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INTRODUCTION

Despite the Supreme Court's recognition of the importance of public education,[1] America's public schools remain ravaged by "savage inequalities"[2] which lead to failure of the public schools.[3] Because

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1 Although education is not a fundamental right under the United States Constitution, as found in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973), the Supreme Court has recognized that "education is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Board of Educ.,* 347 U.S. 483, 493 (1954). Indeed, the Court has stressed "the importance of education in maintaining our basic institutions . . . ." *Plyler v. Doe,* 457 U.S. 202, 221 (1982). *See also Rodriguez,* 411 U.S. at 29-30 ("[T]he grave significance of education both to the individual and to society cannot be doubted."); *Wisconsin v. Yoder,* 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a State."); *Abington Sch. Dist. v. Schempp,* 374 U.S. 203, 230 (1963) (Brennan, J., concurring) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government.").

2 Jonathon Kozol coined the term "savage inequalities" to refer to the gross disparities in both financing and quality among America's public schools. *See* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991).

3 Indeed there are very few people who have the temerity to stand up and say that the public school system is doing a good job of educating its students. Virtually everyone who

every State, except Hawaii, partially finances local public schools through local property taxes[4] and because there are differences in the value of real property,[5] there are vast disparities[6] in available funding for local school districts. [7] While every State Constitution requires the State Legislature to establish a public school system[8] and while the State Legislatures have enacted a variety of statutes in an attempt to meet the state constitutional obligations,[9] virtually every State has seen a school finance suit[10]—a claim the state legislature has

comments on education, be they defenders or enemies of the establishment, agrees that the system is in dire need of reformation.

James A. Peyser, *School Choice: When, Not If*, 35 B.C. L. REV. 619, 626 (1994).

4 See Norman C. Thomas, Equalizing Educational Opportunity Through School Finance Reform: A Review Assessment, 48 U. CIN. L. REV. 255 (1979).

5 The States have utilized three distinct methods of correcting the disparities. First, the state may give flat rate grants of a certain amount of money per pupil or per teacher to a given school district regardless of its ability to raise funds through the local tax base. Second, the state may enact a so-called foundation program that guarantees that the state will provide funds up to a certain level for any district that is unable to raise that level of money through taxes. Third, and most effectively, the state may enact a power equalization plan whereby the state guarantees the same amount of money per pupil to all districts that tax themselves at the same rate. Annette Johnson, State Court Intervention In School Finance Reform, 28 CLEV. ST. L. REV. 325, 328-30 (1979).

6 These funding disparities have significant consequences. First, some districts have trouble providing even the basics while others are able to offer educational luxuries. Second, given the probable relationship between the level of expenditures and the quality of the education received by the students, differences in funding may well lead to differences in educational quality. Peyser, School Choice, supra note 3, at 626. Third and paradoxically, equalization of funding would disadvantage urban districts and benefit rural districts. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 595 (1986).

7 Indeed, "If a state without a previous history of public financing were now proposing the initiation of a plan, it is highly unlikely that the system of dual responsibility [both local and state] would be adopted." Johnson, State Court Intervention, supra note 5, at 327.

8 Paula J. Lundberg, State Courts and School Funding: A Fifty-State Analysis, 63 ALB. L. REV. 1101, 1107 (2000); Matt Brooker, Comment, Riding the Third Wave of School Finance Litigation: Navigating Troubled Waters, 75 UMKC L. REV. 183, 189 (2006); Madeline Davis, Comment, Off the Constitutional Map: Breaking the Endless Cycle of School Finance Litigation, 16 BYU EDUC. & L.J. 117, 122-23 (2016) For a list of the State Education Clauses, see Appendix 1.

9 See FUNDING PUBLIC SCHOOLS IN THE UNITED STATES AND INDIAN COUNTRY (David C. Thompson, R. Craig Wood, S. Craig Neuenswander, John M. Heim, and Randy D. Watson, eds., 2019).

10 Only Delaware, Hawaii, Mississippi, Nevada, and Utah have avoided litigation at the state high court level. Bonner ex rel. Bonner v. Daniels, 885 N.E.2d 673, 692 n.5, 231 Ed. Law Rep. 896 (Ind. App. 2008). For a list of cases, see Appendix 2.

violated[11] the State Constitution[12] by failing to fund the public schools[13] in an equitable[14] or adequate[15] manner.[16]

11 See R. CRAIG WOOD, DAVID C. THOMPSON, JOHN DAYTON & CHRISTINE KIRACOFE, EDUCATIONAL FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS—AN ANALYSIS OF STRATEGIES (4th ed. 2015).

12 This emphasis on state constitutional provisions illustrates the revival of constitutional law that began in the 1970's. See A.E. Dick Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 VA. L. REV. 873 (1976). Because of this revival, "it would be most unwise these days not also to raise the state constitutional questions." William J. Brennan, State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489, 502 (1977).

13 For an articulation of the economic theories which led to school finance litigation, see JOHN COONS, WILLIAM CLUNE & STEPHEN SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970); John Coons, William Clune, & Stephen Sugarman, Education Opportunity: A Workable Constitutional Test for State Financial Structures, 57 CALIF. L. REV. 305, 313-16 (1969).

14 Under the equity theory, the plaintiffs, relying on the State Equality Guarantee Clause, assert that all children are entitled to have equitable funding and/or equitable educational opportunities. Although the cases from the 1970's and the 1980's treated equity as synonymous with equality of expenditures, more recent cases use a theory that distinguishes between equality of expenditures and equity. As Professor Rubenstein observed:

> A critical starting point is to recognize that equity is not synonymous with equality. In fact, equity is often very much at odds with equality because equality may represent unfairness. For example, would it be fair for all school districts to receive equal state or federal funding when some can raise substantially more revenue from their own tax bases? Is it fair for all schools or school districts to have equal resources when some face substantially higher costs to educate students?

Ross Rubenstein, The School Finance Perspective on Equity, THE SOURCE (2016), https://www.advanc-ed.org/source/school-finance-perspective-equity. In particular, the recent cases stress the difference between "horizontal equity," the idea that students in equal situations receive equal resources, and "vertical equity," the idea that students with different needs should receive different resources. Id.

15 Under the adequacy theory, the plaintiffs, relying on the State Constitutions' Education Clauses, argue that the finance system is unconstitutional because some schools lack the money to meet minimum standards of quality. In other words, all children are entitled to an education of at least a certain quality, and that more money is necessary to bring the worst school districts up to the minimum level mandated by the State Constitution. See William E. Thro, Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model, 35 B.C. LAW REV. 597 (1994). In adequacy suits, the emphasis is on differences in the quality of education delivered rather than on the resources available to the districts. The systems are struck down not because some districts have more money than others, but because the quality of education in some schools, not necessarily the poorest in financial terms, is inadequate. In an adequacy suit, the plaintiffs assert that the State Constitution establishes a particular quality and that the schools do not measure up to that standard. The plaintiffs assume that the reason for this failure is inadequate funds. Although many contemporary cases have equity suit arguments, the adequacy suit is the dominant strategy of the 1990s and the early twenty-first century.

For a critique of the adequacy theory, see William S. Koski & Rob Reich, When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters, 56 EMORY L.J. 545, 547 (2006).

16 To be sure, some scholars maintain that there is no real distinction between the adequacy theory and the equity theory. See William S. Koski, Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educational Finance Reform

Yet, despite three waves of litigation [17] spanning half a century,[18] "there are few certainties in the school funding litigation process."[19] Indeed, school finance litigation is in chaos.[20] First, courts fail to define the constitutional challenge; whether it is facial or as applied.[21] Second, judges refuse to focus on the plain meaning of the constitutional text; [22] Florida's highest court insisted the text was "puffery" not law.[23] Third, when the judiciary does interpret or construct the constitutional text, it often fails to articulate the reasons why there is or is not a constitutional violation, [24] but instead engages in

Litigation, 43 SANTA CLARA L. REV. 1185, 1283-96 (2003); James E. Ryan, Standards, Testing, and School Finance Litigation, 86 TEX. L. REV. 1223, 1238 (2008).

17 See William E. Thro, The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation, 19 J.L. & EDUC. 219 (1990).

18 In the first wave, which lasted from the late 1960's until the Supreme Court's decision in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), litigants pursued a form of the equity theory—an argument the federal Equal Protection Clause required equal funding and/or equal opportunity. Because Rodriguez foreclosed the federal constitutional argument, the second wave, which lasted from the New Jersey Supreme Court's decision in Robinson v. Cahill, 303 A.2d 273 (N.J. 1973), until early 1989, focused on state constitutional provisions and continued to use a form of the equity theory. Although the plaintiffs were able to prevail in Arkansas, California, Connecticut, New Jersey, Washington, West Virginia, and Wyoming, the overwhelming majority of the second wave cases resulted in victories for the State and state education clauses, the plaintiffs argued the equity theory. In contrast, the third wave, which began with the Montana, Kentucky, and Texas decisions in 1989 and continues to the present, emphasizes the adequacy theory—an argument the State Constitution requires the schools to meet certain quality standards and current funding levels are inadequate to meet those standards. Thro, Third Wave, supra note 17, at 239.

19 John Dayton, Anne Profitt Dupre & Eric Houck, Brother Can You Spare A Dime? Contemplating The Future of School Funding Litigation In Tough Economic Times, 258 Ed. Law REP. 937, 938 (2010).

20 In the view of some courts, it is no longer necessary "to achieve ample funding, "as long as the "funding formulas were at least reasonably likely to achieve ample funding." Joshua E. Weishart, Rethinking Constitutionality in Education Rights Cases, 72 ARK. L. REV. 491, 497 (2019). The judiciary "have abandoned heightened scrutiny and the tiers of scrutiny altogether, even when the right to education has been deemed fundamental under the state constitution." Id. Instead, courts employ "an ad-hoc, often-unannounced, less proscriptive standard that scrutinizes the reasonableness of the fit between the legislative means and the constitutional ends (adequacy and equity), with little or no scrutiny of the means or the ends themselves." Id.

21 William E. Thro, School Finance Litigation As Facial Challenges, 272 EDUC. L. REP. 687 (2011).

22 William E. Thro, Originalism & School Finance Litigation, 335 EDUC. L. REP. 538 (2016).

23 Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ., 262 So. 3d 127 (Fla. 2019). For a commentary on the case, see R. Craig Wood & William E. Thro, Puffery or Law: Reflections on the Florida School Finance Decision, 368 EDUC. L. REP. 961 (2019).

24 As Professor R. Craig Wood observes:

Given these realities and the highly political nature of adequacy claims, several state courts reflect a manipulation of precedent and text in order to fit a desired result, despite the tensions marked in these opinions. It may be ventured that an interpretive framework is at play that, although decidedly consequentialist, is rooted in the philosophical foundations articulated

activism[25] or abdication.[26] Finally, when the courts have found a constitutional violation, the result has often been a constitutional crisis where the legislature refuses to comply with the judicial mandate.[27]

The chaos in school finance litigation—like all of the chaos in constitutional law—reflects a fundamental misunderstanding about how the National and State Constitutions limit constitutional actors, the judicial duty to enforce those limits, the way the courts interpret

in John Hart Ely's "representative-reinforcing" concept of judicial review. As noted, Ely constructed a rationale premised on the responsibility of the judiciary to insist that the legislature provide citizens the rights essential to the operation of a democratic political process. To Ely, "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about." In a similar tack, Ronald Dworkin argued that "[t]he function of judges . . . [was] to secure the 'democratic conditions' necessary for a democracy to exist." Key to this appreciation of judicial review, evidenced in the recent case record, is the right of all citizens in a democracy to be informed participants; thus, imposing upon the state the responsibility to ensure that they are provided the opportunity to achieve what Robert Dahl characterized as "enlightened understanding." This aggressive affirmation of the nexus between education and the fundamental rights of citizenry, dismissed in San Antonio Independent School District v. Rodriguez in a judicial treatment utilized subsequently in courts presenting it as restrained, has become a principle characteristic of an activist state judiciary in the realm of public education finance.

R. Craig Wood, Justiciability, Adequacy, Advocacy, and the "American Dream," 92 KY. L.J. 739, 776-77 (2010) (footnotes omitted).

25 For example, the Supreme Court of Kentucky, interpreting an Education Clause that mandated an "efficient" system of education, declared:

an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (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.

Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989) at 212. This standard, if taken literally, is impossible to attain. William E. Thro, Judicial Humility: The Enduring Legacy of Rose v. Council for Better Education, 98 KY. L.J. 717, 731 (2010).

26 Some courts have interpreted the constitutional provision in a manner that eviscerates its substance. William E. Thro, A New Approach to State Constitutional Analysis in School Finance Litigation, 14 J.L. & POL. 525, 549 (1998). For example, the Supreme Court of Minnesota held that there was no constitutional violation where the school districts were able to meet the minimum state standards. Skeen v. Minnesota, 505 N.W.2d 299 (Minn. 1993) at 314-18.

27 Joshua E. Weishart, Aligning Education Rights and Remedies, 27 KAN. J.L. & PUB. POL'Y, 346, 347-51 (2018).

and construct the Constitutions, and the discretion of elected officials to make decisions within constitutional boundaries.

In America, the law is sovereign.[28] Ultimate authority is vested not in an absolute monarch or a religious leader or the Party or bureaucratic experts or judges who want to do justice or the political majority of the day or even the People themselves,[29] but in inviolable "self-evident" truths.[30] This is what Americans mean by a "Government of Laws, not Men," or the "Rule of Law" or "Law of the Land." Because the Law, not the People, is sovereign, five propositions follow. First, the National and State Constitutions limit constitutional actors. Second, the judiciary must enforce those limitations. Third, after the judiciary interprets and constructs those limitations, constitutional actors must "follow the Court's interpretations, not just in the particular case announcing those interpretations, but in similar cases as well."[31] Fourth, because Law, not personal notions of justice, is sovereign "judicial opinions should be grounded in consistently applied principle" that respects the law.[32] Fifth, when a court determines there has been a constitutional violation, its "remedial powers . . . must be adequate to the task,"[33] but legislative and executive officials have "primary responsibility for elucidating, assessing, and solving" the

28 DAVID STARKEY, MAGNA CARTA: THE MEDIEVAL ROOTS OF MODERN POLITICS 1308 (2015) (ebook).

29 Starkey notes that the British and the Americans have two quite different concepts of Magna Carta. Britain reflects the reissued Magna Carta of 1216, which had no enforcement mechanism. The Magna Carta of 1216 "is centrist and is the painstaking work of the political process." Id. at 1288. This is "the foundation of English political history." Id. In contrast, America reflects the original Magna Carta of 1215, Id. at 1306 which allowed twenty-five Barons to declare the King in violation of the charter and, to make war against the King. Id. at 621-630.

30 DECLARATION OF INDEPENDENCE ¶ 2. As Justice Thomas, joined by Justice Scalia, explained:

> Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that "all men are created equal" and "endowed by their Creator with certain unalienable Rights," they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

Obergefell v. Hodges, 135 S. Ct. 2584, 2639 (2015) (Thomas, J., joined by Scalia, J., dissenting) See also Id. at 2639-40 (Thomas, J., joined by Scalia, J., dissenting) ("Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One's liberty, not to mention one's dignity, was something to be shielded from—not provided by—the State.").

31 STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 60 (2010).

32 McCreary County v. ACLU, 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting).

33 Whitcomb v. Chavis, 403 U.S. 124, 161 (1971).

problems of constitutional compliance.[34]

If one applies these five propositions to the process of interpreting, constructing, and the enforcing the National and State Constitutions, then constitutional analysis consists of answering four questions: *Who? What? Why? & How?*[35]

First, *Who*? Who allegedly violates the Constitution? Does the Legislature exceed its powers? Does the Executive enforce a particular statute in an unconstitutional way? *Who* is a question about defining the constitutional challenge—either facial (legislative branch violates the Constitution) or as-applied (executive branch violates the Constitution).

Second, *What*? What does the Constitution mean? What does the Constitution limit? What does it prohibit? What does it require? *What* is always a question about constitutional interpretation, but sometimes it is also a question about constitutional construction. If the process of constitutional interpretation—determining the original public meaning of the words—does not yield a constitutional rule, then the court must engage in constitutional construction to determine a constitutional rule.

Third, *Why*? Why is there a violation of the Constitution? Alternatively, why is there not a violation of the Constitution? *Why* is a question about the application of a constitutional rule to particular circumstances of the case.

Fourth, if there is a constitutional violation, *How*? How should the court remedy the constitutional violation? How should the judiciary ensure that constitutional actors conform to the Constitution? How should the judiciary respect the constitutional discretion of legislative and executive branch officials? *How* is a question about resolving the tension between the Law as Sovereign and the Democratic Process.

By describing how courts should go about answering *Who*, *What*, *Why*, & *How*, one reimagines constitutional analysis. This is true for any constitutional context, but especially for state constitutional analysis in school finance litigation. Answering *Who, What, Why, &*

34 Brown v. Board of Education, 349 U.S. 294, 299 (1955).

35 The first question—Who—comes from Nicholas Quinn Rosenkranz, The Subjects of the Constitution, 62 Stan. L. Rev. 1209 (2010). The second, third, and fourth questions are my own creation, but are certainly inspired by Rosenkranz' paradigm of focusing on constitutional grammar.

How in a systematic and coherent way leads to judicial recognition of constitutional limits, constitutional interpretation and construction consistent with the original public meaning, and enforcement of the Constitutions in a manner that maximizes Democratic discretion.

The purpose of this Article is to reimagine state constitutional analysis in school finance litigation by focusing on *Who*, *What*, *Why*, & *How*. Over the last thirty years,[36] I have written extensively on various aspects of state constitutional analysis in school finance litigation,[37] but this Article is the first time I have sought to combine all aspects of my scholarship into one comprehensive Originalism[38] focused theory.[39] In doing so, I hope to demonstrate: (1) school finance litigation is always a facial challenge; (2) courts must interpret and construct the State Constitutions using original public meaning with particular emphasis on the textual difference between State Education Clauses; (3) deciding whether there is a constitutional violation involves assessing statutory text and readily available objective evidence; and (4) when there is a violation, invalidate all education related statutes, but allow the Legislature broad discretion to remake the educational system. [40]

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36 My initial piece was William E. Thro, Note, To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Litigation, 75 VA. L. REV. 1639 (1989).

37 At the time I begin exploring these issues during my second year of law school, school finance litigation was a dead letter. As the Second Wave receded, the state courts were rejecting the Equity Theory and the States were prevailing. However, at the same time, the Third Wave with its emphasis on adequacy was breaking.

38 When I started my scholarship during my second year of law school in 1988-89, originalism theory was in its infancy. The contemporary consensus on original public meaning rather than original intent had not emerged. Justice Scalia, the foremost judicial voice of originalism, had been on the Court for only three years.

39 My previous work has informed and influenced judicial decision-making in school finance litigation. See Ex parte James, 713 So.2d 869 (Ala. 1997); Lobato v. Colorado, 218 P.3d 358 (Colo. 2009); Connecticut Coalition for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206 (Conn. 2010); Delawareans for Educational Opportunity v. Carney, 199 A.3d 109 (Del. Ch. 2018); King v. Iowa, 818 N.W.2d 1 (Iowa 2012)(in dissent); Hancock v. Commissioner of Educ., 822 N.E.2d 1134 (Mass. 2005); Campaign for Fiscal Equity, Inc. v. New York, 796 N.Y.S. 2d 106 (N.Y. 2003) (in dissent); Campaign for Fiscal Equity v. New York, 719 N.Y.S.2d 475 (N.Y. Sup. 2001); Abbott by Abbott v. Burke, 693 A. 2d 417 (N.J. 1997); Leandro v. North Carolina, 488 S.E.2d 249 (N.C. 1997); Bismarck Public School Dist. No. 1 v. North Dakota By and Through North Dakota Legislative Assembly, 511 N.W.2d 247 (N.D. 1994); William Penn School District v. Pennsylvania Department of Education, 170 A.3d 414 (Pa. 2017); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Carrollton-Farmers Branch Independent School Dist. v. Edgewood Independent School Dist., 826 S.W.2d 489 (Tex. 1992).

40 Although the discussion of Why and How is entirely new, the discussion of the Who and What is adapted from some of my previous works. The Who discussion is adapted from Thro, Facial Challenges, supra note 21, and William E. Thro, Rosenkranz' Constitutional Subjects And School Finance Litigation, 260 EDUC. LAW REP. 1 (2010). The What discussion is adapted from

This Article has four Parts, one for each of the four questions: *Who*? *What*? *Why*? and *How*? Each Part has two subsections. The first subsection offers a general overview of how courts should approach the particular question. The second subsection explores how courts should answer that question in the context of school finance litigation.

I. WHO?

Who? Who violates the Constitution? Does the Legislature exceed its powers? Does the Executive Branch enforce a particular statute in an unconstitutional way? *Who* is a question about defining the constitutional challenge—either facial (legislative branch violates the Constitution) or as-applied (executive branch violates the Constitution).

A. Answering Who Defines the Constitutional Challenge

1. The Constitutions Limit Constitutional Actors

The National and State Constitutions limit constitutional actors. As James Madison observed, "[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[41] Of course, neither the People nor their leaders are angels;[42] they are flawed individuals who will pursue self-interest, abuse power, and engage in corruption.[43] Consequently, the National and State Constitutions reflect a Calvinist perspective[44]—a fundamental distrust of

Thro, Originalism, supra note 22, and William E. Thro, Barnett's & Bernick's Theory of Constitutional Construction and School Finance Litigation, 357 EDUC. L. REP. 464 (2018).

41 THE FEDERALIST NO. 51 (James Madison).

42 In contrast, those who advocated for a new European Constitution viewed humanity as inherently good. See GEORGE WEIGEL, THE CUBE AND THE CATHEDRAL (2005). Robert Keegan has suggested that the foreign policy disputes between the United States and Europe are a product of different perspectives on humanity. See ROBERT KEEGAN, OF PARADISE AND POWER (2003).

43 R.C. SPROUL, WILLING TO BELIEVE: THE CONTROVERSY OVER FREE WILL 52-55 (1997).

44 As Mark David Hall demonstrated, Calvinist theology (sometimes called reformed theology) was one of the foundations of the Constitution. MARK DAVID HALL, ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC 12-40 (2013). This is not to discount the influence of Locke or Montesquieu, but simply to acknowledge the Framing Generation had great awareness of the Calvinist thread of the Protestant tradition. As Hall explained, "American leaders were familiar with Locke, but few thought his political philosophy was at odds with traditional Christian or Calvinist political ideas." Id. at 24. Rather, "Locke's political philosophy is best understood as a

humans and human institutions.[45] In order to protect the liberty of the People, individually and collectively, from constitutional actors and the ever-shifting political winds,[46] the National and State Constitutions establish the parameters of the government and limits on the government.[47] All constitutional provisions are limitations on the government's unbridled government discretion.[48] By establishing both the parameters of the government and limits on the government, it limits, with "elegant specificity,"[49] the discretion of constitutional actors to pursue a particular end by a particular means.[50]

In America where the Law, not the People, is Sovereign, constitutional limitations result from three sources. First, there is the division of sovereignty between the States and the National Government. Instead of an all-powerful national government,[51] the Constitution "split the atom of sovereignty . . . establishing two orders of government, each with its own direct relationship, its own privity, its own set

logical extension of Protestant resistance literature rather than as a radical departure from it. Id. at 21.

45 As Professor Marci Hamilton explained:

One of the dominating themes of Calvin's theology is the fundamental distrust of human motives, beliefs, and actions. On Calvin's terms, there is never a moment in human history when that which is human can be trusted blindly as a force for good. Humans may try to achieve good, but there are no tricks, no imaginative role-playing, and no social organizations that can guarantee the generation of good. . . . Thus, Calvinism counsels in favor of diligent surveillance of one's own and other's actions, and it also presupposes the value of the law (both biblical and secular) to guide human behavior away from its propensity to do wrong.

MARCI HAMILTON, The Calvinist Paradox of Distrust and Hope at the Constitutional Convention in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 293, 295 (Michael W. McConnell, Robert F. Corchran, Jr. & Angela C. Carmella, eds., 2001)

46 See RANDY BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY & SOVEREIGNTY OF WE THE PEOPLE (2016).

47 Afroyim v. Rusk, 387 U.S. 253, 257 (1967).

48 The Constitution's structural and textual provisions—such as the division of sovereignty between the States and the National Government, the separation of powers between the three branches, the enumeration of legislative powers, explicit textual guarantees of rights, bicameralism, the executive veto, the advise and consent requirement for appointments, and treaty ratification process—all express a fundamental distrust of humanity and a desire to avoid concentrations of power.

49 Arizona State Legislature v. Arizona Indep. Redistrict Comm'n, 135 S. Ct. 2652, 2690 (2015) (Roberts, C.J, joined by Scalia, Thomas & Alito, JJ., dissenting).

50 The "federal and state charters are not, contrary to popular belief, about 'democracy'. . . —a word that appears in neither document, nor in the Declaration of Independence. Our enlightened 18th- and 19th-century Founders, both federal and state, aimed higher, upended things, and brilliantly divided power to enshrine a promise (liberty), not merely a process (democracy)." Patel v. Texas Dep't of Licensing & Regulation, 469 S.W.3d 69, 92 (Tex. 2015) (Willett, J., joined by Lehman & Devine, JJ., concurring) (emphasis added).

51 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

of mutual rights and obligations to the people who sustain it and are governed by it."[52] The National Constitution establishes a government of enumerated powers.[53] Conversely, the State Constitutions have established a government of broad powers,[54] subject only to the limitations imposed by delegation of power to the National Government and the limitations of both the National and State Constitutions.[55] Because state constitutions are often amended or even completely revised,[56] they often are more reflective of the contemporary values of society.[57]

Second, there is the constitutional structure. Rather than combining executive, legislative, and judicial power in a single parliament dominated by the majority party of the day,[58] the National and every

52 U.S. Term Limits v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J. concurring).

53 United States v. Morrison, 529 U.S. 598, 607 (2000).

54 Hornbeck v. Somerset County Board of Education, 458 A.2d 758, 785 (Md. 1983); Board of Educ. v. Nyquist, 439 N.E.2d 359, 366 n. 5 (N.Y. 1982).

55 Almond v. Rhode Island Lottery Comm'n, 756 A.2d 186, 196 (R.I. 2000).

56 See ROBERT F. UTTER, Freedom and Diversity In a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 239, 241-42 (Bradley McGraw, ed., 1984).

57 As Professor A.E. Dick Howard explained:

> A state constitution is a fit place for the people of a state to record their moral values, their definition of justice, their hopes for the common good. A state constitution defines a way of life. George Mason understood that precept when, in drafting Virginia's Declaration of Rights in 1776, he wrote that "no free government, nor the blessings of liberty, can be preserved to any people" but by a "frequent recurrence to fundamental principles."

A.E. Dick Howard, The Renaissance of State Constitutional Law, 1 EMERGING ISSUES IN STATE CONSTITUTIONAL LAW 1, 14 (1988).

58 South Africa's Constitution illustrates the point. First, Constitutional Court—the highest judicial body—is commanded to "promote the values that underlie an open and democratic society based on human dignity, equality, and freedom." South. Afr. Const. § 39(1). Second a two-thirds majority of the National Assembly can amend the most provisions of the Constitution at any time. Id. at § 74(3). If one party holds more than two-thirds of the seats—a common occurrence during the first two decades of multi-racial democracy, a single political party can accomplish revision of the nation's fundamental law. Third, the National Assembly—the legislature—is elected by proportional representation, which allows parties with low levels of support to obtain seats. Id. at § 46(1)(d). Fourth, because the President is the leader of the party or the coalition that has a majority in the National Assembly, see Id. at § 86, there is neither a legislative check on the executive nor an executive check on the legislature. Fifth, although South Africa is nominally a federation, see Id. at §§ 103-141, the individual provinces are subordinate to the will of the National Government, which, as explained above, is controlled by democratic majorities.

Of course, South Africa does have a comprehensive Bill of Rights and the Constitutional Court vigorously enforces those rights. Indeed, the Constitutional Court invalidated the initial Constitution. See In re Certification of the Constitution of the Republic of South Africa, 1996 (4)

State Constitution "protects us from our own best intentions" by preventing the concentration of "power in one location as an expedient solution to the crisis of the day."[59] By dividing power "among distinct and separate departments" within the National or State Governments, the People ensure that each government "will be controlled by itself."[60]

Third, there are explicit textual limitations. Because "all . . . are created equal and endowed by their creator with certain unalienable rights,"[61] the National and each State Constitution "withdraws certain subjects from the vicissitudes of political controversy" and "places them beyond the reach of majorities and officials."[62]

Regardless of whether the source is from the division of sovereignty, the constitutional structure, or the constitutional text, the National and State Constitutions impose both requirements and prohibitions on constitutional actors.[63] While Americans are familiar with the idea of constitutional provisions as prohibitions, they are less familiar with the notion of constitutional provisions that impose requirements on government to act in a particular way.[64] Yet, the fifty State Constitutions frequently require government to act in a particular way. [65] Professor Scott Bauries argues that these requirements are "duties,"[66]

SA 744 (CC). However, this judicial check is the only real check on the power of a democratic majority. For South Africa, the Bill of Rights creates limits on government rather than merely confirming the limits that are implicit in the structure.

59 New York v. United States, 505 U.S. 144, 187 (1992).

60 THE FEDERALIST NO. 51 (James Madison).

61 DECLARATION OF INDEPENDENCE.

62 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

63 William E. Thro, No Clash of Constitutional Values: Respecting Freedom & Equality in Public University Sexual Assault Cases, 28 REGENT UNIV. L. REV. 197 (2016).

64 Compare Abner S. Greene, What Is Constitutional Obligation?, 93 B.U.L. REV. 1239, 1241–42 (2013) (arguing that the Constitution creates certain duties for public officials), with Nicholas Quinn Rosenkranz, The Objects of the Constitution, 63 STAN. L. REV. 1005, 1008–10 (2011) (discussing how the Constitution restricts the various branches of federal and state government).

65 Some scholars regard the prohibitions as "negative rights" and the requirements as "positive rights." In this paradigm, the State Constitutions are a fountainhead of positive rights. EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 36-47 (2013). See also Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 HARV. L. REV. 1131, 1137 (1999).

While the positive/negative rights paradigm may be helpful in understanding the nature of the State's obligations, it tends to discount the larger constitutional realities that all "rights" are actually limitations on the discretion of government. Government must do what is required and must refrain from doing what is prohibited. There is no discretion to refuse to do what is required or to do what is prohibited

66 Scott R. Bauries, The Education Duty, 47 WAKE FOREST L. REV. 705, 747-48, (2012).

and the judiciary must engage in a process-based review to determine if the government has violated its duty of care.[67] What Bauries calls "duties" are effectively explicit textual limitations on the government's discretion to act or refrain from acting., In the absence of a textual limitation establishing a "duty," the government has absolute discretion to act or refrain from acting. Conversely, with the textual limitation establishing the "duty," the government must act.

2. The Judiciary Must Enforce the Constitutional Limits

The judiciary must enforce those limitations.[68] Because our constitutional actors are imperfect humans prone to sin,[69] there will be times, in the words of Alexander Hamilton, "where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution . . . ."[70] "[E]very act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid."[71] Therefore, the judiciary "will not shrink from our duty 'as the bulwar[k] of a limited constitution against legislative encroachments.'"[72] If, as Alexis de Tocqueville suggested, every political question becomes a judicial one,[73] then judicial review of the actions of other constitutional actors will be the norm.

The obligation to enforce the Constitution extends to all provisions. Recently, the Supreme Court of the United States ruled that political gerrymandering issues were non-justiciable political

67 Scott R. Bauries, Perversity as Rationality in Teacher Evaluation, 72 Ark. L. Rev. 325, 358 (2019).

68 The idea of limitations on government and those limitations should be articulated in writing is inspired by and reflects the British experience after Magna Carta. See A.E. Dick Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America (1968). Indeed, the Anglo-American-Australasian constitutional tradition defines freedom for the entire planet. See Daniel Hannan, Inventing Freedom: How The English-Speaking Peoples Made the Modern World 49-50 (2013). See also Nelson Mandela, Long Walk to Freedom: The Autobiography of Nelson Mandela (1995) (Referencing the British and American Constitutional ideals).

69 JEFFREY A BRAUCH, FLAWED PERFECTION: WHAT IT MEANS TO BE HUMAN AND WHY IT MATTERS FOR CULTURE, POLITICS, AND LAW 165-173 (2017) (ebook).

70 THE FEDERALIST NO. 78 (Alexander Hamilton). See also MARTIN LUTHER KING, JR., LETTER FROM THE BIRMINGHAM JAIL (1963) (arguing that a human law which is contrary to the moral law should not stand).

71 THE FEDERALIST NO. 78 (Alexander Hamilton).

72 Northwest Austin Mun. Utility Dist. No. One v. Holder, 557 U.S. 193, 205 (2009).

73 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 310 (Arthur Goldhammer, trans., The Library of America 2004) (1835)

questions.[74] Given there is nothing in the constitutional text addressing political gerrymandering, the Court's result is correct, even if its reasoning is overly convoluted.[75] Indeed, had the Court actually decided the issue, it would have been substituting its policy choices for those of the democratically elected state officials.

Yet, when the constitutional text does address an issue, then courts may not avoid interpreting the constitutional text. This is so for two reasons. First, because the "words cannot be meaningless, else they would not have been used,"[76] every constitutional provision must be viewed as limiting the discretion of some constitutional actor in some way.[77] While there may be circumstances where constitutional actors are entitled to great deference,[78] "[i]t is no more the court's function to revise by subtraction than by addition. A provision that seems to the court unjust or unfortunate . . . must nonetheless be given effect."[79]

Second, all constitutional limitations are subject to judicial enforcement, that is they are justiciable "judicial power includes the duty 'to say what the law is.'"[80] If the only issue is whether the text of the statute comports with the text of the Constitution, then "[a]bdication of responsibility is not part of the constitutional design."[81]

3. Answering Who Determines Whether the Constitutional Challenge is Facial or As Applied and Defines Standing

In an article entitled *The Subjects of the Constitution,* Professor Nicholas Quinn Rosenkranz sets forth a new model of judicial review.[82] Emphasizing that the grammatical structure of constitutional

74 See Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019).

75 Rather than applying its political question doctrine, I believe the Court should have simply said that the National Constitution is silent on the issue of political gerrymandering and, therefore, the States have absolute discretion subject only to the State Constitutions.

76 United States v. Butler, 297 U.S. 1, 65 (1936).

77 See ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 27 (2012).

78 For example, the judiciary should defer to complex, context-specific decisions involving the discretion of constitutional actors, such as the conduct of military operations in wartime.

79 SCALIA & GARNER, supra note 77, at § 26. .

80 Sanchez-Llamas v. Oregon, 548 U.S. 331, 353 (2006).

81 Clinton v. New York, 524 U.S. 417, 452 (1998) (Kennedy, J. concurring).

82 Rosenkranz, supra note 35.

provisions "may be just as revealing as the words themselves,"[83] Rosenkranz insists that "careful attention to constitutional grammar can reveal—and will reveal—nothing less than the constitutional structure of judicial review."[84] Like ordinary grammar, constitutional grammar has subjects (the governmental actor), verbs (the unconstitutional action) and objects (the statutes and regulations).[85] According to Rosenkranz, judicial review, like grammatical analysis,[86] "should begin at the beginning with subjects."[87] In other words, the "fundamental question from which all else follows" is identifying of the subject of the Constitution—*who* has violated the Constitution.

Rosenkranz' new paradigm begins with two propositions. The first proposition is that statutes and regulations do not violate the Constitution; governmental *actions* violate the Constitution.[88] Unconstitutional actions require an actor—a person or entity that does something to violate the Constitution.[89] "Thus, a constitutional claim is necessarily a claim that some *actor* has acted inconsistently with the Constitution."[90] "Every exercise of judicial review should begin by identifying a governmental actor, a constitutional *subject*. And every constitutional holding should start by saying *who* has violated the Constitution."[91]

The second proposition is that the Constitution restricts all actors, but it restricts them in different ways.[92] The Framers recognized that executive, legislative, and judicial power pose "different and distinct threats to individual liberty."[93] Thus, as the Court observed in *Marbury v. Madison*,[94] the Constitution "organizes the government, . . . assigns, to different departments, their respective powers . . . [and] establish[es] certain limits not to be transcended by those departments . . . . [T]hose limits . . . confine the persons on whom they are

83 Id. at 1210.
84 Id.
85 Id.
86 Id. at 1214-15.
87 Id. at 1210.
88 Id. at 1212-15.
89 Id. at 1212-13.
90 Id. at 1214.
91 Id. at 1214 (footnote omitted).
92 Id. at 1222.
93 Id. at 1223.
94 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

imposed."[95] Restrictions on legislative power are different from those on executive power.[96] Similarly, limitations on the federal governmental actors are different from those on state governmental actors. If the Court does not identify *who* the actor is, then it cannot determine if the actor is violating the Constitution. The Court cannot know if or how the Constitution limits the actor without first knowing the identity of the actor.[97] Therefore, "it is essential to identify the constitutional culprit, because judicial review of a legislative act is entirely different—formally, structurally, temporally different—from judicial review of an executive act."[98]

Yet, contemporary courts refuse to identify *who* is violating the Constitution.[99] Instead of referring to constitutional actors, judges refer to statutes and regulations as violating the Constitution.[100] While such phrasing may promote inter-branch harmony,[101] the real effect is "to conceal and abet a constitutional culprit. This sort of circumlocution renders our government more opaque and less accountable, so that the people do not know whom to blame, whom to vote against, whom to impeach."[102] More significantly, such rhetoric leads to "analytical confusion" by ignoring both that the Constitution restricts actions and that constitutional actors are restricted in different ways.[103] If a court is to decide whether a specific action violates the Constitution, the tribunal must know who performed the action (the constitutional subject) and how the Constitution limits the actor. In short, the court must determine who is violating the Constitution.

The identity of the constitutional subject (the actor who violates the Constitution) also determines *when* the constitutional violation takes place, a consideration that determines ripeness and mootness.[104] If the Legislature violates the Constitution, then the constitutional violation occurs when the Legislature makes the law.[105] This is

95 Id. at 176. Indeed, Rosenkranz cites this passage as the support for his second proposition. Rosenkranz, supra note 35, at 1222 n.36.

96 Rosenkranz, supra note 35, at 1222-23.

97 Id. at 1222-24.

98 Id. at 1223-24.

99 Id. at 1215.

100 Id. at 1215-22.

101 Id. at 1219-20.

102 Id. at 1221.

103 Id.

104 Id. at 1224-26.

105 Id. at 1225.

so even though the constitutional challenge to the law may not occur until years later.[106] Conversely, if it is the Executive that violates the Constitution, the constitutional violation occurs when the law or regulation is enforced.[107]

a. Answering Who Defines Whether the Constitutional Challenge Is Facial or As Applied

Constitutional challenges may be either as-applied or facial. A litigant bringing an as-applied challenge simply asserts that the statute is unconstitutional as applied to the circumstances before the court.[108] If the court finds that the statute is unconstitutional as applied, the government may not enforce that statute in those particular circumstances, but may continue to enforce the statute in other circumstances.[109]

In contrast, a litigant bringing a facial challenge contends that the statute is "invalid *in toto*" and, thus, "incapable of any valid application."[110] Should the court find that the statute is unconstitutional on its face, the government may never enforce the statute.[111] Since passing on the constitutionality of legislation is "the gravest and most

106 Id. at 1225-26.

107 Id. at 1224-25.

108 Ulster County Court v. Allen, 442 U.S. 140, 154-55 (1979).

109 William E. Thro, Respecting The Democratic Process: The Roberts Court And Limits On Facial Challenges, 9 ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY'S PRACTICE GROUPS 54, 54 (October 2008).

110 Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982).

111 The decision to entertain a facial challenge has enormous consequences for the judicial craft. As the Court explained:

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional law in advance of the necessity of deciding it'" nor "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that "'[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'"
>
> Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 450-51 (2008) (citations omitted).

delicate duty that [the judiciary] is called upon to perform,"[112] "when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program."[113] Indeed, facial challenges "are fundamentally at odds with the function of the . . . courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision."[114]

There are three types[115] of facial challenges—standard, overbreadth, and legislative authority.[116]

First, in a standard facial challenge, a litigant alleges "that no set of circumstances exists under which the Act would be valid."[117] The challenger "must show that the [statute] cannot operate

112 Rostker v. Goldberg, 453 U.S. 57, 64 (1981).

113 Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975). Traditionally, the Supreme Court has been hesitant to invalidate a statute on its face until "state courts [have] the opportunity to construe [the statute] to avoid constitutional infirmities." New York v. Ferber, 458 U.S. 747, 768 (1982).

114 Younger v. Harris, 401 U.S. 37, 52 (1971).

115 Although there are three distinct categories of facial challenges, there are substantial similarities between what I call a standard facial challenge and what I term a legislative authority facial challenge. When there is no set of circumstances in which a statute is constitutional (standard facial challenge), the reason is that the legislature lacks authority to enact the statute (legislative authority). Conversely, if the legislature lacks the authority to enact a statute (legislative authority), then it is certain that the statute will never have unconstitutional application (standard). Properly understood, a facial challenge is a challenge to legislative authority. See Rosenkranz, supra note 64, at 1007.

116 Although Rosenkranz regards all facial challenges as legislative authority challenges, the courts are divided as to whether there are two or three categories of facial challenges. Rosenkranz, supra note 35, at 1227-38. The Eastern District of Virginia expressly recognized the existence of a legislative authority challenge, albeit it did not use that term. Commonwealth Ex Rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 774 (E.D. Va. 2010). See also Thomas More Law Center v. Obama, 651 F.3d 529, 566-67 (6th Cir. 2011) (Graham, J. concurring in part and dissenting in part) (recognizing a legislative authority facial challenge). In contrast, Sixth Circuit Judge Sutton refused to recognize a legislative authority challenge and insisted that a legislative authority challenge be treated as a standard facial challenge. Thomas More Law Center, 651 F.3d at 556-57 (Sutton, J. concurring).

117 United States v. Salerno, 481 U.S. 739, 745 (1987). "While some Members of the Court have criticized the Salerno formulation, all agree that a facial challenge must fail where the statute has a 'plainly legitimate sweep.'" Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 (2008) (citations omitted). Indeed, in a later case, the Court used the "plainly legitimate sweep" standard, Crawford v. Marion County Election Bd., 553 U.S. 181, 202-03 (2008) (Stevens, J., joined by Roberts, C.J. & Kennedy, J., announcing the judgment of the Court).

Yet, the difference between "no set of circumstances" and "plainly legitimate sweep" is more theoretical than substantive. It is the difference between always unconstitutional and almost always unconstitutional. As a practical matter, this is a distinction without a difference.

constitutionally under any circumstance."[118] "Proof of a single constitutional application is all that is necessary" for the government to prevail.[119] Successful standard facial challenges are rare.[120] The judiciary typically rejects the facial challenge,[121] but leaves open the possibility that a litigant might be able to prevail in an as-applied challenge.[122]

Second, in a facial challenge alleging overbreadth,[123] the litigant asks the court to invalidate a law in *all* applications because it is invalid in *many* applications.[124] Overbreadth challenges not only "invite judgments on fact-poor records, but they entail a further departure from the norms of adjudication in federal courts: overbreadth challenges call for relaxing familiar requirements of standing to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand."[125] Consequently, the Supreme Court has "recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, only on the strength of a

118 West Virginia v. U.S. Dep't of Health & Human Servs., 289 F.3d 281, 292 (4th Cir. 2002).

119 Commonwealth Ex Rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 774 (E.D. Va. 2010).

120 To illustrate, consider Virginia's sodomy statute, which prohibits oral and anal sex between all persons in all circumstances. Virginia Code § 18.2-361. Because Lawrence v. Texas, 539 U.S. 558 (2003) generally prohibits the criminal prosecution of private sexual conduct between consenting adults, the Virginia sodomy statute is unconstitutional in many applications. McDonald v. Virginia, 645 S.E.2d 918, 922 (Va. 2007). However, the Virginia statue is constitutional in all applications. Specifically, the Virginia statute remains constitutional as applied to conduct involving a minor, McDonald, 645 S.E.2d at 924, or conduct that occurs in public. See Singson v. Virginia, 621 S.E.2d 682 (Va. App. 2005); Tjan v. Virginia, 621 S.E.2d 669 (Va. App. 2005) (both holding that the Commonwealth may criminalize sexual conduct that occurs in public). Thus, a standard facial challenge to the Virginia sodomy statute would fail.

121 See Thomas More Law Center v. Obama, 651 F.3d 529, 556-57 (6th Cir. 2011) (Sutton, J. concurring) (rejecting a standard facial challenge to the individual mandate of the health care reform legislation).

122 Crawford v. Marion County Election Bd., 553 U.S. 181, 202-03 (2008) (Stevens, J., joined by Roberts, C.J. & Kennedy, J., announcing the judgment of the Court); Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 457-58 (2008).

123 In an overbreadth challenge:

The showing that a law punishes a 'substantial' amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep,' suffices to invalidate all enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression."

Virginia v. Hicks, 539 U.S. 113, 118-19 (2003) (citations omitted).

124 See Virginia v. Black, 538 U.S. 343, 375 (2003) (Scalia, J., joined by Thomas, J., dissenting).

125 Sabri v. United States, 541 U.S. 600, 609 (2004).

specific reason … weighty enough to overcome the Court's well-founded reticence."[126] "Outside these limited settings, and absent a good reason," the Court has refused to entertain facial challenges alleging overbreadth.[127]

Third, in a legislative authority challenge,[128] the litigant "questions the authority of Congress [or the state legislature]—at the bill's inception—to enact the legislation."[129] A facial challenge to legislative authority "is somewhat analogous to" a challenge to a court's subject matter jurisdiction—both question "the power to act ab initio."[130] In a legislative authority challenge, the issue is whether the legislature has exceeded its constitutional authority.[131] For example, because the First Amendment explicitly prohibits Congress from establishing religion,[132] a federal statute establishing a National Church would be facially unconstitutional.[133] Indeed, "almost all constitutional challenges to specific exercises of enumerated powers, particularly the Commerce Clause, are facial."[134] "When . . . a federal statute is challenged as going beyond Congress's enumerated powers, under our precedents the court first asks whether the statute is unconstitutional *on its face.*"[135]

126 Id. at 609-610.

127 Id. at 610. Moreover, while the Court has not rejected explicitly overbreadth challenges in the abortion context, it has disapproved of such challenges. Gonzales v. Carhart, 550 U.S. 124, 167-68 (2007). But see Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309-10 (2016) (appearing to approve a form of overbreadth challenge in the abortion context). Cf. Id. at 2324-28 (Thomas, J., dissenting) (criticizing the Court's apparent approval of an overbreadth challenge in the abortion context).

128 To be sure, the Supreme Court has never explicitly recognized facial challenges to legislative authority as a separate category of facial challenge. However, there is implicit recognition. See Sabri, 541 U.S. at 610 (Kennedy, J., joined by Scalia, J., concurring) (noting that, in some instances, the Court has determined that Congress lacked legislative authority to enact a statute). "A careful examination of the Court's analysis in [United States v. Lopez, 514 U.S. 549 (1995)] and [United States v. Morrison, 529 U.S. 598, 658 (2000)] does not suggest the standard articulated in Salerno. In both Lopez and Morrison, the Court declared the statute under review to be legally stillborn without consideration of its effect downstream." Commonwealth Ex Rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 774 (E.D. Va. 2010).

129 Id.

130 Id.

131 Rosenkranz, supra note 35, at 1238.

132 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

133 Similarly, because the Second Amendment protects an individual right to own a firearm, there is no legislative authority to enact a general ban on the ownership of firearms. District of Columbia v. Heller, 554 U.S. 570, 634-36 (2008).

134 Cuccinelli, 728 F. Supp. 2d at 774.

135 Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 743 (2003) (Scalia, J., dissenting). See also City of Boerne v. Flores, 521 U.S. 507, 516 (1997) (Congress' authority to enforce the

Although the distinction between as-applied and facial challenges appears to be a distinction based on the relief the plaintiffs seek, it is actually a distinction based on answering *Who*.[136] The identity of the constitutional actor defines whether the challenge is facial or as-applied.[137] First, if the legislature is allegedly violating the Constitution, then the challenge is facial—whether the legislature has exceeded its constitutional authority.[138] Second, if the elected executive or as subordinate officer of the executive[139] is allegedly violating the Constitution, then the issue is whether the *execution* of the law is improper.[140]

b. Answering Who Defines Standing

Rosenkranz' paradigm offers insights into standing doctrine[141] Just as asking who violates the Constitution dictates the form of judicial review and informs the substantive inquiry, identifying the constitutional subject provides insights into who has standing. If the legislature violates the Constitution by making a law, "the violation is likely to affect many people. In some cases, it may affect all taxpayers,

Fourteenth Amendment does not include the power to redefine what actions violate the Fourteenth Amendment.) (emphasis added).

136 Rosenkranz, supra note 35, at 1235-42.

137 Id. at 1244.

138 Id. at 1238 (emphasis original). Of course, the Supreme Court has never explicitly recognized facial challenges to legislative authority as a separate category of facial challenge. However, there is implicit recognition. See Sabri v. United States, 541 U.S. 600, 610 (2004) (Kennedy, J., joined by Scalia, J., concurring) (noting that, in some instances, the Court has determined that Congress lacked legislative authority to enact a statute). "A careful examination of the Court's analysis in [United States v. Lopez, 514 U.S. 549, (1995)] and [United States v. Morrison, 529 U.S. 598, 658 (2000)] does not suggest the standard articulated in Salerno. In both Lopez and Morrison, the Court declared the statute under review to be legally stillborn without consideration of its effect downstream." Commonwealth Ex Rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 774 (E.D. Va. 2010).

139 To be sure, the executive usually acts through subordinate officers. Thus, even though it is the local police who perform an unreasonable search or the local prosecutor who chooses to apply a criminal law to unusual circumstances, these actions are still actions by the executive.

140 Rosenkranz, supra note 35, at 1241-42. Because the alleged constitutional violation occurs when the executive executes the statute, "the facts of execution will be relevant to an assessment of the merits—indeed, here, those facts will be the constitutional violation." Id. at 1239. The statutory text and the question of legislative power are irrelevant; what matters is how the statute is implemented. Id. at 1239-42.

141 See id. at 1246-48.

or perhaps even all citizens."[142] Conversely, if the executive violates the Constitution in the execution of a law, then "the violation is likely to affect a much smaller number."[143] Thus, while challenges to executive action are limited to those actually injured, any citizen, or at least any taxpayer, may challenge a legislative action.[144] When the legislature violates the Constitution by passing a statute, the very existence of the law constitutes the injury.[145]

II. IN SCHOOL FINANCE LITIGATION, ANSWERING *WHO* DEFINES THE CONSTITUTIONAL CHALLENGE

A. State Constitutions Limit the Legislature in the Context of Education

The State Constitutions limit the Legislature in the context of education.[146] First, the State Education Clauses[147] limit the Legislature by requiring the Legislature to establish a public school system of a particular quality.[148] In the absence of such a state constitutional provision, state legislatures would have absolute discretion whether to pursue the end of a public school system and to choose the means of achieving that end.[149] The Education Clause limits that discretion—state legislatures may not decline to have a public school system.[150] By limiting legislative discretion, the provision effectively compels the legislature to perform an affirmative act—establishing a school

142 Id. at 1248.

143 Id. at 1249.

144 Id. at 1249-50 (discussing the relaxed standing requirements for standing to bring an overbreadth challenge to legislative action); Id. at 1258-63 (discussing taxpayer standing to legislative action in the Establishment Clause context).

145 Id. at 1259.

146 Thro, supra note 22, at 543.

147 See the list of Education Clauses in Appendix 1.

148 Thro, supra note 25, at 725–26.

149 See Scott R. Bauries, State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation, 18 GEO. MASON L. REV. 301, 358–59 (2011) (arguing that state legislatures, by default, have all power not given to the federal government and are thus constrained, not enabled, by specific grants of power in state constitutions).

150 To be sure, some have questioned whether the State Constitution actually limits the legislature's discretion. Because State Constitutions "resemble regulatory statutes, prescribing social and economic policy," Wood contends the state charters are merely aspirational and do not impose substantive standards which are judicially enforceable. Wood, supra note 24, at 745, 778. Similarly, the Supreme Court of Illinois found the Education Clause to be "a purely hortatory statement of principle." Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1187 (1996).

finance system.[151]

Second, the State Equality Guarantees prohibit the Legislature from acting in a particular way.[152] Like the federal Equal Protection Clause, the state Equality Guarantees preclude the legislature from discriminating against classes of citizens or from abridging fundamental rights.[153] If education is a fundamental right under the State Equality Guarantee, then the legislature may not structure the school finance system in a way that results in unequal or inadequate education.[154]

B. *In School Finance Litigation, Courts Must Enforce the Constitutional Limits*

Although the Education Clauses clearly limit the government and although the judiciary has a duty to enforce those limits, some courts have found school finance issues to be non-justiciable.[155] Most

151 Moreover, Constitutions are entrustments and legislatures are fiduciaries, particularly where there is an affirmative obligation to pursue certain policy goals. Bauries, supra note 66, at 705-06, 718-57. In other words, at a minimum the State Legislature has an "education duty" and citizens may enforce this duty by convincing the courts that the Legislature "has acted insufficiently, either by not legislating at all (and thereby arguably violating a duty of obedience to the legislative command), or by legislating insufficiently well (and thereby violating the duty of due care)." Id. at 759-60.

152 Although the state equality guarantees may be the equivalent of the federal Equal Protection clause, the state courts' modes of analysis for such clauses fit into three distinct categories. See Robert Williams, Equality Guarantees in State Constitutional Law, 63 TEX. L. REV. 1195, 1219-21 (1985). First, some state courts follow federal Equal Protection doctrine without deviation. See Id. at 1219. Second, some state courts use the federal levels of scrutiny framework but have developed their own independent analysis as to what constitutes a fundamental right or suspect classification. See Id. at 1219. Third, a few state courts reject all aspects of the federal approach and develop their own independent frameworks and modes of analysis. See Id. at 1219-1221.

153 The court may also decide whether the legislation is rationally related to a legitimate state interest. See Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 345 (Ark. 1983).

154 In determining whether education is a fundamental right, state courts have used a variety of tests. See Thro, supra note 36, at 1671-78.

155 Committee for Educational Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996) ("What constitutes a 'high quality' education and how it may best be provided, cannot be ascertained by any judicially discoverable or manageable standards."). City of Pawtucket v. Sundlun, 662 A.2d 40, 58 (R.I. 1995) ("What constitutes an appropriate education or even an 'equal, adequate, and meaningful' one is 'not likely to be divined for all time even by the scholars who now so earnestly debate the issues.'").

As Bauries observes, the question of justiciability turns on the court's concept of the education clause. Scott R. Bauries, Is There An Elephant In The Room?: Judicial Review of

recently, the Supreme Court of Florida ruled a state constitutional amendment,[156] imposing the highest possible duty[157] on the State Legislature,[158] was simply "puffery."[159]

Such an approach is fundamentally flawed for three reasons. First, it fails to recognize the limitations imposed by the Education Clauses. Second, it represents abdication of the judicial responsibility to enforce limits.[160] Third, it disrespects the People's choice to choose

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Educational Adequacy and The Separation of Powers In State Constitutions, 61 ALA. L. REV. 701, 760-61 (2010).

156 The change of constitutional language was a direct result of the previous State constitutional challenge of Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996). In Coalition, the Florida Supreme Court upheld the education finance distribution formula while specifically rejecting plaintiffs' arguments that education was a fundamental right under the previous Florida constitutional mandate.

In Coalition, the Florida Supreme Court noted that the plaintiffs made "a blanket assertion that the entire system is constitutionally inadequate." Id. at 406. The court cited the intermediate appellate court in Citizens in noting "Petitioners' claim is 'the State's entire K-12 public education systems—which includes 67 school districts, approximately 2.7 million students, 170,000 teachers, 150,000 staff members and 4,000 schools—is in violation of the Florida Constitution.'" Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ., 232 So. 3d 1163, 1165 (Fla. Dist. Ct. App. 2017). In Coalition, the court upheld the dismissal with prejudice as it was of the view that the plaintiffs had not made a "sufficient showing" in order "to "justify some form of "judicial intrusion." Id at 407-408.

157 The Florida Education Clause provides:

The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children living within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high-quality system of free public schools that allows students to obtain a high-quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

FLA. CONST. art. IX, §1.

158 The new language was the result of the proposal of the Florida Constitutional Revision Commission (CRC) of 1998. The earlier constitutional language at issue stated, "Adequate provision shall be made by law for a uniform system of free public schools." Fla. Const. art. IX, § 1. The CRC language restored the term "paramount duty" to the Constitution. Fla. Const. of 1868. The CRC language did not say that education was a fundamental right, but rather, the Commission used the term "fundamental value of the people." More terms were added to the proposal, that is, "efficient" and "high quality."

159 Citizens for Strong Sch., Inc. v. Fla. State Bd. Of Educ., 262 So. 3d 127, 141 (Fla. 2019).

160 As the Supreme Court of Kentucky explained:

The issue before us-the constitutionality of the system of statutes that created the common schools-is the only issue. To avoid deciding the case because of "legislative discretion," "legislative function," etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is unthinkable.

We believe that what these several cases cited as controlling by appellants mean is that

particular words for their Constitution. This is particularly true when the People have chosen to adopt the words of another State's Constitution.[161]

C. Answering Who Determines Whether the Constitutional Challenge is Facial or As Applied and Defines Standing

As I explained in previous works, Rosenkranz' thinking has important implications for school finance litigation.[162] First, regardless of whether the plaintiffs pursue the equity theory,[163] the adequacy theory,[164] or some combination of the two,[165] the answer to the Who question in school finance litigation is clear—the legislature violates the Constitution.[166] A contention that the legislature has exceeded its authority is a *facial* challenge.[167] In school finance litigation, the constitutional violation occurs the moment that the legislature enacts (and the governor signs) the law establishing a school finance system

great weight should be given to the decision of the General Assembly. We believe they mean that the presumption of constitutionality is substantial. We believe that they mean that legislative discretion-in this specific matter of common schools-is to be given great weight and, we do so in this decision. We do not question the wisdom of the General Assembly's decision, only its failure to comply with its constitutional mandate. In so doing, we give deference and weight to the General Assembly's enactments; however, we find them constitutionally deficient

Rose v. Council for Better Educ., 790 S.W.2d 186, 209 (1989).

161 See the discussion of the textual differences between the Education Clauses, infra notes 207-221 and accompanying text.

162 See Thro, Facial Challenges, supra note 21; Thro, Rosenkranz, supra note 40.

163 For an explanation of the equity theory, see supra note 14. For a discussion of constitutional implications of the equity theory, see Molly McUsic, The Use of Education Clauses in School Finance Reform Litigation, 28 HARV. J. LEGIS. 307, 312-14 (1991).

164 For an explanation of the adequacy theory, see supra note 15. My own scholarship included commentary on two of the early adequacy cases. See William E. Thro, The Significance of the Tennessee School Finance Decision, 85 EDUC. L. REP. 11 (1993); William E. Thro, The Implications of Coalition for Equitable Educational Funding v. State for the Future of Public School Finance Litigation, 69 EDUC. L REP. 1012 (1991).

165 For strategic reasons, the plaintiffs frequently allege some combination of both theories.

166 As explained in more detail, supra notes 146-54 and accompanying text, state constitutions limit the legislature in the context of education in two ways. First, the Education Clauses impose requirements. Second, the Equality Guarantee Clause impose prohibitions.

167 Commonwealth Ex Rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 774 (E.D. Va. 2010).Cuccinelli, 728 F. Supp. 2d at 744. See also Rosenkranz, Subjects, supra note 35, at 1238.

that does have the constitutional requisites.[168] Ultimately, the constitutional claim is not that the legislature should enact a better school finance system, but that the legislature violated the relevant constitutional provisions when it first established the school finance system.[169]

Second, because the answer to *Who* in school finance litigation is always the legislature, any citizen, or at least any taxpayer, has standing.[170] The injury is the very existence of a statute that exceeds the constitutional limits. That injury applies to everyone.[171]

III. WHAT?

What? What does the Constitution mean? What does the Constitution limit? What does it prohibit? What does it require? *What* is always a question about constitutional interpretation, but sometimes it is also a question about constitutional construction. If the process of constitutional interpretation—determining the original public meaning of the words—does not yield a workable constitutional rule, then

168 When the legislature fails to structure the school finance system in a manner mandated by the State Constitution, the legislature exceeds its authority. Thus, legislative decisions regarding the structure of a school finance system are no different from legislative decisions to punish speech, establish a church, or ban the ownership of guns. In every instance, the legislature is exceeding its authority.

169 Rosenkranz, supra note 35, at 1236-37.

170 School finance cases frequently involve standing issues. Meira Schulman Ferziger, Annotation, Procedural Issues Concerning Public School Funding Cases, 115 A.L.R. 5th 563 (2004). "While the understanding of this principle in federal court is based upon the 'case-or-controversy' requirement in Article III of the United States Constitution, the source of standing rules varies from state to state, as does the specific content." Wood, supra note 24, at 744. "Although some states have relied upon the federal standards, most have utilized a more tolerant approach." R. Craig Wood & George Lange, Selected State Education Finance Constitutional Litigation In The Context Of Judicial Review, 207 Ed. Law Rep. 1, 4 (2006). Rosenkranz' paradigm is consistent with this more tolerant approach.

171 However, except where state law authorizes such a suit, school districts may not bring school finance litigation. A school district "created by the state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." Williams v. Mayor of Baltimore, 289 U.S. 36, 40 (1933). Indeed, each State has plenary authority to "withhold, grant, or withdraw privileges" of a state agency "as it sees fit." Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 362 (2009) (quoting Trenton v. New Jersey, 262 U.S. 182, 187 (1923)). School districts, like other subordinate units of government, "never were and never have been considered as sovereign entities but are "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." Reynolds v. Sims, 377 U.S. 533, 575 (1964). See also Louisiana Ex Rel. Folsom v. Mayor and Administrators of New Orleans, 109 U.S. 285, 287 (1883) ("Municipal corporations are instrumentalities of the State for the convenient administration of government within their limits.").

the court must engage in constitutional construction to determine a workable constitutional rule. Answering *What* provides the constitutional rule to be applied in *Why*.

A. Constitutional Analysis Turns on the Original Public Meaning of the Constitutional Text

1. In Interpreting the Constitutions, The Judiciary Must Apply the Original Public Meaning of the Words

In *Cooper v. Aaron*, the Supreme Court of the United States adopted both judicial supremacy and judicial universality.[172] As Professor Josh Blackman explains, "Judicial Supremacy" declares the Supreme Court's interpretation of the Constitution is the supreme law of the land and it does not matter that the other Branches or the States may interpret the Constitution differently.[173] Judicial Universality

172 In Cooper v. Aaron, the Court stated:

Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of Marbury v. Madison, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, ¶3 'to support this Constitution.' Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' 'anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State.

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: 'If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery. A Governor who asserts power to nullify a federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, 'it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases.

Cooper v. Aaron, 358 U.S. 1, 18–19 (1958) (citations omitted). Accord United States v. Nixon, 418 U.S. 683, 704 (1974); Powell v. McCormack, 395 U.S. 486, 549 (1969).

173 Josh Blackman, The Irrepressible Myths of Cooper v. Aaron, 107 GEO. L.J. 1135, 1137 (2019). Of course, others reject the notion that the Supreme Court's constitutional

declares all government officials in the other branches of government and all States are bound by the Supreme Court's decisions in a particular case even though those officials were not a party to the decision.[174] The principles of Judicial Supremacy and Judicial Universality should be equally applicable to decisions of a State's highest court interpreting the State Constitution as well. Just as the Supreme Court of the United States is the ultimate interpreter of the National Constitution, the highest court of a State is the ultimate interpreter of its State Constitution. To allow other constitutional actors to pursue differing interpretations of the State Constitution or to ignore similar constitutional decisions when they are not a party is a recipe for constitutional chaos and ultimately undermines the idea of the Law as Sovereign. If the judiciary declares legislators or executive branch officials have violated the Constitution, then those constitutional actors need to conform their conduct to the constitutional norm.[175]

Because of judicial supremacy and judicial universalism as well as their status as flawed human beings, judges are tempted to become "a bevy of Platonic Guardians,"[176] who "substitutes their predictive judgments for those of elected legislatures and expert agencies."[177] To preserve "the rule of law from the dictatorship of a shifting Supreme Court majority,"[178] "the words of the Constitution should be interpreted according to the meaning they had at the time they were enacted."[179]

In a constitutional system where the Law, not People, is Sovereign, the intentions of the legislature or the aspirations of those who advocated for adoption of a constitutional amendment or the views of

interpretation is binding on the other Branches. See MICHAEL STOKES PAULSEN & LUKE PAULSEN, THE CONSTITUTION: AN INTRODUCTION 331-32 (2015) (arguing that the judiciary does not have the sole power of constitutional interpretation); Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 GEO. L.J. 217, 345 (1994).

174 Blackman, supra note 173, at 1137.

175 Thro, supra note 22, at 543-45. But see Weishart, supra note 27, at 377 (noting that judicial supremacy is less prevalent among State courts)

176 Griswold v. Connecticut, 381 U.S. 479, 526 (1965) (Black, J., dissenting) (quoting LEARNED HAND, THE BILL OF RIGHTS 70 (1958)).

177 Lingle v. Chevron, 544 U.S. 528, 544 (2005).

178 McCreary County v. ACLU, 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting).

179 RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 88 (2005). Of course, there are other principled modes of constitutional analysis. See STEPHEN BREYER, ACTIVE LIBERTY (2005); RONALD DWORKIN, LAW'S EMPIRE (1986); JOHN HART ELY, DEMOCRACY & DISTRUST (1979). However, none of those other methods reflect an objective commitment to actual words of a statute.

the executive are irrelevant.[180] Because it is "impossible for a court—even one that knows each legislator's complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact,"[181] "it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated."[182] If the Law is Sovereign and the meaning of the words is controlling then the sole role of judicial interpretation is to determine the meaning of the text.[183] Since all Constitutions were "written to be understood by the voters, its words and phrases were used in their normal and ordinary meaning as distinguished from technical meaning,"[184] the judiciary may embrace "an idiomatic meaning" but must reject "secret or technical meanings that would not have been known to ordinary citizens" at the time the National or State Constitution was adopted.[185] Such an approach recognizes the words of the Constitution represent an overwhelming democratic consensus. [186]

Significantly, "fidelity to original meaning does not require

180 Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1487 (2018) (Thomas, J. concurring). Contrary to what many persons may think, originalism does not require judges to: (1) ascertain what the Framers intended; (2) refuse to apply the Constitution to contemporary technologies; (3) overturn Brown v. Board of Education; or (4) ignore precedent. LAWRENCE SOLUM, STATEMENT IN SUPPORT OF THE NOMINATION OF THE HONORABLE NEIL M. GORSUCH TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES 2-4 (2017).

181 Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 547–48 (1983).

182 Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 1, 17 (Amy Gutmann ed., 1997).

183 Lawson v. FMR LLC, 571 U.S. 429, 459–60 (2014) (Scalia, J., concurring).

184 United States v. Sprague, 282 U.S. 716, 731 (1931). See also Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824).

185 District of Columbia. v. Heller, 554 U.S. 570, 576–77 (2008).

186 As Justice Scalia explained during his confirmation hearings:

[A] Constitution has to have ultimately majoritarian underpinnings. To be sure, a constitution is a document that protects against future democratic excesses. But when it is adopted, it is adopted by democratic process. That is what legitimatizes it . . . [I]f the majority that adopted it did not believe this unspecified right, which is not reflected clearly in the language, if their laws at the time do not reflect that the right existed, nor do the laws at the present date reflect that society believes that the right exists, I worry about my deciding that it exists. I worry that I am not reflecting the most fundamental, deeply felt beliefs of our society, which is what a constitution means, but rather, I am reflecting the most deeply felt beliefs of Scalia, which is not want I want to impose on society.

Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States, 99th Cong. 89 (1986) (statement of Antonin Scalia).

fidelity to original expected application."[187] "What judges must be faithful to is the enacted law, not the expectations of the parties who wrote the law."[188] For example, America's adoption of the Equal Protection Clause[189] in 1868 prohibited racially segregated schools[190] and miscegenation laws[191] even though the authors of the Equal Protection Clause or those state legislators who ratified it may not have intended these results.[192]

B. *When Constitutional Interpretation is Inadequate to Determine A Constitutional Rule, Courts Must Engage in Constitutional Construction to Determine a Constitutional Rule*

While the "letter" of the constitutional text will resolve many cases, "judges will very often find themselves confronted with constitutional text that does not yield a single determinative answer in a particular case."[193] "When interpretation has provided all the guidance it can but more guidance is needed, constitutional interpretation must be supplemented by constitutional construction."[194] "Yet exercising judicial power where the Constitution's text does not provide a single determinate answer looks suspiciously like an act of will rather than 'merely judgment'—a legislative rather than a judicial act."[195]

Recognizing both the need for constitutional construction when the "letter" is inadequate and the inherent dangers of unbridled judicial discretion, Professors Randy Barnett and Evan Bernick "present an originalist theory of constitutional construction: *good faith originalist* construction. Good faith originalist construction seeks to implement the Constitution faithfully by ascertaining and adhering to

187 Jack M. Balkin, Framework Originalism and the Living Constitution, 103 N.W. L. REV. 549, 552 (2009). See also JACK M. BALKIN, LIVING ORIGINALISM (2012).

188 Steven G. Calabresi & Livia G. Fine, Two Cheers for Professor Balkin's Originalism, 103 N.W. L. REV. 663, 669 (2009).

189 U.S. CONST. amend. XIV, § 1.

190 Brown v. Board of Education, 347 U.S. 483 (1954).

191 Loving v. Virginia, 388 U.S. 1 (1967).

192 Calabresi & Fine, supra note 188, at 669-72.

193 Randy Barnett & Evan Bernick, The Letter & The Spirit: The Judicial Duty of Good Faith Constitutional Construction, GEORGETOWN UNIVERSITY LAW CENTER FACULTY SCHOLARSHIP 2 (2017) (available on Social Science Research Network). Barnett and Bernick revised this work and published it under a different title. See infra note 198.

194 Barnett, supra note 179, at 120.

195 Barnett & Bernick, supra note 193, at 2.

the original functions of the constitutional text—its 'spirit.'"[196] The scholars argue "originalism must be committed to the Constitution's original spirit as well—the functions, purposes, goals, or aims implicit in its individual clauses and structural design elements."[197] By combining the original public meaning of the Constitution's text (the "letter")—with a constitutional construction consistent with original public meaning (the "spirit"), Barnett and Bernick articulate "a unified theory of Originalism."[198]

Barnett and Bernick articulate "guidelines for how judges are to engage in good-faith construction and thereby enabling observers to monitor construction and identify opportunistic abuses of judicial discretion . . ., to make it both more likely that good-faith construction will take place and bad-faith construction will be critically examined, censured, and discouraged."[199] More specifically, they suggest that judges should follow a three-step process:

> 1.Make a good-faith effort to determine the original meaning of the text of the relevant provision and to resolve the case on the basis of the letter.
>
> 2.Failing this, identify the spirit of the provision, and
>
> 3.Formulate a rule that is
>
> A. consistent with the letter and
>
> B. Designed to implement the function, either of
>
> (i) The provision at issue or, failing that,
>
> (ii) The structure in which the provision appears or, failing that,

196 Id. at 3.

197 Id. at 2.

198 Randy E. Barnett & Evan D. Bernick, The Letter & The Spirit: A Unified Theory of Originalism, 107 GEO. L.J. 1, 5 (2018). In doing so, the scholars hope to unite all originalists and further distinguish Originalism from Living Constitutionalism. Id.

199 Id. at 33.

(iii) The Constitution as a whole.[200]

In following this three-step process, the judiciary must proceed "candidly and carefully, explaining why implementing the rule is consistent with the spirit of the law, setting forth the rule clearly and concisely and modeling its proper application."[201] Conversely, when "judges use their discretion to adopt constitutional constructions that undermine rather than consist with the spirit of 'this Constitution,' they are evading the deal they made when they received powers in return for their oath to uphold 'this Constitution'—and thus, whatever their motives, they are acting in bad faith."[202]

Because "[g]ood-faith construction will not always produce one and only one rule," judges will continue to have discretion.[203] Nevertheless, insisting on good faith originalist constitutional construction "makes it marginally more likely that judges will arrive at rules that are consistent with the Constitution's spirit."[204]

C. In School Finance Litigation, Constitutional Analysis Turns on the Original Public Meaning of the Constitutional Text

1. In Interpreting the Constitutional Limitations, the Courts Should Apply the Original Public Meaning

In interpreting the constitutional limitations on the Legislature in the context of education, courts should apply the original public meaning.[205] Specifically, the courts should recognize that textual differences between State Constitutions reflect the People's desire to

200 Id. at 35-36.

201 Id. at 36

202 Id.

203 Id. at 37.

204 Id.

205 As explained supra notes 180-192 and accompanying text, a focus on original public meaning is fundamentally different than a focus on the original intent of the drafters. See also Thro, supra note 22, at 546-47. Professor Dinan has produced a comprehensive work on the original intent of the Education Clauses. John Dinan, The Meaning of State Constitutional Education Clauses: Evidence from the Constitutional Convention Debates, 70 Alb. L. Rev. 927, 929 (2007). However, a review of original intent, while helpful to ascertaining original public meaning, is not determinative of original public meaning. Scalia, supra note 182, at 38 (discussing how the Federalist and Anti-Federalist Papers can provide insights into original public meaning, but such writings are not determinative of original public meaning).

impose different limitations.[206]

To explain, while all Education Clauses limit the policy discretion of the legislature,[207] some Education Clauses impose greater restrictions than others.[208] Twenty-one Education Clauses simply mandate the establishment of public school systems;[209] eighteen require educational systems of specific quality;[210] six provisions establish levels or quality and strong mandates to achieve them;[211] five "high duty

206 This emphasis on textual differences is a form of "horizontal federalism." See Ronald K. L. Collins, Reliance on State Constitutions: Some Random Thoughts, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 14-15 (Bradley McGraw ed., 1985).

207 Bauries, supra note 149, at 358-60; See also Scott R. Bauries, Forward: Rights, Remedies, and Rose, 98 KY. L.J. 703, 708-11 (2010) (similar analysis).

208 There are four categories of Education Clauses. See Erica Black Grubb, Breaking The Language Barrier: The Right To Bilingual Education, 9 HARV. C.R.-C.L.L. REV. 52, 66-70 (1974); Gershon M. Ratner, A New Legal Duty For Urban Public Schools: Effective Education In Basic Skills, 63 TEX. L. REV. 777, 814 n. 143-46 (1985). This article refines the basic framework developed by Grubb and Ratner.

209 See ALA. CONST. art. 14, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; CONN. CONST. art. VIII, § 1; HAW. CONST. art. IX, § 1; KAN. CONST. art. VI, § 1; LA. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX; NEB. CONST. art. VII, § 1; N.H. CONST. pt. 2, art. 83; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; OKLA. CONST. art. XIII, § 1; S.C. CONST. art. XI, § 3; TENN. CONST. art. XI, § 12; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68.

A typical example of an establishment provision clause is Tennessee's, which provides, "The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools." TENN. CONST. art. XI, § 12.

210 See ARK. CONST. art. XIV, § 1; COLO. CONST. art. IX, § 2; DEL. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; KY. CONST. § 183; MD. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; MONT. CONST. art. X, § 1; N.J. CONST. art. VIII, § 4; N.D. CONST. art. VII, § 1; OHIO CONST. art. VI, § 3; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; TEX. CONST. art. VII, § 1; VA. CONST. art. VIII, § 1; W.VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

A typical example is the Pennsylvania education clause, which provides, "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." PA. CONST. art. III, § 14. Generally, the specific quality is "thorough and/or efficient." As the Supreme Court of West Virginia observed, Illinois, Maryland, Minnesota, New Jersey, Ohio, and Pennsylvania require "thorough and efficient" systems; Colorado, Idaho, and Montana require thorough systems; and Arkansas, Delaware, Kentucky, and Texas require "efficient" systems. Pauley v. Kelly, 255 S.E.2d 859, 865 (W.Va. 1979).

211 See CAL. CONST. art. IX, § 5; IND. CONST. art. VIII, § 1; IOWA CONST. art. 9 2d, § 2; NEV. CONST. art. XI, § 2, R.I. CONST. art. XII, § 1; S.D. CONST. art. VIII, § 1.

The provisions of the California Constitution provide a typical example: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people [purposive preamble], the Legislature shall encourage by all suitable means [stronger mandate] the promotion of intellectual, scientific, moral, and agricultural improvement." Cal. Const. art. IX, § 1. Similarly, the Rhode Island education clause demands that the state legislature will "promote the public schools and to adopt all means . . . to secure . . . education." R.I. Const. art. XII, § 1.

provisions" seem to place education above other governmental functions such as highways or welfare.[212]

Historically, the courts generally have ignored these semantic differences among the State Education Clauses.[213] Yet, if the judicial task is to determine the original public meaning of text or to create a constitutional construction that is consistent with the original public meaning, the presence of words such as "thorough," "efficient," "uniform," "primary," and "paramount" should be significant.[214] A constitutional provision that speaks of a "quality education" and "paramount duty" has a different original public meaning from a constitutional provision stating, "establish a school system." The more specific provision imposes greater restrictions on legislative discretion than the more general provision. The greater restriction is the direct result of the People's conscious choice to choose certain words and reject others.[215] In interpreting the meaning of these restrictions, the courts must recognize that the original public meaning of the different words can lead to different results.[216]

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212 See FLA. CONST. art. IX, § 1. GA. CONST. art. VIII, § 1, ¶ 1; ILL. CONST. art. X, § 1. ME. CONST. art. 8, § 1; § 1(a); WASH. CONST. art. IX, § 1.

For example, Washington's Education Clause provides that "it is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex." Wash. Const. art. IX, § 1 A second example is Georgia's Education Clause that reads, "[t]he provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia, the expense of which shall be provided for by taxation." Ga. Const. art. VIII, §. 1, ¶ 1.

213 To be sure, there were exceptions. In several instances, courts in states with establishment provisions recognized that the state constitution's text did not mandate a particular quality standard or establish education as a fundamental right. For example, the South Carolina Supreme Court followed a similar mode of analysis and concluded that the education clause gave the legislature broad discretion and that the legislature had not violated that discretion. Richland County v. Campbell, 364 S.E.2d 470, 471 (S.C. 1988). Finally, in the first New York decision, Bd. of Educ., Levittown Union Free Sch. District v. Nyquist, 439 N.E.2d 359 (N.Y. 1982), the state's highest court, combining language and historical analyses, interpreted N.Y. CONST. art. XI, § 1 ("[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.") to mean "only that the Legislature provide for . . . a system of free schools in order that an education might be available to all the State's children." Id. at 368. The court went on to hold that since the New York public schools were among the best in the nation, the legislature obviously fulfilled its obligation. Id. at 369.

214 William E. Thro, The Role of Language of the State Education Clauses in School Finance Litigation, 79 EDUC. L. REP. 19, 22 (1993). But see Bauries, supra note 155, at 760-61 (arguing that semantic differences are meaningless).

215 Of course, while different words may have different meanings, the practical impact of the different words may be negligible. A "thorough and efficient" educational system may not be substantively distinguishable from a "thorough" educational system or an "efficient" educational system. Yet, the fact that semantic differences have no practical effect does not excuse the judiciary from ascertaining the original public meaning of the words.

216 Thro, supra note 26, at 543-44.

The semantic differences are significant in four ways. First, the semantic differences establish the scope of the restrictions on the legislature. If the provision simply requires the establishment of an educational system, then the legislature simply has to establish the educational system. Conversely, if the clause imposes a quality standard, such as "thorough and efficient," then something more is required. The legislature action—the statutes—must show an awareness of the quality standard and some affirmative effort to achieve the quality standard.

Second, the semantic differences dictate the burden of proof. Normally, the parties challenging the constitutionality of the legislature's actions has the burden of proving the action is unconstitutional. However, in some circumstances, such as when the government uses a racial classification, the burden is on the governmental actors to prove that their actions conform to the Constitution.[217] If the State Constitution contains a quality standard and a strong mandate to achieve it, it is appropriate to place the burden of proof on the constitutional actors. Conversely, if there is no strong mandate, the burden of proof should remain with the challengers.

Third, the semantic differences establish a hierarchy of constitutional values. If the constitutional text is a "high duty provision," then the People of the State have said that quality education is a higher value than other governmental functions such as roads or welfare. In such an instance, the burden of proof should be on the constitutional actors to prove that the quality standard has been met *and* that education is a higher priority than other constitutional obligations. In States with high duty provisions, the legislature's sovereign discretion is constrained to the greatest degree.

Fourth, the semantic differences determine whether education is a fundamental right[218] under the State Equality Guarantee Clauses.[219] Although the courts have used a variety of tests of

217 Fisher v. University of Texas, 570 U.S. 297, 311-12 (2013).

218 Historically, the question of whether education is a fundamental right has been central to the Equity Theory. See Serrano v. Priest, 557 P.2d 929, (Cal. 1976); Horton v. Meskill, 376 A.2d 359 (Con. 1977); Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980). Alternatively, the Equity Theory may involve claims that wealth is a suspect class under the State Constitution or that the finance system is irrational. See Dupree v. Alma School Dist. No. 30, 651 S.W.2d 90 (Ark. 1983).

219 Outside of the school finance context, some scholars have explored the issue of whether education was a fundamental right under the State Constitutions at the time of the adoption of the Fourteenth Amendment. Eastman contends the state constitutions did not create

fundamentality in school finance cases,[220] the most logical approach is to look at the actual language of the education clauses.[221] For example, if education is a primary duty, then it is far more likely to be a fundamental right than if the educational system merely has to be thorough and efficient. Similarly, if the legislature is simply required to have a school system, education is not a fundamental right.

2. In School Finance Litigation, When Constitutional Interpretation is Inadequate to Determine A Constitutional Rule, Courts Must Engage in Constitutional Construction to Determine A Constitutional Rule

In school finance cases, although the constitutional text of the Education Clauses provides important insights into the level of restrictions, the burden of proof, the hierarchy of constitutional values, and whether education is a fundamental right, constitutional interpretation often does not determine a constitutional rule.[222] When the

a fundamental right to an education. John C. Eastman, When Did Education Become A Civil Right? An Assessment of State Constitutional Provisions for Education 1776-1900, 42 AM. J. LEGAL HIST. 1, 2 (1998). However, Calabresi and Perl reached the opposite conclusion. See Steven G. Calabresi & Michael W. Perl, Originalism and Brown v. Board of Education, 2014 MICH. ST. L. REV. 429, 435 (2014).

220 Thro, supra note 36, at 1671-78

221 The West Virginia and Wyoming Supreme Court's employed an analysis similar to this. See Thro, supra note 36, at 1673-75.

For example, in Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979), the West Virginia Supreme Court carefully assessed the meaning of its education clause and held " the mandatory requirement of 'a thorough and efficient system of free schools,' found in Article XII, Section 1 of our Constitution demonstrates that education is a fundamental constitutional right in this State." Id. at 878.

In Washakie Co. School Dist. v. Herschler, 606 P.2d 310 (Wyo. 1980), the Wyoming Supreme Court, without any reference to the West Virginia decision, said, "[i]n the light of the emphasis which the Wyoming Constitution places on education, there is no room for any conclusion but that education for the children of Wyoming is a matter of fundamental interest." Id. at 333. In both cases, the importance of education to the people of the state, as expressed through the language of the state constitutions' education clauses, W.VA. CONST. art 12, § 1 (a thorough and efficient clause); WYO. CONST. art VIII, § 9; art. I, § 23; art, XXI, § 28, was the critical factor in the determination of fundamentality. For an analysis of the inequalities of public school financing and possible equal protection violations in Wyoming prior to the Washakie decision, see Note, Equal Protection And The Financing Of Public Education In Wyoming, 8 LAND & WATER L. REV. 273 (1978).

222 Of course, there are school finance cases when the constitutional text establishes the constitutional rule. For example, if the Education Clause simply requires the establishment of a school system, then the Legislature has met its constitutional obligation by simply establishing a school system. If the original public meaning of the text is sufficient to resolve the issue, then

original public meaning does not resolve the issue, then the judiciary must develop a construction that reflects the text's function and original public meaning.[223] Because constitutional construction requires "a fair construction of the whole instrument,"[224] a court facing a school finance challenge will have to deal with several competing constitutional considerations.[225]

First, a constitutional mandate for educational adequacy or equity is not necessarily a mandate for a particular level of funding. Although money is certainly a factor, perhaps the most important factor, it is not the only factor in achieving adequacy or equity.[226] Thus, in order to correct the inadequacy, it may be necessary to do more than restructure the finance system.[227] Indeed, it may be necessary to undergo fundamental reform of the entire educational system rather than simply the method of distributing money.[228] Any attempt at constitutional construction in the context of school finance litigation must recognize that adequacy and equity entail more than just financial resources.

Second, "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools."[229] Americans distrust any concentration of power. Just as the National Constitution divides power between the States and National Government, the state charters divide power between the centralized state governments and local governments.[230] While some states have explicit textual

the judiciary enforces the text. Thro, supra note 22, at 546-47.

223 See Thro, Constitutional Construction, supra note 40, at 474.

224 McCullough v. Maryland, 17 U.S. (4 Wheat) 316, 406 (1819).

225 Thro, Constitutional Construction, supra note 40, at 479-81.

226 Some scholars call for a renewed emphasis on financial resources. See. Koski & Reich, supra note 15, at 547.

227 As explained infra notes 319-38 and accompanying text, a violation of the State Constitution theoretically could be the springboard for implementation of a conservative or liberal agenda of reform.

228 To illustrate, assume that money is gasoline and the finance system is a car. Obviously, the car needs gasoline to operate, but simply providing more gas will not correct major mechanical problems. Moreover, no amount of major mechanical repairs can transform a 1920 Ford Model T into a 2020 Ford Mustang. It may be necessary to simply abandon the old car and obtain a new one.

229 Milliken v. Bradley, 418 U.S. 717, 741 (1974).

230 See Board of Educ. v. Booth, 984 P.2d 639, 646 (Colo. 1999) (discussing the need to reconcile state constitutional provision concerning power of the local school board with state constitutional provision concerning power of the State).

provisions guaranteeing local control of the schools,[231] this division of responsibility reflects more the state constitutional structure and historical understandings than the actual text.[232] Nevertheless, "local control remains an important norm in American education,"[233] and "courts view local control as a fundamental constitutional value, comparable to equal protection or the right to a basic education found in many state constitutions."[234] "Most of the courts that have refused to invalidate the local property tax-based system of school finance have relied on local control as the principal justification for sustaining the status quo."[235]

Third, any rule must harmonize often-competing constitutional provisions and values.[236] For example, provisions mandating a balanced budget,[237] limiting the growth of government,[238] or setting priorities among governmental functions,[239] must be reconciled with the constitutional mandate for adequacy or equity.[240]

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231 See, e.g. COLO. CONST. art. IX, § 15; VA. CONST. art. VIII, § 7

232 Moreover, for the state legislature and state executive, the constitutional value of decentralization imposes both political and structural restraints on their policy options. Quite simply, a proposal to have the State government exerting centralized control over all schools within a State or even over all aspects of financing at the local level would face widespread and strong political opposition.

233 Aaron Saiger, Note, Disestablishing Local School Districts As A Remedy For Educational Inadequacy, 99 COLUM. L. REV. 1830, 1865 (1999).

234 Richard Briffault, The Role of Local Control in School Finance Reform, 24 CONN. L. REV. 773, 785 (1992).

235 Maurice Dyson, Playing Games With Equality: A Game Theoretic Critique Of Educational Sanctions, Remedies, And Strategic Noncompliance, 77 TEMPLE L. REV. 577, 599 (2004).

236 One cannot focus on the guarantees of individual freedom while ignoring the mandate to treat every person equally. Conversely, the government's obligation to treat everyone equally does not justify a diminishment of the individual rights explicitly granted in the text. Indeed, the canons of legal and constitutional interpretation require consideration of the whole text and a command to harmonize any conflicting interpretations. Scalia & Garner, supra note 77, at § 27.

237 Most States require a balanced budget. See National Conference of State Legislatures, STATE BALANCED BUDGET PROVISIONS 4-5 (2010), http://www.ncsl.org/IssuesResearch/BudgetTax/StateBalancedBudgetRequirementsProvisionsand/tabid/12651/Default.aspx.

If the State requires a balanced budget, increases in educational spending must be offset by new revenues or cuts in other areas. Dayton, Dupree & Houck, supra note 19, at 953 (noting the tension between balanced budget provisions and school finance decisions mandating more expenditures).

238 See COLO. CONST. art. X, § 1. If there are limits on the growth of government and if educational expenditures grow faster than the prescribed limits, then the rate of growth in other areas must be limited. Thro, supra note 25, at 735-36.

239 See FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1, ¶ 1; ILL. CONST. art. X, § 1. ME. CONST. art. 8, § 1; § 1(a); WASH. CONST. art. IX, § 1.

240 See Board of Educ. v. Booth, 984 P.2d 639, 646 (Colo. 1999) (discussing the need to

Of course, because the Education Clauses have different words,[241] because every State has different constitutional values,[242] the results of constitutional construction rules will vary from State to State.[243] Consequently, there can be no universal constitutional rule applicable in all school finance cases in all States.

IV. WHY?

Why? *Why* is there a violation of the Constitution? Alternatively, why is there not a violation of the Constitution? *Why* is a question about the application of a constitutional rule to the circumstances of the case.

A. To Establish A Constitutional Violation Courts Must Compare the Constitutional Rule to the Constitutional Actor's Actions.

Once the court has determined the constitutional rule by answering the What question, the judges must compare the constitutional rule to the constitutional actor's actions.

How the Court does so depends on how it answered *Who*. As explained above, answering *Who* defines whether the constitutional challenge is as applied or facial.[244] Challenges against the legislature are facial.[245] If the legislature is allegedly violating the Constitution, then the issue is whether the legislature has exceeded its constitutional authority.[246] Because the alleged constitutional violation occurs when the statute is passed, "[t]he specific facts of enforcement cannot

reconcile state constitutional provision concerning power of the local school board with state constitutional provision concerning power of the State).

241 For a description of the textual differences between the Education Clauses, see supra notes 207-221 and accompanying text.

242 See Howard, supra note 57, at 14.

243 "The nature of the state constitutions themselves distinguishes the role of the state judiciary." R. Craig Wood & George Lange, The Justiciability Doctrine and Selected State Education Finance Constitutional Challenges, 32 JOURNAL OF EDUCATION FINANCE 1, 5 (2006). For example, because of Kentucky's explicit separation of powers provisions, KY. CONST. §§ 27-29, the remedial powers of Kentucky courts are more limited than the remedial powers of the federal judiciary. Rose v. Council for Better Educ., 790 S.W.2d 186, 214 (Ky. 1989).

244 See supra notes 136-40 and accompanying text.

245 See supra notes 136-38 and accompanying text.

246 Rosenkranz, supra note 35, at 1238.

matter here, for the simple reason that the constitutional violation is complete before those facts arise."[247] Rather, the court must "lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."[248]

Rosenkranz does not distinguish between constitutional prohibitions and constitutional requirements; I believe the distinction has significance to resolving facial challenge. If the constitutional provision at issue prohibits the Legislature from acting, then the views of experts about how the statute works or even specific evidence about how the statute works are irrelevant. The only question is purely legal.[249] Conversely, if the constitutional provision at issue *requires* the Legislature to act, it seems that such a situation should require more than simply a comparison of text. For example, if the legislature is required to draw legislative districts that have equal population,[250] simply examining the statute will not tell the court whether the Legislature has done what it is required to do. The court must examine the census data as well. In other words, a facial challenge involving a constitutional requirement may necessitate an examination of readily available objective data.

Conversely, challenges against executive branch officials are as-applied.[251] If the executive or an agent of the executive[252] is allegedly violating the Constitution, then the issue is whether the *execution* of the law is improper.[253] Because the alleged constitutional violation occurs when the Executive Branch *executes* the statute, "the facts of execution will be relevant to an assessment of the merits—indeed, here,

247 Id. at 1276.

248 United States v. Butler, 297 U.S. 1, 62 (1936).

249 As explained in more detail, supra notes 115-35 and accompanying text, this question varies depending upon the nature of the facial challenge. First, in a legislative authority challenge, the sole issue is whether a court believes the legislature had the authority to enact the statute or, in the case of a requirement, to fail to act. Second, in a First Amendment overbreadth challenge, the question is the magnitude of the number of the statute's unconstitutional applications. Third, in a standard facial challenge, the question is whether there is a constitutional application of the statute.

250 See Baker v. Carr, 369 U.S. 186 (1962).

251 See supra notes 139-40 and accompanying text

252 To be sure, the executive usually acts through subordinate officers. Thus, even though it is the local police who perform an unreasonable search or the local prosecutor who chooses to apply a criminal law to unusual circumstances, these actions are still actions by the executive.

253 Rosenkranz, supra note 35, at 1241-42.

those facts *will be* the constitutional violation."[254] The statutory text and the question of legislative power are irrelevant; what matters is how the Executive Branch implements the statute.[255]

B. *In School Finance Litigation, To Establish A Constitutional Violation, Courts Must Compare the Constitutional Rule to the Constitutional Actor's Actions.*

Because school finance litigation is always a facial challenge, courts should follow Rosenkranz paradigm[256] and compare the statutory text to the Constitution.[257] Instead of presenting evidence or testimony concerning the results of the current system, attorneys must explain why the legislature's choices comply with the constitutional text. Since state constitutional violations cannot result from factors outside of the state government's control, the question of whether the legislature has exceeded its authority must depend on what the legislature has actually done—the statute that establishes the school finance system.[258] As a practical matter, this is an arbitrariness standard.[259]

Alternatively, as I suggest above, because Education Clause is a *requirement*, the court should examine statutory text plus readily available objective evidence.[260] Thus, a court could review test scores on state-wide standardized tests, expenditures, course offerings,

254 Id. at 1239.

255 Id. at 1239-42.

256 Id. at 1235-38.

257 Thro, supra note 21, at 698-701. Thro, Rosenkranz, supra note 40, at 15-18.

258 Indeed, in some instances, other constitutional provisions, such as the requirement for a balanced budget, may interfere with the State's efforts to achieve quality education. See Thro, supra note 25, at 735-36.

259 This is consistent with Bauries' notion that "a state education clause, if it is to be enforced as a legislative disability, should be read to disable only legislative action which is arbitrary in its pursuit of the broadly universal goal of a system that adequately educates the people." As he explains, an arbitrariness standard "falls short of the many duty-based conceptions that state courts and especially commentators have articulated, but it both fits and justifies the conception that the overwhelming majority of state courts have actually applied." Bauries, supra note 149, at 364. The arbitrariness standard ensures that the judiciary enforces the constitutional limits, but also ensures that judges do not implement their policy views. See Thro, Rosenkranz, supra note 40, at 15. Such an approach is consistent with judicial humility. See Thro, supra note 25, at 738.

260 See supra notes 249-250 and accompanying text.

percentage of students on free and reduced price lunch, and similar information.[261] Under either the Rosenkranz approach or my approach, there is no need to have lengthy trials or present expert testimony regarding the impact of the current school finance system on particular school districts or individual students. As a practical matter, the case is resolved on cross-motions for summary judgment.

Although Rosenkranz' approach or my approach are the logical ways to assess a constitutional claim that the Legislature has violated the Constitution by failing to do what the Constitution *requires*, no court and no other scholar has endorsed it.

Instead, every court to date has engaged in extensive hearings with reams of evidence and dueling experts. Trial court proceedings have often lasted years and resulted in lengthy judicial decisions. In formulating those decisions, trial judges, who are often overwhelmed with the day-to-day flood of civil and criminal cases, have little sense of what the Constitution requires or prohibits. More importantly, they have no notion as to whether the evidence and expert testimony indicates legislative compliance or a constitutional violation.

This traditional approach to school finance litigation is flawed in three respects. First, it elevates policy preferences above the original public meaning of the constitutional text. It assumes that the Constitution requires the plaintiffs' vision of adequacy or equity and, in most cases, financial considerations alone are determinative. Yet, while the constitutional text limits legislative discretion, it does not abolish it. There are still a variety of ways, including various formulas for allocating money, of achieving constitutional compliance. To the extent the Constitution allows for legislative discretion between X or Y, it is inappropriate for a court to say the Constitution requires X rather than Y.

261 The emphasis is how the statutory system works in general rather than the amount of money available at a particular point in time. As a broad generalization, education finance formulas consist of both a state and local fiscal share. Typically, the state share is reflective of state income tax revenues and/or sales tax revenues whereas the local share generally consists of property tax revenues. In periods of economic recession or low growth, state legislatures have less revenue due to declining income and sales receipts. Normally, property taxes reflect assessed valuations that are lower than retail. Property assessments tend to be stable over short periods and thus the local property tax levies remain consistent. Thus, the formula reflects different revenue streams regardless of the economic conditions at a given point in time. Accordingly, in these types of formulas in periods of economic recessions, the state revenues will decrease while local revenues will remain stable. In other words, a period of economic contraction or slow growth results in less money from the state government. If the constitutionality of the school finance system depends exclusively on the amount of money provided by the state government, then changing economic conditions can result in constitutional violations.

Second, this traditional approach ignores the distinction between a facial challenge and an as-applied challenge.[262] It focuses not on comparison of the constitutional and statutory texts, but on the application of the existing system to particular circumstances. In effect, it employs the methodology for an as-applied challenge to executive branch actors rather than a facial challenge. Such an approach is "messy" and less focused than the facial approach.[263]

Third, this traditional approach encourages judges to either refuse to enforce the Constitution or to simply make up a standard that will please a particular political faction. In a nation where the Law, not the People, is sovereign, the judiciary cannot refuse to enforce the Constitution or develop a constitutional rule that does not reflect the original public meaning of the constitutional text.

Recognizing the inherent flaws in the traditional approach, two leading scholars of school finance litigation have suggested alternatives. First, Bauries believes the Education Clauses impose "general fiduciary duties, and that they ought to be adjudicated as such, using the tools of deference appropriate to the review of discretionary decisions by individuals in positions of trust."[264] As he explains, " courts generally conceive of the legislative duty in absolutist terms, requiring the establishment of a school system that qualitatively seems" to meet a quality standard.[265] He argues such a "substance-oriented, absolutist approach often fails to achieve the adequacy that the courts claim to seek and sometimes even results in the courts conceding the issue back to the legislatures after prolonged institutional conflicts." Instead, "state courts should address affirmative duties as the fiduciary duties they are by switching from such a substance-oriented approach of review to a more process-oriented form of review."[266] This "fiduciary approach has the potential to balance the judiciary's reluctance to exceed its traditional role with the need for limited fallback judicial review of gross deficient or completely absent legislative deliberation on an important, often fundamental policy issue."[267]

262 See Spencer C. Weiler, Luke Cornelius & Edward Brooks, Examining Adequacy Trends in School Finance Litigation, 345 Ed. Law Rep. 1, 11–12 (2017).

263 Id. at 11-12.

264 Bauries, supra note 66, at 706

265 Id. at 716-17.

266 Id. at 717.

267 Id. at 767. Although the decision predates publication of Bauries' fiduciary theory, the Supreme Court of Washington's focused on whether the school finance system "achieves or

Bauries' approach limits the judicial role and is certainly superior to lengthy trials filled with expert testimony about policy preferences, but it ignores the original public meaning of the constitutional text. Bauries assumes that the Education Clauses do not impose substantive quality standards and the semantic differences are meaningless, but instead simply impose a broad fiduciary duty.[268] In contrast, I believe that the Education Clauses do impose substantive quality standards and the semantic differences are significant for both the Education Clauses and the Equality Guarantee Clauses.[269] If the Education Clauses impose substantive quality standards substantive content and the semantic differences matter, then the focus must be on the constitutional requirement and prohibition, not on the legislative process. If the Legislature does not what is required or refrains from doing what is prohibited, it does not matter whether the legislative process was cursory or comprehensive. If the Education Clauses have substantive content, then the focus must be on the destination, not the journey.

Second, Professor Joshua Weishart believes that liability should turn on a "positive directly proportional relationship" between equality (equity) and liberty (adequacy).[270] He suggests "a two-part inquiry: (1) whether the state's actions improve both equity and adequacy in tandem, and (2) whether the margin between equity and adequacy remains proportional so as to protect children from the harms of educational disparities."[271] As he explains, the initial inquiry focuses on equity and "provides a mechanism for assessing the

is reasonably likely to achieve 'the constitutionally prescribed end."' McCleary v. Washington, 269 P.3d 227, 248 (Wash. 2012).. As Bauries suggests, the inquiry is not whether the legislature had a rational basis for its decision, but whether the legislative decision is rationally directed toward achieving the constitutional mandate. Scott Bauries, The Washington School Finance Decision, THE EDJURIST (Feb. 1, 2012), http://www.edjurist.com/blog/washingtons-school-finance-decision.html. Such an analysis gives a degree of deference to legislative choices but remains skeptical. The school finance scheme—on the face of the statutory text—must demonstrate the rational connection to the constitutional goal. In sum, the judiciary is doubtful, not deferential.

268 As Bauries explained, "although the education duty in each state's constitution should be subject to judicial enforcement, the proper focus of judicial review should be the general duty of care imposed by each state's constitution, rather than the nebulous qualitative terms contained in each state's education clause." Bauries, supra note 66 at 706. In his view, "enforcement as an application of the qualitative terms in the education clause has resulted in both overenforcement and underenforcement of the education duty." Id. at 707.

269 See supra notes 207-21 and accompanying text.

270 Joshua E. Weishart, Equal Liberty in Proportion, 59 WM. & MARY L. REV. 215, 222–23 (2017).

271 Id. at 223.

mutually reinforcing, upward trajectory of equity and adequacy. It is meant to enforce the notion, well-established in precedent, that all children of different needs should have access to a high-quality education and enjoy approximately equal chances for educational success."[272] Conversely, the second inquiry focuses on adequacy so that "the space between equity and adequacy is, in turn, meant to enforce the ultimate vision of equal liberty—one in which all children are endowed with the capabilities to function as equal citizens and to compete favorably for admission to higher education and high-quality jobs."[273]

In a provocative new article expanding on his previous work, Weishart suggests transcending the "notion of constitutionality as being fixed and tethered to the strictures of the litigation process and judicial procedure" and reimagining "constitutionality in education rights cases as demonstrable and durable fidelity to the constitution,"[274] he envisions state high courts remanding "to a special master or a trial court to exercise jurisdiction *periodically*. At each specified interval, the trial court or special master would make factual findings and render legal conclusions regarding the state's fidelity to educational adequacy and equity."[275] Between specified intervals, courts would mandate both "data collection" by education policy scholars[276] and "public engagement" by "organizing coalitions of teachers, parents, and business and community leaders; forming panels of professional educators for cost studies; convening focus groups or town halls to elicit broad-based public education; discussion; and involvement in implementation of the state's remedial scheme."[277]

Weishart's approach has the advantage of being both "more and less deferential to legislative prerogatives but delineates the judiciary's indispensable role in mutually enforcing children's equality and liberty interests,"[278] but it also ignores the original public meaning of the constitutional text. While Weishart, unlike Bauries, assumes that the Education Clauses impose substantive quality standards, he

272 Id.
273 Id.
274 Weishart, supra note 20, at 512-13
275 Id. at 513.
276 Id. at 514-15.
277 Id. at 515.
278 Weishart, supra note 270, at 223.

assumes that all State Constitutions require a proportionate balance between equity and adequacy and that there must be constant upward trajectory of both equity and adequacy. Such a constitutional construction is inconsistent with some, if not all, of the State Education Clauses. Moreover, his new notion of focusing on a "demonstrable and durable fidelity to the constitution"[279] appears to elevate education policy scholars and various stakeholders above ordinary citizens or the People's elected representatives in the Legislature. The notion of greater rights for academics or for interest groups is incompatible with a constitutional system where the Law is sovereign.

V. How?

Fourth, if there is a constitutional violation, *How*? How should the court remedy the constitutional violation? How should the judiciary ensure that constitutional actors conform to the Constitution? How should the judiciary respect the constitutional discretion of democratically elected legislative and executive branch officials? *How* is a question about resolving the tension between the Law as Sovereign and the Democratic Process.

A. The Judiciary Must Enforce the Constitution, But Must Respect the Democratic Process

1. Answering the Who, What, and Why Questions Defines the Judicial Duty to Enforce the Constitution

When a constitutional violation occurs, federal[280] and state courts'[281] must enforce the Constitutions,[282] but constitutional actors

279 Weishart, supra note 20, at 513

280 Ex parte Young, 209 U.S.123 (1908).

281 Every state court has the authority to enjoin state officials from prospective violations of the National and State Constitutions. See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 317 n. 15 (1997) (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

282 As the Supreme Court of Kentucky explained, the Government

is not immune from suit in a declaratory judgment action to decide whether the [Legislature] has failed to carry out a constitutional mandate and that members of the [Legislature] are not immune from declaratory relief of this nature simply because they are acting in their official

""have a high degree of competence in deciding how best to discharge their governmental responsibilities. A State, in the ordinary course, depends upon successor officials, both appointed and elected, to bring new insights and solutions."[283] Indeed, "one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions" particularly when "those institutions are ready, willing, and able to remedy the deprivation of constitutional rights themselves."[284] Therefore, "in devising a remedy," the judiciary "must take into account the interests of [legislative and executive] authorities in managing their own affairs, consistent with the Constitution."[285] Constitutional actors do not have carte blanche,[286] but officials "should at least have the opportunity to devise their own solutions to these problems."[287] "There was a time when [the judiciary] presumed to make such binding judgments for society,"[288] but the "myth of the legal profession's omnicompetence . . . was exploded long ago."[289]

Developing a remedy that respects both the Law as Sovereign and the Democratic Process "requires each branch of government [to] stay within its own lane. It is the legislature's job to make policy. It is the court's job to interpret the laws and determine if the legislature is meeting its constitutional mandate."[290] Yet, the exact boundaries of

capacity. . . . [A] declaratory judgment over constitutionality is not limited to deciding the constitutionality of statutes but extends to failure to enact statutes complying with constitutional mandate. While it would be a violation of the separation of powers doctrine . . . in the Kentucky Constitution, Sections 27 and 28, for our Court to tell the [Legislature] what to do, i.e., what system or rules to enact, it is our constitutional responsibility to tell them whether the system in place complies with or violates a constitutional mandate, and, if it violates the constitutional mandate, to tell them what is the constitutional "minimum." But by its very nature, judicial exercise of this responsibility requires great restraint.

Beshear v. Haydon Bridge Co., 416 S.W.3d 280, 287-88 (Ky. 2013).

283 Frew ex rel. Frew v. Hawkins, 540 U.S. 431, 442 (2004).

284 Missouri v. Jenkins, 495 U.S. 33, 51, (1990).

285 Milliken v. Bradley, 433 U.S. 267, 280–81 (1977).

286 Swann v. Charlotte–Mecklenburg Bd. of Education, 402 U.S. 1 (1971).

287 Jenkins, 495 U.S. at 52. Cf. Sixty–seventh Minnesota State Senate v. Beens, 406 U.S. 187, 196, (1972) (per curiam).

288 United Haulers v. Oneida Harkimer Solid Waste Management Authority, 550 U.S. 330, 347 (2007) (Roberts, C.J., joined by Souter, Ginsburg & Breyer, JJ., announcing the judgment of the Court) (citation omitted).

289 People Who Care v. Rockford Bd. of Educ. School District No. 205, 111 F.3d 528, 536 (7th Cir. 1997).

290 Larry J. Obhof, School Finance Litigation and the Separation of Powers, 45 MITCHELL HAMLINE L. REV, 539, 566-67 (2019).

each branches' "lane" in a particular case depends on the answer to the *Who, What, & Why* questions.

First, as explained above, answering the *Who* question defines whether the constitutional challenge is facial or as-applied.[291] Challenges against the legislature are facial[292] If the Court determines the legislature violated the Constitution, then the statute should be invalidated in toto.[293] Conversely, challenges against executive branch officials are as-applied.[294] Thus, if the Court determines the executive violated the Constitution, then the remedy is to stop the constitutional actor from applying the statute in those circumstances.[295]

Second, as explained above, answering the *What* question defines what the Constitutions require or prohibit.[296] Through constitutional interpretation and, if necessary, constitutional construction, the judiciary determines a constitutional rule consistent with original public meaning.[297] That rule describes exactly what constitutional actors are required to do or are prohibited from doing.

Third, as explained above, answering the *Why* question defines exactly what the constitutional actor must do to remedy the constitutional violation.[298] For example, if an executive branch actor violated Due Process Clause in a student disciplinary hearing by failing to allow the student to cross-examine the complaining witness, the remedy is for the executive branch actor to allow the student to cross-examine the complaining witness.[299] Similarly, if the Legislature violates the Establishment Clause by favoring a particular faith, the remedy is to invalidate the statute in its entirety.[300]

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291 See supra notes 41-171 and accompanying text.

292 See supra notes 136-38 and accompanying text.

293 Rosenkranz, supra note 35, at 1248-49.

294 See supra notes 139-40 and accompanying text.

295 Ayote v. Planned Parenthood, 546 U.S. 320, 328-330 (2006).

296 For a full explanation of What, see supra notes 172-243 and accompanying text.

297 Of course, there will be instances when constitutional interpretation is inadequate to determine the constitutional rule. In those instances, the judiciary must engage in constitutional construction consistent with original public meaning. For a full explanation of constitutional construction, see supra notes 193-204 and accompanying text.

298 For a full explanation of the Why question, see supra notes 244-79 and accompanying text.

299 See Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2019).

300 Stone v. Graham, 449 U.S. 39, 41-43 (1981) (invalidating state law requiring the posting of the Ten Commandments).

2. In the Space Between What the Constitutions Require and What the Constitutions Prohibit, the Democratic Process Determines How to Remedy A Constitutional Violation

If there is a constitutional violation, the judiciary must force constitutional actors to do what the Constitutions require and must stop constitutional actors from doing what the Constitutions prohibit. Yet, in the space between what the Constitutions require and what the Constitutions prohibit, elected legislative and executive actors have absolute discretion to pursue whatever policy objectives they desire.[301] Within this constitutional space, the legislative and executive actors can choose how to remedy the constitutional violation.[302] Because any "ruling of unconstitutionality frustrates the intent of the elected representatives of the people,"[303] the judiciary cannot force the legislative and executive actors to choose a particular course when other courses are equally constitutional.[304]

To be sure, there will be times—particularly involving constitutional prohibitions—when the constitutional space is small or even non-existent. For example, if the court finds a local prosecutor is violating the First Amendment by applying a statute to a criminal defendant, the only remedy is to say the local prosecutor may not apply the statute to the criminal defendant.[305] Similarly, if the Court finds that the legislature has violated the First Amendment by enacting a statute that is facially unconstitutional, then the only remedy is to prohibit the enforcement of the statute.[306]

Conversely, there will be times—particularly involving constitutional requirements—when the constitutional space will be quite large. For example, if the court concludes an executive branch official

301 Cf. Locke v. Davey, 540 U.S. 712, 718-19 (2004) (States may pursue any policy in the space between what the Establishment Clause prohibits and what the Free Exercise Clause requires).

302 See Milliken v. Bradley, 433 U.S. 267, 280–81(1977).

303 Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (White, J., joined by Rehnquist, C.J. & O'Connor, J., announcing the judgment of the Court),

304 See Missouri v. Jenkins, 495 U.S. 33, 52 (1990). Cf. Sixty–seventh Minnesota State Senate v. Beens, 406 U.S. 187, 196, (1972) (per curiam).

305 See Virginia v. Black, 538 U.S. 343 (2003) (Although legislature did not violate the First Amendment by enacting a statute prohibiting cross-burning with the intent to intimidate, local Prosecutor violated the First Amendment by applying the statute to Ku Klux Klan member).

306 See Brown v. Entertainment Merchant's Ass'n, 564 U.S. 786, 805 (2011).

violated the Sixth Amendment by failing to provide an attorney to an indigent criminal defendant, there are a variety of ways of fulfilling the constitutional mandate.[307]

Regardless of whether the violation is facial or as-applied and regardless of whether the constitutional limitation is a requirement or a prohibition, the judiciary must insist on constitutional compliance, but the legislative and executive branch—the branches directly accountable to the People[308]—get to choose the method of compliance.[309]

3. When the Democratic Process Determines How to Comply with the Constitution, the Judiciary Must Ensure the Elected Officials Actually Comply

When the Democratic Process determines how to comply with the Constitution, the judiciary must ensure the elected officials actually comply without undue interference. The federal judiciary's efforts to end de jure school segregation illustrates the proper approach. The Constitution *prohibits* de jure segregation of students,[310] but also *requires* government officials to eliminate vestiges of past de jure discrimination to the extent practicable.[311] Once the courts determine that a school district has engaged in de jure segregation, the school district must "come forward with a plan that promises realistically to work, and promises realistically to work now."[312] When the court finds "the proposed plan to have real prospects for dismantling the state-imposed dual system 'at the earliest practicable date,' then the plan may be said to provide effective relief."[313] However, "federal supervision of local school systems was intended as a temporary

307 See Gideon v. Wainwright, 372 U.S. 335 (1963).

308 To be sure, many state judges are elected, and those elections are sometime partisan. However, other state judges are appointed or face retention elections or are selected by the legislature. In contrast, all state legislators and state governors are elected.

309 Horne v. Flores, 557 U.S. 443, 450 (2009). For some early observations about the impact of Horne, see William E. Thro, The Many Faces of Compliance: The Supreme Court's Decision in Horne v. Flores, 75 SCHOOL BUSINESS AFFAIRS 14 (October 2009).

310 Brown v. Board of Educ., 347 U.S. 483 (1954).

311 Board of Educ. v. Dowell, 498 U.S. 237, 247-48 (1991).

312 Green v. Cty. Sch. Bd. of New Kent Cty.,391 U.S. 430, 439 (1968).

313 Id.

measure to remedy past discrimination."[314] "Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes" the importance of respecting local officials.[315]

B. *In School Finance Litigation, the Judiciary Must Enforce the Constitution While Respecting the Democratic Process*

1. Answering Who, What, and Why Requires the Judiciary to Invalidate All Education Statutes in Toto

In school finance litigation, as in other constitutional contexts, answering *Who*, *What*, and *Why* define the judicial duty to enforce the Constitution. If the judiciary determines the Legislature has violated the Education Clause or the Equality Guarantee Clause, then the appropriate response is to invalidate *all* education statutes in toto. This is so for three reasons.

First, answering *Who* indicates the Legislature is the constitutional actor that violates the Constitution.[316] Because the legislature violates the Constitution, the constitutional challenge is a facial constitutional challenge[317] and "basic remedial principles suggest that the Court should accord the violation no legal effect and should instead restore the law to the pre-violation status quo."[318] The remedy is to invalidate those statute(s) *in toto*.

Second, answering *What* indicates the Education Clause or the Equality Guarantee Clause impose limitations that are far broader than simply the amount of funding or the distribution of funding. Indeed, there are many factors outside the control of local school

314 Dowell, 498 U.S. at 247.
315 Id. at 248
316 Supra notes 162-69 and accompanying text.
317 Supra notes 136-38 and accompanying text.
318 Rosenkranz, supra note 35, at 1248.

districts.[319] Perhaps most radically,[320] Professor Derek Black suggests that Legislatures engaged in "educational gerrymandering" as a means of privileging the middle class and wealthy and disadvantaging the poor.[321] Less radically, as Weishart notes,[322] various scholars have suggested the remedy in school finance cases should include:

racial or socioeconomic integration,[323] improved standards,[324] accountability measures,[325] compensatory services,[326]

319 Kevin Welner & Sarah LaCour, Education in Context: Schools & Their Connections to Societal Inequalities, in the OXFORD HANDBOOK OF U.S. EDUCATION LAW ____ (Kristine L. Bowman, ed., forthcoming 2020).

320 Given the importance of local control, it is unlikely that policy-makers would abolish local school districts or significantly alter them. The Supreme Court of Kentucky recognized as much when it observed:

> In no way does this constitutional requirement act as a limitation on the General Assembly's power to create local school entities and to grant to those entities the authority to supplement the state system. Therefore, if the General Assembly decides to establish local school entities, it may also empower them to enact local revenue initiatives to supplement the uniform, equal educational effort that the General Assembly must provide. This includes not only revenue measures similar to the special taxes previously discussed, but also the power to assess local ad valorem taxes on real property and personal property at a rate over and above that set by the General Assembly to fund the statewide system of common schools. Such local efforts may not be used by the General Assembly as a substitute for providing an adequate, equal, and substantially uniform educational system throughout this state.

Rose v. Council for Better Educ., 790 S.W.2d 186, 211-12 (Ky. 1989) (footnotes omitted).

321 Derek Black, Educational Gerrymandering: Money, Motive, and Constitutional Rights, 94 N.Y.U. L. REV. 1385 (2019).

322 Recognizing that readers may wish to explore particular remedies in more detail, I have included Weishart's original footnotes in slightly edited form in the block quotation.

323 Derek W. Black, Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access, 53 B.C. L. Rev. 373 (2012); Kristi L. Bowman, A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools, 1 Duke F. For L. & Soc. Change 47 (2009); Molly S. McUsic, The Future of Brown v. Board of Education: Economic Integration of the Public Schools, 117 HARV. L. REV. 1334, 1355-56 (2004); James E. Ryan, Schools, Race, and Money, 109 YALE L.J. 249, 308 (1999); James E. Ryan, Sheff, Segregation, and School Finance Litigation, 74 N.Y.U. L. REV. 529, 533-35 (1999); Christopher A. Suarez, Note, Sliding Towards Educational Outcomes: A New Remedy for High-Stakes Education Lawsuits in a Post-NCLB World, 15 Mich. J. Race & L. 477 (2010).

324 Jill Ambrose, Note, A Fourth Wave of Education Funding Litigation: How Education Standards and Costing-Out Studies Can Aid Plaintiffs in Pennsylvania and Beyond, 19 B.U. PUB. INT. L.J. 107 (2009).

325 MICHAEL A. REBELL, COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS 57 (2009).

326 Kelly Thompson Cochran, Comment, Beyond School Financing: Defining the Constitutional Right to an Adequate Education, 78 N.C. L. REV. 399, 469 (2000); Note, Education Policy Litigation as Devolution, 128 HARV. L. REV. 929, 930 (2015).

institutional remedies,[327] universal preschool,[328] public boarding schools,[329] school discipline reform,[330] school choice,[331] private school vouchers,[332] public school vouchers,[333] teacher tenure and evaluation reform,[334] multicultural and bilingual curriculum,[335] and the equitable distribution of quality teachers[336]--with still other remedies[337] as potential offshoots.[338]

If any of these proposed solutions is to be adopted, it is necessary to clear away the existing statutory thicket. The court should

327 Shavar D. Jeffries, The Structural Inadequacy of Public Schools for Stigmatized Minorities: The Need for Institutional Remedies, 34 HASTINGS CONST. L. Q. 1 (2006); Aaron Saiger, Note, Disestablishing Local School Districts as a Remedy for Educational Inadequacy, 99 COLUM. L. REV. 1830 (1999).

328 James E. Ryan, A Constitutional Right to Preschool?, 94 CALIF. L. REV. 49 (2006); see also Kevin Woodson, Why Kindergarten Is Too Late: The Need for Early Childhood Remedies in School Finance Litigation, 70 ARK. L. REV. 87 (2017).

329 Bret D. Asbury & Kevin Woodson, On the Need for Public Boarding Schools, 47 GA. L. REV. 113 (2012); Shelaswau Bushnell Crier, Beyond Money: Public Urban Boarding Schools and the State's Obligation to Make an Adequate Education Attainable, 44 J.L. & EDUC. 23 (2015).

330 Derek W. Black, Reforming School Discipline, 111 NW. U. L. REV. 1 (2016).

331 Ryan, Schools, Race, & Money, supra note 323, at 310-14; Ryan, Sheff, Segregation, and School Finance Litigation supra note 323, at 560-62; Aaron Jay Saiger, School Choice and States' Duty to Support "Public" Schools, 48 B.C. L. REV. 909, 969 (2007). Scott Ellis Ferrin & Pamela R. Hallam, State Constitutionality and Adequacy: Signposts of Concern on Utah's Path Toward Developing Vouchers, 2008 BYU L. Rev. 353, 354 (2008).

332 Greg D. Andres, Comment, Private School Voucher Remedies in Education Cases, 62 U. CHI. L. REV. 795, 796 (1995).

333 Christopher E. Adams, Comment, Is Economic Integration the Fourth Wave in School Finance Litigation?, 56 EMORY L.J. 1613, 1652 (2007).

334 See Derek W. Black, The Constitutional Challenge to Teacher Tenure, 104 CALIF. L. REV. 75, 107, 123-42 (2016). See also Michele Aronson, Note, The Deceptive Promise of Vergara: Why Teacher Tenure Lawsuits Will Not Improve Student Achievement, 37 CARDOZO L. REV. 393 (2015) (discussing lawsuits related to teacher tenure). Cf. Vergara v. California, 209 Cal. Rptr. 3d 532, 538 (Cal. App. 2016) (rejecting a claim that California's tenure rules result in ineffective teachers being assigned to economically disadvantaged students and therefore deny those students equal protection).

335 David G. Hinojosa, "Race-Conscious" School Finance Litigation: Is a Fourth Wave Emerging?, 50 U. RICH. L. REV. 869 (2016).

336 Derek W. Black, Taking Teacher Quality Seriously, 57 WM. & MARY L. REV. 1597, 1617 (2016); Jared S. Buszin, Comment, Beyond School Finance: Refocusing Education Reform Litigation to Realize the Deferred Dream of Education Equality and Adequacy, 62 EMORY L.J. 1613, 1616 (2013).

337 Kevin G. Welner, Silver Linings Casebook: How Vergara's Backers May Lose by Winning, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 121, 141 (2015) ("inequities in class size," "grade retention," "access to enriched and engaging curriculum, transportation, buildings and facilities," and "access to and use of technology").

338 Weishart, supra note 27, at 354–55 (footnotes original; slightly edited).

invalidate those statutes that could hinder the implementation.

Third, answering *Why* determines why the current system is constitutionally deficient, but does not necessarily specify exactly what is necessary to achieve compliance.[339] Educational equity or adequacy involves the complex interaction of multiple factors[340] Invalidating all of the statues ensures the maximum amount of space for a creative legislative solution.

Of course, by advocating the wholesale invalidation of all educational statutes, I am calling for a radical departure from the norm in school finance litigation. The Supreme Court of Kentucky invalidated all education statutes,[341] but every other court has confined itself to invalidating the finance statutes. Yet, the finance only approach ignores the complexities of delivering an adequate and equitable education, the importance of local control, and the role of other constitutional provisions.

339 Thro, supra note 25, at 731-32, 736-37. See also D. Frank Vinik, The Contrasting Politics of Remedy: The Alabama and Kentucky School Equity Funding Suits, 22 J. EDUC. FIN. 60 (1996).

340 See Horne v. Flores, 557 U.S. 443, 450 (2009).

341 In Rose, the Supreme Court of Kentucky declared that:

Lest there be any doubt, the result of our decision is that Kentucky's entire system of common schools is unconstitutional. There is no allegation that only part of the common school system is invalid, and we find no such circumstance. This decision applies to the entire sweep of the system-all its parts and parcels. This decision applies to the statutes creating, implementing and financing the system and to all regulations, etc., pertaining thereto. This decision covers the creation of local school districts, school boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. It covers school construction and maintenance, teacher certification-the whole gamut of the common school system in Kentucky.

While individual statutes are not herein addressed specifically or considered and declared to be facially unconstitutional, the statutory system as a whole and the interrelationship of the parts therein are hereby declared to be in violation of Section 183 of the Kentucky Constitution. Just as the bricks and mortar used in the construction of a schoolhouse, while contributing to the building's facade, do not ensure the overall structural adequacy of the schoolhouse, particular statutes drafted by the legislature in crafting and designing the current school system are not unconstitutional in and of themselves. Like the crumbling schoolhouse which must be redesigned and revitalized for more efficient use, with some component parts found to be adequate, some found to be less than adequate, statutes relating to education may be reenacted as components of a constitutional system if they combine with other component statutes to form an efficient and thereby constitutional system.

Rose v. Council for Better Educ., 790 S.W.2d 186, 215 (Ky. 1989).

2. The Legislature Must Be Allowed to Develop Its Own Solution

By invalidating all education statutes, the court raises the possibility of revolutionary change. Although some suggest "[i]t is not enough to find a violation of its education clause. To ensure real change, the court must prescribe a remedy,"[342] the decision to pursue a revolution—in whole or in part—belongs to the People's representatives, not to the judiciary.[343]

This is so for two reasons. First, there is "a renewed concern among judges about their capacity to make effective decisions on questions of school funding."[344] Since "the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for exercise of legislative and administrative discretion,"[345] "courts pay particular deference to the states in decisions involving 'the most persistent and difficult question of educational policy'…."[346] Second, the judiciary must depend upon the other Branches of government to implement the remedy. Courts do not doubt "their authority to interpret the constitution," but do question "their ability to enforce it with a remedy that the other branches would be willing and able to execute."[347]

Accordingly, the judiciary should direct the Legislature "to recreate and redesign a new system" that will "guarantee to all children the opportunity for an adequate education, through a *state* system."[348] Instead of mandating a specific remedy, "the courts" should 'offer a form of guidance" and limit the judicial role "essentially to the

342 Lauren A. Webb, Note, Educational Opportunity for All: Reducing Intradistrict Funding Disparities, 92 N.Y.U. L. Rev. 2169, 2204 (2017). See also, Ryan, supra note 328, at 85-86 (urging courts to be specific about remedy). Cf. Weishart, supra note 270, at 317 (discussing Ryan's views).

343 As the Supreme Court of Kentucky noted, "the sole responsibility . . . lies with the General Assembly." Rose, 790 S.W.2d at 216. Thus, instead of creating a judicial solution, the Court "directed the General Assembly to recreate and redesign a new system" that will guarantee to all children the opportunity for an adequate education, through a state system." Rose, 790 S.W.2d at 212.

344 John Dinan, School Finance Litigation: The Third Wave Recedes, in FROM SCHOOL HOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 96, 110 (Joshua M. Dunn & Martin R. West, eds., 2009).

345 Committee for Educational Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996).

346 Villanueva v. Carere, 85 F.3d 481, 487 (10th Cir. 1996) (citations omitted).

347 Weishart, supra note 27, at 348.

348 Rose, 790 S.W.2d at 212.

articulation of general principles."[349] By doing so, the Court acknowledges solving "the problems of school financing is the province of state legislatures"[350] and recognizes "responsibility for discharging the State's obligations is returned promptly to the State and its officials' when the circumstances warrant."[351]

3. When the Democratic Process Determines How to Comply with the Constitution, the Judiciary Must Ensure the Elected Officials Actually Comply

Of course, deference to the Legislature works only if the Legislature actually complies.[352] Because State courts have difficultly "encouraging, or even trying to compel, legislatures to raise money" for schools,[353] the possibility of non-compliance is high.[354] In some States, such as Kentucky[355] and Texas,[356] the legislature has eagerly embraced the judicial mandate for reform,[357] but other States, such as Kansas,[358]

349 George D. Brown, Binding Advisory Opinions: A Federal Court's Perspective on the State School Finance Decisions, 35 B.C. L. REV. 543, 49 (1994).

350 Jonathan Banks, State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?, 45 VAND. L. REV. 129, 156 (1992).

351 See Horne v. Flores, 557 U.S. 443, 450 (2009).

352 Bauries, supra note 155, at 727.

353 JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 37-38 (2018).

354 Obhof, supra note 290, 568–69.

355 Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989).

356 See Neeley v. West Orange-Cove Consolidated Indep. Sch. Dist., 176 S.W.3d 746 (Tex. 2005); Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 [66 Ed. Law Rep. 496] (Tex. 1991); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

357 Sutton, supra note 353, at 31 (discussing the Texas experience).

358 Gannon v. Kansas, 319 P.3d 1196 (Kan. 2014), appeal after remand, 368 P.3d 1024 (Kan.), subsequent determination, 372 P.3d 1181 (Kan. 2016), subsequent determination, 390 P.3d 461 (Kan.), subsequent determination, 402 P.3d 513 (Kan. 2017), subsequent determination, 420 P.3d 477 (Kan. 2018). See also Montoy v. Kansas, 102 P.3d 1160 [194 Ed. Law Rep. 439] (Kan.), supplemented, 112 P.3d 923 (Kan.), republished with concurring opinion, 120 P.3d 306 (Kan. 2005); Unified Sch. Dist. v. Kansas, 885 P.2d 1170 (Kan. 1994). For a contemporary analysis of the Kansas litigation, see Richard E. Levy, Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation, 54 U. KAN. L. REV. 1021 (2006).

New Jersey,[359] Ohio,[360] South Carolina,[361] and Washington,[362] have seen genuine constitutional crises where the legislature has refused to comply with the judicial mandates.[363]

In an effort to avoid future constitutional crises, Weishart suggests courts review legislative responses using a "direct proportionality" standard.[364] The legislative response would pass constitutional muster "if it is calculated to ensure that the equity and adequacy of educational opportunities maintain an upward, directly proportional relationship."[365] This is "a highly deferential remedial standard because it entails no judicial review of the legislative means or the fit between those means and the constitutional ends."[366] Instead of demanding "the actual achievement of the constitutional ends,"[367] it simply demands the Legislature set "equity and adequacy on a mutually-reinforcing, upward trajectory that maintains proportionality between them."[368]

Although I believe Weishart's approach will promote legislative compliance and thereby reduce the constitutional crises, I reject it. Weishart's "direct proportionality" test is derived from the Supreme

359 Robinson v. Cahill, 303 A.2d 273 (N.J. 1973) (Robinson I); Robinson v. Cahill, 306 A.2d 65 (N.J. 1973) (Robinson II); Robinson v. Cahill, 335 A.2d 6 (1975) (Robinson III); Robinson v. Cahill, 339 A.2d 193, reprinted in corrected form, 351 A.2d 713 (1975) (Robinson IV); Robinson v. Cahill, 355 A.2d 129 (N.J. 1976) (Robinson V); Robinson v. Cahill, 70 N.J. 155, 358 A.2d 457 (1976) (Robinson VI); Robinson v. Cahill, 360 A.2d 400 (N.J. 1976) (Robinson VII). See also Abbott v. Burke, 971 A.2d 989 [245 Ed. Law Rep. 232] (N.J. 2009); Abbott v. Burke, 693 A.2d 417 (N.J. 1997). See also Abbott ex rel. Abbott v. Burke, 20A.3d 1018, 1023 (N.J. 2011) (noting that the court has retained jurisdiction for over twenty-years).

360 Ohio ex rel. Ohio v. Lewis, 789 N.E.2d 195 (Ohio 2003); DeRolph v. Ohio, 780 N.E.2d 529 [172 Ed. Law Rep. [428]] (Ohio 2002); DeRolph v. Ohio, 677 N.E.2d 733(Ohio 1997). For a contemporary analysis of the litigation, see Larry J. Obhof, DeRolph v. State and Ohio's Long Road to an Adequate Education, 2005 BYU EDUC. & L.J. 83 (2005).

361 Abbeville County Sch. Dist. v. South Carolina, 515 S.E.2d 535 (S.C. 1999), appeal after remand, 767 S.E.2d 157 (S.C. 2014), further proceedings, 777 S.E.2d 547 (S.C.), opinion amended, 780 S.E. 2d 609 (S.C. 2015); Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988).

362 McCleary v. Washington, 269 P.3d 227 (Wash. 2012). See also Federal Way School Dist. No. 210 v. Washington, 219 P.3d 941 (Wash. 2009); School District's Alliance for Adequate Funding of Special Educ. v. Washington, 202 P.3d 990 (Wash. App. 2009); Seattle Sch. Dist. No. 1 v. Washington, 585 P.2d 71 (Wash. 1978); Northshore Sch. Dist. No. 417 v. Kinnear, 530 P.2d 178 (Wash. 1974).

363 Sutton, supra note 353, at 31-33 (discussing the Ohio experience).

364 Weishart, supra note 27, at 353.

365 Id.

366 Id.

367 Id.

368 Id.

Court's "congruence and proportionality" test[369] for determining if Congress has properly exercised its powers under Section 5 of the Fourteenth Amendment.[370] Like the "congruence and proportionality" test, his direct "proportionality test" requires judges to balance competing interests.[371] It requires the court to decide if equity and adequacy are "mutually reinforcing" and "on an upward trajectory."[372] Such an approach has "a way of turning into vehicles for the implementation of individual judges' policy preferences."[373] Although called balancing, "the scale analogy is not really appropriate since the interests on both sides are incommensurate, it is more like judging whether a particular line is longer than a particular rock is heavy."[374] Accordingly, judicial balancing tests should be rejected.[375]

Instead, I advocate a standard where the Legislature is simply required to make a good faith effort to recreate the education

369 City of Boerne v. Flores, 521 U.S. 507, 516-20 (1997).

370 Weishart, supra note 27, at 374-76.

371 In criticizing the federal "congruence and proportionality test," Justice Scalia observed:

Section 5 grants Congress the power "to enforce, by appropriate legislation," the other provisions of the Fourteenth Amendment. Morgan notwithstanding, one does not, within any normal meaning of the term, "enforce" a prohibition by issuing a still broader prohibition directed to the same end. One does not, for example, "enforce" a 55-mile-per-hour speed limit by imposing a 45-mile-per-hour speed limit--even though that is indeed directed to the same end of automotive safety and will undoubtedly result in many fewer violations of the 55-mile-per-hour limit. And one does not "enforce" the right of access to the courts at issue in this case, by requiring that disabled persons be provided access to all of the "services, programs, or activities" furnished or conducted by the State. That is simply not what the power to enforce means--or ever meant. The 1860 edition of Noah Webster's American Dictionary of the English Language, current when the Fourteenth Amendment was adopted, defined "enforce" as "To put in execution; to cause to take effect; as, to enforce the laws." Nothing in § 5 allows Congress to go beyond the provisions of the Fourteenth Amendment to proscribe, prevent, or "remedy" conduct that does not itself violate any provision of the Fourteenth Amendment. So-called "prophylactic legislation" is reinforcement rather than enforcement.

Tennessee v. Lane, 541 U.S. 509, 558-59 (2004) (Scalia, J., dissenting) (citations omitted). For an expansion of Justice Scalia's suggestion in the context of sovereign immunity, see William E. Thro, Toward A Simpler Standard for Abrogating Sovereign Immunity, 6 ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY'S PRACTICE GROUPS 65 (October 2005).

372 Weishart, supra note 27, at 353.

373 Tennessee v. Lane, 541 U.S. 509, 556 (2004) (Scalia, J. dissenting).

374 Bendix Autolite Corp. v. Midwesco, 486 U.S. 888, 898 (1988) (Scalia, J., concurring).

375 See, e.g., Ewing v. California, 538 U.S. 11, 31-32, (2003) (Scalia, J., concurring in judgment) (declining to apply a "proportionality" test to the Eighth Amendment's ban on cruel and unusual punishment); Stenberg v. Carhart, 530 U.S. 914, 954-956 (2000) (Scalia, J., dissenting) (declining to apply the "undue burden" standard of Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)); BMW of North America, Inc. v. Gore, 517 U.S. 559, 599,(1996) (Scalia, J., dissenting) (declining to apply a "reasonableness" test to punitive damages under the Due Process Clause).

system.[376] As long as the Legislature does something and that something is materially different from the previous system, then the judiciary should accept the legislative solution and terminate jurisdiction. The Court should not worry specifics, particularly specific levels of funding. The Court should assume that the new system will work and meet the constitutional standard. The Court can always hear a second case at the appropriate time. This approach ensures that the judiciary will avoid situations, which have become all too common in some States, where the People's elected representatives and the judges fight over the specifics.[377]

Of course, there is always a possibility that the Legislature—a collection of flawed human beings—will ignore the decision or respond inadequately. Yet, I think this is unlikely for three reasons.

First, the Legislature is going to face enormous political pressure. As Ohio State Senate President Larry Obhof notes, "the framers of the various state constitutions *did* envision mechanisms for resolving breakdowns in the political system. Those mechanisms involve public pressure from legislators' constituents, criticism by citizens or the press, and regular elections where legislators are judged (at least in part) for their responsiveness to such issues."[378] "Candidates who ignore systemic problems with the education system do so at their own political peril."[379] A legislature confronting a decision that invalidates all of the statutes related to education will face enormous political pressure. It will respond with a good faith effort to comply.

Second, the legislature will recognize the Law is Sovereign. As

376 In the past, I have suggested that courts should "admonish" courts to act and also describe what actions are acceptable. Thro, supra note 26, at 552. However, Obhof, an elected legislator, contends that my approach:

> intrudes upon the legislative function. Although this is less of an intrusion than court-imposed education or spending policies, as a legislator, I find those outcomes to be separated only by degree. I do not view a proverbial sword hanging over the legislature's head—complete with a judicially-recommended escape hatch—as philosophically distinct from the court ordering its own remedy.

Obhof, supra note 290, at 568 n. 193. Upon further reflection, I believe Obhof's point is valid. Accordingly, I have revised my thinking to give more discretion to the People's elected representatives.

377 See Sutton, supra note 353, at 31-33 (discussing Ohio experience).

378 Obhof, supra note 290, at 569

379 Id.

Justice Gorsuch observed, in the United States, "the government can and does lose in its own courts and then respect those judgements."[380] In America, "the law really is supreme. And if there is a final, sovereign arbiter it is" the highest courts of each State and the Nation.[381] Legislators who take an oath to follow the State and National Constitutions are going to be reluctant to defy a judicial decision enforcing the State Constitution, even if they disagree.

Finally, if the court utilizes the *Who, What, Why, & How* paradigm outlined in this Article, the Legislature is more likely to comply.[382] As Justice Scalia observed, courts "are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government, but "when conflict is unavoidable," the rule should have a "demonstrable basis in the text of the Constitution and [should] objectively be shown to have been met or failed."[383] The *Who, What, Why, & How* paradigm embodies Justice Scalia's ideal.[384] It recognizes Constitutions impose limits, requires interpretation and construction based on original public meaning, determines liability based on the text and objective evidence, and defers to the democratic process. This is the essence of judicial humility.[385] The Law prevails, but the People's representative rules. Such an attitude will encourage the Legislature to respect the decision even when they disagree.

CONCLUSION

The National and State Constitutions reflect an "obsessive distrust of government—*all* government—and [the] elevation of law into the ruling power of the state. Indeed, the idea of law itself as *sovereign* is the key."[386] In a government where the Law, not the People, is Sovereign,[387] five propositions are true: (1) the Constitution limits

380 NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 237 (2019)

381 Starkey, Magna Carta, supra note 28, at 1313.

382 Obhof makes a similar point. Obhof, Separation of Powers, supra note 290, at 575-77.

383 Lane, 541 U.S. at 558 (Scalia, J., dissenting).

384 See generally Ralph Rossum, ANTONIN SCALIA'S JURISPRUDENCE (2005). For a review of Rossum's work, see William E. Thro, Limiting Judges: A Review of Ralph Rossum's Antonin Scalia's Jurisprudence, 33 J. COL. & U.L. 169 (2006)

385 Thro, Judicial Humility, supra note 25, at 721-22.

386 Starkey, supra note 28, at 1308 (emphasis original).

387 To be sure, there are some who do not have an inherent distrust of all governmental actors. See Breyer, supra note 179. For a review of Justice Breyer's book, see William E. Thro, A Pelagian Vision for Our Augustinian Constitution: A Review of Justice Breyer's Active Liberty, 32 J.

constitutional actors;[388] (2) the judiciary enforces those limits;[389] (3) judicial interpretations and constructions of the Constitution are both supreme and universal;[390] (4) judicial interpretation and construction of the Constitution must be based on original public meaning;[391] and (5) elected officials—in both the legislative and executive branches—have the responsibility for correcting any constitutional violations.[392]

Because the Law is Sovereign and these five propositions are true, then constitutional analysis—the process of interpreting, constructing, and enforcing constitutional requirements and prohibitions—is reduced to four questions. First, *Who* violates the Constitution—a question about the nature of the constitutional challenge. Second, *What* does the Constitution mean—a question about developing a constitutional rule using constitutional interpretation and construction. Third, *Why* is the Constitution violated or not violated—a question about applying the constitutional rule to the particular circumstances. Fourth, if there is a constitutional violation, *How* is the constitutional violation remedied—a question about respecting both the Law as Sovereign and the Democratic Process.

Applying the *Who, What, Why*, *& How* paradigm to school finance litigation allows courts to avoid judicial abdication as well as judicial activism. It ensures that the State Constitution limits the Legislature, but it avoids a constitutional crisis where the Legislature defies the Judiciary. First, all school finance litigation is a facial challenge—a contention that the Legislature violated the State Constitution by failing to do what the Education Clause requires or what the Equality Guarantee Clause prohibits. Second, in interpreting

COLL. & U.L. 491 (2006).

388 Indeed, there is no reason for the courts to defer to any group of constitutional actors. William E. Thro, No Angels in Academe: Ending the Constitutional Deference to Public Higher Education, 5 BELMONT L. REV. 27, 27-32 (2018).

389 Although many may regard judicial enforcement of constitutional limits as a recent development, the reality is the Marshall Court recognized the ability of federal courts to enjoin state officers who were violating the Constitution. See Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 838-39 (1827).

390 As the Seventh Circuit observed, "the 'judicial Power' under Article III of the Constitution is one to make conclusive decisions, not subject to disapproval or revision by another branch of government." Baez-Sanchez v. Barr, 947 F.3d 1033 (7th Cir. 2020).

391 Gorsuch, Republic, supra note 380, at 110-127.

392 Indeed, "one branch's handicap is another's strength." Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 500 (2010).

and constructing the State Constitution to develop a constitutional rule, the judiciary will employ the original public meaning of the text. The adjectives of the Education Clauses and the semantic differences between the Education Clauses are significant and determinative of whether education is a fundamental right under the Equality Guarantee Clause. Third, determining a constitutional violation does not involve never ending hearings with evidence or expert witnesses. Rather, it involves a comparison of the constitutional text with the statutory text and readily available objective evidence. Fourth, when there is constitutional violation, the appropriate remedy is to invalidate all education statutes, in toto. However, the Legislature can comply simply by making a good faith effort to reinvent the education system.

Undoubtedly, there will be many who dislike the *Who, What, Why, & How* paradigm. It does not permit "philosopher-king judges [to] swoop down from their marble palace [and] ordain answers rather than allow the people and their representatives to discuss, debate, and resolve them."[393] Any revolution in education policy must come through the ballot box, not the courts. Nor does the *Who, What, Why, & How* paradigm allow the judiciary to leave constitutional enforcement to "the mercy of political actors and the shifting winds of popular opinion, and without the chance for a fair hearing before a neutral judge."[394] The judiciary ensures the Will of the People (the words of the Constitution)—prevails over of the Will of the People's Agents (the words of the statute).[395] In short, the Law, not the People, is Sovereign.[396]

393 Gorsuch, supra note 380, at 113.

394 Kisor v. Wilkie, 139 S. Ct 2400, 2438 (2019) (Gorsuch, J., joined by Thomas, Alito & Kavanaugh, JJ., concurring).

395 THE FEDERALIST NO. 78 (A. Hamilton).

396 People "may intend what they will; but it is only the laws that they enact which bind us." Scalia, supra note 182, at 17.

APPENDIX 1
THE STATE EDUCATION CLAUSES

ALA. CONST. art 14; § 256;

ALASKA CONST. art. VII, § 1;

ARIZ. CONST. art. XI; § 1;

ARK. CONST. art. XIV, §1;

CAL. CONST. art. IX, § 5;

COLO. CONST. art. IX; § 2;

CONN. CONST. art. VIII; § 1;

DEL. CONST. art. X, § 1;

FLA. CONST. art. IX; § 1;

GA. CONST. art. VIII, § VII, ¶ 1;

HAW. CONST. art. X, § 1;

IDAHO CONST. art. IX, § 1;

ILL. CONST. art. X, § 1;

IND. CONST. art. VIII, sec. 1;

IOWA CONST. art. IX, § 3;

KAN. CONST. art. VI, § 1;

KY. CONST. § 183;

LA. CONST. art. VIII, § 1;

ME. CONST. art. 8, § 1;

MD. CONST. art. VIII, § 1;

MASS. CONST. pt. 2, ch. 5;

MICH. CONST. art. VIII, § 2;

MINN. CONST. art. XIII, § 1;

MISS. CONST. art. VIII, § 201;

MO. CONST. art. 9. § 1(a);

MONT. CONST. art. X, § 1;
NEB. CONST. art. VII, § 1;
NEV. CONST. art. XI, § 2;
N.H. CONST. pt. 2, art. 83;
N.J. CONST. art. VIII, § 4;
N.M. CONST. art. XII, § 1;
N.Y. CONST. art. XI, § 1;
N.C. CONST. art. IX, § 2;
N.D. CONST. art. VII, § 1;
OHIO CONST. art. VI, § 3;
OKLA. CONST. art. XIII, § 1;
OR. CONST. art. VIII, § 3;
PA. CONST. art. III, § 14,
R.I. CONST. art. XII, § 1;
S.C. CONST. art. XI, § 3;
S.D. CONST. art. VIII, § 1;
TENN. CONST. art. XI, § 12;
TEX. CONST. art. VII, § 1;
UTAH CONST. art. X, § 1;
VT. CONST. ch. 2, § 68;
VA. CONST. art. VIII, § 1;
WASH. CONST. art. IX, § 1;
W.VA. CONST. art. XII, § 1;
WIS. CONST. art. X, § 3;
WYO. CONST. art. VII, § 1.

APPENDIX 2
THE SCHOOL FINANCE DECISIONS
(HIGHEST COURT OF STATE ONLY)

Alabama: *James v. Alabama*, 836 So. 2d 813 [174 Ed. Law Rep. 487] (Ala. 2002); O*pinion of the Justices*, 624 So. 2d 107 (Ala. 1993).

Alaska: *Matanuska-Susitna v. State*, 931 P.2d 391 [116 Ed. Law Rep. 401] (Alaska 1997).

Arizona: *Hull v. Albrecht*,950 P.2d 1141 (Ariz. 1997); *Roosevelt v. Bishop*, 877 P.2d 806 [93 Ed. Law Rep. 330] (Ariz. 1994); *Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973).

Arkansas: *Lake View v. Huckabee*, 91 S.W.3d 472 [173 Ed. Law Rep. 248] (Ark. 2002); *Tucker v. Lake View Sch. Dist. No. 25,* 917 S.W.2d 530 (Ark. 1996); *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 [11 Ed. Law Rep. 1091] (Ark. 1983).

California: *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976); *Serrano v. Priest*, 96 Cal. Rptr. 601, 487 P.2d 1241 (Cal. 1971).

Colorado: *Lobato v. Colorado*, 304 P.3d 1132 (Colo. 2013); *Lobato v. Colorado,* 218 P.3d 358 [249 Ed. Law Rep. 881] (Colo. 2009); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 [6 Ed. Law Rep. 191] (Colo. 1982).

Connecticut: *Connecticut Coalition for Justice in Educ. Funding, Inc. v. Rell,* 990 A.2d 206 [254 Ed. Law Rep. 874] (Conn. 2010); *Sheff v. O'Neill*,678 A.2d 1267 (Conn. 1996); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977).

Florida: *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127 (Fla. 2019); *Haridopolos v. Citizens for Strong Schools, Inc.*, 81 So.3d 465 (Fla. 2011); *Citizens for Strong Schools, Inc. v. Florida Stale Board of Educ.,*78 So.3d 605 (Fla. 2009); *Coalition for Adequacy and Fairness in Sch. Funding v. Chiles*, 680 So.2d 400 (Fla. 1996).

Georgia: *McDaniel v. Thomas*, 285 S.E.2d 156 [1 Ed. Law Rep. 982] (Ga. 1981).

Idaho: *Idaho Schools for Equal Educational Opportunity v. Idaho,* 129 P.3d 1199 (Idaho 2005); *Idaho Schs. For Equal Educ. Opportunity v. Idaho*, 976, 922 P.2d 913 (1998); *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724 [82 Ed. Law Rep. 660] (Idaho 1993); *Thompson v. Engelking,* 537 P.2d 635 (Idaho 1975).

Indiana: *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516 [245 Ed. Law Rep. 412] (Ind. 2009).

Illinois: *Carry v. Koch* 960 N.E.2d 640 (Ill. 2011); *Lewis E. v. Spagnolo*,710 N.E.2d 798 (Ill. 1999); *Committee v. Edgar*, 672 N.E.2d 1178 [114 Ed. Law Rep. 576] (Ill. 1996); *Blase v. Illinois,* 302 N.E.2d 46 (Ill.1973).

Iowa: *King v. Iowa,* 818 N.W.2d 1 (Iowa 2008).

Kansas: *Gannon v. Kansas*, 319 P.3d 1196 (Kan. 2014), *appeal after remand*, 368 P.3d 1024 (Kan.), *subsequent determination*, 372 P.3d 1181 (Kan. 2016), *subsequent determination*, 390 P.3d 461 (Kan.), *subsequent determination*, 402 P.3d 513 (Kan. 2017), *subsequent determination*, 420 P.3d 477 (Kan. 2018) *See also* Montoy *v. Kansas*, 102 P.3d 1160 [194 Ed. Law Rep. 439] (Kan.), *supplemented*, 112 P.3d 923 (Kan.), *republished with concurring opinion*, 120 P.3d 306 (Kan. 2005); Unified *Sch. Dist. v. Kansas*, 885 P.2d 1170 (Kan. 1994).

Kentucky: *Rose v. Council for Better Educ.*, 790 S.W.2d 186 [60 Ed. Law Rep. 1289] (Ky. 1989).

Louisiana: *Charlet v. Legislature*, 13 So. 3d 1199 (La. 1998); *Louisiana Ass'n of Educators v. Edwards*, 521 So. 2d 390 [45 Ed. Law Rep. 905] (La. 1988).

Maine: *School Administrative Dist. v. Commissioner*, 659 A.2d 854 [101 Ed. Law Rep. 289] (Me. 1995).

Maryland: *Maryland State Bd. Of Educ. v. Bradford*, 387 Md. 353 (Md. 2005); *Hornbeck v. Somerset*, 458 A.2d 758 [10 Ed. Law Rep. 592] (Md. 1983).

Massachusetts: *Hancock v. Commissioner of Educ.,* 822 N.E.2d

1134 [195 Ed. Law Rep. 591] (Mass. 2005); *McDuffy v. Secretary of the Executive Office of Educ.*, 615 N.E.2d 516 [83 Ed. Law Rep. 657] (Mass. 1993).

Michigan: *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973).

Minnesota: *Cruz-Guzman v. Minnesota*, 916 N.W.2d 1; (Minn. 2018); *Skeen v. Minnesota*, 505 N.W.2d 299 (Minn. 1993).

Missouri: *Committee for Educ. Equality v. Missouri*, 294 S.W.3d 477 [249 Ed. Law Rep. 926] (Mo. 2009); *Committee for Educ. Quality v. Missouri*, 878 S.W.2d 446 (Mo. 1994).

Montana: *Columbia Falls Elementary Sch. District No. 6 v. Montana,* 109 P.3d 257 [196 Ed. Law Rep. 958] (Mont. 2005); *Helena v. Montana*, 769 P.2d 684 [52 Ed. Law Rep. 342] (Mont. 1989); *Montana ex rel. Woodahl v. Straub*, 520 P.2d 776 (Mont. 1974).

Nebraska: *Nebraska Coalition for Education Equity and Adequacy v. Heinman,* 731 N.W.2d 164 [219 Ed. Law Rep. 761] (Neb. 2007); *Douglas County School District v. Johanns*, 694 N.W.2d 668 (Neb. 2005); *Gould v. Orr*, 506 N.W.2d 349 [86 Ed. Law Rep. 414(Neb. 1993).

New Hampshire: *Londonderry Sch. Dist. SAU #12 v. New Hampshire*, 958 A.2d 930 [238 Ed. Law Rep. 307] (N.H. 2008); *Claremont School District v. Governor,* 703 A.2d 1353 (N.H. 1997); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375 [88 Ed. Law Rep. 1102] (N.H. 1993).

New Jersey: Abbott *ex rel. Abbott v. Burke*, 20 A.3d 1018, 1023 (N.J. 2011); *Abbott v. Burke*, 971 A.2d 989 [245 Ed. Law Rep. 232] (N.J. 2009); *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997); *Abbott v. Burke,* 575 A.2d 359 [60 Ed. Law Rep. 1175] (N.J. 1990); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) (Robinson I); *Robinson v. Cahill*, 306 A.2d 65 (N.J. 1973) (*Robinson II*); *Robinson v. Cahill,* 335 A.2d 6 (1975) (*Robinson III*); *Robinson v. Cahill*, 339 A.2d 193, *reprinted in corrected form*, 351 A.2d 713 (1975) (*Robinson IV*); *Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976) (*Robinson V*); *Robinson v. Cahill*, 70 N.J. 155, 358 A.2d 457 (1976) (*Robinson VI*); *Robinson v. Cahill*, 360 A.2d 400 (N.J. 1976) (*Robinson VII*).

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Inequities Today (REFIT) v. Cuomo, 631 N.E.2d 647 (N.Y. 1995); *Board of Educ., Levittown v. Nyquist*, 439 N.E.2d 359 [6 Ed. Law Rep. 147] (N.Y. 1982).

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North Dakota; B*ismarck Public Sch. Dist. No. 1 v. North Dakota*, 511 N.W.2d 247 [88 Ed. Law Rep. 1184] (N.D. 1994).

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Rhode Island: *City of Pawtucket v. Sundlun*, 662 A.2d 40 [102 Ed. Law Rep. 235] (R.I. 1995).

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2009).

Tennessee: *Tennessee Small Sch. Sys. v. McWherter*, 91 S.W.3d 232 [172 Ed. Law Rep 1044] (Tenn. 2002); *Tennessee Small Sch. Systems v. McWherter*, 894 S.W.2d 734 [98 Ed. Law Rep. 1102] (Tenn. 1995); *Tennessee Small Sch. Systems v. McWherter*, 851 S.W. 2d 139 [82 Ed. Law Rep. 991] (Tenn. 1993).

Texas: *Neeley v. West Orange-Cove Consolidated Indep. Sch. Dist.,* 176 S.W.3d 746 [204 Ed. Law Rep. 793] (Tex.2005); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 [66 Ed. Law Rep. 496] (Tex. 1991); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 [56 Ed. Law Rep. 663] (Tex. 1989).

Vermont: *Brigham v. Vermont*, 692 A.2d 384 [117 Ed. Law Rep. 667] (Vt. 1997).

Virginia: *Scott v. Virginia,* 443 S.E.2d 138 [91 Ed. Law Rep. 396] (Va. 1994).

Washington: *McLeary v. State*, 269 P.3d 227 (Wash. 2012)., *Federal Way School Dist. No. 210 v. Washington,* 219 P.3d 941 (Wash. 2009); *School District's Alliance for Adequate Funding of Special Educ. v. Washington*, 202 P.3d 990, [242 Ed. Law Rep. 383] (Wash. App. 2009); *Seattle Sch. Dist. No. 1 v. Washington*, 585 P.2d 71 (Wash. 1978); *Northshore Sch. Dist. No. 417 v. Kinnear*, 530 P.2d 178 (Wash. 1974).

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Wisconsin: *Vincent v. Voight*, 614 N.W.2d 388 [146 Ed. Law Rep. 422] (Wis. 2000); *Kuker v. Grover*, 436 N.W.2d 568 [52 Ed. Law Rep. 241] (Wis. 1989).

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32 P.3d 325 (Wyo. 2001), *Wyoming v. Campbell County Sch. District,* 19 P.3d 518 (Wyo.2001) *Campbell County Sch. Dist. v. State*, 907 P.2d 1238 [105 Ed. Law Rep. 771] (Wyo. 1995); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980); *Sweetwater County Planning Committee for Organization of Sch. Districts v. Hinkle,* 491 P.2d 1234 (Wyo.1971).