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Justiciability and the Role of Courts in
Adequacy Litigation: Preserving the
Constitutional Right to Education

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ABSTRACT. In the first study of opinions handed down in education adequacy litigation between January 2005 and January 2008, this paper shows a marked shift away from outcomes favorable to adequacy plaintiffs. Following two decades in which courts spurred significant reforms in our nation's neediest schools by interpreting the education clauses of their state constitutions to guarantee an "adequate" education for all students, the years 2005 to 2008 have seen a dramatic change in the judicial response to adequacy litigation. Through an analysis of the latest body of cases, this paper shows that separation of powers concerns have begun to drive state courts out of this important avenue of education reform. These separation of powers concerns have become more salient as litigators pressure courts to mandate concrete remedies that would trump legislative discretion. The most problematic such remedy is one that would require courts to order the legislature to make specific budgetary allocations. This trend spans courts seeing adequacy claims for the first time and those presiding over a second round of adequacy litigation. This paper argues that despite this shift recent courts have not wholly disavowed their role in substantiating the state constitutional right to education. Courts remain willing to act as a constitutional check on the legislature's actions within the field of education if only plaintiffs can find a way to respond to concerns over remedies. This paper examines the nature of and reasons for courts' increasing separation of powers concerns and then briefly explores what lessons adequacy plaintiffs might take away for use in future litigation.

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INTRODUCTION

Over the last two decades, state courts have spurred significant reforms in our nation's neediest schools. Interpreting the right to education enshrined in every state constitution, state courts have demanded that their executive and legislative branches take action to guarantee an "adequate" education for all of their state's students, not just those lucky enough to live in a well-funded school district. By applying pressure for legislative and court-ordered improvements, "education adequacy" litigation has achieved huge reforms in education funding across the country.

During the past three years, however, state courts have delivered a string of disappointing decisions to adequacy plaintiffs. While those courts have articulated a variety of state-specific rationales for rejecting adequacy claims, their opinions reveal a common concern with the boundaries between their judicial role and the prerogatives of the legislature.

Education adequacy suits have challenged courts to enforce not only suitable education standards in their states, but, more generally, to find a suitable role for themselves in education reform.¹ The prospect of interfering in an area – such as education policy – that is traditionally seen as a legislative prerogative makes judges especially uneasy. At the same time, state judiciaries are reluctant to abandon this affirmative constitutional right completely to a political process prone to fail the children

¹See e.g., Michael A. Rebell, *Symposium: High-Poverty Schooling in America: Lessons in Second-Class Citizenship: What are the Limits and Possibilities of Legal Remedies?: Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C.L. Rev. 1467, 1538 (2007).

most in need.² Between 1989 and 2005, the tension between these dueling concerns was generally resolved in favor of adequacy plaintiffs— who won more than 75% of the cases.³

As the adequacy movement matures, however, the balance between deference and action by courts in adequacy suits has begun to tip towards deference and away from judicial intervention. In fact, since 2005, courts' unease with adjudicating these cases has proven difficult to surmount. Plaintiffs' adequacy claims were dismissed before ever reaching trial in nine of the nineteen decisions handed down over the past three years.⁴ The Supreme Courts of Texas and Massachusetts both reversed lower-court rulings in favor of adequacy plaintiffs, finding instead that current school systems met constitutional standards despite obvious continued disparities and failures.⁵ Similarly, in South Carolina and Alaska, trial courts rejected claims that the school systems in their states suffered from inadequate funding.⁶ And, despite prior findings that the constitution

² See e.g. Ian Millheiser *What Happens to a Dream Deferred?: Cleansing the Taint of San Antonio Independent School District v. Rodriguez*, 55 DUKE L.J. 405 (2005) (Arguing that because political branches are structurally ill-suited to protect the affirmative right to an adequate education, "judicial restraint' leaves undereducated Americans without recourse to any branch of government."); Larry J. Obhof *Rethinking Judicial Activism and Restraint in State School Finance Litigation* 27 HARV. J.L. & PUB. POL'Y 569 (2004) (Discussing structural disincentives for the political branches to adequately fund schools or reform the school finance system absent external pressure).

³ Between 1989 and 2005, plaintiffs prevailed in twenty of twenty-five final decisions of the highest state courts or unappealed trial court decisions. See National Access Network, *School Funding "Adequacy" Decisions Since 1989* (Oct. 2006), <http://www.schoolfunding.info/litigation/adequacydecisions.pdf>.

⁴ See *Crane Elementary Sch. Dist. v. State of Arizona* No. 04-0076 (Ariz. App. Nov. 22, 2006); *Labato v. State of Colorado* Case Number: 05 CV 4794 (Co. Dist. Ct. 2006); *Connecticut Coalition for Justice in Education Funding et. al. v. Rell* No. X 09 CV 05 4019406 (CT Sup. Ct. 2007); *Bonner v. Daniels* Cause No. 49D01604PL016414 (Indiana Sup. Ct. 2007); *Young v. Williams* No. 03-00055/01152 (Cir. Ct., Div. II., Feb. 13, 2007), *Pendleton School District 16R et al. v. State of Oregon et al.* [No written opinion] (2007); *Committee for Educational Equality (CEE) v. State of Missouri* Case No. 04CV323022 (Cir. Ct., Div. II, 2007); *Neb Coalition for Ed Equity & Adequacy v. Heinman* 731 N.W.2d 164 (2007); *Oklahoma Educ. Ass'n v. State ex rel. Oklahoma Legislature* 158 P.3d 1058 (2007).

⁵ *Hancock v. Driscoll*, 443 Mass. 428 (2005); *Neeley v. West Orange-Cove Consol. Independent School Dist.*, 176 S.W.3d 746 (2005).

⁶ See *Moore v. State of Alaska*, No. 3AN-04-9756 (Alaska Sup. Ct. 2007); *Abbeville County School District v. State*, No. 93-CP-31-0169 (South Carolina Court of Common Pleas 2007).

demanded increased school funding, the highest courts in New York and Kansas largely left their legislatures to judge for themselves how much funding is enough.⁷

This backwards trend in adequacy suits comes in the face of developments that would seem to bode well for the movement. Despite ever-more mobilized opposition,⁸ adequacy plaintiffs could reasonably expect to be more successful as adequacy litigation strategies are perfected and they are able to build on prior precedent establishing both the justiciability of these cases and the substance of state constitutional rights to education. In addition, the rise of the “New Accountability” movement – as demonstrated by the passage of the Improving America’s Schools Act of 1994 and the No Child Left Behind Act in 2002⁹ - introduced education standards that were expected to encourage judicial supervision of education reform by giving substance to the constitutional right and shielding courts from attacks of judicial caprice.¹⁰

Having acknowledged the critical role the judiciary must play to protect every child’s right to education, and in the face of new standards that help substantiate the adequacy of an education, why are courts now – at all stages of adequacy litigation – bowing out of education reform? Given the overwhelming shift in courts’ responses to their lawsuits, this is a question all current adequacy plaintiffs must confront.

The answer, as it turns out, is both straightforward and deeply troubling from the perspective of future litigants. A close reading of the most recent adequacy decisions finds judges expressing a surprisingly unified concern: state courts across the country are

⁷ See *Montoy v. State of Kansas*, 282 Kan. 9, 138 P.3d 755 (2006); *Campaign for Fiscal Equity, Inc. v. State* 861 N.E.2d 50 (2006).

⁸ In response to the initial string of adequacy victories, states began to seek external expertise and share best practices for how to mount an effective defense to this novel claim.

⁹ See e.g. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 937-39 (2004).

¹⁰ See e.g. James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C.L. REV. 1703, 1718-20 (2002-2003).

ill at ease with the role they have been cast in modern adequacy litigation – a role they increasingly fear may run afoul of traditional separation of powers precepts.

By 2005, many state courts had already ruled in favor of judicial review in education cases and recent events have seen no dramatic facial reversals of this precedent. Superficially, only four recent courts explicitly dismissed adequacy claims as non-justiciable. Yet, even the claims disposed of on other grounds were victims of the same overarching justiciability concerns: judges refused to grant plaintiffs relief for fear that adequacy suits have forced courts over the boundary separating the judiciary from other branches of government. In fact, a close reading of the recent case law makes clear that core justiciability concerns are not only pervasive, but often decisive. For example, the Supreme Court of Texas vigorously defended the court’s duty to determine the constitutionality of the public school system at the same time that it essentially cited separation of powers concerns in upholding the state’s school finance system.¹¹ In the same vein, a Connecticut trial court paid lip service to that state’s binding precedent that the courts must enforce and thereby delineate the state constitution’s education guarantee, but imported a classic justiciability analysis under another name in order to dismiss the adequacy portion of a recent suit.¹² And finally, even as the Chief Justice of the Massachusetts Supreme Court used neither the words “separation of powers” nor “justiciability” in writing for the plurality dismissing an adequacy suit, the logic of her argument was driven by a keen sense of the judiciary’s limited role in matters such as education that involve the state budget and other primarily legislative concerns.¹³

¹¹ See *infra* Section II.C.

¹² *Id.*

¹³ See *infra* Section II.A.

Education advocates must confront the reality of this shifting pendulum in adequacy suits. The constitutional right to education is a powerful tool. It has done much to improve education in schools across the country. It has been a critical means for advocates to ensure educational opportunities to those who would be otherwise left behind by the political process. Yet the state constitutional right to education is in danger of being rendered meaningless, even as recent decisions leave it superficially intact. The modern education adequacy litigation formula, particularly to the extent that it portrays adequacy as a pot of money, threatens to foreclose future causes of action under state education clauses as courts set broad and unfavorable precedent.¹⁴

This result is not inevitable. While expressing discomfort with the demands of recent litigation, courts have not wholly disavowed their role in substantiating the state constitutional right to education. Thus, there is reason to believe that courts remain willing to act as a constitutional check on the legislature's actions within the field of education, if only plaintiffs can find a way to respond to their concerns. In order to initiate that vital conversation, this article examines the adequacy decisions delivered between January 2005 and January 2008 to better understand the nature of and reason for the increased separation of powers concerns expressed therein. It then briefly explores what lessons adequacy plaintiffs might take away for use in future litigation.

¹⁴ Strong nonjusticiability precedent may foreclose not only alternative forms of adequacy claims under the state education clause, but also equity claims. Further, even if courts carefully preserved judicial review of the school system under the state equal protection clause, there is no consensus that equal protection claims alone can achieve the necessary reform. This is why advocates turned to adequacy initially. First, equity simply may not be enough: it costs more money to educate students with greater needs, such as bi-lingual or at-risk students. It has yet to be seen whether courts will go beyond horizontal equity to embrace a theory of "vertical equity." Second, education advocates turned their energy toward adequacy suits in part because equity suits received a lukewarm welcome in state courts. *See Ryan supra* note 16. Finally, from a practical perspective, equity suits may be less conducive to sparking reform by the political branches. Whereas adequacy suits are seen as a fight for better schools for all children, equity suits tend to pit the poor against the wealthy thereby impeding political progress. To the extent that adequacy campaigns are truly won in the court of public opinion this is an important consideration.

Part I provides a short overview of the origins and evolution of education adequacy litigation. Its focus is on those aspects of the historical context that help illuminate the challenges faced by modern adequacy litigants.

Part II turns to the adequacy decisions delivered between January 2005 and January 2008. It argues that over the past three years, increasing separation of powers concerns have begun to drive state courts out of an important avenue of education reform. These separation of powers concerns have become more salient as courts are increasingly pushed – by maturing cases and litigation strategies – toward mandating concrete remedies at the expense of the Legislature’s discretion. The most alarming such remedy for courts is the sense that adequacy suits will require them to order the legislature to make specific budgetary allocations. Judges’ natural distaste for budgetary intervention is aggravated by newly converging factors such as increasingly proactive legislative involvement in the area of school funding, evidence of improving schools, and growing doubts that money alone can transform those schools that continue to struggle. Further, courts are functioning against a new backdrop: the aftermath of judicial intervention in other jurisdictions. Although adequacy suits have done much to increase funding, improve schools, and draw attention to the children left behind by the political process,¹⁵ courts looking to other states also see interminable litigation, ever-growing demands from plaintiffs, and tension-fraught showdowns between the judiciary and legislatures.

Part II groups recent courts’ predominant concerns in recent adequacy opinions into three categories. First, the maturation of the adequacy movement poses new

¹⁵ See, e.g., Rebell, *supra* note 1 at 1527-28 (citing instances in which courts’ interventions have resulted in significant reductions in spending disparities between rich and poor school districts, increased achievement, and improved facilities and noting significant reforms driven by adequacy cases even where plaintiffs have not prevailed).

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 second generation cases - in which plaintiffs press the legislature for further reform - may force courts to make a difficult choice between aggressive judicial intervention and total abdication of the issue to the legislature. Further, the very success of early education suits and the reforms they engendered may be a barrier to continued success. Whereas courts confidently intervened in the face of legislatures that had clearly abdicated their constitutional duties to provide a rational system of education to state school children, they are less willing to order remedial action that would interfere with legislative appropriations when the plight of school children in their state is no longer as dire.

Second, separation of powers concerns have been exacerbated by litigation strategies increasingly focused on appropriations as the benchmark and remedy for an inadequate education. Adequacy suits have always fought for more resources. But this fight has recently begun to center on specific funding levels rather than more systemic reforms. 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. When faced with an either or proposition, courts have chosen to find for defendants rather than grant a funding-centered remedy. Moreover, courts are even less likely to intrude into the legislature's budget allocations if - as is increasingly the case - they doubt more money alone can solve the problem.

And finally, these separation of powers concerns are contagious. Many recent opinions echo the justiciability arguments of sister states. As courts weigh the benefits of engaging their coercive power against the risk of diluting their own legitimacy or encroaching on another branch's prerogatives, recent experiences in other states are a primary source of guidance. With more precedent to look to, courts have seemed to find much to dissuade them from substantively entering the fray. Thus, both recent out-of-state opinions and the aftermath of prior adequacy decisions have shaped the latest adequacy outcomes.

I. ADEQUACY LITIGATION'S ORIGINS AND EVOLUTION: A SHORT INTRODUCTION TO MODERN CHALLENGES

Though this article focuses primarily on the latest education adequacy litigation, we begin with a brief overview of education litigation in the United States. This cursory review is meant only to flag those aspects of the historical context that shed light on the challenges faced by modern adequacy litigation. The origins and evolution of adequacy litigation are treated in greater detail elsewhere.¹⁶

A. The First Wave: The U.S. Constitution and Equal Protection

Scholars typically describe the history of education litigation in three waves. In the First Wave of education litigation, plaintiffs sought justice in federal courts under the equal protection clause of the United States Constitution. The seminal case during this genesis period was *San Antonio v. Rodriguez*.¹⁷ While the public education received by Demetrio Rodriguez in the Edgewood Independent School District in 1968 was inferior

¹⁶ See, e.g., James Ryan, *Schools, Race and Money*, 109 YALE L. J. 249 (1999); Michael Rebell, *Education Adequacy, Democracy and the Courts*, 38-60 (Paper prepared for the National Academy of Sciences and the National Research Council, 2001).

¹⁷ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58-59 (1973).

to the education available in wealthier Texas districts by almost any measure,¹⁸ the plaintiffs' litigation strategy focused specifically on the inequity of the school finance system. Due to its heavy reliance on local property taxes, the school finance system generated gross disparities in funding between poor and rich school districts. In contrast to disparities in educational opportunity or academic achievement, disparities in per pupil funding were the most direct, unmitigated evidence of state abdication of the responsibility to educate all children, offering plaintiffs what seemed to be the strongest case that Rodriguez had been denied equal protection under the laws.

While a federal district court found for the plaintiffs in *Rodriguez*, a divided Supreme Court reversed. Notwithstanding the dissent's accusation that they were leaving "appellees to the vagaries of [a] political process which ...has proved singularly unsuited to the task of providing a remedy," the Supreme Court held that, because education is not a fundamental right under the Federal Constitution, the Texas school financing plan would only be subject to rational basis review. Under that lenient standard, the Court found the dramatic disparities created by the Texas funding scheme to be rationally related to the legitimate state interests in "assuring basic education" while permitting and encouraging local control of schools.¹⁹ Thus, Demetrio Rodriguez must seek justice elsewhere.

B. The Second Wave: State Courts and Equal Protection

In the so-called second wave of education litigation, plaintiffs across the country turned to the state courts for relief. Advocates hoped that state courts – bolstered by

¹⁸ See, e.g., Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607 (1999).

¹⁹ *Rodriguez*, at 49.

explicit education clauses in their state constitutions – could be convinced to depart from federal equal protection precedent, declare education a fundamental right, and subject school finance schemes to strict scrutiny.²⁰

Following this second wave strategy, in 1984, the *Rodriguez* plaintiffs filed *Edgewood Independent School District v. Kirby (Edgewood I)*.²¹ In addition to bringing an equity claim, this time under the Texas Constitution’s equal rights provision, the *Edgewood I* plaintiffs also challenged the school finance system under the “efficiency” mandate of the Texas education clause.²² Article VII, §1 of the Texas Constitution provides:

A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

In a victory for plaintiffs, the Texas Supreme Court responded by striking down the school finance system as unconstitutional under the education clause,²³ holding that “efficiency” required that districts “have substantially equal access to similar revenues per pupil at similar levels of tax effort.”²⁴ The Court declined altogether to address plaintiffs’ claim under the equal protection clause, perhaps for many of the same reasons that had left the Supreme Court in *Rodriguez* so divided.²⁵

²⁰ This strategy proved successful in a handful of early cases, but was disappointing overall. For a comprehensive discussion, see *Ryan*, *supra* note 16 at 266-268.

²¹ *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (hereinafter *Edgewood I*).

²² *Id.* at 392.

²³ *Id.* at 392.

²⁴ *Id.* at 397.

²⁵ See, e.g., Farr & Trachtenberg, *supra* note 18 at 642 (explaining that “the fact that each school district serves both poor and wealthy kids, or both white and brown kids, muddles the [equal protection] claim that the discrimination is aimed at one identifiable group.”) Other scholars have argued that federal and state courts

Although the Texas Supreme Court relied on the education clause in *Edgewood I*, it explicitly struck down the school finance system under a theory of equity.²⁶ The Court read the “efficiency” language in the Education Clause to demand “substantially equal access to similar revenues per pupil at similar levels of tax effort.”²⁷ Although this holding presages the idea that state education clauses contain a substantive component,²⁸ neither the Court nor the plaintiffs conceptualized the theory as one of adequacy.²⁹ In fact, “adequacy” would not make its first appearance before the Texas Supreme Court until it was raised *sua sponte* by Justice Cornyn six years later in *Edgewood IV*.³⁰ And plaintiffs themselves did not bring adequacy claims before the justices until 2005 when *Neely* reached the Texas Supreme Court.³¹

This history in Texas underscores the extent to which adequacy litigation was shaped by its development from early equal protection claims based on school finance inequities. In many ways, the litigation strategy was driven by innovative public interest lawyers navigating evolving doctrine. Education reform litigation began with equity in

alike feared declaring education a fundamental right or poor students a suspect class would set the court down a slippery slope of litigation.

²⁶ *Edgewood I* at 397. Because the line between equity and adequacy is conceptually blurry, “adequacy” concerns “filtered through the court’s language” even though “*Edgewood I* dealt primarily with the equity issue.” Farr & Trachtenberg, *supra* note 16 at 645.

²⁷ *Id.* at 637.

²⁸ Farr & Trachtenberg, *supra* note 16 at 645 (“The reason so many people were concerned with the inequities perpetuated by the Texas school-finance system is that the schoolchildren in the poorer districts received a substandard education.”).

²⁹ See e.g. Farr & Trachtenberg, *supra* note 16 at 644 (articulating the reasons why plaintiffs had rejected an “adequacy” claim in favor of “equity”).

³⁰ See *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 16-20 (Tex. 1995) (hereinafter *Edgewood IV*). The Texas Supreme Court struck down the public school finance system twice more in *Edgewood II* and *Edgewood III*. In *Edgewood II*, *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991), the Court unanimously dismissed the latest legislation as little more than a band-aid. However, by *Edgewood III*, *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 502 (Tex. 1992), the Court’s unanimous front had begun to break under mounting political pressure. Justice Cornyn limited the demands of equity by introducing the concept of adequacy: Districts need not have “substantially equal revenue for substantially equal tax effort at *all levels of funding*.” Instead, the State need only equalize resources up to a constitutional minimum – “a general diffusion of knowledge.” Wealthy districts remain free to supplement state funding with local funds as long as the entire system remains financially efficient..

³¹ See *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.* 176 S.W.3d 746, 753 (2005).

part because it started with the federal constitution. Although the large majority of state constitutions explicitly protect the right to an “adequate,” “thorough,” or “efficient” education, not funding, early adequacy claims predominantly challenged specifically the school finance system, in large part because they were often bundled with equity challenges that had long focused on funding as the most strategic measure of equality.³² Another reason for the initial focus on funding is the tradition of local control over education.³³ Historically, a state’s major influence on schooling came from the provision of funds so it is not surprising that plaintiffs seeking systemic change would choose inequitable funding as an avenue to get at systemic, statewide problems. The ultimate shift from equity litigation to adequacy litigation has been at times something of an *ad hoc* process, driven as much by the preferences of the bench as by education plaintiffs.³⁴

C. The Third Wave: Kentucky and the Birth of Adequacy

Scholars have labeled Kentucky the “birthplace” of the adequacy movement and the Third Wave of education litigation. Just one year after the *Rodriguez* plaintiffs filed their lawsuit in Texas state court, a coalition of public school students, sixty-six local school districts, and a handful of Boards of Education in Kentucky followed with their

³² Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 109 (1995).

³³ The most recent decision in Oregon’s adequacy litigation signaled this concern. In rejecting part of the plaintiffs adequacy claim as foreclosed by precedent, the Court cited *Olsen v. State*, 554 P.2d 139 (Or. 1976), which found that while the Oregon Constitution “provides for a minimum of educational opportunities in the district,” it “permits the districts to exercise local control over what they desire, and can furnish, over the minimum.” *Pendleton Sch. Dist. V. State*, Multnomah Count Circuit Court No. 060302980 A133649 at 8. The *Pendleton* Court noted that beyond the basic “opportunities,” *Olsen* was not about adequacy but was merely a statement that the state constitution required some measure of uniformity of education. *Id.*

³⁴ See, e.g., Ryan, *supra* note 16 at 268-269 (“The shift in focus from equality to adequacy is in some cases a matter of choice or strategy, and in other cases it is a matter of necessity, as litigants who have already lost on an equality claim return to court for a second or third time.”)

own suit.³⁵ The education clause in Kentucky, like its counterpart in Texas, requires the General Assembly to provide an “efficient” system of public schools.³⁶ Thus, as in Texas, plaintiffs in *Rose v. Council for Better Education*³⁷ challenged the school finance system under not only the equal protection clause and due process clause, but also under the state constitution’s education clause. In Kentucky, however, in addition to challenging the school *finance* system, the plaintiffs also claimed that the entire public school system was unconstitutional under §183’s “efficiency” mandate. In a landmark decision, the Supreme Court of Kentucky struck down the school system under the Education Clause of the Kentucky Constitution. Aware of the revolutionary nature of its decision, the court made its holding as clear as possible:

Lest there be any doubt, the result of our decision is that Kentucky's entire system of common schools is unconstitutional. ...This decision applies to the entire sweep of the system -- all its parts and parcels. This decision applies to the statutes creating, implementing and financing the system and to all regulations, etc., pertaining thereto. This decision covers the creation of local school districts, school boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. It covers school construction and maintenance, teacher certification -- the whole gamut of the common school system in Kentucky.³⁸

Echoing the themes of equality running through earlier decisions, such as *Edgewood I*,³⁹ the *Rose* court held that, under §183, “[e]ach child, *every* child, in this Commonwealth must be provided with an equal opportunity to have an adequate education.”⁴⁰ But, by including the word “adequate,” the Court went even further, to hold that the education clause guaranteed not only equality, but also a certain *quality* of education. Specifically,

³⁵ See *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 190 (Ky. 1989).

³⁶ Ky. Const. § 183

³⁷ *Rose*, 790 S.W.2d 186 (Ky. 1989)

³⁸ *Id.* at 215.

³⁹ See, e.g., *Edgewood I*.

⁴⁰ *Rose*, 790 S.W.2d 186, 211 (Ky. 1989) (emphasis in the original).

the Court found a school system could only pass constitutional muster if - at a minimum - it aimed to provide all children with the capacities it deemed necessary to enable students to “function in a complex and rapidly changing civilization” “understand the [political] issues that affect his or her community, state, and nation;” and “compete favorably ...in the job market.”⁴¹

While its opinion went beyond merely thinking about education in terms of funding, the Court did specifically mandate that the General Assembly provide sufficient funding for an adequate education for all. Significantly, the Court left the determination of how best to achieve a constitutionally efficient funding system to the legislature, emphasizing:

We do not instruct the General Assembly to enact any specific legislation. We do not direct the members of the General Assembly to raise taxes. ...We only determine the intent of the framers. Carrying-out that intent is the duty of the General Assembly.⁴²

The General Assembly responded to *Rose* by immediately enacting sweeping reforms under the Kentucky Education Reform Act (KERA).⁴³

The *Rose* vision was subsequently adopted and cited by courts in at least seven other states.⁴⁴ For example, in *McDuffy v. Secretary of the Executive Office of Educ.*,⁴⁵ a

⁴¹ *Id.* at 212 (“[A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.”).

⁴² *Id.*

⁴³ See Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky* 28 J.L. & EDUC. 485 (1999).

case discussed in greater depth in Part II.A, the Massachusetts Supreme Court unequivocally held that children in the Commonwealth are constitutionally entitled to an education that will provide them with the seven capabilities set forth by the Kentucky Supreme Court in *Rose*, and that will prepare them to take their place as knowledgeable and productive citizens. As in Kentucky, the Massachusetts legislature responded by rapidly enacting significant reforms that injected “enormous amounts of new money”⁴⁶ and “revolutionized public education in Massachusetts.”⁴⁷

Crucially, early cases such as *Edgewood I*, *Rose*, and *McDuffy* did not initially force courts to wrestle with the boundaries of the separation of powers doctrine. Rather, those courts were able to trigger a legislative response while remaining well within the traditional bounds of judicial power: they declared the education system unconstitutional, defined the basic contours of the right to education, and left the legislature to devise reforms to bring the school system into compliance. Most courts have followed this formula and left the specifics of reform up to their legislatures,⁴⁸ unless and until a recalcitrant legislature or inadequate progress forces the court to play a more active role in the remedial stage.⁴⁹

⁴⁴ See *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997). See also *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.* 826 S.W.2d 489 (Tex. 1992); *Opinion of Justices No. 338*, 624 So. 2d 107, 1993 Ala. LEXIS 441 (Ala. 1993); *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170 (Kan. 1994); *Leandro v. State*, 488 S.E.2d 249, (N.C. 1997); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, (S.C. 1999).

⁴⁵ 415 Mass.545, 621, 615 N.E.2d 516 (1993)

⁴⁶ See *Hancock v. Driscoll*, 443 Mass. 428, 451 (2005) (quoting lower court).

⁴⁷ *Hancock* at 441.

⁴⁸ See Molly S. McUsic, *Symposium: Brown at Fifty: The Future of Brown v. Board of Education: Economic Integration of the Public Schools* 117 HARV. L. REV. 1334, 1348 2004 (“State courts have been loath to clarify the full content of the rights they recognize or to prescribe for state legislatures the remedial steps necessary to bring the school funding system into constitutional compliance. The courts’ most common course has been to declare the system unconstitutional and send it back to the legislature to make it constitutional.”)

⁴⁹ In some states, immediate resistance from the political branches have forced courts to play a more aggressive remedial role very early on. See, e.g., Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the*

II. GROWING JUSTICIABILITY CONCERNS: ADEQUACY LITIGATION FROM 2005-2007

The years 2005 through 2007 witnessed a sea change in judicial attitudes towards education adequacy claims. Despite growing momentum, the benefit of lessons learned in previous litigation, favorable precedent and more sophisticated costing out methodologies, recent adequacy plaintiffs have almost universally encountered a judiciary reluctant to entertain their claims or to offer them meaningful remediation.⁵⁰ A close reading of these recent opinions finds separation of powers concerns at their common core. In order to find for plaintiffs in adequacy cases, judges perceived that they must intervene substantively in their state's education policy to craft a remedy that would encroach on traditional legislative prerogatives. This is the broad umbrella under which fall many more concrete, situational concerns. This Part takes up the recent set of adequacy decisions and identifies three interrelated factors within the umbrella of

Kansas School Finance Litigation 54 KAN. L. REV. 1021, 1046-1047 (2006) (Describing how the legislature's failure to fully comply provoked the Kansas Supreme Court to order a minimum increase in funding by a specific date.).

⁵⁰ Contrary to the dominant trend, plaintiffs prevailed in New Hampshire and Washington. However, even these two successes were somewhat qualified. In *Federal Way School District v. State of Washington*, No. 06-2-36840-1 KNT (Sup. Ct. 2007), the trial court granted plaintiffs' motion for summary judgment on an extremely narrow claim under the state's education clause. Despite striking down a salary system not based on the cost of providing educational opportunity, the trial court goes to great pains to soften the impact of its ruling. The opening paragraphs note, "[T]his decision should in no way be construed to find or even suggest that the legislature has not provided for full funding of education in the Federal Way School District. . . . If this decision is upheld by the Washington State Supreme Court it will be of little moment. The State legislature has been moving closer to equalization over the years and getting there will not require great effort." In *Londonderry School District v. State of New Hampshire*, 154 N.H. 153 (2006), the Supreme Court of New Hampshire held that the State had failed to define a constitutionally adequate education, as it had been ordered to do a decade earlier. Noting that "deference. . . has its limits," the Court - for the first time - backed its decision with a deadline and warned that if the state failed to spell out enforceable and reviewable standards by the end of the fiscal year 2007, a trial court or special master might have to do it for them. In this way, the Court added substantial bite to its earlier decision. Indeed, this was a victory for plaintiffs, who had been awaiting such a step since the Court first articulated the state's duty back in 1993. However, it is also important to note what the Court chose *not* to do. In *Claremont School District v. Governor*, 703 A.2d 1353 (1997), the Court had ordered the state not only to define an adequate education, but also to 1) determine the cost, 2) fund it with constitutional taxes, and 3) "ensure its delivery through accountability." The *Londonderry* trial court found for plaintiffs on all three counts; but the Supreme Court affirmed only the first and stayed all other findings. In addition to considering only one claim, the Court gave the state an entire year to take just that first step. The dissent criticized the majority for dancing around the core issue of adequate funding.

separation of powers that have contributed to the startling shift in the judicial response to adequacy lawsuits.

First, while separation of powers concerns have always factored in education litigation, courts in earlier years could mandate reform without actively intervening in legislative decision-making. Initially, plaintiffs were fighting for legislative reform at the most basic levels. Legislatures had not yet been judicially required to meet certain standards in education funding. Now, they must show that systems subjected to initial reforms, are still underfunded and/or wholly inadequate. When the claim is closer to legislative deficiency than legislative abdication, plaintiffs struggle to convince courts that there is a judicial role available that would not involve stepping into legislative shoes. This remedial concern can also be characterized as a problem in the plaintiff's proof of breach. That judges are balking now, either at the question of breach or in envisioning an appropriate remedial role, where they once embraced education suits with a degree of fervor is in some ways a function of the adequacy movement's past success in convincing judges to order legislative reforms. Second, the increasing centrality of budgetary appropriations and pervasive use of costing out studies in adequacy cases has triggered perhaps the most fundamental separation of powers alarm for courts. Costing out studies invite judges to review the spending levels set by the legislature – something they are extremely reluctant to do. This concern is compounded in the adequacy context by the growing chorus of voices contending that the solution lies not in more money, but in such things as increased accountability, better management, and the flexibility to fire failing teachers. Finally, when courts look to other states that have mandated specific appropriations or reforms, it is not clear to them that such intervention represents a long-

term solution. They fear specific reforms will require repeated trips back to their courthouses for enforcement, if they can be enforced at all. The experience of sister states reinforces the conviction that courts' power to enforce such remedies is tenuous in the face of legislative resistance.

A. THE POLITICAL PROCESS

By 2005, nearly a generation had passed since the first state courts recognized the constitutional right to education. In the intervening years, as legislative appropriations failed to keep pace and temporary gains in educational justice were lost, parents and activists once again looked to the courts to protect the constitutional rights of their children in the face of political inaction.⁵¹ Such constitutional challenges to school systems in states that had already recognized both a qualitative right to education and the judiciary's duty to uphold it make up the "Second Generation" of adequacy litigation⁵²

Paradoxically, the very successes of early adequacy plaintiffs in reforming grossly dysfunctional, unequal and inadequate school systems poses problems for second generation litigation. A close reading of recent opinions reveals three primary ways in which the changing education landscape has heightened separation of powers concerns for courts adjudicating second generation cases. First, courts are troubled by the increasingly intrusive remedial role seemingly demanded by school systems that have already undergone significant reforms. This failure to perceive an acceptable remedial role can lead courts to abdicate their function entirely in adequacy adjudication,

⁵¹In *Young v. Williams*, No. 03-00055/01152 (Cir. Ct., Div. II., Feb. 13, 2007), for example, the Council for Better Education filed suit again demanding that the Kentucky General Assembly deliver more quickly on the promises of *Rose*.

⁵² See, e.g., Michael Rebell, *Adequacy Cases are Alive and Well*, available at <http://www.schoolfunding.info/blog/2007/10/29/adequacy-cases-are-alive-and-well/>.

essentially, if not overtly, reversing any positive precedent. Second, signs of renewed political engagement and progress (however minimal) may cause courts to question the very legitimacy of judicial intervention. Over the years, a powerful strain of argument has developed maintaining that the judiciary should only engage in structural reform litigation in the face of egregious political neglect.⁵³ In courts that subscribe to this view, plaintiffs will struggle to convince judges that anything more than perfunctory oversight on their part is constitutionally permitted, let alone necessary, when the legislature is also actively involved. Finally, improved schools further blur the already uncertain line delineating breach. Where ambiguous constitutional standards and steadily improving conditions pose tricky line-drawing problems, courts are much more likely to defer to the judgment of the legislature. The latest adequacy litigation in Massachusetts presents a striking example of the first two trends.

i. New Remedial Challenges

In 1993, Massachusetts became one of the earliest states to hold that its children were constitutionally entitled to an adequate education. In *McDuffy v. Secretary of the Executive Office of Educ.*,⁵⁴ the Massachusetts Supreme Court unanimously⁵⁵ and unequivocally held that children in the Commonwealth are constitutionally entitled to an education that will provide them with the seven capabilities set forth by the Kentucky

⁵³ See e.g. William A. Fletcher *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy* 91 YALE L.J. 635, 694 (1982) (“The only legitimate basis for a . . . judge to take over the political function in devising or choosing a remedy in an institutional suit is the demonstrated unwillingness or incapacity of the political body”)

⁵⁴ 415 Mass. 545 (1993).

⁵⁵ The lone dissenting voice, Justice O’Connor, dissented only on the question of breach. *McDuffy* at 621..

Supreme Court in *Rose*,⁵⁶ and prepare them to take their place as knowledgeable and productive citizens.⁵⁷

Twelve years later, however, a second generation adequacy case produced a divided court⁵⁸ newly skeptical of its own ability to remedy problems of inadequacy in education. In *Hancock v. Driscoll*, students from four of the state's poorest public school districts revived the *McDuffy* case,⁵⁹ alleging that their schools "continue[d] to suffer with largely the same conditions"⁶⁰ existing prior to *McDuffy*, thereby depriving them of the education mandated by the Supreme Court. The *Hancock* plaintiffs acknowledged that the 1993 education reforms had achieved a great deal,⁶¹ but they argued that the state continued to leave some of its neediest children behind.⁶²

Despite reaffirming *McDuffy* as binding precedent⁶³ and finding that the Commonwealth had failed to achieve the objectives outlined therein,⁶⁴ the *Hancock* plurality held for the defendants. In her plurality opinion, the Chief Justice denied plaintiffs relief not because she did not find a constitutional violation, but because she

⁵⁶ See *supra* Part I.

⁵⁷ *McDuffy* at 606.

⁵⁸ In *Hancock v. Driscoll*, seven justices wrote four separate opinions. The Chief Justice wrote for the plurality, joined by Justices Spina and Cordy, JJ. Justice Cowin concurred and was joined by Justice Sosman. Justices Graeney and Ireland each wrote their own dissenting opinion.

⁵⁹ *Hancock* at 442.

⁶⁰ *Id.*

⁶¹ *McDuffy* at 452.

⁶² *Hancock* at 432.

⁶³ Five of the seven justices reaffirmed *McDuffy*: Chief Justice Marshall and Justices Spina, Cordy, Graeney, and Ireland.

⁶⁴ In their joint dissent, Justices Graeney and Ireland make clear their position that the state has clearly failed to achieve the *McDuffy* objectives. Although the plurality claimed to find no breach, the Chief Justice – writing for the plurality conceded that the "goals of education reform adopted since *McDuffy* have [clearly not] been fully achieved." In fact, she writes that, "[n]o one, including the defendants, disputes that serious inadequacies in public education remain." She acknowledged that the state's record of education reform since 1993 a "marred by areas of real and in some instances profound failure." She further admitted that the "slow, sometimes painfully slow, pace of educational reform in the focus districts," has maintained "sharp disparities in the educational opportunities, and the performance, of some Massachusetts school students." She agreed with the Superior Court judge's assessment that the failures are due – in part – to insufficient funding: "No one reading the judge's report can be left with any doubt that the question is not 'if' more money is needed, but how much."

could not identify an acceptable remedy. In an opinion reflecting a full range of traditional justiciability concerns, the Chief Justice makes clear her discomfort with remedies she deems to be properly the province of concomitant branches of government.

At trial, the Superior Court judge had suggested two possible remedial paths: 1) to order the Department of Education “to determine the ‘actual cost’ of funding a ‘constitutionally adequate level of education’ for all students in the focus districts,” and 2) to order the Commonwealth “to implement the funding and administrative changes necessary to achieve that result.”⁶⁵ The Chief Justice rejects both of these recommendations. She explicitly refuses to order a costing out study “rife with policy choices that are properly the Legislature’s domain.”⁶⁶ Further, she argues that the judiciary has neither the authority nor the competency to make such fundamentally political choices.⁶⁷ And finally, as the costing-out study alone falls far short of a cure for failing schools, she warns of a slippery slope towards “forcing the Legislature to appropriate more money.”⁶⁸

The Chief Justice’s remedial concerns underscore one major difficulty faced by courts in second generation adequacy cases. Whereas the court in *McDuffy* had deferred to the legislature to determine how to fulfill its Constitutional duty – finding these “details of implementation...best left, *at least initially*, to the executive and to the legislative branches of government” – persisting inadequacies would have required that

⁶⁵ *Hancock* at 432.

⁶⁶ *Id.* at 460.

⁶⁷ *Id.* (“The study would assume, for example, that in order to fulfill its constitutional obligation under the education clause, the Commonwealth “must” provide free preschool for all three and four year old children “at risk” in the focus districts, and presumably throughout the Commonwealth thereafter. That is a policy decision for the Legislature....Other programs might be equally effective to address the needs of at risk students, such as remedial programs.... nutrition and drug counseling programs, or programs to involve parents more directly in school affairs. Each choice embodies a value judgment; each carries a cost, in real, immediate tax dollars; and each choice is fundamentally political. Courts are not well positioned to make such decisions.”)

⁶⁸ *Id.* at 461.

the *Hancock* court offer more specific guidance on the substance of the right. If a court perceives the state to be making a good faith effort to improve education, then issuing yet another declaratory judgment that the school system is unconstitutional becomes an empty formalism. The legislature need only respond by continuing to make its best effort to improve the system.

Faced with the prospect of finding a constitutional violation with no meaningful remedy, the *McDuffy* plurality ultimately held that the plaintiffs had failed to prove that the Commonwealth had violated the state's Education Clause.⁶⁹ Although concurring in this result, Justice Cowan's opinion criticizes the Chief Justice's opinion as less-than-honest. He accuses her of "avoid[ing] the need to deal with *McDuffy*'s intrusive and flawed analysis," by an "artful" rendition of "clear error" review.⁷⁰ In other words, Justice Cowan suggests that the plurality holding fails to find a clear breach of the constitutional duty, when, in fact their problem is with the court's own institutional competence to order a remedy:

If the Chief Justice and those Justices who joined with her are concerned about a self-imposed position at the helm of this debate, they should reject much or all of *McDuffy*. If, on the other hand, they are comfortable with the prospect of determining whether the Commonwealth's educational reforms and expenditures have produced satisfactory results, they should accord the trial judge's findings and conclusions their due deference.⁷¹

Justice Cowan here hints at the deeper tension running through Chief Justice Marshall's opinion. Although the Chief Justice never explicitly mentions "separation of powers" or "justiciability" in her opinion, those principles drive her decision. Forced to choose

⁶⁹ *Id.* at 434.

⁷⁰ *Id.* at 468 (Cowan, Concurring)

⁷¹ *Id.* at 469 (Cowan, Concurring).

between a more aggressive remedial stance and abdication of any role in adjudicating the education right, the Supreme Court of Massachusetts bows out by failing to find breach.

ii. Legitimacy of Judicial Intervention

Even had the most traditional of judicial remedies been available to the *Hancock* court, it is not clear that it would have been persuaded of its prerogative to intervene on behalf of Massachusetts' children. Like its counterparts across the country, the court's tone of deference may reflect an additional concern: that courts lack the authority to intervene in education in the absence of a breakdown of the political process.⁷² Indeed, some scholars have argued that grievous deficiencies alone are not sufficient to trigger judicial action. Instead, the judiciary can only legitimately engage in structural reform when a government institution becomes "substantially immune from conventional political mechanisms of correction."⁷³

In *Hancock*, the Chief Justice 's opinion points to the standard of legislative breakdown as the bar which must be met for judicial intervention.⁷⁴ She determines whether the Commonwealth has met its duty by focusing not the quality of the education, but rather on whether the legislature's action merits judicial intervention. Rather than

⁷² See, e.g., *Neely* at 789 (concluding that the constitutional standards could not "be used to fault a public education system that is working to meet [those] goals merely because it has not yet succeeded in doing so."); *Young* at 15 (citing improving test scores and performance relative to neighboring states and concluding, "Given this progress, we are unwilling at this time to declare that the level of education funding in Kentucky is unconstitutionally inadequate."); *CCJEF* at 40 (identifying complete abdication – such as total abolition of ESL programs - as the bar for legitimate judicial intervention)

⁷³ See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1062 (2004); See also *Marisol A. ex rel. Forbes v. Giuliani*, 185 F.R.D. 152, 164 (S.D.N.Y. 1999) (noting that even if the plaintiffs established liability at trial, "the Court may not have been in a position to provide for more relief than simply encouraging continued effort and improvement by [the defendant]"). But See Owen Fiss, *The Forms of Justice* 93 HARV. L. REV. 1 (1979).

⁷⁴ See *Hancock* at 433, fn 2 (distinguishing judicial intervention in *McDuffy* as necessitated by the Commonwealth's utter neglect: "[B]efore the enactment of the Education Reform Act of 1993 (act), many of the Commonwealth's children, notably poor children, urban children, children of color, and children with special needs were in essence systematically discarded educationally, with no obligation recognized by the Commonwealth to intervene on their behalf.").

asking if the state is preparing the rich and poor in every city and town to “participate as free citizens,” she questions whether the Legislature “neglected or avoided a constitutional command”? Has it acted “in an arbitrary, non-responsive, or irrational way to meet the constitutional mandate”?⁷⁵ Is it “presently neglecting or is likely to neglect its constitutional duties, thus requiring judicial intervention.”?⁷⁶ After thus framing breach as a question of legislative engagement, she is able to find the education inadequate, but the legislature’s efforts sincere. She concludes the court cannot offer relief:

No one . . . disputes that serious inadequacies in public education remain. But the Commonwealth is moving systemically to address those deficiencies and continues to make education reform a fiscal priority. It is significant . . . that the Commonwealth has allocated billions of dollars for education reform since the act's passage By creating and implementing standardized Statewide criteria of funding and oversight; by establishing objective competency *goals* and the means to measure progress toward those goals³; by developing, and acting on, a plan to eliminate impediments to education based on property valuation, disability, lack of English proficiency, and racial or ethnic status; and by directing significant new resources to schools with the most dire needs, *I cannot conclude that the Commonwealth currently is not meeting its constitutional charge to "cherish the interests of . . . public schools." Part II, c. 5, §2.*⁷⁷

Justice Graeney, the sole justice on the *Hancock* Court to have participated in McDuffy twelve years earlier, interprets the Chief Justices’ opinion as effectively overruling *McDuffy*.⁷⁸ Seizing on her use of the words “priority”, “commitment”, “plan,” and “progress” he criticizes her for interpreting the duty to educate as a duty that turns on “effort and not on results” – an emphasis he views as incompatible with *McDuffy*’s

⁷⁵ *Id.* at 435

⁷⁶ *Id.* at 457

⁷⁷ *Id.* at 433-444 (emphasis added).

⁷⁸ *Id.* at 478, 485 (Graeney, J. dissenting).

holding. In other words, children in the Commonwealth have only a right to an earnest legislature – one that is trying its best to provide an adequate education.

Whether the Chief Justice’s opinion is read to guarantee a right to an adequate education (but, no remedy) or no such right at all (as the dissent would argue), the outcome here is the same: plaintiffs are denied relief as long as the legislature is deemed to be making a good faith effort to reform the school system.

As was the case in Massachusetts, many courts adjudicating second generation cases will find grievous failures in education despite no longer being confronted with inactive or inattentive legislatures. The resulting separation of powers concerns threaten to drown out plaintiffs’ assertions that political activity is not the same as ensuring that a state achieves its constitutional duty towards children.

iii. Uncertain Breach

The final way in which political progress heightens separation of powers concerns in education adequacy suits is also the most obvious: as school conditions and the constitutional standard converge, courts are less certain whether there is a constitutional violation to be remedied in the first place.

Despite the sophistication of costing-out studies, adequacy still leaves courts without a consensus about the precise measurement of “adequate” funding or “adequate” education. As Professor Peter Enrich writes:

Faced with a constitutional provision mandating an indeterminate level of governmental activity, and demanding a commensurate and equally indeterminate (but very large) dedication of governmental resources, a court's most natural

inclination is to defer to the choices made by the political branches...⁷⁹

The question is naturally less daunting for courts when the level of funding or quality of education falls below any imaginably acceptable standard. Thus, many early adequacy courts could intervene with moral certainty while at the same time not being forced to set a specific level of funding or quality. Whatever the constitutional standard, they could declare with confidence that the current education system fell short.⁸⁰

As budgets have increased and schools improved, courts have faced more difficult factual scenarios in which levels of funding fell near, or within, the spectrum of plausible standards.⁸¹ In such situations, courts have seemed significantly less comfortable substituting their own judgment for that of the legislature on issues that push against the bounds of the separation of powers.⁸²

B. INCREASED FOCUS ON FUNDING LEVELS

Adequacy suits have always been about money,⁸³ but recent cases suggest that appropriations pressures have now become one of the greatest stumbling blocks for courts as they consider their ability to respond to the claims of adequacy plaintiffs. There

⁷⁹ See Enrich *supra* note 32 at 171-172.

⁸⁰ See, e.g., *Neely* at 783 (“In *Edgewood I* and *II*, we did not find it necessary to articulate a standard of review; the public school finance system was simply not “efficient” by any stretch of the word.”); *Young* at 13 (“[*Rose*] was decided based upon evidence alleging that the Kentucky school system provided students a vastly inferior education, falling far short of ‘efficient.’”); *Hancock* at 452 (“In *McDuffy*, this court faced an overwhelming, stipulated body of evidence that the structure of public education in Massachusetts was condemning generations of public school students in our poorer communities to an inferior education. It was a record of abysmal failure.”).

⁸¹ See, e.g., *Moore* at 19-20 (discussing prior reforms to the school funding formula that directed more resources to the poorest districts.).

⁸² See *id.* (finding school funding constitutionally adequate).

⁸³ See Christopher E. Adams, *Is Economic Integration the Fourth Wave in School Finance Litigation?* 56 EMORY L.J. 1613, 1614-1615. *Edgewood I* challenged the structural design of the school finance system that starved property-poor districts for funds. In *Rose*, liability may have turned on the state’s failure to provide an adequate education, but the Court made it extremely clear that the state’s duty included the requisite funding for a constitutional education.

are three interrelated reasons why money has increasingly become a barrier to success in adequacy cases. First, plaintiffs have focused more and more on levels of funding as the measure of adequacy in education, often to the exclusion of other elements that might be less tangible, but more easily approached by courts. Second, costing-out studies have exacerbated this problem by focusing courts on specific dollar amounts. Persuading courts to demand a specific budget from the legislature sets a higher separation of powers bar than asking for an indeterminate amount of increased funding in order to accomplish other specific objectives such as improved facilities. Judges have refused repeatedly in recent years to interfere with legislative judgments about exactly how much money is enough. Finally, the increased focus on money has engendered a countermovement arguing that money alone does not make a successful school. This means that just at the time courts are being pointed towards money as a solution in adequacy cases, they are hearing loud arguments against the efficacy of such a remedy.

i. Focused on Funding

The particular separation of powers concerns stemming from adequacy's focus on money have intensified in the past several years in part because of the evolution traced in Part I. Because of their roots in equity, early adequacy claims focused on the structural aspects of school finance systems that systematically condemned students in poor school districts to an inadequate education.⁸⁴ For example, the *Edgewood I* plaintiffs claimed that a school finance system heavily reliant on local property taxes violated not only the equal protection clause, but also the state right to education.⁸⁵ As the litigation strategy evolved, however, plaintiffs began to challenge not the basic funding *structure*, but

⁸⁴ See Enrich, *supra* note 32 at 109.

⁸⁵ *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

funding *levels* themselves.⁸⁶ When an adequacy claim is structured around the level of funding, however, courts are forced to evaluate appropriations, the heart of the legislature’s domain, rather than considering the overall structure of school finance, an area in which a court could potentially intervene without overtly mandating increased expenditures.

Further cornering courts in the legislative domain, adequacy plaintiffs increasingly emphasize funding levels to the exclusion of broader challenges to the overall adequacy of the public school education.⁸⁷ Kentucky is illustrative of this trend. In 2007 a Kentucky trial court dismissed adequacy claims expressly due to the nature of the plaintiffs’ claim. In *Young v. Williams*, the plaintiffs had focused their pleadings specifically on the level of school funding, claiming it was both “inadequate and arbitrarily determined by the legislature.”⁸⁸ On a motion for summary judgment, however, Judge Thomas Wingate of the Franklin Circuit Court denied the *Young* plaintiffs a chance to proceed to trial with their claim.

Significantly, in granting the defendant’s motion for summary judgment, the *Young* court did not disavow *Rose*, Kentucky’s landmark education case. Instead, the opinion sought to reiterate *Rose*’s holding that only the judiciary can determine when a constitutional standard is met. At the same time, however, Judge Wingate found that

⁸⁶ See e.g. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.* 176 S.W.3d 746, 753 (2005).

⁸⁷ See, e.g., *Moore* at 83, 173 (“The gravamen of this case...has been about funding. Very limited testimony was presented about Kuspuk’s curriculum, its alignment with the State’s standards, the professional development available to its staff, the communities’ involvement in their schools, and the other components of its educational system. ...[However], [t]he primary question in this case – whether the public education system in Alaska is constitutionally adequate – can not be framed solely in terms of funding, but *must also address the opportunity for children to obtain an education. Funding is just one component of the State’s public school system.*”) (emphasis added); *Neb Coalition for Ed. Equity & Adequacy v. Heinman*, 731 N.W.2d 164 (2007) (noting that plaintiffs failed to allege at any point the negative impact of funding insufficiencies on the education received by students in the classroom.).

⁸⁸ *Young v. Williams*, No. 03-00055/01152 at 1 (Cir. Ct., Div. II., Feb. 13, 2007).

Young was a different case from *Rose*. In *Young*, he wrote, plaintiffs “allege inadequate monetary expenditures, not an [inadequate] education system.”⁸⁹ Thus, Judge Wingate reasoned, they “ask[] the court to *exceed* the rule from *Rose* by going beyond mere constitutional *interpretation* ...[to] stipulate[e] the *manner* by which the General Assembly must carry out its responsibilities.”⁹⁰ Reinforcing this point, Judge Wingate’s opinion explicitly states that the plaintiffs could have survived summary judgment if only they had brought “appropriate claims” before the court, backed by a “fact pattern parallel to *Rose*.” It argued that courts are – and should be – “less willing to stretch [the] separation of powers”⁹¹ for disputes over funding than for claims alleging a violation of the underlying right. Ultimately, Judge Wingate wrote, increased funding “must be the product of political will, not judicial decree.”⁹²

Courts have also suggested that narrow claims of inadequate funding narrow the remedial options available to the court. For example, the plaintiffs in the most recent Texas adequacy case, *Neely v. West Orange Cove Consol Independent School District*, like those in *Young*, alleged only inadequate funding. The Texas Supreme Court denied them relief. In response to the dissent’s argument for a non-monetary remedy, the *Neely* majority responded: “[w]e are constrained by the arguments raised by the parties to address only issues of school finance.” As these recent decisions in Texas and Kentucky show, the evolution of plaintiffs’ litigation strategies over the past decade has had the effect of pushing state courts ever closer to appropriations, an area where they are extremely loath to tread.

⁸⁹ *Id.* at 13.

⁹⁰ *Rose* at 3 (emphasis added).

⁹¹ *Young* at 12.

⁹² *Id.* at 20.

ii. *The Costs of Costing-Out*

The salience of funding levels in education adequacy cases has also increased significantly with the advent of the “costing-out” study. Even in cases closely replicating previously successful pleadings or with broader claims about the adequacy of education, costing-out studies have recently become a ubiquitous tool for plaintiffs wishing to give courts a concrete estimate of what it would take to achieve adequacy in their states.

First developed in 1997, a “costing out” study employs one of four methodologies to calculate the cost of providing a constitutionally adequate education to all children.⁹³ By quantifying “adequacy,” these studies offer a tangible benchmark for a somewhat nebulous constitutional standard. For example, in *Young*, all of the five costing-out studies concluded that appropriations for the 2001-2002 school year fell short by at least \$740 million. Similarly, the costing out study offered by the *Neely* plaintiffs concluded that the state must boost expenditures by a minimum of \$1.653 billion.⁹⁴ Thus, costing-out studies have quickly become central to the core adequacy litigation strategy.⁹⁵

The same power of the costing-out study to quantify a state’s failures in education also necessarily accentuates separation of powers concerns. It shifts the focus of an

⁹³ For a more comprehensive introduction to costing out studies (theory, methodologies, and utilization), see, e.g., Janet D. McDonald, Mary F. Hughes, & Gary W. Ritter, *The Ben J. Alzheimer Symposium; Education Funding at the Crossroads; Article: School Finance Litigation and Adequacy Studies*, 27 U. ARK. LITTLE ROCK L. REV. 69, 79 (2004); Christopher E. Adams, *Is Economic Integration the Fourth Wave in School Finance Litigation*, 56 EMORY L.J. 1613, 1624 (2007); and Eric A. Hanushek, *The Alchemy of “Costing Out” an Adequate Education* (Oct. 2005) (revised version paper prepared for the conference on Adequacy Lawsuits: Their Growing Impact on American Education), available at <http://www.uark.edu/ua/der/EWPA/Research/School Finance/1787.html>.

⁹⁴ See *Neeley*, 176 S.W.3d 746, 769 (2005).

⁹⁵ See McDonald, *supra* note 93 at 93. (Describing how the first costing out study was conducted in Ohio by consultants Augenblick & Myers in 1997 and how over the next decade consultants were hired to conduct costing out studies in at least seventeen other states). Indeed, at least one costing-out study was at issue in more than half of the nineteen cases examined in this article. Plaintiffs offered costing-out studies not only in *Young* and *Neely*, but also in *Moore v. State of Alaska*, *CCJEF v. Rell*, *Oklahoma Educ. Ass’n v. State ex rel. Oklahoma Legislature*, 158 P.3d 1058 (2007), *Montoy v. State of Kansas*, and *CFE v. State of New York*. The plaintiffs requested the Court to order the state to conduct a costing-out study in *Hancock* and in *Crane Elementary Sch. Dist. v. State of Arizona*, No. 04-0076 (Ariz. App. Nov. 22, 2006).

adequacy case from defining the contours of the constitutional right to arbitrating the underlying funding dispute.⁹⁶ The former is quintessentially judicial. The latter is a power explicitly granted to the political branches by most state constitutions.⁹⁷ For this reason, under traditional separation of powers precepts, the judiciary is extremely reluctant to review – let alone mandate – appropriations.⁹⁸

In 2006, the New York Court of Appeals demonstrated why using the costing-out study may create more problems than it solves. Despite being initially sympathetic to adequacy plaintiffs claims, the court was extremely reluctant to interfere with the details of its legislature’s budgetary determinations. In 2003, the Court of Appeals had found for the plaintiffs in their adequacy lawsuit, *CFE II*, and directed the state to reform the current school funding and accountability systems to ensure that “every school in New York City would have the resources necessary for providing the opportunity for a sound basic education.”⁹⁹ This remedy, while not as explicit as some, seemed to demand a comprehensive overhaul of the state’s funding scheme. In response, however, the Governor chose to adopt the lowest number generated by various possible methods of

⁹⁶ The underlying funding dispute was underscored by competing costing out studies offered by the opposing parties. The study offered by plaintiffs concluded that Texas needed to increase school funding by \$1.653 billion to \$6.171 billion in order to achieve 55% statewide pass rate on the state standardized test. In contrast, the study offered by defendants concluded just \$563 - \$731 million in additional funds was necessary to achieve the same goal. See *Neely* at 770. Similarly, whereas the studies in *Young* uniformly concluded that “fulfilling Kentucky’s constitutional mandate toward education would require significantly more money than current funding levels,” they “disagreed as to the precise amount necessary.” *Young* at x. For the 2001-2002 school year, the various studies estimated Kentucky schools to be under-funded by as little as \$740 million or as much as \$2.3 billion. See *Young* at 2.

⁹⁷ See, e.g., CONNECTICUT CONSTITUTION, Art 4 § 16 (“The governor shall have power to disapprove of any item or items of any bill making appropriations of money . . .”).

⁹⁸ See e.g. Okla. Educ. Ass'n v. State ex rel. Okla. Legislature, 2007 OK 30, P24 (Okla. 2007), quoting *Calvey v. Daxon* 2000 OK 17, 21 (footnotes omitted) (“This Court has no authority to consider the desirability, wisdom, or practicability of fiscal legislation.”); *Connecticut Coalition for Justice in Education Funding et. al. v. Rell*, p. 37 No. X 09 CV 05 4019406 (CT Sup. Ct. 2007) (citing *Rodriguez* for the proposition that the judiciary should defer to the legislature on school finance issues as the court “lack[s] both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues.”)

⁹⁹ Campaign for Fiscal Equity, Inc. v. State of New York, 100 N.Y.2d 893 (2003).

estimating the state's spending gap on education and proposed a program bill incorporating that methodology.¹⁰⁰

In *CFE III*, plaintiffs returned to court to challenge the governor's sum as insufficient to bring the state into compliance with the mandate of *CFE II*. At the end of an extensive fact-finding process, the lower court adopted the findings of an appointed panel of expert referees, concluding that New York was spending \$5.63 billion *less* than was constitutionally necessary to provide a sound basic education.

In a huge blow to New York's adequacy campaigners, however, the Court of Appeals rubber-stamped the Governor's proposal, holding that the court's job was merely to determine the *rationality* of the State's proposed spending.¹⁰¹ Tellingly, the Court of Appeals opinion does little to define how a "rationality" test would work. Instead, much like rational basis review in equal protection doctrine, the court suggests that if there is any way that the Legislature's determination can be justified, then it will be viewed as rational. Just how deferential the court's opinion is becomes clear from a close reading. The majority opinion expends as much ink on its separation of powers concerns,¹⁰² and in articulating something akin to the restraint prescribed by the political question doctrine¹⁰³ as it does actually reviewing the State's funding determination for reasonableness.

In making its determination, the Court of Appeals stressed that deference is "especially necessary where it is the State's budget plan that is being questioned." Thus,

¹⁰⁰ The number the Governor chose was \$1.93 billion.

¹⁰¹ *Campaign for Fiscal Equity, Inc. v. State of New York*, 861 N.E.2d 50; 2006 NY Slip Op 8630, 8 (N.Y. 2006) ("The role of the courts is not, as Supreme Court assumed, to determine the best way to calculate the cost of a sound basic education in New York City schools, but to determine whether the State's proposed calculation of that cost is rational. Supreme Court should not have endorsed an examination in which the cost of a sound basic education in New York was calculated anew, when the state budget plan had already reasonably calculated that cost. In this respect, we agree with the Appellate Division.")

¹⁰² *Id.* at 58.

¹⁰³ *Id.* ("the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government") (citations omitted).

the Court imposed a self-described “formidable burden” of proof on plaintiffs, emphasizing that a state financing scheme must be “patently *irrational*...before judicial deference will give way.”¹⁰⁴ Just three years after mandating reform, the Court proved unwilling to interfere substantively with the spending determinations made by other branches of government.

Recent opinions from around the country echo the concerns of the *CFE III* court. In Massachusetts, Justice Marshall cited the costing-out study as threatening to force her court down the slippery slope towards “forcing the Legislature to appropriate more money,”¹⁰⁵ a step her concurring colleagues denounce as a patent violation of the separation of powers:

Often, these disagreements about education concern how much money to spend and how best to spend it. The issue of public education is thus no different from our political controversies concerning whether we should invest more money in our public transportation system . . . and the amount we should provide in public assistance to low-income individuals and families. In other words, the controversy before us today is largely a funding debate. Choices regarding how much money to spend and how to spend it are in every instance political decisions left to the Legislature, to be arrived at with input from the executive branch and the citizenry; they should not be the result of judicial directives.¹⁰⁶

In Kentucky, the *Young* court refused to “substitute the [costing-out study’s] approximations...for the General Assembly’s actual appropriations,” characterizing

¹⁰⁴ *Id.* at 58.

¹⁰⁵ *Hancock* at 460.

¹⁰⁶ *Id.* at 472. Even the *Hancock* dissent – which would have ordered a costing-out study – acknowledged the inherent separation of powers concerns involved in mandating appropriations: “I am well aware of the limitations that apply to unelected members of a court ordering an elected Legislature and executive to appropriate money and, frankly, the difficulties that might be encountered if it became necessary to enforce any orders against recalcitrant elected officials. The problem, of course, is magnified considerably when dealing with expenditures needed to fund public education; the need to allocate resources equitably between various school districts achieving at different levels; the complexity of education policy in general; and the disagreement between competent experts on how best to remediate a nonperforming or poorly performing school district.” *Hancock* at 484 (Graeney, J. dissenting).

plaintiffs requests for the court to “determine the adequacy of the *specific amount* of education funding,” as “ask[ing] the court to push the limits of separation of powers.”¹⁰⁷ In Texas, the Supreme Court largely ignored the costing-out studies to which the District Court had accorded great weight in striking down current funding levels, emphasizing that legislatively-determined school funding levels should be deemed constitutional unless “arbitrary”.¹⁰⁸

The costing-out study is undoubtedly a useful tool for making tangible the harm in an adequacy case and/or quantifying a proposed remedy, but it is increasingly a tool plaintiffs use at their own peril. When combined with active legislatures, improved schools and ever-louder voices arguing that money (or money alone) will not solve education problems, the predominance of the costing-out study only confirms courts’ fears that they are being pushed firmly into the legislative territory of appropriations. Whereas earlier courts facing state-wide education crises might not have quibbled about stepping into the legislative zone to stir-up an inactive body or even suggesting particular appropriations, recent courts are no longer working in such a legislative vacuum. For these courts, the costing-out study can trigger alarms by seeming to frame adequacy cases as suits about funding and nothing more. Perhaps worse, they can provide an excuse for wary courts to avoid grappling further with the remedial challenges of modern adequacy suits.

iii. Doubts That Money Alone is the Solution

¹⁰⁷ *Young* at 14 (emphasis added).

¹⁰⁸ *See Neely* at 785..

The judiciary's willingness to encroach traditional separation of powers boundaries has waned with their faith in the efficacy of money as a solution. Adequacy's initial success fueled a concerted counter-movement that has effectively cast doubt on the basic assumption that increased funding alone will improve academic performance.¹⁰⁹ This movement has produced literature and experts widely cited and called upon by defendants in adequacy cases. No Child Left Behind reinforces the message that money doesn't matter by sending a strong message to the judiciary that the nation's most difficult education problems should be remedied by stronger accountability measures not increased spending.

Setting aside the validity of these claims, one thing is certain: the latest adequacy decisions reveal that the courts are, in fact, increasingly skeptical that increased funding will produce constitutionally adequate school systems. Whereas in 1989 the Texas Supreme Court confidently declared, "[t]he amount of money spent on a student's education has a *real* and *meaningful* impact on the educational opportunity offered that student,"¹¹⁰ its confidence soon faltered. By 2005, the Court characterized the same relationship as "neither simple nor direct," warning that while achievement "can and often does improve with greater resources...money does not guarantee better schools or more educated students."¹¹¹ Sharing in that sentiment, many courts have recently accorded great weight to the non-monetary barriers to academic success: financial mismanagement, lackluster school leadership, and environmental factors.¹¹²

¹⁰⁹ See, e.g., ERIC A. HANUSHEK ET AL., MAKING SCHOOLS WORK: IMPROVING PERFORMANCE AND CONTROLLING COSTS (1994).

¹¹⁰ See *Edgewood I* at 393.

¹¹¹ See *Neely* at 788.

¹¹² Trial courts in Arizona and South Carolina argue that increased expenditures will have little impact where children are exposed to a negative home environment. See *Crane Elementary Sch. Dist. v. State of Arizona* No. 04-0076 (Ariz. App. Nov. 22, 2006) and *Abbeville v. State*, 93-CP-31-0169, ¶ 9 (S.C. Ct. Common Pleas, 3d

Trial courts in Arizona and South Carolina refused plaintiffs' plea for increased resources they believed would have little impact amidst a culture of poverty.

Distinguishing plaintiffs' claims of inadequate operations funding from an earlier adequacy victory on facilities funding, the court in *Crane Elementary School District v. State of Arizona*¹¹³ placed the blame for persistent failure on broken homes, not broken schools:

Here, the underlying circumstances common to at-risk students that are predictors of poor performance, e.g., low parent participation and low self esteem, are not caused by the State's educational funding system but are attributable to a dysfunctional home environment that, unlike deteriorating capital facilities, cannot easily be remedied by an influx of money.¹¹⁴

Such creeping doubts about the efficacy of injecting more money into the education system only fortify the judiciary's inclination to defer to legislative judgment. In the case of *Crane*, the court declined to hold the state accountable for problems it argued it could no more solve than it could create.

The South Carolina trial judge in *Abbeville v. State* also doubted that the school system could simply spend its way to success. In fact, he went so far as to suggest that the money thrown at failing schools had largely been wasted, partially because remedial efforts were vitiated by the forces of poverty and shattered families and partially because

Judicial Circuit 2005) (finding the "millions of dollars spent each year on the Plaintiffs Districts" have had no "appreciable impact" in student achievement due in part to mediating factors, such as prenatal factors, family status, divorce, frequent moving, and child rearing). The Supreme Court of Massachusetts suggested financial mismanagement and corruption are at the root of the education problem. *See Hancock* at 1157, n. 35 (noting that proposed remedies addressed only funding and not the "failing administrative and financial management that currently deprives students in the focus districts of the educational opportunities they deserve."). The Alaska trial court also underscored the importance of non-monetary inputs. *See Moore v. Alaska*.

¹¹³ *Crane Elementary Sch. Dist. v. State of Arizona*, No. 04-0076 (Ariz. App. Nov. 22, 2006).

¹¹⁴ *Id.* at 24.

the money came too late.¹¹⁵ For these reasons, instead of explicitly mandating more appropriations, the trial judge ordered South Carolina to provide preschool in the plaintiff districts – a remedy he hoped would mediate the environmental factors proven to leave kindergartners from poor families lagging behind their resource-rich peers.

That the trial judge found any remedy at all, and particularly such a dramatic one, could be seen as a victory for the *Abbeville* plaintiffs. The trial judge had been so reluctant to interfere with education funding that he initially dismissed plaintiffs’ adequacy claim as a non-justiciable political question. The Supreme Court reversed and remanded the case, explicitly holding that it would be error to use “judicial restraint, separation of powers, and the political question doctrine as the basis for declining to decide the meaning of the education clause.”¹¹⁶ Nonetheless, when the trial judge eventually issued his ruling mandating preschool, the *Abbeville* plaintiffs did not see it as a victory. They immediately filed a motion to alter or amend putting their teacher quality, curriculum, transportation, facilities and various other claims back before the court. The claims were once again rejected by the trial judge, but the plaintiffs’ motion shows how far they viewed his order to be from the full funding reform remedy they sought.

Although the Supreme Court’s decision forced him to adjudicate the case, the trial judge’s later opinions indicate a continuing concern with judicial interference in this arena. While reluctant to interject itself into the legislature’s larger funding decisions, the trial judge responded to the Supreme Court’s demand that he hear the case by mandating preschool, a remedy that, although likely to necessitate some additional spending, leaves

¹¹⁵ See *Abbeville v. State*, 93-CP-31-0169, ¶ 431-433 (S.C. Ct. Common Pleas, 3d Judicial Circuit 2005)

¹¹⁶ *Id.* at ¶ 9.

the legislature considerable discretion in shaping and implementing an early childhood program. Although not the pure legislative deference witnessed in New York, the South Carolina judge selected a remedy that would allow him to avoid the question of specific appropriations. In fact, by choosing to mandate preschool rather than increased funding for the system as a whole, the judge in a sense echoed the earliest adequacy decisions that called for functioning school systems, but left the details to the legislature. In order to respond to the commands of the Supreme Court while avoiding legislative prerogatives, the judge invented a remedy that brought him squarely back into comfortable judicial territory. This type of creative yet cabined remedy can increasingly be expected of trial judges skeptical of interfering with legislative budgetary allocations.

In the 2007 case, *Moore v. State*, an Alaska trial court similarly ordered a non-monetary remedy in lieu of the statewide funding reform sought by plaintiffs. Although the trial court found not only that the state's "achievement gap" was a serious concern,¹¹⁷ but also that the education provided in at least one district was so deficient as to make it a violation of substantive due process to require its students to pass the statewide exam in order to receive their high school diplomas,¹¹⁸ it concluded that Plaintiffs proved neither that current funding was constitutionally inadequate nor that an increase of funding would remedy the existing achievement gap in the state.¹¹⁹ Suggesting that local school districts had failed to spend existing funds in the best interest of their students,¹²⁰ the court directed the legislature to step up its oversight of the system and to ensure better accountability. In reasoning resonant with the logic of No Child Left Behind, the court

¹¹⁷ Moore et al. v. Alaska, 3AN-04-9756 Civil at Conclusions of Law, Part I ¶ 19.

¹¹⁸ *Id.* at Conclusions of Law, Part II.

¹¹⁹ *Id.* at ¶¶ 17-20.

¹²⁰ *Id.* at ¶ 287.

determined that the state was failing to meet its constitutional mandate not for lack of funding, but due to a failure of adequate oversight.

These recent opinions in Arizona, South Carolina and Alaska demonstrate three possible responses to education suits. Ranging from total rejection of plaintiffs' claims, to a highly specific yet cabined remedy, to the vague command to "increase oversight," they have in common the sense that money will not solve a state's education problems. While courts may respond, as did the Arizona court, by placing blame on parents rather than the state, or, as did South Carolina and Alaska, by searching out a remedy that avoids an overt mandate of increased spending, their skepticism about whether money will solve problems contributes to the sense that the legislature is best positioned to address modern education problems.

At a broader level, the cases in this section show how important innovative remedial proposals will be to the future success of education reform litigation. By focusing on funding, plaintiffs may open a window for unsympathetic courts to exempt themselves altogether from the process of reform. Even the more engaged courts may draw the line of intervention at specific budgetary allocations. Thus, when adequacy plaintiffs do not offer remedies that are not overtly monetary, they may end up with a court that decides to defer to legislative budget numbers or with a non-responsive remedy.

C. LESSONS FROM ADEQUACY CASES ACROSS THE COUNTRY

Finally, adequacy decisions delivered between 2005 and 2008 reflect significant changes in the larger national landscape. In the previous sections this Article showed courts to be increasingly pushed – by maturing cases and litigation strategies – towards

mandating appropriations, a remedy with which they were increasingly uncomfortable. This section adds the backdrop: By 2005 courts had to weigh this uncertain justice against the risk that their actions would begin a losing battle with the state legislature, or that, at best, judicial interference would only contribute to the kind of mixed results seen over the years in their own and other states.

In the early adequacy cases, courts were exploring new territory. They recognized separation of powers tensions from the very beginning, but they also saw the many ways in which education is *sui generis*. As a state's single affirmative constitutional duty, education is elevated in state constitutions, as it is in American life. In response to early rulings, legislatures could not, and did not reject outright the judiciary's insistence that they provide an adequate education for all children.

By 2007, plaintiffs had litigated adequacy cases in 35 states. As discussed in Part I, many of the judicial decisions served as catalysts for immediate sweeping education reform. In a handful of states, however, staunch political opposition forced courts to play a more active role in the remediation stage, straining the allocation of power among the branches and ultimately shaking judicial commitment to protecting the constitutional right.¹²¹

These struggles during the 1990s portend for today's judges what may be at stake when they preside over adequacy litigation. The history of education litigation in Texas is particularly illustrative of what courts may fear when they contemplate becoming deeply involved in an education remedy. The Texas Supreme Court began its intervention in the state's failing education system committed to the constitutional guarantee and to

¹²¹ See Rebell, *supra* note 1 at 1528-1529 (Citing instances of excessive delay and resistance by political branches that – in states like Ohio and Alabama – ultimately led courts to retreat).

requiring the reforms necessary to fulfill that guarantee. When the Court unanimously struck down the state’s school finance system in 1989 in *Edgewood I*, it called for sweeping legislative action, warning, “[a] band-aid will not suffice; the system itself must be changed.”¹²² Two years later, in *Edgewood II*, the Court continued to press Texas to meet its duty to schoolchildren. The Court unanimously struck down the public school finance system a second time, dismissing the latest legislation as wholly insufficient: “The fundamental flaw . . . lies not in any particular provisions but in its overall *failure to restructure the system*.”¹²³ Four months later, the legislature enacted new legislation, modeled closely on prescriptive judicial advice.¹²⁴ Not yet satisfied, however, the Court rejected the legislature’s effort yet again in *Edgewood III*, decided in January of 1992.

The Texas Supreme Court accompanied each of its decisions with an unbending injunction threatening to shut down the public school system if the legislature failed to pass constitutional legislation by the designated deadline. By *Edgewood III*, however, the court’s unanimous front began to break under mounting pushback from the legislature.¹²⁵ Finally, in *Edgewood IV* – facing the legislature’s threat to strip its jurisdiction¹²⁶ – the Court declared the school finance system constitutional.

¹²² *Id.* at 397.

¹²³ *Edgewood II* at 16. (emphasis added) The Supreme Court actually reversed the district court’s decision to vacate the injunction “on the equitable grounds of deference to the Legislature.”

¹²⁴ This advice was not-so-subtly slipped into an unnecessary opinion denying a rehearing. Justice Doggett wrote a concurrence criticizing this inappropriate use of the opinion denying a rehearing to “influence the final stages of current legislative deliberations.” *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991).

¹²⁵ In his dissent, Justice Mauzy – who had written the *Edgewood I* decision – wrote, “In two prior opinions on this same case, the court worked together to follow the rather clear command of the Constitution without regard to the political consequences of its decision. Through compromise and consensus-building, the court spoke with one firm voice in what many have recognized as the most important case it has ever considered. Tragically, this has all been lost.” *Edgewood III* at 539 (Mauzy, J., dissenting).

¹²⁶ See Farr & Trachtenberg, *supra* note 25 at 702 (“Had it struck down Senate Bill 7, there might have been a revolt in the Legislature, particularly among the legislative leaders who had invested so much into the creation of the law. House leader Libby Linebarger surmised that, had the court declared Senate Bill 7 unconstitutional, the Culberson amendment would have passed, sharply restricting the court’s jurisdiction over education-related issues.”).

By the account of the four dissenting justices, *Edgewood IV* was the result of a capitulation to political pressure. They denied that anything substantive had changed since the Court's ruling in *Edgewood I*. Writing for the dissent, Justice Hecht explained:

Today, despite the Court's admonition that systemic change is essential, made in *Edgewood I*, and repeated in *Edgewood II*, and the Legislature's three opportunities in as many years to comply with constitutional requirements, the basic system with its fundamental flaws remain intact.¹²⁷

And, by the majority's own admission, its dramatic departure from former precedent was motivated by the need to escape the "judicial purgatory where we must hear the same case over and over."¹²⁸ This claim, first expressed by Justice Cornyn in his one-justice dissent in *Edgewood III*, was adopted by the majority in *Edgewood IV*¹²⁹ perhaps because it promised a graceful exit from a situation that had become untenable due to political pressure.

This epic battle left its mark on the Texas judiciary long after its final *Edgewood* decision. Although by the time *Neely v. West Orange Cove Consol Independent School District* reached the Texas Supreme Court in December of 2005, only Justice Hecht remained on the court from the *Edgewood cases*, his experience clearly informed the court's response to *Neeley*. Now writing for the *Neeley* majority, Justice Hecht vigorously defended the Court's duty to determine the constitutionality of the public school system. At the same time, he ultimately engaged in the inquiry with pronounced deference to the legislature. Bound by the lower court's factual findings, Justice Hecht

¹²⁷ *Edgewood IV* at 760.

¹²⁸ *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 526 (Tex. 1992).

¹²⁹ *See Edgewood IV* at 766 (Spector, J. dissenting).

reversed the lower court’s holding by taking the teeth out of the standards applied.¹³⁰ He ruled that in addition to proving that the system is [currently] not producing a general diffusion of knowledge, the plaintiffs must prove that it is incapable of doing so.¹³¹ Not surprisingly, the plaintiffs failed to meet a burden of proof that was, by the court’s own admission, “very deferential to the Legislature.”¹³² Thus, although the Court recognized serious deficiencies in education – including “wide gaps in performance amongst student groups differentiated by race, proficiency in English, and economic advantage”¹³³ – it determined that “those deficiencies do not amount to a violation of [the Texas Education Clause]”.¹³⁴

This long saga in Texas, and similar experiences in a handful of other states¹³⁵ have undoubtedly influenced subsequent courts trying adequacy cases. This is not surprising since state courts are especially likely to value the experience of sister jurisdictions when faced with novel constitutional claims and new remedial challenges not addressed by the federal courts.¹³⁶ At the same time, it means that over time, a few

¹³⁰ While the Texas Supreme Court adopted the duty articulated by the District Court - that a constitutional school system must provide all students “with a meaningful opportunity to acquire the essential knowledge and skills reflected in curriculum requirements...such that upon graduation, students are prepared to ‘continue to learn in postsecondary educational, training, or employment settings’” – it significantly softened the standard with the following caveat: “The public education system need not operate perfectly; it is adequate if districts are reasonably able to provide their students the access and opportunity the district court described.” *Neely* at 787.

¹³¹ *Id.* at 789.

¹³² *Id.* at 790.

¹³³ *Id.* at 789 (“There are wide gaps in performance among student groups differentiated by race, proficiency in English, and economic advantage. Non-completion and dropout rates are high, and the loss of students who are struggling may make performance measures applied to those who continue appear better than they should. The rate of students meeting college preparedness standards is very low. There is also evidence of high attrition and turnover among teachers statewide, due to increasing demands and stagnant compensation.”).

¹³⁴ *Id.* at 754.

¹³⁵ See *Rebell*, *supra* notes 1 & 121.

¹³⁶ See William S. Koxsi, *The Politics of Judicial Decision-Making in Education Policy Reform Litigation*, 55 HASTINGS L.J. 1077, 1226 (2004) (“What affects state supreme court decision-making in educational finance reform litigation? From a formal legal viewpoint, judicial decision-making in school finance reform cases, like all judicial decision-making, should be based on a straightforward application of the law to the facts of the case. But the law is hardly determinative in educational finance reform cases. Many of these cases are cases of first impression in which a state's high court is interpreting vague and century-old state constitutional language. Law

notable failures may have a disproportionate impact on judges dealing with later litigation.

For example, in 2006, the Kansas Supreme Court foreclosed further adequacy litigation explicitly to avoid the fate of its sister states.¹³⁷ In *Montoy v. State of Kansas*, the Court “elect[ed] ...to end th[e] litigation,”¹³⁸ despite lingering doubts about whether the legislature had successfully created a constitutional school finance system.¹³⁹ In one prong of its decision, the Court held that it could not properly determine the constitutionality of recently-passed legislation that had made changes to the school finance system. It deemed the changes significant enough to require that the plaintiffs amend their complaint in order to continue to properly challenge the system. In the second prong, after surveying the progression of adequacy suits in sixteen sister states, the Court declined to allow plaintiffs to amend their complaint to properly challenge the constitutionality of the “new” school finance system. The Court offered the experiences of New Jersey, Arkansas, and Texas as empirical evidence that remanding to the trial court tends to delay success in the face of continued litigation. Thus, the Supreme Court dismissed the case, concluding that “a constitutional challenge...must wait for another day”.¹⁴⁰

and legal precedent being of limited explanatory value, this study looks outside the law for influences on judicial decision-making.”).

¹³⁷ *Montoy v. Kansas*, 282 Kan. 9 (2006).

¹³⁸ *Id.* at 25.

¹³⁹ *Id.* Finding that the most recent legislation “so fundamentally altered the school funding formula that the school finance formula that *was* at issue in this case no longer exists,” the Court held it could not determine the constitutionality of such without further fact-finding by a lower court. At the same time, the court refused to remand to the district court to allow plaintiffs to amend their pleading to challenge the new funding formula. Thus, the court provided no substantive response to plaintiffs’ claims that the amended legislation still failed to pass constitutional muster.

¹⁴⁰ Two dissenting judges criticize the majority for “graft[ing] a ‘good enough for government work’ phrase” onto Article 6 §6 of our state constitution”. *Id.* at 35.

Courts in other states have used a similar rationale for rejecting adequacy suits or denying relief. In *Hancock*, for example, the Supreme Court of Massachusetts pointed to the other states, this time New Jersey and New York, as evidence for why it should stay its hand in 2005. Likewise, in 2007, the Alaska trial court in *Moore* pointed to Arkansas' experience as "illustrative" of why it should deny plaintiffs claims of inadequate funding.¹⁴¹

In still other states, courts have explicitly cited recent experiences from around the country as grounds for avoiding adequacy litigation altogether. In dismissing plaintiffs claims as non-justiciable in their 2007 case, *Nebraska Coalition for Ed Equity & Adequacy v. Heinman*, the Nebraska Supreme Court went out of its way to chastise state courts that foolishly took up what it deemed to be a prohibited political question:

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.¹⁴²

The court followed with a scathing critique of its peers in Arkansas, Texas, Alabama, and New Jersey for mistakenly believing the judicial branch could bring meaningful resolution and reform to school finance systems. In particular, the court minced no words in rebuking the New Jersey courts for nearly 25 years of school finance litigation, saying, "[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 the duties of a Legislature."¹⁴³

Whether courts explicitly acknowledged their influence or not, the landscape of prior education litigation across the country and its aftermath cannot help but have

¹⁴¹ *Moore v. Alaska*, No. 3AN-04-9756 (Alaska Sup. Ct. 2007).

¹⁴² *Neb. Coalition for Educ. Equity & Adequacy v. Heineman*, 273 Neb. 531, 557 (Neb. 2007)

¹⁴³ *Id.*

informed all cases decided between 2005 and 2008. It is not coincidental that in each and every instance where the question of adequacy was one of first impression, courts between 2005 and 2008 dismissed plaintiffs' claims. To put this in perspective, consider that at least four courts have dismissed adequacy claims on grounds of justiciability in the past three years,¹⁴⁴ whereas only five courts had done so in the preceding 16.¹⁴⁵

A closer look at each of these recent dismissals, reveals judges deeply concerned about their institutional competence to deal with the questions presented, a worry that seems to be reinforced by the similar skepticism coming out of other state courts. For example, in *Oklahoma Education Association v. State*, the Oklahoma Supreme Court dismissed plaintiffs' claims that the state had failed to adequately fund the public school system as a non-justiciable political question. The court reprimanded plaintiffs for "attempting to circumvent the legislative process by ...[ask]ing ... this Court to invade the Legislature's power to determine policy," and concluded, "This we are constitutionally prohibited from doing."¹⁴⁶ Likewise, the Indiana trial court in *Bonner v. Daniel* delivered an extremely brief opinion dismissing plaintiffs' claims as contrary to separation of powers doctrine.¹⁴⁷

¹⁴⁴ See *Labato v. Colorado*, No. 05 CV 4794 (2005); *Bonner v. Daniels*, No. 49D01604PL016414 (Ind. 2007); *Oklahoma Educ. Ass'n v. State ex rel. Oklahoma Legislature*, 158 P.3d 1058 (2007); *Nebraska Coalition for Ed Equity & Adequacy v. Heinman*, 731 N.W.2d 164 (Neb. 2007). As is described in greater detail below, many other cases were dismissed for justiciability concerns, if not explicitly on justiciability grounds. See, e.g., *Carroll Hall v. Rell*, No. X 09 CV 05 4019406 (Conn. 2007); *Young v. Williams*, No. 03-00055/01152 (Ky. Cir. Ct., Div. II., Feb. 13, 2007). Plaintiffs claims in *Pendleton School District 16R et al. v. State of Oregon et al.* (2007) were dismissed in October 2007. There is a dispute as to whether this case was dismissed on grounds of justiciability or due to failure to state a claim as the trial court chose to give the verdict from the bench without issuing a written judicial decision. The case is now on appeal.

¹⁴⁵ See *Ex Parte James* 836 So.2d 813 (Ala. 2002); *Marrero v. Commonwealth*, 739 A.2d 110 (Pa. 1999); *Coalition for Adequacy and Fairness in School Funding, Inv. Chiles*, 680 So.2d 400 (Fla. 1996); *Committee for Educational Rights v. Edgar*, 672 N.e.2d 1178 (Ill. 1996); *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995).

¹⁴⁶ *Oklahoma Educ. Ass'n v. State ex rel. Oklahoma Legislature*, 158 P.3d 1058, 1066 (2007)

¹⁴⁷ *Bonner v. Daniels*, No. 49D01604PL016414, 4 (2007)

Similarly, the plaintiffs claims in *Labato v. State of Colorado* were dismissed on justiciability grounds in 2006. Notably, the Colorado Supreme Court had previously adjudicated a constitutional challenge to the education system. In an equal protection suit - *Lujan v. Colorado State Bd. Of Educ.* 649 P.2d 1005 (Colo. 1982) – the Court had “interpreted the state’s Education Clause and applied its interpretation to the public school finance system.”¹⁴⁸ Although asked to do the same for the very same provision, the *Labato* trial court drew a bright line between *equal* and *adequate* opportunity claims, and dismissed the latter as a political question to be addressed by the legislature.¹⁴⁹

And finally, in September 2007, a Connecticut trial court dismissed plaintiffs’ claims to “suitable” educational opportunity in a pre-trial motion. Judge Shortall clearly shared many of the concerns expressed by his peers in Nebraska, Oklahoma, Indiana, and Colorado. However, bound by precedent from the state’s highest court on the justiciability of such cases, he could not follow their lead. Thus constrained, Judge Shortall technically faulted plaintiffs for failure to state a claim in a thinly veiled justiciability decision. The judge imported his concerns about the proper role of the judiciary into the analysis under the title, “prudential cautions.”¹⁵⁰ Judge Shorthall claimed his “prudential cautions” concerns were part of the *Geisler* test traditionally employed by Connecticut courts to construe the contours of a state constitutional right.¹⁵¹

¹⁴⁸ Quoting from Appellants’ Opening Brief, *available at* 2006 WL 4082602.

¹⁴⁹ “Despite Plaintiffs’ assertion that the Colorado Supreme Court has exercised jurisdiction over Education Clause claims, these cases presented constitutional questions of equality, not quality or adequacy of educational funding. In fact, no Colorado court has defined “adequate” or “thorough” because the substance of these terms is a legislative determination.” *Labato* at 2.

¹⁵⁰ *CCJEF* at 37. (“While the court has rejected the state’s argument that the questions raised by plaintiffs are not justiciable, it cannot ignore the ‘prudential cautions [which shed light on the proper definition of constitutional rights and remedies]”).

¹⁵¹ *See State v. Geisler* 222 Conn. 672, 685-686 (1992) (citations omitted) (Specifying six “tools of analysis” to be considered in construing the contours of the Connecticut Constitution: “(1) the textual approach, (2) holdings and dicta of this court, and the Appellate Court ,(3) federal precedent, (4) sister state

A close reading of his opinion shows, however, that his “prudential cautions” map perfectly onto the classic justiciability case, *Baker v. Carr*.¹⁵² Further, neither *Geisler* – nor any case before or after – introduces a justiciability analysis as a step in defining the contours of a constitutional right.¹⁵³ Judge Shortall’s strange manipulation of the *Geisler* test therefore suggests that, as in other states recently dismissing adequacy suits, justiciability concerns actually drove the Judge’s decision.¹⁵⁴

decisions or sibling approach, (5) the historical approach, including the historical constitutional setting and the debates of the framers, and (6) economic/sociological considerations.”).

¹⁵² The Court’s arguments map onto the *Baker v. Carr* criteria as follows: 1) A textually demonstrable constitutional commitment of the issue to coordinate political department (“The holders of public office at both [the state and regional] levels and in both the executive and legislative branches of government have the constitutional responsibility to determine what is necessary to provide a free and substantially equal educational opportunity... Courts “must resist the temptation...to enhance [their]own constitutional authority by trespassing upon an area clearly reserved as the prerogative of a coordinate branch of government.” *Carroll-Hall* at 35 (citing *Pellegrino v. O’Neill*, 193 Conn. 681); 2) The lack of judicially discoverable and manageable standards for resolving the issue (“In order to determine whether the allegations of the complaint are true, the court would have to receive evidence concerning and determine such questions as, ‘What is a ‘high quality preschool?’; ‘What are ‘appropriate class sizes?’;... What makes up a ‘rigorous curriculum with a wide breath of courses?’...Stating explicitly what is implicit in the plaintiffs’ argument makes it plain how far afield from the courts’ constitutional function of hearing and deciding cases their complaint would take the court.” *Id.* at 35-37; 3) The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion (“[M]any and varied issues of educational policy...are involved in defining a ‘substantive’ level of educational opportunity...[D]ecisions of the Supreme Court subsequent to *Horton I* demonstrate that Court’s reluctance to insert itself into educational policy decisions in the absence of clear constitutional or legislative authority to do so.” *Id.* at 18-19; and 4) The impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government/without disregarding legislature’s exclusive authority. (“An examination of the complaint in this case makes it evident how deep an intrusion by the court into the constitutional prerogatives of the other branches of state government, to say nothing of local boards of education, would be necessary to grant plaintiffs the relief they seek.” *Id.* at 35.

¹⁵³ Judge Shortall’s decision would have been telling had it merely attempted to masquerade justiciability concerns as “prudential cautions.” However, “prudential cautions” – let alone justiciability – are not, in fact, a part of the traditional test used to define the contours of a constitutional right. The precedent cited by Judge Shortall identified “economic/sociological considerations,” not prudential cautions, as the sixth tool of a constitutional rights analysis.¹⁵³ Moreover, the tool is not just different in name. “Economic/sociological considerations” in the *Geisler* inquiry instructs courts to recognize constitutional prohibitions even beyond the letter of the constitutional provisions themselves, when allowing the act would – in practice – undermine the core right. For example, in *Geisler*, the Supreme Court of Connecticut construed the exclusionary rule broadly to exclude *all* evidence derived from an unlawful warrantless entry into the home – including evidence obtained while the defendant is in lawful custody outside of the home – to eliminate incentives for the police to conduct unconstitutional search and seizures.

¹⁵⁴ Importantly, only the decisions in Oklahoma and Nebraska were final decisions before the state’s highest court. Each of the other cases – in Indiana, Colorado, Connecticut, and Oregon – is being appealed. Future appellate court decisions may very well direct reluctant lower courts to take on these daunting cases – as they have in the past. *See, e.g., Abbeville*, 335 S.C. 58, 515 S.E.2d 535 (1999); *Poehling v. Idaho State Board of Education*, 850 P.2d 724 (1993); *Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 635 A.2d 1375 (1993); *Montoy v. State*, 275 Kan. 145, 62 P.3d 228 (2003).

CONCLUSION: MOVING BEYOND JUSTICIABILITY

The recent shift in outcomes for adequacy plaintiffs this Article describes – towards judicial restraint at the remedial phase, findings of non-justiciability, and deference to legislative budget allocations – is instructive for those who look to the courts to fight for children in failing schools. The affirmative state right to education is a vital tool precisely because of the tendency of majority politics to leave behind the voiceless. Children growing up with grossly inadequate educational opportunities are exactly those citizens whom courts must protect. This paper has shown that continuing to tread the paths carved and refined by three decades of adequacy litigation has ceased to bring plaintiffs closer to the goal of producing tangible improvements for those children. Rather than producing desperately needed change in state education policy, the most recent adequacy litigation has encountered mounting resistance and fueled separation of powers fears that may ultimately leave the courts altogether unwilling to intervene in the area of education. In doing so, it is jeopardizing the very right that extends so much promise to this country's children, no matter their race or socioeconomic background. Modern adequacy litigation – as we know it - may have run its course.

But, all is not lost. To the contrary, this precarious situation gives education advocates a mandate to think critically about the past evolution of the adequacy litigation strategy and creatively about the way forward. Courts have shown themselves reluctant to wholly relinquish their authority to adjudicate the education right and generally have not done so to this point.

One thing recent decisions make clear is that plaintiffs must find a way to recharacterize both the right and the remedy so that they cannot be boiled down to a

demand for increased funding. Scholars and courts have already begun to explore a handful of legally and politically plausible non-monetary alternatives. The recent South Carolina decision suggests one way forward.¹⁵⁵ Because early education programs have been shown to nearly guarantee a boost in at-risk academic achievement while leaving the legislature and localities with significant discretion in how to structure such a program, universal preschool is a particularly appealing non-monetary remedy.¹⁵⁶ That the South Carolina court elected to adopt a remedy of mandatory preschool shows how realistic an option it is to structure future litigation around such non-monetary remedial requests. At the same time, universal preschool is certainly not the only possible remedy that could avoid throwing courts directly into the arena of appropriations. This example hints at a whole universe of cases that might target critical elements of an adequate education.

Non-monetary remedies need not be incremental. In fact, one of the boldest proposals to date steers clear of the legislature's power of the purse while arguing for drastic reform. Professor James Ryan has made the case that the education clauses enshrined in state constitutions guarantee children the right to a socio-economically integrated education.¹⁵⁷ Similarly, others have argued that an "adequate" education requires carefully targeted school choice.¹⁵⁸

Finally, courts may be able to avoid directing fiscal and educational policy by instead focusing on the process by which that policy is determined. Many scholars have

¹⁵⁵ *See supra*, Section

B. Increased focus on Funding Levels.

¹⁵⁶ *See e.g.* James E. Ryan, *A Constitutional Right to Preschool* 94 Calif. L. Rev. 49 (2006)

¹⁵⁷ *See e.g.* James E. Ryan, *Schools, Race and Money*, 109 YALE L. J. 249 (1999); Christopher E. Adams, *Is Economic Integration in the Fourth Wave in School Finance Litigation?* 56 Emory L.J. 1613 (2007)

¹⁵⁸ *See e.g. Crawford v. Davy* Docket No. C-137-06 (Sup. Ct. 2007)

proposed the judiciary play a role more akin to a “catalyst” or “backstop” than “dictator” in structural reform litigation.¹⁵⁹ The most recent Wyoming decision provides an initial sense of what a process-focused remedial role might look like in the education context.¹⁶⁰

Identifying new litigation strategies that can work in the present climate will not be easy. Courts’ separation of powers concerns are deeply-rooted and their relationships with their legislatures are complex. Structural reform litigation to some extent will inevitably demand that courts take an unusually active role in crafting a remedy. In trying to give wide berth to the legislature’s spending power, courts may risk encroaching on the prerogative of local control. However, unless courts are presented with avenues for remediation that do not force them to encroach on the legislature’s appropriations prerogative, they may allow the right to erode irrevocably by paying it lip service while abdicating their role in guaranteeing its substance.

There is another, perhaps an equally compelling reason for plaintiffs to look away from funding at this juncture. Whereas when equity suits first pressed for increased school funding, the lack of money was by far the greatest barrier to an adequate education, today this is no longer the case. Although adequate funding is undoubtedly one part of providing adequate educational opportunity, experience has taught that money

¹⁵⁹ See e.g. Susan Sturm *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons* 138 U. Pa. L. Rev. 805 (1990)

¹⁶⁰ *Campbell County School District v. State of Wyoming* 2008 WY 2 (2008) In 2001, the Supreme Court handed down a very detailed remedy. It instructed the legislature not only in the factors they needed to take into consideration in creating the formula used to calculate the cost of a constitutional education, but it also mandated explicit levels of funding for Kindergarten and Capital Construction. By contrast, in 2008, in deciding whether or not the legislature had fully complied, the Court looked – at times - to the process by which the legislature had decided on its course of action and the facts that informed its decisions. For example, the court’s assessment of the sufficiency of funding for at-risk students turned on the fact that the “state [had] exerted significant effort to develop a fair and accurate method of estimating the additional cost of addressing at-risk students.” Similarly, the Court upheld the level of funding for small schools because the State had replaced arbitrary cut-offs with an adjustment “revised on the basis of ...data and applied in a consistent manner.”

alone will never be enough to guarantee that such opportunities are present. For both normative and strategic reasons, then, it is vital that adequacy campaigners shift their focus away from funding and towards more judicially-enforceable iterations of the right.

There is no obvious answer to this problem, nor does this Article attempt to suggest one. Whether it be conceiving of education as a procedural right or framing it as the right to some minimum set of non-monetary entitlements such as preschool, the way forward for education suits will no doubt be difficult. Despite the difficulty, however, pathbreaking new strategies must be sought before they are found. Education is too important a part of this country's promise and its future to ignore the signs that current litigation strategies have reached the end of their usefulness.