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NOTES

MANAGEABLE ADEQUACY STANDARDS IN EDUCATION REFORM LITIGATION

I. INTRODUCTION

State courts play a vital role in ensuring that a state's public schools provide students with an adequate education.

[A]s Thomas Jefferson pointed out early in our history . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society.¹

Because an educated citizenry is so important, each state's constitution contains a provision obligating the state to provide for its public schools.² The wording of each such provision varies, sometimes stating the commitment in very lofty and aspirational terms, sometimes in very simple terms.³ In each case, though, the legislative branch is obligated to set up and finance the state's public schools.

Litigation has long been a tool of education reform advocates. Commentators often categorize education reform litigation⁴ into three

1. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

2. See Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1343-48 (1992) (listing each state's education clause).

The Mississippi Constitution is the source of some dispute among commentators. The language of the constitution certainly contains language about schools. MISS. CONST. art. 8, § 201 ("The Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe.") However, some notable experts assert that this language imposes no obligation on the state, and therefore they do not classify it as an education clause. See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 n.5 (1991); William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661 n.102 (1989). But see Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1158 n.64 (1995) (asserting that the Mississippi Constitution does contain an education clause).

3. See *infra* notes 42-44 and accompanying text.

4. In this Note, the term "education reform litigation" will be used to describe suits to challenge public school system funding as a whole. Limited challenges on behalf of specific classes of students (e.g., the developmentally disabled, handicapped, or other special-needs students) will not be

“waves.”⁵ During the first wave, which lasted until 1973, plaintiffs generally alleged that funding disparities among school districts deprived them of equal protection under the Fourteenth Amendment of the Federal Constitution.⁶ After the Supreme Court foreclosed this avenue, the second wave began.⁷ Plaintiffs in the second wave of litigation turned to the equal protection clauses of their state constitutions.⁸ However, several years of these suits proved to be largely unsuccessful for plaintiffs.⁹ Thus, in the late 1980s plaintiffs shifted their focus to claims of absolute, rather than relative, inadequacy.¹⁰ These third-wave plaintiffs began to enjoy some success by grounding their claims in their state constitutions’ education clauses,¹¹ but some courts have exhibited a reluctance to address such a value-laden and ethereal issue as educational adequacy.¹²

This Note argues that when a citizen sues the state on the theory that the state has failed to fulfill its constitutional obligation to provide for adequate education, the judiciary has the institutional duty to interpret the education clause to determine whether the state has complied with its constitutional obligation.¹³ This Note further argues that the proper approach to a judicial definition of educational adequacy is to adopt as mandatory the standards that the legislature and the education bureaucracy have adopted for themselves in the form of accreditation standards or statutory statements of educational goals.¹⁴ Such an approach gives the legislature and administration clear

addressed specifically.

5. William Thro first suggested this framework for analysis of school reform litigation, and commentators have generally accepted his categorization. William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J. L. & EDUC. 219 (1990); see also Gail F. Levine, Note, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507 (1991); Margaret R. Westbrook, Comment, *School Finance Litigation Comes to North Carolina*, 73 N.C. L. REV. 2123 (1995) (discussing the history of the three waves of litigation leading up to the new challenge in North Carolina).

6. See *infra* Part II.A.

7. See *infra* Part II.B.

8. See *infra* Part II.B.

9. See *infra* Part II.B.

10. See *infra* Part II.C.

11. See *infra* Part II.C.

12. See *infra* Part II.C.

13. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) (arguing that courts have a duty, as a check on the coordinate branches, to decide constitutional questions properly before them). *But see* *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995) (holding that the legislature’s “plenary constitutional power” to provide for education precluded them from invalidating the school financing laws).

14. See *infra* Part IV.D.

guidance to help them correct noncompliance with their constitutional duty, if necessary, but at the same time this “existing standards” approach allows the court to stay within its narrow institutional role as interpreter of the constitution.¹⁵

Part II of this Note outlines the landmark cases in each of the three waves of education reform litigation. Part III then describes and critiques the two approaches that courts have most often used to define educational adequacy during the third wave. Part IV.A highlights third-wave decisions in Kansas and Alabama as examples of a third approach, herein referred to as the existing standards approach. Drawing on the lessons learned from all three third-wave approaches, Part IV.B argues that the existing standards approach presents the most feasible method of resolving education reform litigation in which adequacy is at issue. After Part IV.C points to cases in which litigants or courts missed opportunities to define adequacy, Part IV.D argues that adequacy standards do exist and that courts should not avoid the issue of educational adequacy for lack of manageable standards. Finally, Part V concludes the Note.

II. THE THREE WAVES OF EDUCATION REFORM LITIGATION

A. *The First Wave*

During the first wave of education reform litigation, plaintiffs sued under the Equal Protection Clause of the Federal Constitution.¹⁶ They typically claimed that a state’s school financing scheme deprived them of equal protection because of wide funding disparities inherent in a system that depended on local property taxes.¹⁷

The seminal case during this period was the 1971 California case of *Serrano v. Priest* (“*Serrano I*”).¹⁸ In *Serrano I*, the California Supreme Court

15. See *infra* Part IV.B (discussing the advantages of this “existing standards” approach).

16. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

17. Every state except Hawaii derives a significant portion of its school funds from local taxes. NATIONAL CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., DIGEST OF EDUCATION STATISTICS 152 (1995). In *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241, 1246 (Cal. 1971), *appeal after remand*, (*Serrano II*) 557 P.2d 929 (Cal. 1976) (affirming the lower court’s enforcement of *Serrano I*), *cert. denied*, 432 U.S. 907 (1977), for example, the plaintiffs alleged that district property tax bases varied by as much as 10,000 to 1.

18. *Serrano I*, 487 P.2d 1241.

held California's school finance system unconstitutional on two grounds.¹⁹ First, the court held that wealth constituted a suspect class, against which the system of local property tax funding discriminated because the available resources were a function of a child's wealth (or the wealth of the district in which the child lived).²⁰ Second, the court launched into a lengthy discussion on the importance of education, finding that education was a fundamental right for the purposes of equal protection.²¹

Under either prong of the court's analysis, the result was that the school financing system was subject to strict scrutiny.²² The *Serrano I* court not only held that the state lacked a compelling interest, but also that the state's alleged interest, local control of public education, was a "cruel illusion for the poor school districts."²³ Even with a very high tax effort, the poor districts did not have the property tax base to raise the revenue that rich districts could raise with a low tax effort.²⁴ The court held that the school financing system violated the equal protection clauses of both the California and Federal Constitutions.²⁵

19. Actually, *Serrano I* only reversed a motion to dismiss by holding that the plaintiffs' allegations, if proven, would amount to valid claims under the constitutions. *Id.* at 1266. On remand, the lower court in an unpublished opinion found in favor of the plaintiffs three years after *Serrano I*. The California Supreme Court upheld the plaintiffs' verdict. *Serrano II*, 557 P.2d at 929 (4-3 decision).

20. *Serrano I*, 487 P.2d at 1250-55 (discussing wealth as a suspect class). The court held that discrimination against district wealth was equally invalid as discrimination against individual wealth. *Id.* at 1252-53.

21. For instance, the California court pointed out that the United States Supreme Court had recognized the importance of public education in *Brown v. Board of Education*, 347 U.S. 483 (1954). *Serrano I*, 487 P.2d at 1256 (observing that "education is perhaps the most important function of state and local governments" and that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education") (quoting *Brown*, 347 U.S. at 493).

22. *Serrano I*, 487 P.2d at 1259-63. In an equal protection analysis, a court often invokes a two-tiered scrutiny. If a court determines that the right at stake is not a fundamental constitutional right, then the government need only show some rational relation to a legitimate government interest in order to treat classes differently. If a fundamental right is at stake, or if the classification discriminates against a suspect class, however, a court will use a strict scrutiny standard. Under strict scrutiny, the government must show that the classification is necessary to achieve a compelling governmental interest. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16-2 to -6 (2d ed. 1988).

23. *Serrano I*, 487 P.2d at 1260.

24. "Tax effort" is a measure of how heavily a district taxes its property. These figures are sometimes expressed as dollars of tax per hundred dollars of assessed property value. See *Serrano I*, 487 P.2d at 1260 (showing that a poor district could not raise as much revenue at a rate of \$5 tax per \$100 assessed value as a wealthy district could raise at a rate of about \$2 per \$100).

25. *Id.* at 1244-45, 1265-66. See U.S. CONST. amend. XIV, § 1; CAL. CONST. art. I, § 7 (stating, in relevant part, "A person may not be deprived of life, liberty, or property without due process of law

Serrano I opened the floodgates for similar suits in other states. By some counts, plaintiffs in more than thirty states brought similar claims in the following few years.²⁶ The United States Supreme Court closed this floodgate in 1973 when it decided *San Antonio Independent School District v. Rodriguez*.²⁷ In *Rodriguez*, the Court rejected the Texas plaintiffs' equal protection claims, holding that 1) plaintiffs had failed to prove that identifiably "poor" people lived in property-poor districts or that poverty had caused "absolute deprivation of education;"²⁸ 2) education spending did not seem to correlate with family income;²⁹ and 3) district wealth defined too "large, diverse, and amorphous" a class to be considered a suspect class worthy of strict scrutiny.³⁰ In addition, the Court decided that because the U.S. Constitution neither expressly nor impliedly guarantees education, it is not a fundamental right for the purposes of federal equal protection analysis.³¹

As is usually the case when a court invokes a rational relation analysis, the Court did find the disparity to be rationally related to a legitimate government interest.³² Specifically, the Court found Texas's system of funding schools based on local ad valorem property tax bases to be rationally related to the legitimate state interest of local school control.³³ Further, the Court feared that declaring education to be fundamental would logically mean that other interests, like food and shelter, would also have to be fundamental.³⁴

or denied equal protection of the laws").

26. See Thro, *supra* note 5, at 224 n.24 (citing Betsy Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 1977 DUKE L.J. 1099, 1101).

27. 411 U.S. 1 (1973).

28. *Id.* at 25.

29. *Id.* at 26-27.

30. *Id.* at 27-29.

31. *Id.* at 35 (finding no basis for implicit constitutional protection); see also *id.* at 35-39 (rejecting plaintiffs' theory that linked education to the free speech and voting rights because there had been no deprivation of those rights).

32. *Id.* at 54-55. See *supra* note 22 for a brief discussion of equal protection levels of scrutiny.

33. *Rodriguez*, 411 U.S. at 54-55. The notion that local control is a legitimate interest for funding disparities has been sharply criticized by courts and scholars both before and after *Rodriguez*. See, e.g., *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241, 1260 (Cal. 1971) (asserting that local control is a "cruel illusion for the poor school districts"), *appeal after remand*, (*Serrano II*), 557 P.2d 929 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977); *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983); *Tennessee Small Sch. Sys. v. McWhorter*, 851 S.W.2d 139, 155 (Tenn. 1993); Michael A. Rebell, *Fiscal Equity in Education: Deconstructing the Reigning Myths and Facing Reality*, 21 N.Y.U. REV. L. & SOC. CHANGE 691, 705-10 (1994-95); Jennifer E. Palmer, Comment, *Education Funding: Equality Versus Quality—Must New York's Children Choose?*, 58 ALB. L. REV. 917 (1995).

34. *Rodriguez*, 411 U.S. at 37.

B. *The Second Wave*

In precluding the use of the Federal Equal Protection Clause in education finance reform claims, *Rodriguez* effectively foreclosed the use of federal courts in broad challenges to state systems of public education.³⁵ Thus, plaintiffs turned to state courts.³⁶

The common strategy was to challenge education financing primarily under state constitutions' equal protection clauses.³⁷ Although the theory was similar to that in pre-*Rodriguez* cases, state courts are not constrained by federal constitutional jurisprudence in interpreting their own constitutions.³⁸ Moreover, differences in the constitutional language suggested that reliance on state constitutions might be promising.³⁹ For instance, the *Rodriguez* Court found no mention of education in the Federal Constitution, which indicated that education was not a fundamental right. In contrast, all fifty state constitutions contain some sort of education clause that imposes upon the state the duty to provide for public schools.⁴⁰

Education clauses vary widely among states, but each one gives the state

35. The Supreme Court did leave a very narrow opening in the Federal Equal Protection Clause for education reform litigators. The Court implied that a system may violate equal protection if the school system is inadequate to the extent that it effectively deprives children of their First Amendment rights or their right to vote. *Id.* at 36-37. However, because this avenue is so narrow, plaintiffs bring their suits in state courts, where they have more and better opportunities to win. Also, plaintiffs may of course utilize the federal courts for federal statutory claims; however, these challenges are outside the scope of this Note.

36. *See, e.g., DuPree*, 651 S.W.2d 90; *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982) (en banc); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *Board of Educ. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982); *Britt v. North Carolina State Bd. of Educ.*, 357 S.E.2d 432 (N.C. Ct. App.), *aff'd. mem.*, 361 S.E.2d 71 (N.C. 1987); *Board of Educ. v. Walter*, 390 N.E.2d 813 (Ohio 1979); *Olsen v. State*, 554 P.2d 139 (Or. 1976); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978) (en banc); *Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988); *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979); *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980).

37. *See supra* note 36. *See generally* Thro, *supra* note 2.

38. Many state courts do find the United States Supreme Court's constitutional interpretation to be persuasive. This is probably a significant reason why reliance on state equal protection turned out to be a relatively unsuccessful strategy for education reform litigators. *See infra* note 56 for a list of unsuccessful challenges during the second wave.

39. For a good discussion of the differences among the states' constitutional language, see William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19 (1993). *See also* McUsic, *supra* note 2, at 319-26, 334-39.

40. *See* Hubsch, *supra* note 2, at 1343-48 (compiling the states' education clauses in an appendix).

the duty to provide for public education.⁴¹ Some of them explicitly require adequacy or high quality.⁴² Several state constitutions require that the legislature provide for a “general and uniform” system of schools.⁴³ Yet another typical provision mandates “a thorough and efficient system” of schools.⁴⁴ Whatever the specific language, these provisions helped some plaintiffs during the second wave to bolster their claims that education was a fundamental right under state equal protection.⁴⁵

A number of states’ school systems were struck down under state equal protection clauses (sometimes in conjunction with education clauses) during the second wave. Among those were Arkansas,⁴⁶ California,⁴⁷ Connecticut,⁴⁸ New Jersey,⁴⁹ West Virginia,⁵⁰ and Wyoming.⁵¹ Plaintiffs in these cases continued to couch their arguments primarily in terms of equality; however, they were in a better position to assert that education was a fundamental right.⁵² They could point to the state’s constitutional guarantee of free public schools and argue that the *Rodriguez* Court would have found education to be a fundamental right under the Federal Equal Protection Clause if education had been guaranteed in the Federal Constitution.⁵³ Thus, plaintiffs were on strong ground to claim that it was consistent with *Rodriguez* for education to

41. *Id.*

42. See FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; ILL. CONST. art. X, § 1; MONT. CONST. art. X, § 1(3); N.M. CONST. art. XII, § 1; VA. CONST. art. VIII, § 1.

43. See ARIZ. CONST. art. XI, § 1; IDAHO CONST. art. IX, § 1; IND. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; N.C. CONST. art. IX, § 2; OR. CONST. art. VIII, § 3; S.D. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2.

44. See MD. CONST. art. VIII, § 1; N.J. CONST. art. VIII, § 4, ¶ 1; OHIO CONST. art. VI, § 2; PA. CONST. art. III, § 14; W. VA. CONST. art. XII, § 1.

45. The boot-strap argument, prompted by the reasoning of *Rodriguez*, is that education is a fundamental right under the Equal Protection Clause because education is specifically guaranteed elsewhere in the constitution. *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1972) (“Education . . . is not among the rights afforded explicit protection under our Federal Constitution.”).

46. *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983) (the only court to strike down school financing using the rational basis standard).

47. *Serrano v. Priest (Serrano II)*, 557 P.2d 929 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977).

48. *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977).

49. *Robinson v. Cahill (Robinson I)*, 303 A.2d 273, 294 (N.J.), *on reargument, (Robinson II)*, 306 A.2d 65 (N.J.), *cert. denied*, 414 U.S. 976 (1973) (expressing equality concerns, but basing its holding exclusively on the education clause rather than the equal protection clause).

50. *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979).

51. *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980).

52. See *supra* note 45 (briefly explaining the boot-strap argument used by some second-wave plaintiffs).

53. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1977) (failing to find any mention of education in the Federal Constitution).

be a fundamental state right.⁵⁴ Furthermore, state courts could totally disregard *Rodriguez* if they wanted to grant broader rights under their own state constitutions.⁵⁵

The vast majority of second-wave challenges failed.⁵⁶ Courts routinely rejected the notion that states were required to spend an equal amount on each student,⁵⁷ refused to recognize district wealth as a suspect class,⁵⁸ and declined to recognize education as a fundamental right worthy of strict scrutiny.⁵⁹

C. The Third Wave

Successful suits in 1989 in Kentucky,⁶⁰ Montana,⁶¹ and Texas⁶² generally mark the beginning of the third wave of education reform litigation.⁶³ Challenges during the third wave have focused more on minimal educational adequacy than on equality of funding.⁶⁴ Such adequacy claims have proved to be a much more successful strategy for plaintiffs than equality claims were in

54. See, e.g., *Serrano v. Priest (Serrano II)*, 557 P.2d 929, 951 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977); *Horton v. Meskill*, 376 A.2d 359, 372-74 (Conn. 1977).

55. See, e.g., *Pauley v. Kelly*, 255 S.E.2d 859, 863-64 (W.Va. 1979) (finding an inquiry into its own state's constitutional language necessary to decide if it wanted to require stricter standards and also questioning the *Rodriguez* Court's determination that education is not a fundamental right).

56. See *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982) (en banc); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *Board of Educ. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982); *Britt v. North Carolina State Bd. of Educ.*, 357 S.E.2d 432 (N.C. Ct. App.), *aff'd mem.*, 361 S.E.2d 71 (N.C. 1987); *Board of Educ. v. Walter*, 390 N.E.2d 813 (Ohio 1979); *Olsen v. State*, 554 P.2d 139 (Or. 1976); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979); *Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988); *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989).

57. See, e.g., *Lujan*, 649 P.2d at 1018; *Hornbeck*, 458 A.2d at 770; *Kukor*, 436 N.W.2d at 579.

58. See, e.g., *Lujan*, 649 P.2d at 1019-21; *Engelking*, 537 P.2d at 645-46; *Hornbeck*, 458 A.2d at 787 & n.17.

59. See, e.g., *Lujan*, 649 P.2d at 1022-23; *Walter*, 390 N.E.2d at 820-22; *Olsen*, 554 P.2d at 144; *Kukor*, 436 N.W.2d at 579-80. *But see* *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983) (finding an equal protection violation even under rational basis standard).

60. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

61. *Helena Elem. Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989), *modified*, 784 P.2d 412 (Mont. 1990) (postponing effective date of earlier decision to allow executive and legislative branches to implement satisfactory system of funding).

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

63. Thro discusses a number of third-wave cases in William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994).

64. For discussions of the shift from equality arguments to adequacy arguments, see Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995); Heise, *supra* note 2.

the 1970s and 1980s.⁶⁵

The notion that states are responsible for providing some minimal level of educational adequacy is appealing for numerous reasons. Chief among them is that an adequacy standard guarantees that each student has the opportunity to attain some minimal proficiency, yet still allows the state to provide more than that if it is willing and able.⁶⁶ While defining adequacy may prove to be more difficult than defining equality,⁶⁷ requiring mere equality of funding would allow a state to shirk its duty by providing an equally paltry sum for each student.⁶⁸

William Thro, a leading education litigation expert, has found a pattern in

65. In addition to the three successful suits in 1989, plaintiffs have recently won in several other states. *See, e.g.*, Opinion of the Justices, 624 So. 2d 107 (Ala. 1993) (approving, in an advisory opinion for the state senate, a lower court decision not yet ripe for review, Alabama Coalition for Equity v. Hunt, Nos. CV-90-883-R & CV-91-0117, 1993 WL 204083 (Ala. Cir. Ct. April 1, 1993), which had struck the schools down as being inadequate on numerous grounds); *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994) (en banc) (holding that reliance on ad valorem property taxes violates the "general and uniform" requirement of the education clause because of gross funding disparities, but that the issue of sufficiency was not properly before the court); *McDuffy v. Secretary of Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Abbott v. Burke (Abbott II)*, 575 A.2d 359 (N.J. 1990); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993).

66. *See* John A. Nelson, *Adequacy in Education: An Analysis of the Constitutional Standard in Vermont*, 18 VT. L. REV. 7, 18 (1993) (stating that the real issue in adequacy suits is equality of educational opportunity).

67. Even this proposition may not be entirely true. Courts in New Jersey have struggled for over two decades to define that state's "thorough and efficient" education clause. The early cases concentrated on equality, but the later claims clearly shifted the focus to adequacy. *See* *Robinson v. Cahill (Robinson I)*, 303 A.2d 273 (N.J.), *on reargument, (Robinson II)*, 306 A.2d 65 (N.J.), *cert. denied*, 414 U.S. 976 (1973); *Robinson v. Cahill (Robinson III)*, 335 A.2d 6 (N.J. 1975); *Robinson v. Cahill (Robinson IV)*, 351 A.2d 713 (N.J.), *cert. denied*, 423 U.S. 913 (1975), *vacated, (Robinson V)*, 355 A.2d 129 (N.J. 1976); *Robinson v. Cahill (Robinson VI)*, 358 A.2d 457 (N.J. 1976); *Robinson v. Cahill (Robinson VII)*, 360 A.2d 400 (N.J. 1985); *Abbott v. Burke (Abbott I)*, 495 A.2d 376 (N.J. 1985); *Abbott II*, 575 A.2d 359; *Abbott v. Burke (Abbott III)*, 643 A.2d 575 (N.J. 1994); *see also* Ronald T. Hyman, *School Finance Litigation in New Jersey*, 66 EDUC. L. REP. 531 (1991); Phil Weiser, *What's Quality Got to Do with It?: Constitutional Theory, Politics, and Education Reform*, 21 N.Y.U. REV. L. & SOC. CHANGE 745 (1995) (analyzing New Jersey's seemingly interminable struggle to create a constitutional school system); Richard D. Ballot, Note, 21 SETON HALL L. REV. 445 (1991); Craig A. Ollenschleger, Comment, *Another Failing Grade: New Jersey Repeats School Funding Reform*, 25 SETON HALL L. REV. 1074 (1995).

68. As an illustration, assume that the average expenditure in school districts all over the state of Metro is \$3000 per student per year. Because of varying property tax bases, however, spending in individual districts varies from \$1000 to \$5000 per student per year. If a Metro court struck this system down on purely equal protection grounds, the Metro legislature could theoretically make the school financing scheme constitutional by setting up a common fund to ensure that \$1000 were spent on each student in each district. The major flaws in this result are that a) it ignores differences in costs across districts, and b) if the equalized amount is insufficient to educate any child, then no child in the state will receive an adequate education.

the courts' approaches to third-wave cases.⁶⁹ Courts generally engage in a five-step inquiry: 1) Is the suit an equality suit or an adequacy suit?; 2) If an adequacy suit, then does the constitutional language dictate a specific standard of quality?; 3) If a specific standard, then how exactly is that standard to be defined?; 4) Applying that standard to the school system in question, has there been a violation?; and 5) What role, if any, does funding play in the violation?⁷⁰

Although, as noted, the adequacy approach has proven fruitful for plaintiffs,⁷¹ several suits have also failed either because the plaintiff failed to state an adequacy claim⁷² or because the court was unwilling⁷³ or unable⁷⁴ to define the standard of adequacy. While differing outcomes depend at least partially on differences in the language of constitutional provisions,⁷⁵ a more

69. Thro, *supra* note 63, at 604-08.

70. *Id.*

71. See *supra* note 65.

72. See, e.g., Committee for Educ. Rights v. Edgar, 641 N.E.2d 602, 605 (Ill. App. Ct. 1994) (noting that "the claimed constitutional violation rests not on the adequacy of education in a district, but on differences in benefits and opportunities offered from district to district"); Gould v. Orr, 506 N.W.2d 349, 353 (Neb. 1993) (finding that plaintiffs failed to allege that unequal funding affected quality of education); Fair Sch. Fin. Council of Okla., Inc. v. State, 746 P.2d 1135, 1149-50 (Okla. 1987) (holding that the constitution guaranteed a "basic, adequate education according to the standards that may be established by the State Board of Education," but finding no claim that students were receiving an inadequate education).

73. See *Gould*, 506 N.W.2d at 353 (implying that an adequacy standard exists, declining to define it, and refusing leave to amend); City of Pawtucket v. Sundlun, 662 A.2d 40, 56 (R.I. 1995) (exhibiting total deference to the legislature: "No standard or authority has been assigned to review the General Assembly's performance in fulfillment of its constitutional duties in this regard."); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 152-56 (Tenn. 1993) (declining to define the adequacy standard, basing holding instead on equal protection).

74. See, e.g., Roosevelt Elem. Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 814 n.7 (Ariz. 1994) (en banc) (clearly implying that an adequacy requirement exists, but finding that the task of defining that standard was not properly before the court); Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995) (no attempt to define adequacy standard because the court was reviewing the case on motion for summary judgment on the pleadings).

75. Commentators have categorized education clauses in state constitutions according to the strength of the education commitment. See, e.g., McUsic, *supra* note 2, at 319-26, 334-39; Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814-22 & nn.143-46 (1985); Thro, *supra* note 39, at 23-27. Compare, for example, Alabama's simple provision, ALA. CONST. art. XIV, § 256 ("The legislature shall establish, organize and maintain a liberal system of public schools . . ."), and New Hampshire's ornate version of an education clause:

Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, . . . to countenance and

fundamental stumbling block can be a court's inability to discern a workable adequacy standard.⁷⁶ In terms of Thro's five-step analysis, courts have sometimes had trouble with the third step: defining the constitutional mandate.⁷⁷

III. JUDICIAL PROBLEMS WITH DEFINING ADEQUACY

Defining the level of adequacy required by a state's constitutional provision is perhaps the most important step in deciding a contemporary education reform case. Even if a court is willing to recognize the existence of the right to an adequate education, the right is meaningless without a workable, and hence enforceable, standard to measure adequacy. Because the definition of adequacy can be outcome-determinative,⁷⁸ a court must carefully craft definitional standards so as to maintain both legitimacy and enforceability.

Educational measurement is a difficult and controversial task even among education experts.⁷⁹ While most would agree that many American schools are not as good as they should be,⁸⁰ there is considerable disagreement on whether to mandate adequacy via output measures (e.g., standardized test

inculcate the principles of humanity and general benevolence, public and private charity, industry, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people.

N.H. CONST. pt. II, art. LXXIII.

76. See *supra* note 74.

77. See Thro, *supra* note 63, at 612-14.

78. Standards are outcome-determinative if plaintiffs tend to win when the state's obligation is defined with very demanding standards and lose when the standards are relatively lax. See *id.* at 613 (finding that aspirational standards "would be next to impossible to implement" but that accreditation standards are easy to meet because states generally will not revoke school accreditation). The situation is analogous to equal protection analysis, in which plaintiffs usually win under strict scrutiny and lose under rational basis analysis. Compare *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241 (Cal. 1971) (California Supreme Court finding for plaintiffs using strict scrutiny), *appeal after remand*, (*Serrano II*), 557 P.2d 929 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977) with *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (U.S. Supreme Court finding for defendants using rational basis on a similar equal protection claim).

79. See, e.g., NATIONAL CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *THE CONDITION OF EDUCATION 1995*, at viii-x (1995) [hereinafter *THE CONDITION OF EDUCATION 1995*] (noting the difficulty inherent in educational measurement and touting recent improvements).

80. See NATIONAL COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983) [hereinafter *A NATION AT RISK*] (scathingly critiquing American public schools and proposing improvements). This report asserts, for instance, "If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war." *Id.* at 5.

scores, graduation rates, and college acceptance rates) or input measures (e.g., per-pupil funding, student-to-teacher ratios, and teacher salaries).⁸¹ Whereas the first and second-wave cases sought relief in the form of input mandates (i.e., equality of funding), one advantage of the third-wave cases is that courts can set broad goals, allowing the state legislature free rein to choose the inputs appropriate to attain that standard.⁸²

Courts have approached their role in defining adequacy in very different ways—from the extremely deferential approach of the Rhode Island Supreme Court⁸³ to the relatively intrusive, policy-oriented approach of the high courts in Kentucky and Massachusetts.⁸⁴ However, this Note argues that neither these approaches nor those substantially similar to them⁸⁵ are a suitable method of resolving education reform litigation. Rather, the ideal approach lies in between the two.⁸⁶

A. *The Deferential Approach*

Some courts, perhaps mindful of the difficulties inherent in adequacy measurement or perhaps fearful of overstepping the bounds of judicial competence, have deliberately refrained from giving the coordinate branches specific directions on how to fix the state school systems. Although courts in a few states have adopted this approach, the result of this analysis has been either a right with no remedy for plaintiffs⁸⁷ or a mandate with insufficient guidance for legislatures.⁸⁸

The most extreme example of this approach has been Rhode Island's *City of Pawtucket v. Sundlun*,⁸⁹ in which the state supreme court held that the

81. See Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423 (1991), for an in-depth discussion of the input-output analysis in terms of education reform litigation. The input-output debate began in earnest upon publication of "The Coleman Report," a study that argued that no discernible causative correlation existed between inputs and outputs. JAMES S. COLEMAN ET AL., *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966).

82. Enrich, *supra* note 64; Thro, *supra* note 63; Westbrook, *supra* note 5, at 2133.

83. *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1990); *see infra* notes 89-91 and accompanying text.

84. *Rose v. Council for Better Educ., Inc.* 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Secretary of Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *see infra* notes 134-46 and accompanying text.

85. *See infra* notes 103-15, 116-32 and accompanying text (briefly analyzing Texas's and New Jersey's extensive struggles with education reform).

86. *See infra* Part IV (discussing the "existing standards" approach).

87. *See, e.g., Pawtucket*, 662 A.2d 40.

88. *See, e.g., Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391 (Tex. 1989).

89. 662 A.2d 40 (R.I. 1995).

legislature, not the judiciary, was responsible for supplying substantive adequacy standards where none were explicit in the education clause of the state constitution.⁹⁰ Because the court found no equal protection violation,⁹¹ students in Rhode Island have a right to an adequate education with essentially no way to enforce it judicially.

Decisions by the high courts in Arizona and Tennessee show a similar reluctance to tackle the adequacy issue.⁹² In *Tennessee Small School Systems v. McWherter*,⁹³ the Supreme Court of Tennessee rested its finding of a constitutional violation on state equal protection⁹⁴ and explicitly declined to address the adequacy claim.⁹⁵ There was no obvious rationale for choosing equal protection over the education clause;⁹⁶ thus, the decision to use equal protection seems to have been a conscious decision to dodge the adequacy issue.

In the Arizona case, *Roosevelt Elementary School No. 66 v. Bishop*,⁹⁷ the court found that gross funding disparities among districts were impermissible under the education clause, which requires that schools be "general and uniform."⁹⁸ The plurality in *Bishop* held that both adequacy and uniformity were necessary in school district funding,⁹⁹ but that the plaintiffs had not pled the adequacy issue.¹⁰⁰ The concurrence, however, would have taken the next

90. *Id.* at 56, 58-59; see R.I. CONST. art. XII, § 1. In support of the separation of powers argument, Justice Lederberg cited New Jersey's troubles stemming from a judicial definition of constitutional standards. *Pawtucket*, 662 A.2d at 59. "The volume of litigation and the extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on the duties of a Legislature." *Id.*

91. *Pawtucket*, 662 A.2d at 61-62 (applying the typical rational basis standard); see R.I. CONST. art. I, § 2.

92. See *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994) (en banc); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) (holding based on the state constitution's equal protection provision).

93. 851 S.W.2d 139 (Tenn. 1993).

94. *Id.* at 156 (finding no rational basis justifying the different educational opportunities for students in similar circumstances); see TENN. CONST. art. I, § 8.

95. *McWherter*, 851 S.W.2d at 152 (finding that the equal protection violation obviated the need to determine the adequacy issue).

96. *Contra* *Helena Elem. Sch. Dist. No. 1 v. State*, 769 P.2d 684, 691 (Mont. 1989) (finding resolution of the equal protection issue unnecessary because the court had found a violation of the education clause where the state had not provided for adequate education).

97. 877 P.2d 806 (Ariz. 1994).

98. *Id.* at 815-16; see ARIZ. CONST. art. XI, § 1.

99. *Bishop*, 877 P.2d at 814 n.7 (finding that adequacy and uniformity were both necessary conditions, but that neither was independently sufficient).

100. *Id.* (finding that the "contours" of adequacy were not properly before the court); see also *id.* at 824 & n.1 (Moeller, V.C.J., dissenting) (agreeing with the plurality opinion that the plaintiffs had

step by defining adequacy¹⁰¹ in terms of existing legislative and administrative standards.¹⁰² Given this dispute among the justices in Arizona, it is unclear whether the plurality's deferential approach was procedurally necessary or, as in *McWherter*, the court was avoiding an issue it was reluctant to address.

The Texas Supreme Court tried to help define Texas's education clause¹⁰³ in the 1989 case of *Edgewood Independent School District v. Kirby* ("*Edgewood I*"),¹⁰⁴ but was unable to communicate any clear standards for the required reform.¹⁰⁵ In requiring "fiscal neutrality," the court went only as far as mandating "substantially" equal district funding.¹⁰⁶

The court's vagueness was likely a sign of deference to the legislature, but many experts agree that the court's vague standards doomed the plaintiffs' victory.¹⁰⁷ *Edgewood I* proved to be just the beginning of a string of cases brought to challenge subsequent attempts at legislative reform.¹⁰⁸ The Texas Supreme Court twice struck down legislative responses to *Edgewood I*.¹⁰⁹ The Texas court's lack of guidance reportedly drove one Texas senator to claim that he wanted to "surrender" to the court but that the justices would not tell

not pled an adequacy theory).

101. *Id.* at 819 (Feldman, C.J., specially concurring) (finding that the court has the obligation to give the legislature some indication of what the legislature is constitutionally required to provide).

102. *Id.* at 819-22 (Feldman, C.J., specially concurring) (finding that the legislature was required to ensure that public schools met standards passed by the legislature itself and set by the state Board of Education under the authority of enabling legislation).

103. TEX. CONST. art. VII, § 1.

104. 777 S.W.2d 391 (Tex. 1989).

105. *See, e.g.*, Nelson, *supra* note 66, at 16-17 (asserting that the Texas court's failure to separate notions of equity and adequacy foiled legislative attempts to comply with the court's rulings).

106. *Edgewood I*, 777 S.W.2d at 397.

107. *See, e.g., id.*; William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 754 (1992) (criticizing the "judicial management" in the *Edgewood* cases because the Texas Supreme Court gave the legislature very little guidance to help it correct the education financing statutes); William E. Sparkman & Fred Hartmeister, *The Edgewood Saga Continues: The Texas School Finance System Is Constitutional—But Not out of the Woods*, 101 EDUC. L. REP. 509 (1995) (analyzing *Edgewood IV*); Mark G. Yudof, *School Finance Reform in Texas: The Edgewood Saga*, 28 HARV. J. ON LEGIS. 499 (1991).

108. *Edgewood I*, 777 S.W.2d at 399 (holding the school system to be unconstitutional); *Edgewood Indep. Sch. Dist. v. Kirby* (*Edgewood II*), 804 S.W.2d 491 (Tex. 1991) (holding that the legislature's proposed cure did not make the school system efficient); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.* (*Edgewood III*), 826 S.W.2d 489 (Tex. 1992) (holding the new legislative plan to be unconstitutional on different grounds); *Edgewood Indep. Sch. Dist. v. Meno* (*Edgewood IV*), 893 S.W.2d 450, 484 (Tex. 1995) (holding that the legislature had finally made the school financing system constitutional).

109. *Edgewood II*, 804 S.W.2d at 498-99; *Edgewood III*, 826 S.W.2d at 514.

him where to turn himself in.¹¹⁰ One education reform expert likened Texas's struggle to a Russian novel: "long, tedious, and everyone dies in the end."¹¹¹ On its fourth appearance before the high court the legislature's reformed school financing program was finally held to be a constitutional implementation of the Texas Constitution's mandate for an "efficient" school system to provide "a general diffusion of knowledge."¹¹²

Perhaps the single most important lesson learned from the experiences of Texas is that a plaintiff's victory is hollow if the court is unable to give the legislature or administration sufficient guidance as to how to correct the deficiency.¹¹³ However, a court must walk a narrow line in providing such guidance. On the one hand, a court should not be so vague as to provide essentially no guidance to the coordinate branches,¹¹⁴ on the other hand, a court should not be so specific that it unduly constrains the coordinate branches' available options in implementing reform.¹¹⁵

B. *The Intrusive Approach*

Erring on the side of specificity has entrapped New Jersey education reform in more than twenty years of controversy and litigation.¹¹⁶ This battle to enforce the state constitution's "thorough and efficient" education clause¹¹⁷ began in 1973 with *Robinson v. Cahill* ("*Robinson I*"),¹¹⁸ and has culminated (so far) with *Abbott v. Burke* ("*Abbott III*"),¹¹⁹ in 1994. Though the court

110. Clune, *supra* note 107, at 755 n.93 (quoting William P. Hobby & Mark G. Yudof, School Finance Reform in an Imperfect World 4-5 (1991) (unpublished manuscript)).

111. Yudof, *supra* note 107.

112. *Edgewood IV*, 893 S.W.2d at 484; see TEX. CONST. art. VII, § 1.

113. One commentator, for instance, proposed a three-pronged plan that would give the plaintiffs a meaningful remedy. Clune, *supra* note 107, at 722 (proposing a program of foundation aid, state compensatory aid, and output standards). Mark Yudof, the dean of the University of Texas School of Law, said of the *Edgewood* decisions, "The story is beginning to resemble *War and Peace*, though it is likely to be less amusing. One can only hope that its conclusion will be less catastrophic." Yudof, *supra* note 107, at 505.

114. See, e.g., *Edgewood Indep. Sch. Dist. v. Kirby* (*Edgewood I*), 777 S.W.2d 391 (Tex. 1989).

115. See, e.g., *Robinson v. Cahill* (*Robinson I*), 303 A.2d 273 (N.J.), *on reargument*, (*Robinson II*), 306 A.2d 65 (N.J.), *cert. denied*, 414 U.S. 976 (1973); see also *infra* Part III.B (discussing the "intrusive approach").

116. See *supra* note 67 (listing the numerous cases the New Jersey Supreme Court has decided). See generally Hyman, *supra* note 67; Ollenschleger, *supra* note 67.

117. N.J. CONST. art. VIII, § 4, ¶ 1.

118. 303 A.2d 273 (N.J. 1973). This series of cases was finally resolved in 1976 with *Robinson v. Cahill* (*Robinson VII*), 360 A.2d 400 (N.J. 1976).

119. 643 A.2d 575 (N.J. 1994). The *Abbott* line of cases began in 1985 with *Abbott v. Burke* (*Abbott I*), 495 A.2d 376 (N.J. 1985).

struggled with the separation of powers issue,¹²⁰ the decision in *Robinson I* to invalidate the school financing statutes sparked a political struggle among all three branches of government in New Jersey.¹²¹

The string of *Robinson* cases first mandated a redistribution system to increase the funding of poor districts without scrapping the local *ad valorem* property tax system.¹²² The legislature dragged its feet, and eventually the court enjoined further education expenditures until the legislature enacted a suitable funding scheme.¹²³ In response to this injunction, the legislature enacted New Jersey's first state income tax.¹²⁴ The court's specific mandates¹²⁵ and deadlines for the legislative compliance¹²⁶ put the court in the eye of the state's political storm.¹²⁷

Although the New Jersey line of cases saw a noticeable shift of the court's focus from equity to adequacy,¹²⁸ the court was perhaps even more detail-oriented in these later cases, ordering that specific poor districts be funded better to mitigate funding disparities between poor urban districts and rich suburban districts.¹²⁹ At a time when state legislators were under

120. See, e.g., *Robinson v. Cahill (Robinson IV)*, 351 A.2d 713, 716-20 (N.J.) (asserting that the court had exercised restraint, but warning that the court would act more affirmatively if the legislature did not), *cert. denied*, 423 U.S. 913 (1975), *vacated*, (*Robinson V*) 355 A.2d 129 (N.J. 1976).

121. For a discussion of the political problems with the New Jersey court's treatment of education reform, see generally Ollenschleger, *supra* note 67 (arguing that the court was unable to get the legislature to comply because the court did not sufficiently address the political obstacles to real education reform).

122. See *Robinson I*, 303 A.2d at 294 (concluding that local property taxation was an acceptable means of funding a system of schools, but that the state must ensure the system is thorough and efficient); *Robinson v. Cahill (Robinson IV)*, 351 A.2d 713, 721-24 (N.J.) (guaranteeing a minimum equalized valuation), *cert. denied*, 423 U.S. 913 (1975), *vacated*, (*Robinson V*), 355 A.2d 129 (N.J. 1976).

123. *Robinson v. Cahill (Robinson VI)*, 358 A.2d 457, 459-60 (N.J. 1976).

124. See *Robinson VI*, 358 A.2d at 462 (Mountain, J., dissenting) (arguing that the court had indirectly mandated the unpopular tax); Ollenschleger, *supra* note 67, at 1077-78.

125. See, e.g., *Robinson IV*, 351 A.2d at 721-22 (guaranteeing a minimum equalized valuation); *Robinson VI*, 358 A.2d at 459-60 (enjoining expenditures).

126. See, e.g., *Robinson v. Cahill (Robinson II)*, 306 A.2d 65, 66 (N.J.) (deferring judgment for 18 months to give the legislature time to comply with the court's mandate), *cert. denied*, 414 U.S. 976 (1973); *Robinson v. Cahill (Robinson V)*, 355 A.2d 129, 139 (N.J. 1976) (setting a date by which the legislature was to have fully funded its reforms).

127. Several articles have been written to chronicle the tangled politics of New Jersey's long struggle to remedy the state's educational shortcomings. For a fuller discussion of the political issues, see generally Hyman, *supra* note 67; Weiser, *supra* note 67; Ballot, *supra* note 67; Ollenschleger, *supra* note 67.

128. Compare *Robinson IV*, 351 A.2d at 721-22 (focusing on equalizing district valuations) with *Abbott v. Burke (Abbott I)*, 495 A.2d 376 (N.J. 1985) (focusing on the students' ability to compete).

129. *Abbott v. Burke (Abbott II)*, 575 A.2d 359, 366 (N.J. 1990). See Ollenschleger, *supra* note

enormous public pressure to lower taxes,¹³⁰ the court was telling them how they must spend billions of tax dollars.¹³¹ Clearly legislators were between a rock and a hard place, and the court was squeezing them.¹³²

Whereas the New Jersey court constrained its legislature with its specificity of details,¹³³ the Kentucky Supreme Court, in the landmark case of *Rose v. Council for Better Education, Inc.*,¹³⁴ entered the legislative arena at the broader policy level. In *Rose*, the Kentucky Supreme Court adopted the trial court's enunciation of seven broad goals that an "efficient"¹³⁵ school system must meet to be constitutional.¹³⁶ According to these goals, the state must provide each student:

- (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
- (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
- (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
- (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;

67, at 1095 (asserting that "*Abbott II* handcuffed suburban spending to urban expenditures by demanding" equal spending).

130. The 1990 tax increase in New Jersey caused a backlash for Democratic legislators at election time. Rebell, *supra* note 33, at 716. Republican Governor Christine Todd Whitman, who promised to lower state income taxes by 30%, staunchly opposed increased spending, intending instead to rely on increased efficiency with the existing funds. Patrick Jenkins, *Whitman Reassures Localities on Municipal and School Aid*, STAR-LEDGER (Newark, N.J.), Nov. 18, 1994, available in 1994 WL 9380208; Mary McGrath, *Schools to Become More Businesslike? Educators Assess Impact of Ruling*, RECORD (N.N.J.), July 14, 1994, at A19, available in 1994 WL 7800990.

131. The education budget in New Jersey is approximately \$4.8 billion annually. McGrath, *supra* note 130.

132. *E.g.*, Robert Schwaneberg, *Budget Ax Cuts Across the Board: Governor Slashes Jobs, Social Programs*, STAR-LEDGER (Newark, N.J.), Jan. 28, 1996, available in 1996 WL 7916010.

133. See Ballot, *supra* note 67, at 473 ("The *Abbott* court made a dubious judicial foray into the legislative realm by functionally making complex policy decisions, yet remaining elusively beyond electoral grasp."); Weiser, *supra* note 67, at 765-66 (arguing that the *Abbott* decisions were too involved in details).

134. 790 S.W.2d 186 (Ky. 1989).

135. KY. CONST § 183 ("The General Assembly shall, by appropriate legislation, provide an efficient system of common schools throughout the state.").

136. *Rose*, 790 S.W.2d at 212.

(v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;

(vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

(vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.¹³⁷

The list of goals was not the only unusual aspect of *Rose*. For the first time in education reform litigation, an entire school system was declared constitutionally inadequate.¹³⁸ In every other case before and since, courts have limited the scope of their inquiries to funding schemes;¹³⁹ *Rose* forced the Kentucky legislature to restructure the entire education bureaucracy.¹⁴⁰

The Kentucky Supreme Court specifically rejected the allegation that it was overstepping the bounds of judicial authority.¹⁴¹ The court called its pronouncement the establishment of “certain criteria, standards and goals which must be met [to comply with the Kentucky Constitution].”¹⁴² In the *Rose* court’s view, it was not legislating from the bench because it had left the details to the Kentucky General Assembly.¹⁴³

Four years later, the Massachusetts Supreme Judicial Court found part of the Kentucky court’s reasoning persuasive enough to adopt *Rose*’s statement of goals verbatim in *McDuffy v. Secretary of the Executive Office of Education*.¹⁴⁴ The Massachusetts court limited its holding to the funding scheme,¹⁴⁵ but even so, its adoption of *Rose*’s definition of adequacy defined the legislature’s policy objectives for them, leaving only the details of

137. *Id.*

138. *Id.* at 215 (“Lest there be any doubt, the result of our decision is that Kentucky’s *entire system* of common schools is unconstitutional. . . . This decision applies to the entire sweep of the system—all its parts and parcels.”).

139. *Thro*, *supra* note 63, at 616-17 (noting that *Rose* is the only education reform case to declare that the constitutional violation encompassed anything but funding problems).

140. *Rose*, 790 S.W.2d at 215; *see* Kentucky Education Reform Act of 1990, 1990 Ky. Acts 476.

141. *Rose*, 790 S.W.2d at 214 (“Clearly no ‘legislating’ is present in the decision of the trial court, and more importantly, . . . there is none present in the decision of this Court.”).

142. *Id.*

143. *Id.* (holding that “the specifics of the legislation will be left up to the wisdom of the General Assembly”).

144. 615 N.E.2d 516, 554 (Mass. 1993).

145. *Id.* at 552-55.

implementation.¹⁴⁶

Setting the adequacy standard in terms of goals like those in *Rose* and *McDuffy* is certainly a positive development for plaintiffs. There are undoubtedly few school systems that can legitimately claim to impart such knowledge to each student;¹⁴⁷ thus, the use of such a standard almost assures that the school system will be declared unconstitutional. However, despite leaving the details of implementation to the legislature,¹⁴⁸ it is unclear how a court can seriously claim that such a manufactured pronouncement¹⁴⁹ is within its power as interpreter of the constitution.¹⁵⁰ When a court starts from

146. *Id.* at 555 (“Thus, we leave it to the magistrates and the Legislatures to define the precise nature of the task which they face in fulfilling their constitutional duty to educate our children today, and in the future.”); *cf. Rose*, 790 S.W.2d at 214 (leaving “specifics” to the legislature).

147. *Thro*, *supra* note 63, at 613.

148. *See Rose*, 790 S.W.2d at 214; *McDuffy*, 615 N.E.2d at 555.

149. That is, the judiciary manufactured the list of educational goals on its own.

150. *See Enrich*, *supra* note 64, at 175 (stating that “it remains unclear how any of these [decisions including *Rose* and *McDuffy*] can truly ground the crucial step from generic constitutional language to specific substantive criteria”); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 59 (1973) (noting that “the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them”); William R. Andersen, *School Finance Litigation—The Styles of Judicial Intervention*, 55 WASH. L. REV. 137, 169-70 (1979-80) (concluding that “the characteristic drag of legal doctrine” may render significant judicial intervention undesirable in the mercurial field of education reform); George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 563-68 (1994) (proposing that state courts and legislatures should engage in a dialogic, rather than managerial, approach to solving school finance problems, but concluding that the *McDuffy* decision was extremely deferential); John Dayton, *The Judicial-Political Dialogue: A Comment on Jaffe and Kersch’s “Guaranteeing a State Right to a Quality Education.”* 22 J.L. & EDUC. 323, 325 (1993) (arguing that a judicial order without popular support cannot effect meaningful education reform); Wechsler, *supra* note 13, at 10-20 (advocating the use of judicial standards of “generality” and “neutrality,” which apply to all similar cases, not just the case before the court, in order to produce a “principled decision”). *But see* Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 HARV. J. ON LEGIS. 341, 344-45 (1991) (noticing a “palpable diminution in judicial deference,” but concluding that “the [*Rose*] court asserted a limited but definite judicial role” in explaining the legislature’s duty); Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1089-99 (1993) (arguing that the theory of “positive separation of powers” allows courts to define a coordinate branch’s duty as long as they do not tell that branch exactly how to fulfill that duty); Alexandra Natapoff, 1993: *The Year of Living Dangerously: State Courts Expand the Right to Education*, 92 EDUC. L. REP. 755, 773-83 (1994) (asserting that courts may legitimately be more activist when dealing with positive rights); Weiser, *supra* note 67 at 759, 762 (characterizing *Rose* as a “[m]odel of [j]udicial [i]nterpretation” and concluding that the court merely “framed the debate” by making a broad declaration); Troy Reynolds, Note, *Education Finance Reform Litigation and Separation of Powers: Kentucky Makes Its Contribution*, 80 KY. L.J. 309, 329-31 (1991-1992) (arguing that contemporary courts are not very constrained by judicial deference and that *Rose* posed no problem with separation of powers because it did not mandate any specific legislation or tax increase); Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1091-92 (1991) (arguing that political obstacles

scratch to create its own laundry list of fundamental goals for public education, the conclusion seems inescapable that the court is legislating, which is an unacceptable violation of the separation of powers.¹⁵¹

IV. THE EXISTING-STANDARDS APPROACH: A STRONG MIDDLE GROUND

In short, the deferential approach is not enough and the intrusive approach is too much. This Note argues that courts need to find “existing standards” to define adequacy. Existing standards can either be a) statutory expressions of aspirational goals, which would generally be a very high standard for public schools to achieve or b) state school accreditation standards, which would usually be a very low standard to meet because most states will accredit their own schools.¹⁵² Using these existing standards is an effective middle ground

to meaningful constitutional remedies and increased accountability of state judges necessitate increased judicial independence from the legislatures).

For an excellent, in-depth discussion of the justifications and limits of judicial review, see generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986).

151. This conclusion has not seemed so “inescapable” to the vast majority of education reform commentators. See *supra* note 150 (listing some of the many pieces that directly refute the conclusion that the *Rose* and *McDuffy* courts acted outside the scope of acceptable judicial review); Enrich, *supra* note 64, at 175-77 (proposing that the Kentucky and Massachusetts courts “were surely acting boldly, [but] they were not acting alone” because the wheels of education reform had already begun to turn in those states). But see JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Ely, critiquing the “interpretivist approach” of judicial review, in the context of constitutional review as opposed to statutory review, explains:

There is obviously a critical difference: in nonconstitutional contexts, the court’s decisions are subject to overrule or alteration by ordinary statute. The court is standing in for the legislature, and if it has done so in a way the legislature does not approve, it can soon be corrected. When a court invalidates an act of the political branches on constitutional grounds, however, it is overruling their judgment, and normally doing so in a way that is not subject to “correction” by the ordinary lawmaking process. Thus the central function, and it is at the same time the central problem, of judicial review: a body that is not elected or otherwise responsible in any significant way is telling the people’s elected representatives that they cannot govern as they’d like.

Id. at 4 (footnote omitted). Although Ely’s comments refer to the federal judiciary, which tends to be less accountable than that of the states because of life tenure, the same underlying problem exists a) in states where judges are appointed and not elected and b) in any state to the extent, if any, that judges are less accountable than legislators.

152. These standards have been criticized as being outcome-determinative. See, e.g., Thro, *supra* note 63, at 614-15. The cases discussed in the text of this Note suggest that this is not always the case. For example, in *Unified School District No. 229 v. State*, 885 P.2d 1170, 1187 (Kan. 1994), *cert. denied*, 115 S. Ct. 2582 (1995), the Kansas Supreme Court invoked standards fully as ambitious as the Kentucky court’s goals in *Rose*, but found no constitutional violation. See *infra* notes 155-65 and accompanying text. On the other hand, the Alabama Circuit Court, in an opinion approved in *Opinion of the Justices*, 624 So. 2d 107 (Ala. 1993), found that many of that state’s schools could not even meet the accreditation standards used by the state board of education. See *infra* notes 166-72 and accompanying text. Moreover, these existing standards are no more outcome-determinative than a

between the deferential and intrusive approaches. Existing standards will likely give the coordinate branches enough guidance to be able to comply with a court's definition of the constitutional mandate, but since the court is not writing the standards itself, it is able to leave implementation to the coordinate branches. Thus, the court can remain within its role of interpreter of the constitutional and statutory language.¹⁵³

A. *The Kansas and Alabama Examples*¹⁵⁴

The existing standards approach has been exemplified by the courts in Kansas¹⁵⁵ and Alabama.¹⁵⁶ The Kansas Supreme Court, in interpreting the language of Kansas's education clause¹⁵⁷ in *Unified School District No. 229 v. State*,¹⁵⁸ looked to the state legislature's own statement of educational goals, embodied in the School District Finance and Quality Performance Act.¹⁵⁹

court's selection of the level of scrutiny in an equal protection analysis.

153. A court will rarely, if ever, be able to completely avoid value judgments. See Wechsler, *supra* note 13, at 15 (noting that constitutional questions are "inescapably 'political'"). Thro argues that defining adequacy always entails primarily a value judgment. Thro, *supra* note 63, at 612 (finding that courts never discuss their reasons for using a particular standard, which makes the definitional question very unpredictable and value-laden). Given that there is *some* value judgment inherent in any education reform decision, courts should strive to minimize the extent of this subjective aspect of analysis.

154. In addition to the examples in *Unified School District No. 229* and *Opinion of the Justices*, the New Hampshire Supreme Court's language in *Claremont School District v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993) suggests that the New Hampshire court might define adequacy with the legislature's and Department of Education's standards. Because the court was deciding *Claremont* on appeal from dismissal for failure to state a cause of action, *id.* at 1376, the issue was not squarely before the court. The court stated that the legislature and governor should be the ones to define adequacy and that they should look to existing standards to help them with the definition. *Id.* at 1381. Thus, it is not entirely clear how the New Hampshire court would handle the issue of defining adequacy if it were ripe for decision.

155. *Unified Sch. Dist. No. 229*, 885 P.2d at 1187 (finding adequacy standards in the state legislature's own statement of educational goals contained in the Kansas School District Finance and Quality Performance Act, KAN. STAT. ANN. § 72-6439 (1992), but holding that the existing funding scheme satisfied those goals).

156. *Opinion of the Justices*, 624 So. 2d 107 (approving, in an advisory opinion for the state senate, the lower court's decision, *Alabama Coalition for Equity v. Hunt*, Nos. CV-90-883-R & CV-91-0117, 1993 WL 204083 (Ala. Cir. Ct. April 1, 1993), which found adequacy standards in state and regional accreditation standards and in a statutory statement of educational goals).

157. KAN. CONST. art. 6, § 6(b) ("The legislature shall make suitable provision for finance of the educational interests of the state.").

158. 885 P.2d 1170, 1186-87 (Kan. 1994), *cert. denied*, 115 S. Ct. 2582 (1995).

159. *Unified Sch. Dist. No. 229*, 885 P.2d at 1187; see KAN. STAT. ANN. § 72-6439 (1992), amended by 1995 Kan. Sess. Laws Ch. 263, § 1 (removing the 10 goals cited by the court and changing the assessment provisions).

This statute listed ten goals that the Kansas Board of Education was to meet in defining school accreditation.¹⁶⁰

While the statutory goals were substantively similar to those used by the Kentucky and Massachusetts courts,¹⁶¹ the Kansas court acknowledged that the legislature's standards were the product of a comprehensive study by education experts.¹⁶² It thus refused to impose its own judgment of suitability on the definition of adequacy.¹⁶³ The court went on to hold, without discussion, that Kansas's education financing scheme satisfied these lofty statutory goals.¹⁶⁴ Although the explanation of why there was no violation may have been too cursory,¹⁶⁵ the approach to defining adequacy was

160. Kansas's School District Finance and Quality Performance Act provided:

(a) In order to accomplish the mission for Kansas education, the state board of education shall design and adopt a quality performance accreditation system for Kansas schools. The accreditation system will be based upon goals for schools which will be framed in measurable terms and will define the following outcomes:

- (1) Teachers establish high expectations for learning and monitoring pupil achievement through multiple assessment techniques;
- (2) schools have a basic mission which prepares the learners to live, learn, and work in a global society;
- (3) schools provide planned learning activities within an orderly and safe environment which is conducive to learning;
- (4) schools provide instructional leadership which results in improved pupil performance in an effective school environment;
- (5) pupils have the communication skills necessary to live, learn, and work in a global society;
- (6) pupils think creatively and problemsolve in order to live, learn and work in a global society;
- (7) pupils work effectively both independently and in groups in order to live, learn and work in a global society;
- (8) pupils have the physical and emotional well-being necessary to live, learn and work in a global society;
- (9) all staff engage in ongoing professional development;
- (10) pupils participate in lifelong learning.

KAN. STAT. ANN. § 72-6439 (1992), amended by 1995 Kan. Sess. laws ch. 263, § 1 (removing these 10 goals).

161. See *supra* text accompanying note 137 (enumerating the goals originally set forth by the Kentucky Supreme Court in *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 212 (Ky. 1989), and later adopted by the Supreme Judicial Court of Massachusetts in *McDuffy v. Secretary of the Executive Office of Education*, 615 N.E.2d 516, 554 (Mass. 1993)).

162. *Unified Sch. Dist. No. 229*, 885 P.2d at 1186.

163. *Id.*

164. *Id.* at 1187. This suggests that an aspirational adequacy standard is not always as outcome-determinative as one might think.

165. Presumably, the court examined evidence thoroughly to find that no violation existed, but the court did not put any of this analysis in its opinion.

commendable.

The Alabama court also relied heavily on existing standards.¹⁶⁶ Although the court order contained a list of goals that appeared to be based on the Kentucky Supreme Court's goals in *Rose*,¹⁶⁷ the circuit court measured the Alabama schools' adequacy in terms of the standards the legislature and state officials had used to measure adequacy.¹⁶⁸ These standards included accreditation standards,¹⁶⁹ substantive standards promulgated by the legislature and the Alabama Department of Education,¹⁷⁰ and output measures including drop-out rates, college remediation rates, and preparedness for the workforce.¹⁷¹ The circuit court's decision exhaustively applied the standards to the Alabama schools to show the schools to be grossly inadequate and in violation of the education clause.¹⁷²

B. Institutional Advantages of the Existing Standards Approach

Institutionally,¹⁷³ the existing standards approach strikes the proper

166. See *Opinion of the Justices*, 624 So. 2d 107 (Ala. 1993). For a firsthand account of how the plaintiffs in Alabama went about proving their case, see Martha I. Morgan et al., *Establishing Education Program Inadequacy: The Alabama Example*, 28 U. MICH. J.L. REF. 559 (1995) (written by the attorneys who handled the Alabama case).

167. *Opinion of the Justices*, 624 So. 2d at 107-08, 166; see *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989); *supra* text accompanying note 137.

168. *Opinion of the Justices*, 624 So. 2d at 127 (discussing at length the application of each standard to the facts). The three broad categories of adequacy standards included accreditation standards set by state and regional agencies, statutory and administrative statements of goals for schools, and output measures. *Id.* Some of the accreditation and statutory standards dealt with adequacy of physical facilities, *id.* at 128-31; available curricula, *id.* at 131-32; school staffing (including teachers, librarians, and maintenance staff), *id.* at 132-34; and availability of up-to-date textbooks, supplies and equipment, *id.* at 134-36. Performance-based output measures included dropout rates, *id.* at 136-37; remediation rates for Alabama high school graduates as college freshmen, *id.* at 137; level of readiness to enter the workforce, *id.* at 137-38; and state spending relative to other states, *id.* at 138-39.

169. *Id.* (finding that state officials had, in practice, measured adequacy using accreditation under both state standards and the standards of the Southern Association of Colleges and Schools).

170. These measures included the 1991 Alabama Education Improvement Act, 1991 Ala. Acts 323, which was never funded, and the State Department of Education's 1984 Plan for Excellence, which was endorsed by the legislature. *Opinion of the Justices*, 624 So. 2d at 128-29.

171. *Opinion of the Justices*, 624 So. 2d at 136-38 (finding, for example, that 48% of adult Alabamians have no high school diploma, that the dropout rate is among the highest in the country at about 35%, and that over 40% of Alabama's high school graduates require remediation before doing college-level work).

172. *Id.* at 126-44; see ALA. CONST. art. XIV, § 256 ("The legislature shall establish, organize and maintain a liberal system of public schools . . .").

173. The term "institutional advantage" is used to denote the beneficial aspects in terms of the doctrine of separation of powers. Aside from institutional effects, an existing standards approach is

balance of powers because a court can help resolve the inadequacy by pointing the coordinate branches in the right direction without immersing itself in the creation and implementation of policy. This approach allows the judiciary a middle ground between backing away from the issue entirely,¹⁷⁴ which drains any meaning from the right to education, and creating basic education policy,¹⁷⁵ which intrudes upon the legislature's sphere of competence.¹⁷⁶

Because education is so vitally important to society,¹⁷⁷ the right to education should realistically entail an enforceable guarantee of some quantum of training adequate to make students into competent citizens and

also preferable for practical or political reasons. That is, the legislative and administrative standards are the most objective measure of educational adequacy because they are presumably devised after study and consideration by experts. Objectivity lends legitimacy to a decision that may be very controversial among taxpayers and education experts. For example, if a court declares a state's schools constitutionally inadequate, the state will probably have to increase its spending for education. *See, e.g.,* W. Lance Conn, *Funding Fundamentals: The Cost/Quality Debate in School Finance Reform*, 94 EDUC. L. REP. 9, 17 (1995) (finding that successful education reform litigation usually results in increased funding); Heise, *supra* note 2, at 1166 (noting that most courts assume that increased funding will translate into increased educational quality); Enrich, *supra* note 64, at 169 (noting that increased education funding must come from either raising taxes or reducing funding for other programs). Higher expenditures often translate into unpopular tax increases. *See, e.g.,* Hyman, *supra* note 67, at 535-36 (briefly discussing the unpopularity of New Jersey's tax increases). If, on the other hand, a court holds a state's schools to be adequate, controversy seems possible if the plaintiffs' dissatisfaction with the schools is representative of dissatisfaction among the general public.

In addition to the tax controversy, the inherent uncertainty of educational measurement makes any adequacy standard somewhat controversial among education experts. *See generally* THE CONDITION OF EDUCATION 1995, *supra* note 79, at xi (the Commissioner for Education Statistics noting uncertainty in many statistical trends); Hanushek, *supra* note 81 (analyzing the broad policy controversies of public school financing). In the face of such formidable barriers to broad public acceptance of the litigation's outcome, courts need the standards to be as objective as possible to mitigate negative political consequences.

174. *See, e.g.,* Roosevelt Elem. Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994); City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993).

175. *See, e.g.,* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989); McDuffy v. Secretary of the Exec. Office of Educ., 615 N.E.2d 516 (Mass. 1993).

176. Again, many commentators seem to disagree with this statement. *See supra* notes 150-51 (citing some of those commentators who believe that *Rose* and *McDuffy* did not violate separation of powers).

177. *See, e.g.,* Plyler v. Doe, 457 U.S. 202, 221 (1982) (asserting that "education has a fundamental role in maintaining the fabric of our society"); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (calling education the most important governmental function at the state and local level); A NATION AT RISK, *supra* note 80, at 6 (quoting President Reagan's comments at the Commission's first meeting: "Certainly there are few areas of American life as important to our society, to our people, and to our families as our schools and colleges.").

workers.¹⁷⁸ However, courts must recognize their limited but definite role in defining the contours of this guarantee. Courts are the interpreters of constitutions, not super-legislatures that can impose specific legislative reform.¹⁷⁹

A court that avoids the issue entirely in education reform litigation leaves citizens with a right to an adequate education but without a judicial remedy to enforce it.¹⁸⁰ The Rhode Island Supreme Court has asserted that the separation of powers doctrine demands that courts refrain from breathing life into a constitutional provision which itself provides no standards to guide their interpretation.¹⁸¹ The Rhode Island court stated, "A judge accustomed to the constraints implicit in adversary litigation cannot feasibly by judicial mandate interfere with this delicate balance without creating chaos."¹⁸² However, refusing even to decide the education issue removes the judiciary's check on the legislative and executive branches. This is a fundamental mistake in a governmental scheme that relies on a balance of powers.¹⁸³ Essentially, the court is allowing the legislature to define a constitutional duty not subject to judicial review.

Moreover, if a lack of textual standards within the constitution were a sufficient reason to refrain entirely from judicial intervention, then courts

178. Several courts have stated that a primary objective of educating students is to mold them into competent workers and participants in a democracy. *See, e.g., Plyler*, 457 U.S. at 221-23, 223 n.20; *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); Opinion of the Justices, 624 So. 2d 107, 158 (Ala. 1993); *Rose*, 790 S.W.2d at 190; *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993); *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 666 (N.Y. 1995).

179. For a discussion of the scope of judicial review generally, see BICKEL, *supra* note 150; ELY, *supra* note 151; Wechsler, *supra* note 13. Even those who argue that *Rose* posed no separation of powers problems would likely agree with this general statement. However, they argue that *Rose*, in leaving the details of implementation to the legislature, did not impose any specific reforms. *See, e.g., Alexander*, *supra* note 150, at 365 (asserting that the *Rose* court's approach of invalidating the whole school system "tended to preserve legislative autonomy rather than to diminish it, and in so doing the court was able to maintain the proper balance in the separation of powers"); Weiser, *supra* note 67, at 768-69 (stating that the *Rose* court's broad declaration was an open opportunity for the legislature to begin anew in creating a school system).

180. The most egregious example of this in recent years is the Rhode Island case. *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995). The Rhode Island court held that the education clause does not guarantee an opportunity for an education, "nor does it guarantee an 'equal, adequate, and meaningful education.'" *Id.* at 55 (quoting the lower court's oral decision). Further, the court considered itself incompetent to handle the education issue because of concerns about separation of powers and a lack of justiciable standards. *Id.* at 57-59.

181. *Id.*

182. *Id.* at 63.

183. *See, e.g., Wechsler*, *supra* note 13, at 19 (stating that courts have a duty to review cases properly before them even if there must be some inherent value judgment in the resulting decision).

would similarly decline to give substantive meaning to other constitutional provisions—for example, takings or home rule provisions.¹⁸⁴ Clearly this is not the case. The Rhode Island Supreme Court, the same court that refused to define educational adequacy, has seen fit to devise standards to give real-world meaning to other constitutional provisions.¹⁸⁵ Consequently, there seems to be no principled reason why outside standards may not similarly make an education clause into an enforceable right.¹⁸⁶

In defining the scope of the coordinate branches' duty, a court must be careful to provide them with sufficient guidance, but to refrain from infringing on their spheres of power. When a court gets too involved in the administration of adequate education, the court enters the realm of lawmaking, which is properly left to legislators and administrative agencies.¹⁸⁷ The court's role is merely to interpret the constitution. A court that enlists existing legislative or administrative standards to interpret an education clause is able to resolve the issue in a manner that points the coordinate branches in the right direction without forcing them down the court's chosen policy path.¹⁸⁸ This approach, somewhat like a "binding

184. See R.I. CONST. art. XIII (home rule) and R.I. CONST. art. I, § 16 (takings) for examples of constitutional provisions that have not given Rhode Island courts as much trouble when the courts were faced with opportunities to read standards into them.

185. See, e.g., *Westerly Residents for Thoughtful Dev. v. Brancato*, 565 A.2d 1262 (R.I. 1989) (holding that sewer systems are a purely local concern, and because of the home rule provision, not subject to state regulation); *Garcia v. Falkenholm*, 198 A.2d 660 (R.I. 1964) (holding that differential assessment rates between improved and unimproved land were reasonable under the takings clause); *In re Rhode Island Suburban Ry.*, 48 A. 591 (R.I. 1901) (holding that "necessary" does not mean *absolutely* necessary, but rather that the property be reasonably required for a public purpose); *Feldman*, *supra* note 150, at 1084 (likening a court's defining of an education clause to the defining of "cruel and unusual" punishment).

186. Some commentators have advocated increased judicial activism when dealing with "positive rights." Positive rights are rights the government is obligated to provide, as opposed to rights that the constitution protects by prohibiting government interference. See, e.g., *Feldman*, *supra* note 150; *Natapoff*, *supra* note 150.

187. For example, some commentators believe the courts in New Jersey got too involved with policy decisions beginning with *Robinson v. Cahill* (*Robinson I*), 303 A.2d 273 (N.J. 1973). See *Ballot*, *supra* note 67, at 471-73; *Hyman*, *supra* note 67, at 535-36; *supra* note 67.

In addition, this Note argues that decisions of the high courts in Kentucky and Massachusetts unduly limited the legislatures as well. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Secretary of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *supra* Part III.B (discussing the "intrusive" approach). But see *supra* notes 150-51 (listing some of the many authorities who disagree with this proposition).

188. See *Brown*, *supra* note 150 (advocating "binding advisory opinions" for the court to help the legislature define its obligation); *Heise*, *supra* note 2, at 1176 (finding that courts could look to educational standards when determining adequacy).

A weak point of the existing standards approach is that it allows the coordinate branches to define

advisory opinion,"¹⁸⁹ should be the extent of a court's role as constitutional interpreter.

C. Missed Opportunities to Define Adequacy

A court deciding an education reform case should not forego its duty to interpret the constitution because of a lack of standards. To do so is to miss an opportunity to exercise an essential role in the balance of powers. The Arizona, Tennessee, and Rhode Island cases are examples of missed opportunities to define educational adequacy.¹⁹⁰ Rather than interpreting their education clauses as constitutional rights to an adequate education, these courts left students and legislators in the dark by failing to assert themselves as interpreters of their constitutions.¹⁹¹

An analogous problem arises when litigants themselves constrain a court's ability to define adequacy by failing to offer sufficient standards into evidence. Consequently, courts may not have an opportunity to fully define adequacy even if they believe the legislature needs guidance to determine its duty. The third-wave decisions from the high courts of Montana¹⁹² and New

their own constitutional obligations. If the legislature and education officials know that existing standards are the measure of their duty, they could theoretically amend their own standards to impose on themselves a very light obligation. One would hope, however, that both political pressure and the importance of education would prevent this sort of subversive action.

189. See generally Brown, *supra* note 150 (advocating the use of "binding advisory opinions" in school litigation).

190. See *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 814 n.7 (Ariz. 1994); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58, 63 (R.I. 1995); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993). The courts in Arizona and Tennessee avoided the adequacy issue by basing their decisions on equal protection rather than adequacy, thus explicitly declining to decide the meaning of educational adequacy under their state's constitution. *Bishop*, 877 P.2d at 814 n.7; *McWherter*, 851 S.W.2d at 152. The Rhode Island court, finding a lack of manageable standards, refused to second-guess the legislature's provision for public schools. *Pawtucket*, 662 A.2d at 58, 63; see *supra* Part III.A (discussing the "deferential" approach).

191. The Rhode Island court might respond that it did in fact interpret its education clause in *Pawtucket*. See *Pawtucket*, 662 A.2d at 55-57 (discussing the language of the education clause). However, its deferential interpretation seemed to be buttressed primarily by its finding that there were no judicially manageable standards. See *id.* at 58-59 (expressing concern that any attempt at defining the constitutional mandate would involve the court in a long-term struggle, as in New Jersey).

The *Bishop* plurality and dissent each argued that the pleadings precluded them from addressing the definition of adequacy. *Bishop*, 877 P.2d at 814 n.7; *id.* at 824 & n.1 (Moeller, V.C.J., dissenting). It was this point, though, that prompted Chief Justice Feldman to concur rather than join the plurality. *Id.* at 819 (Feldman, C.J., concurring) (arguing that the court *should* define adequacy); see *supra* notes 87-102 and accompanying text (discussing of these cases).

192. *Helena Elem. Sch. Dist. No. 1 v. State*, 769 P.2d 684, 691 (Mont. 1989) (finding that the state aid program failed to fund sufficiently even for minimal accreditation standards), *modified*, 784 P.2d

York¹⁹³ illustrate this situation.

These two decisions provided incomplete definitions of adequacy because the courts were able to utilize only part of the available standards.¹⁹⁴ In both cases, the problem appears to have been the litigants' failure to offer all available standards into evidence rather than the courts' unwillingness to recognize the relevance of existing standards.¹⁹⁵ The Montana court held that the Montana Board of Public Education's accreditation standards¹⁹⁶ were a necessary but insufficient component of educational adequacy.¹⁹⁷ In so holding, the court impliedly set a tougher standard for the state's obligation, but it was unable to articulate that standard because it was confined by the trial record.¹⁹⁸

In *Campaign for Fiscal Equity, Inc. v. State*, the New York Court of Appeals faced the same problem as the Montana court, but from a different perspective. The New York court was deciding the case on appeal from a motion to dismiss¹⁹⁹ and the plaintiffs had relied primarily on aspirational standards.²⁰⁰ After asserting that the standards established by the Board of Regents and the Commissioner of Education required more than the state's education clause required,²⁰¹ the court declined to "definitively specify what

412 (Mont. 1990) (postponing effective date).

193. *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995) (finding that the plaintiffs had stated facts sufficient to state a cognizable claim, but that the administrative standards proffered by plaintiffs exceeded the minimal adequacy requirement).

194. That is, the litigants offered either the relatively tough aspirational standards, or the relatively easy accreditation standards, but not both. See *Helena*, 769 P.2d at 691-92 (holding that the state's school accreditation standards partially defined adequacy); *Campaign for Fiscal Equity*, 655 N.E.2d at 666 (noting that the plaintiffs relied on "aspirational" administrative standards).

195. Both courts were apparently willing to use existing standards to resolve the disputes before them because both courts used the standards before them as partial definitions of adequacy. See *Helena*, 769 P.2d at 691-92 (amending the lower court's findings to emphasize that accreditation standards, while not a full definition, do serve as a starting point to define the state's obligation); *Campaign for Fiscal Equity*, 655 N.E.2d at 666-68 (holding that noncompliance with the lofty aspirational standards would not alone establish a violation of the education clause, but that the plaintiffs had nonetheless stated a claim sufficient to withstand a motion to dismiss).

196. The court described these briefly as standards that require teacher certification, limit teachers' workloads, establish minimum curricular requirements, and set size, maintenance, and safety standards for school facilities. *Helena*, 769 P.2d at 691.

197. *Id.* at 691-92.

198. *Id.*

199. *Campaign for Fiscal Equity*, 655 N.E.2d at 664.

200. *Id.* at 666.

201. *Id.* (noting that the plaintiffs had relied heavily on the standards promulgated by the Board of Regents and the Commissioner of Education and that some of those standards were more "aspirational" than is appropriate for a definition of minimal adequacy).

the constitutional concept and mandate of a sound basic education entails,²⁰² preferring instead to delay that decision until after a full trial.²⁰³

These two cases show that litigants, as well as courts, can play a role, perhaps unwittingly, in removing courts from the balance of powers. Consequently, the safe strategy is to offer into evidence standards that are aspirational (e.g., statutory or administrative lists of goals) *and* standards that set a lesser duty (e.g., state school accreditation standards).²⁰⁴

D. Sources of Existing Standards

While every court will not venture to define educational adequacy even with existing standards, no court should decline to address the issue for lack of manageable standards,²⁰⁵ and no plaintiff should fail to offer sufficient existing standards into evidence.²⁰⁶ Whether its education clause requires a very lofty level of educational adequacy or merely a minimal level, almost every state has existing standards available to define the legislature's constitutional obligation.

If a court interpreted its state's education clause to impose a minimal obligation, almost every state has accreditation standards for its own schools that could be used to define the requisite level of adequacy.²⁰⁷ Additionally, regional accreditation standards can provide standards for a minimal constitutional obligation.²⁰⁸ In the event that the education clause suggests a tougher standard, a court could examine the legislature's own goals for the

202. *Id.*

203. *Id.* at 666-67.

204. The failure to produce evidence of tougher standards was clearly a tactical error in the Montana case. Plaintiffs logically want the state's obligation to be set as high as possible; thus, it was a mistake to rely on minimalist accreditation standards. However, this error can likely be explained by the fact that the *Helena* decision was one of the earliest third-wave cases. See generally Thro, *supra* note 63; *supra* Part II.C. (discussing the third wave). In *Campaign for Fiscal Equity*, however, the plaintiffs may have been behaving strategically when they offered only aspirational standards. Perhaps they did not want to facilitate the setting of a relatively low level of obligation by offering low standards into evidence. This seems to have been a risky decision, however, because those standards almost cost them a motion to dismiss.

205. See *supra* Part III.C.

206. See *supra* Part IV.C.

207. In two states that have been cited as examples, Rhode Island and Tennessee, existing standards can be found scattered throughout the states' education titles, codified at R.I. GEN. LAWS tit. 16 (1994) and TENN. CODE ANN. tit. 49, chap. 6 (1995).

208. In *Opinion of the Justices*, 624 So. 2d 107, 127 (Ala. 1993), for instance, the Alabama court used the accreditation standards of the Southern Association of Colleges and Schools as a relevant indicator because state education officials had themselves used these standards as benchmarks.

state schools as stated in the state's education statutes.²⁰⁹

One notable education expert fears that Congress's statement of goals embodied in the federal "Goals 2000"²¹⁰ program will attract litigation.²¹¹ While states may implicitly adopt Congress's statement of goals when they participate in the Goals 2000 program, it is a voluntary program²¹² and thus not relevant in defining a state's constitutional mandatory obligation to provide for education. Even a state where the constitution imposes only a minimal level of educational adequacy may strive to do more than is required.²¹³ However, the existence of Goals 2000 has encouraged some states to develop their own goals for their schools,²¹⁴ and these may be relevant indicators of a state's constitutional obligation.

V. CONCLUSION

As many courts have realized during the third wave of education reform litigation, education clauses in state constitutions must entail guarantees of

209. See *supra* note 207 (citing the education statutes in two example states). Alabama and Arizona, for example, both had explicit statutory statements of goals for public schools. *Opinion of the Justices*, 624 So. 2d at 128 (citing the Alabama Education Improvement Act, 1991 Ala. Acts 323); *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170, 1187 (citing the Kansas School District Finance and Quality Performance Act, KAN. STAT. ANN. § 72-6439 (1992)), *cert. denied*, 115 S. Ct. 2582 (1995).

210. Goals 2000: Educate America Act, 20 U.S.C. §§ 5801-6084 (Supp. 1994). Goals 2000 is a program in which states may apply for federal funds by submitting plans detailing how they intend to meet the lofty goals enumerated in the Act. *Id.*

211. Michael Heise, *Goals 2000: Educate America Act: The Federalization and Legalization of Educational Policy*, 63 FORDHAM L. REV. 345, 372-80 (1994) (predicting, with some trepidation, that people will try to transform the Goals 2000 program into an entitlement, which will necessitate judicial involvement).

212. Although Goals 2000, like many federally funded projects, enjoys widespread participation by states, its popularity has faded quickly. See, e.g., *Lynne v. Cheney, The National History (Sub)Standards*, WALL ST. J., Oct. 23, 1995, at A18 (describing the controversy surrounding the federal American History curricular standards, which critics found too "politically correct"); Rene Sanchez, *GOP's Power of the Purse Put to the Test: Education Goals Program Targeted for Early Demise*, WASH. POST, Sept. 26, 1995, at A1 (noting that the concept of a federal education program has lost much of its support because of the movement to return responsibilities to the states and concluding that the program may not last much longer, even with reduced funding).

213. New York may be an example of a state that requires only a low, accreditation standard for its public schools, see *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995), but still participates in Goals 2000.

214. Indiana, for instance, developed its "Indiana 2000" program, which the legislature decided was distinct from the federal Goals 2000 program. Rebecca Buckman, *Amendment May Save Funding for State Education Program*, INDIANAPOLIS STAR, Jan. 18, 1996, at B4 (reporting that the state senate had continued the funding for Indiana 2000 even though it was opposed to Goals 2000).

adequate education to be meaningful.²¹⁵ Specifying the obligation in terms of adequacy rather than equal protection does not relieve courts from their institutional responsibility of judicial review. Since *Marbury v. Madison*,²¹⁶ judicial review has played a crucial role in our system of checks and balances. State courts must supply a check on the coordinate branches by interpreting state constitutions and furnishing sufficient standards to define the states' obligations to provide for public schools.²¹⁷ Only then can students have an enforceable right to an adequate education. Existing standards are the most institutionally sound method for courts to enunciate a state's duty without stepping outside their role as interpreter of constitutions.

As the U.S. Supreme Court so succinctly stated in *Brown v. Board of Education*, "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."²¹⁸ In the context of education reform litigation, a state court may hold in its hands the chances of the state's children to succeed in life. It should neither shirk this duty nor overstep its institutional competence because it lacks judicially manageable standards.

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215. See *supra* Part II.C.

216. 5 U.S. (1 Cranch) 137 (1803).

217. See *supra* Part IV.B.

218. 347 U.S. 483, 493 (1954).

