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Preliminary Thoughts on the Virtues of Passive Dialogue

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PRELIMINARY THOUGHTS ON THE VIRTUES OF PASSIVE DIALOGUE

by

Michael Heise*

I. INTRODUCTION

The judicial, legislative, and executive branches interact in many ways. These interactions fuel a constitutional dialogue that serves as a backdrop to myriad governmental activities, both large and small.[1] Although this on-going dialogue takes numerous forms and its quality varies, its existence is one sign of a functioning democracy. The judiciary's participation in the nation's constitutional dialogue is necessary, desirable, and, as an empirical matter, inevitable. The judiciary's participation raises important normative issues as well. This article analyzes two competing models that bear on the normative question: what *form* should the judiciary's participation take?

Debates over the judiciary's appropriate role in the public constitutional dialogue have captured scholarly attention for decades. Many credit Professor Alexander Bickel's classic work, *The Least Dangerous Branch*,[2] for framing much of the modern discussion about the Court's proper role in the broader public constitutional dialogue.[3] Professor Cass Sunstein's more recent call for decisional minimalism[4] contributes to a conversation invigorated by Bickel.[5] Notably, both Bickel and Sunstein advance theoretical rationales for judicial modesty and reticence, although they approach the issue from different vantage points and they articulate different argu-

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[1] It goes without saying that participants in the nation's constitutional dialogue include more than the major governmental actors and their activities.

[2] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

[3] *See generally id.*

[4] CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) [hereinafter, SUNSTEIN, ONE CASE AT A TIME]. *See also* Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

[5] Professor Sunstein correctly notes the "obvious connection" between his work and that of Bickel. SUNSTEIN, ONE CASE AT A TIME, *supra* note 4, at 267 n.5.

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ments. However, both Bickel and Sunstein agree that a modest or minimalist approach enhances democratic rule and public discourse by allowing more room for the other political branches to function. This restrained vision of the Court's role in the public constitutional dialogue has lately come under attack[6] and recent court decisions suggest it enjoys mixed doctrinal support.[7]

Professor Katyal's recent contribution to this debate argues for something quite different. Unlike Bickel and Sunstein, Katyal calls for courts to engage actively in the larger public constitutional dialogue principally by dispensing non-binding advice to political branches through a variety of mechanisms.[8] Through advice-giving, Katyal maintains, the Court "enters into a conversation with the political branches and embraces its partnership."[9] According to Katyal, such active judicial dialogic participation will generate enhanced democratic decision-making and popular accountability.[10]

Professor Katyal's thesis contrasts nicely with the points advanced by Bickel and Sunstein, and revisits important assumptions about the Court's proper institutional position within our constitutional regime. In this article, I explore some of the larger issues surrounding the courts' role in general and Katyal's thesis in particular. Specifically, I assess Katyal's argument from the vantage point of a specific jurisprudence — school finance — and within a discrete judicial setting — state supreme courts. While this vantage point limits my analysis, it offers the advantage of keeping the judicial context constant so as to better isolate the differences that separate the consequences flowing from active and passive judicial postures.

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[6] *See, e.g.*, Neal K. Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998); Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 701-02 (1989).

[7] For example, according to some commentators the doctrine of desuetude has fallen into relative disuse over time. *See, e.g.*, Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1448 (1999); RICHARD H. FALLON, JR., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1285 & n.3 (4th ed. 1996). *See also* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (prohibiting reliance on pendant state grounds); United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) (holding that the expiration of a named plaintiff's claim does not moot an entire class action); *but see*, Washington v. Glucksberg, 117 S. Ct. 2258, 2275 (1997) ("throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.").

[8] *See* Katyal, *supra* note 6.

[9] *Id.* at 1711.

[10] *Id.* at 1824.

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Notably, my test case — school finance litigation — should favor Katyal's active model. Court decisions relating to school finance involve state rather than Article III courts, and the many differences that separate these two systems cut in a direction that makes state court participation in a constitutional dialogue less threatening to democratic rule. Moreover, school finance litigation is a timely example of institutional[11] or public law[12] litigation. Public law cases present a more inviting opportunity for courts to participate in the broader public dialogue. Thus, to the extent that active judicial participation in constitutional dialogue yields such sought-after benefits as enhanced democratic decision-making and increased accountability, these results should be visible in the school finance context.

School finance decisions provide an especially attractive context in which to compare competing models of judicial participation in constitutional dialogue for reasons that bear on research design. Courts in some states quite forcefully influenced school finance remedies and, by so doing, participated more directly and actively in the constitutional dialogue that accompanied the issue. In other states, courts only passively engaged in the constitutional dialogue swirling around them and ceded much of the remedial task to the other political branches, typically the legislature. The courts' differing treatment of the remedial portions of successful[13] school finance decisions uncovers potential distinctions between active and passive judicial engagement.[14]

Results from a modest comparison of active and passive judicial dialogic engagements in the school finance context do not bode well for Katyal's thesis. The benefits predicted in Katyal's active model are not readily apparent. In contrast, the costs incurred by a judicial branch actively engaged in a constitutional conversation with legislative and executive branches are far clearer. Consequently, the models advanced by Bickel and Sunstein — which promote passive virtues and judicial minimalism — receive more support than Katyal's call for active judicial engagement. At least in the school finance context, active judicial participation appears to erode rather than enhance democratic rule, and dilute rather than enhance political accountability. Although I argue that this finding follows for both theoretical and practical reasons, I do not discuss whether and, if

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[11] *See generally* Owen M. Fiss, *The Supreme Court 1978 Term: Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

[12] Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

[13] By "successful" I mean only to refer to those school finance lawsuits where the plaintiffs successfully challenged a state's school finance system on state constitutional grounds.

[14] *See infra* Part II.

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so, how these findings might inform other areas within education law or beyond.

In Part II of this article, I describe in more detail what I mean by active and passive judicial participation. Part III considers why the debate about the proper judicial posture within the larger constitutional dialogue is important and warrants attention. In Part IV, I explain why my selected case study — school finance decisions by state supreme courts — should favor Katyal's active model. Part V explores examples of passive and active judicial activity within the context of school finance remediation. In conclusion, I consider the implications of school finance decisions and their support for the passive model, and I identify lines of further research.

II. FORMS OF JUDICIAL DIALOGIC PARTICIPATION

Judicial participation in constitutional dialogue takes various forms and manifests itself in an array of subtle shades and hues. Despite important and often nuanced distinctions, it remains possible to characterize two broad forms of judicial participation: passive and active.

A. Passive Judicial Participation

For the narrow purpose of this article, I define "passive participation" to include the standard use of traditional avenues of judicial participation in constitutional dialogue. Passive participation can be viewed from two similar, but distinct, vantage points. One involves a court's decision to decide a case.[15] A second vantage point arises once a court takes a case, and involves the nature of the court's opinion.

1. Passive Virtues

Professor Bickel's important work, *The Least Dangerous Branch*,[16] speaks directly to the first issue: whether the court should take a case in the first instance. According to Bickel, courts can pursue three principal avenues: i) invalidate legislation as inconsistent with principle; ii) validate legislation as consistent with principle; or iii) do neither i nor ii.[17] When courts invalidate or validate legislation, the judicial opinion is the principal tool for doing so. Under option three, the court actively does nothing or, in Bickel's words, exercises "passive virtues."[18] The exercise of passive virtues is typically achieved through the use of such judicial doctrines as standing, ripeness, mootness, political questions, and the exercise of grant-

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[15] By definition, my reference relates to those appellate courts that enjoy some level of discretionary review.

[16] *See* BICKEL, *supra* note 2, at 2.

[17] *Id.* at 69.

[18] *See id.* at 115-98.

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ing certiorari.[19]

For Bickel, one principal benefit of the judiciary's exercise of passive virtues is that it reduces the courts' entanglement with, and thereby increases its insulation from, political issues.[20] Of particular concern to Bickel are the ills that flow from a political backlash aimed at the Court for unpopular decisions or perceived (or real) institutional overreaching.[21]

2. Decisional Minimalism

Professor Sunstein refines Bickel's passive virtues thesis by focusing on limiting the scope of the Court's use of traditional tools once it has decided to hear a particular case and address its substantive components. Where Bickel dwells on the Court's decision to hear a case, Sunstein's decisional minimalism[22] examines how the Court can exercise self-restraint by writing narrow opinions in cases that bear on controversial, public issues.[23] Sunstein's decisional minimalism is exercised when judges write narrow judicial opinions and avoid articulating through any particular case a broad rule or abstract theory not necessary for the specific case at bar. Sunstein's thesis recognizes that the way in which judges use judicial tools — such as the opinion — can vary, sometimes dramatically.

For Sunstein, decisional minimalism's principal virtue includes its ability to enhance democracy by allowing other constitutional branches greater room to maneuver.[24] Professor Sunstein worries less about a need to insulate the Court from possible political fallout than the need to recognize its comparative institutional disadvantages when it comes to formulating and advancing policies that sometimes benefit from empirical and social science evidence.[25]

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[19] *Id.* at 169, 117-27.

[20] *Id.*

[21] *See, e.g.*, *id.* at 199-200 ("Exercising a function of this description, however imprecise, in a society dedicated both to the morality of government by consent and to moral self-government, the Supreme Court touches and should touch many aspects of American public life. But it would be intolerable for the Court finally to govern all that it touches, for that would turn us into a Platonic kingdom contrary to the morality of self-government; and in this world at least, it would not work.").

[22] SUNSTEIN, ONE CASE AT A TIME, *supra* note 4, at 4.

[23] *Id.* at 4-5.

[24] *Id.* at 4 ("[M]inimalism can promote democracy because it allows democratic processes room to maneuver.").

[25] *Id.* at 267-68. *See also* NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

3. Examples of Passive Judicial Participation

Connecticut's contraception cases illustrate the salient points of passive virtue. Connecticut's anti-birth-control statute was enacted in 1879.[26] Earlier efforts to have the Connecticut Supreme Court strike down the under-enforced statute as unconstitutional proved unsuccessful. While the Court granted certiorari in both instances, the Court dismissed both cases on justiciability grounds. In *Tileston v. Ullman*,[27] the Court concluded that the appellant lacked legal standing to bring the lawsuit. Similarly, the Court concluded, 18 years later in *Poe v. Ullman*,[28] that the appellant advanced a legal issue that was not ripe because the appellant failed to demonstrate a "real" threat of prosecution by the state of Connecticut.

Multiple attempts to amend Connecticut's statute from 1923 demonstrate the political controversies surrounding the issue at that time.[29] According to Bickel, the Court wisely refrained from prematurely entering this long-simmering political fight and instead sought to deflect the political fight surrounding reproductive technologies back to the legislature.

That the Court ultimately decided the issue squarely four years later in *Griswold v. Connecticut*[30] perhaps owes much to the indefatigable and creative litigation prowess of those seeking to thrust the Court into an area into which it previously declined to venture. If nothing else, the Court's exercise of passive virtues by declining to adjudicate the substantive merits of the earlier cases bought the Court helpful time while the larger, public constitutional dialogue gelled around the social and political implications of birth control. The value of this time, during which other political and social institutions addressed the still controversial (though decidedly less so) issues surrounding birth control,[31] is as difficult to over-estimate as it is to quantify with any accuracy.

In contrast, Sunstein dwells on cases in which the Court undertakes a review of an underlying constitutional claim and decisions that "leave things open," "make deliberate decisions about what should be left

[26] *See* Tileston v. Ullman, 26 A.2d 582, 589 (Conn. 1942).

[27] 318 U.S. 44 (1943).

[28] 367 U.S. 497 (1961).

[29] *See* BICKEL, *supra* note 2, at 143-56.

[30] 381 U.S. 479 (1965).

[31] The implications of birth control for human rights are one example of birth control's enduring controversy. *See generally* Margaret Plattner, *The Status of Women Under International Human Rights Law and the UN World Conference on Women, Beijing, China*, 84 KY. L.J. 1249 (1995-96); Valerie A. Dormady, Note, *Women's Rights in International Law: A Prediction Concerning the Impact of the United Nations' Fourth World Conference on Women*, 30 VAND. J. TRANSNAT'L L. 97 (1997).

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unsaid," and judges that do and say "as little as necessary in order to justify an outcome."[32] By way of examples, Professor Sunstein points to three recent and politically charged cases in which the Court decided the particular case in front of it, but did so in a manner that left open large portions of the larger public debate surrounding an underlying constitutional question. When the Supreme Court concluded that the publicly-funded Virginia Military Institute could not exclude women from its cadet corps, the Court pointedly refused to rule more broadly on the constitutionality of single-gender education institutions.[33] When the Court invalidated an affirmative action program in Richmond, Virginia, the Court refused to rule conclusively on the larger constitutional question relating to the government's use of race-conscious programs.[34] Finally, when the Court struck down a Colorado law prohibiting measures banning discrimination on the basis of sexual orientation, the Court avoided any discussion about other possible intersections between sexual orientation and the Constitution.[35] The fact that the related controversy and litigation on these three broad issues persist[36] underscores that the Court's decisions in *VMI*, *Croson*, and *Romer* were narrow enough not to foreclose further public and legal debate on the larger issues implicated by these particular cases.

B. Active Judicial Participation

In contrast to the examples of passive judicial participation described above, active judicial participation involves the use of non-traditional judicial tools, as well as an aggressive use of the traditional judicial tools available to judges. Through both sets of mechanisms, courts participate in the public constitutional dialogue by interacting with the legislative and executive branches in a more robust, direct, and engaged manner.

1. Non-traditional Judicial Tools: Advice-giving

Notwithstanding a strong history and practice to the contrary,[37]

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[32] SUNSTEIN, ONE CASE AT A TIME, *supra* note 4, at 3.

[33] *See* United States v. Virginia, 518 U.S. 515 (1996).

[34] *See* Richmond v. J. A. Croson, Co., 488 U.S. 469 (1989).

[35] *See* Romer v. Evans, 517 U.S. 620 (1996).

[36] *See, e.g.*, Jonathan N. Reiter, Note, *California Single-Gender Academies Pilot Program: Separate but* Really *Equal*, 72 S. CAL. L. REV. 1401 (1999) (arguing that California's single-gender public academies are constitutional); Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998) (discussing affirmative action); Baker v. Vermont, 744 A.2d 864 (Vt. 1999) (discussing same-sex marriage).

[37] *See generally* Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 15-23 (1998) (arguing against Article III courts' issuing advisory opinions). *But see* Kaytal, *supra* note 6, at 1723-53 (argu-

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Professor Katyal argues that, in addition to the traditional powers accorded to the federal courts under Article III, federal courts also enjoy authority to render advice.[38] Specifically, he argues that the judiciary "has used, and should continue to use, a range of interpretative and decision-making techniques to give advice to the political branches and state governments."[39] Judicial advice can be advanced either in dicta or through an advisory opinion. Advisory opinions are the more controversial vehicle. Since the Republic's earliest days, federal courts generally have declined to issue advisory opinions.[40] Of course, state supreme courts' experiences with advisory opinions vary, and a minority of state supreme courts have formal advisory opinion procedures.[41]

Katyal identifies "exemplification" and "demarcation" as two examples of legal advice by federal courts. In the former, a court strikes down legislation but suggests to lawmakers a constitutionally permissible method to achieve the same end. Chief Justice Taft's opinion in *Hill v. Wallace*[42] and Justice O'Connor's decision in *New York v. United States*[43] are examples of this genre. Demarcation, by contrast, is where the Court upholds legislation as constitutional, but informs lawmakers that any legislation that ventures any further will trample upon constitutional protections. Justice Breyer's concurring opinion in *Washington v. Glucksburg*,[44] a right-to-die case, illustrates how one justice draws such lines in advance and publicly articulates these lines.

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ing that Article III courts possess advisory opinion authority).

[38] For purposes of this Article, I will equate the type of judicial advice-giving that Professor Katyal describes to active judicial participation in the nation's constitutional dialogue. Katyal writes that, as an advice-giver a federal judge "enters into a conversation with the political branches and embraces its partnership." Katyal, *supra* note 6, at 1711.

[39] Katyal, *supra* note 6, at 1710. *But see* Abner J. Mikva, *Why Judges Should Not be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825 (1998) (arguing that judges lack both the legitimacy and capacity to serve the democratic process as advicegivers). To be fair, Katyal focuses his argument on one court—the U.S. Supreme Court—and one form of advice—Constitutional advice. Katyal, *supra* note 6, at 1711.

[40] *See* Krotoszynski, *supra* note 37, at 16. *But see* Katyal, *supra* note 6, at 1723-53.

[41] For one historical summary, see Charles M. Carberry, *The State Advisory Opinion in Perspective*, 44 FORDHAM L. REV. 81 (1975).

[42] 259 U.S. 44 (1922).

[43] 505 U.S. 144 (1992).

[44] 117 S. Ct. 2302, 2310-12 (1997) (Breyer, J., concurring).

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2. Aggressive Use of Traditional Tools: Judicial Opinions

An aggressive use of traditional judicial tools — such as the judicial opinion — can facilitate active judicial participation in constitutional dialogue. One "strong" form of active judicial dialogue is implicit within Professor Zacharias' "political effects" model of judicial activity.[45] Under the political effects model, a court would impose liability on a defendant with an eye toward indirectly prompting legislative and administrative action that might lessen the need for a general liability rule.[46] Professor Zacharias is careful to limit the applicability of his model and notes that, as a general rule, courts should decide matters of liability solely on the basis of substantive legal doctrine.[47] He also notes that the political effects model assumes — and indeed depends upon — the idea that legislators, and not judges, are best positioned and able to address social issues and public policy.[48] However, he goes on to note that legislative processes are often not sensitive enough to conditions that affect a non-vocal constituency.[49] The political effects model comes into play only when "process" concerns prevent a court from implementing traditional legal analysis that would otherwise generate liability.[50] In essence, Zacharias' model seeks to have political concerns trump process in those instances where process trumps substance to the disadvantage of a non-vocal constituency.

3. An Example of Active Participation: Judge Calabresi and the *Then* Opinion

A celebrated example that illustrates many variants of the active judicial participation model comes from Judge (and former Professor) Guido Calabresi's concurring opinion in *United States v. Then*.[51] In *Then*, the court struggled with a paradox generated by the operation of the Sentencing Guidelines [hereinafter "the Guidelines"].[52] The Guidelines were designed partly to generate more continuity for criminal sentences among judges, reduce variation, and, as a result, increase equity.[53] Pursuant to its

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[45] Fred C. Zacharias, *The Politics of Torts*, 95 YALE L.J. 698, 699-700 (1986).

[46] *Id.* at 698.

[47] *Id.* at 714.

[48] *Id.* at 714-15.

[49] *Id.*

[50] *Id.* at 714.

[51] United States v. Then, 56 F.3d 464 (2d Cir. 1995).

[52] The Sentencing Reform Act of 1984 was enacted as Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1987-2034 (1984).

[53] Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WISC. L. REV. 679, 686-90 (1996).

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statutory instructions, the Sentencing Commission grouped criminal offenses and defendants into categories, and established a matrix that generates sentencing ranges determined by such factors as the seriousness of the crime and the defendant's criminal history.[54]

The intersection between the Guidelines and convictions for offenses involving crack cocaine, especially its racial dimension, generates a "thorny" issue.[55] The issue flows from the Guidelines' mandate for a 100-to-1 sentencing ratio for crack versus powder versions of cocaine.[56] As Professor Krotoszynski notes, the operative effect of this portion of the Guidelines is to dramatically increase criminal sentences for those convicted of possessing comparatively modest amounts of crack cocaine. Defendants convicted of crimes involving crack cocaine are disproportionately African-American. Accordingly, the issue's thorniness relates to the consequence that African-Americans receive disproportionately longer sentences than non-African-Americans for convictions stemming from cocaine offenses.[57]

In *United States v. Then,* the Second Circuit confronted the question of whether the Guidelines' disproportionate impact on African-Americans flowing from sentencing distinctions drawn between varieties of cocaine violated the Fifth Amendment's guarantee of equal protection. Consistent with other federal courts, the Second Circuit declined to find a constitutional violation.[58] On this point, the *Then* decision appears remark-

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[54] *See* United States Sentencing Commission, *Sentencing Guidelines and Policy Statements* (1987). According to the *Sentencing Guidelines*:

> [t]he Federal Sentencing Guidelines are, in a sense, nothing more than a set of instructions for one chart—the Sentencing Table. The goal of guidelines calculations is to arrive at numbers for the vertical (offense level) and horizontal (criminal history category) axes on the Sentencing Table grid, which in turn generate an intersection in the body of the grid. Each such intersection designates a *sentencing range* expressed in months.

Id. See also Frank O. Bowman, III, *Coping With "Loss": Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines,* 51 VAND. L. REV. 461, 472-73 (1998). For a readable and concise explanation of the sentencing guidelines "grid" and the calculation of a sentence under the guidelines, see Bowman, *supra* note 53, at 693-704.

[55] Krotoszynski, *supra* note 37, at 10.

[56] *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(1997). *See id.* at 10 n.34 for an example of how this aspect of the Guidelines works.

[57] *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 364-86 (1997).

[58] *See, e.g.,* David Cole, *The Paradox of Race and Crime: A Comment on Randall Ken-*

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ably unremarkable.[59]

In his concurring opinion, Judge Calabresi reiterated the majority's conclusion that the racial disparity did not amount to an equal protection violation. Judge Calabresi rested his analysis principally on the petitioner's failure to make the case for any intentional animus harbored by the Sentencing Commission or Congress.[60] Again, to this point, Judge Calabresi's concurring opinion is wholly unremarkable. It is Judge Calabresi's next step that is notable. In his concurrence, Judge Calabresi noted that while the petitioner failed to establish any intent thus far, from this point forward all bets are off. For as of now, Calabresi notes, the Commission and Congress are on notice of the racial disparities. Consequently, Judge Calabresi opined that he could foresee constitutional arguments that were unpersuasive in the past becoming persuasive in the future.[61] Moreover, in light of the evidenced presented in *Then*, Judge Calabresi mused that if the Commission or Congress did not recalibrate the Guidelines to blunt the racial disparity, such legislative inaction alone might be sufficient to satisfy the intent requirement as articulated in *Washington v. Davis*.[62]

Although Judge Calabresi did not ultimately tip his hand and reveal how he might rule, he was blunt in his assessment that the Guidelines might be "heading toward unconstitutionality."[63] Moreover, he artfully raised two rhetorical questions that openly begged for a legislative response.[64] Judge Calabresi's concurring opinion pulls few punches. He expressly advocates the position that judges should engage in a dialogue with lawmakers and further notes that "[t]he tradition of courts engaging in dialogue with legislatures is too well established in this and other courts to disregard."[65]

Not surprisingly, Judge Calabresi's "dialogue" did not go unnoticed by members of his own panel. To his colleagues on the Second Circuit, Judge Calabresi's concurrence resembled an advisory opinion.[66] The

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nedy's "Politics of Distinction", 83 GEO. L. REV. 2547, 2548-49 (1995); David Slansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1302-03 n.93 (1995).

[59] Krotoszynski, *supra* note 37, at 12.

[60] United States v. Then, 56 F.3d 464, 466-67 (2d Cir. 1995) (Calabresi, J., concurring).

[61] *Id.*

[62] 426 U.S. 229, 240 (1976).

[63] *See Then*, 56 F.3d at 469 (Calabresi, J., concurring).

[64] Judge Calabresi queried: "Precisely at what point does a court say that what once made sense no longer has any rational basis," and "What degrees of legislative action, or of conscious inaction, is needed when that (uncertain) point is reached?" 56 F.3d at 468-69 (Calabresi, J., concurring).

[65] *Id.* at 467 n.1 (Calabresi, J., concurring).

[66] *See* Krotoszynski, *supra* note 37, at 14.

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majority in *Then* emphasized the courts' more traditional and appropriate role in the constitutional order, and noted in particular the ordinary practice of refraining from issuing advisory opinions.[67] Indeed, scholars have joined Judge Calabresi's judicial colleagues in characterizing his concurring opinion as a "judicial intervention in an essentially legislative enterprise."[68]

III. THE COSTS AND BENEFITS OF JUDICIAL DIALOGUE

The dilemma is straightforward. Some form of judicial participation in the constitutional structure is necessary to secure sought-after democratic self-rule. Too much judicial participation, however, threatens to erode the very end sought. A critical question, then, is how much judicial participation is too much?

The court's unique institutional characteristics — notably the appointment of unelected judges serving life terms — make attention to the court's role in our public constitutional dialogue especially important. Among the constitutional actors, the federal courts need to be particularly prudent in discharging their duties, especially that of judicial review. While the Court's decision in *Marbury v. Madison*[69] settled one question surrounding the constitutionality of judicial review, it raised a crucial dilemma: how to reconcile the tension between the principle that the Constitution reposes sovereign authority in the people, who duly elect their political representatives, and the principle that the Court possesses the final word over questions about the political process. Questions about passive and active judicial participation form one piece of this much larger, complicated puzzle.

One critical dimension to the consideration of the courts' proper posture in interbranch constitutional dialogue is the potential impact judicial participation will have on the other branches and, ultimately, on democratic processes. Specifically, will active, robust court participation enhance the deliberative processes and thereby advance democratic principles? Or, in contrast, will active court participation erode or supplant the constitutional duties allocated to the executive or legislative branches? Not surprisingly, proponents of the active and passive models disagree on the consequences of these models.

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[67] 56 F.3d at 466 (arguing the court's role is "limited to interpreting and applying the law that Congress passes, and striking down those that we conclude are unconstitutional.").

[68] Krotoszynski, *supra* note 37, at 14.

[69] 5 U.S. (1 Cranch) 137 (1803).

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A. Passive Judicial Participation

Advocates of passive participation suggest that efforts to minimize the structural tension between unelected judges and democratic rule will generate various theoretical and practical benefits. Much of the theoretical discussion pivots on what Professor Bickel labeled as the countermajoritarian difficulty. Many of the Framers harbored deep concerns about the potential for a judicial branch wholly insulated from direct political accountability which, in turn, could generate a tyrannical superlegislature.[70] The judiciary's structure, along with the Article III courts' activities, stress traditional notions of political legitimacy. This stress is greater with active rather than passive judicial participation in the nation's constitutional dialogue.

Threats to political legitimacy flow from multiple sources. Federal judges are unelected, enjoy a life tenure, benefit from a guaranteed salary, and, as a consequence, are felt to be less legitimate as constitutional actors than their elected counterparts and other political institutions.[71] Moreover, the institutional characteristics that help define the judiciary and distinguish it from the legislature also threaten the judiciary's political legitimacy.[72] Finally, passive judicial engagement can promote democratic goals, principally by granting latitude to the legislative and executive branches, and by providing room for democratic processes to grow.[73] In other words, passive judicial activity minimizes the possibility that a court might prematurely terminate public debate on an issue.[74]

Practical benefits also flow from passive judicial engagement in the public constitutional dialogue. For Bickel, the prudent exercise of passive virtues is necessary for the Court's performance of its core functions.[75] Passive rather than active participation enables the Court to minimize entanglement with controversial political battles.[76] Side-stepping heated polit-

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[70] THE FEDERALIST No. 81, at 482 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

[71] For an excellent comparison between judicial and legislative processes from a legitimacy standpoint, see Mikva, *supra* note 39, at 1828-29. It is perhaps notable that Judge Mikva's professional activities include service in all three branches of the federal government.

[72] *See generally* BICKEL, *supra* note 2; SUNSTEIN, ONE CASE AT A TIME, *supra* note 4; KOMESAR, *supra* note 25.

[73] SUNSTEIN, ONE CASE AT A TIME, *supra* note 4, ch.2.

[74] *Id.* at 4; 26-32; James A. Gardner, *The Ambiguity of Legal Dreams: A Communitarian Defense of Judicial Restraint*, 71 N.C. L. REV. 805, 836-47 (1993).

[75] BICKEL, *supra* note 2, at 71 ("the Court's grand function as proclaimer and protector of the goals.").

[76] Schapiro, *supra* note 7, at 1448.

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ical battles reduces the political fallout aimed at the Court, thereby helping to stabilize the Court's delicate constitutional role.[77] Passive participation reduces the burdens (or costs) of decisions by reducing the uncertainty surrounding the future application of a legal rule to new unanticipated facts or changed circumstances.[78] Another benefit is a reduction in judicial error. Judges and courts can make mistakes, and the likelihood of error increases with the breadth and scope of a given decision.[79] The risk of judicial error is also a function of institutional structure. The judicial branch in general — and courts in particular — are relatively ill-suited for such tasks as those incident to policy analysis and risk calculus that typically accompany legal issues that bear heavily on public policy. This is not to say that Congress or any other constitutional institution might acquit itself well on any particular policy matter. Rather, the more narrow point is that, *ex ante*, comparative institutional analysis suggests that institutions other than the courts might be structurally better equipped to resolve policy issues, especially ones that involve public investment and risk assessment.[80] If nothing else, the lines of political accountability when Congress acts are clearer. Through their votes, citizens can directly express their preferences to Congress on legislative and policy matters.

Professor Paul Tractenberg, long active in the New Jersey school finance litigation,[81] identifies institutional credibility as an important practical concern for courts. Tractenberg is acutely aware of the institutional stakes involved in active judicial participation, particularly within the school finance setting. On the one hand he reasons that an active judicial posture might provide political cover for reluctant legislators. After all, politically accountable legislators could point to the state supreme court and suggest that the justices left them with little choice but to increase school spending.[82] Such a calculation, Professor Tractenberg correctly notes, risks

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[77] SUNSTEIN, ONE CASE AT A TIME, *supra* note 4, at 267 n.5.

[78] *Id.* at 47-48.

[79] *Id.* at 49-50.

[80] For a fuller discussion of comparative institutional analysis, see KOMESAR, *supra* note 25.

[81] For a detailed biographical account of Professor Tractenberg's decades-long involvement with the New Jersey school finance litigation see Paul L. Tractenberg, *Using Law to Advance the Public Interest: Rutgers Law School and Me*, 51 RUTGERS L. REV. 1001 (1999).

[82] Notably, New Jersey Supreme Court justices are appointed by the Governor with the advice and consent of the state senate. THE COUNCIL OF STATE GOVERNMENTS, 32 THE BOOK OF THE STATES 1998-99 136 table 4.4 (1998) [hereinafter BOOK OF THE STATES].

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depleting the court's limited and valuable "political capital."[83] He goes on to note that:

> [T]here are only so many times that the court [the New Jersey Supreme Court] can be portrayed as the dictatorial villain forcing the State to do, in the name of a constitutional mandate, what a majority of its citizens disfavor before judicial credibility is undermined.[84]

B. Active Judicial Participation

Proponents of active judicial participation argue that a more engaged judicial branch will generate an array of goals, including enhanced democracy. Professor Katyal, for example, argues that courts can enhance democracy, popular sovereignty, separation of powers, and federalism goals by actively engaging in interbranch constitutional dialogues through advice-giving that includes broad, non-binding opinions.[85] If the Court dispensed advice and if Congress and the Executive branch heeded it, Katyal argues, the need for the Court to engage in formal judicial review would lessen.[86]

In addition to theoretical benefits, other, more practical benefits are also predicted as consequences of active judicial participation. Increased efficiency is one such predicted benefit. Then law professor — and soon-to-be Justice — Cardozo lamented at what he perceived to be an absence of formal and regularized interactions between judges and legislators.[87] Cardozo's primary concern related to legal reform and the deleterious impact that the "separation" generated, particularly the inefficiencies.[88] Professor Schauer notes that increased judicial dialogue with legislators would improve relations and correspondingly reduce conflicts.[89] Finally, Professor Krotoszynski argues that certain benefits would flow from a more candid acknowledgment of existing levels of judicial

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[83] Paul L. Tractenberg, *A Clear and Powerful Voice for Poor Urban Students: Chief Justice Robert Wilentz's Role in* Abbott v. Burke, 49 RUTGERS L. REV. 719, 743 (1997).

[84] *Id.*

[85] Katyal, *supra* note 6, at 1715 n.24.

[86] *Id.* at 1711.

[87] Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113-14 (1921).

[88] *Id.* ("The penalty is paid both in the wasted effort of production and the lowered quality of the product . . . ").

[89] Frederick Schauer, *Refining the Lawmaking Function of the Supreme Court*, 17 U. MICH. J.L. REF. 22, 23 (1983).

participation in interbranch activities.[90]

IV. STATE SUPREME COURTS AND SCHOOL FINANCE LITIGATION

To gain some insights into the differences between the active and passive models, I examine examples of both models within a common judicial context. School finance litigation, specifically the remedial portion of state supreme court decisions, provides this context. As previously discussed, school finance decisions should be receptive to active judicial participation. I first discuss why state supreme courts are stronger candidates for active judicial participation than are their federal counterparts. I then turn to why school finance decisions are an appropriate and relatively favorable test for the active judicial participation model.

A. *How State and Article III Courts Differ*

State courts differ from Article III courts[91] and they do so in a manner that makes state courts stronger candidates for active judicial participation in interbranch constitutional dialogue. Stated in the negative, if the active dialogic model does not work in the state supreme court context, it is less likely to work in the federal setting.

1. Method of Selection and Retention

A critical difference — and one that goes to the core of Bickel's concerns about counter-majoritarian difficulties — relates to differences in how many state and federal judges are selected. Federal judges, nominated and appointed by the president and confirmed by the Senate, enjoy life appointments, and are removable only by impeachment.[92] Consequently, federal judges[93] remain untouched by direct, first-hand participation electoral processes, at least as it bears on their judicial commission and tenure on the federal bench. Indeed, one purpose of the appointive process is to insulate federal judges from majoritarian

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[90] Krotoszynski, *supra* note 37, at 9.

[91] In his classic article, *The Myth of Parity*, Professor Neuborne advanced the argument that federal courts are more favorable for litigants seeking to vindicate federal constitutional rights. *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). For responses to and critiques of Neuborne's argument see William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999) (arguing that the interests of gay rights might be better addressed to state and not federal courts). In contrast, this article focuses on whether and, if so, how differences separating state and federal courts might implicate their respective abilities to participate in interbranch constitutional dialogues.

[92] U.S. CONST., art. III, § 1.

[93] Specifically, Article III judges.

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pressures.[94]

In contrast, state judges are far closer to electoral and political pressures. Selection and retention of state judges typically use one (or more) of three broad mechanisms: appointment; election, either partisan or nonpartisan; and initial appointment followed by retention election. Approximately 50 percent of state supreme court justices initially are *not* appointed by the governor. Approximately 80 percent of state supreme court justices must face some form of electoral process for retention.[95] Among those justices who are elected, approximately 25 percent participate in partisan elections.[96] As a result, state supreme court justices are both in theory and in practice closer to those people who are influenced by their decisions.

Consequences flow from the close proximity of state judges to electoral and political processes. Some of these consequences bear on the courts' comparative abilities to participate in interbranch dialogues. On the one hand, judges who are more accountable to the electorate are, presumably, more representative of the electorate and are held to a more direct form of accountability. Indirect evidence of this point is suggested by results from a survey of state judges that reveal that 15.4 percent of the respondents reported that retention elections made them less inclined to take on controversial cases and issue controversial rulings.[97] Such accountability to and access by the citizens to the state judges that preside over them blunt some of the democratic concerns posed by judicial review.[98] On the other hand, the comparatively greater influence of political processes in state judicial affairs might make state

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[94] Neuborne, *supra* note 91, at 1127. This federal judicial independence from political forces and majoritarian influence is frequently celebrated. *See, e.g.*, Phillip Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes From History*, 36 U. CHI. L. REV. 665, 667 (1969) ("Without their independence, the federal judges will have lost all that separates them from total subordination to the political processes from which they ought to be aloof.").

[95] *See* BOOK OF THE STATES, *supra* note 82.

[96] *Id. See also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 1998 19 (2000).

[97] Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 312-13 (1994). However, seven percent of the responding state judges reported that direct electoral participation made them more secure to make controversial rulings. *Id.*

[98] Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1089 (1991)(arguing that because state court judges relatively closer links to those bound by their actions state courts' participation in remedial activities pose a correspondingly lesser threat to traditional separation of powers concerns).

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judges and justices more susceptible to majoritarian impulses.[99]

2. Geography

Simple geographic proximity between state judges and citizens also distinguishes many state and federal courts. Geographic proximity can fuel dialogue at two distinct levels: an overt, formal dialogue that plays out in each of the branches' official workproduct, duties, and functions, as well as an informal, covert dialogue that takes place in social or non-official settings.[100] Proximity also facilitates informal interactions among a state's judicial and political players.[101] To the extent that proximity fuels interaction, this interaction should reduce the risk that the judiciary would be wholly unaware of the competing considerations that state legislators confront while formulating policy. That is, close geographic proximity increases the likelihood that each branch is more aware of what the others are doing.

Paradoxically, this increased informal interaction may also reduce the need for formal dialogue. That is, if proximity accords certain advantages, one such advantage is that the courts have a better sense of legislators' actions and concerns. It then follows that the opposite is also true. If so, it is plausible that there will be less need for formal dialogue because the necessary information has already passed among the institutional actors.

3. Text, Structure, and History: Differences Between State and Federal Constitutions

Important textual differences distinguish various state constitutions and the federal constitution, especially as these constitutions address education. The federal constitution does not include the word "education." In stark contrast — at least in terms of school finance litigation — all 50 states' constitutions speak in some manner to education, typically through an education clause.[102] Yet, state education clauses vary in

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[99] *See, e.g.*, Daan Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L.J. 577, 611 (1989); Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 900 (1989); Robert Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 43 (1989).

[100] Krotoszynski, *supra* note 37, at 214.

[101] *Id.* ("State judges, legislators, and executive branch personnel often move in the same circles, particularly in states with relatively small populations.").

[102] *See* ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL.

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what they require, and commentators note four basic groups of clauses.[103] The first group of education clauses simply mandates the establishment of public education.[104] Clauses in the second group require that a state provide a minimal level of educational services or possess some other characteristic such as uniformity.[105] A third group mandates a minimum educational quality level, and also articulates other purposes, usually described by such language as requiring a "thorough and efficient"[106] educational system. The fourth group — and the most stringent from a state's perspective — explicitly describes education as a "primary," "fundamental," or "paramount" duty of the state legislature.[107]

Structural and historical factors also distinguish the federal and state constitutions. One structural difference involves malleability. It is easier to amend state constitutions than it is to amend the federal Constitution.[108] Consequently, state supreme court interpretations of state constitutional laws are comparatively less secure than the United States

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CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2d, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt.1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt.2, ch.5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. 8, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt.2, art. LXXXIII; N.J. CONST. art. VIII, § 4; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 2; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch.2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W.VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

[103] Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814-16 (1985) (describing four groups of education clauses classified as descriptions of general education, quality of education, specific mandates, and strongest commitment to education).

[104] *See, e.g.*, CONN. CONST. art. VIII, § 1.

[105] *See, e.g.*, ARK. CONST. art. XIV, § 1.

[106] *See, e.g.*, N.J. CONST. art. VIII, § 4; OHIO CONST. art. VI, § 2. William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 606 n. 57 (1994) (stating that education clauses in New Jersey and Ohio are similarly categorized as "Category II" type education clauses).

[107] *See, e.g.*, ILL. CONST. art. X, § 1.

[108] Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 277 (1994).

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Supreme Court's interpretations of the United States Constitution. This fuels the perception that state residents are better equipped to rectify perceived errors in state constitutional interpretation.[109] Moreover, this perception supports the argument that state constitutional interpretation by state judges can be more aggressive and active because, when state supreme courts venture "too far," citizens have more direct political access to state judges and greater ability to amend state constitutions.[110]

Another structural point involves the different institutional roles performed by federal and state courts within their respective constitutional regimes. Notably, some state supreme courts are not limited to deciding "cases and controversies"[111] and thus issue advisory opinions.[112] This tilts the balance of power in state governments further towards the courts. Commentators also note that the "history of state constitutionalism is marked by a gradual shift in power from the legislative branch to the executive branch and judiciary, reflecting a growing distrust for state legislatures."[113]

History also appears to play a role in distinguishing state and federal constitutionalism. The origins of many state constitutions benefit from more and more direct citizen participation. For example, Justice Feldman of the Arizona Supreme Court notes that Arizonians selected their state constitutional delegates by a vote.[114] In contrast, delegates to the Federal Constitutional Convention in Philadelphia in 1787 were sent by state legislators. Moreover, Arizonians voted to ratify their state constitution directly, unlike the state conventions that were used to ratify the federal Constitution.[115] As a consequence, commentators note that state constitutions might better reflect the citizens' views than does the federal Constitution.[116]

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[109] *Id.* at 272 (arguing that a positive correlation exists between ease of state constitutional amendment and level of state judicial activism).

[110] Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of Locality in State Judicial Review of Education Finance*, 60 U. PITT. L. REV. 231, 260 (1998) ("The relative ease of state constitutional amendment supports an active an expansive judicial interpretation. . . .").

[111] U.S. CONST., art. III § 2.

[112] *See, e.g.*, Carberry, *supra* note 41.

[113] Advisory Commission on Intergovernmental Relations, *State Constitutions in the Federal System* 62-63 (1989) [hereinafter Advisory Commission].

[114] Stanley G. Feldman & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 ARIZ. ST. L.J. 115, 145 (1988).

[115] *Id.*

[116] *See, e.g.*, Blanchard, *supra* note 110, at 261-65 (arguing that state courts should more aggressively protect individual rights).

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The cumulative weight of these differences reduces the traditional threats generated by active judicial participation in the broader constitutional dialogue by state supreme court justices.[117] Thus, if active judicial participation in constitutional dialogue is sensible, it should make the most sense for state courts.

B. School Finance Litigation

One critical question is whether court decisions involving school finance might elucidate competing models of judicial engagement and, if so, whether they are a fair test of the models. State supreme courts play a pivotal role in the debate over school finance reform. Some form of litigation challenging state school funding systems has reached the state supreme court in 40 states.[118] Of those 40 state supreme court decisions, approximately 40 percent (17) resulted in decisions favorable to those challenging school finance systems.[119] Although the states have litigated school finance issues for more than two decades, resolutions to many complicated questions remain elusive. As a result, school finance litigation will assuredly continue into the future.[120] A review of the school

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[117] *Id.* at 265.

[118] David Long, *Status of School Finance Constitutional Litigation* (accessed Feb. 2, 2000) <http://nces.ed.gov/edfin/litigation/status.asp>.

[119] These 17 include: Opinion of Justices, 624 So.2d 107 (Ala. 1993); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994); DuPree v. Alma Sch. Dist., 651 S.W.2d 90 (Ark. 1983); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); McDuffy v. Secretary of Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); Helena Elementary Sch. Dist. v. State, 769 P.2d 684 (Mont. 1989); Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997); Abbott v. Burke, 575 A.2d 359 (N.J. 1990); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tx. 1989); Brigham v. State, 692 A.2d 384 (Vt. 1997); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978); Pauley v. Bailey, 324 S.E.2d 128 (W. Va. 1984); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980).

[120] Scholarly attention to school finance litigation—already high—will likely increase in the future. The number of law review articles, comments, and notes addressing school finance issues is large, to say the least. Underscoring the increased scholarly attention to this topic are peer-reviewed and faculty-edited scholarly journals that devote significant attention to school finance and related issues. *See generally* J. EDUC. FIN. and J. L. & EDUCATION. Also, special or symposium law review issues, such as 28 HARV. J. ON LEGIS. (1991) and 35 B.C. L. REV. (1994), focus on school finance. Finally, it is important to note that one of the panels at the University of Virginia School of Law's Symposium on Equal Educa-

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finance decisions handed down during the past decades demonstrates two themes. One involves how school finance litigation theory has evolved, thereby influencing the nature of judicial opinions. A second theme relates to a contrast between the courts' sense of their institutional roles in the articulation of a state constitutional right involving education, and their roles in remedying violations of that right.

Most scholars organize the growing number of school finance decisions into three distinct waves.[121] The initial two waves focus on equitable concerns arising from disparities in per-pupil spending. Per-pupil spending disparities exist in districts that rely substantially on local property taxes for their funding source. All but two states (as well as the District of Columbia) draw heavily from local property taxes for school funding.[122] Property values vary across all states and, not surprisingly, per-pupil spending levels reflect this variation. Indeed, discrepancies in per-pupil spending levels persist even after adjustment for varying levels in taxing efforts.[123] The earlier equity-based school finance lawsuits sought, in part, to reduce per-pupil spending gaps.

The third and current wave of school finance decisions emerged

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tion Under the Law (Feb. 6-7, 1998) focused on school finance reform.

[121] *See* Thro, *supra* note 106, at 598 n.4 (claiming ownership over "the idea of waves of litigation."). As Thro notes, the idea has been reiterated by others. *See, e.g.*, Michael Heise, *Equal Opportunity and Constitutional Theory: Preliminary Thoughts on the Role of School Choice and the Autonomy Principle,* 14 J. L. & POL. 411, 425 (1998). *See also* Gail Levine, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings,* 28 HARV. J. ON LEGIS. 507, 507-08 (1991) (describing three waves of school finance litigation); Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform,* 14 HARV. J.L. & PUB. POL'Y 517, 520-35 (1991)(describing three different approaches in addressing challenges to state school finance systems).

It is important to note that at least one commentator has called for the recognition of a fourth wave. *See* Kevin R. McMillian, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts' Lingering Institutional Concerns,* 58 OHIO ST. L.J. 1867 (1998).

[122] Hawaii and the District of Columbia each operate a single or unified school system for their citizens. In 1993, Michigan decided to replace a property tax with a sales tax as the core for school funding. *See* Michael F. Addonizio, et al., *Michigan's High Wire Act,* 20 J. EDUC. FIN. 235 (1995) (discussing ramifications of the Michigan legislature's decision to eliminate local property tax base as a source of public school revenue).

[123] For a more thorough discussion of the relation between per-pupil spending levels and taxing efforts, see generally Michael Heise, *State Constitutions, School Finance Litigation and the "Third Wave": From Equity to Adequacy,* 68 TEMPLE L. REV. 1151 (1995).

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in 1989.[124] Rather than focusing on per-pupil spending gaps or total educational funding levels, adequacy-based lawsuits instead emphasized the adequacy or quality of educational services provided. As a result, adequacy-based school finance litigants have prevailed not because of any per-pupil funding disparities, but because the quality of education delivered to schoolchildren failed to meet a state constitutionally mandated minimum.[125]

The shift from equity- to adequacy-based school finance decisions helped to broaden the equal educational opportunity doctrine. Equal education opportunity today, and certainly when cast in litigation terms, frequently is defined from a perspective of educational adequacy rather than race. School finance decisions striking down state school finance systems typically point to a failure to deliver basic academic skills to students.[126] Once such a failure is identified, courts increasingly make clear that it is the school districts' task to present students with a meaningful opportunity to achieve basic academic skills. One implicit assumption is that training in these skills, ensured by state constitutions, must be provided almost regardless of cost.[127] In many instances — but not all — mi-

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[124] *See* Rose v. Council for Better Educ., Inc., 790 S.W. 2d 186 (Ky. 1989). *See also* Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989).

[125] James E. Ryan, *Schools, Race, and Money*, 109 YALE. L. J. 249 (1999). As Professor Ryan correctly notes, not all cases decided after the 1989 *Rose* decision reflected the shift from equity to adequacy. *See id.* at 268 n.82. Of course, Professor Ryan goes on to also note that "for the most part" the shift from equity to adequacy took place during this third wave of school finance decisions. *Id.*

[126] In *Rose v. Council for Better Educ., Inc.*, the Kentucky Supreme Court identified seven basic educational needs to include sufficient: (i) oral and written communication skills; (ii) knowledge of economic, social and political systems; (iii) understanding of governmental processes; (iv) self-knowledge and knowledge of his or her mental and physical wellness; (v) grounding in the arts; (vi) training or preparation for advanced training in either academic or vocational fields; and (vii) Levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market. 790 S.W.2d 186, 212 (Ky. 1989).

[127] And the costs can be considerable. One commentator notes that the *Rose* decision in Kentucky resulted in new tax legislation that increased revenues by more than one billion dollars. Revenues for all Kentucky school districts increased by at least eight percent and, in some districts, up to 25 percent. *See* Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 HARV. J. ON LEGIS. 341, 343 n.12 (1991). The recent case *Campbell County School District v. State*, 907 P.2d 1238 (Wyo. 1995), adds another dimension to this broad point. The court in *Campbell* wrote that "competing priorities not of constitutional magnitude are secondary [to education], and the legisla-

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nority students and students from low-income households bear the brunt of inadequate educational services.[128] Thus, most current discussions about how to improve equal educational opportunity for those most in need dwell on educational adequacy, a concept frequently construed through school finance litigation.

1. School Finance Court Decisions: Rights versus Remedies

Another key reason that school finance lawsuits provide helpful insights into competing models of judicial engagement flows from the structure of the court decisions themselves. Specifically, some state supreme courts display much greater engagement with the task of defining a constitutional right than with the task of outlining a particular remedy. The research literature benefits from a rich discussion about possible distinctions between legal rights and remedies.[129] The scope of this literature cuts across an array of legal areas. The swath includes school finance litigation. Commentators note that even victorious plaintiffs in school finance lawsuits sometimes emerge with less than full satisfaction from the legal remedy provided.[130]

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ture may not yield to them until a sufficient provision is made for elementary and secondary education." *Id.* at 1279. Thus, the court constructs what amounts to a preference for education over all other claims to state dollars.

[128] It is important to note that I use the term "inadequate" rather than "inequitable," given how these two terms are commonly used in this context. This distinction becomes important when one considers that data presented by the U.S. Department of Education suggest that, from a per-pupil spending perspective, more educational funds are spent on a per-pupil basis in school districts with high concentrations of minority students than in districts with lower concentrations of minority students. Put slightly differently, a "positive relationship between the percentage of minority students and expenditures in a district" exists, "when factors are equal." *See* NATIONAL CENTER FOR EDUCATION STATISTICS, DISPARITIES IN PUBLIC SCHOOL DISTRICT SPENDING 1989-90, 13-16 tbl.1 (1995). Of course, as the school finance adequacy theory suggests, just because some minority students in some school districts may benefit from relatively high per-pupil spending, the education they receive might nonetheless still be constitutionally inadequate. Interestingly, the opposite relationship is found for students from low-income families. That is to say, a statistically negative relation exists between the percentage of schoolchildren from low-income households and per-pupil educational spending. *Id.* at 16-17 tbl.2.

[129] *See, e.g.*, Fiss, *supra* note 11, at 44-58; Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 870-72 (1999); PETER SCHUCK, SUING GOVERNMENT 26-28 (1983).

[130] For an empirical analysis see Michael Heise, *State Constitutional Litigation, Educational Finance, and Legal Impact: An Empirical Analysis*, 63 U. CIN. L. REV. 1735

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Various reasons explain why some state courts approach the rights and remedies implicated in school finance cases differently. One commentator notes that the gap separating right and remedy in the school finance context flows from fundamental conflicts between the successful plaintiffs and the institutions that they sued.[131] Other explanations rely on the political influence of wealthy school districts that stand to lose school funding in a legislative action the redistributes school dollars.[132] Regardless of the precise explanations, the appropriateness of using school finance decisions as a test of competing models of judicial participation presupposes that some school finance decisions exhibit a distinction between the constitutional right sought and the forthcoming remedy.

Although a full theoretical exposition on the distinction between rights and remedies is beyond the scope of this article, the issue warrants brief discussion. According to Professor Levinson, the notion that rights and remedies occupy different conceptual and real space is consistent with a rights-essentialist theory.[133] Not only are rights and remedies distinct concepts, but remedies are subordinate to — or a subsidiary of — rights.[134] The distinction between rights and remedies is in many ways parallel to Professor Dworkin's distinction between arguments of principle and policy.[135] In such a world, a world in which rights and remedies (or principles and policies) occupy distinct space, judges would have primary jurisdiction over rights, and legislatures would have a corresponding jurisdiction over remedies. A court seeking to participate actively in the public constitutional dialogue would actively interact with the legisla-

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(1995) (noting the inability of successful equity-based school finance lawsuits to increase state education spending) [hereinafter *State Constitutional Litigation*]; Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Explanation,* 32 GEO. L. REV. 545 (1998) (arguing that one reason for the theoretical shift from equity with adequacy in school finance litigation theory is the inefficacious successful equity-based lawsuits) [hereinafter *Equal Educational Opportunity*].

[131] Note, *supra* note 98, at 1078.

[132] *Id.*

[133] Levinson, *supra* note 129, 870-72.

[134] *See generally* Fiss, *supra* note 11, at 44-58.

[135] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 82-84, 90 (1977) ("Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals."). Professor Levinson concludes that "Dworkin's principle/policy distinction roughly lines up with the rights/remedy distinction." Levinson, *supra* note 129, at 872.

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tive (and executive) branches in the remedial areas. A court seeking passive dialogue would not do this.

A gap exists between the willingness of some state courts to articulate individual rights relating to education and their willingness to participate more forcefully and actively in the remedial process.[136] One crucial question is why courts might elect to cede their bold voice in remedial affairs. Answers to this question provide insight into a court's approach toward judicial participation in constitutional dialogue.

One answer involves the courts' institutional interest that flows from the uncertainty accompanying such a judicial effort. Even if the courts choose to become engaged in the constitutional dialogue surrounding Supreme Court school finance decisions which invalidate school funding schemes, it is not clear whether such judicial engagement can alter the course of future events, at least in ways desired by the plaintiffs. Given the institutional stakes implicated by such a judicial move, the possibility of outright failure might give some state courts pause. Why pick a potential constitutional fight when the outcome is not obvious?

Finally, the nature of the typical task at hand in the school finance context makes an already difficult task even more so. In most school finance cases, the constitutional challenge flows less from what the state legislature has done and more from what the legislature has *not* done. State court participation in an effort to overcome legislative inertia is more intrusive than a judicial participation in an effort to get state lawmakers to cease doing something.[137]

2. School Finance Court Decisions as a Test of Judicial Participation Models

School finance decisions are not only a fair test of the active judicial participation model, but are also likely slanted in its favor. Because the stakes can be significant, plaintiffs seeking judicial assistance in influencing education policy and spending are even more inclined to pursue a litigation strategy in the first instance, as well as to seek an active judicial role. The policy and economic stakes posed by school finance litigation and the attendant allocation of state resources are significant. State spending on public primary and secondary education accounts for one of the largest single segments of a state's annual budget. Thus, court decisions influencing state spending on education invariably influence state spending in other areas, at least indirectly. After all, a court order to increase educational spending will almost always result in another claimant

[136] Detailed examples illustrating this point are considered in Part IV.B.3, *infra*.
[137] Note, *supra*, note 98, at 1082.

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on state resources receiving fewer resources or taxpayers contributing more money, or both.

Paradoxically, while the potentially significant policy and economic stakes provide incentive for a litigation strategy, the enormity of the stakes implicated by such a lawsuit works against the likelihood that a successful school finance lawsuit will achieve its stated goals. Moreover, the underlying complexities of school finance also work against court efforts to influence education spending. School finance involves multiple institutions and variables.[138] Their interactions — along with those of a host of other variables — make judicial efforts seeking to influence school spending difficult. Indeed, empirical studies of the efficacy of various school finance decisions underscore the uncertainty surrounding what judicial opinions can accomplish with respect to education spending.[139]

3. School Finance Litigation: Models of Judicial Engagement

a. Active Judicial Participation: New Jersey

No example of the active judicial participation model is perhaps more notorious than the three-decade saga surrounding school finance litigation in New Jersey. This litigation has been described by even those who are partial towards the court's involvement as a "war"[140] involving two technically distinct, but related, lawsuits: *Robinson v. Cahill*[141] and *Abbott v. Burke*.[142] It is, of course, difficult to summarize succinctly the dia-

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[138] For examples of models of education spending see *Equal Educational Opportunity, supra* note 130; *State Constitutional Litigation, supra* note 130.

[139] *See, e.g., Equal Educational Opportunity, supra* note 130 (finding relatively little evidence of successful equity-based school finance lawsuits). *But cf.* Sheila E. Murray, et al., *Education-Finance Reform and the Distribution of Education Resources,* 88 AMER. ECON. REV. 789 (1998) (arguing that successful school finance lawsuits positively impact school funding levels).

[140] Tractenberg, *supra* note 81, at 1006.

[141] *See* Robinson v. Cahill, 360 A.2d 400 (N.J. 1976); Robinson v. Cahill, 358 A.2d 457 (N.J. 1976); Robinson v. Cahill, 355 A.2d 129 (N.J. 1976); Robinson v. Cahill, 351 A.2d 713 (N.J. 1975); Robinson v. Cahill, 339 A.2d 193 (N.J. 1975); Robinson v. Cahill, 335 A.2d 6 (N.J. 1975); Robinson v. Cahill, 306 A.2d 65 (N.J. 1973); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); Robinson v. Cahill, 289 A.2d 569 (N.J. Super. Ct. Law Div. 1972); Robinson v. Cahill, 287 A.2d 187 (N.J. Super. Ct. Law Div. 1972).

[142] *See* Abbott v. Burke, 710 A.2d 450 (N.J. 1998); Abbott v. Burke, 693 A.2d 417 (N.J. 1997); Abbott v. Burke, 643 A.2d 575 (N.J. 1994); Abbott v. Burke, 636 A.2d 515 (N.J. 1993); Abbott v. Burke, No. 91-C-00150, 1993 WL 379818 (N.J. Super. Ct. Ch. Div. Aug. 13, 1993); Abbott v. Burke, 575 A.2d 359 (N.J. 1990); Abbott v. Burke, 495 A.2d 376 (N.J. 1985); Abbott v. Burke, 483 A.2d 187 (N.J. 1984); Ab-

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logue — constitutional or otherwise — that surrounded New Jersey's legal battles with school finance reform. These battles have inspired entire books, and even those books convey only parts of a multi-faceted and complex story.[143] That said, a few broad themes emerge that are particularly salient to the court's participation in the constitutional dialogue that surrounded the litigation effort.

The initial decision in *Robinson* was announced just two weeks after the United States Supreme Court rejected a similar challenge, rooted in the Federal Equal Protection Clause, that the Texas school finance system faced.[144] The New Jersey court in *Robinson* was among the first to expansively articulate the application of the equal education opportunity doctrine in the school finance context,[145] as well as to link educational outcomes to economic and citizenship outcomes. The central analytical contribution of *Robinson* was its rejection of Equal Protection Clause analysis and its embracing of the New Jersey Constitution's "thorough and efficient" language contained in the state's educational clause.[146] One critical question was how to define "thorough and efficient" for constitutional purposes in the education context. Notably, the New Jersey court elected not to construe "thorough and efficient" to mean "equal resources."[147] Rather, the court chose to interpret these words to mean that the state must provide equal educational opportunity.[148] Of course, the court confronted additional definition problems relating to equal educational opportunity. Compounding the court's task is that neither the legislative nor the executive branches of New Jersey's government had articulated what equal educational opportunity meant in this context. Rather than permit the coordinate branches to respond, the court operationalized a definition with respect to the requirements for participation as an informed citizen, as well as participation in the labor market.[149]

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bott v. Burke, 477 A.2d 1278 (N.J. Super. Ct. App. Div. 1984). As of this writing, the *Abbott* litigation remains pending.

[143] *See, e.g.*, RICHARD LEHNE, THE QUEST FOR JUSTICE (1978).

[144] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[145] For more on the relation between the equal education opportunity doctrine and school finance, see generally Heise, *supra* note 121.

[146] N.J. CONST., art. VIII, § IV, par. 1 ("The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.").

[147] Robinson v. Cahill, 303 A.2d 273, 294 (N.J. 1973).

[148] *Id.*

[149] *Id.* at 295-96.

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Between 1973 and 1976, the *Robinson* litigation was consumed by remedial efforts. Specifically, a tug-of-war began between the court and New Jersey lawmakers over a new school finance system that would pass state constitutional muster. What emerged in 1975 was the Public School Education Act that, the court concluded, was facially neutral.[150] However, in the opinion, many justices openly aired serious misgivings about whether the Act would be constitutional once it was applied.[151] Some of the justices were quite blunt with their warnings that, if the Act did not produce constitutionally acceptable results in practice, the court would welcome further legal challenges.[152] This challenge, almost invited by the court, arrived five years later in *Abbott v. Burke*.[153]

In many respects, the *Abbott* litigation reflects the consistent progression established earlier by the *Robinson* decisions. In other respects, however, the two pieces of litigation demonstrate quite distinct threads. *Abbott* reflects the court's simultaneous contraction and expansion of its role in the dialogue that had consumed many New Jersey lawmakers and citizens. *Abbott* significantly expanded the judicial scope, but targeted the court's effort at fewer and more discrete school districts. The court veered off of its initial track of trying to influence school policy for all New Jersey schoolchildren. In its place, the court endeavored to improve the educational opportunities of the least advantaged students, principally those of minority students from low-income households attending racially identifiable urban schools. Moreover, the court re-inserted the resource issue into the definition of "equal educational opportunity." Specifically, the court demanded that students in low-income urban districts receive per-pupil spending levels substantially equivalent to the levels received by their more affluent suburban counterparts. In addition to resource equalization, the court concluded that the low-income students' special educational needs must also be addressed.[154] The dialogue among New Jersey's lawmakers, governor, and Supreme Court now spans more than four decades.

b. Active Judicial Participation: Texas

If New Jersey's experience is the most notorious, than Texas' experience is a close second. One observer close to the multi-decade school finance litigation battle waged in Texas likened the ordeal to a Russian novel: "It's long, tedious, and everybody dies in the end."[155] Sim-

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150 Robinson v. Cahill, 335 A.2d 6 (N.J. 1975).

151 *See* Robinson v. Cahill, 355 A.2d 129, 139 (N.J. 1976).

152 *See id.*

153 Abbott v. Burke, 477 A.2d 1278 (N.J. Super. Ct. App. Div. 1984).

154 Abbott v. Burke, 495 A.2d 376, 385 (N.J. 1985).

155 Mark Yudof, *School Finance Reform in Texas: The* Edgewood *Saga*, 28 HARV. J.

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ilar to what happened in New Jersey, the Texas Supreme Court, over time and through its decisions, became intimately intertwined with school finance reform to a self-conscious degree. Even supporters of school finance reform and the court's role in it recognize that:

> [the] structure and process of the long "conversation" and the [Texas] capitol exhibited the incremental, some would say questionable, entanglement of the two branches of government over the course of the Edgewood drama.[156]

This "conversation" initially involved whether Texas courts should decide such a case because it was feared that the underlying issue was more political than it was legal.[157] The Texas Supreme Court quickly disposed of any separation-of-powers concerns and, in so doing, opened a door that Texas courts walked through.[158] Although it was ultimately concluded that the Texas courts indeed had a role to play, the precise nature of the role was initially undefined. When the *Edgewood* line of decisions is considered in its entirety, however, what emerges is a picture of a court that occupies a progressively more intrusive role; one intimately and directly engages with the legislative and executive branches.

In *Edgewood I*, the Texas court did little more than to declare the state school funding system unconstitutional and order the legislature to fix it.[159] In the next wave of decisions, the Texas court again struck down the legislative response. The judicial opinion included strongly suggestive language and broached such topics as "tax base consolidation."[160] The trend of increased court involvement persisted and deepened. The *Edgewood III* opinion was laden with highly technical policy language incident to school finance nuances, worthy of the most sophisticated of policy wonks. The Texas court disassembled another legislative response and made further legislative proposals.[161] Finally, in the fourth piece of litiga-

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ON LEGIS. 499, 499 (1991).

[156] J. Steven Farr & Mark Trachtenberg, *The* Edgewood *Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 710 (1999).

[157] Kirby v. Edgewood Indep. Sch. Dist., 761 S.W.2d 859, 867 (Tex. App. 1988) [hereinafter *Edgewood I*].

[158] *Edgewood I*, 777 S.W.2d 391, 394 (Tex. 1989).

[159] *Id.* at 399 ("The legislature has primary responsibility to decide how to best achieve an efficient system.").

[160] Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 498 (Tex. 1991) [hereinafter *Edgewood II*].

[161] Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 491, 504-10 (Tex. 1992) [hereinafter *Edgewood III*].

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tion, *Edgewood IV*, the Texas Supreme Court approved the legislative response and, in the opinion, self-consciously remarked that its role is only "to determine whether the Legislature has complied with the Constitution."[162] To some, the Court's description of its role in the arduous process reflected a court either "exercising a fine sense of irony or wallowing in a profound state of denial."[163]

c. Passive Judicial Participation: Massachusetts

Unlike the state supreme courts' active involvement in New Jersey and Texas, the experience in Massachusetts exemplifies the passive model. The Massachusetts Supreme Judicial Court's treatment of a challenge to that state's school finance system illustrates how courts, as an institution, can be far more deferential in the remedial aspect of school finance decisions than in the articulation of the underlying state constitutional right to education.

The plaintiffs in *McDuffy*,[164] including sixteen separate Massachusetts school districts, asserted that the educational opportunities offered were not adequate, particularly when compared to what was offered in other more affluent school districts.[165] In interpreting the state's education clause, the court found the source for rights owed to individuals as well as obligations upon the legislature.[166] The court also looked carefully at the array of relevant state statutes and noted the state's long history and practice of local control. However, notwithstanding the tradition of local control, the court concluded that the state could not delegate its duty to educate and, therefore, retained ultimate responsibility for education.[167] Finally, the court concluded that the plaintiffs were not receiving the constitutionally required level of education.

After concluding that the Massachusetts Constitution established a duty for the state to educate its citizens and that the state failed in its duty as it related to the plaintiffs, the court then turned to the question of remedy. This section of the court's opinion contrasts sharply both in substance and in form with the earlier section in which the court established a duty of care and discussed how the state had breached it. First,

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[162] Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 747 (Tex. 1995) [hereinafter *Edgewood IV*].

[163] Farr & Trachtenberg, *supra* note 156, at 713. Indeed, these commentators conclude that the Texas Supreme Court did, in fact, "assume a supervisory role." *Id.* at 714.

[164] McDuffy v. Secretary of Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993).

[165] *Id.* at 553.

[166] *Id.* at 548.

[167] *Id.* at 553.

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the remedy section of the court's opinion is rather brief.[168] Somewhat oddly, portions of the remedy section of the opinion dwell on dicta from the Kentucky Supreme Court's *Rose* decision.[169] Second, the tone of the remedy portion of the *McDuffy* decision reveals marked institutional hesitance. The Massachusetts court previously cited *Marbury v. Madison*[170] for the proposition that it is the court's role to interpret the constitution in the rights section, but, when it came to a remedy, the court decidedly backed away from its earlier active posture. According to Professor Brown, the successful plaintiffs came away from the decision with "a nice sounding declaration" of a fundamental right. However, the victory was short-lived because, in the decision's remedial section, the court "essentially remitted [the plaintiffs] to the legislature which caused their problem in the first place."[171] Thus, according to another commentator, after declaring that a state constitutional right was infringed by the state's school funding scheme, the courts turn over to the state legislatures the task of formulating a proper remedy.[172]

Perhaps this is a price for state constitutional peace. The *McDuffy* opinion does not appear to satisfy wholly either the plaintiffs or the defendants. The plaintiffs succeeded in gaining an articulated standard of educational care, as well as a ruling that the state had failed to discharge its affirmative constitutional obligations. However, in the same opinion the court, rather than fashion a judicially crafted remedy, essentially handed to Massachusetts lawmakers the technical matter of revising the state school finance mechanism to conform to state constitutional requirements. Although it remains unclear whether school districts have improved in Massachusetts to the satisfaction of the prevailing plaintiffs, what is clear is that Massachusetts avoided the acrimonious political "warfare" that emerged in New Jersey and Texas.

V. CONCLUSION

A critical point bears repeating: the issue is not *whether* courts will participate in the nation's constitutional dialogue, but rather what *form* the courts' participation should take. How the courts participate raises important normative questions that reside at the heart of constitutional structure and democratic rule. This article considers two general models

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[168] *Compare McDuffy*, 615 N.E.2d at 516-53 *with McDuffy*, 615 N.E. 2d at 554-56.
[169] *Id.* at 554 (quoting Rose v. Council for Better Educ., Inc., 790 N.E.2d 186, 212 (Ky. 1989)).
[170] *Id.* at 611 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803)).
[171] George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 544 (1994).
[172] Jonathan Banks, Note, *State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?*, 45 VAND. L. REV. 129, 156 (1992).

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of judicial participation: active and passive, and it does so within a particular judicial context — school finance litigation. Variation in the state supreme courts' approaches to school finance remedies provides a quasi-experimental design to observe differences in the active and passive judicial models. The results of a brief analysis of three states' experiences provide support for the passive model of judicial participation. That the particular judicial context used in this analysis — state supreme courts and school finance litigation — is favorable to the active model makes the (contrary) results even more interesting. Of course, given the limited nature of this study, it is difficult to over-emphasize the narrowness of these results. Whether these results inform other areas of educational law or other judicial settings is unclear. Such questions would benefit from future study.

How courts approach the nation's constitutional dialogue has important consequences. The experiences in New Jersey and Texas, unlike the experience in Massachusetts, illustrate the potential for courts to become entangled in a quagmire of battles with other constitutional actors and institutions from which no real victors are likely to emerge, or to emerge unscathed. Such episodes threaten to erode democratic processes in numerous ways.

In addition to a threat to constitutional structure and notions about separation of powers, active judicial participation can also trigger more practical consequences. First, courts might gain for the plaintiffs less than what they might gain from lawmakers if lawmakers were forced to guess at what courts require. Where courts adopt an active posture in school finance disputes, they typically set forth baseline constitutional requirements. State lawmakers, perhaps displeased at having the courts strike down their earlier legislative efforts, might be inclined to respond to the strict mandates advanced by the courts and then do nothing more. In contrast, by simply striking existing legislation and remaining silent about the minimal level necessary to meet constitutional standards, a court, through a passive posture, can keep lawmakers guessing about what is required. If the lawmakers guess incorrectly and respond unacceptably, the court can again invalidate the legislation. All that is lost is time, effort, and energy. If, on the other hand, lawmakers respond with an effort that exceeds that which the court internally felt was necessary, the plaintiffs will have benefited from this asymmetrical information. That is, where the court forces lawmakers to guess at constitutional minimums, it preserves the possibility that lawmakers may guess higher than what state constitutions require.

Second, active judicial participation in the school finance area might indirectly exacerbate one problem that it seeks to solve. One problem that arises in the school finance context involves legislative inertia. The question is how courts should approach and respond to instances of legislative inertia, assuming that such a condition is easily recognizable. By seeking to address an issue by actively and directly

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engaging lawmakers, courts may ultimately "solve" one inertia problem, but they will do so in a manner that will fuel additional inertia problems in the future. Specifically, active judicial participation often provides political "cover" for lawmakers eager to avoid tough — and possibly divisive — political questions that sometimes occupy the center of the political process. Once lawmakers see that judges are willing to inject themselves into political debates, some lawmakers might be induced to become more, rather than less, complacent. Moreover, once the judiciary becomes engaged with a political problem, it becomes part of that problem. To the extent that such problems might not go away anytime soon or, for that matter, worsen, the judiciary's institutional credibility could become an issue.

Of course, the likely costs of a court adopting a passive approach are also unpalatable. Specifically, problems — both theoretical and practical — arise when courts clearly articulate a constitutional right that for whatever reason defies an adequate constitutional remedy. However, if the remedial component of a problem flows from lawmakers who are not discharging their legislative obligations, a less structurally stressful answer resides in the political rather than in the legal domain — at least within the specific context of school finance litigation. Legislatures that fail to adhere to judicially articulated constitutional school finance requirements create important problems that harm schoolchildren, among others. Such problems demand immediate and sustained attention. However, to address that problem by having a state supreme court actively engage itself in the formulation of a political solution risks making a regrettable situation even worse. Simply put, the risks generated by active judicial participation in school finance problems are too high.

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