Settling Without "Settling": School Finance Litigation and Governance Reform in Maryland

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INTRODUCTION

When the ACLU filed suit against Maryland in 1994 on behalf of a class of at-risk students in Baltimore, the city schools were spending $5873 per pupil.1 By 2003, per-pupil spending in Baltimore had risen to $8926,2 and under current law is projected to grow to $13,496 in 2008.3 Relative to this remarkable infusion of resources, the Maryland litigation has received little recent attention in the scholarly literature.4 The primary reason is that Maryland settled its school finance case, and the litigation never produced a Maryland Supreme Court opinion on the merits. The case consequently flies below the radar screen of most school finance litigation studies.

This Essay aims to correct that deficiency. By examining the experience of Maryland, it explores the complexity of modern school finance litigation. The

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Maryland litigation serves as a fascinating reminder that adequacy is not a monolithic concept, and plaintiffs who make the decision to sue under an adequacy theory rather than an equity theory nevertheless face numerous strategic choices. They must decide whether to sue on behalf of a school district or a class of students. They must develop a working definition of adequacy. They must decide whether to focus exclusively on money or whether to seek more comprehensive school reform. They must operate simultaneously as litigants in a legal system and as political actors in a larger struggle. They must consider the impact of fiscal constraints and business cycles on the stability of the remedy they seek. They must decide how to wield the threat of litigation and when it is appropriate to drop their legal claims in pursuit of short-term gains. And in the end, they must assess whether litigation itself can improve academic achievement in the face of entrenched social problems. Many of these questions have no clear answer, but by telling the story of school finance litigation in Maryland, this Essay documents how litigants in one state grappled with these issues and assesses how their choices impacted the course of the litigation.

The Essay focuses on four themes. First, it examines the efficacy of suing on behalf of a class of at-risk children rather than representing a school district. Maryland provides a good basis for comparing these two approaches because the litigation involved both kinds of plaintiffs: the ACLU filed its case, Bradford v. Maryland State Board of Education, as a class action, while the City of Baltimore, in Mayor v. Maryland, sued on behalf of its school system. The legal claims in the two cases were almost identical. Indeed, the judge overseeing the litigation combined the cases, and this Essay generally refers to the merged litigation simply as the Bradford case. Nevertheless, the ACLU gained considerable flexibility by deciding to sue on behalf of a class of at-risk students, and repeatedly found itself in the position of advocating more forcefully for the interests of the schoolchildren than Baltimore, which felt constrained by its need to maintain a positive long-term relationship with the state on multiple fronts.

Second, this Essay analyzes the decision by both the ACLU and the City to settle the Bradford suit. Settlement required the plaintiffs to make sacrifices and accept an interim remedy they considered underfunded, but it gave them considerably more control over the remedial stage of the litigation. State supreme courts that strike down their school finance systems often fail to provide lawmakers with much guidance about how to construct a constitutional system. The resulting uncertainty gives opponents of reform an opportunity to whittle down the gains made in court and can even leave legislatures that try to comply in good faith unable to craft a stable remedy. The settlement in Maryland avoided these problems. It allowed the plaintiffs and sympathetic figures within state government to negotiate the details of the remedy in
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advance and present the legislature with a comprehensive plan for an up-or-down vote rather than a vague command to bring the system into compliance with amorphous constitutional standards.

Third, the Essay examines the legislative battle surrounding the initial school finance remedy and its expansion five years later. It focuses in particular on the decision by the legislature in both instances to broaden the remedy and provide additional funding for needy students in districts across the entire state that were never involved with the litigation. This broadening substantially enhanced the stability of the remedy by giving every district a stake in the long-term health of the funding formula. The broadening also mimicked the result that would have been achieved if the ACLU had sued on behalf of a state

Finally, the Essay attempts to understand why race played such a surprisingly small role in the Maryland litigation given Baltimore’s status as a predominantly African-American school district in a largely white state. Although considerations of race were certainly present, the plaintiffs deemphasized race and were largely successful in their efforts to frame the public debate in race-neutral terms. Dispelling the perception that only minority students would benefit from the new funding formula represented a considerable accomplishment in light of the polarizing influence race has traditionally exerted in school finance litigation. The decision to exclude race entirely, however, limited the nature of the Bradford remedy by eliminating the (remote) option of pursuing integration as a remedy. The Bradford case accordingly tests the effectiveness of providing an urban school district with an infusion of resources in the absence of either socioeconomic or racial integration.

The early progress of reform has been promising, an encouraging result given the current unlikeliness of plaintiffs seeking integration to prevail, but the situation deserves monitoring: If reform stagnates, it will once again call into question the effectiveness of trying to help urban school systems without tying their fate to that of suburban schools.

I. A BRIEF INTRODUCTION TO MARYLAND

Maryland is the eighteenth most populous state, but it contains five of the fifty largest school districts in the nation. School districts in Maryland are

unusually large because they correspond to the political boundaries of Maryland’s twenty-three counties and one self-governing city. Like districts in thirteen other states, school districts in Maryland are fiscally dependent on county and state government, meaning that local school boards lack independent power to levy taxes.\textsuperscript{7} The large size of Maryland’s school districts has historically contributed to a relatively equitable distribution of funding in the state. In 1998, just as the school finance remedy was in its early stages of implementation, the highest-spending district in the state spent only 1.4 times as much as the lowest-spending district, and 87.5% of all Maryland students attended school in districts spending within twelve percent of the state average.\textsuperscript{8} In neighboring Virginia, the ratio was 2.34 to 1, and only fifty percent of students resided in districts spending within twelve percent of the state average.\textsuperscript{9} Districts achieved this relative equality despite receiving only forty percent of their funding from the State, the thirteenth lowest level of state support in the nation.\textsuperscript{10}

Maryland contains a broad mix of communities. The Eastern Shore of the Chesapeake Bay and Western Maryland are rural and overwhelmingly white. The Baltimore-Washington corridor, home to most of the state’s wealth, is predominantly suburban and majority white. At both ends of the corridor lie Maryland’s two majority black jurisdictions. On the Washington side is Prince George’s County, the wealthiest majority-black county in the country, but one experiencing a rapid influx of poorer residents from Washington, D.C. On the opposite end is Baltimore, Maryland’s only urban jurisdiction and its most troubled.

Baltimore suffers from a typical array of urban problems. According to the 2000 Census, the city’s poverty rate of 21.1% and median household income of $30,564 made Baltimore the fourteenth poorest large city in the nation.\textsuperscript{11} The number of drug addicts in Baltimore hovered around 60,000, roughly eight percent of the city’s population, throughout the 1990s.\textsuperscript{12} Baltimore also grapples with a declining population fueled by an exodus of middle-class blacks. The city lost 11.5% of its population in the 1990s,\textsuperscript{13} earning it the dubious distinction of being the fastest shrinking major city in America.

These urban ills have left their mark on the Baltimore schools. The year before the \textit{Bradford} suit was filed, 68.7% of students in Baltimore were eligible

\textsuperscript{7} See id. at app. 2 exhibit 2 (2000).
\textsuperscript{8} Id. at app. 2.
\textsuperscript{9} Id.
\textsuperscript{10} Id.
\textsuperscript{11} See Eric Siegel, \textit{A Survey of City’s Woes}, BALT. SUN, Nov. 29, 2001, at 2B.
\textsuperscript{13} Siegel, \textit{supra} note 11.
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for free or reduced-price lunch. In 1996, the *Baltimore Sun* described the plight of the city schools in stark terms:

Two of every three children live in poverty. With their families unable to afford stable housing, nearly one of four changes schools during the year. One of five is absent from school each day. One of six receives special education. One of seven drops out of high school.

In addition to its poverty, the Baltimore school system has experienced three decades of growing racial isolation. By 1995, 159 of Baltimore’s 184 schools were majority black.

II. THE LAWSUIT

A. The Shadow of Hornbeck

To understand the success of the *Bradford* suit, it is important to look back more than a decade at a notable failure—the first Maryland school finance case. *Hornbeck v. Somerset County Board of Education* began in 1978 when three rural districts and Baltimore City filed suit against the State Board of Education. The plaintiffs sued under a traditional equity theory. They claimed that disparities in district wealth prevented poor districts from spending as much money on their schools as wealthier districts, despite taxing themselves at higher rates. They further argued that the formula for distributing state aid failed to close this gap, and in some cases exacerbated the disparities. The plaintiffs based their suit on the education clause of the Maryland Constitution, which requires the State to maintain a “thorough and efficient” system of free public schools, the state due process clause, and the federal Equal Protection Clause.

The plaintiffs won at the trial level before Circuit Judge David Ross, who ordered the statewide equalization of school funding. The Court of Appeals, Maryland’s highest court, granted direct review and reversed. Judge Murphy,

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16. See James Bock, “Resegregated” Schools Not All Bad, Some Say, BALT. SUN, May 20, 1996, at 1A.
17. 458 A.2d 758 (Md. 1983).
18. For example, the same tax rate that would have raised $2766 per pupil in Calvert County only would have raised $699 in neighboring St. Mary’s County and $568 in Baltimore. Issues of municipal overburden aside, Baltimore needed to tax itself at more than 4.8 times the rate of Calvert County just to spend an equal nominal amount on its schools. See Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 766 (Md. 1983).
19. MD. CONST. art. VIII, § 1 (requiring “a thorough and efficient System of Free Public Schools”).
20. MD. DECL. OF RIGHTS art. XXIV. The Maryland Court of Appeals has interpreted the state due process clause to contain an equal protection guarantee. See Atty Gen. v. Waldron, 426 A.2d 929, 940-41 (Md. 1981) (“Although the Maryland Constitution contains no express equal protection clause, we deem it settled that this concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights.”).
writing for the majority, looked to the history of the education clause and noted that Maryland had amended its constitution in 1867 to replace the word "uniform" with the phrase "thorough and efficient." The Court of Appeals interpreted this change to preclude the type of equalization order by Judge Ross.

As for the equal protection claims in *Hornbeck*, the Court of Appeals largely followed the Supreme Court's reasoning in *San Antonio Independent School District v. Rodriguez*. Judge Murphy worried that equalizing education funding would push the court down a slippery slope toward equalizing funding for police and fire protection, welfare, and other social services. He avoided this perceived danger by concluding that education was not a fundamental right under the state constitution. He then proceeded to apply the rational basis test, holding, as in *Rodriguez*, that the state interest in preserving local control over education justified toleration of finance disparities among districts.

*Hornbeck* cast a long shadow. It served as a cautionary tale for others considering litigation as a tool for reforming Maryland's school finance system. The *Hornbeck* litigants had poured four years of effort into taking the case from its earliest stages through a four-month trial to the final decision in the Court of Appeals. Not only had they emerged empty-handed, but they had expended substantial sums of money that otherwise could have been used for education. In the wake of the Court of Appeals decision, advocates turned their attention for over a decade to lobbying in Annapolis.

**B. From *Hornbeck* to *Bradford***

In 1994, the ACLU of Maryland lost patience with lobbying on behalf of school finance reform and began considering its legal options. It hoped that a new court case would force action in Annapolis and serve as a focal point for reform efforts. But the ACLU still had to grapple with the shadow of *Hornbeck*. Rulings denying school finance equalization tend to remain entrenched as precedents. The Supreme Court laid the groundwork for this entrenchment in *Rodriguez* when it announced that courts should determine whether a right is fundamental under the federal Constitution by looking to text and history rather than solely to the importance of the right to society. Despite disclaiming strict adherence to the *Rodriguez* test, the Maryland Court of Appeals adopted a similar backward-looking method of constitutional

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22. *Hornbeck*, 458 A.2d at 785.
23. *Id.* at 786 (concluding that education is not a fundamental right but distinguishing the "overly simplistic articulation of the fundamental rights test set forth in *Rodriguez*.")
24. *Id.* at 788.
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interpretation that left future plaintiffs little room to distinguish *Hornbeck*. Future plaintiffs could not rely on the shift from heavy industry to an information-based economy. Nor could they distinguish *Hornbeck* with social science data demonstrating the positive correlation between education and various life outcomes. Overturning *Hornbeck* would have instead required a direct assault on the court’s interpretation of the 1867 Constitutional Convention.

Even without the complications created by *Hornbeck*, the ACLU did not necessarily want to sue under an equity theory. Instituting a system of fiscal neutrality would not have guaranteed significant funding increases for Baltimore, since reductions in the City’s tax effort, the highest in the state, could have offset much of the benefit derived from a new funding formula. More importantly, the ACLU believed that students in Baltimore required more resources than students elsewhere in the state because of their exposure to pervasive and persistent social problems. To reach this goal, the ACLU would have been forced to convince the courts both to read an equity requirement into the Maryland Constitution and to interpret the text as mandating *vertical* equity.

The ACLU responded to these concerns like litigants in other states by adopting an adequacy theory. Adequacy allowed the ACLU to litigate on a clean slate. In fact, *Hornbeck* had explicitly left the door open for adequacy. The Court of Appeals noted:

No evidentiary showing was made in the present case—indeed no allegation was even advanced—that [the State’s] qualitative standards were not being met in any school district, or that the standards failed to make provision for an adequate education . . . . Simply to show that the educational resources available in the poorer school districts are inferior to those in the rich districts does not mean that there is insufficient funding provided by the State’s financing system for all students to obtain an adequate education.

Adequacy had gained further legitimacy after *Hornbeck* through a series of victories in Kentucky, Massachusetts, Alabama, and Arizona.

26. *See* *Hornbeck*, 458 A.2d at 786 (“We agree with the view expressed in *Rodriguez* that whether a claimed right is fundamental does not turn alone on the relative desirability or importance of that right.”).

27. Interview with Susan Goering, Executive Director, ACLU of Maryland, in Baltimore, Md. (Jan. 23, 2003) [hereinafter Goering Interview].

28. *Id.*

29. In contrast to horizontal equity, which mandates equal expenditures for all students, vertical equity calls for spending in proportion to student need, with the greatest amount of resources directed to the neediest students.


C. The ACLU Complaint

The ACLU filed its complaint in Circuit Court on December 6, 1994. Unlike the adequacy cases in Kentucky and Massachusetts, which were brought on behalf of entire school districts, the ACLU represented a class of at-risk students in Baltimore. The class included more than 70,000 current students and an indeterminate number of future students at risk of educational failure. A group of parents and students represented the class, and the case was captioned Bradford v. Maryland State Board of Education after Keith Bradford, the father of three young children in Baltimore.

The strategy of representing a class of students rather than the district itself paid large dividends as the litigation progressed. As discussed throughout this Essay, suing on behalf of a class of students allowed the ACLU to focus exclusively on the interests of the parents and children it represented. Baltimore, in contrast, found itself caught in a complex web of political tradeoffs. It had to consider whether pressing for educational aid would jeopardize other goals and could not afford to take a strong stand on school reform as readily as the ACLU. As Susan Goering, Executive Director of the ACLU of Maryland, put it: “The advantage of doing it independently is that we did not have to depend on the political winds that were blowing at any given moment.”

The ACLU complaint alleged that Maryland’s education clause required the state to provide every child with an “adequate education as measured by contemporary education standards.” The complaint avoided locking itself into a single definition of adequacy, and instead it looked to deficiencies in both the resources available to students in Baltimore and the outputs produced. The complaint placed particular emphasis on the failure of students in Baltimore to meet the state’s own achievement standards. Maryland was one of the first states in the country to implement a system of standards-based reform. The centerpiece of the program was the Maryland School Performance Assessment.

35. The ACLU defined the class of “at-risk” students broadly to include students who: (1) lived in poverty, as measured by eligibility for free and reduced-price school meals; (2) attended schools where more than thirty percent of students live in poverty; (3) lived in single-parent households; (4) had parents who did not graduate from high school; (5) lived with unemployed parents; (6) were homeless; (7) were parents themselves or pregnant; (8) lived under the threat of violence at home or school; (9) had been retained in grade; (10) scored more than a year below grade level on standardized tests; or (11) had otherwise been determined to be in need of remedial education. Complaint at 3-4, Bradford v. Md. State Bd. of Educ., No. 94340058 (Md. Cir. Ct., filed Dec. 6, 1994) [hereinafter ACLU Complaint].

36. Id. at 8.

37. In addition, Mayor Kurt Schmoke faced pressure not to embarrass Governor Parris Glendening, a fellow Democrat who narrowly won election in 1994 by less than a 6000-vote margin. See Peter Maass & Charles Babington, Ecker Considers Governor’s Race, WASH. POST, Aug. 29, 1996, at M6 (describing the political ramifications of subsequent Glendening-Schmoke split).

38. Goering Interview, supra note 27.

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Program (MSPAP), a series of tests administered annually to third-, fifth-, and eighth-graders. The tests measured higher-order skills in six subject areas. The tests were designed to assess the effectiveness of schools rather than the skills of individual students. State law authorized the State Board of Education to take over and "reconstitute" individual schools that consistently failed to make progress. Since the debut of the MSPAP in 1991, Baltimore had always scored lower than any other jurisdiction in the state, and forty of the forty-two schools declared reconstitution-eligible in the first three years of the program were located in the City.

Reliance on MSPAP scores to prove inadequacy placed the ACLU on the cutting edge of a national trend. As adequacy theories grew in popularity in the mid 1990s, litigants and courts struggled to develop manageable adequacy standards. Despite the willingness of some courts to articulate tests for adequacy, others proved reluctant to substitute their own judgments about the purposes of public education for those of the legislature. The rising popularity of statewide standards in the mid 1990s helped bridge the gap. William Dietz has argued that plaintiffs will be most successful when they can appeal to "existing standards" of adequacy. Standards-based reform programs provide the most obvious and accessible sources of existing standards. Plaintiffs in the early stages of a lawsuit can look to the failure to meet these standards in order to secure relief while reserving judgment on whether the education clause requires the state to provide an even higher quality system of education. Beth McCallum, pro bono counsel assisting the ACLU, said the availability of MSPAP scores was "tremendously important" for the Bradford plaintiffs.

Evidence of educational failure in the Baltimore schools existed in

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40. Maryland abandoned the MSPAP in 2002, because the failure to provide individual scores did not comply with the mandates of the No Child Left Behind Act of 2001. Mike Bowler, Maryland School Test Is Dropped, BALTIMORE SUN, Apr. 25, 2002, at 1A.


42. James Liebman was one of the first scholars to identify the potential use of state standards in school finance litigation. See James S. Liebman, Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform, 76 VA. L. REV. 349, 413-18 (1990); see also Michael Heise, The Courts vs. Educational Standards, 120 PUB. INT. 55, 55 (1995) ("[S]tandards will serve as a catalyst for the next generation of educational litigation.").

43. Compare Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989), with Coalition for Adequacy & Fairness in Sch. Funding, v. Chiles, 680 So. 2d 400, 408 (Fla. 1996) ("[A]ppellants have failed to demonstrate in their allegations, or in their arguments on appeal, an appropriate standard for determining 'adequacy' that would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature."); and Marrero v. Commonwealth, 739 A.2d 110, 113-14 (Pa. 1999) ("[T]his court is likewise unable to judicially define what constitutes an 'adequate' education or what funds are 'adequate' to support such a program. These are matters which are exclusively within the purview of the General Assembly's powers, and they are not subject to intervention by the judicial branch of our government." (quoting Tabales ex rel. Marrero v. Commonwealth, 709 A.2d 956, 965-66 (Commw. Ct. Pa. 1998)).


45. Telephone Interview with Beth McCallum, Partner, Howrey, Simon, Arnold & White, and pro bono counsel for the Bradford plaintiffs (Feb. 12, 2003) [hereinafter McCallum Interview].
abundance. Baltimore had by far the lowest MSPAP scores in the state. The highest percentage of Baltimore schoolchildren receiving a satisfactory MSPAP score in any subject area during the 1992 administration of the test was 20.5% for fifth-grade math. The average in math for the rest of the state was 46.5%. The average passing rate for students in Baltimore across the four subject areas for which the ACLU had 1992 data at the time of filing was 10.1%, less than one-third of the state average. Not only had Baltimore students failed to pass, but 60.5% had scored at the lowest possible level on the tests. The data for older students was no more encouraging. The annual dropout rate in Baltimore hovered around seventeen percent. Of the students who remained in high school, 23.3% of eleventh-graders had not passed all four functional tests in 1994, even though the state designed the tests to measure eighth-grade skills. Approximately thirty percent of students who did graduate failed to complete the minimum course requirements for admission to the University of Maryland system.

The ACLU complaint also highlighted serious resource deficiencies in Baltimore. Although the City spent more per pupil than nine other districts in the state, its unique concentration of special needs (as well as some questionable management decisions) left it spending less on instructional expenses than any other jurisdiction. The City paid its teachers between $3000 and $8500 less per year than teachers in neighboring school districts. It received fewer applications per position than any other system in the state, and persistently failed to fill up to ten percent of its teaching vacancies. Over twenty percent of school buildings were rated as being in “poor” condition. Baltimore spent less money on library books than any other district and ranked near the bottom in spending on classroom materials and supplies.

The ACLU complaint did not seek a specific remedy. Instead, it asked the court to declare that Maryland had an obligation to provide every child with an adequate education, and that the State had failed to meets its obligation. It then asked the court to order the State to sit down with the ACLU and the City to develop a remedy.

46. ACLU Complaint, supra note 35, at 14.
47. Id.
48. See id. at 14-15.
49. See id. at 15. The ACLU did not provide data for fifth grade social studies.
50. See id. at 20.
51. Id. at 24.
52. Baltimore spent $2437 per student on current instructional expenses in 1992-93. The statewide average was $2926. Id. at 36.
53. Id. at 27.
54. Id.
55. Id. at 30.
56. Id. at 29.
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D. The City of Baltimore Complaint

Originally, Baltimore City intended to file its own complaint at the same time as the ACLU, but the City delayed filing in the hope of reaching a political settlement with newly-elected Governor Parris Glendening. It engaged in sporadic negotiations with the State for nine months but emerged empty-handed. Former Mayor Kurt Schmoke attributed the failure to reach a political solution in part to the fragmented nature of funding for urban education. He explained that Baltimore’s reliance on local, state, and federal funding in roughly equal proportions forced the City to respond to “multiple constituencies, each of which had its own power base over our budget.”57 The presence of so many players with veto rights prevented Baltimore from making the political concessions required to strike a deal with the State.

Once it became clear that additional education aid would not be forthcoming, the City filed its own lawsuit, Mayor v. Maryland, in Baltimore Circuit Court on September 15, 1995.58 Baltimore also sued under an adequacy theory, and its complaint followed the general structure of the ACLU’s but placed more emphasis on monetary relief. Baltimore alleged that the State had set the level of its foundation grants too low for property-poor districts like the City to provide an adequate education to their students. It requested an order requiring the state to assess the actual needs of City students and fund the system accordingly.59

E. The State Response and the Combination of the Lawsuits

After Baltimore filed its complaint, the legal battle over the school finance system began in earnest. The State answered the complaint on October 20, 1995 by going on the offensive. It counter-sued the City of Baltimore and impleaded Baltimore into the Bradford case as a defendant. Although this move technically placed Baltimore and the ACLU on opposite sides of the Bradford case, the combined litigation proceeded as if Bradford and Mayor v. Maryland were a single case with both the ACLU and City functioning as plaintiffs.

The State alleged that pervasive mismanagement in Baltimore, rather than a lack of resources, was responsible for the deficiencies of the City school system.60 Although the State did not concede inadequacy, it devoted most of its answer to supporting its allegations of mismanagement. The State focused in

57. Telephone Interview with Kurt Schmoke, former Mayor of Baltimore (Feb. 13, 2003) [hereinafter Schmoke Interview].
59. Complaint at 33-34, Mayor v. Maryland, No. 95-258055 (Md. Cir. Ct., filed Sept. 15, 1995).
60. Kate Shatzkin & Mike Bowler, Md. Fires a Salvo in School Dispute, BALT. SUN, Oct. 21, 1995, at 1A.
particular on the results of a 1992 management study, and it accused Baltimore of failing to implement any of the management reforms recommended in the report. The State also noted that Baltimore had failed to spend $11.9 million in federal and state funds for which it was already eligible. The state asked the Circuit Court to order a "substantial, immediate restructuring" of the Baltimore school system.

As a legal strategy, the decision to focus on mismanagement within Baltimore accomplished little for the defendants. The education clause of the Maryland Constitution places the duty of providing a "thorough and efficient" education on the State. A focus on mismanagement might have changed the nature of the remedy required, but it could not rebut the allegation that the state had failed to meet its constitutional duty in the first place. The State's response proved especially ineffective as a legal theory because of the unique dynamic created by the participation of two plaintiffs in the case. Baltimore was not only unwilling to acknowledge mismanagement, but wanted to avoid the embarrassment of having its administrative failures exposed in public. The ACLU had no such qualms. The independence the ACLU gained by representing a class of parents and children rather than the school system allowed it to levy criticism at both sides in the debate. Susan Goering explained:

[W]hen the City intervened in the suit, there was inevitably finger-pointing back and forth about who was at fault for the dismal outcomes. We were able to say: "It's not our problem. . . . If the State doesn't like what the City is doing, it has the authority to make the City do something different." The ACLU had staked out the same position in its complaint when it stated: "To the extent that misuse of available funds or other mismanagement, at any level of government, contributes to the failure of BCPS to provide an adequate education to plaintiff schoolchildren, the State is legally responsible for those failures as well."

Even Nancy Grasmick, the State Superintendent of Schools and one of the defendants in the combined case, conceded the strength of the ACLU position. During a deposition, she responded "yes" when asked whether "public education is basically a function and responsibility of the state." More importantly, Judge Joseph Kaplan agreed with the ACLU as well. He granted

61. Id.
62. Id.
63. Id.
64. Goering Interview, supra note 27. Louis Bograd, an attorney with the national ACLU working on the Bradford case, echoed this sentiment. See Telephone Interview with Louis Bograd, ACLU (Jan. 5, 1999) [hereinafter Bograd Interview] ("Whether it is money or management . . . the state is the responsible legal authority.").
65. ACLU Complaint, supra note 35, at 37.
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the plaintiffs partial summary judgment on October 16, 1996, holding that the education clause imposed an affirmative duty on the state to provide “an education that is adequate when measured by contemporary education standards.” He also found no genuine material factual dispute over whether students in Baltimore were receiving an adequate education; they were not. Judge Kaplan accordingly instructed the parties to focus their efforts at trial on the disputed issues that remained: the cause of the inadequacy and the appropriate remedy.

Even though the decision to focus on mismanagement produced limited success as a legal strategy beyond influencing the contours of the remedy, it functioned quite effectively as a political strategy. It signaled that the State cared about the Baltimore schools and was not simply being obstructionist by denying its constitutional duty altogether. Indeed, it allowed the state to portray itself as acting in the best interest of the school children in Baltimore by insisting that any infusion of resources be well spent. The focus on mismanagement also maintained the State’s credibility by dodging the uphill struggle that would have been required to demonstrate the adequacy of the Baltimore schools. At the same time, the emphasis on mismanagement put Baltimore on the defensive. It was personally and politically embarrassing for Mayor Kurt Schmoke. It also called into question the relationship between resources and educational achievement, thereby forcing Baltimore to expend its energy arguing this technical point rather than presenting more emotionally compelling evidence about its plight.

F. The Road to Settlement

As the parties braced themselves for trial and continued to squabble in the public arena, the Bradford case took an unusual turn. Judge Kaplan met with Federal District Court Judge Marvin Garbis to discuss the similarities between the Bradford case and a decade-old special education case overseen by Judge Garbis called Vaughn G. v. Amprey. They decided that both cases would function better if combined, since the Bradford class of at-risk students overlapped substantially with the special education class in the federal case. Mayor Schmoke agreed, noting that special education reform could not proceed without finance reform.

The parties never put the joint federal-state trial arrangement to the test,

68. Id. at ¶ 2.
70. Schmoke Interview, supra note 57 (“It was so clear that ultimately we needed more resources in the schools if we were going to be able to satisfy the requirements coming out of Vaughn G.”).
however, because they were able to reach a settlement in both the school finance and special education cases before trial. Although Baltimore had filed suit after nine months of failed negotiations, State Schools Superintendent Nancy Grasmick approached Mayor Schmoke after the initial flurry of pleadings to broach the subject of a settlement once again. These discussions laid the groundwork for a plan in which Baltimore would relinquish some control over its schools in exchange for an infusion of new money from the state. The parties remained far apart, however, on the details of the plan. The General Assembly responded during the 1996 legislative session with an attempt to pressure the City to settle. Lawmakers adopted a carrot-and-stick approach. The carrot included an additional $10 million for the worst-performing schools in the City and $2 million to raise teacher salaries. The stick involved withholding $12 million in general school aid already appropriated for Baltimore. Lawmakers made access to both pots of money, $24 million in total, contingent on Baltimore’s agreement to restructure its school system and drop its lawsuit. Interestingly, legislators appeared to overlook the role of the ACLU in the lawsuit, and again the independence the ACLU gained from representing a class of parents and students came into play. Stuart Comstock-Gay, Executive Director of the ACLU of Maryland at the time, announced that the ACLU would not drop its lawsuit simply to secure release of the withheld $24 million, thereby reducing the effectiveness of the withheld money as a negotiating tool in the hands of the state.

Negotiations between the City and State dragged into the summer. The parties made an apparent breakthrough in July when the Governor and Mayor reached a “conceptual agreement” to restructure the City School Board, funnel $150 million in new funding to the City over five years, and delay Baltimore’s lawsuit for one year. But the handshake agreement collapsed shortly afterwards amid mutual recriminations, creating a deep political rift between the Mayor and Governor that culminated in Schmoke’s decision to endorse Glendening’s opponent in the 1998 Democratic primary.

The prospect of a settlement seemed dead after the public meltdown of the handshake agreement, and the parties braced for their November 6 trial date. Several weeks before trial, however, Judge Kaplan reinitiated settlement negotiations. He called all the parties together and asked them to prepare confidential memos outlining their settlement demands and potential areas of

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73. Thomas W. Waldron & Peter Jensen, *City School Aid Freeze Is Likely*, BALT. SUN, Apr. 2, 1996, at 1A.
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compromise. He then slowly went to work on the litigants, warning them that a trial would poison the atmosphere for future education reform in Baltimore. Sensing progress, Judge Kaplan and Judge Garbis postponed the trial on the night before it was set to begin to give the parties one final chance to reach an agreement. Three weeks of intensive, round-the-clock negotiations followed as the lawyers grappled with the complexity of crafting a four-way settlement. Key to the success of the negotiations was the extensive involvement of the politicians responsible for implementing the settlement that emerged. Attorneys for the state consulted regularly with the Governor, his chief of staff, his budget secretary, the State Secretary of Education, the President of the State Board of Education, and the chairs of the Senate Budget and Taxation Committee and the House Appropriations Committee.

Noticeably absent from the negotiations were representatives from Montgomery County, Maryland’s wealthiest subdivision and the one most opposed to providing additional aid for Baltimore. Montgomery County had played a crucial role in Hornbeck, joining the case as a third-party defendant and spending $1.3 million defending the constitutionality of the school finance system. It attempted to intervene once again in the Bradford case under the theory that its taxpayers would disproportionately bear the cost of a plaintiff victory. Judge Kaplan rejected the request and ruled that “Montgomery County is not entitled as a matter of right to intervene in this litigation, which is a discrete case involving the adequacy of the education of Baltimore City schoolchildren.” His decision rested on the distinction between the direct impact of an equity case on the statewide funding formula and the indirect impact of an adequacy case on Montgomery County. A narrowly divided Court of Appeals upheld the decision, reasoning that a plaintiff victory would “not automatically or necessarily result in any of Maryland’s current public school funding resources being diverted from their current uses to provide additional funding for the City’s public schools.”

The parties agreed that the exclusion of Montgomery County from the negotiations greatly enhanced their ability to reach a settlement. “It would have been a whole lot more difficult to negotiate a settlement if Montgomery County had been at the table,” said Louis Bograd, the lead negotiator for the ACLU.

77. Montgomery County v. Bradford, 691 A.2d 1281, 1292 (Md. 1997). Other states have proved more tolerant of interveners in their school finance cases. See, e.g., Pinto v. Ala. Coalition for Equity, 662 So. 2d 894 (Ala. 1995). The specific legal theory advanced by Montgomery County, however, seems unlikely to gain much traction elsewhere since allowing a county to intervene on the basis of its disproportionate contribution to the state’s coffers does not readily lend itself to any limiting principle that would prevent the county from claiming intervention rights in all cases against the state.
78. Bograd Interview, supra note 64.
An attorney for the State Board of Education concurred, calling the exclusion “essential” and noting that “if Montgomery County were in the case, the whole focus would have shifted.”

G. The Consent Decree

The parties reached an agreement in principle to settle the case on November 11, 1996, just five days after the trial was slated to begin. They then continued negotiating for two more weeks in order to produce a written document that all could endorse. The final consent decree was signed on November 26. It began by accepting the existence of the State’s duty to provide “all students in Maryland’s public schools with an education that is adequate when measured by contemporary educational standards,” and acknowledging the failure to provide students in Baltimore with an adequate education. The remainder of the consent decree was divided into three sections.

The first section created a new governance and management structure for the City schools. It replaced the existing board, appointed entirely by the Mayor, with a new board selected jointly by the Mayor and Governor from a list of candidates submitted by the State Board of Education. The agreement further specified the composition of the new ten-person board, requiring it to include at least four members with substantial experience in the administration of large business or non-profit entities, three members with educational expertise, at least one parent of a currently enrolled student, at least one member with special education experience, and one non-voting student member. The consent decree replaced the existing position of superintendent with a triumvirate of officials—a Chief Executive Officer, a Chief Financial Officer, and a Chief Academic Officer—all of whom reported to the board. It also established a fourteen-member Parent and Community Advisory Board. The Bradford plaintiffs were entitled to appoint two members of the Advisory Board, and the plaintiffs in the federal special education case were entitled to appoint three. The decree gave the CEO the power to appoint the remaining nine members with board approval: three from a list submitted by the Baltimore Council of PTAs, two from area-based parent networks, two from a list compiled by the Title I liaisons, and the final two from other parent or community groups.

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79. Telephone interview with an official in the Maryland Attorney General’s Office speaking on condition of anonymity (Jan 31, 2003) [hereinafter Maryland Attorney General’s Office Interview].
81. Id. at 5.
82. Id.
83. Id. at 7.
84. Id. at 8.
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The consent decree required the new board to adopt a Master Plan by March 1, 1998 detailing its strategy for improving academic achievement and management of the system. Thereafter the board was obligated to issue annual public reports analyzing its progress under the Master Plan. The consent decree also included a controversial provision canceling all collective bargaining agreements on June 30, 1997, so that the new board could negotiate with its unions on a clean slate.

The second section of the consent decree promised additional funding for the Baltimore schools. The State agreed to provide $230 million in new operating aid over five years with a payment of $30 million in the first year and $50 million in each subsequent year. It also promised $24 million in other aid, primarily school construction funding. The State agreed that the new money would not supplant any existing sources of funding. To further protect itself against the loss of general education aid, Baltimore insisted that the State cap the amount of funding it would lose under the enrollment-driven formula as the number of students in its schools declined. As a compromise, the parties endorsed a table of projected enrollment figures for the City over the five-year period of the consent decree. The table predicted that Baltimore would lose over 12,000 students. The consent decree granted the State flexibility to reduce funding based on the projected figures but prevented it from cutting aid any further if actual enrollment dipped below the projections.

The funding section of the consent decree also contained a provision allowing the plaintiffs to request more money beginning in 1999. The State committed to use “best efforts to satisfy any such request, subject to the availability of funds.” The decree provided that the plaintiffs could return to court under an expedited hearing schedule and receive a hearing on their request within fifteen days if the State failed to appropriate the money. Of all the provisions in the consent decree, the plaintiffs’ ability to request more funding and challenge any denial in court would prove the most divisive since it set the parties on a collision course for the future.

The third and final section of the consent decree addressed the grievances raised in the federal special education case. It dissolved the dual management

85. Id. at 15.
86. See id. at 14-15.
87. Id. at 13-14. Controversy over remedial funding supplanting existing funding flared up in 1998 and led former School Board Chairman Philip Farfel, one of the original plaintiffs in the Mayor v. Maryland case, back to court. See Request for Declaratory Judgment that the State is Supplanting Funds in Violation of the November 26, 1996 Consent Decree, Mayor v. Maryland, No. 95-258055 (Md. Cir. Ct., filed Oct. 6, 1998). Judge Kaplan dismissed the case on standing grounds. See Bradford v. Md. State Bd. of Educ., Nos. 94-340058 & 95-258055 (Md. Cir. Ct. Apr. 10, 2001) (Order in Response to Request for Declaratory Judgment that the State is Supplanting Funds in Violation of the November 26, 1996 Consent Decree).
88. Consent Decree, supra note 80, at 16.
89. See infra discussion accompanying notes 140-144.
structure created by prior court orders and returned control over special education to the new Board of School Commissioners and CEO, subject to a number of conditions and ongoing monitoring requirements.

H. The Advantages of Settling

The decision to settle the Bradford case offered the plaintiffs a number of advantages. Like any settlement, it hedged against the uncertainty of an unfavorable court ruling. The initial trial did not appear to be a cause for concern, since Judge Kaplan’s partial summary judgment order had already granted the plaintiffs a victory on the two most important aspects of their case—the existence of a constitutional duty to provide an adequate education and a violation of that duty. The plaintiffs could not be certain, though, how they would fare on appeal where they could expect a colder reception than they had received before the Circuit Court of Baltimore City. Indeed, when the question whether Montgomery County should be allowed to intervene in the Bradford case reached the Court of Appeals, the dissenters expressed considerable hostility toward the plaintiffs’ legal theory and request for relief. Judge Eldridge joined by Judge Raker invoked separation of powers concerns to question the ability of a court to order the legislature to appropriate additional money or restructure the Baltimore school system.90 The dissenters characterized the terms of the consent decree as an "unprecedented excursion beyond the outer limits of judicial authority."91 The majority, in contrast, took no position on the merits of the underlying legal issues apart from Montgomery County’s attempt to intervene.92 Had Judges Eldridge and Raker been able to convince just two other judges to join them on a direct appeal of the Bradford case, the plaintiffs would have lost on appeal had they chosen not to settle.

More daunting to the plaintiffs than the uncertainty of prevailing on appeal was the certainty that pursuing their case through the courts would substantially delay the implementation of a remedy.93 On the whole, they had confidence in their legal theory. Beth McCallum described the “evidence of inadequacy” as “truly undisputed and truly horrific.”94 In fact, the plaintiffs were loathe to delay the remedy precisely because they were so confident that students in Baltimore were not receiving an adequate education.95

91. Id. at 1295.
92. See id. (majority opinion) (“The cases before us involved nothing more than Montgomery County’s motion to intervene and we do not therefore consider the merits of the underlying cases.”).
93. Schmoke Interview, supra note 57 (“I was really hesitant about lawsuits because they just drag on for so long.”).
94. McCallum Interview, supra note 45.
95. Former Senator Barbara Hoffman framed the issue of delay vividly, explaining that every five-year interval, such as the five years in which the ACLU and Baltimore postponed filing suit while
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The settlement saved the plaintiffs the expense of conducting a full trial and arguing years of appeals, but to achieve the settlement, the plaintiffs had to spend considerable amounts of money preparing for trial. The parties took over 100 depositions. They employed expert witnesses. Baltimore alone paid its lead attorney over $1.6 million before entering the month-long, round-the-clock negotiations that produced the settlement. The firm of Howrey Simon spent over $2 million in actual costs and attorney time between the initial round of litigation and the return to court in 2000 assisting the ACLU on a pro bono basis. Only by demonstrating their capability to sustain a legal challenge were the Bradford plaintiffs able to create the credible threat of a court victory needed to force the state to the bargaining table.

Finally, settling the case helped to foster a cooperative atmosphere that benefited the plaintiffs when the remedy went before the legislature. Litigation can strain long-standing relationships and harden bargaining positions for the future. The courtroom forces parties to interact as adversaries. It devalues nuance and the shades of gray necessary for maintaining long-term partnerships in favor of clear claims of entitlement. The settlement process, in contrast, enabled the Bradford plaintiffs to forge a partnership with the defendants. Together, they emerged from negotiations as allies committed to passing a common plan. The political leaders who endorsed the settlement then went back to the General Assembly and worked as insiders to shepherd the remedy through the legislature rather than as adversaries.

Despite its prevalence in other areas of law, settlement has proven the exception rather than the rule in school finance litigation. Three factors contributed to the ability of the parties in the Bradford case to reach an amicable settlement. First, the defendants in the case sympathized with the plight of the Baltimore schools. State Superintendent Nancy Grasmick had been an outspoken advocate for the children of Baltimore and genuinely wanted her legacy to include reform of the city schools. Representatives from Baltimore chaired the two most important appropriations committees in Annapolis. Governor Glendening, himself a former professor, believed in the importance of education and was politically indebted to the city for his narrow, seeking a political solution, represented the entire elementary school career of a student. Telephone Interview with Barbara Hoffman, former chair of the Maryland Senate Budget and Taxation Committee (Feb. 13, 2003) [hereinafter Hoffman Interview].

96. Jean Thompson, Questions and Answers on School Reform, BALT. SUN, Aug. 4, 1996, at 23A.
97. Jean Thompson, Legal Bills Hit $5 Million in Schools Suit, BALT. SUN, Dec. 8, 1996, at 1B.
98. Goering Interview, supra note 27.
99. Id. ("When you go to court it can be very polarizing. . . . it becomes more difficult for the state officials to say, 'We'll do our part.'").
100. But see Lauren A. Wetzler, Buying Equality: How School Finance Reform and Desegregation Came to Compete in Connecticut, 22 YALE L. & POL’Y REV. 481, 505 (2004); Anne O’Connor, NAACP School Suit is Settled; Group, State Agree on Offering More Options for City Students, STAR TRIB. (Minneapolis, MN), Mar. 14, 2000, at 1A.
5000-vote margin of victory in the 1994 election. Second, representatives from all three branches of government participated actively in settlement negotiations, and Judge Kaplan encouraged lawyers for the state to consult frequently with state officials to ensure that their concessions did not move too far beyond what the political leaders of the state were willing to endorse. This inclusive approach paid enormous political dividends, since the Governor and key lawmakers found themselves in the position of enacting a plan they had agreed to rather than reluctantly responding to a court order. Third, and most importantly, the plaintiffs were politically astute and patient. They recognized that lawmakers would not appropriate additional money for Baltimore without management reforms. Mayor Schmoke made the difficult decision to relinquish considerable control over the schools in order to secure a financial remedy. The plaintiffs also moderated their financial demands to make the plan more palatable to lawmakers. Maryland faced a projected deficit of $200 million in the 1997-98 fiscal year. The plaintiffs strategically decided to accept smaller short-term funding infusions in exchange for the provision in the consent decree allowing them to return to court in several years to request additional funding.

The willingness of the Bradford plaintiffs to time the business cycle in their pursuit of education funding holds lessons for other states. Melissa Carr and Susan Fuhrman have noted that school finance reform proves significantly more difficult during tight fiscal times because lawmakers seeking to help poor districts face an unsavory choice between raising taxes and redistributing revenue. In fact, Furman found as an empirical matter that “periods of legislative activity in the sphere of school finance have usually coincided with strong state economies.” The connection makes sense. Surpluses allow lawmakers to provide infusions of money for poor districts without leveling-down or otherwise threatening wealthier districts. The Bradford plaintiffs recognized this fact and correctly predicted in 1997 that Maryland would soon be experiencing substantial surpluses. Susan Goering said:

In 1997, the state was in a recession, and they said that it was the best they could do. We accepted that but [knew] red ink might not be flowing later. We thought strategically that if the City could use its money wisely and well for a couple years that at some point when the situation was better fiscally for the state then we could ask for more money.

Although delaying a full remedy during difficult economic times can harm the students continuing to receive an inadequate education in the interim, it may, as a pragmatic move, prove necessary in some situations to avoid the even longer

102. Id. at 140 (citing Susan H. Fuhrman, Legislatures and Education Policy, in THE GOVERNANCE OF CURRICULUM 30, 31 (R.F. Elmore & Susan H. Fuhrman eds., 1994)).
103. Goering Interview, supra note 27.
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delays that accompany a stand-off between the courts and the legislature after lawmakers reject a full remedy as fiscally infeasible.

III. THE REMEDY

A. Passage of Senate Bill 795

The General Assembly endorsed the Bradford consent decree at the end of the 1997 legislative session, but the result was far from preordained. In fact, Senate President Mike Miller publicly predicted the defeat of the remedy on the eve of the legislative session. Lawmakers from Prince George’s County, the only other majority-black jurisdiction in the state and a traditional ally of Baltimore in the struggle for school funding, followed a few weeks later with an announcement that they would not support an infusion of money for Baltimore unless their county received a comparable package. Baltimore’s political strength had been waning in the General Assembly for years. As discussed, it had experienced rapid population loss in the 1990s, and legislators knew that Baltimore would lose several seats in the General Assembly after the 2000 census. Even worse, the seats were expected to go to Montgomery County, the most vocal opponent of more increasing aid to Baltimore. As the legislative session opened, Montgomery County still smarted from Judge Kaplan’s denial of its petition to intervene in the litigation and was appealing its exclusion to the Maryland Court of Appeals.

In this difficult political climate, five factors accounted for the ultimate passage of the Bradford remedy. First, the decision to sue under an adequacy theory rather than an equity theory made the remedy less threatening to suburban counties in Maryland. Although adequacy suits involve the redistribution of resources through the tax system, the redistribution is indirect and does not impact schools in neighboring jurisdictions in as politically visible ways as equity suits. The ACLU had emphasized from the moment it filed suit that it did not want to take resources away from schools outside of Baltimore to fund the remedy. The first paragraph of the ACLU complaint stated, “Nor do the claims presented herein seek to reduce or reallocate educational resources currently provided to any other school district in Maryland. Rather, this case is

105. C. Fraser Smith, Miller Predicts Demise of School Aid, BALR. SUN, Jan. 8, 1997, at 1A.
brought solely to ensure that all schoolchildren in Baltimore City have access to a constitutionally adequate public education."\textsuperscript{108} By avoiding the specter of leveling-down, the ACLU reassured lawmakers that they could vote for the Bradford remedy without hurting their own districts. As Peter Enrich put it in his article about the switch from equity to adequacy, adequacy suits, unlike equity suits, do not ask politically powerful constituencies "to sacrifice their own children's educations for the sake of a societal norm."\textsuperscript{109}

Second, linking the infusion of education aid to management reform reassured lawmakers that Baltimore was less likely to waste the new money. The City-State partnership required the State Board of Education to monitor the way in which Baltimore spent the money and to hold the Board of School Commissioners accountable for meeting the reform targets in its Master Plan. Even some lawmakers who remained unconvinced of the need for additional funding viewed it in pragmatic terms as the price of securing a new management structure in the City.\textsuperscript{110}

Third, the threat of returning to court made the General Assembly wary of voting against the Bradford remedy. The prospect of a court ordering even larger spending increases sent ripples of fear through Annapolis. Lawmakers also worried that a judicial remedy would not include the extensive management reforms demanded by the state in settlement negotiations. The consent decree played upon this fear of a court-ordered remedy. It scheduled the lawsuit to resume on May 12, 1997, a month after the end of the legislative session, if the General Assembly did not enact its provisions into law.\textsuperscript{111} Former Senator Barbara Hoffman, who repeatedly warned her colleagues that inaction would return the case to court, said, "It was very clear to everybody that this was not an idle threat."\textsuperscript{112} The threat of returning to court gained even greater saliency in the closing days of the legislative session when the Ohio Supreme Court struck down Ohio's school funding system on adequacy grounds.\textsuperscript{113} According to Delegate Michael Gordon, the Ohio decision reminded lawmakers what could happen in Maryland if they failed to act and allowed the Bradford case to return to court.\textsuperscript{114}

Fourth, the consent decree served an important agenda-setting function. Courts often decline on separation of powers grounds to order specific remedies in school finance cases. In fact, they sometimes provide legislators
with confusing and even contradictory guidance, leaving them to guess what steps they must take to bring the school funding system into compliance with the dictates of the state constitution.\textsuperscript{115} This vagueness can lead to considerable frustration and additional rounds of litigation as courts continually strike down remedial legislation without providing a clear blueprint for how to design a constitutional system.\textsuperscript{116} The consent decree in the \textit{Bradford} case avoided these problems by presenting lawmakers with a detailed plan. The decree even included the text of a proposed bill implementing its terms. The General Assembly enjoyed little leeway to alter the bill, since changes affecting the substantive rights of any party required the written permission of that party or the approval of the court.\textsuperscript{117} The consent decree consequently forced lawmakers to vote up or down on the proposal negotiated by the parties while depriving opponents of the opportunity to weaken it with amendments or through parliamentary maneuvering.

Fifth, the decision to broaden the \textit{Bradford} remedy to include additional funding for at-risk students outside of Baltimore considerably enhanced its popularity in the General Assembly. From the moment the consent decree was signed, politicians from around Maryland began complaining about the perceived unfairness of helping only Baltimore when every county in the state educated at-risk children. Even Montgomery County had felt the pinch after two decades of shifting demographics. One in five students in the Montgomery County school system qualified for free or reduced-price lunch,\textsuperscript{118} and the county educated over half of all English for Speakers of Other Languages (ESOL) students in the state.\textsuperscript{119} To address such needs, representatives from Maryland’s six largest counties floated a plan to link the $254 million aid package for Baltimore City with $325 million for the rest of the state over five years.\textsuperscript{120} Legislative leaders balked at the price tag of the proposal, but eventually reached a deal with most of the suburban counties to include an

\textsuperscript{115} Compare Brigham v. Vermont, 692 A.2d 384, 397 (1997) ("We find no authority for the proposition that discrimination in the distribution of a constitutionally mandated right such as education may be excused merely because a ‘minimal’ level of opportunity is provided to all."), with id. ("Equal opportunity does not necessarily require precisely equal per-capita expenditures, nor does it necessarily prohibit cities and towns from spending more on education if they choose . . . .").

\textsuperscript{116} See, e.g., Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III), 826 S.W.2d 489, 538 (Tex. 1992) (Doggett, J., dissenting) ("A majority of this court has led the Legislature down the primrose path. Today’s unconstitutional legislation is only yesterday’s judicial vision; it is nothing more than the natural response to the majority’s previous encouragement of tax base consolidation. The Legislature, the Governor, and three separate Texas trial judges all followed accurately the prior judicial instructions; now the majority unjustifiably changes the instructions.").

\textsuperscript{117} Consent Decree, \textit{supra} note 80, at 4.

\textsuperscript{118} Howard Libit, \textit{Local Schools Seeing Rise in Urban Woes}, BALT. SUN, May 18, 1997, at 1B.

\textsuperscript{119} Michael Dresser, \textit{Montgomery Pupils Speak a World of Languages}, BALT. SUN, Mar. 1, 1997, at 1B.

\textsuperscript{120} Terry M. Neal, \textit{Counties’ Plan: Money for All Schools in Md.}, WASH. POST, Mar. 16, 1997, at B1.
additional $167 million in Senate Bill 795 for schools outside Baltimore.\textsuperscript{121}

B. The Politics of Race

Race played a puzzling role in the \textit{Bradford} case. James Ryan has studied the impact of race on school finance litigation and noted a “discernable pattern in legislative responses: minority districts that were successful in court faced protracted legislative battles that were more intense and longer-lasting than those typically faced by successful white districts.”\textsuperscript{122} Baltimore represents a striking counter-example to this general trend. As a predominantly African-American city, it managed to secure a sizeable remedy within months after ending its court battle. Race was not irrelevant, but the relatively limited impact of race on the \textit{Bradford} case requires explanation.

One answer advanced by critics of the City-State Partnership is that race did indeed play an enormous role in the litigation, and that its apparent absence from the debate simply reflected the collapse of African-American political power in Maryland. They viewed the infusion of money into Baltimore not as a gesture of concern for black schoolchildren but simply as a buyout in exchange for depriving African-Americans of control over their own school system. This perspective bubbled to the surface most notably in the closing days of the 1997 legislative session when a group of African-American leaders wrote an open letter to the General Assembly. The letter accused state officials of making Baltimore a “colony of the State” in a gesture of “racist paternalism.”\textsuperscript{123} Signatories included a set of prominent black ministers, the CEO of Baltimore’s \textit{Afro-American} newspaper, and Kweisi Mfume, a former Maryland congressman and head of the national NAACP. Their view gained additional adherents after the fact in 2002 when the State intervened in Prince George’s County, the only other majority-minority county in the state, to replace its school board as well.\textsuperscript{124}

Despite these accusations, proponents of school finance reform in Maryland appear genuinely to have succeeded in minimizing the importance of race compared to other states. The ACLU scrupulously avoided mentioning race in its pleadings. Susan Goering had come to the organization after working on the

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  \item \textsuperscript{121} David Montgomery et al., \textit{Montgomery, Pr. George’s Satisfied}, WASH. POST, Apr. 10, 1997, at M1.
  \item \textsuperscript{123} Letter from Rev. Arnold Howard et al., to the Maryland General Assembly 1 (Apr. 3, 1997), reprinted in Thomas W. Waldron & William F. Zorzi, Jr., \textit{Blacks Denounce Schools Package}, BALT. SUN, Apr. 4, 1997, at 1A.
  \item \textsuperscript{124} Paul Schwartzman, \textit{Crisis over Schools Had Been Building}, WASH. POST, Feb. 16, 2002, at B1 ("[A]dvocates of change faced vigorous attacks from opponents who equated the abolition of an elected panel with robbing citizens of their voting rights, an argument that may carry added resonance in a county that is predominantly black.").
\end{itemize}
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trial of the famous desegregation case of Missouri v. Jenkins, and she was wary of complicating the litigation in Maryland. She noted, “For better or worse, what ends up happening when you introduce race is that it adds a layer of complexity and political charge that ends up making it harder sometimes to get the remedy.”125

Broadening the remedy provided in Senate Bill 795 further mitigated the impact of race by expanding the class of perceived beneficiaries of the legislation to include a substantial number of at-risk whites. Such an approach will not always be successful. Professor Ryan examined polling data from New Jersey and Texas indicating that white residents tended to perceive school finance reform as primarily benefiting minorities even when their own districts received substantial funding boosts.126 Ryan accordingly concluded that “incorporating minority districts within a larger group of beneficiaries that includes white districts may not be sufficient to overcome popular perception that legislative reform will primarily assist minorities.”127 The experience of Maryland does not necessarily rebut this conclusion, since the extent to which the inclusion of $167 million for other counties changed perceptions among the public at large remains unclear. Broadening the remedy, however, at least allowed lawmakers who were paying close attention to the distribution of education aid to return to their districts ready to dispel the misperception that Senate Bill 795 only helped African-American students in Baltimore, if challenged on the point.

Finally, no account of the impact of race on the Bradford case would be complete without mentioning Delegate Howard “Pete” Rawlings. Delegate Rawlings served as both the harshest critic of the Baltimore schools and one of their biggest champions in the state legislature. From his position as the powerful chairman of the House Appropriations Committee, Delegate Rawlings spearheaded efforts to withhold money from Baltimore until it agreed to join the City-State partnership. When Rawlings, who was African-American, called for management reforms, opponents could not readily dismiss his criticism in racial terms. The Baltimore Sun quoted Rawlings as saying, “You can’t call me a racist. . . . I’m in a position to raise these questions.”128 Interestingly, Delegate Rawlings’s counterpart in the Senate perceived the situation differently. Former Senator Barbara Hoffman, who is white, believed taking power away from Baltimore “was a much bigger struggle for Pete Rawlings because he had more to lose by speaking out and got called all kinds of names.”129 Whatever the truth, Rawlings and Hoffman made a powerful

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125. Goering Interview, supra note 27.
127. Id. at 476.
128. Peter Jensen, Rawlings Undeterred by Flak over School Aid, BALTIMORE SUN, Feb. 17, 1996, at 1A.
129. Hoffman Interview, supra note 95.
IV. THE RETURN TO COURT

Three years of relative calm followed the passage of Senate Bill 795 as Baltimore restructured its school system and invested in its schools. The Mayor and Governor appointed a new Board of School Commissioners, which in turn hired Robert Schiller, former State Superintendent of Michigan, as interim CEO in the summer of 1997. Schiller proved to be a dynamic leader as he laid a solid foundation for future reforms. Lawmakers had inserted a provision into Senate Bill 795 prohibiting the interim CEO from seeking the position on a permanent basis. Although this provision may have encouraged some opponents to wait out his reform efforts, Schiller used his short tenure to his advantage as he set about aggressively restructuring the school system. He replaced over a dozen ineffective principals and initiated contract negotiations with the teachers' union to create a comprehensive performance evaluation system tied to student achievement. Schiller spent the first installment of Bradford money to reduce elementary class size and establish after-school academies for at-risk students. In just six months, Baltimore hired 1062 new teachers and called an additional 166 teachers out of retirement. The General Assembly was so impressed with Schiller's performance that it voted to extend his tenure until the end of the 1997-98 school year. At that point, the Board of School Commissioners named Robert Booker as his permanent successor.

In 1999, the Board and the State commissioned an independent evaluation of their efforts as required by the consent decree and Senate Bill 795. Metis Associates examined the Master Plan and early implementation efforts, concluding that Baltimore had “made meaningful progress” toward improving the quality of its public schools. It in turn commissioned an adequacy study by the Council of the Great City Schools, a non-profit organization based in

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130. Schmoke Interview, supra note 57.
131. An Act Concerning Primary and Secondary Education—New Baltimore City Board of School Commissioners, 1997 MD. LAWS 105.
133. An Act Concerning Baltimore City Board of School Commissioners—Statutory Deadlines, 1998 MD. LAWS 597.
134. See 1997 MD. LAWS 105.
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Washington, D.C. that had conducted similar studies in Philadelphia and New York. The study was released in January 2000 and incorporated into the formal evaluation issued the next month. The study confirmed what the plaintiffs had known at the time they signed the consent decree—even with the influx of new money from the state, funding remained far below the level needed to provide an adequate education in Baltimore. The study estimated that Baltimore needed to increase its expenditure of $7576 per pupil to $10,274 in order to achieve adequacy. The $2698 per-pupil increase would have cost the system over $260 million a year.

Pursuant to the consent decree, the Board of School Commissioners submitted a supplemental budget request to the state. It did not ask for the full $265 million immediately, but instead proposed a more modest increase of $49.7 million for operating costs and $40 million for capital improvements in fiscal year 2001. The City bolstered its budget request by pointing to a record of academic improvement in the first year of the City-State Partnership. Sixty-five percent of elementary schools had improved their first grade reading scores on the Comprehensive Test of Basic Skills, and sixty-three percent had improved their second grade scores. The City had also posted gains on its total School Performance Index (SPI), a composite of MSPAP scores, attendance, and functional test scores. Its SPI had risen from 16.1 in 1998 to 17.0 in 1999, the first time since MSPAP testing began in 1992 that Baltimore’s score increased at a faster rate than the state average.

The state welcomed the achievement gains but told Baltimore it needed to give existing reforms more time to work before requesting additional money. The Bradford plaintiffs protested. They pointed to the provision in the consent decree committing the state to use “best efforts” to meet supplemental funding requests from the Board of School Commissioners. Beth McCallum

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136. COUNCIL OF THE GREAT CITY SCHOOLS, ADEQUATE FINANCING OF URBAN SCHOOLS: AN ANALYSIS OF FUNDING OF THE BALTIMORE CITY PUBLIC SCHOOLS 20 (2000), available at http://www.cgcs.org/pdfs/BaltimoreFinanceReport.pdf. The figure produced by the Council should be taken with a grain of salt, because the report lacked the methodological sophistication of the “successful schools” study commissioned by the Thornton Commission. See infra Part V. The report looked at average spending in the eight highest-performing school districts in Maryland. It then multiplied the per-pupil expenditures in these districts by the “virtual enrollment” of Baltimore. The report calculated virtual enrollment by counting each poor student in Baltimore as 1.2 students and each special education student as 2.3 students. COUNCIL OF THE GREAT CITY SCHOOLS, supra, at 19. The weights were not Maryland-specific but rather drawn from a national study conducted a decade earlier. Moreover, the study failed to apply the weights when calculating the per-pupil spending in the high-performing school districts, exposing it to charges that it overestimated the cost of an adequate education in Baltimore by failing to acknowledge that part of the high spending in successful districts resulted from efforts to help their own special needs students.

137. Howard Libit, Schools Taking a Second Look at State Aid, BALT. SUN, June 18, 2000, at 1B.


139. Id.

140. See Consent Decree, supra note 80, at 16.
explained, “That provision was in the consent decree because everybody knew from day one that the $50 million a year wasn’t going to be enough to achieve adequacy.”

Susan Goering agreed, “We made clear in 1997 when this thing got passed that it was just a downpayment on what was truly needed for reform. Nobody was under any illusions that the City was going to create this massive reform with $50 million.”

Unable to make headway in negotiations, Baltimore and the ACLU filed for an expedited hearing on their funding request. Governor Glendening responded on June 21, 2000 by offering Baltimore a $30 million settlement. Baltimore rejected the offer, and Judge Kaplan presided over a hearing on June 26, 2000. Beth McCallum felt the ACLU returned to court in a strong position. She explained:

By the time we got two years into it, we had some decent, statistically significant scores that showed [the City-State partnership] had been working. But we also had our jointly appointed independent auditor saying we still needed an additional $2700 per student to achieve adequacy.

The plaintiffs could also point to Maryland’s $1 billion projected budget surplus and $4.4 billion multi-year tobacco settlement. Their decision in 1997 to delay seeking a full financial remedy until healthier fiscal times had indeed proved prophetic.

Judge Kaplan sided with the plaintiffs just four days after the hearing. He held that the State had failed to meet its constitutional obligation to provide an adequate education and suggested that Baltimore needed an additional $2000 to $2600 per pupil to achieve adequacy. Judge Kaplan declined to order specific spending, but the per-pupil figures he cited from the interim evaluation implied that Baltimore required approximately $267 million annually to achieve adequacy.

The State found the price tag unacceptable and appealed. The appeal turned the tables on Baltimore and forced it to decide whether it was willing to make concessions in order to avoid the risk of an adverse judgment. Martin O’Malley, the new mayor who had only been in office for nine months, decided to avoid a showdown with the State and accept a settlement in January 2001. At

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141. McCallum Interview, supra note 45.
142. Goering Interview, supra note 27.

144. McCallum Interview, supra note 45. McCallum added, “It was nice to go in and be able to say to Judge Kaplan that [the agreement] hammered out three years ago had worked.” Id. See also Joint Petition for Further Relief, supra note 145, at 13 (“The BCPSS’ scores on the statewide MSPAP tests have shown steady increase during the Consent Decree period . . . .”).

145. M. Dion Thompson, City Pupils Lack Funds, Judge Rules, BALT. SUN, July 1, 2000, at 1B.
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$55 million, the settlement came much closer to Governor Glendening's initial settlement offer than to Judge Kaplan's ruling. The gap was tolerated because, as discussed below, Maryland had already set in motion a process for revising the statewide funding formula. The Mayor worried about upsetting this process with a court battle and did not want to squander political capital by pressing for enforcement of Judge Kaplan's ruling when a statewide remedy was already in the pipeline.

Once again, though, the independence the ACLU gained from representing a class of students rather than the school district allowed it to press on when Baltimore sounded the retreat. The ACLU refused to endorse the $55 million settlement and announced its intention to defend Judge Kaplan's ruling on appeal. This decision placed the State in the awkward position of having announced a settlement that failed to end the court case. Governor Glendening responded by ordering the attorneys for the State to drop their appeal. The order represented a serious legal blunder on the part of the Governor, for it allowed Judge Kaplan's ruling to stand and become the law of the case. Rather than buying peace for $55 million with no outstanding legal liability, the State found itself forced to pay $55 million while leaving the $267 million judgment against it in place, all because the ACLU stood firm and asserted its independence from Baltimore.

V. THE THORNTON COMMISSION AND THE PROCESS OF DEFINING ADEQUACY

Between the initial passage of Senate Bill 795 in 1997 and the reopening of the Bradford case in 2000, the General Assembly and Governor Glendening established a commission to study the school finance system of Maryland and recommend changes. After getting off to a rocky start, the Commission on Education Finance, Equity, and Excellence—generally called the Thornton Commission after Alvin Thornton, its chairman and former President of the Prince George's County School Board—emerged as a model for conducting the process of calculating the cost of an adequate education. The Thornton Commission's recommendations sparked the most comprehensive reform of the education funding system in modern Maryland history.

The history of the Thornton Commission and the Bradford case are inextricably intertwined. Strictly speaking, Bradford did not force the creation

146. Erika Niedowski, School Funding Plan Is Opposed, BALT. SUN, Jan. 26, 2001, at 3B.
147. Maryland Attorney General's Office Interview, supra note 79.
148. Governor Glendening's reasons for terminating the appeal are unclear. His term was drawing to a close in 18 months, and there was speculation that he hoped to be appointed Secretary of Education if Al Gore were elected in 2000. See Daniel LeDuc, New Role Elevates Glendening's National Profile, WASH. POST, Aug. 15, 1999, at M5. Actively fighting a school finance case on appeal would have cast a shadow over his generally pro-education record as Governor.
of the Thornton Commission. But the Bradford settlement did serve both directly and indirectly as an impetus for the formation of the Commission. The direct impact arose from the recognition that the 1997 settlement did not meet the full costs of providing an adequate education to the students of Baltimore. Those interested in providing a complete remedy wanted to understand the true cost of achieving adequacy. They also viewed the adequacy study as a useful tool in case circumstances forced the plaintiffs to return to court in pursuit of more money. Baltimore additionally hoped that an adequacy study would lend support to its claim that a lack of resources rather than deficient management accounted for the low performance of its students.

The indirect impact of Bradford on the establishment of the Thornton Commission was twofold. First, the success of the Bradford case emboldened other school systems in Maryland, which began contemplating their own lawsuits against the State. Counties on the rural Eastern Shore of the Chesapeake Bay, several of which had participated in the original Hornbeck litigation, were the most vocal in this regard. The Thornton Commission represented both a genuine and cynical response to the threat of additional litigation. Former Senator Hoffman, who served on the Commission, described both motivations. She said, “Part of what we did with Thornton was to keep people out of court. It was an attempt to say that we were really going to try to solve the problem.” But she then added, “I guess there were some people who wanted to do the Thornton Commission just as a way to keep from having to do anything.” This second group of lawmakers viewed the Commission as a substitute for action, placating school districts in the short term without producing substantial change.

The second indirect link between Bradford and the creation of the Thornton Commission was equally complicated. Some of the most outspoken proponents of creating a school finance commission came from the ranks of legislators who most resented the consent decree and Senate Bill 795. It was these lawmakers who had pushed to broaden the Bradford remedy in the belief that Baltimore was receiving a disproportionate benefit while the poor children in their own counties were being ignored. They watched in dismay as the Governor steered $18 million in new funding to Prince George’s County and $13.4 million to

150. Even the attorneys for the Bradford plaintiffs acknowledged that other political dynamics contributed to the establishment of the Thornton Commission. Beth McCallum said, “Do I personally believe that the Bradford case helped prompt it? Absolutely. Might you get a different answer from legislators? Possibly.” McCallum Interview, supra note 45.

151. Despite the acknowledged concentration of need in Baltimore, Senate Bill 795 still left the City spending only $19 per pupil above the state average in 1998. See Thornton Commission, Preliminary Report, supra note 6, tbl.12.

152. Interview with Chris Maher, Education Director, Advocates for Children & Youth, in Baltimore, Md. (Jan. 22, 2003) [hereinafter Maher Interview].

153. Hoffman Interview, supra note 95.

154. Id.
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Baltimore in 1998. They grew even more alarmed when Prince George’s County extracted an additional $140 million in the same legislative session to help it construct up to sixteen new neighborhood schools needed to dissolve its longstanding federal desegregation order. According to lawmakers, this piecemeal distribution of aid allowed the Governor to reward his most loyal political constituencies at the expense of the rest of the state. They argued that the situation called for a statewide solution. The reference to “equity” in the title of the commission did not reflect a concern for the special needs of poor districts so much as it reflected the desire of middle-class counties to establish a comprehensive education funding formula that would displace the system of alleged favoritism that had emerged in the wake of the Bradford settlement.

The Thornton Commission began work in November 1999 by conducting a comprehensive analysis of the existing funding system. It then set about defining the scope of its mission and developing a working plan. The Commission spent much of 2000 debating interim recommendations about how the State should proceed while the Commission worked on its report. Only at the end of 2000 did it begin calculating the cost of an adequate education.

The Commission defined adequacy as the amount of money required for students to meet state standards, as measured primarily by satisfactory performance on the MSPAP. This functional definition simplified the work of the Commission. Like the use of MSPAP scores in the Bradford suit, defining adequacy with reference to state standards invoked the political legitimacy of existing legislative judgments about the purposes of public education. It allowed the Thornton Commission to avoid the thorny task of articulating its own vision for the schools, and accordingly deflected the criticism commonly levied against unelected bodies that attempt to develop independent definitions of adequacy out of whole cloth. Although the

155. See Thomas W. Waldron, $68 Million in Aid to Local Schools Gets Final Assembly OK, BALT. SUN, Apr. 10, 1998, at 4B.
157. See Editorial, Glendening’s School Aid: The Sequel, BALT. SUN, Aug. 6, 1997, at 12A.
158. See THORNTON COMMISSION, PRELIMINARY REPORT, supra note 6.
159. The Commission described an adequate financing system in its final report as one that establishes a “direct link between what is expected of school systems and the level of funding that school systems receive.” COMM’N. ON EDUC. FIN., EQUITY, & EXCELLENCE, FINAL REPORT 51 (2002), available at http://mlis.state.md.us/other/education/final/2002_final_report.pdf [hereinafter THORNTON COMMISSION, FINAL REPORT].
160. See, e.g., Dietz, supra note 44, at 1211-12 (“When a court starts from scratch to create its own laundry list of fundamental goals for public education, the conclusion seems inescapable that the court is legislating, which is an unacceptable violation of the separation of powers.”); Troy Reynolds, Note, Education Finance Reform Litigation and Separation of Powers: Kentucky Makes Its Contribution, 80 Ky. L.J. 309, 335 (1992) (“[S]trict adherence to traditional legislative or executive roles precludes a court from judicially defining a qualitatively adequate education.... [S]uch judicial intrusions are fraught with the danger of seemingly endless litigation and problems of judicial management.”).
Thornton definition of adequacy might be criticized for focusing too narrowly on money as a determinate of educational achievement, it must be remembered that the link to state standards reflected the fact that the Commission operated against a background system of accountability designed to ensure the money it recommended would be well spent.

In November 2000, the Thornton Commission hired the firm of Augenblick & Myers to conduct an adequacy study. It soon found itself confronted by the same methodological choices as Wyoming, Ohio, and other states that have attempted to define adequacy in the wake of school finance litigation. The Commission focused on two primary methods for calculating the cost of an adequate education: the “successful schools” approach and the “professional judgment” model. Since each method presented its own host of promises and pitfalls, the Commission asked Augenblick & Myers to employ both techniques.

The successful schools approach as practiced in Maryland looked to schools already meeting state standards and examined their spending patterns. The Maryland study proved somewhat unusual insofar as it marked the first large-scale use of the successful schools method with individual schools as the unit of analysis. The successful schools approach has traditionally looked to high-performing school systems, but because Maryland contains such large school districts, no single district uniformly met state standards. Examining individual schools introduced an additional degree of complexity into the study because Augenblick & Myers had to estimate the percentage of district-level administrative costs attributable to each school, but it also produced some countervailing benefits. The State Department of Education identified fifty-nine elementary, middle, and high schools that met or exceeded state standards for MSPAP scores, attendance, and the drop-out rate. It did not select the highest performing schools in the state, but rather attempted to maximize the geographic, economic, and racial diversity of the pool. The performance threshold somewhat constrained efforts to diversify the sample, but Maryland was still able to include more variability by examining individual schools than it could have by looking at district-wide averages.

Another notable aspect of the Maryland successful schools study is that it probed beneath official spending figures in an effort to identify actual spending patterns. Augenblick & Myers surveyed the schools in the study to determine the amount each school received in donations of time and money. The surveys revealed that ninety-seven percent of elementary schools received monetary support or donations of equipment, which averaged $72 per pupil across all

schools. Ninety percent of middle schools received support, which averaged $39 per pupil. All the high schools studied received support, with an average of $121 per pupil, much of it dedicated to athletic programs. In addition, volunteers contributed 13.4 hours per pupil in elementary school, 1.2 hours per pupil in middle school, and 6.1 hours per pupil in high school. To the extent that less-successful schools lack access to the same level of community wealth and volunteer time, adequacy studies that fail to adjust for these informal resources will underestimate the true cost of providing an adequate education. In this respect, Maryland provides a model for other states interested in conducting accurate adequacy studies.

The most obvious criticism of the successful schools approach as practiced in Maryland is that it failed to account for varying levels of student need in calculating the cost of an adequate education. The study tried to compensate partially for this deficiency by selecting as diverse a sample of schools as possible and examining informal community resources, but in general it made no adjustments based on poverty, peer effects, family status, and other demographic factors that may influence achievement. In theory, the inability to make these adjustments is not an inherent failing of the successful schools approach. A sophisticated econometric regression with sufficient data about individual students could support the development of weights modifying the funding formula based on the link between background characteristics and student need. But states that undertake such an effort may find themselves confronting the same problems as Maryland, which discovered that the schools meeting state standards contained a slightly below-average number of special education students and a much lower proportion of students eligible for free or reduced-price lunch. Had Maryland attempted to derive pupil weights from its successful schools study, it would have been forced to draw conclusions about how to treat entire categories of students from tiny samples.

The Thornton Commission turned instead to a professional judgment approach to obtain per-pupil weights adjusting the funding formula for the cost of educating students with special needs. It assembled six panels of educational experts to design prototypical schools for a district with 30,000 students. The panels were told to assume that 13.5% of students were eligible for special education, 31% were eligible for free or reduced-price lunch, and 2% had limited English proficiency. The panels identified a series of programs and staffing arrangements needed to meet state standards in the prototypical

162. See id. at 24.
163. See id.
164. See id.
165. Id. at 25.
166. See id. at 20.
167. Id. at 13.
schools. An oversight panel then synthesized their recommendations into a single model. Augenblick & Myers calculated the cost for each component of the prototype and devised weights for special needs students based on the features of each school identified by the experts as intended to help such students. An independent collection of advocacy organizations and individuals, the New Maryland Education Coalition, also conducted its own professional judgment study. It coordinated with the Thornton Commission to use similar baseline assumptions so that the studies would complement one another.

The professional judgment approach is not immune from criticism. By looking to prototypes rather than real schools with a demonstrated record of success, it risks relying too heavily on educational theory in a field notoriously plagued by fads. But this critique proves relatively weak, since successful schools may also follow fads unrelated to their achievement results, and the experts on panels tend to be experienced educators drawing not just from theory but also from a deep reservoir of knowledge accumulated over years of practice. The more serious criticism of the professional judgment model arises from the suspicion that it might systematically inflate the reported cost of providing an adequate education. Augenblick & Myers explained, “Our observation is that participants in the professional judgment approach find it very difficult to focus exclusively on those resources, and only those, that are needed so that a school might meet a particular outcome, such as a level of pupil performance or a rate of attendance.” Even if no such distortion exists, opponents in the political arena can dismiss the determinations made by a professional judgment panel as self-interested and therefore unreliable.

Given the flaws associated with both the successful schools and professional judgment approaches, the Thornton Commission chose to use them in tandem. The decision to treat the models as complements became significantly easier after the studies produced relatively similar estimates of the cost of an adequate education. The successful schools approach produced a base cost figure of $5,969 per pupil in 1999-2000, unadjusted for student need. The Augenblick & Myers professional judgment study calculated the average cost of each prototypical school to be $10,631 per pupil, with a base cost of $6,612 per pupil remaining after the authors stripped away the spending attributable to special needs students. The New Maryland Education Coalition reported the results of its three professional judgment panels

169. AUGENBLICK & MYERS, INC., supra note 161, at 28.
170. Id. at 23.
171. Id. at 17.
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separately as $9313, $7461, and $9215 per pupil.172 The study did not strip away the costs associated with special needs students to produce a base figure, so its estimates should be compared to the $10,631 figure produced by the Augenblick & Myers panels rather than the adjusted amount of $6612 reported in the final study.

The variations from study to study reflect the imprecision inherent in any attempt to calculate the cost of an adequate education.173 Nevertheless, the Thornton Commission found itself in the fortunate position of not having to reconcile any major discrepancies. Indeed, the relative similarity of the figures bolstered the credibility of the individual studies. Chris Maher of Advocates for Children and Youth, which was instrumental in organizing the New Maryland Education Coalition report, explained, “There was a lot of credence lent to them because professional judgment and successful schools came out with relatively similar numbers as far as what was recommended for adequacy.”174 This bolstering effect may prove unique to Maryland, though, since the risk of multiple studies undermining rather than complementing one another persists.175

After much debate, the Thornton Commission adopted a two-tier funding recommendation. It started with the base cost identified in the successful schools study and adjusted it downward to account for teacher retirement payments from the state and other general aid programs slated to continue. This calculation produced a figure of $5443 per pupil in 2002.176 The Commission then applied per-pupil weights derived from the professional judgment model to account for special needs. It determined that districts needed 2.17 times the base cost ($11,811) for each special education student, 2.10 times the base cost ($11,430) for each student eligible to receive free or reduce price meals, and 2 times the base cost ($10,886) for each Limited English Proficiency student.177

The assignment of student weights proved controversial. Educators debated whether the Commission should add a concentration of poverty factor to account for the unique challenges facing schools with a high number of poor students.178 Critics also took issue with the Commission’s decision to reduce

172. MAP INC. REPORT, supra note 168, at 10 tbl.7.
173. The Augenblick & Myers report cautioned that “the figures produced should be viewed as reasonable estimates rather than as precise calculations.” AUGENBLICK & MYERS, INC., supra note 161, at 4.
174. Maher Interview, supra note 152.
176. THORNTON COMMISSION, FINAL REPORT, supra note 159, at 53.
177. See id. at 55.
the weights based on an “overlap” analysis. The original professional judgment study had called for poor students to receive 2.39 times the base cost. The Thornton Commission lowered the figure after noting that twenty percent of students eligible for free and reduced-price meals also qualified for special education or LEP services and should not be double-counted.

The overlap analysis, combined with several other adjustments, allowed the Thornton Commission to reduce the magnitude of its final recommendations in response to Maryland’s weakening fiscal situation. The adequacy studies had identified $2.7 billion in unmet annual need, but the final Thornton Commission report proposed increasing funding by $1.1 billion. Moreover, it phased in the suggested funding increases over five years, with most of the augmentation coming in the final two years.

These adjustments serve as an important reminder that the process of calculating the cost of an adequate education is not a purely objective, technocratic exercise. Producing a final report involved hundreds of interrelated decisions. For instance, the Thornton Commission had to decide which areas to exclude from its analysis. It also had to determine how to account for local variations in the cost of educational inputs. In making these decisions, the Commission did not remain immune from political pressure. In fact, nine of its twenty-seven members served in the General Assembly, and another three held elected positions in local government.

Although it is tempting to criticize the Thornton Commission and speculate whether a politically insulated body of experts could have resisted the pressure to introduce budgetary considerations into its needs-driven analysis, the presence of politicians on the Commission seemed to serve as a net asset. Participation on the Commission ensured that a core set of lawmakers would develop a sense of ownership and have a political stake in the legislative success of the plan. These lawmakers also lent the Commission their political expertise. The Thornton Commission faced a difficult choice between requesting full funding at the risk of having its report languish on a shelf unimplemented, and lowering its sights to bolster the politically viability of its

179. See, e.g., id. at 8 (Nov. 19, 2001) (statement of Bebe Verdery, ACLU of Maryland).
180. See AUGENBLICK & MYERS, INC., supra note 161, at 2 (deriving a weight for low income students but noting that it was “extraordinarily high” relative to the weight used in other states).
181. THORNTON COMMISSION, FINAL REPORT, supra note 159, at 17.
182. See id. at 64 (characterizing the plan as “back-loaded”).
183. Chris Maher described the adjustments as “totally political” and driven by the belief that a $2.7 billion plan would not pass the General Assembly. Maher Interview, supra note 152.
184. The Commission assumed that all school facilities were adequate despite knowing that this assumption did not reflect reality. See THORNTON COMMISSION, FINAL REPORT, supra note 159, at 81-82.
185. See id. at 58.
186. See id. at v-vi.
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plan. The lawmakers on the Commission helped steer it through the Scylla of excessive compromise and the Charybdis of overreaching. They drew upon their political experience to advise the Commission how far it could push without losing everything. Barbara Hoffman defended the exercise. She said, “There was a limit to what we could realistically expect to get passed, but we tried to do it straight.” She added, “No one would think this amount of money was a pragmatic compromise.” The Commission had reduced the size of its proposal, but the $1.1 billion it recommended still represented a thirty-eight percent increase for a state spending $2.9 billion a year on education.

VI. THE LEGISLATIVE RESPONSE TO THORNTON

Despite the reductions made by the Thornton Commission, the call for $1.1 billion in new spending received an icy reception in Annapolis. Senate President Mile Miller, who had incorrectly predicted the demise of the Bradford remedy in 1997, said the proposal “could not come at a worse time” and warned that the deepening recession would prevent Maryland from implementing any new spending initiatives. Montgomery County similarly signaled its opposition to the plan. Its two representatives on the Thornton Commission had dissented in the final vote and filed a minority report. Montgomery County objected in particular to the inclusion of wealth-equalization provisions reducing the size of special-needs grants based on the fiscal capacity of local districts to fund supplementary programs on their own.

In the face of this opposition, proponents of the Thornton legislation invoked the threat of a lawsuit. Baltimore remained well positioned to return to court seeking enforcement of Judge Kaplan’s order. The Thornton report provided the plaintiffs with a treasure trove of information. As Barbara Hoffman put it, “Once you’ve gone through this exercise and proved [the lack of adequate funding], you don’t really have a fig leaf to hide behind. You are exposed legally.” In addition, the report handed a half-dozen other school

187. In many ways, this selection between principle and pragmatism tracks the “difficult, if familiar, strategic choice” Professor Enrich invoked to frame the shift from equity to adequacy in school finance litigation. See Enrich, supra note 109, at 182.

188. David Nitkin, “Edgy” Capital Session Likely, BALT. SUN, Jan. 6, 2002, at 1A.


190. See, e.g., Letter from Sen. Barbara Hoffman & Sen. Nathaniel McFadden, to Gov. Parris Glendening 2 (Jan. 26, 2002) (“We’re sure that you remember that under the terms of the bill [SB 795] and the court settlement, it is likely that we will find ourselves back in court if the state does not attempt to meet some of these needs . . . .”).

191. McCallum Interview, supra note 45 (“It was helpful for education funding advocates to be able to say, ‘Hey, there is this court order.’ We said it as many times as we could, as loudly as we could.”).

192. Hoffman Interview, supra note 95.
The threat of litigation alone, however, is not sufficient to explain the passage of the Thornton recommendations. Like in 1997, proponents were forced to assemble a coalition to support the legislation. Their efforts once again shed light on the effectiveness of broadening a school finance remedy to include beneficiaries from across the state. Chris Maher of Advocates for Children and Youth described how a working group of public interest organizations sat down with a map of Maryland to plan strategy. They knew they could count on the votes of Baltimore and Prince George's County, both of which benefited substantially under the Thornton plan. They also anticipated receiving support from the rural eastern and western portions of the state, which also struggled to fund their schools. The formation of this rural-urban coalition gave proponents of the legislation a solid base of support and allowed them to concentrate their efforts on the few key suburban counties that held the swing votes.

They first appealed to the self-interest of suburban lawmakers. Advocates for Children and Youth prepared single-page briefing sheets for every lawmaker in the General Assembly. Each sheet told lawmakers how much additional money the Thornton recommendations would send to schools in their district. Next to this figure, the organization presented district-specific polling information showing overwhelming support for the legislation. The sheets then described the results of a statewide poll showing that a slim majority of Maryland residents would even be willing to pay higher taxes to increase education funding. The final statistic on each sheet showed lawmakers how much the schools in their districts needed to improve in order to meet state performance standards.

The coalition also courted conservative lawmakers. It pointed out that the Thornton legislation would replace a series of complicated categorical programs and duplicative reporting requirements with transparent block grants that would facilitate accountability. In the end, three Republicans in the House and three in the Senate broke ranks to vote for the final bill despite the fact that it included a tax increase.

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193. Maher Interview, supra note 152 ("The threat of litigation was extremely significant, because not only did we have Prince George's County talking about it, but we had the Eastern Shore Consortium lined up.").

194. Not all lawmakers were cowed by the prospect of legal action. Kumar Barve, the chairman of the Montgomery County delegation who later became Majority Leader of the House of Delegates after the 2002 election, challenged counties with legal claims to sue and settle the issue in court. See Howard Libit, Funding for Diversity, BALT. SUN, Feb. 10, 2002, at 1B.

195. Maher Interview, supra note 152.

196. See David Nitkin & Sarah Koenig, Voters Back Slots, Taxes for Schools, BALT. SUN, Jan. 9, 2002, at 1A (describing how fifty-two percent of respondents expressed a willingness to pay higher taxes to fund the schools).

197. Maher Interview, supra note 152.
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Even with a broad coalition in place, advocates found that they lacked the votes to pass the Thornton legislation over the opposition of the Montgomery County delegation. Barbara Hoffman consequently decided to broaden the remedy even further and inserted a provision into the Bridge to Excellence in Public Schools Act increasing aid to Montgomery County by $80 million a year in the name of helping its large population of LEP students. She defended the move as remaining largely true to the Thornton framework. 198 Chris Maher was less sanguine:

It was an absolute pure political buyout. At that point, we were faced as a coalition with a choice. We could give Montgomery their money and give everyone else in the state a lot more money, or we could trash it all. The choice was pretty clear. We had to go with it. 199

Whatever the reality, broadening the remedy once again proved effective. The Montgomery County delegation switched overnight from being the biggest opponent of the legislation to being one of its most outspoken supporters. 200 With the help of Montgomery County, lawmakers even pushed through a 34-cent increase in the tobacco tax to fund the first two years of the legislation.

The long-term stability of the Bridge to Excellence in Public Schools Act remains uncertain, however. The law, which passed in an election year, did not identify a revenue source beyond the first two years. In 2002, “virtually every politician in the state pledged to find a way to fund the new education aid formula.” 201 Lawmakers reaffirmed their commitment to full funding in 2004 by repealing a “trigger” that would have automatically reduced funding levels in the absence of a joint resolution certifying that the plan was affordable. 202 But long-term funding remains stalled by a dispute between Governor Robert Ehrlich, Jr. and the Speaker of the House of Delegates over whether to pay for the spending increases with slot machine revenue or new taxes.

VII. THE IMPACT OF THE BRADFORD SUIT ON STUDENT ACHIEVEMENT

Measured in terms of inputs, the Bradford case has been remarkably successful. Baltimore spent $5565 per pupil and ranked fifteenth the state in the school year that preceded the filing of the Bradford suit. 203 By the 2000-2001 school year, it expended $8790 per pupil, and only two school districts spent

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198. Hoffman Interview, supra note 95.
199. Maher Interview, supra note 152.
200. See, e.g., id. ("They were against it and then they got their buyout. After that, they could not have been a stronger ally. There has never been a sharper 180.").
203. See MD. STATE DEP’T OF EDUC., supra note 1, at 15 tbl.15.
more. In terms of money actually spent on instruction, Baltimore ranked twentieth in the state in 1993-94. By 2000-2001, it ranked fourth. The growth in spending was particularly pronounced after 1997 when Baltimore received its first installation in remedial funding. Spending on instructional materials rose from $13 million per year to $23 million annually over the first three years of the remedy. Funding for library books increased from $377,402 to $3.5 million. Expenditures for textbooks exploded from $2.4 million in 1996-97 to $12.4 million in 1998-99 and $11.7 million in 1999-2000. After several years of catch-up spending, Baltimore then drastically scaled back its purchases of books and materials in 2000-2001.

Baltimore received an additional funding boost of $55 million after returning to court in 2000. Passage of the Thornton legislation freed up $18.5 million more in 2002 with much larger increases slated for the future. If the General Assembly maintains its commitment to fund the law, Baltimore will see its state aid rise in accelerating increments over the next five years. By 2008, it will receive $258.6 million more per year than it did in 2002, a 44.3% increase. The increase will enable Baltimore to spend $13,496 per pupil in 2007 with $9143 of that amount coming directly from the State.

Early infusions of money were generally well spent. The official independent evaluation of the City-State partnership concluded in 2001, "The extra financial supports provided by Annapolis ... have been invested appropriately on areas of identified need." Baltimore earmarked the majority of new money for initiatives aimed at enhancing elementary school education and recruiting high-quality teachers and principals. The City reduced class size to twenty students in grades one and two. It maintained its pre-kindergarten programs in 111 schools and added full-day kindergarten to an additional thirty-eight schools. It then adopted a uniform reading curriculum, so that

204. See id.
205. See id. at 16 tbl.16.
206. See id.
207. Id. at 12 tbl.12.
208. Id. at 14 tbl.14.
209. Id. at 13 tbl.13.
210. Spending on instructional materials dropped by 48.5% to $11.9 million in 2000-2001. Id. at 12 tbl.12. Spending on library books dropped by 90.6% to $327,806. Id. at 14 tbl.14. Spending on textbooks dropped by 79.7% to $2.4 million. Id. at 13 tbl.13.
212. See DEP'T OF LEGISLATIVE SERVS., supra note 3, at exhibit 8.
213. See supra note 3.
214. See supra note 3.
216. Id. at 104. These numbers are expected to increase even further in the wake of Thornton, since the Bridge to Excellence in Public Schools Act mandates full-day kindergarten for all students and
highly mobile students who switched schools in the middle of the year would maintain some continuity. Baltimore also purchased new reading and math textbooks for every elementary school classroom in the city.

On the personnel front, Baltimore instituted a system of performance-based evaluations that included student achievement as a category by which all teachers would be judged. It increased first-year teacher salaries by thirty-seven percent (from $24,215 to $33,300) between 1997 and 2002. A reduction in the number of steps in the pay scale further increased Baltimore’s competitiveness with surrounding counties, raising the size of its compensation package from last in the state to third. Baltimore also enhanced principals’ salaries in 2001, lifting them from twentieth in the state to second. Baltimore has historically scrambled to hire hundreds of new teachers in August to fill vacancies, but in 2001 the school system filled its vacancies early. Officials attributed the success to higher teacher salaries funded by the school finance remedy. Nevertheless, the push to reduce class size has produced a marked increase in the number of uncertified teachers. Of the 1022 teachers hired during the 1998-99 school year, only thirty-two percent were certified, and by 2001, over a quarter of all teachers in Baltimore lacked certification. To help soften the blow, Baltimore created a summer institute to train uncertified teachers for four weeks prior to putting them in the classroom.

These reforms have been accompanied by modest gains in student achievement. The Composite Index (CI) measures the number of students scoring satisfactorily across the six subject areas of the MSPAP. The CI for Baltimore rose from 13.9% in 1996-97 to 22.5% in 2000-01. Gains were most pronounced in the early grades where Baltimore had concentrated its resources. The third-grade CI rose from 13.4% to 23.1%, and the fifth-grade CI rose from 14.5% to 25.3%.

Gains were fairly evenly distributed across Baltimore. Of the 120 elementary schools in the city, 109 improved their MSPAP scores between

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promotes preschool for all four-year-olds living in poverty.

217. See BCPSS, MASTER PLAN II, supra note 211, at 18.
218. Liz Bowie, Study of City Schools Expected This Week, BALT. SUN, Dec. 3, 2001, at 1B.
219. WESTAT REPORT, supra note 215, at 170.
220. Id.
221. Liz Bowie, City Ready with New Teachers, BALT. SUN, July 26, 2001, at 1B.
222. WESTAT REPORT, supra note 215, at 172.
223. BCPSS, MASTER PLAN II, supra note 211, at 18.
224. The Composite Index is calculated by dividing the number of passing scores in each content area by the total number of test takers.
Moreover, the City schools improved at a faster rate than other schools in Maryland on many subject areas during the first five years of the *Bradford* remedy, narrowing the performance gap, albeit modestly, for the first time since the implementation of the MSPAP. And perhaps the brightest moment for Baltimore came in 2002 when City first-graders exceeded the national average on standardized reading and math exams for the first time in more than a decade.

Despite this progress, the relentless focus on increasing student achievement was not matched by equal attention to management issues. Poor planning and bookkeeping across the tenure of two superintendents led to the accumulation of a $58 million deficit by 2003 and more than 800 layoffs. The school system also experienced an acute cash-flow crunch in 2004 that left it within days of being unable to pay its bills. The crisis revealed weaknesses in the management structure created by the *Bradford* settlement, which had diffused financial responsibility by splitting control of the schools between Baltimore and the State. Although Mayor O'Malley eased the short-term crisis with an emergency loan and enhanced financial oversight, the lingering deficit will require additional cuts and consume a portion of future state aid. School officials have begun increasing class size and eliminating summer programs. Both moves potentially could threaten the student achievement gains Baltimore has posted.

In addition, Baltimore has yet to receive a full financial remedy. It will not reach the level of funding identified by the Thornton Commission as adequate until 2007, and even then it will not achieve adequacy in its facilities and other areas excluded from the Thornton analysis. Baltimore's early progress is promising, but it will take many years before the impact of the *Bradford* remedy is fully known.

**CONCLUSION**

The *Bradford* litigation represents an important test case on three fronts. First, it tests whether litigants who settle their claims can produce satisfactory and stable remedies in the long run. A number of political forces have aligned against the *Bradford* plaintiffs since their initial legislative victory. Governor

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228. Liz Bowie, *Warnings Lined Road to Disaster*, BALT. SUN, Apr. 4, at 1A; Tom Pelton & Laura Vozzella, *How City Schools Spiraled into Debt Almost Unchecked*, BALT. SUN, Feb. 20, at 8A.
229. Tanika White, *Schools Accept Funding Offer*, BALT. SUN, Mar. 16, at 1B.
231. The Bridge to Excellence in Public Schools Act created a separate task force to study facilities needs. Bridge to Excellence in Public Schools Act, 2002 MD. LAWS 288.
Settling Without “Settling”

Glendening left office and was replaced by Maryland’s first Republican governor since Spiro Agnew. Baltimore lost legislative seats in the redistricting that followed the 2000 Census. The City also relinquished its hold on the chairmanship of the Senate Budget and Taxation Committee with the defeat of Senator Barbara Hoffman in the 2002 Democratic primary, and the chairmanship of the House Appropriations Committee with the death of Delegate Howard Rawlings in 2003.232 If the Bradford plaintiffs weather this storm and manage to maintain their remedy without a definitive Maryland Court of Appeals ruling in their favor, it will provide powerful evidence that settlements, a potentially underutilized tool in school finance litigation, do not necessarily sacrifice long-term reform in favor of short-term gains.

Second, the Bradford case tests the viability of targeting special needs students within the framework of a broad remedy. One of the most interesting aspects of the Thornton legislation is that it largely mimics the remedy Maryland would have been required to implement if the Bradford plaintiffs had successfully sued on behalf of a statewide class of students rather than limiting their suit to at-risk students residing in Baltimore. To the extent this broad distribution of aid helps stabilize the gains made in Baltimore and mutes the politics of race, it might induce plaintiffs in other states to consider suing on behalf of an expanded class from day one. Such a strategy will not make sense in all situations. It risks fragmenting control over school finance lawsuits and inflating the cost of the remedies beyond the ability of states to fund them. Indeed, the plaintiffs in Maryland itself had good reasons for concentrating their efforts on Baltimore. Susan Goering explained:

We followed the old adage that good facts make good law. As an attorney, you take your best case and the most compelling facts you have for a case of first impression. Baltimore City was far and away the worst. . . . There wasn’t even a close second among the other counties.233

Nevertheless, building broad-based political coalitions to support school finance reform can help translate a right articulated in the courtroom into a remedy. Suing on behalf of a statewide class serves as one way to begin constructing these coalitions from the earliest stages of a lawsuit.

Finally, the Bradford case tests whether a lawsuit that focuses on money and school management without enhancing socioeconomic and racial integration can truly transform a disadvantaged urban school system. James Ryan has suggested that the pursuit of integration may raise academic achievement among isolated groups more effectively than remedies focused strictly on money.234 The Bradford case has set in motion another bold attempt

232. Former Governor Glendenning told the press a week after Delegate Rawlings’s death, “This is a low point in political power for the city itself.” David Nitkin & Michael Dresser, Rawlings’ Death Leaves Vacuum, BALT. SUN, Nov. 16, 2003, at 1B.
233. Goering Interview, supra note 27.
to reform an urban school system using the traditional tools of school finance litigation without enhancing integration. Baltimore has one of the most racially segregated school systems in the country. In 2001, 87.5% of students in the Baltimore City public schools were African-American. Of the twenty-six central city districts with over 60,000 students, only Detroit and New Orleans exceeded Baltimore in this respect. The high percentage of African-American students in Baltimore has left them largely isolated from their white peers. On a key measure of racial isolation, only 5.9% of African-American students in Baltimore attended schools that were more than ten percent white. Baltimore ranked sixth in the nation in terms of African-American isolation, trailing only Chicago, Detroit, Dallas, New Orleans, and Washington, D.C. The Baltimore schools have also remained socioeconomically isolated, with the percentage of elementary school students eligible for free and reduced-price meals hovering between sixty-seven and eighty-three percent for a decade. Despite this lack of integration, the early signs of academic improvement in Baltimore are encouraging.

Depending on whether these improvements continue, the *Bradford* case will provide guidance for potential litigants and scholars grappling with the practical implications of Ryan’s theory. The decision to pursue integration can be costly for plaintiffs. It complicates their legal claims and appears threatening to suburban districts. Although litigants do not face an exclusive choice between pursuing integration or pursuing additional resources, they may be reluctant in practice to raise integration claims unless they believe that a more traditional finance remedy will be of little avail. If Baltimore continues on an upward trajectory in the absence of integration, litigants may remain reluctant to modify their legal claims along the lines suggested by Ryan. But if the reform process stalls, Baltimore will join the list of *Milliken II* districts and school systems in Connecticut and New Jersey that Ryan cites as examples of districts that failed to improve academic achievement in the absence of meaningful integration.


236. *Id.* Four other systems—Los Angeles, Chicago, Dallas, and Santa Ana—had lower percentages of white enrollment based on their sizeable Latino populations. *Id.*

237. *Id.*

238. *Id.*


240. See supra text accompanying note 125.