State Courts and Educational Finance

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A recent *New York Times* op-ed article touches on a number of themes relevant to the topic of educational equity. Written by Adam Cohen, it is entitled, "After Ten Long Years, Alabama is Back Where it Started,"[1] and it expresses a sense of futility about the ability of school finance lawsuits to change the way schools are funded and the level of resources available to them. Cohen addresses the theme of race and class-based denials of educational opportunity, which is at the forefront of our discussion.

The following is organized around three main points. First, I will present a quick overview of the trajectory from the school desegregation lawsuits to the school finance lawsuits or, as I term it in *On Equal Terms*, the progression from race to class in court interventions in the area of public education.[2] Then I will argue that these school finance suits do, in general, make a difference, and that whether or not the plaintiffs in these cases win does matter for the operation of schools. Finally, I will discuss the way racial and class inequities in public education are distinctive but also share a moral and normative linkage. They resonate in a similar key in spite of the profound differences between the two.

First, the trajectory. Beginning in the late 1960s and continuing into the early 1970s, the NAACP's campaign against school segregation moved into a remedial phase during which courts evaluated various desegregation remedies available to school districts. Litigation in those years also moved from the South to the North and West, into districts like Denver and Boston that had *de facto* rather than *de jure* segregation.[3] As those conflicts unfolded, many people began arguing that simply putting a black child next to a white child in a school would not, in and of itself, change the educational opportunities those children enjoyed. The argument became particularly obvious and acute when the result of the desegregation effort was to put white children from poor neighborhoods into schools with black children from poor neighborhoods, reflecting the class dimension of the desegregation effort. Children were being moved from one poorly funded school to another, and the logical question was whether that really addressed the problem that concerned Thurgood Marshall and the NAACP.

As a result, a number of litigators filed lawsuits aimed not at the composition of the schools but at the way the schools were funded. Their initial

claims, filed in federal courts, asserted that the disparate levels of funding among schools violated the equal protection clause of the U.S. Constitution ("No state shall…deny to any person within its jurisdiction the equal protection of the laws"). Cases were brought first in California (*Serrano v. Priest*) and then in Texas (*Rodriguez v. San Antonio*).[4] *Serrano* became the occasion for the first federal court decision striking down a system of school financing.

The decision in *Rodriguez* was appealed to the Supreme Court. In 1973, in spite of the enormous difference in the amount of money available to different school districts in Texas, the Court ruled that the state's system of funding schools did not violate the U.S. Constitution.[5]

The Court offered two primary reasons for its decision. Noting that there is no education clause in the U.S. Constitution, the Court declared that education is not a fundamental constitutional right. Therefore, Justice Lewis Powell wrote for the majority, the plaintiffs had no basis for their claim that there was a robust substantive right to education. This was a major shift from *Brown*. In that case, the Court called education one of the most important functions of state and local governments. It thereby implied that education was a robust right if not one that could be labeled fundamental in legal terms.[6]

The second reason, which had ramifications beyond the realm of school finance, was that poverty did not constitute a suspect classification for the purposes of the Fourteenth Amendment. When a classification such as race is labeled "suspect" by the Court, the burden falls on the government to prove that any law that categorizes by race is legitimate.[7] It is a high standard to meet and as a result, the government will usually lose. Where a classification is not suspect, the burden falls on the plaintiff to prove that the categorization embodied in a particular statute is unconstitutional. Plaintiffs lose more of those cases than not. Until *Rodriguez*, there had been some question about whether poverty was a suspect classification, but the *Rodriguez* court held that it was not. The result was that policies treating the poor and the non-poor differently were constitutional.

The litigators, however, were not ready to give up. Unable to rely on the federal constitution, they turned to state constitutional provisions in those states with a clear constitutional commitment to public education. They began basing their cases on recently enacted state equal rights amendments, or on older equality language in state constitutions, or on state constitutions' education provisions.[8]

The first decision in the new kind of case came down thirteen days after *Rodriguez*. Of course the lawsuit was not filed and decided within thirteen days. Litigation had begun earlier in New Jersey, the decision of the lower courts in the case had been appealed, and thirteen days after *Rodriguez* the

New Jersey Supreme Court ruled that the New Jersey finance system violated the New Jersey state constitution.[9] Between 1973 and 2001, there were thirty-six such cases decided by state supreme courts. That means over two-thirds of the states have ruled on the issue to date; the plaintiffs have won in about half of the cases.[10]

Race isn't central to those cases. Some of them, such as those from New York and Connecticut, have a racial component.[11] The cases are based primarily on other arguments, however, involving claims of inadequacy or inequitable distribution. It is the combination of high property values in some districts and heavy reliance on local property taxes in all districts that accounts for the inequities. Local control and the local property tax constitute the institutional foundation of public education, but they generate unequal distribution. The property-based U.S. public educational finance system is in effect designed for inequality, and yet the degree to which states comply successfully with these court decisions is measured by the extent to which they overcome the inequitable machinery. This leads to the second point for discussion, which is how far the states have moved towards compliance in those cases where plaintiffs have won.

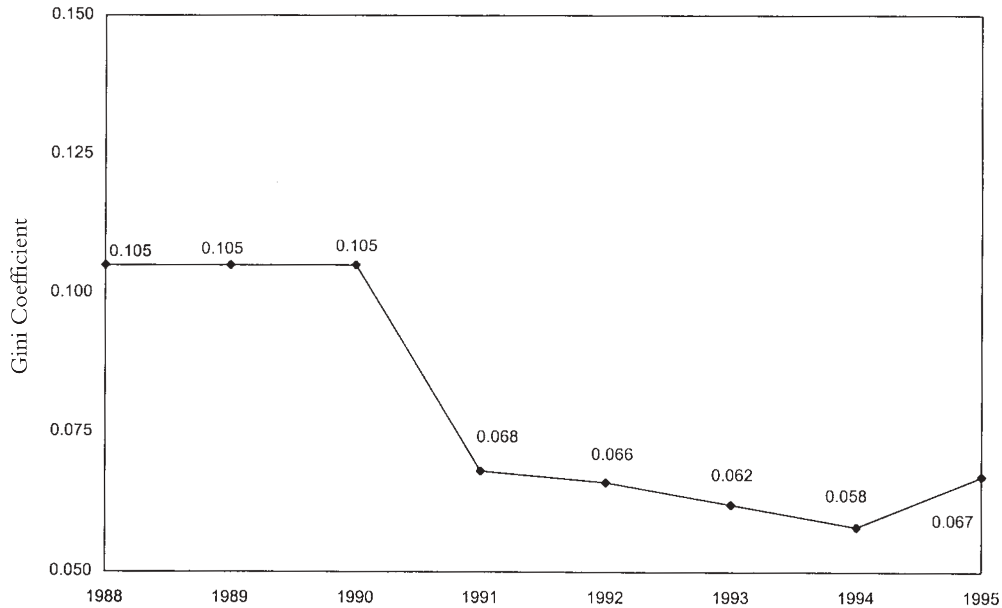
Winning really does matter. If we look at adequacy of funding and the goal of raising the floor that the state provides for education, we can see a modest consequence for winning. On average there has been a general trend in the increase of public education spending in the United States in recent years, so that the statistics reflect a rise in the number of dollars spent on education in *all* states. Where plaintiffs have won their cases, however, there has been about a 14.2% increase in the median funding level. Where they have lost, the increase has been, roughly, only 12%. The real result of these cases, however, is not in their adequacy component but in their equity component. That is shown by the following chart.

Table 1 illustrates the changes in the equity of school funding in Kentucky over time. The Gini coefficient measures the relative dispersion of funding among students. A "1" is perfectly unequal, and means in effect that one unit has captured all the funding; zero reflects perfectly equal funding. If we track the Gini coefficient over time in the states where cases have been won, we can see the extent to which the states now have more equal distribution of resources.

Notice the direction of the line in Table 1. It begins at about 0.100 and then within a few short years (lower right of table) it winds up at .066, which is over a 30% reduction in the level of inequality.

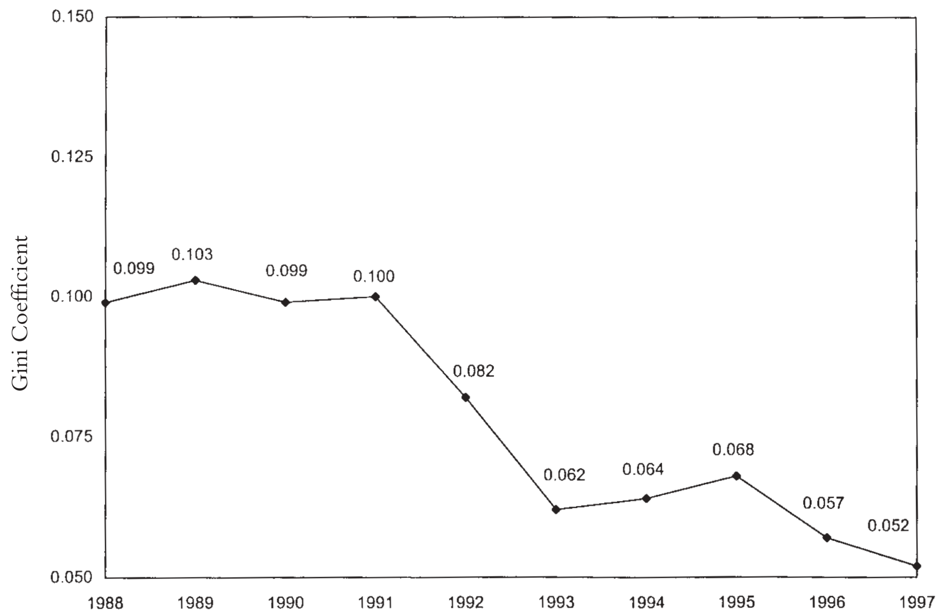
Table 2 shows the changes in the equity of New Jersey's schools in the wake of the 1990 state supreme court decision striking down the existing funding

Table 1



K12 districts only.
All values weighted for district enrollment and calculated using constant 1995 dollars
Data source: Kentucky Department of Education, March 1994 and December 1996

Table 2



K12 and hypothetical K12 districts constructed from regional high schools and K8 and K6 districts.
All values weighted for district enrollment and calculated using 1997 dollars
Data source: New Jersey Department of Education, January 1994 and March 1997

scheme. Note that the 1990 decision is followed in 1991 by a legislative reform bill, resulting in a sudden and rapid drop-off in the level of inequality.

While it is true that the median level of educational funding seems only modestly affected by court school finance decisions, the equality of the distribution of educational dollars can be substantially altered by courts. This is especially true when courts follow up their initial decisions with further rulings on the constitutionality of legislative funding reforms. The subsequent decisions typically heighten pressure on state legislatures and induce further compliance. While the particulars of the policy stories in Kentucky and New Jersey are vastly different, and they are indeed different in almost every case, there are striking similarities in those states where the plaintiffs have been successful.

Losing has the opposite effect. There has been an increase of nine to ten percent in the average level of inequality in states where the plaintiffs lost. But it is not merely the percentage of change altogether or the percentage of the change in the distribution that is at stake; the difference in absolute level of funding is enormous. Public education is a huge industry in the United States. If we were to take the money that states and localities spend on education and put that figure into the federal government budget, it would constitute the budget's largest item, amounting to roughly 22% of the total. Measured by Gross Domestic Product, the amount spent by states and localities (and, to a modest extent, the federal government) on public elementary and secondary education adds up to about 4.4% of this nation's total economic activity. If there is just a marginal shift of 10-15% in the distribution of that money, then vast sums have been moved around to localities or from localities.

Here the politics get particularly sticky. Moving a lot of money around is hard for state legislators, because school districts overlap and intersect with state legislative electoral districts. When a state department of education produces an estimate of changes in school funding, every state legislator looks at his or her district and asks, "How did I do?" As New Jersey Assembly member John Rocco, chair of the Assembly's education committee, put it, any reform "has to go to the legislators and the first thing a legislator does is to look at his district, to say 'Am I winning or am I losing?'"[12] It takes some significant, highly politicized adjustment of these formulas to generate a winning coalition of legislators behind major funding changes.

Part of the problem in coalition-building is that the beneficiaries usually are clearly identifiable. The goal is to funnel more money to poor districts. In general, there are only two ways to direct additional funds to poor districts, and both are politically difficult for state legislators. The first is to raise taxes, so as to generate new money for the poor districts. The second is to take

money away from other, generally affluent districts and transfer it to districts with minority urban poor populations. Neither of these is a recipe for reelection, and there is intense opposition to taking money from affluent districts and spending it in inner cities or the kind of needy rural areas that exist in states such as Alabama. Whether the poorer districts are urban or rural, they do not contain the suburban soccer moms legislators want to befriend.

Jim Florio lost the New Jersey governorship, and the Democrats in the New Jersey state legislature were swept out, precisely because Florio's plan to change the distribution of money significantly in New Jersey made him politically untenable. This is the kind of conflict that has to be sorted out by state legislators. This is where the color of money becomes apparent and the salience of race to school finance litigation becomes most obvious.

Because the relationship between race and money cannot always be expressed directly, however, it is frequently couched as complaints about inefficiencies and waste in urban school systems. These complaints are often quite justified; there are districts that are doing miserable jobs of educating. But those districts are the vehicles in place and the question is what we ought to do to reform those vehicles. Should we not fund them, as a punishment for past failures, or should we restructure and impose change as a condition for new money? The more frequent, politically easy response is simply to complain about waste and abuse.

In the 1970s, for example, Connecticut was forced to provide additional educational funds to Hartford. "The majority party in [the Senate] today," state senator Richard Bozzuto declaimed, "is about to commit a travesty on every taxpaying citizen in the state of Connecticut…Today, you are legislating a tax that is going to cost every citizen in this state more money and you're funneling it into a cesspool, a political cesspool that spends and spends because they know that they're not responsible."[13]

A former state senator, whom I interviewed some twelve years after Bozzuto made that comment, immediately interpreted it as describing African Americans in Hartford as living in a cesspool. Talk of corruption, of taint, of inefficiency, of all the racial stereotypes that had appeared in previous school desegregation lawsuits emerged again when the talk turned to money. There is always a racial dimension to the class aspect of school finance reform in the United States.

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That brings us back to the *New York Times* op-ed referred to earlier. In order for the Alabama school finance lawsuit to move forward, a court had to strike down Amendment 111 to the Alabama Constitution. What was Amendment 111? Enacted in reaction to *Brown v. Board of Education*, Amendment 111 said in effect that public education was not a fundamen-

tal right in the state of Alabama. That meant the state could close schools rather than integrate them. Amendment 111 was struck down as unconstitutional, but there have since been efforts by some Alabamans to reinstate it. This, of course, would enable the state to distribute monies unequally or inadequately without violating its constitution.

The connection between the desegregation cases and the school finance cases brings us to a third point – one about moral symbolism. In some respects, there is a moral or normative symmetry between the school finance claims and the school desegregation claims, even though they revolve around different policy issues with different dynamics. Under Jim Crow, segregated schools had crippling effects. There lies the parallel with school financing disparities, because in both cases, the result is a system that damages children.

NOTES

1. Adam Cohen, "After 10 Long Years, Alabama Is Back Where It Started," *New York Times*, March 11, 2002.

2. *On Equal Terms: The Constitutional Politics of Educational Opportunity* (Princeton University Press, 2001).

3. *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973); *Morgan v. Hennigan*, 379 F. Supp. 410 (1974).

4. *Serrano v. Priest*, 5 Cal.3d 584, 487 P.2d 1241 (1971); *Rodriguez v. San Antonio Independent School District*, 337 F.Supp. 280 (1971).

5. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

6. "Today, education is perhaps the most important function of state and local governments…It is the very foundation of good citizenship." *Brown v. Board of Education*, 347 U.S. 483 (1954), at 493.

7. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967). The court's first use of the suspect classification doctrine for race-based government action came in *Korematsu v. United States*, 323 U.S. 214 (1944), at 216, but the doctrine was not fully developed until after *Brown*.

8. Montana's constitution, for example, declares, "Equality of educational opportunity is guaranteed to each person of the state." Art. 10, sec. 256, para. 1. There is a full compendium of state quality clauses in Robert F. Williams, "Equality Guarantees in State Constitutional Law," 63 *Texas Law Review* 1195 (1985).

9. *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973). Art. 8, sec. 4, para. 1 of the New Jersey constitution says, "The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.'

10. The significant state supreme court rulings that have either struck down the existing school finance system or upheld it are listed in the Appendix.

11. New York: *Campaign for Fiscal Equity v. New York,* 187 Misc. 2d. 1; 719 N.Y.S. 2d. 475 (2001). Connecticut: *Sheff v. O'Neill,* 238 Conn. 1 (1996).

12. Associated Press, "Sticking points remain in school funding talks," *The Record* (Bergen, New Jersey), October 3, 1996.

13. Quoted in Reed, *On Equal Terms*, p. 165.