The Future of School Finance Litigation

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Abstract

Just about everyone who writes on the topic agrees that school finance litigation, going forward, will be inextricably linked with the standards and testing movement. The basic idea is that state constitutions can and should be read to protect the right to an adequate education. Academic standards, in turn, define what counts as an adequate education. This leaves to courts in school finance cases the task of determining if schools have sufficient resources to meet the standards -- and thus provide an adequate education. Linking school finance litigation to standards and testing, so everyone also seems to agree, will benefit school finance plaintiffs.

This Article explains why the conventional wisdom is wrong not just once, but twice. It is inaccurate as a matter of description, and it is wrong-headed as a matter of prescription. Courts have not yet relied on standards to define an adequate education, and it will hurt school finance plaintiffs if and when they do. A close reading of the cases indicates why, and studying the actual cases also indicates a more fruitful direction for litigants and courts to follow. As the Article argues, litigants and courts should focus on the principle of comparability of resources, which is already implicit in many cases, as the touchstone for determining whether students are receiving an adequate education.
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Introduction

Two reforms currently dominate the world of education law and policy: the standards and testing movement and school finance litigation. All states, with the prodding of the federal No Child Left Behind Act, have established academic standards that describe what students are expected to know and be able to do at various stages in their K-12 education. Every state has also instituted a series of tests to assess whether those standards are being met and to sanction schools, and sometimes students, who fail to reach the designated goals.

At the same time, nearly all states have been subject to lawsuits, based on state constitutions, challenging the way they fund their schools. According to the conventional account, most school funding suits over the last 15 years have focused on “adequacy” as opposed to “equity.” Instead of pursuing equal resources for all schools, school finance litigants now seek recognition of a right to an adequate education and the resources necessary to provide it. The basic approach of adequacy cases, at least in theory, is to define the outcomes that constitute an adequate education and then to work backward to determine the resources necessary to reach those outcomes. One obvious difficulty is how to define an adequate education. This task is not only conceptually difficult, but it also strains the institutional capacity and perhaps integrity of courts.

Enter the standards and testing movement. There is an emerging consensus among commentators, which is hardening into conventional wisdom, that academic standards have been and will continue to be a big help to school finance plaintiffs. The existence of standards, it is argued, can relieve courts of the difficult task of defining an adequate education because academic standards themselves define adequacy. Better still, the definition comes from the legislature rather than the courts. To be sure, courts that rely on standards would still have to determine whether schools are meeting the

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standards and what remedy to order if schools are falling short. But at least the knotty definitional problem would be solved. This would help school finance plaintiffs, so the conventional wisdom continues, because courts will be less reluctant to enter into and more likely to remain in school funding disputes if they can rely on a legislative benchmark for adequacy.5

Commentators have high hopes for the marriage of standards and school finance litigation. Peter Schrag, author of a recent book on school finance litigation, nicely captures the mood of optimism: “[T]he effort to raise academic standards and accountability in the public schools . . . and then use those standards to calculate the resources needed to achieve them is both a radical idea in American education and probably the most helpful step for poor kids since the Brown decision a half-century ago.”6 As Schrag’s statement suggests, he and most other commentators believe not only that standards could help school finance plaintiffs, but that they already have helped them.7

I believe that the nascent conventional wisdom about the relationship between standards and school finance litigation is wrong not just once, but twice. It is inaccurate as a matter of description, and it is wrong-headed as a matter of prescription. A close reading of the cases indicates why, and studying the actual cases also indicates a more fruitful direction for litigants and courts to follow.

To preview the argument briefly, there is a divergence between the commentary on school finance cases and the actual cases themselves. The first and narrowest goal of this Article is to document that discrepancy. Contrary to almost all accounts, whether written by fans or opponents of school finance litigation, standards have not yet proven especially attractive to courts in school funding cases.8 Indeed, I found only a single decision from a state’s highest court (the Kansas Supreme Court) that relied on legislative standards to define adequacy.9 Courts tend instead to focus on whether resources among different school districts are comparable, even in so-called “adequacy” cases. This point is rarely acknowledged in the school finance literature, and it calls into question not only the categories used to describe school finance cases but the ways in which these cases have been understood.

8 See infra Part I.
9 See id.
The larger ambition of the Article is to explain why court reliance on legislative standards to define adequacy, if and when it occurs, will likely harm rather than benefit school finance plaintiffs. There are three related dangers. First, legislative standards and tests tend to narrow the scope of education; the narrower the scope, the less ambitious the reform. Second, courts will inevitably rely on test scores to determine if schools are providing an adequate education. Contrary to what one might expect, reliance on test scores is more likely to justify existing finance schemes than bolster the case for increased funding. Third, using standards and tests to define a court-enforced right to funding creates perverse incentives for legislatures to dilute standards and lower expectations. One way to make education cheaper, after all, is to lower the goals.

The issue of incentives leads to the final and broadest point of the Article, which addresses the always fair but occasionally ignored question of where to go from here. If school finance plaintiffs and courts should not rely on legislative standards, what should they rely on instead? The answer, I argue, is found in the cases themselves. Courts and litigants should focus their attention and efforts on fleshing out the principle of comparability, which already pervades many school finance decisions.

Focusing on comparability of resources is a more promising approach because it establishes a goal that is harder to manipulate than the goal of meeting state-defined standards. The reason is simple: States are loath to prevent property-rich districts from spending locally raised revenues on their own schools. If those districts provide the benchmark against which adequacy is measured, states will have less ability to game the system because they cannot do so without hurting property-rich, politically powerful school districts.

Ensuring comparable resources is also a better fit with the institutional capacity of courts. Here I take issue with another shibboleth in the school finance commentary, namely that courts should focus on outcomes rather than inputs. To be sure, outcomes ultimately matter more than inputs, which makes the focus on outcomes in both the standards movement and school finance literature understandable. But courts lack the institutional capacity to ensure good outcomes, and they subject themselves to unnecessary criticism when they try to do so. Although the principle of comparability is not self-enforcing and will require some judgment to implement, courts are in a better position to compare resources than they are to determine the link between particular inputs and certain outcomes.

This Article proceeds in four parts. Part I explains the history and theory behind standards-based reform, school finance litigation, and the potential marriage of the two. Part II examines actual decisions and demonstrates how courts in school finance cases have focused primarily on resource disparities. Part III makes the normative case against relying on legislative standards in school finance cases. Part IV makes the case in favor of comparability. The conclusion emphasizes the importance of tying strategies -- where urban and rural districts tie their fate to the fate of politically powerful suburban districts -- in education reform.
One qualification is in order before proceeding. For purposes of this Article, I generally accept the premise of school finance litigation, namely that additional resources will help struggling schools. There is a raging debate in the social science literature on the question of the relationship between inputs and outputs in education. I am persuaded that more than money is necessary to improve this country’s worst schools, and I have written elsewhere on this topic. Here, however, I want to put that debate to one side and confront school finance litigation on its own terms by accepting that more resources will help low-performing schools. A basic goal of this Article is to explain why focusing on legislative standards to define adequacy is not a very promising strategy to secure those resources.

I. History and Theory

A. The Standards and Testing Movement

Standards and testing currently dominate the landscape of public education. The movement traces back to the 1983 publication of A Nation at Risk, which warned in ominous terms that public schools were being flooded by a “rising tide of mediocrity.” Advocates of academic standards sought to raise expectations for all students and to hold them and schools accountable for any failure to meet those expectations. Some states, beginning in the late 1980s, created standards that set out what students were expected know and be able to do in each grade. They also devised tests ostensibly designed to gauge results and provide a basis for rewarding or punishing schools and students.

The federal government became involved in 1994 and since that time has become the driving force in the standards and testing movement. In 1994, Congress enacted both the Goals 2000 Act and the Improving America’s Schools Act (IASA). The former offered money to states willing to establish academic standards and conduct regular assessments of students. The latter reauthorized and reoriented Title I of the Elementary and Secondary Schools Act by embracing standards-based reform. In the past, Title I provided funds to support remedial instruction for disadvantaged students. Under the IASA, Title I funds now had to be used to create standards for all students. In order to receive Title I funds, states had to create “challenging” content and performance standards in at least reading and math, develop assessments that were aligned with those standards, and formulate plans to assist and ultimately sanction failing schools. Standards and assessments for Title I schools had to be the same as those established for all other schools within a state. In this way, the federal government

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14 § 6311(b)(1).
15 § 6317(c)(5).
16 § 6311(b)(3).
hoped to ensure that states would hold all students to the same high expectations and hold all schools, regardless of their student population, accountable for failure. 17

The No Child Left Behind Act, passed in 2001, is the latest and most important piece of federal education legislation. 18 It follows the same basic approach as the IASA, but it establishes more ambitious goals and places greater constraints on the states. States must still develop “challenging” content and performance standards, now not only in reading and math, but also in science. 19 States must still use assessments that are aligned with those standards, and must hold schools and school districts accountable for failing to meet ambitious achievement goals. But the frequency 20 of tests has increased, and the sanctions for failure have become more severe. 21 In addition, the NCLB requires that all schools have virtually all of their students scoring at the proficiency level in math and reading by 2014. 22

As a result of these combined state and federal efforts, all states have adopted standards and standardized tests, which drive both their curricula and accountability systems. The standards and testing movement has generated a good deal of criticism, much of it focused on the NCLB. Critics charge, among other things, that schools waste too much time teaching to the test, which has the effect of dumbing down the curriculum in many schools; that basing accountability on test scores provides an inaccurate measure of schools and unfairly punishes schools with poor and minority students; and that the federal government has failed to provide sufficient resources to states to enable them to meet the demanding requirements of the NCLB. 23 Much of the criticism, especially of the dominance of standardized tests, comes from the political left, although there is also some criticism from the right regarding the unprecedented federal intrusion into an area traditionally reserved to the states. 24

One important group on the left, however, has refrained from criticizing standards and testing: school finance reform advocates. These advocates have generally made their peace with standards and testing because they believe this movement serves their own goal of increasing

17 See Ryan, Perverse Incentives, supra note xx, at 939.
19 § 6311(b)(1)(A).
20 § 6311(b)(3)(C)(ii).
21 § 6316(b)(7)(C).
22 § 6311(b)(2)(F).
23 Lynn Olson, A Decade of Effort, in QUALITY COUNTS 2006, EDUCATION WEEK, Jan. 5, 2006 at 8, 16;
24 See Schrag, supra note xx, at xxi.
resources for schools. To understand why, it is helpful to have some familiarity with the progression of school finance litigation.

B. School Finance Litigation

The conventional account of school finance litigation goes something like this. School finance litigation began in the 1960s, and the first “wave” involved federal claims based on the Equal Protection Clause. Litigants sought equalized funding. This wave ended shortly after it began, when the Supreme Court in San Antonio v. Rodriguez upheld Texas’ unequal school funding system. Litigants then turned to state courts and state constitutions. They continued, in the second wave, to seek equalized funding, arguing that equal protection and education provisions in state constitutions required as much. They met with mixed success, though the losses outnumbered the victories in this second wave of “equity” decisions.

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

Despite plaintiffs’ success, so-called adequacy cases have for some time been plagued by an obvious difficulty, which is both definitional and institutional: What constitutes an adequate education, and are courts the proper institution to make that determination? In order to decide whether states are providing students the opportunity to receive an adequate education, courts need to know what an adequate education looks like. It is not at all obvious. Is adequacy, for example, measured by the mastery of certain skills and the attainment of certain knowledge, regular advancement from grade-to-grade, on-time graduation, preparation for the workforce or college, or perhaps all of these things? Is it an absolute standard or a relative one, such that adequacy itself requires some degree of comparison among schools?

These questions are clearly difficult and concrete answers cannot be found in the usual materials of constitutional interpretation – i.e., neither the text nor drafting history of education clauses offers much help in defining

26 411 U.S. 1.
what constitutes an adequate education. Whether courts are the appropriate institution to define an adequate education has thus been a constant source of debate and controversy.

C. A Match Made in Theory

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

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

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

This initial insight highlighted a theoretical connection between standards and school finance litigation. Oddly, however, it has developed over the last decade into conventional wisdom regarding the actual relationship between standards and school finance litigation. Commentators who support court involvement in school funding litigation, as well as those who oppose it, share the assumption that the standards movement has already been and will continue to be a boon to school finance plaintiffs. Thus, proponents of school finance reform tend to celebrate the synergy between standards and school finance reform, while opponents lament that standards

28 See, e.g., Liebman, supra note xx, at 378.
29 This particular problem might be ameliorated by the use of costing-out studies, which rely on various methodologies for determining the costs of meeting specified outcomes. But none of the methodologies is beyond challenge, and the production function of education remains hotly contested. For further discussion of costing-out studies, see infra TAN.
30 See, e.g., Gorman, supra note xx.
will continue to fuel court involvement that is illegitimate, futile, or counterproductive. Indeed, both groups seem to believe, in the words of two critics of court-ordered school finance reform, that “[a]ttorneys have turned classroom failure into courtroom success.”

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

II. Reality

A. Neither Equity Nor Adequacy, But Comparability

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

But this is not how the cases have proceeded. Perhaps not surprisingly, no state court that has ruled against plaintiffs has relied on legislative standards to define adequacy; these courts instead tend either to decide simply that existing resources are sufficient or that the question is essentially not justiciable. Most successful cases, in turn, have a strong comparative focus. As I describe in more detail below, a surprising number

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32 West & Peterson, supra note xx, at 1-4, 18-19; Heise, Adequacy Litigation, supra note xx, at 273-74; Andrew Rudalevige, Adequacy, Accountability, and the Impact of The No Child Left Behind Act, in SCHOOL MONEY TRIALS, supra note xxx, at 243-57.
33 West & Peterson, supra note xxx, at 8.
36 Cases have been brought in all but five states, and plaintiffs have succeeded in roughly twenty states and failed in twenty. Most of my discussion focuses on states where plaintiffs have succeeded. I am not aware of any state court that previously rejected a school funding challenge that has since changed its mind because of the advent of the standards movement. Until that occurs, it remains sheer speculation as to whether the standards movement will help plaintiffs in states that have rejected at least one school funding challenge. Standards have begun, but just barely, to influence courts that have already ruled in favor of school finance plaintiffs at least once. Because successful school funding cases are essentially never-ending,
of cases, given that we are supposedly in the “adequacy” wave of decisions, focus explicitly on equality of educational opportunity. Those that focus more on adequate inputs or outcomes still have a comparative aspect, either in the proof relied upon or in the definition of the adequacy standard. Even those decisions that have only a minimal comparative component do not rely primarily, or at all, on legislative academic standards but on the court’s own definition of adequacy. Indeed, I found only a single decision, from Kansas, that incorporated state outcome standards as the definition of an adequate education. Some states appear to be moving in that direction, as I discuss below. But the most simple and basic point to recognize about these cases is that they have not yet caught up with the commentary. Courts have not yet taken advantage of the standards movement when defining an adequate education.

1. The Cases

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

39 Rose, 790 S.W.2d at 212.
40 Montoy v. State, 102 P.3d 1160, 1164 (Kan. 2005).
42 Cf. Minorini and Sugarman, supra note xx, at 190 (noting that “an important part of the legal strategy [in adequacy cases] has been to demonstrate that there are large spending and other input differences from place to place – just as in the equity cases”); see also Briffault, supra note xxx, at 27-30 (discussing the blurring of adequacy and equity).
This is apparent even in the *Rose* decision out of Kentucky, said to mark the beginning of the adequacy wave. In that case, the Kentucky Supreme began, as many do, recounting the relevant facts established by the trial court. The facts cited all relate to disparities. The Court described the unequal funding and the resulting curricular disparities among schools with regard to offerings in foreign language, science, math, music, and art. It concluded that “[s]tudents in property poor districts receive inadequate and inferior educational opportunities as compared to those offered to students in the more affluent districts.” The Court also referred to different outcomes on tests, but the bulk of this portion of the opinion focused on disparities in inputs, leading the Court to observe that “[c]hildren in 80% of local school districts in this Commonwealth are not as well-educated as those in the other 20%.”

The Court continued the same theme of comparability when defining what the state constitution requires. The constitutional text mandates the provision of an “efficient” system of schools, which the Kentucky Court read to mean a system of “practical equality in which the children of the rich and poor meet upon a perfect level.” The system must be “substantially uniform” and provide every child with “an equal opportunity to have an adequate education.” The Court then proceeded to list the seven goals of an adequate education, in the form of a list of capacities and skills that students should acquire by the end of their education. This list of outcome goals and the emphasis on adequacy have led most commentators to characterize the Kentucky decision as the first in a new breed of adequacy cases. But this characterization misses the repeated and clear focus on disparities in opportunities and the concern for equalizing those opportunities. Indeed, after stating that the Constitution requires the state to provide children “an equal opportunity to have an adequate education,” the Court emphasized: “Equality is the key word here.”

Requiring the state to provide an equal opportunity to obtain an adequate education may not, in theory, be much different than simply requiring the state to provide an adequate education. This may be why most have characterized this as an adequacy case, pure and simple. But doing so obscures the concern with and emphasis on comparability of resources. There is no suggestion in the opinion that the court would tolerate wildly different resources made available be schools. The court, for example, acknowledged that local school districts could supplement state funding, but it emphasized that local efforts could not be used as a substitute for an

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43 *Rose*, 790 S.W.2d at 196-98 (1989).
44 *Id.* at 198.
45 *Id.* at 197.
46 *Id.* at 198.
47 *Id.* at 205 (emphasis added).
48 *Id.* at 211.
49 *Id.* at 211.
50 *Id.* at 211.
“adequate, equal, and substantially uniform educational system throughout the state.”\textsuperscript{52} The court indicated, in other words, that there was a limit to which locally-driven disparities would be tolerated.

Similar concern for disparate resources and opportunities runs through almost all of these decisions. The Montana Supreme Court, in a case also decided in 1989, began its discussion of the evidence by highlighting funding disparities and disparities in curricula, materials, and instructional equipment.\textsuperscript{53} It struck down the funding system because “the comparative evidence establish[ed] that spending differences among similarly sized school districts in the state result in unequal educational opportunities for students.”\textsuperscript{54} In the same year, the Texas Supreme Court also struck down Texas’ school funding system, for the same reason: disparities in funding and opportunities.\textsuperscript{55} The Court described different levels of school spending, as well as disparities in curricular and extracurricular offerings, including band, debate, and football.\textsuperscript{56} The Court concluded that the Texas Constitution, which requires the legislature to create an “efficient system” of schools, prohibits substantial funding inequalities. It requires “substantially equal access to similar revenues per pupil at similar levels of tax effort.”\textsuperscript{57}

And on it goes. The Massachusetts Supreme Court struck down that state’s funding system after comparing the opportunities available in some districts with those available in others.\textsuperscript{58} The Tennessee Supreme Court held that there were impermissible disparities in educational opportunities throughout the state, as demonstrated by significant differences in teacher qualifications, student performance, basic educational programs, and facilities.\textsuperscript{59} It required that opportunities be substantially equal. The Arizona Supreme Court held that the Arizona Constitution requires the state to educate students “on substantially equal terms.”\textsuperscript{60} A school funding system which itself “creates gross disparities,” the Court concluded, is unconstitutional.\textsuperscript{61} The New York Court of Appeals focused on disparities in teaching, facilities, instructional materials, and student outcomes that exist between New York City schools and the rest of the State.\textsuperscript{62} In explaining and justifying its ruling, the Court emphasized that “New York City schools have the most student need in the state and the highest local costs yet received some of the lowest per-student funding and have some of the worst results.”\textsuperscript{63} The New Jersey Supreme Court focused on disparities in opportunities and needs between poor, urban districts and their wealthy suburban counterparts.\textsuperscript{64} It ordered the state to ensure not just equal funding among

\begin{itemize}
\item[\textsuperscript{52}] Rose, 790 S.W.2d, at 211.
\item[\textsuperscript{54}] Id. at 688.
\item[\textsuperscript{55}] Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (1989).
\item[\textsuperscript{56}] Id. at 394.
\item[\textsuperscript{57}] Id. at 397.
\item[\textsuperscript{58}] McDuffy v. Sec’y of Executive Office of Educ., 615 N.E.2d 516, 553 (Mass. 1993).
\item[\textsuperscript{59}] Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 144 (1993).
\item[\textsuperscript{60}] Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 814 (Ariz. 1994).
\item[\textsuperscript{61}] Id. at 814-15.
\item[\textsuperscript{62}] Campaign For Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 333-36 (N.Y. 2003).
\item[\textsuperscript{63}] Id. at 350.
\item[\textsuperscript{64}] Abbott v. Burke, 693 A.2d 417, 433-4 (N.J. 1997).
\end{itemize}
these districts, but additional funding for the poor, urban districts above and beyond what suburban districts were spending. 65

Opinions from Wyoming, Arkansas, Vermont, and Ohio follow the same pattern. The Wyoming court ruled that the State must provide an equal opportunity for a quality education. 66 While recognizing that localities could spend above the amount required for a quality education, the court emphasized that the definition of a quality education is dynamic, and "necessarily will change."67 Should the definition change because of "local innovation," all students would be "entitled to the benefit of that change as part of a cost-based, state financed proper education."68 The Arkansas court emphasized disparities in expenditures, curriculum, buildings and equipment, and ruled that the state constitution requires equality of educational opportunity. 69 "Equality of opportunity must include as basic components substantially equal curricula, substantially equal facilities, and substantially equal equipment for obtaining an adequate education."70 The Vermont Court struck down that state’s funding system because it resulted in wide disparities in revenues available to local districts.71 Children in that state, the court concluded, are entitled to "substantially equal opportunity to have access to similar educational revenues."72 And the Ohio opinion focused extensively on differences in curricular offerings and facilities among districts, which the court held violated the constitutional requirement that that the state provide a thorough and efficient system of education.73

2. The Labels

This is not to suggest simply that these cases are "equity" decisions as opposed to "adequacy" decisions. Some surely are better characterized as the former rather than the latter, including those from Montana, Texas, Tennessee, Arizona, New Jersey, Arkansas, and Vermont. But the problem is not (just) with the labeling of these cases, which has given the false impression that most cases since 1989 are about adequacy as opposed to equity. 74 The more important problem is with the labels themselves.

The labels suggest that there is a neat divide between adequacy and equity. The cases demonstrate otherwise by their focus on comparability of resources and opportunities. Courts in these cases generally do not seek to enforce some absolute notion of adequacy, where disparities in resources are ignored, nor do they focus on some absolute notion of equity, where exactly equal resources must be provided or where all students must be funded according to their individual needs. Instead, they focus on disparities and

65 Id. at 434, 444.
67 Id. at 1274.
68 Id.
70 Id. at 500.
72 Id. at 397.
73 DeRolph v. State, 677 N.E.2d 733, 742-744 (Ohio 1997).
74 Cf. Briffault supra note xx, at 26-30 (criticizing the description of cases).
seek to ensure rough comparability. One sees this in the focus on disparities in funding, curricula, teacher quality, facilities, and instructional materials. One sees this in legal standards that require “substantial” equality of opportunity. One also sees this in decisions that emphasize the ability of localities to spend more than necessary to provide an adequate education, but caution – as the Wyoming court did – that adequacy is a dynamic standard. The clear implication is that, at some point, local add-ons will create intolerable disparities in opportunities, which will require the state to achieve greater comparability between wealthy and poor districts.

To be sure, some courts have established outcome goals, and I do not mean to suggest that courts are not concerned with results. But as I mentioned, only one court has concluded that an adequate education is defined by legislatively-created academic standards. Courts are much more likely to define an adequate education themselves, and the court-created standards tend to incorporate notions of comparability. Courts in Wyoming, North Carolina, New Hampshire, and New Jersey, for example, have described the ultimate aim of public education in similar terms: to prepare students to participate as citizens and to compete in the employment market or for admission to higher education.\(^{75}\) Clearly, one’s ability to compete for employment or admission to higher education requires comparable educational opportunities at the elementary and secondary level. Thus, the very definition of a suitable or “adequate” education in these cases requires a degree of comparability in opportunity. Otherwise, the ultimate aim of preparing students to compete with one another would be an empty gesture.

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

**B. Academic Standards and Comparability**

Once it is understood that these cases focus primarily on disparities in resources, and to a lesser extent on disparities in outcomes (broadly defined), it is easy to see why academic standards have not proven very attractive to courts. The dominant analytical approach is fundamentally comparative, even in so-called “adequacy” cases; a standards-based approach is fundamentally non-comparative. In particular, relying on legislative standards to define an adequate education would render irrelevant much of the concern with resource disparities that one finds in current school finance decisions. If the real concern were making sure that students had a realistic opportunity to meet legislatively-created standards, disparities in resources would only be relevant in a tangential way, insofar as schools with greater

\(^{75}\) *See* supra TAN.
resources might be producing better results on tests. The central question, however, would be non-comparative: What is the amount of resources needed to meet the standards? If some schools could provide greater resources and go above and beyond what the standards require, in theory that should not matter.

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

More generally, most courts that have ruled in favor of school finance plaintiffs seem to recognize that an “adequate education” is necessarily a relative concept. Frank Michelman made a similar point about educational adequacy in a seminal article in 1969,76 and the point has been developed ably by William Koski and Robert Reich.77 The basic idea is simple: to determine whether one child is receiving an adequate education, you have to know what others are learning. We cannot know, for example, whether an athlete has received adequate training until we know what sort and amount of training her competitor has received. The same is true in education. This comparative perspective is pervasive in current school finance decisions, given their focus on comparability in resources and their use of “adequacy” standards that focus on the ability of students to compete for jobs and admission to higher education. This perspective is in serious tension with the standards movement, which rests on the tacit assumption that meeting the standards is enough, even if some schools and students go well beyond legislatively-created standards.

III. The Trouble With Standards

Academic standards do not fit easily with the approach taken by most courts in school finance cases today. But it is possible that courts in the future will become attracted to them, even if it means shifting focus away from resource disparities toward test performance or compliance with standards. Indeed, there are some signs of this already, as two courts – in

77 Koski and Reich, supra note xx, at 46.
Texas\textsuperscript{78} and Arkansas\textsuperscript{79} – have stressed recently that the legislature should define what constitutes an adequate education.

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

A. Narrowing The Definition of An Adequate Education

The academic standards that exist in all fifty states cover an increasing number of topics, including math, reading, history, science, and foreign languages. But states differ in the subjects covered by standards, as well as in the subjects that are tested. Even in those states with wide-ranging standards, it is unlikely that the standards capture all that schools can (and should) offer. Tests, which play an increasingly important role, cover even fewer topics than standards, as not all subjects that might be covered by standards are tested. Indeed, one of the persistent criticisms of the standards and testing movement is that it is narrowing the curriculum, leading schools to downplay or abandon subjects not covered by standards or those not tested.\textsuperscript{80}

If standards are used to define an adequate education, and especially if tests are used to assess whether such an education is being provided, the scope of a student’s right to an “adequate” educational opportunity will likely contract. As described above, courts in school finance cases point to disparities not just in academic performance in core classes like reading, math, and science. They also point to disparities in the state of science labs, the quality of teachers, the general amount of resources, the availability of foreign language classes and extracurricular activities, and the state of facilities and physical plants.

Similarly, those courts that have articulated output goals as part of their definition of an adequate education tend to speak in broad terms. In the well-known \textit{Rose} decision from Kentucky, for example, the court articulated seven goals, which have since been adopted by other courts when they have defined the meaning of an adequate education. These goals include not just “sufficient oral and written communication skills,” but “sufficient grounding in the arts,” “sufficient understanding of governmental processes,” and “sufficient knowledge of economic, social, and political systems to enable the student to make informed choices.”\textsuperscript{81} The last goal is the broadest of all

\textsuperscript{78} Neeley, 176 S.W.3d 746, 787 (2005).
\textsuperscript{79} Lake View School District No. 25 of Phillips County v. Huckabee, 91 S.W.3d 472, 486 (Ark. 2002)
\textsuperscript{80} \textit{See, e.g.}, James Comer, \textit{Our Mission}, in \textit{Quality Counts} 2006 at 59.
\textsuperscript{81} \textit{Rose} v. \textit{Council for Better Education}, Inc., 790 S.W.2d 186, 212 (Ky. 1989).
and incorporates a comparative element: “Sufficient levels of academic and vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.”

The general thrust of these opinions, whether focused exclusively on resource disparities or also on outcome goals, is that opportunities, broadly defined, should be roughly comparable. Substituting legislative standards for the definition of adequacy would narrow the focus to performance in subjects covered by standards (or perhaps those tested). The amount of resources required by court decisions would almost surely decline as a result. After all, the broader the definition of adequacy or the scope of relevant disparities, the more likely that courts will require additional resources.

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

More than just money is at stake. To the extent that determining the adequacy of one student’s education requires a comparative judgment, using academic standards as the sole measure of an adequate education necessarily invites tolerance of inadequacy. Some schools, because of resources and demographics, will necessarily be able to go well beyond what is required by standards or demanded on tests. Other schools will be able to do little more than focus on preparing for tests in some subjects. If adequacy requires a comparative judgment, it would be difficult to conclude that students in the latter set of schools are receiving an adequate education, given the fact that students in the former set of schools are exposed to a broader and richer curriculum. Yet this sort of disparity, and thus this form of inadequacy, would necessarily be tolerated if legislative standards alone defined an adequate education.

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82 Note as well that with goals stated at this high a level of abstraction, comparability of resources will matter a great deal, for the simple reason that it will be difficult if not impossible for courts to monitor whether these goals are being achieved.
83 Minorini and Sugarman, supra note xxx, at 203-04.
To be sure, the current focus on test preparation in many schools is driven primarily by state and federal accountability systems. These accountability systems, pushed most aggressively by the No Child Left Behind Act, punish schools, teachers, and in some states students for poor performance on tests. Whether schools have more or less money will not necessarily alter their incentives to do well on tests. But to the extent doing well on tests is the measure of adequacy, there will be correspondingly less pressure to require schools to do any more. Whatever pressure exists, moreover, will have to contend with the fact that resources are pegged to standards and tests and not meant to support curricular offerings, facilities, or extracurricular activities that are neither tested nor covered by the standards.

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

First, standards are relevant only in adequacy cases, not equity cases. Equity cases by necessity focus on inputs; legislative standards focus on outcomes. Some states have already rejected adequacy claims, and there is little reason to believe that a new claim based on academic standards would cause these courts to change their minds. Second, some state courts have rejected equity but not adequacy claims, while others have not confronted a school finance case at all. It is not clear that the mere existence of standards will motivate these courts to rule favorably in an “adequacy” suit. Indeed, given the degree to which resource disparities have already motivated many courts in successful “adequacy” cases, there seems to be just as much reason to expect that similar disparities would motivate courts in other states. If this assumption is correct, the third point follows: plaintiffs may be settling for less if they persuade courts to rely on standards rather than on disparities in resources as the basis for their rulings.

Reliance on standards can therefore help plaintiffs in states where courts would rule in their favor only because of the existence of standards, and not because of resource disparities. It is impossible to guess how many states will fall into that category, but it is unlikely to be a large number. So far, the number is zero.

**B. Test Scores as Shield, Not Sword**

Although standards and tests are not identical, it is difficult to disentangle the two. In theory, standards describe the knowledge and skills that should be acquired in a number of subjects at each grade level. These standards are supposed to drive the curriculum. Test results are supposed to indicate whether those standards are being met, but tests usually cover only a small portion of what standards cover. Nonetheless, for accountability purposes, test scores are the primary if not sole measurement of success. As
a result, in many states and schools, tests have become the de facto standards insofar as they drive the curriculum. That is, schools teach to the tests and ignore standards (and entire subjects) that are not tested.\(^{86}\)

Test scores will undoubtedly become relevant in school funding cases if standards are used to define an adequate education. Test scores, after all, offer the best existing proof of whether standards are being met. It is possible, as I discuss below, to imagine courts placing little weight on test scores, at least initially. But those scores will likely prove difficult to ignore for very long, and states can be expected, where scores are favorable, to press the point that test scores prove that funding is sufficient.

Indeed, a moment’s reflection reveals that increased reliance on test scores will most likely help defendants, not plaintiffs, in school funding cases. Many courts have relied on disparities in resources alone in concluding that states are not providing a constitutionally sufficient education. Switching to standards to define an adequate education necessarily means switching from an input focus to an output focus. Standards, after all, define what students should know and be able to do, not what they must be provided by way of teachers, class sizes, and funding.

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

Now imagine that test scores show that students are meeting, or close to meeting, the standards, but there are nonetheless large resource disparities among schools. Under the dominant approach in school funding cases, disparities in resources might well be enough to trigger corrective action by courts. Under a standards-based approach, however, the test scores could lead courts to ignore these disparities. After all, resource disparities in and of themselves should not matter; only the test results should matter. If adequate results, as evidenced by adequate test scores, can be achieved within a system marked by disparate resources, presumably the constitutional standard would be satisfied. The same is true for systems where test scores are sufficient but schools differ in terms of curricular or extracurricular offerings or overall academic performance, including graduation and college attendance rates. In short, test scores could emerge as a one-way ratchet downward toward less, rather than more, funding.

If this seems overly pessimistic, consider three different decisions from three different states. In 1989, the Texas Supreme Court held that the state constitution, which required the legislature to create an “efficient” system of public schools, demanded substantially equal resources for

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schools. 87 “[I]n other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort.” 88 The court indicated that localities could supplement funding, provided that the state created an “efficient system” of schools. But the focus of the opinion was on the vast disparities in resources available to schools, and the court made it clear that these “inequalities are . . . directly contrary to the constitutional vision of efficiency.” 89

By 2005, however, the Texas Supreme Court had altered its focus from disparities in inputs to results. 90 The constitutional standard, the court now emphasized, was “plainly result-oriented,” creating “no duty to fund public education at any level other than what is required to achieve a general diffusion of knowledge.” 91 The court went on to reject plaintiffs’ argument that existing funding disparities, and disparities in educational achievement, were unconstitutional. Why? Because test scores were rising. 92

The court recognized that there were still funding disparities, and that funding might not be sufficient to meet all curricular demands. It recognized that there were still wide gaps in performance, that drop out rates were high, that relatively few students were prepared to enter college, and that there was a shortage of highly qualified teachers. But none of this ultimately mattered “because the undisputed evidence is that standardized test scores have steadily improved over time, even while tests and curriculum have been made more difficult.” 93 Because the legislature was not acting arbitrarily in determining the funding necessary for students to perform well on the tests, the court was satisfied.

In the most recent decision from North Carolina, the supreme court also placed a good deal of emphasis on test scores. 94 These scores were used, along with other output measures, such as graduation rates and post-secondary education success, to gauge whether the state was meeting its constitutional requirement. The court acknowledged that “at-risk” students achieved proficiency on standardized tests in numbers far below the state average. 95 But this was not enough to deem the funding system unconstitutional. It simply suggested a problem, but it remained necessary to determine whether poor test performance was related to a lack of resources. Plaintiffs, in other words, still had the burden to “show that their failure to obtain [a constitutionally sufficient] education was due to the State’s failure to provide them with the opportunity to obtain one.” 96 Ultimately, the court determined not that the legislature had to provide more funds or reduce

87 Edgewood, 777 S.W.2d 391 (1989).
88 Id. at 399.
89 Id.
91 Id. at 788.
92 Id. at 789-90.
93 Id.
95 Id. at 383.
96 Id. at 383 n.11.
resource disparities, but simply that it “assess its education-related allocations” to local schools. 97

In the most recent decision from the Court of Appeals in New York, that state’s highest court, the state contended that rising test scores indicated that children in New York City were receiving a constitutionally sufficient education. 98 The court’s response was telling. The court first began by detailing the resource disparities between New York City schools and the remainder of the state. 99 The court then indicated that “[a] showing of good test results and graduation rates among [New York City] students – the ‘outputs’ – might indicate that they somehow still receive the opportunity” 100 for a constitutionally sufficient education. It went on to conclude that the test scores, contrary to the state’s assertion, were not good enough to excuse the input disparities. 101 But notice that the court tacitly accepted the state’s premise: that decent test scores could excuse inadequate or unequal resources. And notice, too, that it was the state that sought to use test scores in order to defend the funding system.

These three decisions are cautionary tales. All suggest that adequate test scores may be used by courts to excuse resource inadequacies and disparities. At best, inadequate test scores will lead courts to examine resource deficiencies to determine if there is a connection between the resources and the test scores. If test results captured all that schools should offer to students and were decent measures of whether students were truly receiving an adequate education, this entire approach might make a great deal of sense. But even the strongest testing advocate would have difficulty asserting that test results tell you everything you need to know about the adequacy of the education offered at a particular school. Yet if test scores become the main benchmark to determine whether an adequate education is being provided, test scores may indeed tell courts all they need to know about adequacy when it comes to funding.

There is one possible way to avoid focusing exclusively or primarily on test scores: costing-out studies. These studies seek to determine the resources schools need to achieve a particular outcome. There are a number of different ways to conduct costing-out studies, but the two most dominant seem to be the professional judgment approach and the successful schools approach. Under the former, a group of school professionals, including teachers and administrators, give their best judgment about the resources needed to meet particular goals. Under the latter, schools that are performing well provide the benchmark used to determine the resources necessary for success. Some courts have already ordered costing-out studies, and it is possible that more will. 102

97 Id. at 391.
98 Campaign For Fiscal Equity, Inc. v. State, 801 N.E.2d at 338 (N.Y. 2003
99 Id. at 333-336
100 Id. at 336.
101 Id. at 340
102 See, e.g., Springer & Guthrie, supra note xxx, at 105-07.
Relying on these studies could lead courts to downplay test results. Courts might simply order that states provide whatever the studies indicate is necessary to achieve success. But it seems difficult to imagine that courts will be able to ignore test scores for very long, even if they initially order legislatures to abide by costing-out studies. Suppose test scores rise while funding disparities remain, or before the legislature has funded schools at the level required by the relevant costing-out study? It is not as if costing-out studies are hard science. They are good guesses about what is needed to succeed. Test scores, in turn, are hard proof of success. Courts will have to be strong-willed to remain focused on what a group of school professionals estimate is needed, or on what other schools are spending, if concrete evidence suggests that some schools can perform well on tests while spending relatively little.

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

C. Perverse Incentives

Relying on legislative standards to define adequacy, and test results to determine if an adequate education is being provided, suffers from an additional flaw: it creates perverse incentives for states. If funding is linked to standards and tests, states will have an incentive to decrease funding requirements by lowering standards and making tests easier to pass. Thus, even if costing-out studies are followed by courts, and even if those studies indicate the need for greater resources, states under a standards-based approach still have an out: make education cost less by lowering standards and making tests easier to pass.

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105 See Heise, Adequacy Litigation in an Era of Accountability, in West and Peterson, supra note xxx, at 263, 268.
An analogous phenomenon is already occurring as a result of the No Child Left Behind Act, which creates similarly perverse incentives. The NCLB penalizes school districts and schools if an insufficient number of students in any given school fail to reach “proficiency” on state tests in reading, math, and science. The sanctions increase in severity every year that the benchmarks are not met, while the benchmarks themselves become more ambitious every year. The NCLB couples this regime of sanctions and ambitious goals with complete laxity regarding state standards and tests. States retain the ability to set their own standards, devise their own tests, and set the scores needed to be considered proficient.

It should not have been hard to foresee what states might do to avoid being sanctioned: play around with the standards, the tests, or the scores needed to be considered proficient. And this is exactly what a number of states have already done.\(^\text{106}\)

Consider just test scores. A number of states have lowered the scores necessary to be considered “proficient” for purposes of the NCLB. State tests are criterion-referenced, not norm-referenced. This means that students are not compared to one another but to a single proficiency benchmark, which they either make or do not make. An important issue, obviously, is just where that benchmark is set.

More than a dozen states, including Louisiana, Colorado, Connecticut, Pennsylvania, Michigan, Texas, Tennessee, Virginia, and Wisconsin, have tinkered with their scoring systems in order to increase the number of students who “pass” the tests.\(^\text{107}\) Tennessee provides as good an illustration as any other. Every year since the passage of the NCLB, Tennessee has lowered the number of questions students must answer correctly in order to be deemed proficient. In 2003, for example, eighth-graders had to answer 36 out of 70 questions on the reading test – fifty-one percent – to be considered proficient. In 2004 that number dropped to 29 out of 68, or 43 percent, and in 2005 the number dropped again to 22 out of 55, or 40 percent.\(^\text{108}\)

Education officials in Tennessee have defended their revisions, arguing that the tests have changed and scores reflect what the average student answered correctly the year before. But the pattern of downward


revisions, which occurred with other tests as well, is difficult to explain away. The impact of Tennessee’s downward revision on passage rates is also hard to ignore and adds to the suspicion that the tinkering has been politically motivated. Between 2004 and 2005, the percentage of Tennessee eighth-graders who “passed” the reading test jumped from eighty percent to eighty-seven percent.109

Additional evidence that the bar has not been set very high in most states is found in studies that compare results on state tests with results on the National Assessment of Education Progress. The NAEP tests a sample of students in every state in fourth and eighth grade reading and math.110 The test does not align with any particular state’s standards but instead is designed to test what all students in fourth and eighth grade ought to know and be able to do in reading and math. Comparison between NAEP scores and scores on state tests are thus imperfect. A state may emphasize somewhat different material than is tested on NAEP. In addition, NAEP is not a high stakes test, so it is not clear how seriously schools or students prepare for or treat it. Finally, the scores necessary to be deemed “proficient” on the NAEP are not based on science but rest on the subjective judgment of those who created the test. Some believe that the proficiency bar for the NAEP is unreasonably high.111 That said, the NAEP, commonly dubbed “the nation’s report card,”112 provides a fairly useful benchmark against which to compare the rigor of state tests.

Paul Peterson and Rick Hess, two prominent education commentators and editors of the periodical Education Next, tabulated the differences between the percentage of students deemed proficient on state tests with those deemed proficient on the NAEP, and they have assigned a letter grade to each state. The grade reflects how much easier it is for students to pass the state test as compared to the NAEP test. An A grade reflects consistency between the two tests, while an F represents a wide divergence. Only five states and the District of Columbia earned an “A” grade, and even among these six, students still were more likely to pass the state tests than the NAEP. The average difference was 31%, meaning that, on average, 31% more students passed state tests than the NAEP.113 Other reports have found similarly wide discrepancies between state results and results on the NAEP.114 Again, the comparison is not perfect, but the consistency of the pattern provides good reason to suspect that states have not set very high goals.

If courts rely on legislative standards to define a constitutionally sufficient education, they will essentially replicate the problem created by the NCLB. Legislatures will be required to fund an “adequate” education, but they will be allowed to determine what adequacy demands. If states have

109 Id.
110 Ryan, Perverse Incentives, supra note xxx.
112 E.g., Peterson & Hess, Race to the Bottom, supra note xxx, at 28.
113 Id. at 28-29.
114 E.g., Carey, supra note xxx.
lowered standards or manipulated test scores to avoid NCLB sanctions, it is hard to see why they would not also lower standards or manipulate test scores to avoid paying the check delivered by courts.

Indeed, the parallels between this litigation strategy and the No Child Left Behind Act are striking. The NCLB tells states that schools will be sanctioned if schools don’t post good test scores. Adequacy litigation that relies on state standards, if successful, tells the state that it must pay what it takes to meet the standards and pass the tests. But both approaches ultimately leave it to the state to define the goals they are being forced to meet, either through increased funding or sanctions. Just as it did not take states long to figure out how to game the NCLB, it would not take them long to figure out how to game this approach to adequacy litigation.

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

IV. Two Cheers for Comparability

If linking school finance litigation to academic standards is a bad idea, what is the alternative? The answer is found in existing opinions: comparability of resources. That principle should become the guiding one for determining the constitutional sufficiency of funding schemes. The basic idea is straightforward. Courts willing to enforce education rights should begin with the (hopefully) uncontroversial principle that legislatures are required to ensure that all students have a realistic opportunity to acquire a decent education. The questions then become: what is a decent education, and what is necessary to ensure a realistic opportunity to acquire it?

In the abstract, these questions are without definite answers and are endlessly contestable. On the ground, however, they are more tractable. In every state there are examples of schools and school districts that would generally be considered successful. They could be identified by a combination of test scores, advancement and graduation rates, facilities, curricular and extracurricular offerings, college placement, parental satisfaction, reputation, and perhaps even local real estate prices (though there is an obvious chicken and egg problem here). Whatever the precise criteria used, suffice it to say that it would not be hard to identify a collection of “good” schools in every state.
The schools could be selected by allowing defendants and plaintiffs each to offer several examples, along with explanations as to why these schools are providing a constitutionally sufficient education. The court could then winnow the list to a few representative schools and use these as the benchmark. This could also be done with districts as opposed to schools, depending on the level of generality at which the case is pursued. The basic question, after identifying the model schools or districts, would be whether the state is providing comparable resources to plaintiff schools or districts. This question could be asked in a general or specific fashion, with the focus either on overall funding or more specific resources like curricular offerings, facilities, class sizes, teacher quality, and even the socioeconomic makeup of the student population.

The details in using the principle of comparability would vary, as I explain in more detail below, but the general benefits would remain the same. Two stand out. First, the principle of comparability is less subject to manipulation by the state than is standards-based adequacy. Focusing on comparability harnesses existing political incentives instead of working against them. Second, enforcing comparability is more consistent with the institutional capacity of courts than is enforcing standards-based adequacy. Comparability does not require equal resources per pupil nor does it preclude providing more resources to students who need more, as I will explain. Although comparability is a better approach than relying on standards, it is not perfect. Then again, no approach in school finance litigation is perfect or even self-sustaining.

A. Comparability and Doctrine

Before discussing the relative benefits of comparability, a word should be said about whether the principle of comparability is compatible with existing doctrine. As I have already explained, most contemporary school finance cases are not straightforward equity cases, calling for equalized expenditures. Nor are they pure adequacy cases, which evince no concern with inequality in resources or outcomes. The equity cases tend to call for equity up to a point; the adequacy cases tend to be more tolerant of inequalities in resources, but only up to a point. In some ways, the cases styled as equity and adequacy are flip-sides of the same coin, both calling either explicitly or implicitly for the elimination of gross disparities in resources.115

It follows that courts willing to recognize a right to equal educational opportunity or a right to an adequate education should have little trouble adopting comparability as the guiding principle. It could be styled as “rough equity” by courts drawn to the right to equal educational opportunity. Similarly, it could be incorporated into adequacy cases with the recognition, already made by some courts, that adequacy and equity are linked.116 At some point, inequalities in resources among schools affect the adequacy of

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115 See supra TAN.
116 See Briffault, supra note xxx, at 25-27 (discussing overlap in cases).
the education offered at schools lacking resources. Thus, for courts willing to recognize a substantive, judicially enforceable right to education, it would require little to no doctrinal stretching to incorporate the principle of comparability.

To be sure, some courts might conclude, as some already have, that education rights are simply not justiciable. But there is no reason for that determination to turn on the acceptability of comparability as a guiding principle, as opposed to more general concerns with constitutional text, history, and separations of powers principles. This is not the place settle arguments about whether, as I believe, education rights ought to be enforced in courts. The only point is that for those courts willing to enforce education rights, there is no doctrinal obstacle to using comparability as the guiding principle.

B. Comparability and Political Incentives

The first argument in favor of comparability is a continuation of the argument against standards-based adequacy. As discussed, relying on standards to define adequacy creates perverse incentives for states to water down standards and tests, and it also gives states the ability to act on those incentives. If comparability of resources is the benchmark, by contrast, it is harder for the state to game the system.

The reason has everything to do with politics. Schools are funded primarily by a combination of state and local funds, with the federal government supplying a small percentage of overall funding. Local funds are usually generated by property tax revenues. State funds typically come from income and sales taxes. State contributions vary from state to state and among localities, with states often, but not always, giving more money to localities with lower property tax values. States rarely, however, limit the amount that localities can contribute. Even in states that are subject to court decrees requiring increases in expenditures, localities are usually given the freedom to spend what they like on local schools. The state might have to increase their contributions to other localities in order to minimize the disparities created by local spending, but few states cap local spending.

The reason is not hard to fathom. Limiting local spending is political dynamite. Localities with high property values also tend to be localities with wealthy and politically influential constituents. These residents care about their local schools, either because their children attend them or because the perceived quality of local schools is related to the value of their homes – or

118 See id.
119 For further discussion on this particular point, see James E. Ryan, A Constitutional Right to Preschool?, 94 CAL. L. REV. 49, 85-86 (2006).
both. To prohibit local residents from spending as much as they would like on their local schools would interfere with the ability of powerful constituents to promote their children’s welfare and protect the value of their homes.\textsuperscript{122} It is difficult to imagine a more controversial step for state governments to take. For the same reason, states have limited ability to reduce funding to districts, even those with high property values, because doing so would be perceived as an attack on good districts and a lack of commitment to education.

This is why legislatures in response to court orders to make funding more equitable tend to increase state funding to relatively poor districts rather than limit local spending.\textsuperscript{123} The few states that have responded to court orders by requiring localities to share property tax revenues with other districts – which is a form of limiting local spending – have witnessed intense opposition and controversy. Even in typically placid Vermont, residents were outraged when the legislature required wealthy districts to share some of their revenues with their neighbors. Protestors went so far as to purchase a car being sold by a leading state legislator, park it in front of the statehouse, and offer those passing by the opportunity to sledgehammer it.\textsuperscript{124}

If comparability of resources is the overall goal of school finance litigation, existing school districts will serve as the benchmark. States will be loath to decrease the resources available in “good” school districts because doing so would be political suicide. As a result, states will be less able to game the system because the benchmark will not be fully in their control. Put differently, states will have a powerful incentive not to deprive good school districts of resources and thus will be unlikely to lower the bar in response to a school finance case.

A fair question to ask at this point is this: Won’t the same political incentives prevent states from tinkering with standards and testing as a way of reducing school funding? The answer is no. Standards-based adequacy cases would presumably result in an overall adequacy figure: the amount needed to meet the standards or pass the tests. Relatively affluent districts, however, care less about the overall adequacy figure than do relatively poor districts. Poor districts are the plaintiffs in school finance suits, and they are looking for the state to increase state funding. Wealthier districts are mostly looking for states not to cut their funding or to interfere with local spending. If watering down standards and testing lowers the overall adequacy figure and reduces the state’s funding obligation, wealthier districts are unlikely to be effected and therefore unlikely to object. Indeed, if anything, wealthier

\textsuperscript{122} For further discussion of these points and examples, see, e.g., Enrich, supra note xxx, at 157-59; Molly S. McCusic, The Law’s Role in the Distribution of Education: The Promise and Pitfalls of School Finance Litigation, in LAW AND SCHOOL REFORM 88, 108-15 (Jay P. Heubert, ed., 1999).

\textsuperscript{123} Ryan & Heise, supra note xxx, at 2061.

districts might like a low adequacy figure because it might mean that they pay less in state sales or income taxes.\textsuperscript{125}

An example from New Jersey helps illustrate all of these points. In 1996, the legislature formulated a new school funding formula, ostensibly in response to the ongoing school finance case in that state, \textit{Abbott v. New Jersey}. I say ostensibly because the formula did not accomplish what the court ordered, which was parity in spending between poor, urban districts and their wealthy, suburban counterparts. Instead, the state created a set of academic standards and then estimated the amount needed to meet those standards. The amount just happened to be well below what most suburban districts were already spending, and indeed below what most urban districts were spending.\textsuperscript{126}

To make the figure credible, the legislature considered a proposal that would have required suburban districts to inform their constituents of the “constitutionally sufficient” funding level and that any amount over that level – which would be funded by local voters – was deemed unnecessary to provide a constitutionally acceptable education. Suburban legislators, school officials, and concerned parents expressed outrage and alarm, contending that the proposal would effectively limit the amount that localities would spend on their schools. The proposal was quickly dropped.\textsuperscript{127} The overall adequacy figure, however, which was lower than what the court had ordered, was not dropped. And this is not surprising: middle-class and affluent suburbs did not object to a lower adequacy figure, because it did not really effect them. It effected the poor, urban districts who relied on the state for a large portion of their funding.

The key point of the New Jersey tale is simple and applicable across the country: trying to interfere with what good suburban school districts spend on their schools is not a winning strategy politically. School finance advocates ought to recognize and take advantage of this basic political reality, and relying on the principle of comparability is one way to do so.

\section*{C. Comparability and Institutional Competence}

Focusing on comparability of resources means focusing more on inputs rather than outputs. Today, the dominant trend in education policy is to focus on outputs; hence the ubiquity of standards and tests, which respectively set outcome goals and measure whether they have been achieved. Commentators suggest that the current approach represents a significant shift in perspective from the past, where inputs were the dominant concern.\textsuperscript{128} I tend to think this is an exaggeration; it is implausible to suggest that at some point in the past, school officials, teachers, and parents simply did not care about results. I also tend to think that the pendulum may have swung too far in the direction of outcomes. Indeed, the concern with


\textsuperscript{126} All of these points are discussed in the New Jersey Supreme Court’s opinion. See \textit{Abbott v. Burke}, 693 A.2d 417, 422-29 (N.J. 1997).

\textsuperscript{127} See \textit{id. at} 429.

\textsuperscript{128} See, e.g., Enrich, \textit{supra} note xxx.
outcomes has tended to narrow our conception of what we expect from schools insofar as relevant outputs are often reduced to scores on standardized tests, no more and no less.

But even if we accept that outputs ultimately matter more than inputs, it does not follow that courts are the appropriate institution to ensure decent outcomes. In truth, they cannot accomplish this task. Courts in school finance cases, even if concentrating on outcomes, can only control inputs. Whether those inputs are translated into good or bad results depends on other actors, most importantly principals, teachers, parents, and the students themselves. These actors, for the most part, cannot be managed by courts.

When courts set for themselves the goal of ensuring adequate outcomes, they generate unnecessary controversy. In addition to requiring the cooperation of actors beyond their control, this goal requires trying to determine the level of resources needed to achieve particular results. But no one knows how to do this. Social science and expert opinion cannot provide an answer to that question. Costing-out studies have an air of hard science about them, but in reality they represent no more than educated guesses about the relationship between certain inputs and certain outcomes. When the inputs required by courts do not translate into the hoped-for outcomes, courts and school funding litigation generally are criticized as futile and perhaps counterproductive.

Courts should set for themselves a more modest goal: ensuring the opportunity for an adequate education by focusing on resources that are relevant to that goal. They need not and should not be any more precise or ambitious than that. Courts should be explicit about their own institutional limitations and the end goal of school funding litigation, which should be to create the conditions for adequacy, not adequacy itself. Whether those resources are put to good use remains the task of other actors, and states can and should take on the responsibility to manage those actors. Courts should limit themselves to ensuring that the opportunity is there; the responsibility for translating opportunity to results should remain on the shoulders of school officials, principals, teachers, parents, and students.

Focusing on comparability of resources is a perfect way to accomplish this task, and it is itself a task within the competence of courts. Courts need not try to answer questions that have eluded social scientists regarding the relationship of inputs to outcomes. They can instead focus on what sort of resources are provided by schools that are generally considered good schools, and require states to ensure that other schools have similar resources. In so doing, they can ensure that every school has the ability to provide an adequate education and, therefore, that every student has the opportunity to obtain an adequate education.

129 See, e.g., Peterson & West, supra note xxx, at 8-10.
130 See supra TAN.
131 See id.
Focusing on comparability of resources has a potential side benefit as well, as it can counter the tendency to focus primarily on test outcomes as the measure of educational quality. The concern with outcomes leads inevitably to concern with test results because it is difficult to focus on outcomes that cannot be measured. The cost of testing, as well as the stress and often high stakes involved, further narrow the focus by limiting the subjects that are tested. In many elementary schools, for example, only reading and math are tested. These are obviously core subjects, but they are not the only subjects offered or the only subjects of importance. Similarly, in high schools, foreign languages, extracurricular activities, music, and art rarely find their way onto the menu of state tests or into the articulation of academic standards. But these offerings may be precisely what make some schools adequate, if not excellent, in the eyes of teachers, parents, and students. Focusing on resources rather than results allows these non-testable educational items to be considered in the calculation of the resources required to provide the opportunity for an adequate education.

D. Comparability and Horizontal Equity

Comparability of resources is not the same as equal funding per pupil. To begin with the obvious, comparable is not the same as equal; at most comparability will require rough equality. The more important and less obvious point is that comparability could be used in one of two general ways: to secure a general level of funding or to secure a package of more specific resources. School funding cases most typically focus on the former, and the fight concerns the level of funding needed to make the system equitable or adequate. Litigants and courts occasionally focus on more specific resources, however, and demand the state to lower class sizes, provide access to preschool, or to improve facilities.

It is in the latter approach that the real benefits of comparability might be found. Social scientists do not agree on the precise relationship between inputs and outputs, but it is not difficult to identify resources that are relevant to an adequate education: qualified teachers, a robust curriculum, adequate facilities, and extracurricular offerings. One might add a few things to this list, including middle-class peers, as I will get to below. But it should not be difficult to identify the relevant resources. Litigants and ultimately courts, after determining the relevant resources, could then compare the provision of these resources in the model schools or districts with their provision in the plaintiff schools or districts.

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133 See supra TAN.
There are two advantages to this approach. First, because the goal is simply to provide the opportunity for an adequate education, courts need not get bogged down in the precise relationship between specific inputs and certain outcomes. The question would be whether the resource at issue is simply not relevant to an adequate education; if it is not, it can be excluded. If it is relevant, it ought to be included in the calculation of the resources necessary to provide the conditions for adequacy.

The second advantage of this approach is that it provides a basis for focusing on poor students and poor schools. Consider qualified teachers. Suppose a court were to identify qualified teachers as a resource that ought to be included when determining the inputs necessary for an adequate education, which seems completely reasonable. Suppose further that the model schools or districts have teachers who are experienced, well-educated and trained, which seems completely plausible. The question would then become how to attract the same general quality of teachers to disadvantaged schools. The answer might very well be to pay them more to take on the challenge of teaching in a disadvantaged school.

The same is true with regard to providing additional programs for disadvantaged students. It is most likely that the model schools or districts will be predominantly middle-class. There is a good deal of social science evidence, dating back to the famous report by James Coleman in the 1960s, to suggest that the socioeconomic status of one’s family is highly related to academic achievement. Evidence also suggests that the socioeconomic status of peers exerts a significant, independent influence on academic achievement. In a sense, middle-class peers are an educational resource.

Courts can and should take this into account when considering the resources needed at schools of concentrated poverty. If “successful schools” are filled primarily with middle-class students, part of their success might have to do with the fact that their students come to school without the distractions and deficits facing poor students, such as a lack of health care, a less stable home life, and a lack of role well-educated role models. Courts

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138 Even Eric Hanushek, the social scientist well-known for his skepticism about the relationship between spending and achievement, agrees that good teachers do make a difference. See, e.g., Steven G. Rivkin, Eric A. Hanushek, & John F. Kain, Teachers, Schools, and Academic Achievement, 73 ECONOMETRICA 417 (March 2005).
140 JAMES S. COLEMAN, ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY (1966)
141 For further discussion of the data regarding both points – the importance of a student’s own socioeconomic status and that of his or her peers – see, e.g., Ryan, Schools, Race, and Money, supra note xxx at 286-307.
142 Cf. Abbott v. Burke, 693 A.2d 417, 433 (N.J. 1997) (“With concentrated poverty in the inner-city comes drug abuse, crime, hunger, poor health, illness, and unstable family situations. Violence also creates a significant barrier to quality education in city schools where often just getting children safely to school is considered an accomplishment.”)
should then focus, much like the New Jersey Supreme Court has, on programs that might help poor students overcome the disadvantages of poverty in order to provide them a realistic opportunity to succeed in school. 143

With regard to middle-class peers, some courts might be bold enough to consider ordering socioeconomic integration as a way of ensuring that this resource is fairly distributed. 144 Those not willing to pursue so bold a course, however, might still acknowledge that schools or districts filled primarily with poor students do not have the same resource – a predominantly middle-class school – as do the model schools or districts. The question would then become what else, aside from middle-class peers, can be provided to help poorer students overcome the double disadvantage of being from a poor family and being in a poor school. 145

This is not to predict that courts will likely follow one course or the other, or even to endorse one particular approach over another. The course that will and should be followed will depend on circumstances that will vary from court to court and from state to state. Instead, the discussion is meant to demonstrate the flexibility and the potential effectiveness of focusing on comparability of resources. The key point to keep in mind is that plaintiffs would not be asking for, and courts would not be ordering, any resources that are not already being provided – in one form or another – in some schools. By keeping comparability of resources as the guiding principle, both plaintiffs and courts can remain grounded in the real world of what states and localities are already providing to some students and some schools.

E. Why Only Two Cheers

So why only two cheers instead of three? This approach to school finance litigation tries to take advantage of the political incentives that state legislatures and local suburbanites have to make sure that middle-class suburban schools have sufficient resources. That is the good part. The bad part is that this approach does nothing to change the incentives themselves. Unless and until politically powerful constituents are in sufficient number throughout school districts within a particular state, the same dynamic that led to litigation in the first place will continue to operate. That is, legislatures will still have reason to protect some districts and shortchange others.

Notice, however, that this problem is not limited to this particular approach to school finance litigation but is instead endemic to school finance litigation, no matter how structured. In a way, school finance litigation itself,
and not one particular approach or another, deserves only two cheers. The simple truth about funding litigation is that it requires continued court involvement in order to succeed over the long run. The reason is that school funding needs change while the basic politics tend to remain the same. Thus, even if school districts secure more funding through a court order in year one, in year five their funding needs will have changed. The legislature, however, will have no more incentive in year five than they did in year one to increase funds. The most likely result is a return trip to court. In short, if the political dynamics do not change for some reason, school finance litigation will either never end or it will end when courts grow tired of superintending funding schemes.

School finance litigation, in other words, does not create a self-sustaining reform. Indeed, there are no examples of states where plaintiffs have won a school finance case and legislatures have responded adequately without any further court involvement. Even in Kentucky and Massachusetts, famous for how the responsiveness of their legislatures to school funding decisions in the early 1990s, there has been another round of litigation. Continued success therefore requires continued vigilance on the part of courts. In some states, like New Jersey, courts have remained adequate to the task, at least for now; in other states, like Ohio and Alabama, courts have bowed out of the process after multiple rounds of litigation. Thus, even if we grant that all schools with sufficient resources can provide an adequate education, it seems precarious over the long run to rely on school finance litigation alone to provide those resources.

Conclusion

The crude slogan that “green follows white,” in vogue during the crusade to desegregate schools in the early 1950s, expresses a fairly old political theory. The basic idea is that the best way to protect the interests of a minority is to link together the fate of political minorities and political

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146 On the responsiveness of Kentucky and Massachusetts, see Enrich, supra note xxx, at 175-77; on subsequent litigation in each state, see, e.g., Access, Education Litigation State by State, http://www.schoolfunding.info/news/litigation/7-3-07litupdate.php3 (describing “second generation” litigation in Kentucky); Hancock v. Commissioner, 822 N.E.2d 1136 (2005) (rejecting second generation suit).


150 See Ex Parte James, So.2d 213 (Ala. 2002) (unilaterally dismissing school finance litigation, after originally affirming a ruling for plaintiffs, on ground that issues were non-justiciable).

majorities. Applied to the context of desegregation, this theory predicted that black students would benefit from being in school with white students because whites dominated state and local legislatures and therefore controlled school funding. If black students were in the same school as white students, white dominated legislatures could not shortchange them without also shortchanging white students. The strategy, in essence, was to tie the fate of white and black students together.

The somewhat disappointing history of desegregation, coupled with controversy over exactly why blacks would benefit from being in school with whites, has tended to obscure the tying strategy that underlay desegregation. This is unfortunate because paying attention to legislative incentives remains crucial to the success of education reforms, whether generated by courts or by legislatures. School finance litigation that is linked to standards-based reform, for reasons described above, does not pay sufficient attention to the incentives and ability of legislatures to reduce their financial obligation by gaming the standards and tests. School finance litigation that is based on the principle of comparability, by contrast, at least tries to take advantage of existing political incentives to maintain amply funded, high-quality middle-class suburban schools. In a sense, it ties the fate of “poor” and unsuccessful schools and districts to their advantaged and successful peers.

But school finance litigation, regardless of the theory upon which it is based or the outcome, does little to alter the underlying incentives. Courts in school finance cases are often accused of unwarranted judicial activism, but from one perspective they are quite conservative: they never challenge school district lines. Yet school district lines often demarcate the boundary between jurisdictions with resources and political power and jurisdictions with neither, which often corresponds with the race and income of the residents. Leaving existing lines intact means that suburban schools remain separate from urban schools and poor schools remain separate from affluent ones. Indeed, if anything, school finance litigation – just like the standards and testing movement – reinforces existing lines by defining the problem in terms of resources rather than in terms of segregation on the basis of race or class. Defining the problem in this way, however, obscures the fact that resources and segregation are linked, insofar as separating the politically powerful from the politically weak enables the former to horde rather than share resources.

Litigants and courts in school funding cases would do well to focus on the principle of comparability because doing so takes advantage of existing political incentives, whereas standards-based adequacy is vulnerable to those incentives. That said, school districts separated by race and class are likely to have comparable resources only to the extent, and only for as long, as school finance courts are willing to stay involved. Self-sustaining change awaits the time when the separation itself is successfully addressed.

152 See, e.g., Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (“The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.”).