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When Words Fail: How Idaho's Constitution Stymies Education Spending and What Can Be Done About It

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WHEN WORDS FAIL: HOW IDAHO'S CONSTITUTION STYMIES EDUCATION SPENDING AND WHAT CAN BE DONE ABOUT IT

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> *"'[N]o fund is more sacred than the school fund, and perhaps there is no other fund so sacred; it should be guarded in every manner possible.'"*[1]

1. Thompson v. Engelking, 537 P.2d 635, 647, 96 Idaho 793, 805 (1975) (quoting Delegate McConnell's statement at the Idaho Constitutional Convention of 1889).

Providing education is among the most important state functions.[2] But no matter how important, or how universal the agreement that education should be adequately funded, not everyone agrees on how much money is needed or where it should come from. In Idaho, this disagreement eventually started a "twenty years' war"[3] of litigation, beginning in 1993 with *Idaho Schools for Equal Educational Opportunity v. Evans* (*ISEEO I*).[4]

An Idaho public school student may be oblivious to the legal forces—like those on display in *ISEEO I*—shaping her education. She hears that Idaho ranks poorly in key metrics such as per-pupil spending, teacher salaries, and college attendance.[5] Yet, despite her community's recent effort to pass a tax levy,[6] she may also hear the conflicting view that more money is not the answer.[7] And even if she subscribes to the common view that her school needs more money,[8] she is probably unaware that the defining moments for Idaho's education spending have taken place in the courtroom and chambers of the Idaho Supreme Court. In exercising its power to "say what the law is,"[9] the Court has had to

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2. Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483, 493 (1954).

3. For another use of this moniker, see Bret Stephens, *The Twenty Years' War: Defeating Saddam Took 19 Years Too Long*, WALL ST. J. (Aug. 23, 2010), http://online.wsj.com/news/articles/SB10001424052748703846604575447203550463656. "It matters what we call our wars, lest we fail to understand them." *Id.*

4. Idaho Sch. for Equal Educ. Opportunity v. Evans (*ISEEO I*), 850 P.2d 724, 123 Idaho 573 (1993). *ISEEO I* raised issues that are still being litigated twenty years later. *See infra* Part II.D. It also raised important issues from *Thompson*, 537 P.2d 635, 96 Idaho 793, an earlier education finance case, which is discussed throughout this Note.

5. *See, e.g.*, MARK DIXON, PUBLIC EDUCATION FINANCES: 2011, U.S. CENSUS BUREAU 11 (2013), *available at* http://www2.census.gov/govs/school/11f33pub.pdf (ranking Idaho fiftieth in per-pupil spending); Nate Green, *Shame: Idaho Ranks Poorly in Many Key Areas*, IDAHO PRESS-TRIBUNE, Jan. 16, 2012, http://www.idahopress.com/news/state/room-for-improvement-in-idaho/article_69e564a4-3f3f-11e1-a84c-0019bb2963f4.html (reporting rankings by the National Center for Education Statistics and U.S. Census Bureau, which place Idaho forty-second for teacher salary and forty-seventh for college enrollment after high school).

6. The number of Idaho districts with tax levies has increased dramatically over the last decade. *See* MICHAEL FERGUSON, IDAHO PUBLIC SCHOOL FUNDING – 1986 TO 2013, at 14 fig. 11 (2012), *available at* http://idahocfp.org/wp-content/uploads/2012/04/Idaho-Public-School-Funding-1980-to-2013.pdf.

7. *See, e.g.*, Green, *supra* note 5 (reporting State Superintendent Tom Luna's sentiment that more money is not the "silver bullet" fix for Idaho's poor rankings in college enrollment and graduation); *see also* Idaho Sch. for Equal Educ. Opportunity v. State (*ISEEO III*), 976 P.2d 913, 921, 132 Idaho 559, 567 (1998) (discussing Idaho's counter-complaint against district superintendents alleging that any deficiency in funding was brought about by those superintendents' mismanagement).

8. William J. Bushaw & Shane J. Lopez, *Which Way Do We Go?*, KAPPAN, Sept. 2013, at 9, 20, *available at* http://pdkintl.org/noindex/2013_PDKGallup.pdf (reporting recent poll results where Americans cited lack of funding as the number one problem facing their local schools); *see also* Idaho Sch. for Equal Educ. Opportunity v. State, No. 94008, at 8 (4th Jud. Dist. of Idaho Feb. 5, 2001), *available at* http://fourthjudicialcourt.idaho.gov/pdf/id_schools_decision.pdf ("There is no question that all Idaho schools could benefit from substantially increased funding.").

9. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

say what the Idaho Constitution's education clause means. Not everyone is content with the result, particularly regarding education finance.

This Note examines Idaho's education finance from a legal perspective and argues that the state's constitution—together with the judiciary's interpretation of it since *Thompson v. Engelking*[10]—stymies Idaho's ability to sufficiently fund public education. This Note also poses a solution: a constitutional amendment that requires more from Idaho's government. Part I provides background by placing Idaho's education finance litigation in historical context, and outlines the relationship between education clause language and education funding. Part II discusses Idaho's education finance system and suggests that whatever its shortcomings, options for challenging it are exhausted. Part III identifies constitutional amendment as the remaining option to improve Idaho's education funding, and Part IV introduces and conducts a comparative analysis to identify specific language that could be included in such an amendment. Part V offers draft language for the amendment, and recommends two implementation stages. Part VI concludes.

I. BACKGROUND

Education finance has been litigated in all but five states.[11] Typically, the focus is on equitable funding between districts within a state, adequate funding in the state as a whole, or both.[12] Besides these categories, scholars have also identified three temporal waves of litigation.[13] In the 1960s, plaintiffs invoked equal protection arguments under the 14th Amendment.[14] This wave ended in 1973 with *San Antonio Independent School District v. Rodriguez*,[15] where the U.S. Supreme Court held that education is not a fundamental right and consequently did not require the application of strict scrutiny.[16] This foreclosed equal protection claims under the U.S. Constitution; despite disparities in funding between districts, local property taxes were viewed as a rational means

10. Thompson v. Engelking, 537 P.2d 635, 647, 96 Idaho 793, 805 (1975).

11. Delaware, Hawaii, Mississippi, Nevada, and Utah. EDUC. JUSTICE, http://www.educationjustice.org/index.html (use map index to navigate to individual state summaries) (last visited June 29, 2014).

12. *See* Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, B.Y.U. EDUC. & L. J. 1, 9 (1997); Phil Weiser, *What's Quality Got to Do with It?: Constitutional Theory, Politics, and Education Reform*, 21 N.Y.U. REV. L. & SOC. CHANGE 745, 753 (1995). When this Note refers to "equity" or "adequacy," it is in reference to the types of funding challenges identified here.

13. *See, e.g.*, Kevin Randall Mcmillan, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts' Lingering Institutional Concerns*, 58 OHIO ST. L.J. 1867, 1869 (1998).

14. *Id.*

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

16. Mcmillan, *supra* note 13, at 1870.

of achieving legitimate local and state control of education finance.[17] This shifted the ensuing second wave to equal protection claims under *state* constitutions.[18] A third wave of claims began in 1989, which raise adequacy concerns under states' education clauses.[19]

Idaho's education finance litigation caught the second and third waves, starting in 1975 with three equity arguments raised in *Thompson*.[20] Then, in 1993, Idaho saw the onset of third-wave adequacy litigation: specifically, the plaintiff in *ISEEO I* complained that the "system of funding public schools [was] unconstitutional because it [did] not provide a thorough education in that necessary resources [were] unavailable due to lack of money."[21] The plaintiff also raised an equity argument from *Thompson*, alleging that spending disparities between districts violated the education clause's uniformity requirement.[22] The Idaho Supreme Court affirmed *Thompson*, but when it later held the state's financing scheme unconstitutional in *Idaho Schools for Equal Education Opportunity v. State* (*ISEEO V*),[23] equity was a key factor underlying the holding.[24]

Even though the *ISSEO V* plaintiffs won, the issues are far from resolved. Some individuals continue to despair Idaho's education finance system,[25] and shortly after *ISSEO V*, the plaintiffs took the issue to the federal level, claiming the Legislature failed to provide a remedy.[26]

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17. *Id.* at 1871.

18. *Id.* New Jersey's *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) began the second wave. *Id.* at 1872.

19. *Id.* at 1875. Kentucky's *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989), is credited as the first third-wave case. *Id.* at 1876. That same year, Montana and Texas also used their education clauses to strike down their education finance systems. William E. Thro, *The Role of the State Education Clauses in School Finance Litigation*, 78 ED. L. REP. 19, 21 (1993).

20. After discussing the United States Supreme Court's holding and reasoning in *Rodriguez*, the Idaho Supreme Court quickly dispensed with the equal protection arguments resting on both the federal and Idaho constitutions. Thompson v. Engelking, 537 P.2d at 642, 96 Idaho at 800. In responding to the third equity argument, which rested on Idaho's education clause, the Court examined the clause's requirement for a "general and uniform" system of education, and held that it required neither equal "services and facilities" throughout the state, nor equal per-pupil expenditures. *Id.* at 647, 650, 96 Idaho at 805, 808.

21. *ISEEO I*, 850 P.2d 724, 729, 123 Idaho 573, 578 (1993).

22. *Id.* at 729–30, 123 Idaho 573 at 578–79.

23. Idaho Sch. for Equal Educ. Opportunity v. State (*ISEEO V*), 129 P.3d 1199, 142 Idaho 450 (2005).

24. *Id.* at 1205–06, 142 Idaho at 456–57. The Idaho Supreme Court's holding was largely based on concerns for Idaho's poorest districts and their access to safe facilities. *See infra* Part II.A. One scholar labels these types of suits "hybrid claims" that "combine[] the equal protection/equality claim with the education clause/adequacy claim," and tend to be "very successful." Jensen, *supra* note 12, at 27.

25. *E.g.*, FERGUSON, *supra* note 6.

26. *See* Kress v. Copple-Trout, CV-07-261-S-BLW, 2008 WL 352620 (D. Idaho Feb. 7, 2008) (discussing plaintiffs' complaint that the Idaho Supreme Court's failure to order the Legislature to take specific action in *ISEEO V* violated plaintiffs' due process rights), *on reconsideration*, CV-07-261-S-BLW, 2008 WL 2095602 (D. Idaho May 16, 2008). This argument was raised again in a 2012 lawsuit. *See* Amended Class Action Complaint for Declaratory

Some have also accused the Legislature of making matters worse in the years since *ISSEO V* by forcing districts to rely more heavily on levies that exacerbate existing resource disparities.[27] This state of affairs underscores the importance of understanding Idaho's education finance litigation, determining why it has failed to bring about change, and finding a solution.

A. The Relationship Between a State's Constitution and Education Funding

Providing education in the United States has always been a local endeavor.[28] Scholars credit the Ye Old Deluder Satan Act, a 1647 piece of Massachusetts legislation, with establishing this American tradition of local governance, under which education is both locally controlled and funded.[29] This model spread to the nation's territories and eventually dominated as states entered the Union.[30] This section briefly discusses the dynamic between the local and state political units that affect education funding and then discusses the specific dynamics operating in Idaho.

i. The General Political Dynamics of Education Finance

Although it was once the case that local districts had the greatest responsibility for education, there are strong indicators that local control is decreasing.[31] Among them are the school district consolidation movement of the twentieth century, states' greater assumption of responsibility for financing education, and states' ever-increasing demands for content standards, changes to curricula, and uniform systems of examination.[32]

Against this backdrop, education funding has persisted as a joint venture between states and local school districts. All fifty states constitutionally mandate the creation of a public school system,[33] but all

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Judgment, Refund of Fees Paid, and other Relief, at para. 38, Joki v. Idaho, No. CIV00-212-S-LMB (Oct. 9, 2012) [hereinafter Amended Class Action Complaint] (on file with author).

27. *E.g.*, Amended Class Action Complaint, *supra* note 26, at para. 38; FERGUSON, *supra* note 6, at 9, 13.

28. Joseph P. Viteretti, *The Federal Role in School Reform: Obama's Race to the Top*, 87 NOTRE DAME L. REV. 2087, 2088 (2012). This in spite of high-profile federal education policies like George W. Bush's No Child Left Behind and Barack Obama's more recent Race to the Top initiative. *See generally id.* at 2087.

29. *See* James W. Guthrie, *American Education Reform: What Is Needed Is 'National' Not Federal*, 17 ST. LOUIS U. PUB. L. REV. 125, 133 (1997).

30. *Id.*

31. *Id.* at 133–34.

32. *Id.*

33. Jensen, *supra* note 12, at 1, 3.

states share the financing responsibility with local governments.[34] Thus, a defining feature of education funding in the United States is its heavy reliance on local property taxes.[35] Across the nation, this has generated much litigation, primarily because differences in property value between districts give rise to inequalities in funding capacity.[36]

States protect and define the rights surrounding education, which they accomplish by administering their education clauses.[37] There is an inherent tension in these clauses: they create the need for funding education yet rarely deal with the funding question directly and instead leave the mechanics to the state legislatures.[38] In short, a state's education clause, while certain to demand an education system, is unlikely to specify how to fund it.

This tension is a major theme in education finance litigation, and some education clauses generate better results for plaintiffs.[39] The most effective language specifies a high quality level of education, while the least effective specifies a minimum quality level or none at all.[40]

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34. *See* REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS SCHOOL YEAR 2009–10 (FISCAL YEAR 2010), NAT'L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/pubs2013/2013307/tables/table_01.asp [hereinafter REVENUES AND EXPENDITURES]. Additionally, each state also receives federal funds. *Id.* The range of funding combinations varies significantly between states, with some relying more on local government revenues than others. *See id.* For example, in 2010, the share of local government revenues ranged from a low of 4.6% (Vermont) to a high of 58.9% (Nevada) of the total education revenues. *See id.* It should be noted that not all districts have taxing authority, and those that do not rely on other local government entities such as city councils or county boards for revenue. Guthrie, *supra* note 29, at 133.

35. *See* Jim Fenwick, *Funding Public Education: The Constitutionality of Relying on Local Property Taxes*, 27 J.L. & EDUC. 517 (1998) (noting that almost 90% of education funding comes from property taxes). Reliance on property tax has been a major factor in recent education spending cuts because the decrease in real estate values associated with the real estate bubble collapse reduced the available revenue. Kristi L. Bowman, *Before Districts Go Broke: A Proposal for Federal Reform*, 79 U. CIN. L. REV. 895, 903 (2011). These budget cuts have led to a recent spate of education finance litigation. *Id.* at 912–13.

36. For some examples, see *infra* Part IV. Notably, district inequality was the very root of the equal protection claim in *Rodriguez*, discussed at *supra* Part I. After the United States Supreme Court held that education was not a fundamental right in *Rodriguez*, Texas plaintiffs continued to litigate the issue in the Texas court system through a series of cases that have become well known in school finance scholarship. J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 608–09 (1999).

37. *See* Jensen, *supra* note 12, at 3.

38. *See, e.g.*, Joki v. Meridian Sch. Dist. No. 2, No. CV-OC-1217745, at 11–12 (4th Jud. Dist. of Idaho Nov. 27, 2013) (unpublished memorandum decision) (on file with author) ("The [Idaho] Constitution does not mandate a particular level of funding or a particular funding mechanism."). *But cf* COLO. CONST. art. IX § 17 (West, Westlaw current with amendments adopted through the Nov. 5, 2013 General Election) (providing for a minimum growth rate in education spending); MO. CONST. art. IX § 3(b) (West, Westlaw through the Nov. 6, 2012 General Election) (requiring a minimum percentage of annual state revenue to be set aside for education). For a fuller discussion of the Colorado and Missouri constitutions' funding provisions, see *infra* Part III.D.

39. *See* Thro, *supra* note 19, at 25–27.

40. Jensen, *supra* note 12, at 6.

ii. Idaho's Political Dynamics in Education Finance

Idaho's education clause proclaims, "[I]t shall be the duty of the [L]egislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools."[41] It is useful to distinguish between the Legislature's bare duty to "establish and maintain" the system (what this Note calls the "duty phrase"), and the particular qualities ("general, uniform and thorough") the system must have. The latter list of qualities is the clause's "qualitative phrase."[42]

In *Thompson*, the Idaho Supreme Court implied that the duty to fund education abides in the Legislature's dual mandate under the duty phrase to "establish and maintain" the education system.[43] But, because of Idaho's longstanding tradition of local education control, the Court was unwilling to find that this also required a statewide funding system and instead favored ongoing support from school districts.[44] The system of education the Legislature *establishes*, then, is in practice *maintained* by the Legislature and the 115 Idaho school districts through a combination of general revenue transfers and districts' property tax levies.[45]

Meanwhile, the Legislature receives a great deal of deference from the judiciary in the details of the system the Legislature maintains.[46] The Court's deference in this area extends beyond the Legislature's choice of legislation and broaches an arena traditionally left exclusively to the judiciary: constitutional interpretation. Here, the critical example is the education clause's requirement for a "thorough" system,[47] which

41. IDAHO CONST. art. IX, § 1 (West, Westlaw through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature).

42. Jensen, *supra* note 12, at 4.

43. Thompson v. Engelking, 537 P.2d 635, 653, 96 Idaho 793, 811 (1975) (observing that the Legislature has a mandate to establish a system of "basic, thorough and uniform education," and that the record did not show an "inadequacy of funding to maintain" that system).

44. *See id.* at 653, 96 Idaho at 811. The school districts had traditionally accomplished this through property tax levies. *Id.* at 653, 96 Idaho at 811.

45. Joki v. Meridian Sch. Dist. No. 2, No. CV-OC-1217745, at 12 (4th Jud. Dist. of Idaho Nov. 27. 2013) (unpublished memorandum decision) (on file with author) ("Idaho statutes place the burden of actually providing this system [of schools] on the local school districts and provide a funding mechanism for them."); *see also* FERGUSON, *supra* note 6, at 10. It should also be noted that Idaho receives substantial federal funds; in the 2010 fiscal year, federal funds accounted for 20% of total elementary-secondary revenues. *See* REVENUES AND EXPENDITURES, *supra* note 34.

46. *See Thompson*, 537 P.2d at 658, 96 Idaho at 816 ("[T]he resolution of socio-politico-educational policy decisions lie [sic] outside the ambit of our constitutional authority and within that of the [L]egislature."). In general, judicial deference to legislative education policy is a major factor in education finance litigation. Amy L. Moore, *When Enough Isn't Enough: Qualitative and Quantitative Assessment of Adequate Education in State Constitutions by State Supreme Courts*, 41 U. TOL. L. REV. 545, 563 (2010) (noting that "[e]ven a court that wants to be an activist" still defers to legislative education policy formulation).

47. Going forward, this Note refers to this as the "thoroughness requirement." Although the Idaho Supreme Court has recognized its duty under the separation of powers doc-

has been the focus of Idaho's education finance litigation since *ISEEO I*.[48] The Court has twice stated that the other branches' definitions of thoroughness were consistent with the Court's own view of thoroughness without clearly identifying how and without actually defining the word.[49] Thus, unless a challenger can demonstrate that the Legislature's definition of thorough is itself flawed, the Court has indicated that it will most likely adopt the Legislature's definition.[50]

The result is that the Legislature nearly has a two-fold corner on the how the education clause operates. Not only does the Legislature have plenary power to establish and maintain Idaho's system of education, but because of the deference the Court has given to the Legislature's own meaning of "thoroughness,"[51] the Legislature also has practical control over the most important standard by which its educational offerings are judged. This limits education reform because there may be a gap between the funding level the Legislature provides and the level actually needed to meet the system's modern demands.[52]

II. IDAHO'S SYSTEM OF EDUCATION FINANCE

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trine to interpret the thoroughness requirement, it also recognized the need to involve both the legislative and executive branches, stating that it "was not equipped to legislate in a 'turbulent field of social, economic and political policy.'" *ISEEO I*, 850 P.2d 724, 734, 123 Idaho 573, 583 (1993). The Court went on to say that its duty had "been made simpler" because thoroughness had already been defined by the State Board of Education pursuant to the Legislature's directive. *Id.* at 734, 123 Idaho at 583.

48. *See ISEEO I*, 850 P.2d at 734, 123 Idaho at 583; *ISEEO III*, 976 P.2d 913, 919–20, 132 Idaho 559, 565–66 (1998); *ISEEO V*, 129 P.3d 1199, 1204, 142 Idaho 450, 460 (2005).

49. *ISEEO I*, 850 P.2d at 734, 123 Idaho at 583 (holding that the then-existing standards for thoroughness outlined in the State Board of Education Rules and Regulations for Public School K-12 were consistent with the Court's own view of thoroughness); *ISEEO III*, 976 P.2d at 920, 132 Idaho at 566 (holding that new rules promulgated by the State Board of Education and the definition of thoroughness codified by the Legislature in I.C. § 33-1612 were "consistent with [its] view of thoroughness with respect to facilities"). The Idaho Supreme Court's only positive definition of thoroughness is "that a safe environment conducive to learning is inherently a part of a thorough system." *ISEEO III*, 976 P.2d at 920, 132 Idaho at 566. But even that minimum standard was already well established by both the Idaho Legislature and the Idaho State Board of Education. *See id.* at 920, 132 Idaho 559 at 566. Thus, the Court has had no essential role in defining thoroughness.

50. This is essentially the procedure lower courts have outlined for interpreting thoroughness. *ISEEO III*, 976 P.2d at 915, 132 Idaho at 561.

51. "A thorough system of public schools in Idaho is one in which: 1. A safe environment conducive to learning is provided; 2. Educators are empowered to maintain classroom discipline; 3. The basic values of honesty, self-discipline, unselfishness, respect for authority and the central importance of work are emphasized; 4. The skills necessary to communicate effectively are taught; 5. A basic curriculum necessary to enable students to enter academic or professional-technical postsecondary educational programs is provided; 6. The skills necessary for students to enter the work force are taught; 7. The students are introduced to current technology; and 8. The importance of students acquiring the skills to enable them to be responsible citizens of their homes, schools and communities is emphasized." IDAHO CODE ANN. § 33-1612 (West, Westlaw current through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature).

52. *See infra* Part II.B.

Although the Idaho Supreme Court has given tremendous deference to the Legislature, Idaho's education finance system was held unconstitutional in *ISEEO V* at the end of 2005.[53] This section examines the current funding scheme temporally: first, it evaluates the system the Court held unconstitutional; second, it evaluates the legislative response to *ISEEO V*; and finally, it evaluates the post-*ISEEO V* litigation landscape. It concludes that Idaho's public education system, while severely underfunded,[54] is, in practical terms, unchallengeable.

A. Pre-*ISEEO V*

Idaho policymakers have always been concerned with balancing the need for state-funded education with the state's tradition of local education control.[55] Yet it was not until 1933 that the state actually recognized an obligation to use general tax revenue to support public schools.[56] Ultimately, there came to be an "informal rule" that about half of the state's general fund would be appropriated for public schools.[57]

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53. *ISEEO V*, 129 P.3d at 1209, 142 Idaho at 460. In the intervening time between *ISEEO I* and *ISEEO V*, the Court reviewed mootness, Idaho Sch. for Equal Educ. Opportunity v. Idaho State Bd. of Educ. (*ISEEO II*), 912 P.2d 644, 128 Idaho 276 (1996), and whether facilities funding had to be equalized and not subject to voter approval, *ISEEO III*, 976 P.2d 913, 132 Idaho 559 (1998). Then, in 2004, the Court struck down a bill the Legislature enacted in 2003 "directed specifically at the ISEEO case" and designed to disrupt the plaintiff's cause of action. Idaho Sch. for Equal Educ. Opportunity v. State (*ISEEO IV*), 97 P.3d 453, 459, 140 Idaho 586, 592 (2004). As discussed at *infra* Part II.D, this bill, which amended the Constitutionally-Based Educational Claims Act (CBECA), still requires plaintiffs to litigate the education system's perceived deficiencies against the district first. Joki v. Meridian Sch. Dist. No. 2, No. CV-OC-1217745, at 4, 12 (4th Jud. Dist. of Idaho Nov. 27, 2013) (unpublished memorandum decision) (on file with author).

54. *See, e.g.*, Clark Corbin, *State Board Members Rip Luna's K–12 Budget*, IDAHOED NEWS (Oct. 17, 2013), http://www.idahoednews.org/news/state-board-members-rip-lunas-budget-proposal/ ("'I don't think anyone on the board or in the room would argue that we have adequately funded K–12 education.'") (quoting State Board of Education member and Task Force For Improving Education chairman Richard Westerberg); FERGUSON, *supra* note 6, at 6 ("This [reduction in public school spending as a percentage of personal income since 2000] is a stunning reduction in the state's commitment to public schools."); Scott Maben, *Idaho Still Ranks Low on Education Spending*, THE SPOKESMAN-REVIEW (May 22, 2013), http://www.spokesman.com/stories/2013/may/22/idaho-still-ranks-low-on-education-spending/ ("Idaho remains stuck near the bottom of public education funding, ranking second to last of all states in per-student spending for the third straight year.").

55. This concern found its way into pre-statehood constitutional debates, continued as a major principle undergirding the Idaho Supreme Court's *Thompson* decision, and remains an ongoing consideration in the formulation of education policy by the State Board of Education. Thompson v. Engelking, 537 P.2d 635, 647, 650–53, 96 Idaho 793, 805, 808–11 (1993); *School Consolidation Could Save $15 Million, According to Luna*, IDAHOREPORTER.COM (Mar. 25, 2010), http://www.idahoreporter.com/2010/school-consolidation-could-save-15-million-according-to-luna/ (reporting that State Superintendant Tom Luna does not want to make district consolidation mandatory, despite potential cost savings of $15 million).

56. Steve Guerber, Dir., Idaho State Historical Soc'y, A Brief History of Education in Idaho 8 (May 1, 1998), http://

Even so, 1993 saw the release of a Needs Assessment Report compiled by a committee pursuant to 1991 legislation; the report indicated that 57% of Idaho's public schools had serious safety problems.[58] In the ramp-up to *ISEEO V*, the district court filled twelve of its forty-eight page findings with a list of severe, unresolved problems related to structural integrity, fire hazards, drainage, plumbing, and drinking water.[59]

These findings, largely adopted by the Court in *ISEEO V*,[60] were significant not only because of the quantity of evidence recounted, but also because they identified a source of the problem: some of the inflicted facilities were in rural districts that had a declining property tax base and could simply not come up with the funds needed to finance their own capital improvements or replacements.[61] The "glaring gap" the district court identified was a funding system that "lacked a mechanism to deal quickly with major, costly, potentially catastrophic conditions by districts which [were] low in population, [had] a low tax base, and [were] in economically depressed areas which [could not] fund the cost of totally new construction."[62]

This funding gap had already been litigated under the uniformity requirement,[63] which the Idaho Supreme Court made clear "requires only uniformity in curriculum, not uniformity in funding."[64] The constitutional challenge in *ISEEO V* rested on the *thoroughness* requirement,[65] though apparently an outgrowth of similar underlying inequali-

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www.sde.idaho.gov/site/schoolsbudget/docs/Guerber%20presentation%20to%20SBOE,%20May%201998.pdf.

57. FERGUSON, *supra* note 6, at 2. This rule persisted through the 1990s when health and welfare spending began to crowd out education spending. *Id.* at 2–4.

58. Idaho Sch. for Equal Educ. Opportunity v. State, No. 94008, at 14 n.1, 15 (4th Jud. Dist. of Idaho Feb. 5, 2001), *available at* http://fourthjudicialcourt.idaho.gov/pdf/id_schools_decision.pdf (discussing the 1993 report). Ironically, *ISEEO I* was on appeal during a time of relative prosperity in education funding; in 1993, Idaho was spending 4.4% of its aggregate personal income on education—roughly in line with the previous ten-year average, and more than 1% higher than in 2013. FERGUSON, *supra* note 6, at 5 fig. 3. In 1992, this figure had been at a 33-year high of 4.8%. *Id.* at 5–6.

59. *See Idaho Sch. for Equal Educ. Opportunity*, No. 94008, at 3. Although citing only four districts as examples, the district court stated the problem was so widespread that the examples were only "illustrative." *Id.* at 37–40. A 1999 follow-up to the 1993 report found that 53 of the buildings needing "serious and immediate attention in 1993 had deteriorated even further." *ISEEO V*, 129 P.3d 1199, 1205, 142 Idaho 450, 456 (2005). The Idaho Supreme Court found the list of concerns "distressingly long" and that the "overwhelming evidence . . . compel[led] the district court's conclusion" that the system of funding at that time was constitutionally inadequate under the thoroughness provision of the education clause. *Id.* at 1205–06, 142 Idaho at 456–57.

60. *ISEEO V*, 129 P.3d at 1208, 142 Idaho at 459 ("[T]he evidence in the record clearly supports the district court's 2001 Findings.").

61. *Idaho Sch. for Equal Educ. Opportunity*, No. 94008, at 30.

62. *Id.* at 32.

63. Thompson v. Engelking, 537 P.2d 635, 636, 641, 96 Idaho 793, 794, 799 (1993); *ISEEO I*, 850 P.2d 724, 731, 123 Idaho 573, 580 (1993).

64. *ISEEO I*, 850 P.2d at 730–31, 123 Idaho at 579–80.

65. *ISEEO V*, 129 P.3d 1199, 1202, 142 Idaho 450, 453 (2005).

ties.[66] In theory, *ISEEO V* created an opportunity for the Court to flesh out the meaning of thoroughness. However, the complaint raised a very narrow aspect of thoroughness, alleging only that the State had failed to provide a thorough education by failing to provide safe facilities.[67] The logic of the Court's holding in *ISEEO V* was accordingly narrow: because the funding scheme failed to provide safe facilities to some districts, it also failed to meet the thoroughness requirement, but only insofar "as it relate[d] to school facilities."[68] The Court felt it had no reason to discuss the thoroughness of "course work and programming,"[69] and thoroughness remains minimally defined as access to a "safe environment conducive to learning."[70]

B. Legislative Response to *ISEEO V*

The Court's holding that the "method of funding as it relate[d] to school facilities" was inadequate had very specific concern: the system permitted a systemic underfunding of facility repair and replacement throughout the state.[71] More precisely, the problem was the system's reliance on borrowed funds to finance school repair and replacement.[72] In responding to this narrow holding, the Legislature passed the School Facilities Improvement Act (SFIA)[73] during the 2006 regular session.

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66. *Compare Thompson*, 537 P.2d at 667, 96 Idaho at 825 (Donaldson, J., dissenting), ("The poorer districts in the state cannot reach the funding levels of the wealthier districts . . . ."), *with ISEEO V*, 129 P.3d at 1204, 142 Idaho at 455 ("Idaho's schools, *particularly those in rural areas*, are stretched to the breaking point . . . .") (emphasis added).

67. *ISEEO V*, 129 P.3d at 1204, 142 Idaho 450 at 455 ("We again emphasize the current issues before the Court today relate solely to whether the Legislature has failed to provide an adequate means of funding school facilities."); *see also* Joki v. Meridian Sch. Dist. No. 2, No. CV-OC-1217745, at 9 (4th Jud. Dist. of Idaho Nov. 27, 2013) (unpublished memorandum decision) (on file with author) ("*ISEEO V* dealt with in [sic] the narrow issue of funding for school facilities, not the education system as a whole.").

68. *ISEEO V*, 129 P.3d at 1209, 142 Idaho at 458.

69. *Id.* at 1204, 142 Idaho at 455.

70. *ISEEO III*, 976 P.2d 913, 920, 132 Idaho 559, 566 (1998); *see also supra* note 49 and accompanying text.

71. *ISEEO V*, 129 P.3d at 1209, 142 Idaho at 460.

72. *Id.*; *see also* Idaho Sch. for Equal Educ. Opportunity v. State, No. 94008, at 31 (4th Jud. Dist. of Idaho Feb. 5, 2001), *available at* http://fourthjudicialcourt.idaho.gov/pdf/id_schools_decision.pdf (noting that the only fund source for a new school at the time was a bond issue, which required a supermajority voter approval).

73. Safe Facilities Improvement Act, 2006 Idaho Sess. Laws 956 (2006). The SFIA offered these five provisions: (1) it provided for a stream of funds into the School District Building Account rather than just a one-time contribution; (2) it "remove[d] artificial limits" on the index used to calculate the amount of funds to which districts were entitled under the equalized levy program; (3) it added a measure to assist school districts that had unsafe facilities but could not, through voter-approved levies, raise enough funds to remedy the problem; (4) it provided a system for state loans to districts to front the cost of repairs; and (5) it mandated that school districts begin setting aside funds for future facility needs. *Id.*

The SFIA was designed to meet with the Court's assumption that the Legislature would "carry out its constitutional duties in good faith and in a timely manner."[74]

The Court has never said whether the SFIA corrected the system's ills.[75] The Court had made it clear that it was the Legislature's responsibility to fashion a remedy and retained jurisdiction over the case following *ISEEO V* in order to evaluate the Legislature's "future . . . efforts to comply."[76] The Court has since issued a final order on the appeal—with apparent preclusive effect[77]—but has given no explanation regarding the remedy or final appeal.[78] Procedurally, there is nothing to appeal to the United States Supreme Court because the plaintiffs won the case on the merits; meanwhile, a state district court cannot provide a remedy because the Idaho Supreme Court has retained jurisdiction.[79] All of this has amounted to a very confusing and dissatisfying end to what would otherwise have been a significant plaintiffs' victory.[80]

Without more from the Court, it is hard to be certain that the SFIA adequately responded to *ISEEO V*.[81] The plaintiffs' attorney maintains

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74. *ISEEO V*, 129 P.3d at 1209, 142 Idaho at 460; *see also* Safe Facilities Improvement Act, § 1, 2006 Idaho Sess. Laws 956, 957–58 (2006). The stated purpose of the SFIA was "to fulfill the Legislature's responsibility under [Idaho's education clause], by establishing an ongoing, state-funded system for funding repair or replacement of unsafe school facilities in a manner that fairly and equitably balances the state and local contributions." § 1(7), 2006 Idaho Sess. Laws at 958. The Legislature had already introduced legislation in 2000 designed to cure some of the problems later identified in the district court's findings. *ISEEO V*, 129 P.3d at 1206, 142 Idaho at 457. That legislation provided funds for school facility repair and replacement and established a method for inspecting facilities and increasing facility levy repayment terms to reduce payments. *Id.* But it was not enough to pass constitutional muster in *ISEEO V* because the Court did not see these as long-term solutions to such a systemic problem, nor could the Court entirely attribute to this legislation the progress made in bringing Idaho school facilities up to par. *Id.* at 1206–07, 142 Idaho at 457–58.

75. *See* Kress v. Copple-Trout, CV-07-261-S-BLW, 2008 WL 352620 (D. Idaho Feb. 7, 2008), *on reconsideration*, CV-07-261-S-BLW, 2008 WL 2095602, at *3 (D. Idaho May 16, 2008) (discussing the informal closing of the *ISEEO V* appeal and the Idaho Supreme Court's lack of explanation after plaintiffs attempted to reopen the case to argue that the 2006 Legislature did nothing during the regular session to comply).

76. *ISEEO V*, 129 P.3d at 1208–09, 142 Idaho at 459–60.

77. *Kress*, 2008 WL 352620, at *3.

78. *Id.*

79. *Id.*

80. *See id.* ("Plaintiffs are seemingly stuck in limbo. They have succeeded on the merits before both the state district court and the Idaho Supreme Court. However, they have been neither granted nor expressly denied a remedy by the Idaho Supreme Court.").

81. There is some evidence that the SFIA was an adequate legislative response, but it is murky. First are the specific provisions of the SFIA, which ensured a flow of funds into capital improvements from both general revenue and local revenue sources, and ensured that poor districts had access to resources for safe facilities even if local voters did not pass needed levies. Safe Facilities Improvement Act, 2006 Idaho Sess. Laws 956 (2006). These provisions appear to aim at the Court's chief concern that the system did not provide enough funds for safe school facilities, particularly in districts that had a dire need for funds and could not get the voter approval needed to pass bond levies. *See ISEEO V*, 129 P.3d at 1203–04, 142 Idaho at 454–55.

Second, the approach taken by the Legislature roughly tracks some of the policies the Idaho Supreme Court referenced in *ISSEO V*. *See ISEEO V*, 129 P.3d at 1209, 142 Idaho at

that the Legislature has done nothing to comply.[82] But the State is budgeting more money for facilities,[83] and a 2009 legislative report showed that superintendents, board members, and teachers ranked facilities as a less pressing need than salaries and benefits, discretionary spending, classrooms and textbooks, and technology.[84]

Whatever the adequacy of the SFIA as a response to *ISSEO V*, this Note's position is that the current system of education finance is still inadequate on the whole. There are many more aspects of a thorough education[85] that are ignored when the Court and Legislature fixate on safe facilities. Thus, while facilities funding may have improved in the years since *ISEEO V*, those other aspects are still in need of attention—

460. There, the Court listed policies other states had used to provide safe facilities, two of which were to create an emergency fund for the most urgent facility needs and to fund school facilities using general funds. *Id.* While the SFIA gives no indication whether its provisions had any root in the Court's suggestions, the SFIA's creation of the public school cooperative funding program employed these options. *See* Idaho Code Ann. § 33-909 (West, Westlaw current through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature enacted as of April 3, 2014); *see also* LEGIS. SERVS. OFF., STATE OF IDAHO: 2006 LEGISLATIVE FISCAL REPORT 5 (2006), [hereinafter 2006 LEGISLATIVE FISCAL REPORT], *available at* http://legislature.idaho.gov/budget/publications/LFR/FY2007/FY2007LFR.pdf (discussing the first-ever appropriation from the General Fund into the bond levy equalization program, used to subsidize construction costs for the state's poorest districts).

The Court's silence on the matter is inconclusive. One could argue that because the Court implied that it would oversee compliance with *ISEEO V* and then closed the case, *Kress*, 2008 WL 352620, at *3, this might suggest that the Court tacitly approved the legislative resolution through the SFIA. But if that was the case, why would the Court not have stated this expressly when it issued its final order?

Ultimately, resolution of this issue is beyond the scope of this Note. The issue is discussed here to draw attention to an area of Idaho's education finance litigation that is still shrouded in confusion, and which will need to be part of any policy discussion going forward.

82. Amended Class Action Complaint*, supra* note 26, at para. 37.

83. *Compare, e.g.*, 2006 LEGISLATIVE FISCAL REPORT, *supra* note 81, § 1, at 3 (disclosing total facilities appropriations of $11,300,000 and $13,450,000 for fiscal years 2005 and 2006, respectively), *with* LEGIS. SERVS. OFF., STATE OF IDAHO: 2008 LEGISLATIVE FISCAL REPORT § 1, at 3 (2008), *available at* http://legislature.idaho.gov/budget/publications/LFR/FY2009/FY2009LFR.pdf (disclosing total facilities appropriations of $22,722,900 and $32,772,600 for fiscal years 2007 and 2008, respectively), *and* LEGIS. SERVS. OFF., STATE OF IDAHO: 2010 LEGISLATIVE FISCAL REPORT § 1, at 3 (2010), *available at* http://legislature.idaho.gov/budget/publications/LFR/FY2011/FY2011LFR.pdf (disclosing total facilities appropriations of $36,850,000 and $17,900,000 for fiscal years 2009 and 2010, respectively).

84. OFF. OF PERFORMANCE EVALUATIONS, IDAHO LEG., PUBLIC EDUCATION FUNDING IN IDAHO 63, 68 (Jan. 2009) [hereinafter OFF. OF PERFORMANCE EVALUATIONS], *available at* http://www.legislature.idaho.gov/ope/publications/reports/r0901.pdf. The poll also showed that stakeholders in urban districts saw facilities as a slightly more pressing need than did rural stakeholders. *Id.* at 70.

85. *See, e.g.*, *supra* note 51 and text accompanying note 83.

more attention, at least, than a bill like the SFIA that leaves the overall structure of the funding system intact.[86]

C. The 2006 Extraordinary Legislative Session and Beyond

In August 2006, just months after the Legislature passed the SFIA, then-Governor Jim Risch called a special session of the Idaho Legislature.[87] The product of this session was the Property Tax Relief Act,[88] which raised the Idaho sales tax 1% and eliminated the state property tax levy as a source of revenue supporting public school maintenance and operations (M&O).[89]

The effect of the tax swap was to reduce the portion of education funding relying on the state's property tax from roughly 25% to 10–15%.[90] To make up for the loss of state support, Idaho school districts have begun to increase funding through supplemental override levies.[91] Because these levies do not have the equalized quality of their state counterparts, there is evidence that their increased use is exacerbating disparities in funding capacity between districts.[92] Although this has been argued to be a violation of yet another constitutional provision,[93] this specific claim has not been litigated.[94]

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86. The formula used to calculate how funds were distributed between districts was undisturbed by the SFIA. *See* OFF. OF PERFORMANCE EVALUATIONS, *supra* note 84, at x (stating that as of January 2009, the funding formula had not been changed since 1994). For a discussion of this formula, see *Idaho Sch. for Equal Educ. Opportunity v. State*, No. 94008, at 43–45 (4th Jud. Dist. of Idaho Feb. 5, 2001), *available at* http://fourthjudicialcourt.idaho.gov/pdf/id_schools_decision.pdf.

87. FERGUSON, *supra* note 6, at 6; *House Revenue and Taxation Comm. Minutes*, IDAHO DIGITAL PUBLICATIONS (Aug. 25, 2006), http://legislature.idaho.gov/sessioninfo/2006/standingcommittees/hrev0825min.pdf.

88. Property Tax Relief Act of 2006, 2007 Idaho Sess. Laws 1st Ex. Sess. (2006).

89. FERGUSON, *supra* note 6, at 5. The estimated $210 million in new tax revenue generated from the sales tax increase was meant to replace the roughly $260 million from the property tax levy, the ultimate result being a reduction of $50 million in taxes. 2007 Idaho Sess. Laws 1st Ex. Sess. (2006) at 4; FERGUSON, *supra* note 6, at 7. The tax-reduction measure received broad public support. FERGUSON, *supra* note 6, at 7.

90. *See* FERGUSON, *supra* note 6, at 6 fig. 4 (demonstrating graphically the reduction in reliance on property taxes since the change made in 2006).

91. *Id.* at 9.

92. *Id.* at 16–19 (demonstrating that the increased reliance on unequalized supplemental override levies requires less taxing effort by a wealthy district compared to a poor district in order to raise the same dollar of levied funds). The difference between equalized and unequalized levies is that the former has an adjustment mechanism to account for the funding capacity disparities resulting from differences in taxable property value. *Id.* at 1 n.2.

93. *Id.* at 17. The argument is that the increased reliance on local supplemental levies violates the uniform tax provision in article VII, section 5 of the Idaho Constitution. *Id.* This provision requires that taxes be "uniform upon the same class of subjects within the territorial limits." IDAHO CONST. art. VII, § 5 (West, Westlaw through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature). Because these supplemental override levies are unequalized, a wealthy district with high property values can tax its citizens at a lower rate than a district with a comparatively low property value, yet still raise the same amount of funds. FERGUSON, *supra* note 6, at 17. For example, a resident of the Pocatello school district would have to be taxed at a rate of over 3.4 times higher

More importantly, as has already been discussed, the Court continues to hold that such disparities are not prohibited by the uniformity provision in the education clause.[95] In light of this precedent, drastic differences in funding capacity between districts simply do not appear to create a constitutional problem. The only known exception is if those disparities prevent poorer districts from having access to safe facilities conducive to learning, as in *ISEEO V*.

D. "Free" Education Under the Idaho Education Clause

Since *ISEEO V*, further attempts to declare the overall system of education funding inadequate have not succeeded.[96] Recently, a former school district superintendent brought suit claiming districts violated the "free common schools" provision of the education clause by charging registration fees.[97] The suit included a second cause of action that the State was inadequately funding education;[98] essentially, the plaintiffs sought a declaratory judgment that "the [L]egislature has not corrected the system found deficient in [*ISEEO V*]."[99] The complaint makes it clear that the lawsuit was an outgrowth of perceived ongoing and severe education funding problems in Idaho, by suggesting that the underfunding is the reason districts have to charge registration fees in the first place.[100]

This second cause of action was dismissed by the district court, based on the complaint's failure to "touch[] upon the adequacy of any facilit[y]."[101] The district court acknowledged the narrowness of the *ISEEO V* holding and observed that without alleging a problem related to school facilities, there was no claim to support relief.[102] The district court also noted that even if the complaint had invoked facts sufficient

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than a resident of the Coeur d' Alene district in order to raise the same dollar of revenue, as a result of the Coeur d' Alene district's thrice higher taxable property value. *See id.* at 12 tbl. 2 (compiling figures useful for calculating the tax rate differential).

94. *But see* Sch. Dist. No. 25, Bannock Cnty. v. State Tax Comm'n, 612 P.2d 126, 133, 101 Idaho 283, 290 (1980) (holding that article VII, section 5 is not violated unless the method used to value the property within a tax district somehow varies arbitrarily between classes of subjects within that district).

95. *See supra* Part II.A.

96. Following *ISEEO V*, the plaintiffs sought to reopen the case on the grounds that the Legislature did nothing in 2006 to cure the funding defects, which resulted in the procedural "limbo" discussed at *supra* Part II.B. *See* Kress v. Copple-Trout, CV-07-261-S-BLW, 2008 WL 352620 (D. Idaho Feb. 7, 2008), *on reconsideration*, CV-07-261-S-BLW, 2008 WL 2095602 (D. Idaho May 16, 2008).

97. Amended Class Action Complaint, *supra* note 26, at para. 1–2.

98. *Id.* at para. 2, 41.

99. Joki v. Meridian Sch. Dist. No. 2, No. CV-OC-1217745, at 9 (4th Jud. Dist. of Idaho Nov. 27, 2013) (unpublished memorandum decision) (on file with author).

100. Amended Class Action Complaint, *supra* note 26, at para. 2.

101. *Joki*, No. CV-OC-1217745, at 10.

102. *Id.*

to piggyback *ISEEO V*, the Court would have still pared down the class action because, under the Constitutionally Based Education Claims Act (CBECA),[103] the litigation had to start against the plaintiff's local school district.[104]

This case illustrates the ongoing dissatisfaction with Idaho's education funding system, and the perception that the alleged violation of the "free" requirement is symptomatic of persistent underfunding. It also demonstrates the difficulties a challenger faces because of the CBECA's local-district-first requirement and how insulated the State is from a declaration of inadequate funding.[105] At this point, and in light of the setbacks to the "free" clause litigation, at least as far as overall funding adequacy is concerned, it seems plaintiffs wanting to challenge the funding system are out of feasible options.

III. SOLUTION: CONSTITUTIONAL AMENDMENT

Taking the words of the education clause one at a time shows that the clause's effectiveness for reform has been exhausted. First, because district disparities do not violate the uniformity requirement, this requirement does not support a funding challenge even though such disparities persist.[106] Second, even if the SFIA did not sufficiently address the facilities problem underlying *ISEEO V*, a further remedy addressing system-wide inadequacy at this stage is unlikely.[107] Finally, a challenge to funding adequacy through the education clause's "free" provision, and by reviving *ISEEO V*, appears to suffer from procedural limitations.[108] In any case, the CBECA poses a serious obstacle to a broad inadequacy claim against the State.[109]

How can Idaho public schools get the funding they need? One solution involves a change more fundamental than a judicial decision or a legislative funding package: an amendment to the Idaho Constitution.[110]

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103. Constitutionally Based Education Claims Act, 1996 Idaho Sess. Laws 845 (1996) (current version at IDAHO CODE ANN. § 6-2215 (2009 & Supp. 2013)). For more context on the 2003 amendments to this Act held unconstitutional in *ISEEO IV*, see Robert C. Huntley, *Public Education School Funding Litigation in Idaho: A Tale of Legislative Irresponsibility and Delay*, 41 IDAHO L. REV. 247, 258–61 (2005).

104. *Joki*, No. CV-OC-1217745, at 11. Although amendments to the CBECA were struck down in *ISEEO IV*, the core provision still applies to claims raised after 2003. *Id.*; *see also supra* note 53.

105. *See Joki*, No. CV-OC-1217745, at 12 ("Plaintiffs . . . must exhaust their remedies under CEBECA [sic] before pursuing a general declaration that the entire school funding system in Idaho is unconstitutional.").

106. *See supra* Part II.A.

107. *See supra* Part II.B.

108. *See supra* Part II.D.

109. *See id.*

110. An Idaho court also made the suggestion that Idaho voters could change the state's constitution if they wanted a more explicit funding method than the Idaho Constitution provided. *ISEEO III*, 976 P.2d 913, 918, 132 Idaho 559, 564 (1998) (quoting the trial court). Furthermore, one scholar acknowledges that "[a]n argument can be made that states

There are good reasons why Idaho legislators should embrace amendment and why Idaho voters should pressure them to do so. A bolder mandate in Idaho's highest education law would likely spur immediate improvements, because under the duty phrase, the Legislature would be obligated to increase funding to "establish and maintain" the more exacting provisions of the amended clause. An amendment would also support improvements if future plaintiffs again have to resort to the judicial process to goad the Legislature into compliance. The Idaho Supreme Court would then have the opportunity—or duty—to issue more robust pronouncements as it interprets the new language.

Finally, and perhaps most importantly, amended language would improve the state's overall attitude toward education by prioritizing it. This, in turn, might impel a future Idaho judiciary to take a more assertive and transparent approach to protecting education, and to afford a clear and meaningful remedy if the Legislature fails to fund education adequately.

Admittedly, this solution has obstacles. Primarily, Idaho voters cannot directly amend their constitution through initiative,[111] as can voters in some states.[112] Instead, the amendment process requires a proposal by either chamber of the Idaho Legislature, followed by a supermajority vote of both houses; alternatively, two-thirds of both chambers can call a constitutional convention, which must then be submitted to the electorate at the next general election.[113] Since both options require participation by the very political body presiding over the current reduction in financial commitment to education, one might be justly skeptical of this solution. Even so, if the Legislature did propose an amendment, only a majority of Idaho voters have to approve it before it

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should amend their constitutions, where necessary, to reflect the state's actual concern and support for education." Jensen, *supra* note 12, at 42.

111. *See* IDAHO CONST. art. XX, § 1 (West, Westlaw through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature) ("Any amendment or amendments to this Constitution may be proposed in either branch of the [L]egislature."); IDAHO CONST. art. XX, § 3 (West, Westlaw through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature) ("Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to call a convention to revise or amend this Constitution, they shall recommend to the electors to vote at the next general election."); JAMES BENJAMIN WEATHERBY ET AL., GOVERNING IDAHO: POLITICS, PEOPLE AND POWER 82 (2005).

112. *See, e.g.*, COLO. CONST. art. V, § 1(2) (West, Westlaw current with amendments adopted through the Nov. 5, 2013 General Election); MO. CONST. art. III, § 50 (West, Westlaw through the Nov. 6, 2012 General Election; INITIATIVE & REFERENDUM INST. AT THE UNIV. OF S. CAL., COMPARISON OF STATEWIDE INITIATIVE PROCESSES, http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/A%20Comparison%20of%20Statewide%20I&R%20Processes.pdf (last visited June 29, 2014).

113. IDAHO CONST. art. XX, §§ 1, 3 (West, Westlaw through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature).

can take effect.[114] Thus, the main battle is pressuring the Legislature to take action.

Beyond the procedural hurdle, the Idaho Supreme Court's handling of the *ISEEO V* remedy calls into question whether a future win for plaintiffs would matter. That is, unless the Court is willing to assert a stronger role in overseeing the legislative response to a future finding of inadequate education funding, plaintiffs may face another hollow victory.

Despite these obstacles, constitutional amendment is the right approach chiefly because, as this Note has pointed out, it appears to be the *only* remaining approach. More importantly, if phrased properly, an amendment could actually heighten the Legislature's duty to provide for education, and, at the same time, steer the Idaho Supreme Court toward a stronger interpretive approach that is less deferential to the Legislature and more protective of education.

IV. COMPARATIVE STATE ANALYSIS

A. Introduction

The suggestion for constitutional amendment raises the question: exactly how should the Idaho Constitution be amended? In answering the question, it becomes highly relevant how other states have dealt with the issue and interpreted similar constitutional provisions.[115]

This Note takes a comparative approach to identify what changes could improve Idaho's education clause and, in turn, improve education funding. Because more comprehensive surveys of education clauses and associated litigation already exist,[116] such an approach is neither necessary nor desirable here. This Note does not intend to exhaust the possible options for amended language but rather to offer one solution that could yield improvements in Idaho.

It is worth justifying why Idaho should look to other states' clauses to improve its own. First, the variations between state education clauses and the educational offerings in those states provide natural bases for comparing the relative duties states owe their citizens, and the resulting outcomes.[117] Combined with the long history and high volume of litigation in this area,[118] these comparisons illustrate how educational offerings have been affected by the various permutations of education clause

114. IDAHO CONST. art. XX, §§ 1, 4 (West, Westlaw through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature).

115. *See* Thro, *supra* note 19, at 22.

116. *See, e.g.*, Jensen, *supra* note 12; Moore, *supra* note 46; Thro, *supra* note 19.

117. Thro, *supra* note 19, at 31.

118. Education finance litigation is now in its forty-first year; scholars credit *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) with at least partially starting the cascade of litigation. Thro, *supra* note 19, at 19.

language,[119] which is useful in isolating and examining the effectiveness of individual words.

Second, the Idaho Supreme Court has hinted that it values other states' interpretations and applications of their education clauses.[120] The Court discussed four states' interpretations in *Thompson*, largely adopting Washington's definition of "general and uniform."[121] Also, the Court observed in *ISEEO V* that four other states had developed financing schemes to "assist school districts in providing a safe environment conducive to learning."[122] Other state high courts can be persuasive, and their interpretations of similar language deserve consideration.

Comparisons have limitations. Most notably, each state has political, historical, or cultural uniqueness that makes exact comparisons unsound.[123] Similarly, each constitutional challenge within a jurisdiction has comparison-confounding idiosyncrasies. A court's interpretation of language may change over time,[124] and even consistent interpretations may be applied differently at different times or in different circumstances.[125]

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119. Particularly, education clauses have been an integral part of successful litigation and the quality of education offered in states after that litigation. Jensen, *supra* note 12, at 3–4.

120. The Idaho Supreme Court is not unique in this regard; many state high courts look to how other states have interpreted their education clauses. *See, e.g.*, Skeen v. State, 505 N.W.2d 299, 310–12 (Minn. 1993) (discussing eight states' interpretations of different education clause provisions).

121. The Washington Supreme Court had ruled that "[a] general and uniform system, that is, a system which, within reasonable constitutional limits of equality, makes ample provision for the education of all children, cannot be based upon exact equality of funding per child because it takes more money in some districts per child to provide about the same level of educational opportunity than it does in others." Thompson v. Engelking, 537 P.2d 635, 652, 96 Idaho 793, 810 (1975) (quoting Northshore Sch. Dist. No. 417 v. Kinnear, 530 P.2d 178, 202 (Wash. 1974), *overruled on other grounds by* Seattle Sch. Dist. No. 1 of King Cnty. v. State, 585 P.2d 71 (Wash. 1978)). The Idaho Supreme Court also discussed Arizona, California, and New Jersey in its *Thompson* decision. *Id.* at 651, 96 Idaho at 809.

122. *ISEEO V*, 129 P.3d 1199, 1209, 142 Idaho 450, 460 (2005) (surveying legislation in Hawaii, Kansas, New Jersey, and North Carolina).

123. *See, e.g.*, C. Scott Trimble & Andrew C. Forsaith, *Achieving Equity and Excellence in Kentucky Education*, 28 U. MICH. J. L. REFORM 599, 610 (1995) (noting that Kentucky's education reform may have been a function of the state's "paradoxical nature"); Farr & Trachtenberg, *supra* note 36, at 616–18 (identifying four unique factors shaping Texas's education reform).

124. The Texas Supreme Court, for example, initially held that "efficiency" was a near absolute standard, requiring "direct and close correlation between a district's tax effort and the educational resources available to it," and "substantially equal access to similar revenues per pupil." Edgewood Ind. Sch. Dist. v. Kirby (*Edgewood I*), 777 S.W.2d 391, 397 (Tex. 1989). The Texas Supreme Court used the "wiggle room" in this language to soften its approach in later litigation. Farr & Trachtenberg, *supra* note 36, at 693.

125. *See, e.g.*, *ISEEO I*, 850 P.2d 724, 735 n.2, 123 Idaho 573, 584 n.2 (1993) ("Our holding of the consistency of the IDAPA standards, [sic] with a definition of thoroughness is limited to the standards as they exist today. We express no opinion as to whether the IDAPA

While these limitations caution against over-simplification and generalization, there is still value in understanding how other high courts have dealt with similar constitutional challenges. To capitalize on this value, this Note mitigates the potential downsides in two ways. First, it points out where limitations apply and how they should temper predictions for Idaho. Second, it filters the states used for comparison to the most relevant examples. In choosing the examples, this Note considers factors such as: the success of education reform in that state, whether language from that state's education clause might have influenced Idaho's education finance jurisprudence if it had been part of Idaho's education clause, and the degree of similarity between that state and Idaho in terms of education finance systems and key litigation facts.

B. Prioritizing Education

i. Making Education a Fundamental Right

Before comparing specific education clause provisions, however, a more general difference between Idaho's education system and those in other states deals with whether the right to education is fundamental under the state constitution as a whole.

With *Thompson*, Idaho joined a host of states holding that education is not a fundamental right.[126] Courts in these states are more deferential to legislatures, and less likely to strike down education finance systems.[127] A plaintiff challenging an education finance system would prefer education be ascribed fundamental status, because that typically calls for strict scrutiny protection.[128] Strict scrutiny, in turn, involves less deference to legislatures.[129] In some states, courts have even combined strict scrutiny with adequacy requirements, declaring not only the right to education fundamental, but the right to an *adequate* education fundamental.[130] In New Hampshire's *Claremont School District v. Governor* (*Claremont II*), for example, this approach led the New Hampshire

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standards would be consistent with that definition if the Board of Education were to amend them.").

126. Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1326 (1992). For a list of states in which education *is* a fundamental right, see Ken Gormley, *Education as a Fundamental Right: Building a New Paradigm*, 2 F. ON PUB. POL'Y 207, 219 n.63 (2006).

127. Hubsch, *supra* note 126, at 1334.

128. *See* Kelly Thompson Cochran, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 431 (2000). Under strict scrutiny, laws must be "narrowly tailored to achieve a compelling government interest," where rational basis review only requires a "reasonable [relationship] to a legitimate government interest." *Id.* at 406. These standards of review operate in examinations of rights under the United States Constitution, and most states adopt the same approach in examinations of rights under their own constitutions. Gormley, *supra* note 126, at 224.

129. *See* Gormley, *supra* note 126, at 224.

130. Cochran, *supra* note 128, at 417 n.91 (citing Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353 (N.H. 1997) as an example).

Supreme Court to adopt the standards discussed in Part IV.C.ii, as "benchmarks of a constitutionally adequate public education" that the New Hampshire Legislature needed to implement.[131] Notably, "adequacy" does not appear in the New Hampshire education clause,[132] so *Claremont II* is remarkable in essentially reading that requirement into the New Hampshire government's duty to provide education.

Unfortunately, the Idaho Supreme Court has held education is not a fundamental right because the Idaho Constitution expresses it as a legislative duty and not as a positive right.[133] Therefore, in a challenge to the Idaho education finance system, plaintiffs must contend with rational basis review,[134] under which the Legislature receives the highest level of deference.[135] Because Idaho's constitution lacks the positive phrasing regarding education, challengers also lack the "strong[] textual basis for arguing that [their] government [has] a duty to provide support for . . . public education."[136]

ii. Paramountcy

Washington's education clause, in part, announces that it is the "paramount duty of the state to make ample provision for the education of all children."[137] The duty this language imposes is unique, particularly the coupling of "paramount duty" with "ample provision."[138] This heightened standard makes Washington's clause ideal for a constitutional challenge.[139]

Washington's Supreme Court has reviewed the overall adequacy of education funding twice.[140] In *Seattle School District No. 1 of King County v. Washington*, the state's supreme court held that the para-

131. *Claremont II*, 703 A.2d 1353, 1359 (N.H. 1997).

132. *See* N.H. CONST. pt. 2, art. 83 (West, Westlaw updated with laws current through Chapter 7 of the 2014 Reg. Sess., not including changes and corrections made by the State of New Hampshire, Office of Legislative Services).

133. *ISEEO I*, 850 P.2d 724, 733–34, 123 Idaho 573, 582–83 (1993). For a discussion on positive rights in state constitutions, see Cochran, *supra* note 128, at 431.

134. *See ISEEO I*, 850 P.2d at 734, 123 Idaho at 583 (discussing application of the rational basis test as the proper standard of review where no fundamental right or suspect class is involved).

135. *See supra* notes 46–50 and accompanying text.

136. Cochran, *supra* note 128, at 431.

137. WASH. CONST. art. 9, § 1 (West, Westlaw current through amendments approved 11-5-2013).

138. Seattle Sch. Dist. No. 1 of King Cnty. v. Washington, 585 P.2d 71, 85 (Wash. 1978).

139. Jensen, *supra* note 12, at 5–6. Scholars who have categorized education clauses according to the level of duty imposed on the state legislature have identified Washington's education clause as a Category IV (highest) example. Thro, *supra* note 19, at 22–24, 25 n.38 (summarizing categories outlined by Professors Grubb and Ratner and highlighting Washington as a Category IV example).

140. McCleary v. State, 269 P.3d 227, 230 (Wash. 2012).

mount duty-ample provision was not a mere preamble, but imposed an affirmative duty on the Washington Legislature.[141] In so holding, the Washington Supreme Court recognized not only this duty, but a "correlative right" of "equal [paramount] stature."[142] This means all Washington children enjoy a right to an amply provided education.[143] The Washington Legislature has recently been criticized for failing to discharge its duty,[144] but the initial result of *Seattle School District* was a substantial increase in education funding.[145]

McCleary v. State[146] was in many ways *Seattle School District* redux. In *McCleary*, the Washington Supreme Court reviewed the Washington Legislature's 2009 education reform package, and held that if fully funded, the system would be constitutional.[147] Noting that the state's overall K-12 funding experienced drastic cuts in the 2011–2013 operating budgets, the Court went on to hold that the Legislature failed to meet its duty by "consistently providing school districts with a level of resources that [fell] short of the actual costs of the basic education program."[148] The Court retained jurisdiction to monitor the Legislature's progress, imposing a 2018 deadline.[149] As part of the Court's remedial oversight, the Legislature must report its progress towards the goals outlined in *McCleary*.[150]

Washington's jurisprudence in this area is important because it has influenced Idaho's,[151] and because the facts underlying both states' education finance litigation are similar.[152] However, the two states' high

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141. *Seattle Sch. Dist.*, 585 P.2d at 91.

142. *Id.*

143. *Id.*

144. *See* Daniel C. Stallings, *Washington State's Duty to Fund K-12 Schools: Where the Legislature Went Wrong and What It Should Do to Meet Its Constitutional Obligation*, 85 WASH. L. REV. 575, 591–92 (2010).

145. *Washington: Major Cases*, EDUC. JUSTICE, http://www.educationjustice.org/states/washington (last visited June 29, 2014); *see also* Jensen, *supra* note 12, at 22.

146. McCleary v. State, 269 P.3d 227, 230 (Wash. 2012).

147. *Id.* at 231.

148. *Id.* at 261.

149. *Id.*

150. *See* John Stang, *Legislature Wonders if Supreme Court Will Accept its Homework Assignment*, CROSSCUT.COM (Aug. 2, 2013), http://crosscut.com/2013/08/02/olympia-2013/115807/legislature-wonders-if-supreme-court-will-accept-i/.

151. The Idaho Supreme Court used an early Washington equity case, *Northshore Sch. Dist. No. 417 v. Kinnear*, 530 P.2d 178 (Wash. 1974), to support its holding in *Thompson* that a general and uniform system did not require equal per-pupil funding. Thompson v. Engelking, 537 P.2d 635, 652, 96 Idaho 793, 810 (1975). The Court also adopted Washington's definition of "general and uniform." *See supra* note 121 and accompanying text. In *ISEEO III*, the Court distinguished *Seattle School District* because that case involved the unique "paramount duty" provision, and was therefore inapplicable. *ISEEO III*, 976 P.2d 913, 920–21, 132 Idaho 559, 566–67 (1998); *see also infra* note 155 and accompanying text.

152. For instance, both high courts have been called on to resolve equity cases arising from districts' disparate property values. *Compare, e.g.*, *Northshore Sch. Dist. No. 417*, 530 P.2d at 181 (noting that the petitioner's arguments included equal protection claims resulting from lower assessed property values, and allegations that the legislature had failed

courts came to different conclusions on analogous arguments related to financial support of education through voter-approved tax levies.[153] In *ISEEO III*, the plaintiffs argued that submitting override levies to voters violated Idaho's constitutional requirement for thoroughness—an argument parallel to that raised by the *Seattle School District* plaintiffs.[154] The Idaho Supreme Court distinguished *Seattle School District* on the basis that in Idaho, providing education is not the Legislature's paramount duty.[155] This implies that had there been a paramount duty provision, the argument against voter-approved levies might have succeeded. This would have forced the Idaho Legislature to reexamine the relative composition of state and local revenues, and the reliance on supplemental override levies currently giving rise to even greater disparities[156] may never have materialized.

More generally, Washington illustrates how a higher constitutional standard for education could improve judicial oversight in Idaho. The Washington Supreme Court's handling of the remedy in *McCleary*—imposing a deadline for the Legislature and requiring progress reports[157]—seems to be a natural outgrowth of the high regard for education created by the language of the Washington Constitution.[158] Compared with the confusion besmirching the Idaho Supreme Court's retention of jurisdiction following *ISEEO V*,[159] the Washington judiciary's commitment to post-*McCleary* oversight is a model of clarity and assertiveness. If Idaho's constitution held the Legislature to a paramount du-

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to provide a general and uniform education system), *with Thompson*, 537 P.2d at 636–37, 96 Idaho at 794–95 (summarizing its holding that Idaho's system did not violate equal protection nor the uniformity requirement even though there were disparities in per-pupil resources as a result of the state's reliance on property taxes), *and ISEEO I,* 850 P.2d 724, 729, 123 Idaho 573, 578 (1993) (discussing a portion of the complaint that "alleged that the disparities in funding caused by the property-tax system results in a system that does not provide a uniform education and violates the equal protection clause"). Both high courts have also dealt with complaints against levy schemes that ultimately raised adequacy concerns. *Compare* Seattle Sch. Dist. No. 1 of King Cnty. v. Washington, 585 P.2d 71, 97 (Wash. 1978) (holding that a constitutional system requires funds to be raised through "dependable and regular tax sources"), *with ISEEO V*, 129 P.3d 1199, 1203, 142 Idaho 450, 454 (2005) (agreeing with the trial court's finding that a system relying on loans for funding was unconstitutional).

153. *ISEEO III*, 976 P.2d at 917, 132 Idaho at 563; *Seattle Sch. Dist.*, 585 P.2d at 78.

154. *ISEEO III*, 976 P.2d at 920, 132 Idaho at 566. Voter-approved levies can create funding shortfalls because voters may not approve them, leaving districts starved for funds. *See* FERGUSON, *supra* note 6, at 17.

155. *ISEEO III*, 976 P.2d at 920–21, 132 Idaho at 566–67.

156. *See supra* notes 90–92 and accompanying text.

157. *See supra* text accompanying notes 149–50.

158. *See* McCleary v. State, 269 P.3d 227, 261 (Wash. 2012) ("This court cannot idly stand by as the legislature makes unfulfilled promises for reform. . . . A better way forward is for the judiciary to retain jurisdiction over this case to monitor . . . *the State's compliance with its paramount duty*.") (emphasis added).

159. *See supra* Part II.B.

ty to provide education, perhaps the Idaho Supreme Court would have likewise felt compelled to oversee the Legislature's *ISEEO V* remedy, or at the very least articulate whether the SFIA was indeed a sufficient legislative response.[160]

The Washington example supports the commonsense notion that a lofty education clause may inspire a government to provide high-quality education.[161] A constitutional requirement prioritizing education over other legislative agendas can channel more energy, focus, and resources into education.[162] Because the opposite seems to be happening in Idaho,[163] language similar to that in article IX of the Washington Constitution[164] could positively impact Idaho's education finance.

C. An "Efficiency" Requirement

The Idaho education clause's qualitative phrase specifies that the Legislature must establish and maintain "a general, uniform and thorough system of public, free common schools."[165] Taken individually, these words are not particularly unique; eight state constitutions require generality,[166] eight require uniformity,[167] and seven require thor-

160. *See generally supra* Part II.B.

161. *But see* Gormley, *supra* note 126, at 224 ("'[S]trong' education provisions do not necessarily produce strong judicial interpretations of those provisions."); Jensen, *supra* note 12, at 40–41 (noting the corollary that low-standard education clauses do not necessarily produce sub-par funding).

162. *See McCleary*, 269 P.3d at 249 ("'[P]aramount' means the State must 'amply provide for the education of all Washington children as the State's first and highest priority before any other State programs or operations.'") (quoting and affirming the trial court's definition of paramount).

163. *See generally* FERGUSON, *supra* note 6, at 1–5 (discussing the reduction in Idaho's financial support of education over a twenty-three year period, and the crowding out of education spending by health and welfare spending).

164. *See supra* text accompanying note 137.

165. IDAHO CONST. art. IX, § 1 (West, Westlaw through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature).

166. *See* ARIZ. CONST. art. XI, § 1 (West, Westlaw through legislation effective April 30, 2014 of the Second Regular Session of the Fifty-first Legislature); DEL. CONST. art. X, § 1 (West, Westlaw through 79 Laws 2014, ch. 227); IND. CONST. art. 8, § 1 (West, Westlaw current with all legislation of the Second Regular Session of the 118th General Assembly (2014) with effective dates through May 1, 2014); MINN. CONST. art. XIII, § 1 (West, Westlaw current with legislation of the 2014 Regular Session effective through May 15, 2014); N.C. CONST. art. IX, § 2(1) (West, Westlaw through the end of the 2013 Regular Session of the General Assembly); OR. CONST. art. VIII, § 3 (West, Westlaw through Nov. 6, 2012, General Election); S.D. CONST. art. VIII, § 1 (West, Westlaw through the 2013 Regular Session and Supreme Court Rule 13-17); WASH. CONST. art. 9, § 2 (West, Westlaw current through amendments approved 11-5-2013).

167. *See* ARIZ. CONST. art. XI, § 1 (West, Westlaw through legislation effective April 30, 2014 of the Second Regular Session of the Fifty-first Legislature); COLO. CONST. art. IX, § 2 (West, Westlaw current with amendments adopted through the Nov. 5, 2013 General Election); IND. CONST. art. 8, § 1 (West, Westlaw current with all legislation of the Second Regular Session of the 118th General Assembly (2014) with effective dates through May 1, 2014); MINN. CONST. art. XIII, § 1 (West, Westlaw current with legislation of the 2014 Regular Session effective through May 15, 2014); N.C. CONST. art. IX, § 2(1) (West, Westlaw through the end of the 2013 Regular Session of the General Assembly); OR. CONST. art. VIII, § 3 (West,

oughness.[168] But Idaho's is the only clause requiring all three.[169] Seven states with clauses containing at least one of either "general," "uniform," or "thorough" combine that requirement in hendiadys-type[170] phrases with "efficiency,"[171] and three others require efficiency in some stand-alone context.[172] All told, then, efficiency is a requirement in 20% of the states.[173]

Of the many plain meanings of "efficiency," one is the "use of resources so as to produce results of little waste."[174] Budget shortfalls and dismal prognoses for school financing in upcoming years have already made this concept a relevant consideration for policymakers.[175] Moreo-

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Westlaw through Nov. 6, 2012, General Election); S.D. CONST. art. VIII, § 1 (West, Westlaw through the 2013 Regular Session and Supreme Court Rule 13-17); WASH. CONST. art. 9, § 2 (West, Westlaw current through amendments approved 11-5-2013); WYO. CONST. art. 7, § 1 (West, Westlaw through amendments approved by the voters on November 6, 2012).

168. *See* COLO. CONST. art. IX, § 2 (West, Westlaw current with amendments adopted through the Nov. 5, 2013 General Election); MD. CONST. art. VIII, § 1 (West, Westlaw through chapters effective May 15, 2014, of the 2014 Regular Session of the General Assembly); MINN. CONST. art. XIII, § 1 (West, Westlaw current with legislation of the 2014 Regular Session effective through May 15, 2014); N.J. CONST. art. VIII, § 4, cl. 1 (West, Westlaw through amendments approved at Nov. 5, 2013 election); OHIO CONST. art. VI, § 2 (West, Westlaw through files 1 to 94 and statewide issue 1 of the 130th GA (2013-2014)); PA. CONST. art. III, § 14 (West, Westlaw through 2014 Regular Session Acts 1 to 21, 23 to 36 and 38 to 40); W. VA. CONST. art. XII, § 1 (West, Westlaw current with laws of the 2014 Regular and First Ex. Sess. with effective dates through June 2, 2014).

169. *See* IDAHO CONST. art. IX, § 1 (West, Westlaw through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature); Moore, *supra* note 46, at 561 n.142.

170. Hendiadys literally means "one through two"; it is a pair of words separated by "and" that expresses one idea. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 540 (10th ed. 1993). Generally the device combines words that could also be combined as an independent word and modifier (an example is the hendiadys "nice and warm" instead of "nicely warm"). *Id.* For analytical purposes, and for lack of a better term, this Note categorizes phrases such as "thorough and efficient" as hendiadyses when courts interpret them as a single concept, even though the courts and literature have not discussed them this way.

171. *See* DEL. CONST. art. X, § 1 (West, Westlaw through 79 Laws 2014, ch. 227); MD. CONST. art. VIII, § 1 (West, Westlaw through chapters effective May 15, 2014, of the 2014 Regular Session of the General Assembly); MINN. CONST. art. XIII, § 1 (West, Westlaw current with legislation of the 2014 Regular Session effective through May 15, 2014); N.J. CONST. art. VIII, § 4, cl. 1 (West, Westlaw through amendments approved at Nov. 5, 2013 election); OHIO CONST. art. VI, § 2 (West, Westlaw through files 1 to 94 and statewide issue 1 of the 130th GA (2013-2014)); PA. CONST. art. III, § 14 (West, Westlaw through 2014 Regular Session Acts 1 to 21, 23 to 36 and 38 to 40); W. VA. CONST. art. XII, § 1 (West, Westlaw current with laws of the 2014 Regular and First Ex. Sess. with effective dates through June 2, 2014); Moore, *supra* note 46, at 561 n.142.

172. ILL. CONST. art. X, § 1 (West, Westlaw current through 4/1/2014) ("efficient system of high quality"); KY. CONST. § 183 (West, Westlaw current with emergency effective legislation through the 2014 Regular Session) ("an efficient system of common schools"); TEX. CONST. art. VII, § 1 (West, Westlaw through the end of the 2013 Third Called Session of the 83rd Legislature) ("an efficient system of public free schools").

173. *See* sources cited *supra* notes 171–72.

174. *Edgewood I*, 777 S.W.2d 391, 395 (Tex. 1989).

175. Moore, *supra* note 46, at 563–564.

ver, education finance challenges based on efficiency requirements lend themselves to a type of hybrid adequacy argument that courts tend to find persuasive.[176] Finally, some states that have had successful education reform[177] have efficiency in their education clauses.[178] These are all reasons why Idaho education finance might benefit from an efficiency requirement.

There is another reason: Idaho's qualitative phrase specifies the type of education system the Legislature must establish and maintain, but as a whole, the education clause fails to address how the Legislature should do so.[179] This leaves much to legislative discretion, and there has been little to check the Idaho Legislature's understanding and administration of the education clause.[180] An efficiency requirement provides an important link between *all* ends (outputs) required by the qualitative phrase, and a legislature's chosen means (inputs).[181] Providing safe facilities is only one of these inputs—an efficiency requirement would give the Court cause to examine *all* of the Idaho Legislature's educational inputs.[182]

In some of the efficiency states where education clause challenges are justiciable,[183] judicial interpretations of the term can be broadly grouped into one of three overlapping yet analytically distinct interpretive models: first are those that associate efficiency with an objective,

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176. Jensen, *supra* note 12, at 27. "A hybrid suit combines the equal protection/equality claim with the education clause/adequacy claim." *Id. Edgewood I*, discussed at *infra* Part IV.C.i, was a hybrid suit. *Edgewood I*, 777 S.W.2d at 397; Jensen, *supra* note 12, at 31. For context on equity and adequacy claims, see *supra* note 12 and accompanying text.

177. Kentucky, New Jersey, and Texas have been identified as states that have "set new and higher standards" for education funding, at least in terms of equity. Charles S. Benson, *Definitions of Equity in School Finance in Texas, New Jersey, and Kentucky*, 28 HARV. J. ON LEGIS. 401, 401 (1991).

178. Thro, *supra* note 19, at 27 & n.58 (comparing the lack of plaintiff victories based on the word "uniform" with the relatively significant number of plaintiff victories based on the word "efficient").

179. Joki v. Meridian Sch. Dist. No. 2, No. CV-OC-1217745, at 11 (4th Jud. Dist. of Idaho Nov. 27, 2013) (unpublished memorandum decision) (on file with author).

180. *See supra* Part I.A.ii.

181. *See* Paul L. Tractenberg, *Beyond Educational Adequacy: Looking Backward and Forward through the Lens of New Jersey*, 4 STAN. J. C.R. & C.L. 411, 432 (2008) (observing that "efficient system" language constitutes a bridge between educational inputs like funding, and outputs like student performance). Efficiency "literally can encompass everything that goes on in the educational process." *Id.*

182. Alternatively, even an output-oriented approach to an efficiency requirement could lead the Idaho Supreme Court to be less deferential to the Legislature. For an illustration of an efficiency state's high court focusing on output, yet still "abandon[ing] its traditional deference to the [legislature,]" and "establish[ing] a clear direction for the state's education policy," see Trimble & Forsaith, *supra* note 123, at 608–09 (discussing *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989)); *see also infra* Part IV.C.ii.

183. Pennsylvania is an efficiency state that has not heard a challenge to the education clause because the state's supreme court has held the issue nonjusticiable. *See* Danson v. Casey, 399 A.2d 360, 428–429 (Pa. 1979); *see also Pennsylvania: Litigation*, EDUC. JUSTICE, http://www.educationjustice.org/states/pennsylvania.html (last visited June 29, 2014).

minimum level of funding required to carry out the education clause; second are those that define efficiency expansively; and third are those that treat efficiency with little distinction from the other word in its hendiadys pair.[184]

In this section, this Note postulates that an efficiency requirement could yield positive results for funding in Idaho. But there are a variety of ways the Idaho Supreme Court could interpret the requirement, leading to varied results. It needs to be drafted properly to avoid an emasculating interpretation.

i. The Minimally Adequate Model

Texas is an example of one interpretive model, under which efficiency serves to establish a minimum funding level as a prerequisite to the education clause's other mandates. In *Edgewood Independent School District v. Kirby* (*Edgewood I*), the Texas Supreme Court initially held that the efficiency provision in the Texas Constitution[185] required a close correlation between the resources available to districts and their relative tax effort.[186] After a series of failed legislative efforts to overcome Texas's vast 700-to-1 property value disparity, a feature responsible for severe funding inequalities between districts,[187] the Texas Supreme Court changed its approach and linked the efficiency and "general diffusion of knowledge" requirements.[188] This meant that so long as Texas districts had "substantially equal" access to funds up to a minimally adequate level, disparities beyond that did not violate the efficiency standard.[189] The minimally adequate level was, in turn, judged by students' access to "an accredited education."[190]

The Texas Supreme Court's interpretation is notable in finding this relationship between efficiency and the education clause's requirement

184. *See generally supra* note 170 (discussing the hendiadys device).

185. "[I]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an *efficient system of public free schools*." TEX. CONST. art. VII, § 1 (West, Westlaw through the end of the 2013 Third Called Session of the 83rd Legislature) (emphasis added).

186. *Edgewood I*, 777 S.W.2d 391, 397 (Tex. 1989). See *supra* note 36 and cited sources for context on *Edgewood I*.

187. Farr & Trachtenberg, *supra* note 36, at 615. By way of illustrating the severity of this figure, Idaho's disparity in property values between the richest and poorest districts (Avery and Snake River, respectively), while still troubling, is only 68-to-1. *See* FERGUSON, *supra* note 6, at 12 tbl. 2.

188. More precisely, this link was essentially a syllogism linking efficiency with equality, and equality with a "general diffusion of knowledge." *See* Farr & Trachtenberg, *supra* note 36, at 692; Jensen *supra* note 12, at 31.

189. The Texas Supreme Court defined "minimally adequate" in terms of the level required to meet the "general diffusion of knowledge" requirement also in the state's constitution. Farr & Trachtenberg, *supra* note 36, at 692–93. This required all districts to have "access to funds necessary to provide an accredited education." *Id.* at 693.

190. *Id.* at 692.

for a "general diffusion of knowledge."[191] In response to the litigation, Texas implemented a bill under which the property disparity dropped to 28-to-1,[192] illustrating the effectiveness of an efficiency requirement when property value disparity is the essential source of the adequacy problem.[193]

The reasoning in *Edgewood I* that found an "implicit link"[194] between efficiency and general diffusion is similar to the Idaho Supreme Court's reasoning in *ISEEO V* regarding thoroughness, with one key distinction. The Idaho Supreme Court affirmed that "'a system based on loans alone [was] not adequate to meet the constitutional mandate [of thoroughness],'"[195] but the Court never suggested that there was some minimal *level* of funding the Legislature failed to provide.[196] Instead, the Court was concerned that the Legislature had not provided poor districts with an adequate *means* of raising funds other than loans to finance capital improvements.[197] In theory, this might mean there is no minimally adequate funding level in Idaho—only a minimally adequate method. For those who want a minimum dollar commitment of State funding, this is troubling.

However, the distinction may be without a difference. The holding in *ISEEO V* with respect to thoroughness led to a logically similar result: thoroughness required access to safe facilities, so a system that permitted unsafe facilities in some districts was unconstitutional.[198] By implication, the minimally adequate level of funding in Idaho is that which provides districts with safe facilities. Understood this way, the thoroughness provision in Idaho establishes a minimally adequate funding level the same way efficiency does in Texas.[199] The primary differ-

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191. TEX. CONST. art. VII, § 1 (West, Westlaw through the end of the 2013 Third Called Session of the 83rd Legislature); Jensen, *supra* note 12, at 31 (discussing the Texas Supreme Court's recognition of an "implicit link . . . between efficiency and equality").

192. Farr & Trachtenberg, *supra* note 36, at 703. Texas plaintiffs later resumed litigation, *see Texas: Litigation*, EDUC. JUSTICE, http://www.educationjustice.org/states/texas (last visited June 29, 2014), but the state is still an example of "the dramatic improvements attainable through litigation," Farr & Trachtenberg, *supra* note 36, at 727.

193. This is important because many states, including Idaho, face the property disparity problem. *See* Farr & Trachtenberg, *supra* note 36, at 615 ("Although most states . . . have used some formula of adjustment to try to account for poor-property districts, the end result is the disparity displayed so vividly by Edgewood and Alamo Heights.") (summarizing the infamous example of two Texas school districts with extreme resource disparities); FERGUSON, *supra* note 6, at 12 (displaying a table of taxable property value organized by Idaho school district).

194. *See Edgewood I*, 777 S.W.2d 391, 397 (Tex. 1989); *supra* note 188.

195. *ISEEO V*, 129 P.3d 1199, 1203, 142 Idaho 450, 454 (2005) (quoting Idaho Sch. for Equal Educ. Opportunity v. State, No. 94008, at 8 (4th Jud. Dist. of Idaho Feb. 5, 2001), *available at* http://fourthjudicialcourt.idaho.gov/pdf/id_schools_decision.pdf).

196. *See id.* at 1209, 142 Idaho at 460.

197. *Id.*

198. *See supra* note 68 and accompanying text.

199. The Idaho Supreme Court has already alluded to this implicit link. For example, in *ISEEO I*, the Court stated that if the plaintiffs showed "that they [could not] meet the [education] standards established by the State Board of Education . . . with the money pro-

ence is the standard by which a court judges minimal adequacy.[200] Texas's access-to-accredited-education standard was high because of how the Texas Supreme Court associated efficiency with "general diffusion of knowledge."[201]

The possible benefits from an efficiency requirement interpreted under the minimally adequate model are two-fold. First, it may help a court establish the existence of a minimum funding level if none exists. Second, it may heighten the standard by which that level is judged. The impact on education funding under this model ranges from no impact (i.e. minimal adequacy is too low to matter) to significant impact (i.e. minimal adequacy is high). All of that depends, as it did in Texas, on the other language in a state's education clause and how a reviewing court establishes the relationship between efficiency and that language.

ii. The Kentucky Model

Under the second interpretive model, courts define efficiency expansively. Kentucky, the first and strongest example, saw perhaps the most effective reform from its education clause's requirement for an "efficient system of common schools throughout the state."[202] In *Rose v. Council for Better Education, Inc.*, the Kentucky Supreme Court established nine standards defining the characteristics of an efficient education system.[203] Among the standards was a requirement that the system be sufficiently funded and have a goal of developing "seven [student] capacities."[204] The legislative response to *Rose* was widespread reform,

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vided under the current funding system they will have presented an apparent prima facie case that the State has not established and maintained a system of thorough education." *ISEEO I*, 850 P.2d 724, 735, 123 Idaho 573, 584 (1993).

200. In Texas, the standard was access to an accredited education. *See supra* note 190 and accompanying text. In Idaho, the analogous standard would be access to safe facilities conducive to learning. *See supra* note 70 and accompanying text. Again, Idaho's limitation is this narrow construction of thoroughness; if access to safe facilities is the sole standard for minimal adequacy, one can see just how minimal the funding would be.

201. *See supra* notes 188–90 and accompanying text.

202. KY. CONST. § 183 (West, Westlaw current with emergency effective legislation through the 2014 Regular Session).

203. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212–13 (Ky. 1989).

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

which included changes to the state's funding scheme.[205] The law implementing *Rose* guaranteed a minimum commitment of spending by the state, and mandated that districts contribute a minimum of 0.3 cents per dollar of assessed value in the district.[206] The result of these dual minima was a $490 million injection into the Kentucky education system over a single academic year.[207] Kentucky's progress in reform drew national attention and boosted Kentucky students' graduation rates and test scores.[208] Eight other states have adopted the *Rose* seven-capacity standard.[209]

There are many reasons offered for the successful outcome in *Rose*, some of which might caution that *Rose* is not replicable.[210] Even so, an efficiency requirement in the Idaho education clause could catalyze dramatic reform—including funding improvements—if the Idaho Supreme Court interpreted the requirement this expansively. To start, requiring students to achieve "seven capacities" could inspire changes to Idaho's curricula and the funds needed to offer them. Also, a funding mechanism like Kentucky's, which included access to equalized funds,[211] could decrease the district funding disparities that spawned Idaho's education finance litigation.[212]

Although a *Rose*-style interpretation of efficiency would produce optimal results, it is also the least likely outcome in Idaho. First, as part of this expansive interpretation, the Idaho Supreme Court would be casting its definition of "efficiency" in terms of education standards, and then imposing those standards on the Legislature. This would, in effect, establish curricula guidelines—a level of policy influence the Idaho Supreme Court has already eschewed.[213] Second, even if the Idaho Su-

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205. For a discussion of the key features of Kentucky's post-*Rose* reform, see Trimble & Forsaith, *supra* note 123, at 612–13.

206. *Id.* at 612.

207. *Id.* at 613.

208. Debra H. Dawahare, *Public School Reform: Kentucky's Solution*, 27 U. ARK. LITTLE ROCK L. REV. 27, 48 (2004).

209. Alabama, Arkansas, Kansas, Massachusetts, New Hampshire, North Carolina, South Carolina, and Texas. *Kentucky: Court Interpretation of Education Article*, EDUC. JUSTICE, http://www.educationjustice.org/states/kentucky.html (last visited June 29, 2014).

210. Trimble & Forsaith, *supra* note 123, at 609–10 (highlighting as possible explanations that *Rose* gave the Kentucky General Assembly the "political cover and an intellectual framework for improving the schools"; that it created a sense of solidarity that mobilized the citizenry to support the change; that it was the result of key Kentucky leaders and organizations; that it did not involve a request for redistribution from wealthy to poor districts; and that Kentucky is unique).

211. *See, e.g.*, *id.* at 612 (discussing Kentucky's funding solution, which provided districts with equalized and unequalized choices for funding beyond the guaranteed minimum).

212. *See supra* text accompanying notes 20–24.

213. *See* Thompson v. Engelking, 537 P.2d 635, 640, 96 Idaho 793, 798 (1975) (rejecting arguments that the Idaho Constitution required equal per-pupil spending, because doing otherwise would be an "unwise and unwarranted entry into the controversial area of public school financing"); *ISEEO I*, 850 P.2d 724, 734, 123 Idaho 573, 583 (1993) ("This Court is not well equipped to legislate 'in a turbulent field of social, economic and political policy.'"); *ISEEO V*, 129 P.3d 1199, 1208, 142 Idaho 450, 459 (2005) ("It is not our intent to substitute

preme Court did adopt such guidelines, the Legislature would also have to catch the same vision of broad reform when shaping its response to the holding.[214] There is no way to predict whether this perfect storm would coalesce in Idaho the way it did in Kentucky; if it did, the result would be a tremendous win for education funding.

iii. The Hendiadys Model

Courts in efficiency states do not always interpret efficiency in meaningful separation from other education clause language.[215] This can happen when efficiency is included as one of the words in a hendiadys-type phrase.[216] For example, the New Jersey Supreme Court has consistently treated "the maintenance and support of a *thorough and efficient* system of free public schools"[217] as an adequacy requirement dealing with fiscal resources and their educational outcomes.[218] Similarly, Ohio case law indicates its education clause's requirement for a "*thorough and efficient* system of common schools"[219] roughly expresses the concept of a minimally sufficient level of educational resources.[220] New Jersey and Ohio's generalized interpretive approach may be an outworking of how the specific arguments in those states were litigated,[221] but it also illustrates the possibility that a court might not view efficiency in conceptual isolation from other words in the education

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our judgment on how to establish criteria for safe buildings or create a proper funding system for that of the Legislature.").

214. The Kentucky General Assembly's embracing of *Rose* was somewhat surprising to some. Trimble & Forsaith, *supra* note 123, at 609–10. Reasons for such a positive legislative response to *Rose* include the political cover and framework for reform it provided, the general call to action and sense of citizen-solidarity it created, and the fact that plaintiffs were not seeking to redistribute wealth from rich districts to poor districts. *Id.*

215. Tractenberg, *supra* note 181, at 429.

216. *See generally supra* note 170.

217. N.J. CONST. art. VIII, § 4, cl. 1 (West, Westlaw through Nov. 5, 2013 election) (emphasis added).

218. Tractenberg, *supra* note 181, at 431.

219. OHIO CONST. art. VI, § 2 (West, Westlaw through files 1 to 94 and statewide issue 1 of the 130th GA (2013-2014)) (emphasis added).

220. *See* DeRolph v. State, 677 N.E.2d 733, 741 (Ohio 1997) ("A school system could not be thorough and efficient if a 'school district was receiving so little local and state revenue that the students were effectively being deprived of educational opportunity.'") (quoting Cincinnati Sch. Dist. Bd. of Educ. v. Walter, 390 N.E.2d 813, 825 (Ohio 1979)). Ohio could also serve as an example of the minimally adequate interpretive model, with "access to educational opportunity" defining the standard of minimal adequacy. *See generally supra* Part IV.C.i.

221. Similar to Idaho, both New Jersey's and Ohio's education finance litigation began as equity challenges. *See* Tractenberg, supra note 181, at 420; Janis J. Winterhof, Note, *From Rationing Toilet Paper to Computer Hook-Ups With Moscow: Wealth-Based Disparities in Public School Financing Are Held Unconstitutional in DeRolph v. Ohio*, 31 CREIGHTON L. REV. 1251, 1255 (1998).

clause. This makes it difficult to isolate the effect of an efficiency requirement.

Still, one case deserves mention because it parallels *ISEEO V*. In *DeRolph v. State*, the Ohio Supreme Court struck down Ohio's financing scheme because the "evidence [was] overwhelming that many districts [were] 'starved for funds' and lack[ed] teachers, buildings, or equipment"[222] as a result of disparities in property value.[223] The Court identified such factors as insufficient funding for building maintenance, reliance on property taxes for revenue, and requirements for district borrowing[224]—the very problems identified in *ISEEO V*.[225]

The *DeRolph* Court, however, was less diplomatic than the Idaho Supreme Court, and its holding was much broader. Ohio's Supreme Court called for "a complete systematic overhaul," and apostrophized lawmakers that "the time ha[d] come to fix the system."[226] This is a stunning contrast to the Idaho Supreme Court's deferential and narrow *ISEEO V* holding.[227]

A key difference underlying Ohio and Idaho's education clauses is Ohio's efficiency requirement.[228] But the Ohio Supreme Court did not cite efficiency as the *precise* reason for its holding.[229] Part of the Ohio Supreme Court's reasoning rested on a concern that an education system not be "mediocre but be as perfect as could humanly be devised."[230] The Idaho Supreme Court never offered such lofty language as justification for *ISEEO V*.[231] Thus, while *DeRolph* may provide an example of what an efficiency requirement can accomplish, it may also only be a reflection of the different attitude towards education in Ohio.

Positive outcomes aside, the New Jersey and Ohio education clauses are best viewed as examples of how *not* to draft an efficiency requirement. This is because of the danger that efficiency not be given a useful, independent meaning when combined with another qualitative

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222. *DeRolph*, 677 N.E.2d at 745.

223. *Id.* at 746.

224. *Id.* at 747.

225. *See supra* Part II.A.

226. *DeRolph,* 677 N.E.2d at 745.

227. *See supra* Part II.A.

228. *Compare* IDAHO CONST. art. IX, § 1 (West, Westlaw through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature), *with* OHIO CONST. art. VI, § 2 (West, Westlaw through files 1 to 94 and statewide issue 1 of the 130th GA (2013-2014)).

229. At one point, the Ohio Supreme Court seemed poised to discuss efficiency separately from thoroughness, but went on to hold that the Ohio funding system "violate[d] the Thorough and Efficient Clause" as a whole. *DeRolph*, 677 N.E.2d at 775–776 (Ohio 1997).

230. *Id.* at 740 (quoting the Ohio Constitution's framers).

231. Although the Court recognized that ensuring the Legislature met its mandate under the thoroughness requirement was a "matter of great public importance," *ISEEO V*, 129 P.3d 1199, 1207, 142 Idaho 450, 458 (2005), the Court does not seem to value education as highly as the Ohio Supreme Court in *DeRolph*. Instead, in addition to holding education not to be a fundamental right, *ISEEO III*, 976 P.2d 913, 921, 132 Idaho 559, 567 (1998), the Court has stated that education is not even "implicit in [the] State's concept of ordered liberty." *ISEEO I*, 850 P.2d 724, 733, 123 Idaho 573, 582 (1993).

requirement. For Idaho's education funding to improve, it cannot risk an emasculating judicial interpretation of "efficiency."

iv. Efficiency Requirement Summary

Some efficiency states have experienced positive education finance reform. While it is impossible to credit the entirety of these reforms to that requirement, direct comparison helps isolate the usefulness of an efficiency requirement, and informs the difference it could make in Idaho. The possibilities range from, at worst, no difference if the requirement is drafted in a hendiadys-type phrase, to at best, a comprehensive overhaul of Idaho's education system.

Somewhere in the middle is the possibility for another *ISEEO V* type of holding, but couched in broader terms that lead to a more drastic legislative response. One commonality in all the examples this section discussed is the opportunity for broad reform that the efficiency requirement afforded in different contexts. This suggests that if such a requirement had existed in Idaho at the time of *ISEEO V*, even Idaho's narrow issue of facilities funding could have also led to broad reform. The facilities issue would have likely implicated both efficiency and thoroughness. Instead of holding the system unconstitutional because it failed to provide a thorough education "as it relate[d] to school facilities,"[232] the Idaho Supreme Court could have used the same narrow problem to hold the entire system inefficient. The difference is that a holding of inefficiency calls for broader reform,[233] because it implicates both resource inputs and educational outputs.[234] By contrast, as the actual legislative response to *ISEEO V* illustrates, a thoroughness problem alone seems to only call for small-scale legislation like the SFIA.[235]

An efficiency requirement appears to be a good step in improving Idaho's education clause. Nevertheless, because there are risks of interpreting this requirement in ways that limit reform, it should be combined with other improvements and drafted in a way to ensure it read as robustly as possible.

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232. *ISEEO V*, 129 P.3d at 1209, 142 Idaho at 460.

233. *Compare, e.g.*, *DeRolph*, 677 N.E.2d at 744 (admonishing the Ohio General Assembly "that it must create an entirely new school financing system" in order to meet the requirements of a "thorough and efficient" education system), *and Edgewood I*, 777 S.W.2d 391, 397 (Tex. 1989) ("More money allocated under the present system . . . would at best only postpone the reform that is necessary to make the system efficient."), *with ISEEO V*, 129 P.3d at 1209, 142 Idaho at 460 (suggesting "a number of alternatives to assist school districts in providing a safe environment conducive to learning" in order to meet the thoroughness requirement).

234. *See supra* note 181 and accompanying text.

235. *See supra* Part II.B.

D. Explicit Constitutional Funding Provisions

Although all fifty state constitutions mandate the establishment of an education system, it is rare for the constitutions to flesh the mandate out in great detail.[236] But there are exceptions, and these are offered in this section as examples of how Idaho could explicitly require its Legislature to meet a specific funding level.

Some constitutions require a basic level of funding tied to a figure such as total revenue or total student enrollment. For example, Missouri's constitution requires the state to provide a minimum level of education funding equivalent to 25% of state revenues.[237] Oklahoma's requires a minimum state commitment of $42 per pupil based on the prior year's enrollment,[238] and California's requires the greater of either $120 per pupil or $2400 per district.[239] California administers this requirement through equalized "revenue limits."[240]

Colorado's amended education clause establishes a growth rate in education funding,[241] instead of just an overall funding level. This was a response to an earlier amendment that limited the expansion of overall tax revenue to a specified formula, adversely affecting education funding.[242] Amendment 23 was designed to reverse this trend by requiring the state to increase per-pupil funding by a rate of 1% over inflation for ten years, and by a rate equal to inflation thereafter.[243] The provision was not a long-term solution, but did increase spending initially.[244]

Admittedly, these constitutional provisions do not guarantee improved education funding, because they are still susceptible to unfavorable judicial interpretations and budget crises. For example, the Missouri Supreme Court has held that a constitutionally adequate level of funding requires *no more* than the 25% minimum.[245] Oklahoma's high

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236. *See supra* notes 33, 38, and accompanying text.

237. MO. CONST. art. IX, § 3(b) (West, Westlaw through the Nov. 6, 2012 General Election).

238. OKLA. CONST. art. XIII, § 1(a) (West, Westlaw through amendments received through 11/1/2013).

239. CAL. CONST. art. IX, § 6 (West, Westlaw through urgency legislation through Ch. 16 of the 2014 Reg. Sess. and all propositions on the 6/3/2014 ballot).

240. HEATHER ROSE & MARGARET WESTON, CALIFORNIA SCHOOL DISTRICT REVENUE AND STUDENT POVERTY: MOVING TOWARD A WEIGHTED PUPIL FUNDING FORMULA 14 (2013), *available at* http://www.ppic.org/content/pubs/report/R_213HRR.pdf.

241. COLO. CONST. art. IX, § 17 (West, Westlaw current with amendments adopted through the Nov. 5, 2013 General Election). Colorado voters approved "Amendment 23" in 2000. Iris J. Lav & Erica Williams, *A Formula for Decline: Lessons from Colorado for States Considering TABOR*, CTR. ON BUDGET AND POL'Y PRIORITIES 7 (Updated Mar. 15, 2010), *available at* http://www.cbpp.org/files/10-19-05sfp.pdf.

242. Lav & Williams, *supra* note 241, at 4, 7.

243. *Id.* at 7.

244. *Id.*

245. Comm. for Educ. Equality v. Missouri, 294 S.W.3d 477, 488 (Mo. 2009) ("Plaintiffs are attempting to read a separate funding requirement into section 1(a) that would require the legislature to provide 'adequate' education funding in excess of the 25-percent requirement contained in section 3(b). Such language does not exist.").

court has refused to hear the merits on justiciability grounds,[246] and in 2003, California legislators imposed a change to the source of funds used to provide the constitutional minimum, which resulted in an overall reduction of funds.[247] Finally, the Colorado electorate's well-intentioned Amendment 23 was offset by the Colorado Legislature's subsequent redefinition of the base figure used to calculate the increase.[248]

Despite these limitations, tying some component of education funding to inflation, revenue, or enrollment is appealing because it provides a clear and objective guideline outside the imagination of legislators and judges. In Idaho, where the Court has avoided suggesting a particular funding system,[249] this approach might be a start to establishing a base level of state funding. Similar to Missouri's 25% requirement,[250] Idaho could make a formal, constitutional requirement out of the previously honored "informal rule that Idaho's public schools should receive one-half of the revenue appropriated from the General Fund."[251] Idaho could also follow Oklahoma or California and require a certain dollar figure per pupil be appropriated for education. If equalized, like in California, the provision could lessen funding disparities between Idaho districts. Finally, a provision like Colorado's demanding a certain growth rate in funding could actually increase funding for Idaho education.

Including an explicit funding requirement would likely not be a complete solution to providing a long-term and stable source of revenue for Idaho's education; however, when combined with the other suggestions for amended language, an explicit requirement could make an important difference by establishing a clear adequacy guideline.

V. APPLYING THE EXAMPLES

The climate for education finance reform in Idaho is stagnant. The issue has been litigated, and the education clause has already been employed to its most useful end: to produce a plaintiffs' victory in *ISEEO V.*

246. Okla. Educ. Ass'n v. State ex rel. Okla. Leg., 158 P.3d 1058, 1066 (Okla. 2007) ("Questions of fiscal and educational policy are vested in the Legislature, and its wisdom in these areas is not within the scope of this Court's review.").

247. ROSE & WESTON, *supra* note 240, at 14 n.22.

248. *Amendment 23 FAQs*, GREAT EDUC. COLO., http://www.greateducation.org/statistics-faqs/funding-faqs/amendment-23/ (last visited June 29, 2014).

249. *See ISEEO V*, 129 P.3d 1199, 1208–09, 142 Idaho 450, 459–60 (2005) ("By listing these alternatives [to Idaho's funding system], we are in no way usurping the Legislature's role; we leave the policy decisions to that separate branch . . . .").

250. MO. CONST. art. IX, § 3(b) (West, Westlaw through the Nov. 6, 2012 General Election).

251. FERGUSON, *supra* note 6, at 2; *see also supra* text accompanying note 57.

But after *ISEEO V*, Idaho still ranks among the lowest in such ratios as funding-per-pupil and public school spending-to-income.[252]

This Note has suggested that the primary reason for this lack of improved funding lies in the language of the education clause and how the Idaho Supreme Court has interpreted that language. Simply stated, there is a mismatch between what public schools need and what the system actually provides.[253] This could persist in the face of ever-growing demands on Idaho's education system unless the constitutional language is aligned with modern needs.

Plaintiffs in other states have experienced better progress under their education clauses. Language prioritizing education, efficiency requirements, and explicit funding provisions are examples of constitutional language that have helped these efforts by setting a higher bar. Using these examples, Idaho could fashion a constitutional amendment that would heighten the Legislature's duty and increase education funding. This Note discusses the possibilities in two stages, beginning with the simplest to implement.

A. Stage One: Simple Verbal Additions

The first stage involves simple but significant verbal additions to the following three components of the Idaho Constitution: Article I, and the qualitative and duty phrases of the education clause. The combination of changes would make education both a fundamental right and the top legislative priority, and would require that the system be efficient.

The first verbal addition would use positive language to make education a fundamental right. This addition is a direct response to *ISEEO I*, where the Idaho Supreme Court held "that the 'fundamental rights' found in [the] state constitution are those expressed as a positive right," which precluded the right to education from being ascribed fundamental status.[254]

Although this language could appear in Article IX with the rest of the education clause, the Court's discussion in *ISEEO I* implies the right would be better expressed on exactly the same plane as the other fun-

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252. *Compare* GOVERNMENTS DIVISION, U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES: 2006, at 11 tbl. 11, 12 tbl. 12 (2008), *available at* http://ftp2.census.gov/govs/school/06f33pub.pdf (ranking Idaho fiftieth in per-pupil spending and fortieth in spending-to-income based on data from 2005-2006 when *ISEEO V* was decided), *with* MARK DIXON, GOVERNMENTS DIVISION, U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES: 2011, at 11 tbl. 11, 12 tbl. 12 (2013), *available at* http://www2.census.gov/govs/school/11f33pub.pdf (ranking Idaho fiftieth in per-pupil spending and forty-third in spending-to-income based on data for fiscal year 2011).

253. *See generally* TASK FORCE FOR IMPROVING EDUCATION 29–30 (Idaho State Board of Education 2013), *available at* https://www.boardofed.idaho.gov/board_initiatives/education_improvement_taskforce/Task%20Force%20for%20Improving%20Education_Final_09-06-13.pdf (highlighting the dire financial needs of Idaho's public schools).

254. *ISEEO I*, 850 P.2d 724, 732, 123 Idaho 573, 581 (1993).

damental rights in Article I.[255] Thus, to make clear education's status as a fundamental right, an effective amendment would list "obtaining education"[256] alongside "enjoying and defending liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety."[257] This is the positive language the Court is looking for to establish a fundamental right, and a place among the other fundamental rights in Article I would drive that point deeper.

The amendment should take this notion a step further by modifying "education." Two possible modifiers discussed in this Note—"adequate" and "ample"—derive from the New Hampshire and Washington examples.[258] By definition, "ample" is "more than adequate,"[259] and thus is the stronger of the two modifiers. The positive right, therefore, would optimally be phrased as "obtaining an ample education."

This verbal addition would encourage the Idaho Supreme Court to do two new things. First, it would encourage the Court to apply strict scrutiny when the right is allegedly infringed.[260] This would be a boon to future plaintiffs, because it would require much less deference to the Legislature. Secondly, it would also require the Court to define "ample." This could lead the Court to adopt standards—the *Rose* standards, for example[261]—characterizing ample. Where the Court has traditionally been so reticent to influence education policy, this verbal addition might demand it.

The second verbal addition would borrow Washington's "paramount duty" language to establish education's heightened importance over other legislative endeavors.[262] Idaho needs this constitutional priority in order to stop the crowding out of education spending by health and welfare spending.[263]

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255. There, the Court quoted *Thompson*, asserting that education was on a "different plane" than the fundamental rights set forth in Article I. *Id.* at 733, 123 Idaho at 582.

256. Alternatively, one scholar recommends inserting the words "education constitutes a fundamental right of all citizens" to effect the same result. Gormley, *supra* note 126, at 224. This Note declines to follow this generic approach because it would muddy Article I's existing syntax and brevity. *See infra* text accompanying note 257.

257. IDAHO CONST. art. I, § 1 (West, Westlaw through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature).

258. It should be noted that neither states' education clause explicitly modifies the word "education" with "adequate" or "ample." *See* N.H. CONST. pt. 2, art. 83 (West, Westlaw updated with laws current through Chapter 7 of the 2014 Reg. Sess., not including changes and corrections made by the State of New Hampshire, Office of Legislative Services); WASH CONST. art. 9, § 1 (West, Westlaw current through amendments approved 11-5-2013). Instead, "adequate" was read into New Hampshire's fundamental right to education, and "ample" actually describes the Washington's required level of provision. *See* Part IV.B.i–ii.

259. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 39–40 (10th ed. 1993).

260. Gormley, *supra* note 126, at 224.

261. *See supra* note 204.

262. *See* WASH CONST. art. 9, § 1.

263. *See supra* note 57.

As the Washington Supreme Court realized, even a plain meaning of "paramount" would require a legislature to make "a first priority" out of ensuring "fully sufficient funds" for schools.[264] Thus, this seems to be the likeliest interpretation of paramount duty, and the amendment's drafters could simply include the provision as part of the Idaho education clause's duty phrase: "it shall be the [paramount] duty of the [L]egislature of Idaho, to establish and maintain a . . . system of . . . schools."[265]

The third verbal addition adds an efficiency requirement to the education clause. While this could spur fundamental change to Idaho's education finance system prior to litigation,[266] the benefits of an efficiency requirement would more realistically manifest through litigation itself.

The catalyst would be the Idaho Supreme Court's interpretation of the requirement. This Note has posited three models other state high courts have used, with varying degrees of impact on education funding.[267] Given the Court's history of interpreting the education clause conservatively, and with deference to the Legislature, one should not expect an expansive *Rose* interpretation.[268] The Court is simply too reticent to impose a set of guidelines that would affect curricula.[269]

Instead, it is more likely the Court would take the approach of the Texas Supreme Court in *Edgewood*.[270] This would still be a win for Idaho education, because it would call for a broad holding that the education funding system as a whole is inefficient, which, in turn, would call for broader change than what Idaho's SFIA produced. Moreover, an *Edgewood*-style efficiency interpretation directly addresses the district funding disparities afflicting Idaho's current funding system, because it associates "inefficiency" with inequity. Because funding disparities have been at the heart of Idaho's education finance litigation since *Thompson*, legislation aimed at reducing these disparities would also strike at the root problem.

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264. Seattle Sch. Dist. No. 1 of King Cnty. v. State, 585 P.2d 71, 91, 95 (Wash. 1978) (analyzing the plain meaning of the word "paramount" and then clarifying what that required of the Washington Legislature).

265. IDAHO CONST. art. IX, § 1 (West, Westlaw through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature). A 1998 amendment to Florida's constitution made providing education "*a* paramount duty" of the Florida Legislature. Gormley, *supra* note 126, at 223 (quoting FLA. CONST. art. IX, § 1) (emphasis added). This Note suggests that in order to promote the optimal interpretation, Idaho's amendment should use a definite article ("the" instead of "a") to define "paramount duty." That is, the goal is to establish one paramount duty: education. Using an indefinite article to describe this duty could lead to an interpretation that conflates it with other legislative duties.

266. This, of course, would depend on how the Legislature understands its duty under an efficiency requirement, and what legislation, if any, it enacts to produce efficiency.

267. *See supra* Part IV.C.

268. *See supra* Part IV.C.ii.

269. *But see supra* note 128 and accompanying text (discussing how making education a fundamental right could change this deferential approach through strict scrutiny).

270. *See supra* note 199 and accompanying text.

The reason such legislation has never been enacted is that the Idaho Supreme Court's decisions have not called for it.[271] The education clause's uniformity requirement, the likeliest constitutional grounds for attacking funding disparities, proved impotent for that purpose in *Thompson* and in *ISEEO I*.[272] An efficiency requirement, on the other hand, could spur that legislative response, because it could provide the textual link needed for the Court to finally recognize that all students deserve access not only to a safe environment, but to a more generous level of resources overall.[273]

There are two drafting considerations with an efficiency requirement. The first was discussed at *supra* Part III.A.iii, and advises against placing the requirement in a hendiadys phrase, which could lead to an emasculating judicial interpretation. Thus, Idaho should avoid simply placing "efficient" alongside some other provision of the qualitative phrase with a conjunctive link.

A related drafting consideration is whether "efficient" should modify the public school system,[274] or the Legislature's duty. Put another way, the question is whether efficient should relate to the clause's qualitative phrase or duty phrase. The better drafting move is the first, because it focuses on the education system as a whole. A system is "characterized by a functional relationship, organization, coordination, interconnection, and interdependence."[275] Rendering all these moving parts efficient makes system-wide change more realistic than simply requiring the legislature to legislate efficiently.

Taking the two verbal additions pertaining to the education clause together and using an Oxford comma[276] in the qualitative phrase would result in the following: "it shall be the [paramount] duty of the legislature of Idaho, to establish and maintain a general, uniform[,] thorough, [and efficient] system of public, free common schools."[277]

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271. *See, e.g.*, *ISEEO V*, 129 P.3d 1199, 142 Idaho 450 (2005); *see generally supra* Part II.

272. *See supra* notes 20–24 and accompanying text.

273. *See supra* Part IV.C.i.

274. *E.g.*, TEX. CONST. art. VII, § 1 (West, Westlaw through the end of the 2013 Third Called Session of the 83rd Legislature) (requiring an "*efficient system* of public free schools") (emphasis added).

275. Tractenberg, *supra* note 181, at 426 (describing the dominant traits of a "system" in the education context).

276. Why the Oxford (serial) comma? Because it is never wrong, and omitting it can create ambiguity. BRYAN A. GARNER, THE REDBOOK 4 (2d ed. 2006). Here, it is critical that "efficient" not lose its independent meaning, as in the hendiadys examples discussed at *supra* Part IV.C.iii. The Oxford comma keeps the essential word separate.

277. *See* IDAHO CONST. art. IX, § 1 (West, Westlaw through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature).

B. Stage Two: Explicit Funding Provision

The second stage explores adding an explicit education funding requirement like those discussed at *supra* Part IV.D to the Idaho Constitution. It should be explored prior to implementation because it is inherently complex, and it involves difficult policy questions: Should the constitution actually specify a level of funding? If so, how would that level be calculated, or account for inflation? Should it be tied to an independent figure like general revenue or enrollment? How would such a provision be integrated with Idaho's balanced budget provisions?[278] Answers to these questions should be supported by thorough economic analysis, which this Note has not attempted, and which Idaho leaders would do well to conduct.

Until then, the Legislature should gather relevant information, but should take up this sort of amendment after the verbal additions at *supra* Part V.A have been incorporated. Focusing political efforts on the simple changes first would lay a strong constitutional foundation for education, and would give time for the analytical work needed to successfully implement the second stage.

VI. CONCLUSION

When words fail, one option is to find new words—better words. Idaho plaintiffs seeking judicial declarations of and remedies for inadequate education funding face significant obstacles, which the existing education clause cannot remove. Even after the Idaho Supreme Court struck down the education finance system in *ISEEO V*, resources available to Idaho's public schools remain inadequate. This is primarily because of the minimal standards of Idaho's education clause, and the lines the Idaho Supreme Court has drawn when interpreting the clause's key provisions.

The words of Idaho's constitution have failed. Idaho needs to amend its constitution with better words in order to improve education funding. Idaho voters who share a recognition of the need for improved education funding should avail themselves of the constitutional amendment process, borrowing language from states that have seen successful education finance reform.

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278. IDAHO CONST. art. VII, § 1 (West, Westlaw through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature); IDAHO CONST. art. VIII, § 1 (West, Westlaw through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature). One can imagine how this would become problematic during times of economic distress, when spending cuts may be required. *See* Phil Oliff et al., *States Continue to Feel Recession's Impact*, CTR. ON BUDGET AND POL'Y PRIORITIES 1 (Updated June 27, 2012), *available at* http:// www.cbpp.org/files/2-8-08sfp.pdf.