Chapter 1

Introduction

The Fight over Funding

The Kansas Constitution has a provision providing for a free public education. Article 6, section 1 of the constitution states, "The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law." Article 6, section 6 spells out the financing:

> (a) The legislature may levy a permanent tax for the use and benefit of state institutions of higher education and apportion among and appropriate the same to the several institutions, which levy, apportionment and appropriation shall continue until changed by statute. Further appropriation and other provision for finance of institutions of higher education may be made by the legislature.
>
> (b) The legislature shall make *suitable* provision for finance of the educational interests of the state. *No tuition shall be charged* for attendance at any public school to pupils required by law to attend such school, except such fees or supplemental charges as may be authorized by law. The legislature may authorize the state board of regents to establish tuition, fees and charges at institutions under its supervision.

In 2011, Sam Brownback became governor of Kansas. Along with allies in the Kansas state legislature, Brownback pushed through a series of significant

tax cuts, created as part of a "real, live experiment" in governance (Berman 2015), designed to stimulate the state economy and result in an expansion of state revenue. Instead, the state has seen a significant decline in revenue and a downgrade in the state's credit rating (Hanna 2016). The decline in revenue has led to severe cutbacks in state spending, including education. Specifically, Brownback and the Republican-dominated legislature changed the way funds were allocated to public schools. Previously, money had been allocated on a per pupil basis to ensure adequate financing for each district. This time Brownback and the legislature passed a block grant provision providing a set amount of funds to each district, leaving in doubt whether all school districts were to receive "suitable provision" for financing public education.

When subsequent litigation reached the state supreme court, the court, relying on a state court precedent, held that the block grant provision did not provide enough financing for each district's education requirements. The court ordered the state to increase education funding and distribute its money without creating major funding differences between poor and rich districts.

While the Kansas high court ordered the legislature to remedy inequities in the school finance system, it refrained from opining on the adequacy (or suitability) issue, sending the case back to the lower courts. The following May, the legislature added $129 million into the finance system targeted at property-poor districts, thus fulfilling its court-ordered equity obligation. However, at the end of the year in 2014, a lower court three-judge panel ruled that the finance system plan was still inadequate, potentially forcing the governor to roll back his signature tax cuts in order to increase school spending.

In response, Brownback and the more conservative members of the legislature enacted retaliatory measures designed to limit the court's authority, including a measure to increase the definition of an impeachable offense to include "attempting to subvert fundamental laws and introduce arbitrary power" and "attempting to usurp the power of the legislative or executive branch of government" (Lefler 2016).

In addition, the legislature curtailed the centralized authority of the supreme court over state court administration. The measure allows local courts to opt out of state supreme court control over budget preparation and submission and takes away the supreme court's authority to pick chief district court judges.

In June of 2016, the legislature finally agreed to a compromise acceptable to plaintiffs and defendants in the court case, pending a definitive ruling by the state supreme court. The bill reinstates an earlier formula for distributing equalization aid, and it adds $38 million to that formula to fund

education and avoid shortages. The state supreme court has yet to rule on the constitutionality of the provisions designed to weaken court authority.

Kansas is far from the only state to experience tension between the legislative, executive, and judicial branches of government. In 2003, for example, in Nevada, the legislature was required by the Nevada Constitution to approve a balanced budget, including funding for education, by a certain date. A recent amendment to the constitution also mandated a two-thirds majority of the house to pass a bill that would generate public revenue in any form, such as taxes.

The legislature failed to provide funding for education, because it was unable to get the two-thirds majority. Because of this, teachers had not been hired, programs were cut, and schools were not able to plan for the upcoming school year. Due to the impending financial crises, the governor therefore asked the court to compel the legislature to fulfill its constitutional duty to pass a balanced budget, including appropriations for education.

Subsequently, in *Guinn v. Angle* (2003)[1] the Nevada Supreme Court held that the two-thirds vote requirement was a procedural matter, which clashed with a substantive right, funding for education. The court held that the legislature had failed to fulfill the constitutional mandate because of conflict between provisions within the constitution and therefore found that it was the judiciary's responsibility to intervene. The court ruled that education is a basic constitutional right in Nevada, and that, "when a procedural requirement that is general in nature prevents funding for a basic, substantive right, the procedure must yield." The court ordered the legislature to pass a budget.

The decision proved controversial. Though the legislature adhered to the court's decision and approved education funding, the decision prompted outrage to the point that state assembly member Sharon Angle mounted an effort to unseat the state supreme court justices for what she and other members of the legislature viewed as an unconstitutional usurpation of power. One member of the legislature who voted with the majority was up for reelection and subsequently was defeated. With the retirement of three other justices who voted to defy the legislature, the majority coalition for the opinion did not exist any longer. Eventually, *Guinn* was overruled in 2006 in *Nevadans for Nevada v. Beers* (2006).[2] Here the court concluded that the Nevada Constitution should be read as a whole, to give effect to and harmonize each provision.

These cases represent one of the fundamental policy issues in American society, pitting the importance of education against the cost of funding

this core American value. This debate repeats itself over a variety of critical domestic issues, whether it concerns entitlement spending or the cost of national defense or even funding for parks, library, and local services. Public opinion surveys consistently show strong support for Social Security, Medicare, national defense, and local services. However, just as often the public rejects measures designed to raise revenue for these ventures.

The debate over education funding provides insight into how the political system, particularly the courts, reacts to and deals with public policy when confronted with a core program that needs a method of taxpayer-funded revenue. Through the prism of education finance, scholars and those interested in both this specific issue and other great policy debates can examine the unique aspects of the American political system, and how and why courts often end up determining and resolving these debates. In many ways, education finance pivots around the fundamental parameters of American political life. Education finance deals with important issues of tax and spending, federalism, and the interplay of the separated powers in both the state and federal systems. Education financing has involved governors, legislatures, and, of course, courts on both state and federal levels. It has at times pitted the courts against these other institutions. Education funding has involved the federal constitution and, most importantly for our purposes, the state constitutions as well as legislation and court-mandated remedies, equal protection and the guarantee of a free public education, the meaning of specific statutory and constitutional language, and ultimately who pays for this important value and how we should pay for this.

A Brief History of Public Education

Without a doubt, education plays a key role in American society and is highly valued. James Madison famously noted, "A well instructed people alone can permanently be a free people" (1810). Thomas Jefferson wrote that society needs to "educate and inform the whole mass of the people . . . they are the only sure reliance for the preservation of our liberty." More recently, former president George H. W. Bush said, "Think about every problem, every challenge, we face. The solution to each starts with education" (1991).

Because of its importance, free publicly financed education has been paramount to the attainment of so many goals promulgated in American public discourse. Earl Warren, writing in *Brown v. Board of Education* (1954), eloquently wrote:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[3]

Brown v. Board of Education represented a significant milestone in the understanding of the importance of education in modern society. While concerned with whether school desegregation violated the Equal Protection Clause of the United States Constitution, the opinion went much further than merely declaring segregation in public education unconstitutional. Chief Justice Warren, in the unanimous opinion, noted the key role public education plays in American life. Furthermore, the court argued that it could not turn the clock back to 1868, the year of the adoption of the Fourteenth Amendment, nor even to 1896, the year the Supreme Court issued its decision in *Plessy v. Ferguson*[4] upholding state-mandated segregation, when assessing the effects of segregation. Instead, to Warren and his brethren it was only relevant to consider public education in light of its present place in American life.

While education might be increasingly important in modern society, as the Madison, Jefferson, and Bush quotes demonstrate, the United States has long recognized the importance of free public education and, over time, the importance of financing public education. The importance even predates the existence of the United States. Massachusetts opened taxpayer-financed schools in the seventeenth century and by the time of the American Revolution many other colonies had at least partially funded public schools. Political elites began to support public-funded education. For example, John Adams in 1785 wrote, "The whole people must take upon themselves the education of the whole people and be willing to bear the expenses of it. There should not be a district of one mile square, without a school in it . . . maintained at the public expense of the people themselves" (1785, 540).

In 1790, the Commonwealth of Pennsylvania established free public schools for the poor. The first public high school started in Boston in 1821,

and by 1827 Massachusetts made all public schools free of charge. By the 1840s, according to census data, about 55 percent of 3.69 million children of school age attended local primary schools (Tucker 1843, chap. 6). To be sure, the education of African Americans was still sorely lacking. Slaves received almost no formal instruction, and after 1830 Southern states passed laws that prohibited the teaching of slaves. Free blacks, even in the North, were in segregated schools, and Southern schools remained segregated by law until *Brown v. Board of Education*. However, for white school-age children, even girls, things were different. As one scholar notes, "by the middle of the nineteenth century U.S. schooling rates were exceptionally high, schooling was widespread among the free population, and literacy was virtually universal, again among the free population" (Goldin 1999).

Educational innovation soon followed initial public schooling. With Massachusetts and famed educator Horace Mann leading the way, states adopted age-appropriate grading and age-appropriate classes. The day of the one-room schoolhouse with multiple grades in the same room was passing. Other changes included professionalized teaching, standardized curricula, and eventually mandated compulsory attendance throughout the nineteenth and early twentieth centuries.

By the 1870s, in recognition of the importance of free schooling, every state enacted a provision in their respective constitutions that guaranteed some form of free public education. However, guaranteeing free public education, what constitutes an adequate free public education, and then paying for it are distinct and separate issues. The sporadic movement toward free public education over two centuries also meant a lack of any coherent or universally accepted funding mechanism.

Tellingly, public schools were under local control with little or no state control or federal oversight or input. In addition to local control, the schools were generally locally financed. In fact, "federal aid was basically non-existent until 1917" (Benson and O'Halloran 1987, 504). Initially, localities funded schooling through a variety of measures, including taxes on whiskey. However, as free public schooling gained acceptance, particularly in northern states, the requirement of payment by parents who could afford to pay for schooling was abolished. This occurred first in the northern states, then in the western states, and finally the southern states.

The progressive movement of the latter part of the nineteenth century led to adoption of local taxation that met the basic cost of teacher salaries and school supplies. This meant the implementation of a taxation system on locally owned private property for the benefit of local schools as the

dominant method to finance public schools. From the onset of universal free public education throughout the United States in the latter part of the nineteenth century and through the first three decades of the twentieth, property taxes on homes and commercial property were the primary revenue source for school funding. Over a forty-year period from 1890 through 1930 local funding of public education accounted for more than 80 percent of total public school revenue. State taxes funded the remainder.

The local or township model of school organization, begun in New England, became the model for public school organization. Other states followed this model initially centered on towns and cities. Those states with even more rural, smaller populations created even smaller jurisdictions. By the early 1930s, when the Office of Education first counted school districts, there were almost 130,000 separate school districts in the United States. While some had tax rates set by larger governing units, such as counties or townships, most were fiscally independent. Thus, even by the third decade of the twentieth century, the United States had an enormous number of school districts with independent fiscal decision-making powers.

However, the onset of the Great Depression in 1929 and 1930 imperiled local financing. The depression led to high unemployment and high foreclosure rates on homes, resulting in drops in property values and a subsequent significant decline in local revenue. This resulted in the first shift toward greater state financing of education. The post–World War II baby boom put additional stress on local financing and led to another jump in state aid. Finally, in the 1970s, taxpayer revolts against property taxes and the movement toward court-ordered finance reform led to the next increase in state aid to local schools. By the early 1980s, state support of schools independent of local financing amounted to close to 50 percent of revenue while the federal share was 6 percent (Benson and O'Halloran 1987, 506). This financing pattern continues through the present with almost one-half (46%) of primary and secondary public education funding throughout the United States coming from local funding (Snyder and Dillow 2011, 67), and the balance from state and federal sources.

The Funding Disparity and the Turn to Court-Ordered Solutions

When you rely on local funding for close to one-half of all public education funding, the result is that in the United States education spending is

not equal. There is often significant disparity in the resources available and money spent for schools within any particular state as well as across states (Evans, Murray, and Schwab 1997; Wood and Theobald 2003). Since public education is financed chiefly through local revenue, and most of that revenue derives from taxes on commercial and residential property, this means that the funding that is available throughout most states varies considerably from state to state and from district to district within each state. There is significant expenditure variation between states and districts and not all of it can be attributed to cost differentials between the states. For example, in the school year 1993–1994, the state of New Jersey spent over $9,400 per pupil, while Utah spent one-third of that amount. New Jersey, on average, paid $17,000 in salary per teacher more than Utah paid.

Significant variation exists not only between states but also within states. When revenue is dependent to a large extent on property taxes that means revenue depends on property values. Areas with better, more expensive homes and a greater number of taxable businesses will have a larger property tax base to spend on education. A greater tax base means more spending on public schools, and more spending on public schools usually translates to better opportunities and better teachers at those schools. Figure 1.1 shows a map of the United States with spending per pupil by school district and demonstrates the disparity. The average spending per pupil in the United States is currently close to $12,000 per pupil. However, as the map shows, spending varies considerably.

The figure shows variation in spending from approximately one-third below the mean to one-third above. Certain states, such as New York and Connecticut, spend considerably above the national average. Other states, such as Florida, spend well below the national average. However, the figure clearly shows the disparity in funding within most states. In Texas, for example, most districts in the western part of the state spend above the mean, while the eastern part of the state lags far behind.

This emphasis on local funding sources and the resultant inequality of resources creates the classical problem of circularity. The single biggest determinant of housing values in a particular area is the quality of public schools in the area (Kane et al. 2006). The better the school, the higher the property values, and the higher the property values, the greater the property tax base and thus the larger the amount of money to spend on public education. This in turn creates better schools, which result in corresponding higher property values.

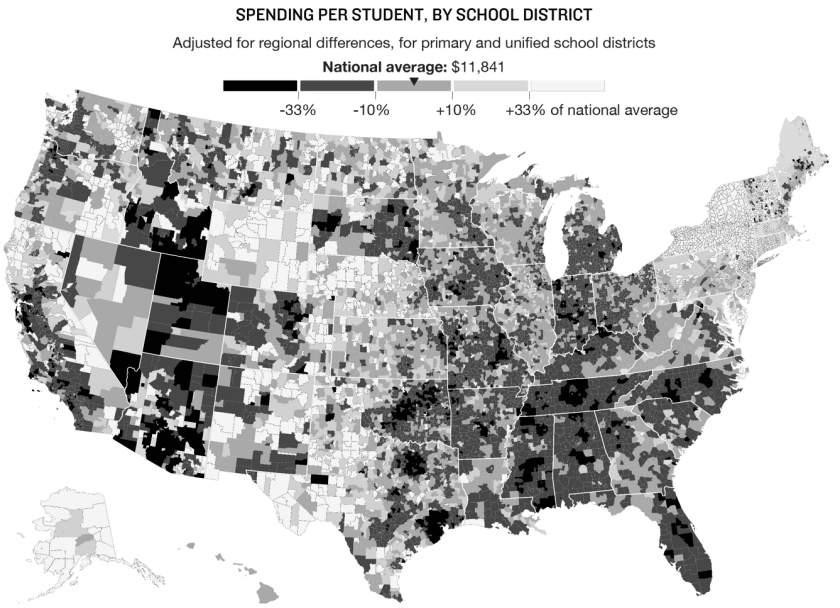


Figure 1.1. Spending per Pupil by School District US. (*Source:* Alyson Hurt and Katie Park/NPR. Data available through *Education Week*, U.S. Census Bureau. https://www.npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem)

Even with the court's decision in *Brown v. Board of Education* and the subsequent commitment of the national government to educational equality, funding disparities made the goal of equal education seem distant and unobtainable for those students who attended schools in poor districts. These funding disparities created a form of unequal educational opportunity that *Brown* and its progeny could not solve. In an attempt to remedy this imbalance, those who have been unable to obtain legislative redress often turn to the courts.

There were some initial attempts at the state level to end the disparity. For example, in 1973 the New Jersey Supreme Court declared in *Robinson v. Cahill*[5] that New Jersey's school funding statute was unconstitutional because it violated the "thorough and efficient education" requirement of the state constitution. Similarly, in what is generally regarded as the first of the modern-era education finance litigation decisions, the Supreme Court of California, in 1971, ruled education a fundamental constitutional right in

Serrano v. Priest.[6] The California court noted the disparity in school funding between two school districts—the less affluent Baldwin Park Unified School District, which spent less than $600 per student, and the wealthy Beverly Hills Unified School District, which spent more than twice as much, over $1,200 per student. The justices noted that this more than 1 to 2 ratio in spending reflected the much greater 1 to 13 ratio of per student assessed property values in these two school districts. The justices noted that, even more disturbingly, Baldwin Park had a school property tax rate that was more than twice the rate of Beverly Hills. However, these school taxes produced less than half the amount of school expenditures. The California Supreme Court thus found the system of education finance in California violated the equal protection clause of the Fourteenth Amendment of the United States Constitution. This holding rested on the finding that district wealth violated the equal protection clause. In 1976, in *Serrano v. Priest* (*Serrano II*),[7] the same court affirmed the lower court's finding that the wealth-related disparities in per-pupil spending generated by the state's education finance system violated the equal protection clause of the California constitution.

The seminal early case in New Jersey relied on the state, not the federal, constitution. The New Jersey Constitution, article 8, section 4, paragraph 1, states, "The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools." In *Robinson*, plaintiffs challenged the New Jersey school finance system under the state equal protection clause, arguing that the "thorough and efficient" clause made education a fundamental interest and, directly under the education clause, arguing that the state failed to meet the guarantee of a *thorough and efficient* education in property-poor districts. The trial court found the New Jersey system unconstitutional under both the education and equal protection clauses of the state constitution. In a unanimous ruling affirming the decision, the Supreme Court of New Jersey relied on the education provision of the state constitution and found that plaintiffs had been denied "a thorough and efficient education." However, the court refused to find a denial of equal protection, a finding that would be buttressed in subsequent state cases. One scholar notes, "The court was concerned that basing its decision on the equal protection clause might implicate all municipal services. Unequal tax bases also result in some municipalities being able to provide better police and fire protection. If variations in local expenditures for education deny equal protection, then variations in local expenditures for other essential services may also deny equal protection to those living in poor municipalities" (Martell 1977, 149).

While these cases were at the state level, by far, the most potent attack on local funding of education occurred at the federal level premised on the use of the equal protection clause of the Fourteenth Amendment to the United States Constitution. This was the case of *San Antonio Independent School District v. Rodriguez* (1973). In an attempt to remedy funding disparities, a lawsuit was brought in the federal district court for the Western District of Texas in 1968 by members of the Edgewood Concerned Parent Association. The Edgewood school district was part of the greater San Antonio, Texas, school system. The parents represented their children and similarly situated students. In the initial complaint, the parents sued five other wealthier school districts, including Alamo Heights. Eventually the school districts were dropped from the case and the state of Texas became the sole defendant.

The parents argued that the "Texas method of school financing violated the equal protection clause of the Fourteenth Amendment to the U.S. Constitution." The lawsuit alleged, following the dictates of *Brown*, that education was a fundamental right and that wealth-based discrimination in the provision of education created in the poor, or those of lesser wealth, a constitutionally suspect class.

To support their argument, the plaintiffs offered data demonstrating the disparity between the Edgewood and Alamo Heights school districts. The wealthy Alamo Heights district spent on average $594.00 per pupil, while the poorer Edgewood district spent $356.00 per pupil. The greatest disparity came from local property tax revenue. Local revenue paid for $26.00 per pupil in Edgewood. This compared to $333.00 spent per pupil in Alamo Heights. Although Edgewood received more federal aid than Alamo Heights, this greater amount of federal aid could not compensate for the more than ten times disparity in available local funding. This led to enormous differences in resources and spending. For example, in the 1968–1969 school year:

> all of the Alamo Heights teachers had college degrees, while 80% of the Edgewood teachers had them; 37.17% of the Alamo Heights teachers had advanced degrees, while 14.98% of the Edgewood teachers had them; 11% of the Alamo Heights teachers depended on emergency teaching permits, while 47% of the Edgewood teachers depended on them; Alamo Heights' maximum teaching salary was 25% greater than Edgewood's maximum salary; Alamo Heights' teacher-student ratio was 1 to 20.5, while Edgewood's was 1 to 26.5; and Alamo Heights

> provided one counselor for every 645 students, while Edgewood provided one counselor for every 3,098 students. (Sutton 2008, 1967 citing brief of petitioner)

These disparities existed despite the fact that Edgewood property owners actually paid higher property tax rates. This paralleled the situation in California between the two disparate school districts. The property values in Edgewood were simply insufficient to cover the inequality with the wealthier district. After the plaintiffs won in a decision issued by a three-judge federal district court panel, the state appealed to the Supreme Court. The court did not hear arguments in the case until the fall of 1972 and the decision was not released until 1973.

The state of Texas was represented by Charles Alan Wright, a University of Texas law professor. Wright, who would later represent President Richard Nixon during the Watergate investigation, was a famed scholar of constitutional law and civil procedure and had extensive experience arguing before the Supreme Court. For Wright, the argument was simple: while acknowledging the disparity and admitting that the state should do a better job, there was simply no federal constitutional right to equal education. The equal protection clause did not apply to wealth and income, and thus wealth and income did not constitute any sort of protected class demanding greater Supreme Court scrutiny.

The US Supreme Court, in a narrow 5–4 decision and with the majority opinion authored by Justice Powell, agreed with the state of Texas and ruled that unequal financing for education did not violate the equal protection clause of the United States Constitution. Powell had at one time served on the Richmond Board of Education in Virginia. The opinion, while citing (and praising) *Brown v. Board of Education* and affirming the importance of education, ruled that education is not a fundamental right guaranteed in the Constitution. The opinion offered two rationales for the decision. First, according to Powell, "education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation" (*Rodriguez*, 35). Because education is not a fundamental right, the court cannot subject the financing plan to strict scrutiny. Therefore, the state of Texas was free to enact a financing plan that rationally advanced its interests, even if that resulted in inequality among school districts.

In addition, the opinion failed to find "wealth" (or being poor) a protected class that would call for equal protection. Powell wrote:

> appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level. Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts. . . . Second, neither appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages . . . (*Rodriguez*, 23–24)

Given this, the court did not find any federal constitutional violation in unequal financing schemes. That is, "the Constitution did not prohibit the government from providing different services to children in poor school districts than it did to children in wealthy school districts" (Van Slyke et al. 1994, 2). Politically, the Supreme Court outcome resulted from the retirement of several members of the Warren court and the election of Richard Nixon, who promised to appoint "strict constructionist" judges (Whittington 2003). The 1973 Burger court consisted of four justices appointed by President Richard Nixon: Chief Justice Warren Burger and Associate Justices Lewis Powell, Harry Blackmun, and William Rehnquist. They replaced Chief Justice Earl Warren and Associate Justices Black, Fortas, and Harlan, all of whom had served under Earl Warren as members of the Warren court. The Segal Cover scores,[8] which measure each justice's ideology through content analysis of newspaper editorials at the time of their confirmation (and run from 0 [most conservative] to 1 [most liberal]), for the four retired and the four replacement justices are represented in figure 1.2.

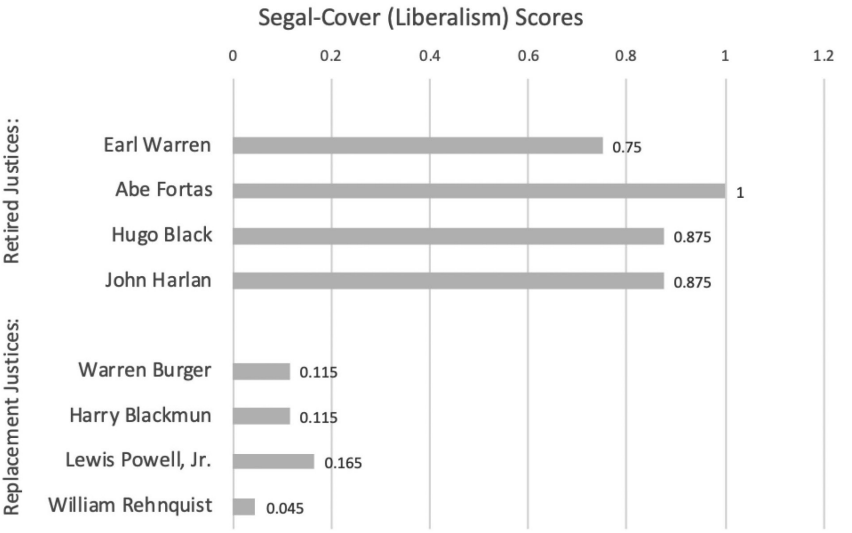


Figure 1.2. Ideology Scores for Retired Warren Court Justices and Replacement Burger Court Justices. (*Source:* http://www.stonybrook.edu/polsci/jsegal/qualtable.pdf)

The average ideology score for the four retired justices is .88, extremely liberal. The average ideology score for the four replacement justices is .11, very conservative. That is an average drop of more than .75, moving from liberal to conservative. Thus, much more conservative justices replaced some of the most liberal justices in the history of the United States Supreme Court and also replaced some of the most important members of the Warren court. It is true that justice ideology is not constant (Epstein et al. 1998) and that Harry Blackmun, whose voting record so matched his friend and fellow Minnesotan Warren Burger that the two were referred to as the "Minnesota Twins" (Yarbrough 2008, chap. 6), did significantly deviate from his early conservative voting record the longer he sat on the bench (Greenhouse 2005). However, at the time of the *Rodriguez* decision, Blackmun still had a more conservative voting record, matching that of his sponsor, Warren Burger.

These four relatively new justices, along with Justice Potter Stewart, a Republican Eisenhower appointee, constituted the Supreme Court majority in *Rodriguez* and voted in favor of the state of Texas, rejecting the argument of the parents; Justice Stewart also filed a concurring opinion. Four justices,

William O. Douglas, William Brennan, Thurgood Marshall, and Byron White, supported the school district.

Where *Brown* gave school districts and district courts the power to implement tools aimed at desegregation, *Rodriguez* denied the federal government means to address the underlying structure that creates and perpetuates segregation in schools. After decades of desegregation in the aftermath of *Brown* in the 1960s and 1970s, the 1990s and 2000s were marked by resegregation (Unah and Blalock 2019; Ogletree 2013). Reardon et al. (2012) find that the effects of "court-ordered desegregation plans . . . fade over time, at least in the South, where most of the districts under court order are located. Following the release from court order, white/black desegregation levels begin to rise within a few years of release and continue to grow steadily for at least 10 years" (899). As long as de facto residential and social segregation exists, the success of desegregation through busing and other tools sanctioned after *Brown* will be temporary.

At the same time, residential segregation itself is tied to the limitations that have been and continue to be placed on the tools courts have at their disposal to combat inequality and segregation. As Unah and Blalock write: "Anti-integration leaders discovered back in 1970 that if they could remove overt discussion of race from their rhetoric and label themselves as advocates of 'local control' and 'antibusing,' they could shift the narrative away from race. The Supreme Court has followed a similar tact, advocating that school districts find 'race-neutral' alternatives to promote diversity in schools" (2019, 4).

Federal involvement in equality as it regards education—whether in terms of race and ethnicity or in terms of funding—has weakened consistently with *Rodriguez* and *Brown*'s progenies in the 1990s and after. As a result, federal constitutional and legal tools were increasingly placed out of reach for reformers, which shifted the responsibility of addressing the interconnected web of economic and racial inequality to state laws and constitutions.

While *Rodriguez* effectively precluded any further court action at the federal level, it did not stop further court action at the state courts. If a state court ruling relies solely on interpretations of state constitutional law, then its decisions are unreviewable by the federal courts; as Justice William Brennan explained: "We are utterly without jurisdiction to review such state decisions" (1977, 501). State high courts of last resort are the supreme arbiters of state law. The principle laid down by the US Supreme Court in *Murdock v. City of Memphis* (1875) held that the US Supreme Court could

not review a decision of a state high court unless it involved an application of federal law. This is the principle known as Adequate and Independent State Grounds. Put more simply, under the doctrine of Adequate and Independent State Grounds, state high court decisions that are based on state law and independent of federal interpretation are outside the jurisdiction of the federal courts and, thus, not reviewable by the US Supreme Court (Haas 1981; see *Michigan v. Long* [1983]). This of course presupposes that the state court decision does not intrude or lower civil liberties and rights already guaranteed under the United States Constitution.

In terms of educational financing, the doctrine of Adequate and Independent State Grounds means that the United States Constitution and the United States Supreme Court do not necessarily have the final say in how a state chooses to finance public education. Instead, if the state legislature fails to find an acceptable solution to school funding, litigants can turn to state constitutions and state courts for remedies. This doctrine then precludes the US Supreme Court from even reviewing the state high court's decision if the state high court's decision is premised solely on its own laws and own state constitution.

While California and New Jersey were the first states to have litigation over education finance, these cases continue until today. As of December 2015, forty-four states have experienced some form of state education finance litigation. In figure 1.3, we show the states and the litigation with cases starting in 1971 through 2010. The map shows that all but a few states have experienced education finance reform litigation. Plaintiffs have successfully challenged those states in medium gray, while school districts and states have won where the color is dark gray. A few states have had mixed results.

Why Courts? A Theory of Policy Change through State Courts

Of course, all this begs the question, why courts, and how do courts move social and public policy? Given attitudinal preferences of judges throughout the federal and state courts, we next want to present a theory of how judges make policy, that is, how they operate within the American political system. We make no argument that courts are more important than elected officials in making policy, but we do argue that they perform an important and influential role. In this section we offer a theory of how courts make

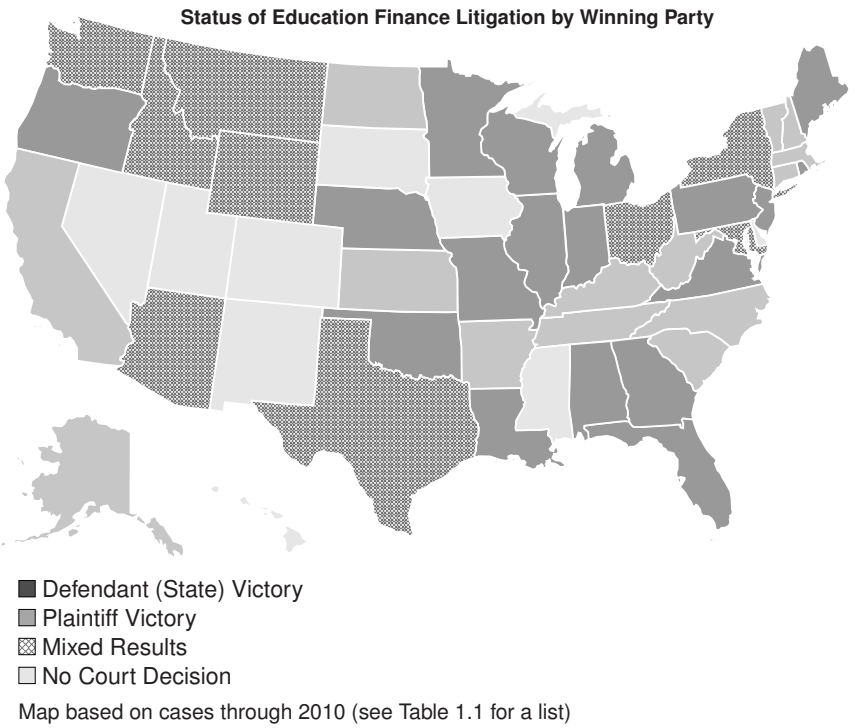


Figure 1.3. Status of Education Finance Litigation by Winning Party. (*Source:* National Education Access Network http://schoolfunding.info/litigation-map/Figure)

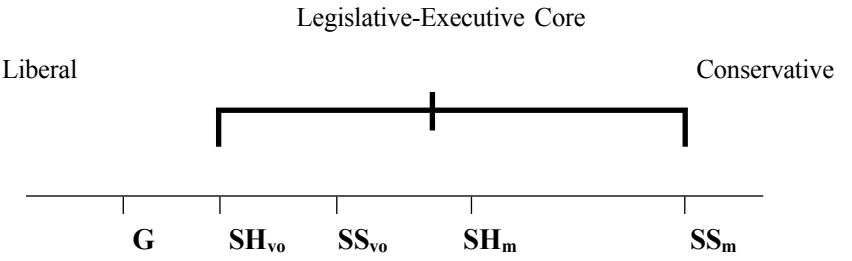
policy that borrows from prior works by Howard and Nixon (2002) and Howard and Steigerwalt (2011), who use Hammond and Knott's (1996) articulation of agency control which they expand to the concept of policy control. For our purposes, we examine state courts.

In this formulation, courts exogenously establish a "legal set." The legal set may or may not overlap with what is termed the "legislative-executive core." The legislative-executive core is the critical veto point over executive action; in other words, policies falling within this core are supported by both the legislature and the executive while policies falling outside the core are those that run the risk of being vetoed by the governor or overridden by the state legislature. One assumes therefore that this core point on a liberal-conservative continuum is where most policy will be set at the state

level if one substitutes a governor for the executive. We present this situation in figure 1.4.

Figure 1.4 implies that the majority of public and social policy will fall within the "legislative-executive core," because such policies will not be overturned through statutory means (Hammond and Knott 1996). If the governor, **G**, is relatively extreme, one boundary of the legislative-executive core is defined by the median state house (or state assembly) member, $\mathbf{H_m}$, or the median state senator, $\mathbf{S_m}$, whichever is furthest from the governor. The crucial veto-override legislator in the state house, $\mathbf{H_{vo}}$, or state senate, $\mathbf{S_{vo}}$, whichever is closer to the governor, defines the other boundary of the core. It is the views captured within these boundary lines that reflect the policy preferences of the dominant state political coalition.

If the legal set does not fully subsume the legislative-executive core, then judicial review presents additional constraints on policy development and change. In such a situation, policy will not be established at the boundary of the legislative-executive core, because it will be overturned in the courts and then a court-ordered policy will be substituted for the elected preferences anywhere within the legal set. Alternatively, if the state supreme court's policy preference falls outside of the preferences of the legislative-executive core, then there is the possibility of a legislative override of the court-ordered policy. Statutory interpretation policies established by the courts are easier



G – Governor

SH$_{vo}$ – Critical Most Liberal State House Member (key veto override representative)

SS$_{vo}$ – Critical Most Liberal State Senator (key veto override senator)

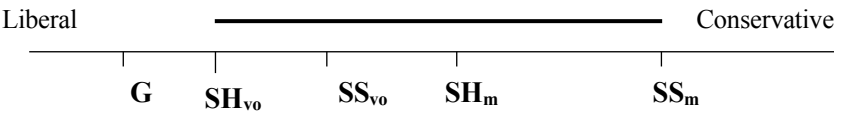
SH$_m$ – Median State House Member

SS$_m$ – Median State Senator

Figure 1.4. Policy Domain without State Supreme Courts.

for the legislature to override than constitutional interpretations. We show this added legal set for state supreme courts in figure 1.5.

How does a state supreme court establish a range of permissible policy outcomes? Consider figure 1.6's illustration of a five-judge state supreme court, $\mathbf{J}_{1\text{-}5}$, whose ideological preferences are arrayed on a liberal-conservative scale. The legal set here is established by $\mathbf{J}_3$, the median judge. In this case, the legal set is relatively narrow and shows a more liberal court. The set represents the indifference points of the median justice's ideological preferences. Move



State Supreme Court Legal Set

G – Governor

SHvo – Most Liberal State House Member (key veto override representative)

SSvo – Most Liberal State Senator (key veto override senator)

SHm – Median State House Representative

SSm – Median Senator

Figure 1.5. Policy Domain with State Supreme Courts.

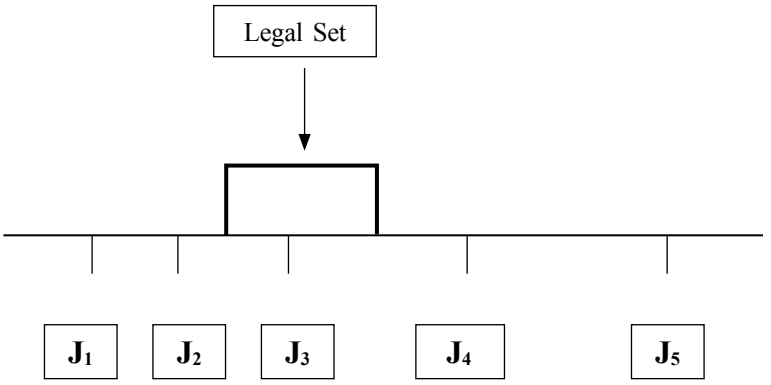


Figure 1.6. Policy Range of State Supreme Courts.

the median justice to the right or left and the legal set moves accordingly. Since state courts are either elected or appointed, or appointed subject to a retention election, it is reasonable to assume that the legal set will fall within or close to the legislative-executive core, particularly if the judge confronts reelection or a retention election. Therefore, when the elected officials are unable to act, the court can step in and enact policy somewhat close to elected official preferences.

The extension of these theories highlights how, even within a system of constraints, judicial decisions can still substantially impact policy. And, the more the views of the judges are in line with those of elected officials, the more power judges possess to substantially alter policy with little fear of oversight or backlash.

Furthermore, these models do not take into account the numerous instances when legislatures and executives decide to cede power over certain issue areas to the courts, thus increasing the courts' ability to influence state and national policy. In particular, legislatures might defer to the courts, thus transferring power to make important policy choices to the courts on certain issues (see, e.g., Graber 1993; Lovell 2003). For example, legislatures might pass laws that are intentionally vague in order to reach legislative compromise and, just as importantly, shift the blame for necessary difficult decisions to the courts. As Katzmann explains, "ambiguity [in statutes] is a deliberate strategy to secure a majority coalition in support of the legislation" (1997, 61). However, when those ambiguities inevitably lead to questions that must be resolved, courts are forced to answer the question, even if the legislature has provided relatively little guidance, since courts *must* answer all legal claims properly brought before them.

On the other hand, legislatures may also deliberately pass legislation in order to provoke a reaction from the courts. Take, for example, the debates surrounding the passage of the Flag Protection Act in 1989. The Supreme Court in 1985 in the case of *Texas v. Johnson* struck down a Texas law prohibiting flag burning as a violation of the First Amendment. While a majority of senators and representatives voted for this law, a majority of them also recognized that the law was likely unconstitutional. However, many members supported the law for strategic purposes: they wanted the Supreme Court to strike down the law, and thus hopefully mobilize the necessary support to pass a constitutional amendment. As Senator Kasten stated, "The matter before us tonight is an attempt to provide by statute, the protection our flag deserves. Given the decision of five Supreme Court justices that the statute in *Texas v. Johnson* violated the Constitution, I don't