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BINDING ADVISORY OPINIONS: A FEDERAL COURTS PERSPECTIVE ON THE STATE SCHOOL FINANCE DECISIONS†

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INTRODUCTION

The "third wave" of state school finance decisions continues, with no apparent sign of abatement.[1] These cases—deriving important educational rights from state constitutions—are representative of the state courts' new role as protectors of individual rights and liberties in areas where federal judicial relief is not available.[2] Within this overall context, the recent Massachusetts discussion in *McDuffy v. Secretary of the Executive Office of Education*[3] is significant for several reasons. It adds to the roster of school finance cases the prestige of a state supreme court that has been in the forefront of the state constitutional revolution.[4] The opinion itself is a highly interesting example of state judicial methodology,[5] particularly in its bold derivation of individual rights and legislative duties from the education clause of the Massachusetts

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[1] *See* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994); Kate Strickland, *The School Finance Reform Movement, A History and Prognosis: Will Massachusetts Join the Third Wave of Reform?*, 32 B.C. L. REV. 1105 (1991).

[2] *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

[3] 615 N.E.2d 516 (Mass. 1993).

[4] *See* Charles H. Baron, *The Supreme Judicial Court in its Fourth Century: Meeting the Challenge of the "New Constitutional Revolution,"* 77 MASS. L. REV. 35 (1992).

[5] *See* Thro, *supra* note 1, at 610.

Constitution.[6] The opinion leaves no doubt that the current legislation governing school finance is unconstitutional.

When it comes to the question of remedy, however, the *McDuffy* court's boldness evaporates. A high degree of deference to the legislature is the dominant theme of this relatively brief portion of the opinion.[7] The court comes close to saying that while it can say what is wrong, only the legislature can fix it.[8] This dissonance between right and remedy is not unique to *McDuffy*. Other state supreme courts show the same pattern of expansive declarations of right and duty coupled with an insistence that solutions must come from the legislative rather than the judicial branch.[9]

This aspect of the state school finance cases is the subject of increasing commentary.[10] In this Article, I offer a "federal courts" perspective on what the state courts are doing. In examining the remedial dimensions of the cases, I utilize a number of doctrines and approaches developed by the United States Supreme Court to control the exercise of federal judicial power. I also draw on the extensive body of federal courts scholarship contrasting the capacities of state and federal courts as protectors of individual rights and liberties. It is an article of faith among many academic writers that the state courts cannot perform this function as vigorously as their federal counterparts.[11] This is the disparity thesis: the contention that inherent structural differences make the two sets of courts unequal in this area.[12] At first blush, school finance decisions like *McDuffy* can be seen as illustrations of the disparity thesis. The plaintiffs have come away from the case with a nice sounding declaration, but the state judicial system has essentially remitted them to the legislature which caused their problem in the first place. The analysis offered here indicates, however, that the lessons to be drawn from the school finance cases are considerably more complex.

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[6] *See* McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 548 (Mass. 1993) (quoting Education Clause of Massachusetts Constitution).

[7] *See infra* notes 23–55 and accompanying text.

[8] *See infra* notes 29–36 and accompanying text.

[9] *See infra* notes 37–55 and accompanying text.

[10] *See, e.g.*, Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072 (1991) [hereinafter *Unfulfilled Promises*]; *but see*, Thro, *supra* note 1, at 604 (noting recent tendency of state courts to be more assertive at remedial stage).

[11] *See, e.g.*, Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1779–80 (1992).

[12] Burt Neuborne proclaimed the classic statement of this thesis. *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

Section I of the Article describes the remedial dimensions of *McDuffy* and discusses briefly other cases illustrating the same phenomenon of merits boldness and remedial deference.[13] Section II outlines the disparity thesis and discusses these decisions as possible illustrations of it.[14] Particular attention is devoted to what advocates of disparity cite as the phenomenon's main course: state judges' dependence on the electorate for their positions and the resulting reluctance to take politically unpopular stands.[15] I contend that the classic disparity thesis does not explain the remedial deference of the school finance cases. The positions taken on the merits of school finance suits are not necessarily unpopular with the electorate, and remedial deference can be found in the decisions of appointed judges such as those in Massachusetts. A variant of the thesis may shed light, however. State supreme courts are highly dependent on state *legislatures*—as opposed to the electorate—for their salaries and budgets, if not for their jobs. Moreover, the two bodies find themselves in constant interaction, as ongoing, equal partners in the state governmental process. Thus a state court—unlike a federal court hearing a claim against state practices—may well be reluctant to order its partner to take specific steps, including the raising of revenue, to address educational inadequacies. There is a limit to state court boldness; the disparity thesis seems to be vindicated.

Section III sounds a cautionary note to this initial conclusion.[16] The theme of judicial restraint is not limited to state courts. The United States Supreme Court, particularly under Chief Justices Burger and Rehnquist, has utilized a wide array of doctrines to circumscribe federal judicial power. Issues such as standing, ripeness, political questions and remedial comity are central to any discussion of the proper role of federal courts, especially in wide-ranging institutional litigation.[17] What the state supreme courts are doing in the remedial component of school finance litigation may well reflect the same concerns that motivate the nation's highest court; both are engaged in the process of circumscribing the judiciary's reformist role. In other words, one should invoke a thesis of similarity rather than disparity.

Section IV takes the analysis a step further and advances the contention that neither a disparity nor a similarity thesis explains fully

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[13] *See infra* notes 23–55 and accompanying text.

[14] *See infra* notes 56–93 and accompanying text.

[15] *See infra* notes 70–93 and accompanying text.

[16] *See infra* notes 94–156 and accompanying text.

[17] *See* Abram Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 11 (1982).

the remedial dimensions of school finance cases.[18] An alternative analysis is that state courts, unconstrained by Article III of the United States Constitution, are developing their own approaches to a particularly complex form of institutional litigation. What the cases represent is not so much a judicial "resolution" of a problem, but rather one step in an ongoing approach to a multi-dimensional social question. The state courts engage in a dialogue about that question with the political branches almost to the point where they become partners in crafting a solution. That solution does not come from the court nor is it imposed by the court. Judicial decisions resemble a set of guidelines for the next, legislative step in the process rather than judgments designed to affect the rights and duties of a particular set of litigants. The judicial decree is not, as in the federal norm, the "centerpiece"[19] dictating who shall do what. The court does declare a duty, but its order is essentially advice on how to the perform that duty. These binding advisory opinions are quite different from the manner in which Article III courts handle reform litigation. This does not mean that the state approach is inferior.

One way of looking at the differences between the two judicial systems is that they represent Justice Brandeis' "laboratory" theory of federalism[20] at work. The various courts approach their possible reformist role in different ways. What emerges is an exchange of views not just within each state but among the states as well as between the state and federal judiciaries. Beyond any specific subject matter such as school finance is the broader question of the proper role of courts in a democratic society. Our society now relies on courts for more than just the resolution of simple bipolar disputes such as *Marbury v. Madison*.[21] This change has produced questions of effectiveness as well as legitimacy: *Can* courts produce social change even if the validity of the effort is accepted?

The school finance cases offer one set of answers in one context. It may be that the state courts themselves will move beyond a posture of remedial deference and will take direct charge of all aspects of the matter[22] in a way that makes them look like a federal district court in a desegregation case. For the moment, however, they offer a different vision.

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[18] *See infra* notes 157–80 and accompanying text.

[19] Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298 (1976).

[20] *See* New State Ice Co. v. Liebman, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting).

[21] *See* 5 U.S. (1 Cranch) 137 (1803).

[22] *See* Lewis B. Kaden, *Court and Legislatures in a Federal System: The Case of School Finance*,

I. *McDuffy* and the Phenomenon of Remedial Deference

The Massachusetts Supreme Judicial Court's analysis in *McDuffy v. Secretary of the Executive Office of Education* proceeds in three distinct phases. Most of the opinion is devoted to a painstaking, largely historical exegesis of the education clause of the Massachusetts Constitution.[23] Based on this analysis, the court concluded that this clause imposes on the political branches an enforceable:

> duty to provide an education for *all* [Massachusetts] children, rich and poor, in every city and town of the Commonwealth at the public school level, and that this duty is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts.[24]

The court then turned to the facts of the case before it. *McDuffy* was an action by students in sixteen separate school districts against state-level education officials.[25] The opinion examined the array of state statutes governing public education and concluded that, despite an extensive local role, the cities and towns act as delegates and the state retains the "ultimate responsibility" for educating the public.[26] The court then concluded, in almost cursory fashion, that the record before it demonstrated the State's "failure to educate the children in the plaintiffs' schools and those they typify."[27] This analysis was based on brief references to stipulations and affidavits concerning the substandard conditions in the sixteen districts and the considerably greater opportunities available in three wealthy districts used for comparison.[28] A majority of the justices concluded that what the plaintiffs were getting in their school districts did not rise to the level of an "education."[29]

Having established that there was a duty to educate and that for the plaintiffs this duty was not being met, the court turned to the question of remedy. This portion of the opinion is also surprisingly brief.[30] Much

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11 Hofstra L. Rev. 1205, 1255–59 (1983) (advocating greater judicial involvement); Thro, *supra* note 1, at 604 (noting recent tendency of state courts to be more assertive at remedial stage).

[23] *See supra* note 6 and accompanying text.

[24] McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 548 (Mass. 1993).

[25] *Id.* at 517–18 (outlining procedural history of case).

[26] *Id.* at 553.

[27] *See id.* at 552.

[28] *Id.* at 553.

[29] *McDuffy*, 615 N.E.2d at 553–54.

[30] *See id.* at 554–56.

of it is devoted to quoting the broad guidelines which the Supreme Court of Kentucky has promulgated to determine whether a school system is producing educated children.[31] After noting that the means of achieving such goals will "evolve together with our society,"[32] like other constitutional provisions whose impact changes over time, the court "le[ft] it to the [Executive] and the Legislature to define the precise nature of the task which they face in fulfilling their constitutional duty to educate our children today, and in the future."[33]

The opinion indicates that the Legislature must act. There is an insistence that "it is the responsibility of the Commonwealth to take such steps as may be required in each instance effectively to devise a plan and sources of funds sufficient to meet the constitutional mandate."[34] There are clear intimations of future judicial intervention if the Legislature does not move on the matter.[35] Still, the overall thrust of the opinion is one of guidance rather than direction. The Legislature is under a duty to furnish education. Specific conditions such as unsafe schools or inadequate science education indicate that that duty is not being met. The broad Kentucky guidelines—such as "sufficient grounding in the arts to enable each student to appreciate his or her cultural heritage"[36]—give a general, aspirational idea of how to meet it. Beyond that, however, the Legislature is to decide what to provide and how to pay for it. Not only does the court refrain from telling the Legislature what to do, but it gives the clear impression that almost any legislative action will be viewed as compliance.

This dichotomy between the right/duty component and the remedial dimension of the opinion is not unique to *McDuffy*. It can be found, in varying degrees, in many of the state supreme court opinions declaring existing school finance schemes unconstitutional. These courts, relying primarily on the education clauses of their state constitutions, have not hesitated to find broad legislative duties to provide education.[37] At the remedial stage, however, the tone changes sharply. According to one commentator:

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[31] *See id.* at 554 (quoting Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989)).

[32] *Id.* at 555.

[33] *Id.*

[34] *McDuffy*, 615 N.E.2d at 555–56.

[35] The court stated that "[n]o present statutory enactment is to be declared unconstitutional, but the single justice may, in his or her discretion, retain jurisdiction to determine whether, within a reasonable time, appropriate legislative action has been taken." *Id.* at 556.

[36] *Id.* at 554 (quoting *Rose*, 790 S.W.2d at 212).

[37] *See* Thro, *supra* note 1, at 604.

> [w]hen the courts have found a violation of the state constitution, they have turned the task of formulating a proper remedy over to the legislature without so much as maintaining jurisdiction to oversee the process.[38]

This seems an overstatement. Some courts have retained jurisdiction.[39] Others have imposed deadlines and made it clear that the educational process will come to a halt unless the judicial mandate is obeyed.[40] But even in such cases there is considerable question as to what that mandate is beyond a duty to do something. Indeed, individual justices have called on their colleagues to spell out the contours of that duty.[41] Instead of taking that step, the courts offer a form of guidance. They seem to see the judicial role in these cases as confined essentially to the articulation of general principles.[42] One reason for this level of generality is the focus by several courts on inequalities and inadequacies within the state system as a whole.[43] Even in *McDuffy*, while conditions in specific districts provided a springboard for a call to action, the court's message to the Legislature was that it should attack the problem on a statewide basis.

Speaking in generalities and granting deference to the legislature may have its limits, however. One circumstance that could put this judicial attitude to the test is inaction or insufficient action on the legislature's part. The situation in New Jersey is illustrative. That state's supreme court has called for school finance reform in a series of decisions dating back to 1973.[44] The Legislature has at times been slow to act; in other instances, it has passed reforms that do not seem responsive to the concerns expressed by the court. On two occasions, the court stepped in forcefully: once in 1975, ordering a redistribution of school aid funds,[45] and again in 1976, enjoining the operation of all schools until the Legislature took further action.[46] However, the court

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[38] Jonathan Banks, Note, *State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?*, 45 VAND. L. REV. 129, 156 (1992).

[39] *See, e.g.*, Helena Elementary Sch. Dist. v. State of Montana, 769 P.2d 684 (Mont. 1989).

[40] *See Rose*, 790 S.W.2d at 215.

[41] *Id.* at 216.

[42] *See* McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 554 n.92 (Mass. 1993) ("Ultimately, [the courts of our sister states] left the task of defining the specifics of their state's educational systems to their legislative and administrative bodies."); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 336 (Wyo. 1980).

[43] *See* Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 156 (Tenn. 1993); *Rose*, 790 S.W.2d at 212; *Washakie County Sch. Dist. No. 1*, 606 P.2d at 332.

[44] *See generally Unfulfilled Promises*, *supra* note 10.

[45] *See* Robinson v. Cahill, 351 A.2d 713 (N.J. 1975) [hereinafter *Robinson II*].

[46] *See* Robinson v. Cahill, 358 A.2d 457 (N.J. 1976) [hereinafter *Robinson III*].

has shied away from decreeing with specificity the elements of a long-term, constitutionally acceptable plan.[47] Returning to the fray in 1990, the New Jersey Supreme Court, in *Abbott v. Burke*, was much more specific about what was wrong with the existing scheme and how to fix it.[48] Even this opinion, however, continued to sound strong themes of remedial deference.[49]

This dissonance between right and remedy has stirred strong criticism from within and without the judiciary. Through much of New Jersey's long-running saga, Justice Pashman rebuked his colleagues for becoming a "party" to the constitutional wrong,[50] and called on the court to "completely remedy" the violations found.[51] A recent academic commentary labels the courts as "complicit actors in the unsatisfactory remedies for school finance inequity"[52] and decries "unwarranted judicial deference to the political branches in the remedial phase . . . ."[53] At the heart of such critiques is the view that a court is not performing the whole judicial function when it "stops short" of the remedial dimension of a case.[54] Thus, Professor Lewis Kaden, in a landmark analysis of the school finance cases, contends that the judicial mandate to explain the meaning of a constitution includes the duty to identify a remedy for violations which a court has found.[55] To the extent that these criticisms have merit, they evoke the question whether there is something intrinsically wrong with state courts that leads them to fail to perform an important part of their duty in such a significant area of litigation.

II. State School Finance Cases and the Disparity Thesis—Another Validation?

At least one critic has concluded that the remedial deference under discussion here is due in part to the nature of state courts.[56] These courts are presented as encountering serious difficulties, not faced by federal courts, when cases before them present claims of

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[47] *See Unfulfilled Promises*, *supra* note 10, at 1075–78.

[48] *See* 575 A.2d 359 (N.J. 1990).

[49] *See id.* at 410.

[50] *See* Robinson v. Cahill, 335 A.2d 6, 10 (N.J. 1975) (Pashman, J., dissenting) [hereinafter *Robinson I*].

[51] *See Robinson II*, 351 A.2d 713, 734 (N.J. 1975) (Pashman, J., dissenting).

[52] *See Unfulfilled Promises*, *supra* note 10, at 1088.

[53] *See id.* at 1072.

[54] *See* Kaden, *supra* note 22, at 1256–57.

[55] *See id.* at 1244.

[56] *See id.* at 1235–44.

individual rights which would require overturning the results of state governmental processes. This analysis of the school finance cases may represent a significant validation of one of the fundamental tenets of mainstream federal courts scholarship: the disparity thesis.[57] Advocates of this thesis contend that the state courts' ability to handle some matters impartially and fairly is suspect, and that in such cases the federal courts must be available as an alternative. The contention is an old one, found as early as the Federalist Papers.[58] It clearly underlies the grant of diversity jurisdiction in the original Constitution,[59] and is implicitly present whenever federal courts are assigned a class of cases which state courts might normally be expected to handle.

In recent years, the debate over this issue has focused on cases presenting claims of individual rights and liberties against state governments and on the arguments advanced by Professor Burt Neuborne in his celebrated article, *The Myth of Parity*.[60] Neuborne pulled no punches. In his view, "the only judicial forums in our system capable of enforcing countermajoritarian checks in a sustained, effective manner are the federal courts."[61] Neuborne wrote to refute the Burger Court's emerging emphasis on judicial comity[62] between the federal and state courts based on its willingness to see the two sets of courts as "functionally interchangeable forums likely to provide equivalent protection for federal constitutional rights."[63]

Neuborne based his analysis on three institutional factors differentiating the state and federal courts: technical competence; psychological set; and, insulation from majoritarian pressures. With respect to competence, he emphasized the complex nature of contemporary constitutional litigation and factors such as judicial selection process, caseload and support staff, all of which work to make federal courts more capable of dealing with such cases than their state counterparts.[64]

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[57] *See id.* For a general discussion of this thesis and some implications for federal courts scholarship, see Symposium, *Federalism and Parity*, 71 B.U. L. REV. 593, 593–664 (1991).

[58] Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PENN. L. REV. 793, 802 (1965).

[59] U.S. CONST. art. III, § 2.

[60] *See* Neuborne, *supra* note 12; Adam S. Cohen, *More Myths of Parity: State Court Forums and Constitutional Actions for the Right to Shelter*, 38 EMORY L.J. 615, 646 n.173 (1989) (most academic commentators follow Neuborne in rejecting notion of parity).

[61] Neuborne, *supra* note 12, at 1131.

[62] *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971) (elaborating doctrine of federal court abstention based on principles of comity and federalism).

[63] Neuborne, *supra* note 12.

[64] *Id.* at 1121–24.

As for psychological set, Neuborne contended that "a series of psychological and attitudinal characteristics renders federal judges more likely to enforce constitutional rights rigorously."[65] He cited the federal judiciary's "elite tradition,"[66] receptivity to United States Supreme Court pronouncements,[67] and "ivory tower" detachment from "distasteful and troubling fact patterns which can really test abstract constitutional doctrine and foster a jaded attitude toward constitutional rights."[68] In an analysis that would bring joy to the hearts of Rush Limbaugh and his followers, Neuborne celebrated "class-based predilections favorable to constitutional enforcement"[69] more likely to be found in the federal than state courts.

Although these two components of his analysis are certainly provocative, the most influential dimension of Neuborne's article has been his emphasis on the federal courts' insulation from majoritarian pressures as compared to their state counterparts. He began with the following observation, central to most contemporary writing about judicial review in a democratic society: A court presented with a constitutional claim against a result reached by an organ of government is being asked to substitute its judgment for that of the other body.[70] If the initial decisionmaker is selected through democratic means, the court is engaging in a countermajoritarian exercise of power. Neuborne viewed the state judiciaries as less willing and able to perform this task because of the influence on them of the very processes they would have to review.[71] Although he refers in general terms to a comparison of "the institutional *structure*"[72] of the two systems, the only specific difference that he discusses is the fact that most state judges are elected.[73] Federal judges enjoy life tenure and other protections under Article III of the United States Constitution.[74] In Neuborne's view, this "insulation from political pressures"[75] represents a fundamental institutional difference, explaining the "historical preference for federal

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[65] *Id.* at 1124.

[66] *Id.*

[67] *Id.*

[68] Neuborne, *supra* note 12, at 1125.

[69] *Id.* at 1126.

[70] *Id.* at 1127.

[71] *Id.* at 1127–28.

[72] *Id.* at 1127 (emphasis added).

[73] Neuborne, *supra* note 12, at 1127–28.

[74] U.S. CONST. art. III, § 1 ("The judges of both the Supreme and inferior courts, shall hold their offices during good behavior . . . .").

[75] Neuborne, *supra* note 12, at 1128.

enforcement of controversial constitutional norms."[76] Subsequent writers who have accepted the disparity thesis and applied it to various jurisdictional issues have focused primarily on the issue of insulation and, in particular, on state judges' dependence on the electoral process.[77]

Does the extent of remedial deference in the school finance cases bear out the disparity thesis? There are several reasons for an affirmative response. It is easy to focus on the rights components of these decisions and to view them as examples of the state constitutional revolution. It is important, however, not to lose sight of the linkage between right and remedy. An ineffective, hortatory remedy, or a failure to provide one at all, can dilute or even nullify the right that the state court has boldly declared. The remedy puts the rights component in perspective, lending support to Neuborne—like doubts about state courts as rights protectors. The fact that the rights in question are derived from state rather than federal constitutional sources does not change the analysis. The underlying issue is whether state courts can protect individual rightholders from denials at the hands of majoritarian political processes. The school finance cases can be viewed as resulting from situations in which the political processes are incapable of protecting the asserted rights.[78] Such situations present a classic justification for rigorous judicial review.[79] The cases cast doubt on the state courts' ability to provide it.

Still, the fit with Neuborne's analysis is not perfect. He focused on the differences between state and federal trial courts, and expressed ambivalence as to whether his thesis extended to state appellate courts.[80] The school finance decisions have come primarily from these tribunals. Thus, Neuborne's analysis of structural differences at the trial court level may be inapplicable. Moreover, remedial deference can be found in the decisions of appointed state supreme court justices such as those in Massachusetts and New Jersey, who benefit from the political insulation which Neuborne advocated. Perhaps the strongest argument against applying Neuborne's analysis to the school finance cases is that

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[76] *Id.*

[77] *See, e.g.*, Susan N. Herman, *Why Parity Matters*, 71 B.U. L. REV. 651, 652 (1991); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 613 (1991).

[78] *See Unfulfilled Promises*, *supra* note 10, at 1078–81.

[79] The best known exposition of this justification is found in the works of Professor John Ely, in notably his seminal book, DEMOCRACY AND DISTRUST (1980).

[80] Neuborne, *supra* note 12, at 1116 n.45.

the rights enumerated in those cases may not represent a politically unpopular position. Being for "better schools" and "educational reform" can put public officials in a favorable light, particularly if they do not have to pay for the changes.[81] It is hard to see school finance decisions provoking the sort of electoral wrath such as the decisions on criminal cases that led to the removal of former California Chief Justice Rose Bird.[82]

At this point, I wish to propose an alternative disparity thesis that may help explain the remedial deference in the school finance cases. This alternative thesis is that the state supreme courts are, indeed, fearful of the political consequences of ordering explicit remedies, but the consequences are those that flow from a direct confrontation with the legislature. The remedies called for by critics would require a court either to substitute itself for the legislature, or to order the legislature to take affirmative steps in the volatile and sensitive area of taxation and expenditure. One set of consequences might well be retaliation.

Whether or not state judges owe their jobs to the voters, they owe their budgets to the legislatures. Professor Martin Redish, in a recent application of the disparity thesis, speculates that state judges may fear legislative reduction of their salaries.[83] A more realistic fear may be that an unhappy legislature may simply refuse to grant increases, letting judicial compensation lag behind inflation.[84] Apart from concern about their own salaries, state supreme court justices are likely to take an intensely proprietary interest in legislative funding for the entire judicial branch. Pet projects such as data processing systems and courthouse upgradings could easily fall victim to interbranch conflict.[85] The risk of retaliation is not limited to the fiscal field, however. In 1992, for example, the Massachusetts Legislature passed a comprehensive court reform package.[86] There was widespread speculation that provisions

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[81] At the present time, Congress is considering proposals, based in part on suggestions by President Clinton, to increase the national role in education reform. *See* Editorial, *A New Federal Role in Education Reform*, SEATTLE TIMES, Feb. 27, 1994, at B8.

[82] *See* Redish, *supra* note 11, at 1781.

[83] *Id.* at 1779–80.

[84] Scott Lehigh, *Judges Press for Hike in Pay*, BOSTON GLOBE, Mar. 5, 1994, at 21 (article based on letter from Massachusetts' top judges to Governor noting that state's judges have received no raise since 1988 and warns of judicial exodus); Doris Sue Wong, *Politics May Stall Judges' Pay Raise*, BOSTON GLOBE, Dec. 19, 1993, at 56.

[85] *See* Gregg Krupa, *Besieged Courts Aided by Reform, Justice Says*, BOSTON GLOBE, Jan. 16, 1994, at 30 (Chief Justice of Massachusetts Supreme Judicial Court cites inadequate financing for the computerization of state court records).

[86] 1992 Mass. Acts 379.

concerning administrative authority were crafted so as to punish the state's Chief Justice for putting too much pressure on the Legislature.[87]

Apart from any fear of retaliation, there is another set of reasons why a state supreme court may wish to avoid a direct confrontation with its legislature over school finance remedies. The two branches are close working partners in the ongoing give-and-take of state government and politics. Some state courts render advisory opinions to the legislature.[88] Others find themselves serving frequently as umpires in disputes between the executive and legislative branches.[89] On an informal level, members of all three branches tend to come from the same political class and frequently have served together in one or more capacities. The result can be a sense of common enterprise with understood, if undelineated, roles and limits. It is very hard to imagine a state supreme court (not to mention a trial court) holding legislators in contempt for failing to pass a school finance bill.[90] In sum, an alternative statement of the disparity thesis may explain why state courts are reluctant to enter this particular thicket.

Of course, it may well be unfair to apply the Neuborne analysis, and its comparison with federal courts, to the state school finance cases. These cases may present such unique problems as to be *sui generis*. The subject matter is complex and does not lend itself to easy answers. Decreeing statewide school finance reform is far different from desegregating a school system or upgrading a prison. These arguments have force. Some of them surface in the United States Supreme Court's decision to keep school finance litigation out of federal courts.[91] On the other hand, it is possible to see the school finance cases as another, albeit complex, form of institutional litigation.[92] In this view, the remedial issues do not lie outside the realm of

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[87] *See* Toni Locy, *Legal Minds Assess Court Reform Plan*, BOSTON GLOBE, Jan. 7, 1993, at 27 ("The bill represents numerous political compromises and jabs particularly at the Supreme Judicial Court and its Chief Justice, Paul Liacos.").

[88] P. BATOR, P. MISHKIN, D. MELTZER, D. SHAPIRO, HART & WECHSLER'S, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 70 (3d ed. 1989) [hereinafter HART & WECHSLER].

[89] *See, e.g.*, MacManus v. Love, 499 P.2d 609 (Colo. 1972) (suit by legislators challenging governor's veto of bill).

[90] In Spallone v. U.S., 493 U.S. 265 (1990), the Supreme Court reviewed a decision of a federal district court which held city counselors in contempt for failing to take specific steps to remedy segregated housing. For a discussion of *Spallone*, see *infra* notes 144–50, 155–56.

[91] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40–44 (1973). In *Rodriguez*, the Court stated 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." *Id.* at 41. The Court also noted the "complexity" of school finance issues and the lack of judicial "specialized knowledge and experience . . . ." *Id.* at 42.

[92] *See, e.g.*, Kaden, *supra* note 22, at 1244–50.

judicial competence. Those who want the state courts to do more can certainly find in the disparity thesis an explanation for the current state of affairs.[93] Implicit in this position, however, is the assumption that the federal courts would do something quite different. As the next section demonstrates, federal cases cast doubt upon this assumption.

III. State Courts, Federal Courts, and the Pursuit of Judicial Restraint—the Similarity Thesis

One of the striking aspects of the state school finance decisions is the widespread citation of United States Supreme Court precedents. *Marbury v. Madison*[94] is invoked by many state supreme courts to justify the exercise of judicial power to invalidate existing legislation.[95] Several of the cases contain extensive treatments of the federal political question doctrine.[96] The state courts rely on decisions such as *Baker v. Carr*[97] and *Powell v. McCormack*[98] in discussing whether school finance represents an area which is beyond the reach of the judicial power.[99] The general conclusion is that it is not.[100] The implicit message of all these citations is that the two sets of courts are engaging in a common enterprise: entering politically sensitive waters to render justice to litigants who invoke the court's power, even though the case presents broad issues of structural reform.

As the analysis in Section II suggests, however, the two systems can be seen as diverging sharply at the remedial phase. The state courts defer to the legislature to provide the remedy. Federal courts also defer to state and local institutions to provide the remedy in the first instance.[101] But if these authorities fail to do the job, the federal courts will step in and do it for them.[102] A central tenet of federal constitutional doctrine is that, once invoked, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and

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[93] *See Unfulfilled Promises, supra* note 10, at 1083–85 (citing majoritarian constraints on state courts).

[94] 5 U.S. (1 Cranch) 137 (1803).

[95] *See, e.g.*, McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

[96] *See, e.g.*, Seattle Sch. Dist. No. 1 v. State of Washington, 585 P.2d 71 (Wash. 1978).

[97] 369 U.S. 186 (1962).

[98] 395 U.S. 486 (1969).

[99] *See, e.g.*, Robinson v. Cahill, 351 A.2d 713, 718 (N.J. 1975).

[100] *But see, Seattle Sch. Dist. No. 1*, 585 P.2d at 126 (Rossellini, J., dissenting) (applying *Baker* criteria to find political question).

[101] *See, e.g.*, Milliken v. Bradley, 433 U.S. 267, 281 (1977) [hereinafter, *Milliken II*].

[102] *Id.*

flexibility are inherent in equitable remedies."[103] It is this willingness to have the federal courts step in and formulate a decree that becomes the "centerpiece" of the controversy[104] that seemingly takes these courts far beyond where their state counterparts dare to tread.

Supreme Court precedents are not monolithic, however. The Court, under Chief Justices Burger and Rehnquist, has been deeply concerned about the role of the courts in a democratic society and about delineating the limits of judicial power. The state courts' extraordinary deference to the legislative branch in remedying school finance issues may well reflect similar concerns. Examination of recent Supreme Court precedents in a number of areas shows just how strong these concerns are at the national level. It also suggests that different courts may demonstrate these concerns in dealing with different aspects of particular cases: whether to remedy a violation; how to limit that remedy; and, whether to take the case at all. Judicial restraint, analysis shows, is in ample supply at both levels.

The Supreme Court's concern with limiting judicial power has manifested itself primarily in the area of standing. The cases cover a wide range of issues and concerns.[105] Particularly relevant to this Article are two decisions in which the Supreme Court has invoked standing to support a narrow judicial role in cases seeking broad-based institutional reform. *Allen v. Wright*[106] involved a challenge to Internal Revenue Service rules and practices concerning private schools allegedly operating on a discriminatory basis. The Court denied standing to minority plaintiffs who sought to bring a nationwide class action. An important element of the majority's analysis is that the plaintiffs' assertion of harm would, if accepted, "pave the way generally for suits challenging, not specifically identifiable violations of law, but the particular programs agencies establish to carry out their legal obligations."[107]

The Court found in the constitutional doctrine of separation of powers serious structural barriers to any such attempt to use the courts "to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties."[108] As Justice Stevens pointed out in dissent, this analysis seems sharply at variance with the Court's appar-

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[103] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

[104] *See* Chayes, *supra* note 19, at 1298.

[105] *See, e.g.*, Gene R. Nichol, Jr., *Standing on the Constitution: The Supreme Court and Valley Forge*, 61 N.C. L. REV. 798 (1983).

[106] 468 U.S. 737 (1984).

[107] *Id.* at 759.

[108] *Id.* at 761.

ent acceptance of a broad judicial role in cases involving school desegregation and re-appointment.[109] Nonetheless, a majority returned to this theme in *Lujan v. Defenders of Wildlife*,[110] and denied standing in a case which it characterized as challenging a "generalized level of governmental action . . . ."[111]

An important theme of these cases is the desire to keep the federal courts out of the role of "continuing monitors"[112] of governmental activity, a role which is central to most institutional litigation. The same concern was at work in *Gilligan v. Morgan* which provides a significant articulation of the political question doctrine.[113] In *Gilligan*, plaintiffs sought federal court review of the training, weaponry and orders of the Ohio National Guard following the tragic events at Kent State University in 1970. Five Justices viewed the matter as a nonjusticiable political question.[114] The two opinions taking this position focused on the undesirability of a federal court assuming an ongoing supervisory role over the defendants' activities.[115] The same Justices, however, insisted that the federal courts might be open to more narrowly focused suits seeking damages or injunctive relief.[116]

This preference for the narrowly drawn lawsuit was even more visible in the controversial decision of *City of Los Angeles v. Lyons*.[117] In that case, the Court held that an attempt to secure injunctive relief against a police practice of using chokeholds did not present a case or controversy, even though brought by a plaintiff who had been subject to it.[118] The Court noted that any claims as to the future were not yet ripe, and that any attempt to seek an injunction based on the past occurrence ran afoul of the mootness doctrine.[119] The Court emphasized that the plaintiff's damages claim for that occurrence was within Article III.[120] The articulation of this preference took place against the backdrop of an important academic discussion of the changing nature of litigation. Many observers have noted the courts' movement away from deciding only bipolar lawsuits which *Marbury v. Madison*

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[109] *Id.* at 792 n.10 (Stevens, J., dissenting).
[110] 112 S. Ct. 2130 (1992).
[111] *Id.* at 2140.
[112] *Id.* at 2145.
[113] 413 U.S. 1 (1973).
[114] *Id.* at 10.
[115] *Id.* at 10, 13.
[116] *Id.* at 11–12, 14.
[117] 461 U.S. 95 (1983).
[118] *Id.* at 105.
[119] *Id.* at 105–10, 111–13.
[120] *Id.* at 111.

typifies.[121] The reformist, institutional litigation which has become so important in the federal courts presents three novel elements: an acceptance of the "public action" in which citizens challenge the legality of government conduct; a view of the judicial role in which articulation of public values becomes as important as dispute resolution; and, an increasingly managerial role for trial courts at the remedial stage.[122]

Despite widespread academic approval of these developments, a "conservative" court might well have reservations. Judicial power, especially the power to strike down statutes, derives its legitimacy from the court's authority to decide cases and to apply to them all applicable sources of law.[123] Once judges move beyond bipolar disputes to broader issues of social policy, the defense of legitimization through adjudication becomes attenuated even as the need for it increases. In *Lujan*, Justice Scalia utilized a discussion of standing to invoke the bipolar *Marbury* model as delineating the sphere of judicial competence.[124] Courts are to "decide on the rights of individuals;" the political branches are the ones concerned with the public interest.[125] The conservative Justices were not of one mind on this point. Justice Kennedy pointed out that "[m]odern litigation has progressed far from the paradigm of Marbury suing Madison to get his commission or Ogden seeking an injunction to halt Gibbons' steamboat operations."[126]

Of particular concern to conservatives is the power of a decision in one case to affect large numbers of people. Chief Justice Rehnquist has explained the concept of standing as reflecting, in part, "a due regard for the autonomy of those persons likely to be most directly affected by a judicial order."[127] Restricting the scope of lawsuits can be seen as limiting the reach of judicial power to a small group of people directly affected by a particular case and able to participate in it. Justice Kennedy developed this concept at length in his separate opinion in *Missouri v. Jenkins*,[128] a case involving the power of federal courts to order governmental bodies to levy taxes. He saw the imposition of taxes as beyond the judicial power and a violation of the due process rights of persons not before the court. For Kennedy, "[t]he exercise of judi-

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[121] *See generally* Chayes, *supra* note 19; Owen M. Fiss, *The Supreme Court 1978 Term: Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

[122] *See* HART & WECHSLER, *supra* note 88, at 79–82.

[123] This, of course, was the rationale in *Marbury* itself. *See* 5 U.S. (1 Cranch) 137 (1803).

[124] Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2145 (1992).

[125] *Id.*

[126] *Id.* at 2146 (Kennedy, J., concurring).

[127] Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 473 (1982).

[128] *See* 495 U.S. 33, 58 (1990).

cial power involves adjudication of controversies and imposition of burdens on those who are parties before the Court."[129] A taxation order, by contrast, "has the purpose and direct effect of extracting money from persons who have had no presence or representation in the suit."[130] Legislatures can levy financial burdens because the affected taxpayers have consented to be represented through the legislative process.[131]

These efforts to limit judicial power through limiting the scope of adjudication may seem artificial. The decision in any case of *A v. B* can lay down a rule governing millions of people. Remedial orders in cases involving schools and other institutions have an obvious impact on the public treasury. Conservatives might respond that that is an important reason for setting limits on institutional litigation. Indeed, academic analysts of these suits have identified the question of representation of affected people at the remedial stage as a major problem.[132] The state courts may be responding to similar concerns in the school finance cases. By leaving all remedial issues to the legislature, they attempt to keep the judiciary out of the most political phase of the litigation. On a more general level, the state courts may, like the Supreme Court, be concerned with the outer limits of the judicial function. The extensive discussions of political question issues show an awareness that they are approaching these limits. One state court justice even discussed the academic treatment of institutional litigation in federal courts to bolster his contention that the school finance cases go too far.[133] True, the state courts take the cases, but remedial deference can be an effective means of tempering this boldness. Thus we see concerns about judicial restraint manifesting themselves in both systems.

When looking for similarities between the two systems, it is also important to remember that the subject of school finance represents an area which the United States Supreme Court has been extremely reluctant to enter. The main reason state courts are hearing these cases is that the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*,[134] in 1973, established that such cases present no federal question. The *Rodriguez* opinion expressed great concern

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[129] *Id.* at 66.

[130] *Id.*

[131] *Id.*

[132] *See* Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979).

[133] Pauley v. Kelly, 255 S.E.2d 859, 898 (W. Va. 1979) (Neely, J., dissenting) (citing Chayes, *supra* note 19).

[134] 411 U.S. 1 (1973).

about the complexity of educational finance issues and about the desirability of leaving them to state political processes.[135] The Court has reiterated these themes in the context of desegregation litigation.[136] School finance cases can take courts beyond education questions into multi-faceted issues of metropolitan equity and inter-jurisdictional redistribution of resources and opportunities.[137] These too are matters which the Supreme Court has kept away from the federal judiciary.[138]

Some Supreme Court cases provide support, albeit indirect, for the thesis that the remedial deference of the state school finance decisions reflects pressures that are present in the federal courts as well. Perhaps the best way to test this thesis is to examine those cases in which the Supreme Court has established the principles governing the remedial power of federal courts in institutional reform litigation. The precedents seem inescapably ambivalent. On the one hand, there is the principle enunciated in *Swann v. Charlotte-Mecklenburg Board of Education*, that once the defendant officials have failed to act a court may order broad relief.[139] For example, in *Milliken v. Bradley II*,[140] the Court upheld a desegregation order that went beyond pupil assignment to include compensatory programs, teacher training, testing, and counseling. On the other hand, there is a recurring notion of limits to the federal judicial remedial power, even in this area. Thus, in *Milliken v. Bradley I*,[141] involving the same school district, the Court struck down a multidistrict order that included school districts not found to have discriminated. The opinion relied heavily on notions of local control over education[142] and cautioned against federal courts becoming *de facto* legislatures and school superintendents.[143]

The same ambivalence can be found in two important 1990 cases dealing with remedial power: *Spallone v. United States*[144] and *Missouri v. Jenkins*.[145] *Spallone* grew out of a long-running judicial challenge to racially segregated housing patterns in Yonkers, New York. After the city failed to carry out housing reforms, to which it had agreed, the

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[135] *Id.* at 40–43.

[136] Milliken v. Bradley, 418 U.S. 717, 742–43 (1974) [hereinafter *Milliken I*].

[137] *See* Abbot v. Burke, 575 A.2d 359, 410 (N.J. 1990).

[138] *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975) (denying standing to plaintiffs seeking to challenge exclusionary effects of suburban zoning ordinance).

[139] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 403 U.S. 1, 15 (1971).

[140] 433 U.S. 267 (1977).

[141] 418 U.S. 717 (1974).

[142] *Id.* at 741–44.

[143] *Id.* at 743–44.

[144] 493 U.S. 265 (1990).

[145] 495 U.S. 33 (1990).

federal district court levied civil contempt penalties against it and individual city councilors. The Supreme Court upheld the contempt order against the city,[146] but held the individual orders invalid.[147] The majority relied primarily on principles of federal equity jurisprudence, particularly notions of deference to state and local officials.[148] It also found support in doctrines establishing the immunity of individual legislators from suits arising out of performance of their duties.[149] It viewed the contempt order as interfering unduly with the decisionmaking processes of individual legislators.[150]

Missouri v. Jenkins saw judicial authority affirmed up to a point. As part of a comprehensive desegregation order, a federal district court had imposed a tax. The Supreme Court held that this action violated principles of comity and equitable discretion.[151] It upheld, however, a modified version of the order under which the court would order the necessary educational programs, direct the school district to levy the taxes required to pay for them, and suspend the operation of any state laws that would limit those taxes.[152] The majority apparently found a significant difference between direct and indirect judicial imposition of a tax, despite Justice Kennedy's characterization of it as a "convenient formalism."[153] Writing for himself, Chief Justice Rehnquist and Justices O'Connor and Scalia, Justice Kennedy denounced the order as outside the judicial power and invoked *Spallone* as showing the proper respect for limits on that power.[154]

Taken together, the cases constitute support for broad federal judicial power. Contempt against a city and indirect imposition of taxes are valid remedies. It is also important to note that these remedies were upheld in order to facilitate programmatic remedies concerning housing and education which were themselves quite sweeping.[155] Moreover, there are strong indications in each opinion that the district court could have ordered the invalidated relief if there was no other alternative to achieve the programmatic end.[156] Still, the notion of limits is

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[146] *Spallone*, 493 U.S. at 276.

[147] *Id.* at 280.

[148] *Id.* at 278–80.

[149] *Id.* at 278–79.

[150] *Id.* at 280.

[151] Missouri v. Jenkins, 495 U.S. 33, 50 (1990).

[152] *See id.*

[153] *See id.* at 64 (Kennedy, J., dissenting).

[154] *Id.* at 70.

[155] In *Jenkins*, the lower court had ordered an elaborate program of magnet schools with a range of facilities and educational offerings. *Id.* at 39 n.5.

[156] *See, e.g.*, Spallone v. U.S., 493 U.S. 265, 280 (1990) (lower court should have proceeded

very much present. Each case struck down judicial action. For Justice Kennedy and his colleagues, at least, *Spallone* could be an important building block in this direction. The four Justices who took this position in *Missouri v. Jenkins* have since been joined by Justices Souter and Thomas, a change in the Court which enhances the likelihood of further concern for restraint. For the moment, however, the *Swann* principle appears to remain the main remedial guidepost for federal courts in complex institutional reform litigation. Once a constitutional violation is established and the defendant officials have been given an opportunity to redress it, those courts may continue to immerse themselves in all aspects of the remedy.

So far, the state courts have not taken a similar approach to school finance litigation. It may be that continued legislative inaction will push them to the federal model, but remedial deference is the norm for now. Thus, on the specific level of remedies, the similarity thesis is not a complete explanation of the state courts' actions. This does not constitute a validation of the disparity thesis with its clear notions of state court inferiority. It may well be that state courts are seeking the same reformist goals as their federal counterparts, but that they have chosen an alternative route toward playing a role in the achievement of social change in a democratic society.

IV. State Courts and Constitutional Reform Litigation—Responding in Their Own Voice

The state courts' repeated citations to *Marbury v. Madison*[157] show that they view themselves as functioning as courts in the classic mode of constitutional adjudication. At the same time, the frequent references to the political question doctrine[158] show an awareness that they are on the outer edge of what the judiciary can do. Reforming school finance to produce quality education is a complex and controversial issue. Social change of this nature will take a long time. It requires enactment of legislation, and courts are hesitant to order legislatures to act. As discussed above,[159] the state courts' position as participants in the political process makes them particularly reluctant to act. On

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first with sanctions against the city alone and should only have considered individual sanctions if that approach failed).

[157] *See, e.g.*, McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

[158] *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 225 (Ky. 1989) (Liebson, J., dissenting) (case nonjusticiable under *Baker v. Carr* standards).

[159] *See supra* notes 83–90 and accompanying text.

the other hand, they may well recognize that being integral parts of that process gives them unique advantages when it comes to moving it forward.[160] The school finance cases have emerged from this welter of competing considerations. In this Section, I consider the possibility that these cases represent the beginnings of a new approach to institutional reform suits, a different form of public law litigation.

Two key features of the cases are the emphasis on guidance and the lack of direct involvement at the remedial stage. The latter point has been discussed above, as well as the contrast between it and the federal model. With respect to guidance, it is noteworthy that several courts have emphasized that the case before them involved a request for a declaratory judgment and that this device can play a special role in cases of great public importance.[161] The courts seem to be telling the legislatures something along the following lines: "Here is what you are doing wrong, and here are some general thoughts on how to correct it. We will not tell you what to do. We insist, however, that you do something."

I have referred to these cases as binding advisory opinions. Several of them include discussions of whether they are, in fact, advisory.[162] The state courts do not think that they are doing this.[163] However, the line between declaratory judgments and advisory opinions is anything but clear. This may be an area where state courts, unconstrained by Article III of the United States Constitution,[164] can be more flexible than their federal counterparts. In the federal courts the declaratory judgment is treated as one remedy among others available in a court of general jurisdiction.[165] The goal of the federal declaratory judgment is to make the parties aware of their rights and duties. It is one step in the remedial process; the authorizing statute states clearly that the

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[160] *See Unfulfilled Promises*, *supra* note 10, at 1089.

[161] *See, e.g.*, Horton v. Meskill, 376 A.2d 359, 365 (1977).

[162] *See, e.g.*, *Rose*, 790 S.W.2d at 215.

[163] The fact that the state courts view these cases as traditional adversary litigation rather than advisory opinion requests is shown by their emphasis on standing and the presence of proper parties. *See* Washakie County. Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 316–17 (Wyo. 1980) (requirement of standing screens out advisory opinions); Serrano v. Priest, 557 P.2d 929, 941 (Cal. 1976) (discussion of proper parties); *cf.* Robinson v. Cahill, 355 A.2d 129, 163 (N.J. 1976) (Pacshman, J., dissenting) (consideration of recently enacted legislation on its face not an advisory opinion).

[164] *See* DeFunis v. Odegaard, 416 U.S. 312 (1974) (Article III might bar federal court from considering constitutional issue even though state court could hear it because of important public interest involved).

[165] *See* 28 U.S.C. § 2201 (1982). This statute, authorizing the declaratory judgement, treats it as a newly created remedy.

plaintiff may return to court for further relief.[166] In the school finance cases, the state courts seem to see the declaration itself as their main contribution to the controversy. The plaintiffs may be able to return to court, but it is possible that all they will get is another declaration. Even if more coercive relief is available—such as an injunction against all school spending[167]—it is aimed less at remedying the particular plaintiffs' situation than at getting the legislature to do something about the general problem analyzed in the court's initial declaration.

I do not contend that these are advisory opinions in the pure sense of requests for judicial action on a hypothetical set of facts.[168] Although several state constitutions permit advisory opinions in certain circumstances,[169] the cases do not arise under these provisions. They differ from advisory opinions, as the concept is generally presented, in that they are adversary proceedings brought by affected litigants based on specific factual situations. On the other hand, the state courts frequently proceed at a high level of generality, analyzing the problem of the state's public education system, or groups of districts within that system.[170] The judgment does not point with much specificity at a resolution of the particular fact situation that triggered it. The essential function of the opinion is to advise the legislature on the constitutional dimensions of an ongoing social problem.

According to Hart and Wechsler, one of the telling features of advisory opinions is that a court moves away from its position as the organ of "sober second thought" within the community whose function it is to pass on what the legislature has done.[171] Advisory opinions draw the judiciary into a position of sharing front-line responsibility for making those decisions.[172] The school finance cases put the state courts in precisely that position. The legislature must remedy the problem, since the court will not, but it acts within the ambit of what the court has told it and with an eye on the court's hovering presence. Indeed,

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[166] 28 U.S.C. § 2202 provides: "Further necessary or proper relief based on a declaratory judgement or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgement."

[167] *Robinson III*, 358 A.2d 457 (N.J. 1975).

[168] The classic example of such an advisory opinion is the letter from Thomas Jefferson, Secretary of State, to Chief Justice Jay and Associate Justices, which is reproduced in HART & WECHSLER, *supra* note 88, at 65.

[169] *See id.* at 70.

[170] Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 155 (1993).

[171] HART & WECHSLER, *supra* note 88, at 68.

[172] *Id.*

the court may have timed its decision to provide maximum impetus to the legislative process.[173]

This situation puts the court in a difficult position if the matter returns to it, a distinct possibility in school finance cases.[174] To the extent that the legislature has tried to follow the court's advice, it will be difficult to strike down that action. The court has diminished its power by tipping its hand in the form of guidance. This problem has surfaced in at least one school finance case.[175] There are, however, advantages to this judicial role. The court and the legislature can be seen as establishing a dialogue on how to approach a deep-rooted problem.[176] Each branch performs the task it does best. The judiciary elaborates broad legal standards; the legislature applies them to matters of taxation, spending and educational policy.

The court's main function is to get the process moving. Dean Colin Diver has contended that this is a particularly appropriate role for the judiciary in complex reform litigation.[177] Indeed, it is possible to view problems such as school finance as ones that the courts can never resolve on their own. Real change acceptable to the citizenry at large can only come from the legislature. In this view, the state courts' remedial deference is the beginning of remedial wisdom. Perhaps the school finance cases represent development of a new form of public law litigation: the dialogic as opposed to the managerial model.[178] The state judiciary is taking a track different in two ways from the federal judicial approach. They are less managerial and more advisory. The federal trial courts, in particular, have shown ongoing commitment to the managerial mode. The United States Supreme Court may have doubts about this approach,[179] but its firm commitment to Article III would cast doubt on an advisory role as well.

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[173] *See* Seattle Sch. Dist. No. 1 v. State of Washington, 585 P.2d 71, 111 n.14 (Wash. 1978) (noting that legislature passed a new reform law while litigation pending in state supreme court).

[174] *See Unfulfilled Promises*, *supra* note 10, at 1072 (discussing phenomenon of "second-round challenges to school finance remedies").

[175] Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489 (Tex. 1992) (reviewing and striking down statute passed in reliance on previous court decision).

[176] *See* Peter H. Shuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763, 1771–72 (1993) (discussing "dialogic" nature of "interactions between courts, legislatures, agencies and other social processes").

[177] Diver, *supra* note 132, at 79–82. Dean Diver asserts that the courts' role "is to stir the governmental entities to action to make sure that issues are addressed and choices made, not to make those choices itself." *See id.* at 92.

[178] *See generally* Shuck, *supra* note 176.

[179] *See Milliken I*, 418 U.S. 717, 744–45 (1974) (district court in desegregation litigation became both legislature and school superintendent).

What the school finance cases represent is federalism at work. The Supreme Court tossed the ball to the state courts in *Rodriguez*.[180] Some have declined to find for the plaintiffs on the underlying merits, but there is a strong trend toward finding important education rights in state constitutions. In providing remedies for these rights, state courts tend to take a sharply different approach from the federal courts in analogous circumstances. The situation is still evolving. What is transpiring is a multi-faceted dialogue between state courts and legislatures, across state judicial systems, and between these courts and the national judiciary. The intrastate dimensions pose the most serious problems. State courts may not be able to resolve the conflict between their insistence on being the ultimate interpreters of the state constitutions and their insistence on letting the legislature say how to effectuate the guarantees in question. The school reform cases may push the judiciary too far into a political mode, lessening its legitimacy. The state courts may ultimately revert to the federal, managerial model, with diminished credibility to perform the task. At this stage of the process, however, automatic preference for the federal model rests largely on assumptions about the disparity thesis and about the efficiency of the judicial process in achieving social change. Perhaps it is time to question both assumptions.

CONCLUSION

McDuffy v. Secretary of the Executive Office of Education[181] is an important case in the overall national trend of state court derivation of rights from the education clauses of state constitutions. Its remedial dimensions are equally important. Like other state supreme courts, the Massachusetts Supreme Judicial Court tempered considerably the rights and duties found by relying primarily, if not exclusively, on the legislature to remedy them. In pulling back from remedial issues, the state courts manifest an approach to reform litigation that seems in sharp contrast to the managerial model prevalent in the federal courts. It is possible to view this contrast as symptomatic of a larger difference between the two sets of courts; because of their dependence on the electorate and closeness to the political process the state courts are less capable of vigorous enforcement of individual rights than their federal counterparts. In this view, school finance cases illustrate the disparity

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[180] 411 U.S. 1 (1973). The holding in *Rodriguez* effectively eliminates any federal constitutional claim for school finance plaintiffs. Thus, even those plaintiffs relying upon state equal protection clauses are making state arguments only.

[181] 615 N.E.2d 516 (Mass. 1993).

thesis that dominates much federal courts literature. Alternatively, it is possible to view the state courts as motivated by the same concerns for judicial restraint that have characterized the United States Supreme Court under Chief Justices Burger and Rehnquist. The analysis in this Article suggests that both explanations are plausible, but that they do not tell the whole story. In the school finance cases, we see the state courts embarking on their own road to institutional reform. Their deference to the legislative branch in matters of remedy reflects, as much as anything, their considered judgment about how to achieve social reform over the long-term. A sympathetic understanding of their dialogic approach is appropriate, particularly at this early phase of the process.