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JUSTICIABILITY OF STATE LAW SCHOOL SEGREGATION CLAIMS

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I. INTRODUCTION

Courts have always been the final repository of hope for parents and students who feel that their schools are consigning them to second-class citizenship.[1] In the United States, no modern educational injustice has a longer or more abusive history than racial segregation,[2] and its effective redress has proven all but impossible without occasional judicial intervention.[3] Now, concerned parents are finding new legal avenues towards desegregating their schools, by relying on state courts and constitutions.[4] But there are warning signs that those courts may decide—for the first time ever—that

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†† Jim Hilbert is an Associate Professor of Law at Mitchell Hamline School of Law.1. *See* MICHAEL A. REBELL, COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS 5 (2009) ("Only with court involvement has our nation made significant inroads into our intractable educational inequities."); Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 111 (2004) ("[T]he simple reality is that without judicial action equal educational opportunity will never exist.").

2. In the words of Martin Luther King, Jr., "[s]egregation is a glaring evil. . . . Segregation is nothing but slavery covered up with certain niceties of complexity." Martin Luther King, Jr., Facing the Challenge of a New Age, Address at the First Annual Institute on Non-Violence and Social Change, in Montgomery, Ala., (Dec. 3, 1956) *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 142 (James M. Washington ed., 1991). According to a recent study by the Government Accounting Office, not only is school segregation still a problem in American schools, it is increasing. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-345, K–12 EDUCATION: BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION 12 (2016), http://www.gao.gov/assets/680/676745.pdf [hereinafter GAO REPORT] ("Specifically, according to our analysis of [the Department of] Education's data, the number of schools where 90 to 100 percent of the students were eligible for free or reduced-price lunch and 90 to 100 percent of the students were Black or Hispanic grew by 143 percent from school years 2000-01 to 2013-14.").

3. In the absence of judicial intervention, policy makers seldom do anything to address segregated schools. *See* Erica Frankenberg & Chinh Q. Le, *The Post-*Parents Involved *Challenge: Confronting Extralegal Obstacles to Integration*, 69 OHIO ST. L.J. 1015, 1021 (2008) ("[S]cores of school districts and communities . . . have essentially offered no strategy for or even intention of addressing racial, ethnic, and socioeconomic isolation in their schools").

4. *See infra* text accompanying notes 102–57 (describing desegregation cases based on state constitutional law).

claims of racial segregation fall outside the purview of the judicial system.[5]

Over several decades, education advocates have developed "educational adequacy" lawsuits as a vehicle for educational reforms.[6] While the claims in these suits vary, they all share a basic structure.[7] Educational adequacy lawsuits assert that a state's constitution creates either a legislative obligation to provide an education with particular characteristics, or a fundamental right to education.[8] Plaintiffs in these suits then allege that some defect in a state's K–12 school system results in a failure to meet those requirements, or else violates that fundamental right. In doing so, the plaintiffs seek to override the legislatively-developed educational system to correct the inequity.[9]

Most often, the asserted defect is funding inequality or insufficiency, such as a state's school funding formula that prevents constitutionally adequate funding.[10] But other claims have proven viable as well. One such claim is a segregation claim. Segregation, particularly racial segregation, is the grandparent of all educational inequality in the United States.[11] As long as parents have been fighting for fairer schools, segregation has been at the heart of those fights.[12] Although few in number, educational adequacy segregation

5. *See* Lia Epperson, *Civil Rights Remedies in Higher Education: Jurisprudential Limitations and Lost Moments in Time*, 23 WASH. & LEE J. C.R. & SOC. JUST. 343, 372 (2017) ("As a result of shifts in the Supreme Court composition and social and political climate, the Supreme Court disfavors court-based remedies altogether, favoring only limited, forward-looking 'diversity' rationales.").

6. *See* William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1283–96 (2003) (detailing the history of such cases involving educational adequacy lawsuits).

7. *See infra* Part II.B–C (describing state-based education reform cases).

8. *Id.*

9. *See, e.g.*, Ken Gormley, *Education as a Fundamental Right: Building a New Paradigm*, 2 F. ON PUB. POL'Y 207, 214–15 (2006), http://forumonpublicpolicy.com/vol2no2.edlaw/gormley.pdf (cataloging cases where state supreme courts invalidated state education systems for violating state constitutions).

10. *See* Koski, *supra* note 6, at 1203–09 (discussing different theories of school finance litigation).

11. Racial segregation in our schools precedes the civil war and dates back to the early 1800s. The most famous early case upholding school segregation is from 1849 in Boston. *See* Roberts v. Boston, 59 Mass. 198, 205 (1849) (upholding a school system that maintained schools for the "exclusive instruction of white children").

12. *See id.*

lawsuits stand out.[13] They are a novel mechanism for attacking a morally and politically evocative problem against which previous legal remedies have sometimes fallen short.[14]

However, educational adequacy lawsuits have met resistance, and segregation claims are no exception.[15] In recent years, there have been indications that some courts have come to see the education system as a policy consideration for the legislature, resulting in the dismissal of education clause suits under the principle of justiciability.[16]

This article addresses the intersection of justiciability, education clause claims, and segregation. It will argue that education clause claims are often justiciable, and that education clause claims based on racial segregation are particularly justiciable.[17] Part I provides background on the historic roots of education policy and educational inequality.[18] Part II describes historical efforts to secure integrated and equitable education from federal and state courts.[19] Part III summarizes the doctrine of justiciability and analyzes cases in which it has been held to prevent education clause claims in state courts.[20] Part IV shows how the harms of segregation form a special case that supports the justiciability of education clause claims.[21]

II. BACKGROUND ON SCHOOLS

A. Legal Basis of Public Education

Education has always been one of the core functions of state government.[22] While the word "education" does not appear in the

13. *See* Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83, 95 n.53 (2010) (discussing educational adequacy lawsuits).

14. *See infra* text accompanying notes 100–01 (discussing the failure of federal courts to effectively address school segregation).

15. *Id.*

16. *See* Simon-Kerr & Sturm, *supra* note 13, at 95–103 (chronicling growing justiciability concerns in education adequacy litigation).

17. *See infra* Part V.

18. *See infra* Part I.

19. *See infra* Part II.

20. *See infra* Part III.

21. *See infra* Part IV.

22. *See* Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a State."); Brown v. Bd. of Educ., 347 U.S 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and

federal Constitution,[23] all fifty states have explicit language relating to education in their state constitutions.[24] States regard education not just as an imperative state function, but revere it as uniquely important among the state's other responsibilities.[25] As the Vermont Supreme Court recognized, "[o]nly one governmental service—public education—has ever been accorded [such] constitutional status."[26] Other states share this same perspective.[27] Because the federal Constitution does not contain an education clause, there is no federal constitutional supremacy limiting what states can derive from their state constitutions.[28]

State constitutions require legislatures to create education systems.[29] There is considerable variation among the states in their

local governments."). State supreme courts agree. As the West Virginia Supreme Court held, "[o]ur Constitution manifests, throughout, the people's clear mandate to the Legislature, that public education is a *prime* function of our State government." Pauley v. Kelly, 255 S.E.2d 859, 884 (W. Va. 1979). State constitutions often clearly articulate such mandates. For example, the Washington Constitution states "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders." WASH. CONST. art. IX, § 1.

23. *See Pauley*, 255 S.E.2d at 681 ("[T]here is, of course, no specific reference to public education in the United States Constitution . . . ."); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education is not among the rights afforded explicit protection under our Federal Constitution.").

24. *See* Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1087 n.532 (2003) (listing all fifty states' education clauses); *see also* Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814 (1985) ("The most direct sources of the duty to educate are state constitutions.").

25. *See* Shaman, *supra* note 24 at 1088 n.532 ("[Education is] the essential prerequisite that allows our citizens to be able to appreciate, claim and effectively realize their established rights.").

26. Brigham v. State, 692 A.2d 384, 392 (Vt. 1997).

27. *See, e.g.*, Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 492 (Ark. 2002) ("[E]ducation has been of paramount concern to the citizens of this state since the state's inception is beyond dispute. It is safe to say that no program of state government takes precedence over it."); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1356 (N.H. 1997) ("[P]ublic education differs from all other services of the State. No other governmental service plays such a seminal role in developing and maintaining a citizenry."); McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993) ("The crux of the Commonwealth's duty lies in its obligation to educate all of its children.").

28. *See* Gormley, *supra* note 9, at 213 ("The federal Constitution sets the floor, beneath which states may not fall. But a state may always go beyond that floor, and grant more expansive rights under the state constitution.").

29. *See, e.g.*, MINN. CONST. art. XIII, § 1 (requiring the legislature to "establish

constitutional language and the way they treat educational rights.[30] At one end of the spectrum are the twenty-one state "establishment provisions," which simply require states to establish a free public school system "and nothing more."[31] In the middle are eighteen state "quality provisions," which direct states to provide an educational system "of a specific quality."[32] Further along that continuum, there are six state "strong mandate" provisions that both establish a level of quality and provide a strong mandate to achieve it.[33] Finally, at the

a general and uniform system of public schools").

30. State education clauses can be divided into four categories based upon the level of duty imposed by the text. Ratner, *supra* note 24, at 814 n.143–46 (citing Erica Black Grubb, *Breaking the Language Barrier: The Right To Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 66–70 (1974)); *see also* William E. Thro, *Judicial Humility: The Enduring Legacy of* Rose v. Council for Better Education, 98 KY. L.J. 717, 725 (2010) [hereinafter Thro, *Judicial Humility*] (refining Grubb and Ratner's basic framework). *See generally*, William E. Thro & Carlee Poston Escue, *Doubt or Deference: Comparing the South Dakota and Washington School Finance Decisions*, 281 EDUC. L. REP. 771, 771 n.3 (2012).

31. *See* Thro, *Judicial Humility*, *supra* note 30, at 726 (listing states with establishment provisions for education in their constitutions). A typical example of an establishment provision clause is Tennessee's, which states that "[t]he General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools." TENN. CONST. art. XI, § 12. *See* Ratner, *supra* note 24, at 815 ("Provisions in the first group contain only general education language and are exemplified by the Connecticut Constitution: 'There shall always be free public elementary and secondary schools in the state.'" (citing CONN CONST. art. VIII, § 1)).

32. *See* Thro, *Judicial Humility*, *supra* note 30, at 726. *See, e.g.*, MINN. CONST. art. XIII, § 1 ("The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state."); *see also* Ratner, *supra* note 24, at 815 ("Provisions in the second group emphasize the quality of public education."). The West Virginia Supreme Court of Appeals discussed and subcategorized this type of provision at length. *See* Pauley v. Kelly, 255 S.E.2d 859, 865–78 (W. Va. 1979). Generally, the specific quality includes either "thorough," "efficient," or both. *Id.* As the West Virginia Supreme Court of Appeals observed, Maryland, Minnesota, New Jersey, Ohio, and Pennsylvania require "thorough and efficient" systems; Colorado, Idaho, and Montana require "thorough" systems; and Arkansas, Delaware, Illinois, Kentucky, and Texas require "efficient" systems. *Id.* at 865.

33. *See* Thro, *Judicial Humility*, *supra* note 30, at 726. Provisions in the third group contain a stronger and more specific education mandate than those in the first and second groups. Ratner, *supra* note 24, at 815. A typical clause is the Rhode Island Constitution, which requires the legislature "to promote public schools and to adopt all means which they may deem necessary and proper to secure . . . the

far end are five state "high duty provisions," which require states to place education "above other governmental functions such as highways or welfare."[34]

Importantly, regardless of the variations in the textual language, every state constitution imposes some duty on the state to provide a minimum level of public education to its children.[35] Even states with arguably the weakest provisions require, at a minimum, that the state "maintain[s] free public schools."[36] For example, the Tennessee Constitution states that "[t]he General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools."[37] States with constitutional text on the other end of the spectrum go much further. The Washington Supreme Court explained that its constitutional provision "does not merely seek to broadly declare policy, explain goals, or designate objectives to be accomplished. It is declarative of a constitutionally imposed *[d]uty*."[38]

In addition to the legislative duties related to education, some states have determined that education is a fundamental right. However, there is again variation among states.[39] Fifteen states, for

advantages . . . of education." R.I. CONST. art. XII, § 1. *See* CAL. CONST. art. IX, § 1 ("A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.").

34. Thro, *Judicial Humility*, *supra* note 30, at 726. The provisions in the fourth group contain the strongest commitment to education. Ratner, *supra* note 24, at 816. An example is the Washington State Constitution's education clause, which provides that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex." WASH. CONST art. IX, § 1. Although other states have education clauses that qualify for this category, Washington is the only one that makes the duty "paramount." *See* Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 84 (Wash. 1978).

35. *See* Ratner, *supra* note 24, at 816 (explaining how "[a]ll four categories [of constitutional text] impose duties on the state to provide some form of public education").

36. *Id.*

37. TENN. CONST. art. XI, § 12; *see also* Ratner, *supra* note 24, at 816 (citing the New York and Connecticut constitutions).

38. *Id.* at 816 (quoting *Seattle School Dist. No. 1*, 585 P.2d at 85 (emphasis added)). *See* GA. CONST. art. VIII, § 1 ("The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia.").

39. There also appears to be at least a loose relationship between the text of the constitution and whether state courts have found education to be a fundamental right. *See* Thro, *Judicial Humility*, *supra* note 30, at 727 ("[I]f the text of the

example, already consider education a fundamental right through judicial action or constitutional amendment,[40] while twenty-two states have interpreted their education clause to confer an affirmative obligation on the state to provide an adequate education.[41] Without exception, the right to education under state constitutional law has required a minimal guarantee of quality education.[42]

B. Growth of Inequality in Public Education

Rights and obligations aside, in practice, schools often fail to provide equal opportunity for quality education to students.[43] Racial disparities, present since the days of formal statutory segregation, continue to be both dramatic and entrenched.[44] For example, African American students' achievement on the National Assessment of Educational Progress lags twenty-seven scaled points behind white students in reading and thirty-one points in math.[45]

constitution is nothing more than an establishment provision, then there is no quality standard or fundamental right.").

40. *See* Gormley, *supra* note 9, at 219 ("The highest courts of at least fourteen states, at one time or another, have declared that education is a fundamental right under their state constitutions."). The list includes Alabama, Arizona, California, Connecticut, Kentucky, Minnesota, New Hampshire, North Dakota, Tennessee, Virginia, West Virginia, Wisconsin, and Wyoming. *Id.* at 219 n.63. "Florida amended its Constitution in 1998 to specifically provide that 'the education of children is a fundamental value of the people of the State of Florida.'" *Id.* (quoting FLA. CONST. art. IX, § 1). Professor Gormley also notes that the Pennsylvania Supreme Court has stated that education is a fundamental right under the State Constitution. *Id.* (citing Sch. Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n, 667 A.2d 5, 9 (Pa. 1995)). But that court later seemed to retreat from that position. *Id.* (citing Marrero ex rel. Tabalas v. Commonwealth, 739 A.2d 110, 113 (Pa. 1999)).

41. Anne Gordon, *California Constitutional Law: The Right to an Adequate Education*, 67 HASTINGS L.J. 323, 351–52 (2016). Importantly, "only a minority of states have found that their education clauses confer no substantive right." *Id.* at 352.

42. *See id.* at 352–53 ("Where a state's high court has found a right to education, none has found that right to exist without a guarantee of quality.").

43. *See* Derek Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C.L. REV. 373, 374 (2012).

44. *Id.*

45. *Id.* (citing U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2009, app. A at 153 tbl.A-12-2, 157 tbl.A-13-2 (2009)), https://nces.ed.gov/pubs2009/2009081.pdf. In a slightly earlier analysis, researchers found little to no change in math and reading achievement gaps for the previous fifteen years. *See* U.S. DEP'T OF EDUC.,THE CONDITION OF EDUCATION 2007, 39, 144 tbl.14-1 (2007),

This disparity is equivalent to two to three years of learning.[46] The so-called "achievement gap"[47] between white students and most students of color has been substantial for decades.[48]

Segregated schools are largely to blame for these disparities.[49] A recent study by the United States Government Accounting Office found that such disparities along racial lines "are particularly acute among schools with the highest concentrations" of students of color and low-income students.[50] Students of color who attend segregated schools score lower on achievement tests and other learning assessments.[51] Segregated schools have lower graduation rates, lower

https://nces.ed.gov/pubs2007/2007064.pdf.

46. *See* CHRISTOPHER LUBIENSKI & SARAH THEULE LUBIENSKI, NAT'L CTR. OF PRIVATIZATION IN EDUC., CHARTER, PRIVATE, PUBLIC SCHOOLS AND ACADEMIC ACHIEVEMENT: NEW EVIDENCE FROM NAEP MATHEMATICS DATA 5 (2006), http://www.ncspe.org/publications_files/OP111.pdf (explaining how to interpret achievement gaps on the NAEP). Stated differently, African-American eighth-graders are earning scores equivalent to white students in sixth grade. Black, *supra* note 43, at 404.

47. *See* Cassandra Abbott, Note, *The "Race to the Top" and the Inevitable Fall to the Bottom: How the Principles of the "Campaign for Fiscal Equity" and Economic Integration Can Help Close the Achievement Gap*, 2013 B.Y.U. EDUC. & L.J. 93, 113 n.137 (2013) ("The term 'achievement gap' has a derogatory connotation in the sense that it implies that the 'gap' is largely a student-centered problem.").

48. *See* Amy Stuart Wells et al., *The Space Between School Desegregation Court Orders and Outcomes: The Struggle to Challenge White Privilege*, 90 VA. L. REV. 1721, 1721–22 (2004).

49. Decades of data confirm segregation undermines student achievement. *See* GARY ORFIELD & ERICA FRANKENBERG, CIVIL RIGHTS PROJECT, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE 37 ("The consensus of nearly 60 years of social science research on the harms of school segregation is clear: separate remains extremely unequal."). Of course, other forms of racism are responsible as well. As just one example, the federal government recently concluded that racism was a "real problem" in contributing to the racial disparities in student discipline. *See* U.S. DEP'T. OF JUSTICE & U.S. DEP'T. OF EDUC., JOINT "DEAR COLLEAGUE" LETTER ON NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 4 (2014) ("[I]n our investigations we have found cases where African-American students were disciplined more harshly and more frequently because of their race than similarly situated white students. In short, racial discrimination in school discipline is a real problem.").

50. GAO REPORT, *supra* note 2, at 42.

51. *See* Roslyn Arlin Mickelson & Martha Bottia, *Integrated Education and Mathematics Outcomes: A Synthesis of Social Science Research*, 88 N.C. L. REV. 993, 1043 (2010); Stephanie Southworth, *Examining the Effects of School Composition on North Carolina Student Achievement Over Time*, 18 EDUC. POL'Y ANALYSIS ARCHIVES 1, 24 (2010); Eric Hanushek et al., *New Evidence About Brown v. Board of Education: The*

college attendance rates, and students from such schools are less likely to obtain a four-year degree.[52]

One reason for segregated schools' negative impact on student achievement is the disparity in resources.[53] In a joint policy paper on the importance of diversity, the United States Departments of Education and Justice acknowledged that segregated schools are far more likely to have fewer and lower quality educational resources, such as fewer classroom materials, deficient technology and facilities, and less challenging curricula.[54] Segregated schools are also more likely to be staffed with less qualified teachers and suffer a higher degree of teacher turnover.[55]

However, resource disparities alone do not account for all the harms of racial segregation.[56] Segregation also reinforces negative

Complex Effects of School Racial Composition on Achievement, 27 J. LAB. ECON. 349, 351 (2009).

52. *See* Suzanne E. Eckes, Aaron J. Butler, and Natasha M. Wilson, *Brown v. Board of Education's 60th Anniversary: Still No Cause for a Celebration*, 311 EDUC. L. REP. 1, 36 (2015) (discussing the correlation between segregated schools and college attendance); ORFIELD & FRANKENBERG, *supra* note 49, at 39 (discussing the correlation between segregated and high school dropout and college success). Segregated education also impacts student attitudes and other benefits. *See* john a. powell, *Segregation and Education Inadequacy in the Twin Cities Public Schools*, 17 HAMLINE J. PUB. L. & POL'Y 337, 343 (1996) ("Homogenous education fails to prepare students of all races for life in a multicultural society. Segregated schools deny all students the benefit of exposure to diverse views and perspectives."). Students in segregated schools are separated from important networks that have lasting impacts on future employment opportunities. *See* Derek Black, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 953 (2002) ("Attending racially diverse schools opens up social networks to racial minorities, which often lead to additional job opportunities. As these benefits increase, they will perpetuate themselves naturally, and further integrate the job market and social networks.").

53. *See* U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS 1 (2011) [hereinafter DOJ & DOE JOINT GUIDANCE], http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html. Students in segregated schools are also subjected to more suspensions and disciplinary actions. *See* GAO REPORT, *supra* note 2, at 21–24.

54. *See* DOJ & DOE JOINT GUIDANCE, *supra* note 53, at 1.

55. *Id.*

56. PHILIP TEGELER, ROSLYN ARLIN MICKELSON & MARTHA BOTTIA, NAT'L COALITION ON SCH. DIVERSITY, RESEARCH BRIEF: WHAT WE KNOW ABOUT SCHOOL INTEGRATION, COLLEGE ATTENDANCE, AND THE REDUCTION OF POVERTY 1 (2010), http://school-diversity.org/pdf/DiversityResearchBriefNo4.pdf (discussing how students at integrated schools have higher education aspirations and lower levels of

social and interpersonal mechanisms which harm children.[57] For example, segregated schools lack access to professional and academic social networks, which are a critical aspect in educational advancement, college attendance, and ultimately employment.[58] In addition, segregation reduces children's exposure to people from different social and ethnic backgrounds, which impairs their ability to form cross-group or interracial friendships and working relationships.[59]

Segregation's impact on student achievement is, in part, a consequence of the strong relationship between racial isolation and poverty concentration.[60] As many as half of all students in highly racially segregated schools are in schools that are also impacted by concentrated poverty.[61] Concentrated poverty, on its own, negatively impacts educational achievement.[62] For instance, a study by the National Center for Education Statistics shows lower achievement among students in high poverty schools.[63] In 2007, the average

violence than their peers at racially-isolated schools).

57. *Id.*

58. *Id.*

59. *See* CAROLE LEARNED-MILLER, NAT'L COALITION ON SCH. DIVERSITY RESEARCH BRIEF: HOW TO SUPPORT THE SOCIAL-EMOTIONAL WELL-BEING OF STUDENTS OF COLOR (2017), http://school-diversity.org/pdf/DiversityResearchBrief11.pdf.

60. *See, e.g.*, GARY ORFIELD ET AL., BROWN AT 62: SCHOOL SEGREGATION BY RACE, POVERTY AND STATE, 1–2 (2016) (describing the link between the two and finding that "[m]any schools are affected by both at the same time. . . ."); Kristi L. Bowman, *A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools*, 1 DUKE F. FOR L. & SOC. CHANGE 47, 55–56 (2009) ("[T]he more black and brown a school's population is, the more likely it is that students in that school are predominantly poor.").

61. *See* ORFIELD & FRANKENBERG, *supra* note 49, at 15. "This means that these students face almost total isolation not only from white and Asian students but also from middle class peers as well." *Id.*

62. *See* Richard D. Kahlenberg, *Socioeconomic School Integration*, 85 N.C. L. REV. 1545, 1547 (2007) ("Researchers have consistently found that schools with high concentrations of poverty present, on average, a very difficult environment for student learning."); GAO REPORT, *supra* note 2, at 8 ("An extensive body of research over the past 10 years shows a clear link between schools' socioeconomic (or income) composition and student academic outcomes. That is, the nationally representative studies we reviewed (published from 2004 to 2014) showed that schools with higher concentrations of students from low-income families were generally associated with worse outcomes, and schools with higher concentrations of students from middle- and high-income families were generally associated with better outcomes.").

63. *See* The CONDITION OF EDUCATION 2007, *supra* note 45, at 18.

reading and math scores for fourth- and eighth-grade students in schools where fifty-one to seventy-five percent of students were eligible for free or reduced-price lunches was roughly two grade levels lower than students in schools where only eleven to twenty-five percent of students were eligible for discounted lunches.[64] While a student's individual poverty status has some impact on achievement, the overall level of poverty in the school is a more powerful contributor.[65] The combination of both racial and economic segregation creates significant barriers to learning for students of color trapped in "double segregation."[66]

III. CORRECTING SCHOOL DISPARITIES WITH LITIGATION

A. Federal Courts

Segregation has been at the center of school litigation since at least 1930.[67] That year, the NAACP commissioned the "Margold

64. *Id.*

65. *See* Robert A. Garda, Jr., *Coming Full Circle: The Journey from Separate but Equal to Separate and Unequal Schools*, 2 DUKE J. CONST. L. & PUB. POL'Y 1, 44 (2007) (reviewing studies and concluding that "the socioeconomic status of the student body is the most important, school-related factor for academic success, even more important than an individual student's wealth"); Kahlenberg, *supra* note 62, at 1549 ("Low-income students do not typically perform as well academically as middle class children, with one striking exception: low-income students attending middle class schools perform better, on average, than middle class students in high-poverty schools.").

66. ORFIELD ET AL., *supra* note 60, at 1. For example, a recent study analyzed more than 100 million test scores from 2009 to 2012 of public school children, grades three through eight, in over 300 metropolitan areas to determine whether it is "the racial or socioeconomic composition of schools that drives the persistent association between segregation and achievement inequality." Sean F. Reardon, *School Segregation and Racial Academic Achievement Gaps*, 2 RUSSELL SAGE FOUND. J. SOC. SCI. 34, 35 (2016). The resulting data shows "an association between racial school segregation and achievement gaps, net of many socioeconomic differences between white and minority families . . . [which is] driven by the strong association between racial segregation per se and racial differences in school poverty." *Id.* at 50. The study concludes that "the racial difference in the proportion of students' schoolmates who are poor is the key dimension of segregation driving th[e] association [between segregation and achievement gaps]." *Id.* at 19. Of course, both aspects of this segregation have independent impacts. Racial segregation brings its own special sort of negative impact on learning. *See* powell, *supra* note 52, at 344 ("[E]conomic accounts do not tell the whole story. . . . [R]acial segregation creates harms independent of economic segregation.").

67. *See* Leland B. Ware, *Setting the Stage for Brown: The Development and*

Report," which carefully plotted a legal campaign against educational segregation as the first step in a decades-long battle against Jim Crow in the courts.[68] For years, plaintiffs attacking school segregation were forced to rely on federal courts and federal constitutional rights, for the simple reason that they could not expect a fair hearing from the state courts which enforced the very Jim Crow laws they were fighting.[69]

The modern root of school desegregation law is *Brown v. Board of Education*.[70] In *Brown*, the Supreme Court found that "[s]eparate educational facilities are inherently unequal," and that intentional government operation of such facilities violates equal protection principles.[71] The correct application of these principles was unaddressed in the *Brown* decision, and follow-up cases created opportunities for districts to delay implementation.[72] These omissions, combined with "massive resistance" in some parts of the

Implementation of the NAACP's School Desegregation Campaign, 1930–1950, 52 MERCER L. REV. 631, 632 (2001).

68. *Id.* at 632, 640 (detailing the efforts and describing the Margold Report as "the foundation of the NAACP's strategy against segregation"); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, 27–28 (1987) (explaining how the Margold Report convinced the NAACP to attack segregation directly rather than argue for equalization of funding).

69. *See* A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 521 (1990) (documenting "court-enforced racism" in Jim Crow-era courtrooms, including "refusal to accord black witnesses the civilities customarily accorded to white witnesses; attacks on the credibility of blacks as witnesses or accuseds; prosecutorial appeals to fear of violence by blacks; reliance on claims that racial minorities have a propensity toward violence; use of racist comments; and overtly racist conduct by judges.").

70. 347 U.S. 483 (1954).

71. *Id.* at 495 ("Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

72. Much of the blame lies with the Court's declaration in *Brown v. Board of Education* 349 U.S. 294 (1955) [*Brown II*], that district courts issue "orders and decrees . . . as are necessary and proper to admit to public schools on a racially nondiscriminatory basis *with all deliberate speed*. . . ." *Id.* at 301 (emphasis added). The phrase "with all deliberate speed," in particular, was taken by many districts as giving permission to equivocate on the issue. Indeed, ten years after *Brown*, schools were nearly as segregated as they were before the *Brown* decision. See ORFIELD & FRANKENBERG, *supra* note 49, at 4 ("In the great majority of the several thousand southern districts nothing had been done.").

South and apathy about integration elsewhere, ensured that progress on desegregation remained essentially nonexistent in many areas for more than a decade after *Brown*.[73] By the late 1960s, the courts began confronting the lack of progress on school integration.[74] In doing so, the courts expanded school desegregation law in unique and unprecedented ways.[75]

Federal desegregation law is built out of the need to forbid, prevent, and remedy the operation of an intentionally segregated school system—or what became known as a "dual system"—in violation of equal protection rights as established in *Brown*.[76] However, state and local resistance to judicial interventions became so extraordinary and widespread that almost every aspect of these interventions was eventually adjudicated before the United States Supreme Court.[77] Consequently, the Court was forced to develop a robust, highly practical body of law that dealt very specifically with almost every dimension of the elimination of segregation in schools.[78]

The Supreme Court has defined "dual systems" broadly.[79] The term does not describe any single policy, or even a constellation of

73. *See generally* Robert R. Merhige, Jr., *The Promise of Equality: Reflections on the Post-Brown Era in Virginia*, 39 U. RICH. L. REV. 11 (2004); Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After* Brown, 89 NW. U. L. REV. 92 (1994).

74. *See generally* Charles L. Zelden, *From Rights to Resources: The Southern Federal District Courts and the Transformation of Civil Rights in Education, 1968–1974*, 32 AKRON L. REV. 471, 471–72 (1999).

75. *Id.* at 479–80 (discussing the "commitment within the federal judicial hierarchy to use judicial powers to achieve 'equality of results' in civil rights matters"). Federal courts focused "their initial efforts on education," using "the medium of race-based reallocation of resources. *Id.* "The effect of this shift in Civil Rights enforcement priorities away from the individual toward the group—and from color-blind nondiscrimination to preferential (i.e. color-based) discrimination—was explosive." *Id.*

76. *See, e.g.*, Green v. Cty. Sch. Bd., 391 U.S. 430, 435 (1968) ("It was such dual systems that, 14 years ago, *Brown I* held unconstitutional, and, a year later, *Brown II* held must be abolished. . . .").

77. *See* Zelden, *supra* note 74, at 472 ("Few in the South accepted the Supreme Court's offer in *Brown II* of a voluntary process of desegregation in 1955, and this position of 'massive opposition' to civil rights reforms continued into the 1960s.").

78. *See* A.B.A., TIMELINE OF SUPREME COURT SCHOOL-DESEGREGATION CASES FROM *BROWN* TO *FISHER*, A.B.A. ANNUAL MEETING (2013), https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/aba-annual2013/written_materials/20_lessons_in_leadership.authcheckdam. pdf.

79. *See, e.g.*, Bd. of Educ. v. Dowell, 498 U.S. 237, 245–46 (1991).

policies, but instead the practice (varying in its particulars across regions or districts) of educating children of different races separately.[80] In a typical school desegregation case, the finding that a government entity operates a dual system acts as a starting pistol which creates an obligation for the entity—or, if need be, the courts themselves—to dismantle the dual system and create a "unitary" system.[81] While intentional ("*de jure*") segregation is the only segregation proscribed by the federal Constitution, dual systems were treated in their totality as *de jure* segregation.[82]

The United States Supreme Court held that dual systems must be eliminated "root and branch."[83] They are not cured until authorities, or the courts themselves, have purged both the root of intentional government discrimination and the branched-off, second-order effects that cause additional harm and reinforce the segregation.[84] Thus, after a dual system is identified, its transformation into a unitary district typically requires the elimination of most forms of segregation throughout the system, regardless of whether the proximate cause of that segregation is government policy.[85]

Despite this duty to eliminate dual systems, the Supreme Court placed practical limitations on school segregation remedies, stating that while vestiges of prior discrimination must be eliminated,

80. *See, e.g.*, *id.* at 262–64 (Marshall, J., dissenting) ("The evil to be remedied in the dismantling of a dual system is the '[r]acial identification of the system's schools.'" (quoting Green v. Cty Sch. Bd., 391 U.S. 430, 435 (1968))).

81. *See, e.g.*, *id.* at 246 ("Courts have used the terms 'dual' to denote a school system which has engaged in intentional segregation of students by race, and 'unitary' to describe a school system which has been brought into compliance with the command of the Constitution.").

82. *See, e.g.*, *Green*, 391 U.S. at 437–38 ("School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.").

83. *Id.*

84. *See id.* at 435; *see also* Freeman v. Pitts, 503 U.S. 467, 472 (1992) (holding it is the "school district's mandatory responsibility to eliminate all vestiges of a dual system.").

85. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 213 (1973) ("If the District Court determines that the Denver school system is a dual school system, respondent School Board has the affirmative duty to desegregate the entire system root and branch."); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) ("The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."); *Green*, 391 U.S. at 435.

districts do have the opportunity to prove that some racial concentrations are not a consequence of state action.[86] Concentrations not rooted in government discrimination need not be undone under this standard.[87] The Supreme Court also created strong policy limitations, most notably limiting the extension of remedies across district borders in federal suits.[88]

Once a court determines a school system is a dual system, its equitable powers to effect a remedy are expansive.[89] If the school system's educational authorities are found to have taken any degree of segregative discrimination, segregation elsewhere in the same system is presumed intentional.[90] Potential remedies include: arranging for student transportation, monitoring school openings and closures, monitoring teachers and hirings, and adjusting attendance boundaries or zones.[91] Until unitary status is achieved, these and other mechanisms remain available.[92]

86. *See, e.g.*, *Swann*, 402 U.S. at 26 ("In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law.").

87. *See id.* at 16 (providing that the required "task is to correct . . . the condition that offends the Constitution"). However, when segregation occurs in a system where the vestiges of state-sponsored discrimination are elsewhere apparent, the burden of demonstrating that there is no connection between the two is significant. *See Keyes*, 413 U.S. at 211 ("[A] connection between past segregative acts and present segregation may be present even when not apparent and . . . close examination is required before concluding that the connection does not exist.").

88. Perhaps the most-criticized desegregation decision has been *Milliken v. Bradley*. 418 U.S. 717, 752–53 (1974) (holding that federal desegregation remedies cannot include outlying districts not party to the case at hand, absent a showing that the outlying districts enacted policies with a significant segregative effect in the central district). By frequently eliminating the ability of segregation plaintiffs to incorporate whiter and more affluent suburbs, *Milliken* forced inner-city districts to, in effect, desegregate themselves—something that became impossible after large-scale white flight. *See, e.g.*, Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 UCLA L. REV. 364, 409–10 (2015).

89. *See, e.g.*, *Swann*, 402 U.S. at 16 ("In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.").

90. *Keyes*, 413 U.S. at 208 ("[A] finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious.").

91. *Swann*, 402 U.S. at 20–31.

92. *Id.*

The Supreme Court laid out rules for when unitary status has been achieved.[93] Factors include whether the district or school system has engaged in good-faith compliance with their constitutional obligations and whether vestiges of past discrimination have been eliminated "to the extent practicable."[94] This is a searching inquiry in which courts look "not only at student assignments, but 'to every facet of school operations—faculty, staff, transportation, extra-curricular activities and facilities.'"[95]

After finding a dual system, the United States Supreme Court's school segregation rules have the practical effect of reducing the importance of the distinction between *de jure* (intentional) and *de facto* (unintentional) segregation.[96] While the end goal remains the unraveling of government-backed segregation, the Supreme Court has generally recognized that the distinction between these concepts can easily blur at the margins.[97] The Supreme Court adopted pragmatic rules that tend to, whenever plausible, treat existing racial divides as an outgrowth of historic discrimination.[98] Doing so was a critical step in developing functional rules for effectuating desegregation; other approaches could have been hamstrung by continual assertions that easily-observed racial isolation was, nonetheless, the product of private choice.[99] In *Keyes v. School District*

93. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 487, 489–91 (1992); Bd. of Educ. v. Dowell, 498 U.S. 237, 246–50 (1991).

94. *Dowell*, 498 U.S. at 249–250 ("The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.").

95. *Id.* at 250 (citing Green v. Cty. Sch. Bd., 391 U.S. 430, 435 (1968)).

96. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 214–17 (1973) (Douglas, J., concurring).

97. This is because, after an intentionally segregated district is identified, the Supreme Court has strongly suggested that any existing segregation in that district should be eliminated as presumptively unconstitutional. For example, the Court has said that although schools where all students are of one race are not intrinsically forbidden, they are targets for desegregation. *See, e.g.*, *Swann*, 402 U.S. at 26 ("The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools.").

98. *Green*, 391 U.S. at 435–36 (discussing how the goal of the Court in these cases has evolved from "the concern . . . with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children" to "[t]he transition to a unitary, nonracial system of public education.").

99. *See* Missouri v. Jenkins, 515 U.S. 70, 116 (1995) (Thomas, J., concurring).

No. 1, the high-water mark for expansive application of *Brown*, the Court stated: "We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of de jure segregation as to each and every school or each and every student within the school system."[100]

Despite the availability of powerful desegregation remedies and the persistence of segregation, enforcement of federal desegregation rules has waned greatly.[101] Access to these remedies relied on plaintiffs successfully persuading a court that a district is being operated as a dual system.[102] Because overt racial assignment policies and other obvious manifestations of discrimination have become less frequent, proving the existence of a dual system has become more challenging.[103] In other words, an array of powerful legal tools for evaluating and reducing school segregation remain available,[104] but lie dormant as federal Equal Protection claims become harder to prove.

B. Shifting to State Law Claims

The "school finance" litigation movement developed largely because of the lack of progress in desegregation as litigators shifted the focus from the demographics of schools to the disparities in

100. 413 U.S. at 200.

101. For example, one 2000 study found that while dozens of desegregation orders remained open across the country, "most cases suffer from extreme neglect—little activity will occur for years, if not decades." Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1160 (2000).

102. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 200 (1973).

103. Roslyn Arlin Mickelson, *Achieving Equality of Educational Opportunity in the Wake of Judicial Retreat from Race Sensitive Remedies: Lessons from North Carolina*, 52 AM. U. L. REV. 1477, 1478–79 (2003).

104. *See, e.g.*, Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America,* 83 U. CHI. L. REV. 1329, 1393–1411 (2016); Krista Kauble, *Litigating Keyes: The New Opportunity for Litigators to Achieve Desegregation,* 31 CHICANA/O-LATINA/O L. REV. 103 (2012) (discussing how *Keyes* serves as a unique tool for litigators seeking reform on behalf of Latinx students); Kimberly C. West, *A Desegregation Tool That Backfired: Magnet School and Classroom Desegregation,* 102 YALE L.J. 2567, 2575–77 (1993).

funding between schools.[105] The first "wave"[106] of this resources-based litigation relied on federal equal protection theories.[107] In particular, the success of *Serrano v. Priest*,[108] in which the California Supreme Court held that the state's school finance system violated the equal protection guarantees of both the California and United States Constitutions, inspired similar lawsuits, in more than thirty other states, mostly based on the federal Constitution.[109]

Two years after *Serrano*, the United States Supreme Court in *Rodriguez* ended the use of federal courts for addressing the wide funding disparities between wealthy and low-income districts, concluding the first wave of school finance litigation.[110] Litigators

105. *See* James E. Ryan, *Sheff, Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 532 n.14 (1999) ("School finance litigation began in the late 1960s and early 1970s, at a time when the slow pace of desegregation was causing some civil rights activists to question the efficacy of desegregation as a tool to improve the educational opportunities of [students of color]."). School desegregation and school finance litigation shared the same goal of improving educational opportunity for low-income students of color. *See* Goodwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 L. & INEQ. 81, 81 (2006) ("One strategy involves redistributing schoolchildren; the other involves redistributing money. One focuses on race; the other focuses on resources. Despite these differences, both are united by a common purpose of improving educational opportunity for the most disadvantaged children—in particular, those who are minority and poor.").

106. The idea of categorizing school finance litigation into "waves" originated with William Thro, a long-time education lawyer and legal scholar on school litigation. *See* William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 222–32, 250 (1990). *But see* Koski, *supra* note 6, at 1188 (noting how the so-called "waves" are not actually such distinct categories).

107. Kamina Aliya Pinder, *Reconciling Race-Neutral Strategies and Race-Conscious Objectives: The Potential Resurgence of the Structural Injunction in Education Litigation,* 9 STAN. J.C.R. & C.L. 247, 256–57 (2013).

108. 487 P.2d 1241, 1244 (Cal. 1971) (finding that California's school financing system "invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors").

109. *See* Betsy Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 1977 DUKE L.J. 1099, 1101 n.11 (1977) (citing nine decisions throughout the country between 1971 and 1973 that illustrated the success of the *Serrano* litigation strategy).

110. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41 (1973) ("[W]e continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues."); *cf.* Erwin Chemerinsky, *Making Schools More Separate and Unequal:* Parents Involved in

responded by linking school finance litigation to state constitutional provisions, something explicitly suggested by both Justice Marshall (in his *Rodriguez* dissent)[111] and Justice Brennan (in a law review article).[112] The "second wave" of litigation again focused on unequal spending between districts, but this time using "education clauses" and state constitutional principles.[113] But the second wave included more losses than wins,[114] and even the few victories produced rather mixed results, often leading to vague remedies overly deferential to noncompliant legislatures.[115] In light of the losses and in response to the concerns about the lack of compliance by state legislatures, school finance cases began to wane in the 1980s[116]—but this was only a momentary pause.

The "third wave" shifted focus to the "adequacy" of education, rather than the "equity" of funding, with one state court declaring

Community Schools v. Seattle School District No. 1, 2014 MICH. ST. L. REV. 633, 634 (2014) ("*Rodriguez* meant that [schools] would be unequal. American public education is characterized by wealthy, white suburban schools spending a great deal on education surrounding much poorer black and Latino city schools that spend much less on education.").

111. *See Rodriguez*, 411 U.S. at 133 n.100 (Marshall, J., dissenting) ("Of course, nothing in the Court's decision today should inhibit further review of state educational funding schemes under state constitutional provisions.").

112. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 n.38 (1977) ("Recent decisions have also given rise to some doubt as to the Court's continuing commitment to the eradication of racial discrimination in . . . education."). In this article, written shortly after *Rodriguez*, Justice Brennan wrote, "[t]he legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed." *Id.* at 491.

113. *See, e.g.*, Robinson v. Cahill, 303 A.2d 273, 295 (N.J. 1973) (finding the school finance system unconstitutional after determining that the State failed to "fulfill[] its obligation to afford all pupils that level of instructional opportunity which is comprehended by a thorough and efficient system of education for students," as required under the state constitution).

114. Of the twenty-two meaningful opinions in school finance cases issued between 1973 and 1989, less than one-third were victories for plaintiffs. *See* Koski, *supra* note 6, at 1189 (collecting cases and observing that "[t]his round of . . . litigation proved mostly unsuccessful for plaintiffs").

115. *See* Levin, *supra* note 109, at 1135 (describing the lengthy, repeated litigation in New Jersey and California trying to enforce school finance victories against reluctant and slow-moving state legislatures).

116. *See* Janet D. McDonald et al., *School Finance Litigation and Adequacy Studies*, 27 U. ARK. LITTLE ROCK L. REV. 69, 75 (2004) ("[T]he general unwillingness of courts to find for the plaintiffs in these [second wave] cases encouraged litigants to move away from arguments based only on funding inequities.").

the state's entire education system unconstitutional.[117] The Kentucky Supreme Court decision in *Rose v. Council for Better Education, Inc.* marks one of the largest historical interventions in education by a state court.[118] As sweeping as its order striking down the entire education system was, the court went even further. The court provided the legislature with specific criteria on what would constitute an "efficient" system of common schools, including what competencies students should receive and what standards a constitutional school system must uphold.[119]

The *Rose* decision paved the way for large successes in the "third wave" of school finance litigation, commonly known as "adequacy

117. *See* Rose v. Council for Better Educ., 790 S.W.2d 186, 215 (Ky. 1989) ("This decision applies to the entire sweep of the system—all its parts and parcels . . . the whole gamut of the common school system in Kentucky."). Two other "adequacy" cases were decided the same year as *Rose*, adding to the sense that a new era of education reform litigation was underway. *See* Helena Elem. Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); *see also* Gormley, *supra* note 9, at 216 ("In this trilogy of cases, and others that followed, the courts presumably jettisoned equality analyses under state constitutions in favor of an "adequacy" analysis in scrapping dysfunctional funding schemes for public education.").

118. *See* Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority*, 28 HARV. J. ON LEGIS. 341, 342 (1991) ("This ruling constituted one of the most comprehensive interventions by a state judiciary into the realm of legislative policymaking for education . . . invalidating 153 years of legislation and legislative autonomy."). According to the court in *Rose*, "Kentucky's educational effort" was both "inadequate and well below the national effort." 790 S.W.2d at 197.

119. *See Rose*, 790 S.W.2d 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.

Id.

cases."[120] Soon after the *Rose* decision, state courts in three more cases directed their legislatures to craft a remedial plan to comply with the criteria set forth in *Rose*.[121] Litigating "adequacy" rather than "equity" shifted the focus of state court litigation from ensuring an equitable balance of resources to securing sufficient resources to provide every student an "adequate" education.[122] This new focus resulted in many more successful outcomes for plaintiffs than the prior approach.[123] Since *Rose*, plaintiffs have won about two-thirds of finance and adequacy cases.[124]

State-based educational reform litigation (both finance and adequacy cases) has fallen short of improving system-wide

120. *See* McDonald et al., *supra* note 116, at 77 (collecting cases where "Kentucky's definition of adequacy has been used directly or served as a substantive portion of the adequacy definition adopted in several other states"); *see also* Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 482 (N.Y. 2001) (listing states that used *Rose* to interpret their own education clauses).

121. *See* Koski, *supra* note 6, at 1273–74 ("Courts in Alabama, Massachusetts, and New Hampshire addressed the constitutionality of their educational finance systems for the first time and, citing the *Rose* decision, declared them unconstitutional under an adequacy theory. Each of those courts specifically relied on [*Rose*]'s definition of 'adequacy' and sent the matter back to their legislatures to craft a remedial plan in accordance with that definition.").

122. *See, e.g.*, DeRolph v. State, 677 N.E.2d 733, 746 (Ohio 1997) ("[W]e must ensure that there is enough money that students have the chance to succeed because of the educational opportunity provided, not in spite of it. Such an opportunity requires, at the very least, that all of Ohio's children attend schools which are safe and conducive to learning."); Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 667 (N.Y. 1995) ("We think it beyond cavil that the failure to provide the opportunity to obtain such fundamental skills as literacy and the ability to add, subtract and divide numbers would constitute a violation of the Education Article.").

123. *See* Molly A. Hunter & Kathleen J. Gebhardt, *Legal Precedent and the Opportunity for Educational Equity: Where to Now, Colorado?*, 50 U. RICH. L. REV. 893, 894 (2016) ("Though defendant states often prevailed in the 1970s and 1980s in cases based on equal protection clauses and seeking equal per-pupil funding, plaintiffs' success rate improved as they focused more on ensuring that schools had sufficient resources to educate all students, relying on state constitutional education articles.").

124. From *Rose* until the early 1990s, plaintiffs won six of nine cases (66%) that reached a final state supreme court decision. Koski, *supra* note 6, at 1264. The jurisprudential distinction between adequacy and finance may be less clear. *See* Gormley, *supra* note 9, at 218 ("It is unhelpful and inaccurate to suggest that these cases can be segregated and packaged into neat 'equality' and 'adequacy' boxes. In fact, most state constitutional decisions in this area contain elements of both equality and adequacy themes.").

achievement for students of color.[125] First, school districts comprised primarily of students of color have not fared as well as mostly white districts in such litigation.[126] They lost school finance cases more often than predominantly white districts.[127] And even when segregated or diverse districts have won, they have faced far more legislative resistance to reform than predominantly white districts.[128] Second, students of color trapped in segregated schools do not always show increased student achievement even if their schools receive more money.[129] Thus, while many segregated schools still lack sufficient resources, segregation cannot be fixed by money alone.[130]

125. *See* Michael Rebell et al., *Many Schools are Still Inadequate, Now What?*, EDUC. NEXT (2009), http://educationnext.org/many-schools-are-still-inadequate-now-what/ (last visited April 15, 2018) ("[A]verage black and Hispanic students [are] lagging three or four grade levels behind the average white student. . . . [B]lack students . . . have regressed compared to their peers nationally.").

126. James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 433 (1999) ("[M]inority school districts—particularly urban minority districts—do not fare as well as white districts in school finance litigation.").

127. *See id.* at 433 (reviewing cases and concluding that "minority districts do not win school finance cases nearly as often as white districts do. . . .")

128. *See id.* (finding that "in the few states where minority districts have successfully challenged school finance schemes, they have encountered legislative recalcitrance that exceeds, in both intensity and duration, the legislative resistance that successful white districts have faced"); *see also* Garda, *supra* note 65, at 56 ("[P]oor minority districts that most need additional funding are the least likely to obtain it through finance litigation.").

129. *See* Molly S. McUsic, *The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1353 (2004). As Professor Molly McUsic has found, "[i]n school district after school district, large funding increases have proved inadequate to overcome the educational disadvantages faced by poor, underachieving students." *Id. See* Eric A. Hanushek, *When School Finance "Reform" May Not be Good Policy*, 28 HARV. J. ON LEGIS. 423, 437–38 (1991) (discussing studies which conclude that there is "no strong or systematic relationship between school expenditures and student performance").

130. *See* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 256 (1999) ("Although it is possible that school finance reform could have been a helpful supplement to desegregation, it is a poor substitute. Despite the hopes of early school finance advocates, we should not expect school finance reform to solve the problems created by the failure to desegregate many urban schools.").

C. State Law Segregation Claims

1. Sheff

Efforts to improve educational outcomes for students of color through state courts took a step further with a case filed two months before the *Rose* decision was handed down.[131] In *Sheff v. O'Neill*,[132] plaintiffs brought a hybrid case that combined previous adequacy cases with federal desegregation theories.[133] Like previous school finance cases, *Sheff* relied on the state constitution (Connecticut) and the case was filed in state court—but, instead of seeking more equitable funding or more resources to improve education, *Sheff* challenged the segregation of Hartford's schools.[134] In *Sheff*, the plaintiffs alleged that "students in the Hartford public schools are burdened by severe educational disadvantages arising out of their racial and ethnic isolation and their socioeconomic deprivation."[135]

Importantly, unlike federal courts, the court in *Sheff* did not limit its inquiry to intentional conduct or school district

131. *Rose* was decided on June 8, 1989. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 186 (Ky. 1989). *Sheff* was filed shortly before that on April 28, 1989. Gayl Shaw Westerman, *The Promise of State Constitutionalism: Can It Be Fulfilled in* Sheff v. O'Neill*?*, 23 HASTINGS CONST. L.Q. 351, 353 (1996).

132. 678 A.2d 1267 (Conn. 1996).

133. *See* John C. Brittain, *Why* Sheff v. O'Neill *Is a Landmark Decision*, 30 CONN. L. REV. 211, 213–14 (1997) (explaining how *Sheff* blended school finance equity theory with a theory similar to traditional desegregation cases). *Sheff* also illustrates how funding is not enough to address school segregation. 678 A.2d at 1281. Twelve years before *Sheff*, the Connecticut Supreme Court struck down the state's school funding structure in a traditional school finance case. *See* Horton v. Meskill, 376 A.2d 359, 374–75 (Conn. 1977). As a result, Connecticut provided the most state aid to the Hartford schools, which were predominantly low-income and students of color. Liu, *supra* note 102, at 105. The effect was to make the inner city schools the highest funded in the region. *Id.* The court had specifically found that "[s]tate financial aid is distributed so that the neediest school districts receive the most aid." *Sheff*, 678 A.2d at 1273. Despite additional funding, however, students in Hartford's segregated schools did significantly worse than their suburban counterparts. *See id.* (noting that academic performance of Hartford students fell "significantly below that of schoolchildren from the twenty-one surrounding suburban towns"); *see also* McUsic, *supra* note 129, at 1353 ("Despite the millions of dollars in state resources spent on the Hartford, Connecticut schools, for example, students attending them have scored far below statewide and suburban test-score averages in every area tested, at every grade level in every year.").

134. 678 A.2d at 1271.

135. *Id.*

boundaries.[136] Rejecting the state's argument that adequacy cases do not extend to issues other than a school's funding,[137] the Connecticut Supreme Court held that "the existence of extreme racial and ethnic isolation in the public school system" violates the state constitution.[138] Like *Rose* before it, *Sheff* demonstrated that "the underlying right recognized in school finance cases—the right to an adequate or equal education—need not be defined solely in monetary terms."[139] Under *Sheff*, educational adequacy required eliminating school segregation.[140]

136. *Id.* Importantly, unlike the federal cases in the *Brown* progeny, the issue of intent and the *de jure / de facto* distinction were not relevant. *See id.* at 1285 ("Racial and ethnic segregation has a pervasive and invidious impact on schools, whether the segregation results from intentional conduct or from unorchestrated demographic factors."). The court made clear the legislature must "remedy segregation in our public schools, regardless of whether that segregation has occurred de jure or de facto." *Id.* at 1283.

137. *Id.* at 1281. For the court in *Sheff*, the central issue was "whether the state has fully satisfied its affirmative constitutional obligation to provide a substantially equal educational opportunity if the state demonstrates that it has substantially equalized school funding and resources." *Id.*

138. *See id.* (explaining that the requirement of educational adequacy under the state constitution "differs in kind from most constitutional obligations" in that it "explicitly require[s] the state to act rather than not to refrain from acting"). According to *Sheff*, Connecticut has an affirmative obligation under the state constitution to repair the racial isolation in Hartford's public schools. *See id.* at 1270–71 ("We hold today that the needy schoolchildren of Hartford have waited long enough. The constitutional imperatives . . . of our state constitution entitle the plaintiffs to relief.").

139. Ryan, *supra* note 105, at 532.

140. Unlike *Rose*, however, the court in *Sheff* failed to articulate any specific criteria to guide the legislature. After ruling that *de facto* segregation violated the state constitution, the court limited its relief to a declaratory judgment that the school districting and boundary drawing system was unconstitutional. *Sheff*, 678 A.2d at 1291. In "staying [its] hand," the court issued only an admonishment to "the legislature and the executive branch to put the search for appropriate remedial measures at the top of their respective agendas." *Id.* at 1290; *see also* James K. Gooch, *Fenced In: Why* Sheff v. O'Neill *Can't Save Connecticut's Inner City Students*, 22 QUINNIPIAC L. REV. 395, 415 (2004) (criticizing the remedy in *Sheff* because it "did not offer detailed guidance as to what 'appropriate measures' might be, nor set a timetable for achieving improvement. Perhaps more immediately harmful was its failure to offer a standard by which improvement could be judged").

2. Minnesota Cases

Two Minnesota cases have followed *Sheff*'s lead, using state constitutional principles to challenge school segregation.[141] In *Minneapolis Branch of the NAACP v. Minnesota*, filed shortly before the *Sheff* decision and based on the *Sheff* complaint,[142] plaintiffs argued that racial and socioeconomic segregation in Minneapolis schools violated the Minnesota Constitution's education and equal protection clauses.[143] Two years prior, the Minnesota Supreme Court had determined that the state's education clause created a fundamental right to education.[144]

The *Minneapolis NAACP* case withstood two separate motions to dismiss and a certified question to the state supreme court.[145] After

141. *See* Cruz-Guzman v. State, 892 N.W.2d 533 (Minn. Ct. App. 2017); Minneapolis Branch of the NAACP. v. Minnesota, No. 95–14800 (Minn. Dist. Ct. Sept. 19, 1995) [hereinafter *Minneapolis NAACP* Complaint].

142. *See* Margaret C. Hobday et al., *A Missed Opportunity: Minnesota's Failed Experiment with Choice-based Integration*, 35 WM. MITCHELL L. REV. 936, 956 n.124 (2009) ("The litigation was, in large part, modeled after the ongoing litigation in Connecticut, *Sheff v. O'Neill*."); *see also* Myron Orfield, *Choice, Equal Protection, and Metropolitan Integration: the Hope of the Minneapolis Desegregation Settlement,* 24 L. & INEQ. 269, 311 (2006) (noting that *Sheff* was argued in the state supreme court just nine days after the filing of the *Minneapolis NAACP* Complaint).

143. *Minneapolis NAACP* Complaint. The suit also brought claims of housing segregation, which were dismissed because of potential interference with an existing consent decree for desegregating public housing. NAACP, Minneapolis Branch v. Metro. Council, 125 F.3d 1171 (8th Cir. 1997), *vacated*, 522 U.S. 1145 (1998), *aff'd on reh'g*, 144 F.3d 1168 (8th Cir. 1998).

144. Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993). In *Skeen*, the Minnesota Supreme Court conducted a thorough analysis of the state constitution. *See id.* at 309–10. After analyzing the text of the constitution, the court reasoned: "[W]e hold that education *is* a fundamental right under the state constitution, not only because of its overall importance to the state but also because of the explicit language used to describe this constitutional mandate. While a fundamental right cannot be found "[a]bsent constitutional mandate," the Education Clause *is* a mandate, not simply a grant of power." *Id.* at 313 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 31(1973)). *See* Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996) (declaring Connecticut's constitution to contain a fundamental right to education).

145. Orfield, *supra* note 142, at 312–13 ("The district court judge, after hearing arguments in April 1996, ordered several defendants dismissed but allowed the case to go forward. The district court also determined that the issues raised in the case were sufficiently novel and important enough to be decided directly by the Minnesota Supreme Court. The higher court refused to hear the certified questions, and the defendants subsequently sought unsuccessfully to have the case dismissed on jurisdictional grounds.").

multiple attempts at mediation, the case finally settled in 2000, nearly five years after being filed.[146] Though small in scope and scale, the settlement has largely been viewed as a success, albeit a limited one.[147] The settlement established a four-year experimental program that provided students living in the most racially isolated neighborhoods in Minneapolis with free transportation as well as guaranteed seats in successful suburban schools and the highest performing magnet schools in Minneapolis.[148] The legislature voted to continue the program after the four-year settlement expired,[149] and a version of the program still exists today.[150]

In 2015, a second lawsuit was filed in Minnesota challenging racial and socioeconomic segregation under the state constitution.[151] In *Cruz-Guzman v. State of Minnesota*, the plaintiffs alleged again that segregated schools deny schoolchildren their right to receive an adequate education under their state constitution.[152] The complaint and legal theories are nearly the same

146. *See generally* Settlement Agreement, Minneapolis Branch of the NAACP v. State (undated) [hereinafter *Minneapolis NAACP* Settlement] at 1–7 (on file with authors).

147. *See* Kahlenberg, *supra* note 62, at 1587 ("The program, though small, has been seen as a success."); Orfield, *supra* note 142, at 315–18 (detailing the positive aspects of the settlement, including the growth of the program, the survey results of participating parents, and the desegregating impact on suburban districts along with poorly executed aspects, such as the "poor publicity" of different features and underutilization by intended benefactors).

148. *Minneapolis NAACP* Settlement, *supra* note 146, at 2. At the end of the four years, the plaintiffs were free to reinstitute their lawsuit if sufficient progress had not been made. *Id.* at 3–4.

149. Kahlenberg, *supra* note 62, at 1587.

150. *See* Isaac Peterson, *One Desegregation Lawsuit Not Enough,* MINNESOTA SPOKESMAN-RECORDER (June 28, 2015) (quoting Dan Shulman, lead attorney in the *Minneapolis NAACP* case, stating "[t]o one degree or another [The Choice is Yours Plan] still exists").

151. Class Action Complaint, Cruz-Guzman v. State, 892 N.W.2d 533 (Minn. Ct. App. 2017) (No. 27-CV-15-19117) [hereinafter "*Cruz-Guzman* Complaint"]. The complaint specifically alleges that students in Minneapolis and St. Paul public schools are segregated by race and class in violation of the Minnesota Constitution. *Id.* ¶ 2; *see also* Quick Facts about the *Cruz-Guzman v. State of Minnesota* Educational Adequacy Case, http://www.gpmlaw.com/portalresource/Cruz-Guzman_quick-facts.pdf [hereinafter "Quick Facts about *Cruz-Guzman*"]. The plaintiffs also include One Family One Community, a Minnesota nonprofit organization. *Cruz-Guzman* Complaint ¶ 14.

152. The complaint alleges that a segregated education is *per se* an inadequate education under the Minnesota Constitution. *Cruz-Guzman* Complaint, *supra* note

as the *Minneapolis NAACP* case in the 1990s.[153] In 2015, however, the conditions in Minneapolis schools were arguably worse than the conditions giving rise to the previous case.[154] Segregation had become more intense, with far more highly segregated schools than in 1995.[155] At the time of the *Cruz-Guzman* complaint, there were thirty-six public schools in Minneapolis and St. Paul combined containing 90% or more students of color.[156] Segregation had also spread into suburban districts, where at least thirty-four schools in fourteen districts were less than one-third white.[157] Students of color had proficiency rates in reading, math, and science at less than one-third the proficiency rates of white students.[158]

On July 8, 2016, the district court denied the main parts of defendants' motion to dismiss.[159] Importantly, the court

151, ¶ 69. The complaint also alleges that the State of Minnesota is strictly liable for this deprivation of Plaintiffs' fundamental right to an adequate education. *Id.* ¶ 74.

153. Plaintiffs' counsel makes clear that *Cruz-Guzman* is basically the same case as *Minneapolis NAACP*. *See* Peterson, *supra* note 150 (quoting the lead attorney, "[e]ssentially, you could say it's the son of the previous case; it's the same case. Of course, there will be different plaintiffs, but it will assert many of the same violations."). There is even a significant overlap in the roster of lawyers representing the plaintiffs. *See* Quick Facts about *Cruz-Guzman*, *supra* note 151, at 1 (explaining that the current lawyers comprise "three attorneys [who] represented the plaintiffs in the [*Minneapolis NAACP*] educational adequacy litigation in the 1990s"). Unlike *Minneapolis NAACP*, however, *Cruz-Guzman* has expanded its coverage to both Minneapolis and St. Paul. *See Cruz-Guzman* Complaint, *supra* note 151, ¶ 2 ("The Minneapolis Public Schools have been in the past and currently are segregated on the basis of both race and socioeconomic status, such that members of the plaintiff class attend schools the enrollment of which is disproportionately comprised of minority students and students living in poverty, as compared with neighboring and surrounding suburban school districts.").

154. *See* Peterson, *supra* note 150 (quoting the lead plaintiff's attorney explaining that "[t]he same conditions that existed when we filed the first case in 1995 have reoccurred almost 20 years later. And they're worse").

155. *Id.*

156. *Cruz-Guzman* Complaint, *supra* note 151, ¶¶ 23, 25. Such a high number of racially isolated schools is remarkable in a state that is less than 30% students of color. *Id.* ¶ 21.

157. *Id.* ¶ 51.

158. *Id.* ¶ 36. Disparities in science proficiency were particularly stark. In Minneapolis, the ratio of white student proficiency to African American student proficiency in science was 71.1% to 12.5%. In St. Paul, the ratio is 64.2% to 14%. *Id.*

159. The court was relying on a previous Minnesota case that established education as a fundamental right and "cited with approval" *Rose* and its progeny. *See* Order Den. Mot. to Dismiss, Cruz-Guzman v. State of Minnesota, July 8, 2016, at 14 ("[T]he Skeen court cited with approval several cases from other states that

acknowledged the link between *Cruz-Guzman* and the previous adequacy cases that established that education clauses contain a "qualitative standard."[160] On March 13, 2017, however, the Minnesota Court of Appeals reversed the district court's decision, deeming the plaintiffs' claims a nonjusticiable political question.[161] On April 26, 2017, the Minnesota Supreme Court reversed the dismissal order and granted review.[162] Notably, *amici curiae* were filed by eleven local and twenty-one national education and constitutional scholars, unanimously arguing for overturning the Court of Appeals decision.[163]

IV. BACKGROUND ON JUSTICIABILITY

The 2017 dismissal of Minnesota's *Cruz-Guzman* case was not the first time that state educational adequacy claims have found themselves obstructed by justiciability principles.[164] Several other adequacy cases have been dismissed at least superficially on similar grounds, leading to concern among some scholars that courts are beginning to doubt their role as the guarantors of a constitutionally sufficient education.[165]

recognized a qualitative educational standard within their respective constitutions." (citing Skeen v. State, 505 N.W.2d 299, 310–12 (Minn. 1993))) (on file with authors).

160. *Id.*

161. *See* Cruz-Guzman v. State, 892 N.W.2d 533 (Minn. Ct. App. 2017), *review granted*, Cruz-Guzman v. State, No. A16-1265, 2017 Minn. LEXIS 236 (Apr. 26, 2017) (reversing the district court's denial of the State's motion to dismiss because Cruz-Guzman's claims present a nonjusticiable political question).

162. *Id.*; Beena Raghavendran, *Minnesota Supreme Court to Take Up School Integration Lawsuit*, STAR TRIB., Apr. 27, 2017, at B2.

163. *See, e.g.*, Br. of Amici Curiae Educ. Law Ctr. and the Constitutional & Educ. Law Scholars in Support of Pl.'s-Pet'rs [hereinafter ELC Brief] and Br. of *Amici Curiae* Concerned Law Professors [hereinafter CLP Brief] (both filed June 2, 2017) (briefs on file with authors). Both briefs assert that the Court of Appeals "deviated from this significant body of case law" in a fashion that is "inconsistent with principles of justiciability" as commonly applied across numerous adequacy cases from across the country. ELC Brief, at 10–11; CLP Brief, at 15 n.5.

164. *See* Simon-Kerr & Sturm, *supra* note 13, at 83 (describing how justiciability and "separation of powers concerns have begun to drive state courts out of this important avenue of education reform").

165. Some state courts have ruled that educational adequacy cases are nonjusticiable, particularly where judges are "concerned about their institutional competence to deal with the questions presented." *Id.* at 118.

A. Basic Principles and Federal Law

Political question justiciability is a concept that is sometimes easier to grasp in the abstract than in application. The United States Supreme Court has stated, "[t]he nonjusticiability of a political question is primarily a function of the separation of powers," implying that the doctrine arises from the intent of the U.S. Constitution to adjudicate certain matters through the operation of the political system rather than through litigation in the courts.[166] The reality of the doctrine is less straightforward, and appears to raise questions of the courts' expertise as well as their intended role in the constitutional scheme.[167]

The most elaborate clarification of political question justiciability arose in the U.S. Supreme Court case of *Baker v. Carr*,[168] which created a six-part test to evaluate whether a case involves a political question. In order to be deemed nonjusticiable, a case must involve one of the following:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
>
> [2] a lack of judicially discoverable and manageable standards for resolving it; or
>
> [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
>
> [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
>
> [5] an unusual need for unquestioning adherence to a political decision already made; or
>
> [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[169]

The Court set a high bar for nonjusticiability, clarifying that "[u]nless one of these formulations is *inextricable* from the case at

166. *See* Baker v. Carr, 369 U.S. 186, 210 (1962).

167. *See* Simon-Kerr & Sturm, *supra* note 13, at 97 (noting the challenges of the justiciability doctrine by analyzing judicial competence).

168. 369 U.S. 186.

169. *Id.* at 217. A number of adequacy cases have applied the *Baker* test. *See infra* notes 191–195 and accompanying text (explaining how the majority of adequacy cases have found claims justiciable).

bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence."[170] Courts may not reject "bona fide" lawsuits just because there is a question "as to whether some action denominated 'political' exceeds constitutional authority."[171]

The Supreme Court has long held that courts have the authority to interpret what the law means and review whether government actors have complied with the law, particularly when protecting constitutional rights.[172] For the Court, "injury to a legally protected right" is the "touchstone to justiciability."[173] In fact, access to the courts to preserve rights and remedy violations has been a foundation of our legal system dating back to English common law.[174]

The federal political question doctrine, as a limitation on these principles, has been subject to debate and criticism by leading scholars.[175] A major critique of the political question doctrine is that

170. *Baker*, 369 U.S. at 217 (emphasis added).

171. *Id.*

172. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("[W]here there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."). The Supreme Court has recognized, since its beginning, that courts not only have the power to decide whether a constitutional right has been violated but that it is "the very essence of judicial duty" to do so. *Id.* at 178–79; Londonderry Sch. Dist. SAU No. 12 v. State, 907 A.2d 988, 996 (N.H. 2006) ("[T]he judiciary has a responsibility to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but essential.").

173. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 140 (1950) (plurality opinion).

174. As far back as the seventeenth century, English law recognized the right of individuals who had no personal stake in the outcome to obtain a writ of prohibition. Couey v. Atkins, 355 P.3d 866, 878, 902 (Or. 2015) (citing EDWARD COKE, 2 INSTITUTES OF THE LAWS OF ENGLAND 602 (1797)). In a similar vein, the court in *Couey* also cited Blackstone, who noted the existence of "popular actions," which could be brought by any person. *Id.* at 887 (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 161 (1803)). As for early American courts, the court recalled that nineteenth-century caselaw widely recognized that individuals with no particular personal interest could bring actions to vindicate public rights. *Id.* at 888.

175. *See, e.g.*, ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 99 (1987) (arguing that the political question doctrine is "inconsistent with the most fundamental purpose of the Constitution: safeguarding matters from majority rule"); Martin H. Redish, *Judicial Review and the 'Political Question*,' 79 NW. U. L. REV. 1031, 1059–60 (1984) (criticizing the political question doctrine because it allows other branches of the federal government to violate constitutional provisions without the check of judicial review).

the *Baker* criteria "seem useless in identifying what constitutes a political question."[176] Notwithstanding ample litigation, the United States Supreme Court has rarely found that a political question bars its adjudication of an issue.[177] As one state supreme court observed, the Supreme Court did not even discuss the doctrine in *Bush v. Palm Beach County Canvassing Board*[178] or *Bush v. Gore*,[179] which involved the 2000 national presidential election and certainly raised "a 'political issue' as conventionally understood. . . ."[180]

B. Justiciability in State Courts

State courts, of course, are free to establish their own rules of justiciability.[181] The United States Supreme Court has been clear that federal justiciability rules bind only federal courts, leaving state courts to develop their own justiciability doctrines.[182] State courts must consider their own "special needs of state and local governance" in configuring their state justiciability doctrine, rather

176. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 153 (6th ed. 2012).

177. *See* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 267–68 (2002) ("In fact, in the almost forty years since *Baker v. Carr* was decided, a majority of the Court has found only two issues to present political questions, and both involved strong textual anchors for finding that the constitutional decision rested with the political branches.").

178. 531 U.S. 70 (2000).

179. 531 U.S. 98 (2000).

180. Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 780 (Tex. 2005). As the court observed, the U.S. Supreme Court "has held only two issues to be nonjusticiable political questions. . . . [The Court] did not hold the one-man-one-vote congressional apportionment issue in *Baker v. Carr* to be a political question, and it has refused to hold issues to be political questions in at least seven other cases." *Id.* at 779.

181. Brennan, *supra* note 112, at 493. Justice Brennan, who authored *Baker*, declared that "state courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts." *Id.* at 501.

182. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("[T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability."); N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 8 n.2 (1988) ("[T]he special limitations that Article III of the Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts. The States are thus left free . . . to determine matters that would not satisfy the more stringent requirement in the federal courts that an actual 'case' or 'controversy' be presented for resolution." (citation omitted)).

than confining their assessments to federal constraints.[183] The federal political question doctrine has limited value for state courts, where "there are hardly any state analogues to the self-imposed constraints on justiciability, 'political questions,' and the like."[184] There are significant differences between the separation of powers under state constitutions compared to those under the U.S. Constitution.[185]

One important distinction between state and federal constitutions is the inherent remedial role of state courts. This is due to the different nature of the rights accorded in state constitutions and the United States Constitution.[186] The United States

183. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1905 (2001). As Professor Hershkoff has stated, state constitutions "do not reflect the same level of trust in state legislative decision-making as does the [F]ederal Constitution in congressional decision-making." *Id.* at 1891–92. "Article I of the Constitution assumes that Congress is best situated to decide how to carry out the terms of its authority. . . . State constitutions, in contrast, impose not only substantive, but also procedural requirements on legislative activity." *Id.* at 1892. "[S]uch provisions alter the dynamics of lawmaking, implicating the state courts in the resolution of certain governance questions that are largely outside the Article III experience." *Id.* at 1893. In some states, the courts have not applied any limitations under the political question doctrine. *See, e.g.*, Backman v. Sec'y of the Commonwealth, 441 N.E.2d 523, 527 (Mass. 1982) ("[W]e have never explicitly incorporated the [political question] doctrine into our State jurisprudence, [because] . . . this court has an obligation to adjudicate claims that particular actions conflict with constitutional requirements.").

184. Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248 (1972).

185. *See* Christine M. Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 N.Y.U. L. REV. 1601, 1603 (2001) ("State constitutions have a tradition independent of federal law in the allocation of power among the branches of state government and in their development and understanding of republican principles."); Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1558 (1997) ("State courts regularly are called upon to enforce state constitutional obligations that, for sound reasons of federalism, federal courts have declined to enforce."). As the Supreme Court explained long ago, "[w]hether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state." Dreyer v. Illinois, 187 U.S. 71, 84 (1902).

186. *See* Gary S. Gildin, *Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court's Constitutional Remedies Jurisprudence*, 115 PENN ST. L. REV. 877, 881–83 (2011) ("Just as state courts may

Constitution mostly grants "negative" rights—those rights upon which the government may not infringe.[187] If a court finds an infringement of a negative right, the remedy is most likely limited to stopping the infringement by prohibiting and perhaps even punishing the action.[188] The difference in the inherent remedial power of state courts arises because all state constitutions also grant "positive" rights, including rights that entitle individuals to benefits or actions by the state.[189] In contrast to protecting "negative" rights, preventing government action represents the greatest threat to "positive" rights.[190]

C. Application to Educational Adequacy Lawsuits

As discussed above, several educational adequacy claims have been defeated on justiciability grounds.[191] However, a simple tally shows that these decisions do not, at least not so far, represent a sea change in state education law. The "clear majority" of state courts, when addressing adequacy claims, have ruled in favor of

legitimately find rights to be guaranteed by state constitutions where the United States Supreme Court has refused to protect the right under the federal Constitution, state courts are free to adopt a remedial scheme that more generously compensates the rights-holder. . . .").

187. *See* Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 U. KAN. L. REV. 1021, 1024–34 (2006) ("Most constitutional rights are 'negative' rights in the sense that they prohibit the government from taking action that interferes with a right that the individual already has.").

188. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 317–18 (1980) ("Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.").

189. *See* Hershkoff, *supra* note 183, at 1889–90 ("Such provisions shift the inertial bias associated with the federal government: if negative rights under the [F]ederal Constitution restrain government action, positive rights under state constitutions mandate such action.").

190. *See* Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1089 (1993) ("[W]hen positive rights are at issue legislative action represents the good and legislative inertia the evil."). Indeed, "legislative action satisfying a constitutional obligation is extremely unlikely unless judicial rulings call for such action." *Id.*

191. *See supra* Part III.B; *see also* Simon-Kerr & Sturm, *supra* note 13, at 95–98 (discussing education litigation and justiciability).

justiciability.[192] Dozens of state high courts have affirmed their judiciary's role in vindicating constitutional education guarantees to children.[193] In most adequacy cases when defendants raise justiciability arguments, "the courts reject them out of hand."[194] According to one recent study, out of twenty-nine different state educational adequacy cases since 1989, only "seven states . . . have held for defendants at the basic liability stage in sound basic education."[195] Before 1989, every court to which defendants presented this "political question" argument patently rejected it.[196]

Courts have found justiciability particularly appropriate given the constitutional nature of education adequacy claims.[197] In adequacy claims, courts have the "final obligation to guard, enforce, and protect" their states' constitutional education requirements.[198]

192. Gannon v. State, 319 P.3d 1196, 1219 (Kan. 2014) ("[A] clear majority of [state courts] have ruled in favor of justiciability. . . .").

193. *See* ELC BRIEF, *supra* note 163, at 8 (collecting cases where state high courts have held that lawsuits challenging whether education has been provided in accordance with a constitutionally enshrined standard are justiciable).

194. REBELL, *supra* note 1, at 23.

195. *Id.* at 22–23.

196. Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 115–16 (1989); *see also* McDaniel v. Thomas, 285 S.E.2d 156, 157 (Ga. 1981) ("Indeed, '[w]e know of no sister State which has refused merits treatment to such issues, and we would regard our own refusal to adjudicate plaintiffs' claim of constitutional infringement an abdication of our constitutional duties.'" (quoting Bd. of Educ., Levittown v. Nyquist, 443 N.Y.S.2d 843 (N.Y. App. Div. 1981))); *see also* Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 87 (Wash. 1978) (concluding that "the judiciary has the ultimate power and the duty to interpret, construe and give meaning to words, sections and articles of the constitution" because "[i]t is emphatically the province and duty of the judicial department to say what the law is").

197. The Kentucky Supreme Court summarized this widely adopted rule aptly: "Courts may, should, and have involved themselves in defining the standards of a constitutionally mandated educational system." Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 210 (Ky. 1989).

198. Columbia Falls Elem. Sch. Dist. No. 6 v. State, 109 P.3d 257, 261 (Mont. 2005) ("As the final guardian and protector of the right to education, it is incumbent upon the court to assure that the system enacted by the Legislature enforces, protects and fulfills the right."). *See* Lobato v. State, 218 P.3d 358, 371–72 (Colo. 2009) (holding "the court has the responsibility to review whether the actions of the legislature are consistent with its obligation to provide a thorough and uniform public school system"); Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 734 (Idaho 1993) (declining "to accept the respondents' argument that the other branches of government be allowed to interpret the constitution for us").

To find otherwise "would be a complete abrogation of judicial responsibility" and would do a "severe disservice to the people."[199] Courts carrying out this judicial responsibility is the only way to ensure that "the Legislature . . . fulfill[s] [its] constitutional mandate" to provide a sound education.[200]

As the court in *Rose* explained:

> The judiciary has the ultimate power, and the duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it. It is *solely* the function of the judiciary to so do. This duty must be exercised even when such action serves as a check on the activities of another branch of government or when the court's view of the constitution is contrary to that of other branches, or even that of the public.[201]

Under the basic principle of the separation of powers for the Kentucky Supreme Court, "[t]o allow the General Assembly . . . to decide whether its [own] actions are constitutional is literally unthinkable."[202] When the "question becomes whether the legislature has actually performed its duty" under an education clause, it "is left to the courts to answer."[203] It is exclusively the courts' responsibility to do so.[204]

D. When Have Adequacy Claims Been Found Nonjusticiable?

While the majority of state courts have firmly rejected the idea that educational adequacy lawsuits are nonjusticiable,[205] it is also worthwhile to explore cases found nonjusticiable. Doing so reveals that these decisions are not merely an instance of courts diverging on identical questions. Instead, in many cases, important substantive

199. Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 484 (Ark. 2002).

200. Hussein v. State, 973 N.E.2d 752, 754 (N.Y. 2012).

201. Rose v. Council for Better Educ., 790 S.W.2d 186, 209 (Ky. 1989).

202. *Id.*

203. Gannon v. State, 319 P.3d 1196, 1226 (Kan. 2014).

204. *See* DeRolph v. State, 677 N.E.2d 733 (Ohio 1997) ("We will not dodge our responsibility by asserting that this case involves a nonjusticiable political question. To do so is unthinkable.").

205. Gannon v. State, 319 P.3d 1196, 1219 (Kan. 2014) (noting that a "clear majority" of other state courts have ruled in favor of justiciability).

differences in law, legislative history, or constitutional language can account for seemingly divergent outcomes between states.[206]

Each of the clear minority of cases that have held adequacy claims nonjusticiable occurred in a state that has not deemed education a fundamental right.[207] As discussed below, of those seven cases, only five states rely on justiciability in their dismissals, and only four rely upon the *Baker v. Carr* political question doctrine.[208] By contrast, twenty-two state supreme courts have held that their respective education clauses produce justiciable claims.[209]

1. Nebraska

In 2007, the Nebraska Supreme Court affirmed that school funding claims based on the state education clause were nonjusticiable.[210] The court had not yet addressed whether the state education clause created a fundamental right to education.[211] Moreover, the language of the education clause is from the "establishment only" end of the spectrum and particularly weak.[212] The clause only states that "it shall be the duty of the Legislature to pass suitable laws . . . to encourage schools and the means of instruction."[213] But perhaps most importantly, the court determined that the history of the state constitution strongly supported legislative control of school funding and counseled against the recognition of a fundamental right to education.[214] Not only had a 1972 revision to the state constitution eliminated a provision requiring an equitable distribution of funds, but in 1996, voters

206. *See supra* Part III.C (discussing cases which have held that educational adequacy lawsuits are nonjusticiable).

207. *See supra* note 40 (listing states in which education is deemed a fundamental right). There is now one notable exception: the Minnesota Court of Appeals decision in *Cruz-Guzman*.

208. *See infra* Part III Sections D.1–D.6. The seventh case is the Minnesota Court of Appeals decision in *Cruz-Guzman*. 892 N.W.2d 533, 538 (Minn. Ct. App. 2017).

209. *CLP Brief*, *supra* note 163, at 11.

210. Neb. Coal. For Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164 (Neb. 2007).

211. *But cf.* Citizens of Decatur for Equal Educ. v. Lyons-Decatur-Lyons Sch. Dist., 739 N.W.2d 742 (Neb. 2007) (holding that the Free Instruction Clause of Nebraska's state Constitution does not provide a fundamental right to equal and adequate funding of schools).

212. *Heineman*, 731 N.W.2d at 170.

213. *Id.*

214. *Id.* at 179–80.

rejected a proposed constitutional amendment that would explicitly have made education a fundamental right.[215]

2. Oklahoma

In 2007, the Oklahoma Supreme Court also held that a series of school funding claims posed nonjusticiable political questions.[216] Here, too, the court was asked to rule on significantly weaker constitutional provisions.[217] The Oklahoma Constitution provides that: "[p]rovisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control. . . ."[218] As in Nebraska, there had been no previous recognition of a fundamental right to education.[219] Instead, the Oklahoma Supreme Court had previously held "the Legislature has few constitutional restraints in carrying out its duty to establish and maintain a free educational public system."[220]

3. Pennsylvania

In 1999, the Pennsylvania Supreme Court decided the narrow question of whether claims against the state school funding system were improperly dismissed as political questions.[221] The Pennsylvania judiciary had already held that the state's education clause created no fundamental right, or individual right, of any kind.[222] The court held that a constitutional provision requiring the legislature to "provide for the maintenance of a thorough and efficient system of public schools" was nonjusticiable.[223] While its constitutional language is considered in the middle range category,[224] the Minnesota Supreme Court felt that Pennsylvania's

215. *Id.* at 180–81.
216. Okla. Educ. Ass'n v. State, 158 P.3d 1058 (Okla. 2007).
217. *Id.*
218. OKLA. CONST. art. I, § 5.
219. *Okla. Educ. Ass'n*, 158 P.3d at 1065–66.
220. *Id.*
221. Marrero ex rel. Tabalas v. Commonwealth, 739 A.2d 110, 113 (Pa. 1999).
222. *Id.* at 112.
223. *Id.* at 112–13.
224. *See supra* notes 30–35 and accompanying text (explaining how education provisions in state constitutions are categorized).

language was weaker than the "general and uniform" language found in the Minnesota Education Clause.[225]

4. Indiana

In *Bonner v. Daniels*, the plaintiffs challenged the state's school finance system by seeking "a declaratory judgment to establish that the Indiana Constitution imposes an enforceable duty on the state government to provide a standard of quality education to public school students."[226] While these claims were dismissed, the court did not rely on justiciability grounds.[227] Instead, the court analyzed the history and language of the state education clause, and determined it was not intended to impose affirmative duties on the legislature.[228] The *Bonner* plaintiffs also sought declaratory relief, arguing education was a fundamental right.[229] After brief analysis, the court held their claim lacked merit because the Indiana Constitution did not expressly grant a "right or entitlement to education."[230]

225. *See* Skeen v. State, 505 N.W.2d 299, 315 (Minn. 1993) ("Thus, a clear reading of the original constitution indicates that the drafters intended to draw a distinction between the fundamental right to a 'general and uniform system of education' and the financing of the education system, which merely must be 'thorough and efficient.'").

226. Bonner ex rel. Bonner v. Daniels, 907 N.E.2d 516, 518 (Ind. 2009) (claiming additionally that the state government did not meet its duty to provide a standard of quality education).

227. *Id.* at 525 (Rucker, J., dissenting) (explaining the plaintiffs simply seek a declaration that the education they receive falls short of the constitutional mandate of providing a uniform system of open schools and stating "to say in effect that plaintiffs have not presented a justiciable issue is simply wrong in my view").

228. *Id.* at 521 ("As can be seen from the text of the Education Clause, its language speaks only of a general duty to provide for a system of common schools and does not require the attainment of any standard of resulting educational quality."); *see* King v. State, 818 N.W.2d 1, 21 (Iowa 2012) (holding that Iowa's education clause does not mandate free public schools, or require the public education system of Iowa to be "adequate, efficient, quality, thorough, or uniform").

229. 907 N.E.2d at 519.

230. *Id.* at 522 ("[T]he drafters of our Constitution did not include any reference to education in Article 1 of the Bill of Rights, which declares the rights of individuals in relation to government. Education is not among the enumerated individual rights.").

5. Iowa

A recent Iowa Supreme Court decision affirmed the dismissal of a constitutional challenge to schools.[231] The case, however, leaves open the possibility that future constitutional challenges to public education programs are justiciable.[232] The plaintiffs brought suit seeking a declaration that education is a fundamental right.[233] The plaintiffs also alleged the Iowa state government violated the state education clause by failing to establish or enforce standards, failing to adopt effective educator pay systems, and failing to "establish and maintain an adequate education delivery system."[234] In doing so, they relied upon the opening clause of the "perpetual support fund" provision of the Iowa Constitution.[235] The clause only indirectly invoked school characteristics by stating "[t]he general assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement."[236]

The district court dismissed these claims as involving a nonjusticiable political question.[237] On appeal, however, the supreme court expressly avoided deciding both the question of justiciability and whether education constituted a fundamental right—although it did reaffirm that "students have a due process right to an adequate education. . . ."[238] The court nonetheless affirmed dismissal, holding the plaintiffs' "specific challenges to the educational policies of this state" were inadequate.[239] But, crucially, the court noted that its decision "does not foreclose future constitutional challenges . . . in the vital field of public education."[240]

6. Illinois

The Illinois Education Clause states "[t]he State shall provide for an efficient system of high quality public educational institutions

231. *King*, 818 N.W.2d at 4.
232. *Id.*
233. *Id.* at 5–6.
234. *Id.*
235. *Id.* at 12.
236. IOWA CONST. art. IX, pt. 2, § 3.
237. *King*, 818 N.W.2d at 5, 10.
238. *Id.* at 22, 25–27.
239. *Id.* at 5 (explaining challenges to the state's educational policies should be brought to the plaintiffs' elected representatives, rather than the court).
240. *Id.*

and services."[241] This was used as the basis for two school funding claims in 1996: one premised on a failure to satisfy the legislative duty created by the clause, and another founded on an equal protection claim that the funding system impinged upon a fundamental right.[242] The Illinois court first held that claims under the state education clause were political questions "outside the sphere of judicial function."[243] But the court did not resolve the equal protection component using the political question doctrine.[244] Instead, the court determined that there was no fundamental right to education in Illinois and thus the equal protection claims should be resolved with a "rational basis review."[245] A second decision in 1999 reaffirmed these holdings.[246]

V. ARE STATE LAW SEGREGATION CLAIMS JUSTICIABLE?

Typically, when questions of justiciability are raised, educational adequacy claims are evaluated generically. That is to say, courts have decided the question without considering the underlying allegation of harm.

Likewise, in the one instance of a Minnesota state law segregation claim being dismissed on justiciability grounds—the appellate ruling on the Minnesota *Cruz-Guzman* case—the claim was evaluated generically, by applying the *Baker v. Carr* factors.[247] The plaintiffs in that case were described as seeking "an education of a

241. ILL. CONST. art. X § 1.

242. Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1193, 1208 (Ill. 1996).

243. *Id.* at 1193.

244. *Id.* at 1203.

245. *Id.* at 1195.

246. Lewis v. Spagnolo, 710 N.E.2d 798, 804–05 (Ill. 1999) (affirming dismissal of an education clause claim when recognition of such a claim "would require the judiciary to ascertain from the constitution alone the content of an 'adequate' education"). When confronted with nearly identical questions in *Skeen*, the Minnesota Supreme Court took the opposite course. Rather than dismissing education clause claims as nonjusticiable, the court determined that the language of the clause created a substantive adequacy requirement, but not a blanket uniformity requirement. *See* Skeen v. State, 505 N.W.2d 299, 312 (Minn. 1993). When asked to recognize a fundamental right to education for the purposes of equal protection claims, the court unambiguously did so, though it did not apply that right to the facts before it. *Id.* at 315.

247. Cruz-Guzman v. State, 892 N.W.2d 533, 538 (Minn. Ct. App. 2017).

certain quality."[248] Indeed, beyond a single footnote, neither race nor segregation was mentioned once in the court's analysis.[249]

The weight of the evidence suggests that, using the *Baker v. Carr* factors, adequacy suits should be justiciable regardless of their factual claims.[250] However, there is no reason a court's inquiry into the justiciability of an education clause claim must be neutral to the underlying harms or allegations.[251] It is plausible that certain types of adequacy claims could be more justiciable than others—that is, that some kinds of harms are especially appropriate for judicial resolution.[252]

Segregation claims are likely to be one such category. In the case of segregation claims, the robust body of preexisting law, the practical experience of courts in resolving similar claims, and the invocation of profoundly important and clearly defined constitutional rights all counsel in favor of justiciability.[253]

A. Applying Baker v. Carr *to State Law Segregation Claims*

The United States Supreme Court has assessed that the *Baker* factors "are probably listed in descending order of both importance and certainty."[254] When courts apply the *Baker* test in educational adequacy cases, the most frequently relevant factors are the first three: (1) "a textually demonstrable constitutional commitment of

248. *See id.* at 535.

249. *Id.*

250. *See* Aaron Y. Tang, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195, 1208 (2011) ("The vast majority of courts have rejected state defendants' non-justiciability arguments, reasoning that to decline to address plaintiffs' challenges would amount to an abdication of the court's essential responsibility to interpret the meaning of the state constitution."); *see also* Christine M. O'Neill, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims*, 42 COLUM. J.L. & SOC. PROBS. 545, 585 (2009) ("[S]tate courts must stop using the federal political question doctrine to abdicate their responsibility to children").

251. Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 707 (2010).

252. *See* Jared S. Buszin, *Beyond School Finance: Refocusing Education Reform Litigation to Realize the Deferred Dream of Education Equality and Adequacy*, 62 EMORY L.J. 1613, 1616 (2013).

253. Cruz-Guzman v. State, 892 N.W.2d 533, 537 (Minn. Ct. App. 2017) ("A segregation claim based on racial discrimination is justiciable."). *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

254. Vieth v. Jubelirer, 541 U.S. 267, 278 (2004).

the issue to a coordinate political department," (2) a lack of "judicially discoverable and manageable standards" for resolving the claims, and (3) the need for the court to make "an initial policy determination of a kind clearly for nonjudicial discretion."[255]

1. Baker *Factor #1 – Textually Demonstrable Commitment*

One primary argument in adequacy cases that present courts with nonjusticiable political questions is that "constitutional language apparently favoring exclusive legislative responsibility for education" amounts to a "textually demonstrable constitutional commitment" to the legislature.[256] In other words, because most education clauses in state constitutions speak only to the legislature's duty to "provide" for the education of the state's schoolchildren, while omitting any mention of judicial review of the constitutionality of the legislature's chosen method of providing for education, there must be no such authority vested in the judiciary.[257] When examined more closely, it becomes clear that this argument "represents a fundamentally flawed view of the concept of judicial review."[258]

Scholars have wondered if asking courts to set aside their authority because of a "textually demonstrable commitment of the issue"[259] to another branch of government makes little sense in light of the federal Constitution. As Professor Chemerinsky has pointed out, "there is no place in the [federal] Constitution, where the text states that the legislature or executive should decide whether a particular action constitutes a constitutional violation."[260] Professor Redish has similarly observed that because there is no clear judicial review authority in the federal constitution, "the fact that a provision vesting power refers to the political branches and not to the judiciary cannot justify a finding of a textual commitment of discretion to the political branches, because the same could be said of virtually every provision vesting authority in a political branch."[261]

255. *See, e.g.*, *Cruz-Guzman*, 849 N.W.2d at 539–41 (applying the three factors of the *Baker* test); *see also* Baker v. Carr, 369 U.S. 186, 217 (1962).

256. Hubsch, *supra* note 196, at 115.

257. *See id.* at 134.

258. Redish, *supra* note 175, at 1033.

259. *Baker*, 369 U.S. at 217.

260. CHEMERINSKY, *supra* note 176, at 150 ("The Constitution does not mention judicial review, much less limit it by creating 'textually demonstrable commitments' to other branches of government.").

261. Redish, *supra* note 175, at 1040. "It is difficult to construe a constitutional

State courts, in adequacy cases, have been similarly dismissive of this factor, even where the state constitution clearly assigns the duty to the legislature.[262] In *Neeley*, the Texas Supreme Court rejected the state's argument that such a textual assignment satisfied *Baker*, and explained that "by assigning to the Legislature a duty, [the constitution] both empowers and obligates."[263] Even though the constitution clearly commits to the legislature the authority to make education policy, "the Constitution nowhere suggests that the Legislature is to be the final authority on whether it has discharged its constitutional obligation."[264]

As the Texas court explained, "[i]f the framers had intended the Legislature's discretion to be absolute, they need not have mandated that the public education system be efficient and suitable; they could instead have provided only that the Legislature provide whatever public education it deemed appropriate."[265] Importantly, the court clarified that the courts are not excluded merely by the mention of legislative prerogative, declaring that "[t]he constitutional commitment of public education issues to the Legislature is primary but not absolute."[266] Indeed, to leave a state's entire system of education to the legislature without any oversight "would be a dangerous doctrine to announce."[267]

provision as excluding judicial review on the basis of the facts that (1) the courts are not mentioned, and (2) other branches are mentioned . . . because the power of the judiciary to engage in judicial review is not explicitly mentioned in any constitutional provision." *Id.* at 1042.

262. *See* Jay M. Zitter, Annotation, *Construction and Application of Political Question Doctrine by State Courts*, 9 A.L.R. 6th 177 (2005) (juxtaposing those states that have held the right to education—and its funding—to be a political question against those states that have not).

263. Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 778 (Tex. 2005) (citing TEX. CONST. art. VII, § 1).

264. *Id.*

265. *Id.*

266. *Id.* The Texas Supreme Court's ruling was clear: "The final authority to determine adherence to the Constitution resides with the Judiciary. . . ." *Id.* at 777 (quoting W. Orange-Cove Consol. Indep. Sch. Dist v. Alanis, 107 S.W.3d 558, 563 (Tex. 2003)). Other courts have made this same point. *See, e.g.*, Harris v. Shanahan, 387 P.2d 771, 777 (Kan. 1963) ("In the final analysis, this court is the sole arbiter of the question whether an act of the legislature is invalid under the Constitution of Kansas.").

267. Gannon v. State, 319 P.3d 1196, 1220 (Kan. 2014) (quoting Comm'rs of Sedgwick Co. v. Bailey, 13 Kan. 600, 607 (Kan. 1874)).

But if carving out certain policy spheres as unreviewable is dangerous, the danger is dramatically higher when the issue being "textually committed" is the racial makeup of schools.[268] *Brown* establishes that the U.S. Constitution forbids the operation of educational facilities intentionally segregated by race.[269] State constitutions cannot grant state agencies discretion to reach beyond the bounds of federal constitutionality,[270] and, in the case of segregation, those bounds are clearly drawn.[271] To find otherwise would permit a state, at least in some circumstances, to attempt to limit the reach of *Brown* by declaring school segregation a policy issue for its legislature.[272] At the very least, it may render certain issues nonjusticiable political questions in state courts but justiciable in federal courts.[273] It is unlikely that a state constitution envisions such a broad or arbitrary grant of legislative authority; the federal Constitution does not.[274] It is also unclear how much policy discretion over the degree of school segregation a "coordinate political department" could allowably be granted.[275] Any intentional effort to implement a school system with a greater degree of racial

268. *See generally* Michael Besso, Sheff v. O'Neill*: The Connecticut Supreme Court at the Bar of Politics*, 22 QUINNIPIAC L. REV. 165, 183–97 (discussing the political climate in Connecticut, prior to *Sheff*, that prevented real legislative change on the topic of school racial integration).

268. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

269. *Id.*

270. McCulloch v. Maryland, 17 U.S. 316, 400 (1819) ("The [United States C]onstitution . . . shall be the supreme law of the land, and shall control all State legislation and State constitutions, which may be incompatible therewith. . . .").

271. *Brown*, 347 U.S. at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

272. Erika K. Wilson, *Blurred Lines: Public School Reforms and the Privatization of Public Education*, 51 WASH. U. J.L. & POL'Y 189, 191–92 (2016) ("However, since at least the 1990s—and some may argue even earlier—federal courts have become increasingly hostile to court mandated desegregation schemes.").

273. *See* Franklin Sacha, *Excising Federalism: The Consequences of* Baker v. Carr *Beyond the Electoral Arena,* 101 VA. L. REV. 2263, 2294 (2015) ("[T]he court stated that the post-*Baker* political question doctrine did not implicate federalism, as it is 'based on concepts that underlie the separation of powers among the three branches of the federal government rather than notions of federalism between the federal government and the states'. . . ." (quoting DeJulio v. Georgia, 127 F. Supp. 2d 1274, 1291 (N.D. Ga. 2001))).

274. *Id.*

275. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

segregation seems likely to run up against constitutional safeguards.[276]

2. Baker *Factor #2 – Lack of Standards*

Another central argument is that adequacy cases presents courts with nonjusticiable political questions because the courts in such cases cannot identify any "judicially discoverable and manageable standards" for resolving claims of educational inadequacy.[277] Under this argument, courts are unable to evaluate "inadequate-education claims" because they "inevitably require [courts] to define the relevant qualitative standard."[278] Professor Redish argues that this "so-called 'absence-of-standards' rationale borders on the disingenuous, because the Supreme Court has never been at a loss to decipher roughly workable standards for the vaguest of constitutional provisions when it so desires."[279] For example, courts have had to determine standards for plenty of vague terminology, including what constitutes sufficient "probable cause,"[280] whether a

276. Policy decisions made with the intent of moving the racial balance of schools in a segregative direction likely pose an equal protection problem, as they would represent disparate treatment of a group on the basis of membership in a protected class. *See* City of Richmond v. Croson, 488 U.S. 469, 471–72 (1989) (applying strict scrutiny to all race-based classifications in Fourteenth Amendment equal protection claims). By contrast, policy decisions made with the intent of moving the racial balance in schools in an integrative direction may be permissible, because there is a compelling government interest in school diversity. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 787–88 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

277. Cruz-Guzman v. State, 892 N.W.2d 533, 539 (citation omitted). *See* Redish, *supra* note 175, at 1046 ("Perhaps the most widely cited ground in support of the prudential [version of the political question] doctrine is the view that certain constitutional provisions do not lend themselves to the development of workable generalizable standards of construction. . . .").

278. *Cruz-Guzman*, 892 N.W.2d at 540.

279. Redish, *supra* note 175, at 1060; Gannon v. State, 319 P.3d 1196, 1228 (Kan. 2014) ("We also observe that courts are frequently called upon, and adept at, defining and applying various, perhaps imprecise, constitutional standards."); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning,* 119 HARV. L. REV. 1274, 1275 (2006) (arguing that the Supreme Court's determination of what constitutes a judicially manageable standard is "so discretionary . . . that if the requirement of judicial manageability [was] applied to the Court's own decision making process . . . the criteria by which the Court identifies judicially unmanageable standards might themselves be disqualified as judicially unmanageable").

280. Gerstein v. Pugh, 420 U.S. 103, 111 (1975).

specific punishment is "cruel and unusual,"[281] and what represents "equal protection under the laws."[282] As Professor Redish points out, "Courts are often called upon to apply generalized and ambiguous abstract principles to specific factual situations, even when the application of those principles is unclear."[283] As one state supreme court summed up, "[t]he judiciary is well-accustomed to applying substantive standards the crux of which is reasonableness."[284] In comparison, disagreements about the meaning of the state constitutional language "are not unique to the [state's education clause]; they persist as to the meanings and applications of due course of law, equal protection, and many other constitutional provisions. Indeed, those provisions have inspired far more litigation than [the state's education clause]."[285]

As one example from the adequacy context, the Connecticut Supreme Court found enforceable standards in its state constitution's education clause, which merely provided that "[t]here shall always be free public elementary and secondary schools in the state" and that "[t]he general assembly shall implement this principle by appropriate legislation."[286] The court acknowledged this language was less specific than that found in some other state constitutions' education clauses,[287] but nevertheless held that such language:

> embodies a substantive component requiring that the public schools provide their students with an education suitable to give them the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service and voting, and to prepare them to progress to institutions of higher education, or to attain productive employment and otherwise to contribute to the state's economy.[288]

281. Furman v. Georgia, 408 U.S. 238, 243–47 (1972).

282. Shelly v. Kraemer, 334 U.S. 1, 23 (1948). *See* Korematsu v. U.S., 323 U.S. 214 (1944) (discussing how legal restrictions targeted at a specific racial group are subject to the highest scrutiny under Equal Protection principles).

283. Redish, *supra* note 175, at 1050.

284. Neeley v. West Orange-Cove Consol. Indep. Sch. Dist, 176 S.W.3d 746, 778 (Tex. 2005).

285. *Id.* at 779.

286. Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 228 (Conn. 2010) (quoting CONN. CONST. art. 8, § 1).

287. *Id.* at 223.

288. *Id.* at 227.

The court explained that "[t]o satisfy this standard, the state, through the local school districts, must provide students with an objectively 'meaningful opportunity' to receive the benefits of this constitutional right."[289]

Even though constitutional standards in educational adequacy cases "import a wide spectrum of considerations and are admittedly imprecise . . . they are not without content."[290] In *Rose*, the Kentucky Supreme Court examined its constitution's education clause which simply provided, "[t]he General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State."[291] The *Rose* court held that this constitutional provision "requires the General Assembly to establish a system of common schools that provides an equal opportunity for children to have an adequate education."[292] It then articulated standards for measuring compliance with the provision, which have been adopted by numerous state courts across the country.[293] Similarly, other state supreme courts have concluded that discerning standards to interpret their states' education articles is well within their judicial authority.[294]

289. *Id.* at 253–54.

290. Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 778 (Tex. 2005).

291. KY. CONST. § 183; Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 211 (Ky. 1989).

292. *Rose*, 790 S.W.2d at 211.

293. *See* Gannon v. State, 319 P.3d 1196, 1236 (Kan. 2014) (officially adopting *Rose* standards and noting that other courts had done so); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1359 (N.H. 1997) ("We view these guidelines as benchmarks of a constitutionally adequate public education."); McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993) ("These guidelines accord with our Constitution's emphasis on educating our children to become free citizens on whom the [State] may rely to meet its needs and to further its interests.").

294. *See, e.g.*, Leandro v. State, 488 S.E.2d 249, 254–55 (N.C. 1997) (following *Rose* criteria for defining constitutional adequacy); *Claremont Sch. Dist.*, 703 A.2d at 1359–60 (same); *McDuffy*, 615 N.E.2d at 554 (same). *See* Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999) (interpreting the constitution to require a "minimally adequate education," which includes "[1] the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; [2] a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and [3] academic and vocational skills."); Seattle Sch. Dist. No. 1 of King Cty. v. State, 585 P.2d 71, 94–95 (Wash. 1978) (identifying "broad educational concepts"—designed to allow students to adequately participate in our political system, the labor market, and in the market place of ideas—to guide the legislature in its duty to "make ample provision for the

In school segregation cases, however, courts need not even reach the question of whether devising new standards is appropriate. That is because they are governed by robust preexisting standards, developed to resolve precisely the problem at hand.[295] These standards have been laid out over the course of many U.S. Supreme Court and other federal cases.[296] More than being "discoverable and manageable,"[297] the judicial standards that govern school desegregation played a key role in 20th and 21st century American history.[298] Likewise, federal law establishes a clear endpoint for desegregation measures. Formerly *de jure* segregated school systems are released from their constitutional burdens when they are deemed unitary.[299]

There is, of course, one important distinction between the standards used in federal and state school desegregation lawsuits: the former is premised on allegations of intentional segregation, while the latter need not be. However, this distinction is less significant than it initially appears, due to the broad scope of the required remedies in a federal desegregation suit.[300] The Supreme Court's expansive school desegregation jurisprudence required the elimination of any *vestige* of state-operated segregation in a dual system, and would therefore, in many cases, require the elimination of most segregation within that system.[301] Consequently, the task undertaken by a federal court resolving a desegregation claim is unlikely to differ much in scope or scale from the task faced by a state court. In both instances, the courts are being asked to achieve a similar outcome: the eradication of segregation within a school system.

education of all children").

295. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. Cty. Sch. Bd., 391 U.S. 430 (1968).

296. *See supra* note 295.

297. *Rose*, 790 S.W.2d at 224 (citing Baker v. Carr, 369 U.S. 186 (1962)).

298. Karl A. Cole-Frieman, *A Retrospective of Brown v. Board of Education: The Ghosts of Segregation Still Haunt Topeka, Kansas: A Case Study on the Role of the Federal Courts in School Desegregation*, 6 KAN. J.L. & PUB. POL'Y 23, 3 (1996).

299. *See, e.g.*, Bd. of Educ. of Oklahoma City v. Dowell, 498 U.S. 237 (1991); *Green*, 391 U.S. at 430.

300. *See supra* Section III.A.

301. *Id.*

3. Baker *Factor #3 – Initial Policy Determination*

The third *Baker* factor precludes a court from adjudicating a case where it is impossible to decide the outcome "without an initial policy determination of a kind clearly for nonjudicial discretion."[302] Defendants in adequacy cases argue that measuring adequacy through educational metrics, such as test scores and graduation rates, requires courts to establish education policy.[303] Some courts worry that assessing whether states have "failed to provide an adequate education would require [courts] to first determine the applicable standard, which is 'an initial policy determination of a kind clearly for nonjudicial discretion.'"[304] Such a determination "rests in educational policy and is entrusted to the legislature, and not the judicial branch," according to this line of reasoning.[305]

But there is a reason why the U.S. Supreme Court has not used the third, rather obscure, *Baker* factor to dismiss a case on political question grounds.[306] Given the cases cited by the Court in *Baker* to develop the six factor test,[307] it would appear that the third factor "means something other than a requirement that the political branches identify and assign weight to broad policy considerations relevant to the controversy" before determining entitlement to relief.[308] The more appropriate basis for the third factor is an inquiry

302. *Baker*, 369 U.S. at 217.

303. *See* Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191–92 (Ill. 1996) (explaining that the case was nonjusticiable because the separation of powers doctrine prohibits a court from making an "initial policy determination," and the court would not "presume to lay down guidelines or ultimatums for [the legislature]."); Cruz-Guzman v. State, 892 N.W.2d 533, 538 (Minn. Ct. App. 2017) ("[Plaintiffs] attempt to gauge adequacy based on student-performance measures such as standardized test scores and graduation rates[;] defining the necessary qualitative standard inevitably requires the judiciary to establish educational policy. . . .").

304. *Cruz-Guzman*, 892 N.W.2d at 539 (quoting *Baker*, 369 U.S. at 217).

305. *Id.*

306. *See* Kimberly Breedon, *Remedial Problems at the Intersection of the Political Question Doctrine, the Standing Doctrine, and the Doctrine of Equitable Discretion*, 34 OHIO N.U. L. REV. 523, 538 (2008) (finding that no Supreme Court case has used the third factor to establish nonjusticiability).

307. *See Ex parte Hitz*, 111 U.S. 766 (1884) (holding that courts cannot recognize diplomatic privilege until the executive determines diplomatic status); Doe v. Braden, 57 U.S. (16 How.) 635 (1850) (holding that courts cannot interpret interests protected by a treaty until the executive branch first determines whether such a treaty is in effect).

308. Breedon, *supra* note 306, at 539.

into "whether a particular and discrete diplomatic determination by a political branch about a party to, or a fact in, the specific controversy . . . must be made before the court can decide the legal issues."[309]

As scholars have cautioned, "the third *Baker* factor is arguably the one most susceptible to an overly broad application."[310] This likely tendency toward broader application of the third *Baker* factor is because courts recognize that "mak[ing] law or . . . extend[ing] existing law beyond the limits of proper interpretation . . . is a political responsibility, and whether to do so [is] a 'political question.'" [311] Application of the third factor is reserved for only extreme cases, not the run-of-the-mill assessment of liability or constitutionality.[312] This is because the third *Baker* factor "requires courts to evaluate whether it would be impossible to decide the case without making an initial policy determination of a kind clearly involving nonjudicial discretion."[313] In other words, "a political question under the third factor exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis."[314]

Once again, though, these questions are simplified in the instance of a school segregation claim. This is because one of the most important policy judgments—the status of segregated schools vis a vis integrated or racially diverse schools—is already settled, and cannot be altered. All state courts are bound by *Brown*'s

309. *Id.*

310. *Id.*

311. Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 598 (1976).

312. In *Native Village of Kivalina v. ExxonMobil Corp.*, for example, the court found that the third *Baker* factor applied, only because "Plaintiffs are in effect asking this Court to make a political judgment that the two dozen Defendants named in this action should be the only ones to bear the cost of contributing to global warming." 663 F. Supp. 2d 863, 877 (N.D. Cal. 2009). By contrast, claims that are merely political in nature but do not include any contradictory actions or statements from the legislature or executive branches, do not rise to the level of a *Baker* factor three application. In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 438 F. Supp. 2d 291, 303–04 (S.D.N.Y. 2006).

313. In re *MTBE*, 438 F. Supp. 2d at 301; In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 71 (E.D.N.Y. 2005), *aff'd sub nom.* Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2d Cir. 2008).

314. Gross v. German Found. Indus. Initiative, 456 F.3d 363, 388 (3d Cir. 2006) (internal citations and quotations omitted).

determination that racial segregation is inherently unequal.[315] As a matter of law, the inherent inequality of segregated schools is binding and unbreakable: no "policy judgment of a legislative nature" by state lawmakers can adjust that determination by the U.S. Supreme Court.[316]

A simple statement of two schools' inherent inequality is not sufficient to fully resolve a segregation claim.[317] But it gives courts a starting point, rather than asking them to simply invent standards by themselves. And to the extent that further determinations are needed, the mere existence of *Brown* and its progeny undermines the idea that "policy determinations" related to school segregation are "of a kind clearly for nonjudicial discretion."[318] Indeed, the Supreme Court has stated quite broadly the opposite: that when faced with an actionable claim of racial segregation, "judicial authority may be invoked," and "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[319] Surely this is no less true when the wrong inflicted is a state's failure, through maintenance of a segregated school system, to fulfill a constitutional duty or vindicate a fundamental right.

B. Judicial Competence to Resolve Segregation Suits

The *Baker v. Carr* factors are not the end of the issue. State courts may apply their own unique interpretations of justiciability doctrine, and without clearly established standards, it is difficult to address those situations hypothetically.[320] However, one particular concern

315. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

316. *See Gross*, 456 F.3d at 388 (discussing how the third *Baker* factor is implicated when courts are asked to make a "policy judgement of a legislative nature").

317. Peter M. Shane, *Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1050 (1984) (discussing how the harms cited in *Brown* should only be a "starting point for analysis and [one must] take account also of subsequent research into the nature of racial inequality").

318. *See Brown*, 347 U.S. at 495 (holding that school desegregation is a justiciable issue); *see also* Baker v. Carr, 369 U.S. 186, 217 (1962) (discussing the third *Baker* factor: "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion").

319. Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 15 (1971).

320. *See generally* Hershkoff, *supra* note 183, at 1844. (discussing how the courts in some states "undertake and discharge functions that are conventionally deemed beyond the Article III power, functions that commentators often characterize as essentially nonjudicial because they are outside understood limits on judicial

often seems to underlie the application of the political question doctrine to educational adequacy claims, and that concern can be addressed.[321]

Scholars who have written on the intersection of the political question doctrine and educational adequacy have noted that dismissals seem to be rooted in underlying worries about a court's "institutional competence" to adjudicate complex policy issues.[322] The resolution of a school finance case could require a court to delve into the intricacies of funding formulas, research on educational evaluation, or the minute details of municipal finance. Accepting this obligation can immerse courts in what might seem like an unwanted quagmire.[323]

Recent trends in some adequacy cases may be exacerbating the problem.[324] A 2010 article wondered if judges' concerns with particular litigation strategies—especially "specific monetary demands" and "increasing[] focus[] on appropriations as the benchmark and remedy"—was behind several recent justiciability dismissals by state courts.[325] The article argued that these ultra-specific litigation demands were pushing courts away from their "traditional judicial role":[326] declaring a system unconstitutional and allowing legislatures an opportunity to enact a remedy before proactively intervening.[327]

capacity").

321. Simon-Kerr & Sturm, *supra* note 13, at 118.

322. *Id.*

323. *Id.* at 117–18 (explaining how challenges to school finance systems can overburden courts with extensive litigation).

324. *Id.* at 88 ("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.").

325. *Id.* at 88–90.

326. *Id.* at 88.

327. For example, shortly after Minnesota's recent segregation case was dismissed by a state court of appeals on justiciability grounds, a second adequacy suit reached the same court. Forslund v. State, No. 62-CV-16-2161, 2017 WL 3864082 (Minn. Ct. App. Sept. 5, 2017). This second case used Minnesota's constitutional education provisions to attack the state's teacher tenure law, making the very specific claim that teacher tenure statutes unconstitutionally burden the right to an adequate education. *Id.* at *1. It, too, was dismissed on justiciability grounds, with the court pointing out that resolution of the claim would require it to, among other things, "defin[e] both what an effective teacher is and what level or prevalence of

At first blush, educational adequacy cases that focus on segregation raise similar concerns. Remedies are sure to be elaborate and require development of a certain degree of expertise.[328] Segregation cases are also sure to be lengthy—no dual school system has ever been eliminated in a month.[329]

But the long legacy of school desegregation litigation should help inoculate such cases against the greatest worries of this nature. Unlike virtually every other case dealing with school conditions, desegregation lawsuits can safely build off *Brown*'s definitive statement that segregated schools are inherently unequal.[330] And if segregation cases require expertise, it is expertise courts have demonstrated themselves to possess over the course of hundreds of federal lawsuits.[331] Prior segregation cases also provide a reasonable, time-tested pathway for gradually escalating intervention. First, an instruction to the relevant educational authorities to correct the offending condition; only if they fail to do so would a court typically take jurisdiction and intervene more directly.[332] Moreover, even in the event that court-directed remedies become necessary, there is much national experience with this type of remedy.[333] A court resolving a segregation case, unlike a court resolving other educational adequacy claims, need not worry about its remedial efforts stumbling into some heretofore unknown usurpation of legislative power.[334] Instead, it will be walking well-trodden ground,

ineffectiveness in teaching represents an inadequate education." *Id.* at *3.

328. *See, e.g.*, Parker, *supra* note 101, at 1187 (analyzing 126 written opinions regarding court-ordered desegregation for 138 school districts).

329. *Id.*

330. Brown v. Bd. of Educ., 347 U.S 483, 495 (1954).

331. One 2000 study, looking at just three federal judicial districts in the South, found 192 districts covered by desegregation orders. Parker, *supra* note 101, at 1187.

332. *See, e.g.*, Stell v. Bd. of Pub. Educ., 860 F. Supp. 1563, 1564–66 (S.D. Ga. 1994) (describing the court's instructions and subsequent involvement in a desegregation plan).

333. *See, e.g.*, Robert E. Buckholz, Jr., et al., *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 799–800 (1978) (illustrating the remedial approach of "remedial abstention," in which defendants are permitted to develop their own remedies, before eventual appointment of a court expert as a pressure mechanism to encourage compliance (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971))). *See generally* Zelden, *supra* note 74, at 471 (describing the gradual development of new proactive desegregation remedies by district courts).

334. *See, e.g.*, Zelden, *supra* note 74, at 528 ("[I]t was the federal courts that ultimately shaped the desegregation process: setting standards, promoting

with well-drawn boundaries.[335] In short, the judicial branch has been doing this sort of thing for a very long time.[336] It has previously been asked to—and did—retain jurisdiction for years by monitoring, approving, or requiring changes in virtually every area of school operations.[337] Courts can surely do this sort of thing again, even if the initial claims are marginally different.

As a practical matter, from the perspective of plaintiffs, it would be faintly absurd for a court, faced with one allegation of segregation, to take jurisdiction and institute a far-reaching series of changes, and then, faced with a slightly different allegation of segregation, to dismiss the case, disclaiming the whole problem as outside its purview. If plaintiffs' right to integrated schools in a unitary system could be vindicated before, surely it can be vindicated now.

VI. CONCLUSION

Time and again, the court system has been called to uphold constitutional rights guaranteeing equal and adequate education.[338] First, these battles were waged primarily in federal courts, and fought over intentional segregation. Then, they moved into state courts and were fought over financing and funding.[339] Now, there may be an opportunity to combine these two trends, and, using the guarantees of state constitutions, fulfill the promise of integrated schools in places where desegregation was never completed or never took in the first place.

By and large, courts have accepted the burden of acting as the guarantor of constitutional education requirements.[340] School segregation poses a burden of a different sort—perhaps a much

methods, integrating the efforts of other agencies, and ultimately, judging success or failure.").

335. *See id.*; *see also Swann*, 402 U.S. at 20–31 (1971) (addressing a wide range of allowable remedies in school desegregation lawsuits).

336. *See* Zelden, *supra* note 74 (describing the judicial branch's work in desegregation from the years 1968–1974 and expressing the effects of which are still felt in current day).

337. *See Swann*, 402 U.S., at 18–21 (discussing several judicial holdings as to various aspects of school operations).

338. *See* Parker, *supra* note 101, at 1187 (describing an empirical study of hundreds of judicial orders involving desegregation for schools in the South).

339. *See supra* Part II.B.

340. *See supra* Part I.A.

larger one. But the American judicial branch's long history of pursuing the unification of formerly divided school districts proves that the judicial system is equal to the challenge.[341] Courts should recognize the justiciability of state law segregation claims and accept that challenge.

341. *See, e.g.*, Dennis G. Terez, *Protecting the Remedy of Unitary Schools,* 37 CASE W. RES. L. REV. 41, 70 (1986) ("In 1955, the Supreme Court concluded that the appropriate remedy [to remedy constitutional wrong inflicted upon minority groups] was to be unitary schools. . . . The racially identifiable schools of a dual system have been largely eliminated, so we now have neither 'black' schools nor 'white' schools but just schools.").