
**LOCAL CONTROL VS. POOR PATROL: CAN
DISCRIMINATORY POLICE PROTECTION BE
REMEDIED THROUGH THE EDUCATION
FINANCE LITIGATION MODEL?**

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INTRODUCTION

The public has demonstrated a renewed focus on police protection for our cities and towns since the terrorist attacks of September 11, 2001. This resurgence of interest in “homeland security” brings attention to the fact that police protection is discriminatorily enjoyed by relatively wealthy areas. Education finance litigation brought similar inequalities and inadequacies in the distribution of services to the forefront of state political and academic discussions. This Note examines the applicability of the salient factors of that litigation strategy to remedy disparities in police protection.

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Generally, the level of local government services, such as education, police and fire protection, trash disposal, sewer, and public utilities varies as a function of the property wealth in a municipality. For instance, through the current police funding system, it is possible that Town A experiences a low crime rate and has substantial resources for police funding, allowing the police to drive around in expensive SUVs, while neighboring Town B suffers from a high crime rate and lacks the funds even to provide minimally adequate force levels on the street. This dichotomy is largely the result of funding local police departments through local property tax revenues. As Professors Inman and Rubinfeld observe:

Substantial differences in community spending levels may result if local public services are funded primarily by taxing local rather than regional or state resources. In particular, where local property taxes are the primary source of revenues for public services, and there are major differences in the value of taxable properties among localities, equal tax rates will support very different levels of public services.¹

These spending differences are particularly pronounced in the distribution of police services. Not only do the police in property-poor towns have fewer resources compared to their wealthier counterparts, but poverty and inequalities of income are positively correlated to the crime rate; poorer towns statistically have more crime and thus require more police. Consequently, these property-poor towns are doubly hit by inequalities present in a funding system that relies on property tax revenue.

Education finance litigation and reform legislation have addressed similar inequalities due to property tax reliance throughout the country. Many successful lawsuits have been filed against states bringing about reform (although it has normally taken years).² Even the few states that have avoided education finance litigation have experienced institutional education finance reform as a result of the national litigation pressure.³ Much of the reform is based on the important role education plays in our society, as exemplified by state constitutional provisions calling for some level of public education.

The purpose of this Note is to examine the applicability of the education finance litigation model to redress disparities in police protection. In the words of Professor Gerald Frug, "it is no more justifiable . . . for the quality of police protection . . . to vary with district wealth than it is for the quality of schools."⁴ Although a strong argument can be made that the importance of police protection is on par with that of education, state constitutions do not generally have specific constitutional provisions calling for police protection, as they do for education. This Note will analyze whether this deficiency precludes police

¹ Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1705 (1979).

² See Part II *infra*.

³ See *infra* text accompanying note 112.

⁴ Gerald Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 327 (1993).

protection litigation from using the education finance model. Given the huge change brought about by education litigation, a relative dearth of scholarship exists examining the possibility of extending that model to other government services.⁵ This Note strives to fill that gap.

Part I of this Note discusses the right to equal distribution of government services and introduces the problem of disparate police protection. Part II reviews the background of education finance litigation and the various factors contributing to the success of that model. Part III begins with an explanation of the lack of other legal avenues for redress of the problem of discriminatory police protection, notably the lack of any available federal remedy. This part continues with an analysis of potential police protection reform under the education model, highlighting the benefits of and possible objections to such a strategy. Ultimately, this Note concludes that the education finance reform litigation model analytically fits the problem of discriminatory police protection due to disparate funding. However, many realistic barriers, ranging from political impediments to institutional concerns about local control, potentially stand in the way of reform in this area through the education model. Nonetheless, examining the disparities in police protection under the microscope of education finance litigation can serve as a guidepost for future reform in this crucial area. Any potential avenue of reform is worth serious consideration given the lack of other viable legal remedies.

I. THE PROBLEM OF INADEQUATE AND UNEQUAL POLICE PROTECTION

A. *The Problem of Discriminatory or Inadequate Funding for Police Protection*

In order to state a viable legal claim for disparate police protection, plaintiffs must first have *evidence* of discriminatory police protection based on the relative wealth of municipalities. Discriminatory police protection is explained as follows: (i) because funding for local police protection is generally derived from local property taxes, property-poor towns receive less money for police protection than property-rich towns; and (ii) because the adequacy of the citizen protection is tied to police funding; then (iii) citizens in poorer towns are disproportionately hurt by this funding system through less police protection. Compounding this disparity is the fact that higher poverty typically

⁵ *But see* Emel Gökyigit Wadhvani, *Achieving Greater Inter-Local Equity in Financing Municipal Services: What We Can Learn from School Finance Litigation*, 7 TEX. F. ON C.L. & C.R. 91, 93 (2002) (considering “the usefulness of employing school financing to municipal services and the extent to which the lessons of the school financing cases may be brought to bear on current debates about divorcing municipal services from local taxes”). Wadhvani, however, focuses on the potential extension to all other government services with an emphasis on the efficacy of tax-sharing proposals as a solution.

means higher crime rates.⁶ To make matters worse, citizens of these property-poor towns are often taxed at a higher percentage of income, while receiving lower levels of public service than their property-rich counterparts.⁷

The support for the above evidentiary steps is the following. Local property taxes are the largest source of revenue for municipal spending,⁸ and police protection is generally the second-largest local government expenditure, behind education.⁹ Consequently, property-rich municipalities have an advantage over property-poor municipalities because more money is available to budget for public services.¹⁰ This advantage is empirically demonstrated by Inman and Rubinfeld, who found that spending levels for police protection are either equal between rich and poor municipalities or favorable to the rich municipalities,¹¹ even though poorer communities generally have higher crime rates. The concern over adequate police funding is also supported by a 2004 study by the National League of Cities, which cites public safety needs as a leading factor that squeezed cities' budgets over the previous year.¹² Notably, the American Bar Association has found that inadequate funding is the primary problem with the criminal justice system, resulting in less police protection for citizens.¹³

Few recent scholarly studies have specifically investigated the connection between property tax revenue and the adequacy of police protection. Carl

⁶ See Travis C. Pratt & Francis T. Cullen, *Assessing Macro-Level Predictors and Theories of Crime: A Meta-Analysis*, in 32 CRIME AND JUSTICE: A REVIEW OF RESEARCH 373, 424-29 (2005).

⁷ See Inman & Rubinfeld, *supra* note 1, at 1663 (demonstrating the regressivity of the property tax for local government services).

⁸ OSBORNE M. REYNOLDS, JR., *HANDBOOK OF LOCAL GOVERNMENT LAW* 291 (West Publishing Co. 1982) (observing that, traditionally, tax on real property has been the "largest single source of municipal revenue").

⁹ U.S. Census Bureau, *State and Local Government Finances by Level of Government and by State: 2001-02*, available at http://www.census.gov/govs/estimate/0200ussl_1.html (last visited Mar. 20, 2006).

¹⁰ See Inman & Rubinfeld, *supra* note 1, at 1675-76 (observing that expenditures for government services rise with the level of income).

¹¹ *Id.* at 1675 (citing the property-related nature of police and fire protection as the reason for this disparity).

¹² MICHAEL A. PAGANO, NATIONAL LEAGUE OF CITIES, CITY FISCAL CONDITIONS IN 2004 iv, available at <http://www.nlc.org/content/Files/RMPctyfiscalcondrpt04.pdf> (showing that seventy-eight percent of city finance directors surveyed thought that public safety needs had a negative effect on city finances).

¹³ The Special Committee on Criminal Justice in a Free Society of the American Bar Association Criminal Justice Section, *Criminal Justice in Crisis: A Report to the American People and The American Bar on Criminal Justice in the United States: Some Myths, Some Realities, and Some Questions for the Future* (1988), available at <http://www.druglibrary.org/special/king/cjic.htm> ("The entire criminal justice system is starved for resources.").

Shoup reviewed a number of studies completed in the 1970s and 80s regarding the distribution of urban services, some of which specifically examined the determinants of unequal police protection.¹⁴ One study reviewed by Shoup noted that “tax contributions per capita” was the major determinant in the allocation of expenditures for police protection among various districts: the higher the contribution, the more funding for police protection.¹⁵

Interestingly, a recent criminology study of predictors of crime rates found that while poverty and inequalities in wealth were very strong predictors of crime, police-related factors such as police expenditures, the number of police per capita, and police force size were not significant predictors of crime.¹⁶ This study suggests that social forces such as poverty and wealth inequality may negate any criminal justice system controls, such as police funding and “get-tough” police policies.¹⁷ Such a finding is not fatal to applying the education finance litigation model to police protection. First, the crime rate is not the only measure of the quality of police protection, it is simply the easiest to quantify. Second, although most of the police-related factors in the study failed to affect the crime rate directly, on some level these factors may combat the adverse social forces proven to predict crime. Third, the study showed a strong correlation between incarceration and crime rates, meaning that crime rates were lower where jail time and punishment were more likely and severe.¹⁸ Fourth, the fact that poverty and inequality in wealth were strongly

¹⁴ See Carl S. Shoup, *Rules for Distributing a Free Government Service Among Areas of a City*, 42 NAT'L TAX J. 103, 116 (1989) (finding, generally, that the distribution of services within an urban locality is not random but rather varies according to certain factors). Various studies, however, have found different factors governing this distribution, ranging from taxes paid to racial discrimination. *Id.* It should be noted that this article and the studies it reviewed looked mainly at distributions of public services within a city, instead of within a state at large.

¹⁵ See *id.* at 114 (citing the Boyle and Jacobs study of New York City conducted from 1969 to 1970). *But see id.* at 113 (describing the Lineberry study of San Antonio, Texas, which did not find the allocation of police services to vary by income within the city).

¹⁶ Pratt & Cullen, *supra* note 6, at 424-25 (explaining that poverty, an indicator of economic deprivation, was a relatively strong predictor of crime, while criminal justice system-related factors were relatively weak predictors). Other academic studies, however, support the contention that an increase in police (which requires more funding) reduces crime rates. See STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS* 126 (2005) (citing Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime*, 3 AM. ECON. REV. 270 (1997)).

¹⁷ See Pratt & Cullen, *supra* note 6, at 437-38 (concluding that the empirical evidence shows “the likely futility of continued efforts to reduce crime by focusing exclusively on criminal justice system dynamics,” and suggesting instead that the adoption of a “more progressive crime-control policy agenda – one that specifically targets the multiplicity of negative effects associated with concentrated disadvantage – is more likely to result in a substantial reduction in crime”).

¹⁸ *Id.* at 415-16, 424 (commenting that one of the most common deterrence-related predictors of crime was the incarceration effect).

ties to crime rates supports the contention that property-poor towns will need relatively more police protection.¹⁹ Frug admits that although police are fairly ineffective in controlling crime, people still rely on police for protection.²⁰ Finally, the authors of this crime study identify many limitations on their research, namely the debate regarding the efficacy of meta-data analysis versus statistical analysis, the debate surrounding which variables are placed under the various headings (e.g., social forces), the accuracy of the variable measurements, and any crossover potential of variables under many headings (such as unemployment and poverty).²¹

In discussing unequal or inadequate police protection, it is important to note the inherent difficulties in measuring the deficiencies. For instance, more money might actually be spent in areas with higher crime, which are most likely lower-income (property-poor) areas, but unequal funding could still be present on a per capita basis or as a function of the crime rate.²² Therefore, as Shoup notes, measurements of equality need to be qualified as regarding either inputs (money allocated to police protection) or outputs (crime rate).²³ Shoup recommends that preventative services, like police protection, be measured in outputs for equality purposes due to the fact that the same amount of input could yield drastically different results depending on the community.²⁴ Additionally, output measurements are amenable to either equality or adequacy claims.²⁵ An equality argument is that different municipalities should have an equal number of police officers on patrol per capita (an output measurement); an adequacy argument is that municipalities must operate above a certain crime rate (another output measurement) in order to be deemed to have “adequate police protection.”

The evidence of inadequate and/or unequal police protection may serve as the factual basis for a claim by a municipality or citizen group against the state. In order for plaintiffs to prevail, they must also establish a legal right to nondiscriminatory police protection. Education finance reform litigation provides vital help in forming the legal basis of such a claim.

¹⁹ *Id.* at 427-28 (stressing that economic deprivation is one of the strongest and most stable predictors of crime).

²⁰ Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 68 (1998).

²¹ Pratt & Cullen, *supra* note 6, at 430-36.

²² See discussion *infra* Part III.B.v.

²³ Shoup, *supra* note 14, at 104 (concluding that the distinction between input and output and their measurement has been neglected in prior studies).

²⁴ *Id.* at 104-05 (discussing the undesirable result of the equal input rule with regard to preventative services). For example, spending \$2 million per year on police protection in Small Town A is going to yield different results if the \$2 million was spent in Big City B, which has a much larger police force.

²⁵ The difference between equality (sometimes called “equity”) and adequacy claims is further explained *infra* Part II.B.

B. *The Right to Adequate and Equal Police Protection*

Under the education finance litigation model, students' entitlement to nondiscriminatory and adequate educational services is established primarily through two methods: either (i) by failing to reach an "adequate" level recognized by the state constitution education clause; or (ii) through the court finding a right under the state constitution to equal funding for education (per pupil or through some other measurement) regardless of the relative property wealth of a community.²⁶ In the police protection context, this raises the question of whether the citizens (and municipalities) of a state are entitled to a certain level of police protection, or a certain amount of resources for police protection, independent of the property wealth of the community. Education and police protection are similar in that both traditionally derive their funding from local property tax revenues, thereby financially benefiting wealthier communities.²⁷

Substantial academic debate exists on the issue of which local government services, if any, must be provided on an equal basis to citizenry of a state, irrespective of the relative wealth of their community.²⁸ A thorough review of the competing theories of government service distribution is beyond the scope of this Note, which focuses on providing legal arguments for equalizing police protection. A brief overview of the academic landscape is essential, however, to understanding the proposals put forth herein.

Charles Tiebout's landmark article in 1956 espoused a model of citizens as consumers of local government services ("public goods").²⁹ Tiebout's model assumes citizen mobility between municipalities and a set allocation level among the local government services (i.e., education, police, fire, trash disposal).³⁰ Citizen-consumers simply locate and move to the municipality that best fits their preferred allocation of services.³¹ Given this model, Tiebout eschews the need for absolute equality in government services.³² In fact,

²⁶ See *infra* Part II.B (discussing the evolution of education finance litigation and the states' various methods).

²⁷ See Georgette C. Poindexter, *Towards a Legal Framework for Regional Redistribution of Poverty-Related Expenses*, 47 WASH. U. J. URB. & CONTEMP. L. 3, 19 (1995) (explaining that the lower the value of the real estate taxed, the less revenue generated).

²⁸ See, e.g., Frug, *supra* note 20, at 25-34 (reviewing and analyzing much of the scholarship in this area).

²⁹ Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (defining the local citizen as a consumer-voter of public goods, responding to a set level of preferences in allocation of local expenditures prescribed by the local government).

³⁰ *Id.* at 418, 424 (stating that consumer-voters adopt a local government's expenditure pattern because the consumer-voter is fully mobile and could move if he so chooses).

³¹ *Id.* ("[T]he consumer-voter moves to that community whose local government best satisfies his set of preferences.").

³² *Id.* at 418 (theorizing that, once mobile, if a citizen does not like the amount allocated to the town's schools, for example, he can move to a town that allocates more for that

equality in service distributions between municipalities would deny the citizen-consumers' freedom of choice regarding their service preferences.³³

Professor Gerald Frug criticizes Tiebout's model, and its progeny of consumer-goods theorists, for relying on mistaken assumptions about the nature of government services and the nature of cities.³⁴ According to Frug, the assumptions that government services can be viewed as consumer goods to "shop" for and that cities are akin to "voluntary associations" lead to public policy decisions based on an erroneous view of homogeneous and fragmented communities.³⁵ Frug acknowledges that the consumer-voter model put forth by Tiebout matches much of the public's perception of municipal services.³⁶ This perception views local taxes as the collective property of the community, which must be spent exclusively for its benefit.³⁷ The self-interest inherent in the consumer-goods model leads to inevitable fragmentation among the citizens and municipalities; this runs contrary to "the notion of equality traditionally associated with the public sector, replacing the one-person, one-vote principle associated with democracy with the one-dollar, one-vote rule of the marketplace."³⁸ Consumer-goods theorists typically defend their model in terms of freedom of choice; Frug, however, counters that such an autonomous view of government services fails to take into account the impact that surrounding communities can have on one another.³⁹

Comparatively, Frug espouses a community-building model of government services in which municipalities work together regionally for a more equitable distribution of government services across the community (not bounded by

service. As consumers' preferences vary, the funding allocation that determines the service level must as well); *see* GILLETTE & BAKER, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 375 (2d ed. 1999) (following Tiebout's general model, and emphasizing that it may be beneficial for localities to provide varying service levels as a means to distinguish themselves).

³³ *See Tiebout, supra* note 29, at 418 ("The greater the number of communities and the greater *variance* among them, the closer the consumer will come to fully realizing his preference position.") (emphasis added).

³⁴ Frug, *supra* note 20, at 28 ("The literature as a whole, Tiebout's original article included, is based on two assumptions that I reject – one about the nature of city services and one about the nature of cities.").

³⁵ *Id.* at 28-29 (observing that based on such assumptions, like-minded people would have the same preferences and want to live in a community that had the same shared interests).

³⁶ *Id.* at 29-30 (commenting that residents themselves "often consider city services to be consumer goods").

³⁷ *Id.* (asserting that residents "pay taxes with the same expectations they have when they pay dues to be a member of a club").

³⁸ *Id.* at 31.

³⁹ *Id.* at 33-34 (explaining that fragmentation has a "powerful, negative impact" and "undervalue[s] the impact that cities within a single metropolitan area have on one another").

municipal boundaries) to facilitate and encourage diverse interactions which, in his view, benefit all those involved.⁴⁰ The fundamental difference between Frug's model and the consumer-goods model is Frug's acknowledgment that tax revenue should not only be spent on government services distributed within the collecting town, but also used to equalize funding of the broader communities' government services, receiving in return a more heterogeneous community atmosphere.⁴¹

Professors Charles Haar and Daniel Fessler, discussed in detail later in this Note, find a public duty in law to provide equal, adequate, and nondiscriminatory government services to *all* citizens.⁴² This would undoubtedly include police protection. The rationale of Frug and the conclusions of Haar and Fessler are convincing in the following sense: all public sector services should not necessarily be distributed among citizens based solely on a pay-for-what-you-get model with no regard to the nature of the service distributed. The nature of some government services makes them vital to a functioning society and, therefore, mandates their distribution independent of the consumer market model.⁴³

This Note is predicated on the idea that adequate police protection should be provided to all citizens without regard to the property-wealth of a

⁴⁰ *Id.* at 36-37. For further discussion of this model, see generally Gerald Frug, *The Geography of Community*, 48 *Stan. L. Rev.* 1047 (1996).

⁴¹ See Frug, *supra* note 20, at 33-34.

⁴² CHARLES M. HAAR & DANIEL WM. FESSLER, *FAIRNESS AND JUSTICE: LAW IN THE SERVICE OF EQUALITY* 15, 20 (1986) (calling for equality in the distribution of municipal services, and asserting that "enterprises providing functions and services that are essential and public in character have a common law duty to serve – a positive obligation to provide all members of the public with equal, adequate, and nondiscriminatory access"); see *infra* text accompanying notes 137-138.

⁴³ Courts have long used the government-proprietary test to determine matters relating to distribution of government services; if a good is governmental in nature, such as education or police protection, then it is of statewide concern, and if the good is proprietary in nature, such as utilities, it is concerned with a matter of local concern and control. See Reynolds, *supra* note 8, at 67-68:

In making the necessary distinction under this doctrine between matters of local concern and those of statewide import, courts may utilize the related distinction between governmental activities and proprietary activities. Thus, as a rule of thumb, governmental matters may be considered of statewide concern, as they are matters in which the city acts as a kind of agency of the state. Proprietary matters, on the other hand, are those in which the city, by definition, is acting in much the same role as a private business, as, for instance, when the city operates a water utility. These proprietary matters may be considered as a general rule to be of purely local concern.

See also Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 *IOWA L. REV.* 277, 306, 310-312 (1990) (defining the differences between governmental and proprietary goods).

community.⁴⁴ As a matter of equity, the citizens of poor areas are entitled to the same adequate level of police protection as wealthier areas in order to ensure their physical safety. Logically, no connection should exist between police funding and property values because property-poor communities are statistically more likely to have a higher incidence of crime.⁴⁵ Thus, comparatively greater funding for wealthier areas makes no sense at all. Moreover, establishing a scheme of equal funding⁴⁶ for police protection may not exact any negative costs on society because such redistribution of tax funds would simply ensure allocation where it is *needed* the most, instead of where it *protects* the most. If police funding is reallocated to poorer towns through the education finance litigation model, nothing prohibits wealthier towns from supplementing government funding through private donations. Additionally, given the spillover effect of crime from one municipality to the next, wealthier towns could stand to benefit indirectly from a redistribution of police funding to neighboring poorer towns with higher crime rates.⁴⁷

An argument against equalizing police protection through funding changes is that there may be no way to draw the line between which government services must be provided regardless of wealth and which can properly be based on the municipality's wealth. The Supreme Court itself touched on this concern in *San Antonio Independent School District v. Rodriguez*.⁴⁸ In rejecting the proposition that education is a fundamental right because it is

⁴⁴ The focus of this Note is not the relationship between crime and police protection – it largely presupposes such a connection on some level. Rather, it focuses on the reality of the problem of inadequate and unequal police protection *caused* through the funding mechanism, and a potential legal means for correcting it.

⁴⁵ See Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL'Y REV. 53, 83 (2003) (observing that rates of both property crime and violent crime are far higher in poorer neighborhoods).

⁴⁶ Note that “equal funding” depends on the measurement being used – i.e., per person, per crime rate, etc. See *infra* Part III.B.5.

⁴⁷ See Frug, *supra* note 20, at 75-79. But see Rosenthal, *supra* note 45, at 83-84 (pointing out that “criminals tend to identify as desirable targets persons or locations in their own communities, since they feel more comfortable in those environments and, as with other routine activities, are relatively less willing to travel considerable distances for an uncertain reward”).

⁴⁸ 411 U.S. 1, 37, 54 (1973):

If local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. We perceive no justification for such a severe denigration of local property taxation and control as would follow from appellees' contentions. It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live.

necessary to participate meaningfully in the political process, the Court stated that education could not be distinguished from food or shelter, for “the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process.” The Court went on to specifically cite concerns about the possible extension of a finding of unconstitutionality to other local government services.⁴⁹ Another argument posed in opposition to an equal level of government services is that, given the current fiscal strain in most states, matched with strong political opposition to raising taxes, a demand for equal distribution of government services could lead to a ratcheting-down of all local government services provided across the state, as illustrated by California’s experience in education.⁵⁰ Further, as mentioned earlier, residents of wealthier communities do not want to lose control of their locally collected tax dollars; these residents argue for independence and variation in government services.⁵¹ Because the distribution of government services is one of the only functions of local governments, this “local control” dispute underlies any discussion on local government services, and some courts have expressed reluctance to impose institutional reform restricting this local power.⁵²

Despite the merit of these arguments against the right to an equal and adequate level of police protection, there are persuasive responses to all of them. Any line-drawing argument in opposition to providing police protection on an equal or adequate basis can be rejected by examining the nature of the

⁴⁹ *Id.*

⁵⁰ See Michael A. Rebell, *Education Adequacy, Democracy and the Courts* 21-22 (Nat’l Acad. of Sciences and Nat’l Res. Council Research Paper), Apr. 25, 2001, available at http://www.schoolfunding.info/resource_center/research/EDUADEQ.PDF:

Unfortunately, this equalization mandate, combined with a constitutional cap on increases in local property taxes known as Proposition 13 which had been adopted by California’s voters at the time, resulted in a dramatic leveling down of educational expenditures: whereas California had ranked 5th in the nation in per pupil spending in 1964-65, by 1994-95 it had fallen to 42nd.

⁵¹ See Frug, *supra* note 20, at 33 (arguing against the public goods theory because it allows wealthier citizens to exclude the poor through zoning and to ensure the revenues raised through tax dollars are used to enrich their community only); Poindexter, *supra* note 27, at 23 (pointing out that suburban residents do not want to lose “control over how their tax dollars are spent,” and will resist redistribution because it “erase[s] the benefits of the economic cost-benefit analysis that lead homeowners to choose houses in the suburbs”). Such “fragmentation” is supported by some as offering “consumers a range of choices about packages of public goods from which they might want to select.” *Id.*

⁵² See, e.g., *Rodriguez*, 411 U.S. at 53-54 (refusing to change the state system of school financing because increasing state control over educational funding would decrease local autonomy in determining how such funds are spent); *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 366 (N.Y. 1982) (concluding that “the preservation and promotion of local control of education” is a “legitimate State interest”). *But see Rodriguez*, 411 U.S. at 129-30 (Marshall, J., dissenting) (“[L]ocal control is a myth for many of the local school districts.”). For further discussion, see *infra* text accompanying notes 182-189.

services being provided in education and police protection.⁵³ As discussed *infra*, the level of education provided to a municipality's children and the safety of its streets are more important and fundamental to a functioning society than most, if not all, other local services.⁵⁴ For instance, a municipality's inability to institute a recycling program for its trash because it lacks the financial resources to do so simply does not implicate the same societal concerns as inadequate education and police services. A distinction can be made regarding the nature of the public service along the judicially-recognized governmental-proprietary split, where courts have found both education and police protection to be governmental goods, while services like trash collection and utilities are deemed proprietary in nature.⁵⁵ The ratcheting-down phenomenon can be avoided in the police protection arena through remedial action – not in the form of mandated equalization, but rather funding according to the communities' police needs instead of by the value of the communities' property (the current situation) or by another arbitrary factor such as population size.⁵⁶ Finally, the concern about local control over tax dollars is characterized in the education context as a “myth” by both Justice Marshall in *Rodriguez* and Professor Georgette Poindexter, who points out the differences between cities and suburbs.⁵⁷ Poindexter argues that choosing to live in suburbs comes with less poverty-expense burdens and, as a result, those residents should bear a cost for that benefit; the most effective method to do so is through reallocation of these expense-burdens at the state level.⁵⁸ This argument applies equally to the police protection context.

The Supreme Court has said that there is no *federal* constitutional requirement for absolute equality in local government services within a state, specifically identifying both education and police protection within the scope of is pronouncement.⁵⁹ Nevertheless, this holding does not preclude a finding that the equal and adequate provision of some local government services may

⁵³ See *infra* Part III.B.2.

⁵⁴ See *id.*

⁵⁵ See *infra* text accompanying notes 202-205.

⁵⁶ As long as the funding mechanism is tied to some level of community need (for example, the crime rate, this fear of across-the-board ratcheting-down of the level of service through equalized funding should be avoided.

⁵⁷ Poindexter, *supra* note 27, at 50 (concluding that the suburban separation from city politics and economics comes at a cost, and that “[t]his cost is the redistribution that flows back to the city because it bears a disproportionate burden of poverty related expenses”).

⁵⁸ *Id.*

⁵⁹ *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54 (1973) (declining to find a right to equal education funding and disparaging any extension of similar constitutional arguments to police funding because “[i]t has simply never been within the constitutional prerogative of this Court to nullify statewide [funding schemes] merely because the burdens . . . fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live”).

be required by a *state* constitution.⁶⁰ This strategic shift, focusing on state constitutional rights, has been key to the education finance litigation model, and also has the potential to redress the problem of discriminatory police protection.

II. THE EDUCATION FINANCE REFORM LITIGATION MODEL

A. Background

Historically, virtually every state relied on local property tax revenue as the primary funding source for public school systems.⁶¹ Given the dramatic differences in property wealth throughout any given state, this scheme leads to disparities in the funding of school districts, depending on the level of taxes imposed on the residents of the respective districts.⁶² The resulting inequality prompted legal challenges, beginning notably in California with *Serrano v. Priest*.⁶³ In that 1971 case, the California Supreme Court pronounced that the right to education is a fundamental interest and wealth is a suspect category, calling for strict scrutiny under equal protection doctrine.⁶⁴ Holding that there was no compelling state interest furthered by the state finance scheme, the *Serrano* court declared that the California education finance system's reliance

⁶⁰ See *id.* at 133 n.100 (Marshall, J., dissenting) (“[N]othing in the Court’s decision today should inhibit further review of the education funding schemes under the state constitutional provisions.”); see also *infra* Part II.

⁶¹ E.g., Bradley W. Joondeph, *The Good, the Bad, and the Ugly: An Empirical Analysis of Litigation-Prompted School Finance Reform*, 35 SANTA CLARA L. REV. 763, 766 (finding that “in most states, local property tax dollars are a major source of school revenues”); William E. Thro, *School Finance Reform: A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 525 n.1 (1998) (citing Hawaii as the sole exception).

⁶² See *Rebell*, *supra* note 50, at 7-9 (illustrating this disparity by contrasting two school districts in Texas: a poor minority-dominated district with \$356 in funding per student and the neighboring “Anglo” school district, taxed a rate twenty percent below its minority neighbors, yet providing nearly \$600 of funding per student); see also *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353, 1355-57 (N.H. 1997) (stating that the public school funding scheme in New Hampshire allowed certain districts to raise more money per student even though they were being taxed at a rate four times lower than more property-poor districts).

⁶³ *Serrano v. Priest*, 487 P.2d 1241, 1244 (Ca. 1971) (“We are called upon to determine whether the California public school financing system, with its substantial dependence on local property taxes and resultant wide disparities in school revenue, violates the equal protection clause of the Fourteenth Amendment.”).

⁶⁴ *Id.* at 1263; see *id.* at 1244:

Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing. We have concluded, therefore, that such a system cannot withstand constitutional challenge and must fall before the equal protection clause.

on property taxes violated the Equal Protection Clause of the U.S. Constitution.⁶⁵ However, this legal success was short-lived for plaintiffs fighting educational disparities.

In 1973, in *San Antonio Independent School District v. Rodriguez*, the Supreme Court virtually foreclosed the possibility of using the Equal Protection Clause of the U.S. Constitution to redress inequalities in school funding.⁶⁶ Citing a lack of textual support from the Constitution, the Court rejected the argument that education is a fundamental right.⁶⁷ Moreover, the Court found that the Equal Protection Clause does not require absolute equality regarding issues of wealth.⁶⁸ The court qualified this by saying that absent an absolute deprivation or a more clearly defined category of "poor," wealth was not a suspect classification requiring strict scrutiny in constitutional jurisprudence.⁶⁹ Practically, this means that the Court will not critically review any state action that disproportionately burdens less wealthy people unless these two qualifications are met. Consequently, under rational basis review, the Court found that the Texas school financing scheme bore a rational relation to a legitimate state purpose, and thus did not violate the Equal Protection Clause.⁷⁰

The foreclosure of a federal remedy in *Rodriguez* forced plaintiffs in education finance litigation to turn (as suggested by Justice Thurgood Marshall) to state constitutional provisions for redress of perceived inequalities.⁷¹ Since *Rodriguez*, plaintiffs have brought such litigation in forty-five states with widely varying success.⁷²

⁶⁵ *Id.*

⁶⁶ *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

⁶⁷ *Id.* at 35.

⁶⁸ *See id.* at 25 ("For these two reasons – the absence of any evidence that the financing system discriminates against any definable category of "poor" people or that it results in the absolute deprivation of education – the disadvantaged class is not susceptible of identification in traditional terms.").

⁶⁹ *Id.*

⁷⁰ *Id.* at 55.

⁷¹ *Id.* at 133 n.100 (Marshall, J., dissenting). In addition, the majority in *Rodriguez* voiced concern about federal government encroachments in this area, remarking that education policy is an area of specialized knowledge that "counsels against premature interference with the informed judgments made at the state and local levels," and that "[i]t must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system." *Id.* at 42-44.

⁷² The plaintiffs in education financing challenges have been successful in the following twenty-six states: Alabama, Alaska, Arkansas, Arizona, California, Connecticut, Idaho, Kansas, Kentucky, Massachusetts, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, South Carolina, Tennessee, Texas, Vermont, Washington, West Virginia, and Wyoming. Opinion of the Justices, 624 So. 2d 107, 107 (Ala. 1993); *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 399 (Ark. 1997);

Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 816 (Ariz. 1994); DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ariz. 1983); Serrano v. Priest (*Serrano II*), 557 P.2d 929, 949-952 (Cal. 1976); Horton v. Meskill (*Horton II*), 376 A.2d 359 (Conn. 1977); Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 728 (Idaho 1993); Montoy v. State, No. 99-C-1738, 2003 WL 22902963 (Shawnee County Ct., Div. 6, Kan. Dec. 3, 2003); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 216 (Ky. 1989); McDuffy v. Sec. of the Executive Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993); Comm. for Educ. Equality v. State, No. CV190-1371CC (Cir. Ct. Cole County, Mo. Jan. 1993); Helena Elementary Sch. Dist. v. State, 769 P.2d 684, 690 (Mont. 1989); Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353, 1354 (N.H. 1997); Robinson v. Cahill (*Robinson I*), 303 A.2d 273, 295 (N.J. 1973); Campaign for Fiscal Equity v. State, 655 N.E.2d 661, 666 (N.Y. 1995); Leandro v. State, 488 S.E.2d 249, 254 (N.C. 1997); DeRolph v. State, 677 N.E.2d 733, 737 (Ohio 1997); Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 144 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby (*Edgewood II*), 804 S.W.2d 491, 493 (Tex. 1991); Brigham v. State, 692 A.2d 384, 397 (Vt. 1997); Seattle Sch. Dist. No. 1 v. Washington, 585 P.2d 71 (Wash. 1978); Pauley v. Kelly, 255 S.E.2d 859, 865 (W. Va. 1979); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 315 (Wyo. 1980).

The following seventeen states have successfully defended against challenges to their education funding schemes: Colorado, Florida, Georgia, Illinois, Louisiana, Maine, Maryland, Michigan, Minnesota, Nebraska, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Virginia, and Wisconsin. Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1025 (Colo. 1982); Coal. for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 406 (Fla. 1996); McDaniel v. Thomas, 285 S.E.2d 156, 165 (Ga. 1981); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1195-96 (Ill. 1996); Charlet v. Legislature, 713 So. 2d 1199, 1207 (La. 1998); Sch. Admin. Dist. No. 1 v. Commissioner, 659 A.2d 854, 858 (Me. 1995); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 790 (Md. 1983); Governor v. State Treasurer, 390 Mich. 389, 409 (Mich. 1973); Skeen v. State, 505 N.W.2d 299, 320 (Minn. 1993); Gould v. Orr, 506 N.W.2d 349, 353 (Neb. 1993); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 250 (N.D. 1995); Fair Sch. Fin. Council v. State, 746 P.2d 1135, 1137 (Okla. 1987); Olsen v. State, 554 P.2d 139, 149 (Or. 1976); Danson v. Casey, 399 A.2d 360, 367 (Pa. 1979); City of Pawtucket v. Sundlun, 662 A.2d 40, 42 (R.I. 1995); Scott v. Commonwealth, 443 S.E.2d 138, 142-43 (Va. 1994); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989).

While Alabama appears on the plaintiff's victory list, because the plaintiffs did in fact win the legal case, the Alabama Supreme Court subsequently reopened the case and dismissed the claim for lack of jurisdiction, giving in effect a victory to the state. *Ex parte James*, 836 So. 2d 813 (Ala. 2002); *see also* Campaign for Educational Equity, *Alabama Litigation*, ACCESS, http://www.schoolfunding.info/states/al/lit_al.php3 (last visited Mar. 4, 2006) (outlining the history of education finance litigation in Alabama).

Litigation over this issue has not occurred in Delaware, Hawaii, Mississippi, Nevada, or Utah; while cases were filed in Indiana and Iowa, a court decision was never reached. *See* Campaign for Educational Equity, *State by State*, ACCESS, http://www.schoolfunding.info/states/state_by_state.php3 (last visited Mar. 4, 2006) (maintaining a list of the current education litigation status in every state).

A wealth of scholarly commentary exists regarding the factors that determine these varying outcomes at the state level.⁷³ An examination of the main determinative factors cited in this literature is critical to understanding the potential application of the education finance litigation model to claims of inadequate and unequal police protection.

B. *State Constitutional Claims*

Some state courts, unlike the U.S. Supreme Court, have found education to be a fundamental right under their state equal protection clauses.⁷⁴ Ultimately, however, this finding was not necessary to a successful outcome for plaintiffs in cases based on equal protection claims; claims succeeded simply upon the lack of a rational relationship between the funding method and educational needs.⁷⁵

The majority of the suits brought after *Rodriguez* in the late 1970s and 80s were maintained under what most scholars have now termed the “equity” theory (the second “wave” of education finance litigation).⁷⁶ The “equity” theory is based on the premise that all children have a right to receive equal funding for education and/or have equal educational opportunities.⁷⁷ Thus, plaintiffs’ equity suits were generally structured as a claim that disparities in education funding, largely due to the inability of state-wide funding to make up for variance in property tax revenues, violate this equity right under state equal protection or, occasionally, specific education provisions of state

⁷³ See, e.g., Thro, *supra* note 61, at 530 n.13 (noting the “extensive” scholarship on this topic and citing sources).

⁷⁴ *Serrano II*, 557 P.2d at 949-52 (asserting that although the Supreme Court found that education was not a fundamental right under the U.S. Constitution, it was still a fundamental right under the California State Constitution); *Horton II*, 376 A.2d at 374 (“[I]n Connecticut, . . . education is a fundamental right.”); *Pauley*, 255 S.E.2d at 878 (concluding “that education is a fundamental constitutional right in [West Virginia]”).

⁷⁵ See *DuPree*, 651 S.W.2d at 93 (holding that the funding scheme violated the state equal protection clause, *without* finding education to be a fundamental right, because the scheme “ha[d] no rational bearing on the educational needs of the district”).

⁷⁶ Thro, *supra* note 61, at 534-37:

In an equity suit, plaintiffs rely on state equality guarantees, and assert that education is a fundamental right and that disparities in funding violate that right. . . . In a quality [or “adequacy”] suit, the plaintiffs assert that the state constitution establishes a particular quality and that the schools do not measure up to that standard.

However, at least one commentator does not believe in the distinction between “equity” and “adequacy” claims or the various “waves” of education finance litigation. See Anna Williams Shavers, *Rethinking the Equity v. Adequacy Debate: Implications for Rural School Finance Reform Litigation*, 82 NEB. L. REV. 133, 155-57 (2003) (asserting that the second and third “waves” can be collapsed into one strategic movement in search of “equal educational opportunity”).

⁷⁷ Shavers, *supra* note 76, at 155-57.

constitutions.⁷⁸ Commentators have observed that after some initial success using the “equity” litigation theory, this strategy no longer produced the same level of victorious results for plaintiffs by the late 1980s.⁷⁹ Commentators most frequently cite the following factors as the source of antipathy toward state equal protection claims: (i) the interpretation of state constitutions as encompassing no greater equal protection rights than those permitted by the U.S. Constitution;⁸⁰ (ii) the difficulty state courts encounter in fashioning a remedy for violations;⁸¹ (iii) the resistance of legislators and taxpayers to increased property taxes due to court orders to remedy education finance systems after successful suits;⁸² and (iv) complaints of diminished local control.⁸³

Education finance litigation, however, was in no way dead. The focus of this litigation shifted from the textual hook of equal protection to almost exclusive reliance on the education clauses in state constitutions.⁸⁴ Every state, with the exception of Mississippi, has an education provision within its constitution.⁸⁵ The language of these education clauses varies widely, ranging

⁷⁸ See, e.g., *Serrano II*, 557 P.2d at 951 (finding that education is a fundamental interest under the state constitution); *Horton I*, 332 A.2d 113, 119 (Conn. 1974) (stating that education is a fundamental right under the state constitution); *Brigham v. State*, 692 A.2d 384, 397 (Vt. 1997) (finding a constitutional “right to equal educational opportunities”).

⁷⁹ *Rebell*, *supra* note 50, at 24 (observing that after a “flurry” of victories in the mid-1970s, plaintiffs won only two decisions in the early 1980s, while defendant states had totaled fifteen victories since the *Rodriguez* decision); *Shavers*, *supra* note 76, at 154-55 (2003). “[I]nitial victories under the second wave were followed by victories in less than half of the states where claims were litigated.” *Id.* at 155.

⁸⁰ Thus, *Rodriguez* is at least the guiding principle for the courts that interpret their state constitutions in this light. See *McDaniel v. Thomas*, 285 S.E.2d 156, 165 (Ga. 1981) (citing *Rodriguez* extensively, and finding that while the state constitution required the provision of “basic educational opportunities,” it did not provide that these opportunities be equalized); see also *Rebell*, *supra* note 50, at 24 (“[Fifteen] of the State Supreme Courts had denied any relief to the plaintiffs – essentially for reasons similar to those articulated by the U.S. Supreme Court in *Rodriguez*.”).

⁸¹ See *Rebell*, *supra* note 50, at 20, 25 (observing the “difficulties experienced by state courts which issued remedial decrees” and that courts gave “little specific guidance” to state legislatures in how to “eliminate the inequities of the old system”).

⁸² *Shavers*, *supra* note 76, at 154-55 (describing taxpayer reticence to “Robin Hood” remedies); see also *Rebell*, *supra* note 50, at 24 (observing the political resistance faced at the imposition of such court orders).

⁸³ Bruce D. Baker & Preston C. Green, *Can Minority Plaintiffs Use the Department of Education Implementing Regulations to Challenge School Finance Disparities?*, 173 ED. L. REP. 679, 681 (2003).

⁸⁴ See *Thro*, *supra* note 61, at 530 n.14 (stating that the “quality” suits prevailing in the 1990s signaled a “profound shift in litigation strategy”); see also *Shavers*, *supra* note 76, at 154-55 (discussing the “new formula,” the goals of which were “taxpayer equity, funding equity, and increased funding for at-risk students”).

⁸⁵ *Thro*, *supra* note 61, at 538.

from general statements establishing a public school system to specific mandates placing education as a priority government service.⁸⁶ Regardless of the wording of the education provision, the strategic shift to relying on the education clauses has largely been a successful one for plaintiffs engaged in this “third wave” of education finance reform litigation,⁸⁷ commonly referred to as “adequacy” suits in the literature.⁸⁸ Plaintiffs structure their argument in these cases around a claim that a certain threshold level of educational quality is required by the constitutional clause, and that the current funding system provides insufficient resources to meet that threshold.⁸⁹ Thus, parity in the monetary amount distributed to or collected by various school districts is no longer the central issue.⁹⁰

Reliance on education clauses led to cases that “sometimes succeeded where equal protection arguments previously failed or where concurrent equal protection arguments were dismissed.”⁹¹ Most scholars credit the success of plaintiffs in the 1990’s “third wave” to the utilization of the novel “adequacy” strategy as compared with “equity.”⁹² Commentators attribute courts’

⁸⁶ *Id.* at 538-40. For a more in-depth analysis of the impact of the language in the education statutes, see generally Thro, *supra* note 61.

⁸⁷ Rebell, *supra* note 50, at 25 (observing the “strong reversal in the outcomes” of such cases since 1989); Thro, *supra* note 61, at 540-42 (declaring that judges have generally “ignored the meaning of the text” of the education clauses).

⁸⁸ See Rebell, *supra* note 50, at 2; Shavers, *supra* note 76, at 137.

⁸⁹ See, e.g., Campaign for Fiscal Equity v. State, 655 N.E.2d 661, 664 (N.Y. 1995) (alleging that the “educational financing scheme fails to provide . . . an opportunity to obtain a sound basic education as required by the State Constitution”).

⁹⁰ Although not the central issue, many suits did contain both equity and adequacy arguments; however, far fewer successful equity claims were brought alone, without a companion adequacy claim. See, e.g., Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 500 (Ark. 2002) (finding the state failed its duty to provide “an adequate education” and to ensure that “equal educational opportunity for an adequate education is being substantially afforded”); Tenn. Small Sch. Sys. V. McWerter, 851 S.W.2d 139, 156 (Tenn. 1993) (“The essential issues in this case are quality and equality of education . . . [and] not . . . equality of funding.”).

⁹¹ Wadhvani, *supra* note 5, at 101-02.

⁹² William E. Thro, *Issues in Education Law and Policy: Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 603-04 (1994) (speculating that the shift in litigation strategy to focusing on “adequacy” rather than “equity” has “made it easier for [plaintiffs] to prevail”); Rebell, *supra* note 50, at 34:

[T]he marked trend toward plaintiff victories . . . can be directly correlated to a greater reliance . . . on claims of a denial of basic educational opportunities guaranteed by . . . state constitution, in contrast to the earlier practice of pleading equal protection claims based on disparities in . . . educational funding.

But see Kenneth Fox, *The Suspectness of Wealth: Another Look at State Constitutional Adjudication of School Finance Inequalities*, 26 CONN. L. REV. 1139, 1192 (1994) (suggesting that distinctions between cases should not be made according to the “wave”

willingness to find constitutional violations of education provisions based on the “adequacy” theory to (i) a more workable criterion on which to base the judicial standard,⁹³ (ii) the absence of a requirement for equal education spending,⁹⁴ (iii) “fewer implications for other areas of the law;”⁹⁵ and (iv) an easier case for the plaintiffs to prove.⁹⁶ However, it is important to observe that some scholars feel the adequacy suits raise similar, and possibly more, problems than equity suits, citing the vague nature of the term “adequate” and the difficulty faced by courts in fixing a remedy.⁹⁷

On the whole, the education finance models that rely on some combination of the education or equal protection clauses in state constitutions have successfully reformed disparities in public education expenditures throughout the country.⁹⁸ Courts typically award successful plaintiffs legislative mandates to construct more equitable funding systems.

An anomaly among the more recent education finance cases, in *Claremont School District v. Governor*, the Supreme Court of New Hampshire predicated a victory for plaintiffs on a violation of a taxation provision in the state constitution, rather than on the equal protection or education provisions.⁹⁹

theory, but rather that the underlying similarity between these cases is the court’s analysis of whether wealth is a suspect classification, that is, essentially an equal protection analysis); Shavers, *supra* note 76, at 189 (asserting that the adequacy and equity claims, at least for rural schools, are sufficiently connected so that distinction made in “wave” theory is misguided, and that equity claims are still viable litigation options).

⁹³ Rebell, *supra* note 50, at 29, 34 (finding that the “standards-based reform movement” that occurred in many states during this period provided a clear basis for judging “adequacy” of education).

⁹⁴ Thus, the remedy is less politically controversial. See Shavers, *supra* note 76, at 156 (characterizing the second wave as “appealing because they emphasize educational opportunity and do not demand equal education spending”) (citing Michael Heis, *Equal Education Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 582 (1998)).

⁹⁵ Thro, *supra* note 92, at 603.

⁹⁶ *Id.* at 603-04.

⁹⁷ See Shavers, *supra* note 76, at 157:

The third wave cases present similar problems regarding definitions as existed with the second wave cases. This is illustrated by the fact that some scholars have suggested that equity or inequality is easier to define and prove than adequacy, while others have suggested the opposite.

John Dayton, *Rural Children, Rural Schools, and Public School Funding Litigation: A Real Problem in Search of a Real Solution*, 82 NEB. L. REV. 99, 119 (2003) (“[A]dequacy cases’ lack the clear judicially manageable standard of fiscal neutrality [of] . . . the equity cases, leading judges into the murkier waters of defining an ‘adequate’ education”).

⁹⁸ See cases cited *supra* note 72.

⁹⁹ 703 A.2d 1353, 1354 (N.H. 1997):

[T]he present system of financing . . . education . . . is unconstitutional. To hold otherwise would be to effectively conclude that it is reasonable, in discharging a State obligation, to tax property owners in one town or city as much as four times the amount

Although the New Hampshire court also found that a fundamental right to an adequate education exists in the state, the court declined to reach a decision on any other potential constitutional violation, except that of Part II, article 5, which requires the New Hampshire legislature to “impose . . . proportional and reasonable . . . taxes upon . . . residents within the . . . state.”¹⁰⁰ The *Claremont* court found that this constitutional provision required “all taxes be proportionate and reasonable – that is, equal in valuation and uniform in rate.”¹⁰¹ Thus, the then-current New Hampshire education finance scheme, which taxed residents at different rates across the state, violated the uniform taxation provision of the state constitution.¹⁰² Critical to this holding was the court’s finding that the taxation for school funding was for a state purpose, thus comprising a “state tax” subject to Part II, Article 5 of the state constitution.¹⁰³ This case is particularly notable because the basis of the constitutional violation was not rooted in education, but rather in a taxation requirement that involves broader implications outside the education realm.

Although the textual basis is paramount to the decisions in all these cases, various other factors may also have significant effects on the success of education finance litigation.¹⁰⁴ Surprisingly, traditional legal factors, e.g. the use of precedent, and statutory and constitutional interpretation, do not correlate with the results in education finance litigation.¹⁰⁵ These factors include the constitutional language (specifically, the wording of education clauses), per-pupil spending, the wealth-gap in the state, the “wave” of litigation period, and the ratio of revenue from local sources.¹⁰⁶ And, although

taxed to others similarly situated in other towns or cities.

¹⁰⁰ *Id.* at 1355, 1359.

¹⁰¹ *Id.* at 1355.

¹⁰² *Id.* at 1357.

¹⁰³ *Id.* at 1355-56:

That the State . . . has shifted most of the responsibility for supporting public schools to local school districts does not diminish the State purpose of the school tax. . . . [T]he taxes are in fact State taxes that have been authorized by the legislature to fulfill the requirements of the New Hampshire Constitution.

¹⁰⁴ Yohance C. Edwards & Jennifer Ahern, Note, *Unequal Treatment in State Supreme Courts: Minority and City Schools in Education Finance Reform Litigation*, 79 N.Y.U. L. REV. 326, 360 (2004) (showing that “the predominant race of the plaintiff school districts, school district setting, and the number of plaintiff school districts involved in litigation” are better predictors of outcome in education finance litigation than traditional legal factors).

¹⁰⁵ See Edwards & Ahern, *supra* note 104, at 349 (“Legal factors are weak predictors of outcome.”); Thro, *supra* note 61, at 538-42 (declaring that because courts consistently ignore the meaning of the constitutional text, the relative duty imposed by the particular state’s education provision made no difference to the outcome of the litigation); Thro, *supra* note 92, at 617 (“[D]espite decisions in more than half of the states, there appears to be no coherent pattern of litigation results.”).

¹⁰⁶ Edwards & Ahern, *supra* note 104, at 349-50 (concluding that neither “stronger constitutional language” nor “[t]he other legal factors – per-pupil spending, wealth gap, wave, and revenue ratio” were associated with outcome); see also Thro, *supra* note 61, at

no statistical analysis exists on this factor, a number of courts that have rejected plaintiffs' state constitutional claims regarding education made a point to register concerns that interference with the state education policy is not a proper role for the courts, as it inappropriately usurps legislative authority.¹⁰⁷ Additionally, many courts cite concerns about the diminution of local control in education to support their rejection of plaintiffs' request for judicial remedy.¹⁰⁸

In reviewing this background, it appears that the shift of strategic focus from "equity" to "adequacy" has had arguably the largest impact on litigation in this area.¹⁰⁹ The underlying textual basis for alleging constitutional violations changed from equal protection to the specific education clause in most state constitutions.¹¹⁰ New Hampshire stands out as the sole state to use a generally

540-42 (declaring that the relative strength of the constitutional language in the education clauses made no difference to the outcome of the litigation).

¹⁰⁷ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973) (stating that the court lacks expertise in the areas of taxation and education policy, and that the judiciary should not constitutionally handicap the legislature from developing methods to solve these sorts of complex policy problems at the state and local level); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1196 (Ill. 1996) ("[R]eform must be undertaken in a legislative forum rather than in courts."); *Marrero v. Commonwealth*, 709 A.2d 956, 965-66 (Pa. 1998) (finding that education finance policy matters "are exclusively within the purview of the General Assembly's powers, and they are not subject to intervention by the judicial branch of our government"); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 57 (R.I. 1995) (interpreting the education clause to give the legislature "virtually unreviewable discretion in this area" and advising plaintiffs to "seek their remedy in that forum rather than in the courts").

¹⁰⁸ See *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981) ("[T]he Georgia public school finance system preserves the idea of local contribution, perhaps out of concern 'that along with increased control of the purse strings at the state level will go increased control over local policies.'" (quoting *Rodriguez*, 411 U.S. at 53)); *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 366 (N.Y. 1982) ("[T]he preservation and promotion of local control of education[] is both a legitimate State interest and one to which the present financing system is reasonably related."). But see *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983) (citing the local control findings in *Serrano* to support a finding of no rational basis for the education finance system); *Serrano v. Priest*, 557 P.2d 929, 948 (Cal. 1976) (stating that the notion of "local control" in education finance is a "cruel illusion" for the poor districts placed upon them by the system itself).

¹⁰⁹ But see *Dayton*, *supra* note 97, at 119 (stating that the shift from "equity" to "adequacy" cases is not necessarily a positive turn for plaintiffs because judges might be more reluctant to order remedial efforts when faced with the "murk[y] waters" of defining an "adequate" education than with a familiar legal standard like "equity"); *Shavers*, *supra* note 79, at 147-48 (observing that the academic distinction between "equity" and "adequacy" claims is false; that the success or failure of school finance litigation is instead attributable to the social, economic and political conditions in the plaintiff's state; and, furthermore, that equity suits are still a viable litigation option).

¹¹⁰ See *supra* notes 91-92 and accompanying text.

applicable tax clause in the state constitution as the basis for finding a violation, instead of the education or equal protection clauses. The use of that generally applicable provision has implications for the possibility of lawsuits based on other governmental services funded through tax revenues, particularly in New Hampshire, but also throughout the country, given the common occurrence of uniform taxation provisions in state constitutions.¹¹¹ Education finance litigation thus demonstrates that a textual hook is necessary for successful adjudication of a claim of inadequate or inequitable distribution of government services, and that such claims are most effective when based in the text of state constitutions.

The overarching accomplishment of the education finance litigation model has been a nationwide school finance reform movement toward a more equitable and effective distribution of resources, regardless of plaintiffs' individual litigation successes or failures.¹¹² Given the breadth of cases and scholarship, the education finance litigation model provides ample fodder for analysis of the implications for future inadequate and unequal governmental services cases, particularly police protection.

III. THE POTENTIAL FOR POLICE PROTECTION LITIGATION

A. *Alternative Avenues of Redress for Inadequate Police Protection*

If a municipality or citizens' group wanted to bring a lawsuit in order to address the problem of discriminatory police protection, they would find few legal options. Neither a federal claim brought under the Equal Protection or Due Process Clauses of the U.S. Constitution nor a state tort claim are likely to be successful.

In addition to foreclosing the possibility of using the Equal Protection Clause of the U.S. Constitution to redress the inequalities of school funding, the *Rodriguez* Court also strongly intimated that this Clause would not be a viable option for bringing challenges based on inequality of funding for police protection.¹¹³ Given the Court's pronouncements in this area, it would likely

¹¹¹ See generally WADE J. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION (1984) (reviewing tax uniformity provisions state by state).

¹¹² In both Iowa and Indiana, cases were filed but never actually litigated because settlement was reached and the legislature immediately reformed the school funding system, rendering the cases moot. See Campaign for Educational Equity, ACCESS, State by State, http://www.schoolfunding.info/states/state_by_state.php3 (last visited Mar. 30, 2006) (citing *Lake Central v. State*, No. 56 C01-8704-CP81 (Newton Cir. Ct., Ind. 1987)); Campaign for Educational Equity, *Alabama Litigation*, *supra* note 72 (citing *Coal. for a Common Cents Solution v. State* (Ia. 2002)).

¹¹³ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973) (finding strict scrutiny improper as the "poor," defined as those from relatively poorer towns, are not a suspect class, and that financing system disadvantages resulted from living in a relatively poor school district rather than individual income characteristics). The Court also opined

apply only rational basis review to a claim of discriminatory police protection based on property-wealth. In order for the state to meet the rational basis test, it need only show that the discriminatory system bears a rational relationship to a legitimate government interest.¹¹⁴ The *Rodriguez* Court found that local control over the provision of local government services is a sufficiently legitimate government interest to discriminate in service distribution based on wealth.¹¹⁵ As a result, unless a plaintiff can show that the disparate police protection is a result of a state intent to discriminate against its relatively poor citizens, the Equal Protection Clause is not a viable possibility to redress a problem of disparate police protection.¹¹⁶ Such a showing is highly unlikely.

Additionally, the Supreme Court has repeatedly held that equal protection challenges to state and local taxation schemes deserve minimum scrutiny, primarily due to apprehension about institutional competence and interfering with local control.¹¹⁷ Lawrence Rosenthal notes other factors that limit the possibility for relief under an equal protection claim of disparate police protection including: a potential lack of standing (likelihood of victimization is too speculative), redressability problems (court-ordered changes may not have any effect on the crime rate), and federalism and separation of powers concerns.¹¹⁸ Moreover, Professors Inman and Rubinfeld note a reluctance on the part of federal courts to direct a remedy in cases concerning the discretionary use of locally-raised funds; they conclude that federal relief in this area is truly only viable for racial discrimination upon a showing of intent

that “if local taxation for local expenditures were an unconstitutional method of providing education then it might be an equally impermissible means of providing other necessary services . . . including local police and fire protection”). *Id.* at 54.

¹¹⁴ *Id.* at 40.

¹¹⁵ *Id.* at 52-55 (arguing that any scheme of local taxation requires the establishment of inevitably arbitrary jurisdictional boundaries, and that the fact that some localities are “blessed with more taxable assets than others” does not invalidate the entire system of education finance where there are legitimate reasons for retaining local control of education).

¹¹⁶ *Washington v. Davis*, 426 U.S. 229, 239-241 (1976) (holding that in order to trigger strict scrutiny analysis under the Fourteenth Amendment, preliminary findings of both disparate impact and discriminatory intent are required).

¹¹⁷ *See, e.g., Rodriguez*, 411 U.S. at 40-41:

[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption or constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes

(quoting *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940)); *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (“[T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification This standard is especially deferential in the context of classifications made by complex tax laws.”).

¹¹⁸ Rosenthal, *supra* note 45, at 75.

to discriminate based on race.¹¹⁹ Consequently, the plaintiffs in any police protection litigation should avoid the federal courts and the Equal Protection Clause altogether. Without a showing of a fundamental right or discriminatory intent to provide inadequate police protection on the basis of wealth, the legitimate government interest in local and state control of such services will undoubtedly win out.

In addition to federal claims under the Equal Protection Clause, plaintiffs from property-poor towns could theoretically claim that inadequate police protection as a result of the funding system denies them due process. But, historically, courts have been reluctant to hold municipalities accountable for inadequate police protection.¹²⁰ It appears that no Due Process Clause remedy exists for inadequate police protection of a defined group of citizens. Most of the Due Process Clause challenges to police protection, which are largely unsuccessful, focus on individual incidents where the police failed to protect a plaintiff from private violence.¹²¹ In *Bowers v. Devito*, Judge Posner found that “[i]t is monstrous if the state fails to protect its residents against [third persons] but it does not violate the due process clause of the Fourteenth Amendment.”¹²² Posner stated that the Constitution “does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.”¹²³

Importantly, in *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court ruled that the state does not violate the Due Process Clause by failing to protect an individual against private violence, unless that individual is in state custody.¹²⁴ Professor Jack Beermann asserts

¹¹⁹ Inman & Rubinfeld, *supra* note 1, at 1701:

[T]wo factors serve to limit the traditional presumption of flexibility accorded to federal courts in designing effective remedies. First, the judiciary is reluctant to order local governments to spend funds otherwise subject to the discretionary control of local officials. Second, recent Supreme Court opinions have evidenced a general unwillingness to interfere with local control and initiative In summary, the federal law currently provides some protection against the distribution of services among neighborhoods within a community only where it is the result of intentional racial discrimination.

¹²⁰ See Gerald P. Krause, Comment, *Municipal Liability: The Failure to Provide Adequate Police Protection – The Special Duty Doctrine Should be Discarded*, 1984 WIS. L. REV. 499, 499 (1984) (discussing judicial reluctance to find a municipality liable for failing to provide adequate police protection even in jurisdictions in which the doctrine of sovereign immunity has been abolished).

¹²¹ See Jack Beermann, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078, 1082 (1990).

¹²² 686 F.2d 616, 618 (7th Cir. 1982) (finding no due process violation where state officials allegedly failed to protect the decedent from a released psychiatric patient with a history of violence).

¹²³ *Id.*

¹²⁴ 489 U.S. 189, 191 (1989) (finding no due process violation where the state social services agency failed to protect a young child from severe abuse by his father).

that the *DeShaney* ruling “stands as a broad principle against governmental duties to prevent private misconduct.”¹²⁵ As interpreted by the Court, the Due Process Clause functions as a limitation on state power, not as a promise of a certain level of safety benefits.¹²⁶ Thomas Eaton and Michael Wells resist reading *DeShaney* to prohibit *any* due process claim and maintain that there is still a viable constitutional claim under the Due Process Clause if an official’s egregious misconduct (as evidenced through limitations on self-help, affirmative contribution to the danger, or government action worsening the situation) is indicative of deliberate indifference to the risk of harm.¹²⁷

Furthermore, 42 U.S.C. § 1983 provides a vehicle for redressing constitutional violations by government officials if the conduct amounts to a “state-created danger.”¹²⁸ However, the state-created danger test generally requires much more direct government action than simple funding decisions.¹²⁹ Additionally, Professor Armacost casts doubt on the possibility of any failure-to-protect liability against state officials for funding decisions through § 1983.¹³⁰ She argues that general failure-to-protect cases turn on

¹²⁵ Beermann, *supra* note 121, at 1084 (asserting, like many other academics, that the court reached too narrow a result in *DeShaney* by defining the state’s behavior as inaction as opposed to action, thereby completely disregarding citizens’ reliance on the modern welfare state).

¹²⁶ *DeShaney*, 489 U.S. at 195 (“The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.”); *see* Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (famously stating that “[t]he Constitution is a charter of negative rather than positive liberties”) (citations omitted); Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 983 (1996) (commenting that in *DeShaney* the Court did not see the Due Process Clause as imposing any affirmative obligations on the state).

¹²⁷ Thomas Eaton & Michael Wells, *Governmental Inaction as a Constitutional Tort: DeShaney and Its Aftermath*, 66 WASH. L. REV. 107, 166 (1991):

[T]he due process clause protects a person’s life and health against egregious misconduct by government officers If the evidence regarding [the government officer’s] knowledge and motives warrants characterizing his attitude toward to victim’s plight as “deliberate indifference,” then the plaintiff makes out a good claim.

¹²⁸ 42 U.S.C. §1983 (2000); *see* Matthew Barrett, Note, *Failing to Provide Police Protection: Breeding a Viable and Consistent “State-Created Danger” Analysis for Establishing Constitutional Violations under Section 1983*, 37 VAL. U. L. REV. 177, 179-84 (2003) (describing case history leading to the creation of a “state-created danger theory” of government liability under Section 1983). But note that this provides only injunctive relief against state officials because of the Eleventh Amendment. *See* Armacost, *supra* note 126, at 985-86 n.17 (“The Eleventh Amendment bars § 1983 suits for damages against states and state officers in their official capacities. Injunctive relief, however, may be obtained against state officials . . . through the ‘fiction’ of suing state officials in their individual capacities.”).

¹²⁹ *See* Barrett, *supra* note 128, at 188-204 (categorizing and describing the various circuit court state-created danger tests).

¹³⁰ Armacost, *supra* note 126, at 1017.

considerations of resource allocation at both the legislative and operational level, and such considerations are beyond the institutional competence of the courts.¹³¹

As generally understood, an allegation that a group of citizens is not receiving adequate police protection because of funding disparities would not state a Due Process claim because the actual harm is inflicted by private persons through crime and not by the government entity directly. One might imagine a claim under the Eaton and Wells rubric if the situation amounted to deliberate indifference by the government agent, but arguments relying on this level of misconduct are beyond the scope of this Note. As both the Equal Protection and Due Process Clauses are both effectively foreclosed, a challenge to unequal or inadequate police protection must be brought under the applicable state constitution.

Although a multitude of state tort cases have been brought against municipal police departments for failure to adequately protect an individual from harm, there is an “overwhelming presumption *against* liability for failure to protect.”¹³² Presently, the potential liability of a state or local official varies widely by state.¹³³ Generally, before a municipality can be held liable, a “special duty” must exist between the injured person and the police department.¹³⁴ Liability for a lack of police protection is generally premised on the “public-duty rule,” stating that the government has a general duty to protect the entire community – not a duty to protect any one individual.¹³⁵

¹³¹ *Id.* at 1017-18 (discussing *Reiff v. City of Philadelphia*, 471 F. Supp. 1262 (E.D. Pa. 1979), in which the plaintiff, who was shot during a robbery while shopping, claimed that the government failed to protect her by providing inadequate police protection in a high crime area). The argument that resource allocation is beyond the scope of court’s proper role holds true for this Note; the overriding focus is the resource allocation disparities by the state and local authorities of policing funds. *Armacost* states that these are inherently political budgeting decisions and are therefore inappropriate for judicial review. *Id.* at 1003. However, those with an ineffective political voice may require the court’s help in effecting their rights.

¹³² *See Armacost, supra* note 126, at 985 (commenting on the close legal relationship between a Due Process action for failure to protect and a tort claim for failure to protect).

¹³³ *See GILLETTE & BAKER, supra* note 32, at 674 (observing that some states reject the governmental/proprietary distinction, some retain it, and some abolish governmental immunity all together).

¹³⁴ *See Krause, supra* note 120, at 507 (“Courts also require that plaintiffs show the existence of a ‘special duty’ between themselves and a municipality before liability will attach.”).

¹³⁵ *See, e.g., Riss v. City of New York*, 240 N.E.2d 860, 861 (N.Y. 1968) (refusing to establish a general government duty of police protection, but conceding that certain situations, as where the police undertake responsibility for certain individuals or expose them to the risks which cause the harm, are different and might result in liability); *see also Krause, supra* note 120, at 499:

Jurisdictions that have addresses the issue of inadequate police protection adhere to the general rule that a municipality owes a duty of police protection to the general public,

Thus, it is unlikely that a court would apply the “special duty” doctrine to the community-wide claim proposed in this Note, as the doctrine’s requirement of proof of an individual duty is inconsistent with the notion of a community-wide claim. However, it is possible to imagine a community-wide claim based on the more general public duty; for instance, plaintiffs might be able to show that the state funding scheme for police protection prevents an adequate police response that results in an overall failure to meet the general duty to protect the general public. Yet Professor Armacost notes that the oft-mentioned concerns – institutional competence and separation of powers – remain in any type of lawsuit resulting in a presumption against government liability.¹³⁶

Haar and Fessler argue that state and local governments have a common law duty to provide equal and adequate governmental services – a duty based on historical common law traditions which is enforceable in tort.¹³⁷ Although they make a strong, passionate argument, such a claim is generally thought to be non-justiciable.¹³⁸ Nevertheless, given the state of the doctrine as discussed, a tort claim by a community against a state is at least conceptually articulable because of the recognized general duty to protect a community.

None of the potential avenues of redress for a claim of inadequate or unequal police protection reviewed above appear particularly advantageous. Federal equal protection and due process remedies have been effectively barred by the Supreme Court, and state tort relief faces the same obstacles that have hindered other local government services cases – a preference for local control and concerns regarding institutional competence.

B. *Analysis of Police Protection Reform Under the Education Model*

The education finance reform strategy’s use of state constitutional doctrine may serve as model for addressing the problem of inadequate or unequal police protection in relatively poor, crime-ridden communities. Analogy of the police protection problem to education finance reform proves meaningful considering

but owes no duty to any particular individual. Absent a ‘special duty’ to a particular individual, a municipality is not liable for its failure to provide adequate police protection.

Armacost, *supra* note 126, at 996 (stating that the public duty rule is often invoked to deny liability in failure-to-protect cases because the government “‘has a duty to the general public, as opposed to [any] particular individual’”).

¹³⁶ Armacost, *supra* note 126, at 1039 (“This notion that certain kinds of decisions should be left to the political branches rather than the courts reflects strongly held and normatively powerful beliefs about how our governmental system should operate.”).

¹³⁷ Haar & Fessler, *supra* note 42 (“[E]nterprises providing functions and services that are essential and public in character have a common law duty to serve – a positive obligation to provide all members of the public with equal, adequate, and nondiscriminatory access.”).

¹³⁸ See Clayton P. Gillette, *Equality and Variety in the Delivery of Municipal Services*, 100 HARV. L. REV. 946, 968 (1987) (admitting that Haar and Fessler’s theory is a significant start to solving unequal services, but one that still delivers less than promised).

the many parallels between the two areas, such as the textual basis of the claim, the public nature of the services, the funding mechanism, the parties involved, the remedy available, and the role of the court. Although a potential police protection claim under the education finance reform model enjoys many of the same positive traits, it also suffers many of the same pitfalls.

1. The Textual Basis of the Claim

Despite the fact that the problem of unequal or inadequate police protection is clear, in order to draw a successful analogy to education finance reform litigation, those who seek police funding reform must base their argument on some textual provision of the state constitution. As noted earlier, education finance reform has largely relied on the specific education provisions in state constitutions as the basis of the legal challenge.¹³⁹ Courts seized upon the specific requirement in these education clauses to provide free public education in order to find an adequate level or standard that the state had failed to reach using the challenged funding scheme.¹⁴⁰

The “adequacy” arguments have logical application to other municipal services only if such government services are required to be provided at some threshold level by the state government as granted by the state constitution.¹⁴¹ A specific provision for police protection, akin to the education clause, generally does not exist.¹⁴² However, there are non-specific clauses in most state constitutions that regard police protection from which a court might find a positive right. Along these lines, courts have used non-specific language in state constitutions to afford affirmative rights to the receipt of welfare benefits, public health assistance, and the provision of emergency shelters for the homeless.¹⁴³

Turning to police protection, the Massachusetts Constitution, for instance, mentions protection and safety of its citizens numerous times in the Preamble alone, and further states that “[e]ach individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the

¹³⁹ See *supra* notes 91-92 and accompanying text (outlining the parameters of the “third wave” of education finance litigation).

¹⁴⁰ See *supra* text accompanying notes 85-90.

¹⁴¹ See Wadhvani, *supra* note 5, at 102 (stating that a strict translation of the education finance litigation model requires direct language in the state constitution requiring a minimum standard of municipal services in order for courts to adjudicate any claim).

¹⁴² See *id.*

¹⁴³ See *id.* at 103-04 (reviewing the work of Professor Hershkoff (welfare), Professor Braveman (welfare and public health), and John Connell (right to emergency shelter for the homeless), and arguing that education does not have a completely unique position in state constitutions).

expense of this protection”¹⁴⁴ This provision not only specifically confers a right of protection, but also indicates that this right should be financed by the citizens, most likely through taxes.¹⁴⁵ Other state constitutions have similar provisions; for instance, the New Jersey Constitution states that “government is instituted for the protection, security, and benefit of the people.”¹⁴⁶

Arguably, the police protection language cited above employs no vaguer concepts than some of the education provisions that were interpreted to create positive rights that state education funding schemes violated.¹⁴⁷ Additionally, the few scholars analyzing the determinative factors in education finance litigation have found that the strength and specificity of the wording in the education clause does not correlate with the outcome of the suit.¹⁴⁸ Therefore, the simple fact that the constitutional language calling for the protection of all citizens is abstract does not alone foreclose an argument that a state is required to provide some threshold level of police protection to all of its citizens.

Professor Robert Ellickson expresses doubt that state constitutional language (other than education clauses) can or will be interpreted to bestow affirmative rights on the states’ citizens in the same manner as the right to schooling.¹⁴⁹ He presents this position while discussing whether a right to shelter exists for the homeless, and frames his argument around whether

¹⁴⁴ MASS. CONST. pmb. (“[T]he people have a right to . . . take measures necessary for their safety”); *Id.* pt. I, art. X.

¹⁴⁵ This raises interesting issues regarding exactly what “his share” of protection would mean. Does it mean that one who consumes and requires more police protection should pay more for it? Or does this mean that every citizen should pay their per capita share of the protection of all the state citizens? The answer lies beyond the scope of this Note.

¹⁴⁶ N.J. CONST. art. I, ¶ 2a; *see* OHIO CONST. Art. I, § 2 (“Government is instituted for [the peoples’] equal protection and benefit”); VA. CONST. art. I, § 3 (“[G]overnment is . . . instituted for the common benefit, protection and security of the people”).

¹⁴⁷ *Compare Horton II*, 376 A.2d 359, 362 n.2, 374 (Conn. 1977) (finding a fundamental right to equal education through the state’s education clause, CONN. CONST. art. VIII, 1, which states only that “[t]here shall always be free public elementary and secondary schools in the state”) with N.H. CONST. pt. I, art. 12 (“Every member of the community has a right to be protected”).

¹⁴⁸ Even in states with vague or weak education clauses that set no clear standard or requirement beyond establishing a public school system, courts have found that such language required the state to provide at least a minimum threshold level of public education. *See Thro*, *supra* note 61, at 539-42 (classifying each state’s relevant constitutional clause as: “establishment provisions,” “quality provisions,” or “high duty provisions,” but finding that this classification has no effect on case outcomes); *see also* Edwards & Ahern, *supra* note 104, at 349-50 (stating that “[p]laintiffs in state with the strongest constitutional language have been much less successful than those in states with mid-range levels of constitutional language, and only about as successful as those in states with the weakest language”).

¹⁴⁹ Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL’Y 17, 32 (1992).

creating such an entitlement would encourage or discourage work.¹⁵⁰ Finding that a right to education encourages work and a right to shelter discourages work, he argues that courts are less likely to find entitlements where such entitlements might discourage work.¹⁵¹ As the issue of inadequate police protection does not necessarily encompass a traditionally-viewed entitlement, Ellickson's position is inapplicable to the subject of this Note. However, By analogy, one could argue that areas with high crime and inadequate police protection tend to drive out business and economic development, which has a very real and detrimental effect on employment possibilities. Using Ellickson's argument, this would mean that courts may be more likely to find a positive right for adequate police protection than for sheltering the homeless.

A notable roadblock to the use of "protection" provisions to remedy inadequate police enforcement is that "[w]here specific constitutional language carrie[s] little weight," as in education finance litigation, "political pressures are more likely to hold sway."¹⁵² The political pressures likely to arise in the police protection context are in fierce opposition to redistribution of wealth from property taxes away from the communities that pay more (and thus have more of a political voice) toward communities that are suffering from a lack of police funds (property-poor communities with less political voice).¹⁵³ Strong opposition abounds when citizens perceive a loss of local control over locally-collected property taxes.¹⁵⁴ Therefore, although it is possible for courts to find a positive right to police protection in the above-referenced constitutional phrases, strong political pressures against doing so present a very real obstacle.

Even if the absence of a specific clause announcing a right to equal or adequate police protection detracts from the analogy to the education finance reform model,¹⁵⁵ the review of education cases has uncovered an interesting possibility. As noted earlier, in deciding *Claremont School District v. Governor*, the Supreme Court of New Hampshire used the education clause as the textual basis for determining that education was a state, not local, concern,

¹⁵⁰ *Id.* at 32-33.

¹⁵¹ *Id.*

¹⁵² Fox, *supra* note 92, at 1188 (discussing Thro's argument that because there is no correlation between the outcome of education reform litigation and the actual language in the state constitution, political pressures explain the different outcomes).

¹⁵³ See, e.g., GILLETTE & BAKER, *supra* note 32, at 377 (observing that citizens who are politically unable to make their preference known – e.g., poor citizens – in turn lack access to municipal services); Frug, *supra* note 20, at 29 (analogizing city services to consumer goods, and arguing that residents use taxes as a means by which to exclude undesirables, like the dues for membership to an exclusive club).

¹⁵⁴ See, e.g., Frug, *supra* note 20; Wadhvani, *supra* note 5, at 96 ("The idea that municipal services should be paid for and controlled locally is so ingrained in the American system of government that voters tend to perceive any regional redistributive efforts as a grave injustice.").

¹⁵⁵ See Wadhvani, *supra* note 5, at 102 (indicating the importance of a "textual hook" to success using the adequacy argument).

but it was not the primary basis to invalidate its school funding scheme.¹⁵⁶ It was not used as a primary basis to invalidate its school funding scheme. Instead, the Court cited a violation of the uniform taxation provision of the New Hampshire Constitution.¹⁵⁷ The taxation provision states that the legislature may “impose and levy proportional and reasonable assessments [upon the] residents within [New Hampshire].”¹⁵⁸ The Supreme Court of New Hampshire defines “proportional and reasonable” to mean “equal in valuation and uniform in rate . . . and just.”¹⁵⁹ The test to determine if a tax is equal and proportional is to ask “whether the taxpayers’ property was valued at the same per cent [sic] of its true value as all the taxable property in the taxing district.”¹⁶⁰ Thus, the relevant issue is the definition of “taxing district,” regardless of the purpose for the tax, be it education, police protection, or some other purpose.

In *Claremont*, the Supreme Court of New Hampshire rejected the lower court’s focus on the identity of the entity controlling the administration of the tax in favor of an approach focusing on the purpose behind the tax.¹⁶¹ The *Claremont* court found that purpose of the school tax was education for the public’s benefit and, thus, the tax was a “state tax.”¹⁶² Consequently, this court rationalized that because the school tax is a state tax, the relevant taxing district must be the state and, given that the property tax rates vary by municipality, the imposition of the property tax for schooling violates the New Hampshire Constitution.¹⁶³ Thus, following that logic, if a court is presented with a police protection discrimination claim based on a violation of the uniform tax provision, the court may investigate such a claim more vigorously than a claim based on another constitutional provision. However, a potential

¹⁵⁶ 703 A.2d 1353 (N.H. 1997) (*Claremont II*).

¹⁵⁷ *Id.* at 1357 (holding that the state’s financing scheme violates the New Hampshire Constitution because the varying tax rates applied across the state to fund education were “unreasonable and disproportionate”).

¹⁵⁸ N.H. CONST. pt. II, art. 5.

¹⁵⁹ Opinion of the Justices, 379 A.2d 782, 786 (N.H. 1977) (citing Opinion of the Justices, 138 A. 284, 291 (N.H. 1927) and Opinion of the Justices, 4 N.H. 565, 570 (1829)).

¹⁶⁰ *Claremont II*, 703 A.2d at 1255 (quoting *Bow v. Farrand*, 92 A. 926, 926 (N.H. 1915)).

¹⁶¹ *Id.* at 1355-56:

[T]he trial court reasoned that whether a tax is a State tax or local tax depends on “the entity that controls the mechanics of assessment and collection” and “the disposition of the tax revenues after their collection.” . . .

Determining the character of a tax as local or State requires an initial inquiry into its purpose.

¹⁶² *Id.* at 1356 (“We find the purpose of the school tax to be overwhelmingly a State purpose and dispositive of the issue of the character of the tax.”).

¹⁶³ *Id.* at 1356-57 (citing specific tax rates in Pittsfield, Moultonborough, Allenstown, and Rye to show differences in tax rates of up to 400 percent, and concluding that the school tax thus violates the State Constitution).

problem with the uniformity tax provision approach, and using New Hampshire as a model specifically, is that the *Claremont* court attempted to limit its ruling only to the education field, by distinguishing education as a unique government service.¹⁶⁴ This theme recurs throughout the education finance decisions, and is scrutinized below.¹⁶⁵

Relying on issue-specific state constitutional provisions to find a right of equal or adequate police protection is not without its pitfalls. The likelihood of such a finding is undermined by the argument that the success of the third wave of education finance litigation was due to judges' willingness to find an education right specifically because such rulings could not be extended to other municipal services.¹⁶⁶ The courts suggest that the drafters singled out education to receive special protection under the state constitution. Therefore, by negative implication, legislatures did not intend similar treatment of other governmental services. The Supreme Court of Vermont made this point when it stated: "Many essential governmental services such as welfare, [and] police and fire protection . . . receive no mention whatsoever in our Constitution. Only one governmental service – public education – has ever been accorded constitutional status in Vermont."¹⁶⁷ Such strong language makes clear that the court's rationale for relying on the education clauses was to distinguish education from other government services, even if most of the opinion's language focused on a the problem with wealth disparity in distributing local government services.

However, at least one scholar, Kenneth Fox, has argued that because courts invoking state education clauses based their decisions on essentially equal protection concerns, they knew and *intended* the potential for extension of their rationale to other municipal services.¹⁶⁸ Moreover, Fox asserts that all of the education finance litigation is inherently focused on equal protection claims centered on wealth discrimination, whether implicitly or explicitly.¹⁶⁹ Therefore, Fox finds that "the wealth discrimination perspective reveals that

¹⁶⁴ *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1356 (N.H. 1997) ("[P]ublic education differs from all other services of the State. No other governmental service plays such a seminal role in developing and maintaining a citizenry . . .").

¹⁶⁵ See *infra* Part III.B.2.

¹⁶⁶ See, e.g., Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 315 (1991) (asserting that state high courts favor plaintiffs' cases that rely on education clauses because their extension to other areas of law is more limited than that of equal protection cases).

¹⁶⁷ *Brigham v. State*, 692 A.2d 384, 392 (Vt. 1997).

¹⁶⁸ Fox, *supra* note 92, at 1145 (declaring that the judicial examination was truly about whether wealth discrimination was occurring – essentially an equal protection examination).

¹⁶⁹ Fox, *supra* note 92, at 1179-81 (claiming that, for instance, the *Robinson* court actually applied equal protection jurisprudence even though it claimed to be deciding the case on the education clause).

school finance litigation has been as much concerned with property taxes, and the redistributive effects of tax reform, as with educational opportunity.”¹⁷⁰

Equal protection doctrine, as employed in education finance litigation, resists the limitations of issue-specific constitutional provisions, and consequently provides a parallel argument for enforcing a right to equal police protection. Wadhvani’s description of the potential argument is as follows:

[B]y delegating the financial responsibility for police protection to the local governmental units, the state has created a system whereby the quality of police protection may vary according to district wealth, leading to significant disparities in service levels. Because protection of life and property is a fundamental right, a court should examine the state policy under heightened scrutiny. The state purpose of facilitating local control over the provision of services would not withstand this level of scrutiny, because fiscal control is a “cruel illusion” for the less wealthy local political units that have no meaningful authority over how much they can spend on police protection.¹⁷¹

However, the crux of this litigation strategy depends on whether a state interprets its equal protection clause to encompass the same rights, and no more, as the federal Constitution (mandating only rational basis review), or whether the state has been willing to protect more broadly the rights of its citizens (allowing heightened scrutiny of police protection claims). The Supreme Court created this limitation by reading the federal Constitution to deny a fundamental right to education, and casting serious doubt on whether wealth could ever be a suspect classification under Equal Protection Clause jurisprudence.¹⁷² Consequently, the education finance plaintiffs ran into a brick wall when attempting to rely on equal protection in state courts¹⁷³ that had previously interpreted their equal protection clause as identical to the federal Constitution.¹⁷⁴ It is worth noting however, that absent such a previous

¹⁷⁰ *Id.* at 1180.

¹⁷¹ Wadhvani, *supra* note 5, at 113-14.

¹⁷² *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 23-25, 37 (1973) (holding that education is not a fundamental right or liberty, and that the Equal Protection Clause does not require wealth equality). The Court rejected wealth as a suspect classification because of the absence of an appropriate definition of the affected class and the lack of finding an absolute deprivation of any right, stating that “where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.” *Id.* at 23-25.

¹⁷³ This tactic had been encouraged by Justice Marshall in his dissent in *Rodriguez*. *Id.* at 133 n.100 (Marshall, J., dissenting) (“[N]othing in the Court’s decision today should inhibit further review of state educational funding schemes under state constitutional provisions.”).

¹⁷⁴ *See* *McDaniel v. Thomas*, 285 S.E.2d 156, 167 (Ga. 1981) (stating that federal equal protection caselaw provides guidance for claims under the state constitution’s equal protection clause); *Bd. of Educ. v. Nyquist*, 439 N.E. 2d 359, 365-66 (N.Y. 1982) (holding

ruling, some state courts would be willing to interpret their state constitution more broadly, even if the clause is similar in structure and language to the federal Equal Protection Clause.¹⁷⁵ In addition, there is a trend in current jurisprudence giving state courts more leeway to interpret state constitutions unencumbered by the boundaries set by the Supreme Court with respect to the federal Constitution.¹⁷⁶

Wadhvani states that police protection may be the only other local government service that could rise to the level of a fundamental interest, which is necessary for heightened equal protection scrutiny.¹⁷⁷ Education and police services, as discussed *infra*, are more easily distinguished from services that could constitutionally be distributed based on ability to pay.¹⁷⁸ Moreover, if wealth disparity has truly been the concern and focus of the courts, then it suggests that claims based on wealth discrimination in the context of police protection may be viable under similar reasoning.

But given the reticence of some state courts to find equal protection violations for education financing¹⁷⁹ and the specific call in successful claims for limitation to the education context,¹⁸⁰ relief under state equal protection clauses looks questionable. Although not binding on state courts' interpretation of their own constitutions, the Supreme Court's strong language in *Rodriguez* may deal a fatal blow to any attempt to extend state equal protection doctrine to a right to adequate or equal police protection:

[I]f local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible

that the state equal protection clause provided no stronger legal claims than those available under the federal Constitution); *see also* Josh Kagan, Note, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2242 n.6 (2003) (noting that state equal protection claims are frequently unsuccessful because state courts frequently interpret state equal protection clauses to provide no greater protection than the federal clause).

¹⁷⁵ *See, e.g.*, *Serrano v. Priest*, 557 P.2d 929, 950-51 (Ca. 1976) (finding that the state equal protection clause, "while substantially the equivalent of" the Equal Protection Clause in the federal Constitution, was "possessed of an independent vitality which . . . may demand an analysis different from that which would obtain if only the federal standard were applicable," and holding education to be a fundamental interest and wealth to be a suspect classification).

¹⁷⁶ Kagan describes this as the "New Federalism," a legal trend that "seeks to develop judicial protection of rights under state constitutions that go beyond protections offered by courts in federal constitutional cases." Kagan, *supra* note 174, at 2256 n.92.

¹⁷⁷ Wadhvani, *supra* note 5, at 114.

¹⁷⁸ The nature of the government services provided is discussed *infra* Part III.B.2.

¹⁷⁹ *See supra* text accompanying notes 80-83.

¹⁸⁰ *See, e.g.*, *Brigham v. State*, 692 A.2d 384, 390 (Vt. 1997) (finding education so "integral to our constitutional form of government" that it must be strongly protected as a fundamental right under equal protection clause of the state constitution regardless of the standard of review applied).

means of providing other necessary services customarily financed largely from local property taxes, including local *police and fire protection*, public health and hospitals, and public utility facilities of various kinds. We perceive no justification for such a severe denigration of local property taxation and control as would follow from [plaintiffs'] contentions. It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live.¹⁸¹

Further, whether equal protection is applied using rational basis or heightened review, some courts have defeated similar education claims by designating the significant or compelling government interest as local control – an interest equally applicable in the police protection realm.¹⁸² Concerns over the control of locally-raised finances, because of its perceived tie to defining local policy, is a roadblock to police funding reform. This argument is grounded in autonomy concerns and the strong desire of local residents to use their property tax money for the benefit of their own town.¹⁸³ As outlined by the Supreme Court in *Rodriguez*, local control over finances is equated with local control over important policy decisions.¹⁸⁴ If the funding mechanism is shifted to the state level, the fear is that local autonomy will be severely diminished.¹⁸⁵ This autonomy argument operates on two levels. On one level is a concern for personal autonomy, illustrated by the notion that a citizen has chosen where she would like to live in order to get certain services and would object to the idea of her money being spent outside those bounds.¹⁸⁶ On the other level is the governmental autonomy concern regarding the ability of the local governmental body to make policy decisions within its borders.¹⁸⁷ This strong political opposition from both individual citizens and the town governing body may be a barrier to any police funding reform because the remedy would most likely involve the redistribution of tax money.

¹⁸¹ *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54 (1973) (emphasis added).

¹⁸² *See, e.g., Rodriguez*, 411 U.S. at 53-54 (asserting that all schemes of local taxation require the drawing of arbitrary boundaries); *Bd. of Educ. v. Nyquist*, 439 N.E. 2d 359, 366 (N.Y. 1982) (holding that local control over education is a state interest).

¹⁸³ *See supra* text accompanying note 37 (describing the public perception of local taxes as collective property of the community to be spent for its benefit).

¹⁸⁴ *See Rodriguez*, 411 U.S. at 52-53 (acknowledging citizens' concerns that state control over finances leads to state control over local policies).

¹⁸⁵ *Id.*

¹⁸⁶ *See Frug, supra* note 20, at 29 (describing the autonomy concerns of consumers of public goods and the perception of local taxes as collective property to be spent within the community's boundaries).

¹⁸⁷ *See Rodriguez*, 411 U.S. at 52-53.

However, many authorities, including Justice Thurgood Marshall, have suggested that the justification of local control proffered by states is a “myth” and inadequate to validate the disparity in governmental services.¹⁸⁸ This “myth” is perceived by understanding that local *fiscal* control has no effect on local *policy* control if the locale’s resources are insufficient to execute that policy. Some courts have ruled that local control as a compelling state interest is a “cruel illusion” because the state action of discriminatory funding leaves disadvantaged communities with little real choice over their education quality.¹⁸⁹ These responses to the local control argument in education reform are as applicable to the police protection context as the local control argument itself. Many communities may not feel that they have a real choice in funding police at a low level, but rather that the insufficient revenue generated based on property taxes has stripped away this choice.

In sum, the potential textual bases to redress inadequate and unequal police protection share, at the very least, theoretical obstacles. These obstacles range from complete preclusion of any useful extension – such as a federal equal protection claim – to obstacles that have been rebutted in education reform and can be analogized to police protection – like state equal protection clauses, state constitutional language intimating a right to protection, and uniform taxation provisions. The best chance to establish a viable basis for a reform claim would be (i) the assertion of a positive right in the general state constitutional language about security and protection, and (ii) the utilization of the uniform taxation provisions of state constitutions, as New Hampshire did for education reform.

2. The Nature of the Public Service Provided

It is imperative that plaintiffs who claim unequal police protection compare the nature of the government service provided in education with that provided in police protection. Notably, much of the success of education litigation has been pinned on the special stature that courts confer on education.¹⁹⁰ The often-quoted passage from the seminal case of *Brown v. Board of Education* highlights the importance of education in our society:

¹⁸⁸ See *id.* (Marshall, J., dissenting) (suggesting that Texas’ local control rationale is unpersuasive because the state had structured the system to guarantee that some wealthy districts spend less and some poor districts spend more); see also Wadhvani, *supra* note 5, at 116-17 (recounting cases where courts suggested that local control over the funding of government services is a fallacy).

¹⁸⁹ See *Serrano v. Priest*, 487 P.2d 1241, 1260 (Cal. 1971) (rejecting the local control as a compelling state interest and observing that any financing scheme could still leave control with local districts); see also *Brigham v. State*, 692 A.2d 384, 396 (Vt. 1997) (citing *Serrano* for the proposition that for poorer districts, fiscal free will is an illusion).

¹⁹⁰ See, e.g., *Brigham*, 692 A.2d at 390 (finding for the plaintiffs and holding that education is so “integral to our constitutional form of government” that it must be strongly protected as a fundamental right under the equal protection clause of the state constitution, regardless of the standard of review applied).

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 education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹⁹¹

Commentators point out that lack of education can lead to children's inability to realize their full potential, which "create[s] a formula for future disadvantage and poverty."¹⁹² Additionally, "[e]ducation is considered the road to advancement, for the poor as well as the rich: the better the education, the better the job and, as a result, the better the quality of life."¹⁹³

Although many education reform cases portray education in a unique light,¹⁹⁴ a strong argument can be made that education does not hold a unique position in the realm of governmental services.¹⁹⁵ The public services of education and police protection share many common traits. Both services occupy the largest budget items for municipalities, indicating their relative importance in the eyes of local legislative bodies.¹⁹⁶ Both education and police protection are fundamental government services necessary for society to function properly and for the citizenry to prosper. Disparities and inadequacies in the funding of each can have detrimental effects on one's community. Inadequate funding for education leads to inadequate education of children.¹⁹⁷

¹⁹¹ 347 U.S. 483, 493 (1954). However, the Court's strong language is tempered by the Court's later recognition that education is *not* a fundamental right under the Constitution. *Rodriguez*, 411 U.S. at 35.

¹⁹² Dayton, *supra* note 97, at 100.

¹⁹³ Frug, *supra* note 20, at 45.

¹⁹⁴ See, e.g., *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1356 (N.H. 1997).

¹⁹⁵ See, e.g., *id.* ("[P]ublic education differs from all other services of the State. No other governmental service plays such a seminal role in developing and maintaining a citizenry . . ."); *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 492 (Ark. 2002) (announcing that "education has been of paramount concern to the citizens of this state since the state's inception is beyond dispute. It is safe to say that no program of state government takes precedence over it"). *But see* Wadhvani, *supra* note 5, at 102-03 (declaring the premise put forth in education finance literature and cases that education is a unique government service due to its exclusive status in state constitutions may not be completely accurate).

¹⁹⁶ See Frug, *supra* note 20, at 85.

¹⁹⁷ Dayton, *supra* note 97, at 100.

Similarly, inadequate funding for police protection leads to inadequate protection.¹⁹⁸ A lack in education funding leads to a low-skilled or unskilled labor force.¹⁹⁹ Poverty-stricken and economically disadvantaged communities with less to spend on police generally have higher crime rates.²⁰⁰ Moreover, if a municipality's streets are unsafe due to crime and insufficient police protection, a child may not have the opportunity to safely get to the equally-funded school to reap the benefits of education.

Professor Frug equates education and police protection throughout his analysis of local government service distribution, citing the desire for good education and the fear of crime as the factors that drive fragmentation of cities and suburbs.²⁰¹ Conceptually, if the crime rate is higher in the city than the suburbs, city-residents will move to the wealthier suburbs when they can afford to do so. This up-and-out phenomenon only exacerbates the problem of inadequate funding for police; if people move from the city to the suburbs, fewer people are paying property taxes to fund city government services. Frug also cites public education and police protection as the two public goods upon which there is "widespread agreement" that allocation should not be based on the municipality's ability to pay.²⁰²

Scholars have historically divided public goods between state and local authorities by using the governmental-proprietary test – arguing that both police protection and education are state goods and governmental in nature.²⁰³ The "governmental" label denotes that the nature of the good is essential to the proper functioning of government and necessary for the public, and thus a matter of statewide concern; the "proprietary" label denotes services of a businesslike nature and, as a result, matters of only local concern.²⁰⁴ Professor Antieau suggests a test for determining whether a good or service constitutes a state function by examining: (i) whether uniformity of the service throughout the state is desired; (ii) the historical role played by the state in provision of the

¹⁹⁸ Special Committee on Criminal Justice in a Free Society of the American Bar Association Criminal Justice Section, *Criminal Justice in Crisis: A Report to the American People and The American Bar on Criminal Justice in the United States: Some Myths, Some Realities, and Some Questions for the Future* (A.B.A. 1988), available at <http://www.druglibrary.org/special/king/cjic.htm>.

¹⁹⁹ Dayton, *supra* note 97, at 131.

²⁰⁰ See Pratt & Cullen, *supra* note 6, at 411-13 (finding that poverty and relative income levels have a strong positive correlation with the crime rate).

²⁰¹ Frug, *supra* note 20, at 44; see Frug, *supra* note 4, at 327 ("[I]t is not more justifiable . . . for the quality of police protection, hospitals, or welfare programs to vary with district wealth than it is for the quality of the schools").

²⁰² Frug, *supra* note 20, at 42.

²⁰³ See, e.g., REYNOLDS, *supra* note 8, at 103, 107 (defining the government-proprietary split and stating that police are traditionally viewed as a state concern); Wadhvani, *supra* note 5, at 104-05 (citing several scholars' viewpoints that police protection and education should be state affairs). *But see* Griffith, *supra* note 43, at 306-28.

²⁰⁴ See, e.g., REYNOLDS, *supra* note 8 at 103-12; Griffith, *supra* note 43, at 306-16.

service; (iii) the effects of the service on those outside the municipality; and (iv) whether the service requires regional cooperation.²⁰⁵ This test supports the proposition that both education and police protection fit within the domain of state functions.²⁰⁶ Lastly, many courts highlight the historical importance of education as a justification for deeming education a fundamental interest.²⁰⁷ However, as Fox points out, other government services, particularly police protection, have enjoyed historical importance; if education must be afforded equalized funding, then other historically important government services must also.²⁰⁸

Although similarities exist between the nature of the public services provided in education and police protection, as outlined above, some notable differences are also apparent. First, education provides a more tangible benefit to the community. Conversely, good police protection may manifest in the absence of criminal activity. The tangible benefit of education may be more conspicuous to the community because of the affirmative act of educating and thus may more strongly impact voters. It is important to note, however, that this theory might hold only for areas experiencing low or moderate crime rates and generally adequate police protection. A significant lack of police protection could manifest itself much more noticeably in daily life, overpowering any tangible benefit derived from education.²⁰⁹ Second, in a post-September 11th world, the importance of protecting the citizenry has taken on renewed prominence in political discourse. This renewed focus has led many to advocate for the adequate funding of police, possibly above all other government services.²¹⁰ Many commentators and judges point to education as a necessity for the survival of our democratic system, without

²⁰⁵ 1 ANTIEAU, MUNICIPAL CORPORATIONS § 3.40 (1978), *cited in* REYNOLDS, *supra* note 8 at 115-116).

²⁰⁶ *See* Wadhvani, *supra* note 5, at 104-05 (asserting that under Antieau's test, police protection is a state concern).

²⁰⁷ *See supra* text accompanying notes 190-195.

²⁰⁸ Fox, *supra* note 92, at 1184 n.204 (citing Justice Loiselle's dissent in *Horton v. Meskill*, 376 A.2d 359, 379 (Conn. 1977) for the proposition that police expenditures were equally important as education historically and thus should be treated similarly).

²⁰⁹ A counterargument to police protection being a more important governmental service in high crime areas is that generally people view education as a means to extricate themselves from such high crime areas or low socio-economic status. Additionally, education has been found to have an inverse relationship with the crime rate, suggesting that the better the education provided, the lower the crime rate in a community will be. *See Serrano I*, 487 P.2d 1241, 1258 (Ca. 1976) (citing Coons et al., *Educational Opportunity: A Workable Constitutional Test of State Financial Structures*, 57 CAL. L. REV. 305, 362-63 (1969)).

²¹⁰ *See, e.g., Prepared Statement of Lee Hamilton Before the Committee on Homeland Security*, April 14, 2004, <http://hsc.house.gov/files/TestimonyHamilton4.2005.pdf> (encouraging non-political allocation of additional federal resources to combat terrorism).

which political participation becomes infinitely more difficult.²¹¹ But, given the threat of terrorism, inadequate police protection may be as big or even a bigger threat to our democratic system.²¹²

Generally, the education finance reform caselaw supports holding education out as a uniquely protected state governmental service. In light of the relatively tangible benefits of education reform, inadequate education might be a more cognizable challenge for a court to redress.

However, many government law scholars refute education's special place in the pantheon of government services.²¹³ Given their similarities, equating education and police protection may be a more effective strategy to convince courts of a cognizable claim than attempting to show that police protection is more important.

Finally, a response to any 'floodgates' argument opposing the analogy of police protection to education is that there is no line-drawing problem if the following test is applied: any state "governmental" service (as determined by Antieau's criteria) must be provided on a non-discriminatory basis. Given the current political atmosphere, police protection has risen in prominence as a public service that gravely concerns the citizenry. This prominence may bring more political pressure for adequate police funding; such pressure is necessary to raise police protection to the same level as education. Therefore, the nature of the public service could be the key to redressing the police protection problem under the education finance reform model.

3. The Funding Mechanism

Another key element of education finance reform, and the focus of much of the education finance litigation, is its funding mechanism. As noted earlier, property tax revenues have predominantly funded both education and police, creating disparities among communities.²¹⁴ As noted earlier, a major problem with this funding system, particularly for services such as education and police, is that a municipality's funding needs often have an inverse relationship to the

²¹¹ See *Serrano I*, 487 P.2d at 1256 (Cal. 1971) (acknowledging the importance of education to a democratic society and the requirement of education for participation in the most basic public responsibilities, such as the military); see also *Rebell*, *supra* note 50, at 3 (highlighting the importance of education for voting and jury duty).

²¹² Senator Dianne Feinstein has noted her concerns: "It is all too clear that we are shortchanging the American people by not providing first responders with funds they need to respond to a catastrophic terrorist attack." Statement by Senator Dianne Feinstein, *Concerns Raised Over Inadequate Funding for Police, Fire and other First-Responders to Terrorist Attacks* (Sept. 3, 2003), available at <http://feinstein.senate.gov/03Releases/r-homesecurityfunding.htm>.

²¹³ See *Wadhvani*, *supra* 5, at 121.

²¹⁴ See *supra* note 8, 9 and accompanying text. E.g., Georgette C. Poindexter et al., *Selling Municipal Property Tax Receivables: Economics, Privatization and Public Policy in an Era of Urban Distress*, 30 CONN. L. REV. 157, 158 (1997).

municipality's property wealth, exacerbating the disparity.²¹⁵ The goal of education reform was the eradication of precisely such funding mechanisms, divorcing the resources a municipality has to spend on education from its property tax base.²¹⁶ By achieving that goal through education finance litigation (or the threat of it), most states now have a more complex education funding system that does not rely solely on local property taxes, but is generally controlled at the state level to ensure some measure of equity or adequacy.²¹⁷ Because the primary funding mechanism complained of in education reform – the reliance on property tax revenue – is the same funding mechanism for police departments, this element of the education litigation model is relevant to the formulation of a potential police protection claim.

But problems may arise in evaluating the funding of police departments. Every state, and even localities within states, may fund their police departments slightly differently. The model derived from the education challenges only works for police departments that rely primarily on their community wealth factors, such as income or property taxes. Although, like schools, police departments receive some combination of both federal and state aid, this aid generally does not change the primary funding reliance on property taxes. For example, the study by the National League of Cities cites a crisis in public safety funding with sixty-nine percent of cities increasing spending on public safety, while thirty-three percent said that federal aid overall for the year had decreased, and fifty-two percent of cities said state aid overall had decreased.²¹⁸

The funding mechanism serves as the factual basis of the complaint in education finance reform. Because police departments are largely funded through the same mechanism of property taxes, this facet of the education finance litigation translates nicely to a potential police protection claim. However, complexities and variations in the funding of both services may make success in police protection litigation more difficult.

²¹⁵ See *supra* Part I. Poorer towns have higher crime rates and therefore need more police. See Pratt & Cullen, *supra* note 6, at 411-13.

²¹⁶ Jeffrey Meltzer, *Inequitable Equilibrium: School Finance in the United States*, 36 IND. L. REV. 561, 562-63 (2003) (chronicling education finance litigation and the emphasis on establishing equal spending per pupil across the state).

²¹⁷ U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *Overview and Inventory of State Educational Reforms: 1990-2000*, at 33-44, 51, 59 (2003), available at <http://nces.ed.gov/pubs2003/2003020.pdf> (chronicling state governments' role in education financing, particularly after education finance litigation).

²¹⁸ Pagano, *supra* note 12, at 6, 12, 20.

4. The Parties Involved

The identity of the parties in education finance reform correlates with the success of the litigation.²¹⁹ Therefore, in order to undertake viable police protection litigation in the education model, it is desirable to have substantially similar primary parties to the litigation. The proposed police litigation could meet this in the following manner: (i) local police departments (possibly along with the town or city councils) would fulfill the role of the school district plaintiffs;²²⁰ (ii) a group of local taxpayers from an area suffering from inadequate police protection and high crime would assume the role of the parents and students from property-poor towns;²²¹ and (iii) the state would be the defendant in the lawsuit, just as in the education litigation.²²² Additional defendants could include the public safety secretary and/or commissioner in states where the secretariat is responsible for funding decisions.²²³

Inadequate police funding litigation is best focused on the state instead of the municipality because, although the funding allocations are generally made at the local legislative level, these allocations are made among scarce resources and typically fixed revenue.²²⁴ Therefore, the municipality would not be able to provide the remedy requested – specifically, more funding – without hurting some other municipal service.²²⁵ If the conceptual basis of the suit is that the municipality is too poor to adequately fund local services, while other municipalities can meet the need with relative ease, then seeking a remedy against the municipality itself makes little sense. An action against the state seeking institutional reform would be more appropriate and effective given that the disparity exists on a state-wide basis. The education finance reform litigation serves as an example of this strategic method.

Statistical analysis in the education context demonstrates that cases with large numbers of diverse plaintiffs are generally more successful than other

²¹⁹ See Edwards & Ahern, *supra* note 104, at 348 (showing that success rates often correlate to the predominant race of the school district, with multi-racial plaintiffs having the most success).

²²⁰ See *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 806 (Ariz. 1994) (in which the plaintiffs included the local school district and several interested parents on behalf of their students).

²²¹ See *Robinson v. Cahill*, 303 A.2d 273, 273 (N.J. 1973) (in which the action was brought by residents, taxpayers, and municipal officials).

²²² See *Matanuska-Susitna Borough Sch. Dist. v. Alaska*, 931 P.2d 391, 391 (Alaska 1997) (in which the defendants were the State of Alaska, the governor, the State Department of Education, and its commissioner).

²²³ See *id.*

²²⁴ See GILLETTE & BAKER, *supra* note 32, at 396-97 (expounding on the difficulties that could arise from judicial intervention in a fixed municipal budget).

²²⁵ *Id.*

plaintiffs.²²⁶ For that reason, fashioning a plaintiff coalition of taxpayers, not only from property-poor towns with high crimes rates but also from neighboring wealthy towns affected by the overflow of crime across town lines, may be an effective litigation strategy. The difficulty apparent in this configuration is that the remedy likely to be sought through such litigation, discussed *infra*, would be a redistribution of property tax revenues across the state or, alternatively, another mechanism to pay for police protection that is not reliant on property tax values.²²⁷ Generally, wealthier citizens benefit from the current systems and thus have no incentive to assist in any litigation seeking reform. However, if a wealthy town borders a poorer town with a higher crime rate, or a suburb borders a city, then the current funding system disadvantages this wealthy area as well because it allows crime to flourish nearby; crime does not normally respect town lines.²²⁸

Consequently, a coalition of wealthy and poor citizens of a state would be optimal to bring a police protection claim, but actually fashioning such a coalition may be difficult. Nonetheless, with the state as the only party able to grant relief from discriminatory police protection, the state is the proper focus of any police protection claim as demonstrated by the education finance reform cases.

5. The Remedy Available

The harm complained of in a police protection claim is the same harm claimed in the education context: discrepancies in the distribution of a government service based on the wealth of the community.²²⁹ Thus, the remedy sought – the eradication of such discrepancies – is basically the same.²³⁰ The specific outcomes granted in the education realm varied from state to state: (i) some state courts have retained jurisdiction and subsequently reviewed the constitutionality of legislatively-created education finance schemes;²³¹ (ii) other state courts have dismissed the plaintiffs' claim, stating

²²⁶ See Edwards & Ahern, *supra* note 104, at 349 (showing an eighty percent success rate for multiracial school districts challenging state education financing).

²²⁷ See *infra* Part I.A.2.

²²⁸ See Frug, *supra* note 20, at 75-76 (discussing the benefits of a regional approach to crime control). The wealthier town may have more resources to fight encroaching crime within its borders, but it is perhaps more effective and efficient to increase police protection by providing funding to the poorer town in order to deal with the crime at its source. *Id.* (arguing that fear provides a powerful incentive to collaborate between neighborhoods to address the crime problem).

²²⁹ See Fox, *supra* note 92, at 1179 (stating that school financing cases all “concerned the question of discrimination among public school pupils deriving from differences in taxable property wealth among local school districts”).

²³⁰ See *id.*

²³¹ See, e.g., Opinion of the Justices, 765 A.2d 673, 675-76 (N.H. 2000) (answering the question of whether a school financing bill satisfied certain provisions of the New Hampshire constitution); Campbell v. State, 907 P.2d 1238, 1279 (Wy. 1995) (directing the

that the relief for the ill complained of can only be achieved through the legislature and thus is outside the court's jurisdiction;²³² or (iii) although no formal legal remedy has been granted in some cases, reform has indirectly taken place as a result of the impending lawsuit.²³³

Given the similarity in the remedy sought to the education context, a police protection claim is likely to encounter similar impediments to recovery. Many of the courts that found against education finance reform recognized the lack of available or appropriate remedies in rejecting plaintiffs' arguments.²³⁴ Some courts even admitted that the state's funding scheme was unconstitutional, but were reticent to administer a remedy.²³⁵ The reluctance of these courts to grant relief involved a combination of (i) separation of powers and institutional competence issues; (ii) a desire for local control over local government services; and (iii) the lack of measurable standards upon which to formulate a remedy.²³⁶ These concerns are applicable in the police protection context as well.

The lack of a standard by which to evaluate the problem and potential success of a remedy is arguably the most complex issue facing any police protection litigation.²³⁷ A successful argument based on principles of "equity" or "adequacy" must first establish the measurement of police protection –

Wyoming legislature to "design the best educational system [for] each Wyoming student[,] . . . whether she lives in Laramie or Sundance").

²³² See, e.g., *Ex parte James*, 836 So.2d 813, 819 (Ala. 2002) ("[A]ny specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature.").

²³³ See *Lake Central v. State*, No. 56 C01-8704-CP81 (Newton Cir. Ct., Ind. 1987); *Coal for a Common Cents Solution v. State* (Ia. 2002) (decision pending); *supra* note 112 (providing two examples in which the cases were filed but never actually litigated because the legislature moved immediately to reform the school funding system, rendering the cases moot). As reform is the ultimate goal of such lawsuits, I include this achievement in the remedy category for the purpose of this Note.

²³⁴ See, e.g., *McDaniel v. Thomas*, 285 S.E.2d 156, 168 (Ga. 1981) (decrying the disparities in education funding but denying relief to the plaintiffs because "the solutions must come from our lawmakers").

²³⁵ See, e.g., *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1360-61 (N.H. 1997) (leaving the identification of the appropriate remedy to the legislature).

²³⁶ See *Rebell*, *supra* note 50, at 28-29 (asserting that a lack of standards prohibited courts from crafting remedies). The Supreme Court foreshadowed these concerns in *Rodriguez*, warning against judicial interference with "the informed judgment made at state and local levels" due to the Court's "lack of specialized knowledge" and noting the challenge of identifying solutions to education problems. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973) ("In such circumstances the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could . . . handicap the . . . experimentation so vital to finding even partial solutions to educational problems.").

²³⁷ See *Rodriguez*, 411 U.S. at 42-43 (highlighting the difficulty the Supreme Court faced in attempting to come up with solutions to the educational problem).

inputs (resources, money) or outputs (quality of protection as measured by the crime rate or officers per capita).²³⁸ Although Shoup states that inputs are generally more measurable because of their expression in monetary terms,²³⁹ Inman and Rubinfeld caution against using the traditional input approach because of differing needs across communities.²⁴⁰ Additionally, Shoup mentions that for preventative services, like police protection, output measurements are more accurate reflections of service differentials.²⁴¹

The initial solution raised in education cases focused on monetary inputs through the principle of fiscal neutrality, first articulated by Professor John Coons and his colleagues at Berkeley Law School, and later relied on in *Serrano v. Priest*.²⁴² This principle sought to remedy disparities in government services due to property wealth by simply holding “that the state has a constitutional obligation to equalize the value of the taxable wealth in each district, so that equal tax efforts will yield equal resources.”²⁴³ The fiscal neutrality principle can be described as follows: all districts are taxed at the same rate by the state; if a property-poor town does not raise enough to reach the minimum school funding level, the state makes up the difference.²⁴⁴ On the other hand, if a wealthy town raises an excess of the minimum amount needed, the state recaptures this excess.²⁴⁵ The “district power equalization plans” that developed from this fiscal neutrality principle faced strong opposition from wealthier communities due to the recapture elements, which ultimately resulted in a legislative shift away from this remedy.²⁴⁶ Rebell

²³⁸ See Inman & Rubinfeld, *supra* note 1, at 1700.

²³⁹ Shoup, *supra* note 14, at 104 (“Inputs can usually be stated readily in terms of money.”).

²⁴⁰ Inman & Rubinfeld, *supra* note 1, at 1700 (stating that input measurements are inaccurate and unfair determinations of equality because the circumstances of localities differ and thus require different inputs).

²⁴¹ See Shoup, *supra* note 14, at 105 (arguing that preventative services can really only be measured by how much damage occurs “despite the service”).

²⁴² 487 P.2d 1241, 1246, 1248, 1263 (Cal. 1971) (holding that California’s educational financing system and “the statutes comprising it must be found unconstitutional” because the main source of revenue was local real property taxes and funding was therefore determined by the local tax base); Rebell, *supra* note 50, at 17 (describing the theory originally expressed by Professor John Coons and his colleagues); see also JOHN E. COONS, WILLIAM H. CLUNE III & STEPHEN D. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 153, 201 (1970) (arguing that it is “wrong for the state to make any child’s education a function of district wealth,” and putting forth a new theory of school funding in which state financial resources would be equally available to all public school children).

²⁴³ See Rebell, *supra* note 50, at 17.

²⁴⁴ See Metzler, *supra* note 216, at 567 (describing Coons’ theory of “power equalizing”).

²⁴⁵ See *id.*

²⁴⁶ See Inman & Rubinfeld, *supra* note 1, at 1707 (describing the functioning of the district power equalization (DPE) system); see also *Buse v. Smith*, 247 N.W.2d 141, 155

states that this provided an easily justiciable standard but “avoided dealing with the complexities at the core of the issue – how to assure an adequate level of education for all students.”²⁴⁷

Police protection claims would face the same problems. Like education, simply equalizing the funds provided to police departments across the state may have a negligible effect on the level of police protection experienced in communities, other than to decrease overall level of protection in the state.²⁴⁸ Equalizing resources (inputs) for police may have a negligible effect on the areas that suffer from deprivation of protection because such areas inevitably need *more* resources to deal with crime, not simply equal amounts.²⁴⁹

After the failure of district power equalization plans, state courts dealing with education finance reform focused on crafting a remedy to either achieve “equal educational opportunity,”²⁵⁰ or to reach some constitutionally adequate level of education.²⁵¹ Typically, equal educational opportunity can be measured using either inputs or outputs, but the claims based on student achievement, or student “adequacy,” are most often measured in outputs.²⁵² Many commentators and cases have noted the difficulty in determining the “adequate” level of education required to be provided by the state.²⁵³

Using the adequacy and equal opportunity remedies as a model, distribution of police protection in relation to a municipality’s wealth can likewise be conceptualized through inputs or outputs measurements: (i) inputs would include police officers per capita and monetary resources for police protection

(Wis. 1976) (declaring a DPE plan unconstitutional due to the recapture elements under the “general rule applicable to appropriations that a tax must be spent at the level at which it was raised”) (citations omitted).

²⁴⁷ See *Rebell supra* note 50, at 18.

²⁴⁸ See *id.* at 21-22 (observing that this occurred in California for education); see also Shoup, *supra* note 14, at 116 (summarizing a study that found that equal input distribution of police officers would lead to an increase of crime across the area measured).

²⁴⁹ See Inman & Rubinfeld, *supra* note 1, at 1748-49.

²⁵⁰ See, e.g., *Brigham v. State*, 692 A.2d 384, 397 (Vt. 1997) (holding that the Vermont educational financing system violated the right to equal educational opportunity).

²⁵¹ See, e.g., *DeRolph v. State*, 677 N.E.2d 733, 747 (Ohio 1997) (holding that the state education finance system did not meet the constitutionally provided level of “thorough and efficient” education).

²⁵² See Metzler, *supra* note 216, at 565 (demonstrating that when measured using inputs, equal educational opportunity would assess the level of resources going into the system compared with the property-wealth, whereas when measured using outputs, it would examine the relationship between test scores, for instance, and property-wealth). Adequacy generally uses output measurements to determine the appropriateness of the service provided – for instance, looking at whether test scores meet a minimum level.

²⁵³ See, e.g., Shavers, *supra* note 76, at 157 (describing the transition from an inputs-based test to an outcomes-based test for educational financing).

per capita;²⁵⁴ and (ii) outputs would include crime rate per dollar spent, crime rate per capita, or a qualitative measurement of how safe citizens feel in their community. Adequate education has been measured by standardized testing of school children.²⁵⁵ It is difficult to conceive of an equivalent system of “testing” police departments for their level of protection. Given all the complexities, a remedy based on equalizing the resources expended as a function of the crime rate initially appears to be the most justiciable measurement. Logically, the lower the crime rate, the less money should be expended in that locality on police protection. However, the lack of statistical correlation between police expenditures and the crime rate presents a problem for this metric.²⁵⁶ In order to use the police resources per capita and police officers per capita variables to receive a judicial remedy, lawyers must establish a clearly defined connection between these factors and increased police protection.²⁵⁷

Once a measurement of police protection has been identified, potential remedies for unequal or inadequate funding of police include the centralization of financing at the state level,²⁵⁸ perhaps through a statewide property tax that is then distributed among the districts based on some measurement of police protection needs. This remedy has been used in education reform in several states to ensure that property-rich towns are not disproportionately favored in funding at the expense of property-poor towns.²⁵⁹ Such a remedy in the police protection realm will likely be challenged on the same local control and institutional competence grounds as education reform remedies encountered.²⁶⁰

²⁵⁴ See *supra* note 240 and accompanying text (acknowledging the problems with equalizing this measurement).

²⁵⁵ See, e.g., Shavers, *supra* note 76, at 157 (presenting the example of Maryland, in which schools are considered “adequately funded” only if “the amount of funding provided is sufficient to allow [schools] to meet prescribed State performance standards” (quoting MARYLAND COMMISSION ON EDUCATION, FINANCE, EQUITY AND EXCELLENCE: FINAL REPORT (2001), available at http://mlis.state.md.us/other/education/final/2002_final_report.pdf)).

²⁵⁶ See Pratt & Cullen, *supra* note 6, at 424-25 (delineating the five principle predictors of crime: percent nonwhite, percent black, measures of family disruption, poverty level, and incarceration). Notably absent is police expenditures. See *supra* text accompanying notes 16-21.

²⁵⁷ See Inman & Rubinfeld, *supra* note 1, at 1700 (“[I]n the absence of a clear finding of service differentials, the federal courts will not impose liability.”).

²⁵⁸ See *id.* at 1707 (suggesting consolidation of all taxing and spending at the state level as a possible solution to inequities in government service distribution).

²⁵⁹ U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. STATISTICS, OVERVIEW AND INVENTORY OF STATE EDUCATIONAL REFORMS: 1990-2000, at 49, 51 (2003), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2003020> (stating that Kansas and New Hampshire implemented statewide property taxes as a result of education litigation).

²⁶⁰ See Inman & Rubinfeld, *supra* note 1, at 1662-63, 1707, 1750 (emphasizing the role of local government in the lives of its constituents and highlighting the concerns that many have over eliminating local fiscal and governing control).

As mentioned earlier, the remedy must be directed at the state because, like education, the reallocation of local government funding to police is generally viewed as non-justiciable.²⁶¹ Local governments have a finite pie of resources to allocate among all locally-provided services, and thus any remedy directed at the local level would lead to a decrease in funding for another service, thereby simply shifting the disparity problem.²⁶²

Consequently, although the remedy sought in education and police protection claims are conceptually similar, unless the police protection plaintiffs can articulate a cognizable standard upon which to evaluate the state's subsequent actions, the courts may be reluctant to adjudicate the claim. Further, even if a justiciable measurement for police protection is formulated, the remedy may encounter the same challenges as education finance reform did – that it infringes on local control and violates separation of powers. However, education finance reform faced many of these same challenges, yet that litigation model was still able to affect broad reform across the country.

6. The Role of the Court

Some courts resisted involvement in the education finance debate, citing a concern that judging education policy is not an appropriate role for the court.²⁶³ These state courts have followed the lead of the Supreme Court in *Rodriguez*²⁶⁴ by ruling against forcing education finance reform due to the oft-mentioned concerns about loss of local control and institutional competence. Further, state courts have ruled against education reform claims based on separation of powers concerns, asserting that “the process of reform must be undertaken in a legislative forum rather than in the courts.”²⁶⁵ For instance, after initially ruling to require the legislature to develop a plan for reducing education funding disparities, the Alabama Supreme Court subsequently dismissed the plaintiffs’ case on separation of powers grounds, holding that the issue was not justiciable and that “serious difficulties [were] implicated by judicial involvement in the administrative details of school funding.”²⁶⁶ The basis of this argument is that policy decisions such as education funding are most appropriately dealt with on the legislative level.²⁶⁷ This concern applies with equal force to police funding reform litigation: the manner of funding for local

²⁶¹ See GILLETTE & BAKER, *supra* note 32, at 396-98 (pointing out the difficulties that arise when courts attempt to reallocate local government resources).

²⁶² *Id.*

²⁶³ See *supra* text accompanying note 107 (listing cases in which courts have found local education financing to be a nonjusticiable issue).

²⁶⁴ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42, 52-53 (1973).

²⁶⁵ See, e.g., *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1196 (Ill. 1996).

²⁶⁶ *Ex parte James*, 836 So.2d 813, 817 (Ala. 2002).

²⁶⁷ See *id.* at 818 (acknowledging “school-funding matters . . . to be purely legislative in nature”).

police departments is a legislative policy matter, and therefore outside of the authority of the courts to regulate.

Thus, the role of the court as an occasional roadblock to reform also appears in the context of potential police protection litigation. However, arguments can be made that (i) the rationale behind this abdication of judicial action is faulty; and (ii) stronger reasons exist for judicial intervention in the police protection arena.²⁶⁸ Professor John Dayton strongly opposes the judicial non-interventionist rationale, citing specific concerns that rural communities are unlikely to be successful in redressing funding discrimination through the political process due to the “limited population and wealth of rural areas in comparison to the more populous, wealthy, and consequently more politically influential metropolitan areas.”²⁶⁹ This argument could extend to reformers of the police funding system from rural and/or property-poor towns and cities, demonstrating the need for judicial relief.²⁷⁰

An even stronger argument exists for court involvement in police protection matters. A major reason given by courts that declined to participate in education finance reform was lack of expertise.²⁷¹ Certainly the same cannot be said for funding within the criminal justice system. Judges are part of the criminal justice system, with direct knowledge of its strengths and shortcomings. Although most judges are not taxation experts, they are routinely called upon to decide tax matters; thus the “lack of experience” argument put forth in the education finance debate loses its credence when applied to criminal justice matters.

Due to articulated separation of powers concerns, coupled with the special constitutional stature of education in many states,²⁷² some courts may be hesitant to play a role in reforming the allocation of another local government service not backed up by such a provision. However, courts have played a pivotal role in forcing education finance reform, and they potentially possess even more power to reform disparities in police protection.²⁷³

²⁶⁸ See, e.g., Dayton, *supra* note 97, at 108 (observing that poor, rural communities may have a limited political voice and, therefore, implying that a judicial remedy might be warranted).

²⁶⁹ *Id.* (listing factors that the court in *Edgar* failed to take into consideration when dismissing the claim).

²⁷⁰ See *supra* text accompanying note 153.

²⁷¹ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42, 52-53 (1973) (declaring that the court lacked the knowledge and expertise in education or finance to provide an appropriate remedy).

²⁷² See *supra* text accompanying note 139 (stating that education finance reforms have relied largely on the education clauses in state constitutions).

²⁷³ See U.S. Dep’t of Educ., *supra* note 259, at 38 (2003) (noting the importance of judicial action in education reform).

CONCLUSION

Reform of police protection funding is possible, but potential plaintiffs first need to show (i) that a disparity in fact exists between the funding of property-rich and property-poor towns that leads to inadequate and unequal police protection and (ii) that there is a right to equal or adequate level police protection funding. The theoretical basis for non-disparate funding of police protection is that a government service that is fundamental to the proper functioning of society should not be based on the ability to pay. The factual and empirical bases for a disparate police protection claim is that because police departments are largely funded through local property tax revenues and because funding of police departments is tied to the level of police protection achieved, property-poor towns suffer from this funding scheme while wealthy towns benefit. Making this connection is effectively the biggest challenge to any potential claim. Knowing the challenge is certainly a step in the direction of potential reform.

A compelling argument exists that the problem of unequal and inadequate police protection can be remedied using the education finance reform litigation model. Because no federal cause of action is likely viable under Equal Protection or Due Process, and tort recovery is unlikely, the best potential method of rectifying disparities in police protection is through litigation in state courts modeled after education finance reform.

Police protection and education claims are closely analogous. First, the most important factor in translating the education litigation strategy into effective police protection reform is the identification of a textual basis for the claim. State constitutional language intimating a right to police protection or the uniform taxation provisions yield the biggest potential gains in the police protection realm. State equal protection clauses could possibly be used in states that interpret their clauses to embody more rights than their federal counterpart. All of the potential textual bases face the same problem of courts' reluctance to become involved in matters of local policy and control. Furthermore, police protection cases face the additional barrier that the education finance cases have given education a special stature as compared to other public services.

Second, the nature of the public good delivered in police protection is every bit as worthy of equitable distribution as education. Opponents would likely argue that any extension of the education litigation would lead to a slippery slope that would end in a requirement of equal distribution for all government services, and ultimately a ratcheting-down of all services provided. This bleak scenario can be avoided by relying on the historic government/proprietary or state/local good tests. This test comports with the vision of the public sector distributing essential government services to its citizens regardless of ability to pay.

Third, although funding mechanisms can be varied and complex, the largest component of local funding is property tax revenue, making this factor from the education model applicable to police funding reform. Fourth, the identity

of parties to the litigation translate well to the police protection litigation, with affected citizens from property-poor towns as plaintiffs and the state as defendant. Lastly, the remedy available and the role of the court in the proposed police protection litigation encounter the same challenges raised in the education litigation – local control and institutional competence. But, it is important to note that the local control argument, certain to be raised in a police protection claim, was largely defeated in education finance reform litigation and the argument for court involvement in police matters is much stronger than in education matters.

Consequently, both the successful and unsuccessful education finance cases provide invaluable insight for a claim of discriminatory police protection. Although not all cases succeeded, such litigation prompted education finance reform across the country.²⁷⁴ With eradication of inadequate and unequal police protection as the goal, the education finance reform litigation serves as a potential means to that end.

²⁷⁴ Another example of such equitable relief occurred with domestic violence class action suits against police. Although these claims have had limited success in the courts, they have been successful in changing police procedures in dealing with matters of domestic violence – an important remedy in itself. *See Stop Violence Against Women, Law Enforcement and Reform Efforts, available at http://www.stopvaw.org/printview/Law_Enforcement_Reform_Efforts.html (last visited Mar. 10, 2006).*