Educational Adequacy as a Distributive Principle

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A long line of court cases in the United States, beginning with the 1973 Supreme Court decision in *Rodriguez* and continuing with state court decisions in the 70s and 80s, have rejected the principle of equality proposed by John Coons, William Clune, and Stephen Sugarman, that the political subunits of a state have no right to be "relatively wealthy for educational purposes."[1] There is no federal constitutional requirement, and in a number of states no state constitutional requirement either, that the various school districts within a state receive equal funding. Litigation seeking equity in school finance appeared to have reached a dead end, consigning the educational fate of children in poor districts to state legislatures disproportionately influenced by wealthy voters campaigning for tax breaks.

But advocates of school finance reform did not abandon their efforts. State constitutions may not require equality, but they do require an education for every child, often one that is uniform, thorough, and/or efficient. They impose, on state legislatures and on citizens generally, a substantive duty. Can courts specify a set of actions that fulfill this constitutional mandate? Can they articulate what level of education is adequate?

Most successful school finance litigation in the 80s and 90s has focused on the principle of constitutional adequacy. In this essay, I consider moral implications of adequacy litigation. First, if we set aside the requirement of equality, where does the concept of adequacy get its normative bite? What other moral reasons compel educational provision at a determinate level? Second, is adequacy really informative as a criterion for distributive justice? Does it do more than merely reiterate the intuitions with which one starts? I shall try to answer these questions by examining two important state court decisions, *Council for Better Education v. Rose* (1989), in which the Kentucky public school system was declared inadequate, and *Coalition for Equity v. Hunt* (1993), which reached a similar conclusion about the public school system in Alabama.

In pursuing these questions, I set aside several other important issues which cannot be addressed satisfactorily in an essay of this length. I shall say nothing about why the courts (or anyone else) might want to reject equality (of resources, opportunity, or some form of outcome) as a distributive standard. I shall avoid trying to justify services for those who can make independent provision; I shall simply assume that in the cases of most interest, the parents cannot do so. Finally, I shall not address the question raised in voucher debates about the justification for educating children in public schools rather than elsewhere. This essay focuses on narrower questions: Is educational adequacy a morally compelling distributive principle, and can it be specified with sufficient precision to serve as a legal standard to measure the obligations of state officials?

The Rose Decision and the Problem of Outcome Standards

The term adequacy implies sufficiency for a purpose, so let us start by looking at purposes that the courts mention. The Kentucky court defined an adequate education as one in which students acquired

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[2]

The *Rose* court, in short, found that an adequate education generates the skills and knowledge needed for economic, social, and civic participation. Anyone who lacked these would find it difficult to get a job, enjoy the social and cultural life of the community, and participate effectively in democratic politics. In effect, the court returned to reasons formerly given for requiring educational equality and found that they could generate apparently informative and compelling adequacy criteria.[3]

Having enumerated the purposes relevant to educational adequacy, can we say what level of provision is adequate? William Thro suggested in 1994 that (iii) could be satisfied only if then-graduating students understood such complex issues as the health care plan recently presented by President Clinton, the implications of the North American Free Trade Agreement, and the causes and consequences of the war in Bosnia.[4] Given the rather large number of college-educated citizens who have yet to master these issues, it seems highly unlikely that this requirement could be satisfied for every high school student. Presumably the court had some lower level of achievement in mind, but what level? The record is not helpful on this point. The trial judge found that an adequate school system is one which "provides each of its students with at least" the seven capacities on the list, but the appellate court discreetly amended this language, requiring merely that the system "have as its goal" that students achieve the capacities.[5] Is "having as one's goal" a legally meaningful standard? Does it enable courts to compel any specific action?

This issue has yet to be adjudicated in Kentucky. But we can ask parallel questions about educational adequacy as a moral requirement. What moral reasons are there for one person to pay for someone else's child's education, which might help determine an obligatory minimum level of provision? One approach would be to appeal to concern for others, but given the multiplicity of others who engage our concern to very different degrees, that seems unlikely to yield a determinate answer. A principle of equal concern would do so, but that is not relevant to the present inquiry and in any case appears to have been rejected decisively by those whose duty we are trying to define.

What other approaches are available? One fairly uncontroversial strategy would be to conceive of society as a cooperative arrangement for mutual advantage,

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as theorists with widely divergent views of distributive justice have in fact done, and then point out that advantages cannot be realized or realized fully unless all are able to contribute. If I cannot educate myself, you ought to see to it that I have a decent education, because you will benefit from my social participation. Moreover, if the fairness of social constraints depends on the advantages derived by the constrained parties, then guaranteeing opportunity would appear to be a prerequisite for creating enforceable political obligations. Unless the poor have opportunities, it is unreasonable for others to expect them to comply with democratically enacted laws, and consequently unfair to punish them if they refuse.

The same result can be derived from libertarian premises about property rights. Libertarians generally concede that the validity of those rights depends on the justification of initial appropriation of unowned resources, and this in turn depends on the requirement that unowned resources may be appropriated just in case there is "enough and as good left for others," including others in future generations. It can be argued that resources are morally significant because of the opportunities they afford; if this is accepted, then it follows that the validity of property rights depends on provision of opportunity to all who would otherwise lack it. Adequate educational provision, in short, is a prerequisite for the legitimacy of property rights.

There are, of course, other ways in which a moral obligation to provide adequate education could be derived, but these approaches have a significant advantage for present purposes. They do not appeal to moral premises rejected by those who bear the tax burdens, and they fit well in the legal context in which they are to be applied. American courts do recognize property rights, and those that have upheld the rights of residents of wealthy districts to supply extra funds to their schools have generally done so on libertarian grounds — on the assumption, that is, that people should be free to dispose of their income in that way if they choose to do so.

Do these arguments for opportunity help us specify what level of provision would satisfy the *Rose* criteria? A very brief example involving the opportunity to become a doctor will show how this connection can be drawn.

Why should taxpayers support educational provisions to enable other people's children to become doctors? One obvious answer is that having more doctors is sufficiently beneficial to taxpayers to justify the increased cost of the requisite educational services. A second argument is that becoming a doctor is one of those remunerative opportunities that must be open to everyone, to ensure that political obligation is not undermined and laws thereby made unenforceable. Third, the largest property holdings can be justified only if relatively generous opportunities are widely available, because only then is the proviso satisfied for a very extensive appropriation of unowned natural resources. It is not clear how this condition could be fulfilled if the opportunity to become a doctor is denied to children living in property-poor school districts.

What educational provisions are needed to ensure that high school students not be denied the opportunity to become doctors? Because of the demanding character of pre-med programs at the college level, a high school student cannot realistically aspire to a medical career unless she takes advanced and rigorous courses in

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chemistry and biology. It appears to follow from our opportunity arguments, then, that such courses, taught by qualified teachers with appropriately-equipped laboratories, should be offered in every high school, or at least in sufficiently many high schools that any student can take them.

So far, our adequacy standard is compatible with equal opportunity. Are the two standards equivalent? If so, then proponents of adequacy as an alternative to equality are in trouble. On closer inspection, however, we find that the two standards diverge. Not every student will be equally well-prepared for such courses; not all will choose to enroll in them; and those who do enroll will not reach equal levels of achievement. The mere provision of such courses does not, therefore, ensure equal opportunity.

It might be argued that any differences in life prospects would be eliminated by adequacy requirements at other levels. Rigorous courses in algebra will be needed, and these will require high-level instruction in middle school, and so on down the line all the way to preschool programs and infant nutrition. But however far back these requirements extend, they will not generate equal life prospects. For even if two equally well-prepared students enroll in these advanced courses, unequal interest, aptitude, and effort may cause achievement levels to diverge, and an adequacy standard will require no compensating provision. Interest, aptitude, and diligence are ingredients of opportunity that students and parents can reasonably be expected to supply on their own; a competently taught advanced experimental biology course is something poor families cannot supply, and that is why the opportunity arguments require public provision.

The arguments for opportunity, then, do lend specificity to the *Rose* criteria, but obviously there is more work to be done to translate these moral requirements into legal conclusions. The court framed its adequacy standard broadly, so as to avoid trespassing on legislative discretion and thereby violating Kentucky's stringent separation of powers doctrine.[6] Because of the generality of the criteria, we cannot ascertain from this decision whether in fact a detailed legal standard of adequacy can be formulated, and whether a standard that is legally acceptable will be consistent with the moral arguments presented here. Answers to these questions can be found in *Coalition for Equity v. Hunt*, in which an Alabama district court offered a very detailed account of the criteria it used to invalidate the state's public school system.

Connecting Outcome Standards to Input Criteria: The Hunt Decision

William Dietz, who writes about legal aspects of school finance reform, has suggested that the *Hunt* decision represents a middle road between two extreme approaches to the judicial definition of educational adequacy.[7] At one extreme, courts defer to the state legislature, either by explicitly assigning it responsibility for defining adequacy standards, as the Rhode Island court did, or by leaving the standard sufficiently vague that invalidating existing provisions represents only a "hollow victory" for the plaintiffs. The second or "intrusive" approach, exemplified by *Rose* and by a Massachusetts decision which adopted the *Rose* language, relies on aspirational standards, which cannot be operationalized without encroaching on legislative responsibility.

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The *Hunt* court, by contrast, achieves specificity not by extracting standards from case law and constitutional language, both of which provide only very general guidance, but rather by invoking statements of public policy produced by the two other branches, in the form of statutes, reports, and executive orders. What Dietz calls the "existing standards approach" provides detailed guidance for reform without immersing the court "in the creation and implementation of policy," which are constitutionally reserved for the political branches.

Because of its reliance on existing policy, the *Hunt* court, unlike its Kentucky counterpart, is able to introduce input standards for assessing educational adequacy. How does this approach affect our adequacy arguments? Heretofore it has been outcomes that give educational adequacy its normative force. But outcomes are crude tools for measuring legal compliance, as we can see from the *Rose* criteria. How are we to assess whether a certain feature of outcomes reflects the state's efforts, the efforts of students, or some mix of the two? The level of inputs is obviously relevant evidence, and the *Hunt* court directs us to it, offering criteria for assessing actual school facilities, equipment, staffing, supervision, curriculum, and teaching supplies.

For the most part, the specific requirements outlined by the court are closely connected to the kinds of capacities mentioned in *Rose*, which in turn are covered by our opportunity arguments. There should be enough textbooks so that children can study at home. The science, mathematics, and language courses students need for the advanced diploma required for admission to the state university should actually be offered in each high school. Buildings should be sound and maintained well enough to eliminate distraction and danger. Schools need professionally staffed libraries.[8] These provisions are obviously tied in the appropriate way to outcomes we have found to be morally significant — opportunities for economic and social participation.

For some input standards, though, the connection may be less obvious. For example, the court found some schools inadequate because they lacked auditoriums, which are found in most suburban schools. Since auditoriums are not tied to the *Rose* criteria as directly as, say, science laboratories and libraries, how are we to avoid the implication that adequacy is simply equality in disguise, requiring for poor districts all of the educational resources available in rich ones? A New Jersey court appeared to take this line recently when it rejected the state's argument that high levels of school spending in wealthy districts did not bear on the adequacy of educational provision in poor districts because the excess spending was wasteful and did not enhance educational quality.[9] The court implied that if the additional resources enhanced education enough for the parents to be willing to pay the requisite taxes, that was sufficient reason for children in poor districts to receive them as well.

The concept of adequacy proposed here does not support such an inference, nor does the *Hunt* court's reasoning invite it. The court begins its discussion of school facilities by noting that the Alabama Educational Improvement Act requires "acceptable facilities conducive to an effective teaching and learning environment" and that the state's own accreditation standard requires "appropriate facilities and

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equipment necessary to reach instructional objectives."[10] The instructional relevance of an auditorium is not spelled out, but it is easy to see how it might be established: plays and concerts develop cultural awareness, debates and forums enhance communication skills, assemblies encourage and recognize academic achievement. An auditorium, in short, can fairly easily enhance the academic achievement of significant numbers of students in a wide range of areas. Similar claims cannot be made about all of the facilities that wealthy districts provide, and hence lack of these facilities elsewhere is not evidence of inadequacy.

Another area in which skepticism might arise is the *Hunt* court's requirement that the school provide counseling services.[11] Not only are these services not obviously tied to academic skills, but they are also a focus of suspicion, mainly on the part of social conservatives, that schools are being transformed into social service agencies at the expense of their traditional academic responsibilities.

Do counseling services meet our requirements? If they do, can they be defended against attack by social conservatives? What we need to show is that they advance the relevant capacities of a significant number of students. Let us suppose the requirement is fulfilled if they very dramatically advance the capacities of a few students and modestly advance those of many more. To show how this might happen, consider the hypothetical example of an unmanageable and disruptive fourth grader, whose demands on the teacher are such that, during an arithmetic lesson, distractions proliferate and individual attention to other students is all but impossible. The defense of counseling services would presumably rest on their ability to help this child, and thereby the rest of the children in math class, reducing disruption, freeing up time for one-on-one teaching, and significantly improving achievement of all students.

If this claim is true, then adequacy standards will cover counseling services, and will provide a rationale that avoids the conservative objection. If it is false — if counseling services do not significantly advance the school's academic mission — then an adequacy standard will not require counseling services, and thus need not address the objection. Either way, the standard appears to generate specific legal requirements, compliance with which can be adjudicated without too much difficulty, provided the empirical questions can be answered with a reasonable degree of confidence.

Its reliance on input standards, then, is one of the strengths of the *Hunt* decision. It specifies what educational resources must be provided in a way that is consistent with the opportunity arguments introduced earlier. But what about how the resources are used? If resources are morally relevant only (or primarily) because of their contribution to outcomes, then courts cannot base their conclusions about adequacy on resources alone.

The *Hunt* court takes note of the state and local responsibility to supervise schools; presumably, if this responsibility is fulfilled, resources are used in the appropriate way, and thus adequate provision guarantees acceptable outcomes. But except in the case of special education, the *Hunt* court does not lay out a plan for evaluating the supervisory function.[12] What it does do to supplement its input criteria

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is to identify three outcomes that an adequate school system generates — not just the very general outcomes found in the *Rose* decision, but also more specific results that are to some extent measurable.[13] Two of these outcome measurements — the dropout rate and the percentage of college entrants requiring remedial English and mathematics — are easily determined and are linked to future opportunities in obvious ways. But for the third outcome, preparation for work, measurement is not so easy or obvious, and the evidence on which the court bases its judgment raises interesting issues for our theory of adequacy.

Does Competitiveness Require Equality?

The problem concerns the relevance of economic competitiveness to a theory of educational adequacy. Heretofore we have interpreted adequacy as a non-comparative standard, based on sufficiency for a purpose. We have assumed that education ought to generate opportunities. A school that does so is adequate even if other schools have more resources and produce students who are better prepared. But what if the graduates of merely adequate schools have to compete against graduates of superior schools? How can we still claim the former have genuine opportunity? Once again, an adequacy standard may be driven toward equality.

Economic competitiveness plays a central role in the *Hunt* court's assessment of Alabama high school graduates' level of preparation for the workforce. Several state leaders testified that Alabama's low level of education makes it less attractive than other states as a site for business expansion. Another claimed that the Alabama educational system "is not producing the kind of workers necessary to compete in [the] world economy." The seventh *Rose* criterion also sounds this theme, requiring that students be able "to compete favorably with their counterparts in surrounding states, in academics or in the job market." It is difficult to see how this could be achieved unless the schools in one state were as good as or better than those provided by other states and nations. How, then, can adequacy be a noncomparative standard?

The problem can be avoided, however, if we examine the competitiveness argument more closely. Just what is being compared when a company claims to have sited a plant in one state rather than another because its workforce is better educated? One might think that a state is competitive, from the company's point of view, only if its population is as well educated as the state with the best-educated population, but that is surely false. If it were true, every company that opened a new plant would simply consult the educational rankings and pick the state at the top. All new plants would open in only one state, or in a few states in the case of a tie.

This is not, of course, how companies actually behave. Obviously, states can still be competitive without having the best educated workforce. But then how well-educated must its workforce be? Evidently well enough to supply workers whose academic preparation is sufficient to meet the company's needs. Those needs generate a noncomparative standard of adequacy, and thereby ensure that economic competitiveness, at least on the level of states and nations, does not require equality.

The same conclusion applies to competitiveness of individuals. To be competitive, one need not be as well-educated as everyone else, because no one competes with everyone else, most obviously because people in one occupation ordinarily

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cannot do the work of people in others. True, people do compete to enter occupations, especially professions, but here, too, prospective entrants do not all compete together. The law schools at Yale and Georgia State draw from different applicant pools. Once training is complete, competition begins anew, but here again it is restricted, now by location, price, area of specialization, and various other factors. When people do compete, educational attainment is only one relevant factor among many, and it will be decisive only in the case of incompetence. Competence, then, or at least its academic underpinnings, are what adequacy requires in preparing students to compete in the work force. That standard can be met without pursuing equality. The competitiveness requirements introduced by the *Hunt* and *Rose* courts thus pose no threat to adequacy as a coherent distributive principle.

Conclusion: The Moral Significance of Separation of Powers

The legal criteria of adequacy we have been considering have the form that they do because the courts had to respect separation of powers — that is, they had to avoid encroaching on the responsibilities of the executive and legislative branches. Is there anything morally significant about this doctrine? If not — if its constraints are conventional — then much of the reasoning of the *Hunt* and *Rose* courts is irrelevant to the moral issues we have been considering.

There is, however, reason to think that separation of powers does have moral significance. According to one influential account of popular sovereignty, majority rule expresses political rights, and political rights generate political obligation, which explains how it is that we can be justly compelled to obey duly-constituted state authority. Whenever a court invalidates legislative or executive action, it countermands popular sovereignty and thereby restricts political rights. One way it avoids undercutting political obligation is to restrict political rights only when they enforce obligations people have even if they do not consent to them through their representative institutions.

I have argued that adequate educational provision is obligatory because it is a prerequisite for mutually advantageous social cooperation, for the legitimacy of property rights, and for the enforceability of political obligations in general. In requiring such provision, the courts do not undercut political obligation; they make it possible. They are only telling us to do what we must do. But if the courts go further and tried to prescribe *how* adequate education is to be provided, they would abridge political rights, because the duty to provide adequate education does not imply a duty to provide it by one means rather than another.

The *Rose* court avoided this difficulty by not mentioning input criteria, but that left its specification of adequacy somewhat vague. The *Hunt* court avoided it by selecting input criteria that the governor and legislature had already chosen. Through their political representatives, Alabama citizens had already identified auditoriums, guidance counselors, and science classes as essential for educational adequacy, and thus the court could require that all these things be provided without abridging political rights — without, as Dietz puts it, undermining the legitimacy of its order. Separation of powers concerns, then, are not morally insignificant: they represent an essential link between our political rights and duties, between what we may do and what we must do.

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Some may resist adequacy as a distributive standard on the grounds of moral impoverishment. Is all we want for our society a *merely* adequate education for everyone? But this objection misses precisely the feature of adequacy that separation of powers highlights. The legal standard of adequacy is meant to compel, not to inspire. Its aim is to distinguish what is obligatory from what is supererogatory and compel only the former. That is why it is well-suited to the exacting and potentially divisive work of legal enforcement.

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1. John Coons, William Clune III, and Stephen Sugarman, *Private Wealth and Public Education* (Cambridge: Harvard University Press, 1970), 201.

2. *Rose v. Council for Better Education,* 790 S.W. 2d 186 at 212.

3. In *Brown I* (347 U.S. 483 at 493).

4. William E. Thro, "Judicial Analysis during the Third Wave of School Finance Reform Litigation: The Massachusetts Decision as a Model," *Boston College Law Review* 35 (May 1994), 613.

5. *Council for Better Education et al. v. Wilkinson* (85-CI-1759) (Franklin Circuit Court, Ky. October 14, 1988), Findings of Fact, 4; 790 S.W. 2d 212.

6. *Council v. Wilkinson,* Conclusions of Law, 12; Kentucky Constitution, Sections 27, 28, 29.

7. William F. Dietz, "Manageable Adequacy Standards in Education Reform Litigation," *Washington University Law Quarterly* 74 (Winter 1996), 1193-1223.

8. 624 So. 2d. 134, 132, 121, 133.

9. *Abbott v. Burke* 149 New Jersey 145 (1997).

10. 1991 Ala. Acts 323 at 620, quoted in 624 So 2d. 128; Performance-Based Accreditation Standard at 1C, quoted in 624 So 2d. 129.

11. 624 So. 2d. 133.

12. Ibid., 143.

13. Ibid., 136 f.

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