



3-24-2022

## State Courts and Education Finance: Past, Present and Future

Michael A. Rebell

*Center for Educational Equity, Teachers College, Columbia University*

Follow this and additional works at: [https://scholarsarchive.byu.edu/byu\\_elj](https://scholarsarchive.byu.edu/byu_elj)



Part of the [Education Commons](#), and the [Law Commons](#)

---

### Recommended Citation

Rebell, Michael A. (2022) "State Courts and Education Finance: Past, Present and Future," *BYU Education & Law Journal*: Vol. 2022: Iss. 1, Article 7.

Available at: [https://scholarsarchive.byu.edu/byu\\_elj/vol2022/iss1/7](https://scholarsarchive.byu.edu/byu_elj/vol2022/iss1/7)

This Article is brought to you for free and open access by the Journals at BYU ScholarsArchive. It has been accepted for inclusion in *BYU Education & Law Journal* by an authorized editor of BYU ScholarsArchive. For more information, please contact [ellen\\_amatangelo@byu.edu](mailto:ellen_amatangelo@byu.edu).

# STATE COURTS AND EDUCATION FINANCE: PAST, PRESENT AND FUTURE

Michael A. Rebell<sup>1</sup>

## INTRODUCTION

Over the past half century, state courts in 48 of the 50 states have wrestled with challenges to state education finance systems brought by students, parents, teachers and education advocates who claim that funding for their schools is either inequitable, inadequate, or both.<sup>2</sup> Almost two-thirds of these states — 65% — have

---

<sup>1</sup> Professor and Executive Director, Center for Educational Equity, Teachers College, Columbia University. Zoe Masters, a student at the Yale Law School, and Lars R. Odland, a student at Columbia Law School, provided valuable research assistance. This article updates and reconsiders the overview of the state school funding cases in MICHAEL A. REBELL, *COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS* (University of Chicago Press, 2009.) Substantial portions of this article previously appeared in the *Education Law & Policy Review*. For more detailed histories and the current status of the individual cases discussed in this article, see the website of the school funding project of the Center for Educational Equity at Teachers College, Columbia University, [www.schoolfunding.info](http://www.schoolfunding.info).

<sup>2</sup> Counting final decisions of the highest state courts, decisions of trial courts, intermediate appeals decisions and consent decrees, there have been over 300 state court decisions involving equity and adequacy constitutional challenges to state education finance systems during this time period. Ethan Hutt, Daniel Klasik & Aaron Tang, *How Do Judges Decide School Finance Cases?*, 97 WASH. U. L. REV. 1047, 1070, 1075-76 (2020) (identifying 318 courts decisions based on the [schoolfunding.info](http://www.schoolfunding.info) data base and other sources.).

held that students have a judicially enforceable right to education under their state constitutions, although implementation of effective reforms that accord with these rights have not been consistently achieved. The courts' involvement in these cases, and the legal doctrines and remedial mechanisms they have developed, constitute the most extensive and dynamic area of state court constitutional jurisprudence in American history.

Fifty years ago, few legal analysts would have predicted this spate of creative state court activity regarding educational rights. After all, the legal breakthroughs of the civil rights era had occurred largely in the federal courts; indeed, civil rights lawyers in those days strategized on ways to obtain federal jurisdiction of their claims because the state courts were assumed to be more conservative and less capable of handling large-scale institutional reform litigations.<sup>3</sup> It was the bold decision of the California Supreme Court in *Serrano v. Priest (Serrano II)*<sup>4</sup> that set the stage for the burgeoning of state court involvement in education finance cases.

In 1971, the California Supreme Court held, in *Serrano I*, that the state's education finance system was unconstitutional under the equal protection clause of the Fourteenth Amendment to the U. S Constitution.<sup>5</sup> Two years later, however, the United State Supreme Court ruled in *Rodriguez v. San Antonio Independent Sch. Dist.*<sup>6</sup> that substantial inequities in the amount of funds

---

<sup>3</sup> See, e.g., William F. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L.REV. 489,495 (1977) ("I suppose it was only natural that when during the 1960's our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions.")

<sup>4</sup> 557 P.2d 929 (Cal. 1976).

<sup>5</sup> *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

<sup>6</sup> 411 U.S. 1 (1973).

2] State Courts and Education Finance  
 available to students in high poverty school districts did not raise valid claims under the Fourteenth Amendment.

The *Rodriguez* case was brought by parents of students in Edgewood, a district in the San Antonio, Texas metropolitan area, whose student demographics were approximately 90% Mexican American and 6% African American. The district's property values were so low that even though its residents taxed themselves at a substantially higher rate than did the residents of the neighboring largely White district, they were able to provide their schools only about half the funds on a per student basis that were available to their more affluent neighbors. The Supreme Court agreed that Texas's school finance system, which, like most state education finance systems, was largely based on local property taxes, was highly inequitable. Nevertheless, the high court denied the plaintiffs' claims, primarily because it held that education is not a "fundamental interest" under the Fourteenth Amendment's equal protection clause.<sup>7</sup> Governmental actions that do not involve "fundamental interests" are generally upheld by the federal courts if the authorities have any "rational" explanation for their actions. In this case, the Supreme Court said that the tradition of local control of education was sufficient justification for the continuation of Texas' state education finance system, even if it resulted in gross inequities. The Supreme Court's ruling in *Rodriguez* precluded the possibility of obtaining fiscal equity relief from the federal courts.

The *Rodriguez* decision seemed to have effectively overruled *Serrano I*, which had relied on the federal equal protection clause as the basis for its invalidation of

---

<sup>7</sup> 411 U.S. at 29. The Court also held that the relative poverty of a plaintiff class did not constitute a valid basis for applying "strict scrutiny" to the analysis of the equal protection claims. For a detailed discussion of this case, see, PAUL A. SRACIC, SAN ANTONIO V. RODRIGUEZ AND THE PURSUIT OF EQUAL EDUCATION: THE DEBATE OVER DISCRIMINATION AND SCHOOL FUNDING (2006).

the state's education finance system. Many observers, therefore, expected that upon reconsideration, the California court would accept the U.S. Supreme Court's perspective and deny relief to the plaintiff class. (Indeed, from the date of the U. S. Supreme Court's decision in 1973 to the issuance of the California Supreme Court's second *Serrano* ruling ("*Serrano II*") in December 1976, six state supreme courts considered equal protection challenges to their state's education finance system and *every one of them* decided against the plaintiffs.<sup>8</sup> In *Serrano II*, however, the California Supreme Court took a decidedly different course, an approach that would inspire and fuel the proactive stance subsequently taken by courts in many other states.

Directly disputing the Supreme Court's reasoning in *Rodriguez*, the California Supreme Court in *Serrano II* re-stated its earlier conclusions that education was a fundamental interest and that claims based on wealth disparities were entitled to strict scrutiny review—if not under the federal Constitution, then under the state constitution. Rejecting the *Rodriguez* rationale, the California Supreme Court boldly declared that:

[O]ur state equal protection provisions, while 'substantially the equivalent of' the guarantees contained in the Fourteenth Amendment to the United States Constitution, are possessed of an independent vitality which, in a given case, may demand an analysis different from that

---

<sup>8</sup> See *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973); *Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973); *State ex rel. Woodahl v. Straub*, 520 P.2d 776 (Mont. 1974); *Northshore Sch. Dist. No. 417 v. Kinnear*, 530 P.2d 178 (Wash. 1974); *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Olsen v. State*, 554 P.2d 139 (Or. 1976). As noted below in note 11, the New Jersey Supreme Court's decision in *Robinson v. Cahill* upheld plaintiffs' claims, but on "thorough and efficient," rather than equal protection grounds.

2] State Courts and Education Finance  
 which would obtain if only the federal  
 standard were applicable...<sup>9</sup>

Accordingly, it concluded that California's education finance system, while not in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution, is invalid as being in violation of the equal protection clause of the California Constitution. Implementing this ruling, the lower California state courts then held that "wealth-related disparities in per pupil expenditures be reduced to insignificant differences," which they interpreted to mean "amounts considerably less than \$100.00 per pupil,"<sup>10</sup> in 1974 dollars.

## I. THE STATE COURT DECISIONS: 1973-2008

*Serrano II* led to a dramatic turnaround in the outcome of challenges to state funding systems in other state courts. Whereas before the California Court's ruling, every other post-*Rodriguez* state court ruling had rejected equal protection challenges to state education finance systems, in the three years following *Serrano II*, courts in Connecticut, Washington and West Virginia

---

<sup>9</sup> *Serrano*, *supra* note 4, at 950. For the U.S. Supreme Court, the equal protection issue in *Rodriguez* raised federalism concerns that would not arise in a decision issued under a state equal protection clause. The U.S. Supreme Court specifically stated in this regard that "[I]t would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State."<sup>411</sup> U.S. at 44.

<sup>10</sup> *Serrano v. Priest*, 226 Cal.Rptr. 584, 600 (Cal. Ct. App. 1986).

also declared their state education finance systems unconstitutional.<sup>11</sup>

Soon thereafter, though, difficulties in actually achieving equal educational opportunity in the initial fiscal equity cases made courts in other states less inclined to uphold these claims. In Connecticut, for example, the equity decision resulted in more state aid flowing to low-wealth districts, but the main beneficiaries were taxpayers whose property tax bills were cut or capped while little, if any, extra money was allocated to the schools.<sup>12</sup> In New Jersey, the state supreme court deferred to the legislature to devise a remedy for the inequities, and then found itself embroiled in prolonged litigations to compel the legislature to act or to improve inadequate remedies; three years after the court's initial liability finding, the

---

<sup>11</sup> Horton v. Meskill, 376 A.2d 359 (Conn. 1977), Seattle Sch. Dist. No. 1 v. State of Washington, 585 P.2d 71 (Wash. 1978) (overruling Northshore Sch. Dist. No. 417 v. Kinnear, *supra* note 8); Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979).

The New Jersey Supreme Court issued an opinion less than two weeks after the Supreme Court's ruling in *Rodriguez*, Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973.) Relying to a substantial degree on the U.S. Supreme Court's ruling in *Rodriguez*, it decided that New Jersey's education finance system did not violate the state constitution's equal protection clause. It also held, however, that the system did violate the requirement that the state provide all students a "thorough and efficient system of free public schools" under Art. VIII, § 4, 1 of the state constitutions.

Serrano had more of an immediate effect on advocates and attorneys than did Robinson because of its bold rejection of the U.S. Supreme Court's equal protection stance, since most of the legal thinking at the time assumed that equal protection was the logical path to follow in litigating fiscal equity claims. The Robinson Court may have been quite prescient, however, because its approach, based on an "adequacy clause" in the state constitution became the predominant path to legal victories for plaintiffs in the 90s and early 2000s, as discussed below at pp. 7–32.

<sup>12</sup> George P. Richardson & Robert E. Lamitie, *Improving Connecticut School Aid: A Case Study with Model-Based Policy Analysis*, 15 J. EDUC. FIN. 169, 171 (1989).

2] State Courts and Education Finance  
 New Jersey Court had been involved in no less than five follow-up compliance litigations.<sup>13</sup>

In *Serrano* itself, the ultimate outcome of the Court's equity decree yielded questionable results for the plaintiffs. A constitutional cap on increases in local property taxes known as Proposition 13 was adopted by California's voters, largely as a taxpayers' defiant response to *Serrano*.<sup>14</sup> The court's equalization mandate, combined with Proposition 13, ultimately resulted in a dramatic leveling down of educational expenditures. Whereas California had ranked fifth in the nation in per pupil spending in 1964-65, as of 2015-2016, it had fallen to 41st.<sup>15</sup>

Despite an initial flurry of pro-plaintiff decisions in the years immediately following *Serrano*, a decade later, the pendulum had decisively swung the other way. Plaintiffs won only two decisions from March, 1979 through 1988,<sup>16</sup> while defendants prevailed in nine cases during that time period.<sup>17</sup> Beginning in 1989, however,

---

<sup>13</sup> RICHARD LEHNE, *THE QUEST FOR JUSTICE; THE POLITICS OF SCHOOL FINANCE REFORM* (1978) (providing a detailed analysis of the history of the Robinson litigation). Litigation has continued in New Jersey to the present day, as the Robinson case was followed by *Abbott v. Burke*, 575 A. 2d 369 (N.J.1990), which has at the time of this writing has resulted in no fewer than 22 follow-up orders by the New Jersey Supreme Court.

<sup>14</sup> See William A. Fischel, *Did Serrano Cause Proposition 13?* 42 NAT'L TAX J. 465 (1989).

<sup>15</sup> Mark Schaur & Steve Durbin, "Protecting" School Funding, SACRAMENTO BEE, June 28, 1993, at B14; California Budget & Policy Center, Fact Sheet (January, 2017), available at <https://calbudgetcenter.org/resources/californias-support-k-12-education-improving-still-lags-nation/>

<sup>16</sup> *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980); *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983).

<sup>17</sup> *Danson v. Casey*, 399 A.2d 360 (Pa. 1979); *Board of Educ. (Cincinnati) v. Walter*, 390 N.E.2d 813 (Ohio 1979); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Board of Educ. (Levittown Union Free Sch. Dist.) v. Nyquist*, 439 N.E.2d 359 (N.Y.

there was another dramatic reversal in the outcomes of state court litigations: during the period from 1989–2008, plaintiffs prevailed in the vast majority (19 of 28 or 68%) of the states’ highest court decisions or unappealed trial court decisions in cases challenging state education finance systems.<sup>18</sup> What is the

---

1982), *Lujan v. Board of Educ.*, 649 P.2d 1005 (Colo. 1982); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *Fair Sch. Finance Council of Okla., Inc. v. State*, 746 P.2d 1135 (Okla. 1987); *Britt v. North Carolina State Bd. of Educ.*, 357 S.E.2d 432, *aff’d mem.*, 361 S.E.2d 71 (N.C. 1987); *Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988).

<sup>18</sup> Specifically, plaintiffs prevailed in the highest court decisions or unappealed lower court decisions in the following 19 states: *Alaska*: *Kasayulie v. State* No. 3AN-97-3782 (Alaska Super. Ct. Sept. 1, 1999) (A27); *see* Alaska, SCHOOLFUNDING.INFO (Nov. 18, 2021), <https://www.schoolfunding.info/litigation-map/alaska/#1483933751327-c11fa582-3a8e>; *Arizona*: *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P. 2d 806 (Ariz. 1994) (capital funding issue); *Arkansas*: *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (2002); *Idaho*: *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724 (Idaho 1993); *Idaho Sch. for Equal Educ. Opportunity v. State*, 976 P.2d 913 (Idaho 1998); *Kansas*: *Montoy v. State*, 120 P.3d 306 (Kan. 2005); *Kentucky*: *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Maryland*: *Bradford v. Maryland Bd. of Educ.*, Case No. 94300058/CE 189672 (Cir. Ct, Oct 18, 1996 [unreported but described in *Maryland State Bd. of Educ. v. Bradford*, 875 A.2d 703 (2005)]); *see* Maryland, SCHOOLFUNDING.INFO (Nov. 18, 2021), <https://www.schoolfunding.info/litigation-map/maryland/#1484024675409-23786064-3090>; *Massachusetts*: *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Montana*: *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257 (Mont. 2005); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Missouri*: *Comm. for Educ. Equal. v. State*, 878 S.W.2d 446 (Mo. 1994) (final trial court decision; appeal dismissed on procedural grounds); *New Hampshire*: *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997); *New Jersey*: *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *New York*: *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E. 2d 326 (N.Y. 2003); *North Carolina*: *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *Ohio*: *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997);

2] State Courts and Education Finance  
 explanation for the newfound willingness of state courts – which had historically been reluctant to innovate in areas of constitutional adjudication – to uphold challenges to state education finance systems?

One factor was a definitive shift in legal strategy by plaintiff attorneys. At the end of the 1980s, plaintiff lawyers largely changed their focus from equal protection claims based on disparities in the level of educational funding among school districts to claims based on opportunities for a basic level of education guaranteed by the specific provisions in the state constitutions. Interestingly – and significantly – at least seven of the pro-plaintiff decisions during this period, those in Arizona, Idaho, Maryland, Montana, New York,

---

*South Carolina*: Abbeville County Sch. Dist. v. State, 515 S.E.2d 535 (S.C. 1999); *Texas*: Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); *see also*, Neeley v. West Orange-Cove Consol. Independent School Dist., 176 S.W.3d 746 (2005) (plaintiffs prevail on ad valorem state tax claim, court holds that constitution requires an adequate education, but denies adequacy claim on facts in this case); *Vermont*: Brigham v. State, 692 A.2d 384 (Vt. 1997); and *Wyoming*: Campbell County Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995). This list does not include follow-up decisions at the compliance stages of these cases, some of which are discussed in section III below.

During this time period, defendants prevailed in the decisions in *Alabama*: *Ex parte* James, 836 So. 2d 813 (Ala. 2002); *Florida*: Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996); *Illinois*: Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996), *Lewis v. Spagnolo*, <sup>710 N.E.2d</sup> <sup>798</sup> (1999); *Nebraska*: Neb. Coal. for Educ. Equity & Adequacy v. Heinman, 273 Neb. 531 (2007); *Oklahoma*: Okla. Educ. Ass'n v. State *ex rel.* Okla. Legislature, 158 P.3d 1058 (Okla. 2007); *Pennsylvania*: Marrero *ex rel.* Tabalas v. Com., 739 A.2d 110 (Pa.1999); *Rhode Island*: City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995); *Virginia*: Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994); *Wisconsin*: Vincent v. Voight, 614 N.W.2d 388 (Wis. 2000).

For up-to-date information about the status of cases in all 50 states, see, the website of the School Funding project at the Center for Educational Equity, Teachers College, Columbia University, [www.schoolfunding.info](http://www.schoolfunding.info).

North Carolina, and Ohio, were written by highest state courts that had ruled in favor of defendants only a few years earlier.<sup>19</sup>

The education clauses of almost all the state constitutions contain language that requires the state to provide students some substantive level of basic education. The specific language used to convey this concept includes calls for establishing an “adequate” education,<sup>20</sup> a “sound basic education,”<sup>21</sup> a “thorough and

---

<sup>19</sup> *Arizona*: Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994), *distinguishing* Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); *Idaho*: Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724 (Idaho 1993), *distinguishing* Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); *Maryland*: Bradford v. Maryland Bd. of Educ., Case No. 94300058/CE 189672 (Cir. Ct, Oct 18, 1996) [unreported but described in Maryland State Bd. of Educ. v. Bradford, 875 A.2d 703 (2005)], *distinguishing* Hornbeck v. Somerset Cty. Bd. of Educ., 458 A.2d 758 (Md. 1983); *Montana*: Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989), *modified*, 784 P.2d 412 (Mont. 1990), *reversing* State *ex rel.* Woodahl v. Straub, 520 P.2d 776 (Mont. 1974); *New York*: Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995), *distinguishing* Levittown v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); *North Carolina*: Leandro v. State, 488 S.E.2d 249 (N.C. 1997), *distinguishing* Britt v. North Carolina State Bd. of Educ., 357 S.E.2d 432, *aff'd mem.* 361 S.E.2d 71 (N.C. 1987); *Ohio*: DeRolph v. State, 677 N.E.2d 733 (Ohio 1997), *distinguishing* Bd. of Educ. of City Sch. Dist. of Cincinnati v. Walter, 390 N.E.2d 813 (Ohio 1979).

<sup>20</sup> Ga. Const. Art. VIII, § 1.

<sup>21</sup> N.Y. Const. Art. XI, § 1. The specific language in this constitutional provision states that “the legislature shall provide for the maintenance and support of a system of free common schools, wherein all of the children of this state may be educated.” The New York Court of Appeals has interpreted the concept of “educated” in this provision to mean “a sound basic education.” Levittown, 439 N.E.2d at 368-69 (1982). *See also* Campaign for Fiscal Equity v. State (CFE I), 655 N.E.2d 661, 665 (N.Y. 1995) (holding that New York state constitution’s education clause requires “a sound basic education.”) Other courts have interpreted similar provisions in their constitutions to have substantive contemporary content. *See, e.g.,*

2] \_\_\_\_\_ State Courts and Education Finance  
 efficient” education,<sup>22</sup> or a “basic system of free quality public elementary and secondary schools.”<sup>23</sup> Many of these provisions were incorporated into the state constitutions as part of the common school movement of the mid-19th century, which created statewide systems for public education and attempted to inculcate democratic values by bringing together under one roof students from all classes and all ethnic backgrounds.<sup>24</sup> Some of them, especially in the New England states, date back to 18<sup>th</sup>-century revolutionary ideals of creating a new republican citizenry that would “cherish the interests of literature and science”<sup>25</sup>—an archaic phrase that the Massachusetts Supreme Judicial Court has now interpreted to require the provision of “an adequate education.”<sup>26</sup> And, in many Southern states, these

---

Leandro v. State, 488 S.E.2d 249, 257 (N.C. 1997) (holding that “North Carolina Constitution requires that all children have the opportunity for a sound basic education...”); Tennessee Small Sch. Syst. v. McWherter, 851 S.W.2d 139, 150-51 (Tenn. 1993) (holding that state education clause requires a system that “generally prepare[s] students intellectually for a mature life”); Fair Sch. Fin. Council of Okla., Inc. v. State, 746 P.2d 1135, 1149 (Okla. 1987) (holding that education clause requires “a basic, adequate education”).

<sup>22</sup> N.J. Const. Art. VIII, § 4. *Cf.* Idaho Const Art. IX, § 1 (a “general, uniform and thorough system” of education.); Ky. Const. § 183 (an “efficient system of common schools throughout the state”).

<sup>23</sup> Mont. Const. Art. X, § 1.

<sup>24</sup> *See generally* LAWRENCE CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783-1876 (1980); CARL KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780-1860 (1983).

<sup>25</sup> *See* Mass. Const. Part 2, Ch. 5, § 2; *see also* Brigham v. State, 692 A.2d 384 (Vt. 1997); N.H. Const. Art. 83.

<sup>26</sup> McDuffy v. Sec’y of Educ., 615 N.E. 2d 516, 545 (Mass. 1993). *Accord:* Claremont Sch. Dist. v. Governor, 635 A. 2d 1375, 1381 (N.H. 1993).

clauses were incorporated into the state constitutions as a condition for re-joining the Union after the Civil War.<sup>27</sup>

Although the state constitutions use different language to connote this concept of a substantive basic education, there is broad consensus among the courts that have applied these concepts as to its core meaning.<sup>28</sup> Virtually all of the courts that have defined their states' constitutional language have agreed that a basic education that meets contemporary needs is one that ensures that a student is equipped to function capably as a citizen and to compete effectively in the global labor market. For example, the New York Court of Appeals defined a "sound basic education" in terms of preparing students to "function productively as civic participants . . . qualified to vote or serve as a juror . . . capably and knowledgeably" and "the ability to obtain competitive employment."<sup>29</sup>

---

<sup>27</sup> See, Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 778-94 (2018).

<sup>28</sup> Attempts to categorize the constitutional language in the state constitutions in terms of their relative strength have proved unavailing. For example, William E. Thro, in *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19 (1993) set forth four basic categories related to the relative "strength" of the educational clauses: (1) seventeen states that simply mandate free public education; (2) twenty-two states that "impose some type of minimum standard of quality;" (3) six states that require a "stronger and more specific educational mandate" than (1) or (2); and (4) four states that regard education as an "important, if not the most important, duty of the state." *Id.* at 23-24. His predictions regarding the likely outcome of court cases based on his categorizations have, however, been belied by the actual decisions. For example, based on Thro's categorization, plaintiffs should have won the cases in Maine, Rhode Island, and Illinois, which they lost, and lost the decisions in New York, North Carolina, and Vermont, which they won.

<sup>29</sup> *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E. 2d 661, 665 (N.Y. 1995); See also *Serrano v. Priest*, 487 P.2d. 1241,

2] State Courts and Education Finance

In these cases, courts focus on the substance of the education students are actually receiving in the classroom rather than on the more abstract consideration

---

1258-59 (Cal. 1971) (education is “crucial to . . . the functioning of democracy [and to] an individual’s opportunity to compete successfully in the economic marketplace . . .”); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997) (defining constitutional duty in terms of preparing “citizens for their role as participants and as potential competitors in today’s marketplace of ideas”); *Robinson v. Cahill*, 303 A. 2d 273, 295 (N.J. 1973) (defining the constitutional requirement as “that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market”); *Edgewood Indep. Sch. Dist v. Kirby*, 777 S.W.2d 391, 395-96 (Tex. 1989) (citing intent of framers of education clause to diffuse knowledge “for the preservation of democracy . . . and for the growth of the economy”); *Vincent v. Voight*, 614 N.W.2d 388, 396 (Wis. 2000) (“a sound basic education is one that will equip students for their roles as citizens and enable them to succeed economically and personally”); *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1259 (Wyo. Sup. Ct. 2001) (defining the core constitutional requirement in terms of providing students with “a uniform opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually”).

Some commentators argue that the 18<sup>th</sup> and 19<sup>th</sup> century drafters of these state constitutional clauses saw them as being largely hortatory and did not intend to create a judicially enforceable right that could be used to overturn legislative judgments regarding an equitable, adequate, and/or uniform education. John Dinan, *The Meaning of State Constitutional Education Clauses: Evidence from the Constitutional Convention Debates*, 70 ALB. L. REV. 927 (2007). *See also* John C. Eastman, *Reinterpreting the Education Clauses in State Constitutions*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 55 (Martin R. West & Paul E. Peterson, eds., 2007). The vast majority of state court judges have, however, rejected this viewpoint and have held that the constitutional purpose “should be measured with reference to the demands of modern society . . . .” CFE II, 801 N.E. 2d at 330. *See also* INSTITUTE FOR EDUCATIONAL EQUITY AND OPPORTUNITY, *EDUCATION IN THE 50 STATES: A DESKBOOK OF THE HISTORY OF STATE CONSTITUTIONS AND LAWS ABOUT EDUCATION* (2008) (showing that the state constitutions contained rich, purposeful language that was intended to create the educations and the citizens they spoke about in that rhetoric).

of comparative amounts of school district funding at issue in the equity cases. The evidence in the education-clause cases focuses on the blatant lack of educational opportunity that persists in many states, and judges have responded accordingly. For example, one poor rural Arkansas school district had a single uncertified mathematics teacher to cover all high school mathematics courses. The teacher was paid \$10,000 a year as a substitute teacher, which he supplemented with \$5,000 annually for school bus driving.<sup>30</sup> Passing an examination in a laboratory science course is required for high school graduation in New York State, but 31 New York City high schools had no science labs.<sup>31</sup>

In addition to the persuasive power of the evidence of educational inadequacy that has been revealed in the record of these cases, another major reason for plaintiffs' victories was the emergence of the standards-based education reform movement at about the same time. These reforms responded to a series of major commission reports in the 1980s that had warned of "a rising tide of mediocrity" in American education—a phenomenon that was said to be undermining the nation's ability to compete in the global economy.<sup>32</sup> In response, both the federal government and the states emphasized the importance of articulating clear expectations concerning what children should know and be able to do when they graduate high school. Virtually all states have now adopted substantive

---

<sup>30</sup> Lake View Sch. Dist. v. Huckabee, No. 1992-5318 (Ark. Ch. Ct., May 25, 2001).

<sup>31</sup> CFE II, 801 N.E. 2d at 334, n.4.

<sup>32</sup> NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 5 (1983); *see also* CARNEGIE FORUM ON EDUCATION AND THE ECONOMY, TASK FORCE ON TEACHING AS A PROFESSION, A NATION PREPARED: TEACHERS FOR THE 21<sup>ST</sup> CENTURY (1986); THEODORE SIZER, HORACE'S COMPROMISE: THE DILEMMA OF THE AMERICAN HIGH SCHOOL (1989).

2] State Courts and Education Finance academic content standards around which they organize their curricula, their teacher training, and their graduation requirements and examinations—and by which the federal government has held them accountable through the requirements of Elementary and Secondary Education Act (known from 2002 to 2015 as the No Child Left Behind Act, and since its latest re-authorization as the Every Child Succeeds Act).<sup>33</sup>

With the advent of standards-based reform, the concept of educational opportunity gained substantive content. The message underlying the reforms was that student achievement in most state education systems—and certainly in school districts that primarily served poor and minority students—fell below the new level of expectations. Standards-based reform also put into focus the fundamental goals and purposes of America’s system of public education. It reinforced the courts’ orientation to probe the intent of the 18<sup>th</sup> and 19<sup>th</sup> century drafters of the clauses in the state constitutional clauses that established public education systems and to evaluate the contemporary significance of these provisions. In addition, the new state standards provided the courts practical tools for developing judicially manageable approaches for dealing with complex educational issues and implementing effective remedies. They offered judges workable criteria for crafting practical remedies in these litigations.

The adequacy approach remains dominant today. This is perhaps because it tends to invoke less political resistance at the remedial stage. Rather than raising fears of “leveling down” educational opportunities currently available to affluent students, it gives the promise of “leveling up” academic expectations for all other students. Although standards-based reforms would most dramatically improve the performance of the lowest achieving students, the reforms are comprehensive and intended to provide benefits to almost all students.

---

<sup>33</sup> 20 U.S.C. § 6301 et seq. (2015).

Instead of threatening to shift money from property rich districts to property poor districts, therefore, the emphasis on providing all students a basic, substantive level of educational opportunity connotes the possibility of enriching opportunities for all.

The courts generally have rejected defendants' attempts to interpret these education clauses in the state constitutions to provide only limited rights, and "the concept of an adequate education emerging from state courts invalidating school finance systems goes well beyond a basic or minimum educational program that was considered the acceptable standard ... decades ago."<sup>34</sup> Essentially, what the court orders have done in these cases is to require the states to ensure that schools—and especially schools in poor urban and rural areas—have the resources to provide their students a fair opportunity to meet the state's own academic expectations as set forth in the state standards and the federal accountability requirements. They have ordered states to revise their education finance systems to ensure that districts with low property tax wealth will have

---

<sup>34</sup> Deborah A. Verstegen, *Judicial Analysis During the New Wave of School Finance Litigation: The New Adequacy in Education*, 24 J. EDUC. FIN. 51, 67 (1998). See also William H. Clune, *The Shift From Equity to Adequacy in School Finance*, 8 EDUC. POL'Y 376 (1994) (describing the thrust of the cases as calling for "a high minimum level"); Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 175, 188 (Helen F. Ladd et al. eds. 1999) (stating that the cases call for a "high minimum approach [that] focuses on what would be needed to assure that all children have access to those educational opportunities that are necessary to gain a level of learning and skills that are now required, say, to obtain a good job in our increasingly technologically complex society and to participate effectively in our ever more complicated political process").

2] State Courts and Education Finance  
 sufficient funding to provide all of their students the opportunity for a sound basic education.<sup>35</sup>

Most of the literature in this field uses the term “education adequacy” to describe these cases that draw on the education clauses of state constitutions. At this stage in the history of this litigation, however, “adequacy” has become a misleading label for the level of substantive educational opportunity that the courts have described in these cases, and the terminology used to describe these judicial decisions should be updated. “Adequacy” connotes a minimal level of education, but the courts in these cases clearly have in mind a concept that emphasizes the educational skills that students need to function as citizens and productive workers in the twenty-first century, and this concept is far more than minimal. The term “sound basic education” used by the courts in New York, North Carolina, South Carolina, and Wisconsin appears to describe most accurately the level of quality educational training in substantive skills that most of the courts have agreed is necessary for students to function productively in the 21st century.<sup>36</sup>

---

<sup>35</sup> Interestingly, Justice Lewis Powell, the author of the majority opinion in *Rodriguez*, thought that defining “adequacy” in education was entirely “subjective” and this was a major reason why he rejected the possibility of declaring that education was a fundamental interest. See, *San Antonio Independent School District v. Rodriguez*, Supreme Court Case Files Collection, Box 8, Powell Papers, Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia at 101–102, available at <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1032&context=casefiles>

[hereinafter, Powell Rodriguez files]. The state court decisions that have defined “adequacy” based on evidence of resources needed to achieve specific state standards arguably have proved him wrong.

<sup>36</sup> Many of these cases also have an “equity” dimension, and disparities in resource availability constitute a major element of the proof that is actually offered at many of these trials. A simplistic distinction between “adequacy” and “equity” cases does not connote this nuance. See, e.g., Richard Briffault, *Adding Adequacy to Equity*, in *SCHOOL MONEY TRIALS*, *supra* note 29 **Error! Bookmark not**

In virtually all of the cases that went to trial during this period, judges examined whether students were, in fact, receiving the educational opportunities they need to prepare them to function productively as citizens and workers in the 21<sup>st</sup> century. Strikingly, the courts consistently found the level of resources that the states were providing to students in the low wealth districts to be inadequate. Conversely, almost all of the defendant victories at the liability stage of sound basic education litigations in this era occurred only where the state's highest courts ruled that the sound basic education issue was not "justiciable," meaning that they did not consider it proper for the courts to even consider these questions for separation of powers reasons. Thus, they dismissed these cases at the outset, before any trial was held and any evidence of inadequacy could even be considered.<sup>37</sup>

In other words, the seven states that held for defendants at the basic liability stage in sound basic education cases during this period—Alabama, Florida, Illinois, Nebraska, Oklahoma, Pennsylvania, and Rhode Island—did so not because they determined that the current state system was, in fact, providing students a sound basic education. Rather, they avoided confronting the evidence and answering that critical question by holding that there were "no judicially manageable standards" that would not "present a substantial risk of

---

**defined.**, at 47 (arguing that in both theory and practice there has been a "general blurring of adequacy and equity concerns" in the cases); 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 (2006) (criticizing "adequacy" for including only static, non-relational standards).

<sup>37</sup> During the prior 1979-1988 period, when most of the cases focused on equal protection rather than sound basic education issues, about half of the defendant victories were based on upholding state funding systems on rational relationship grounds and about half on justiciability grounds. (See cases cited, *supra* note 17).

2] \_\_\_\_\_ State Courts and Education Finance  
judicial intrusion into the powers and responsibilities assigned to the legislature . . .”<sup>38</sup> or that the court was “unable to judicially define what constitutes an ‘adequate’ education or what funds are ‘adequate’ to support such a program.”<sup>39</sup>

In the majority of the cases, however, the courts did reject these justiciability arguments as being inconsistent with the courts’ core constitutional responsibilities.<sup>40</sup> As the Arkansas Supreme Court put it:

This court’s refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education.<sup>41</sup>

Similarly, the Idaho Supreme Court stated, “[W]e decline to accept the respondents’ argument that the other branches of government be allowed to interpret the

---

<sup>38</sup> *Coal. for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996).

<sup>39</sup> *Marrero ex rel. Tabalas v. Com.*, 739 A.2d 110, 113-14 (Pa. 1999).

<sup>40</sup> There is, in fact, no coherent theory of separation of powers that can explain why a minority of courts conclude that adequacy cases are not justiciable while the large majority of state courts deem these issues fully justiciable. See Scott R. Bauries, *Is There an Elephant in the Room? Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701 (2010) (detailed analysis of decisions in adequacy cases finds no correlation between separation of powers texts in state constitutions and the extent of judicial review in educational adequacy cases).

<sup>41</sup> *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 484 (Ark. 2002).

constitution for us. That would be an abject abdication of our role in the American system of government.”<sup>42</sup>

Many commentators have also questioned the validity of the justiciability doctrine,<sup>43</sup> especially as applied to the state courts. In contrast to the negative restraints of the federal constitution, the structure of most state constitutions, especially in key areas of state responsibility like education, incorporate “positive rights” that require affirmative governmental action – and implicitly call for judicial review if the other branches fail to take that action. The implications of such positive rights in state constitutions have been explained as follows by Professor Helen Hershkoff:

---

<sup>42</sup> Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724,734 (1993). See also Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 209 (Ky. 1989) (“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 . . . to decide whether its actions are constitutional is literally unthinkable.”).

<sup>43</sup> See, e.g., Martin Redish, *Judicial Review and the “Political Question,”* 79 N.W. U. L. REV. 1031, 1059-60 (1984) (“Once we make the initial assumption that judicial review plays a legitimate role in a constitutional democracy, we must abandon the political question doctrine, in all of its manifestations”); Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597 (1976) (arguing that although courts should give deference to the substantive decisions of the political branches, there is no justification for permitting self-monitoring of their constitutional compliance); Richard F. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006) (arguing that most constitutional tests would not pass muster under a strict application of the ‘judicially manageable standard’ concept).

2] State Courts and Education Finance

When the state constitution mandates a specific purpose and thus authorizes the government to carry out the stated goal, the legislature and the governor have a duty to achieve, or at least to help promote, the constitutional mandate....a positive constitutional right imposes an affirmative obligation on the state to realize and advance the objects and purposes for which ....powers have been granted.....Judicial review in such a regime must serve to insure that the government is doing its job and moving policy closer to the constitutionally prescribed end.<sup>44</sup>

The Washington Supreme Court, citing the Hershkoff article, acknowledged this distinction in its decision in that state's education adequacy decision:

This distinction between positive and negative constitutional rights is important because it informs the proper orientation for determining whether the State has complied with its [education adequacy] duty in the present case. In the typical

---

<sup>44</sup> Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. R. REV. 1131, 1137 (1999). *See also* Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA L. REV. 189, 192 (2002) ("State constitutions often contain positive or affirmative rights, while federal constitutional rights are primarily negative in nature."); Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 Cornell L. Rev. 656 (2000) (noting that state constitutions often establish affirmative obligations that the government must discharge); cf. Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. Rev. 857 (2001) (discussing the difficulties for courts in enforcing positive rights).

constitutional analysis, we ask whether the legislature or the executive has overstepped its authority under the constitution. . . This approach ultimately provides the wrong lens for analyzing positive constitutional rights, where the court is concerned not with whether the State has done too much, but with whether the State has done enough. Positive constitutional rights do not restrain government action; they require it.<sup>45</sup>

Judith Kaye, former chief judge of the New York Court of Appeals, also noted that state court judges have a firmer democratic pedigree: “State courts are generally closer to the public, to the legal institutions and environments within the state, and to the public policy process. This both shapes their strategic judgments and renders any erroneous assessments they may make more readily redressable by the People.”<sup>46</sup> In contrast to federal judges who are appointed for life, state judges in 39 of the 50 states are chosen by the public either in garden-variety partisan elections or through a variant of a retention election.<sup>47</sup> Moreover, the constitutions that state judges are called upon to interpret can be amended relatively easily, rendering their decisions subject to a form of “majoritarian ratification.”<sup>48</sup>

---

<sup>45</sup> *McCleary v. State*, 269 P.3d 227, 248 (Wash. 2012).

<sup>46</sup> Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49, 56 (1988).

<sup>47</sup> Adam Liptak, *Rendering Justice, with One Eye on Re-Election*, N.Y. TIMES, May 25, 2008, at A1. See also, Delia B. Allen, *Judicial Rulings v. Judicial Selection Processes: An Investigation into School Funding Litigation Rulings and the Judges Who Make Them*, 6 EDU. LAW & POL’Y REV. 90 (2021.)

<sup>48</sup> Burt Neuborne, *Forward: State Constitutionalism and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 900 (1989).

2] State Courts and Education Finance

Why, then, do a number of state highest courts nevertheless adhere to the justiciability doctrine? The Nebraska Supreme Court was quite explicit in stating its major concern. It discussed at some length in its 2007 *Nebraska Coalition for Educational Equity and Adequacy v. Heineman* decision<sup>49</sup> the difficulties that courts in other states have had with crafting remedies in sound basic education cases. After tracing a pattern of remedial complexity, the court bluntly concluded: “The landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states’ school funding systems. Unlike those courts, we refuse to wade into that Stygian swamp.”<sup>50</sup>

The Nebraska court did not, however, mention that the courts’ intervention in education finance matters has in many cases resulted in significant increases in the both the adequacy of educational funding and the equity of resource distribution. In Kentucky, for example, litigation has resulted in dramatic reductions in spending disparities among school districts, the redesign and reform of the entire education system, and a significant increase in that state’s student achievement scores.<sup>51</sup> In

---

<sup>49</sup> 731 N.W. 2d 164, 182–183 (Neb. 2007).

<sup>50</sup> *Id.* at 183. *See also* *City of Pawtucket v. Sundlun*, 662 A.2d 40, 59 (R.I. 1995) (“[T]he volume of litigation and the extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on” an adequacy litigation); Fallon, *supra* note 43, at 1293 (“In most public rights cases, courts first rule on the merits, then struggle with remedial issues. Sometimes, however, worries about the difficulty of crafting remedies contribute to decisions that a category of dispute is non-justiciable.”).

<sup>51</sup> *See, e.g.*, Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J. L. & EDUC. 485 (1999) (noting that immediate legislative response to the court order led to substantial increases in funding for low wealth districts); KENTUCKY DEPARTMENT OF EDUCATION, RESULTS MATTER: A DECADE OF DIFFERENCE IN KENTUCKY’S PUBLIC SCHOOLS 1990–2000 REPORT ON THE 10TH ANNIVERSARY OF EDUCATION REFORM IN KENTUCKY 72–87 (2000).

Massachusetts, enactment of the Education Reform Act of 1993 in response to that state's adequacy litigation has also sharply reduced the funding gaps between rich and poor school districts, and the percentage of students achieving proficiency on state tests has risen dramatically.<sup>52</sup> Similarly, in Vermont, within months of the court's decision, the legislature enacted a dramatic set of sweeping education finance reforms that have led to improvements in student outcomes.<sup>53</sup> Decades of litigation in New Jersey on behalf of the largely minority, low income students in 31 urban districts has resulted in significant increases in their achievement test scores;<sup>54</sup> one of these districts, Union City, a 92% Latino district that is the poorest in the state, has effectively closed the achievement gap between its students and non-urban students, and may be the first urban district in the United

---

<sup>52</sup> See, John P. Papay et. al., *Lifting All Boats? Accomplishments and Challenges from 20 Years of Education Reform in Massachusetts* (Annenberg Institute, Brown University, 2020), [annenberginstitute.org/edopportunity/liftingallboats](https://annenberginstitute.org/edopportunity/liftingallboats) (discussing the accomplishments of the Massachusetts Education Reform Act, adopted in response to *McDuffy v. Sec'y of Educ.*, 615 N.E.2d 516 (Mass 1993).

<sup>53</sup> Thomas Downes, *School Finance Reform and School Quality: Lessons from Vermont*, DEPARTMENT OF ECONOMICS, TUFTS UNIVERSITY (2003), [https://www.academia.edu/21128895/School\\_Finance\\_Reform\\_and\\_School\\_Quality\\_Lessons\\_from\\_Vermont](https://www.academia.edu/21128895/School_Finance_Reform_and_School_Quality_Lessons_from_Vermont) (arguing that Act 60 has dramatically reduced dispersion in education spending and initial evidence indicates that student performance has become more equal in the post-Act 60 period).

<sup>54</sup> Margaret Goertz & Michael Weiss, *Assessing Success in School Finance Litigation: The Case of New Jersey*, THE CAMPAIGN FOR EDUCATIONAL EQUITY, TEACHERS COLLEGE, COLUMBIA UNIVERSITY (2009), <https://files.eric.ed.gov/fulltext/ED523993.pdf>.

2] State Courts and Education Finance  
States to sustain academic achievement into the middle grades.<sup>55</sup>

In other instances, though, resistance from the governor and/or the legislature or lack of judicial monitoring has delayed or impeded funding reforms. For example, despite the issuance of a number of compliance orders by the state Supreme court, the New Hampshire legislature has repeatedly failed to ensure adequate funding for students in property-poor school districts around the state.<sup>56</sup> The West Virginia legislature virtually ignored the courts' extensive orders throughout the 1980s but then implemented some more limited reforms after another piece of follow-up litigation was initiated in the mid-1990s.<sup>57</sup> In Ohio, the legislature had partially responded to a series of court orders by, among other things, reducing funding inequities and improving school facilities following the declaration of unconstitutionality. However, the legislature's failure to implement judicial orders effectively and the judges' unwillingness to confront the legislature led the state supreme court to retreat from the fray and terminate the cases before an appropriate remedy had been fully effectuated.<sup>58</sup>

---

<sup>55</sup> DAVID KIRP, *IMPROBABLE SCHOLARS: THE REBIRTH OF A GREAT AMERICAN SCHOOL SYSTEM AND A STRATEGY FOR AMERICA'S SCHOOLS* (2013).

<sup>56</sup> For a summary of legal and legislative developments in New Hampshire since the court's initial ruling in *Claremont School District v. Governor*, 635 A.2d 1375 (1993), see the [schoolfunding.info](http://www.schoolfunding.info) website at <http://www.schoolfunding.info/litigation-map/new-hampshire/#1485150611794-bca14785-8203>.

<sup>57</sup> *Tomblin v. West Virginia State Board of Education*, Civ. No. 75-1268 (2003). See also John E. Taylor, *Foreword: Pauley – and “The Recht Decision” – at Forty*, 121 W. VA. L. REV. 757 (2019).

<sup>58</sup> See Larry Obhof, *DeRolph v. State and Ohio's Long Road to an Adequate Education*, 2005 B.Y.U. EDUC. & L.J. 83 (2005).

Although achievement gains do not always follow from judicial intervention, especially when courts do not steadfastly enforce their remedies, recent research has indicated that overall, the results of judicial interventions in this area have been impressive. A recent major study by the National Bureau of Economic Research (NBER) considered the impact of state supreme court decisions in twenty-eight states between 1971 and 2010.<sup>59</sup> It concluded that school finance reforms stemming from court orders have tended both to increase state spending in lower-income districts and to decrease expenditure gaps between low- and high-income districts. The authors also discussed the effects of court-ordered funding reforms on students' long-term success. They found that a 20% increase in annual per-pupil spending for K-12 low-income students leads to almost one more year of completed education. In adulthood, these students experienced 25% higher earnings, and a 20% decrease in adult poverty. The authors posit that these results could reduce at least two-thirds of the achievement gap between adults who were raised in low- and high-income families.

Other recent studies have also concluded that court-ordered reforms have significant positive effects. A 2016 study of the impact of state aid increases on student achievement as measured by representative samples of scores on the National Assessment of Educational Progress (NAEP) found that the "reforms cause increases in the achievement of students in these districts, phasing in gradually over the years following

---

<sup>59</sup> C. Kirabo Jackson, Rucker Johnson & Claudia Persico, *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 20847, 2015), <http://www.nber.org/papers/w20847>.

2] State Courts and Education Finance  
 the reform,<sup>60</sup> and other recent studies have also concluded that the implied effect of school resources on educational achievement is large.”<sup>61</sup>

Although on balance the involvement of state courts in educational funding cases has had a positive impact, it is nevertheless true that in many cases the reform process has been slow, limited, or ultimately unsuccessful. One of the major reasons for delay and resistance to constitutional mandates in these cases is that the “the literature on law and courts is replete with analysis of rights, but considerably more limited when it comes to examining the nature of remedies,”<sup>62</sup> and there

---

<sup>60</sup> Julien Lafortune, Jesse Rothstein, and Diane W. Schzenbach. *School finance reform and the Distribution of Student Achievement*. NBER WORKING PAPER 22011 (2016), <https://www.nber.org/papers/w22011.pdf>.

<sup>61</sup> See, e.g., Joshua Hyman. 2017. *Does Money Matter in the Long Run? Effects of School Spending on Educational Attainment*, 9 AM. ECON. J. ECON. POL’Y, 256 (2017), <https://www.aeaweb.org/articles?id=10.1257/pol.20150249> (finding that students exposed to 10% more spending were three percentage points more likely to enroll in college); Christopher A. Candelaria & Kenneth A. Shores, *Court-Ordered Finance Reforms in the Adequacy Era: Heterogeneous Causal Effects and Sensitivity*, 14 J. EDUC. FIN. & POL’Y 31 (2019) (study of court-ordered finance reforms between 1989 and 2010 finding 6.8 % to 11.5% increase in graduation rates for the highest poverty quartile of students). See also C. Kirabo Jackson, *Does School Spending Matter? The New Literature on an Old Question* (2018), [https://works.bepress.com/c\\_kirabo\\_jackson/38/](https://works.bepress.com/c_kirabo_jackson/38/) (discussing significance of recent studies that employ larger data-sets and use quasi-experimental methods and discussing the older literature and its limitations).

<sup>62</sup> R. Shep Melnick, *Taking Remedies Seriously: Judicial Methods for Controlling Bureaucratic Discretion in Public Schools*, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY’S ROLE IN AMERICAN EDUCATION 17 (Joshua M. Dunn and Martin R. West, eds., 2009)

is an “absence of a legitimate legal discourse”<sup>63</sup> to support and guide appropriate judicial intervention.

Courts can, however, develop and implement appropriate and effective mechanisms for judicial involvement that can vindicate children’s rights without submerging the courts in a “stygian swamp.” I will suggest such a remedial path in the concluding sections of this article, after providing an overview of the case law from 2009 to date, and considering the additional challenges posed by the 2008 recession and the COVID-19 crisis.

## II. THE STATE COURT DECISIONS: 2009-2020

The Great Recession that began in 2008 resulted in extensive reductions in state and local funding for public education and in substantial cutbacks in educational services, some of which still have not been restored. States spent down their reserves and the sizable federal aid they received and then cut funding to K-12 schools to balance their budgets. By 2011, 17 states had reduced per-student funding by more than ten percent. As a result, local school districts laid off teachers, librarians, and other staff; scaled back counseling and other services; and even reduced the number of school days.<sup>64</sup> A decade after the recession, state support for K-

---

<sup>63</sup> MALCOM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS 97 (1999).

<sup>64</sup> Nicholas Johnson, *As School Year Starts, Schools Face New and Lingering Challenges*, WASHINGTON, D.C., CENTER ON BUDGET AND POLICY PRIORITIES, (August 24, 2020), <https://www.cbpp.org/blog/as-school-year-starts-schools-face-new-and-lingering-challenges>).

2] State Courts and Education Finance  
 12 schools in many states still remained below pre-Great Recession levels.<sup>65</sup>

This economic crisis also had a noticeable impact on school funding litigation. Students and parents in many states looked to the courts for relief from the devastating cutbacks, but judges tended to consider the impact of their rulings not only on children's educational rights but also their impact on state finances. Plaintiffs clearly did not fare as well in the period following the Great Recession of 2008 as they had during the previous era. Some commentators have concluded that since the 2008 recession, state courts have largely retrenched from supporting legal challenges to state education finance systems.<sup>66</sup> The reality is, however, that courts in many states have continued to honor and expand rights to equitable and adequate education, and the situation is more nuanced than a simple tabulation of plaintiff-defendant won-lost records would indicate.

There has been, in fact, a sharp decline in plaintiff victories in the state court decisions issued since the 2008 recession. Counting all state supreme court rulings and unappealed lower court decisions, there were

---

<sup>65</sup> As of 2017, state funding for schools was below pre-recession levels in 22 states plus the District of Columbia, and in seven states expenditures were 10% or more below pre-recession levels. Michael Leachman, *K-12 Funding Still Lagging in Many States*, WASHINGTON, D.C., CENTER ON BUDGET AND POLICY PRIORITIES, (May 29, 2019), <https://www.cbpp.org/blog/k-12-funding-still-lagging-in-many-states>).

<sup>66</sup> See, e.g., Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423, 431 (2016) ("The recession appears to have changed the trajectory of equity and adequacy litigation. Since the recession, courts have rejected school funding and quality challenges at a far higher rate. Even in those instances in which plaintiffs have won since the recession, legislatures have simply defied the courts, refusing to comply with judicial remedies;") Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 KSJLPP 346, 351 (2018) ("Surveying the battlefield, the impression is that state courts are losing ground even as a few remain vigilant").

relevant decisions in 12 states between 2009 and 2020, and plaintiffs won only a quarter of them. Specifically, defendants prevailed in nine of these states (California,<sup>67</sup> Colorado,<sup>68</sup> Connecticut,<sup>69</sup> Florida,<sup>70</sup> Indiana,<sup>71</sup> Missouri,<sup>72</sup> Mississippi,<sup>73</sup> Rhode Island,<sup>74</sup> and South Dakota<sup>75</sup>) and plaintiffs won only three (Minnesota,<sup>76</sup> New Mexico,<sup>77</sup> and Pennsylvania.<sup>78</sup> The New Mexico case was an unappealed trial court decision and the

---

<sup>67</sup> Campaign for Quality Educ. v. State, 209 Cal.Rptr.3d 888 (2016). The California Supreme Court declined to hear plaintiffs' appeal from lower court decisions that had decided not to add a right to an "adequate" education to *Serrano's* precedent that there is a right to an "equitable" education under the California constitution.

<sup>68</sup> Lobato v. State, 304 P.3d 1132 (Colo. 2013). *See also*, Dwyer v. State, 357 P.3d 185 (Colo. 2016) (upholding across the board educational cuts and interpreting constitutional provision that called for an annual inflation increase in education funding to apply to "base" funding but not to other factors such as funding for at-risk students, low enrollment and cost of living for staff).

<sup>69</sup> Conn. Coal. for Justice in Educ. Funding v. Rell, 176 A.3d 28 (Conn. 2018).

<sup>70</sup> Citizens for Strong Sch., Inc v. Florida State Bd. of Educ. 262 So.3d 127 (Fl. 2019).

<sup>71</sup> Bonner *ex rel.* Bonner v. Daniels, 907 N.E.2d 516 (Ind. 2009).

<sup>72</sup> Comm. for Educ. Equal. v. State, 294 S.W.3d 477 (Mo. 2009) (en banc).

<sup>73</sup> Clarksdale Municipal Sch. Dist. v. State, 233 So.3d 299 (Mich. 2017).

<sup>74</sup> Woonsocket Sch. Comm. v. Chafee, 89 A.3d 778 (R.I. 2014).

<sup>75</sup> Davis v. State, 804 N.W. 2d 618 (S.D. 2011).

<sup>76</sup> Cruz-Guzman v. State 916 N.W.2d 1 (Minn. 2018).

Among other things, plaintiffs in this case argued that a segregated education is *per se* an inadequate education under the Education Clause of the Minnesota State Constitution. In the spring of 2021, the parties reached agreement on a settlement to the case, subject to the legislature adopting a bill incorporating its terms and providing an appropriation to cover its costs.

<sup>77</sup> Martinez/Yazzie v. State of New Mexico, 2018 WL 9489378 (N.M. Dist. 2018.)

<sup>78</sup> William Penn Sch. Dist. v. Pa. Dept. of Educ., 170 A.3d. 414 (Pa. 2017). The trial in this case was scheduled to begin in October, 2021.

2] State Courts and Education Finance  
 Minnesota and Pennsylvania decisions were at the motion to dismiss stage, rather than final rulings on the merits.<sup>79)</sup>

Also notable is the contrast in the outcome of cases that went to trial in the post-recession period. Between 1989 and 2009, every case that went to trial but one (Rhode Island) resulted in an ultimate victory for the plaintiffs, indicating that once courts looked at the actual evidence of the extent of educational deficiencies, they became convinced that the existing state finance systems were inadequate and/or inequitable and that the court needed to do something to remedy these problems. In the post-Recession period, however, plaintiffs won only one of the cases that were fully tried (New Mexico), whereas the defendants prevailed in five (Colorado, Connecticut, Florida, Missouri and South Dakota.)

On the other hand, if we look to the question of whether challenges to state education finance systems

---

<sup>79</sup> Arguably, there were 13 post-Recession cases, of which plaintiffs won 4, if Delaware is added to the plaintiff victory list. In Delaware, the Chancery Court issued an extensive ruling, denying the state's motion to dismiss and holding that "The Education Clause obligates the State of Delaware to create and maintain a system of public schools that *successfully* educates Delaware's students." *Delawareans for Educational Opportunity v. Carney*, 199 A.3d 109, 154 (2018.) (emphasis added) In 2020, the parties entered into a settlement agreement that calls for substantial increases in funding, primarily for low income school districts, over the next five years. *See, Settlement Stipulation*, SCHOOLFUNDING.INFO (2020)

<http://www.schoolfunding.info/wp-content/uploads/2020/10/Delaware-settlement-stipulation-and-order-final-.pdf>. The settlement provides that the case will be dismissed by August 15, 2021, if the state has complied with its requirements by that date, but the settlement further provides that the case may be reinstated over the next 4 years if the state fails to comply with requirements for further increases. Although the case has been settled, since it has not been formally dismissed, it cannot yet be deemed an "unappealed trial court decision." Accordingly, Delaware has not been included in this article as a case that has definitively held that there is a constitutional right to a sound basic education.

are justiciable, it is significant that despite the recession, state courts have established important new precedents upon which future plaintiffs may rely in bringing new cases even in states where the courts ruled that the evidence presented in recent cases did not warrant judicial relief. Specifically, since 2008, the courts in six additional states have held that challenges to state education finance systems are justiciable (Connecticut, Colorado, Minnesota, New Mexico, Pennsylvania and South Dakota); and in only three states have the courts issued new decisions holding that the adequacy claims were not justiciable (Indiana, Missouri and Mississippi.)<sup>80</sup> Perhaps the most notable of these decisions was the Pennsylvania Supreme Court's 2017 holding that overruled three long-established prior rulings that had specifically held that these issues were not justiciable.<sup>81</sup>

Although most decisions that declare that there is an enforceable right to education under the state constitution uphold the immediate plaintiffs' claims, such declarations also sometimes occur in cases where

---

<sup>80</sup> Two of the cases that ruled against plaintiffs on justiciability grounds during this period, Florida, *Citizens for Strong Sch., Inc v. Florida State Bd. of Educ.* *supra* note 70 and Rhode Island, *Woonsocket Sch. Comm. v. Chafee*, *supra* note 74, were restating prior non-justiciability holdings. The Florida Supreme Court had previously ruled that the state constitution's education clause was not enforceable, *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996), but following that decision, voters approved a referendum that substantially revised the education clause; the 2019 case held that the cited provisions of the new constitutional language also do not provide manageable standards for judicial review. The Rhode Island Supreme Court's decision reiterated its previous position that school funding issues are not justiciable; in doing so, it rejected the plaintiffs' arguments that the state's recent standards-based reforms provided judicially manageable standards.

<sup>81</sup> *Danson v. Casey*, 399 A.2d 360 (Pa.1979); *Marrero ex rel. Tabalas v. Com.*, 739 A.2d 110 (Pa. 1999); *Pennsylvania Ass'n of Rural and Small Schools v. Ridge*, 737 A.2d 246 (Pa. 1999.)

2] State Courts and Education Finance  
 the court finds for the defendants on the facts of the current case, as did the South Dakota Supreme Court in its 2011 ruling. There, the Court held that the constitution guarantees students “an adequate and quality education,”<sup>82</sup> but after a trial, it determined that the plaintiffs had not shown that the state’s education finance system is “clearly and unmistakably” unconstitutional and that “there is no reasonable doubt that it violates fundamental constitutional principles.”<sup>83</sup> In other situations, courts have held in ruling on a motion to dismiss that the adequacy issues are justiciable, but later, after reviewing the evidence at trial, they determined that the plaintiffs have not proven their case. Thus, in Colorado, after ruling in its 2009 *Lobato* decision that plaintiffs’ claim that students were being denied their right to a “thorough and uniform” education is “justiciable,”<sup>84</sup> the Colorado Supreme Court decided four years later, after the trial, that the plaintiffs had not met their burden to establish that the system was not “rationally related” to the constitutional mandate of a “thorough and uniform” system of public education.”<sup>85</sup> Similarly, after the Connecticut Supreme court ruled that the case was justiciable in denying a motion to dismiss in the *Coalition for Educational Funding* case,<sup>86</sup> it subsequently affirmed the trial court’s determination that

---

<sup>82</sup> Davis, *supra* note 75, at 641.

<sup>83</sup> *Id.*

<sup>84</sup> *Lobato v. State*, 218 P.3d 358, 368 (Colo. 2009). This decision distinguished the current adequacy claim, which the court held to be justiciable, from a prior ruling that had denied plaintiffs’ “equity claims” on rational relationship grounds. *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982.)

<sup>85</sup> *Lobato v. State*, 304 P.3d 1132, 1141 (Colo. 2013).

<sup>86</sup> *Conn. Coal. For Justice in Educ. Funding v. Rell (Rell)*, 990 A.2d 206 (Conn. 2010). This decision added to the Court’s previous upholding of an equity claim, in *Horton v. Meskill*, 376 A.2d 359 (1977), a declaration that there was an enforceable right to “an education suitable to give [students] the opportunity to be responsible citizens able to participate fully in democratic institutions.” *Rell*, 990 A.2d at 253.

the state had provided its students “minimally adequate educational resources.”<sup>87</sup>

Certainly, the recession affected judicial attitudes in the school funding cases.<sup>88</sup> Plaintiffs’ won-lost record, no matter how it is calculated, was lower than in the previous periods, and courts in states like Colorado and Connecticut, which had issued strong justiciability rulings before the recession fully took hold, imposed very heavy burdens of proof on the plaintiffs and reversed lower court decisions that had found for the plaintiffs a few years later.<sup>89</sup> However, it is also

---

<sup>87</sup> Conn. Coal. for Justice in Educ. Funding v. Rell, 176 A.3d 28 (Conn. 2018). The court also reversed the lower court’s further determination that the state’s educational policies in regard to the specifics of the school funding formula, its academic content standards and graduation requirements, its teacher evaluation and compensation systems and its programs for special education were all so irrational that they were depriving students in low wealth districts a minimally adequate education. The Supreme Court held that these issues involved matters of educational policy that should be determined by the legislature, and not by the court.

<sup>88</sup> See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (arguing that the meaning of constitutional rights is not settled in a vacuum; it is shaped by judicial appraisals of “the threat of undesirable remedial consequences” that “motivat[e] courts to construct the right in such a way as to avoid those consequences”); see also, Powell, Rodriguez files, *supra* note 35, at 99-101 (discussing likely impact of a school funding remedy on school districts in his home state of Virginia); Hutt, Klasik & Tang, *supra* note 2, find that when economic conditions are strong, judges are more likely to side with plaintiffs and issue orders calling for the legislature to increase school spending, and that when state governments face steep deficits, judges are far less likely to impose new spending mandates.

<sup>89</sup> Of course, changes in the composition of the members of the courts also have an impact on judicial outcomes. For example, the entire Connecticut Supreme Court turned over between the 2010 decision on justiciability and the 2018 decision on the merits for the defendants. *Justices of the Connecticut Supreme Court*, CONNECTICUT SUPREME COURT HISTORICAL SOCIETY (Nov. 20,

2] State Courts and Education Finance  
 important to consider that since most states had already taken positions on the justiciability of school funding cases before the recession, there were fewer new constitutional paths to plough.

We also should take into account another important measure of the state courts' attitude toward constitutional rights to adequate and/or equitable school funding, *i.e.* whether the large number of state courts that had in the past declared that students had such a constitutional right would continue to enforce those rights even during times of severe fiscal constraint. By this measure, plaintiffs fared remarkably well.

The vast majority of reported follow-up or compliance decisions strongly favored plaintiffs, rather than defendants. Plaintiffs prevailed in rulings of highest state courts or unappealed lower court rulings in post-recession follow-up or compliance cases in seven states

---

2021),  
<https://www.jud.ct.gov/HistoricalSociety/justices/default.htm>.  
*Supreme Court Justices*, CONNECTICUT JUDICIAL BRANCH (Nov. 20, 2021), <https://www.jud.ct.gov/external/supapp/supjustices.htm>. In Colorado, where Supreme Court Justices face decennial retention elections, two Justices resigned after joining the justiciability opinion in 2009; one of their replacements joined the opinion for the defendants in 2013 and the other recused herself. *Colorado Supreme Court Overturns Lobato School Funding Lawsuit (as Predicted by Clear the Bench Colorado)*, CLEAR THE BENCH COLORADO (May 27, 2013), <http://www.clearthebenchcolorado.org/2013/05/>.

California,<sup>90</sup> Kansas,<sup>91</sup> New Jersey,<sup>92</sup> New Hampshire,<sup>93</sup> New York,<sup>94</sup> North Carolina,<sup>95</sup> South Carolina,<sup>96</sup> and

---

<sup>90</sup>Cal. Sch. Bds. Ass'n v. State, 192 Cal.App.4th 770 (2011) (unappealed Court of Appeals decision upholding claim that state constitution requires the legislature to reimburse school districts for the costs they incur in complying with new state mandates); Cal. Sch. Bds. Ass'n v. Cohen (2015) and Cal. Sch. Bds. Ass'n v. Bosler (2018) (unpublished, <https://www.csba.org/Newsroom/PressReleases/2019/2019-0702ELAlitigation>) (California Superior Court holding that the State had manipulated the system established by Proposition 98, a constitutional amendment requiring public schools to receive stable funding aligned with the state's economic growth; 2019 settlement called for all California public schools to receive a repayment of \$686 million due to prior year underpayments); Ella T. v. State of California, Case No. BC 685730 (Cal. Sup. Ct. 2018) (unpublished ruling, <http://www.publiccounsel.org/tools/assets/files/1037.pdf>; complaint, 2017 WL 6033628), (motion to dismiss claim that failure to provide basic literacy denies minority students equal educational opportunity denied; 2020 settlement agreement committed the state to provide services in 75 lowest performing schools in the state).

<sup>91</sup>Gannon v. State, 319 P.3d 1196 (Kan. 2014); Gannon v. State, 368 P.3d 1024 (Kan. 2016); Gannon v. State, 372 P.3d 1181 (Kan. 2016); Gannon v. State, 390 P.3d 461 (Kan. 2017); Gannon v. State, 402 P.3d 513 (Kan. 2017); Gannon v. State, 420 P.3d 477 (Kan. 2018); Gannon v. State, 443 P.3d 294 (Kan. 2019).

<sup>92</sup>Abbott v. Burke, 20 A.3d 1018 (N.J. 2011).

<sup>93</sup>City of Dover v. State of New Hampshire, 219-2015-cv-312, Sup. Ct. Sullivan (2016); *see also*, Contoocook Valley School District v. State, 2021 WL 1096896 (N.H. 2021) (motion to dismiss denied; case remanded to the trial court to review claim that the actual amounts determined by the legislature have failed to meet its obligation to fully fund an adequate as required by the state constitution)

<sup>94</sup>Aristy-Farer v. State, 29 N.Y.3d 501 (N.Y. 2017); Maisto v. State of New York, 149 N.Y.S.3d 599 (3d Dep't, 2021).

<sup>95</sup>Hoke Co. Sch. Bd v. State, 731 S.E.2d 691 (N.C. App. 2012). This case was held to be moot following legislature's amendments to pre-kindergarten program. Hoke Co. Bd. of Ed. v. State, 749 S.E.2d 451 (N.C. 2013); Hoke Co. Sch. Bd. v. State, Consent Order on Remedial Action, 95-CVS -1158 (N.C. Gen. Ct. of Justice, Sup. Ct. Div. 2020),

2] State Courts and Education Finance  
Washington<sup>97</sup>) – and in multiple rulings in some of these states.<sup>98</sup> Defendants prevailed in only two post-recession compliance decisions, in Arkansas<sup>99</sup> and Texas.<sup>100</sup>

The premium that many of these courts placed on ensuring compliance with their previous rulings is

---

<https://s3.amazonaws.com/carolinajournal.com/app/uploads/2020/01/21164527/Jan-21-order.pdf>

<sup>96</sup> *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157 (S.C. 2014). In a prior ruling in this case, 515 S.E.2d 535 (S.C. 1999), the state supreme court had remanded the case for trial. The trial was held in 2003-2004, an appeal and cross-appeal were filed, and oral argument was held in 2008 and again in 2012. The 2014 decision upheld the aspects of the trial court decision that favored plaintiffs and reversed many aspects of that decision that favored defendants. This decision can best be classified as a compliance decision because of the long delay in the court’s consideration of this appeal, and the fact that after the recession it requested a second oral argument in 2012 before issuing its decision in 2014.

<sup>97</sup> *McCleary v. State*, 269 P.3d 227 (Wash. 2012).

<sup>98</sup> Plaintiffs have also prevailed to date in a number of lower court compliance decisions. *See*, *Boyd v. State* (Vt. Sup. Ct. 2019) (denying motion to dismiss challenge to impact of funding formula on rural districts), appeal pending; *Bradford v. Md. State Bd. of Educ.*, 24-C-94-340058 (Md. Cir. Ct, 2019), [https://www.aclu-md.org/sites/default/files/field\\_documents/2020\\_bradford\\_motion\\_to\\_dismiss\\_opinion.pdf](https://www.aclu-md.org/sites/default/files/field_documents/2020_bradford_motion_to_dismiss_opinion.pdf) (trial court denies motion to dismiss petition to revive 25 year- old law suit, order the state to provide \$290 in immediate funding increases and develop a comprehensive plan to ensure that all Baltimore City students receive a “thorough and efficient education”); *Maisto v. State of New York*, 149 N.Y.S. 3d 599 ( 3<sup>rd</sup> Dept 2021) ( students from poverty backgrounds are entitled to extensive supportive services), appeal pending.

<sup>99</sup> *Deer/Mt. Judea Sch. Dist. v. Hutchinson* (No. 60CV-10-69360, Cir. Ct. Ark. June 7, 2016) (Court rejects claim that state failed to provide small remote school districts the additional funding they need to provide students a substantially equal opportunity for an adequate education).

<sup>100</sup> *Morath v. Tex. Taxpayer and Student Fairness Coal.*, 490 S.W.3d 826 (Tex. 2016) (holding that adequacy depends not on inputs but on outputs – *i.e.* results, and schools passed the “results” test because the overwhelming majority of school districts and individual campuses met state accountability and accreditation standards).

exemplified by the fact that between 2014 and 2019, the Kansas Supreme Court issued no less than seven compliance rulings, several of which threatened to shut down the entire state education system if the state legislature did not appropriate the full amount of funding required by the courts' prior decisions; the state finally fully complied in 2019.<sup>101</sup> The Washington Supreme Court actually did hold the state in contempt and imposed monetary fines until compliance was finally achieved in 2018.<sup>102</sup>

In a number of these cases, the state supreme courts expanded the previously established rights. Thus, in its 2012 *McCleary* decision, the Washington Supreme Court reiterated the importance of the constitutional right it had established in 1978 in *Seattle School District No. 1 v. State*<sup>103</sup> and explicated that definition by emphasizing the state's "paramount" obligation to provide all students an "ample" education.<sup>104</sup> The Kansas Supreme Court, in its 2017 decision, substantially strengthened the adequacy definition it had applied in previous decisions by fully adopting the demanding "Rose" standard.<sup>105</sup>

To the extent that one can generalize about trends in court decisions, plaintiffs' 78% success rate in follow-up cases or cases alleging noncompliance with past rulings may indicate that even in times of fiscal constraint, courts will adhere to the well-established doctrine that cost considerations cannot affect the enforcement of established constitutional rights. The U.S. Supreme

---

<sup>101</sup> *Gannon v. State*, 443 P.3d 294 (Kan. 2019).

<sup>102</sup> See discussion of the history of the implementation of the *McCleary* decision at <http://www.schoolfunding.info/litigation-map/washington/#1485219774549-72fcfdc3-4082>

<sup>103</sup> *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978).

<sup>104</sup> *McCleary*, *supra* note 97.

<sup>105</sup> *Gannon v. State*, 319 P.3d 1196 (2014); see also *Rose v. Council for Better Educ., Inc.*, 790 S.W. 2d 186 (Ky. 1989).

2] State Courts and Education Finance  
 Court has held that “[f]inancial constraints may not be used to justify the creation or perpetuation of constitutional violations.”<sup>106</sup> State courts have also generally upheld this doctrine,<sup>107</sup> and specifically in education adequacy litigations. As the Kentucky Supreme Court put it, “the financial burden entailed in meeting [educational funding requirements] in no way lessens the constitutional duty.”<sup>108</sup>

On the other hand, while continuing to enforce constitutional requirements, many of the state courts were cautious in shaping the remedies they ordered, especially during the immediate recession and post-recession years. For example, in its 2011 *Abbott v. Burke*

---

<sup>106</sup> *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 392 (1992) (addressing defendants’ request to modify a consent decree remedying unconstitutional conditions of confinement for pretrial detainees). *See also* *Watson v. City of Memphis*, 373 U.S. 526, 537 (1963) (“[V]indication of conceded constitutional rights [to park desegregation] cannot be made dependent upon any theory that it is less expensive to deny than to afford them.”); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (“The saving of welfare costs cannot justify an otherwise invidious classification”); *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) (“[h]umane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations”); *Liddell v. State of Mo.*, 731 F.2d 1294, 1308 (8th Cir. 1984) (“Simply put, parsimony is no barrier to a constitutional remedy”).

<sup>107</sup> *See, e.g.*, *Klostermann v. Cuomo*, 463 N.E.2d 588 (N.Y. 1984) (rejecting state’s claim that they lacked funds to provide adequate services to mental health patients and stating that the state’s position was “particularly unconvincing when uttered in response to a claim that existing conditions violate an individual’s constitutional rights”); *Braam ex rel. Braam v. State*, 81 P.3d 851, 862–63 (Wash. 2003) (upholding foster children’s rights to basic services and reasonable safety, and stating “this court can order expenditures, if necessary, to enforce constitutional mandates”) (citing *Hillis v. State of Wash., Dep’t of Ecology*, 932 P.2d 139 (Wash. 1997)); *Blum v. Merrell Dow Pharm., Inc.*, 626 A.2d 537, 548 (Pa. 1993) (“[F]inancial burden is of no moment when it is weighed against a constitutional right”).

<sup>108</sup> *Rose v. Council for Better Educ.*, 790 S.W. 2d 186, 208 (Ky. 1989).

decision, the New Jersey Supreme Court, which had in the past issued a number of strong compliance rulings, ordered the governor and the legislature to rescind substantial budget cuts for 31 poor urban districts, but refused, on technical grounds, to include the rest of the state's school districts in the funding restoration order.<sup>109</sup> In the next section of this article, I will discuss ways in which courts can and should issue appropriate orders that fully enforce constitutional rights in school funding cases, consistent with proper separation of powers concerns.

### III. STATE COURT INVOLVEMENT IN SCHOOL FUNDING CASES IS NECESSARY AND APPROPRIATE

Reviewing the involvement of state highest courts in school funding cases since the time of *Serrano* 50 years ago, two salient trends stand out. First, plaintiffs have been remarkably successful: overall, final decisions of the courts in 31 states have declared that students have an enforceable right to education under their state constitutions,<sup>110</sup> and courts in 24 of these states have

---

<sup>109</sup> *Abbott v. Burke*, 20 A.3d 1018 (N.Y. 2011). The patterns of post-recession judicial decisions are discussed in more detail in Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855 (2012).

<sup>110</sup> Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Kansas, Kentucky, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. In addition to the decisions of the highest state courts in 29 states, this statistic also includes unappealed lower court decisions in Maryland and New Mexico. For details regarding all of these cases, see [www.schoolfunding.info](http://www.schoolfunding.info)

2] State Courts and Education Finance issued orders to enforce those rights.<sup>111</sup> These decisions have been issued in many predominantly urban states and in many largely rural states, in many “red” states and in many “blue” states. At the same time, however, 14 state courts have declared that these issues are not justiciable,<sup>112</sup> and five highest courts have not yet opined on the subject.<sup>113</sup>

Overall, this means that adequacy provisions are currently enforceable in 62% of the states (69% of the states that have ruled on the issue), and that in the majority of the states (53%) courts have issued rulings to enforce those rights. Moreover, even after the substantial reduction in available government revenues that occurred in the wake of the Great Recession of 2008, the vast majority of these courts have continued to enforce students’ constitutional rights, as plaintiffs have prevailed in 78% of the follow-up and compliance cases that have been issued since that time.

---

<sup>111</sup> Of the 31 states listed in note 110, all but the following have, at the time of this writing, issued decisions that have enforced these justiciable rights: In Minnesota and Pennsylvania, state supreme courts have ruled that the education adequacy decisions are justiciable, and the cases have been remanded for trial. In North Dakota, a lower court order was affirmed by three of the five members of the Supreme Court, but because the state constitution requires affirmance by four of the justices to invalidate any statute, the order was not enforced. In Colorado and South Dakota, the state supreme courts held that the immediate plaintiffs had not proven their cases, and in Virginia and Wisconsin, the court ruled against plaintiffs in equity cases but indicated that future adequacy claims would be justiciable. For details regarding all of these cases, *see* [www.schoolfunding.info](http://www.schoolfunding.info).

<sup>112</sup> Alabama, Florida, Georgia, Illinois, Indiana, Louisiana, Maine, Michigan, Mississippi, Missouri, Nebraska, Oklahoma, Oregon, and Rhode Island. For details regarding all of these cases, *see* [www.schoolfunding.info](http://www.schoolfunding.info).

<sup>113</sup> Delaware and Nevada, where cases are currently pending in the lower courts, Iowa, where the state Supreme Court has explicitly stated that it has not yet decided this issue, and Hawaii and Utah, where no cases have as yet been filed.

On the other hand, it is also true that in recent years, the pace of plaintiff victories has slowed, and the courts have tended to exhibit more caution in confronting state legislatures at the remedial stages of the litigations and in the follow-up and compliance cases. Noting these trends, even before the impact of the Great Recession had influenced events, Julia Simon-Kerr and Robynn K. Sturm explained why the maturation of the adequacy movement has posed new remedial challenges:

During the initial waves of adequacy litigation, courts could be responsive to plaintiffs merely by adopting a traditional judicial role: they could declare the constitutional right and leave the legislature to design a remedy. Recent evidence suggests that [in] second generation cases . . . separation of powers concerns were exacerbated by litigation strategies increasingly focused on appropriations as the benchmark and remedy for an inadequate education... This shift in emphasis implies to courts that any outcome favoring plaintiffs must entail explicitly ordering the legislature to spend more money, something every court is hesitant to do.<sup>114</sup>

Both the refusal of almost a third of the state highest courts to even accept jurisdiction of school funding cases, and the reluctance of other judges to take effective

---

<sup>114</sup> Julia Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83, 88-89 (2010).

2] State Courts and Education Finance  
 steps to enforce their judgments, are rooted in the concept of inappropriate “judicial activism” that suffuses the media, the political culture, and the conscious or subconscious attitudes of many judges themselves. This negative perception of the role of courts in resolving major social policy issues is, however, inconsistent with a proper understanding of the purpose of judicial review and the realities of how separation of powers should function in the 21<sup>st</sup> century.

The negative connotation of “judicial activism” and the notion that courts have somehow been usurping the role of the executive and legislative branches originated with the fierce opposition to federal desegregation decrees in the 1960s and 1970s. At the time, Harvard Professor Abram Chayes confronted these objections in a major article that described what he called the “new model” of public law litigation that was responding to the need for judicial involvement in the reform of schools and other public institutions that were violating constitutional or statutory rights. Chayes viewed this new judicial role as an aspect of the broader expansion of governmental activities in the welfare state era.<sup>115</sup> Malcolm Feeley and Edwin Rubin, agreeing with this perspective, put it this way:

[Judges] are part of the modern administrative state . . . and they fulfill their role within that context. Under certain circumstances that role involves public policy makings; as our state has become increasingly administrative and managerial, judicial policymaking has become both more necessary for judges to

---

<sup>115</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

produce effects and more legitimate as a general model of governmental action.<sup>116</sup>

That the courts' expanded role is a fundamental judicial reaction to deep-rooted social and political trends seems to be borne out by the fact that the activist stance initiated during the Warren Court era has persisted to a large extent through the Burger, Rehnquist, and Roberts years,<sup>117</sup> and that conservatives no less than liberals now tend to look to the courts routinely to remedy legislative or executive actions of which they disapprove.

In the 1980s, my colleague Arthur R. Block and I undertook two major empirical studies to test the validity of the competing arguments in the judicial activism debate in actual instances of educational policymaking by courts, legislatures, and a major administrative agency, the Office of Civil Rights in the U.S. Department of Health, Education and Welfare ("OCR").<sup>118</sup> We concluded, that, among other things, the

---

<sup>116</sup> MALCOM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 344 (1998).

<sup>117</sup> See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (upholding in part and invalidating in part the federal Affordable Care Act); Citizens United v. Fed. Election Com'n, 558 U.S. 310 (2010) (invalidating federal statute barring independent corporate expenditures for electioneering communications); Brown v. Plata, 563 U.S. 493 (2011) (affirming lower court order requiring California to free thousands of prisoners from overcrowded jails); Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (invalidating explicit use of racial classifications in voluntary school district student assignment plans); Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (June 23, 2021) (limiting schools' ability to regulate off-campus student speech).

<sup>118</sup> MICHAEL A. REBELL & ARTHUR R. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM (1982); MICHAEL A. REBELL & ARTHUR R. BLOCK, EQUALITY AND EDUCATION: FEDERAL CIVIL

2] State Courts and Education Finance  
 evidentiary records accumulated in the court cases were more complete and had more influence on the actual decision-making process than did the factual data obtained through legislative hearings. The latter tended to be “window dressing” occasions organized to justify political decisions that had already been made. Our study also found that the courts’ remedial involvement in school district affairs was both less intrusive and more competent than is generally assumed, largely because school districts and a variety of experts generally participated in the formulation of reform decrees, with the courts serving as catalysts and mediators. The courts’ “staying power” and their ability to respond flexibly to changed circumstances at the remedial stage were also markedly more effective than those of the legislatures and the administrative agency.

This is not to say, of course, that the executive and legislative branches do not have significant strengths in regard to policymaking that the courts lack. Our studies found, for example, that the legislatures’ “mutual adjustment” decision-making processes more effectively foster political compromises and that the “pragmatic-analytic” decision-making approach of the executive agency was most effective for grassroots implementation processes.

One of the major fallacies of those who argue that courts lack the institutional capacity to deal with complex social policy issues is that they focus on the limitations of the judicial branch, while ignoring the comparable institutional shortcomings of the legislative and executive branches. For example, Donald Horowitz, one of the foremost critics of the courts’ involvement in policy issues, catalogued a bevy of examples of alleged

---

RIGHTS ENFORCEMENT IN THE NEW YORK CITY SCHOOL SYSTEM (1985).

<sup>118</sup> A comparative analysis of the fact-finding capabilities of Congress and the courts reached similar conclusions. See Neal Devins, *Congressional Fact Finding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169–1214 (2001).

judicial incompetence, ranging from receiving information in a skewed and halting fashion to failing to understand the social context and potential unintended consequences of the cases before them.<sup>119</sup> As Professor Neil Komesar forcefully pointed out, however, Horowitz's critique, like that of many of his current disciples, was unreasonably one-sided:

Horowitz's study can do no more than force us to accept the reality of judicial imperfection. By its own terms it is not comparative, and that is far more damning than Horowitz supposes. All societal decisionmakers are highly imperfect. Were Horowitz to turn his critical eye to administrative agencies or legislatures he would no doubt find problems with expertise, access to information, characterization of issues, and follow-up. Careful studies would undoubtedly reveal important instances of awkwardness, error, and deleterious effect.<sup>120</sup>

Among the main criticisms of judicial intervention in the state court educational equity and adequacy cases were that the courts failed to "require[e] the efficient or cost-effective use of funds."<sup>121</sup> As Komesar pointed out, however, none of these critics have even claimed that the other branches of government have been more effective

---

<sup>119</sup> DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977).

<sup>120</sup> Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 698 (1988).

<sup>121</sup> Alfred A. Lindseth, *The Legal Backdrop to Adequacy*, in *COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN* 33 (Eric A. Hanushek, ed., 2006).

2] State Courts and Education Finance  
 than the courts in ensuring the productive use of educational funding.

Separation of powers issues need to be looked at in a different way. Instead of seeing active involvement of courts in enforcing social and economic rights as in some way usurping the powers of the legislative and executive branches, it is more appropriate to realize that substantial, enduring progress can only be made in complex, controversial policy areas through the active involvement of all three branches of government. Providing meaningful educational opportunities to all students in a cost-effective manner is a daunting challenge that no governmental entity has been able to accomplish so far. If the vision of meaningful equal educational opportunity is to be realized, it will require the sustained commitment of the courts, working collaboratively with the executive and legislative branches in dramatic new ways.

Successful advances in implementing meaningful educational opportunity have, in fact, generally occurred in the past when the judicial, legislative and executive branches have worked together collaboratively. For example, in the late 1960s, extensive desegregation of Southern schools was achieved by Congress' advancing the desegregation remedies formulated by the courts by enacting the Elementary and Secondary Education Act and Title VI of the 1964 Civil Rights Act, both of which were then actively enforced by the federal Office of Civil Rights.<sup>122</sup> Similarly, Congress enacted the Individuals with Disabilities Education Act (IDEA) to implement the rights of students with disabilities that had been articulated by two federal district courts,<sup>123</sup> and the IDEA continues to be broadly

---

<sup>122</sup> See MICHAEL A. REBELL, COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS 51–52 (2009).

<sup>123</sup> *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pa. Ass'n for Retarded Children v. Commonwealth*, 334 F. Supp.

enforced by the federal and state courts and the federal and state administrative agencies.

In considering the role of the courts when statutes or constitutional requirements regarding educational opportunities have been violated, the approach should be to consider, from a comparative institutional perspective, what functions courts can best undertake in collaboration with the other branches to promote effective school reform practices. To accomplish this critical task, what is needed is a “colloquy”<sup>124</sup> among the branches, rather than a competition. Such a colloquy should build on the realization that each of the three branches has specific institutional strengths and weaknesses regarding social policy making and remedial problem solving. The focus, therefore, should be on how the strengths of each of the branches can best be jointly brought to bear on remedying legal violations and solving critical social problems.

The courts’ principled approach to issues and their long-term staying power are essential for providing continuing guidance on constitutional or statutory requirements and sustained commitment to meeting constitutional goals. Legislatures, however, are better equipped to develop specific reform policies, and executive agencies are most effective in undertaking the day-to-day implementation tasks of explaining what must be done and how it can be accomplished, and then checking that districts and schools actually carry out those requirements. When disputes arise on whether specific reforms are, in fact, meeting constitutional or statutory requirements, judicial fact-finding mechanisms should be invoked because they are often more

---

1257 (E.D. Pa. 1971). *See also* H.R. Rep No. 332, 94th Cong., 1st Sess., 3–4 (1975) (stating that P.L.94-142, the predecessor statute to the IDEA, was enacted in response to these two litigations).

<sup>124</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 962 (1986).

2] State Courts and Education Finance

extensive, more probing, and more objective than legislative or administrative fact-finding approaches.<sup>125</sup>

From the comparative institutional perspective, Simon-Kerr and Sturm's insight that courts may be pushing the limits of separation of powers boundaries in ordering legislatures to appropriate specific amounts of money<sup>126</sup> is correct. Courts should avoid, to the maximum extent possible, directly confronting legislative prerogatives by mandating specific funding formulas or expenditure amounts. Undertaking cost analyses to determine the amount of resources needed to achieve stated policy goals is a proper legislative function, although judicial review may be needed at times to ensure that fair and objective processes are undertaken and the results are not improperly manipulated.<sup>127</sup>

Simon-Kerr and Sturm propose that instead of ordering specific funding increases, judicial remedies might include "bold" actions such as "ordering socio-economic integration or school choice options."<sup>128</sup> Other recent commentators have described and/or suggested remedial decrees in adequacy cases that would eliminate or revise teacher tenure and teacher evaluation

---

<sup>125</sup> Even some major critics of the role of the courts in educational policymaking acknowledge the significance of the courts' independent, efficient fact-finding role. See, ERIC A. HANUSHEK and ALFRED A. LINDSETH, *SCHOOLHOUSES, COURTHOUSES AND STATEHOUSES*, 285–287 (2009) (calling for extensive judicial factfinding at remedial stage of sound basic education litigations).

<sup>126</sup> Simon-Kerr & Sturm, *supra* note 114.

<sup>127</sup> At the remedial stage of an important Ohio case, the trial court was critical of the General Assembly because of "evidence of a conscious consideration by the State [to manipulate] Dr. Augenblick's methodology with an intent to lower the base cost of calculation" *DeRolph v. State*, 712 N.E. 2d 125, 194 (Ohio Ct. Common Pleas 1999). The Ohio Supreme Court upheld these findings, stating that "We are perplexed by the General Assembly's actions of enlisting an expert in the area of school financing and then, with no explanation, altering his method." *DeRolph v. State*, 728 N.E. 2d 993, 1007 (Ohio 2000).

<sup>128</sup> Simon-Kerr & Sturm, *supra* note 114, at 122.

statutes;<sup>129</sup> require equitable distribution of “quality teachers,”<sup>130</sup> call for “enforceable, results-driven education reform,”<sup>131</sup> or establish “individual rights” to reasonable class sizes or other specific educational opportunities.<sup>132</sup>

These approaches, are, however, also inconsistent with the separation of powers because, as with mandating specific expenditure amounts, they call for judicial involvement in basic policy matters that are more appropriately and effectively handled in the legislative and executive domains. Instead, in their initial remedial orders, courts should clearly articulate the basic constitutional or statutory principles at issue and order the legislative and executive branches to carry out their constitutional responsibilities by devising the specific means for ensuring compliance with these requirements. These orders may also include appropriate remedial guidelines, but not substantive policy prescriptions. For example, it would be appropriate for courts to order states to undertake objective cost analyses and then revamp their funding formulas and accountability mechanisms to ensure that all schools are provided the level of funding determined through such analyses. The details of the methodologies to be used in these studies and the development of the funding formulas and accountability devices to implement them should be left to executive and legislative discretion, so long as these

---

<sup>129</sup> William Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897, 1927 (2017).

<sup>130</sup> Derek W. Black, *Taking Teacher Quality Seriously*, 57 WM. & MARY L. REV. 1597 (2016).

<sup>131</sup> Julie Zwibelman, *Broadening the Scope of School Finance and Resource Comparability Litigation*, 36 Harv. C.R.-C.L. L. Rev. 527, 529 (2001)

<sup>132</sup> Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 Ga. L. Rev. 949 (2014)

2] \_\_\_\_\_ State Courts and Education Finance  
 processes are fair, faithfully executed and meet the  
 applicable constitutional or statutory goals.<sup>133</sup>

#### IV. A NEW PARADIGM FOR PROVIDING “MEANINGFUL” REMEDIES IN SOUND BASIC EDUCATION CASES

As discussed above,<sup>134</sup> most education clauses in state constitutions incorporate “positive rights” that call for affirmative government action to provide substantive benefits to students, in contrast to the “negative rights” of the federal constitution that prohibit government from taking certain actions like interfering with free speech. Too few state judges fully understand and conscientiously act on this distinction. The educational opportunities that result from judicial remedies in sound basic education cases should aim to actually achieve the educational purposes of the state constitutional mandates, as the courts themselves have interpreted them. In most cases, that would require ensuring the implementation of extensive, substantive educational reforms that include, but go well beyond, increasing funding levels and ensuring that funding formulas are equitable.

---

<sup>133</sup> See, e.g., the remedial order issued in: Campaign for Fiscal Equity (CFE) v. State of New York, 801 N.E. 2d. 326, 348 (NY 2003):

[The state must] ascertain the actual cost of providing a sound basic education in New York City. Reforms to the current system of financing school funding and managing schools should address the shortcomings of the current system by ensuring, as a part of that process, that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education. Finally, the new scheme should ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education.

<sup>134</sup> See discussion, *supra* at pp. 16–18.

Can courts put such ambitious judicial remedies into effect without overstepping the separation of powers parameters outlined in the previous section? Can they direct and oversee school reform processes that accomplish substantial, meaningful results without encroaching on the appropriate boundaries for legislative and executive policymaking prerogatives? The balanced separation of powers scheme that was outlined by the U.S. Court of Appeals for the Fifth Circuit in *Castaneda v. Pickard*<sup>135</sup> provides an important framework for responding positively to these questions. The major issue before the Court in *Castaneda* was whether the language remediation program the school district had implemented satisfied the requirements of the federal Equal Educational Opportunity Act of 1974. The court developed a three-stage process for reviewing whether the district's development and implementation of an educational program for English language learners complied with the statutory requirements. Under this approach, the court's role was to:

- 1.[A]scertain that a school system is pursuing a program informed by an educational theory recognized as sound by some experts in the field, or, at least deemed a legitimate experimental strategy;
2. Determine whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school;
3. Ensure that "after being employed for a period of time sufficient to give the plan

---

<sup>135</sup> 648 F.2d 989 (5th Cir. 1981)

2] \_\_\_\_\_ State Courts and Education Finance  
 a legitimate trial, [the plan] produce[s]  
 results indicating that the . . . barriers  
 confronting students are actually being  
 overcome...”<sup>136</sup>

The *Castaneda* framework for judicial oversight properly balances the constitutional responsibilities of the courts and the policymaking prerogatives of the political branches. The framework is remarkably consistent with the functional strengths and weaknesses of the branches as identified by comparative institutional analysis. It calls upon the courts to identify the legal principles to be followed and utilizes the courts’ “staying power” to ensure that the political branches carry out their responsibilities on a sustained basis, but, so long as the school officials are using sound professional judgment to develop and implement effective policies and programs, the detailed policymaking and administrative functions are left in their hands. State courts should apply this remedial approach in crafting remedies to promote meaningful educational opportunities in constitutional sound basic education cases.

#### A. Reviewing Educational Policies and Programs

The first stage of the *Castaneda* remedial approach as applied in the sound basic education context

---

<sup>136</sup> *Id.* at 1009–10. The *Castaneda* framework has been adopted by federal courts throughout the country in other cases involving the implementation of language remediation programs. *See, e.g.,* Gomez v. Ill. State Board of Ed., 811 F.2d 1030 (7th Cir. 1987), Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698 (N.D. Cal. 1989), Valeria G. v. Wilson, 12 F. Supp.2d 1007 (N.D. Cal. 1998); U.S. v. Texas, 572 F. Supp.2d 726 (E.D. Tex. 2008); *see also*, Horne v. Flores, 557 U.S. 433, 458 (2009); *id.* at 477–478 (Breyer, J., dissenting).

would not involve the choice of a specific type of language remediation program, but the same division of responsibility between the court and the state or local defendants should apply. The Court should articulate the constitutional principles that must be satisfied but should allow the state authorities to select the particular policies and programs that they propose to use to satisfy those principles.<sup>137</sup> So long as these programmatic decisions are made in good faith and reflect reasonable professional judgments, the court should approve the defendants' choices.

As noted above, most highest state courts have defined the purposes of the education clauses in their state constitutions in terms of preparing students to function capably as citizens and to obtain employment in the competitive job market.<sup>138</sup> Some courts have articulated these purposes in more expansive terms. For example, in *Rose v. Council for Better Education*,<sup>139</sup> the Kentucky Supreme Court defined a constitutionally acceptable education as one that has as its goal the development in each and every child of the following seven capacities:

1. Sufficient oral and written communication skills to enable students

---

<sup>137</sup> Ideally, in doing so, the state would establish a process that allows and encourages meaningful input from the plaintiffs, interested advocacy groups and members of the interested public. Experience has demonstrated that remedies tend to be most successful when there is strong public engagement in their development and implementation. See Michael A. Rebell, *Adequacy Litigations: A New Path to Equity Adequacy Litigations* in BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY (Janice Petrovich and Amy Stuart Wells eds., 2005); MICHAEL PARIS, FRAMING EQUAL OPPORTUNITY: LAW AND THE POLITICS OF SCHOOL FINANCE REFORM (2010).

<sup>138</sup> See cases cited, *supra* note 29.

<sup>139</sup> 790 S.W.2d 186, 212 (Ky. 1989)

2] State Courts and Education Finance

to function in a complex and rapidly changing civilization;

2. Sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
3. Sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
4. Sufficient self-knowledge and knowledge of his or her mental and physical wellness;
5. Sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
6. 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
7. 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.

This explication of the goals of education has been especially influential—it has been followed by the highest courts in at least eight other states.<sup>140</sup>

If a court has acknowledged that the state constitution requires the state to provide all students the opportunity to attain these capacities, it should order the state at the remedy stage of a sound basic education litigation to establish an educational program that makes all feasible attempts to reach these goals ----- for *all* students. Courts that have not articulated the purposes of education with similar particularity should do so in order to provide the legislature, the executive branch and the school authorities with a meaningful framework and practicable guidelines for compliance with their constitutional requirements.

Most state courts, however, have not required the state to undertake the extensive reforms needed to create an education system that truly complies with constitutional requirements as the judges themselves have defined them. Instead, they have accepted remedial plans that abstractly increase funding levels and/or render funding formulas somewhat more equitable without tying those funding reforms to an analysis of the actual number of dollars needed to provide a sound basic education or a thorough and efficient education to all students. Even courts that have articulated the purposes

---

<sup>140</sup> The Rose standards have been explicitly adopted by courts in Kansas, Massachusetts, and New Hampshire. *See Gannon v. State*, 319 P.3d 1196 (Kan. 2014), *McDuffy v. Sec’y of the Exec. Off. of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993); *Claremont v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997), and have substantially influenced the constitutional definitions adopted by the courts in Alabama, Arkansas, North Carolina, South Carolina, and Texas. *See Alabama Opinion of the Justices*, 624 So.2d 107 (Ala. 1993); *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997); *Abbeville Cty. Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999); *Neeley v. W. Orange Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005).

2] \_\_\_\_\_ State Courts and Education Finance  
of education in meaningful, concrete terms, rarely seriously attempt to induce the state to make the systemic reforms necessary to meet state constitutional requirements.

The extensive, systemic reforms required for true constitutional compliance are not aspirational visions of judicial imagination. They are reflective of the current educational policy priorities of both the federal and state governments. The nation's prime educational policy, as established in recent decades by the Congress and practically all the state legislatures, is that a) virtually all children can learn at high proficiency levels,<sup>141</sup> b) existing achievement gaps can be closed,<sup>142</sup> c) states should provide all students a "significant opportunity to receive a fair, equitable, and high-quality education,"<sup>143</sup> and d) the states must "[e]stablish ambitious State-designed long-term goals, which shall include measurements of interim progress toward meeting such goals,"<sup>144</sup> and they must undertake "comprehensive support and improvement activities" in regard to schools

---

<sup>141</sup> This is the aim of the challenging content standards that all of the states have adopted, *see* discussion, *supra* at p. 12; "The standards shall cover grades kindergarten through twelve and shall clearly set forth the skills, competencies and knowledge expected to be possessed by all students at the conclusion of individual grades or clusters of grades," History of Massachusetts' Learning Standards, MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION (Sept. 25, 2015), <https://www.doe.mass.edu/LearningStandards.html>; "The standards were created to ensure that all students graduate from high school with the skills and knowledge necessary to succeed in college, career, and life, regardless of where they live." *About the Standards*, COMMON CORE STATE STANDARDS INITIATIVE (July 2, 2021), <http://www.corestandards.org/about-the-standards/>.

<sup>142</sup> Every Student Succeeds Act (ESSA), Statement of Purpose, 20 U.S.C. § 6301.

<sup>143</sup> *Id.* The term "Significant" is essentially synonymous with "meaningful." *See, e.g.*, AMERICAN HERITAGE COLLEGE DICTIONARY 1268 (3d ed. 1997).

<sup>144</sup> 20 U.S.C. §6311(c)(4)(A).

that are not making sufficient progress in meeting state standards.<sup>145</sup>

The No Child Left Behind Act (“NCLB”), adopted in 2002, had, in fact, required the states to ensure that 100% of American students would be proficient in meeting challenging state standards by 2014.<sup>146</sup> Although that overly-ambitious goal clearly was not realized, the current Every Student Succeeds Act (“ESSA”) still requires each state to provide all students a “significant opportunity” to receive a “high quality education” and requires states to establish “ambitious State-designed long-term goals,” to achieve these ends.<sup>147</sup>

Providing all students a *meaningful* opportunity for a *high quality education* is what is needed to address the racial inequalities that historically have massively disadvantaged African-American, Native American and other students and that substantially persist today. The Black Lives Matter movement, and the recent wave of unjustifiable police killings of black people, have triggered wide-spread commitments to identifying and eliminating the systemic racism that most white people now realize permeates many of America’s core institutions.<sup>148</sup> Providing truly meaningful educational

---

<sup>145</sup> 20 U.S.C. §6311(d).

<sup>146</sup> No Child Left Behind Act, 20 U.S.C. §6311(b)(2)(F) (2006) (current version at 20 U.S.C. §6301 et seq.).

<sup>147</sup> 20 U.S. C. §6301; 20 U.S.C. §6311(c)(4)(A).

<sup>148</sup> According to Monmouth University polls, the percentage of Americans who agreed that racial and ethnic discrimination is a big problem rose from 51% in January 2015 to 68% in July 2016 and to 76% by early June, 2020; only 7% of Americans believed that racial discrimination was not a problem. Even 54% of self-identified Republicans agreed that racial discrimination is a big problem. As of June, 2020, 71% of Americans agreed and just 26% disagreed that Black Lives Matter has brought attention to real racial disparities in America. *Partisanship Drives Latest Shift in Race Relations Attitudes*,

2] State Courts and Education Finance

opportunities to students of color is an important part of this reckoning. Black and brown students historically have been systematically denied meaningful educational opportunities by the extensive inequities in educational funding revealed by the sound basic education cases,<sup>149</sup> by segregated school systems that have persisted even after *Brown v. Board of Education* outlawed *de jure* segregation in the schools,<sup>150</sup> and by complacent attitudes of educational policy makers who have implicitly assumed that “realistically” little could be done to remake school systems so that they truly can provide meaningful educational opportunities to all

---

MONMOUTH UNIVERSITY POLL (July 8, 2020), [https://www.monmouth.edu/polling-institute/documents/monmouthpoll\\_us\\_070820.pdf](https://www.monmouth.edu/polling-institute/documents/monmouthpoll_us_070820.pdf). Although the percentage of Americans labelling racial discrimination dipped somewhat as a result of partisan reactions to the George Floyd demonstrations, in late June 2020, 67% of all respondents, including 40% of Republicans still agreed that racial discrimination is a big problem. *Id.* As of April, 2021, 70% of Americans supported “greater efforts to achieve racial equity that go beyond current laws on providing equal opportunities” and only 27% were opposed. *Public Weighs In On Potential Race Relation Impact Of Trial Verdict*, MONMOUTH UNIVERSITY POLL (April 15, 2021), [https://www.monmouth.edu/polling-institute/documents/monmouthpoll\\_us\\_041521.pdf](https://www.monmouth.edu/polling-institute/documents/monmouthpoll_us_041521.pdf).

<sup>149</sup> Overall, in 2016, school districts that predominantly serve students of color received \$23 billion less in funding than predominantly white school districts in the United States, despite serving the same number of students. *Nonwhite Schools Districts Get \$23 billion less than White Districts Despite Serving the Same Number of Students*, EDBUILD (Feb. 2019), <https://edbuild.org/content/23-billion#CA>.

<sup>150</sup> As a result of a waning of assiduous enforcement of school desegregation requirements by the U.S. Supreme Court since 1973, and its failure to outlaw *de facto* segregation, in 2000, more than 70% of black and Latino students attended predominantly minority schools, a higher percentage than 30 years earlier. Furthermore, between 1980 and 2003, the percentage of white students in schools attended by the average black student fell from 45% to 20%. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 869–71 (2007) (Appendix A to opinion of Breyer, J., dissenting).

students. As a result, achievement of black and brown students is significantly below that of white and Asian students.<sup>151</sup>

To eliminate systemic racism in education, some have proposed education finance monetary reparations,<sup>152</sup> or “abolitionist teaching” that would radically remake the schools.<sup>153</sup> Such approaches are obviously highly controversial. But a significant approach to eliminating systemic racism in education that can feasibly be undertaken without stirring substantial polarized controversy is taking concrete action to truly implement the nation’s long-standing bipartisan commitment to providing *meaningful* educational opportunities to *all* students. Such actions would have a dramatic impact on mitigating systemic racism, since students of color have been the major victims of historic funding inequities and patterns of education neglect,<sup>154</sup> but they would also provide new opportunities for low-income students of all backgrounds and thereby promote a spirit of cohesion

---

<sup>151</sup> For example, in 2019, 44% of white 8<sup>th</sup> grade students, but only 13% of black and 20% of Hispanic students were meeting the proficiency standards of the National Assessment of Educational Progress (“NAEP”). *National Assessment of Educational Progress*, NAT’L CTR. FOR EDUC. STAT. (2021), <https://nces.ed.gov/nationsreportcard/>

<sup>152</sup> See, e.g., Preston C. Green III, Bruce D. Baker, and Joseph O. Oluwole, *School Finance, Race, and Reparations*, 27 WASH. & LEE J. CIV. RTS. & SOC. JUST. 483 (2021).

<sup>153</sup> BETTINA L. LOVE, *WE WANT TO DO MORE THAN SURVIVE: ABOLITIONIST TEACHING AND THE PURSUIT OF EDUCATIONAL FREEDOM* (2019).

<sup>154</sup> For example, 45% of Black students and 44% of Hispanic students attend the high-poverty schools that would benefit most from the approach to remedial reform I am proposing. *Free and Reduced Price Lunch*, NAT’L CTR. FOR EDUC. STAT. (July 2010), [https://nces.ed.gov/pubs2010/2010015/indicator2\\_7.asp#5](https://nces.ed.gov/pubs2010/2010015/indicator2_7.asp#5).

2] State Courts and Education Finance that is critical for overcoming the deep political and cultural divisions that currently plague our county.<sup>155</sup> Meaningful educational opportunity requires that states and school districts take all feasible steps to accomplish four goals: 1) eliminate disparities in the availability of basic educational resources like qualified teachers, reasonable class sizes, adequate curricula, books, computers and technology, and school facilities; 2) provide effective programs for English language learners and students with disabilities; 3) offer a range of supplementary and supportive services such as early childhood, after school and summer programs, and mental and physical health services, as needed, to prepare all students to be ready to learn;<sup>156</sup> and 4) ensure that students are receiving the full range of knowledge, skills, experiences and values they need to become capable citizens and competitive workers.<sup>157</sup>

North Carolina Superior Court Judge David Lee has already taken significant steps to implement thorough-going reforms aimed at actually providing all students meaningful educational opportunities in a manner that is consistent with this proposed approach. In 2018, with the consent of the governor and the state board of education, he appointed an independent

---

<sup>155</sup> See, GEORGE PACKER, *LAST BEST HOPE: AMERICA IN CRISIS AND RENEWAL* (2021.)

<sup>156</sup> See Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. CIV. RTS-CIV. LIB. L. REV. 47 (2012.).

<sup>157</sup> See Debra Satz, *Equality, Adequacy and Educational Policy*, 3 EDUC. FIN. & POL'Y 424 (2008) (arguing that education adequacy must be judged not in terms of achievement scores but in terms of achievement of civic equality); MICHAEL A. REBELL, *FLUNKING DEMOCRACY: SCHOOLS, COURTS AND CIVIC PREPARATION* (2018). Pro-active advancement of racial integration in the schools would help advance these initiatives. Although state courts can require school districts to take a number of feasible steps to promote racial integration, *see id.* 143–148, major reforms to truly desegregate the schools could not be undertaken without substantial revision of the applicable U.S. Supreme Court case law in this area.

consultant to develop comprehensive recommendations for actions that would be necessary to achieve sustained compliance with the constitutional mandates articulated in that state's long-pending sound basic education litigations.<sup>158</sup> The consultant was charged with recommending specific actions the state should take to: a) provide a competent, certified, well-trained teacher in every classroom and a well-trained, competent principal for every public school; and b) identify the resources necessary to ensure that all children in public school, including those at risk, have an equal opportunity to obtain a sound basic education, as defined in *Leandro and Hoke*.

A year later, the consultant, West Ed, issued a 300-page report that called for substantive educational reform. The report identified enhancements to teacher and principal recruitment, payment and supports, expanded pre-kindergarten programs, extensive programs and supports to meet the educational needs of all students in high-poverty schools, and new approaches for assessment, accountability, and education finance reform. In 2020, the Court issued a consent order adopting these recommendations and requiring the defendants to submit a comprehensive remedial plan for implementing these extensive changes over the next 8 years. In March, 2021, the Governor and the State Board of Education submitted such a plan, which they estimated would cost approximately \$5.6 billion to implement over the next seven years. The judge then approved the plan and ordered it to be "implemented in

---

<sup>158</sup> *Leandro v. State of North Carolina*, 488 S.E.2d 249 ( N.C.,1997), and *Hoke Cty Bd of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004.)

2] \_\_\_\_\_ State Courts and Education Finance  
 full and in accordance with the timelines set forth  
 therein.”<sup>159</sup>

## B. Ensuring Effective Implementation

The second stage of the *Castaneda* process calls for the Court to monitor the implementation of the programmatic reforms to which the state has committed, ensure that adequate funding is actually provided and confirm that an effective accountability system has been put in place.<sup>160</sup> In past sound basic education cases,

---

<sup>159</sup> Hoke Cty. Bd of Educ. v. State, Order of June 7, 2021, p.7. The actual cost of the plan would likely be much higher because some recommended items — like raising pay for teachers, principals and assistant principals — did not have a total cost estimate. Much of the new funding, however, would have to come from the Republican-led General Assembly, which has not been a party to the case, and, as of September 2021, the legislature had not appropriated sufficient funding to support the first stage of the plan’s implementation, and the court had scheduled a hearing to consider options for dealing with this matter. For more up-to-date information about these developments, see *North Carolina Recent Events*, SCHOOLFUNDING (Sept. 24, 2021), <http://www.schoolfunding.info/litigation-map/north-carolina/>.

<sup>160</sup>An example of the type of procedures that states can adopt in order to ensure on-going funding adequacy and accountability systems is provided by the “Act 57” procedures enacted by the Arkansas legislature in response to the court’s orders in *Lake View School District No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002). Among other things, this statute requires the House and Senate education committees on an ongoing basis to:

Assess, evaluate, and monitor the entire spectrum of public education across the State of Arkansas to determine whether equal educational opportunity for an adequate education is being substantially afforded to the school children of the State of Arkansas and recommend any necessary changes....

(7) Review and continue to evaluate the amount of per-student expenditure necessary to provide an equal educational opportunity and the amount of state funds to be provided to school districts, based upon the cost of an adequate education and monitor the expenditures and distribution of state funds and recommend any necessary changes....

courts have often failed to hold states accountable when they failed to implement promised programmatic reforms, or, more often, failed to provide adequate funding.

The real issue here is not lack of judicial capacity to undertake such reviews, but a reluctance to do so. In Arkansas, for example, the court felt compelled to appoint special masters on three occasions to respond to plaintiffs' allegations that the legislature had not taken appropriate actions to remedy the constitutional defects that the court had identified in its previous decisions.<sup>161</sup> Although the legislature then responded by adopting a number of appropriate educational reforms, the masters had concluded that "much needs to be done to fully implement the system, such as the adoption of rules, commission appointments, training, and development of assessment instruments."<sup>162</sup> The Arkansas Supreme Court recognized that not all of the promised reforms had yet been implemented, but it nevertheless decided to terminate the court's jurisdiction, stating that "[I]t is not this court's constitutional role to monitor the General Assembly on an ongoing basis over an extended period of time until the educational programs have all been

---

Ark. Code Ann. § 10-3-2102(a) (2012). Unfortunately, as indicated in the discussion in the main text, the Arkansas courts have not consistently enforced these requirements.

<sup>161</sup> *Lake View Sch. Dist. 25 v. Huckabee*, 189 S.W.3d 1 (Ark. 2004); *Tucker v. Lake View Sch. Dist. No. 25*, 917 S.W.2d 530 (Ark. 1996).

<sup>162</sup> *Huckabee*, 189 S.W.3d at 10-11. In *DeRolph v. State*, 780 N.E.2d 529 (Ohio 2002), after several years of litigation, the Ohio Supreme Court held that despite some progress in increasing school funding, "a complete systematic overhaul" of the school-funding system" was still needed, and it directed the General Assembly "to enact a school-funding scheme that is thorough and efficient," as explained in its prior decisions; after thus announcing that the state's school funding system was still unconstitutional, however, the Court vacated its prior judgment and ended its jurisdiction of the case. *Id.* at 530.

2] \_\_\_\_\_ State Courts and Education Finance completely implemented....”<sup>163</sup> To the contrary, if evidence before a court reveals a pattern of continuing non-compliance, the “court’s constitutional role” is to continue to monitor programmatic implementation under compliance has been achieved or can reasonably be held to be on target.

### C. Assessing the Results

The third stage of the *Castaneda* remedial review procedure requires the court to determine, after the reforms have been in effect for a sufficient period of time, whether the reform policies and programs are working and if substantial progress has been made toward complying with the constitutional requirements. Legislatures rarely undertake serious policy reviews of the results of rigorous educational reforms; often, they set unrealistic achievement targets for political reasons and then abandon the enterprise when problems arise. Putting policymakers on notice that outcomes will be assessed after a reasonable implementation period is likely, in and of itself, to have a significant positive effect in motivating the legislators and administrators to set ambitious, but attainable, goals and to effectively implement the programs they have developed to meet them.

From a comparative institutional perspective, sustained judicial oversight is needed to ensure that significant results are, in fact, achieved. Courts have not consistently carried out this role. For example, in *Hancock v. Commissioner of Education*,<sup>164</sup> the Massachusetts Supreme Judicial Court found that the state had substantially increased school spending, and that, as a result, overall statewide student performance on standardized tests was the highest in the country. Plaintiffs established to the trial court’s satisfaction,

---

<sup>163</sup> Huckabee, 189 S.W.3d at 161.

<sup>164</sup> 822 N.E.2d 1134 (Mass. 2005)

however, that the performance levels of students in four high poverty “focus districts” were still at exceedingly unacceptable levels. Despite the evidence that the state was far from meeting constitutional compliance for these students, the court terminated its jurisdiction, and the chief justice issued a pious statement that she was “confident that . . . the Governor and the Legislature will continue to work expeditiously to provide a high-quality public education to every child.”<sup>165</sup>

Courts need to be more demanding than this. If a state has not substantially achieved its interim indicators or long-term goals, it should bear the burden of explaining why its efforts have fallen short of the mark, and then propose feasible alternative strategies to actually provide all students a meaningful educational opportunity. In assessing results, courts need to be demanding, but also pragmatic. Professor James Liebman has described the state’s responsibility in such situations to recommit its efforts to achieve acceptable results in the following terms:

[W]hen the defendant state’s own experience (or the well-documented experience of other states in similar circumstances) provides evidence that . . . disparities may be meaningfully diminished through reasonably available means . . . the state must employ those ameliorative means or others that are at least as effective in alleviating the disparities, while monitoring and adjusting based on the results.”<sup>166</sup>

---

<sup>165</sup> *Id.* at 1158 (Marshall, C.J., concurring with plurality opinion) (internal quotation marks omitted).

<sup>166</sup> James S. Liebman, *Perpetual Evolution: A Schools-Focused Public Law Litigation Model For Our Day*, 117 COLUM. L. REV. 2005, 2039 (2017).

If the constitutional mandate for providing all students the opportunity for a sound basic education is to be truly honored, courts need to retain jurisdiction and to be available to ensure that programs are adequately funded and effectively implemented over a sustained period of time. In the area of school desegregation, the U.S. Supreme Court held that a court should terminate its jurisdiction only after the court has determined that the school board has “complied in good faith with the ... decree since it was entered, and [that] the vestiges of past discrimination had been eliminated to the extent practicable.”<sup>167</sup> An analogous test should be applied in state court sound basic education cases. A decree should not be terminated until there has been a determination that the state has “complied in good faith” with the court order and that the opportunity for a meaningful educational opportunity has been provided to all students “to the extent practicable.”<sup>168</sup>

---

<sup>167</sup> Bd. of Educ. v. Dowell, 498 U.S. 237, 249–50 (1991).

<sup>168</sup> The Washington Supreme Court’s follow through of its 2012 *McCleary* decision illustrates how these principles can be applied in the state court school funding context. The Court there deferred to the reform plan the legislature had adopted in recent statutes, as well as the cost analysis and program reforms recommended by a legislative task force. It also accepted the legislature’s commitment to phase in the programmatic reforms and associated substantial cost increases over a six-year period. The Court then announced that it would retain jurisdiction to monitor compliance and indicated that it would take a proactive stance to ensure that the state adhered to the six-year schedule. The Court largely adhered to that regime, even going so far as to find the state in contempt and impose monetary sanctions when the state failed at one point to meet its own planning and progress goals. For details of the specific orders issued by the Washington Supreme Court throughout this six-year compliance period, see *Recent Events*, SCHOOLFUNDING.INFO (September 24, 2021), <http://www.schoolfunding.info/litigation-map/washington/>

## V. LOOKING AHEAD: SCHOOL FUNDING LITIGATION IN THE POST-PANDEMIC ERA

At the height of the COVID-19 crisis of 2020–2021, state and local revenues were sagging and school districts were bracing for major cutbacks in education funding for the foreseeable future. Under those circumstances, the gloomy political and economic atmosphere that prevailed in the years following the Great Recession of 2008 seemed likely to be repeated. However, passage of the American Rescue Plan Act<sup>169</sup> early in 2021 dramatically changed that scenario.

The Act provides \$123 billion in new, flexible funding for school districts that can be spent over the next three-and-a-half school years — the largest-ever one-time federal investment in K-12 education. The Act also contains maintenance of effort provisions that restrict states’ ability to cut school funding, and “maintenance of equity” provisions that require states to avert cuts specifically to schools and school districts with high numbers of children living in poverty. In addition, the Act provides approximately \$350 billion in funding to states and localities that may allow the states and municipalities to increase their support for education and work to eliminate systemic racism.<sup>170</sup>

---

<sup>169</sup> The American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. (2021).

<sup>170</sup> CBPP Staff, *Priorities for Spending the American Rescue Plan’s State and Local Fiscal Recovery Funds* CTR. ON BUDGET & POL’Y PRIORITIES (MAY 7, 2021), <https://www.cbpp.org/research/state-budget-and-tax/priorities-for-spending-the-american-rescue-plans-state-and-local>.

For details of the Act, see Nicholas Johnson and Victoria Jackson, *American Rescue Plan Act Includes Much-Needed K-12 Funding*, CTR. ON BUDGET & POL’Y PRIORITIES (Mar.15, 2021), <https://www.cbpp.org/research/state-budget-and-tax/american-rescue-plan-act-includes-much-needed-k-12-funding>.

2] State Courts and Education Finance

Most of this new educational funding must be used to address learning loss, increased mental health needs, technology gaps, and other health and educational needs that have resulted from the Covid crisis. Moreover, these federal funds will run out in a few years. Accordingly, although school districts will not presently be facing the sharp state aid reductions they experienced in the years following the 2008 recession, shortfalls in state revenues and fiscal constraints are likely to be continuing realities in many states.

Despite these limitations, the significantly increased commitment to overcoming systemic racism that has emerged in recent years and to dealing with the systemic inequities that devastated all children in poverty during the Covid crisis will undoubtedly bolster education reform efforts and may induce at least some states to increase their support for educational opportunity after or even before the federal funding runs out. Indeed, some states have already substantially increased their post-pandemic education funding so that, when combined with the substantial influx of federal funds, some school districts may now be in a position to undertake major new initiatives to provide meaningful educational opportunity to all of their students.<sup>171</sup>

---

<sup>171</sup> For example, in its budget for Fiscal Year 2022, New York State raised core education spending by \$1.4 billion, committed to further increase funding by \$1.4 billion for each of the next two years, and imposed a new millionaires' tax to pay for these increases. See Reema Amin, *NYC schools to get billions of new dollars under state budget deal*, CHALKBEAT (Apr. 7, 2021), <https://ny.chalkbeat.org/2021/4/7/22372087/nyc-schools-to-get-billions-of-new-dollars-under-state-budget-deal>; Colorado school districts will receive between 10% and 12% more funding per student for the typical district — and schools that serve large numbers of students who live in poverty and English learners will be the biggest beneficiaries. See Erica Meltzer and Annie Fu, *Colorado schools are getting more money. Bigger changes could be on the way*, CHALKBEAT (June 29, 2021), <https://co.chalkbeat.org/2021/6/29/22549459/colorado-school-funding-changes-analysis>;

Given the likely economic and political climate for the near future, state courts will have less reason to exhibit the “caution” that circumscribed their enforcement of constitutional requirements after the 2008 recession. Therefore, in states where remedial issues in pending cases are still open, litigators and advocates should emphasize the need for judicial remedies that go beyond funding reforms and call upon the courts to require states to provide the full scope of meaningful educational opportunities that are implied by a state’s Constitution and its prior court rulings. In states where the courts have ruled that education adequacy claims are justiciable but there are no currently pending cases, advocates should consider mounting new litigations to assert these broader claims.

Litigators should also now consider bringing new litigations in the 14 states where the highest courts have ruled that these issues are not justiciable and ask for these doctrines to be reconsidered. Plaintiffs in Pennsylvania recently were able to convince that state’s supreme court to set aside three long-established contrary precedents and agree that these issues are indeed justiciable.<sup>172</sup> Given the changed circumstances created by the COVID-19 crisis and the heightened awareness of the importance of ending systemic inequities, some other state courts may well be willing to do the same.

Defendants will, of course, emphasize fiscal concerns, especially in light of the scope of new programming that would be required in most instances

---

Delaware’s legislature is moving toward substantially increasing equity-oriented state funding in compliance with the consent order signed in that state’s pending sound basic education litigation. See Larry Nanengast, *Delaware Taking First Steps Toward Improving State Education Funding*, DEL. PUB. MEDIA (June 4, 2021), <https://www.delawarepublic.org/post/delaware-taking-first-steps-toward-improving-state-education-funding>.

<sup>172</sup> William Penn Sch. Dist. v. Pa. Dept. of Educ., 170 A.3d 414 (Pa. 2017).

2] State Courts and Education Finance  
 to truly provide all students meaningful educational opportunities. The legal doctrine that constitutional rights cannot be compromised because of a state's fiscal constraints is well-established.<sup>173</sup> At the same time, it should be acknowledged that students have a right to a meaningful opportunity for a sound basic education, but not necessarily to any specific level of state appropriations. When times are tough, or the scope of needed new programs is extensive, policymakers would be justified in making extra efforts to reduce costs, but not in ways that infringe on students' constitutional rights. Educational expenses can be reduced substantially without trampling on constitutional rights through selective cost cutting. By reducing costly state mandates that are unnecessary or outdated, or by providing additional supportive services through Response to Intervention or other programs that provide services to students having academic difficulties in the early grades, thereby reducing the likelihood that they will later need to be referred for costly special education services, education funding can be made more efficient.<sup>174</sup> School districts' experiences with remote learning during the COVID-19 crisis may also allow them to utilize a variety of on-line instructional methods that might reduce instructional costs.

Cost reduction efforts must, however, be undertaken carefully, with a scalpel and not with a meat cleaver. Currently, policymakers tend to impose mandatory cost reductions—often through across-the-board percentage budget cuts—without sufficient regard for the impact of these cuts on students' core educational services. Constitutional requirements dictate a very

---

<sup>173</sup> See discussion, *supra* at pp. 30–31.

<sup>174</sup> For a detailed discussion of concepts for reducing educational costs without undermining constitutional values, see Rebell, *Safeguarding the Right to A Sound Basic Education*, *supra* note 109, at 1920–1956. See also, GETTING THE MOST BANG FOR THE EDUCATION BUCK (Frederick M. Hess and Brandon L. Wright, eds., 2020).

different course. When vital educational services are at issue, the state must show how necessary services will be maintained or new constitutionally-mandated services will be provided, despite state budgetary constraints.<sup>175</sup>

Yet additional funds will need to be appropriated in many, if not most, cases to meet student needs if policymakers are serious about undoing the systemic racism and inequities that have plagued American education for generations. In recent years, politicians of both parties have been reluctant to raise taxes to pay for pressing societal needs. Those attitudes and the political pressures behind them may soften in the coming era. Rather than being overly cautious when obvious needs for additional expenditures to meet constitutional mandates arise, courts should take principled stands in calling upon governors and legislatures to do what is necessary to obtain the revenues required to meet their constitutional obligations.

One of the U.S. Supreme Court's reasons for refusing to remedy the blatant inequities in Texas' education finance system in *Rodriguez* was that the case raised "persistent and difficult questions of educational policy," in which the courts lacked "specialized

---

<sup>175</sup> The U.S. Supreme Court has specifically held that although a state cannot deny important constitutional benefits for reasons of cost, economic factors may be considered—"for example, in choosing the methods used to provide meaningful access" to services, *Bounds v. Smith*, 430 U.S. 817, 825 (1977), and in tailoring modifications to consent decrees. *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 393 (1992); *see also* *Wright v. Rushen*, 642 F.2d 1129, 1134 (9th Cir. 1981) (advising a trial court in a prison reform case that the remedy should not be unnecessarily expensive). The Court has emphasized, however, that cost constraints cannot allow remedies to fall beneath the threshold that which would be required to vindicate the constitutional right. *Bounds*, 430 U.S. at 825; *Cf. Lewis v. Casey*, 518 U.S. 343 (1996) (explicating application of *Bounds* doctrine in prison cases).

2] \_\_\_\_\_ State Courts and Education Finance  
 knowledge and experience.”<sup>176</sup> Over the past half century, the state courts, in deciding hundreds of fiscal equity and adequacy cases, have gained a “specialized knowledge and experience,” and have become conversant in the “difficult questions of educational policy;” in deciding over 300 equity and adequacy cases, they have considered a broad range of remedial options and established important doctrinal precedents.

Working in concert with governors and state legislatures, state courts have a vital role to play in securing the constitutional rights to equitable and adequate educational opportunities that are explicitly written into almost all of the state constitutions. The judicial “caution” reflected in the remedial stages of many past school funding cases is inconsistent with the courts’ proper role in the modern functional separation of powers. Advocates and attorneys concerned about continuing inequities and inadequacies in state education systems need to continue litigating these cases and must pro-actively ask courts to implement broad remedies that will truly provide all students the meaningful educational opportunities to which they are entitled.

The California Supreme Court was prescient when it stated 50 years ago in its first *Serrano* decision that “the need for an educated populace assumes greater importance as the problems of our diverse society become increasingly complex.”<sup>177</sup> That Court also opined,

“In light of the public interest in conserving the resource of young minds, we must unsympathetically examine any action of a public body which has the effect of depriving children of the opportunity to obtain an education.”<sup>178</sup> This is advice that contemporary judges in California and throughout the country would do well to follow because, simply stated, equal educational

---

<sup>176</sup> Rodriguez, *supra* note 6, at 42.

<sup>177</sup> *Serrano v. Priest*, 487 P.2d 1241, 1258 (Cal. 1971).

<sup>178</sup> *Id.* at 1257.

opportunity will never be achieved in the post-pandemic era without the active and sustained involvement of the courts.<sup>179</sup>

---

<sup>179</sup> There also may be a concomitant important role for the federal courts in the years to come in ensuring that all students throughout the United States have a meaningful opportunity to an education that prepares them to be capable citizens. *See* *A.C. v. Raimondo*, 494 F.Supp.3d 170 (D. R.I. 2020), appeal pending No. 20-2082 (1<sup>st</sup> Cir, Dec. 16, 2020) (federal litigation claiming that students have a right under the U.S. Constitution to an education adequate to prepare them to function productively as civic participants). The author is lead counsel for plaintiffs in this case. For more information about this litigation, *see* *Cook v. Raimondo* (July 2, 2021), THE CTR. FOR EDUC. EQUITY, TCHRS. COLL. COLUM. UNIV., [www.cookvraimondo.info](http://www.cookvraimondo.info).