2010

Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education

Julia Simon-Kerr
Robynn K. Sturm

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
ARTICLE

JUSTICIABILITY AND THE ROLE OF COURTS IN ADEQUACY LITIGATION: PRESERVING THE CONSTITUTIONAL RIGHT TO EDUCATION

Julia A. Simon-Kerr & Robynn K. Sturm†

In the first study of opinions handed down in education adequacy litigation between January 2005 and January 2008, this Article shows a marked shift away from outcomes favorable to adequacy plaintiffs. Following two decades in which courts spurred significant reforms in our nation’s neediest schools by interpreting the education clauses of their state constitutions to guarantee an “adequate” education for all students, the years 2005 to 2008 have seen a dramatic change in the judicial response to adequacy litigation. Through an analysis of the latest body of cases, we show that separation of powers concerns have begun to drive state courts out of this important avenue of education reform. These separation of powers concerns have become more salient as litigators pressure courts to mandate concrete remedies that would trump legislative discretion. The most problematic such remedy is one that would require courts to order the legislature to make specific budgetary allocations. This negative trend for adequacy plaintiffs spans courts seeing adequacy claims for the first time and those presiding over a second round of adequacy litigation. We argue that despite this shift, recent courts have not wholly disavowed their role in substantiating the state constitutional right to education. Courts remain willing to act as a constitutional check on the legislature’s actions within the field of education if plaintiffs can find a way to respond to concerns over remedies. We examine the nature of and reasons for courts’ increasing separation of powers concerns and then briefly explore what lessons adequacy plaintiffs might take away for use in

† Julia A. Simon-Kerr is Bigelow Fellow and Lecturer in Law at the University of Chicago Law School. She holds a B.A. from Wesleyan University and a J.D. from Yale Law School. Robynn K. Sturm is Assistant Deputy Chief Technology Officer, White House Office of Science and Technology Policy. She holds a B.A. and M.A. from Yale University and a J.D. from Yale Law School.
INTRODUCTION

Over the last two decades, state courts have spurred significant reforms in our nation’s neediest schools. Interpreting the right to education enshrined in every state constitution, state courts have demanded that their executive and legislative branches take action to guarantee an “adequate” education for all of their state’s students, not just those lucky enough to live in well-funded school districts. By applying pressure for legislative and court-ordered improvements, “education adequacy” litigation has achieved huge reforms in education funding across the country.

From 2005-2008, however, state courts have delivered a string of disappointing decisions to adequacy plaintiffs. While those courts have articulated a variety of state-specific rationales for rejecting adequacy claims, their opinions reveal a common concern with the boundaries between their judicial role and the prerogatives of the legislature.

Education adequacy suits have challenged courts to enforce not only suitable education standards in their states, but, more generally, to find a suitable role for themselves in education reform. The prospect of interfering in an area that is traditionally seen as a legislative prerogative—such as education

---

Adequacy Litigation—makes judges especially uneasy. At the same time, state judiciaries are reluctant to abandon completely this affirmative constitutional right to a political process prone to fail those children who are most in need. Between 1989 and 2005, the tension between these dueling concerns was generally resolved in favor of adequacy plaintiffs, who won more than seventy-five percent of the cases.

As the adequacy movement matures, however, the balance between deference and action by courts in adequacy suits has begun to tip toward deference and away from judicial intervention. In fact, since 2005, adequacy plaintiffs struggled to surmount the courts’ unease with adjudicating these cases. Plaintiffs’ adequacy claims were dismissed before ever reaching trial in nine of the nineteen decisions handed down between 2005 and 2008. By contrast, only five courts had refused to hear adequacy claims in the preceding sixteen years. The supreme courts of Texas and Massachusetts both reversed lower-court rulings in favor of adequacy plaintiffs, finding instead that current school systems met constitutional standards despite obvious and continued disparities and failures. Similarly, in South Carolina and Alaska, trial courts rejected claims that the school systems in their states suffered as a result of inadequate funding. And, despite prior findings that the constitution demanded

2. See infra note 166.
increased school funding, the highest courts in New York and Kansas largely left their legislatures to judge for themselves how much funding is enough.9

This backwards trend in adequacy suits comes in the face of developments that would seem to bode well for the movement. Despite ever more mobilized opposition,10 adequacy plaintiffs could reasonably expect to be more successful as adequacy litigation strategies were perfected and they were able to build on prior precedent establishing both the justiciability of these cases and the substance of state constitutional rights to education. The Improving America’s Schools Act of 1994 and the No Child Left Behind Act of 2001 demonstrate the rise of the accountability movement.11 This “New Accountability” movement introduced education standards that were expected to encourage judicial supervision of education reform by giving substance to the constitutional right and shielding courts from attacks of judicial caprice.12

Having acknowledged the critical role the judiciary must play to protect every child’s right to education, and in the face of new standards that help substantiate the adequacy of an education, why did courts begin—at all stages of adequacy litigation—bowing out of education reform? Given the overwhelming shift in courts’ responses to their lawsuits, this is a question all current adequacy plaintiffs must confront.

The answer is both straightforward and deeply troubling from the perspective of future litigants. A close reading of the most recent adequacy decisions finds judges expressing a surprisingly unified concern: state courts across the country are ill at ease with the role they have been cast in modern adequacy litigation—a role they increasingly fear may run afoul of traditional separation of powers precepts.

By 2005, many state courts had already ruled in favor of judicial review in education cases, and recent events have seen no dramatic facial reversals of this precedent. Superficially, only four recent courts explicitly dismissed adequacy claims as nonjusticiable. Yet, even the claims disposed of on other grounds were victims of the same overarching justiciability concerns: judges refused to grant plaintiffs relief for fear that adequacy suits have forced courts over the boundary separating the judiciary from other branches of government. In fact, a close reading of 2005-2008 case law makes clear that core justiciability concerns are not only pervasive, but often decisive. For example, the Supreme

21, 2007); Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 539 (S.C. 1999) (overturning a trial court decision that the state’s education clause “imposes no qualitative standards”).


10. In response to the initial string of adequacy victories, states began to seek external expertise and share best practices for how to mount an effective defense to this novel claim.


ADEQUACY LITIGATION

Court of Texas vigorously defended the court’s duty to determine the constitutionality of the public school system at the same time that it cited separation of powers concerns in upholding the state’s school finance system. In the same vein, a Connecticut trial court paid lip service to that state’s binding precedent that the courts must enforce, and thereby delineate, the state constitution’s education guarantee, but imported a classic justiciability analysis under another name in order to dismiss the adequacy portion of a recent suit. And finally, even as the chief justice of the Supreme Judicial Court of Massachusetts used neither the words “separation of powers” nor “justiciability” in writing for the plurality dismissing an adequacy suit, the logic of her argument was driven by a keen sense of the judiciary’s limited role in matters such as education that involve the state budget and other primarily legislative concerns.

Education advocates must confront the reality of this shifting pendulum in adequacy suits. The state constitutional right to education is a powerful tool. It has done much to improve education in schools across the country. It has been a critical means for advocates to ensure educational opportunities for those who would be otherwise left behind by the political process. Yet the state constitutional right to education is in danger of being rendered meaningless, even as recent decisions leave it superficially intact. The modern education adequacy litigation formula, particularly to the extent that it portrays adequacy as a pot of money, threatens to foreclose future causes of action under state education clauses as courts set broad and unfavorable precedent.

This result is not inevitable. While expressing discomfort with the demands of recent litigation, courts have not wholly disavowed their role in

15. See infra Subpart II.A.1.
16. Strong nonjusticiability precedent may foreclose not only alternative forms of adequacy claims under state education clauses, but also equity claims. Further, even if courts carefully preserve judicial review of the school system under the state equal protection clause, there is no consensus that equal protection claims alone can achieve the necessary reform. This is why advocates turned to adequacy initially. First, equity simply may not be enough: it costs more money to educate students with greater needs, such as bilingual or at-risk students. It has yet to be seen whether courts will go beyond horizontal equity to embrace a theory of “vertical money.” See EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES (Helen F. Ladd, Rosemary Chalk, & Janet S. Hansen, eds., 1999) (describing basic concepts of horizontal and vertical equity in the education context). Second, education advocates turned their energy toward adequacy suits in part because equity suits received a lukewarm welcome in state courts. See James E. Ryan, Schools, Race, and Money, 109 YALE L.J. 249, 268 (1999-2000). Finally, from a practical perspective, equity suits may be less conducive to sparking reform by the political branches. Whereas adequacy suits are seen as a fight for better schools for all children, equity suits tend to pit the poor against the wealthy thereby impeding political progress. To the extent that adequacy campaigns are truly won in the court of public opinion this is an important consideration.
substantiating the state constitutional right to education. Thus, there is reason to believe that courts remain willing to act as a constitutional check on legislatures' actions within the field of education, if only plaintiffs can find a way to respond to courts' concerns. In order to initiate that vital conversation, this Article examines the adequacy decisions delivered between January 2005 and January 2008 to better understand the nature of and reason for the increased separation of powers concerns expressed therein. It then briefly explores what lessons adequacy plaintiffs might take away for use in future litigation.

Part I provides a short overview of the origins and evolution of education adequacy litigation. It focuses on those aspects of the historical context that help illuminate the challenges modern adequacy litigants currently face.

Part II turns to the adequacy decisions delivered between January 2005 and January 2008. It argues that over those three years, increasing separation of powers concerns began to drive state courts out of an important avenue of education reform. These separation of powers concerns became more salient as courts are increasingly pushed by maturing cases and litigation strategies centering on specific monetary demands—toward mandating concrete remedies at the expense of legislatures' discretion. The most alarming such remedy for courts is the one that will require them to order legislatures to make specific budgetary allocations. Judges' natural distaste for budgetary intervention was aggravated by newly converging factors such as increasingly proactive legislative involvement in the area of school funding, evidence of improving schools, and growing doubts that money alone can transform those schools that continue to struggle. In addition, courts were functioning against a new backdrop: the aftermath of judicial intervention in other jurisdictions. Although adequacy suits have done much to increase funding, improve schools, and draw attention to the children left behind by the political process, courts looking to other states also see interminable litigation, ever-growing demands from plaintiffs, and tension-fraught showdowns between the judiciary and legislatures.

Part II groups courts' predominant concerns in adequacy opinions from 2005-2008 into three categories. First, the maturation of the adequacy movement poses new remedial challenges. During the initial waves of adequacy litigation, courts could be responsive to plaintiffs merely by adopting a traditional judicial role: they could declare the constitutional right and leave the legislature to design a remedy. Recent evidence suggests that second generation cases—in which plaintiffs press the legislature for further reform—may force courts to make a difficult choice between aggressive judicial intervention and total abdication of the issue to the legislature. Particularly when a legislature has made an effort at education reform, it would be empty formalism for a court simply to issue a declaratory judgment that the system

17. See, e.g., Rebell, supra note 1, at 1527-28.
ADEQUACY LITIGATION continues to be unconstitutional. Without a more concrete remedial order, the legislature could simply continue making its own best faith effort at improvement, even if that effort falls far short of a constitutional minimum. Further, the very success of early education suits and the reforms they engendered may be a barrier to continued success. Whereas courts confidently intervened in the face of legislatures that had clearly abdicated their constitutional duties to provide a rational system of education, they are less willing to order remedial action that would interfere with legislative appropriations when the plight of school children in their state is no longer as dire.

Second, separation of powers concerns were exacerbated by litigation strategies increasingly focused on appropriations as the benchmark and remedy for an inadequate education. Adequacy suits have always fought for more resources. But this fight began to center on specific funding levels rather than more systemic reforms. This shift in emphasis implies to courts that any outcome favoring plaintiffs must entail explicitly ordering the legislature to spend more money, something every court is hesitant to do. When faced with an either/or proposition, courts have chosen to find for defendants rather than grant a funding-centered remedy. Moreover, courts are even less likely to intrude into a legislature’s budget allocations if—as is increasingly the case they doubt that more money alone can solve the problem.

And finally, these separation of powers concerns are contagious. Many 2005-2008 opinions echo the justiciability arguments of sister states. As courts weigh the benefits of engaging their coercive power against the risk of diluting their own legitimacy or encroaching on another branch’s prerogatives, recent experiences in other states are a primary source of guidance. With more precedent to look to, courts have seemed to find much to dissuade them from substantively entering the fray. Thus, both recent out-of-state opinions and the aftermath of prior in-state adequacy decisions have shaped the latest adequacy outcomes.

I. ADEQUACY LITIGATION’S ORIGINS AND EVOLUTION: A SHORT INTRODUCTION TO MODERN CHALLENGES

Though this Article focuses primarily on the latest education adequacy litigation, we begin with a brief overview of education litigation in the United States. This cursory review is meant only to flag those aspects of the historical context that shed light on the challenges faced by modern adequacy litigation. The origins and evolution of adequacy litigation are treated in greater detail elsewhere. 18

18. E.g., Michael A. Rebell, Educational Adequacy, Democracy, and the Courts, in ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL 218 (Timothy Ready et al. eds., 2001); Ryan, supra note 16.
A. The First Wave: The U.S. Constitution and Equal Protection

Scholars typically describe the history of education litigation in three waves. In the first wave of education litigation, plaintiffs sought justice in federal courts under the Equal Protection Clause of the United States Constitution. The seminal case during this genesis period was *San Antonio v. Rodriguez*.19 While the public education received by Demetrio Rodriguez in the Edgewood Independent School District in 1968 was inferior to the education available in wealthier Texas districts by almost any measure,20 the plaintiffs’ litigation strategy focused specifically on the inequity of the school finance system. Due to its heavy reliance on local property taxes, the school finance system generated gross disparities in funding between poor and rich school districts. In contrast to disparities in educational opportunity or academic achievement, disparities in per-pupil funding were the most direct, unmitigated evidence of state abdication of the responsibility to educate all children, offering plaintiffs what seemed to be the strongest case that Rodriguez had been denied equal protection under the laws.

While a federal district court found for the plaintiffs in *Rodriguez*, a divided Supreme Court reversed. Notwithstanding the dissent’s accusation that they were leaving “appellees to the vagaries of [a] political process which ... has proved singularly unsuited to the task of providing a remedy,”21 the Supreme Court held that, because education is not a fundamental right under the Federal Constitution, the Texas school financing plan would only be subject to rational basis review.22 Under that lenient standard, the Court found the dramatic disparities created by the Texas funding scheme to be rationally related to the legitimate state interests in “assuring basic education” while permitting and encouraging local control of schools.23 Thus, Demetrio Rodriguez had to seek justice elsewhere.

B. The Second Wave: State Courts and Equal Protection

In the so-called second wave of education litigation, plaintiffs across the country turned to the state courts for relief. Advocates hoped that state courts—bolstered by explicit education clauses in their state constitutions—could be convinced to depart from federal equal protection precedent, declare education a fundamental right, and subject school finance schemes to strict scrutiny.24

22. *Id.* at 54-55.
23. *Id.* at 49.
24. This strategy proved successful in a handful of early cases but was disappointing overall. For a comprehensive discussion, see Ryan, *supra* note 16, at 266-69.
ADEQUACY LITIGATION

Following this second wave strategy, in 1984, the Rodriguez plaintiffs filed *Edgewood Independent School District v. Kirby (Edgewood I).* In addition to bringing an equity claim, this time under the Texas constitution’s equal rights provision, the *Edgewood I* plaintiffs also challenged the school finance system under the “efficiency” mandate of the Texas education clause. Article VII, Section 1 of the Texas constitution provides: “A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”

In a victory for plaintiffs, the Texas Supreme Court responded by striking down the school finance system as unconstitutional under the education clause, holding that “efficiency” required that districts “have substantially equal access to similar revenues per pupil at similar levels of tax effort.” The court declined altogether to address plaintiffs’ claim under the state’s equal protection clause, perhaps for many of the same reasons that had left the Supreme Court in *Rodriguez* so divided.

Although the Texas Supreme Court relied on the education clause in *Edgewood I*, it explicitly struck down the school finance system under a theory of equity. The Court read the “efficiency” language in the education clause to demand “substantially equal access to similar revenues per pupil at similar levels of tax effort.” Although this holding presages the idea that state education clauses contain a substantive component, neither the court nor the plaintiffs conceptualized the theory as one of adequacy. In fact, “adequacy” would not make its first appearance before the Texas Supreme Court until it was raised sua sponte by Justice Cornyn six years later in *Edgewood IV.*

---

26. *Id.* at 392-93.
27. *Id.* at 392.
28. *Id.* at 397.
29. *Id.* at 398. See, e.g., Farr & Trachtenberg, *supra* note 20 at 642 (explaining that “the fact that each school district serves both poor and wealthy kids, or both white and brown kids, muddles the [equal protection] claim that the discrimination is aimed at one identifiable group.”).
30. *Edgewood I,* 777 S.W.2d at 397. Farr and Trachtenberg explain that because the line between equity and adequacy is conceptually blurry, “adequacy” concerns “filtered through the court’s language” even though “*Edgewood I* dealt primarily with the equity issue.” *Supra* note 19, at 645.
31. *Edgewood I,* 777 S.W.2d at 397.
32. Farr & Trachtenberg, *supra* note 19, at 645 (“The reason so many people were concerned with the inequities perpetuated by the Texas school-finance system was that the schoolchildren in the poorer districts received a substandard education.”).
33. See, e.g., *Id.* at 644-45 (articulating the reasons why plaintiffs had rejected an “adequacy” claim in favor of “equity”).
34. See *Edgewood Indep. Sch. Dist. v. Meno,* 917 S.W.2d 717, 729-30 (Tex. 1995) [hereinafter *Edgewood IV*]. The Texas Supreme Court struck down the public school finance
plaintiffs themselves did not bring adequacy claims before the justices until 2005, when Neeley v. West Orange-Cove Consolidated Independent School District reached the Texas Supreme Court.  

This history in Texas underscores the extent to which adequacy litigation was shaped by its development from early equal protection claims based on school finance inequities. In many ways, the litigation strategy was driven by innovative public interest lawyers navigating evolving doctrine. Education reform litigation began with equity in part because it started with the Federal Constitution. Although the large majority of state constitutions explicitly protect the right to an “adequate,” “thorough,” or “efficient” education—and not the right to funding—early adequacy claims predominantly challenged the school finance system specifically, in large part because such claims were often bundled with equity challenges that had long focused on funding as the most strategic measure of equality. Another reason for the initial focus on funding is the tradition of local control over education. Historically, a state’s major influence on schooling came from the provision of funds, so it is not surprising that plaintiffs seeking systemic change would choose inequitable funding as an avenue to get at systemic, statewide problems. The ultimate shift from equity litigation to adequacy litigation has been at times something of an ad hoc process, driven as much by the preferences of the bench as by education plaintiffs.

system twice more in Edgewood II and Edgewood III. In Edgewood II, Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991), the court unanimously dismissed the latest legislation as little more than a band-aid. However, by Edgewood III, Carrollton-Farmers Branch Independent School District v. Edgewood Independent School District, 826 S.W.2d 489, 502 (Tex. 1991), the court’s unanimous front had begun to break under mounting political pressure. In Edgewood IV, Justice Cornyn limited the demands of equity by introducing the concept of adequacy: districts need not have “substantially equal revenue for substantially equal tax effort at all levels of funding.” 917 S.W.2d at 730. Instead, the State need only equalize resources up to a constitutional minimum—“a general diffusion of knowledge.” Carrollton-Farmers Branch Indep. Sch. Dist., 826 S.W.2d 489 at 494. Wealthy districts remain free to supplement state funding with local funds as long as the entire system remains financially efficient.


37. The most recent decision in Oregon’s adequacy litigation signaled this concern. In rejecting part of the plaintiff’s adequacy claim as foreclosed by precedent, the court cited Olsen v. State, which found that while the Oregon constitution “provides for a minimum of educational opportunities in the district,” it “permits the districts to exercise local control over what they desire, and can furnish, over the minimum.” Pendleton Sch. Dist. v. State, 185 P.3d 471, 478 (Or. Ct. App. 2005), aff’d in part, rev’d in part, 200 P.3d 133 (Or. 2009) (quoting Olsen v. State, 554 P.2d 139, 148 (Or. 1976)). The Pendleton court noted that beyond the basic “opportunities,” Olsen was not about adequacy but was merely a statement that the state constitution required some measure of uniformity of education. Id.

38. See, e.g., Ryan, supra note 16, at 268-69 (“The shift in focus from equality to adequacy is in some cases a matter of choice or strategy, and in other cases it is a matter of
C. The Third Wave: Kentucky and the Birth of Adequacy

Scholars have labeled Kentucky the “birthplace” of the adequacy movement and the third wave of education litigation.39 Just one year after the Rodriguez plaintiffs filed their lawsuit in Texas state court, a coalition of public school students, sixty-six local school districts, and a handful of boards of education in Kentucky followed with their own suit.40 The constitutional education clause in Kentucky, like its counterpart in Texas, requires the General Assembly to provide an “efficient” system of public schools.41 Thus, as in Texas, plaintiffs in Rose v. Council for Better Education, 790 S.W.2d 186 (Ky. 1989), challenged the school finance system under not only the Equal Protection and Due Process clauses, but also under the state constitution’s education clause. In Kentucky, however, in addition to challenging the school finance system, the plaintiffs also claimed that the entire public school system was unconstitutional under the state constitution’s efficiency mandate.42 In a landmark decision, the Supreme Court of Kentucky struck down the school system under the education clause of the Kentucky constitution. Aware of the revolutionary nature of its decision, the court made its holding as clear as possible:

Lest there be any doubt, the result of our decision is that Kentucky’s entire system of common schools is unconstitutional. . . . This decision applies to the entire sweep of the system—all its parts and parcels. This decision applies to the statutes creating, implementing and financing the system and to all regulations, etc., pertaining thereto. This decision covers the creation of local school districts, school boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. It covers school construction and maintenance, teacher certification—the whole gamut of the common school system in Kentucky.43

Echoing the themes of equality running through earlier decisions, such as Edgewood I, the Rose court held that, under section 183, “[e]ach child, every child, in this Commonwealth must be provided with an equal opportunity to have an adequate education.”44 But, by including the word “adequate,” the court went even further, to hold that the education clause guaranteed not only equality, but also a certain quality of education. Specifically, the court found a school system could only pass constitutional muster if—at a minimum—it

39. See, e.g., ERIC HANUSHEK, COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES’ GOOD INTENTIONS AND HARM OUR CHILDREN XV (2006) (“Kentucky is usually identified as the birthplace of the modern era of [adequacy] cases.”).
41. KY. CONST. § 183.
42. Rose, 790 S.W.2d at 190-91.
43. Id. at 215.
44. Id. at 211.
aimed to provide all children with the capacities it deemed necessary to enable students to “function in a complex and rapidly changing civilization,” to “understand the [political] issues that affect his or her community, state, and nation,” and to “compete favorably... in the job market.”

While its opinion went beyond merely thinking about education in terms of funding, the court did specifically mandate that the General Assembly provide sufficient funding for an adequate education for all. Significantly, the court left the determination of how best to achieve a constitutionally efficient funding system to the legislature, emphasizing: “We do not instruct the General Assembly to enact any specific legislation. We do not direct the members of the General Assembly to raise taxes... We only determine the intent of the framers. Carrying-out that intent is the duty of the General Assembly.”

The General Assembly responded to Rose by immediately enacting sweeping reforms under the Kentucky Education Reform Act (KERA).

The Rose vision was subsequently adopted and cited by courts in at least seven other states. For example, in McDuff v. Secretary of the Executive Office of Education, a case discussed in greater depth in Part II.A, the Massachusetts Supreme Court unequivocally held that children in the Commonwealth are constitutionally entitled to an education that will provide them with the seven capacities set forth by the Supreme Court of Kentucky in Rose, and that will prepare them to take their place as knowledgeable and productive citizens. As in Kentucky, the Massachusetts legislature responded by rapidly enacting significant reforms that injected “enormous amounts of new

45. Id. at 212 (“[A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (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.”).

46. Id.


49. 615 N.E.2d 516, 548, 554 (Mass. 1993).
money”\(^{50}\) and “revolutionized public education in Massachusetts.”\(^{51}\)

Crucially, early cases such as Edgewood I, Rose, and McDuffy did not initially force courts to wrestle with the boundaries of the separation of powers doctrine. Rather, those courts were able to trigger a legislative response while remaining well within the traditional bounds of judicial power: they declared the education system unconstitutional, defined the basic contours of the right to education, and left the legislature to devise reforms to bring the school system into compliance. Most courts have followed this formula and left the specifics of reform up to their legislatures.\(^{52}\)

II. GROWING JUSTICIABILITY CONCERNS: ADEQUACY LITIGATION FROM 2005-2008

The years 2005 through 2008 witnessed a sea change in judicial attitudes toward education adequacy claims. Despite growing momentum, the benefit of lessons learned in previous litigation, favorable precedent, and more sophisticated costing-out methodologies, recent adequacy plaintiffs have almost universally encountered a judiciary reluctant to entertain their claims or to offer them meaningful remediation.\(^{53}\) A close reading of these recent opinions finds


\(^{51}\) Id. at 1144.

\(^{52}\) See Molly S. McUsic, The Future of Brown v. Board of Education: Economic Integration of the Public Schools, 117 Harv. L. Rev. 1334, 1348 (2004) (“State courts have been loath to clarify the full content of the rights they recognize or to prescribe for state legislatures the remedial steps necessary to bring the school funding system into constitutional compliance. The courts’ most common course has been to declare the system unconstitutional and send it back to the legislature to make it constitutional.”). Of course, as we will discuss, in some states immediate resistance from the political branches has forced courts to play a more aggressive remedial role very early on. See, e.g., Richard E. Levy, Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation, 54 Kan. L. Rev. 1021, 1046-47 (2006) (describing how the legislature’s failure to fully comply provoked the Kansas Supreme Court to order a minimum increase in funding by a specific date); see also Abbott v. Burke, 693 A.2d 417, 439-45 (N.J. 1997).

\(^{53}\) Contrary to the dominant trend, plaintiffs prevailed in New Hampshire and Washington. However, even these two successes were somewhat qualified. In Federal Way School District No. 210 v. State, the trial court granted plaintiffs’ motion for summary judgment on an extremely narrow claim under Washington’s education clause. No. 06-2-36840-1, slip op. at 8 (Wash. Sup. Ct. Nov. 2, 2007), rev’d, 219 P.3d 941 (Wash. 2009). Despite striking down a salary system not based on the cost of providing educational opportunity, the trial court goes to great pains to soften the impact of its ruling. The opening paragraph notes, “[T]his decision should in no way be construed to find or even suggest that the legislature has not provided for full funding of education in the Federal Way School District. The court, recognizing that the state supreme court would review the case acknowledged that even if the case were upheld, it would “be of little moment The State legislature has been moving closer to equalization over the years and getting there will not require great effort.” Id. In Londonderry School District v. State, the Supreme Court of New Hampshire held that the state had failed to define a constitutionally adequate education, as it had been ordered to
separation of powers concerns at their common core. In order to find for plaintiffs in adequacy cases, judges perceived that they must intervene substantively in their state’s education policy to craft a remedy that would encroach on traditional legislative prerogatives. This is the broad umbrella under which fall many more concrete, situational concerns. This Part takes up the recent set of adequacy decisions and identifies three interrelated factors within the umbrella of separation of powers that have contributed to the startling shift in the judicial response to adequacy lawsuits.

First, while separation of powers concerns have always factored in education litigation, courts in earlier years could mandate reform without actively intervening in legislative decision-making. Initially, plaintiffs were fighting for legislative reform at the most basic levels. Legislatures had not yet been judicially required to meet certain standards in education funding. Now, plaintiffs need to show that systems subjected to initial reforms are still underfunded or wholly inadequate or both. When the claim is closer to legislative deficiency than legislative abdication, plaintiffs struggle to convince courts that there is a judicial role available that would not involve stepping into legislative shoes. This remedial concern can also be characterized as a problem in the plaintiff’s ability to prove a breach of the constitutional duty to provide an adequate education. That judges began to balk—either at the question of breach or in envisioning an appropriate remedial role—where they once embraced education suits with a degree of fervor, is in some ways a function of the adequacy movement’s past success in convincing judges to order legislative reforms.

Second, the increasing centrality of budgetary appropriations and pervasive use of costing-out studies in adequacy cases have triggered perhaps the most fundamental separation of powers alarm for courts. Costing-out studies invite judges to review the spending levels set by the legislature, which is something they are extremely reluctant to do. This concern is compounded in the adequacy context by the growing chorus of voices contending that the solution do a decade earlier. 907 A.2d 988, 996 (N.H. 2006). Noting that “deference . . . has its limits,” the court—for the first time—backed its decision with a deadline and warned that if the state failed to spell out enforceable and reviewable standards by the end of the fiscal year 2007, a trial court or special master might have to do it for them. In this way, the court added substantial bite to its earlier decision. Indeed, this was a victory for plaintiffs, who had been awaiting such a step since the court first articulated the state’s duty back in 1993. See McDuffy, 615 N.E.2d 516 (Mass. 1993). However, it is also important to note that the court chose not to do so in Claremont School District v. Governor, 703 A.2d 1353 (N.H. 1997). In that case, the court had ordered the state not only to define an adequate education, but also to 1) determine the cost, 2) fund it with constitutional taxes, and 3) “ensure its delivery through accountability.” Londonberry, 907 A.2d at 990. The Londonderry trial court found for plaintiffs on all three counts, but the state supreme court affirmed only the first and stayed all other findings. Id. at 996. In addition to considering only one claim, the court gave the state an entire year to take just that first step. Id. at 995. The dissent criticized the majority for dancing around the core issue of adequate funding Id. at 998 (Duggan, J., concurring in part and dissenting in part).
lies not in more money, but in such measures as increased accountability, better management, and the flexibility to fire failing teachers.

Finally, when courts look to other states that have mandated specific appropriations or reforms, it is not clear to them that such intervention represents a long-term solution. They fear specific reforms will require repeated trips back to their courthouses for enforcement, if they can be enforced at all. The experience of sister states reinforces the conviction that courts' power to enforce such remedies is tenuous in the face of legislative resistance.

A. Concerns About Judicial Competence

By 2005, nearly a generation had passed since the first state courts recognized the constitutional right to education. In the intervening years, as legislative appropriations failed to keep pace and temporary gains in educational justice were lost, parents and activists once again looked to the courts to protect the constitutional rights of their children in the face of political inaction. Such constitutional challenges to school systems in states that had already recognized both a qualitative right to education and the judiciary's duty to uphold it make up the second generation of adequacy litigation.

Paradoxically, the very successes of early adequacy plaintiffs in reforming grossly dysfunctional, unequal, and inadequate school systems poses problems for second generation litigation. A close reading of recent opinions reveals three primary ways in which the changing education landscape has heightened separation of powers concerns for courts adjudicating second-generation cases. First, courts are troubled by the increasingly intrusive remedial role seemingly demanded in order to improve school systems that have already undergone significant reforms. This failure to perceive an acceptable remedial role can lead courts to abdicate their function entirely in adequacy adjudication, essentially, if not overtly, reversing any positive precedent. Second, signs of renewed political engagement and progress (however minimal) may cause courts to question the very legitimacy of judicial intervention. Over the years, a powerful strain of argument has developed maintaining that the judiciary should only engage in structural reform litigation in the face of egregious political neglect. In courts that subscribe to this view, plaintiffs will struggle to convince judges that anything more than perfunctory oversight on their part is constitutionally permitted, let alone necessary, when the legislature is also actively involved. Finally, improved schools further blur the already uncertain


55. See, e.g., William A. Fletcher The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 YALE L.J. 635, 694 (1982) ("The only legitimate basis for a . . . judge to take over the political function in devising or choosing a remedy in an institutional suit is the demonstrated unwillingness or incapacity of the political body").
line delineating breach. Where ambiguous constitutional standards and steadily improving conditions pose tricky line-drawing problems, courts are much more likely to defer to the judgment of the legislature. The latest adequacy litigation in Massachusetts presents a striking example of the first two trends.

1. New Remedial Challenges

In 1993, Massachusetts became one of the earliest states to hold that its children were constitutionally entitled to an adequate education. In *McDuffy v. Secretary of the Executive Office of Education*, the Massachusetts Supreme Court unanimously and unequivocally held that children in the Commonwealth are constitutionally entitled to an education that will provide them with the seven capabilities set forth by the Supreme Court of Kentucky in *Rose*, and prepare them to take their place as knowledgeable and productive citizens. 56

Twelve years later, however, a second-generation adequacy case produced a divided court newly skeptical of its own ability to remedy problems of inadequacy in education. 57 In *Hancock v. Driscoll*, students from four of the state’s poorest public school districts revived the *McDuffy* case, alleging that their schools “continue[d] to suffer with largely the same conditions” that existed prior to *McDuffy*, thereby depriving them of the education mandated by the Supreme Court. 58 The *Hancock* plaintiffs acknowledged that the 1993 education reforms had “achieved a great deal,” 59 but they argued that the state continued to leave some of its neediest children behind. 60

Despite reaffirming *McDuffy* as binding precedent and finding that the Commonwealth had failed to achieve the objectives outlined therein, 61 the

56. 615 N.E.2d 516, 548, 554 (Mass. 1993). Justice O’Connor disagreed only on the question of breach. *Id.* at 556 (O’Connor, J., concurring).
57. *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134 (Mass. 2005) (Seven justices wrote four separate opinions: The chief justice wrote for the plurality, joined by Justices Spina and Cordy; Justice Cowin concurred and was joined by Justice Sosman; Justice Greaney wrote a dissent in which Justice Ireland joined and Justice Ireland wrote a dissent in which Justice Greaney joined.).
58. *Id.* at 1145.
59. *Id.* at 1151.
60. *Id.* at 1138.
61. Five of the seven justices reaffirmed *McDuffy*: Chief Justice Marshall and Justices Spina, Cordy, Greaney, and Ireland. *Id.* at 1137 (Marshall, C.J., concurring) (plurality opinion); *id.* at 1165 (Greaney, J., dissenting). In their joint dissent, Justices Greaney and Ireland make clear their position that the state has clearly failed to achieve the *McDuffy* objectives. *Id.* at 1166 (Greaney, J., dissenting). Although the plurality claimed to find no breach, the chief justice, writing for the plurality, conceded that the “goals of education reform adopted since *McDuffy* have [clearly not] been fully achieved.” *Id.* at 1140 (Marshall, C.J., concurring) (plurality opinion). In fact, she writes, “No one, including the defendants, disputes that serious inadequacies in public education remain.” *Id.* at 1139. She acknowledged that the state’s record of education reform since 1993 is “marred by areas of real and in some instances profound failure.” *Id.* at 1152. She further admitted that the “slow, sometimes painfully slow, pace of educational reform in the focus districts,” has maintained


_Hancock_ plurality held for the defendants. In her plurality opinion, Chief Justice Marshall denied plaintiffs relief not because she did not find a constitutional violation, but because she could not identify an acceptable remedy. In an opinion reflecting a full range of traditional justiciability concerns, the chief justice makes clear her discomfort with remedies she deems to be properly the province of concomitant branches of government.

At trial, the superior court judge had suggested two possible remedial paths: 1) to order the Department of Education “to determine the ‘actual cost’ of funding a ‘constitutionally adequate level of education’ for all students in the focus districts,” and 2) to order “the Commonwealth . . . to implement the funding and administrative changes necessary to achieve that result.”62 The chief justice rejects both of these recommendations. She explicitly refuses to order a costing-out study “rife with policy choices that are properly the Legislature’s domain.”63 Further, she argues that the judiciary has neither the authority nor the competence to make such fundamentally political choices.64 And finally, because the costing-out study alone falls far short of a cure for failing schools, she warns of a slippery slope toward “forcing the Legislature to appropriate more money.”

The chief justice’s remedial concerns underscore one major difficulty faced by courts in second-generation adequacy cases. Whereas the court in _McDuffy_ had deferred to the legislature to determine how to fulfill its constitutional duty—finding these “details of implementation . . . best left, at least initially, to the executive and to the legislative branches of government”—66—persisting inadequacies would have required that the _Hancock_ court offer more specific guidance on the substance of the right. If a court perceives the state to be making a good faith effort to improve education, then issuing yet another declaratory judgment that the school system is unconstitutional becomes an

---

62. _Id._ at 1138.
63. _Id._ at 1156.
64. _Id._ at 1156-57. (“The study would assume, for example, that in order to fulfill its constitutional obligation under the education clause, the Commonwealth ‘must’ provide free preschool for all three and four year old children ‘at risk’ in the focus districts, and presumably throughout the Commonwealth thereafter. That is a policy decision for the Legislature. . . . Other programs might be equally effective to address the needs of at risk students, such as remedial programs . . . , nutrition and drug counselling programs or programs to involve parents more directly in school affairs. Each choice embodies a value judgment; each carries a cost, in real, immediate tax dollars; and each choice is fundamentally political. Courts are not well positioned to make such decisions.”).
65. _Id._ at 1157.
empty formalism. The legislature need only respond by continuing to make its best effort to improve the system.

Faced with the prospect of finding a constitutional violation with no meaningful remedy, the Hancock plurality ultimately held that the plaintiffs had failed to prove that the Commonwealth had violated the state’s education clause. Although concurring in this result, Justice Cowin’s opinion in Hancock criticizes the chief justice’s plurality opinion as less-than-honest. He accuses her of “avoid[ing] the need to deal with McDuffy’s intrusive and flawed analysis” by an “artful” rendition of “clear error” review. In other words, Justice Cowin suggests that the plurality holding fails to find a clear breach of the constitutional duty when, in fact, the problem lies in the court’s own institutional competence to order a remedy:

If the [c]hief [j]ustice and those [j]ustices who joined with her are concerned about a self-imposed position at the helm of this debate, they should reject much or all of McDuffy. If, on the other hand, they are comfortable with the prospect of determining whether the Commonwealth’s educational reforms and expenditures have produced satisfactory results, they should accord the trial judge’s findings and conclusions their due deference.

Justice Cowin here hints at the deeper tension running through Chief Justice Marshall’s opinion. Although the chief justice never explicitly mentions “separation of powers” or “justiciability” in her opinion, those principles drive her decision. For example, she explains that because in Massachusetts,

...exercising ultimate control over, and provide substantial and increasing (subject only to dire fiscal circumstances) resources to support, public education in a way that minimizes rather than accentuates differences between communities based on property valuations, constitutionally impermissible classifications, and other criteria extrinsic to the educational mission, we cannot conclude that they are presently violating the education clause.

Forced to choose between a more aggressive remedial stance and abdication of any role in adjudicating the education right, the Supreme Court of Massachusetts bows out by failing to find breach.

2. Legitimacy of Judicial Intervention

Even had the most traditional of judicial remedies been available to the Hancock court, it is not clear that the court would have been persuaded of its prerogative to intervene on behalf of Massachusetts’ children. The court’s tone

67. Hancock, 822 N.E.2d at 1155.
68. Id. at 1162 (Mass. 2005) (Cowin, J., concurring).
69. Id.
70. Id. at 1152-53 (Marshall, C.J., concurring) (plurality opinion) (internal citations omitted).
of deference may reflect an additional concern shared by judicial counterparts across the country: that courts lack the authority to intervene in education in the absence of a breakdown of the political process. Indeed, some scholars have argued that grievous deficiencies alone are not sufficient to trigger judicial action. Instead, the judiciary can only legitimately engage in structural reform when a government institution becomes “substantially immune from conventional political mechanisms of correction.”

In Hancock, the chief justice’s opinion points to the standard of legislative breakdown as the bar that must be met for judicial intervention. She determines whether the Commonwealth has met its duty by focusing not on the quality of the education, but rather on whether the Legislature’s action merits judicial intervention. Instead of asking if the state is preparing the rich and poor in every city and town to “participate as free citizens,” she questions whether the Legislature “neglected or avoided a constitutional command.” Has it acted “in an arbitrary, nonresponsive, or irrational way to meet the constitutional mandate”? Is it “presently neglecting or is [it] likely to neglect its constitutional duties, thus requiring judicial intervention”? Thus, after framing breach as a question of legislative engagement, she is able to find the education inadequate but the Legislature’s efforts sincere. She concludes the court cannot offer relief:

71. See, e.g., Carroll-Hall v. Rell, 44 Conn. L. Rptr. 224, No. X09CV054019406, 2007 WL 2938295, at *13 (Conn. Super. Ct. Sept. 17, 2007) (identifying complete abdication—such as total abolition of English as a Second Language programs—as the bar for legitimate judicial intervention); Young v. Williams, Nos. 03-CI-00055 & 03-CI-01152, slip op. at 15 (Ky. Cir. Ct. Feb. 13, 2007) (citing improving test scores and performance relative to neighboring states and concluding, “Given this progress, we are unwilling at this time to declare that the level of education funding in Kentucky is unconstitutionally inadequate.”); Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 789 (Tex. 2005) (concluding that the constitutional standards could not “be used to fault a public education system that is working to meet [those] . . . goals merely because it has not yet succeeded in doing so”).

72. Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 HARV. L. REV. 1016, 1062 (2004); see also Marisol A. v. Giuliani, 185 F.R.D. 152, 164 (S.D.N.Y. 1999) (noting that even if the plaintiffs established liability at trial, “the Court may not have been in a position to provide for more relief than simply encouraging continued effort and improvement by [the defendant]”); But see Owen M. Fiss, Foreword: The Forms of Justice, 93 HARV. L. REV. 1, 53 (1979) (arguing for the role of the judge in effectuating structural legal reform).

73. See Hancock, 822 N.E.2d at 1138 n.2 (Marshall, C.J., concurring) (plurality opinion) (distinguishing judicial intervention in McDuffy as necessitated by the Commonwealth’s utter neglect: “[B]efore the enactment of the Education Reform Act of 1993 [,] many of the Commonwealth’s children, notably poor children, urban children, children of color, and children with special needs were in essence systematically discarded educationally, with no obligation recognized by the Commonwealth to intervene on their behalf.”) (emphasis added).

74. Id. at 1137, 1146.
75. Id. at 1140.
76. Id. at 1155.
No one... disputes that serious inadequacies in public education remain. But the Commonwealth is moving systemically to address those deficiencies and continues to make education reform a fiscal priority. It is significant... that the Commonwealth has allocated billions of dollars for education reform since the act’s passage.... By creating and implementing standardized statewide criteria of funding and oversight; by establishing objective competency goals and the means to measure progress toward those goals; by developing, and acting on, a plan to eliminate impediments to education based on property valuation, disability, lack of English proficiency, and racial or ethnic status; and by directing significant new resources to schools with the most dire needs, I cannot conclude that the Commonwealth currently is not meeting its constitutional charge to “cherish the interests of... public schools.”

Justice Greaney, the sole justice on the Hancock Court to have participated in McDuffy twelve years earlier, interprets the chief justice’s opinion as effectively overruling McDuffy. Seizing on her use of the words “priority,” “commitment,” “plan,” and “progress,” he criticizes her for interpreting the duty to educate as a duty that turns on “effort and not on results”—an emphasis he views as incompatible with McDuffy’s holding. In other words, children in the Commonwealth have only a right to an earnest legislature—one that is trying its best to provide an adequate education.

Whether the chief justice’s opinion is read to guarantee a right to an adequate education (but, no remedy) or no such right at all (as the dissent would argue), the outcome here is the same: plaintiffs are denied relief as long as the legislature is deemed to be making a good faith effort to reform the school system.

As was the case in Massachusetts, many courts adjudicating second-generation cases will find grievous failures in education despite no longer being confronted with inactive or inattentive legislatures. The resulting separation of powers concerns threaten to drown out plaintiffs’ assertions that political activity is not the same as ensuring that a state achieves its constitutional duty toward children.

3. Uncertain Breach

The final way in which political progress heightens separation of powers concerns in education adequacy suits is also the most obvious: as school conditions and the constitutional standard converge, courts are less certain whether there is a constitutional violation to be remedied in the first place.

Despite the sophistication of costing-out studies, adequacy still leaves courts without a consensus about the precise measurement of “adequate”

77. Id. at 1139 (emphasis added).
78. Id. at 1165, 1173 (Greaney, J., dissenting).
79. Id. at 1171.
funding or "adequate" education. As Professor Peter Enrich writes, "Faced with a constitutional provision mandating an indeterminate level of governmental activity, and demanding a commensurate and equally indeterminate (but very large) dedication of governmental resources, a court's most natural inclination is to defer to the choices made by the political branches . . . ."80

The question is naturally less daunting for courts when the level of funding or quality of education falls below any imaginably acceptable standard. Thus, many early adequacy courts could intervene with moral certainty while at the same time not being forced to set a specific level of funding or quality. Whatever the constitutional standard, they could declare with confidence that the current education system fell short.81

As budgets have increased and schools improved, courts have faced more difficult factual scenarios in which levels of funding fell near, or within, the spectrum of plausible standards.82 In such situations, courts have seemed significantly less comfortable substituting their own judgment for that of the legislature on issues that push against the bounds of the separation of powers.83

B. Increased Focus on Funding Levels

Adequacy suits have always been about money,84 but recent cases suggest that appropriations pressures have now become one of the greatest stumbling blocks for courts as they consider their ability to respond to the claims of adequacy plaintiffs.85 There are three interrelated reasons why money has

80. Enrich, supra note 36, at 172.
81. See, e.g., Young v. Williams, Nos. 03-CI-00055 & 03-CI-01152, slip op. at 13 (Ky. Cir. Ct. Feb. 13, 2007) ("[Rose] was decided based upon evidence alleging that the Kentucky school system provided students a vastly inferior education, falling far short of 'efficient.'"); Hancock, 822 N.E.2d at 1151 ("In McDuffy, this court faced an overwhelming, stipulated body of evidence that the structure of public education in Massachusetts was condemning generations of public school students in our poorer communities to an inferior education. It was a record of abysmal failure." (emphasis added)); Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 783 (Tex. 2005) ("In Edgewood I and II, we did not find it necessary to articulate a standard of review; the public school finance system was simply not 'efficient' by any stretch of the word.").
82. See, e.g., Moore v. State, No. 3AN-04-9756, slip op. at 19-20 (Alaska Super. Ct. June 21, 2007) (discussing prior reforms to the school funding formula that directed more resources to the poorest districts).
83. See Enrich, supra note 36, at 178-79 (finding school funding constitutionally adequate).
84. See Christopher E. Adams, Is Economic Integration the Fourth Wave in School Finance Litigation? 56 EMORY L.J. 1613, 1614-15. Edgewood I challenged the structural design of the school finance system that starved property-poor districts for funds. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 392-93 (Tex. 1989). In Rose, liability may have turned on the state's failure to provide an adequate education, but the Court made it extremely clear that the state's duty included the requisite funding for a constitutional education. Rose v. Council for Better Educ., 790 S.W.2d 186, 216 (Ky. 1989).
increasingly become a barrier to success in adequacy cases. First, plaintiffs have focused more and more on levels of funding as the measure of adequacy in education, often to the exclusion of other elements that might be less tangible but more easily approached by courts. Second, costing-out studies have exacerbated this problem by focusing courts on specific dollar amounts. Persuading courts to demand a specific budget from the legislature sets a higher separation of powers bar than asking for an indeterminate amount of increased funding in order to accomplish other specific objectives such as improved facilities. Judges have refused repeatedly in recent years to interfere with legislative judgments about exactly how much money is enough. Finally, the increased focus on money has engendered a countermovement arguing that money alone does not make a successful school. This means that just at the time courts are being pointed toward money as a solution in adequacy cases, they are hearing loud arguments against the efficacy of such a remedy.

1. Focused on Funding

Separation of powers concerns have intensified in the past several years partially as a result of adequacy’s focus on money as discussed in Part I. Because of their roots in equity, early adequacy claims focused on the structural aspects of school finance systems that systematically condemned students in poor school districts to an inadequate education. For example, the Edgewood I plaintiffs claimed that a school finance system heavily reliant on local property taxes violated not only equal protection but also the state right to education. As the litigation strategy evolved, however, plaintiffs began to challenge not the basic funding structure but funding levels themselves. When an adequacy claim is structured around the level of funding, however, courts are forced to evaluate appropriations, the heart of the legislature’s domain, rather than to consider the overall structure of school finance, an area in which a court could potentially intervene without overtly mandating increased expenditures.

Further cornering courts in the legislative domain, adequacy plaintiffs

---

87. See Enrich, supra note 36, at 109.
88. Edgewood I, 777 S.W.2d at 391-92.
89. See, e.g., Neeley, 176 S.W.3d at 753.
increasingly emphasize funding levels to the exclusion of broader challenges to
the overall adequacy of the public school education.90 Kentucky is illustrative
of this trend. In 2007 a Kentucky trial court dismissed adequacy claims
expressly due to the nature of the plaintiffs’ claim. In Young v. Williams, the
plaintiffs had focused their pleadings specifically on the level of school
funding, claiming it was both “inadequate and arbitrarily determined by the
legislature.”91 On a motion for summary judgment, however, Judge Thomas
Wingate of the Franklin County Circuit Court denied the Young plaintiffs a
chance to proceed to trial with their claim.92

Significantly, in granting the defendant’s motion for summary judgment,
the Young court did not disavow Rose, Kentucky’s landmark education case.
Instead, the opinion sought to reiterate Rose’s holding that only the judiciary
can determine when a constitutional standard is met.93 At the same time,
however, Judge Wingate found that Young was a different case from Rose. In
Young, he wrote, plaintiffs “allege[] inadequate monetary expenditures, not an
[inadequate] education system.”94 Thus, Judge Wingate reasoned, they “ask[]
the Court to exceed the rule from Rose by going beyond mere constitutional
interpretation . . . [to] stipulate[e] the manner by which the General Assembly
must carry out its responsibilities.”95 Reinforcing this point, Judge Wingate’s
opinion explicitly states that the plaintiffs could have survived summary
judgment if only they had brought “appropriate claims” before the court,
backed by a “fact pattern parallel to Rose.”96 It argued that courts are—and
should be—“less willing to stretch [the] separation of powers” for disputes over
funding than for claims alleging a violation of the underlying right.97

“Ultimately,” Judge Wingate wrote, “increase[d] . . . funding must be the
product of political will, not judicial decree.”98

21, 2007) (“The gravamen of this case...has been about funding. Very limited testimony was
presented about Kuskuk’s curriculum, its alignment with the State’s standards, the
professional development available to its staff, the communities’ involvement in their
schools, and the other components of its educational system.” Id. at 7. However, the court
noted that “[t]he primary question in this case—whether the public education system in
Alaska is constitutionally adequate—can not be framed solely in terms of funding, but must
also address the opportunity for children to obtain an education. Funding is just one
component of the State’s public school system.” Id. at 173. (emphasis added); Neb. Coal. for
Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 169 (Neb. 2007) (noting that
plaintiffs failed to allege at any point the negative impact of funding insufficiencies on the
education received by students in the classroom).

91. Young v. Williams, Nos. 03-CI-00055 & 03-CI-01152, slip op. at 1 (Ky. Cir. Ct.
92. Id. at 20.
93. Id. at 16.
94. Id. at 13.
95. Id. at 3 (emphasis added).
96. Id. at 13.
97. Id. at 12.
98. Id. at 20 (emphasis added).
Courts have also suggested that narrow claims of inadequate funding narrow the remedial options available to the court. For example, the plaintiffs in the most recent Texas adequacy case, *Neeley v. West Orange Cove Consol Independent School District*, like those in *Young*, alleged only inadequate funding.99 The Texas Supreme Court denied them relief.100 In response to the dissent’s argument for a nonmonetary remedy, the *Neeley* majority responded: "[w]e are constrained by the arguments raised by the parties to address only issues of school finance."101 As these recent decisions in Texas and Kentucky show, the evolution of plaintiffs’ litigation strategies over the past decade has had the effect of pushing state courts ever closer to appropriations, an area where they are extremely loath to tread.

2. The Costs of Costing-Out

The salience of funding levels in education adequacy cases has also increased significantly with the advent of the “costing-out” study. Even in cases closely replicating previously successful pleadings or with broader claims about the adequacy of education, costing-out studies have recently become a ubiquitous tool for plaintiffs wishing to give courts a concrete estimate of what it would take to achieve adequacy in their states.

First developed in 1997, a “costing-out” study employs one of four methodologies to calculate the cost of providing a constitutionally adequate education to all children.102 By quantifying “adequacy,” these studies offer a tangible benchmark for a somewhat nebulous constitutional standard. For example, in *Young*, all of the five costing-out studies concluded that appropriations for the 2001-2002 school year fell short by at least $740 million.103 Similarly, the costing-out study offered by the *Neeley* plaintiffs concluded that the state must boost expenditures by a minimum of $1.65 billion.104 Thus, costing-out studies have quickly become central to the core adequacy litigation strategy.105

100. *Id.* at 799.
101. *Id.* at 754 (quoting Edgewood III, 826 S.W.2d 489, 524 (Tex. 1992)).
102. For a more comprehensive introduction to costing-out studies (theory, methodologies, and utilization), see, for example, Adams, supra note 84, at 1623-27 (2007); Janet D. McDonald, Mary F. Hughes, & Gary W. Ritter, *School Finance Litigation and Adequacy Studies*, 27 U. ARK. LITTLE ROCK L. REV. 69, 89-104 (2004); and Hanushek, *Costing Out*, supra note 86.
103. *Young*, Nos. 03-CI-00055 & 03-CI-01152 at 14, 12.
104. *See Neeley*, 176 S.W.3d at 769.
105. *See McDonald*, supra note 102, at 93 tbl.2. (describing how the first costing out study was conducted in Ohio by consultants Augenblick & Myers in 1997 and how over the next decade consultants were hired to conduct costing out studies in at least seventeen other states). Indeed, at least one costing-out study was at issue in more than half of the nineteen cases examined in this article. Plaintiffs offered costing-out studies not only in *Young* and
The same power of the costing-out study to quantify a state’s failures in education also necessarily accentuates separation of powers concerns. It shifts the focus of an adequacy case from defining the contours of the constitutional right to arbitrating the underlying funding dispute. The former is quintessentially judicial. The latter is a power explicitly granted to the political branches by most state constitutions. For this reason, under traditional separation of powers precepts, the judiciary is extremely reluctant to review—let alone mandate—appropriations.

In 2006, the New York court of appeals demonstrated why using the costing-out study may create more problems than it solves in *Campaign for Fiscal Equity, Inc. v. State (CFE III)*. Despite being initially sympathetic to adequacy plaintiffs claims, the court was extremely reluctant to interfere with the details of its legislature’s budgetary determinations. In 2003, the court of appeals had found for the plaintiffs in their adequacy lawsuit, *CFE II*, and directed the state to reform the current school funding and accountability systems to ensure that “every school in New York City would have the resources necessary for providing the opportunity for a sound basic education.” This remedy, while not as explicit as some, seemed to demand a
comprehensive overhaul of the state’s funding scheme. In response, however, the Governor chose to adopt the lowest number generated by various possible methods of estimating the state’s spending gap on education and proposed a program bill incorporating that methodology.\textsuperscript{112}

In \textit{CFE III}, plaintiffs returned to court to challenge the governor’s sum as insufficient to bring the state into compliance with the mandate of \textit{CFE II}. At the end of an extensive fact-finding process, the lower court adopted the findings of an appointed panel of expert referees, concluding that New York was spending $5.63 billion \textit{less} than was constitutionally necessary to provide a sound basic education.\textsuperscript{113}

In a huge blow to New York’s adequacy campaigners, however, the court of appeals rubber-stamped the Governor’s proposal, holding that the court’s job was merely to determine the rationality of the State’s proposed spending.\textsuperscript{114} Tellingly, the court of appeals opinion does little to define how a “rationality” test would work. Instead, much like rational basis review in equal protection doctrine, the court suggests that if there is any way that the Legislature’s determination can be justified, then it will be viewed as rational. Just how deferential the court’s opinion is becomes clear from a close reading. The majority opinion expends as much ink on its separation of powers concerns, and in articulating something akin to the restraint prescribed by the political question doctrine, as it does actually reviewing the State’s funding determination for reasonableness.\textsuperscript{115}

In making its determination, the court of appeals stressed that deference is “especially necessary where it is the State’s budget plan that is being questioned.” Thus, the court imposed a self-described “formidable burden” of proof on plaintiffs, emphasizing that a state’s financing scheme must be “patently irrational . . . before judicial deference will give way.”\textsuperscript{116} Just three years after mandating reform, the court proved unwilling to interfere substantively with the spending determinations made by other branches of government.

Recent opinions from around the country echo the concerns of the \textit{CFE III} court. In Massachusetts, Justice Marshall cited the costing-out study as threatening to send her court down the slippery slope toward “forcing the

\textsuperscript{112} The number the Governor chose was $1.93 billion. \textit{id.} at 52.

\textsuperscript{113} \textit{Id. at 57}.

\textsuperscript{114} \textit{Id. at 57} (“The role of the courts is not, as Supreme Court assumed, to determine the best way to calculate the cost of a sound basic education in New York City schools, but to determine whether the State’s proposed calculation of that cost is rational. Supreme Court should not have endorsed an examination in which the cost of a sound basic education in New York was calculated anew, when the state budget plan had already reasonably calculated that cost. In this respect, we agree with the Appellate Division.”).

\textsuperscript{115} \textit{Id. at 58} (“[T]he manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government.”).

\textsuperscript{116} \textit{Id. at 58}.
Legislature to appropriate more money," a step her concurring colleagues denounce as a patent violation of the separation of powers:

Often, these disagreements about education concern how much money to spend and how best to spend it. The issue of public education is thus no different from our political controversies concerning whether we should invest more money in our public transportation system . . . and the amount we should provide in public assistance to low-income individuals and families. In other words, the controversy before us today is largely a funding debate. Choices regarding how much money to spend and how to spend it are in every instance political decisions left to the Legislature, to be arrived at with input from the executive branch and the citizenry; they should not be the result of judicial directives.\

In Kentucky, the Young court refused to "substitute the [costing-out study’s] approximations . . . for the General Assembly's actual appropriations," characterizing plaintiffs’ requests for the court to “determine the adequacy of the specific amount of education funding,” as “ask[ing] the court to push the limits of separation of powers.” In Texas, the Supreme Court largely ignored the costing-out studies to which the district court had accorded great weight in striking down current funding levels, emphasizing that legislatively determined school funding levels should be deemed constitutional unless “arbitrary.”

The costing-out study is undoubtedly a useful tool for making tangible the harm in an adequacy case and/or quantifying a proposed remedy, but it is increasingly a tool plaintiffs use at their own peril. When combined with active legislatures, improved schools and ever-louder voices arguing that money (or money alone) will not solve education problems, the predominance of the costing-out study only confirms courts’ fears that they are being pushed firmly into the legislative territory of appropriations. Whereas earlier courts facing statewide education crises might not have quibbled about stepping into the legislative zone to stir up an inactive body or even suggesting particular appropriations, recent courts are no longer working in such a legislative vacuum. For these courts, the costing-out study can trigger alarms by seeming to frame adequacy cases as suits about funding and nothing more. Perhaps

---

118. Id. at 1164-65. Even the Hancock dissent—which would have ordered a costing-out study—acknowledged the inherent separation of powers concerns involved in mandating appropriations:

I am well aware of the limitations that apply to unelected members of a court ordering an elected Legislature and executive to appropriate money and, frankly, the difficulties that might be encountered if it became necessary to enforce any orders against recalcitrant elected officials. The problem, of course, is magnified considerably when dealing with expenditures needed to fund public education; the need to allocate resources equitably between various school districts achieving at different levels; the complexity of education policy in general; and the disagreement between competent experts on how best to remediate a nonperforming or poorly performing school district.

Id. at 1172 (Greaney, J. dissenting).
119. Young, Nos. 03-CI-0005 & 03-CI-01152, slip op. at 14, 37 (emphasis added).
120. See Neeley, 176 S.W.3d 746, 785 (Tex. 2005).
worse, they can provide an excuse for wary courts to avoid grappling further with the remedial challenges of modern adequacy suits.

3. Doubts That Money Alone is the Solution

The judiciary's willingness to encroach traditional separation of powers boundaries has waned with its increasing faith in the efficacy of money as a solution. Adequacy's initial success fueled a concerted counter-movement that has effectively cast doubt on the basic assumption that increased funding alone will improve academic performance. This movement has produced literature and experts widely cited and called upon by defendants in adequacy cases. No Child Left Behind reinforces the idea that money doesn't matter by sending a strong message to the judiciary that the nation's most difficult education problems should be remedied by stronger accountability measures, not increased spending.

Setting aside the validity of these claims, one thing is certain: the latest adequacy decisions reveal that the courts are, in fact, increasingly skeptical that increased funding will produce constitutionally adequate school systems. Whereas in 1989 the Texas Supreme Court confidently declared, "[t]he amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student," its confidence soon faltered. By 2005, the Court characterized the same relationship as "neither simple nor direct," warning that while achievement "can and often does improve with greater resources . . . money does not guarantee better schools or more educated students."

Sharing in that sentiment, many courts have recently accorded great weight to the nonmonetary barriers to academic success: financial mismanagement, lackluster school leadership, and environmental factors. For example, trial courts in Arizona and South Carolina argue that increased expenditures will have little impact where children are exposed to a negative home environment. Similarly, the Supreme Court of Massachusetts suggested that

121. See, e.g., ERIC A. HANUSHEK et al., MAKING SCHOOLS WORK: IMPROVING PERFORMANCE AND CONTROLLING COSTS (1994).

122. Cf. Danielle Holley-Walker, The Accountability Cycle: The Recovery School District Act and New Orleans' Charter Schools, 40 CONN L. REV. 125, 130, 141 (describing how "accountability cycle" started by passage of NCLB, "accountability-based education reform legislation," and arguing requirement that states "adopt accountability measures" leads to creation of more charter schools); Ryan, supra note 11, at 933-34 (arguing that states may lower academic standards, increase segregation in classrooms, and eject low-performing students due to accountability provisions of NCLB).


124. Neeley, 176 S.W.3d at 788.


HeinOnline -- 6 Stan. J. C.R. & C.L. 110 2010
financial mismanagement and corruption are at the root of the education problem. An Alaska trial court also underscored the importance of nonmonetary inputs.

Trial courts in Arizona and South Carolina refused plaintiffs’ plea for increased resources they believed would have little impact amidst a culture of poverty. Distinguishing plaintiffs’ claims of inadequate operations funding from an earlier adequacy victory on facilities funding, the court in *Crane Elementary School District v. State of Arizona* placed the blame for persistent failure on broken homes, not broken schools:

> Here, the underlying circumstances common to at-risk students that are predictors of poor performance, e.g., low parent participation and low self-esteem, are not caused by the State’s educational funding system but are attributable to a dysfunctional home environment that, unlike deteriorating capital facilities, cannot easily be remedied by an influx of money.

Such creeping doubts about the efficacy of injecting more money into the education system only fortify the judiciary’s inclination to defer to legislative judgment, even if that judgment has permitted mismanagement and waste. In the case of *Crane*, the court declined to hold the state accountable for problems it argued could no more solve than it could create.

The South Carolina trial judge in *Abbeville v. State* also doubted that the school system could simply spend its way to success. In fact, he went so far as to suggest that the money thrown at failing schools had largely been wasted, partially because remedial efforts were vitiated by the forces of poverty and shattered families and partially because the money came too late. For these reasons, instead of explicitly mandating more appropriations, the trial judge ordered South Carolina to provide preschool in the plaintiff districts—a remedy he hoped would mediate the environmental factors proven to leave kindergartners from poor families lagging behind their resource-richer peers.

That the trial judge found any remedy at all, and particularly such a dramatic one, could be seen as a victory for the *Abbeville* plaintiffs. The trial

---

126. See Hancock v. Comm’r of Educ., 822 N.E.2d 1134, 1157 (Mass. 2005) (noting that proposed remedies addressed only funding and not the “failing administrative and financial management that currently deprives students in the focus districts of the educational opportunities they deserve.”).

127. See Moore, No. 3AN-04-9756, slip. op. at 174-77.


129. Id.


131. Id. at 159-62.
judge had been so reluctant to interfere with education funding that he initially dismissed plaintiffs’ adequacy claim as a nonjusticiable political question. The Supreme Court reversed and remanded the case, explicitly holding that it would be error to use “judicial restraint, separation of powers, and the political question doctrine as the basis for declining to decide the meaning of the education clause.” Nonetheless, when the trial judge eventually issued his ruling mandating preschool, the Abbeville plaintiffs did not see it as a victory. They immediately filed a motion to alter or amend, putting their teacher quality, curriculum, transportation, facilities, and various other claims back before the court. The claims were once again rejected by the trial judge, but the plaintiffs’ motion shows how far they viewed his order to be from the full funding reform remedy they sought.

Although the supreme court’s decision forced him to adjudicate the case, the trial judge’s later opinions indicate a continuing concern with judicial interference in this arena. While reluctant to interject into the legislature’s larger funding decisions, the trial judge responded to the supreme court’s demand that he hear the case by mandating preschool, a remedy that, although likely to necessitate some additional spending, leaves the legislature considerable discretion in shaping and implementing an early childhood program. Although not the pure legislative deference adopted by the New York court, the South Carolina judge selected a remedy that would allow him to avoid the question of specific appropriations. In fact, by choosing to mandate preschool rather than increased funding for the system as a whole, the judge in a sense echoed the earliest adequacy decisions that called for functioning school systems, but left the details to the legislature. In order to respond to the commands of the supreme court while avoiding legislative prerogatives, the judge invented a remedy that brought him squarely back into comfortable judicial territory. This type of cabined remedy can increasingly be expected of trial judges skeptical of interfering with legislative budgetary allocations.

In the 2007 case, Moore v. State, an Alaska trial court similarly ordered a nonmonetary remedy in lieu of the statewide funding reform sought by plaintiffs. Although the trial court found not only that the state’s “achievement gap” was a serious concern, but also that the education provided in at least one district was so deficient as to make it a violation of substantive due process to require its students to pass the statewide exam in order to receive their high school diplomas, it concluded that the plaintiffs proved neither that current funding was constitutionally inadequate nor that an increase of funding would remedy the existing achievement gap in the state. Suggesting that local school districts had failed to spend existing funds in the best interest of their

132. Id. at 6.
133. See id. at 158-59.
135. Id. at 193.
136. Id. at 178-79.
students, the court directed the legislature to step up its oversight of the system and to ensure better accountability. In reasoning resonant with the logic of the No Child Left Behind Act, the court determined that the state was failing to meet its constitutional mandate not for lack of funding, but due to a failure of adequate oversight.

These recent opinions in Arizona, South Carolina, and Alaska demonstrate three possible responses to education suits. Ranging from total rejection of plaintiffs’ claims, to a highly specific yet cabined remedy, to the vague command to “increase oversight,” they have in common the sense that money will not solve a state’s education problems. While courts may respond, as did the Arizona court, by placing blame on parents rather than the state, or, as did South Carolina and Alaska, by searching out a remedy that avoids an overt mandate of increased spending, their skepticism about whether money will solve problems contributes to the sense that the legislature is best positioned to address modern education problems.

At a broader level, the cases in this Part show how important innovative remedial proposals will be to the future success of education reform litigation. By focusing on funding, plaintiffs may open a window for unsympathetic courts to exempt themselves altogether from the process of reform. Even the more engaged courts may draw the line of intervention at specific budgetary allocations. Thus, when adequacy plaintiffs do not offer remedies that are not overtly monetary, they may end up with a court that decides to defer to legislative budget numbers or with a nonresponsive remedy.

C. Lessons from Adequacy Cases Across the Country

Finally, adequacy decisions delivered between 2005 and 2008 reflect significant changes in the larger national landscape. In the previous Parts this Article showed courts to be increasingly pushed—by maturing cases and litigation strategies—toward mandating appropriations, a remedy with which they were increasingly uncomfortable. This Part adds the backdrop: by 2005 courts had to weigh this uncertain justice against the risk that their actions would begin a losing battle with the state legislature, or that, at best, judicial interference would only contribute to the kind of mixed results seen over the years in their own and other states.

In the early adequacy cases, courts were exploring new territory. They recognized separation of powers tensions from the very beginning, but they also saw the many ways in which education is sui generis. As a state’s single affirmative constitutional duty, education is elevated in state constitutions, as it is in American life. In response to early rulings, legislatures could not, and did not, reject outright the judiciary’s insistence that they provide an adequate education for all children.

137. Id. at 199.
By 2007, plaintiffs had litigated adequacy cases in thirty-five states. As discussed in Part I, many of the judicial decisions served as catalysts for immediate sweeping education reform. In a handful of states, however, staunch political opposition forced courts to play a more active role in the remediation stage, straining the allocation of power among the branches and ultimately shaking judicial commitment to protecting the constitutional right.138

These struggles during the 1990s portend for today’s judges what may be at stake when they preside over adequacy litigation. The history of education litigation in Texas is particularly illustrative of what courts may fear when they contemplate becoming deeply involved in an education remedy. The Texas Supreme Court began its intervention in the state’s failing education system committed to the constitutional guarantee and to requiring the reforms necessary to fulfill that guarantee. When the court unanimously struck down the state’s school finance system in 1989 in Edgewood I, it called for sweeping legislative action, warning, “[a] band-aid will not suffice; the system itself must be changed.”139 Two years later, in Edgewood II, the court continued to press Texas to meet its duty to schoolchildren. The court unanimously struck down the public school finance system a second time, dismissing the latest legislation as wholly insufficient: “[T]he fundamental flaw . . . lies not in any particular provisions but in its overall failure to restructure the system.”140 Four months later, the legislature enacted new legislation, modeled closely on prescriptive judicial advice.141 Not yet satisfied, however, the Court rejected the legislature’s effort yet again in Edgewood III, decided in January of 1992.142

The Texas Supreme Court accompanied each of its decisions with an unbending injunction threatening to shut down the public school system if the legislature failed to pass constitutional legislation by the designated deadline. By Edgewood III, however, the court’s unanimous front began to break under mounting pushback from the legislature.143 Finally, in Edgewood IV—facing

138. See Rebell, supra note 1, at 1528-29 (citing instances of “excessive delay and resistance” by political branches that—in states like Ohio and Alabama—ultimately led courts to retreat).
140. Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II), 804 S.W.2d 491, 500 (Tex. 1991) (emphasis added) (internal quotation marks omitted). The Supreme Court actually reversed the district court’s decision to vacate the injunction “on the equitable grounds of deference to the Legislature.” Id. at 494.
141. This advice was not-so-subtly slipped into an unnecessary opinion in Edgewood II denying a rehearing. Justice Doggett wrote a concurrence criticizing this inappropriate use of the opinion denying a rehearing to “influence the final stages of current legislative deliberations.” Id. at 501.
143. In his dissent, Justice Mauzy—who had written the Edgewood I decision—wrote, “In two prior opinions on this same case, the court worked together to follow the rather clear command of the Constitution without regard to the political consequences of its decision.
the legislature's threat to strip its jurisdiction— the court declared the school finance system constitutional.

By the account of the four dissenting justices, Edgewood IV was the result of a capitulation to political pressure. They denied that anything substantive had changed since the court’s ruling in Edgewood I. Writing for the dissent, Justice Hecht explained: “Today, despite the court’s admonition that systemic change is essential, made in Edgewood I, and repeated in Edgewood II, and the legislature’s three opportunities in as many years to comply with constitutional requirements, the basic system with its fundamental flaws remain intact.”

And, by the majority’s own admission, its dramatic departure from former precedent was motivated by the need to escape the “judicial purgatory where [w]e must hear the same case over and over.” This claim, first expressed by Justice Cornyn in his one-justice dissent in Edgewood III, was adopted by the majority in Edgewood IV, perhaps because it promised a graceful exit from a situation that had become untenable due to political pressure.

This epic battle left its mark on the Texas judiciary long after its final Edgewood decision. Although by the time Neeley v. West Orange Cove Consolidated Independent School District reached the Texas Supreme Court in December of 2005, only Justice Hecht remained on the court from the Edgewood cases, his experience clearly informed the court’s response to Neeley. Now writing for the Neeley majority, Justice Hecht vigorously defended the court’s duty to determine the constitutionality of the public school system. At the same time, he ultimately engaged in the inquiry with pronounced deference to the legislature. Bound by the lower court’s factual findings, Justice Hecht reversed the lower court’s holding by taking the teeth out of the standards applied. He ruled that in addition to proving that the

Through compromise and consensus-building, the court spoke with one firm voice in what many have recognized as the most important case it has ever considered. Tragically, this has all been lost.” Id. at 539 (Mauzy, J., dissenting).

See Farr & Trachtenberg, supra note 20, at 702 (“Had it struck down Senate Bill 7, there might have been a revolt in the Legislature, particularly among the legislative leaders who had invested so much into the creation of the law. House leader Libby Linebarger surmised that, had the court declared Senate Bill 7 unconstitutional, the Culberson amendment would have passed, sharply restricting the court’s jurisdiction over education-related issues.”).

See Edgewood IV, 917 S.W.2d at 766 (Spector, J., dissenting).

While the Texas Supreme Court adopted the duty articulated by the district court—that a constitutional school system must provide all students “with a meaningful opportunity to acquire the essential knowledge and skills reflected in . . . curriculum requirements . . . such that upon graduation, students are prepared to ‘continue to learn in postsecondary educational, training, or employment settings’”—it significantly softened the standard with the following caveat: “The public education system need not operate perfectly; it is adequate if districts are reasonably able to provide their students the access and opportunity the district court described.” Neeley v. W. Orange-Cove Consol. Indep. Sch.
system is [currently] not producing a "general diffusion of knowledge," the plaintiffs must prove that it is incapable of doing so.\textsuperscript{149} Not surprisingly, the plaintiffs failed to meet a burden of proof that was, by the court’s own admission, "very deferential to the legislature."\textsuperscript{150} Thus, although the court recognized serious deficiencies in education—including "wide gaps in performance among student groups differentiated by race, proficiency in English, and economic advantage"\textsuperscript{151}—it determined that "those deficiencies do not amount to a violation of [the Texas education clause]."\textsuperscript{152}

This long saga in Texas, and similar experiences in a handful of other states,\textsuperscript{153} have undoubtedly influenced subsequent courts trying adequacy cases. This is not surprising since state courts are especially likely to value the experience of sister jurisdictions when faced with novel constitutional claims and new remedial challenges not addressed by the federal courts.\textsuperscript{154} At the same time, it means that over time, a few notable failures may have a disproportionate impact on judges dealing with later litigation.

For example, in 2006, the Kansas Supreme Court foreclosed further adequacy litigation explicitly to avoid the fate of its sister states.\textsuperscript{155} In \textit{Montoy v. State}, the Court "elect[ed] . . . to end th[e] litigation," despite lingering doubts about whether the legislature had successfully created a constitutional school finance system.\textsuperscript{156} In one prong of its decision, the court held that it

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{149} \textit{Id.} at 789.
\item \textsuperscript{150} \textit{Id.} at 790.
\item \textsuperscript{151} \textit{Id.} at 789 (“There are wide gaps in performance among student groups differentiated by race, proficiency in English, and economic advantage. Non-completion and dropout rates are high, and the loss of students who are struggling may make performance measures applied to those who continue appear better than they should. The rate of students meeting college preparedness standards is very low. There is also evidence of high attrition and turnover among teachers statewide, due to increasing demands and stagnant compensation.”).
\item \textsuperscript{152} \textit{Id.} at 754.
\item \textsuperscript{153} \textit{See} Rebell, \textit{supra} note 1, at 1501-05.
\item \textsuperscript{154} \textit{See} William S. Koski, \textit{The Politics of Judicial Decision-Making in Education Policy Reform Litigation}, 55 Hastings L.J. 1077, 1226 (2004) (“What affects state supreme court decision-making in educational finance reform litigation? From a formal legal viewpoint, judicial decision-making in school finance reform cases, like all judicial decision-making, should be based on a straightforward application of the law to the facts of the case. But the law is hardly determinative in educational finance reform cases. Many of these cases are cases of first impression in which a state’s high court is interpreting vague and century-old state constitutional language. Law and legal precedent being of limited explanatory value, this study looks outside the law for influences on judicial decision-making.”).
\item \textsuperscript{155} \textit{Montoy v. State}, 138 P.3d 755, 765 (Kan. 2006).
\item \textsuperscript{156} \textit{Id.} at 765 (finding that the most recent legislation “so fundamentally altered the school funding formula that the school finance formula that was at issue in this case no longer exists” (emphasis added), the court held it could not determine the constitutionality of such without further fact-finding by a lower court. At the same time, the court refused to remand to the district court to allow plaintiffs to amend their pleading to challenge the new funding formula. Thus, the court provided no substantive response to plaintiffs’ claims that
\end{itemize}
\end{footnotesize}
ADEQUACY LITIGATION

could not properly determine the constitutionality of recently-passed legislation that had made changes to the school finance system. It deemed the changes significant enough to require that the plaintiffs amend their complaint in order to continue to properly challenge the system. In the second prong, after surveying the progression of adequacy suits in sixteen sister states, the court declined to allow plaintiffs to amend their complaint to properly challenge the constitutionality of the “new” school finance system. The court offered the experiences of New Jersey, Arkansas, and Texas as empirical evidence that remanding to the trial court tends to delay success in the face of continued litigation. Thus, the Supreme Court dismissed the case, concluding that “[a] constitutional challenge . . . must wait for another day.”

Courts in other states have used a similar rationale for rejecting adequacy suits or denying relief. In Hancock, for example, the Supreme Court of Massachusetts pointed to the other states, this time New Jersey and New York, as evidence for why it should stay its hand in 2005. Likewise, in 2007, the Alaska trial court in Moore pointed to Arkansas’s experience as “illustrative” of why it should deny plaintiffs’ claims of inadequate funding.

In still other states, courts have explicitly cited recent experiences from around the country as grounds for avoiding adequacy litigation altogether. In dismissing plaintiffs’ claims as nonjusticiable in their 2007 case, Nebraska Coalition for Educational Equity & Adequacy v. Heineman, the Nebraska Supreme Court went out of its way to chastise state courts that foolishly took up what it deemed to be a prohibited political question: “The landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states’ school funding systems. Unlike those courts, we refuse to wade into that Stygian swamp.” The court followed with a scathing critique of its peers in Arkansas, Texas, Alabama, and New Jersey for mistakenly believing the judicial branch could bring meaningful resolution and reform to school finance systems. In particular, the court minced no words in rebuking the New Jersey courts for nearly twenty-five years of school finance litigation: “‘[t]he volume of litigation and the extent of judicial

the amended legislation still failed to pass constitutional muster.’).

158. Id. at 230.
159. Id. at 231.
160. Montoy, 138 P.3d at 762. Two dissenting judges criticize the majority for “graft[ing] a ‘good enough for government work’ phrase onto Article 6 § 6 of our state constitution.” Id. at 771.
164. Id.
oversight provide a chilling example of the thickets that can entrap a court that takes on the duties of a legislature."165

Whether courts explicitly acknowledged their influence or not, the landscape of prior education litigation across the country and its aftermath cannot help but have informed all cases decided between 2005 and 2008. It is not coincidental that in each and every instance where the question of adequacy was one of first impression, courts between 2005 and 2008 dismissed plaintiffs' claims. To put this in perspective, consider that at least four courts dismissed adequacy claims on grounds of justiciability between 2005 and 2008,166 whereas only five courts had done so in the preceding sixteen.167

A closer look at each of these recent dismissals, reveals judges deeply concerned about their institutional competence to deal with the questions presented, a worry that seems to be reinforced by the similar skepticism coming out of other state courts. For example, in Oklahoma Education Association v. State, the Supreme Court of Oklahoma dismissed plaintiffs' claims that the state had failed to adequately fund the public school system as a nonjusticiable political question. The Court reprimanded plaintiffs for "attempting to circumvent the legislative process by . . . [asking . . . this Court to invade the Legislature's power to determine policy,]" and concluded, "[t]his we are constitutionally prohibited from doing."168 Likewise, the Indiana trial court in Bonner v. Daniels delivered an extremely brief opinion dismissing plaintiffs' claims as contrary to separation of powers doctrine.169

Similarly, the plaintiffs' claims in Lobato v. State were dismissed on justiciability grounds in 2006.170 Notably, the Colorado Supreme Court had previously adjudicated a constitutional challenge to the education system. In Lujan v. Colorado State Board of Education, an equal protection suit, the court had "interpret[ed] the Education Clause . . . [and] applied its interpretation to

165. Id. (quoting City of Pawtucket v. Sundlun, 662 A.2d 40, 59 (R.I. 1995)).
170. Lobato, at No. 05CV4794, slip op. at 2-3.
the public school finance system."


172. Despite Plaintiffs' assertion that the Colorado Supreme Court has exercised jurisdiction over Education Clause claims, these cases presented constitutional questions of equality, not quality or adequacy of educational funding. In fact, no Colorado court has defined 'adequate' or 'thorough' because the substance of these terms is a legislative determination.

Lobato, No. 05CV4794, slip op. at 2. Just as this article was receiving its final edits, the Colorado Supreme Court issued its opinion overturning the court of appeals' holding that claims regarding education quality and adequacy of the state's public school financing are nonjusticiable political questions. The Court seemed, however, to require that, on remand, the court of appeals perform rational basis review to determine the constitutionality of the school financing system. The Court held, "the judiciary must . . . evaluate whether the current state's public school financing system is funded and allocated in a manner rationally related to the constitutional mandate." Lobato v. State, No. 08SC185, slip op. at 40 (Colo. Oct. 19, 2009). It will be interesting to see how the trial court responds to a remand that cautions it to "give significant deference to the legislature's fiscal and policy judgments" and instructs that it may "appropriately rely on the legislature's own pronouncements to develop the meaning of a 'thorough and uniform' system of education." Id. at 42.


174. Id. at *12 ("While the court has rejected the state's argument that the questions raised by plaintiffs are not justiciable, it cannot ignore the 'prudential cautions [which] shed light on the proper definition of constitutional rights and remedies.'"") The Connecticut Supreme Court heard oral argument on the interlocutory appeal of Judge Shorthall's ruling in April of 2008. In April of 2009, the court informed the parties that the two members who did not hear oral argument in the case would participate in the decision. The court has yet to issue a ruling as of the date of writing.

175. See State v. Geisler, 610 A.2d 1225, 1232 (Conn. 1992) (specifying six "tools of analysis" to be considered in construing the contours of the Connecticut Constitution: "(1) the textual approach, (2) holdings and dicta of this court, and the Appellate Court, (3) federal precedent, (4) sister state decisions or sibling approach, (5) the historical approach, including the historical constitutional setting and the debates of the framers, and (6) economic/sociological considerations." (citations omitted)).
perfectly onto the classic justiciability case, *Baker v. Carr.* Further, neither *Geisler*—nor any case before or after—introduces a justiciability analysis as a step in defining the contours of a constitutional right. Judge Shortall’s strange manipulation of the *Geisler* test therefore suggests that, as in other states recently dismissing adequacy suits, justiciability concerns actually drove the judge’s decision.

176. The Court’s arguments map onto the *Baker v. Carr* criteria as follows: 1) A textually demonstrable constitutional commitment of the issue to coordinate political department (“The holders of public office at both [the state and regional] levels and in both the executive and legislative branches of government have the constitutional responsibility to determine what is necessary to provide a free and substantially equal educational opportunity . . . . Courts ‘must resist the temptation . . . . to enhance [their] own constitutional authority by trespassing upon an area clearly reserved as the prerogative of a coordinate branch of government.’” *Carroll-Hall*, 2007 WL 2938295, at *11); 2) The lack of judicially discoverable and manageable standards for resolving the issue (“In order to determine whether the allegations of the complaint are true, the court would have to receive evidence concerning and determining such questions as: What is a ‘high quality preschool’?; What are ‘appropriate class sizes’; . . . What makes up a ‘rigorous curriculum with a wide breath of courses?’ . . . Stating explicitly what is implicit in the plaintiffs’ argument makes it plain how far afield from the courts’ constitutional function of hearing and deciding cases their complaint would take the court.” *Id.* at *12); 3) The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion (“[M]any and varied issues of educational policy . . . are involved in defining a ‘substantive level of educational opportunity’ . . . . Decisions of the Supreme Court subsequent to *Horton I* demonstrate that Court’s reluctance to insert itself into educational policy decisions in the absence of clear constitutional or legislative authority to do so.” *Id.* at *6); and 4) The impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government without disregarding legislature’s exclusive authority. (“An examination of the complaint in this case makes it evident how deep an intrusion by the court into the constitutional prerogatives of the other branches of state government, to say nothing of local boards of education, would be necessary to grant plaintiffs the relief they seek.” *Id.* at *12.)

177. Judge Shorthall’s decision would have been telling had it merely attempted to masquerade justiciability concerns as “prudential cautions.” *Id.* at *12. However, “prudential cautions”—let alone justiciability—are not, in fact, a part of the traditional test used to define the contours of a constitutional right. *Id.* at *5. The precedent cited by Judge Shorthall identified “economic/sociological considerations,” not prudential cautions, as the sixth tool of a constitutional rights analysis. Moreover, the “tool” is not just different in name. *Id.* at *5. “Economic/sociological considerations” in the *Geisler* inquiry instructs courts to recognize constitutional prohibitions even beyond the letter of the constitutional provisions themselves, when allowing the act would—in practice—undermine the core right. For example, in *Geisler* the Supreme Court of Connecticut construed the exclusionary rule broadly to exclude all evidence derived from an unlawful warrantless entry into the home—including evidence obtained while the defendant is in lawful custody outside of the home—to eliminate incentives for the police to conduct unconstitutional search and seizures. *Geisler*, 610 A.2d at 1237.

178. Importantly, only the decisions in Oklahoma and Nebraska were final decisions before the state’s highest court. Each of the other cases—in Indiana, Colorado, Connecticut, and Oregon—is being or had been appealed. Future appellate court decisions may very well direct reluctant lower courts to take on these daunting cases—as they have in the past. See, e.g., *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724 (Idaho 1993); *Montoy v. State*, 62 P.3d 228 (Kan. 2003); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375 (N.H.)
CONCLUSION: MOVING BEYOND JUSTICIABILITY

The recent shift in outcomes for adequacy plaintiffs this Article describes—toward judicial restraint at the remedial phase, findings of nonjusticiability, and deference to legislative budget allocations—is instructive for those who look to the courts to fight for children in failing schools. The affirmative state right to education is a vital tool precisely because of the tendency of majority politics to leave behind the voiceless. Children growing up with grossly inadequate educational opportunities are exactly those citizens whom courts must protect. This Article has shown that continuing to tread the paths carved and refined by three decades of adequacy litigation has ceased to bring plaintiffs closer to the goal of producing tangible improvements for those children. Rather than producing desperately needed change in state education policy, recent adequacy litigation has encountered mounting resistance and fueled separation of powers fears that may ultimately leave the courts altogether unwilling to intervene in the area of education. In doing so, it is jeopardizing the very right that extends so much promise to this country’s children, no matter their race or socioeconomic background. Modern adequacy litigation—as we know it—may have run its course.

But, all is not lost. To the contrary, this precarious situation gives education advocates a mandate to think critically about the past evolution of the adequacy litigation strategy and creatively about the way forward. Courts have shown themselves reluctant to wholly relinquish their authority to adjudicate the education right and generally have not done so to this point.

One thing recent decisions make clear is that plaintiffs must find a way to recharacterize both the right and the remedy so that they cannot be boiled down to a demand for increased funding. Scholars and courts have already begun to explore a handful of legally and politically plausible nonmonetary alternatives. The recent South Carolina decision suggests one way forward.179 Because early education programs have been shown nearly to guarantee a boost in the academic achievement of at-risk students while leaving the legislature and localities with significant discretion in how to structure such a program, universal preschool is a particularly appealing nonmonetary remedy.180 That the South Carolina court elected to adopt a remedy of mandatory preschool shows how realistic an option it is to structure future litigation around such nonmonetary remedial requests. At the same time, universal preschool is certainly not the only possible remedy that could avoid throwing courts directly into the arena of appropriations. This example hints at a whole universe of cases that might target critical elements of an adequate education.

Nonmonetary remedies need not be incremental. In fact, one of the boldest

179. See Abbeville, 515 S.E.2d at 540-41.
proposals to date steers clear of the legislature’s power of the purse while arguing for drastic reform. Professor James Ryan has made the case that the education clauses enshrined in state constitutions guarantee children the right to a socio-economically integrated education. Similarly, others have argued that an “adequate” education requires carefully targeted school choice.

Finally, courts may be able to avoid directing fiscal and educational policy by instead focusing on the process by which that policy is determined. Scholars have proposed the judiciary play a role more akin to a “catalyst” or “backstop” than “dictator” in structural reform litigation. The most recent Wyoming decision provides an initial sense of what a process-focused remedial role might look like in the education context.

Identifying new litigation strategies that can work in the present climate will not be easy. Courts’ separation of powers concerns are deeply rooted and their relationships with their legislatures are complex. Structural reform litigation to some extent will inevitably demand that courts take an unusually active role in crafting a remedy. In trying to give wide berth to the legislature’s spending power, courts may risk encroaching on the prerogative of local control. However, unless courts are presented with avenues for remediation that do not force them to encroach on the legislature’s appropriations prerogative, they may allow the right to erode irrevocably by paying it lip service while abdicating their role in guaranteeing its substance.

There is another, perhaps an equally compelling reason for plaintiffs to look away from funding at this juncture. Whereas when equity suits first pressed for increased school funding, the lack of money was by far the greatest barrier to an adequate education, today this is no longer the case. Although adequate funding is undoubtedly one part of providing adequate educational

184. See Campbell County Sch. Dist. v. State, 181 P.3d 43, 59 (Wyo. 2008). In 2001, the Supreme Court handed down a very detailed remedy. Id. at 48. It instructed the legislature not only in the factors they needed to take into consideration in creating the formula used to calculate the cost of a constitutional education, but it also mandated explicit levels of funding for kindergarten and capital construction. Id. at 59. By contrast, in 2008, in deciding whether or not the legislature had fully complied, the Court looked—at times—to the process by which the legislature had decided on its course of action and the facts that informed its decisions. For example, the court’s assessment of the sufficiency of funding for at-risk students turned on the fact that the “state [had] exerted significant effort to develop a fair and accurate method of estimating the additional cost of addressing at-risk students.” Campbell County, 2008 WY at 52. Similarly, the Court upheld the level of funding for small schools because the State had replaced arbitrary cut-offs with an adjustment “revised on the basis of ...data and applied in a consistent manner.” Id. at 45, 61; see also Abbott v. Burke, 971 A.2d 989, 1007 (N.J. 2009) (scrutinizing methodology for creation of new state funding scheme before finding it constitutional).
opportunity, experience has taught that money alone will never be enough to guarantee that such opportunities are present. For both normative and strategic reasons, then, it is vital that adequacy campaigners shift their focus away from funding and toward more judicially enforceable iterations of the right.

There is no obvious answer to this problem, nor does this Article attempt to suggest one. Whether it be conceiving of education as a procedural right or framing it as the right to some minimum set of nonmonetary entitlements such as preschool, the way forward for education suits will no doubt be difficult. Despite the difficulty, however, path-breaking new strategies must be sought before they are found. Education is too important a part of this country’s promise and its future to ignore the signs that current litigation strategies have reached the end of their usefulness.