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Justiciability, Adequacy, Advocacy, and the “American Dream”

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INTRODUCTION

THE financing of public elementary and secondary education in the fifty states is presently interwoven among judicial theories, various and often poorly designed concepts of educational adequacy, special interest groups, and what some might call legal and political theater. Since *Rose v. Council for Better Education, Inc.*, a multiplicity of state courts have examined a variety of claims involving equity and adequacy and the applicable state constitutional controlling language with a variety of theories, conflicting examinations, and differing results.² Nearly all state legislatures have

¹ Professor, Educational Administration and Policy, University of Florida. Much of this piece is adapted from the following of the author's previous works: R. Craig Wood & George Lange, *The Justiciability Doctrine and Selected State Education Finance Constitutional Challenges*, J. OF EDUC. FIN., Summer 2006, at 1, 1–18 [hereinafter Wood & Lange, *The Justiciability Doctrine*]; R. Craig Wood & George Lange, *Selected State Education Finance Constitutional Litigation in the Context of Judicial Review*, WEST'S EDUC. L. REP., 2006, at 1, 2–14 [hereinafter Wood & Lange, *Constitutional Litigation in the Context of Judicial Review*]; William E. Thro & R. Craig Wood, *The Constitutional Text Matters: Reflections on Recent School Finance Cases* (Oct. 2009) (unpublished manuscript, on file with the Ky. L.J.) (paper presented at Education Law Association Annual Meeting in Louisville, Kentucky); R. Craig Wood & Bruce D. Baker, *An Examination and Analysis of the Equity and Adequacy Concepts of Constitutional Challenges to State Education Finance Distribution Formulas*, 27 U. ARK. LITTLE ROCK L. REV. 125, 142–143 (2004); R. C. WOOD & ASSOCS., STATE OF RHODE ISLAND EDUCATION ADEQUACY STUDY: FINAL REPORT 1–5 (2007), <http://rcwoodassoc.com/pdf/rhodeisland.pdf> (presented to the Joint Committee to Establish a Permanent Education Foundation Aid Formula for Rhode Island).

² For a general discussion of this area, see R. CRAIG WOOD, EDUCATIONAL FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS—AN ANALYSIS OF STRATEGIES (3d ed. 2007); Thro & Wood, *supra* note 1, at 3 n.8, noting the following cases: Alabama: Opinion of the Justices, 624 So. 2d 107 (Ala. 1993); Alaska: Matanuska–Susitna Borough Sch. Dist. v. State, 931 P.2d 391 (Alaska 1997); Arizona: Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994); Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Arkansas: Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472 (Ark. 2002); DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); California: Serrano v. Priest, 557 P.2d 929 (Cal. 1976); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Colorado: Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); Connecticut: Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Florida: Schroeder v. Palm Beach

experienced a constitutional challenge regarding the equity and/or

County Sch. Bd., 10 So. 3d 1134 (Fla. Dist. Ct. App. 2009); Coal. for Adequacy and Fairness in Sch. Funding v. Chiles, 680 So. 2d 400 (Fla. 1996); Georgia: McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Idaho: Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724 (Idaho 1993); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Illinois: Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996); Blase v. State, 302 N.E.2d 46 (Ill. 1973); Indiana: Bonner *ex rel.* Bonner v. Daniels, 907 N.E.2d 516 (Ind. 2009); Kansas: Montoy v. State, 102 P.3d 1160 (Kan. 2005), *supplemented*, 112 P.3d 923 (Kan. 2005), *republished with concurring opinion*, 120 P.3d 306 (Kan. 2005); Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170 (Kan. 1994); Kentucky: Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Louisiana: La. Ass'n of Educators v. Edwards, 521 So. 2d 390 (La. 1988); Maine: Sch. Admin. Dist. No. 1 v. Comm'r., 659 A.2d 854 (Me. 1995); Maryland: Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); Massachusetts: Hancock v. Comm'r of Educ., 822 N.E.2d 1134 (Mass. 2005); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); Michigan: Milliken v. Green, 212 N.W.2d 711 (Mich. 1973); Minnesota: Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Missouri: Comm. for Educ. Equality v. State, 294 S.W.3d 477 (Mo. 2009); Comm. for Educ. Equality v. State, 878 S.W.2d 446 (Mo. 1994); Montana: Columbia Falls Elementary Sch. Dist. No. 6 v. State, 2005 MT 69, 326 Mont. 304, 109 P.3d 257; Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989); State *ex rel.* Woodahl v. Straub, 520 P.2d 776 (Mont. 1974); Nebraska: Neb. Coal. for Educ. Equity and Adequacy v. Heineman, 731 N.W.2d 164 (Neb. 2007); Gould v. Orr, 506 N.W.2d 349 (Neb. 1993); New Hampshire: Londonderry Sch. Dist. SAU No. 12 v. State, 958 A.2d 930 (N.H. 2008); Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997); Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993); New Jersey: Abbott v. Burke, 971 A.2d 989 (N.J. 2009); Abbott v. Burke, 693 A.2d 417 (N.J. 1997); Abbott v. Burke, 575 A.2d 359 (N.J. 1990); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); New York: Campaign for Fiscal Equity v. State, 801 N.E.2d 326 (N.Y. 2003); Reform Educ. Fin. Inequities Today v. Cuomo, 606 N.Y.S.2d 44 (N.Y. App. Div. 1993); Bd. of Educ. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); North Carolina: Hoke County Bd. of Educ. v. State, 599 S.E.2d 365 (N.C. 2004); Leandro v. State, 468 S.E.2d 543 (N.C. Ct. App. 1996), *rev'd*, 488 S.E.2d 249 (N.C. 1997); Britt v. N.C. State Bd. of Educ., 357 S.E.2d 432 (N.C. Ct. App. 1987), *aff'd*, 361 S.E.2d 71 (N.C. 1987); North Dakota: Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247 (N.D. 1994); Ohio: State *ex rel.* State v. Lewis, 789 N.E.2d 195 (Ohio 2003); DeRolph v. State, 780 N.E.2d 529 (Ohio 2002); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); Bd. of Educ. of the City Sch. Dist. of Cincinnati v. Walter, 390 N.E.2d 813 (Ohio 1979); Oklahoma: Okla. Educ. Ass'n v. State, 158 P.3d 1058 (Okla. 2007); Fair Sch. Fin. Council of Okla., Inc. v. State, 746 P.2d 1135 (Okla. 1987); Oregon: Withers v. State, 891 P.2d 675 (Or. Ct. App. 1995); Coal. for Equitable Sch. Funding v. State, 811 P.2d 116 (Or. 1991); Olsen v. State, 554 P.2d 139 (Or. 1976); Pennsylvania: Marrero v. Commonwealth, 739 A.2d 110 (Pa. 1999); Danson v. Casey, 399 A.2d 360 (Pa. 1979); Rhode Island: City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995); South Carolina: Abbeville County Sch. Dist. v. State, 515 S.E.2d 535 (S.C. 1999); Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988); South Dakota: Olson v. Guindon, 771 N.W.2d 318 (S.D. 2009); Tennessee: Tenn. Small Sch. Sys. v. McWherter, 91 S.W.3d 232 (Tenn. 2002); Tenn. Small Sch. Sys. v. McWherter, 894 S.W.2d 734 (Tenn. 1995); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Texas: Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746 (Tex. 2005); Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Vermont: Brigham v. State, 692 A.2d 384 (Vt. 1997); Virginia: Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994); Washington: Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978); Northshore Sch. Dist. No. 417 v. Kinnear, 530 P.2d 178 (Wash. 1974); Sch. Dists.' Alliance for Adequate Funding of Special Educ. v. State, 202 P.3d 990 (Wash. Ct. App. 2009), *reh'g granted*, 217 P.3d 337 (Wash. 2009); West Virginia: Bd. of Educ. of the County of Kanawha v. W. Va. Bd. of Educ., 639 S.E.2d 893 (W. Va. 2006); State *ex rel.* Bd. of Educ. of Randolph v. Bailey, 453 S.E.2d 368

adequacy of the state education finance distribution formula.³

It is the purpose of this paper to examine selected education finance constitutional challenges post-*Rose* with the observation that in certain instances such claims are without judicial merit and present claims that are essentially histrionic in nature. In addition, they are fundamentally lacking a sound substantive education finance research foundation upon which state constitutional claims can be based.

I. JUSTICIABILITY AND STATE CONSTITUTIONS⁴

State constitutions are inherently dissimilar from the United States Constitution. In order to grasp the complexity of the fifty state constitutions it is necessary to consider judicial theory, constitutional interpretation, and the unique nature of state courts and constitutions. Such considerations must distinguish state judiciaries and these courts' institutional and administrative roles from that of the federal courts;⁵ while the concept of

(W. Va. 1994); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Wisconsin: Vincent v. Voight, 614 N.W.2d 388 (Wis. 2000); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989); Wyoming: Campbell County Sch. Dist. v. State, 181 P.3d 43 (Wyo. 2008); State v. Campbell County Sch. Dist., 32 P.3d 325 (Wyo. 2001); State v. Campbell County Sch. Dist., 19 P.3d 518 (Wyo. 2001); Campbell County Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995); Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310 (Wyo. 1980); Sweetwater County Planning Comm. for the Org. of Sch. Dists. v. Hinkle, 491 P.2d 1234 (Wyo. 1971).

³ Thro & Wood, *supra* note 1, at 2–3 (citing *Bonner*, 885 N.E.2d at 692 n.5). Only Delaware, Hawaii, Mississippi, Nevada, and Utah have avoided litigation. *Id.* at 3 n.7.

⁴ Much of what appears in the first half of this piece is adapted or directly quoted from the following sources: Wood & Lange, *The Justiciability Doctrine*, *supra* note 1, at 1–18; Wood & Lange, *Constitutional Litigation in the Context of Judicial Review*, *supra* note 1, at 2–14. Quotation marks and indications of modifications have been left out for purposes of clarity and readability.

⁵ Federal courts are referred to herein as Article III courts given that the federal judiciary was specifically addressed in Article III of the United States Constitution, which reads as follows:

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a

judicial function and role has often been considered in general terms, the doctrines which apply to the United States Supreme Court and the lower federal courts are not completely apposite to state court adjudication.

Constitutions specify the delegation of governmental powers, while identifying rights that the government cannot breach.⁶ The authority granted to the courts to consider whether the actions of the government are consistent with these tenets and to invalidate those which fail to evidence fidelity with the same is commonly known as judicial review.⁷ The authority to determine the meaning and application of such review failed to garner even mention in the United States Constitution.⁸ Yet, as Alexander M. Bickel observed, "This is not to say that the power of judicial review cannot be placed in the Constitution; merely that it cannot be found there."⁹ The essence of the difficulty in defining and establishing the parameters for the institution was that judicial review stands as a "countermajoritarian force" in American democracy.¹⁰ One commentator, while weaving an historical and jurisprudential justification for review, nonetheless acknowledged that "judicial review is a deviant institution" in a democracy, given the power conferred to the judiciary to apply and construe a constitution or law

State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except of Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed with any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

U.S. CONST. art. III.

⁶ Wood & Lange, *Constitutional Litigation in the Context of Judicial Review*, *supra* note 1, at 2.

⁷ *Id.* (citing G. ALAN TARR, *JUDICIAL PROCESS AND JUDICIAL POLICYMAKING* 281 (3rd ed. 2003)).

⁸ *Id.*

⁹ *Id.* (citing ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 1 (2d ed. 1986)).

¹⁰ *Id.* (citing BICKEL, *supra* note 9, at 16).

against the wishes of the legislative majority and hence the citizenry of the republic.¹¹

The United States Supreme Court in *Marbury v. Madison* established the authority of the courts to review the actions of the other branches of government.¹² In essence, to leave such decisions to a legislature would be to allow those who the Constitution was constructed to limit to set those very limits.¹³ The concept of judicial review as a distinct arena of intervention followed in the years subsequent to *Marbury*.¹⁴

It has been observed that the “justiciability doctrine both reflects and shapes underlying assumptions about the judicial function.”¹⁵ Within this judicial institution rests the fact that its limits “are not universally recognized or well defined.”¹⁶ This is particularly evidenced in the justiciable treatment of the political question and separation of powers doctrines, which are of direct consequence to a contextual appreciation of education finance litigation.¹⁷ The “political question doctrine” is based on the view that certain issues are non-justiciable and, thus, inappropriate for judicial resolution; the courts find that the issue in question is more properly the province of the legislative and executive offices, these “political branches” being more structurally capable of addressing the issues in question.¹⁸ Phillip B. Kurland has noted that the non-justiciability of a political question is a function of separation of powers.¹⁹

11 *Id.* (citing BICKEL, *supra* note 9, at 18).

12 *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 146–49 (1803)).

13 *Id.* (citing BICKEL, *supra* note 9, at 3).

14 *Id.*

15 *Id.* at 3 (quoting Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1909 (2001)).

16 *Id.* (quoting *State v. Campbell County Sch. Dist.*, 32 P.3d 325, 340 (Wyo. 2001)).

17 *Id.*

18 *Id.* The Supreme Court has noted that

[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of [the legislature] or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as “courts are fundamentally underequipped to formulate national [or state] policies or develop standards for matters not legal in nature.”

Japan Whaling Ass’n. v. Am. Cetacean Soc’y, 478 U.S. 221, 230 (1986) (quoting *United States ex rel/ Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981)).

19 Wood & Lange, *Constitutional Litigation in the Context of Judicial Review*, *supra* note 1, at 3. Phillip B. Kurland has described the arrangement, observing that “[s]eparation of powers certainly encompasses the notion that there are fundamental differences in governmental functions—frequently but not universally denoted as legislative, executive, and judicial—which must be maintained as separate and distinct, each sovereign in its own area, none to operate in the realm assigned to another.” Phillip B. Kurland, *The Rise and Fall of the “Doctrine”*

Irrespective of constitutional theory, the contemplation of education finance litigation in the context of judicial review and characterizations of courts as activist or restrained must be drawn through the prism of state courts with varying constitutions.²⁰ When contemplating education finance litigation within the context of what Justice Louis Brandeis referred to as the “laboratories of democracy,” cognizance of the unique nature of these fifty venues is integral to any appreciation.²¹

The treatment of standing in federal and state courts is frequently accorded divergent applications.²² While the understanding of this principle in federal court is based upon the “case-or-controversy” requirement in Article III of the United States Constitution, the source of standing rules varies from state to state, as does the specific content.²³ Other limits of justiciability that are evidenced in Article III courts are also absent or attenuated in state judiciaries.²⁴ “State courts more typically find it their duty to resolve constitutional questions that federal courts would consider moot, elaborating constitutional norms as ‘a matter of public interest’ on the view that the other branches will benefit from receiving ‘authoritative adjudication for further guidance.’”²⁵

Additionally, federal courts cannot render advisory opinions; however, state courts often serve advisory roles, allowing them “to articulate constitutional principles, while effectively ‘remanding’ disputes back to the other branches.”²⁶ The institutional character of state judiciaries and the political branches as well as the fact that states are not required “to imitate the separation of powers prescribed for the federal government” leads to further distinctions.²⁷ State courts are often involved in administrative and oversight tasks that would not be contemplated at the federal level.²⁸

The nature of the state constitutions themselves also distinguishes the role of the state judiciary.²⁹ Unlike the United States Constitution,

of Separation of Powers, 85 MICH L. REV. 592, 593 (1986).

20 Wood & Lange, *Constitutional Litigation in the Context of Judicial Review*, *supra* note 1, at 4.

21 ROBERT L. MADDEX, *STATE CONSTITUTIONS OF THE UNITED STATES* xi (1998).

22 Wood & Lange, *Constitutional Litigation in the Context of Judicial Review*, *supra* note 1, at 4.

23 *Id.* (citing *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1081–82 (Ohio 1999); G. ALAN TARR & MARY CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* (1988)).

24 *Id.* at 5.

25 Hershkoff, *supra* note 15, at 1860 (footnotes omitted).

26 Wood & Lange, *Constitutional Litigation in the Context of Judicial Review*, *supra* note 1, at 5 (quoting Hershkoff, *supra* note 15, at 1851).

27 *Id.* (quoting *Risser v. Thompson*, 930 F.2d 549, 552 (7th Cir. 1991)).

28 *Id.*

29 *Id.*

state documents are plenary and inherent.³⁰ State constitutions resemble regulatory statutes, prescribing social and economic policy, the specificity of which creates a dynamic within which “[a] shortfall in enforcement may not simply be remitted to politics; it instead implicates the judiciary in a collaborative process of elaborating the constitutional mandate.”³¹

II. ACTIVIST AND RESTRAINED COURTS

In the realm of education finance litigation, judicial review is not coextensive with judicial activism.³² That said, a number of cases exhibit a trend of venturing beyond simply stating what the law is, and into the realm of dictating what it should be.³³ Conversely, certain courts have demonstrated a level of restraint, if not reticence, to expand beyond a conscripted role, which is more remarkable given the venue of state judiciaries.³⁴

A. Examples of Judicial Restraint

The Supreme Court of Rhode Island provided the quintessential example of judicial restraint in *City of Pawtucket v. Sundlun*.³⁵ In that case, the court upheld the state methodology for distributing state and local funds for public education under the state constitution’s education clause and equal protection provision.³⁶ The court stated that it would “not invalidate a legislative enactment unless the party challenging the enactment can prove beyond a reasonable doubt to this court that the statute in question is repugnant to a provision in the constitution.”³⁷ Further, the court acknowledged the importance of education, yet ruled that “the analysis of the complex and elusive relationship between funding and ‘learner outcomes,’ when all other variables are held constant, is the responsibility of the Legislature.”³⁸

The court counseled that to venture into that realm risked engaging the judiciary in “a morass comparable to the decades-long struggle of the Supreme Court of New Jersey that ha[d] attempted to define what constitutes the ‘thorough and efficient’ education specified in that state’s

³⁰ *Id.*

³¹ *Id.* (quoting Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1156 (1999)).

³² *Id.*

³³ *Id.* at 5–6.

³⁴ *Id.* at 6.

³⁵ *Id.* (citing *City of Pawtucket v. Sundlun*, 662 A.2d 40, 42 (R.I. 1995)).

³⁶ *Id.* (citing *Sundlun*, 662 A.2d at 42).

³⁷ *Id.* (citing *Sundlun*, 662 A.2d at 45).

³⁸ *Id.* (citing *Sundlun*, 662 A.2d at 57).

constitution.”³⁹ Addressing equity, the court noted “the inherent risks of a judicially imposed constitutional mandate that requires equity in funding contingent on ‘learner outcomes.’”⁴⁰

The Illinois Supreme Court also presents an example of judicial restraint in *Committee for Education Rights v. Edgar*.⁴¹ In a state constitution where the education clause would seemingly require a high standard of education for all students,⁴² the high court found that significant revenue disparities resulting from the state’s reliance on local property wealth to fund education did not offend either the education article or equal protection provision of the state constitution.⁴³ Plaintiffs relied upon the education article’s call for an “efficient system of high quality public educational institutions and services,” and the treatment of education as a “fundamental goal” to argue that the disparities violated the text and created educational inadequacies.⁴⁴

The court declined to address the question of what constituted an adequate or quality education, stating that it would not “presume to lay down guidelines or ultimatums for [the legislature]” and that “it would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution.”⁴⁵ The court explained, “[W]hile the framers of the 1970 Constitution recognized the importance of ‘the educational development of all persons to the limits of their capacities,’ they stopped short of declaring such educational development to be a ‘right,’ choosing instead to identify it as a ‘fundamental goal.’”⁴⁶ Characterizing the constitutional language as a “purely hortatory statement of principle,” not a specific command, the court resorted to *San*

39 *Id.* at 6–7 (citing *Sundlun*, 662 A.2d at 59).

40 *Id.* at 7 (citing *Sundlun*, 662 A.2d at 61).

41 *Id.* (citing *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1180–81 (Ill. 1996); *Coal. for Adequacy and Fairness in Sch. Funding v. Chiles*, 680 So. 2d 400, 402 (Fla. 1996) (providing a similar example of restrained judicial posture)).

42 Article X, § 1 of the Illinois Constitution stated in part:

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.

The State shall provide for an efficient system of high quality public educational institutions and services. . . .

The State has primary responsibility for financing the system of public education.

ILL. CONST. art. X, § 1.

43 Wood & Lange, *Constitutional Litigation in the Context of Judicial Review*, *supra* note 1, at 7 (citing *Edgar*, 672 N.E.2d at 1183).

44 *Edgar*, 672 N.E.2d at 1189 (quoting ILL. CONST. art. X, § 1).

45 Wood & Lange, *Constitutional Litigation in the Context of Judicial Review*, *supra* note 1, at 7 (quoting *Edgar*, 672 N.E.2d at 1192).

46 *Id.* at 8 (quoting *Edgar*, 672 N.E.2d at 1195).

Antonio Independent School District v. Rodriguez to turn aside the plaintiff's contention that education's relationship with other aspects of citizenship warranted its treatment as a fundamental right.⁴⁷

B. Examples of Judicial Activism

Other state judiciaries have found themselves at the opposite extreme, standing as exemplars of judicial activism.⁴⁸ In 1997 the Supreme Court of Vermont struck down the state's public education finance distribution methodology in *Brigham v. State*.⁴⁹ The plaintiffs, in seeking equity rather than adequacy, did not allege that the public education system was inadequate or failed to provide basic academic skills.⁵⁰ The supreme court overturned a trial court's judgment for the state and, in doing so, presented an interpretation of a simple education clause that could only be grounded in legal realism, usurping the will of the legislature with its own and utilizing the article not only as a subsidiary of an equal protection claim, but an essential aspect of its ruling.⁵¹ The Vermont constitution's education article mandated that "a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth."⁵² The state supreme court took this phrase and inferred a mandate far beyond the clear text. The court directed the legislature "to make educational opportunity available on substantially equal terms," and directed the lower court to retain jurisdiction "until valid legislation is enacted and in effect."⁵³

In contrast to *Committee for Educational Rights v. Edgar*, Vermont's high court rejected the contention that the clauses were meant to be "aspirational ideas"⁵⁴ in marking education as "essential to self-government."⁵⁵ Yet, what exactly constituted the characteristics of an adequate education to meet this challenge was not specifically detailed; rather, the court presumed that the disparities in and of themselves evidenced inadequacy.⁵⁶

The Wyoming Supreme Court presents an extreme level of activism as reflected in a series of rulings.⁵⁷ The court has interjected itself into

47 *Id.* (citing *Edgar*, 682 N.E.2d at 1187, 1194).

48 *Id.*

49 *Id.* (citing *Brigham v. State*, 692 A.2d 384, 397 (Vt. 1997)).

50 *Id.* (citing *Brigham*, 692 A.2d at 387).

51 *See Brigham*, 692 A.2d at 386–87.

52 Wood & Lange, *Constitutional Litigation in the Context of Judicial Review*, *supra* note 1, at 8 (quoting Vt. CONST. ch. II, § 68).

53 *Id.* (quoting *Brigham*, 692 A.2d at 398).

54 *Brigham*, 692 A.2d at 394.

55 *Id.* at 393.

56 *Id.* at 389–90.

57 Wood & Lange, *Constitutional Litigation in the Context of Judicial Review*, *supra* note 1, at

education policy and crafted challenging goals and requirements from sparse constitutional text.⁵⁸ In 1980 with *Washakie County School District No. One v. Herschler*, the court struck down the state's education finance distribution funding formula, ruling it unconstitutional under the equal protection clause of the Wyoming Constitution.⁵⁹ Then in 1995, for the second time in less than two decades, the Wyoming Supreme Court again invalidated the state public education funding provisions in *Campbell County School District v. State*.⁶⁰ Referencing the financing redesign implemented in the wake of *Washakie*, the state acknowledged that disparities still remained but argued that plaintiffs had failed to demonstrate "that the challenged features significantly deprived, infringed upon, or interfered with their educational rights."⁶¹ The court ruled that the state's education article demanded "a uniform opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually."⁶² The opinion declared that "[s]upporting an opportunity for a complete, proper, quality education is the legislature's paramount priority."⁶³

In compliance litigation six years following *Campbell I*, the Wyoming Supreme Court ruled that the state had yet to fulfill the judicial order "to provide and fund an education system which is of a quality appropriate for the times."⁶⁴ The state argued that what fiscal disparities remained were due to acceptable cost differences and not reflective of local wealth.⁶⁵ The court acknowledged this point, yet found that differences "may be due to political decisions or a failure to adequately measure differences

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58 *Id.*

59 *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 315 (Wyo. 1980).

60 Wood & Lange, *Constitutional Litigation in the Context of Judicial Review*, *supra* note 1, at 9 (citing *Campbell County Sch. Dist. v. State (Campbell I)*, 907 P.2d 1238, 1244 (Wyo. 1995)).

61 *Id.* (quoting *Campbell I*, 907 P.2d at 1250).

62 *Id.* (quoting *Campbell I*, 907 P.2d at 1259). Article VII, § 1 of the Wyoming Constitution stated,

The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary.

WYO. CONST. art. VII, § 1.

63 Wood & Lange, *Constitutional Litigation in the Context of Judicial Review*, *supra* note 1, at 9 (citing *Campbell I*, 907 P.2d at 1259).

64 *Id.* (citing *State v. Campbell County Sch. Dist. (Campbell II)*, 19 P.3d 518, 538 (Wyo. 2001)).

65 *Id.* (citing *Campbell II*, 19 P.3d at 536).

in cost because of time constraints or gaps in the data, and those reasons are no more acceptable than wealth differences.”⁶⁶ In a decision which scrutinized all aspects of the state public education system, the court reserved for its consideration what constituted an education “appropriate for the times,” asserting that the constitutional question was one the court alone must answer.⁶⁷ These cases are distinguished by a determination to create constitutional standards beyond the discovery of those that are presently articulated therein, a stress on the primacy of education to other state concerns, and an adherence to an independent vertical judicial federalism while simultaneously demonstrating a pronounced horizontal federalism posture.⁶⁸

The course of education finance litigation in New York State culminated in the 2003 court of appeals’ decision in *Campaign for Fiscal Equity, Inc. v. State*.⁶⁹ It began, however, in 1995 when the Court of Appeals of New York was “called upon to decide whether plaintiffs’ . . . complaint pleads viable causes of action under the Education Article of the State Constitution, the Equal Protection Clauses of the State and Federal Constitutions, and Title VI of the Civil Rights Act of 1964 and its implementing regulations.”⁷⁰ In finding for the plaintiffs on the first and last of these charges, the court addressed the interpretation of the education article proffered in *Board of Education of Levittown Free School District v. Nyquist*.⁷¹ The court, in an opinion that expanded a judicial appreciation of a “basic education,” asserted that education “should consist of basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.”⁷² Absent in

⁶⁶ *Id.* at 9–10 (citing *Campbell II*, 19 3d at 536).

⁶⁷ *Id.* at 10 (citing *Campbell II*, 19 P.3d at 539).

⁶⁸ As noted, horizontal judicial federalism refers to the utilization of sister state constitutional interpretations in analysis of constitutional text; activist courts have perceived their own constitutional jurisprudence to be dependent upon the constitutional understandings of other states. See, for example, *McDuffy v. Sec’y of Educ.*, 615 N.E.2d 516, 554–55 (Mass. 1993), and *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1378 (N.H. 1993), both of which are decisions where the courts utilized the definition of adequacy as marked by the Kentucky Supreme Court in *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212–13 (Ky. 1989). See also *Pauley v. Kelly*, 255 S.E.2d 859, 874–76 (W.Va. 1979) (consulting the constitutions of Ohio, Minnesota, Pennsylvania, New Jersey, Illinois, Colorado, Idaho, Montana, Arkansas, Texas, Kentucky, Delaware and Virginia).

⁶⁹ Wood & Lange, *Constitutional Litigation in the Context of Judicial Review*, *supra* note 1, at 10 (citing *Campaign for Fiscal Equity v. State (CFE III)*, 801 N.E.2d 326, 350 (N.Y. 2003)).

⁷⁰ *Id.* (quoting *Campaign for Fiscal Equity v. State (CFE I)*, 655 N.E.2d 661, 663 (N.Y. 1995)).

⁷¹ *CFE I*, 655 N.E.2d at 664–66 (discussing *Bd. of Educ. v. Nyquist*, 408 N.Y.S.2d 606, 634–46 (N.Y. Sup. Ct. 1978), *modified*, 443 N.Y.S.2d 843 (N.Y. App. Div. 1981), *modified*, 439 N.E. 2d 359 (N.Y. 1982)).

⁷² Wood & Lange, *Constitutional Litigation in the Context of Judicial Review*, *supra* note 1, at 10 (quoting *CFE I*, 655 N.E.2d at 666).

the decision was any explanation of its rationale for this expansion of the construction of the education article or the substantive nature of the skills necessary to meet this broadened standard.⁷³ On remand, the New York State Supreme Court found the state public education financing system to be unconstitutional, not only in reference to New York City, but also statewide.⁷⁴

The state appealed to the New York State Supreme Court, Appellate Division. In reversing the lower court, the appellate division noted the New York State Supreme Court's interpretation of what constituted a "sound basic education."⁷⁵ The court of appeals broadened the constitutional construction of the education article in *CFE I* and, on remand, the trial court embraced a standard that was described by the appellate division as follows:

[A]n education must be provided which enables people to evaluate complex campaign issues, such as tax policy, global warming and charter reform, and to have the verbal, reasoning, math, science, and socialization skills necessary to determine questions of fact on such matters of DNA evidence, statistical analysis, and convoluted financial fraud.⁷⁶

Whereas the high court in *CFE I*, had directed that children must be educated to "function productively as civic participants," the trial court was compelled to interpret that directive to mean "competitive employment," which was more than "low-level jobs."⁷⁷

Finding that there was no evidence presented to demonstrate that students in New York City were "unable to perform basic mathematic calculations" and pointing to the provision of components of a sound basic education such as "history and civics, and science and technology," the appellate division ruled that the "plaintiffs . . . failed to establish that the New York City public school children are not receiving the opportunity for a sound basic education."⁷⁸ In addressing educational outputs, the appellate division reasoned that "the proper standard is that the State must offer all children the opportunity of a sound basic education, not ensure that they actually receive it. . . . The standard is a 'sound basic education,' not

73 *Id.*

74 *Id.* at 11 (citing *Campaign for Fiscal Equity v. State (DeGrasse Decision)*, 719 N.Y.S.2d 475, 478 (N.Y. Sup. Ct. 2001), *rev'd* 744 N.Y.S.2d 130 (N.Y. App. Div. 2002), *aff'd in part, modified in part*, 801 N.E.2d 326 (N.Y. 2003), *aff'd in part, modified in part, vacated in part*, 861 N.E.2d 50 (N.Y. 2006)).

75 *Id.* (citing *Campaign for Fiscal Equity v. State (CFE II)*, 744 N.Y.S.2d 130, 134-39 (N.Y. App. Div. 2002), *aff'd in part, modified in part*, 801 N.E.2d 326 (N.Y. 2003), *aff'd in part, modified in part*, 861 N.E.2d 50 (2006)).

76 *Id.* (quoting *CFE II*, 744 N.Y.S.2d at 137).

77 *Id.* (quoting *DeGrasse Decision*, 719 N.Y.S.2d at 485-87).

78 *Id.* (quoting *CFE II*, 744 N.Y.S.2d at 139).

graduation from high school.”⁷⁹ The state could not “be faulted if students do not avail themselves of the opportunities presented.”⁸⁰

The New York State Supreme Court and the State Supreme Court, Appellate Division had rendered two vastly divergent decisions, rulings clearly at the extremes of activism and restraint.⁸¹ A significant issue for the Court of Appeals of New York, along this continuum of review, was the choice to expand upon the constitutional construction of the education article in question, and to what degree a court dare venture into the realm of education policy and administration.⁸² At the outset of the case, the court of appeals found “paramount” the question of “whether the trial court correctly defined a sound basic education” and, further, the determination of “which court’s findings more nearly comport with the weight of the credible evidence.”⁸³ Agreeing with the trial court’s interpretation of a “sound basic education,” the court of appeals observed that “the record establishes that for this purpose a high school level education is now all but indispensable.”⁸⁴ The state demonstrated that ninety percent of the New York City school students who reached the eleventh grade demonstrated competency in reading and mathematics by passing either the Regents Competency Test or the Regents Examination; further, it relied upon the results of a number of nationally–normed reading and math tests.⁸⁵ The court of appeals dismissed both approaches, finding that neither approach reflected the newly minted standard of a “meaningful high school education,” and that “the New York [c]onstitution ensures students not an education that approaches the national norm—whatever that may be—but a sound basic education.”⁸⁶ The opportunity for “a basic education” detailed in *Levittown* had now been expanded to the assurance of “a meaningful high school education,” equipping students to decipher DNA evidence, campaign finance litigation, statistical analysis and financial fraud.⁸⁷

The Massachusetts Supreme Judicial Court opined in *McDuffy v. Secretary of Education* that “[t]he content of the duty to educate which the Constitution places on the Commonwealth necessarily will evolve together with our society.”⁸⁸ Courts in Arizona and Ohio revised previous

79 *Id.* at 11–12 (quoting *CFE II*, 744 N.Y.S.2d at 143).

80 *Id.* at 12 (quoting *CFE II*, 744 N.Y.S.2d at 143).

81 *Id.*

82 *Id.*

83 *Id.* (quoting *Campaign for Fiscal Equity v. State (CFE III)*, 801 N.E.2d 326, 329 (N.Y. 2003), *aff’d in part, modified in part*, 861 N.E.2d 50 (2006)).

84 *Id.* (quoting *CFE III*, 801 N.E.2d at 331).

85 *Id.* at 12–13 (citing *CFE III*, 801 N.E.2d at 338–39).

86 *Id.* at 13 (quoting *CFE III*, 801 N.E.2d at 339).

87 *See CFE II*, 744 N.Y.S.2d at 137.

88 Wood & Lange, *Constitutional Litigation in the Context of Judicial Review*, *supra* note 1, at 13 (citing *McDuffy v. Sec’y of Educ.*, 615 N.E.2d 516, 555 (Mass. 1993)).

interpretations of state educational articles presented by the states' high courts and utilized the reinterpretations to strike down state funding systems.⁸⁹ These broadening treatments of constitutional construction, clearly exemplified in the discussion of New York,⁹⁰ as well as a more recent push back regarding the limitations of such attempts, is evidenced in *McDuffy*.⁹¹

Of particular significance is the Wisconsin Supreme Court decision in *Vincent v. Voight*, which is noteworthy in that its expansion of the constitutional mandate occurred within a decision that found for the state in a school funding challenge under both the equal protection and education articles.⁹² The new right to education included "the opportunity for students to be proficient in mathematics, science, reading and writing, geography, and history, and for them to receive instruction in the arts and music, vocational training, social sciences, health, physical education and foreign language, in accordance with their age and aptitude."⁹³ The Wisconsin Constitution provided in part that "[t]he legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of [four] and [twenty]."⁹⁴ Unclear in the decision in *Vincent* is how the court's expansive construction is supported within this text, apart from the citation of other state court interpretations and the court's stated necessity of embracing an adequacy-based constitutional standard "as a goad [sic] or as a backstop to the legislature[]." ⁹⁵

C. Special Examples: Montana, Indiana and Florida⁹⁶

The state of Montana has faced litigation involving the state's education finance distribution formula for many years.⁹⁷ The latest challenge involved

89 *Id.* at 13–14 (citing *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 812–16 (Ariz. 1994); *DeRolph v. State*, 677 N.E.2d 733, 747 (Ohio 1997)).

90 *See supra* pp. 749–51.

91 Wood & Lange, *Constitutional Litigation in the Context of Judicial Review*, *supra* note 1, at 14.

92 *Id.* (citing *Vincent v. Voight*, 614 N.W.2d 388, 396–97 (Wis. 2000)).

93 *Id.* (quoting *Vincent*, 614 N.W.2d at 396–97).

94 *Id.* (quoting Wis. CONST. art. X, § 3).

95 *Id.* (citing *Vincent*, 614 N.W.2d at 407).

96 Much of the discussion of Montana in this subsection is directly quoted from Thro & Wood, *supra* note 1, but quotation marks and indications of modifications have been removed for purposes of clarity and readability.

97 *See* *Helena Elem. Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989), *modified*, 784 P.2d 412 (Mont. 1990) (ruling that the existing finance system was unconstitutional). In 1991, two suits were filed, *Helena Elementary School District No. 1 v. State* and *Montana Rural Education Association v. State*, challenging the school funding system adopted by the legislature, but in

whether the state legislature was funding a “quality” education as defined by the legislature and this question has persisted for at least the past five years.⁹⁸ The state of Montana has certain fundamental issues regarding the manner in which the state legislature distributes and oversees local and state monies to fund public elementary and secondary education.⁹⁹ Some of these fundamental issues derive from the fact that currently the state has 324 school districts consisting of fifty-two K–12 districts, 105 combined districts with joint school boards, 158 elementary school districts, two state-funded school districts, and seven non-operating or annexed school districts for a total state school student enrollment of approximately 142,000.¹⁰⁰ This presents the critical public policy issue revolving around which school districts are small and inefficient due to the geographical realities of a sparsely populated state and which school districts are small and inefficient due to choice.¹⁰¹ This means that the issues of economies of scale are embedded throughout the distribution formula and may not be reflected in any remedy that the plaintiffs would find acceptable.¹⁰² Thus, the plaintiff’s position has been and will continue to be that the state should fund all school districts, regardless of the inherent inefficiencies of certain school districts and regardless of the local educational program.¹⁰³ Compounding this issue is the fact that the state has a large number of American Indian children reflecting high per pupil expenditures and relatively low achievement scores.¹⁰⁴

On April 15, 2004, the Montana District Court in *Columbia Falls Elementary School District No. 6 v. State* issued its lengthy opinion regarding whether the state’s education finance distribution formula met the state constitutional mandate involving public education.¹⁰⁵ The constitutional mandate in question reads as follows:

(1) It is the goal of the people to establish a system of education which

the course of these events the Montana Legislature adopted House Bill 667 changing the state’s education finance distribution formula and the court declared these challenges moot. *Montana Rural Educ. Assn. v. State*, No. BDV–91–2065, 1992 Mont. Dist. LEXIS 439, at *5–6, *15–16 (Mont. 1st Jud. Dist. Dec. 22, 1992).

⁹⁸ Thro & Wood, *supra* note 1, at 19.

⁹⁹ *Id.* at 19–20.

¹⁰⁰ *Id.* at 20.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*; see MONT. INDIAN EDUC. ASS’N, RECOMMENDATIONS FOR THE SCHOOL FUNDING FORMULA TO THE QUALITY SCHOOLS INTERIM COMMITTEE (2005), available at <http://www.mtica.org/downloads/micarecommendationstoqualityschools.pdf>.

¹⁰⁵ *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, No. BDV–2002–528, 2004 WL 844055, at *1 (Mont. Dist. Ct. Apr. 15, 2004), *aff’d in part, vacated in part*, 2005 MT 69, 326 Mont. 304, 109 P.3d 257.

will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.

(2) The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.

(3) The legislature shall provide a basic system of free quality public elementary and secondary schools. The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.¹⁰⁶

The court noted in its 2004 decision that the state of Montana had numerous school districts with a total enrollment of nearly 150,000.¹⁰⁷ These school districts consisted of elementary school districts, secondary school districts and K-12 school districts.¹⁰⁸ Enrollments varied from two students to 9974 across all school districts.¹⁰⁹ These figures must also be understood within the context of separate school boards for each school district as well as the existence of County Superintendents of Schools who are elected in certain counties.¹¹⁰ A County Superintendent may exist in a county with several different school boards representing different school districts.¹¹¹

The state required a 95 mills property tax, which was levied statewide.¹¹² Of this amount 55 mills was for county equalization with the balance remitted to the state and credited to the state general fund.¹¹³ Additionally, there were school trust fund land revenues.¹¹⁴ The largest single source of federal monies was P.L. 874 funds.¹¹⁵

The court examined the state accreditation standards and reasoned that the state accreditation standards required school districts to offer certain programs and classes, hire and train licensed teachers, and meet a variety of state standards.¹¹⁶ The court further reasoned these standards did not define quality, but rather were minimal standards imposed by the state legislature.¹¹⁷ With this reasoning, the court concluded that the state

¹⁰⁶ MONT. CONST. art. X, § 1.

¹⁰⁷ *Columbia Falls Elem. Sch. Dist. No. 6*, 2004 WL 844055, at *2.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See id.*

¹¹¹ Thro & Wood, *supra* note 1, at 21.

¹¹² *Columbia Falls Elem. Sch. Dist. No. 6*, 2004 WL 844055, at *4.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Thro & Wood, *supra* note 1, at 22.

¹¹⁷ *Id.*

standards were not defined and adequately funded by the legislature.¹¹⁸ The court noted, “Complying with the accreditation standards has imposed additional financial burdens on school districts without corresponding increases in state aide to meet the new standards.”¹¹⁹ The court heavily relied on the plaintiffs’ single “professional judgment” panel to project the cost of providing an adequate education in the state.¹²⁰ Thus, the court was persuaded that the state had not defined an adequate education and that the state had not funded education at a level that could be deemed adequate.¹²¹ However, the court noted that the plaintiffs had not established the state education finance distribution system was inequitable.¹²²

In summary, the court held that the school funding system did not violate the equal protection clause of the Montana Constitution.¹²³ However, the court stated that the funding system and the classification contained therein were not based on educationally relevant facts.¹²⁴ The court also noted that the state had not recognized the distinct and unique cultural heritage of American Indians of the state.¹²⁵ The court further opined that the state had failed to provide adequate funding for the public schools of the state.¹²⁶ The court was of the opinion that the state did not pay its obligated share toward public elementary and secondary education.¹²⁷ In its final conclusion, the court stated, “To satisfy [the] Montana Constitution, the State’s school finance system must be based upon a determination of the needs and costs of the public school system, and the school finance system must be designed and based upon educationally-relevant factors.”¹²⁸

The state appealed and the coalition cross-appealed; the Montana Supreme Court heard the case in October of 2004.¹²⁹ The supreme court ruled that the question of funding schools was a justiciable issue rather than a non-justiciable political question and it found that the overall system was constitutionally inadequate in that the system did not satisfy the state

118 *Id.*

119 *Columbia Falls Elem. Sch. Dist. No. 6*, 2004 WL 844055, at *14.

120 *See id.* at *30.

121 Thro & Wood, *supra* note 1, at 22.

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.* at 22–23.

127 *Id.* at 23.

128 *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, No. BDV–2002–528, 2004 WL 844055, at *25 (Mont. D.C. Apr. 15, 2004), *aff’d in part, vacated in part*, 2005 MT 69, 326 Mont. 304, 109 P.3d 257.

129 *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69 ¶¶ 12–35, 326 Mont. 304, ¶¶ 12–35, 109 P.3d 257, ¶¶ 12–35.

constitution.¹³⁰ However, it deferred to the state legislature to provide the definition of a “quality” education and to fund the system at the defined level.¹³¹ Specifically, the court stated as follows:

[B]ecause the Legislature has not defined what “quality” means we cannot conclude that the current system is designed to provide a “quality” education. Article X, Section 1(3), explicitly requires the Legislature to fund a “quality” educational system. Therefore we defer to the Legislature to provide a threshold definition of what the Public Schools Clause requires. We also conclude, however, that given the unchallenged findings made by the District Court, whatever definition the Legislature devises, the current funding system is not grounded in principles of quality, and cannot be deemed constitutionally sufficient.¹³²

During the next legislative session the state conducted an extensive examination to determine the adequacy of the present system with recommendations for how the state education finance distribution formula could be addressed in terms of adequacy.¹³³ As a result of this study as well as extensive work by the Legislature, the funding system underwent extensive revisions in the next Legislative session. However, plaintiffs filed suit arguing that the Legislature had not implemented the court’s order and that the state education finance distribution formula continued to be unconstitutional.¹³⁴ In February 2008, plaintiffs asked for supplemental relief.¹³⁵

In May 2008, the First Judicial District Court, Lewis and Clark County, issued its decision regarding plaintiffs’ claims that the new funding mechanism had not met the directive of the Montana Supreme Court.¹³⁶ The court stated that the revisions to the education finance distribution formula were not “substantial” based on the affidavits of the plaintiffs’ expert witnesses.¹³⁷ The court noted “that although the State has contributed more money to the system, it is not clear whether it has addressed the structural deficiencies in the funding formula.”¹³⁸

130 *Id.* at ¶ 31.

131 *Id.*

132 *Id.*

133 *See* R. C. WOOD & ASSOCS., DETERMINING THE COST OF PROVIDING AN ADEQUATE EDUCATION IN THE STATE OF MONTANA 3 (2005) [hereinafter R.C. WOOD & ASSOCS., MONTANA REPORT], available at <http://www.rcwoodassoc.com/pdf/Montana.pdf> (prepared for the Quality Schools Interim Committee and the Montana State Legislature).

134 *See* *Stroebe v. State*, 2006 MT 19, ¶¶ 7-8, 331 Mont. 23, ¶¶ 7-8, 127 P.3d 1051, ¶¶ 7-8.

135 *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, No. BDV-2002-528, at 2 (Mont. 1st Jud. Dist. May 5, 2008) (order denying defendant’s motion to dismiss).

136 *Id.*

137 *Id.* at 3.

138 *Id.*

In summation the court stated as follows:

The Court must be mindful to use its judicial resources wisely. At this stage of the proceedings, it does not appear to the Court to be a wise use of its resources to have the parties begin a new lawsuit that would take months, if not years, to prepare and weeks to try. Plaintiffs are suggesting that the State of Montana has not complied with this Court's Order or the order of the Montana Supreme Court. The task of ensuring compliance with its orders is not a task that is foreign to this Court. Although this case is more complicated than the vast majority of cases before this Court, Plaintiffs' request for an examination of whether the State's actions have met the standards required by this Court and the supreme court does not seem to be unreasonable and out of the ambit of what courts frequently do in other civil cases.

The Court, however, needs to address a couple of matters. . . . [T]he Court does not feel it appropriate that the burden of proof be on the State of Montana. It is Plaintiffs' contention that the funding formula has not changed in order to meet the mandates of the supreme court. The Plaintiffs will be required to prove that to this Court.

Further, this Court, as it writes these words, is unsure of the precise nature of any supplemental relief that might be awarded after the hearing if the Court agrees with the Plaintiffs. The Court makes this statement for the reason that it does not want the parties to assume that, even if the Court should agree with the Plaintiffs that the system has not been changed as required by the Montana Supreme Court, the remedies sought by Plaintiffs in their motion for order to show cause will be granted.¹³⁹

In December 2008 the court issued its findings.¹⁴⁰ At this point, the case was over five years old and this decision was in response to the plaintiffs' motion for supplemental relief and order to show cause.¹⁴¹ Following the adjournment of the 2007 legislative session, the court issued an order denying the plaintiffs' motion as being premature.¹⁴² Following this denial, the plaintiffs filed a renewed motion for supplemental relief and an order to show cause.¹⁴³ The court heard these arguments and issued an order rejecting the state's opposition and set the matter for a hearing to examine whether supplemental relief should be granted and placed the burden of proof on the plaintiffs.¹⁴⁴

The court noted that the previous issues addressed by that court and the Montana Supreme Court were:

¹³⁹ *Id.* at 5–6.

¹⁴⁰ *Columbia Falls Elem. Sch. Dist. No. 6 v. State, No BDV–2002–528, 2008 Mont. Dist. LEXIS 483, at *1 (Mont. 1st. Jud. Dist. Dec. 15, 2008).*

¹⁴¹ *Id.* at *1–2.

¹⁴² *Id.* at *2.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

1. Definition of a quality education.
2. The number of school districts budgeting at their maximum authority.
3. Problems with accreditation standards.
4. Problems attracting and retaining teachers.
5. Cutting of educational programs.
6. Deterioration of buildings.
7. Increasing competition over general fund dollars between special education and general education.
8. Lack of an inflationary provision in the school funding formula.
9. Whether the funding provided by the State relates to the needs of providing a quality education.
10. Failure to have a study to determine the costs of providing a quality education.
11. Ability to provide a quality education.
12. Implementation of Article X, section 1(2), of the Montana Constitution.
13. Declining share of the State's contribution to school districts.
14. Provision for at-risk and gifted students.¹⁴⁵

The court further noted that the parties were in agreement that the legislature had “properly defined the basic system of free quality public elementary and secondary schools,”¹⁴⁶ and had “met its obligation . . . by providing adequate funds for Indian Education for All Montana students.”¹⁴⁷

The court then discussed the extensive changes that the legislature had enacted in funding public elementary and secondary education in the state.¹⁴⁸ The court spent considerable time examining the 2005 legislative session, which created the Joint Select Committee on Education Funding.¹⁴⁹ This committee proposed, the legislature adopted, and the Governor signed Senate Bill 525 creating the Quality Schools Interim Committee (“QSIC”).¹⁵⁰ Pursuant to its charge, the QSIC hired R. C. Wood & Associates to conduct an examination regarding the cost of meeting the educational needs of the state.¹⁵¹

The R.C. Wood & Associates' study examined four distinct methodologies in determining the costs of providing an adequate education in the state: “statistical analysis; evidence-based analysis; successful schools analysis; and professional judgment analysis.”¹⁵²

¹⁴⁵ *Id.* at *3-4.

¹⁴⁶ *Id.* at *4 (referring to MONT. CODE ANN. § 20-9-309(2) (2009)).

¹⁴⁷ *Id.* (referring to MONT. CONST. art. X, § 1(2)).

¹⁴⁸ *Id.* at *4-15.

¹⁴⁹ *See id.* at *15.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at *17.

¹⁵² *Id.* at *17-18.

Additionally, the study conducted a needs assessment survey with a return rate of eighty–three percent of the school districts of the state.¹⁵³ The needs assessment study estimated approximately \$34 million in increased cost, plus the costs of “recruitment and retention of qualified educators.”¹⁵⁴ The study provided cost estimates based on each methodology. At the time of the study, it was the first education finance study in any state to examine the cost of adequacy based on all four current models offering a range of estimates for a legislature. Additionally, the study contained an examination of the costs of closing the American Indian student achievement gap.¹⁵⁵ The study noted that certain issues regarding the cost of funding an adequate education were interwoven with small inefficient and isolated schools and districts.¹⁵⁶ Additional studies by various state agencies examined numerous funds and issues applicable to the public schools of the state.¹⁵⁷

The court spent considerable time in examining and noting the expenditures, new programs, and earmarked funds for a variety of programs clearly related to the issue of a quality education.¹⁵⁸ New components to the overall distribution formula were fully funded by the state and these included: quality educator, at–risk, American Indian Achievement Gap, and Indian Education for All.¹⁵⁹ The court noted that the legislative education finance distribution formula incorporated many of the costs determined by the QSIC process.¹⁶⁰ The plaintiffs had argued that the funding system was not based on the “costs of meeting the standards.”¹⁶¹ However, evidence indicated that the legislature had appropriated monies for a variety of purposes based on the various reports, all of which were based upon cost estimates.¹⁶² The State relied heavily upon the studies conducted by R.C. Wood & Associates, as well as Stoddard and Young of Montana State University in terms of examples of extensive costing–out studies.¹⁶³

In an overall observation the court stated as follows:

As noted earlier, the R.C. Wood study indicated that there were four possible ways to cost–out the price of education. The cost determined by the evidence–based method was \$20 million; by the statistic–based method \$34

153 *Id.* at *18.

154 *Id.*

155 *Id.*

156 *See* R.C. WOOD & ASSOCS., MONTANA REPORT *supra* note 133, at 11–15.

157 *See* *Columbia Falls Elem. Sch. Dist. No. 6*, 2008 Mont. Dist. LEXIS 483, at *20–24.

158 *See id.* at *33–47.

159 *See id.* at *43–44.

160 *Id.* at *65.

161 *Id.* at *64.

162 *Id.* at *66–69.

163 *See id.* at *65–67.

million; and by the successful schools model \$96 million. The professional judgment study relied on by Plaintiffs seeks in excess of \$300 million additional dollars. When this Court held its original hearing in this matter in 2004, the only study that had been done was a professional judgment study. Now, the Court notes that the three other studies mentioned above have been done. This Court is not in a position to tell the legislature which of the studies to choose. If the legislature were to choose the costs based on any of the studies other than the professional judgment study, all of which were under \$100 million, the legislature, since it has provided \$148 million in new ongoing State funding since 2005, has exceeded the costs of providing an education as determined by the three studies other than the professional judgment methodology.

This Court finds that the State has determined the cost of providing an education in the state of Montana. That determination is not only in QSIC study, but it is also in the various studies mentioned in the R.C. Wood study and otherwise prepared in conjunction with the R.C. Wood study, and through the whole QSIC process. The legislature, then, had a smorgasbord of numbers from which to choose. Probably the biggest problem in this case is that there is not a bright line connecting many of the cost figures to the money actually allocated by the legislature.¹⁶⁴

The court noted,

[One] complicating factor in Montana is the fact that the state of Montana has hundreds of school districts. Perhaps this is necessary and perhaps not, but the immense variety in the makeup of Montana school districts, from rural to non-rural, from east to west and north to south, along with a huge number of school districts, is a guarantee of future disputes.¹⁶⁵

In summation, the court stated the following:

The Court is also faced with what remedy to provide. The Court concludes that it will not order any supplemental or additional relief. This Court concludes that the legislature and the state of Montana have made a good faith attempt to address the various problems mentioned by this Court and the supreme court. Tens of millions of dollars of additional funding have been supplied to the school districts. Further, the exact remedy that this Court could provide is unclear. Given that lack of clarity and the good faith steps taken by the State, the Court concludes that the current problems do not warrant this Court to take any action at this time. This court, as this opinion is being written, has no idea what the 2009 legislature has in store for the schools of Montana.¹⁶⁶

Thus, the court upheld the current education finance distribution formula

164 *Id.* at *66-68 (citation omitted).

165 *Id.* at *71.

166 *Id.* at *73-74.

citing the facts that the legislature had engaged in determining the cost of an adequate education in the state of Montana.¹⁶⁷ The legislature was not under an obligation to fund programs that school districts had adopted.¹⁶⁸ It was under an obligation to fund programs that were required by state standards and to determine the amount of funding necessary to meet those stated state standards.¹⁶⁹

The most recent decision from Indiana was issued in June 2009 in the matter of *Bonner ex rel Bonner v. Daniels*.¹⁷⁰ In that case, plaintiffs argued that the education finance distribution formula failed to fund the state standards and thus the education finance distribution formula was inadequate.¹⁷¹ The plaintiffs attended eight different school corporations (school districts) within the state.¹⁷² The trial court dismissed the complaint and the court of appeals reversed.¹⁷³ The plaintiffs appealed the trial court's decision and "sought a declaratory judgment to establish that the Indiana Constitution imposes an enforceable duty on state government to provide a standard of quality education."¹⁷⁴ The court stated,

Although recognizing the Indiana Constitution directs the General Assembly to establish a general and uniform system of public schools, we hold that it does not mandate any judicially enforceable standard of quality, and to the extent that an individual student has a right, entitlement, or privilege to pursue public education, this derives from the enactments of the General Assembly, not from the Indiana Constitution.¹⁷⁵

The plaintiffs claimed that the education finance distribution formula violated the Indiana Constitution. The court quoted the plaintiffs' complaint to describe the nature of how they saw the action as follows:

[1] that the Indiana Constitution imposes an enforceable duty on the General Assembly to provide an education that prepares all of Indiana's children—rich or poor, white, black or Hispanic, with or without special needs, and with or without English proficiency—to function in a complex and rapidly changing society, to discharge the duties and responsibilities

167 *Id.* at *74–75.

168 *Id.* at *75.

169 *Id.*

170 *Bonner ex rel Bonner v. Daniels*, 907 N.E.2d 516, 516 (Ind. 2009).

171 *Id.* at 519. This concept appears to be largely based upon an unpublished costing out study commissioned by the Indiana State Teachers Association.

172 *Bonner v. Daniels*, No. 49Do10604PL016414, 2007 WL 6913265, at *1 (Ind. Cir. Ct. Jan. 29, 2007), *vacated*, 907 N.E.2d 516 (Ind. 2009).

173 *Bonner ex rel Bonner v. Daniels*, 885 N.E.2d 673, 676–77 (Ind. Ct. App. 2008), *vacated*, 907 N.E.2d 516 (Ind. 2009).

174 *Bonner*, 907 N.E.2d at 518.

175 *Id.*

of citizenship, and to compete successfully with their peers for productive employment and opportunities for advancement through higher education. [2] that the Defendants are violating their constitutional duty because Indiana's current system of financing education violates the Indiana Constitution, with the result that the plaintiffs, and the tens of thousands of other Indiana school children whom plaintiffs represent, are not receiving their constitutional entitlement of education as intended by the framers of the Constitution.¹⁷⁶

The court noted that the plaintiffs stated that they did not seek a “judicial mandate for a particular school funding system, but express that what they seek ‘is a determination that the current system falls woefully short of the requirements of the Indiana Constitution.’”¹⁷⁷ The plaintiffs based their argument on the following passage of the state constitution:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.¹⁷⁸

The court noted the complaint and observed the following:

The plaintiffs' complaint, and their appellants' brief, do not allege violation of the “general and uniform system” or the “equally open to all” requirements, nor of any other specific provision in the Education Clause. Instead, the plaintiffs' claim of unconstitutionality is a general one—that the Clause imposes a duty to provide public school students with an education of satisfactory quality and that Indiana state government, because of its system of public school financing, has failed to satisfy such duty. The plaintiffs specifically insist that their claims are “brought under the entire Education Clause,” and not focused on any single specific phrase in the Clause.¹⁷⁹

The court explained that the education clause of the state constitution had two parts, the first part being “general and aspirational” and the second part being more “concrete.”¹⁸⁰ The court went on to observe that the education clause did not require a “standard of educational achievement” and that “[t]he Clause says nothing whatsoever about educational quality.”¹⁸¹

¹⁷⁶ *Id.* at 519.

¹⁷⁷ *Id.* (citation omitted).

¹⁷⁸ IND. CONST. art. 8, § 1.

¹⁷⁹ *Bonner*, 907 N.E.2d at 520 (citing Reply Brief of Appellants/Plaintiffs at 6, *Bonner v. Daniels*, No. 49Do10604PLo16414, 2007 WL 4130214 (Ind. Ct. App. Oct. 1, 2007)).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 521.

The Indiana Supreme Court noted in *Nagy v. Evansville–Vanderburgh School Corp.* that the history and meaning of the education clause were well documented and settled as a matter of law.¹⁸² Relying on *Nagy*, the *Bonner* court stated,

The historical facts do not evidence any intention to require the establishment of a public education system with any particular standards of educational output. We decline the plaintiffs' invitation to amplify the words and meaning of our Constitution as crafted by its framers and approved by its ratifiers.

Guided as we are by the text of the constitutional provision in the context of its history, we conclude that the Education Clause of the Indiana Constitution does not impose upon government an affirmative duty to achieve any particular standard of resulting educational quality. This determination is delegated to the sound legislative discretion of the General Assembly. And in the absence of such a constitutional duty, there is no basis for the judiciary to evaluate whether it has been breached.

....

[W]e conclude that the framers and ratifiers certainly sought to establish a state system of free common schools but not to create a constitutional right to be educated to a certain quality or other output standard.¹⁸³

Interestingly, Justice Boehm, who concurred in a separate opinion, noted the following:

The plaintiffs have chosen to sue the Governor and the Superintendent of Public Instruction. It is appropriate to sue executive officers to enjoin them from enforcing an unconstitutional statute. But the plaintiffs here do not seek to enjoin the state's funding of the current system. Rather, they seek affirmative relief in the form of a mandate to implement a system of public education that meets their standards. That is more than these defendants can deliver, even if they admitted the allegations of the complaint and agreed to a consent judgment. The General Assembly must first act to create a system, which can then be tested for conformity to the constitution.¹⁸⁴

Thus, the Indiana Supreme Court appears to have forestalled any attempt at overturning the present education finance distribution formula based on a general concept of adequacy. The court precluded the plaintiffs from defining a set standard, or standards, by which the legislature must fund to operationalize the performance of the system, declined to find an enforceable legislative duty to provide an education at a given level of quality, and held that the constitution did not establish an individual right

¹⁸² *Nagy v. Evansville–Vanderburgh Sch. Corp.*, 844 N.E.2d 481, 484–88 (Ind. 2006).

¹⁸³ *Bonner*, 907 N.E.2d at 522 (emphasis omitted).

¹⁸⁴ *Id.* at 524 (Boehm, J., concurring) (citations omitted).

to an education.¹⁸⁵

In 1996, the state's education finance distribution formula was upheld by the Florida Supreme Court in *Coalition for Adequacy and Fairness in School Funding, Inc. v Chiles*.¹⁸⁶ However, in 1998 voters in the State of Florida approved the following state constitutional mandate concerning public elementary and secondary education:

The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.¹⁸⁷

In 2008 a novel challenge based on a perceived lack of educational adequacy was filed against a single selected school district in Florida in *Schroeder v. Palm Beach County School Board*.¹⁸⁸ In that case, the plaintiffs, consisting of students and parents, challenged the educational services provided to selected students as being inadequate under the state constitution.¹⁸⁹ The Palm Beach County School District, at the time of the suit, included approximately 175,000 students and 164 schools.¹⁹⁰ The American Civil Liberties Union, on behalf of the plaintiffs, sought a declaration, via a class action, that the Palm Beach County School District was not providing an adequate education under the requirements of the state constitution.¹⁹¹ Plaintiffs stated that the Palm Beach County School District failed "to provide a uniform, efficient, safe, secure and high quality education to the children of Palm Beach County as mandated by the Florida Constitution."¹⁹² The plaintiffs contended that this was evidenced by the low graduation rates within the school district.¹⁹³ Citing the same constitutional mandate, the plaintiffs contended that the school district

¹⁸⁵ *Id.* at 522.

¹⁸⁶ *Coal. for Adequacy and Fairness in Sch. Funding v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996).

¹⁸⁷ FLA. CONST. art. IX, § 1.

¹⁸⁸ *Schroeder v. Palm Beach County Sch. Bd.*, No. 502008CA007579XXXXMB, 2008 WL 5376086, at *1 (Fla. Cir. Ct. July 28, 2008) *aff'd*, 10 So.3d 1134 (Fla. 2009).

¹⁸⁹ *Id.*

¹⁹⁰ Class Action Complaint at 7, *Schroeder*, No. 502008CA007579XXXXMB, 2008 WL 5376086 (Fla. Cir. Ct. March 18, 2008), *available at* http://www.aclu.org/files/pdfs/racialjustice/shroeder_v_palmbeachschoolboard_complaint.pdf.

¹⁹¹ *See id.* at 6.

¹⁹² *Id.* at 2.

¹⁹³ *Id.*

had not provided for this specific constitutional standard regarding African–American, as well as Hispanic, children in the district as evidenced by a “significant disparity between the graduation rates of African–American and Hispanic students and those of white students.”¹⁹⁴

The complaint continued by stating that this lack of graduation and “the consequences for the students and the county are devastating as those who leave school without even a high school diploma are significantly less able or likely to share in the *American dream*.”¹⁹⁵ Interestingly, the complaint does not define the “American dream,” nor does it point to a specific portion of the complaint where it is argued that the school district was statutorily or constitutionally obligated to meet a standard equating to the “American dream.” This “American dream” concept was not defined, in terms of how the court was to measure this standard in any operational manner; thus, this term, as utilized by the plaintiffs, appears to be aspirational and lacks statutory or constitutional definition within the State of Florida. The plaintiffs argued that the school district was responsible, under the authority of the Florida Constitution, for the “operation, control and supervision” of the public schools of the county.¹⁹⁶ The plaintiffs named the school superintendent and members of the Board of Education in their official capacity as defendants in the action.¹⁹⁷

In the complaint, the plaintiffs spent considerable time discussing the various methodologies of computing high school graduation rates and comparisons to selected school districts from across the nation.¹⁹⁸ It seems that one of the plaintiffs’ legal theories was that if low graduation rates were to exist and, in particular, a disparity among racial and ethnic groups, then this would be a constitutional violation under the Florida Constitution. Specifically the plaintiffs argued,

Even if the low graduation rates or high disparities between the graduation rates of African–American and Hispanic students and white students can be attributed to socio–economic status or immigrant status, the Palm Beach County School District has a constitutional obligation to develop and implement programs and measures that enable all of its students to graduate, regardless of the students’ race or ethnicity.

Regardless of the cause of the Palm Beach County School Districts’ low graduation rates an essential component of a uniform, efficient, safe, secure and high quality education is a meaningful opportunity to graduate from high school.

High school graduation rates as low as those in the Palm Beach County

194 *Id.*

195 *Id.* (emphasis added).

196 *Id.* at 4 (citing FLA. STAT. ANN. § 1001.32 (West 2009)); see also FLA. CONST. art. IX, §

4.

197 Class Action Complaint, *supra* note 190, at 4–5.

198 *See id.* at 7–9.

School District establish its failure to provide a uniform, efficient, safe, secure and high quality education.¹⁹⁹

The complaint further detailed that “[i]n a 2003 study based on data generated by the United States Department of Corrections, two-thirds of state prison inmates in this Country are high school drop-outs and an incredible 52% of all African-American male drop-outs in their early thirties had a prison record.”²⁰⁰ It is unclear why the plaintiffs chose a six-year-old national study or how the Palm Beach County Public School District contributed to this fact and, if so, how the school district failed to meet a constitutional threshold in this regard. The complaint next questioned the Palm Beach County School District’s methodology for treating GEDs the same as regular high school diplomas.²⁰¹ Again, it is unclear how this was contrary to state statute or in conflict with the state constitutional mandate in question.

Regarding the specifically-named plaintiffs, the complaint stated, “The inadequate education provided by the defendants has had effects on the named plaintiffs and, as a result, their chances of graduating from high school are diminished.”²⁰² Once again, it is unclear what standard or practice the plaintiffs allege that the school district must engage in regarding the “chances” of students to graduate. Regarding the specifically-named lead plaintiff, the complaint presented an interesting constitutional claim described as follows:

Like many students in the Palm Beach County school district, plaintiff Thomas Schroeder is having academic problems and is being subjected to school discipline concerning attendance. Because Thomas is a student at William T. Dwyer High School in the Palm Beach County school district and, because the district fails to graduate a very significant percentage of its students every year, Thomas is not receiving a uniform, efficient, safe, secure, and high quality education.²⁰³

Other named students at other schools within the district were also included with this same exact wording.²⁰⁴ At this point it is interesting to note that the lead plaintiff claims a constitutional failure by the school district because he is having apparent difficulty attending school, yet the record is silent as to what specific actions that the school district engaged in, or did not engage in, that would have influenced his attendance rate.

¹⁹⁹ *Id.* at 13.

²⁰⁰ *Id.* at 14.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *See id.* at 15-17.

Plaintiffs sought relief asking for a declaratory judgment because “the disparity in the high school graduation rates of African–American students and those of white students in the Palm Beach County School District is a violation of the [d]efendants’ constitutional obligation to provide a uniform education to all students in Palm Beach County.”²⁰⁵ The complaint further sought a declaratory judgment regarding graduation rate disparities between Hispanic and white students and to have the school district adopt a graduate rate definition to be approved by the court.²⁰⁶ Finally, plaintiffs sought an “injunction and order mandating and requiring the [d]efendants to improve the overall graduation rate . . . and the graduate rate for each racial subgroup of students, students who qualify for the school lunch program, and English Language Learners” of the district.²⁰⁷

On July 28, 2008, the court found that the issue was one of “whether a private right of action exist[ed] for the enforcement of Article IX, section 1 of the Florida Constitution against an individual school [district].”²⁰⁸ The court concluded, “as a matter of law, that no such private cause of action exist[ed].”²⁰⁹ In so holding the court noted that the plaintiffs argued that the school district demonstrated a violation of the constitutional mandate to “fulfill the ‘fundamental value’ of educating children with an education that is ‘uniform, efficient, safe, secure, and high quality.’”²¹⁰

The court relied on *Simon v. Celebration Co.* in which parents brought suit against the Osceola County School Board arguing that the school district “violated Article IX, section 1 of the Florida Constitution by failing to provide [children] with a high quality free public education.”²¹¹ The court explained this reliance as follows:

We consider the holding in [*Simon*] to be that no private cause of action exists for the enforcement of Article IX, section 1, against individual school boards because the clause, in the words of the district court, specifically states that the provision of an adequate education must be made by the Legislature since the provision states that “adequate provision shall be made by law.” We consider the district court’s observation that there is no benchmark for determining what “adequate provision for education” is meant to entail, nor is the term “high quality education” defined in the provision, to be dicta.²¹²

²⁰⁵ *Id.* at 18.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Schroeder v. Palm Beach County Sch. Bd.*, No. 502008CA007579XXXXMB, 2008 WL 5376086, at *1 (Fla. Cir. Ct. July 28, 2008), *aff’d*, 10 So.3d 1134 (Fla. 2009).

²⁰⁹ *Id.*

²¹⁰ *Id.* (quoting FLA. CONST. art. IX, § 1).

²¹¹ *Simon v. Celebration Co.*, 883 So. 2d 826, 829 (Fla. Dist. Ct. App. 2004).

²¹² *Schroeder*, 2008 WL 5376086, at *1 (alteration in original) (citation omitted).

The court noted that the plaintiffs argued that the legislature's delegation of its duty was clear to the individual school districts across the state.²¹³ Plaintiffs cited a statement made by the state Constitutional Revision Commission's Commissioner Jon Mills during a full commission meeting regarding the new constitutional changes as reflected in Article IX, section 1 in which he stated, "If the entire system, that is the school board had a [thirty percent illiteracy] rate, that would be emblematic of an entire system that was broken."²¹⁴ The court explained, regardless of issues that might be raised as to the various reasonings and implications,

Substantively, however, this court still would find that the plain language of Article IX, section 1 does not provides [sic] a private right of action for the enforcement of that section against an individual school board or school superintendent, but only against the state. Article IX, section 1 expressly refers to education as being a "paramount duty of the state," and expressly provides that adequate provision for education "shall be made by law." While it is common sense that education also is a duty of individual school boards and superintendents, the question here is the enforcement of an express constitutional provision, which refers only to the state. Moreover, only the state legislature can make law.²¹⁵

The court noted the plaintiffs' contention that a private right should exist against school districts because the legislature had delegated the responsibility to these agencies.²¹⁶ The court noted that this observation might be logical, but that the language of the constitution controlled this arena.²¹⁷ Specifically the court stated,

Also unpersuasive is Plaintiffs' contention that this court should look behind the plain language to divine the intent of the 1998 Constitutional Revision Commission. While this court appreciates Plaintiffs' quote from Commissioner Mills, no one person speaks for the body, and once the Constitution becomes effective, the Commission's intent gives way to the will of the people of the state.²¹⁸

In final summation the court noted,

While we stop short of saying 'never,' appellants have failed to demonstrate in their allegations, or in their arguments on appeal, an appropriate standard for determining 'adequacy' that would not present

²¹³ *Id.*

²¹⁴ *Id.* (citing FLA. CONSTITUTION REVIEW COMM'N, MEETING PROCEEDINGS FOR FEBRUARY 26, 1998, at 58 (1998), <http://law.fsu.edu/crc/minutes/crcminutes022698.html>).

²¹⁵ *Id.* (quoting FLA CONST. art. IX, § 1) (emphasis omitted).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature, both generally (in determining appropriations) and specifically (in providing *by law* for an adequate and uniform system of education).²¹⁹

In 2009 the case was appealed and the decision was affirmed with rehearing denied without comment.²²⁰ Thus, it appears challenging an individual school district regarding an adequacy claim in the state of Florida will not be successful. The lack of measuring and determining the aspirational nature of the constitutional mandate will continue to prove difficult to operationalize for the plaintiffs at least on an individual school district level. Additionally, a high level of judicial intrusion would be necessary if the first hurdle could be surmounted. As a result, these two obstacles will continue to be problematic for the plaintiffs for at least the near future within the state of Florida.

III. THE CONCEPT OF ADEQUACY

The issues before state courts have varied greatly since the days of *Rose v. Council for Better Education*. Notwithstanding the variety of claims, more suits are being filed based on adequacy or adequacy masquerading as equity. Adequacy is a concept that has attractiveness for plaintiffs, yet it is fraught with peril because of a variety of fundamental educational finance research flaws. State legislatures are slowly but assuredly beginning to grasp the conceptual and technical arguments against these elusive and aspirational concepts that are presented to the courts.

A. Adequacy Challenges²²¹

The plaintiffs in adequacy cases argue the state aid distribution formula is fiscally inadequate and as a result educationally inadequate.²²² Thus, it is argued, the state aid distributional formula fails the state constitutional mandate and the applicable statutory mandates for an education that meets minimal standards.²²³ In certain instances, these plaintiffs are essentially arguing that the state education finance formula, at best, demonstrates an

²¹⁹ *Id.* at 4.

²²⁰ *Schroeder v. Palm Beach County Sch. Bd.*, 10 So. 3d 1134, 1134 (Fla Dist. Ct. App. 2009).

²²¹ Much of what appears in this section is directly quoted from R.Craig Wood & Bruce D. Baker, *An Examination and Analysis of the Equity and Adequacy Concepts of Constitutional Challenges to State Education Finance Distribution Formulas*, 27 U. ARK. LITTLE ROCK L. REV. 125, 142–43 (2004). Quotation marks and indications of alterations have been omitted for purposes of clarity and readability.

²²² *Id.* at 142.

²²³ *Id.*

“equality of poverty.”²²⁴ In other words, if a state aid distribution formula allocates funds in an equitable manner, but such funds were, by definition, unable to meet various educational and academic standards, such a distribution formula would be by definition inadequate.²²⁵ The question then becomes whether the education finance distribution formula violates the applicable constitutional and statutory obligations of the state.²²⁶ The specific question is how the plaintiffs are able to satisfactorily demonstrate in a valid manner how certain school districts are not able to reach certain levels when other school districts, serving the same populations and receiving the same moneys, are able to do so under the same education finance distribution formula.²²⁷ The answer to this conundrum lies within the research methodology, or lack thereof, in the plaintiffs’ case.

Various legislatures have unwittingly established a standard by which many plaintiff groups are able to question and attempt to quantitatively establish noncompliance via the state distribution formula.²²⁸ That is to say, in the movement toward greater educational accountability and raising academic standards for the public schools of a given state, the legislature has, unsuspectingly, defined by statute of what an adequate education consists.²²⁹ Thus, when school districts are not able to meet those stated standards, due to fiscal constraints placed upon them by various constitutional tax limitations, statutory and economic realities, the plaintiffs argue for relief.²³⁰ The relief sought is to declare the state education finance distributional formula unconstitutional.²³¹ Often this is further compounded by the fact that the state is already taxing at its maximum tax rate while observing a constitutional limitation regarding operating within a state balanced budget. Thus, the court is called into judging which constitutional standard must be met by the legislature.

In recent years, state legislatures have faced an increasing number of challenges to the state education finance distribution formula based on the concept of adequacy.²³² Generally, the plaintiffs are not challenging the equity of the distribution formula in the conventional sense.²³³ That is, most recent arguments have centered not on whether wealthy and poor school districts have roughly the same amount of revenue per pupil, but whether, in general, there is enough funding to achieve state standards and, further,

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *See id.* at 142–43.

²²⁸ *Id.* at 143.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

whether school districts with higher concentrations of high need students have sufficient additional funding, beyond the basic level of funding, to achieve the same standards.²³⁴ In many cases, plaintiffs link insufficient overall funding or insufficient additional support primarily in poor urban schools to insufficient student outcomes occurring disproportionately in those same schools.²³⁵ The plaintiffs argue that, by virtue of the fact that certain groups of children are underachieving on these state-imposed sanctions, the distribution formula is, by definition, inadequate, at least for these groups of children.²³⁶ Yet, interestingly, the question remains the same when achievement varies among school districts despite the fact that per pupil expenditures may be remarkably similar within a given state. This is evidenced by the prior discussion within this paper regarding the most recent case in Florida.²³⁷

Also, increasingly, various groups ranging from state legislatures themselves to a variety of advocacy groups have attempted to determine the adequacy of public education.²³⁸ An overview of these adequacy studies reveals an increase of approximately thirty to fifty percent of expenditures that would be necessary to meet an adequate level for public education.²³⁹ Numerous studies have been conducted to date.²⁴⁰

*B. The Measurement of Educational Adequacy*²⁴¹

It has long been established that state education finance distribution formulas should be designed to accommodate differences in educational need by allocating different levels of financial resources across schools and districts.²⁴² Weighted student formulas date back nearly as far, with

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See *supra* pp. 764–69.

²³⁸ Wood & Baker, *supra* note 221, at 143.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Much of what appears in this subsection is directly quoted from R. C. WOOD & ASSOCS., STATE OF RHODE ISLAND EDUCATION ADEQUACY STUDY: FINAL REPORT 1–5 (2007), available at <http://rcwoodassoc.com/pdf/rhodeisland.pdf> (presented to the Joint Committee to Establish a Permanent Education Foundation Aid Formula for Rhode Island) [hereinafter R.C. WOOD & ASSOCS., RHODE ISLAND REPORT]; see also R. C. WOOD & ASSOCS., FINANCING MISSOURI'S PUBLIC ELEMENTARY & SECONDARY SCHOOLS: FINAL REPORT 106–31 (2005), <http://www.rcwoodassoc.com/pdf/missouri.pdf> (presented to the Missouri Joint Interim Committee on Education of the Missouri General Assembly). Again, quotation marks and indications of alternations have been omitted for purposes of clarity and readability.

²⁴² R.C. WOOD & ASSOCS., RHODE ISLAND REPORT, *supra* note 241, at 5 (citing PAUL R. MORT, THE MEASUREMENT OF EDUCATIONAL NEED: A BASIS FOR DISTRIBUTING STATE AID 6–7 (1924)).

examples of weighted pupil calculations to adjust for grade level and school size provided in textbooks dating back to at least 1951.²⁴³ At that time, the primary emphasis was on the different costs of providing quality education under different geographic circumstances.²⁴⁴ Education finance scholars were evaluating the relative costs of providing curricular opportunities in high schools of varied size.²⁴⁵ Scholars and policymakers were beginning to realize that there were sets of conditions that were outside of the control of local school districts that affected the costs of operating schools.²⁴⁶

Since the Coleman report in 1966, much greater emphasis has been placed on the influence of family backgrounds, on student outcomes, and on the related costs of offsetting educational deficits associated with the socio-economic status of the family.²⁴⁷ Empirical research on costs, student needs and educational outcomes have been reflected for many years in the education finance literature.²⁴⁸

The goal of state finance aid distributional formulas is to provide students, regardless of their individual backgrounds or their geographic circumstances, with comparable programs to achieve educational opportunities.²⁴⁹ Since the emergence of the 1990s accountability movement and subsequent passage of the federal No Child Left Behind Act (NCLB), the emphasis of many state school finance policies have been on outcomes and providing equitable opportunity to achieve them.²⁵⁰

Student need-driven state education finance distribution formulas are rooted in the assumption that financial leverage can be applied to offset deficits that some children have by virtue of birth circumstances.²⁵¹ Further, financial leverage can be used to create equitable conditions for learning, and ultimately more equitable student opportunities in otherwise very different environments, from the urban core to remote, sparse rural schools hours from the nearest population center.²⁵² Ultimately, the education finance distribution formula must strive toward the right balance of student and societal needs.²⁵³

243 *Id.* (citing PAUL R. MORT & WALTER C. REUSSER, PUBLIC SCHOOL FINANCE: ITS BACKGROUND, STRUCTURE, AND OPERATION 73-75 (2d ed. 1951)).

244 *Id.*

245 *Id.*

246 *Id.*

247 *Id.* (referencing generally JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY (1966)).

248 *Id.*

249 *Id.*

250 *Id.* (referencing No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.)).

251 *Id.*

252 *Id.*

253 *Id.*

Formulating educational adequacy is predominately determined by the usage of one, or a combination of each of the four following approaches: Evidenced Based Model; Professional Judgment Model; Production or Cost Production Model; and Successful Schools Model.²⁵⁴ The Evidenced Based Model is essentially built on the approach of what educational strategies and concepts appear to be the most successful in improving achievement in the elementary and secondary schools.²⁵⁵ The bulk of these studies are virtually impossible to cost out and to determine if they might be generalizable to a given state.²⁵⁶ Nonetheless, the mainstream of professional opinion supports certain programs, e.g., full-day kindergarten and pilot programs, to be reasonable and cost effective mechanisms for state legislatures to explore.²⁵⁷ Evidence-based analysis requires a specific empirical research basis for recommended resource configurations.²⁵⁸ Evidence-based models do not, however, require rigorous meta-analysis of all available studies on each possible intervention.²⁵⁹ Nor does application of evidence-based cost analysis require that the interventions in question be evaluated with respect to specific, policy-relevant outcome measures.²⁶⁰ Thus, various studies purport to be evidenced based and yet use various standards of what and how studies are chosen for this standard.²⁶¹

The Professional Judgment Model concept varies greatly from small, non-scientific selected panels to more robust statewide surveys. Two studies have actually surveyed every building principal with numerous meetings to estimate the adequacy levels of various prototype schools.²⁶² In this manner different size schools and organizational variables may be estimated.²⁶³ One might assume, for example, that a panel of well-informed professionals would prescribe inputs for schools based at least partly on the professionals' knowledge of research literature on effective reform strategies.²⁶⁴ However, in most instances this does not appear to be the case.²⁶⁵

The Production or Cost Production Model essentially creates a

254 *See id.* at 3.

255 *Id.*

256 *Id.* at 4.

257 *Id.*

258 *Id.* at 15.

259 *Id.*

260 *Id.*

261 *Id.*

262 *Id.*; R.C. WOOD & ASSOCS., MONT. REPORT, *supra* note 133, at 110.

263 R. Craig Wood & R. Anthony Rolle, *Improving "Adequacy" Concepts in Education Finance: A Heuristic Examination of the Professional Judgment Research Protocol*, EDUC. CONSIDERATIONS, Fall 2007, at 51, 52.

264 R.C. WOOD & ASSOCS., RHODE ISLAND REPORT, *supra* note 241, at 15.

265 *See id.*

regression equation consisting of a host of variables to create a curve of best fit.²⁶⁶ Cost of education variables such as poverty, language proficiency, and disabilities as well as competitive wages and issues of scale may be addressed.²⁶⁷ Increasingly common among recent analyses of educational adequacy are statistical methods that may be used either to estimate (a) the quantities and qualities of educational resources associated with higher or improved educational outcomes or (b) the costs associated with achieving a specific set of outcomes, in different school districts, serving different student populations.²⁶⁸ The first of these methods is known as the Education Production function and the second of these methods is known as the Education Cost function.²⁶⁹

The Successful Schools Model is essentially the process of performance measures reflective of successful schools/districts by a state's criteria while accounting for student needs and demographics.²⁷⁰ The most notable variable is the number of students who live in poverty. The model determines a targeted expenditure equal to what successful schools/districts are achieving in a state.²⁷¹ Successful Schools studies utilize outcome data on measures such as attendance and dropout rates and student test scores to identify that set of schools or school districts in a state that meet a chosen standard of success.²⁷²

Utilizing the exact same data from a given state, the four models will produce a wide array of adequacy targets. The models will yield targets from the highest to the lowest with the Professional Judgment Model generally being the highest and the Evidenced Based Model being the lowest cost; the Education Costs or Production Function Model and the Successful Schools Model will be between these two. Unfortunately, a major shortcoming of either Professional Judgment or Evidenced Based is that these studies appear to be poor estimators of the actual costs of educating children.²⁷³ Professional Judgment models suffer from significant reliability and validity issues while Evidenced Based models often draw assumptions based on studies with very limited or no generalizability.²⁷⁴

C. Adequacy Studies as Advocacy

The literature concerning state adequacy studies is growing over time

²⁶⁶ *Id.* at 3.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 15.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 3.

²⁷¹ *Id.*

²⁷² *Id.* at 14.

²⁷³ *Id.* at 15.

²⁷⁴ *Id.*

as education finance researchers continue to examine and refine education finance studies. However, the actual examination of these documents is scarce and objective analysis is almost unheard of within the literature. In some instances, the actual studies are unattainable. Nearly all commentators have either a self-interest or a social/political perspective that prevents objective analysis regarding the public policy issues under examination. Of the studies done to date, many are, in fact, reflective of advocacy groups or state political organizations. Thus, by definition one has to examine the validity of the claims therein. Additionally, many are based solely on small, non-scientific selected professional judgment panels. Professional judgment panels, with rare exceptions, will always produce the highest cost estimates as compared to the other three models.

Lori R. Benton, in one of the few studies that has examined state adequacy studies in detail, categorized them in a most useful manner.²⁷⁵ Approximately one-half of the state education finance adequacy studies to date have been conducted, or sponsored, by some type of advocacy organization.²⁷⁶ Appendix A reflects an overview, presented in chronological order, of the major state adequacy studies to date.

CONCLUSION

The adequacy claims as presented in the various state courts all attempt to totally ignore the issues of equity and to concentrate on issues of perceived adequacy. Adequacy is defined according to how the plaintiffs perceive it from state to state. It is critical to understand a fundamental flaw in the adequacy concept. This flaw is found within the education finance equity literature. That is, in fact, if equity were judged to have been met, then, by definition, all school districts would either be adequate or inadequate. If it were determined that fiscal equity existed by the traditional measures utilized in such studies, then the plaintiffs' burden changes significantly in terms of explaining why the plaintiffs' districts are offering an inadequate education. For example, if expenditures were remarkably the same, that is, within a narrow range and exhibiting a high level of horizontal equity as reflected in the Variance, the McLoone Index, the Coefficient of Variation, and the Gini Coefficient,²⁷⁷ plaintiffs' explanations must be drawn toward issues of student achievement.

If student achievement becomes the primary basis upon which

²⁷⁵ Lori Rosen Benton, *Examination and Application of the Education Adequacy Models and Studies to the State of Florida* 175–82 (Dec. 2008) (unpublished Ph.D. dissertation, University of Florida) (on file with author).

²⁷⁶ *See id.* (showing that out of fifty-one studies, twenty-five were sponsored by some form of adequacy organization).

²⁷⁷ ROBERT BERNE & LEANNA STIEFEL, *THE MEASUREMENT OF EQUITY IN SCHOOL FINANCE: CONCEPTUAL, METHODOLOGICAL, AND EMPIRICAL DIMENSIONS* 19 (1984).

adequacy claims are made, it initiates a conundrum for the courts. It is a conundrum when this contention is examined and analyzed. If equity were statistically present, and assuming that a given set of state standards have even a modest degree of discrimination, then the result will always be that some students will not meet the prescribed state standards. Given the undeniable fact that a bell curve of student abilities exists, and assuming that the state standard actually measures some degree of achievement, then by definition some students will fail. On the other hand, assuming that the state standards are at best minimalist, then the vast majority of students may meet the state standard with a high passage rate regardless of the existence of the bell curve of individual abilities. The concept of one-hundred percent passage based on NCLB standards or a state standard is, at best, questionable and, in actuality, not possible if state standards were indeed meaningful. If an extremely high passage rate were exhibited then the achievement variable would be diminished to the point of not being a fruitful path for the plaintiffs.

That is, often the examination reveals a setting in which statistically similar school districts serving statistically similar students produce significantly differing results within a state that exhibits a high degree of statistical education finance equity. In other words, some school districts pass the state standards, while other school districts do not, yet they have similar access to revenues and have similar expenditures.

Given these realities and the highly political nature of adequacy claims several state courts reflect a manipulation of precedent and text in order to fit a desired result, despite the tensions marked in these opinions. It may be ventured that an interpretive framework is at play that, although decidedly consequentialist, is rooted in the philosophical foundations articulated in John Hart Ely's "representative-reinforcing" concept of judicial review.²⁷⁸ As noted, Ely constructed a rationale premised on the responsibility of the judiciary to insist that the legislature provide citizens the rights essential to the operation of a democratic political process.²⁷⁹ To Ely, "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about."²⁸⁰ In a similar tack, Ronald Dworkin argued that "[t]he function of judges . . . [was] to secure the 'democratic conditions' necessary for a democracy to exist."²⁸¹ Key to this appreciation of judicial

278 JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 153-61 (1980); see, e.g., *Campaign for Fiscal Equity v. State*, 801 N.E.2d 326, 345 (N.Y. 2003); *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 394-95 (N.C. 2004); *Brigham v. State*, 692 A.2d 384, 386 (Vt. 1997); see also *Vincent v. Voight*, 614 N.W.2d 388, 407 (Wis. 2000) (although finding for the state, the court expanded the constitutional text of the education article to embrace an adequacy standard that included preparation for students roles as citizens).

279 See ELY, *supra* note 278, at 117.

280 *Id.*

281 Edward B. Foley, Rodriguez Revisited: *Constitutional Theory and School Finance*, 32 GA. L. REV. 475, 503 (1998) (quoting RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF*

review, evidenced in the recent case record, is the right of all citizens in a democracy to be informed participants; thus, imposing upon the state the responsibility to ensure that they are provided the opportunity to achieve what Robert Dahl characterized as “enlightened understanding.”²⁸² This aggressive affirmation of the nexus between education and the fundamental rights of citizenry, dismissed in *San Antonio Independent School District v. Rodriguez* in a judicial treatment utilized subsequently in courts presenting it as restrained,²⁸³ has become a principle characteristic of an activist state judiciary in the realm of public education finance.

Ignored is the operative presumption that the ordinary democratic political process cannot be entrusted to protect the rights in question; therefore, the risk posed by an unresponsive and/or irresponsible legislative branch is balanced by the inherent risks posed by greater judicial involvement.²⁸⁴ An integral component of Ely’s concept is the assertion that the protection of the political process interests of those who cannot do so for themselves is the responsibility of the judiciary, a duty superseding separation of powers doctrine and a position affirmed by the Supreme Court in *Kramer v. Union Free School District No. 15*.²⁸⁵ In *Nixon v. United States*, Justice Souter noted in a concurring opinion in referenc to the political question case that “[n]ot all interference is inappropriate or disrespectful . . . and application of the doctrine ultimately turns, as Learned Hand put

THE AMERICAN CONSTITUTION 32–33 (1996)).

282 *Id.* at 504 (quoting ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 112 (1989)).

283 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 (1972). Plaintiffs had contended that education was unique due to its relationship to other rights and liberties accorded protection under the Constitution such as speech and the right to vote. In addressing this presumed nexus, the Court marked that it had “long afforded zealous protection against unjustifiable governmental interference with the individual’s rights to speak and to vote. Yet, we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice.” *Id.*

284 *See* Foley, *supra* note 281, at 105–09.

285 ELY, *supra* note 278, at 117–20 (noting *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627–28 (1969)). The Court, in invalidating a requirement that a person own property in order to vote in school board elections, stated:

[T]he deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators or other public officials. . . . The presumption of constitutionality and the approval given “rational” classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

Kramer, 395 U.S. at 627–28.

it, 'on how importunately the occasion demands an answer.'"²⁸⁶

The difficulty with these views is obvious—the answers are often preordained based on the political–social–economic filter of the court. That is, it is only an answer if the court ordains what the answer should be absent the constraints of the state constitution and the privilege of the people as represented in the state legislature.

The courts exhibiting restraint have, in contrast, reflected Chief Justice Burger's dissent in *Plyler v. Doe* that "it is for Congress, and not this Court, to assess the 'social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.'"²⁸⁷

The dilemma for the various state courts is overwhelming upon any examination. It is perhaps one thing to assert the role of the court into a political–social–economic discussion absent specific constitutional language. It is entirely another to make such public policy premised on the concept of "unblocking stoppages within the democratic process" based on studies that do not meet the most minimal requirements of scientific inquiry—studies that are interwoven with advocacy while lacking scientific justification.²⁸⁸ Thus, at least in some instances, absent what we know to exist in society, advocacy groups will construct what they wish to exist in society and continue to hope the courts will enforce their definition of the "American dream" absent a constitutional standard to do so.

²⁸⁶ *Nixon v. United States*, 506 U.S. 224, 253 (1993) (Souter, J., concurring) (citation omitted).

²⁸⁷ *Plyler v. Doe*, 457 U.S. 202, 253–54 (1982) (Burger, C.J., dissenting) (citation omitted).

²⁸⁸ ELX, *supra* note 278, at 117.

Appendix A: Major State Education Adequacy Studies

| State | Title of Study | Year | Researcher | Funding Source | Advocacy Group (Yes/No) |
|---------------|--|------------|---|---|-------------------------|
| Massachusetts | Every Child a Winner | July 1991 | Massachusetts Business Alliance for Education Committee on School Finance | Massachusetts Business Alliance for Education | Yes |
| Wyoming | A Proposed Cost-Based Block Grant Model for Wyoming School Finance | May 1997 | Management Analysis & Planning Associates (MAP) | Joint Appropriations Comm. of the Wyoming Legislature | No |
| Maine | Essential Programs and Services: Equity and Adequacy in Funding to Improve Learning for All Children | Jan. 1999 | Maine Education Policy Research Institute | Maine Legislature | No |
| Oregon | The Oregon Quality Education Model | April 1999 | Legislative Council on the Oregon Quality Education Model | Oregon Legislative Assembly | No |
| Oregon | Oregon Quality Education Model-2000 | Jan. 2000 | Oregon Quality Education Commission | Oregon Gov. John Kitzhaber and Schools Superintendent Stan Bunn | No |

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|----------|--|------------|---|--|-----|
| Illinois | A Procedure for Calculating a Base Cost Figure and an Adjustment for At-Risk Pupils that Could be Used in the Illinois School Finance System | June 2001 | Augenblick and Myers, Inc. | Illinois Education Funding Advisory Board | No |
| Maryland | A Professional Judgment Approach to Determining Adequate Education Funding in Maryland | June 2001 | Management Analysis & Planning, Inc. (MAP) | The New Maryland Education Coalition | Yes |
| Maryland | Calculation of the Cost of an Adequate Education in Maryland in 1999-2000 Using Two Different Analytic Approaches | Sept. 2001 | Augenblick and Myers | Maryland Commission on Education Finance, Equity, and Excellence (Thornton Commission) | No |
| Wyoming | Proposed Revisions to the Cost-Based Block Grant | Jan. 2002 | Management Analysis and Planning Associates (MAP) | Wyoming State Legislature | No |
| New York | Estimating the Cost of an Adequate Education in New York | Feb. 2002 | Duncombe | Center for Policy Res. | Yes |
| Kansas | Calculation of the Cost of a Suitable Education in Kansas in 2000-2001 Using Two Different Analytical Approaches | May 2002 | Augenblick and Myers | Kansas' Legislative Coordinating Council | No |

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|-----------|--|------------|--|--|-----|
| Wisconsin | Funding Our Future: An Adequacy Model for Wisconsin School Finance | June 2002 | Norman | Institute for Wisconsin's Future | Yes |
| Montana | Calculation of the Cost of a Suitable Education in Montana in 2001-2002 Using the Professional Judgment Approach | Aug. 2002 | Myers and Silverstein (Augenblick and Myers) | Montana School Board Association | Yes |
| Indiana | Calculation of the Cost of an Adequate Education in Indiana in 2001-2002 Using the Professional Judgment Approach | Sept. 2002 | Augenblick and Myers, Inc. | Indiana State Teachers Association | Yes |
| Colorado | Calculation of the Cost of an Adequate Education in Colorado using the Professional Judgment and the Successful School District Approaches | Jan. 2003 | Augenblick and Myers | Colorado School Finance Project (CSFP) | Yes |
| Kentucky | A State-of-the-Art Approach to School Finance Adequacy in Kentucky | Feb. 2003 | Picus and Associates | Kentucky Department of Education | No |
| Kentucky | Calculation of the Cost of an Adequate Education in Kentucky: A Professional Judgment Approach | Feb. 2003 | Verstegen | Council for Better Education, Inc. | Yes |

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|--------------|---|------------|-------------------------------------|--|-----|
| Washington | What Will It Take? Defining a Quality Education in Washington and a New Vision of Adequacy for School Funding | Mar. 2003 | Conley and Freund | The Rainer Institute | Yes |
| Kentucky | A Professional Judgment Approach to School Finance in Kentucky | May 2003 | Picus and Associates | Kentucky Department of Education | No |
| North Dakota | Calculation of the Cost of an Adequate Education in North Dakota in 2002-2003 Using the Professional Judgement (sic) Approach | July 2003 | Augenblick, Palaich, and Associates | North Dakota Department of Public Instruction (DPI) | No |
| Arkansas | An Evidenced-Based Approach to School Finance Adequacy in Arkansas | Sept. 2003 | Picus | Arkansas Legislature's Joint Committee on Educational Adequacy | No |
| Tennessee | Calculation of the Cost of an Adequate Education in Tennessee in 2001-02 Using the Professional Judgment Approach and the Successful School District Approach | Dec. 2003 | Augenblick, Palaich, and Associates | Coalition for Tennessee's Future | Yes |
| New York | Estimating the Additional Cost of Providing an Adequate Education | Jan. 2004 | New York State Education Department | New York State Board of Regents | No |

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|-----------|---|-----------|--|---|-----|
| Minnesota | Determining the Cost of an Adequate Education in Minnesota: Implications for the Minnesota Education Finance System | Feb. 2004 | Haveman | Minnesota Center for Public Finance Research | Yes |
| New York | Resource Adequacy Study for the New York State Commission on Education Reform | Mar. 2004 | Standard & Poor's (S & P) | New York State Commission on Education Reform | No |
| New York | The New York Adequacy Study: Determining the Cost of Providing All Children in New York an Adequate Education | Mar. 2004 | American Institutes for Research (AIR), MAP and Taylor | The Atlantic Philanthropies, Bill and Melinda Gates Foundation, and The Ford Foundation | Yes |
| Texas | School Outcomes and School Costs: The Cost Function Approach | Mar. 2004 | Gronberg, Jansen, Taylor, and Booker | The Texas Joint Select Committee for Public School Finance | No |
| Texas | Estimating the Costs of Meeting the Texas Educational Accountability Standards | May 2004 | Imazeki and Reschovsky | Plaintiffs in West Orange Cove v. Neeley | Yes |
| Arizona | An Evidenced-Based Approach to School Finance Adequacy in Arizona | June 2004 | Picus | Rodel Charitable Foundation of Arizona and Greater Phoenix Leadership | Yes |

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|-------------|---|-----------|--|---|-----|
| Arizona | Arizona English Language Learner Cost Study | Feb. 2005 | National Conference of State Legislatures's National Center on Education Finance | Arizona Legislative Council | No |
| Hawaii | State of Hawaii Adequacy Funding Study | Mar. 2005 | Thornton | Hawaii Department of Education | No |
| Connecticut | Estimating the Cost of an Adequate Education in Connecticut | June 2005 | Augenblick, Palaich, and Associates | Connecticut Coalition for Justice in Education Funding (CCJEF) | Yes |
| Montana | Determining the Cost of Providing an Adequate Education in the State of Montana | Oct. 2005 | R.C. Wood and Associates | Quality Schools Interim Committee and the Montana State Legislature | No |
| Wyoming | An Evidenced-Based Approach to Recalibrating Wyoming's Block Grant School Funding Formula | Nov. 2005 | Picus | Wyoming Legislative Select Committee on Recalibration | No |
| Kansas | Estimating the Costs of Meeting Performance Outcomes Adopted by the Kansas State Board of Education | Dec. 2005 | Duncombe and Yinger | Kansas Legislative Division of Post Audit (LPA) | No |
| Kansas | Elementary and Secondary Education in Kansas: Estimating the Costs of a K-12 Education Using Two Approaches | Jan. 2006 | Legislative Division of Post Audit (LPA) | Legislative Division of Post Audit (LPA) | No |

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|--------------|---|------------|--|---|-----|
| South Dakota | Estimating the Cost of an Adequate Education in South Dakota | Jan. 2006 | Augenblick, Palaich, & Associates | South Dakota Alliance for Education | Yes |
| Arkansas | Recalibrating the Arkansas School Funding Structure | Aug. 2006 | Odden, Picus, and Goetz | Adequacy Study Oversight Sub-Committee of the House & Senate Interim Committees on Education of the Arkansas General Assembly | No |
| Nevada | Estimating the Cost of an Adequate Education in Nevada | Aug. 2006 | Augenblick, Palaich, and Associates, Inc. | Nevada Legislative Committee to Study School Financing Adequacy | No |
| Washington | An Evidence-Based Approach to School Finance Adequacy in Washington | Sept. 2006 | Odden, Picus, Goetz, Mangan, and Fermanich | K-12 Advisory Committee of Washington Learns | Yes |
| Washington | Washington Learns: Successful District Study | Sept. 2006 | Fermanich, Mangan, Odden, Picus, Gross, and Rudo | Washington Learns | Yes |
| Colorado | Estimating Colorado School District Costs to Meet State and Federal Education Accountability Requirements | Oct. 2006 | Augenblick, Palaich, and Associates | Colorado School Finance Project | Yes |
| Minnesota | Estimating the Cost of an Adequate Education in Minnesota | Nov. 2006 | Silverstein, Rose, and Myers | P.S. Minnesota | Yes |
| Montana | Estimating the Cost of an Adequate Education in Montana | Jan. 2007 | Silverstein, Rose, Palaich, Myers, and Brown | Montana Quality Education Coalition | Yes |

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|--------------|--|-----------|---|---|-----|
| Washington | Washington Adequacy Funding Study | Jan. 2007 | Conley and Rooney – Educational Policy Improvement Center (EPIC) and Center for Educational Policy Research (CEPR) | Washington Education Association | Yes |
| California | Aligning School Finance with Academic Standards: A Weighted Student Formula Based on a Survey of Practitioners | Mar. 2007 | Sonstelie, Altman, Battersby, Benelli, Dhaey, Gardinali, Hill, and Lipscomb | Institute for Research on Education Policy and Practice at Stanford University | No |
| California | Efficiency and Adequacy in California School Finance: A Professional Judgment Approach | Mar. 2007 | Chambers, Levin, and DeLancey (American Institutes for Research – AIR) | Bill and Melinda Gates Foundation, William and Flora Hewlett Foundation, James Irvine Foundation, and Stuart Foundation | Yes |
| Rhode Island | State of Rhode Island Education Adequacy Study | Mar. 2007 | R.C. Wood and Associates | Joint Committee to Establish a Permanent Education Foundation Aid Formula for Rhode Island | No |
| Wisconsin | Moving From Good to Great in Wisconsin: Funding Schools Adequately And Doubling Student Performance | Mar. 2007 | Odden, Picus, Archibald, Goetz, Mangan, & Aportela | Wisconsin School Finance Adequacy Initiative | Yes |

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|--------------|--|-----------|---|---|----|
| Pennsylvania | Costing Out the Resources Needed to Meet Pennsylvania's Public Education Goals | Nov. 2007 | Augenblick, Palaich, and Associates, Inc. | Pennsylvania State Board of Education | No |
| New Mexico | An Independent Comprehensive Study of the New Mexico Public School Funding Formula | Jan. 2008 | American Institutes for Research (AIR) | Funding Formula Task Force appointed by the State Legislature | No |

Lori Rosen Benton, Examination and Application of the Education Adequacy Models and Studies to the State of Florida 175-82 (Dec. 2008) (unpublished Ph.D. dissertation, University of Florida) (on file with author).

