STANDING UP TO LEGISLATIVE BULLIES: SEPARATION OF POWERS, STATE COURTS, AND EDUCATIONAL RIGHTS

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ABSTRACT

The separation of powers doctrine creates a strong presumption in favor of judicial deference to legislative policy determinations. This doctrine was developed for federal courts, however, and does not apply with identical force to state courts enforcing state constitutional rights. This Note examines rationales for the separation of powers doctrine and their potential application to state courts. After concluding that deference should be more limited in state courts, it then applies this conclusion to educational rights, which are frequently at risk due to political market failures. By examining case studies of constitutionally based education litigation in seven states, this Note concludes with recommendations to state courts facing the challenge of managing such cases: issue a strong first opinion, maintain jurisdiction by remanding the case rather than finalizing it, and demonstrate an upfront commitment to enforcing educational rights.

INTRODUCTION

In 1973 in *San Antonio Independent School District v. Rodriguez*,[1] the Supreme Court of the United States held that there is

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

no federal constitutional right to education.[2] In the wake of *Rodriguez*, school districts and civil rights groups around the country began to file suits in state courts under state constitutional provisions.[3] These suits challenged state funding structures that disadvantaged racial and economic minorities, and they fell along two lines of argument: disparate funding between districts violated the state's equal protection guarantees (equity claims), or the funding system prohibited students in low-wealth districts from receiving an adequate education as required by the education clause of the state constitution (adequacy claims).[4] Between 1973 and 2007, there were eleven successful equity claims and twenty successful adequacy claims covering twenty-six states.[5]

Even several decades after *Rodriguez*, however, family education and income levels remained the best predictors of a child's future academic success.[6] Nationwide, minority students were only two-

2. *Id.* at 35.

3. 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, 220 n.4 (1990). These suits followed the sage advice of Justice William Brennan that "[s]tate constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). For a catalog of such provisions, see Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1343–48 (1992).

4. *See* Thro, *supra* note 3, at 222, 225, 233 (explaining that *Rodriguez* and other claims based on the federal constitution made up the first wave of litigation, the second wave was equity suits based on state constitutions, and the third wave consists of adequacy suits based on state constitutions). *But see* William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1188 (2003) (noting that "courts have fused their equity and adequacy analyses" and that it is often difficult to distinguish second and third wave cases effectively).

5. Sonja Ralston Elder, *School Financing Lawsuits: The Way out of the Fog or Just Blowing Smoke?*, 3 EDUC. L. & POL'Y F., 5 tbl.1 (2007), http://www.educationlawconsortium.org/forum/2007/papers/Ralston2007.pdf. States with successful equity rulings ("equity states") include Alabama, Arizona, Arkansas, California, Connecticut, Missouri, Montana, New Hampshire, North Dakota, Tennessee, and Wyoming. States with successful adequacy rulings ("adequacy states") include Alaska, Arizona, Arkansas, Idaho, Kansas, Kentucky, Maryland, Massachusetts, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, South Carolina, Texas, Vermont, and Wyoming. *Id.*

6. *See generally* RICHARD ROTHSTEIN, CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP (2004) (documenting the variety of pervasive differences between the classes that explains much of the discrepancy between lower-class and middle-class average student scores).

thirds as likely to graduate from high school as white students.[7] Students who do not learn to read well are significantly more likely to be unemployed, incarcerated, and poor.[8] A quality education is critical for all children, yet not all children have the opportunity to receive that education.

As the persistence of dramatic inequities demonstrates, not all courtroom victories have become classroom successes; indeed, in some states, very little has changed. For example, in Ohio, ten years after the first Ohio Supreme Court decision,[9] the state's system of education financing remained unconstitutional,[10] and the Ohio Supreme Court decided that its involvement in the matter was finished.[11] In many cases, state courts are reluctant to "usurp" policymaking power from the legislature, and in their respect for the idea of separation of powers,[12] they leave class after class of schoolchildren without the announced, basic constitutional right to an adequate education.[13]

This Note advocates that state courts intervene more actively to remedy violations of individuals' state constitutional rights when legislatures have been recalcitrant. In these circumstances, the courts are justified in taking action because arguments advocating judicial restraint for Article III courts do not apply wholesale to state courts. Although this Note focuses on the education clauses of state

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7. *See* GARY ORFIELD ET AL., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS 2 (2004), *available at* http://www.urban.org/UploadedPDF/410936_LosingOurFuture.pdf (observing that in 2001 only 50 percent of black students, 51 percent of Native American students, and 53 percent of Hispanic students graduated from high school, whereas 75 percent of white students graduated).

8. Nat'l Inst. for Literacy, Facts & Statistics, http://www.nifl.gov/nifl/facts/workforce.html (last visited Nov. 27, 2007).

9. The Ohio Supreme Court first addressed the state's education system in *DeRolph v. State* (*DeRolph I*), 677 N.E.2d 733 (Ohio 1997).

10. The Ohio Supreme Court has never recanted its original determination that the state's financing system is unconstitutional. *See infra* text accompanying notes 127–41.

11. *See* State *ex rel.* State v. Lewis (*DeRolph V*), 789 N.E.2d 195, 202 (Ohio 2003) ("The duty now lies with the General Assembly to remedy an educational system that has been found . . . to still be unconstitutional."); *see also* Christen Spears Hignett, Comment, *Ohio's Public School Funding System: The Unanswered Questions and the Unresolved Problems of* DeRolph, 33 CAP. U. L. REV. 739, 739–40 (2005) ("[T]he Supreme Court of Ohio . . . ruled that . . . the courts of Ohio could no longer exercise any jurisdiction in this case.").

12. *E.g.*, Campaign for Fiscal Equity, Inc. v. State (*CFE III*), 861 N.E.2d 50, 58 (N.Y. 2006) ("[W]e must avoid intrusion on the primary domain of another branch of government.").

13. *See* Hignett, *supra* note 11, at 740 (explaining how "legislative inaction and judicial reluctance and restraint" in the Ohio cases have left the students virtually "without redress").

constitutions, the analysis regarding the role of and limits on the state courts' powers could apply to any state constitutional violation. Part I examines the separation of powers doctrine and argues that it should not be interpreted as stringently in state courts as it is in the federal courts. Part II explains how the separation of powers issue applies to educational rights in particular. Then, to better understand the ideal path for educational rights cases, Part III presents case studies of successes in Kentucky and Massachusetts, where the system functioned as designed and each branch upheld its end of the separation of powers bargain. Finally, Part IV examines three alternative court reactions to legislative inaction through the school financing experiences in Ohio and New Jersey, in New York and North Carolina, and in Nevada, with the latter three states providing models for how state courts can overcome reluctant legislatures and uphold students' educational rights.

I. THE SEPARATION OF POWERS DOCTRINE

The idea of separation of powers has always been an integral part of the federal government and national constitution.[14] It plays a central role in the United States' unique experiment with democracy as it serves to "implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty."[15] At the federal level, it is generally accepted that there are solid distinctions between the powers of each branch.[16] Based on these structural features, the Supreme Court has recognized that the federal courts should generally defer to the legislative and executive branches regarding policymaking.[17] Even at the federal level, however, judicial deference has its limits because the very purpose of the judiciary is to

14. *See* Buckley v. Valeo, 424 U.S. 1, 124 (1976) ("The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted . . . .").

15. Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). Justice Kennedy goes on to quote the Federalist Papers' statement that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." *Id.* (quoting THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961)).

16. *See, e.g.*, *Buckley*, 424 U.S. at 124 (emphasizing that separation of powers is not "an abstract generalization"). The text of the Constitution also suggests such distinctions. *See* U.S. CONST. art. I, § 1 (vesting "*[a]ll* legislative [p]owers" in Congress (emphasis added)).

17. Helvering v. Davis, 301 U.S. 619, 640 (1937) (finding that the determination of the "general welfare" for purposes of the Spending Clause requires discretion, which is vested in Congress and not the courts).

uphold the people's constitutional rights and to provide a check on the power of the other branches.[18] Separation of powers is therefore a good starting point for the courts, but by no means absolute.

In *Rodriguez*,[19] the Supreme Court explained that "the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues."[20] Concluding that the problems of funding and implementing education are complex, the Court decided that the legislature's judgments were "entitled to respect."[21] Judicial deference based on the separation of powers doctrine continues to rule in federal courts, but deference should not be an end in itself, only a means of enforcing the structural balance of power established by the Constitution. If the underlying structural reasons for deferring are absent in a particular case, deference should not be mandated. In the federal system, separation of powers arguments for deference of Article III courts are rooted in three key structural aspects of the Constitution: (1) the federal constitution that federal courts uphold is primarily one of negative rights,[22] (2) the federal government is one of limited powers,[23] and (3) the federal courts are beyond popular review.[24] A fourth and more practical

18. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 870 (1960) ("[T]he judiciary was made independent because it has . . . the primary responsibility and duty of giving force and effect to constitutional liberties and limitations upon the executive and legislative branches."); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

19. This Note does not address the propriety of *Rodriguez*. Until it is overruled, however, future efforts to ensure educational rights must work within its framework.

20. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41 (1973).

21. *Id.* at 42.

22. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) (upholding against constitutional challenge a state's inaction because "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors"). Although *DeShaney* deals with action by a state government, it interprets the federal Constitution. *Id.* at 191.

23. *See* John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1143–45 (1996) (discussing the limits on the powers of the federal government imposed by the Tenth Amendment and Article III, Section 2, Clause 1).

24. Concern about unelected judges overriding the determinations of legislative majorities is perhaps the most frequently given reason for the need for judicial restraint. *See, e.g.*, Girardeau A. Spann, *Neutralizing* Grutter, 7 U. PA. J. CONST. L. 633, 635 (2005) ("The existence of judicial review . . . poses the countermajoritarian danger that unelected judges, who are

reason is also sometimes cited by the courts as a rationale for deference: they consider the federal courts largely incompetent in making policy.[25] Each of these four issues does not apply in the same way to state courts.[26] This Part explores these rationales and their application to state courts in turn.

A. State Constitutions Provide Positive Rights

First and most importantly, state courts enforce state constitutions that are substantively different from the federal constitution. As the Supreme Court envisions it, the federal constitution is one of negative rights[27]—rights that prevent the government from doing something to people, like unreasonably searching their homes[28] and that cannot be violated by government inaction. In contrast, all state constitutions contain at least some positive rights[29]—rights that entitle people to some benefit or action

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intentionally insulated from political accountability will . . . trump the policy preferences of the representative branches of government.").

25. *See Rodriguez*, 411 U.S. at 41 (reiterating that the Justices "lack . . . the expertise" to tackle certain problems).

26. *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105 (1977) (noting that federal and state courts are not the same and that it is dangerous to assume that they are); *see also* Amanda S. Hawthorne, Annual Survey of South Carolina Law, *The Opportunity in Adequacy Litigation: Recognizing the Legitimacy and Value of Pursuing Educational Reform through the Courts*, 56 S.C. L. REV. 761, 762 (2005) ("Educational reform through the courts is justified given the inherent flexibility of the separation of powers doctrine at the state level . . . .").

It is important to remember that there are fifty state constitutions, all different, that all provide for a different balance of power between the state's branches of government. Therefore, each of these issues (particularly the first two) varies a great deal in how strongly it applies to a given state. In a broader sense, this section is an argument against federal bias in state courts: one should not assume that all state courts operate by the same rules or principles that the federal courts do.

27. *See DeShaney*, 489 U.S. at 195 ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (summarizing Supreme Court precedent from *Harris v. McRae*, 488 U.S. 297 (1980), Judge Posner commented that "the Constitution is a charter of negative rather than positive liberties"); *see also* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 886 (1986) (explaining that Judge Posner's characterization "finds support in the constitutional language, in Supreme Court decisions, and in the history of the Bill of Rights as a safeguard against governmental intrusion").

28. *See* U.S. CONST. amend. IV.

29. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135 (1999) ("Unlike the Federal Constitution,

from the state government;[30] the right to education is a quintessential example of a positive right. By including these positive rights, state constitutions "explicitly engage state courts in substantive areas that have historically been outside the Article III domain."[31]

With positive rights, the courts have to be more involved because it is more difficult to "ensure that the government is doing its job"[32] than it is to prohibit certain behaviors.[33] As Professor Helen Hershkoff puts it, "[t]he enforcement of positive rights thus requires a state court to share explicitly in public governance, engaging in the principled dialogue that commentators traditionally associate with the common law resolution of social and economic issues."[34] An appropriate application of the separation of powers doctrine to positive rights would "recognize that legislative action satisfying a constitutional obligation is extremely unlikely unless judicial rulings call for such action."[35] In the absence of the judicial requirement to provide the right and judicial threat to act in the stead of a recalcitrant legislature, legislative actors have little incentive to spend money raised in their own districts on constituents in other districts because there is no electoral return for the political risk.[36] Judicial threats are a common means of enforcing constitutional rights; for example, Article III courts threaten through the exclusionary rule to suppress evidence gathered in violation of the Fourth Amendment.[37]

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every state constitution in the United States addresses social and economic concerns, and provides the basis for a variety of positive claims against the government.").

30. *Id.* at 1138 ("[P]ositive rights not only restrain the government's exercise of power, but also compel its exercise, constraining the government to use its assigned authority to carry out a specified constitutional purpose.").

31. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1890 (2001).

32. *See* Hershkoff, *supra* note 29, at 1138.

33. *See* Hershkoff, *supra* note 31, at 1890–91 ("[I]f negative rights under the federal Constitution restrain government action, positive rights under state constitutions mandate such action." (citation omitted)). Additionally, more judicial involvement is warranted because these provisions of state constitutions are more complex than the prohibitions in the federal Constitution and need more interpretation and enforcement. *Id.*

34. Hershkoff, *supra* note 29, at 1138.

35. 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 (1993).

36. *See infra* Part II.B.

37. Elkins v. United States, 364 U.S. 206, 217 (1960) (explaining that the rule's "purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it").

Because state courts are charged with enforcing a different type of constitutional right, different types of judicial threats are appropriate.

B. State Governments Are Not As Limited As the Federal Government

One reason frequently given for the need for restraint and deference from the federal courts is that the federal government as a whole is one of limited powers.[38] Article III courts were established in direct rejection of the English common law system of courts in which final appeal rested with the House of Lords, which frequently mixed policymaking with judicial determinations.[39] On the other hand, states are sovereigns with legislative and judicial powers broader than those of the federal government,[40] and state courts have inherent powers as well as statutorily granted ones.[41]

Article III courts are also subjected to substantial limits on their powers through the Constitution's jurisdictional restraints.[42] Many state courts are not similarly restricted.[43] Moreover, nearly all state courts are common law courts, directly engaged in crafting the law as well as applying it.[44] Common law jurisprudence is inherently a policymaking enterprise because the process of selecting a legal test

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38. Hershkoff, *supra* note 31, at 1888; *see, e.g.*, United States v. Morrison, 529 U.S. 598, 608 (2000) ("Congress' . . . authority is not without effective bounds.").

39. Michael L. Wells & Edward J. Larson, *Original Intent and Article III*, 70 TUL. L. REV. 75, 103–04 (1995) (noting that in 1787 "no court in England or any American state" had final appellate authority and that many state legislatures "retained the authority to review judicial decisions"). After the ratification of the federal constitution, many states moved away from the English model and established separate judiciaries, but they did so in a variety of manners and at different times. *See id.* at 104–05 ("At the time of the convention, many state appellate courts, such as those of Massachusetts, New Hampshire, and Rhode Island, provided entirely new trials for appellants. In other states, such as the Carolinas, trial-court judges met together to consider appeals.").

40. *See* U.S. CONST. amend. X (reserving powers "not delegated to the United States by the Constitution" to the states).

41. Hershkoff, *supra* note 31, at 1888–89 ("[T]he concept of inherent authority provides a legitimating wedge for state judicial activity even when the constitution or statutory scheme does not explicitly grant jurisdiction.").

42. U.S. CONST. art. III, § 2.

43. Hershkoff, *supra* note 31, at 1845–46.

44. *Id.* at 1889 (explaining that the common law system inherently involves "state courts in social and economic policymaking"). Although the historical traditions of Louisiana law are rooted in the Napoleonic Code rather than English common law, Louisiana's public law and court systems are and have always been based on the common law model. Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775, 777 (2005).

for tort liability or good faith dealing, for example, rests in large part on what values the court decides to uphold and then on how such values can be promoted through rules, tests, and doctrines.[45] It is therefore not out of place for state courts to engage in the policymaking decisions necessary to enforce and uphold constitutional rights.

C. State Judges Are Not beyond Popular Review

Another oft-cited reason for judicial restraint at the federal level is that the federal judiciary is beyond popular control: judges are appointed by the executive for life terms.[46] In such a system, there is legitimate concern for those worried about a loss of democratic control if judges insert themselves too much into policymaking, which, by design, is to be carried out by the popularly elected branches of government. Thirty-eight states, however, engage in some form of judicial elections.[47] Eleven of the remaining twelve states usually appoint judges for terms that are renewable by the state legislature; only Rhode Island appoints judges for life.[48] Although the merits of judicial elections are debatable, the fact that nearly all state court judges are elected or subject to review by elected officials means that criticisms of so-called judicial activism based on life tenure are largely inapplicable to state courts.

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45. *See* Hershkoff, *supra* note 31, at 1889 ("The common law's continuing vitality, involving state courts in social and economic policymaking, effectively 'blur[s] the lines of separation of powers within and among state institutions.'" (quoting Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CAL. L. REV. 613, 619 (1999)) (alteration in original) (citation omitted).

46. *See, e.g.*, Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 16 (1983) ("What can fairly be inferred from the constitutional scheme [of life appointment in Article III] is that the judges are not to exercise the same free-wheeling legislative discretion as the elected representatives . . . .").

47. JAN WITOLD BARAN, METHODS OF JUDICIAL SELECTION/ELECTION 1 (2006). There are two main types of judicial elections. In the first type of system, judges run for their bench seats in the same way legislators run for their statehouse ones. In the second, judges are appointed by the executive or by the legislature and periodically run unopposed in retention elections. Any judge who is not reelected is replaced by a new appointment. *Id.*

48. Am. Judicature Soc'y, Judicial Selection in the States, http://www.ajs.org/js/select.htm (last visited Nov. 27, 2007) (surveying information about each state's judiciary). Interestingly, the Rhode Island Supreme Court has ruled that education adequacy is a nonjusticiable political question. City of Pawtucket v. Sundlun, 662 A.2d 40, 58 (R.I. 1995) ("Because we believe the proper forum for this deliberation is the General Assembly, not the courtroom, we decline to endorse the trial justice's plan . . . .").

D. State Courts Are Competent Policymakers

Finally, there is concern about the policymaking competence of Article III courts. These concerns come in two varieties: federalist and interbranch. The federalist concern, as the Supreme Court put it in *Rodriguez*, says that a key reason the federal courts should stay out of local policy issues like education is their incompetence regarding the policymaking that school funding inevitably requires.[49] There is little question that crafting a constitutional school funding system, like the remedial phase of much public law litigation, is "essentially part of a process of policy design and implementation."[50] Yet that does not necessarily mean that courts should stay out; courts routinely deal with complex and controversial issues. In their continued struggle to desegregate American schools, even the federal courts made use of some unusual tools, such as special masters, that substantially improved the courts' competence in designing remedies.[51] Additionally, state courts have smaller jurisdictions and closer ties to the community, so their competence in crafting appropriate remedies in positive rights cases is arguably much greater than that of their federal counterparts.[52]

The interbranch concern pertains to the comparative competence of the branches; most state constitutions "do not reflect the same level of trust in state legislative decisionmaking as does the federal Constitution in congressional decisionmaking."[53] This lack of trust is eminently reasonable. Some states have only part-time legislatures[54] or ones that only meet biennially.[55] Even in those states where serving as a representative is a full-time job, legislatures are

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49. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41 (1973).

50. Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine*, 33 LAND & WATER L. REV. 281, 310 (1998).

51. *Id.*

52. *See id.* ("Complex issues are nothing new to the judiciary.").

53. Hershkoff, *supra* note 31, at 1892–93.

54. Nat'l Conference of State Legislatures, NCSL Backgrounder: Full- and Part-Time Legislatures, http://www.ncsl.org/programs/press/2004/backgrounder_fullandpart.htm (last visited Nov. 27, 2007) (explaining that there are seventeen legislatures that can be considered part-time in which legislators are only paid an average of about $16,000 and average just over one staff person per legislator).

55. Nat'l Conference of State Legislatures, Session History, http://www.ncsl.org/Programs/legismgt/about/sesshistory.htm (last visited Nov. 27, 2007).

often understaffed[56] and rarely have the time to fully research national trends or best practices. Many states have constitutional provisions limiting the actions of the legislature such as bans on special legislation, which were enacted to combat legislative abuses and corruption.[57] In sum, unlike the situation between Congress and the Article III courts, many state legislatures do not possess an institutional competency greater than that of their state courts; therefore, interbranch concerns about competence do not apply to the state courts in the same blanket way they are applied to the federal courts, and federalist concerns are, by definition, inapplicable to state courts dealing with state issues.

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For the Article III courts, the Constitution may require a stricter separation of powers, but this doctrine should not be applied wholesale to state courts without considering the reasoning behind it. State courts, unlike Article III courts, enforce positive rights, are not courts of limited powers, are generally democratically accountable, and are more competent than federal courts relative to their legislative counterparts in overseeing policy implementation.

This broader view of the separation of powers doctrine at the state level means that state courts should see themselves as empowered and obligated to be as involved as is necessary to ensure that all students are receiving a constitutionally adequate education.

II. "DEFERENCE, HOWEVER, HAS ITS LIMITS."[58]

At the state court level, there is widespread agreement that judicial deference reaches its limits when the other branches of government enact policies that violate people's constitutional rights or, conversely, fail to enact policies needed to protect those rights. Section A demonstrates such agreement in school financing and educational adequacy cases, and Section B examines why it is justified under public choice theory.

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56. *See generally* Nat'l Conference of State Legislatures, Staff Trends in the 50 State Legislatures: 1979, 1988, 1996, 2003, http://www.ncsl.org/programs/legismgt/about/staffchg.htm (last visited Nov. 27, 2007) (showing a decline in the total number of staff in state legislatures between 1996 and 2003, which suggests possible understaffing).

57. Hershkoff, *supra* note 31, at 1894.

58. Londonderry Sch. Dist. SAU #12 v. State, 907 A.2d 988, 996 (N.H. 2006).

A. The Infringement of Constitutional Rights is the Limit of Deference

It is precisely because each branch of government is charged with different duties that the courts' deference to the legislative and executive branches must have limits: without such limits, the courts could not fulfill their function as the ultimate protector of the people's rights.[59] Education adequacy cases are some of the most political, policy-heavy issues dealt with by state courts. Yet throughout the canons of education adequacy law, courts have found that judicial deference is limited, even when they have refused to act on such findings.[60] For example, the abundantly cautious New Jersey Supreme Court stated in 1997, after more than twenty years of deferential judicial involvement in the state's education financing policy,[61] that a judicial remedy was finally needed to "vindicate the constitutional rights of the school children in the poverty-stricken urban districts."[62] As the New Jersey court suggested, the limits of judicial deference are reached when the other branches of government fail (sometimes repeatedly) to remedy unconstitutional situations that violate people's rights.[63] In education adequacy cases,

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59. *See, e.g.*, Robinson v. Cahill (*Robinson IV*), 351 A.2d 713, 724 (N.J. 1975) (calling the courts "the designated last-resort guarantor of the Constitution's command").

60. *See, e.g.*, *Londonderry Sch. Dist. SAU #12*, 907 A.2d at 1003 (Galway, J., concurring specially in part and dissenting in part) ("While it is appropriate to give due deference to a co-equal branch of government as long as it is functioning within constitutional constraints, it would be a serious dereliction on our part to deliberately ignore a clear constitutional violation." (quoting Baines v. N.H. Senate President, 876 A.2d 768, 775 (N.H. 2005))). The New Hampshire court ultimately refused to supply meaning to the state's right to education because it continued to see that task as one for the legislature. *Id.* at 996 (majority opinion).

61. *See* Abbott v. Burke (*Abbott IV*), 693 A.2d 417, 445 (N.J. 1997) (noting that "one must evaluate an alternative, 'wait and see' approach," but, given "the persistence and depth of the constitutional deprivation, and in the absence of any real prospect for genuine educational improvement in the most needy districts, that approach is no longer an option").

62. *Id.*; *see also Londonderry Sch. Dist. SAU #12*, 907 A.2d at 996 ("[T]he judiciary has a responsibility to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but essential."); Campaign for Fiscal Equity, Inc. v. State (*CFE III*), 861 N.E.2d 50, 62 (N.Y. 2006) (Kaye, C.J., concurring in part and dissenting in part) ("Having failed to satisfy their responsibility, defendants now compel this Court to determine the specific steps that must be taken to remedy the undisputed constitutional violation."); James C. Sheil, Note, *The Just-Do-It Decision: School-Funding Litigation Tests the Limits of Judicial Deference*, 28 SETON HALL L. REV. 620, 647 (1997) ("When a governmental body fails to meet its constitutional obligations, the courts are not only empowered, but are obligated to act.").

63. *Robinson IV*, 351 A.2d at 724 (noting that "there comes a time when no alternative [to judicial action] remains"); *see also* Larry J. Obhof, DeRolph v. State *and Ohio's Long Road to*

courts should begin their enforcement of students' rights with deference to and trust in the coequal branches of government, but they should always be on the lookout for evidence that "[their] trust was misplaced" and a more active remedy has become necessary.[64]

In fact, many courts recognize that the limits to their deference are not discretionary. The New Jersey Supreme Court has held that a court "must use power equal to its responsibility" as the last-resort protector of the people's rights.[65] The New Hampshire Supreme Court has required that when the other branches fail to act, "a judicial remedy is not only appropriate but essential."[66] The chief judge of the New York Court of Appeals, Judith Kaye, proclaimed that when the state failed to bring the school funding statute into constitutional compliance, the court was "compel[led]" to act in its stead.[67] The Wyoming Supreme Court found that the scope of its "duty to protect individual rights include[d] compelling legislative action."[68] The Arkansas Supreme Court also found that it had a "duty . . . to assure constitutional compliance" when it gave the legislature less than a year to fix its failing education system or have the solution mandated by the court.[69] The list goes on. Although these limits apply to all state constitutional cases, they are reached frequently in cases regarding educational rights because such rights are positive in nature and can be infringed by legislative inaction.

Indeed, when enforcing negative rights, deference to the legislature is more easily justified because the court's action in striking down the offending law ends the constitutional violation; no further legislative action is needed to remedy the situation. With positive rights, on the other hand, the legislature's inaction is the very source of the constitutional violation and deference allows that

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an Adequate Education, 2005 BYU EDUC. & L.J. 83, 142 ("A court should be constrained by the limitations of its role. It should not, however, abandon its duty to determine whether the legislature has complied with the State's constitution."); Sheil, *supra* note 62, at 631–32 (explaining that the court's remedy in *Abbott IV* was based on its reasoning "that the court's role as the ultimate protector of constitutional rights demanded action" despite its respect for the separation of powers doctrine).

64. *CFE III*, 861 N.E.2d at 62 (Kaye, C.J., concurring in part and dissenting in part).

65. *Robinson IV*, 351 A.2d at 724.

66. *Londonderry Sch. Dist. SAU #12*, 907 A.2d at 996.

67. *CFE III*, 861 N.E.2d at 62 (Kaye, C.J., concurring in part and dissenting in part).

68. Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1264 (Wyo. 1995).

69. Lake View Sch. Dist. No. 25 v. Huckabee, 220 S.W.3d 645, 657 (Ark. 2005).

violation to persist.[70] Thus judicial deference should be most limited in cases that concern positive rights.

B. Educational Rights in Peril

The sheer volume of educational rights lawsuits attests to the fact that the positive right to education is often underprovided. A market-based model like public choice theory is apropos to the problems surrounding the provision of educational rights, because it provides an explanation for why legislatures have so frequently failed to adequately fund the education of impoverished children. Public choice theory explains that one can conceive of democratic institutions, such as legislatures, as a type of political market.[71] In the political market, politicians act to maximize their chances for reelection, and one gains election by accumulating more votes (political capital) than one's opponent.[72] To maximize efficiency, the politician will seek capital with a low marginal cost, from interest groups who control large numbers of votes and are easy to please.[73] When they function properly and there are no externalities such as disenfranchisement, political markets, like economic markets, provide an efficient allocation of resources.[74] Like economic markets, however, political markets can fail.[75] Such failures are most likely to occur, almost by definition, when the rights of the powerless are at stake because the majority is making the laws. When there is a political market failure in the legislative branch, the courts can

70. In the segregation context, several lower courts treated states' violations of the separate but equal requirement as violation of a positive right—the right to equal facilities provided by the state—and accordingly refused to defer to the legislature for a remedy. In ordering Delaware's schools integrated, Chancellor Seitz rejected deference to the legislature as equivalent to telling the plaintiff, "Yes, your Constitutional rights are being invaded, but be patient, we will see whether in time they are still being violated." Belton v. Gebhart, 87 A.2d 862, 870 (Del. Ch. 1952), *aff'd*, 91 A.2d 137 (Del. 1952).

71. Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 10 (1996).

72. *Id.*

73. *See id.* ("The politician will accept campaign contributions from interest groups until the marginal cost in votes of taking another contribution is equal to the contribution's marginal benefit.").

74. *See id.* at 14–16 (explaining that inegalitarian distribution of political capital, common in the modern system of campaign finance, creates a Kaldor-Hicks inefficient allocation of resources).

75. *Id.*

frequently step in and "jump-start" the process by declaring that someone's rights have been violated.[76]

Public school financing is particularly susceptible to political market failure because children cannot vote, children in low-income families are especially underrepresented in statehouses, and voters generally resist attempts to send locally raised revenues to other localities. First, the right to education is uniquely vulnerable to majoritarian attack because very few of the right holders are members of the electorate.[77] Given that children cannot vote, they must rely on others to value a quality education on their behalf either out of altruism or because they see some personal benefit in so doing, like reducing their need for private child care, improving the economy, or stabilizing their own retirement by preparing future workers.[78] Long-term investments, however, are notoriously difficult in political bodies because they involve short-term sacrifices.[79] This differential could also be explained as a time-based, or "vertical," political externality because "[present] constituents obtain benefits at the expense of other [future] constituents."[80] Here, the present voters gain lower taxes at the expense of educating future voters.

A second reason the right to education is unusually predisposed to political market failure is that the children for whom the right matters the most, at-risk students,[81] are concentrated in a few

76. Heise, *supra* note 50, at 306.

77. Lynn A. Stout, *Some Thoughts on Poverty and Failure in the Market for Children's Human Capital*, 81 GEO. L.J. 1945, 1956 (1993) ("Investing in children's human capital on a pay-as-you-go basis requires present voters to sacrifice in order to increase the returns enjoyed by a future generation. Unfortunately, that future generation lacks voting power at the time the decision to invest must be made.").

78. *Id.* at 1957.

79. *Id.* at 1956.

80. Ben Depoorter, *Horizontal Political Externalities: The Supply and Demand of Disaster Management*, 56 DUKE L.J. 101, 109 (2006) (explaining that vertical externalities occur when there are time differences between paying and receiving constituents). Politicians are unwilling to invest in disaster prevention programs whose benefit will accrue to future generations and thus future politicians but they are very willing to overspend on disaster response in the present term. *Id.* at 104. In the same sense, politicians are willing to spend billions to incarcerate undereducated people in the present but are unwilling to spend a fraction of that on improving public education for low-income children to prevent future crime.

81. Although many factors influence a student's risk for academic difficulties, living in poverty is the most commonly used indicator. *See, e.g.*, KAN. STATE DEP'T OF EDUC., AT-RISK DEFINITION 1, *available at* http://www3.ksde.org/leaf/survey_on_education_costs/at-risk.pdf ("Kansas statutes define at-risk as the number of students eligible for free lunches."). In addition to living in a low-income household, living with only one parent or with someone other

legislative districts[82] and command fewer votes per child than their non-at-risk peers.[83] For example, in a low-income area, single-parent families are more common.[84]

Data from the U.S. Census Bureau help quantify the differences. In 2005, an average single-earner household had roughly $30,000 in income and contained 2.3 people.[85] Recognizing that a substantial number of those households were single adults, those low-income households that contain children would contain more people than the average: it is reasonable to say the ratio of voters to children in a lower-income household is roughly one voter to 1.3 children. In contrast, an average dual-earner household earned around $80,000 and contained three people.[86] Because a dual-earner household almost invariably requires two adults, the ratio in that case is closer to two voters to one child. Therefore, approximately 2.6 times as many votes represent each non-at-risk child as do each at-risk child.[87] This analysis is necessarily imperfect because the data are only available in

than a parent, having poorly educated parents, and being a non-native English speaker are risk factors.

82. In the past three decades, poverty has become increasingly concentrated in inner cities as "high-poverty ghettos and barrios" have expanded rapidly. Paul A. Jargowsky, *Sprawl, Concentration of Poverty, and Urban Inequality*, *in* URBAN SPRAWL: CAUSES, CONSEQUENCES AND POLICY RESPONSES 39, 42 (Gregory Squires ed., 2002).

83. As a general matter, wealthier people have fewer children. *Now We Are 300,000,000*, ECONOMIST, Oct. 12, 2006, at 29, 29; *see* U.S. CENSUS BUREAU, FERTILITY OF AMERICAN WOMEN: JUNE 2004, at 4 (2005) (showing that women in the $20,000–$34,999 annual family income bracket have 18 percent more children than do women in the $100,000 and above bracket); Robert L. Brown, *Baby Boom and Baby Bust: Fertility Rates and Why They Vary*, CONTINGENCIES, Jan./Feb. 2004, at 17, 18 (explaining that the more educated a woman is, the fewer children she has because the opportunity cost of having children is higher).

84. NAT'L CTR. FOR CHILDREN IN POVERTY, RATE OF CHILDREN IN LOW-INCOME FAMILIES VARIES WIDELY BY STATE 2 (2004) ("Single-parent families are more than twice as likely to be low-income as two-parent families."); *see* U.S. CENSUS BUREAU, CHILDREN'S LIVING ARRANGEMENTS AND CHARACTERISTICS: MARCH 2002, at 14 (2003) (showing that although more than half of children in families below the poverty line live with only one parent, only about 7 percent of children in families earning more than $75,000 annually do).

85. U.S. Census Bureau, Current Population Survey, 2006 Annual Social and Economic Supplement, Selected Characteristics of Households by Total Money Income in 2005, *available at* http://pubdb3.census.gov/macro/032006/hhinc/new01_001.htm.

86. *Id.*

87. The high income ratio of 2:1 reduces to 2. The low income ratio of 1:1.3 reduces to 0.77. To compare the two ratios, divide the first by the second: 2/0.77 = 2.6. Certainly, not all non-earners are children and not all voters are wage-earners, but almost equally certainly, and despite some minors in the workforce, nearly all wage-earners are eligible to vote and nearly all children are non-earners. Other evidence also corroborates the assumptions that underlie this methodology. *See supra* notes 81–84.

aggregated form. In its rough sketches, however, it demonstrates a discrepancy in the political voice of children from different backgrounds. This imbalance is further exacerbated by the fact that eligible voters in low-income areas are less likely to vote in general.[88] With that kind of imbalance, it is not surprising that at-risk children face an uphill battle in the legislature for adequate funding for their schools.

Third, school funding decisions are susceptible to legislature capture. Professor Clayton Gillette provides an excellent depiction of how this process applies to school funding decisions:

> [P]ublic choice theory tells us that the very fact that local representatives are making these decisions will frustrate reform efforts. . . . [S]tate legislators from wealthy areas will be reluctant to engage in substantial redistribution of local school dollars. Even well-meaning legislators will fear electoral redress should they spend local dollars on non-local functions. One can readily appreciate the dilemma of the state legislator who agrees that some redistribution is appropriate, but who fears informing constituents that he or she has voted to send their tax dollars to a neighboring locality.[89]

This is an example of a horizontal political externality[90] because the benefits would accrue to people in the poorer areas who could not vote for the representatives from the wealthier areas whose support would be needed to pass the law—there is no electoral payoff to the suburban legislator for supporting improvement of the urban schools.

Taken together, these factors counsel courts to limit their deference to the legislature when adjudicating cases regarding school financing in particular, and educational adequacy in general. For the reasons discussed in this Part, the political branches are often unwilling to uphold educational rights, and this "political voicelessness" creates a political market failure because it produces an "inefficient underinvestment" in the education of future

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88. Jan E. Leighley & Jonathan Nagler, *Individual and Systemic Influences on Turnout: Who Votes? 1984*, J. POL., Aug. 1992, at 718, 725; *see also* Ian Millhiser, Note, *What Happens to a Dream Deferred: Cleansing the Taint of* San Antonio Independent School District v. Rodriguez, 55 DUKE L.J. 405, 412 (2005) (noting that lower-educated people are less likely to vote).

89. Clayton P. Gillette, *Reconstructing Local Control of School Finance: A Cautionary Note*, 25 CAP. U. L. REV. 37, 49 (1996).

90. *See* Depoorter, *supra* note 80, at 109 (noting that horizontal externalities among different political actors occur when there are geographic, rather than temporal, differences between paying and receiving constituents).

generations.[91] This market failure, however, could be "particularly susceptible to judicial resolution" because judicial involvement would provide political cover for legislators who would like to allocate resources more equitably but do not for fear of electoral reprisals.[92]

Although most state judges operate in some type of political market, few if any are in the same type of market as legislators: judicial retention elections are rarely contested,[93] judges usually do not run as members of political parties,[94] some judges face political review by the legislature or the governor rather than the voters,[95] and even those state high court judges who face electoral review do so on a statewide rather than a districted basis.[96] These factors, combined with the overarching difference in the job description of a judge,[97] indicate that they are in a better position than legislators to withstand electoral pressures on their decisions.

In addition to political cover, when courts frame issues in terms of rights rather than policy preferences, legislators can be encouraged to adopt a more rights-based approach to lawmaking, making fair and just decisions rather than those that are merely self-serving in the political marketplace.[98] Unfortunately, as Part IV.A explains, some legislators need more encouragement or cover than others, and the market failure in those cases requires more than a jump start. In those

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91. Stout, *supra* note 77, at 1957.

92. Gillette, *supra* note 89, at 49.

93. *See, e.g.*, Iowa Judicial Branch, Judicial Retention Elections, http://www.judicial.state.ia.us/Public_Information/About_Judges/Retention/ (last visited Nov. 27, 2007) ("In a retention election, judges do not have opponents.").

94. LARRY C. BERKSON, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT 6–7 (2004), *available at* http://www.ajs.org/js/berkson_2005.pdf (noting that, of states that elect judges, more use nonpartisan elections than partisan ones).

95. BARAN, *supra* note 47, at 2.

96. For example, North Carolina Supreme Court justices are elected by statewide ballot. N.C. CONST. art. IV, § 16.

97. *See In re* Raab, 793 N.E.2d 1287, 1292 (N.Y. 2003) ("Unlike other elected officials, however, judges do not serve particular constituencies but are sworn to apply the law impartially to any litigant appearing before the court. Once elected to the bench, a judge's role is significantly different from others who take part in the political process . . . .").

98. *See* Heise, *supra* note 50, at 306 (calling such legislative action a "veil of ignorance" approach to lawmaking because lawmakers would pursue legislative activity without regard to electoral concerns such as to whom rights or benefits would accrue); *see also* JOHN RAWLS, A THEORY OF JUSTICE 11 (rev. ed. 1999) (explaining that the just rules for society are those that would be chosen by one situated behind an imaginary "veil of ignorance," who does not know "his place in society, his class position . . . his intelligence, strength, and the like").

cases, the courts should see their more aggressive involvement as merited—if not required—by their ultimate duty to the people.[99]

III. WHEN THE SYSTEM WORKS

Since the early 1970s, forty-six state high courts have dealt with the issue of educational rights,[100] and it is not surprising that there have been forty-six different outcomes, both in terms of liability and remedy. Perhaps the greatest difference, even between states that have had similar outcomes, is the speed with which and degree to which the legislative and executive branches have complied with the courts' orders.[101] The separation of powers doctrine, however, assumes that each branch of government will fulfill its duties.[102] This Part examines situations in which that assumption was true, along with the reaction from the courts and the impact of the litigation on the children. It explores the experiences in Kentucky and Massachusetts, where each branch upheld its end of the bargain: the court defined the rights guaranteed by the state's constitution, and the legislature responded quickly and completely with substantial reforms.

The drama of school finance litigation in Kentucky could hardly have followed the separation of powers script better than it did. The challenge to the state's finance law was filed in late 1985,[103] and the Kentucky Supreme Court issued the final decision in June of 1989.[104]

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99. *See* Koski, *supra* note 4, at 1297–98 ("And if the political branches do not respond appropriately, the judicial 'veto power' can again be invoked.").

100. *See* Nat'l Access Network, Litigations Challenging Constitutionality of K-12 Funding in the 50 States (2007), http://www.schoolfunding.info/litigation/In-Process%20Litigations.pdf (noting that Delaware, Hawaii, Mississippi, Nevada, and Utah have never had a lawsuit challenging the constitutionality of K-12 funding). Although Nevada has not had a suit challenging its education system, its supreme court has interpreted the education clause of its constitution to compel a remedy in a funding stalemate. *See* discussion *infra* Part IV.C.

101. *See* Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485, 498–99 (1999) ("In [states other than Kentucky], responses to parallel court decrees have generally been slow, piecemeal, and seldom in compliance with the constitutional mandate on the first attempt.").

102. *See* Heise, *supra* note 50, at 326 ("[E]ach branch necessarily relies on the others to fulfill its respective duties. If each governmental branch meets its obligations, conscientiously performs its assigned roles, and respects the scope and contours of its counterparts' roles, the tri-partite form of government should perform as designed.").

103. Debra H. Dawahare, *Public School Reform: Kentucky's Solution*, 27 U. ARK. LITTLE ROCK L. REV. 27, 40 (2004).

104. *Id.* at 43.

The high court's decision in *Rose v. Council for Better Education*[105] was simultaneously sweeping and specific: it declared the entire system of schools in Kentucky inadequate, requiring a complete re-creation of the system,[106] and also spelled out seven detailed areas in which all children must acquire proficiency.[107] What the court did not do was specify how the school system should be re-created, organized, or financed;[108] it merely laid out, in no uncertain terms, what the Kentucky Constitution required in the end. The court then gave the General Assembly until the end of the regular legislative session in 1990 to solve the problem.[109]

In contrast to nearly every other state where plaintiffs have prevailed in a school adequacy case, the Kentucky General Assembly reacted with "astonishing" speed.[110] In just over ten months, the Kentucky Education Reform Act (KERA)[111] became law.[112] KERA was indeed the complete overhaul of the education system that *Rose* mandated and became a national model for school reform.[113] Under KERA, the Kentucky Department of Education was totally

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

106. *Id.* at 215.

107. *Id.* at 212–13. The court required

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

Id. at 212.

108. *Id.* at 214 (rejecting the state's contention that the trial court had ordered specific legislation enacted). The court went on:

> It is clear that the specifics of the legislation will be left up to the wisdom of the General Assembly. Clearly, no 'legislating' is present in the decision of the trial court, and more importantly, as we have previously said, there is none present in the decision of this Court.

Id.

109. *Id.* at 216.

110. Hunter, *supra* note 101, at 498–99.

111. Kentucky Education Reform Act of 1990, ch. 476, 1990 Ky. Acts 1208 (codified as amended in scattered sections of KY. REV. STAT. ANN. §§ 156.005–168.100 (LexisNexis 2006)).

112. Dawahare, *supra* note 103, at 47.

113. Hunter, *supra* note 101, at 499.

redesigned, an accountability system centered on performance-based assessments was created, and a substantial minimum of per pupil funding was guaranteed.[114] In the decade that followed, "Kentucky . . . sustained the most long-lasting, comprehensive education reforms in the nation" and student achievement improved.[115] As a testament to the General Assembly's embrace of its role in remedying the constitutional inadequacies of the Kentucky schools, there have been no further proceedings regarding *Rose*.

A similar situation unfolded in Massachusetts, where the 1993 case *McDuffy v. Secretary of Executive Office of Education*[116] found that state's education system constitutionally inadequate.[117] In articulating the breadth of the state's constitutional obligation, the Massachusetts court quoted directly from *Rose* the seven capacities that children must develop in school.[118] The *McDuffy* court also explicitly recognized the proper limits of its power by "presum[ing] . . . that the Commonwealth will fulfil its responsibility with respect to defining the specifics and the appropriate means to provide the constitutionally-required education."[119] In this case, as in Kentucky, the court's presumption proved correct.

A mere three days after the opinion in *McDuffy* was issued, the legislature passed the Education Reform Act of 1993 (ERA),[120] which "radically restructured the funding of public education . . . based on uniform criteria of need, and dramatically increased . . . mandatory financial assistance to public schools."[121] The ERA also created objective and performance-based accountability measures for all children, teachers, schools, and districts.[122] Although the education system in Massachusetts is not perfect and gaps based on wealth remain between districts, "the elected branches have acted to transform a dismal and fractured public school system into a unified system that has yielded . . . 'impressive results in terms of

114. *Id.* at 500–02.

115. *Id.* at 515–16.

116. McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993).

117. *Id.* at 555.

118. *Id.* at 554.

119. *Id.* at 555 n.92.

120. Education Reform Act of 1993, 1993 Mass. Acts 71 (codified as amended in scattered sections of MASS. ANN. LAWS chs. 10, 15, 29, 60, 69, 70, 71, 74, 76, 150E, 214 (LexisNexis 2006)).

121. Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1138 (Mass. 2005) (Marshall, C.J., concurring).

122. *Id.*

improvement in overall student performance.'"[123] In declining to continue its oversight of the school reform process, the Supreme Judicial Court lauded the legislature for upholding its end of the separation of powers bargain by acting quickly and creating a "steady trajectory of progress" for the state's education system.[124]

In both Kentucky and Massachusetts, the courts issued strong and specific rulings in their first dispositions of the cases, the state legislatures responded quickly and assertively by substantially reforming the education systems, and no further intervention by the courts was needed to ensure constitutional compliance. In neither case did the court decide how much money would be spent or any other functional detail of the reformed education system.[125] The courts were able to enforce their respective state constitutions while deferring to the separation of powers precisely because the other branches of government accepted the courts' rulings and acted.

IV. WHEN THE LAWMAKERS DROP THE BALL

Although the Kentucky and Massachusetts legislatures proved amenable to change, it may be difficult for a state court to know in advance what type of legislative reaction it will receive when it is deciding a constitutional case. If the legislature proves unwilling to remedy the situation, how should a state court, which need not be preoccupied with the Article III interpretation of the separation of powers doctrine,[126] respond? This Part examines three possibilities by examining the approaches of Ohio and New Jersey, New York and North Carolina, and Nevada. Section A looks at the overly deferential stance of the courts in Ohio and New Jersey as a response to legislative intransigence and the results for children and their constitutional rights. In contrast, Section B examines New York's and North Carolina's progress in balancing the separation of powers between the courts and legislatures and the need to ensure compliance with constitutional mandates. In both states, key aspects of this success have included courts retaining jurisdiction over the

123. *Id.* (quoting Hancock v. Driscoll, No. 02-2978, 2004 Mass. Super. LEXIS 118, at *486 (Mass. Super. Ct. Apr. 26, 2004)).

124. *Id.* at 1139.

125. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 216 (Ky. 1989); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993); *see also supra* note 108.

126. *See supra* Part I (discussing the separation of powers doctrine).

cases, being specific and upfront about timelines and expectations, clearly defining the right at issue, and following through with enforcement proceedings if the legislatures fail to act. Section C then examines the unique experience in Nevada where the supreme court effectively prioritized sections of the state's constitution to lower the standard for increasing taxes to assure that educational rights were upheld.

A. Refusing to Fight Back: Ohio and New Jersey

In 1991, students from rural Perry County, Ohio, filed suit against the state of Ohio, alleging that the state's system of funding schools failed to meet the state constitution's mandate that the state establish a "thorough and efficient" system of education.[127] The Ohio Supreme Court first decided the case in 1997 in *DeRolph v. State* (*DeRolph I*),[128] calling for a complete overhaul of the state's school funding system.[129] The General Assembly's piecemeal reform efforts were found inadequate when the system was again declared unconstitutional in 2000 (*DeRolph II*)[130] and then again in 2001 (*DeRolph III*).[131]

Throughout this process, the court attempted to keep its distance from policymaking, but in the 2001 decision, *DeRolph III*, it declared that "changes to the [funding] formula are required to make the new plan constitutional."[132] The court went on to list requirements[133] at a level of specificity that belied the court's exhortation in the opinion's opening paragraphs that designing a plan is "not [its] burden."[134] This plan, however, was vacated a year later in *DeRolph IV*[135] when the court issued a prompt reversal.[136] Then in 2003, after an election changed the composition of the court, it issued *DeRolph V*,[137] which ended the line of cases by declaring that the trial court no longer had

127. Obhof, *supra* note 63, at 83–84 (internal quotations omitted).
128. DeRolph v. State (*DeRolph I*), 677 N.E.2d 733 (Ohio 1997).
129. *Id.* at 747.
130. DeRolph v. State (*DeRolph II*), 728 N.E.2d 993, 1020 (Ohio 2000).
131. DeRolph v. State (*DeRolph III*), 754 N.E.2d 1184, 1200–01 (Ohio 2001).
132. *Id.* at 1200.
133. *Id.* at 1200–01.
134. *Id.* at 1189.
135. DeRolph v. State (*DeRolph IV*), 780 N.E.2d 529 (Ohio 2002).
136. *Id.* at 530.
137. State *ex rel.* State v. Lewis (*DeRolph V*), 789 N.E.2d 195 (Ohio 2003).

jurisdiction over the remedy.[138] The case is therefore over but the issue remains unresolved.[139]

After six years of the General Assembly's failing to comply with the court's mandates, it is ironic that the court so adamantly defended its decision in *DeRolph IV* to give the legislature total authority over solving the problem.[140] In the ten years after the court found Ohio's schools constitutionally inadequate, the court did not reverse its finding, and judicial restraint did not improve the education of the generation of children who attended these schools during that period.[141]

The New Jersey experience—still ongoing in 2007—has involved a similar string of repetitive decisions lasting over thirty years; and progress, when it has come at all, has come in inches, not miles.[142] The ordeal began in 1970 when *Robinson v. Cahill*[143] was first filed.[144] In the first New Jersey Supreme Court decision, the court upheld the trial court's determination that the state's funding system was unconstitutionally inequitable but failed to define the constitutional mandate of "a thorough and efficient system" of education.[145] At the time, the state provided only 28 percent of education funding—substantially below the 40 percent that was required by state statute and was the national average.[146] Regarding remedies, the case was reminiscent of *Brown v. Board of Education*'s[147] "all deliberate speed"

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138. *Id.* at 202.

139. Hignett, *supra* note 11, at 740.

140. *DeRolph V*, 789 N.E.2d at 202 ("The duty now lies with the General Assembly to remedy an educational system that has been found by the majority in *DeRolph IV* to still be unconstitutional."). The court never found the school system constitutional or overturned the substantive findings of *DeRolph I*, *II*, and *IV*. *Id.*

141. *See* Hignett, *supra* note 11, at 760 (noting Chief Justice Moyer's frustration in his *DeRolph IV* dissent that, without the judicial remedy from *DeRolph III*, the parties are "simply . . . in the same position that they were in when this litigation all began"). Moyer was the court's staunchest advocate of deference in *DeRolph I* and *II*. *See id.* at 755 (noting that "Moyer dissented on separation of powers grounds").

142. *See* Alexandra Greif, *Politics, Practicalities, and Priorities: New Jersey's Experience Implementing the* Abbott V *Mandate*, 22 YALE L. & POL'Y REV. 615, 618 (2004) ("Over the course of this tumultuous period . . . the New Jersey Supreme Court was continually called upon to address school finance deficiencies, but was repeatedly proven powerless in its attempts to reform urban education.").

143. Robinson v. Cahill (*Robinson I*), 303 A.2d 273 (N.J. 1973).

144. Greif, *supra* note 142, at 618.

145. *Robinson I*, 303 A.2d at 295 (internal quotations omitted).

146. *Id.* at 296.

147. Brown v. Bd. of Educ., 349 U.S. 294 (1955).

requirement,[148] vaguely stating that the legislature would need "some time" to act and inviting parties back for further argument on the remedy issue.[149]

There were eventually seven New Jersey Supreme Court decisions in the *Robinson* line of cases.[150] During the 1970s, the New Jersey Legislature developed a "pattern of noncompliance" with the court's rulings.[151] The court responded with tough talk in *Robinson IV*,[152] noting that the "time has now arrived" for the court to "act, even . . . to encroach, in areas otherwise reserved to other Branches of government" because "no alternative remain[ed]."[153] Unfortunately for New Jersey's children, this talk was not accompanied by sufficiently strong action as the court simply repeated its order for a new funding system, which the legislature enacted and then refused to fund.[154] Only when the high court enforced an injunction closing all the schools in the state did the legislature appropriate the funding necessary for the new system, which relieved localities of some of the financial burden of operating schools.[155] But this injunction did not come until *Robinson VI*.[156]

Nearly two decades later, serious inequities persisted among the bottom decile of districts, and the *Robinson* story virtually repeated itself in *Abbott v. Burke*[157] and its progeny. In these cases the court became gradually more specific over time due to its "[f]rustrat[ion] with the recalcitrance of the New Jersey Legislature."[158] Although the order in *Abbott V*[159] was more specific and demanding than the order

148. *Id.* at 301.

149. *Robinson I*, 303 A.2d at 298. In *Brown*, the arguments regarding remedies were scheduled in the term following the one that decided the segregation issue. *Brown*, 347 U.S. at 495.

150. Greif, *supra* note 142, at 620.

151. *Id.*

152. Robinson v. Cahill (*Robinson IV*), 351 A.2d 713 (N.J. 1975).

153. *Id.* at 724.

154. *See* Sheil, *supra* note 62, at 629–33 (noting that in *Robinson I* the Court withheld consideration of whether it could order equalization of funds if the state failed to act, but that in *Robinson IV* a "decidedly less tentative supreme court ordered a redistribution of state funds to increase aid to poorer school districts as well as equalize tax burdens for support of education expenditures").

155. *Id.* at 634.

156. *Id.* (citing Robinson v. Cahill (*Robinson VI*), 358 A.2d 457, 459 (1976) (per curiam)).

157. Abbott v. Burke (*Abbott II*), 575 A.2d 359 (N.J. 1990).

158. Greif, *supra* note 142, at 615.

159. Abbott v. Burke (*Abbott V*), 710 A.2d 450 (N.J. 1998)

in *Rose*,[160] the legislature seemed to have learned from experience that there was little consequence to violating the court's orders.[161] This lesson was reinforced in *Abbott VI*[162] when the court refused to appoint a standing master or issue an injunction to force the state to stop dragging its heels in implementing the preschool programs required under *Abbott V*.[163] Although the state did eventually get around to creating the preschools, five years after the *Abbott VI* decision, only 40 percent of preschool classrooms in districts covered by the *Abbott* decision were performing at the "good-to-excellent range" or better as mandated by the court.[164] The New Jersey system improved, but given its slow rate of improvement, many more generations of children will be undereducated before the problem is solved.[165]

Although the Ohio court simply threw up its hands in frustration, the New Jersey court did finally get tough, but it took thirty years. In the time between the original filing in *Robinson* in 1970 and the judicial remedy in *Abbott VI* in 2000, New Jersey schools remained constitutionally inadequate according to the court. During that time, several million students attended New Jersey public schools[166] and were thus denied their constitutional right to an adequate education.

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160. *Abbott V* required whole-school reform and full-day kindergarten and half-day preschool programs for three- and four-year-olds, technology programs, accountability programs, alternative schools, school-to-work and college-transition programs, rehabilitating and constructing needed infrastructure, *id.* at 473–74, whereas *Rose* specified the standards that must be met and left the implementation to the legislature, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989).

161. *See* Greif, *supra* note 142, at 616 (noting that the "political leaders continued to find wiggle room to thwart the thrust of the court's orders").

162. Abbott v. Burke (*Abbott VI*), 748 A.2d 82 (N.J. 2000).

163. *See id.* at 95–96 ("We do not see the need for the appointment of a Judge of the Superior Court as a Standing Master . . . . Education disputes are properly decided in the first instance by those statutorily entrusted with that responsibility.").

164. Laura Fasbach, *Gains Found in Abbott Preschools*, RECORD (Bergen County, N.J.), May 20, 2005, at A3.

165. *See Abbott VI*, 748 A.2d at 85 (noting that "another generation of children will pay the price for each year of delay").

166. *See* Southern Regional Education Board, Elementary and Secondary School Enrollment, Enrollment Data-Public (June 2007), *available at* http://www.sreb.org/DataLibrary/tables/FB07.xls (reporting annual enrollment of students in New Jersey schools). Dividing the sum of the annual enrollment during these years by thirty to find the average number of students enrolled per year and then again by thirteen (the number of grades in public schools) gives the average number of students per class. Multiplying this figure by the forty-two classes of students that passed through the New Jersey schools between 1970 and 2000 gives a total of 4.19 million students.

For those students and for the hundreds of thousands in Ohio who continue to attend constitutionally inadequate schools, there was no remedy because the legislatures refused to act, and the courts bowed in deference.

B. Start Strong and Carry a Big Stick: New York and North Carolina

The courts in New York attempted to prevent much of the back-and-forth with the legislature by being upfront about their expectations. In 1993, the nonprofit Campaign for Fiscal Equity, representing schoolchildren from New York City, filed suit against the state, alleging that inadequate funding was denying the children their right to a sound basic education.[167] In its first decision on the merits in 2003, the Court of Appeals hoped to emulate the Kentucky experience—and avoid the prolonged litigation experienced in New Jersey[168]—by "initially offer[ing] more detailed remedial directions."[169] Like the Kentucky court, the New York court provided the legislature with a specific definition of the skills students must attain to fulfill the state's guarantee of a "sound basic education."[170] The court attempted to strike the balance in terms of deference by searching for a remedy that was "ultimately less entangling for the courts" than overseeing finance reform but "more promising" for the plaintiffs than simply directing the state to fix the problem.[171] The court settled on largely affirming the trial court's order and requiring the state to determine the cost of providing a sound basic education to the children of New York City and then to provide it.[172] The legislature was also given a strict one-year time limit in which to remedy the financial inadequacies of the system.[173]

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167. Campaign for Fiscal Equity, Inc., A Sound Basic Education for All Children: The Campaign for Fiscal Equity v. State of New York, http://www.cfequity.org/ns-nys.htm (last visited Nov. 27, 2007).

168. Campaign for Fiscal Equity, Inc. v. State (*CFE II*), 801 N.E.2d 326, 349 (N.Y. 2003).

169. *Id.*

170. *See id.* at 330 ("[W]e equate[] a sound basic education with 'the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.'" (quoting Campaign for Fiscal Equity v. State (*CFE I*), 655 N.E.2d 661, 666 (N.Y. 1995)).

171. *Id.* at 345.

172. *Id.* at 348.

173. *See id.* at 349 ("[D]efendants should have until July 30, 2004 to implement the necessary measures.").

In the 2006 round of litigation, the New York courts virtually bypassed concerns about the separation of powers, and the issue on appeal became very specific: not whether the Court of Appeals should order the legislature to appropriate a specific dollar amount to remedy the problem, but exactly how much the legislature must spend.[174] Although the decision was written in the language of deference to the state's other branches of government,[175] the court was not deferring. The legislature failed to meet the deadline set in the 2003 case and was ordered to spend at least $1.9 billion more per year on the New York City public schools.[176] The court could have adopted the New Jersey brand of deference and simply ordered the state legislature to remedy the situation however it saw best, but instead, after having given the state that chance after the 2003 decision,[177] the court left no room for political wrangling. In the wake of the decision, then Governor-elect Eliot Spitzer continued to promise more than the minimum, and even the state's Republican leaders, who held up the same $1.9 billion proposal in 2004 leading to the courts' renewed involvement in the case, said they supported fulfilling the court's mandate.[178] In April 2007, the legislature approved the state budget with an increase of $1.76 billion for education, about half of which went to New York City.[179] Although this was only half the mandated amount, it constituted a significant victory for the plaintiffs, coming a mere four years after the first high

174. The Referees appointed by the trial court concluded that $5.63 billion per year for the New York City public schools would be sufficient, whereas Defendants, who ultimately prevailed in the high court, were seeking a ruling requiring only $1.9 billion per year. Campaign for Fiscal Equity, Inc. v. State (*CFE III*), 861 N.E.2d 50, 55–57 (N.Y. 2006).

175. *Id.* at 58 (noting in particular that "the Judiciary has a duty 'to defer to the Legislature in matters of policymaking, particularly in a matter so vital as education financing . . . . [The courts] have neither the authority, nor the ability, nor the will, to micromanage education financing.'" (quoting *CFE II*, 801 N.E.2d at 345)).

176. *Id.* at 52–53. The $1.9 billion cost estimate was endorsed by a special commission created by Governor George Pataki to study the issue and was substantially lower than the Referees' estimate of $5.63 billion. *Id.* at 56. The key differences in the numbers were whether districts spending above the median for all effective districts are financially inefficient; how much to weight the needs of English language learners, disabled students, and low-income students; and which cost adjustment method was used to compare different parts of the state. *Id.* at 60.

177. *See supra* notes 172–73 and accompanying text.

178. David M. Herszenhorn, *List for Schools Seems to Grow More Wishful: Ruling May Force City to Scale Back Plans*, N.Y. TIMES, Nov. 25, 2006, at B1.

179. Ford Fessenden, *Schools are Seeking Higher Taxes Despite Extra Aid from Albany*, N.Y. TIMES, May 5, 2007, at A1.

court decision declaring the schools inadequate.[180] As of December 2007, however, it is unknown whether they will return to court seeking more.

A similar situation has played out in North Carolina. In 2004, the North Carolina Supreme Court declared that students in many low wealth counties in the state were not receiving their constitutionally entitled "sound basic education."[181] The ruling came in response to a suit filed in 1994 by parents and school boards in five rural counties that claimed the state was not providing adequate aid. As the suit progressed, six urban districts joined, claiming the state's funding formula was inadequate to educate at-risk students and English language learners.[182] In a prior decision denying the state's motion to dismiss, the court, also emulating *Rose*, specifically defined the skills that composed a sound, basic education.[183] In the 2004 decision, while repeatedly recognizing the separation of powers and the legislative and executive branches' authority over the funding issue,[184] the court ultimately remanded the case to the trial court to oversee the implementation rather than ordering it to relinquish jurisdiction.[185]

Judge Howard Manning of the Wake County Superior Court has been an active manager of the case on remand, which has produced positive results across the state.[186] The next year, Governor Mike Easley specially asked for and the general assembly appropriated $25 million for a special fund that gives districts extra money for disadvantaged students.[187] In 2006, the reluctant general assembly stepped up and doubled the fund for disadvantaged students, fully

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180. *See* Campaign for Fiscal Equity, Inc., 2007–2008 Enacted Education Budget Legislation, http://www.cfequity.org/ns-legislation.htm (last visited Nov. 27, 2007) ("With Governor Spitzer's leadership, we have turned litigation into law." (quoting Geri Palast, Executive Dir., Campaign for Fiscal Equity)).

181. Hoke County Bd. of Educ. v. State, 599 S.E.2d 365, 396 (N.C. 2004).

182. North Carolina Justice Center, Leandro Lawsuit, www.ncjustice.org/content/index.php?pid=78 (last visited Nov. 27, 2007).

183. Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997).

184. Hoke County Bd. of Educ., 599 S.E.2d at 395 ("[W]e . . . recognize our limitations in providing specific remedies for violations committed by other government branches in . . . public school education, that is within their primary domain.").

185. *Id.* at 397.

186. *See* Todd Silberman, *Schools Want a Spending Plan; Wake Judge Hears Funding Request*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 8, 2005, at 5B ("No more playing the budget game . . . . I don't want to hear it any more." (quoting Judge Manning)).

187. *See id.* ("The State Board of Education has requested $25 million for the disadvantaged student fund—about the same that Easley provided during two special allocations last year.").

funded the low wealth equalization fund, and spent a total of $600 million more than it spent in fiscal year 2005 on education statewide.[188] Manning's management has gone beyond the budget: in the spring of 2006, he threatened to enjoin seventeen very low-performing high schools from opening in August if significant changes in leadership and design were not made.[189] By August, sixteen schools had made the changes and opened on schedule, many with new ninth-grade academies to improve student performance before students take graduation tests.[190]

In both New York and North Carolina, the states' highest courts spoke repeatedly of deference to the legislature, but they also stated that such deference comes with the requirement of the legislature doing its job. In both states, by retaining jurisdiction over the cases and remanding them to trial level, judges maintained a commitment to ensuring that the students' rights are enforced. Furthermore, both courts were specific and upfront about their expectations. Like Kentucky, both states precisely defined the scope of the right at issue. New York additionally set a tight deadline for compliance, and then, unlike Ohio, moved forward with enforcement proceedings when the deadline was not met. Although more time is inevitably needed to see whether these actions were enough to secure students' rights substantively, initial evidence is promising.

C. Change the Rules of the Game: Nevada

Nevada has never had an education equality or adequacy case, but in 2003, the state came to a standoff regarding its education budget.[191] Four provisions of the Nevada Constitution seemed to conflict:[192] the legislature is the only body that can raise revenue or

188. Todd Silberman & Dan Kane, *Schools' Budget Ship Comes In*, NEWS & OBSERVER (Raleigh, N.C.), July 6, 2006, at 1A.

189. Todd Silberman, *Manning Likes Progress of Failing Schools*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 19, 2006, at 5B.

190. *Id.* Ninth-grade academies are an alternative organizational model encompassing smaller learning communities, intensive tutoring and remediation, and mentoring for students.

191. Nat'l Access Network, Litigation: Nevada, http://www.schoolfunding.info/states/nv/lit_nv.php3 (last visited Nov. 27, 2007).

192. Guinn v. Legislature of the State of Nev., 71 P.3d 1269, 1272–73 (Nev. 2003), *overruled in part by* Nevadans for Nev. v. Beers, 142 P.3d 339, 348 (Nev. 2006) (overruling only the portion of *Guinn* that declares the procedural provisions of the state constitution must yield to the substantive ones).

appropriate funds;[193] the state must fund a system of common schools;[194] the state must have a balanced budget;[195] and by a 1996 amendment, tax increases must pass the legislature by a two-thirds majority.[196] After a full 120-day legislative session and two special sessions on the education budget, the legislature was at a deadlock, having passed an appropriations bill by a simple majority but having been unable to pass the necessary tax increases by the required supermajority.[197] The Governor subsequently sued the legislature and asked the court to issue writs of mandamus requiring that the legislature raise the appropriate revenue so the schools could open.[198] The Nevada Supreme Court went one step further and, in addition to issuing the writ to the legislature, waived the supermajority requirement and allowed the tax increases to pass by a simple majority.[199]

The court reasoned that although the legislature had complete control over the budget process, "constitutional construction is purely a province of the judiciary."[200] The court then proceeded to follow standard rules of statutory construction, relying on the premise that specific provisions should control over general ones.[201] The court determined that procedural provisions are more general than substantive ones because the former apply to all bills under consideration.[202] Under the status quo, the legislature's adherence to the procedural supermajority provision was preventing it from actualizing the substantive education funding requirement.[203] Therefore, the court concluded that the provisions could not be harmonized and that "the procedure must yield" to the basic, substantive right.[204] As part of its support for this outcome, the court

193. NEV. CONST. arts. 3, 4, § 19.

194. *Id.* art. 11, § 6.

195. *Id.* art. 9, § 2.

196. *Id.* art. 4, § 18, cl. 2.

197. *Guinn*, 71 P.3d at 1273. In Nevada, the legislature in special sessions may only consider the agenda the governor puts forward. NEV. CONST. art. 5, § 9. In this case, the education budget and its accompanying funding mechanism were the only items up for discussion. *Guinn*, 71 P.3d at 1273.

198. *Guinn*, 71 P.3d at 1272.

199. *Id.*

200. *Id.* at 1274.

201. *Id.* at 1274–75.

202. *Id.* at 1276.

203. *Id.*

204. *Id.* at 1275.

cited a Wyoming Supreme Court opinion in that state's education adequacy line of cases: "[c]onstitutional provisions imposing an affirmative mandatory duty upon the legislature are judicially enforceable in protecting individual rights, such as educational rights."[205] Two weeks after the court's decision, the tax bill passed by a two-thirds majority as one Republican legislator who had previously voted against the bill changed his mind because he did not want the courts deciding the appropriate level of taxation.[206]

In 2006, the Nevada high court held in *Nevadans for Nevada v. Beers*[207] that the constitution must be read as a whole and the unambiguous text of the document is not dispensable.[208] With regard to constitutional doctrine, *Beers* was correctly decided. In July of 2003, however, the court was faced with an essentially insurmountable textual dilemma, and the tack it chose was essentially the only one available in which educational rights were recognized in any meaningful way. In the end, the Nevada court was able to secure students' education rights through the proper delegation of powers by threatening the legislature with a loss of control over the situation. Even though the tax increase, the largest in the state's history,[209] eventually passed by a two-thirds majority, it is undeniable that the court's ruling prompted the reluctant Republican to change his position.[210] Although the *Guinn v. Legislature of Nevada*[211] decision was extreme, it shows that courts need not be deterred from their responsibility to enforce the entirety of the state's constitution.

* * *

In Ohio and New Jersey, the courts' unwillingness to push the legislatures harder has condemned millions of children to an education that is less than they deserve based on their state constitutions. In New York, North Carolina, and Nevada, on the

205. *Id.* (quoting Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1264 (Wyo. 1995)).

206. *See* Ed Vogel, *Assemblyman Who Broke Deadlock*, LAS VEGAS REV.-J., July 23, 2003, at 8A ("[The Republican] did not want to risk a simple majority passage of a tax bill being challenged in court, so he broke the stalemate.").

207. Nevadans for Nev. v. Beers, 142 P.3d 339 (Nev. 2006).

208. *Id.* at 348, 350.

209. Sean Whaley & Jane Ann Morri, *Guinn Signs Record Tax Increase*, LAS VEGAS REV.-J., July 23, 2003, at 1A.

210. Vogel, *supra* note 206.

211. Guinn v. Legislature of the State of Nev., 71 P.3d 1269, 1272–73 (Nev. 2003), *overruled in part by Nevadans for Nev.*, 142 P.3d at 348.

other hand, the courts have all seen fit to push the envelope of the separation of powers doctrine to protect and meaningfully realize individual students' educational rights. These three states serve as examples of courts executing their duties to protect students' educational rights in the face of legislatures that are less than willing to uphold their end of the separation of powers bargain. By issuing strong first opinions, retaining jurisdiction over the cases, and showing the seriousness of their commitment to educational rights, these courts demonstrate the effectiveness of taking advantage of the flexibility of the separation of powers doctrine at the state level.

CONCLUSION

More than three decades after *Rodriguez*, nine-year-olds in low-income communities were still performing three grade levels behind their more affluent peers.[212] Yet educating low-income students is not impossible; it simply takes more time, more effort, and more resources than the status quo provides.[213] When students in every state have some form of constitutional right to education[214] and the formula for educating all students is known, the achievement gap can only be attributed to a failure of will among those who control the resources. In such an environment, it is precisely the role of the courts to stand up for students, especially low-income students who are largely voiceless. Yet, in too many cases, the courts have restrained themselves out of an unnecessary devotion to a federal separation of powers doctrine developed for Article III courts. State courts are

212. Teach For America, Our Nation's Greatest Injustice, http://www.teachforamerica.org/mission/index.htm (last visited Nov. 27, 2007).

213. *See* Knowledge Is Power Program, KIPP in Action: Student Achievement, http://www.kipp.org/01/schoolachievement.cfm (last visited Nov. 27, 2006) (explaining that KIPP charter schools, located in the poorest neighborhoods, routinely outperform not only their neighborhood schools but entire school districts). A key part of the KIPP program is that students attend school for 60 percent longer. Knowledge Is Power Program, About KIPP: What is a KIPP School?, http://www.kipp.org/01/whatisakippschool.cfm (last visited Nov. 27, 2007). Making at-risk students succeed likely also takes more resources than doing the same for non-at-risk students. *See* Paul Tough, *What It Takes to Make a Student*, N.Y. TIMES MAG., Nov. 26, 2006, at 44, 47–48 (explaining that children from low-income homes need more school resources to succeed because they begin school substantially behind their higher-income counterparts). For example, by the time children are three, those with professional parents had vocabularies more than twice as large as children whose parents were on welfare. *Id.* at 47; *see generally* ROTHSTEIN, *supra* note 6 (detailing various research-based proposals for improving education of at-risk students, all of which require additional resources).

214. *See* Hubsch, *supra* note 3, at 1343–48.

substantively and significantly different from federal courts in that they enforce state constitutional rights that are frequently positive in nature, they have broad and inherent powers, they almost universally depend on electoral or legislative review, and they are institutionally competent vis-à-vis state legislatures. Because of these differences, state courts should embrace their own state vision of what the separation of powers requires, and they should not hesitate to do their part in upholding students' educational rights. As courts in these cases embark on the challenge of enforcing students' rights, they should do so with deference to and trust in the coequal branches of government, but they should also remain vigilant for evidence that "[their] trust was misplaced" and that a more active remedy has become necessary.[215]

Although it is unlikely that the courts alone will ever be able to solve the problems of public education,[216] they should not eschew their proper role in the process. In the meantime, citizens of every state should join Chief Judge Kaye of the New York Court of Appeals in being "hopeful" that their policymakers "will continue to strive to make the schools not merely adequate, but excellent."[217]

215. Campaign for Fiscal Equity, Inc. v. State (*CFE III*), 861 N.E.2d 50, 62 (N.Y. 2006) (Kaye, C.J., concurring in part and dissenting in part).

216. *See* Greif, *supra* note 142, at 656 ("New Jersey's experience suggests that judicial opinions alone are insufficient to sustain substantial educational reform.").

217. *CFE III*, 861 N.E.2d at 67 (Kaye, C.J., concurring in part and dissenting in part).