴⁶ *See infra* Part IV-B (analyzing the intentions of the 1970 Constitutional Convention delegates).

¹⁴⁷ *See BURESH*, *supra* note 2, at 126 (quoting Malcolm Kamin, a member of the Convention's education committee, as stating after the Convention that “[i]f the legislature and the new State Board of Education will take the school financing language for what it is—the statement of a pressing problem and the urgent prayer for a fair solution—then they will act to equalize educational opportunity and the tax burdens of educational financing without further judicial intervention”).

¹⁴⁸ *See Sectar*, *supra* note 2 and accompanying text; Thomas D. Wilson & John K. Wilson, *Equalizing School Funding and the 1970 Constitutional Convention*, ILL. ISSUES, Mar. 1992, at 21, 21, available at <http://www.lib.niu.edu/1992/ii920321.html> (stating that “[t]he hope for equalizing funding through the legislature has never been fulfilled” since the 1970 Convention, but funding disparities between rich and poor districts have greatly increased).

¹⁴⁹ In *Rodriguez*, the Texas district court initially delayed hearing of the case for two years while the Texas legislature unsuccessfully investigated possible reforms. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6 n.4 (1973). After invalidating the funding scheme, the court stayed its decision for another two years but retained its right to fashion remedial actions in case the legislature failed to act. *Id.* at 6 n.5. In New Jersey, *Robinson v. Cahill* first invalidated the state's funding system in 1973, but the legislature did not pursue true reform until after *Abbott v. Burke* was decided in 1997. *See Robinson v. Cahill*, 303 A.2d 273, 287-298 (N.J. 1973); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); Lynch, *supra* note 14, at 974 (summarizing education reform in New Jersey).

¹⁵⁰ *See supra* Part I (summarizing the economic shortfalls and inequalities Illinois public schools currently face). During the 2011-2012 school year, just 32.5% of public school funding came from the state. 2012 ANNUAL REPORT, *supra* note 4; *Total Revenues and Percentage Distribution*, *supra* note 4.

¹⁵¹ *See infra* Part IV-B (providing an analysis of the 1970 Constitutional Convention record and what it suggests about the meaning of Article X).

would encroach on the authority of the executive or legislature.¹⁵² Because the United States Supreme Court has the ultimate authority to interpret the Federal Constitution,¹⁵³ it also has the final authority to determine when an issue or responsibility has been delegated to a particular branch of the government.¹⁵⁴ The Court outlined its current political question doctrine standard in 1962 in *Baker v. Carr*.¹⁵⁵ Holding that mere political sensitivity did not make an issue a political question,¹⁵⁶ the Court formulated a six-factor test to determine whether an issue was a political question and thus non-justiciable.¹⁵⁷ If the issue involved any of the following six factors, it could not be reviewed by the court: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) or a lack of judicially discoverable and manageable standards for resolving it; (3) or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; (4) or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; (5) or an unusual need for unquestioning adherence to a political decision already made; (6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁵⁸ Nevertheless, even after *Baker*, application of the political question doctrine in the Court's opinions has remained fairly limited.¹⁵⁹

In contrast, some state supreme courts have readily invoked the doctrine in the context of education finance cases.¹⁶⁰ As many legal scholars have argued, however, there is nothing explicitly binding state courts to the Supreme Court's political question precedent when ruling on state constitutional law.¹⁶¹ The political question doctrine is rooted in the Federal Constitution's

¹⁵² See *Baker v. Carr*, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers."); see also NOWAK & ROTUNDA, *supra* note 27, at 58-66 (providing a general overview of the United States Supreme Court's political question jurisprudence); O'Neill, *supra* note 27, at 555-56 ("The political question doctrine is the judiciary's attempt to respect the structural boundaries between the three branches of federal government.").

¹⁵³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). See generally NOWAK & ROTUNDA, *supra* note 27, at 1-11 (summarizing the United States Supreme Court's judicial review authority).

¹⁵⁴ *Baker*, 369 U.S. at 210. Early in the Court's history, the political question doctrine most often arose in cases involving the Guaranty Clause of Article IV, Section 4. See O'Neill, *supra* note 27, at 556; see, e.g., *Luther v. Borden*, 48 U.S. 1, 42-43 (1849). Generally, these cases involved a dispute over an elected office, a matter the Court believed it lacked authority to decide. In *Luther v. Borden*, plaintiffs alleged the Rhode Island government failed to satisfy the Constitution's guaranty of a republican government. *Id.* The Court refused to decide the case, instead asserting that either the President or Congress must resolve the conflict. *Id.*; see also O'Neill, *supra* note 27, at 556 (noting that "[v]ery early on, the Supreme Court used the doctrine to avoid political representation issues under the Guaranty Clause of the Constitution" and discussing *Luther v. Borden*).

¹⁵⁵ *Baker*, 369 U.S. at 198-99. In *Baker*, the court was presented with the issue of whether voting districts that, due to population shifts, effectively diluted the voting power of a particular voting group violated the Equal Protection Clause. *Id.* at 187-88. The defendants argued that issues of political reapportionment involved political questions, and as such, the court lacked authority to decide the matter. *Id.* at 197-98.

¹⁵⁶ *Id.* at 217 ("The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority.").

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*; see also NOWAK & ROTUNDA, *supra* note 27, at 59-60 (summarizing *Baker*'s impact on political question jurisprudence).

¹⁵⁹ See NOWAK & ROTUNDA, *supra* note 27, at 61-66 (discussing the political question doctrine's limited application to certain issues involving foreign affairs and war, constitutional amendments, impeachment, political gerrymandering, apportionment of congressional districts among states, and Origination Clause cases); Blanchard, *supra* note 33, at 272 (stating that Supreme Court commentators have observed a decrease in the use of the political question doctrine since the early 1960s); O'Neill, *supra* note 27, at 557-60 (noting that the doctrine has been limited in application to questions of political districting and foreign affairs, and then summarizing the few cases since *Baker* in which it has been at issue).

¹⁶⁰ See, e.g., *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996); *Lewis E. v. Spagnolo*, 710 N.E.2d 798, 802-03 (Ill. 1999); *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 183 (Neb. 2007) (formally adopting the U.S. Supreme Court's *Baker* test, finding that issues of education adequacy are political questions for the legislature to decide, and upholding the Nebraska state school funding system); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 57-58 (R.I. 1995) (upholding Rhode Island's funding system, and finding that the determination of what constitutes an adequate or equal education is a political question reserved for the state general assembly).

¹⁶¹ See Brennan, *supra* note 78, at 501 ("[S]tate courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts."); Blanchard, *supra* note 33, at 233 ("State court reliance on federal separation of powers and political question doctrine jurisprudence is problematic because these doctrines are not freely transferrable to state constitutional analysis."); NOWAK & ROTUNDA, *supra* note 27, at 11 ("The supreme court of a state is

separation of powers, and as such has no real applicability to state constitutional jurisprudence.¹⁶² Furthermore, unlike federal courts, which are courts of limited jurisdiction, state courts are courts of general jurisdiction, and they retain significant common law powers not afforded to the federal judiciary.¹⁶³ As such, state courts are able to “make law” much more so than federal courts, resulting in a fundamentally different relationship between state government branches than that of their federal counterparts.¹⁶⁴ As a policy matter, too, strict adherence to the political question doctrine is unnecessary.¹⁶⁵ In many states (including Illinois), state supreme court justices are elected, making them politically accountable for their opinions.¹⁶⁶ Moreover, state supreme court opinions are easier to overrule than United States Supreme Court opinions because state constitutions are more malleable.¹⁶⁷

Regardless of the Illinois Supreme Court's justification for adopting federal political question jurisprudence,¹⁶⁸ its application in *Edgar* and *Lewis E.* is also at odds with its own past political question cases.¹⁶⁹ Cases involving political question issues prior to the education cases are few and far between, generally involved disputes over elections, and generally barred courts from ruling on any politically-tinged issue.¹⁷⁰ In *Donovan v. Holzman* (1956), however, the court

truly the highest court in terms of this body of law . . . [i]t is free to interpret state laws or the state constitution in any way that does not violate principles of federal law.”); Gardner, *supra* note 24, at 808-09 (“[I]t is certainly possible for a state constitution to contain a political question doctrine, and it is even possible for the state doctrine to be so similar to the federal version that precisely the same analysis could be used for both—possible, but highly unlikely.”); O’Neill, *supra* note 27, at 578-79 (“It does not follow that the same barriers (political question doctrine) would apply to state court action.”).

¹⁶² See Blanchard, *supra* note 33 and accompanying text.

¹⁶³ See Gardner, *supra* note 24, at 809 (“[V]irtually all state courts have significant common law powers that federal courts lack. The power to elaborate the common law is a power to make law.”); O’Neill, *supra* note 27, at 579 (noting state courts’ affirmative common law powers).

¹⁶⁴ See Gardner, *supra* note 24, at 809; see also O’Neill, *supra* note 27, at 579 (noting that state courts have no case in controversy requirement, meaning that they may issue binding advisory opinions compelling state legislatures to formulate remedies); Blanchard, *supra* note 33, at 273 (noting that state courts are generally more involved in creating public policy than federal courts).

¹⁶⁵ See Blanchard, *supra* note 33, at 273 (citing various reasons why greater authority for state supreme court justices would not threaten state separation of powers or democracy); Swenson, *supra* note 98, at 1152-53 (noting that many states have directly-elected justices).

¹⁶⁶ Blanchard, *supra* note 33, at 273-74; see also Swenson, *supra* note 98, at 1152-53 (discussing various appointment systems for state supreme court justices).

¹⁶⁷ State constitutions are re-written relatively often, and are generally easier to amend through state referendum. See Blanchard, *supra* note 33, at 273 (“[S]tate court opinions are more easily overruled by constitutional amendment.”). Article XIV of the Illinois State Constitution requires a referendum to be presented to voters every twenty years on whether a new constitutional convention should be convened. ILL. CONST. art. XIV, § 1.

¹⁶⁸ It is worth noting that Article II, Section 1 of the Illinois State Constitution specifically provides for the separation of state powers, yet neither the *Edgar* nor *Lewis E.* opinion makes any mention of it, instead deferring to *Baker v. Carr*. See ILL. CONST. art. II, § 1; Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996); Lewis E. v. Spagnolo, 710 N.E.2d 798, 802-05 (Ill. 1999).

¹⁶⁹ See O’Neill, *supra* note 27, at 562 (discussing generally the Court’s past political question cases and noting that “[e]ducational adequacy cases are the only cases in which the Illinois Supreme Court has invoked the political question doctrine to preclude judicial review”).

¹⁷⁰ See *People v. McWeeney*, 102 N.E. 233, 238 (Ill. 1913); *Daly v. Madison County*, 38 N.E.2d 160, 167 (Ill. 1941); *Donovan v. Holzman*, 132 N.E.2d 501, 502, 506 (Ill. 1956); *Kluk v. Lang*, 531 N.E.2d 790, 791, 797 (Ill. 1988). In two early cases, *People v. McWeeney* (1913) and *Daly v. Madison* (1941), the court appeared to erect a clear barrier between the judiciary and any politically tinged issues. *McWeeney* involved a disputed injunctive order that would have barred one faction of the Democratic Committee of Cook County from attending an official party event. *McWeeney*, 102 N.E. at 234-35. Specifically, the court was reviewing the validity of the injunction because the rival party faction had been held in contempt of court for its violation. *Id.* In ruling that the injunction was impermissible, the court noted that the “courts cannot be drawn into political contests of any sort or description unless required by statute, and any injunction for the purpose of restraining or controlling acts of a political nature is void.” *Id.* at 238. The court maintained its strict prohibition on deciding political issues in *Daly*, a taxpayer suit that sought the enjoinder of the use of public funds to run an election. *Daly*, 38 N.E.2d at 162. The plaintiffs filed the suit because they believed the state’s failure to reapportion voting districts from 1901 to 1940 had diluted their voting strength. *Id.* Once again, the court found the issue to be political and thus outside of its authority. *Id.* at 164-65 (“A court of equity is prohibited from passing on any political question, and once it is determined that the controversy involves political and not civil or property rights, the court must refuse to exercise its jurisdiction. The power to hold an election is political. A court of equity has no power to restrain officers in the exercise of that power.”). Critically, both of these cases involved judicial action that directly impaired the democratic process. In *McWeeney*, the court ruled invalid a lower court’s injunction—thus, it was not determining whether a party’s claim was justiciable. *McWeeney*, 102 N.E. at 237-38. The lower court’s injunction was invalid because it directly impaired democratic party members from attending an official party event related to primary

opened the door for judicial review of some types of cases involving constitutional judgment.¹⁷¹ Decided just a few years before *Baker*, the *Donovan* court drew roughly the same conclusion as the United States Supreme Court—that there is a difference between “political questions” and “political cases.”¹⁷² The court believed that *Donovan*, involving a disputed reapportionment plan, was firmly in the latter category, merely requiring it to judge whether the legislature’s reapportionment effort was constitutional, rather than take the quasi-legislative action of formulating its own plan.¹⁷³ Later, in *Kluk v. Lang* (1988), the court formally adopted the *Baker* test.¹⁷⁴ Since *Kluk*, the Illinois Supreme Court has never dismissed a case under its political question doctrine—except for the education cases.¹⁷⁵

As discussed above, the court’s adherence to the doctrine is questionable; however, even under the *Baker* test the current court should be able to rule on education issues.¹⁷⁶ Contrary to the *Edgar* court’s finding that it did not have the resources to judge educational adequacy, at the time there were several academic standards with which it could judge the relative educational equality of Illinois schools, including the Illinois Goal Assessment Program test, a state-level standardized academic assessment exam, national academic assessments such as the American College Testing (“ACT”) exam, and graduation, daily attendance, and drop-out rates.¹⁷⁷ Since *Edgar* and *Lewis E.*, the Illinois State Board of Education has also instituted two comprehensive

elections. *Id.* In *Daly*, the court refused to rule on the case because it found it had no power to halt an election. *Daly*, 38 N.E.2d at 163-64.

¹⁷¹ *Donovan*, 132 N.E.2d at 502-03. The *Donovan* plaintiff initiated a taxpayer suit seeking a declaratory judgment that reapportioned state senate and representative districts were constitutionally invalid. *Id.* The plaintiff’s prayer for relief was key—rather than ask the court to halt elections (as in *Daly*) or redraw districts themselves, he merely sought the court’s judgment on the constitutionality of the reapportionment. *Id.*

¹⁷² See *id.* at 506 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)) (“The mere fact that political rights and questions are involved does not create immunity from judicial review.”); *Baker v. Carr*, 369 U.S. 186, 217 (1962).

¹⁷³ *Donovan*, 132 N.E.2d at 506. As the court emphasized:

There is a vast difference between determining whether the principle of compactness of territory has been applied at all or not, and whether or not the nearest practical approximation to perfect compactness has been attained. The first is a question which the courts may finally determine; the latter is for the legislature.

Id. Drawing this distinction was a matter of degree—there was no bright line between political questions and political cases—and could only be settled by examining the plaintiff’s complaint and the evidence in the record. *Id.* The legislation would be given a presumption of constitutionality, however the court would still conduct some degree of independent judicial review. *Id.* at 506-07. Although the court generally deferred to the legislative record, it did note that it had not been presented with “any other of the vast spectrum of factors that might militate against” laying out the districts as they had been drawn. *Id.* at 506. Presumably, if presented with other forms of evidence besides the legislative record, the court would have taken this into consideration. *Id.* Turning to the record, the court found nothing in the legislative record or in the contours of the districts themselves that suggested they had been drawn to favor specific populations or political groups. *Id.* The apportionment scheme was upheld. *Id.* at 507.

¹⁷⁴ *Kluk*, 531 N.E.2d at 797. The court also firmly reiterated its authority to judge the constitutionality of legislative action, even those involving political issues:

We are of the opinion that a determination by a court that if an integral part of the legislative branch of government is permitted to proceed in a particular manner the result will be a deprivation of a constitutional right of an individual, does not constitute a lack of respect due a coordinate branch of the government, but it is an exercise of one of the duties committed to the judiciary.

Id. at 796-97.

¹⁷⁵ O’Neill, *supra* note 27, at 562.

¹⁷⁶ In *Edgar* the court focused on the second prong of the *Baker* standard, that “a lack of judicially discoverable and manageable standards for resolving” suggests an issue is a non-justiciable political question, and found it lacked standards for determining what constitutes a “high quality” education. *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996) (“The constitution provides no principled basis for a judicial definition of high quality. It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense.”).

¹⁷⁷ See *State Board of Education Approves Comprehensive Changes in System of Support for Academically Struggling Schools*, ILL. STATE BOARD OF EDUC. (May 13, 2003), <http://www.isbe.net/news/2003/may13a-03.htm> [hereinafter *Comprehensive Changes*] (noting that the IGAP test was replaced by the Illinois Standards Achievement Test and Prairie State Achievement Test in 1999 and 2001, respectively). The ACT has been in existence since 1959. See generally ACT: THE FIRST FIFTY YEARS, 1959—2009 (2009), available at http://media.act.org/documents/ACT_History.pdf.

state exams testing student achievement in core subject matters.¹⁷⁸ The Illinois Standards Achievement Test (“ISAT”), administered in grades three through eight, tests students in math, reading, science, and writing.¹⁷⁹ The Prairie State Achievement Exam (“PSAE”), taken each year by all eleventh grade students, is the high school equivalent to the ISAT.¹⁸⁰ Scoring on these tests is weighed against statewide standards, allowing for comparison of one district to another, and results are readily accessible online.¹⁸¹ Furthermore, Illinois’ education funding system, which categorizes districts into “foundation,” “alternative,” and “flat grant” districts based on their local property wealth, provides for a convenient set of “district wealth” standards against which student performance may be compared.¹⁸²

A brief examination of the remaining *Baker* standards further suggests education finance litigation does not raise a political question. Without specific constitutional or statutory language to indicate otherwise, there is no reason to believe there is an “unusual need for unquestioning adherence to a political decision already made” or “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”¹⁸³ Presumably, plaintiffs in future education litigation would again merely seek a declaration that the funding system is unconstitutional, fully allowing the state legislature to formulate a new system without judicial interference.¹⁸⁴ Moreover, there is nothing in the text of Article X, Section 1 to suggest a need for exceptional judicial deference.¹⁸⁵ The same basic reasoning also indicates the Illinois Supreme Court would not have to make an “initial policy determination of a kind clearly for non-judicial discretion.”¹⁸⁶ Additionally, a judicial decision on the constitutionality of a piece of legislation would not show a “lack of respect due [to the] coordinate branches of government”—weighing the constitutionality of law is, after all, a primary function of the court.¹⁸⁷ Finally, there is no “textually demonstrable constitutional commitment of the issue to a coordinate political

¹⁷⁸ See *Comprehensive Changes*, *supra* note 177. The tests are components of the Adequate Yearly Progress benchmarks required under No Child Left Behind, the major federal education reform legislation. *No Child Left Behind/Annual Yearly Progress: Frequently Asked Questions*, ILL. STATE BOARD OF EDUC., <http://www.isbe.net/ayp/htmls/faq.htm> (last visited Oct. 26, 2013). See generally *Elementary and Secondary Education Act*, U.S. DEP’T OF EDUC., <http://www.ed.gov/esea> (last visited Oct. 26, 2013) (for background information on NCLB).

¹⁷⁹ *Illinois Standards Achievement Test (ISAT)*, ILL. INTERACTIVE REPORT CARD, <http://iirc.niu.edu/Tests.aspx?isat> (last updated Oct. 25, 2013) [hereinafter *ISAT*]; see *Student Assessment Illinois*, *supra* note 14. The ISAT measures individual student achievement relative to the statewide learning standards developed by the Illinois State Board of Education (“ISBE”), evaluating students by subject according to four performance levels: exceeds standards, meets standards, below standards, and academic warning. See *ISAT*, *supra*; *Student Assessment Illinois*, *supra* note 14.

¹⁸⁰ *Prairie State Achievement Exam (PSAE)*, ILL. INTERACTIVE REPORT CARD, <http://iirc.niu.edu/Tests.aspx?psae> (last updated Oct. 25, 2013) [hereinafter *PSAE*]; see also *Student Assessment Prairie State*, *supra* note 14. The PSAE evaluates students based on their ACT scores (all students in Illinois are required to take the ACT during the first day of the two-day PSAE), a science assessment developed by the Illinois State Board of Education, and additional reading and math exams developed by the ACT corporation. *Id.*

¹⁸¹ See ILLINOIS INTERACTIVE REPORT CARD, *supra* note 8 (providing an interactive internet application for users to view and compare test scores, district financial information, and many other key educational metrics); *2013 Illinois School Report Cards*, CHI. TRIB., <http://schools.chicagotribune.com/> (last visited Nov. 1, 2013).

¹⁸² See *supra* Part III-A (explaining Illinois’ school funding system).

¹⁸³ *Baker v. Carr*, 369 U.S. 186, 217 (1962); see ILL. CONST. art. X, § 1 (note that there is no language that could reasonably be read to suggest that the Court must avoid education issues).

¹⁸⁴ Indeed, recent litigation before the Illinois Supreme Court did seek declaratory judgment. See *Complaint*, *supra* note 30, at 15; *Public Education—School Funding Litigation*, BUS. & PROF. PEOPLE FOR THE PUB. INT., http://www.bpchicago.org/pe_litigation.php (last visited Oct. 26, 2013) [hereinafter *Public Education—School Funding Litigation*] (providing additional information about the suit). Given the Illinois Supreme Court’s extreme reluctance in *Edgar* to substantively critique or amend the state’s education funding system, it seems unlikely the court would be willing to do anything more than simply strike down the funding system as unconstitutional. See *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1192 (Ill. 1996) (“[W]e will not under the guise of constitutional interpretation, presume to lay down guidelines or ultimatums for [the legislature].” (internal quotation marks omitted)).

¹⁸⁵ ILL. CONST. art. X, § 1.

¹⁸⁶ *Id.* Like the *Donovan* court’s assessment of political districts, the court would be making a judgment of the constitutionality of the funding system in general (as a finance system predicated on local property wealth), and not an assessment of the specific mechanics of the scheme. See *Donovan v. Holzman*, 132 N.E.2d 501, 506 (Ill. 1956).

¹⁸⁷ *Baker*, 369 U.S. at 217; see ILL. CONST. art. VI, § 4 (granting the Illinois Supreme Court final appellate jurisdiction over questions of law decided in lower courts).

department.”¹⁸⁸ The Illinois Supreme Court is thus fully capable of ruling on the constitutionality of the state’s education funding system, and should not dismiss future cases as nonjusticiable political questions.

B. Fundamental Rights and the Article X Education Clause Promise of a Minimally Adequate Education

Once a plaintiff surmounts the “political question hurdle” erected by *Edgar* and *Lewis E.*, he will have to persuade the court that it should apply strict scrutiny review to the funding system because it infringes on a fundamental right promised by the Illinois state constitution.¹⁸⁹ Otherwise, the court will apply a highly deferential rational basis review that grants the funding scheme a strong presumption of constitutionality.¹⁹⁰ This Part will thus examine the Illinois Supreme Court’s refusal to find a fundamental right to education within the Illinois Constitution.¹⁹¹

The plaintiffs in both *Edgar* and *Lewis E.* essentially made two distinct fundamental right arguments, one based on equal protection/due process principals, and one based on Article X, Section 1 of the Illinois State Constitution.¹⁹² In both cases, the Illinois Supreme Court rejected the plaintiffs’ equal protection/due process complaints by strictly adhering to the U.S. Supreme Court’s ruling in *Rodriguez*.¹⁹³ Much like its application of the federal political question doctrine, the Illinois Supreme Court’s lockstep adherence to *Rodriguez* appears unfounded.¹⁹⁴ State court constitutions and high courts are fundamentally different than their federal counterparts, unbound by the strict contours of the Federal Constitution.¹⁹⁵ As such, state courts have considerably greater power to expand on personal rights and liberties than federal courts, and should not necessarily adhere to federal precedent.¹⁹⁶ Furthermore, the presence of a dedicated educational article in the Illinois State Constitution at least suggests a stronger entitlement to education than does the Federal Constitution, which is wholly silent on the matter.¹⁹⁷

¹⁸⁸ *Baker*, 369 U.S. at 217. During its analysis of the 1970 Constitutional Convention record, the *Edgar* court found that the education article was meant to delegate exclusive responsibility for the education system to the state legislature. *Edgar*, 672 N.E.2d at 1190. This is despite the fact that delegates to the 1970 Constitutional Convention specifically replaced the phrase “General Assembly” with “the state” when it rewrote the constitution’s education article. *Id.* The majority opinion in *Edgar* glosses over this point, essentially stating that because education issues are a matter for the legislature only, the change in wording could not have expanded responsibility for public education to all three branches of the state government. *Id.* (“Surely, however, this provision does not alter the roles or expand the powers assigned to the different branches of government by the constitution. Courts may not legislate in the field of public education any more than they may legislate in any other area.”). The court’s circular logic does not provide a meaningful answer to the “textually demonstrable constitutional commitment” prong of the *Baker* standard, and seems to ignore contrary proof within the constitutional convention record. *See id.* at 1200-02 (Freeman, J., concurring in part and dissenting in part) (arguing that, based on the constitutional convention record, the 1970 delegates’ use of the phrase “the state” was a deliberate delegation of responsibility to all three branches of the Illinois state government.).

¹⁸⁹ This Article will ignore arguments that the funding system discriminates against a suspect class (such as the poor or racial/ethnic minorities). Suspect class arguments have generally been unsuccessful in other states. *See supra* Part II (discussing the shift towards education clause “adequacy” claims following *Rodriguez*). Additionally, suspect class arguments did not factor significantly into either the *Edgar* or *Lewis E.* decisions. *See supra* Part III-C (summarizing the plaintiffs’ arguments in *Edgar* and *Lewis E.* as well as the court’s analysis).

¹⁹⁰ *See Edgar*, 672 N.E.2d at 1180-96 (refusing to apply strict scrutiny to the court’s review of the Illinois education funding system, and in turn upholding it under rational basis review); *see also supra* Part III-C (summarizing the *Edgar* decision). Although, as will be shown in Part IV-C, plaintiffs may be able to make a strong case against the funding serving even a rational basis. *See infra* Part IV-C.

¹⁹¹ *See infra* Part IV-B (analyzing the 1970 Illinois Constitutional Convention record and what it suggests about the meaning of Article X).

¹⁹² *Edgar*, 672 N.E.2d at 1182; *Lewis E. v. Spagnolo*, 710 N.E.2d 798, 801, 812 (Ill. 1999).

¹⁹³ *Edgar*, 672 N.E.2d at 1193-94; *Lewis E.*, 710 N.E.2d at 805.

¹⁹⁴ *See supra* Part IV-A (discussing differences in state and federal courts and why the federal legal doctrines should not necessarily be applied in state constitutional cases).

¹⁹⁵ *See Brennan*, *supra* note 78 and accompanying text.

¹⁹⁶ *Id.*

¹⁹⁷ *See Banchard*, *supra* note 33, at 256 (“Ascribing ‘nonfundamental’ status to educational rights in spite of express education clauses in the state constitutions indicates reluctance on the part of courts to serve as protectors of political minority interests.”).

Finding clearly defined education rights within Article X of the Illinois Constitution, however, may be difficult. In *Edgar*, the plaintiff's Article X claim made two separate arguments: 1) an "efficient" system of education required substantial equality in funding between districts; and 2) the article's promise of a "high quality" education guaranteed some minimum level of quality.¹⁹⁸ For the first time, the Illinois Supreme Court conducted a substantial interpretation of Article X, Section 1.¹⁹⁹ The court's subsequent reading appears to be largely—but not *wholly*—correct.²⁰⁰

A 1975 report on the 1970 Convention Education Committee, which included post-convention interviews with many of the delegates, confirms much of the *Edgar* court's analysis.²⁰¹ The use of the word "efficient" in the 1870 education article had been read by Illinois courts to mean that school district boundaries had to be drawn so as not to exclude or severely inconvenience students.²⁰² With little debate, the 1970 delegates agreed that the use of *efficient* in their revision would simply retain the legal precedent developed since 1870, and did not mean *equal funding*.²⁰³ More critically, the *Edgar* court correctly determined Article X's final line, a promise that "the State has the primary responsibility for financing the system of public education," is only a non-binding proclamation and does not require the majority of school funding to come from state funds (as oppose to local property tax revenue).²⁰⁴ The 1970 Convention rejected two different amendments to Article X that would have required the state to provide the majority of funding for public schools as well as limit total contributions to school funding from local property taxes.²⁰⁵ Subsequently, the Convention settled on Article X's present language, explicitly proposed as a mere "hortatory" statement of intent.²⁰⁶

Still, other elements of Article X remained undefined in the *Edgar* court's analysis and may provide a guarantee of some minimal level of education.²⁰⁷ Most notably, the use of the phrase "high-quality," dismissed by the *Edgar* and *Lewis E.* courts under their political question analysis, was never clearly defined during the 1970 Convention and only briefly debated.²⁰⁸

¹⁹⁸ *Edgar*, 672 N.E.2d at 1183. The *Lewis E.* plaintiffs, although attempting to distinguish their case from *Edgar*, essentially made the same argument regarding the use of "high quality" in the article—that it guaranteed some minimally adequate level of education. *Lewis E.*, 710 N.E.2d at 802.

¹⁹⁹ *Edgar*, 672 N.E.2d at 1186-87.

²⁰⁰ Compare *id.* at 1185 ("The framers of the 1970 Constitution embraced this limited construction that the constitutional efficiency requirement authorized judicial review of school district boundaries."), with BURESH, *supra* note 2, at 84 (explaining that the 1970 Convention education committee intended the promise of an "efficient" education system to retain the meaning originally assigned to it under the 1870 constitution, just as the *Edgar* court had read the provision).

²⁰¹ See BURESH, *supra* note 2, at 84.

²⁰² *Edgar*, 672 N.E.2d at 1185 ("Under the 1870 Constitution, this court consistently held that the question of the efficiency and thoroughness of the school system was one solely for the legislature to answer . . . However, under a limited exception to this principle it was held that pursuant to the 'thorough and efficient' requirement school district boundaries must be established so that the districts are compact and contiguous.')

²⁰³ See BURESH, *supra* note 2, at 84 (stating that the 1970 Convention education committee believed that "efficient" would incorporate the meaning originally assigned in the 1870 article).

²⁰⁴ See *Edgar*, 672 N.E.2d at 1187 (describing Article X's final line as a "purely hortatory statement of principle").

²⁰⁵ See BURESH, *supra* note 2, at 84-86, 114-18 (summarizing the debate over Article X's final sentence).

²⁰⁶ See *id.* After proposing the language eventually included in Article X, Delegate Dawn Netsch noted that "while [Article X's final sentence] is not legally enforceable, I hope that it will function as a conscience to the General Assembly to assume a greater proportion of the financing of the public schools of the state." *Id.* at 114.

²⁰⁷ See BURESH, *supra* note 2, at 126 (discussing the ultimate intent of the delegates in re-writing Article X); *infra* Part III-C (summarizing the *Edgar* opinion).

²⁰⁸ See RECORD OF PROCEEDINGS, *supra* note 1, at 767. Conversation regarding the meaning and intent of "high quality" was largely limited to the following:

MR. GARRISON: Mr. President, I would like to direct attention to line 6 of section 1, where the term, "high-quality public educational institutions and services," is used.

It is my understanding that the word "quality" is—in relation to education—is a much debated concept and that there have been commissions which have given a great deal of study to it.

Although the delegates appear to suggest the legislature should ultimately define the meaning of “high quality,” delegate Kamin’s statement during the debate at least implies that “high quality” is supposed to mean something more than adequate.²⁰⁹ If a plaintiff can successfully persuade the court to abandon its application of the political question doctrine, it would remove entirely the *Edgar* court’s justification for not finding in “high quality” some guaranteed level of education.²¹⁰

Additionally, statements made by delegate Kamin after the 1970 Convention shed additional light on how the education committee understood the impact of the new Article X, as well as the ultimate goal the delegates pursued in the process:

If the Illinois school financing system is further challenged in the courts, the new equal protection clause in the Illinois Bill of Rights, together with the “efficient system” language of the Educational Article, should compel a *Serrano*-like result . . . Hopefully, such a case will not be necessary. If the legislature and the new State Board of Education will take the school financing language for what it is—the statement of a pressing problem and the urgent prayer for a fair solution—then they will act to equalize educational opportunity and the tax burdens of educational financing without further judicial intervention.²¹¹

As some have suggested, the delegates’ intent and the full meaning of Article X cannot be clearly discerned from the Convention’s record.²¹² The *Edgar* court was correct in concluding that Article X makes no guarantee of equal education funding districts, nor does it compel the state to shift to a more centralized funding system.²¹³ Still, the court’s failure to sufficiently

Did the committee come to any definite definition or conclusion as to what would constitute quality services with respect to education?

MR. FOGAL: No, we—the word “quality,” I suppose, means different things to different people. We had in mind the highest, the most excellent educational system possible; leave this up to the determination of the legislature and your local districts, and let the citizens keep pushing for higher-quality education. We didn’t attempt to define all of the ramifications of high quality.

MR. PATCH: But there was strong deliberation on the fact that if you just left it at quality, it could be low quality, medium quality; we wanted the highest form of quality that can be obtained by any system.

MR. GARRISON: Would it be possible to have a system higher and the high quality that you provide for—for example, a superior education?

MR. PATCH: Well, I don’t know—it might be, but I wouldn’t knock it.

And then later:

MR. KAMIN: I would also like to, if I could, address myself to Mr. Garrison. The use of the word “high quality” is a play on the use of the word “good” which is in the present article [the 1870 educational article]. The committee felt that there was not any more specific a definition perhaps for “high quality” than there was for “good,” but at least “good” is a lower term; “high quality” is a term which is going in the direction in which we want to go.

Id.

²⁰⁹ *Id.*

²¹⁰ See *supra* Part III-C (summarizing the Court’s justification for not finding “high quality” to guaranty some minimum level of educational quality).

²¹¹ Malcolm S. Kamin, *The School Finance Language of the Education Article: The Chimerical Mandate*, 6 J. MARSHALL J. PRAC. & PROC. 331, 345 (1973); see BURESH, *supra* note 2, at 126.

²¹² See Wilson & Wilson, *supra* note 148 (“The transcripts of the 1970 Illinois Constitutional Convention, however, reveal neither an intent to require fiscal neutrality nor a desire to dismiss equality of educational funding altogether. Instead, the convention’s debates on education were full of confusing turns and contradictory aims: The delegates generally desired more equality of educational opportunities, but they generally rejected any specific measure which could achieve it.”).

²¹³ See *supra* Part III-C (summarizing the *Edgar* court’s analysis of Article X).

consider the meaning of “high quality” leaves open the possibility of adequacy claims.²¹⁴ Given these ambiguities, future challenges to Illinois education funding system should continue to make adequacy claims based on Article X.²¹⁵

C. The Illinois Supreme Court Should Not Defer to “Local Control” of Public Schools

The final impediment to education finance reform is the public policy preference for “local control,” the idea that communities, parents, and local school boards should have maximum say in the operations of schools.²¹⁶ In *Rodriguez*, the U.S. Supreme Court, after determining that rational basis review was most appropriate for judging Texas’ funding system, found local control to be a legitimate state interest rationally served by the financing scheme.²¹⁷ Similarly, the Illinois Supreme Court in *Edgar* deferred to the concept of local control after refusing to find a suspect class or fundamental right to education harmed by Illinois’ funding scheme.²¹⁸ The court’s deference is misguided. There is nothing constitutionally binding the court to the idea of local control, and the very idea of local control is becoming increasingly irrelevant as state and national changes impact the fundamental operation of public education in Illinois.

Despite strong judicial deference to local control, there is nothing in either the United States Constitution or Illinois State Constitution immunizing the concept from the reach of the judiciary.²¹⁹ Local control is primarily manifested in Illinois through the existence of local school boards, entities entirely defined by statute.²²⁰ Illinois’ local school boards have broad authority under the Illinois School Code to hire and fire teachers, manage school curriculum, and contract, however, the scope of their powers (and limitations) is enumerated by the state.²²¹ Given that local control is simply a policy choice established by statute, and that state courts often take on a greater role in setting public policy, the Illinois Supreme Court’s deference to this concept is questionable.²²²

Moreover, it is hard to argue that school districts and local school boards actually have meaningful control over school funding.²²³ As Justice White’s dissent in *Rodriguez* forcefully illustrates, property tax-based funding systems are quite unresponsive to the will of the locality.²²⁴ Like all districts, property-poor districts are free to tax at a higher rate than the statutorily prescribed minimum; however, they may only be able to generate a fraction of what wealthier districts can raise, even at tax rates several times that of wealthy districts.²²⁵ Moreover, even if

²¹⁴ See *supra* Part III-C.

²¹⁵ See *infra* Part V (proposing that future education finance litigants may be able to successfully challenge the state’s education funding system).

²¹⁶ See Blanchard, *supra* note 33, at 279 (providing a general overview of the local control concept); Faber, *supra* note 57 (describing local control of schools as a devolution of management control from the state to local school boards).

²¹⁷ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44, 49 (1973); see also *supra* Part II (summarizing the *Rodriguez* opinion).

²¹⁸ *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1193, 1195-96 (Ill. 1996); see also *supra* Part III-C (summarizing the *Edgar* opinion).

²¹⁹ See U.S. CONST.; ILL. CONST.

²²⁰ 105 ILL. COMP. STAT. ANN. 5/10-1 to 10-22.19 (West 2013); see Faber, *supra* note 57 (“Legally, these local school districts are agents of the state, created in accordance with state law for the purpose of implementing the state’s responsibility.”).

²²¹ 105 ILL. COMP. STAT. ANN. 5/10-1 to 10-22.19.

²²² See Blanchard, *supra* note 33, at 273 (stating that, because state courts can issue binding advisory opinions, they are more involved in setting public policy than federal courts bound by case in controversy requirements).

²²³ See *id.* at 281 (arguing that property tax-based school funding systems do not provide local control of schools for poor districts). See generally Eric P. Christofferson, Note, *Rodriguez Reexamined: The Misonomer of “Local Control” and a Constitutional Case for Equitable Public School Funding*, 90 GEO. L.J. 2553, 2575-76 (2002) (arguing against the use of local control to justify maintaining property tax-based funding systems).

²²⁴ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 63-70 (1973) (White, J., dissenting) (explaining in detail how plaintiff’s school district, despite its willingness to tax at a higher rate to achieve greater school funding, is circumstantially and statutorily prevented from actually achieving school funding levels anywhere close to wealthier neighboring districts).

²²⁵ To illustrate using two of the districts referenced in the introduction to this Article, in 2012 Northbrook School District 28 had an equalized assessed property (“EAV”) value of \$977,894 per student, and taxed at a rate \$1.89 per \$100 EAV. ILLINOIS INTERACTIVE

property poor districts have the political will and popular support to tax at any rate necessary to match wealthier districts, Illinois sets a maximum rate at which districts may tax.²²⁶ Wealthy school districts are then free to set rates much lower than poor districts and still generate much greater revenues. This greater revenue subsequently allows wealthy districts to gain more experienced teachers, classroom technology, smaller class sizes, and newer school facilities.²²⁷ Moreover, the Illinois School Code permits the State Board of Education to assume temporary fiscal control over financially-challenged districts, further eroding the notion that current laws provide any meaningful financial autonomy, and thus local control, to school districts.²²⁸

Local control, of course, also refers to other areas of educational planning, including setting curriculums, staffing schools, and managing school facilities.²²⁹ Here too, more recent changes in education policy have significantly reduced the amount of local control districts are able to exercise over day-to-day operations.²³⁰ As part of the state's application for funding under the U.S. Department of Education's Race to the Top program,²³¹ the Illinois state legislature passed the Performance Evaluation Reform Act ("PERA") in 2010, increasing state control over how teachers are evaluated, tenured, and dismissed.²³² Under PERA, school districts reviewing teacher performance must incorporate the use of data on student growth, based on state guidelines, as a significant factor in rating teaching performance.²³³ In June 2011, Governor Pat Quinn signed into law Public Act 97-8 (commonly referred as "Senate Bill 7"), expanding the use

REPORT CARD, *supra* note 8. As a result, the district was able to spend \$11,332 per pupil. *Id.* In contrast, Calumet Public School District 132 had an EAV of just \$124,755 per student, but taxed at a rate of \$3.46 per \$100 EAV. *Id.* It was able to spend just \$5,007 per pupil. *Id.* East St. Louis School District 189, a high school district, may offer the most extreme example. With an EAV of just \$17,010, the district taxes at \$7.49 per \$100 EAV but can spend just \$8,104 per student (in contrast, Niles High School District 219 has an EAV of \$1,139,709, taxes at \$2.27 per \$100, and spends \$12,667 per student). *Id.* Although this inverse relationship between property wealth and tax rate does not always hold true, it is common throughout Illinois. *See also* Secter, *supra* note 2 ("Rich districts can raise more money through property taxes, and yet individual taxpayers in those districts don't shell out nearly as much as a percentage of their income as taxpayers in less prosperous places.").

²²⁶ 105 ILL. COMP. STAT. ANN. 5/17-2; *see supra* Part III-A. In *Rodriguez*, the Texas funding system also set a maximum tax rate for districts. *Rodriguez*, 411 U.S. at 67.

²²⁷ *See* Blanchard, *supra* note 33, at 281 ("Local fiscal responsibility translates into paralysis rather than autonomy if the district in question happens to be too poor to provide meaningful choice. Innovations that may result from local experimentation will likely only be available to districts that can afford them. . . . [O]nly the wealthiest districts will be in a position to pioneer improvements in education, and should any beneficial innovations occur that require funding, only the wealthiest districts will be able to take advantage and implement them."); *see supra* Part I and *infra* Part V-A (discussing how funding disparities impair the performance of poorer schools and low-income students, and how increasing funding can help improve performance).

²²⁸ *See* 105 ILL. COMP. STAT. ANN. 5/1A-8 (dictating the powers of the Illinois State Board of Education to assume control of districts deemed to be in financial difficulties).

²²⁹ *See* Blanchard, *supra* note 33, at 279 (discussing broadly the tenets of local control); *see also* BURESH, *supra* note 2, at 79 (quoting a delegate from the 1970 Illinois Constitutional Convention as stating that the areas most connected with local control in Illinois—teachers, administration, curriculum, and requirements of local school districts—would be unaffected by revisions made in the new education article).

²³⁰ The plaintiffs in *Carr v. Koch* similarly argued that changes in education policy have effectively limited local control; however, the Illinois Supreme Court's dismissal of the case for lack of standing left the issue largely unaddressed. *See Carr v. Koch*, 981 N.E.2d 326, 331-36 (Ill. 2012).

²³¹ Part of the 2009 American Recovery and Reinvestment Act—the "stimulus"—the Race to the Top program is a \$4.35 billion competitive grant program that awards money to states enacting various education reforms. U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 2 (2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>. *See generally Race to the Top Fund*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/programs/racetothetop/index.html> (last updated Jun. 7, 2013) (providing background information on the Race to the Top program). According to the Department of Education, the program "encourage[s] and reward[s] States that are creating the conditions for education innovation and reform; achieving significant improvement in student outcomes . . . closing achievement gaps, improving high school graduation rates, and ensuring student preparation for success in college and careers." *Id.*

²³² 2009 Ill. Legis. Serv. P.A. 96-861 (S.B. 315) (West) (codified at 105 ILL. COMP. STAT. ANN. 5/24A-1 to 24A-20).

²³³ 105 ILL. COMP. STAT. ANN. 5/24A-4(b). Although school districts will technically be able to formulate their own evaluation criteria, the districts must meet certain minimum standards set by the state Performance Evaluation Advisory Council. *Id.* Furthermore, if a district's evaluation reform committee fails to develop adequate evaluation criteria after 180 days, the district must implement the state's model evaluation criteria. *Id.*; *see Performance Evaluation Advisory Council (PEAC)*, ILLINOIS STATE BOARD OF EDUC., <http://www.isbe.net/peac/html/overview.htm> (last updated Sept. 30, 2011).

of student test scores by tying results more closely with teacher tenure and dismissal procedures.²³⁴ Under Senate Bill 7, seniority—the length of time a teacher has taught at a given school district—is now equally weighed against all other factors (such as teacher evaluations and other merit-based factors) when districts make employment decisions.²³⁵

The state has taken control over other areas of local education policy.²³⁶ Districts with schools that fail to meet Adequate Yearly Progress benchmarks under No Child Left Behind must formulate school improvement plans subject to approval by the Illinois State Board of Education, and may also be monitored and assessed by the State Board.²³⁷ The Board also requires all school children to meet certain annual curriculum goals, and districts to administer statewide standardized tests.²³⁸ All Illinois public schools are obligated to provide special education services pursuant to state and federal standards under the Individuals with Disabilities Education Act, the primary piece of federal legislation addressing education for disabled students.²³⁹ Finally, the push for charter schools in some of the state's poorest neighborhoods has ceded local control not to the state, but to private nonprofit and for-profit organizations.²⁴⁰ Local control is thus no longer a relevant, legitimate basis for Illinois courts to avoid striking down the current education funding system, and should be attacked by future plaintiffs.

V. PROPOSAL

Forty-three years after 1970 Illinois Constitutional Convention, the Illinois state legislature has failed to answer Article X's "urgent prayer for a fair solution" to education

²³⁴ 2011 Ill. Legis. Serv. P.A. 97-8 (S.B. 7) (West) (codified in scattered sections of 105 ILL. COMP. STAT. ANN. 5). Under Senate Bill Seven, teachers can only achieve tenure by receiving several consecutive positive performance evaluations. *Id.*; see also HODGES, LOIZZI, EISENHAMMER, RODICK & KOHN LLP, EDUCATION REFORM SIGNED INTO LAW 2 (2011), available at <http://www.hlerk.com/pdf/SB7.pdf> (summarizing changes made in Senate Bill Seven).

²³⁵ 2011 Ill. Legis. Serv. P.A. 97-8 (S.B. 7) (West). Senate Bill Seven requires districts to group teachers into various categories based on their most recent performance evaluation. *Id.* In the event of reductions in force, districts must dismiss teachers based on these categories starting with the lowest rated teachers. *Id.*; see also HODGES, LOIZZI, EISENHAMMER, RODICK & KOHN LLP, *supra* note 234 (summarizing changes made in Senate Bill Seven). None of this is to say that performance-based evaluations are poor education policy; rather, these laws merely illustrate that the traditional concept of local control has significantly diminished in the current push for educational reforms.

²³⁶ See Complaint, *supra* note 30; see also *Public Education—School Funding Litigation*, *supra* note 184 (providing additional information about the suit).

²³⁷ 105 ILL. COMP. STAT. ANN. 5/2-3.25d; see *No Child Left Behind / Adequate Yearly Progress*, ILL. STATE BOARD OF EDUC., <http://www.isbe.state.il.us/ayp/> (last visited Oct. 27, 2013).

²³⁸ 105 ILL. COMP. STAT. ANN. 5/2-3.64; see also *supra* Part IV-A (discussing the implementation of the ISAT and PSAE standardized tests in Illinois schools).

²³⁹ 105 ILL. COMP. STAT. ANN. 5/14-1.01. Under the Individuals with Disabilities Education Act, schools have an affirmative duty to identify children requiring special education services, develop individualized education plans designed to meet the unique needs of each special education student, and conduct regular monitoring and evaluation of student performance. See ILL. ADMIN. CODE tit. 23, § 226.50 (2013) ("A free appropriate public education ("FAPE") as defined at 34 CFR 300.17, must be made available by school districts to children with disabilities in accordance with 34 CFR 300.101 through 300.103."); *Id.* § 226.100 ("Each school district shall be responsible for actively seeking out and identifying all children . . . within the district . . . who may be eligible for special education and related services."); 34 C.F.R. § 300.131 (2013) ("Each [Local Education Agency] must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district. . ."). See generally *Building the Legacy: IDEA 2004*, U.S. DEPARTMENT OF EDUC., <http://idea.ed.gov/explore/home> (last visited Sept. 16, 2013) (providing information on IDEA); *Individuals with Disabilities Education Act Amendments of 1997 (IDEA)*, ILL. STATE BOARD OF EDUC., <http://www.isbe.net/spec-ed/html/idea.htm> (last visited Sept. 16, 2013) (providing information of IDEA's implementation in Illinois public schools).

²⁴⁰ See generally *Catalyst In Brief: Chicago's Charter Schools*, CATALYST CHI. (Community Renewal Soc'y), Feb. 2010, available at <http://www.catalyst-chicago.org/assets/assets/extra/InBrief-Charter-Feb10.pdf> (providing an explanation of charter schools). Chicago International Charter Schools, for example, utilizes a mix of non-profit and for-profit educational management organizations to oversee its thirteen Chicago campuses. *Id.* Although charter schools in Illinois are subject to periodic state review, they are exempt from many of the reporting requirements public schools must follow. *Id.*

funding inequality.²⁴¹ Instead, the state's public schools have faced perpetual funding crises²⁴² and chronic disparities in educational spending between districts.²⁴³ Sweeping local remedies have had little success in improving educational equality, and popular national reform policies—particularly the push for charter schools—have had mixed results.²⁴⁴ Further, recent state budget deficits have only further strained public schools.²⁴⁵

Even so, true public education finance reform in Illinois remains elusive due to its political sensitivity.²⁴⁶ The quality of local schools plays a fundamental role in how Americans select communities to live in and is intimately related to housing prices.²⁴⁷ Moreover, there has long been a political divide between urban, suburban, and rural state representatives, each of

²⁴¹ See BURESH, *supra* note 2, at 126 (noting that Article X was intended by the 1970 Convention delegates to be an “urgent prayer” to reform the state’s school funding system); Secter, *supra* note 2 (noting the failure of the Illinois legislature to pass meaningful funding reforms); Wilson & Wilson, *supra* note 148 (noting that the 1970 Convention delegates’ plea for funding reform has gone unanswered); *supra* Part III-B (discussing the failed effort to amend Article X in 1992).

²⁴² See Secter, *supra* note 2 (stating that Illinois schools have “lurched” from one funding crisis to the next); Malone & Long, *supra* note 3 (discussing cuts to education funding in the current state budget, as well as outstanding debts owed to school districts).

²⁴³ See *supra* Part III-A (explaining how the current public education funding system produces large disparities in per-pupil spending in different districts).

²⁴⁴ Approximately 2.3 million American school children attend about 6,000 charter schools across the country during the 2012-13 school year, a figure that has increased by 80% since 2009. CTR. FOR RESEARCH ON EDUC. OUTCOMES, STAN. U., NATIONAL CHARTER SCHOOL STUDY 2013 1 (2013) [hereinafter NATIONAL CHARTER SCHOOL STUDY 2013], available at <https://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf>. The efficacy of charter schools as compared to traditional public schools remains inconclusive. See Stephanie Banchemo, *Daley School Plan Fails to Make Grade*, CHI. TRIB. (Jan. 17, 2010), http://articles.chicagotribune.com/2010-01-17/news/1001160276_1_charter-schools-chicago-reform-urban-education (discussing the failure of Renaissance 2010, former Chicago Mayor Richard Daley’s signature education reform initiative, to improve academic performance and test scores in Chicago Public Schools). In a 2009 study of 2,403 charter schools in fifteen states and the District of Columbia, researchers found that only 17% of charter schools outperformed their local public school alternative in math achievement goals, while 46% performed about the same as their counterpart public school, and 37% performed worse than their counterpart school. CTR. FOR RESEARCH ON EDUC. OUTCOMES, STAN. U., MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES 3 (Jun. 2009) [hereinafter MULTIPLE CHOICE], available at http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf. Although the Center for Research on Education Outcomes found improvements in charter performance in a follow-up study published in 2013, the Center nonetheless noted “charter school quality is uneven across the states and across schools.” See NATIONAL CHARTER SCHOOL STUDY 2013, *supra*, at 3. The follow-up study found charters outperformed traditional public schools in 16 of 27 states studied with regard to reading learning gains, but only 12 of 27 states with regard to math gains. *Id.* at 52.

²⁴⁵ See Malone & Long, *supra* note 3 (discussing cuts to education funding in a recent state budget); Garcia & Pearson, *supra* note 3 (further discussing levels of education spending in the state).

²⁴⁶ See *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1180 (Ill. 1996) (describing education finance as a “sensitive and controversial” topic); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 56-59 (1973) (noting the complexity of education finance issues and the lack of consensus over what reforms should be pursued); *supra* text accompanying note 104 (discussing the bitter debate over the proposed 1992 amendment to Article X). A central concern, recognized even by delegates to the 1970 Convention, is that altering the current funding system will divert funds away from wealthy, academically successful schools and towards the poorest, least successful schools, resulting in the wealthy schools performing worse but not significantly improving the poorest schools. See BURESH, *supra* note 2, at 102 (noting that a minority of the 1970 education committee feared that reforming the funding system would result in a system where “all school districts would be reduced to the level of mediocrity rather than raised to greater heights”); see also Secter, *supra* note 2 (noting the political apathy Illinois voters have felt towards increasing funding in districts outside of their own).

²⁴⁷ Although home prices have fallen in most communities over the past several years, homes in communities with high-performing schools have retained much more of their value than those in neighboring communities. Sarah Max, *Good Schools, Bad Real Estate*, WALL ST. J. (Jun. 25, 2010), <http://online.wsj.com/article/SB10001424052748704009804575308951902854896.html>. With the advent of easily-accessible state test scores and independent school rating websites, local school quality now factors even more greatly into home buying decisions. *Id.* Not surprisingly, the impact of school quality results in a “snowballing” effect that helps continue to improve wealthy schools districts while continuing to diminish funding for poor districts. *Id.* In some wealthy school districts, residents view local schools as an investment and tend to approve higher tax rates for schools. *Id.* This in turn drives up funding for local schools, and when these schools improve in academic performance, this tends to drive up home prices, further increasing the tax base. *Id.* Conversely, neighborhoods with worse schools tend to see greater decreases in residential property values, shrinking the overall tax base for local schools. *Id.*

whom serve very different constituencies and school districts with very different economic needs.²⁴⁸

Since the United States Supreme Court's decision in *Rodriguez*, the path to education finance reform has run not through state legislatures, but rather through state supreme courts.²⁴⁹ In twenty-seven states, challenges to property tax-based financing systems have been successful, and new cases continue to be litigated.²⁵⁰ The Illinois Supreme Court's rulings in *Edgar* and *Lewis E.*, however, firmly placed the court within a small minority that have refused to hear education litigation due to the court's belief that such questions are political and thus not justiciable.²⁵¹ Despite the barrier to future litigation ostensibly erected by these cases, plaintiffs should continue to challenge the state's unjust funding system and the court's questionable education funding jurisprudence.

This Part will first examine how increasing education funding can help improve student performance. Next, it will discuss the importance of building statewide political consensus before future plaintiffs initiate litigation. This Part will then argue that the Illinois Supreme Court should hear future litigation cases on the merits, and should find a guarantee of a minimally adequate education level in the Illinois state constitution's education article. Finally, this Part will urge the Illinois state legislature to recognize that a truly effective education funding system requires consideration of each district's individual needs rather than a system that simply equalizes funding for districts across the board.

A. Increasing Education Funding Improves Academic Performance in Public Schools

Before discussing the path forward for future litigants, it is worth examining whether increased education funding does, in fact, improve educational performance.²⁵² Perhaps surprisingly, researchers have only recently attempted to analyze the relationship between education spending and student achievement.²⁵³ Moreover, studies examining this relationship are inherently difficult to design and often suffer from a lack of useful data.²⁵⁴ Even so, studies published in the last fifteen years suggest that increasing education funding can have a

²⁴⁸ See Seter, *supra* note 2 (noting Illinois voters' and representatives' unwillingness to increase funding for districts other than their own); *supra* note 104 and accompanying text (discussing the political divide between urban, suburban, and rural state representatives over the proposed 1992 amendment to Article X of the Illinois State Constitution).

²⁴⁹ See generally Brooker, *supra* note 39 (summarizing state-level education funding reform litigation post-*Rodriguez*); NAT'L EDUC. ACCESS NETWORK, <http://schoolfunding.info/> (last visited Sept. 16, 2013) (providing information on school funding litigation across the country).

²⁵⁰ See NAT'L EDUC. ACCESS NETWORK, *supra* note 249 (summarizing litigation results across the United States).

²⁵¹ See O'Neill, *supra* note 27, at 560-61 (noting that seven states, including Illinois, have dismissed education funding cases based on the state's political question doctrine). For examples of education funding cases in other states that have also refused to decide cases on the merits because due to nonjusticiability, see *Nebraska Coalition for Education Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 182-83 (Neb. 2007) and *City of Pawtucket v. Sundlun*, 662 A.2d 40, 57-59 (R.I. 1995).

²⁵² In *Rodriguez*, the United States Supreme Court questioned whether reforming school funding would actually benefit children in poor districts. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 56-59 (1973) ("The complexity of these problems is demonstrated by the lack of consensus with respect to whether it may be said with any assurance that the poor, the racial minorities, or the children in over-burdened core-city school districts would be benefited by abrogation of traditional modes of financing education.").

²⁵³ See Dennis J. Condrón & Vincent J. Roscigno, *Disparities Within: Unequal Spending and Achievement in an Urban School District*, 76 SOC. EDUCATION 18, 32 (2003) ("The analysis of the link between spending and achievement at the school level is in its infancy."); David Card & A. Abigail Payne, *School Finance Reform, the Distribution of School Spending, and the Distribution of Student Test Scores*, 83 J. PUB. ECON. 49, 68 (2002) (noting that at the time of their study, there was "relatively little direct evidence linking school finance reforms to student outcomes" and that "research on the generic effects of school spending is controversial").

²⁵⁴ Student performance may be influenced by a number of variables, and education funding disparities may manifest themselves in different ways at different schools, including differences in teacher education, quality of facilities and instructional material, and the talent of district administrators. See Condrón & Roscigno, *supra* note 253, at 21. Many studies to date have focused on district-level measures of education spending and student performance, yet spending between schools within the same district is itself often unequal. See *id.* at 20 (noting that variations in spending between schools within the same district can make studies examining school funding and student academic performance unreliable). Moreover, the availability of school-level spending and academic achievement data varies from state to state, making large-scale studies difficult. See *id.*

meaningful, tangible impact on student performance.²⁵⁵ One 2002 study examining the impact of school funding litigation found that, in twelve states where judicial invalidation of the education funding system resulted in an increase in funding for poorer districts, Scholastic Aptitude Test (“SAT”) test scores increased by about five percent.²⁵⁶ A 2003 study examining the impact of funding differences between elementary schools within the same district found that schools that spent more money per pupil generally had more highly educated teachers and better-maintained facilities.²⁵⁷ Consequently, students at schools that spent more per pupil outperformed students at poorer schools within the district on state academic assessment tests.²⁵⁸ The study’s authors found that a \$1,000 increase in educational spending correlated to a 6 to 10% increase in the number of students at a school passing the state assessment tests.²⁵⁹

In Illinois schools, a 2008 study also suggested that increasing student funding corresponds to improved test scores.²⁶⁰ Notably, the analysis first looked at data only from districts with less than 8% of students below the poverty line.²⁶¹ This was done to help control for external valuables that often impact poorer students, such as lack of parental support or reinforcement of education in the household.²⁶² An analysis of student performance on the ISAT versus per-pupil instruction spending suggested performance improved with each additional \$1,000-2,200 spent per-pupil.²⁶³ A similar analysis was also conducted using data from schools with 27 to 32% of their student population in poverty, and found a similar correlation between spending and performance.²⁶⁴

A comparison of per-pupil expenditure in Cook County school districts versus performance on various standardized tests also seems to suggest a general correlation. The following charts contain spending and testing data from all elementary and high school districts in Cook County (note that the data does not include Chicago Public Schools and other unit districts). For high school students, there appears to be a fairly strong relationship between spending and performance on both the PSAT and ACT. For elementary school students there does appear to be a relationship, however the correlation appears to be weaker than for high school students. Data were obtained from the Illinois Interactive Report Card.²⁶⁵

²⁵⁵ See Myron Orfield, *The Region and Taxation: School Finance, Cities, and the Hope for Regional Reform*, 55 BUFF. L. REV. 91, 114 (2007) (citing various studies of reform effects as evidence that funding reform can improve academic achievement); Condrón & Roscigno, *supra* note 253, at 20-21; Card & Payne, *supra* note 253, at 79-80; Susanna Loeb & Marianne E. Page, *Examining the Link Between Teacher Wages and Student Outcomes: The Importance of Alternative Labor Market Opportunities and Non-Pecuniary Variation*, 82 REV. ECON. & STAT. 393, 403, 406 (2000) (examining the impact of higher teacher salaries on student performance).

²⁵⁶ Card & Payne, *supra* note 253, at 80 (finding an increase in SAT scores following education funding reforms).

²⁵⁷ Condrón & Roscigno, *supra* note 253, at 29. The study compared eighty-nine public elementary schools in Ohio’s Columbus Public School District. *Id.* at 23. Despite operating within the same district, total per-student spending ranged from \$3,045 to \$8,165 amongst the elementary schools. *Id.* at 20. The authors attributed this variation to several factors, including political pressure on elected school board members to satisfy wealthier residents of the district, variations in grant money to rich and poor schools, selection biases in distributing local and state funds, etc. *See id.* at 21.

²⁵⁸ *Id.* at 30.

²⁵⁹ *Id.*

²⁶⁰ See CTR. FOR TAX & BUDGET ACCOUNTABILITY, *supra* note 11, at 11 (“The big question remaining, however, is whether increased investment in instruction generates better academic performance. . . . [T]he answer appears to be a resounding yes.”).

²⁶¹ *Id.*

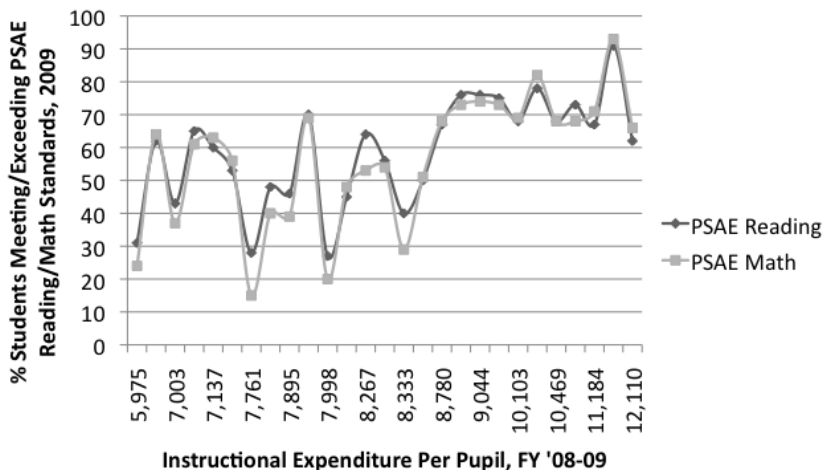
²⁶² *Id.* at 12.

²⁶³ *Id.* at 11.

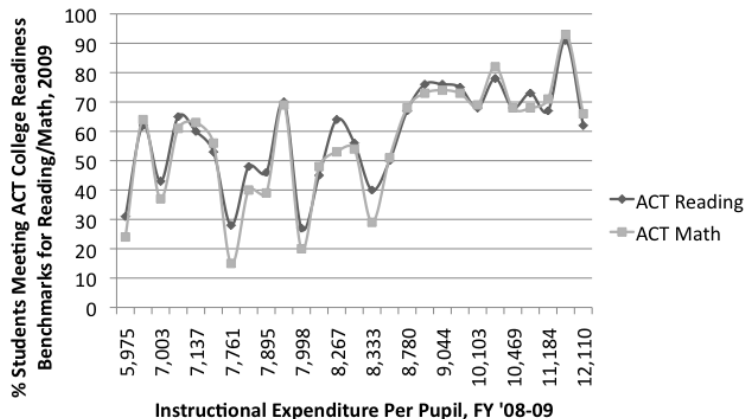
²⁶⁴ *Id.* at 12.

²⁶⁵ See ILLINOIS INTERACTIVE REPORT CARD, *supra* note 8. A spreadsheet containing the data used to create these charts is on file with the author.

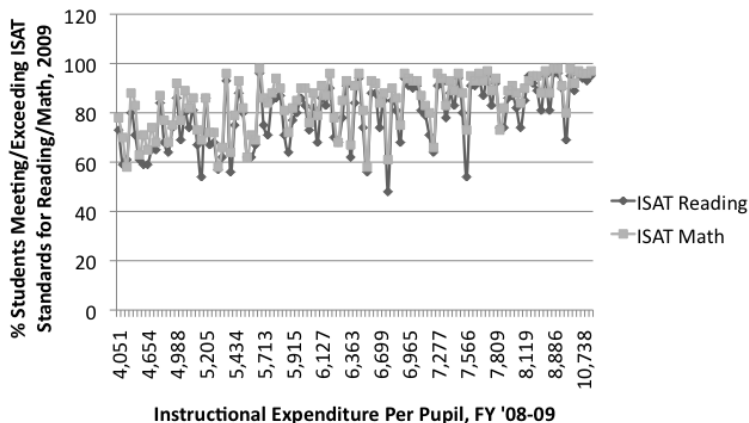
Instructional Spending vs. Student PSAE Performance, Cook County High School Districts



Instructional Spending vs. Student ACT Performance, Cook County High School Districts



Instructional Spending vs. Student ISAT Performance, Cook County Elementary School Districts



Increased educational spending can also benefit students beyond mere standardized test scores. A 2012 report by the Brookings Institution found that having a high-performing teacher (measured in terms of a teacher's impact on her students' test scores) for *just one school year* can increase a student's net lifetime earnings by \$6,400, increase the likelihood a student attends college by 1.7%, and reduce the likelihood of teen pregnancy by 1.7%.²⁶⁶ As noted earlier in this Article, wealthier districts are much more likely to employ teachers with advanced degrees,²⁶⁷ and may generally be more attractive to more experienced and talented educators.²⁶⁸ Similarly, a 2000 study found that increasing teacher salaries by 10% could ultimately decrease student dropout rates by 3-6%.²⁶⁹

B. New Plaintiffs in Education Funding Cases Must Build State-wide Consensus and Political Support

The inherent political sensitivity of school funding issues will require future plaintiffs to build political consensus around funding reform before their cases reach the courts.²⁷⁰ The Kentucky plaintiffs in *Rose v. Council for Better Education*, generally considered to be the first major adequacy claim plaintiff victory before a state supreme court, consciously built public awareness and support for funding reform before the case was tried.²⁷¹ This included convening education town hall events across the state, meeting with various civic organizations, issuing numerous reports, and building support among the state's business community.²⁷² Publicity efforts focused on funding issues facing *all* schools in the state, and purposefully avoided characterizing reform as a redistribution or equalization of school funding wealth.²⁷³ This approach was crucial in minimizing opposition to the litigation from wealthier districts in the state.²⁷⁴

²⁶⁶ MICHAEL GREENSTONE ET AL., THE BROOKINGS INST., A DOZEN ECONOMIC FACTS ABOUT K-12 EDUCATION 3 (2012), available at http://www.hamiltonproject.org/files/downloads_and_links/THP_12EdFacts_2.pdf.

²⁶⁷ See *supra* text accompanying note 12 (providing data showing that Illinois schools in wealthier districts often have several times more teachers with advanced degrees than schools in poorer districts).

²⁶⁸ See Condrón & Roscigno, *supra* note 253, at 22 (noting that "most highly credentialed teachers . . . are concentrated in high [socio-economic status], white schools with, arguably, higher per-pupil expenditures" and that "[s]uch schools may be more attractive to teachers because of real or perceived differences in quality or more tangible classroom resources that are tied to instructional expenditures (e.g. computers, books, and the availability of teacher's aids)").

²⁶⁹ Loeb & Page, *supra* note 255, at 403.

²⁷⁰ See *supra* text accompanying note 104 (discussing the political volatility of school funding issues in Illinois); Orfield, *supra* note 255, at 120-25 (discussing the importance of building political consensus in school funding cases).

²⁷¹ See Orfield, *supra* note 255, at 117, 120-25 (noting that the plaintiffs in *Rose* actively cultivated support for their case). See generally *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989) (invalidating Kentucky's public education funding system); *Litigation—Kentucky*, NAT'L EDUC. ACCESS NETWORK, http://www.schoolfunding.info/states/ky/lit_ky.php3 (last updated Feb. 2008) [hereinafter *Litigation—Kentucky*] (providing a general overview of Kentucky's education reform litigation, including the *Rose* decision).

²⁷² See Orfield, *supra* note 255, at 120-22 (discussing the various publicity efforts education reformers undertook before and during *Rose*, and noting that "virtually all of Kentucky's education advocacy groups," including teacher unions, parent teacher associations, and administrator associations, came together to form an education coalition focused on lobbying for finance reform); see also Josh Kagan, *A Civics Action: Interpreting "Adequacy" in State Constitution Education Clauses*, 78 N.Y.U. L. REV. 2241, 2242 (2003) (noting that *Rose* "gave plaintiffs their first education-article-based victory"); Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485 (1999) (providing a detailed account of *Rose* and education funding in Kentucky).

²⁷³ See Orfield, *supra* note 255, at 122 (referring to this strategy as the "anti-Robin Hood" approach). A common concern amongst opponents of education funding reform is that it would substantially reduce funding for the schools that *are* performing well, because these schools tend to be in wealthier neighborhoods. See BURESH, *supra* note 2, at 102 (noting that a minority of the 1970 education committee feared that reforming the funding system would negatively impact schools already achieving high-level academic performance); Seter, *supra* note 2 (noting that Illinois residents have generally disfavored increasing funding for districts outside of their own).

²⁷⁴ See Orfield, *supra* note 255, at 122 (noting that the "anti-Robin Hood" approach made education funding reform palatable to all districts).

Similarly, building comparable political consensus in Illinois is important. State supreme court justices may be more influenced by current political trends than their federal counterparts.²⁷⁵ Unlike federal judges, state supreme court justices in many states, including Illinois, are popularly-elected and do not serve life terms (in Illinois, they serve ten year terms).²⁷⁶ State supreme courts also generally play a greater role in setting public policy than federal courts.²⁷⁷ Furthermore, both *Edgar* and *Lewis E.* featured a limited number of district plaintiffs; increasing popular support may aid in including a larger, more diverse body of district plaintiffs in future litigation, thereby increasing the political pressure on the court to hear the case on the merits.²⁷⁸

Should a future challenge prove successful, building political consensus may also encourage state lawmakers to work quickly towards a reformed funding system.²⁷⁹ In *Edgar* and *Lewis E.*, as well as *Rose* in Kentucky, plaintiffs have merely sought a declaration that the current funding system is unconstitutional.²⁸⁰ Following the court's ruling, the onus for fashioning a new funding system shifts to the state legislature, without an explicit framework for a new funding system.²⁸¹ As past cases demonstrate, state legislatures are often slow to act on education finance reform.²⁸² Public demand for reforms in school funding may thus act as a spur to legislative inertia and partisan gridlock.²⁸³

There is evidence to suggest that a broad base of political support for funding reform could be built in Illinois.²⁸⁴ The vast majority of Illinois public schools are either "foundational" or "alternative" grant schools, meaning that most schools should have some interest in receiving greater funding from the state.²⁸⁵ Moreover, the failed attempt at reforming Article X of the Illinois State Constitution in 1992 received bi-partisan support from urban Democrats and rural

²⁷⁵ See Swenson, *supra* note 98, at 1152-54 (finding that elected supreme court justices were somewhat more likely to strike-down school funding systems). It should be noted, however, that Swenson's article found that, because even appointed justices often face retention elections, the relationship between the method of judicial appointment in a state supreme court and the justices' likelihood of striking-down a state finance system is not entirely clear. *Id.*

²⁷⁶ U.S. CONST. art. II, § 2, cl. 2 (granting the President the power to appoint "judges of the Supreme Court, and all other Officers of the United States," which includes judges in lower federal courts); U.S. CONST. art. III, § 1 (granting federal judges lifetime tenure); ILL. CONST. art. VI., § 10, 12(a); see also GA. CONST., art. VI, § 7, ¶ 1 (providing for the election of Georgia state supreme court judges); MINN. CONST., art. VI, § 7 (providing for the election of Minnesota state supreme court judges); TEX. CONST., art. V, § 2(c) (providing for the election of Texas state supreme court judges); WASH. CONST., art. IV, § 3 (providing for the election of Washington state supreme court judges); WIS. CONST., art. VII, § 4 (providing for the election of Wisconsin state supreme court judges).

²⁷⁷ See *supra* note 164 and accompanying text.

²⁷⁸ The *Edgar* suit was brought by roughly thirty-seven districts (and additional individuals), and in *Lewis E.* the local district was a defendant. *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1180 (Ill. 1996); *Lewis E. v. Spagnolo*, 710 N.E.2d 798, 800 (Ill. 1999). In contrast, the body of plaintiffs in *Rose* initially included a coalition of sixty-six districts, and was later joined by districts from five additional counties. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 190 (Ky. 1989).

²⁷⁹ See Orfield, *supra* note 255, at 120-25 (noting the positive influence *Rose* and its surrounding reform advocacy efforts had on Kentucky's legislature).

²⁸⁰ See *Edgar*, 672 N.E.2d at 1180; *Lewis E.*, 710 N.E.2d at 801-02; *Rose*, 790 S.W.2d at 190.

²⁸¹ See, e.g., *Litigation—Kentucky*, *supra* note 271 (noting that the Kentucky legislature was ultimately responsible for fashioning school funding reforms with minimal guidance from the Kentucky Supreme Court).

²⁸² See *supra* Part III-C (noting that legislative reform following judicial invalidation of a school funding system can often take several years).

²⁸³ See generally Hunter, *supra* note 272, at 499-516 (discussing reform in Kentucky following *Rose*); Orfield, *supra* note 255, at 120-25 (arguing that advocacy efforts helped spur the Kentucky state legislature to enact meaningful reform following *Rose*).

²⁸⁴ See *supra* Part III-B (noting that there was bipartisan support for the failed 1992 amendment to Article X); CTR. FOR TAX & BUDGET ACCOUNTABILITY, *supra* note 11 (discussing how both urban and downstate school districts have a strong interest in education funding reform, suggesting that both Chicago-area Democrats and downstate Republicans should be able to reach consensus on the issue).

²⁸⁵ In 2011, approximately 73.1% of Illinois' public school children were served by foundation level districts, 21.9% of students attended alternate formula districts, and just 5.0% of students attended flat grant districts. GENERAL STATE AID, *supra* note 83; see also CTR. FOR TAX & BUDGET ACCOUNTABILITY, *supra* note 11, at 6 (providing a similar breakdown of how many students attend each type of district).

Republic legislators.²⁸⁶ These instances of past statewide support for reform suggest that future challenges to current funding system can once again be built.

C. The Illinois Supreme Court Should Hear Future Funding Litigation on the Merits, and Should Find a State Constitutional Guarantee of a Minimally Adequate Education

Provided that future plaintiffs seek a declaratory judgment that the current Illinois school funding system is unconstitutional, the Illinois Supreme Court should not continue to dismiss such claims as non-justiciable political questions.²⁸⁷ Even if the court applies the federal *Baker* standards for determining when an issue is political—a choice that is itself questionable—education finance litigation is well within the ambit of the judiciary.²⁸⁸ The advent of state and nationwide academic standards and increased standardized testing, as well as the structure of Illinois' school funding itself, provides easily comparable statistics with which the court can judge the fundamental constitutionality of the funding system.²⁸⁹ Moreover, there is nothing in the court's past political question jurisprudence to suggest that it is prohibited from ruling on politically sensitive issues so long as it is not, in effect, legislating from the bench.²⁹⁰ Simply put, education finance cases require the court to do nothing more than its basic function—to judge the constitutionality of the law.²⁹¹

Once past the “political question hurdle” established by *Edgar* and *Lewis E.*, the court should reexamine Article X of the Illinois State Constitution and find that it guarantees some minimal level of educational quality. Although the *Edgar* court appeared to be correct in its determination that Article X does not create a mandate for centralized state funding of the public education system, it largely failed to address other salient elements of the clause.²⁹² Most notably, the court's refusal to clearly define the meaning of “high-quality,” and instead dismissing it under their aforementioned political question analysis, leaves open the potential that Article X does in fact guarantee a minimally adequate education for Illinois students.²⁹³ Records from the 1970 Illinois Constitutional Convention suggest that the use of “high-quality” was meant to promise something more than the “good” education promised in the constitution's original education article.²⁹⁴ Moreover, comments from delegates following the convention, while not legally binding, further suggest that they did intend for Article X to catalyze education-funding reform.²⁹⁵

²⁸⁶ See *supra* Part III-B; see also *CTR. FOR TAX & BUDGET ACCOUNTABILITY*, *supra* note 11, at 6-7 (discussing generally how the state funding system negatively impacts both urban and downstate schools).

²⁸⁷ See *supra* Part IV-A (arguing that the *Edgar* and *Lewis E.* courts erred in their use of the federal political question doctrine to find education funding issues nonjusticiable).

²⁸⁸ See *supra* Part IV-A (arguing that past Illinois Supreme Court precedent in political question cases should allow the court to rule on education funding cases so long as it does not actively fashion a new funding scheme on its own).

²⁸⁹ See *supra* Part IV-A (arguing that the Illinois Supreme Court has had readily-available standards with which it can judge educational quality since at least *Edgar*, and that recent changes in standardized testing have only made such comparisons easier to make).

²⁹⁰ See *supra* Part IV-A (arguing that the most recent Illinois political question cases allow the court to rule on issues that are politically sensitive).

²⁹¹ More recent school funding litigation has pressed the court only for a declaration of unconstitutionality, and has specifically acknowledged that the court *should not* formulate its own funding reform measures. See *Complaint*, *supra* note 30, at 15; *BUS. & PROF'L PEOPLE FOR THE PUB. INTEREST, FREQUENTLY ASKED QUESTIONS REGARDING THE BPI/SIDLEY SCHOOL FUNDING LAWSUIT 1* (Mar. 24, 2010), available at <http://www.bpichicago.org/documents/FREQUENTLYASKEDQUESTIONS.3.24TOUSE.pdf>. Moreover, state supreme courts in other states have similarly emphasized the role of the legislature in reforming funding schemes. See *Orfield*, *supra* note 255, at 117 (noting that the Kentucky Supreme Court emphasized in *Rose v. Council for Better Education* that reform is solely the legislature's duty).

²⁹² See *supra* Part IV-B (arguing that the *Edgar* court failed to adequately determine the meaning of “high-quality” in Article X).

²⁹³ See *supra* Part IV-B (arguing that the use of “high-quality” in the 1970 Convention redraft of Article X was intended by the delegates to increase the minimum level of education adequacy promised by the Illinois State Constitution); *RECORD OF PROCEEDINGS*, *supra* note 1, at 767 (providing a transcript of debate regarding the inclusion of “high-quality”).

²⁹⁴ See *supra* Part IV-B; *RECORD OF PROCEEDINGS*, *supra* note 1, at 767.

²⁹⁵ See *supra* Part IV-B (quoting Delegate Malcolm Kamin as stating his belief that the new Article X would lead to meaningful education finance reform in Illinois).

Lastly, the court should not avoid ruling on future funding cases out of deference for the concept of “local control.”²⁹⁶ The current education funding system provides meaningful choice only to the wealthiest districts, while poorer districts are politically and economically precluded from affecting real funding changes at the local level.²⁹⁷ Local control has also ceded to state oversight in many other areas, including curriculum planning, personnel decision making, and the education of disabled students.²⁹⁸ Ultimately, local control is a policy preference, not a statutory or constitutional mandate.²⁹⁹ The Illinois Supreme Court should not constrain its full authority in the face of what may well be an antiquated policy choice for public schools.

D. The Illinois State Legislature Must Understand that Schools Should Not Be Funded Equally

While an examination of alternative school funding systems is beyond the scope of this Article, it is worth noting that achieving complete equality in school funding may both be impossible and unwise.³⁰⁰ Education funding schemes that redirect money away from wealthy, academically successful school districts to poorer districts would prove highly unpopular.³⁰¹ Furthermore, schools that are able to spend more on their students tend to perform better,³⁰² and it does not make sense to pull resources away from well-functioning districts. Beyond politics, however, lies the fact that poor districts in both urban and rural areas may in fact require a greater level of funding than suburban schools to properly address issues unique to their student populations. Poorer school districts often serve students requiring more complex services, including English as a Second Language instruction, services for students with learning disabilities and/or psychiatric disorders, long-distance busing in rural areas, etc.³⁰³ Effective education funding reform in Illinois must therefore account for the unique needs of school districts across the state.³⁰⁴

²⁹⁶ See *supra* Part IV-C (arguing that, as a mere policy preference, there are no constitutional or prudential reasons why the Illinois Supreme Court must defer to the concept of local).

²⁹⁷ See *supra* Part IV-C (arguing that only wealthy districts have the financial resources to experiment with their curriculum, hire more highly-educated and talented teachers, etc., whereas poor districts are forced to tax between statutorily-specified minimum and maximum rates and generally lack sufficient financial resources to affect change in their schools).

²⁹⁸ See *supra* Part IV-C (discussing the various testing and labor laws that have centralized control of Illinois schools in the state over the past several years).

²⁹⁹ See *supra* Part IV-C (arguing that the Illinois Supreme Court is empowered to rule on the constitutionality of laws such as the current funding system, and should not defer to a traditional policy preference).

³⁰⁰ During the 1970 Illinois Constitutional Convention, two different drafts of Article X that would have substantially equalized per-pupil funding in all schools were roundly rejected. See BURESH, *supra* note 2, at 84-86, 114-18 (summarizing the debate over Article X Section 1's final sentence). Furthermore, the amount of money a school requires to adequately fund its students' education is dependent on the needs and circumstances of its student body, including the prevalence of learning disabilities and other health issues. See BAKER ET AL., *supra* note 5, at 7 (arguing that schools require different funding levels based on demographic differences in the student body).

³⁰¹ Take, as an example, the bitter debate over the 1992 Article X amendment proposal, which led to a fistfight between downstate and suburban Chicago state representatives. See *supra* note 104 and accompanying text; see also BURESH, *supra* note 2, at 102 (noting that a minority of delegates to the 1970 Constitutional Convention feared education funding reform would redirect funds from wealthy districts to poor districts, at the expense of students in wealthier districts).

³⁰² See *supra* Part V (discussing the impact of increased per-pupil expenditures and academic performance).

³⁰³ See BAKER ET AL., *supra* note 5, at 7 (“Student poverty — especially concentrated student poverty — is the most critical variable affecting funding levels. Student and school poverty correlates with, and is a proxy for, a multitude of factors that impact upon the costs of providing equal education opportunity— most notably, gaps in educational achievement, school district racial composition, English language proficiency, and student mobility. State finance systems should deliver greater levels of funding to higher-poverty versus lower-poverty settings, while controlling for differences in other cost factors.”).

³⁰⁴ The funding reforms devised by the Kentucky legislature following the *Rose* decision might serve as a model. Briefly, Kentucky's revised funding system created base-level grants for school districts that factor in the number of poor, disabled, and special education students present in a district. See LAWRENCE O. PICUS ET AL., KY. DEP'T OF EDUC., ASSESSING THE EQUITY OF KENTUCKY'S SEEK FORMULA: A TEN-YEAR ANALYSIS 3-5 (2001), available at <http://education.ky.gov/districts/SEEK/Pages/Taxes.aspx> (summarizing the structure and impact of Kentucky's education funding reforms). On top of these base grants, the Kentucky system provides districts with several optional, property tax-based methods for supplementing revenues, and further provides additional state aid to proper-poor districts. See *id.*; Orfield, *supra* note 255, at 119 (noting that Kentucky doubled its state aid to public schools following the *Rose* decision, significantly increasing total funding to poor school districts and essentially eliminating the link between local property wealth and per-pupil expenditures).

VI. CONCLUSION

Since the United States Supreme Court's landmark decision in *Rodriguez*, plaintiffs have taken on inequitable public education finance systems in state courts. While many cases have been successful and resulted in significant reforms in some states, the Illinois Supreme Court effectively closed the courthouse door on funding litigation. Nevertheless, the court's decisions in *Edgar* and *Lewis E.* are not impenetrable. The court's refusal to judge these cases on the merits rests on questionable application of the federal political question doctrine, neglecting to consider the unique nature of state supreme courts as well as the Illinois Supreme Court's own political question jurisprudence. Moreover, the court's reading of the 1970 Constitutional Convention record regarding the drafting of Article X only goes halfway, failing to properly consider whether it mandates a minimum level of educational quality for Illinois students. Finally, the court shackled its own judicial authority by deferring to the concept of "local control," a mere policy preference rather than a constitutional or even statutory dictate.

Future challenges to the Illinois education funding system may very well prove successful on these points, but it will require a comprehensive effort to build the political will necessary for enacting true education reform. Future plaintiffs should not be deterred by the magnitude of such an endeavor. Political consensus for reform has existed in the past, and it can be built again today.³⁰⁵ As school budgets continue to be cut, as school buildings continue to crumble, and as Illinois' students continue to fall behind their peers across the nation,³⁰⁶ it will become increasingly clear that the state can longer turn its back on one of its most pressing problems.

³⁰⁵ See *supra* Part V-B (discussing the importance of building political consensus around funding reform before commencing litigation, and the existence of past political consensus in Illinois).

³⁰⁶ Illinois has some of the largest "performance gaps"—differences in academic performance between specific demographic groups—in the nation. In 2011, there was a 33% difference in the number of non-low-income 4th graders and low-income 4th graders who could read proficiently, the 5th greatest disparity in the nation. ADVANCE ILL., THE STATE WE'RE IN: A REPORT CARD ON PUBLIC EDUCATION IN ILLINOIS 7 (2012), available at http://www.advanceillinois.org/filebin/swi_2012/Adv_III_Report_Card-Nov12.pdf. There was a 27% difference in the number of white and Latino 4th graders who read proficiently—the 11th worst in the nation—and a 33% gap between white and black 4th grade readers—the 5th worst in the nation. *Id.* A comparison of Illinois 8th graders' math proficiency found similar disparities between these demographic groups, with Illinois ranking in the bottom 20 of states in all three comparison categories. *Id.* Illinois also ranked 34th in the nation in high school graduation rates, 41st in worst (greatest) K-12 student suspension rate, 41st in the minimum number of K-12 instruction hours per year, and 40th in the number of high school graduates attending college. *Id.* at 21-22, 24.